STREAMLINING CONSTRUCTION ARBITRATION:
REDUCING THE PERIL OF “DOUBLE JEOPARDY” IN DUAL TRACK
PROCEEDINGS THROUGH CONSOLIDATION, JOINDER, VOUCHING IN, AND
APPELLATE ARBITRATION

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I. INTRODUCTION

Those who engage in the field of international engineering and construction recognize that major construction projects can “generate major litigation” and that “the management of either is perilous.”1 To reduce the perilous impact of disruptive disputes upon the construction process, the American construction industry for over 125 years has followed the historic practice of merchants2 in promoting “rapid resolution” of disputes by experts selected by the parties in consensual binding arbitrations (and other non-binding ADR methods) rather than by courtroom litigation.3

Arbitration between two contracting parties has worked well in resolving disputes over the past century. The U.S. Supreme Court has enforced the Federal Arbitration Act of 19254 to overcome remnants of early legislative and judicial hostility to binding arbitration, and over the past thirty-five years has become an enthusiastic proponent of arbitration.5 Illustrative is Chief Justice Burger’s momentous “shot heard round the legal world” in favor of arbitration in his compelling advice to the American legal profession in 1985:
The obligation of the legal profession is, or has long been thought to be, to serve as healers of human conflicts. To fulfill 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 sixteen in my present position, added to twenty 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. 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. 6

II. THE PERIL OF “DOUBLE JEOPARDY”

In voicing full-throated support for judicial enforcement of arbitration agreements, the U.S. Supreme Court fully recognized that the end result could be inefficient and risky “piecemeal” resolution of related disputes among multiple parties performing on the same project under different contracts with different dispute resolution provisions. 7 That result is precisely the problem that has confronted the construction industry in the twenty-first century. Although arbitration agreements now are routinely enforced, the resolution of multi-party construction disputes has become more complex because of the significant growth in the size and number of projects, number of specialized parties engaged in the building process, 8 rapid advances in technology, legal development of “construction law”, 9 and endemic language variations in dispute resolution clauses governing different parties engaged on the same project.
When factually intertwined multi-party construction disputes now arise, all too often they are resolved on a “piecemeal” basis because not all parties are found amenable to the jurisdiction of the same forum -- some parties are found to have agreed to arbitrate with different parties in separate arbitrations administered by difference institutions, while others are found to have assumed no contractual obligation to arbitrate and must pursue litigation for recourse.¹⁰ Necessarily, such multi-forum disputes and claims arising out of the same intertwined facts end up being: (1) decided by different arbitrators in separate arbitration proceedings or by an arbitrator in an arbitral forum and a judge in a judicial forum having jurisdiction,¹¹ and (2) reviewed and enforced by different appellate courts under the different statutory scopes of judicial review applicable to arbitration awards¹² and to court judgments.¹³ This uncertainty of outcomes 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 respective awards and judgments are subject on appeal to different standards and scopes judicial appellate review.

This “double jeopardy” risk of inconsistent outcomes in “piecemeal” arbitration, litigation and on appeal, combined with the inefficiency, added cost and delay inherent in dual track proceedings, is one major objection often voiced by parties who eschew domestic arbitration in favor of litigation.¹⁴ Our Federal Rules of Civil Procedure, for example, offer the advantage of broad rights of consolidation of related suits and joinder of claims and parties.¹⁵

To allow the U.S. construction industry to deal more efficiently with the "double jeopardy" risk, Standard U.S. construction industry contract forms began in 2007 to eliminate the century-old requirement for mandatory arbitration of disputes and now permit the contracting parties to select either arbitration or litigation, with litigation as the default option.¹⁶ Accepting litigation to
enhance joinder of parties and consolidation of cases, however, creates a Faustian Bargain: the litigation option cannot assure that the assigned judge has the requisite expertise and knowledge of construction industry customs and practices to decide correctly many types of complex construction disputes.\textsuperscript{17} Such an undertaking can be viewed by judges lacking some construction expertise as “formidable.”\textsuperscript{18}

\textbf{III. THE CONTRACT DRAFTER’S ROLE IN MINIMIZING “DOUBLE JEOPARDY”}

Minimization of the “double jeopardy” problem rests initially with contract drafters who control the content of the arbitration clause. Arbitration clauses should be drafted broadly to provide for expansive arbitrator jurisdiction,\textsuperscript{19} to incorporate supportive arbitration rules,\textsuperscript{20} to promote joinder of claims\textsuperscript{21} and joinder of non-signatory third parties,\textsuperscript{22} to allow consolidation of related arbitrations, and to authorize appellate arbitration. The goal is to bind all project participants to common arbitration clauses and rules that require arbitration of all intertwined disputes and claims arising on or related to the same project to be addressed under the same arbitration provisions and adjudicated before the same tribunal.\textsuperscript{23}

Broad arbitration clauses, along with broad arbitration rules,\textsuperscript{24} should confirm expressly the authority of the arbitral tribunal or the arbitral administrator: (1) to decide challenges to the arbitral tribunal’s jurisdiction over issues arising out of or relating to the arbitration, (2) to consolidate multiple arbitrations before a single arbitral tribunal, (3) to join necessary non-signatories in the arbitration proceeding (or otherwise bind such signatories by findings and conclusions in the arbitral tribunal’s award), (4) to decide all project claims, counter-claims and cross-claims arising out of or related directly or indirectly to the same factual issues –whether pleaded legally 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. Restrictive clauses, such as those precluding consolidation of cases or allowing joinder of non-signatories only upon express written consent\textsuperscript{25} or limiting arbitrable claims to those alleging “breach of contract”, clearly should be avoided.

**IV. THE JUDICIARY’S SUPPORT FOR MITIGATING THE RISK OF “DOUBLE JEOPARDY”**

The U. S. Supreme Court, having acknowledged that America’s strong policy in support of enforcing arbitration could lead to “piecemeal” resolution of disputes, and having recognized that the Federal Arbitration Act\textsuperscript{26} is silent on issues of consolidation and joinder, has permitted state contract law principles to fill the void. In *Arthur Anderson LLP v. Carlisle*, Justice Scalia, writing for the majority, stated:

Neither [Section 2 or 3 of the Federal Arbitration Act] purports to alter background principles of state contract law regarding the scope of agreements (including the question of who is bound by them). Indeed § 2 explicitly retains an external body of law governing revocation (such grounds “as exist at law or equity”). And we think § 3 adds no substantive restriction to § 2’s enforceability mandate. State law, therefore, is applicable to determine which contracts are binding under § 2 and enforceable under § 3 if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. Because “traditional principles” of state law allow a contract to be enforced by or against nonparties to the contract through assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel, the Sixth Circuit’s holding that nonparties to a contract are categorically barred from § 3 relief was error.\textsuperscript{27}

By allowing traditional contract principles of state law to be considered in determining the enforceability of an arbitration agreement, and by supporting the arbitrator’s expansive jurisdiction to decide all procedural issues\textsuperscript{28} and substantive contract validity issues,\textsuperscript{29} the Supreme court opened the door to the use of creative state common law theories to promote enforcement of arbitration aimed at joining related multiple claims and parties before one arbitral forum through (1) consolidation of proceedings, (2) joinder of contract and non-contract claims in arbitration, (3)
joinder of non-signatory parties in arbitration when legal relationships justify such joinder, (4) “vouching-in” liability of non-participating indemnitors and appellate arbitration. The result has been a blossoming of judicial decisions that have facilitated reduction of “piecemeal” dispute resolution as follows:

A. CONSOLIDATION OF SEPARATE PENDING ARBITRATIONS

Consolidation of arbitrations necessarily reduces the risk of “double jeopardy”, and routinely is granted where justified. The question of consolidation is treated today under arbitral law and arbitration rules as a procedural issue for arbitrators to decide rather than a substantive issue of arbitrability for the courts. Arbitration rules often grant arbitrators or arbitration administrators broad authority to order consolidation of arbitrations having common issues of fact or law.

Where consolidation is upheld, a major subsidiary issue is whether two or more arbitrations are consolidated merely for hearing of evidence by their separate tribunals sitting together in one proceeding 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 between and among all parties. Some jurisdictions with restrictive statutes or case law deny consolidation absent the express consent of all parties by contract, adoption of broad arbitration rules or other writing. Problems also arise when contracts or arbitration rules require written consent of all parties to consolidation of arbitration proceedings, when agreed arbitration rules fail to address consolidation, or when arbitration clauses are infected by drafting ambiguities.

The broadest consolidation rights appear in the JAMS Engineering and Construction Arbitration Rules and Procedures (2014), which empower JAMS as tribunal administrator to
Consolidation rights under international arbitration rules are less definitive. *ICC Arbitration Rules* (2017) 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 same. 38 *UNCITRAL Arbitration Rules* (2013) allow joinder of additional parties, but do not expressly mention consolidation. 39 The *Canadian Arbitration Association Arbitration Rules* (2016) make no mention of either consolidation or joinder, but do empower arbitrators under Rule 7 to hear challenges to their jurisdiction. 40

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

In the early 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 endeavored to do so simply by pleading their claims in tort or equity rather than contract.

