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YOU'VE GOT A FRIEND, OR DO YOU? HOW DO THE DELIVERY SYSTEMS AND PARTY POSTURES IMPACT LITIGATION STRATEGY AND PROCEDURES IN MULTI-PARTY CONSTRUCTION CLAIMS?

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I. INTRODUCTION

Construction projects are complex undertakings, involving many different parties all working together to achieve a common goal. The three main parties involved in every construction project are the owner, the architect, and the contractor. However, their relationships and alignment may vary depending on the type of delivery system being utilized for the particular project. This paper will address the most common project delivery systems and how the relationships and alignments between the parties involved can affect three procedural issues that arise when the parties are embroiled in litigation or arbitration: joinder, obtaining non-party discovery, and arbitrator selection. In order to facilitate understanding of the legal issues surrounding project delivery systems, we have proposed a hypothetical that will be used throughout this paper:

> The Project is a multi-building condominium in a mid-Atlantic state. It was completed nearly three years ago. The Developer had engaged Contractor to build the buildings and the Architect to design. Now that it has been completed, it is clear that the buildings leak, and the leaks are getting progressively worse. The current Board for the Condominium has an expert report indicating an approximate repair cost would be four million dollars – the repair costs are for reinstallation of poorly performed work and fixing damage that resulted from the defective work (such as extensive water damage to sheathing). The defective construction centers on three separate subcontractors: sheathing, window installer, and framer. There is also a serious question of whether the Architect should have modified the flashing details when the Developer changed the window type. The Developer purchased the windows itself and supplied them to the jobsite. There is also a question of

[1] This article was written with the assistance of Meghann Myers, Esq., associate at Porter Hedges LLP.

whether the property manager under both the Developer and then the Board acted at all times consistently with its contract (disclosure, failure to mitigate, etc.).

To begin, we will describe the different project delivery systems, the parties involved, their relationships and alignments, and the pros and cons of using each delivery system.

II. COMMON PROJECT DELIVERY SYSTEMS

A. Design-Bid-Construct

Historically, the most common delivery system is Design-Bid-Construct. This is the typical delivery system that most people are used to when thinking about a construction project. Design-Bid-Construct is a three party arrangement with two principal contracts: the owner contracts with the architect for the design of the project, and the owner separately contracts with the general contractor for the overall construction of the project. The architect and the general contractor do not have a direct contractual relationship.

Typically, construction commences when the design is complete. The architect provides a final, detailed set of drawings and specifications to the owner. The owner then uses the drawings and specifications to obtain bids from general contractors to perform the scope of the work. This approach is designed to take advantage of each party's expertise: the architect is in charge of the design team and retains the sub-consultants, while the general contractor is in charge of the construction and retains the subcontractors. The owner is the contact person for both the design team and the construction team.

In theory, under this system, the design is complete, well developed and of high quality before construction commences, thereby enabling the general contractor and subcontractors to provide thorough and accurate bids. As such, the cost of construction should be more predictable. Further, subject to contract terms, the owner may allocate the risk of cost overruns to the general contractor. On the design side, the owner has the benefit of engaging the architect

directly and allowing the architect to act as the agent of the owner throughout the project, providing advice to and advocacy on behalf of the owner.

The Design-Bid-Construct system also provides checks and balances for the architect and the general contractor. The architect observes construction in progress and can keep the owner apprised of any construction issues. The general contractor is similarly motivated to identify errors and omissions in the design documents and can bring those to the owner's attention. Since most members of the construction industry are familiar with this system, all parties fall into their roles easily and comfortably, with everyone's role fairly well understood.

However, there are some disadvantages to using the Design-Bid-Construct system. First, the owner relies solely on the architect for the design of the project, with little to no opportunity for input from the general contractor or subcontractors, who oftentimes have more expertise in such issues as value engineering, cost escalation, cost estimating, constructability, scheduling, material availability, and design of specialized equipment or proprietary systems. Although that input may be received after construction commences, changes to the design at that point result in delays and/or cost overruns. Second, the system does not intend for the design process and the construction to overlap, thereby resulting in a longer project schedule. The longer a project takes to construct, the greater the risk of escalation of construction costs or potential loss of revenue for the owner. Third, under the traditional three party system, it can be more difficult to resolve claims, as the architect will argue that problems are due to construction defects, while the general contractor will argue that the plans and specifications are defective. Such disputes are complicated and challenging. It is difficult to resolve the issue of fault without undue time and expense for all involved. Adding to the level of complexity is the fact that the subcontractors and lower tier entities do not have a direct contractual relationship with the owner. Since

payment flows from the owner to the general contractor and then down through the tiers, there is more delay from the time labor and materials are furnished to the date payment is made.

1. Multiple Primes

One variation to the Design-Bid-Construct system is the Multiple Primes system, where there is no general contractor and the owner contracts directly with each trade. Entities that would be considered subcontractors under the Design-Bid-Construct system are now prime contractors. One advantage of this approach is the elimination of one level of fee or markup from the construction team. In addition, removal of a link of the payment chain lessens the risk of financial stress on smaller entities. However, a significant drawback to the Multiple Primes approach is that the owner must assume coordination responsibility for the trades. Also, because the owner has a direct contractual relationship with each trade, the owner must then deal more directly with claims arising from the trades. For states that permit constitutional liens for prime contractors contracting directly with the owner, the Multiple Primes approach enables all the entities to take advantage of a constitutional lien on the project which can complicate financing and title issues for the project.

B. Construction Management

Construction Management systems evolved out of the dissatisfaction of owners with some of the disadvantages of the Design-Bid-Construct system: primarily the lack of control over cost estimating, construction scheduling and constructability analysis. As such, owners retain a construction manager who possesses expertise in these areas, to bridge the gap between design services and construction.

