Know Before You Go: What U.S. Lawyers Should Know About Ontario's New Construction Act

By Troy Harris

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Given the countries' physical proximity, it is no surprise that Canada is one of the United States' largest trading partners and that many U.S.-based construction and design firms have operations there. Canada's most populous province is Ontario, and in December 2017 the Ontario Legislative Assembly enacted significant changes to (what was then called) the "Construction Lien Act." The new law, dubbed the "Construction Act," contains two major innovations: a prompt payment regime and mandatory adjudication of disputes. The Canadian Parliament also is considering legislation to mandate prompt payment and adjudication on federal construction projects, and similar legislation has been introduced in numerous other provinces in Canada.[1] For U.S.-based firms working in the True North, therefore, it is important to be aware of the changes in Ontario not only because they affect construction projects located in that province but also because they will likely serve as a model for the rest of the country.

This article first provides an overview of the new Construction Act and then examines in greater detail its prompt payment and adjudication provisions, highlighting some of the issues that may arise based on experience with similar legislation in the UK.

Overview of Ontario's New Construction Act

Despite its title, the old Construction Lien Act, passed in 1983, always encompassed much more than mechanic's liens. In addition to specifying lien rights, it included mandatory provisions regarding holding of construction funds in trust and "holdbacks." The new Construction Act updated the previous legislation and added provisions regarding prompt payment, adjudication, and requirements for surety bonds for public contracts. While many of the provisions embrace concepts that are familiar to U.S. lawyers, such as prompt payment,[2] trust funds,[3] bonding requirements,[4] and lien rights,[5] there are some major differences from U.S. practice. For example, whereas prompt payment statutes in the United States may or may not apply to private construction projects, the Construction Act applies to both public and private projects. Similarly, "holdback" in Canada does not mean the same thing as "retainage" in the United States. The purpose of "holdback" in the Construction Act is to protect those participants in the construction process who are downstream from the owner, by requiring the owner (and each payer under a contract or subcontract) to retain funds until potential liens have expired or been discharged.[6] The Construction Act's holdback provisions contain certain safe habors specifying when a payer may release holdback[7] without running the risk of becoming personally liable if downstream participants end up going unpaid.[8] In the United States, of course, "retainage" refers to funds held back by a payer from progress payments otherwise due to the payee in order to protect the payer against various forms of nonperformance by the payee.

To a U.S. reader, many of the Construction Act's provisions appear permissive (a party "may" do X or Y), rather than mandatory (a party "shall" or "must" do X or Y), but this is a peculiarity of how the statute is drafted. The way the Construction Act achieves its purposes is by deeming construction contracts to include its provisions and rendering contrary contractual provisions null and void: "[e]very contract or subcontract related to an improvement is deemed to be amended in so far as is necessary to be in conformity with this Act."[9] Moreover, "[a]n agreement by any person who supplies services or materials to an improvement that this Act does not apply to the person or that the remedies provided by it are not available for the benefit of the person is void."[10] Significantly, therefore, the Construction Act (unlike Article 2 of the Uniform Commercial Code in the United States, for example) does not merely provide a set of default rules, applicable only in the absence of agreement by the parties. The remedies of the Construction Act are mandatory.

A final noteworthy feature of the Construction Act is the treatment it gives to public-private partnerships (denominated "[a]lternative financing and procurement arrangements"[11]). For such projects, the Construction Act has special provisions regarding who has the duty to hold back,[12] surety bonds for public contracts,[13] prompt payment,[14] and adjudication.[15] The evident purpose of these provisions is to shift risk in a public-private partnership down from the special purpose entity to the contractor. Thus, for example, the Construction Act

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permits the inclusion in a project agreement between a special purpose entity and a contractor of provisions requiring certification prior to the giving of a "proper invoice."[16] As discussed below, the submission of a "proper invoice" is a key feature of the prompt payment/adjudication regime created by the Construction Act. It also exempts from the prompt payment regime altogether those provisions of agreements under which the operation and maintenance of public-private partnership projects are carried out by special purpose entities.[17] Disputes regarding whether an agreement between a special purpose entity and a contractor has been substantially performed are not subject to mandatory adjudication.[18]