Today, joinder of claims is promoted by contract dispute clauses that (1) broadly define "claims" 41 as including “disputes arising out of or relating to the Contract”, and (2) require arbitration of all claims “arising out of or related to” the contract, 42 and by arbitration rules authorizing broad arbitrator jurisdiction. 43 Joinder of claims also is promoted by judicial rulings that view joinder of claims as a procedural issue to be decided by the arbitrators. 44 Most U. S.
jurisdictions adhere to the principle that all claims – however labeled - between contracting signatories, which arise out of or are related to a contract containing the an arbitration clause, will be sent to arbitration without regard to whether those claims are brought in contract, tort, equity or under statute.\textsuperscript{45} 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 clause.\textsuperscript{46} 

Illustrative of the modern judicial treatment of joinder of contract and non-contract claims is \textit{Leighton v. Chesapeake Appalachia, LLC},\textsuperscript{47} in which land owners who had leased their lands to a contractor conducting natural gas fracking operations commenced suit against the drilling contractor and three non-signatory subcontractors for injury to the lessors’ water supply alleged to have been caused by their 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 broadly 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 U.S. 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.
C. JOINDER IN ARBITRATION OF NON-SIGNATORY PARTIES

Like the issues of consolidation and joinder of claims, the issue of joinder of non-signatory parties is controlled (1) by state statutes, (2) by the scope of the arbitration clause, 48 (3) by the arbitration rules accepted by the signatory parties, 49 and (4) by common law principles of law. 50 At the heart of the issue of joinder of non-signatories is arbitrator jurisdiction. U.S. federal and state courts support joinder of non-signatories ordered by arbitrators under arbitration clauses and rules that broadly define the jurisdiction of arbitrators to decide the procedural issue of joinder of non-signatory parties. 51 One such rule is JAMS Engineering and Construction Arbitration Rules and Procedures (2014), Rule 6(f), which provides:

Where a third party seeks to participate in 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. 52

Illustrative of how two courts used different joinder analyses to reach the same result is University of Notre Dame (USA) in England v. TJAC Waterloo, LLC. 53 In that case, a college entered into a purchase contract to buy for $58 million a London building following the seller’s renovation and conversion of the building into a student dormitory. The Purchase Contract stated that the work would be performed by the seller’s affiliated construction company operating under a separate renovation contract with the seller. The purchase contract named the college as “buyer”, the “seller” and the contractor as parties, and was signed by a single agent acting on behalf of the seller and its contractor. The purchase contract contained an arbitration clause that allowed either the “buyer” or “seller” (without mention of the contractor) to refer disputes for resolution “by an expert” (construed to be an “arbitrator” under the Federal Arbitration Act). The construction
contract, however, contained no arbitration clause, and stated that it “is subject to English law and the jurisdiction of the English courts”.

After buying the building, the college discovered deficiencies alleged to cost $8.5 million to repair, commenced arbitration against the seller and contractor, obtained a partial award in its favor on the issue of liability of the seller and contractor, and commenced suit against the seller and contractor in England’s Technology and Construction Court to confirm the partial award. The seller and contractor were represented by the same counsel throughout the arbitration. Concerned about potential disappearance of the respondents’ U.S. assets, the college also commenced suit in the United States District Court for the District of Massachusetts seeking an order preventing the seller and contractor from dissipating or transferring assets. That court confirmed the partial award under the Federal Arbitration Act, and authorized the college to attach $7 million in assets pending completion of arbitration in England on the issue of quantum of damages.54 The seller and contractor appealed the District Court’s confirmation of the partial award and attachment order to the U. S. Court of Appeals for the First Circuit.

Before the U.S. Court of Appeals, the seller and contractor argued unsuccessfully that confirmation of the partial award should be vacated because the award was not “final” and thus not confirmable. The contractor also argued separately that it was not bound by the award, because (1) it never had agreed to arbitrate with the college, (2) the purchase contract’s arbitration clause permitted only the “buyer” or “seller” to initiate arbitration, (3) it had performed its work for the seller under a separate construction contract having no arbitration clause, and (4) the construction contract expressly provided that it was subject to English law and the jurisdiction of the English court.
The Court of Appeals, in an opinion authored by Associate Justice (Ret.) David Souter sitting by designation, ruled that the partial award on liability was a “final award” under the Federal Arbitration Act, and affirmed the District Court’s confirmation of the partial award against both the seller and contractor. The Court further held that the contractor was bound by the partial award, because the contractor: (1) in fact was named as a party on the purchase contract signed by its agent; (2) never claimed that the agent who signed the contract on its behalf was not authorized to do so; (3) took part in selecting the arbitrator; (4) did not object to the arbitration proceedings, made no effort to contest the arbitrator’s jurisdiction or “reserve the issue”; and (5) participated throughout the arbitration as if it was a party. The Court concluded that the contractor’s conduct throughout the proceedings confirmed that it regarded itself as more than a “nominal” party to the arbitration,

In reaching its decision, the Court was not dissuaded by the contractor’s argument that the arbitration clause’s language, which allowed either the “buyer” or “seller” (without mention of the contractor) to commence arbitration, did not preclude the contractor’s status as a party to the purchase contract. The Court also took judicial notice of the English case of ZVI Const. Co. v. Univ. of Notre Dame (USA) in England,55 in which England’s Technology and Construction Court had ruled that the contractor was bound by the partial award, because it had “impliedly agreed” to arbitral jurisdiction and thus was “estopped” from claiming otherwise. Thus, the U.S. Court and the English court each arrived at the same result using different rationales – an express contract interpreted consistent with conduct, and an implied agreement and estoppel by conduct preventing the contractor from disavowing an obligation to arbitrate.

Where joinder of non-signatory parties is not restricted by statute, arbitration clauses or arbitration rules, the risk of “double jeopardy” in multi-party disputes is likely to be mitigated by
joinder of non-signatory parties under one or more of twelve common law doctrines. These doctrines are the product of the common law’s nineteenth and twentieth century journey along a road leading from "text" to "context" and from "formalism" to "fairness." These doctrines are:

1. Agency. Non-signatory agents have a right to join in arbitrations to defend themselves against allegations of malfeasance that form the basis of claims against their signatory principals or to join with their signatory principals in asserting affirmative claims against other arbitrating parties. Thus, one who carries out contractual duties on behalf of a signatory principal under a contract providing for arbitration, and whose conduct is the “nexus” of claims brought by or against its signatory principal, may join or be joined in the arbitration. The critical nexus is the agency relationship, which may be based on actual or apparent authority.

Leighton v. Chesapeake Appalachia, LLC, 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 subcontractors. The claims against the non-signatory subcontractors were solely tort claims for injury to the lessors’ water supply allegedly caused by their negligence in performing fracking operations on nearby properties. Two of the non-signatory subcontractors, however, were subsidiaries of the contractor, while the third was entirely independent of them. The U.S. District Court ruled that the contractor’s two non-signatory subsidiary subcontractors 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 proceed to determine whether the third independent subcontractor should be joined under the same principles or under another legal doctrine such as equitable estoppel.
2. *Equitable Estoppel.* Non-signatory third parties with no agency relationship may compel and be compelled to join arbitrations in which claims asserted by or against signatory parties allege misconduct in performance of duties by the non-signatories under agreements authorizing arbitration, particularly where the alleged misconduct is closely intertwined with or a direct cause of damages claimed in the arbitration.\(^60\) Non-signatories also may compel arbitration and stay litigation of claims against them of malfeasance related to the contract authorizing arbitration and asserted by a contract signatory engaged in the litigation.

The legal principle supporting such non-signatory joinder is the Doctrine of Equitable Estoppel.\(^61\) The signatory is said to be “equitably estopped” to avoid arbitration with the non-signatory. The Doctrine is stated thusly:

Existing case law demonstrates that equitable estoppel allows a non-signatory to compel arbitration in two difference 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. If each of a signatory’s claims against a non-signatory makes reference to or presumes the existence of the written agreement, then 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 favor of arbitration effectively thwarted.\(^62\)

Non-signatories, however, may not use equitable estoppel affirmatively to compel arbitration of their own claims unless signatories have first commenced litigation against them. To that extent, the right of arbitration remains consensual.
3. “Inextricable Nexus.” Non-signatory parties, whose claims and defenses have an indisputably “inextricable nexus”\textsuperscript{63} to claims in arbitration can join and be joined.\textsuperscript{64} 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 analyses.\textsuperscript{65}

Although this “intertwining” principle often is stated as a stand-alone concept, the concept is in reality the second prong of the Doctrine of Equitable Estoppel and often is said to be the basis for equitable estoppel.\textsuperscript{66} This principle is particularly helpful to compel arbitration of related affirmative claims asserted by signatories against non-signatories on a multi-party project, where the arbitration clause broadly allows joinder of “any other persons substantially involved in a common question of fact or law, whose presence is required for complete relief.”\textsuperscript{67}

4. Third Party Beneficiary. An “intended” third party beneficiary (as distinguished from an “incidental” beneficiary) may compel or be joined in arbitration with a signatory of a contract containing an arbitration clause.\textsuperscript{68} The Third Party Beneficiary theory often is applied in the context of owner–subcontractor disputes (1) to allow a non-signatory subcontractor to arbitrate claims that are brought by or against a signatory owner, and that arise out of the owner-contractor
contract, or (2) to allow a non-signatory owner to arbitrate claims by or against a signatory subcontractor that arise out of the contractor-subcontractor subcontract.

