UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 1998

(Argued: January 25, 1999 Decided: March 17, 1999)

Docket No. 98-7823 (L), 98-7893 (XAP)

AMERICAN BUREAU OF SHIPPING,

Plaintiff-Appellant-Cross-Appellee,

v.

TENCARA SHIPYARD S.P.A.,

Defendant-Appellee-Cross-Appellant,

SOCIETE JET FLINT, S.A. *et al.*,

Defendants-Appellees.

Before: NEWMAN, WALKER, and CALABRESI, *Circuit Judges.*

Appeal from a judgment in the United States District Court for the Southern District of New York (Harold Baer, Jr., *District Judge*) granting plaintiff's motion to compel arbitration against defendant Tencara Shipyard S.P.A. and denying plaintiff's motion with respect to the other defendants.

Affirmed in part, reversed in part, and remanded.

ROBERT A. MILANA, Kirlin, Campell & Keating, New York, NY (Michael D. Wilson & Richard H. Brown, Jr., on the brief) for *Plaintiff-Appellant-Cross-Appellee.*

TULIO R. PRIETO, Cardillo & Corbett, New York, NY, for *Defendant-Appellee-Cross-Appellant.*

JOSEPH G. GRASSO, Thacher Proffit & Wood, New York, NY, for *Defendants-Appellants.*

CALABRESI, *Circuit Judge:*

Plaintiff-Appellant-Cross-Appellee American Bureau of Shipping ("ABS") appeals from a judgment entered on May 26, 1998, in the United States District Court for the Southern District of New York (Harold Baer, Jr., *Judge*). Defendant-Appellee-Cross-Appellant Tencara Shipyard S.P.A. ("Tencara") cross-appeals from the same judgment. The district court granted ABS's motion to compel arbitration against Tencara but denied the same motion against the defendant owners and underwriters of the racing yacht "Tag Heuer." We agree with the district court's holding that Tencara is bound to arbitrate its claims against ABS. But we disagree with the court's conclusion that the yacht owners and underwriters are not required to arbitrate with ABS. Accordingly, we affirm in part, reverse in part, and remand for further proceedings.

BACKGROUND

In 1992, Titouan Lamazou and a group of investors (the "Owners") entered into a construction contract with Tencara-an Italian shipyard-to build a racing yacht that would eventually be named the "Tag Heuer." The Owners wanted a ship that could "circumnavigate the globe is less than 80 days, in competition for the Jules Verne Trophy." The construction contract between Tencara and the Owners specified that (1) the Owners would be solely responsible for registering the vessel under the French flag, (2) the Owners would provide all necessary assistance to Tencara to ensure that the yacht met with the approval of the French authorities, and (3) the ship would be "classed" according "[t]o the quality standards and norms permitting approval of . . . the American Bureau of Shipping, Genoa Office."

"Classification" is a term of art in maritime contract law. It refers to the process by which a ship is inspected to make sure it is seaworthy and complies with various safety regulations. "Contracts for vessel certification and classification are unique to the realm of admiralty; these inspections and resulting certificates are required either legally or practically before a shipowner may ply navigable waters." *Sundance Cruises Corp. v. American Bureau of Shipping*, 7 F.3d 1077, 1081 (2d Cir. 1993).

To obtain a ship classification, one goes to a classification society. ABS is one of the world's leading classification societies. As we have stated:

A classification society such as ABS develops rules, guides, standards, and other criteria for the design and construction of ships. When requested, a society reviews the design and surveys a ship before, during, and after construction to verify compliance with the relevant international safety conventions and applicable rules of the classification society.

Id. at 1078.

Vessel classifications provide two major benefits for shipowners. First, insurance is much less expensive for classed ships than for non-classed ships. Second, many governments-the French authorities in this case--require a vessel classification before they will allow a craft to sail under their national flag.

To obtain an ABS classification for the "Tag Heuer," Tencara entered into a contract with ABS in March 1992 (the "Request for Class Agreement"). This agreement specified that all disputes arising thereunder were to be arbitrated in New York. The Owners received a copy of the Request for Class Agreement from Tencara in May 1992. The coverage that the Owners obtained on the "Tag Heuer" from a variety of insurers (the "Underwriters") was premised on the existence of a valid classification. While the yacht was under construction throughout 1992, however, the Owners had only limited contact with ABS, and Tencara handled virtually all matters related to shipbuilding and classification.

In February 1993, the yacht was completed and delivered by Tencara to the Owners. At that time, ABS delivered an Interim Certificate of Classification ("ICC") to Tencara pursuant to the Request for Class Agreement. Tencara, in turn, gave the ICC to the Owners. The ICC explicitly incorporated by reference the "terms and conditions" of the Request for Class Agreement, including that agreement's arbitration clause.

A few months after the "Tag Heuer" was delivered to the Owners, the yacht suffered serious hull damage during a cruise to Venice. A survey indicated that the craft's damage had been the product of a defective design and of poor construction. As a result, the Underwriters indemnified the Owners pursuant to their insurance policies. Tencara subsequently sued ABS in Italy, while the Owners and the Underwriters each filed independent claims against ABS in France.

ABS then brought this action, seeking to compel Tencara, the Owners, and the Underwriters to arbitrate their claims pursuant to the Request for Class Agreement, both in itself and as it was incorporated in the ICC. The district court held that Tencara was required to arbitrate with ABS, because Tencara was acting on its own behalf in signing the Request for Class Agreement rather than as an agent of a disclosed principal--the Owners. The court, however, rejected ABS's argument that the Owners and the Underwriters were bound to arbitrate with ABS due to the Owners' acceptance of the ICC from ABS. Specifically, the district court held (1) that acceptance of the ICC did not give rise to a contract between the Owners and ABS, and (2) that the Owners were not estopped from denying the obligations of the ICC, as any benefits that they had received from the ICC were only "indirect."[1]

DISCUSSION

Subject-matter jurisdiction in this suit is grounded in admiralty. *See* 28 U.S.C. 1333 (1994).[2] We review the district court's conclusion as to the existence of an arbitration agreement for clear error. *See Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 845 (2d Cir. 1987) (stating that the district court's determination that there was an arbitration agreement is a factual finding and citing Fed. R. Civ. P. 52(a), which enunciates the "clear error" standard of review for factual findings, though legal rulings concerning which entities are bound are reviewed *de novo*).

Our first task is to determine whether the Owners of the "Tag Heuer" can be bound to arbitrate with ABS even though they never signed the arbitration agreement. We have stated that non-signatories may be bound by arbitration agreements entered into by others. *See Thomson-CSF, S.A. v. American Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995). This can occur pursuant to five different theories: (1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; and (5) estoppel. *See id.* Because it proves to be sufficient, we focus exclusively on the estoppel theory.[3]

As an initial matter, the Owners assert that--since they were never in privity with ABS--we lack pe[illegible] over

them and cannot consider ABS's estoppel argument. This contention is without merit. It is well-settled that federal courts applying New York law have personal jurisdiction over parties that agree to arbitrate their disputes in New York. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Lecopulos*, 553 F.2d 842, 844 (2d Cir. 1977). The Owners construe this to mean that personal jurisdiction exists only when there is an express arbitration agreement between the parties. But if the Owners are estopped from denying their obligations under the arbitration agreement between Tencara and ABS, it follows that they are also estopped from asserting a lack of personal jurisdiction based on that agreement. There is no good reason to read the equitable theory of estoppel to allow the defense of "no personal jurisdiction" while barring the defense of "no duty to arbitrate." With the owners estopped from denying personal jurisdiction, the law regards such jurisdiction as established in litigation between these parties.

We therefore turn to the merits of ABS's estoppel argument. A party is estopped from denying its obligation to arbitrate when it receives a "direct benefit" from a contract containing an arbitration clause. *See Thomson-CSF*, 64 F.3d at 778-79. ABS argues that the Owners received several direct benefits from the ICC, which incorporated the Request for Class Agreement's arbitration clause by reference. We agree with ABS that the Owners received such benefits, including (1) significantly lower insurance rates on the "Tag Heuer," and (2) the ability to sail under the French flag. In reaching the conclusion that the Owners had only received an indirect benefit from the ICC, the district court relied heavily on the erroneous assumption that it was Tencara's rather than the Owners' responsibility to register the vessel under the French flag. Whatever the situation might have been under the district court's incorrect assumption, it is patent that on the actual facts the Owners received direct benefits from the ICC. Without the ICC, registration would have been practically impossible. The Owners are hence required to arbitrate their claims against ABS.