Although the Construction Act received royal assent on December 12, 2017, much of it did not come into force until July 1, 2018, and the prompt payment and adjudication provisions (along with a number of other provisions) do not come into force until October 1, 2019. The reason for the delay in implementation of the adjudication provisions is that the Construction Act specifies that adjudications "may only be conducted by an adjudicator listed in the registry" maintained by the government-designated "Authorized Nominating Authority,"[19] and so the government will need time to designate the Authority, which, in turn, is charged with training and qualifying adjudicators, among other things.[20] Amendments to the Construction Act were passed by the new provincial government in December 2018. Most of these are of a housekeeping nature, although some substantive changes were made, including to the mandatory adjudication process.

Prompt Payment + Statutory Adjudication: "Smash and Grab" Comes to Canada?

The Ontario approach to prompt payment is different from that generally found in the United States. Although one survey of prompt pay acts in the United States concluded that "these laws can safely be described as 'all over the place' both in terms of statutory location and scope of protection,"[21] the Michigan prompt pay act is perhaps not atypical. Under the Michigan statute, which only applies to construction by a "public agency,"[22]

> (3) Each progress payment requested, including reasonable interest if requested under subsection (4), shall be paid within 1 of the following time periods, whichever is later:
>
> (a) Thirty days after the architect or professional engineer has certified to the public agency that work is in place in the portion of the facility covered by the applicable request for payment in accordance with the contract documents.
>
> (b) Fifteen days after the public agency has received the funds with which to make the progress payment from a department or agency of the federal or state government, if any funds are to come from either of those sources.
>
> (4) Upon failure of a public agency to make a timely progress payment pursuant to this section, the person designated to submit requests for progress payments may include reasonable interest on amounts past due in the next request for payment.[23]

In many instances, the "applicable contract documents" will also require certification of the contractor's payment application by the owner's representative.[24]

By contrast, under Ontario's Construction Act, once the owner has received a "proper invoice," it must either provide a "notice of non-payment" within fourteen days or pay the invoice within twenty-eight days.[25] The Construction Act defines a "proper invoice" as one that contains such basic information as the contractor's name and address, date of the invoice, a description of the services or materials supplied, and the amount of payment sought.[26] Significantly, "[a] provision in a contract that makes the giving of a proper invoice conditional on the prior certification of a payment certifier or on the owner's prior approval is of no force or effect."[27] As noted above, this prohibition does not extend to P3 projects. A notice of nonpayment must, *inter alia*, specify the amount not being paid and detail "all of the reasons for nonpayment."[28] Any undisputed amount of the proper invoice must be paid within the original twenty-eight days.[29] A similar process applies to contractor payments to subcontractors and subcontractor payments to their own subcontractors.[30]

As explained below, the mandatory adjudication regime gives significant teeth to these contractor-friendly (by U.S. standards) prompt payment requirements and creates a "pay now, argue later" approach to payment disputes, in order to keep construction funds flowing. That is, in the absence of adjudication as an interim remedy for noncompliance with the prompt payment requirements, the aggrieved party would be entitled only to interest on late payments.[31]

While statutory adjudication has a long history in England and elsewhere, and while contractual adjudication features in the FIDIC forms of construction contract are in widespread use internationally, the process is relatively unfamiliar in the United States. In general terms, adjudication is a process for resolving disputes as they arise on construction projects. A neutral third party decides the dispute, typically on a fast-track basis, while the project is still underway. The decision is binding on the parties unless and until the parties challenge the decision in litigation or arbitration, where the adjudicator's decision may be revisited.

The adjudication provisions of the Construction Act attempt to create a "made in Ontario" version of statutory adjudication inspired by, but not adopted verbatim from, England and elsewhere. Questions of interpretation will arise under the adjudication provisions of the Act, and it is to be expected that Canadian courts will look to English and Commonwealth decisions for guidance.

