

*Conhecer não é demonstrar
nem explicar. É aceder
à visão. A. Saint-Exupéry*

2017, ANO V, N.º 7

AB INSTANTIA

REVISTA DO INSTITUTO DO CONHECIMENTO AB

DIRECTOR Ricardo Costa

CONSELHO EDITORIAL

Ana Manuela Barbosa, Miguel Teixeira de Abreu,
Paulo de Tarso Domingues, Paulo Teixeira Pinto

REGULAMENTO GERAL DE PROTECÇÃO DE DADOS

Direitos de personalidade e responsabilidade civil; Direito ao esquecimento; Privacidade; § PRIVADO Dupla descrição predial – STJ, 23.02.2016; Resolução de contrato de agência e interesse contratual positivo – Relação de Lisboa, 20.12.2017; PERSI e pagamento de dívida; § INSOLVÊNCIA Isenção de IMT e transmissão de imóveis – STA, 29.03.2017; Empresas locais; Direito de retenção e consumidor; § PROPRIEDADE INDUSTRIAL Marcas sensoriais; Confusão entre marcas; § ARBITRAGEM Estatuto de partes não signatárias; § CONCORRÊNCIA Corrupção no sector privado; § ESTUDO Mercado de valores mobiliários em Angola; § RECENSÃO Direito penal e o terrorismo.

STATUS OF NON-SIGNATORY PARTIES IN MARITIME ARBITRATION – LONDON AND NEW YORK COMPARED*

ANDRÉ PEREIRA DA FONSECA**

I. Introduction

Consent is the foundation of arbitration.

As a principle, only the parties that have executed an arbitration agreement will be bound to it. However, there are exceptional cases in which the parties can be allowed recourse or compelled to arbitration, although not signatories to the arbitration agreement.

In the maritime industry, the issue of determining whether an arbitration clause is binding on third parties is particularly relevant. The fabric of the sector is prone to disputes relating to non-signatories. It is common for maritime contracts to be entered into by third parties within relations of agency and for agreements to be assigned. Also, the issue of whether bills of lading can bind a holder to the charterparty arbitration clause is often debated. The sophistication of modern-day maritime commerce has led that operators such as ship-owners, charterers and cargo owners frequently function in a corporate group structure in which the affiliated companies operate in specific areas concerning interrelated transactions, and in some cases, as a mere “*front*” for other companies. These scenarios are fertile ground to place the question of who is actually bound to an arbitration agreement.

The purpose of this article is to analyze and discuss the approaches taken by the arbitral tribunals and by the courts regarding the legal status of non-signatory parties within the context of the two major maritime arbitration hubs: London and New York.

* O presente trabalho consiste numa análise comparativa da forma como os Tribunais arbitrais (e judiciais) abordam a questão de entidades não signatárias de acordos de arbitragem no contexto dos dois maiores centros de arbitragem marítima do mundo – Londres e Nova Iorque –, procurando assim propor soluções que proporcionem um equilíbrio entre a certeza jurídica e a realidade prática do comércio marítimo. Corresponde à intervenção do Autor no *XX International Congress of Maritime Arbitrators*, que decorreu em Copenhaga entre os dias 25 e 29 de Setembro de 2017.

** LL.M. em *International Dispute Resolution*, Queen Mary University of London. Pós-Graduado em Direito do Trabalho e da Segurança Social, Faculdade de Direito da Universidade de Lisboa

Advogado AB

Besides looking into jurisdictional matters, such as who should decide the issues posed, we will analyze the most relevant legal theories that have been developed and applied in each jurisdiction to approach the issue of non-signatories. A task which is not easy, since arbitrators, courts and academics often diverge on the categorization of these theories, which as we will note ahead, frequently overlap with each other¹.

This paper will be concluded with an analysis and reflection regarding which of the two approaches better serves the maritime community in achieving a balance between legal certainty and commercial practicality.

