New Approaches to Dispute Resolution in the Construction Sector

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INTRODUCTION

In recent years one of the most important issues to be considered in drafting any contract, including a construction contract, is the method of future dispute resolution. Although many contracts may remain silent on the issue of future dispute resolution; the costs in time, money and fractured business relationships which can be exacted when disputes are resolved through traditional litigation have meant that more and more contracts now include provisions providing for or mandating dispute resolution through so-called alternative dispute resolution (ADR).

ADR refers to any type of dispute resolution which does not involve adjudication through litigation in a court and it may involve, either alone or in combination, arbitration, mediation, negotiation and counselling. Not only does ADR promise a dispute resolution mechanism which is efficient and effective but it also offers the added benefit of allowing parties to tailor rules and procedures for dispute resolution which accord with their needs and interests. This paper will primarily address the following issues relating to ADR:

- mandatory mediation in Ontario
- CCDC provisions in practice
- selecting an arbitrator or mediator; and
- issues in selecting and drafting arbitration clauses generally;

MANDATORY ADR

Ontario is moving to become the first province in Canada with mandatory referral to mediation for all civil, non-family cases. Once this system is in place, all cases will proceed to mediation after a statement of defence has been issued. The mediation will be conducted by a
mediator selected by the parties or by an individual from an approved roster of private sector mediators and only in exceptional circumstances, as determined by master or judge, will the parties be permitted to opt out of the mediation. Strangely, Construction Lien cases are not required to participate in mandatory mediation. Mediated cases which do not result in a settlement will proceed through the ordinary litigation channels in the case managed system. To date Ottawa and Toronto have mediation in 100% of civil cases. Roughly 40% of all civil cases are settled in Toronto by way of mediation.

**CCDC 2 AND DISPUTE RESOLUTION**

As you know the CCDC 2 is a Fixed Price contract made up of three main sections: the Articles of Agreement which are specific to the particular project being undertaken; a definitions section which defines the terms and phrases which are assigned a special specific meaning within the document; and the general conditions, which, *inter alia*, set out the specific rights and obligations of the parties to the contract. The standard 1994 CCDC 2 form assumes a tripartite relationship regarding the subject matter of the contract and contains provisions with respect to the roles of the Owner, the “Consultant” who had been engaged by the owner under a separate agreement, and the Contractor who has agreed to undertake the work to be performed on the project.

The present form incorporates in Part 8 a detailed form of Dispute Resolution. Basically, the dispute resolution process involves the following steps:

1. disputes arising from the performance of the work or interpretation of the contract are referred to the consultant, who renders a decision on the matter;

2. a party disputing the consultant’s findings can indicate its dissatisfaction by notice in writing and invoke mandatory mediation;
3. if mandatory mediation is not successful, a party can by written notice invoke binding arbitration;

4. if binding arbitration is not chosen, a party can proceed to litigation or another type or arbitration.

When a claim, dispute or other question arises during a project which relates to the performance of the work or the interpretation of the contractual documents, the dispute is initially referred to the consultant. Section 2.2.7 of CCDC 2 – 94 provides that such matters shall be referred initially to the design consultant by written notice to the consultant and the other party. The consultant will provide his or her findings by written notice to the parties within a reasonable time.

One of the major changes enacted by the 1994 revisions was contained in Section 8.2 of the new CCDC 2, which provided for progressive escalation through negotiation, mandatory mediation and arbitration. This portion of the standard form contract is reproduced in Appendix “C”

**MANDATORY MEDIATION under CCDC Contracts**

The 1994 CCDC 2 contained substantive changes in the steps parties must follow in resolving construction disputes. The most significant change is that mandatory mediation must take place before the parties can pursue traditional avenues of arbitration or litigation. Section 8.2.1 of the CCDC 2 – 94 requires the parties to appoint a project mediator within 30 days after the contract is awarded or within 15 days after either party by written notice requests that the project mediator be appointed. The individual will be called upon to assist the parties to reach agreement on an unresolved dispute if either or both of the parties disputes a consultant’s finding made pursuant to Section 2.2.7. **If a party does not dispute the finding of the consultant, Section 8.2.2 stipulates that it shall be conclusively deemed to have accepted the consultant’s decision** and to have expressly waived and released the other party from any claims
in respect of the matter. A party wishing to dispute the consultant’s decision must send a written notice to the other party and the consultant within 15 days after receipt of the decision.

Section 8.2.3 requires the parties to make reasonable efforts to resolve their dispute through negotiations. This section also requires the parties to provide, without prejudice, disclosure of relevant facts, information and documents to facilitate the negotiations. If the parties have not succeeded in resolving the matter through their own efforts, then days after the receipt of the responding party’s reply, Section 8.2.4 provides that the parties shall request the project mediator to assist them. According to Section 8.2.5, the dispute must be resolved within 10 working days after the project mediator was called to assist or within such further period agreed to by the parties.