We next confront the issue of whether the yacht's Underwriters can also be compelled to arbitrate with ABS. It is clearly established that "an insurer-subrogee stands in the shoes of its insured." *See Gibbs v. Hawaiian Eugenia Corp.*, 966 F.2d 101, 106 (2d Cir. 1992). Accordingly, ABS's motion to compel arbitration against the insured Owners is equally valid against the insurer Underwriters, and we therefore hold that the Underwriters of the "Tag Heuer" must also submit to arbitration with ABS.(4)

Finally, we address the cross-appeal of Tencara. Tencara's position is that it was acting solely as the Owners' agent when it signed the Request for Class Agreement, and that, as the agent of a disclosed principal, it cannot be bound by that agreement's arbitration clause. *See* Restatement (Second) of Agency 320 (1958). We review a determination of an agency relationship *de novo*. *See Karavos Compania Naviera S.A. v. Atlantica Export Corp.*, 588 F.2d 1, 7-9 (2d Cir. 1978). There is no merit in Tencara's argument, which is based on the mistaken notion that a party must be either solely a principal or solely an agent. *See* Restatement (Second) of Agency 328 cmt. b ("In many cases the agent is a party to the contract made by him on behalf of a disclosed principal and, as such, is responsible for its performance."). The shipyard clearly acted, at least in part, on its own behalf when it contracted with ABS for classification services. It itself derived the benefit of fulfilling its ship construction contract with the Owners by hiring ABS in the Request for Class Agreement. And the record shows no exercise of control by the Owners over Tencara sufficient to negate Tencara's role as, at least, one of the principals. As a result, we affirm the district court's conclusion that Tencara must arbitrate its claims with ABS.

The judgment of the district court is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

1. Because, in the court's view, the Underwriters' obligations depended on the existence of Owner obligations, this holding also freed the Underwriters from any duty to arbitrate.

2. The district court found jurisdiction on the basis of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *see* 9 U.S.C. 201, 203 (Supp. 1998), since "[t]he defendants all reside in Italy, France, or Great Britain," all signatories to the Convention. In view of the presence in the suit of various Lloyd's of London syndicates, and assuming *arguendo* that residence in a signatory state is necessary for jurisdiction to lie, that basis of jurisdiction may be problematic as to some defendants. *Cf. E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co.*, 160 F.3d 925, 928-29 (2d Cir. 1998) (describing the structure of Lloyd's and pointing out that syndicates are comprised of thousands of individual underwriters whose identity (and residence) is not disclosed). But since jurisdiction was also claimed, and undoubtedly exists, in admiralty as to all the parties, we need not consider further the perplexities engendered by the presence of the Lloyd's syndicates. *See Advani Enter., Inc. v. Underwriters at Lloyds*, 140 F.3d 157, 161 (2d Cir. 1998) (permitting suit to proceed in admiralty where unknown citizenships of the Lloyd's Underwriters placed diversity jurisdiction in doubt).

3. Accordingly, we express no view on the question of whether the Owners and ABS also came into privity upon the Owners' acceptance of the ICC.

4. The Underwriters counter that the French court hearing their suit against ABS will not recognize the arbitration of the Underwriters' claims because "[u]nder French law, Underwriters are entitled to pursue these claims whether or not they have obtained a subrogation agreement from the Owners." We express no view as to the possible effect under French law of this judgment or of a subsequent arbitration award. Under American law, the Underwriters are clearly required to arbitrate, and that is the only issue before us today.

> AMERICAN BUREAU OF SHIPPING, Plaintiff, v. SOCIETE JET FLINT, S.A., et. al., Defendants.
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>
> UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK
>
> 1998 U.S. Dist. LEXIS 7920
>
> May 26, 1998, Decided
>
> May 27, 1998, Filed
>
> DISPOSITION:
> [*1] Plaintiff's motion to compel arbitration against defendants GRANTED in part and DENIED in part.
>
> CORE TERMS: arbitration clause, arbitrate, vessel, non-signatory, certificate, classification, underwriters, issuance, arbitration agreement, arbitration, estoppel, incorporation, hull, sail, bind, contractual relationship, compel arbitration, personal jurisdiction, navigable waters, contractual liability, favoring arbitration, right to arbitrate, indirect benefit, federal policy, gave rise, inspector, compelled, signatory, formally, shipper
>
> COUNSEL:
> For AMERICAN BUREAU OF SHIPPING, plaintiff: Robert A. Milana, Kirlin, Campbell & Keating, New York, NY.
>
> JUDGES:
> Harold Baer, Jr., U.S.D.J.
>
> OPINIONBY:
> Harold Baer, Jr.
>
> OPINION:
>
> OPINION AND ORDER

>
> Hon. HAROLD BAER JR., District Judge:
>
> Plaintiff American Bureau of Shipping ("ABS") moves to compel arbitration against defendants Tencara Shipyard S.p.A. ("Tencara"), Societe Jet Flint ("Jet Flint"), Copropriete Jules Verne, all of the individual shareholders of Jules Verne and the hull underwriters of the yacht TAG HEUER ("Underwriters"). For the foregoing reasons, the plaintiff's motion is GRANTED in part and DENIED in part.
>
> I. Discussion
>
> In 1991, a French citizen Titouan Lamazou entered into discussions with Tencara, a shipyard in Italy, for the construction of a sailing vessel named TAG HEUER designed to "circumnavigate the globe in less than 80 days, in competition for the Jules Verne Trophy." Lamazou Decl. P 2. The next year, a co-proprietorship, Jules Verne, was formed for purposes of owning the TAG HEUER. Lamazou Decl. P 3. The shareholders of the co-proprietorship are [*2] Titouan Lamazou Promotions, Jet Flint and 121 individuals of French Nationality (together the "Yacht Owners").
>
> A contract between the Yacht Owners and Tencara was finalized on January 31,
>
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>
> 1992. Lamazou Decl. P 7. Among other things, the contract required that the yacht be constructed in accordance with "the standards of quality acceptable to, and to be approved by, the Genoa office of ABS and the French authorities." Lamazou Decl. P 8. ABS is a not-for-profit maritime classification society that develops "rules, guides, standards and other criteria for the design and construction of marine vessels, the review of design and survey during and after construction to verify compliance with such rules, guides, standards or other criteria, the assignment and registration of class when such compliance

> has been
> verified, and the issuance of classification certificates." Rodgers Aff. P
> 9.
>
> Tencara and ABS executed a "Request for Classification Survey and
> Agreement
> ("Request for Class agreement") dated March 31, 1992. Lamazou Decl. P 14.
> Approximately one month later, on April 30, 1992, the Yacht Owners asked
> Tencara
> to send them a copy of this agreement, which Tencara mailed four days
> later.
> [*3] Le Villain Aff. P 7. The Request for Class agreement contains an
> arbitration clause requiring all disputes to be arbitrated in New York in
> accordance with the Rules of the Society of Maritime Arbitrators, Inc.
> Rodgers
> Aff. P 16. Further, according to the plaintiff, "ABS agreed to provide
> classification services for the benefit of the Yacht Owners," which
> included
> issuing an Interim Class Certificate ("ICC"). Rodgers Aff. PP 18, 22.
>
> The TAG HEUER was delivered to the Yacht Owners on February 21, 1993.
> At that
> time, Tencara also provided the Yacht Owners with the ICC. Lamazou Decl. P
> 19.
> The ICC explicitly incorporates by reference the "terms and conditions" of
> the
> Request for Class agreement, including the arbitration clause. Rodgers
> Aff. P
> 22. According to the plaintiff, the ICC "permitted the Yacht Owners to,
> among
> other things, obtain marine insurance, which was in fact obtained from the
> Underwriters, and sail the TAG HEUER in navigable waters pending issuance
> of a
> Final Certificate of Classification for Hull by ABS." Rodgers Aff. P 23.
> ABS
> issued a "Final Certificate of Classification for Hull" on April 29, 1993
> which
> stated that "the issuance and interpretation of the class certificate [*4]
> is
> subject to the terms and conditions of the Request for Class [agreement]."
> Rodgers Aff. P 29.
>
> Following delivery to the Yacht Owners, the TAG HEUER set sail in the
> Mediterranean. Unfortunately, while en route from France to Venice, the
> vessel
> sustained hull damage. Lamazou Decl. P 20. In response, Lamazou "requested
> that
> ABS survey the damage to the vessel on behalf of [the] owners." Lamazou
> Decl. P