1. Agency Construction Management

Under Agency Construction Management, the owner retains the construction manager to act as a consultant to the owner and to contract with the trades as the owner's agent. The

construction manager coordinates the trades, but does not provide other typical general contractor-type responsibilities such as cost or completion guarantees. Basically, the Agency Construction Management system is the Multiple Primes approach supplemented with a construction manager to advise the owner and coordinate the trades.

The primary advantage to the Agency Construction Management system is that the interest of the owner is aligned with the party that is responsible for managing the construction process. Many such contracts are structured as a cost plus fee contract. As such, the inherent conflict between the general contractor and the owner is eliminated because the construction manager does not assume the risk of completion by an agreed upon time or for an agreed upon cost. Further, because the construction manager receives a set fee for his services, he does not have any financial interest in the construction that could guide his decision-making process and he is better able to provide impartial advice to the owner.

The flip side is that there is no single point of responsibility for performance and completion of construction. Therefore, the ability of the owner to pinpoint the source of delay or cost overruns is limited, and can result in protracted and expensive claims. Further, the liability retained by the construction manager is limited by the contract between the parties, which can result in lengthy contract negotiations and highly customized contracts. Since the parties may not be used to such an approach, the obligations and risks of the participants can be unclear and lead to confusion down the road.

2. Construction Manager at Risk

Another type of construction management is the Construction Manager at Risk ("CMAR"), which is commonly described as a hybrid between Agency Construction Management and Design-Bid-Construct. Under the CMAR system, the owner retains a construction manager during or prior to the commencement of the design process. The CMAR

provides the same pre-construction services as the agency construction manager: cost estimating, construction scheduling, value engineering and constructability analysis. The CMAR is directly involved in the evolution of the design documents, which benefits the quality of those documents. However, the CMAR is not the agent of the owner. The CMAR retains the trade contractors directly, forming a subcontractor relationship. The subcontractors therefore have no contractual privity with the owner.

The CMAR is similar to the general contractor in that it is responsible for quality, cost and timely completion of the project. The benefit to the owner is the involvement of the CMAR, an experienced construction professional, in the design process to optimize the drawings and specifications. This scenario also provides the opportunity to overlap the design and construction process and shorten the project duration.

The disadvantages of the CMAR system are similar to those with the Design-Bid-Construct. Since the CMAR has economic incentives in the project, his interests may not be aligned with the owner's. Accurate and reliable pricing can also be an issue: since the CMAR is retained before the design is completed, the price furnished is only an estimate, often including a large contingency to protect the CMAR from cost increases as the drawings and specifications are further defined. Finally, the retention of the CMAR is usually done through a negotiation process rather than competitive bidding. This is often a disadvantage for the owner, because he is not getting the benefit of several bidders competing for the opportunity to participate in the project.

C. Design-Build

Design-Build is an increasingly popular project delivery system. Under the Design-Build system, the owner contracts with a single entity that can both design and construct the project.

This system is often selected by owners who prefer a single point of responsibility for the project and who do not desire much day-to-day involvement in the project.

A Design-Builder is typically a general contractor with in-house design expertise, or a joint venture between a contractor and an architect. With this approach, the design and construction processes are fully integrated and overlapping, leading to shorter project duration. Further, Design-Build integrates the expertise of specialty trade contractors and product manufacturers directly into the design process. As a result, the drawings and specifications should contain the latest industry technology and equipment, as the trade contractors and product manufacturers are more likely to have the latest information as to product availability, how certain equipment can be effectively utilized and how to best customize a certain design for the desired outcome.

One disadvantage to the owner turning the control of the project over to the Design-Builder is that the owner has little control over the design process. As such, if aesthetics are particularly important to the owner, this Design-Build system may not be the best approach. Further, with the interests of the designer and the contractor being aligned, there is no check and balance between the two as in the Design-Bid-Construct system. Also, procurement of a Design-Build contract can be more difficult. If an owner requests proposals from several design builders, each proposal can vary significantly, leaving the owner to choose between "apples and oranges." Further, pricing submitted on a proposal is inherently unreliable, as it is usually based on a limited design. Design-Builders are reluctant to spend time and resources developing a detailed and thorough design if they are not assured of being awarded the contract. However, a limited design proposal puts the Design-Builder at risk because it has gambled that it can complete the project for a certain price; if awarded the contract, the Design-Builder may not be

able to deliver the project on those terms once the design is completed.

This paper will focus on ways in which these various delivery systems affect three issues relating to litigation and arbitration. Specifically, (1) how the party structure among the different delivery systems affects joinder issues; (2) how the process of obtaining non-party discovery, both for discovery and trial, changes among different delivery systems; and (3) the factors that parties in each delivery system must consider when selecting an arbitrator.