II. London and the LMAA

London is commonly accredited as the world's dominant maritime arbitration hub. The majority of maritime arbitrations are conducted under the terms of the London Maritime Arbitrators Association (LMAA), a professional association constituted in 1960.

The society has had a crucial role within maritime arbitration encouraging professional knowledge of maritime arbitrators and assisting the expeditious determination of disputes. The LMAA does not administer arbitrations but it lays down standards of conduct, publishes terms, rules, and appoints arbitrators. The wide acceptance of LMAA terms has provided them to frequently govern procedures in which arbitrators are not LMAA members. Three thousand appointments and more than four hundred awards are estimated to be annually issued under the LMAA terms².

Most of the awards are not made public, hence making it difficult to ascertain the understanding of arbitrators. Only a few summaries of LMAA awards are provided in *Lloyd's Maritime Law Newsletter*³.

Arbitration agreement and jurisdiction

If the parties to a maritime arbitration choose London as the seat, the proceedings will be ruled by the Arbitration Act 1996 and by principles of common law.

¹ See 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. Iss. 3 (2004), p. 482 ("a review of published arbitral awards, case law and secondary materials reveals an extensive list of legal theories claimed to bind non-signatories to arbitration agreements").

² See CLARE AMBROSE, KAREN MAXWELL AND ANGHARAD PARRY, LONDON MARITIME ARBITRATION, 3rd Edition, 2009, Ch. 1, referring to LMAA statistics.

³ The cases are usually identified as "*London Arbitration*" without disclosing the parties' identity.

Section 6(1) of the Act defines arbitration agreement as “*an agreement to submit to arbitration present or future disputes (whether they are contractual or not)*”. Agreements to arbitrate should be made or evidenced in writing⁴.

Section 30 of the Act confers the tribunal the power to rule upon its own jurisdiction (*Kompetenz-Kompetenz*) thus allowing arbitrators to decide non-signatory issues, although subject to review by the courts. Alternatively, under Section 32, a party may bring the matter of jurisdiction to the courts.

The general rule under English law is that arbitration agreements can only be enforced by or against parties which are part to it (“*Doctrine of Privity of Contract*”). Nevertheless, there are exceptions that can cause a non-signatory to be bound to arbitrate. We will analyze below the most relevant.

Agency

It is frequent for maritime contracts to be entered into by an agent who, with actual or apparent authority, acts in representation of another party.

Agency relationships, depending on the facts and applicable substantive law, can bind a “*third party*” – the principal – to an arbitration agreement regardless of the fact that the agreement is not directly executed by such party. In a 2007 London Maritime Arbitration – a dispute regarding the conclusion of a charterparty repudiated by the Respondent with grounds that it was not represented by the agent – the Tribunal held that the former was bound to arbitrate given that “P” was indeed acting as the Respondent’s agent and had sent a fixture recap e-mail which incorporated the terms of a charter that included a London arbitration clause⁵.

Disputes frequently arise particularly regarding the determination on whether a party acted as principal or agent and if the agent’s actions actually bind the principal. Recently, in a 2016 maritime arbitration, the Tribunal held that it had no jurisdiction over a company described in a booking note contract as “*Merchant’s representative at loading port*” since it was not a party to the contract⁶.

Assignment

Assignment is also common within maritime affairs and reflects the commercial necessities of the sector.

⁴ Section 5.

⁵ 16/07 [2007] 721 LMLN 3.

⁶ 13/16 [2016] 952 LMLN 4.

A party to a maritime agreement (such as a charterparty or a vessel sale and purchase agreement)⁷ can agree to assign its rights and obligations to a third party (the “assignee”), including the arbitration provision⁸. In such case, the assignee, although a non-signatory to the original agreement will generally be bound by the arbitration provision⁹.

In practice, jurisdictional issues frequently arise particularly concerning whether the assignor or the assignee is rightly regarded as a party to the arbitration. If the proceedings are already pending, the assignee should give notice of the assignment to the other party and to the arbitral tribunal¹⁰.