One such interpretive question is the vexed (in England, anyway) issue of "smash and grab" adjudications. In the much-discussed case of *Grove Developments Ltd. v. S&T (UK) Ltd.*, the English High Court characterized "smash

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and grab" claims as "large payment applications made at the end of the works but before the final account."[32] The owner has a relatively short time frame within which either to notify the contractor of any grounds for nonpayment or to pay the amount claimed in the contractor's payment application before the contractor may initiate an adjudication for the amount claimed. Where the invoice at issue is the contractor's penultimate payment application, the owner will not have the opportunity to exercise any setoff rights against future interim payment applications because there will not be any future interim payment applications, only the final payment application. As the High Court noted, "it may be months or even years before there is a determination of the 'true' value of the application, as part of the final account process."[33] Thus, the owner is faced with a dilemma. It may (a) issue a "pay less notice" that is largely speculative regarding the existence and responsibility for any defective work or (b) pay the payment application and try to get at least some of the money back later. The disadvantages to option (b) are obvious, and option (a) may not be much better.

To mitigate the harshness of the outcome when the contractor's payment application is, in fact, inflated, an owner might well initiate a second adjudication to recover back the overpayment. Given the fast-track nature of the adjudication process, this is a more attractive alternative than waiting for a de novo proceeding (whether litigation or arbitration) at which all of the parties' accumulated grievances and excuses will be finally aired and determined—often years after the owner has paid the inflated payment application. Indeed, as the High Court noted in *Grove Developments*,

If there is no right to obtain a decision on the "true" value by way of a second adjudication, the risk is that, whilst an over-valued application may be capable of being put right at the next interim stage whilst the contract works are ongoing, an over-valued application at the last interim stage, almost always issued after practical completion, cannot be put right until the final account.[34]

But is such a second adjudication an option? The High Court of England and Wales has reached different conclusions on that question. In one series of cases, the High Court held, in effect, that an employer's failure to deliver timely a notice of nonpayment amounted to a deemed agreement (for adjudication purposes) by the employer that the amount claimed by the contractor was valid, thereby precluding a second adjudication as to the "true" value of the contractor's payment application.[35] More recently, however, a different judge of the High Court, in *Grove Developments Limited v. S&T (UK) Limited*,[36] considered and rejected the "deemed agreement" rationale of the earlier cases.

The *Grove Developments* case involved a dispute under the Joint Contracts Tribunal (JCT) Design and Build Contract 2011. In concluding that the earlier authorities reached the wrong conclusion, the Court in *Grove Developments* set forth a number of reasons why a second adjudication as to the "true" value of the payment application is permissible, three of which may become relevant to understanding how the adjudication provisions of the Ontario Construction Act will be interpreted.

First, under prior case law, adjudicators generally were held to have the same powers as a court, including the power to determine the "true" value of a payment application:

> [I]n any case where the parties have conferred upon an adjudicator the power to decide all disputes between them, the adjudicator has the same wide powers as the court. In this case, therefore, I consider that, in line with *Henry Boot* [*Construction Ltd. v. Alstom Combined Cycles Ltd.* [2005] 1 WLR 3850], the court (and/or an adjudicator) has the power to decide the "true" valuation of interim application 22.[37]

Second, the Court noted that the adjudication statute and its regulations themselves give an adjudicator extremely broad powers to decide disputes. Specifically, under Section 108(1) of the Housing Grants (Construction and Regeneration) Act 1996, "A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section." Moreover, Section 20 of the applicable regulations (The Scheme for Construction Contracts (England and Wales) Regulations 1998) provides,

> The adjudicator shall decide the matters in dispute. He may take into account any other matters which the parties to the dispute agree should be within the scope of the adjudication or which are matters under the contract which he considers are necessarily connected with the dispute.[38]

Third, the Court held that the contract language in the case distinguished between asserted value of a payment application ("the sum stated as due") and true value ("the sum due"), the latter of which could only be determined through a final accounting, thereby implicitly recognizing the potential difference between what a contractor asserts as its due and what a final accounting may substantiate as due:

> 80. Here, the words in the contract expressly differentiate between "the sum due" (Clause 4.7.2) on the one hand, and "the sum stated as due" in the payment notice or the pay less notice (Clause 4.9), on the other. The contract deliberately uses different terms. Why?
>
> 81. In my view, the answer is obvious. "The sum due" is identified in Clause 4.7 because that is the result of the contractual mechanism designed to calculate the contractor's precise entitlement (the "true" valuation). It is the process by which the correct amount, calculated to the penny, is arrived at. That is a very different thing to "the sum stated as due", which is the phrase used twice in Clause 4.9. Clause 4.9 recognises that the contractor's application/payment notice will identify the sum which the contractor has "stated to be due" and it provides that, in the absence of a payment notice

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and/or a Pay Less Notice from the employer, it is "the sum stated as due" which will be payable. Similarly, if there was a valid pay less notice, then it would be "the sum stated as due" in that notice that would be payable.

82. In neither case would it be "the sum due" (ie the "true" valuation) that was payable (save in the most unlikely of coincidences, where the contractor or employer got it 100% right in their particular application or notice). In this scenario, the mechanism in Clause 4.7, designed to arrive at the precise "sum due", has been displaced by the notice regime, where all that matters is the sum "stated to be due" in the relevant notice. There is a fundamental difference between these two concepts. "The sum stated as due" will almost certainly be different to the sum carefully calculated under Clause 4.7, but (for example) because of the employer's failure to serve a proper or timeous pay less notice, it is "the sum stated as due" that has to be paid. That does not mean that "the sum stated as due" has somehow magically been transformed into a Clause 4.7 valuation, and "the sum due".[39]

Thus, given the broad common law and statutory powers conferred on adjudicators and the contractual recognition that the sums parties claim to be due are frequently different from what they are, in fact, due "(save in the most unlikely of coincidences, where the contractor or employer got it 100% right in their particular application or notice)," the Court had little difficulty rejecting the notion that an employer, simply by failing to serve a timely notice of objection to the sum claimed in a contractor's payment application, should be deemed to have agreed that that sum is actually owed for purposes of initiating a subsequent adjudication to determine the issue:

In my view, the concept of a deemed agreement, which lies at the root of *ISG v Seevic* and *Galliford Try v Estura* is not only unjustified, but it is also an unnecessary complication, given the clear distinction in the contract between "the sum due", on the one hand, and "the sum stated as due", on the other.[40]

In short, whereas, under the earlier line of cases, a first "smash and grab" adjudication precluded a second adjudication to determine the "true" value of the work covered by the "proper invoice," the court in *Grove Developments* held that a second adjudication was permitted. As the *Grove Developments* Court aptly noted, the laudable goal of improving cash flow up and down the contractual chain "must not be confused with the contractor retaining monies to which he has no right."[41] On November 7, 2018, the English Court of Appeal affirmed the judgment of the High Court, definitively resolving the conflict among the earlier High Court decisions.[42]

While the decisions in *Grove Developments* turned, in part, on the language of the contract at issue, both the High Court and the Court of Appeal based their decisions on the statutory grant of jurisdiction to adjudicators. That statutory grant, which has resulted in divergent lines of authority in England and Wales, is not appreciably different from the statutory grant under the Ontario Construction Act.