5. Incorporation by Reference. Non-signatories to a contract frequently are successful in compelling arbitration or joining in arbitration enforced under an arbitration clause in a contract document incorporated by reference. Key issues often are the extent of the parties’ understanding of trade custom and usage applicable to “flow down” provisions, the extent to which an arbitration clause in an incorporated document is apparent, and the strictness of contractual interpretation of the incorporated contract and the arbitration clause. Strict judicial interpretation of the language of the incorporated contract without consideration of industry customs and practices can push claims into litigation. 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 results. Major construction industry incorporation by reference issues affect sureties and subcontractors whose obligations typically include performance of prime contract responsibilities incorporated by reference into their respective bonds and subcontracts.

6. Assignment. A legal assignment permits the assignee to enforce contractual rights of its assignor against other parties to the assigned contract. This includes arbitration rights contained in the assigned contract. 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 arbitrate. Assignment also can occur as a matter of law, where a surety or guarantor completes the guaranteed contract upon the principal’s default.
7. Assumption. Non-signatories, such as performance bond sureties or contract guarantors who have taken over and completed contracts after default of their principals, and such as 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 contracts they “take over”. Upon assumption of a contract, an assuming party ordinarily “steps into the contractual shoes” of the defaulting party, and must complete performance of the obligations of the defaulting obligor under the defaulted contract.

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 arbitration.

9. Alter Ego or “Piercing the Veil”. An alter ego is bound in the same respect as a contracting party it controls. Where a corporate contracting party lacks independent control and substance of its own, its corporate form may be pierced and the controlling entity may be forced to arbitrate the controlled party’s claims and obligations.

10. Waiver. Like any contract right, the right to arbitrate disputes or right to avoid arbitrating disputes can be waived expressly or by conduct.

11. Implied Contract. The Doctrine of Implied Contract recognizes and implies into contracts various rights and duties arising from parties’ conduct, from surrounding circumstances and from the contextual transaction, even if not set forth in the formal contractual expressions of parties. This doctrine has been invoked repeatedly to find implied modifications of express contract, implied warranties and duties of design and construction, implied duties to cooperate and not hinder or delay the other party, implied authority to bind an employer, and implied waiver of
The doctrine has not often been invoked to compel joinder of non-signatories in arbitration.

The doctrine, among other things, has been invoked to suggest 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 parties. This implied contract theory, although not widely articulated by the U.S. judiciary, has proponents. Opining 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 federal appellate 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.

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[Here] 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 case, the architect, with respect to the construction project. The construction managers in both cases [in litigation] 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 construction 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 architect.
12. “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 international commentary espouses “good faith” as an overarching doctrine\(^\text{92}\) (more expansive than the principle of equitable estoppel or “alter ego”) to govern arbitration issues addressing the parties’ reasonable commercial expectations, including the issues of compelling or denying joinder of non-signatories.\(^\text{93}\) In federal contracts, an implied duty of good faith and fair dealing is read into every contract as a matter of law.\(^\text{94}\) In many state jurisdictions, the same is true.\(^\text{95}\) In many civil law jurisdictions, the principle of good faith is accepted.\(^\text{96}\) Application of the doctrine of “good faith” to joinder issues suggests that, if signatory and non-signatory persons or entities hold “reasonable commercial expectations” within the context of the transaction that disputes arising out of their contract will be settled by arbitration, such contextual reasonable commercial expectations may establish “intent” sufficient to permit non-signatories to join or be joined in an arbitration with signatories.

IV. BINDING NON-PARTICIPATING NON-SIGNATORIES TO FACTUAL AND LEGAL DETERMINATIONS IN ARBITRATION AWARDS BY “VOUCHING-IN”

“Vouching-in”\(^\text{97}\) is an important common law concept in construction arbitration that can bind third party non-signatory indemnitors to factual determinations of an arbitration award or court judgment. Contractors and subcontractors commonly enter written contracts containing arbitration clauses, as well as express indemnity, insurance, guarantee, warranty and surety obligations benefitting other contract signatories. When disputes arise regarding the work, one or more arbitrating contract signatories may seek to join non-signatory parties owing indemnity obligations, such as sub-subcontractors, suppliers, insurers, sureties, material warrantors, and sub-tier sureties, to avoid dual proceedings and to minimize the risk of inconsistent findings.
If the joinder effort is unsuccessful, the non-signatory indemnitor may still be bound to the factual determinations of an adverse arbitration award by invoking at an early stage the procedure of “vouching-in” as follows:

“Vouching-in” is a common-law procedural device by which a defendant notifies another: (a) of the pendency of a suit [or arbitration] against him; (b) that if liability is found, the defendant will look to the vouchee for indemnity; (c) that the notice constitutes a formal tender of the right to defend the action; and (d) that, if the vouchee refuses to defend, it will be bound in any subsequent litigation between them to the factual determinations necessary to the original judgment [or award].

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Voucher is usually employed in situations where the vouchee is not subject to personal jurisdiction. The procedure has also been employed where it is not possible to obtain jurisdiction over all the relevant parties in one proceeding because of the existence of arbitration provisions prohibiting joinder.98

A third-party indemnitor will not be bound by factual determinations in an arbitral award, if the non-signatory indemnitor’s refusal to join in the arbitration was based on an express contractual reservation99 or if the arbitration award contains no factual findings.100

V. APPELLATE ARBITRATION: OVERCOMING DISPARITIES IN SCOPES OF JUDICIAL REVIEW OF ARBITRATION AWARDS AND JUDGMENTS, AND “GETTING THE AWARD RIGHT”

A concern in addition to joinder issues, which is most often raised 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]”.101 Professors Thomas Stipanowich and Ryan Lamare, in a 2014 article, advise that these “leading concerns” can be addressed as follows:
Concerns 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 damages.¹⁰²

The peril of “double jeopardy” is magnified immensely when common issues in dispute are tried on dual tracks of arbitration and litigation, and are subject to fundamentally different scopes of judicial review governing arbitration awards and court judgments. Under the Federal Arbitration Act¹⁰³ 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 for mere mistakes or errors of law or correction of other substantive or procedural legal deficiencies.

Because of the stringent statutory limitations on judicial vacation of arbitral awards, construction parties have endeavored for years to enlarge by agreement the statutory scope 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 limited grounds for award vacation.¹⁰⁴

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 restrictive.¹⁰⁵
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 their arbitration agreement.\textsuperscript{106} 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 \textit{de novo}, and is restricted to a standard of “reasonableness,”\textsuperscript{107} unless the court determines the question of law to be of “central importance to the legal system… and outside the… specialized area of expertise of the administrative decision maker,” in which case the standard for review is “correctness.” To confuse matters further, an appeal of an award on a question of law can only be granted if the question was “expressly referred” to the arbitral tribunal for decision.\textsuperscript{108} As a consequence, it is difficult even for a Canadian arbitration award to be vacated for ordinary legal or substantive errors.\textsuperscript{109}

By U.S. 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 recognize the wisdom of using Appellate Arbitration.\textsuperscript{110} Appellate Arbitration allows the parties to maintain control over the scope of review, and to select appellate arbitrators with recognized 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.
When Appellate Arbitration is provided for in the arbitration clause or under arbitration rules, either party may demand review of the award by an appellate tribunal. Upon appointment, the appellate tribunal has the power to interpret the rules and arbitration clause to determine its own jurisdiction, and the appealed award then is not deemed a “final award” subject to judicial confirmation.\textsuperscript{111} When an award has been reviewed by an appellate arbitration tribunal and becomes a “final award” ripe for confirmation, the prospect of judicial confirmation likely is enhanced.

The \textit{JAMS Optional Arbitration Appeal Procedure} (2003)\textsuperscript{112} offers one example of a formal appellate arbitration process. Unless the parties agree otherwise, the \textit{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, \textit{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”.\textsuperscript{113} Such a standard of review affords an arbitral appellate \textit{de novo} review of all issues of law, rather than more limited statutory grounds for vacatur of an arbitral award to which the judiciary is confined.