III. HOW DO I GET ALL PARTIES JOINED?

Under the Federal Rules of Civil Procedure, joinder is a procedure by which parties may be joined to the same lawsuit if "(1) their claims or the claims asserted against them are asserted jointly, severally, or in respect of the same transaction or occurrence, and (2) any legal or factual question common to all of them will arise."[1] Joinder is required, where "(1) in that party's absence, those already involved in the lawsuit cannot receive complete relief; or (2) the absent party claims an interest in the subject of an action, so that party's absence might either impair the protection of that interest or leave some other party subject to multiple or inconsistent obligations."[2]

Under state procedural rules, the joinder standards may vary but tend to follow the same general rules. In Texas, for example, any party may join another party to the lawsuit if they assert any right to relief or have a right asserted against them "jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action."[3] A party must be joined if "(1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair

or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest."[4]

A. The Litigation Context

In the litigation context, many of the transactions involved in a construction project typically meet the standard of "the same transaction or occurrence" and therefore, most parties will fall within the permissible or compulsory joinder definition. It is difficult to imagine a court refusing to join a party on the grounds that their claims do not arise out of the "same transaction or occurrence" if all the parties were working on the same construction project. However, joinder issues may arise between the different project delivery systems based on the contractual relationships and the legal theories behind the claims asserted. Consider the example of the application of the economic loss rule.[5] Under the economic loss rule, "if a plaintiff only seeks to recover for the loss or damage to the subject matter of a contract, he cannot maintain a tort action against a defendant."[6] Simply stated, "a duty in tort does not lie when the only injury claimed is one for economic damages recoverable under a breach of contract claim."[7]

Based on the idea that the parties' contractual relationships govern the applicability of the economic loss rule, whether a certain party is joined to the lawsuit may affect the claims that are brought. If a general contractor believes it has suffered losses for which the architect is responsible, the economic loss rule may prohibit the general contractor from asserting a claim against the architect. For example, in our hypothetical: the Contractor may believe that the Architect's failure to modify the flashing details caused the leaks in the building. Within the Design-Bid-Construct system, the Contractor's only option could be to pursue the Developer, with whom it has a contractual relationship, thereby placing the burden on the Developer to bring

a third-party action against the Architect.

Another issue that can arise with Design-Bid-Construct is that the owner's dispute with the general contractor may not be in the same forum as the dispute with the architect, which raises a whole host of claims issues. However, if the parties are aligned under a different delivery system, for example the Agency Construction Management system, then as the owner's agent, the construction manager (though acting as the general contractor) may contract directly with the architect and bring a breach of contract claim against the architect as opposed to a tort claim, thereby eliminating the application of the economic loss rule. Similarly, with Design-Build, the architect and the general contractor can be one entity, so the economic loss rule problem as applied to the owner would be eliminated because he can contract directly with both the architect and the general contractor.

B. The Arbitration Context

Arbitration involves another set of considerations within the context of joinder of parties. Typically, arbitration occurs where the parties include an arbitration agreement in their contract. An owner can require that the general contractor flow down arbitration language into its subcontracts, but there may not be an arbitration provision in the owner's contract with the architect. Also, equipment procured under a purchase order may not be subject to arbitration. As a general rule, non-signatories to a contract cannot be bound by an agreement to arbitrate. Therefore, the problem arises: how do you join a non-signatory to an arbitration?

The courts have applied several exceptions to the general rule that non-signatories cannot be joined to an arbitration. First, courts have applied the agency theory.[8] Under the agency theory, "a non-signatory cannot be bound to arbitrate unless it is bound under traditional principles of contract and agency law."[9] To enforce an arbitration agreement, a court must ask

"whether [the party to be joined] is bound by that agreement under traditional principles of contract and agency law."[10] Under agency law, "[t]o bind a principal by its agent's acts, the plaintiff must demonstrate that the agent was acting on behalf of the principal and that the cause of action arises out of that relationship."[11]

The agency exception affects the Agency Construction Manager delivery system. If the contract between the owner and architect contains an arbitration provision, the parties can join the construction manager as a party to the arbitration by virtue of the fact that the construction manager is an agent of the owner.[12] The same argument could also be made for the Construction Manager at Risk, depending on the level of responsibility and cooperation between the owner and the CMAR.

Another exception is the incorporation by reference theory.[13] Under this theory, "a non-signatory may compel arbitration against a party to an arbitration agreement when that party has entered into a separate contractual relationship with the non-signatory which incorporates the existing arbitration clause."[14]

This exception fits neatly within with the construction context in general, where many subcontract agreements incorporate by reference certain provisions of the upstream contracts (or the prime contracts in their entirety). The incorporation by reference exception can be applied in multiple scenarios across multiple delivery systems. Specifically it could be used to attempt to join subcontractors of any level to the arbitration, provided that the arbitration provision included in the contract between the owner and the general contractor flows down into each level of subcontract.[15] In situations where the owner does not have direct contractual privity with the subcontractors (as opposed to Multiple Primes, where the owner contracts directly with the subcontractors), this exception is useful to ensure that the appropriate parties are joined in the

arbitration proceeding.

Traditional concepts of piercing the corporate veil and alter ago are also sometimes used as the basis to argue an exception to the signatory requirement.[16] Again, this could be used at any level and with all relationships in the project delivery system context, provided the party to be joined is an affiliate with a sufficiently close relationship to its parent corporation.[17]

Non-signatories should also be aware that certain conduct may indicate an assumption of the agreement to arbitrate.[18] Although this is a fact-specific inquiry, parties in every type of delivery system should be aware that this exception exists and may be applied to join a non-signatory to the arbitration.

Probably the most commonly used exception is the estoppel theory: where claims are "intimately founded in and intertwined with the underlying contract obligations" non-signatories may be ordered to arbitrate.[19] Courts have noted that where the estoppel theory applies to bind a non-signatory to an arbitration clause, the claims have all been "integrally related" to the contract which contains the arbitration provision.[20]

The *McBro* opinion illustrates the application of this theory. In *McBro*, St. Margaret's Hospital, as the owner, contracted with both McBro, as the construction manager, and Triangle, as the electrical contractor, to perform electrical work.[21] Both contracts contained identical arbitration provisions, which stated that "any controversy 'arising out of or relating to this [Contract] or the breach thereof' shall be settled by arbitration."[22] Triangle asserted tort claims against McBro for breach of its construction management and supervisory duties, and argued that they should not have been compelled to arbitrate because there was no written agreement between Triangle and McBro requiring arbitration.[23] Operating under the Federal Arbitration Act, the court acknowledged "the close relationship of the three entities here involved—St.

