Managing the Battlefield: Using a Uniform Multi-Party Construction Arbitration Agreement[*]

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For many businesses, arbitration offers an expedited, cost-effective, and private method of resolving complex disputes. These benefits, however, often come at the expense of reliable procedural rules. On one hand, the Federal Arbitration Act (FAA) and the growing judicial enthusiasm for the use of arbitration provide companies with great latitude to create unique and enforceable multi-party dispute-resolution provisions during contract formation. On the other hand, that same body of law can tether disputing parties and their attorneys to poorly crafted arbitration clauses that inadvertently foment inefficiency and unpredictability. This article intends to guide the construction industry, and the lawyers advising it, toward a usable arbitration provision that is designed to meet the challenges inherent in multi-party and consolidated proceedings.[1]

A perennial problem that construction litigators face is corralling multiple parties into a *single* arbitral proceeding despite the parties having independently negotiated separate contracts, each one containing its own arbitration clause. In many—if not most—circumstances, parties in complex disputes would prefer to avail themselves of consolidation or joinder mechanisms to coordinate all parties into one arbitral venue. As one commentator has put it, "many cases reveal that consolidation or joinder may be the

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[1]This article addresses post-completion arbitration. Pre-completion (or "during-construction") arbitration, conducted through dispute review boards and the like, encompasses similar concerns, although with decidedly broader issues involved (focused on moving toward project completion, notwithstanding the parties' disputes). This article is also not intended to address foreign-state or international arbitration, at least when the fundamental notions underlying the concept of arbitration differ significantly from those in the United States.

only adequate means of achieving the ultimate goals of arbitration: fair, efficient, and economical commercial justice."[2] Even when parties within the same project have different claims, they likely would benefit from a single arbitrator who has a thorough understanding of the project relationships that are the source of the disputes.[3] Despite these clear benefits, using consolidation or joinder in arbitral proceedings often is difficult or impossible when parties neglect to draft these mechanisms adequately in their arbitration clauses. Absent contractual consent, courts often cannot order consolidation or joinder unless there is state law to the contrary. Therefore, without careful attention to the interaction between multiple contracts' arbitration provisions, the end result can be a series of expensive, time-consuming proceedings that risk inconsistent (yet binding) awards.[4]

This consolidation dilemma is particularly acute in the construction industry, where development plans can implicate dozens of interrelated parties acting under multiple contracts; an average construction project may involve owners, contractors, subcontractors (including design/build firms), construction managers, suppliers, engineers, architects, insurers, and reinsurers.[5] In a famous opinion issued by the District of Columbia Court of Appeals, Judge John W. Kern III wrote:

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[2]Thomas J. Stipanowich, *Arbitration and the Multiparty Dispute: The Search for Workable Solutions*, 72 Iowa L. Rev. 473, 500 (Mar. 1987) ("Whether consolidation or some other procedural mechanism is employed to bring about joint arbitration hearings, the goal is the same: accommodating multiparty disputes in such a manner as to achieve, economically and efficiently, fair and final resolution of the entire controversy."); *see also* Allen L. Overcash, *Introducing a Novel ADR Technique for Handling Construction Disputes: Arbitration,* 35 Constr. Law. 22, 26–27 (Winter 2015).

[3]*See* Overcash, at 26.

[4]Stipanowich provides a good example of the problems broached by inconsistent arbitral awards: "an arbitral award ordering the contractor to pay the owner damages probably will be inadmissible in later proceedings initiated by the contractor seeking indemnification from the subcontractors participating in the roof construction." Stipanowich, at 481. Inconsistency between proceedings is particularly troublesome in the context of arbitration because arbitral awards have extremely limited effects on other proceedings compared to courtroom litigation, which has the advantage of res judicata and collateral estoppel. Stipanowich, at 502.

[5]*See* Overcash, at 25 ("New procedures such as lean construction endeavor to more directly include these other parties in the design and construction process. The prime contractor responsible for managing the project may self-perform little of the actual work and in that sense may be a bystander as to much of the project. This development necessitates that effective legal input into the project understands the overall project's goals and objectives and has the ability to appropriately deal with all its participants."); *see also* Philip L. Bruner & Patrick J. O'Connor Jr., 7 Bruner and O'Connor on Construction Law

> [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. 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.[6]

As one might expect, despite the number of separate agreements involved in these large projects, the disputes that arise almost always require the involvement of multiple parties seeking to resolve common claims. Disputes "arising out of a construction contract will have a ripple effect which will precipitate separate, but related, actions."[7] Unfortunately, more often than not, litigators rifle through fistfuls of arbitration clauses only to realize that the parties provided no adequate, reconcilable means of ensuring that the parties can gather their common claims into a single arbitral proceeding. Instead, the attorneys discover that each agreement has its own insular clause, typically giving each party an absolute right to refuse consolidation—or, even worse, they discover that some agreements lack arbitration clauses entirely. As Richard Jeydel puts it, "[t]ransactional counsel who draft dispute resolution provisions are rarely informed of the consolidation and joinder problems that can arise long after the ink is dry; too often, they don't consider these issues."[8]

In this scenario, where a party fails to carefully draft its arbitration clause to anticipate multi-party arbitrations, it may find itself without any effective recourse to consolidate separate

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§ 21:277, p. 598 (Mar. 2016) ("One of the perceived disadvantages of arbitrating construction disputes is the difficulty of obtaining the participation of all relevant parties in one proceeding.").

[6]Blake Const. Co., Inc. v. C. J. Coakley Co., Inc., 431 A.2d 569, 575 (D.C. 1981); *see also* Robert F. Cushman et al., Construction Disputes: Representing the Contractor § 2.04[B] (2001) (observing that parties in construction litigation must begin by effectively "forming alliances and declaring war").

[7]Matthew D. Schwartz, *Multiparty Disputes and Consolidated Arbitrations: An Oxymoron or the Solution to a Continuing Dilemma?*, 22 Case W. Res. J. Int'l L. 341, 344 (1990); *see also* Overcash, at 26 ("Because construction is a collective effort and a dispute carries a collective impact, it stands to reason that a collective dispute resolution procedure is in the interest of the efficiency of the project."). Due to the increasing complexity of construction projects, some sources have estimated the cost of construction industry disputes to exceed $10 billion per year. *See* Overcash, at 26 (citing Coop. Research Centre for Constr. Innovation, Dispute Avoidance and Resolution: A Literature Review, Rep. No. (2007-006-EP), 47).

[8]Richard Jeydel, "Consolidation, Joinder, and Class Actions: What Arbitrators and Courts May and May Not Do," American Arbitration Association Handbook on Arbitration Practice 139, 146–47 (2010).

arbitral proceedings or join necessary parties to a proceeding (other than commencing litigation with the hope that a court pulls in all claims and controversies, finding arbitration inconvenient or inadequate to resolve all disputes uniformly).[9] The FAA does not authorize consolidation, and federal courts have been increasingly reluctant to order consolidation without the consent of all parties. Nor can parties depend on state law to come to the rescue; some states, like California and Massachusetts, statutorily authorize court- or arbitrator-ordered consolidation, but several, like Connecticut and Ohio, forbid the practice absent consent. The joinder of non-signatory parties to an arbitration can prove even more difficult than consolidation, as state law generally only allows it under five circumstances: incorporation by reference; assignment and assumption; corporate veil-piercing or alter ego; estoppel; and agency. As one commentator has warned, if "multiple-party arbitrations are to become common in construction, they must be created by contract."[10]

Accordingly, since defective arbitration clauses have become an all-too-common occurrence in the construction industry, and since federal and state law is currently insufficient to supply the means of compelling multi-party arbitration, it is incumbent upon attorneys to attend to consolidation strategies while negotiating and drafting construction contracts. This article therefore surveys the history and current state of consolidated arbitration proceedings, and then proposes a Uniform Construction Arbitration Agreement (UCAA), which is a practice-ready template for a universal arbitration clause that provides the parties with stability and predictability.[11]

While the UCAA is the product of the authors' experiences in litigating complex construction cases, as well as a review of the extant law discussed in this article, the hope is that this model

[9] For example, California Code of Civil Procedure Section 1281.2 allows a court to refuse to order arbitration pursuant to a written agreement if (a) the right to compel arbitration has been waived by the movant; (b) grounds exist for revocation of the arbitration agreement; or (c) in a multi-party proceeding arising out of the same transaction (or related transactions), there is "a possibility of conflicting rulings on a common issue of law or fact." *See, e.g.,* Carlson v. Home Team Pest Defense, Inc., 239 Cal. App. 4th 619, 632–37, 191 Cal. Rptr. 3d 29, 2015 I.E.R. Cas. (BNA) 188812, 165 Lab. Cas. (CCH) P 61623 (1st Dist. 2015) (adhesive arbitration agreement unenforceable when it was cloaked with a high degree of procedural and substantive unconscionability); Robertson v. Health Net of California, Inc., 132 Cal. App. 4th 1419, 1428–29, 34 Cal. Rptr. 3d 547 (1st Dist. 2005) (arbitration agreement unenforceable when it did not comply with statutory requirements).

[10] Overcash, *Introducing a Novel ADR Technique for Handling Construction Disputes: Arbitration,* 35 Constr. Law. 22, 27 (Winter 2015).

