# Contemporary Issues in International Arbitration and Mediation
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## Fast-Track International Construction Arbitrations

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### Introduction

Perceptions that the arbitral process takes too long and costs too much are at the top of concerns about commercial arbitration generally, including international construction arbitration.[1] A sobering example in the United States occurred in 2007 when the American Institute of Architects dropped arbitration as the "default" process for ultimately resolving construction disputes in their suite of contract forms.[2] Over the past 10 to 15 years construction industry concerns about time and cost have prompted legislatures and industry organizations, including the legal profession, to develop faster, more efficient, and generally cheaper adjudication[3] processes for deciding construction disputes.[4] The procedures which have had the

[1] For a comprehensive exposition of the causes and potential cures for excessive time and cost of commercial arbitration, see College of Commercial Arbitrators "Protocols for Expeditious, Cost-Effective Commercial Arbitration--Key Action Steps for Business Users, Counsel, Arbitrators & Arbitration Provider Institutions" (2010); *See also* Morton, "Can a World Exist Where Expedited Arbitration Becomes the Default Procedure," 26 Arbitration International 1, pp. 103 to 114 (2010).

[2] *See* AIA Document, AIA-201 (2007 ed.).

[3] The term "adjudication" is to distinguish those processes leading to a binding determination of disputes, as contrasted with various ADR processes which assist the parties to reach an agreed settlement. *See generally* Overcash and Gerdes, "Five Steps to Fast-Track the Large, Complex Construction Case," Dispute Resolution Journal, pp. 35 to 41 (May/July 2009); see also College of Commercial Arbitrators "Protocols for Expeditious, Cost-Effective Commercial Arbitration--Key Action Steps for Business Users, Counsel, Arbitrators & Arbitration Provider Institutions" (2010).

[4] In the last five years, a number of arbitral institutions have adopted new rules for "expedited," "streamlined," "accelerated" or "fast-track" arbitrations, some of which pertain especially to disputes arising out of construction projects. *See, e.g.*, Joint Contracts Tribunal, Construction Industry Model Arbitration Rules; CPR International Institute for Conflict Prevention & Resolution, Rules for Expedited Arbitration of Construction Disputes ; CPR Global Rules For Accelerated Commercial Arbitration (August 20, 2009); Society of Construction Arbitrators 100 Day Arbitration Procedure ; JAMS Engineering and Construction Arbitration Rules and Procedures for Expedited Arbitration (July 15, 2009); German Institution of Arbitration, Supplementary Rules for Expedited Proceedings (April, 2008); The Swiss Rules of International Arbitration (January 2006), Section V, Expedited Procedure; the Stockholm Chamber of Commerce Rules for Expedited Arbitration (January 2010), http://www.sccinstitute.com; and the Central Chamber of Commerce of Finland (CCCF) Rules for Expedited Arbitration (1 June 2004). *See generally* Morton, "Can a World Exist Where Expedited Arbitration Becomes the Default Procedure," 26 Arbitration International 1, pp. 103 to 114 (2010); Abraham, "Fast-track Arbitration: An Idea Whose Time Has Come?" IBA Arbitration Newsletter, pp. 22 to 23 (March 2010); Hentunen, Aro & Ramm-Schmidt,"Time and Cost in Arbitration: A Finnish Perspective, IBA Arbitration Newsletter, Vol. 16, No.2, pp. 99 to 102 (September 2011).

most success in reducing the time and cost of construction adjudication have been the accelerated or "fast-track" procedures which are designed to significantly reduce the time from the initiation of the dispute resolution process to a binding determination, whether that determination is final or for an interim time. The progenitor for modern accelerated construction arbitration, and the process that has had the most profound impact on traditional construction dispute resolution, was Statutory Adjudication, which was enacted in the United Kingdom in the mid-90s and took effect on May 1, 1998.[5] While adjudication differs from arbitration in several respects, this paper will briefly examine the Statutory Adjudication procedures as applicable to construction disputes in England and then review a sampling of "fast-track" or accelerated arbitration rules and procedures that are published by various construction industry organizations and arbitral institutions.[6]

**Statutory Adjudication**

Similar to the construction industry in the United States, participants in the United Kingdom construction industry were concerned about the significant time and cost required to resolve construction disputes. None of the alternative dispute resolution procedures--mediation, conciliation, or adjudication (as then existed)--seemed to have any noticeable effect on reducing the time, cost, or frustration expended on construction disputes, most notably the classic case of a party's withholding of moneys as leverage to encourage or force a settlement. Consequently, Sir Michael Latham led an investigation in the early 1990s, culminating in his report of 1994, *Constructing the Team*, in which he recommended that some quick simple procedure be developed so as to provide at least a temporary resolution. The result was legislation in the form of Part II of the Housing Grants, Construction and Regeneration Act 1996[7] which addressed the principal Latham recommendations.[8] This legislation (HGCRA, the Act, or Statutory Adjudication)[9] had a profound impact on the UK construction industry and legal profession. As Dr. Robert Gaitskell, QC, observed in 2005:

> Adjudication is a procedure that ... now dominates the construction dispute field. It has been so successful that the Government is regularly reviewing how to improve the procedure and thereby encourage even more disputes to be

[5] Housing Grants, Construction and Regeneration Act 1996, Appendix 12.

[6] *See also* Morton, "Can a World Exist Where Expedited Arbitration Becomes the Default Procedure," 26 Arbitration International 1, pp. 103 to 114 (2010).

[7] Housing Grants, Construction and Regeneration Act, 1996, c. 53; other portions of the Act cover matters unrelated to construction dispute resolution.

[8] *See generally* Simmonds, Statutory Adjudication; A Practical Guide (2003), §2.1, p. 5. The opinion in Macob Civil Engineering Ltd v. Morrison Construction Ltd, 1999 WL 250101 (U.K. QBD (TCC) 1999) observed that the Act was to be "... a speedy mechanism for settling disputes in construction contracts on a provisional interim bases, and requiring the decision of the adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement."

[9] Housing Grants, Construction and Regeneration Act, 1996, c. 53 (Eng.); *see* Appendix 12. The HGCRA legislation was amended in 2009 and 2011 in several respects, none of which substantially affect the references in this Chapter; *see* Local Democracy, Economic Development and Construction Act 2009, Part 8, §§138 to 145; Thomas, "Statutory Reform in UK Construction Contracts," Construction Law International, Vol. 6, Issue 4, pp. 32 to 33 (December 2011).

> adjudicated rather than to be dealt with in any other way. As more parties become more familiar with Adjudication, and as its procedures are streamlined to meet the needs of the market, it is to be expected that the reduction in arbitration and litigation will increase.[10]

Since May 1, 1998, when Statutory Adjudication came into effect, the mandatory procedures have necessitated major changes to preexisting dispute resolution clauses in most UK form construction agreements.[11] Statutory Adjudication as a construction dispute resolution process in the UK began slowly, then accelerated to reach a peak in 2003, then fell away by about 25% from 2004 through 2007 and leveled out over the past five years.[12] The types of disputes early dealt with by Statutory Adjudication were primarily simple payment issues, but in later years more complex construction disputes were put to the process. Today, many adjudications involve large sums of money and contain complex legal questions.[13]

It has been said that the underlying purpose of Statutory Adjudication is to provide a "pay now, litigate later" solution on the assumption that anything that goes awry can be cured in subsequent litigation or arbitration.[14] As Lord Ackner observed at the "report stage" of the bill creating the Act, the general understanding of the adjudication process was to produce "a quick, enforceable interim decision which lasted until practical completion when, if not acceptable, it would be the subject matter of arbitration or litigation,"--a "sensible way" of dealing expeditiously and relatively inexpensively with disputes which might hold up the completion of important contracts.[15] After the economic downturn in 2008, Statutory Adjudication similarly experienced a downturn in referrals, but the views of those familiar with the process are generally that the processes are still highly regarded and useful for resolving construction disputes.[16]

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[10] Gaitskell, "Current Trends in Dispute Resolution-Focus on ICC Dispute Resolution Boards," presented to the Society of Construction Arbitrators, Annual Conference, 13-15 May, 2005, p. 22.

[11] Chan, "Construction Industry Adjudication: A Comparative Study of International Practice," 22 J. Int'l Arb. No. 5 pp. 363, 365.

[12] *See* "The Development of Statutory Adjudication in the UK and its Relationship with Construction Workload," School of the Built and Natural Environment, Table 6, Glasgow Caledonian University, Glasgow, UK (2010) (http://www.adjudication.gcal.ac.uk).

[13] *See generally* Simmonds, Statutory Adjudication; A Practical Guide (2003); Uff, "Are We All in the Wrong Job--Reflections on Construction Dispute Resolution," Society of Construction Law Papers (July 2001). *See also* Coulson, Construction Adjudication (2007). "The Development of Statutory Adjudication in the UK and its Relationship with Construction Workload," School of the Built and Natural Environment, Table 6, Glasgow Caledonian University, Glasgow, UK (2010) (http://www.adjudication.gcal.ac.uk).