> 21. ABS conducted this survey, and the Yacht Owners paid for these
> services.
> Lamazou Decl. P 21.
>
> A short time later, the Yacht Owners commenced litigation in Paris
> against
> the TAG HEUER Underwriters. Lamazou Decl. P 22. After court-appointed
> surveyors
> issued a preliminary report attributing the vessel's damage to deficient
> design
> and construction, the Underwriters partially indemnified the Yacht Owners
> pursuant to a hull insurance policy. Lamazou Decl. PP 23-24.
>
> Much to the plaintiff's dismay, a deluge of litigation soon followed.
> Tencara
> commenced an indemnity suit in Italy against ABS in December 1996. Rodgers
> Aff.
> P 4. The next month, in January 1997, the Yacht Owners initiated
> litigation
> against ABS in the French commercial court in Paris, "seeking compensation
> for
> uninsured [*5] losses arising from ABS's [alleged] negligence in
> connection
> with its oversight of design and construction of the vessel." Lamazou
> Decl. P
> 24. Later that year, in May, the TAG HEUER Underwriters also commenced an
> action
> in France against ABS based on the subrogated interests of the Yacht
> Owners.
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>
> Rodgers Aff. P 6. In the instant case, ABS seeks to compel arbitration of
> all
> issues in the three separate actions.
>
> II. Discussion
>
> The plaintiff seeks to compel arbitration pursuant to the Federal
> Arbitration
> Act ("FAA") and the Convention on the Recognition and Enforcement of
> Foreign
> Arbitral Awards (the "Convention"). ABS is a resident of the United
> States. The
> defendants all reside in either Italy, France or Great Britain. All of
> these
> countries are signatories to the Convention. Consequently, @ 203 of the
> Convention confers subject matter jurisdiction in this matter. n1 9 U.S.C.

> @
> 203.
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> ----------Footnotes----------
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>
> n1 Although all of the defendants have commenced actions in
> international
> forums, this fact does not preclude enforcement of the arbitration
> agreement, if
> found applicable. See Sumitomo Corp. v. Parakopi Compania Maritima, S.A.,
> 477 F.
> Supp. 737, 742 (S.D.N.Y. 1979). Parties to an arbitration agreement may
> not
> "circumvent an arbitration clause by commencing litigation" in foreign
> courts.
> Id. Indeed, "the federal policy favoring arbitration is even stronger in
> the
> context of international transactions." Deloitte Noraudit A/S v. Deloitte
> Haskins & Sells, U.S., 9 F.3d 1060, 1063 (2d Cir. 1993) (citation
> omission).
>
> ----------End Footnotes----------
> ---
> [*6]
>
> The FAA embodies a strong federal policy favoring arbitration. See
> Thomas
> James Associates v. Jameson, 102 F.3d 60, 65 (2d Cir. 1996). Consistent
> with
> this policy, all doubts as to the scope of issues eligible for arbitration
> must
> be resolved in favor of arbitrability. See McMahan Securities Co., L.P. v.
> Forum
> Capital Markets L.P., 35 F.3d 82, 86 (2d Cir. 1994) (citing Moses H. Cone
> Hosp.
> v. Mercury Constr. Corp., 460 U.S. 1, 24-25, 103 S. Ct. 927, 941, 74 L.
> Ed. 2d
> 765 (1983). Arbitration is preferred "unless it may be said with positive
> assurance that the arbitration clause is not susceptible of an
> interpretation
> that covers the asserted dispute." Thomas James Associates, 102 F.3d at 65
> (quoting David L. Threlkeld & Co. v. Metallgesellschaft, 923 F.2d 245, 250
> (2d
> Cir. 1991). Of course, this preference for arbitration is tempered by the
> Supreme Court's admonition that "the FAA does not require parties to
> arbitrate
> when they have not agreed" to resolve their dispute in that fashion. Volt
> Info.

> Sciences Inc. v. Board of Trustees, 489 U.S. 468, 478, 109 S. Ct. 1248,
> 1255,
> 103 L. Ed. 2d 488 (1989).
>
> Since it is well-established that arbitration [*7] is a matter of
> contract
> "a party cannot be required to submit to arbitration any dispute which
> [the
> party] has not agreed so to submit." Deloitte Noraudit A/S v. Deloitte
> Haskins &
> Sells, U.S., 9 F.3d 1060, 1064 (2d Cir. 1993) (quoting United Steelworkers
> of
> America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582, 80 S. Ct.
> 1347,
> 1353, 4 L. Ed. 2d 1409 (1960)). However, non-signatories may be bound by
> an
> arbitration agreement in five circumstances: (1) incorporation by
> reference; (2)
> assumption; (3) agency; (4) veil-piercing or alter ego; and (5) estoppel.
> See
> Thomson-CSF, S.A. v. American Arbitration Association, 64 F.3d 773, 776
> (2d Cir.
> 1995)
>
> A. Yacht Owners
>
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>
>
> The Yacht Owners did not sign the Request for Class agreement executed
> between Tencara and ABS that includes the arbitration clause underlying
> this
> action. Nonetheless, ABS articulates several theories in support of its
> argument
> that the Yacht Owners are bound to arbitrate its dispute.
>
> 1. Contractual Obligation through Issuance of Certificate
>
> First, the plaintiff argues that the issuance of a certificate such as
> the
> ICC binds both the issuer, ABS, and the party receiving the certificate,
> [*8]
> the Yacht Owners, to a contractual relationship. Essentially, ABS seeks to
> bind
> the Yacht Owners to the arbitration clause in the Request for Class
> agreement
> because the Yacht Owners were given the ICC when Tencara delivered the
> vessel to

> them on February 21, 1993. n2 It is important to note that ABS issued the
> ICC to
> Tencara, as part of its obligations under the Request for Class agreement.
> Tencara then provided the ICC to the Yacht Owners upon delivery of the
> vessel.
>
> - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - -
> - - -
>
> n2 The ICC explicitly incorporates by reference the "terms and
> conditions" of
> the Request for Class agreement, including the arbitration clause. Rodgers
> Aff.
> P 22.
>
> - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - -
> - - -
>
> The plaintiff cites two Second Circuit cases, International Ore &
> Fertilizer
> Corp. v. SGS Control, 38 F.3d 1279 (2d Cir. 1994) and Sundance Cruises
> Corp. v.
> American Bureau of Shipping, 7 F.3d 1077 (2d Cir. 1993), to support this
> proposition. Yet, the Yacht Owners correctly argue that these cases are
> inapposite. In International Ore, the Court held that issuance of [*9] a
> "
> Certificate of Readiness" by a shipper to a ship inspector gave rise to
> potential contractual liability between the shipper and the ship
> inspector.
> International Ore, 38 F.3d at 1281, 1284. Likewise, in Sundance Cruises,
> ABS
> issued statutory and classification certificates directly to the vessel
> owners
> after having been "formally retained" in a Request for Class agreement
> executed
> between ABS and the vessel owners, which gave rise to contractual
> liability.
> Sundance Cruises, 7 F.3d at 1079.
>
> Conversely, in the instant case ABS issued all classification
> certificates to
> Tencara, the shipyard, and not to the owners of the TAG HEUER. More
> importantly,
> the Yacht Owners did not formally retain ABS. Quite the opposite, the
> Request
> for Class agreement was executed between ABS and Tencara. In International
> Ore
> and Sundance Cruises, the courts found a contractual relationship solely
> between