The CCDC has developed CCDC – 40, which sets out the “rules for mediation and arbitration of construction disputes” arising under CCDC contracts. These are reproduced for reference purposes in Appendix “D”. The parties can alter these rules if both concur in writing with the changes but if they do not then the document applies in its entirety. Rule 5.3 provides that the project mediator must be impartial and independent and an experienced and skilled commercial mediator who preferably resides or conducts business in the jurisdiction of the place of work and is knowledgeable of construction industry issues. Before accepting the position, the proposed mediator must sign a written statement declaring that he or she has no interest in the outcome of the case and is not aware of any circumstances that could raise a likelihood of bias or non-objectivity. This assists in preserving the integrity and impartiality of the mediator, whose role is to facilitate negotiations between the participants involved in the dispute.

Legal counsel may, pursuant to Rule 8.2, also accompany a party to the mediation conference. Although it is not specifically stated in the rules, it is assumed that the costs of legal representation are to be borne by the party who has retained the counsel to attend the mediation conference on its behalf.
According to Rule 10, any settlement agreement shall be in writing and shall refer to the issues resolved in the dispute, the obligations assumed by each party and the consequences of failure to comply with the agreement. If an agreement is not reached the parties can invoke Rule 11.3, which provides that the parties may agree to request that the project mediator provide a recommendation of settlement. The usefulness of this recommendation, however, is circumspect as it is not binding on the parties and pursuant to the mediation rules cannot be introduced as evidence in the subsequent proceedings.

**ARBITRATION UNDER CCDC 2**

If mandatory mediation fails to resolve the dispute, Section 8.2.6 of the CCDC 2 –94 provides that either party may refer the dispute to binding arbitration by providing a written notice to the other party. The written notice must be provided within 10 working days after the termination of mediation. If a written notice to proceed to arbitration is not sent within the stipulated time period, Section 8.2.7 provides that the parties may then resort to litigation or any other form of dispute resolution which they have agreed to use. If a party does request that the dispute be arbitrated, unless the party stipulates in the written notice that the dispute must be arbitrated immediately, Section 8.2.8 states that it will be held in abeyance until

1. substantial performance of the work;
2. the contract has been terminated; or
3. the contractor has abandoned the work, whichever is earlier, and consolidated into a single arbitration pursuant to the rules.

In order to protect a contractor’s right to commence legal proceedings to protect a lien right, Section 8.3 provides that the dispute resolution procedures shall not limit a party from asserting any statutory right to a lien. Furthermore, the section provides that the assertion of such right does not prevent a party from proceeding with arbitration to adjudicate the merits of the claim upon which such a lien is based.
The rules governing the arbitration of disputes are explicit and far more comprehensive than the rules governing mediation. This is probably a result of the more formalized and binding nature of arbitration, which results in a decision being rendered by the arbitrator at the end of the proceedings. Conversely, a mediator merely facilitates the decision-making process for the parties, and will not impose a settlement if it is not satisfactory to both parties. It is foreseeable that many parties will invoke the arbitration option since the problems that often arise in construction disputes must be adjudicated within a period of time which is inconsistent with the normal court procedure. Inordinate delays often mean a loss out of proportion to the amount involved in a given dispute. Arbitration will provide an efficient, fair and less expensive method of resolving disputes in such situations than proceeding directly to litigation.

When initiating the request to arbitrate the dispute, the written notice shall contain the following:
1. a description of the contract;
2. a statement of the issue in dispute;
3. a request that the dispute be referred to arbitration;
4. a description of the claim; and
5. the names of proposed arbitrators.

Procedural Rule 9.1 provides that within 5 days after the appointment of the arbitrator or the tribunal, a procedural meeting of the parties shall be convened to reach a consensus and to make orders on:

1. the procedure to be followed in the arbitration,
2. the time periods for taking steps in the proceedings,
3. the scheduling of any oral hearings,
4. any preliminary applications or objections a party may have, and
5. any other matters which will assist the arbitration to proceed in an efficient and expeditious manner.

The procedural meeting may be conducted by conference call, which will assist in expediting the arbitration process and will not inconvenience the parties who are often not located within a convenient distance of one another. A written record of the procedural meeting is prepared and distributed by the arbitrator.

The arbitrator also has the power under Rule 15.1 to retain experts to provide him or her with a written report on specific issues and can also require a party to permit the expert to review relevant documents, goods or other property. A copy of the expert’s report shall, according to Rule 15.2, be provided to the parties who may cross-examine the expert on his or her report.

An expert who has been retained to assist the arbitrator must, upon request of a party under Rule 15.3,

(a) make available to the party for inspection all documents which he or she was provided with to prepare the report, and
(b) provide the party with a list of all documents provided to the expert but not in his or her possession that were relied upon in order to prepare the report, and a description of the location of these documents to a party requesting to see them.

At the hearing, the arbitrator is not required to follow the rules of evidence and shall determine to relevance and materiality of the evidence presented. The arbitrator may also order a witness to appear and give evidence and the party opposite in interest may cross-examine the witness and call evidence in rebuttal.