[14] *See* Chan, et al., "Construction Industry Adjudication: A Comparative Study of International Practice," 22 J. Int'l Arb. No. 5, pp. 363, 365.

[15] Speech of Lord Ackner, reported in Hansard, H.L. Vol. 571, Cols. 989 to 990.

[16] "The Development of Statutory Adjudication in the UK and its Relationship with Construction Workload," School of the Built and Natural Environment, Abstract, Glasgow Caledonian University, Glasgow, UK (2010) (http://www.adjudication.gcal.ac.uk).

Under the Act, a party to a "construction contract" as defined,[17] has the right to refer a dispute arising under the contract for Statutory Adjudication under the specified procedures.[18] A requirement for application of the Act is that the construction operations take place in England, Scotland, or Wales, without regard to whether the law of England or Wales or Scotland is otherwise applicable to the interpretation and enforcement of the contract.[19] The Statutory Adjudication procedures apply only to construction contracts that are "in writing" and that were executed after May 1, 1998.[20] The Act mandates that the construction contract will contain at least the following provisions, sufficient to:

- Enable a party to give notice at any time of his intention to refer a dispute to adjudication;
- Provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute within seven days;
- Require the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred; however, the adjudicator may extend the period of 28 days by up to 14 days, with the consent of the party by whom the dispute is referred;[21]
- Impose a duty on the adjudicator to act impartially;
- Enable the adjudicator to take the initiative in ascertaining the facts and the law;
- Provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement;

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[17] A "construction contract" is defined as "an agreement with a person for any of the following--(a) the carrying out of construction operations; (b) arranging for the carrying out of construction operations by others, whether under sub-contract to him or otherwise; (c) providing his own labour, or the labour of others, for the carrying out of construction operations." HGCRA, Pt. II, §104 (1).

[18] HGCRA, Pt. II, §108(1).

[19] HGCRA, Pt. II, §104(7).

[20] The "in writing" requirement was broadly defined to include a written agreement without regard to whether signed by the parties; or so long as the agreement is made by exchange of communications in writing; or if the agreement is otherwise evidenced in writing, such as having been recorded by any means, or incorporated by reference into a agreement; and an exchange of submissions in Statutory Adjudication proceedings or other contexts, where one party alleges the existence of a written construction contract and the other party does not deny the allegation, the parties are deemed to have agreed in writing, within the meaning of the Act. *See* HGCRA, Pt. II, §107. The requirement of a "writing" was dropped from Part 2 of the 1996 Act by Section 135(1) of the Local Democracy, Economic Development and Construction Act 2009, so that the Act will now apply to all construction contracts, whether in writing or oral, or partly in writing and partly oral; Id., Part 8 §139.

[21] The statistics available indicate that 56% of decisions are rendered within 28 days; 36% within 28 to 42 days and only 8% are rendered after 42 days; see Adjudication Reporting Center, Glasgow Caledonian University, Report No. 10, Table 9 (June, 2010): www.adjudication.gcal.ac.uk. It has been suggested that these very short timescales, which are considerably shorter than applicable to DABs under FIDIC contracts, have spawned the greatest controversy and litigation in the UK; *see* Scott, "Lessons Learned from Statutory Adjudication in the United Kingdom," presented to Center for International Legal Studies, Dispute Resolution Seminar, Salzburg, June 10-12, 2004, p. 9.

- That the adjudicator have certain immunities from acting as such in the proceedings, unless in bad faith.[22]

If the construction contract does not comply with any of these requirements as specified by the Act, then a series of regulations, known as "The Scheme for Construction Contracts (England and Wales) Regulations 1998" will be deemed to apply and to be incorporated into the construction contract.[23] However, parties to construction contracts are not required to adhere strictly to the adjudication procedures set forth in the Scheme, so long as the contract includes the minimum required provisions of the Act.

The Statutory Adjudication Scheme[24] provides a detailed procedure for submitting and deciding disputes under the Act. Some highlights of the Scheme are as follows:

- Any party to a construction contract (the Referring Party) may give written notice (Notice of Adjudication) to every other party to the contract of his intention to refer any dispute arising under the contract to Statutory Adjudication;[25]

- The Notice of Adjudication shall briefly state a brief description of the dispute and parties, details of where and when the dispute has arisen, and the nature of redress sought;

- The Referring Party shall either specify the person named in the contract to act as an adjudicator or submit a request to name an adjudicator to an "Adjudicator Nominating Body";[26]

- The person who is requested to act as an adjudicator shall indicate whether or not he is willing to act within two (2) days of receiving the request and shall declare his independence and lack of interest in the parties or dispute; if an Adjudicator Nominating Body makes the selection, such action shall be taken and notified to the Referring Party within five (5) days of the request;

- After selection of the adjudicator, the Referring party shall, within seven (7) days, refer the dispute in writing to the adjudicator (the Referral Notice), together with copies of or

[22] HGCRA, Pt. II, §108 (1) to (4).

[23] HGCRA, Pt. II, §108 (5); Statutory Adjudication Scheme, §2-3.

[24] Schedule (Regulations 2, 3, 4), Scheme for Construction Contracts (England and Wales) Part I--Adjudication (Statutory Instrument No. 649); see Appendix 12.

[25] It should be noted that even after initiating arbitration or litigation, a party does not thereby waive the right to submit the dispute to Statutory Adjudication; *see* Herschel Engineering Ltd v. Breen Property Ltd, 2000 WL 491503 (U.K. QBD (TCC) 2000) (Dyson, J.).

[26] An "Adjudicator Nominating Body" (ANB) is a non-natural organization or entity that holds itself out publicly as an organization which will select an adjudicator when requested to do so. *See* Scheme, §2(3). There are now quite a few organizations that act as Adjudicator Nominating Bodies, including the Academy of Independent Construction Adjudicators, The Chartered Institute of Arbitrators, the Construction Industry Council, Institution of Civil Engineers, Royal Institute of British Architects, the Royal Institution of Chartered Surveyors and the Technology and Construction Solicitors Association. For a more complete list of ANBs, see Construction Umbrella Bodies Adjudication Task Group, c/o Construction Industry Council, www.cic.org.uk.

relevant extracts from the construction contract and "such other documents as the Referring Party intends to rely upon"[27] all of which shall be served on other parties to the dispute; a counterclaim may not be considered, unless it derives from the same "dispute";[28]

- Only the referred dispute may be adjudicated in the proceeding, except with the consent of the adjudicator and all parties;

- The adjudicator shall "act impartially in carrying out his duties and shall do so in accordance with any relevant terms of the contract and shall reach his decision in accordance with the applicable law in relation to the contract," and, in doing so, "shall avoid incurring unnecessary expense";[29]

- The adjudicator may act inquisitorially and "take the initiative in ascertaining the facts and the law necessary to determine the dispute," including: requesting any party to provide documents or written statements, deciding the language(s) to be used, whether there shall be a "hearing" or meetings of the parties, make site visits, conduct tests and inspections (subject to the consent of necessary third parties), appoint experts, assessors, or legal advisors, establish a timetable and deadlines for responses, and generally establish the procedure to be followed by the parties in the adjudication;[30]

- If a party refuses or fails to comply with the directions of the adjudicator, he may either continue with the proceedings, draw negative inferences and make decisions on the basis of the evidence before him, attaching such weight as he deems fit; however, any evidence received or taken into account by the adjudicator must be disclosed to all parties;

- Any party may be represented by counsel or a representative;

- The decision of the adjudicator shall decide the matters in dispute, taking into account any other matters which the parties agree should be within the scope of the adjudication or which the adjudicator considers necessarily connected with the dispute, including opening up any previous determination, *e.g.*, by an engineer or other certifying party;[31]

- The decision of the adjudicator shall be made within twenty eight (28) days after the date of referral or 42 days thereafter if the Referring Party consents;

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[27] Statutory Adjudication Scheme, §7 (2).

[28] *See* Simmonds, Statutory Adjudication (2003) p. 62, §8.3. Issues have arisen as to what is included within a "dispute" for purposes of Statutory Adjudication; *see* Fastrack Contractors Ltd v. Morrison Construction Ltd, 2000 WL 571237 (U.K. QBD (TCC) 2000) (J. Thornton); Halki Shipping Corp v. Sopex Oils Ltd, 1997 WL 1105544 (CA (Civ Div) 1997).

[29] Statutory Adjudication Scheme, §12.

[30] Statutory Adjudication Scheme, §13.

[31] Not surprisingly, cases have challenged decisions of adjudicators based on claims of lack of jurisdiction; *see* Bouygues UK Ltd v. Dahl-Jensen UK Ltd, 2000 WL 1084433 (CA (Civ Div) 2000); Homer Burgess Ltd. v. Chirex (Annan) Ltd., [2000] BLR 124.