Instead of engaging in an appeal process that drags on for years, the parties promptly receive the appellate award on such record as they present. With the added oversight of the appellate arbitrators, all parties can have confidence that the award, when reviewed and perhaps modified, is 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 likely the wave of the future.

VI. STREAMLINING INTERNATIONAL ARBITRATION
BY JOINDER OF CLAIMS AND NON-SIGNATORIES, CONSOLIDATION AND APPELLATE ARBITRATION

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, ways to minimize “piecemeal” dispute resolution, arrangements to maximize arbitration joinder and consolidation, selection of the best arbitration providers with arbitration rules most favorable 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”.

2 For a description of the arbitration process invoked by European merchants during the late middle ages, see Gerard Malynes, Consvestudo, 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 who negotiate in all parts of the world,” and confirming that the 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.
See Philip L. Bruner, *Rapid Resolution ADR*, 31 Const. Law 6 (Spring 2011) (“For well over a century, the American construction industry has promoted the nationwide use of non-judicial dispute resolution methods capable of promptly and fairly resolving complex construction disputes. Beginning with early efforts of the American Institute of Architects, founded in 1857, an industry initiative arose to develop a national contract form. The result was the 1888 “Uniform Contract,” the first national standard form construction contract drafted by the American Institute of Architects and endorsed by the National Association of Builders (predecessor to the Associated General Contractors of America). The contract form mandated two methods for binding resolution of disputes between the owner and contractor: (1) the architect was given near dictatorial authority to decide with finality all disputes over “the true construction and meaning of the drawings and specifications,” and issues regarding existence of “sufficient grounds” to justify owner termination of the contract for cause, and (2) the architect’s decisions regarding computation of payment for delays or for authorized change orders, when timely “dissented” from by the aggrieved party, could be referred to binding arbitration before a panel of three arbitrators (one appointed by each party plus a third selected by them). This format was broadened in the 1905 edition of the “Uniform Contract” to authorize referral upon timely notice of all disputes not settled by the architect to --

A Board of Arbitration to consist of one person selected by the Owner, and one person selected by the Contractor, these two to select a third. The decision of any two of this Board shall be final and binding on both parties hereto. Each party shall pay one-half of the expense of such reference”).


arbitration notice requirement not imposed on other contracts); 

Major League Baseball Players Ass’n v. Garvey, 532 U.S. 1015, 121 S. Ct. 1724, 149 L. Ed. 2d 740 (2001) (“no matter how erroneous the arbitrator’s decision”, a reviewing court may not decide the merits of the dispute); 

Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002) (interpretation of an NASD rule imposing a six-year time limit for arbitration was a matter presumptively for the arbitrator, not the court, unless the contract called for judicial determination of whether arbitration was time-barred); 

Green Tree Financial Corp. v. Bazzle, 539 U.S. 444, 123 S. Ct. 2402, 156 L. Ed. 2d 414 (2003) (allowing class arbitration to go forward where the arbitration clause did not clearly preclude it); 

Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006) (illegality of contract as a whole, rather than arbitration clause itself, was to be determined by the arbitrator rather than the court); 

Hall Street Associates LLC v. Mattel, Inc., 552 U.S. 576, 128 S. Ct. 1396, 170 L. Ed. 2d 254 (2008) (grounds stated in the Federal Arbitration Act for vacating or modifying or correcting an award could not be altered by contract and constituted the exclusive grounds for vacatur and modification); 

Preston v. Ferrer, 552 U.S. 346, 128 S. Ct. 987, 169 L. Ed. 2d 917 (2008); 

Arthur Anderson LLP v. Carlisle, 556 U.S. 624, 129 S. Ct. 1896, 173 L. Ed. 2d 832 (2009) (Federal Arbitration Act required setting aside a bankruptcy court’s automatic stay and allowing a non-signatory to enforce the contract’s arbitration clause as a third party beneficiary); 

14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 129 S. Ct. 1456 (2009) (statutory claims for age discrimination were for the arbitrator, not the court); 

Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 130 S. Ct. 2772 (2010) (ruling that an arbitration clause that delegated exclusive authority to the arbitrator to resolve any dispute over the contract’s enforceability was valid under the Federal Arbitration Act); 

AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011) (Federal Arbitration Act preempts California’s judicial rule regarding the unconscionability of class arbitration waivers in consumer contracts); 

KPMG LLP. v. Cocci, 565 U.S. 18, 132 S. Ct. 23, 181 L. Ed. 2d 323 (2011) (holding that a state court could not refuse to compel arbitration under the Federal Arbitration Act merely because some of the claims could be decided by the court); 

American Express Co., v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013) (approving class action waiver under the overarching principle of the FAA that arbitration is a matter of contract in the absence of a different congressional command); 

BG Group PLC v. Republic of Argentina, 134 S. Ct. 1198, 134 S. Ct. 1198, 188 L. Ed. 2d 220 (2014) (“courts presume that the parties intend arbitrators, not courts, to decide disputes about the meaning and application of particular procedural preconditions to the use of arbitration”); 

Kindred Nursing Centers Ltd. v. Clark, 581 U.S. ___., 137 S. Ct. 1421, 197 L. Ed. 806 (2017) (preempting a state’s “clear statement” limitation on validity of arbitration contracts not imposed on other forms of contracts).


7 See, Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 20, 103 S. Ct. 927, 74 L. Ed. 2d 927 (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). The court expressed its strong support for arbitration, but recognized that such judicial support enhances the peril of "double jeopardy"); Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221, 105 S.Ct.1238, 84 L. Ed. 2d 158 (1985) (“The preeminent concern of Congress in passing the [Federal Arbitration Act] was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is “piecemeal” litigation....); KPMG LLP v. Cocchi, 565 U.S. 18, 19, 132 S. Ct. 23, 181 L. Ed. 2d 323 (2011) (“The [Federal Arbitration Act] has been interpreted to requires that if a dispute presents multiple claims, some arbitrable and some not, the former must be sent to arbitration even if this will lead to piecemeal litigation.... From this it follows that state and federal courts must examine with care the complaints seeking to invoke their jurisdiction to separate arbitrable from non-arbitrable claims. A court may not issue a blanket refusal to compel arbitration merely because some of the claims could be resolved by the court without arbitration”). See also, State ex rel. Johnson Controls, Inc. v. Tucker, LLC, 729 S. E. 2d 808 (W. Va. 2012) (reversing a trial court order that required seven defendants to litigate a complex construction dispute together before the court, and compelling arbitration of the plaintiff’s claims against three of the seven defendants -- the prime contractor and two subcontractors -- in accordance with the arbitration clauses in their respective contracts).


“Construction Law” … is a “capstone” subject, a towering legal edifice built out of modern statutes, “contextual” common law principles of and foundational legal concepts sustaining and binding the multitude of parties – architects, engineers, contractors, subcontractors, material suppliers, material manufacturers, sureties, insurers, code officials and tradesmen.

9 Paul Hardeman, Inc. v. Ark. Power & Light Co., 380 F. Supp. 298, 317 (E.D. Ark. 1974) (“Construction contracts are a separate breed of animal; and, even if not completely sui generis, still… [the] law must be stated in principles reflecting underlying economic and industry realities. Therefore, it is not safe to broadly generalize”).

10 See, Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 20, 103 S. Ct. 927, 74 L. Ed. 2d 927 (1983) (requiring arbitration of contractor claims against an owner under the owner-contractor agreement, but denying arbitration of the owner’s indemnity claim against the architect because the owner-architect agreement contained no arbitration clause); Fox v. Forest River, Inc., 2017 WL 2623889 (N.D.N.Y. June 16, 2017) (holding that an arbitration clause in a motor home purchase agreement bound only the seller and not two third-party manufacturers, and refusing to stay the purchaser’s litigation against the manufacturers pending the outcome of the purchaser’s arbitration with the seller). See also, Thomas J. Stipanowich, Arbitration and the Multiparty Dispute: The Search for Workable Solutions, 72 Iowa L. Rev. 473, 481-82 (1987).
See, *Grover-Diamond Assocs. v. American Arbitration Ass’n*, 211 N.W. 2d 787, 788 (Minn. 1973) (“The owners are entitled to arbitrate their dispute with the contractor and their dispute with the architect. There is no suggestion that the architect and contractor are obliged to arbitrate their differences in that [consolidated] proceeding [because neither the contractor nor architect has agreed to arbitrate with the other]. The only question is whether the two arbitration matters demanded by the owners should be heard at the same time and place or whether they should be heard separately”).


