MANDATORY ARBITRATION JEOPARDIZES YOUR COVERAGE WITH THE STROKE OF A PEN AND HANDCUFFS YOUR DEFENSE

NEW SUB-LIMIT ON DAMAGES AND DEFENCE COSTS

If an architect agrees to mandatory arbitration in a contract with a client, it will trigger a new sub-limit on coverage for BOTH damages and claims expenses.

The imposition of the sub-limit can have serious financial consequences for the architect.

Dispute Resolution provisions included in a Client / Architect contract may seriously impact or negate the architect's professional liability insurance coverage. Owners are frequently requesting architects to agree to dispute resolution provisions that require the architect to participate in any arbitration between the Owner and any other party or participate in a dispute resolution process as determined by the Owner / Client. A new sub-limit incorporated into the Pro-Demnity policy addresses the serious financial consequences faced by Pro-Demnity where architects agree to such provisions.

Please familiarize your self with the following. Your practice's financial viability may depend upon it.

THE PROBLEM: MANDATORY DISPUTE RESOLUTION CLAUSES HURT ARCHITECTS.

For many years, Pro-Demnity has been advising Ontario architects about the negative implications where an architect agrees to a client-authored contract provision that has the architect agreeing to participate in a Dispute Resolution process dictated by the client. Pro-Demnity's advice and request has consistently been: "Please do not agree to these provisions!"

Unfortunately, too many architects ignored this advice, possibly because there was no apparent consequence for the architect who ignored Pro-Demnity's guidance and went along with the client's contract terms instead.

The financial burden from these architects' decisions has fallen onto Pro-Demnity in its role providing and managing a defence to these architects when claims have arisen on projects where the architects have ignored Pro-Demnity's advice. The added costs incurred by Pro-Demnity are in turn being distributed amongst every Ontario architect that has not agreed to such provisions.

The situation has become unsustainable. In the last few years, there have been several claims where Pro-Demnity's ability to manage a defence for the architect has been prejudiced by the architect's having agreed to participate in a binding arbitration in their contract with a client. These have generated extraordinary defence costs, including one current situation where defence costs are approaching $5,000,000 (!) without a resolution in sight.

It was determined that architects who ignore Pro-Demnity's advice respecting arbitration should face a financial consequence – hopefully significant enough to convince architects (and their clients) to re-think their attachment to binding arbitration as a contract requirement. It is expected that this will help maintain a more equitable distribution of risk amongst all architects, as the increased costs of providing coverage for arbitrations agreed to by some affects everyone's

premiums.

WHAT HAS CHANGED?

On February 1, 2024, Pro-Demnity advised architects of the updated, “refreshed” Pro-Demnity policy that would come into effect at each firm’s next renewal on or after April 1, 2024.

One important change to coverage that was highlighted was the institution of a new sub-limit on BOTH defence costs AND damages payable by Pro-Demnity on a claim where the architect has agreed to participate in a mandatory arbitration or other dispute resolution process dictated by the client.

Quoting from the February 1, 2024 Bulletin, we draw your attention to the following instances where coverage language is more explicit in the refreshed policy:

Addition of a new sub-limit in cases where Mandatory arbitration is required in a contract:
“If You have agreed, in a contract for professional services, to a mandatory arbitration or other type of dispute resolution clause that removes or restricts Our ability to defend You, and there is a Claim made that relates to such contract, the maximum amount of all Damages and Claims Expenses that we will pay on Your behalf or reimburse to You shall not exceed $50,000 for one Claim and $100,000 for all Claim(s) reported during the Period Of Insurance”.

This sub-limit will take effect for contracts signed on or after **July 1, 2024**. It is intended to encourage Certificate of Practice policyholders to pay particular attention to Dispute Resolution clauses in contracts which erode protections from Pro-Demnity that would otherwise be yours. *[How much We will pay: Our limit(s) of Liability and Your Deductible. Important Sub-Limits and Reductions to Limits of Liability. Item 6]*

WHAT DOES THIS MEAN FOR YOUR PRACTICE?

Regardless of the claim limits the architect may purchase for its practice or the higher limits that a client may require as a condition of engaging the architect, if the architect has agreed to participate in binding arbitration, or any other dispute resolution provisions in a contract that prejudices Pro-Demnity's ability to deliver or manage the defence that the insured architect would be entitled to, **the MAXIMUM amount Pro-Demnity will pay for BOTH claims expenses AND damages is the new sub-limit of $50,000 for one claim, and $100,000 for all claims in the (annual) Period of Insurance**.

The excerpt from the February 1, 2024 bulletin is clear. The intent is to encourage architects to pay close attention to any dispute resolution provisions in any contract that is presented to them. It provides a significant consequence for architects who don't take Pro-Demnity's advice respecting arbitration seriously, and an incentive for clients to reconsider their – and their lawyers' – enthusiasm for writing such provisions.

We strongly recommend that every architectural practice ensure that any member of the firm who has the authority to enter into a contract with a client is made aware of the new sub-limit and the financial consequences for the practice if the issue is ignored. Refusal to accept such provisions in a contract should be adopted as a prudent business requirement by every Ontario architectural practice.

FOUR THINGS YOU CAN DO TO AVOID THE SUB-LIMIT AND PROTECT YOUR COVERAGE:

1. **Insist that any client-authored dispute resolution provision DOES NOT commit the architect – and by extension, Pro-Demnity – to participate in any form of client-directed dispute resolution process.** If you are unsure of the impact of a client-authored dispute resolution process, refer it to your own lawyer and / or Pro-Demnity's risk services team.

