The Alternative Dispute Resolution Processes in Canada's New CCDC 2-2020 Construction Contract

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Since its formation in 1974, the Canadian Construction Documents Committee (CCDC) has been responsible for the development, revision, and publication of a suite of standard form contracts (and accompanying forms, guides, and bulletins) for use in both the public and private sectors of the construction industry in Canada.

One such standard form is the stipulated or fixed price contract, known as "CCDC 2", which is the most widely used construction contract in Canada[1]. The 1994 version (which introduced alternative dispute resolution into CCDC's standard forms of contract) was updated and revised in 2008, and then again in December of 2020. The modified 2020 version was welcomed by the construction industry because it incorporates the new streamlined and consolidated requirements relating to the introduction of prompt payment legislation; the role of "adjudication" in resolving payment disputes; the evolving responsibilities for overall health and safety; the valuation of change directives; the responsibility for delays; and the prerequisites for both early occupancy of the project by the owner and a new "Ready-for-Takeover" completion milestone.

Owners, who might be prepared to use the standard CCDC 2 contract as a baseline document, may add supplementary general conditions (**SGC**s) in order to reallocate responsibilities and risk.

[1] For a review of two annotated iterations of the CCDC 2 contract, see Harvey J. Kirsh, *Annotated Stipulated Price Construction Contract (CCDC 2-1982)* (Canada Law Book Inc., 1989), and Harvey J. Kirsh and Lori Roth, *Kirsh and Roth: The Annotated Construction Contract (CCDC 2-1994)* (Canada Law Book Inc., 1997)

Authority and Role of Consultant

The CCDC 2-2020 contract includes provisions relating to the important decision-making function and role of the Consultant[2]. During the construction phase of a project, the Consultant has the responsibility to provide contract administration services[3] which include, among other things, inspection, testing, reviewing shop drawings, preparing change orders, responding to requests for time extensions, rejecting deficient work, determining amounts owing to the Contractor[4], and issuing payment certificates.

Furthermore, the Consultant has traditionally been the arbiter of first instance with respect to disputes between the Owner[5] and the Contractor[6] as to the interpretation, application or administration of the contract. If a particular dispute is not resolved promptly, the Consultant will usually give instructions to the parties to ensure the proper and continuous performance of the work and to prevent delays pending resolution of the dispute[7]. The parties would then be obliged to follow those instructions, on the understanding that doing so would be without prejudice to any claim either party may have[8].

After the passage of 15 Working Days[9] from the date of receipt of the Consultant's finding (and assuming that neither party challenges it), the parties would be deemed to have accepted it, and to

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[2] As defined in CCDC 2-2020
[3] GC 2.2.1
[4] As defined in CCDC 2-2020
[5] As defined in CCDC 2-2020
[6] GC 2.2.7
[7] GC 8.1.3
[8] *ibid*
[9] As defined in CCDC 2-2020

have expressly waived and released the other party from any claims in respect of the particular matter dealt with in that finding[10].

Arbitral Immunity of Consultant

Over the past one hundred years, courts in England have grappled with the issue as to whether a Consultant, in purporting to resolve disputes between the parties, was acting as an agent for the Owner or as an arbitrator between the Owner and the Contractor. The early court decisions held that, in the former role, the Consultant would be potentially liable for negligence, whereas in the latter role, he would be protected from actions for negligence by the doctrine of "*arbitral immunity*"[11].

The English decisions[12], which have been followed in Canada[13], have held that, absent proof of bad faith or fraud, arbitral immunity would be available where the Consultant acts as a quasi-judicial decision-maker in respect of a dispute in which evidence and submissions are put forward by both sides for his consideration. This immunity applies to contractual liability that may arise out of the arbitration agreement, and to tort liability that may result from the arbitrator's acts or omissions.

Despite that the Consultant is generally retained by, and has the authority to act on behalf of, the Owner, his arbitral role is intended to be exercised in an impartial, unbiased, fair, and

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[10] GC 8.3.2

[11] For a discussion of this doctrine, see Harvey J. Kirsh, "*Arbitral Immunity of Design Consultants*", Pipeline Magazine (Mechanical Contractors Association of Toronto, 2001), Vol. 3, No. 3, Summer 2001; and Harvey J. Kirsh, "*Resolving Disputes: When Arbitral Immunity Protects Design Consultants*", Osler Construction Briefing newsletter, Spring 2001. Also see David I. Bristow and Jesmond Parke, "*The Gathering Storm of Arbitrators' and Mediators' Liability*", 7 C.L.R. (3d) 238

[12] See, for example, *Sutcliffe v. Thakrah* [1974] A.C. 727; *Arenson v Casson Beckman Rutley & Co*. [1977] A.C. 405

[13] See, for example, *Zittrer v. Sport Maska Inc.* [1988] 1 S.C.R. 564 [S.C.C.]; *Flock v. Beattie*, 2010 ABQB 193

professionally competent manner[14]. This is reflected in GC 2.2.8, which provides that "(i)*nterpretations and findings of the Consultant shall be consistent with the intent of the Contract Documents. In making such interpretations and findings the Consultant will not show partiality to either the Owner or the Contractor*".