13 See, *Pullman-Standard v. Swint*, 456 U.S. 273, 287-289 (1982) (Federal appellate court standard for review a district court judgment is de novo review of issues of law and of issues of mixed fact and law, but pure findings of fact are reviewed under the “clearly erroneous standard). See also Federal Rules of Civil Procedure (2016), Rule 52 (a)(6) (“Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court’s opportunity to judge the witnesses' credibility”).

14 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); Thomas J. Stipanowich, *Arbitration and the Multiparty Dispute: The Search for Workable Solutions*, 72 Iowa L. Rev. 473, 481-82 (1987); Andrew McDougal, The “Business Case” For and Against International Arbitration, Rocky Mountain Mineral Law Foundation Conference, 2013 RMMLF–INST Paper 11, page 10 (Westlaw) (“[T]he simplest and most effective way to account for the business risks posed by multiple parties is to account for them in the arbitration agreement. To be effective, multi-party arbitration clauses should provide that each party consents to arbitration against every other party, ensures that every party is given notice of the arbitration proceedings, and provide a mechanism for appointing the arbitrators. Providing a mechanism for the appointment of the arbitral tribunal is particularly important because the traditional appointment method whereby each side selects an arbitrator and then those two parties or their two party-named arbitrators select the chair is ill-suited.”)

Illustrative is the American Institute of Architects, Owner-Contractor Agreement, AIA A101-2017, §6.2, and General Conditions of the Contract for Construction, AIA A201-2017, §15.4.1, which allow contracting parties to check a box to select arbitration or litigation, and if neither box is checked then litigation is the default option.

See, for example, E.C. Ernst, Inc. v. Manhattan Construction Co., 387 F. Supp. 1001, 1006 (S.D. 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.

See also, Kiewit-Atkinson-Kenny v. Massachusetts Water Resources Authority, 2002 WL 31187691*12 (Mass Super., Sept. 3, 2002) in which the court expressed its frustration at the parties’ requests for the court’s interpretation of construction contract language:

The contract language…is sprawled over hundreds of pages and contained in several documents, not all speaking consistently with one another; and the “record” is massive, covering literally thousands of pages. The burden placed on this court is immense, and it fears, after all of its attempts to give fair attention and correct rulings to the various issues, whichever side does not prevail will first seek reconsideration and thereafter will ultimately appeal, and may well argue that material facts remain in dispute. In short, this memorandum and the orders it produces may turn out to be an exercise in futility driven by a hugely over-litigated case. One need only look at the fact that the contract in issue contains provisions for a Disputes Review Board made up of three experts in the kind of construction at issue who themselves have taken months to resolve some of these very same issues, only to be asked to reconsider their initial conclusions and then, because their determinations are not binding, to have the issues raised again in this litigation. Here, a single judge – not a panel of experts in the subject of tunnel construction – is asked to resolve the issues because the parties themselves refuse to accept the decisions of their contractually assembled team of experts.

See, Blake Constr. Co. v. C. J. Coakley Co., 431 A. 2d 569, 575 (D. C. 1981): [E]xcept in the middle of a battlefield, nowhere must men coordinate the movement of other men and all materials in the midst of such chaos and with such limited certainty of present facts and future occurrences as in a huge construction project such as the building of this 100-million-dollar hospital. Even the most painstaking planning frequently turns out to be mere conjecture and accommodation to changes must necessarily be of the rough, quick and ad hoc sort, analogous to ever-changing commands on the battlefield. Further, it is a difficult task for a court to be able to
examine testimony and evidence in the quite of a courtroom several years later concerning such confusion and then extract from them a determination of precisely when the disorder and constant readjustment, which is to be expected by any subcontractor on the job sit, became so extreme, so debilitating and so unreasonable as to constitute a breach of contract between a contractor and a subcontractor. This was the formidable undertaking faced by the trial judge in the instant case....

19 See, BG Group PLC v. Republic of Argentina, 134 S. CT. 1198, 1206, 134 S. Ct. 1198, 188 L. Ed. 2d 220 (2014) (“Where ordinary contracts are at issue, it is up to the parties to determine whether a particular matter is primarily for arbitrators or for courts to decide. If the contract is silent on the matter of who primarily is to decide “threshold” questions about arbitration, courts determine the parties’ intent with the help of presumptions.... [C]ourts presume that the parties intend arbitrators, not courts, to decide disputes about the meaning and application of particular procedural preconditions for the use of arbitration. These procedural matters include claims of waiver, delay or a like defense to arbitrability. And they include the satisfaction of prerequisites such as time limits, notice, laches, estoppel and other conditions precedent to an obligation to arbitrate”); Rent-A-Center, West, Inc v. Jackson, 561 U.S. 63, 69-73, 130 S. Ct. 2772 (2010) (enforcing an arbitration clause provision that gave to the arbitrator for decision “gateway” issues, such as whether the parties agreed to arbitrate or whether the parties’ arbitration clause covered a particular claim).

20 See, e.g., JAMS Engineering and Construction Arbitration Rules (2014), Rule 11 (b) (“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 this Arbitration, shall be submitted to the ruled on by the Arbitrator. The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter”); AAA Construction Industry Arbitration Rules (2015), Rule R-9(a) (“The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim”). See also, Rainbow Cinemas, LLC v. Consolidated Construction Co. of Alabama, 2017 WL 2610506 (Ala., June 16, 2017) (“The contract incorporates the AAA’s Construction Industry Arbitration Rules, which state that ‘the arbitrator shall have the power to rule on his or her own jurisdiction’ ..... We conclude...that ‘although the question whether an arbitration provision may be used to compel arbitration between a signatory and a non-signatory is a threshold question of arbitrability usually decided by the court, here that question has been delegated to the arbitrator’”).

21 See, Hale-Mills Construction Ltd. v. Willacy County, 2016 WL 192133*5 (Tex. App. Jan. 14, 2016) (“[The] arbitration agreements in this case are extremely broad in scope. The contracts use broad language providing that ‘claims and disputes’ that arise ‘between the parties’ must be arbitrated. The language suggests that the parties intended all claims between the parties, both during and after construction, are subject to arbitration. Such broad language includes both contractual and extra-contractual claims”); Vector Electric & Controls, Inc. v. ABM Industries Inc., 2016 WL 126752*5 (M. D. La, January 11, 2016) ([T]he Arbitration Provision here is not uncommonly broad, its reach is easy to discern. Quite simply, it contains language – “any dispute arising out of or relating to the Agreement, or the claimed breach thereof – that numerous courts
have found sufficiently broad to induce arbitration of any disagreement ever any rights and violations reasonably traceable to the pertinent contract).

22 See, Slutsky-Peltz Plumbing & Heating Co., Inc. V. Vincennes Community School Corporation, 556 N.E. 2d 344 (Ind. App. 1990) (The arbitration clause authorized 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"). See also, JAMS Engineering and Construction Arbitration Rules (2014), Rule 6(f) (“Where a third party seeks to participate in 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 shall determine such request, taking into account all circumstances he or she deems relevant and applicable”).

23 See, Peter C. Sheridan and Alex Linhardt, Managing the Battlefield: Using a Uniform Multi-Party Construction Arbitration Agreement, 11 J. ACCL 2 (Jan. 2017) (stating as its purpose to “guide the construction industry, and the lawyers advising it, toward a usable arbitration provision that is designed to meet the challenger inherent in multi-party and consolidated proceedings”).

24 Even where the arbitration clause itself is devoid of expansive jurisdictional and joinder provisions, the clause’s reference to and incorporation of expansive arbitration rules is sufficient to remedy any deficiencies in the clause as drafted. See, Portland General Electric Co. v. Liberty Mutual Ins. Co., 2017 WL 2925013 9th Cir. July 10, 2017 (“[P]arties may delegate the adjudication of gateway issues to the arbitrator if they ‘clearly and unmistakably’ agree to do so. We have found such delegation when the parties have incorporated by reference the rules of the American Arbitration Association, which state in relevant part that the ‘arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the ... validity of the arbitration agreement....’”).

25 See, e.g., Zurich American Ins. Co. v. Heard, 740 S.E. 2d 429 (Ga. App. 2013) (denying joinder of a non-signatory architect where the 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.”) See also, American Institute of Architects, General Conditions of Contract for Construction, AIA A201-2017, §15.4.4.2 (“[E]ither party 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 such joinder. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of any claim, dispute or other matter in question not described in the written consent”).


See, *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84-85 (2002) (ruling that “procedural questions which grow out of the dispute and bear on its final disposition are presumptively not for the judge, but for the arbitrator, to decide”, and holding that the arbitrator rather than the court should decide whether an NASD six-month time limit for filing claims was applicable); *Rainbow Cinemas, LLC v. Consolidated Construction Co. of Alabama*, 2017 WL 2610506 (Ala., June 16, 2017).


See, e.g., *Alpine Glass, Inc. v. State Farm Fire and Casualty Co.*, 2014 WL 2481814 (D. Minn., June 3, 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”).


