How Arbitration and Mediation Affects Condominium Repair Projects

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A large proportion of the condominium housing stock is reaching an age that will require substantial capital outlay to make repairs and replacement of major building systems and components. Repair contracts in the order of $1,000,000 are becoming common and repairs of that order of magnitude typically benefit from professional administration of industry-recognized contracts. No longer should a purchase order or one-page contractor's quote be considered adequate. Formal contracts prepared by project management and engineering consultants are becoming compulsory.

Many condominium repair contracts, at least those prepared by consultants, use standard construction documents prepared by the Canadian Construction Documents Committee (CCDC) as the basis for agreements between the condominium and the contractor. A commonly employed form of agreement is the CCDC 2 Stipulated Price Contract.

These contract forms have been prepared by a committee of representatives from all aspects of construction including consulting engineers, contractors, specification writers, lawyers, and architects. As a consensus product of those bodies, those contracts represent a variety of interests, including, sensibly, what to do if the contract goes awry. Thus, there are alternative dispute resolution (ADR) clauses in the General Conditions to the CCDC 2 contract (alternative dispute resolution, being an alternative to litigation).

It is likely that any of us, whether we are members of a Board of Directors, a contractor, or a consultant, will end up in disputed contract at some time. It is therefore important to understand the ADR terms in the CCDC 2 form of agreement to deal with the dispute resolution process effectively.

Here's a synopsis of the requirements of the ADR process and some of the pitfalls to avoid.

Appointment of a Project Mediator

Did you know that the General Conditions (GCs) in the CCDC 2 Contract require that a Project Mediator be appointed within 30 days of Contract award? Never done that you say? Not to worry, if a Project Mediator is not appointed within the first 30 days, GC 8.2 says you appoint a mediator if one of the parties, (Contractor or Condominium) requests that one be appointed. Then you have 15 days to find one you can agree on. While CG 8.2 goes on at length about the process after a Project Mediator is appointed, it doesn't say what to do if one is not appointed. Presumably if you don't want to mediate, you sue; but then it should be no surprise if the court sends you right back to Mediation anyway, so you may as well appoint a Project Mediator at the outset.

The Consultant's role

The Consultant and the Project Mediator are different people but the according to the CCDC 2 contract conditions, first arbitrator of the Contract is the Consultant (GC 2.2.6). The Consultant, when asked in writing by either party to rule on a claim, must give a finding within "a reasonable period of time". Once a dispute is identified and a "finding" has been made by the Consultant, either party has 15 working days to formally disagree with that "finding". If the finding is not refuted within those 15 days, the parties to the contract are deemed to have agreed with the Consultant's "finding" and the finding is final.

What if you don't agree with the Consultant's finding?

Within 15 working days of the "finding" by the Consultant, the disagreeing party must write out the basis of the dispute, citing the matters in dispute and the Contract provisions on which they rely and then send it to the other party and the Consultant.

Then the other party has 10 days to respond in kind. This means that within 25 working days of a consultant finding, both sides in the dispute must have declared their positions and supported those positions with contract-based rationale. Meanwhile, other Work of the Contract is supposed to be continuing, progress claims processed, payments made, etc. as though there is no dispute.

CCDC 2 does not say what should happen if there is no response to a properly presented challenge of a Consultant's finding. Presumably, the challenger could go to court to have the respondent forced to comply with the terms of the Contract.

Referral to a Project Mediator

If there is a properly executed challenge and response to the Consultant's finding, are supposed to negotiate for 10 working days before you ask that the Project Mediator aid in resolving the dispute.

The Project Mediator then has 10 working days to resolve the dispute - which means that, altogether, within 45 working days (about two months) of a Consultant's "finding", the matter is to be resolved by the Project Mediator – case closed.

There is one major hindrance that is very difficult to

overcome. While the CCDC 2 requires that both parties act expeditiously and in good faith to attempt to settle the disputed matter, anxiety levels make it questionable whether there will be the temperament for resolution. The CCDC 2 mediation process forces parties to generate documentary support, rehearse, and reinforce their positions at a pace that may fuel the anxiety and thus the conflict. Some litigators believe that the fast-track ADR process simply adds a layer of cost to what is already an expensive legal process. They may be right.

