



## Construction Arbitration: Unique Joinder and Consolidation Challenges

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### Introduction

It is well known that arbitration as a means of deciding disputes is used widely in the construction industry to avoid litigation costs and delays and for other reasons. To a great extent, the American Arbitration Association (AAA) has provided the preferred forum and rules. Yet, there are lawyers and their clients who question use of arbitration to resolve construction disputes. One of the reasons often advanced relates to the potential inability in some circumstances to join, that is add, some parties to a proceeding or consolidate related, but separate, arbitrations, with the consequence that multiple proceedings, increased expense, and inconsistent results can occur. It is important for those in the construction industry to understand what the joinder and consolidation challenges actually are and how they can be mitigated.

### I. Reasons Construction Disputes May Give Rise to Joinder and Consolidation Issues

Construction disputes often require evaluation of which parties should be joined in a proceeding or whether a related arbitration should be consolidated with a proceeding for a number of reasons unique to the construction setting, which are discussed below.

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### A. Construction Project Delivery

Project delivery methods used in the construction industry may give rise to joinder and consolidation issues. The term “project delivery” refers to the design and construction processes that may be used to design and construct buildings and other projects. Many different types of project delivery are used in the construction industry. The more common of them are as follows:

1. *Design/Bid/Build*

Here, an owner hires an architect or engineer to perform design services. Once the design documents are finished, the owner lets the same out for bid. The owner then selects a contractor, often a single general contractor, to build the project. The contractor then contracts with subcontractors and suppliers.

2. *Design/Build*

Here, an owner enters into a contract with a contractor to provide both design and construction services, with the intent of establishing a single point of responsibility for the work. The contractor then contracts with subcontractors and suppliers as well as the necessary design professionals.

3. *Multi-Prime*

Here, an owner contracts with several different contractors to complete a project. For example, an owner might have separate contracts for site work and constructing a building or, on a power plant project, have separate contracts with a boiler supplier, suppliers of other large components, and an erection contractor. Many more examples could be given.

4. *Permutations*

There are many variations on the above project delivery methods, including construction management, combinations of design/bid/build and design/build on a single project, and others. In the context of all of the above project delivery methods, there usually are multiple separate contracts involved. Persons with whom a claimant has no contract may be responsible for loss or damage suffered by it. Therefore, each of the parties to a dis-

pute may need to consider the responsibility of other persons for the loss or damages at issue and decide whether it would be desirable to join them in a proceeding or consolidate a proceeding with another related proceeding.

### **B. Participants in the Construction Process**

The large number of participants in many construction projects may give rise to the question of joining other parties or consolidating related proceedings. Whether a construction project involves home building, commercial building, medical facilities, sports facilities, infrastructure, industrial, or other types of projects, commonly a very large number of different participants may be involved, including owners, lenders, architects and engineers, construction managers, general contractors, subcontractors, material and equipment suppliers, labor providers, and many others. Even relatively small projects may involve dozens of participants. Large projects can involve several hundred participants.

In many ways, the participants in a project are dependent on one another to achieve an intended outcome. If even one participant falls short, there may be adverse repercussions on all or many of the rest. Construction disputes often involve disagreements over the cause of adverse impacts leading to construction defects, increased costs, delays, and other consequences to one or more of the participants. Often the issues involved cannot be sorted out without extensive fact development and expert analysis. For these reasons, participants in a construction dispute may need to evaluate who should be joined or whether a related proceeding should be consolidated.

### **C. The Availability of Causes of Action That Are Not Dependent on a Contract Increases the Chance That a Party May Wish to Join Other Parties or Consolidate Related Proceedings**

Many construction disputes, perhaps most, involve claims by a participant against a party with whom it has a contract. Owners assert contract claims against contractors; contractors assert contract claims against owners. Contractors assert contract claims against their subcontractors and vice-versa. Owners assert claims against architects or engineers they engage and vice-

versa. And so on. However, as discussed above, participants in construction projects do not necessarily have contracts with one another at the same time as they interact with one another and depend on each other for a successful project outcome.

