SYMPOSIUM COMMENT

NONSIGNATORIES IN ARBITRATION: A GOOD-FAITH ANALYSIS

by
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As businesses conduct more and more transactions in the world market, the ability to settle disputes between international parties in a neutral forum has become a paramount concern. For this reason, the arbitration clause is an integral part of the international commercial contract. Still, due to the complex nature of most international commercial transactions, a nonsignatory, often times a subsidiary or parent corporation of one of the signatories, becomes materially involved in the performance of the contract. All of the benefits of the arbitration clause relied on by the contracting parties—such as a neutral forum, dispute finality, party autonomy, and reliance on enforceability—can be lost if the nonsignatory is not required to arbitrate disputes arising out of the contract.

Acknowledging this problem, U.S. courts have applied a variety of legal theories to require arbitration with a nonsignatory. Still, application of these different theories is inconsistent from jurisdiction to jurisdiction and is incongruent with the delocalization movement inherent in international transactions. This Comment proposes that U.S. courts should apply the principle of good faith to determine whether arbitration including a nonsignatory is appropriate. Essentially, courts should utilize the equitable principle of good faith to analyze both the contractual language as well as the conduct of the parties during negotiation and performance of the contract to determine whether the nonsignatory may compel or be compelled to arbitrate. This Comment

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focuses on past cases dealing with the nonsignatory issue to exemplify how the principle of good faith would create a uniform test and to demonstrate how this principle is consistent with the public policy underpinnings of arbitration. Last, this Comment concludes with arbitration clause drafting tips. Parties must engage in "conscious drafting" so that when the principle of good faith is used to interpret the parties' contract, it will be clear when a nonsignatory should or should not arbitrate.

I. INTRODUCTION

One hallmark of international commercial contracts is the arbitration clause. It is standard practice for companies to include arbitration provisions, which essentially construct a miniature private-law system between the parties tailored to their specific needs. So far, the trend in American courts is to support this private dispute resolution. Accordingly, in the international commercial field, the presumption in favor of arbitration "applies with special force."[1] There is strong reasoning behind this presumption; a country's support of arbitration fosters foreign trade, international comity, and reciprocal respect between foreign courts. International arbitration also provides its participants a range of benefits, such as a neutral forum, dispute finality,

[1] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631 (1985) (asserting that the "presumption is reinforced by the emphatic federal policy in favor of arbitral dispute resolution").

party autonomy, and reliance on the enforceability of the awards in foreign courts.[2]

A problem arises though, when a party that has not signed the contract containing the arbitration agreement—a nonsignatory—becomes involved in the transaction that was intended to be governed by the contract's pre-arranged, private-law system. All of the benefits to the contracting parties can be lost if a nonsignatory,[3] who is materially involved in the execution of the contractual obligations or the receipt of the contractual rights, is not required to follow the preordained private law and arbitrate. For this reason, a growing number of courts are choosing to enforce arbitration clauses to their fullest extent by requiring nonsignatories to arbitrate their claims.[4]

As businesses conduct more and more transactions in the world market, companies look to the courts to follow this trend and to ensure that disputes between international parties—regardless of whether the parties signed the contract—are resolved in a neutral forum and not subjected to the potentially biased laws of another country.[5] This Comment proposes that when a dispute arises regarding a contractual transaction between a signatory and a nonsignatory that was materially involved in the transaction, courts should import into the contract equitable principles that will function in a similar fashion as they do in public law. In congruence with the delocalization movement in international transactions, U.S. courts should adopt the equitable principle of good faith to determine whether or not a nonsignatory must arbitrate the dispute.

Part II of this Comment briefly examines the legal theories currently used by U.S. courts as a basis for requiring a nonsignatory to arbitrate. Though most courts rely on common law principles of contract and agency law, some decisions support more broad legal concepts that expand the types of nonsignatories that are required to arbitrate their claims.[6] Regardless of the legal theory used, decisions by the courts seem

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[2] *See generally* Edward Brunet, *The Core Values of Arbitration*, *in* ARBITRATION LAW IN AMERICA 3, 3–28 (2006).

[3] A nonsignatory is a party that has not signed the arbitration agreement. James M. Hosking, *The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice Without Destroying Consent*, 4 PEPP. DISP. RESOL. L.J. 469, 472 n.7 (2004).

[4] MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 33 (2008) (discussing the various legal theories used by courts to require nonsignatories to arbitrate).

[5] *Id.* at 60.

[6] Anthony M. DiLeo, *The Enforceability of Arbitration Agreements by and Against Nonsignatories*, 2 J. AM. ARB. 31, 62–63 (2003) (discussing "special relationship" theory as a new possibility to bind a nonsignatory to an arbitration agreement); J. Douglas Uloth & J. Hamilton Rial, III, *Equitable Estoppel as a Basis for Compelling Nonsignatories to Arbitrate—A Bridge Too Far?*, 21 REV. LITIG. 593, 602–04 (2002) (discussing the emerging theory that a nonsignatory may be bound to arbitrate through implied consent through ratification or collateral estoppel).

to be influenced by the factual circumstances of the case, focusing more on the principle of good faith than on any overarching legal theory.[7]

Part III examines the contexts and public policy reasons that support requiring nonsignatories to arbitrate their claims regarding an international commercial transaction. Many commentators argue that broad legal theories promoting involvement of nonsignatories in arbitration chip away at the foundational policies of arbitration.[8] Still, in the vast majority of cases, factual considerations, such as a party's attempts to avoid contractual liability, evidence how arbitration with nonsignatories does not destroy but actually bolsters policy reasons in favor of arbitration.

Last, Part IV discusses practical drafting options when commercial entities write an arbitration clause to encompass the broadest range of potentially relevant actors. Gone are the days when a boiler-plate arbitration clause can fulfill the reasonable expectations of the parties. Careful drafting by attorneys must properly define the scope and parties that may arbitrate their claims under the contract, as well as avoid issues with nonsignatories.

The topic of nonsignatories in global arbitration raises such an extensive laundry-list of legal issues that one writing cannot address them all. This Comment focuses only on how U.S. courts deal with the issue of nonsignatories and does not address the domestic law of the many other countries that have done so as well.[9] Another major legal issue when dealing with nonsignatories is enforcement of the arbitration award. Though this Comment briefly touches on the subject, it is not intended to be an exhaustive analysis of the issue. Last, and most important, this Comment focuses specifically on nonsignatories in international commercial arbitration and does not assert that the arguments made would be congruent in the domestic context.[10]

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[7] *See infra* Part II.B.

[8] Alexandra Anne Hui, Note, *Equitable Estoppel and the Compulsion of Arbitration*, 60 VAND. L. REV. 711, 737 (2007) (arguing that the second strand of equitable estoppel used to bind nonsignatories to arbitration circumvents the fundamental requisite of consent to arbitration).

[9] For an interesting discussion comparing how English, U.S., French, and International law deal with nonsignatories, see Hosking, *supra* note 3. *See also* Marcus S. Jacobs, *Requirement of Writing and of Signatures Under the UNCITRAL Model Law and the New York Convention*, 21-11 MEALEY'S INT'L ARB. REP., Nov. 2006, at 15 (discussing UNCITRAL Rules and giving examples of how arbitration panels and various courts in other countries are dealing with nonsignatory issues); Liu Yuwu, *Arbitration Agreement: The Chinese Practice and Future Trends*, 16-8 MEALEY'S INT'L ARB. REP., Aug. 2001, at 16 (discussing how Chinese courts treat nonsignatories' involvement in arbitration).

[10] However, they may be.

II. THE GOOD, THE BAD & THE UGLY: HOW COURTS DEAL WITH THE WIDE RANGE OF NONSIGNATORIES

Binding nonsignatories to arbitrate disputes is becoming an increasingly controversial topic in the legal community.[11] One reason for this is the fact that many international transactions are becoming more complex and necessarily include relevant parties who are not actual signatories to the arbitration contract. To remedy this problem, U.S. courts apply common law principles of contract and agency law to require certain nonsignatories to arbitrate their claims, regardless of whether the claims sound in contract or in tort.[12] These theories are: (1) alter ego/piercing the corporate veil, (2) incorporation by reference, (3) assumption, (4) agency, (5) third-party beneficiary, and (6) equitable estoppel.[13] Because of the national policy in favor of arbitration, courts

[11] *See* Carolyn B. Lamm & Jocelyn A. Aqua, *Defining the Party—Who Is a Proper Party in an International Arbitration Before the American Arbitration Association and Other International Institutions*, 34 GEO. WASH. INT'L L. REV. 711 (2003) (discussing various legal theories used to bind nonsignatories and touching on the dispute over whether the expansion of these theories to include more nonsignatories is a good thing); *see also* James M. Hosking, *Non-Signatories and International Arbitration in the United States: The Quest for Consent*, 20 ARB. INT'L 289 (2004) (discussing how the expansion of legal theories to require certain nonsignatories to arbitrate has a detrimental effect on the most important principle of arbitration: consent); Dwayne E. Williams, Binding Nonsignatories to Arbitration Agreements, 25 FRANCHISE L.J. 175 (2006) (discussing how careful drafting is necessary for franchise agreements due to expansive interpretation of arbitration clauses requiring many related entities to arbitrate their claims even though they are nonsignatories).

[12] *See, e.g.*, Thomson-CSF, S.A. v. Am. Arbitration Ass'n, 64 F.3d 773, 776 (2d Cir. 1995) (holding that under ordinary principles of contract and agency law, a nonsignatory parent company was not bound to arbitrate claims arising from a contract between its subsidiary and a supplier); Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753, 757–58 (11th Cir. 1993) (holding that the nonsignatory plaintiff was required to arbitrate its claims against the defendant, even though most of the claims sounded in tort, because the claims were "intimately founded in and intertwined with the underlying contract obligations" (quoting McBro Planning & Dev. Co. v. Triangle Elec. Constr. Co., 741 F.2d 342, 344 (11th Cir. 1984))).

[13] Williams, *supra* note 11, at 176. Besides these methods, there are several emerging theories regarding methods of binding a nonsignatory to arbitration such as waiver and the "group of companies" doctrine. *In re* Arbitration Between Halcot Navigation Ltd. P'ship & Stolt-Nielsen Transp. Group, BV, 491 F. Supp. 2d 413, 419 (S.D.N.Y. 2007) (holding that plaintiff, Halcot, waived objection to arbitration with a nonsignatory by arguing nonarbitrability in front of the arbitration panel because to hold otherwise would "impermissibly afford Halcot a 'second bite at the apple'"); Siegfried Wiessner, Marathon Oil Co. v. Ruhrgas AG: *Amicus Curiae Brief by Professors of International Arbitration*, 9 WORLD ARB. & MEDIATION REP. 137 (1998) (arguing that the Fifth Circuit should adopt the international "group of companies" theory which holds that if one company in a larger group of entities is a signatory to a contract, any of the nonsignatory entities in the group may be required to arbitrate claims based on their involvement in the performance of the contract).

are using an increasingly broad form of these theories.[14] This trend causes commentators to criticize the legal accuracy of courts' use of the above listed principles, particularly equitable estoppel.[15]

Though criticism of a court's reasoning that requires a nonsignatory to arbitrate may be valid, the results tend to comport with a reader's broad sense of what the "right" result should be. This raises the conjecture that judges may use a variety of legal principles to require arbitration between parties, but their decisions actually turn on the good faith actions of the parties, i.e., achieving the "right" result. Regardless of the actual legal theory the court relies on, close analysis of case law shows that courts will often compel arbitration by implicitly relying on the equitable principle of good faith.

