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Termination Provisions May Defeat Arbitration

By Robert E. Bartkus – January 3, 2018


It is easy enough to say that the employer was hoisted by its own petard because it drafted the agreement and must have had a reason for choosing the agreement terms and structure to “sign up” the executive for a limited period of time, all the while contemplating that the executive might continue to work beyond the initial term. This case suggests a review may be warranted of employment and other commercial agreements to avoid this and similar “termination” problems by, for example, including a survival provision.

It is common for an employment or commercial arrangement to expire at the end of the term set out in a written agreement. Disputes that arise in the course of the concluded relationship or its termination often are subject to the arbitration clause in the agreement. A second visit to the kiddy park is not covered by the agreement signed for a prior visit, though, unless the initial contractual relationship specifically covers subsequent visits; the second visit requires a second contract signed by a person with legal authority. See Weed v. Sky N.J., LLC, No. A-4589-16, 2018 N.J. Super. Unpub. LEXIS 410 (N.J. Super. Ct. App. Div. Feb. 22, 2018) (friend’s signing of second form inadequate). Commercial entities often try to avoid this problem by entering into a general agreement stating that future purchases or transactions are subject to specified basic terms and conditions. Unless covered by a carefully worded agreement, an employee who leaves a job, then returns as a rehire, is not bound by the terms of the initial writing; a new agreement is required. The reason? Because arbitration agreements must be in “writing” (9 U.S.C. § 2) or in a “record” (N.J. Stat. Ann. 2A:23B-6), oral agreements may be sufficient to enforce most terms of the second contract but not an arbitration clause only in the earlier writing.

Another twist: After the end of the contractual term, the employee may continue to work without the employer’s revising the writing to cover an extended term. This also happens in franchise, licensing, service, or similar commercial relationships. Where claims relate to conduct during the original term, most courts would conclude that the dispute must be arbitrated pursuant to the arbitration clause in the written agreement. But if the dispute arises from
conduct during the extension period, covered only by the oral contract, arbitration may not be available. In *Spathos v. Smart Payment Plan LLC*, No. 15-8014, 2016 U.S. Dist. LEXIS 95152 (D.N.J. July 21, 2016) (citing *Bogen Commc’ns, Inc. v. Tri-Signal Integration, Inc.*, 227 F. App’x 159 (3d Cir. 2007)), for example, the parties agreed orally to continue their agency relationship after the end of the term of a written agreement with an arbitration clause; arbitration was not permitted of a dispute arising out of the period governed by the oral agreement. Broad reliance on an earlier arbitration agreement covering the parties’ “relationship” may not solve the problem. See *Katsil v. Citibank, N.A.*, No. 16-3694, 2016 U.S. Dist. LEXIS 169560 (D.N.J. Dec. 8, 2016) (declining arbitration regarding dispute over second credit card).

In the case involving Susan O’Keefe, the court faced a different scenario—the executive continued to work after the initial term, but the contractual language relied on by the employer to argue that the right to arbitration and other contractual obligations continued was, at best, equivocal. One section of the agreement provided that the employee might “remain in the employ of the Company” (emphasis added) after the initial one-year term but under conditions consistent with those applicable to other employees. Thus, the employee may have become an at-will employee, without the written protections of the original one-year term. The arbitration clause covered disputes “arising out of Executive's employment . . .” (emphasis added), but the court held that was insufficient to cover anything beyond the initial one-year term.

As with confidentiality and non-compete clauses, arbitration clauses may be drafted to include survival language. Or the employer may require a new, separate arbitration agreement after the initial term, presumably without risking the employee’s at-will status. Otherwise, contract terms may “cease[] to exist” at the expiration of the contract. See *Craffey v. Bergen Cty. Utils. Auth.*, 315 N.J. Super. 345, 350 (App. Div. 1998); cf. *Owens v. Press Publ’g Co.*, 20 N.J. 537, 550 (1956).

Time to look again at those arbitration contracts.

Summary Disposition in Arbitration

By Sunu M. Pillai – January 3, 2018

It is well known that a party must clear a high hurdle to vacate the decision of an arbitration panel. Section 10 of the Federal Arbitration Act (FAA) provides the grounds on which a court “may make an order vacating the award upon the application of any party to the arbitration.” 9 U.S.C.A. § 10. One of the grounds for vacatur is evident partiality or corruption in the arbitrators. Three recent decisions from the Second, Eighth, and District of Columbia Circuits provide guidance as to when the lack of disclosure by an arbitrator could be considered substantial enough to warrant the vacatur of an award under the evident partiality standard.

