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Solving Construction Disputes: The Latest Developments: Why Not Court?

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“I was only ruined but twice… once when I lost a lawsuit…

- *… and once when I won!”*
  - *Mark Twain (from Voltaire)*

Introduction

- - How/ When Court Works
- - Rights vs. Interests
- - You can Lead a Horse to Water…

How/ When Court Works

- disputes that simmer become claims
- how many of you *actually signed* your construction contracts?
- how many of you *actually included* dispute resolution clauses?

either a good relationship or a bad relationship

- good relationship
  - common goal to complete
- bad relationship
  - resort to court
  - no longer performing/ paying

the lien remedy

- 45 days after last supply, or where you are the contractor, 45 days from completion or abandonment
- more and more I see written notices of claim 5 days before
- or no formal publication of substantial performance

Rights vs. Interests

Are the CCDC Part 8 provisions mandatory or permissive?

Know the Difference between Without Prejudice and Confidentiality

- information in the session is not confidential
- information in the session is only without prejudice settlement discussions (Rule 24.1.14) if existing litigation and GC 8.2.3
- mediation is like email - it is informal, people have their guard down and sometimes say too much

Court has a great deal of suffering on both sides

- damaged reputations
- damaged relationships
- alternative?
- “compromise for completion”
- “sign a separation agreement”
- “is there life after a failed project?”

Mediation can be Like the TV Show the Weakest Link

- In multi-party disputes…
- Mediator or opposing parties will find the weakest link of the mediation

Why when there is mandatory arbitration are parties so often ignoring the ADR provisions and suing instead?

What are the Expectations?

- have you been through the process before?
- prepare with a discussion and perhaps show them a video of a mock trial

Exchanging Offers Before Process Starts

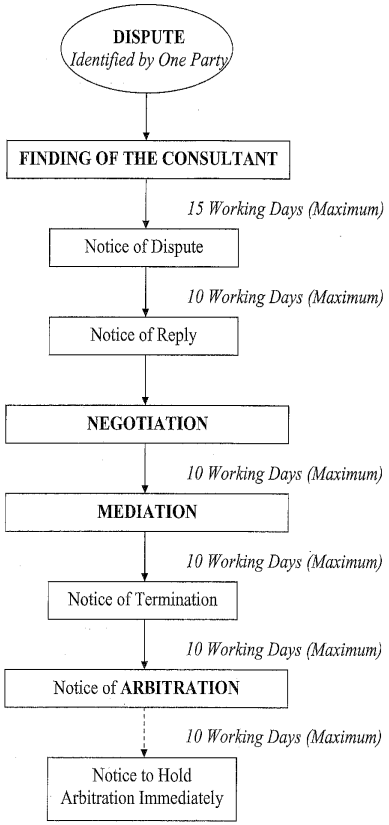
- when to do it and when not to
- first reasonable offer anchors the settlement range

You can lead a horse to water…

Who uses the CCDC Part 8 Dispute Resolution clauses?

- Use CCDC 40 – Rules for Mediation and Arbitration of Construction Disputes (2005)
  - under review
  - arbitration is slow to start

The following is a graphic sequence of the process delineated in PART 8 - DISPUTE RESOLUTION of the Standard Contract Form CCDC 2, including time frames for the expeditious resolution of construction disputes:



These rules are specifically written to set the requirements of the process and should be read and understood by both parties to the Contract.

lawsuits are costly and slow (remember Mark Twain?)

- time consuming
- management time not compensable
- your lawyer becomes your new “best friend”

Litigation has tighter timelines where one side is being difficult

- but… trials in Toronto take a long time
- 90% of cases settle before trial

litigation process has formal rules of evidence, more costly

- more procedural justice
- lots of rules
- always a winner and a loser

Judges are not construction experts

- not necessarily subject matter experts

Almost always have experts…

- delay and impact
- whether standard of performance met or not

Experts

- Rule 53 must be impartial and unbiased
- sign a form acknowledging duty first to the court
- set a range of reasonable outcomes
- can’t be an advocate

- What are the important trends and issues surrounding the use of expert evidence?
  - court plays a gatekeeper function
- changing roles for expert witnesses
- new Rules of Civil Procedure

"The use and misuse of experts reports is in part a by product of the adversarial system. The theory has always been that a trial of fiercely contending positions will ultimately reveal the truth, a theory not unlike Adam Smith's vision of the Invisible Hand, which guides its warring participants towards production of the optimal result. In courtrooms, as well as in the investment banking business the thought has belatedly occurred to people that the Invisible Hand has its limitations as a control mechanism. As a result, a number of reforms have been tried, with mixed success."

- Justice Ian Binnie "The Changing Role of the Expert Witness (2010) 49 S.C.L.R. (2d) 179 at 180

serving a notice of arbitration no guarantee the arbitration will proceed

Stays pending Arbitration

- *Penn Construction v. Constance Lake*
- plaintiff contractor sued owner and others, including project consultants
- litigation proceeded
- plaintiff then moved to stay litigation for arbitration

Stays pending Arbitration (cont'd)

- judge dismissed stay motion, and upheld by Court of Appeal
- "However, by bringing this action, the appellant defined the parameters of its dispute with the respondents more broadly that it could have under arbitration. The appellant has cast a broad net by commencing the action and, in our view, cannot escape the consequences. Any right the appellant may have to arbitrate certain aspects of its dispute with the respondent must now be considered in the light of the claim it has advanced in the action"
- multi party, multi issue dispute

Conclusions

- Court sometimes works when
- *“good, fast and cheap... pick any two”*