

# Featured Article

## Expanding the Reach of Arbitration Agreements: A Pennsylvania Federal Court Opinion Applies Principles of Agency and Contract Law to Require a Subsidiary-Reinsurer to Arbitrate Under Parent's Agreement

Article contributed by

John R. Vales, Riker, Danzig, Scherer, Hyland & Perretti, LLP

### Introduction

When sophisticated commercial entities enter into contracts with each other, they often choose to include an arbitration clause in the contract providing for the resolution of all disputes arising from the contract in arbitration. In such cases, it should come as no surprise when courts compel *parties to the contract* to resolve disputes between them through arbitration. Indeed, the U.S. Supreme Court “has long recognized and enforced a “liberal federal policy favoring arbitration agreements.”<sup>1</sup> This liberal policy arises from the Federal Arbitration Act (FAA)<sup>2</sup> and “is at bottom a policy guaranteeing the enforcement of private contractual arrangements.”<sup>3</sup>

Because arbitration is fundamentally a creature of contract,<sup>4</sup> one might assume that its reach only extends to those parties that have signed a contract containing an arbitration clause, *i.e.*, the signatories. In fact, however, courts have applied principles of agency and contract law to extend the reach of arbitration agreements to *non-signatories*.

A recent decision by the U.S. District Court for the Eastern District of Pennsylvania in *Fencourt Reinsurance Co., Ltd. v. ITT Industries, Inc.*, No. 06-CV-4786, 2008 BL 141024 (E.D. Pa. June 20, 2008), illustrates this point well. In *Fencourt*, the court compelled Fencourt Reinsurance Company, Ltd. (Fencourt) – a wholly-owned subsidiary of Hartford Financial Services Group, Inc. (Hartford) – to arbitrate its claims against ITT Industries, Inc. (ITT) under the arbitration clause of a contract to which Hartford and ITT, but not Fencourt, were signatories. Although Fencourt never signed the contract containing the arbitration clause, the court concluded that principles of agency and contract law bound Fencourt to arbitrate its claims pursuant to the contract.

This article will explore the court's reasoning for extending the reach of the arbitration agreement at issue to Fencourt, a wholly-owned subsidiary of a signatory to the agreement.

### The Nature of the Dispute

In October 2006, Fencourt filed suit in the U.S. District Court for the Eastern District of Pennsylvania against ITT seeking indemnification for approximately \$85.5 million in reinsurance obligations ceded by Century Indemnity Company (Century) to Fencourt pursuant to a captive reinsurance program known as the 'Domestic Casualty Program' (DCP).<sup>5</sup>

Under the DCP, from 1978 to 1992, Century issued general liability insurance policies to ITT's predecessor, ITT Corporation (ITT Corp.).<sup>6</sup> Century, in turn, reinsured these policies through Fencourt, which at the time existed as a subsidiary of ITT Corp.<sup>7</sup>

To induce both Fencourt and Century to participate in the DCP, ITT Corp. allegedly promised to indemnify and hold Fencourt harmless against any net losses incurred by Fencourt as a result of its reinsurance obligations to Century.<sup>8</sup> Although no written contract memorialized this alleged indemnification agreement, Fencourt asserted that a contract was formed by a series of verbal agreements and through a course of conduct.<sup>9</sup>

In 1995, ITT Corp. split into three unaffiliated public companies: (1) ITT; (2) Hartford; and (3) Starwood Hotels & Resorts Worldwide, Inc. (Starwood).<sup>10</sup> The parties accomplished this corporate restructuring through a written 'Distribution Agreement' among ITT Corp., Hartford, and Starwood (collectively, the Signatories).<sup>11</sup> Pursuant to the Distribution Agreement, ITT Corp. transferred Fencourt's stock to Hartford, which previously had no ownership interest in Fencourt and played no role in managing Fencourt's involvement in the DCP.<sup>12</sup>