U.S. Supreme Court Precedent

The Supreme Court considered the “evident partiality” standard 50 years ago, but the justices could not agree on a single rationale. In a plurality opinion for four members of the Court, Justice Black wrote that “any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias,” the same standard that governs judges. Commonwealth Coatings Corp. v. Cont’l Cas. Co., 393 U.S. 145, 150 (1968). He also prescribed a reasonableness standard, by stating that arbitration boards may not “reasonably be thought biased against one litigant and favorable to another.” Justice White, joined by Justice Marshall, provided a less restrictive standard in his concurring opinion, holding that “arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial.” He noted that “where the arbitrator has a substantial interest in a firm which has done more than trivial business with a party, that fact must be disclosed.” He further stated that it is not the decision of the Court that arbitrators are to be held to the standards of judicial decorum of Article III judges or indeed of any judges. The Court thus did not articulate a single standard for vacating an arbitral award for evident partiality. Most courts have since followed the less restrictive standard in the concurring opinion, using a reasonableness test to determine whether the relationship is trivial.

The D.C. Circuit Decision

The Republic of Argentina challenged an arbitration decision, contending that there was evident partiality by one of the arbitrators because the arbitrator sat on the board of directors of a financial services company with investments in two of the parties. Republic of Argentina v. AWG Grp. LTD., 894 F.3d 327, 333 (D.C. Cir. 2018). The court held that Argentina failed to meet its heavy burden of proof to challenge the arbitrator’s partiality, as the facts it set forth failed to indicate improper motives on the part of the arbitrator. Following the concurring opinion in Commonwealth Coatings, the court explained that Argentina must show that the arbitrator had
a substantial interest in a firm that has done more than trivial business with one of the parties. The court found that the arbitrator’s position as a board member in a financial services company was so far removed from investment decisions of the company “that it could not have given her a substantial interest in the parties.” The court further found that the business of the firm with the two parties was trivial and stated that “speculation that [the firm’s] investment of 0.06% of its assets, most of which was credited to its clients and not its own bottom line, created a substantial interest in [the parties] is simply not enough to satisfy the Act’s high standard of proof.” The court thus held that there was no basis for vacating the panel’s award.

The Eighth Circuit Decision
The Eighth Circuit acknowledged in a recent decision that its interpretation of the term “evident partiality” has reflected some “uncertainty” over the years. However, the court stated that it “need not decide which of our constructions of the term binds us as a matter of circuit precedent” because the facts did not show “evident partiality under any of them.” Ploetz for Laudine L. Ploetz, 1985 Tr. v. Morgan Stanley Smith Barney LLC, 894 F.3d 894, 898 (8th Cir. 2018). The court noted that, in prior cases, it has interpreted evident partiality using various standards, including “an undisclosed relationship [that] creates an impression of possible bias,” “an undisclosed relationship [that] casts significant doubt on the arbitrator’s impartiality,” and a relationship that “objectively demonstrate[s] such a degree of partiality that a reasonable person could assume that the arbitrator had improper motives.” It observed that there is a lack of consensus on the meaning of “evident partiality” among federal courts and that its own “interpretation of evident partiality has migrated in the salutary direction of its plain and ordinary meaning.” In Ploetz, the arbitrator had disclosed 10 cases in which he was an arbitrator in matters involving one of the parties but failed to disclose a mediation involving the party. The court held that because he timely disclosed the 10 other cases he arbitrated, his undisclosed mediation represented at most a trivial and inconsequential addition to that relationship. The court upheld the arbitration award, stating that Ploetz does not warrant relief from the award under any of the evident partiality standards because she could not explain how the arbitrator’s undisclosed mediation creates even an impression of possible bias.