Margaret's, Triangle, and McBro—and the close relationship of the alleged wrongs to McBro's contractual duties to perform as construction manager" and held that Triangle's "claims are intimately founded in and intertwined with the underlying contract obligations" and therefore arbitration was appropriate.[24]

The estoppel theory would also be applicable in the Design-Bid-Construct delivery system, where even if the subcontracts do not contain the requirement to arbitrate, the owner could argue that the claims are "integrally related" to the general contract containing an arbitration provision; therefore, the non-signatory subcontractors are estopped from avoiding arbitration. However, in other delivery systems (for example, the Multiple Primes system), there is no one central contract that the parties could point to that would "integrally relate" all the potential claims. Consider the hypothetical: the Developer's claim against the sheathing contractor for leaks in the building. If the Project was a Multiple Primes system, the sheathing contractor asserts that the defect lies with the installation of windows by the window installer under a separate contract. The Developer's contract with the sheathing contractor contains an arbitration provision; the Developer's contract with the window installer does not. Can the Developer bind the window installer to arbitrate? Are the claims against the window installer "integrally related" to the contract with the sheathing contractor? Potentially, but it is not so clear. If the project was operating under the Design-Bid-Construct system, the solution would be simpler – either the Developer would have required the Contractor to include an arbitration provision in all subcontracts, or the Developer could argue that both claims, against the sheathing subcontractor and the window installer, were "integrally related" to the general contract that contained the arbitration provision.

Similarly, under the equitable estoppel theory, non-signatory defendants can compel

arbitration because plaintiff's claims against the signatory and the non-signatory defendants were "based on the same operative facts and are inherently inseparable."[25] In the construction context, because all the parties are working on the same construction project, the claims will arguably be based on the same operative facts and be inherently inseparable. As such, even if one party is a non-signatory to a construction contract containing an arbitration provision, that party may still be joined in the arbitration if doing so would further the goal of "equity-fairness" which is the "linchpin" of equitable estoppel.[26]

In short, where the parties to an arbitration seek to join a party who is a non-signatory to the contract containing the arbitration provision, the non-signatory may be joined if one of the above exceptions applies. Many of the exceptions are applicable in the construction context. However, several of the exceptions have different applications and different results based on which delivery system is involved. Under some delivery systems, it may not be possible to join all the potential parties to the arbitration. In this situation, the parties to the arbitration will have to subpoena witness testimony and documents from the non-signatories who are not joined in the arbitration. As discussed below, subpoenas can involve complications among the various delivery systems as well.

Note that the AIA has taken measures to address the joinder issue in its AIA contract forms. The 1997 AIA forms prohibited joinder of arbitration claims against the architect absent written consent of *all* parties to arbitration. However, the 2007 AIA forms are considerably more flexible – any party may seek to join a non-party to the contract (with the non-party's written consent) as long as (1) the person to be joined is substantially involved in common questions of law and fact; and (2) the person's presence is required to afford complete relief.

IV. I NEED NON-PARTY DISCOVERY—CAN I GET A SUBPOENA?

Courts have procedures to compel production of documents and testimony from witnesses who are not parties to the proceeding. A "subpoena" is defined as "a writ or order commanding a person to appear before a court or other tribunal, subject to a penalty for failing to comply."[27] A subpoena is "the medium for compelling the attendance of a witness and is a process in the name of the court or a judge, carrying with it a command dignified by the sanction of the law."[28]

To the extent that a party is not joined in the arbitration or litigation proceeding, obtaining evidence in the form of testimony and documents may require a subpoena. In arbitration, the parties' contract can determine whether non-party discovery subpoenas are permitted. However, because most contracts are silent as to the scope of discovery, many parties typically reference and incorporate the American Arbitration Association Construction Industry Rules to govern their disputes. The American Arbitration Association Construction Industry Rules permit discovery at the discretion of the arbitrator.[29] Similarly, the JAMS Engineering and Construction Arbitration Rules and Procedures permit the issuance of a subpoena for a third party witness or the production of documents from a third party.[30]

However, a non-party cannot be bound to participate in discovery based on a provision in a contract that they did not negotiate and execute. The applicable statutory authority must be examined to determine whether non-parties are obligated to provide documents and testimony in arbitration proceedings. Depending on the jurisdiction, the following statutes govern the statutory authority of the arbitrator to issue non-party subpoenas: the Federal Arbitration Act ("FAA"), the Uniform Arbitration Act ("UAA"), the Revised Uniform Arbitration Act ('RUAA"), and the various state arbitration acts.

A. The Federal Arbitration Act (FAA)

The FAA, codified at 9 U.S.C §1, *et seq*., applies where interstate commerce is involved: for example, courts have held that construction contracts involve interstate commerce where the parties involved are from different states, or where the labor, equipment, materials, subcontractors, suppliers or management originate from outside the state where the project is located.[31] The FAA also applies where the dispute involves a federal question other than interstate commerce or where there is complete diversity of citizenship among the parties. Note, however, that the FAA does not provide an independent ground for subject matter jurisdiction.[32]

Section 7 of the FAA discusses the arbitrator's powers to compel attendance at the arbitration hearing itself, stating that the arbitrator "may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case."[33] The term "before them" has been interpreted as permitting the arbitrator to subpoena non-parties to appear at the arbitration hearing, but the courts are divided over whether this language also permits non-party subpoenas for prehearing discovery.[34]

