UNIVERSITÉ DE MONTRÉAL

“ARBITRATION UNDER THE REGULATIONS ON THE GUARANTEE OF NEW RESIDENTIAL BUILDINGS IN QUEBEC”

par:
Linda Frazer

Faculté de Droit

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Présenté par
Linda Frazer

A été évalue par un jury compose des personnes suivantes :
Emmanuel DARANKOUM, Président
Nabil ANTAKI, directeur originaire de recherche
Pierre-Claude LAFOND, membre du jury

RESUME

In my memoire, I discuss the concept of arbitration generally as a dispute resolution method after which I outline a history of its acceptance under Quebec law.

Chapter I addresses the structure under the R.B.Q. Regulations, which is a mandatory institutional arbitration system is discussed, and includes the various procedures of the arbitration system.

The security offered under the Guarantee Plan which is regulated by the R.B.Q. is discussed in Chapter II insofar as it affects its arbitration system, including the structure of the guarantee plan and the contents of the guarantee.

Chapter III reviews a Beneficiary's available recourses as well as the advantages and limitations of the arbitration system under the Regulations.

Then a brief comparative study with four other jurisdictions is directed in Chapter IV, including our neighbouring Ontario, United States, and then overseas to the United Kingdom and Germany.

In conclusion, I prove that the arbitration system protects Quebec Beneficiaries more than any where else that I have studied and recommend improvements to the system, including the expansion of the guarantee plan, the addition of powers to the arbitration similar to those granted in the United States jurisdictions and the integration of an adjudication system similar to that used in the United Kingdom for construction dispute resolution.

Key words: Arbitration, Regulations, batiment, Guarantee plan, Construction

RESUMÉ

Dans ma mémoire, j'ai discuté les concepts d'arbitrage comme méthode de résolution d'un litige et par après, je donne un court historique de l'acceptation d'arbitrage au Québec.

Le Chapitre I étudie la structure des règlements du R.B.Q., qui est un gendre d'arbitrage obligatoire institutionnelle, et j'inclus les diverses procédures dans ce système d'arbitrage.

La sécurité offert par le plan de garantie règle par le R.B.Q. est discuté dans le Chapitre II en autant qu'il est relié avec le system d'arbitrage R.B.Q., y compris la structure du plan et le contenu de la sécurité.

Chapitre III parle des recours disponible aux Bénéficiares ainsi que les avantages et désavantages de l'arbitrage sous les Règlements du R.B.Q.

Un court étude comparative de quatre autres juridictions est recherché en Chapitre IV, incluant notre voisin, Ontario, les Etats-Unis et on croise dans les juridictions de Royaume Unie et Allemagne.

En conclusion, j'établis que notre système d'arbitrage sous le Règlement protéges notre publique plus que d'autres juridictions. Je suggère des améliorations au système, par contre, incluant l'agrandissement du plan de garantie, l'ajout des pouvoirs donnés aux arbitres américains et ensuite d'intègré un système d'arrêt semblable aux Royaumes Unis.

Mots clés: Arbitrage, Règlements, bâtiment, plan de garantie, construction

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LA LISTE DES ABBRÉVIATIONS

Les mots « American Arbitration Association » s'abrége : « AAA »

Les mots « L'Association de la Construction du Québec » s'abrege : « A.C.Q. »

Les mots « Association provincial des contracteurs d'habitation du Québec Inc. » s'abrége : « A.P.C.H.Q. »

Le mot « Beneficiare du plan de garantie» s'abrége : « Beneficiary »

Les mots « Centre Canadien d'arbitrage commercial » s'abrege « CCAC »

Les mots « Centre d'arbitrage commercial national et international du Québec » s'abrége : « C.A.C.N.I.Q. »

Les mots « Chambre de commerce internationale » s'abrége « C.C.I. »

Les mots « Le Groupe d'arbitrage et de mediation sur mesure » s'abrége : « GAMM »

Les mots « *Plan de garantie des bâtiments résidentiels neufs* » s'abrége : « Guarantee Plan »

Les mots « Régie de bâtiments du Québec » s'abrége : « R.B.Q. »

Les mots « *Règlement sur le plan de garantie des bâtiments résidentiels neufs* » s'abrége : « *Règlement* »

Les mots « Société pour la résolution des conflits Inc.» s'abrége : « SORECONI »

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DEDICATION

For his undying love and support I wish to dedicate this thesis to my husband, A. Robert TREMAINE, without whom it would not have been written.

ARBITRATION UNDER THE REGULATIONS ON THE GUARANTEE OF NEW RESIDENTIAL BUILDINGS IN QUEBEC

> *"Arbitration raises serious questions about the function of adjudication, the purpose of law and the legal system, and the objective of law practice."*[1]

Arbitration is an alternative dispute resolution procedure to judicial litigation. It provides the parties a solution to resolve their dispute using a private yet binding decision by a neutral third party. Although arbitration is generally *ad hoc*, meaning agreed to between the parties, the Quebec legislature considers arbitration the desired method in which disputes should be settled under *the Règlement sur le plan de garantie des bâtiments résidentiels neufs*[2] ("*Règlement*")which was enacted under the umbrella of the *Loi sur le bâtiment*[3] which is governed by the Régie de bâtiment du Québec ("R.B.Q."). The *Règlement* was set up by the R.B.Q. in order to provide purchasers of certain residential new buildings with securities that are not otherwise available unless the parties contractually agree.

Arbitration was set up by the R.B.Q. as a mandatory

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[1] Thomas E. Carbonneau, *The Law and Practice of Arbitration*, (New York, Juris Publishing Inc., 2004) at 19.
[2] *Regulation regarding the guarantee plan for new residential buildings*, 1998 G.O.Q. 2, 2510.
[3] *Building Act*, R.S.Q., c. B-1.1, s. 185(19.3-19.6),(38) and s. 192.

method of dispute resolution for parties who have contracted purchases of residential new construction disputes under the "*Plan de garantie des bâtiments résidentiels neufs*" ("Guarantee Plan"). The Guarantee Plan contains securities regarding the contractor's legal obligations which are regulated by the R.B.Q., as the supervisory source to oversee that industry standards in construction and safety to the public have been met as well as ensuring that if a contractor were to become insolvent that, nevertheless, the work will be completed or corrected as the case may be.

In order to benefit from the securities offered by the Guarantee Plan, a purchaser, defined and referred to under the *Règlement* as a "Beneficiary", must submit to institutional arbitration regulated by administrative bodies accredited by the R.B.Q., which must follow the standards and arbitration procedures set out in the *Règlement* by the R.B.Q.

The legislation does not make a distinction in its definition of a "Beneficiary" between an astute purchaser and a consumer. Furthermore, Section 6 (b) itself of the

Loi sur la protection du consommateur[4] exempts the sale or construction of an immoveable.

Arbitrators deciding under the *Règlement* are unable to decide matters outside the parameters of the Guarantee Plan and therefore, must abide by the standards set out by the R.B.Q. Therefore, a glance at the parameters Guarantee Plan is necessary, which is not the purpose of this paper, but only addressed insofar as necessary regarding its impact on the arbitration process.

The purpose of this paper is to reflect on whether the mandatory, institutional arbitration process required by the *Règlement* is, indeed, a fair and equitable alternative dispute resolution process and suitable for the specific construction disputes found under the umbrella of the circumstances covered by the *Règlement.*

Upon further study, it became obvious that the question carries a pyramid of answers and further questions. In this complex matter I have broken down the principal considerations into three primary factors:

1) Why impose institutional arbitration on the parties?

---

[4] *Consumer Protection Act*, R.S.Q., c. P-40.1.

2) What security is the legislature offering under the *Règlement*?

3) How does arbitration enhance or inhibit the protection of the security?

CHAPTER I:

ARBITRATION AS A CHOSEN DISPUTE RESOLUTION

1) The reasons behind imposing institutional arbitration on the parties can be divided in two categories.

Firstly, why arbitrate at all? Secondly, why institutional as opposed to ad hoc?

Why arbitration?

Arbitration is considered an alternative dispute mechanism which is intended to be, above all else, fair and equitable between the parties. The arbitrator must take into consideration the interests of both parties, the facts at hand and the rules of law in making a decision. Arbitration is considered desirable because it is intended to be private, less formal and more flexible than in the courts. Professor Thomas E. Carbonneau of the Penn State University describes the underlying result of arbitration for both parties:

> "The reduction of litigious obfuscation results in an economy of time and money."[5]

Time and money are always in both parties' best

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[5] Thomas E. Carbonneau, *Cases and Materials on Arbitration Law and Practice,* 5th ed. (St. Paul, MN, Thomson Reuters, 2009) at 11.

interests regardless of whether they are the stronger or weaker party to the transaction since, in theory if the stronger party is saving time and money, ultimately the weaker party will benefit on a cost analysis basis.

Arbitration offers a dispute to be heard before an impartial expert who has carefully taken into consideration all the facts of the case, the rules of law and has the authority to make a decision to which the parties are bound.

Construction disputes are specialized and complex areas which are destined for dispute resolution by arbitration. Olivier F. Knott and Claudine Roy[6] set forth the following reasons:

> « On peut attribuer cet état de fait à certains des avantages que présente l'arbitrage par rapport au processus judiciaire pour traiter des différends qui surgissent dans ce secteur d'activités (construction). Ces différends sont souvent de natures techniques et fréquemment multiples dans un même projet bien que d'une valeur monétaire pouvant varier considérablement.

[6] Ogilvy Renault, Oliver F. Knott and Claudine,*La construction au Québec : Perspectives juridiques* (Montréal, Wilson & Lafleur Ltd., 1998)

> De nombreux écrits sur l'arbitrage déclinent les avantages de ce mode de règlement des différends par rapport aux procédures judiciaires devant les tribunaux étatiques: degré de contrôle des parties sur le choix des arbitres, rapidité, flexibilité, finalité et confidentialité du processus arbitral […] il s'agit d'un secteur dans lequel la faculté de choisir des arbitres qualifies ayant une connaissance de l'industrie, voire des divers disciplines pertinentes, est fort importante »[7] [emphasis added]

Although the choice of arbitrators is not up to the parties in matters regulated by the R.B.Q., the R.B.Q. ensures that the administrative arbitration body maintains experienced and qualified arbitrators trained specifically in construction matters involving the Guarantee Plan. We will see that speed could be enhanced, confidentiality is only an issue for one party, the Contractor, leaving flexibility and finality as primary reasons for the arbitration process to be favoured in circumstances involving R.B.Q. jurisdiction.

What is an Arbitrator? He is not truly a "tribunal" in the sense of Articles 33 and 846 C.C.P., which do not

[7] *Ibid.* at 702.

apply to arbitration. The Supreme Court of Canada has deemed that an Arbitrator is a "quasi judiciary".[8]

Louis Marquis, lawyer and professor at the Université de Sherbrooke describes an Arbitrator as follows:

> "[...]juge de sa compétence, maître de la procédure arbitrale, pouvoir de régler des points importants même une fois la sentence finale rendue, etc. L'amalgame de ces attributions conduit à admettre que l'arbitre jouit d'un pouvoir juridictionnel aussi intense que celui du juge. » [9]

2638 C.C.Q. describes the role of an Arbitrator:

> *"An arbitration agreement is a contract by which the parties undertake to submit a present or future dispute to the decision of one or more arbitrators, to the exclusion of the courts."*
>
> [emphasis added]

The arbitrator must not only be fair and impartial, but must also be knowledgeable within the construction field and familiar with its technical language. This knowledge in construction disputes entails a very

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[8] *Québec (Procureur général) c. Du Mesnil*, J.E. 97-2081 (C.S.), A.J.Q./P.C. 1998-208 (C.S.) [emphasis added]

[9] Louis Marquis, *La compétence arbitrale: Une Place au Soleil ou a l'ombre du pouvoir judiciaire*, (1990) 21 R.D.U.S. 303, 325.

technical; involving a unique vocabulary and understanding of construction expertise. Therefore, it is imperative that he be qualified to hear the case. The selection of the arbitral tribunal is one of the most important factors with regards to providing the parties with a fair and equitable arbitration process.

What are the advantages that parties receive in arbitration proceedings as opposed to other methods of resolving their dispute?

First and foremost, the parties enjoy the benefits of arbitration over the courts to resolve their disputes as it is designed to allow the parties to maintain greater privacy of their affairs during the course of the dispute resolution process.

Secondly, the arbitration process is meant to be an informal, simplified and less intimidating process for the parties, thereby providing a forum which caters to maintaining or improving good relationships between the parties, an important feature where the construction project is incomplete.

Thirdly, the advantages of arbitration include that, in principle, the process should be less expensive and less time consuming than a judicial tribunal due to the fact

that arbitration is adapted to resolve a particular dispute in a much more concise and flexible manner than the courts.[10]

In the Province of Quebec, parties may have to wait over a year or more before obtaining a date for a hearing in a tribunal. The arbitrator performs basically as a "private judge" who has been given the authority to render a final decision regarding the resolution of the parties' dispute.

The arbitrator is in control of the choice of procedures he wishes to use, unless the parties have chosen specific procedures or the administering institution imposes specific procedures in its rules, therefore establishes which procedures he will use in accordance with the individual claims. After careful and impartial analysis of all the facts and the contents of the relevant part or parts of the documents, and contracts or agreements between the parties, he may tailor a remedy which he deems fair and equitable while applying the rules of law.

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[10] *Règlement*, *supra* note 2 at s. 120: "The award, being rendered, is binding on the parties and the administrator. The arbitration decision is final and without appeal." Therefore the process is designed to be accelerated as it eliminates the appeal process.

John E. C. Brierley[11] portrayed an arbitrator as follows:

> "L'arbitre, par contre, qui pourrait être lui aussi un expert, remplit une fonction judiciaire: il *juge* un différend à lui déféré, après avoir observé, comme un juge ordinaire l'aurait fait, le principe du contradictoire, c'est-à-dire après avoir reçu les preuves et arguments au sujet d'un rapport conflictuel."[12]

Therefore, control of the proceedings is not the only motivation for the R.B.Q. to have chosen mandatory arbitration as its dispute resolution mechanism. The simple fact that the R.B.Q. is responsible for the securities under the Guarantee Plan and therefore has an interest in the procedures of dispute resolution is not, in itself, sufficient. Nabil Antaki offers further depth regarding the reasons arbitration is a suitable alternative dispute resolution process because of the particular and unusual complexity of construction disputes:

"[...]que l'objet est complexe et nécessite une

---

[11] John E.C. Brierley, *La convention d'arbitrage en droit québécois interne*, (1987) 2 CP du N. 507.
[12] *Ibid.* at 536

expertise particulière[...]Alors, les techniques alternatives (versus recourse in the courts, our addition) publiques ou privés sont attrayantes. Elles permettent une approche [...] plus personnalisée du conflit d'affaires [...]»[13]

Therefore, the choice of arbitration as a dispute resolution is a matter of economy of time. Both a judge and an arbitrator are neutral parties. However, by appointing a private third party who has specialized expertise ensures expediency, since there is no need to educate the neutral on matters of construction and on what the Guarantee Plan specifically entails thus enabling the arbitration process to be more customized to suit the parties' needs.

Recognition of arbitration as an alternative dispute resolution mechanism

Historically, arbitration has survived as a dispute resolution system over thousands of years; seen as a desired method of settling a dispute where parties were unable to find their own resolution whereby the parties submitted to an impartial third party set up to decide the resolution of the dispute. A well known Athenian law maker

[13] Nabil Antaki, *L'arbitrage commercial : concept et définitions,* (1987) 2 CP du N. 485, 493.

by the name of Solon who, during a period of great social unrest, demonstrated that the resolution of disputes could be both expeditious and mutually beneficial to the parties by deferring the dispute to a third party having knowledge of the subject forming the dispute who would be witness to the parties' pleadings and who would render an impartial final decision of how to resolve the dispute1.[14]

Old England continued the development of arbitration between 602-1698 A.D officially adopting the arbitration system into its judicial system in 1281 A.D. By then, the fruits of the arbitration process allowed merchants more freedom to resolve their disputes in a speedy and expeditious fashion, rather than the parties dealing with the judicial court system which was encumbered with inane rules and procedures, mostly unsuitable for the growing world of merchants. The arbitration decisions were enforced through social pressure. A person was enticed to comply with an award handed down by the arbitral tribunal on the basis that failure to comply effectively ex-communicated a person from the business world as no one would conduct business with him or extend him any credit.

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[14] Feniosky Pena-Mora, Carlos E. Sosa, and Sean D. McCone, *Introduction to Construction Dispute Resolution* (New Jersey: Pearson Education Inc., 2003) at 24.

However, in more modern history, arbitration fell out of favour, due to the popular view in the judicial world that a party was somehow disadvantaged by waiving his rights, in advance, to access recourse through the court tribunal system. As a result, arbitration became restricted by the courts. Courts would regularly rescind arbitration agreements at the petition of either party for fear that the arbitrators were unable to adequately perform their function of dispute resolution.

It wasn't until after World War II that attitudes began to change, and the foundations of the Quebec arbitration system were laid based on the recommendations of International arbitration under UNCITRAL and the *New York Convention 1958*. The freedom of contracting parties to apply arbitration as a method of dispute settlement was finally recognized insofar as the dispute had already arisen between the parties.

Quebec courts did not accept arbitration as an alternative dispute mechanism without reticence. From the 1960's history of Quebec, courts attempted to restrict the use of arbitration contracts by construing arbitration agreements as limited; debating upon the semantics of arbitration clauses, such as whether the clause was one of

submission or a compromise, and as such many arbitration agreements were considered null and void by the courts.

From 1867 to 1970, ad hoc arbitration was essentially unsupported as an alternative dispute resolution process, and institutional arbitration did not exist, even though dispositions were available in Chapter VII of the *Civil code of procedure*[15] ("C.C.P.") at that time. Furthermore, the debate continued even after the reform of the *Civil code of procedure*, in 1965, which enacted arts. 940-951 C.C.P..

The jurisprudence illustrated that the courts were not convinced, even though the C.C.P. had been modified, that arbitration agreements should be recognized generally. As a result, courts underwent a series of years in which the debate in the jurisprudence was determining the nature of the arbitration agreement: "compromis", being arbitration chosen by the parties as a dispute mechanism to an existing dispute versus "clause compromissoire", which pertained to the parties agreeing to resolve a future dispute through arbitration.

Agreements pertaining to an existing dispute were

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[15] Old article 951 C.C.P. was the first recognition of the submission clause, however, remained unsanctioned by the jurisprudence until much later in time.

generally accepted.[16] However, the controversy which absorbed the courts was to determine whether an arbitration agreement could effectively govern disputes which did not exist between the parties at the time of the signing of their agreement and therefore whether a clause "compromissoire parfaite", could be valid and binding upon the parties.

Secondly, the courts were preoccupied with whether it was necessary for the parties to renounce to their recourse to the judicial court system.

Then, the turning point ended the debate in 1983 in *Zodiac International Productions Inc. v. The Polish People's Republic*,[17] ("Zodiac") where the court reversed the attitude that ad hoc arbitration was considered exceptional by the Courts and acceptance of its validity was born, thereby, allowing arbitration to become a more popular method to resolve disputes. By November 11th, 1986, the *Civil code of Lower Canada* finally confirmed,

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[16] "Submission" was defined in the old *Civil code of procedure* as early as 1867. Art. 1341 C.C.P. "Submission is an act by which person, in order to prevent or put an end to a lawsuit, agree to abide by the decision of one or more Arbitrators whom they agree upon."

[17] [1983] 1 R.S.C. 529 See also *Condominiums Mont St. Sauveur Inc.* c. *Construction Serge Sauvé Ltée.*, [1990] A.Q. (Quicklaw) no. 2952;[1990] R.J.Q. 2783 (C.A.) the acknowledgement of a valid private adjudicative tribunal was upheld as a recognition of a "metamorphosed" Quebec consensual arbitration law.

legislatively, what the court had determined in *Zodiac*.[18]

The leading case by the Supreme Court of Canada in *Sport Maska v. Zittrer*[19] confirmed, concretely, the recognition of the submission clause and ended the long debate as to whether it was necessary to determine the nature of the arbitration clause was one of compromise or submission affected the validity of the arbitration process between the parties, thus confirming that the "compromissoire parfaite" arbitration clause could be considered as final and binding on the parties, where Judge l'Heureux-Dubé joined the clauses, removing any distinction between "compromis" and "compromissoire parfaite" by expounding:

> "On pourrait croire que, ce faisant, le législateur a voulu fonder en un seul concept ces deux conventions distinctes que sont le "compromis" et la "clause compromissoire". A mon avis, tel n'est pas le cas, la distinction demeure : le différend ne se référant au compromis et le différend éventuel à la clause

---

[18] *Ibid.* at art. 1926.1 C.C.B.C. defined arbitration as "La convention d'arbitrage est un contrat par lequel les parties s'engagent à soumettre un différend né ou éventuel la décision d'un ou de plusieurs arbitres, à l'exclusion des tribunaux."

[19] *Sport Maska v. Zittrer*, [1988] 1 R.C.S. 564, 603.

compromissoire qui tous deux étaient et demeurent les composantes de la convention arbitrage. »[20]

The ability of parties to resort to arbitration was finally recognized to be a fundamental right of the parties to express themselves in the scope of contractual freedom, confirmed, once again, by the courts in *Laurentienne-vie (La) compagnie d'assurance Inc. c. Empire (L'), compagnie d'assurance-vie.*[21]

Imagine only 25 years ago arbitration had such a tenuous debut and yet the Quebec legislature came as far as to impose institutional arbitration which is mandatory if the Beneficiaries wish to avail themselves on the financial securities offered by the Guarantee Plan.

The R.B.Q. would not relinquish control over the supervision of the dispute mechanism process, which entails the imposition of its own procedures of arbitration as well as the power to decide who can be accredited to act as an administrative body regulating the arbitration process.

However, in controlling the parties' dispute resolution process, has the R.B.Q. prohibited the parties from obtaining other recourses?

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[20] *Ibid,* at 582 [emphasis added]
[21] [2000] R.J.Q. 1708 (C.A.)

The R.B.Q. cannot override the *Civil code of Quebec* and the *Civil code of procedure*, which remain at the peak of the system of hierarchy and cannot be superseded unless they give rise to that option, serving as a safety-net to any contracts entered into between the parties as well as any legislation which binds parties to a set of rules and Règlements which is incomplete.

In order to truly appreciate how the arbitration process under the *Règlement* protects a Beneficiary, we will conclude with a chapter on various recourses as they pertain to warranties offered under the Quebec law system, whether recourse to the courts or to arbitration is preferable in this area of law and complete the analysis with a comparative study including Ontario, United States, Germany and England, other jurisdictions which offer arbitration as an alternative dispute mechanism in the context of construction.

Why institutional arbitration as opposed to ad hoc arbitration?

Firstly, we must determine the differences between them. Arbitration has branched out considerably in scope and in recognition since its unsettled modern history and is now internationally recognized as the most desirable method to resolve disputes in both private and public

international circles. Arbitration may be ad hoc, meaning that the parties are governed by the agreement between the parties which stipulates the procedures and, usually, the selection of the arbitrator. Where the parties have omitted procedures, the C.C.P. will fill in the lacunas.

HIERARCHY OF RULES OF LAW

CIVIL CODE OF QUEBEC* and the *CIVIL CODE OF PROCEDURE

Loi sur le bâtiment

Règlement sur le Plan de garantie des bâtiments résidentiels neufs

R.B.Q.
RÉGIE DE BÂTIMENT DU QUÉBEC

which delegates dispute settlement to a choice of three arbitral bodies whose purpose is to settle disputes between the parties with regard to an Administrator's report

Arbitration rules set out by the Arbitral organizations

****

1988	1993	1994
CCAC	GAMM	SORECONI

THERE IS A CHOICE OF THREE ACCREDITED ADMINISTRATORS UNDER THE GUARANTEE PLAN WHICH MUST GUARANTEE THE FINANCIAL OBLIGATIONS OF THE CONTRACTOR AND THE QUALITY OF HIS WORK BUT ARE UNRELATED TO THE ARBITRATION SYSTEM.

Arbitration may also be institutional, meaning that the parties have chosen that they will submit their disputes to a set of rules of arbitration which are monitored by an institution.

With regard to form, the rules of interpretation of a contract apply to a conventional arbitration agreement. An arbitration clause within a contract between two parties is considered separable from the principal contract, and therefore even where the principal contract is null and void, the arbitration agreement may stand. In the event that one of the stipulations in the principle contract should be invalidated, the arbitration contract will still be valid as it is considered a "contrat nommé".[22]

The rules of contract validity still apply and therefore all the formalities of the formation of contract will apply, including form, consent, and content. A written agreement of arbitration, even in the context of an adhesion contract, is accepted as a viable dispute mechanism as long as the contracting parties clearly demonstrate their understanding of

[22] Art. 2642 C.C.Q. establishes the doctrine of separability: "An arbitration agreement contained in a contract is considered to be an agreement separate from the other clauses of the contract and the ascertainment by the Arbitrators that the contract is null does not entail the nullity of the arbitration agreement."

giving up the right to recourse in a tribunal. Otherwise, the arbitration clause can be considered imperfect.[23]

Party autonomy applies, including the procedures which must be followed in the event of arbitration, unless the subject matter is outside of an arbitrator's jurisdiction as established under the *Civil Code of Procedure*[24] or the subject matter is inarbitrable because it is a family matter or deviates from public order.

Marc Lalonde[25] addressed the different definitions under his title, "Functions of Arbitrators" and he defined ad hoc arbitration as follows:

> « […]c'est a dire un arbitrage réglementé par les dispositions de la loi applicable et par les règles additionnelles prévues par les parties dans la clauses compromissoire ou dans l'acte de compromis. »[26]

He defined institutional arbitration as follows:

> « c'est-a-dire un arbitrage ou en sus des dispositions législatives applicables s'appliqueront les règles établies par un

[23] *Supra* note 17.
[24] C.C.P. art. 940 et seq.
[25] Marc Lalonde, « Nomination des arbitres et procédure d'arbitrage. » (1987) 2 CP du N. 573.
[26] *Ibid.* at 579.

organisme particulier désigné par les parties, règles qui viennent « complémenter » et parfois même se substituer aux règles non mandataires contenues dans la loi applicable. En outre, cet organisme agira comme organisme de supervision du déroulement de l'arbitrage. »[27]

Nabil Antaki[28] describes institutional arbitration as follows:

"[…]les parties soumettent le règlement de leur différend à un règlement modèle d'arbitrage indépendant de toute institution et qui prévoit des mesures de déblocages entrant en jeu."[29]

In both ad hoc and institutional arbitration, the parties make the choice to arbitrate, although institutional arbitration is submitted to a particular set of Règlements which are monitored by a Centre or Administrator.

Oliver F. Knott and Claudine Roy describe the distinction between ad hoc and institutional arbitration:

"Il existe une distinction importante entre l'arbitrage « institutionnel » et l'arbitrage *ad hoc*. Dans le premier cas, l'arbitrage procède

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[27] *Supra* note 25 at 579.
[28] *Supra* note 13 at 485.
[29] *Supra* note 13 at 498.

> sous les auspices et selon les règles d'une institution particulière établie a cette fin, comme le Centre d'arbitrage commercial national et international du Québec (« C.A.C.N.I.Q. ») ou, a l'échelle internationale, la Cour internationale d'arbitrage de la Chambre de commerce internationale, mieux connue sous l'acronyme C.C.I.
>
> Des institutions comme le C.A.C.N.I.Q. et la C.C.I. supervisent les procédures arbitrales. Par exemple, elles agiront comme « autorité de nomination » pour choisir le ou les arbitre [...] L'arbitrage *ad hoc* résulte d'une convention d'arbitrage dans laquelle les parties établissent les règles de procédure qui régiront l'arbitrage ou adoptent par renvoi certaines règles modèles. » [30]

Nabil Antaki cautions, however, that parties choosing an institutional arbitration process without having the supervision offered by the appropriate arbitral organization can be dangerous unless there are established and secure rules in place. :

[30] *Supra* note 6 at 705.

> "Adopter le règlement d'une institution d'arbitrage sans les mécanismes de sécurité et le savoir-faire de l'institution n'est pas plus sécurisant. C'est comme acheteur un appareil de haute technologie sans mode d'emploi ni garantie. »[31]

Under the *Règlement*, arbitration is not contractual at all. The parties have not chosen to submit their disputes to arbitration rather the legislation has decided that if the Beneficiary wishes to secure his rights under the Guarantee Plan, he is obligated to seek dispute resolution through the institutional arbitration process which has been established by the R.B.Q.

Unlike ad hoc arbitration and institutional arbitration whereby the parties have conventionally decided on the process of arbitration, arbitration under the *Règlement* is an institutionalized and statutory process, an exceptional and specialized branch of institutional arbitration. Parties have not agreed to submit to the arbitration process, they have not chosen the arbitration procedures nor have they selected the arbitrator. The entire process of arbitration is imposed upon the parties

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[31] *Supra n*ote 13 at 498 °30

in accordance with the terms of the *Règlement.*

Can the parties obtain a fair and equitable hearing because the dispute resolution process is mandatory and specialized?

While the parties cannot contract out of these rules, they benefit from the fact that the accredited arbitral organizations monitor the arbitration process. Where there is duality between what can be arbitrated under the Guarantee Plan and the rights of the parties under the *Civil Code of Quebec*, a party may seek recourse in the courts. However, in so doing, they give up the security offered by the Guarantee Plan.

The process is regulated and supervised by an accredited arbitral organization and in accordance with Nabil Antaki's caution, have specially trained and qualified arbitrators accustomed to the full extent of the security offered by the Guarantee Plan and scrutinized by the institutions.

Consequently, insofar as the statutory arbitration system is set up to be supervised adequately, the R.B.Q.'s choice in dispute resolution is a viable one.

Arbitrators operating under the Guarantee Plan will often reserve the rights of the person to take recourse in

the courts regarding matters which do not fall within the scope of the Guarantee Plan.

The hierarchy peaks with the *Quebec Civil Code* and the *Code of Civil Procedure* to which all other legislation must not contravene. The *Loi sur le bâtiment* is the législation which governs the R.B.Q. standards and allows the R.B.Q. to enact Regulations regarding its Guarantee Plan.

STRUCTURE OF THE ARBITRATION PROCESS UNDER THE REGLEMENT

The R.B.Q. has three accredited sponsoring (managing) organizations with regard to supervising the protection of the norms of arbitration within the scope of residential new construction, namely A.P.C.H.Q. (Association provincial des contracteurs d'habitation du Québec Inc.), the most well-known and popular organization which has been in existence since 1976, La Guarantee habitation du Québec Inc., a subsidiary of L'Association de la Construction du Québec (A.C.Q.) which has been operating since 1982 and La Guarantee des mâitres bâtisseurs Inc., actively seeking competition with A.P.C.H.Q., which only began its program in 2003.

The powers of the R.B.Q. to regulate the Guarantee Plan are enumerated in the *Loi sur le bâtiment* Chapter

VIII, Section II, Section 185, paragraphs 19.3 to 19.6, 38 and s. 192, and specifically as it pertains to arbitration under 19.6 d):

"[...]19.4 déterminer les cas, les conditions et les modalités de la garantie offerte en vertu d'un plan, notamment:[...] et

19.6 établir les normes et critères d'un plan de garantie et d'un contrat de garantie, notamment:[...]

d) la procédure d'arbitrage permettant à une personne de se pourvoir contre une décision de l'administrateur concernant une réclamation ou a l'entrepreneur de se pouvoir contre une décision de l'administrateur refusant ou annulant son adhésion au plan; "

The R.B.Q. has enacted the appropriate regulations in order to fulfill its mission. When a party is not satisfied with the decision of the administrator, he may make a claim to arbitration in order to have his dispute resolved but he must follow the procedures furnished by the *Règlement* with regard to obligatory arbitration in virtue of Articles 19, 35 and 106 of the *Règlement*.

The R.B.Q. imposes mandatory "institutional" arbitration in order to offer a supervised settlement of disputes between the parties which is ultimately controlled

by the R.B.Q. The regulations bind approved arbitral bodies to resolve conflicts within the confines of the Guarantee Plan and outline the qualifications required by the accredited organizations under *Règlement* in which the R.B.Q. maintains control as it alone has the power to enact the standards of arbitration rules and procedures.

The Beneficiary is granted a series of financial guarantees under the *Règlement* for his financial protection under arts. l3 and 81 to ensure that the Contractor respects his obligations under the Guarantee Plan. Pauline Roy expressed her concerns relating to the mandatory arbitration system, suggesting that the dispute resolution process may be insufficient:

> « Il est illusoire de croire que le bénéficiare puisse facilement contrer les arguments invoqués par le premier décideur au soutien de sa décision qui était nécessairement plus favorable a l'entrepreneur qu'au bénéficiare. »[32]

Furthermore, Pauline Roy is concerned that the arbitration mechanism can only function where a Beneficiary contests an administration decision. She believes that the

[32] *Droit de la protection du consommateur, Lois et règlements commentés*, (Cowansville, Quebec : Éditions Yvon Blais, 2006) at 345.

administrator is already in a position where he must defend the Contractor and therefore the Contractor would be favoured against a Beneficiary.

However, in practice, studies reveal that arbitrators will not favour one party over the other. At least 75% of the time, Arbitrators require corrective measures, where necessary, of the Contractor and in over half of those the Arbitrators require the administrator to supervise the work. In addition, the strength of the argument regarding whether the arbitration process under the Guarantee Plan is fair lies in whether the Arbitrators are granted a sufficient mandate to decide on matters of dispute between the parties.

An Arbitrator cannot decide a case outside the limits of the Guarantee Plan itself, on pain of nullity of his decision. Therefore, if a Beneficiary's claim is outside the required delays or for amounts superior to those that the *Règlement* permits, he will lose the protection offered by the Guarantee Plan and must seek recourse in a Court Tribunal at his risks and perils since the Contractor may no longer be solvent.

Although Serge Crochetière expresses his concerns regarding the powers of the Arbitrator, he admits that

fairness to the Beneficiary is contingent on the selection process regarding the procedures of arbitration:

> "Bien que, la sélection des membres de chacun des organismes d'arbitrage, l'assignation de l'arbitre à chacun des dossiers ainsi que la procédure d'arbitrage elle-même ne relevant ni de la Régie du Bâtiment, ni du gouvernement."[33]

With these concerns in mind, the next consideration lies in the conditions required by the Règlements of accreditation of the arbitral organizations.

The R.B.Q. has accredited three arbitral bodies, hereinafter referred to as the "Centre", to supervise the arbitration process under the Guarantee Plan, namely,

1) CENTRE CANADIEN D'ARBITRAGE COMMERCIAL, formerly known as THE QUEBEC NATIONAL AND INTERNATIONAL COMMERCIAL ARBITRATION CENTRE (now referred to as "CCAC");
2) SOCIETE POUR LA RESOLUTION DES CONFLITS INC. ("SORECONI"), who refer to their Règlements as the "Procedure d'Arbitrage"; and
3) LE GROUPE D'ARBITRAGE ET DE MEDIATION SUR MESURE

[33] Guy Lefebvre, dir., *L'Edification du nouveau droit de la construction, Les Journées Maximilien-Caron, Règlement sur le plan de garantie les bâtiments résidentiels neufs*(Montréal : Les Éditions Thémis, 1999)à la p.140

("GAMM"), who refer to their Règlements as the "Code d'Arbitrage"

The accredited arbitration Centres must maintain rules within the confines of the specification of the *Règlement* which govern the arbitration process and they must be available to the public, by virtue of Article 132 of the *Règlement*.

Conditions of accreditation of the arbitral institutions

Conditions to which the authorization is granted to function as an arbitral body are found in Article 128 of the *Règlement*:

(1) The arbitral body must have a mechanism for updating the "list indicating each Arbitrator's area of expertise and availability to any interested party who makes the request.

(2) "it has a permanent program for training Arbitrators". The Arbitrators must be trained with regards to the understanding of the guarantees themselves, the limitations of the guarantees, obligations of the parties, the Plan itself and how it works, the terms and conditions of the contractors' membership with his sponsoring organization, the arbitration procedures and all related civil law concepts;

(3) it has an Arbitrator's "code of ethics" and procedures to resolve disputed fees;

(4) it has "arbitration services accessible in each administrative region of Quebec";

(5) it has an accelerated arbitration procedure which must comply with the R.B.Q.'s Règlements, including an application form for a party to request arbitration, facilities to prepare the file, a method in which to appoint a competent, qualified Arbitrator granted sufficient powers to render an award;

(6) The Arbitrator must be bound by the rules of the arbitral body to inform the parties of the arbitration procedures, periods, recusation and revocation of the Arbitrator, the fashion in which witnesses must be summoned and with regards to the arbitration award itself.

It must have "an explanatory document concerning the arbitration procedure",

Parties must be informed of their right to be represented by a person of their choosing, the rules of procedure and production of evidence, the procedure required to summon witnesses and experts, procedures

regarding the potential inspection of the site, the possibility of forming an agreement and discontinuing the arbitration award and in the event of the non compliance by a party to honour the contents of the arbitral award, the procedure for homologating an arbitration award."

THE CCAC complies, in theory, to this obligation by virtue of its second definition under its Rule relating to the arbitration of residential new buildings which obliges the Centre to provide the Beneficiary with a full notice of disclosure regarding the arbitration procedures, as required by Section 128(6) of the *Règlement*. However, in practice, the beneficiary must be informed of his right and obligation to arbitrate.

The "Notice of disclosure" of the CCAC Rule complies with the R.B.Q.'s requirements, as defined in Section 2 of the CCAC Residential New Construction Rules, which reflect the conditions provided for in Section 128.6 et seq. of the *Règlement*.

GAMM addresses these aspects in its "Document de vulgarisation de la procédure d'arbitrage" rather than in its arbitration code. The right of the interested parties to be represented is presented in a rather « round about » fashion by requiring that the registered mail include the

names and addresses of the parties or their representatives. On the second page of its documents, GAMM mentions that a party must inform the Arbitrator of the names of its witnesses and experts. If a visitation of the property is required by the party, it should be mentioned to the Arbitrator. These are not presented as "rights" of a party but rather as options. The *Règlement* has not referred to options, rather disclosure is a condition required by the R.B.Q.

SORECONI addresses the same information, although not in order, on its "procédure d'arbitrage", but also includes in s. 4) (SORECONI) « Peut révoquer le mandat d'un arbitre qui n'agit pas dans les délais réglementaires. » and in s. 7 "au besoin, informe la partie intéressée sur la procédure à suivre devant le tribunal de droit commun relativement à un témoin récalcitrant"

SORECONI's Rule has appears to lack sufficiency where it has the obligation to advise the parties of their rights and obligations in accordance with the R.B.Q.'s Règlements.

Perhaps it could be recommended that the three organizations maintain the same or a similar Rule in order to assure the continuity of Section 128 of the *Règlement.* Nevertheless, the lacunas are completed with the terms and

conditions stipulated in the *Règlement* and the Centres cannot deviate from the standards set out in the *Règlement.*

The *Civil Code of Québec* and the *Civil Code of Procedure* are the basis in which governing parties who submit their dispute to arbitration where no arbitration contract exists or the arbitration contract has not specified the procedures which should be used in the arbitration process. However the administrating arbitral body, when imposing mandatory Règlements regarding arbitration, must also respect the essential elements originating in the scope of the Quebec codes as well as those set out by the *Règlement*.

Procedures of arbitration

The interested parties who apply for arbitration are,

(1) for a claim, in theory the beneficiary or the contractor, but generally the beneficiary;

(2) and for membership, the contractor.[34]

The Beneficiary has the right to obtain relief through arbitration following an Administrator's decision regarding the status of the progression of construction or correction of work poorly performed. The same rule applies to the Contractor with regard to a situation where his membership

[34] *Supra* note 2 at s. 106.

is threatened to be cancelled or suspended by the Administrator.

However, the decision of the administrator remains in force, even though a party has requested arbitration until a decision is rendered.[35]

The arbitration process is monitored by the arbitration "Rule" of each Centre, which comes into effect as a result of an inspector's decision which has been provoked by a claim by either party.

A beneficiary or contractor who is dissatisfied with a decision of the administrator may request that the dispute be submitted to arbitration.

There are time frames which must be respected by the parties and formalities in the receipt of the notice. Pauline Roy defends her argument with regard to the limits of the mandatory arbitration process under the Guarantee Plan by stating that the delays are too short and should be lengthened. The average Purchaser has no knowledge of his legal recourses and the repercussions of not respecting the required delays. Furthermore, that the Beneficiary may have to hire an expert to support his claim and prove that

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[35] *Supra* note 2 at s. 106(3).

corrective measures or completion of work are required.[36]

Delays have proved to be a source of grief with regard to arbitration disputes in practice. They are one of the main reasons for a Beneficiary to be denied a positive decision under the Guarantee Plan because of the lack of knowledge of procedures and the inability to be advised in a timely manner. The hiring of an expert, although may appear to be laborious on the Beneficiary, is an important part of the discovery process. The Beneficiary must prove there is a defect or completion to be made or the Contractor would suffer unfairness. The arbitrator has the power to reimburse the Beneficiary where he has proved that he has a valid claim. In practice, where the Beneficiary proves through the expert report that his claim is well-founded the arbitrator will allocate the fee to the Administrator.

Notice of arbitration and time frames

A notice must be sent to the arbitral administrating body, hereinafter referred to as the "Centre" within 30

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[36] *Supra* note 32 at 345. If the delays are not respected, the Court will reject revision: *Claire Renaud* c. *Construction Nomi Inc.* and *La Garantie Habitation du Quebec Inc.*, 2008 ACCA 8214 at para. 13.

days of the administrator's decision.[37]

By virtue of Pauline Roy's suggestion in her former Press Conference[38] the period allocated to send the notice was extended by the R.B.Q. from 15 to 30 days. Time delays are basically de rigueur[39] as both the Centre and the parties are restricted from extending any time delays imposed by the Rule, unless the Rule specifically allows such an extension.

Art. 944.1 C.C.P. allows Arbitrators "*all the necessary powers for the exercise of their jurisdiction*". However, perhaps time extensions could fall into "necessary powers" for the Arbitrator who deems that extending delays is necessary in order to allow the parties fair proceedings. In practice, this has not been implemented.

The Règlements of both SORECONI and GAMM have not provided for time extensions and are therefore bound by the time frames set out in the *Règlement*.

When arbitration proceedings have been initiated, the notice must be sent by the Centre[40] to the opposing party or

[37] S. 11 of the CCAC Rule which complies with s. 107 of the *Règlement*, requiring a maximum 30 day period. The proof that the delay has been respected must also accompany the notice.
[38] Option Consommateurs <http://www.option-consommateurs.org/conf_presse_2005/texte_conf_2005/050615tcp_pl>.
[39] S. 5 CCAC Rule
[40] *Supra* note 2 at s. 108.

his Mandatary or authorized representative in accordance with s. 8 of the CCAC Rule.

Speed is emphasized:

> "*8. A notice by virtue of these rules must be transmitted by whatever rapid means allowing evidence of its reception* […]"

Personal delivery at a party's address or elected domicile, ordinary residence or last known address is acceptable.[41]

Service appears to be more lenient in the CCAC Rule than the service provided in the C.C.P. by virtue of the fact that the notice can be delivered personally, or by means of bailiff in the event that proof of delivery may be required whereas under the C.C.P., service must be made in accordance with the code.[42] There are no specifications regarding the time delays of delivery to the parties. Section 109 of the *Règlement* states:

> "As soon as that notice (claim to arbitrate) shall be given to interested parties."

The delay begins immediately on the "*date of reception*

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[41] S. 9 CCAC Rule.
[42] Art. 940.5 C.C.P.

of the notice".[43]

Contents of the notice of arbitration

The notice required under Section 11 CCAC Rule must specifically contain pertinent information regarding the case, namely:

a) the names, capacities and addresses of the parties or, if applicable, their authorized representatives;

b) a summary of the claim, including the monetary amounts applicable thereto and any supportive documents;

c) a list of witnesses and experts who will be participating.

Pauline Roy suggests that the arbitration notice should also contain a clause which informs the parties of their right to make a further claim in the tribunal, as the Contractor is still responsible for the entirety of his legal obligations.[44]

The suggestion is to ensure that the Parties are aware of those factors which are not covered by the Guarantee Plan, however, it is redundant to insert it in the notice itself. Arbitrators very often reserve the party's rights to further recourse in the Court Tribunals.

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[43] S. 10 CCAC Rule. There is an extension to the next working day should the notice be delivered on a holiday or weekend.
[44] *Supra* note 32 at 345.

It appears that, unlike the date stipulated in the Civil Code of procedure under Article 944(2) *C.C.P.* which stipulates "*The arbitration proceedings commence on the date of service of the notice*" to the defending party, the date of commencement would be the date that the Centre is seized of the arbitration, which is when the Centre has received the notice to arbitrate by the claimant. Therefore, the defending party having received notice is insufficient to commence proceedings under the Rule although it is deemed the commencement of proceedings under the C.C.P.

At this point the Centre must advise the defending party and the administrator of the arbitration process.[45]

A written response by the defending party or administrator must then be filed with the Centre, including:

a) a brief version of the facts from the defending party's point of view;

b) the defending party's opinion with regard to the claim alleged by the claimant;

and the production of any information and documents supporting the defence or counter claim.[46]

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[45] *Supra* note 2, s. 108. See also, S. 12 CCAC Rule. There appears to be no specified time delay regarding the response from the defending party. The parties are directed to view referenced document available on the internet: <www.ccac-adr.org>.

[46] S. 13 CCAC Rule

One would assume this also includes a list of experts and witnesses required by the defence. Should the defending party omit to respond, the arbitration proceedings will nevertheless continue.[47]

The administrator must forward his file to the Centre as soon as he has received the notice.[48]

The Centre advises the claimant of any response it has received by the defending party or the Administrator, as the case may be.[49]

SORECONI and GAMM have not published the specifications regarding notice that are contained in the CCAC Rule. Once the formalities of the request and notice have been completed, an Arbitrator must be appointed by the Centre.

Then the Centre has the obligation to forward copies of the initiating papers, along with the Administrator's report and all other pertinent documents of evidence are provided, by the Centre, to the Arbitrator within a certain delay prior to the hearing.

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[47] S. 16 CCAC Rule, in keeping with Art. 944.5 ¶1 C.C.P.
[48] *Supra* note 2, s. 109; S. 14 CCAC Rule
[49] S. 15 CCAC Rule

Appointment of the arbitrator
The single most important aspect of a fair trial

The most important decision during the arbitration process is the selection of the arbitrator. When an arbitrator is independently selected, it is essential that it be monitored for quality control and that the arbitrators are held accountable for their decisions.

In ad hoc arbitration, if the parties have not specified the choice of arbitral tribunal in their contract or a method in which an arbitral tribunal should be chosen, the parties must agree on the choice of an Arbitrator. This choice is crucial to both parties because the choice of arbitral tribunal will ultimately influence the final decision rendered, which is to the entire discretion of the arbitral tribunal. If the parties have not established a nomination procedure they will be bound by the procedures set out in the C.C.P.[50]

However, under institutional arbitration, the nomination procedure is set out by the Rules of the institution ("Centre") and it is the Centre itself that performs the nomination process.[51]

General procedures include a notice filed by the

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[50] Art. 941 C.C.P.
[51] *Supra* note 2 at s. 107.

claimant party which proceeds to the selection of an arbitral tribunal, if not otherwise chosen. If the defending party should not agree with the selection of the Arbitrator under the prescribed 30 day delay, a party may petition the court to make the appointment.[52] This principle also applies in the event that the two appointed arbitrators cannot come to the agreement of a third arbitrator.

In the event that the procedure for selection of the arbitrator has been foreseen in the contract but is not being respected by one of the parties, the remaining party may ask the court to intervene to annul the nomination ("recusation")of the arbitrator.[53]

Should the recusation be unable to be obtained, a party has 30 days from the time he was been notified of the nomination to petition the court for a decision on the matter of the nomination of a replacement arbitrator. Unless and until the judge has handed down a decision, the arbitrators may continue the process and hand down an award.[54]

In the event that one of the parties seek court

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[52] Art. 941.1 C.C.P.
[53] Art. 942.2 C.C.P.
[54] Art. 942.4 C.C.P.

relieve in ad hoc arbitration, Article 941.3 C.C.P. stipulates that *"The decision of the judge under articles 941.1 and 941.2 is final and without appeal"* with regard to both the appointment of arbitrators and the procedure of the appointment of arbitrators.

If the arbitration clause designates a dispute resolution organization, their procedures and regulations will apply.

In the arbitration process prescribed by the Guarantee Plan, one out of the three accredited Centres must supervise the arbitration process using their own Rules which must not deviate from the law or the *Règlement*, including the nomination of arbitrators, the proper administration of procedures including delays and notices and it must assure that the arbitrator has adequately informed parties of the procedure of arbitration.

The parties must be advised to motivate reasons for their decisions in order to assure that the arbitrator has a complete understanding of the circumstances, in order to ensure due process and fair proceedings.[55]

Institutional arbitration was chosen by the R.B.Q. in order to ensure that qualified arbitrators, specially

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[55] *Règlement*, *supra* note 2 at s.128 6 et seq.

trained in construction matters and the sphere of the Guarantee Plan, will be appointed and supervised by the Centre. Unlike the norm scheduled under the *Civil Code of Procedure,*[56] a three-panel tribunal has been eliminated in favour of a sole accredited arbitrator in the arbitration of residential new construction, which is selected by the Centre using a list of accredited arbitrators.[57]

All three of the accredited Centres must have a list of qualified arbitrators and it is the Centre who appoints the arbitrator in accordance with Section 128 of the *Règlement*.

"Le GAMM voit à la désignation de l'arbitre à partir d'une liste de personnes préalablement dressée par lui et transmise à la Régie du bâtiment du Québec. Cette liste est constituée de personnes physiques ayant de l'expérience dans les plans de garantie ou de la formation professionnelle dans les matières se rapportant aux questions soulevées par l'arbitrage, notamment en finance, en comptabilité, en technique de la construction ou en droit[…] »[58]

« De ce fait, le Tribunal est justifié de présumer que l'arbitre a une certaine expérience dans les plans de

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[56] Art. 941 C.C.P.
[57] "*Tribunal arbitral*" defined by the CCAC Rule*:« désigne un arbitre unique nommé par le Centre à partir de la liste des arbitres accrédités par le Centre pour trancher un différend, en vertu du présent règlement. »*
[58] S. 4 (2) of GAMM Rules, See also Annex 5: arbitrators CV

garantie et une formation professionnelle dans les matières relatives a l'arbitrage. »[59]

Unlike conventional arbitration, the R.B.Q. took the selection process out of the hands of the parties and rendered the Centre in charge of appointing the Arbitrator responsible for the case.

Although all the qualifications required of an Arbitrator are not set out specifically in Section 112 of the *Règlement*, the accreditation process is limited to natural persons who must have experience in Guarantee Plans or other pertinent training. Experience is not necessarily sufficient for the R.B.Q.

However, the R.B.Q. requires that the Centre screen and maintain a specialized training which is provided by the Centre.[60]

Consequently the selected arbitrators must have attended specialized training courses in order to allow them to prevail upon the complex issues of construction disputes and control proceedings in a fair and effective manner.[61]

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[59] *La Garantie des bâtiments résidentiels neufs de l'APCHQ Inc.* c. *Claude Dupuis*, 2007-ACCS 4701 (C.S.) at para. 4.
[60] *Règlement*, *supra* note 2 at s. 128(2) requires a "permanent program for training Arbitrators on the content of the Guarantee Plan[...]"
[61] *Règlement*, *supra* note 2 at s. 107(2)

While appointing an arbitrator, the Centre must also take into consideration his availability and independence to the case at hand, in order to retain an impartial arbitrator, competent to make a decision to resolve the dispute between the parties.

Furthermore, he must be independent and impartial and this requirement has been deemed one of public order.[62]

The arbitrator cannot have functioned as an expert or mediator in the same case, as it is deemed a conflict to have a mediator take on the role of an arbitrator.[63]

The nomination process must ensure equality between the parties. In the event that one party has the upper hand, the nomination may be annulled.[64]

Once appointed, the arbitrator is protected with a certain immunity.[65] Immunity has been recognized and supported by the Courts fairly commonly, even prior to the revised *Civil Code of Québec.*[66] An arbitrator cannot be called to witness in court or even do so voluntarily.

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[62] *Desbois* c. *Industries A.C. Davie Inc.*, [1990] A.Q. (Quicklaw) no. 616 (C.A.)

[63] *Règlement*, *supra* note 2 at s. 103 (3), s. 20. CCAC rule.

[64] S. 2641 C.C.Q.

[65] S. 21 CCAC Rule

[66] *Zittrer* c. *Sport Maska Inc.*, [1985] C.A. 386. Unless the arbitrator acts outside of his jurisdiction and in bad faith, the arbitrator cannot be liable for consequences resulting from his duty.

The Centre's responsibility to advise parties of the process of arbitration

Once an arbitrator has been appointed, the Centre is under an obligation to notify the interested parties, including the claimant and defending party as well as the administrator of the project, of the constitution of the arbitral tribunal.[67]

The R.B.Q. imposes the obligation of the organizations to assure that the arbitral procedure contains the following elements:

a) a request for arbitration;

b) preparation of the file;

c) the way in which an arbitrator is appointed, his competence and his powers;

d) the obligation imposed upon the arbitrator to inform the parties; and

e) the procedure of the arbitration process, its time frames, how to recuse or revoke an arbitration, the assignment of witnesses and the arbitral decision.[68]

Once these procedures have been established, the R.B.Q. imposes an obligation on the Centre to ensure the

[67] *Règlement*, *supra* note 2 at s. 108, s. 22 CCAC Rule.
[68] *Règlement*, *supra* note 2 at s. 128, para. 5.

proper application of the *Règlement*, which includes that the Centre is responsible for forwarding the relative sections of the administrator's file to the arbitrator who examines the documents in the file along with any other evidence that the interested parties may want to deliver to him, including documents of evidence, invoices, expert reports, photos, plans, evaluations etc in order to allow the file to be as complete as possible. The documents serve to provide the nature of the dispute to the Arbitrator in order that he may ascertain whether or not he is qualified to hear the case.[69]

SORECONI, in its "AVANT LA TENUE DE L'AUDITION" section of procedures indicates that there is an obligation on SORECONI to assure that parties are notified of certain procedures and places the burden on the arbitrator to inform them.

Otherwise, SORECONI in its « PROCEDURE D'ARBITRAGE AVANT LA TENUE DE L'AUDITION » presents the following disclosures, for example, in S. 5 « […] informe les parties intéresses et l'administrateur qu'ils peuvent être représentes par les personnes de leur choix" and in

[69] S. 24 CCAC Rule.

s.6 « […] avise les parties intéressés de la procédure d'assignation des témoins. »

SORECONI has not created a general obligation to self impose the obligation to oversee all the proper application of its Rules even though the *Règlement* imposes it.

GAMM, on the other hand, has a more elaborate list of Articles than SORECONI, however, as in the case of SORECONI it also has no general obligation imposed upon it to assure the proper application of its Rules.

The CCAC requires that the Centre act with « *grand diligence* » in order to carry out their supervisory role.

Therefore, CCAC has taken the responsibility required by Section 128 of the *Règlement*. The CCAC has undertaken not just a simple "do your best" or "bon père de famille" responsibility. It is stronger than "diligence" or "bonne foi". It is an attestation that their conduct will be in good faith with regard to the responsibility of performing its obligations.[70]

The obligation extends to mandatory obligations "established in the public interest".[71] However, the requirement indicated in the Centre's Rule appears to

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[70] Art. 1375 C.C.Q.
[71] Art. 1376 C.C.Q.

require an absolute obligation.

The possibility of ultimate recourse to Court proceedings has excluded arbitrators from ignoring fair proceedings, on pain of nullity of their award. In *Promutuel Dorchester* c. *Ferland,*[72] the Court found that the arbitrator is bound by substantive law and rules of procedure, which are of public order. In this case, the arbitrator failed to give the claimant party the chance to examine the witness. Furthermore, a site visit took place without the presence of the claimant party. The arbitrator was considered to have been unfair as a result of interrogation of witnesses or the production of documents prior to hearing the arguments of the parties.[73]

The arbitrator must control the proceedings in a fair and equitable manner, bearing in mind the interests of the parties and the facts of the case. The parties have a right to be heard and have a right to have sufficient time to produce their case and find witnesses and experts to support their arguments. Parties must have been given

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[72] *Promutuel Dorchester, société mutuelle d'assurances générale* c. *Ferland*, J.E. 2001-1512 (C.S.) REJB 2001-25555 (C.S.).

[73] *Tanguay* c. *Assurances générales des Caisses Desjardins*, J.E. 2001-1582 (C.S.), REJB 2001-25734 (C.S.), whereby the arbitrator, on top of disallowing evidence and testimony, also had a telephone conversation with the representative of one party without disclosure to the remaining party.

sufficient information to become fully aware of the arbitration procedures and are bound by the procedures laid out in the Rule or Code of the Centres.

Revocation and recuse

An arbitrator has the power to decide on his own competence,[74] including whether the parties have any grounds for his recusation[75] or whether a contract contains elements which would be against public order.[76] It is in his interest to do so, as otherwise his award may be annulled.

An arbitrator is obliged to disclose any reasons which could affect his impartiality or any conflicts of interest that he may have with regard to the specific dispute. Failure to do so may lead to application by the opposing party to apply for replacement, as provided for in Article 942.2 C.C.P.

The consequence of non-disclosure of any reason which would disqualify the arbitrator is found in Article 947.2 C.C.P. obliging the arbitrator who knows of any reason to decline his appointment or the court may be authorized to annul his award.

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[74] Art. 943 C.C.P.

[75] Art. 942.1 C.C.P., S. 25 of the CCAC Rule : "*An Arbitrator must immediately inform the parties and the Centre of any valid causes such that may raise doubts as to his or her impartiality, independence or qualifications.*"

[76] Art. 2639 (2) C.C.Q.

The request for Recusation of the Arbitrator can only be required by the "*party having appointed an Arbitrator*", for reasons discovered after the nomination of the Arbitrator under Article 942.2 C.C.P.

However, the *Règlement* and related Rules of the Centres allow a wider freedom to the parties. Should one of the parties wish to challenge the lack of jurisdiction of the arbitral tribunal, it must not be later than the "*submission of the statement of defence*", which is, in accordance with the CCAC Rule,[77] 15 days following the notice to arbitrate. Even though a party may have participated in the appointment of the arbitral tribunal, he may, nevertheless, challenge the jurisdiction of the tribunal. This request must be made as soon as the "*alleged matter occurs.*" This is not a rigorous date as the tribunal has the discretion to allow a later challenge if it "considers the delay justified."

A party may lose his right to challenge a provision of the Rule, or the arbitration agreement, if he "*pursues the arbitration without formulating an objection promptly or within the delay provided*" then he is "*deemed to have waived his or her right to raise an objection.*"

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[77] S. 36 CCAC General Rule

Therefore a party has more grounds to recuse an arbitrator under the General commercial CCAC Rule than the C.C.P.[78] since he is not precluded from raising the lack of jurisdiction even if he participates in the appointment of the arbitrator.[79]

Section 113 of the *Règlement* lays out the revocation process which may be requested by an interested party or by the Administrator in the event that they are not satisfied that the Arbitrator can "fulfill his mission or fails to perform his duties within the periods prescribed." The R.B.Q. has granted a very wide interpretation which exceeds the description granted under article 942.2 in an attempt to ensure that the arbitrator will continue with a fair and equitable proceeding.

In the event that the revocation is declared by the Centre, it is considered final and without appeal.[80]

It is then the Centre's responsibility to replace an Arbitrator who is unable to act.[81]

In ad hoc arbitration the delay to file a recusation

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[78] Art. 942.2 C.C.P.: "The party having appointed an Arbitrator may propose his recusation only on a ground of recusation which has arisen or been discovered since the appointment."S. 37. CCAC General Rule

[79] S. 37 CCAC General Rule

[80] *Règlement*, *supra* note 2 at s. 14.

[81] *Règlement*, *supra* note 2 at s. 115 specifies the reasons for replacement: "recusation, revocation, death or incapacity to act"

of arbitrator is 15 days from the time the party received knowledge of the nomination of the arbitrator. If the parties don't agree or the arbitrator refuses to resign, the remaining arbitrators can make a decision between themselves.[82] Article 942.5 C.C.P. allows a party to petition before a Judge to revoke the appointment of an arbitrator who is unable to perform his duties or fails to perform his duties in a timely manner.

In the event that the procedure established in the arbitration agreement cannot be exercised in practice, a party may petition the Court to prove such a fact and have the nominated arbitrator revoked or recused.[83] The Judge's decision is then final.[84]

Should an arbitrator need to be replaced during the arbitration proceedings, the nomination procedure is back to square one, identical to the initial nomination process.[85]

The CCAC Rule allows an Arbitrator to be recused "[…]*only if circumstances exist that give rise to* *justifiable doubts* *as to his or her impartiality,*

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[82] Art. 942.3 para. 2 C.C.P.
[83] Art. 942.6 C.C.P.
[84] Art. 942.7 C.C.P.
[85] Art. 942.8 C.C.P.

independence or qualifications for settling a dispute.[86]

How are "justifiable doubts" measured? There is a subjective tone to this section that does not appear under the terms of the *Civil code of procedure.*[87]

Therefore, even under institutional arbitration, the parties should not be precluded from exercising their civil rights to appeal before a tribunal under circumstances which would be allowed by the C.C.P. if the Centre refuses to consider the application of the party to recuse an arbitrator.