Incorporation by reference

Within maritime affairs, incorporation by reference is commonly associated with the question of whether a bill of lading successfully incorporates an arbitration provision included in a charterparty, thus binding a non-signatory.

Section 6(2) of the 1996 Arbitration Act states that “*The reference in an agreement to a written form of arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement*”. However, difficulties arise concerning bills of lading as to in which cases the reference is efficiently made. Indeed, frequently there is a string of charters and the bill of lading fails to identify the charterparty to which relates to¹¹. Also, dispute resolution clauses in charterparties are increasingly complex, often with an hybrid form and in many cases not signed by both parties. Additionally, third parties holding negotiable bills of lading are frequently unfamiliar with the charterparty terms.

The analysis should be made on a basis of construction of the meaning of the words as a whole in their context and of the parties’ intentions. Although English Courts recently appear to adopt a more liberal approach trying to accommodate business practice¹², they often struggle with conflicting views.

⁷ See AMBROSE, MAXWELL AND PARRY, *supra* note 2, Ch. 15.

⁸ See *Shayler v Woolf* [1946] Ch 320.

⁹ As per Section 82(2) of the English Arbitration Act 1996. See also *The Jay Bola* [1997] 2 Lloyd’s Rep 279 cited with approval in *Starlight Shipping v Tai Ping Insurance Co Ltd Hubei Branch* [2007] EWHC 1893 (Comm); [2008] 1 Lloyd’s Rep 230; *West Tankers Inc v Ras Riunione Adriatica di Sicurtà, The Front Comor* [2005] EWHC 454 (Comm) [2005] 2 Lloyd’s Rep 257.

¹⁰ See *Montedipe SpA v JTP-TO Jugotanker* [1990] 2 Lloyd’s Rep 11; *Baytur SA v Finagro Holding* [1992] 1 Lloyd’s Rep 134.

¹¹ YVONNE BAATZ, SHOULD THIRD PARTIES BE BOUND BY ARBITRATION CLAUSES IN BILLS OF LADING? [2015] LMCLQ001-154, 88 (“*Although it is a question of construction in each case, the general rule is that the head charter, to which the shipowner is party, is incorporated*” (internal citations omitted)).

¹² *Id.* at 91.

As a principle, general words of incorporation in a bill of lading will not effectively incorporate an arbitration clause in a charterparty¹³. Thus, in order to assure certainty, the words should refer specifically to the arbitration provision¹⁴, even if it is necessary to manipulate the wording of the charterparty clause¹⁵.

Group of companies / alter ego / veil piercing

Some jurisdictions have acknowledged that, in specific circumstances, corporate relationships can be so close as to constitute a single economic unity, which together with an interpretation of the intent of the parties, can justify binding a non-signatory affiliate to an arbitral agreement¹⁶ (“*Group of Companies Doctrine*”).

However, in England, maritime arbitrators and courts have evidenced great reluctance towards this doctrine, rigorously upholding the fundamental principle that a company has an independent legal personality.¹⁷

In a 2014 London maritime arbitration¹⁸ the Tribunal held that a consignee was a separate legal entity from its parent company, thus, the latter could not be regarded as bound to any arbitration agreement entered into by the former regardless of its majority shareholding. In another 2014 London maritime arbitration¹⁹, the arbitrators disregarded Owners’ arguments that the consignee had breached the arbitration agreements contained in the bills of lading, and that such breach was influenced by the consignee’s parent company, by the charterers and sub-charterers, all owned by the same company.

In *Peterson Farms Inc. v C&M Farming Ltd.*²⁰ the English High Court partially set aside an ICC award in which the arbitral tribunal, based on the group of companies doctrine, had accepted jurisdiction regarding claims for damages claimed by non-signatories, relentlessly stating: “*English law treats the issue as one*

¹³ In *Caresse Navigation Ltd v Zurich Assurances MAROC and others (Channel Ranger)* [2014] EWCA Civ 1366, the Court of Appeal underlined that this principle is “*an exception to the general approach of English law which in principle accepts incorporation of standard terms by the use of general words*”.

