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# EXPEDITED ARBITRATION RULES

CONSTRUCTION

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*This article was first published in the JAMS newsletter,* ***JAMS Global Construction Solutions****, Fall 2012.*

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## COMPLAINTS ABOUT ARBITRATION

A constant complaint among companies and counsel is that arbitration is becoming too much like litigation. Arbitration is not faster and cheaper, claim disputants, and some statistical evidence supports that contention.

American Arbitration Association ("AAA") statistics reveal that it takes approximately 10 months from initiation to final result to arbitrate construction matters valued between $75,000 and $500,000.[1] Cases with values in excess of $1 million or more averaged 19 months from filing to award.[2] These comparisons are true for legal sectors such as construction, securities,[3] and employment.[4] Based on these statistics, arbitration's long-held promise of offering more expedient justice than traditional litigation has been questioned by some practitioners and arbitral organizations.[5]

Similarly, arbitration's cost-effectiveness has been debated. The costs associated with lengthy arbitration can be substantial.[6] Not only do parties in arbitration incur attorneys' fees and expert costs, but the parties are also responsible for paying the fees of arbitrators as well as other administrative fees.[7] These fees typically increase as the amount in controversy rises.[8] Additionally, the expenses of the arbitrator(s)[9] are paid by the parties.[10] Most complex disputes involve a panel of three arbitrators.

In large cases, these costs will be substantial. While there may be significant cost savings in arbitration if the parties do not push for extensive discovery,[11] the substantial discrepancy in fees and administrative costs can quickly eviscerate savings.[12]

1. See http://www.adr.org/sp.asp?id=28701 (AAA White Paper July 31, 2006) (but note that AAA concludes that court is not faster or cheaper).
2. http://www.adr.org/check_the_box.com (Jan. 14, 2008 article citing statistics from 2006).
3. See Brunet, E., et. al. Arbitration Law in America: A Critical Assessment 18-19 (Cambridge Univer. Press 2006) (in 2003, the average time for disposition of a securities arbitration was 15.2 months).
4. See Alleyne, R. Statutory Discrimination Claims: Rights "Waived" and Lost in the Arbitration Forum, 13 Hofstra Lab. L. J. 381, 399 n. 131 (1996) (finding that the average time for a labor arbitrator's decision is 385 days after the filing of the grievance, citing 1994 statistics).
5. Many practitioners still prefer arbitration to litigation, however, thus maintaining a lively debate. See Cruz, J. Arbitration v. Litigation, An Unintended Experiment, ABA Dispute Resolution Journal (Nov. 2005 – Jan. 2006) (advocating arbitration in a study of two similar cases, one litigated, one arbitrated).
6. See, e.g., Public Citizen report "The Costs of Arbitration," April 2002, at http://www.citizen.org/documents/ACF110A.PDF (last accessed February 9, 2007).
7. See Alleyne, supra note 19, at 410 n. 189.
8. See, e.g., AAA Construction Industry Arbitration Rules and Mediation Procedures fee structure, http://www.adr.org/sp.asp?id=22004#Fees (last accessed February 9, 2007).
9. See Panel Discussion I, Judge & Jury Symposium Transcript, 47 S. Tex. L. Rev. 367, 376 (2005) (panel of judges noting that perception of many lawyers is that arbitration is not faster and noting one arbitrator's fee of $700 per hour).
10. See AAA Commercial Arbitration Rules R-49, R-50, at http://www.adr.org/sp.asp?id=22440 (last accessed Oct. 19, 2006) (mandating administrative fees to be paid upfront by parties, as well as other expenses to be borne by the parties).
11. See Brunet, supra note 10, at 20 (citing a 1997 Federal Judicial Center study).
12. See *ibid.* (noting that lack of discovery may decrease the efficiency of arbitration by decreasing the chance of a full and fair hearing).

Many reforms have been implemented to improve arbitration, in addition to expedited procedures. *The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration* (Juris Pub. 2006) and *Protocols for Expeditious, Cost-Effective Commercial Arbitration* (2010 www.thecca. net) are major efforts in that regard, offering advice and best practices on appointment and disclosure, conduct of neutral and non-neutral arbitration, arbitrability, class procedures, pre-hearing procedures, motions, discovery, hearings, awards, and an overview of international arbitration. These reforms depend largely on arbitrator training and administrative expertise, and have been embraced by arbitrators and tribunals. Establishing procedural rules to mandate expedited arbitration has also been a major initiative among tribunals, but has not to date gained widespread acceptance in the contracting process.

## AVAILABLE EXPEDITED ARBITRATION PROCEDURES

In response to criticisms about arbitration, prominent arbitration tribunals enacted rules for expedited arbitration. Two sets of arbitration rules were promulgated in 2006 by the International Institute for Conflict Prevention & Resolution (CPR) and by Swiss Chambers Arbitration/Swiss Rules of International Arbitration (SCA) with the intent of expediting arbitration procedures. As of Oct. 1, 2010, JAMS enacted, "Optional Expedited Arbitration Procedures, whereby parties can choose a process that limits depositions, document requests, and e-discovery." Each of these sets of rules has the objective of allowing parties to select an expedited resolution process, either during the contracting process or during the arbitration itself.