The Distribution Agreement did not directly address the alleged indemnification agreement between Fencourt and ITT Corp. pertaining to the DCP.<sup>13</sup> However, the agreement expressed an intent for the Signatories to "allocate and assign responsibilities for those liabilities in respect of [ITT Corp., Hartford, and Starwood] on the Distribution Date . . . and those liabilities in respect of other businesses and activities of *ITT [Corp.] and its former subsidiaries*,"<sup>14</sup> a universe of subsidiaries that included Fencourt.<sup>15</sup>

Finally, Article VI of the Distribution Agreement set forth a broad arbitration clause, which provided in relevant part:

In the event of a controversy, dispute or claim arising out of, in connection with, or in relation to the interpretation, performance . . . or breach of this Agreement or *otherwise arising out of, or in any way related to this Agreement* . . . such Agreement Dispute shall be determined, at the request of any relevant party, by arbitration . . . .<sup>16</sup>

According to Fencourt, in the nine years following the effective date of the Distribution Agreement, Fencourt maintained sufficient reserves to cover DCP-related losses ceded by Century, such that Fencourt had no occasion to seek indemnification from ITT.<sup>17</sup> However, in December 2004, Century made a demand for approximately \$85.5 million in reinsurance from Fencourt, causing Fencourt to seek indemnification from ITT.<sup>18</sup> When ITT refused to indemnify Fencourt for these reinsurance obligations, Fencourt filed its complaint.<sup>19</sup>

#### *The Motion Before the Court*

More than two months after Fencourt filed its complaint, ITT filed a motion to dismiss the complaint pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure,<sup>20</sup> or, in the alternative, to stay the proceedings pending arbitration.<sup>21</sup> ITT sought this relief on grounds that Fencourt's claims for indemnification against ITT fell subject to mandatory arbitration under the arbitration clause of the Distribution Agreement.<sup>22</sup> On the same date, ITT filed a 'Notice of Intention to Arbitrate' against Fencourt and Hartford with the American Arbitration Association.<sup>23</sup>

After ITT and Fencourt submitted briefs to the court on ITT's motion, the parties filed a consent order with the court staying the proceedings and moved forward with arbitration proceedings before the former Chief Judge of the U.S. Court of Appeals for the Third Circuit, Honorable John J. Gibbons.<sup>24</sup> In February 2008, however, at the request of both parties, the court ordered the case taken out of suspense.<sup>25</sup> Soon after, in May 2008, the court held oral argument on ITT's motion.<sup>26</sup>

#### *Summary of the Parties' Arguments*

##### A. *ITT*

In seeking a dismissal or stay of the federal court proceeding, ITT asserted that the Distribution Agreement superseded all previous agreements between the parties – including the alleged indemnification agreement between ITT Corp. and Fencourt – and that the broad arbitration clause of the Distribution Agreement therefore bound Fencourt to pursue its claims through arbitration.<sup>27</sup>

According to ITT, Fencourt's status as a non-signatory to the Distribution Agreement did not alter this conclusion since ITT could bind Fencourt to the Distribution Agreement's arbitration clause under certain principles of contract law that courts have previously applied to bind non-signatories to arbitrate, *i.e.*, third-party beneficiary and equitable estoppel principles.<sup>28</sup>

In support of its third-party beneficiary contention, ITT asserted that an indemnification provision of the Distribution Agreement requiring ITT to indemnify Hartford and "its affiliates" – a group of companies that included Fencourt – made Fencourt a third-party beneficiary of the agreement.<sup>29</sup>

In support of its equitable estoppel contention, ITT asserted that (i) Fencourt's acceptance of \$84 million in promissory notes from ITT in connection with the Distribution Agreement and (ii) Fencourt's reliance on the Distribution Agreement to establish ITT's liability for predecessor ITT Corp.'s alleged obligations estopped Fencourt from contesting the application of the Distribution Agreement's arbitration clause.<sup>30</sup>

#### *B. Fencourt*

For its part, Fencourt argued that its claims did not fall subject to the arbitration clause of the Distribution Agreement since it was suing under the alleged indemnification agreement between ITT Corp. and Fencourt, not under the subsequent Distribution Agreement.<sup>31</sup> Fencourt further contended that the Distribution Agreement did not supersede the alleged indemnification agreement in any respect.<sup>32</sup>

