

APPENDIX D

[See page 55]

CONSTRUCTION LIENS AND ARBITRATION

Canadian Bar Association

BACKGROUND

[1] At its 1997 annual meeting, the Uniform Law Conference of Canada considered a report by the National Construction Law Section of the Canadian Bar Association. The National Construction Law Section recommended that amendments to existing construction/builders' lien legislation in force in the provinces be considered in order to prevent conflict between lien claimants' statutory remedies and arbitration procedures.

[2] Arbitration acts generally require a stay of court proceedings while an arbitration is in process. At the same time, lien statutes contain mandatory time limits for the commencement and trial of an action to preserve and enforce a lien. In order to resolve this conflict, the National Construction Law Section report identified legislative options and made five recommendations, three of which were approved by the Conference for implementation.

[3] The recommendations approved by the Conference were:

- (a) to add a provision to lien legislation preventing a stay ordered to permit arbitration from operating so as to prohibit that taking of any step required to preserve a lien or to protect the land or money to which it attached.

CONSTRUCTION LIENS AND ARBITRATION

(b) to add a provision to lien legislation to make it clear that lien actions taken by lien claimants not party to an arbitration agreement could proceed without reference to arbitration proceedings pending between other parties and relating to the same project.

c) to add a provision to lien legislation preventing the taking of a required step in a lien action from operating as a waiver of a lien claimant's right to arbitrate the claim.

[4] The Conference resolved that draft legislation for addition to existing lien statutes, and commentaries, be prepared in accordance with the discussion for consideration at the 1998 Conference.

[5] The following provisions have been drafted in response to the 3 recommendations approved by the Conference. The provisions have been circulated to the various provincial subsections of the National Construction Law Section as well as to the national executive of the Section for comment and approval. The provisions are numbered as though they were to be added to the Saskatchewan *Builders' Lien Act*, S.S. 1984-85-86, C. B-7.1.

Proposed Amendments

PART VII.1 LIENS AND ARBITRATION

Certain steps not affected by stay

97.1 Notwithstanding *The Arbitration Act, 1992* or *The International Commercial Arbitration Act* or equivalent legislation of any other jurisdiction, a stay of proceedings granted by any court of competent jurisdiction to assist the conduct of an arbitration does not prohibit the taking of any step pursuant to this Act:

(a) to register a claim of lien;

(b) to prevent the expiry of a lien;

(c) to preserve the land or personal property to which a lien attaches or any estate or interest in land or personal property to which a lien attaches; or

(d) to have a trustee appointed pursuant to section 84.

Commentary: This section ensures that a lien claimant will not be prevented from taking all steps required under the *Builders' Lien Act* to preserve its lien or the security to which it attaches as a result of a stay of proceedings ordered pending completion of an arbitration process in which the lien claimant is participating. Required steps in most provinces include the commencement of a lien action, service of the statement of claim and setting the action down for trial within mandatory time limits which vary from province to province. Subsection (d) also makes it clear that an application by a lien claimant to appoint a trustee to complete or preserve a construction project will be permitted.

Right to arbitrate not waived

97.2 Notwithstanding *The Arbitration Act, 1992* or *The International Commercial Arbitration Act* or equivalent legislation of any other jurisdiction, where the contract or subcontract of a lien claimant contains a provision respecting arbitration, the taking of any step described in section 97.1 does not constitute a waiver of the lien claimant's rights to arbitrate a dispute pursuant to the contract or subcontract.

Commentary: Section 97.2 is intended to eliminate the possibility that a court will find that the taking of a step required under the *Builders' Lien Act* to preserve a lien or the security to which it attaches constitutes a waiver of the lien claimant's right to proceed to arbitration

CONSTRUCTION LIENS AND ARBITRATION

under the terms of its contract or subcontract. So long as the lien claimant only takes the minimum steps required to preserve its lien under the *Act*, it will then still be permitted the benefit of the arbitration provisions included in its contract or subcontract.

Certain actions not stayed by arbitration

97.3 Notwithstanding *The Arbitration Act, 1992* or *The International Commercial Arbitration Act* or equivalent legislation of any other jurisdiction:

(a) an action to enforce a lien that is commenced by a lien claimant whose contract or subcontract does not provide for arbitration is not stayed by the commencement or continuation of arbitration proceedings between other parties with respect to a matter that, in whole or in part, deals with the subject-matter of the action; and

(b) no order shall be made directing a stay of an action described in clause (a) solely on the grounds that arbitration proceedings have been commenced or continued between other parties with respect to a matter that, in whole or in part, deals with the subject-matter of the action.

Commentary: This section is intended to preclude the possibility that a court will order a lien claimant's action stayed where arbitration relating to the same construction project or improvement is pending between other parties under an arbitration agreement to which the lien claimant taking action is not privy. This issue arises because of the nature of the construction pyramid, the relationship between the contracts existing between the owner, its general contractor, and the various sub-contractors and suppliers involved in a project or improvement and the fact that lien statutes permit limited remedies to be enforced upwards by those at the bottom of the pyramid against parties with whom a claimant is not in privity of contract. Recently, courts have ordered a stay of all actions commenced by parties claiming through a party who is involved in an arbitration, even though the parties being

stayed are not privy to the contract which contains the arbitration agreement and are therefore not able to participate in the arbitration process. Section 97.3 provides that the effect of a stay of proceedings pending arbitration shall be limited to the parties to the arbitration agreement and makes it clear that third party actions commenced to enforce lien claims will not be stayed notwithstanding that a party above them in the construction pyramid is involved in an arbitration process.

CONCLUSION AND NEXT STEPS

[6] The National Construction Law Section recommends that the draft sections be adopted by the Conference and proposes that the draft sections and commentaries be circulated to the jurisdictions for review and revision as required to comply with the existing lien statutes.

[7] The National Construction Law Section further suggests that the 4th recommendation set out in its 1997 report¹, which was not approved by the Conference at its 1997 annual meeting, be further studied by the Section and reported upon at the 1999 annual meeting.

The National Construction Law Section recommended to the Conference in its report delivered at the 1997 annual meeting that consideration be given to enacting a provision precluding a stay of proceedings where the arbitration process or location of the arbitration hearing would cause prejudice to lien claimants. The Section also considered as an option a provision simply requiring arbitration relating to a construction project or improvement to be held in the jurisdiction where the improvement is located and conducted in accordance with the domestic arbitration rules applicable in that jurisdiction.

The Conference felt that no recommendation should be made in this area, as any such provision would interfere with the parties' freedom of contract. The matter was therefore referred back to the National Construction Law Section for further consideration.

Given that the primary policy aims of lien legislation are (i) to ameliorate potential prejudice to subcontractors and suppliers resulting from the limitations of traditional contractual remedies to provide an adequate resolution to multi-party disputes where many of the parties are not in privity with each other and (ii) to provide some security to those at the bottom of the construction pyramid given the great inequality of bargaining power between those at the top and bottom of the construction pyramid, the Section would like the opportunity to address the Conference's concern with the Section's recommendation on this issue and its potential to interfere with the law of contract by way of a further report at the 1999 annual meeting.