Personality incompatibility is not a reason to recuse the Arbitrator as it does not demonstrate lack of impartiality.[88]

Section 26 of the *Règlement* specifies that the parties' right to recuse the arbitrator for reasons including that impartiality was not respected or that the Arbitrator was not independent or qualified will also apply after the appointment of the arbitrator. Therefore, the *Règlement* further extends reasons for recusation beyond the scope of the C.C.P.

If one of the parties intends to recuse an arbitrator

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[86] S. 26 CCAC Rule.
[87] Art. 942 C.C.P.
[88] *Du Mesnil*, *Supra* note 8.

the Centre must be informed, by written statement, of the reasons the party wishes to recuse an arbitrator.

Then the Centre makes a decision based on a consultation with the parties and the arbitral tribunal and must make its "decision known". Whether this is by a written notice or a verbal phone conversation, we are not advised by the Rule.[89]

Contrary to the C.C.P. Art. 942.4 para. 2, which provides for the continuance or recommencement of the arbitration proceedings while a petition may be made to a judge to recuse an Arbitrator, the proceedings may be suspended by the Centre under the CCAC Rule.[90]

Furthermore, if the Arbitrator cannot complete his function or does not do so within the delays expected, an interested party or the administrator has the right to request recusation of the arbitrator, in keeping with Art. 942.5 *C.C.P.*[91]

The arbitrator can resign or be revoked by the simple consent of the parties should the Centre agree. The Centre is able to alleviate Court proceedings of recusation and is given the power to ascertain whether or not the revocation

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[89] S. 27 CCAC Rule.
[90] S. 28 CCAC Rule.
[91] S. 29. CCAC Rule

is appropriate.

SORECONI Regulations refer to revocation of the arbitrator in Section 4) which allows SORECONI to revoke the mandate of an arbitrator who does not act within the regulated time frames. It addresses recusation within the scope of the powers of the arbitrator under the heading "L'arbitre".

5) doit se récuser dans les cas prévus au Code de déontologie de SORECONI.

« Le nouvel arbitre désigné par l'organisme d'arbitrage doit agir dans les délais prévus. »

GAMM has enacted four sections with regard to recusation and revocation of an arbitrator.

Section 6 requires that an arbitrator disclose in writing should he know of valid cause of recusation.

Section 7 allows any interested party to declare in writing to GAMM should he have knowledge of a cause of recusation of the arbitrator. Then GAMM would have the final decision unless the arbitrator has consented in writing. The Regulation does not stipulate what procedure would be used in the event that the arbitrator fails to consent.

Section 8 stipulates that if the arbitrator cannot complete his function fully or within the required time frames, that any interested party may revocation of his mandate. The decision rendered by GAMM is final.

Section 9 provides for the replacement by GAMM in the event that the Arbitrator has been recused, revoked, died or is unable to act. The newly appointed arbitrator then decides whether he will continue from where the former arbitrator left off or to begin the proceedings once again. Then newly appointed arbitrator, however, must act within the prescribed time frames.

This procedure eliminates the need for lengthy procedural replacements in order to expedite the arbitrator's decision required under the *Règlement.*

Obligations of an arbitrator

The *Règlement* requires the intervention of an independent Arbitral Organization responsible to supervise the dispute resolution process designed to ensure that independent and impartial neutrals are appointed in order to assure parties of a fair process.

The CCAC system upholds the concept of due process and fair procedure throughout its rules, beginning with its definition section.

SORECONI does not elaborate the due process and fair procedure in its Regulations, but has one section relating to fairness in its code of ethics:

Section 3: "L'arbitre doit se comporter d'une façon impartiale et objective. Il doit être libre de toute attache à l'égard des parties. »

GAMM upholds its fair procedure and due process in its code of ethics, as opposed to its Rules, having the identical Section 3 as SORECONI and adds Section 12:

> "L'arbitre doit aussi dénoncer aux parties toute situation qui crée une crainte raisonnable de partialité. Apres une telle dénonciation, l'arbitre peut accepter, poursuivre ou exécuter son mandat d'arbitre. »

Nevertheless, all of the arbitration Centres are bound by the *Règlement* and must render decisions based on fair and equitable proceedings.

Arbitrators have a duty to respect all provisions contained in an arbitration agreement with regard to ad hoc arbitrations and in institutional and/or statutory arbitration to respect the Rules created by the Centres in statutory arbitration as regulated by the Règlement. Substantive laws of public order apply to arbitrators and

must be enforced.

Arbitrators must act impartially and disclose all reasons in which they would be unable to do so. Justice Naturelle or "amiables compositeurs" can only exist conventionally where parties have mutually agreed prior to the hearing in ad hoc arbitration,[92] however, the arbitrator must "appeal to fairness where circumstances warrant.[93]

The concept of *amiables compositeurs* has attracted some controversy. The concept entails an award which takes into consideration equity and fairness as well as substantive rules of law. The concept is one that allows the arbitrator to come to a sensible resolution of the dispute even though the law may have provided another solution.

Arbitration under the *Règlement* has granted the freedom for the arbitrator to apply rules of law as well as equity under Article 116 as demonstrated in *La Garantie des bâtiments résidentiels neufs de l'APCHQ Inc.* c. *Claude Dupuis*[94]

« [...]l'arbitre doit trancher le litige suivant

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[92] Art. 944.10 para. 2 C.C.P. arbitrators "*cannot act as amiables compositeurs except with the prior concurrence of the parties.*"
[93] *Règlement*, *supra* note 2 at s. 116; S. 2 ¶7 of the CCAC: "An arbitrator shall decide in accordance with the rules of law; he shall also appeal to fairness where circumstances warrant."
[94] *Supra* note 58, *Claude Dupuis*, at para. 75.

les règles de droit et qu'il doit tenir compte de la preuve déposée devant lui. Il doit interpréter les dispositions du règlement et les appliquer au cas qui lui est soumis. Il peut cependant faire appel aux règles de l'équité lorsque les circonstances le justifient. Cela signifie qu'il peut suppléer au silence du règlement ou l'interpréter de manière plus favorable à une partie. »

Then Judge Michele Monast describes what she means by « équité »:

"L'équité est un concept qui fait référence aux notions d'égalité, de justice, d'impartialité qui sont les fondements de la justice naturelle. Dans certains cas, l'application littérale des règles de droit peut entraîner une injustice. Le recours a l'équité permet, dans certains cas, de remédier à cette situation. »[95]

The arbitrator has the duty to assure fair proceedings and to give full opportunity to all the parties to give their reasons for their claim or defence so that the parties feel satisfied that their arguments have been

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[95] *Claude Dupuis, Supra* note 58at 76

heard.[96]

They must give notice to the parties with regard to the date of hearing. In the event that a site inspection will take place, the arbitrators have the same obligation to give notice to the parties of the date of the inspection.[97]

The arbitrator has a duty to retain all confidences.[98] This duty, however, is not absolute or guaranteed as the arbitrator is entitled to disclose some of these confidences if it forms part of his reasons disclosed when rendering his award.

Powers of an arbitrator

The arbitration process allows arbitrators all necessary powers in order to complete their mandate; to perform their duties and establish procedures, including the nominations of experts.[99] The tribunal may decide questions of error regarding consent or rather the lack thereof.

"The arbitrators may decide the matter of their own

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[96] *Promutuel Dorchester, supra* note 72, S. 7. CCAC Rule:"7. *En toutes circonstances, les parties doivent être traités sur un pied d'égalité et avoir toute possibilité de faire valoir leur droits. "*

[97] *Règlement*, *supra* note 2 at s. 118. See also, Art. 944.4 C.C.P.

[98] Art. 945 C.C.P., *Règlement*, *supra* note 2 at s. 122.

[99] Art. 940 to 944.1 C.C.P.; S. 45. CCAC Rule, however the conduct of proceedings under the CCAC is governed by the Centre.

competence."[100]

The jurisdiction of an arbitrator may be limited, either by the parties' agreement, in the event of a contractual arbitration agreement, or through the imposed procedures of an institution, or the Centre under the *Règlement*.

In the event that a question is raised with regard to the arbitral tribunal exceeding its powers, the arbitrator may decide during the proceedings to delay such a decision if he deems it is for a valid cause. The arbitrator may, nevertheless, decide to pursue the arbitration process and decide on the matter of competence in the final decision.

Pauline Roy[101] has commented with regard to arbitral jurisdiction under the *Règlement*, claiming that the arbitration process under the R.B.Q. is too limited in scope. She claims that because an arbitrator has no jurisdiction outside the delays or monetary values provided by the *Règlement*, it causes the Beneficiary to appeal to the Courts should the Beneficiary fail to respect the limitations of the delays provided for in the *Règlement* or should he have a claims which, in monetary value or content

[100] Art. 943 C.C.P., recognized by the court in *Sport Maska; Supra* note 19; S. 33 CCAC Rule.
[101] *Supra* note 32.

are superior to the ceilings provided for. Consequently the Beneficiary loses the protection of his guarantee under the Guarantee Plan.[102]

Arbitrators have the power to request statements of claims and defence by the parties and to obtain all the necessary accompanying documentation to prove their claims (and defence as the case may be), including the right to request expert reports.[103] The arbitrator may limit the scope of discovery and encourage the parties to exchange documents in order to expedite the proceedings.

However, whatever the arbitrator may decide with regards to the amount of discovery material he will allow, the arbitrator must give equal opportunity to each party to provide whatever proof is necessary for their claim or defence or the result may be the annulment of the Arbitrator's award.[104]

The arbitrator cannot force a reticent witness to comply, therefore a party must appeal to the Court in order force a reticent Witness to comply.[105]

They have the power to administer oaths.[106]

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[102] *Supra* note 32 at 345.
[103] Art. 944.2 C.C.P.; S.62(c) CCAC.
[104] *Promutuel Dorchester*, *supra* note 72.
[105] Art. 944.6 C.C.P.
[106] Art. 944.7 C.C.P.

The power to award damages is granted in the *Civil code of procedure*, substantiated by jurisprudence.[107]

Additional indemnity may be imposed by an arbitrator for the simple reason that, once the award is homologated, it is equivalent to a court judgment.[108]

The arbitrator has the power to address whether a party may be reimbursed for a claim for supplementary support.[109]

Provisional measures to ensure the conservation of the building may be requested before or during the arbitration process either by an interested party or by the administrator himself.[110] The arbitrator has the right to allocate conservative measures for as long as they effect interested parties but must appeal to the tribunal should

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[107] Art. 944.10 C.C.P., *Société de construction des musées du Canada Inc.* c. *Acoustique Piché Inc.*, J.E. 95-36 (C.S.).

[108] *Renwick of Canada Inc.* c. *Investissements Admasa Inc.*, [1990] R.J.Q. 1353 (C.S.), Art. 1619 C.C.Q.

[109] *Axor Construction Inc.* c. *Commission scolaire Marguerite-Bourgeoys*, J.E. 2000-691(C.S.) REJB 2000-17161 (C.S.)A.E/P.C.2000-230 (C.S.)

[110] Art. 940.4 C.C.P.; *Règlement*, *supra* note 2 at art. 111: "Avant ou pendant la procédure arbitrale, une partie intéressé ou l'administrateur peut demander des mesures nécessaires pour assurer la conservation du bâtiment.", ss. 37 to 39. CCAC Rule. No provisional or conservatory remedies can be granted by the arbitral tribunal under the General Commercial Regulation of the CCAC. Should a party desire such a remedy, he must petition the Court tribunal. Section 38 stipulates that: "*The arbitral tribunal may not order any provisional or conservatory remedies. Such remedy may be sought from a competent judicial authority.*"

the measures involve third parties.[111]

Babak Barin[112] describes the purpose of Article 940.4 C.C.P. with regard to the powers of an arbitrator in the matter of provisional measures:

> "[…] none of the Article 940.4 C.C.P. decisions, except *Placements Raoul Grenier Inc. c. Cooperative forestiere Laterriere* rendered by Godbout J. in May of 2002 ("*Raoul Grenier*"), appear to have involved an arbitration agreement explicitly permitting the arbitral tribunal to grant provisional measures. Regrettably, even though this decision was appealed, the issue of an arbitrator's ability to grant a provisional remedy, was not."

In *Desputeaux c. Editions Chouette (1987) Inc.*, Judge Lebel remarks with regard to the Arbitrator's powers:

> "The arbitrator's mandate must not be interpreted restrictively by limiting it to what is expressly set out in the arbitration agreement. The mandate also includes everything that is closely connected

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[111] *Règlement*, *supra* note 2 at s. 119 (1); Art. 944.4 C.C.P."*A judge or the court may grant provisional measures before or during arbitration proceedings on the motion of one of the parties.*"

[112] Babak Barin, « Provisional Remedies » in domestic arbitrations: Time perhaps for a fresh look in Québec? » 64 R du B 137(2004),142-143.

with that agreement, or, in other words, questions that have "a connection with the question to be disposed of by the arbitrators with the dispute submitted to them[…] Since the 1986 arbitration reforms, the scope of arbitration agreements has been interpreted liberally[…]"[113]

Ultimately, arbitrators have the power to render a decision and hand down an award[114] and must do so within prescribed periods of time.[115]

The arbitrator cannot exceed his powers or decide beyond the restraints of his mandate or the award may be voided through review by the court.

The pre-hearing

Arbitration under the *Règlement* requires no pre-hearing.[116]

On the contrary, arbitration under the Guarantee Plan is designed by the *Règlement* to be a rapid process, thereby eliminating the exchange of numerous documents in advance.

In other types of arbitrations proceedings, the Parties may agree to and require a pre-hearing for one or

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[113] [2003] 1 S.C.R. 178.
[114] Art. 944.10 C.C.P.
[115] *Règlement*, *supra* note 2 at s. 122.
[116] Interestingly, the General Commercial Regulation of the CCAC obligates the arbitral tribunal to convene parties to a pre-hearing within a 30 day period.

more of the following reasons:

a) preservation of evidence;

b) request to continue construction

c) to resolve procedural matters; and

d) to exchange of documents between parties and list of Expert witnesses;

During the meeting, the arbitrator will have prepared an agenda, to which he will refer. One of the issues on the agenda will be the timetable which needs to be discussed with the parties to ascertain the date of the hearing itself and the date of any site inspection which might be necessary. If the parties are unable to agree on the timetable, the arbitrator will impose a time that he determines is realistic under the circumstances of the case. The location of the hearing is generally agreed upon between the parties or designated by the arbitrator. However, the site under the *Règlement* is chosen by the Centre.

The hearing

Parties make opening statements in order to outline, briefly, their proof of claim or defence. Witnesses may be called upon to testify regarding technical construction matters and the opposing party shall have the right to

cross-examine the witness. There may be times which require re-examination of the witness after the cross-examination. Witnesses who will be testifying on the same material may be encouraged to remain off the premises of the tribunal room until such time as the arbitrator is ready to hear their testimony. Then the parties are expected to make closing statements and arguments to substantiate their claim or defence.

The Place of the arbitration hearing under the CCAC is at the offices of the Centre or at a place decided upon by the Centre or the arbitrator himself.[117]

The arbitration hearing must begin within the prescribed periods, which is 30 days for a construction dispute and 15 days for a Contractor's membership dispute.[118]

The arbitrator must give a notice of at least 5 days in advance, in writing "of the date, time and place of the hearing and, where applicable, notice of the date on which he will inspect the property or visit the premises."[119]

The arbitrator must, firstly, address the following

[117] S. 50 CCAC Rule.
[118] *Règlement*, *supra* note 2 at s. 117; S. 46 CCAC Rule.
[119] *Règlement*, *supra* note 2 at s. 118.; S. 47 CCAC Rule, which makes no mention regarding the time on that date. One would assume this should be added as all parties must be present at the site inspection. Art. 944.4 C.C.P.

subjects:

a) The rules of law and the admittance of applicable evidence.[120] Ordinarily, arbitrators can be granted the power of amiables compositeurs if the parties agree. However, the Règlement of the R.B.Q. allows an arbitrator to "appeal to fairness where circumstances warrant".

On the other hand, Article 944.10 para. 2 C.C.P. strictly prohibits the use of amiable compositeur unless the parties have agreed. Therefore, it may be questioned as inappropriate by some to allow an arbitrator to appeal to fairness or equity without the consent of the parties. The arbitrators under the R.B.Q. have often allowed equity to be used in virtue of Section 116 of the *Règlement*. In practice, the arbitrators use Section 116 frequently in order to reduce or eliminate the allocation of arbitration fees to the Beneficiary.

b) The rules of procedure which will be followed;

c) Whether or not a site inspection will be necessary; and

d) The number of witnesses and experts who will testify, assuring that the parties are granted equal time to be

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[120] *Règlement*, *supra* note 2 at S. 116; S. 52. CCAC Rule.

heard at the hearing;[121]

The arbitration proceedings will continue even if a party defaults in presenting his statements or fails to appear.[122]

Construction disputes require numerous experts and therefore arbitration is particularly well suited for dispute resolution through arbitration as the arbitrator may, more easily than a judge, accommodate schedules of parties and witnesses. Bear in mind that a judge rendering a decision under the Guarantee Plan cannot exceed the powers of the arbitrator.

Once the arbitrator has declared the closure of proceedings and he is in a position to deliberate, no new evidence can be presented unless the arbitrator has requested it.

SORECONI arbitration guide provides that SORECONI must inform the interested parties in S. 5 that they may be represented by a person of their choice. GAMM establishes this fact within the scope of its disclosure statement signed by the parties.

Under the title, “TENUE DE L’AUDTION” SORECONI

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[121] S. 48 CCAC Rule.
[122] S. 49 CCAC Rule.

allocates the procedures to the arbitrator himself. The arbitrator then becomes the key to the proceedings themselves, responsible to inform interested parties and conduct the proceedings. Twelve specific duties are expected from SORECONI with regard to the arbitrator:

1) The arbitrator is master of the procedures, generally, and must take into account all C.C.P. and C.C.Q. articles pertaining to those procedures;
2) He must inform all interested parties that his decision must be in conformity with rules of law, and where circumstances justify, in accordance with equity;
3) He must advise all interested parties and the administrator of their correct behavior during the proceedings;
4) He must state the object of the request to arbitrate;
5) He must attend to any preliminary objections which have been brought up;
6) In the event of a demand, he must enquire whether conservatory measures need to be addressed and whether third parties are involved;
7) The arbitrator must receive a list of facts from each party and evidence;
8) He must require a list of documents which will form

evidence in the file, which have not already been presented;

9) He must assure that all interested parties have convocated their witnesses and experts;

10) The arbitrator must inform himself of any procedures taken in a tribunal by either party regarding the unwillingness of a witness to attend;

11) He must establish with the interested parties, the expected duration of the arbitration proceedings;

12) Then the arbitrator must proceed, without delay, to perform the discovery of evidence and proceed with the hearing.

GAMM divides their Rule in two separated sections. One for the hearing itself ("Section 4 – Audience") and one for the procedures of arbitration ("Section 5 – Deroulement de l'arbitrage").

The GAMM code also establishes the time frame to begin arbitration proceedings.[123]

The arbitrator is required to issue a written notice to the interested parties and administrator, or their representatives, at least 5 days in advance, advising of the time, place and date of the hearing and whether a site

[123] S. 10.(4) GAMM

inspection will take place.[124]

A preparatory telephone conference in which the parties will disclose a summary of facts and arguments may be required by the arbitrator. In the event that this conference is held, each party must inform the arbitrator of its experts and witnesses, which documents he intends to submit and whether the case involves more than one subject.[125]

At the request of a party, the arbitrator may require the attendance of a witness, unless the request is futile on the face of it.[126]

However, in the event that the witness is unwilling to attend, a motion by an interested party to the tribunal would be required under Section 119 of the *Règlement.*[127]

The arbitrator must inform the parties of the procedures and the presentation of evidence as well as the time he can allocate to each party.[128]

The arbitrator has the power to interrogate the parties in order to conciliate their interest and may deal

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[124] S. 11 GAMM
[125] S. 12 (5) GAMM
[126] S. 13 GAMM
[127] S. 15 GAMM reiterates Section 119 of the *Règlement* with regard to matters in which the parties must appeal to the tribunal.
[128] S. 14 GAMM.

with requests to ensure the preservation of the building.[129]

The arbitration award

First and foremost, in conformity with the C.C.P., "the Arbitrator's decision is final and not subject to appeal."[130]

Arbitration awards must be in writing and substantiated with reasons within the prescribed periods set out in the *Règlement.*[131] Prescribed periods may be extended conventionally by the parties.

When concluding the award, the arbitral tribunal must give reasons for his decision.[132]

Should the parties come to an agreement during the course of the arbitration, their agreement will be recorded in the arbitral award.[133]

The Beneficiary, the Contractor and the Administrator are bound by the arbitration decision as soon as it is rendered.[134]

The original written award must be deposited with the Centre and certified copies forwarded to the interested

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[129] S. 16 GAMM.
[130] *Règlement*, *supra* note 2 at art. 120.
[131] *Règlement*, *supra* note 2 at art. 122; Art. 945 and seq. of C.C.P.
[132] *Règlement*, *supra* note 2 at art. 122; *Du Mesnil*, *supra* note 90.
[133] S. 54 CCAC parallels Art. 945.1 C.C.P.
[134] *Règlement*, *supra* note 2 at art. 120.

parties and administrator within 30 days (15 days in the case of contractor membership disputes) of the closing of the hearing.[135]

The award must be presented to the parties within a relatively short delay.[136] However, Article 945.4 of the C.C.P. requires that the award be presented to the parties "*immediately*". The possibility of interested parties consenting to a supplementary delay has been integrated in the CCAC. Although it is not an option suggested by the C.C.P., there is no reason why parties could not conventionally deviate from these delays.

The contents of the award include the date and place of arbitration and it is deemed to be made on the date and in the place in which it is recorded.[137]

The substance of the award determines the amount of damages, where appropriate, and shall decide matters in accordance with the rules of law.[138]

Arbitrators acting under the Guarantee Plan will also allocate arbitration fees either to the Contractor, the Administrator or the Beneficiary or a combination of the

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[135] S. 55 CCAC
[136] S. 55 CCAC The General Commercial Rule, whereby the time frame for the deposit of the award is a maximum 6 months of the pre-hearing date, *"at the latest, two months after having decided to end the hearings"*
[137] S. 56 CCAC; Art. 945.3 C.C.P.
[138] Art.944.10 C.C.P.

two; more generally grouped between the Contractor and the Administrator, and any necessary corrective measures or completion of work to be done by the Contractor.

The award, in conjunction with Article 944.10 C.C.P. must not contain elements beyond the scope of the *Règlement* or invent new arguments, even indirectly. In the event that the arbitrator should render a decision which is beyond his mandate under the scope of the Guarantee Plan, his award may be subject to court review.

Ad hoc arbitration, in parallel terms, also restricts the arbitrator's powers by the scope of the contract between the parties or the consequence may be annulment of the award.[139]

There is no precedential value to the award, as each proceeding is treated as a separate and specific award in accordance with the facts of the claim.

The arbitral tribunal may, of its own will, correct any error in the award, including, "*correct any clerical, computational or material error contained therein.*"[140]

Article 945.5 C.C.P., allows an arbitrator to affect an amendment to his award within an allocated 30 day

[139] *Société de construction des musées du Canada Inc.* c. *Acoustique Piché Inc.*, J.E. 95-36 (C.S.).
[140] S. 58. CCAC.

period, on his own accord. A party can request that an arbitration award be corrected or that a particular part of the arbitration award be interpreted or an additional award on a matter which was omitted in the award under Article 945.6 C.C.P. The correction must be for error, to correct, interpret or render a supplementary award, to affect the amendment.[141]

A party must make the demand within three months of the reception of the arbitration award or its respective correction in accordance with Article 945 5 C.C.P.

However, the CCAC allows a party to request a correction within five days of receipt of the award.[142] All corrections are considered an integral part of the award.

Publication and confidentiality

The Centre must conserve the arbitration files for a period of two years from the deposit of an arbitral award or, in the event that there is a judicial contestation of the award, until the final judgment has been rendered in court.[143]

The *Règlement* requires the Centres to publish its

[141] Art. 945.7 C.C.P. The arbitrator shall have a delay of 60 days, after the application by a party to correct, interpret or render a supplementary award and must be requested within 30 days of the parties' receipt of the award.
[142] S. 58 CCAC.
[143] *Règlement*, *supra* note 2 at s. 126; S. 68 CCAC Rule.

awards annually and conserve all awards in conformity with the *Règlement.*[144]

One of the reasons that arbitration is an effective dispute resolution is based on confidentiality and privacy. Article 945 C.C.P. requires that an Arbitrator be bound by secrecy, even though he is allowed to give reasons on which his decision is based. "The origins of the concept of confidentiality are respectably rooted in antiquity."[145]

Therefore, in imposing publication of the arbitral awards is there a breach of confidentiality of the parties? Are any parties prejudiced as a result of this publication?

The Contractor may be prejudiced by the publication of an award should he be developing a residential project or condominium where one complaint may reveal matters of dispute to future Beneficiaries of the site projects.

However, the fact that the arbitration proceedings have commenced remains confidential, as awards are only published once the decision has been rendered.

In reality, the R.B.Q. favours protecting the public interests of the Beneficiary versus the private interests of

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[144] *Règlement*, *supra* note 2 at s. 131; S. 69.CCAC, S. 25 GAMM, SORECONI is mute.

[145] Loh Sze On, Quentin Loh and Lee peng (Edwin) Khoon, *Confidentiality in arbitration: How Far Does It Extend?*, (Singapore: Academy Publishing, 2007) 104.

the Contractor or Administrator and therefore deems that any prejudice caused by lack of confidentiality is substantiated by the public interests at large.

There are many questions with regard to the scope of confidentiality. Quentin Loh points out that the extent of the obligation of confidentiality may be different at different stages and times.[146] This would justify the R.B.Q.'s position on matters of confidentiality, as publication of the award is not likely to take place during the period in which the Contractor remains on site.

Arbitration expenses (fees)

Construction disputes have a tendency to be more costly than the average dispute primarily due to three reasons:

1) the extensive documentation and expert witness testimony required; and
2) the complexity of the issues within the context of construction necessarily dictates longer delays, possible site visits, and as a result, the hearing process may need extending;
3) to properly assess all the entire issues, the Arbitrator must take more time analysing various

[146] *Ibid.* at 64

aspects and therefore the length of time needed imposes supplementary costs to arbitration.

Bearing in mind the cost of a construction dispute for the Beneficiary who seeks recourse in a tribunal, the *Règlement* offers a distinct advantage to the Beneficiary with regard to arbitral fees.

There are two basic fees involved in arbitration regulated by the *Règlement*:

1) The arbitrator's honorarium;[147] and

2) The fees due to the Centre;

The Centre designates specifically how the fees are partitioned:[148]

a) If the contractor is the claimant, the cost is partitioned between the administrator and contractor;[149]

b) If the Beneficiary is the claimant, the administrator absorbs the arbitration fees and, at times, the arbitrator may assess the quantum of reasonable expenses of pertinent expertise and allocate part or all of the expert fees incurred by the

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[147] S. 62. CCAC Rule, travel expenses, expert expenses required by the Arbitrator etc.

[148] S. 63 CCAC Rule SORECONI Regulations in and of themselves do not deal with Arbitral fees. However, they do have a fee chart available on the web site, entitled "La Grille de Tarification pour l'Arbitrage." GAMM, on the other hand, assigns Section 7 – "Couts d'arbitrage" containing 5 articles which deal with fees.

[149] *Règlement*, *supra* note 2 at art. 123; S. 26 GAMM.

Beneficiary to the Administrator,[150] should the Beneficiary have proved even one aspect of his claim. Should the Beneficiary have failed to provide proof of all of his claims, the arbitrator shall decide on costs. If the Beneficiary has failed to prove one aspect of his claim, the fees may be divided between the Beneficiary and the Administrator, or be paid by the Beneficiary himself.

However, in practice, the arbitrators tend to use Section 116 of the *Règlement* and allocate, on equity, a reduction of the arbitral fees of the Beneficiary to those of small claims court.

The parties are permitted to obtain legal council but must assume their own expenses for legal representation.[151]

The *Civil code of procedure* has not commented with regard to the regulation of arbitration expenses. The R.B.Q. has allowed the Centres to administer the fees and give a statement to the parties at the end of the arbitration proceedings.[152]

Only the Centre can collect the fees and issue

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[150] *Règlement*, *supra* note 2 at art. 124. Otherwise, expert fees are ordinarily supported by each party. This section does not apply to a claim of membership by the contractor. S. 65 CCAC; S. 27 GAMM.

[151] S. 66 CCAC; S. 28 GAMM.

[152] S. 67 CCAC Rule; S. 29 GAMM.

statements of account of the arbitration.[153] A tariff schedule is annexed to the Centre's Rules.

The fee structures are not the same in each Centre.

The CCAC basic fee structure to a Beneficiary is based on the amount of the claim:

$1.00 - $50,000.00	3% (MINIMUM $600.00& MAXIMUM $1,500.00)
$50,001.00 - $200,000.00	$1,500 + 2%
$200,001.00 - $1,000,000.00	$4,500 + 1%
$1,000,001.00 - $10,000.000.00	$12,500 + ½%

Therefore, for example if the claim were to be $75,000.00 the Centre would charge $1,500 + 2% between $50,001.00 and $75,000.00 = $1,500 + $500.00, the fees would amount to $2,000.00.

GAMM and SORECONI charge a flat $400.00 administration fee and pay their Arbitrators $125 per hour. The minimum charge is $500.00 and the ceiling is allocated in accordance with the amount of the claim:

[153] S. 64 CCAC Rule.

$1.00-$7,000.00	MAXIMUM: $2,000.00
$7,001.00-$15,000.00	Maximum: $3,000.00
$15,001.00-$30,000.00	Maximum: $5,000.00
$30,001.00-$60,000.00	Maximum: $6,000.00
Over $60,000.00	No maximum.

There is no maximum for a Contractor.

I have prepared a chart demonstrating the statistics on the allocation of arbitration fees in arbitral awards over a three year period.

The web site of CCAC was under re-construction at the time of the drafting of this paper and therefore, the statistics could be drawn by their awards as only 2008 sentences were consulted prior to their unavailability. However, due to the amount of cases attributed to each of the organizations the statistics drawn from CCAC is unlikely to alter my conclusion.

CHART OF THE AMOUNT OF CASES ATTRIBUTED TO ORGANIZATIONS

	2008	2007	2006	2005	2004
SORCONI	13	81	103	88	49
CCAC	3	16	20	5	4
GAMM	56	102	89	87	77

*statistics were drawn in September 2008

An average taken from the study of the last three years of arbitration decisions with regard to the allocation of arbitration fees, approximately 80% of the arbitration fees were paid by either the Administrator or the Administrator and Contractor jointly. An average of approximately 15%-20% of the cases shared fees shares between the Administrator and the Beneficiary and 5% or less was allocated solely to the Beneficiary.

CASE STUDY OF THE ALLOCATION OF ARBITRATION FEES

		BENEFICIARY	BENEFICIARY & ADMINISTRATOR	ADMINISTRATOR	ADMINISTRATOR & CONTRACTOR	CONTRACTOR	DELAYED OR MUTE
2008	SORECONI	4	6	17	2	0	0
	GAMM	5	5	27*	9	0	5
2007	SORECONI	1	15	46**	18	0	1
	GAMM	0	8	26**	6	2	0
2006	SORECONI	1	26	55***	18	1	2
	GAMM	1	5	32***	7	0	5

*SORECONI 3 expert fees refunded or paid by the Administrator
*GAMM 5 expert fees refunded or paid by the Administrator

**SORECONI 12 expert fees refunded or paid by the Administrator
**GAMM 5 expert fees refunded or paid by the Administrator

***SORECONI 5 expert fees refunded or paid by the Administrator
***GAMM 6 expert fees refunded or paid by the Administrator

However, even where the Beneficiary was obliged to pay arbitration fees, for the most part, the Arbitrator exercised his rights in Equity under Article 116 of the *Règlement* and reduced the amount that the Beneficiary had to pay to the amount that he would have paid in small claims Court. At most, the Beneficiary was imposed an equal split with the Administrator. The year that allocated the most fees to be paid between the Beneficiary and the

Administrator, SORECONI's Arbitrators allocated an amount to be paid by the Beneficiary of less than $150.00 in 19 out of 26 cases.

When imposed fees, the result was primarily due to the fact that the Beneficiary desisted or withdrew from the case or because the delays imposed by the *Règlement* were not respected.

In the event that the Beneficiary desists prior to the nomination of the arbitrator, SORECONI AND GAMM have not imposed fees or honorariums. Once the Arbitrator has been nominated, there is a fixed fee of $75.00 for fees and $75.00 for the arbitrator's honorarium. Should the desistment occur after the date in which the hearing was scheduled, the fees remain $75.00 and the honorarium is the amount of $175.00.

In conclusion, a Beneficiary has little risk regarding the payment of arbitration fees when commencing a claim to arbitrate unless he has not respected the delays allocated under the Guarantee Plan.

Furthermore, even where the Beneficiary paid part of the arbitration fees, for the most part the Arbitrator decided to impose correctives to which the Contractor must attend and the Administrator must supervise and therefore

the Beneficiary benefitted from the proceedings.

In cases where the administrator's decision was upheld, for the most part the Beneficiary was advised by the arbitrator that he had the right to recourse in the Tribunals as the issues did not fall within the scope of the *Règlement*.

Interestingly, where the Administrator was ordered to pay the arbitration fees, between 20-25% of the time the Beneficiary was granted a reimbursement (or the Administrator was requested to pay the expert) of all or part of his expert fees.

Court Intervention

> "Il est, en effet, de la nature de l'arbitrage d'être final et d'exclure les recours aux tribunaux."[154]

Homologation of an award

Although it is hoped that the parties will voluntarily honour the terms of the arbitration award, the decision of the arbitrator cannot be enforced without homologation.[155]

The Homologation of an arbitration award is not an appeal process and therefore not subject to judicial

[154] Nabil Antaki, *supra* note 13 at 497; Art. 941.3 C.C.P.
[155] Art. 946.6 C.C.P.; *Règlement*, *supra* note 2 at s. 121; S. 6 CCAC Rule.

review. An award may be homologated, by petition to the Superior Court or the Court of Quebec in order to force the execution of the obligations contained in the award. Homologation is a simple and speedy procedure, but mostly requires mandating an attorney to prepare the motion. Once homologated the award is equivalent to a court judgment.[156]

A petition for homologation of an award can be refused by the Court under the following circumstances:[157]

1) One of the parties did not have the capacity to sign the contract;[158]

2) The arbitration agreement is not valid;

3) Proper notification of the nomination of the Arbitrator or the proceedings was not given to the defending party;

4) The award did not regulate the issues clearly written in the arbitration agreement; If, however, the issue on point can be separated from the remainder of the award, a partial refusal will be applied;[159]

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[156] Art. 946.6 C.C.P., *La Garantie des bâtiments résidentiels neufs de l'APCHQ Inc. c. Maryse Desindes and Yvan Larochelle*, 500-09-103349-030, 2004 (C.A.) at para. 44

[157] Art. 946.4 C.C.P.

[158] *Groulx* c. *Bouchard*, J.E. 99-1182 (C.S.)

[159] *Axor Construction Inc.* c. *Commission scolaire Marguerite-Bourgeoys*, J.E. 2000-691 (C.S.), REJB 2000-17161 (C.S.) A.E./P.C. 2000-230 (C.S.)

5) The nomination procedure of the Arbitrator was contrary to the agreement or the rules of the *Civil code of procedure.*[160]

However, the court cannot otherwise refuse homologation except where the award is contrary to public order.[161]

Although most jurisdictions require a one year period to "confirm" an arbitration award, the *Civil code of procedure* is mute regarding the delays required for the petitioning of a homologation of an award. A party should file for homologation within a "reasonable delay" and the judge should treat the delays with fairness.[162]

In spite of the limitations enumerated in Article 946.4 C.C.P. if one party can control the arbitration procedure either by modifying it unilaterally or cancelling it, the contract of arbitration is considered a contract of adhesion and therefore the weaker party can require that the homologation of the award be declined.[163] However, even when an award appears to be dealing with matters which are against public order the Court has held that if the result

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[160] *Capitale (La), compagnie d'assurances générales* c. *Lavoie*, A.J.Q./P.C. 1999-1045 (C.S.)
[161] Art. 946.5 C.C.P. ; Art. 2639 C.C.Q.
[162] *Chambre des Notaires* c. *Gauthier*, B.E. 99BE-757 (C.Q.), A.J.Q./P.C.
[163] *Pétrolière impériale* c. *Lessard*, J.E. 96-439 (C.S.)

of the award is not against public order, the award may be upheld. In *Desputeaux* c. *Éditions Chouette (1987) Inc.*[164] it was decided that even though an arbitrator made an error interpreting a statutory provision, the Court would not review the case unless the result of the arbitration award was in conflict with the fundamental principles of public order.

The award must be examined in its entirety to see whether or not one of the principles of public order have been contravened. Article 946.5 C.C.P. was given a wide interpretation by the Supreme Court of Canada.[165]

A party who does not respect an award, once homologated, may be held, under civil execution, in contempt of court.[166]

An award cannot be homologated or annulled until the arbitrator has completed his jurisdiction and rendered a decision. However, a party is allowed to ask for the homologation of award, prior to the award, even though the Court may refer it back to arbitration.[167] The Court may not rule on the competence of the arbitrator unless the

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[164] [2003] 1 S.C.R. 178
[165] *Éditions Chouette (1987) Inc. c. Desputeau* REJB 2003-38952 (S.C.C.)
[166] *Sheppard* c. *Royal Institution for the Advancement of Learning (McGill University)* J.E., 2001-757 (C.A.), D.T.E. 2001T-368 (C.A.).
[167] *La Garantie des batiments residentiels neufs de l'APCHQ Inc.* c. *Maryse Desindes and Yvan Larochelle*, 500-09-013349-030, 2004 (C.A.)

procedures of nomination of the arbitrator have not been respected.[168]

A decision of the Court which recognizes the competence of the arbitrator is final.[169]

Judicial intervention

The *Règlement*[170] foresees four reasons where parties must petition the judicial court:

a) Should they need to force a hostile witness to testify in the arbitration hearing;[171]

b) To force a recalcitrant witness;[172]

c) homologation of an arbitration award;[173]

d) the imposition of conservatory measures with regard to a third party.[174]

Even where there is a valid petition pending in court, arbitration proceedings may be commenced or pursued and the arbitrator may pronounce an award at any time while the

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[168] *Leduc* c. *Houle*, J.E. 96-1657 (C.S.)
[169] Art. 946.4 C.C.P.
[170] *Règlement*, *supra* note 2 at s. 119.
[171] *Règlement*, *supra* note 2 at s. 119 Para. 2; Article 944.6 para. 1 C.C.P.:*"Witnesses are summoned in accordance with articles 280 to 283."* If a witness refuses to attend or to produce *"any real evidence in his possession which is connected to the dispute, a party may with leave of the arbitrators apply to a judge to issue a rule under article 53."*
[172] *Règlement*, *supra* note 2 at s. 119 para. 3
[173] *Règlement*, *supra* note 2 at s. 119 para. 4
[174] *Règlement*, *supra* note 2 at s. 119 para. 1 ; Art. 940.1 C.C.P.

case is pending before the court.[175] The Court may not intervene to refuse a homologation of an award except in exceptional circumstances.[176]

However, parties can seek judicial intervention under certain circumstances, even though arbitration proceedings have commencedunder the following circumstances:

A party may require recusation of the arbitrator, and same may be granted by the Court should the arbitrator have insufficient qualifications which have been specifically required under the *Règlement* or the arbitration agreement[177] or should the arbitrator be incapable of completing his mandate or respecting reasonable delays to settle the process.[178]

The arbitration award is considered binding on the parties and Administrator.[179]

Louis Marquis comments: "Cette dernière (arbitration award) acquiert d'ailleurs l'autorité de la chose jugée des

[175] Art 940.1 C.C.P.
[176] Art 943.2 C.C.P.
[177] *The Gazette* c. *Blondin*, [2003] J.Q. no. 9433 (C.A.)1999-1302 (C.Q.)
[178] Art 946.5 C.C.P. recites that *"The arbitration award as homologated is executory as a judgment of the court".*
[179] *Règlement*, *supra* note 2 at s. 120; Art 946 C.C.P. In ad hoc, a binding arbitration clause is final and binding upon the parties. This is a voluntary act on the part of the parties and the execution of the award cannot be forced without the winning party applying to the court for homologation.

qu'elle est rendue, avant même d'être homologuée. »[180]

The arbitral tribunal has a duty to decide whether a matter is against public order.[181] The court can refuse to homologate his award (or annul the award)[182] if it is contrary to public order, so the arbitrator has every interest to investigate the matter.[183]

The court maintains the discretion, nevertheless to recognize the award,[184] however it has interpreted its discretion restrictively and the award must be studied as a whole. If the result of the award is reconcilable with the fundamental principles of public order, the award should not be annulled.[185]

> *"L'ordre public intervient principalement lorsqu'il s'agit d'apprécier la validité de la sentence arbitrale. Les limites de son rôle doivent cependant être correctement définies. D'abord, comme nous l'avons vu, les arbitres sont fréquemment tenus d'examiner des questions et des dispositions législatives d'ordre public pour régler le différend*

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[180] *Supra* note 9 at 311.
[181] Art. 946.5 C.C.P. *"The court cannot refuse homologation of its own motion unless...the award is contrary to public order."*
[182] Art. 947.2 C.C.P.
[183] *Condominiums Mont St-Sauveur* c. *Constructions Serge Sauvé Ltée*,[1990] R.J.Q. 2783 (C.A.)
[184] Art 2639 para.2. C.C.Q.
[185] *Desputeaux*, *supra note 165.*

dont ils ont été saisis. Ce seul examen ne rend pas la décision annulable. L'article 946.5 exige plutôt d'examiner la sentence dans son ensemble, afin d'apprécier son résultat […] »[186]

"The courts are called upon to intervene in the arbitration process only in limited and well defined cases."[187] The C.C.P. has stipulated some exceptions[188] to the general rule stipulated in Article 940 C.C.P.

With regard to judicial review on matters concerning the Guarantee Plan, the Courts have ruled that the arbitration decision is final unless the decision is manifestly unreasonable or outside of the mandate of the arbitrator.[189]

The Court, if petitioned by a party for relief, must refer the parties back to arbitration unless an exception applies under 940.2 C.C.P. and seq., in which case the Court may intervene, or if the Court should find that the arbitration agreement was void.[190]

The court cannot decide any question regarding the

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[186] Frederic Bachand, "Arbitrage commercial", (2001) 35 R.J.T. 465, 477, para. 54.
[187] *Ibid.* at 474.
[188] Arts. 940.2, 941.3, 942.7, 943.2, 945.8, 946 to 947.4 and 940.5 C.C.P.
[189] *La Garantie des bâtiments résidentiels neufs de l'APCHQ Inc.* c. *Maryse Desindes and Yvan Larochelle*, 500-09-013349-030, 2004 (C.A.)
[190] Art. 940.1 para. 1; *Kingsway Financial Services Inc.* c. *118997 Canada Inc.*, J.Q. (Quicklaw) no. 5922 (C.A.)

merits of the arbitration award.[191]

However, the court cannot intervene with regards to the merits of the arbitral decision, rather the court must establish whether the rules of law and principles of natural justice have been respected by the arbitrator.[192]

In *Rousseau v Rousseau*,[193] the Court declared that 940.1 C.C.P.[194] must be interpreted in a strict and limited manner and therefore until a case can be inscribed, arbitration may be referred at any time.

The Court in *Gazette* c. *Blondin*[195] prohibited judicial review of the merits of a dispute regulated by arbitration on the basis that by its very nature, Article 946.4 C.C.P. presents an exhaustive list regarding the grounds of review available with regards to an arbitration award.[196]

> "Les procureurs admettent que l'arbitre était saisi d'une question mixte de fait et de droit. En ce qui concerne l'appréciation des faits, il n'est

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[191] Art. 940.3 C.C.P.: "*A judge or the court cannot intervene in any question governed by this Title except in the cases provided for therein.*"; Art. 946.2 C.C.P.

[192] *Renovation Marc Cleroux Inc.* c. *Societe pour la resolution des conflits et al*, REJB2003-28952 (C.S.C.)

[193] J.E. 2002-886 (C.S.) REJB 2002-30864 (C.S.), A.E./P.C. 2002-1667 (C.S.)

[194] *Renovation Marc Cleroux Inc.* c. *Societe pour la resolution des conflits et al*, REJB2003-28952 (C.S.C.)

[195] [2003] R.J.Q. 2090 (C.A.)

[196] Art. 946.2 C.C.P.:"*The court examining a notice for homologation cannot enquire into the merits of the dispute.*"

pas vraiment conteste que seule une décision manifestement déraisonnable autoriserait une révision judiciaire. »[197]

Therefore, judicial review is reserved for extreme cases in which the Courts are loathe to intervene.[198]

"Peu de décisions ont été rendues par les tribunaux sur la norme de contrôle applicable lorsque saisis d'une demande en révision judiciaire d'une décision d'un arbitre mandaté pour trancher un différent découlant de l'applications d'un Plan de garantie des Bâtiments Résidentiels Neufs[…]

Le Tribunal en a répertorie trois émanant de la Cour Supérieure, soit *Garantie des Bâtiments résidentiels neufs de l'A.P.C.H.Q. c. Decarie*, *Garantie Habitation Québec Inc. c. Masson, Garantie Habitation du Québec Inc. C. LeBire* et la décision de la Cour d'Appel dans l'affaire *La Garantie des Bâtiments Résidentiels Neufs de l'A.P.C.H.Q. Inc. c. Desindes et Larochelle.* »[199]

In principle, any contestation brought to the court with regard to the arbitration proceedings is referred back to

[197] *Gazette c. Blondin, supra* note 195 at para. 44.
[198] *Renovation Marc Cleroux Inc.* c. *Societe pour la resolution des conflits Inc. (SORECONI)*, 2007 QCCS 116 (C.S.)
[199] *Supra* note 197 ¶62, 63.

the arbitrator.[200]

The powers of the Court to review arbitration proceedings are therefore limited.[201]

The Court can intervene upon request by a party who has challenged the competence of the arbitrators.[202]

Prescriptions are imposed regarding the request by a party to have the Court intervene.[203]

Arbitration under the *Règlement* does not fall into Article 940 and seq. C.C.P. because the Court intervention is considered an administrative act rather than the judicial review. Judicial review cannot look at the merits of the award, but an administrative act can and must in order to ascertain whether the matter fell within the scope of the *Règlement* or not, therefore, whether the arbitrator decided within the boundaries of his mandate.

Annulment of the award

The rules with regards to the homologation of an arbitral decision apply to the Annulment of the award,

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[200] Art.940.1 para. 1 C.C.P., *Construction Ceriko Asselin C.A Lombardi Inc* c. *Sikh Temple Association Inc.*, B.E. 2002BE-236 (C.A.), A.E/P.C. 2002- 1488 (C.A.) unless the Court declares the arbitration agreement itself void: *Brique Antique (Foam) Inc.* c. *Gestions Noraykan Inc.*, J.E. 2000-1412 (C.S.)
[201] Art. 940.3 C.C.P.
[202] Art. 943.1 C.C.P.
[203] Art. 947.4 C.C.P.

albeit adapted for that purpose.[204]

The annulment of an arbitration award is rare, but can be accomplished either by means of a motion in court to annul it or by virtue of a defense to a motion of homologation filed by the winning party.[205] An annulment must be requested within 3 months of an arbitration award or, in the event of the correction of the award, 3 months after the correction has been issued.

In the past, the Courts have not been terribly clear as to whether or not the three month period to apply for annulment of an arbitral award is a mandatory time frame. The Superior Court qualified the dispute so that a request for annulment may be a *delai de rigeur*, but in the event of a defense to a homologation, the three month period is not a binding period.[206]

However, a recent case, *Compagnie d'assurance Standard Life* c. *Fagan*[207] has said that the three month time frame is mandatory even though the appeal was dropped after the Supreme Court of Canada granted leave to appeal. This may

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[204] Art. 947.2 C.C.P.:"Articles 946.2 to 946.5 adapted as required, apply to an application for annulment of an arbitration award."
[205] Art. 947.1 C.C.P.
[206] *Chantier maritime de Paspébiac (1985) Inc.* c. *Pêcheries Richard Desbois Inc.*, [1988] R.J.Q. 2474 (C.S.)
[207] [2004] J.Q. (Quicklaw) no. 5741 (C.A.)

leave the door open for a winning party to have the upper hand and file for homologation of his award with the assurance that there will be no contestation to the homologation.

In *Les Habitations Sylvain Menard Inc. c. Gilles Lebire*[208] Judge Pierrette Sevigny stated :

« Les articles 947 et suivants du C.p.c [C.C.P.] restreignent, en effet, les pouvoirs d'un Tribunal saisi d'un pareil litige qui ne peut conclure à l'annulation de la sentence arbitrale que lorsque l'un ou l'autre des critères prévus exhaustivement par le législateur a l'article 946.4 du C.p.c. sont rencontres. »[209]

The Court credential, in principle, is to find that an arbitrator has not acted within the confines of his mandate and has exceeded his competence in order to annul the decision. The burden of proof is on the person who is requesting the decision to be annulled.[210]

Arbitration under the *Règlement* is a little more peculiar. It would appear that a decision rendered by an arbitrator under the *Règlement* cannot be annulled unless

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[208] REJE 2008 QCCS 2686 (C.S.C.)
[209] *Ibid.* 258 at 36.
[210] *Compagnie d'Assurance Standard Life du Canada* c. *Jeannine Lavigne et Claude Lapierre*, EYB 2008-131079 (C.A.) at 47.

the matter has been proved to be outside of the boundaries of the Guarantee Plan.

Although *Habitations Sylvain Ménard Inc*. c. *Labelle*[211] appears to annul an arbitrator's decision under the Guarantee Plan, the facts of the case reveal that the arbitrator acted outside of the confines of the Guarantee Plan. However, Judge Hélène Langlois, made the distinctions between arbitration under the *Règlement* and ad hoc arbitration:

> "Les articles 947 et suivants du *Code de procédure civile* s'appliquent uniquement en matière d'arbitrage conventionnel[…] L'arbitre tirait en conséquence ses pouvoirs de dispositions législatives et non de la seule volonté des parties au contrat de vente original[…] »[212]

In conclusion, the R.B.Q. chose institutional arbitration as the dispute resolution process in order to protect the Beneficiary. Institutional arbitration ensures that the R.B.Q. maintain control of the proceedings through accredited Centres and that the arbitrators will be expert in matters of construction and the dimensions of the

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[211] 2008 QCCS 3274.
[212] *Ibid.* ¶20, 25.

Guarantee Plan.

Also, arbitration under these very particular circumstances allows the arbitrator to be one step ahead of a judge, as they are fully trained, thus saving the parties’ time and money.

CHAPTER II: WHAT SECURITY HAS BEEN OFFERED BY THE R.B.Q.: THE GUARANTEE PLAN

LOI SUR LE BÂTIMENT

Social and economic pressures dictated a need to shield disadvantaged contracting parties following the revised *Civil Code of Québec* which increased the protection offered to contracting parties in which the R.B.Q. was placed to protect, amongst other things, Beneficiaries purchasing residential new buildings.

One of the roles of the R.B.Q. is to oversee rules and regulations of the construction industry in order to protect parties by imposing norms such as construction codes and securities of guarantees and by providing a means in which to resolve a dispute. For the most part, the protection is offered to the Beneficiary to assure that the obligations of the Contractor under the Guarantee Plan have been respected and that the Administrator supervises any work that needs to be performed by the Contractor in regards to these guarantees. The arbitration system has been set up to ensure that parties have recourse to a higher source of authority to ensure that any complaints with regard to the Contractor's work under the Guarantee Plan have been properly addressed by the Administrator and

can be resolved by a neutral and qualified arbitrator.

Arbitration under the Guarantee Plan is two-fold, as it not only deals with disputes between the Beneficiary and the Contractor, it can also serve to resolve a dispute with regard to the Contractor's membership and his Administrator.

One of the functions of the R.B.Q. administration of the Guarantee Plan is the adoption of regulations which ensure the proper supervision of the Guarantee Plan.

Even though Quebec law favours parties to have the freedom to contract, it was deemed that the Beneficiary needed supplemental protection from the recourses and sanctions granted in the *Civil Code of Quebec* and therefore, the R.B.Q. enacted a set of rules known as the "*Règlement sur le plan de garantie des bâtiments résidentiels neufs*" in order to set up security for the Beneficiary's financial investments.

Objectives of the *Loi sur le bâtiment*

A contractor is presumed to be a specialist in his field and well aware of the quality of his workmanship and the quality of the goods provided as well as the related cost thereto. Construction of residential immoveable property in and of itself connotes a complex contractual

transaction which involves a considerable amount of investment from the Beneficiary, regardless of whether he is a savvy purchaser or a person who does not know whether the cost he is paying is relative to the quality of the property that he has been promised. The Beneficiary is accorded rights and recourses in order to force the Contractor to respect the standards imposed by the R.B.Q. The Beneficiary is deemed to be protected by the Guarantee Plan. As a result, is the system unfair to the Contractor?

The contractor may encounter extraneous circumstances which may lead him to bear more costs and entertain more aggravation during the construction of the property than he first anticipated. His role is heavily burdened with the coordination of the project and the elements of construction that can go astray. Can the Contractor be assured equal treatment with the Beneficiary under the Guarantee Plan? Under the *Règlement*, some of the private rights of the Contractor are compromised in order to offer protection to the Beneficiary, as general public rights.

In a fixed rate contract, the contractor is on the hot seat to perform his obligations and because there are always unforeseeable external and internal obstacles (including weather, organizing workmen, supply of materials

and his own reliance on professional staff), his cost may be substantially higher than the price he quoted to the Purchaser. Therefore, the contractor is in a position where he may try to find ways to cut corners in order to increase his profit and reduce the inherent risks which have been allocated to him. The creation of potential conflict between the contractor and the Beneficiary is evident.

On the other hand, all potential owners of a property are inclined to demand exceptional quality at the lowest cost possible. Sometimes, a Beneficiary's expectations are much higher than the industry standards imposed on the Contractor, thereby leaving the Beneficiary feeling short changed and the Contractor feeling frustrated. However, assuring that the property is completed on time is of utmost importance to both the Contractor and the Beneficiary and any dispute that could halt the continuation of the construction is not to either party's advantage.

One of the objectives of the *Loi sur le bâtiment* is to ensure the quality of the work performed during the construction of a building.

Section I, Application, Article 1.

1. « d’assurer la qualité des travaux de construction d’un bâtiment […]
2. d’assurer la sécurité du public […] »[213]

Clearly, the intention of the R.B.Q. is much wider than the guarantee of the Beneficiary’s investments provided by the Guarantee Plan.

The purpose of the *Loi sur le Bâtiment* under the Guarantee Plan is two-fold:[214]

Firstly, that the Contractor, vis-à-vis his beneficiary is performing in accordance with industry standards and provides a residential new building without defaults.

Building and safety codes are in place in order to accomplish this goal. The R.B.Q. recognizes three sponsoring or managing organizations, namely A.P.C.H.Q., A.C.Q., and Garantie habitation bâtisseurs Inc., which are in place to ensure the obligations, both legal and contractual provided under the terms of the Guarantee Plan, of the Contractor’s work, hereinafter referred to as the “Administrator”.

Secondly, that the Administrator, vis-à-vis the Contractor’s membership, is responsible to ensure that the

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[213] *Loi, supra* note 3 at S. 81.
[214] *Loi, supra* note 3 at S. 77.

Contractor remains solvent.

The Contractor's license is granted for a period of one year and is renewable. The Administrator who is in charge of supervising the Contractor's work must also assure the solvency of the Contractor. The Administrator may revoke or suspend the Contractor's membership in the event that the Contractor fails to meet the conditions specified in Section 93 of the *Règlement*.

Construction codes were adopted by the R.B.Q. in order to «[…] **établis des normes concernant les travaux de construction d'un bâtiment**[…]»[215]

There are minimum standards imposed on the Contractor by the R.B.Q.[216] He is obliged to maintain the qualifications required by industry standards.

In order to accomplish this mission, the R.B.Q. was granted the legislative right to create regulations which regulate the quality and safety of construction.[217]

Règlement sur le plan de garantie des bâtiments résidentiels neufs

The R.B.Q. enacted the *Règlement* for the protection of

[215] *Loi, supra* note 3 at S. 13.
[216] *Loi, supra* note 3 at S. 46.
[217] *Loi, supra* note 3, S. 110.

Beneficiaries under the Guarantee Plan provided specifically for the particularity of the construction of residential new buildings, in accordance with Article 80 of the *Loi sur le bâtiment*.

The R.B.Q. supervises by imposing upon a Contractor that he be a member of a recognized organization, called the Administrator. The Administrator's role is to police the Contractor's license through membership with the Administrator and secure financial guarantees as well as the assurance that the quality of the building has respected the standards of the Guarantee Plan.

The R.B.Q. intended to provide parties with a simple resolution process in the event of a dispute between the parties using knowledgeable Arbitrators who have been trained under the Guarantee Plan as a supervisory role to the Administrator.

In *Renovation Marc Cleroux Inc.* c. *SORECONI*,[218] Judge Pierre Isabelle described the arbitration system under *Règlement* as follows:

> "[…]les dispositions du Règlement sur le Plan de garantie Plan des bâtiments résidentiels neufs permettent de constater que le législateur a voulu

[218] J.E. 2007-1116 (C.S.)

> mettre en place un mode alternatif de résolution des réclamations ou de règlement des différends qui peuvent survenir à l'occasion de la construction ou de la vente d'un bâtiment neuf.
>
> Le législateur a voulu en obligeant tout entrepreneur à adhérer obligatoirement à un plan de garantie de maison neuves, soumettre les différends à un processus souple, simple et moins couteaux pour les parties. »[219]

The obligatory character of the *Règlement* is outlined in *La Garantie des bâtiments résidentiels neufs de l'APCHQ Inc.* c. *Maryse Desindes and Yvan Larochelle*[220] where Judge Rayle concludes that the Administrator is bound by the dispositions of the *Règlement* and cannot avoid arbitration to settle a dispute.

Pauline Roy, Professor at the University of Montreal and advocate for consumer rights, alludes to the fact that many modifications could improve the guarantees under the Guarantee Plan by reviewing the differences between the guarantees offered by the *Civil Code of Quebec* and those of

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[219] *Ibid.* ¶50, 60; See also *Claude Dupuis, Supra* note 59 at 69: « Le législateur veut, par l'adhésion obligatoire[…] donner ouverture a un mode de résolution des réclamations ou des différends survenus[…] ».
[220] 500-09-013349-030, 2004 (C.A.) at para. 32.

the *Règlement*, including:

> "Notons que la durée des garanties offertes par le plan, quant aux malfaçons et aux vices énumérés à l'article 2118 C.C.Q., est la même que celle qui est prévue au Code Civil. En revanche, la période de protection contre les vices cachés est limitée à trois ans de la réception du bâtiment, alors que la durée de cette garantie n'est aucunement limitée sous le Code civil. En conséquence, si un défaut caché se manifeste après ce délai, le client ou l'acheteur ne pourra pas se prévaloir du plan de garantie, mais pourra intenter un recours devant les tribunaux de droit commun. » [221]

In order to ascertain whether the query is well-founded, it is necessary to analyse the obligations of the parties and the structure of the Guarantee Plan itself.

Structure of the Guarantee Plan

The Participants: Who is the R.B.Q. attempting to protect?

The definitions of the main players are set out in

[221] *Droit de la protection du consommateur, Lois et règlements commentes*, (Cowansville, Quebec : Éditions Yvon Blais, 2006) at 344.

Section 1 of the *Règlement*, including the most protected party:

The Beneficiary: Under Chapter I, INTERPRETATION Section I, of the *Règlement*, the Purchaser of the building is referred to as the "bénéficiaire" or Beneficiary thereunder:

> «*Une personne physique ou morale, une société, une association, un organisme sans but lucratif ou une coopérative* […]»

The definition of a Beneficiary is not limited to a physical person and therefore the definition includes a corporate body, association or partnership. There is no distinction made between a person who is purchasing with expertise and a person who has no knowledge of construction, nor one who is a consumer.

Therefore, simply by the name that the R.B.Q. accorded the Purchaser of residential new buildings would signify that it is the Beneficiary that the R.B.Q. intended to protect. The public interests of the Beneficiary override the private interests of the Contractor in at least two areas:

1- Confidentiality of the arbitral award has been superseded by publication of arbitral decisions under the

Règlement; and

2- Regardless of whether the Beneficiary is purchasing for his own residential use or that of an investment as long as the building is used for residential purposes, the obligations of the Contractor towards the Beneficiary are guaranteed under the Guarantee Plan.

