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Crossing Troubled Waters: Joining Non-Signatories In Maritime Arbitration—The Co-Optation and Containment of Consent in United States and British Law

Glenys P. Spence*

INTRODUCTION

Arbitration is an ancient method of resolving disputes privately between parties who agree to the jurisdiction of an impartial tribunal.¹ In medieval times, the ancient Greeks submitted their disputes to the Oracle at Delphi. Even after the Roman Conquest, arbitration continued to be the favored method of dispute resolution among the Greeks.² At the bedrock of arbitration is the single pillar of consent.³ Coercion, then, is antithetical to the fundamental tenets of arbitration because the common understanding is that there must be an agreement to

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1. JOSEPH F. MORRISSEY & JACK M. GRAVES, *International Sales Law and Arbitration: Problems, Cases, and Commentary* 31 (Wolters Kluwer 2010).

2. W. L. Westermann, *Interstate Arbitration in Antiquity*, 2 CLASSICAL J., no. 5, Mar. 1907, at 198 (“The honor therefore of first formulating the principle of interstate arbitration and of first putting it into practice lies with the Greeks.”).

3. See William W. Park, *Non-Signatories and International Contracts: An Arbitrator’s Dilemma*, in MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION: CONSENT, PROCEDURE AND ENFORCEMENT 1 (Oxford 2009) (“Like consummated romance, arbitration rests on consent.”).

arbitrate.⁴ This agreement is generally contained in the parties' contract after all parties have negotiated the essential terms, such as choice of law and choice of forum. Therefore, a party should not be compelled to arbitrate a claim absent that party's informed consent. The contractual provision to arbitrate confers jurisdiction on an arbitral tribunal or a panel of arbitrators and serves as the sole source of that authority.⁵

Compared to litigation, arbitration is generally understood as a "friendly" forum where all parties have the power to choose the arbitrators. However, in recent times, this age-old dispute resolution mechanism has come under fire because arbitration is now viewed by many policymakers, lawyers, and a large segment of the population as a sword and not a shield.⁶ In the United States, there is a concerted effort among policy makers to create legislation that would eliminate forced arbitration as it relates to consumer, employment, and civil rights issues.⁷ These efforts resulted in the proposed Arbitration Fairness Act.⁸ The proposed legislation gained some support during the Obama administration, but appears to be still-born upon the ushering in of a new Republican administration.⁹

The issue of forced arbitration cuts across the spectrum of society. In the area of commercial law, arbitration has always

4. See MORRISSEY & GRAVES, *supra* note 1, at 32 ("[T]hird parties cannot be required to participate in arbitration without express consent.").

5. See Park, *supra* note 3, at 3 ("For arbitrators, motions to join non-signatories create a tension between two principles: maintaining arbitration's consensual nature, and maximizing an award's practical effectiveness by binding related persons.").

6. See Interview by Jennifer D. Adams with Sen. Al Franken and Rep. Henry Johnson, in *Gaining Ground*, TRIAL: FORCED ARBITRATION, Jan. 2017, at 31, 31 (stating that replacing the judicial process with forced arbitration discards "the body of law and jurisprudence under which a decision can be made" and replaces this system with "a private, for profit, anything-goes type of system.").

7. See Jessica Guynn, "Enough is enough": Gretchen Carlson says bill ending arbitration would break silence in sexual harassment cases, USA TODAY (Dec. 6, 2017, 12:06 PM), <https://www.usatoday.com/story/money/2017/12/06/bipartisan-bill-would-eliminate-forced-arbitration-break-silence-sexual-harassment-cases/925226001/>.

8. See Arbitration Fairness Act of 2017, S. 537, 115th Cong. (2017).

9. See Interview by Jennifer D. Adams, *supra* note 6, at 33 (recounting Rep. Johnson's statement: "I believe that as long as Republicans control the House of Representatives, I see no prospects for the Arbitration Fairness Act to see the light of day.").

been the preferred method of settling commercial disputes. However, in recent times, the decision to arbitrate has become a one-sided affair. In the maritime context, arbitration is frequently the preferred method of dispute resolution, and the arbitral process threatens to destabilize litigation in the world of shipping. Long respected as a unique and special “club,” maritime lawyers now find the doors of the courtroom closed.¹⁰ The fields of maritime law and arbitration are as old as the sea.¹¹ However, maritime disputes, because of their complexity, have always been guided by a unique system of laws.¹²

In modern maritime practice, the omnipresence of arbitration clauses that lie cloistered in the fine print of contracts across the commercial spectrum is giving rise to issues of fraud and unconscionability in maritime contracts. At bottom, the resistance is not about the arbitration itself, but the absence of consent among parties who were unaware that the doors of the courthouse would be closed in the event of a dispute. Arbitration, then, is now viewed as a nemesis to litigation.¹³ This negative view of arbitration is amplified because the process is mired in secrecy. Compared to our system of litigation and our legal culture of transparency, a system that is characteristically non-transparent is vulnerable to attack particularly when the rights of weaker parties are juxtaposed against the might of a large corporation or

10. See Interview by Jennifer D. Adams, *supra* note 6, at 32 (positing that arbitration is a good thing in principle and it pervades the shipping community; going into an arbitration or being drawn into one, is to enter a world of practice that is different from litigation, and some knowledge of arbitration is indispensable to the maritime lawyer).

11. James Allsop, Chief Justice, Address to the 16th Conference of Chief Justices of Asia and the Pacific: Comity and Commerce (Nov. 8, 2015) (describing the development of commercial practices with regards to maritime trade, including the Laws of Manu circa 1500 BCE and the various customary codes of Greece and Egypt and the maritime law of the Rhodians within Justinian’s Digest).

12. See NICHOLAS J. HEALY ET AL., *CASES AND MATERIALS ON ADMIRALTY 1* (West 5th ed. 2012) (“In writings from Babylonian times until the collapse of the Roman empire, traces remain of a cluster of doctrines of maritime law that persist to this day.”).

13. See Deepak Gupta, *Fighting the Fine Print*, TRIAL: FORCED ARBITRATION, Jan. 2017, at 24, 25 (“Over the last decade, corporations have used the fine print to block the courthouse doors by forcing consumers and employees into arbitration.”).

other powerful entities.¹⁴

What's even more troubling is the fact that over the last decade, the United States Supreme Court's jurisprudence has moved closer to favoring arbitration even where non-signatories to a contract have argued on the basis of consent. In its earlier jurisprudence, the Court has long recognized and reiterated that arbitration must be consensual under the Federal Arbitration Act (FAA) and federal maritime law.¹⁵

But, in maritime transactions, it is often difficult to identify all of the parties to a contract. Because maritime law is *sui generis* international, the very nature of maritime transactions is based on a chain of transactions, which includes multiple contracts with multiple parties across several countries. When a dispute arises from these contracts, the challenge of identifying the proper parties to the contract is more pronounced in international commercial arbitration.¹⁶

Historically, the doctrine of privity of contract controls the obligations and rights of the parties to sue on a given contract.¹⁷ Thus, the issue of jurisdiction over the parties is often a bone of contention for arbitral bodies. In international commercial arbitration, it is more likely than not that one of the parties will

14. See Paul Bland & Dani Zylberberg, *In the Dark: A System of Secrecy*, TRIAL: FORCED ARBITRATION, Jan. 2017, at 40, 41 ("An open and transparent court system has long been a pillar of our democracy, guaranteeing fair proceedings . . . and ensuring public support and acceptance of the 'means used to achieve justice.'").

15. See *Stolt-Nielsen S.A. v. AnimalFeeds Int. Corp.*, 559 U.S. 662, 684 (2010) ("[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so."); *id.* at 683 ("We think it is also clear from our precedents and the contractual nature of arbitration that parties may specify *with whom* they choose to arbitrate their disputes."); see also *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002); *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

16. See CLARE AMBROSE, KAREN MAXWELL & ANGHARAD PARRY, *LONDON MARITIME ARBITRATION* 229 (Bruce Harris ed., 3d ed. 2009) ("In charter party or bill of lading contracts it is extremely common for the contract to be signed or concluded by an agent. . . . [I]t is important to take every precaution to ensure that any claim is asserted against the proper party. Any dispute as to the identity of the proper party to sue (or be sued) can normally be categorised as a jurisdictional issue . . .").

17. See BRIAN H. BIX, *CONTRACT LAW: RULES, THEORY AND CONTEXT* 11 (2012).

challenge the arbitrators' jurisdiction over the dispute based on the choice of forum or choice of law clauses. Often, this challenge to jurisdiction is raised on the basis that either one of the parties did not consent to arbitration or is not a signatory on the underlying contract.¹⁸

This Article seeks to analyze the joinder of parties who are non-signatories in certain maritime contracts where these parties are seeking to avoid arbitration. This Article will grapple with the question of whether consent in international arbitration has been rendered irrelevant through the practice of joinder. At issue is whether the current practice of joining these non-signatories to arbitration disregards the fundamental principle of consent that is central to arbitration, and thus offends public policy both in the United States and internationally.

Unlike litigation, there are no *per se* rules of joinder in the realm of arbitration, and non-signatories to an underlying contract containing an arbitration clause, will resist the insistence by the opposing side to arbitrate. In recent times, however, arbitral tribunals have employed "joinder-like" instruments to join non-signatories to arbitration under the rubric of "deemed consent."¹⁹

Invoking language such as "commercial reality," "economic reality," corporate veil-piercing, alter-ego, and equitable principles of "estoppel" in myriad forms, courts and arbitral tribunals have legitimized the practice of joining non-signatories to arbitration.²⁰ While in practice, the borrowing of joinder rules serve the needs of uniformity in international commercial transactions, and international trade, the practice of joining non-signatories to arbitration has met with some hostility both in the United States, Britain, and other European countries.²¹ In fact, this practice may offend the public policy of some countries, creating conflict of laws issues in the fractious space of international trade.

18. See AMBROSE, MAXWELL & PARRY, *supra* note 16, at 75.

19. See Park, *supra* note 3, at 8–9 (explaining the analysis arbitrators undertake to join non-signatories).

20. See *id.* at 12 ("References to 'surrogates' or 'substitutes' for consent sometimes serve as catchphrases to explain joinder situations in which arbitrators or courts deem an arbitration agreement to exist. However, sound doctrine should never countenance a suggestion that consent has somehow become irrelevant.").

21. *Id.* at 14.

This Article will analyze the issue of joinder under the principles of estoppel under United States law, the Group of Companies Doctrine adopted by some Continental legal systems,²² and the English Contracts (Rights of Third Parties) Act 1999.²³ At the crux of this analysis is to what extent this practice disturbs the fundamental principles that form the basis of international public policy such as those rights enshrined in Article 6 of the European Convention on Human Rights (ECHR), The Right to a Fair Trial,²⁴ the British Human Rights Act 1998,²⁵ and American public policy underlying the Federal Arbitration Act (FAA).²⁶

The issue of joinder where a party is seeking to avoid arbitration will be explored through the lens of shipbroker contracts.²⁷ Recently, in *International Chartering*, the Second Circuit Court of Appeals revisited the issue of joining non-signatories to arbitration.²⁸ In predecessor cases to *International Chartering*, the court held that the joinder of a non-signatory to an arbitration proceeding without the party's consent was in violation of American public policy.²⁹ In *Republic of Ecuador*, the court explained that "a choice-of-law clause will govern where a nonsignatory to a particular arbitration agreement seeks to

22. See *Dow Chemicals v. Isover Saint-Gobain*, 9 Y.B. Comm. Arb. 131, 136 (ICC Int'l Ct. Arb. 1984) (a claim was brought not only by the companies who signed the arbitration agreement but also by their parent company and a French subsidiary in the same group).

23. Contracts (Rights of Third Parties) Act 1999, ch. 31 (Eng.), available at https://www.legislation.gov.uk/ukpga/1999/31/pdfs/ukpga_19990031_en.pdf.

24. Convention for the Protection of Human Rights and Fundamental Freedoms, *amended by* Protocols Nos. 11 and 14, art. 6, Nov. 4, 1950, ETS No. 5 (Eur.).

25. Human Rights Act 1998, ch. 42 (Eng.), available at http://www.legislation.gov.uk/ukpga/1998/42/pdfs/ukpga_19980042_en.pdf.