For example, in *WJBK-TV*, the Sixth Circuit held that "the FAA's provision authorizing an arbitrator to compel the production of documents from third parties for purposes of an arbitration hearing has been held to implicitly include the authority to compel the production of documents for inspection by a party prior to the hearing."[35] The Eighth Circuit agreed, although seemingly finding it important that the non-party was "not a mere bystander pulled into this matter arbitrarily" but was "integrally related to the underlying arbitration."[36]

However, in *COMSAT*, the Fourth Circuit limited the arbitrator's powers to "the plain language of the statute," stating "[n]owhere does the FAA grant an arbitrator the authority to

order non-parties to appear at depositions, or the authority to demand that non-parties provide the litigating parties with documents during prehearing discovery. By its own terms, the FAA's subpoena authority is defined as the power of the arbitration panel to compel non-parties to appear 'before them;' that is, to compel testimony by non-parties at the arbitration hearing."[37] This strict constructionist approach was adopted and expanded upon by the Third Circuit in *Hay Group, Inc. v. E.B.S. Acquisition Corp*., 360 F.3d 404 (3d. Cir. 2004).[38] In an opinion written by the now-U.S. Supreme Court Justice Samuel Alito, the court held that the language of section 7 is "unambiguous" and offered the following analysis:

> "The 'only power conferred on arbitrators with respect to the production of documents by a non-party is the power to summon a non-party 'to attend before them or any of them as a witness *and* in a proper case *to bring with him or them* any book, record, document or paper which may be deemed material as evidence in the case.' The power to require a non-party 'to bring' items 'with him' clearly applies only to situations in which the non-party accompanies the items to the arbitration proceeding, not to situations in which the items are simply sent or brought by a courier. In addition, the use of the word 'and' makes it clear that a non-party may be compelled 'to bring' items 'with him' only when the non-party is summoned 'to attend before [the arbitrator] as a witness.' Thus, Section 7's language unambiguously restricts an arbitrator's subpoena power to situations in which the non-party has been called to appear in the physical presence of the arbitrator and to hand over the documents at that time."[39]

The approach taken by the *Hay Group* court was adopted by the Second Circuit in late 2008.[40]

Currently, it depends on the particular jurisdiction whether the courts have interpreted the FAA's language as permitting the arbitrator to issue non-party subpoenas for production of documents at the arbitration hearing only or whether the language is broad enough to include pre-hearing production of documents from non-parties. However, since *Hay Group*, the general trend seems to be that courts are leaning toward a strict interpretation of the FAA and disapproving the arbitrator's authority to order the production of documents from a non-party prior to the hearing. Further, to date no court has found that arbitrators are authorized by the

FAA to issue subpoenas to non-parties for pre-hearing depositions. Parties should be aware of the different readings of the statute and their particular jurisdiction's interpretation when analyzing the impact of non-party subpoenas on their claims, and be aware that should the FAA apply to their proceeding, it is unlikely that non-party discovery will be available prior to the hearing.

B. The Uniform Arbitration Act (UAA) and the Revised Uniform Arbitration Act (RUAA)

The UAA, promulgated in 1955, was designed "to insure the enforceability of agreements to arbitrate in the face of oftentimes hostile state law."[41] To date, "Forty-nine jurisdictions have arbitration statutes; 35 of these have adopted the UAA and 14 have adopted substantially similar legislation." The UAA, and its subsequent version, the RUAA (revised in 2000), apply where the FAA is inapplicable.[42] This distinction is important when considering the pre-emptive effect of the FAA: the FAA can preempt "choice-of-law provisions routinely included in commercial contracts."[43] In *Volt Information Sciences, Inc. v. Stanford University*, 489 U.S. 468 (1989) and *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), the U.S. Supreme Court established that "a clearly expressed contractual agreement by the parties to an arbitration contract to conduct their arbitration under state law rules effectively trumps the preemptive effect of the FAA. If the parties elect to govern their contractual arbitration mechanism by the law of a particular State and thereby limit the issues that they will arbitrate or the procedures under which the arbitration will be conducted, their bargain will be honored—as long as the state law principles invoked by the choice-of-law provision do not conflict with the FAA's prime directive that agreements to arbitrate be enforced."[44] If adopted by a particular state, the UAA and the RUAA will govern the parties' arbitration procedures should they decide that the disputes will be governed by state law.

As under the FAA, the UAA poses a similar conundrum: the availability of non-party discovery subpoenas is highly dependent on the particular jurisdiction. Section 7 of the UAA provides that "[t]he arbitrators may issue (cause to be issued) subpoenas for the attendance of witnesses and for the production of books, records, documents and other evidence." Although it doesn't specify whether the subpoenas apply to pre-hearing discovery, the language has been interpreted to mean at the arbitration hearing only.[45] Since the UAA is silent as to the availability of pre-hearing discovery, some states have enacted statutes which specifically authorize third-party subpoenas in arbitration.[46]

The revisions made to the UAA in the RUAA make the availability of non-party discovery more clear. The RUAA has been adopted by twelve states, and is being considered for adoption by several others.[47] Section 17(a) of the RUAA provides that "[a]n arbitrator *may* issue a subpoena for the attendance of a witness and for the production of records and other evidence *at any hearing*."[48] Section 17(b) addresses pre-hearing depositions, providing that "an arbitrator may permit a deposition of any witness to be taken for use as evidence at the hearing, including a witness who cannot be subpoenaed for or is unable to attend a hearing."[49] Section 17(c) includes the catch-all provision, stating that "[a]n arbitrator may permit such discovery as the arbitrator decides is appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious, and cost effective."[50] If discovery is permitted under 17(c), the RUAA provides that "the arbitrator may order a party to the arbitration proceeding to comply with the arbitrator's discovery-related orders, issue subpoenas for the attendance of a witness and for the production of records and other evidence *at a discovery proceeding*."[51]