[11] *See* Appendix (Uniform Construction Arbitration Agreement).

agreement applies equally to—or at least sheds light on—the sort of troublesome issues that arise frequently in consolidating proceedings for *any* multi-party dispute: arbitrator selection; arbitrator disqualification; arbitral subject matter; duties to incorporate arbitration clauses by reference in ancillary and subsequent agreements; the resolution of conflicts between arbitration clauses; assumptions of arbitration obligations; internal arbitral procedures, such as discovery rules; and timelines for joinder, among other topics. The parties inevitably will need to tailor the minor, procedural aspects of the UCAA to the particular needs of the project at issue, but the agreement's broader terms and purposes should be acceptable to nearly all projects. At the very least, the UCAA acts as an exemplar and checklist to ensure that parties are not surprised or frustrated when disputes occur.[12]

This article begins, in Part One, with a brief account of the contemporary statutory and judicial framework for arbitration, describing the circumstances in which consolidated proceedings are often warranted. Part Two then examines the need for contractual consolidation provisions due to the paucity of federal and state devices for compelling consolidation or the joinder of non-signatories. Finally, Part Three reviews common drafting errors and suggests ways in which the UCAA solves these problems or prevents them from arising in the first place.

I. The Merits of Arbitral Consolidation and Joinder

Imagine that a large commercial property owner has a claim for breach of contract against many parties: its general contractor; its engineering firm; and its architectural firm. The owner consults its contract with the contractor and determines that it may commence an arbitration proceeding through JAMS, with each party allowed to strike one arbitrator from a JAMS-selected list of three arbitrators.

So far, so good. Moving to the other parties, however, the owner realizes that its individualized contract with its engineering firm expressly disclaims to bind either party to any form of multi-party arbitration, and its form contract with its architects requires the parties to proceed through AAA, with each party selecting its own neutral representative, who in turn must choose a third arbitrator. Moreover, both of the design-team contracts do

[12]Outside of construction disputes, common scenarios implicating arbitral consolidation or joinder include insurance, maritime, and sales transactions. *See* Stipanowich, *Arbitration and the Multiparty Dispute: The Search for Workable Solutions,* 72 Iowa L. Rev. 473, 481–482 (Mar. 1987); *see also* Schwartz, at 345 (identifying arbitral consolidation issues in the context of maritime charter party agreements).

not bind either the engineers or the architects to arbitrations between the owner and the general contractor. Even worse, the contractor is likely to request that its subcontractors and suppliers appear in any arbitration proceeding and respond to direct, contribution, or indemnity claims, and both types of those second-tier relationships are governed by separate contracts, with their distinct arbitration clauses (or no such clauses at all). Perhaps the subcontractors will try to place their liability on yet another party (e.g., a materials supplier), back on the general contractor, or (all too commonly) the owner. Even in the absence of these complex contractual restrictions, there are a number of difficult strategic decisions to be made: by way of example only, for the time-being, should the owner present a "united front" with its design team to recover against the general contractor, or will that raise the threat of collateral estoppel for subsequent claims against the design professionals?[13]

The owner's counsel are left with their brows furrowed and their desks covered in at least five unique, and non-interlocking, contracts. Even in a best-case scenario, the owner may have no choice but to bring simultaneous claims in separate arbitral forums, requiring the litigators to assemble and present the same evidence again and again, posing a great burden and risking inconsistent results.[14] How did this happen, and what could have been done to avoid it?[15]

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[13]As *The Construction Contracts Book* advises, rather than including a design professional in a single arbitral forum, the owner may find it preferable to use the designer's status as an actual or perceived agent of the owner in order to develop a concerted attack against the general contractor. Mark Bloomquist, "Consolidation and Joinder," The Construction Contracts Book: How to Find Common Ground in Negotiating the 2007 Industry Form Contract Documents 285, 286 (David S. Brennan et al. eds., 2008). Undertaking that strategy, however, risks preclusion of any subsequent claim against the designer. *See* Bloomquist, at 286 (citing City of Bismarck v. Toltz, King, Duvall, Anderson and Associates, Inc., 855 F.2d 580 (8th Cir. 1988)); *but see* Vandenberg v. Superior Court, 21 Cal. 4th 815, 833–34, 88 Cal. Rptr. 2d 366, 982 P.2d 229 (1999) (judicially confirmed arbitration award has no collateral estoppel effect in favor of third persons unless parties to arbitration agreed to that result).

[14]*See* Overcash, at 26 ("Any dispute proceeding on a complex project necessarily involves some education of the neutral in the logistics and demands of the project, and it potentially wastes valuable time to duplicate this process.").

[15]Beyond the problems in this hypothetical scenario, many other issues may arise. For example, parties may draft provisions that allow each party to select its own arbitrator for inclusion in an arbitral panel, only to realize later that they have contractually bound themselves to an even number of arbitrators without setting forth any mechanism to resolve panel deadlocks. *See* Richard Jeydel, "Consolidation, Joinder, and Class Actions: What Arbitrators and Courts May and May Not Do," American Arbitration Association Handbook on Arbitration Practice 139, 147 (2010); *see also* Stipanowich, at 479 (describing the com-

This may be an extreme example, but it is hardly in the realm of fantasy. Few owners ever imagine that complex, multi-party disputes will arise. While a general contractor may have the experience and foresight to integrate its subcontracts with its prime contract, the average project owner may only deal with the construction industry intermittently. As Charles M. Sink writes, it seems plausible that an owner's

> [a]greements inked with a soils engineer, a civil engineer, or with an architect may lack any thought for the future needs to coordinate dispute resolution clauses with the contracts yet to come with a prime contractor, construction manager, or an equipment supplier dealing directly with the owner.[16]

That scenario often results in a frustrating paradox: parties select arbitration procedures with the intent to minimize cost and maximize efficiency, but they end up embroiled in multiple arbitral proceedings requiring complicated and expensive procedural maneuvering.[17] The very purpose of including an arbitration provision in a two-party or multi-party agreement is to settle any disputes that might arise through unanticipated contingencies in a project, and yet without carefully negotiated and drafted arbitration clauses *anticipating* the type and nature of eventual disputes, these provisions are at best useless and at worst detrimental.

Despite serious concerns—especially the ever-growing technical complexities of multi-party projects, the conceptual difficulty of coordinating a variety of separate-but-related contracts, and the skepticism of public-policy opponents to private dispute resolution—arbitration remains one of the most efficient and practical methods of resolving multi-party construction disputes.[18] Arbitration allows parties to circumvent formal rules of evidence

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mon complexity of multi-party construction disputes); Overcash, at 25 (describing how a subcontractor dispute with a contractor may implicate the owner, designer, and additional subcontractors).

[16] Charles M. Sink, ADR Construction 145 (Adrian L. Bastianelli, III & Charles M. Sink eds., 2014). *See also* Stipanowich, at 496 ("Surveys suggest that although businesspersons generally know that arbitration affords advantages, they have little specific knowledge or understanding of the procedural niceties of this form of dispute resolution.")

[17] In Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 20, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983) the U.S. Supreme Court held that the FAA "requires piecemeal resolution when necessary to give effect to an arbitration agreement" even if there are parties to the dispute that are not parties to the arbitration agreement.

[18] Arbitration may go in and out of style throughout the centuries, but its durability is not in doubt; it existed prior to governmental adjudication and spread rapidly after the Enlightenment notion of a social contract led legal scholars to develop new contract-law principles premised on the consent of the

or civil procedure, avoid protracted pretrial motion practice and discovery, obtain flexibility in scheduling hearings, and receive the assurance of limited or no subsequent judicial review.[19] Even as far back as the nineteenth century, American lawyers did not believe courtroom litigation was a suitable instrument for resolving construction disputes.[20] An average commercial construction project is: (a) technically complex, interdisciplinary, and often unique; (b) a part of a major industrial engine that hinges on uninterrupted development speed; and (c) once litigated, likely to raise a vast array of legal doctrines, including contract, tort, property, commercial law, and equity, and prone to involve lengthy

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parties. *See* Jaime Dodge Byrnes and Elizabeth Pollman, *Arbitration, Consent, and Contractual Theory: The Implications of* EEOC v. Waffle House, 8 Harv. Negotiation L. Rev. 289, 297–98 (2003); *see also* J.B. Moyle D.C.L., Imperatoris Justiniani Institutionum 633 (5th ed. 1912) (Roman historians stating that "the earliest judges derived their judicial authority, not from the state, but from the voluntary submission of the parties"). Notwithstanding that legacy, arbitration is still the subject of much controversy among both individuals and corporations. *See* Gerald F. Phillips, "Is Creeping Legalism Infecting Arbitration?," American Arbitration Association Handbook on Arbitration Practice 41, 41 (2010) (noting that commercial arbitration has gathered a reputation for a length and cost that now rivals courtroom adjudication); Jessica Silver-Greenberg and Robert Gebeloff, "Arbitration Everywhere, Stacking the Deck of Justice," *N.Y. Times* (Oct. 31, 2015) (noting that arbitration has gathered a reputation for business-friendly bias and a deprivation of procedural rights); Thomas J. Stipanowich, Reflections on the State and Future of Commercial Arbitrations: Challenges, Opportunities, Proposals 6, 73 (Pepperdine U. Sch. of Law Legal Studies Research Paper Series, Paper No. 2014/29) (business counsel often prefer mediation or litigation as a means of accomplishing third-party intervention in a dispute). Conversely, arbitration proponents encourage expanded applications for this alternative to litigation. *See* Overcash, *Introducing a Novel ADR Technique for Handling Construction Disputes: Arbitration*, 35 Constr. Law. 22, 23–24 (Winter 2015) (recommending the use of non-binding arbitration throughout ongoing construction projects, rather than after concrete disputes have arisen, "to provide the parties with an advisory opinion that they can adopt as their settlement or use as an indicator of the probable result of a trial"). It is now clear under Supreme Court precedent that the FAA requires state and federal courts to promote arbitration, even in the context of allegedly unconscionable class arbitration waivers in consumer contracts. *See, e.g.,* DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463, 193 L. Ed. 2d 365, 166 Lab. Cas. (CCH) P 61659 (2015) (even when parties' arbitration agreement referred to "law of your state" in a jurisdiction that, at the time, held class arbitration waivers unenforceable, waiver was enforceable); AT & T Mobility LLC v. Concepcion, 563 U.S. 333, 131 S. Ct. 1740, 179 L. Ed. 2d 742, 161 Lab. Cas. (CCH) P 10368 (2011) (FAA preempts California common law regarding class arbitration waivers).