A. Common Theories Used to Allow Nonsignatories to Arbitrate

To better understand how judges decide to require arbitration between a signatory and a nonsignatory, it is necessary to understand the different legal mechanisms judges currently use. Most judicial opinions rely upon common law principles of contract and agency law as described below.

One commonly used method to require a nonsignatory to arbitrate is alter ego/piercing the corporate veil. This situation most often arises when an entity negotiates and arranges an international commercial transaction and then uses a subsidiary to sign the contract and to perform any duties under it.[16] The subsidiary in this case often defaults

[14] *See, e.g.*, Smith/Enron Cogeneration Ltd. P'ship v. Smith Cogeneration Int'l, Inc., 198 F.3d 88, 99 (2d Cir. 1999) (holding that the nonsignatory was bound to the arbitration agreement under piercing the corporate veil and equitable estoppel and emphasizing the broad national policy in favor of arbitration in which "[d]oubts should be resolved in favor of coverage"); *McBro Planning & Dev. Co.*, 741 F.2d at 344 (requiring nonsignatory to arbitrate tort claims under theory of equitable estoppel because "a party may not avoid broad language in an arbitration clause by attempting to cast its complaint in tort rather than contract"); Boston Telecomms. Group, Inc. v. Deloitte Touche Tohmatsu, 278 F. Supp. 2d 1041, 1046 (N.D. Cal. 2003) (requiring plaintiff nonsignatories to arbitrate their fraudulent inducement claim that related to a partnership agreement that contained an arbitration clause and noting that "[e]specially in the case of international arbitration, courts are to give 'full effect' to the 'most minimal indication of the parties' intent to arbitrate'" (quoting Republic of Nicaragua v. Standard Fruit Co., 937 F.2d 469, 478 (9th Cir. 1991))); Robert Lamb Hart Planners & Architects v. Evergreen, Ltd., 787 F. Supp. 753, 757 (S.D. Ohio 1992) ("Provisions favoring arbitration should be construed broadly; whereas language which limits arbitration must be narrowly construed.").

[15] Hosking, *supra* note 3, at 576–77; Hui, *supra* note 8, at 739–43; Uloth & Rial, *supra* note 6, at 613–19.

[16] *See, e.g.*, Bridas S.A.P.I.C. v. Gov't of Turkmenistan, 447 F.3d 411, 420 (5th Cir. 2006) (applying doctrine of alter ego to international transactions between Bridas and Turkmenneft, a subsidiary of the government of Turkmenistan). *Smith/Enron Cogeneration Ltd. P'ship*, 198 F.3d at 90, 97 (piercing the corporate veil of the nonsignatory so it could compel arbitration with a party that was a signatory to a contract with the nonsignatory's affiliates); *see also* Lamm & Aqua, *supra* note 11, at

on its obligations, and the other signatory attempts to collect damages under various claims for breach of contract. Unfortunately, the subsidiary usually is defunct or no longer holds any assets by the time the signatory considers referring the dispute to arbitration. In response, the signatory will attempt to initiate arbitration against the parent entity, regardless of its nonsignatory status.[17]

A court may pierce the corporate veil when the relationship between a parent and its subsidiary are "sufficiently close" to justify holding one legally responsible for the actions of the other.[18] For example, the Fifth Circuit has held: "The doctrine applies only if '(1) the owner exercised complete control over the corporation with respect to the transaction at issue and (2) such control was used to commit a fraud or wrong that injured the party seeking to pierce the veil.'"[19] Though the test varies from jurisdiction to jurisdiction, and a variety of factors are often used, the court generally looks at: (1) whether the entities engaged in separate operations or were independent; (2) whether the defendant used the multiplicity of entities as part of a plan to defraud; and (3) whether not piercing the veil would lead to substantial injustice or inequity.[20]

Another traditional principle of contract law used to require a nonsignatory to arbitrate is incorporation by reference.[21] Under this

722–23. In fact, in complex commercial deals, courts find it so inequitable to not compel arbitration simply because the plaintiff or defendant is not the exact party in a group of companies (parent and subsidiaries) that actually signed the contract, it will apply the alter ego theory with little analysis, focusing on the unity of control. *See, e.g.*, Long v. Silver, 248 F.3d 309, 320 (4th Cir. 2001) (allowing shareholders of a corporation to compel arbitration as the alter ego of the corporation based on arbitration provision in the employment contract between corporation and corporate officer); J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A., 863 F.2d 315, 320–21 (4th Cir. 1988); *see also* Scott M. McKinnis, Note, *Enforcing Arbitration with a Nonsignatory: Equitable Estoppel and Defensive Piercing of the Corporate Veil*, 1995 J. DISP. RESOL. 197, 204–06 (discussing the liberal use of the instrumentality rule in the parent/subsidiary context).

[17] *See, e.g.*, *Bridas S.A.P.I.C.*, 447 F.3d at 415.

[18] *See, e.g.*, Thomson-CSF, S.A. v. Am. Arbitration Ass'n, 64 F.3d 773, 777–78 (2d Cir. 1995) (holding Thomson-CSF was not bound to arbitrate under piercing the corporate veil theory because it did not exert the necessary degree of control over the signatory subsidiary).

[19] *Bridas S.A.P.I.C.*, 447 F.3d at 416 (quoting Bridas S.A.P.I.C. v. Gov't of Turkmenistan, 345 F.3d 347, 359 (5th Cir. 2003)).

[20] Intergen N.V. v. Grina, 344 F.3d 134, 148–49 (1st Cir. 2003) (holding that under this test a "modest amount of corporate overlap" was not sufficient to pierce the corporate veil).

[21] Gingiss Int'l v. Bormet, 58 F.3d 328, 331–32 (7th Cir. 1995) (finding an arbitration award enforceable against nonsignatories because the agreement to arbitrate was incorporated into the guaranty by reference). "Under federal law, a subcontract with a guarantor or surety may incorporate a duty to arbitrate by reference to an arbitration clause in a general contract." *Id.* (citation omitted). *See also*, Spinks v. Krystal Co., No. 6:07-2619-HMH, 2007 WL 4568992, at *3–6 (D.S.C. Dec. 20, 2007) (holding officers of corporation could be compelled to arbitrate contract claims because by signing the guaranty, the individual officers incorporated

doctrine, a party may incorporate another document into a contract by referring to it and agreeing that it should bind the parties.[22] "[I]n the absence of fraud or other wrongful conduct, a party who signs a written contract is conclusively presumed to know its contents and to assent to them, and he is therefore bound by its terms and conditions."[23] If the nonsignatory consented to inclusion of a preexisting contract into a new contract, courts will easily find that it consented to the arbitration clause in the preexisting contract; the arbitration clause is not deemed to be specific only to the original contract.[24]

Similarly, the doctrine of assumption essentially finds consent to arbitrate claims regarding certain transactions when the nonsignatory's conduct evidences an implied assumption of the duty to arbitrate.[25] In *Gvozdenovic v. United Air Lines, Inc.*, the Second Circuit found that a union representing Pan American flight attendants, though a nonsignatory, had assumed the duty to arbitrate the attendants' claims regarding the determination of seniority status after a merger with United Airlines.[26] The union did so by hiring counsel to represent them, creating a committee to represent the interests of the group, and advocating for particular relief.[27] These actions showed the airline attendants' implied consent to assume the requirement to arbitrate and thereby bound them to the decision of the arbitrators.[28]

Courts also apply the traditional principles of agency law to determine whether a nonsignatory principal or a signatory agent is bound to a contract.[29] A principal is bound by an arbitration agreement signed by his agent.[30] For example, in *Pritzker v. Merrill Lynch, Pierce,*

the arbitration clause by reference). *But see*, Grundstad v. Ritt, 106 F.3d 201, 204 n.4 ("It has been established that mere reference to the main contract will not be sufficient to establish consent to the arbitration provision." (quoting 1 GABRIEL M. WILNER, DOMKE ON COMMERCIAL ARBITRATION § 10.07, at 133 (rev. ed. 1996))).

[22] *Thomson-CSF, S.A.*, 64 F.3d at 777.

[23] Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional de Venez., 991 F.2d 42, 46 (2d Cir. 1993) (granting defendant's motion to stay action pending arbitration because plaintiff incorporated an arbitration agreement into a contract by specifically referencing the agreement and subjecting the contract to that agreement).

[24] *See, e.g.*, *id.*

[25] *See, e.g.*, *Thomson-CSF. S.A.*, 64 F.3d at 777 (finding there was no assumption of the duty to arbitrate because Thomson-CSF explicitly stated to the moving party that it was not bound to the obligations of the contract in question).

[26] 933 F.2d 1100, 1105 (2d Cir. 1991) (finding that the flight attendants' union "manifested a clear intent to arbitrate the dispute . . . [by] their active and voluntary participation in the arbitration").

[27] *Id.*

[28] *Id.* at 1103.

[29] *See, e.g.*, McCarthy v. Azure, 22 F.3d 351, 363 (1st Cir. 1994) (holding that the arbitration agreement did not extend to agent or employees of signatory by using traditional principles of agency law).

[30] DiLeo, *supra* note 6, at 60 (discussing state and federal cases that have applied agency theory to the nonsignatory issue).

Fenner & Smith, Inc., the court found that the trustees of a retirement plan were required to arbitrate their ERISA claims with not only the signatory defendant but also with the defendant's employee, Stewart, even though she was a nonsignatory to the retirement investment contract.[31] Stewart was the agent of the defendant in charge of making the investments for the trustees' retirement management account.[32] Even though Stewart was a nonsignatory, the court reasoned that agents are bound by the contracts of their principals, and therefore, Stewart had the right to invoke the arbitration clause.[33]

The fifth theory used by courts is treating the nonsignatory as a third-party beneficiary. A third-party beneficiary can be bound to arbitrate regarding contractual disputes with a signatory where the third party's underlying claims are based upon the contract and the third party was an intended beneficiary.[34] Courts require a party to show with "specific clarity" that the contracting parties intended to confer benefits upon the third-party nonsignatory.[35] A party can do this by showing that the contract mentions the nonsignatory or evidences that the signatories entered into the contract to benefit the nonsignatory, and one or both of the signatories owe a duty to the nonsignatory.[36] For example, in *Boston Telecommunications Group, Inc. v. Deloitte Touche Tohmatsu*, the court found that nonsignatory CGCS was a third-party beneficiary of a partnership agreement because the contract specifically mentioned CGCS, placed specific contractual duties upon CGCS, and stipulated that the contract would also "inure" benefits upon CGCS.[37] Therefore, CGCS could compel arbitration, regardless of its nonsignatory status.

The final and most controversial mechanism to bind a nonsignatory to an arbitration clause is equitable estoppel. There is a substantial

[31] 7 F.3d 1110, 1121 (3d Cir. 1993) (finding a nonsignatory sister corporation was also covered by the arbitration clause but not clearly explaining the reasoning).

[32] *Id.* at 1112.

[33] *Id.* at 1121–22 ("In keeping with the federal policy favoring arbitration, we share the views of the Courts of Appeals for the Sixth and Ninth Circuits and will extend the scope of the arbitration clauses to agents of the party who signed the agreements.").