The Second Circuit Decision
In a matter of first impression, the Second Circuit held that a party must sustain a higher burden to prove evident partiality on the part of a party-appointed arbitrator who is expected to espouse the view or perspective of the appointing party. Certain Underwriting Members of Lloyds of London v. Fla., Dep’t of Fin. Servs., 892 F.3d 501, 503–4 (2d Cir. 2018). The party-appointed arbitrator in a reinsurance dispute failed to disclose dealings between the appointing party and a firm for which the arbitrator served as the president and chief executive officer and that his firm operated out of the same office space as the appointing party. The district court
vacated the award, holding that the undisclosed relationships were significant enough to demonstrate evident partiality and noting the “apparent willfulness of the non-disclosures.” The Second Circuit vacated and remanded, stating that to expect the same level of institutional impartiality of party-appointed arbitrators as is applicable to neutrals would impair the process of self-governing dispute resolution. Note that this is at odds with the presumption of neutrality, unless explicitly agreed otherwise, contained in most arbitral institution rules (e.g., American Arbitration Ass’n Commercial Rule 18). The court held that an undisclosed relationship between a party and its party-appointed arbitrator constitutes evident partiality, such that vacatur of the award is appropriate if (1) the relationship violates the contractual requirement of disinterestedness or (2) it prejudicially affects the award.

Conclusion
Courts have cited “fundamental fairness” as the policy behind vacating awards for evident partiality. However, a party trying to vacate an arbitration award faces a heavy burden. As the District of Columbia Circuit and Eighth Circuit decisions show, a relationship that is more than trivial is required for an arbitration award to be vacated due to evident partiality. The Second Circuit decision articulates an even higher standard for party-appointed arbitrators who are expected to espouse the view of the appointing party.

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Litigate Today, Arbitrate Tomorrow? Not So Fast, Big Business!

By Alexander Bachuwa – January 3, 2018

The issue in *Dasher v. RBC Bank (USA)*, 882 F.3d 1017 (11th Cir. 2018), was whether the defendant could compel arbitration in a case, where consumers were actively engaged in a lengthy pending litigation, simply by updating its customer-account agreement to include an arbitration provision. The plaintiff artfully characterized the defendant’s motion to compel as “litigation-protracting sandbagging.” *Id.* at 1024 n.4. Unsurprisingly, the defendant took the exact opposite position, arguing that it amended its agreement containing an arbitration provision only for account holders who continued to use their accounts and did not opt out. *Id.* at 1021 n.3. On appeal, the Eleventh Circuit held that the defendant’s motion “failed to demonstrate the requisite meeting of the minds to support a finding that the parties agreed . . . to arbitrate their then-pending litigation.” *Id.* at 1021.

What This Means for Consumers

This case serves as a reminder to consumers that it takes two to go to arbitration. Consumers have been conditioned to believe that corporations can do as they please and that consumers have no way of fighting back against the fine print. The consensus among consumers is that if it is in the contract, it must be enforceable.

This submissive approach was not taken in *Dasher*. While it is settled law that arbitration agreements are constitutional, that does not mean that companies can invoke them unilaterally when it is advantageous for them to do so. Remarkably, arbitrability was first argued in August 2010, almost one year before the *Concepcion* decision, but was not resolved until February of 2018. *In re Checking Account Overdraft Litig.* [Login Required], Nos. 09-MD-02036-JLK, 2010 U.S. Dist. LEXIS 94532, at *1* (S.D. Fla. Aug. 23, 2010); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 333, 131 S. Ct. 1740, 1742 (2011). Consumers should remain vigilant and be prepared to challenge whether disputes are subject to arbitration merely because the terms and conditions say that they are.

What This Means for Consumer Attorneys

It is fair to say that plaintiff-side attorneys are less than thrilled with mandatory arbitration in consumer disputes. While this case in way weakens the enforcement of valid arbitration agreements, it does send a clear message that claims that arose before the shift from litigation to arbitration will be enforced.
Strategically, consumer attorneys should focus their efforts on challenging the arbitrability of claims where there was a past agreement to litigate, instead of obsessing over the constitutionality of standard form contracts for claims where a consumer has agreed to resolve disputes through arbitration.

What This Means for Corporations
The consensus among corporations is that consumer arbitration is an effective way of managing disputes while reducing a company’s legal liability. With the elimination of most class action lawsuits, companies do not have to be fearful of the next headline-grabbing jury award. Having said that, corporations should not be so brash as the defendants in *Dasher* to believe that arbitration can be used as a procedural ploy to escape litigation. Courts will not sympathize with corporations that try this new take on forum shopping in order to protract the resolution process.

