Arbitration and Construction Liens 1997

ARBITRATION AND CONSTRUCTION LIENS

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A. INTRODUCTION

[1] In June of 1995, a preliminary discussion paper titled "Builders'/Mechanics' Lien Acts: Interaction with Arbitration Procedures" was prepared by the Construction Section of the Canadian Bar Association. This paper reviewed three general areas of concern in terms of the interrelationship of the statutory remedies created by lien legislation and arbitration provisions contained in construction contracts, namely:

a) the possibility of an owner, contractor, supplier or labourer being required to undertake two procedural courses of action simultaneously (i.e. registering a lien or commencing an action in order to protect lien rights while being forced to arbitrate other issues involving the same contract or project);

b) the possibility of conflict between the procedural requirements of the relevant lien legislation and the arbitration agreement and the potential for a required procedural step under either process to prejudice a party's rights under the other. Related to this concern is the potential for one of the parties to the dispute to intentionally adopt a strategy of using one process to impair or delay the other party's rights or remedies under the other;

c) the possibility of the parties becoming involved in preliminary applications or litigation over the interrelationship of the two processes or the paramountcy of one process over the other resulting in additional cost and delay.

[2] The paper concluded that these concerns appeared to justify further study regarding possible legislative amendments in order to facilitate the arbitration process in a construction context. The paper recommended the formation of a Working Group of the Uniform Law Conference of Canada to identify legislative options and to make recommendations.

[3] This paper has been prepared for consideration at the 1997 Annual Meeting of the Uniform Law Conference of Canada. **(1)** It examines lien and arbitration legislation as well as recent court decisions from across Canada and discusses the policy choices which must be considered in order to successfully integrate arbitration with the formal court process which

must be resorted to in the enforcement of the statutory rights and remedies created by lien legislation.

B. OVERVIEW OF CONFLICTING POLICY OBJECTIVES

[4] In a typical construction project, an owner contracts with a general contractor, who subcontracts with trade contractors, who, in turn, subcontract further with material suppliers and labourers. There are routinely a multiplicity of parties and many separate contracts involved. There is often a great disparity in the bargaining power of those at the bottom of the construction pyramid from those at the top. In addition, those who actually do the work and supply the materials to construct the improvement will usually have no privity of contract with the owner or lender who is the source of the funding from which they hope to be paid.

[5] The law of contract has been recognized by Canadian legislators to be inadequate to regulate and protect the rights and obligations of the various parties involved in a construction project. The result has been the creation of extraordinary *in rem* remedies by statute, in order to permit a labourer, contractor or material supplier to register and enforce a charge against the title to the project and/or the funds owing or paid for its construction and permitting the joinder of all claims relating to the project and/or to the funds into one action, notwithstanding that the claimant will often have no contractual relationship with the owner of the land or the holder of the funds.

[6] To protect the labourers at the bottom of the pyramid, who might otherwise be forced to give up their rights under lien legislation in order to obtain work due to their weak bargaining position, lien statutes across Canada provide that a labourer can not contract out of the protection afforded by the Acts. **(2)** In Ontario, Manitoba, Saskatchewan and Alberta the Acts also provide that the parties to a construction contract can not contract out of the provisions of the legislation and that any term in a contract which conflicts with the statute is null and void. **(3)** In short, the legislatures and the courts have acknowledged that the law of contract provides an inadequate framework for the resolution of disputes involving construction contracts or improvements and have intervened to police the actions of the parties and to level the playing field.

[7] A primary policy objective intended to be fostered by the legislation passed to facilitate domestic and international arbitration is commercial certainty in the law and the encouragement that this gives to trade and commerce. This policy consideration becomes even more important in international trade and commerce, where contractual parties headquartered in different countries will agree to arbitration at a neutral location under standard rules in order to avoid the legal uncertainties and/or the perceived bias which might result from a trial in a foreign jurisdiction under foreign procedural rules. **(4)**

[8] Arbitration also has several potential advantages over the traditional court process. These can include:

a) reduced delay and expense;

b) the ability to resolve the dispute privately;

c) the ability to choose a decision-maker with technical or scientific training or experience relating to the subject matter of the dispute;

d) the recovery of the costs of the arbitration on a scale agreed to by the parties rather than as set by a court tariff;

e) the ability of the parties to make up their own procedural and evidenciary rules;

f) an improved opportunity to maintain a good long-term working relationship at the conclusion of the process.

