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Challenges to Jurisdiction and Non-Signatories in Arbitration

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Challenges to Jurisdiction and Non-Signatories

Janet Walker*

I—Typical challenges to jurisdiction:

- **subject matter of dispute not arbitrable**
eg dispute involves public law
- **clause inoperative**
eg institution or arbitrator does not exist
- **clause does not cover the dispute**
eg dispute does not relate to the contract
- **clause does not bind the parties**
eg one party is a non-signatory

II—Non-signatories generally not bound

an agreement “signed by the parties” New York Convention, art II/Model Law, art 7(2)

but...

exceptions based on five (or six) theories:

- incorporation by reference
- assumption
- agency
- veil piercing/alter ego
- equitable estoppel
- third party beneficiaries

Denney v BDO Seidman LLP 412 F 3d 58, 71 (2^d Cir 2005) (five exceptions)

InterGen NV v Grina, 344 F 3d 134, 146 (1st Cir 2003) (third-party beneficiaries)

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III—Non-signatories - Canadian view

Party autonomy/read the contract:

- *Kaverit Steel and Crane Ltd v Kone Corp* (1992) 87 DLR (4th) 129 (Alta CA) (referral to arbitration of some parties in multi-party matter mandatory despite inconvenience)
- *SimEx Inc v IMAX Corp* [2005] OJ No 5389 (Ont CA) (choice of court clause in transfer agreement applicable not arbitration clause in initial contract)
- *Xerox Canada Ltd v MPI Technologies Inc* [2006] OJ No 4895 (Ont SCJ) (addition of wholly owned subsidiary's parent proper where other party did not distinguish between them prior to dispute and sought discovery of parent)
- *Rampton v Eyre* 2007 ONCA 331 (Ont CA) (major shareholder of party unable to invoke arbitration clause, but other objections to clause rejected)

IV—Who decides? Two approaches...

- **US: a question of arbitrability** for the courts (unless “clear and unmistakable evidence” of party intent)

First Options of Chicago, Inc v Kaplan 514 US 938 (1995)

Howsam v Dean Witter Reynolds, Inc 537 US 79 (2002)

- **Canada: *Kompetenz-kompetenz***—the arbitral tribunal may rule on its own jurisdiction.... Model Law, art 16(1)

Masterfile Corp v Graphic Images, Inc [2002] OJ No 2590 (arbitrator appointed to determine whether objecting party was bound as signatory)