This policy of equanimity is further reflected in legislation which provides, at least for architects in Ontario, that "(f)*ailing to act fairly and impartially between the parties to a contract that the* [architect] *is administering*" constitutes "*professional misconduct*"[15], and exposes the offending architect to the prospect of sanctions, such as a suspension or revocation of his licence, and a fine of up to $5,000[16].

This arbitral role of the Consultant dovetails with provisions contained in widely used forms of architectural consulting agreements. For example, GC 5.4.2 of the 2018 Edition of the Canadian Standard Form of Contract for Architectural Services (known as "Document Six") contemplates that the architect "*shall be, in the first instance, the interpreter of the Construction Contract, and shall make written interpretations and findings that are impartial and consistent with the intent of the Construction Documents*". Furthermore, GC 1.1.11 of Document Six provides that the architect "*will perform the Services with impartiality*". These provisions segue to GC 9.2.3, which provides that "*The Architect shall not be liable, in contract or tort, for the result of any interpretation or finding of the Architect rendered in good faith in accordance with the Construction Documents*". As such, Document Six contains, within its four corners, a qualified

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[14] See, for example, *Coady Construction and Excavating Limited v. St. John's (City)*, [2004] N.J. No. 259 (T.D.), supplementary reasons, [2004] N.J. No. 327 (T.D.); *D.W. Matheson & Sons Contracting Ltd. v. Canada (Attorney General)*, [1999] N.S.J. No. 163 (S.C.), aff'd [2000] N.S.J. No. 96, 3 C.L.R. (3d) 22 (C.A.)

[15] See s. 42(46), R.R.O. 1990, Regulation 27 under Ontario's *Architects Act*, R.S.O. 1990, Ch. A.26

[16] *Architects Act*, R.S.O. 1990, Ch. A.26, section 34(4)

and slightly modified notion of arbitral immunity, which is supplemental to the protection afforded by common law.

The Three Steps in the Sequential Process of Dispute Resolution

(i) *Negotiation*

If either party should decide to challenge the Consultant's finding, then the first of three steps in the sequential process of dispute resolution would be launched. The unsatisfied party would send a formal written Notice in Writing[17] of the dispute to the Consultant[18] and the opposing party calling for negotiation, and the opposing party would in turn send a formal Notice in Writing of reply[19], whereupon the battle would be joined. That battle, though, would be somewhat tempered by the fact that GC 8.3.3 mandates that "(t)*he parties shall make all reasonable efforts to resolve their dispute by amicable negotiations and agree to provide, without prejudice, frank, candid and timely disclosure of relevant facts, information and documents to facilitate these negotiations*".

(ii) *Mediation*

GC 8.3.1 of CCDC 2-2020 calls for the appointment of a "Project Mediator"[20], shortly after the award of the contract, for the general purpose of assisting the parties, by way of a mediated negotiation, to reach agreement, from time to time, on disputed findings made by the Consultant and on any other unresolved issues.

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[17] As defined in CCDC 2-2020
[18] GC 8.3.2
[19] *ibid*
[20] GC 8.3.1 provides that "*the parties shall appoint a Project Mediator*" [emphasis added], implying that this is mandatory

CCDC 40-2018, which is a companion document incorporated by reference into the CCDC 2-2020 contract[21], embodies the "*Rules for Mediation and Arbitration of Construction Industry Disputes*". Rule 5.3 provides that the Project Mediator "*shall be impartial and independent of the Parties, be experienced and skilled in commercial mediation, and have knowledge of relevant construction industry issues*".

Appended to CCDC 40-2018 is a sample Mediator Services Agreement, which sets out proposed rules regarding the appointment of a mediator; the conduct and timelines relating to the mediation; the elements of privilege and confidentiality; the requirement for frank, candid and timely disclosure; the exchange of mediation briefs and key documents; and the possible joinder of additional parties (subject to the consent of all affected parties).

The Project Mediator, who is jointly appointed by both parties and would therefore be more readily acceptable as a neutral person, may not have the perceived "baggage" which encumbers the project Consultant as the arbiter of first instance. Furthermore, the appointment of the Project Mediator by both parties might serve to eliminate the skepticism of some Contractors as to the impartiality of the Consultant, who is paid by the Owner, and whose own negligence may have caused or contributed to the very claims being reviewed.

