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ARBITRATION CLAUSES IN CONSTRUCTION CONTRACTS: DRAFTING CONSIDERATIONS

It is now common for the parties to a construction contract to resolve their disputes by arbitration. Arbitration is a private binding dispute resolution method in which the parties have the flexibility to tailor the proceeding for the resolution of the matter, including choosing the person that will decide the matter (the arbitrator) and the rules governing the proceeding. Parties may only submit their dispute to arbitration by agreement. This agreement is often provided through an arbitration clause included in the construction contract between the parties. Although the parties may not be thinking about disputes before the contract even starts, to ensure a smooth arbitration of the dispute, the parties should give due thought to the arbitration clause when negotiating the terms of the contract.

Arbitration is a preferred method of dispute resolution in the construction industry because it has many advantages over litigation. One advantage is confidentiality. Unlike court proceedings, arbitrations are conducted in private. Another advantage is the ability to select the arbitrator. The parties may tailor the selection to the dispute at hand and choose an arbitrator with expertise on the matter. Further, the parties may also select the rules that will govern the process. In general, the rules of evidence in arbitration may be more lenient and may allow reliance on evidence which might not be admissible in court. That said, the parties and the arbitrator remain required to abide by the fundamental principles of fairness, including the provision of required notices and rendering of an unbiased decision.

In an arbitration, the parties must pay for the arbitrator and often an administrative fee. This contrasts with the state providing access to judges and courthouses at a nominal cost. Despite this, arbitrations are usually quicker and less costly than resorting to the court.

When drafting or reviewing an arbitration clause, some of the questions that the parties should ask themselves are the following:

- Should arbitration of disputes be permissive or mandatory?
- What should the scope of the arbitration be?
- Should the arbitration proceeding be administered by an arbitration institution?
- What should the rules governing the arbitration proceeding be?
- Should there be any preliminary steps that must be taken before starting an arbitration?
- How should the costs be allocated?

To ensure that arbitration of disputes is mandatory, the parties should state that clearly in the arbitration clause. To create the obligation to submit a dispute to arbitration use the words "shall", "will" or "must" as opposed to the word "may". If, however, the parties choose to draft the clause as permissive, and the parties decide to proceed with arbitration of the dispute, then the resolution of the dispute through arbitration becomes mandatory.

The parties should clearly express what disputes the parties agree to resolve through arbitration. Uncertainty

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about the scope of the arbitration clause may lead to disagreements over whether a dispute falls within the scope of the arbitration clause, and thus, may add time and cost to the parties' resolution of the dispute. One way to avoid such disagreements is to provide that all disputes arising in relation to the construction contract will be submitted to arbitration for resolution. If a narrower scope is preferred by the parties, then the parties should be very specific about what they want included within the scope of the arbitration clause.

Parties may choose that an arbitration institution, such as the Vancouver International Arbitration Centre, administer the arbitration. Such an institution is engaged to facilitate the process of the arbitration by providing administrative assistance, including the handling of payment of arbitrator's fees and disbursements, scheduling, arranging hearing rooms, and by providing guidelines and other resources. It may also assist with the selection of the arbitrator by providing a list of experienced arbitrators with expertise on the subject of the dispute. All these services will be provided in exchange for a fee. To avoid the institution's fee, the parties may choose to administer the arbitration themselves, however, this may add delay and additional expenses.

An arbitration clause should specify the rules that will govern the arbitration proceeding. If the arbitration is administered by an arbitration institution, the institution's procedural rules will generally apply. The parties may develop their own set of rules; however, this is to be discouraged as it can lead to further disagreement, inconsistencies in the rules, and consequent delays and costs. An example of rules for arbitration can be found in the dispute resolution clause of some of the CCDC standard construction contracts, which refers to the rules provided in the Standard Construction Document CCDC 40 Rule for Mediation and Arbitration of Construction Disputes.

A dispute resolution clause in a contract may provide that preliminary steps are first taken before the parties may submit their dispute to arbitration. The pre-arbitration steps may require that the parties engage in amicable negotiations to find a resolution to the disagreement or that they mediate the dispute. These stages are intended to pursue a prompt resolution of the dispute that avoids a costly and lengthy arbitration proceeding. These pre-arbitration stages may create difficulties as well. They can delay the resolution of the dispute, in cases where the parties are entrenched in their positions, making the negotiation or mediation of the dispute a waste of time. They can also create uncertainty as to the jurisdiction of the arbitrator as they raise the question of whether a party may commence arbitration proceedings without complying with the provisions regarding negotiation and mediation. If the parties decide to include pre-arbitration steps, the dispute resolution provision should be clear and concise. Some guiding rules are as follows: set out clear timelines for each step, be specific about what the step requires (for example, avoid vague language, such as, "negotiate in good faith"), and if the intention is to make a step a condition precedent to arbitration, state that clearly.

Finally, regarding the allocation of costs, the parties may provide that each party will bear their own costs (including the administrative fee of the arbitration institution, arbitrator's fees, and legal counsel's fees and expenses) or leave the allocation of costs to be determined by the arbitrator once a decision in respect of the dispute is made.

If an arbitration clause is thoughtful, expresses the parties' intentions and preferences, and is clear, the proceeding is more likely to be fast and effective and attract less costs. Contracting parties will be well advised to draft carefully and do not hesitate to seek legal counsel, when needed.

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This article is intended for the general information of organizations in British Columbia. If your organization has specific issues or concerns relating to the matters discussed in this article, please consult a legal advisor.

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