26. Federal Arbitration Act, 9 U.S.C. § 9 (1925).

27. See H. Edwin Anderson, III, *Shipbrokers' Commissions: Entitlement, Standing, and Jurisdiction*, 24 TUL. MAR. L. J. 55, 55 (1999) ("Shipbrokers act as intermediaries and agents between owners and charterers of a vessel.").

28. *Int'l Chartering Servs., Inc. v. Eagle Bulk Shipping Inc.*, 138 F. Supp. 3d 629, 629 (S.D.N.Y. 2015), *remanded by* 557 Fed. Appx. 81 (2d Cir. 2014).

29. See *Sarhank Grp. v. Oracle Corp.*, 404 F.3d 657, 662 (2d Cir. 2005) (holding that "[a]n American nonsignatory cannot be bound to arbitrate in the absence of a full showing of facts supporting an articulable theory based on American contract law or American agency law"); see also *Republic of Ecuador v. ChevronTexaco Corp.*, 376 F. Supp. 2d 334, 356 (S.D.N.Y. 2005).

enforce the agreement against a signatory, *but not where a signatory seeks to enforce the agreement against a nonsignatory.*³⁰ *International Chartering* rests on the same footing.³¹ As in *Republic of Ecuador*, a signatory is asking the court to compel the non-signatory to arbitration. However, the court announced that it was in fact, overruling itself in *Republic of Ecuador* based on the doctrine of direct benefit estoppel.³² Given this posture, shipbrokers must be diligent to ensure that they understand the standard language in the charter party form.³³ According to *International Chartering*, the incorporation of commission terms³⁴ will bind brokers to the charter party, even where there is a change in ownership of the vessel, or where there is a separate agreement between the original owners and the brokers.³⁵

In addition to the issue of joinder of non-signatories, *International Chartering* raises choice of law issues.³⁶ The

30. 376 F. Supp. 2d at 355 (emphasis added).

31. See *Int'l Chartering Servs., Inc.*, 138 F. Supp. 3d at 635.

32. See *id.* at 635–36 (reasoning that *Republic of Ecuador* was incorrect).

33. See STEWART C. BOYD ET AL., SCRUTTON ON CHARTERPARTIES AND BILLS OF LADING 3 n.19 (21st ed. 2008) (“*Charterparty*: in medieval Latin, *carta partita*, an instrument written in duplicate on a single sheet and then divided by indented edges so that each part fitted the other.”). The legal relations between the owner of the vessel and the charterer are controlled by the charter party. *Id.* at 3, art. 3–4. In legal disputes, the terms of the charter party itself are controlling. See *E.A.S.T., Inc. of Stamford v. M/V Alaia*, 673 F. Supp. 796, 799 (E.D. La. 1987) (“A charter party, such as the New York Produce Exchange time charter . . . is merely a form of contract and is generally subject to the rules and principles of construction for ordinary commercial contracts.”); see also *Marine Overseas Servs., Inc. v. Crossocean Shipping Co.*, 791 F.2d 1227, 1234 (5th Cir. 1986) (noting that a charter comes into existence when “the traditional elements of a contract are present” (citation omitted)).

34. See *Brokerage Commission: An Overview*, FISHERS SOLICITORS (July 22, 2011), <http://www.fisherslondon.com/pages/news/index.asp?NewsID=50> (“Brokerage commission is payable under a time charter on hire. Standard form charters will ordinarily stipulate that commission is only payable on hire that is both earned and *paid* (see for example the NYPE form). Subject to the precise wording of the charter, the broker’s entitlement to commission will therefore only arise when the charterers remit hire or it is recovered by some other means.”).

35. See *Int'l Chartering Servs., Inc.*, 138 F. Supp. 3d at 642. According to *Int'l Chartering Servs., Inc.*, if the benefit sued upon (i.e., broker’s commission) depends on the charter party for its existence, then under the doctrine of direct benefit estoppel, the brokers will be deemed to consent to arbitration. *Id.* at 636.

36. See *id.* at 635.

question for the court was whether federal maritime law or English law applied to the charter parties at issue.³⁷ Both the District Court and the Second Circuit held that English law applied to the charter parties because if federal maritime law applied, the charter parties' reference to "Owners and the Charterers" would not apply to the shipbrokers.³⁸

In arriving at this conclusion, the court's decision revived the age old question of whether shipbroker contracts are "firmly entrenched" within the admiralty jurisdiction of the United States.³⁹ The court held that under English law, the phrase "Owners and the Charterers" in the charter party includes shipbrokers, while in the United States, brokers are not characterized as such.⁴⁰ Therefore, federal maritime law and English law will produce different outcomes, which compel a choice of law analysis.⁴¹

The choice of law issues will be analyzed alongside the preliminary contracts doctrine under United States maritime law. This Article hopes to convey that the time has come for United States courts to decide whether federal maritime law applies *ex proprio vigore* to shipbroker commissions. These contracts should be squarely within the ambit of admiralty jurisdiction by virtue of their symbiotic nature with the charter party. In addition to the admiralty jurisdiction question, *International Chartering* revives the thorny question as to the fairness of binding a non-signatory to a charter party which includes an arbitration choice of law clause. Acknowledging that the issue is fraught with uncertainty, the court concluded that English law governed the claims under the charter parties and ruled that the parties must bring their

37. *See id.* at 634.

38. *See id.* at 634, 642; *id.* at 634 ("This Court previously determined that under federal law, the charter parties' arbitration clauses—which by their terms apply only to 'Owners and the Charterers'—did not apply to Plaintiffs. The Second Circuit did not reverse that conclusion. 'Were substantive federal maritime law to apply, [the District Court's holding] might be correct.'" (alteration in original) (internal citations omitted)).

39. *Id.* at 634.

40. *Id.*

41. *Id.* ("Thus, as the Second Circuit held, '[s]ince English law and federal law produce different results, the choice of law analysis is essential.'").

claims to arbitration in London.⁴²

The Second Circuit foreclosed a prime opportunity to clarify this area of law to the detriment of international maritime arbitration.⁴³ *International Chartering*, with its implication of English law in the area of maritime jurisdiction as it relates to broker contracts, provided fertile ground for the court to offer a definitive response to the question of maritime jurisdiction over the so-called preliminary contracts doctrine.⁴⁴

The presence of a choice of law clause in *International Chartering* allowed the court to sidestep the issue of whether brokerage contracts are creatures of maritime law.⁴⁵ The often-used alibi of international uniformity gave the court an “out” in this choppy area of admiralty jurisdiction, and the parties were sent out into the channels of English law.⁴⁶ Where a dispute is international, courts favor arbitration, and even in situations where a party’s substantive rights are implicated, courts will subjugate the important issue of United States admiralty jurisprudence for the international principles of comity and uniformity.⁴⁷

Indeed, the court’s acknowledgment that English law will provide a remedy for the brokers in *International Chartering*, because they will be deemed as “owners” and “charterers” in England, begs the question of whether they should receive the same treatment under United States law.⁴⁸ The court stated that *International Chartering* will not sound in admiralty because, under federal law, brokers and charterers are not included in the phrase “Owners and the Charterers,” but it stopped short of

42. *Id.* at 642–43.

43. *See Int’l Chartering Servs., Inc., v. Eagle Bulk Shipping Inc.*, 557 F. App’x 81 (2d Cir. 2014).

44. *See id.*

45. *See Int’l Chartering Servs., Inc., v. Eagle Bulk Shipping Inc.*, 138 F. Supp. 3d 629, 638 (S.D.N.Y. 2015).

46. *See id.* at 642.

47. *See Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 526, 537 (1995) (“Petitioner’s skepticism . . . must give way to contemporary principles of international comity and commercial practice.”); *id.* at 537–38 (“[T]he historical judicial resistance to foreign forum selection clauses ‘has little place in an era when . . . businesses once essentially local now operate in world markets.’” (quoting *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972))).

48. *See Int’l Chartering Servs., Inc.*, 138 F. Supp. 3d at 634.

revisiting the preliminary contracts doctrine.⁴⁹

The questions on remand seem to suggest a nod towards the application of federal law if the brokers' claims were found independent of the charter parties.⁵⁰ The court ordered the parties to provide further briefing on the choice of law issues for claims independent of the charter parties.⁵¹ Notably, the court requested further briefing on whether certain claims were independent of the charter party, and if so, whether those claims should be subject to arbitration in London as a matter of contract law.⁵² If not, the court asked the parties to explain how the question should be resolved under federal law.⁵³

Part I of this Article will provide a background of the *International Chartering Services* (ICS) case which provides context for some of the issues raised in this Article. Part II discusses the practice of shipbrokering within the principles of agency law; Part III discusses the preliminary contracts doctrine under the law of admiralty to demonstrate that primary jurisdiction over maritime contracts lies with the admiralty jurisdiction of courts. Part IV introduces comparative principles of arbitration through an explanation of British maritime law and the English Rights of Third Party's Act, and the Group of Companies Doctrine to demonstrate the human rights principles that lie at the heart of consent. Part V discusses choice of law rules in United States jurisprudence as it relates to international

49. *Id.*

50. *See id.* at 634, 643.

51. *Id.* at 643.

52. *Id.* (holding that “[a]dditional [b]riefing is [n]ecessary to [d]etermine [w]hether [p]laintiffs [h]ave [c]laims [i]ndependent of the [c]harter [p]arties”).

53. *Id.* The Court requested briefing on the following issues: (1) “Should the question of whether Plaintiffs have claims independent of the charterparties [sic]—claims that cannot be arbitrated—be determined by this Court, or by the arbitrators in England?”; (2) “If the Court should make the determination, then as a matter of contract law, do Plaintiffs have claims against Defendants independent of the charter parties?”; (3) “If Plaintiffs’ claims are independent as a matter of contract law, is there any reason why they must still arbitrate such claims under the charter parties? For *each* of these questions, the parties should (a) address whether English or federal law applies, (b) explain how the question should be resolved under English law”; (4) “Finally, the parties should address what would happen if the Court, applying federal law, determines that Plaintiffs must arbitrate all of their claims in London—yet under English law, the arbitrators would refuse to hear some or all of those claims.” *Id.*

arbitration issues. Part VI provides a discussion of the modern trend in the courts for joining non-signatories to arbitration through the surrogate principles of direct benefit estoppel and the Group of Companies Doctrine. Part VII signals the dangers for the forced nature of arbitration that lies hidden in standard form contracts used in the maritime industry, and Part VIII cautions against the potential threat of forced arbitration to the need for arbitration in the international legal system. Finally, the Article concludes with the importance of consent as the bedrock of arbitration, and the pivotal role that consent plays in the ongoing quest for uniformity and certainty in the international legal system of commercial law and arbitration.

I. BACKGROUND OF THE CASE

A. *The Charter Parties*

Plaintiffs, shipbrokers International Chartering Services (ICS) and Peraco Chartering (USA) LLC (Peraco), filed a declaratory judgment in state court for breach of contract and breach of maritime contract on the basis that defendants, thirteen vessel owners (ship-owning defendants) that were wholly owned subsidiaries of Defendant Anemi Maritime Services S.A. (Anemi), were liable for commissions payable under brokerage agreements.⁵⁴ At the time the charter parties were signed, Anemi was a wholly owned subsidiary of non-party Kyrini Shipping Inc.⁵⁵ After the contracts were finalized, Anemi and its subsidiaries were purchased by Eagle Bulk Shipping, Inc. (Eagle), making Eagle and its wholly owned subsidiaries the defendants in this case.⁵⁶

In 2006, ICS arranged meetings between Anemi and Korea Line so that the two entities could discuss the chartering of Anemi's vessels (the thirteen vessels at issue in this case).⁵⁷ In 2007, Korea Line and Anemi signed four master charter parties with each chartering multiple ships.⁵⁸ The charter parties were between Korea Lines and Anemi. Anemi designated the thirteen

54. *Id.* at 632–33.

55. *Id.* at 632.

56. *Id.*

57. *Id.* at 633.