[9] The attitude demonstrated by the courts and legislatures towards contractual arbitration provisions, however, is directly opposite to the protective and interventionist approach reflected in construction/builders' liens legislation. Where the parties to a contract have provided for the resolution of disputes under the contract through arbitration, the courts and legislatures have adopted a *laisser faire* approach based upon freedom of contract. **(5)** In addition, the legislatures and courts have gone further and have deferred to the parties' "intention" by declining jurisdiction over contractual disputes of a nature which the parties have agreed to submit to arbitration. **(6)** The brief discussion which follows highlights some of the problems caused by the interaction of the conflicting policies outlined above.

C. PROCEDURAL AND SUBSTANTIVE CONFLICTS

[10] Where a dispute arises between a contractor and an owner, or more particularly between the general contractor and its subcontractors, materialmen or labourers, procedural problems and conflicts can arise. If one of the contracts contains an arbitration clause and the parties to that contract wish to submit the issue of the balance owing for work completed or properly to be charged back for deficiencies in the work to arbitration, then it becomes necessary to resolve many areas of potential or actual conflict between the two processes and the two forums. Specific areas which will be discussed are:

a) the impact of a stay of the court process pending the completion of arbitration on the various statutory limitations peculiar to the registration of liens and the prosecution of lien actions;

b) problems arising out of a multiplicity of parties where all parties are not privy to the arbitration clause;

c) the risk that a step taken in either proceeding might constitute a waiver of rights in the other proceeding;

d) the rules and location of the arbitration hearing;

e) the impact of an arbitration clause upon sureties who may have issued labour and material payment or performance bonds to secure payment or performance by the parties to the construction contract.

D. IDENTIFICATION OF OPTIONS AND RECOMMENDATIONS

a) The impact of a stay of proceedings

[11] In general, the court system seeks to avoid multiplicity of actions in order to save time, minimize expense, achieve a final disposition of all matters as between all affected parties, and reduce the risk of inconsistent results. Where parties to a construction contract have provided for arbitration of disputes relating to the contract, however, whichever party alleges a breach and seeks to obtain a remedy is faced with a dilemma. The party seeking redress must comply with the terms of the arbitration clause included in the contract, while at the same time meeting the statutory time limitations for registration and prosecution of claims included in lien legislation. This has the result of requiring the parties to participate in two hearing processes under different rules and perhaps in two different locations at the same time.

[12] The solution which has been adopted to eliminate this problem where parties to a contract have agreed to refer their disputes to arbitration is to stay any court proceedings until the arbitration has been completed. In the case of a lien however, the imposition of a stay creates unusual complications due to the dual nature of the remedies available to a lien claimant. Where a contractor, subcontractor, material supplier or labourer has not been paid he can take an action for payment or for damages under his contract. He can also pursue the extraordinary *in rem* remedies which attach to his lien. In order to do so, however, a lien claimant is required to meet a strict timetable of dates for the registration of the claim, to commence an action, and in some jurisdictions, to serve the statement of claim and set the lien action down for trial. Most of these time limits are strictly construed and can not be extended. This is the price the legislation exacts for the extraordinary protection afforded by the *in rem* rights provided by the lien.

[13] Arbitration typically only involves the construction or interpretation of a contract in a dispute as between the parties to the contract. Arbitration is therefore a common procedure through which to resolve the matter of the balance owing under the contract, for example. Where a lien action is stayed pending resolution of purely contractual issues, however, there is the potential for the statutory charge created by the legislation to be prejudiced or even

lost due to an inability on the part of the claimant to take some required step to preserve his lien.

[14] It would therefore appear necessary to modify or regulate the stay mandated by arbitration legislation so that the lien is preserved.

