Contractual Clauses Providing for Alternative Dispute Resolution

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Almost every construction contract on large projects contains a mechanism for the parties to resolve disputes. Many provide for multiple stages of dispute resolution, but all aim to resolve disagreements as efficiently as possible to ensure the parties' efforts are focused on the project itself.

While construction contracts take many forms, the most widely used are the standard-form contracts written by the Canadian Construction Documents Committee (CCDC). These contracts include a standard alternative dispute resolution (ADR) provision which typifies the way most parties envision an ADR process unfolding. There are however many other types of ADR provisions which may better suit the circumstances of any particular project. This paper will provide an overview of the CCDC regime and discuss some of the most commonly-seen alternatives.

ALTERNATIVE DISPUTE RESOLUTION IN THE CCDC STANDARD FORM CONTRACTS

Under the CCDC2, the project consultant is initially required to address all matters relating to the performance of the work or the interpretation of the contract documents. The consultant's interpretations and findings must be consistent with the contract documents and must not show bias towards either party. In many cases, the consultant can resolve issues before they develop into full-fledged disputes. The consultant's involvement also allows for minor disputes to be handled economically and quickly, minimizing the disruption to the project.

The parties can contest the consultant's findings, but must adhere to strict timelines in order to do so or risk being contractually bound by the consultant's decision. Under Condition 8.2.2, a party is deemed to have conclusively accepted the consultant's decision unless it sends a written notice of dispute to both the other party and the consultant within 15 working days of the decision. If this notice is delivered, the other party must provide a reply within 10 working days. Once the parties have set out their positions, they have a further 10 working days to negotiate and attempt to resolve the dispute. Notably, the CCDC2 requires the parties to "make all reasonable efforts to resolve their dispute by amicable negotiations" and to provide frank, candid, and timely disclosure of relevant facts, information, and documents to facilitate the negotiations. Again, the contract is designed to promote a quick and cost-effective resolution of the disagreement.

If negotiations are unsuccessful, the parties proceed to mediation where negotiations continue in a more structured fashion with the assistance of a neutral third party. If no resolution is reached within 10 working days of the mediator's appointment, either party may refer the dispute to binding arbitration.

Both the mediation and arbitration stages are conducted in accordance with CCDC 40 – Rules for Mediation and Arbitration of Construction Disputes. While these rules set out the general procedure, a mediator or an arbitrator ultimately controls how the proceeding unfolds.

If neither party elects to proceed to binding arbitration within 10 working days of the termination of mediation, either party may refer the dispute to the courts or any other

forum, including an alternative forum for arbitration. Occasionally the parties will explicitly require arbitration (a confidential form of dispute resolution) if mediation is unsuccessful, with the goal of keeping disputes out of the courts and the public eye.

While the parties are engaged in ADR, the consultant is required to give whatever instructions it deems necessary to ensure the project is not disrupted. The parties are required to comply with these instructions and, while not explicitly stated, the implication is that neither party can cease or delay performance of the project. It's not uncommon for parties to explicitly agree to a requirement to continue working on the project notwithstanding the existence of a dispute.

While the CCDC2 provides relatively strict timelines, the parties can agree to modify these timelines as needed. It's not uncommon for the parties to take several months to proceed to the arbitration stage.

MODIFIED DISPUTE RESOLUTION PROVISIONS

Because ADR is by nature consensual, the parties are at liberty to agree to ADR provisions that modify the CCDC ADR provisions, provide for a substantially different approach to ADR, or leave out an ADR clause entirely, leaving any disputes for the courts. Typically, modified provisions contemplate either a single type of ADR, usually binding arbitration, or a hybrid form that provides a different combination of ADR stages than the CCDC2.

Public and institutional owners will often have their own standard-form ADR clauses that require referral of disputes to binding arbitration. Those clauses commonly set out a process for selecting an arbitrator or panel, the jurisdiction from which an arbitrator or panel must be selected, and that the arbitration must be conducted in accordance with the Nova Scotia Commercial Arbitration Act (CAA).