With regard to ITT's third-party beneficiary argument, Fencourt disputed that it enjoyed third-party beneficiary status under the Distribution Agreement, but also asserted that it mattered not whether it held such status since it was suing under the alleged indemnification agreement, not the Distribution Agreement.<sup>33</sup>

As respects ITT's equitable estoppel argument, Fencourt asserted that its acceptance of promissory notes from ITT did not estop Fencourt from contesting the application of the Distribution Agreement's arbitration clause to it, since such notes purportedly represented the repayment of loans taken by ITT Corp., rather than the conferral of a "direct benefit" upon Fencourt.<sup>34</sup> Fencourt also argued that the estoppel argument missed the mark since it was suing pursuant to the alleged indemnification agreement, which pre-dated the Distribution Agreement.<sup>35</sup>

#### *The Court's Reasoning for Compelling Arbitration*

After outlining the parties' respective positions, the court ordered a stay of litigation pending arbitration, but not simply for those reasons advocated by ITT. Indeed, the court concluded that the terms of the Distribution Agreement and agency principles – in addition to equitable estoppel and third-party beneficiary principles – bound Fencourt, a non-signatory, to arbitrate under its parent's agreement.<sup>36</sup>

#### *A. Non-Signatory Arbitration in the Parent-Subsidiary Context*

As a precursor to its analysis, however, the court reviewed the landscape of the existing law concerning non-signatory arbitration in the parent-subsidiary context.<sup>37</sup> In particular, the court focused upon opinions by the U.S. Court of Appeals for the Third Circuit in *E.I. DuPont de Nemours & Co. v. Rhodia Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187 (3d Cir. 2001), and *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith*, 7 F.3d 1110 (3d Cir. 1993).<sup>38</sup>

In *DuPont*, the court rejected an application to compel a non-signatory parent corporation, DuPont, to arbitrate under an agreement entered into by a DuPont subsidiary.<sup>39</sup> Although the *DuPont* court denied the requested relief, the court recognized that "[t]raditional principles of contract and agency law" – including (1) agency, (2) equitable estoppel, and (3) third-party beneficiary principles – may extend the reach of an arbitration clause to non-signatories.<sup>40</sup>

The *Fencourt* matter, of course, involved the reverse issue of the *DuPont* matter – whether a court should bind a subsidiary to arbitrate under its parent’s arbitration agreement. Noting that the Third Circuit had not addressed this precise issue, the *Fencourt* court observed that the Third Circuit’s opinion in *Pritzker* was “particularly instructive.”<sup>41</sup>

In *Pritzker*, the court, *inter alia*, compelled arbitration of certain ERISA claims brought against a financial consultant under an arbitration agreement entered into by her employer, a brokerage firm.<sup>42</sup> Applying agency principles, the court observed that where “a principal is bound under the terms of a valid arbitration clause, its agents, employees, and representatives are also covered under the terms of such agreements.”<sup>43</sup> Adopting this same logic, the court also compelled a corporate sister of the signatory brokerage firm to arbitrate.<sup>44</sup>

The *Pritzker* opinion thus pointed to at least one rationale for compelling a subsidiary company to arbitrate under its parent’s arbitration agreement. Specifically, should a court find that a subsidiary company is an *agent* of its parent company – just as an employee is an agent of her employer – agency principles may bind the subsidiary company to arbitrate. Indeed, in *Fencourt*, the court applied this very rationale.