¹⁴ However, in “*London Arbitration 22/00*” [2000] 550 LMLN 4, the Tribunal while relying on *The Merak* [1964] 2 Lloyd’s Rep 527 and on the *The Annefeld* [1971] 1 Lloyd’s Rep 1, held that “*where there were general words of incorporation in the bill and the arbitration clause or some other provision in the charter made it clear that the clause was to govern disputes under the bill as well as under the charter, then the arbitration clause was incorporated*”.

¹⁵ See BAATZ supra note 11 at 93.

¹⁶ See *Dow Chemical France v Isover Saint Gobin* (ICC Case n.º 4131, Interim Award of 23 September 1982).

¹⁷ *Salomon v A Salmon & Co.* [1897] A.C. 22.

¹⁸ 3/14 (2014) 891 LMLN 4.

¹⁹ 2/14 (2014) 891 LMLN 3.

²⁰ [2004] EWHC 121 (Comm).

subject to the chosen proper law of the Agreement and that excludes the doctrine which forms no part of English law”.

The same reasoning applies to States and State entities. A London maritime arbitration tribunal decided in 1997²¹ that it had no jurisdiction to consider a cross-claim submitted by charterers’ against owners with grounds that both owners and another State organization (over whom Charterers’ had a credit) were owned and controlled by the State²².

A non-signatory may also be bound to arbitrate by “*piercing the corporate veil*”. However, the English system again has shown great reluctance in applying or even clearly defining the content of such doctrine, doing it so in exceptional cases²³. It appears that two tests need to be satisfied: *i*) There must exist some impropriety amounting to dishonest abuse of the company to pierce involving something akin to a “*sham*” transaction; 2) The transaction has the purpose of avoiding a legal restriction or defeating rights of third parties²⁴.

Contracts (Rights of Third Parties) Act 1999

This statute embodies an exception to the doctrine of privity by allowing a third party, on its own right, to enforce terms in a contract where there is an express provision allowing such enforcement or where, subject to a contrary intention, the term purports to confer a benefit (Section 1).

Although parties can agree to contract out of the Act and Section 1 does not confer rights on a third party in the case of “*a contract for the carriage of goods by sea*” (defined to cover bills of lading, sea waybills or corresponding electronic transactions and ship’s delivery orders²⁵), the statute has had a significant impact regarding non-signatories within the maritime arbitration context²⁶. Indeed, Section 8(1) of the Act states that if it is shown that the substantive term is within the range of Section 1 and that the third’s party right to enforce is subject to an arbitration agreement, the third party - although a non-signatory of the agreement that contains the arbitral clause - shall be treated as such in order to enforce

²¹ 19/97 [1997] 472 LMLN 4.

²² See also *Dallah Estate and Tourism Holding Company v Ministry of Religious Affairs GoP* [2010] UKSC 46.

²³ See *Antonio Gramsci Shipping Corporation v Stepanovs* ([2011] EWHC 333 (Comm)); *Alliance Bank JSC v Aquanta Corporation* ([2011] EWHC 3281 (Comm)).

²⁴ JULIAN COOKE, TIMOTHY YOUNG QC, JOHN KIMBALL, LEROY LAMBERT, ANDREW TAYLOR, DAVID MARTOWSKI, VOYAGE CHARTERS (4th Edition, 2014), Ch. 2, Para 2.43 (internal citations omitted). See also *VTB Capital plc v Nutritek International Corp* [2013] UKSC 5 and *Prest v Petrodel Resources Ltd* [2013] UKSC 34.

²⁵ Section 6(5) states “*except that a third party may in reliance on that section avail himself of an exclusion or limitation of liability in such a contract*”.