Under the C.C.Q. if the Contractor has been autonomous and that he has not been subordinate to the requests of the Purchaser or client, the Purchaser is protected by the mechanisms under the C.C.Q. Article 2099 C.C.Q. stipulating as follows:

> "*The contractor or the provider of services is free to choose the means of performing the contract and no relationship of subordination exists between the contractor or the provider of services and the client in respect of such performance.*" [emphasis added]

is the codification of a principle which had been recognized in the Supreme Court of Canada and finally incorporated into our *Civil Code* under the revised *Civil Code of Québec.*[222]

The autonomy of the Contractor is defined as "control

[222] *Quebec Asbestos Corporation* c. *Gedeon Couture*, [1929] R.C.S. 166

in the exercise of his work, particularly the method of construction."[223] The fixed-rate contract of enterprise places the entire burden of risk on the contractor to perform all of his obligations under the contract.

However, a savvy Purchaser may not be offered full protection because under the *Civil Code of Quebec* his recourses are larger. For example, it is both a Purchaser's privilege to supervise, but may also become his obligation.[224] In the event that the Purchaser has intermeddled in the construction process, the Contractor may be able to claim supplementary costs from him if something goes wrong. This obligation is somewhat contingent on the Purchaser's degree of knowledge with regard to construction techniques themselves. Should the client have extensive knowledge of the construction process, he may share some of the burden equally with the contractor.

The *Civil Code of Québec* has also distinguished between turn key contracts and contracts whereby the Purchaser, also owner of the property, has employed other

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[223] Bernard P. Quinn, *Développement récents en droit de la construction*, « L'autonomie de l'entrepreneur dans le choix des méthodes et des moyens de réalisation de l'ouvrage » , Service de la formation permanente du Barreau du Québec, Vol. 223, (Cowansville, Québec : Éditions Yvon Blais, 2005, p. 45

[224] Art. 2119 C.C.Q.

workers along with the contractor. Article 2117 C.C.Q. imposes an onus on the Purchaser to survey the work being done.

Costs may be payable to the contractor where the Purchaser has caused a delay in the advancement of the Contractor’s work due to his right to supervise or due to intervention caused by providing some of the services or materials to the construction project. If the Purchaser has hired other workers to work alongside the Contractor, and inconvenienced the contractor as a result; whether it be through poor quality of work or delays due to his worker’s availability, the Purchaser may bear a responsibility under the *Civil code of Québec*.

These elements never enter into determining the Contractor’s obligations under the Guarantee Plan because the R.B.Q. does not differentiate between the sale of a residential new construction and a construction job contracted between an Owner of land and the contractor. If the contract falls under the scope of the Guarantee Plan, the *Règlement* will apply as well as its dispute mechanism.

Therefore, in the event of a dispute between the parties, it becomes essential to determine what obligations the parties have one to the other under the Guarantee Plan

and which obligations of the parties fall outside of the Guarantee Plan since the arbitrator cannot decide on matters outside of those governed under the Guarantee Plan.

Obligations of the Beneficiary

The obligations of a Beneficiary purchasing residential new immoveable property under the Guarantee Plan differ from the purchase of an immoveable property under the *Civil Code*. The primary obligation of the Purchaser under the C.C.Q. of a Purchaser in a contract of sale of an immoveable property with the contractor is to pay the price stipulated under the terms of the offer to purchase and to receive the immovable property.[225]

Furthermore, Article 2111 C.C.Q. clarifies that the price to be paid involves a time frame in which the Purchaser must pay.[226]

The C.C.Q. has provided protection to a Purchaser purchasing immoveable property for the purpose of

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[225] Art. 2110 C.C.Q.: "*The client is bound to accept the work when work is completed; work is completed when the work has been produced and is ready to be used for its intended purpose.Acceptance of the work is the act by which the client declares that he accepts it, with or without reservation.*"

[226] "*The client is not bound to pay the price before the work is accepted. At the time of payment, the client may deduct from the price, until the repairs or corrections are made to the work, a sufficient amount to meet the reservations which he made as to the apparent defects or poor workmanship that existed when he accepted the work. The client may not exercise this right if the contractor furnishes him with sufficient security to guarantee the performance of his obligations.*"[emphasis added]

habitation. Included in these protections are hold backs which are permitted by law under two circumstances in accordance with the *Civil Code of Québec*:

1) Article 2111 C.C.Q. read in conjunction with Article 2113 C.C.Q. allows a Purchaser to hold back monies at the time he is accepting the immovable property for apparent and non-apparent defects; and

2) Article 2123 C.C.Q. allows a hold back by the Purchaser in order to assure payment of claims of the workmen and all other persons who are entitled to exercise a legal hypothec which may be published on the immovable property regarding work or materials supplied to the immovable. This hold back may be maintained until such time as the contractor has given an acquittance or discharge by the Claimant to the Purchaser where the contractor has provided sufficient security to guarantee the claims filed.

In the event that the Purchaser maintains his recourse under the reserve permitted under Article 2111 C.C.Q., he will have recourse to hold back for apparent and non apparent defects.

"Buyer Beware"! Where a Purchaser has received the property without maintaining his reserve, Article 2113

C.C.Q. stipulates that he will lose his right to withhold funds for apparent defects and only his recourse against defects which were not apparent at the reception of the property will apply.

Article 2113 C.C.Q. is silent with regards to apparent defects:

> *"A client who accepts without reservation retains his right to pursue his remedies against the contractor in cases of non-apparent defects or non-apparent poor workmanship."* [emphasis added]

Where there is a dispute with regards to the amount of the hold back, there may be a need to engage an expert opinion to establish the quantum of holdback.[227]

Furthermore, in the event that the Purchaser has necessitated an expert's opinion to prove quantum and the contractor has unjustifiably refused to provide this information, the Purchaser may apply to the Court for reimbursement of the cost to produce expert reports due to circumstances mentioned in Article 2112 C.C.Q.[228]

In the event of a dispute under the Guarantee Plan,

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[227] Art. 2112 C.C.Q.: *"If the parties do not agree on the amount to be deducted and on the work to be completed, an assessment is made by an expert designated by the parties, or, failing that, by the court."* [emphasis added]

[228] *Poirier c. Goyette, Duchesne, Lemieux Inc.*, J.E. 2004-107 (C.Q.)

the Arbitrator may, out of equity, allocate expert fees to be paid by the Administrator or reimbursed to the Beneficiary where the expert report has proved necessary that the alleged defect required correction by the Contractor.

Under the Guarantee Plan, the Beneficiary has additional concerns besides his financial commitment. His primary Obligation, aside from paying the price, is to accept the building. Although under the C.C.Q. he is not obliged to pay the price until he accepts the work, the work may not be complete at the time he must issue instalments of money under the Guarantee Plan as well as his initial deposit agreed to at the time of the signing of the offer to purchase. Furthermore, he may face extraneous expenses such as relocation, storage and moving costs in the event that the Contractor is late on delivery, which are only protected to maximum ceilings under the Guarantee Plan.[229]

The identical hold backs allowed under the C.C.Q. are not protected under the Guarantee Plan due to ceilings which limit the extent of the guarantee.

The delays of "reception" of the property may differ from the *Règlement* and the C.C.Q. It is feasible that a

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[229] *Règlement*, supra note 2 at s. 13 and 30.

Beneficiary receives the building under the Guarantee Plan prior to complete construction of the building, by writing a list of work to be completed and defects which need to be corrected. Article 2110 C.C.Q. only foresees reception at the completion of the work. Consequently, the delays in which a Beneficiary can claim under the Guarantee Plan would commence prior to those accorded by the C.C.Q. and therefore the guarantees would expire prematurely.

The *Règlement* could be amended in order to bridge this difference to deem that, nevertheless, even if a Beneficiary receives the building earlier than the completion of the work, the guarantee period would begin upon completion of the building and not upon signing of the deed of sale.

The Contractor

The **contractor**, referred to under Chapter I of the *Règlement* as an "entrepreneur" is defined as follows:

> *"une personne titulaire d'une* *__licence__* *d'entrepreneur général l'autorisant à exécuter ou à faire exécuter* […] »

The Contractor must maintain his license in accordance with the type of construction he will build and must build following the qualifications required by the R.B.Q. in accordance with the type of construction he is building.

Should he fail to fulfill his commitments, the accredited organization to which he is a member and who sponsors his guarantees, may suspend or revoke his license. This mechanism is necessary in order to provide the Administrator with the appropriate sanctions in order to allow the Administrator to force the Contractor to honour his obligations towards the Beneficiary and to sustain the guarantees offered by the Administrator sponsoring organization to the Beneficiary.[230]

Obligations of the Contractor

Under the C.C.Q., the obligations stipulated in the contract must be respected and the Contractor must produce the building described in the contract. His obligation does not expire at the completion of the project, due to legal warranties which are imposed upon him. For example, guarantees are included in Articles 2098 and seq. of C.C.Q. and Article 77 of the *Loi sur le bâtiment.*

A Beneficiary purchasing a residential new construction under the Guarantee Plan may, conceivably, benefit from a broader set of recourses, set out by the C.C.Q. which are not secured by the Guarantee Plan. This duality of recourses sends the Beneficiary into a

[230] *Règlement*, supra note 2 at s. 46.

conundrum. Although he may benefit from wider recourses under the C.C.Q., should he propose to obtain the resolution of his dispute through the tribunals he must be prepared to suffer the consequences of an insolvent Contractor.

On the other hand, under the Guarantee Plan, the contractor cannot contract inferior guarantees to those which are exigible under the regulations of the said *Loi sur le bâtiment.*[231] There are levels of guaranties which are available to the Beneficiary imposed by the R.B.Q. throughout a five-year period upon acceptance of the building.

Under the C.C.Q. there are warranties available to a Purchaser and the parties are free to establish conventional warranties within the terms of the contract which may be complimentary to the guarantees under the Guarantee Plan. However, a Beneficiary can be easily confused with regard to his recourses against the Contractor in the event that the Contractor should fail to honour his obligations. Any supplementary conventional warranties and any extensions available by virtue of the C.C.Q. which are not covered by the Guarantee Plan cannot

[231] *Loi* supra note 3 at Chapter I, Section II, s. 4.

be decided by the Arbitrator on pain of nullity of the decision.[232]

Mostly, the obligations of guarantees required by the contractor are obligations of result. The obligations in Article 2100 C.C.Q. cannot be overridden by contract.[233]

Article 2100 ¶2 C.C.Q.: *"Where they are bound to produce results, they may not be relieved from liability except by proving superior force."* Therefore, the contractor must provide his work with caution and diligence and follow the normal customs and usages.[234]

What a "reasonable person" would expect from the Contractor's work is, therefore, not considered sufficient. Indeed, the contractor is entirely responsible for the work he performs unless he can prove that the cause was due to circumstances which were unforeseeable or superior force or that he was the victim of a fault caused by a third party. Climatic conditions are not considered superior force if the contractor could have reasonably foreseen the change in weather.[235]

Although the Contractor bears the burden of proof to

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[232] *Habitations Sylvain Ménard Inc.* c. Labelle, 2008 QCCS 3274
[233] *Zurich du Canada, compagnie d'indemnités* c. *Construction Elmo Inc.*, J.E. 97-1561 (C.A.).
[234] *Pichette c. Bouchard*, [1957] C.S. 18
[235] *Val Richelieu Construction Inc.* c. *Dugas*, [1958] C.S. 622

show that he was thorough, under the obligation of means he is expected to act with prudence and diligence and to deliver the result expected by the Beneficiary.[236] What a "reasonable person" would expect under industry norms would apply in this case. Diligence is evaluated in accordance with the facts.

The contractor has the obligation to complete the building, but must honour the terms of guarantees imposed by the *Civil Code of Quebec* and the *Règlement sur le plan de garantie des bâtiments résidentiels neufs* as it pertains to the Guarantee Plan.

The contractor is expected to produce results within the norms of industry standards regulated by the *Loi sur le bâtiment.*[237]

In order for the contractor to sell a residential new construction to a Beneficiary, he must respect the terms that the R.B.Q. has set out in the *Règlement*, including obtaining the appropriate licence under Article 46. The license required is contingent on the type of property he intends to construct. The R.B.Q. will not grant a licence to a Contractor building residential new

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[236] *37313 Canada Inc.* c. *Société immobilière du patrimoine architecturale de Montréal*, J.E. 97-1132

[237] *Loi* supra note 3 at s. 14.

construction until he provides his membership from an accredited administrator.

Should a Contractor not respect the terms of the *Règlement*, his licence may be suspended or revoked by his Administrator. The Contractor, however, benefits from the right to seek recourse vis-à-vis his Administrator through the Arbitration system set up by the *Règlement* in the event of a dispute with its Administrator.

The Administrator

The Contractor and the Beneficiary are the obvious players and the parties who contract together. However, under the *Règlement*, a remaining player is added to the scope of residential new construction, requiring an Administrator, the sponsoring organization of the guarantee (referred to therein as "administrateur"). The Administrator must be a corporate organization and must be accredited by the R.B.Q. in accordance with the *Loi sur le bâtiment,* approved by the R.B.Q. in accordance with qualifications required under Article 41 of its *Règlement*:

> *"Une personne morale autorisée par la Régie du bâtiment du Québec à administrer un plan de garantie ou un administrateur provisoire désigné par la Régie en vertu de l'article 83 de la Loi*

sur le bâtiment (L.R.Q., c B-1.1)"

The Administrator provides financial guarantees by overseeing the Contractor's obligations to a Beneficiary by holding many securities, including a deposit, insurance, guarantees, etc. in accordance with Article 47 of the *Règlement.* The Administrator must also perform site inspections conducted by its inspectors to ensure the quality of the Contractor's work.

1976	1982	2003
A.P.C.H.Q.	A.C.Q	La garantie des maitres
	Garantie habitation	Bâtisseurs Inc.
	Du Québec Inc.	

Now that the objectives of the R.B.Q. and the main players have been addressed, along with their respective obligations and responsibilities under the Guarantee Plan, a peripheral view of pertinent aspects of the Guarantee Plan must be analysed since the powers of the Arbitrator are integrally tied to the contents of the guarantees offered under the Guarantee Plan and therefore, the arbitration process cannot have jurisdiction.

Contents of the Guarantee

The guarantees offered to the Beneficiary under the Guarantee Plan are distinguished by the *Règlement* between

pre-reception[238] and post-reception.[239]

Pre-reception guarantees are found in Article 9 and when added to Articles 13 and 14. The deposit made by the Purchaser is protected up to $30,000.00,[240] the completion of work in progress[241] and moving and storage of goods.[242]

Pauline Roy points out that these amounts have not been revised since 1999![243] Perhaps it is time for the R.B.Q. to reconsider the limitations of the current ceilings.

Post-reception guarantees cover six different warranties:

1) Work which must still be performed which is documented in writing at the time of the reception of the property or within 3 days after reception if the beneficiary has not yet have moved;

2) A written list of the repair of defects or poor workmanship disclosed at the time of reception (or three days later) is allowed and the *Règlement*, in consequence, allows the client to retain a holdback on the payment to the Contractor, in accordance with Article 2111 C.C.Q. which allows the client to […] deduct from the price, until

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[238] *Règlement*, supra note 2 at s. 9.
[239] *Règlement*, supra note 2 at s. 27.
[240] *Règlement*, supra note 2 at s. 13 para.1 and art.14 para. 1
[241] *Règlement*, supra note 2 at s. 13 para.3 and art. 14 para. 3
[242] *Règlement*, supra note 2 at s. 13 para. 2 and art. 14 para.2
[243] *Supra* note 32 at 344

the repairs or corrections are made to the work […]”;

Serge Crochetiere[244] warns that reception of the property prior to “end of work” which is contrary to Article 2110 C.C.Q., which provides that the “[…]client is bound to accept the work when work is completed[…]” Therefore, by allowing the Beneficiary to accept the building with a written list prior to completion may jeopardize the Beneficiary’s claim insofar as the prescriptions of the guarantee because they commence upon reception of the property by the Beneficiary rather than the date in which the property is actually completed. Furthermore, he cautions that the Guarantee Plan has limitations:

> «[…]il est essential de se rappeler que la garantie réglementaire n’est pas une garantie de produits, mais un cautionnement de certaines des obligations de l’entreprise de construction[…] »[245]

3) Repairs of poor workmanship which are not apparent at the time of reception, but have been discovered within one year of reception, in accordance with Articles 2113 and 2120 C.C.Q.;

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[244] Textes réunis par Guy Lefebvre, *L’Édification du nouveau droit de la construction, Les Journées Maximilien-Caron, Règlement sur le plan de garantie les bâtiments résidentiels neufs*, (Montréal : Université de Montréal, Les Éditions Thémis, 1999) at 136
[245] *Ibid.* at 127

Article 2113 C.C.Q. allows the client to retain his *"right to pursue his remedies against the contractor in cases of non-apparent defects or non-apparent poor workmanship."* The Civil code has not distinguished between an apparent or non apparent poor workmanship. However, the *Règlement* requires a list disclosing all apparent defects at the time of reception by the Beneficiary.

If the work is not completed in conformity with the norms of the industry, including norms contained in the *Code national du bâtiment du Canada*,[246] the *Code canadien de l'électricité*[247] and the *Code de plomberie,*[248] there is a deemed default equalling poor workmanship unless the nature of the default itself threatens the quality, security or use of the property.

Defects themselves must be distinguished from poor workmanship under Article 2120 C.C.Q. Poor workmanship does not entail the entire project being at risk. The prescription period to report poor workmanship is a one year period following acceptance of the immovable.

The warranty provided under 2120 C.C.Q. can be

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[246] *Code de construction du Québec*, Chapitre I, Bâtiment et Code national du bâtiment-Canada 1995 (modifié) (décret 953-2000, 26 juillet 2000), L.R.Q., c-B-1-1

[247] *Loi sur les maîtres électriciens*, L.R.Q., c. M-3 and *Loi sur les installations electriques*, L.R.Q., c. I-13.01

[248] *Loi sur les maitres mécaniciens en tuyauterie*, L.R.Q., c. M-4

excluded by the contracting parties on a civil law basis because it is not of public order.[249]

However, unlike the C.C.Q., the *Règlement* does not allow parties to contract out of the Contractor's obligations with regard to legal obligations of the Contractor under the Guarantee Plan.[250]

Serge Crouchetiere notes that the last paragraph of Article 10 of the *Règlement* leaves only insignificant non-conformities out of its one-year guarantee on poor workmanship and therefore some elements would not be covered by the Guarantee Plan with regard poor workmanship to the quality, security or use of the building.[251]

4) Repair of hidden defects are covered by Article 1726 C.C.Q. and defects found within three years as of reception in accordance with Article 2103 C.C.Q.[252] The Beneficiary must notify the Contractor in writing within a reasonable delay, not exceeding six months from the time that he discovered the hidden defect in accordance with Article 1739 C.C.Q.

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[249] *Nova Construction (Marcel Parent) Inc.* c. *3098-1062 Québec Inc.*, J.E. 97-386

[250] *Règlement*, supra note 2 at art. 2, ¶4, 5.

[251] *Supra* note 33 at 136

[252] "*The contractor* […] *He shall furnish only property of good quality; he is bound by the same warranties in respect of the property as a seller.*"

The Règlement confirms the warranty against hidden defects described in Article 1726 C.C.Q.[253]

5) Repair of defects of conception, construction or defects in the soil in accordance with Article 2118 C.C.Q. These defects must be discovered within five years after the completion of work and the Beneficiary has the obligation to notify the Contractor within a reasonable delay, not exceeding six months.

The same concerns exist for the Beneficiary regarding the determination of the prescription period to which the five year warranty may expire prior to five years after the building was completed.

Serge Crouchetiere[254] indicates that the "end of work" differs substantially if the building is held under divided co-ownership. He points out that the common portions may be completed to the use in which they were intended whereby the private portions may not yet be completed under the Guarantee Plan. The private portions are presumed completed when the Contractor has completed the work relative to the

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[253] *"The seller is bound to warrant the buyer that the property and its accessories are, at the time of the sale, free of latent defects which render it unfit for the use for which it was intended or which so diminish its usefulness that the buyer would not have bought it or paid so high a price if he had been aware of them[…]"* [emphasis added]

[254] *Supra* note 33 at 137

private portion and at the latest, when the common parts are finished. Serge Crouchetiere concludes that the five-year warranty no longer corresponds with the reception date of the Beneficiary, rather in the context of divided co-ownerships the end of work relates to the termination of the common portions. These matters could be clarified by more specifically defining that the guarantees begin their respective prescriptions once the building has been completed, or in the case of divided co-ownership, when both the private and common portions of the building are complete.

Buildings Covered

The Guarantee Plan secures some of the financial obligations of the Contractor, concentrating on the guarantee of the building rather than the guarantee of the terms and conditions set out in the contract between the Contractor and the Beneficiary. The limitations of the guarantees under the Guarantee Plan continue with the restricted definition given to the word "bâtiment":

> *"le bâtiment lui-même, y compris les installations et les équipements nécessaire à son utilisation soit le puits artésien, les raccordements aux services municipaux ou gouvernementaux, la fosse septique et son champ d'épuration et le drain*

français ; "[255]

The building must be purchased for use as a residence but not need to be the Purchaser who resides in the building.

Once again Serge Crochetiere remarks that not all buildings are included under the Guarantee Plan, nor all elements of the building covered.

"La garantie réglementaire ne saurait donc inclure d'autres obligations que celles prévues aux article ci-dessus mentionnées."[256]

Therefore, only the list of necessary elements which the inspectors must verify and which are incorporated into the *Règlement* assure that the obligations of the Contractor are met.[257]

The object of the *Règlement* pertains specifically to residential new buildings as enumerated specifically in Division II, Application, Section 2 of the Règlement.

"2. (1) the following new buildings intended mainly for residential purposes and not held in divided co-

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[255] *Règlement*, supra note 2 at s. 1 para. 3.

[256] *Supra* note 33 at 133, referring to *Règlement*, supra note 2 at ss. 9, 10, 26, and 27; and *supra* note 3 at S. 77.

[257] *Règlement*, supra note 2 at s. *17. Both the Contractor and the Beneficiary must be present at the time of the site inspection. "17. Chaque bâtiment visé par la garantie doit être inspecté avant la réception. Cette inspection doit être effectuée conjointement par l'entrepreneur et le bénéficiaire* […]*"*

ownership by the beneficiary of the guarantee:

(a) a detached, semi-detached or row-type single-family dwelling;

(b) a multifamily building, from a duplex to a quintuplex;

a multifamily building comprising more than 5 dwelling units and held by a non-profit organization or a cooperative[…]"

Condominiums having more than four stories are excluded.

It would appear that as long as the use of the building conforms with the definitions of the *Règlement*, the intention of the Beneficiary is not relevant. Therefore, he may purchase the property as a consumer or as an investor without any distinction recognized between the two. There is no restriction to the protection of the Guarantee Plan should the Beneficiary choose not to reside in the building, therefore the building can be rented, as long as the use within the building remains residential.

Residential new construction of buildings up to three stories high are protected under the Guarantee Plan; however four stories or higher are not included.

Furthermore, Article 1 of the *Règlement* limits the

elements which are included in the Guarantee Plan regarding the exterior of the building to French drains, septic tanks and their respective fields of drainage and connecting pipes to government services.

Landscaping and leveling, parking spaces, storages sheds, pools, balconies and sidewalks are not included in the Guarantee Plan. A garage which forms part of the building would be covered by the Guarantee Plan but only if it is not considered a separate exterior element.[258]

There are many arbitration cases exactly on point whereby the Arbitrator must determine whether the claim is covered by the Guarantee Plan. For example, whether the installation of the French drain is at fault, which would be covered by the Guarantee Plan or whether it pertains to leveling and landscaping which would not apply and therefore if the problem were ascertained to be landscaping, the Arbitrator does not have the jurisdiction to render a decision on the matter.

All matters which are not included under the Guarantee Plan would give rise to recourse before a Tribunal in order to file a claim against the Contractor. However, in seeking recourse in a Tribunal the Beneficiary would not be

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[258] *Règlement*, supra note 2 at s. 12 para. 9.

secured by the protective mechanisms of the Guarantee Plan any longer.

Deposits and expenses

The deposit made by a Beneficiary in order to secure the purchase of his new residential building (or condominium) is guaranteed by the Administrator by virtue of Articles 13.1 and 30.1 of the *Règlement*, which obliges the Administrator to indemnify the Beneficiary up to the ceiling provided.

Should a Beneficiary deposit $50,000.00 with his contractor, he is only secured for $30,000.00 under the Guarantee Plan. Therefore, the remaining $20,000.00 would not be secured. The Beneficiary would have to recover the ceiling amount from the Administrator and then take action in a Court Tribunal to recover the residue of his deposit with the risk that the Contractor is no longer financially viable and cannot return the balance of the deposit.

In practice, this is not always an option to the Beneficiary.

Arbitrators have been known to uphold correctives under the Guarantee Plan.

In *La Garantie des bâtiments résidentiels neufs de*

l'APCHQ Inc. c. *Claude Dupuis*[259] the Court considered that the arbitrator has the juridiction to decide on these matters and grant correctives:

« L'arbitre reconnaît qu'une interprétation littérale du règlement peut porter à conclure du moins à première vue, que la protection offerte par le plan de garantie de l'A.P.C.H.Q. ne couvre pas le parachèvement des parties communes.

Il se dit cependant en désaccord avec cette conclusion sur le plan du droit et de l'équité. En effet, selon lui, le cadre général du règlement n'exclut pas le parachèvement des travaux dans les parties communes[…] L'arbitre note qu'en vertu des règles du droit civil, ce sont les copropriétaires eux-mêmes, et non le syndicat des copropriétaires, qui sont les détenteurs des titres de propriété sur les parties privatives et les parties communes.

Le Tribunal en vient donc a la conclusion que l'arbitre n'a pas modifie la portée de la garantie et qu'il n'a pas excédé sa juridiction»[260]

In order to benefit from the Guarantee Plan, parties

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[259] *Claude Dupuis, Supra* note 59.
[260] *Claude Dupuis, Supra* note 59 at paras. 31, 32, 37, and 82.

must have make their complaint within the prescribed methods, delays and procedures. Omission of the Beneficiary to respect the delays (along with desistment during the terms of the arbitration process) accorded under the Guarantee Plan are one of the main reasons Beneficiaries find themselves with unsatisfactory arbitration results, due to the fact that the Arbitrator has no power to render a decision on the matter if the delays have not been respected. The delays to file remain short, the R.B.Q. having extended the delays only from 15 to 30 days.

Storage and additional moving costs as well as temporary difficulties finding professional advise in the allotted time frame.

Lodging costs are expenses in which a Beneficiary can be reimbursed under the Guarantee Plan in the event that the Contractor has been unable to deliver the property within a reasonable amount of time and, as a result, the Beneficiary suffers damages therefrom.[261]

Reception of the property

Upon reception of the property, the Beneficiary must inspect the property. It is recommended that he be

[261] *Règlement*, supra note 2 at s. 9, para. 3.

accompanied by a professional or expert having knowledge of construction. In the event that he considers the property incomplete or incorrect, he must address the contractor by registered mail and send a copy to the administrator. The inspector of the administrator will then make a site visit and issue a report with regard to any defects or poor workmanship that he may have found. In the event that the Beneficiary is not satisfied with the administrator's report, he has thirty (30) days from the moment he receives the report to send a notice requiring the arbitration process to begin.

Reception of the property is an area in which the Beneficiary faces a possibility of unfair results under the Guarantee Plan, as pointed out by both Pauline Roy and Serge Crochetiere, since a Beneficiary may receive the building even though the contractor has not completed his work, contrary to Article 2110 C.C.Q. A list of work to be completed or corrected may be established at the time the Beneficiary receives the building. The implications for the Beneficiary can be profound.[262]

Unlike under the C.C.Q., the guarantees under the Guarantee Plan begin at the time of reception rather than

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[262] *Supra* note 33 at 137

at the time of the “end of work”, which in practice could be anywhere between one month and nine months later, depending on the time of year the reception takes place. Therefore, the amount of time in which the Beneficiary is granted security following his recourse under the Guarantee Plan is diminished by the difference in time between reception of the property and the “end of work” defined under the C.C.Q.

Limitations of the Guarantee Plan

Most Beneficiaries who purchase a new construction for habitation are unaware that they are not receiving a blanket guarantee for everything that could go wrong with the building. There are limitations and exclusions to the guarantee.

To begin with, there are restrictions of the guarantee stipulated in Articles 13 and 30 as the *Règlement* functions in terms of the protection of the type of building constructed rather than protecting the terms of the contract between the parties.

Furthermore, there are ten exclusions listed in Article 29 of the *Règlement* for which the Contractor cannot be held liable, which in law, for the most part, he would not be in any case:

1- Defaults in the material or equipment furnished and installed by the Beneficiary in the private portion of a condominium;

2- Repairs which are necessary because of the usual characteristics of the material, such as cracks and shrinkage;

3- Fault of the Beneficiary in maintaining or using the property, in which case the default would be a deemed defect;[263]

4- Deterioration due to normal use of the building;

5- The obligation to move and store property by the Beneficiary as a result of superior force, such as earth quakes, flooding, severe climatic conditions or strike and lock-outs;

6- Repair of damages stemming from the civil extra-contractual responsibility of the contractor;

7- Repair of damages resulting from contaminated soil, including the replacement of the soil;

8- Public service in gas or electricity issues;

9- Outside parking lots and conveniences (pools,

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[263] *Paquet* c. *Construction Godin & Leclerc Inc.*, J.E.98-199 (C.A.) qualifies the legislation to read that if the consumer has not suffered any prejudice, s. 6 will not apply, even though he may suffer prejudice at a later date.

terraces, balcony etc;

10- Debts owing to people who participated in the construction of the property;

However, all exclusions mentioned in paragraphs 2 and 5 are not applicable if the Contractor is in default of performing his obligations in accordance with the norms of the construction described in Section 27 of the *Règlement*.

One of the problems a Purchaser faces in setting up his claim to a tribunal is that he must prove that he has suffered a prejudice to receive a favourable decision. The court considered in *Paquet* that the Contractor was not liable when he did not follow industry standards providing there were no defects affecting the property, thereby concluding that there was no proof that the Beneficiary suffered prejudice.[264] Under the C.C.Q., prejudice must be proved in order for a Purchaser to have a claim. However, under the *Règlement* this is not a necessary distinction.

However, decisions like *Paquet* leave Beneficiaries feeling shortchanged and would seem to contradict the security offered under the *Règlement*. Although no prejudice was proved at the time of the hearing, damages may arise later in the life of the property and then the

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[264] *Ibid.* at J.E.98-199 (C.A.)

Beneficiary will suffer the consequences and, by that time, he may be outside the delays in which recourse is available to him. In the interim, the client is disillusioned and justice has not been rendered.

Under Article 2102 C.C.Q., the common law creates an obligation by the contractor to inform the Beneficiary prior to the conclusion of the contract, of any problems he foresees which may arise during the period of construction.

"Before the contract is entered into, the contractor or the provider of services is bound to provide the client, as far as circumstances permit, <u>with any useful information concerning the nature of the task which he undertakes to perform</u> and the property and time required for that task." [emphasis added]

Indeed, it is the scope of the Guarantee Plan that triggers the powers of the Arbitrator and on the matters he may decide regarding a dispute between the parties and therefore, the strength or weakness of the Guarantee Plan influences the efficiency of the arbitration process set up by the R.B.Q.

CHAPTER III: AVAILABLE RECOURSES

A BENEFICIARIE'S RECOURSES UNDER THE *RÈGLEMENT*

The arbitration system under the Guarantee Plan has been criticized by authors, summarized by Denys-Claude Lamontagne:

> "Une telle approche fait en sorte que la protection offerte au consommateur immobilier par le droit administrative est tout aussi incomplète et insatisfaisante que celle offerte par le droit prive de la consommation."[265]

When purchasing immoveable property the Beneficiary is faced with a battery of potential problems: he may be faced with issues of poor workmanship, incomplete construction or construction which may not be completed in conformity with the terms and conditions in the contract he signed with the Contractor and at the price he was willing to pay. The work can be late or never completed and, worst of all, there may be apparent or non apparent defects. Therefore it is not difficult to ascertain who the vulnerable party is: The Beneficiary, who has no distinction regarding whether he has or does not have

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[265] Denys-Claude Lamontagne, *Les contrats relatifs à l'entreprises, droit spécialisé des contrats*, Vol. 3, (Cowansville, Québec : Éditions Yvan Blais, 1999) at 366

knowledge of construction norms, as discussed earlier in "Structure of the Guarantee Plan" in Chapter II.

The Beneficiary risks facing prejudice on what is probably the largest investment of his life. A professional vendor is presumed to know the defects of the property. The legal regime historically presumed that the responsibility of surveillance by the architect in Article 1689 C.C.B.C.[266]

However the bearer of the responsibility of surveillance is now established to be borne by the experts, as codified in Article 2119 C.C.Q. It is unfair to a purchaser who has little expertise to have a duty of surveillance on a matter which he does not understand.[267]

As discussed earlier under "Obligations of the Contractor" in Chapter II, a professional Vendor cannot contract out of legal warranties required by law.[268]

The contract may contain explicit warranties but all legal obligations are implicit and of public order and cannot be contracted out.[269]

As discussed earlier in "Contents of the Guarantee"

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[266] Replaced by Art. 2121 C.C.Q.
[267] Art. 2100 C.C.Q. provides for an obligation of result for the property which has been promised by the Contractor.
[268] Art. 2100 C.C.Q.
[269] *Davie Ship Building Co.* c. *Cargill Grain Co.*, [1978] 2 R.C.S. 570.

under Chapter II legal warranties are contained within the scope of Article 2098 and seq. C.C.Q. including three levels of warranty:

1-Poor workmanship, which has a 1 year prescription;[270]

2-Hidden defects, which have a 3 year prescription;[271] and

3-Defects of conception, which have a 5 year prescription.[272]

The application of the warranties under Article 77 of the *Loi sur le bâtiment* is similar to the C.C.Q., however, the time restraints are not parallel. The C.C.Q. contains a more open-ended warranty, whereas even though the *Règlement* provides for security to the recourses of the Purchaser under the scope of warranties, it has set limits in accordance with the object in which it is providing the guarantee.

Under Quebec law, Article 2111 C.C.Q. allows the Purchaser to retain a holdback when accepting the property which is deducted from the purchase price until the property has been repaired or until the contractor furnishes the purchaser with a security to guarantee that

[270] Art. 2113 C.C.Q. (of public order) and Art. 2120 C.C.Q. (not of public order)
[271] Art. 2103 C.C.Q.
[272] Art. 2118 C.C.Q.

his obligations will be fulfilled.

However, the purchaser's greatest fear lies in the domain of hidden or latent defects which are default warranties covered under the Civil Code as follows:

Legal warranty is guaranteed to any purchaser of immoveable property under the C.C.Q. unless otherwise eliminated in the preliminary contract. As already discussed, there are warranties which cannot be contracted out of should the vendor be a professional, such as the Contractor in this study. Legal warranty need not be specified in the contract in order to apply as it is the automatic default setting. The warranty against hidden defects is set out legislatively to ensure that the purchaser has practical and economic use of the property which he has acquired.

The *Civil Code* enumerates the general principles of legal warranty in Articles 1726 to 1739 C.C.Q.

There are four criteria which must be met in order for a Purchaser to seek judicial recourse with regard to defects under legal warranty, namely:

1-The hidden defect must have existed at the time of the sale;

2-It must be serious;

3-It must be hidden; and

4-It must be unknown by the purchaser at the time of purchase.

The *Civil Code* has not expressly defined the term “defect”. However, jurisprudence[273] has established that there are three principles regarding hidden defects, which relate to the deficiency of use to the Purchaser:

The material defect must touch a particular good, i.e. in this context, the property;

The functional default must affect the conception of the goods, (i.e., in this context, the construction); and

The conventional default must affect the Purchaser’s intended use of the property.

The material and functional defects relate to the normal use of the property by the Purchaser, the property having been built for residential purposes, whereas the conventional defect relates to the function of the particular use of the property declared to the vendor by the purchaser, which in our study are one and the same.

In 2007, the Supreme Court of Canada[274] reiterated the concepts of the responsibility of a Vendor regarding hidden

[273] For example, *ABB Inc.* c. *Domtar Inc.*, 2007 CSC 50, no. 31176, 31177 and 31174, ¶47 and 48.
[274] *ABB Inc., Ibid.*

defects. Although there is an obligation by the Vendor to divulge all known defects, which stems from the good faith general principle[275] a Purchaser has the obligation to inspect as well as any ordinary diligent purchaser would have done. In *ABB Inc.* c. *Domtar Inc.* treated the subject of hidden defect:

> « Le caractère cache du vice s'apprécie selon une norme objective, c'est-à-dire en évaluant l'examen fait par l'acheteur en fonction de celui qu'aurait fait un acheteur prudent et diligent de même compétence […]Autrement dit, on ne s'interroge pas simplement sur l'ignorance du vice ; on cherchera aussi à déterminer si un acheteur raisonnable place dans les mêmes circonstances aurait constate le vice. »[276]

A vendor need not warrant against latent defects known to the purchaser or apparent defects[277] which are defects that a prudent purchaser would have noticed without the assistance of an expert.

In order for a purchaser to prove the existence of a hidden defect, he must show that the hidden defect was

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275 Art. 1375 C.C.Q.; *Banque de Montreal* c. *Bail Ltee*, [1992] 2 R.C.S. 554 at 586.
276 *Supra* note 274 at para. 52.
277 Art. 1726 C.C.Q.

serious and not known to him at the time of the purchase and that he would not have purchased the property or that he would have purchased the property at a lower amount. The purchaser must not have been able to notice the defect as any prudent and diligent purchaser would have without seeking recourse with an expert[278] and he must advise the vendor of the defect within a reasonable delay.[279] The purchaser bears the burden of proof[280] to demonstrate the need of the resolution of the sale if the default of the vendor is important or to maintain the contract with a reduction of the price.[281]

When considering the recourses of the Purchaser the courts will consider the following aspects, namely:

The price of the immoveable property;

The municipal evaluation;

The market value;

The nature of the defect;

The cost to repair the defect;

The equity increase once the corrective repairs have

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[278] An imprudent purchaser will not be protected under the code: *Placement Jacpar Inc.* c. *Benzakour*,[1989] R.J.Q. 2309

[279] Art. 1739 C.C.Q.

[280] *McLellan* c. *Larin*, 2007 QCCS 212, J.E. 2007-394; Ouellet et Belair c. Dionne, C.S., 250-001048-016, at para. 34; Art. 289 C.C.P.

[281] Arts. 1458, 1590 and seq. C.C.Q.

been executed and whether the property is increased or decreased as a result of the repairs.

The recourses available to the Purchaser regarding legal warranty are governed by ordinary principles of the law of contract.[282]

The recourse in execution of the nature of the contract[283] and the recourse in execution of the performance of the obligation[284] are available in the courts but unfortunately, due to the restriction of recourses granted under the Guarantee Plan as a result of the R.B.Q. defining the security around the building and not the contract between the parties, the recourse is not available in the arbitration centre of the *Règlement.*

In theory, the purchaser may seek the resolution of the sale; however, claims regarding contracts pertaining to immoveable property are more likely to seek the reduction of the price.[285]

The purchaser may also choose a recourse in damages before a tribunal.[286]

As stated in *Marcoux* c. *Picard*:

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[282] *Marcoux c. Picard*, 2008 QCCA 259, (le 5 fevrier 2008) at para. 27.
[283] Art. 1601 C.C.Q.
[284] Art. 1602 C.C.Q.
[285] Art. 1604 C.C.Q.
[286] Art. 1728 C.C.Q. and Arts. 1611-1621 C.C.Q.

"[…]dans le régime de la garantie de qualité, l'acheteur, comme tout créancier, a le choix des sanctions et, en matière de vices cachés, il est reconnu qu'après avoir mis le vendeur de remédier au vice, l'acheteur peut également faire réparer le bien a ses frais et obtenir une réduction du prix calculée en fonction des dépenses encourues. »[287]

In the same judgement,[288] the court reproduced the following extract:

"Enfin, il ne faut pas oublier que, des le 3 novembre 2003, les appelants ont reçu de la part des intimes le préavis exigé par l'article 1739 C.C.Q. A compter de ce moment, ils auraient pu eux-mêmes effectuer la réparation de l'immeuble vendu a un coût possiblement inferieur a celui des tiers engages par les intimes, puisqu'il s'agit justement d'un des objets de ce préavis. Au surplus, ils n'on fait aucune preuve visant a démontrer que le coût des réparations pouvait être supérieur au montant de la réduction de la valeur de la résidence résultant de la présence des vices cachés :

[287] 2008 QCCA 259 at para 27.
[288] *Ibid.* at para. 30.

« Dans tous les cas ou un tribunal est en situation de fixer la proportion ou le montant qui constituera la diminution du prix de vente en raison d'un vice caché, il faut que cette proportion ou ce montant s'appuie sur des éléments de preuve qui vont nécessairement varier selon les circonstances. »

In *Ouellet* c. *Eymann,*[289] Judge Marc Beauregard hands down the following decision :

"Quant a la diminution du prix en raison des vices caches, je suis d'opinion qu'il faut l'évaluer en tentant de se demander quel prix aurait offert l'intime lors de l'achat (…)s'il avait su (…).

Dans la détermination de ce prix, l'intime aurait certainement évalué les déboursés qu'il allait avoir a faire pour (…)ou, a tout le moins, évaluer le travail nécessaire pour (…)

L'intime aurait pas la suite pondéré le chiffre qu'il aurait obtenu dans l'éclairage du prix global qu'il aurait été prêt à payer pour (…)

Il faut aussi se demander si, compte tenu de toutes ces mêmes circonstances, l'appelant aurait accepté l'offre

[289] [1988] R.J.Q., 2448 (C.A.).

à la baisse de l'intime et tente d'établir la réduction théorique sur laquelle les parties se seraient entendue.»[290]

The Purchaser does have the obligation to mitigate the damages under Article 1479 C.C.Q.:

> *"A person who is liable to reparation for an injury is not liable in respect of any aggravation of the injury that the victim could have avoided."*

Defects under the *Règlement* and recourses available to the Beneficiary

The primary difference between the warranties offered under the *Règlement* and the C.C.Q. are that the Civil Code governs all the terms and conditions of the contract between the parties whereas the Guarantee Plan only governs certain aspects of the building, but the security offered by the *Règlement* is superior to the recourse a Purchaser has under the C.C.Q.

The guarantees under *Règlement* are maximum guarantees provided on any contractual basis. The guarantees apply whether the contract is one of sale or a contract of enterprise. However, the guarantee is limited in scope by the definition of the term "building". Not all buildings

[290] See also *Carrier* c. *Malette*, [2004] J.Q. no. 1447, C.S., 760-17-000375-025

are covered by the Guarantee Plan (eg. A six-plex is not covered nor is a condominium containing more than four stories) and not all parts of the building are covered (eg. Landscaping, out buildings which are not attached to the primary property, balconies, etc.) The five main elements which are protected by the Guarantee Plan are as follows:

1- The deposit of the Beneficiary up to $30,000.00 maximum;

2- The completion of work;

3- Relocation expenses and repair of apparent defects;

4- Poor workmanship; and

5- Latent defects.

While the Guarantee Plan does not offer more scope than the Civil code with regard to reparation of defects, poor workmanship and latent defects, it does offer a security on these matters which the Purchaser would otherwise not be entitled to. The *Règlement* distinguishes its guarantee on the basis of reception between pre-reception guarantees and post-reception guarantees, as discussed in CONTENTS OF THE GUARANTEE, the result being that prescription of the recourses of the purchaser under the C.C.Q. and the *Règlement* due to the fact that the time

of acceptance of the building is generally sooner under the *Règlement* than under the terms of the *Civil code*, primarily due to the fact that under the *Civil code*, the Purchaser should hold out until he is satisfied with the completion of the terms and conditions of the contract or he may holdback a sum of money or require a security from the Contractor.

On the other hand, the *Règlement* purports to replace such a hold back or conventional security with the Guarantee Plan. The Purchaser under the Guarantee Plan, when accepting the property, must enumerate a list of repairs or projects to be completed at the time of his acceptance of the property and, insofar as the items are those which are governed by the Guarantee Plan (i.e., not items which are outside the scope of the definition "Building", such as landscaping, etc., as discussed earlier in the definition section.) the purchaser's security is already in place and controlled carefully by the R.B.Q..

The real coverage offered by the *Règlement* lies in the fact that the security on the above mentioned defects lasts for the prescriptive times allocated by the C.C.Q. because the Administrator must financially guarantee that the repairs will be done. In the event that the Purchaser

seeks recourse in a tribunal, rather than using the dispute resolution process offered under the Guarantee Plan, the Purchaser is not offered a full security by his contractor, unless the contractor stays in business and therefore can be sued for performance by a dissatisfied Purchaser.

Under the *Règlement*, the Purchaser does not have the same array of remedies as discussed hereinabove. The Purchaser must rely exclusively on the arbitrator's powers allotted under the Guarantee Plan, which generally entails enforcing the correction or completion of the project on the Contractor or the Administrator or both. The restitution of the purchase price is unheard of since the Beneficiary purchasing residential new construction often has a personalized, customized element to the completion of the project, where he has chosen options which the Contractor would otherwise not have effected for a third party purchaser.

As discussed under the powers of the arbitrator, he has been given the power under the Guarantee Plan to allot certain damages pertaining to justifiable expert expenses by the Purchaser in order to prove his claim, storage and moving costs, etc. as discussed earlier under the chapter on POWERS OF THE ARBITRATOR.

Neither regime provides for the inclusion of a Purchaser of immoveable property being defined as a "consumer". The scope of application of the L.p.c. specifically excludes most immoveable property and limits the concept of a consumer context to exceptional contracts which pertain to renovations and repairs. Article 6(b) of L.p.c. expressly exempts the regulation of the construction and sale of immoveable property under the legislation and therefore, the purchaser of real estate cannot be considered a consumer under the current legal system.

However, it is true that most construction contracts are controlled by the contractor and there are stipulations which are imposed on a Purchaser or the Contractor is unwilling to contract, thereby giving the illusion of a contract of Adhesion.[291] This is precisely why there are guarantees that cannot be contracted out of, and why the R.B.Q. considered the importance of protecting the vulnerable party, the Beneficiary.

Denys-Claude Lamontagne maintains that a reform in the consumer laws including the purchaser of immoveable property is in order. He suggests that the legislature

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[291] Art. 1379 C.C.Q. stipulates: "*A contract of adhesion is a contract in which the essential stipulations were imposed or drawn up by one of the parties, on his behalf or upon his instructions, and were not negotiable.*"

reform the L.p.c. in stages, thereby progressively integrating its scope of application.

However, in reality, the legislature has preferred to regulate immoveable property in its own separate and particular set of rules because of its particular and complex nature. It has included building codes governing workmanship, apparent and non-apparent defects, and offered a better security than that which is envisaged in Article 2111 C.C.Q.

In order to further protect a Purchaser, the Legislature based its rules under Articles 1785 C.C.Q. to 1794 C.C.Q. in order to conclude the current regulations on this subject. The *Civil Code* provides for the purchase of residential habitation purchase whereby the Purchaser must be a natural person (physical) who is purchasing for his own habitation (or as others would interpret would include a purchase for another family member, but this is a questionable interpretation not agreed to by all doctrinal writers) Article 1785 C.C.Q. excludes moral persons, who are nevertheless, conversely, allowed to benefit under purchases governed by the *Règlement*.

Article 1793 C.C.Q. provides recourse if the formalities required by the preliminary contract, as laid

out in articles 1786 C.C.Q. and seq. are not followed that the Purchaser may cancel the contract if he shows that he has suffered a serious prejudice from the original preliminary contract. Article 1794 C.C.Q. ties the sale of the residential immoveable property to the rules relating to warranties as established in the *Civil code of Quebec* as discussed hereinabove. The *Civil Code* was modified under the New *Civil Code of Quebec* in 1994 to distinguish between contracts of service and contracts of construction of buildings in order to better protect the Purchaser of immoveable property.

Available recourses

The recourses available to the Beneficiary are two-fold. He maintains the right to access justice in the Tribunal as long as he has not obtained a binding arbitration decision, which is final and binding unless, exceptionally, the tribunal has annulled the decision due to, exceptionally, the arbitrator ruling outside of his mandate. However, the consequences of his choice will affect the final outcome to justice.

Should the Beneficiary wish to seek recourse in the Tribunal on matters which are protected in the plan de guarantee, he loses the financial security offered by the

R.B.Q. Even though he may attain a favourable judgment he may nevertheless, in practice, have no practical claim should the Contractor have become insolvent. A Beneficiary should be aware that a Judge has no more jurisdiction than an arbitrator to decide on matters which are guaranteed under the Guarantee Plan. Therefore, a Beneficiary may spend between $15,000.00 - $20,000.00 on lawyer's fees only to find out that the arbitrator could have rendered the same decision, which would be final and binding, for a relatively small fee, or none at all. Also, in a tribunal, a Purchaser may take the risk of recourse against a Contractor only to find out that his recourse has not shown prejudice and therefore may be unable to obtain a favourable judgement.[292]

Just because the Beneficiary chooses the tribunal does not give him any further power over the results of the decision. A Judge cannot grant more relief to a Beneficiary under the Guarantee Plan than an arbitrator. He only has more scope than an arbitrator because he is able to rule beyond the limitations of the Guarantee and consider the contents of the contract between the parties as a whole.

It is often preferable for a Beneficiary to bear the

[292] *Paquet c. Construction Godin & Leclerc Inc.*, J.E.98-199 (C.A.)

arbitration fees than for a Beneficiary to pay legal fees only to find out that his claim is a dead end.

The Beneficiary must seek advice in a Tribunal on all matters outside the scope of the plan de guarantee because the arbitrator has no power to render a decision. He has no power because the arbitrator cannot decide on matters outside the scope of his mandate, although this is no fault of the arbitration rules themselves, which are in conformity with the C.C.P. and therefore they are wide enough and efficiently prepared for action in the event that the Guarantee Plan were to become enlarged to include all the recourses otherwise available to the Beneficiary under the C.C.Q.

The choice to arbitrate does not disallow the Beneficiary from seeking relief in a tribunal. Technically, the Beneficiary, in parallel terms, may autonomously seek recourse both in arbitration on matters which are included in the Guarantee Plan and in the tribunal for all matters which are outside the scope of the definition of a "building" under the Guarantee Plan. Why should a beneficiary not be allowed to seek recourse in arbitration on all matters of the C.C.Q. rather than having to file in two separate sources?

Therefore, although the current recourses available to the Beneficiary are insufficient it is not because the arbitration system is insufficient.

The mandatory arbitration system was set up, not only because arbitration is a growing concern and considered an efficient dispute method in construction matters worldwide, but the Legislature also decided that State intervention was necessary to protect a purchaser buying residential new property. In order to offer the security necessary to protect the Purchaser, the Legislature set up controls and limitations in order to ensure that the State had full control over the matter; such as establishing industry building codes, the terms in which a Contractor must be licensed, the Administrator who must put up a bond to financially ensure that the work is complete, and all of these particular and specialized mechanisms lead to control of the dispute resolution process which was intended to remain within the surveillance of the R.B.Q., who alone has the power to establish its arbitration rules.

As discussed in the beginning of the paper, arbitration is considered well suited for supervision by the R.B.Q., as it alone has the power to offer the arbitration Centres their accreditation. It alone sustains

the power to impose procedures of arbitration through its *Règlement.*

Other than expanding the Guarantee Plan, does the arbitration system offer a sufficient dispute mechanism?

The first issue is that the Beneficiary must be informed of the procedures of arbitration and a better process is needed to ensure that the Beneficiary is aware of his rights under the arbitration system of the R.B.Q. and the process followed.

The procedure is simple, if the Beneficiary knows that he is entitled to complain to the Administrator in the event of incompletion of the Contractor’s work or a complaint against the quality of the work. The Administrator must, then, investigate the Contractor’s work. In the event that the Administrator finds a fault in the work, his role is to impose upon the Contractor to attend to the construction or repairs. Meanwhile, the Administrator is financially responsible to the Beneficiary as he is obliged, under the Guarantee Plan, to assure the Beneficiary that the work will be complete and of good quality. While there is a conflict of interest as the Administrator is to take on two roles: the guarantee of financial security that the Contractor’s obligations have

been satisfied while scrutinizing the very work that it guarantees.

Denys Lamontagne suggests expanding the guarantees with neutral "Administrators" who do not have the obvious conflict of interest that now exists:

"Un tel objectif pourrait être atteint en prévoyant, d'une part, un véritable plan de garantie qui s'impose au premier chef à l'entrepreneur, dans le respect des règles de droit commun applicable à l'ensemble de ses obligations légales et contractuelles et, d'autre part, un plan de cautionnement qui aurait vocation à s'appliquer seulement lorsque l'entrepreneur est dans l'impossibilité d'agir. Dans ce cas, le cautionnement d'exécution des travaux, au sens traditionnel du terme, pourrait prévoir des limites a l'engagement de la caution, tout en élargissant la protection offert au bénéficiaire pour inclure, notamment, le cautionnement de matériaux et main-d'œuvre, lequel garantit le paiement des ouvriers, fournisseurs et sous-traitants evitant ainsi au propriétaire d'être tenu hypothécairement au paiement de ces créances[…]"[293]

The R.B.Q. has taken the responsibility to govern the security offered to the Beneficiary. Therefore, it

[293] *Supra* note 266 at 438

controls who is accredited as Administrators and who is accredited as Arbitrators. While there is a conflict of interest on the part of the Administrators who guarantee the very work that they must supervise, the common misconception that the conflict exists on the arbitration level is unfounded.

To summarize, what are the advantages and limitations to the mandatory arbitration system under the Guarantee Plan?

Advantages of the arbitration system

It is not difficult to see the many advantages that arbitration offers to dispute resolution, now an embraced method used in international business. Easy access to the judicial system when the Beneficiary is well informed and he can rely on the security that the Arbitrator can impose sanctions upon the Contractor and the Administrator, if warranted. The financial risk to the Beneficiary is minimal and he obtains a speedy decision by an Arbitrator who is fully qualified, neutral and specially trained to review construction covered by the Guarantee Plan and who renders a decision which is full and final between the parties.

Limitations of the arbitration system

The primary limitations circle around the powers of the arbitrator. He is totally dependant on the Guarantee Plan because he cannot rule outside of the confines of the stipulations in the Guarantee Plan. As a direct result, he cannot decide on all matters pertaining to the obligations of the Contractor; for example, he is limited to the definition of "buildings", and he is dwarfed by the prescription limits due to the time in which a Beneficiary accepts the property, generally prior to completion of the property. The arbitrator cannot impose the extent of damages that a Judge could in a tribunal, but can only refund the expert expenses, relocation and storage costs of the Purchaser.

The most valuable limitation is that of a lack of information given to a Beneficiary who often does not understand the procedures or the benefits available to him under the arbitration system.

There has been controversy regarding the misunderstood arbitration system. It has received the brunt of the insufficiencies of the Guarantee Plan. Therefore to improve the plan, it is necessary to compare with other jurisdictions.

CHAPTER IV: BRIEF COMPARATIVE STUDY OF THE QUEBEC ARBITRATION PROCESS WITH OTHER JURISDICTIONS

In order to truly understand the merits of the *Règlement* and its pitfalls, it is imperative to perform a brief comparative study with other international private arbitration systems insofar as construction purchases are concerned, in order to compare the benefits of the Quebec system and to establish where the arbitration system could be improved. At random, Ontario, United States, Germany and England were chosen as the jurisdictions for the purpose of comparative studies, which incidentally, in spite of the fact that the Guarantee Plan could use some improvement, all other jurisdictions have fallen short of the securities offer by the *Règlement* and its Guarantee Plan.

Most jurisdictions distinguish, to some extent, material of a construction nature with general arbitration rules; however, they do not distinguish between construction of real estate and construction of residential real estate, as the Quebec system singled out because of the another particularity of this area of law.

ONTARIO REGULATIONS
Residential sector of the construction industry

Beginning close to home, in our neighbouring province, Ontario's construction laws are regulated, strangely, under the auspices of the *Labour Relations Act*, *Lois de 1995 sur les relations de travail*, Ontario Regulation 522/05.

The arbitration process in Ontario relies on the conventional agreement to arbitrate between the parties. The goal of arbitration in Ontario is to search for a "good, fast and cheap"[294] dispute resolution method.

Unlike Quebec, Ontario does not have specific legislation governing construction arbitration, let alone residential construction arbitration.

The security available to a person purchasing real estate in Ontario is limited into the following categories:

1. "Pay when paid" clauses in subcontracts provide that the contractor has no responsibility to pay the subcontractor or suppliers until the owner has paid;

1. Liens can be created against the property under the *Construction Lien Act* by an interested party.[295]

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[294] D.W. Glaholt, "Has the time come for the '100 day construction arbitration in Canada?" (2007), 59 C.L.R. (3d) 1

[295] "14(1) *Creation of a Lien – a person who supplies services or materials to an improvement for an owner, contractor or subcontractor, has a lien upon the interest of the owner in the premises improved for the price of those services or materials;*"

2. The amount that may be collected is limited to the amount of improvement made and subject to holdbacks. The lien can be registered within 45 days (15 days longer than in Quebec) following the completion of the contract or the date of the publication of a declaration certificate proving substantial performance of the contract.

3. A holdback may be used to require 10% of the services or materials supplied may be claimed against as a deduction against the purchase price.

Another available method of protection is the Trust provisions which may be used to ensure that monies are received by contractors, subcontractors and suppliers which the owner or purchaser of the property must deposit in trust for the benefit of persons who have supplied services or materials.

Contractors can be required to establish a Material Payment Bond and a Performance Bond as a condition of the contract, in order to protect the owner from subcontractor's claims in the event of insolvency or default of the contractor. However, this mechanism does not protect suppliers of subcontractors of the contractors, rather only the contractors, contractor's suppliers and subcontractors themselves.

All of these protective measures must be stipulated in the contract between the parties or the security will not exist.

The Ontario arbitration laws are not institutional, but rather based on the fact that the parties have had the freedom to conventionally agree to arbitrate and to bind themselves to the arbitrator's full and final decision, but the rules apply where parties have not established the procedures.

The scope of application of the Regulations apply where an arbitrator has been appointed under section 150.2 of the Labour Relations Act and the parties disagree regarding the procedures of arbitration.

Prior to arbitration, mediation is encouraged between the parties to settle on an agreement:

"The arbitrator shall try to assist the parties through mediation to settle any matter that he or she considers necessary to conclude the collective agreement."[296]

The method of arbitration is found in Section 4. (1): *"The method of arbitration for the monetary items in disputes shall be mediation-final offer selection*[…]*"*

And in Section 4. (2):

[296] S. 3 (3) of the *Labour Relations Act*, *Lois de 1995 sur les relations de travail*, 522/05

"The method of arbitration for the other items in dispute shall be mediation-arbitration[…]*"*

Although most jurisdictions prohibit an arbitrator from performing both as mediator and the arbitrator for the same matter, it is encouraged as a dispute resolution procedure in Ontario.

Parties who have not agreed to the nomination of the arbitrator are regulated under Section 150.2 of the Labour Relations Act.

The arbitration process is basic but relatively swift, whereby the beginning of the proceedings are deemed in Section 2 to be within 7 days of the arbitrator's appointment. The arbitrator then convenes the parties to the hearing.

The parties then file joint written statements setting out the matters which have already been agreed upon. If there is disagreement between the parties with regard to monetary terms, each party writes a final written offer on the monetary items.

The arbitrator has exclusive powers to "*determine all matters that he or she considers necessary to conclude a*

new collective agreement[…]"[297] until such time as the new agreement between the parties is in force or deemed to be in force by virtue of Section 6.[298]

Then there is a time delay in which the decision of the arbitrator must be awarded in Section 5, requiring a quick resolution where the award must be handed down within 7 days after the first day of the proceeding.

The construction rules in the Ontario arbitration system are geared towards the encouragement of a conventional settlement. The arbitration system has been based on the most prevalent of matters to be arbitrated, namely labour law, and does not have the more specific rules regarding construction disputes as in the Quebec system. There are no securities set up particular to construction disputes, other than the available conventional forums of "pay when paid", liens, holdbacks, trusts and bonds. In the event that the Contractor refuses to agree to one or more of the securities, he cannot be forced by law to grant a security. Therefore, the Purchaser

[297] S. 3 (1) of the *Labour Relations Act*, *Lois de 1995 sur les relations de travail*, 522/05

[298] S. 6 (4) of the *Labour Relations Act*, *Lois de 1995 sur les relations de travail*, 522/05: *"If either party fails to execute the documents within seven days after the arbitrator gives them to the parties, the documents come into force as though they had been executed by the parties and those documents constitutes the new collective agreement."*

of real estate in Ontario has no recourse to financial security or to a report to a supervising body to verify the contractor's quality of work and to force him to complete his tasks. The Quebec system, although it requires improvement, has progressed in comparison with the Ontario system as the securities are in place and there are supervisory bodies which have been set up to ensure the quality and completion of the building. Although the Quebec arbitration system is mandatory, the Purchaser benefits on a greater scale than a Purchaser acquiring Ontario property.

