

DUAL TRACK PROCEEDINGS IN ARBITRATION AND LITIGATION: REDUCING THE PERIL OF “DOUBLE JEOPARDY” BY CONSOLIDATION, JOINDER AND APPELLATE ARBITRATION

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I. INTRODUCTION

Those who engage in the fields of engineering and construction universally acknowledge this fundamental truth: “major construction projects generate major litigation” and “the management of either is perilous”¹. To manage the perilous impacts upon construction projects of such “major litigation” between and among parties engaged in the construction process, the construction industry for centuries has followed the practice of merchants of resolving disputes by consensual binding arbitration rather than by courtroom litigation². Arbitration was regarded as more efficient and cost-effective than litigation because awards settling the disputes could be rendered promptly by neutral arbitrators selected by the parties for their expertise in construction law, knowledge of specialised industry customs and practices, and lack of local prejudices and biases.

Arbitration between two contracting parties has worked well in resolving their disputes over the centuries. But construction’s modern complexity has led to significant expansion in both the number of specialised parties involved in projects, the number and complexity of construction disputes,

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¹ *Morse/Diesel Inc v Trinity Indus Inc* 67 F 3d 435, 437 (2d Cir 1995).

² See e.g., Gerard Malynes, *Consuetudo, Vel Lex Mercatoria*, or *The Ancient Law-Merchant* 447 (1622), a treatise on England’s Law Merchant written in 1622 by a London merchant for the benefit of “all judges, lawyers, merchants and all others negotiate in all parts of the world”, and confirming that ADR method ordinarily employed to resolve disputes between merchants was binding arbitration:

“[The] ordinary course to end the questions and controversies arising between merchants is by way of *Arbitrement*, when both parties do make choice of honest men to end their causes, which is voluntary and in their own power, and therefore is called *Arbitrium* or of free will, whence the name Arbitrator is derived: and these men (by some called Good men) give their judgments by awards, according to Equity and Conscience, observing the Custom of Merchants, and ought to be void of all partiality of affection more nor less to the one than to the other: having only care that right may take place according to the truth, and that the difference may be ended with brevity and expedition; insomuch that he may not be called an arbitrator who (to please his friend) makes delays and propagates their differences, but he is rather a disturber and an enemy to justice and truth.”

and variations in contract dispute resolution clauses among parties working on the same project. When disputes among multiple parties now arise, all too often all parties are not amenable to the jurisdiction of the same forum, because some parties have agreed contractually to arbitrate with different parties in separate arbitrations, while others have no contractual obligation to arbitrate at all and look to litigation for recourse³. As a consequence, disputes factually and legally intertwined often are resolved on a piecemeal basis in separate arbitrations and litigation, with resulting sometimes inconsistent awards and judgments invariably subject to different scopes of appellate review. The “double jeopardy” risk of inconsistent outcomes in arbitration, litigation and on appeal, combined with the added cost of dual track proceedings, is one reason often voiced as an objection by some parties for not agreeing to settle disputes by arbitration.

II. JUDICIAL SUPPORT FOR ARBITRATION OVER LITIGATION AND THE PROBLEM OF PIECE-MEAL DISPUTE RESOLUTION

Binding arbitration has been strongly encouraged for decades by the US judiciary. In 1985 US Supreme Court Chief Justice Warren E Burger fired a momentous “shot heard round the legal world” in favour of arbitration when he presented this compelling advice to the American legal profession:

“The obligation of the legal profession is, or has long been thought to be, to serve as healers of human conflicts. To fulfil that traditional obligation means that there should be mechanisms that can produce an acceptable result in the shortest possible time, with the least possible expense and with a minimum of stress on the participants. That is what justice is all about ...

My overview of the work of the courts from a dozen years on the Court of Appeals and now 16 in my present position, added to 20 years of private practice, has given me some new perspectives on the problems of arbitration. One thing an appellate judge learns very quickly is that a large part of all litigation in the courts is an exercise in futility and frustration. A large proportion of civil disputes in the courts could be disposed of more satisfactorily in some other way ...

My own experience persuades me that in terms of cost, time, and human wear and tear, arbitration is vastly better than conventional litigation for many kinds of cases. In mentioning these factors, I intend no disparagement of the skills and broad experience of judges. I emphasize this because to find precisely the judge whose talents and experience fit a particular case of great complexity is a fortuitous circumstance.

³ See e.g., *State ex rel Johnson Controls Inc v Tucker LLC* 729 SE 2d 808 (W Va 2012) (reversing a trial court order requiring seven defendants to try a complex construction dispute together before the court, and granting the appeal of three of the seven defendants, the prime contractor and two sub-contractors, to arbitrate the plaintiff’s claims in accordance with the arbitration clauses in their respective contracts).

This can be made more likely if two intelligent litigants agree to pick their own private triers of the issues ...

The acceptance of this concept has been far too slow in the United States.”⁴

The American judiciary’s strong support for arbitration, however, has had the effect of enhancing the peril of “double jeopardy”, because “the relevant federal law requires piecemeal resolution when necessary to give effect to an arbitration agreement”⁵. This judicial ambivalence about promoting complete resolution of disputes among multiple parties in a single arbitral forum has created unbridled tension between parties’ exposure to risks of piecemeal enforcement of arbitration under common law principles of contract, and their commercial interests in resolving promptly and efficiently among all necessary parties the disputes dividing them. One proponent of more liberal constructs for promoting joinder of non-signatories to the arbitration agreement concludes: “[T]he subordination of federal policy advancing arbitration to ‘traditional principles’ of contract law is inevitably conducive to a rigid and formulaic construct [for limiting arbitration consolidation and joinder] that either misapprehends, or does not apprehend at all, nascent corporate structures and affiliations that economic globalisation has fostered”⁶.

In the United States, the Federal Arbitration Act⁷ governs most domestic and all international contract arbitration enforcement, because it governs all US arbitrations involving either “interstate commerce”⁸ or international commerce subject to the New York Convention⁹. The Federal Arbitration Act does not address consolidation or joinder¹⁰. There are no requirements in

⁴ Warren E Burger, Chief Justice of the US Supreme Court “Remarks before the American Arbitration Association and the Minnesota State Bar Association: Using Arbitration to Achieve Justice”, 21 August 1985, in 40 *Arb J* 3, 6 (1985).

⁵ See *Moses H Cone Mem'l Hosp v Mercury Constr Corp* 460 US 1, 20; 103 S Ct 927; 74 L Ed 2d 765 (1983) (opining that the possibility of the plaintiff having to resolve its disputes in two forums – one in state court and one in arbitration – where one of the parties to the underlying dispute was not a party to the arbitration agreement, “occurs because the relevant federal law *requires* piecemeal resolution when necessary to give effect to an arbitration agreement”). (Emphasis in original).

⁶ Pedro Martinez-Fraga, “The Dilemma of Extending International Commercial Arbitration Clauses to Third Parties: Is Protecting Federal Policy While Accommodating Economic Globalization a Bridge to Nowhere?”, 46 *Cornell Int’l L J* 291, 319 (Spring 2011) (proposing a broad comprehensive balancing test for joinder in international arbitration based on an “inextricability” standard, and observing that “adherence to the ‘traditional principles’ of contract law for the purported protection of non-signatories creates a doctrinal test that does not promote symmetry (equitable treatment) between signatories and non-signatories seeking extension of an arbitral clause and undermines federal policy favouring arbitration”).

