

Has the Time Come for the ‘100 Day Construction Arbitration’ in Canada?

D. W. Glaholt*

The Construction Industry and the legal industry that it supports have learned a number of valuable lessons for the experience [with 28 day statutory adjudication]. First, Adjudication has established or re-established that serious disputes can be resolved in days rather than years. The ability to do so was seemingly lost to English Arbitration during the last half century, although surviving in other jurisdictions.

(Professor John Uff, Q.C., lecture notes, January 26, 2005)

You can have it good, fast or cheap. Pick two.

(Anecdotal: contender for world’s shortest complete retainer)

We seem to have three predominant values in construction arbitration in Canada: party autonomy, equal treatment, and the right to be heard. We also seem to want reasoned awards by competent industry professionals, but we want these awards “good, fast *and* cheap”. We want a dispute resolution model that does not sacrifice any of our predominant values. This a tall order, but it can be achieved.

In earlier articles, the writer has advocated the adoption of uniform security of payment legislation across Canada, including the adoption of an adjudicative model of dispute resolution.¹ This model has taken root elsewhere. It sacrifices party autonomy and a good deal of the right to be heard in favour of achieving quick, interim, enforceable results. It is an “ends over means” model which has gained wide acceptance. This idea has also received a warm reception by the construction industry and many lawyers here in Canada, but it will be a long time before we join the rest of the common law world in enacting such sweeping reforms. In the meanwhile something else is needed. Something contractual and effective.

* Partner, Glaholt LLP, Toronto, Ontario.

¹D.W. Glaholt, “The Adjudication Option: The Case for Uniform Payment & Performance Legislation in Canada” (2006), 53 C.L.R. (3d) 8. The author has also advocated an inquisitorial model for the resolution of large scale construction disputes: D.W. Glaholt and M. Rotterdam, “Toward an Inquisitorial Model for the Resolution of Complex Construction Disputes” (1998), 36 C.L.R. (2d) 159.

Once again, we have working models to follow from the U.K., U.S. and soon Australia. As the models are contractual, we can implement them immediately.

The U.K. Version of the 100 Day Arbitration

The U.K. 100 day model was created and refined as a reaction to the imposition of statutory adjudication in that country setting out minimum standards for dispute resolution in a relatively wide range of building contracts. The process was adapted from existing private models and is called “adjudication”. Statutory adjudication is above all summary. A recent retrospective study concludes that statutory adjudication is effective.² The vigour of the *Housing Grants, Construction and Regeneration Act* reforms in 1996 appears to have taken many in the U.K. arbitration bar by surprise.

On one hand the U.K. reforms achieved wide judicial support and buy-in by many industry users; on the other hand they were said by some to mark a return to “trial by ambush” and a “pay now argue later” approach which is antithetical to any principled system of justice.

The other, perhaps unexpected consequence was that the arbitration bar in the U.K. became worried. Arbitrators wondered what would become of construction arbitrations. How could they compete?

In 2002, a U.K. barrister, Paul Darling, Q.C., proposed something he called “the 100-day Arbitration”.³ In its most summary form, and using Canadian terminology, Mr. Darling proposed selection of an arbitrator at the beginning of a project, service of a Statement of Claim with accompanying documents and statements within 7 days of an arbitral dispute arising; a Statement of Defence with accompanying documents within 28 days of service of the Statement of Claim; interim relief within 7 days if necessary (which partial award would be unappealable); then consultation with the parties and imposition by the Arbitrator of an interlocutory schedule that would result in an oral hearing over a maximum of two days (time to be shared equally), and a reasoned final award within at most 100 days of the close of pleadings.

In 2004, John Uff, Q.C., of Keating Chambers, Professor Emeritus of Construction Law at Kings College London, and well-known and respected author of *Construction Law: Law and Practice Relating to the Construction Industry*,⁴

²See the Report at <http://www.dti.gov.uk/files/file15091.pdf>.

³P. Darling, “What is the Future for Arbitration in the Light of Adjudication?”, TECBAR Review, March 2002.

⁴9th ed. (London: Sweet & Maxwell, 2005). Professor Uff is also the principal author of the *Construction Industry Model Arbitration Rules* (London: Sweet & Maxwell, 1998), and joint author of the chapter on Construction Contracts in the 28th edition of *Chitty on*

lectured LL.M. students on the then new 100 day arbitration procedure. Professor Uff introduced a new set of standard rules promulgated by the U.K.’s Society of Construction Arbitrators to add to their Construction Industry Model Arbitration Rules (CIMAR).