See, *JAMS Engineering and Construction Arbitration Rules* (2014), Rule 6(e) (Unless otherwise precluded by the parties or law, JAMS may consolidate JAMS arbitrations having “common issues of fact or law” and is authorized to decide which panel of arbitrators will hear the consolidated cases.); *AAA Construction Industry Arbitration Rules* (2015), Rule R-7 (authorizing appointment by the AAA of a separate arbitrator to decide issues of consolidation and joinder); *ICDR Arbitration Procedures* ((2014), Article 8 (providing for ICDR’s appointment of a “consolidation arbitrator who will have the power to consolidate two or more arbitrations pending under these Rules, “where the parties agree, the claims are made under the same arbitration agreement or the arbitrations involve the same parties and issues, and the arbitration agreements are compatible).

See, e.g., *English Arbitration Act 1996*, Section 35(2) (allowing consolidation with other arbitral proceedings only if the parties expressly agree to confer such powers upon the tribunal).

See, *Georgia Casualty & Surety Co. v. Excalibur Reinsurance Corp.*, 2014 WL 996388 (N.D. Ga. March 13, 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 authorized the court to order consolidation); *Baesler v. Continental*
Grain Co., 900 F. 2d 1193, 1195 (8th Cir. 1990) (supporting the “view that the Federal Arbitration Act precludes federal courts from ordering consolidation of arbitration proceedings”).

35 See, e.g., American Institute of Architects, General Conditions of Contract for Construction, AIA A201-2017, §15.4.4.2 (requiring written consent of all parties to consolidation of cases). See also, Zurich American Ins. Co. v. Heard, 740 S.E. 2d 429 (Ga. App. 2013) (denying joinder where the 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”).

36 See, e.g., LCIA Arbitration Rules (2014, Article 22 (ix) (allowing consolidation of cases “where all the parties to the arbitrations to be consolidated so agree in writing”).


41 See, American Institute of Architects, AIA A201-2017, 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….”). See also, Southwinds Express Construction LLC v. D. H. Griffin of Texas, Inc., 513 S.W. 3d 66 (Tex. App. 2016) (“Claims generally are arbitrable when the facts alleged touch matters that are covered by, have a significant relationship to, are inextricably enmeshed with or are factually intertwined with the contract that contains the arbitration provision”).

42 See, Developers Surety and Indemnity Co. v. Carothers Construction, Inc., 2017 WL 3054646 *3 (D. S.C., July 18, 2017) ([T]he arbitration clause at issue here is a ‘broad’ arbitration clause. The agreement applies to any claims, disputes or other matters ‘arising out of or relating to’ the subcontract. Both the Supreme Court and [the Fourth Circuit] have characterized similar
formulations to be broad arbitration clauses capable of an expansive reach. Broad arbitration clauses do not limit arbitration to the literal interpretation or performance of the contract, but embrace every dispute between the parties having a significant relationship to the contract regardless of the label attached to the dispute”); *Hale-Mills Construction Ltd. v. Willacy County*, 2016 WL 192133*5* (Tex. App. Jan. 14, 2016) ("[The] arbitration agreements in this case are extremely broad in scope. The contracts use broad language providing that ‘claims and disputes’ that arise ‘between the parties’ must be arbitrated. The language suggests that the parties intended all claims between the parties, both during and after construction, are subject to arbitration. Such broad language includes both contractual and extra-contractual claims"); *Vector Electric & Controls, Inc. v. ABM Industries Inc.*, 2016 WL 126752*5* (M. D. La, January 11, 2016) ([T]he Arbitration Provision here is not uncommonly broad, its reach is easy to discern. Quite simply, it contains language – “any dispute arising out of or relating to the Agreement, or the claimed breach thereof – that numerous courts have found sufficiently broad to induce arbitration of any disagreement ever any rights and violations reasonably traceable to the pertinent contract).

43 See, *JAMS Engineering and Construction Arbitration Rules and Procedures* (2014), Rule 11(b) (giving the arbitrator jurisdiction over arbitrability issues); *AAA Construction Industry Arbitration Rules* (2015), Rule R-9(a) (“The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim”).

44 See, *BG Group PLC v. Republic of Argentina*, 134 Sup. Ct. 1198 (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).


46 See, *Marco Scodeller v. David Compo*, 2017 WL 2791452 (Mich. App. June 27, 2017) (enforcing arbitration of claims arising under a building contract, but refusing to compel arbitration of two tort claims against a real estate entity affiliated with the builder arising out of the related purchase agreement of land upon which the project was built, because the real estate agreement contained no arbitration clause and the claims for fraudulent misrepresentation and emotional distress were independent of the building contract); *G. T. Leach Builders, LLC v. Sapphire VP, LP*, 2013 WL 2298447 (Tex. Ct. App. May 23, 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”).


48 See, Cape Romain Contractors, Inc., v. Wando, 747 S.E. 2d 461 (S.C. 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….).

49 See, JAMS Engineering and Construction Arbitration Rules (2014), Rule 6(f) (“Where a third party seeks to participate in 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 shall determine such request, taking into account all circumstances he or she deems relevant and applicable”); AAA Construction Industry Arbitration Rules (2015), Rule R-7 (setting procedures for joinder and appointment of a separate arbitrator to decide disputes over joinder); UNCITRAL Arbitration Rules (2013), Article 17.5, and LCIA Arbitration Rules (2014), Article 22.1(h) (empowering the arbitral tribunal to decide its own jurisdiction, and to allow joinder of additional parties).

50 See, Arthur Anderson LLP v. Carlisle, 556 U.S. 624,631, 129 S. Ct. 1896, 173 L. Ed. 2d 832 (2009) (A non-signatory to a contract may bind a signatory to arbitrate a dispute when “traditional principles of state law allow a contract to be enforced by or against nonparties to the contract through “assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel.”) See also, 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 upon 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 favoring arbitration “); Tamara J. Lindsay, Compelling Arbitration By and Against Non-signatories, 36 Const. Law 16 (Summer 2016) (“[W]hile it is true that ordinarily a party will not be compelled to arbitrate if that party has not executed an agreement to do so, certain common law principles provide avenues under which non-signatories may either compel or be compelled to participate in arbitration”).

51 See, Eckert/Wordell Architects, Inc. v. FJM Properties of Wilmar, LLC, 2014 WL 2922343 (8th Cir., June 30, 2014) (affirming an arbitrator’s jurisdiction under AAA arbitration rules to order joinder of a non-signatory party). See also, Vector Electric & Controls, Inc. v. ABM
Industries Inc., 2016 WL 126752*5 (M. D. La, January 11, 2016) (compelling a non-signatory “apparent agent and successor” of a signatory party to arbitrate disputes arising out of the contract).


53 University of Notre Dame (USA) in England v. TJAC Waterloo, LLC, 861 F. 3d 287 (1st Cir., 2017), authored by Associate Justice (Ret.) David Souter sitting by designation.


55 ZVI Const. Co. v. Univ. of Notre Dame (USA) in England (2016) EWHC (TCC) 1924 Para. 52 (Eng.).

56 See, Leighton v. Chesapeake Appalachia, LLC., 2013 WL 6191739 (M. D. Pa., Nov. 26, 2013) (ruling that under agency theory, non-signatory subsidiaries of the respondent, which carried out respondent’s duties in performing fracking operations, could join in the arbitration and compel the claimants to arbitrate their claims against them pursuant to the arbitration agreement).

57 See, Provenzano v. Ohio Valley General Hospital, 121 A. 3d 1085, 1097 (Pa. Super. 2014) (“Pennsylvania law has held that non-signatories to an arbitration agreement can enforce the agreement when there is an ‘obvious and close nexus’ between the non-signatories and the contract or the contracting parties…. One ‘obvious and close nexus’ between non-signatories and the contract or the contracting parties arises from the relationship between a signatory principal and a non-signatory agent….”).

58 See, Trina Solar US, Inc. v. JRC-Services, LLC, 229 F. Supp. 3d (S.D.N.Y. 2017) (marketing company as seller of solar panels had actual authority and likely apparent authority to bind the non-signatory manufacturer-principal to arbitrate disputes under the seller’s contract with the buyer).


60 See, Trina-Solar US, Inc. v. JRC-Services LLC, 229 F. Supp. 3d 176 (S.D.N.Y. 2017) (applying equitable estoppel to bind an installer of solar panels, a non-signatory to the sales contract, to the contract’s arbitration agreement); Waterstone on Lake Conroe v. Williams, 2017 WL 3298234 *6 (Tex. App., August 3, 2017) (“We hold that the [owner’s] claims [in litigation] against [the non-signatory developer] are so intertwined with and dependent upon the purchase agreement and the [owner’s] claims against [the signatory contractor] that it would be impractical to resolve the [owner’s] claims against [the contractor] without simultaneously resolving the claims against [the developer]. We conclude that equitable estoppel entitles [the developer] to compel arbitration, and that the trial court abused its discretion by determining that [the developer] was not entitled to arbitration because it is a non-signatory”); Renewable Energy Products, LLC v. Lakeland Development Co., 2011 WL 68394 (Cal. Ct. App., Feb 28, 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”); *Cappadonna Electric Management v. Cameron County*, 180 S.W. 3d 364, 373 (Tex. App. 2005), in which the doctrine of estoppel is explained as follows:

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 while seeking to avoid the arbitration provision. The application of this doctrine falls with the trial court’s discretion.