In regards to payment disputes, the Ontario Construction Act's provision for adjudication states, in relevant part,

[A] party to a contract may refer to adjudication a dispute with the other party to the contract respecting any of the following matters:

1. The valuation of services or materials provided under the contract.
2. Payment under the contract, including in respect of a change order, whether approved or not, or a proposed change order.
3. Disputes that are the subject of a notice of non-payment under Part I.1.[43]

While the Construction Act is more specific than its English counterpart in describing the potential subjects of adjudication, the adjudicator's powers under the Construction Act are similar to those set forth in Section 20 of the English regulations, quoted above.[44]

To see how "smash and grab" might work under the new Construction Act, consider the following scenario:

4. In its penultimate payment application, the contractor submits a "proper invoice" to the owner.
5. The owner neither pays the "proper invoice" nor issues a "notice of non-payment" within twenty-eight days of the "proper invoice"—the scenario that occurred in numerous cases reviewed by the Court of Appeal in *Grove Developments*.[45]
6. Thirty days after submitting its "proper invoice," the contractor initiates adjudication for nonpayment.
7. Because a "proper invoice" is deemed to be payable (regardless of the "true" value of the work covered by the payment application) if the owner has neither paid nor issued a timely "notice of non-payment," an adjudicator awards the contractor the full amount of proper invoice, without inquiring into the true value of the work covered by the "proper invoice."
8. Thereafter, as required by the Construction Act, the owner pays the adjudication award within ten days of receiving the adjudicator's determination.[46]

The potential for a "smash and grab" is increased by the statutory provision (noted above) that a contractual requirement of certification of the contractor's payment application by the owner's representative "is of no force or effect" for purposes of determining whether the contractor has submitted a "proper invoice."

The owner's notice of nonpayment must satisfy Section 6.4(2)'s requirement that it detail "all of the reasons for nonpayment." Many of the reasons for nonpayment may not be known with certainty within twenty-eight days of the owner's receipt of the "proper invoice" or even before the conclusion of an adjudication. If the owner relies upon a

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speculative notice of nonpayment, it runs the risk that, having raised, but ineffectively, an issue as to the "true" value of the work covered by the "proper invoice," it is barred from relitigating the "true" value in a future adjudication when it can prove for certain the reasons for nonpayment. Consistent with the aim of adjudication to require parties to "pay now, argue later," the result either way probably will be a substantial payment from the owner to the contractor. The right to contest the adjudicator's decision in a subsequent arbitration or court proceeding will likely be cold comfort.

In sum, divergent lines of interpretation of the Construction Act's adjudication provisions may well develop in Ontario as they have in England. Whether Ontario courts will accept the "deemed agreement" analysis of the earlier English cases (and thereby clear the way for "smash and grab" adjudications in Ontario) remains to be seen.

Is Adjudication Available in Disputes Governed by the Ontario International Commercial Arbitration Act?

A second interpretive question under the Construction Act may arise in the context of projects involving international parties. Specifically, can a party avoid a "smash and grab" adjudication (or, indeed, any adjudication) by preemptively launching an arbitration? For example, suppose that an owner, anticipating that the contractor may attempt a "smash and grab" adjudication, initiates an arbitration proceeding alleging breach by the contractor or seeking a declaration of the parties' respective rights and obligations. May the contractor still initiate an adjudication if the owner fails to pay the contractor's "proper invoice" within twenty-eight days? Maybe not, if the arbitration is "international."

Arbitration in Ontario is governed by two different statutes, depending on whether it is an international or domestic arbitration. International arbitrations in Ontario are subject to the Ontario International Commercial Arbitration Act (ICAA),[47] while domestic arbitrations are subject to the Arbitration Act, 1991.[48] The new Construction Act refers only to the latter. Specifically, Section 13.5(5) of the Construction Act states,

> [a] party may refer a matter to adjudication under this Part even if the matter is the subject of a court action or of an arbitration under the *Arbitration Act, 1991*, unless the action or the arbitration has been finally determined.[49]

The inference that a party may not refer a matter to adjudication if it is the subject of an arbitration governed by ICAA is strengthened by other provisions in the Construction Act. Section 13.15 ("[e]ffect of determination") provides,

> (1) The determination of a matter by an adjudicator is binding on the parties to the adjudication until a determination of the matter by a court, a determination of the matter by way of an arbitration conducted under the *Arbitration Act, 1991*, or a written agreement between the parties respecting the matter.
>
> (2) Subject to section 13.18 [regarding application for judicial review of an adjudication award], nothing in this Part restricts the authority of a court or of an arbitrator acting under the *Arbitration Act, 1991* to consider the merits of a matter determined by an adjudicator.[50]

