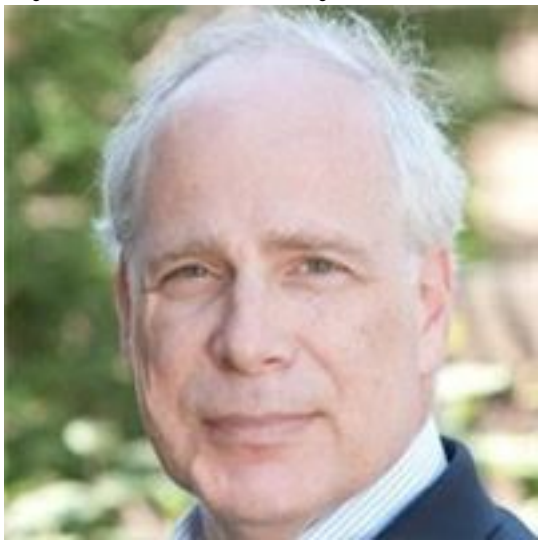
ADR

Complexity of construction disputes makes them perfect for ADR

By AdvocateDaily.com Staff



The complexity of construction disputes makes them prime candidates for alternative dispute resolution (ADR) methods, says Toronto lawyer and arbitrator Marvin Huberman (http://www.marvinhuberman.com/).

Huberman, the editor of *A Practitioner's Guide to Commercial Arbitration (https://www.irwinlaw.com/titles/practitioner%E2%80%99s-guide-commercial-arbitration)*, says construction disputes cover a range of issues across the spectrum of a project, including problems with the bidding process, incomplete or faulty designs, ambiguous contract clauses, disagreements over scope and cost overruns among others.

"They frequently involve complex factual and legal matrices, with different points of law and procedures, and specialized forms of contract. And there are often voluminous documents for examination and consideration, over and above what you would expect in other types of disputes," he

tells AdvocateDaily.com (http://www.advocatedaily.com/).

All that adds up to the potential for more complex, time-consuming and expensive litigation than typical commercial conflicts, Huberman says.

“Therefore, parties are looking to alternative dispute resolution processes as a means to resolve these matters in an effective way,” he says, explaining that there are three main options for parties to consider.

“Any one of these methods can be used alone or in combination to effectively manage construction disputes,” Huberman says.

Mediation

This non-binding process sees a neutral third party assisting the adversaries to reach a settlement.

“The emphasis is on trying to achieve a win-win conclusion, where both parties can feel satisfied with the outcome. In other words, it’s a facilitated negotiation,” Huberman says, adding that there are wide variations in approach, depending on the style of the mediator handling the session.

“You can have mediators who are facilitative, evaluative, directive, transformative or problem-solving, and many times, a particular mediator will employ one or more of those processes during a particular session,” he says.

“Mediation is chosen because it is usually easier and faster than a traditional arbitration hearing. The costs are generally lower, and the emphasis on a win-win solution also helps preserve the ongoing relationship and gives the parties control over their dispute and the terms of settlement.”

Adjudication

Later this year, a new mandatory adjudication system for construction disputes in Ontario will take effect, designed to bring a prompt payment regime to the province, Huberman says. The interim dispute resolution process is a key plank of Bill 142, the *Construction Lien Amendment Act (http://ontla.on.ca/web/bills/bills_detail.do?locale=en&Intranet=&BillID=4957),* passed by the legislature in late 2017.

“Owners and contractors need to be aware of its imminent implementation,” Huberman says.

Cases will be heard by adjudicators registered with a body designated by the provincial government, who must turn around written reasons within 30 days of receiving documents from the party initiating the hearing, he says. Adjudicator’s decisions are binding and can be enforced by court order, while appeals can only occur with leave from Ontario’s Divisional Court.

“The idea is to provide a quicker, more cost-effective and streamlined approach to dispute resolution by involving experienced construction adjudicators,” Huberman says. “We’ll see whether or not it fulfils that promise, but it will depend on the quality and experience of the people they get to hear the cases.”

Arbitration

“I’m very passionate about making arbitration an effective tool for the cost-efficient and timely resolution of these kinds of disputes,” says Huberman, adding that practitioners in the area recently received a boost when an International Chamber of Commerce’s (ICC) commission released its report (https://iccwbo.org/publication/construction-industry-arbitrations-report-icc-commission-arbitration-adr/) on arbitration in the construction industry.

Although intended primarily for judges operating under the ICC's own rules, he says the report's recommendations, tools and techniques offer valuable guidelines for parties and arbitrators proceeding with construction arbitrations under other jurisdictions.

The ICC report highlights the importance of case management in the process, advising the parties to meet for a conference before the issuance of the first procedural order and timetable, which sets out the roadmap for everything that follows in the arbitration.

Parties should also consider the pros and cons of a bifurcated hearing, such as dividing proceedings between the issues of liability, and then the quantum of damages if necessary, according to the report.

"The idea is that people should apply their minds to the question of whether splitting the proceedings is likely to expedite or delay things, and then decide if it will be sensible and cost-effective to proceed in that way," Huberman says.

A number of the report's recommendations concern appropriate use of experts in construction cases, he says.

"In some cases, experts may not even be required. There's no point wasting time and money obtaining reports if you can prove the relevant issues in other ways," Huberman says. "You can also limit the scope of disagreements between experts by having them discuss the issues in advance."

In addition, the report recommends that factual witnesses are generally heard before the experts so that the latter can modify or withdraw conclusions in response to admissions or denials by the former.

"Lastly, the report says that the parties are free to come up with settlement or sealed offers at any time in the proceeding, and introduces a new ICC procedure for their introduction, which may help to expedite a resolution," Huberman says.

To Read More Marvin Huberman Posts Click Here (/profile/marvin-huberman.html)

AdvocatePlus

- NearZero Discovery strengthens its partnership with Venio Systems, adding VenioOne OnDemand and becoming a Venio reseller (/NearZero-Discovery-nearzero-discovery-strengthens-its-partnership-with-venio-systems-adding-venioone-ondemand-and-becoming-a-venio-reseller.html)
- Canada: how to manage unresponsive employees on leave (/Littler-LLP-Sari-Springer--Harrison-Brown-canada-how-to-manage-unresponsive-employees-on-leave.html)
- Ontario, Canada: court takes on employer termination conduct (/Littler-LLP-Rhonda-Levy--George-Vassos-ontario-canada-court-takes-on-employer-termination-conduct.html)
- Court of Appeal affirms that employees in British Columbia, Canada must continue to meet a high standard to establish "family status" discrimination (/Littler-LLP-Rhonda-Levy--Sari-Springer-court-of-appeal-affirms-that-employees-in-british-columbia-canada-must-continue-to-meet-a-high-standard-to-establish-family-status-discrimination.html)
- Littler Global Guide - Canada - Q1 2019 (/Littler-LLP-Monty-Verlint--Rhonda-Levy-littler-global-guide---canada---q1-2019.html)

- Ontario 2019 Budget & Justice: FOLA applauds some measures, has some concerns (/Federation-of-Ontario-Law-Associations-Katie-W.-Robinette-ontario-2019-budget---justice-fola-applauds-some-measures-has-some-concerns.html)

View more articles > (/advocate-wire.html)

Lawyer Directory

Select Area of Practice

View Lawyers

(http://www.mkdinternational.com/)

(https://www.separation.ca/blog/)

(https://greystones-health-school-c30e.thinkific.com/)

(https://jdlawyers.ca)

Privacy (/privacy.html)

▲ RETURN TO TOP