[15] Options

1. These matters could be left to be resolved by the parties privately by contract.

2. The matter of ensuring that the stay does not operate so as to prejudice a party's lien rights could be dealt with by application to the court as might be required.

3. Modify the lien legislation to provide that the various time limits set out therein do not run during the period of any stay of proceedings granted to facilitate arbitration.

4. Add a provision to the lien legislation which provides that any stay ordered to permit arbitration shall not operate so as to prohibit the taking of any step required in order to preserve a lien, or to protect the land or money to which it attaches.

[16] **Recommendation**

It is submitted that Option 4 would most closely accord with the expectations of the parties to a construction contract. This is reflected by GC 8.3 of CCDC 2 -1994 which provides for the reservation of any statutory right to a lien, notwithstanding that the

parties have agreed to arbitrate their disputes under the contract. **(7)**

b) Multiplicity of parties

[17] The initial response of trial level courts to the issue of whether a lien action should be stayed pending arbitration was, generally, to permit the lien action to proceed on the basis that the arbitration clause was null and void, inoperative or incapable of being performed **(8)**. These trial judge's decisions were overturned by their respective courts of appeal, however, on the basis that the legislative provisions directing a stay of court proceedings pending the completion of arbitration are mandatory. **(9)**

[18] Mandatory deference to arbitration in construction disputes becomes problematical where third parties who are not privy to the contract containing the arbitration clause are necessary parties or are interested in the subject matter of the dispute. It will be recalled that one of the objectives of lien legislation is to permit a court to deal with the complex web of rights and obligations existing in a typical construction project between the owner,

the design professionals, the general contractor, the subcontractors, material suppliers and workers. One of the peculiarities of lien legislation, therefore, is that it creates *in rem* remedies and rights of action as between parties who are not in privity of contract with each other. Another is that the legislation permits the inclusion of all parties with a claim relating to the project in one action. **(10)** Proceedings to enforce a lien or trust claim under the Acts are therefore constituted somewhat in the nature of a class action with those in each class pro-rating amounts recovered from those above them in the construction pyramid. The Acts generally also permit flexibility with respect to the matter of adding additional parties, in some jurisdictions right up to and even after judgment **(11)**.

[19] The arbitration process, being based in contract, does not provide comparable powers to an arbitrator with respect to third parties and in particular, granting them *in rem* remedies. Where a lien action is stayed, therefore, special consideration must be given by the court to the rights of these third parties who are not parties to the arbitration clause, and to other actions which they may have commenced or will commence while the arbitration process runs its course. The court must also consider the interests of any parties common to the arbitration and these actions who will be required to participate in active proceedings in both forums if the court proceedings are not stayed.

[20] Not surprisingly, judges have arrived at differing solutions to this problem. Some judges have simply permitted the third parties' actions to proceed. Some have ordered temporary stays of the third parties' actions of fixed and limited duration. Others have stayed the third parties' actions through to completion of the arbitration hearing and the release of the arbitrator's award on the basis that the arbitrator's decision might clarify issues relevant to them as well.

[21] An additional issue in some cases is whether the third parties should be held bound by the arbitration clause on the basis that it has been incorporated into their contract by reference. Standard CCDC construction subcontracts typically incorporate the general conditions of the general contract by reference. This provision has been construed restrictively, however, where it was argued that an arbitration clause contained in the general contract was incorporated by reference in a subcontract. **(12)** It is submitted that a common approach should be adopted which balances the interests of the participants in the arbitration with the interests of the third parties who are not party to the arbitration clause.

[22] **Options**

1. Add a provision to the lien legislation making it clear that the third party actions may proceed without reference to a related arbitration which is pending.

2. Add a provision to the lien legislation permitting the third party actions to proceed, but with any party to such an action who is also party to an arbitration involving the same or related issues having the right to apply for a stay in the event of hardship or prejudice.