[34] *See, e.g.*, Collins v. Int'l Dairy Queen, Inc., 2 F. Supp. 2d 1465, 1473 (M.D. Ga. 1998) (holding that certain franchisees were direct third-party beneficiaries and therefore were compelled to arbitrate their claims while other franchisees were not); Lamm & Aqua, *supra* note 11, at 726–28.

[35] *See, e.g.*, *McCarthy*, 22 F.3d at 362 (holding that defendants were not third-party beneficiaries of a purchase agreement because the agreement did not refer to them or explicitly confer any benefits upon them).

[36] *See, e.g.*, *id.* (finding Azure was not a third-party beneficiary because "[n]either Azure nor any other employee of Theta II is mentioned explicitly in the Purchase Agreement; there are no meaningful categorical references; the critical provision in the contract omits any mention of agents and employees; and we can find no principled basis for including Azure by necessary implication (especially since the contract contains an integration clause)" (citation omitted)).

[37] 278 F. Supp. 2d 1041, 1047 (N.D. Cal. 2003).

amount of commentary on the judicial use of this doctrine.[38] There are two types of equitable estoppel used by courts regarding compulsion of arbitration.[39] First, a nonsignatory may be equitably estopped from litigating a claim against a signatory if the claim touches on rights and obligations that flow from a contract, and the nonsignatory receives a "direct benefit" from the contract.[40] Therefore, if a nonsignatory sues based on direct contractual benefits or rights, the signatory may compel arbitration.[41] For the second type of equitable estoppel, a court may allow a nonsignatory to compel a signatory to arbitrate because the claims are "intimately founded in and intertwined with the underlying contract obligations" and "the close relationship between the entities involved, as well as the relationship of the alleged wrongs to the nonsignatory's obligations and duties in the contract."[42]

B. Finding Coherent Reasoning in a Panoply of Legal Theories

Though courts rely on various legal theories to bind nonsignatories to arbitration agreements, the reasoning used to reach the end result often leaves the reader with more questions than answers. After a lengthy disposition of the facts, the court makes a conclusory statement that a particular principle, whether it be equitable estoppel or another listed above, applies.[43] Other common scenarios include cases involving facts that do not strongly implicate whether the judge should pierce the corporate veil or use another principle of contract or agency law. Often

[38] *See generally* Uloth & Rial, *supra* note 6; Jeff DeArman, Comment, *Resolving Arbitration's Nonsignatory Issue: A Critical Analysis of the Application of Equitable Estoppel in Alabama Courts*, 29 CUMB. L. REV. 645 (1999); Hui, *supra* note 8; McKinnis, *supra* note 16.

[39] Hui, *supra* note 8, at 727–32.

[40] *Id.* at 714 n.15, 727–32.

[41] *See, e.g.*, Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 418 (4th Cir. 2000) ("International Paper's entire case hinges on its asserted rights under the Wood-Schwabedissen contract; it cannot seek to enforce those contractual rights and avoid the contract's requirement that 'any dispute arising out of' the contract be arbitrated.").

[42] Thomson-CSF, S.A. v. Am. Arbitration Ass'n, 64 F.3d 773, 779 (2d Cir. 1995) (quoting Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753, 757 (11th Cir. 1993)). The "close relationship" requirement is usually fulfilled through some type of parent-subsidiary relationship or other entity-connection. *See, e.g.*, *Sunkist Soft Drinks, Inc.*, 10 F.3d at 757–58 (finding a close "integral relationship" between a parent corporation and a recently acquired subsidiary).

[43] *See, e.g.*, J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A., 863 F.2d 315, 321 (4th Cir. 1988) (describing the contract, factual background, and the claims asserted throughout five lengthy pages, while only spending one paragraph discussing why the theories of alter ego or equitable estoppel required the nonsignatory to arbitrate its claims); Sam Reisfeld & Son Imp. Co. v. S.A. Eteco, 530 F.2d 679, 681 (5th Cir. 1976) (court reasoning for binding a nonsignatory to arbitrate consists of three sentences).

cases with similar fact patterns result in different outcomes.[44] This trend has caused many commentators to criticize court decisions and call for strict adherence to traditional principles of contract and agency law, as well as a restricted use, or even completely doing away with the use, of equitable estoppel.[45] Though this debate is worthwhile, there is no indication that courts plan to abate their very liberal use of legal theories to bind nonsignatories to arbitration in support of the federal policy favoring arbitration agreements.[46] As a practical matter, the real question that should be the focus of legal debate is not *how* does a court choose to bind a nonsignatory, but *why*?

If attorneys want to advise their clients regarding the breadth of an arbitration clause during contractual negotiations and effectively draft such clauses, they must be able to understand the implicit factors that influence a judge to require a nonsignatory to arbitrate. This is especially

[44] For example, both *E.I. Dupont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187 (3d Cir. 2001), and *Boston Telecommunications Group Inc. v. Deloitte Touche Tohmatus*, 278 F. Supp. 2d 1041 (N.D. Cal. 2003), involve joint ventures/partnerships where the party that negotiated the deal was not the signatory. E.I. Dupont was the parent corporation of subsidiary Dupont China that actually executed the contract with Rhone. *E.I. Dupont de Nemours & Co.*, 269 F.3d at 193. In *Boston Telecommunications*, plaintiff Marshall alleged he was fraudulently induced to create signatory Boston Telecommunications for the purpose of the partnership venture. 278 F. Supp. 2d at 1044. Also, nonsignatory defendants Mainas and CGCS were agents of Deloitte, who was the signatory. *Id.* Both cases involved broad arbitration clauses, including any dispute arising out of the agreements, and claims of fraudulent misrepresentations that induced the parent entity to engage in the partnership. Both cases also evidence a long history of nonsignatory parties being highly involved in the negotiation and, often, in the obligations of the contracts. *Id.*; *E.I. Dupont de Nemours & Co.*, 269 F.3d at 192–93. Still, the court in *E.I. Dupont* found that the nonsignatory could not be compelled to arbitrate through a third-party beneficiary, agency, or equitable estoppel because there was "no evidence that DuPont embraced the Agreement itself during the lifetime of the Agreement" even though DuPont negotiated the agreement, derived benefits from the joint venture, guaranteed the joint venture's debt, and all of its claims stemmed from the joint venture agreement. *E.I. Dupont de Nemours & Co.*, 269 F.3d at 197, 200. On the other hand, Boston Telecommunications was required to arbitrate with nonsignatory defendant CGCS because CGCS was responsible for tasks in relation to the partnership business manifesting that the signatories "intended to both benefit and burden CGCS" in the partnership agreement. *Boston Telecomms. Group Inc.*, 278 F. Supp. 2d at 1047–48.

[45] *See* Hosking, *supra* note 3, at 576–77; Uloth & Rial, *supra* note 6, at 613–19; Hui, *supra* note 8, at 739–43.

[46] 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1474 (2009) (holding nonsignatory employees bound to arbitration clause in Collective Bargaining Agreement negotiated on their behalf by union). "Parties generally favor arbitration precisely because of the economics of dispute resolution. As in any contractual negotiation, a union may agree to the inclusion of an arbitration provision in a collective-bargaining agreement in return for other concessions from the employer. Courts generally may not interfere in this bargained-for exchange." *Id.* at 1464 (citation omitted). *See also*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631 (1985).

imperative when a client is about to engage in a large international commercial transaction that implicates significant financial and legal risks. Though a court may use one of the various legal theories described above, whether a nonsignatory is permitted or required to arbitrate often depends on a case-by-case factual analysis that turns on each party's good faith during contractual negotiations and performance. Essentially, courts are utilizing the principle of good faith to flesh out the substance of a transaction to determine if compelling arbitration that involves a nonsignatory is equitable.

The concept of good faith in contractual dealings is pervasive in both common law and civil law systems.[47] Under the Uniform Commercial Code (UCC), good faith means "honesty in fact and the observance of reasonable commercial standards of fair dealing."[48] In civil law systems, good faith is the first and most accepted principle in the interpretation of consent.[49]

> Here, "interpretation in good faith" is simply a less technical way of saying that "when interpreting a contract, one must look for the parties' common intention, rather than simply restricting oneself to examining the literal meaning of the terms used." However, the moral connotation of the expression "interpretation in good faith" is more in keeping with the tenor of general principles of law.[50]

The concept of good faith to determine consent to arbitrate is also used by the International Center for Settlement of Investment Disputes[51] and codified in the UNIDROIT principles.[52]

There are two ways the principle of good faith affects the analysis of determining whether a nonsignatory must arbitrate. First, a court may use the principle of good faith as a tool in interpreting the contractual language. In doing so, the court will establish the intentions of the parties (or what would have been the intentions of the parties had they discussed the issue) by determining what meaning a reasonable person in

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[47] *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981) ("Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness.").

[48] U.C.C. § 2-103(1)(j) (2002) (amended 2003).

[49] FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 257 (Emmanuel Gaillard & John Savage eds., 1999).

[50] *Id.* (citing CODE CIVIL [C. CIV.] art. 1156 (Fr.)).

[51] Abby Cohen Smutny, *Arbitration Before the International Centre for Settlement of Investment Disputes*, TRANSNAT'L DISP. MGMT., Feb. 2004, http://transnational-dispute-management.com/samples/freearticles/tv1-1-article_66.htm.

[52] UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS art. 1.7(1) (2004) (stating that "[e]ach party must act in accordance with good faith and fair dealing in international trade").

the same circumstances would have given to the contract.[53] The court will use a "practical" interpretation regarding the meaning of the contract by examining the context of the transaction and the attitudes of the parties.[54] The sophistication of the parties may also have an effect on the analysis.[55] This use of good faith overlaps with the "objective test" of consent in U.S. contract law, which finds consent in the apparent good faith intent "as shown by their overt acts and words" regardless of any hidden motive.[56]

The second use of good faith is essentially a good faith inquiry by the court in attempt to achieve the "just" result.[57] This type of good-faith analysis falls more in line with the civil law system, which requires parties at all times (during negotiations, as well as before and after the contract is performed) to act in good faith and fair dealing.[58] It is also not surprising that this type of good-faith analysis would be used by courts in the international commercial context because good faith and fair dealing is "the *Magna Carta* of international commercial law."[59] If a party violates the duty of good faith (i.e., is a bad actor), the court will intervene as justice requires.[60]

Therefore, in the context of a nonsignatory, the court may look at each party's actions, respectively, for violations of the duty of good faith and decide whether the nonsignatory must arbitrate based on what justice requires to re-balance the equities between the two parties. Essentially, the court will affirm the choice of forum, whether arbitral panel or courthouse, of the party that does not violate the duty of good faith regardless of either party's status as a nonsignatory.

Though U.S. courts have not yet relied on the concept of good faith explicitly to find that a nonsignatory must arbitrate, it seems to be the

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[53] MICHAEL JOACHIM BONELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW: THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 142 (3d ed. 2005).

[54] FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, *supra* note 49, at 257–58.

[55] Intergen N.V. v. Grina, 344 F.3d 134, 150 (1st Cir. 2003) ("Both InterGen and ALSTOM are sophisticated commercial actors, and each has been quite deliberate in constructing and deploying an elaborate web of affiliates to handle the . . . projects. As a result of these posturings, neither of them is a signatory to the underlying contracts. . . . Therefore, the claims asserted by InterGen in its amended complaint are not subject to compulsory arbitration.").

[56] BRIAN A. BLUM & AMY C. BUSHAW, CONTRACTS: CASES, DISCUSSION, AND PROBLEMS 59 (2d ed. 2008).

[57] *See infra* Part II.B.2. This is a more liberal use of the principle of good faith.

