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Do we need fast-track arbitration?

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AT a recent cocktail party, an acquaintance I'll call Fred, the CEO of a good-sized design firm, bent my ear for an hour about arbitration. He'd heard it would be 'faster and cheaper' than going to court, but to his dismay, he'd found it to be neither.

After a series of applications, extensions and adjournments, three years later he calculated that the award had been more expensive than litigation, once the tribunal's fees and expenses were taken into account, and certainly no faster. Vowing never again to put arbitration into his contracts, he grumbled: "What I want is a way to get rid of disputes in a few weeks or months at most, so we can get our people back to business." I reminded Fred there might be other reasons for using arbitration, and wished him the good luck of not needing dispute resolution proceedings again, but suggested that fast-track arbitration might be an option for the company's future contracts.

What is fast-track arbitration?

Fast-track, accelerated, or expedited arbitration has existed for decades. Some argue that arbitration in its original form was in fact all 'fast-track'. However, as disputes involved more complex issues, with sometimes enormous amounts of money at stake, the game has become more procedural, more careful, more thorough, and regrettably, longer and more expensive. Cash-strapped smaller companies faced insolvency while they waited for a decision about who owed what to whom. In the early 1990s there was growing concern in international arbitration circles about the need for a genuinely 'faster and cheaper' version of arbitration.

One response came out of the Woolf report¹, which led to the adoption in the UK of adjudication² for the quick resolution of construction disputes. This 'quick fix' method, originally created by contract, has now become the first (and often last) port of call for construction disputants. However, its very speed makes it unsuitable for genuinely complex cases, where the time limits can invite ambush or make adequate presentation of facts and arguments impossible. Many adjudicators' decisions are now being challenged either in court or in arbitration.

Some parties drafted dispute resolution clauses to bypass or shorten the many steps between the initiation of the arbitration and the final award, reducing the timeframe to between two and six months, as opposed to an average³ of about two years for most cases. Some high-profile successes, including the Formula One case, gave fast-track arbitration a spate of positive publicity⁴.

How does fast-track arbitration work?

The basic foundation of arbitration is party autonomy. In removing their case from the

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constraints of a state court system, parties can choose the type of procedure they want – including the members of the tribunal to decide the case, and the law and rules they will apply to the procedure and merits. If they wish, parties can craft a compromise to follow the 'rough and ready' adjudication process with a procedurally less cumbersome arbitration.

The model law⁵, the English act⁶ and other modern legislation⁷ all recognise the power of the tribunal, subject to party agreement, to decide all evidentiary and procedural matters. This includes what kind of evidence and written submissions, and (subject to party agreement otherwise) the timing of those submissions. With this in mind, the parties may indeed agree in advance the specifics of the dispute resolution process, or they may leave the administrative aspects up to the rules of an institution and, eventually, the tribunal. Parties might agree to an ad hoc⁸ procedure involving time-saving measures such as:

- Using a sole arbitrator (to avoid diary scheduling problems and lengthy deliberations).
- Submitting full statements of claim and defence at the outset of the proceedings, without further written submissions.
- Abridging time frames for submission of pleadings and documentary evidence.
- Limiting interim applications.
- Using common briefs to expert witnesses, and witness conferencing.
- Limiting or dispensing with depositions.
- Using documents-only procedure.
- Shortening the period for deliberation and rendering of final award.

Alternatively, parties may use institutional arbitration, but still include one or more of the stipulations above. Or they may choose an institution⁹ that has special rules for expeditious treatment of cases, providing for a pared-down procedure, perhaps on documents-only. In its rules revision of 1998, the International Chamber of Commerce (ICC) concluded that its classic rules could be adapted to produce a speedy procedure, so special fast-track rules were therefore superfluous¹⁰. That stance is surely in for scrutiny during the ICC's current rules revision exercise¹¹.

Is there a downside?

One thing is obvious; once the parties are in dispute, the likelihood of their agreeing on an expedited procedure is slim. While one party (usually the claimant) will want a rapid solution, a respondent with a weak case may try everything to delay the day of reckoning. Unlike adjudication, the 'default provision' in construction disputes, fast-track arbitration needs to be written into the contract at the outset.

Even so, problems can still occur. It is sometimes hard to predict what kind of dispute will arise, whether a party is likely to be claimant or respondent, the complexity and the amount that will be at stake. A party who has agreed to fast-track procedures may have later regrets, but be powerless, without the opposing party's consent, to change them. Despite the attractions of speed and efficiency, risk-averse advocates hesitate to agree anything that may limit their ability to defend a client's position down the line. For example, limiting interim applications may deprive a party of a useful technique or remedy. Or, if credibility is an issue, hearing a witness in

person could be critical, but unavailable if the parties have agreed to a documents-only procedure. Parties who insist that their advocates leave no stone unturned should not agree to fast-track arbitration.