> the party issuing the certificate and the party in direct receipt. Thus,
> these
> cases do not compel the conclusion that issuance of a certificate
> contractually
> binds both the party in direct receipt of the certificate, Tencara, as
> well as a
> third-party, the Yacht Owners, to a relationship [*10] with the issuer.
> Accordingly, I decline to find a binding arbitration agreement between ABS
> and
> the Yacht Owners simply because the certificates issued by ABS to Tencara
> were
> ultimately provided to the Yacht Owners.
>
> 2. Incorporation by Reference
>
> Second, the plaintiff erroneously argues that the Yacht Owners should
> be
> bound to the arbitration clause under the incorporation by reference
> doctrine,
>
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>
> within the Second Circuit, "[a] non-signatory may compel arbitration
> against a
> party to an arbitration agreement when that party has entered into a
> separate
> contractual relationship with the non-signatory which incorporates the
> existing
> arbitration clause." See Thomson-CSF, 64 F.3d at 777.
>
> Here, a signatory to the contract, ABS, seeks to compel a
> non-signatory, the
> Yacht Owners, to arbitrate its claims. Thus, the situation is incongruous
> from
> that envisioned in Thomson-CSF, where the Second Circuit suggests only
> that a
> non-signatory may enforce an arbitration agreement through incorporation
> by
> reference. Id. Further, the incorporation by reference doctrine is
> inapplicable
> because no "separate contractual relationship" exists between ABS and the
> Yacht
> Owners. Id. [*11] That is, there is no contract between ABS and the Yacht
> Owners that incorporates the arbitration clause in the Request for Class
> agreement.
>
> 3. Estoppel
>

> Third, the plaintiff argues that the Yacht Owners may be bound to
> arbitrate
> under the estoppel doctrine. Pursuant to this doctrine, a non-signatory is
> bound
> to honor an arbitration clause in a contract where the non-signatory
> directly
> benefits from the contract, but nonetheless seeks to avoid its
> obligations. See
> Thomson-CSF, 64 F.3d at 778. Estoppel, however, is not appropriate where a
> non-signatory derives only an indirect benefit from the contract. Id. at
> 779.
>
> While a closer question, I am unable to conclude that the Yacht Owners,
> as
> urged by ABS, derived a direct benefit from the Request for Class
> agreement and
> the ICC, at least to the degree needed to compel the Yacht Owners, a
> non-signatory, to arbitrate all disputes with ABS. The plaintiff argues
> that the
> Yacht Owners benefitted from the ICC, which flowed from the Request for
> Class
> agreement, because the ICC permitted the Yacht Owners to "obtain marine
> insurance . . . and sail the TAG HEUER in navigable waters pending
> issuance of a
> Final Certificate of Classification [*12] for Hull by ABS." Rodgers Aff.
> P 23.
> Essentially, the plaintiff contends that the Yacht Owners directly
> benefitted
> from the Request for Class agreement because without the ICC the TAG HEUER
> could
> not sail. In the Request for Class agreement executed between ABS and
> Tencara,
> the plaintiff agreed to provide classification services for the TAG HEUER,
> including issuance of an ICC.
>
> Notwithstanding this contention, I conclude for the reasons stated
> below that
> the benefit of sailing the TAG HEUER is more logically a direct
> consequence of
> Tencara satisfying its contract with the Yacht Owners. It was Tencara's
> contractual obligation to construct a vessel that could sail in navigable
> waters
> and obtain the necessary approval of French authorities.
>
> Quite obviously, the Yacht Owners could not have sailed the TAG HEUER
> without
> obtaining the requisite classification certificates from ABS, which were
> required before the French authorities would approve the vessel.
> Ultimately,

> however, it was Tencara's contractual responsibility to the Yacht Owners
> to
> obtain ABS certification, and more significantly, approval from the French
> authorities. While the classification of the TAG HEUER was important, it
> [*13]
> paled as compared to the complex process of constructing and registering
> the
> vessel under the French Flag, for which Tencara was primarily responsible.
> Any
> benefit flowing to the Yacht Owners from the Request for Class agreement
> is,
> therefore, at best indirect. Consequently, the estoppel doctrine is not
> available to bind the Yacht Owners to the arbitration agreement. n3 See
>
> PAGE 698
> 1998 U.S. Dist. LEXIS 7920, *13
>
> Thomson-CSF, 64 F.3d at 779 (estoppel not available where non-signatory
> derived
> only an indirect benefit from the contract).
>
> ----------Footnotes----------
>
> n3 ABS also argues that the Yacht Owners should be compelled to
> arbitrate
> because they are third-party beneficiaries of the Request for Class
> agreement
> between the plaintiff and Tencara. Even if this were true, I am precluded
> from
> considering this argument because the only basis of personal jurisdiction
> over
> the Yacht Owner's in New York is the arbitration clause. See Atlanta
> Shipping
> Corp. v. Cheswick-Flanders & Co., 463 F. Supp. 614, 618 (S.D.N.Y. 1978)
> (party
> that agrees to arbitrate in New York consents to personal jurisdiction).
> Since I
> conclude that the Yacht Owners are not bound by that arbitration clause,
> there
> is no personal jurisdiction, and I cannot pass on the merits of any other
> argument.
>
> ----------End Footnotes----------
> [*14]
>
> To reiterate, I find that the Yacht Owners were not a party to the
> Request

> for Class agreement between Tencara and ABS. I also conclude that the
> Yacht
> Owners cannot be compelled to arbitrate as a non-signatory pursuant to
> either
> the incorporation by reference or estoppel doctrines. Accordingly, the
> motion to
> compel the Yacht Owners to arbitrate is denied.
>
> B. Underwriters
>
> ABS argues that it is entitled to arbitrate any claim alleged by the
> Underwriters pursuant to its alleged right to arbitrate any dispute with
> the
> Yacht Owners. It is true that "since an insurer-subrogee stands in the
> shoes of
> its insured, any defenses that are valid against the insured are also
> applicable
> against the insurer." See Gibbs v. Hawaiian Eugenia Corp., 966 F.2d 101,
> 106 (2d
> Cir. 1992). Nonetheless, I have determined that ABS has no right to
> arbitrate
> any dispute with the Yacht Owners. Therefore, the plaintiff may not compel
> the
> Underwriters to arbitrate the claims advanced against ABS in the French
> commercial court. See Continental Ins. Co. v. Daewoo Shipbuilding & Heavy
> Machinery LTD, 1987 U.S. Dist. LEXIS 7523, at *5 (S.D.N.Y. 1987) (ABS
> could not
> bind subrogee insurance company to arbitration [*15] agreement where
> subrogor
> itself was not bound).
>
> C. Tencara
>
> The claims advanced by Tencara against ABS, however, are subject to the
> arbitration clause in the Request for Class agreement. Clause fifteen of
> that
> agreement states that "any and all differences and disputes . . . shall be
> put
> to arbitration in the City of New York pursuant to the laws relating to
> arbitration there in force." Rodgers Aff., Ex. 8 at P 15. Tencara seeks to
> evade
> the plain meaning of this clause by arguing that when it signed the
> Request for
> Classification it acted as an agent for the Yacht Owners, who it contends
> was a
> fully-disclosed principal.
>
> This argument is without merit. Tencara offers no proof that suggests
> it

> acted merely as an agent. Rather, the primary negotiator for the Yacht
> Owners,
> Lamazou, declares that he "did not appoint Tencara to act as the owners'
> agent
> for purposes of contracting with ABS or for any other purposes." Lamazou
> Decl. P
>
> PAGE 699
>
> 1998 U.S. Dist. LEXIS 7920, *15
>
> 11. Moreover, there is no evidence that Tencara communicated to ABS that
> it
> acted as the Yacht Owner's agent when executing the Request for Class
> agreement.
> Quite to the contrary, the Request for Class agreement explicitly states
> that
> "all provisions hereof [*16] are for the sole and exclusive benefit of
> the
> parties hereto." Rodgers Aff., Ex. 8 at P 12. In other words, the
> agreement by
> its own terms limits its application to ABS and Tencara, with ABS
> responsible
> for certifying the design and the construction of the TAG HEUER.
>
> Given the absence of an agency relationship, Tencara is bound by the
> arbitration clause contained in the agreement it signed with the
> plaintiff.
> Accordingly, all claims between Tencara and ABS must be arbitrated
> forthwith in
> New York.
>
> III. Conclusion
>
> For the reasons discussed above, the plaintiff's motion to compel
> arbitration
> against the Yacht Owners and the Underwriters is DENIED and the motion to
> compel
> arbitration against Tencara is GRANTED. Tencara is directed to arbitrate
> its
> claims with ABS pursuant to the arbitration clause in the Request for
> Class
> agreement. The Clerk is directed to close this case.
>
> SO ORDERED.
> Dated: May 26, 1998
>
> New York, New York
>
> Harold Baer, Jr.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 1998

(Argued: January 25, 1999 Decided: March 17, 1999)

Docket No. 98-7823 (L), 98-7893 (XAP)

AMERICAN BUREAU OF SHIPPING,

Plaintiff-Appellant-Cross-Appellee,

v.