### JAMS

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." The JAMS Expedited Construction Rules include:

- Detailed provisions for electronic filing and exchange of pleadings, submissions and other documents;
- Interim measures;
- Consolidation of related arbitrations;
- Third-party intervention or participation;
- Default appointment of one sole arbitrator, unless otherwise agreed by the parties;
- Telephonic conferences;
- 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 …";
- Summary disposition of claims, either by agreement of the parties or at the request of one party;
- Hearings scheduled "no later than four (4) months from the date of the Preliminary Conference";
- Written witness statements in the discretion of the arbitrator;
- Hearings based on written submissions with agreement of the parties;
- Telephonic hearings with the agreement of the parties "or in the discretion of the Arbitrator";
- Final awards within 20 days after the date of the close of the hearing;
- Provisions for sanctions against a party failing to comply with obligations under the Rules; and for
- Optional "bracketed" (High-Low) or final offer (Baseball) arbitration.

The complete rules can be found online at www.jamsadr.com/construction-practice/.

### International Institute for Conflict Prevention & Resolution (CPR)

CPR developed an expedited arbitration procedure, effective June 2006, modeled on the United Kingdom's construction adjudication process.

- A 100-day hearing window follows the pre-hearing conference (60 days for discovery, 30 days for hearing, and 10 days for the award).
- Three arbitrators (one selected by each party, the third selected by both), with the option to opt for one or three arbitrators all appointed by CPR; if the parties do not select arbitrators in time, CPR appoints them.
- Statement of Claim and Statement of Defense must include copies of all documents that the party intends to use and summaries of all witness testimonies.
- Arbitrator(s) may appoint a neutral expert.
- Parties may have a mediator sit in on arbitration to conduct simultaneous mediation.
- Parties may use a list of non-lawyer CPR arbitrators whose calendars are less congested.

- Discovery rules include aspiration that arbitrator(s) ensure depositions are "brief" and e-discovery is "narrow" — within strict 60-day time frame.

### Swiss Chambers Arbitration/Swiss Rules of International Arbitration (SCA)

The Swiss Rules (Section V) are generally modeled on the United Nations Commission on International Trade Law (UNCITRAL) rules, discussed below.

- Referral to a single arbitrator unless the arbitration agreement provides otherwise.
- Award within six months of transmitting file to arbitral tribunal.
- Single hearing for examination of witnesses and experts, as well as oral argument, unless case submitted entirely on documentary evidence.

### UNCITRAL

The UNCITRAL Arbitration Rules were revised effective Aug. 15, 2010, following a lengthy report issued by Jan Paulsson and Georgios Petrochilos in April 2006 listing recommendations for revising the 1976 arbitration rules.[13] The 2010 rules were intended to update the 1976 rules and reflect advancements in arbitration processes in the 30 years since their enactment.[14] Some aspects of the rules that enhance expedited resolution include:

- Empowerment of the tribunal to "avoid unnecessary delay and expense" and "provide a fair and efficient process."[15]
- Requirement of a detailed statement of claim, including, insofar as possible, attachment of evidence relied upon and citations to evidence[16] and similar requirements for the statement of defense.[17]
- Limiting time for submission of statements to 45 days absent a determination by the tribunal that more time is warranted.[18]
- Empowering the tribunal to consider witness testimony remotely[19] and to appoint neutral experts if warranted.[20]
- Providing that "in principle" the costs of the arbitration will be paid by the unsuccessful party or parties, with the tribunal having authority to apportion costs.[21]

Although the UNCITRAL rules leave much to the discretion of the arbitral tribunal, the framework permits expected and efficient resolution if the arbitrators perform their function well. Other arbitration tribunals throughout the world have joined the expedited rules groundswell, including ADR Chambers Canada;[22] Swedish Arbitration Institute of the Stockholm Chamber of Commerce;[23] Arbitration Institute of Finland;[24] and the Arbitration Foundation of Southern Africa.[25]

## FACILITATING RULES

Many international arbitration institutions have rules that promote the efficiency of arbitration. However, these rules are more discretionary and do not aggressively push for greater efficiency. The following are methods promoted by some institutions to encourage efficiency.