3. Have the lien legislation permit an application by a party to an arbitration agreement or clause to stay related third party lien or trust actions only for a limited time and to extend this stay from time to time pending the conclusion of the arbitration provided that: i) the arbitration is proceeding expeditiously; ii) the lien(s) claimed in the land or funds are secure and not at risk due to delay; and iii) the third parties are not unreasonably prejudiced.

4. Have the lien legislation provide that all related third party proceedings shall be stayed upon the stay of and concurrent with the stay of the action between the parties to the arbitration agreement.

5. The referring court could be given jurisdiction under lien legislation to add the third parties to the arbitration. **(13)**

6. Add a section to the lien legislation which would provide that an arbitration provision in a general contract would be deemed incorporated by reference in all subcontracts below that contract in the construction pyramid.

[23] **Recommendation**

It is submitted that Option 3 strikes the most appropriate balance between the interests of the arbitrating parties and the third parties. While it is agreed that the parties to the arbitration clause should not be required to participate in ongoing proceedings in two forums at once, it is submitted that the third parties should not suffer prejudice as a result of a stay, nor should they be required to initiate an application to permit them to proceed. Granting a limited stay and then placing the onus of maintaining the stay on the parties to the arbitration will ensure that the arbitration will proceed expeditiously and will not unduly delay or prejudice the "class action" required to resolve all claims with respect to the project. **(14)**

c) Waiver

[24] As the law has developed surrounding the stay of court proceedings pending arbitration, a significant jurisprudence has grown up around the issue of waiver. Numerous applications have been brought over the years with one party or the other arguing that a step taken in a lien action amounts to a binding waiver of rights under the arbitration clause. **(15)** In a construction dispute, there is a serious risk that a party will be taken to have waived its right to arbitration, either unintentionally, or because of a step taken under the Acts to preserve a lien or the right to continue with an action to enforce it. There are decided authorities which hold that the commencement of a lien action, *simpliciter,* will not constitute a waiver by the Plaintiff of its right to take the dispute to arbitration. **(16)** Permitting the commencement of the action, however, does not resolve the Plaintiff's problem.

[25] Typically under lien legislation, it is not only the time permitted for a Plaintiff to

commence a lien action, but also the time to serve the claim, and to set the matter down for trial which are controlled by the legislation. These time periods are brief and some of them can not be extended by judge's order. This creates the risk that by taking such a required step a Plaintiff might be held to have waived its right to arbitration. It is submitted, therefore, that the existing law unnecessarily leaves open the possibility that a party will waive its rights through inadvertence or because of the conflict in the procedural requirements of the two forums.

[26] **Options**

1. This issue could be left to be resolved by judges on application, applying the existing test: "To constitute a waiver, the act or step taken must be in furtherance of the legal proceedings and not an attempt to suppress them."

2. Provisions could be added to lien legislation to provide that the taking of a required step by a party under lien legislation will not constitute a waiver of the party's right to arbitrate the dispute. **(17)**

3. Arbitration legislation could be amended to provide that any waiver of an arbitration provision must be intentional and in writing.

[27] **Recommendation**

It is submitted that Option 2 represents a reasonable balance of the procedural requirements of the two forums in a construction setting. Such a provision would represent a necessary corollary to the recommendation made with respect to issue **a)** discussed above.

d) Hearing procedure and rules

[28] The arbitral process is principally defined by the terms of the submission which include the rules adopted by the parties. Because these matters are settled by contract, of necessity they only bind the parties to the arbitration clause or agreement. The arbitration process also does not permit the participation of parties not privy to the arbitration clause or agreement, except by consensus. This can be a serious limitation in a construction dispute due to the multiplicity of parties involved.

[29] Under lien legislation, special provisions permit the joining of all claims and parties required in order to finally dispose of the matters in dispute. Under the Acts, rights are created in lands owned by or funds payable by parties above the lien claimants in the construction pyramid, but with whom the lien claimants are not in privity of contract. It can therefore be seen that third parties will frequently have a direct interest in the outcome of an arbitration, and particularly a determination of the balance owing to the party directly above them in the construction pyramid, but may have no right to participate in the arbitral

process. Given that they are not able to participate, the arbitrator's award will not bind them. The issues decided in the arbitration may therefore require a second determination in the court.