It should be noted that the 45-working day period is an aggregation of what may be termed "opportunity" windows and has no relationship to the 45-calendar day construction lien period. Construction dispute resolution and construction liens are two separate issues.

If you can't settle it, someone else will

If you don't resolve the dispute in those 45 days leading to the conclusion of mediation you can request immediate arbitration or you can let the matter rest until the end of the project. If you want to finally settle the matter immediately, you have 10 working days to request that an arbitrator be appointed. If you wish to wait, you can hold all disputes in abeyance until the earliest of: Substantial Performance of the Work, termination of the Contract, or abandonment of the Contract, then refer the collective disputes to an Arbitrator. Arbitrators can be chosen from experts in the matter under dispute or from the legal community versed in contract law. Rosters of good arbitrators are available.

It is important to note that an acting Project Mediator is not allowed to act as the Arbitrator. This is because, during the mediation process, the mediator is likely to become privy to information that could bias an Arbitrator's decision. It wouldn't be fair and fairness is one of the principal obligations of an arbitrator.

Typically, there are pre-established rules for the arbitration and for the Arbitrator to employ as a guide to making the finding. Those rules may be contract-specific or generally adopted rules from acknowledged ADR bodies, but the rules must be agreed at the outset.

Not all disputes can be settled quickly. The CCDC 2 document recognizes that disputes may not be resolved using the prescribed path and allows parties to re-enter negotiations, mediation or arbitration at any time and any process, including any ADR process or court.

What does this mean for Consultants?

To begin with, the Consultant's "finding" is by no means final. Boards of Directors often believe that the Consultant makes the final decisions.

Increased incidence of disputes also means that contractual arrangements between the Consultants and Condominiums should consider that disputes may arise and consulting fee and scope of service arrangements should be geared to handle the extra level of effort required to prepare technical briefs and attend mediation/arbitration meetings.

While Consultants are required by CCDC 2- GC 2.2.6 to act with complete impartiality in their role as the first arbiter of the Contract, Owners may attempt to pressure Consultants to deny claims for extra Work - but be careful. CCDC 2 Contracts stipulate that if the Consultant orders disputed Work to be performed at no extra cost and the final finding through the ADR or other process is that there should be an extra to the contract, the Contractor is required to be paid for the extra Work. Some owners may attempt to recover that extra cost from the Consultant. Similarly, if the Consultant finds reasonable middle ground within the terms of the Contract, they could be at risk of being dismissed or sued by an aggrieved Owner. Consultants need to protect themselves against such action. Unfortunately, nowhere in the CCDC 2 agreement is there protection for the Consultant against such action. This is in contrast to typical ADR agreements where there is such protection for arbitrators and mediators.

Consultants should consider insisting that a Project Mediator be appointed/retained as a provision in the General Requirements of the Contract for Work.

What does it mean to Contractors?

Contractors should be prepared to propose Project Mediators and share in the cost of the appointed Project Mediator.

Contractors also need to learn how to manage an effect dispute resolution process while the Work of the Contract is ongoing. Contractors understand that cost-effective bids win projects, but good reputation gets them invited to bid in the first place. It's tough for a Contractor to maintain a good relationship with an Owner or Consultant while embroiled in a poorly handled dispute. Contractors must factor the value of a good relationship into any dispute because once the dispute is finally resolved, the nature of the relationship between the parties may be all that remains.

What does it mean to Owners?

Owners need to accept the role of the Consultant as set out in the CCDC 2 Contract and consider reasonable indemnification clauses in the Consultant's service agreements. Owners need to understand that disputes can arise and must commit to resolution rather than confrontation.

Owners must also weigh the value of their principles against the cost of the dispute. We are all aware of people who will argue minor details on the basis of the "principal of the thing". Condominium Boards must answer to the owners. That responsibility should consider that condominiums are businesses, members of communities, and participants in an active construction and repair industry. Again, reputation may be all that survives the dispute.

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