#### B. *The Court’s Application of Agency and Contract Principles to Compel Arbitration*

In *Fencourt*, the court identified three principal reasons for its conclusion that Fencourt must arbitrate: (1) the terms of the Distribution Agreement and agency principles; (2) equitable estoppel; and (3) third-party beneficiary principles.<sup>45</sup>

##### 1. *The Terms of the Distribution Agreement and Agency Principles*

The terms of the Distribution Agreement proved central to the court’s order compelling Fencourt to arbitrate. Indeed, upon review of the Agreement’s terms, the court concluded that the parties intended the Agreement to govern the financial relationships (i) between and among ITT Corp. and its subsidiaries before the merger, and (ii) between and among the entities formed thereafter.<sup>46</sup> Among the terms was a recital within the Distribution Agreement stating the Agreement’s intent to “allocate and assign responsibilities for those liabilities in respect of [ITT Corp., Hartford, and Starwood] on the Distribution Date . . . and those liabilities in respect of other businesses and activities of *ITT [Corp.]* and *its former subsidiaries* [including Fencourt] . . . .”<sup>47</sup>

Since Fencourt’s indemnification claims necessarily required a determination of financial responsibility between and among Fencourt, ITT Corp., and ITT for Fencourt’s reinsurance liabilities, the court concluded that the Distribution Agreement applied to Fencourt’s claims and that Fencourt must therefore arbitrate its claims against ITT pursuant to the broad arbitration clause of the Agreement.<sup>48</sup>

Further strengthening this conclusion, the court determined that Fencourt existed at all times relevant as a wholly-owned subsidiary and *agent* of signatories to the Distribution Agreement, thus binding Fencourt to the Agreement under recognized common law principles for compelling a non-signatory to arbitrate.<sup>49</sup>

In concluding that Fencourt existed as an agent of signatories to the Distribution Agreement, the court did not identify a specific bright line test for determining agency status in the context of non-signatory arbitration. Rather, the court rested its determination on factual findings that Fencourt was “*under the control of*” ITT Corp. prior to the execution of the Distribution Agreement and “*under the control of*” Hartford thereafter.<sup>50</sup> Additionally, the court placed special emphasis on its finding that ITT Corp. had the power to bind Fencourt to the Distribution Agreement, and indeed did so under the Agreement.<sup>51</sup>

Thus, under the court’s reasoning, if a non-signatory falls “under the control of” a signatory to an

agreement containing an arbitration clause and the same agreement purports to bind the non-signatory, a court may extend the reach of the arbitration agreement to the non-signatory under traditional principles of agency law. The Third Circuit applied similar reasoning in *Pritzker, supra*, and the court expressly followed this reasoning in *Fencourt*.<sup>52</sup>

## 2. *Equitable Estoppel*

As noted above, in *Fencourt*, the court also found that principles of equitable estoppel bound Fencourt to the Distribution Agreement's arbitration clause. Under the doctrine of equitable estoppel, courts may bind non-signatories to an arbitration clause when the "non-signatory knowingly exploits the agreement containing the arbitration clause despite having never signed the agreement."<sup>53</sup> In short, equitable estoppel principles preclude a non-signatory from denying the application of an arbitration clause when the non-signatory has sought to benefit from other provisions of the same agreement.<sup>54</sup>

Reviewing the parties' correspondence subsequent to the Distribution Agreement, the court found that Fencourt had in fact sought to benefit from certain provisions of the Distribution Agreement.<sup>55</sup> In particular, the court focused on correspondence preceding Fencourt's commencement of the federal court action, wherein Fencourt's parent – Hartford – had invoked an indemnification provision of the Distribution Agreement in support of its demand for indemnification by ITT.<sup>56</sup>

Under the court's analysis, such explicit reliance by Hartford on the Distribution Agreement for the benefit of Fencourt estopped Fencourt from later arguing that other provisions of the Agreement, i.e., the arbitration clause, did not apply to Fencourt.<sup>57</sup> The doctrine of equitable estoppel thus provided an independent basis for the court's order compelling Fencourt to arbitrate.