These revisions in the RUAA address the issue of pre-hearing discovery, and the RUAA

specifically acknowledges the involvement of non-parties: "[i]n Section 17 most of the references involve 'parties to the arbitration proceeding.' However, many arbitrations involve outside, third parties who may be required to give testimony or produce documents. Section 17(c) provides that the arbitrator should take the interests of such 'affected persons' into account in determining whether and to what extent discovery is appropriate. Section 17(b) has been broadened so that a 'witness' who is not a party can request the arbitrator to allow that person's testimony to be presented at the hearing by deposition if that person is unable to attend the hearing."[52]

In sum, while the language of the FAA and the UAA supports the arbitrator's authority to subpoena attendance of witnesses and documents at the hearing, it is far from certain that an arbitrator has the authority to issue non-party subpoenas for production prior to the hearing, and such authority is highly jurisdiction-dependent. Therefore, the alignment and subsequent joinder of the parties based on the various project delivery systems can be critical. If a particular party is not joined in the arbitration, then the participating parties are not guaranteed to be able to subpoena documents and testimony from non-parties, which could ultimately determine the outcome of the case.

If all contracts on a project contain a provision for non-party discovery subpoenas, then the challenges to the practitioner will be fewer, but without specific language, it can be difficult. Consider the hypothetical, operating under the Multiple Primes delivery system: what if the framing contractor is in a dispute with the Developer but wants or needs documents from the sheathing contractor and the window installer? Under the Design-Bid-Construct system, what if the Developer brings a claim in arbitration against the Architect for failing to modify the flashing details when the window type changed, but other parties believe the issue lies with defective

window installation performed by the window installer as a subcontractor to Contractor, who is not a party to the arbitration?

Although this issue of non-party discovery may not be "top of mind" when the Owner is deciding which delivery system to choose, parties to arbitration agreements ought to be aware of these issues and should consider specifying broader discovery related powers for the arbitrator in the dispute resolution provisions of their contracts. Further, owners will need to require the contractor and architect to incorporate this language in downstream contracts. Note, however, that even if a contract grants an arbitrator discretion to permit non-party discovery, the arbitrator has to actually exercise his authority. Therefore, as discussed below, the selection of the arbitrator is an important consideration.

V. HOW DO I SELECT THE BEST ARBITRATOR?

Parties and their counsel generally seek to find arbitrators who are fair minded, neutral, knowledgeable, experienced and who are also good managers. As construction attorneys and their clients become more sophisticated in their selection of arbitrators, they will include in their selection criteria the arbitrator's knowledge of the particular delivery system involved in their case. Attorneys and clients need to ask whether the arbitrator they are considering will understand the roles of the parties under each delivery system. Knowledge of the pros and cons of each delivery system will be important to a party trying to convince the panel that a construction manager at risk failed in his duty to schedule when the project is under a construction manager at risk delivery system.

When analyzing the factors that go into determining which arbitrator to select as it relates to a given project delivery system, it is important to understand the alignment considerations from each party's standpoint. Do I want an industry professional or an experienced construction

attorney? Who would be a good choice from an owner's perspective? Under Design-Bid-Construct and Construction Manager at Risk, all the parties are adverse, so the considerations of each party cannot be consolidated. However, under Agency Construction Management and Design-Build, certain parties are aligned and can "join forces" to select an arbitrator that fits their interests. In Agency Construction Management, the owner may be aligned with the construction manager against the architect. Therefore, they would want to select an arbitrator who is an industry professional with construction experience, or an attorney who represents builders versus a design professional or an attorney who frequently represents architects. Under the Design-Build delivery system, the contractor and architect are aligned against the owner. Would a particular architect who may typically have some bent toward design professionals be as good an arbitrator in a design build case where the architect and builder are one entity?

How much expertise do you need on the panel? If your case involves complex issues of insurance, indemnity or contract interpretation, you may want an all attorney panel. However, if the case involves very technical issues, whether window flashing details and installation deviations or process specifications for a refinery, you may want at least one panel member with that expertise. The presentation of expert testimony could be less time consuming if an industry professional is on the panel. From the parties' perspective, this could result in cost savings.

Another consideration is non-party discovery. As discussed above, in many jurisdictions, whether to allow non-party discovery in the form of subpoenas for witness testimony or document production is discretionary for the arbitrator. Therefore, the parties must decide if they want to select an arbitrator who is inclined to allow non-party discovery or not.

Consider the hypothetical: the Developer brings a claim against the Architect for failing to modify the flashing details when the window type was changed. The Architect files a

counterclaim against the Developer for providing defective windows which caused the leaks. The window installer possesses critical documents or witness testimony that is necessary to prove that the windows provided by the Developer were not defective, but the window installer is not a party to the contract between the Architect and the Developer and therefore is not joined in the arbitration. The testimony or documents must be subpoenaed – what if the arbitrator declines to exercise his discretion to allow non-party discovery? This could be detrimental to the Developer's case if it cannot offer evidence from the window installer. However, if the window installer's documents establish that the windows were, in fact, defective, the Developer may want to limit the availability of non-party discovery. The Architect may not be able to prove its claim that the windows were defective without testimony or documents from non-parties. As such, because an arbitrator's discretion could be critical to the outcome of the dispute, the arbitrator's position on whether to permit non-party discovery is an important consideration in arbitrator selection, depending on which parties are joined in the arbitrator proceeding.