- If requested by one of the parties, the adjudicator shall provide reasons for the decision.[32]

In the absence of any directions by the adjudicator relating to the time for performance of the decision, the parties are required to comply with the decision, immediately upon receipt.[33] While the adjudicator has no authority, in the absence of the parties' consent, to award or allocate attorney's fees or legal costs against either party, the fees and expenses of the adjudicator can be allocated as between the parties, and the parties are jointly and severally liable to the adjudicator to pay these fees and expenses.[34]

Most participants involved in Statutory Adjudication have observed that, because of the short time frames and truncated procedures, justice is typically meted out as with a machete, rather than a scalpel.[35] However, notwithstanding the "rough and ready" or "rough justice" nature of the proceedings, it has been decided that rules of "natural justice" do apply and the proceedings must be conducted with fairness to each party as time constraints permit.[36] It has further been suggested that the truncated process is not suitable for complex construction cases, "where many lever arch files will be involved."[37] Nevertheless, the Act has been increasingly

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[32] The entire procedure is set out in detail in the Statutory Adjudication Scheme, §§1 to 26.

[33] Statutory Adjudication Scheme, §§21 to 23. Statutory Adjudication decisions are enforced by actions for summary judgment; *see* Outwing Construction Ltd v. H Randell & Son Ltd, 1999 WL 250106 (U.K. QBD (TCC) 1999) (J. Lloyd) (TCC).

[34] Statutory Adjudication Scheme, §§9(4); 25. Studies have indicated that average fees for adjudicators in construction cases have been steady over the past years and average about 5% of the sum claimed; that the mean average adjudicator's fee is GBP150 to GBP175 per hour; but that about half of all adjudications concern sums in dispute of less than GBP 50,000. *See* survey by Hammonds & Building Magazine, quoted in Construction Law (March 2005) pp. 1, 4; June 2010, Report No. 10, Glasgow Adjudication Reporting Centre (http://www.adjudication.gcal.ac.uk); Gaitskell, "Current Trends in Dispute Resolution--Focus on ICC Dispute Resolution Boards," Society of Construction Arbitrators, Annual Conference: 13-15 May, 2005, p. 21, 22.

[35] Derek Simmonds, author of a handbook on Statutory Adjudication, noted: "It must be remembered that adjudication has always been accepted as being a somewhat rough and ready process. The requirement that a decision, perhaps on a complicated dispute and often based on limited information, is to be given--in the context of legal processes--in a very short time means that there will inevitably be some rough justice along the way. The niceties of arbitration or litigation cannot always be observed and the courts, when investigating adjudicators' behaviour, have acknowledged this." *See* Simmonds, Statutory Adjudication (2003) p. 59; and, as noted by Dyson, J. in Bouygues v. Dahl-Jensen, [2000] BLR 49, "... the purpose of the scheme is to provide a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced pending final determination of disputes by arbitration, litigation or agreement, whether those decisions are wrong in point of law or fact. It is inherent in the scheme that injustices will occur, because from time to time adjudicators will make mistakes. Sometimes those mistakes will be glaring obvious and disastrous in their consequences for the losing party."

[36] *See* Macob Civil Engineering Ltd v. Morrison Construction Ltd, 1999 WL 250101 (U.K. QBD (TCC) 1999); Bouygues UK Ltd v. Dahl-Jensen UK Ltd, 2000 WL 1084433 (CA (Civ Div) 2000); and Discain Project Services Ltd v. Opecprime Development Ltd (Bias), 2001 WL 332187 (U.K. QBD (TCC) 2001); D. Scott, Lessons Learned from Statutory Adjudication in the United Kingdom, presented to Center for International Legal Studies, Dispute Resolution Seminar, Salzburg, 10-12 June, 2004, p. 9.

[37] *See* Gaitskell, "Current Trends in Dispute Resolution--Focus on ICC Dispute Resolution Boards," Society of Construction Arbitrators, Annual Conference: 13-15 May, 2005, p. 22.

used for more complex cases that were referred to adjudication.[38] The short time for a response to the Notice of Adjudication and presentation of all evidence means that respondents will likely be at a disadvantage in relation to the Referring Party who will presumably have had much longer to prepare its claim, together with necessary supporting evidence and documentation. Hence there have been complaints of "ambush" tactics.[39] Moreover, because so much will have to be done in such a short time period, parties and their representatives must be prepared to focus, perhaps exclusively, on the case at hand, so as to be able to present and manage the fast-moving case.

It is generally believed that the vast majority of adjudication decisions are not taken to arbitration or litigation; rather, the losing parties simply decide to "live with it."[40] While concerns have been expressed about the competence of some adjudicators and the quality of certain decisions, the construction industry's general conclusion about Statutory Adjudication has been, on the whole, positive.[41]

**The Society of Construction Arbitrators' "100-day" rules**

While Statutory Adjudication has demonstrated that it is clearly faster than arbitration, and possibly cheaper, still, there are certain advantages to arbitral proceedings. For example, there is much less chance that a party will be "ambushed" in arbitration, for example, by not having the time to prepare to respond to a claim.[42] Furthermore, arbitration procedures generally

[38] Scott, "Lessons Learned from Statutory Adjudication in the United Kingdom," presented to Center for International Legal Studies, Dispute Resolution Seminar, Salzburg, 10-12 June 2004, p. 5; Kirkham, "The Future of Adjudication", Society of Construction Law Papers, p. 1, 9 (September 2004).

[39] Simmonds, Statutory Adjudication (2003) p. 85.

[40] Dr. Robert Gaitskell, QC has stated that "[f]igures given anecdotally are that [as of May, 2005] there have been about 15,000 adjudications thus far, the vast bulk being dealt with by members of the RICS [Royal Institute of Chartered Surveyors]. Of this enormous number only about 300 have reached the courts, and of these about 200 reported decisions have resulted. It is believed that well over 80% of adjudication decisions are simply accepted, with the losing party content that it has had a fair chance to put its case to an independent tribunal." Paper presented to the Society of Construction Arbitrators, Annual Conference: May 13-15, 2005, "Current Trends in Dispute Resolution--Focus on ICC Dispute Resolution Boards"; and Scott, "Lessons Learned From Statutory Adjudication in the United Kingdom," presented to Center for International Legal Studies, Dispute Resolution Seminar, Salzburg, June 2004 10-12, p. 10.

[41] *See* "The Development of Statutory Adjudication in the UK and its Relationship with Construction Workload," School of the Built and Natural Environment, Abstract, Glasgow Caledonian University, Glasgow, UK (2010) (http://www.adjudication.gcal.ac.uk); Coulson, Construction Adjudication (Oxford University Press, 1st ed. 2008); Fenn and O'Shea (Editors), "Adjudication: Tiered and Temporary Binding Dispute Resolution in Construction and Engineering," 134 ASCE Journal of Professional Issues in Engineering Education and Practice, No. 2, pp. 203 to 224 (April 2008); Bailey, Public Law and Statutory Adjudication, (1st prize winning paper, SCL Hudson Prize Essay Competition, 2007, presented to Society of Construction Law, London (3 June 2008). For recent commentary on the interplay between adjudication and arbitration, see Rana, "Is Adjudication Killing Arbitration?," 75 Arbitration No. 2, pp. 223 to 230 (May 2009); Tackaberry, "Adjudication and Arbitration: The When and Why in Construction Disputes," 75 Arbitration, No. 2, pp. 235 to 243 (May 2009); Britton, "Court Challenges to ADR in Construction: European and English Law," a paper based on the essay awarded the Norman Royce Prize, 2008, by the Society of Construction Arbitrators (January 2009).

[42] While "ambush" is not attractive, it was held in an English case not to amount to procedural unfairness; see Wilcox, J, London & Amsterdam [2004] BLR 179.

provide more autonomy and flexibility to the parties and tribunal to adapt the process to the problem and to the circumstances of the dispute. Still yet, arbitral procedures, while flexible, are more clearly defined; there is a fairly well developed body of case law and precedent on the effect and enforcement of arbitral decisions. Perhaps, most importantly, arbitration arguably affords a greater likelihood of "getting it right" as opposed to just "getting it done."

After approximately five years of experience with Statutory Adjudication, the UK Society of Construction Arbitrators went about assessing the advantages and disadvantages of Adjudication relative to full-scale arbitration.[43] The conclusion drawn by the Society of Construction Arbitrators was that the perceived "wrongs" of arbitration had been overstated and there was much to be seen as "right" with arbitral processes.[44] There was a closer balance that could be struck as between the 28-plus day Statutory Adjudication process and full-scale arbitration which often takes one to two years or more to complete. The result of this balancing analysis was the promulgation in 2004 of a set of rules to be known as the "100 Day Arbitration Procedure."[45] The drafters of the 100-Day Arbitration Procedure recognized fully that, even within a larger time period, respondents might still be ambushed or placed at a relative disadvantage by not having sufficient time to assess the claimant's case. To account for this potential problem, the 100-day countdown would not begin until both parties had essentially "stated their cases" in the initial pleadings. The anticipated result was that construction disputes submitted to the 100-day procedures would, in reality, consume the better part of four to five months, which would still be "middle ground" between the one to two month Statutory Adjudication average time and the ICC aspirational six-month time period.[46] The 100-Day Arbitration Procedure would be available for parties to incorporate into their construction contracts to resolve future disputes, or existing disputes could, by mutual agreement, be submitted to the process. Of course, the parties could always modify the procedures to suit their particular needs.