This now-standard 100 day Arbitration Procedure requires a decision by the Arbitrator within 100 days of the earlier of the Defence (or Defence to Counterclaim) or the date the Arbitrator gives a first order for directions (which has to occur under this model within 7 days of appointment). In other words, under the U.K.’s new model rules, the 100 day period does not start to run until pleadings are closed. In order to give teeth to the extremely summary disclosure periods involved in 100 day arbitration (documents, experts’ reports etc. to be completed in a 21-day cycle), the model rules ban unproduced documentary evidence at the hearing without leave. These rules extend the maximum possible hearing duration to 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.⁵ Under CIMAR rules, the Arbitrator has 30 days following written submissions to render a final award. In order to get the job done, the Arbitrator under the CIMAR model rules is specifically empowered with inquisitorial jurisdiction.⁶

Six months later, Professor Uff revisited his comments in a more substantial paper also delivered at King’s College, London. His view was that the main criticism of statutory adjudication to which the CIMAR 100 day arbitration model responded was the “one size fits all” criticism. Not every dispute lends itself to the radically summary statutory adjudication procedure in the U.K. and elsewhere. In theory, the CIMAR 100 day arbitration model allows some procedural compromise. Professor Uff argued that the CIMAR procedure had three important procedural advantages: first, its standard adoption clause could operate as a severable agreement to arbitrate; second, the procedure could also be

Contracts (London: Sweet & Maxwell, 1999) and the *Institution of Civil Engineers Arbitration Practice* (London: Thomas Telford, 1983). He is a contributor to *Keating on Construction Contracts*, 8th ed. (London: Sweet & Maxwell, 2006).

⁵See Rule 9.4. of the JTC Supplementary and Advisory Procedures.

⁶See J. Uff, “100-Day Arbitration: Is the Construction Industry Ready for It?”, www.keatingchambers.com/resources/publications/2005/ju_100day_arb.aspx?searchText=cimar

adopted *ad hoc*; and third, it could be adopted for a dispute that was tied up in some other form of dispute resolution.

The CIMAR model 100 day arbitration rules and standard form arbitration agreement can be found at www.arbitrators-society.org.

The U.S. Version of the 100 Day Arbitration

Effective in 2006, the International Institute for Conflict Prevention & Resolution, CPR Construction Advisory Committee, chaired by Jesse B. Grove III, published Rules for Expedited Arbitration of Construction Disputes.⁷

The introduction to the CPR Report says this:

The United Kingdom's speedier construction adjudication process propelled CPR to challenge the existing American structure and develop an expedited arbitration procedure for construction disputes centered on a 100-day hearing time frame.

The process retains the hallmarks historically associated with arbitration: a fair, expeditious, private and less expensive process than litigation. It also contains familiar protections to avoid erosion of parties' rights that could occur with an (sic) less carefully-drafted procedure. Nonetheless, it allows tight arbitrator control and fosters compressed time frames to bring about sought-after speed and reduced expense. While party modification of the Rules is permitted, the intent is to retain an expeditious process.

The Report goes on to describe its highlights, including compressed time frames, a 100 day hearing window (60 days for discovery, 30 days for hearing and 10 days for award), presumptive use of three arbitrators, institutional appointment (essentially the function of CPR), detailed pleading requirements, avoiding ambush, limited discovery and various ancillary opportunities through CPR (subpoena enforcement, neutral expert appointment, mediation, "arbitration appeal procedure").

The CPR publishes a submission clause at http://www.cpradr.org/CMS_disp.asp?page=adr_detail&M=9.1.4.

The CPR schedule is as follows:

Calculated by Business Days	
Day 1	Notice of Arbitration, Statement of Claim and Nomination of Arbitrator by Claimant
Day 10	Nomination of Arbitrator by Respondent

⁷These Rules are available at the Institute's website at <http://www.cpradr.org/pdfs/ConstructionArbRules06.pdf#page=9>

Calculated by Business Days	
Day 15	Third Arbitrator Agreed and Named
Day 20	Statement of Defense and any counterclaim or Respondent’s Motion to Expand Time and Arbitrator Appointment by CPR if Necessary
Day 25	Pre-hearing Conference of Parties with Tribunal, Determination of Time to Commence the 100-Day Period and Interim Deadlines Established

Calculated by Calendar Days except Where Noted From the Date of Commencement of 100-Day Period	
60 Days	All Discovery Complete and All Pre-hearing Submissions Filed
90 Days	Hearing Complete
100 Days	Award Rendered (Business Days Apply to Award Time Frame)

The Australian Version of the 100 Day Arbitration

Responding to their own version of statutory security of payment legislation and “adjudication” processes, the Institute of Arbitrators and Mediators of Australia recently announced that on December 5, 2006 the Institute would host its inaugural National Arbitration Day to consider the concept of fast track arbitration. A set of “100 Day” rules has been proposed and the legal and construction industries have been invited to comment.