[19]*See* Stipanowich, *Arbitration and the Multiparty Dispute: The Search for Workable Solutions,* 72 Iowa L. Rev. 473 (Mar. 1987).

[20]Sink, at xxxix-xl (describing the development of the first nationwide standard form construction agreement drafted, in 1888, by the American Institute of Architects).

and, on occasion, difficult or obscure expert testimony. Between those considerations and concerns about juror bias, construction lawyers understandably are enthusiastic about resolving their clients' disputes through arbitration.[21]

Ironically, however, the same factors that motivate construction parties to opt for multi-party arbitration clauses can end up frustrating the efficacy of any actual arbitration proceeding. Arbitration is based fundamentally on contractual consent (as the courts have emphasized repeatedly), and therefore any arbitration clause only binds the parties that have signed it. Since the average commercial construction project entails multiple participants executing multiple contracts with different arbitration clauses, a party commencing arbitration often must deal with several predicaments at once: parties have arbitration clauses that refer to different procedural rules, venues, and/or choice of law; parties are necessary to a proceeding, yet they are non-signatories to the arbitration agreement and refuse to give consent; multiple arbitration agreements govern one or more parties; or some signatories waive enforcement of the arbitration clause, but others do not.[22] In short, in complex transactions, it is rare for all parties to be signatories to a *single* arbitration agreement, and therefore any arbitration proceeding runs the risk of resolving common issues of law or fact multiple times for a single party, leading to the burdens of duplicate efforts, collateral-estoppel effects, and/or inconsistent awards.[23]

Given the range of potential problems in establishing a single

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[21]*See* Sink, at xxxix-xl (enumerating and explaining in more detail the motivations for construction arbitration); *see also* Schmitz, *Transatlantic Perspectives on Alternative Dispute Resolution: Consideration of "Contracting Culture" in Enforcing Arbitration Provisions*, 81 St. John's L. Rev. 123, 154–55 (2007) (observing that binding arbitration is "the mainstay of construction dispute resolution," and that its use contributes to an industry in which parties "are likely to know one another on personal and professional levels and share mutual connections . . . creat[ing] a more friendly and accountable contracting culture in which players feel an inherent duty to abide by their promises and treat one another fairly.").

[22]*See* Shamoon and TenCate, *Absence of Consent Trumps Arbitral Economy: Consolidation of Arbitrations Under U.S. Law*, 12 Am. Rev. Int'l Arb. 335, 335–36 (2001) (describing types of multi-party contractual scenarios). For a good analysis of how courts determine whether a party has waived its right to arbitrate that is geared toward construction attorneys, *see* Andrew D. Ness and David D. Peden, *Arbitration Developments: Defects and Solutions*, 22 Constr. Law. 10, 11–13 (Summer 2002).

[23]*See* Ness and Peden, at 10 ("Where there are more than two parties to a dispute, the principles of efficiency and consistency suggest that the entire dispute be resolved in a single forum."). Of course, in some circumstances, even if all parties are joined in a single arbitral forum, the arbitrator may bifurcate issues by the parties or contracts involved (i.e., in a dispute primarily oriented

arbitral forum, consolidation and joinder represent the two procedural mechanisms for preventing the initiation of multiple arbitration proceedings arising out of the same common issues of law or fact. Notably, even arbitrators who may have an unintended pecuniary interest in duplicative proceedings widely approve of the efficiency created by these two methods. (Although there has been little empirical data recently, a 1994 report found that 83% of arbitrators favored consolidation procedures.[24]) Beyond efficiency, consolidation tends to promote fairness, providing an arbitrator with a clearer view of a complex transaction and limiting the amount of gamesmanship spurred by a party's strategic abuse of separate proceedings.[25]

Even though these procedural instruments for bringing together parties have outsized benefits for disputants and arbitrators alike, legislatures and courts strangely discourage their use in the absence of tailored contractual provisions, presumably because consolidation and joinder endanger the theories of contractual consent underlying arbitration agreements. For instance, and as discussed more fully in the following section, despite the FAA's strong endorsement of arbitration, the act fails to provide any authorization whatsoever for federal courts to order

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around an owner and general contractor, subsidiary claims against design professionals or subcontractors may be undertaken in separate hearings). While the addition of new parties through consolidation and joinder likely generates extra risks and burdens for any arbitral proceeding, those defects are outweighed because this addition is only appropriate when there would otherwise be a duplicative presentation of evidence in multiple proceedings. *See* Stipanowich, at 505.

[24]Dean B. Thomson, *Arbitration Theory and Practice: A Survey of Construction Arbitrators*, 23 Hofstra L. Rev. 137, 165–67 (1994); Thomson, *The Forum's Survey on the Current and Proposed AIA A201 Dispute Resolution Provisions,* 16 Constr. Law. 3, 3, 5 (Fall 1996).

[25]Shamoon and TenCate, at 359–60. Although some critics of arbitral consolidation argue, as a practical matter, that it obstructs resolution of independent claims that would be "resolved much faster without consolidation," the majority of scholars and lawyers believe consolidation generally enhances the efficiency and consistency of arbitral proceedings. Mark Bloomquist, "Consolidation and Joinder," The Construction Contracts Book: How to Find Common Ground in Negotiating the 2007 Industry Form Contract Documents 285, 285 (David S. Brennan et al. eds., 2008). For instance, the AIA documents encourage consolidation and joinder, "reflect[ing] the growing view that it is both cost-effective and in the interest of consistency to have all parties to a dispute participate in one resolution proceeding." Bloomquist, at 286. In any event, an arbitrator in a consolidated proceeding can conduct a series of mini-trials on smaller claims (with all parties entitled to appear) and dispense with simple or mundane issues in advance of resolving the larger issues. *See, e.g.,* JAMS Comprehensive Arbitration Rules & Procedures Rule 24(d) (arbitrator may make interim or partial rulings, orders, and awards); AAA Construction Industry Arbitration Rules & Mediation Procedures Rule R-48(b) (same).

consolidation or joinder. Notwithstanding the handful of states that have supplied statutory bases for court-ordered consolidation, it seems clear that parties should not rely on courts to compel consolidation without an express or implied basis in an agreement between the parties.[26]

II. The Importance of Contractual Consolidation and Joinder Provisions

If a party neglects to craft an arbitration clause that addresses consolidation or joinder, both federal and state law generally are disinclined to supply a means to centralize the parties in a single forum. On the federal level, the FAA's failure to even refer to these procedures has prompted federal courts to resist their imposition if the parties have not clearly spelled out the terms of their use in a written contract.[27] Despite the obvious efficiency of these procedural tools, the Supreme Court has been unequivocal in holding that the FAA is solely intended to secure enforcement of privately negotiated agreements, regardless of whether that enforcement is practical or efficient.[28] Consequently, nearly all federal appellate courts "have held that a district court may not consolidate multiple arbitrations when an arbitration agreement is silent on the issue of consolidation."[29] Moreover, in *Green Tree Financial Corp. v. Bazzle*, the Supreme Court held that where the parties' agreement is ambiguous on the question of consolidated arbitration proceedings, an arbitrator, not the court, resolves the issue (at least in a class-action context).[30] Further, non-signatories lack any standing to compel the contracting par-

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[26]*See* Shamoon and TenCate, at 335.

[27]Richard Jeydel, "Consolidation, Joinder, and Class Actions: What Arbitrators and Courts May and May Not Do," American Arbitration Association Handbook on Arbitration Practice 139, 139 (2010); *see also* Ness and Peden, at 10 ("[T]he federal courts have consistently demonstrated less enthusiasm for ordering consolidation of arbitrations in recent years."); McCabe, *Uniformity in ADR: Thoughts on the Uniform Arbitration Act and Uniform Mediation Act*, 3 Pepp. Disp. Resol. L.J. 317, 361 (2003) ("In the absence of clear direction in the FAA, courts have reached conflicting holdings. The current trend under the FAA disfavors court-ordered consolidation absent express agreement.").