Legally, a participant suffering loss or damage in a construction setting may have a claim against another participant with whom it has no contract. For example, a contractor may have a claim against a project architect engaged by an owner.<sup>1</sup> A subcontractor may have a claim against a project architect engaged by an owner.<sup>2</sup> An owner may have a claim against a subcontractor with whom it has no contract.<sup>3</sup> An owner may have a claim against a supplier of goods with whom it has no contract.<sup>4</sup> As a broad generalization, legal theories based on negligence, professional negligence, implied warranties, third-party beneficiary, misrepresentation, and contribution may not depend on the existence of a direct contractual relationship between a claimant and a targeted person. This means that some construction disputes, especially complex ones, give rise to the need to evaluate who should or can be joined or consolidation of related proceedings.

## II. How the Courts Deal with Joinder and Consolidation Issues in Federal Court

Generally, in court proceedings, the plaintiff possesses the power to choose which claims and which parties will be joined in the litigation, although the plaintiff's decision may not be decisive. Litigants usually can rely on

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<sup>1</sup>*Prichard Bros., Inc. v. Grady Co.*, 428 N.W.2d 391 (Minn. 1988) (construction contractor brought negligence action against architectural firm for damages arising out of delays in completion of project); *U.S. ex rel. Los Angeles Testing Lab. v. Rogers & Rogers*, 161 F. Supp. 132 (S.D. Cal. 1958) (contractor permitted to assert negligent misrepresentation claim against architect).

<sup>2</sup>*Gurtler, Herbert & Co. v. Weyland Mach. Shop*, 405 So. 2d 660 (La. Ct. App. 1981) (a subcontractor was allowed to recover from an architect in tort where subcontractor alleged architect's unsatisfactory drawings required revisions and delays for revisions led to liability).

<sup>3</sup>*Sears, Roebuck and Co. v. Jardel Co.*, 421 F.2d 1048 (3rd Cir. 1969) (following the first Restatement and permitting a suit by an owner against a subcontractor as a third-party beneficiary of the promise of the subcontractor to the contractor); *Syndoulos Lutheran Church v. A.R.C. Industries*, 662 P.2d 109 (Alaska 1983) (holding owner claim as third-party beneficiary against subcontractor and its alleged principal shareholder on basis of a breach of subcontract due to defects in materials and workmanship).

<sup>4</sup>*Miller v. Big River Concrete*, 14 S.W.3d 129 (Mo. Ct. App. 2000) (although Missouri applies the economic loss rule, a cause of action by an owner against a concrete supplier was deemed to state a cause of action for negligent misrepresentation).

liberal rules of joinder and consolidation to structure their lawsuits. Joinder and consolidation may be utilized for the practical purposes of minimizing piecemeal litigation, diminishing the likelihood of inconsistent results, and preventing duplicative resolution. Ultimately, judges have broad discretion to grant permissive joinder of parties and claims, to allow non-parties to intervene into a lawsuit, or to consolidate cases within a district for trial or pretrial purposes.

Using the federal courts as an example, Rules 18 through 21 of the Federal Rules of Civil Procedure outline the joinder process. In a typical litigation scenario, a plaintiff has a claim against one or more defendants. Under Rule 18, the plaintiff may bring all claims that plaintiff may have against a defendant, even if the claims are unrelated to a single event or dispute.<sup>5</sup>

When a party that is not named in the lawsuit is potentially involved, there are rules that come into play regarding joinder. Particularly, Rule 19 relates to a party that is necessary to the action. A party is a “necessary party” under compulsory joinder rules if, in that person’s absence, the court cannot accord complete relief among existing parties.<sup>6</sup> In determining whether a party is necessary and indispensable, a court looks to whether it can grant complete relief to the persons already parties to the action; the effect that the court’s decision has on absent parties is immaterial.<sup>7</sup>

Under Rule 19(b), if the court determines that the absent party is a required party, it must consider whether there are any obstacles to joining the absent party. If there are none, then the party must be joined. The most common obstacle is that joinder could destroy complete diversity, thus stripping the federal court of jurisdiction.<sup>8</sup> If the court determines that the absent party cannot be joined, then the court must decide whether to con-

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<sup>5</sup>Fed. R. Civ. P. 18.

<sup>6</sup>Fed. R. Civ. P. 19(a)(1)(A).

<sup>7</sup>*First Nat’l Ins. Co. of Am. v. Peralta Cmty. Coll. Dist.*, No. 12-cv-5943 JSC, 2013 U.S. Dist. LEXIS 21265 (N.D. Cal. Feb. 15, 2013) (denying motion to dismiss for failure to join party to construction contract as a non-necessary party).