TENCARA SHIPYARD S.P.A.,

Defendant-Appellee-Cross-Appellant,

SOCIETE JET FLINT, S.A. *et al.*,

Defendants-Appellees.

Before: NEWMAN, WALKER, and CALABRESI, *Circuit Judges.*

Appeal from a judgment in the United States District Court for the Southern District of New York (Harold Baer, Jr., *District Judge*) granting plaintiff's motion to compel arbitration against defendant Tencara Shipyard S.P.A. and denying plaintiff's motion with respect to the other defendants.

Affirmed in part, reversed in part, and remanded.

ROBERT A. MILANA, Kirlin, Campell & Keating, New York, NY (Michael D. Wilson & Richard H. Brown, Jr., on the brief) for *Plaintiff-Appellant-Cross-Appellee.*

TULIO R. PRIETO, Cardillo & Corbett, New York, NY, for *Defendant-Appellee-Cross-Appellant.*

JOSEPH G. GRASSO, Thacher Proffit & Wood, New York, NY, for *Defendants-Appellants.*

CALABRESI, *Circuit Judge:*

Plaintiff-Appellant-Cross-Appellee American Bureau of Shipping ("ABS") appeals from a judgment entered on May 26, 1998, in the United States District Court for the Southern District of New York (Harold Baer, Jr., *Judge*). Defendant-Appellee-Cross-Appellant Tencara Shipyard S.P.A. ("Tencara") cross-appeals from the same judgment. The district court granted ABS's motion to compel arbitration against Tencara but denied the same motion against the defendant owners and underwriters of the racing yacht "Tag Heuer." We agree with the district court's holding that Tencara is bound to arbitrate its claims against ABS. But we disagree with the court's conclusion that the yacht owners and underwriters are not required to arbitrate with ABS. Accordingly, we affirm in part, reverse in part, and remand for further proceedings.

BACKGROUND

In 1992, Titouan Lamazou and a group of investors (the "Owners") entered into a construction contract with Tencara-an Italian shipyard-to build a racing yacht that would eventually be named the "Tag Heuer." The Owners wanted a ship that could "circumnavigate the globe is less than 80 days, in competition for the Jules Verne Trophy." The construction contract between Tencara and the Owners specified that (1) the Owners would be solely responsible for registering the vessel under the French flag, (2) the Owners would provide all necessary assistance to Tencara to ensure that the yacht met with the approval of the French authorities, and (3) the ship would be "classed" according "[t]o the quality standards and norms permitting approval of . . . the American Bureau of Shipping, Genoa Office."

"Classification" is a term of art in maritime contract law. It refers to the process by which a ship is inspected to make sure it is seaworthy and complies with various safety regulations. "Contracts for vessel certification and classification are unique to the realm of admiralty; these inspections and resulting certificates are required either legally or practically before a shipowner may ply navigable waters." *Sundance Cruises Corp. v. American Bureau of Shipping*, 7 F.3d 1077, 1081 (2d Cir. 1993).

To obtain a ship classification, one goes to a classification society. ABS is one of the world's leading classification societies. As we have stated:

A classification society such as ABS develops rules, guides, standards, and other criteria for the design and construction of ships. When requested, a society reviews the design and surveys a ship before, during, and after construction to verify compliance with the relevant international safety conventions and applicable rules of the classification society.

Id. at 1078.

Vessel classifications provide two major benefits for shipowners. First, insurance is much less expensive for classed ships than for non-classed ships. Second, many governments-the French authorities in this case--require a vessel classification before they will allow a craft to sail under their national flag.

To obtain an ABS classification for the "Tag Heuer," Tencara entered into a contract with ABS in March 1992 (the "Request for Class Agreement"). This agreement specified that all disputes arising thereunder were to be arbitrated in New York. The Owners received a copy of the Request for Class Agreement from Tencara in May 1992. The coverage that the Owners obtained on the "Tag Heuer" from a variety of insurers (the "Underwriters") was premised on the existence of a valid classification. While the yacht was under construction throughout 1992, however, the Owners had only limited contact with ABS, and Tencara handled virtually all matters related to shipbuilding and classification.

In February 1993, the yacht was completed and delivered by Tencara to the Owners. At that time, ABS delivered an Interim Certificate of Classification ("ICC") to Tencara pursuant to the Request for Class Agreement. Tencara, in turn, gave the ICC to the Owners. The ICC explicitly incorporated by reference the "terms and conditions" of the Request for Class Agreement, including that agreement's arbitration clause.

A few months after the "Tag Heuer" was delivered to the Owners, the yacht suffered serious hull damage during a cruise to Venice. A survey indicated that the craft's damage had been the product of a defective design and of poor construction. As a result, the Underwriters indemnified the Owners pursuant to their insurance policies. Tencara subsequently sued ABS in Italy, while the Owners and the Underwriters each filed independent claims against ABS in France.

ABS then brought this action, seeking to compel Tencara, the Owners, and the Underwriters to arbitrate their claims pursuant to the Request for Class Agreement, both in itself and as it was incorporated in the ICC. The district court held that Tencara was required to arbitrate with ABS, because Tencara was acting on its own behalf in signing the Request for Class Agreement rather than as an agent of a disclosed principal--the Owners. The court, however, rejected ABS's argument that the Owners and the Underwriters were bound to arbitrate with ABS due to the Owners' acceptance of the ICC from ABS. Specifically, the district court held (1) that acceptance of the ICC did not give rise to a contract between the Owners and ABS, and (2) that the Owners were not estopped from denying the obligations of the ICC, as any benefits that they had received from the ICC were only "indirect."[1]

DISCUSSION

Subject-matter jurisdiction in this suit is grounded in admiralty. *See* 28 U.S.C. 1333 (1994).[2] We review the district court's conclusion as to the existence of an arbitration agreement for clear error. *See Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 845 (2d Cir. 1987) (stating that the district court's determination that there was an arbitration agreement is a factual finding and citing Fed. R. Civ. P. 52(a), which enunciates the "clear error" standard of review for factual findings, though legal rulings concerning which entities are bound are reviewed *de novo*).

Our first task is to determine whether the Owners of the "Tag Heuer" can be bound to arbitrate with ABS even though they never signed the arbitration agreement. We have stated that non-signatories may be bound by arbitration agreements entered into by others. *See Thomson-CSF, S.A. v. American Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995). This can occur pursuant to five different theories: (1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; and (5) estoppel. *See id.* Because it proves to be sufficient, we focus exclusively on the estoppel theory.[3]

As an initial matter, the Owners assert that--since they were never in privity with ABS--we lack personal jurisdiction over

them and cannot consider ABS's estoppel argument. This contention is without merit. It is well-settled that federal courts applying New York law have personal jurisdiction over parties that agree to arbitrate their disputes in New York. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Lecopulos*, 553 F.2d 842, 844 (2d Cir. 1977). The Owners construe this to mean that personal jurisdiction exists only when there is an express arbitration agreement between the parties. But if the Owners are estopped from denying their obligations under the arbitration agreement between Tencara and ABS, it follows that they are also estopped from asserting a lack of personal jurisdiction based on that agreement. There is no good reason to read the equitable theory of estoppel to allow the defense of "no personal jurisdiction" while barring the defense of "no duty to arbitrate." With the owners estopped from denying personal jurisdiction, the law regards such jurisdiction as established in litigation between these parties.

We therefore turn to the merits of ABS's estoppel argument. A party is estopped from denying its obligation to arbitrate when it receives a "direct benefit" from a contract containing an arbitration clause. *See Thomson-CSF*, 64 F.3d at 778-79. ABS argues that the Owners received several direct benefits from the ICC, which incorporated the Request for Class Agreement's arbitration clause by reference. We agree with ABS that the Owners received such benefits, including (1) significantly lower insurance rates on the "Tag Heuer," and (2) the ability to sail under the French flag. In reaching the conclusion that the Owners had only received an indirect benefit from the ICC, the district court relied heavily on the erroneous assumption that it was Tencara's rather than the Owners' responsibility to register the vessel under the French flag. Whatever the situation might have been under the district court's incorrect assumption, it is patent that on the actual facts the Owners received direct benefits from the ICC. Without the ICC, registration would have been practically impossible. The Owners are hence required to arbitrate their claims against ABS.