At the same time, companies should not be so self-assured as to believe that compelling arbitration in consumer claims relieves them from financial liability. Though it does not have the media appeal that a class action judgement has, the result of filing and winning thousands of individual arbitrations might change a corporation’s strategy on how it handles consumer disputes. This is especially true given the fact that corporations are responsible for paying almost all the fees in a consumer arbitration claim, which can add up quickly.

The Way Forward
*Dasher* was a unique case because it predated *Concepcion*, when consumer arbitration agreements were not the norm that they are today. Following this ruling, it is unlikely that corporations will be successful should they try to impose arbitration agreements on consumers when they are in the midst of litigation. Such a maneuver does little to garner public support for consumer arbitration. Instead, it perpetuates the belief that consumer arbitration is skewed in favor of big businesses. Furthermore, consumers will continue to be skeptical and wonder why corporations are so adamant about compelling arbitration if there is no decided advantage.

Simultaneously, when it is determined that arbitration is the proper forum for handling such disputes, consumer attorneys should embrace the process and understand that consumers can find meaningful results through arbitration. Pending a dramatic shift in public policy and the makeup of the Supreme Court, consumer arbitration will be around for the foreseeable future. It would behoove all parties involved to avoid the bluster from *Dasher* and focus on the reason alternative dispute resolution was developed in the first place: to resolve disputes.

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California Court Holds Parties May Not Contract Around Hague Convention

By Jiyun Cameron Lee – January 3, 2018

In business transactions, parties regularly include terms specifying how their disputes will be resolved, where the actions will be brought, and what rules will apply. Among the terms often found in international contracts are terms specifying how to provide notice of a dispute or proceeding so that the parties can avoid the often time-consuming—and sometimes mysterious—rules for service of process in foreign jurisdictions.

A California appellate court, however, recently threw a wrench into these norms of practice, holding that parties may not contract around the Hague Service Convention by setting their own terms of service. Rockefeller Tech. Invs. (Asia) VII v. Changzhou SinoType Tech. Co., Ltd., 24 Cal. App. 5th 115 (2018). While the long-term impact of this case is not yet known, it has the potential to wreak havoc on many current contractual relationships.

The Underlying Contract

In 2008, Rockefeller Asia, an American investment partnership, entered into a four-page memorandum of understanding (MOU) with SinoType, a Chinese company. Under the MOU, the parties set out the basic terms by which they would form a new company based in California. While the MOU contemplated that additional “long form agreements” would be prepared and signed, it also stated that upon execution, the MOU “shall be in full force and effect.”

In the MOU, the parties agreed that they would provide notice to each other by Federal Express, with copies by fax or email. The parties specified that in case of disputes, they would submit to the jurisdiction of federal and state courts in California and “consent to service of process in accord with the notice provisions above.” The parties further agreed that either party could submit the dispute to JAMS for binding arbitration.

The Dispute and Resulting Judgment

The parties’ relationship soured, and in 2012, Rockefeller Asia filed a demand for arbitration with JAMS. Notice of the arbitration proceeding was given in accordance with the MOU. SinoType did not appear, and the arbitration proceeded in its absence. The arbitrator issued a final award in November 2013, awarding Rockefeller Asia $414 million.
Rockefeller Asia filed a petition to confirm the arbitration award and served SinoType in China by Federal Express in accordance with the terms of the MOU. Again SinoType did not appear. In October 2014, the trial court confirmed the arbitration award and entered judgment for Rockefeller Asia in the amount of $414 million.

**Trial Court Rejects SinoType’s Motion to Set Aside Judgment**

After learning from a client that Rockefeller Asia was alleging that SinoType owed it money, SinoType filed a motion to set aside the judgment in January 2016. The trial court denied SinoType’s motion, explaining that any other result would allow a party to unilaterally disregard its contractual obligations by returning to its home country. The trial court also observed that it could not find any case law indicating that parties could not contractually select alternative means of service, thereby waiving the service provisions of the Hague Service Convention.

**Court of Appeal Overturns the Trial Court, Voiding the Judgment**

The appellate court disagreed with Rockefeller Asia and the trial court, holding that private parties could not contract around a nation’s service requirements. Relying on the language and purpose of the Hague Service Convention, the court observed that “the Convention emphasizes the right of each contracting state—not the citizens of those states—to determine how service shall be effected.” *Rockefeller Technology*, 24 Cal. App. 5th at 132 (emphasis in original). Here, China had expressly objected to allowing alternative methods of service under the convention and established laws by which service of process was to be effected on its citizens. Because SinoType was not properly served with the summons and petition to confirm the arbitration award in accordance with the convention, the court deemed the judgment void.