²⁶ See AMBROSE, MAXWELL AND PARRY, *supra* note 2, Ch. 15.

its right, as long as the agreement is wide enough to cover a dispute between the original parties as to the performance of the substantive term²⁷.

The Act made easier for non-signatories to enforce its rights within maritime arbitration. For instance, brokers find it simpler to sue for commission under charterparties or ship sale contracts. In a 2006 London maritime arbitration, brokers, although non-signatories, successfully submitted a claim for their commission against the owners under the 1999 Act²⁸. Independent contractors (e.g. stevedores) can more effectively rely on exclusion or limitation clauses inserted into bills of lading or charterparties for their own benefit²⁹.

III. New York and the SMA

New York is home to the Society of Maritime Arbitrators (SMA), the leading maritime arbitration institution in the United States. It was created in 1963 by a group of individuals active within the maritime community in New York with the goal of promoting balanced arbitration proceedings that could meet the needs of the maritime community.

SMA Arbitrations are determined under the “*Maritime Arbitration Rules of the Society of Maritime Arbitrators*” (SMA Rules) promulgated in 1963 and grown out of the practice and experience developed by New York lawyers specialized in maritime arbitration.

None of SMA members are practicing attorneys (although some members are graduated in law). SMA panels are composed by industry peers who apply their skills, knowledge and commercial experience in the shipping business. Differing from the LMAA, the SMA routinely publishes full reasoned awards³⁰. This has allowed for maritime operators to be aware of the understanding of arbitrators regarding contentious matters. More than 4200 awards have been issued by SMA arbitrators, paving the way in many areas of maritime arbitration, including the issue of non-signatories.

²⁷ See *Nisshin Shipping Co Ltd v Cleaves & Company Ltd*, [2003] EWHC 2602; See also *Fortress Value Recovery Fund I LLC and others v Blue Sky Special Opportunities Fund LP and others* [2013] EWCA Civ 367 (evidencing an unwillingness to find a third party bound by an arbitration agreement regarding a claim against a third party where the latter seeks to rely on a limitation or exclusion of liability benefit conferred by the contract in which the arbitral agreement is enclosed and emphasizing the need for very clear drafting in such case).

²⁸ 7/2006 [2006] LMLN 688 citing *Nisshin Shipping*.

²⁹ See AMBROSE, MAXWELL AND PARRY, *supra* note 2, Ch. 15.

³⁰ Provided by the SMA award service and available in the USAWDS file of the Admiralty (ADMRTY) library in *Lexis-Nexis*.

Arbitration agreement and jurisdiction

Maritime arbitrations in New York, if not subject to another law, are ruled by the 1925 Federal Arbitration Act (FAA)³¹. This statute, enacted with maritime affairs strongly in mind, reflects a clear “*pro-arbitration*” policy.

The Act expressly states that “*a written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction*” shall be “*valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.*”³²

As a principle, the determination of issues concerning the arbitration agreement will be subject to the Courts, except if the parties have agreed, clearly and unmistakably, to submit it to the arbitrators. If that is the case, the arbitrator’s decision should only be set aside in “*certain narrow circumstances*”³³. SMA rules, contrarily to others³⁴, do not contain a provision granting arbitrators the power to determine its own jurisdiction. In practice however, SMA arbitrators frequently decide on its jurisdiction, including non-signatory issues.

Ordinary contract and agency principles provide the source to determine whether a non-signatory can be bound to an arbitration agreement. Traditionally, five theories have been identified within this regard: i) Agency; ii) Incorporation by reference; iii) Assumption; iv) Estoppel; and v) Veil-piercing/alter ego³⁵. We will examine each one below.

Agency

The approach regarding agency relationships does not differ particularly when comparing London to New York.

An agent with actual or apparent authority can enter into a contract on behalf of a principal³⁶ and if the agreement contains an arbitral provision, the disclosed principal will normally be bound to it³⁷.

³¹ *United States Code*, Title 9.

³² § 2.