The highlights of the 100-Day Arbitration Procedure are as follows:

- The 100 days begins from the date on which the later of the statement of defense to the claim or counterclaim is delivered; or if already delivered, when the arbitrator[47] gives directions on the procedures to follow.[48]

- A procedural conference is quickly arranged among the arbitrator and the party representatives to obtain their views on future procedures.[49]

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[43] Uff, "Lessons Learned from Adjudication and the new 100-day Procedure," delivered to a joint meeting of the Society of Construction Arbitrators and the Society for Construction Law, Kings College, July 1, 2004.

[44] Uff, "Lessons Learned from Adjudication and the new 100-day Procedure," delivered to a joint meeting of the Society of Construction Arbitrators and the Society for Construction Law, Kings College, July 1, 2004.

[45] 100 Day Arbitration Procedure (effective, July 1, 2004).

[46] ICC Rules, Art. 24(1).

[47] The 100 Day Arbitration Procedure contemplates that there will be a sole arbitrator, although the parties may elect to have three or more serve on a tribunal.

[48] 100 Day Arbitration Procedure, Rule 1(a)(b).

- Communications by, between, and among the arbitrator and the parties is contemplated to be by electronic means, including fax and email.[50]

- Within seven days of appointment, or later by agreement, the arbitrator will establish a procedural timetable lasting not longer than 100 days.[51]

- The procedural order and timetable will provide for:

    - service of any outstanding pleadings, witness statements, experts' reports, within seven days;

    - service of all further documents, including replies to witness statements and experts' reports, or service of document requests, within 14 days thereafter;

    - final exchanges of documents or reports, within seven days of request;[52]

    - setting of the date(s) for an oral hearing (not to exceed 10 working days) to commence not more than 28 days after the conclusion of the exchange of pleadings, witness statements and documents; and

    - final written submissions (if ordered by the arbitrator) within seven days from the end of the hearing.[53]

- The arbitrator is expressly granted authority to (1) order any submission or other material to be delivered in writing or electronically; (2) take the initiative in ascertaining the facts and the law; (3) direct the manner in which the time of the hearing is to be used; (4) limit or specify the number of witnesses and/or experts to be heard orally; (5) order questions to witnesses or experts to be put and answered in writing; (6) conduct the questioning of witnesses or experts himself; and (7) require two or more witnesses and/or experts to give their evidence together.[54]

- The arbitrator is to make an award within 30 days of the oral hearing.[55]

The parties are encouraged, and may agree, to shorten any of the time periods, and they may also agree to extend any time period; however, the arbitrator has no such power, but, as with any aggrieved party, may apply to the court under the English Arbitration Act 1996 for time relief.[56]

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[49] 100 Day Arbitration Procedure, Rule 3.

[50] 100 Day Arbitration Procedure, Rule 3.

[51] 100 Day Arbitration Procedure, Rule 4.

[52] Once this document exchange is complete, no further documents are to be requested or served, unless ordered by the arbitrator; *see* 100 Day Arbitration Procedure, Rule 4(4).

[53] 100 Day Arbitration Procedure, Rule 4(1) to (6).

[54] 100 Day Arbitration Procedure, Rule 6.

[55] 100 Day Arbitration Procedure, Rule 4(7).

[56] 100 Day Arbitration Procedure, Rule 7.

In summary, the 100-Day Arbitration Procedure is intended for use by parties with all types and manner of construction disputes--whether complex or simple--and the parties have complete autonomy to adapt the procedures to suit their needs and circumstances.[57]

**The CPR International Institute for Conflict Prevention and Resolution "expedited" arbitration procedures**

In 2005 the CPR International Institute for Conflict Prevention and Resolution (CPR Institute), taking the English Statutory Adjudication and 100-Day Arbitration Procedures as guides, formed an advisory and drafting committee to develop accelerated construction arbitration procedures for use both in the United States and globally.[58] The result of this committee's work was the promulgation, effective June 2006, of the CPR Rules for Expedited Arbitration of Construction Disputes (CPR Expedited Construction Rules).[59] The dual goals of the CPR Expedited Construction Rules are, first, to retain the intended benefits of traditional arbitration, including a fair, expeditious, private and less expensive process than litigation, and second, to afford the parties and arbitrators sufficient flexibility to adapt the procedures to their particular needs. Yet, while flexibility is permitted, the overall intent is to retain an expeditious process.[60] As with the English 100-Day Arbitration Procedures, the parties are free to apply the CPR Expedited Arbitration Rules to future disputes by incorporation into the construction contract or to existing disputes by agreement.

The anticipated timetable and benchmarks of the CPR Expedited Construction Rules are as follows:

*[Calculated by business days]:*

- Day 1: Submission of the Notice of Arbitration, Statement of Claim, and Nomination of Arbitrator by Claimant;
- Day 10: Nomination of Arbitrator by Respondent;
- 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;

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[57] *See* Uff, "What's Wrong With Arbitration? Lessons Learned From Adjudication and the New 100 Day Procedure," Paper delivered to a Joint Meeting of the Society of Construction Arbitrators and the Society for Construction Law, Kings College, London (July 1, 2004).

[58] *Rules For Expedited Arbitration of Construction Disputes*, CPR International Institute For Conflict Prevention and Resolution (June 2006), website: http://www.cpradr.org/pdfs/ConstructionArbRules06.pdf. On August 20, 2009, the CPR Institute promulgated their "Global Rules for Accelerated Commercial Arbitration" (CPR Global Accelerated Rules); *see also* Grove, "New Rules for Expedited Construction Arbitration in the United States," 24 Int'l Const. L. Rev. Pt. 2 [2007] pp. 136 to 141.

[59] *See* CPR website: http://www.cpradr.org/pdfs/ConstructionArbRules06.pdf. On August 20, 2009, the CPR Institute promulgated their "Global Rules for Accelerated Commercial Arbitration" (CPR Global Accelerated Rules).

[60] *See* Introduction to the CPR Expedited Construction Rules.

- Day 25: Prehearing conference of parties with tribunal, determination of time to commence the 100-day procedure; interim deadlines are established.

*[Calculated by calendar days, except where noted]:*

- Within 60 days: Discovery and exchanges of documents and evidence complete;
- Within 90 days: Hearing completed;
- Within 100 days: Award rendered (business days apply to award time period).[61]

Other notable features of the CPR Expedited Construction Rules are:

- Unless otherwise agreed, the tribunal will consist of three neutral arbitrators, one appointed by each of the parties and a third to be appointed by the arbitrators, or in the case of default, by CPR.[62]
- The tribunal shall hold an initial prehearing conference for planning and scheduling the proceeding within five days after appointment, at which time the tribunal will declare the date for the running of the 100-day time period.[63]
- The tribunal is generally empowered to conduct the arbitration "in such manner as it shall deem appropriate to assure fundamental fairness" and in an "expeditious manner," and has the explicit authority to: determine time limits for presentation of each party's case;[64] determine the time, manner, and means of discovery; determine the times for filing of motions and requests for interim relief; decide on the utility of bifurcation of the proceedings or separation of issues to be decided; the need for and type of record or transcription of the proceedings; determine the means for identifying and narrowing the issues; the possibility of appointment of a neutral expert; and to instruct the parties to file more detailed statements of claim and defense or other prehearing memoranda.[65]
- The tribunal is enjoined to decide the dispute in accordance with the substantive law or rules designated by the parties and in accordance with the terms of the contract, and is further empowered to "grant any remedy or relief, including but not limited to specific performance of the contract, which is within the scope of the agreement of the parties and permissible under the law(s) or rules of law applicable to the dispute."[66]

[61] CPR Expedited Construction Rules, Rule 1 Schedule.

[62] CPR Expedited Construction Rules, Rules 5.1, 6.

[63] CPR Expedited Construction Rules, Rule 9.3.

[64] Each party is enjoined to appoint a person to monitor time actually used during the hearing and the appointed persons shall agree to time used after each session and report to the tribunal; *see* Rule 9.3 (a).

[65] CPR Expedited Construction Rules, Rules 9.3, 9.4.

[66] CPR Expedited Construction Rules, Rules 10.1 to 10.3.