- Provisional timetables ensure that the arbitrator will be available sooner and discipline the parties to keep the arbitration moving.[26]
- Settlements are encouraged by rules that give consent awards the same force as final awards.[27]

13. http://www.uncitral.org/uncitral/en/index.html is the UNCITRAL home page with a link to the report. The direct link is: http://www.uncitral.org/pdf/english/news/arbrules_report.pdf .
14. http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html
15. *Ibid.* at Article 17 (1).
16. *Ibid.* at Article 20.
17. *Ibid.* at Article 21.
18. *Ibid.* at Article 25.
19. *Ibid.* at Article 28(4).
20. *Ibid.* at Article 29.
21. *Ibid.* at Article 42.
22. http://adrchambers.com/ca/arbitration/expedited-arbitration/expedited-arbitration-rules/
23. http://www.sccinstitute.com/forenklade-regler-2.aspx
24. http://www.arbitration.fi/FCCC_Expedited_Rules.pdf
25. http://www.arbitration.co.za/downloads/expedited_rules.pdf
26. See, e.g., ICC Rules of Arbitration Article 14, Swiss Rules of International Arbitration Article 15(3), Arbitration Rules of the Chamber of National and International Arbitration of Milan Article 24(3), and Arbitration Rules of the Netherlands Arbitration Institute Articles 23(2) and 23(3).
27. See, e.g., UNCITRAL Model Law Article 30 ("If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings . . . . An award on agreed terms . . . has the same status and effect as any other award on the merits of the case."), ICC Rules Article 26, UNCITRAL Rules Article 34(1), LCIA Rules Article 26.8, AAA International Arbitration Rules Article 29(1), WIPO Rules Article 65(b), and DIS Rules Section 32.

- Written direct testimony limits hearing time to cross-examination.[28] (However, written direct testimony may not be appropriate where there are complex facts or significant details,[29] or where credibility is at issue.[30])
- Confrontation testimony, the simultaneous questioning of multiple witnesses on the same issues.[31]
- Pre-hearing expert conferences, where opposing experts (without counsel) meet and confer with the arbitrator to identify the narrow set of issues on which there is disagreement.[32]
- When parties on the same side are unable to appoint an arbitrator, an external Appointing Authority will appoint the entire tribunal.[33] (This was a recommendation in the Paulsson UNCITRAL report but has already been adopted by other institutions).

## RESPONSE OF CONTRACTING PARTIES

Contract drafters have not yet widely incorporated the expedited rules into their arbitration agreements, and contracting parties do not seem to be insisting on their use. By contrast, step process negotiation and mediation as conditions to arbitration flourish, indicating a willingness of parties to extend the time frame for dispute resolution if a negotiated settlement can be obtained. Seemingly, parties are less concerned about a few months delay in dispute resolution when the promise of settlement exists, than they are when the fight has quickened into arbitration.

Once the formal arbitration is commenced, disputants purport to want a speedy resolution, but many countervailing needs may combine to extend the process. First, absent specific election of an expedited process or a contractual limitation on the number of arbitrators, larger disputes will default to a three-arbitrator panel. As noted above, the time required to constitute the panel; the time required to schedule a hearing of any length; and the cost of panel compensation and expenses all add to the complaint that arbitration is not faster and cheaper than court. Many disputants believe these costs are justified, because a panel of qualified (and industry-specific) arbitrators is viewed as one of the principal advantages of arbitration over a court or jury trial.

In addition, most counsel in larger disputes agree that some discovery is warranted. At a minimum, a document exchange is customary in most arbitrations. In larger complex cases, this exchange and related reviews can be costly — just as it would be in litigation. Electronic discovery and exchange of massive amounts of data are perceived as important to ensure that complex cases are fully discovered and evaluated. In U.S. arbitrations, discovery often goes further; parties in complex cases frequently agree on deposition discovery. In this regard, disputants are showing that they prefer knowledge about the case, claims and defenses, to speed and cost savings. The market forces in complex cases therefore tend to show that perceived "economy" results from spending more money and time on the resolution process in the hope of receiving a better or more predictable award.

Of course, contracting parties in the heat of a dispute may not agree on steps or best practices that will expedite the arbitration process. Arbitrators will inevitably try to be fair to both parties, which results in compromise that would not be permitted if the contract mandated the use of expedited rules. Knowing this, it would seem that contract drafters would favor the use of expedited rules, perhaps customized to account for very large disputes to which they may be less favorable. Thus far, and notwithstanding the continued complaints about arbitration becoming more like litigation, the expedited rules remain a tool infrequently used at the contract drafting stage, and infrequently adopted during the dispute in major complex matters. The task of ensuring that arbitration is an efficient remedy is therefore often left to the arbitrators, underscoring the importance of selecting experienced and qualified arbitrators to preside over disputes.

28. See, e.g., International Arbitration Rules of the International Centre for Dispute Resolution of the American Arbitration Association Article 20(5), IBA Rules of Evidence Articles 4.7-4.9.
29. Rivkin at 666.
30. See Fellas, J. A Fair and Efficient International Arbitration Process, DISPUTE RESOLUTION JOURNAL Feb-Apr 2004, at http://www.findarticles.com/p/articles/mi_qa3923/is_200402/ai_n9392131.
31. See, e.g., IBA Rules of Evidence Article 8.1.
32. See, e.g., IBA Rules of Evidence Article 5.3.
33. See, e.g., English Arbitration Act 1996 Sections 16 and 18, ICC Rules Article 10, LCIA Rules Article 8.1, WIPO Rules Article 18.