Mandatory Adjudication: What Can Ontario's Construction Industry Expect?

September 23, 2019

On October 1, 2019 Ontario will implement the final phase of amendments to modernize and update its *Construction Act* (Act). One of the key amendments is implementation of a mandatory dispute adjudication regime that allows parties to refer course of construction disputes to mandatory binding adjudication. Upon referral of a dispute to adjudication the selected adjudicator is empowered to issue a legally binding determination on the parties until such time as the dispute is otherwise determined by a court, arbitrator, or by agreement. The main goal of the system is to resolve project payment disputes, maintain project cash flow, and keep construction projects progressing towards completion. These goals are achieved via the system's short turnaround times, which, as legislated, require final determination of a dispute (depending on deadlines for response to the initial claim) within roughly two months from the date when adjudication is first initiated.

Ontario has modelled this regime after the United Kingdom's own construction dispute resolution system which was established in 1998. Like the Ontario regime the U.K. system also features binding interim determinations and quick turnaround times, and since being established it has been generally accepted by the U.K. construction industry. Moreover, after twenty years of implementation the system remains in regular use and averages around 1,500 disputes annually. The system has been praised as effectively resolving disputes at a lower cost than litigation or arbitration, and its implementation has coincided with a reduction in the volume of construction litigation. Since implementation of mandatory adjudication the annual number of claims in the London Technology and Construction Court dropped by roughly 36 per cent.[1]

Notwithstanding these successes, the system has also drawn criticism and faced operational challenges. One such criticism focuses on the system's short turnaround times, which have the potential to compromise the quality of submissions and evidence provided to adjudicators. This has spurred critique of the system as sacrificing the rendering of correct decisions in favor of quick results.[2] Moreover, abuses of the U.K. system have also been reported. Serial claimants have been noted to repeatedly refer the same (or substantially the same) dispute to adjudication, while other claimants have been seen to ambush respondents by referring complex claims, prepared well in advance, to adjudication and requiring unsuspecting respondents to defend themselves within the confines of the system's short turnaround times.

Mandatory adjudication will hopefully provide an important tool for Ontario's construction industry to quickly resolve course of construction disputes. Coupled with the Act's prompt payment amendments, this should improve financing along the contract pyramids of Ontario projects. Ideally, the system will be accepted in Ontario, as it has been in the U.K., and Ontario's construction industry will enjoy similar benefits, however, to preserve the value of the system adjudicators, and the Ontario legislature, will need to guard against abuses and address potential operational challenges that may arise.

[1] Nicholas Gould and Charlene Linneman, "Ten Years on: Review of Adjudication in the United Kingdom" (2008) 134:3 J of Professional Issues in Engineering Education & Practice at 300.

[2] John G Davies, "Alternatives to the Alternatives: A review of ADR Procedures Currently Available to the Construction Industry in Canada" (2010) 91 CLR (3rd) 6 (WL) page 7

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