The parties involved in the arbitration are also obligated to take certain steps during the proceedings. Within 14 days after the procedural meeting is held, Rule 11.1 requires the
claimant to provide a statement outlining the facts, matters at issue and relief sought and the respondent shall in turn respond within 14 days of receiving the claimant’s statement. A copy of the written statements must also be forwarded to the arbitrator for his or her review. The parties must also attach to their respective statements a list of documents upon which they intend to rely in support of their respective positions.

Rule 12.4 provides for the exchange of witness statements at least 21 days before any oral hearing commences. If the witness is an expert, a written statement or report prepared by the expert witness must be provided to the other party. At least 15 days before the oral hearing commences, Rule 12.5 stipulates that each party shall provide the other party and arbitrator with an assembly of all documents to be introduced at the hearing.

According to Rule 18.2, the final award of the arbitrator must be made not later than 30 days after the hearing had ended or final submissions have been made, whichever is later. The final award shall be in writing, shall state the reasons and shall be signed and dated. Rule 18.5 permits the arbitrator to award interest in the final award. Significantly, Rule 18.6 states that the award is final and binding on the parties and the parties agree to comply with it as soon as possible.

Costs of the arbitration are also to be fixed in the final award. Except for legal fees, Rule 19.2 provides that the costs of the arbitration shall be borne by the unsuccessful party unless the arbitrator considers it appropriate to apportion costs between the parties. Legal costs incurred by the successful party are, according to Rule 19.3, to be determined by the arbitrator and may be apportioned if the arbitrator considers it just and reasonable to do so. It is important to note that according to Rule 19.4 the arbitrator is not limited to awarding the legal fees and expenses which a court may award to a successful party in a civil judicial proceeding and is thus provided with broader discretion in awarding costs.
Clearly, the arbitration process envisioned is intended to more expedient and less costly than the traditional litigation process. Whether it in fact is significantly cheaper remains to be established once more arbitrations have been completed.

SELECTING AN ARBITRATOR OR MEDIATOR

Unlike judges in the traditional courtroom setting, arbitrators are not required to possess any specialized knowledge or skill. While statutes such as the *Labour Relations Act*, 1995 authorize Cabinet Ministers to approve lists from which arbitrators can be chosen, the basic right of parties to select an arbitrator has not been restricted by statute. This freedom to select a decision-maker is, in some sense, a double-edged sword. While it allows parties to select arbitrators who are sensitive to the needs of various interests and have a highly sophisticated understanding of the industry or area in which the particular dispute has arisen, it also allows for the selection of arbitrators who are untrained and ill-prepared for the task at hand. Thus, in *R. v. Famous Players*, [1932] O.R. 307 (S.C.), the court noted that:

> Parties to an arbitration are free to appoint whomever they choose to arbitrate their claims. They may if they see fit choose an incompetent or unfit person or agree that the arbitrator shall be chosen by law.

Whether the arbitrator or mediator is selected at the time the initial contract is drafted or only after a dispute has arisen between the parties, it is essential that the parties carefully consider what type of arbitrator or mediator would be most appropriate for them. In light of the profound effect that an arbitrator or mediator may have on the ultimate resolution of a dispute, the parties must determine what knowledge, skills and background would be most useful in resolving the disputes which have already arisen or may arise in the future.

One of the most important single factors to consider in selecting an arbitrator or mediator is the nature of the disputes which have arisen or are likely to arise between the parties. In particular, the parties must determine whether the disputes are likely to be factual, legal or a combination of both. When the disputes centre on legal issues or some mixture of fact and law,
the most appropriate arbitrators or mediators are often senior lawyers or retired judges. These arbitrators have a number of advantages as arbitrators or mediators. Specifically, they are often well-known and well respected such that they can command the respect of both parties. Furthermore, most judges have significant experience resolving complex matters in a variety of factual settings. My partner, Claude Thomson, who has been an arbitrator and an advocate before arbitrators, has concluded that:

In [his] experience, the retired judge forum is ideal for resolving complicated commercial disputes that may involve issues of fact and law that the parties want to resolve with a minimum of discovery and interlocutory proceedings within as short a time as possible.

When disputes are of a more factual nature, parties may select an entirely different type of arbitrator or mediator. In particular, when disputes are predominantly or purely factual, it may be appropriate to select an individual who is an expert in the particular field in which the dispute has arisen. This is particularly advisable when the facts at the heart of the dispute are highly technical in nature. When such technical disputes are considered in a traditional courtroom setting, a significant portion of the trial is often spent educating the judge about the technical details of the dispute through expert testimony. When such disputes are considered in the ADR setting, the expert can act as the judge and thus increase the efficiency of the process and the likelihood that the technical aspects of the dispute will be resolved appropriately.

Despite the advantages which may accompany the use of arbitrators or mediators who are not legally trained, certain concerns should be noted. First, many experts who have the knowledge and expertise to help resolve a dispute in a particular field may also have written books or articles regarding the issues at the centre of the dispute. While this should not necessarily disqualify the expert as an arbitrator or mediator, the expert’s previous writings should be promptly and fully disclosed so that his or her ability to consider the dispute in an unbiased and credible manner can be fully explored. Second, as an individual without legal training or experience, the expert may have difficulty controlling the counsel, witnesses or complicated processes which may be involved in a complex arbitration or mediation. Many
judges, however, have similar difficulties and this concern simply highlights the fact that, in choosing any individual as an arbitrator or mediator, the parties should have regard to the capabilities of the individual in question.