⁷ 9 USCA, §1 *et seq.*

⁸ See *Allied-Bruce Terminix Companies Inc v Dobson* 513 US 265; 115 Sup Ct 834; 130 L Ed 2d 753 (1995).

⁹ United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards, 21 UST 2571 (10 June 1958).

¹⁰ See *Doctor’s Assocs Inc v Distajo* 66 F 3d 438, 446 (2d Cir 1995) (concluding that the Federal Arbitration Act’s “strong bias in favour of arbitration” overcomes any possible prejudice due to piecemeal litigation caused by the absence of certain parties to the arbitration agreement). Thus, Federal courts are left to find authority for consolidation and joinder under state law, or by broad interpretation of agreements to arbitrate. See *New England Energy Inc v Keystone Shipping Co* 855 F 2d 1 (1st Cir 1988) (opining that where the FAA is silent on an issue, courts may look to state law for authority not inconsistent with the FAA).

the statute for consolidation and for joinder of claims, remedies and parties as is provided for in federal court litigation by Rules 18, 19, 20 and 42 of the US Federal Rules of Civil Procedure. The US Supreme Court thus authorised federal courts hearing jurisdictional disputes under the Federal Arbitration Act to look to state law for guidance on issues of arbitration consolidation and joinder¹¹. States in turn have sought to minimise the peril of “double jeopardy” either (1) by adoption by most states of statutory provisions¹² and common law principles permitting joinder of non-signatory parties and consolidation of arbitrations, or (2) by adoption by a few states of statutes or case law condoning the dubious practice of authorising courts to refuse to enforce arbitration agreements where related disputes already are involved in litigation¹³.

US judicial innovations, statutory enactments and broad arbitration rules are reducing the “double jeopardy” risk by promoting arbitration rights of consolidation, joinder of claims and of non-signatory parties, and appellate arbitration¹⁴. Broad judicial endorsement of the arbitral tribunal’s authority to decide procedural matters regarding arbitrability, such as scope of the arbitration clause, interpretation of arbitration rules and defining its own jurisdiction, has been forthcoming¹⁵.

¹¹ See *Arthur Andersen LLP v Carlisle* 556 US 634; 129 Sup Ct 1896; 173 L Ed 832 (2009) (holding that the Federal Arbitration Act does not “alter background principles of state contract law” and that “traditional principles” of state law allow a contract to be enforced by or against non-parties to a contract through assumption, piercing the corporate veil, alter ego, incorporation by reference, third party beneficiary theories, waiver and estoppel”).

¹² See e.g., Revised Uniform Arbitration Act (2000), section 10 (authorising a court to order consolidating arbitrations where: “(1) there are separate agreements to arbitrate or separate arbitration proceedings between the same persons or one of them is a party to a separate agreement to arbitrate or a separate arbitration proceeding with a third person; (2) the claims subject to the agreements to arbitrate arise in substantial part from the same transaction or series of related transactions; (3) the existence of a common issue of law or fact creates the possibility of conflicting decisions in the separate arbitration proceedings; and (4) prejudice resulting from a failure to consolidate is not outweighed by the risk of undue delay or prejudice to the rights of or hardship to parties opposing consolidation”). The RUA has been adopted in 15 US states.

¹³ See California’s Code of Civil Practice, section 1281.2(c) grants the trial court discretion to refuse to enforce a written arbitration agreement where a signatory already is engaged in litigation with third parties regarding issues common to the litigation and arbitration, and may order intervention or joinder of all parties in a single proceeding when (1) a party to the agreement also is a party to pending litigation with a third party who did not agree to arbitration; (2) the pending third party litigation arises out of the same transaction or series of related transactions as the claims subject to arbitration; and (3) the possibility of conflicting rulings on common factual or legal issues exist. See also, *Acquire II LTD v Colton Real Estate Group* 213 Cal App 4th 959; 153 Cal Rptr 3d 135 (2013), *Serrano Management Group v South Bay Hospital Management Co LLC* 2013 WL 6489945 (Cal App, 10 December 2013) (denying motion to compel arbitration under a clause that did not bind all parties).

¹⁴ See generally, Philip L Bruner and Patrick J O’Connor Jr, *Bruner and O’Connor on Construction Law*, Chapter 21 (arbitration) (2014).

¹⁵ See *Bollinger Shipyards Lockport LLC v Northrup Grumman Ship Systems Inc* 2009 WL 86704 (WD La, 12 January 2009); Paul Milligan, “Who Decides the Arbitrability of Construction Disputes?”, 31 *Construction Law* 23 (Spring 2011). See also, JAMS Engineering and Construction Arbitration Rules and Procedures (2009), Rule 11(c) (available at www.jamsadr.com (Last accessed 11 August 2014)) (“Jurisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator. The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter”).

III. THE DISPUTE RESOLUTION PERIL OF “DOUBLE JEOPARDY”

The uncertainty of outcomes in dual track proceedings is known as the dispute resolution peril of “double jeopardy” – the peril that economically inconsistent decisions will be rendered by different deciders of fact and law, who sit in different arbitral tribunals or courts, and whose decisions on appeal will be constrained by different standards and scopes of appellate review. All too frequently, factually and legally intertwined multi-party disputes and claims arising out of the same intertwined facts (1) are decided by different arbitrators or judges in separate arbitration or litigation trial forums, and (2) are reviewed and enforced by different appellate courts under different scopes of judicial review¹⁶.

In construction, the “jeopardy” problem typically is created by contract drafters who fail to tie the many parties participating in a project to a common dispute resolution process that compels all parties to resolve their disputes and claims against each other in the same manner and in the same forum. Those contract drafters who favour binding arbitration – because of the opportunity to select arbitrators having specialised expertise in both construction law and cost-effective early resolution of claims – endeavour to craft broad arbitration clauses with expansive joinder, consolidation and appellate arbitration provisions that bind all parties to arbitrate their disputes and claims against each other under the same arbitration rules and before the same tribunal. Other contract drafters, who despair of ever eliminating the risk of “double jeopardy” by contract, leave dispute resolution to the courts, where expansive court rules usually allow joinder or consolidation of claims and parties before the same court-assigned judge. Accepting litigation to enhance joinder and consolidation of parties, however, creates a Faustian Bargain: the litigation option cannot assure that the assigned judge has knowledge of construction industry customs and practices and requisite expertise in deciding complex construction disputes¹⁷.

¹⁶ See *Hall Street Associates LLC v Mattel* 552 US 576; 128 S Ct 1396; 170 L Ed 2d 254 (2008) (refusing to allow arbitrating parties to enlarge by agreement the scope of judicial review of arbitration awards under the Federal Arbitration Act).

¹⁷ See *EC Ernst Inc v Manhattan Construction Co* 387 F Supp 1001, 1006 (SD Ala 1974), in which a Federal district judge advised the parties during a pre-trial conference:

“Being trained in this field [of construction], you are in a far better position to adjust your differences than those untrained in [its] related fields. As an illustration, I, who have no training whatsoever in engineering, have to determine whether or not the emergency generator system proposed to be furnished ... met the specifications, when experts couldn’t agree. This is a strange bit of logic. ... The object of litigation is to do substantial justice between the parties’ litigant, but the parties’ litigant should realize that, in most situations, they are by their particular training better able to accomplish this among themselves.”