[28]Okuma Kazutake, *Party Autonomy in International Commercial Arbitration: Consolidation of Multiparty and Classwide Arbitration,* 9 Ann. Surv. Int'l & Comp. L. 189, 194 (Spring 2003).

[29]Jeydel, at 141 (noting that the Seventh Circuit holds the minority view that a party can impliedly consent to arbitral consolidation); *see also* Connecticut General Life Ins. Co. v. Sun Life Assur. Co. of Canada, 210 F.3d 771 (7th Cir. 2000); *cf.* Weyerhaeuser Co. v. Western Seas Shipping Co., 743 F.2d 635, 1985 A.M.C. 30 (9th Cir. 1984) (under FAA, court cannot order consolidation without express consent of all parties).

[30]For a commentary on this ruling and a discussion of how to determine which arbitrator is entitled to order consolidation in this context, *see* Charles M.

ties to arbitrate and also cannot themselves be compelled to arbitrate by any signatory, if they otherwise have not agreed to arbitrate.[31]

At the same time, a stable, although slim, body of law has developed that puts tension on the traditional notion of arbitration-via-consent, identifying limited circumstances in which courts can compel non-signatories to an agreement into the signatories' arbitral proceeding.[32] As a result, some lower courts have concluded that, even if the FAA emphasizes adherence to the consensual terms of an arbitration agreement, "it does not follow . . . that under the [FAA] an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision."[33] The point is not that ordering non-signatories to participate in signatories' arbitrations is allowable despite the contractual requirement of consent, but rather that a party may demonstrate, by clear and unmistakable evidence, that a non-signatory *impliedly consented* to an arbitration

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Sink, *ADR Construction* 132–34 (Adrian L. Bastianelli, III & Charles M. Sink eds., 2014); *see also* Samuel Estreicher, Michael J. Puma, and Jonathan S. Krause, "The Current State of Class Actions in Arbitration," American Arbitration Association Handbook on Arbitration Practice 149, 150 (2010). The College of Commercial Arbitrators' Guide to Best Practices suggests, however, that a recent Supreme Court case may have tacitly undermined arbitrators' authority to consolidate discrete arbitration proceedings, and the guide therefore recommends that arbitrators should request briefing or argument on recent case law prior to ruling on any consolidation request. The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration 98 (James M. Gaitis et al. eds., 3d. ed. 2014) (discussing Stolt-Nielsen S.A. v. AnimalFeeds International Corp., 559 U.S. 662, 673–77, 130 S. Ct. 1758, 176 L. Ed. 2d 605, 93 Empl. Prac. Dec. (CCH) P 43878, 2010-1 Trade Cas. (CCH) ¶ 76982, 2010 A.M.C. 913 (2010)).

[31]*See* Ness and Peden, *Arbitration Developments: Defects and Solutions*, 22 Constr. Law. 10, 13 (Summer 2002). As a practical matter, this result almost always holds true even under more liberal state statutory regimes. *See, e.g.,* Acquire II, Ltd. v. Colton Real Estate Group, 213 Cal. App. 4th 959, 964, 153 Cal. Rptr. 3d 135 (4th Dist. 2013); Parker v. McCaw, 125 Cal. App. 4th 1494, 1505–06, 24 Cal. Rptr. 3d 55 (2d Dist. 2005) (even where court-ordered consolidation is permissible, it will not be allowed "if it substantially alters a party's contractual rights, or it results in unfair prejudice").

[32]Byrnes and Pollman, *Arbitration, Consent, and Contractual Theory: The Implications of* EEOC v. Waffle House, 8 Harv. Negot. L. Rev. 289 (2003).

[33]Thomson-CSF, S.A. v. American Arbitration Ass'n, 64 F.3d 773, 776 (2d Cir. 1995). At one time, commentators believed the minority rule of permissible court-ordered consolidation was trending into the majority rule. *See* Stipanowich, *Arbitration and the Multiparty Dispute: The Search for Workable Solutions,* 72 Iowa L. Rev. 473, 489–91 (Mar. 1987). Subsequent decisions have not borne out that prediction. *See* notes 27 and 29.

clause it never actually executed.[34] (In particular, the Seventh Circuit has inferred that parties intended to be bound to arbitral consolidation, even where the contract was silent on the issue.[35]) Still, it is clear from even a cursory review of the case law that it is exceedingly rare for a party to find a federal court willing to consider consolidation and joinder absent the express agreement of the parties, and these rulings likely will become even rarer; although some scholars have recommended enacting federal legislation that prioritizes efficiency over consent in some circum-

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[34]Byrnes and Pollman, at 289 (describing E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 122 S. Ct. 754, 151 L. Ed. 2d 755, 12 A.D. Cas. (BNA) 1001, 81 Empl. Prac. Dec. (CCH) P 40850 (2002), and noting that although the Supreme Court prohibits federal courts acting under the FAA from binding non-signatories to arbitration clauses without consent, it has not clearly articulated the *criteria* for gauging the presence of a party's consent); *see* Baesler v. Continental Grain Co., 900 F.2d 1193, 1195 (8th Cir. 1990) (summarizing initial circuit split, and noting that the Fifth, Ninth, and Eleventh Circuits follow the majority rule that district courts lack the authority to order consolidation, and that the First Circuit permits consolidation only if state arbitration law specifically authorizes it); Kazutake, *Party Autonomy in International Commercial Arbitration: Consolidation of Multiparty and Classwide Arbitration,* 9 Ann. Surv. Int'l & Comp. L. 189, 209–10 (Spring 2003) (observing that all of the federal circuits are now functionally aligned on the issue of court-ordered consolidation without an agreement by the parties); *see also* Mitchel S. King & John E. Matosky, *Considering Consolidation,* 78 Def. Couns. J. 70, 70 n.2 (Jan. 2011) (collecting cases). For several years, the Second Circuit's *Nereus Shipping* decision suggested that a district court had authority to compel consolidation into one arbitral forum—regardless of the parties' consent—where the facts and the law were common to all proceedings and there was a risk of inconsistent awards. *See* Compania Espanola de Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A., 527 F.2d 966, 975, 1975 A.M.C. 2421, 21 Fed. R. Serv. 2d 259 (2d Cir. 1975) (abrogated by, Government of United Kingdom of Great Britain and Northern Ireland, Through United Kingdom Defense Procuremant Office, Ministry of Defense v. Boeing Co., 998 F.2d 68, 1993 A.M.C. 2906, 26 Fed. R. Serv. 3d 33 (2d Cir. 1993)), *cert. denied*, 426 U.S. 936 (1976) (extrapolating from Federal Rules of Civil Procedure 42(a) and 81(a)(3)). However, subsequent decisions clarified that the *Nereus Shipping* rule was essentially based on a theory of implied consent and, more importantly, was rooted in the court's general equitable powers, not any provision or policy purpose of the Federal Rules of Civil Procedure or the FAA. *See* Government of United Kingdom of Great Britain and Northern Ireland, Through United Kingdom Defense Procuremant Office, Ministry of Defense v. Boeing Co., 998 F.2d 68, 74, 1993 A.M.C. 2906, 26 Fed. R. Serv. 3d 33 (2d Cir. 1993); *see also* Kazutake, at 192–94 (discussing the *Boeing* case). The one caveat to this rule is a 2001 opinion in which the Second Circuit wrote, in dicta, that consolidation may be possible regardless of consent if the separate proceedings involved "similar claims arising between the same parties under a series of nearly identical contracts that are silent on the question of consolidation." Hartford Acc. and Indem. Co. v. Swiss Reinsurance America Corp., 246 F.3d 219, 230 (2d Cir. 2001); *see also* Shamoon and TenCate, at 349–50.

[35]*See* Connecticut General Life Ins. Co. v. Sun Life Assur. Co. of Canada, 210 F.3d 771, 771 (7th Cir. 2000).

stances, these proposals have met hostility from both industry lobbyists and federal legislators, who generally seek to reduce the power given to arbitrators under the FAA.[36]

Of course, state law may fill in the FAA's silence regarding consolidation and joinder, but there is little uniformity in how states have addressed the issue.[37] Several states have embraced the Revised Uniform Arbitration Act's (RUAA) consolidation provisions, which expressly permit court-ordered consolidation, even when there is no party consent. In this sense, the RUAA flips the default position under federal case law, assuming that consolidation is permissible in the absence of consent unless the parties have expressly prohibited it via contract.[38] A motivating factor behind this change, made in 2000, was that "it is likely that in many cases one or more parties, often nondrafting parties, will not have considered the impact of the arbitration clause on multiparty disputes."[39] The RUAA default therefore "encourages drafters to address the issue expressly and enhances the possibility that all parties will be on notice regarding the issue."[40] States that have adopted the RUAA, which was initially based on Cali-

[36] According to one commentator, "compulsory consolidation is inappropriate insofar as it undermines the predictability in proceedings, interferes with binding contractual relationships, and jeopardizes the enforceability of arbitral awards in foreign jurisdictions." Schwartz, *Multiparty Disputes and Consolidated Arbitrations: An Oxymoron or the Solution to a Continuing Dilemma?*,22 Case W. Res. J. Int'l L. 341, 342 (1990).