## 3. *Third-Party Beneficiary*

In finding that *agency* and *equitable estoppel* principles bound Fencourt to the Distribution Agreement's arbitration clause, the court relied upon two of the five theories identified by the U.S. Court of Appeals for the Second Circuit in the seminal opinion of *Thomson-CSF, S.A. v. American Arbitration Association*, 64 F.3d 773, 776 (2d Cir. 1995), for binding non-signatories to arbitration agreements. The other three theories recognized in *Thomson-CSF* – (1) incorporation by reference, (2) assumption, and (3) veil-piercing/alter ego – did not factor into the court's analysis. However, an additional theory not addressed in *Thomson-CSF* – *intended third-party beneficiary status* – provided a third reason for the court's conclusion.<sup>58</sup>

In *DuPont, supra*, the U.S. Court of Appeals for the Third Circuit recognized that a non-signatory may be bound to an agreement's arbitration clause "where its claim [1] arises out of the underlying contract [2] to which it was an intended third-party beneficiary."<sup>59</sup> Relying upon *DuPont*, Judge Baylson concluded in *Fencourt* that third-party beneficiary principles also bound Fencourt to the Distribution Agreements' arbitration clause.

First, applying Pennsylvania law, the court concluded that Fencourt was an intended third-party beneficiary of the Distribution Agreement.<sup>60</sup> The court predicated this finding on the express terms of the Distribution Agreement designating Fencourt as an intended beneficiary of the agreement, including a provision under which ITT and Starwood agreed to indemnify Fencourt.<sup>61</sup>

Second, the court concluded that Fencourt's claims *arose* under the Distribution Agreement.<sup>62</sup> While this conclusion might appear at odds with Fencourt's claim that it was suing under an indemnification agreement predating the Distribution Agreement, the court found that it must view Fencourt's claims through the lens of the Distribution Agreement since that agreement – by the admission of both parties – governed the parties' financial relationship.<sup>63</sup>

Having found that Fencourt's claim "arose" out of an agreement to which Fencourt was an intended beneficiary, the court determined that third-party beneficiary principles also bound

Fencourt to the Distribution Agreements' arbitration clause.<sup>64</sup>

### Conclusion

The Pennsylvania federal court's opinion in *Fencourt* signals once again that traditional principles of agency and contract law may extend the reach of arbitration agreements to non-signatories. These principles include the (1) agency, (2) equitable estoppel, and (3) third-party beneficiary theories applied in *Fencourt*, but may also include (4) incorporation by reference, (5) assumption, and (6) veil-piercing/alter ego theories.

The *Fencourt* opinion should also serve as a blueprint for those seeking to compel a subsidiary company to arbitrate under a parent company's arbitration agreement. Indeed, under an aggressive reading of the court's opinion, arbitration proponents might argue that every wholly-owned subsidiary is necessarily an agent of its parent company and therefore bound by every arbitration agreement entered into by its parent. At a minimum, the court's opinion extends the reach of parent company arbitration agreements to every wholly-owned subsidiary company to which the agreement purports to bind under agency principles.

The lesson of *Fencourt* is therefore clear: parties who wish to exempt wholly-owned subsidiaries from the reach of parent company arbitration agreements should, as a matter of prudence, consider inserting language in their agreements designed to specifically accomplish this intent.

*Jack Vales is a partner in the Morristown, New Jersey office of Riker, Danzig, Scherer, Hyland & Perretti LLP. A commercial litigator, he practices in the firm's Insurance and Reinsurance Practice Group, with an emphasis on insurance, reinsurance, professional liability, and other complex commercial disputes. The views and opinions expressed in this article are the author's alone. Replies to this article are welcome.*

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<sup>1</sup> *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (quoting *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983)). In *Howsam*, the Court noted that one exception exists to the liberal policy favoring arbitration: "The question whether the parties have submitted a particular dispute to arbitration, *i.e.*, 'the question of arbitrability,' is an issue for judicial determination unless the parties clearly and unmistakably provide otherwise." *Id.* (quoting *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 649 (1986) (emphasis added)); see also *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 452-53 (2003) (concluding that arbitrators, not courts, should decide all arbitration related disputes except those pertaining to "certain gateway matters," such as [1] whether the parties have a valid arbitration agreement at all or [2] whether a concededly binding arbitration clause applies to a certain type of controversy.").

<sup>2</sup> See, e.g., 9 U.S.C. § 2 (making a written agreement to arbitrate "in any maritime transaction or a contract evidencing a transaction involving commerce . . . valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.").