2. Ensure that **if arbitration is included as a dispute resolution option in any contract with a client (or a sub-consultant), the use of arbitration *must be by mutual consent of all the parties to the dispute.***

3. **Replace any client-authored dispute resolution provisions with ones that will not tie Pro-Demnity's hands and trigger the sub-limit.** A suitable example is the wording in *OAA Document 600-2021A, GC 16 – DISPUTE RESOLUTION*, items 16.1 through 16.8.

   Particularly important in this context are Items 16.4, 16.5 and 16.6. These should NOT be altered.

4. **Delete or abandon any Dispute Resolution provisions in a contract for your services that may apply to a Claim.** There is no need for such provisions. Every claim or lawsuit that is instituted against an architect will be subject to exiting law and settlement protocols applicable in the jurisdiction where the claim or lawsuit is filed. "Silence in the contract" is much preferred to a set of provisions that can result in a denial of coverage or imposition of the new sub-limit. "Silence in the contract" can also encourage rational discussion about a sensible process if the need arises.

ADDITIONAL INFORMATION

This bulletin notes previous efforts to convince architects to NOT agree to client-authored dispute resolution provisions in contracts for their services. Most of these have been provided through Risk Service contract reviews requested by the architect. However, Risk Education information has been posted on the Pro-Demnity website or included in OAA standard forms of contracts for architectural services. These include:

- **Risk Transfer Concerns with Insurance Implications**

A March 2018 article prepared for an RAIC submission to a Senate Committee includes a number of concerns with Client-Authored contract provisions including a reference to client-authored Dispute Resolution or Settlement Provisions included in a Contract.

- **Arbitration is a Four-Letter Word!**

A July 2021 example of more extensive Risk Education information provided to all Ontario architects is posted on the Pro-Demnity website: *The Straight Line Newsletter – Issue 15* (July 13, 2021).

The article includes a description of some of the factors that make arbitration a problematic (and expensive) dispute resolution process. Underlining for emphasis:

- *As a further detriment, these provisions invariably increase the costs that Pro–Demnity must pay to defend the architect – additional costs that are borne by all of the architects participating in the program.*

- *There are no inherent cost savings with the arbitration process when compared with processes reliant on the courts. Experience suggests the opposite: The costs may be substantially more, since the parties to the arbitration will need to pay for a venue as well as the arbitrator's (or arbitrators') fees.*

- *Some client-authored dispute resolution provisions refer to protocols that require a panel of arbitrators – dramatically increasing the costs the architect will have agreed to share or assume.*

- *Arbitration in Ontario, generally, has other significant drawbacks, including the inability to bring other parties into the arbitration without their express consent.*

- *When consent is not forthcoming from an entity that should be included, the parties to the arbitration may find themselves facing multiple actions with significant cost and litigation risk implications.*

- Without these client-authored provisions in the contract, the decision to participate in an arbitration would involve mutual agreement of the parties to the dispute, in accordance with the rules in place in each jurisdiction.

- Where the dispute qualified as a Claim, as defined by the architect's professional liability policy, Pro-Demnity's decision to participate (or not), and in what capacity, would be based on the architect's best interests.

- Arbitration has its place, but it is not a panacea. In some instances, it may be useful in resolving some aspect of a Claim. However, it doesn't make sense to attempt to determine the most appropriate and effective means of resolving a dispute or Claim until the issue arises, and the circumstances are understood.

In addition, and very importantly, most mandatory arbitration provisions limit the ability of the parties to appeal the arbitrator's decision. Even where they do not, judges place a very high degree of deference on an arbitrator's decision when they do review them, and only very rarely interfere with the result. This can result in decisions through arbitration that would not be reached through the ordinary legal process – costing one or other of the parties significant damages that would not have been awarded by a court. The restricted ability to appeal an arbitrator's decision prejudices Pro-Demnity's ability to effectively manage the defence it is obliged to provide and can significantly drive-up costs incurred to defend the architect.

- **OAA Document 600-2021A:**

Pro-Demnity worked with the OAA to develop appropriate “Dispute Resolution” provisions

that have been incorporated in OAA Document 600 2021A. These provisions have been referenced earlier in this bulletin. The OAA contract wording provides for the use of arbitration “**by mutual consent**,” addressing Pro-Demnity’s major concerns.

Another benefit of the Dispute Resolution provisions in OAA Document 600-2021A is provision of an example of appropriate dispute resolution wording as a benchmark against which an architect may compare any client-authored provisions.

Paragraphs 16.4, 16.5 and 16.6 referenced earlier are included below. Underling is for emphasis:

16.4 If the Dispute is not resolved through mediation, the parties are free to pursue whatever means of dispute resolution is available to them through the courts of the applicable jurisdiction.

16.5 Subject to mutual agreement, the parties to the Dispute may choose to refer the Dispute or any issues that are part of the Dispute to arbitration for final resolution.

16.6 The Client agrees that, should a construction Contract include a provision that any dispute between the Client and the contractor may be finally resolved by arbitration, such construction contract shall include provisions satisfactory to the Architect that:*

.1 require the Client and contractor to give the Architect Notice in Writing of any agreement to arbitrate a dispute between the Client and contractor in which the Architect has a vested or contingent financial interest in the outcome thereof and of any matters in dispute that affect the Architect;

.2 provide that, upon receipt of the Notice in Writing in GC 16.6 above, the Architect shall have the option to participate in the arbitration as a party; and

.3 provide that, in the event GC 16.6.1 and GC 16.6.2 above are not complied with, the Client and contractor agree any decision or award arising from such arbitration is not admissible in any dispute resolution process involving the Architect and shall otherwise not be used in any way to support or further any claim against the Architect.

**Note: In 16.6 above, as a practical matter, "provisions satisfactory to the Architect" means "approved by Pro-Demnity Insurance Company in writing."*

Please contact the Risk Services Team for any support or questions regarding this bulletin.

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