[58] BONELL, *supra* note 53, at 129.

[59] *Id.* at 128.

[60] *Id.* at 134 (explaining courts' prohibition of inconsistent behavior as a violation of good faith and comparing this general principle to the common law doctrine of equitable estoppel).

court's implicit compass regardless of the legal principle applied.[61] A survey of exemplary cases in the following section shows how a party's good faith and fair dealing (or lack thereof) is determinative of whether the court will require a nonsignatory to arbitrate. Part III explains why this result enhances, as opposed to detracts from, the foundational public policies of arbitration in the international commercial context.

1. Exemplary Cases Using a Good-Faith Interpretation of Consent

In *Sourcing Unlimited, Inc. v. Asimco International, Inc.*, Sourcing Unlimited (d/b/a Jumpsource) entered into a partnership agreement with Asimco Technologies, Inc. (ATL) that contained an arbitration clause.[62] ATL was to take over the manufacturing of mechanical parts on behalf of Jumpsource for the Chinese market, with both partners splitting all profits. Asimco, the parent corporation of ATL, became involved in the transaction by promising to deliver parts produced by the partnership to customers in the United States.[63] Jumpsource asserted that this was a separate oral contract, while Asimco asserted that the agreement was an oral modification of the Jumpsource/ATL contract.[64] Jumpsource's complaint against Asimco alleged various breaches of the contract.[65] Asimco filed a motion to dismiss the action and compel arbitration, even though it was a nonsignatory under both parties' theories of the transaction.[66]

The First Circuit overturned the district court's order, granting Asimco's motion to dismiss and to compel arbitration.[67] The actual theory employed by the court to compel arbitration was equitable estoppel.[68] The court compelled a signatory (Jumpsource) to arbitrate with a nonsignatory party (Asimco) because the claim was "intertwined"

[61] Though not explicitly relied upon, many courts acknowledge the issue of good faith in dicta. *See, e.g.*, *In re* Transrol Navegacao S.A., 782 F. Supp. 848, 853 (S.D.N.Y. 1991) (holding that Transrol was required to arbitrate regardless of its nonsignatory status because "Transrol is trying to play 'fast and loose' with the judicial system, and is certainly trying to undermine 'the integrity of the relationship between the parties [sic],'" and that to "permit Transrol to vacate the arbitrator's award under these circumstances would be to condone inequitable manipulation of courts and litigants" (quoting Konstantinidis v. Chen, 626 F.2d 933, 937 (D.C. Cir. 1980))); Grigson v. Creative Artists Agency, LLC, 210 F.3d 524, 528 (5th Cir. 2000) (stating that the plaintiff must arbitrate its claims against defendant nonsignatories because "to not apply this intertwined-claims basis to compel arbitration would fly in the face of fairness"). *See also,* ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION 182 (1981) ("[T]he question of estoppel [is] a fundamental principle of good faith . . . .").

[62] 526 F.3d 38, 41 (1st Cir. 2008).

[63] *Id.* at 42.

[64] *Id.* at 43.

[65] *Id.* at 42.

[66] *Id.*

[67] *Id.* at 48.

[68] *Id.* at 47; *see supra* notes 38–42 and accompanying text.

with the contractual transaction.[69] This judgment raises the question whether, as a matter of contract law, the intertwining of a claim with a contract should be a standard in contractual interpretation when the effect is to forfeit one party's right to its day in court. One can think of many instances when a claim is "intertwined" with a contract, and no court would find that a party had the right to arbitrate.[70] I posit that this reasoning is hollow and is merely disguising the underlying good-faith analysis.

Instead, by using a good-faith interpretation of the breadth of the parties' consent, which includes examining the text and context of the transaction, a reasonable person could foresee arbitrating with a parent company that is highly involved in the performance of contractual obligations. Important to the court's analysis was the context of the agreement between the involved parties (Jumpsource, Asimco, and ATL).[71] The court emphasized Jumpsource's contractual intent to arbitrate all claims regarding the transaction and not which parties Jumpsource envisioned it would arbitrate against. The arbitration agreement in the contract was a claim-focused clause, not a party-focused clause; meaning that the clause addressed the types of claims that were arbitrable but not the parties that could arbitrate.[72] Also, throughout contractual negotiations and performance, all three parties were integral to the success of the venture, even though Asimco was a nonsignatory. By having a claim-focused arbitration clause, a party in Jumpsource's position consented to an arbitration clause that would encompass claims against Asimco under the equitable principle of good faith to interpret the contract.

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[69] *Sourcing Unlimited, Inc.*, 526 F.3d at 47.

[70] For example, a warranty or tort claim by a customer against a retailer regarding a product provided by a manufacturer is clearly intertwined with the manufacturer-retailer relationship. But one would balk at the idea of a court compelling the customer to arbitrate based on the manufacturer-retailer contract without the customer independently agreeing to such arbitration. Another example is that a sweatshop worker's poor working conditions are directly intertwined with the supply contract between the manufacturer and purchaser. Still, one could not imagine courts compelling sweatshop workers to arbitrate such claims based on the underlying supply contract. *See* Debra Cohen Maryanov, Note, *Sweatshop Liability: Corporate Codes of Conduct and the Governance of Labor Standards in the International Supply Chain*, 14 LEWIS & CLARK L. REV. 397, 409–12 (2010) (arguing that poor sweatshop conditions are a direct result of the failure of American companies to enforce working condition standards in supply contracts and outlining the struggle to hold such companies accountable).

[71] *Sourcing Unlimited, Inc.*, 526 F.3d at 46–47 ("The context of the case is significant. . . . There is no real issue in this case about whether the subject matter of the suit is intertwined with the subject matter within the scope of the arbitration clause.").

[72] *Id.* at 41 ("This agreement shall be governed by, and construed in accordance with, the laws of the P.R. China, without regard to conflicts of laws principles thereof. Any action to enforce, arising out of, or relating in any way to, any of the provisions of this agreement shall be brought in front of a P.R. China arbitration body.").

The court's decision in *CD Partners, LLC v. Grizzle* may also be explained through finding consent to arbitrate by use of the contract interpretation principle of good faith.[73] In this case, CD Partners had a contract with CD Warehouse, Inc. (CDWI) regarding CD Warehouse franchises.[74] CD Partners sued CDWI for breach of contract, but it was stayed due to CDWI filing for bankruptcy. CD Partners then sued Grizzle, Motley, and Johnson, three principals of the franchisor, for several torts regarding the franchise agreement with CDWI.[75] The defendants moved to compel arbitration under the arbitration clause in the CD Partners/CDWI contract.[76]

The Eighth Circuit overturned the district court's ruling and compelled CD Partners to arbitrate its dispute with the defendants. Again, the court relied on the less-than-illuminating standard of equitable estoppel, finding that arbitration could be compelled because of the "close relationship" between the signatory and nonsignatories.[77] As with *Sourcing Unlimited, Inc.*, a "close relationship" does not seem to be a satisfactory explanation for ignoring traditional principles of contract law—specifically the principle that a contract is a voluntary transaction whose terms may only be enforced against those who have given consent to be bound.[78] Though the court's reasoning explicitly relies on the close relationship between the parties, it is inherently engaging in a good-faith interpretation of the contractual language to determine the actual intent of the parties.

The court focused on two main factors in determining that it was appropriate to compel arbitration with the nonsignatories. First, the franchise agreements between CD Partners involved an "ongoing relationship" and multiple contracts that relied upon the officers of CDWI (the defendants) to carry out CDWI's obligations to CD Partners.[79] Second, each franchise agreement included a broad arbitration clause and a clause limiting rights under the contract to the "Franchisee, Franchisor, Franchisor's officers, directors, and employees."[80] A reasonable party could interpret these two clauses to extend the protection of the arbitration clause to the defendants. Using a good-faith

[73] 424 F.3d 795 (8th Cir. 2005).

[74] *Id.* at 797.

[75] *Id.*

[76] *Id.* (The arbitration clause stated: "Except as provided in this Agreement, Franchisor and Franchisee agree that any claim, controversy or dispute arising out of or relating to Franchisee's operation of the Franchised business under the Agreement . . . which cannot be amicably settled shall be referred to Arbitration in accordance with the Rules of the American Arbitration Association." (omission in original) (quotation marks omitted)).

[77] *Id.* at 799.

[78] BLUM & BUSHAW, *supra* note 56, at 43.

[79] *CD Partners, LLC*, 424 F.3d at 800 (finding that "the core of the dispute is the conduct of the three nonsignatories in fulfilling signatory CDWI's promises").

[80] *Id.*

interpretation of the contract, the court could interpret the contract to find CD Partners consented to arbitrate claims with CDWI's principals.

As a final example, *Intergen N.V. v. Grina* demonstrates that using a good-faith interpretation of a contract to determine consent does not always result in a nonsignatory being required to arbitrate.[81] The parties in *Intergen* each used subsidiary companies in the course of a complex international transaction regarding the purchase of gas turbines for two power projects. Intergen financed the projects and held an equity stake in each project, but a subsidiary of its cousin corporation, Bechtel Limited, negotiated the gas turbine purchase.[82] The turbines were purchased from ALSTOM Power Generation (APG), a subsidiary of ALSTOM Power. The arbitration clause in the purchase contract had a broad scope regarding the claims included but limited the parties allowed to invoke the clause to the "Buyer" and "Seller" only.[83] After the turbines were installed, several defects occurred causing power outages.[84] Based on these failures, Intergen sued APG, ALSTOM Power, and ALSTOM's agent, Grina, for multiple claims sounding in tort.[85]

The defendants (hereinafter collectively referred to as Grina) attempted to invoke the arbitration clause.[86] Affirming the district court's determination that Intergen had not consented to arbitrate claims against Grina, the First Circuit relied heavily upon the sophistication of the parties and the text of the arbitration clause.[87] Under a good-faith interpretation of the contract in question, a reasonable person could not find that the parties intended to include Intergen in the arbitration clause because the contract specifically limited its effect to the "Buyer" and "Seller," i.e., to Bechtel Limited and APG.[88] The parties involved were, according to the court, "sophisticated commercial actors" and should have reasonably understood that such a narrow definition of parties (Buyer and Seller) would not be broad enough to include any

[81] 344 F.3d 134 (1st Cir. 2003).

[82] *Id.* at 138.

[83] *Id.* at 139. The clause applied to "[a]ny and all controversies, disputes or claims between Buyer and Seller arising out of or in any way relating to this Agreement." *Id.* (alteration in original) (quotation marks omitted). "Buyer" is defined as "the Bechtel entity shown in the Purchase Order Agreement form," and Seller as "the Party who has been awarded the Agreement." *Id.* (quotation marks omitted). Therefore, the arbitration clause is limited to Bechtel Limited and APG.

[84] *Id.* at 139.

[85] *Id.* at 140 (explaining that Intergen brought six claims: intentional deceit, negligent deceit, unfair trade practices, promissory estoppel, tortious interference with advantageous relations, and quantum meruit; and that none of the claims attempted to enforce a contractual right).

[86] *Id.*

[87] *Id.* at 150.

[88] *Id.* at 146–47 (noting that "[t]he critical fact is that the purchase orders neither mention nor manifest an intent to confer specific legal rights upon InterGen").

parent corporations.[89] Though Intergen's claims were admittedly related to the contract in question—even "intertwined" as relied upon by other courts—the textual language paired with the parties' sophistication made it impossible to decide that the parties' good-faith intention was to include Intergen in the arbitration ambit. Without consent to arbitrate, nonsignatory Intergen was free to pursue its claims in the court.

