'Get In, Get It Done, Get It Done Right, Get Out' -
Managing Construction Disputes through Expedited Arbitration

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Disputes are a 'business problem', not a 'lawyer problem'.[5] Controlling the dispute risk must be included in the contract documents at the start, when cooler heads prevail, with a wisely-considered process designed to push the dispute to closure.

The Contractor's mantra for profitability, 'Get In, Get It Done, Get It Done Right, Get Out'[1], also works for the Owner - in essence, both parties to a commercial relationship profit by avoiding delay, controlling costs and maintaining quality. Successful projects, and the inevitable changes within them, are planned, executed, controlled and completed[2] quickly and efficiently by the owner, contractor, sub-trades and consultants. For little reason other than habit and tradition, project disputes don't follow that path. Uncontrolled, project disputes can destroy a project budget and schedule, and run on for years. With the right process included in the contract documents, forcing the parties to focus on and expedite disputes, mediators and arbitrators can plan and control the execution and closure of disputes with certainty and in a timely and cost-effective way.

Risks such as flooding or storm damage, changes to the broader economy, or discovery of unanticipated site conditions cause an immediate response by the parties - a risk assessment with consequential changes to the project constraints (scope, budget, schedule or quality) to mitigate or maintain control over those identified risks. This is one of the primary business interests of the owner and contractor - to identify and respond to risk, thus maintaining profitability.

Why are project disputes treated differently? When a dispute arises, after a negotiation between the parties, each party packages up the file and sends it to their respective lawyers - fateful words, albeit wrongly targeted: "It's in the lawyer's hands now."

Where is the dispute risk analysis - what will be the impact on the project constraints of that dispute risk? What is the scope of the dispute itself? What is the range of cost to conclude the dispute? What is the probable time duration of it? Who will drive the timely and cost-effective resolution of the dispute?

Disputes are effectively outsourced by each party, typically to mediation, arbitration or litigation. Those processes are controlled outside the project by counsel until the hearing, and are most often deferred until after the project is finished.[3] The project is closed, the project manager is long gone[4], and the dispute takes on a life of its own. The mediator and arbitrator sit and wait for each party's counsel to put his or her case together.

Disputes are a 'business problem', not a 'lawyer problem'.[5] Controlling the dispute risk must be included in the contract documents at the start, when cooler heads prevail, with a wisely-considered process designed to push the dispute to closure. After the project is underway and the pressure is on to get it done and get out, a dispute quickly brings the parties to a boil, and both parties typically instruct their counsel to go for the jugular.

The contract documents should:

- include expedited procedural rules to designate at the outset of the project a specific project mediator and arbitrator to manage the dispute should a negotiated resolution fail.
- place as a first priority on the

parties, and on the mediator and arbitrator, the assessment of the scope, cost, time and quality of the dispute, and the development and execution of a plan for pushing the dispute to a conclusion.

- deal with every dispute immediately when the problem is fresh and of immediate consequence to all parties, and the evidence and witnesses are available.
- provide the arbitrator with ample discretion to deal with all aspects of the dispute, including the number of witnesses, volume of evidence, dispute schedule, etc. - some disputes may be resolved quickly, some may require extensive analysis and take much more time.
- provide for no appeals.

Natural justice must always be assured, and there are trade-offs, including the 'rightness' or the 'wrongness' of the outcome of the dispute - the parties obtain finality at reasonable cost and duration by giving up the possibility that one or the other might have been able to prove at the Court of Appeal that they were right.

What are the costs of a typical construction dispute? Can a party save money by litigating? David Bristow, Q.C., then at Fraser & Beatty, analyzed a construction lien matter[6]. The total fees and disbursements for the lawyers and opportunity costs for the time of the parties was almost double the $100,000.00 value of the claim. With typical costs awards to the successful party, the best the winning party can do is to get back to zero, applying its successful judgement against its unrecovered costs - and this does not take into account the time and costs of appeals.[7] Fighting and winning a dispute but without any net gain is not a wise business decision. ***See Chart 1***

After a project is underway, one party wants to expedite a dispute, while the other party wants to delay. Yet many of our forms of commercial contract institutionalize the opportunity for a party to delay, increasing the dispute risks, perhaps the most common being the appointment of a mediator and an arbitrator by 'mutual agreement of the parties' after the dispute has crystallized.[8, 9]

In a thought-provoking article, Peter Morton, a Partner in the International Arbitration Group, K&L Gates LLP, London, UK asks "Can a World Exist Where Expedited Arbitration Becomes the Default Procedure?".[10] He identifies six procedural issues, and two other factors, generally unspoken, in response to a client's question about the procedural timetable:

- Tribunal availability: Use a sole arbitrator, base the selection on 'availability' rather than waiting for the perceived 'best', and consider the level and timing of the arbitrator's involvement.
- Counsel availability: Same as for Tribunal availability.
- Expansive disclosure process: It is counsel's natural inclination [and duty - see note 5] to 'leave no stone unturned', but the trade-off of arbitral speed and efficiency [and cost effectiveness] for limited documentary disclosure is rarely presented to the client.
- Expansive witness evidence: Similar to documentary disclosure - allow only key witnesses and experts, with shorter witness statements or summaries.
- Witness availability: Consider written statements, video links, real necessity for cross-examination - expediting enhances witness availability due to the shorter time from dispute initiation to hearing.
- Dilatory tactics and their accommodation by the Tribunal: One party is a reluctant participant, while opposing counsel is anxious to proceed. Arbitrators are reluctant to rule against requests for additional time, fearing possible recourse against themselves or their award for failing to observe due process. Default mode for many counsel and arbitrators is to follow a somewhat leisurely timetable which end-users find frustrating. Expedited arbitration imposes significant stress on both counsel and the arbitrator for the duration of the dispute, but that is the cost of meeting the demands of the customer.
- Habits or preconceptions: How to get counsel, arbitrators and institutions to change their mind-set and approach to arbitration procedure, and their expectations as to how long is reasonable for each step to take and how quickly things should move in arbitration? Before the pre-hearing, the process ought to direct consideration of the number and extent of submissions and how much time - at a minimum - is really necessary.
- Self-fulfillment: Cynically, it may be said that the pace of an arbitration is largely controlled by those being paid on an hourly basis. It is human nature

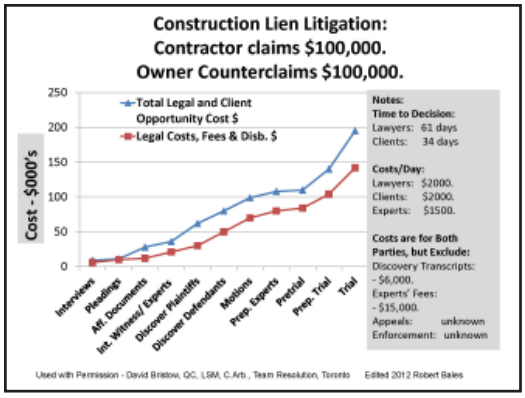

Chart 1

that submissions to be completed within a prescribed time period are, at best, completed at the period end, and would present substantially the same points if the time period were shorter.

In effect, Peter Morton suggests shifting the process, and the mind-set, toward expediency - make the expedited process the default, while allowing counsel to argue for and justify requests for greater time or detail. In my view, imposing a truly expedited process will focus the parties, and the mediator and arbitrator, on a business-wise, risk-mitigated conclusion to the dispute.

Governor-General David Johnston and retiring Justice Ian Binnie of the Supreme Court of Canada have recently re-iterated, in effect, that 'justice delayed is justice denied'.[11] There are certainly trade-offs, but the costs and delays arising from allowing disputes to run on for years are huge. At least in commercial matters, we as arbitrators need to step up to the bar and assist owners, contractors and their counsel to design and implement expedited arbitration procedures in their contracts. Before the first shovel is in the ground - when both parties are happy - including a truly expedited procedure in the contract documents will help them to, successfully, 'Get In, Get It Done, Get It Done Right, and Get Out'.

1 Loosely attributable to Donald Trump's father, Fred C. Trump
2 Generally, Project Management Institute, "A Guide to the Project Management Body of Knowledge, 4th Ed." (PMBOK® Guide)
3 Canadian Construction Documents Committee "CCDC 2 Stipulated Price Contract", General Condition GC8.2.8 includes as a default that an arbitration shall be held in abeyance to the end of the contract. Public Works and Government Services Canada (PWGSC), RPCD Construction Contract General Conditions GC6.4, arbitrations consolidated and held in abeyance 'unless otherwise agreed'.
4 PMBOK® Guide, supra note 2, 12.4 Close Procurements: "Unresolved claims may be subject to litigation after closure."
5 In Ontario, the lawyer for each party has a duty to his or her client set out in the Rules of Professional Conduct of the Law Society of Upper Canada, Commentary to Rule 4.01 Advocacy:
"The lawyer has a duty to the client to raise fearlessly every issue, advance every argument, and ask every question, however distasteful, which the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law."
6 David Bristow, Team Resolution, Toronto, 'Cost of a $100,000.00 Construction Litigation', originally prepared twenty years ago but recently presented to a meeting on 'Legal Project Management', ADR Ontario Construction Section, 25 May 2011 - see graph attached.
7 A recent case with similar claims made it all the way to the Supreme Court of Canada (leave to appeal denied): Tri-Way General Construction Ltd. v. Hans, Kruzick J., 2008 CarswellOnt 2391
8 Canadian Construction Documents Committee "CCDC 40 Rules for Mediation and Arbitration of Construction Disputes", s.8 Appointment of Arbitrator; Ontario Provincial Standards for Roads and Public Works, "OPS General Conditions of Contract", GC 314.03 Appointment of Arbitrator; ***Commercial Arbitration Act***, SNS 1999, c 5 Consolidated Statutes of Nova Scotia, Schedules A, B & C; PWGCS GC811.5 Appointment of Tribunal, devolves into a costly and lengthy selection process.
9 The National Arbitration Rules of the ADR Institute of Canada, Inc., available on-line at http://www.adrcanada.ca/rules/arbitration.cfm, caps the delay by providing a default back to the Institute where the parties fail to agree within the time prescribed.
10 Arbitration International (March 2010), 26 (1), pg. 103-113. Although copyright is held by the London Court of International Arbitration, Peter may be able to provide a limited number of copies of his article to those interested in expedited arbitration. I shall provide his contact details on request - rob.bales@sympatico.ca
11 "Forceful Governor-General tells lawyers, 'Heal thyself'", Richard Foot, Ottawa Citizen, 15 August 2011; "Binnie's wise words on unclogging courts", Globe & Mail Editorial, 27 September 2011