³³ *First Options of Chicago Inc. v Kaplan*, 514 U.S. 938, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995), *aff’g*, 19 F.3d 1503 (3d Cir. 1994). See also *NRG Linhas Aereas, S.A. v MatlinPatterson Global Opportunities et al.*, 717 F.3d 322 (2d Cir. 2013).

³⁴ Such as the AAA Commercial Arbitration Rules (R-7).

³⁵ *Thomson-CSF, S.A. v American Arbitration Association*, 64 F.3d 773 (2d Cir. N.Y. Aug. 24, 1995).

³⁶ *Garanti Finansal Kiralama A.S. v Aqua Marine & Trading, Inc.*, 697 F.3d 59, 2012 AMC 2926 (2d Cir. 2012).

³⁷ See *e.g.*, *Interbras Cayman Co. v Orient Victory Shipping Co., SA*, 663 F.2d 1, 6–7 (2d Cir. 1981).

On the other hand, an agent that executes a contract in representation of a disclosed principal generally will not be bound to arbitrate³⁸. This can happen exceptionally such as when the agent fails to reveal a relationship with the principal³⁹ or when a party is considered both as agent and principal.⁴⁰

Incorporation by reference

New York's approach regarding incorporation is different, and somewhat more "liberal", when compared to London in what regards incorporation through bills of lading.

London arbitrators and courts have shown to be particularly strict on the requirement that the incorporation should specifically address the arbitration provision. New York counterparts tend to focus on express and clear identification of the charterparty in the bill of lading and on whether its holder had either actual or constructive notice of the incorporation⁴¹.

General charterparty wording with a wide meaning requiring arbitration of all disputes can suffice. Narrow wording limiting the arbitration clause to a specific scope (*e.g.* disputes between owner and charter) can impair incorporation.

Ideally, the charterparty should be identified in detail. Nonetheless, specification of the date, together with references to the parties has been considered sufficient⁴². If necessary, the court or arbitrators can look to extrinsic evidence to determine the intent of the parties. However, if the bill of lading is with the charterer, the charterparty will govern relations between the parties, including arbitration.

Assumption

A non-signatory party can also be bound to arbitration if its conduct evidences that it is assuming a commitment to arbitrate. The requirement of "consent" is thus inferred from the party's behavior. If a party participates voluntarily and actively in the process and its conduct manifests intent to arbitrate the dispute on which

³⁸ *Arhontisa Mar. Ltd. v Twinbrook Corp.*, 2001 U.S. Dist. LEXIS 15536 (S.D.N.Y. Sept. 26, 2001); *Keystone Shipping Co. v Texport Oil Co.*, 782 F. Supp. 28, 1992 AMC 1768 (S.D.N.Y. 1992). See also *Keystone Shipping Co. v Compagnie Marocaine de Navigation*, 1990 AMC 2971 (S.D.N.Y. 1990), where the court determined that an agent for a partially disclosed principle was bound to arbitrate.

³⁹ See *Beck v Suro Textiles, Ltd.*, 612 F. Supp. 1193, 1194 (S.D.N.Y. 1985).

⁴⁰ *American Bureau of Shipping v Tencara Shipyard S.P.A.*, 170 F.3d 349 (2d Cir. N.Y. Mar. 17, 1999).

⁴¹ See *Midland Tar Distillers Inc. v The Lotos*, 362 F. Supp. 1311, 1973 AMC 1924 (S.D.N.Y. 1973); *F.D. Import & Export Corp. v M/V Reefer Sun*, 2003 AMC 60, 66–67 (S.D.N.Y. 2003); *National Material Trading v M/V Kaptan Cebi*, 1998 AMC 201 (D.S.C. 1997).

⁴² *Cont'l Ins. Co. v Polish S.S. Co.*, 346 F.3d 281, 283, 2003 AMC 2718 (2d Cir. 2003).

the other party relies, then it will be bound to it⁴³ and may be precluded from subsequently challenging the jurisdiction of the arbitrators. The intention to be bound by an arbitral agreement, although subject to being inferred, should be clear and unambiguous⁴⁴. Nonetheless, there is some variation upon analysis on how a non-signatory can be bound to the arbitration agreement and such will mostly depend on the facts at stake.