58. *Id.*

ships at issue in the case. The charter parties provided that: “[S]hould any dispute arise between Owners and the Charterers, the matter in dispute shall be referred to three persons at London.”⁵⁹ Each of the four charter parties also contained a choice of law provision, which stated: “This Charter Party shall be governed by the English Law.”⁶⁰

Shortly after the charter parties were signed, Eagle purchased Anemi and its subsidiaries. ICS, Plaintiffs, were not signatories to the charter parties.⁶¹ However, they served as the deal breakers in that they participated in the negotiations between Anemi and Korea Line.⁶² The resulting charter parties provided commission rates payable to ICS.⁶³ ICS argues that these commission rates with Anemi were negotiated separately from the charter parties.⁶⁴ They contend that the commission rates were memorialized in an email dated May 4, 2007.⁶⁵

B. Modifications of Agreements

During the market downturn starting in 2007–2008, Korea Line became insolvent, and entered into rehabilitation proceedings in the Seoul Central District Court in Korea.⁶⁶ As part of the rehabilitation process, Korea Line, Anemi and the ship-owning defendants negotiated modifications to their agreements.⁶⁷ Notably, Eagle was not a party to these modifications. The modifications created a “suspension period” of one year and provided that the owners “would seek other employment for their vessels, with Korea Line guaranteeing a minimum income of \$17,000 per vessel per day.”⁶⁸ After the one-year suspension period, the ship-owners would resume working for Korea Line “at a reduced rate of hire, but subject to a profit-sharing agreement.”⁶⁹

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

C. *The Case in the Second Circuit Court of Appeals*

Eagle informed ICS (Plaintiffs) in December of 2011 that “it would not pay their commissions during the suspension period.”⁷⁰ Plaintiffs then sued Eagle in the Supreme Court of New York for New York County, bringing various claims including: breach of contract, breach of maritime contract, willful frustration of contract, unjust enrichment, and accounting.⁷¹ Defendants filed a motion to have the case removed to the District Court.⁷² In response, Plaintiffs contended that “their claims did not arise under the charter parties at all, but rather stemmed from a separate contract memorialized in the May 4, 2007, emails.”⁷³

In addition, Plaintiffs argued that “even if their claims *did* arise under the charter parties, they were not bound by the arbitration clauses” in the charter parties executed between Anemi and Korea Line.⁷⁴ The District Court for the Southern District of New York denied the owners’ motion to compel arbitration under the charter parties.⁷⁵ The Defendant ship owners appealed the decision.⁷⁶

The Second Circuit Court of Appeals reversed the District Court’s denial on interlocutory appeal and remanded with instructions to perform a choice of law analysis.⁷⁷ The Second Circuit held that “under English Law, Plaintiffs would be included in the phrase ‘Owners and the Charterers’” and would be interpreted as “assignees from the original parties.”⁷⁸ The

District Court did not address the question of whether the commission agreements were independent of the charter parties.⁷⁹

On remand, the questions for the District Court to tackle were: “(1) whether federal or English maritime law should apply under federal maritime choice-of-law rules to the question of whether Plaintiffs’ claims under the charter parties must be

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 633–34.

74. *Id.* at 634.

75. *Id.*

76. *Id.*

77. *Id.* (citing *Int’l Chartering Servs., Inc. v. Eagle Bulk Shipping Inc.*, 557 F. App’x 81, 83, n.3 (2d Cir. 2014)).

78. *Id.* (citing *Int’l Chartering Servs., Inc.*, 557 F. App’x at 83).

79. *Id.*

arbitrated, and if so, (2) whether Plaintiffs have claims that are independent of the charter parties and need not be arbitrated.”⁸⁰

The Court of Appeals concluded that the choice of law analysis would be outcome determinative, thus deeming it essential to the case.⁸¹ Both the District Court and the Court of Appeals determined that, under federal maritime law, Plaintiffs were neither “owners” nor “charterers” and, if federal maritime law were to apply, the arbitration clause in the charter parties would not apply.⁸²

This gap between United States law and English law as it relates to shipbrokers signals that the time is ripe for United States law to carve out a bright line rule as to the jurisdictional “saltiness” of brokerage contracts. From the English line of cases, it is clear that shipbrokers contracts are considered maritime in nature because of their interdependence with the charter party. In the United States, however, there is a judicial reluctance to bring these contracts into the charter party, and hence into maritime jurisdiction. This jurisdictional ambivalence creates uncertainty in maritime law and has the potential to promote uncertainty in international trade. To understand the nexus of ship brokering contracts to maritime law, a brief description of the business of ship brokering is necessary.

II. THE PRACTICE OF SHIPBROKERING⁸³

A. *Agency Relationship*

It is axiomatic that all parts of the shipping industry cross international boundaries, and as such, the business of shipbrokers is an internationalized commercial activity. Shipbrokers are subject to the vagaries of the international freight market and must adapt to the conditions prevailing in the international market.⁸⁴ The freight market runs on the exchange of

80. *Id.*

81. *Id.*

82. *Id.*

83. “A shipbroker is someone who arranges the ocean transport of goods and commodities by sea, the employment of a vessel or buys and sells ships on behalf of his clients.” *A Career in Shipbroking?*, BALTIC EXCH. (Aug. 2, 2006), <http://www.balticexchange.com/other-services/employment/careers-advice/index.shtml>.

84. See LARS GORTON ET. AL., *SHIPBROKING AND CHARTERING PRACTICE* 33

information. These information channels are facilitated through a network consisting of various parties: owners, time charterers or despondent owners, cargo owners, and charterers.⁸⁵ These parties negotiate their transactions through intermediaries known as “shipbrokers” or “booking agents.”⁸⁶ After negotiations are completed, a document, the charter party, memorializes the agreements between the owners and charterers of the vessel.⁸⁷

Generally, the function of a shipbroker is to act as a representative of his or her principal in charter negotiations.⁸⁸ The broker undertakes the obligation to work to the benefit of the principal and to protect the principal’s interests in the following ways:

- (1) The broker should keep both the owner and the charterer continuously informed about the market situation, the market development, available cargo proposals and shipment possibilities, and he should, in the best possible way, cover the market for the given positions and orders respectively.
- (2) The broker should act strictly within given authorities in connection with the negotiations. Sometimes the broker will have a fairly wide framework—a wide discretion—within which to work when carrying out the negotiations, with an absolute limit which must not be exceeded.
- (3) The broker should in all respects work loyally for his principal and should carry out scrupulously and skillfully the negotiations and other work connected with the charter.
- (4) The broker may not withhold any information from his principal nor give him wrong information. Nor may he reveal his principal’s business “secrets” and may not act to the advantage of the counter party in the negotiations in order to reach an agreement.⁸⁹

(6th ed. 2004).

85. *See id.*

86. *See id.* at 39.

87. *See id.* at 107.

88. *Id.* at 40.

89. *Id.*

B. Shipbroker Commissions: Agreements Outside of the Charter Party

A broker is entitled to a commission when the broker brings together the principal and a third party, facilitating a meeting of the minds on the essential terms of the agreement.⁹⁰ However, “[w]here a special contract exists, the broker’s entitlement to commissions is entirely dependent upon the language of the contract authorizing those commissions.”⁹¹ Where commissions are due on the negotiation of a charter party, the payment of commissions will depend on the language in the charter party. Thus, if a charter party states that commissions are “due ‘on all hire as paid under th[e] charter[s],” then the right to commission will accrue only to the extent that hire was actually paid.⁹² In some cases, brokers will execute separate agreements outside of the charter party form to protect themselves in the event of cancellation of the charter party.⁹³

A factual question that arises in brokerage disputes is whether an obligation to pay commissions survives default or cancellation under the charter party.⁹⁴ In other words, courts must determine whether the right to commission attaches to any subsequent transactions between owners and charterers. Generally, courts will find that a right to payment attaches where the ship owner has not sustained any implied or constructive losses or where there is no failure of performance, as in cases where there is either an assignment or a modification of the original charter.⁹⁵ According to this view, brokers should lose the

90. *Tankers Int’l Navigation Corp. v. Nat’l Shipping & Trading Corp.*, 499 N.Y.S. 2d 697, 1987 A.M.C. 478, 481 (N.Y. App. Div. 1986).

91. *Id.* (citations omitted).

92. *Id.*

93. *See id.* (holding that Broker not entitled to payment from settlement funds after cancellation of charter) (citing *Lougheed & Co., Ltd. v. Suzuki*, 1926 A.M.C. 790, 796 (N.Y.A.D. 1926) (holding that, short of vessel owner’s willful default, all risks, which might interfere with the earning of hire should be shared by broker, and that all causes that where no hire earned, the broker was not entitled to commission)).

94. *Tankers Int’l Navigation Corp.*, 1987 A.M.C. at 483.

95. *Id.* at 485 (citing *Kane v. Neptune Shipping, Ltd.*, 1948 A.M.C. 1407 (1948)). The *Kane* court held that “the broker was entitled to a recovery . . .

right to commissions only where there is no substitute performance.

However, the issue of substitute performance becomes a bone of contention where there is a cancellation of the original charter party or a “fix-around” of the brokers to the original charter party. In this situation, some courts have held that, where there is a new charter party, which amounts to a “fix-around,” the brokers to the original charter party are not entitled to commissions.⁹⁶ Nor would these brokers be vested with third party rights.⁹⁷ This view is at odds with the English law, where ship brokers are deemed to be owners and charterers under the Contracts (Rights of Third Parties) Act of 1999, and under the theory of assignment.⁹⁸ The Rights of Third Parties Act and its attendant theory of assignment, though beneficial to shipbrokers who stand to lose commissions, can also force these brokers into admiralty jurisdiction and thus, arbitration.⁹⁹ To understand this result, the next sections of this Article will explore the position of shipbrokers in the space of admiralty jurisdiction in United States and English law.

on the theory ‘that performance under a modified agreement is not such a failure of performance as to cause the broker to forfeit his commissions.’” *Id.* (quoting *Kane*, 1948 A.M.C. at 1413).

96. See, e.g., *Tankers Int’l Navigation Corp.*, 1987 A.M.C. at 485.

97. See *Parsons v. Wales Shipping Co.*, 1987 A.M.C. 1576, 1580 (1986) (finding that there was no evidence to suggest that the contracting parties intended to confer a benefit on the brokers as third-party beneficiaries).

98. See *BOYD ET AL.*, *supra* note 33, at 50 (stating the Commissions Clause in the Charter Party “does not make the broker a party to the contract,” but under the Contracts (Rights of Third Parties) Act 1999, the broker can now enforce the promise of the payment of commission); see also *Nisshin Shipping Co. v. Cleaves & Co.*, [2003] EWHC 2602 (Comm) [29] (Eng.) (holding that a broker was entitled to sue for commission under the charter party because the effect of the charter party clause was to confer a benefit on the broker).

99. *Nisshin Shipping Co. v. Cleaves & Co. Ltd.*, [2003] EWHC 2602 (Comm) [42] (Eng.).

III. ADMIRALTY JURISDICTION IN THE UNITED STATES: SHIPBROKERS
AND THE PRELIMINARY CONTRACTS DOCTRINE¹⁰⁰

Maritime law is unsettled in the United States regarding shipbrokers and the contracts they enter into. In *International Chartering*, the shipbrokers' claims raised the issue of whether United States law recognizes shipbrokers under the "owners and charterers" provision in the charter party form.¹⁰¹ Generally, the New York Produce Exchange (NYPE) Forms Time Charter provides for arbitration of disputes between "owners and charterers."¹⁰² "[T]he Court of Appeals held that if the charter parties' arbitration clauses were interpreted under English law, [the Shipbrokers] would be included in the phrase 'Owners and the Charterers' as assignees from the original parties" to the charter party.¹⁰³

This conclusion is troubling because in the United States, the law is still in flux as to whether shipbroker contracts are enshrined within the admiralty. Both the District Court and the Second Circuit agreed that under United States law, shipbrokers are not considered under the "owners and charterers" designation, and claims arising from the shipbrokers contract will not be cognizable under the charter party.¹⁰⁴ Historically, shipbrokers'

100. See *Exxon Corp. v. Cent. Gulf Lines, Inc.*, 500 U.S. 603, 612 (1991) (overturning the *Minturn Rule* by holding that "rather than . . . excluding all or certain agency contracts from the realm of admiralty, lower courts should look to the subject matter of the agency contract and determine whether the services performed under the contract are maritime in nature").

