

## Arbitration May Be Compulsory Even When the Arbitration Agreement Has Not Been Countersigned

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The U.S. District Court for the Southern District of New York (in Manhattan) has reaffirmed the principle that an arbitration agreement is binding even when one party to an arbitration agreement has transmitted the agreement containing an arbitration clause, and the other party has accepted benefits of the agreement, but has not countersigned the agreement. This same issue arises frequently in the context of customer agreements sent by a brokerage firm to its customer, where the customer trades in the new account, but never returns the agreement. Under these circumstances, the customer may refuse to arbitrate the dispute, insisting upon a judicial forum. This case supports compulsory arbitration of the dispute. The case is *In re Refco Inc. Securities Litigation*, --- F. Supp. 2d --- (S.D.N.Y. May 21, 2008) (Lynch, J.). Ernst & Young, one of many defendants in a complex array of parties in the Refco bankruptcy proceeding, moved to compel the Trustee to mediate and then arbitrate his claim against E&Y. According to the Trustee, E&Y had helped to prepare fraudulent income tax returns for Refco between 1991 and 2005, and thereby aided and abetted the now defunct options and commodity futures broker to exaggerate its financial performance. E&Y's motion to compel mediation/arbitration relied primarily on a 2001 Letter of Engagement with Refco that Refco apparently received and acted upon, but did not countersign and return. Two subsequent Letters of Engagement, in 2002 and 2003, referenced an exhibit to the earlier, unsigned Letter, the "Dispute Resolution Procedures" ("DRPs"), but the DRPs were not attached to the subsequent letters. The Court compelled arbitration anyway. After stating that, "the threshold issue of whether E&Y and Refco reached an agreement to arbitrate is a matter for the Court, rather than for the arbitrator, to decide," *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003), the Court held that, ". . . Refco's failure to sign the 2001 Engagement Letter would not invalidate the letter's arbitration clause. The lack of a signature on a contract does not affect its validity where the non-signing party received the contract and knowingly accepted its benefits. See *Thomson-CSF, S.A. v. American Arbitration Ass'n*, 64 F.3d 773, 778 (2d Cir. 1995); *Deloitte Noraudit A/S v. Deloitte Haskins & Sells*, 9 F.3d 1060, 1064 (2d Cir. 1993) (noting that where non-signatory "failed to object to the Agreement when it received it" and "knowingly accepted the benefits of the Agreement," that party "is estopped from denying its obligations to arbitrate under the Agreement"); see also *Genesco*, 815 F.2d at 846 ("[W]hile the [FAA] requires a writing, it does not require that the writing be signed by the parties."). Here, it is undisputed that Refco received a "direct benefit" from E&Y's preparation of its 2000 tax returns. *Camferdam v. Ernst & Young Int'l, Inc.*, No. 02 Civ. 10100, 2004 WL 307292, at \*5 (S.D.N.Y. Feb. 13, 2004) (internal quotations marks omitted). The Court also compelled arbitration on the basis that the 2002 and 2003 Letters of Engagement, even without the DRPs or the particulars of the parties' intended arbitration procedure, nonetheless manifested a joint intention to arbitrate. "[T]o the extent that any ambiguity remains," said the Court, "federal policy requires that 'any doubts concerning the scope of the arbitrable issues . . . be resolved in favor of arbitration.'" *Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.*, 406 U.S. 1, 24-25 (1983).