Thus, maritime parties should be mindful of their conduct both before, during and after a dispute arises if they do not wish to be otherwise bound to an agreement to arbitrate.

The doctrine of assumption may overlap with other contractual or equitable principles such as estoppel. Some courts and commentators actually prefer to subsume both within a broader definition of estoppel⁴⁵, which we will analyze next.

Estoppel / Third party beneficiary

Estoppel is a theory grounded on a fundamental but certainly subjective concept of “*fairness*”. Contrarily to England, the doctrine of estoppel has been broadly applied in the US in order to compel a non-signatory to arbitrate⁴⁶.

However, its wide scope often provides for different criteria and not always consistent application by US courts. Its broad application has even raised comments that this theory has lately been placed as an alternative to “*consent*” within arbitration.⁴⁷

Courts and commentators that distinguish “*Assumption*” from “*Estoppel*” have often used the latter for situations in which a party relies on the existence of a contract containing an arbitration provision in order to prove its claim and exercise its right. Based on Second Circuit case-law, non-signatories to arbitration agreements may be bound to arbitrate disputes under an estoppel theory where the non-signatory accepts the benefits of the main agreement. If a party knowingly exploits such agreement and accepts their benefits, it may be estopped from avoiding arbitration despite never signing it⁴⁸. The benefit arising out of the agreement should be direct⁴⁹.

⁴³ See *Gvozdenovic v United Air Lines, Inc.*, 933 F.2d 1100, 1105 (2d Cir. 1991).

⁴⁴ See *Chios Charm Shipping Co. v Rionda*, 1994 U.S. Dist. LEXIS 4571 (S.D.N.Y. Apr. 11, 1994).

⁴⁵ See HOSKING, *supra* note 1, 490 (“*assumption of obligation*’ is really no more than either estoppel or the creation of a separate oral contract”).

⁴⁶ *Id.*, 530.

⁴⁷ *Id.*

⁴⁸ *Deloitte Noraudit A/S v Deloitte Haskins & Sells, U.S.*, 9 F.3d 1060, 1064 (2d Cir. 1993).

⁴⁹ *American Bureau of Shipping v Tencara Shipyard S.P.A.*, 170 F.3d 349 (2d Cir. N.Y. Mar. 17, 1999); *Thomson-CSE, S.A. v American Arbitration Association*, 64 F.3d 773 (2d Cir. N.Y. Aug. 24, 1995).

Veil piercing / Alter ego (group of companies)

The way that the courts, and in particular maritime arbitrators in New York handle the issue of veil-piercing / alter ego / group of companies is significantly different when compared to London.

As we stated, the English system is particularly adverse to these theories. In contrast, SMA arbitrators have commonly allowed for non-signatory parties to take stand in arbitration proceedings where a close corporate and operational relationship between the parties and with the subject matter is found. Within this regard, the arbitrators typically take into account if the relationship between the parties and the issues/claims at stake, in particular their commercial intentions, duties, and obligations, are intimately founded in and intertwined with the charterparty⁵⁰. These principles were basically upheld in *Astra Oil Co. v Rover Navigation*⁵¹ by the Court of Appeals for the Second Circuit under the “wide” theory of estoppel. Nonetheless, in practice, considering that this approach amounts to a form of lifting the principle of separation between separate but group related legal entities, one should note that the practical result is close to the “group of companies doctrine”.

In what regards “piercing the corporate veil”, maritime law allows it where shareholders or a parent company use a corporation to commit fraud or, where there is such a dominance and disregard for its corporate form that its evident that its purpose is to carry their own personal business rather than pursuing the company’s commercial purpose⁵². These principles also apply in the context of binding a non-signatory to an arbitral agreement⁵³, although courts appear generally less willing to blur the principle of separation of corporate entities when comparing to arbitrators.