Minimisation of “double jeopardy” in dual track proceedings begins with careful drafting of arbitration clauses, thoughtful designation of arbitration rules, and thorough review of governing arbitration statutes and legal principles. The clauses and rules should confirm the authority of the arbitral tribunal or the arbitral administrator (1) to decide challenges to the tribunal’s jurisdiction regarding any issues arising out of or related to the arbitration, (2) to consolidate multiple arbitrations before a single tribunal, (3) to join necessary non-signatories in the arbitration proceeding (or otherwise bind such non-signatories by findings and conclusions in the arbitral tribunal’s award), (4) to decide all claims, counter-claims and cross-claims arising out of or related directly or indirectly to the same factual and legal issues in dispute – whether asserted as claims in contract, tort, equity or statute – in one binding award; and (5) to permit any party to appeal an award to an appellate arbitration panel before proceeding with judicial confirmation of the award.

IV. CONSOLIDATION OF SEPARATE PENDING ARBITRATIONS

Consolidation universally is treated today under arbitral statutes and rules as a procedural issue for arbitrators to decide rather than a substantive issue of arbitrability for the courts¹⁸. Most courts construe standard US arbitration clauses,¹⁹ arbitration statutes²⁰ and arbitration rules broadly to authorise arbitrators or the arbitration administrator to order consolidation of arbitrations having common issues of fact or law. Consolidation’s major legal issue is whether two or more arbitrations are consolidated merely for hearing by their separate tribunals sitting together to hear the evidence and then writing their own awards, or whether the arbitrations are consolidated for all purposes and with one of the tribunal panels selected to hear and decide all disputes, claims, cross-claims, and counterclaims asserted among

¹⁸ See *Green Tree Financial Corp v Bazzle* 539 US 444, 123 S Ct 2402; 156 L Ed 414 (2003), *Nath v Merrill Lynch, Pierce, Fenner & Smith Inc* 2014 WL 2438435, *4 (NY Sup, 21 May 2014) (“[T]he question of whether arbitration proceedings should (or should not) be consolidated is a procedural matter to be decided by the arbitrators, not by the court”).

¹⁹ See *ConsensusDocs 200* (2011), §12.6 (“All parties necessary to resolve a matter agree to be parties to the same dispute resolution proceeding. Appropriate provisions shall be included in all other contracts relating to the Work to provide for joinder or consolidation of such dispute resolution procedures”); American Institute of Architects (AIA) A201-2007, General Conditions of Contract, §15.4.4.1 (“Either party, at its sole discretion, may consolidate an arbitration conducted under this Agreement with any other arbitration to which it is a party, provided that (1) the arbitration agreement governing the other arbitration permits consolidation, (2) the arbitrations to be consolidated substantially involve common questions of law or fact; and (3) the arbitrations employ materially similar procedural rules and methods for selecting arbitrator(s)”).

²⁰ See Revised Uniform Arbitration Act (2000) at fn. 12 above.

all parties. Even where the issue is decided by courts, consolidation of arbitrations is granted where justified²¹. Some courts, applying purely contract law, deny consolidation absent the express consent of all parties or of other contractual or statutory authorisation²². Thus, arbitration clauses written to require consent of all parties to consolidated proceeding can create major impediments to consolidation, particularly, where agreed arbitration rules also fail to address consolidation²³.

The broadest consolidation rights appear in the JAMS Engineering and Construction Arbitration Rules and Procedures (2009),²⁴ Rules 6(e) and 11, which empower JAMS as tribunal administrator to consolidate separately commenced arbitrations involving claims of different parties that have the same “common issues of fact or law”, and to designate administratively which selected tribunal will hear the consolidated matters. Once consolidated, parties in both arbitrations are treated for all purposes as parties in one arbitration, and may assert claims and cross-claims against any and all consolidated parties. The JAMS Rules also empower the arbitrators “to resolve all disputes regarding the interpretation and applicability of these Rules”.

Consolidation rights under international arbitration rules are less definitive. ICC Arbitration Rules, Article 10, allows consolidation only where the parties agree, or where all claims are made under the same agreement, or, if claims are made under separate agreements, where the parties and their legal relationships are the same²⁵. UNCITRAL Arbitration Rules, Articles 23 and 17.5, and LCIA Arbitration Rules, Articles 23 and 22.1(h), empower the arbitral tribunal to decide its own jurisdiction, allow joinder of additional parties, but do not expressly mention consolidation²⁶. The Canadian Arbitration Association Arbitration Rules make no mention

²¹ See *Alpine Glass Inc v State Farm Fire and Casualty Co* 2014 WL 2481814 (D Minn, 3 June 2014) (consolidating 140 claims into a single arbitration, and opining: “Courts consider several factors when determining whether to order consolidation of claims for arbitration, including the efficiencies of consolidation, the danger of inconsistent judgments if disputes are arbitrated separately, and the prejudice that parties may suffer as a result of consolidation”).

²² See *Georgia Casualty & Surety Co v Excalibur Reinsurance Corp* 2014 WL 996388 (ND Ga, 13 March 2014) (denying motion to consolidate two arbitrations arising out of the same transaction, because neither of the respective arbitration clauses nor state statute nor the Federal Arbitration Act expressly authorised the court to order consolidation). See also, England’s Arbitration Act 1996, section 35 (“[T]he tribunal has no power to order consolidation of proceedings or concurrent hearings” unless “the parties agree to confer such power on the tribunal”).

²³ See English Arbitration Act 1996, section 35(2) (allowing consolidation with other arbitral proceedings only if the parties agree).

²⁴ See JAMS Engineering and Construction Arbitration Rules and Procedures (2009) at www.jamsadr.com under “rules” (Last accessed 11 August 2014). The American Arbitration Association Construction Arbitration Rules, Rule R-7 provides for AAA appointment of a special independent arbitrator to decide parties’ objections to consolidation or joinder.

²⁵ See ICC Arbitration Rules (2012).

²⁶ See UNCITRAL Arbitration Rules (2010), Articles 23 and 17, paragraph 5; LCIA Arbitration Rules (1998), Article 23.

of either consolidation or joinder, but do empower arbitrators under Rule 7 to hear challenges to their jurisdiction²⁷.

V. JOINDER OF NON-CONTRACT CLAIMS WITH CONTRACT CLAIMS IN ARBITRATION

In the 20th century, judicial controversy existed over whether arbitrators were limited to hearing only claims for breach of the contract that contained the parties' agreement to arbitrate. Parties who wished to avoid arbitration and proceed to court endeavoured to do so by simply pleading their claims in tort rather than contract.

Today, joinder of claims is addressed by broad arbitration clauses requiring arbitration of all claims²⁸ "arising out of or related to" the contract, by arbitration rules authorising broad arbitrator jurisdiction, and by judicial rulings that view joinder of claims as a procedural issue to be decided by the arbitrators²⁹. Most US jurisdictions adhere to the principle that all claims between contracting signatories, which arise out of or are related to a contract containing the an arbitration clause, will be sent to arbitration even if those claims are alleged in tort, equity or statute³⁰. The only exception is a claim that truly rises to the level of an independent claim unrelated to and outside of the scope of the contract and the contract's arbitration clause³¹.

Illustrative of the modern judicial treatment of joinder of contract and non-contract claims is *Leighton v Chesapeake Appalachia LLC*³² in which land owners who had leased their lands to a contractor conducting natural gas

²⁷ See Canadian Arbitration Association Arbitration Rules, Rule 7 at www.canadianarbitrationassociation.ca under "regular arbitration rules" (Last accessed 25 September 2014).

²⁸ See American Institute of Architects (AIA) A201-2007, General Conditions of Contract for Construction, section 15.1.1 ("A Claim is a demand or assertion by one of the parties seeking, as a matter of right, payment of money, or other relief with respect to the terms of the Contract. The term 'Claim' also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract ...").