101. See *Int'l Chartering Servs., Inc. v. Eagle Bulk Shipping Inc.*, 138 F. Supp. 3d 629, 634–41 (S.D.N.Y. 2015).

102. BIMCO, ASBA & SMF, NEW YORK PRODUCE EXCHANGE TIME CHARTER PARTY EXPLANATORY NOTES (last revised Oct. 15, 2015) (hereinafter NYPE 2015), available at <http://www.smf.com.sg/pdf/NYPE%202015%20Explanatory%20Notes.pdf> ("The New York Produce Exchange Form (NYPE) is the most widely used standard time charter party in the dry cargo sector of the industry. The first NYPE form was published in November 1913 and amended in 1921, 1931, 1946, 1981 and 1993 and for a sixth time with the 2015 revision. The 1946 edition is arguably still the most commonly used version of the NYPE charter, although many of its twenty-eight clauses are commonly amended or replaced with numerous rider clauses.").

103. See *Int'l Chartering Servs., Inc.*, 138 F. Supp. 3d at 634 (citing *Int'l Chartering Servs., Inc. v. Eagle Bulk Shipping Inc.*, 557 F. App'x 81, 83 & n.3 (2d Cir. 2014)).

104. See *id.* ("[T]his Court held and the Second Circuit did not reverse, under federal law Plaintiffs are not included in the phrase 'Owners and the

contracts were deemed as preliminary services contract, and not within the cognition of the admiralty law.¹⁰⁵ Up until 1991, the rule set forth in *Minturn v. Maynard* stood for the proposition that, agency contracts, which also enveloped shipbroker services contracts, were *per se* excluded from admiralty.¹⁰⁶ The *Minturn per se* exclusionary rule remained the standard until the Supreme Court announced a new rule in *Exxon Corporation v. Central Gulf Lines*.¹⁰⁷

In *Exxon*, the Supreme Court announced a new rule that agency contracts were not *per se* excluded from admiralty jurisdiction.¹⁰⁸ Notwithstanding, the Court explained that its holding was a narrow one, that did not reach the general status of the preliminary contracts doctrine.¹⁰⁹ Thus, the status of shipbroker contracts still languish in that empty space between federal and state jurisdiction. In a line of cases after *Minturn*, the Court ruled that actions of *assumpsit* were no longer automatically excluded from admiralty as long as the claim arose as a breach of a maritime contract.¹¹⁰

The issue of what types of contracts come within the admiralty was decided in *Insurance Co. v. Dunham*,¹¹¹ and should have settled once and for all the rule that any contract that called for the performance of maritime services or maritime transactions were squarely within admiralty jurisdiction. However, courts today still go to great lengths to determine whether shipbrokers' contracts or agreements to pay commission are cognizable in admiralty law.¹¹² The reason that courts still belabor this point is

Charterers,' and thus their claims under the charter parties would not be arbitrable.").

105. See *Minturn v. Maynard*, 58 U.S. 477, 477 (1854), *overruled by* *Exxon Corp. v. Cent. Gulf Lines, Inc.*, 500 U.S. 603, 612 (1991).

106. *Exxon Corp.*, 500 U.S. at 605.

107. *Id.* at 612 (holding that "*Minturn* is incompatible with current principles of admiralty jurisdiction over contracts and therefore should be overruled").

108. *Id.* at 607.

109. *Id.* at 612 (stating that the rule in *Exxon* is a narrow one removing "only the precedent of *Minturn* from the body of rules that have developed over what types of contracts are maritime").

110. See, e.g., *Archawski v. Hanioti*, 350 U.S. 532, 536 (1946).

111. See *New England Mut. Marine Ins. Co. v. Dunham*, 78 U.S. (11 Wall.) 1, 22 (1871).

112. See, e.g., *id.* at 26–29.

that others take the position that such agreements are within the confines of preliminary services contracts. And since the Supreme Court has yet to state a definitive rule for the preliminary contracts doctrine's relationship with maritime law, the uncertainty persists.¹¹³

It would seem that the determination could be an easier one if the rule in *Dunham* was given any weight. *Dunham* declared a truism that if the nature and subject matter of the contract makes reference to maritime service or maritime transactions, then that contract is a maritime contract.¹¹⁴ Moreover, in *Kossick*, the court focused on the substance rather than the form of the contract.¹¹⁵ The substance, then, should be what animates the transaction. In the realm of shipbrokering, the efforts of the shipbroker give birth to the maritime transaction. The broker not only "fixes" the vessel, but is also involved throughout the post-fixture process to the completion of the charter party.¹¹⁶

In *International Chartering*, the court held that the plaintiffs were bound to the arbitration agreement under the doctrine of direct benefit estoppel.¹¹⁷ The court explained that "[w]ithout the charter parties, no right to commission would exist."¹¹⁸ Thus, the existence of the commissions payable under the brokerage agreements was dependent upon the charter parties.¹¹⁹ Viewed within the lens of interdependency, brokerage contracts, though preliminary in nature, should be subject to admiralty jurisdiction, since these contracts become part of the charter party. The

113. See *Exxon Corp.*, 500 U.S. at 607 n.3 (explaining that the reason for the confusion is because "[t]he preliminary contract rule, which excludes 'preliminary services' from admiralty, was enunciated in the Second Circuit as early as 1881. . . . In the Second Circuit, the agency exception to admiralty jurisdiction—the *Minturn* rule—has been fused with the preliminary contract rule." (internal citations omitted)).

114. See *Dunham*, 78 U.S. (11 Wall.) at 27; see also *Kossick v. United Fruit Co.*, 365 U.S. 731, 736 (1933).

115. See *Kossick*, 365 U.S. at 742.

116. See GORTON ET AL., *supra* note 84, at 39–42.

117. *Int'l Chartering Servs., Inc. v. Eagle Bulk Shipping Inc.*, 138 F. Supp. 3d 629, 636 (S.D.N.Y. 2015) ("Plaintiffs are estopped from denying the choice-of-law provisions *insofar as* their claims arise under the contract. This is because '[a] party is estopped from denying its obligation to arbitrate when it receives a "direct benefit" from a contract containing an arbitration clause,' even if it is not a signatory to the agreement." (citation omitted)).

118. *Id.* at 637.

119. *Id.*

charter party and the brokerage agreements, then, enjoy a symbiotic relationship.¹²⁰

Notwithstanding, the Second Circuit is still reluctant to include brokerage contracts in admiralty jurisdiction.¹²¹ This ambivalence on the part of the Second Circuit creates uncertainty in admiralty law. In a line of cases pre-*Exxon*, the court analyzed preliminary contracts, and held as a general matter that these contracts, such as freight forwarder services, were not cognizable in admiralty.¹²² In other words, these contracts were not firmly entrenched in admiralty because they were too remote from the tide of maritime commerce.

At the same time, the district courts have observed that these contracts are not *per se* excluded.¹²³ Instead, courts should perform a qualitative analysis, and inquire into the nature of the tasks to determine the character of the work to be performed.¹²⁴ In *CTI-Container Leasing Corp. v. Oceanic Operations Corp.*, the court held that admiralty jurisdiction over contracts that “relate[s] to a ship in its use as such . . . or to transportation by sea or to maritime employment is fairly said to constitute a maritime contract.”¹²⁵ The court’s holding in *CTI-Container Leasing* signaled a willingness to avoid a *per se* rule on preliminary

120. See *id.* (comparing this case with *Robinson Brog Leinwand Greene Genovese & Gluck, P.C. v. John M. O’Quinn & Assocs., L.L.P.*, 523 F. App’x. 761 (2d Cir. 2013) (attorney’s fees) and *Am. S.S. Owners Mut. Prot. & Indem. Ass’n v. Henderson*, Nos. 10 Civ. 8033(PGG), 11 Civ. 3869(PGG), 2013 WL 1245451 (S.D.N.Y. Mar. 26, 2013) (insurance contract), and concluding that “a declaratory judgment that Defendants are liable for commissions payable under the brokerage agreements and damages in the amount of such commissions . . . is a benefit that depends on the charter parties for its existence. Without the charter parties, no right to commission would exist. Indeed, the charter parties themselves incorporate the commission rates that Plaintiffs negotiated.”).

121. See *Shipping Fin. Servs. Corp. v. Drakos*, 140 F.3d 129, 130 (2d Cir. 1998).

122. See *Ingersoll Milling Mach. Co. v. M/V Bodena*, 829 F.2d 293, 301 (2d Cir. 1987); *Peralta Shipping Corp. v. Smith & Johnson Corp.*, 739 F.2d 798 (2d Cir. 1984).

123. See *Ingersoll*, 829 F.2d at 302.

124. See *id.* (holding that “[i]t is the character of the work to be performed under the contract that is determinative of whether the agreement was maritime”).

125. *Id.* (quoting *CTI-Container Leasing Corp. v. Oceanic Operations Corp.*, 682 F.2d 377, 379 (2d Cir. 1982) (internal quotations omitted)).

contract services.¹²⁶ Since then, however, the Second Circuit appears to be receding from this friendlier shore.

In *Shipping Financial Services Corp. v. Drakos*, the first case before the Second Circuit after the *Exxon* decision, the court made a drastic move. It disentangled itself from the convergence of agency contracts and preliminary contracts to avoid collision with the rule announced by the Supreme Court in *Exxon*.¹²⁷ Yet the Second Circuit, although acknowledging its jurisprudential error of conflating the agency and the preliminary services contract doctrines, refused to carve out a rule for the doctrine.¹²⁸

While the contract at issue in the *Drakos* case was too removed from the action that was sued upon, the case presented an opportunity to further clarify the preliminary contracts doctrine.¹²⁹ In the *Drakos* opinion, the court seemed to go the extra mile to hold fast to its historical jurisprudence that charter brokerage contracts are not cognizable in admiralty.¹³⁰ In *Drakos*, the plaintiff broker sued based on a “fix-around.”¹³¹ His services never led to the formation of the actual charter party under which he was claiming commissions.¹³² Thus, the court correctly held that the plaintiff’s role in the charter party was preliminary.¹³³ Hence, his services were not maritime in nature because these services never resulted in a charter party.¹³⁴

126. See *CTI-Container Leasing Corp.*, 682 F.2d at 380.

127. See *Shipping Fin. Servs. Corp. v. Drakos*, 140 F.3d 129, 133 (2d Cir. 1998) (stating that “[a]lthough *Exxon* instructs that the *per se* agency contract exception no longer applies, it does not necessarily require a similar fate for the preliminary contract doctrine”).

128. See *id.*

129. See *id.* (stating that “*Exxon* now forces us to disentangle [agency contracts and preliminary contracts] and consider the possibility that while agency contracts are not a *per se* exception to admiralty jurisdiction, preliminary contracts may still be an exception to such jurisdiction”).

130. See *id.* at 134 (“If *The Harvey and Henry* and *Boyd* were to remain good law after *Exxon*, they would apply to bar this claim from maritime jurisdiction.” (citing *The Harvey and Henry*, 86 F. 656, 657 (2d Cir. 1898); *Boyd, Weir & Sewell, Inc. v. Fritzen-Halcyon Lijn, Inc.*, 709 F. Supp. 77, 79 (S.D.N.Y. 1989)); *id.* at 132 (“The doctrine in this Circuit—set forth more than a century ago and upheld since—provides in pertinent part that disputes arising out of preliminary services contracts do not invoke maritime jurisdiction.” (citing *The Thames*, 10 F. 848, 848 (S.D.N.Y. 1881))).

131. See *id.* at 134.

132. *Id.*

133. *Id.*

134. See *id.* (holding that “plaintiff’s purported role in giving advice about

However, the court's conclusion in *Drakos* provided a harbinger for the inclusion of preliminary services contracts in admiralty law. The court, while not announcing a bright line rule for the preliminary services contracts doctrine, hinted that there was "potential for charter party brokerage agreements to qualify for admiralty jurisdiction."¹³⁵ The questions set out in the briefing requests in *International Chartering* could be an overture by the court to settle the issue.¹³⁶

United States maritime law has not characterized brokerage relationships as firmly rooted in maritime law.¹³⁷ Thus, absent a clear assignment of rights that may provide for a maritime lien, maritime law is not automatically applied to shipbrokers' commissions. In this same vein, shipbrokers' commissions are not automatically excluded from maritime law either.¹³⁸ It is precisely this uncertainty that compels a bright line rule in the United States for this category of contracts. Until then, these contracts will continue to be tossed about in the courts by different winds of doctrine.