AMERICAN ARBITRATION ASSOCIATION (AAA) on construction disputes

In the United States, a common law jurisdiction, The United States Arbitration Act, enacted in 1925, known as the Federal Arbitration Act ("FAA") governs arbitration. Section 2 of the FAA is all encompassing, covering all types of arbitration, and deems an arbitration agreement is presumed "valid, irrevocable and enforceable."

Indeed, the United States Supreme Court diametrically ruled:

> *"Agreeing in advance on a forum acceptable to both parties is an indispensable element in*

International trade, commerce and contracting"[299]

In the United States, faxes and other forms of communication have been accepted as sufficient proof that the parties intended to submit to arbitration.

"If one party is considerably more powerful than the other, the party with the lesser power may benefit from the fairness-determining aspect of arbitration."[300]

The common law Courts are loath to invalidate arbitration clauses except under the following formula:

The first question to be asked in the common law is whether the contract was a contract of adhesion. If the Court deems that the contract is one of adhesion, it must then decide whether the consumer understood that he was giving up his rights to fuller judicial review. From there, it must be proved that the arbitration clause was unconscionable or fraudulently induced.[301] Therefore, even with regard to adhesion contracts, unless the arbitration clause is obviously unfair and unreasonable, under ordinary

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[299] *Mitsubishi Motors Corp. V. Soler Chrylser-Plymouth Inc.*, 473 U.S. 614 (1985), at 630, Blackmun J.

[300] John W. Cooley and Steven Lubet, *Arbitration Advocacy*, 2nd ed. (Notre Dame, Ind.: National Institute for Trial Advocacy, 2003), at 10 while comparing mediation with arbitration.

[301] *Harper v. J.D. Byrider of Canton*, 772 N.E. 2d 190 (9th Cir. 2002).

circumstance, the arbitration clause will be upheld.

The leading United States' case regarding unfair process stems from employment law. In *Hooters of America Inc.* v. *Phillips*[302] the Court ruled that the arbitration clause was void for reasons of "public policy". Within the context of employment, the ruling became the primary model for the 1998 *Due Process Protocol for Mediation and Arbitration of Consumer Disputes* in the United States and a source of consumer law, the clause was considered unconscionable, because it was considered so *"one-sided that its only purpose was to undermine neutrality of the proceeding."*

Protocols require the intervention of an independent Arbitration Dispute Resolution Board and are designed to ensure that independent and impartial neutrals are appointed in order to assure parties of a fair process. Protocols, however, are voluntary procedures and do not have the force of law.

Many sponsoring organizations, such as the American Arbitration Association (AAA) have adopted minimum due process protocols with regards to arbitration in order to set standards for disputes which arise following the

[302] 175 F.3d 933 (4th Cir. 1999)

signature of the contract. The protocols are designed to ensure a fair process both in the selection of the arbitrator and the procedure of the arbitration proceedings.

An interesting example lies in Maine legislation[303] designed for the purpose of new car purchases, where all car manufacturers must submit to state-certified arbitration in the event that a consumer requests arbitration within a two year period of the delivery of a new car. The arbitrator is then selected by the Department of Attorney General in order to "promote fairness and efficiency."

Arbitration in the scope of adhesion contracts has been in the lime light in recent United States' jurisprudence. *Brower* v. *Gateway 2000 inc.,*[304] a landmark case which allowed a contract of adhesion to validly contain an arbitration clause, ruled that such a contract could only be challenged by the contracting parties on the basis that such a contract can be shown to be "unconscionable".

Due process is the consideration of fair and just

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[303] Me. Rev. Stat. Ann. 10, SS 1169 (West 1997)
[304] 676 N.Y.S. 2d 569 (App. Div. 1998)

treatment, alluding to the concept of Natural justice:

> *"the idea that any specific sense of fair treatment may be indefensible if it violates some deeper standard of justice...(the role of officials applying the law) Here the issue is what should be the officials' approach where a law, or its application in a case, violates a more fundamental standard of justice. Different views are tenable, but I suggest that if, after close analysis, an official concludes that to apply the law would be an injustice at a deep level and of a serious kind, then his duty would be not to apply it."*[305]

The AAA allows an arbitrator to apply *"any remedy which the arbitrator deems just or equitable within the scope of the agreement"* which, liberally interpreted may allow an arbitrator to decide on the matter submitted in accordance with law, equity.

Some authors believe that due process dates back to the Magna Carta, referring to clause 30 of the Charter of 1215, purported to establish a suggestion of a fair trial by jury.

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[305] D.J. Galligan, *Due Process and Fair Procedures A Study of Administrative Procedures*, (Oxford, England: Clarendon Press, 1996) at 61

"No freeman shall be taken and imprisoned or disseised of any tenement or of his liberties or free customs […] except by the lawful judgment of his peers or by the law of the land."[306]

This was the embryonic stage in which due process began to evolve. Due process has been integrated into various common law statutes to provide for procedures which must be used in order to allow a fair hearing and to ascertain whether an action is justified in law and that the rules of law be applied in an appropriate manner.

> *"In their simplest form, procedures are the steps leading to a decision; they are the means for reaching a decision or other result. In a modern legal system, the range of legal decision is considerable, but one common feature is that each tries to advance certain ends and goals."*[307]

What do we anticipate from due process and fair proceedings?

> *"For procedural fairness is very much concerned with the way persons are treated in legal processes. Whenever a question arises about how a person should be treated, about the allocation of burdens and benefits, where*

[306] *Ibid.* at 173 referring to authors such as Faith Thompson, an American Historian, S. Thorne, W. Dunham and P. Kaarland, who studied the Magna Carta and its history at 173
[307] *Supra* note 305 at 5

> *rights or interests are affected, fairness is in issue. Fairness is often linked to ideas about giving a person what is due, but it goes further and rests on the general principle that a person is treated fairly if he is treated in a way to which he has a justifiable claim."*[308] [emphasis added]

The American Arbitration Association has three sets of Rules and Procedures with regard to Construction Disputes. The American system distinguishes construction matters in terms of quantum of money involved, rather than on the complexity of the issues themselves.

For matters which are inferior to $75,000.00, there is a "Fast Track Procedure" which is a 60-day "time standard" for the case to be completed. A list of accredited arbitrators who are pre-qualified to assist expedited procedures are presented for the parties' mutual approval. The hearing must take place within 30 calendar days following the appointment of the arbitrator and the hearing is generally not more than a single day. The "Fast Track Procedure" must be quick as the award must be handed down within a 14 day period once the hearing has taken place.

For matters which are inferior to $10,000.00, the

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[308] *Supra* note 305 at 52

American Arbitration Association provides a “documents only” procedure in order to issue an award.

“Regular Track Procedures” exist for disputes which exceed $75,000.00. The arbitrator is appointed by mutual agreement between the parties using a list of accredited arbitrators. The arbitrator is granted extensive powers to control discovery and production of evidence as well as broad powers to orchestrate the hearing itself. The award itself bears a written explanation, unlike other matters of arbitration in the American system.

A claim superior to $500,000.00 is considered a Large complex Construction dispute and bears its own procedures. A highly qualified panel of arbitrators who are trained in the technical aspects of construction will be appointed. A preliminary hearing will be heard prior to the hearing, which the arbitrator may choose to conduct by telephone. The hearing itself will take many days which may be scheduled on consecutive days or in blocks, depending on the availability of the arbitrators and the parties involved.

Regular tract procedures

Section R-1 of the Regular Track Procedures requires evidence of an arbitration agreement in order to have the rules of the AAA govern arbitration in the event that a

dispute arises between them.

Similar to the Quebec arbitration Centres who supervise the arbitration system, the administration may be given to the AAA to administer the arbitration.[309]

A National Roster of accredited construction arbitrators exists for the parties to choose from.[310]

As in other jurisdictions, the claiming party must give notice of his intention to file for arbitration proceedings. A notice of the claiming party is sent to the responding party as well as duplicate copies sent to the office of the AAA.[311] The AAA then confirms the notice of filing to the parties.

The statement of claim encourages the parties "*to provide descriptions of their claims in sufficient detail to make the circumstances of the dispute clear to the arbitrator.*"[312]

Up until the time that the arbitrator is appointed, the claim may be flexible.[313] It may be increased or decreased insofar as the monetary amount is concerned and

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[309] S. R-2 of the AAA Construction Industry Arbitration Rules and Mediation Procedures. See also American Arbitration Association <http://www.adr.org/sp.asp?id=22004>.
[310] *Ibid.* at S. R-3
[311] *Supra* note 309 at s. R-4(a)(i)
[312] *Supra* note 309 at s. R-4 (d)
[313] *Supra* note 309 at s. R-6

the claim maybe modified during the process as long as it is made in writing, filed with the AAA, and a copy sent to the other party. The other party is granted a period of ten days if he chooses to file an answer with the AAA.

The jurisdiction of the arbitrator is dealt with in Section R-8. As in Quebec, the Arbitrator is permitted to rule on its own competence and comment with regard to the validity of the arbitration agreement or contract between the parties. However, under Section R-8 (c) of the AAA, parties are given a time frame in which they can file an objection, which is *"no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection."* This is a practical addition to the Rules to be encouraged to save the parties time and expense trying to attack jurisdiction later in the proceedings.

The AAA provides for mediation at any time during the arbitration proceedings in Section R-9. However, unlike the Ontario system, the mediator cannot be the arbitrator who has been appointed to the case.

The preliminary hearing is established under Section R-10 whereby the AAA is permitted to conduct an "administrative conference" with the parties either in

person or by means of the telephone to determine preliminary arrangements, such as the selection of the arbitration, whether or not mediation will take place, administrative matters, including the timing of the hearing and exchange of information.

The place of hearing, or the "Fixing of Locale", depends on a mutually satisfactory locale proposed by one of the parties insofar as the remaining party does not object within 15 days.[314] Where an objection is lodged, the AAA has the power to decide where the hearing shall take place.

The single most important element of arbitration is the choice of the arbitrator. In the event that the parties have not agreed on an arbitrator or the method to appoint one, a default system is set up in Section R-12 of the AAA. The method provided for the parties to choose the arbitrator is extremely detailed.[315] Each party is sent a list of accredited arbitrators by the AAA (generally 10 unless the AAA decides otherwise). Then the parties are encouraged to agree to an arbitrator from the list. The arbitrator cannot, however, be a person who has mediated

[314] *Supra* note 309 at s. R-11
[315] *Supra* note 309 at s. R-12 (a)

between the parties. If the parties still cannot agree the parties must strike names from the list and number their order of preference on the remaining names and return the list to the AAA.[316] In the event that one party does not return the list, all the arbitrators on the other party's list are deemed to be acceptable by him. The AAA will then inform the arbitrator who is the designated mutual order of preference. If none of the arbitrators are able to act or all of the arbitrators on the list are not accepted, the AAA then has the power to appoint an arbitrator from other members of the National Roster without the consent of the parties.

The notice of the appointment of the arbitrator must be filed within 15 days or the AAA shall appoint the arbitrator.[317]

Where an arbitral tribunal of three arbitrators is formed, a chairperson must be appointed.[318] The AAA encourages a sole arbitrator to act but a panel of three arbitrators is acceptable.[319]

Under the AAA, arbitrators should be selected in accordance with the following objectives:

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[316] *Supra* note 309 at s. R-12(b)
[317] *Supra* note 309 at s. R-13(d)
[318] *Supra* note 309 at s. R-14
[319] *Supra* note 309 at s. R-16

1) Impartiality and objectivity;

2) Dispute management skills;

3) Experience in arbitration proceedings; and a strong academic background and professional or business credentials;

The Arbitrator is obliged to report any reasons that he should decline the nomination,[320] including the inability to be impartial or independent due to a bias which may exist either because of a personal interest or a financial interest in the outcome of the case. Any past or present relationships with the parties or their representatives, as the case may be, must be reported to the parties.

The AAA is the only jurisdiction studied hereunder which provides for the "Nationality of Arbitrator in International Arbitration". It would appear that the allegation of a person having the same Nationality with the arbitrator may be an available exclusion to a dissenting party.

Disqualification of an Arbitrator is limited to three

[320] *Supra* note 309 at s. R-17. Disclosure of reasons is required where they may *"give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any financial or person interest in the result of the arbitration or any past or present relationship with the parties or their representatives"*. The obligation continues through the entire arbitration procedure to include any future impartiality or independence issues that may arise during the proceedings.

circumstances:

"*(i) partiality or lack of independence;*

(ii) inability or refusal to perform his or her duties with diligence and in good faith; and

(iii) any grounds for disqualification provided by applicable law. The parties may agree in writing, however, that arbitrators directly appointed by a party pursuant to Section R-13 shall be non-neutral, in which case such arbitrators need not be impartial or independent and shall not be subject to disqualification for partiality or lack of independence."[321]

It is at the discretion of the AAA as to whether an arbitrator should be disqualified in the event that one of the parties should object to the arbitrator.[322]

Section R-31(a), the Conduct of Proceedings, clearly establishes the principle of due process and fair proceedings:

"*[…]The arbitrator has the discretion to vary this procedure, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.*"

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[321] *Supra* note 309 at s. R-18 (a)
[322] *Supra* note 309 at s. R-18 (b)

Further powers of the arbitrators include the ability to "*make preliminary rulings and enter interlocutory orders.*"

The arbitrator is in control of how much evidence shall be admitted in accordance with what he deems is relevant and he need not follow the rules of law on evidence,[323] including the power to subpoena a witness or any documents that he may require.[324] To facilitate proof, witnesses may be evidenced by written declaration or affidavit.[325]

If the arbitrator decides that a site visit is necessary, he will instruct the AAA of the time and date of the visit and the AAA will send notice to the parties.[326] If a party is not present at the inspection, the arbitrator is expected to make an oral or written report and allow the parties the "*opportunity to comment.*"

The arbitrator is given more power than in other jurisdiction to grant interim measures. He may "[…]*take <u>whatever interim measures</u> he or she deems necessary, including injunctive relief and measures for the protection or conservation of property and disposition of perishable*

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[323] *Supra* note 309 at s. R-32
[324] *Supra* note 309 at s. R-32(d)
[325] *Supra* note 309 at s. R-33
[326] *Supra* note 309 at s. R-34

goods."[327] and may require security for costs with regard to interim measures.[328]

The Deliberation is dealt with in Section R-36. Once the arbitrator has declared the hearing closed, the 30 day time limit begins to run on the production of the final award.[329]

Any time prior to the decision being awarded, the hearing may be reopened if necessary.[330]

The award is issued in writing[331] and the award may be reasoned if the arbitrator believes it is necessary or one of the parties have required an explanation of the award. Delivery of the award is mailed to the parties at the "*last known address*" or "*personal or electronic service.*"[332]

Fast tract procedures

The Fast Track Procedures under the AAA are designed to be swift. Section F-1 limits any extension to the process under extraordinary circumstances to a one 7 day extension of time in order to allow a person to respond to a claim or counterclaim.

As in Regular Track Procedures, a party may modify,

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[327] *Supra* note 309 at s. R-35 [emphasis added]
[328] *Supra* note 309 at s. R-35(b)
[329] *Supra* note 309 at s. R-42
[330] *Supra* note 309 at s. R-37
[331] *Supra* note 309 at s. R-43
[332] *Supra* note 309 at s. R-45

increase or decrease his claim until the selection of the arbitrator has taken place.[333] Parties have a 5 day period to file with the AAA after receiving a copy of the claim or counterclaim. If as a result of an increased claim or counterclaim the claim exceeds the amount of $75,000.00, the case will be administered under Regular Track procedures unless the parties and the arbitrator agree otherwise.

Since Fast track procedures are accelerated, service of the notice to arbitrate can be made by telephone.[334]

The parties are given 7 days to choose an arbitrator from the list given by the AAA.[335] If they fail to make the choice, the AAA will appoint the arbitrator from the names which are not struck out on the list.

A preliminary telephone conference is held between the parties and arbitrator "as promptly as practicable" after the appointment of the arbitrator.[336]

There is no discovery except for an exchange of documents which must be done at least 2 business days prior to the hearing.[337]

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[333] *Supra* note 309 at s. F-2
[334] *Supra* note 309 at s. F-3
[335] *Supra* note 309 at s. F-4
[336] *Supra* note 309 at s. F-5
[337] *Supra* note 309 at s. F-6

If the claim is less than $10,000.00 the proceedings are "documents only", unless the parties wish to proceed with an oral hearing.[338]

Within 30 days of the confirmation of the arbitrator's appointment, the date, time and place of hearing must be set by the arbitrator.[339] The AAA bears the responsibility to advise the parties of the hearing date.

The hearing does not generally exceed more than one day.[340] An additional day may be scheduled within 7 days of the initial hearing if necessary in order to allow the parties to have equal opportunity to prove their claims.

The award must be rendered within 14 days of the closing of the hearing.[341]

Under exceptional circumstances the time limit of 60 days may be extended.[342]

In the United States, "*the arbitrator may grant any remedy or relief which is just and equitable within the terms of the agreement of the parties.*"[343]

The AAA defends the arbitration system and discourages

[338] *Supra* note 309 at s. F-8
[339] *Supra* note 309 at s. F-9
[340] *Supra* note 309 at s. F-10
[341] *Supra* note 309 at s. F-11
[342] *Supra* note 309 at s. F-12
[343] Jay Folberg, Dwight Golam, Lisa Kloppenberg, and Thomas Stipanovich, *Resolving Dispute, Theory, Practice and Law,* (New York: Aspen Publishers Inc., 2005) at 503

judicial review of the awards. Therefore, unlike most jurisdictions, including the Quebec arbitration system under the *Règlement*, it has advised that arbitrators are not to give reasons for their awards.

Should a party wish to "confirm" the award in Court, thus making the award equal to a judgment, he can file a motion in Court. The process is similar to the Quebec homologation process. The winning party must serve the losing party with the motion. Then, a Court official will review the documents and grant a judgement.

The award can only be vacated by corruption or fraud, partiality of the arbitrator or misconduct of the arbitrator; basically, where the arbitrator has exceeded his powers or improperly executed them. An Arbitrator must fail to provide the parties with an opportunity to lodge their arguments to the dispute or that the arbitrator has decided on matter which does not form part of the matters submitted by the parties. In the event that the arbitrator was given procedural strategies by the parties and does not follow them, he has exceeded his powers. Enforcement is accomplished by a very strictly limited and restricted judicial supervision.

The United States has an elaborate plan regarding construction disputes which is more suitable for large construction disputes or commercial construction.

There is no state intervention and, once again, the agreement of the parties is imperative in order to make the arbitration recourses functional.

The AAA serves an administrative role much like the Arbitration Centres set up in Quebec under the *Règlement* although the AAA is the parties' choice and not imposed upon them.

What we can learn from the American arbitration system is that the AAA has granted extensive powers to its arbitrators in comparison with the powers allocated to arbitrators under the *Règlement*; including interlocutory orders and interim measures which are beneficial in construction contexts. The "documents only" quick arbitration is not suitable for implementation in construction contexts, due to site visits.

GERMAN REGULATIONS

German enforcement of arbitration awards under the Construction Laws of Germany are handled by the Court of Arbitration.[344]

Germany, a civil law jurisdiction has regulations which are much more simplistic than those of Quebec and very few delays are written in the regulations themselves. We are not given privy to how long and under what circumstances a party must file for arbitration.

The scope of application is divided in accordance with either the parties' agreement or in accordance with the amount of the claim, rather like the American system. The German arbitration system divides the claims into regular arbitration proceedings and simplistic arbitration proceedings.[345]

The arbitration notice must be in writing from the claimant (plaintiff) to the defendant. Then, "*The arbitration proceedings begin on the day on which the notification of the institution of arbitration proceedings is obtained by the plaintiff and the court.*"[346]

Most time delays are inscribed as "immediate",

[344] *Arbitration rules of the court of arbitration for private construction law in Germany*
[345] *Ibid.* at s. 1, ss. 1(2),(3)
[346] *Supra* note 344 at s. 1, ss. 2(2)

including the acceptance of the arbitral tribunal, referred to as the "Court of arbitration".

Declarations by the parties or the parties legal representatives[347] must be made in writing.[348]

Simplified arbitration proceedings are resolved with one arbitrator, who is either a building expert or a lawyer.[349] Where three arbitrators are appointed, one or two shall be building experts and the remaining one or two shall be *"holding judicial office"*. Should the parties agree, even a regular arbitration proceeding can be dealt with *"by one or two arbitrators."*[350]

The selection of the arbitrator(s) is made by the Court of Arbitration itself and is not chosen by the parties.

Any justified doubt concerning an arbitrator's impartiality and independence may be raised by a party.

The rejection of an arbitrator takes immediate effect once the reason is known.[351] The remaining party and the court of arbitration must be notified in writing, which

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[347] *Supra* note 344, permitted in s. 1, ss. 4(1)
[348] *Supra* note 344 at s. 1, ss. 3(1)
[349] *Supra* note 344 at s. 1, ss. 5(1)351 *Supra* note 345 at s. 1, ss. 5(2)
[350] *Supra* note 344 at s. 1, ss. 6(1): *"The court of arbitration for private construction law in Germany appoints the arbitrators. These arbitrators are deemed commissioned by both parties."*[emphasis added]
[351] *Supra* note 344 at s. 1, ss. 8(1)

must contain the reasons for rejection.[352]

Refusal proceedings are necessary if the opposing party does not agree with the refusal and the refusing party must petition the tribunal court in order to have effect, which incurs yet another delay of 14 days.[353]

The arbitrator may be replaced to continue the proceedings if he is no longer able to act.[354]

A lot of detail is dedicated to the procedures relating to the appointment of the arbitrator even though the parties have no choice in who the arbitrator will be. The State, as under the Quebec *Règlement* knows best which arbitrator would be suitable for a specific case.

Fundamental procedural principles emphasize the necessity of speed, using terms such as "*as early as it is necessary*" and to "*ensure that the arbitration proceedings are carried out swiftly.*"[355]

The notice of arbitration is sent to the defendant by the court of arbitration[356] and the parties are summoned to the hearing by registered mail. The notice must be sent

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[352] *Supra* note 344 at s. 1, ss. 8(3)

[353] *Supra* note 344 at s. 1, ss. 9(1) following the statement of the opposing party.

[354] *Supra* note 344 at s. 1, ss. 10 "*(1) If an arbitrator is prevented from exercising his/her function due to death or illness, another arbitrator can be appointed by the court of arbitration.*

[355] *Supra* note 344 at s. 1, ss. 11.

[356] *Supra* note 344 at s. 1, ss. 11(4).

within 14 days of the scheduled hearing.[357] However, "*In urgent cases the court may curtail the period and summon the parties by telegraph, telex or facsimile.*"

The Court encourages one hearing, if possible[358] and as a result the Court decides what it will allow as evidence.[359]

Although the arbitrators are granted a great deal of latitude with regard to proceeds, the arbitration Court must act "*according to the best of its knowledge and belief in an impartial way.*"[360]

The reasons for the award must be published[361]

"*unless the parties have expressly waived this requirement.*" [emphasis added] This allows the parties to protect their privacy should they choose to. In Quebec, the construction awards must be published under the Rules and Regulations. The American arbitration association prefers not to publish. However, in any case, the court records must be preserved for a period of five years.[362]

The parties are jointly and severally liable for the

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[357] *Supra* note 344 at s. 1, ss. 11(5)
[358] *Supra* note 344 at s. 1, ss. 11(6)
[359] *Supra* note 344 at s. 1, ss. 11(7) The Court may "*refuse the parties' motions to take admission of evidence when and insofar as it deems them irrelevant, unnecessary or an attempt to delay the proceedings.*"
[360] *Supra* note 344 at s. 1, ss. 5 (3)
[361] *Supra* note 344 at s. 1, ss. 17 (2)
[362] *Supra* note 344 at s. 1, ss. 17(6)

costs of the arbitration proceedings.[363] The payment of half the arbitration fees must be made up front. If one party does not pay, the Court may require that the other party pay the delinquent amount. If the party refuses, the Court will terminate, not suspend, the proceedings.[364]

The enforcement of an arbitration award may be requested by a party through a petition to Court.[365]

The German construction arbitration system, once again, requires the agreement to arbitrate by the parties, but it is the Court who imposes the selection of the arbitrator on the parties. The awards can be published, but unlike the Quebec *Règlement* the parties may request for the award not to be published. It has a two tiered system based on the quantum of the claim, a distinction which is similar to the AAA. The costs and fees of the German arbitration system exceed those imposed on a Beneficiary under the *Règlement*.

There are no built in securities for the vulnerable party and therefore, the Quebec arbitration system regarding residential new construction is still a more viable system with regard to the recourses available to the

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[363] *Supra* note 344 at s. 1, ss. 19(1)
[364] *Supra* note 344 at s. 1, ss. 19(9)
[365] SS.1602 and seq. German C.C.P.

Purchaser.

Some jurisdictions will impose or encourage conciliation as an obligatory procedure prior to Arbitration or Litigation, in order to attempt to settle the parties' disputes prior to a hearing. The Ontario system is very pro-mediation to the extent it allows the arbitrator to also be the mediator in an attempt to reach an agreement.

The United Kingdom is no exception, however, it has a slightly different approach and a very interesting private construction arbitration (adjudication) dispute system.

THE UNITED KINGDOM

Recourses with regard to legally imposed warranties are present within the United Kingdom, but not necessarily on a statutory level.

Under British law, as it applies to construction contracts reads as follows:

"For the purposes of this section and s. 5 below, goods are of satisfactory quality if they meet the standards that a reasonable person would regard as satisfactory, taking into account the price (if relevant)

and all other relevant circumstances."[366] [emphasis added]

Notwithstanding any statutes, the common law courts have a tendency to protect the rights of the vulnerable party, in this context, the purchaser, as a matter of public policy, thereby creating a specific liability on the part of the contractor to provide the consumer with quality materials. In the leading United Kingdom case, *Young & Marten* v. *McManus Child*[367] the court determined that material provided by the Contractor must be free from latent defects and that there is an implied warranty whereby a consumer can rely on the contractor's "skill and judgement" to assume that the material provided is fit for the purpose in which it was designed. The case focused around the fact that the roofing tiles installed were defective and the owners were obliged to re-roof their their property within twelve months of their installation. Judge Pearce pointed out:

"It would, I think, surprise the average householder if it were suggested that by simply exercising a choice he lost all right of recourse in respect of the quality of fittings against the builder who normally has better

[366] S. 4.2(A) of the *Supply of Goods and Services Act 1982, Part II*
[367] [1969] 9 BLR 77

knowledge of these matters."[368]

In the common law, the "usual remedy for breach of contract is the payment of damages, which is monetary compensation intended to put the injured party in the position he would have been in, had the contract been carried out."[369]

An alternative remedy, which is the rescission of the contract, is not practical in the scope of construction as the restitution of parties to their original position prior to entering into the contract is impractical.

John Adriaanse documented examples of damages awarded by the UK Courts:[370]

"[…]£500 for delay resulting from the delay in completing the plaintiff's holiday home. He lost three weekends in the house and spent Christmas in a hotel: *Franks & Collingwood* v. *Gates*[371] […]£1,500 following a negligent survey the plaintiff's had to move into his mother-in-law's house whilst repairs were carried out: *Roberts* v. *Hampson*[372]

[…]£8,000. Remedial work in a farmhouse totally

[368] [1969] 9 BLR 77 at 91
[369] John Adriaanse, *The Essentials: Construction Contract Law,* (New York: Palgrave McMillan Inc., 2005) at 308.
[370] *Ibid.* at 318
[371] (1983) 1 CLR 21
[372] [1989] 2 All ER 504

disrupted family life for two years. Only two bedrooms were habitable: *Syrett v. Carr and Neave.*"[373]

As in other common law jurisdictions, the parties must agree to arbitrate. An arbitration agreement must be proved, however, and cannot be evidenced by oral testimony alone. An agreement to arbitrate, must be "[…]*in writing or evidenced in writing*[…]"[374] which has been loosely interpreted to include electronic transmission, signed and unsigned documents, letters, faxes or a memorandum written by one party or authorised by one party.

The Arbitrators in the United Kingdom are mandated to attempt to have the parties agree to the monetary figures of the case, failing which, the arbitrator will make use of the "Scott Schedule".

The *"Scott Schedule"* is used to allow the arbitrator a visual point by point of a display a chart of the claims and defences of the case. The first column underlines all the monetary terms which the claimant is claiming in enumerated form, each under its own relevant heading. The next column is filled in by the defence party who shall comment and, where necessary, add his own figures of

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[373] *Supra* 371 at 318, (1990) CILL 619
[374] *United Kingdom Arbitration Act,* 1996 (U.K.), Part I, s. 5.

assessment. The last column is provided for the arbitrator's comments when he is in a position to consider his award.

In the case where the reply is "admitted" the claim has been accepted by the opposing party. Sometimes a claim is neither admitted or denied in which case an expert may be called upon to offer strict proof of evidence.

A security may be requested by the defending party in the beginning of the proceedings.

In order to assure fairness of proceedings, the arbitrator must allow the parties to present their evidence in an equal fashion.

Under ordinary arbitration proceedings in the United Kingdom, the service by the claimant must be made within 6 weeks of the date of the preliminary meeting and the defence has the right to rebut within 6 weeks of receipt of the points of claim. Should the responding party have made a counter claim the claimant will have 21 days to defend himself. This reply of defence to the counterclaim must be addressed within 14 days of receipt of the reply to the defence. Any further particulars must be provided within 21 days of the receipt of the request for more documents. Already, the process is time encumbering.

Evidence which will be presented before arbitration may be oral, documentary or real. Real evidence is the production of material objects which are brought in or, more likely under a construction dispute, a site inspection is performed.

What is Evidence?

> *"Information relied upon to establish a disputed fact is know as evidence"*[375]

In the courts, all facts must be governed by substantive laws and legal issues must be proved by the parties in the form of admissible evidence. The person who brings forth the allegations bears the burden of proof and must produce sufficient evidence to sustain his arguments so that the Court is satisfied that the party has proved the truth of their allegations. The pleading party must disclose only relevant information. There are methods of evidence as well as evidence itself which is not admissible in court.

Expert evidence in court does not require the opinion of the expert witness, rather that the facts of the

[375] Anthony Thornton and Kim Franklin, "The Nature of Expert Evidence" in Andrea Burns, ed., *Construction Disputes, Liability and the Expert Witness*, (London: Butterworths, 1989), at 59

material at hand are disclosed in order to allow the authority hearing the case to draw his own opinion from the facts presented. The duties of the expert witness have been expressed in *David* v. *Edinburg Magistrates:*

> *"Their duty is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the Judge or jury to form their own independent judgment of the application of these criteria to the facts proved in evidence."*[376]

However, strict rules of evidence do not apply in arbitration hearings. For example, hearsay, which is generally a testimony by a person other than the person who actually witnessed the fact, is usually admissible along with many other types of evidence which are normally excluded in trial Courts.

The arbitrator has many powers to ascertain evidence, including the calling of expert opinions and initiating a site visit where necessary.

The expert is expected to have the professional qualifications to comment on the facts of the case and to

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[376] 1953 SC34, 1953, SLT S4.

advise the arbitrator of technical information that he may require in order to ascertain a fair decision by the arbitral tribunal.

Due process and fair proceedings are also key factors in the United Kingdom's arbitration system. Arbitrators have a duty, when resolving a dispute, to act "[…]*fairly and impartially as between the parties giving each party a reasonable opportunity of putting his case and having it dealt with by his opponent*[…] "[377]

The common law upholds fairness in its adjudication process.

In the United Kingdom, *Discain Project Service Ltd. v. Opecprime Developments Ltd.,*[378] the Court held that an adjudicator's award should be set aside where the adjudicator had not conducted his adjudication in a fair manner and displayed bias when he had discussed matters of a material nature with the claimant on the telephone and had not informed the defendant which he took into account when rendering his decision.

In *Balfour Beatty Construction Ltd. v. The Mayor and Burgesses of the London Borough of Lambeth*[379] the

[377] *Supra* note 376 at 168
[378] [2001] BLR 402
[379] [2002] EWHC 597 (TCC)

Adjudicator was found to have exceeded his jurisdiction for failure to act impartially, as he was accused of using a procedure which had not been agreed to between the parties with regard to how the dispute should be decided.

In the common law, the arbitration award is "confirmed" rather than homologated, thus making the award which is otherwise considered a conventional document like a contract, equivalent to a Court judgment. At such time, the opposing party may require an award to be corrected by the Arbitrator due to mathematical or linguistic errors, or may move to strike the award as invalid. He must have serious reasons to require the nullity of the award, as Courts favour the judicial recognition of the arbitrator's award.

The petition to confirm, vacate or modify an award must be filed within a certain delay after the award has been delivered. A party wishing to confirm the award may wait until the opposing party's recourse has expired before applying to the Court for confirmation of the award.

Judicial review of an arbitrator's award is limited to very particular situations. Other than in the United Kingdom, Courts will not review the substance of the arbitration award, in law or in fact.

Other dispute resolution management in the UK

The arbitration system regarding construction disputes, unlike the American system, bases its priorities on the complexities of the issues, as opposed to the quantum value of the building or repairs required thereon.

A new form of dispute resolution called "Adjudication", having its roots in arbitration, began as an experimental process proposed under the Latham report which was successfully legislated as an Adjudication process for the construction industry in the United Kingdom's Part II Housing Grants, Construction and Regeneration Act 1996.

The purpose of the adjudication process is to provide fast, efficient and cost-friendly resolution to a dispute between a Contractor and a property owner.

The adjudicative process combines features of expert determination along with the general rules of arbitration but over a shorter period of time in order to provide resolution to a dispute in an ongoing construction matter. As in Arbitration, a notice is required which serves for four distinct and separate purposes, namely:

1- The procedure itself is unilateral therefore can be instigated by either party without the consent of the other

party. Firstly, to inform the opposing party of the contract a notice of dispute must be served containing a 7 day notice that there is an issue under dispute in order to allow the settlement of the dispute or to allow the opposing party to prepare his defence;

2- Basic information regarding the contract and the claims of dispute are sent to the appointing body for the purpose of selection of the adjudicator;

3- The notice serves to provide the nature of the dispute to the adjudicator in order that he may ascertain whether or not he is qualified to hear the case; and

4- The notice will define the exact jurisdiction that the adjudicator will have on the case.

The notice must contain the nature and description of the dispute, the parties' names and addresses, where and when the dispute arose, the nature of the claim, including monetary considerations and any work which should be carried out and whether such work includes an extension of time.

The description of the dispute should be kept fairly general, but should include the basic category and type of work involved, and whether the workmanship or supply of materials was in compliance with the contract signed by the

parties.

The adjudicator must then sort out whether the dispute has been described in a sufficient manner and what the issues of the case are in order to determine whether he has the experience and knowledge of the subject matter that the parties require under the circumstances of the case.

The Appointment of the adjudicator, as arbitration, is a voluntary matter and therefore the adjudicator should be acceptable to all parties, he should be impartial and he must declare any conflicts or interests that he may have in the individuals under dispute.

Under the UK "Scheme", there are 4 ways to select an adjudicator:

1) agreement between the parties;
2) as named and specified in the contract;
3) as selected by an appointing body named in the contract;
4) Arbitration Nominating Board.

The entire process from start to finish, leading to the award itself should take less than 2 months. The decision is binding for the duration of the construction project but can be reversed through either arbitration or litigation once the construction job has been completed. In

the event that it is proved that the Adjudicator ruled outside of his mandate, his decision can be challenged in either a tribunal or an arbitration hearing; otherwise Parliament sustains the decision of the adjudicator.

The appointment of the adjudicator should take place within 7 days of the issuing of the notice by the claimant, who must use sufficient effort to find an adjudicator in this short delay. If the chosen adjudicator refuses to act, or the claimant is unable to locate an adjudicator, he may refer to the appointing body named in the contract, or in default of such appointing body, refer to the Arbitration Nominating Board for help. Once the nomination has been completed, the adjudicator must confirm his acceptance within a 2 day period. If the Nominating Board fails to appoint an adjudicator within 5 days, the claimant shall go to yet another Nominating Board for selection of an adjudicator and so on until an adjudicator is nominated. This process can go round and round until the proper prerequisites have been established and the adjudicator has finally confirmed his appointment within the appropriate delay of time.

Once the adjudicator has been nominated, a referral notice is sent by the claimant to the opposing or

responding party. The date on which the opposing party has been served is the date that starts the clock ticking. The notice must have all the required details (arguments and information regarding the claim, relevant extracts of the construction contract and any other documents which the referring party will rely on in order to win his case) Another set of documents must be sent to the adjudicator.

Oddly, there is no guidance in the "Scheme" as to how the adjudication should be conducted nor whether a defence should be presented by the opposing party. Therefore, the adjudicator has the discretion to suggest the appropriate procedures in the case. The same impartiality and fairness rules of arbitration will also apply to the adjudicator, on pain of nullity or rescission of his decision.

The opposing party can attempt to delay proceedings. He may reject an incorrect notice or challenge the appointment of the adjudicator but eventually, he will have to adhere to the adjudication process.

The Procedure should be completed in a 28 day time frame from the point in which the adjudicator receives the referral notice, or any other period that the parties can agree to. The adjudicator is in charge of the procedures he wishes to use; whether further testing should be down,

whether a site visit is required, how many and what kind of expert witnesses should be called and whether the subject matter can be addressed in an oral or written presentation. The adjudicator's decision is binding until such time as it is finally determined by legal proceedings, arbitration or by the parties' agreement.

The final decision shall not decide whether work needs to be redone, but rather whether the work complies with the specifications within the contract. Therefore, the adjudicator's primary goal is to determine the contractual rights between the parties and to apply them in a fair and equitable manner, in accordance with the rules of natural justice. The decision must comply or it can be set aside.

The two negatives of the adjudication system surround the adjudicator himself. Firstly, a reliable and knowledgeable adjudicator must be found and he must agree to take on the case within 7 days. Secondly, a difficulty lies in the fact that it may be difficult for any qualified adjudicator to render a just and equitable decision in less than 2 months, as construction disputes have a tendency to be highly technical and complex. Since the Act has been in force for only a few years, researchers have taken a "wait and see" attitude towards the adjudication process.

Although the adjudication process requires the consent of both parties and is not imposed upon the parties the adjudication process is a solution to speedy resolution in construction disputes. In the event of a dispute, it is in the best interests of both parties for the construction project to continue due to the cost and inconvenience to the Contractor, who has his subcontractors and suppliers lined up, and hassle for the Purchaser, who has scheduled his date of moving. Therefore a specialized, trained adjudicator is a fabulous practical solution to this volatile area of business.

The decision, unlike arbitration, is not final and binding and therefore can be reversed once the project is complete. The downfall is that if the adjudicator made the wrong decision, how difficult, in practice, is it to reverse the decision?

Otherwise, the adjudication process is an excellent solution to construction matters. An experienced, neutral person having much the same, only limited, powers to decide on an “emergency” basis would be welcomed in any jurisdiction, including Quebec. Court tribunals can take 2 to 3 years for a decision to be rendered and generally, it can take months, rather than a few weeks, for an

arbitration award to be handed down. Meanwhile, the construction project can be stag mending.

The recourse to accomplish what the Purchaser has paid for, in other words, the property stipulated within the contract is more readily available to the Purchaser.

The decision of the adjudicator is not based on whether the work needs to be redone in accordance with industry standards or, as in the *Règlement*, according to the type and part of the Building that is involved, rather the adjudicator will determine whether the work complies with the specifications within the contract. We live in a society which has respected the freedom to contract and yet, the Legislature has deemed that parties are unable to protect themselves in the contract and that the *Civil code* is unable to offer sufficient securities as they are in the *Règlement*.

However, we can learn two things from the United Kingdom Adjudication system:

1- That a temporary, emergency procedure can be put into place in order to allow construction to continue in the event that the project is not complete; and

2- To increase the security under the Guarantee Plan

> to include all matters available under the C.C.Q. Perhaps the *Règlement* could expand the definition of Building or, better yet, have the arbitrators, who are fully qualified, take a look at the stipulations within the contract itself: Are they respecting the C.C.Q. public order articles and are they respecting the specifications required under the *Règlement*?

The R.B.Q. currently has a team looking into a reform of the Guarantee Plan and its regulations within the next four years. Perhaps we will see a fresh look on the Guarantee Plan in order to enhance the powers of the arbitrator.

Furthermore, the delays require extending. A Purchaser, who has no knowledge of the procedures and his rights under the Reglement, has only 30 days to seek advice and decide whether he will file for arbitration or his recourse is terminated.

CONCLUSION

Arbitration has historically been seen as a desired method of settling a dispute when the parties have been unable to find their own resolution to the dispute. Arbitration is the oldest dispute resolution method and is considered, in the modern world, a welcome alternative to the long tedious Court proceedings which are lengthy and costly to all parties concerned. Arbitration offers impartial and knowledgeable neutral parties to aid in the resolution of the disputes between the parties, while attempting to preserve business relationships between the parties and leaving the process on a private and confidential level.

"[…]arbitration was not introduced into Quebec by way of a free-standing statute, but has instead been codified at articles 940 to 952 of the *Code of Civil Procedure*. More important still, arbitration agreements have also been recognized and enshrined in the *Civil Code*. Consequently, arbitration is an integral part of the basic legal

architecture."[380]

Historically, the R.B.Q. sent its own inspectors to assure that the Contractors honoured their obligations insofar as building according to code. This function was delegated to the Administrator under the Guarantee Plan.

The objective of the Guarantee Plan was to enable the R.B.Q. to supervise the construction of new residential buildings through a general statutory legislation, which process is intended to be flexible in order to enable the supervision of construction through new technology and changes in building practices.

But as Judge Michele Monast illustrates:

«La protection offerte par la garantie ne couvre pas tous les risques associés au bâtiments résidentiels neufs. En ce sens, il ne s'agit pas d'un garantie de produit mais plutôt d'un garantie de la même nature que celle donnée en vertu d'un cautionnement d'exécution a l'égard de certaines obligations de l'entrepreneur. »[381]

The R.B.Q. requires control of both the Guarantee Plan and the method in which parties will resolve their

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[380] Donald Bisson and Shaun Finn, "A disputed alternative to alternative dispute resolution-a discussion of class-wide arbitration and its relevance for Quebec Class Action litigants and practitioners." (2004) 82 Can Bar Rec. 309, at 333.
[381] *Claude Dupuis, supra* note 59 at para. 20.

disputes, which is accomplished by enacting the *Règlement*.

The real issues are not truly directed towards the fairness and due process of the arbitration system set out by the R.B.Q., rather the crux of the matter lies with the Guarantee Plan itself.

The R.B.Q. recognizes that arbitrators are granted the liberty to conform to rules of law and also to appeal to the equity where circumstances are justified through Article 116 of the *Règlement*. However, an arbitrator must act within the confines of his mandate under the Guarantee Plan and must not be manifestly unreasonable.

A pool of arbitrators qualified specifically to deal with residential new construction is an exceedingly important factor to obtaining due process and fair proceedings in institutional arbitration. The selection by the parties are facilitated by the fact that the arbitrators are "screened" ahead of time by the arbitration Centre.

The parties should be made aware that they have alternatives with regard to their claim by appealing to other sources of law conferred by the C.C.Q. in the case where the claim falls outside of the Guarantee Plan, with

regard to the obligations of the parties.[382]

Very few arbitration decisions have been challenged by the Courts with regard to the Guarantee Plan rather most have been referred back to the arbitrator or sustained.

Powers of the arbitrator do not yet include the ability to issue provisionary measures against third parties or to compel uncooperative witnesses to appear at the hearing. However, an arbitrator may impose conservatory measures between the parties. So perhaps it is time to glance at the powers granted to the American arbitrators in order to enhance the powers of the Quebec arbitrators under the *Règlement.*

The majority of arbitral organizations require the back-up of the obligations and powers designated by the *Règlement* and the *Civil Codes*. In the event that the regulations are missing elements, they are provided by R.B.Q.

Although there are obvious recommendations to widen the scope of the Guarantee Plan, such as allowing the guarantees to commence upon completion of work even if the Beneficiary receives the property with a scheduled list of

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[382] Art. 1545 C.C.Q., *La Garantie des batiments residentiels neufs de l'APCHQ Inc.* c. *Maryse Desindes et Yvan Larochelle*, C.A. 500-09-013349-030 at 45.

correctives or additions.

Contradiction to any of these rules, however, necessitates the need to modify the rules themselves.

It is interesting how arbitration has, over the years, battled for recognition by the Courts, in order for the Courts to finally determine that parties have the right to determine in advance of a dispute that the resolution can take place before an arbitrator and that the arbitrator's decision is final and without appeal.

Then to the metamorphosis of statutory institutional arbitration where parties are obliged to settle their disputes through arbitration, such as those provided by the *Règlement*.

It is obvious that the intention of the R.B.Q. in imposing mandatory arbitration to resolve disputes is yet another step towards their control over the Guarantee Plan. The R.B.Q. did not want the parties to choose the rules in which they would arbitrate. The arbitration process was chosen and carefully monitored by the R.B.Q. in order to assure that the Guarantee Plan remains intact.

Although the arbitration system controlled by the *Règlement* has been attacked on several levels, the Courts, nevertheless, are sustaining the arbitration decisions as

long as the decision is based on the confines of the Guarantee Plan.[383]

The world is becoming a smaller place. Most jurisdictions are in the process of developing their own private construction arbitration rules. Arbitration is a viable and flexible forum of recourse by an injured party. Arbitration is being used more and more for the purpose of dispute resolution to ensure that international trade continues with a trustworthy recourse to justice. Otherwise, on an international scope, a contracting party may be contracting with a jurisdiction that does not recognize the contract stipulations and therefore a private Court may reject the claims of an injured party. Therefore, arbitration has been used and favoured over private Court tribunals, both in private international circles, public international matters and a mixture of both so that the parties can rely on the justice system resolving their claims.

In conclusion, for the most part, it is the Guarantee Plan and not the arbitration system which is responsible for the limitations of the mandate of the arbitrator and

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[383] *Renovation Marc Cleroux Inc.* c. *Societe pour la resolution des conflits Inc. (SORECONI)*, J.E. 2007 QCCS 116 (C.S.), *La Garantie des bâtiments résidentiels neufs de l'APCHQ Inc.* c. *Maryse Desindes and Yvan Larochelle*, C.A. 500-09-013349-030, 2004

the matters in which he is authorized to decide. In the event that the Guarantee Plan was widened to the same scope of the *Civil Code of Quebec* recourses, or even to consider the parties' contracting stipulations, *ipso facto* the *Règlement* itself would allow arbitrators to have full powers, along with the addition of the extra powers granted to the American arbitrators, to decide on all aspects of the completion of their mandate.

A Beneficiary must make a choice: He takes his chances in the tribunal or he takes the opportunity to embrace the security that the Guarantee Plan offers to a Beneficiary, in which the R.B.Q. maintains control. The anomaly created between the *Civil Codes* and the *Règlement* insofar as the limitations of the Guarantee Plan results from the R.B.Q. deeming it necessary to limit the Guarantee Plan to cover what is foreseeable under the *Règlement* and leaving the more unforeseeable disputes to be dealt with by the court tribunals.

The Arbitrators have relied on Article 116 of the *Règlement* in order to seal the gaps and provide a more liberal perception of the arbitrator's mandate through the rules of equity. It is the Guarantee Plan which does not have the parameters available to widen the mandate of the

arbitrator and not the arbitration process which has been set up to allow an arbitrator all powers to settle the matters of dispute in a fair and equitable fashion. In the event that the Guarantee Plan would be widened to the same scope as that of the Civil Code of Quebec recourses, arbitrators would have full powers to complete their mandate and to deliver fair decisions on all matters forming part of the dispute.

There are many areas which could be improved in the Guarantee Plan, including the extension of delays and notification to the parties and the extension of prescription periods on the guarantee itself in order to widen the periods to those allocated under the Civil code even if the contents of the guarantee cannot be modified.

Even though there are limitations under the Guarantee Plan, the Beneficiary is, nevertheless, better protected than he was twenty years ago and has more security offered to him than in other jurisdictions. He is offered a security which is imposed upon the Contractor and guaranteed by a separate entity which goes well beyond any other jurisdiction. He has little to fear with regard to the payment of arbitration fees and corrective measures are imposed by the Arbitrator even where the Beneficiary has

had to absorb some the fees. However, should we wish to enhance our system, we would not only expand the terms of the Guarantee Plan and add the powers granted to the American arbitrators, we would also contemplate the integration of the UK scheme of adjudication to fill all the gaps during the construction period.

As John Hinchey and Troy Harris have said:

> "[…]*the English experiences with Adjudication, both good and bad, will undoubtedly be drawn upon by other countries... in deciding whether or what aspects of Statutory Adjudication can or could be transplanted, either into domestic contracts or legislation.*"[384]

It remains to be seen whether the R.B.Q. will receive sufficient challenge to amend the Guarantee Plan in their study over the next four years in order to enhance the powers of the arbitrator while securing the Beneficiary's rights in virtue of the *Règlement*. Will the team be searching other jurisdictions in order to improve the Guarantee Plan? If so, the first stop would be having a fresh look at the United Kingdom's adjudication system from

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[384] See "International Construction Arbitration Handbook" <http://www.adrchambers.com/blog>.

which we have a lot to learn. The Adjudication system not only protects the purchasers of property but also ensures that the Contractor can complete his work in a timely fashion, even when a dispute has arisen, saving costs to both the Contractor and the Purchaser.

It is unfortunate that all other jurisdictions base their arbitration disputes on the stipulations contained in the contract between the parties except for the Quebec arbitration system under the *Règlement* which focuses on the concept of the building and building codes under the Guarantee Plan.

To ameliorate the arbitration system would mean to allow arbitrators more powers and more scope in order that they may decide on a global view of the dispute between the parties rather than limiting him to a narrow set of rules, which would be a better balance of justice between the parties.

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c. B-1.1, r. 0.2
Regulation respecting the guarantee plan for new residential buildings

Building Act

(R.S.Q., c. B-1.1, s. 185, pars. 19.3 to 19.6 and 38, and s. 192)

CHAPTER I

INTERPRETATION AND APPLICATION

DIVISION I

INTERPRETATION

1. In this Regulation, unless the context indicates otherwise,
«accountant» means a member of a professional order of accountants specified in Schedule I to the
Professional Code (R.S.Q., c. C-26) who is authorized, under the Act contituting that order, to practise the
professional accounting activity required by the application of a provision of this Regulation; (comptable)

«actuary» means a Fellow of the Canadian Institute of Actuaries; (actuaire)

«approved plan» means a guarantee plan meeting the standards and criteria established by this Regulation

and approved by the Régie du bâtiment du Québec; (plan approuvé)

«beneficiary» means a natural or legal person, a partnership, an association, a non-profit organization or a
cooperative that enters into a contract with a contractor for the sale or construction of a new residential
building and, in the case of the common portions of a building held in divided co-ownership, the syndicate of
co-owners; (bénéficiaire)

«building» means the building itself, including the installations and equipment necessary for its use,
specifically, the artesian well, connections with municipal or government services, the septic tank and its
absorption field and the subsoil drain; (bâtiment)

«building professional» means an architect, an engineer or a technologist who is a member of a professional

order and is trained in the field of engineering or construction; (professionnel du bâtiment)

«contractor» means a person holding a general contractor's licence authorizing him to carry out or have
carried out, in whole or in part, for a beneficiary, construction work on a new residential building governed by
this Regulation; (entrepreneur)

«manager» means a legal person authorized by the Board to manage a guarantee plan, or a provisional

manager designated by the Board under section 83 of the Building Act (R.S.Q., c. B-1.1). (administrateur)

O.C. 841-98, s. 1.
DIVISION II

APPLICATION

2. This Regulation applies to guarantee plans guaranteeing the performance of the contractor's legal and
contractual obligations provided for in Chapter II and resulting from a contract entered into with a beneficiary
for the sale or construction of
(1) the following new buildings intended mainly for residential purposes and not held in divided cohttp://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=3&fi...

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ownership by the beneficiary of the guarantee:

(a) a detached, semi-detached or row-type single-family dwelling;
(b) a multifamily building, from a duplex to a quintuplex;
(c) a multifamily building comprising more than 5 dwelling units and held by a non-profit oganization or a
cooperative;
(2) the following new buildings intended mainly for residential purposes and held in divided co-ownership
by the beneficiary of the guarantee:
(a) a detached, semi-detached or row-type single-family dwelling;
(b) a multifamily building of combustible construction ;
(c) a multifamily building of noncombustible construction comprising no more than 4 private portions
stacked one above the other ;
(3) the buildings specified in subparagraphs 1 or 2 and acquired by the contractor from a syndic,
municipality or mortgage lender.
For the purposes of this Regulation, the terms “combustible construction” and “noncombustible construction”
have the meaning given to them in the National Building Code–Canada 1995 (NRCC 38726E) including the
revisions of July 1998 and November 1999 issued by the Canadian Commission on Building and Fire Codes
of the National Research Council of Canada.

The intended use of a building is established on the date of conclusion of the contract and is presumed valid
for the term of the guarantee. The guarantee applies to the entire building.

O.C. 841-98, s. 2; O.C. 920-2001, s. 1.
3. Any guarantee plan to which this Regulation applies shall meet the standards and criteria established
herein and shall be approved by the Board.
O.C. 841-98, s. 3.
4. No change may be made to an approved plan unless the change meets the standards and criteria
established by this Regulation.
O.C. 841-98, s. 4.
5. Any provision of a guarantee plan which is irreconcilable with this Regulation

is invalid.
O.C. 841-98, s. 5.
CHAPTER II

MINIMUM GUARANTEE

DIVISION I

GUARANTEE AND REQUIRED MEMBERSHIP

6. Any person wishing to become a contractor for the new residential buildings referred to in section 2 shall,
in accordance with Division I of Chapter IV, join a plan guaranteeing the performance of the legal and
contractual obligations provided for in section 7 and resulting from a contract entered into with a beneficiary.
O.C. 841-98, s. 6.
DIVISION II

CONTENT OF THE GUARANTEE

7. The guarantee plan shall guarantee the performance of the contractor's legal and contractual obligations
to the extent and in the manner prescribed by this Division.
O.C. 841-98, s. 7.
§1. Guarantee for Buildings Not Held in Divided Co-ownership

I. Coverage of the Guarantee
8. For the purposes of this Subdivision, unless the context indicates otherwise,
«acceptance of the building» means the act whereby the beneficiary declares that he accepts the building
which is ready to be used for its intended purpose and which indicates any work to be completed or corrected;
(réception du bâtiment)

«completion of the work» means completion of the work related to the building and provided for in the original
contract entered into between the beneficiary and the contractor, and completion of the additional work
agreed to in writing between the parties; (parachèvement des travaux)

«end of the work» means the date on which all the contractor's work agreed upon in writing with the
beneficiary and related to the building is completed and the building is ready to be used for its intended
purpose. (fin des travaux)

O.C. 841-98, s. 8.
9. The guarantee of a plan, where the contractor fails to perform his legal or contractual obligations before
the acceptance of the building, shall cover,
(1) in the case of a contract of sale,
(a) either the partial payments by the beneficiary; or
(b) completion of the work, where the beneficiary holds the ownership titles and where an agreement to

that effect is entered into with the manager;
(2) in the case of contrat of enterprise,
(a) either the partial payments by the beneficiary, provided that no unjustified profit for the latter results
therefrom; or
(b) completion of the work, where an agreement to that effect is reached with the manager; and
(3) the relocation, moving and storage of the beneficiary's property where,
(a) the beneficiary is unable to declare acceptance of the building on the date agreed upon with the
contractor, unless the partial payments are reimbursed; or
(b) the beneficiary is unable to declare acceptance of the building on the date agreed upon with the
contractor so that the manager may complete the building.
O.C. 841-98, s. 9.
10. The guarantee of a plan, where the contractor fails to perform his legal or contractual obligations after
acceptance of the building, shall cover
(1) completion of the work related to the building, notice of which is given in writing at the time of
acceptance or, so long as the beneficiary has not moved in, within 3 days following acceptance;

(2) repairs to apparent defects or poor workmanship as described in article 2111 of the Civil Code of
Québec, notice of which is given in writing at the time of acceptance or, so long as the beneficiary has not
moved in, within 3 days following acceptance;
(3) repairs to non-apparent poor workmanship existing at the time of acceptance or discovered within 1
year after acceptance as provided for in articles 2113 and 2120 of the Civil Code of Québec, and notice of
which is given to the contractor and to the manager in writing within a reasonable time not to exceed 6 months
following the discovery of the poor workmanship;
(4) repairs to latent defects within the meaning of article 1726 or 2103 of the Civil Code of Québec which
are discovered within 3 years following acceptance of the building, and notice of which is given to the
contractor and to the manager in writing within a reasonable time not to exceed 6 months following the
discovery of the latent defects within the meaning of article 1739 of the Civil Code of Québec; and
(5) repairs to faulty design, construction or production of the work, or the unfavourable nature of the ground
within the meaning of article 2118 of the Civil Code of Québec, which appears within 5 years following the end
of the work, and notice of which is given to the contractor and to the manager in writing within a reasonable
time not to exceed 6 months after the discovery or occurrence of the defect or, in the case of gradual defects
or vices, after their first manifestation.
O.C. 841-98, s. 10; O.C. 39-2006, s. 1.
11. Where the manager intervenes to complete or correct work related to a building, the beneficiary shall
have any sum still owing kept by his financial institution or pay such sum into a

trust account with an
advocate, a notary or the manager of the plan for the final payment of the work that will be carried out by the
manager to complete or correct the work provided for in the original contract or the additional work provided
for in any written agreement entered into with the contractor.
O.C. 841-98, s. 11.
II. Exclusions from the Guarantee
12. The guarantee excludes
(1) repairs to defects in the materials and equipment supplied and installed by the beneficiary;
(2) repairs made necessary by normal behaviour of materials, such as cracks or shrinkage;
(3) repairs made necessary by a fault of the beneficiary, such as inadequate maintenance or misuse of the
building, as well as by alterations, deletions or additions made by the beneficiary;
(4) deterioration brought about by normal wear and tear;
(5) the obligation to relocate, move or store the beneficiary's property and repairs made necessary
following an event of force majeure, such as an earthquake, a flood, exceptional climatic conditions, a strike
or a lock-out;
(6) repairs to damage resulting from the contractor's extra-contractual civil liability;
(7) repairs to damage resulting from contaminated soil, and replacement of the soil itself;
(8) the obligation of a public utility to supply the building with natural gas or electricity;
(9) parking areas or storage rooms located outside the building containing the dwelling units, and any
works located outside the building such as swimming pools, earthwork, sidewalks, driveways or surface water
drainage systems;
(10) promises of a vendor concerning costs for use or energy consumption of appliances, systems or
equipment included in the construction of a building, and
(11) claims from the persons who contributed to the construction of the building.

However, the exclusions as provided for in subparagraphs 2 and 5 of the first paragraph do not apply if the
contractor failed to comply with accepted practice or with a standard in force applicable to the building.

O.C. 841-98, s. 12; O.C. 39-2006, s. 2.
III. Limits of the Guarantee
13. The guarantee of a plan for a detached, semi-detached or row-type single-family dwelling is limited per
address to,
(1) for partial payments, $30,000; ($39,000 for construction work beginning on 7 August 2006)
(2) for coverage for relocation, moving and storage of the beneficiary's property, upon the presentation of
vouchers and provided that no unjustified profit for the beneficiary results therefrom, $5,000 as follows: ($5,500
for construction work beginning on 7 August 2006)

(a) reimbursement of reasonable actual costs incurred for moving and storage;
(b) reimbursement of reasonable actual costs incurred for relocation, including meals and
accommodation, without exceeding, on a daily basis:
-for 1 person: $75; ($85 for construction work beginning on 7 August 2006)
-for 2 persons: $100; ($110 for construction work beginning on 7 August 2006)
-for 3 persons: $125; ($140 for construction work beginning on 7 August 2006)
-for 4 persons or more: $150; ($170 for construction work beginning on 7 August 2006)
(3) for completion and repair of defects and poor workmanship, the amount entered in the contract of
enterprise or contract of sale, without ever exceeding $200,000; and ($260,000 for construction work beginning on 7 August
2006)

(4) for coverage for the obligation to supply water, both in quantity and quality, in the event that repairs are
impossible, the amount of the damages suffered by the beneficiary, without ever exceeding the lesser of the 2
amounts mentioned in paragraph 3; coverage applies in the case of a contract of enterprise, provided that the
obligation is included in the contract entered into between the beneficiary and the contractor.
O.C. 841-98, s. 13; O.C. 39-2006, s. 3.
14. The guarantee of a plan for a multifamily building is limited to,
(1) for partial payments, $30,000 per building; ($39,000 for construction work beginning on 7 August 2006)
(2) for coverage for relocation, moving and storage of the beneficiary's property, upon the presentation of
vouchers and provided that no unjustified profit for the beneficiary results therefrom, $5,000 per building, as
follows: ($5,500 for construction work beginning on 7 August 2006)
(a) reimbursement of reasonable actual costs incurred for moving and storage;
(b) reimbursement of reasonable actual costs incurred for relocation, including meals and
accommodation, without exceeding, on a daily basis:
-for 1 person: $75; ($85 for construction work beginning on 7 August 2006)
-for 2 persons: $100; ($110 for construction work beginning on 7 August 2006)
-for 3 persons: $125; ($140 for construction work beginning on 7 August 2006)
-for 4 persons or more: $150; ($170 for construction work beginning on 7 August 2006)

(3) for completion and repair of defects and poor workmanship, the lesser of
(a) the amount entered in the contract of enterprise or contract of sale; or
(b) an amount equal to $100,000 multiplied by the number of dwelling units contained in the building,
without ever exceeding $1,500,00; and ($130,000 and $1,900,00 for construction work beginning on 7 August 2006)
(4) for coverage for the obligation to supply water, both in quantity and quality, in the event that repairs are
impossible, the amount of the damages suffered by the beneficiary, without ever exceeding the lesser of the 2
amounts mentioned in paragraph 3; coverage applies in the case of a contract of enterprise, provided that the
obligation is included in the contract entered into between the beneficiary and the

contractor.
O.C. 841-98, s. 14; O.C. 39-2006, s. 4.
15. The guarantee of a plan applies to a building that has no beneficiary at the end of the work, provided
that acceptance of the building occurs within 24 months after the end of the work.
The guarantee pertaining to faulty design, construction or production of the work, or the unfavourable nature
of the ground within the meaning of article 2118 of the Civil Code of Québec is nevertheless limited to the
remaining term of the guarantee.