²⁹ See *BG Group plc v Republic of Argentina* 572 US ___; 134 Sup Ct 1198; 188 L Ed 2d 220 (5 March 2014) (confirming that arbitrators decide issues of procedural arbitrability, while courts decide substantive arbitrability, and holding that the issue in dispute was one of procedural arbitrability to be decided by the arbitrators). See also, JAMS Engineering and Construction Arbitration Rules and Procedures (2009) Rule 11(c) (giving the arbitrator jurisdiction over arbitrability issues).

³⁰ See *Helo Energy LLC v Southern California Edison Co* 2013 WL 5615414 (Cal Ct App, 15 October 2013) (reversing the lower court, and compelling joinder of claimant's tort claims in an arbitration in which the claimant also asserted a contract claim arising under the contract out of which the tort claims arose, because to do otherwise would risk inconsistent rulings).

³¹ See *G T Leach Builders LLC v Sapphire VP LP* 2013 WL 2298447 (Tex Ct App, 23 May 2013) (denying non-signatory third party defendants' motion to compel arbitration, because "[The owner's] claims against the Insurance Appellants are clearly not based on the General Contract [that contained an arbitration clause] ... [The owner] claims that the Insurance Appellants failed to procure the appropriate type of [property damage] insurance. This claim is not related to the construction of the complex").

³² *Leighton v Chesapeake Appalachia LLC* 2013 WL 6191739 (MD Pa, 26 November 2013).

fracking operations commenced suit against the drilling contractor and three non-signatory sub-contractors for injury to the lessors' water supply as a result of negligence in performing fracking operations on nearby properties. An investigation by the state found that "water drawn from [claimants'] groundwater supplies had become flammable and surface water running through the creek on the property had begun bubbling". The lease's arbitration clause required arbitration of any "disagreement between the Lessor and Lessee concerning this Lease, performance thereunder, or damages caused by Lessee's operations ...". The claimants' lawsuit alleged eight causes of action – one for breach of the lease seeking remediation costs to restore the property and water supply to its pre-drilling condition, and seven claims seeking punitive damages for the torts of negligence, negligence per se, private nuisance, discharge of hazardous substances, strict liability, trespass and "inconvenience and discomfort". The US District Court ruled that the arbitration clause was broad enough in scope to cover all of the claimants' claims, because all claims arose out of lease "performance", and that all eight claims would be decided in arbitration.

VI. JOINDER OF NON-SIGNATORY PARTIES IN ARBITRATION

Like the issues of consolidation and joinder of claims, the issue of joinder of non-signatory parties is controlled by state statutes, by the arbitration clause³³ and arbitration rules accepted by the signatory parties,³⁴ and by common law principles of law. At the heart of the issue is the arbitrators' jurisdiction to decide this joinder issue. US and state courts favouring arbitration endorse the jurisdiction of arbitrators to decide the procedural issue of joinder of non-signatory parties under recognised principles of law and accepted arbitration rules³⁵. Illustrative of such a rule is JAMS Engineering and Construction Arbitration Rules and Procedures (2009), Rule 6(f), which provides: "Where a third party seeks to participate in

³³ See *Cape Romain Contractors Inc v Wando* 747 SE 2d 461 (SC 2013) (Arbitration clause provided: "Any party to an arbitration may include by joinder persons or entities substantially involved in a common question of law or fact whose presence is required if complete relief is to be accorded in arbitration, provided that the party sought to be joined consents in writing to the joinder ..."). Compare, *Zurich American Ins Co v Heard* 740 SE 2d 429 (Ga App 2013) (Arbitration agreement provided: "No arbitration arising out of or relating to the Contract shall include, by consolidation or joinder or in any other manner, the Architect, the Architect's employees or consultants, except by written consent containing specific reference to the Agreement and signed by the Architect, Owner, Contractor and any other person or entity sought to be joined").

³⁴ See also, UNCITRAL Arbitration Rules, Article 17.5, and LCIA Arbitration Rules, Article 22.1(h) (empowering the arbitral tribunal to decide its own jurisdiction, and to allow joinder of additional parties).

³⁵ See *Eckert/Wordell Architects Inc v FJM Properties of Wilmar LLC* 2014 WL 2922343 (8th Cir, 30 June 2014) (affirming an arbitrator's jurisdiction under AAA arbitration rules to order joinder of a non-signatory party).

an Arbitration already pending under these Rules or where a Party to an Arbitration under these Rules seeks to compel a third party to participate in a pending Arbitration, the Arbitrator will decide on such request, taking into account all circumstances the Arbitrator deems relevant and applicable”.

Where joinder of non-signatory parties is not controlled by statute or arbitration rules and is not barred by contract, one or more of eleven common law doctrines may be applicable to justify a joinder decision by the arbitrators. These doctrines are:

- (1) *Agency*. Non-signatory agents who carry out contractual duties on behalf of their contracting principals and who are charged by signatories with malfeasance in arbitration disputes, may compel and join in arbitration between the signatories. The critical nexus is the agency relationship. Agents have a right to join in arbitrations to defend themselves against allegations that form the basis of claims against their principals or to join with their principals in asserting affirmative claims against other arbitrating parties. *Leighton v Chesapeake Appalachia LLC*³⁶ also is illustrative of the agency doctrine. There, the land owners who had leased their lands to a contractor conducting natural gas fracking operations commenced suit against four parties: the drilling contractor and three non-signatory sub-contractors. The claims against the non-signatory sub-contractors were solely tort claims for injury to the lessors’ water supply as a result of negligence in performing fracking operations on nearby properties. Two of the non-signatory sub-contractors were subsidiaries of the contractor, while the third was entirely independent of them. The US District Court ruled that the contractor’s two non-signatory subsidiary sub-contractors could join the arbitration to defend themselves and pursue their claims against the owners, under theories of agency and equitable estoppel. Additional discovery was allowed to determine whether the third independent sub-contractor could be joined under the same principles or under another legal doctrine such as equitable estoppel.
- (2) *Equitable Estoppel*. Non-signatory parties may compel or be joined in arbitrations where claims are asserted against them alleging misconduct in performance of legal duties, where the claims are intertwined with claims asserted against signatory parties under

³⁶ *Leighton v Chesapeake Appalachia LLC* 2013 WL 6191739 (MD Pa, 26 November 2013).

agreements under which arbitration is authorised³⁷. The doctrine of equitable estoppel is available to non-signatories who wish to stay litigation pending arbitration, and to compel arbitration of claims related to a contract with an arbitration clause and asserted in litigation by a signatory to a contract. The signatory is said to be “equitably estopped” to avoid arbitration. The Doctrine is stated thus:

Where a signatory to a contract containing an arbitration agreement has sued a non-signatory, equitable estoppel allows the non-signatory to compel the signatory to arbitrate in two circumstances: (1) when the signatory has raised allegations of substantially interdependent and concerted misconduct by both the non-signatory and one or more of the signatories to the contract; or (2) when the nature of the signatory’s claims against the non-signatory requires reliance on the agreement containing an arbitration provision. In other words, the non-signatory is bound to arbitrate if its claim seeks to enforce the terms containing the arbitration provision. The non-signatory cannot enforce specific terms of the agreement whole seeking to avoid the arbitration provision. The application of this doctrine falls with the trial court’s discretion³⁸.