- Discovery, including electronic document discovery (to be completed within 60 days) is authorized, but subject to the control of the tribunal, taking into account "the needs of the parties and the desirability of making discovery expeditious and cost-effective."[67]

- The parties are required to submit detailed statements of their respective cases, including a statement of each claim with supporting law and other authorities on which the parties relies and a statement of the relief requested, including the basis for any damages claimed, together with a listing of witnesses with names, capacity and subjects of testimony.[68]

- Testimony of witnesses will be either in written or oral form as the tribunal may direct.[69]

- The tribunal may direct the parties to produce additional evidence on any issue, and may appoint neutral experts.[70]

- In the interest of expediting the proceedings, the tribunal is given the explicit authority to order the submission of any material either in writing or electronically; to take the initiative in ascertaining the facts and law; to direct the manner in which the hearing time is to be used; to limit or specify and number of witnesses and/or experts to be heard orally; to conduct the questioning of witnesses; to require the witnesses, including experts, to testify in panels, and to require the attendance of the parties during the hearing.[71]

- The tribunal may make final, interim interlocutory and partial awards, all of which shall be shall be in writing and shall state the reasoning on which the award rests.[72]

- The tribunal is empowered to impose various sanctions for failure to comply with the Rules or orders of the tribunal by "any remedy it deems just," including an award on default or imposition of monetary penalties.[73]

- Unless otherwise expressly agreed, all proceedings are to be treated as confidential by the parties and the tribunal.[74]

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[67] The Rules note that the tribunal "will not ordinarily permit more than a few days of deposition discovery, including one-day depositions of experts, and any depositions permitted shall be brief." As to electronic discovery, it "will not ordinarily be permitted except, in the discretion of the Tribunal, to the extent of narrow, focused requests that are justified in terms of importance and materiality and possible to conduct within the time frames established by these Rules." CPR Expedited Construction Rules, Rule 11.2.

[68] CPR Expedited Construction Rules, Rule 12.1.

[69] CPR Expedited Construction Rules, Rule 12.2.

[70] CPR Expedited Construction Rules, Rule 12.3.

[71] CPR Expedited Construction Rules, Rule 12.6.

[72] CPR Expedited Construction Rules, Rule 14.2.

[73] CPR Expedited Construction Rules, Rule 15.1.

[74] CPR Expedited Construction Rules, Rule 17.1.

The overall timeframe--from filing of the Notice of Arbitration to issuance of the final award under the CPR Expedited Construction Rules--will likely be at least four to five months, similar to the English 100-Day Arbitration Procedure.[75] However, the CPR Expedited Construction Rules seem to strike a favorable balance between time efficiency and fairness and provide for definitively stated rights and obligations of the tribunal and parties. With some slight modifications, these rules could easily be adapted to international construction arbitral proceedings.

On August 20, 2009, the CPR Institute promulgated their "Global Rules for Accelerated Commercial Arbitration" (CPR Global Accelerated Rules).[76] The CPR Global Accelerated Rules provide for:

- A schedule "that will result in issuance of the Award in as short a period as feasible under the circumstances, consistent with the reasonable needs of the parties, the subject matter of the arbitration and such other factors as the Arbitral Tribunal determines to be appropriate, but not later than six (6) months from the Selection of the Arbitral Tribunal";[77]

- Explicit agreement among the parties "to expedite the arbitration process and to place a high priority on efficiency of procedure consistent with a reasonable, but not exhaustive, opportunity for each of the parties to present its case";[78]

- An explicit commitment on the part of the tribunal to "actively manage the arbitration proceeding [and who] may limit the evidence presented at the proceedings, impose time limits on each party's presentation of testimony or otherwise control the proceedings as is necessary ... to arrive at a speedy, just Award";[79]

- Consolidation of proceedings, with consent of the parties;[80]

- Effective management of electronic communications and submissions;[81]

- Appointment of a sole arbitrator, unless agreed otherwise;[82]

- Detailed statements of claim and defense;[83]

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[75] *See* §10:3. *See also* Grove, "New Rules for Expedited Construction Arbitration in the United States," 24 Int'l Const. L. Rev. Pt. 2 [2007] pp. 136 to 141.

[76] *See* The Introduction to the Accelerated Rules for Commercial Arbitration notes that "[t]he Accelerated Rules are global in that they can be applied to any subject matter and can function in different jurisdictions and legal cultures around the globe to produce a fair, economical and speedy resolution."

[77] CPR Global Rules for Accelerated Commercial Arbitration, Rule 1.5.2.

[78] CPR Global Rules for Accelerated Commercial Arbitration, Rule 1.5.

[79] CPR Global Rules for Accelerated Commercial Arbitration, Rule 1.6.

[80] CPR Global Rules for Accelerated Commercial Arbitration, Rule 2.4.

[81] CPR Global Rules for Accelerated Commercial Arbitration, Rule 3.1.

[82] CPR Global Rules for Accelerated Commercial Arbitration, Rule 6.

- Interim and emergency measures;[84]

- Preliminary conferences within seven days after the arbitrator is appointed;[85]

- Disclosure of additional documents other than those to be submitted as evidence, only upon a showing of "substantial need," together with great discretion to deny such requests based on a cost-benefit analysis by the arbitrator and the authority to shift the costs of additional disclosure on the requesting party;[86]

- Submission of fact and expert testimony by written submissions, with great discretion by the arbitrator to limit oral testimony;[87] and

- Issuance of the award within 30 days after close of the hearing with sufficient reasons and content as to satisfy the legal requirements of the New York Convention and applicable law in the relevant jurisdictions.[88]

While the CPR Institute Expedited Construction Rules were designed with construction disputes in mind, the commercial Global Rules for Accelerated Commercial Arbitration are perhaps a bit more adaptable to the parties particular needs and would be very serviceable for an international construction dispute.

**Construction Industry Model Arbitration Rules (CIMAR)**

The Construction Industry Model Arbitration Rules (CIMAR Rules) were a response to the enactment of the English Arbitration Act 1996,[89] having been initiated by the Society of Construction Arbitrators which suggested the adoption of such rules in September 1996.[90] The goal of the CIMAR Rules was to unify the arbitration rules to be used by the construction industry in England and the UK:

> The importance of having the same Rules adopted by all relevant construction institutions and bodies is generally accepted. A large proportion of construction work now spans more than one professional body and disputes necessarily do

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[83] CPR Global Rules for Accelerated Commercial Arbitration, Rules 7.1, 7.2.

[84] CPR Global Rules for Accelerated Commercial Arbitration, Rule 9.

[85] CPR Global Rules for Accelerated Commercial Arbitration, Rule 10.1.

[86] CPR Global Rules for Accelerated Commercial Arbitration, Rules 11.2 to 11.4.

[87] CPR Global Rules for Accelerated Commercial Arbitration, Rules 13.1 to 13.2.

[88] CPR Global Rules for Accelerated Commercial Arbitration, Rules 16.

[89] For a general overview of the CIMAR Rules, *see* Lloyd, "Some Aspects of the Construction Industry Model Arbitration Rules," a revised version of a paper presented to a joint meeting of the Society of Construction Law and the North East Branch of the Chartered Institute of Arbitrators, Leeds (23 November 2000).

[90] *See* Notes issued by the Society of Construction Arbitrators (SCA) (1st ed. 1998) The JCT or Joint Contracts Tribunal was a cosponsor of the rules (http://www.arbitrators-society.org).

likewise. There is no good reason for different arbitration rules to exist within the same industry.[91]

While the CIMAR Rules provide for a "Full Procedure"[92] construction arbitration, the objective is "to provide for the fair, impartial, speedy, cost-effective ..." resolution of construction disputes, and with the use of a single arbitrator.[93] To that end, the CIMAR Rules have alternative provisions for a "Short Hearing"[94] and a "Documents Only" hearing,[95] both of which are designed with a view to accelerated construction arbitration. The "Documents Only" proceeding would obviously be applicable where there is to be no oral hearing, for example, because the issues do not require oral evidence or because the amounts in dispute do not warrant the cost of a full hearing.[96] In a Documents Only proceeding, the parties, either simultaneously or in sequence as the arbitrator may direct, are required to:

- Submit written statements of their respective cases, with an account of the relevant facts or opinions, the Claimant to submit its statement within 21 days, and the Respondent to submit its statement within 28 days of the Claimant's submission;[97]

- Submit statements of witnesses concerning those facts or opinions, signed, or confirmed by the witness;

- State the remedy or relief sought;[98]

- Submit a reply statement to the opposing parties submissions within 14 days, such statements being limited to the matters raised in the submission being replied to;[99] and

- Respond to the arbitrator's questions or requests for additional information.[100]

Thereafter, the arbitrator may direct that there be a hearing of not more than one day, at which he may put questions to the parties or to any witness, subject to comment by the parties.[101] The arbitrator shall then make an award within one month of the last of the steps outlined above or within such time as he may require.[102]

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[91] Notes issued by the Society of Construction Arbitrators (SCA) (1st ed. 1998), "Adoption of CIMAR," p;11.

[92] CIMAR Rules, Rule 9.

[93] CIMAR Rules, Rules, 1.2, 1.6.

[94] CIMAR Rules, Rule 7.

[95] CIMAR Rules, Rule 8.

[96] CIMAR Rules, Rule 8.1.

[97] CIMAR Rules, Rules 8.2, 8.3; Pt. B Advisory Procedures.

[98] CIMAR Rules, Rule 8.2.

[99] CIMAR Rules, Rule 8.3; Pt. B Advisory Procedures.

[100] CIMAR Rules, Rule, 8.4 (a).

[101] CIMAR Rules, Rule 8.4 (b).

[102] CIMAR Rules, Rule 8.5.

