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Managing Risks in Construction Contracts and Projects: Construction Project Dispute Resolution – January 27, 2016

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Introduction

- Step Negotiations and Using Dispute Resolution Clauses in your Construction Contract Effectively – One Size Does Not Fit All
- How to Deal with Disputes when they Arise
- Large Infrastructure Project Litigation
- Alternatives to Litigation: Mediation and Arbitration
- The Role of the Mediator and the Arbitrator

Step Negotiations and Using Dispute Resolution Clauses in your Construction Contract Effectively – One Size Does Not Fit All

- Step negotiation advantage: removes roadblocks where individuals have become entrenched
- Step negotiation disadvantage: unwillingness to take ownership to resolve the dispute (if it can be passed on someone else)
- Abuse of non-binding dispute resolution mechanisms. What is non-binding arbitration? Where does it lead?

Step Negotiations and Using Dispute Resolution Clauses in your Construction Contract Effectively – One Size Does Not Fit All:

- Drafting issues – provide for timing of each process
- Urgent disputes mechanisms
- Embedded ADR professionals
- Segregate ADR process by dispute – Big Dollar, Big Process - Small Dollar, Small Process. Dispute resolution mechanisms sometimes disproportionate to amount in dispute;
- Interim relief
- Pinch points – Key issues, obstructive parties

Step Negotiations and Using Dispute Resolution Clauses in your Construction Contract Effectively – One Size Does Not Fit All

- Let go of preconceived ideas about process. Don't force it to parallel litigation
- Higher-ups may be more inclined to make a business decision rather than a principled one

How to Deal with Disputes when they Arise

- Starting the process
- Notices – when to whom
- Early action to prevent escalation
- Set strategy and schedule ASAP
- Resolve party authority issues: Understand decision makers, relationships and drivers

How to Deal with Disputes when they Arise

- Understanding why a claim evolved into a dispute
- Development of a strategy for resolving disputes and backup plans
- Demonstrating cause and effect and level of evidence – “horses for courses”

How to Deal with Disputes when they Arise

- Beware of the transparent dangling carrot. What good is more work from a contractor who does not pay?
- Can you carry the unpaid costs for a protracted period?
- Know when your lien rights expire – get advice. Make a fully informed decision about whether to lien

Large Infrastructure Project Litigation

- Time lag between when the additional costs were spent and decision/judgment
- Size of amounts in dispute and complexity
- Pressure on expert witnesses – many complex issues – reputational risk
- Less flexible than arbitration, which permits party autonomy.
- Political and reputational issues

Large Infrastructure Project Litigation

- Preliminary issues flow
- Partial summary judgment
- Consolidation of claims
- Dual stream litigation and ADR

Alternatives to Litigation: Mediation and Arbitration

- Differences between litigation and ADR process:
 - Public v private;
 - Party autonomy;
 - Industry and technical expertise
 - Binding v non-binding
- Understanding the difference between mediation and arbitration
- Is there a case for having statutory adjudication in Canada, like that in UK, Australia and other common law jurisdictions?

Alternatives to Litigation: Mediation and Arbitration

- Choice of neutrals – qualifications, strategy for three arbitrators
- Parallel process or step process
- Do not get bogged down in “process”

The Role of the Mediator and the Arbitrator

- Understanding the different roles
- Persuading a mediator - what a mediator wants to see
- Persuading an arbitrator - what an arbitrator wants to see
- Some matters involve DRBs

The Role of the Mediator and the Arbitrator

- Neutrality
- Bias
- Communications
- Ethics
- Hearings, necessary or not
- Expert evidence
- Drafting settlement agreements
- Liability of mediator and arbitrator
- Payment