Non-signatories, however, may not use equitable estoppel affirmatively to compel arbitration of their own claims without

³⁷ See *Renewable Energy Products LLC v Lakeland Development Co* 2011 WL 68394 (Cal Ct App, 28 February 2011) (reversing the trial court, and compelling the claimant to arbitrate claims with signatory and non-signatory parties); *Grigson v Creative Artists Agency LLC* 310 F 3d 524 (5th Cir 2000) (“The linchpin for equitable estoppel is equity – fairness. For the case at hand, to not apply this intertwined-claims basis to compel arbitration [with a non-signatory] would fly in the face of fairness”); *MS Dealer Services Corp v Franklin* 177 F 3d 942, 947 (11th Cir 1999):

“Existing case law demonstrates that equitable estoppel allows a non-signatory to compel arbitration in two different circumstances. First, equitable estoppel applies when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the non-signatory. When each of a signatory’s claims against a non-signatory makes reference to or presumes the existence of the written agreement, the signatory’s claims arise out of and relate directly to the written agreement, and arbitration is appropriate. Second, application of equitable estoppel is warranted when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the non-signatory and one or more of the signatories to the contract. Otherwise the arbitration proceedings between the two signatories would be rendered meaningless and the federal policy in favour of arbitration effectively thwarted.”

³⁸ *Cappadonna Electric Management v Cameron County* 180 SW 3d 364, 373 (Tex App 2005). See also, *Corporate America Credit Union v Herbst* 397 Fed Appx 540 (11th Cir 2010) (“Equitable estoppel precludes a party from claiming the benefits of a contract while simultaneously attempting to avoid the burdens that the contract imposes. The purpose of the doctrine is to prevent a plaintiff from, in effect, trying to have his cake and eat it too; that is, from relying on the contract, when it works to his advantage by establishing the claim, and repudiating it when it works to his disadvantage by requiring arbitration”).

signatories first having commenced litigation against them. To that extent, the right of arbitration remains consensual.

- (3) “*Inextricable Nexus*.” Non-signatory parties, whose claims and defences have an indisputably “inextricable nexus” to contracts requiring arbitration for resolution of disputes, can join and be joined³⁹. This principle has been articulated as follows:

This “inextricability” component [after confirmation of the operative arbitration agreement] represents a non-contractually based, flexible approach that is fundamentally premised on the connections between the non-signatory and the underlying instrument comprising an arbitration agreement, as well as to the claims asserted. Essential to this analysis is strict scrutiny of the commercial effects of the transaction at issue. This approach invites tribunals to weigh and consider the actual workings of a transaction at a micro level between the signatories and from a more macro perspective touching non-parties to the agreement. Certainly, it would not be altogether implausible for a tribunal to focus on issues pertaining to industry sectors or broader market considerations. A “connectivity” review of the claims to determine whether a specific non-party is materially affected, or affected at all by the operative averments, also challenges the tribunal to undertake (i) joinder, (ii) indispensable party, (iii) standing, and (iv) third party related analyses⁴⁰.

Although this “intertwining” principle is often stated as a stand-alone concept, the concept is in reality the second prong of the Doctrine of Equitable Estoppel, and often is recognised by courts as equitable estoppel. This principle is particularly helpful for assertion of affirmative claims against non-signatories, where arbitration clauses in individual owner-contractor or owner-designer contracts on a multi-prime project broadly allow joinder

³⁹ See *Great American Insurance Co v Hinkle Contracting Corp* 497 Fed Appx 348; 2012 WL 5936178 (4th Cir 2012) (requiring a performance bond surety to arbitrate its “surety defences” to its bond liability to a general contractor under a subcontract performance bond, because the defences bore a “substantial relationship” to a change order issued under the bonded subcontract that contained an arbitration clause); *Giller v Cafeteria of South Beach Ltd* 967 So 2d 240 (Fla App 2007) (allowing a non-signatory architect to demand arbitration with an owner under an architectural services agreement between his employer and the owner, “because there is an indisputable nexus between these claims and the Professional Services Agreement”).

⁴⁰ Pedro Martinez-Fraga, “The Dilemma of Extending International Commercial Arbitration Clauses to Third Parties: Is Protecting Federal Policy While Accommodating Economic Globalization a Bridge to Nowhere?”, 46 *Cornell Int’l L J* 291, 309 (Spring 2011).

of “any other persons substantially involved in a common question of fact or law, whose presence is required for complete relief”⁴¹.

- (4) *Third Party Beneficiary*. An intended third party beneficiary of a contract containing an arbitration clause may compel or be joined in arbitration with a contracting party⁴². This theory often is applied in condominium disputes to compel arbitration of warranty claims asserted by non-signatory subsequent purchasers against the original contractor based on the original owner-contractor contract containing an arbitration clause⁴³.
- (5) *Incorporation by Reference*. Non-signatories frequently are successful in compelling arbitration or being joined in arbitration where contract terms of one contract containing an arbitration clause are incorporated by reference into other contracts with parties who are non-signatories to the original contract. A key issue often is the strictness of contractual interpretation of the incorporated contract and arbitration clause⁴⁴. Strict judicial interpretation of the language of the incorporated contract without consideration of industry customs and practices can push claims into litigation⁴⁵. More liberal interpretations are based on the “heavy presumption” of arbitrability under federal law and the common construction industry practice and equitable relationships lead to proper joinder results⁴⁶. Major construction

⁴¹ See *Slutsky-Peltz Plumbing & Heating Co Inc v Vincennes Community School Corporation* 556 NE 2d 344 (Ind App 1990) (Multi-prime contractors were compelled to join an arbitration between one of the contractors and the owner, where the claims involved responsibility for project delays. The arbitration clause authorised joinder of “the Owner, the Contractor and any other persons substantially involved in a common question of fact or law, whose presence is required if complete relief is to be accorded in the arbitration”).

⁴² See *Superior Energy Services LLC v Cabinda Gulf Oil Company Ltd* 2013 WL 6406324 (ND Cal, 6 December 2013) (reviewing the doctrines of third party beneficiary, incorporation by reference and equitable estoppel under California law, but finding them inapplicable to compel a non-signatory to arbitrate under an arbitration agreement).

⁴³ See *Home Corp v Bay at Cypress Creek Homeowners Ass’n Inc* 118 So 3d 957 (Fla App 2013).

⁴⁴ See Simon Allison and Kanaga Dharmananda, “Incorporating Arbitration Clauses: The Sacrifice of Consistency at the Altar of Experience”, 30 *Arb Int’l* 265 (No 2, 2014) (tracing the development of England’s strict interpretation of arbitration clauses incorporated by reference, and concluding: “Attitudes towards arbitration have changed significantly over time. A general contra proferentem approach to arbitration clauses, analogous to the treatment of exclusion clauses, can no longer be sustained. Certainty must be balanced with accuracy, fairness and recognition of the realities of modern business”).

⁴⁵ See *Hartford Accident and Indemnity Co v Scarlett Harbor Associates Ltd Partnership* 674 A 2d 106, 142–143 (Md Ct Spec App 1996) (refusing to compel arbitration of claims against a subrogated surety’s performance bond, which incorporated the bonded contract by reference, because “even if that arbitration clause were incorporated into its bond, it only requires arbitration of disputes between [the principal] and [the obligee], not [the surety]”).