The guarantee of completion after acceptance of the building does not apply, however, if the beneficiary and
the contractor agree that the building is sold in the state of completion it has attained at the date of the
contract.

O.C. 841-98, s. 15.
16. The guarantee of a plan benefits any subsequent purchaser for the remaining term of the guarantee.
O.C. 841-98, s. 16.
IV. Implementation of the Guarantee
17. Each building covered by a guarantee shall be inspected before it is accepted. The contractor and the
beneficiary shall carry out the inspection together, using a pre-established list of items to be checked. Such
list shall be supplied by the manager and shall be adapted to the class of building concerned. The beneficiary
may be assisted by a person of his choice.
The inspection shall be deferred where acceptance of the building takes place after the end of the work.

O.C. 841-98, s. 17.
17.1. (cf. 06-08-07)Any claim based on the guarantee referred to in section 9 is subject to the following
procedure :
(1) not later than within 90 days following acceptance of the building, the beneficiary shall send to the
contractor, by registered mail, a claim for reimbursement of expenses relating to relocation, moving and
storage of the beneficiary's property, along with vouchers. If the claim has not been settled within 15 days
after the claim has been sent, the beneficiary shall notify the manager in writing who must decide the claim
within 15 days following receipt of the notice ;
(2) for the implementation of the advance payment guarantee or guarantee of completion before
acceptance of the building, the beneficiary shall send the claim in writing to the contractor and a copy of the
claim to the manager. The procedure described in paragraphs 2 to 6 of section 18 applies to the claim with
the necessary modifications.
For the purposes of subparagraph 2 of the first paragraph, the beneficiary shall pay fees to the manager in the
amount of $100 which will be reimbursed to the beneficiary on the conditions prescribed for reimbursement of
the fees referred to in paragraph 2 of section 18.

O.C. 39-2006, s. 5.
18. Any claim based on the guarantee referred to in section 10 is subject to the following procedure:
(1) within the guarantee period of 1, 3 or 5 years, as the case may be, the beneficiary shall give notice to
the contractor in writing of the construction defect found and send a copy of that notice to the manager in
order to suspend the prescription;
(2) at least 15 days after notice by the beneficiary has been sent, the beneficiary shall notify the manager
in writing if he is dissatisfied with the contractor's intervention or if the contractor has failed to intervene; he
shall pay to the manager fees in the amount of $100 for opening the file. Those fees are reimbursed to him if
the decision rendered is in his favour, in whole or in part, or if an agreement is entered into between the
parties concerned;
(3) within 15 days after receipt of the notice prescribed in paragraph 2, the manager shall ask the
contractor to intervene and to inform him, within 15 days, of the measures he intends to take to remedy the
situation concerning which the beneficiary has given notice;
(4) within 15 days after the expiry of the period granted to the contractor under paragraph 3, the manager
shall carry out an inspection on the premises;
(5) within 20 days following the inspection, the manager shall file a detailed written report stating whether
or not the matter has been settled and send a copy by registered mail to the parties concerned. If the claim
has not been settled, the manager shall decide the claim and order, as applicable, the contractor to reimburse
to the beneficiary the cost of necessary and urgent conservatory repairs, or to complete or correct the work
within the period the manager indicates and agreed upon with the beneficiary;
(6) where the contractor fails to reimburse the beneficiary or to complete or correct the work and there is
no recourse to mediation or the manager's decision is not contested in arbitration by one of the parties, the
manager shall, within 15 days after the expiry of the period agreed upon with the beneficiary under paragraph
5, make the reimbursement or take charge of completing or correcting the work, agree to a time period for
doing so with the beneficiary and undertake, if applicable, the preparation of corrective specifications and a
call for tenders, choose contractors and supervise the work;
(7) (paragraph replaced).
(As of 7 August 2006 the paragraphs 5 to 7 have been replaced for construction work begins on or after date (O.C. 39-2006, s. 30)).

O.C. 841-98, s. 18; O.C. 39-2006, s. 6.
V. Remedy
19. A beneficiary or contractor who is dissatisfied with a decision of the manager shall, in order for the
guarantee to apply, submit the dispute to arbitration within 30 days following receipt by registered mail of the
manager's decision, unless the beneficiary and contractor agree to submit the dispute, within the same period,
to a mediator chosen from a list established by the Minister of Labour in order to try and reach an agreement.
In that case, the deadline to submit the dispute to arbitration is 30 days following receipt by registered mail of
the mediator's advice concluding to the partial or total failure of the mediation.

O.C. 841-98, s. 19; O.C. 39-2006, s. 7.
19.1. Failure by the beneficiary to file a claim or implement the guarantee in timely fashion cannot be set
up against the beneficiary if the contractor or manager fails to perform the obligations under sections 17, 17.1,
18, 66, 69.1, 132 to 137 and paragraphs 12, 13, 14 and 18 of Schedule II, unless the contractor or manager
shows that such failure had no incidence on the failure to file a claim in timely fashion or that the time for filing
the claim or implementing the guarantee has been expired for more than one year.
O.C. 39-2006, s. 8.

20. The beneficiary, the contractor and the manager are bound by the arbitration decision as soon as it is
rendered by the arbitrator.
The arbitrator's decision is final and not subject to appeal.

O.C. 841-98, s. 20.
21. Arbitration fees are shared equally between the manager and the contractor where the latter is the
plaintiff.
Where the plaintiff is the beneficiary, those fees are charged to the manager, unless the beneficiary fails to
obtain a favourable decision on any of the elements of his claim, in which case the arbitrator shall split the
costs.

O.C. 841-98, s. 21.
22. Where applicable, the arbitrator shall decide on the amount of reasonable fees for a relevant expert's
report to be reimbursed to the plaintiff by the manager, where the plaintiff wins the case in whole or in part.
O.C. 841-98, s. 22.
23. The expenses incurred by the beneficiary, contractor and manager for the arbitration are borne by each
one of them.
O.C. 841-98, s. 23.
24. A manager who compensates a beneficiary under this Subdivision is subrogated in his rights up to and
including the sums he has paid.
O.C. 841-98, s. 24.
§2. Guarantee for Buildings Held in Divided Co-ownership

I. Coverage of the Guarantee
25. For the purposes of this Subdivision, unless the context indicates otherwise,
“acceptance of the common portions” means the act, with a copy sent to each known beneficiary, the
syndicate and the contractor, whereby a building professional chosen by the syndicate of co-owners declares
the date of the end of the work on the common portions, subject to minor work indicated by the building
professional as remaining to be completed. The acceptance takes place following receipt of a notice of the
end of work sent by the contractor to each known beneficiary and to the syndicate of co-owners; (réception
des parties communes)

(For construction work beginning on 7 August 2006, the definition “acceptance of the common portions” has been replaced (O.C. 39-2006, s. 30)

“acceptance of the private portion” means the act whereby the beneficiary declares that he accepts the private
portion which is ready to be used for its intended purpose and on which some work is to be completed or
corrected, where applicable; (réception de la partie privative)

“common portions” means those that are part of the building and that are listed in the constituting act of coownership
or, in the absence of specific provisions in that act, those listed in article 1044 of the Civil Code of
Québec; (parties communes)

“completion of the work” means completion of the work related to the building and provided for in the original
contract entered into between the beneficiary and the contractor, and completion of the additional work
agreed to in writing between the parties; (parachèvement des travaux)

“end of the work on the common portions” means the date on which all the contractor's work agreed upon in

writing with the beneficiary and pertaining to the common portions is completed and the building is ready to be
used for its intended purpose; (fin des travaux des parties communes)

“end of the work on the private portions” means the date on which all the contractor's work agreed upon in
writing with the beneficiary and pertaining to his private portion is completed or, at the latest, the date of the
end of the work on the common portions. (fins des travaux des parties privatives)

O.C. 841-98, s. 25; O.C. 39-2006, s. 9.
25.1. For the purposes of this Subdivision, acceptance is deemed to have taken place not later than 6
months after receipt of the notice of the end of work if the following conditions are met :
(1) the work is completed ;
(2) the syndicate is formed and is no longer under the control of the contractor ;
(3) the notice of the end of work sent to the syndicate by the contractor informed the syndicate of the end
of the work and obligations with respect to acceptance ; and
(4) six months have elapsed since the receipt of the notice by the syndicate and the latter, without reason,
did not accept the common portions.
O.C. 39-2006, s. 10.
26. The guarantee of a plan, where the contractor fails to perform his legal or contractual obligations before
acceptance of the private portion or the common portions, shall cover,
(1) in the case of a contract of sale,
(a) either the partial payments by the beneficiary; or
(b) completion of the work, where the beneficiary holds the ownership titles and

where an agreement to
that effect is entered into with the manager;
(2) in the case of a contract of enterprise,
(a) either the partial payments by the beneficiary, provided that no unjustified profit for the latter results
therefrom; or
(b) completion of the work, where an agreement to that effect is reached with the manager; and
(3) the relocation, moving and storage of the beneficiary's property where
(a) the beneficiary is unable to declare acceptance of the building on the date agreed upon with the
contractor, unless the partial payments are reimbursed; or
(b) the beneficiary is unable to declare acceptance of the building on the date agreed upon with the
contractor so that the manager may complete the building.
O.C. 841-98, s. 26.
27. The guarantee of a plan, where the contractor fails to perform his legal or contractual obligations after
acceptance of the private portion or the common portions, shall cover
(1) completion of the work, notice of which is given in writing
(a) by the beneficiary, at the time of acceptance of the private portion or, so long as the beneficiary has
not moved in, within 3 days following acceptance ; and
(b) by the building professional, at the time of acceptance of the common portions;

(2) repairs to apparent defects or poor workmanship as described in article 2111 of the Civil Code of
Québec, notice of which is given in writing at the time of acceptance or, so long as the beneficiary has not
moved in, within 3 days following acceptance;
(3) repairs to non-apparent poor workmanship existing at the time of acceptance and discovered within 1
year after acceptance as provided for in articles 2113 and 2120 of the Civil Code of Québec, and notice of
which is given to the contractor and to the manager in writing within a reasonable time not to exceed 6 months
following the discovery of the poor workmanship;
(4) repairs to latent defects within the meaning of article 1726 or 2103 of the Civil Code of Québec which
are discovered within 3 years following acceptance, and notice of which is given to the contractor and to the
manager in writing within a reasonable time not to exceed 6 months following the discovery of the latent
defects within the meaning of article 1739 of the Civil Code of Québec; and
(5) repairs to faulty design, construction or production of the work, or the unfavourable nature of the ground
within the meaning of article 2118 of the Civil Code of Québec, which appear within 5 years following the end
of the work on the common portions or, where there are no common portions forming part of the building, the
private portion, and notice of which is given to the contractor and to the manager in writing within a
reasonable time not to exceed 6 months after the discovery or occurrence of the defect or, in the case of
gradual defects or vices, after their first manifestation.

O.C. 841-98, s. 27; O.C. 39-2006, s. 11.
28. Where the manager intervenes to complete or correct work related to a building, the beneficiary shall
have any sum still owing kept by his financial institution or pay such sum into a trust account with an
advocate, a notary or the manager of the plan for the final payment of the work that will be carried out by the
manager to complete or correct the work provided for in the original contract or the additional work provided
for in any written agreement entered into with the contractor.
O.C. 841-98, s. 28.
II. Exclusions from the Guarantee
29. The guarantee excludes
(1) repairs to defects in the materials and equipment supplied and installed by the beneficiary;
(2) repairs made necessary by normal behaviour of materials, such as cracks or shrinkage;
(3) repairs made necessary by a fault of the beneficiary such as inadequate maintenance or misuse of the
building, as well as alterations, deletions or additions made by the beneficiary;
(4) deterioration brought about by normal wear and tear;
(5) the obligation to relocate, move or store the beneficiary's property and repairs made necessary
following an event of force majeure, such as an earthquake, a flood, exceptional climatic conditions, a strike
or a lock-out;
(6) repairs to damage resulting from the contractor's extra-contractual civil liability;
(7) repairs to damage resulting from contaminated soil, including replacement of the soil itself;
(8) the obligation of a public utility to supply the building with natural gas or electricity;
(9) parking areas or storage rooms located outside the building containing the dwelling units, and any
works outside the building such as swimming pools, earthwork, sidewalks, driveways or surface water
drainage systems;
(10) promises of a vendor concerning costs for use or energy consumption of appliances, systems or
equipment included in the construction of a building; and

(11) claims from the persons who contributed to the construction of the building.
However, the exclusions as provided for in subparagraphs 2 and 5 of the first paragraph do not apply if the
contractor failed to comply with accepted practice or with a standard in force applicable to the building.

O.C. 841-98, s. 29; O.C. 39-2006, s. 12.
III. Limits of the Guarantee
30. The guarantee of a plan for a building held in divided co-ownership is limited to,
(1) for partial payments, $30,000 per fraction provided for in the declaration of co-ownership; ($39,000 for
construction work beginning on 7 August 2006)
(2) for coverage for relocation, moving and storage of the beneficiary's property, on presentation of

vouchers and provided that no unjustified profit for the beneficiary results therefrom, $5,000 per fraction
provided for in the declaration of co-ownership, as follows: ($5,500 for construction work beginning on 7 August 2006)
(a) reimbursement of reasonable actual costs incurred for moving and storage;
(b) reimbursement of reasonable actual costs incurred for relocation, including meals and
accommodation, without exceeding, on a daily basis:
-for 1 person: $75; ($85 for construction work beginning on 7 August 2006)
-for 2 persons: $100; ($110 for construction work beginning on 7 August 2006)
-for 3 persons: $125; ($140 for construction work beginning on 7 August 2006)
-for 4 persons or more: $150; ($170 for construction work beginning on 7 August 2006)
(3) for completion and repair of defects and poor workmanship to a detached, semi-detached or row-type
single-family dwelling, the amount entered in the contract of enterprise or in the contract of sale, without ever
exceeding $200,000 per housing unit and $2,000,000 for all the housing units provided for in the declaration
of co-ownership, provided that the units comprise common portions forming part of the building; ($260,000 and
$2,600,000 for construction work beginning on 7 August 2006)

(4) for completion and repair of defects and poor workmanship to a multifamily building, the lesser of
(a) the total amount of the purchase price of the fractions contained in the building or the total amount
entered in the contract of enterprise;
(b) an amount equal to $100,000 multiplied by the number of private portions contained in the building,
without exceeding $2,000,000 per building; or ($130,000 and $2,600,000 for construction work beginning on 7 August 2006)
(5) for coverage for the obligation to supply water, both in quantity and quality, in the event that repairs are
impossible, the amount of the damages suffered by the beneficiary, without ever exceeding the lesser of the 2
amounts mentioned in paragraph 3; coverage applies in the case of a contract of enterprise, provided that the
obligation is included in the contract entered into between the beneficiary and the contractor.
O.C. 841-98, s. 30; O.C. 39-2006, s. 13.
31. The guarantee of a plan applies to a private portion that has no beneficiary at the end of the work on the
common portions, provided that acceptance of the private portion occurs within 24 months after the end of the
work.
The guarantee pertaining to faulty design, construction or production of the work, or the unfavourable nature
of the ground within the meaning of article 2118 of the Civil Code of Québec is nevertheless limited to the
remaining term of the guarantee.

The guarantee of completion after acceptance of the private portion does not apply, however, if the
beneficiary and the contractor agree that the private portion is sold in the state

of completion it has attained at
the date of the contract.

O.C. 841-98, s. 31.
32. The guarantee of a plan benefits any subsequent purchaser of the remaining term of the guarantee.
O.C. 841-98, s. 32.
IV. Implementation of the Guarantee
33. Each private portion covered by the guarantee shall be inspected before it is accepted. The contractor
and the beneficiary shall carry out the inspection together, using a
pre-established list of items to be checked.
Such list shall be supplied by the manager. The beneficiary may be assisted by a person of his choice.
The inspection shall be deferred where acceptance of the private portion takes place after the end of the work
on the common portions.

The common portions covered by the guarantee shall be inspected before they are accepted. The contractor,
the building professional chosen by the syndicate of co-owners and the latter shall carry out the inspection
using a pre-established list of items to be checked. Such list shall be supplied by the manager.

O.C. 841-98, s. 33.
33.1. Any claim based on the guarantee referred to in section 26 is subject to the following procedure :
(1) not later than within 90 days following acceptance of the building, the beneficiary shall send to the
contractor, by registered mail, a claim for reimbursement of expenses relating to relocation, moving and
storage of the beneficiary's property, along with vouchers. If the claim has not been settled within 15 days
after the claim has been sent, the beneficiary shall notify the manager in writing who must decide the claim
within 15 days following receipt of the notice ;
(2) for the implementation of the advance payment guarantee or guarantee of completion before
acceptance of the building, the beneficiary shall send the claim in writing to the contractor and a copy of the
claim to the manager. The procedure described in paragraphs 2 to 6 of section 34 applies to the claim with
the necessary modifications.
For the purposes of subparagraph 2 of the first paragraph, the beneficiary shall pay fees to the manager in the
amount of $100 which will be reimbursed to the beneficiary on the conditions prescribed for reimbursement of
the fees referred to in paragraph 2 of section 34.

O.C. 39-2006, s. 14.
34. Any claim based on the guarantee referred to in section 27 is subject to the following procedure:
(1) within the guarantee period of 1, 3 or 5 years, as the case may be, the beneficiary shall give notice to
the contractor in writing of the construction defect found and send a copy of that notice to the manager in
order to suspend the prescription;
(2) at least 15 days after notice by the beneficiary has been sent, the beneficiary shall notify the manager
in writing if he is unsatisfied with the contractor's intervention or if the contractor has failed to intervene; he
shall pay to the manager fees in the amount of $100 for opening the file. Those fees shall be reimbursed to
him if the decision to be rendered is in his favour, in whole or in part, or if an

agreement is entered into
between the parties concerned;
(3) within 15 days after receipt of the notice prescribed in paragraph 2, the manager shall ask the
contractor to intervene and to inform him, within 15 days, of the measures he intends to take to remedy the
situation concerning which the beneficiary has given notice;

(4) within 15 days after the expiry of the period granted to the contractor in paragraph 3, the manager shall
carry out an inspection on the premises;
(5) within 20 days following the inspection, the manager shall file a detailed written report stating whether
or not the matter has been settled and send a copy by registered mail to the parties concerned. If the claim
has not been settled, the manager shall decide the claim and order, as applicable, the contractor to reimburse
to the beneficiary the cost of necessary and urgent conservatory repairs, or to complete or correct the work
within the period the manager indicates and agreed upon with the beneficiary ;
(6) where the contractor fails to reimburse the beneficiary or to complete or correct the work and there is
no recourse to mediation or the manager's decision is not contested in arbitration by one of the parties, the
manager shall, within 15 days after the expiry of the period agreed upon with the beneficiary under paragraph
5, make the reimbursement or take charge of completing or correcting the work, agree to a time period for
doing so with the beneficiary and undertake, if applicable, the preparation of corrective specifications and a
call for tenders, choose contractors and supervise the work;
(7) (paragraph replaced).
(As of 7 August 2006 the paragraphs 5 to 7 have been replaced for construction work begins on or after date (O.C. 39-2006, s. 30)).

O.C. 841-98, s. 34; O.C. 39-2006, s. 15.
V. Remedy
35. A beneficiary or contractor who is dissatisfied with a decision of the manager shall, in order for the
guarantee to apply, submit the dispute to arbitration within 30 days following receipt by registered mail of the
manager's decision, unless the beneficiary and contractor agree to submit the dispute, within the same period,
to a mediator chosen from a list established by the Minister of Labour in order to try and reach an agreement.
In that case, the deadline to submit the dispute to arbitration is 30 days following receipt by registered mail of
the mediator's advice concluding to the partial or total failure of the mediation.
O.C. 841-98, s. 35; O.C. 39-2006, s. 16.
35.1. Failure by the beneficiary to file a claim or implement the guarantee in timely fashion cannot be set
up against the beneficiary if the contractor or manager fails to perform the obligations under sections 33, 33.1,
34, 66, 69.1, 132 to 137 and paragraphs 12, 13, 14 and 18 of Schedule II, unless the contractor or manager
shows that such failure had no incidence on the failure to file a claim in timely

fashion or that the time for filing
the claim or implementing the guarantee has been expired for more than one year.
O.C. 39-2006, s. 17.
36. The beneficiary, contractor and manager are bound by the decision as soon as it is rendered by the
arbitrator.
The arbitrator's decision is final and not subject to appeal.

O.C. 841-98, s. 36.
37. Arbitration fees are shared equally between the manager and the contractor where the latter is the
plaintiff.
Where the plaintiff is the beneficiary, those fees are charged to the manager, unless the beneficiary fails to
obtain a favourable decision on any of the elements of his claim, in which case the arbitrator shall split the
costs.

O.C. 841-98, s. 37.
38. Where applicable, the arbitrator shall decide on the amount of reasonable fees for a relevant expert's
report to be reimbursed to the plaintiff by the manager, where the plaintiff wins the case in whole or in part.

O.C. 841-98, s. 38.
39. The expenses incurred by the beneficiary, contractor and manager are borne by each one of them.
O.C. 841-98, s. 39.
40. A manager who compensates a beneficiary under this Subdivision is subrogated in his rights up to and
including the sums he has paid.
O.C. 841-98, s. 40.

CHAPTER III

MANAGER OF THE GUARANTEE PLAN

DIVISION I

QUALIFICATIONS REQUIRED OF THE MANAGER

41. Only a person having the status of legal person whose sole purpose is to manage financial guarantees
within the meaning of Chapter V of the Building Act may obtain authorization from the Board to manage an
approved plan.
O.C. 841-98, s. 41.
42. Authorization from the Board is granted to a legal person meeting the following conditions:
(1) none of its officers lends his name to another person;
(2) where applicable, it has been discharged if it was declared bankrupt less than 3 years ago;
(3) it has not been issued a winding-up order;
(4) neither it nor any of its officers has, in the 5 years preceding the application, been convicted of an
indictable offence triable only on indictment and connected with the business of manager, unless it or he has

obtained a pardon;
(5) none of its officers has been an officer of a partnership or legal person which has, in the 5 years
preceding the application, been convicted of an indictable offence triable only on indictment and connected
with the business of manager, unless it or he has obtained a pardon;
(6) none of its officers was an officer of a partnership or legal person in the 12 months preceding the
latter's bankruptcy occurring less than 3 years ago;
(7) none of its officers has been an officer of a manager whose authorization by the Board was withdrawn
less than 3 years ago under section 83 of the Building Act;
(8) its organizational structure provides that its officers and key personnel participating in policy decision-
making and application of the guarantee plan are recruited from among persons who, because of their
activities, are capable of contributing in a particular manner to the administration of a guarantee plan, and that
at least 3 of those persons have experience in the financial institutions sector, in government and in the
consumer affairs sector and are recruited from among persons proposed by the most representative
consumer associations. The representatives are to be chosen from a list drawn up by the Board. The term of
the representatives from the financial institutions sector, the government and the consumer affairs sector is of
not less than one year and may be renewed;
(9) its internal by-laws concerning conflict of interest in particular and applying to persons acting within its
organization structure are equivalent to the rules set out in articles 1310 and following of the Civil Code of
Québec. Those rules stipulate, among other things, that no contractor may have access, at any time, to
personal information of a fiscal nature or to other information contained in the file of a peer; and
(10) its fiscal year is the calendar year.

O.C. 841-98, s. 42; O.C. 39-2006, s. 18; S.Q. 2006, c. 22, s. 177.

DIVISION II

CONDITIONS TO BE FULFILLED BY THE MANAGER

§1. Documents and Information

43. A legal person applying for authorization to manage an approved plan shall supply the Board with
(1) its name, the address of its principal establishment and, where applicable, the number of the
declaration of registration deposited in the register of sole proprietorships, partnerships and legal persons, as
well as the name, address of domicile, date of birth, social insurance number and telephone number of all its
officers and of the person responsible for its operations in Québec, where applicable;
(2) information concerning its legal structure, a certified true copy of its deed of incorporation and any

amendments thereto;
(3) any judgment delivered against it or any of its officers, in the 5 years preceding the application, for an
indictable offence triable only on indictment and connected with the business of manager, unless it or he has
obtained a pardon;
(4) 2 copies of its guarantee plan and of its guarantee contract;
(5) the security prescribed in section 58, a certificate of insurance coverage required under section 62 or
any other equivalent guarantee, and a certified true copy of the text of any insurance or equivalent guarantee
prescribed in section 47, in the second paragraph of section 48 and in section 63;
(6) the inspection program and the pre-established list of items to be checked, provided for in sections 68
and 69;
(7) for the first 3 years of operation, a business plan as defined in the «Dictionnaire de la comptabilité et de
la gestion financière», by L. Ménard et al., Canadian Institute of Chartered Accountants, Ordre des experts
comptables-France, Institut des Réviseurs d'Entreprises-Belgique, 1994;
(8) a copy of its internal by-laws; and
(9) financial forecasts prepared in accordance with generally accepted accounting principles and audited in
accordance with generally accepted auditing standards, including an actuary's opinion on the assumptions
used in their preparation.
It shall also supply the Board with a statement signed by an officer generally or specifically authorized for that
purpose certifying

(1) that the officer is filing the application for authorization on behalf of the legal person;
(2) that neither the legal person nor any of its officers is in any of the situations specified in paragraph 2, 3,
4, 5, 6 or 7 of section 42, where applicable; and
(3) that the legal person undertakes to pay, before the beginning of its operations, the contribution
indicated in section 47.
O.C. 841-98, s. 43.
§2. Management

44. Except in the case of a legal person constituted for the sole purpose of managing an approved plan, the
manager shall manage the approved plan separately from his other business and, in particular, keep separate
accounts and bank transactions.

O.C. 841-98, s. 44.
45. For that purpose, the manager shall post separately and identifiably, in the financial statements of the
approved plan, the portion of his general or other expenses allotted to the approved plan.
O.C. 841-98, s. 45.
46. Subject to section 49, any sum received by the manager in consideration of a guarantee contract and
the income generated by those sums shall be deposited in separate bank accounts or

be invested in bonds or
other debt securities issued or guaranteed by Québec, Canada or a province of Canada, the United States of
America or any of its member states, the International Bank for Reconstruction and Development, a
municipality or a school board in Canada or a fabrique in Québec, or in deposit accounts or deposit
certificates of a financial institution for a term not to exceed 5 years.
O.C. 841-98, s. 46.
§3. Solvency

47. The manager shall, before the beginning of his operations, pay a contribution of 1 500 000 $. If he
undertakes to obtain and to keep in force additional insurance or any other equivalent guarantee of at least
1 000 000 $ over and above the reserve account, the contribution that he shall pay is 500 000 $.
A contribution paid in cash shall be deposited in a separate bank account or be invested in one of the forms
provided for in section 46.

O.C. 841-98, s. 47.
48. The manager shall maintain an excess amount of assets over liabilities at least equal to the higher of
the following amounts:
(1) the contribution provided for in section 47; or
(2) the aggregate of
(a) the amount obtained by multiplying the provision for outstanding claims provided for in section 56 by
15 %; and
(b) the amount obtained by multiplying the reserve provided for in section 54 and the additional reserve
provided for in section 56 by 15 %.
The percentage of 15 % referred to in clauses a and b of subparagraph 2 of the first paragraph shall be
reduced to 5 % if the manager holds additional insurance or any other equivalent guarantee of at least
1 000 000 $ over and above the reserve account or of 10 % of that account, covering the obligations that he
assumes for the duration of the coverage provided by the guarantee certificate already obtained.

The minimum excess amount required under this section may be used only for the purposes of the approved
plan.

O.C. 841-98, s. 48.
49. The manager shall keep, at all times, in a separate trust account called «reserve account», sums or
investments sufficient to guarantee the obligations resulting from the approved plan.
O.C. 841-98, s. 49.
50. For that purpose, the manager shall immediately deposit in the reserve account, according to the
classes of buildings concerned, the amounts indicated in the table appearing in Schedule I. Those amounts
shall in no case be less than 60 % of any sum received in consideration of a guarantee certificate issued
under the approved plan.

O.C. 841-98, s. 50.

51. The reserve account may be used by the manager only for one of the following purposes:

(1) to pay a claim originating from a guarantee certificate issued under the approved plan for which a sum was deposited in that account under section 50;

(2) to reimburse the sums due to the contractor following the cancellation of a guarantee certificate for which a sum was deposited in that account under section 50;

(3) to pay the external claims settlement costs related to a claim originating from a guarantee certificate for which a sum was deposited in that account under section 50; or

(4) to pay the internal claims settlement costs directly related to a claim originating from a guarantee certificate for which a sum was deposited in that account under section 50.

However, where, at the end of each fiscal year, the reserve account exceeds the actuarial reserve referred to in section 56, the excess amount may be used by the manager for other purposes than those specified in the first paragraph.

O.C. 841-98, s. 51.

52. Where the reserve account is entrusted to a depositary in the form of a deposit, the term and other conditions are determined in accordance with the agreement between the manager and the depositary. The term agreed upon may not, however, exceed 5 years.

O.C. 841-98, s. 52.

53. Where the depositary of the reserve account is a trust company, the manager may also choose the investments to be made with those funds. In that case, the funds may be invested only by the trust company and only in bonds or other debt securities issued or guaranteed by Québec, Canada or a province of Canada, the United States of America or any of its member states, the International Bank for Reconstruction and Development, a municipality or a school board in Canada or a fabrique in Québec, or in deposit accounts or deposit certificates of a financial institution for a term not to exceed 5 years.

All income from the reserve account shall be paid at least annually.

O.C. 841-98, s. 53.

54. The minimum reserve to be kept at the end of each of the manager's fiscal years in the reserve account shall never be less than the following percentages of the reserve provided for in section 50, based on the time elapsed since the issue of the guarantee certificate:

Time elapsed since the issue of guarantee certificate:

Percentage

(1) less than 1 year: 95 %;
(2) 1 year or more but less than 2 years: 85 %;
(3) 2 years or more but less than 3 years: 75 %;
(4) 3 years or more but less than 4 years: 65 %;
(5) 4 years or more but less than 5 years: 50 %;
(6) 5 years or more but less than 6 years: 25 %;

(7) 6 years or more: 0 %.
O.C. 841-98, s. 54.
55. The reserve account, including the assets held in respect of the provisions referred to in section 56, are
non-transferable and non-seizable.
O.C. 841-98, s. 55.
56. The manager and his actuary shall ensure that they establish an actuarial reserve consisting of the
minimum reserve referred to in section 54, of an additional reserve over and above that minimum reserve
where the actuary is of the opinion that the minimum reserve does not constitute a good and sufficient
provision to guarantee the obligations resulting from the guarantee certificate issued by the manager, and of a
good and sufficient provision for outstanding claims, which are claims submitted and not settled and claims
incurred but not reported.
O.C. 841-98, s. 56.
57. The manager shall, where applicable, deposit in the reserve account an additional sum equal to the
difference between the actuarial reserve and the amount of the reserve account.
O.C. 841-98, s. 57.
§4. Security

58. The manager shall furnish security in the amount of 50 000 $.
O.C. 841-98, s. 58.
59. The security may, among other things, be in cash or in bonds or other debt securities issued or
guaranteed by Québec, Canada or a province of Canada, the United States of America or any of its member
states, a municipality or a school board in Québec.
O.C. 841-98, s. 59.
60. The security shall be kept by the Board, either to compensate the beneficiaries of the approved plan
where the manager or his insurer fails to perform the obligations resulting from the plan, or to reinsure the
obligations of the plan where the interest of the beneficiaries so requires.
However, interest on the security shall remain payable to the manager or shall be credited to the manager.

O.C. 841-98, s. 60.
61. The manager may withdraw or replace the bonds and other debt securities making up his security,
provided that the security remains in compliance with this Regulation.
O.C. 841-98, s. 61.
§5. Insurance

62. The manager shall obtain and keep in force insurance or any other equivalent guarantee to cover the
obligations he assumes during the entire duration of coverage of the guarantee certificates, and shall send
confirmation thereof to the Board.
O.C. 841-98, s. 62.
63. The manager shall file with the Board a true copy of the text of any insurance or equivalent guarantee
invoked to reduce in any way the amount of the contribution established in accordance with this Regulation.

The insurance or the equivalent guarantee shall be acceptable to the Board.

O.C. 841-98, s. 63.

§6. Annual Report

64. The manager shall, no later than 4 months after the end of each fiscal year, supply the Board with an annual report of the approved plan stating its situation.

The annual report shall include financial statements for the plan's latest fiscal year, financial statements that shall be prepared in accordance with generally accepted accounting principles and audited in accordance with generally accepted auditing standards.

The annual report shall also be accompanied by experience data sent on a form supplied by the Board.

The annual report shall also include the actuary's report and the changes made during the fiscal year to the guarantee plan and to the guarantee contract.

The actuarial reserve appearing in the financial statements shall be certified by an actuary to the effect that it constitutes a provision which is good and sufficient to guarantee the obligations resulting from the guarantee certificates issued by the manager. Otherwise, the financial statements shall indicate which amount should be deposited in the reserve account in order to constitute a provision which is good and sufficient, in accordance with the actuary's report certifying that it was calculated on the basis of adequate assumptions with regard to the manager's financial situation and the contracts he concludes.

Every 3 years, the annual report shall also include, for the following 3 years of operation, a business plan as defined in the Dictionnaire de la comptabilité et de la gestion financière by L. Ménard et al, Canadian Institute of Chartered Accountants, Ordre des experts comptables-France, Institut des Réviseurs d'Entreprises-Belgique, 1994.

O.C. 841-98, s. 64.

65. Where the funds accumulated in the reserve account represent an amount less than that which is declared to constitute a good and sufficient provision by the actuary's certificate, the manager shall, before filing the financial statements of the approved plan, deposit in the reserve account a sum equal to the difference.

O.C. 841-98, s. 65.

§7. Other conditions

66. Any decision by the manager to refuse or cancel a contractor's membership in the approved plan or concerning a claim made by a beneficiary shall be in writing and give reasons therefor.

The decision must contain the following :

(1) in the case of a decision on a claim made by a beneficiary, mention that it is the decision of the
manager, the names of the beneficiary and the contractor, the address of the building concerned, the date of
each inspection, if any, the date of the final decision, the remedies and time limits prescribed by the regulation
and the names and addresses of the arbitration bodies authorized by the Board as well as those of the
Ministère du Travail so that the list of accredited mediators may be obtained ;
(2) in the case of a decision refusing or cancelling a contractor's membership in the approved plan, the
date of the decision and the remedies and time limits prescribed by the regulation and the names and
addresses of the arbitration bodies authorized by the Board.
O.C. 841-98, s. 66; O.C. 39-2006, s. 19.
67. The manager is subject to the arbitration procedure determined by this Regulation where the contractor
contests a decision by the manager to refuse or cancel his membership in the approved plan, or where a

person contests a decision of the manager concerning a claim.
He shall also, without delay, send to the arbitration body the file on the decision that is subject to arbitration.

O.C. 841-98, s. 67.
68. The manager shall, to ensure implementation of the approved plan, establish and obtain approval for an
inspection program including the various steps in construction of a building and taking into account, in
particular, the experience of the contractors, the nature of the construction projects and the categories of the
buildings concerned.
O.C. 841-98, s. 68.
69. The manager shall supply each contractor with a list of items to be checked for each class of building,
approved by the Board for the purposes of the inspection prior to acceptance.
(For construction work beginning on 7 August 2006, this section has been replaced (O.C. 39-2006, s. 30)).

O.C. 841-98, s. 69; O.C. 39-2006, s. 20.
69.1. Upon receipt of a building registration application from the beneficiary or as soon as the beneficiary is
known, the manager shall send to the beneficiary the explanatory document prepared by the Board on the
application of this Regulation.
O.C. 39-2006, s. 21.
70. The manager shall immediately send to the Board any information which could call into question the
issue, validity or renewal of a contractor's licence.
O.C. 841-98, s. 70.
71. The manager shall ensure that the contractors receive training with regard to the content of the
approved plan and the contract resulting therefrom.
O.C. 841-98, s. 71.

72. The manager shall draw up and keep updated a register indicating, for each contractor, the class of
building covered by the guarantee, the address of the construction site and the arbitration awards concerning
the contractor.
The register is public and may be consulted free of charge during the manager's business hours.

The manager shall issue to any person who so requests a copy or an excerpt of the register, in consideration
of expenses not exceeding the cost of its reproduction and transmission.

O.C. 841-98, s. 72.
73. The manager shall, with regard to the confidentiality of information communicated to him by such
persons as contractors, bankers or consumers, comply with the Act respecting the protection of personal
information in the private sector (R.S.Q., c. P-39.1).
On the beneficiary's request, the manager shall provide access to the file concerning the beneficiary's building
which may include, among other things, reports concerning inspection, intervention, observed defects and
remedies thereto, plans and specifications, experts' opinions used for the manager's report and other similar
documents.

O.C. 841-98, s. 73.
74. For the purposes of this Regulation, the manager shall, where the contractor is absent or fails to

intervene, assume each and every obligation of the contractor within the scope of the approved plan.

O.C. 841-98, s. 74.
CHAPTER IV

STANDARDS AND CRITERIA OF GUARANTEE PLANS AND OF GUARANTEE CONTRACTS

75. In addition to the guarantee requirements set out in Chapter II, the guarantee plan shall include the
standards and criteria prescribed in Divisions I, II and III of this Chapter.
O.C. 841-98, s. 75.
76. No guarantee contract may be offered unless it complies with the rules established in Division IV of this
Chapter and is approved by the Board.
O.C. 841-98, s. 76.
77. No change may be made to a guarantee contract unless the change complies with the rules established
in Division IV of this Chapter.
O.C. 841-98, s. 77.
77.1. The publicity for a guarantee plan must clearly distinguish between the compulsory guarantee plan
and any other guarantee plan and mention that the compulsory plan is approved by the Régie du bâtiment du
Québec and that it ensures financial protection in respect of part of the contractor's legal and contractual

obligations.
O.C. 39-2006, s. 22.
DIVISION I

MEMBERSHIP OF THE CONTRACTOR

78. To join a guarantee plan and obtain a certificate of accreditation, a person shall
(1) complete an application for membership on the form supplied by the manager and return the form to
the manager;
(2) satisfy the conditions and financial criteria prescribed in this Division;
(3) sign the membership agreement supplied by the manager and setting forth the obligations listed in
Schedule II;
(4) hold security in the amount of 20 000 $ against fraud, embezzlement or misappropriation of funds;
(5) submit complete financial statements audited or accompanied by a review engagement report and
drawn up by an accountant. Those statements shall be dated and signed by a person in authority. In addition,
financial statements shall be dated no later than 4 months after the end of the undertaking's fiscal year;
(6) produce a document certifying that the shareholders holding 20% or more of the voting shares, officers
and guarantors have been discharged from any personal bankruptcy and have not been involved in the
bankruptcy of a construction firm for at least 3 years and state whether one of the other shareholders was
involved in such a bankruptcy in less than 3 years ;
(7) produce the personal balance sheet of each officer, shareholder, guarantor and partner, duly
completed, dated and signed;
(8) declare all his obligations towards third parties and towards affiliates or other companies, such as a
legal hypothec or security towards third parties;

(9) produce a certified true copy of the deed of incorporation of his undertaking;
(10) pay the membership fees required by the manager; and
(11) produce a document certifying that he has applied to the Board for a contractor's licence;
(12) if that person, one of its shareholders holding 20% or more of the voting shares or one of its officers
was accredited for the last 3 years by another manager, produce a statement of that manager stating whether
sums are owed by the applicant undertaking, one of its shareholders holding 20% or more of the voting
shares or one of its officers.
O.C. 841-98, s. 78; O.C. 39-2006, s. 23.
79. The manager shall be notified of the amalgamation, sale or assignment of a partnership or legal person,
or of a change to its name, board of directors or officers within 30 days of the event.
O.C. 841-98, s. 79.
80. The manager shall issue a certificate of accreditation if the conditions prescribed in this Chapter are

met.
O.C. 841-98, s. 80.
81. The manager shall remain the owner of the certificate of accreditation.
The holder of a certificate shall not transfer it.
O.C. 841-98, s. 81.
82. The holder of a valid certificate of accreditation shall display that certificate in a conspicuous place at his principal establishment in Québec.
O.C. 841-98, s. 82.
83. The holder of a certificate of accreditation who ceases to be entitled thereto shall notify the manager thereof in writing within 30 days following the date on which his entitlement ends.

O.C. 841-98, s. 83.
§1. General Membership Conditions for All Buildings

I. Type A Undertaking (An undertaking working, in whole or in part, in the construction of residential buildings for less than 4 years)
84. Such an undertaking shall
(1) hold security of a minimum value of 35 000 $ in the form of
(a) a personal security;
(b) a letter of guarantee from a bank;
(c) a hypothecary guarantee; or
(d) security of a third person; and
(2) meet the following financial criteria, where it is possible to calculate them:
(a) working capital ratio: 1,15;

(b) debt/equity ratio: 80 %;
(c) net worth (10 % of sales): 10 %;
(d) gross earnings: 18 %;
(e) net earnings: 5 %.
All the above financial criteria shall be calculated using the average obtained over the last 3 years.

Where an undertaking possesses affiliates or related companies, the manager may require a consolidated balance sheet or financial statements from each of those companies.

In this Subdivision, the financial criteria shall have the meaning given to them in the Dictionnaire de la comptabilité et de la gestion financière by L. Ménard et al., Canadian Institute of Chartered Accountants, Ordre des experts comptables-France, Institut des Réviseurs d'Entreprises-Belgique, 1994.

O.C. 841-98, s. 84; O.C. 39-2006, s. 24.
II. Type B Undertaking (An undertaking working, in whole or in part, in the construction of residential buildings for not less than 4 years)
85. Such an undertaking shall
(1) hold security of a minimum value of 40 000 $ in the form of
(a) personal security;
(b) a letter of guarantee;
(c) a hypothecary guarantee; or

(d) security of a third person; and
(2) meet the following financial criteria:
(a) working capital ratio: 1,15;
(b) debt/equity ratio: 80 %;
(c) net worth (10 % of sales): 10 %
(d) gross earnings: 18 %;
(e) net earnings: 5 %.
All the above financial criteria shall be calculated using the average obtained over the last 3 years.
Where an undertaking possesses affiliates or related companies, the manager may require a consolidated
balance sheet or financial statements from each of those companies.

O.C. 841-98, s. 85.
§2. Additional Membership Conditions for Multifamily Buildings Not Held in Divided Co-ownership and Comprising
More than 5 Dwelling Units

86. An undertaking planning to work on multifamily buildings not held in divided co-ownership and
comprising more than 5 dwelling units shall also supply the manager with
(1) a certificate of financing;

(2) plans of architecture, structure, mechanics and electricity with a seal and approved by the municipality;
(3) a complete ground analysis;
(4) a follow-up and a certificate of conformity by recognized professionals;
(5) a copy of the building permit issued by the municipality; and
(6) a copy of the preliminary contracts.
O.C. 841-98, s. 86.
§3. Additional Membership Conditions for Multifamily Buildings Held in Divided Co-ownership of More than 5
Private Portions

O.C. 841-98, Sd. 3; O.C. 920-2001, s. 2.
87. An undertaking planning to work on multifamily buildings held in divided co-ownership of more than 5
private portions shall also supply the manager with
(1) a certificate of financing;
(2) plans of architecture, structure, mechanics and electricity with a seal and approved by the municipality;
(3) a complete ground analysis;
(4) a copy of the memorandum provided for in article 1787 and following of the Civil Code of Québec;
(5) a copy of the building permit issued by the municipality; and
(6) a copy of the preliminary contracts.
O.C. 841-98, s. 87; O.C. 920-2001, s. 3.
§4. Other conditions

88. Where an undertaking fails to meet the requirements set forth in sections 84 to 87 or when it is
impossible to calculate the financial criteria set forth in subparagraph 2 of the first paragraph of section 84, the
manager may require any other condition for the same purposes, taking into account the technical
competence of the undertaking.

The manager may require security of a value greater than that mentioned in subparagraph 1 of the first
paragraph of section 84 and in subparagraph 1 of the first paragraph of section 85 where he has reason to
believe that the solvency of the undertaking so requires.

O.C. 841-98, s. 88.
88.1. The manager may also require from the contractor that the contractor supply the following
information, if the manager considers it appropriate considering the complaints received or the financial
situation of the undertaking :
(1) detailed cost estimates for the construction of a building ;
(2) any document evidencing a change to the contract ;
(3) when the work concerns multifamily buildings held in divided co-ownership having more than 5 private
portions, a copy of the list of sale prices of the co-ownership units, a list of the units sold, the amount of the
advance payments collected or to be collected and, where a supervisory mandate has been entrusted to a
member of a professional order, a copy of such a mandate ; and

(4) interim financial statements.
O.C. 39-2006, s. 25.
§5. Term of Membership

89. Membership is valid for 1 year.
Notwithstanding the first paragraph, the term of membership of a person who already holds a licence issued
under the Building Act corresponds to the remaining duration of the licence thus amended.

O.C. 841-98, s. 89.
90. Membership takes effect only from the date on which the Board issues the appropriate licence to the
contractor.
O.C. 841-98, s. 90.
§6. Renewal of Membership

91. The contractor's membership is renewed if he sends to the manager, at least 30 days before the expiry
date of his membership, an application for renewal demonstrating that he meets the conditions prescribed in
this Regulation to obtain a certificate of accreditation and if he pays the fees required by the manager.
O.C. 841-98, s. 91.
92. An application for renewal may be received after the period prescribed in section 91 but before the
expiry date of the membership if the contractor demonstrates that he had a valid reason not to comply with
that section.
O.C. 841-98, s. 92.
§7. Cancellation of Membership

93. The manager may cancel a membership where the contractor is in any of the following situations:

(1) he no longer meets one of the conditions prescribed in this Regulation to obtain a certificate of
accreditation;
(2) he is reticent or makes a false declaration;
(3) he fails to pay fees for membership, membership renewal or registration;
(4) his constructions fail to meet the quality criteria required by the manager;
(5) he fails to complete work related to a building or carry out the repairs required in accordance with the
manager's requirements ;
(6) the manager was required to make a payment following the contractor's failure to perform his
obligations pertaining to reimbursement of partial payments, to relocation, moving and storage of the
beneficiary's property, to completion of the work and to the guarantee against defects and poor workmanship,
faulty design, construction or production of the work, or the unfavourable nature of the ground;
(7) for the execution of construction work, he uses the services of another contractor not licensed by the
Board for that purpose;
(8) where the contractor is a legal person, one or more of its shareholders or officers has or have been, at
any time whatsoever, shareholders or officers of another accredited or formerly accredited legal person
having failed to perform the obligations required of it under a membership agreement; or

(9) he fails to send the documents required by the manager or to furnish the guarantees or security
required by the manager under this Regulation.
O.C. 841-98, s. 93; O.C. 39-2006, s. 26.
94. The contractor's membership ceases to have effect once the contractor no longer holds the appropriate
contractor's licence issued by the Board.
O.C. 841-98, s. 94.
95. On the death of a holder of a certificate of accreditation, the liquidator of the succession, the heir, the
legatee by particular title or the deceased's legal representative may continue his activities for up to 90 days
from the date of the death.
O.C. 841-98, s. 95.
§8. Special Provisions

96. The rights of the beneficiary are not affected by the cessation of effect of the contractor's membership.
O.C. 841-98, s. 96.
97. A beneficiary who has entered into a contract for the sale or construction of a building provided for in
section 2 with a contractor who is a member of an approved plan but who does not hold the appropriate
certificate of accreditation does not lose the benefit of the guarantee applicable to that building.
O.C. 841-98, s. 97.
DIVISION II

MEDIATION

98. Notwithstanding section 106, a beneficiary and a contractor may, within 30 days following receipt by
registered mail of the decision of the manager concerning a claim, agree to apply for mediation to try and
reach an agreement about the dispute between them.
O.C. 841-98, s. 98; O.C. 39-2006, s. 27.
99. Upon receipt of an application for mediation, the Minister of Labour shall appoint the mediator chosen
by the beneficiary and the contractor from a list of persons already established by him. The Minister shall
forward a copy of that appointment to the manager.
O.C. 841-98, s. 99.
100. Any agreement that settles the dispute in part or in all shall be put in writing, signed by the mediator,
the beneficiary and the contractor and binds both parties and the manager. The mediator shall forward a copy
of the agreement to the manager and to the Minister, as soon as it is signed, by registered mail.
O.C. 841-98, s. 100.
101. The manager may take part in the mediation. In such a case, the agreement shall also be signed by
the manager to bind him and the mediator shall forward a copy of the agreement to the Minister, as soon as it
is signed, by registered mail.
O.C. 841-98, s. 101.
102. The costs of mediation shall be shared equally by the beneficiary and the contractor, except if they
both agree otherwise. Notwithstanding the preceding, the manager shall pay for a third of the costs when he

takes part in the mediation.

O.C. 841-98, s. 102.
103. Unless the beneficiary, the contractor and, where applicable, the manager agree to it, nothing that was
said or written during a mediation session is admissible in evidence.
A mediator may not divulge what was disclosed to him or what he became aware of while carrying out his
duty or present personal notes or a document made or obtained during mediation before a court, a body or a
person carrying out judicial or quasi-judicial duties.

O.C. 841-98, s. 103.
104. If the mediator becomes unable to act, he shall be replaced according to the procedure followed for
his appointment.
O.C. 841-98, s. 104.
105. An agreement may not depart from the provisions of this Regulation.
O.C. 841-98, s. 105.
This section comes into force 3 March 1999. (O.C. 141-99)

DIVISION III

ARBITRATION

§1. Application for Arbitration

106. Any dispute pertaining to the manager's decision concerning a claim or the refusal or cancellation of
the contractor's membership shall be dealt with exclusively by the arbitrator appointed under this Division.
The interested parties who apply for arbitration are,

(1) for a claim, the beneficiary or the contractor; and
(2) for membership, the contractor.
An application for arbitration concerning the cancellation of a contractor's membership shall not suspend the
enforcement of the manager's decision, unless the arbitrator decides otherwise.

O.C. 841-98, s. 106.
107. An application for arbitration shall be sent to an arbitration body authorized by the Board within 30
days following receipt by registered mail of the manager's decision or, where applicable, the advice of the
mediator concluding to partial or total failure of the mediation. The body shall appoint an arbitrator from a list
of persons drawn up by it beforehand and sent to the Board.
O.C. 841-98, s. 107; O.C. 39-2006, s. 28.
108. As soon as the arbitration body receives an application for arbitration, it shall notify the other
interested parties and the manager.
O.C. 841-98, s. 108.
109. As soon as that notice is received, the manager shall send to the arbitration body the file on the
decision that is subject to arbitration.

O.C. 841-98, s. 109.
110. As soon as the arbitrator is appointed, the arbitration body shall give the interested parties the
explanatory document prescribed in paragraph 6 of section 128.
O.C. 841-98, s. 110.
111. Before or during the arbitration proceedings, an interested party or the manager may request
necessary measures to ensure the preservation of the building.
O.C. 841-98, s. 111.
§2. Arbitrators

112. Only natural persons with experience in guarantee plans or having professional training in matters
related to the questions raised by the arbitration, such as in finance, accounting, construction techniques or
law, may be accredited as arbitrators with the arbitration body.
O.C. 841-98, s. 112.
113. If the arbitrator is unable to fulfil his mission or fails to perform his duties within the periods prescribed,
an interested party or the manager may address the arbitration body for revocation of the arbitrator's
mandate.
O.C. 841-98, s. 113.
114. A decision on the recusation or revocation of an arbitrator is final and is not subject to appeal.

O.C. 841-98, s. 114.
115. In the case of an arbitrator's recusation, revocation, death or incapacity to act, the arbitration body
shall replace him by a new arbitrator who shall decide on the resumption or continuation of the hearing. The
new arbitrator shall act within the periods prescribed in sections 117 and 122.
O.C. 841-98, s. 115.
116. An arbitrator shall decide in accordance with the rules of law; he shall also appeal to fairness where
circumstances warrant.
O.C. 841-98, s. 116.
§3. Hearing

117. The hearing of an application for arbitration shall begin within 30 or 15 days of its receipt, depending
on whether the application concerns a claim or membership.
O.C. 841-98, s. 117.
118. The arbitrator shall give to the interested parties and to the manager or to their representatives at least
5 days' notice in writing of the date, time and place of the hearing and, where applicable, notice of the date on
which he will inspect the property or visit the premises.
O.C. 841-98, s. 118.
119. The following questions shall be referred to the ordinary courts:
(1) the imposition of a conservatory measure with regard to a third party;

(2) the issue of a mandate against a witness compelled to give evidence but refusing to appear;
(3) the case of an unwilling witness;
(4) the homologation of an arbitration award.
O.C. 841-98, s. 119.
§4. Arbitration Award

120. An arbitration award, once it is made, is binding on the interested parties and on the manager.
An arbitration award is final and not subject to appeal.
O.C. 841-98, s. 120.
121. An arbitration award shall not be put into compulsory execution unless it has been homologated in
accordance with the procedure prescribed in articles 946 to 946.6 of the Code of Civil Procedure (R.S.Q., c.
C-25).
O.C. 841-98, s. 121.
122. An arbitration award in writing and giving reasons therefor shall be sent to the interested parties and to
the manager within 30 or 15 days following the date of the end of the hearing, depending on whether the
decision concerns a claim or membership.
The interested parties may agree to an additional period.

O.C. 841-98, s. 122.
123. Arbitration fees are shared equally between the manager and the contractor where the latter is the
plaintiff.
Where the plaintiff is the beneficiary, those fees are charged to the manager, unless the beneficiary fails to

obtain a favourable decision on any of the elements of his claim, in which case the arbitrator shall split the
costs.

Only the arbitration body is empowered to draw up an account of arbitration fees for payment thereof.

O.C. 841-98, s. 123.
124. The arbitrator shall, where applicable, decide on the amount of reasonable fees for a relevant expert's
opinion to be reimbursed by the manager to the plaintiff where the latter wins the case in whole or in part.
This section does not apply to a dispute concerning the contractor's membership.

O.C. 841-98, s. 124.
125. Expenses incurred by the interested parties and by the manager for the arbitration shall be borne by
each one of them.
O.C. 841-98, s. 125.
126. The arbitration body shall keep the arbitration files for 2 years from the filing of the arbitration award
or, in case of a legal challenge of that decision, until the final decision of a court of justice disposing thereof.
O.C. 841-98, s. 126.
§5. Arbitration Body

127. Only a body devoted entirely to the arbitration of disputes may be authorized by the Board to organize
the arbitration provided for in this Regulation.
O.C. 841-98, s. 127.
128. Authorization of the Board is granted to a body meeting the following conditions, in addition to the
conditions provided for by the Building Act:
(1) it has a mechanism for updating the list indicating each arbitrator's area of expertise and available to
any interested person on request;
(2) it has a permanent program for training arbitrators on the content of the guarantee plan such as the
guarantees themselves and related notions of civil law, the terms and conditions of contractors' membership
in the plan and the arbitration procedure;
(3) it has a code of ethics applicable to arbitrators and a procedure to be applied in cases of disputed
accounts;
(4) it has an arbitration service accessible in each administrative region of Québec, with arbitrators living in
each region;
(5) is has an accelerated arbitration procedure consisting of, in addition to the rules prescribed in this
Division, provisions concerning
(a) the application for arbitration;
(b) the preparation of the file;
(c) the appointment, competence and powers of the arbitrator;
(d) the obligation of the arbitrator to inform the parties; and
(e) the order of the arbitration procedures, in particular the periods, the

recusation and revocation of the
arbitrator, the summoning of witnesses and the arbitration award; and
(6) it has an explanatory document concerning the arbitration procedure, in particular with regard to
(a) the right of the interested parties to be represented by a person of their choice;
(b) the rules of procedure and of evidence to be followed;
(c) the procedure for summoning witnesses and experts;
(d) the possibility of inspecting the property or visiting the premises;
(e) the recording of an agreement between the beneficiary, the contractor and the manager or of
discontinuance in an arbitration award; and
(f) the procedure for homologating an arbitration award.
O.C. 841-98, s. 128.
129. The arbitration body shall transmit to the arbitrator the file of the manager concerning the decision to
which the arbitration pertains and the documents produced by the interested parties in support of their
application or defense, so that the arbitrator will have as complete a file as possible.
O.C. 841-98, s. 129.
130. The arbitration body shall provide administrative support for the arbitrators' activities, with due respect

for the autonomy and independence of each of its arbitrators.

O.C. 841-98, s. 130.
131. The arbitration body shall publish annually a compilation of arbitration awards made under this
Division.
O.C. 841-98, s. 131.
DIVISION IV

RULES PERTAINING TO GUARANTEE CONTRACTS

132. In addition to the text of the guarantee prescribed in Subdivision 1 or 2 of Division II of Chapter II,
where applicable, the guarantee contract shall include
(1) the names and addresses of the beneficiary and the contractor;
(2) the number of the contract, its date, and the address of the place where it is signed by the contractor;
(3) a description of the building covered by the guarantee;
(4) the manager's name, address, and telephone and fax numbers;
(5) the contractor's accreditation number and licence number and the words «licensed by the Régie du
bâtiment du Québec»; and
(6) the compulsory nature of the guarantee.
O.C. 841-98, s. 132.
133. The guarantee contract shall indicate that its content has been approved by the Régie du bâtiment du
Québec and specify the number and date of the Board's decision.
O.C. 841-98, s. 133.
134. The guarantee contract shall be drawn up clearly and legibly, at least in duplicate. It shall be typed or
printed.
O.C. 841-98, s. 134.

135. The contractor's signature shall be affixed on the last page of the copies of the guarantee contract
following all the stipulations.
O.C. 841-98, s. 135.
136. The signature affixed by the contractor is binding on the manager.
O.C. 841-98, s. 136.
137. The contractor shall give a copy of the duly signed guarantee contract to the beneficiary and send a
copy thereof to the manager.
O.C. 841-98, s. 137.
138. The beneficiary is required to perform his obligations set forth in the contract entered into with the
contractor only from the time he is in possession of a copy of the duly signed guarantee contract.
O.C. 841-98, s. 138.

139. Any clause of a guarantee contract that is irreconcilable with this Regulation is void.
O.C. 841-98, s. 139.
140. The beneficiary may not, by special agreement, waive the rights granted to him by this Regulation.
O.C. 841-98, s. 140.
CHAPTER V

TRANSITIONAL AND FINAL PROVISIONS

141. Notwithstanding clause e of subparagraph 2 of the first paragraph of section 84 and clause e of
subparagraph 2 of the first paragraph of section 85, the net earnings required shall be 2.5 % for the first year
following the coming into force of those provisions, 3.0 % for the second year, 3.5 % for the third year, 4.0 %
for the fourth year and 4.5 % for the fifth year.
O.C. 841-98, s. 141.
142. In order to be the holder of a certificate of accreditation on 1 January 1999, a contractor shall send his
application for membership to the manager at least 30 days before that date. Notwithstanding section 90, his
membership shall take effect only from 1 January 1999.
O.C. 841-98, s. 142.
143. Only those buildings for which the preliminary contract or the contract of enterprise is signed between
a beneficiary and an accredited contractor whose construction work begins from the date of coming into force
of this section are covered by the guarantee.
O.C. 841-98, s. 143.
144. The provisions of this Regulation will come into force on the date or dates determined by the
Government.
However, for the purposes of section 85 of the Building Act, this Regulation is deemed to come into force on
30 June 1998.

O.C. 841-98, s. 144.
SCHEDULE I

(s. 50)
INITIAL RESERVE

Initial reserve,
Buildings covered in dollars
per guarantee
certificate

Detached, semi-detached
or row-type single-family
dwelling, held or not held
in divided co-ownership;

Multifamily building from

http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=3&fi.
..

2010-09-10

a duplex to a quintuplex,
not held in divided 510
co-ownership;

Multifamily building
comprising more than 5
dwelling units and held
by a non-profit organization
or a cooperative, not held
in divided co-ownership.

Multifamily building of
combustible construction
and multifamily building of
noncombustible construction 760
comprising no more than 4
private portions stacked one
above the other, held in divided
co-ownership.

