

Fast-Track Arbitration

Most people involved in construction industry disputes want them resolved on their merits as quickly and cheaply as possible. Experience teaches that unless arbitration is well managed by reasonable parties, it can take just as long and be just as expensive as litigation, without the same rights of appeal if it goes badly.

In “fast-track” arbitrations the parties and the arbitrator craft a procedure that compresses a full arbitration into a finite period of time. Just as with a fast-tracked building project, the key to success with a fast-tracked arbitration is through ‘just in time’ planning and a high level of co-operation among the parties and the arbitrator.

Even complex construction cases can be arbitrated in 100 days if the parties, their counsel and the arbitrator work together. There are well established rules for such arbitrations in the United Kingdom and in the United States which are readily adaptable in Canada.

Before considering fast-track arbitration, consider the following:

- The Parties. Fast-track arbitration only works if the parties have an equal commitment to the process and equal resources to carry out that commitment. Fast-track arbitrations compress not only the time of the arbitration, but the period of financial burden, so that the parties will have to make resources available to resolve the dispute during an intense 4 – 6

month period. There is no opportunity to ‘ease the pain’ by spreading the cost or human resources burden over a longer period of time.

- Their Lawyers. Fast-track arbitrations require lawyers to make a number of very important decisions such as: what witnesses to call, what witnesses to dispense with; and what examinations to conduct, what examinations to dispense with. Only experienced lawyers can make decisions like this with confidence. Lawyers on fast-track arbitrations must be willing to put everything aside to work within the aggressive schedule required of fast track arbitrations.
- The Arbitrator(s). The hard part for the arbitrator is to be sure that by “fast-tracking” the arbitration, the parties are still given an equal right to make their cases and meet the cases made against them. The arbitrator has to know when and how to hold the parties to their schedule and when and how to allow more time. Fast-track arbitrations usually require the arbitrator to issue a reasoned Award on a very compressed schedule, sometimes within weeks of the close of the hearing. This is a serious commitment on the arbitrator’s part and has to be considered carefully.

Summary arbitration procedures were created and refined in the United Kingdom as a reaction to the imposition of statutory adjudication in that country.¹ The U.K.’s Society of Construction Arbitrators’ Construction Industry Model Arbitration Rules (CIMAR)²

require a decision by the Arbitrator within 100 days of the earlier of the Defence (or Defence to Counterclaim) or the date the Arbitrator gives the first order for directions, which has to occur under this model within 7 days of appointment. The model rules ban unproduced documentary evidence at the hearing without leave. The maximum possible hearing duration is 10 working days, to occur not more than 28 days after pleadings and exchange of documents with final written argument to be filed within 7 days from the end of the evidentiary portion of the hearing. The JCT Supplementary and Advisory Procedures under the JCT edition of CIMAR contain advisory procedures under which the arbitrator must, within 14 days after the time for submission of written statements concludes, and after consultation with the parties, give directions with regard to the future course of the proceedings.³ Under CIMAR rules, the Arbitrator has 30 days following written submissions to render a final Award. In order to do so, the Arbitrator is specifically empowered with inquisitorial jurisdiction.⁴ Such construction arbitrations already happen in Canada on an *ad hoc* basis.⁵

Notes:

1. See Glaholt, “Has the Time Come for the ‘100 Day Construction Arbitration’ in Canada?” (2007), 59 C.L.R. (3d) 1; Darling: *What is the future for arbitration in the light of adjudication? TeCBAR Review*, March 2002.
2. The CIMAR model 100 day arbitration rules and standard form arbitration agreement can be found at www.arbitrators-society.org.
3. See Rule 9.4. of the JTC Supplementary and Advisory Procedures.

4. See Uff, “100-Day Arbitration: Is the Construction Industry Ready for It?”, www.keatingchambers.com/resources/publications/2005/ju_100day_arb.aspx?searchText=cimar.
5. See Glaholt, “Has the Time Come for the ‘100 Day Construction Arbitration’ in Canada?” (2007), 59 C.L.R. (3d) 1.