In selecting an arbitrator or a mediator, the parties must also determine whether they would like to have their dispute considered by a single person or by a panel. Although the use of a single arbitrator or mediator may be preferable in reducing both the time and money involved in the dispute resolution process, it should be noted that there may be circumstances when a panel may be more appropriate, for example, a panel may be helpful in resolving disputes involving a complex web of factual and legal issues. Not surprisingly, therefore, the parties’ decision regarding the appropriate number of arbitrators will depend, to a large extent, on the type and value of dispute to be resolved.

**DRAFTING PROJECT SPECIFIC ARBITRATION CLAUSES**

As is evidenced by the “Multi-Step Dispute Resolution Provision” at Appendix A, arbitration is but one of the dispute resolution mechanisms which may be available to contracting parties. Arbitration is a process in which the parties to a dispute agree to have their dispute adjudicated by a neutral third party or parties. For parties wishing to utilize arbitration as a dispute resolution mechanism but not wanting to use CCDC 40 in its entirety, the single most significant step in ensuring that the arbitration process functions appropriately and efficiently is likely to be the drafting of the arbitration clause.

The arbitration clause sets out the terms upon which the parties agree to have their disputes arbitrated. An arbitration clause should address a number of issues including the following:

- the specific scope of the clause in terms of which types of disputes may be
arbitrated;

- the forum for the arbitration and the applicable law;

- the type and number of arbitrators who may be appointed;

- the time limits which may be imposed on the process;

- the documentary discovery rules;

- the extent of oral pre-arbitration examinations of the parties (if any);

- how costs will be dealt with; and

- the finality of the arbitration process with particular regard to the appropriateness of providing an appeal mechanism.¹

The “Pre-Drafting Checklist” at Appendix B also sets out some of the issues which should be considered by parties in drafting the arbitration clause. In the interests of saving both time and space, this section will focus on the following two issues: (1) the forum for the arbitration and the applicable law; and (2) the time limits imposed on the arbitration process.

(1) **Choice of Forum and Law**

Parties drafting an arbitration clause may select both the forum for the arbitration (i.e., the jurisdiction in which the arbitration will take place) and the law which will be applied in the arbitration.

In Ontario, absent an explicit choice to the contrary, the Ontario *Arbitration Act* (1991) applies generally to arbitrations conducted in the province while the *International Commercial Arbitration Act* applies to arbitrations in the province which involve a party from

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outside Canada. Under Ontario law, only s.3 of the *Arbitration Act* imposes mandatory requirements for the conduct of an arbitration. The six specific provisions which must be adhered to pursuant to s.3 relate to the following:

- paramountcy of an arbitration agreement;
- principles of equality and fairness;
- extensions of time limits;
- the setting aside of an arbitral award;
- declarations of the invalidity of an arbitration; and
- the enforcement of an arbitral award.

While s.3 applies to all arbitrations conducted in the province, apart from the requirements it imposes, the parties are free to craft the provisions they wish to have govern their arbitration.

There are generally four approaches which can be undertaken by the parties in selecting the rules and procedures which will apply to their arbitration. First, the parties may simply adopt all of the provisions of the *Arbitration Act* as the applicable law. While this is simple and cost-effective in reducing the time involved in negotiating the arbitration clause, it has significant disadvantages. Most importantly, this choice does not allow the parties to design specific provisions which may be more appropriate to their dispute. A second option is at the other end of the spectrum and it involves the parties in an ad-hoc arbitration procedure in which the parties draft each of the specific provisions which apply to their arbitration. This option requires significant time and expertise on the part of the drafters to come up with a specific contract covering the resolution of a specific dispute.

For parties who would be unsatisfied with either of the previous options, there are other options which may offer an attractive compromise. As a third option, the parties may make
use of one of the many public or private institutions which are now involved in conducting arbitrations. These institutions offer a well-developed series of rules and procedures which have been tested numerous times in practice. If this is the option selected by the parties, careful attention should be paid in choosing the arbitration facility since there are some important differences in the rules and procedures which apply in the various institutions.

In any event, the decision of the parties regarding the appropriate rules and procedures to apply will likely depend on a number of factors including the complexity of the disputes which are likely to arise, the expertise of the parties and the amount of time and money the parties are willing to devote to negotiating and drafting rules for their particular type of dispute. If the parties elect to formulate some or all of the rules which will govern their arbitration, the parties will be faced with a number of difficult decisions. In particular, the parties will have to decide whether the arbitration clause should contain a time limitation provision with respect to the time within which claims are to be asserted.