61 See, *Bull v. Torbett*, 2017 WL 2772630 at *5 (Miss App., June 27, 2017) (ruling that a signatory plaintiff was equitably estopped to prevent non-signatory defendants from arbitrating rather than litigating the signatory’s claims against them based on the contract containing an arbitration clause); *Scottsdale Ins. Co v. Kinsale Ins. Co*, 2017 WL 2311248 (E.D. Pa., May 26, 2017) (subrogee insurer estopped to deny obligation to arbitrate claims with another insurer); *La Frontera Center, Inc. v. United Behavioral Health, Inc.*, 2017 WL 2297036 at *34-35 (D.N.M., March 20, 2017) (applying equitable estoppel to prevent a signatory subcontractor from avoiding arbitration with non-signatory entities related to the signatory contractor); *Performance Contracting, Inc. v. Abener Teyma Mojave General Partnership*, 2016 WL 1019986 Cal. App., March 15, 2016) (“[A]though plaintiff and [defendant] are the only signatories to the contract and the contract defines “dispute as one between [them], the three non-signatory defendants are equally bound by the contract and thus entitled to [arbitrate claims] against plaintiff); *Hale-Mills Construction Ltd. v. Willacy County*, 2016 WL 192133 (Tex. App., January 14, 2016) (County was estopped from refusing to arbitrate its claims against the non-signatory contractor); *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F. 3d 1110, 1112 (3d. Cir. 1993) (“[T]he effect of the rule requiring arbitration would, in effect, be nullified.”)

62 *MS Dealer Services Corp v. Franklin*, 177 F. 3d 942, 947 (11th Cir. 1999). 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 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”); Waterhouse Const. Group, Inc. v. 5891 SW 64th Street, LLC, 949 So.2d 1095 (Fla Dist. Ct. App. 2007)(non-signatories could compel arbitration of RICO claims brought in connection with a construction project, where the non-signatories were officers, directors or agents of the construction company and assumed duties under the contract containing an arbitration clause).

63 See, Southwinds Express Construction LLC v. D. H. Griffin of Texas, Inc., 513 S.W. 3d 66 (Tex. App. 2016) (“Claims generally are arbitrable when the facts alleged touch matters that are covered by, have a significant relationship to, are inextricably enmeshed with or are factually intertwined with the contract that contains the arbitration provision”).

64 See, Garcia v. Kakish, 2017 WL 2773667*9 (E.D. Cal., June 27, 2017) (“[U]nder California law a non-signatory to an arbitration clause may be required to arbitrate claims where the causes of action are ‘intimately founded in and intertwined’ with the claims of the signatory”); Great American Insurance Co. v. Hinkle Contracting Corp., 497 Fed. Appx. 348, 2012 WL 5936178 (4th Cir., 2012)(requiring a performance bond surety for a subcontractor to arbitrate its “surety defenses” to its bond liability with the general contractor, because the defenses 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”).

65 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 favoring arbitration. “).

66 See, Waterstone on Lake Conroe v. Williams, 2017 WL 3298234 *6 (Tex. App., August 3, 2017) (“We hold that the [owner’s] claims [in litigation] against [the non-signatory developer] are so intertwined with and dependent upon the purchase agreement and the [owner’s] claims against [the signatory contractor] that it would be impractical to resolve the [owner’s] claims against [the contractor] without simultaneously resolving the claims against [the developer]. We conclude that equitable estoppel entitles [the developer] to compel arbitration, and that the trial court abused its discretion by determining that [the developer] was not entitled to arbitration because it is a non-signatory”).

67 See, Slutsky-Peltz Plumbing & Heating Co., Inc. v. Vincennes Community School Corporation, 556 N. E. 2d 344 (Ind. App. 1990) (Multi-prime contractors where compelled to join an arbitration between one of the contractors and the owner, where the claims involved responsibility for project delays, and where the arbitration clause authorized 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”).


69 See, *Reliable Energy Solutions v. Amalfi Apartment Corporation*, 2017 WL 3412198 (S.D. Tex., July 3, 2017) (requiring a signatory owner to arbitrate with a non-signatory subcontractor found to be a third party beneficiary of the owner’s obligations under the prime contract); *Asselin & Vieceli Partnership, LLC v. Washburn*, 2017 WL 3174502 (Conn. Sup., June 20, 2017) (a contractor could compel a non-signatory entity to arbitrate because it was a third party beneficiary of the construction contract).

70 See, *Hautz Construction LLC v. H & M Department Store*, 2012 WL 5880370 (D. N.J., Nov. 20, 2012), in which the court ruled that a signatory owner was a third-party beneficiary of a subcontract and could compel the subcontractor to arbitrate its claims against the owner under the subcontract’s arbitration clause. The Court said:

Wisconsin courts have addressed third-party beneficiary relationships in the context of construction agreements. For example, the Wisconsin Court of Appeals has ruled that a subcontractor was a third-party beneficiary to the contract between the owner and the general contractor.... In addition, in [another case] the Wisconsin Court of Appeals concluded that a subcontractor was a third-party beneficiary of the agreement between the owner and the general contractor because the general conditions of their agreement contained provisions that directly benefitted the subcontractor, such as a clause requiring the contractor to “promptly pay each Subcontractor....” Moreover, in that case, the contractor and owner proceeded to arbitration and, once an award was entered, the Wisconsin Court of Appeals held that the subcontractor, as a third-party beneficiary, had the right to enforce the arbitration award.... In these cases, there was, like here, no explicit provision creating third-party beneficiary status. Yet, the courts found third-party beneficiary status where the contracts benefitted the party seeking to enforce a right provided therein. Applying this sort of analysis here, I conclude that [the owner] is a third-party beneficiary of the subcontracts. (Case citations and footnotes omitted).
See e.g. Advance Tank and Const. Co., Inc. v. Gulf Coast Asphalt Co. LLC, 2006 WL 253600 ( Ala. Feb. 3, 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).


See, G & C Builders, Inc. v. Lawson, 238 W. Va. 280 (W.Va., 2016) (holding that an owner could not be compelled to arbitrate with a contractor, because the contractor prepared the contract and incorporated by reference the general conditions which contained the arbitration clause, but did not provide a copy of the general conditions to the owner, and “failed to provide the detail necessary to ensure that [the owner] was aware of the General Conditions and its terms, including the arbitration provision”); Northrop Grumman Information Technology, Inc. v. United States, 78 Fed. Cl. 45, 48 (2007) (“[U]nder general principles of contract law, a contract may incorporate another document by making clear reference to it and describing it in such terms that its identity may be ascertained beyond doubt”).


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]”); Schneider Electric Buildings Critical Systems, Inc. v. Western Surety Co., 149 A. 3d 778 (Md. App. 2016) (surety not compelled to arbitrate, even though bonded contract contained an arbitration clause and was referenced in the bond).

See, Developers Surety and Indemnity Co. v. Resurrection Baptist Church, 759 F. Supp. 2d 665 (D. Md. 2010) (construing an arbitration clause, which required arbitration of “any claim arising out of or related to the contract” and which 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); U.S. Surety Co. v. Hanover R.S. Ltd Partnership, 543 F. Supp. 2d 492 (W.D.N.C. 2008) (surety was compelled to arbitrate pursuant to a subcontract arbitration clause, which was incorporated by reference into its subcontract performance bond). See also, Philip L. Bruner and Patrick J. O’Connor, Jr., 7 Bruner and O’Connor on Construction Law § 21:92


See, *Robert Lamb Hart Planners and Architects v. Evergreen, Ltd.*, 787 F. Supp. 753 (S. D. 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).

See, *United States Fidelity and Guaranty Co. v. Bangor Area Joint School Authority*, 355 F. Supp. 913 (E.D. 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).

See, *U.S. Pacific Builders Inc. v. Mitsui Trust & Banking Co.*, 57 F.Supp. 2d 1018 (D. Haw. 1999) (Lender would be bound by arbitration awards in arbitration between the owner and the contractor and its surety if it chose to step into the owner’s shoes and expressly assume the obligations of the Construction Contract in writing).