<sup>8</sup>See *Hartford Cas. Ins. v. Tre Servs., Inc.*, No. 09-14634, 2010 WL 4608778 (E.D. Mich. Nov. 5, 2010) (dismissing non-diverse parties to contract for engineering as dispensable parties); see, e.g., *Glancy v. Taubman Ctrs., Inc.*, 373 F.3d 656 (6th Cir. 2004) (determining if joinder is not possible, the court must determine if the suit may continue in party’s absence or if case should be dismissed).

tinue the litigation in the party's absence or dismiss the case.<sup>9</sup> Ultimately, the court, after weighing the factors laid out in the rule, has great latitude and discretion in determining whether a party is indispensable.<sup>10</sup>

Rule 20 permits the joinder of parties when claims arise out of the same nucleus of facts and events and the claims involve the same questions of law or fact. The rule permits parties to the litigation to add parties on either the plaintiff's or the defendant's side as long as the two-part permissive joinder test is satisfied. Specifically, Rule 20 permits joinder of multiple plaintiffs if (1) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (2) any question of law or fact common to all plaintiffs will arise in the action.<sup>11</sup> Similarly, the rule permits joinder of multiple defendants if (1) any right is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (2) any question of law or fact common to all plaintiffs will arise in the action.<sup>12</sup>

Rule 42 governs consolidation, and provides that when common questions of law or fact exist in two separate actions pending before the court, the court may: join the actions for hearing or trial of any or all issues in the actions; consolidate the actions into a single case; or make any other orders to avoid unnecessary cost or delay.<sup>13</sup> A prerequisite to consolidation is the existence of common questions of law or fact.<sup>14</sup> The court may consolidate for discovery and other pretrial matters, for trial, or for any appropriate process.<sup>15</sup>

In sum, the court system offers broad opportunities for both joinder of parties and consolidation of related cases.

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<sup>9</sup>See *Hartford Cas. Ins.*, 2010 WL 4608778, at \*9; see also *Provident Tradesmens Bank & Tr. Co. v. Patterson*, 390 U.S. 102, 109 (1968).

<sup>10</sup>*Hartford Cas. Ins. Co.*, 2010 WL 4608778, at \*9.

<sup>11</sup>Fed. R. Civ. P. 20(a)(1).

<sup>12</sup>Fed. R. Civ. P. 20(a)(2).

<sup>13</sup>Fed. R. Civ. P. 42(a).

<sup>14</sup>Fed. R. Civ. P. 20(a)(1).

<sup>15</sup>Fed. R. Civ. P. 42(a)(1)-(3); see also *In re Air Crash Disaster at Detroit Metro. Airport*, 737 F. Supp. 391, 393-95 (E.D. Mich. 1989) (consolidation for liability phase).

### III. How Joinder and Consolidation Issues Differ in Arbitration

Arbitration is a matter of contract. No person can be compelled to arbitrate absent agreement to (1) arbitrate and (2) resolve a particular controversy by arbitration.<sup>16</sup> The concept of arbitrability relates to whether the parties contracted to arbitrate and intended to submit a specific dispute to arbitration. Disputes over arbitrability can arise in many types of arbitrations and may end up in proceedings before a court. Construction arbitration is no different, but the issue may be more likely to arise than in many non-construction settings in light of project delivery methods used, the number of participants, and the fact that persons may be liable for loss or damage who have no contract with a claimant. Essentially, unless a person sought to be joined has agreed to arbitrate, it cannot be joined even though there are legal theories that might impose liability on it.

### IV. Examples of Situations for Which Joinder and Consolidation Issues May Arise in the Construction Setting and How They May be Resolved

**Example 1:** An owner has a construction defect claim against its general contractor, which has agreed to arbitrate disputes with the owner. The contractor alleges that it followed the specifications provided to it and that, under the *Spearin* doctrine, the owner warranted their adequacy. The owner wishes to join its architect who prepared the specifications in the arbitration. The architect objects. What are the issues?

First, has the architect contractually agreed to arbitrate the dispute? If not, the architect cannot be joined.