IV. JURISDICTION OVER SHIPBROKER CONTRACTS IN ENGLISH MARITIME LAW: THE CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999

While the tenor of maritime law regarding shipbrokers is uncertain under United States law, the inclusion of these parties is more firmly entrenched in English law. Under English law, shipbrokers fall within the term "owners or charterers" under statute, as well as at law, under a theory of assignment.¹³⁹

seeking a subcharter in the Gulf lighterage trade" did not "elevate its status to anything other than a broker" and that plaintiff did not make an "affirmative showing that its contract [was] 'maritime in nature'").

135. *Id.* ("We reiterate the fact-specific nature of our decision. Having failed to establish maritime jurisdiction under either the *Exxon* nature and subject matter test or the preliminary contract doctrine, plaintiff may not enjoy the benefit of bringing this case in federal court. In reaching this conclusion, we make no ruling as to the continuing validity of the preliminary contract doctrine, or the potential for other charter party brokerage agreements to qualify for admiralty jurisdiction.").

136. *See Int'l Chartering Servs., Inc. v. Eagle Bulk Shipping Inc.*, 138 F. Supp. 3d 629, 643 (S.D.N.Y. 2015).

137. *See CTI-Container Leasing Corp. v. Oceanic Operations Corp.*, 682 F.2d 377, 380 n.4 (2d Cir. 1982).

138. *See Minturn v. Maynard*, 58 U.S. 477, 477 (1854).

139. *See Nisshin Shipping Co. v. Cleaves & Co.* [2003] EWHC 2602

Furthermore, the authority to join parties is a function of the court.¹⁴⁰ Arbitrators do not have the power to join non-signatories to a contract.¹⁴¹

Nevertheless, English courts have allowed arbitration of claims where the Contracts (Rights of Third Parties) Act 1999 applies, or under a theory of assignment. The underlying rationale is that common issues of law and fact necessitate joinder.¹⁴² In *Nisshin Shipping Co.*, the court rationalizes this principle under the Contracts (Rights of Third Parties) doctrine under the ambit of assignment.¹⁴³ Presumably, the Second Circuit in *International Chartering Services, Inc.* hung its hat on the principles articulated in *Nisshin Shipping Co.*¹⁴⁴ But the rationale begs the question of whether forcing these parties to arbitrate violates the ECHR and American public policy.

The Contracts (Rights of Third Parties) Act 1999 came into effect on May 11, 2000.¹⁴⁵ The Act has impacted the common law doctrine of privity of contract as it gives third parties the right to enforce contracts which “purport to confer a benefit” on them.¹⁴⁶ Under the Contracts (Rights of Third Parties) Act 1999, a shipbroker is a statutory assignee.¹⁴⁷ As such, if an arbitration clause is intended to confer a benefit on a third party, then that party can enforce the benefit, and as such is bound by the

(Comm) [40, 42], [2004] 1 Lloyd’s Rep. 38. (concluding that under the Rights of Third Parties Act, a shipbroker is a statutory assignee).

140. See AMBROSE, MAXWELL & PARRY, *supra* note 16, at 219 (“[The] inherent and statutory jurisdiction of the High Court . . . enables it to: (a) join additional parties . . . and (d) consolidate separate proceedings” in relation to court proceedings.)

141. *Id.* (“The essentially consensual basis of arbitrators’ powers means that they have no inherent powers to make orders binding third parties (i.e. parties who are not privity to the arbitration agreement pursuant to which the arbitrator is appointed).”).

142. *Id.* at 219–20.

143. *Nisshin Shipping Co.* [2003] EWHC 2602 (Comm) [40, 42], [2004] 1 Lloyd’s Rep. 38.

144. *Int’l Chartering Servs., Inc. v. Eagle Bulk Shipping Inc.*, 557 F. App’x 81, 82–83 (2d Cir. 2014).

145. Contracts (Rights of Third Parties) Act 1999, c. 31.

146. See BOYD ET AL., *supra* note 33, at 34.

147. *Nisshin Shipping Co.* [2003] EWHC 2602 (Comm) [42], [2004] 1 Lloyd’s Rep. 38 (Under section 1(4) of the 1999 Act, the third party “has in effect become a statutory assignee of the promisee’s right of action against the promisor . . .”).

arbitration clause, although a non-signatory.¹⁴⁸

This rule has its genesis in the European Principles of Human Rights, under which the U.K. was forced to depart from the time-honored rule of privity of contract in order to preserve the rights of third party beneficiaries.¹⁴⁹ But where the Act sought to protect these rights, it also created a tension where that same third party was compelled to bring its claim in arbitration, which in turn raised the issue of whether compelling the third party to arbitrate also infringed upon his right under Article 6(1) of the ECHR.¹⁵⁰ The House of Lords answered this question in the negative under the rationale that the assignment was a matter of law versus the intention of the parties.¹⁵¹

Section 1(1) of the Act allows a third party to enforce a contract term in two situations: (1) where the contract expressly provides that the party may enforce terms in its own right, and (2) where the term purports to confer a benefit on the third party.¹⁵² This provision is dependent on the construction of the contract to determine whether the parties intended the term to be enforceable by the third party. In *Nisshin Shipping Co.*, the court held that a broker was entitled to sue for commission due under the charter party under section 1(1)(b) of the Act.¹⁵³

The *Nisshin* court also held that the broker's claims were subject to the arbitration clause, even though the claim only referred to disputes between owners and charterers.¹⁵⁴ While this decision by the *Nisshin* court benefits ship brokers in terms of a clear jurisdictional rule—brokers are “owners and charterers”

148. See Contracts (Rights of Third Parties) Act 1999, c. 31.

149. See AMBROSE, MAXWELL & PARRY, *supra* note 16, at 232 (“However, section 1 of the Contracts (Rights of Third Parties) Act 1999 . . . enacts an exception to the doctrine of privity by enabling a third party to enforce, in his own right, terms in a contract either where there is an express provision allowing such enforcement or where, subject to a contrary intention, the term purports to confer a benefit on him.”).

150. See *Nisshin Shipping Co.* [2003] EWHC 2602 (Comm) [35, 52–53], [2004] 1 Lloyd's Rep. 38 (discussing ECHR, Art. 6(1)).

151. See *id.* at ¶¶ 35–37; see also *El Nasharty v. J. Sainsbury Plc* [2007] EWHC 2618 (Comm) [25, 33–34], [2008] 1 Lloyd's Rep. 360; *Dep't of Econs. Policy & Dev. of the City of Moscow v. Bankers Tr. Co.* [2004] EWCA Civ 314 [11, 27, 32], [2004] 2 Lloyd's Rep. 179.

152. Contracts (Rights of Third Parties) Act 1999, c. 31.

153. *Nisshin Shipping Co.* [2003] EWHC 2602 (Comm) [3, 10, 13–15, 21, 23–24, 33], [2004] 1 Lloyd's Rep. 38.

154. *Id.* at ¶¶ 34, 40, 42–44.

under the charter party—it has the effect of forcing them into arbitration.¹⁵⁵ This rationale, then, allows the joinder of non-signatories who are seeking to avoid arbitration and have their day in court, which appears at odds with the ECHR and English law.¹⁵⁶

This effect has been challenged and criticized under The Human Rights Act of 1998, which came into force in England on October 1, 2000.¹⁵⁷ The law slowly crept into the space of maritime arbitration, even if the primary purpose of the law was geared towards public law.¹⁵⁸ Under the “conditional benefits” approach, English courts have held that a third party cannot seek to enforce a term in a contract without also accepting the obligation to arbitrate.¹⁵⁹

Under the ECHR, the principles underlying fundamental human rights have evolved into the commercial space of private law by ensuring procedural rights, such as evidentiary matters and the right to a “fair and public hearing within a reasonable

155. *Id.*

156. See AMBROSE, MAXWELL & PARRY, *supra* note 16, at 12. There have been attempts to argue that arbitration clauses as a whole should be found contrary to Article 6 of the Convention because they restrict access to a court hearing. Such attempts have been unsuccessful because Convention Jurisprudence accepts that, by agreeing to arbitrate, parties waive their rights to a court hearing under Article 6(1).

157. *Id.*

158. See *id.* (“The purpose of the Human Rights Act is to give effect, within English Law to the rights and freedoms protected by the European Convention on Human Rights. This Convention is an international treaty drawn up in the aftermath of the atrocities of the second world war and the European Court of Human Rights in Strasbourg was set up to protect the rights recognised.”).

159. Contracts (Rights of Third Parties) Act 1999, c. 31. The arbitration provision of the Act provides:

Where—

- (a) a right under section 1 to enforce a term (“the substantive term”) is subject to a term providing for the submission of disputes to arbitration (“the arbitration agreement”); and
- (b) the arbitration is an agreement in writing for the purposes of Part I of the Arbitration Act 1996,

the third party shall be treated for the purposes of that Act as a party to the arbitration agreement as regards disputes between himself and the promisor relating to the enforcement of the substantive term by the third party.

Id.

time by an independent and impartial tribunal established by law.”¹⁶⁰ These procedural safeguards are mandated by Article (6)(1) of the Convention.¹⁶¹ These principles, however, while protecting the rights of parties to a fair hearing, also have the undesirable effect of forcing non-signatories into arbitration and denying them access to the courts. This restricted access to a court hearing has been criticized as contrary to Article 6 (1) of the ECHR.¹⁶² However, courts continue to hold that under ECHR jurisprudence, an agreement to arbitrate waives the right to a court hearing.¹⁶³ This reasoning ignores the effect on parties who, in fact, are not signatories to the underlying contract and thus, have not agreed to arbitrate. In confronting this issue in *International Chartering Services, Inc.*, the Second Circuit and the District Court, on remand, were forced to engage in a choice of law analysis under federal law.¹⁶⁴

V. CHOICE OF LAW PROVISIONS: FEDERAL MARITIME CHOICE OF LAW RULES IN INTERNATIONAL ARBITRATION

A. *Choice of Law Analysis: Federal Jurisdiction*

The Supreme Court has consistently held that a choice of law clause is presumptively valid where the underlying transaction is fundamentally international in character.¹⁶⁵ In the maritime context, these clauses will be held invalid only when the foreign forum will apply its own substantive law, which would result in a lower recovery below a statutory amount.¹⁶⁶ The line of cases decided on the principles in *M/S Bremen* and *Sky Reefer* did not

160. European Convention on Human Rights, Art. 6(1).

161. *Id.*

162. See AMBROSE, MAXWELL & PARRY, *supra* note 16, at 12.

163. See *Nisshin Shipping Co. v. Cleaves & Co.* [2003] EWHC 2602 (Comm) [52–53], [2004] 1 Lloyd’s Rep. 38; Dep’t of Econs. Policy & Dev. of the City of Moscow v. Bankers Tr. Co. [2004] EWCA Civ 314 [27]; [2004] 2 Lloyd’s Rep. 179.

164. See *Int’l Chartering Servs., Inc. v. Eagle Bulk Shipping Inc.*, 138 F. Supp. 3d 629, 634–38 (S.D.N.Y. 2015); *Int’l Chartering Servs., Inc. v. Eagle Bulk Shipping Inc.*, 557 F. App’x 81, 83 (2d Cir. 2014).

165. See *M/S Bremen v. Zapata Offshore Co.*, 407 U.S. 1, 10 (1972); see also *Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540 (1995).

166. See *Sky Reefer*, 515 U.S. at 550–51 (Stevens J., dissenting) (arguing that COGSA’s prohibition against lessening statutory liability applies to foreign forum selection and arbitration clauses).

tackle the issue of non-signatories.¹⁶⁷

The Second Circuit has consistently held that a dispute is arbitrable if the court finds that the parties have agreed to arbitrate.¹⁶⁸ However, the presumption of validity will be overcome if applying the choice-of-law clause would be unreasonable under the circumstances.¹⁶⁹ In fact, in a line of cases, the Second Circuit held that non-signatories should not be bound by an arbitration clause because this practice offends U.S. public policy.¹⁷⁰ Moreover, the Second Circuit unequivocally stated that an arbitration clause requires “clear and unmistakable intent” to enter into arbitration.¹⁷¹

Generally, choice of law and forum selection clauses are unreasonable and will not be enforced: (1) if “incorporate[ing] [the clause] into the agreement was the result of fraud or overreaching”; (2) “if the complaining party will . . . be deprived of his day in court, due to the grave inconvenience or unfairness of the selected forum”; (3) “if the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy”; or (4) “if the clauses contravene a strong public policy of the forum state.”¹⁷²

In evaluating whether any of these four conditions have been met, the Court will consider the following factors: (1) any choice of law provision contained in the contract; (2) the place where the contract was negotiated, issued, and signed; (3) the place of performance; (4) the location of the subject matter of the contract; and (5) the domicile, residence, nationality, place of incorporation, and place of business of the parties.¹⁷³

167. See, e.g., *Fireman’s Fund Ins. Co. v. M.V. DSR Atlantic*, 131 F.3d 1336 (9th Cir. 1997); *Mitsui & Co. (USA), Inc. v. MIRA M/V*, 111 F.3d 33 (5th Cir. 1997); *Talatala v. Nippon Yusen Kaisha Corp.*, 974 F. Supp. 1321 (D. Haw. 1997); *Pasztory v. Croatia Line*, 918 F. Supp. 961 (E.D. Va. 1996).