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 defenses); *Town of Berlin v. Nobel Ins. Co.*, 758 A. 2d 436 (Conn. Ct. App. 2000) (same). Compare, *U.S. Surety Co. v. Edgar*, 2014 WL 1664818 (M.D. Fla. 2014) (takeover surety was not bound to arbitrate disputes with the owner, where the takeover agreement, although referencing the bonded contract, did not expressly incorporate the arbitration clause itself).

See, *Artic Glacier U.S.A. v. Principal Life Ins. Co.*, 2017 WL 3700887 *4 (D. Neb. August 24, 2017) (holding that a purchaser of substantially all of the assets of a seller-signatory party was entitled to arbitrate disputes as the seller’s corporate successor); *Vector Electric & Controls, Inc. v. ABM Industries Inc. and TEGG, Inc.*, 2016 WL 126752 (M.D. La., January 11, 2016) (holding that a non-signatory successor and apparent agent of a signatory can enforce an arbitration provision under Pennsylvania law); *Saxa, Inc. v. DFD Architecture, Inc.*, 312 S. W. 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).


85 See, American Express Co. v. Italian Colors Restaurant, 133 U.S. 2304 2013) (upholding signatory parties’ express waiver of class arbitration).

86 See, Nucor-Yamato Steel Co. v. J.D. Fields & Co., Inc., 2016 WL 6156188 (E.D. Ark., Feb. 2, 2016) (“A party may waive the right to arbitration if the party: (1) knew of an existing right to arbitration; (2) acted inconsistently with that right; and (3) prejudiced the other party by these inconsistent acts”).


88 Id. at §§3:4 – 3:32.

89 See, University of Notre Dame (USA) in England v. TJAC Waterloo, LLC, 861 F. 3d 287 (1st Cir., June 28, 2017) (noting the decision of England’s Technology and Construction Court that a claimed non-signatory seeking to avoid a partial award had “impliedly agreed” to the jurisdiction of the arbitrator).

90 See, e.g., the American Institute of Architects, Conditions of Contract for Construction, Document A201-2017, (defining the roles and duties of the owner, contractors and architect, and providing for arbitration of disputes unless opting for litigation).

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

92 See, MSC Mediterranean Shipping Co., v. Cottenex Anstalt, 2015 EW HC 283 (recognizing the existence of an “organizing principle of good faith” under English law).

93 See, Aubrey Thomas, Comment: Non-signatories in arbitration: A Good-Faith Analysis, 14 Lewis & Clark L. Rev. 953 (Fall 2010) (“This Comment proposes that U.S. Courts should apply the principle of good faith to determine whether arbitration including a non-signatory is appropriate. Essentially, courts should utilize the equitable principle of good faith to analyze 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.”).
See, Metcalf Const. Co., Inc. v. U.S., 742 F. 3d 984 (Fed. Cir. 2014) (holding that “a breach of an implied duty of good faith and fair dealing does not require a violation of an express provision in the contract”, and that the implied duty could be ascertained from “reasonable expectations” of the contract itself); Bannum v. U.S., 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”).

See, e.g., Nova Contracting, Inc. v. City of Olympia, 198 Wash. App. 1048 (unpublished, April 18, 2017) (although not involving arbitration, finding a breach of the pervasive duty of good faith in the public owner’s administration of a construction contract – a duty applicable to arbitration as well). See generally Uniform Commercial Code, Section 2-103(1) (good faith means “honesty in fact and the observance of reasonable commercial standards of fair dealing”); Restatement (Second) of Contracts, Section 205, cmt. a (“Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving ‘bad faith’ because they violate community standards of decency, fairness or reasonableness”).

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”); MSC Mediterranean Shipping Co., v. Cottenex Anstalt, 2015 EW HC 283 (recognizing the existence of an "organizing principle of good faith" under English law). See also, Stefan Leupertz, The Principle of Good Faith Under German Law, 33 ICLR 67 (January 2016).

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, Fidelity and Deposit Co. of Maryland v. Parsons & Whittmore Constructors Corp., 397 N.E. 2d 380, 383 (N.Y.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”).

Philip L. Bruner and Patrick J. O’Connor, Jr., Bruner and O’Connor on Construction Law §§10:95. (2002, supplemented and updated annually). See also, Duf erco International Steel Trading v. T. Klaveness Shipping A/S, 333 Fed. 3d 383, 386 (2d Cir. 2003) (“Vouching-in is a common law procedural device that allows a party to arbitration to join a nonparty alleged indemnitor, referred to as the vouchee, by notifying the nonparty of the pendency of an arbitration that might obligate the vouchee to indemnify the defendant…. Vouching-in is used where the vouchee cannot be impleaded because of defects in personal jurisdiction. The purpose of this legal device is to avoid duplicative litigation and the attendant possibility of inconsistent results”); Bendix-Westinghouse Automotive Air Brake Co. v. Swan Rubber Co., 55 Cal. App. 3d
256, 127 Cal. Rptr. 571 (1976) (applying vouching-in under Uniform Commercial Code); *U.S. 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 principal’s surety); *Montana v. U.S.*, 440 U.S. 147, 99 S. Ct. 970, 59 L. Ed. 2d 210 (1979) (Surety which didn’t appear as a party, but controlled the defense, was estopped from contesting the award).

99 See, e.g., *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 other then the owner without its written consent).

100 See, e.g., Guy. C. Long, Inc. v. Insul/Crete Co. Inc. 1993 WL 218901 (E.D Pa., June 18, 1993) (arbitration award contained no factual findings and thus had no preclusive effect).


102 Id. at 64

103 9 U.S.C. §207.


105 See, England’s *Arbitration Act 1996*, Sections 69 and 70, which limit 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.

106 See, *Dunsmuir v. New Brunswick*, 2008 SCC 9 [2008] (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”).

107 Id. at Para. 55 and 47.

(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.

109 See, Homexx v. Nelson, 2013 ABQB 513 (Sept. 11, 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 favor 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.

110 See, Judge Rudolph Kass, A Private Path to Appellate Arbitration, 50 Fed. Bar. J. 35 (Jan./Feb. 2006) (Appellate arbitration “dodges the considerable uncertainty of being able to obtain judicial review of an arbitral award, and fashions a mechanism to correct serious errors….”).

111 See, e.g., Demuth v. Navient Solutions LLC, 2017 WL 3492541 (W.D. Pa., August 15, 2017) (upholding a party’s right to appeal an award to an appellate arbitration tribunal pursuant to the AAA Optional Appellate Arbitration Rules, and ruling that the plaintiff’s motion to confirm the award was premature).


113 Id. at 2.
Philip L. Bruner is a full-time arbitrator, mediator and resolver of engineering and construction disputes, and is Director of JAMS Global Engineering and Construction Panel of Neutrals. He has chaired or served on many U.S. and international arbitral tribunals hearing complex construction and commercial disputes, and has mediated many complex multi-party disputes. Prior to joining JAMS on January 1, 2008, he was a trial lawyer in private law practice for 40 years, the last 17 of which as a senior partner and founding head of the Construction Law Group of the international law firm of Faegre & Benson (now Faegre Baker Daniel) with offices then in Minneapolis and other U.S. cities and in London, Frankfurt and Shanghai.

Mr. Bruner is a Founding Fellow and past President of The American College of Construction Lawyers, Honorary Fellow of The Canadian College of Construction Lawyers, Fellow of the International Academy of Construction Lawyers, and Life Fellow of the American Bar Foundation. He also is a Chartered Arbitrator and Fellow of the Chartered Institute of Arbitrators (London), Fellow of the College of Commercial Arbitrators, Overseas Member of Britain’s Society of Construction Arbitrators (London), Fellow of The American College of Civil Trial Mediators, Certified Mediator of the International Mediation Institute (The Hague), and Fellow of the National Academy of Distinguished Neutrals.

Mr. Bruner has been recognized for his contributions to the fields of construction law and dispute resolution. In 2011, Britain’s Society of Construction Arbitrators honored him with its 2011 Norman Royce Prize. In 2005 the ABA Forum on Construction Law honored him with its Cornerstone Award presented annually to one lawyer for “exceptional service to the construction industry, to the public and to the legal profession.” The International Who’s Who of Business Lawyers recognizes Mr. Bruner as one of the world’s leading commercial arbitrators, commercial mediators and construction lawyers.

Mr. Bruner is co-author with Patrick J. O’Connor Jr. of Bruner & O’Connor on Construction Law (2002, updated annually), Volume 12, 11,000-page legal treatise regarded as the most authoritative work ever written on American law governing construction. The treatise is cited in more than 350 published judicial opinions reported by American federal, state, commonwealth and territorial courts. He also has authored or co-authored more than 50 published articles on construction law, dispute resolution and related subjects, and has chaired many professional conferences and has presented over 300 lectures to professional groups in North and South America, Europe, Asia. He has spoken at international law conferences held in Alnwick, Barcelona, Beijing, Calgary, Chicago, Halifax, Hong Kong, Istanbul, Kuala Lumpur, London, Los
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