O.C. 841-98, Sch. I; O.C. 920-2001, s. 4.
SCHEDULE II

(s. 78)
OBLIGATIONS OF THE CONTRACTOR

The contractor shall undertake

(1) to meet the membership criteria required by the manager under a regulation of the Régie du bâtiment
du Québec respecting the guarantee plan for new residential buildings;
(2) to notify the manager that notice of intention or of a proposition has been filed in respect of an insolvent
person under section 65.1 of the Bankruptcy and Insolvency Act (R.S.C. (1985) c. B-3);

(3) to comply with accepted practice and the standards in force applicable to the building;
(4) without restricting his liability under the laws in force in Québec, to honour the guarantee required of
him under the guarantee plan approved by the Board and, where applicable, to complete the work or to repair
the defects and poor workmanship covered by the guarantee, once the manager is of the opinion that a claim
is founded, except in the case of a dispute;
(5) to compensate the manager for any loss incurred or to reimburse any payment he has made following
his failure to honour the guarantee required of him under the guarantee plan;
(6) to register with and pay immediately to the manager the premium specified for each class of building
upon the occurrence of the first of the following events:
(a) the signing of the preliminary contract or the contract of enterprise;
(b) the issue of the building permit; or
(c) the beginning of construction work on the building covered;
(7) to perform each and every obligation required of him by the manager as part of the guarantee plan for
any building covered, whether or not the building is registered with the manager;

(8) to give notice to the manager, on the form supplied by him, of each and every partial payment made to
him for the purchase of any building covered, as soon as each payment is made;
(9) to submit to the manager, on the form supplied by him, a list of work on the building, notice of which
was given in writing at the time of acceptance of the building or of the private portion, as the case may be, and
which must be completed;
(10) to supply, on the manager's request, plans for the design or completion of the architecture, structure,
mechanics, plumbing and electricity, as well as the specifications for a building covered;
(11) to send, on the manager's request, continuous supervision reports and the certificate of conformity
prepared by a building professional independent of the contractor, where applicable;
(12) to give notice of the end of the work on the common portions to each known beneficiary and to the
syndicate of co-owners and to notify thereof the manager and any future purchaser of a private portion at the
time of conclusion of the contract;
(13) to carry out an inspection prior to acceptance, with the beneficiary or with the building professional
designated by the syndicate of co-owners and the latter, where applicable, using a pre-established list of
items to be checked supplied by the manager, to give a duly completed copy thereof to the building
professional, the syndicate, each known beneficiary and any new purchaser at the time of conclusion of the
contract and to send the findings thereof to the manager on request;
(14) to give notice to the manager of the end of the work where the beneficiary is unknown and to notify
thereof the future purchaser at the time of conclusion of the contract;
(15) to produce, on the manager's request, the periodic reports and the

certificates of conformity drawn up
by an architect or engineer at the time of construction of any building for which supervision of construction
work is required in accordance with the codes and standards in force;
(16) to comply with the inspection program set up by the manager, to provide access to the construction
work site of each building covered to any duly appointed representative of the manager and to file the reports
ensuing therefrom where applicable;
(17) to collaborate with any duly appointed representative of the manager;
(18) where applicable, to take all necessary measures to ensure the preservation of the building or to
reimburse the beneficiary where the latter was forced to take such measures urgently; and
(19) to pay the required fees for membership in the plan or for membership renewal, for each inspection
required by the manager and for arbitration, where applicable.
O.C. 841-98, Sch. II; O.C. 39-2006, s. 29.
O.C. 841-98, 1998 G.O. 2, 2510
O.C. 842-98, 1998 G.O. 2, 2531
O.C. 920-2001, 2001 G.O. 2, 4781
O.C. 39-2006, 2006, G.O. 2, 878

♀

Règlement d'arbitrage sur le plan de garantie des bâtiments résidentiels neufs

IChamp d'application

1.
Ce règlement s'applique à l'arbitrage de tout différend sous l'égide du Centre prévu par le
Règlement sur le plan de garantie des bâtiments résidentiels neufs, approuvé par le décret 841-98,
du 17 juin 1998, (1998) 130 G.O. II, 3484, portant sur une décision de l'administrateur concernant
une réclamation ou le refus ou l'annulation de l'adhésion d'un entrepreneur.
Peut demander l'arbitrage en vertu de ce règlement, toute partie intéressée:
1.
le bénéficiaire ou l'entrepreneur, pour une réclamation;
2.
l'entrepreneur, pour une adhésion.

IIDéfinitions et dispositions générales

2.
«Centre»: désigne le Centre canadien d'arbitrage commercial (CCAC) constitué en vertu de la
troisième partie de la Loi sur les compagnies (L.R.Q., c. C-38) ou toute personne ou Comité à qui
les règlements du Centre confient la gestion des dossiers d'arbitrage;
«document de vulgarisation»: désigne le document auquel il est référé dans le Règlement sur le
plan de garantie des bâtiments résidentiels neufs. Il a trait:
1.
au droit de représentation des parties intéressées par la personne de leur choix;
2.
aux règles de procédure et de preuve à suivre;
3.
au mode d'assignation des témoins et des experts;
4.
à la possibilité d'inspecter des biens ou de visiter les lieux;
5.
à la consignation d'une entente entre le bénéficiaire, l'entrepreneur et l'administrateur ou
d'un désistement dans une décision arbitrale;
6. à la procédure d'homologation de la décision arbitrale.
«partie(s)»: désigne, lorsque ce terme est employé seul, les parties intéressées et l'administrateur
«règlement d'arbitrage applicable»: désigne le Règlement sur le plan de garantie des bâtiments
résidentiels neufs (c. B-1.1, r.0.2);
«tribunal arbitral»: désigne un arbitre unique nommé par le Centre à partir de la liste des arbitres
accrédités par le Centre, conformément au Règlement sur le plan de garantie des bâtiments
résidentiels neufs pour trancher un différend, en vertu du présent règlement.
3.
Le Centre a pour mission générale d'assurer l'application de ce règlement et jouit pour cela de
tous les pouvoirs nécessaires.
4.
Lorsqu'en vertu de ce règlement, le Centre est requis de poser un acte, il doit agir avec grande
diligence en prenant en considération l'intérêt pour les parties de voir le différend réglé
équitablement, rapidement et au meilleur coût. Ses décisions sont finales et sans appel.

5.
Le Centre et les parties ne peuvent proroger aucun délai prévu dans ce règlement, sauf dans les cas
qui le permettent.

6.
Le Centre ne peut être poursuivi en justice en raison d'un acte accompli de bonne foi dans
l'exercice des fonctions qui lui sont attribuées par ce règlement.
7.
En toutes circonstances les parties doivent être traitées sur un pied d'égalité et avoir toute
possibilité de faire valoir leurs droits.
IIINotifications et délais

8.
Une notification, en vertu de ce règlement, s'effectue par tout moyen rapide qui permet la preuve
de sa réception. Elle est faite à une partie, son mandataire ou son représentant autorisé.

9.
Une notification est réputée reçue si elle a été remise à son destinataire personnellement, délivrée
à son domicile élu, à sa résidence habituelle, ou envoyée à sa dernière adresse connue.
10.
Un délai commence à courir à compter de la date de réception de la notification. Si le dernier jour
d'un délai tombe un jour férié ou chômé, le délai est prorogé jusqu'au premier jour ouvrable
suivant. Les jours fériés et chômés qui surviennent pendant le délai sont comptés.
IVDemande d'arbitrage

11.
La partie intéressée qui entend soumettre un différend à l'arbitrage en fait la demande au Centre
par écrit, dans les trente (30) jours de la réception par poste recommandée de la décision de
l'administrateur ou, le cas échéant, de l'avis du médiateur constatant l'échec total ou partiel de la
médiation.
La preuve que la partie intéressée a respecté ce délai lui incombe.
La demande comporte notamment:
1.
les noms, qualités et adresses des parties ou de leurs mandataires ou représentants autorisés,
s'il y a lieu;
2.
un exposé sommaire de l'objet du différend et, le cas échéant, le montant de la réclamation
qui en découle;
Doivent aussi être joints à la demande les documents et renseignements de nature à établir
clairement les faits.
Le Centre est saisi de l'arbitrage à la date de réception de la demande

12.
Dès réception de la demande d'arbitrage, le Centre notifie les autres parties intéressées et
l'administrateur.
Le Centre remet, sur demande, à cette occasion aux parties intéressées le document de
vulgarisation de la procédure d'arbitrage qui peut être consulté en ligne.
13.
La réponse écrite des parties intéressées ou de l'administrateur doit être adressée au Centre et
contenir notamment:
1.

leur propre exposé sommaire des faits;
2. leur opinion sur les prétentions du demandeur;
Doivent aussi être joints à cette réponse les documents et renseignements pertinents.
14.
Dès réception de la notification prévue à l'article 12, l'administrateur transmet au Centre le
dossier relatif à la décision qui fait l'objet de l'arbitrage.
15.
Le Centre notifie la réponse des parties intéressées et de l'administrateur, s'il y a lieu, au
demandeur.
16.
Lorsque la partie en demande est l'entrepreneur, le Centre requiert de ce dernier, conjointement
avec l'administrateur du Plan, une provision pour frais. Cette provision pour frais sera établie en
fonction de la Grille de tarification pour l'arbitrage en vertu du règlement d'arbitrage applicable.
16.1 le défaut d'une partie de se conformer à la demande ci-haut reprise à l'article 16 ,
habilitera le Centre a émettre un Certificat de désertion de la demande d'arbitrage.
17.
Le défaut d'une partie de répondre à une demande d'arbitrage n'a pas pour effet d'empêcher
l'arbitrage. Dans ce cas, le Centre procède tel que prévu par ce règlement.
VNomination de l'arbitre

18.
Le Centre nomme l'arbitre à partir de la liste de ses arbitres accrédités.
19.
Lorsque le Centre nomme un arbitre, il tient compte de ses qualifications, de sa disponibilité ainsi
que de toute considération propre à garantir son indépendance, son impartialité et sa compétence.
20.
Une personne ayant agi comme médiateur dans le différend qui est l'objet de l'arbitrage ne peut
remplir les fonctions d'arbitre au sujet de ce même différend, en vertu du règlement.
21.
Les arbitres jouissent de la même immunité que celle accordée aux juges.

22.
Le Centre notifie aux parties intéressées, à l'administrateur et à l'arbitre, la constitution du
tribunal arbitral après avoir vérifié auprès de la personne désignée, son acceptation de la mission.
23.
La demande d'arbitrage concernant l'annulation d'une adhésion d'un entrepreneur ne suspend pas
l'exécution de la décision de l'administrateur sauf si l'arbitre en décide autrement.
24.
Le Centre transmet à l'arbitre le dossier de l'administrateur relatif à la décision qui fait l'objet de
l'arbitrage et les pièces produites par les parties intéressées au soutien de leur demande ou défense
de façon à ce que l'arbitre dispose d'un dossier le plus complet possible.
VIRécusation et révocation de l'arbitre

25.
Un arbitre informe immédiatement les parties intéressées, l'administrateur et leCentre de toute
cause valable de nature à soulever des doutes sur son impartialité, son indépendance ou

ses
qualifications.
26.
Un arbitre ne peut être récusé ou révoqué que s'il existe des circonstances de nature à soulever des
doutes légitimes sur son impartialité, indépendance ou qualifications à trancher du différend.
Une partie ne peut demander la récusation ou la révocation d'un arbitre que pour une cause dont
elle a eu connaissance après cette nomination.
27.
La partie qui a l'intention de récuser ou de révoquer un arbitre doit en saisir ce dernier et lui en
exposer les motifs par écrit. L'arbitre rend sa décision après consultation des parties.

28.
La demande de récusation ou de révocation suspend les délais prévus pour les autres procédures
d'arbitrage jusqu'à la notification de la décision de l'arbitre aux parties.
29.
Lorsque l'arbitre est dans l'impossibilité de remplir sa mission ou ne s'acquitte pas de ses
fonctions dans les délais impartis, une partie intéressée ou l'administrateur peut s'adresser au
Centre pour obtenir la révocation de son mandat.
30.
La mission de l'arbitre prend également fin par sa démission.
31.
La nomination d'un arbitre remplaçant, à la suite d'une vacance survenue au tribunal arbitral, est
faite par le Centre.
32.
Au cas de récusation, de révocation, de décès, de démission ou d'empêchement d'un arbitre,
l'arbitre remplaçant décide de la reprise ou de la continuation de l'audience. Le nouvel arbitre doit
agir dans les délais prévus aux articles 46, 47 et 55.

VIICompétence du tribunal arbitral

33.
L'arbitrage est effectué par le tribunal arbitral qui statue en son propre nom.
34.
Le tribunal arbitral statue sur sa propre compétence.
35.
L'exception d'incompétence du tribunal arbitral peut être soulevée au plus tard lors du dépôt des
conclusions en défense. L'exception prise de ce que la question litigieuse excéderait les pouvoirs
du tribunal arbitral est soulevée dès que la question alléguée comme excédant ses pouvoirs est
soulevée pendant la procédure arbitrale. Le tribunal arbitral peut, dans l'un ou l'autre cas,
admettre une exception soulevée après le délai prévu, s'il estime que le retard est dû à une cause
valable.
Le tribunal arbitral, règle générale, statue sur l'exception d'incompétence dès qu'elle est soulevée.
Il peut, toutefois, décider de poursuivre l'arbitrage et statuer sur cette exception dans la sentence
définitive.
36.
Est réputée avoir renoncé à son droit de faire objection toute partie qui, bien qu'elle sache que
l'une des dispositions du présent règlement auxquelles les parties peuvent déroger, n'a pas été
respectée, poursuit néanmoins l'arbitrage sans formuler d'objection promptement ou, s'il est
prévu un délai à cet effet, à l'intérieur de ce délai.
37.
Avant ou pendant la procédure arbitrale, une partie intéressée ou l'administrateur peut

demander
des mesures nécessaires pour assurer la conservation du bâtiment.

38.
Le tribunal arbitral ne peut imposer aucune mesure conservatoire à l'égard d'un tiers.
La requête de mesures conservatoires adressée à une autorité judiciaire n'interrompt pas

l'arbitrage.
39.
Les questions suivantes doivent aussi être référées à l'autorité judiciaire compétente:
1.
la délivrance d'un mandat à l'encontre d'un témoin contraint de venir témoigner mais refusant de se présenter;
2.
le cas du témoin récalcitrant;
3.
l'homologation de la sentence arbitrale.
VIIILe déroulement de l'arbitrage

40.
Le tribunal arbitral est saisi du différend par le Centre après versement à celui-ci du montant de la
provision pour frais fixé par le Centre, selon la grille de tarification en annexe.
Ce montant comprend une participation aux frais d'arbitrage et aux honoraires de l'arbitre. Le
tribunal arbitral ne statue que sur les demandes pour lesquelles la provision pour frais a été versée
au Centre.
41.
Lorsque l'entrepreneur est le demandeur, la provision pour frais est demandée à l'entrepreneur et
à l'administrateur.
42.
Lorsque le bénéficiaire est le demandeur, la provision pour frais est demandée à l'administrateur.
43.
En cours d'arbitrage, le Centre peut demander aux parties auxquelles une provision pour frais est
exigible en vertu des articles 41 et 42 de lui verser un montant additionnel à titre de provision
pour frais ou de frais spéciaux, le cas échéant.
44.
Chaque partie qui en est requise doit verser la provision pour frais dans les trois (3) jours qui
suivent la notification qui lui en est faite. Une partie peut toutefois se substituer à l'autre, au cas
où celle-ci ne verserait pas sa part des provisions, afin de permettre que le tribunal soit saisi.
45.
Le tribunal arbitral détermine la procédure qui régit l'arbitrage. Il dispose de tous les pouvoirs
nécessaires à l'exercice de sa juridiction.
46.
L'audition de la demande d'arbitrage débute obligatoirement dans les trente (30) ou quinze (15)
jours de sa réception selon que la demande porte sur une réclamation ou l'adhésion.
47.
L'arbitre donne aux parties intéressées et à l'administrateur ou à leurs représentants un avis écrit
d'au moins cinq (5) jours de la date, de l'heure et du lieu de l'audience et, le cas échéant, un avis
de la date où il procédera à l'inspection des biens ou à la visite des lieux.

48.
Au cours d’une audience préliminaire par conférence téléphonique, ou au début de la séance,
l’arbitre aborde avec les parties les sujets suivants:
1.
les règles de droit et de preuve applicables;
2.
les règles de procédure à suivre;
3.
la nécessité de faire ou non une visite des lieux ou une inspection des biens;
4.
le nombre de témoins et experts qui seront entendus, et la répartition équitable du temps
d’audition.
De plus, l’arbitre peut de sa propre initiative ou à la demande d’une des parties régler toute
question qui n’aurait pas été soulevée ou fait l’objet d’un accord entre les parties. Il est également
possible pour les parties de compléter l’exposé de leurs prétentions, et d’apporter, si le tribunal
arbitral y consent, toute modification ou révision à la demande d’arbitrage ou à la réponse à cette
demande.
À la suite de ces vérifications et selon le temps d’audition, l’arbitre procède à l’audition du
différend.

49.
Le tribunal arbitral poursuit l’arbitrage si une partie fait défaut d’exposer ses prétentions, de se
présenter à une audience ou de soumettre des preuves au soutien de ses prétentions. Il met fin à
l’arbitrage si la partie intéressée qui a soumis le différend à l’arbitrage fait défaut d’exposer ses
prétentions.
50.
Toute réunion concernant l’arbitrage a lieu dans les bureaux du Centre ou à un endroit choisi par

ce dernier, sauf décision contraire du tribunal arbitral.

51.
La partie qui désire produire un témoin ou un expert peut l’assigner au moyen d’un subpoena
délivré par elle-même ou son représentant, selon la formule qui apparaît en annexe. La partie ou
son représentant doit se charger de la notification de cette procédure.
IXSentence arbitrale

52.
Le tribunal arbitral statue conformément aux règles de droit; il fait aussi appel à l’équité lorsque
les circonstances le justifient.
53.
53. La sentence est finale et sans appel.
54.
54. Si les parties règlent le différend alors que le tribunal arbitral en est saisi, ce dernier consigne
l’accord dans une sentence arbitrale.
55.
55. Le tribunal arbitral rend sa sentence et en dépose l’original au Centre.
Une copie certifiée de la décision arbitrale écrite et motivée doit être notifiée aux

parties
intéressées et à l’administrateur dans les trente (30) ou quinze (15) jours de la date de la fin de
l’audience selon que la décision porte sur une réclamation ou l’adhésion. Les parties intéressées
peuvent, de consentement, convenir d’un délai supplémentaire.
56.
56. La sentence porte mention du lieu et de la date où elle a été rendue. Elle est réputée avoir été
rendue à cette date et en ce lieu.
57.
57. La sentence, dès qu’elle est rendue, lie les parties intéressées et l’administrateur.
58.
58. Le tribunal arbitral peut d’office rectifier, au plus tard cinq (5) jours après avoir rendu une
sentence, toute erreur d’écriture ou de calcul ou quelque autre erreur matérielle qu’elle contient.
Le Centre notifie cette rectification aux parties. La rectification est réputée faire partie intégrante
de la sentence.
59.
59. Une partie peut, dans les cinq (5) jours suivant la réception d’une sentence, demander au
Centre que le tribunal arbitral rectifie une erreur d’écriture ou de calcul ou quelque autre erreur
matérielle contenue dans la sentence.
Le tribunal arbitral, une fois saisi de nouveau par le Centre d’une demande formulée en vertu du
présent article, rend sa décision dans un délai de cinq (5) jours. Toute rectification, tout
complément ou toute interprétation de la sentence sont réputés faire partie intégrante de celle-ci.
60.
60. La sentence arbitrale n’est susceptible d’exécution forcée qu’après avoir été homologuée
suivant la procédure prévue aux articles 946 à 946.6 du Code de procédure civile.
61.
61. Par la soumission de leur différend à ce règlement, les parties s’engagent à participer à
l’arbitrage de bonne foi, à payer les frais de l’arbitrage et à poursuivre sans délai l’exécution de la
sentence.
XFrais de l’arbitrage

62.
Le Centre fixe les frais d’arbitrage. Ceux-ci comprennent uniquement:
1.
les honoraires du tribunal arbitral fixés par le Centre selon la grille de tarification en
annexe;
2.
les frais de déplacement et de séjour de l’arbitre;
3.
les frais de toute expertise ou toute autre aide convenue;
4.
les frais de déplacement et autres indemnités aux témoins, dans la mesure où ces dépenses
ont été approuvées par le tribunal arbitral;
5.
les frais de location de salle et autres frais concomitants;
6.
les honoraires administratifs du Centre selon la grille de tarification en annexe.
63.
Les frais d’arbitrage sont répartis entre les parties par le Centre de la façon suivante:
1.
les coûts de l’arbitrage sont partagés à parts égales entre l’administrateur et l’entrepreneur
lorsque ce dernier est le demandeur;

2.
lorsque le demandeur est le bénéficiaire, ces coûts sont à la charge de l'administrateur à
moins que le bénéficiaire n'obtienne gain de cause sur aucun des aspects de sa réclamation,
auquel cas l'arbitre départage ces coûts.
64.
Seul le Centre est habilité à dresser le compte des coûts de l'arbitrage en vue de leur paiement.
65.
L'arbitre doit statuer, s'il y a lieu, quant au quantum des frais raisonnables d'expertises pertinentes
que l'administrateur doit rembourser au demandeur lorsque celui-ci a gain de cause total ou
partiel.
Le présent article ne s'applique pas à un différend portant sur l'adhésion d'un entrepreneur.
66.
Les dépenses effectuées par les parties intéressées et l'administrateur pour la tenue de l'arbitrage
sont supportées par chacun d'eux.
67.
Après le prononcé de la sentence, le Centre rend compte aux parties de l'utilisation des sommes
reçues en dépôt; il leur restitue tout solde non dépensé après avoir effectué la compensation pour
le montant exigible de chacune d'elles aux termes de l'article 44.
68.
Le Centre conserve les dossiers d'arbitrage pendant deux ans à compter dudépôt de la décision
arbitrale ou, dans le cas de contestation judiciaire de cette décision, jusqu'au jugement final d'une
cour de justice en disposant.
69.
Le Centre publie annuellement un recueil des décisions arbitrales rendues conformément au
règlement.
70.
Le présent règlement est entré en vigueur le 8 octobre 1998 et ses derniers amendements sont en
date du 1er mars 2008.

Code de déontologie

PARTICULIER AUX ARBITRES DES ORGANISMES AUTORISÉS PAR LA RÉGIE DU BÂTIMENT À ADMINISTRER L'ARBITRAGE DE DIFFÉRENDS RELIÉS AU RÈGLEMENT SUR LE PLAN DE GARANTIE DES BÂTIMENTS RÉSIDENTIELS NEUFS

Section 1 - Définitions

Article 1 - Dans le présent code, à moins que le contexte n'indique un sens différent, les expressions et mots suivants signifient:

1. « règlement »: le Règlement sur le plan de garantie des bâtiments résidentiels neufs;
2. « code »: le présent code;
3. « parties »: désigne un bénéficiaire, un entrepreneur ou un administrateur au sens du Règlement sur le Plan de garantie des bâtiments résidentiels neufs.

Section 2 - qualifications générales

Article 2 - L'honnêteté, l'intégrité, l'impartialité, une connaissance générale en matière de plan de garantie et une formation en droit ou une formation professionnelle dans les matières se rapportant aux questions soulevées par l'arbitrage sont les qualités essentielles requises de tout arbitre.

Article 3 - L'arbitre doit se comporter d'une façon impartiale et objective. Il doit être libre de toute attache à l'égard des parties.

Article 4 - Un arbitre qui, dans une de ses décisions, se compromet dans le but de s'assurer des nominations ou des mandats futurs par l'une ou l'autre des parties, déroge à la déontologie professionnelle.

Section 3 - qualifications particulières

Article 5 - Lorsque avant ou au cours du déroulement de l'enquête, l'arbitre constate que l'objet du litige dépasse sa compétence, il peut soit se récuser ou, avec la permission des parties, obtenir l'aide technique appropriée dont il a besoin.

Section 4 - sauvegarde de l'intégrité de la fonction

Article 6 - L'arbitre doit se comporter avec dignité, maintenir l'intégrité de sa fonction et démontrer la réserve nécessaire.

Article 7 - L'arbitre doit prendre les mesures nécessaires pour maintenir sa compétence professionnelle.

Article 8 - L'arbitre ne peut solliciter aucun mandat d'arbitrage.

Section 5 - conflits d'intérêts

Article 9 - L'arbitre doit s'abstenir de se livrer à une activité ou de se placer dans une situation qui

compromettrait l'exercice utile de ses fonctions ou constituerait un motif récurrent de récusation.

♀

Article 10 - L'arbitre ne peut agir comme procureur, représentant ou expert pour le compte d'une partie,
devant un organisme d'arbitrage chargé de l'application du Règlement sur le plan de garantie des
bâtiments résidentiels neufs.

Article 11 - Avant d'accepter sa nomination, l'arbitre doit dénoncer tout conflit d'intérêts qu'il peut
avoir et refuser sa nomination.

L'arbitre qui ignorait une situation ou une circonstance spéciale qui aurait normalement exigé de lui une
dénonciation de conflit d'intérêts, doit dès qu'elle devient connue, se récuser.

Constitue notamment un conflit d'intérêts le fait d'avoir agi à titre de procureur, représentant, expert,
conseiller, administrateur ou employé d'une partie au litige au cours des 24 derniers mois, ou d'avoir un
intérêt d'ordre pécuniaire dans le litige.

Article 12 - L'arbitre doit aussi dénoncer aux parties toute situation qui crée une crainte raisonnable de
partialité. Après une telle dénonciation, l'arbitre peut accepter, poursuivre ou exécuter son mandat
d'arbitre.

Section 6 - application du code

Article 13 - Dans le cas d'une plainte formulée en vertu du présent code, l'organisme d'arbitrage peut
demander l'avis du comité de déontologie, lequel est formé d'un représentant de chacun des organismes
d'arbitrage, d'un représentant de la Régie et d'une personne qui agit comme expert en matière de
déontologie.

La Régie peut également saisir le comité d'une question relative à l'application du présent code.

Article 14 - Lorsqu'il est saisi d'une plainte, l'organisme d'arbitrage peut requérir de toute personne les
renseignements qu'il estime nécessaire afin de statuer sur le bien-fondé de celle-ci.

Après cette enquête, l'organisme d'arbitrage doit donner à l'arbitre l'occasion d'être entendu et, le cas
échéant, détermine la sanction appropriée.

♀

SORECONI - CODE DE DÉONTOLOGIE

APPLICABLE AUX ARBITRES DES ORGANISMES AUTORISÉS
PAR LA RÉGIE DU BÂTIMENT À ADMINISTRER L'ARBITRAGE
DE DIFFÉRENDS RELIÉS AU RÈGLEMENT SUR LE PLAN DE
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SECTION 2 - QUALIFICATIONS GÉNÉRALES

Article 2 - L'honnêteté, l'intégrité, l'impartialité, une connaissance générale en matière de plan de garantie et une formation en droit ou une formation professionnelle dans les matières se rapportant aux questions soulevées par l'arbitrage sont les qualités essentielles requises de tout arbitre.

Article 3 -L'arbitre doit se comporter d'une façon impartiale et objective. Il doit être libre de toute attache à l'égard des parties.

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SECTION 3 - QUALIFICATIONS PARTICULIÈRES

Article 5 -Lorsque avant ou au cours du déroulement de l'enquête, l'arbitre constate que l'objet du litige dépasse sa compétence, il peut soit se récuser ou, avec la permission des parties, obtenir l'aide technique appropriée dont il a besoin.

SECTION 4 - SAUVEGARDE DE L'INTÉGRITÉ DE LA
FONCTION

Article 6 -L'arbitre doit se comporter avec dignité, maintenir l'intégrité de sa fonction et démontrer la réserve nécessaire.

Article 7 -L'arbitre doit prendre les mesures nécessaires pour maintenir sa compétence professionnelle.

Article 8 - L'arbitre ne peut solliciter aucun mandat d'arbitrage.

SECTION 5 - CONFLITS D’INTÉRÊTS

Article 9 -L’arbitre doit s’abstenir de se livrer à une activité ou de se placer dans une situation qui compromettrait l’exercice utile de ses fonctions ou constituerait un motif récurrent de récusation.

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Article 12 -L’arbitre doit aussi dénoncer aux parties toute situation qui crée une crainte raisonnable de partialité. Après une telle dénonciation, l’arbitre peut accepter, poursuivre ou exécuter son mandat d’arbitre.

SECTION 6 - APPLICATION DU CODE

Article 13 -Dans le cas d’une plainte formulée en vertu du présent code, l’organisme d’arbitrage peut demander l’avis du comité de déontologie, lequel est formé d’un représentant de chacun des organismes d’arbitrage, d’un représentant de la Régie et d’une personne qui agit comme expert en matière de déontologie.

La Régie peut également saisir le comité d’une question relative à l’application du présent code.

Article 14 -Lorsqu’il est saisi d’une plainte, l’organisme d’arbitrage peut requérir de toute personne les renseignements qu’il estime nécessaire afin de statuer sur le bien-fondé de celle-ci.

Après cette enquête, l’organisme d’arbitrage doit donner à l’arbitre l’occasion d’être entendu et, le cas échéant, détermine la sanction appropriée.

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1 -
PROCÉDURE D'ARBITRAGE

AVANT LA TENUE DE L'AUDITION

SORECONI

1) transmet la demande d'arbitrage aux autres parties intéressées et à l'administrateur.

2) désigne l'arbitre accrédité qui agira dans le dossier.

3) transmet à l'arbitre le dossier de l'administrateur relatif à la décision qui fait l'objet de
l'arbitrage et les pièces produites par les parties intéressées au soutien de leur demande ou
défense de façon à ce que l'arbitre dispose d'un dossier le plus complet possible

4) peut révoquer le mandat d'un arbitre qui n'agit pas dans les délais réglementaires.

5) informe les parties intéressées et l'administrateur qu'ils peuvent être représentés par les
personnes de leur choix

6) avise les parties intéressées de la procédure d'assignation des témoins

7) au besoin, informe la partie intéressée sur la procédure à suivre devant le tribunal de droit
commun relativement à un témoin récalcitrant

8) informe les parties intéressées que l'arbitre peut rendre une décision consignant le désistement
de la partie ayant fait appel de la décision de l'administrateur ou l'entente intervenue entre le
bénéficiaire, l'entrepreneur et l'administrateur.

- *Sub poena : Ordre de l'arbitre à un témoin de comparaître à une date, à un endroit et à une
heure déterminée
- *Duces tecum : Ordre de l'arbitre à un témoin de comparaître à une date, à un endroit et à une
heure déterminée et d'apporter les documents mentionnés.

L'ADMINISTRATEUR transmet sans délai à l'organisme d'arbitrage le dossier relatif à la
décision qui fait l'objet de l'arbitrage

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PROCÉDURE D'ARBITRAGE (suite)

AVANT LA TENUE DE VAUDITION (suite)

L'ARBITRE

1) peut accepter une demande de mesures conservatoires du bâtiment,

2) doit débuter l'audience des parties intéressées dans les 15 jours de la réception de la
demande d'arbitrage dans le cas d'une adhésion et dans les 30 jours de la réception de
la demande d'arbitrage dans le cas d'une réclamation

3) donne aux parties intéressées et à l'administrateur, ou à leurs représentants, un avis écrit d'au
moins 5 jours de la date, de l'heure et du lieu de l'audience, de la visite des lieux ou de
l'inspection des lieux.

4) avise les parties intéressées et l'administrateur qu'il procédera ex parte si une partie intéressée
est absente sans raison valable.

5) doit se récuser dans les cas prévus au Code de déontologie de SORECONI.

Le nouvel arbitre désigné par l'organisme d'arbitrage doit agir dans les délais prévus.

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1 -
TENUE DE L'AUDITION
Chaque audition commence par une conférence préparatoire qui peut durer quelques minutes ou
plus. Le but de cette conférence préparatoire est de permettre à l'arbitre d'identifier les parties
intéressées, l'administrateur et leurs représentants et leur fournir l'information sur le déroulement
de l'arbitrage.
L'arbitre
1) est le maître de la procédure et il tient compte des dispositions du Code de procédure civile (CPC) et du Code Civil du Québec (CC),
2) informe les parties intéressées que sa décision sera conforme aux règles de droit et, le cas
échéant, si les circonstances le justifient, à l'équité,
3) avise les parties intéressées et l'administrateur qu'il s'attend à ce qu'ils se conduisent
correctement et qu'un certain décorum s'impose pendant toute la durée de l'audition,
4) fait préciser l'objet de la demande d'arbitrage,
5) s'enquiert également des objections préliminaires, le cas échéant, qui seront soulevées,
6) s'enquiert si une demande d'ordonnance de mesures conservatoires sera présentée et si elle
sera à l'égard d'un tiers,
7) demande aux parties intéressées de faire la liste des faits devant être soumis en preuve,
8) demande aux parties intéressées de faire la liste des documents qui ne sont pas au dossier
transmis au préalable et qui seront déposés,
9) demande aux parties intéressées de faire la liste des témoins ordinaires ou experts qui ont été
convoqués,
10) demande aux parties intéressées si une procédure a été entreprise devant un tribunal de droit
commun pour contraindre un témoin récalcitrant à se présenter devant lui,
11) demande aux parties intéressées de déterminer, dans la mesure du possible, la

durée de
l'arbitrage,
12) procède ensuite, sans délai, à l'audition de la preuve des parties intéressées et de leur
argumentation.

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APRÈS LA TENUE DE L'AUDmON

La décision de l'arbitre
1) consigne le désistement du plaignant

2) consigne l'entente entre les parties intéressées

3) dispose de l'objet de la plainte

4) lie les parties intéressées et l'administrateur dès qu'elle est rendue. Elle

est finale et sans appel. Si possible, l'arbitre rend sa décision sans délai, immédiatement après
la fin des plaidoiries des parties intéressées.
5) peut comprendre une ordonnance de sauvegarde du bâtiment

6) doit être écrite et motivée et transmise dans les 15 jours de la fin de l'audience dans les cas
d'adhésion et dans les 30 jours dans les cas de réclamation. Les parties intéressées peuvent
convenir d'un délai supplémentaire si les circonstances le justifient.

7) statue, le cas échéant, quant au quantum des frais raisonnables d'expertises pertinentes que
l'administrateur doit rembourser au demandeur lorsque celui-ci a gain de cause partiel ou total
(sauf dans les cas d'adhésion)

8) peut statuer sur la suspension de la décision de l'administrateur d'annuler l'adhésion d'un
entrepreneur
9) fixe, le cas échéant, les coûts de l'arbitrage selon les dispositions de l'article 123,

2e paragraphe du Règlement.
SORECONI dresse le compte des coûts de l'arbitrage en vue de leur paiement
SORECONI conserve les dossiers d'arbitrage pendant au moins deux ans.

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CE QUI EST RÉSERVÉ AUX TRIBUNAUX
1
Les questions suivantes doivent être référées aux tribunaux de droit commun -1 :L'imposition d'une mesure conservatoire à l'égard d'un tiers
2 :la délivrance d'un mandat à l'encontre d'un témoin contraint de venir témoigner

mais
refusant de se présenter
3 :le cas du témoin récalcitrant
4 :l'homologation de la décision arbitrale.
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La grille d'honoraires apparaît en annexe.

♀

CODE DE DÉONTOLOGIE

APPLICABLE AUX ARBITRES CHARGÉS DE L'ARBITRAGE DE
DIFFÉRENDS RELIÉS AU RÈGLEMENT SUR LE PLAN DE GARANTIE DES
BÂTIMENTS RÉSIDENTIELS NEUFS

Section 1 - DÉFINITIONS

Article 1

Dans le présent code, à moins que le contexte n'indique un sens différent, les expressions et
mots suivants signifient:

a) le Règlement sur le plan de garantie des bâtiments résidentiels
règlement: neufs;
b) code: le présent code
c) parties: désigne un bénéficiaire ou un entrepreneur ou un administrateur

au sens du Règlement sur le Plan de garantie des bâtiments

résidentiels neufs

Section 2 - QUALIFICATIONS DISCIPLINAIRES

Article 2

L'honnêteté, l'intégrité, l'impartialité et une connaissance générale en matière de Plan de
garantie ou en droit ou une formation professionnelle dans les matières se rapportant aux
questions soulevées par l'arbitrage sont les qualités essentielles requises de tout arbitre,

Article 3

L'arbitre doit se comporter d'une façon impartiale et objective. il doit être libre de toute attache
à l'égard des parties.

Article 4
Un arbitre qui, dans une de ses décisions, se compromet dans le but de s'assurer de

nominations ou de mandats futurs par l'une ou l'autre des parties déroge à la déontologie
professionnelle.

Section 3 - QUALIFICATIONS PARTICULIÈRES

Article 5

Lorsque avant ou au cours du déroulement de l'enquête, l'arbitre constate que l'objet du litige
dépasse sa compétence, il peut, avec la permission des parties, soit se récuser, soit obtenir
l'aide technique appropriée dont il a besoin.

Section 4 - SAUVEGARDE DE L'INTÉGRITÉ DE LA FONCTION>

Article 6

L'arbitre doit se comporter avec dignité, maintenir l'intégrité de sa fonction et démontrer la
réserve nécessaire.

Article 7

L'arbitre doit prendre les mesures nécessaires pour maintenir ses compétences professionnelles.

Article 8

L'arbitre ne peut solliciter aucun mandat d'arbitrage.

Section 5 - CONFLITS D'INTÉRÊTS

Article 9

L'arbitre doit s'abstenir de se livrer à une activité ou de se placer dans une situation qui
compromettrait l'exercice utile de ses fonctions ou constituerait un motif récurrent de
récusation.

Article 10

L'arbitre ne peut agir comme comme procureur, représentant ou expert d'une partie, devant un
orgasnisme d'arbitrage chargé de l'application du Règlement sur le Plan de garantie des
bâtiments résidentiels neufs.

Article 11

Avant d'accepter sa nomination, l'arbitre doit dénoncer tout conflit d'intérêts qu'il peut avoir et
refuser sa nomination.

L'arbitre qui ignorait une situation ou une circonstance spéciale qui aurait normalement exigé
de lui une dénonciation de conflit d'intérêts, doit dès qu'elle est connue, se récuser.

Constitue notamment un conflit d'intérêts le fait d'avoir agi à titre de procureur,expert,
conseiller, administrateur ou employé d'une partie au litige au cours des 24 derniers mois, ou
d'avoir un intérêt d'orde pécunière dans le litige.

Article 12

L'arbitre doit aussi dénoncer aux parties toute situation qui crée une crainte raisonnable de
partialité. Après une telle dénonciation, l'arbitre peut accepter, poursuivre ou exécuter son
mandat d'arbitre.

Section 6 - APPLICATION DU CODE

Article 13

Dans le cas d'une plainte formulée en vertu du présente code, le GAMM peut demander l'avis
du Comité de déontologie, lequel est formé de trois représentants de chacun des organismes
d'argitrage, d'un représentant de la Régie et d'une personne qui agit comme expert en matière
de déontologie.

La Régie peut également saisir le Comité de déontologie d'une question relative à l'application
du présent code.

Article 14

Lorsqu'il est saisi d'une plainte, l'organisme d'arbitrage peut requérir de toute personne les
renseignements qu'il estime nécessaire afin de statuer sur le bien-fondé de celle-ci.

Après cette enquëte, l'organisme d'arbitrage doit donner à l'arbitre l'occasion d'être entendu et
le cas échéant, détermine la sanction appropriée.

Entrée en vigueur : le 1er mai 2006

http://www.legamm.com/code.asp

2010-09-10

♀

CODE D'ARBITRAGE

Section 1 - Demande d'arbitrage

Article 1

Tout différend portant sur une décision de l'administrateur concernant une réclamation ou le
refus ou l'annulation de l'adhésion d'un entrepreneur relève de la compétence exclusive de
l'arbitre désigné en vertu du Règlement.

Peut demander l'arbitrage, toute partie intéressée:

1- pour une réclamation: le bénéficiaire ou l'entrepreneur;

2- pour une adhésion: l'entrepreneur.

La demande d'arbitrage concernant l'annulation d'une adhésion d'un entrepreneur ne suspend
pas l'exécution de la décision de l'administrateur sauf si l'arbitre en décide autrement.

Article 2

La demande d'arbitrage doit être adressée au GAMM dans les 30 jours de la réception par
poste recommandée de la décision de l'administrateur ou, le cas échéant, de l'avis du
médiateur constatant l'échec total ou partiel de la médiation.

Article 3

Dès réception d'une demande d'arbitrage, le GAMM avise les autres parties intéressées et
l'administrateur.

Dès réception de cet avis, l'administrateur transmet au GAMM le dossier relatif à la décision qui
fait l'objet de l'arbitrage.

Le GAMM transmet à l'arbitre le dossier de l'administrateur relatif à la décision qui fait l'objet de
l'arbitrage et les pièces produites par les parties intéressées de façon à ce que l'arbitre dispose

d'un dossier le plus complet possible.

Section 2 - Désignation de l'arbitre

Article 4

Le GAMM voit à la désignation de l'arbitre à partir d'une liste de personnes préalablement
dressée par lui et transmise à la Régie du bâtiment du Québec. Cette liste est constituée de
personnes physiques ayant de l'expérience dans les plans de garantie ou de la formation
professionnelle dans les matières se rapportant aux questions soulevées par l'arbitrage,
notamment en finance, en comptabilité, en technique de la construction ou en droit. Les
arbitres inscrits sur cette liste sont tenus de respecter le code de déontologie du GAMM.

Article 5

Dès la désignation de l'arbitre, le GAMM remet aux parties intéressées un document de
vulgarisation sur la procédure d'arbitrage qui sera suivie lors de l'audition du différend.

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Section 3 - Récusation et révocation de l'arbitre

Article 6

L'arbitre qui connaît cause valable de récusation en sa personne est tenu, sans attendre qu'elle
soit proposée, de la déclarer par écrit.

Article 7

Une partie intéressée, qui sait cause de récusation contre l'arbitre, doit sans délai, la déclarer
par écrit en s'adressant au GAMM. Le GAMM, après avoir informé par écrit toute autre partie
intéressée et l'arbitre dont on demande la récusation, décide de la requête, à moins que l'arbitre
concerné n'ait consenti à se récuser par écrit. La décision du GAMM sur la récusation est finale
et sans appel.

Article 8

Si l'arbitre est dans l'impossibilité de remplir sa mission ou ne s'acquitte pas de

ses fonctions
dans les délais impartis, une partie intéressée ou l'administrateur peut s'adresser au GAMM
pour obtenir la révocation du mandat de cet arbitre. La décision du GAMM sur la révocation de
l'arbitre désigné est finale et sans appel.

Article 9

Au cas de récusation, de révocation, de décès ou d'empêchement d'un arbitre, le GAMM le
remplace par un nouvel arbitre qui décide de la reprise ou de la continuation de l'audience. Le
nouvel arbitre doit agir dans les délais prévus au Règlement.

Section 4 - Audience

Article 10

L'audition de la demande en arbitrage doit débuter dans les 30 jours ou les 15 jours de sa
réception selon que la demande porte sur une réclamation d'une partie intéressée ou l'adhésion
d'un entrepreneur.

Article 11

L'arbitre donne aux parties intéressées et à l'administrateur ou à leurs représentants un avis
écrit d'au moins 5 jours de la date, de l'heure et du lieu de l'audience et, le cas échéant, un avis
de la date où il procédera à l'inspection des biens ou à la visite des lieux.

Section 5 - Déroulement de l'arbitrage

Article 12

Avant le début de l'audition, l'arbitre peut tenir une conférence préparatoire téléphonique au
cours de laquelle chacune des parties fait un exposé sommaire des faits et donne son point de
vue sur ses prétentions et sur celles de l'autre partie. A cette occasion, chaque partie informe
l'arbitre du nom des témoins ordinaires ou des témoins experts qu'elle souhaite faire entendre
pour déclarer ce qu'ils connaissent, pour produire un document ou pour les deux (2) objets à la
fois.

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Article 13
A la demande d'une partie, l'arbitre assigne un témoin, à moins qu'il soit d'avis que la demande
d'assignation est futile à sa face même.

Article 14

Lors de la conférence préparatoire, l'arbitre informe les parties de la procédure et du mode de
preuve qu'il juge appropriés eu égard au différend qui lui est soumis ainsi que du temps
d'audition dont disposera chaque partie.

Article 15

A l'audience, chaque partie fait entendre ses témoins, dépose les documents qui sont pertinents
et présente son argumentation dans le temps qui lui est imparti.

Toutefois, les questions suivantes sont référées aux tribunaux de droit commun:

- imposition d'une mesure conservatoire à l'égard d'un tiers;
- délivrance d'un mandat à l'encontre d'un témoin contraint de témoigner et qui refuse de se
présenter à l'audience;
- témoin récalcitrant;
- homologation de la sentence arbitrale.

Article 16

Dans l'exercice de ses fonctions, l'arbitre peut mener lui-même l'interrogatoire et tenter de
concilier l'intérêt des parties.

Avant ou en cours d'audience, une partie intéressée ou l'administrateur peut demander des
mesures nécessaires pour assurer la conservation du bâtiment.

Section 6 - Décision arbitrale

Article 17

L'arbitre statue conformément aux règles de droit; il fait aussi appel à l'équité lorsque les
circonstances le justifient.

Article 18

La décision de l'arbitre est écrite et motivée; elle est transmise aux parties intéressées et à
l'administrateur dans les 30 ou 15 jours de la date de la fin de l'audience selon que la décision
porte sur une réclamation d'une partie ou l'adhésion d'un entrepreneur. Copie de la sentence
est transmise au GAMM.

Article 19

Les parties intéressées peuvent, de consentement, convenir avec l'arbitre d'un délai
supplémentaire pour rendre la décision.

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Article 20
Si l'arbitre est informé avant l'audience ou avant que sa décision ne soit rendue du règlement
total ou partiel ou du désistement d'une demande dont il est saisi, il en donne acte dans une
décision arbitrale qu'il transmet aux parties intéressées et à l'administrateur ainsi que copie au
GAMM.

Article 21

La décision arbitrale est finale et sans appel.

Article 22

La décision arbitrale, dès qu'elle est rendue, lie les parties intéressées et l'administrateur.

Article 23

La décision arbitrale n'est susceptible d'exécution forcée qu'après avoir été homologuée suivant
la procédure prévue aux articles 946 à 946.6 du Code de procédure civile (L.R.Q., c. C-25).

Article 24

Le GAMM conserve les dossiers d'arbitrage pendant deux (2) ans à compter du dépôt de la
décision arbitrale ou, dans le cas de contestation judiciaire de cette décision, jusqu'au jugement
final d'une cour de justice en disposant.

Article 25

Le GAMM publie annuellement un recueil des décisions arbitrales rendues conformément au
Règlement.

Section 7 - Coûts d'arbitrage

Article 26

Les coûts d'arbitrage sont partagés à parts égales entre l'administrateur et l'entrepreneur
lorsque ce dernier est le demandeur.

Lorsque le demandeur est le bénéficiaire, ces coûts sont à la charge de l'administrateur à moins
que le bénéficiaire n'obtienne gain de cause sur aucun des aspects de sa réclamation, auquel
cas l'arbitre départage ces coûts.

Article 27

L'arbitre doit statuer, s'il y a lieu, quant au quantum des frais raisonnables d'expertises
pertinentes que l'administrateur doit rembourser au demandeur lorsque celui-ci a gain de cause
total ou partiel.

Toutefois, le présent article ne s'applique pas à un différend portant sur l'adhésion d'un
entrepreneur.

Article 28

Les dépenses effectuées par les parties intéressées et l'administrateur pour la tenue de
l'arbitrage sont supportées par chacun d'eux.

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Article 29

Une fois la décision arbitrale rendue, le GAMM dresse le compte des coûts de l'arbitrage en vue
de leur paiement. Ce compte comprend:

- les honoraires du GAMM selon la grille de tarification apparaissant en annexe;
- les honoraires de l'arbitre fixés par le GAMM selon la grille de tarification apparaissant en annexe;
- les frais de déplacement et de séjour de l'arbitre, le cas échéant;
- les frais de location de salle et autres frais afférents;
- les frais d'assignation des témoins;
- les autres frais approuvés par les parties. Ces frais ne devraient être exigibles que de façon exceptionnelle et avis devrait en être donné au moment de la désignation de l'arbitre.

Article 30

Le GAMM transmet le compte des coûts de l'arbitrage à chaque partie à qui incombe la charge
d'acquitter une partie ou la totalité dudit compte.

♀

Curriculum vitae des Arbitres
Les arbitres ont suivi une session de formation sur le Plan de garantie des bâtiments résidentiels neufs diffusée par la Régie du bâtiment du Québec.
Les arbitres, qui ont une expérience variée du domaine de la construction, ont suivi une formation spécifique de trente heures sur l'arbitrage des litiges découlant de l'application du Règlement sur le Plan de garantie des bâtiments résidentiels neufs.
Toute personne ayant agi comme médiateur dans un dossier ne peut agir comme arbitre dans le même dossier.
Nom CHARTIER, Marcel
Adresse Trois-Rivières
Titre professionnel Avocat, médiateur et arbitre
Études Baccalauréat ès arts
Séminaire de Trois-Rivières - (1951)
Licence en droit - Université Laval
(1956)
Expérience pratique Pratique du droit
Commissaire de la fonction publique fédérale
Médiateur accrédité de Médiation Québec
s.e.n.c
Médiateur accrédité par le Ministère du Travail
du Québec pour les litiges découlant de
l'application du Règlement sur le Plan de
garantie des bâtiments résidentiels neufs
Arbitre pour la Société de résolutions des
conflits inc. (SORECONI)
Haut de la page -Retour à l'index

Nom
DESJARDINS, France

Adresse
Laval
Titre professionnel
Avocate et arbitre
Études
Baccalauréat ès arts
Licence en droit - Université de Montréal
Membre du Barreau du Québec depuis 1976
Expérience pratique
Régie du logement du Québec- présidente et
régisseure (1998 à 2008) ;

Ministère de la Justice- directrice des Services
judiciaires, région de Montréal ;

Regroupement des présidents des tribunaux
administratifs- présidente ;

Institut d'administration publique du Grand
Montréal - présidente ;

Commissions d'appel en matière de lésions

professionnelles- directrice des greffes ;

Bureau de révision de l'évaluation foncière-
Secrétaire

Arbitre pour la Société de résolutions des
conflits inc. (SORECONI)

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Nom MASSON, Robert
Adresse Montréal
Titre professionnel Ingénieur et avocat
Études Diplôme d'ingénieur – École Polytechnique de
Montréal -1974
Baccalauréat en Sciences appliquées –
Université de Montréal - 1974
Baccalauréat en droit - Université de
Sherbrooke - 1986
Membre du Barreau du Québec
Membre de l'Ordre des ingénieurs du Québec
Expérience pratique Pratique comme avocat et ingénieur depuis

-Retour à l'index
1988
Arbitre et médiateur en matières civiles et
commerciales
Ingénieur et avocat spécialisé en droit de la
construction, en droit des affaires, en droit
immobilier
Compétence en matière de sûreté (hypothèques
et cautionnement)
Compétences en matières d'assurances, de
responsabilité professionnelle – etc...
Arbitre et médiateur habilité au Centre
canadien d'arbitrage commercial (CCAC)
1996
Arbitre pour la Société de résolutions des
conflits inc. (SORECONI) - 2004
Nom PELLETIER, Guy
Adresse Laval
Titre professionnel Architecte
Études Bac. È Arts. – Université Laval - 1968
Bac. Architecture. - Université de Montréal -
1972
Formation sur la tenue d'audience
Gestion des conflits et médiation
Expérience pratique Pratique privée (1972 – 1979):
Les achitectes Huot, Dupuis, Pelletier
O'keefe et associés, architectes –
(architecte associé)
Société d'habitation du Québec (1979 –
1998)
Architecte analyste et concepteur
Directeur des services techniques
Directeur de la construction
Directeur de l'habitation sociale

♀

Régie du bâtiment du Québec (1998 – 2007)

Directeur des politiques, de la
planification, des partenariats et de la
qualification professionnelle
Directeur des programmes et des
partenariats
Directeur principal de la planification et de
la normalisation

Arbitre pour la Société de résolutions des
conflits inc. (SORECONI) - 2008

-Retour à l'index
Nom SÉBASTIEN, Pierre
Adresse Montréal
Titre professionnel Avocat
Études B.A. - Collège Ste-Marie - 1956
LL.L. - Université de Montréal - 1960
Études en droit - Université McGill - 1961
Admis au Barreau du Québec - 1961
Expérience pratique Pratique comme avocat depuis 1961
Pratique individuelle comme avocat, médiateur
et arbitre comme associé sénior du cabinet
Sébastien Downs Astell Lachance depuis le 1er
avril 1996.
Associé au sein du Cabinet Pouliot Mercure de
janvier 1993 à mars 1996.
Pratique du droit au sein du cabinet Lafleur
Brown (maintenant Gowling Lafleur
Henderson) de juillet 1961 à décembre 1992 et
admis comme associé en 1968.
Bâtonnier du Québec 1984-85
Membre, arbitre et médiateur habilité au
Centre canadien d’arbitrage commercial
(CCAC) - 1990

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Médiateur habilité au service de référence à la
médiation en matière civile et commerciale de
la Cour Supérieure du Québec - 1996
Arbitre pour la Société de résolutions des
conflits inc. (SORECONI) - 2007
Haut de la page -Retour à l'index

Nom ROY, Léonce
Adresse Cap-Rouge
Titre professionnel Avocat et Conseiller en relations industrielles
Études Baccalauréat ès arts (1960) Licence en droit -
Université Laval (1965)
Maîtrise en droit - Université de Toronto
(1968)
DES - Institut d’études du travail et de la
sécurité sociale - Lyon (1969)

Doctorat en droit - Faculté de droit et des
sciences économiques - Lyon (1970)
Expérience pratique Pratique privée du droit depuis 1972
Arbitre de griefs et différends depuis 1973
Médiateur spécial en 1974,79,86 et 88 dans le
Secteur public (Affaires sociales et Éducation)
Président et président suppléant de Comités de
discipline
Arbitre à la Commission des droits et libertés
de la personne depuis 1990
Médiateur accrédité par le Ministère du Travail
du Québec pour les litiges découlant de
l'application du Règlement sur le Plan de
garantie des bâtiments résidentiels neufs
Arbitre pour la Société de résolutions des
conflits inc. (SORECONI)
http://www.arbitrage.soreconi.ca/cv.htm
2010-09-10

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Politique d'appropriation et de remboursement des honoraires
administratifs

Service Tarif

1. pour l'ouverture du dossier 55% du montant établi en vertu du barème du Centre;
2. pour la conférence préparatoire 20% du même montant;
3. pour tout travail post-conférence préparatoire 25% du même montant.

L'avis d'arbitrage transmis au Centre doit être accompagné d'un chèque de 1000,00 $ représentant les
frais d'ouverture de dossier, non remboursables mais déductibles du compte final.

Les services liés à l'ouverture du dossier s'étendent aux services afférents, notamment à ceux relatifs à
l'étude, à l'évaluation et à l'organisation matérielle du dossier, y compris les discussions préliminaires
avec les parties pour la bonne marche du dossier, la préparation des calendriers de réalisation et
l'information des parties; les frais relatifs à ces services sont dus et gagnés dès la réception de la
demande d'arbitrage par l'organisme d'arbitrage. Advenant que les parties règlent leur différend à tout
moment avant la conférence préparatoire mais après la réception de la demande d'arbitrage, aucun
remboursement ne sera effectué.

Les services liés à la conférence préparatoire s'étendent aux services afférents, notamment à ceux relatifs
à la désignation des arbitres, à la vérification de leur indépendance et à la confirmation de leur
désignation, ainsi qu'au montage du dossier, à sa gestion et à sa transmission aux arbitres; les frais
relatifs à ces services sont dus et gagnés dès la détermination de la date de la conférence préparatoire.
Advenant que les parties règlent leur différend à tout moment avant le début des audiences mais après la
détermination de la date de la conférence préparatoire, aucun remboursement ne sera effectué.

Les services liés aux audiences s'étendent à tous les autres services jusqu'à la fermeture du dossier; les
frais relatifs à ces services sont dus et gagnés dès la fixation de la date de la première audience.
Advenant que les parties règlent leur différend à tout moment avant la fermeture du dossier mais après la
fixation de la date de la première audience, aucun remboursement ne sera effectué.

Procédure d'arbitrage général bipartite

1 000 $ à 10 000 000 $

Montant du litige Frais administratifs Exemple : arbitrage bipartite
1 000 à
50 000 $
3%
Minimum 600 $
Maximum 1 500 $
Litige de 40 000 $
Les frais sont :
40 000 $ X 3% = 1 200 $
Litige de 75 000 $
50 000 à
200 000 $

1 500 $ + 2% de
l'excédent de 50 000 $
Les frais sont :
1 500 $ + 2% de l'excédent de 50 000 $
(75 000 $ - 50 000 $)
donc 1 500 $ + 500 $ = 2 000 $
200 000 à 4 500 $ + 1% de
Litige de 350 000 $
Les frais sont :

http://www.ccac-adr.org/fr/tarifs.php

2010-09-10

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1 million $ l'excédent de 200 000 $ 4 500 $ + 1% de l'excédent de 200 000 $
(350 000 $ - 200 000 $)
4 500 $ + 1 500 $= 6 000 $

Litige de 2 millions $

Les frais sont de 12 500 $
1 million à 12 500 $ + ½% de pour le premier million $ et
10 millions $ l'excédent de 1 million $ ½% de l'excédent de un million $

(2 millions $ - 1 million $)
12 500 $ + 5 000 $ = 17 500 $

Si le montant du litige n'est pas déterminé et/ou déterminable ou s'il n'y a pas consensus entre les
parties quand à la valeur en litige, le Centre déterminera (évaluera) la valeur pour les parties de la
procédure.

Honoraires des arbitres

Les honoraires du ou des arbitres seront établis sur une base horaire et avant la première heure.

NOTE: Il faut multiplier par trois si le tribunal se compose de trois personnes. Chaque séquence doit être
comptabilisée séparément.

Procédure accélérée d'arbitrage

(Dossiers de moins de 50 000 $ nécessitant une journée d'audition de 7 heures ou moins)

1. Honoraires administratifs du centre
600,00 $ dont 200,00 $ en frais d'ouverture de dossier non remboursables payables par le demandeur
lors de la transmission du dossier d'arbitrage et déductibles de sa part des frais (Article 69, R.G.A.C.)

2. Honoraires de l'arbitre
900,00 $ à 2 000,00 $ excluant les frais de déplacement/séjour.
3. Frais concomitants du centre
Location de salle, télécopies, messageries, etc.
4. Frais spéciaux
Frais de renvoi de l'audition
Ces frais sont payables par la partie qui, après avoir donné son accord à procéder à une date déterminée,

demande de fixer une nouvelle date d'audition.
Ils sont de 225,00 $.
Frais d'extension de l'audition ou de renvoi du dossier à la procédure générale d'arbitrage du Centre

Ces frais sont payables au Centre avant la tenue d'une journée d'audition supplémentaire. Ils ne
comprennent pas les autres frais encourus pour la location de salle et les honoraires de l'arbitre.

Ils sont de 175,00 $ par partie.

5. Partage des frais de l'arbitrage
À parts égales entre les parties (Article 69, R.G.A.C.), à l'exclusion des frais spéciaux.
Procédure d'arbitrage spécialisée pour les litiges entre les
membres de l'accovam ou de la bourse de montréal et leurs
clients

1er janvier 1996

1. HONORAIRES ADMINISTRATIFS DU CENTRE
450 $* dont 200 $ en frais d'ouverture de dossier non remboursables payables par le demandeur lors de
la transmission du dossier d'arbitrage et déductibles de sa part des frais (Article 17, procédure
spécialisée)

Pour un litige impliquant une réclamation dont le montant incluant la demande reconventionnelle est
égal ou inférieur à 3 000 $, intérêts et frais d'arbitrage exclus:

200 $ en frais d'ouverture de dossier non remboursables payables par le demandeur lors de la
transmission du dossier d'arbitrage et déductibles de sa part des frais (Article 17, procédure spécialisée).

2. HONORAIRES DE L'ARBITRE
600 $ comme montant forfaitaire. Si plus de quatre heures d'audition sont nécessaires, le tarif horaire de
usuel de l'arbitre (en matière commercial) est applicable pour chaque heure d'audition supplémentaire.
Les frais de l'arbitre en déplacement et séjour sont en sus.

3. FRAIS CONCOMITANTS DU CENTRE
Les frais de location de salle sont de 150 $ sur la base d'une durée d'audition de quatre heures. Si plus de
temps est requis, les frais de location seront demandés selon le supplément requis. Les frais de
télécopies, messageries et interurbains sont en sus.

4. FRAIS SPÉCIAUX
Frais de renvoi de l'audition
Ces frais sont payables par la partie qui, après avoir donné son accord à procéder à une date déterminée,
demande de fixer une nouvelle date d'audition.