168. See *Smith/Enron Cogeneration Ltd. P’ship v. Smith Cogeneration Int’l, Inc.*, 198 F.3d 88, 95 (2d Cir. 1999) (quoting *Chelsea Square Textiles, Inc. v. Bombay Dyeing & Mfg. Co.*, 189 F.3d 289, 294 (2d Cir. 1999)).

169. *Id.* at 99.

170. See *Sarhank Grp. v. Oracle Corp.*, 404 F.3d 657, 661–62 (2d Cir. 2005) (rejecting contract’s choice of Egyptian law in favor of arbitrability because its broad-brush willingness to bind a non-signatory to arbitration was “contrary to American public policy”).

171. *Id.*

172. *Int’l Chartering Servs., Inc. v. Eagle Bulk Shipping Inc.*, 138 F. Supp. 3d 629, 638–39 (S.D.N.Y. 2015).

173. See *Blue Whale Corp. v. Grand China Shipping Dev. Co.*, 722 F.3d

Courts have applied federal maritime law to obligations arising under a charter party to determine issues arising under an agency relationship.¹⁷⁴ In so doing, the court will employ the maritime choice of law rules established in *Lauritzen v. Larsen*.¹⁷⁵ In *Lauritzen*, a Danish seaman brought suit in the Southern District of New York under the Jones Act, 46 U.S.C. Section 688, alleging that he was negligently injured aboard a ship of Danish flag and registry while in Havana harbor.¹⁷⁶ The ship was owned by a Danish citizen, and the injured seaman had signed the ship's articles providing that disputes would be governed by Danish law.¹⁷⁷ Nevertheless, he sought to invoke United States law.¹⁷⁸ The Court held that even where United States law has the strongest connection to the relevant transaction, international maritime law will control.¹⁷⁹ In focusing on the relevant transaction test, courts seek to protect the rights of third parties who may incur detriment because of the itinerant nature of maritime transactions.¹⁸⁰ Therefore, courts will not enforce a choice of law or forum clause if enforcement "contravenes a strong

488, 499 at n.11 (2d Cir. 2013).

174. See *id.* at 497 (citing *Kirno Hill Corp. v. Holt*, 618 F.2d 982 (2d Cir. 1980)) ("We applied federal maritime law, 'which is the law we apply in an admiralty case,' to determine whether an undisclosed principal was bound by contracts made by an agent acting within his authority.")

175. *Lauritzen v. Larsen*, 345 U.S. 571, 583 (1953). In *Lauritzen*, the balance of factors clearly pointed to application of Danish law: the injured seaman had minimal contacts with the United States beyond the intangible—his desire to invoke this nation's more favorable maritime tort law. 345 U.S. at 587.

176. *Id.* at 573.

177. *Id.*

178. *Id.*

179. See *id.* at 581. The Supreme Court laid out a multi-factor choice of law test, "[t]he purpose of [which,] is to assure that a case will be treated in the same way under the appropriate law regardless of the fortuitous circumstances which often determine the forum." *Id.* at 591.

180. See *Blue Whale Corp. v. Grand China Shipping Dev. Co.*, 722 F.3d 488, 499 (2d Cir. 2013) ("As is often the case in admiralty, we deal here with multi-national foreign parties locked in dispute as the result of an alleged breach of an international shipping contract. Indeed, part of the reason we authorize maritime attachment is the 'peripatetic' nature of maritime parties, the 'transitory' status of their assets . . . and the need for parties to obtain security '[i]n a world of shifting assets, numerous thinly-capitalized subsidiaries, flags of convenience and flows of currencies' . . ." (internal citations omitted)).

public policy of the forum.”¹⁸¹

Generally, courts will not view the choice of a sophisticated forum with a highly developed body of commercial and maritime law as a contravention to public policy. If the goal is to ensure the protection of a party’s rights, then a London arbitration is not likely to contravene public policy because the forum will be deemed reasonable.¹⁸² Where the choice of law clause is challenged as not binding on the parties, however, the court will employ a contacts analysis.¹⁸³ The brokers in this case argued that all contacts were with the United States.¹⁸⁴ Nevertheless, the court dismissed the United States contact factors because they were ancillary to the contract at issue.¹⁸⁵ In addition, the court noted that the plaintiffs were not parties to the contract, and that the contacts analysis only applied to parties to the contract.¹⁸⁶ If the court agrees that these brokers are not parties to the contract, then joining them to arbitration appears to be a collateral issue.¹⁸⁷

B. Choice of Law: Collateral Issues

In choice of law cases where a court is engaged in an alter-ego analysis, piercing the corporate veil is an issue collateral to the contract, and courts are not bound by the choice of law clause in

181. See *See Int’l Chartering Servs., Inc. v. Eagle Bulk Shipping Inc.*, 138 F. Supp. 3d 629, 640 (S.D.N.Y. 2015) (citing *Roby v. Corp. of Lloyd’s*, 996 F.2d 1353 (2d Cir. 1993)).

182. See *id.* at 639 (citing RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 187 CMT. F (AM. LAW INST. 1971)) (“[T]he Restatement specifically contemplates that parties to a multistate maritime agreement ‘should be permitted to submit their contract to some well-known and highly elaborated commercial law’ with no other connection to the transaction.”).

183. See *id.* at 639.

184. See *id.* at 641.

185. See *id.* (“The contracts subject to contacts analysis are the charter parties in their entirety, not merely the minor provisions relating to Plaintiffs’ commissions—and certainly not the May 4, 2007 emails, which Plaintiffs argue form an entirely separate contract.”).

186. See *id.* at 642 (“[W]hen considering the domicile, residence, nationality, place of incorporation, and place of business of the parties, the Court looks primarily at the *parties to the contract*, not the parties to this lawsuit. However, despite their role in the contract negotiations, plaintiffs are not parties to the contracts, and thus their locations are less significant than those of the other participants.”).

187. See *Blue Whale Corp. v. Grand China Shipping Dev. Co.*, 722 F.3d 488, 493 (2d Cir. 2013).

the underlying contract.¹⁸⁸ In *International Chartering*, the court couched the joinder of the non-signatories under the doctrine of direct benefit estoppel to compel the plaintiff to arbitration in London.¹⁸⁹ The doctrine of direct benefit estoppel provides that a party who claims an entitlement to payment based on the contractual obligations of a signatory is seeking a benefit under the contract.¹⁹⁰

However, in an earlier case, the Second Circuit stated that if suits based on brokerage contracts and their collateral claims regarding third party standing are brought within the admiralty jurisdiction, federal maritime law will control notwithstanding a choice of law clause.¹⁹¹ Whether a claim sounds in admiralty is a procedural question on the matter of the court's jurisdiction.¹⁹² On the other hand, the validity of a claim is a substantive issue that should be governed by the relevant substantive law: the law that defines the rights and responsibilities of the parties to the dispute.¹⁹³

In *Blue Whale*, one issue was whether a choice of law provision governed an alter-ego claim.¹⁹⁴ The choice of law clause provided for arbitration in London, governed by British law.¹⁹⁵ The Court in *Blue Whale* held that the choice of law provision was preempted by federal law on the alter-ego claim.¹⁹⁶ The determination of which law governs an alter-ego claim was complex because the court had to first decide whether the issue concerns the obligations under the contract or whether a party is an alter-ego. In the end, the court held that the alter-ego issue was collateral to the contract and, as such, the court was not bound by the choice of law clause.¹⁹⁷

188. *Id.*

189. *Int'l Chartering Servs., Inc.*, 138 F. Supp. 3d 636–37.

190. *Id.* (explaining that “[u]nder this doctrine of direct benefit estoppel, ‘a non-signatory who claims entitlement to payment based on the contractual obligations of a signatory is seeking a benefit under the contract.’” (quoting *Am. S.S. Owners Mut. Prot. & Indem. Ass’n v. Henderson*, Nos. 10-cv-8033, 11-cv-3869, 2013 WL 1245451, at *4 (S.D.N.Y. Mar. 26, 2013))).

191. *See Blue Whale Corp.*, 722 F.3d at 496.

192. *Id.* at 494.

193. *Id.* at 495.

194. *Id.*

195. *Id.* at 491.

196. *Id.* at 498.

197. *See Blue Whale Corp.*, 722 F.3d at 496. The court explained that

In *International Chartering*, the issue of joinder was not premised on an alter-ego claim as in *Blue Whale* because no corporate form questions were implicated in *International Chartering*.¹⁹⁸ However, it can be argued that because these brokers are not parties to the contract, then the issue of joining them should also be governed by federal law, and thus, collateral to the payment of commissions.

As the court explained, the plaintiffs are seeking a benefit that depended upon the charter parties for its existence, although plaintiffs contend that the benefits they seek are enshrined in a separate and independent agreement, which did not become part of the charter parties.¹⁹⁹ Viewed in this light, plaintiffs are not seeking benefits that are dependent on the charter parties. Rather, if the agreement at issue is outside of the charter party, then it is more likely incidental to the charter parties, *and not dependent upon it*.

VI. BINDING NON-SIGNATORIES TO ARBITRATION: PRINCIPLE OF DIRECT BENEFIT ESTOPPEL IN UNITED STATES LAW

Federal courts have held that so long as there is *some* written agreement to arbitrate, a third party may be bound to submit to arbitration.²⁰⁰ However, ordinary principles of contract and agency law may be called upon to bind a non-signatory to an agreement whose terms have not clearly done so.²⁰¹ In so holding,

Blue Whale's claim against HNA sounds in admiralty because it arose from this maritime contract—however, the substance of the attachment claim concerns whether HNA is an alter ego of Development. This corporate identity inquiry is indeed distant from the dispute over the charter party's provisions regarding the transport of iron ore. For this reason, we find that “the issue of piercing the corporate veil is collateral to the contract, and thus this Court is not bound by the choice of law provision.”

Id. (quoting *United Trade Assocs. Ltd. v. Dickens & Matson (USA) Ltd., Inc.*, 848 F. Supp. 751, 759 (E.D. Mich. 1994)).

198. *Int'l Chartering Servs., Inc. v. Eagle Bulk Shipping Inc.*, 138 F. Supp. 3d 629 (S.D.N.Y. 2015).

199. *Blue Whale Corp.*, 722 F.3d at 493.

200. 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, 720 (2003).

201. *See E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin*

courts have recognized six theories for binding a non-signatory to an arbitration agreement: (a) incorporation by reference; (b) assumption; (c) agency; (d) veil-piercing/alter ego; (e) estoppel; and (f) third-party beneficiary.²⁰² However, these factors are not dispositive.²⁰³ At the bedrock of all the preceding factors is an overwhelming concern for public policy in United States law.

The Federal Arbitration Act (FAA) controls whether an American non-signatory agreed to be bound by arbitration.²⁰⁴ For example, in *Sarhank*, the arbitrators concluded that Oracle, a non-signatory to a contract, was bound by its subsidiary's signature under an Egyptian choice of law clause.²⁰⁵ However, the Second Circuit Court of Appeals reversed, holding that despite the choice of law clause, American Federal arbitration law controls and that an American non-signatory cannot be bound to arbitrate "in the absence of a full showing of facts supporting an articulable theory based on American contract law or American agency law."²⁰⁶

Republic of Ecuador v. ChevronTexaco Corp. held that the Federal Arbitration act applied to Ecuador, despite the fact that the New York Convention did not apply, as Ecuador and the United States were signatories to the Inter-American Convention.²⁰⁷ By so holding, the court appeared to clarify its holding in *Sarhank* by making a distinction based on the status of

Intermediates, S.A.S., 269 F.3d 187, 202 (3d Cir. 2001); Thomson-CSF, S.A. v. Am. Arbitration Ass'n, 64 F.3d 773, 776 (2d Cir. 1995).