**Potential Impact**

*Rockefeller Technology* appears to be the first decision rejecting the rights of private parties to waive service of process by contract. In reaching its decision, the court disagreed with the rulings of two other courts that had previously upheld the right of private parties to contract around the Hague Service Convention. *Alfred E. Mann Living Tr. v. ETIRC Aviation S.A.R.L.*, 78 A.D.3d 137, 141 (N.Y. App. Div. 2010); *Masimo Corp. v. Mindray DS USA Inc.*, No. 12-cv-02206-CJC, 2013 WL 12131723 (C.D. Cal. Mar. 18, 2013). The *Rockefeller Technology* court found these prior decisions unpersuasive, finding no textual support in the convention for allowing private parties to avoid service requirements by contract.

Rockefeller Asia, for its part, has filed a petition for review with the California Supreme Court. For now, the decision by the California Court of Appeal calls into question the enforceability of similar notice provisions in numerous contracts between U.S. and foreign companies, at least in
California. Any party with a contractual notice provision who anticipates, or is presently involved in, a dispute with a foreign company is well advised to explore all options for effecting service of process.

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**PRACTICE POINTS**

**Ethics Misstep Leads to Fee Award Being Vacated**

*By Mitchell L. Marinello – December 6, 2018*

On August 30, 2018, the California Supreme Court vacated a fee award in favor of a law firm, holding that the firm’s conflict of interest invalidated the law firm’s entire agreement with its client, including the arbitration clause, and thereby rendered its fee award a nullity. *Sheppard Mullin Richter & Hampton, LLP v. J-M Manufacturing Company*, 237 Cal. Rptr. 3d 424, Case No. S232946 (August 30, 2018).

Sheppard Mullin Richter & Hampton, LLP (Sheppard) agreed to represent J-M Manufacturing Company (J-M) in a federal qui tam action brought on behalf of various public entities. While the suit was pending, Sheppard represented one of those same public entities in an employment matter unrelated to the qui tam suit. Both clients had signed engagement agreements stating that they waived any such conflicts of interest, present or future, but the agreements did not disclose the specific conflicts, nor did Sheppard advise the clients of them. When the public entity discovered the conflict, it successfully moved to disqualify Sheppard in the qui tam suit. A dispute then arose about Sheppard’s legal fees in the qui tam action and the dispute went to arbitration in accordance with the arbitration clause in Sheppard’s engagement agreement with J-M.

Sheppard won a fee award in the arbitration, but the California Court of Appeal reversed. It held that Sheppard’s undisclosed conflict of interest violated the California Rules of Professional Conduct and rendered the engagement agreement, including its arbitration clause, invalid in its entirety. The appellate court held that Sheppard was not entitled to any compensation for the work it performed for J-M while also representing the public entity.

The Supreme Court of California largely affirmed this holding. It agreed that Sheppard’s ethical violation rendered the entire engagement agreement, including the arbitration clause, unenforceable as against public policy, resulting in vacatur of the arbitration award. Succinctly stating California law, the Supreme Court said:

> California cases have made clear that the legislative policy favoring contractual arbitration, and the finality of arbitral awards, applies only when there is, in fact, a valid contract to arbitrate. . . . [W]hile a claim that a single provisions of a contract is illegal ordinarily has no bearing on the validity of the parties’ agreement to arbitrate, the same is not true of a claim that that the entire contract is void for illegality. In such cases, . . .
the agreement to arbitrate cannot be severed from the remainder, and the court is not bound to confirm the results of an arbitration conducted under such a contract.

Sheppard, 237 Cal. Rptr. 3d 424, 437.

Despite this holding, the court gave Sheppard the opportunity to show that it was entitled to some fee award under the doctrine of quantum meruit, and it remanded the case to the trial court for that purpose.

The central lesson of the Sheppard case is clear: Lawyers should specifically disclose conflicts of interest to clients at the beginning of the engagement to avoid the risk of disqualification, loss of the client, and loss of compensation for the work performed.

