Settling a Multi-Party Construction Dispute

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Large construction claims for delay and/or design and construction defects generally involve one plaintiff and several defendants. What if some defendants are prepared to settle with the plaintiff while other defendants want their day in Court – is everyone forced to stay in the litigation and continue to pay legal fees? Certainly not.

Imagine a wind farm project which involves site preparation, surveying and locates, drilling, and installation of windmill foundations before the windmills can be installed and the electrical work at the windmills can take place. All this work involves numerous parties, including the general contractor, the surveyors, the engineers, the drilling trade, the steel foundations installer, and the utility infrastructure contractor, to name a few. The project is located in Northern Ontario and is scheduled to be completed by mid-November. A series of events and circumstances take place and as a result, the project is not completed until the end of March, extended winter work has to take place but was not provided for in contract prices. The utility infrastructure contractor launches an action for damages arising from the delays, naming all the other parties identified above. Once the plaintiff contractor has produced evidence that it was delayed and that it incurred damages as a result, each defendant tries to shift the blame to its co-defendants. As in every dispute, the parties will consent to, or the Court will recommend (or impose), a mediation. After two days of mediation, several defendants are prepared to settle while the remaining two or three are firmly refusing to contribute any money to the settlement.

One might think that in this scenario, no settlement will take place at all and the parties are court bound. Not necessarily all parties. The “settling defendants” and the plaintiff may enter into a Mary Carter or a Pierringer agreement. These types of agreements provide for the settling defendants’ evidentiary obligations in the ongoing litigation and protect them against any further liability to the “non-settling defendants” for contribution and indemnity. Mary Carter and Pierringer agreements are based on the same principles and each agreement will be tailored to the specific case and the specific requirements of the parties. They still each have a set of their own characteristics. For instance, Pierringers have the following characteristics:

- The plaintiff will discontinue the action against the settling defendant;
- The plaintiff indemnifies the settling defendant for any portion of the damages a court may attribute to them and for any claims-over by the non-settling defendants; and
- In the alternative the plaintiff and settling defendant can agree that the plaintiff will limit its claim against the non-settling defendant to the non-settling defendant’s proportionate degree of fault;
- A disadvantage for the plaintiff is that they will now have to show the non-settling defendant’s specific liability rather than the liability of all defendants;
- A Pierringer agreement can result in a procedural disadvantage for the non-settling defendant; and
- The settling defendant avoids further legal costs.

And Mary Carters have the following characteristics:
• The settling defendant remains in the lawsuit and may pursue crossclaims against the non-settling defendant;
• The settling defendant guarantees the plaintiff a specified monetary recovery and caps its own liability (which may be reduced depending on the Court’s finding);
• The settling defendant remains in the action and cooperates with the plaintiff to maximize the quantum of the plaintiff’s recovery;
• The plaintiff indemnifies the settling defendant against any crossclaims for contribution and indemnity;
• The plaintiff and settling defendant risk adverse cost awards if the non-settling defendant does well at trial;

In spite of their differences, they both have the following effects:

• Reduce the plaintiff’s risk associated with litigation and/or finance the ongoing litigation;
• Put pressure on the non-settling defendants, encouraging them to eventually settle;
• The settling defendants either get out of the litigation or put a cap on their liability.

Not surprisingly, a plaintiff will likely favour a Mary Carter type of agreement while a settling defendant will likely insist on a Pierringer. A key factor for defendants to consider settlement is to put an end to legal fees and all other costs associated with litigation, which a Pierringer allows them to achieve.

Until recently, the full benefits of these agreements were somewhat hindered, however, by the fact that settling defendants and the plaintiff were obligated to disclose the amounts of their settlements to the non-settling defendants. Earlier this year, the Supreme Court of Canada put an end to the debate and ruled that even in the context of Pierringer and Mary Carter agreements, settlement privilege must prevail\(^1\). This decision was driven by the principle that the justice system must promote settlements and to that end, must protect litigation the privilege rather than shatter it. Sable Offshore Energy Inc. sued a number of defendants who supplied services and/or materials for the application of anti-corrosion paint to a number of Sable’s offshore facilities and structures. The paint allegedly failed to prevent corrosion. Sable entered into Pierringer agreements with some of the defendants, disclosed all the terms of such agreements to the non-settling defendants, save for the amount of each settlement. The non-settling defendants brought a motion to compel the plaintiff to disclose the settlement amounts. The Court held that settlement negotiations should be protected, that a negotiated settlement amount is a key component of such negotiations, that there would be no prejudice to the non-settling defendants if the settlement amounts remained confidential. The settlement amounts were not disclosed and settlement privilege is now that much stronger.

In passing, the Supreme Court also addressed the use of the words “without prejudice” on correspondence between parties before or during litigation and clarified that the use of these words is not a pre-condition to establish settlement privilege. What is important is the intent of the parties during their communications and communications undertaken with the intent to settle will be protected by settlement privilege, with or without the words “without prejudice” being uttered. Similarly, the use of those words is not a guarantee that settlement privilege will apply if no intent to settle can be demonstrated.

\(^1\) Sable Offshore Energy Inc. v. Ameron International Corp., [2013] SCC 37
In summary, if you are ever involved in complex multi-party litigation, you can settle your way out of it, with or without your co-defendants, and the amount you paid (or received) will remain privileged.