[37] *See* Shamoon and TenCate, at 356–57 (discussing New England Energy Inc. v. Keystone Shipping Co., 855 F.2d 1, 1989 A.M.C. 537 (1st Cir. 1988)). In *Waffle House*, 534 U.S. 279, the Supreme Court held that non-signatory parties cannot be compelled to arbitrate absent consent under federal law, but the court did not fully articulate the criteria that satisfies a showing of consent, nor did it decide whether such compulsion could occur under state law. Therefore, it remains unresolved whether non-signatories can be compelled to arbitrate and, if so, under what circumstances. *Waffle House* suggests that a court must undertake a multi-step analysis, asking first whether the entity resisting arbitration is a party and, then, if that entity is a non-party, determining whether there has been any manifestation of consent. *See* Byrnes and Pollman, at 310; *see also* note 34.

[38] Ness and Peden, *Arbitration Developments: Defects and Solutions*, 22 Constr. Law. 10, 11 (Summer 2002). That being said, courts applying RUAA-based state laws have recognized "that an individual party's rights regarding issues such as arbitrator selection procedures should not be subject to mutual change by consolidation." Ness and Peden, at 11.

[39] Unif. Arbitration Act § 10 cmt. 3 (2000).

[40] McCabe, *Uniformity in ADR: Thoughts on the Uniform Arbitration Act and Uniform Mediation Act*, 3 Pepp. Disp. Resol. L.J. 317, 322 (2003)

fornia legislation,[41] include Alaska, Arizona, Arkansas, Colorado, the District of Columbia, Hawaii, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Utah, and Washington.[42] In addition, Massachusetts, Florida, and Ohio have some form of consolidation provisions in their state arbitration acts, many of which expressly allow non-consensual consolidation. However, several of these states exclusively apply consolidation provisions to international arbitrations (or, in California's case, exclusively to domestic arbitrations).[43] As for arbitral joinder, despite federal law's overriding discouragement of the practice absent consent, state law generally allows parties to bind non-signatories to an arbitration clause through incorporation by reference, assignment or assumption, piercing the corporate veil, agency, or equitable estoppel.[44]

While the RUAA, and the states that have adopted it or similar rules, therefore significantly help parties who have neglected to address consolidation or joinder in their contractual arbitration provisions, they still do not overcome contract language specifically disallowing consolidation. Thus, in a complex, multi-party project with numerous contracts and arbitration clauses, state law does not rescue drafters from ignoring consolidation issues, particularly when projects involve multiple state and national jurisdictions, with inconsistent consequences on procedural and substantive legal doctrines.

Given the unreliable and inconsistent principles of federal and state law, and the FAA's prioritization of contractual consent,

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[41] *See* Gordon v. G.R.O.U.P., Inc., 49 Cal. App. 4th 998, 1006, 56 Cal. Rptr. 2d 914 (1st Dist. 1996) (interpreting California Code of Civil Procedure Section 1281.3 and noting that "California has manifested a strong policy favoring consolidating arbitrations involving common issues of law and fact," with "at least three important aims of this policy: the efficient settling of private disputes, judicial economy, and the avoidance of contrary results") (internal citation omitted).

[42] Charles M. Sink, ADR Construction 137–38 (Adrian L. Bastianelli, III & Charles M. Sink eds., 2014).

[43] Shamoon and TenCate, Absence of Consent Trumps Arbitral Economy: Consolidation of Arbitrations Under U.S. Law, 12 Am. Rev. Int'l Arb. 335, 351–56 (2001); Ness and Peden, at 10–11. Note that in the case of international arbitration, state statutes may be preempted by the New York Convention (9 U.S.C. § 201) or by the federal legislation in Chapter 2 of Title 9 of the United States Code. *See* McCabe, at 8.

[44] Byrnes and Pollman, *Arbitration, Consent, and Contractual Theory: The Implications ofEEOC v. Waffle House,* 8 Harv. Negot. L. Rev. 289, 310–11 (2003) (suggesting that *Waffle House* may have limited veil-piercing and estoppel implications because it may have significantly weakened state laws regarding non-consensual arbitral joinder).

parties need to place a premium on drafting compatible and robust arbitration provisions at the outset of any multi-party project.[45] As Jeydel writes, "[t]he lesson to be drawn from the case law, even in jurisdictions where consolidation can be mandated by a court under certain circumstances, is that there is no substitute for express provisions allowing both consolidation and joinder."[46] Importantly, even transactional attorneys who are aware of these lessons may inadvertently rely on form arbitration clauses that do not provide their clients with much dependability. For instance, while the 2007 AIA A201 industry form agreement is generally liberal, allowing consolidation or joinder mechanisms that encourage architects or engineers to participate in arbitrations involving other parties (such as owners and contractors), the AIA continues to have certain restrictive measures in place: only a party involved in multiple proceedings may seek to consolidate those proceedings, and the other proceeding's governing arbitration clause must permit consolidation.[47] Moreover, for joinder, the newcomer still must specifically consent to its inclusion in the proceeding.[48] Similarly, while ConsensusDocs requires inclusion of all parties in any arbitration—"all Parties necessary to resolve a claim shall be Parties to the same dispute resolution procedure"—the ambiguity involved in determining whether a party is "necessary" to an arbitrated claim may allow a party

[45]As Stipanowich observes, the FAA has made common-law arbitration doctrines subsidiary to the parties' contractual relationship: "[t]he arbitration agreement, once a nullity, is now a 'superclause.' " Thomas J. Stipanowich, *Arbitration and the Multiparty Dispute: The Search for Workable Solutions*, 72 Iowa L. Rev. 473, 483 (Mar. 1987).

[46]Richard Jeydel, "Consolidation, Joinder, and Class Actions: What Arbitrators and Courts May and May Not Do," American Arbitration Association Handbook on Arbitration Practice 139, 142 (2010); *see also* Andrew D. Ness and David D. Peden, *Arbitration Developments: Defects and Solutions*, 22 Constr. Law. 10 (Summer 2002) ("The variety of approaches and rules adopted state-to-state and circuit-to-circuit underscores the importance of both considering consolidation when drafting and negotiating arbitration agreements, as well as making concerted efforts to come to agreement on consolidation when disputes arise.").

[47]*See* Sink, at 141 (citing AIA Document A201-2007, art. 15.4.4). Prior to the 2007 version, the peril was even greater for transactional attorneys using this form, which previously allowed consolidation at the sole discretion of the architect in all owner-architect agreements. *See* Sink, at 124.

[48]*See* Charles M. Sink, ADR Construction 124 (Adrian L. Bastianelli, III & Charles M. Sink eds., 2014). Note that once a newcomer is made a party to an arbitration, whether by consolidation or joinder, it has the same rights of joinder and consolidation as the initial parties to the arbitration. *See* Sink, at 125.

excessive flexibility to include or exclude parties in any proceeding.[49]

Additionally, the internal procedural rules of many dispute-resolution services offer potential pitfalls if transactional attorneys assume these rules are suited to their clients' needs. Under its internal rules, JAMS has the authority to impose consolidation without a motion or request by an involved party, potentially requiring a party to participate in a proceeding without being able to have any input into that proceeding's location or arbitrator(s).[50] AAA specifies, without elaboration, that only a party that has filed a demand for arbitration may seek consolidation and, of course, consolidation still requires the consent of all parties.[51] (AAA requires so-called "R7 arbitrators," who are independent from the underlying arbitration proceeding, to evaluate and rule upon party requests for consolidation or joinder.[52])

Understandably, then, lawyers with foresight emphasize individualizing arbitration clauses to protect against unreliable form agreements and internal arbitration service rules. One article admonishes lawyers to consider a template clause that seeks to address six aspects of arbitral consolidation: (a) the clause's scope, in terms of relevant parties and agreements; (b) the procedure whereby an arbitrator determines whether consolidation is appropriate; (c) the standards for consolidation (e.g., when there are common issues of fact or law); (d) the mode for remedying inconsistent decisions rendered by multiple arbitrators; (e) the procedure for determining which arbitrator will serve for the consolidated proceeding; and (f) the mechanism

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[49]*See* Sink, at 141; 125–26; ConsensusDocs 750: Standard Agreement and General Conditions Between Owner and Constructor — 2011, art. 12.

[50]Sink, at 130–31.

[51]Sink, at 127; Matthew D. Schwartz, *Multiparty Disputes and Consolidated Arbitrations: An Oxymoron or the Solution to a Continuing Dilemma?*, 22 Case W. Res. J. Int'l L. 341, 346,372 (1990) (encouraging major arbitration services to include provisions that allow consolidation in multi-party disputes but to also provide parties with an opportunity to expressly opt out of these procedures in contract clauses because "[t]he opt out requirement, rather than the opt in requirement, would not place an onerous burden on any of the parties or pose any surprises at the time of the dispute").