If ICAA does not preempt the application of the adjudication provisions of the Construction Act, then, under the foregoing provisions, the effect of an adjudicator's decision would be to render a final—not interim—determination of the dispute. Such a result can hardly have been intended. Indeed, if the Construction Act does not actually prohibit adjudication proceedings where the matter is subject to an international arbitration proceeding, the status of such an adjudication is murky at best. Thus, the negative implication is that a party may not refer a matter to adjudication if the matter is the subject of an arbitration under the ICAA.

So what arbitrations are "international"? ICAA (which is based on the UNCITRAL Model Law on International Commercial Arbitration) provides,

An arbitration is international if:

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States [i.e., different countries]; or

(b) one of the following places is situated outside the State [i.e., the country] in which the parties have their places of business:

(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.[51]

The application of these provisions is easy to illustrate. Suppose the owner has its place of business in Ontario and the contractor has its place of business in the United States. An arbitration between the two of them falls squarely within subsection (a), and the arbitration will be governed by ICAA and not the Arbitration Act, 1991. Other scenarios are also possible. Unlike the previous version of the Ontario International Arbitration Act, which excluded Article 1(3)(c) of the UNCITRAL Model Law,[52] the 2017 version does no such thing. Thus, parties may now agree at the outset that the subject matter of the arbitration agreement relates to more than one country. The implications are obvious for contract planning and drafting for any party higher up the contractual food chain wishing to avoid adjudication with its counterparty lower down.

What accounts for the potentially different treatment of international construction projects? The short answer may be that there will be a lot more of them in the future, thanks to the new Canada–European Union Comprehensive

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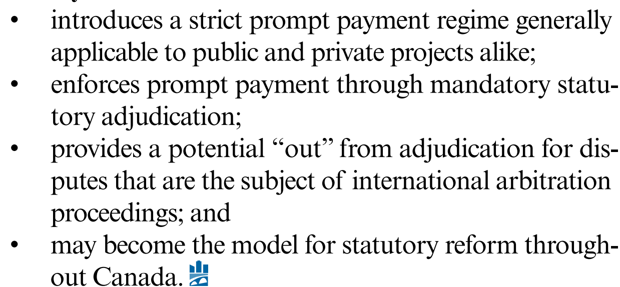
Economic and Trade Agreement (CETA). Under CETA, most public construction procurements in Canada (at all levels of government) that exceed CN$8,500,000 must be open to bidders from the EU on equal terms with Canadians. Also, unlike many public entities in the United States, public entities in Canada can agree to arbitrate disputes.[53] Thus, it is foreseeable that Canada will see an influx of EU-based construction companies working on even municipal projects. While the new adjudication regime may have an impressive common law pedigree, it may well be that European construction companies would prefer to have their disputes settled by international arbitration or even FIDIC-style Dispute Avoidance/Adjudication Boards than UK-style statutory adjudication by a single adjudicator. The new Construction Act seems to permit such a choice, without limiting the choice to EU-based parties. Indeed, any non-Canadian contractor or design firm can easily fall within Article 1(3) of the ICAA and thereby avoid adjudication with its subcontractors.



For U.S. parties doing work in Canada, there are several key takeaways from Ontario's new Construction Act. The new law

- introduces a strict prompt payment regime generally applicable to public and private projects alike;
- enforces prompt payment through mandatory statutory adjudication;
- provides a potential "out" from adjudication for disputes that are the subject of international arbitration proceedings; and
- may become the model for statutory reform throughout Canada.