Mediation is non-binding and is conducted on a "without prejudice" basis. A decision is not imposed upon either party and the Project Mediator's role is to help the parties to communicate with each other. In essence, the process allows the parties to avoid the uncertainty, risks and

[21] See GC 8.3.1

expense inherent in both arbitration and litigation. Furthermore, statistically speaking, mediation is an effective and successful dispute resolution process.

Either party is at liberty to withdraw from the mediation and may elect to invoke the next step of the dispute resolution process, namely arbitration.

(iii) ***Arbitration***

If the dispute has not been resolved through mediation, the Project Mediator will terminate the mediated negotiations by giving Notice in Writing to the parties and the Consultant[22]. Then, within 10 Working Days, either party may refer the dispute to be finally resolved by arbitration in accordance with the Rules for Arbitration set out in CCDC 40-2018[23].

Many commentators and judges have promoted arbitration "*for purposes of speed, economy, finality and privacy*"[24]; and it is widely accepted that arbitration is seen as having advantages over conventional litigation (i) by permitting the parties to select a neutral person with particular expertise in the area of the dispute, (ii) by being a more informal (and possibly less expensive) process which is governed by relatively straightforward rules, (iii) by bringing the dispute before the arbitrator in a timely way at a time and place which suits the parties, thus avoiding the delays often associated with litigation, (iv) by facilitating a more private process (which may be important

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[22] GC 8.3.5
[23] GC 8.3.6
[24] *Valley Ridge Homes Ltd. v. Caldecott*, (2008), 2008 BCSC 121 (at para. 2 (per Brooke, J.)), 2008 CarswellBC 178, 73 C.L.R. (3d) 159 (B.C. S.C.)

if the parties expect to continue to do business together after the conclusion of the arbitration), and (v) by limiting or eliminating the likelihood of appeals[25].

Appended to CCDC 40-2018 is a sample Arbitrator Services Agreement, which sets out proposed rules regarding the requisite qualifications and powers of an independent, impartial single Arbitrator, or a three-person arbitral tribunal; the initial procedural meeting which would launch and define the arbitration; the conduct and timelines relating to the arbitration; the exchange of written position statements or pleadings and key documents; guidelines relating to both factual and expert evidence; and interim and final reasoned Awards.

Construction projects are often characterized by a complex web of legal relationships, and many issues come into play in determining whether or not to refer a dispute to arbitration. A typical project could involve one or more owners, design professionals, sub-consultants, lenders, quantity surveyors, project managers, general contractors, subcontractors, material suppliers, insurers, sureties, and others. What this tends to mean is that construction disputes often involve multiple contracts, subcontracts and service agreements, and multiple parties, some of whom might not be privy to an arbitration clause in a particular construction contract. Bilateral arbitration may not be the best strategy or solution where there are multiple parties, who may have contractual responsibilities, obligations and potential liability, but who may not be compelled by contract or inclination to participate in, or be bound by, a final and binding arbitration award. This dilemma is addressed to an extent by Rule 3.1 of CCDC 40-2018 which provides that "(t)*he joinder of*

[25] *ibid*

Additional Parties with an interest in a dispute to be resolved by arbitration is permissible only if all Parties consent and the proposed Additional Party consents".

Adjudication: A New Construction Industry Remedy

Amendments to Ontario's *Construction Act*[26] , promulgated in October of 2019, introduced a legislative scheme referred to as "prompt payment"[27], which was intended to facilitate a more continuous flow of funds down the construction pyramid. The scheme is enforced by a new interim binding dispute resolution mechanism known as "adjudication".

In the context of this discussion, the processes of negotiation, mediation and arbitration are all derived from CCDC 2-2020, following sequentially on the heels of a finding by the Consultant. However, adjudication, as a method for facilitating "prompt payment", is enabled strictly by the *Construction Act*. There is no reference to adjudication in CCDC 40-2018, and only passing reference in CCDC 2-2020, where GC 8.2 provides that "*(n)othing in this Contract shall be deemed to affect the rights of the parties to resolve any dispute by adjudication as may be prescribed by applicable legislation*".

The enactment of prompt payment legislation in Ontario, and its proposed introduction in other provinces and by the federal government, has apparently justified the reference in CCDC 2-2020 to adjudication in GC 8.2.

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[26] R.S.O. 1990, Chap. C.30, as am.

[27] "*The prompt payment scheme was introduced to ensure payment continuously flows down the construction pyramid by providing statutory deadlines for payment on construction projects*": Howard Krupat and Emma Cosgrave, "Construction Adjudication: An Overview", 36 Constr. L.L. 2 at 3 (November / December 2019)

Epilogue

Taking disputes to court is viewed as a last resort under CCDC 2-2020. Some parties, although apprehensive about unfamiliar alternative dispute resolution processes, are nevertheless mindful of the fact that the time, expense and risks of litigation are significant burdens to be avoided.

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