A Canadian Version of the 100 Day Arbitration

To recap, arbitration in the Canadian construction industry currently appears to embrace three predominant values: party autonomy, equal treatment, and the right to be heard. The construction industry needs “just” results, which means reasoned awards by competent industry professionals, whether legally trained or not. To achieve these goals, construction arbitration procedures have to bring out and develop a case that allows the arbitrator to isolate, sort and choose among reasons to achieve a sound and supportable outcome. We want all of this delivered “good, fast and cheap”.

Such construction arbitrations already happen in Canada and occasionally within 100 days. For example, in a recent, complex mechanical claim of over \$10 million with a long Scott Schedule of issues, pleadings were exchanged in June, documents were exchanged in August, discoveries and related motions were held in October and November, ten procedural meetings and five procedural orders were conducted along the way, and a hearing was scheduled in January and February of the following year. The whole cycle of this arbitration, which settled on the first day of the hearing, was 135 working days, beginning to end. This was hard on counsel and intense for the clients, but all parties co-operated and the job got done.

At the other end of the scale, there are many smaller cases that occupy years of interlocutory proceedings and weeks upon weeks of trial, at ruinous expense to all concerned, that could easily be conducted as “100 day” arbitrations. High on this list are the ever-present, court clogging “dream home” cases. They would all be better resolved by “100 day arbitration”.

A sample schedule follows. It is based loosely on another recently completed case involving substantial claims and counterclaims, several thousand core documents, two experts and approximately 10 witnesses. All dates were driven by the commencement date (the later of close of pleadings, appointment of an arbitrator, or confirmation by the arbitrator that the estimated arbitration fee has been received in full) and the end date (i.e. no later than the 100 days from commencement):

Event	Working days	Calendar Days
1. Notice to arbitrate, selection of arbitrator.	N/A	June 1 - June 30
2. First procedural meeting with arbitrator.	N/A	July 12
3. Both deposits received.	N/A	August 1 - August 15
4. Statement of claim with supporting documents, discovery plan and draft witness list served and filed.	N/A	August 1
5. Defence and counterclaim with supporting documents, discovery plan and draft witness list served and filed.	N/A	August 31
6. Defence to counterclaim served and filed. PLEADINGS CLOSED 100 Days Begins Sept 15 100 Days Expires Feb 8	Day 1	September 15
7. Affidavits of documents, inspection of documents, three procedural meetings by conference call regarding documentary production and finalization of discovery plan.	Days 1 - 30	September 15 - October 30
8. Oral examinations, three procedural meetings during the course of the oral examinations, short notice, “real time”, regarding refusals and undertakings; one “Hearing Management” procedural meeting.	Days 31 - 66	October 31 - December 15

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Event	Working days	Calendar Days
9. Prepare and conduct ten day hearing using witness panels for selected issues and “Chess Clock” approach to allocation of finite hearing time.	Days 67 - 86	Prep: Dec. 15 - Jan. 15 Hearing Week of January 15 Hearing Week of January 22
10. Period of Reserve, Reasons & Award.	Days 87 - 100	Award Released February 8

There are several requirements to make something as aggressive as this work in the real world:

1. Two parties. Depending on the issues (flow through claim or independent cause of action?), if there are more than two parties, the 100 days might become 200 days for example.
2. Co-operative, informed and experienced counsel. Unless there is a strong arbitrator and co-operative counsel, managing a 100 day arbitration can be a grueling experience.
3. No collateral agendas. Not every party that says it wants a summary outcome actually wants a summary outcome. Often parties want summary procedures and outcomes only if they “win”.

There is no doubt that a compressed schedule like this puts tremendous burdens on both counsel and client. Counsel must actually choose among witnesses, documents and evidence. Cross-examination issues must be chosen carefully and cross-examinations crafted to achieve their purpose in the limited time available. There is a significant up-front cash investment by the parties. All of the preparation is compressed and “front-ended”. Witness panels, particularly of expert witnesses, may be necessary. As counsel have finite time, their opening statements and closing arguments tend to be models of economy of expression.

On the brighter side, the whole process can be made to fit into one fiscal year. The parties know where they stand and can obtain a principled summary resolution of their dispute.