⁴⁶ See *Developers Surety and Indemnity Co v Resurrection Baptist Church* 759 F Supp 2d 665 (D Md 2010) (construing an arbitration clause that required arbitration of “any claim arising out of or related to the contract” and that was incorporated by reference into the surety’s bonds as permitting a performance bond surety to arbitrate its claims against the owner and its construction lender for breach of contract).

industry incorporation by reference issues affect sureties and sub-contractors whose obligations typically include performance of prime contract responsibilities incorporated by reference into their respective bonds and subcontracts⁴⁷.

- (6) *Assignment*. Assignment principles permit an assignee to enforce contractual rights of its assignor against other parties to the assigned contract. This includes arbitration rights contained in the assigned contract⁴⁸. Assignments of contract rights routinely are invoked expressly in settlement of affirmative claims by non-signatory parties, where the settlement is less than full value, to preserve recourse for the unpaid balance against third parties. Typically the settlement agreement expressly conveys the assignor's contract rights against third party signatories, including the right to arbitrate⁴⁹. Assignment also can occur as a matter of law, where a surety or guarantor completes the guaranteed contract upon the principal's default⁵⁰.
- (7) *Assumption*. Non-signatories, such as performance bond sureties or contract guarantors who have agreed to take over and complete contracts after default of their principals, and lenders who foreclose on defaulting owners' construction loans and must complete projects under construction, often end up assuming obligations to arbitrate with signatory parties under the defaulted contracts⁵¹. Upon assumption of a contract, an assuming party ordinarily "steps into the contractual shoes" of the defaulting party⁵².

⁴⁷ See *US Surety Co v Hanover RS Ltd Partnership* 543 F Supp 2d 492 (WDNC 2008) (Surety was compelled to arbitrate pursuant to a subcontract arbitration clause incorporated by reference into its subcontract performance bond); *Advance Tank and Const Co Inc v Gulf Coast Asphalt Co LLC* 2006 WL 253600 (Ala 2006) (subcontract dispute was subject to arbitration, where an attachment to a contract that incorporated by reference the contractor's standard terms and conditions contained an arbitration clause).

⁴⁸ See *Cone Constructors Inc v Drummond Community Bank* 754 So 2d 779 (Fla App 2000) (upholding a bank's right to compel arbitration under an assigned contract).

⁴⁹ See *Robert Lamb Hart Planners and Architects v Evergreen Ltd* 787 F Supp 753 (SD Ohio 1992) (upholding a contractor's right to arbitrate its claims against an architect based on an assignment from the owner of its claims against the architect, even though the owner-architect contract precluded joinder and arbitration of claims with anyone not a party to the contract).

⁵⁰ See *United States Fidelity and Guaranty Co v Bangor Area Joint School Authority* 355 F Supp 913 (ED Pa 1973) (compelling a surety to arbitrate its claims against the owner, where the contract was binding on successors and assigns and the surety was a "subrogated" surety).

⁵¹ See *United States Fidelity and Guaranty Co v Bangor Area Joint School Authority* 355 F Supp 913 (ED Pa 1973) (permitting a takeover surety, which was assigned and assumed completion of the bonded contract upon default of its principal, to compel the owner to arbitrate under the arbitration clause of the assigned bonded contract).

⁵² See *Employers Ins of Wausau v Bright Metal Specialties Inc* 251 F 3d 1316 (11th Cir 2001) (by executing a takeover agreement upon default of its principal under the bonded contract, the surety had assumed the principal's obligations under the contract, including the obligation to arbitrate its claims and defences); *Town of Berlin v Nobel Ins Co* 758 A 2d 436 (Conn Ct App 2000) (same).

- (8) *Successor in Interest*. A legal successor in interest by operation of law has the same contractual rights against signatory parties as the party to whose interests it bound to its contractual obligations succeeds. That includes any right of arbitration⁵³.
- (9) *Alter Ego or "Piercing the Veil"*. An alter ego is bound to the same respect as a contracting party it controls⁵⁴. Where a corporate contracting party lacks independent control and substance of its own, its corporate form may be pierced and the controlling entity held liable for the controlled party's obligations.
- (10) *Implied Consent*. Implied consent, which looks for assent to the conduct rather than expressions of parties, is not a doctrine often invoked to compel joinder in arbitration. This doctrine, however, has been invoked repeatedly in subject areas such as implied modification of an express contract, implied warranties and duties, implied authority, and implied waiver of rights. The doctrine postulates, among other things, that parties who engage in large multi-party projects under individual contracts that include the same standard terms, conditions and arbitration clauses, and that contain expressions of third parties' roles and duties on the project, and who perform under such contracts, "impliedly agree" to arbitrate with non-signatory third parties performing the other individual contracts. On virtually all large construction projects involving multiple parties, standard contract documents routinely refer to the duties of other parties⁵⁵. This implied contract theory, although not widely articulated by the judiciary, has proponents. Opining in a dissenting opinion that the "implied contract" theory was more appropriate than equitable estoppel or other theories as justification for joining a non-signatory party in an arbitration, one judge wrote:

An agreement implied in fact is founded upon a meeting of minds, which although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of surrounding circumstances, their tacit understanding.
*** The same contract designated a non-signatory party as construction manager and outlines the duties of the owner, construction contractor, construction manager, and in one

⁵³ See *Saxa Inc v DFD Architecture Inc* 312 SW 3d 224 (Tex App 2010) (allowing successors to the owner's interest to arbitrate claims against an architect, because the owner-architect contract called for arbitration of "any claim, dispute or other matter in question arising out of or related to" the contract).

⁵⁴ See *Lancaster v Harold K Jordon and Co Inc* 2014 WL 2568567 (NS Super, 5 June 2014) (holding owners of a privately-held company bound by an arbitration award as "alter egos").

⁵⁵ See e.g., the American Institute of Architects, Conditions of Contract for Construction, Document A201-2007 (defining the roles and duties of the owner, contractors and architect, and providing for arbitration of disputes unless opting for litigation).

case, the architect, with respect to the construction project. The construction managers in both cases had not signed the owner-contractor agreement but had signed separate contracts containing similar arbitration clauses with either the owner or the owner's architect. By performing duties and accepting benefits under the interlocking and integrated system of contraction contracts and relationships the contractors impliedly agreed to be bound to arbitrate disputes with the construction managers concerning the performance of the managers' duties assigned by and performed under the owner-contractor agreement, although the managers had only signed the related but separate contract documents between themselves and the owner or its architect⁵⁶.

- (11) “*Good Faith*”. Although not commonly invoked to compel or reject joinder of non-signatories, the common law doctrine of good faith and fair dealing warrants observation. Recent commentary espouses “good faith” as an overarching doctrine (more expansive than the principle of equitable estoppel or “alter ego”) to govern arbitration issues including compelling or denying joinder of non-signatories⁵⁷. In many common law jurisdictions, an implied duty of good faith is read into every contract as a matter of law⁵⁸. In many civil law jurisdictions, the principle of good faith is statutorily imposed⁵⁹. Implication of the doctrine to joinder issues suggests that non-signatory persons or entities intimately involved with or benefitted by contractual negotiation or performance may join or be joined in an arbitration. As observed by respected American federal appellate Judge Richard Posner:

⁵⁶ *Grigson v Creative Artists Agency LLC* 210 F 3d 524, 533–534 (5th Cir 2000).

⁵⁷ See Aubrey Thomas, “Comment: Nonsignatories in arbitration: a Good-Faith Analysis”, 14 *Lewis & Clark L Rev* 953 (Fall 2010) (“This Comment proposes that US Courts should apply the principle of good faith to determine whether arbitration including a non-signatory is appropriate. Essentially, courts should utilise the equitable principle of good faith to analyse both the contractual language as well as the conduct of the parties during negotiation and performance of the contract to determine whether the non-signatory may compel or be compelled to arbitrate”).