2. Exemplary Cases of the Duty of Good Faith

Though the principle of good faith should be employed as an interpretive tool, it should also be used as an affirmative duty upon parties engaging in international commercial transactions. State law governing contracts requires all parties to act in good faith.[90] This duty should be imported into the private-law world of international commercial transactions and utilized by courts when determining the rights and obligations that flow from these contracts. Though not explicitly relied upon, applying the duty of good faith to parties and using the principle to re-balance the equities between them when determining whether a nonsignatory must arbitrate already comports with what courts are trying to accomplish. Using the principle of good faith as an affirmative duty, though, prevents the corruption of traditional principles of contract and agency law, such as piercing the corporate veil and third-party beneficiary law. The following are several examples of how the duty of good faith does and should operate in determining the nonsignatory issue.

Motorola Credit Corp. v. Uzan involved an extreme example of a party, the defendant Uzan, violating the duty of good faith in an international commercial transaction.[91] Plaintiffs Motorola and Nokia (hereafter referred to collectively as Motorola) entered into separate international contracts with Telsim and Telefon, two Turkish corporations owned and controlled by the Uzan family, for the purchase of cellular infrastructure and licensing.[92] The contracts involved loaning Telsim well over two billion dollars for which Telefon pledged shares in Telsim as a security interest. The contracts included arbitration clauses stating that Swiss law would govern the contracts, and both were broad clauses including any and all disputes.[93]

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[89] *Id.* at 150.

[90] U.C.C. § 2-103(1)(j) (2002) (amended 2003); *see also supra* notes 47–60 and accompanying text. All states, except for Louisiana, have enacted the UCC and therefore have enacted some form of this good faith requirement. BLUM & BUSHAW, *supra* note 56, at 30.

[91] 388 F.3d 39, 43 (2d Cir. 2004).

[92] *Id.*

[93] *Id.* The Motorola agreement arbitration clause stated any dispute that "arises hereunder, or under any document or agreement delivered in connection herewith" would be decided through arbitration. The Nokia agreement stated that all disputes "arising between the Parties out of or in connection with this Agreement." *Id.*

The Uzan family, though a nonsignatory to the contracts, exercised its controlling power over Telsim and Telefon to cause substantial injury to Motorola. First, the Uzan family made false statements about Telsim regarding the actual value of the company, which made the value of Motorola's security interest substantially weaker.[94] Furthermore, the Uzan family "substantially diluted" the value of the Telsim stock which was pledged to Motorola by passing a resolution creating new shares that were not encumbered by Motorola's security interest.[95] As if this was not enough, the Uzans filed false criminal charges against Motorola's senior executives in Turkey.[96]

Once Motorola brought suit directly against the Uzan family for violations of the RICO and various other statutes, the Uzan family continued to violate the duty of good faith not only through their power over Telsim and Telefon but also throughout the entire litigation in the United States. In Turkish courts, the Uzan family obtained several injunctions in an attempt to halt or interfere with the ongoing litigation in the United States.[97] They refused to appear for depositions and refused to stop pursuing injunctions in Turkish courts in the face of astronomical contempt sanctions imposed by the U.S. district court.[98] Last, the defendants, through their employees at Telsim, obtained another injunction purporting to stay all actions against the Uzan family worldwide.[99]

After a year and a half of litigation, the trial court rendered a judgment for Motorola for over two billion dollars in compensatory damages and two billion dollars in punitive damages.[100] The Uzan family appealed to the Second Circuit, arguing, among other things, that the district court wrongly decided that Motorola was not compelled to arbitrate its claims against the Uzan family based on the contracts with Telefon. Though the Second Circuit modified the district court's order regarding other matters, it upheld the trial court's decision that the Uzan family could not compel Motorola to arbitrate because the Uzans were not signatories to the contracts.[101] The interesting aspect of this case is that in determining whether the Uzans, as nonsignatories, could compel arbitration, the court applied Swiss law, which uses the principle of good faith to determine whether a nonsignatory may be compelled (or may

[94] *Id.*

[95] *Id.*

[96] *Id.* at 44. The criminal charges were dismissed for a lack of factual basis, but included charges of blackmail, extortion, and threats to kill or kidnap members of the Uzan family. *Id.*

[97] *Id.*

[98] *Id.* at 45.

[99] *Id.* at 45–46.

[100] *Id.* at 47 (Nokia was also awarded equitable ownership of Telsim shares).

[101] *Id.* at 49.

compel a signatory) to arbitrate.[102] The court found that under Swiss law, the Uzan family could not compel arbitration because not only did Motorola conduct itself in good faith, but the "District Court's opinion [was] replete with findings that *defendants* repeatedly acted in bad faith."[103] The court also compared the doctrine of "unclean hands" with the principle of good faith, noting that the Uzan family had "no basis for invoking a principle of good faith."[104]

The case is an excellent example of the use of the duty of good faith to determine whether parties must arbitrate, as well as an illustration of how the duty of good faith is already compatible with the equitable theories of U.S. law.[105] Because the Uzan family violated the duty of good faith, it could not take advantage of the private-law benefits of arbitration. Impliedly, if the Uzan family had acted in good faith it may have been able to arbitrate, regardless of their nonsignatory status.

Though *Grigson v. Creative Artists Agency, LLC*[106] did not involve an international commercial transaction, it is also a good example of the pervasive influence of good faith upon a court's decision to bind a nonsignatory to arbitration. In this case the plaintiff, Grigson, had already sued the signatory, TriStar, but voluntarily dismissed the case in order to avoid being compelled to arbitrate.[107] Grigson then sued two nonsignatories, Creative Artists Agency and actor Matthew McConaughey, that were involved in the transaction, claiming tortious interference with a contract.[108] The trial court held that Grigson was equitably estopped from arbitrating the claims between himself and the nonsignatories because his claims were "intertwined" with the contract containing the arbitration clause.[109]

Upon review, the Fifth Circuit recognized that the plaintiff was obviously attempting to make an "end-run" around the arbitration clause.[110] It affirmed the use of equitable estoppel to compel Grigson to arbitrate with the nonsignatory defendants. In dicta, Judge Barksdale

[102] *Id.* at 52 (holding that "[t]he rule that emerges from these cases, and the declarations offered by the experts of both sides, is that a nonsignatory may be required to arbitrate in certain circumstances where it acts in bad faith").

[103] *Id.* at 53.

[104] *Id.*; *see also* N.Y. Football Giants, Inc. v. L.A. Chargers Football Club, Inc., 291 F.2d 471, 473 (5th Cir. 1961) (holding that the clean hands doctrine requires that "he who comes into equity must come with clean hands").

[105] *See* VAN DEN BERG, *supra* note 61, at 185 (stating "the question of estoppel [is] a fundamental principle of good faith").

[106] 210 F.3d 524 (5th Cir. 2000).

[107] The contract was between River City Films and Tristar and included an arbitration clause stating "that any dispute or controversy relating to any of the matters referred to" in the contract be arbitrated. *Id.* at 526. Though a nonsignatory, Grigson was bound by the arbitration clause because he was a third-party beneficiary of the contract. *Id.* at 526–27.

[108] *Id.* at 526.

[109] *Id.* at 528.

[110] *Id.* at 530.

made it clear that the court did not look kindly upon the plaintiff's "blatant" attempt to avoid the arbitration clause.[111] Due to Grigson's violation of his duty of good faith and the defendants' relative innocence in the situation, the court granted the nonsignatory defendants' request to compel Grigson to arbitrate his claims.[112]

A sharply worded dissent by Judge Dennis criticized the court's use of equitable estoppel to require a signatory to arbitrate with a nonsignatory because, in his opinion, the court stretched the theory of equitable estoppel past the boundaries of contractual consent.[113] "[N]early anything can be called estoppel. When a lawyer or a judge does not know what other name to give for his decision to decide a case in a certain way, he says there is an estoppel."[114] The critical mistake in the eyes of the dissent in the application of equitable estoppel is that Grigson never made any promises to Creative or McConaughey upon which they placed detrimental reliance.[115] The majority relied completely upon Tristar's reliance (a signatory but not a named party in the action) because by suing Creative and McConaughey, Grigson was forcing Tristar to be involved as a witness in the litigation when it had agreed only to arbitrate claims arising out of the contract.[116]

Though the dissent has a valid argument that the majority stretched the theory of equitable estoppel beyond its natural boundaries, the result achieved by the majority was the correct result. Parties should not be able to rely upon their contracts to enforce remedies while at the same time deny responsibility for any duties agreed to in the same contract.[117] It is

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[111] *Id.*

[112] *Id.* at 531.

[113] *Id.* Also, note how radical this decision actually was. All parties, Grigson, Creative, and McConaughey, were nonsignatories to the contract in question. The distribution contract was between Tristar and the movie producers: River City Films and Ultra Muchos. Grigson was presumably (though not explicitly addressed by the court) required to arbitrate because as the trustee of the movie owners and the recipient of a percentage of the producers' portion of the distribution contract, he was the third-party beneficiary of that contract. *Id.* at 526–27. Then he was required to arbitrate with other nonsignatories, Creative and McConaughey, because of equitable estoppel. *Id.* Such a result only makes sense if viewed with the understanding that the court was taking into account the fact that Grigson's actions were motivated by bad faith.

[114] *Id.* at 531 (alteration in original) (quotation marks omitted) (quoting 4 RICHARD A. LORD, WILLISTON ON CONTRACTS § 8.5, at 101 (4th ed. 2008)).

[115] *Id.* at 538.

[116] *Id.* at 528, 538.

[117] *Id.* at 528 ("In short, although arbitration is a matter of contract and cannot, in general, be required for a matter involving an arbitration agreement non-signatory, a signatory to that agreement *cannot*, in those instances described in *MS Dealer Serv. Corp.*, 'have it both ways': it cannot, on the one hand, seek to hold the non-signatory liable pursuant to duties imposed by the agreement, which contains an arbitration provision, but, on the other hand, deny arbitration's applicability because the defendant is a non-signatory." (citing MS Dealer Serv. Corp. v. Franklin, 177 F.3d 942, 947 (11th Cir. 1999)).

fundamentally unfair to allow a party like Grigson to avoid arbitration by pursuing highly-related, but nonsignatory parties. Grigson was the quintessential bad actor in this scenario. Since Grigson was acting in bad faith, the court re-balanced the equities of the parties by allowing Creative to have the dispute presented in the forum of its choice, in this case, before an arbitral panel. By using a duty of good faith standard to determine which parties must arbitrate their claims, the court came out with the just and right result.

The use of a good faith standard is even more appropriate in the international context because it achieves the correct result by using a universal principle that does not carry the bias of any particular nation's laws. In *Bridas S.A.P.I.C. v. Government of Turkmenistan*, the government of Turkmenistan (Government) created a wholly government-owned corporation, Turkmenneft, and used it to negotiate and execute a joint venture with Bridas, an Argentinean corporation.[118] The purpose of the joint venture was to exploit oil and gas resources in the former Soviet Union.[119] Soon after the contract was finalized, the Government began making demands for more money and halted exports and imports.[120]

Six months later, Bridas initiated arbitration against both Turkmenneft and the Government, a nonsignatory to the oil contract.[121] The arbitration panel found in favor of Bridas and awarded $495 million against the Government even though it was a nonsignatory.[122] After filing suit in the United States for enforcement of the award, the trial court refused enforcement against the Government because it did not sign the arbitration agreement and there was insufficient evidence to pierce the corporate veil.[123] The trial court found that Turkmenneft's existence as an independent subsidiary through a twenty-one factor analysis that examined both "formalities" and "operations" factors.[124]

Despite a lengthy factual inquiry by the trial court, the Fifth Circuit found the award enforceable because the Government purposefully bled its subsidiary, Turkmenneft, making it essentially judgment proof.[125] The appellate court found both the control element and the fraud/injustice element of piercing the corporate veil because Turkmenneft was not financially independent from the Government, making it impossible for

[118] 447 F.3d 411, 414 (5th Cir. 2006).