(2) Time Limits

Parties who are attracted to arbitration as a means of resolving disputes in a timely and efficient manner often draft contractual provisions setting time limits within which disputes must be resolved by the arbitrator. When disputes are simple or relate to purely legal issues and the arbitrator is skilled and experienced, a time limitation clause may be unnecessary. However, when a dispute is complex and involves a significant amount of evidence, a time limitation clause may play a significant role in the conduct of the arbitration. In such circumstances, while one party may seek to abandon the time limit in order to ensure that his or her case is fully presented to the arbitrator, the other party may seek to have the time limit strictly enforced precisely because they wish to ensure that the other party’s case is not fully presented.

An arbitration carried out strictly in accordance with a time limitation clause may have effects which are not only unfortunate but which also defeat the very purposes for which arbitration was pursued at the outset. In the first instance, if a party feels that adherence to the time limit resulted in a process which did not allow for a full airing of the issues, the party may
seek judicial review of the arbitral award. Similarly, a party forced to adhere to the time limits may be forced to hire more lawyers or even an entirely different law firm in order to prepare effectively for the arbitration within the time limit. Clearly, if either of these were to occur, the costs involved in resolving the dispute, in terms of both time and money, could be greatly increased.

It is important to recognize, however, that the arbitrator’s authority to depart from the wishes of the parties regarding time limits is seriously constrained. While the arbitrator may express an opinion regarding the appropriateness of an extension to the time limit, the arbitrator has no authority to unilaterally grant such an extension. Similarly, although a party may apply to a court for an extension pursuant to s.39 of the *Arbitration Act, 1991*, courts grant such extensions only in rare circumstances. As a result, the arbitrator may be forced to deal with a difficult and seemingly intractable dilemma. It can be asserted that arbitrators in such circumstances must attempt to reconcile two seemingly incompatible objectives:

on the one hand, he must attempt to give effect to the contractual agreement between the parties by enforcing the limits agreed upon. On the other hand, he must ensure that the parties involved are afforded procedural fairness. When arbitrators are faced with factually complex disputes, striving for one goal may mean compromising the other.

In light of the problems which may arise as a result of time limits in arbitration clauses, these clauses should be approached with caution. While strict adherence to time limits may continue to create obstacles in the way of efficient dispute resolution, parties should be aware that some problems may be avoided simply by drafting the time limitation clauses in a precise and accurate manner. In the first instance, parties should ensure that they clearly set out the point at which the time limit commences. For example, the time limit may begin to run on the day the Notice of Arbitration is served, the day the identity of the arbitrator is agreed to or the day the arbitration commences. Similarly, the parties should specify the tasks which must be completed before the expiry of the time limit. While the time limitation clause could require that the award be announced within the limitation period, it could require only that the evidence and
argument is heard before the limitation period expires. In any event, parties who choose to include a time limitation clause should carefully draft the clause so that it accurately reflects the intentions and agreement of the parties.

**FURTHER CONSTRUCTION INITIATIVES**

David Bristow in a paper on this topic noted that as a result of the numerous disputes that have plagued construction projects, a number of innovative dispute resolution alternatives have been implemented by various organizations both in the public and private sector to alleviate the problem:

“The Ministry of Public Works and Government Services Canada has led the way by establishing a system of Contract Disputes Advisory Boards ("CDABs") in 1987. It is a non-binding alternative dispute resolution process whereby factual issues relating to any disagreements arising out of contracts entered into by the Ministry of Public Works and Government Services Canada and any contractors/consultant who has advanced a claim against this government Ministry are reviewed. Boards consist of three members: a neutral chairperson, a person appointed by the claimant and a member who is chosen by the Ministry. Their success rate in resolving contract claims is 88%, which compares very favourably with most other non-binding ADR techniques. Boards have been able to deal with very complex claims and owe a large part of their success to the expertise and professionalism of the participants.

To initiate a CDAB, the contractor/consultant must write to the Minister, who decides the feasibility of establishing a board to examine the dispute. A CDAB provides a forum whereby the parties to the dispute may make presentations, retain experts to explain certain aspects of their respective case and submit written documents defining the issues and outlining the respective positions of the parties. Eight weeks prior to the date set for the commencement of the hearing the claimant may forward copies of the claim documents supporting his or her position. The Ministry of Public Works and Government Services Canada thereafter has 4 weeks to prepare the documents it will present to the board in support of its position. During the hearing, each party may appoint a representative to present its claim to the board. The total duration of the presentations is limited to a maximum of two and one half hours. The practice is further expedited due to the informal proceedings and lack of transcripts or records of the hearing. The chairperson must submit a report within 2 weeks of the hearing to the Minister who thereafter advises the contractor/consultant of his or her decision. If the
claimant rejects the Minister’s offer he or she can still consider arbitration or litigation. Although the board decision is non-binding, the board procedure permits for the adjudication of issues and provides an impartial weighing of the merits of each party’s claim.”