<sup>3</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 617 (1985) (citing *Moses H. Cone Memorial Hospital, supra*, 460 U.S. at 24).

<sup>4</sup> See, e.g., *E.I. DuPont de Nemours & Co. v. Rhodia Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 194 (3d Cir. 2001) ("Because arbitration is a creature of contract law . . .").

<sup>5</sup> See *Fencourt Reinsurance Co., Ltd. V. ITT Industries, Inc.*, No. 06-CV-4786, 2008 BL 141024, 1-5 (E.D. Pa. June 20, 2008) (Baylson, J.); Amended Complaint, *Fencourt Reinsurance Co., Ltd. V. ITT Indus., Inc.*, No. 06-CV-4786, ¶¶ 2, 9-11 (E.D. Pa. filed May 2, 2008).

<sup>6</sup> See Amended Complaint, *supra*, ¶ 10.

<sup>7</sup> *Id.* ¶ 11.

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<sup>8</sup> *Id.* ¶¶ 12-13.

<sup>9</sup> See *Fencourt Reinsurance Co.*, *supra*, 2008 BL 141024, at 5 n.4.

<sup>10</sup> *Id.* at 2.

<sup>11</sup> *Id.* at 3.

<sup>12</sup> See Amended Complaint, *supra*, ¶¶ 20-21.

<sup>13</sup> See *Id.*; ITT's Motion to Dismiss or for a Stay Pending Arbitration, Ex. 1 ("Distribution Agreement"), *Fencourt Reinsurance Co., Ltd. v. ITT Industries, Inc.*, No. 06-CV-4786 (E.D. Pa. filed Jan. 5, 2007).

<sup>14</sup> See Distribution Agreement, *supra*, at p. 1 (emphasis added).

<sup>15</sup> See Amended Complaint, *supra*, ¶ 11.

<sup>16</sup> Distribution Agreement, *supra*, at p. 32 (emphasis added).

<sup>17</sup> See Amended Complaint, *supra*, ¶ 22.

<sup>18</sup> See *Fencourt Reinsurance Co.*, *supra*, 2008 BL 141024, at 3. In its Amended Complaint, Fencourt asserted that the \$85.5 million demand represented liabilities arising from thousands of asbestos and silica related third-party claims, the majority of which resulted from the historic manufacturing operations of two former ITT Corp. subsidiaries – Grinnel and Pennsylvania Glass Sand. See Amended Complaint, *supra*, ¶¶ 23-24.

<sup>19</sup> See *Fencourt Reinsurance Co.*, *supra*, 2008 BL 141024, at 3.

<sup>20</sup> Rule 12(b)(1) provides grounds for dismissal of a complaint due to "lack of jurisdiction over the subject matter." See Fed. R. Civ. P. 12(b)(1).

<sup>21</sup> See Memorandum of Law in Support of ITT's Motion to Dismiss or for a Stay Pending Arbitration, *Fencourt Reinsurance Co., Ltd. v. ITT Industries, Inc.*, No. 06-CV-4786 (E.D. Pa. filed Jan. 5, 2007).

<sup>22</sup> *Id.* at p. 2.

<sup>23</sup> See ITT's Motion to Dismiss or for a Stay Pending Arbitration, Ex. 5, *Fencourt Reinsurance Co., Ltd. v. ITT Indus., Inc.*, No. 06-CV-4786 (E.D. Pa. filed Jan. 5, 2007).

<sup>24</sup> See *Fencourt Reinsurance Co.*, *supra*, 2008 BL 141024, at 4, 13.

<sup>25</sup> *Id.* at 4.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 7-8.