[119] *Id.*

[120] *Id.* at 415.

[121] *Id.*

[122] *Id.*

[123] *Id.* at 415–16.

[124] *Id.* at 418–19 (explaining that the trial court found "Turkmenneft was 'operationally separate from the Government'" because Turkmenneft had operated and maintained certain corporate formalities since the Soviet Union's rule).

[125] *Id.* at 420 ("Despite some indicia of separateness, the reality was that when the Government's export ban forced Bridas out of the joint venture, the Government then exercised its power as a parent entity to deprive Bridas of a contractual remedy.").

Bridas to collect any contractual damages. This factor may be sufficient to prove the fraud/injustice element, but it is surely not legally sufficient to show the complete control element and to overrule the trial court's determination under the clearly erroneous standard. A finding of "control" under alter ego/piercing the corporate veil doctrine usually requires more substantial evidence.[126] In this case, the trial court found that Turkmenneft followed corporate formalities by keeping separate books and records and by holding regular meetings for board members and shareholders. Also, the trial court determined that Turkmenneft maintained separate operations from the Government and also found that Bridas treated the joint venture as "their own fiefdom."[127] Applying alter ego to these facts seems to stretch the doctrine to new heights because the facts do not clearly demonstrate that the Government maintained the necessary control over Turkmenneft.

Though the court used the alter ego/piercing the corporate veil doctrine to affirm an award against the nonsignatory Government, its analysis focused on the Government's actions being fundamentally unfair, as well as the Government's legal and economic manipulation of its subsidiary to avoid liability.[128] The Fifth Circuit noted that there was an element of "fundamental unfairness" when a parent corporation diverted income from the undercapitalized subsidiary to itself, and therefore, piercing the corporate veil was appropriate.[129]

Inherently, one recognizes this is the correct result. The nonsignatory Government should be liable for its breach of the contract because it violated the duty of good faith. Also, the party that did not violate the duty of good faith, in this case Bridas, had the right to pursue its legal remedies in the forum of its choice. It was essential that Bridas have the right to arbitrate its claims against the Government and subsequently enforce that award in foreign courts. Without arbitration, Bridas would have had to pursue its remedies in the Turkmen courts where the Government would be able to perpetuate its bad acts and avoid liability. By using the duty of good faith to re-balance the equities between the parties, the appellate court reached the proper result in enforcing the arbitral award against the nonsignatory Government.

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[126] *See, e.g.*, Thomson-CSF, S.A. v. Am. Arbitration Ass'n, 64 F.3d 773, 778 (2d Cir. 1995) (stating that "a parent corporation and its subsidiary lose their distinct corporate identities when their conduct demonstrates a virtual abandonment of separateness").

[127] *Bridas S.A.P.I.C.*, 447 F.3d at 419.

[128] *Id.* at 417–20.

[129] *Id.* at 420 (citing Trs. of the Nat'l Elevator Indus. Pension, Health Benefit & Educ. Funds v. Lutyk, 332 F.3d 188, 198 (3d Cir. 2003)).

III. THE EFFECT OF A GOOD FAITH THEORY ON THE FOUNDATIONAL POLICIES OF ARBITRATION

The review of cases in Part II.B establishes a strong pattern of inherent reliance on the principle of good faith. Understanding the pervasive influence of good faith upon a court's decision regarding whether a nonsignatory must arbitrate reveals two elements that become critical for those involved in international commercial transactions: the structure of the arbitration clause and the party's duty to act in good faith. Regardless of the principles of contract or agency law used by the court, these two elements tend to be determinative of the nonsignatory issue. Furthermore, the use of a good faith theory is congruent with the broad public policies behind arbitration.

A. Consent

Consent is often described as an essential element to arbitration due to the fact that arbitration is "a creature of contract."[130] The contracting parties' consent "provides the underpinning for the power of the arbitrators to decide the dispute."[131] Still, arbitration also has a quasi-judicial element that makes arbitration clauses unique from other contractual provisions. It is this fusion of contractual and judicial elements that necessitates the use of good faith when examining party consent. Furthermore, the broad policy favoring parties' consent in arbitration is not undercut through the use of good faith to determine when a nonsignatory must arbitrate.

The first use of good faith, as a principle of interpretation, looks for consent by analyzing what a reasonable person in the parties' situation would believe the breadth of the arbitration clause should be.[132] A signatory may be compelled to arbitrate with a nonsignatory if, in good faith, the signatory intended to grant that right to more than just the other signatory.[133] Likewise, a nonsignatory may be compelled to arbitrate with a signatory if the nonsignatory's actions during negotiations of the contract signal its intent to be bound by the promise to arbitrate made by another party.[134] The principle of good-faith

[130] Brunet, *supra* note 2, at 4, 6–7; Hui, *supra* note 8, at 719.

[131] MOSES, *supra* note 4, at 2.

[132] BONELL, *supra* note 53, at 142.

[133] *See, e.g.*, Sourcing Unlimited, Inc. v. Asimco Int'l, Inc., 526 F.3d 38, 48 (1st Cir. 2008). The court stated that "Jumpsource is bound by a written agreement to arbitrate in China '[a]ny action to enforce, arising out of, or relating in any way to, any of the provisions' of the Jumpsource-ATL Agreement. All of Jumpsource's claims against Asimco ultimately derive from benefits it alleges are due it under the partnership Agreement." *Id.* (alteration in original). By referencing Asimco in the partnership agreement and including an arbitration clause, a reasonable party in Jumpsource's position would anticipate arbitration with Asimco, a nonsignatory. *Id.*

[134] *See, e.g.*, Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 416–18 (4th Cir. 2000). Though the court used equitable estoppel to

interpretation looks for consent based on context, the relative sophistication of the parties, reasonable trade expectations, actions of the parties, and attitudes of the parties.[135] The policy supporting party consent to arbitration is therefore advanced through the use of good faith.

The second use of good faith, as an equity-balancing tool, is only used in situations where the need for the court to achieve the just and equitable result trumps the requirement that the bad actor consented to the arbitration. The duty of good faith is an indispensable element of the parties' freedom of contract.[136] A bad actor should not be able to injure an innocent party through their contractual relations and then shout "lack of consent!" in order to avoid the venue of recovery that the innocent party may choose: arbitration or litigation. This balancing of the equities through the imposition of a duty of good faith in international commercial transactions should not be used capriciously, but only as justice requires. When one party violates the duty of good faith, there is never the possibility of finding any other intent besides self-interest, and most often, the bad actor will resist any venue the innocent party chooses in an attempt to avoid being held accountable.[137] Though important, consent is only one policy consideration when courts examine whether arbitration with a nonsignatory is just.[138] When one party is a bad actor, if the contract in issue contained an arbitration clause, the innocent party should be allowed to arbitrate his claim. This is the correct result regardless of either parties' status as a nonsignatory. The

require a nonsignatory to arbitrate, interpreting the arbitration clause using the principle of good faith could also bind the nonsignatory to arbitrate because a reasonable person in International Paper's position could believe that the contract to purchase equipment from the manufacturer, negotiated and carried out on its behalf by a distributor, would be determinative of its rights created in the transaction, including the arbitration requirement. *But see* Intergen N.V. v. Grina, 344 F.3d 134 (1st Cir. 2003) (good-faith interpretation of the arbitration clause did not require the nonsignatory to arbitrate).

[135] *See supra* Part II.B.

[136] BONELL, *supra* note 53, at 150.

[137] *See, e.g.*, *In re* Transrol Navegacao S.A., 782 F. Supp. 848 (S.D.N.Y. 1991). In *In re Transrol Navegacao S.A.*, the defendant damaged the plaintiff's ship. *Id.* at 849. When the plaintiff attempted to initiate arbitration, Transol backed out at the last minute. The plaintiff sued in a French court, and the defendant argued that the claims must be arbitrated. *Id.* The French court dismissed the case and referred the parties to arbitration. *Id.* at 849–50. After receiving an award at arbitration, the plaintiff attempted to enforce the award in the United States. *Id.* at 850. The defendant moved to vacate the award based on the fact that it was a nonsignatory and should not have arbitrated its claim. *Id.* at 851. The court denied the defendant's motion to vacate, recognizing that the defendant could not argue for arbitration in the French courts and then argue for litigation in U.S. courts. *Id.* at 852–53.

[138] *In re* Arbitration Between Halcot Navigation Ltd. P'ship & Stolt-Nielsen Transp. Group, BV, 491 F. Supp. 2d 413, 422 (S.D.N.Y. 2007) (noting that other policies of arbitration, including adjudicative economy and federal policy favoring arbitration, may be more important than consent in some situations).

opposing party should not be allowed to use the policy of consent to shield his bad actions.

B. Fulfilling Party Expectations

Another important policy consideration in arbitration is fulfilling party expectations. Businesses around the world rely upon arbitration to settle international disputes in a prompt, effective, and neutral manner.[139] Large commercial transactions may not occur if parties are not able to guarantee arbitration because of the unique benefits it provides to parties.[140] Judicial support of the participation of nonsignatories in arbitration often works to enhance the fulfillment of party expectations in the finality of the award, enforceability of the award, reliance on a neutral forum, and confidentiality.

Finality is one of the key benefits and core values of arbitration.[141] One of the primary duties of the arbitrators is to end the arbitration with a final, enforceable award.[142] The parties benefit from arbitration because they receive an informal, prompt, and fair decision regarding their rights, without the drawn-out delays of appeals.[143] Requiring or allowing certain nonsignatories to arbitrate their claims through a good-faith analysis highlights the importance of finality to the parties involved. Under the principle of interpretation in good faith, the court often finds the parties have already consented to arbitration, so the benefit of a final award through arbitration should not be denied to one of those parties simply because of its nonsignatory status. When a court imposes arbitration upon a bad actor for violation of the duty of good faith because arbitration is the method of dispute resolution chosen by the innocent party, the court gives the innocent party the right to redress its injury through any means. A party will not be deprived of the benefit of finality in arbitration by the bad acts of the other party.

Another aspect of fulfilling the parties' expectations that is enhanced by the participation of nonsignatories is enforceability. Article I of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) provides for the enforcement of international arbitration awards.[144] In the current legal climate, it is more likely for a company to enforce an

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[139] Wiessner, *supra* note 13, at 138.

[140] *Id.* at 139.

[141] Brunet, *supra* note 2, at 23.

[142] S.I. Strong, *Intervention and Joinder as of Right in International Arbitration: An Infringement of Individual Contract Rights or a Proper Equitable Measure?*, 31 VAND. J. TRANSNAT'L L. 915, 988 (1998).

[143] EDWARD BRUNET ET AL., ALTERNATIVE DISPUTE RESOLUTION: THE ADVOCATE'S PERSPECTIVE 431 (3d ed. 2006).