[30] In the case of international arbitrations, the location in which the arbitration is to be conducted can become an issue. It is not unusual to find that the parties have agreed that the arbitration hearing will take place at a location greatly removed from the location of the work. **(18)** Given the "class action" nature of lien proceedings and lien remedies this has the potential to disadvantage claimants at the bottom of the construction pyramid in a situation where ADR provisions from the general contract have been incorporated by reference in all subcontracts and sub-subcontracts relating to the project or improvement.

[31] Such a result is contrary to the usual policy of conducting a hearing, at a location in reasonable proximity to the parties, or where *in rem* remedies are involved at the judicial centre nearest to the subject matter of the dispute. It must be noted, however, that both domestic and international arbitration legislation requires the court to refer the matter to arbitration as agreed by the parties including their choice of jurisdiction, hearing location and choice of law. The policy of permitting the parties' choice of rules, location of the hearing and choice of law would appear to be less justifiable in circumstances where these choices have the potential to impact the rights of many parties who are without the bargaining power to have any real input with respect to the terms of the arbitration provisions to which they become subject when signing their subcontract or sub-subcontract to do work or supply materials to the project.

[32] **Options**

1. Provisions could be added to lien legislation making it mandatory for all arbitrations involving construction contracts and/or builders' liens to be conducted within the jurisdiction where the work is located and under that jurisdiction's **domestic** arbitration legislation.

2. The referring court could be given jurisdiction under lien legislation to supervise the procedure and the location of the hearing.

3. The court could be given jurisdiction to refuse to stay a lien action and to refuse to refer a dispute to arbitration in circumstances where the hearing process or the location of the hearing agreed to by the parties to the arbitration clause would result in prejudice to third parties on a balance of convenience test.

[33] **Recommendation**

Given the strong policy in favour of deferring to arbitration agreements reflected in current domestic and international arbitration legislation, it is submitted that Option 3 is to be preferred. This would do the least violence to the arbitration process adopted by the parties in their contract and would only permit the court to intervene to protect the rights of third

parties where the arbitrating parties actions or their inaction were the cause of potential prejudice to the rights of third parties.

e) Impact on sureties

[34] The general contractor and the major subcontractors may have been required to obtain labour and material payment and performance bonds according to the terms of the owner's invitation for tenders. The performance bond protects against loss due to a failure by the bonded contractor to complete its contract. The labour and material payment bond protects against non-payment by the bonded contractor of those with whom it has subcontracted for the supply of materials or labour. Although they are not a party to the bond, these subcontractors and suppliers are permitted a direct right of action against the surety under the terms of the labour and material payment bond in the event that the bonded contractor defaults in payment.

[35] If the surety pays the claims of these subcontractors and suppliers, it will take an assignment of their contractual and lien rights so that it can pursue recovery of amounts paid under the bond against the defaulting contractor and/or so that it can pursue their *in rem* remedies against the land or against contract funds which might be available. In this case the surety will be "in the shoes" of the claimants whose claims it has paid in so far as their rights under their contracts and their lien rights are concerned.

[36] The surety who has paid claims, therefore, finds itself in the same position as any other third party claimant. That is, the bonded contractor and/or his payor might obtain a stay of any proceedings commenced or continued by the surety pursuant to the assignments obtained from the third parties at the time of the payment of their claims, pending the completion of arbitral proceedings between the bonded contractor and his payor. **(19)**

[37] Alternatively, if the surety is resisting payment of a claim under a labour and material payment bond, and the bonded contractor has agreed to submit disputes under the contract to arbitration, the surety can successfully argue that an action brought against it by a subcontractor or supplier under the bond should be stayed pending completion of the arbitration. **(20)** This again expands the impact of the mandatory stay which must be granted at the request of either of the parties to the contract containing the arbitration clause.

[38] In either case, it must be noted that the surety will not necessarily be bound by the arbitration clause or the outcome of the arbitration. **(21)** Nor will it be entitled to participate in the arbitration, although it may have a direct financial interest in the outcome of the arbitration process if the ability of the bonded contractor to pay an adverse award is in doubt.