<sup>28</sup> *Id.* at 8. In *DuPont*, *supra*, the U.S. Court of Appeals for the Third Circuit recognized that third-party beneficiary, agency/principal and equitable estoppel theories all constituted principles of agency/contract law that courts may rely upon to bind a non-signatory to an arbitration clause. See *DuPont*, *supra*, 269 F.3d at 195. As support for this conclusion, the court favorably cited a seminal opinion from the U.S. Court of Appeals for the Second Circuit in *Thomson-CSF, S.A. v. Am. Arbitration Association*, 64 F.3d 773, 776 (2d Cir. 1995), where the court recognized the following five theories for binding non-signatories to arbitration agreements: (1) incorporation by reference; (2) assumption; (3) agency; (4) veil piercing/alter ego; and (5) estoppel. See *DuPont*, *supra*, 269 F.3d at 195; *Thomson-CSF*, 64 F.3d at 776.

<sup>29</sup> See *Fencourt Reinsurance Co.*, *supra*, 2008 BL 141024, at 8; See also Distribution Agreement, *supra*, at p. 21.

<sup>30</sup> See *Fencourt Reinsurance Co.*, *supra*, 2008 BL 141024, at 8.

<sup>31</sup> *Id.* at 6.

<sup>32</sup> See *Id.* at 6.

<sup>33</sup> *Id.* at 6.

<sup>34</sup> See *Id.* at 5.

<sup>35</sup> *Id.* at 6.

<sup>36</sup> *Id.* at 13-21.

<sup>37</sup> See *Id.* at 9-14.

<sup>38</sup> See *Id.* at 10-13.

<sup>39</sup> See *DuPont*, *supra*, 269 F.3d at 205.

<sup>40</sup> *Id.* at 195. As discussed at note 28, *supra*, in support of this conclusion, the court favorably cited the *Thomson-CSF* opinion, where the Second Circuit recognized five theories for binding non-signatories to arbitration agreements. See *DuPont*, *supra*, 269 F.3d at 195; *Thomson-CSF*, *supra* 64 F.3d at 776.

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<sup>41</sup> See *Fencourt Reinsurance Co.*, *supra*, 2008 BL 141024, at 12.

<sup>42</sup> *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith*, 7 F.3d 1110, 1121-22 (3d Cir. 1993).

<sup>43</sup> *Id.* at 1121.

<sup>44</sup> *Id.* at 1122.

<sup>45</sup> See *Fencourt Reinsurance Co.*, *supra*, 2008 BL 141024, at 13-21.

<sup>46</sup> *Id.* at 13-14.

<sup>47</sup> *Id.* at 14 (emphasis added).

<sup>48</sup> *Id.* at 17.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 16 (emphasis added).

<sup>51</sup> *Id.* at 17.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 18 (quoting *DuPont*, *supra*, 269 F.3d at 199).

<sup>54</sup> See *Id.* (citing *The Philadelphia Flyers, Inc. v. Trustmark Insurance Co.*, No. 04-CV-2322, at 9 (E.D. Pa. Jul. 6, 2004)).

<sup>55</sup> *Id.* at 18.

<sup>56</sup> *Id.*

<sup>57</sup> *Fencourt Reinsurance Co.*, *supra*, 2008 BL 141024, at 19. In finding that the doctrine of equitable estoppel bound Fencourt to the arbitration clause of the Distribution Agreement, the court also rejected Fencourt's argument that it did not receive a "direct benefit" from its acceptance of \$84 million in promissory notes from ITT in connection with the Distribution Agreement. *Id.*

<sup>58</sup> *Id.* at 20.

<sup>59</sup> *DuPont*, *supra*, 269 F.3d at 195.

<sup>60</sup> See *Fencourt Reinsurance Co.*, *supra*, 2008 BL 141024, at 20-21. As discussed in *Fencourt*, under Pennsylvania law, a non-signatory is an intended third-party beneficiary if "both parties to the contract express an intention to benefit the third party in the contract itself," or "if recognition of a right to performance in the beneficiary is appropriate to effectuate the intentions of the parties and . . . the circumstances indicate that the promisee intends to give the beneficiary the benefit of promised performance." *Id.* (quoting *Scarpitti v. Weborg*, 609 A.2d 147, 150 (Pa. 1992) and Restatement (Second) of Contracts § 302(1)(b) (1979)).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 21

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*