[144] The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. I, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter The New York Convention].

international arbitration award than a judgment from a foreign court.[145] For this reason, it is vital to an international company's ability to seek redress for injuries arising out of commercial transactions to involve nonsignatories in arbitration, when consent is found through the principle of good faith or when a party has violated the duty of good faith. The party opposing arbitration in court proceedings should not have any objection to the benefit of an enforceable award because it will benefit from this as well, if it wins. Any objection to arbitration based on the fact that it will result in an enforceable award would simply be additional evidence of a party's attempt to avoid accountability for any wrongful action related to the contract.

Though enforcement under the New York Convention requires an "agreement in writing" that is "signed by the parties," enforcement against a nonsignatory or by a nonsignatory is still possible.[146] Judicial review of an arbitration award is "quite limited."[147] There are only seven grounds to challenge enforcement of an arbitration award under Article V of the New York Convention.[148] Furthermore, there is a pro-enforcement bias that U.S. courts have interpreted into Article V.[149] The Fourth Circuit recognized in *International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH* that if a court may compel arbitration of a nonsignatory, then the writing requirement in the New York Convention does not preclude enforcement of the award.[150] Though the "agreement in writing" requirement may still be strictly interpreted in some contexts,[151] as long as the court finds a valid principle of contract or agency law to bind the nonsignatory to the arbitration agreement, the award may be enforced against or by the nonsignatory.[152] The

[145] Strong, *supra* note 142, at 918.

[146] The New York Convention, *supra* note 144, at art. II.

[147] *In re* Arbitration Between Promotora de Navegacion, S.A. & Sea Containers, Ltd., 131 F. Supp. 2d 412, 416 (S.D.N.Y. 2000).

[148] The New York Convention, *supra* note 144, at art. V.

[149] Richard E. Spiedel, *International Commercial Arbitration: Implementing the New York Convention*, *in* ARBITRATION LAW IN AMERICA 185, 286 (2006).

[150] 206 F.3d 411, 418 n.7 (4th Cir. 2000). Similarly, the Second Circuit has held in a domestic case that the writing requirement of the Federal Arbitration Act (FAA) (the domestic counterpart of the New York Convention) "contains no built-in Statute of Frauds provision but merely requires that the arbitration provision itself be in writing." Fisser v. Int'l Bank, 282 F.2d 231, 233 (2d Cir. 1960) (footnote omitted). Even though an arbitration award may be enforced against a nonsignatory, there still must be an actual arbitration agreement on which the enforcing party relies. Czarina, LLC v. W.F. Poe Syndicate, 358 F.3d 1286, 1291 (11th Cir. 2004).

[151] For a good discussion on the "agreement in writing" requirement, see MOSES, *supra* note 4, at 20–23.

[152] Bridas S.A.P.I.C. v. Gov't of Turkmenistan, 447 F.3d 411 (5th Cir. 2006); *In re Arbitration Between Promotora de Navegacion, S.A. & Sea Containers, Ltd.*, 131 F. Supp. 2d at 417 (holding the arbitration award unenforceable because the nonsignatory was not bound to the arbitration agreement under traditional principles of contract and agency law, not simply because the party was a "nonsignatory"); *In re* Transrol Navegacao S.A., 782 F. Supp. 848 (S.D.N.Y. 1991); Sourcing Unlimited, Inc. v. Asimco

enforcement of arbitral awards against nonsignatories bolsters the parties' preexisting good-faith expectations in the efficient settlement of disputes which may have been a major factor in enticing the party to engage in the international commercial transaction in the first place.[153]

Along the same lines as finality and enforcement of arbitral awards is the parties' expectation of a neutral forum in arbitration. One of the main reasons parties choose to arbitrate is to avoid the "home court advantage" of the opposing party. "[T]he capacity to incorporate in international contracts enforceable obligations to use an agreed-upon neutral forum is a critical part of the willingness of commercial parties to enter into transborder contracts and, in short, to participate in the global economy."[154] The parties achieve neutrality by designating a system where each disputant is able to have a say in the appointment of arbitrators.[155] In the international commercial context, it seems right that both parties settle their dispute on an even playing field. A party should not be able to oppose arbitration simply because litigation in their domicile would be more advantageous when arbitration still offers the parties an equitable alternative.[156]

Last, when a nonsignatory is allowed or required to arbitrate, the court is fulfilling the party's expectation in the privacy of the disputed issues. Participation of nonsignatories does not destroy the confidentiality of the arbitration proceeding.[157] The arbitration panel can require the nonsignatory to honor the confidentiality clause in the contract in dispute.[158] Many parties choose arbitration because they do not want certain information, such as trade secrets, made public.[159] Arbitration involving nonsignatories allows for parties to settle their dispute in a confidential setting, without which the parties may not have entered into the transaction to begin with.

All of the benefits of arbitration—finality, enforceability, neutrality, and confidentiality—are strong incentives for international actors to engage in potentially risky transactions. Participation in these types of

Int'l, Inc., 526 F.3d 38, 45 n.7 (1st Cir. 2008) (acknowledging in an opinion compelling a nonsignatory to arbitrate that Art. II of the New York Convention does not require the party to be a signatory to the arbitration agreement in order to make it enforceable, but that there must be an arbitration agreement). *See also* Gvozdenovic v. United Air Lines, Inc., 933 F.2d 1100 (2d Cir. 1991) (enforcing an arbitration award against nonsignatories under the FAA).

[153] Wiessner, *supra* note 13, at 139.

[154] *Id.*

[155] MOSES, *supra* note 4, at 4.

[156] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 634 (1985) ("We decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators.").

[157] Michael P. Daly, Note, *Come One, Come All: The New and Developing World of Nonsignatory Arbitration and Class Arbitration*, 62 U. MIAMI L. REV. 95, 126 (2007).

[158] *Id.*

[159] Strong, *supra* note 142, at 933.

transactions is motivated by the expectation that if a conflict arises, the matter will be settled in the manner agreed upon. In the context of a nonsignatory, all of these benefits inure to the nonsignatory regardless of its status. Last, it enhances the system of commercial transactions as a whole to use a good faith principle to involve nonsignatories in the arbitration process.

C. Party Autonomy

Another broad public policy behind arbitration is party autonomy. Arbitration is based on the concept that parties may decide to have their disputes settled in a manner to which they mutually agree.[160] "A strong version of arbitration party autonomy exemplifies the significance of freedom of contract."[161] Still, party autonomy is not absolute. It should bend to principles of equity, allowing nonsignatories to participate in arbitration as justice requires.[162] Though arbitration is an "individualized dispute resolution mechanism," due to its similarity to litigation, it is influenced by pragmatic and due process concerns.[163] Equity may "trump" party autonomy.[164]

The first type of good faith—using good faith as an interpretation principle to find consent—has no effect upon party autonomy because, if a nonsignatory is bound to arbitration, it is done through a finding of actual consent. On the other hand, requiring arbitration because of a violation of the duty of good faith involves the court using its equitable powers to require arbitration, thereby making equity between the parties more important than one party's autonomy. As with the previous discussion regarding consent, a party should not be able to violate the duty of good faith and then oppose arbitration, by arguing its right to autonomy and consent. With these types of violations, the court should be more concerned with re-balancing the equities in favor of the party that has not violated its duty of good faith. Furthermore, party autonomy is a theoretical concept, and a party acting in bad faith may not have actually considered how it would resolve disputes because its intentions were not focused on participating fairly in the international market.

D. The National Policy in Favor of Arbitration

The Supreme Court consistently reaffirms this nation's "liberal federal policy favoring arbitration agreements."[165] This policy is even

[160] MS Dealer Serv. Corp. v. Franklin, 177 F.3d 942, 947 (11th Cir. 1999).

[161] Brunet, *supra* note 2, at 5.

[162] Strong, *supra* note 142, at 986.

[163] *Id.* at 925.

[164] *Id.* at 980.

[165] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625 (1985) (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)) (holding that broad scope of the arbitration clause and the national

stronger in the international context.[166] Any doubt regarding how to interpret an arbitration clause should be resolved in favor of arbitration.[167] Narrow interpretation of arbitration clauses in the international context could leave parties chasing legal remedies in foreign courts, "the dicey atmosphere of such a legal no-man's-land would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements."[168] This highlights the importance of commercial arbitration in international transactions. Denying arbitration due to one party's status as a nonsignatory can leave a party without a remedy and create an atmosphere of insecurity in international transactions.

Using the principle of good faith as an affirmative duty and as an interpretation tool is essential to fostering reliance on courts to broadly enforce arbitration agreements in international commercial transactions. The U.S. economy exists in a world market. It is not beneficial for U.S. courts to embrace any "parochial concept" that disputes and legal issues, such as the involvement of nonsignatories, should be resolved by applying U.S. laws over a prominent international principle like good faith.[169] Using an international standard makes sense because other countries and their companies do not recognize the same legal concepts to bind nonsignatories currently used by U.S. courts.[170] Also, the use of good faith is symbiotic with the delocalization movement of arbitration that drives other integral concepts in arbitration, like *lex mercatoria*.[171]

policy in favor of arbitration made it proper to require parties to arbitrate all claims between the signatories, including an antitrust claim).

[166] *Id.* at 629 ("[W]e conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.").

[167] Robert Lamb Hart Planners & Architects v. Evergreen, Ltd., 787 F. Supp. 753, 757 (S.D. Ohio 1992) (finding signatory bound to arbitrate claims with nonsignatory because the other party to the contract had assigned its contractual rights to the nonsignatory).

[168] Scherk v. Alberto-Culver Co., 417 U.S. 506, 517 (1974) (holding that claims under the Securities Exchange Act were arbitrable).

[169] *Id.* at 519; *see generally* BONELL, *supra* note 53, at 128.

[170] For example, England does not allow nonsignatories to participate in arbitration except under the theories of (1) agency, (2) "controlling mind" (similar to piercing the corporate veil), or (3) third-party beneficiary. Felman Prod. Inc. v. Bannai, 476 F. Supp. 2d 585, 588 n.1 (S.D. W. Va. 2007). Swiss law only uses the principle of good faith to determine if a nonsignatory may arbitrate. Motorola Credit Corp. v. Uzan, 388 F.3d 39, 52 (2d Cir. 2004). In China, nonsignatories may arbitrate only under the theories of (1) assignment, (2) "merger" (essentially assumption), and (3) alter ego. Yuwu, *supra* note 9, at 16.

[171] MOSES, *supra* note 4, at 56, 60 (discussing that the thrust of the delocalization movement is that "international arbitration should not be fettered by the local law of the place where the arbitration occurs").

International transactions should be uniform and predictable so parties may properly balance the risks and benefits of a potential transaction. Incorporation of both uses of good faith discussed above implements the broad policy considerations the courts have found so important when dealing with international commercial arbitration.

In summary, arguments that participation of nonsignatories deteriorate or detract from the structure and policy considerations behind arbitration are largely unfounded. It benefits not only the international commercial market, but also its individual participants to use the principle of good faith to require certain nonsignatories to arbitrate their claims.