⁵⁸ See Restatement (Second) of Contracts, section 205, cmt. a (“Good faith performance or enforcement of a contract emphasises faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterised as involving ‘bad faith’ because they violate community standards of decency, fairness or reasonableness”); *Bannum v US* 80 Fed Cl 239 (2008) (“In every contract there exists an implied covenant of good faith and fair dealing. In a government contract, an implied covenant of good faith and fair dealing requires the government not to use its unique position as sovereign to target the legitimate expectations of its contracting partners ... For the plaintiff to successfully assert a claim for breach of the implied covenant of good faith and fair dealing respecting a contract with the government, he or she must allege and prove facts constituting a specific intent to injure the plaintiff on the part of the government official”).

⁵⁹ See *Motorola Credit Corp v Uzan* 388 F 3d 39 (2d Cir 2004) (applying Swiss law, and ruling that a non-signatory “alter ego” could not compel arbitration with a signatory where the non-signatory had failed to act in good faith and had violated the equitable principle of “unclean hands”). See also, UNIDROIT Principles (2010), Article 1.7 (general principle of good faith).

The duty of good faith in the performance of a contract entails the avoidance of conduct such as evasion of the spirit of the bargain, lack of diligence and slacking off, wilful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance. But the duty of good faith does not require your putting one of your customers ahead of the others, even if the others are paying you more. Parties are not prevented from protecting their respective economic interests. [E]ven after you have signed a contract, you are not obliged to become an altruist toward the other party and relax the terms if he gets into trouble in performing his side of the bargain⁶⁰.

VII. BINDING NON-PARTICIPATING NON-SIGNATORIES TO FACTUAL AND LEGAL DETERMINATIONS IN ARBITRATION AWARDS

Even where non-signatories cannot be compelled to participate as a party in an arbitration, those non-signatories who are “alter egos” of an arbitrating party⁶¹ or have third party indemnification obligations to an arbitrating party, may still be bound to and estopped from challenging liability or damages awarded in arbitration under the ancient common law doctrine known as “vouching-in”⁶². “Vouching-in” often is employed in situations where a non-signatory third party indemnitor is not subject to the personal jurisdiction of the arbitral tribunal and cannot be joined in the arbitration. In US Courts, modern impleader practice in litigation was intended to supplement, not supplant, the older device of “vouching-in”. The same can be said for arbitration.

“Vouching-in” is a common law procedural device by which an arbitrating party “vouches-in” and binds a non-signatory third party indemnitor to an arbitration award by notifying the indemnitor that: (1) an arbitration has been commenced against the arbitrating party, (2) the arbitrating party

⁶⁰ *Wisconsin Elec Power Co v Union Pacific Railroad Co* 557 F 3d 504, 510 (7th Cir 2009).

⁶¹ See *Lancaster v Harold K Jordon and Co Inc* 2014 WL 2568567 (NS Super, 5 June 2014) (holding owners of a privately-held company bound by an arbitration award as the participating party's “alter egos”, where they controlled the party and the party's defines, and participated as witnesses); *British Marine plc v Aawanti Shipping & Chartering Ltd* 2014 WL 24575485 (EDNY, 2 June 2014) (staying arbitration of alter ego claims against non-signatory parties, but noting the preclusive effect of an arbitration award upon them).

⁶² See Philip L Bruner and Patrick J O'Connor Jr, *Bruner and O'Connor on Construction Law* §§10:95-10:101. (2002, supplemented and updated annually). See also, *US ex rel Aurora Painting Inc v Fireman's Fund Ins Co* 832 F 2d 1150 (9th Cir 1987) (applying voucher principles to give an arbitration award against a bond principal preclusive effect against the principle's surety); See also *Montana v US* 440 US 147; 99 S Ct 970; 59 L Ed 2d 210 (1979) (Surety which didn't appear as a party, but controlled the defines, was estopped from contesting the award).

is entitled to indemnification from the indemnitor against liability and damages awarded on claims asserted against it in the arbitration, (3) the arbitrating party tenders to the indemnitor the opportunity to take over and defend the arbitrating party against the asserted claims. If the non-signatory indemnitor refuses to defend or join in the arbitration, and is later determined to have indemnified the arbitrating party against awarded liability or damages, the indemnitor nevertheless will be bound to the factual and legal determinations made in arbitration in any subsequent litigation with the arbitrating indemnitee. In some states, a third party indemnitor will not be bound by factual and legal determinations in an arbitral award, where the indemnitor's refusal to join was based on an express contractual reservation⁶³.

"Vouching-in" remains an important concept in construction arbitration, where construction contracts invariably contain express indemnity, insurance, guaranty and surety payment and performance obligations owed by non-signatory parties, and where arbitrating signatory parties routinely seek to join non-signatory parties to recover claims against them for contractual non-performance, indemnity and contribution⁶⁴.

VIII. APPELLATE ARBITRATION: OVERCOMING DISPARITIES IN SCOPES OF JUDICIAL REVIEW OF ARBITRATION AWARDS AND JUDGMENTS, AND "GETTING THE AWARD RIGHT"

The concern most often expressed by parties opposing binding arbitration of complex disputes is the limited statutory scope of judicial review available to vacate an adverse arbitral award when arbitrators "get it wrong". A 2011 landmark survey of corporate counsel in Fortune 1000 companies identified "leading concerns about binding arbitration [as] the lack of judicial review on the merits, the qualifications of arbitrators, and the belief that arbitrators tend to compromise and ignore legal norms [rather than enforce the contract according to applicable law]"⁶⁵. Professors Thomas Stipanowich and Ryan Lamare advise that these leading concerns can be addressed as follows:

⁶³ See *Application of Perkins and Will Partnership* 502 NYS 2d 318 (App Div 1986) (denying the preclusive effect of an arbitration award against an architect, where vouching-in was unavailable because the architect's contract with the owner expressly rejected arbitration with any party but the owner without its written consent).

⁶⁴ See *Fidelity and Deposit Co of Maryland v Parsons & Whittemore Constructors Corp* 397 NE 2d 380, 383 (NY 1979), *Loyal Order of Moose, Lodge 1392 v International Fidelity Ins Co* 797 P 2d 622 (Alaska 1990) ("[the surety] may require the [obligee] to determine at arbitration 'all disputed questions of fact' relative to either [the contractor's] or the [obligee's] compliance with the terms of the construction contract. Such arbitration, pursuant to and limited to the underlying contract, will bind the surety as well as the principal and beneficiary").

⁶⁵ See Thomas Stipanowich and Ryan Lamare, "Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1000 Corporations", 19 *Harv Negotiation L Rev* 1 (Fall 2014) (in publication).

“[C]oncerns about arbitrators’ conformance to legal norms may be addressed by selecting experienced lawyers or former judges as arbitrators (now the prevailing norm in commercial arbitration), through competent legal advocacy ..., and by imposing contractual standards for award-making in accordance with applicable law. Despite statutory limitations on judicial scrutiny of the merits of arbitration awards, some organizations publish appellate arbitration rules offering different models for review of arbitration awards. Concerns about arbitrator compromise may be allayed by better information about award-making, more specific guidance for arbitrators regarding award-making, and relying on single arbitrators in lieu of multi-member panels that might be tempted, for example, to rely on compromise to fix damages⁶⁶.”