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Non-Signatory Insurers Able to Compel Arbitration

By Melanie Mohr – November 28, 2018

A federal district court, relying on the New York Convention and the doctrine of equitable estoppel, required a plaintiff to arbitrate its property damage claims against nine insurance companies, even though the relevant arbitration clause was present in the plaintiff’s contracts with only two of the nine carriers. The court found that the plaintiff’s claims all arose from the same set of facts and that the coverage and damages issues were identical as to each insurer. Accordingly, the court held that the plaintiff’s arbitrable and non-arbitrable claims were intertwined, and it required the plaintiff to arbitrate its claims against all of the insurers. Port Cargo Service, LLC and Michoud Blvd. Commerce Center, LLC v. Certain Underwriters at Lloyd’s London, et al., Case No. 18-6192, 2018 WL 4042874 (E.D. La. August 24, 2018).

Facts and Procedural History

In 2016, Port Cargo purchased a surplus lines insurance policy which included coverage for a warehouse and office facility in New Orleans. The policy risk was shared by nine separate insurance companies, including two based in foreign countries and seven based in the United States. In 2017, Port Cargo’s property was so severely damaged by a tornado that it needed to be rebuilt completely. When the insurance companies did not pay its claims, Port Cargo filed suit in the Parish of Orleans District Court, Louisiana for about $10 million in damages. Defendants removed the case to federal district court and sought to compel Port Cargo to arbitrate.

Removal, the New York Convention, and Federal Jurisdiction

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) is an international treaty that gives citizens of foreign countries the right to enforce arbitration agreements. The Convention Act, which is chapter two of the Federal Arbitration Act, creates federal subject matter jurisdiction for actions arising under the New York Convention. 9 U.S.C. §§201-208. Section 205 of the Convention Act provides that the defendants may remove an action arising under the New York Convention to federal court.

Both of the foreign insurers had an arbitration agreement in their contract with Port Cargo. Port Cargo acknowledged that, under the New York Convention and the Convention Act, the two foreign insurers had the right to remove the case to federal court and to argue for the enforcement of their arbitration agreements under federal law. Port Cargo pointed out, however, that although all nine insurers shared the policy risk, Port Cargo had a separate insurance contract with each of them. Port Cargo successfully argued that the New York
Convention did not apply to its insurance contracts with the seven domestic insurers and that the Convention Act did not provide federal subject matter jurisdiction over the claims against the domestic insurers or their motions to compel arbitration. Accordingly, Port Cargo argued that even if arbitration were to proceed with respect to the two foreign insurers, the court should send its claims against the seven domestic insurers back to Louisiana state court.

**Non-Signatories and Equitable Estoppel**

The seven domestic insurance carriers were not signatories to the insurance contracts that Port Cargo had with its two foreign insurers. Citing *Grigson v. Creative Artists Agency L.L.C.*, 210 F.3d 524, 527 (5th Cir. 2000), the district court analyzed that when under the doctrine of equitable estoppel non-signatories may compel a signatory like Port Cargo to arbitrate. The court noted that, even though Port Cargo had a separate contract with each of the nine insurers, each contract incorporated the exact same insurance terms—the only significant difference being the percentage of loss that each insurer agreed to take. Thus, all of Port Cargo’s claims cited on the same insurance provisions, accused each insurer of breaching those provisions in the same way, and relied on the same evidence. Given these circumstances, the court held that Port Cargo’s claims against all the insurers were interdependent and that it was therefore appropriate under the doctrine of equitable estoppel to require Port Cargo to arbitrate all of its claims. The court added that to permit two separate proceedings to go forward—one in arbitration and one in the courts—would “thwart the intentions of the Convention and the federal policy in favor of arbitration.”

The court cited an additional factor to support its decision. The seven domestic insurance contracts also contained an arbitration clause. Thus, at the time the contracts were made, the parties “contemplated that all disputes against all of the insurers would be determined in one arbitration.” Port Cargo challenged the validity of the arbitration clauses in the seven domestic insurers’ contracts based on the McCarron-Ferguson Act and a Louisiana statute, but the court found it unnecessary to decide the matter. Instead, a combination of federal law and equitable estoppel required Port Cargo to arbitrate all of its insurance claims.
Conclusion
Non-signatories can use the doctrine of equitable estoppel to require a plaintiff to arbitrate when the plaintiff’s claims are intertwined with other claims that are subject to arbitration. Furthermore, although the Federal Arbitration Act does not provide federal subject matter jurisdiction, the New York Convention and the Convention Act may be a source of federal subject matter jurisdiction when the arbitration agreement in dispute includes foreign citizens.

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