

Non-Signatory Surety Bound By Arbitration Clause in Incorporated Contract

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An arbitration provision in a contract typically applies only to the contracting parties. Where, however, the contract is incorporated by reference into a second agreement, if it is broad enough, the party to the second agreement—although a non-signatory to the original agreement—may find that the arbitration provision applies to them as well. This was the result in a case before the Second Circuit involving a surety on a performance bond.

In *Federal Insurance Co. v. Metropolitan Transportation Authority*, No. 18-3664 (2d Cir. Aug. 30, 2019) (Summary Order), a surety on a performance bond brought suit against the public transportation authorities that contracted with the contractor principal. The public authorities moved to dismiss the claim based on the arbitration clause in the underlying contract. The underlying contract had a broad arbitration clause, which provided that the “parties to this Contract hereby authorize and agree to the resolution of all disputes arising out of, under, or in connection with, the Contract” through arbitration. The underlying contract and all of its terms were expressly incorporated by reference into the performance bond. The district court concluded that the surety was bound by the arbitration provision in the underlying contract and dismissed the complaint.

On appeal, the Second Circuit affirmed. The court made two significant findings. First, the court agreed that the district court had properly concluded that the dispute was subject to determination under the arbitration provision in the underlying contract. Because the broad arbitration clause was not restricted to the immediate parties, the court held that it was effectively incorporated by reference into the performance bond. The court found the language of the arbitration provision sufficiently broad to bind the surety even though it was a non-signatory to the underlying contract.

Second, the court held that the question of arbitrability was for the arbitrator to decide. This was because the contract used “any and all” language when describing the disputes to be resolved, which was “clearly and unmistakably” broad enough to require the issue of arbitrability to be decided by the arbitrator and not the court.

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