Most ADR providers give limited information about the potential arbitrators who are presented for selection. The AAA and JAMS offer little more than the typical biographical, educational and work history information when disclosing a list of potential arbitrators. Certainly information such as prior awards issued, parties involved, the type of case or other indicators are not disclosed. How should parties proceed if they need to make a decision on which arbitrator to select? Parties should conduct their own "background check" on the arbitrators – asking other attorneys or industry professionals if they have used the particular arbitrator and to what end; reviewing law firm bios; and taking advantage of publicly available information from websites such as Westlaw and Lexis which provide some information about an attorney's caseload, previously published cases or court appearances. A joint counsel interview

with the potential arbitrators is another way to determine the arbitrator's leanings. The more informed the parties are, the better decision they will be able to make. Questioning potential arbitrators about their views on topics such as scope of party discovery and non-party discovery, and their knowledge of your particular delivery system can be extremely useful.

Further, the parties should consider the extent to which the arbitrator will strictly follow the law (as opposed to "doing equity"). What procedure or rules govern the arbitration and how familiar with the governing case law is your arbitrator? As discussed in the subpoena section above, depending on the jurisdiction of the arbitration proceeding, certain statutes apply which could affect the availability of non-party discovery or other issues.

Another issue that arises in selecting an arbitrator, regardless of the delivery system applied, involve the arbitrator's powers in general. For example, consider the scope of the dispute to be arbitrated – what is the risk of the arbitrator exceeding his or her powers? This is an important consideration based on the limited scope of review of arbitrator decisions. While courts will typically not overturn an award if an arbitrator makes an error of law, they will certainly vacate an award if the arbitrator exceeded a delineated scope of authority. The parties can agree to limit the arbitrator's power to award certain categories of damages. Such a consideration would be important, for example, if a general contractor wanted to limit the availability of consequential or punitive damages. The owner, on the other hand, may want to limit the availability of interest or attorneys' fees in the event of a payment dispute with the contractor.

At the beginning of a construction project, no one wants to plan for a dispute that could send the parties into arbitration. However, because there are different options for delivery systems out there, a smart owner or industry professional will want to be aware of the types of

issues when considering the selection of a potential arbitrator. Oftentimes, these issues can be addressed in the parties' contract, i.e. specific qualifications for the arbitrator or the discretion to allow non-party discovery. If a party is aware of these issues on the front end, they may be able to leverage some favorable language to be negotiated into the contract before a dispute arises, in order to better protect themselves in the event of a dispute.

VI. CONCLUSION

With the availability of different project delivery systems that move away from the traditional model, parties to a construction contract need to be aware of potential issues that may arise depending on the contract structure and the alignment of the parties involved. Joinder issues arise in litigation where certain claims may not be available if certain parties are not joined in the lawsuit. Further, if the parties end up in different forums, complications arise that lead to excess time and cost when proceeding in multiple forums. To the extent all parties can be joined in one lawsuit, these issues are diminished. In the arbitration context, joinder issues arise where not all parties have an arbitration provision in their contract. Because certain exceptions exist that may facilitate joining additional parties, the parties to the arbitration will need to know the best way to utilize these exceptions in order to get all necessary parties joined in the proceeding.

Subpoena issues arise where parties who are not joined in the proceeding possess evidence in the form of testimony or documents that is critical for the adjudication of the dispute. A party pursuing claims or defending allegations may benefit from non-party testimony or documents. The potential availability of non-party subpoenas may greatly impact the outcome of the dispute, and knowing how to draft the appropriate contractual language before the project begins will allow the presiding judge or arbitrator to subpoena the relevant testimony and documentation to enable the proceeding to go forward with all the necessary information.

Arbitration selection involves many considerations from the perspective of all parties involved. It is best to understand the considerations up front so the parties may negotiate language in the contract that can address some of the concerns so that the arbitrator is the best suited for the dispute at hand.

As with all construction issues, attorneys need to stay apprised of the latest developments so they may advise their clients accordingly. With an ever-changing construction atmosphere and non-traditional project delivery systems becoming increasingly more popular and available, clients will look to the industry professionals to be aware of potential pitfalls, so that the project may proceed as mutually beneficial as possible for all parties involved.

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[1] *See* FED. R. CIV. P. 20; BLACK'S LAW DICTIONARY (9th ed. 2009).
[2] *See* FED. R. CIV. P. 19(a); BLACK'S LAW DICTIONARY (9th ed. 2009).
[3] *See* TEX. R. CIV. P. 40(a).
[4] *See* TEX. R. CIV. P. 39(a).
[5] For a more in depth analysis of the economic loss rule's application to the various project delivery systems, see section __ [refer to Joel's paper].
[6] *See Southwestern Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 494 (Tex.1991).
[7] *Sterling Chemicals, Inc. v. Texaco Inc.*, 259 S.W.3d 793, 796 (Tex. App. – Houston [1st Dist.] 2007, pet. denied) (*citing Trans–Gulf Corp. v. Performance Aircraft Servs., Inc.*, 82 S.W.3d 691, 695 (Tex. App.-Eastland 2002, no pet.)). An in-depth analysis of the economic loss rule and its availability among various jurisdictions is beyond the scope of this paper, but two leading cases which have promoted the widespread acceptance of the economic loss rule are *Seely v. White Motor Co*., 403 P.2d 145 (Cal. 1965) (the products liability context) and *East River Steamship Corp. v. Transamerica Delaval, Inc*., 476 U.S. 858, 106 S. Ct. 2295, 90 L.Ed.2d 865 (1986) (the admiralty law context).
[8] *See, e.g. E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187 (3d. Cir. 2001); *Thomson-CSF, S.A. v. American Arbitration Assoc.*, 64 F.3d 773 (2d. Cir. 1995).
[9] *DuPont*, 269 F.3d at 194 (citations omitted).
[10] *Id*. at 194-95.
[11] *Id*. at 198 (*citing Phoenix Canada Oil Co. v. Texaco, Inc.*, 842 F.2d 1466, 1477 (3d. Cir. 1988)).
[12] *See id*.
[13] *See, e.g. Import Export Steel Corp. v. Miss. Valley Barge Line Co.*, 351 F.2d 503 (2d. Cir. 1965); *Continental U.K. Ltd. v. Anagel Confidence Compania Naviera, S.A.*, 658 F. Supp. 809 (S.D. N. Y. 1987).
[14] *Thomson*, 64 F.3d at 777; *see also Import Export Steel*, 351 F.2d at 505-06 (finding that because a separate agreement with a non-signatory expressly assumed all the obligations and privileges of the signatory party, the arbitration clause could be enforced against the non-signatory); *Continental U.K.*, 658 F. Supp. at 813 ("if a party's arbitration clause is expressly incorporated into a bill of lading, non-signatories…who are linked to that bill through general principles of contract law or agency law may be bound").
[15] *See id*.
[16] *See Thomson*, 64 F.3d at 777-78 (discussing the factors by which a court will pierce the corporate veil).
[17] Keep in mind, however, that piercing the corporate veil is not as easy as it seems, often involving significant research and discovery work to uncover the relationships between two purportedly related corporate entities.