Ils sont de 100,00 $.

Frais d'extension de l'audition ou de renvoi du dossier à la procédure générale d'arbitrage du Centre

Ces frais sont payables au Centre avant la tenue d'une journée d'audition supplémentaire. Ils ne
comprennent pas les autres frais encourus pour la location de salle et les honoraires de l'arbitre.
Ils sont de 150,00 $ par partie.

5. PARTAGE DES FRAIS DE L'ARBITRAGE
À parts égales entre les parties (Article 18, procédure spécialisée) à moins d'une décision contraire de
l'arbitre. Les frais spéciaux sont payés par la partie responsable.
*À compter du 3 novembre 1999, le montant des honoraires est passé de 400 $ à 450 $.

La grille de tarification pour l'arbitrage en vertu du Règlement
sur le plan de garantie des bâtiments résidentiels neufs a été
adoptée par la Régie du bâtiment du Québec le 1er mars 2006.

Elle est obligatoire pour tous les organismes d'arbitrage autorisés.

Rappel de l'Article 123 du Règlement :

« Les coûts de l'arbitrage sont partagés à parts égales entre l'administrateur et l'entrepreneur lorsque ce
dernier est le demandeur ».
« Lorsque le demandeur est le bénéficiaire, ces coûts sont à la charge de l'administrateur à moins que le
bénéficiaire n'obtienne gain de cause sur aucun des aspects de sa réclamation, auquel cas l'arbitre
départage ces coûts. »

1. FRAIS DE L'ORGANISME D'ARBITRAGE
Des frais de 450,00 $ sont réclamés de l'administrateur pour la gestion de chaque dossier. Les déboursés
et frais concomitants sont en surplus (ex. : location de salle, photocopies, messageries, télécopies). En
cas de désistement de la demande d'arbitrage, si le désistement, à la demande des parties, n'est pas
consigné dans une décision arbitrale, les frais sont limités à 140,00 $.

2. HONORAIRES DE L'ARBITRE
2.1 Tarif horaire : 140,00 $
2.2 Calcul des honoraires
Sous réserve des montants maximums prévus à l'article 2.3 :
2.2.1 L'arbitre a droit à des honoraires au taux fixé par l'article 2.1 pour chaque heure réelle effectuée
pour la préparation, la conférence préparatoire avec les parties, l'audience, le délibéré et la rédaction
d'une décision;
2.2.2 Pour chaque journée d'audience tenue, l'arbitre a droit à une rémunération minimale équivalant à

trois (3) heures d’honoraires au taux fixé par l’article 2.1;

2.2.3 À titre d’indemnité en cas de désistement de la demande d’arbitrage (avec ou sans règlement) ou
de remise de la date de l’audience à la demande d’une partie, moins de 30 jours avant la date de
l’audience, l’arbitre a droit à 3 heures d’honoraires au taux fixé par l’article 2.1.
2.3 Le maximum des honoraires permis en vertu des articles 2.1 et 2.2 est le moindre des trois (3)
montants suivants :

- Honoraires, au taux horaire fixé à l’article 2.1, selon les heures réelles effectuées pour la
préparation, l’audience, le délibéré et la rédaction d’une décision;
- Honoraires maximums autorisés selon la valeur estimée de la réclamation, en fonction des
catégories suivantes :

Valeur estimée de la réclamation	Honoraires de l’arbitre maximum autorisé
1 à 7 000 $	2 200 $
7 001 à 15 000 $	3 300 $
15 001 à 30 000 $	5 500 $
30 001 à 60 000 $	6 600 $
60 000 $ et plus	Aucun maximum
Dossier d’adhésion d’un entrepreneur	Aucun maximum

- Honoraires, au taux horaire fixé à l’article 2.1, selon les heures réelles effectuées pour la
préparation, l’audience, le délibéré et la rédaction d’une décision;

3. AUTRES FRAIS ADMISSIBLES

L’arbitre a droit au remboursement des frais réels de location de salle engagée pour une audience et aux
frais réels concomitants (ex : photocopies, messageries, télécopies, etc.)

4. DÉPLACEMENT ET SÉJOUR

- Aucune allocation ni frais de déplacement ou séjour pour les distances inférieures à un rayon de

80 km du port d'attache;

- Déplacement et séjour : Normes du Conseil du Trésor applicables pour les frais de déplacement et de séjour (C.T. 194603 du 30 mars 2000 et ses modifications relativement aux frais de déplacement des personnes engagées à honoraires par le gouvernement du Québec);
- Allocation : Pour les distances supérieures à un rayon de plus de 80 km du port d'attache, le temps de déplacement est rémunéré à raison de 90,00 $ de l'heure pour les arbitres.

5. CAS DE RÉCUSATION

Aucun honoraire ni frais ne sont réclamés pour les cas où il y a récusation de l'arbitre. Cependant, dans le cas d'un motif de récusation connu et invoqué tardivement, les honoraires et frais encourus sont partagés par l'arbitre.

Lorsqu'il n'y a pas récusation de l'arbitre, les frais et honoraires engendrés par l'examen de la demande

de récusation suivent le fond et sont partagés lors de la décision rendue sur le fond.

6. INFORMATION DES PARTIES INTÉRESSÉES

Les parties intéressées sont dûment informées, lors de la demande d'arbitrage, de tous les frais, honoraires et allocations afférents à la demande (incluant entre autres ceux pour le déplacement, le séjour, les provisions s'il y a lieu, le désistement du recours et la demande de récusation), ainsi que des dispositions du règlement quant au partage des coûts.

7. PROVISION POUR FRAIS

Les règles minimales suivantes s'appliquent lorsque la société d'arbitrage demande une provision pour paiement de ses frais ou des honoraires de l'arbitre :

- La provision ne peut excéder les maximums prévus dans la présente grille de tarification.
- Si le demandeur est l'entrepreneur : la provision est payable à parts égales par l'entrepreneur et par l'administrateur.
- Les sommes sont conservées dans un compte en fidéicommis.
- Suite à la décision, les sommes consignées en trop sont remboursées.
- En aucun cas, l'organisme ne peut retenir la décision.

8. NOTE DU CENTRE

- Si le demandeur est le bénéficiaire : aucune provision n'est demandée.
- Si le demandeur est l'entrepreneur : il transmet au Centre, en même temps que sa

demande
d’arbitrage la valeur estimée de sa réclamation.
http://www.ccac-adr.org/fr/tarifs.php

2010-09-10

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GRILLE DE TARIFICATION

RÈGLEMENTSURLEPLANDE GARANTIEDESBÂTIMENTSRÉSIDENTIELS
NEUFS

Référence au Règlement Sm' le plan de garantie. article 123 ;

. «Les coQts de l'arbitrage sont partagés à parts égales entre l'administrateur et l'entrepreneur lorsque ce dernier est le demandeur.

Lorsque le demandeur est le bénéficiaire, ces coOts sont à la charge de l'administrateW" à
moins que le bénéficiaire n'obtienne gain de cause sur aucun des aspects de sa réclamation, auquel cas l'arbitre départage ces coQts.

Seul l'organisme d'arbitrage est habilité à dresser le compte des coQts de l'arbitrage en
vue de leur paiement.»

1 ; FRAIS DE LA SQCIÉTt D'ARBITRAGE;

Des frais de 400 $ sont réclamés pour la gestion de chaque dossier. Les déboursés et frais
concomitants sont en surplus (ex.: location de salle, photocopies, messageries, télécopies).

2: HONORAIRES DE L'ARBITRE ;

2.1 Tarifhoraire: 125 $

2.2 Calcul des honoraires
Le moindre des deux montants suivants ;

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• FRAIS ET HONORAIRES FIXES EN CAS DE DÉSISTEMENT:

Frais 0$ 75 $ 75 $
Honoraires 0$ 75 $ 175 $

Si le désistement du demandeur survient après l'ouverture de l'audience, les frais de
l'organisme et les honoraires de l'arbitre sont réclamés.

CAS DE RÉCUSATION

Aucun honoraire ni frais n'est réclamé pour les cas où il y a récusation de l'arbitre.
Cependant, dans le cas d'un motif de récusation connu et invoqué tardivement, les

honoraires et frais encourus sont partagés par l'arbitre.

Lorsqu'il n'y a pas récusation de l'arbitre, les frais et honoraires engendrés par l'examen
de la demande de récusation suivent le fond et sont partagés lors de la décision rendue sur
le fond.

DÉPLACEMENT ET SÉJOUR

Aucune allocation ni frais de déplacement ou séjour pour les distances inférieures à
un rayon de 80 km du port d'attache.

DéDlacement et séjour: Normes du Conseil du Trésor applicables pour les frais de déplacement et de séjour (C.T. 170100 du 14 mars 1989 et ses modifications relativement aux frais de déplacement des personnes engagées à honoraires par le gouvernement du Québec -Directive 7-74).

Allocation: Pour les distances supérieures à un rayon de plus de 80 km du port d'attache, le temps de déplacement est rémunéré à raison de 50% du taux horaire pour
les arbitres.

INFORMATION DES PARTIES INTÉRESSÉES

Les parties intéressées sont dûment informées, lors de la demande d'arbitrage, de tous les
frais, honoraires et allocations afférents à la demande (incluant entre autres ceux pour le
déplacement, le séjour, les provisions s'il y a lieu, le désistement du recours et la

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demande de récusation), ainsi que des dispositions du règlement quant au partage des
coûts.

PROVISION POUR COMPTES

Les règles minimales suivantes s'appliquent lorsque la société d'arbitrage demande une
provision pour paiement de ses frais ou des honoraires de l'arbitre:

- La provision ne peut excéder les maximums prévus dans la présente grille de tarification.
- Si le demandeur est le bénéficiaire: la provision est payable par l'administrateur.
- Si le demandeur est l'entrepreneur: la provision est payable à parts égales par l'entrepreneur et par l'administrateur.
- Les sommes sont conservées dans un compte en fidéicommis.
- Suite à la décision, les sommes consignées en trop sont remboursées.
- En aucun cas, l'organisme ne peut retenir la décision.

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Rappel de l'Article 123 du Règlement:

« Les coOts de l'arbitrage sont partagés à parts égales entre l'administrateur et l'entrepreneur
lorsque ce dernier est le demandeur ».
« Lorsque le demandeur est le bénéficiaire, ces coOts sont à la charge de l'administrateur à
moins que le bénéficiaire n'obtienne gain de cause sur aucun de$ aspects de sa réclamation,
auquel cas l'arbitre départage ces coOts. »

1 : FRAIS PE LA SOCIÉTÉ p'ARBITRAGE:

Des frais de 400 $ sont réclamés pour la gestion de chaque dossier. Les déboursés et frais
concomitants sQnt en surplus (ex. : location de salle, photocopies, messageries, télécopies).

2 : HONORAIRES PE L'ARBITRE :

2.1 Tarif horaire: 125 $

2.2 Calcul des honoraires
Le moindre des deux montants suivants :

1° Honoraires, au taux horaire fixé à "item 2.1, selon les heures réelles effectuées pour la préparation, l'audience, le délibéré et la rédaction d'une décision.
Minimum des honoraires: quatre (4) heures (ou 500 $). Ce minimum n'est pas applicable en cas de désistement du demandeur ou de récusation de J'arbitre.

2° Honoraires maximums autorisés selon la valeur estimée de la réclamation, en fonction des catégories suivantes:

Valeur estimée de la réclamation	Honoraires de l'arbitre maximum autorisé
1 A7000 $	2000$
7001 A15000$	3000$
15001 A30 000 $	5000 $
30001 A60 000 $	6000 $
60 000$ et plus	aucun maximum
Dossier d'adhésion d'un entrepreneur	aucun maximum

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FRAIS ET HONORAIRES FIXES EN CAS DE DÉSISTEMENT:

AVANT
la nomination de l'arbitre
Frais 0$
Honoraires 0$

APRÈs
la nomination de l'arbitre
mais
AVANT
que la date d'audience

soit fixée
75$
75$

APRÈS

que la date d'audience
soit fixée

75 $
175 $

Si le désistement du demandeur survient après l'ouverture de l'audience, les frais de "organisme
et les honoraires de l'arbitre sont réclamés.

CAS DE RÉCUSATION

Aucun honoraires ni frais n'est réclamé pour les cas où il y a récusation de l'arbitre. Cependant,
dans le cas d'un motif de récusation connu et invoqué tardivement, les honoraires et frais
encourus sont partagés par l'arbitre.

Lorsqu'il n'y a pas récusation de l'arbitre, les frais et honoraires engendrés par l'examen de la
demande de récusation suivent le fond et sont partagés lors de la décision rendue sur le fond.

DÉPLACEMENT ET SÉJOUR

-Aucune allocation ni frais de déplacement ou séjour pour les distances inférieures à un
rayon de 80 km du port d'attache.

Déplacement et séjour: Normes du Conseil du Trésor applicables pour les frais de déplacement et de séjour (CT 194603 du 30 mars 2000 et ses modifications relativement
aux frais de déplacement des personnes engagées à honoraires par le Gouvernement du

Québec).

-Allocation: Pour les distances supérieures à un rayon de plus de 80 km du port d'attache,
le temps de déplacement est rémunéré à raison de 50% du taux horaire pour les arbitres.

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INFORMATION DES PARTIES INTÉRESSÉES

Les parties intéressées sont dûment informées, lors de la demande d'arbitrage, de tous les frais,
honoraires et allocations afférents à la demande (incluant entre autres ceux pour le
déplacement, le séjour, les provisions s'il y a lieu, le désistement du recours et

la demande de
récusation), ainsi que des dispositions du règlement quant au partage des coûts.

PROVISION POUR COMPTES

Les règles minimales suivantes s'appliquent lorsque la société d'arbitrage demande une provision
pour paiement de ses frais ou des honoraires de l'arbitre:

• La provision ne peut excéder les maximums prévus dans la présente grille de tarification.
• Si le demandeur est l'entrepreneur: la provision est payable à parts égales par l'entrepreneur
et par l'administrateur.
• Les sommes sont conservées dans un compte en fidéicommis.
• Suite à la décision, les sommes consignées en trop sont remboursées.
• En aucun cas, l'organisme ne peut retenir la décision.

Notes de SORECONI

• Si le demandeur est le bénéficiaire: aucune provision n'est demandée à l'administrateur qui
s'engage toutefois à acquitter la part des coûts d'arbitrage attribués au bénéficiaire par
l'arbitre. SORECONI, par ailleurs, s'engage à rembourser l'administrateur lorsque le
bénéficiaire acquitte sa part des coûts d'arbitrage qui lui ont été facturés.
• Si le demandeur est l'entrepreneur: il transmet à SORECONI, en même temps que sa demande
d'arbitrage, la valeur estimée de sa réclamation.

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Arbitration -- Residential Sector of the Construction Industry, O. Reg. 522/05

Current version: in force since Sep 30, 2005

Link to the latest version :
http://www.canlii.org/en/on/laws/regu/o-reg-522-05/latest/
Stable link to this version :
http://www.canlii.org/en/on/laws/regu/o-reg-522-05/5722/
Currency: Last updated from the e-Laws site on 2010-09-07

Labour Relations Act, 1995
Loi de 1995 sur les relations de travail

ONTARIO REGULATION 522/05

ARBITRATION – RESIDENTIAL SECTOR OF THE CONSTRUCTION INDUSTRY

Consolidation Period: From September 30, 2005 to the e-Laws currency date.

No amendments.

This Regulation is made in English only.

Application of Regulation

1. This Regulation applies if an arbitrator has been appointed under section 150.4 of the Act and the
parties do not agree upon the method of arbitration for the purposes of that section. O. Reg. 522/05, s. 1.
Beginning proceeding

2. (1) The arbitrator shall convene the parties to begin the proceeding as soon as possible after
being appointed and no later than seven days after that day. O. Reg. 522/05, s. 2 (1).
(2) On or before the first day of the proceeding,
(a) the parties shall file with the arbitrator, a joint written statement setting out the matters on
which they reached agreement before the arbitrator was appointed; and
(b) if there are monetary items in dispute between the parties, both parties shall file with the
arbitrator final written offers on those monetary items. O. Reg. 522/05, s. 2 (2).
Arbitrator

3. (1) The arbitrator has the exclusive jurisdiction to determine all matters that he or she considers
necessary to conclude a new collective agreement, including whether a matter in dispute is a monetary
item. O. Reg. 522/05, s. 3 (1).
(2) The arbitrator remains seized of and may deal with all matters within his or

her jurisdiction until
the new collective agreement between the parties is in force. O. Reg. 522/05, s. 3 (2).
(3) The arbitrator shall try to assist the parties through mediation to settle any matter that he or she
considers necessary to conclude the collective agreement. O. Reg. 522/05, s. 3 (3).

(4) Subject to this Regulation, the arbitrator has the powers of an arbitrator under subsection 48 (12)
of the Act. O. Reg. 522/05, s. 3 (4).
(5) The parties may at any time notify the arbitrator in writing as to matters on which they reach
agreement after the appointment of the arbitrator. O. Reg. 522/05, s. 3 (5).

(6) If the parties execute a new collective agreement before the arbitration is completed, they shall
so notify the arbitrator and the arbitration proceedings are terminated when the collective agreement
comes into force. O. Reg. 522/05, s. 3 (6).
Method of arbitration

4. (1) The method of arbitration for the monetary items in dispute shall be mediation-final offer
selection. O. Reg. 522/05, s. 4 (1).
(2) The method of arbitration for the other items in dispute shall be mediation-arbitration. O. Reg.
522/05, s. 4 (2).
Timing of award

5. (1) The arbitrator shall make an award with respect to the monetary items in dispute within
seven days after the first day of the proceeding. O. Reg. 522/05, s. 5 (1).
(2) Subject to subsection (1), the arbitrator shall make his or her award with respect to the
remaining items in dispute within 30 days after the first day of the proceeding. O. Reg. 522/05, s. 5 (2).
Execution of agreement

6. (1) Within seven days after the arbitrator has made both awards under section 5, the parties shall
prepare and execute documents giving effect to the award and those documents constitute the new
collective agreement. O. Reg. 522/05, s. 6 (1).
(2) The arbitrator may extend the period specified in subsection (1) but the extended period shall
end no later than 30 days after the arbitrator has made both awards. O. Reg. 522/05, s. 6 (2).
(3) If the parties do not prepare and execute the documents as required under subsections (1) and
(2), the arbitrator shall prepare and give the necessary documents to the parties for execution. O. Reg.
522/05, s. 6 (3).
(4) If either party fails to execute the documents within seven days after the arbitrator gives them to
the parties, the documents come into force as though they had been executed by the parties and those
documents constitute the new collective agreement. O. Reg. 522/05, s. 6 (4).

7. Omitted (revokes other Regulations). O. Reg. 522/05, s. 7.

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Federation of Law Societies of Canada

http://www.canlii.org/en/on/laws/regu/o-reg-522-05/latest/o-reg-522-05.html

2010-09-10

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Construction Industry Arbitration Rules and Mediation Procedures

(Including Procedures for Large, Complex Construction Disputes)
Rules Amended and Effective October 1, 2009
Fee Schedule Amended and Effective June 1, 2010

To access the AAA Construction Arbitration Rules and Mediation Procedures with the previous versions of Fee Schedules, visit the Archived Rules area of the site --click here.

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NATIONAL CONSTRUCTION DISPUTE RESOLUTION COMMITTEE

Representatives of the organizations listed below constitute the National Construction Dispute Resolution Committee (NCDRC). This Committee serves as an advisory body to the American Arbitration Association concerning construction dispute resolution services.

American Association of Airport Executives
American Bar Association -- Forum on the Construction Industry
American Bar Association - Construction Litigation Committee
American Bar Association - Public Contract Law Section
American College of Construction Lawyers
American College of Real Estate Lawyers
American Council of Engineering Companies
American Institute of Architects
American Road and Transportation Builders Association
American Society of Civil Engineers
American Subcontractors Association
Associated Builders & Contractors, Inc.
Associated General Contractors of America
American Specialty Contractors, Inc.
Construction Financial Management Association
Construction Management Association of America
Construction Owners Association of America
Construction Specifications Institute
Design Build Institute of America
Dispute Review Board Foundation
Engineers Joint Contract Documents Committee
National Association of Home Builders
National Association of Minority Contractors
National Association of State Facilities Administrators
National Association of Surety Bond Producers
National Society of Professional Engineers
National Utility Contractors Association Surety Association of America
Victor O. Schinnerer

Women Construction Owners & Executives, USA

IMPORTANT NOTICE

These Rules and any amendment of them shall apply in the form in effect at the time the administrative filing requirements are met for a demand for arbitration or submission agreement received by the American Arbitration Association. To insure that you have the most current information,

visit www.adr.org . If an agreement for mediation or arbitration specifies that rules in effect at the time the agreement was executed be used, then absent the parties' agreement otherwise, the AAA shall apply the Rules as required by the agreement. We encourage parties to use the most current, state of the art, AAA rules available.

INTRODUCTION

Each year, many thousands of construction-related transactions take place. Occasionally, disagreements in connection with these transactions develop. Often, these disputes are resolved by arbitration, the voluntary submission of a dispute to a disinterested person or persons for final and binding determination. Arbitration has been proven to be an effective way to resolve disputes fairly, privately, promptly, and economically.

The American Arbitration Association (AAA) is a public-service, not-for-profit organization offering a broad range of dispute resolution services to business executives, attorneys, individuals, trade associations, unions, management, consumers, families, communities, and all levels of government. The AAA is headquartered in New York and has offices located in many major cities throughout the United States and around the

world, including Dublin, Mexico City and Singapore. Parties may hold hearings at local AAA offices or at other locations convenient for them The AAA also provides education and training, publications, and conducts research on all forms of out-of-court dispute resolution.

Generally, the AAA's services are concluded with the transmittal of the award. Although there is voluntary compliance with the majority of awards, judgment on the award can be entered in a court having appropriate jurisdiction if necessary.

Mediation

By agreement, the parties may submit their dispute to mediation before arbitration under the mediation procedures herein. Mediation involves the services of one or more individuals, to assist parties in settling a controversy or claim by direct negotiations between or among themselves. The mediator or mediators participate(s) impartially in the negotiations, guiding and consulting the various parties involved. The result of the mediation should be an agreement that the parties find acceptable. The mediator cannot impose a settlement and an only guide the parties toward achieving their own settlement.

The AAA will administer the mediation process to achieve orderly, economical, and expeditious mediation, utilizing to the greatest possible extent the competence and acceptability of the mediators on the AAA's Construction Mediation Panel. Depending on the expertise needed for a given dispute, the parties can obtain the services of one or more individuals who are willing to serve as mediators and who are trained in mediation skills. In identifying those persons most qualified to mediate, the AAA is assisted by the National Construction Dispute Resolution Committee.

The AAA itself does not act as mediator. Its function is to administer the mediation process in accordance with the agreement of the parties, to teach mediation skills to members of the construction industry, and to maintain the National Panel from which mediators can be chosen.

Procedures for mediation cases are described in Sections M-1 through M-18.

Arbitration

The arbitration rules contain four procedural tracks: the Regular Track Procedures (Section R), the Procedures for the Resolution of Disputes through Document Submission (Section D), the Fast Track Procedures (Section F) and the Procedures for Large, Complex Construction Disputes (Section L). The Regular Track Procedures are applied to the administration of all arbitration cases, unless they conflict with any portion of Section D, Section F or Section L whenever these Sections apply. In the event of a conflict, the Fast Track Procedures, Procedures

for the Resolution of Disputes through Document Submission, or the Procedures for Large, Complex Construction Disputes apply.

Regular Track Procedures

The highlights of the Regular Track Procedures are that they enable:

- opportunities for an administrative conference to help structure the dispute resolution process from the starting point;
- party input into the AAA's preparation of lists of proposed arbitrators;
- checklists for parties and arbitrators to organize the management hearing to address the needs associated with each dispute;
- express arbitrator authority to control the discovery process;
- broad arbitrator authority to control the hearing;
- award format choices;
- a Demand Form and an Answer Form, both of which seek information that will help the AAA to better serve the parties .

PROCEDURES FOR THE RESOLUTION OF DISPUTES THROUGH DOCUMENT SUBMISSION

The highlights of the Procedures for the Resolution of Disputes through Document Submissions are that they provide:

- a simple process for resolution of disputes where a face-to-face hearing is not necessary;
- flexibility to take advantage of technology options;
- the ability to may to be applied to any size dispute by party agreement.

Fast Track Procedures

The Fast Track Procedures are designed for cases involving claims between two parties where no party's disclosed claim or counterclaim exceeds $75,000, exclusive of claimed interest, attorneys' fees, arbitration fees and costs. The highlights of these Procedures are:

- a 45-day "time standard" for hearing process completion;
- the establishment of a special pool of arbitrators who are pre-qualified to serve on an expedited basis;
- an expedited arbitrator appointment process, with party input;
- conference call with the arbitrator within 10 days of confirmation of the arbitrator;
- the presumption that cases involving $10,000 or less will be decided on a documents only basis;
- a single day of hearing in most cases;
- an award in no more than 14 calendar days after completion of the hearing.

Procedures for Large, Complex Construction Disputes

Unless the parties agree otherwise, the Procedures for Large, Complex Construction

Disputes will be applied to all cases administered by the
AAA under the Construction Arbitration Rules in which the disclosed claim or counterclaim of any party is at least $1,000,000 exclusive of claimed interest, attorneys' fees, arbitration fees and costs.

The key features of these Procedures include:

- a highly qualified, trained Panel of Neutrals, compensated at their customary rates;
- a mandatory preliminary hearing with the arbitrators, which may be conducted by telephone;
- broad arbitrator authority to order and control discovery, including depositions;
- the presumption that hearings will proceed on a consecutive or block basis;
- a reasoned award unless the parties agree otherwise.

The National Construction Panel

The AAA maintains a National Panel of individuals competent to hear and decide disputes administered under the Construction Industry
Arbitration Rules. The AAA considers for appointment to the Construction Industry Panel persons recommended by the National Construction
Dispute Resolution Committee, regional advisory committees and customers. These individuals are qualified to serve by virtue of their
experience in the construction field. The majority of these neutrals are actively engaged in the construction industry with attorney neutrals
generally devoting at least half of their practice to construction matters. Neutrals serving on the Panel and under these Rules must also attend
periodic training.

Administrative Fees

The AAA charges a filing fee based on the amount of claim or counterclaim. This fee information, which is contained with these Rules, allows
the parties to exercise control over their administrative fees and costs.

The fees cover AAA administrative services; they do not cover arbitrator compensation or expenses, if any, nor do the fees cover reporting
services, hearing room rental or any post-award charges incurred by the parties in enforcing the award.

Alternative Dispute Resolution (ADR) Clauses

Mediation

If the parties elect to adopt mediation as a part of their contractual dispute settlement procedure, the following mediation clause can be inserted
into the contract in conjunction with a standard arbitration provision:

If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the
parties agree first to try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its
Construction Industry Mediation Procedures before resorting to arbitration, litigation, or some other dispute resolution procedure.

If the parties choose to use a mediator to resolve an existing dispute, the following language may accompany the submission:

The parties hereby submit the following dispute to mediation administered by the American Arbitration Association under its
Construction Industry Mediation Procedures. (The clause may also provide for the

qualifications of the mediator(s), method of
payment, locale of meetings, and any other item of concern to the parties.)

Arbitration

Parties can provide for arbitration of future disputes by inserting the following clause into their contracts:

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by
the American Arbitration Association under its Construction Industry Arbitration Rules, and judgment on the award rendered by the

arbitrator(s) may be entered in any court having jurisdiction thereof.

Arbitration of existing disputes may be accomplished by use of the following:

We, the undersigned parties, hereby agree to submit to arbitration administered by the American Arbitration Association under its
Construction Industry Arbitration Rules the following controversy: (cite briefly). We further agree that the above controversy be
submitted to (one)(three) arbitrator(s). We further agree that we will faithfully observe this agreement and the rules, that we will abide
by and perform any award rendered by the arbitrator(s), and that a judgment of the court having jurisdiction may be entered on the

award.

The AAA's Guide to Drafting Dispute Resolution Clauses for Construction Contracts (www.aaauonline.org/construction_clauses.pdf) offers additional information about dispute resolution options available for
construction disputes. For more information about the AAA's Construction Dispute Avoidance and Resolution Services, as well as the full range

of other AAA services, contact the nearest AAA office or visit www.adr.org

CONSTRUCTION INDUSTRY MEDIATION PROCEDURES

M-1. Agreement of Parties

Whenever, by stipulation or in their contract, the parties have provided for mediation or conciliation of
existing or future disputes under the auspices of the American Arbitration Association (AAA) or under
these procedures, the parties and their representatives, unless agreed otherwise in writing, shall be
deemed to have made these procedures , as amended and in effect as of the date of filing of a request for
mediation, a part of their agreement and designate the AAA as the administrator of their mediation.

The parties by mutual agreement may vary any part of these procedures including, but not limited to,
agreeing to conduct the mediation via telephone or other electronic or technical means.

M-2. Initiation of Mediation

Any party or parties to a dispute may initiate mediation under the AAA's auspices by making a request
for mediation to any of the AAA's regional offices or case management centers via telephone, email,
regular mail or fax. Requests for mediation may also be filed online via AAA WebFile at www.adr.org.

The party initiating the mediation shall simultaneously notify the other party or parties of the request. The
initiating party shall provide the following information to the AAA and the other party or parties as
applicable:

i. A copy of the mediation provision of the parties' contract or the parties' stipulation to mediate.
ii. The names, regular mail addresses, email addresses (if available), and telephone numbers of all parties
to the dispute and representatives, if any, in the mediation.
iii. A brief statement of the nature of the dispute and the relief requested.
iv. Any specific qualifications the mediator should possess.
Where there is no preexisting stipulation or contract by which the parties have provided for mediation of
existing or future disputes under the auspices of the AAA, a party may request the AAA to invite another
party to participate in "mediation by voluntary submission". Upon receipt of such a request, the AAA will
contact the other party or parties involved in the dispute and attempt to obtain a submission to mediation.

M-3. Fixing of Locale (the city, county, state, territory and, if applicable, country of the Mediation)

(a) When the parties' agreement to mediate is silent with respect to locale and the parties are unable to agree upon a locale, the locale shall be
the city nearest to the site of the project in construction disputes as determined by the AAA.

(b) When the parties' agreement to mediate requires a specific locale, absent the parties' agreement to change it, the locale shall be that
specified in the agreement to mediate.
(c) If the reference to a locale in the agreement to mediate is ambiguous, the AAA shall have the authority to consider the parties' arguments
and determine the locale.
M-4. Representation

Any party may participate without representation (pro-se), or by any representative of that party's choosing, or by counsel, unless such choice is
prohibited by applicable law. A party intending to have representation shall notify the other party and the AAA of the name, telephone number
and address, and email address if available of the representative.

M-5. Appointment of the Mediator

Parties may search the online profiles of the AAA's Panel of Mediators at www.aaamediation.com in an
effort to agree on a mediator. If the parties have not agreed to the appointment of

a mediator and have not
provided any other method of appointment, the mediator shall be appointed in the following manner:

i. Upon receipt of a request for mediation, the AAA will send to each party a list of mediators from the
AAA's Panel of Mediators. The parties are encouraged to agree to a mediator from the submitted list and
to advise the AAA of their agreement.
ii. If the parties are unable to agree upon a mediator, each party shall strike unacceptable names from the
list, number the remaining names in order of preference, and return the list to the AAA. If a party does
not return the list within the time specified, all mediators on the list shall be deemed acceptable to that
party. From among the mediators who have been mutually approved by the parties, and in accordance
with the designated order of mutual preference, the AAA shall invite a mediator to serve.
iii. If the parties fail to agree on any of the mediators listed, or if acceptable mediators are unable to serve,
or if for any other reason the appointment cannot be made from the submitted list, the AAA shall have the
authority to make the appointment from among other members of the Panel of Mediators without the
submission of additional lists.
M-6. Mediator's Impartiality and Duty to Disclose

AAA mediators are required to abide by the Model Standards of Conduct for Mediators in effect at the
time a mediator is appointed to a case. Where there is a conflict between the Model Standards and any
provision of these Mediation Procedures, these Mediation Procedures shall govern. The Standards require
mediators to (i) decline a mediation if the mediator cannot conduct it in an impartial manner, and (ii)
disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to
the mediator and could reasonably be seen as raising a question about the mediator's impartiality.

Prior to accepting an appointment, AAA mediators are required to make a reasonable inquiry to
determine whether there are any facts that a reasonable individual would consider likely to create a
potential or actual conflict of interest for the mediator. AAA mediators are required to disclose any
circumstance likely to create a presumption of bias or prevent a resolution of the parties' dispute within
the time-frame desired by the parties. Upon receipt of such disclosures, the AAA shall immediately
communicate the disclosures to the parties for their comments.

The parties may, upon receiving disclosure of actual or potential conflicts of interest of the mediator,
waive such conflicts and proceed with the mediation. In the event that a party disagrees as to whether the
mediator shall serve, or in the event that the mediator's conflict of interest might reasonably be viewed as
undermining the integrity of the mediation, the mediator shall be replaced.

http://www.adr.org/sp.asp?id=22004

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M-7. Vacancies

If any mediator shall become unwilling or unable to serve, the AAA will appoint another mediator, unless
the parties agree otherwise, in accordance with section M-5.

M-8. Duties and Responsibilities of the Mediator

i. The mediator shall conduct the mediation based on the principle of party self-determination. Self-
determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and
informed choices as to process and outcome.
ii. The mediator is authorized to conduct separate or ex parte meetings and other communications with
the parties and/or their representatives, before, during, and after any scheduled mediation conference.
Such communications may be conducted via telephone, in writing, via email, online, in person or
otherwise.
iii. The parties are encouraged to exchange all documents pertinent to the relief requested. The mediator
may request the exchange of memoranda on issues, including the underlying interests and the history of
the parties' negotiations. Information that a party wishes to keep confidential may be sent to the mediator,
as necessary, in a separate communication with the mediator.
iv. The mediator does not have the authority to impose a settlement on the parties but will attempt to help
them reach a satisfactory resolution of their dispute. Subject to the discretion of the mediator, the
mediator may make oral or written recommendations for settlement to a party privately or, if the parties
agree, to all parties jointly.
v. In the event a complete settlement of all or some issues in dispute is not achieved within the scheduled mediation session(s), the mediator
may continue to communicate with the parties, for a period of time, in an ongoing effort to facilitate a complete settlement.

vi. The mediator is not a legal representative of any party and has no fiduciary duty to any party.
vii. The mediator shall set the date, time, and place for each session of the mediation conference. The parties shall respond to requests for
conference dates in a timely manner, be cooperative in scheduling the earliest practicable date, and adhere to the established conference
schedule. The AAA shall provide notice of the conference to the parties in advance of the conference date, when timing permits.
M-9. Responsibilities of the Parties

The parties shall ensure that appropriate representatives of each party, having authority to consummate a

settlement, attend the mediation conference.

Prior to and during the scheduled mediation conference session(s) the parties and their representatives

shall, as appropriate to each party's circumstances, exercise their best efforts to prepare for and engage in

a meaningful and productive mediation.

M-10. Privacy

Mediation sessions and related mediation communications are private proceedings. The parties and their

representatives may attend mediation sessions. Other persons may attend only with the permission of the

parties and with the consent of the mediator.

M-11. Confidentiality

Subject to applicable law or the parties' agreement, confidential information disclosed to a mediator by
the parties or by other participants (witnesses) in the course of the mediation shall not be divulged by the
mediator. The mediator shall maintain the confidentiality of all information obtained in the mediation,
and all records, reports, or other documents received by a mediator while serving in that capacity shall be
confidential.

The mediator shall not be compelled to divulge such records or to testify in regard to the mediation in any
adversary proceeding or judicial forum.

The parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as

evidence in any arbitral, judicial, or other proceeding the following, unless agreed to by the parties or

required by applicable law:

i. Views expressed or suggestions made by a party or other participant with respect to a possible
settlement of the dispute;
ii. Admissions made by a party or other participant in the course of the mediation proceedings;
iii. Proposals made or views expressed by the mediator; or
iv. The fact that a party had or had not indicated willingness to accept a proposal for settlement made by
the mediator.

M-12. No Stenographic Record

There shall be no stenographic record of the mediation process.

M-13. Termination of Mediation

The mediation shall be terminated:

i. By the execution of a settlement agreement by the parties; or
ii. By a written or verbal declaration of the mediator to the effect that further efforts at mediation would
not contribute to a resolution of the parties' dispute; or
iii. By a written or verbal declaration of all parties to the effect that the

mediation proceedings are
terminated; or
iv. When there has been no communication between the mediator and any party or party's representative
for 21 days following the conclusion of the mediation conference.

M-14. Exclusion of Liability

Neither the AAA nor any mediator is a necessary party in judicial proceedings relating to the mediation.
Neither the AAA nor any mediator shall be liable to any party for any error, act or omission in connection
with any mediation conducted under these procedures. Parties to a mediation under these procedures may
not call the mediator, the AAA or AAA employees as a witness in litigation or any other proceeding
relating to the mediation. The mediator, the AAA and AAA employees are not competent to testify as
witnesses in any such proceeding.

M-15. Interpretation and Application of Procedures

The mediator shall interpret and apply these procedures insofar as they relate to the mediator's duties and
responsibilities. All other procedures shall be interpreted and applied by the AAA.

M-16. Deposits

Unless otherwise directed by the mediator, the AAA will require the parties to deposit in advance of the
mediation conference such sums of money as it, in consultation with the mediator, deems necessary to
cover the costs and expenses of the mediation and shall render an accounting to the parties and return any
unexpended balance at the conclusion of the mediation.

M-17. Expenses

All expenses of the mediation, including required traveling and other expenses or charges of the mediator,
shall be borne equally by the parties unless they agree otherwise. The expenses of participants for either
side shall be paid by the party requesting the attendance of such participants.

M-18. Cost of the Mediation

There is no filing fee to initiate a mediation or a fee to request the AAA to invite parties to mediate.

The cost of mediation is based on the hourly or daily mediation rate published on the mediator's AAA profile. This rate covers both mediator
compensation and an allocated portion for the AAA's services. There is a four-hour or one half day minimum charge for a mediation
conference. Expenses referenced in Section M-17 may also apply.

If a matter submitted for mediation is withdrawn or cancelled or results in a settlement after the request to initiate mediation is filed but prior to

the mediation conference the cost is $200 plus any mediator time and charges incurred. These costs shall be borne by the initiating party unless

the parties agree otherwise.

If you have questions about mediation costs or services visit www.aaamediation.com or contact your local AAA office.

CONSTRUCTION INDUSTRY ARBITRATION RULES

REGULAR TRACK PROCEDURES

R-1. Agreement of Parties and Designation of Applicable AAA Rules

(a) The parties shall be deemed to have made these Rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association (hereinafter AAA) under its Construction Industry Arbitration Rules or whenever they have provided for arbitration of a construction dispute pursuant to the Rules of the AAA without designating particular AAA Rules.
(b) Unless the parties or the AAA determines otherwise, the Fast Track Procedures shall apply in any case involving no more than two parties in which no disclosed claim or counterclaim exceeds $75,000, exclusive of claimed interest, attorneys' fees and arbitration fees and costs. Parties may also agree to use these procedures in larger cases. The Fast Track Procedures shall be applied as described in Section F of these Rules, in addition to any other portion of these Rules that is not in conflict with the Fast Track Procedures.

(c) Unless the parties agree otherwise, the Procedures for Large, Complex Construction Disputes shall apply to all cases in which the disclosed claim or counterclaim of any party is $1,000,000 or more, exclusive of claimed interest, attorneys' fees, and arbitration fees and costs. The Procedures for Large, Complex Construction Disputes shall be applied as described in Section L of these Rules, in addition to any other portion of these Rules that is not in conflict with the Procedures for Large, Complex Construction Disputes.

(d) Parties may, by agreement, apply the Fast Track Procedures, the Procedures for Large, Complex Construction Disputes or Procedures for the Resolution of Disputes through Document Submission (Section D of these Rules) to any dispute.
(e) All other cases shall be administered in accordance with Regular Track Procedures of these Rules

R-2. AAA and Delegation of Duties

When parties agree to arbitrate under these Rules, or when they provide for arbitration by the AAA and an arbitration is initiated under these Rules, they thereby authorize the AAA to administer the arbitration.
The authority and duties of the AAA are prescribed in the agreement of the parties and in these Rules, and may be carried out through such of the AAA's representatives as it may direct. The AAA may, in its discretion, assign the administration of an arbitration to any of its offices. Arbitrations administered under these rules shall only be administered by the AAA or by an individual or

organization authorized by the
AAA to do so.

R-3. National Panel of Construction Neutrals

The AAA shall establish and maintain a National Panel of Construction Arbitrators ("National Panel") and shall appoint arbitrators as provided in these Rules. The term "arbitrator" in these Rules refers to the arbitration panel, constituted for a particular case, whether composed of one or

more arbitrators, or to an individual arbitrator, as the context requires.

R-4. Filing Requirements Under an Arbitration Agreement in a Contract

(a) Filing of a Demand: Arbitration under an arbitration provision in a contract shall be initiated in the following manner:
(i) The initiating party ("the claimant") shall, within the time period, if any, specified in the contract(s), file with the AAA a demand for arbitration, the administrative filing fee, and a copy of the applicable arbitration agreement from the parties' contract which provides for arbitration . Filing may be accomplished through use of AAA WebFile, located at www.adr.org , or by filing the demand with any AAA office.

(ii) The claimant shall simultaneously provide a copy of the demand and the applicable arbitration agreement to the opposing party ("the respondent").
(ii) The demand shall include:
(a) The name of each party;
(b) The address for each party, including, if known, telephone and fax numbers and email addresses;
(c) If applicable, the names, addresses, telephone and fax numbers and, if known, email address of the known representative for each party;
(d) A statement setting forth the nature of the claim including the relief sought and the amount involved;
(f) The locale requested, if the arbitration agreement does not specify one.
(b) The AAA shall provide notice to the parties (or their representatives if so named) of the receipt of a demand when the administrative filing requirements have been satisfied. The date on which the filing requirements are satisfied shall establish the date of filing the dispute for administration however, any disputes in connection with the AAA's determination may be decided by the arbitrator.
If a filing does not satisfy the Filing Requirements set forth above, the AAA shall acknowledge to all named parties receipt of the incomplete filing and inform the parties of the filing deficiencies. If the deficiencies are not cured by the due date specified by the AAA, the filing may be returned to the filing party.

(c) Answers and Counterclaims
(i) Answering Statement: A respondent may file an answering statement with the AAA within 14 calendar days after notice of the filing of the demand is sent by the AAA. The respondent shall, at the time of any such filing, send a copy of the answering statement to the claimant and to all other parties to the arbitration. If no answering statement is filed within the stated time, respondent will be deemed to deny the claim.
Failure to file an answering statement shall not operate to delay the arbitration.

(ii) Counterclaim: A respondent may file a counterclaim within 14 calendar days after notice of the filing of the demand is sent by the AAA.
The Respondent shall, at the time of any such filing, send a copy of the counterclaim to the claimant and to all other parties to the arbitration.
If a counterclaim is asserted, it shall include a statement setting forth the nature of the counterclaim including the relief sought and the

amount involved. The filing fee as specified in the applicable AAA Fee Schedule must be paid at the time of the filing of any counterclaim.

If the counterclaim filing is deficient, and not cured by the date specified by the AAA, it may be returned to the filing party.

(d) Parties are encouraged to provide descriptions of their claims, in any document filed pursuant to this section, in sufficient detail to make the circumstances of the dispute clear to the arbitrator.

R-5. Filing Requirements Under a Submission Agreement

Parties to any existing dispute, who have not previously agreed to use these Rules, may commence arbitration under these Rules by either filing online through AAA WebFile or by filing at any office of the AAA a written submission to arbitrate under these Rules, signed by the parties. The submission shall contain:

(a) The names and addresses for each party and their representatives, including, if known, telephone and fax numbers and email addresses;
(b) A statement setting forth the nature of the dispute including the relief sought, the amount involved and the claims and counterclaims asserted by the parties. Unless the parties state otherwise in the submission, all claims and counterclaims will be deemed to be denied by the other party;

(c) The hearing locale, if agreed upon by the parties;
(d) The appropriate filing fee for each claim or counterclaim as provided in the AAA Fee Schedule applicable at the time of filing.
Parties are encouraged to provide descriptions of their claims in sufficient detail to make the circumstances of their dispute clear to the arbitrator.

R-6. Changes of Claim or Counterclaim

(a) A party may at any time prior to the close of the hearing or by the date established by the arbitrator increase or decrease the amount of its claim or counterclaim. Written notice of the change of claim amount must be provided to the AAA and all parties.
(b) Any new or different claim or counterclaim, as opposed to an increase or decrease in the amount of a pending claim or counterclaim, shall be made in writing and filed with the AAA, and a copy shall be provided to the other party, who shall have a period of 14 calendar days from the date of such transmittal within which to file an answer to the proposed change of claim or counterclaim with the AAA. After the arbitrator is appointed no new or different claim or counterclaim may be submitted without the arbitrator's consent.

R-7. Consolidation or Joinder

(a) If the parties are unable to agree to consolidate related arbitrations or to the joinder of parties to an ongoing arbitration, the AAA shall directly appoint a single arbitrator (hereinafter referred to as the R-7 arbitrator) for the limited purpose of deciding whether related arbitrations should be consolidated or parties joined.
(i) To request consolidation of arbitrations, the requesting party must have filed a demand for arbitration, including the applicable arbitration provision(s) from the parties' contract(s) and must provide a written request for consolidation which outlines the reasons for such request. It is the requesting party's responsibility to provide a copy of the request to all parties.

(ii) To request joinder of parties, the requesting party must file a written request to join parties to an existing arbitration which provides the names and contact information for such parties, names and contact information for the parties' representatives, if known and the reasons for such request. It is the requesting party's responsibility to provide a copy of the request to all parties.

(b) Absent agreement of all parties, the R-7 arbitrator appointed under this Rule shall not be an arbitrator who is appointed to any pending case involved in the consolidation request at issue.
(c) If the R-7 arbitrator determines that separate arbitrations shall be consolidated or that the joinder of additional parties is permissible, that arbitrator may also establish a process for selecting arbitrators for any ongoing or newly constituted case and, unless agreed otherwise by the parties, the allocation of responsibility for arbitrator compensation among the parties, subject to reapportionment by the arbitrator(s) appointed to the newly constituted case in the final arbitration award.
(d) The AAA may take reasonable administrative action to accomplish the consolidation or joinder as directed by the arbitrator.
(e)The AAA shall maintain a panel of construction attorneys who have experience with consolidation or joinder issues. All arbitrators appointed to hear requests under this Rule shall be appointed from that panel, unless the parties agree otherwise.

R-8. Interpretation and Application of Rules

The arbitrator shall interpret and apply these Rules insofar as they relate to the arbitrator's powers and duties. When there is more than one arbitrator and a difference arises among them concerning the meaning or application of these Rules, it shall be decided by a majority vote. If that is not possible, either an arbitrator or a party may refer the question to the AAA for final decision. All other rules shall be interpreted and applied by the AAA.

R-9. Jurisdiction

(a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.
(b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.
(c) A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.
R-10. Mediation

(a) At any stage of the proceedings, the parties may agree to conduct a mediation conference under the AAA Construction Industry Mediation
Procedures in order to facilitate settlement. Unless requested by all parties, the mediator shall not be an arbitrator appointed to the case. Should
the parties jointly request that the arbitrator serve as a mediator, the arbitrator's consent to do so is also required.
(b) If the case is initially filed for arbitration and the parties subsequently agree to mediate, unless the parties agree otherwise, or in the absence
of party agreement, by the decision of the arbitrator, the arbitration process shall not be stayed while the mediation is pending.
R-11. Administrative Conference

(a) Before the appointment of the arbitrator, any party may request, or the AAA, in its discretion, may
schedule an administrative conference with a representative of the AAA and the parties and/or their
representatives.
(b) The purpose of the administrative conference is to organize and expedite the arbitration, explore
administrative details, establish an efficient means of selecting an arbitrator, ascertain the parties'
preferred arbitrator qualifications and to consider mediation as a dispute resolution option and to address
other appropriate concerns of the parties, including but not limited to joinder of parties, consolidation of
related cases, changes to claims and the possibility of proceeding through the submission of documents
only as set out in optional Section D of the Rules, may also be explored.
(c) Administrative conferences may be convened, at the AAA's discretion or at the request of any party, at
other times during the case to address case management matters that do not require the arbitrator's
involvement.
R-12. Fixing of Locale (the city, county, state, territory and, if applicable, country of the arbitration)

The parties may mutually agree to the locale where the arbitration is to be held. Any disputes regarding the locale must be submitted to the AAA
and all other parties within 14 calendar days from the date of the AAA's initiation of the case or the date established by the AAA. Disputes

regarding locale shall be determined in the following manner:

(a) When the parties' arbitration agreement is silent with respect to locale and the parties are unable to agree upon a locale, the locale shall be
the city nearest to the site of the project in dispute, as determined by the AAA, subject to the power of the arbitrator to finally determine the
locale within 14 calendar days after the date of the preliminary hearing.

(b) When the parties' arbitration agreement requires a specific locale, absent the parties' agreement to change it, the locale shall be that
specified in the arbitration agreement.
(c) If the reference to a locale in the arbitration agreement is ambiguous and the parties are unable to agree to a specific locale, the AAA shall
determine the locale, subject to the power of the arbitrator to finally determine the locale within 14 calendar days after the date of the preliminary
hearing.

The arbitrator, at the arbitrator's sole discretion, shall have the authority to conduct special hearings for document production purposes or otherwise at other locations if reasonably necessary and beneficial to the process.

R-13. Date, Time and Place of Hearing

The arbitrator shall set the date, time, and place for each hearing and/or conference. The parties shall respond to requests for hearing dates in a timely manner, be cooperative in scheduling the earliest practicable date, and adhere to the established hearing schedule. The AAA shall provide notice of hearing to the parties at least 7 calendar days in advance of the hearing date, unless otherwise agreed by the parties or so

directed by the arbitrator.

R-14. Arbitrator Appointment from National Construction Panel

If the parties have not appointed an arbitrator and have not provided any other method of appointment, the arbitrator shall be appointed in the following manner:

(a) Immediately after the filing of the submission or the answering statement or the expiration of the time within which the answering statement is to be filed, the AAA shall send simultaneously to each party to the dispute an identical list of 10 (unless the AAA decides that a different number is appropriate) names of persons chosen from the National Construction Panel. The parties are encouraged to agree on an arbitrator from the submitted list and to advise the AAA of their agreement.
(b) If the parties are unable to agree upon an arbitrator, each party to the dispute shall have 14 calendar days from the transmittal date in which to strike names objected to, number the remaining names in order of preference, and return the list to the AAA.

The parties shall not exchange arbitrator selection lists. If a party does not return the list within the time specified by the AAA, all persons named therein shall be deemed acceptable by that party. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an arbitrator to serve.

(c) If the parties fail to agree on any of the persons named, or if acceptable arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the AAA shall have the authority to make the appointment from among other members of the National Construction Panel without the submission of additional lists.

(d) Unless the parties agree otherwise, when there are two or more claimants or two or more respondents, the AAA may appoint all the arbitrators without the submission of lists.

(e) In a three-arbitrator case, the parties shall first attempt to agree on the professional backgrounds of the composition of the arbitration panel. If the parties are unable to agree, then the AAA shall determine the professional composition of the panel, taking into account any preferences expressed by the parties.

The AAA may provide the parties with lists, separated by industry, in order for the parties to select arbitrators from different professional background. If separate lists are used, the total number of names will be no less than 15, unless the AAA determines otherwise.

R-15. Direct Appointment by a Party

(a) If the agreement of the parties names an arbitrator or specifies a method of

appointing an arbitrator,
that designation or method shall be followed. The notice of appointment, with the name, address and
telephone number and fax number and email, if known, of the arbitrator, shall be filed with the AAA by
the appointing party. Upon the request of any appointing party, the AAA shall submit a list of members
of the National Construction Panel from which the party may, if it so desires, make the appointment.

(b) Where the parties have agreed that each party is to name one arbitrator, the arbitrators so named must
meet the standards of R-20 with respect to impartiality and independence unless the parties have
specifically agreed pursuant to R-20(a) that the party-appointed arbitrators are to be non-neutral and need
not meet those standards.
(c) If the agreement specifies a period of time within which an arbitrator shall be appointed and any party
fails to make the appointment within that period, the AAA shall make the appointment.
(d) If no period of time is specified in the agreement, the AAA shall notify the party to make the
appointment. If within 14 calendar days after such notice has been sent, an arbitrator has not been
appointed by a party, the AAA shall make the appointment.

R-16. Appointment of Chairperson by Party-Appointed Arbitrators or Parties

(a) If, pursuant to Section R-15, either the parties have directly appointed arbitrators, or the arbitrators
have been appointed by AAA and the parties have authorized those arbitrators to appoint a chairperson
within a specified time and no appointment is made within that time or any agreed extension, the AAA
may appoint the chairperson.
(b) If no period of time is specified for appointment of the chairperson and the party-appointed arbitrators
or the parties do not make the appointment within 14 calendar days from the date of the appointment of
the last party-appointed arbitrator, the AAA may appoint the chairperson.
(c) If the parties have agreed that their party-appointed arbitrators shall appoint the chairperson from the
National Construction Panel, the AAA shall furnish to the party-appointed arbitrators, in the manner
provided in Section R-14, a list selected from the National Construction Panel, and the appointment of the
chairperson shall be made as provided in that Section.

R-17. Nationality of Arbitrator in International Arbitration

Where the parties are nationals of different countries, the AAA, at the request of any party or on its own

initiative, may appoint as arbitrator a national of a country other than that of any of the parties. The

request must be made before the time set for the appointment of the arbitrator as agreed by the parties or

set by these rules.

R-18. Number of Arbitrators

(a) If the parties have not agreed on the number of arbitrators, the dispute shall be heard and determined by one arbitrator, unless the AAA, in its discretion, directs that three arbitrators be appointed. A party may request three arbitrators in the demand or answer, which request the AAA will consider in exercising its discretion regarding the number of arbitrators appointed to the dispute.
(b) Any request for a change in the number of arbitrators as a result of an increase or decrease in the amount of a claim must be made to the AAA and the other parties to the arbitration no later than 7 calendar days after receipt of the R-6 required notice of change of claim amount If the parties are unable to agree with respect to the request for a change in the number of arbitrators, the AAA shall make that determination.
R-19. Disclosure

(a) Any person appointed or to be appointed as an arbitrator as well as the parties and their representatives shall disclose to the AAA, as promptly as practicable, any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Such obligation shall remain in effect throughout the arbitration.

(b) Upon receipt of such information from the arbitrator or another source, the AAA shall communicate the information to the parties and, if it deems it appropriate to do so, to the arbitrator and others.

(c) In order to encourage disclosure by arbitrators, disclosure of information pursuant to this Section R-19 is not to be construed as an indication that the arbitrator considers that the disclosed circumstances is likely to affect impartiality or independence.

R-20. Disqualification of Arbitrator

(a) Any arbitrator shall be impartial and independent and shall perform his or her duties with diligence and in good faith, and may be subject to disqualification for
(i) Partiality or lack of independence,
(ii) Inability or refusal to perform his or her duties with diligence and in good faith, and
(iii) Any grounds for disqualification provided by applicable law.
The parties may agree in writing, however, that arbitrators directly appointed by a party pursuant to Section R-15 shall be non-neutral, in which case such arbitrators need not be impartial or independent and shall not be subject to disqualification for partiality or lack of

independence.

(b) Upon objection of a party to the continued service of an arbitrator, or on its own initiative, the AAA shall determine whether the arbitrator should be disqualified under the grounds set out above, and shall inform the parties of its decision, which decision shall be conclusive.

R-21. Communication with Arbitrator and the AAA

(a) No party and no one acting on behalf of any party shall communicate ex-parte with an arbitrator except as follows. A party or anyone acting
on behalf of a party may communicate ex-parte with a candidate for direct appointment pursuant to Section R-15 in order to advise the
candidate of the general nature of the controversy, and of the anticipated proceedings and to discuss the candidate's qualifications, availability,
or independence in relation to the parties or to discuss the suitability of candidates for selection as a third arbitrator where the parties or party-designated arbitrators are to participate in that selection.
(b) R-21(a) does not apply to arbitrators directly appointed by the parties who, pursuant to R-20(a), the parties have agreed in writing are non-neutral. Where the parties have so agreed under R-20(a), the AAA shall as an administrative practice suggest to the parties that they agree
further that R-21(a) should nonetheless apply prospectively.

(c) In the course of administering an arbitration, the AAA and the parties or anyone acting on behalf of any of the parties may communicate with
each other either jointly or individually.
(d) As set forth in R-41, unless otherwise instructed by the AAA or by the arbitrator, any documents submitted by any party to the AAA or to the arbitrator shall simultaneously be provided to the other party or parties to the arbitration.

R-22. Vacancies

(a) If for any reason an arbitrator is unable to perform the duties of the office, the AAA may, on proof
satisfactory to it, declare the office vacant. Vacancies shall be filled in accordance with the applicable
provisions of these Rules.
(b) In the event of a vacancy in a panel of neutral arbitrators after the hearings have commenced, the
remaining arbitrator or arbitrators may continue with the hearing and determination of the controversy,
unless the parties agree otherwise.
(c) In the event of the appointment of a substitute arbitrator, the panel of arbitrators shall determine in its
sole discretion whether it is necessary to repeat all or part of any prior hearings.
R-23. Preliminary Management Hearing

As promptly as practicable after the selection of the arbitrator(s), a preliminary management hearing shall
be held among the parties and/or their attorneys or other authorized representatives and the arbitrator(s).

Unless the parties agree otherwise or the arbitrator specifically directs otherwise, the preliminary
management hearing will be conducted by telephone rather than in person.
At the Preliminary Management Hearing the matters to be discussed may include:
(a)The issues to be arbitrated, including:

(i) review of claims as set forth in the parties' claims and counterclaims;
(ii) the schedule for specification of any undisclosed claims or counterclaims;
(iii) deadlines for amending claims, if the arbitrator deems appropriate;

(iv) whether claims for attorneys' fees, costs, interest or any other similar claims exist;
(v) if any limitations exist on the arbitrator's authority to award any of the remedies sought.
(b) The identification of any ongoing, related litigation or other dispute resolution.
(c) The procedures for maintaining an efficient and cost effective dispute resolution process, including:
(i) the extent to which testimony may be admitted at the hearing telephonically, over the internet, by
affidavit, or by any other means;
(ii) the overall cost of the dispute resolution process as structured through this management hearing;
(iii) exhibit management;
(iv) a review of possible cost- and time-saving steps.
(d) The date, time, place, and estimated duration of the hearings.
(e) The scope and timing of exchange of information
(f) The need for pre- or post- hearing submissions and schedules for the same if applicable.
(g) The schedule for submission of witness lists.
(h) The form of award.
(i) Any other matters the arbitrator deems appropriate.
The arbitrator shall promptly issue written orders reflecting his or her decisions on the above matters and
may conduct additional conferences when the need arises.

R-24. Exchange of Information

(a) At the request of any party or at the discretion of the arbitrator, consistent with the expedited nature of arbitration, the arbitrator may direct
(i) the production of documents and other information, and
(ii) the identification of any witnesses to be called.

(b) At least 7 calendar days prior to the hearing, or by the date established by the arbitrator, the parties shall exchange copies of all exhibits they
intend to submit at the hearing.
(c) The arbitrator is authorized to resolve any disputes concerning the exchange of information.
(d) There shall be no other discovery, except as indicated herein, unless so ordered by the arbitrator in exceptional cases.

R-25. Attendance at Hearings

The arbitrator and the AAA shall maintain the privacy of the hearings unless the law provides to the
contrary. Any person having a direct interest in the arbitration is entitled to attend hearings. The arbitrator
shall otherwise have the power to require the exclusion of any witness, other than a party or other
essential person, during the testimony of any other witness. It shall be discretionary with the arbitrator to
determine the propriety of the attendance of any person other than a party and its representative.

R-26. Representation

Any party may participate without representation (pro-se), or by counsel or any other representative of that party's choosing, unless such choice
is prohibited by applicable law. A party intending to have representation shall

notify the other party and the AAA of the name, telephone number
and address, and email address if available of the representative at least 7 calendar days prior to the date set for the hearing at which that

person is first to appear. When such a representative initiates an arbitration or responds for a party, notice is deemed to have been given.

R-27. Oaths

Before proceeding with the first hearing, each arbitrator may take an oath of office and, if required by
law, shall do so. The arbitrator may require witnesses to testify under oath administered by any duly
qualified person and, if it is required by law or requested by any party, shall do so.

R-28. Stenographic Record

(a) Any party desiring a stenographic record shall make arrangements directly with a stenographer and shall notify the other parties of these
arrangements at least 7 calendar days in advance of the hearing. The requesting party or parties shall pay the cost of the record.
(b) No other means of recording the proceedings will be permitted absent the agreement of the parties or per the direction of the arbitrator.
(c.) If the transcript or any other recording is agreed by the parties and determined by the arbitrator to be the official record of the proceeding, it must be provided to the arbitrator and made available to the other parties for inspection, at a date, time, and place determined by the arbitrator.