Endnotes

1. *See* Andrew J. O'Brien & Ted Betts, *Prompt Payment Sweeping Across Canada*, Gowling WLG (May 22, 2018), https://gowlingwlg.com/en/insights-resources/articles/2018/prompt-payment-sweeping-across-canada.
2. *See* Edward H. Tricker, Kory D. George & Erin L. Gerdes, *Survey of Prompt Pay Statutes*, 3 J. Am. Coll. of Constr. Law. 91 (2009).
3. *See* Robert F. Carney & Adam Cizek, *Payment Provisions in Construction Contracts and Construction Trust Fund Statutes: A Fifty-State Survey*, 24 Constr. Law., no. 4, Fall 2004, at 5.
4. *See* Fifty State Construction Lien and Bond Law (Laurence Schor ed., 2018).
5. *Id.*
6. Construction Act, R.S.O. 1990, c. C.30, s. 22 (Can.).
7. *Id.* ss. 22–27.
8. *See*, *e.g.*, *id.* s. 23.
9. *Id.* s. 5(1).
10. *Id.* s. 4.
11. *Id.* s. 1.1.
12. *Id.* s. 1.1(3).
13. *Id.* s. 1.1(4).
14. *Id.* s. 1.1(2.1).
15. *Id.* s. 1.1(2.2).
16. *Id.* s. 1.1(2.1)2.
17. *Id.* s. 1.1(2.1).
18. *Id.* s. 1.1(2.2).
19. *Id.* s. 13.9(1).
20. *Id.* s. 13.3(1).
21. Tricker et al., *supra* note 2.
22. Mich. Comp. Laws § 125.1561(h).
23. *Id.* § 125.1562(3), (4).
24. *See*, *e.g.*, Am. Inst. of Architects, AIA Document A101, §§ 5.1.1 to 5.1.6 (2017).
25. Construction Act, c. C.30, s. 6.4.
26. *Id.* s. 6.1.
27. *Id.* s. 6.3(2).
28. *Id.* s. 6.4(2).
29. *Id.* s. 6.4(3).
30. *Id.* ss. 6.5, 6.6.
31. *Id.* s. 6.9.
32. [2018] EWHC 123 (TCC), ¶ 13 (Eng.).
33. *Id.*
34. *Id.* ¶ 139 (footnote omitted).
35. *See* Galliford Try Bldg. Ltd. v. Estura Ltd. [2015] EWHC 412 (TCC) (Eng.); ISG Constr. Ltd. v. Seevic Coll. [2015] 2 All ER Comm. 545 (Eng.); Watkin Jones & Son Ltd. v. Lidl UK GMBH [2002] EWHC 183 (TCC) (Eng.).
36. [2018] EWHC 123 (TCC).
37. *Id.* ¶ 70.
38. The Scheme for Construction Contracts (England and Wales) Regulations 1998, § 20.
39. [2018] EWHC 123 (TCC), ¶¶ 80–82.
40. *Id.* ¶ 118.
41. *Id.* ¶ 138.
42. S&T (UK) Ltd v. Grove Developments Ltd [2018] EWCA Civ 2448 (Eng.). The Court of Appeal took issue with the High Court's reliance upon the definition of "the sum stated as due" contained in Clause 4.9 of the contract, as opposed to the relevant statutory provision (which refers to the "notified" sum), but the distinction made no difference to the outcome of the case. *Id.* ¶ 99.
43. Construction Act, R.S.O. 1990, c. C.30, s. 13.5(1) (Can.).
44. *See id.* s. 13.12.
45. [2018] EWCA Civ 2448, ¶¶ 64, 66, 69, 72, 79–80.
46. Construction Act s. 13.19(2).
47. S.O. 2017, c. 2, schedule 5 (Can.).
48. Arbitration Act, 1991, S.O. 1991, c. 17, § 2(1)(b) ("This Act applies to an arbitration conducted under an arbitration agreement unless . . . the *International Commercial Arbitration Act* applies to the arbitration.").
49. Construction Act s. 13.5(5).
50. *Id.* s. 13.15.
51. ICAA, art. 1(3).
52. R.S.O. 1990, c. I.9.
53. *See*, *e.g.*, Arbitration Act, 1991, § 51 ("This Act binds the Crown."); Ottawa (City) v. Coliseum Inc., 2016 ONCA 363 (2016) (Can.).

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