[39] It is submitted that the recommendations made above with respect to the issues

already addressed will resolve the problems associated with a surety's action being stayed or where a surety seeks to stay an action taken against it pending the arbitration of a dispute involving the bonded contractor. Additional legislative provisions are required, however, to permit the surety to participate in or even take over conduct of an arbitral proceeding where the surety may be at risk and the bonded contractor has become insolvent or is otherwise unable or unwilling to protect its interests in the arbitration.

[40] **Options**

1. Allow the arbitration to proceed without involvement by the surety, but with the surety not being bound by the arbitrator's award.

2. Permit the surety to participate in the arbitration process at its option provided it agrees to the terms of the submission and agrees to be bound by the result.

3. Require the surety to participate in the arbitration process as though it was a party to the arbitration clause or agreement, so that it will be bound by the result.

[41] **Recommendation**

It is submitted that Option 2 provides the best opportunity to avoid a second hearing in court on the issues in dispute in the arbitration. It also reduces the risk that the surety's position under the bond could be prejudiced by the result of the arbitral process.

E. CONCLUSION

[42] Changes to the *ICAA* and the Model Law to protect lien claimants and their *in rem* rights in the subject matter of an 'international' construction project can not be made, given the multi-jurisdictional nature of the *ICAA*. Consideration must therefore be given to drafting amendments to lien legislation in force in the Canadian provinces and territories.

[43] Lien legislation in the Canadian provinces and territories is not uniform at this date. It may not be possible, therefore, to draft amendments which will satisfy the recommendations set out above while still meshing with the provisions of the various lien Acts. Consideration could be given, however, to drafting a separate Part to be added to the various lien Acts which would deal with such of the recommendations as are capable of being addressed in a common or uniform fashion, given the differences in the Acts.

[44] **Options**

1. Provide the recommendations of the ULCC with respect to the issues canvassed in this paper to the various provinces and territories so that amendments can be considered to the various lien statutes on an *ad hoc* basis.

2. Attempt to draft a uniform Part integrating ADR with the various lien statutes, to be added to the lien statutes currently in force in the provinces and territories.

3. Draft a uniform lien Act to replace the existing statutes in force in the provinces and territories, including provisions integrating the *ICAA* and domestic arbitration legislation with this uniform lien Act.

[45] **Recommendation**

It is submitted that Option 2 has the greatest chance of success at this time. The issues raised in this paper have been before the courts frequently since 1992, including the British Columbia, Alberta, Saskatchewan and Ontario Courts of Appeal. While the drafting of an entire uniform Act might be a suitable long-term objective, it is not clear that a need to enact uniform lien legislation is perceived by provincial and territorial legislators or by the construction industry, at present. The drafting of a separate Part addressing the issues discussed herein could provide a timely solution to the problems raised, while also suggesting a need for uniform lien legislation in general.

[46] It is therefore recommended that the ULCC and the CBA Construction Section attempt to draft such a uniform Part for further consideration.

1. 1 The recommendations contained in this paper are those of the Construction Section of the Canadian Bar Association. The paper has been prepared by the Executive of the National Section with input from Provincial Subsections.

2. 2 Mechanics' Lien Act, R.S.N.B. 1973, c. M-6, s. 6, Mechanics' Lien Act, R.S.N. 1990, c. M-3, s. 3 and s. 4, Mechanics' Lien Act, R.S.N.S. 1989, c. 277, s. 4, Mechanics' Lien Act, R.S.P.E.I. 1988, C. m-4, s. 5, Builders' Lien Act, R.S.B.C. 1979, c. 40, s. 9. The Newfoundland Act and the Nova Scotia Act exclude managers, officers and foremen from this protection. The Newfoundland Act also excludes workers who make more than $50.00 per day. The British Columbia Act excludes workers who make more than $15.00 per day. The New Brunswick Act and the Prince Edward Island Act provide no exceptions to this rule.