CONCLUSION

Faced with the long and costly delays involved in proceeding through the court system, it is appropriate and advisable for contracting parties, especially in the commercial context, to consider alternatives to traditional, litigation-oriented dispute resolution. While the movement towards ADR should be promoted and encouraged, it is important to sound a note of caution. Although ADR may offer an efficient and effective mechanism for resolving disputes, it may also present a number of dangers for the party who embarks on it without adequate advice or preparation. This caution is intended, not to discourage parties from pursuing ADR, but rather to encourage parties to participate in ADR with a full understanding of the process and its consequences.
Appendix A

MULTI-STEP DISPUTE RESOLUTION PROVISION

The following provision is an example of a multi-step future dispute resolution clause suitable for a commercial agreement. This provision should not be viewed as a precedent as all alternatives are not presented. Only the negotiation and mediation portion of this provision are included. See other precedents for appropriate arbitration provisions to be added.

DISPUTE RESOLUTION

a. Dispute

Any dispute, controversy or claim arising out of or in connection with this Agreement (a “Dispute”) shall be dealt with in accordance with this Article.

b. Meeting to Negotiate Resolution

A meeting shall be held between the parties promptly after a Dispute has arisen. The meeting will be attended by representatives of the parties with decision-making authority to settle the Dispute. At the meeting, the parties will attempt in good faith to negotiate a resolution of the Dispute.

All negotiations and settlement discussions to resolve a Dispute shall be treated as compromise and settlement negotiations between the parties and shall not be subject to disclosure through discovery or any other process and shall not be admissible into evidence in any proceeding.

c. Mediation

i. Dispute Submitted to Mediation. If, within 30 days after a Dispute has arisen (the “Negotiation Period”), the parties have not succeeded in negotiating a resolution of the Dispute, the Dispute shall be submitted to mediation.

ii. Appointment of Mediator. The parties will jointly appoint a mutually acceptable mediator. If the parties have been unable to agree upon the appointment of a mediator within 20 days from the conclusion of the Negotiation Period, then the mediator will be selected with the assistance of the Arbitration and Mediation Institute of Ontario Inc.
iii. **Participation in Mediation.** The parties agree to participate in good faith in the mediation and related negotiations for a period of 30 days. The parties may enter into an agreement prior to the mediation to set out the procedures to be used during the mediation.

iv. **Costs of Mediation.** The parties will bear equally the costs of the mediation.

v. **Confidentiality.** The parties will not call the mediator as a witness for any purpose in any proceeding nor will they seek access to any documents prepared for or delivered to the mediator in connection with the mediation or any records or notes of the mediator. Documents produced in the mediation which are not otherwise discoverable and statements made in connection with the mediation shall not be subject to disclosure through discovery or admissible in evidence in any proceeding.

d. **Interim Relief**

The procedures for the resolution of disputes set out in this Article do not preclude recourse to the courts for interim or interlocutory, equitable or legal relief.

e. **Arbitration If Mediation Unsuccessful.**

insert appropriate arbitration provision

f. **Application to Court**

insert appropriate provision

g. **Binding Nature of Award**

insert appropriate provision

h. **Stay of Proceedings**

insert appropriate provision
Appendix B

DISPUTE RESOLUTION PRE-DRAFTING CHECKLIST

1. **Likely Disputes** - What are the disputes that are most likely to arise under the agreement?
   
   • If there is more than one aspect of the agreement that could give rise to a dispute, consider each aspect separately - is the same dispute resolution mechanism appropriate for each class of dispute?

2. **Complainant or Respondent** - Is my client more likely to be the complainant or the respondent if a dispute arises?

3. **Importance and Cost** - How important is the dispute likely to be to my client’s business? Will it be more or less important to the other party or parties? What degree of cost does resolution of the dispute warrant?

4. **Relationship** - What is the nature of the relationship between the parties? Will they have an ongoing relationship or is the agreement a “one-time” transaction?

5. **Frequency** - How often will this dispute arise?

6. **Expediency** - How important is it (a) to resolve this dispute quickly and (b) to ensure that the dispute is fully adjudicated?
   
   • These are not mutually exclusive goals
   
   • Will the parties have the same view on this issue?

7. **Inherent Advantages of Respective Positions of the Parties** - Are there any “imbalances” that need to be addressed by the dispute resolution procedure? For example, do the parties have equal access to the evidence relevant to the determination of the dispute?

8. **Expertise** - Is any special expertise (for example, legal, technical, financial, etc.) needed to decide the dispute? Should the adjudicator or mediator be required to have this expertise?
9. **Special Commitments** - Are there any industry or client practices or codes of conduct that determine the nature of the dispute resolution procedure?

10. **Number of Parties** - How many parties will there be to the dispute?

11. **Nationality of Parties** - Will any party to the dispute be a non-Canadian?
   
   • If so, is the party a foreign state? [need to consider waiver of sovereign immunity]
   
   • Is the party a national of a country that has ratified the New York Convention? [some notable exceptions are Brazil and Taiwan]
GC 8.1 AUTHORITY OF THE CONSULTANT

8.1.1 Differences between the parties to the Contract as to the interpretation, application or administration of the Contract or any failure to agree where agreement between the parties is called for, herein collectively called disputes, which are not resolved in the first instance by findings of the Consultant as provided in GC 2.2 - ROLE OF THE CONSULTANT, shall be settled in accordance with the requirements of Part 8 of the General Conditions – DISPUTE RESOLUTION.