[52]*See* Am. Arb. Ass'n Constr. Indus. Arbitration Rules & Mediation Procedures Rule R-7, Consolidation or Joinder. Beyond the alternate dispute-resolution services mentioned in the body of this article, the ICC Rules of Arbitration permit parties to request the joinder of another party as well as the consolidation of multiple proceedings where, in part, "the disputes in the arbitrations arise in connection with the same legal relationship." *See* Allen L. Overcash, *Introducing a Novel ADR Technique for Handling Construction Disputes: Arbitration*, 35 Constr. Law. 22, 26 n.63 (Winter 2015).

for joinder of parties or claims to an existing arbitral proceeding.[53] Another article suggests that a paramount factor is considering "limiting how far down the chain of privity [parties] wish to have disputes consolidated," as well as limiting "how far removed a party may be from the original contract to be eligible to participate in a consolidated proceeding."[54] Notably, beyond considering

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[53]Shamoon and TenCate provide this checklist, and their proposed template clause reads in full: "In order to facilitate the comprehensive resolution of related disputes, all claims between any of the parties to this Agreement that arise under or in connection with the [A] Agreement, the [B] Agreement, or the [C] Agreement (collectively 'Other Agreements') may be brought in a single arbitration. Upon the request of any party to an arbitration proceeding constituted under this Agreement or any of the Other Agreements, the arbitral tribunal shall consolidate such arbitration proceeding with any other arbitration proceeding involving any of the parties hereto relating to this Agreement or to any of the Other Agreements if the arbitrators determine that (i) there are no issues of fact or law common to the proceedings so that a consolidated proceeding would be more efficient than separate proceedings, and (ii) no party would be prejudiced as a result of such consolidation through undue delay or otherwise. In the event of different rulings on this question by an arbitral tribunal constituted hereunder and an arbitral tribunal constituted under any of the Other Agreements, the ruling of the arbitral tribunal constituted first in time shall control, and such arbitral tribunal shall serve as the arbitral tribunal for any consolidated arbitration." Shamoon and TenCate, *Absence of Consent Trumps Arbitral Economy: Consolidation of Arbitrations Under U.S. Law*, 12 Am. Rev. Int'l Arb. 335, 360–61 (2001).

[54]Schwartz, at 373. Sink helpfully notes that, in the end, a customized ADR clause "comes down to three approaches: consolidation or joinder under all circumstances; prohibiting both completely; or allowing them, under limited conditions." Charles M. Sink, *ADR Construction* 126 (Adrian L. Bastianelli, III & Charles M. Sink eds., 2014). *The Construction Contracts Book* provides a brief template for each of those three approaches. Mark Bloomquist, "Consolidation and Joinder," The Construction Contracts Book: How to Find Common Ground in Negotiating the 2007 Industry Form Contract Documents 285, 289–90 (David S. Brennan et al. eds., 2008). As a concrete example of proposed construction arbitration clauses regarding joinder, the following principles are borrowed from the Japan Engineering Advancement Association: "(A) [A]s to the arbitration clause in the prime contract, when the contractor makes the subcontract, the intention of multiparty arbitration and its draft clause is to stipulate that if any dispute or difference to be referred to arbitration under the prime contract, (i) raises issues which are substantially the same as or connected with issues raised in any dispute between contractor and subcontractor, (ii) arises out of substantially the same facts as are the subject of any dispute between contractor and subcontractor, or (iii) is such that the owner and contractor declare that a dispute or difference between the contractor and subcontractor to be one of interest to them in connection with the resolution of any dispute or difference under the prime contract, the owner and contractor agree that the contractor may refer any related dispute as is mentioned in (i) or (ii) above, and that the contractor shall refer any related dispute as is mentioned in (iii) above, to the arbitral tribunal. The arbitral tribunal shall have the power to make all necessary directions as to the joinder of the parties as the arbitral tribunal considers appropriate to achieve such purpose, and any award made by such arbitral

the language and scope of these provisions, lawyers also must ensure that similar provisions are present and consistent in all relevant *collateral* contracts (e.g., owner-contactor, owner-designer, contractor-subcontractor, etc.). As one commentator has warned, judges and arbitrators will hesitate to order consolidation or joinder without compatible and interlocking arbitration clauses agreed to by each party; a party that is not expressly bound to a contract's arbitration clause can circumvent the entire process, even when that clause mandates that related disputes must be resolved in the same forum, and "[t]his has occurred even when, with foresight, a principal party has insisted in its agreement with a prime supplier that all of the latter's downstream vendors and contracts agree to resolve disputes in the same forum."[55]

III. Anticipating Disputes: The Uniform Construction Arbitration Agreement

In light of both the great uncertainty around arbitral consolidation without express consent and the necessity for detailed precautions prior to the emergence of disputes, the attached Uniform Construction Arbitration Agreement is a template for multi-party arbitration agreements that solves many of the aforementioned problems in a single instrument. It is a stand-alone, ancillary agreement that can be appended easily to the parties' larger contracts within a single project, and it provides concrete assurances about the jurisdiction, procedural framework, and finality of any arbitration, conferring stability and predictability upon a complex dispute-resolution process.

First, pursuant to Section 1, the UCAA eschews any confusion about an arbitrator's jurisdiction and scope by stating that all issues of arbitrability are submitted to—and decided by—the arbitrator. Similarly, under Section 3, the parties agree to a particular set of rules, expressly acknowledging that their project implicates interstate commerce, and therefore invoke the rules and policies of the FAA (as well as the rules of the relevant ADR service, which is identified clearly in Section 1(a)–(b)). That same clause also notes that the parties waive the FAA's statutory requirement that a jury shall decide the enforceability of an

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tribunal shall be final and binding. (B) As to the arbitration clause in the subcontract, (i) and (ii) are to stipulate replacing the subcontract by the prime contract, and (iii) is to stipulate to the relationship of the prime-contract; thereby establishing three-party relationships." Kazutake, *Party Autonomy in International Commercial Arbitration: Consolidation of Multiparty and Class-wide Arbitration,* 9 Ann. Surv. Int'l & Comp. L. 189, 213 (Spring 2003).

[55] Richard Jeydel, "Consolidation, Joinder, and Class Actions: What Arbitrators and Courts May and May Not Do," American Arbitration Association Handbook on Arbitration Practice 139, 148 (2010).

arbitration agreement. Under Section 11, the parties expressly submit to the personal jurisdiction of the mandated ADR office, as well as to the corresponding forum and venue for any multi-party dispute governed by the agreement.[56] Relevant commencement fees are set forth in Section 4, and all parties' waiver of any *contra proferentem* argument is set forth in Section 8.

Beyond providing clarity about applicable rules and procedures, the UCAA provides an array of tools designed to make arbitration proceedings highly efficient. For instance, Section 2 seeks to deter parties from withholding consent to a consolidated proceeding by penalizing (or requiring additional consideration from) signatories in the event that they neglect to attach identical arbitration agreements to all related contracts (e.g., collateral contracts with suppliers and subcontractors).[57] If a signatory fails to include identical arbitration agreements in so-called "downstream" collateral contracts, the responsible party is bound to: (i) assume the obligations of the missing party's insurer; (ii) waive any rights of indemnity or contribution against the missing party; and (iii) waive any claim it may have for monies due under the contract to which the arbitration agreement is attached. These provisions no doubt will be the subject of negotiation between the owner/developer, consultants, and contractors; one or more of them may be enough to accomplish the goal. There should be, however, some provision that compels an upstream party to properly include the UCAA in downstream contracts.

Once a dispute arises, the UCAA permits a rapid and clear method of facilitating consolidation or joinder: it provides that arbitrations will be consolidated under the auspices of the ADR service office that is nearest to the construction project or nearest

[56] Courts uniformly uphold waivers of personal jurisdiction and venue challenges, particularly if the waiver has some substantial connection to the forum (e.g., the construction project's location). *Cf.* M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15, 92 S. Ct. 1907, 32 L. Ed. 2d 513, 1972 A.M.C. 1407 (1972) (under federal law, forum-selection clauses are presumed valid, and enforcement will be ordered unless it clearly would be "unreasonable and unjust, or the clause was invalid for such reasons as fraud or overreaching"); National Equipment Rental, Limited v. Szukhent, 375 U.S. 311, 316, 84 S. Ct. 411, 11 L. Ed. 2d 354, 7 Fed. R. Serv. 2d 23 (1964) (holding that "parties to a contract may agree in advance to submit to the jurisdiction of a given court"); Doctor's Associates, Inc. v. Stuart, 85 F.3d 975, 983 (2d Cir. 1996) (parties who agree to arbitrate in particular jurisdiction generally deemed to consent to both personal jurisdiction and venue of courts within that jurisdiction).

[57] Practitioners will need to independently evaluate whether it is advisable, under the relevant state law, to penalize and/or require additional consideration from signatories in regards to collateral arbitration agreements.

to the bulk of the contracting parties (Section 1(a)).[58] The UCAA also limits the number of disqualifying "strikes" that a party can bring to the selection of an arbitrator, mandating in Section 1(a) that a party may only move to disqualify an arbitrator for good cause and that an unsuccessful motion will result in joint and several liability for attorney's fees and costs. That provision, which is California-specific, discourages parties from tying up arbitration with repeated attempts to disqualify arbitrators after disclosure, regardless of whether they have legitimate grounds to do so.[59]

Similarly, the UCAA seeks to expeditiously finalize the arbitral award, providing that the arbitrator shall issue the decision within thirty days of the last day of evidence or the submission of final briefs (Section 1(c)). Following on these precautions to protect and economize arbitration *prior* to the rendering of an award, the UCAA also includes an inducement to the parties to adhere to the terms of the eventual award once it is formally issued.[60] An unsuccessful attempt by a party in challenging the award on any basis (other than bias or corruption) will result in the losing party's double payment of the costs and fees incurred opposing the challenge, with one share to the prevailing party and one share to a charitable organization of the prevailing party's choice (Section 1(d)).