[18] *See, e.g. Thomson*, 64 F.3d at 777 ("[i]n the absence of a signature, a party may be bound by an arbitration clause if its subsequent conduct indicates that it is assuming the obligation to arbitrate"); *see also Gvozdenovic v. United Air Lines, Inc.*, 933 F.2d 1100, 1105 (2d. Cir. 1991), *cert. denied*, 502 U.S. 910 (1991) (party assumed the obligation to arbitrate by sending a representative on her behalf to the arbitration).
[19] *See, e.g. Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753 (11th Cir. 1993), *cert. denied*, 513 U.S. 869 (1994); *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315 (4th Cir. 1988); *McBro Planning & Dev. Co. v. Triangle Elec. Constr. Co.*, 741 F.2d 342 (7th Cir. 1984).
[20] *Thomson*, 64 F.3d at 779.
[21] *McBro*, 741 F.2d at 342-43.
[22] *Id*. at 343.
[23] *Id*. at 343-44.
[24] *Id*. at 344.
[25] *See, e.g. Grigson v. Creative Artists Agency, LLC*, 210 F.3d 524 (5th Cir. 2000); *Sam Reisfeld & Son Import Co. v. S.A. Eteco*, 530 F.2d 679 (5th Cir. 1976).
[26] *See Grigson*, 210 F.3d at 528.
[27] BLACK'S LAW DICTIONARY (9th ed. 2009).
[28] *McCollum v. Superior Court In & For Pima County*, 588 P.2d 861, 862 (Ariz. Ct. App. 1978).
[29] *See* R-24, R-25, R-33(d).
[30] *See* Rule 19(c) and 21(a).
[31] *See* 6 BRUNER & O'CONNOR ON CONSTRUCTION LAW § 20:6 (2009) (citing cases).
[32] *See Huffco Petroleum Corp. v. Transcontinental Gas Pipe Line Corp.*, 681 F. Supp. 400, 401 (S.D. Tex. 1988).
[33] 9 U.S.C. § 7.
[34] Compare *American Federation of Television and Radio Artists, AFL-CIO v. WJBK-TV*, 164 F.3d 1004 (6th Cir. 1999) with *COMSAT Corp. v. Nat'l Sci. Foundation*, 190 F.3d 269 (4th Cir. 1999).
[35] *WJBK-TV*, 164 F. 3d at 1009 (*citing Meadows Indem. Co. v. Nutmeg Ins. Co.*, 157 F.R.D. 42 (M.D. Tenn. 1994); *Stanton v. Paine Webber Jackson & Curtis, Inc.*, 685 F. Supp. 1241 (S.D. Fla. 1988).
[36] *See In re Security Life Ins. Co. of America*, 228 F.3d 865, 870-71 (8th Cir. 2000).
[37] 190 F.3d at 275.
[38] *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3d. Cir. 2004).
[39] *Id.* at 407 (citations omitted).
[40] *See Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210, 216 (2d Cir. 2008) ("*Hay Group* signaled what one commentator has called an 'emerging rule' that 'the arbitrator's subpoena authority under FAA § 7 does not include the authority to subpoena nonparties or third parties for prehearing discovery even if a special need or hardship is shown.'") (citations omitted).
[41] *See* Prefatory Note to the Uniform Arbitration Act, a copy of which can be obtained at http://www.adr.org/sp.asp?id=29567.
[42] *Id.*
[43] *Id*.
[44] *Id*. (citing *ASW Allstate Painting & Constr. Co. v. Lexington Ins. Co.*, 188 F.3d 307 (5th Cir. 1999); *Russ Berrie & Co. v. Gantt*, 988 S.W.2d 713 (Tex. Ct. App. 1999)).
[45] *See, e.g.*, Robert E. Benson, *The Power of Arbitrators and Courts to Order Discovery in Arbitration—Part I*, 25 Colo. Law. 55, 56 n. 14 (Feb. 2006) (citing cases).
[46] *See, e.g. Hay Group*, 360 F.3d at 407 n.1 (discussing statutes in Delaware and Pennsylvania).
[47] *See* the Prefatory Note to the RUAA, a copy of which can be found at http://www.law.upenn.edu/bll/archives/ulc/uarba/arbitrat1213.htm.
[48] *Id*. (emphasis added).
[49] *Id*.
[50] *Id*.
[51] *Id*. at § 17(d) (emphasis added).
[52] *Id*. at § 17 cmt. 5.