Arbitration Clauses in Construction Contracts

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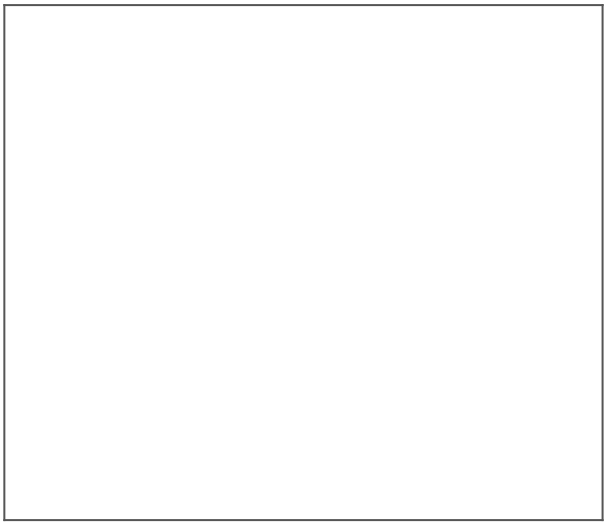

As we are all aware, disputes arise from time to time between parties involved in construction projects. In the absence of any agreement between those parties to the contrary, the “default” method for resolving such disputes is litigation before the courts. While Canadian courts continue to deal on a regular basis with construction related disputes, there is an ever-increasing trend for parties involved in construction projects to elect alternative methods of dispute resolution. One of the primary methods used is arbitration, and it is now common to see arbitration clauses in construction contracts (see, for example, the dispute resolution provisions found in the general conditions of the CCDC 2 - Stipulated Price Contract, which allow either party to engage arbitration following unsuccessful attempts to resolve a dispute through mediation).

While the rules applicable to court proceedings are clearly aimed at ensuring a just result between the litigants at the end of the day, they are somewhat rigid and can create inefficiencies. The arbitration process, on the other hand, is more flexible and parties can generally obtain a resolution more quickly than is the case with litigation. Another potential advantage of arbitration is that parties can select an arbitrator who is familiar with the construction industry. While judges of the court are obviously qualified to deal with legal issues in general, they are not always experienced in dealing with the often technical factual issues at play in construction disputes. That said, it remains of importance that arbitrators have the appropriate training to qualify them to deal with the legal aspects of a dispute.

An arbitration clause in a construction contract can take many forms, from a simple statement that the parties agree to refer any dispute arising between them to arbitration, to a detailed clause containing not only the agreement of the parties to arbitrate disputes, but also setting out how the arbitrator is to be appointed and the procedures to be used by the parties in the process.

Where parties have not previously agreed on the method for appointment of an arbitrator, The Arbitration Act of Manitoba provides that a party may make an application to court to have a judge appoint an arbitrator after a dispute arises. In terms of the procedure to be used in the arbitration, The Arbitration Act also provides that the arbitrator may determine the procedural rules to be followed, subject always to the overriding requirement that the parties to the arbitration must be treated equally and fairly.

It is advisable for parties who have agreed on including an arbitration clause in their contract to provide at least some detail as to how an arbitrator will be selected and the procedures and timelines to be used in the arbitration process. The practical reality is that once a dispute arises, it becomes increasingly difficult for the parties to agree on anything. The benefits of proceeding by arbitration can be compromised where the process for selecting an arbitrator and the rules for the arbitration process have not previously been agreed upon and the parties have to apply to the court to have an arbitrator appointed or have to make repeated arguments before the arbitrator on procedural issues.

There are a variety of written arbitration rules that currently exist, including some specifically developed for use in construction disputes (for example, the Rules for Arbitration of Construction Disputes as provided in CCDC 40). By agreement, parties to a construction contract are free to adopt existing rules entirely or make revisions and adjustments as may be appropriate in the circumstances.

In many cases, arbitration of construction disputes is preferable to litigation. In order to maximize the potential benefits of arbitration, parties to construction contracts should take time at the outset to agree upon the method for appointing an arbitrator and the rules to be used in the arbitration. Failure to deal with such issues at the front end, before a dispute actually arises, can negate some of the advantages that might otherwise be gained through arbitration of a construction dispute.

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