In Section 12, the UCAA sets forth a robust list of provisions to include in any arbitral case management order for the purpose of maximizing efficiency and utility. This case management order includes, among other prescriptions, discovery schedules, discovery limitations, destructive testing protocols, and a prohibition on motions for summary adjudication or judgment (which are time-consuming, particularly since arbitrators appear inclined to deny them).[61] Because the FAA does not set forth formal discovery procedures, this provision represents the sole

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[58]This can be adjusted, of course, to move to the United States any disputes on overseas projects, subject to the jurisdiction and venue laws of the foreign state.

[59]*See, e.g.*, California Code of Civil Procure § 1281.91 (allowing a party to disqualify an arbitrator without cause in any single arbitration).

[60]There is potential tension between the venue and final award provisions. If the venue is remote and does not include trusted, experienced arbitrators among those available to hold hearings in that venue, then one or more parties may wish to allow review of an award, either within the arbitral service provider or at the appropriate state court.

[61]*See* D. Brian King and Jeffrey P. Commission, *Summary Judgment in International Arbitration: The "Nay" Case*, ABA International Law Spring 2010 Meeting—Common Law Summary Judgment in International Arbitration 4 (2010) (listing challenges to the use of summary disposition in arbitrations,

pre-dispute opportunity for the parties to fix and anticipate the arbitrator's discretion in allowing particular discovery procedures.[62]

In the context of residential construction, the UCAA contains an optional clause (Section 13) that requires the parties to append the UCAA to all CC&Rs and Purchase and Sale Agreements, thereby including claims by (or, less often, against) new home purchasers and those in the chain of title thereafter.[63] Finally, the UCAA ends with a customized integration clause, specifying that its terms represent a single, uniform agreement regardless of whether it is appended to contracts of different dates or among different parties.

CONCLUSION

As the use of arbitration continues to expand and as construction projects become more financially and technically sophisticated, participants and their attorneys must attend to arbitration agreements with even more rigor and foresight. The UCAA is a customizable template that addresses the difficult questions that often occur after a dispute has already arisen (including, *inter alia*, the scope and participants of a multi-party arbitration, collateral arbitration agreements and incorporation by reference, assumptions of arbitration costs, internal arbitral procedures,

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including arbitrator concerns about challenges to the resulting award and the lack of de novo review).

[62]*See* Andrew D. Ness and David D. Peden, *Arbitration Developments: Defects and Solutions*, 22 Constr. Law. 10, 15 (Summer 2002) ("The easiest way to obtain adequate discovery in arbitration is to deal with discovery issues at the front end by providing for discovery in the arbitration agreement. If this is not done, the arbitrator will be the one to decide what discovery may be conducted."); *see also* Timothy C. Krsul, "The Limits on Enforcement of Arbitral Third-Party Subpoenas: Should They Be Loosened?," American Arbitration Association Handbook on Arbitration Practice 181, 181 (2010) (noting that courts are generally unwilling to permit wide discovery in arbitration).

[63]This clause expressly acknowledges—and expands upon—settled case law in, for example, California, where the state Supreme Court has held that a project developer could enforce an arbitration agreement against a condominium owners' association even though it had been created prior to the formation of the association. *See* Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC, 55 Cal. 4th 223, 240–46, 145 Cal. Rptr. 3d 514, 282 P.3d 1217 (2012); *see also* Verano Condominium Homeowners Association v. La Cima Development, LLC, 2013 WL 285583 (Cal. App. 4th Dist. 2013 (unpublished) (holding that although CC&Rs do not constitute an agreement to arbitrate, purchase agreements between developer and original purchaser that contained arbitration provisions allowed developer to compel homeowners' association to arbitrate); *cf.* Kramer v. Toyota Motor Corp., 705 F.3d 1122, 1130–32 (9th Cir. 2013) (applying California law to hold that doctrine of equitable estoppel did not enable non-signatory automobile manufacturer to invoke purchaser-dealership arbitration agreement to compel signatory purchasers to arbitrate claims).

and arbitrator selection). Even in circumstances where certain UCAA provisions are inapplicable, the form offers a convenient checklist to assure the parties have carefully considered relevant consolidation or joinder issues prior to executing complex contracts.

As this article has demonstrated, parties cannot depend on federal or state law, piecemeal contractual provisions, or private dispute-resolution services to supply consolidation and joinder mechanisms with any certainty. Therefore, the only way to protect the efficiency and reliability of multi-party arbitration is for attorneys to do the hard work by themselves: review the UCAA carefully, use it as a model, and then draft precise and thorough dispute-resolution agreements that expressly contemplate joinder and consolidation.

APPENDIX

THE UNIFORM CONSTRUCTION ARBITRATION AGREEMENT

WHEREAS, the parties desire to conduct in private by arbitration the resolution of any disputes regarding the Project [define] arising or continuing post-occupancy, or, in the event of a material default and resulting cessation of the work on the Project, any disputes caused by such material default, and have therefore consented to the terms and provisions set forth herein;

WHEREAS, the parties desire to have a single retired judge, or single arbitrator, experienced in construction law resolve in a final and binding manner all of their disputes regarding the Project in the arbitration forum of their choosing;

WHEREAS, the parties are informed of and recognize that arbitration remains a less expensive and more confidential method of resolving their disputes than found in state or federal court;

WHEREAS, the parties are also informed and acknowledge that the ability to completely, finally, and efficiently resolve any disputes arising from the Project will be significantly impaired if the litigation of such disputes in arbitration does not include a party or parties that are alleged to be and may be liable to one or more parties involved in such litigation;

WHEREAS, the parties have adopted this addendum or amendment to their agreement compelling arbitration of all disputes (this "Arbitration Agreement") in full recognition and understanding of (i) the enforcement and other provisions found herein requiring the universal assent to and application of this Arbitration Agreement to all parties contracting to supply services, labor, or material to the Project and, if such universal assent is not achieved, and (ii) the consequences for the party responsible for not achieving such universal assent;

WHEREAS, the parties recognize that this Arbitration Agreement is being appended to or added as an amendment to a variety of different forms of contracts (e.g., with engineers, general and sub-contractors, architects, material suppliers, and the like) regarding all aspects of the Project and, therefore, agree that if there is any conflict between this Arbitration Agreement and any provision of the agreement to which this Arbitration Agreement is appended by addendum or amendment, then the terms and provisions of this Arbitration Agreement will control; and

WHEREAS, this Arbitration Agreement elects arbitration over an action in state or federal court not because of the absence of a

jury but because of the access to a more private and efficient forum for the resolution of disputes.

In light of the foregoing, and expressly incorporating the foregoing "WHEREAS" provisions into the agreement of the parties, the parties hereto agree as follows:

1. All issues of arbitrability and all disputes regarding the Project (including all statutory claims and remedies of any kind) shall be submitted by the complaining party or parties via arbitration demand(s), counter-demand(s), and/or cross-demand(s) to [JAMS, AAA, etc.], including, by way of example only, all claims for foreclosure of liens and other equitable relief, understanding that the actual order of foreclosure and similar injunction or similar order for equitable relief cannot be issued by the arbitrator but all the findings necessary and predicate to entry of such an order can be and will be made by the arbitrator.
   a. If separate actions involving these or other parties to this or other Project-related contracts are initially commenced in arbitration or commenced in state or federal court and ordered to arbitration, then the arbitrations shall be consolidated for all purposes and the [JAMS, AAA, etc.] office nearest to the Project [or nearest to the Owner, Architect, General Contractor, etc.] shall administer and conduct the arbitration, and pursuant to its rules shall, absent consent of all parties to such arbitration, select the single arbitrator. Each party to this Agreement waives any rights it may have under Cal. Civ. Proc. Code Section 1281.91(b), or similar provision of another state's law, to disqualify an arbitrator so selected for anything other than good cause shown to a court of that state. If such a motion to disqualify a selected arbitrator alleging good cause shown is brought and does not succeed in disqualifying the selected arbitrator, then the moving party or parties shall be jointly and severally liable for the reasonable attorney's fees and costs of any one or more opposing party or parties upon motion made at any time thereafter to the selected arbitrator requesting such fees and costs. There shall be no award of fees or costs to any party that prevails on a motion to disqualify an arbitrator unless opposition thereto was brought and maintained without any reasonable basis in law or fact.
   b. The rules of [JAMS, AAA, etc.] most applicable to construction-related disputes, as determined by the selected arbitrator, shall govern the resolution of such disputes in that arbitral forum, provided, however, that if such rules are in conflict with the terms and provisions of this Arbitra-

tion Agreement, then the terms and provisions of this Arbitration Agreement will control; provided further, however, that, in order to expedite the full, final, and consensual selection of the single arbitrator, any party joined in the arbitration shall have ten (10) [or twenty, thirty, forty, etc.] business days to join any and all other parties to the arbitration that are or are alleged to be liable to that party, and thus in order to allow for full joinder of all parties selection of an arbitrator pursuant to such rules shall not commence until forty (40) [or sixty, eighty, etc.] days after the arbitration is first filed and served.

c. The decision of the single arbitrator shall be issued within thirty (30) business days of the latter of (i) the last day evidence is presented; (ii) the day closing arguments are completed; or (iii) the day final briefs are submitted. Such decision shall be final and binding, and shall be in the form of a written statement of decision with findings of fact and conclusions of law. The decision of the arbitrator may be enforced by any party thereto in a court of competent jurisdiction.

d. If any party or parties attempt(s) to challenge or overturn in court the arbitrator's decision on any ground other than bias or corruption of the arbitrator, and does not prevail on such ground(s), and notwithstanding whether there is an attorney's fees clause in the contract to which this Arbitration Agreement is appended or attached, then such party or parties shall pay the reasonable attorney's fees and costs of the prevailing party or parties incurred in opposing that challenge, multiplied by two, with one half payable to the prevailing party and one half payable to the recognized charitable organization of the prevailing party's choice.