The "Short Hearing" procedures are appropriate where the matters in dispute are to be determined principally by the arbitrator's inspection of work, materials, or equipment, for example, defective work claims.[103] Using this subset of the CIMAR Rules, the parties submit written statements of their respective cases, as under the "Documents Only" procedure.[104] Thereafter, there shall be a hearing of not more than one day at which each party will have a reasonable opportunity to address the matters in dispute.[105] Either party may produce expert evidence, but costs will be allocated "only if the arbitrator decides that such evidence was necessary for coming to his decision."[106] The arbitrator makes the award within one month of the last of the procedural steps outlined above.[107]

**The AAA Construction Industry "Fast Track Procedures"**

Using the AAA Construction Industry Arbitration Rules and Mediation Procedures (amended and effective, June 1, 2010) (AAA/ICDR Rules), the parties to a construction dispute may opt for the "Fast Track Procedures."[108] Under these procedures:

- Extensions of time are limited to one seven-day extension for responding to the demand for arbitration or counterclaim or a five-day extension for responding to an amended claim or counterclaim;[109]

- The parties agree to accept notices by telephone;[110]

- A preliminary telephone conference among the parties, attorneys, or representative and the arbitrator is held "as promptly as possible after the appointment of the arbitrator";[111]

- Two days before the hearing, the parties shall exchange copies of all documents and exhibits they plan to use at the hearing;[112]

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[103] CIMAR Rules, Rule 7.1.

[104] CIMAR Rules, Rule 7.2.

[105] CIMAR Rules, Rule 7.3.

[106] CIMAR Rules, Rule 7.5l.

[107] CIMAR Rules, Rule 7.6.

[108] AAA Construction Industry Arbitration and Mediation Procedures (Including Procedures for large, Complex Construction Disputes (October 1, 2009, with fee schedule amended and effective, June 1, 2010). The "Fast Track" Rules are contained within the complete set of rules, designated as F-1 through F-14.

[109] AAA Construction Industry Arbitration Rules and Mediation Procedures (amended and effective, June 1, 2010), Rule F-1, F-2.

[110] AAA Construction Industry Arbitration Rules and Mediation Procedures (amended and effective, June 1, 2010), Rule F-3.

[111] AAA Construction Industry Arbitration Rules and Mediation Procedures (amended and effective, June 1, 2010), Rule F-5.

[112] AAA Construction Industry Arbitration Rules and Mediation Procedures (amended and effective, June 1, 2010), Rule F-6.

- There shall be no discovery, except for the required exchange of hearing evidence and exhibits, unless otherwise ordered by the arbitrator "in extraordinary cases when the demands of justice require it";[113]

- The case can be heard on a "documents only" basis if the dispute involves an amount in controversy of less than $10,000, or if agreed by the parties;[114]

- Hearings are to occur within 30 days after confirmation of the arbitrator's appointment and are generally not to exceed one full day, subject to the need for further submission of evidence as determined by the arbitrator;[115]

- Unless otherwise agreed by the parties, the award is to be rendered not later than 14 days following the date of closing the hearing, or if oral hearing is waived, from the transmittal of final proofs to the arbitrator.[116]

In most cases, the total time for a construction case held under the AAA/ICDR Fast Track Procedures should not exceed 60 days from the arbitrator's appointment to the award, "unless all parties and the arbitrator agree otherwise or the arbitrator extends this time in extraordinary cases when the demands of justice require it."[117] The American Arbitration Association recommends that the AAA/ICDR Fast Track Procedures be used for matters in controversy involving no more than $75,000.[118]

**The LCIA approach to fast-track arbitration**

The LCIA encourages parties to "adopt as expeditious an approach as possible" and the LCIA international arbitration rules include a number of provisions that facilitate acceleration.[119] However, the LCIA does not publish rules specifically designed for construction arbitrations or

[113] AAA Construction Industry Arbitration Rules and Mediation Procedures (amended and effective, June 1, 2010), Rule F-7.

[114] AAA Construction Industry Arbitration Rules and Mediation Procedures (amended and effective, June 1, 2010), Rule F-8. The "Documents Only" procedures are set forth in Rules D-1 through D-4.

[115] AAA Construction Industry Arbitration Rules and Mediation Procedures (amended and effective, June 1, 2010), Rules F-9, F-10. The AAA/ICDR Fast-Track Procedures were amended effective October 1, 2009 to modify various deadlines, including that the answer or counterclaim must be filed within seven calendar days after the filing of the demand is sent (Rule F-2); and that, under Rule F-12, the hearing shall be closed no later than 45 calendar days from the confirmation of the arbitrator's appointment, although the parties, with the consent of the arbitrator, may extend that time. *See* http://www.adr.org.

[116] AAA Construction Industry Arbitration Rules and Mediation Procedures (amended and effective, June 1, 2010), Rule F-11.

[117] AAA Construction Industry Arbitration Rules and Mediation Procedures (amended and effective, June 1, 2010), Rule F-12.

[118] *See* AAA website (http://www.adr.org).

[119] *See* LCIA website: (http://www.lcia.org) "Cost Effectiveness and Speed."

specifically tailored to a fast-track arbitration proceeding.[120] The LCIA Rules that can be adapted or used for a fast-track construction arbitration are:

- Art. 4.7--permitting the Arbitral Tribunal at any time to "abridge any period of time prescribed under these Rules or under the Arbitration Agreement for the conduct of the arbitration, including any notice or communication to be served by one party on the other party."[121]

- Art. 9.1--permitting a party to apply to the LCIA Court for the expedited formation of the Arbitral Tribunal, including the appointment of a replacement arbitrator;

- Art. 14.1--authorizing the Arbitral Tribunal "to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay or expense, so as to provide a fair and efficient means for the final resolution of the parties' dispute".

**Other fast-track procedures**

Added to the rules discussed in the preceding sections are several other international and domestic arbitration procedures for "fast tracking" commercial and construction arbitrations, all of which have been in response to general concerns about the time and cost of arbitration.[122] For example, on June 1, 2007, the Institute of Arbitrators and Mediators Australia (IAMA) published a new set of rules with the goal of reducing the costs associated with arbitrations and to provide the parties with quick determinations.[123] The stated objective of the IAMA Fast Track Rules is to enable an arbitrator to produce an award, excepting only costs, within 150 days after appointment.[124] In general, the IAMA Fast Track Rules follow the same patterns as the English 100-Day Arbitration Procedure and the CPR Expedited Arbitration Rules.

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[120] As stated by the LCIA website, FAQs: "Whilst there are no separate rules for fast-track arbitration, the LCIA Arbitration Rules may be readily adapted to achieve an expedited process. Should the parties wish to provide, in their contract, for fast-track arbitration, the LCIA will provide recommended clauses for that purpose." *See* (http://www.lcia.org/PRINT/FAQ).

[121] *See also* LCIA Rules, Art. 22.1 (b).

[122] *See, e.g.,* Joint Contracts Tribunal, Construction Industry Model Arbitration Rules (Appendix 29); CPR International Institute for Conflict Prevention & Resolution, Rules for Expedited Arbitration of Construction Disputes (Appendix 27); CPR Global Rules For Accelerated Commercial Arbitration (August 20, 2009); Society of Construction Arbitrators 100 Day Arbitration Procedure (Appendix 28); JAMS Engineering and Construction Arbitration Rules and Procedures for Expedited Arbitration (July 15, 2009); German Institution of Arbitration, Supplementary Rules for Expedited Proceedings (April, 2008); The Swiss Chamber of Commerce; the China International Economic Trade Association (CIETAC); and the Stockholm Chamber of Commerce have also provided rules for expedited arbitral proceedings. *See generally* Morton, "Can a World Exist Where Expedited Arbitration Becomes the Default Procedure," 26 Arbitration International 1, pp. 103 to 114 (2010); Abraham, "Fast-track Arbitration: An Idea Whose Time Has Come?", International Bar Association, Arbitration Newsletter, pp. 22 to 23 (March, 2010). IAMA Arbitration Rules (Incorporating the IAMA Fast Track Arbitration Rules), The Institute of Arbitrators & Mediators Australia (amended June 1, 2007), IAMA Fast Track Procedure, Schedule 2, Rule 1.

[123] *See* IAMA Arbitration Rules (Incorporating the IAMA Fast Track Arbitration Rules), The Institute of Arbitrators & Mediators Australia (amended June 1, 2007) (http://www.iama.org.au).

[124] IAMA Arbitration Rules (Incorporating the IAMA Fast Track Arbitration Rules), The Institute of Arbitrators & Mediators Australia (amended June 1, 2007) (http://www.iama.org.au).