Mediation is rarely a stand-alone ADR mechanism in construction contracts. It is normally built into hybrid mediation-arbitration (or "med-arb") clauses, under which a neutral third party first attempts to facilitate resolution. Traditionally mediation has been considered as facilitative, with the mediator guiding negotiation without providing an opinion on the merits of the dispute. But parties may want and can provide for a more evaluative approach, with the neutral third party providing an opinion on the dispute's probable outcome at binding arbitration or trial. An evaluative mediation may provide a welcome expert view on the strength or weakness of parties' positions, and thus offer an incentive to resolve a dispute at an early stage.

Standard med-arb provisions contemplate the same neutral third party acting as arbitrator if mediation doesn't resolve the dispute. In the transition to arbitration, the neutral third party dons a different hat to preside over a more formal dispute resolution process that typically results in a binding, final award. The parties benefit from an arbitrator already versed in their dispute.

Arbitration doesn't have to be binding and final, though. The parties can agree to the arbitrator conducting a paper-based review of the dispute, with the resulting award non-binding. Although this is generally cheaper and quicker than binding arbitration and may encourage consensual resolution, it lacks finality and may be an unnecessary detour in a strongly-contested dispute destined to be resolved by a binding decision.

Parties may also consider a hybrid of arbitration followed by mediation, known as "arb-med". This process involves a formal arbitration where the arbitrator or arbitral panel hears the case and prepares a sealed decision. The parties then attempt resolution through mediation in light of the evidence that came out during the arbitration. If mediation doesn't resolve the dispute, the decision is revealed

and binding on the parties. While an arb-med clause may promote consensual resolution, it is with reason rarer than med-arb clauses. After spending significant resources on arbitration, most parties do not want to spend more time on the dispute resolution process.

The choice of appropriate ADR provision depends on many factors, including project complexity and urgency, past experience with or reputation of the other party, and financial considerations. There may be little room to negotiate the terms of an ADR clause with a contractor or owner who's often involved in major projects. But in cases where there's room to negotiate what ADR process will govern, parties should be well-aware of the options.

ALTERNATIVE ARBITRAL PROCEDURES

Once arbitration has been agreed upon, there are many possibilities open to the parties for organizing the arbitration. The following are just three examples of commonly-used arbitration regimes.

Nova Scotia Commercial Arbitration Act

The CAA is the governing legislation in Nova Scotia for arbitrations conducted in this jurisdiction. Similar legislation exists in the other Atlantic Provinces.

The CAA applies to arbitrations conducted within the Province unless its application is excluded by agreement. With limited exceptions generally relating to the powers of the court, the parties may vary or exclude any provisions of the CAA, including the procedural rules included as Schedules A and B to the CAA.

Under the CAA, an arbitrator has substantial discretion to determine his or her jurisdiction, answer any questions of law which arise during the arbitration, and determine the procedures best suited to the circumstances. Parties typically will specifically incorporate the application of the CAA into their agreements and require that any arbitration be conducted pursuant to it.

ADR Chambers Inc.

ADR Chambers is a Toronto-based organization which offers a wide array of services including mediation, arbitration, neutral evaluation, and private appeals. The company has a substantial roster of individuals experienced in the mediation and arbitration of disputes, including retired judges, senior lawyers, and other practitioners experienced with alternate dispute resolution.

ADR Chambers provides its own procedural rules for mediations and standard and expedited arbitrations. Where parties agree to retain ADR Chambers, they may agree to use different rules of arbitration, such as those contained in provincial arbitration legislation.

International Court of Arbitration

For large and sophisticated projects involving companies based in foreign jurisdictions, the parties may decide to pursue arbitration through one of several international bodies. Some of the better established bodies include the United Nations Commission on International Trade Law (UNCITRAL), the International Chamber of Commerce Court of Arbitration, and the American Arbitration Association. Each of these bodies has detailed procedural rules governing the conduct of proceedings, including rules relating to the appointment of arbitrators, apportionment of costs, and identification of governing law.

Each of the Atlantic Provinces has enacted legislation to permit a superior court to grant an order enforcing an international arbitral award and to exercise the authority granted by Article 6 of the UNCITRAL Model Law on International Commercial Arbitration (originally adopted in 1986 and most recently amended in 2006).

There are distinct advantages and disadvantages to each type of ADR clause and procedural regime. Those involved in negotiating contracts for construction projects in Nova Scotia should carefully consider how to best tailor an ADR clause to meet their needs and circumstances.

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This article is intended to give a brief overview of some of the factors which should be considered and the regimes typically seen. It is not intended to be legal advice.