We next confront the issue of whether the yacht's Underwriters can also be compelled to arbitrate with ABS. It is clearly established that "an insurer-subrogee stands in the shoes of its insured." *See Gibbs v. Hawaiian Eugenia Corp.*, 966 F.2d 101, 106 (2d Cir. 1992). Accordingly, ABS's motion to compel arbitration against the insured Owners is equally valid against the insurer Underwriters, and we therefore hold that the Underwriters of the "Tag Heuer" must also submit to arbitration with ABS.(4)

Finally, we address the cross-appeal of Tencara. Tencara's position is that it was acting solely as the Owners' agent when it signed the Request for Class Agreement, and that, as the agent of a disclosed principal, it cannot be bound by that agreement's arbitration clause. *See* Restatement (Second) of Agency 320 (1958). We review a determination of an agency relationship *de novo*. *See Karavos Compania Naviera S.A. v. Atlantica Export Corp.*, 588 F.2d 1, 7-9 (2d Cir. 1978). There is no merit in Tencara's argument, which is based on the mistaken notion that a party must be either solely a principal or solely an agent. *See* Restatement (Second) of Agency 328 cmt. b ("In many cases the agent is a party to the contract made by him on behalf of a disclosed principal and, as such, is responsible for its performance."). The shipyard clearly acted, at least in part, on its own behalf when it contracted with ABS for classification services. It itself derived the benefit of fulfilling its ship construction contract with the Owners by hiring ABS in the Request for Class Agreement. And the record shows no exercise of control by the Owners over Tencara sufficient to negate Tencara's role as, at least, one of the principals. As a result, we affirm the district court's conclusion that Tencara must arbitrate its claims with ABS.

The judgment of the district court is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

1. Because, in the court's view, the Underwriters' obligations depended on the existence of Owner obligations, this holding also freed the Underwriters from any duty to arbitrate.

2. The district court found jurisdiction on the basis of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *see* 9 U.S.C. 201, 203 (Supp. 1998), since "[t]he defendants all reside in Italy, France, or Great Britain," all signatories to the Convention. In view of the presence in the suit of various Lloyd's of London syndicates, and assuming *arguendo* that residence in a signatory state is necessary for jurisdiction to lie, that basis of jurisdiction may be problematic as to some defendants. *Cf. E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co.*, 160 F.3d 925, 928-29 (2d Cir. 1998) (describing the structure of Lloyd's and pointing out that syndicates are comprised of thousands of individual underwriters whose identity (and residence) is not disclosed). But since jurisdiction was also claimed, and undoubtedly exists, in admiralty as to all the parties, we need not consider further the perplexities engendered by the presence of the Lloyd's syndicates. *See Advani Enter., Inc. v. Underwriters at Lloyds*, 140 F.3d 157, 161 (2d Cir. 1998) (permitting suit to proceed in admiralty where unknown citizenships of the Lloyd's Underwriters placed diversity jurisdiction in doubt).

3. Accordingly, we express no view on the question of whether the Owners and ABS also came into privity upon the Owners' acceptance of the ICC.

4. The Underwriters counter that the French court hearing their suit against ABS will not recognize the arbitration of the Underwriters' claims because "[u]nder French law, Underwriters are entitled to pursue these claims whether or not they have obtained a subrogation agreement from the Owners." We express no view as to the possible effect under French law of this judgment or of a subsequent arbitration award. Under American law, the Underwriters are clearly required to arbitrate, and that is the only issue before us today.

> AMERICAN BUREAU OF SHIPPING, Plaintiff, v. SOCIETE JET FLINT, S.A., et. al., Defendants.
>
> 97 Civ. 3570 (HB)
>
>
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>
> UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK
>
> 1998 U.S. Dist. LEXIS 7920
>
> May 26, 1998, Decided
>
> May 27, 1998, Filed
>
> DISPOSITION:
> [*1] Plaintiff's motion to compel arbitration against defendants GRANTED in part and DENIED in part.
>
> CORE TERMS: arbitration clause, arbitrate, vessel, non-signatory, certificate, classification, underwriters, issuance, arbitration agreement, arbitration, estoppel, incorporation, hull, sail, bind, contractual relationship, compel arbitration, personal jurisdiction, navigable waters, contractual liability, favoring arbitration, right to arbitrate, indirect benefit, federal policy, gave rise, inspector, compelled, signatory, formally, shipper
>
> COUNSEL:
> For AMERICAN BUREAU OF SHIPPING, plaintiff: Robert A. Milana, Kirlin, Campbell & Keating, New York, NY.
>
> JUDGES:
> Harold Baer, Jr., U.S.D.J.
>
> OPINIONBY:
> Harold Baer, Jr.
>
> OPINION:
>
> OPINION AND ORDER

>
> Hon. HAROLD BAER JR., District Judge:
>
> Plaintiff American Bureau of Shipping ("ABS") moves to compel arbitration against defendants Tencara Shipyard S.p.A. ("Tencara"), Societe Jet Flint ("Jet Flint"), Copropriete Jules Verne, all of the individual shareholders of Jules Verne and the hull underwriters of the yacht TAG HEUER ("Underwriters"). For the foregoing reasons, the plaintiff's motion is GRANTED in part and DENIED in part.
>
> I. Discussion
>
> In 1991, a French citizen Titouan Lamazou entered into discussions with Tencara, a shipyard in Italy, for the construction of a sailing vessel named TAG HEUER designed to "circumnavigate the globe in less than 80 days, in competition for the Jules Verne Trophy." Lamazou Decl. P 2. The next year, a co-proprietorship, Jules Verne, was formed for purposes of owning the TAG HEUER. Lamazou Decl. P 3. The shareholders of the co-proprietorship are [*2] Titouan Lamazou Promotions, Jet Flint and 121 individuals of French Nationality (together the "Yacht Owners").
>
> A contract between the Yacht Owners and Tencara was finalized on January 31,
>
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> 1998 U.S. Dist. LEXIS 7920, *2
>
> 1992. Lamazou Decl. P 7. Among other things, the contract required that the yacht be constructed in accordance with "the standards of quality acceptable to, and to be approved by, the Genoa office of ABS and the French authorities." Lamazou Decl. P 8. ABS is a not-for-profit maritime classification society that develops "rules, guides, standards and other criteria for the design and construction of marine vessels, the review of design and survey during and after construction to verify compliance with such rules, guides, standards or other criteria, the assignment and registration of class when such compliance

> has been
> verified, and the issuance of classification certificates." Rodgers Aff. P
> 9.
>
> Tencara and ABS executed a "Request for Classification Survey and
> Agreement
> ("Request for Class agreement") dated March 31, 1992. Lamazou Decl. P 14.
> Approximately one month later, on April 30, 1992, the Yacht Owners asked
> Tencara
> to send them a copy of this agreement, which Tencara mailed four days
> later.
> [*3] Le Villain Aff. P 7. The Request for Class agreement contains an
> arbitration clause requiring all disputes to be arbitrated in New York in
> accordance with the Rules of the Society of Maritime Arbitrators, Inc.
> Rodgers
> Aff. P 16. Further, according to the plaintiff, "ABS agreed to provide
> classification services for the benefit of the Yacht Owners," which
> included
> issuing an Interim Class Certificate ("ICC"). Rodgers Aff. PP 18, 22.
>
> The TAG HEUER was delivered to the Yacht Owners on February 21, 1993.
> At that
> time, Tencara also provided the Yacht Owners with the ICC. Lamazou Decl. P
> 19.
> The ICC explicitly incorporates by reference the "terms and conditions" of
> the
> Request for Class agreement, including the arbitration clause. Rodgers
> Aff. P
> 22. According to the plaintiff, the ICC "permitted the Yacht Owners to,
> among
> other things, obtain marine insurance, which was in fact obtained from the
> Underwriters, and sail the TAG HEUER in navigable waters pending issuance
> of a
> Final Certificate of Classification for Hull by ABS." Rodgers Aff. P 23.
> ABS
> issued a "Final Certificate of Classification for Hull" on April 29, 1993
> which
> stated that "the issuance and interpretation of the class certificate [*4]
> is
> subject to the terms and conditions of the Request for Class [agreement]."
> Rodgers Aff. P 29.
>
> Following delivery to the Yacht Owners, the TAG HEUER set sail in the
> Mediterranean. Unfortunately, while en route from France to Venice, the
> vessel
> sustained hull damage. Lamazou Decl. P 20. In response, Lamazou "requested
> that
> ABS survey the damage to the vessel on behalf of [the] owners." Lamazou
> Decl. P