Second, if the architect has agreed to arbitrate disputes, did the owner contractually agree that the architect would not be joined in a proceeding with the contractor? Many architects include clauses like the following in which they object to joinder or consolidation:

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<sup>16</sup> *AT&T Technologies, Inc. v. Comm'n's Workers*, 475 U.S. 643, 648-49 (1986) ("arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to so submit") (citation omitted); *St. Luke's Hospital v. Midwest Mechanical Contractors, Inc.*, 681 S.W.2d 482 (Mo. Ct. App. 1984) (holding there was no agreement between the hospital and the low bidder for a contract and, therefore, no basis for arbitration); see also *United States Use of Newton v. Neumann Caribbean Int'l, Ltd.*, 750 F.2d 1422 (9th Cir. 1985) (contractors and subcontractor required to submit to arbitration as required by their contracts).

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 this Agreement and signed by the Architect, Owner, Contractor and any other person or entity sought to be joined.

Architects presumably do so because they believe they are more likely to fare better if they are not a party in a proceeding with the contractor. Such clauses will generally be enforced.<sup>17</sup> Therefore, an owner who wishes to have an opportunity to join its architect may in advance wish to expressly include language to that effect in an arbitration clause.

Third, if the arbitration clause in the architect's contract is silent, there often is a reasonable chance the owner may be able to join the architect, assuming there are no compelling circumstances, such as timing of the request, which would result in loss of an opportunity to join.

**Example 2:** An owner asserts defect and delay claims against a contractor with whom it has an arbitration clause. The contractor wishes to join subcontractors who, it alleges, share the blame for defects and delays. What are the issues?

First, does the contractor have an arbitration agreement with the subcontractors? If not, it cannot join them.

Second, if the contractor has an arbitration agreement with the subcontractors, and it does not prohibit joinder or consolidation, which is usually the case, it may be able to join them or consolidate an arbitration against them with an arbitration involving the owner.<sup>18</sup> Third, the owner may or may not object to joinder or consolidation of cases against subcontractors. On the one hand, the owner could conclude that having the contractor and subcontractors in its proceeding, all pointing fingers at one another, for the loss or damage involved, is beneficial. It may believe discovery op-

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<sup>17</sup> *Zurich American Ins. Co. v. Heard*, 740 S.E.2d 429 (Ga. App. 2013) (enforcing arbitration agreement that 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 and 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.").

<sup>18</sup> See *Maxum Foundations, Inc. v. Salus Corp.*, 817 F.2d 1086 (4th Cir. 1987); *Kalman Floor Co. v. Josh Muscarelle, Inc.*, 481 A.2d 553 (N.J. Sup. A.D. 1984).



portunities as well are beneficial. On the other hand, the owner may not want joinder or consolidation because it might mean a longer hearing, more cross-examination of its witnesses, and more discovery demands on it. The owner may conclude that a straightforward case against a responsible contractor offers its best chance at success. Sorting out these issues is often fact-intensive. Likewise, the subcontractors may or may not want to be joined or be involved in consolidated proceedings, particularly if an individual subcontractor's potential responsibility is likely small and being involved in a large, lengthy, expensive case might be disadvantageous. The need to balance competing arguments either for or against joinder or consolidation then arise. To try to avoid adverse rulings, a contractor could include provisions in its subcontracts permitting joinder or consolidation, or giving it discretion.

**Example 3:** Sometimes, owners wish to make direct arbitration claims against one or more subcontractors. That will not work, however, absent an arbitration clause with the subcontractors. But, owners could require contractors to include a flow down clause in its subcontracts that permits an owner to join subcontractors or consolidate cases against them.

**Example 4:** A prime contractor wishes to have the owner join another prime contractor with whom the owner has an arbitration agreement. The owner objects. Can the contractor receive an order compelling the owner to join the architect? The contractor may want that result to facilitate discovery and hopefully deflect its potential liability to the owner. Assuming no prohibition on joinder in the contractor's contract, and compelling reason for it to be joined, it may be possible that an arbitrator could order the owner to join the architect. The authors are unaware of case law on this issue, however.

### **Conclusion**

As can be seen from the above discussion, joinder and consolidation issues often need to be evaluated in the context of construction disputes. Barriers to joinder and/or consolidation can frustrate a party's preferred course of

action in the arbitration setting, however. Sophistication in contracting at the outset of a project can potentially help mitigate some of the challenges.