202. *Javitch v. First Union Sec., Inc.*, 315 F.3d 619, 629 (6th Cir. 2003); *E.I. DuPont de Nemours & Co.*, 269 F.3d at 195–202; *Thomson-CSF, S.A.*, 64 F.3d at 776.

203. *See ACE Capital Re Oversees Ltd. v. Cent. United Life Ins. Co.*, 307 F.3d 24, 28 (2d Cir. 2002) (explaining that courts employ a two-part test in determining the arbitrability of claims: "(1) whether the parties agreed to arbitrate disputes at all; and (2) whether the dispute at issue comes within the scope of the arbitration agreement"); *see also* *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 26 (2d Cir. 2002); *Thomson-CSF, S.A.*, 64 F.3d at 776 (stating that "[a]rbitration is contractual by nature—a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit" (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960))).

204. *Sarhank Group v. Oracle Corp.*, 404 F.3d 657, 661 (2d Cir. 2005).

205. *Id.*

206. *Id.*

207. *See Republic of Ecuador v. ChevronTexaco Corp.*, 376 F. Supp. 2d 334, 353–54 (S.D.N.Y. 2005).

the party seeking the remedy, *not the remedy itself*. In the process, the court reconciled *Motorola* and *Sarhank*, and articulated that a choice of law clause will govern a non-signatory where the non-signatory seeks to compel arbitration, not where the situation is reversed.²⁰⁸ In sum, the court created a bright line that only non-signatories seeking to compel arbitration will be bound by a choice of law clause. In *International Chartering*, however, the court regressed from this line of demarcation, and clouded the water by pouring the doctrine of direct benefit estoppel into the analysis.²⁰⁹

In *International Chartering*, the court held that compelling the shipbrokers to arbitrate their claim did not violate U.S. public policy against forced arbitration.²¹⁰ It legitimized its holding under the doctrine of direct benefit estoppel, and the principles outlined in the earlier *Motorola* opinion.²¹¹ In *Motorola*, the non-signatory parties who were being sued by Motorola attempted to force Motorola to arbitrate its claims against them.²¹² In applying the Swiss choice of law clause in the contracts, the Second Circuit saw no concern with binding these non-signatories to the Swiss choice of law rules because they had invoked the arbitration clause; thus, under the principle of estoppel, they were bound to the choice of law clause.²¹³ In its reasoning, the court dismissed the legally significant fact in *Motorola*; a cardinal sin in analogical reasoning.²¹⁴

208. *See id.* at 356.

209. *Int'l Chartering Servs., Inc. v. Eagle Bulk Shipping Inc.*, 138 F. Supp. 3d 629, 636. (S.D.N.Y. 2015).

210. *Id.* (stating that “[a]lthough Plaintiffs are not signatories to the charter parties, and they are not seeking to invoke the arbitration provisions in the contracts as were the defendants in *Motorola*, applying English law and requiring Plaintiffs to arbitrate does not go against American public policy”).

211. *See Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 51 (2d Cir. 2004). The court explained that there were no concerns about binding the non-signatory defendants, because if they “wish to invoke the arbitration clauses in the agreements at issue, they must also accept the Swiss choice-of-law clauses that govern those agreements.” *Id.* In other words, Defendants were bound to the choice of law clauses by estoppel, a theory rooted in traditional contract principles and acceptable to American public policy.

212. *Id.* at 50.

213. *Id.* at 51.

214. *See Int'l Chartering Servs., Inc.*, 138 F. Supp. 3d at 636 (“[L]ike the *Motorola* defendants, Plaintiffs are estopped from denying the choice-of-law

In *Motorola*, the animating factor that triggered estoppel was that the non-signatories in this case invoked the arbitration clause, while at the same time denying the choice of law.²¹⁵ Conversely, in *International Chartering*, the non-signatories *did not* invoke the arbitration clause.²¹⁶ In fact, the non-signatories did not claim benefits under the charter parties. Rather, their claims were based on a separate contract. Based on this fact, the plaintiffs in *International Chartering* were *not* like the plaintiffs in *Motorola*. They were just the opposite—they were non-signatories who did not wish to invoke the arbitration clause in the underlying contract. While there was some nexus to the charter parties, the question for the court was whether this separate agreement was subject to the arbitration clause.

A determination of whether a party has agreed to submit a dispute to arbitration depends on the terms of the contract. Generally, non-signatories to an arbitration agreement can be compelled to arbitrate their claims in certain circumstances.²¹⁷ Where the non-signatory is suing directly under the agreement containing the arbitration clause or has directly benefited from such agreement, courts will employ the federal law doctrine of equitable estoppel to compel the non-signatory to arbitrate its claim.²¹⁸

provisions *insofar as* their claims arise under the contract. This is because [a] party is estopped from denying its obligation to arbitrate when it receives a ‘direct benefit’ from a contract containing an arbitration clause,” even if it is not a signatory to the agreement.”).

215. *Motorola Credit Corp.*, 388 F.3d at 52–53.

216. *Int’l Chartering Servs., Inc.*, 138 F. Supp. 3d at 635.

217. See, e.g., *Motorola Credit Corp.*, 388 F.3d at 43; *American Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999); see also *World Omni Fin. Corp. v. Ace Capital*, 64 Fed. Appx. 809, 812–13 (2d Cir. 2003); *Am. S.S. Owners Mut. Prot. & Indem. Ass’n v. Henderson*, 2013 WL 1245451 (S.D.N.Y. Mar. 26, 2013); *Robinson Brog Leinwand Greene Genovese & Gluck v. John M. O’Quinn & Assoc.*, 523 Fed. Appx. 761 (2d Cir. 2013).

218. *Am. Personality Photos v. Mason*, 589 F. Supp. 2d 1325 (S.D. Fla. 2008) (holding that the owner of property found in a building during environmental remediation, which was a non-signatory to the remediation services agreement, could not be compelled to arbitrate its replevin and conversion causes of action against the owner of the remediation services provider based on a theory of equitable estoppel, where the provider’s owner failed to show that the property owner directly benefited from the agreement, the provider’s owner signed the remediation agreement as president of the provider and not in his individual capacity, while the claims were against the

Under the estoppel theory, a company knowingly exploiting an agreement with an arbitration clause can be estopped from avoiding arbitration despite having never signed the agreement.²¹⁹ Where a company knowingly accepts the benefits of an agreement with an arbitration clause, even without signing the agreement, that company may be bound by the arbitration clause. The court in *World Omni Financial Corp.* explained that, under such theory, the benefits must be direct, which was to say, they must flow directly from the agreement, as opposed to indirectly, where the non-signatory merely exploits the contractual relation of parties to an agreement but does not exploit (and thereby assume) the agreement itself.²²⁰

Where the third party is deemed a co-plaintiff of a non-adverse signatory, courts have generally not required the third party to arbitrate unless there is a showing that the claims are intertwined, and the non-signatory is seeking a benefit from the original agreement.²²¹ This principle of “intertwinement” holds more potency to compel arbitration on the theory of efficiency and confusion. It stands to reason that if claims are so intertwined, then to promote judicial efficiency the claims should be heard together. This principle furthers the desired goals of efficiency and the avoidance of inconsistent judgments on the same issues or claims.

president in his individual capacity, and the dispute was separate from the dispute between the agreement’s signatories that was already being arbitrated).

219. See *World Omni Fin. Corp.*, 64 Fed. Appx. at 812–13 (2d Cir. 2003) (insurance claimant received direct benefit from reinsurance policy to which it was not a signatory).

220. See *id.* at 813.

221. See, e.g., *Chew v. KPMG*, 407 F. Supp. 2d 790, 805 (S.D. Miss. 2006). The court in *Chew* found that the “intertwined claims” theory of equitable estoppel could not be applied by a non-signatory against a non-signatory any more than it could be applied by a signatory. *Id.* at 805. Thus, the court held that the claims against the accounting firm and law firm asserted in court by customers of the securities firm who had not signed any customer agreement containing an arbitration clause were not subject to the accounting firm’s or law firm’s motion to compel arbitration under the principles of equitable estoppel. *Id.* The court explained that even a signatory to an arbitration agreement cannot compel to arbitration a non-signatory to the agreement, at least under the estoppel theory that the claims of the signatory and non-signatory are intertwined with one another, and that what the movants were asking the court to do was one step further removed from that principle. *Id.*

In the *International Chartering* decision, the court viewed the shipbrokers' relationship, not the separate contract, as intertwined with the charter parties through the prism of dependency.²²² The direct benefit estoppel doctrine articulated by the court is essentially an operation of the principle of deemed consent, frequently employed by arbitrators in the joinder of a non-signatory.²²³ Under United States law, the principle of deemed consent navigates through the doctrine of estoppel, while in some Continental legal systems, such as the French legal system, consent will be implied where a "chain" of transactions is established.²²⁴

The principle of deemed consent was the hallmark of *Dow Chemical*, which also gave birth to the Group of Companies Doctrine.²²⁵ Under the *Dow Chemical* rubric, the assumption is that the party sought to be joined was involved in the initial and final stages of the transaction, i.e., the negotiation and the conclusion of the contract.²²⁶ Under this view, the elements of negotiation, conclusion and execution are merged to form the basis for the joinder. This prescription bodes well when the non-signatory invokes the favor of the arbitration clause. Arguably, the doctrine has a place for corporate veil piercing purposes. However, the doctrine does not hold any appeal to operate as a broad brush in the space of international commercial arbitration. This doctrine and other surrogates, such as direct benefit estoppel and assignment, should never be used as a prescription by arbitral tribunals for those who are non-signatories and do not desire joinder in international arbitration.²²⁷

222. See *Int'l Chartering Servs., Inc. v. Eagle Bulk Shipping Inc.*, 138 F. Supp. 3d 629, 636–37 (S.D.N.Y. 2015).

223. See *Park*, *supra* note 3, at 1.44–46.

224. See *Park*, *supra* note 3, at 1.47. The American doctrine permits courts to direct arbitration with respect to facts intimately intertwined with a cause of action subject to arbitration. *Id.* On the other hand, the French procedural framework of a claim will follow the transfer of substantive rights along a chain of buyers and sellers. In each case, the parties' reasonable expectations require that arbitration be imposed by virtue of facts which in fairness must be assimilated to consent. *Id.*

225. See *Dow Chemical v. Isover Saint Gobain*, ICC No. 4131/1982; *Win Line (UK) Ltd. v. Masterpart (Singapore) Pte. Ltd.* [2000] 2 SLR 98, 118–19.

226. See *Park*, *supra* note 3, at 1.72.

227. *Id.* at 1.74 ("In *Dow Chemical*, the non-signatory did not resist arbitration, but wished to join a proceeding already initiated by its affiliates.

VII. IMPLICATIONS FOR CONTRACT DRAFTING: AMELIORATING THE
COERCIVE NATURE OF STANDARD FORM CONTRACTS

Under traditional notions of privity of contract, a third party cannot be obligated to perform under a contract without the free and unfettered consent of that person.²²⁸ A corollary of the doctrine is that a third party did not have the right to sue to enforce a contract absent consideration flowing from the third party to the promisor, or from some other person at the promisor's request.²²⁹ But the doctrine of privity of contract has always been at odds with mercantile practice, and does not comport with commercial realities.²³⁰ Thus, its death would not be mourned in the law of commercial transactions. However, with the death of the privity doctrine, the doctrines of implied or "deemed" consent gain strength, which means that the right of third parties to choose the forum and law that will govern their disputes is weakened or eradicated.²³¹ This proverbial double-edged sword raises its ugly head in the joinder of non-signatories who are ensnared in the world of standard form contracts. The practice conflates freedom of contract and freedom from contract, which beg the question of whether it is fair and just to the non-signatory.²³²

Given the current posture of English and American courts to compel third parties to arbitration, contract drafters must now be cognizant of contemporary approaches to contract law and make

The non-signatory was able to show that 'the application of the arbitration clause . . . conforms to the mutual intent of the parties.' The party resisting arbitration had in fact agreed to arbitrate the subject matter of the dispute. *Id.* The only issue was whether it would be compelled to honor that arbitration commitment with respect to affiliates of the otherwise legitimate claimant companies.").