> 21. ABS conducted this survey, and the Yacht Owners paid for these
> services.
> Lamazou Decl. P 21.
>
> A short time later, the Yacht Owners commenced litigation in Paris
> against
> the TAG HEUER Underwriters. Lamazou Decl. P 22. After court-appointed
> surveyors
> issued a preliminary report attributing the vessel's damage to deficient
> design
> and construction, the Underwriters partially indemnified the Yacht Owners
> pursuant to a hull insurance policy. Lamazou Decl. PP 23-24.
>
> Much to the plaintiff's dismay, a deluge of litigation soon followed.
> Tencara
> commenced an indemnity suit in Italy against ABS in December 1996. Rodgers
> Aff.
> P 4. The next month, in January 1997, the Yacht Owners initiated
> litigation
> against ABS in the French commercial court in Paris, "seeking compensation
> for
> uninsured [*5] losses arising from ABS's [alleged] negligence in
> connection
> with its oversight of design and construction of the vessel." Lamazou
> Decl. P
> 24. Later that year, in May, the TAG HEUER Underwriters also commenced an
> action
> in France against ABS based on the subrogated interests of the Yacht
> Owners.
>
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>
> Rodgers Aff. P 6. In the instant case, ABS seeks to compel arbitration of
> all
> issues in the three separate actions.
>
> II. Discussion
>
> The plaintiff seeks to compel arbitration pursuant to the Federal
> Arbitration
> Act ("FAA") and the Convention on the Recognition and Enforcement of
> Foreign
> Arbitral Awards (the "Convention"). ABS is a resident of the United
> States. The
> defendants all reside in either Italy, France or Great Britain. All of
> these
> countries are signatories to the Convention. Consequently, @ 203 of the
> Convention confers subject matter jurisdiction in this matter. n1 9 U.S.C.

> @
> 203.
>
> ----------Footnotes----------
> ---
>
> n1 Although all of the defendants have commenced actions in
> international
> forums, this fact does not preclude enforcement of the arbitration
> agreement, if
> found applicable. See Sumitomo Corp. v. Parakopi Compania Maritima, S.A.,
> 477 F.
> Supp. 737, 742 (S.D.N.Y. 1979). Parties to an arbitration agreement may
> not
> "circumvent an arbitration clause by commencing litigation" in foreign
> courts.
> Id. Indeed, "the federal policy favoring arbitration is even stronger in
> the
> context of international transactions." Deloitte Noraudit A/S v. Deloitte
> Haskins & Sells, U.S., 9 F.3d 1060, 1063 (2d Cir. 1993) (citation
> omission).
>
> ----------End Footnotes----------
> ---
> [*6]
>
> The FAA embodies a strong federal policy favoring arbitration. See
> Thomas
> James Associates v. Jameson, 102 F.3d 60, 65 (2d Cir. 1996). Consistent
> with
> this policy, all doubts as to the scope of issues eligible for arbitration
> must
> be resolved in favor of arbitrability. See McMahan Securities Co., L.P. v.
> Forum
> Capital Markets L.P., 35 F.3d 82, 86 (2d Cir. 1994) (citing Moses H. Cone
> Hosp.
> v. Mercury Constr. Corp., 460 U.S. 1, 24-25, 103 S. Ct. 927, 941, 74 L.
> Ed. 2d
> 765 (1983). Arbitration is preferred "unless it may be said with positive
> assurance that the arbitration clause is not susceptible of an
> interpretation
> that covers the asserted dispute." Thomas James Associates, 102 F.3d at 65
> (quoting David L. Threlkeld & Co. v. Metallgesellschaft, 923 F.2d 245, 250
> (2d
> Cir. 1991). Of course, this preference for arbitration is tempered by the
> Supreme Court's admonition that "the FAA does not require parties to
> arbitrate
> when they have not agreed" to resolve their dispute in that fashion. Volt
> Info.

> Sciences Inc. v. Board of Trustees, 489 U.S. 468, 478, 109 S. Ct. 1248,
> 1255,
> 103 L. Ed. 2d 488 (1989).
>
> Since it is well-established that arbitration [*7] is a matter of
> contract
> "a party cannot be required to submit to arbitration any dispute which
> [the
> party] has not agreed so to submit." Deloitte Noraudit A/S v. Deloitte
> Haskins &
> Sells, U.S., 9 F.3d 1060, 1064 (2d Cir. 1993) (quoting United Steelworkers
> of
> America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582, 80 S. Ct.
> 1347,
> 1353, 4 L. Ed. 2d 1409 (1960)). However, non-signatories may be bound by
> an
> arbitration agreement in five circumstances: (1) incorporation by
> reference; (2)
> assumption; (3) agency; (4) veil-piercing or alter ego; and (5) estoppel.
> See
> Thomson-CSF, S.A. v. American Arbitration Association, 64 F.3d 773, 776
> (2d Cir.
> 1995)
>
> A. Yacht Owners
>
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>
>
> The Yacht Owners did not sign the Request for Class agreement executed
> between Tencara and ABS that includes the arbitration clause underlying
> this
> action. Nonetheless, ABS articulates several theories in support of its
> argument
> that the Yacht Owners are bound to arbitrate its dispute.
>
> 1. Contractual Obligation through Issuance of Certificate
>
> First, the plaintiff argues that the issuance of a certificate such as
> the
> ICC binds both the issuer, ABS, and the party receiving the certificate,
> [*8]
> the Yacht Owners, to a contractual relationship. Essentially, ABS seeks to
> bind
> the Yacht Owners to the arbitration clause in the Request for Class
> agreement
> because the Yacht Owners were given the ICC when Tencara delivered the
> vessel to

> them on February 21, 1993. n2 It is important to note that ABS issued the
> ICC to
> Tencara, as part of its obligations under the Request for Class agreement.
> Tencara then provided the ICC to the Yacht Owners upon delivery of the
> vessel.
>
> - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - -
> - - -
>
> n2 The ICC explicitly incorporates by reference the "terms and
> conditions" of
> the Request for Class agreement, including the arbitration clause. Rodgers
> Aff.
> P 22.
>
> - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - -
> - - -
>
> The plaintiff cites two Second Circuit cases, International Ore &
> Fertilizer
> Corp. v. SGS Control, 38 F.3d 1279 (2d Cir. 1994) and Sundance Cruises
> Corp. v.
> American Bureau of Shipping, 7 F.3d 1077 (2d Cir. 1993), to support this
> proposition. Yet, the Yacht Owners correctly argue that these cases are
> inapposite. In International Ore, the Court held that issuance of [*9] a
> "
> Certificate of Readiness" by a shipper to a ship inspector gave rise to
> potential contractual liability between the shipper and the ship
> inspector.
> International Ore, 38 F.3d at 1281, 1284. Likewise, in Sundance Cruises,
> ABS
> issued statutory and classification certificates directly to the vessel
> owners
> after having been "formally retained" in a Request for Class agreement
> executed
> between ABS and the vessel owners, which gave rise to contractual
> liability.
> Sundance Cruises, 7 F.3d at 1079.
>
> Conversely, in the instant case ABS issued all classification
> certificates to
> Tencara, the shipyard, and not to the owners of the TAG HEUER. More
> importantly,
> the Yacht Owners did not formally retain ABS. Quite the opposite, the
> Request
> for Class agreement was executed between ABS and Tencara. In International
> Ore
> and Sundance Cruises, the courts found a contractual relationship solely
> between