2. Each of the parties to this Arbitration Agreement is responsible to the other party or parties hereto, and to all other parties signing their corresponding Arbitration Agreement related to this Project, to have each party with whom or which they contract for services, labor, or materials used in the design or construction of the Project enter into an identical form of this Arbitration Agreement. Any failure by a party hereto (the "Responsible Party") to enter into this Arbitration Agreement with each and every other entity or person with whom or which it contracts for such services, labor, or materials (a "Missing Party") shall result in (a) the Responsible Party assuming the obligations of the Missing Party's insurer under the applicable insurance policy or policies of the Missing Party and subject to the same conditions, terms, and provisions of such policy or policies excluding any rights of subrogation thereunder, and (b) the Responsible Party waiving any rights

of indemnity or contribution, or rights arising in contract or tort, against the Missing Party, and (c) the Responsible Party waiving any claim it may have for recovery of monies due under the contract to which this Arbitration Agreement is appended or added as an amendment against the party or parties that joined such Responsible Party in the arbitration.

3. The parties recognize that the Project is being designed and constructed by persons and entities with their respective operations and headquarters in many different geographic locations, and that the Project may have component parts to be incorporated into the Project created in other geographic locations as well. In particular, by way of example only, [project-specific facts]. Accordingly, and notwithstanding any venue, choice-of-law, or conflict-of-law provision contained in any contract to which this Arbitration Agreement is appended or attached, and also notwithstanding whether any party brings or must respond to any action commenced in state or federal court or any other adjudicatory or dispute-resolution forum to enforce or attempt to block or preclude enforcement of this Arbitration Agreement, the parties agree that the Federal Arbitration Act ("FAA") shall govern and control the interpretation, application, and enforcement of this Arbitration Agreement, and that any and all state laws, rules or statutes shall not govern and control the interpretation, application, and enforcement of this Arbitration Agreement; provided, however, the parties hereto expressly waive the application of and agree they will not invoke the statutory requirement in Section 4 of the FAA that a jury decide the enforceability of this Arbitration Agreement.
4. The parties hereto agree that whichever party shall first commence an arbitration filed pursuant to this Arbitration Agreement shall advance the fees necessary to commence the arbitration in the arbitral forum mandated in paragraph 1, above, subject to later allocation of such fees by the arbitrator once the arbitration is commenced or at the time of settlement or award, or upon motion of the party advancing such fees, as the arbitrator may elect. Any party refusing or failing to pay its share of such fees as and when allocated by the arbitrator shall waive the right to be heard, to present evidence, to cross-examine witnesses, and to assert counterclaims and cross-claims in the arbitration; moreover, as determined by the arbitrator, such failure to pay fees may alone serve as a basis of entry of default and/or adverse final award against the party failing to pay.
5. The parties signing below each acknowledge that the person executing this Arbitration Agreement on its behalf is authorized to so enter into this Arbitration Agreement, and also ac-

knowledge that the signature of its attorney alone is not sufficient to bind it to this Arbitration Agreement.

6. This Arbitration Agreement does not require mediation prior to or concurrent with arbitration.
7. In the event that any provision of this Arbitration Agreement is determined to be unenforceable, the remaining provisions or portions of this Arbitration Agreement shall nevertheless remain in full force and effect.
8. This Arbitration Agreement is the result of arms-length negotiations and each party has cooperated in its drafting and preparation. As a result, in determining the intent or meaning of any provision of this Arbitration Agreement, such provision shall not be construed, in whole or in part, on the basis that any party was its drafter.
9. Each party to this Arbitration Agreement has also had the opportunity to seek the advice of its own counsel with respect to its meaning, consequences, and advisability of becoming bound by it, and has sought and received such advice, to the text it has deemed, in its independent judgment, to be reasonable. Each party executes this Arbitration Agreement and agrees to be bound by all of its terms and provisions, including but not limited to those set forth in paragraph 2, above, regarding the consequences to any party from a failure to ensure the universal consent to this Arbitration Agreement.
10. Each party to this Arbitration Agreement understands and acknowledges that by agreeing to arbitration, among other things, it is giving up (i) the right to a jury trial, (ii) the type of broad discovery customarily allowed to parties in civil court proceedings, and (iii) virtually any right to appeal the award of the arbitrator.
11. Each party to this Arbitration Agreement hereby submits and voluntarily consents to the personal jurisdiction of [the selected local office JAMS, AAA, etc.] and to the federal and state courts of the state in which such arbitral forum is located. Moreover, each party further submits and voluntarily consents to such arbitration organization local office as the appropriate venue for all matters governed by this Arbitration Agreement, as well as all disputes relating to or arising out of its application or interpretation, and hereby waives any and all objections, including but not limited to those relating to venue and personal jurisdiction, the authority of such arbitration organization, and the federal and state courts of the state in which such arbitral forum is located.
12. At the earliest reasonable time in the course of any arbitration commenced hereunder, the arbitrator shall issue a "Case Management Order" ("CMO"). The CMO shall contain, among other things, the following provisions:

- Initial disclosures shall be made within twenty (20) business days of a party's first appearance or within twenty (20) business days of the issuance of the CMO, whichever comes later. Initial disclosures shall include, at a minimum, identification of witnesses, the party's initial, non-binding disclosure of damages/defects/claims and initial computation of damages, a contractor's statement of work, a detailed statement of insurance and production of insurance policies that may apply, and production of all project-related, non-privileged documents.
- There shall be no pleading motions or dispositive motions (e.g., motions for summary or partial adjudication) and no motions *in limine*.
- No separate discovery referee shall be appointed, with all discovery disputes to be decided by the arbitrator.
- No interrogatories and no requests for admission shall be allowed [in the alternative, set forth a list of form of business and insurance interrogatories, identification of PMQ/PMQ interrogatories, and/or scope of work interrogatories required to be answered within twenty (20) business days of service]. Discovery is via initial and supplemental CMO-required disclosures, document production, and depositions only. All documents shall be produced in electronic form in their native format, and only hard copies shall be produced bates-stamped and in PDF text-readable (OCR) format. Deposition time shall be limited in a manner consistent with the state code of civil procedure or the Federal Rules of Civil Procedure. The number of percipient witness depositions shall be set by the arbitrator after the initial disclosures and at the first or second status conference.
- There shall be no limit on third-party discovery subpoenas (records or testimony or both) except as may be shown on good cause demonstrated to the arbitrator.
- "Visual Inspections" shall be liberally allowed and, to prevent such an inspection, the party to be "inspected" must seek a protective order from the arbitrator. "Destructive Testing" will be allowed in a coordinated fashion, after a minimum of a fourteen (14) business-day notice by a requesting party of the type, location, licensed contractor to conduct such work, and insurance available to cover such work, with the requesting party responsible for complete restoration [subject to pursuing other participating parties for contribution].
- All service of all documents shall be electronic using an online service or via email, as the parties may agree or the arbitrator may order.
- The parties shall agree to or, in the absence of complete

agreement, the arbitrator shall order, the usual deadlines and dates for the arbitration, expert witness disclosure, discovery cut-off, and the like.

- Other ideas for inclusion to govern the arbitration:
  - *Impose strict time limits on testimony, and hold parties to it. Couple that with consideration of direct testimony via declaration.*
  - *Use offers of proof on facts not in dispute. Force parties to really meet and confer, and perhaps even conduct a pre-arbitration hearing to resolve disputes on what comes in via this method.*
  - *Relax the rules of evidence for experts. Allow testimony in narrative fashion, allow reports to come into evidence, and even allow expert back-and-forth open dialogue as testimony.*
  - *Limit costs. Use deposition in lieu of live testimony, do not use a court reporter, use joint experts, make offers of proof in lieu of direct examination, and make effective use of stipulations.*

13. [Residential Construction] — The parties hereto acknowledge and intend that this Arbitration Agreement will be included in CC&Rs, Purchase and Sale Agreements, and other governing documents regarding the Common Interest Development created as part of the Project, and that the HOA/HOAs created thereby, and the purchasers of such residences/units, shall be entitled to enforce this Arbitration Agreement and, conversely, shall be subject to enforcement against them of this Arbitration Agreement. [Owner accepts and acknowledges its duty to comply with all applicable laws governing the form of obtaining the consent of the HOA/HOAs and purchasers.]
14. Each and every signature below and on every version of this Arbitration Agreement used on the Project, regardless of date, and regardless of what contract or contracts this Arbitration Agreement may be appended to in the course of the Project, is intended to evidence and constitute a single, uniform Arbitration Agreement for the Project, and all such Arbitration Agreements shall be construed and enforced consistent with that principle.

[Signatures and Dates]