228. See NEIL ANDREWS, *CONTRACT LAW: THIRD PARTIES AND ASSIGNMENT, PRIVACY OF CONTRACT AND 'BURDENS,'* 221 (Colum. Univ. Press, 2011).

229. See *id.* (explaining the General Principle of Privity of Contract that contracts "cannot be thrust on parties behind their backs," and that "[f]reedom of contract, a cornerstone of private law prevents [a third party] . . . from being burdened without his consent").

230. See Neil Andrews, *Strangers to Justice No Longer: Reversal of the Privity Rule Under the Contracts (Rights of Third Parties) Act 1999*, 60 *CAMBRIDGE L.J.* 353, 353 (2001).

231. See *id.* at 368.

232. See BRIAN H. BIX, *MODERN CONTRACT LAW: RULES, THEORY, AND CONTEXT*, 128 (Cambridge U. Press, 2012).

sure to draft appropriately to avoid malpractice. Adopting elements from the law of trusts when drafting contract arbitration clauses is instructive. In the law of trusts, express language is required in order to confer a right on a third party.²³³ Thus, it should be expressly stated in the arbitration clause whether third parties are bound to resolve their disputes through arbitration. This means that standard forms must now include a non-exclusive jurisdiction clause alongside an exclusive jurisdiction clause. In addition, given the reach of the Act, forms should include an exclusion clause, which gives third parties the right to exclude the 1999 Act if the contract calls for dispute resolution in London.²³⁴ Such clauses will benefit third parties. The implication here, of course, is increased transaction costs in the revision of the various standard forms used in shipping and also insurance contracts involved in the carriage of goods.²³⁵ But, when compared to the costs to have a court determine whether third parties are bound to arbitration, the benefits of revising standard forms outweigh the costs of litigation and provides certainty to all parties.

VIII. DEFECTIVE CONSENT: THE IMPLICATIONS FOR THE PERCEPTION OF ARBITRATION AS LITIGATION'S GENTLER COUSIN

The disposition of the *International Chartering* case is a harbinger of a trend in United States courts to favor the joinder of non-signatories to arbitration.²³⁶ This practice signals a reversal from the posture of United States jurisprudence to ensure parties consent to arbitration. By treating the right to payment for services under the principle of direct benefit estoppel, courts seem poised to unlock an arbitration clause from its moorings as an agreement between signatories to descend upon anyone who provides ancillary services.

Although there are strong Supreme Court precedents under the FAA²³⁷ to enforce arbitration clauses in contracts, recently,

233. See, e.g., *Fornazor Int'l, Inc. v. Huntsman*, No. 2:14-CV-291 TS, 2015 WL 6142962, at *8 (D. Utah Oct. 19, 2015) ("Under Utah law, 'only if the written contract's clear intent is to confer rights upon a third party may that third party enforce rights and obligations of the contract.'").

234. See ANDREWS, *supra* note 228, at 215.

235. See NYPE 2015, *supra* note 102.

236. *Int'l Chartering Servs., Inc. v. Eagle Bulk Shipping Inc.*, 138 F. Supp. 3d 629, 636 (S.D.N.Y. 2015).

237. Federal Arbitration Act, 9 U.S.C. §§ 9–16 (2012).

mandatory arbitration is being challenged in the United States, particularly in consumer transactions. In recent times, mandatory arbitration provisions have been attacked as an exploitative tool, as it relates to members of the military.²³⁸ Challenges to mandatory arbitration provisions have been posed in other states, like California.²³⁹ Although these actions are grounded in protection of consumers from exploitative practices, third parties who provide ancillary services to large businesses are in need of protection as well. At the very least, these third parties should be informed of their rights by way of a properly drafted standard forms.²⁴⁰

The swing towards joinder based on expediency deprives third parties of their day in court, and implicates human rights concerns. Unless parties make clear the intention to arbitrate a dispute, courts must not allow tentacles of an arbitration clause to reach out and grip third parties in its grasp. In so doing, the practice offends the public policy concerns that underlie the rights enshrined in Article 6 of the ECHR, The Right to a Fair Trial,²⁴¹ the British Human Rights Act 1998,²⁴² and American public policy underlying the Federal Arbitration Act (FAA).²⁴³

Interestingly, the UK courts have interpreted the Contract (Rights of Third Parties) Act 1990 in the area of bailment law as conferring only benefits and not burdens on third parties.²⁴⁴ In terms of exclusive jurisdiction clauses, the Privy Council has held that an owner who is a non-party to the bailment contract between a bailee and a sub-bailee is bound to the clause only if the owner expressly or impliedly consented to the conditions in that

238. See 10 U.S.C. §§ 987 (e)(3), (f)(4) (making mandatory arbitration provisions in consumer credit agreements with a member of the U.S. military unlawful and unenforceable).

239. BIX, *supra* note 232, at 130 n.19.

240. *Id.* at 140 (positing that refusal to enforce one-sided terms may “create incentives for better or fairer drafting of standard forms”).

241. European Convention on Human Rights, art. 6, Nov. 4, 1950, E.T.S. No. 5.

242. Human Rights Act 1998, c. 42 (Eng.).

243. 9 U.S.C. § 9.

244. See ANDREWS, *supra* note 228, at 223 (“Bailment is a possessor’s (a bailee’s) responsibility for goods owned by the bailor (either an owner or someone with a right to possession). The bailee assumes responsibility to exercise reasonable care of the owner’s goods. This relation normally involves a contract between the bailor and the bailee.”).

contract.²⁴⁵

Under both English and American commercial law jurisprudence, devices are available to contracting parties to structure their contract to provide notices to third parties regarding choice of forum and choice of law clauses.²⁴⁶ Where sophisticated parties fail to take advantage of drafting devices, the innocent party should not be punished for poor drafting. Himalaya clauses can facilitate the inclusion of a third party as if he or she was a party to the contract in chief.²⁴⁷ A Himalaya clause spells out the liabilities of third parties to a contract, and serves to provide certainty in commercial law.²⁴⁸ Although most Himalaya clause jurisprudence relates to maritime contracts concerning bills of lading, these clauses are applicable to all contracts involving third parties.²⁴⁹ At the very least, the broker commission section on the standard forms should be revised to include a “broker” clause that is tantamount to a Himalaya clause.

The rise of third party litigation relating to third party benefits and burdens should signal to drafters a need to include Himalaya clauses that clarify these rights, thus closing the floodgates of litigation on this issue. Proper drafting to inform third parties of their rights in resolving disputes preserves respect and trust for the time-honored practice of consent to arbitration.

When parties are properly informed of the choice of forum, arbitration will be less thought of as the commercial boogey man lurking in the shadows, and its rightful place as an antidote to litigation will be restored.

CONCLUSION

Where parties desire arbitration, the decision to join all relevant parties to arbitration is considerably easier than

245. See, e.g., *Watkins v. M/V. London Senator*, 112 F. Supp. 2d 511, 517 (E.D. Va. 2000) (holding that a “Himalaya Clause . . . extends benefits to any agents, servants, or independent contractors performing ‘any part of the Carriage’”); ANDREWS, *supra* note 228, at 223 (citing *The Pioneer Container* (1994), 2 AC 324, PC).

246. See, e.g., *Watkins*, 112 F. Supp. 2d at 520.

247. See, e.g., *Avikama Corp v. M/V Hanjin Marseilles*, 162 F.3d 571, 574 (9th Cir. 1998) (holding that privity of contract is not required in order to benefit from a Himalaya clause).

248. See *id.* at 574.

249. *Id.* at 573.

compelling a party who is resisting joinder.²⁵⁰ To compel a non-signatory to arbitration triggers public policy concerns and the attendant issues of due process and fundamental justice.²⁵¹ The joinder of non-signatories is a public policy concern in the United States, Britain, and Continental Europe. Given the rights at stake, courts and arbitral tribunals should tread cautiously when deciding to join a non-signatory who resists arbitration. Here, the decision becomes a “sword and shield” scenario, and the surrogates and substitutes that are employed to permit arbitration cannot be dispatched so readily to compel arbitration.²⁵²

Under principles of comity and an increasing need for uniformity in maritime law, and international trade law, the task of upholding choice of law rules in international maritime contracts is a pressing one for courts and arbitral tribunals. To further the goals of certainty and uniformity, our Supreme Court has favored arbitration to ensure the survival of the international commercial system.²⁵³ Despite these valiant goals, the tension lies in promoting uniformity while at the same time protecting fundamental rights of fairness and justice.

At the heart of these rights lies the element of consent. Where consent is contested, an arbiter must weigh facts with more scrutiny to preserve these fundamental rights. Where the resistance is based on the existence of an agreement separate from the contract containing the arbitration clause, the outcome hinges

250. Park, *supra* note 3, at 22 (“The scrutiny and the evidence must be greater when an attempt is made to force (rather than to permit) joinder by a non-signatory. In joining a non-signatory, the evidence of consent would normally require special circumstances.”).

251. *See id.*

252. *Id.* (“Policy reasons as well as practical considerations make it difficult to compare a situation where the non-signatory does want to arbitrate with one where the nonsignatory does not want to arbitrate. In the latter instance, the drawbacks of parallel proceedings must be weighed against the serious countervailing considerations of imposing arbitration on clearly unwilling entities. When the non-signatory has never consented to arbitration, more analytic rigor and hesitation are in order before extension should be ordered. The very basis of arbitral jurisdiction is *prima facie* absent.”).

253. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985) (holding that the presumption in favor of a choice of forum clause “is reinforced by the emphatic federal policy in favor of arbitral dispute resolution”).

on whether the arbitration clause is reasonable.²⁵⁴ But, “reasonableness” should not be based only on the sophistication of the commercial and maritime laws of a given forum. Rather, whether a clause is reasonable should depend on whether parties had notice and an opportunity to agree on the choice of forum. Informed consent lies at the heart of reasonableness.

While the international system cries out for uniformity and certainty in commercial law, these goals should not displace the primordial right of consent that has been enshrined in arbitration since time immemorial. Joinder should be the exception where non-signatories are concerned, not the rule. The Second Circuit acknowledged this principle in its precedent cases.²⁵⁵ The practice of joining non-signatories to arbitration have also been rejected as repugnant to English law and other Continental countries.²⁵⁶ Legal surrogates like “direct benefit estoppel,” “conditional benefit” or “economic reality” serve as destabilizing forces in the system of arbitration.

The practice of forcing non-signatories to arbitrate co-opts the fundamental right of parties to consent to arbitration. Consent is a primordial favorite of the law. In the end, the practice does not

254. See *Roby v. Corp. of Lloyd's*, 996 F.2d 1353, 1362–63 (2d Cir.1985).

255. See, e.g., *id.* at 1360.

256. See *Park*, *supra* note 3, at 24 (noting that, outside of France, few legal systems welcome the group of companies’ doctrine; for example: the English decision in the Peterson Farms case was clear in its disapproval, stating that an arbitral tribunal’s approach in applying the doctrine was “seriously flawed,” and concluding that “where an arbitration agreement (or the contract in which it is contained) is subject to English law . . . an ICC arbitral tribunal has no jurisdiction to apply the ‘Group of Companies’ doctrine”); see also *id.* at 27 (“The tribunal found no evidence of consent to arbitrate merely because the non-signatory participated in the contract negotiation, noting “[i]f the Claimant had intended [the non-signatory] to be a party to either the Contract or its arbitration clause it could have so insisted at that time.”); *id.* at 26 (“The tribunal refused to extend the arbitration clause to non-signatory respondents, and expressed skepticism with respect to the group of companies doctrine generally. There was a finding that the non-signatory’s mention of ‘our company’ and ‘our agreement’ were irrelevant, given that the reference was clearly on behalf of the signatory entity.”); *Petersen Farms, Inc. v. C&M Farming Ltd.* [2004] EWHC 121 (Comm) [47] (Eng.). In the context of the Group of Companies doctrine the agreement was that Arkansas law was the same as English law. As I have already said, English law treats the issue as one subject to the chosen proper law of the Agreement and that excludes the doctrine which forms no part of English law.

promote the desired goals of uniformity in international arbitration. Rather, where arbitrators are given *carte blanche* to make public policy, the central purpose of neutrality in the arbitral process is weakened, and the space of international arbitration is flooded with uncertainty, and mired in allegations of injustice. The practice of arbitration must get back to its primordial roots of building bridges between parties, instead of its current trend of building walls against justice.