In April, 2008, the German Institution of Arbitration (DIS) published their "Supplementary Rules for Expedited Proceedings" (DIS Expedited Rules), with a view to keeping arbitral proceedings to not longer than six months.[125] Under the DIS Expedited Rules:

- The dispute is decided by a sole arbitrator, unless otherwise agreed;
- all responsive pleadings are required to be filed within four weeks of the claiming document;
- The oral hearing shall be held, at the latest, within four weeks after receipt of the final written submission;
- No further submissions are permitted after the hearing;
- Counterclaims and set-offs are only admissible with the consent of all parties and the arbitral tribunal;
- In the absence of consent of the parties, the tribunal may only extend time limits for "good cause"; and
- The arbitral award is required to be issued (without stating the facts of the case) within four weeks after close of a single oral hearing.[126]

Under these DIS fast-track rules, the time scale is contemplated to be:

- Day 0: Filing of the statement of claim;
- Day 3: Respondent's receipt of the statement of claim;
- Day 31: Filing of the statement of defense;
- Day 59: Filing of the claimant's rebuttal;
- Day 87: Filing of the respondent's rebuttal;
- Day 115: Oral hearing;
- Day 143: Arbitral Award[127]

With a view to providing an institutional mechanism for resolution of construction and infrastructure-related disputes, the Construction Industry Development Council, India (CIDC), in

[125] German Institution of Arbitration (Deutsche Institution Schiedsgericktsbarkeit) "Supplementary Rules for Expedited Proceedings," supplementing the DIS Arbitration Rules, http://dis-arb-.de.

[126] DIS Arbitration Rules, §§1.1 to 1.4. German Institute of Arbitration (DIS), Supplementary Rules for Expedited Proceedings (April 2008). See http://www.dis-arb.de/download/2008_SREP_Download.pdf.

[127] *See* review by Hilgard and Kraayvanger, New German Arbitration Rules Meant to Expedite Proceedings, Mayer Brown, International Arbitration Perspectives (Summer 2009).

cooperation with the Singapore International Arbitration Centre (SIAC) has established an arbitration center in India known as the Construction Industry Arbitration Association (CIAA).[128] The CIAA Arbitration Rules provide for tight time frames for appointment of arbitrators and for rendering the award. Under the CIAA Rules, the arbitrator is required to made a reasoned award within 45 days from the close of the hearing.[129] Similarly, the Chicago International Dispute Resolution Association (CIDRA) has promulgated certain "Fast Track Arbitration Rules" which can be agreed to by the parties, having the effect of shortening the various time limits set out in the regular rules.[130]

Effective July 15, 2009, JAMS issued a revised set of Engineering Construction Arbitration Rules & Procedures for Expedited Arbitration (JAMS Expedited Construction Rules). The JAMS Expedited Construction Rules are intended "to govern binding arbitrations of disputes administered by JAMS and related to or arising out of contracts pertaining to the built environment (including, without limitation, claims involving architecture, engineering, construction, surety bonds, surety indemnity, building materials, lending, insurance, equipment and trade practice and usage), where the Parties have agreed to expedited arbitration.[131] The JAMS Expedited Construction Rules include:

- Detailed provisions for electronic filing and exchange of pleadings, submissions and other documents;[132]
- Interim measures;[133]
- Consolidation of related arbitrations;[134]
- Third party intervention or participation;[135]
- Default appointment of one sole arbitrator, unless otherwise agreed by the parties;[136]
- Telephonic conferences;[137]

[128] *See* CIAA website: (http://www.ciaa.in/).

[129] *See* CIAA website: (http://www.ciaa.in/).

[130] *See* The Arbitration Rules of Chicago International Dispute Resolution Association, Art. 41 "Fast Track Arbitration" (http://www.cidra.org/about.htm).

[131] Rule 1(a). *See also* JAMS Streamlined Arbitration Rules & Procedures (effective July 15, 2009) for cases where no disputed claim or counterclaim exceeds $250,000, not including attorney's fees and interest.

[132] JAMS Expedited Construction Rules 1(f); 8.

[133] JAMS Expedited Construction Rule 24(e).

[134] JAMS Expedited Construction Rule 6(d); *see also* §8:32.

[135] JAMS Expedited Construction Rule 6(f).

[136] JAMS Expedited Construction Rule 7(a).

[137] JAMS Expedited Construction Rule 16.

- Document disclosure and exchanges of summaries of anticipated fact and expert witness testimony, noting further that "... [d]epositions will not be taken except upon a showing of exceptional need ...";[138]

- Summary disposition of claims, either by agreement of the parties or at the request of one party;[139]

- Hearings scheduled "no later than four (4) months from the date of the Preliminary Conference";[140]

- Written witness statements in the discretion of the arbitrator;[141]

- Hearings based on written submissions with agreement of the parties;[142]

- Telephonic hearings with the agreement of the parties "or in the discretion of the Arbitrator";[143]

- Final awards within 20 days after the date of the close of the hearing;[144]

- Provisions for sanctions against a party failing to comply with obligations under the Rules;[145] and for

- Optional "bracketed" (High-Low) or final offer (Baseball) arbitration.[146]

Similar to the LCIA approach, the JAMS International Arbitration Rules provide that the parties may agree to shorten the various time limits set out in those rules, and that JAMS may, in its discretion, "abridge or curtail any time-limit ... to enable the Tribunal to deal with urgent circumstances that may have arisen."[147]

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[138] JAMS Expedited Construction Rule 17(a).

[139] JAMS Expedited Construction Rule 18. See also, Beale, Nieuwveld & Nieuwveld, "Summary Arbitration Proceedings: A Comparison Between the English and Dutch Regimes," 26 Arbitration International 1, pp. 139 to 160 (2010).

[140] JAMS Expedited Construction Rule 19(a).

[141] JAMS Expedited Construction Rules 20, 22(f).

[142] JAMS Expedited Construction Rule 23.

[143] JAMS Expedited Construction Rules 22(h).

[144] JAMS Expedited Construction Rule 24(a).

[145] JAMS Expedited Construction Rule 29. The sanctions may include, "... assessment of arbitration fees and Arbitrator compensation and expenses, and any other costs occasioned by the actionable conduct, including reasonable attorney's fees, exclusion of certain evidence, drawing adverse inferences, or in extreme cases, determining an issue or issues submitted to Arbitration adversely to the Party that has failed to comply." Id.

[146] JAMS Expedited Construction Rules 32, 33.

[147] JAMS International Arbitration Rules, Art. 21 "Modified Time Limits."

**Practical problems with fast-track procedures**

The efforts of many to accelerate arbitration procedures and to reduce the time and cost of construction arbitration must take into account certain inherent tensions and even contradictory attitudes of parties to commercial disputes.[148] Ask almost any business person who is not then engaged in a serious commercial dispute, and you will likely hear strong complaints about delays associated with arbitration. Yet, when that same business person's substantial assets are at risk, or if the company's very existence is on the line, procedural efficiency will likely be of lesser concern than preservation of assets.[149] Thus, one may conclude that when serious interests are at risk, "getting it right" often trumps "getting it done."

Another positional status that often leads to tension in construction arbitrations is "who wants the money?" and "who will have to pay"? The party with claims and seeking to recover substantial sums will likely press for speed and efficiency of process; whereas, the party who ultimately will write the check typically wants more time for case preparation and careful deliberation. Typically, also, the complaining party seeking recovery will be better, if not fully, prepared to present their case and will, most likely, resist efforts to engage in discovery. On the other hand, the responding party is often heard to claim "surprise" or "ambush," with pleas for more time for full disclosure of the claimant's evidence. Thus, claimants will almost always insist on speedy resolution; whereas respondents will not.

There is also the well-known bias of the American litigator toward lots of prehearing discovery of documents and evidence.[150] Quite understandably, lawyers want to be thoroughly prepared so as to lessen the risk of losing their client's case or being professionally embarrassed. Lawyers do not like ugly surprises, and neither do their clients. Further, to the point, and, particularly with construction disputes, it is generally the case that the truth of the matter will likely be found in the contemporaneous written records that were generated as the job progressed, rather than in the witness statements prepared for the arbitration. After the dispute is in full flower, "truth" tends to be filtered through the competing interests. Construction counsel know these dynamics well. Thus, they will almost always urge full production and exchange of project documentation, and even the taking of depositions, to test the memories and biases of witnesses. Yet, quite obviously, discovery is the enemy of speed and efficiency for "getting it done."

Added to positional tensions, circumstantial tensions can found in the nature of the dispute. If the issue has to do with quality of workmanship or conformance to specification, the

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[148] *See* Morton, "Can a World Exist Where Expedited Arbitration Becomes the Default Procedure," 26 Arbitration International 1, pp. 103 to 114 (2010); Hinchey & Perry, "Perspective From the United States: Tensions Between 'Getting it Done' and 'Getting it Right'," 134 ASCE Journal of Professional Issues in Engineering Education and Practice, No. 2, pp. 231 to 239 (April 2008).

[149] *See, e.g.*, Hanak, "Effective Proceedings in Construction Arbitration Cases: The Experience in Czechoslovakia," ICCA Stockholm Arbitration Congress, 1990--Working Group II ("... [W]e very often witnessed that both parties were rarely interested, especially in cases where large sums of money were involved, in an efficient and quick resolution of their dispute.") pp. 501, 506.

[150] *See* Kagan, American and European Ways of Law: Six Entrenched Differences, Institute of European Studies, (April 6, 2006) p. 16.

case may require less time, because technical experts can usually observe and test the physical condition at issue and reach resolution relatively quickly. On the other hand, if the issue is "legal" in nature or "contractual," *i.e.*, issues concerning wrongful termination or claims for delay, more complex questions can arise, thus requiring procedural time and energy.