> the party issuing the certificate and the party in direct receipt. Thus,
> these
> cases do not compel the conclusion that issuance of a certificate
> contractually
> binds both the party in direct receipt of the certificate, Tencara, as
> well as a
> third-party, the Yacht Owners, to a relationship [*10] with the issuer.
> Accordingly, I decline to find a binding arbitration agreement between ABS
> and
> the Yacht Owners simply because the certificates issued by ABS to Tencara
> were
> ultimately provided to the Yacht Owners.
>
> 2. Incorporation by Reference
>
> Second, the plaintiff erroneously argues that the Yacht Owners should
> be
> bound to the arbitration clause under the incorporation by reference
> doctrine,
>
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>
> within the Second Circuit, "[a] non-signatory may compel arbitration
> against a
> party to an arbitration agreement when that party has entered into a
> separate
> contractual relationship with the non-signatory which incorporates the
> existing
> arbitration clause." See Thomson-CSF, 64 F.3d at 777.
>
> Here, a signatory to the contract, ABS, seeks to compel a
> non-signatory, the
> Yacht Owners, to arbitrate its claims. Thus, the situation is incongruous
> from
> that envisioned in Thomson-CSF, where the Second Circuit suggests only
> that a
> non-signatory may enforce an arbitration agreement through incorporation
> by
> reference. Id. Further, the incorporation by reference doctrine is
> inapplicable
> because no "separate contractual relationship" exists between ABS and the
> Yacht
> Owners. Id. [*11] That is, there is no contract between ABS and the Yacht
> Owners that incorporates the arbitration clause in the Request for Class
> agreement.
>
> 3. Estoppel
>

> Third, the plaintiff argues that the Yacht Owners may be bound to
> arbitrate
> under the estoppel doctrine. Pursuant to this doctrine, a non-signatory is
> bound
> to honor an arbitration clause in a contract where the non-signatory
> directly
> benefits from the contract, but nonetheless seeks to avoid its
> obligations. See
> Thomson-CSF, 64 F.3d at 778. Estoppel, however, is not appropriate where a
> non-signatory derives only an indirect benefit from the contract. Id. at
> 779.
>
> While a closer question, I am unable to conclude that the Yacht Owners,
> as
> urged by ABS, derived a direct benefit from the Request for Class
> agreement and
> the ICC, at least to the degree needed to compel the Yacht Owners, a
> non-signatory, to arbitrate all disputes with ABS. The plaintiff argues
> that the
> Yacht Owners benefitted from the ICC, which flowed from the Request for
> Class
> agreement, because the ICC permitted the Yacht Owners to "obtain marine
> insurance . . . and sail the TAG HEUER in navigable waters pending
> issuance of a
> Final Certificate of Classification [*12] for Hull by ABS." Rodgers Aff.
> P 23.
> Essentially, the plaintiff contends that the Yacht Owners directly
> benefitted
> from the Request for Class agreement because without the ICC the TAG HEUER
> could
> not sail. In the Request for Class agreement executed between ABS and
> Tencara,
> the plaintiff agreed to provide classification services for the TAG HEUER,
> including issuance of an ICC.
>
> Notwithstanding this contention, I conclude for the reasons stated
> below that
> the benefit of sailing the TAG HEUER is more logically a direct
> consequence of
> Tencara satisfying its contract with the Yacht Owners. It was Tencara's
> contractual obligation to construct a vessel that could sail in navigable
> waters
> and obtain the necessary approval of French authorities.
>
> Quite obviously, the Yacht Owners could not have sailed the TAG HEUER
> without
> obtaining the requisite classification certificates from ABS, which were
> required before the French authorities would approve the vessel.
> Ultimately,

> however, it was Tencara's contractual responsibility to the Yacht Owners
> to
> obtain ABS certification, and more significantly, approval from the French
> authorities. While the classification of the TAG HEUER was important, it
> [*13]
> paled as compared to the complex process of constructing and registering
> the
> vessel under the French Flag, for which Tencara was primarily responsible.
> Any
> benefit flowing to the Yacht Owners from the Request for Class agreement
> is,
> therefore, at best indirect. Consequently, the estoppel doctrine is not
> available to bind the Yacht Owners to the arbitration agreement. n3 See
>
> PAGE 698
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>
> Thomson-CSF, 64 F.3d at 779 (estoppel not available where non-signatory
> derived
> only an indirect benefit from the contract).
>
> ----------Footnotes----------
>
> n3 ABS also argues that the Yacht Owners should be compelled to
> arbitrate
> because they are third-party beneficiaries of the Request for Class
> agreement
> between the plaintiff and Tencara. Even if this were true, I am precluded
> from
> considering this argument because the only basis of personal jurisdiction
> over
> the Yacht Owner's in New York is the arbitration clause. See Atlanta
> Shipping
> Corp. v. Cheswick-Flanders & Co., 463 F. Supp. 614, 618 (S.D.N.Y. 1978)
> (party
> that agrees to arbitrate in New York consents to personal jurisdiction).
> Since I
> conclude that the Yacht Owners are not bound by that arbitration clause,
> there
> is no personal jurisdiction, and I cannot pass on the merits of any other
> argument.
>
> ----------End Footnotes----------
> [*14]
>
> To reiterate, I find that the Yacht Owners were not a party to the
> Request

> for Class agreement between Tencara and ABS. I also conclude that the
> Yacht
> Owners cannot be compelled to arbitrate as a non-signatory pursuant to
> either
> the incorporation by reference or estoppel doctrines. Accordingly, the
> motion to
> compel the Yacht Owners to arbitrate is denied.
>
> B. Underwriters
>
> ABS argues that it is entitled to arbitrate any claim alleged by the
> Underwriters pursuant to its alleged right to arbitrate any dispute with
> the
> Yacht Owners. It is true that "since an insurer-subrogee stands in the
> shoes of
> its insured, any defenses that are valid against the insured are also
> applicable
> against the insurer." See Gibbs v. Hawaiian Eugenia Corp., 966 F.2d 101,
> 106 (2d
> Cir. 1992). Nonetheless, I have determined that ABS has no right to
> arbitrate
> any dispute with the Yacht Owners. Therefore, the plaintiff may not compel
> the
> Underwriters to arbitrate the claims advanced against ABS in the French
> commercial court. See Continental Ins. Co. v. Daewoo Shipbuilding & Heavy
> Machinery LTD, 1987 U.S. Dist. LEXIS 7523, at *5 (S.D.N.Y. 1987) (ABS
> could not
> bind subrogee insurance company to arbitration [*15] agreement where
> subrogor
> itself was not bound).
>
> C. Tencara
>
> The claims advanced by Tencara against ABS, however, are subject to the
> arbitration clause in the Request for Class agreement. Clause fifteen of
> that
> agreement states that "any and all differences and disputes . . . shall be
> put
> to arbitration in the City of New York pursuant to the laws relating to
> arbitration there in force." Rodgers Aff., Ex. 8 at P 15. Tencara seeks to
> evade
> the plain meaning of this clause by arguing that when it signed the
> Request for
> Classification it acted as an agent for the Yacht Owners, who it contends
> was a
> fully-disclosed principal.
>
> This argument is without merit. Tencara offers no proof that suggests
> it

> acted merely as an agent. Rather, the primary negotiator for the Yacht
> Owners,
> Lamazou, declares that he "did not appoint Tencara to act as the owners'
> agent
> for purposes of contracting with ABS or for any other purposes." Lamazou
> Decl. P
>
> PAGE 699
>
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>
> 11. Moreover, there is no evidence that Tencara communicated to ABS that
> it
> acted as the Yacht Owner's agent when executing the Request for Class
> agreement.
> Quite to the contrary, the Request for Class agreement explicitly states
> that
> "all provisions hereof [*16] are for the sole and exclusive benefit of
> the
> parties hereto." Rodgers Aff., Ex. 8 at P 12. In other words, the
> agreement by
> its own terms limits its application to ABS and Tencara, with ABS
> responsible
> for certifying the design and the construction of the TAG HEUER.
>
> Given the absence of an agency relationship, Tencara is bound by the
> arbitration clause contained in the agreement it signed with the
> plaintiff.
> Accordingly, all claims between Tencara and ABS must be arbitrated
> forthwith in
> New York.
>
> III. Conclusion
>
> For the reasons discussed above, the plaintiff's motion to compel
> arbitration
> against the Yacht Owners and the Underwriters is DENIED and the motion to
> compel
> arbitration against Tencara is GRANTED. Tencara is directed to arbitrate
> its
> claims with ABS pursuant to the arbitration clause in the Request for
> Class
> agreement. The Clerk is directed to close this case.
>
> SO ORDERED.
> Dated: May 26, 1998
>
> New York, New York
>
> Harold Baer, Jr.