⁵⁰ See, e.g., *Amerada Hess Shipping v Skip. Nordheim*, SMA 958 (1975); *Map Tankers, Inc. v Mobil Tankers Ltd.*, SMA 1510 (1980); *Compagnie Nationale Algerienne de Navigation v Coscol Petroleum*, SMA 1576 (1981); *Solidarity Carriers v Amerada Hess*, SMA 2138 (1985); *T; Koch Shipping/Koch Supply v Mobil Shipping*, SMA 3615 (2000); *Stena Bulk v Citgo Asphalt Refining Co.*, SMA 3902 (2005); *Sherwin Alumina, L.P. v Western Bulk Carriers*, SMA 4230 (2014).

⁵¹ 344 F.3d 276 (2d Cir. N.Y. Sept. 22, 2003).

⁵² TERENCE COGLIN, ANDREW BAKER, JULIAN KENNY, JOHN KIMBALL, THOMAS H. BELKNAP JR., *TIME CHARTERS*, 7th Edition, 2014, 2A.27, citing *Kirno Hill Corp. v Holt*, 618 F.2d 982, 985 (2d Cir. 1980); *Dow Chemical Pacific Ltd. v Rascator Maritime S.A.*, 782 F.2d 329, 342 (2d Cir. 1986); and *Itel Containers v Atlantrafik Exp. Service Ltd.*, 909 F.2d 698, 703-704 (2d Cir. 1990).

⁵³ *Freeman v Complex Computing*, 119 F.3d 1044, 1052 (2d Cir. 1997); *Smith/Enron Cogeneration Ltd. P’ship, Inc. v Smith Cogeneration Int’l, Inc.*, 198 F.3d 88, 97 (2d Cir. 1999).

IV. Conclusions

The clearest conclusion that we can withdraw from the analysis made is that the New York maritime jurisdiction has a more “*liberal*” approach upon allowing non-signatories to participate in arbitration proceedings, when compared to London.

This is particularly reflected in the way that arbitrators in New York often allow for non-signatories to stand in arbitration proceedings when there is a close corporate and operational relationship between the parties and the subject matter. This is in stark contrast with London, where both arbitrators and courts evidence a clear unwillingness to bind third parties to an arbitration agreement on such grounds.

One should also note that arbitrators in New York make an abundant use of “estoppel” in order to justify binding non-signatories, a theory which has a wide scope and is grounded on a noble, but indeterminate, notion of “*fairness*”. Again, estoppel has little reflection, if any, in London.

Such conclusion may perhaps find partial justification in the declared “*pro-arbitration*” policy embodied in the FAA and followed both by courts and arbitrators. This strong presumption may play a role upon binding a non-signatory to an arbitration agreement. However, this cannot be the only justification given that the English Arbitration Act 1996 also embodies a modern and “*pro-arbitration*” regime.

Another justification may be the fact that arbitrators who generally determine SMA arbitrations are not practicing attorneys but rather maritime industry peers who apply in the conduct of the arbitrations their vast knowledge, skills and experience in the sector. This may, within specific circumstances, favor a solution more compatible with the commercial interests of the parties, rather than a strictly legal one.

On that basis, it is certainly a fact that arbitration is, in its essence, a more commercial and flexible forum when comparing to the courts. It is also a fact that, in some cases, the specificities of the maritime industry can validate a more commercial approach to the issue of non-signatories.

However, one cannot lose sight from shore. Indeed, the application of principles of contract/agency and of theories such as “*group companies*” or “*estoppel*” in order to bind non-signatories to an arbitration agreement should remain as an exception. Otherwise, a broad and inattentive application risks jeopardizing simultaneously three fundamental legal principles:

- i) Privity of contract;
- ii) Corporate personality; and
- iii) Consent in arbitration.

Such result would certainly not satisfy the needs of the maritime community.