8.1.2 If a dispute arises under the Contract in respect of a matter in which the Consultant has no authority under the Contract to make a finding, the procedures set out in paragraph 8.1.3 and paragraphs 8.2.3 to 8.2.8 of GC 8.2 - NEGOTIATION, MEDIATION, AND ARBITRATION, and in GC 8.3 - RETENTION OF RIGHTS apply to that dispute with the necessary changes to detail as may be required.

8.1.3 If a dispute is not resolved promptly, the Consultant shall give such instructions as in the Consultant’s opinion are necessary for the proper performance of the Work and to prevent delays pending settlement of the dispute. The parties shall act immediately according to such instructions, it being understood that by so doing neither party will jeopardize any claim the party may have. If it is subsequently determined that such instructions were in error or at variance with the Contract Documents, the Owner shall pay the Contractor costs incurred by the Contractor in carrying out such instructions which the Contractor was required to do beyond what the Contract Documents correctly understood and interpreted would have required, including costs resulting from interruption of the Work.

GC 8.2 NEGOTIATION, MEDIATION, AND ARBITRATION

8.2.1 In accordance with the latest edition of the Rules for Mediation of CCDC 2 Construction Disputes, the parties shall appoint a Project Mediator

.1 within 30 days after the Contract was awarded, or

.2 if the parties neglected to make an appointment within the 30 day period, within 15 days after either party by notice in writing requests that the Project Mediator be appointed.
8.2.2 A party shall be conclusively deemed to have accepted a finding of the Consultant under GC 2.2- ROLE OF THE CONSULTANT and to have expressly waived and released the other party from any claims in respect of the particular matter dealt with in that finding unless, within 15 Working Days after receipt of that finding, the party sends a notice in writing of dispute to the other party and to the Consultant, which contains the particulars of the matter in dispute and the relevant provisions of the Contract Documents. The responding party shall send a notice in writing of reply to the dispute within 10 Working Days after receipt of the notice of dispute setting out particulars of this response and any relevant provisions of the Contract Documents.

8.2.3 The 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.

8.2.4 After a period of 10 Working Days following receipt of a responding party’s notice in writing of reply under paragraph 8.2.2, the parties shall request the Project Mediator to assist the parties to reach agreement on any unresolved dispute. The mediated negotiations shall be conducted in accordance with the latest edition of the Rules for Mediation of CCDC 2 Construction Disputes.

8.2.5 If the dispute has not been resolved within 10 Working Days after the Project Mediator was requested under paragraph 8.2.4 or within such further period agreed by the parties, the Project Mediator shall terminate the mediated negotiations by giving notice in writing to both parties.

8.2.6 By giving a notice in writing to the other party, not later than 10 Working Days after the date of termination of the mediated negotiations under paragraph 8.2.5, either party may refer the dispute to be finally resolved by arbitration under the latest edition of the Rules for Arbitration of CCDC 2 Construction Disputes. The arbitration shall be conducted in the jurisdiction of the Place of the Work.

8.2.7 On expiration of the 10 Working Days, the arbitration agreement under paragraph 8.2.6 is not binding on the parties and, if a notice is not given under paragraph 8.2.6 within the required time, the parties may refer the unresolved dispute to the courts or to any other form of dispute resolution, including arbitration, which they have agreed to use.

8.2.8 If neither party requires by notice in writing given within 10 Working Days of the date of notice requesting arbitration in paragraph 8.2.6 that a dispute be arbitrated immediately all disputes referred to arbitration as provided in paragraph 8.2.6 shall be

1 held in abeyance until

(1) Substantial Performance of the Work,

(2) the Contract has been terminated, or
(3) the Contractor has abandoned the Work, whichever is earlier, and

consolidated into a single arbitration under the rules governing the arbitration under paragraph 8.2.6.

**GC 8.3 RETENTION OF RIGHTS**

8.3.1 It is agreed that no act by either party shall be construed as a renunciation or waiver of any rights or recourses, provided the party has given the notices required under Part 8 of the General Conditions - DISPUTE RESOLUTION and has carried out the instructions as provided in paragraph 8.1.3.

Nothing in Part 8 of the General Conditions - DISPUTE RESOLUTION shall be construed in any way to limit a party from asserting any statutory right to a lien under applicable lien legislation of the jurisdiction of the Place of the Work and the assertion of such right by initiating judicial proceedings is not to be construed as a waiver of any right that party may have under paragraph 8.2.6 to proceed by way of arbitration to adjudicate the merits of the claim upon which such a lien is based.
Appendix C2  
Proposed CCDC 2 – 2003 (Not in Force)  
Part 8 – Dispute Resolution

GC 8.1 AUTHORITY OF THE CONSULTANT

8.1.1 Differences between the parties to the Contract as to the interpretation, application or administration of the Contract or any failure to agree where agreement between the parties is called for, herein collectively called disputes, which are not resolved in the first instance by findings of the Consultant as provided in GC 2.2 - ROLE OF THE CONSULTANT, shall be settled in accordance with the requirements of Part 8 of the General Conditions - DISPUTE RESOLUTION.