An unrealistically short time period may make it physically impossible to present arguments and evidence adequately. Translations, records and travel arrangements are not always in the control of the parties or their counsel. This raises the spectre of lost jurisdiction, when the tribunal simply cannot comply with the imposed timeframe, the award becomes a nullity, and the parties finish up thousands of pounds the worse in wasted legal costs.

Unlike its speedy cousin, adjudication, arbitration's finality focuses attention on due process or natural justice. There is thus the niggling concern that an award rendered as a result of a fast-track procedure might be open to attack in state court by an unhappy party claiming that it did not have an adequate opportunity to present its case. Even an unsuccessful attack would prolong the process and add

many thousands of pounds to its cost.

So, does it work?

In the Formula One case, the parties had a shared deadline. If the dispute wasn't resolved, they would both lose out on enormous advertising revenue. They thus made a serious common effort to fashion a swift and efficient procedure. The ICC and its robust arbitrators had the confidence and expertise to deal with the innovations. What made this case work was, above all, the cooperation among parties and their counsel, the institution and the tribunal.

40 days is probably record time for ICC arbitration. But what should clients expect? A recent podcast by Michael McIlwrath¹² has sparked some lively discussion in oil, gas, energy, mining and infrastructure dispute (OGEMID) circles. In informal interviews with both counsel and clients, he found no consensus among lawyers on how long an 'expedited' arbitration should take, but a common accord among lawyers that no arbitration should last more than two years. Clients, on the other hand, expected an 'ideal'

arbitration would take 'a couple of months' at most, and an expedited procedure should take between a week and a month. This chasm between client expectations and those of counsel may itself contribute to the number of complaints about the length of arbitral proceedings. McIlwrath suggests somewhat radically that it just might be up to the lawyers and arbitrators to conform to the expectations of clients, if arbitration is to continue to be the method of choice for resolving business disputes.

Turning to a judge or an arbitrator is, at its heart, an adversarial process, as anyone with experience in a construction dispute can attest. Typically, parties expect their counsel to defend their position with all available arms — not to enter the fray with one hand bound. With speed and efficiency on one side of the scales of justice, and due process on the other, tension will always exist. Parties say they want a quick resolution, but they do not like to lose, judges do not like awards tainted by unfairness, arbitrators do not like their awards set aside for procedural irregularities.

If adjudication lacks procedural protection and finality, and classic arbitration's processes are too cumbersome, then fast-track arbitration is an obvious compromise. In order to get it though, parties need tough yet realistic dispute resolution agreements. Counsel must evaluate the risks, and the trade-offs in terms of cost, timeframe and procedure, then with that information, craft dispute resolution provisions according to the client's informed choice. But by the time the dispute arises, it's usually too late.

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¹ *Access to Justice Final Report*, the Right Honourable the Lord Woolf, Master of the Rolls, July 1996

² Under the *Housing Grants, Construction and Regeneration Act 1996* c53, construction industry disputes in the UK are resolved by a 28-day adjudication process leading to a decision. However, an unhappy party to adjudication can take the matter to arbitration or litigation for a legally binding award or judgment. In such a case, adjudication actually adds at least a month to the time taken to resolve the dispute.

³ Averages, even where available, can be very misleading so the two-year period is an anecdotal figure from the author's experience and that of other arbitrators. The author knows of one European case which lasted over 17 years. See also note 9 below.

⁴ One such example, ICC case no.10211/AER involved the sponsor/team colours of two Formula One race cars. With cooperation from the ICC court and the parties, the tribunal delivered the award about 40 days after the request, and the vehicles were shipped to Australia in time for the team to compete.

⁵ UNCITRAL Model Law on International Commercial Arbitration, ch V, especially art19 and 24

⁶ *Arbitration Act 1996* (c23), especially art34

⁷ For example, France's *New Code of Civil Procedure* Book IV, art1460

⁸ For an ad hoc arbitration, many parties choose the UNCITRAL Arbitration Rules, which in Section III set out the tribunal's power to conduct the arbitration in such a manner as it sees fit.

⁹ American Arbitration Association, Japan Commercial Arbitration Association and WIPO, to name a few

¹⁰ ICC rule 32.1 allows parties to agree to shorten various time limits set out in the rules. See also *Techniques for Controlling Time and Costs in Arbitration* a report of the ICC Commission on Arbitration, ICC publication 843.

¹¹ The ICC Commission on Arbitration currently has a working party of over 175 members from around the world, commenting on and suggesting changes to the 1998 rules of arbitration.

¹² CPR Podcast # IDN 66, *As Long as A Piece of String*, Michael McIlwrath is senior counsel at GE Oil & Gas