

Arbitrations and Mediations

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Construction Law

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I. INTRODUCTION

Mediation and arbitration are now fundamental aspects of the dispute resolution process. With the declining use of civil trials as the primary means for resolving commercial disputes, it is now more likely that some form of alternative dispute resolution (“ADR”) will be used by parties to resolve a matter. This is especially the case in many construction contract disputes.

There are many reasons for the growth of ADR but they are not relevant to this presentation. Suffice it to say that both processes are supported by the justice system.¹ With respect to mediation, the *Alberta Rules of Court* require that the parties to a civil dispute undertake some form of judicial dispute resolution (“JDR”) or obtain a Court authorized waiver before a matter can be set down for trial.²

With respect to arbitration, where the parties have agreed to submit a dispute to an arbitral process, the Courts will generally rule against efforts to relocate that dispute into the Court system.³ As stated by Justice Hart in *G. v. G.*:

... the clear policy thrust of the legislation is to limit court intervention and promote arbitral autonomy. In *McCulloch v. Peat Marwick Thorne et al.* (1991), 124 A.R. 267 (Q.B.) at p. 269, Perras J. discussed the underlying philosophy of the Act and quoted with approval from W.H. Hurlburt, *Towards a New Arbitration Act for Alberta*, (Edmonton: Institute of Law Research and Reform, 1987):

The general approach which the law has taken in Alberta and in other common law jurisdictions is to recognize arbitration as a valid form of dispute resolution. It has made provision for assistance in the process and for enforcement of awards. It has imposed some supervision of the process by providing for removal of arbitrators and setting aside awards, and it may allow an arbitration to be pre-empted by a law suit, though the courts lean against pre-emption. But in general it has tended to treat arbitration as something which the parties have chosen for themselves and to which they should be left in the absence of strong reason to the contrary.⁴

¹ This paper does not address the judicial dispute resolution processes undertaken by the Courts nor does it deal with situations where a party to a dispute is not represented by legal counsel.

² On February 12, 2013 the Court of Queen’s Bench issued a Notice to the Profession suspending the requirements for JDR under Rules 8.4(3)(a) and 8.5(1)(a).

³ Generally, and subject to a short list of situations in s. 7(2) of the *Arbitration Act*, the court must stay litigation of a dispute covered by an arbitration agreement when the parties have agreed to resolve their disputes by arbitration. See *Agrium Inc. v. Babcock & Wilcox Canada Ltd.*, 2005 ABCA 82 at paras. 7-9.

⁴ *G. v. G.*, 2000 ABQB 219 at para. 22.