8.1.2 If a dispute arises under the Contract in respect of a matter in which the Consultant has no authority under the Contract to make a finding, the procedures set out in paragraph 8.1.3 and paragraphs 8.2.3 to 8.2.8 of GC 8.2 - NEGOTIATION, MEDIATION, AND ARBITRATION, and in GC 8.3 - RETENTION OF RIGHTS apply to that dispute with the necessary changes to detail as may be required.

8.1.3 If a dispute is not resolved promptly, the Consultant will give such instructions as in the Consultant’s opinion are necessary for the proper performance of the Work and to prevent delays pending settlement of the dispute. The parties shall act immediately according to such instructions, it being understood that by so doing neither party will jeopardize any claim the party may have. If it is subsequently determined that such instructions were in error or at variance with the Contract Documents, the Owner shall pay the Contractor costs incurred by the Contractor in carrying out such instructions which the Contractor was required to do beyond what the Contract Documents correctly understood and interpreted would have required, including costs resulting from interruption of the Work.

GC 8.2 NEGOTIATION, MEDIATION, AND ARBITRATION

8.2.1 In accordance with the latest edition of the Rules for Mediation of Construction Disputes as provided in CCDC 40, the parties shall appoint a Project Mediator

.1 within 20 Working Days after the Contract was awarded, or

.2 if the parties neglected to make an appointment within the 20 Working Days, within 10 Working Days after either party by Notice in Writing requests that the Project Mediator be appointed.

8.2.2 A party shall be conclusively deemed to have accepted a finding of the Consultant under GC 22 - ROLE OF THE CONSULTANT and to have expressly waived and released the
other party from any claims in respect of the particular matter dealt with in that finding unless, within 15 Working Days after receipt of that finding, the party sends a Notice in Writing of dispute to the other party and to the Consultant, which contains the particulars of the matter in dispute and the relevant provisions of the Contract Documents. The responding party shall send a Notice in Writing of reply to the dispute within 10 Working Days after receipt of such Notice in Writing setting out particulars of this response and any relevant provisions of the Contract Documents.

8.2.3 The 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.

8.2.4 After a period of 10 Working Days following receipt of a responding party’s Notice in Writing of reply under paragraph 8.2.2, the parties shall request the Project Mediator to assist the parties to reach agreement on any unresolved dispute. The mediated negotiations shall be conducted in accordance with the latest edition of the Rules for Mediation of Construction Disputes as provided in CCDC 40.

8.2.5 If the dispute has not been resolved within 10 Working Days after the Project Mediator was requested under paragraph 8.2.4 or within such further period agreed by the parties, the Project Mediator shall terminate the mediated negotiations by giving Notice in Writing to the Owner, the Contractor and the Consultant.

8.2.6 By giving a Notice in Writing to the other party and the Consultant, not later than 10 Working Days after the date of termination of the mediated negotiations under paragraph 8.2.5, either party may refer the dispute to be finally resolved by arbitration under the latest edition of the Rules for Arbitration of Construction Disputes as provided in CCDC 40. The arbitration shall be conducted in the jurisdiction of the Place of the Work.

8.2.7 On expiration of the 10 Working Days, the arbitration agreement under paragraph 8.2.6 is not binding on the parties and, if a Notice in Writing is not given under paragraph 8.2.6 within the required time, the parties may refer the unresolved dispute to the courts or to any other form of dispute resolution, including arbitration, which they have agreed to use.

8.2.8 If neither party requires by Notice in Writing, given within 10 Working Days of the date of Notice in Writing requesting arbitration in paragraph 8.2.6, that a dispute be arbitrated immediately, all disputes referred to arbitration as provided in paragraph 8.2.6 shall be held in abeyance until

(1) Substantial Performance, of the Work,

(2) the Contract has been terminated, or

(3) the Contractor has abandoned the Work,
whichever is earlier, and

.2 consolidated into a single arbitration under the rules governing the arbitration under paragraph 8.2.6.

**GC 8.3 RETENTION OF RIGHTS**

8.3.1 It is agreed that no act by either party shall be construed as a renunciation or waiver of any rights or recourses, provided the party has given the *Notice in Writing* required under Part 8 of the General Conditions - DISPUTE RESOLUTION and has carried out the instructions as provided in paragraph 8.1.3.

8.3.2 Nothing in Part 8 of the General Conditions - DISPUTE RESOLUTION shall be construed in any way to limit a party from asserting any statutory right to a lien under applicable lien legislation of the jurisdiction of the *Place of the Work* and the assertion of such right by initiating judicial proceedings is not to be construed as a waiver of any right that party may have under paragraph 8.2.6 to proceed by way of arbitration to adjudicate the merits of the claim upon which such a lien is based.
APPENDIX D

CCDC 40

MEDIATION AND ARBITRATION RULES