3. 3 Construction Lien Act, R.S.O. 1990, c. C-30, s. 4, Builders' Lien Act, R.S.M. 1987, c. B91, s. 11, Builders' Lien Act, S.S. 1984-85-86, c. B-7.1, s. 99, Builders' Lien Act, R.S.A. 1980, c.B-12, s. 3.

4. 4 The policy objectives behind international commercial arbitration legislative schemes are summarized in the reasons of Madame Justice Gerwing in *BWV Investments Ltd. v. Saskferco Products Inc.* (1994), 17 C.L.R. (2d) 165 (Sask. C.A.) as: i) to give effect to the intentions of the parties; ii) to facilitate predictability in the resolution of international disputes, iii) to foster consistency of result between jurisdictions; and iv) thereby to encourage international commercial activity.

5. 5 In Boart Sweden AB v. NYA Stromnes AB (1988), 41 B.L.R. 295 (Ont. H.C.), Campbell J. at pages 302-303 states "Public policy carries me to the consideration which I conclude is paramount having regard to the facts of this case, and that is the very strong public policy of this jurisdiction that where parties have agreed by contract that they will have the arbitrators decide their claims, instead of resorting to the Courts, the parties should be held to their contract." These comments have frequently been quoted in subsequent decisions at the appellate level in Canada.

6. 6 Typically, both international and domestic arbitration legislation provides that there shall be no judicial review of arbitral proceedings or of an order, ruling or award made by an arbitrator except as permitted therein. The legislation also provides that where the parties have agreed to arbitrate a dispute the Court shall stay a legal proceeding involving the same matter unless it determines that the arbitration agreement is null and void, inoperative, or incapable of being performed. These three exceptions to the general rule have been construed narrowly.

7. 7 The Canadian Construction Document Committee is made up of representatives from the various participants in the construction industry including Architects, Engineers, Contractors, and Owners. The most recent standard Stipulated Price Contract is CCDC 2 - 1994. Included in this contract as GC (General Condition) 8 are dispute resolution provisions calling for mandatory mediation and permitting either party to force the dispute to arbitration. It is expressly provided in GC 8.3 that these provisions shall not be construed in any way to limit a party's right to assert his statutory lien by initiating judicial proceedings.

8. 8 For example, in *City of Prince George v. A.L. Sims & Sons Ltd. and McElhanney Engineering Services Ltd.,* [1995] B.C.W.L.D. 684 (B.C.S.C.), Parret J. found the arbitration clause in the CCDC construction contract between A.L. Simms and the City to be both inoperative and incapable of being performed because the issues in dispute also involved McElhanney Engineering but the City's contract with McElhanney did not contain an arbitration clause. In his reasons, Justice Parret commented "Unless the arbitration process contemplated is capable of resolving the dispute, it becomes a source of multiple actions, increased cost and potential delay, creating precisely the difficulties it is intended to avoid.

9. 9 Cumming J.A. reversed Mr. Justice Parret in reasons reported as *City of Prince George v. A.L. Sims & Sons Ltd. and McElhanney Engineering Services Ltd.* (1995), 23 C.L.R. (2d) 253 (B.C.C.A.), stating ". . . as a general principle, the mere fact that there are multiple parties and multiple issues which are interrelated and some, but not all, defendants are bound by an arbitration clause is not a bar to the right of the defendants who are parties to the arbitration agreement to invoke the clause." The legal proceedings commenced by the City against A.L. Sims and McElhanney Engineering were therefore stayed. In arriving at its decision, the Court acknowledged that the result for the City could be a multiplicity of proceedings, delay, additional expense and the possibility of inconsistent decisions as between the City and A.L. Sims and the City and McElhanney Engineering.

10. 10 Manitoba section 61(2); New Brunswick section 38; Nova Scotia section 34(4); Prince Edward Island section 39; Saskatchewan section 88(1).

11. 11 Ontario section 62(6); Alberta section 51; Manitoba section 74; Newfoundland section 38(7); Nova Scotia section 35(4); Prince Edward Island section 49; Saskatchewan section 88(4).

