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Fast-Tracked *ad hoc* Construction Arbitration

Darren J. Reed

In many *ad hoc* arbitration cases there is a desire on the part of at least one of the parties to try to "fast track" the proceedings. Successfully implementing that desire can prove to be elusive, unless there is an alignment among counsel, clients, and arbitrators alike to make the schedule paramount, without sacrificing fairness. Even where such an alignment exists, a carefully drafted arbitration schedule and procedure are important fail-safes.

Fast-tracked *ad hoc* construction arbitration – How can (and does) it work?
Often one of the reasons that parties to construction contracts choose arbitration is to receive a decision quickly. This keeps business interruption to a minimum, and also means that any award that is issued and collected has temporal relevance to the balance sheet.

The reality is that while they are not easy to plan and execute, fast-tracked construction arbitrations can and do work. They also can and do offer benefits to the parties, through speed and expediency in the resolution of the disputes.

There are three factors to broadly consider when attempting to fast track an arbitration:

- The tribunal;
- The other participants, namely the lawyers, the clients and the witnesses; and
- The arbitration schedule and procedure.

The Tribunal – Choose Arbitrators up to the Task
Since the tribunal will be responsible for directing and enforcing the schedule, when selecting an arbitrator (or arbitrators, as the case may be), look for those who have time to address a compressed schedule and resulting issues, who have a reputation for diligently pushing parties to a hearing, and who are known for accessibility and issuing timely interlocutory decisions during the pre-hearing phase.

The importance of the right panel cannot be underestimated. As experienced litigators know, all it takes is one well-timed interlocutory application coupled with scheduling conflicts among the tribunal and lawyers to substantially derail the commencement of the ultimate hearing on the merits.

Other Participants - Lawyers, Clients and Witnesses
Those involved in the arbitration even apart from the tribunal are also important to the success of fast-tracked arbitration:

- Success is enhanced by careful adherence by the parties (to the greatest extent possible) to the arbitration schedule and procedure ("ASP") to which the parties have agreed. When adherence is not possible, nimbleness is required by all to keep the hearing start date preserved. This requires input and commitment from counsel and the clients to keep the schedule paramount.

Tel/Tél: 416-487-4733 Toll-free/Sans frais: 1-877-475-4353 Fax: 416-901-4736 Email/Courriel: admin@adric.ca

- Even though the matters in dispute between the clients sometimes create an acrimonious environment, respect and cooperation between counsel with respect to procedure and schedule is important.
- Extremely responsive experts and diligence by counsel in keeping experts and fact witnesses engaged are essential, especially when there are numerous international witnesses that need to travel into the jurisdiction.

Of course, no matter how dedicated the participants, a small dose of luck is also useful.

The Arbitration Schedule and Procedure – Keeping it on the Rails

In drafting an ASP, certain flexibility is required in order to maintain a hearing start date. In particular:

- Preliminary, interim and interlocutory applications should be initiated by formal notice in writing. Any written argument and supporting materials should be delivered at the same time as the formal notice of application. Timelines for the respondent to provide its brief and any supporting material should be short. The tribunal should be given sole discretion to decide matters at issue based on written submissions, or to mandate oral argument, as it may see fit. Timelines for a decision should be set.
- Pre-hearing disclosure can be truncated. Even in the most complicated construction cases, a full, fair hearing can be accomplished using document requests, followed by responses to document requests in a comparatively tight timeframe. As most realize, this is a key area for dispute. As such, the tribunal should be given the power to determine production disputes summarily on application to account for the possibility of further pre-hearing production.
- It is very helpful to agree to a system of allocating hearing time (e.g., chess clock or otherwise).
- Acknowledge the fact that information (and a lot of it) will be changing hands very quickly. Account for that in your ASP. Provide for things such as:
- A truly supplemental witness statement procedure, which permits not only rebuttal evidence but supplemental evidence as well. Apply this to experts and lay witnesses alike.
- Supplemental direct examination of all witnesses to the extent required to deal with "new" information.

Conclusion

The authors of "Fast Track Arbitration: Just fast or something different?" note that "...fast track procedures must be welcomed by both parties as well as the arbitral tribunal, and must be duly supported by the institution which provides the framework for the proceedings, or else they will not be a success." (Irene Welser/Christian Klausegger, Australian Arbitration Yearbook 2009, pp 259-279 at 278)

Of course, in an *ad hoc* situation, the parties themselves, with the tribunal, determine the framework and timing of the arbitration. With serious commitment by all involved, and a well drafted ASP, the fast track can usually be maintained. This type of commitment may not always exist. Without it, even with a carefully written ASP, the fast track can quickly turn into a slow boat. For counsel, this means carefully assessing the various dynamics at play when advising the client, and keeping a realistic outlook as to the likelihood of maintaining the fast-tracked schedule, if that is what is agreed.

Darren J. Reed is a partner in the Litigation and Dispute Resolution Group at Blake, Cassels & Graydon LLP in Calgary, Alberta. His commercial litigation practice has a strong focus on construction and related disputes.