

Liens and Arbitration Provisions 2000

PART N - LIENS AND ARBITRATION

Comment: This Uniform legislation is drafted to be added as a new Part to an existing statute of the enacting province or territory that provides for builders' liens.

Certain steps not affected by stay

XX.1 Notwithstanding [legislation of the enacting province or territory comparable to the *Uniform Arbitration Act* or the *Uniform 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 [provision of builders' lien legislation or other statute that provides for the appointment of a trustee in relation to a construction project].

Comment: Section XX.1 ensures that a lien claimant will not be prevented from taking all steps required under the construction lien legislation 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 and territories 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 place to place. Paragraph (d) also makes it clear that an application by a lien claimant to appoint a trustee to complete or preserve a construction project is permitted.

Right to arbitrate not waived

XX.2 Notwithstanding [legislation of the enacting province or territory comparable to the *Uniform Arbitration Act* or the *Uniform 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 XX.1 does not constitute a waiver of the lien claimants rights to arbitrate a dispute pursuant to the contract or subcontract.

Comment: Section XX.2 intended to eliminate the possibility that a court will find that the taking of a step required under the builders lien legislation to preserve a lien or the security

to which it attaches constitutes a waiver of the lien claimants right to proceed to 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

XX.3 Notwithstanding [legislation of the enacting province or territory comparable to the *Uniform Arbitration Act* or the *Uniform 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 paragraph (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.

Comment: Section XX.3 is intended to preclude the possibility that a court will order a lien claimants 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 XX.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.