12. 12 Dynatec Mining Ltd. V. PCL Civil Constructors (Canada) Inc. (1996), 25 C.L.R. (2d) 259 (Ont. Ct. of Justice (Gen Div.).

13. 13 An order was made adding a surety to an arbitration process by the trial level judge in *Kvaerner Enviropower Inc. v. Tanar Industries Ltd., Sovereign General Insurance Company and Noralta Metal Fabricators Inc.* (1994), 17 C.L.R. (2d) 70 (Alta. Q.B.), although apparently without jurisdiction to do so.

14. 14 The adoption of this option would also significantly reduce or eliminate the potential prejudice to third parties which can result when the arbitration pending does not take place expeditiously or at all. MacPherson, C.J. dealt with several applications made to the Saskatchewan Court of Queen's Bench in 1996 by a subcontractor, Fuller Austin Insulation Inc. relating to BWV Investments Ltd. v. Saskferco Products Inc. Although the main action and all subcontractors' claims were stayed in 1994 so that the matter could proceed to arbitration in Switzerland, to date, neither of the parties to the arbitration clause has been willing to proceed with the arbitration. Fuller Austin was seeking relief from the stay previously granted.

15. 15 An application to stay proceedings by a Defendant must be brought before any step is taken in furtherance of the legal proceedings or the Defendant will be held to have waived his right to arbitrate the dispute. Examples of steps taken which have been held to constitute such a waiver are: i) the delivery of a defence; ii) an application to extend the time to deliver a defence; iii) obtaining an order for security for costs; iv) demanding and receiving particulars; and v) payment into court to vacate a lien. While it is relatively simple to require a Defendant to apply for a stay of proceedings prior to delivering a Statement of Defence, these examples demonstrate that courts have found considerably less to constitute a waiver.

16. 16 Lonmar Plumbing and Heating v. Representative Holdings (1968), 1 D.L.R. (3d) 591 (Sask. Q.B.); Pigott Const. Co. v. Fathers of Confederation Memorial Citizens Foundation (No. 2) (1965), 51 D.L.R. (2d) 367 (P.E.I.S.C.).

17. 17 This issue is arguably already addressed in the case of an international arbitration conducted pursuant to the *International Commercial Arbitration Act* and the International Law (Schedule 2 to the *ICAA*). Article 9 provides that "It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure."

18. 18 It is not unusual for contractors on large projects located in Canada to be from another province, the U.S. or Europe. Canadian contractors are more frequently bidding work in the U.S. and further afield. It is becoming common for them to agree to arbitrate their disputes under the ICAA at international arbitration centers which have been created at various locations for the purpose. This has the potential to limit meaningful participation by smaller lien claimants who can not afford to participate in a hearing at a remote location. For example, in BWV Investments Ltd. v. Saskferco Products Inc., supra, the estimate provided to the Court of the costs to hold the arbitration in the agreed location, namely Geneva, Switzerland, was $1 - 2,000,000.00.

19. 19 This is the circumstance in which Sovereign General Insurance found itself in the *Kaeverner* decision, *supra*. Sovereign was not permitted to continue with a lien action in Alberta because the bonded subcontractor had agreed to submit disputes under the contract to arbitration in Baltimore, Maryland.

20. 20 In Fuller Austin v. Wellington Insurance Co (1995), (unreported) (Sask. Q.B.), MacPerson, C.J. directed a temporary stay of an action commenced under a labour and material payment bond by a subcontractor, Fuller Austin, pending completion of an arbitration to be held between the defaulting contractor and his payor. The basis of the judge's order was that the arbitration might clarify issues to the benefit of the proceedings under the bond. The stay was made temporary, however, as the arbitration had not even commenced in the 9 ½ months since the "main action" between BWV and UHDE had been stayed to permit the arbitration to take place

21. 21 In paragraph 7.7 of Scott and Reynolds on Surety Bonds titled Arbitration Provisions, the authors suggest that, in the absence of a specific arbitration provision in the bond itself, the surety will not be bound by an arbitration provision in a bonded contract.