IV. "CONSCIOUS DRAFTING" WITH THE PRINCIPLE OF GOOD FAITH IN MIND

Using good faith as a guiding principle during drafting will lead to more thoughtful, conscious drafting of arbitration clauses and will better realize the parties' actual intentions.[172] Attorneys must pay particular attention to the type of arbitration clause, broad or narrow, that is drafted because it will often determine the power to bind nonsignatories to arbitration. Gone are the days when attorneys could use boiler plate arbitration clauses and expect their clients to be satisfied when a dispute involving the contractual transaction arises.[173]

First, it must be noted that drafting advice can only deal with the nonsignatory issue to a certain extent. If a party violates its duty of good faith, no amount of artful drafting will protect a client from a court's decision to require or deny arbitration in an effort to re-balance the equities between the parties.[174] Still, careful drafting does have a significant effect on a court's good-faith interpretation of consent based on the arbitration clause and surrounding context.

Using good faith as a contractual interpretation tool, the court will establish the intentions of the parties, or what would have been the intentions of the parties had they discussed the issue, by determining what meaning a reasonable person in the same circumstances would have given to the contract.[175] The court will make a "practical" interpretation

[172] The Author uses the phrase "conscious drafting" to refer simply to the concept that attorneys should make thoughtful, calculated decisions about every phrase that is put into a contract.

[173] DiLeo, *supra* note 6, at 73–74 (discussing the form of arbitration agreements and the importance of language that preserves the predictability of arbitration agreements).

[174] *See supra* Part II.B.2.

[175] BONELL, *supra* note 53, at 142 (discussing UNIDROIT standard for the use of good faith in contract interpretation). Though not stated explicitly, several U.S. court decisions fall in line with the "reasonable person" standard. *See, e.g.*, JLM Indus., Inc. v. Stolt-Nielsen SA, 387 F.3d 163, 178 (2d Cir. 2004) (finding that signatory JLM was bound to arbitrate claims with the nonsignatory parent company of the other

regarding the meaning of the contract by examining the context of the transaction and the sophistication and attitude of the parties.[176] The text of the arbitration clause can shed a significant amount of light on the parties' true intentions, or it can be so vague that a court will find that a reasonable person could believe such a clause to include practically any party or dispute.

A. Party Distinctions

The first way in which an arbitration clause can be broad or narrow is in the designation of the parties that may invoke the right to arbitration. The use of clear language is necessary when drafting the contract in an attempt to make it as broad or as narrow as the signatory parties want. This ensures that the status of nonsignatories is a conscious decision by the parties.[177] An example of a party-broad arbitration clause is the International Chamber of Commerce suggested arbitration clause: "All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules."[178] Note that this clause does not even mention the parties. Such a broadly worded arbitration clause leaves it up to the court's interpretation whether a nonsignatory may arbitrate based on that contract.[179] Furthermore, a broad arbitration clause gives rise to a presumption of arbitrability; "even a collateral matter will be ordered if the claim alleged implicates issues of contract construction or the parties' rights and obligations under it."[180]

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contractual signatory because there was a broad arbitration clause and JLM effectively treated the nonsignatory as if it was a signatory to the contract); *but see* Thomson-CSF, S.A. v. Am. Arbitration Ass'n, 64 F.3d 773, 777 (2d Cir. 1995) (finding that nonsignatory was not bound to arbitrate because it did not exhibit any intention to be bound by the agreement). *See also supra* Part II.B.1.

[176] *See supra* Part II.B; *In re* Arbitration Between Promotora de Navegacion, S.A. & Sea Containers, Ltd., 131 F. Supp. 2d 412, 417 (S.D.N.Y. 2000) (noting that the parties involved were "as sophisticated as they come" and therefore the assertion that one party showed an intent to arbitrate must be shown by "compelling evidence," and finding that because this burden was not met, the court would not enforce the arbitration award against the nonsignatory).

[177] Williams, *supra* note 11, at 175.

[178] INT'L CHAMBER OF COMMERCE, RULES OF ARBITRATION 3 (2008), *available at* http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf.

[179] Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional de Venez., 991 F.2d 42, 48 (2d Cir. 1993) (holding that arbitration clause was incorporated by reference into an agreement between the two parties and therefore arbitration was proper); Strong, *supra* note 142, at 993.

[180] *JLM Indus., Inc.*, 387 F.3d at 172–73 (finding district court erred in not referring the dispute to arbitration because the scope of the arbitration agreement and "[t]he central factual allegations of the complaint in this case posit that a price-fixing conspiracy among the Owners undermined legitimate contractual relations between the parties").

A good example of a party-narrow arbitration clause is found in *In re Arbitration Between Promotora de Navegacion, S.A. & Sea Containers, Ltd.*[181] The arbitration clause stated: "Should any dispute arise between Owners and Charterers, the matter in dispute shall be referred to three persons at New York . . . [and] their decision . . . shall be final."[182] The contract also defined "Owners" and "Charterers" to further clarify the included parties.[183] The express restriction of the parties that could invoke the arbitration provision made the parties' intent to only allow arbitration between "Owners" and "Charterer" unquestionable.[184] The court held that because the parties chose a narrow arbitration clause, the plaintiff could not enforce the arbitration award against the nonsignatory parent corporation.[185]

Contract drafters must also be mindful of the nonsignatory parties it refers to in a contract. Even if the arbitration clause itself is narrow, a court may find the parties had the good-faith intention to extend the rights of a signatory to the nonsignatory employees or other related entities because the contract specifically grants particular contractual rights to nonsignatories. For example, in *CD Partners, LLC v. Grizzle* the arbitration clause stated that only the "Franchisor" and "Franchisee" would settle claims through arbitration.[186] On its face, this is a narrow arbitration clause. Still, later in the agreement, the contract stated "nothing in this Agreement is intended, nor shall be deemed, to confer upon any Person or legal entity other than Franchisee, Franchisor, Franchisor's officers, directors and employees . . . any rights or remedies under or by reason of this Agreement."[187] From this language the court inferred that the signatories intended to confer certain rights and remedies upon officers, directors, and employees of the Franchisor.[188] For this reason, the Franchisor's officers were permitted to compel arbitration.[189] Though *CD Partners* involved a party-narrow clause, the grant of rights and remedies to nonsignatories opened the door for a court determination of the parties' reasonable intentions. In this case, the court found it proper to allow nonsignatories to compel CD Partners to arbitrate through a good-faith interpretation of the contractual intent.

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[181] 131 F. Supp. 2d at 412.

[182] *Id.* at 414.

[183] *Id.*

[184] *Id.* at 418.

[185] *Id.* The court found that the parent corporation could not incorporate by reference the arbitration clause because it was party specific. *Id.* at 418–19. The plaintiff also failed to show the parent company's intent to arbitrate or that the subsidiary signatory was the parent's alter ego. *Id.* at 419–23. This is further evidence that express language of the parties' good faith intent is essential if the parties wish the arbitration clause to be inclusive or exclusive.

[186] 424 F.3d 795, 797 (8th Cir. 2005).

[187] *Id.* (omission in original).

[188] *Id.* at 800.

[189] *Id.*

B. Claim Distinctions

Just as an arbitration clause can be broad or narrow in regard to parties, it can also be broad or narrow as to the claims that are arbitrable.[190] A claim-broad clause generally uses the "any and all disputes" phraseology[191] or "every claim, controversy or dispute arising out of."[192] A claim-narrow clause is usually paired with party-narrow wording and tends to be uncommon. An example is "'[a]ll disputes between the City and the Contractor of the kind delineated in this article that arise under, or by virtue of, this Contract' shall be determined in accordance with PPB rules, which provide for alternative dispute resolution (ADR)."[193] Under a good-faith interpretation of intent, a court will find a drastic difference between the types of arbitral claims in the broad clause and the narrow clause.

This is significant because a reasonable person could believe that a claim-broad arbitration clause including "any and all disputes arising out of" the contract to include claims by related third parties. Claim-broad arbitration clauses imply consent to arbitration of "matters or claims independent of the contract or collateral thereto."[194] If such claims are included in the arbitration clause, a party, in good faith, cannot expect such disputes to not include nonsignatories. For example, in *Boston Telecommunications Group, Inc. v. Deloitte Touche Tohmatsu*, the signatories agreed to an arbitration clause that covered "[a]ny dispute arising out of the interpretation of this Agreement or with respect to the conduct of the Partnership business . . . ."[195] First, the court noted the parties' intentions controlled whether the nonsignatory, Deloitte, could compel arbitration.[196] By combining claim-broad language in the clause and the extremely broad, yet vague, definition of the dispute subject matter as "partnership business," the court easily found that the signatories

[190] DiLeo, *supra* note 6, at 73.

[191] *Id.*

[192] *See, e.g.*, *CD Partners, LLC*, 424 F.3d at 800.

[193] FCI Group, Inc. v. City of N.Y., 862 N.Y.S.2d 352, 354–55 (N.Y. App. Div. 2008) (alteration in original) ("Application of the ADR procedure, however, is expressly limited 'to disputes about the scope of work delineated by the Contract, the interpretation of Contract documents, the amount to be paid for Extra Work or disputed work performed in connection with the Contract, the conformity of the Contractor's Work to the Contract, and the acceptability and quality of the Contractor's Work.'").

[194] Boston Telecomms. Group, Inc. v. Deloitte Touche Tohmatsu, 278 F. Supp. 2d 1041, 1046 (N.D. Cal. 2003) (quoting Mediterranean Enters., Inc. v. Ssangyong Corp., 708 F.2d 1458, 1463–64 (9th Cir. 1983)).

[195] *Id.* at 1044 (describing this as a broad arbitration clause covering "any dispute arising out of").

[196] *Id.* at 1046. Note that this is also the focus of the good-faith principle of interpretation. The court stated that "[e]specially in the case of international arbitration, courts are to give 'full effect' to the 'most minimal indication of the parties' intent to arbitrate.'" *Id.* (quoting Republic of Nicaragua v. Standard Fruit Co., 937 F.2d 469, 478 (9th Cir. 1991)).

intended to confer the benefit of arbitration upon nonsignatories involved in the partnership business, including claims alleging fraud.[197]

The text of the arbitration clause is the crux of a good-faith interpretation of its meaning. It is important for an attorney to recognize the implications of broadly or narrowly drafted arbitration clauses and the significant impact the choice of clause can have on the method of dispute resolution allowed under the contract. Though there are benefits to involving nonsignatories in arbitration, as discussed in Part III *supra*, if a client wishes to know with the greatest amount of certainty who may arbitrate under a particular clause, it is important to list the parties that may or may not rely on the arbitration clause and the type of claims, sounding in contract or tort, that may be asserted. As with most contractual matters, the more clear the drafting, the less likely the client will be surprised about with whom and what matters it is required to arbitrate.

V. CONCLUSION

Arbitration clauses are now features of nearly every international commercial contract.[198] Though discussing the possibility of disputes during the contract drafting stage may be the "deal killing" type of discussion both parties wish to avoid, it is an important one to have. Integral to drafting the arbitration clause is specific attention to the breadth of the clause, whether it be narrow or broad. By using the principle of good faith to determine if a nonsignatory may arbitrate claims regarding the contract, the court is fulfilling the reasonable expectations the parties had during negotiation. Reinforcing these reasonable expectations is the affirmative duty of good faith that the courts should impose. This duty would encourage parties to act in good faith in order to avoid the situation where the court looks at each parties' actions, respectively, for violations of the duty of good faith and decides whether the nonsignatory must arbitrate based on what justice requires to re-balance the equities between the two parties. Importing the principle of good faith into the private-law world of arbitration to determine when a nonsignatory may arbitrate is a neutral compass that makes the arbitration process more fair for all parties involved and does not conflict with other policy considerations that support arbitration.

[197] *Id.* at 1048.

[198] MOSES, *supra* note 4, at 1.