Finally, in the rush to reform, one cannot ignore a more subtle and not-often-discussed dynamic, which is that counsel tend to shy away from the day of reckoning. No advocate likes to lose cases. No matter how strong one believes one's position is, there is always a substantial risk that the tribunal will see it differently. If counsel have advised their client that the case is strong or that recovery is likely, they will be most disappointed to be determined wrong. Therefore, there is a natural tendency for counsel to want as much time as possible to prepare the case, in the interest of avoiding or putting off the risk of loss.

The success of fast-track arbitration, especially for substantial construction disputes, will depend on parties who are willing to, perhaps, compromise their "positional" or "circumstantial" status in the process, even when it may hurt.[151] Success will also depend on arbitrators who can commit to the process. In major construction cases, arbitrators will have to devote close to their full-time to the task of fast tracking arbitrations, and they must be prepared to resist the inevitable motions for continuance and extensions of time. At the same time, the tribunal must balance speed against the need for fairness and a reasonable opportunity for each party to prepare. Similarly, counsel must commit to prepare and so move the case forward consistent with the accelerated procedures. This time commitment will likely put larger law firms at an advantage over solo practitioners and smaller firms who must attend to other matters.

While the construction industry is legitimately concerned that the traditional ways of resolving construction disputes are taking too long and costing too much, at the same time, it must be remembered that accelerated processes that lead to cost and time savings may derogate from the quality of arbitration as a means of reaching a fair and just result. Quite obviously, time can be saved by implementing an accelerated or fast-track timetable for the arbitration, but cutting time may result in an injustice to one or both parties. Indeed, a cost-benefit analysis should be done for virtually all procedural choices that are made in the context of arbitration. Concerns about excessive time and cost for international arbitrations are legitimate, but there is no easy or quick fix. Perhaps the most that can be achieved is a patient pursuit of the good rather than the perfect. One very thoughtful article proposed the following suggestions, among others:

(1) The growing direct involvement of the 'client', notably sophisticated in-house counsel from major multinational companies who must ultimately accept that they, rather than the outside professionals, must accept responsibility for what is intended to be a party-driven process;

(2) Recognition that there can be no simplification of arbitral procedures without significant trade-offs. What is "streamlining" and "efficient" for one party is likely to be viewed by the opposing party as cutting an essential procedure;

[151] *See generally* Morton, "Can a World Exist Where Expedited Arbitration Becomes the Default Procedure," 26 Arbitration International 1, pp. 103 to 114 (2010); Abraham, "Fast-track Arbitration: An Idea Whose Time Has Come?", International Bar Association, Arbitration Newsletter, pp. 22 to 23 (March 2010).

(3) Willingness on the part of the arbitrators to make earlier, but judicious, dispositive decisions in the form of granting motions or applications on substantive issues;

(4) Facing the fact that very large, complex and high-value disputes which formerly were resolved in the courts, with much expenditure of time and expense because the stakes were significant are now being arbitrated; thus, there is little reason to expect that less time or less expense will be incurred when the same type of disputes are in arbitration.[152]

The author concluded with these observations:

> "Whatever the past, the reality is that arbitration is and will continue to be inevitable, and that the effort to keep it true and cost-effective is a constant trial of innovation and, sometimes, error. There will be no revolution that will convert (or return) international arbitration to some warm and ancestral south where its procedures were largely consensual, cost-effective and quick. This is not to say that nothing can be done, but it is to say that, in my view, the most that realistically can be hoped for is what George Eliot termed 'a slow contagion of the good'.[153]

In the end, it may be said that the intrinsic values of arbitration are not speed or economy or even efficiency. Rather, it is party autonomy that transcends all of these values, worthy though they may be. If the parties so choose, they can have speed and early finality of their dispute. On the other hand, the parties can exercise their autonomy to engage in a protracted and thorough grinding out of the issues. In either event, the choice should not be seen as reflecting the core values of arbitration, but rather the core values of the parties making the choice.

**Practical tips and techniques for successful fast-track arbitration**

There are a number of procedural techniques that will assist and aid in the effort to shorten the time, and, consequently, the cost, of construction arbitrations. Some of these techniques are reflected in the fast-track rules as discussed in the preceding sections, and others are more practical in nature, as follows:

**PRACTICE TIPS:**

- Prior selection of arbitrators. If at all possible, the parties should attempt to agree on their respective choices of persons to serve either as sole arbitrator or to serve on the tribunal, before filing the initial notice or request for arbitration. If the parties cannot agree on the persons, they should at least have in mind what the desirable backgrounds and qualifications should be; then they should discuss these requested choices or qualifications with the administering arbitral institution.

- Initial statements of position. The initial pleadings, including the notice or request for arbitration, should be as detailed as possible as to the specific claims and defenses

[152] Ulmer, "The Cost Conundrum," Arbitration International, Vol. 26, No. 2, pp. 221 to 250 (2010).

[153] Id., pp. 248-249.

asserted by the parties. The initial pleadings should not only state the general nature of the claims, but should also state the specific facts constituting the claim and provide further a detailed breakdown of the damages or remedy sought and make explicit reference to documents or witnesses in support of these claims. In a similar fashion, the responsive pleading should respond directly to each allegation of the claim with an admission, denial, or statement that one has insufficient information to admit or deny, and with similar specificity as to supporting proof. To the extent that the parties have made detailed and explicit allegations concerning their claims and defenses, further statements and even discovery may not be necessary.

- Fine-tuning the issues. Once the claims and defenses are filed, the arbitrator or tribunal should carefully review the submissions with a view toward determining precisely what matters are truly in dispute and what allegations are either not relevant, immaterial, duplicative, or superfluous. In most construction arbitrations, the truly disputed fact issues are far less that those that are typically offered up by the parties. Further, the arbitrators should separate out any strictly legal issues for possible resolution by motion, and consideration should be given to a division or bifurcation of the issues, with the most critical issues to be heard first. Sometimes, the resolution of a key issue will lead the parties to settlement or abandonment of the remaining issues. Finally, a detailed "Terms of Reference" or specification of the contentions of the parties and the issues to be decided should be prepared so as to better enable both the parties and the tribunal to focus on the real issues in dispute.

- The procedural timetable. At the preliminary procedural conference the arbitrators should work with the parties and counsel to develop a detailed schedule or procedural timetable. It is usually more efficient to first pick the hearing dates as the outside marker, and then fill in the intervening deadlines for exchanges of evidence, submissions, and other intervening events. Once the timetable is in place, the arbitrator or chair of the tribunal should schedule a telephonic status conference call every week or so to check on the parties progress with the timetable. These regular calls will often serve as a prompt for the counsel and parties to quickly accomplish what they have committed to do, so as to be prepared for the status call. Immediately following the call, the arbitrator should send out an email summary of what was discussed and decided.

- Electronically stored and communicated information. To the extent possible, practical and economically viable, all submissions, including briefs, witness statements, memorials, and documentary and graphic data should be converted to electronic form, either on CDs or flash drives. In that form, the electronic data can be transmitted instantly to all parties and the tribunal, and with a significant saving of copying and transmission costs.

- Documentary evidence presumed authentic and premarked. All documentary evidence should be presumed to be authentic and admissible as evidence, unless objected to prior to the hearing. Much hearing time is too often spent with objections and handling documents that could have been accomplished prior to the hearing.

- Exchange deadlines. The tribunal should set hard deadlines for production and exchanges of documentary evidence and for exchanges of lists of witnesses, with the order or rule that anything submitted after that date, except for providential cause, will not be considered by the arbitrators.

- Written witness statements and expert reports. Except in unusual cases, the direct testimony of all fact and expert witnesses should be submitted to the panel and opposing parties as far as possible and practical in advance of the hearing, so as to permit both the responding party and the tribunal reasonable opportunity to become familiar with the evidence. The oral hearing should be primarily devoted to cross-examination and additional questioning of the witness as necessary and appropriate.

- Issue clusters and witness panels. To the extent possible and practical, the organization of the evidence should be done by issues, so that all of the witnesses who have anything to add about a particular point should testify either together or back-to-back. This works particularly will when there are many issues to be determined, and also for expert testimony.

- Presentation of the documentary evidence. The documentary and graphic evidence is often more easily and quickly presented if it is done electronically on computer projectors or by video projectors. Much time is spent with the archetypical three-ring notebooks or lever-arch file bundles, with everyone trying to "get on the same page". Having this information in electronic form and displayed on a computer monitor or screen can save substantial time.

- Oral narratives by counsel. When background information is helpful but not in dispute, it can be helpful and efficient for counsel to simply state the information to the tribunal so as to put the issues or testimony in proper context, without the laborious process of question and answer by a witness.

- Use of the "chess clock". It is painful, embarrassing, and time-consuming for the arbitrators to have to scold the parties or counsel about irrelevant or duplicative testimony, and to continually cajole about "moving the process." It is much kinder and more efficient for the time available to be pre-allocated among the parties, thereby permitting the parties and counsel to "value-engineer" their own available time for their own best purposes.

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