The peril of “double jeopardy” is magnified immensely when common issues in dispute are tried on dual tracks of arbitration and litigation. One cause of this magnification is the fundamentally different scopes of judicial review governing arbitration awards and court judgments. Under the Federal Arbitration Act and the New York Convention, the grounds for vacation of an arbitration award are limited to arbitrator misconduct, exceeding powers, corruption, fraud, evident partiality, and the like. Such grounds are far more limited than those available for judicial appellate review of judgments on the merits, such as errors of law or correction of other substantive or procedural legal deficiencies.

Because of the stringent statutory limitations on judicial review and vacation of arbitral awards, construction parties have endeavoured for years to enlarge by agreement the statutory scope of judicial review of arbitral awards. Parties’ consensual enlargement of the scope of judicial review of arbitral awards, however, has been roundly rejected by the United States Supreme Court. In 2008, the court ruled that parties were not permitted to enlarge by agreement the Federal Arbitration Act’s grounds for award vacation⁶⁷.

Other countries that purport to grant arbitrating parties broader statutory scopes of judicial review of arbitral awards do so by statutes that still are unclear and somewhat restrictive⁶⁸. Canadian law, for example, empowers Canadian Courts to vacate arbitration awards for errors on “questions of law” and “questions of fact” only if the parties so provide in

⁶⁶ *Ibid.* at 64.

⁶⁷ See *Hall Street Associates LLC v Mattel Inc* 552 US 576; 128 S Ct 1396; 170 L Ed 2d 254 (2008) (holding that parties could not enlarge by agreement the scope of judicial review of arbitration awards under the Federal Arbitration Act). A few state courts construing arbitration statutes not pre-empted by the Federal Arbitration Act and addressing only intra-state commerce, still allow parties to enlarge by contract the state’s statutory grounds for vacating the award. See *Cable Connection Inc v DIRECTTV Inc* 44 Cal Rptr 4th 1334 (2008) (holding that parties may enlarge by agreement the scope of judicial review of arbitration awards under the California Arbitration Act).

⁶⁸ See England’s Arbitration Act 1996, sections 69 and 70 (limiting appeals of questions of law arising out of an arbitral award to those to which all parties consent or with leave of court upon a judicial determination that the tribunal’s decision is “obviously wrong” and substantially affect the rights of one or more parties).

their arbitration agreement⁶⁹. Where the arbitration agreement does not so provide, parties may still appeal an arbitration award on a “question of law”, but the standard of judicial review is not *de novo*, and is restricted to a standard of “reasonableness”,⁷⁰ unless the court determines the question of law to be of “central importance to the legal system ... and outside the ... specialised area of expertise of the administrative decision maker”, in which case the standard for review is “correctness”. To confuse matters further, relief for errors of law or errors of fact can only be granted on questions not presented to the arbitral tribunal for decision⁷¹. As a consequence, it is difficult even for a Canadian arbitration award to be vacated for ordinary legal or substantive errors⁷².

By US standards, the enunciated Canadian scope of judicial review suggests that – absent a clear agreement of the parties in the arbitration clause and a clear reservation of an appealed question of law from the arbitral tribunal – an arbitral award likely will not be vacated unless the award is infected by a critical error or law of central importance to the legal system, or is clearly “unreasonable”, i.e. near arbitrary and capricious. This suggests that, except where questions of law are explicitly reserved, arbitrators exercise more power than the court.

To avoid entirely this issue of the limited scope of judicial review in North America and elsewhere – and to assure decisions by experts on the merits – parties are beginning to recognise the wisdom of using Appellate Arbitration. Appellate Arbitration allows the parties to maintain control

⁶⁹ See *Dunsmuir v New Brunswick* 2008 SCC 9; [2008] 1 SCR 190. A standard of “reasonableness” means that the award “falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law.”

⁷⁰ *Ibid.* at paragraphs 47 and 55.

⁷¹ See e.g., Alberta Arbitration Act, Rev. Stat. Alberta 2000, Chap. A-43, section 44, which reads:

- 44(1) If the arbitration agreement so provides, a party may appeal an award to the court on a question of law, on a question of fact or on a question of mixed law and fact.
- (2) If the arbitration agreement does not provide that the parties may appeal an award to the court on a question of law, a party may appeal an award to the court on a question of law with leave, which the court shall grant only if it is satisfied that:
 - (a) the importance to the parties of the matters at stake in the arbitration justifies an appeal, and
 - (b) determination of the question of law at issue will significantly affect the rights of the parties.
- (3) Notwithstanding subsections (1) and (2), a party may not appeal an award to the court on a question of law that the parties expressly referred to the arbitral tribunal for decision.

⁷² See *Homexx v Nelson* 2013 ABQB 513 (11 September 2013), in which both arbitrating parties sought vacation of an arbitration award rendered on a dispute over the construction of a home at a wrong elevation lower than contractually specified, which caused ponding. The arbitrator found the contractor in breach of its contract, but rejected the owner’s requested recovery of “cost of repair” in favour of ordering the contractor to change the grade around the house and driveway. Both the homeowner and contractor appealed this award. The Court of Queen’s Bench of Alberta denied both appeals and confirmed the award, because no question of law of “central importance to the legal system has been raised” and because any other question of law was mixed with fact and had been presented to the arbitrator for decision.

over the scope of review, and to select appellate arbitrators with recognised expertise in construction law, customs and practices. Pursuant to the parties' agreement, the arbitral tribunal reviews the appealed arbitral award promptly and efficiently under an agreed scope of review.

The JAMS Optional Arbitration Appeal Procedure⁷³ promulgated in June 2003 offers one example of a formal appellate arbitration process. Unless the parties agree otherwise, the Procedure provides for a scope of arbitral review identical to that of appellate courts in the same jurisdiction at the seat of the arbitration. As a starting point, Procedure Rule (D) states: "The Appeal Panel will apply the same standard of review that the first-level appellate court in the jurisdiction would apply to an appeal from the trial court decision"⁷⁴. Such a standard of review affords *de novo* review of issues of law, rather than more limited statutory grounds for vacating an arbitral award. Instead of an appeal process dragging on for years; the appellate award is rendered promptly on such record as the parties present. With the added oversight of the appellate arbitrators, all parties can have confidence that the reviewed award has "gotten it right". The reviewed award is much more likely to be confirmed and not vacated by a court. The appellate arbitration procedure thus allows the parties to agree upon a broader award review standard than accorded by statute, and to select appellate arbitrators with expertise in construction law and expeditious management of the appellate review process. This process undercuts objections to arbitration by maintaining party control over the scope and procedure for review to be conducted by experts of their choice charged with enforcing the contract in accordance with applicable law. This is the wave of the future.

IX. CONCLUSION

Parties' concerns about dual track "double jeopardy" on major multi-party construction projects are justified, but can be allayed by ample forethought about the breadth of the arbitration clause, arrangements to maximize arbitration joinder and consolidation, selection of the best arbitration providers with arbitration rules most favourable to joinder and consolidation, selection of the best arbitrators with ample expertise and experience, and specification of appellate arbitration unconstrained by statutory review limitations. Careful pre-project planning for dispute resolution, thoughtful post-dispute analysis of issues, detailed attention to consolidation and joinder of claims and parties in arbitration, and invocation of appellate arbitration, can reduce significantly the peril of "double jeopardy".

⁷³ See JAMS Optional Arbitration Appeal Procedure (June 2003) available at www.jamsadr.com (Last accessed 25 September 2014).

⁷⁴ *Ibid.* at 2.