(d) The arbitrator may resolve any disputes with regard to apportionment of the costs of the stenographic record or other recording.
R-29. Interpreters

Any party wishing an interpreter shall make all arrangements directly with the interpreter and shall

assume the costs of the service.

R-30. Postponements of Hearings

The arbitrator for good cause shown may postpone any hearing upon agreement of the parties, upon

request of a party, or upon the arbitrator's own initiative.

R-31. Arbitration in the Absence of a Party or Representative

Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or
representative who, after due notice, fails to be present or fails to obtain a postponement. An award shall

not be made solely on the default of a party. The arbitrator shall require the party who is present to submit

such evidence as the arbitrator may require for the making of an award.

R-32. Conduct of Proceedings

(a) The claimant shall present evidence to support its claim. The respondent shall then present evidence
supporting its defense. Witnesses for each party shall also submit to questions from the arbitrator and the
adverse party. The arbitrator has the discretion to vary this procedure, provided that the parties are treated
with equality and that each party has the right to be heard and is given a fair opportunity to present its
case.
(b) The arbitrator, exercising his or her discretion, shall conduct the proceedings with a view toward expediting the resolution of the dispute and
may direct the order of proof, bifurcate proceedings, and direct the parties to focus their presentations on issues the decision of which could
dispose of all or part of the case.
When deemed appropriate, the arbitrator may also allow for the presentation of evidence by alternative

means including video conferencing, internet communication, telephonic conferences and means other

than an in-person presentation. Such alternative means must still afford a full opportunity for all parties to

present any evidence that the arbitrator deems material and relevant to the resolution of the dispute and

when involving witnesses, provide that such witness submit to examination.

(c) The arbitrator may entertain motions, including motions that dispose of all or part of a claim, or that may expedite the proceedings, and may
also make preliminary rulings and enter interlocutory orders.

(d) The parties may agree to waive oral hearings in any case.
R-33. Evidence

(a) The parties may offer such evidence as is relevant and material to the dispute and shall produce such
evidence as the arbitrator may deem necessary to an understanding and determination of the dispute.
Conformity to legal rules of evidence shall not be necessary.
(b) The arbitrator shall determine the admissibility, relevance, and materiality of the evidence offered.
The arbitrator may request offers of proof and may reject evidence deemed by the arbitrator to be
cumulative, unreliable, unnecessary, or of slight value compared to the time and expense involved. All
evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where: 1) any
of the parties is absent, in default, or has waived the right to be present, or 2) the parties and the
arbitrators agree otherwise.
(c) The arbitrator shall take into account applicable principles of legal privilege, such as those involving
the confidentiality of communications between a lawyer and client.
(d) An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or
independently. Parties who request that an arbitrator sign a subpoena shall provide a copy of the request and proposed subpoena to the other
parties to the arbitration simultaneously upon making the request to the arbitrator.
R-34. Evidence by Affidavit and Post-hearing Filing of Documents or Other Evidence

(a) The arbitrator may receive and consider the evidence of witnesses by

declaration or affidavit, and
shall give it such weight as the arbitrator deems it entitled to after consideration of any objection made to
its admission.
(b) If the parties agree or the arbitrator directs that documents or other evidence be submitted to the

arbitrator after the hearing, the documents or other evidence, unless otherwise agreed by the parties and
the arbitrator, shall be filed with the AAA for transmission to the arbitrator. All parties shall be afforded
an opportunity to examine and respond to such documents or other evidence.

R-35. Inspection or Investigation

An arbitrator finding it necessary to make a site inspection or other investigation in connection with the arbitration shall set the date and time for
such inspection or investigation and shall direct the AAA to so notify the parties. Any party who so desires may be present at such an inspection
or investigation. Absent agreement of the parties, the arbitrator shall not undertake a site inspection unless all parties are present. In the event
of a case proceeding in the absence of a party pursuant to Section R- 31 of these Rules, agreement of the parties for the arbitrator to proceed
without all parties' present is not necessary so long as sufficient notice of the inspection or investigation is provided.

R-36. Interim Measures

(a) The arbitrator may take whatever interim measures he or she deems necessary, including injunctive
relief and measures for the protection or conservation of property and disposition of perishable goods.
(b) Such interim measures may be taken in the form of an interim award, and the arbitrator may require
security for the costs of such measures. If it has been determined that an interim award is needed, the
arbitrator shall establish a reasonable due date for issuing the interim award. In the event an arbitrator
does not promptly establish such a due date, the AAA shall set the due date.
(c) A request for interim measures addressed by a party to a judicial authority shall not be deemed
incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.

(d) The arbitrator shall have the discretion to apportion costs associated with the application for any
interim relief in the interim award or in the final award.
R-37. Closing of Hearing

(a) The arbitrator shall specifically inquire of all parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving
negative replies or if satisfied that the record is complete, the arbitrator shall declare the hearing closed.

(b) If documents or responses are to be filed as provided in Section R-34 (b) , or if briefs are to be filed, the hearing shall be declared closed as
of the final due date set by the arbitrator for the receipt of documents, responses, or briefs. If no documents, responses or briefs are to be filed,
the arbitrator shall declare the hearings closed as of the date of the last hearing

(including telephonic hearings). If the case was heard without
any oral hearings, the arbitrator shall close the hearings upon the due date established for receipt of the final submission.
(c) The time limit which the arbitrator is required to make the award shall commence, in the absence of other agreements by the parties, upon
the closing of the hearing. The AAA may extend the time limit for the rendering of the award only in unusual and extreme circumstances.

R-38. Reopening of Hearing

The hearing may be reopened on the arbitrator's initiative, or by direction of the arbitrator upon

application of a party, at any time before the award is made. If reopening the hearing would prevent the

making of the award within the specific time agreed to by the parties in the arbitration agreement, the

matter may not be reopened unless the parties agree to an extension of time. When no specific date is

fixed by agreement of the parties, the arbitrator shall have 30 calendar days from the closing of the

reopened hearing within which to make an award (14 calendar days if the case is governed by the Fast

Track Procedures).

R-39. Waiver of Rules

Any party who proceeds with the arbitration after knowledge that any provision or requirement of these

Rules has not been complied with and who fails to state an objection in writing shall be deemed to have
waived the right to object.

R-40. Extensions of Time

(a) The parties may modify any period of time by mutual agreement, provided that any such modification that adversely affects the efficient
resolution of the dispute is subject to review and approval by the arbitrator. The AAA or the arbitrator may for good cause extend any period of
time established by these rules, except as set forth in R-37 (c).
(b) The AAA shall notify the parties of any extension.
R-41. Serving of Notice

(a) Any papers, notices, or process necessary or proper for the initiation or continuation of an arbitration under these rules; for any court action
in connection therewith, or for the entry of judgment on any award made under these rules, may be served on a party by mail addressed to the
party or its representative at the last known address or by personal service, in or outside the state where the arbitration is to be held, provided
that reasonable opportunity to be heard with regard thereto has been granted to the party.

(b) The AAA, the arbitrator and the parties may also use overnight delivery, electronic fax transmission (fax) or electronic mail (email) to give the notices required by these rules. Where all parties and the arbitrator agree, notices may be transmitted by other methods of communication.

(c) Unless otherwise instructed by the AAA or by the arbitrator, any documents submitted by any party to the AAA or to the arbitrator shall simultaneously be provided to the other party or parties to the arbitration.

R-42. Majority Decision

When the panel consists of more than one arbitrator, unless required by law or by the arbitration agreement, a majority of the arbitrators must make all decisions; however, in a multi-arbitrator case, if all parties and all arbitrators agree, the chair of the panel may make procedural decisions.

R-43. Time of Award

The award shall be made promptly by the arbitrator and, unless otherwise agreed by the parties or specified by law, no later than 30 calendar days from the date of closing the hearing, or, if oral hearings have been waived, from the due date set for receipt of the parties' final statements and proofs .

R-44. Form of Award

(a) Any award shall be in writing and signed by a majority of the arbitrators. It shall be executed in the form and manner required by law.
(b) In all cases, unless waived by agreement of the parties, the arbitrator shall provide a concise written financial breakdown of any monetary awards and, if there are non-monetary components of the claims or counterclaims, the arbitrator shall include a line item disposition of each non-monetary claim or counterclaim
(c) The parties may request a specific form of award, including a reasoned opinion, an abbreviated opinion, findings of fact or conclusions of law no later than the conclusion of the first Preliminary Management Hearing. If the parties agree on a form of award other than that specified in R44 (b) of these Rules the arbitrator shall provide the form of award agreed upon. If the parties disagree with respect to the form of the award, the arbitrator shall determine the form of award. After the conclusion of the Preliminary Management Hearing, the parties may not change the form of the award without the arbitrator's express consent. In such event, the arbitrator shall confirm the nature of the change to the form of award.
R-45. Scope of Award

(a) The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, equitable relief and specific performance of a contract.
(b) In addition to the final award, the arbitrator may make other decisions, including interim,

interlocutory, or partial rulings, orders, and awards. In any interim, interlocutory, or partial award, the

arbitrator may assess and apportion the fees, expenses, and compensation related to such award as the
arbitrator determines is appropriate.

(c) In the final award, the arbitrator shall assess fees, expenses, and compensation as provided in Sections
R-52, R-53, and R-54. The arbitrator may apportion such fees, expenses, and compensation among the
parties in such amounts as the arbitrator determines is appropriate.
(d) The award of the arbitrator may include:
(i) interest at such rate and from such date as the arbitrator may deem appropriate; and
(ii) an award of attorneys' fees if all parties have requested such an award or it is authorized by law or
their arbitration agreement
R-46. Award Upon Settlement

(a) If the parties settle their dispute during the course of the arbitration and if the parties so request, the arbitrator may set forth the terms of the
settlement in a "consent award." A consent award must include an allocation of arbitration costs, including administrative fees and expenses as
well as arbitrator fees and expenses.

(b) The consent award shall not be released to the parties until all administrative fees and all arbitrator compensation amounts have been paid
in full.
R-47. Delivery of Award to Parties

Parties shall accept as notice and delivery of the award the placing of the award or a true copy thereof in
the mail addressed to the parties or their representatives at the last known address, personal or electronic
service of the award, or the filing of the award in any other manner that is permitted by law.

R-48. Modification of Award

(a) Within 20 calendar days after the transmittal of an award, the arbitrator on his or her initiative, or any
party, upon notice to the other parties, may request that the arbitrator correct any clerical, typographical,
technical or computational errors in the award. The arbitrator is not empowered to re-determine the merits
of any claim already decided.
(b) If the modification request is made by a party, the other parties shall be given 10 calendar days to
respond to the request. The arbitrator shall dispose of the request within 20 calendar days after transmittal
by the AAA to the arbitrator of the request and any response thereto.
(c) If applicable law provides a different procedural time frame, that procedure shall be followed.
R-49. Release of Documents

The AAA shall, upon the written request of a party to the arbitration, furnish to that party, at its expense, copies or certified copies of papers in
the AAA's possession that are not determined by the AAA to be privileged or confidential.

R-50. Withdrawal of Claims or Counterclaims

(a) Once the AAA has provided notice to the parties that the filing requirements for a claim or counterclaim have been met, no claim or
counterclaim may be withdrawn unless the parties agree or the arbitrator consents.

(b) Disputes regarding whether a claim or counterclaim is withdrawn with or without prejudice may be decided by the arbitrator.
R-51. Applications to Court and Exclusion of Liability

(a) No judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a
waiver of the party's right to arbitrate.
(b) Neither the AAA nor any arbitrator in a proceeding under these Rules is a necessary or proper party in
judicial proceedings relating to the arbitration.
(c) Parties to these Rules shall be deemed to have consented that judgment upon the arbitration award
may be entered in any federal or state court having jurisdiction thereof.
(d) Parties to an arbitration under these Rules shall be deemed to have consented that neither the AAA nor
any arbitrator shall be liable to any party in any action for damages, injunctive or declaratory relief for
any act or omission in connection with any arbitration under these rules.
(e) Parties to an arbitration under these Rules may not call the arbitrator, the AAA or AAA employees as
a witness in litigation or any other proceeding relating to the arbitration. The arbitrator, the AAA and
AAA employees are not competent to testify as witnesses in any such proceeding.
R-52. Administrative Fees

As a not-for-profit organization, the AAA shall prescribe filing and other administrative fees and service
charges to compensate it for the cost of providing administrative services. The fees in effect when the fee
or charge is incurred shall be applicable.

The filing fee shall be advanced by the party or parties, subject to final apportionment by the arbitrator in
the award.

The AAA may, in the event of extreme hardship on the part of any party, defer or reduce the
administrative fees.

R-53. Expenses

The expenses of witnesses for either side shall be paid by the party producing such witnesses. All other
expenses of the arbitration, including required travel and other expenses of the arbitrator, AAA
representatives, and any witness and the cost of any proof produced at the direct request of the arbitrator,
shall be borne equally by the parties, unless they agree otherwise or unless the arbitrator in the award
assesses such expenses or any part thereof against any specified party or parties.

R-54. Neutral Arbitrator's Compensation

(a) Arbitrators shall be compensated at rate consistent with the arbitrator's stated rate of compensation.
(b) Absent an agreement of the parties otherwise, or as determined by an arbitrator appointed under the auspices of Section R-7, each party
shall share equally in the compensation of the arbitrator, subject to reapportionment in the final award. In the event that multiple parties are

participating in the arbitration through a single representative, the AAA may consider them a single party for the purposes of allocating arbitrator compensation.
(c) If there is disagreement concerning the terms of compensation, an appropriate rate shall be established with the arbitrator by the Association and confirmed to the parties.

(d) Any arrangement for the compensation of a neutral arbitrator shall be made through the AAA and not directly between the parties and the arbitrator.

(e) The arbitrator's requests for payment shall be made available to the parties upon request.

R-55. Deposits

(a) The AAA may require the parties to deposit in advance of any hearings such sums of money as it deems necessary to cover the expense of the arbitration, including the arbitrator's fee, if any, and shall render an accounting to the parties and return any unexpended balance at the conclusion of the case.
(b) Other than in cases where the arbitrator serves for a flat fee, deposit amounts requested will be based on estimates provided from the arbitrator. The arbitrator will determine the estimated amount of deposits using the information provided by the parties with respect to the complexity or length of each case.
(c) Upon the request of any party, the AAA shall request from the arbitrator an itemization or explanation of the arbitrator's request for deposits.

R-56. Remedies for Nonpayment

(a) If arbitrator compensation or administrative charges have not been paid in full, the AAA may so inform the parties in order that one of them may advance the required payment.

(b) Upon receipt of information from the AAA that payment for administrative charges or deposits for arbitrator compensation have not been paid in full, to the extent the law allows, a party may request that the arbitrator issue an order directing what measures might be taken in light of a party's non-payment.
Such measures may include limiting a party's ability to assert or pursue their claim. In no event, however, shall a party be precluded from defending a claim or counterclaim. The arbitrator must provide the party opposing a request for such measures with the opportunity to respond prior to making any such determination. In the event that the arbitrator grants any request for relief which limits any party's participation in the arbitration, the arbitrator shall require the party who is making a claim and who has made appropriate payments, to submit such evidence as the arbitrator may require for the making of an award.

(c) Upon receipt of information from the AAA that full payments have not been received, the arbitrator, on the arbitrator's own initiative, may order the suspension of the arbitration. If no arbitrator has yet been appointed, the AAA may suspend the proceedings.
(d) If arbitrator's compensation or administrative fees remain unpaid after a determination to suspend an arbitration due to non payment, the arbitrator has the authority to terminate the proceedings. Such an order shall be in writing and signed by the arbitrator.

Procedures for the Resolution of Disputes through Document Submission

D-1. Applicability

(a) In any case, regardless of claim size, the parties may agree to waive in-person hearings and resolve the dispute through submission of
documents to one arbitrator. Such agreement should be confirmed in writing no later than the deadline for the filing of an answer.
(b) If one party makes a request to use the Procedures for the Resolution of Disputes through Document Submission
(D-Procedures) and the opposing party is unresponsive, the arbitrator shall have the power to determine whether to proceed under the D-
Procedures. If both parties seek to use the D- Procedures after the appointment of an arbitrator, the arbitrator must also consent to the process.

(c) When parties agree to the D-Procedures, the procedures in Sections D-1 through D-4 of these Rules shall supplement other portions of
these rules which are not in conflict with the D-Procedures.
D-2. Preliminary Management Hearing

Within 14 calendar days of confirmation of the arbitrator's appointment, the arbitrator shall convene a preliminary management hearing, via
conference call, video conference or internet, to establish a fair and equitable procedure for the submission of documents, and, if the arbitrator

deems appropriate, a schedule for one or more telephonic or electronic conferences.

D-3. Removal From the D Procedures

(a) The arbitrator has the discretion to remove the case from the D-Procedures if the arbitrator determines that an in-person hearing is
necessary.
(b) If the parties agree to in-person hearings after a previous agreement to proceed under the D-Procedures, the arbitrator shall conduct such
hearings. If a party seeks to have in-person hearing after agreeing to the D-Procedures, but there is not agreement among the parties to
proceed with in-person hearings, the arbitrator shall resolve the issue after the parties have been given the opportunity to provide their
respective positions on the issue.
D-4. Time of Award

(a) The arbitrator shall establish the date for either final written submissions or a final telephonic or electronic conference. Such date shall
operate to close the hearing and the time for the rendering of the award shall commence.
(b) Unless the parties have agreed to a form of award other than that set forth in Rule R-44 (b) , when the parties have agreed to resolve their
dispute by the D-Procedures, the arbitrator shall render the award within 14 calendar days from the date the hearing is closed.
(c) If the parties agree to a form of award other than that described in Rule R-44 (b), the arbitrator shall have 30 calendar days from the date the
hearing is declared closed in which to render the award.
(d) The award is subject to all other provisions of the Regular Track of these Rules which pertain to awards.
FAST TRACK PROCEDURES

F-1. Fast Track Applicability

The Fast Track Procedures shall apply to all two party cases where no party's disclosed claim or counterclaim exceeds $75,000.

If a claim or counterclaim is amended to exceed $75,000, the case will be administered under the Regular Track Procedures (or Large Complex Case Procedures, if applicable) unless all parties agree that the case may continue to be processed under the Fast Track Procedures.

The AAA, in its discretion, may reassign a matter to the Regular Track Procedures or, if applicable, Large Complex Case Procedures, upon the occurrence of any of the following events:

(a) The case is to be decided by more than one arbitrator;
(b) The parties agree to any information exchange beyond that permitted by Section F-8;
(c) The timing of the case exceeds the Time Standards set forth in Section F-12; or

(d) Hearing time exceeds what is allowable under Section F-11.
Where no party's claim exceeds $10,000, exclusive of interest, attorneys' fees and arbitration costs, the dispute shall be resolved by submission of documents, unless any party requests an oral hearing, or the arbitrator determines that an oral hearing or conference call is necessary. The arbitrator shall establish a fair and equitable procedure for the submission of documents, as set forth in the D-Procedures of these Rules.

F-2. Answers and Counterclaims

If an answer or counterclaim is to be filed, it shall be filed within 7 calendar days after notice of the filing of the demand is sent by the AAA. All other requirements of Section R-4 apply.

F- 3. Limitation on Extensions

(a) In the absence of extraordinary circumstances, the AAA may grant no more than one 7 calendar day extension of the time in which to respond to a demand for arbitration or a counterclaim as provided in F-2.

(b) All other requests for extensions of time are subject to Sections F-12 and R-40 of these Rules, as applicable.
F-4. Changes of Claim or Counterclaim

(a) A party may increase or decrease the amount of its claim or counterclaim up to 7 calendar days prior to the first scheduled hearing, subject to the provisions of F-1. Such changes must be made in writing and provided to the AAA and the opposing party.

(b) Any new or different claim or counterclaim, as opposed to an increase or decrease in the amount of a pending claim or counterclaim, shall be made in writing and filed with the AAA, and a copy shall be provided to the other party, who shall have a period of 7 calendar days from the date of such transmittal within which to file an answer to the proposed change of claim or counterclaim with the AAA. After the arbitrator is appointed no new or different claim or counterclaim may be submitted without with the arbitrator's consent.

F-5. Appointment and Qualification of Arbitrator

(a) Immediately after the filing of the submission or the answering statement or the expiration of the time within which the answering statement
is to be filed, the AAA shall simultaneously submit to each party an identical list of 5 names from the Construction Panel from which one
arbitrator shall be appointed.
(b) The parties are encouraged to agree to an arbitrator from this list, and to advise the Association of their agreement.
(c) If the parties cannot agree upon an arbitrator, each party may strike up to two names from the list and rank the remaining names in order of
preference. The list shall be returned to the AAA within 7 calendar days of the AAA's transmission of the list. If a party does not return the list by
the due date, all names shall be deemed acceptable to that party.

(d) The AAA will appoint the agreed-upon arbitrator, or in the event the parties cannot agree on an arbitrator, will designate the arbitrator from
among those names not stricken. The parties will be given notice by the AAA of the appointment of the arbitrator, who shall be subject to
disqualification for the reasons specified in R-20.
(e) Within the time period established by the AAA, the parties shall notify the AAA of any objection to the arbitrator appointed. Any objection by a
party to the arbitrator shall be for cause and shall be confirmed in writing to the AAA with a copy to the other party or parties.
(f) Absent agreement of the parties, the arbitrator shall not have served as the mediator in the mediation phase of the instant proceeding.
(g) In the event the AAA is unable to appoint an arbitrator from the first list submitted, the AAA is empowered to appoint an arbitrator without the
submission of additional lists.
F-6. Serving of Notice for Hearing

In addition to notice being provided according to the means specified in R-41, parties shall accept notice of hearings, including preliminary
hearings, by telephone, email, AAA WebFile, fax or mail.

F-7. Preliminary Telephone Management Hearing

(a) A preliminary telephone conference shall be held among the parties or their representatives, and the arbitrator within 10 business days from
the confirmation of the arbitrator's appointment.
(b) During this conference, the arbitrator shall direct the parties' preparations and presentations so that Fast Track F-12 Time Standard can be
met. Arrangements made during the Preliminary Management Hearing shall be confirmed in writing to the parties.
F-8. Exchange of Information

At least 5 business days prior to the hearing or no later than the date established by the arbitrator, the parties shall (a) exchange directly
between themselves copies of all exhibits, affidavits and any other information they intend to submit at the hearing, and (b) identify all witnesses
they intend to call at the hearing. The arbitrator is authorized to resolve any disputes concerning the exchange of information.

F-9. Discovery

There shall be no discovery, except as provided in F-8 or as ordered by the arbitrator in exceptional cases.

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F-10. Date, Time and Place of Hearing

In cases in which a hearing is to be held, the arbitrator shall set the date, time, and place of the hearing. The hearing shall be set so that the time standards in F-12 will be satisfied. The AAA will notify the parties in advance of the hearing date.

F-11. The Hearing

The hearing should not exceed one day. For good cause shown, the arbitrator may schedule additional time, which shall not exceed the equivalent of one day. The arbitrator shall schedule any additional time so as to comply with the F-12 Time Standards. At the discretion of the arbitrator, this additional time can take the form of an in-person meeting, a conference call, or some other means of taking testimony, provided

that each party has the right to be heard and is given a fair opportunity to present its case.

F-12. Time Standards

The hearing shall be closed no later than 45 calendar days after of the date of the preliminary telephone conference, unless all parties and the arbitrator agree otherwise and such agreement is memorialized by the arbitrator prior to the expiration of the initial 45 day period. Such report shall include the reason for the extension of the Time Standards. The AAA may extend the Time Standards in the event the parties agree to AAA mediation.

F-13. Time of Award

The award shall be rendered not later than 14 calendar days from the date of the closing of the hearing or, if oral hearings have been waived,

from the due date established for the receipt of the parties' final statements and proofs.

F-14. Neutral Arbitrator's Compensation

Arbitrators serving on Fast Track cases will receive compensation at rates established by the AAA.

PROCEDURES FOR LARGE, COMPLEX CONSTRUCTION DISPUTES

L-1. Applicability

Unless the parties agree otherwise, the Procedures for Large, Complex Construction Disputes (hereinafter LCC) shall apply to all cases administered by the AAA under the Construction Industry Arbitration Rules in which the disclosed claim or counterclaim of any party is $1,000,000 or more, exclusive of claimed interest, attorneys' fees and arbitration fees and costs. Parties may agree to use these Procedures in cases involving claims or counterclaims under 1,000,000 or in cases involving non-monetary claims. The LCC Procedures are designed to complement the Regular Track of these Rules. To the extent there is any conflict between the Regular Track and the LCC procedures, the LCC Procedures shall control.

L-2. Administrative Conference

Prior to the dissemination of a list of potential arbitrators, the AAA shall, unless the parties agree otherwise, conduct an administrative conference with the parties and/or their attorneys or other representatives by

conference call. The conference call will take place within 14
calendar days after the notice that the administrative filing requirements have
been satisfied. In the event the parties are unable to agree on a
mutually acceptable time for the conference, the AAA may contact the parties
individually to discuss the issues contemplated herein. Such
administrative conference shall be conducted for the following purposes and for
such additional purposed as the parties or the AAA may deem
appropriate:

(a) to obtain additional information about the nature and magnitude of the dispute
and the anticipated length of hearing and scheduling;
(b) to discuss the views of the parties about the technical and other
qualifications of the arbitrator as well as an efficient method for selecting the
arbitrator;

(c) to obtain conflicts statements from the parties;
(d) to consider, with the parties, whether mediation or other non-adjudicative
methods of dispute resolution might be appropriate;
(e) to identify whether there are other related arbitrations or parties which may
requested to consolidate or join the arbitration;

(f) to discuss means and methods for cost effective case management; and
(g) to discuss any other items which may facilitate the management of a complex
arbitration.
L-3. Arbitrators

(a) Large, Complex Construction Cases shall be heard and determined by either one
or three arbitrators, as may be agreed upon by the parties.
If the parties are unable to agree, three arbitrators shall hear the case.
(b) The parties are encouraged to agree upon a method for selection of the
arbitrator(s). The AAA shall appoint arbitrator(s) by the method
agreed upon by the parties.
(c) If the parties are unable to agree on a method of appointment, the AAA shall
appoint arbitrator from the Large, Complex Construction Case
Panel, in the manner provided in the Regular Construction Industry Arbitration
Rules. The AAA shall determine the number of names on the list
(s).
(d) Absent agreement of the parties, the arbitrator shall not have served as the
mediator in the mediation
phase of the instant proceeding.
L-4. Preliminary Management Hearing

As promptly as practicable after the confirmation of the appointment of the
arbitrator, a preliminary management hearing shall be held among
the parties and/or their attorneys or other representatives and the arbitrator.
Unless the parties agree otherwise, or unless the arbitrator
determines that an in-person hearing is necessary, the preliminary hearing will be
conducted by telephone conference call rather than in person.

In addition to the items enumerated in R-23, at the preliminary management hearing
for LCC cases, the matters to be considered shall include,
without limitation:

(a) service of a detailed statement of claims, damages and defenses, a statement of
the issues asserted by each party and positions with
respect thereto, and any legal authorities the parties may wish to bring to the
attention of the arbitrator;
(b) stipulations to uncontested facts;

(c) the extent to which discovery shall be conducted;
(d) exchange and pre-marking of those documents which each party believes may be offered at the hearing;
(e) the identification and availability of witnesses, including experts, and such matters with respect to witnesses including their biographies and expected testimony as may be appropriate;
(f) whether, and the extent to which, any sworn statements and/or depositions may be introduced;
(g) the extent to which hearings will proceed on consecutive days;
(h) whether a stenographic or other official record of the proceedings shall be maintained;
(i) the possibility of utilizing mediation or other non-adjudicative methods of dispute resolution; and
(j) the procedure for the issuance of subpoenas; and
(k) such other items which may facilitate the efficient and cost effective management of the arbitration.
The arbitrator may issue an agenda in advance of the preliminary management hearing outlining the scope of the hearing in effort to efficiently manage the process and eliminate superfluous issues.

By agreement of the parties and/or order of the arbitrator, the pre-hearing activities and the hearing procedures that will govern the arbitration

will be memorialized in a Scheduling and Procedure Order.

L-5. Management of Proceedings

(a) The arbitrator shall take such steps as the arbitrator may deem necessary or desirable to avoid delay and to achieve a just, efficient and cost-effective resolution of Large, Complex Construction Cases.

(b) Parties shall cooperate in the exchange of documents, exhibits and information within such party's control if the arbitrator considers such production to be consistent with the goal of achieving a just, efficient and cost effective resolution of a Large, Complex Construction Case.

(c) The parties may conduct such discovery as may be agreed to by all the parties provided, however, that the arbitrator may place such limitations on the conduct of such discovery as the arbitrator shall deem appropriate. If the parties cannot agree on production of document and other information, the arbitrator, consistent with the expedited nature of arbitration, may establish the extent of the discovery.

(d) At the discretion of the arbitrator, upon good cause shown and consistent with the expedited nature of arbitration, the arbitrator may order depositions of, or the propounding of interrogatories to such persons who may possess information determined by the arbitrator to be necessary to a determination of the matter.

(e) The parties shall exchange copies of all exhibits they intend to submit at the hearing 10 calendar days prior to the hearing unless the arbitrator determines otherwise.

(f) The exchange of information pursuant to this Rule, as agreed by the parties and/or directed by the arbitrator, shall be included within the Scheduling and Procedure Order.
(g) The arbitrator is authorized to resolve any disputes concerning the exchange of

information.
(h) Generally hearings will be scheduled on consecutive days or in blocks of consecutive days in order to maximize efficiency and minimize costs.

L-6. Form of Award

In addition to the award requirements set forth in R-44 (a) and (b) unless the parties agree otherwise, the arbitrator shall issue a reasoned award.

Administrative Fee Schedules (Standard and Flexible Fee)

The AAA has two administrative fee options for parties filing claims or counterclaims, the Standard Fee Schedule and Flexible Fee Schedule. The Standard Fee Schedule has a two payment schedule, and the Flexible Fee Schedule has a three payment schedule which offers lower initial filing fees, but potentially higher total administrative fees of approximately 12% to 19% for cases that proceed to a hearing. The administrative fees of the AAA are based on the amount of the claim or counterclaim. Arbitrator compensation is not included in this schedule. Unless the parties agree otherwise, arbitrator compensation and administrative fees are subject to allocation by the arbitrator in the award.

Fees for incomplete or deficient filings: Where the applicable arbitration agreement does not reference the AAA, the AAA will attempt to obtain the agreement of the other parties to the dispute to have the arbitration administered by the AAA. However, where the AAA is unable to obtain the agreement of the parties to have the AAA administer the arbitration, the AAA will administratively close the case and will not proceed with the administration of the arbitration. In these cases, the AAA will return the filing fees to the filing party, less the amount specified in the fee schedule below for deficient filings.

Parties that file demands for arbitration that are incomplete or otherwise do not meet the filing requirements contained in these Rules shall also be charged the amount specified below for deficient filings if they fail or are unable to respond to the AAA's request to correct the deficiency.

Fees for additional services: The AAA reserves the right to assess additional administrative fees for services performed by the AAA beyond those provided for in these Rules which may be required by the parties' agreement or stipulation.

Standard Fee Schedule

An Initial Filing Fee is payable in full by a filing party when a claim, counterclaim, or additional claim is filed. A Final Fee will be incurred for all cases that proceed to their first hearing. This fee will be payable in advance at the time that the first hearing is scheduled. This fee will be refunded at the conclusion of

the case if no hearings have occurred. However, if the Association is not notified at least 24 hours before the time of the scheduled hearing, the Final Fee will remain due and will not be refunded.

These fees will be billed in accordance with the following schedule:
Amount of Claim Initial Filing Fee Final Fee

Above $0 to $10,000 $775 $200
Above $10,000 to $75,000 $975 $300
Above $75,000 to $150,000 $1,850 $750
Above $150,000 to $300,000 $2,800 $1,250
Above $300,000 to $500,000 $4,350 $1,750
Above $500,000 to $1,000,000 $6,200 $2,500
Above $1,000,000 to $5,000,000 $8,200 $3,250
Above $5,000,000 to $10,000,000 $10,200 $4,000
Above $10,000,000
Base fee of $12,800 plus .01% of the
amount above $10,000,000
Fee Capped at $65,000
$6,000
Nonmonetary Claims1 $3,350 $1,250
Consent Award2
Deficient Claim Filing Fee3 $350
Additional Services4
1 This fee is applicable only when a claim or counterclaim is not for a monetary amount. Where a monetary claim amount is not known, parties will be

required to state a range of claims or be subject to the highest possible filing fee (see fee range for claims above $10,000,000).

2 The AAA may assist the parties with the appointment of an arbitrator for the sole purpose of having their Consent Award signed.

3 The Deficient Claim Filing Fee shall not be charged in cases filed by a consumer in an arbitration governed by the Supplementary
Procedures for the Resolution of Consumer-Related Disputes, or in cases filed by an Employee who is submitting their dispute to
arbitration pursuant to an employer promulgated plan.

4 The AAA may assess additional fees where procedures or services outside the Rules sections are required under the parties' agreement or by stipulation.

Fees are subject to increase if the amount of a claim or counterclaim is modified after the initial filing date. Fees are subject to decrease if the amount of a

claim or counterclaim is modified before the first hearing.

The minimum fees for any case having three or more arbitrators are $2,800 for the Initial Filing Fee, plus a $1,250 Final Fee. Expedited Procedures are applied in any case where no disclosed claim or counterclaim exceeds $75,000, exclusive of interest and arbitration costs.

Parties on cases filed under either the Flexible Fee Schedule or the Standard Fee Schedule that are held in abeyance for one year will be assessed an annual abeyance fee of $300. If a party refuses to pay the assessed fee, the other party or parties may pay the entire fee on behalf of all parties, otherwise the matter will be administratively closed.

For more information, please contact your local AAA office, case management center, or our Customer Service desk at 1-800-778-7879.

Refund Schedule for Standard Fee Schedule

The AAA offers a refund schedule on filing fees connected with the Standard Fee

Schedule. For cases with claims up to $75,000, a minimum filing fee of
$350 will not be refunded. For all other cases, a minimum fee of $600 will not be refunded. Subject to the minimum fee requirements, refunds will be calculated as follows:

> 100% of the filing fee, above the minimum fee, will be refunded if the case is settled or withdrawn within five calendar days of filing.

> 50% of the filing fee, will be refunded if the case is settled or withdrawn between six and 30 calendar days of filing.

> 25% of the filing fee will be refunded if the case is settled or withdrawn between 31 and 60 calendar days of filing.

No refund will be made once an arbitrator has been appointed (this includes one arbitrator on a three-arbitrator panel). No refunds will be granted on awarded cases.
Note: The date of receipt of the demand for arbitration with the AAA will be used to calculate refunds of filing fees for both claims and counterclaims.

Flexible Fee Schedule

A non-refundable Initial Filing Fee is payable in full by a filing party when a claim, counterclaim, or additional claim is filed. Upon receipt of the Demand for Arbitration, the AAA will promptly initiate the case and notify all parties as well as establish the due date for filing of an Answer, which may include a Counterclaim. In order to proceed with the further administration of the arbitration and appointment of the arbitrator(s), the appropriate, non-refundable

Proceed Fee outlined below must be paid.

If a Proceed Fee is not submitted within ninety (90) days of the filing of the Claimant's Demand for Arbitration, the Association will administratively close the file and notify all parties.

No refunds or refund schedule will apply to the Filing or Proceed Fees once received.

The Flexible Fee Schedule below also may be utilized for the filing of counterclaims. However, as with the Claimant's claim, the counterclaim will not be presented to the arbitrator until the Proceed Fee is paid.

A Final Fee will be incurred for all claims and/or counterclaims that proceed to their first hearing. This fee will be payable in advance when the first hearing is scheduled, but will be refunded at the conclusion of the case if no hearings have occurred. However, if the Association is not notified of a cancellation at least 24 hours before the time of the scheduled hearing, the Final Fee will remain due and will not be refunded.

All fees will be billed in accordance with the following schedule:

Amount of Claim

Final Fee
Proceed Fee
Initial Filing Fee
Above $0 to $10,000
$200
$475
$400
Above $10,000 to $75,000
$300
$500

$625
Above $75,000 to $150,000
$750
$1250
$850
Above $150,000 to $300,000
$1,250
$2125
$1,000
Above $300,000 to $500,000
$1,750
$3,400
$1,500
Above $500,000 to $1,000,000
$2,500
$4,500
$2,500
Above $1,000,000 to $5,000,000
$3,250
$6,700
$2,500
Above $5,000,000 to $10,000,000
$4,000

$3,500
$8,200

Above $10,000,000 $4,500 $10,300 plus .01% of claim
amount over $10,000,000 up to
$65,000 $6,000
Nonmonetary1 $2,000 $2,000 $1,250
Consent Award2
Deficient Claim Filing Fee $350
Additional Services3

1 This fee is applicable only when a claim or counterclaim is not for a monetary amount. Where a monetary claim amount is not known, parties will be required to state a range of claims or be subject to the highest possible filing fee (see fee range for claims above $10,000,000).

2 The AAA may assist the parties with the appointment of an arbitrator for the sole purpose of having their Consent Award signed.

3 The AAA reserves the right to assess additional administrative fees for services performed by the AAA beyond those provided for in these Rules and which

may be required by the parties' agreement or stipulation.

For more information, please contact your local AAA office, case management center, or our Customer Service desk at 1-800-778-7879. All fees are subject to increase if the amount of a claim or counterclaim is modified after the initial filing date. Fees are subject to decrease if the amount of a claim or counterclaim is modified before the first hearing.

The minimum fees for any case having three or more arbitrators are $1,000 for the Initial Filing Fee; $2,125 for the Proceed Fee; and $1,250 for the Final Fee.

Under the Flexible Fee Schedule, a party's obligation to pay the Proceed Fee shall

remain in effect regardless of any agreement of the parties to stay, postpone or otherwise modify the arbitration proceedings. Parties that, through mutual agreement, have held their case in abeyance for one year will be assessed an annual abeyance fee of $300. If a party refuses to pay the assessed fee, the other party or parties may pay the entire fee on behalf of all parties, otherwise the matter will be closed.

Note: The date of receipt by the AAA of the demand for arbitration will be used to calculate the ninety (90) day time limit for payment of the Proceed Fee.

There is no Refund Schedule in the Flexible Fee Schedule.

Hearing Room Rental

The fees described above do not cover the cost of hearing rooms, which are available on a rental basis. Check with the AAA for availability and rates.

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Arbitration rules of the court of arbitration for private construction law in Germany

Section 1: Introductory provisions

§ 1 – Scope of application

Arbitration agreement

(1) These arbitration rules apply to disputes which should be decided according to the parties' agreement, whereby any recourse to courts of law is excluded by the court of arbitration for private construction law in Germany in accordance with the provisions of the following arbitration rules.

(2) When the value in dispute exceeds EUR 50,000, regular arbitration proceedings shall be implemented.

(3) The court of arbitration shall implement simplified arbitration proceedings when the value in dispute amounts to up to EUR 50.000. The simplified proceedings differ from the regular proceedings in terms of the number of arbitrators and the fees (§ 2 Para 3 et seq., § 5 Para 1 + 2, § 16 Para 2, § 20 Para 3).

Validity of the Code of Civil Procedure

(4) German law and the provisions of the Code *(Zivilprozessordnung ZPO)* of Civil Procedure (*ZPO*) apply to the arbitration proceedings unless divergent provisions are made in the following.

(5) Arbitration proceedings held before the court of arbitration for private construction law in Germany are held in German.

§ 2 – Institution of arbitration proceedings

Written notification

(1) The party that wants to institute the arbitration proceedings (plaintiff) has to notify the other party (defendant) and the court of arbitration for private construction law in Germany in writing in accordance with § 3.

Beginning of the arbitration proceedings

(2) The arbitration proceedings begin on the day on which the notification of the institution of arbitration proceedings is obtained by the plaintiff and the court.

Content of the notification

(3) The notification of the institution of arbitration proceedings must contain the following details:

a) the request to solve the dispute by means of arbitration proceedings;
b) the names and addresses of the parties;
c) a reference to the arbitration agreement asserted;
d) a reference to the contract or the legal relationship from which the dispute results or to which it refers;
e) the general subject matter of the proceedings and the claim, details of the amount of the value in dispute and the statement of claim (§ 253 Code of Civil Procedure)
f) an advance payment amounting to a daily rate in simplified arbitration proceedings or the payment of court fees in due arbitration proceedings.

(4) The court of arbitration for private construction law in Germany must immediately make a declaration upon receipt of its mandate once it has been informed of its appointment. The declaration must be submitted in writing to both parties.

§ 3 – Correspondence

Written declarations

(1) All the declarations made by the parties or their authorised agents who are instituting the arbitration proceedings should be communicated against furnishing of a proof of service. The effectiveness of written declarations which are communicated in a different way remains unaffected.

(2) Para 1 does not apply to simplified arbitration proceedings.

§ 4 – Representation

Attorneys of record

(1) The representation of the parties by attorneys of record is admissible.

(2) Party representatives not acting as legal representatives of their party must identify themselves with a document of written authority upon request.

Paragraph II: Composition of the court of arbitration

§ 5 – Number of arbitrators

Tripartite court of arbitration

(1) In the simplified arbitration proceedings the dispute is resolved by one arbitrator. Depending on each case the dispute will be dealt with and resolved by a building expert or a lawyer.

Impartiality

(2) In case of due arbitration proceedings the court of arbitration consists of at least three referees: one or two building experts and one or two referees qualified for holding judicial office or an equivalent foreign professional training. HOAI (German schedule of fees for architects and engineers), disputes can, upon application of the parties (regardless of the amount of the value in dispute), be dealt with by one or two arbitrators.

(3) The court of arbitration does not act as a representative of the parties, but instead observes the office conferred upon it according to the best of its knowledge and belief in an impartial way.

Co-operation with the Dutch court of arbitration for construction

(4) In disputes within the due arbitration proceedings during which one party is represented which has its place of business or permanent domicile in the Netherlands, one party can, upon application, nominate an arbitrator from Raad van Arbitrage voor de Bouwbedrijven in Nederland.

Disputes based on HOAI

(5) Disputes which are purely concerned with the schedule of fees for architects can, upon application of the parties (regardless of the amount of the value in dispute), be dealt with by one or two arbitrators.

§ 6 – Appointment of arbitrators

(1) The court of arbitration for private construction law in Germany appoints the arbitrators. These arbitrators are deemed commissioned by both parties.

(2) The presiding arbitrator, the arbitrators and the employees are obliged to observe secrecy.

Declaration of acceptance

(3) The court of arbitration for private construction law in Germany must immediately declare its acceptance of the mandate once it has been informed of its appointment. The declaration must be submitted in writing to both parties.

Paragraph III: Rejection and replacement of arbitrators

§ 7 – Declaration of the rejection of the office of arbitrator

Suspicion of partiality

Each arbitrator is obliged to decline his/her appointment if he/she has a relationship with a party as described in § 41 Code of Civil Procedure or if the preconditions of § 42 Code of Civil Procedure (Suspicion of partiality) are fulfilled; the same applies if an arbitrator is unable to carry out his/her office with immediately effect.

§ 8 – Rejection of the arbitrator by one party

Preconditions for rejection

(1) An arbitrator can be rejected if reasons exist which give rise to justified doubts concerning his/her impartiality and independence.

Time at which rejection takes place

(2) The rejection of an arbitrator must take place with immediate effect once the reason is known. If this does not take place despite the fact that the reason for rejection is known, then this is regarded as a waiver of the right of refusal.

(3) The rejection must be informed to the other party and the court of arbitration. The announcement must be made in writing (§ 3) setting forth the reasons.

§ 9 – Refusal proceedings

Recourse to the court

(1) If one party rejects the arbitrator, then he/she must, if the opposing party does not agree to the refusal, bring about the decision with respect to the declaration of refusal by recourse to the competent higher regional court (§ 1037 Para 1 and 3, 1062 Para 1 No. 1 Code of Civil Procedure). The decision must be requested with immediate effect and 14 days following the statement of the other party regarding the refusal at the latest.

Right of refusal

(2) If the application is not made within this period of time, then this is regarded as a waiver of the right of refusal. For the refusal of the German court of arbitration § 1032 Code of Civil Procedure applies in combination with § 41, 42, 43 and 44 Para 4 Code of Civil Procedure.

§ 10 – Replacement of an arbitrator

(1) If an arbitrator is prevented from exercising his/her function due to death or illness, another arbitrator can be appointed by the court of arbitration.

(2) This does not have any further influence on the course of the proceedings.

Paragraph IV: Arbitration proceedings

§ 11 – Fundamental procedural principles

(1) The arbitration proceedings are in private.

Filing of the statement of claim

(2) As soon as recourse has been made to the court of arbitration for private construction law in Germany, it appoints the arbitrators with immediate effect.

Expedition principle

(3) The court of arbitration must ensure that the arbitration proceedings are carried out swiftly. The parties have to submit their means of prosecuting a case and their means of defence completely and as early as is necessary according to the respective stage of proceedings corresponding to a careful conduct of a case aiming at the furtherance of proceedings.

Passing on of the statement of claim

(4) The court of arbitration for private construction law in Germany passes the statement of claim on to the defendant with the request that he/she makes a statement within a period of time set by the court whilst citing the judicial evidence and files a due application.

Date of court hearing

(5) If the statement of defence is present or the time set for its submission has expired, then the court determines the date of the court hearing. The parties must be summoned to this hearing by means of a registered letter. A period of 14 days must separate the arrival of the summons and the first hearing. In urgent cases the court may curtail the period and summon the parties by telegraph, telex or facsimile.

Preparation of the court hearing

(6) The court of arbitration for private construction law in Germany should already prior to the court hearing see to all arrangements which appear necessary to ensure that the lawsuit can be resolved in one hearing if possible.

No binding arrangement as regards the motions for the admission of evidence

(7) The court of arbitration is not bound bymotions for the admission of evidence the parties' It can allow evidence to be taken by one of the three arbitrators as the commissioned arbitrator or refuse the parties' motions to take admission of evidence when and insofar as it deems them irrelevant, unnecessary or an attempt to delay the proceedings.

Discretion of the court of arbitration

(8) Otherwise the court of arbitration regulates the proceedings at its discretion. It can make the beginning and continuation of its activities contingent upon the advance payment of the appropriate court fee.

§ 12 – Place of the hearing

Place of hearing

The place of the hearing is the domicile of the court of arbitration for private construction law in Germany; the court of arbitration may decide upon a different location. If a local inspection needs to be made, then it must, if possible, be combined with the date of the hearing.

§ 13 – Oral proceedings

Oral proceedings

(1) As a rule, oral proceedings take place. Written proceedings can be ordered in appropriate cases if the parties declare their consent.

Preparation in writing and hearing of the parties

(2) The hearing should be prepared in advance by means of written pleadings. The parties and their representatives must be heard during the hearing.

Assessment of the parties' behaviour

(3) If one of the parties informed of the facts of the case does not make any declaration regarding the actual allegations of the opposite party or does not appear despite a due summons to appear without an adequate excuse, then the court of arbitration continues with the proceedings and makes an award based on the findings established up to that point in time.

§ 14 – Court record

Court record of oral hearing

(1) A record of the hearing before the court of arbitration for private construction law in Germany must be kept (either in writing or with sound-recording tape). The parties' applications and their pleadings are to be recorded within this record insofar as they are deemed essential by the court of arbitration and are not already contained in the parties' written pleadings. Minutes must also be recorded concerning the questioning of witnesses and experts and the implementation of local inspections.

Record kept by commissioned arbitrators

(2) If individual arbitrators are entrusted with the task of taking evidence, then they have to produce the necessary record.

Obligation of secrecy

§ 15 – Obligation of secrecy

The arbitrators as well as the experts and other persons called in by the court of arbitration are obliged to observe secrecy regarding the facts which have been revealed as a result of their involvement in the arbitration proceedings.

§ 16 – Passing of an order as regards the arbitration award

Deliberation and order

(1) Only the arbitrators may be present during the deliberation on the passing of an order regarding the arbitration award.

Majority vote

(2) During simplified arbitration proceedings the arbitrator who has been commissioned arbitrates.

(3) During due arbitration proceedings the court of arbitration arbitrates upon a majority-vote basis.

§ 17 – Form and effect of the arbitration award

Written form

(1) The arbitration award must be formulated in writing.

Obligation to file supporting argument

(2) The court of arbitration must publish the reasons for the arbitration award unless the parties have expressly waived this requirement.

Signing of the award

(3) The arbitration award must be signed by the arbitrators in accordance with § 1054 Para 1 Code of Civil Procedure and must contain the details of the date and the location upon which it was passed and the location of the arbitral proceedings in terms of § 1043 Para 1 Code of Civil Procedure.

Distribution of the verdict

(4) A copy of the arbitration award verdict must be delivered in due form to each party (§ 1054 Code of Civil Procedure).

Effect of the verdict

(5) The arbitration award has the effect of a final and conclusive court judgement (§ 1055 Code of Civil Procedure).

Preservation of court records

(6) The court records compiled will, unless returned to the parties as their property upon application, be preserved by the court of arbitration for five years upon conclusion of the proceedings.

Delivery of an enforceable official copy

(7) It is deemed to be agreed that the local court or regional court is responsible for the delivery of the enforceable official copy of the arbitration award that is competent for the defendant's place of business or, in the event that this is outside of Germany, for the defendant's legal residence. If this is outside of Germany, then the local or regional court competent for the court of arbitration is deemed elected by the parties.

§ 18 – Agreement or other reasons for the termination of the proceedings

Premature agreement between the parties

(1) If the parties reach an agreement concerning the settlement of the dispute prior to the pronouncement of the award, then the court of arbitration either has to issue an order regarding the termination of arbitration proceedings or, if applied for by both parties and agreed to by the court of arbitration, a record should be taken of the agreement in the form of an arbitration award with a form of wording which has been agreed upon by the parties. In this case the arbitration award is not subject to any substantiation.

Termination of the arbitration

(2) If it becomes unnecessary or impossible to continue the arbitration proceedings for reasons different than those mentioned in Section (1) before that arbitration award has been issued, then the court of arbitration must inform the parties of its intention to order the termination of proceedings. The court of arbitration is entitled to issue such an order unless one of the parties raises justified objections against this means of proceeding.

Communication of the order to discontinue the proceedings

(3) The court of arbitration communicates copies of the court order signed by the arbitrators concerning the discontinuation of the arbitration proceedings or the arbitration award using an agreed form of wording

Paragraph VI: Costs of the arbitration proceedings

§ 19 – Determination of costs

(1) The court of arbitration determines the costs of the arbitration proceedings.

§ 20 – Value in dispute and fees

Divergent fee ruling

(1) A fee of the court of arbitration for a due process of law amounts to 30/10 of the fees in accordance with the German Federal Attorneys' Fees Act (Bundesrechtsanwaltsgebührenordnung BRAGO). In the event of disputes regarding architects' fees, the costs of the fees amount to 13/10 or 20/10 depending on the agreed number of arbitrators if a reduced number of arbitrators was agreed upon in accordance with § 1 (4).

Exceptional cases

(2) Expenses, cost of debt etc. are calculated separately in accordance with the principles of BRAGO or in accordance with the costs actually accrued.

(3) In the event of simplified arbitration proceedings it will be settled upon the basis of the time actually spent in accordance with the daily rates that currently apply. The latter can be asked for with the court of arbitration for private construction law in Germany.

Consent of the parties

(4) If in exceptional cases the court of arbitration for private construction law in Germany deems a divergent fee ruling absolutely necessary, then this must be justified in writing by the court of arbitration prior to the first court hearing.

Fees incurred in the event of premature termination

(5) If regular proceedings have been instituted, then the following fees are charged by the court:

a) 0.5 x fee until presentation of the statement of claim in accordance with § 19 of this contract.

b) 1.0 x fee following the filing of the statement of claim in accordance with § 19 of this contract.

c) 1.5 x fee following the filing of the statement of defence in accordance with § 19 of this contract.

d) 2 x fee following the oral hearing.

e) A further fee for the pronouncement of an order to take evidence.

f) A further fee for the issuance of an arbitration award which does not accrue if it is an arbitration award that is not justified due to an agreement between the parties in accordance with § 18 Para 1 of this contract.

Necessary expenses

(6) The parties must bear all the necessary costs for the arbitrators as well as the costs which are incurred due to the questioning of witnesses and experts, for requests for opinions and other information.

Liability of the parties

(7) The parties are jointly and severally liable vis-à-vis the court of arbitration for private construction law in Germany.

Advance payments

(8) The court of arbitration for private construction law in Germany may request advance payments to cover costs which may be incurred at every stage of the proceedings.

(9) Each party is to pay half of the advance payments. If one party does not pay this share, then the court may request the other party to pay the amount in question. If the other party also does not pay this amount, the court terminates the proceedings. If the advance payments for judicial evidence to be obtained are not effected, the provisions of the Code of Civil Procedure shall apply.

JCT/CIMAR

Construction Industry Model Arbitration Rules

2005

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JCT Supplementary and Advisory Procedures

Procedures in Part A are mandatory. They are incorporated into and form part of the 'JCT 2005
edition of the Construction Industry Model Arbitration Rules (CIMAR)'. From 2005, where an
arbitration provision is included in a JCT contract it provides for it to be conducted in accordance
with the 2005 edition of the Rules.

Procedures in Part B are advisory and do not apply unless expressly agreed between the Parties
after arbitral proceedings between them have begun. These procedures provide for the imposition
of stricter timescales than those prescribed by some arbitration rules or those frequently observed

in practice, these stricter timescales to apply unless other periods are ordered at the preliminary
meeting (see Rule 6). Part B also contains detailed procedures to be followed in the event that the
prescribed or ordered timescales are not observed.

Part A: Mandatory Procedures

Procedures under Rule 6

Under Rule 6.2

6.2
.1 Rule 6.2 shall be complied with by each party within 14 days of the date on which the
arbitrator's acceptance of the appointment is notified to the parties.
Under Rule 6.3

6.3
.1 The procedural meeting referred to in Rule 6.3 shall be convened by the arbitrator within 21
days of the date on which the arbitrator's acceptance of the appointment is notified to the
parties unless prior to the expiry of that period it has been decided in accordance with Rule
6.6 that such a meeting is unnecessary in which case the matters referred to in Rules 6.3
and 6.4 shall be directed by the arbitrator having regard to any written representations on
behalf of the parties submitted in accordance with a timetable directed by the arbitrator.
6.3
.2 Unless the parties have agreed which of Rules 7,8 or 9 is to apply, Rule 8 shall apply unless
the arbitrator (having regard to Rules 7.1,8.1 and 9.1, the material submitted under Rule 6.2
and any other representations on behalf of the parties) directs that Rule 9 shall apply.
Part B: Advisory Procedures

Procedures issued under Rule 6.5 relating to Rule 7 (short hearing)

Rule 7.2

7.2
.1 Unless otherwise directed by the arbitrator under Rule 6.3, each party shall submit the
written statements of case referred to in Rule 7.2 to the other party and to the arbitrator not
later than 7 days before the date of the hearing referred to in Rule 7.3.
Rule 7.3

7.3
.1 The hearing referred to in Rule 7.3 shall be held within 21 days of the date on which Rule 7
becomes applicable at such place and such time as the arbitrator directs under Rule 6
unless delayed for reasons beyond the reasonable control of the arbitrator or of the parties.
No evidence other than that provided in accordance with Rules 7.2 and 7.5 may be adduced
by the parties at or subsequent to the hearing unless otherwise directed or allowed by the
arbitrator.
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Rule 7.5

7.5
.1 The substance of any expert evidence to be adduced under Rule 7.5 must be submitted in
writing along with the written statements of case referred to in Rule 7.2.
Rule 7.6

7.6
.1 The last of the steps referred to in Rule 7.6 shall be the date on which the hearing is
concluded.
Procedures issued under Rule 6.5 relating to Rule 8 (documents only)

Rules 8.2 and 8.3

8.2
.1 Unless otherwise directed by the arbitrator under Rule 6.3, the written statements of case
referred to in Rule 8.2 and the statements of reply referred to in Rule 8.3 shall be submitted
to the other party and the arbitrator in accordance with the following timetable.
(a)
The Claimant shall submit his statement of case within 21 days after the date on which Rule 8 becomes applicable.
(b)
The Respondent shall submit his statement of case within 28 days after submission of
the Claimant's statement of case.
(c)
The Claimant may submit a statement in reply within 14 days after submission of the

Respondent's statement of case limited to matters raised in the Respondent's statement of case and shall do so where the Respondent by his statement of case claims from the Claimant any remedy (including but not limited to a claim for money).
(d)
The Respondent may submit a statement in reply within 14 days after submission of the Claimant's statement in reply (if any) limited to matters raised in the Claimant's
statement in reply.
8.2
.2 Subject to Rule 8.2.3, the timetable for submission of statements shall conclude when the
period referred to in either Rule 8.2.1(c) or, if applicable, Rule 8.2.1(d) has expired.
8.2
.3 If either party fails to submit in accordance with the timetable provided for by Rule 8.2.1 a
statement required of him by that Rule, the arbitrator shall direct that his award will be made
on the basis of the material submitted unless within 7 days of the service of that direction on
the party concerned that party submits the statement required of him or by writing shows
sufficient cause why the arbitrator should not proceed to make his award in accordance with
that direction (see Rule 11.3) and:
(a)
if that party submits the statement required of it in accordance with the arbitrator's
direction, the timetable under Rule 8.2.1 will continue as at the date of its

submission;
(b)
if that party shows sufficient cause why the arbitrator should not proceed to make his
award in accordance with that direction, the arbitrator shall direct a date by which the
statement required of it shall be submitted and that date shall form part of the timetable under Rule 8.2.1;
(c)
if that party fails to comply with the arbitrator's direction, the timetable for the
submission of statements shall conclude 7 days after the service of that direction on
the party concerned.
Rule 8.5

8.5
.1 The last of the steps referred to in Rule 8.5 shall be the date on which the timetable for the
submission of statements concludes.
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Procedures issued under Rule 6.5 relating to Rule 9 (full procedure)

Rule 9.2

9.2
.1 Unless otherwise directed by the arbitrator under Rule 6.3, the written statements referred to
in Rule 9.2 shall be exchanged with the other party and the arbitrator in accordance with the
following timetable.
(a)
The Claimant shall exchange his statement of claim within 28 days after the date on

which Rule 9 becomes applicable.
(b)
The Respondent shall exchange his statement of defence and statement of
counterclaim (if any) within 28 days after submission of the Claimant's statement of
claim.
(c)
The Claimant may exchange a statement of reply to the Respondent's statement of
defence limited to matters raised in the statement of defence within 28 days after
submission of the Respondent's statement of defence and shall within that period
exchange a statement of defence to the Respondent's statement of counterclaim (if
any).
(d)
The Respondent may exchange a statement of reply to the Claimant's statement of
defence to counterclaim (if any) limited to matters raised in the statement of
counterclaim within 14 days after exchange of that statement by the Claimant.
9.2
.2 Subject to Rule 9.2.3, the timetable for the submission of statements shall conclude when
the period referred to in either Rule 9.2.1(c) or, if applicable, Rule 9.2.1(d) has expired.
9.2
.3 If either party fails to exchange in accordance with the timetable provided for by Rule 9.2.1 a
written statement of claim, defence, or reply that he is required to exchange by that Rule, the
arbitrator shall direct that the timetable for the exchange of statements will conclude 7 days

after the service of that direction on the party concerned unless within that period that party
exchanges the statement required of him or by writing shows sufficient cause why the
timetable for the exchange of statements should not conclude in accordance with that
direction (see Rule 11.3) and:

(a)
if that party exchanges the statement required of it in accordance with the arbitrator's
direction under Rule 9.2.3, the timetable under Rule 9.2.1 will continue as at the date
of its exchange;

(b)
if that party shows sufficient cause why the timetable for the exchange of statements
should not conclude in accordance with that direction, the arbitrator shall direct a date
by which the statement required of it shall be exchanged and that date shall form part
of the timetable under Rule 9.2.1;

(c)
if that party fails to comply with the arbitrator's direction under Rule 9.2.3, the time
table for the exchange of statements shall conclude in accordance with the arbitrator's direction.

9.2
.4 Except to the extent provided for in Rules 9.3 and 9.4, no statement of claim, defence or
reply shall be of effect unless exchanged by the date on which the timetable for the
exchange of statements concludes.

Rule 9.4

9.4
.1 The arbitrator shall not later than 14 days (or such other period as the arbitrator directs) after
the date on which the timetable for the exchange of statements concludes and after
consultation with the parties give directions in accordance with Rule 9.4 as regards the
future course of the proceedings.

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Procedures issued under Rule 13.5 relating to Rule 13 (costs)

Rule 13.5

13.5
.1 Notwithstanding Rules 7.5 and 7.7, where Rule 7 applies each party shall (unless for special
reasons the arbitrator at his discretion otherwise directs) bear his own costs of the
proceedings conducted under that Rule and half the cost of the arbitrator's fees and
expenses incurred in respect of those proceedings (see Arbitration Act 1996, s.60).

s.60. An agreement which has the effect that a party is to pay the whole or part of the costs of the
arbitration in any event is only valid if made after the dispute in question has arisen.

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