Expedited Arbitration: Where Practicality Meets Principle

At the first New York Arbitration Week in late 2019, the International Institute for Conflict Prevention and Resolution (CPR) hosted a breakfast panel on expedited arbitration. Helena Tavares Erickson of CPR moderated a discussion among Natalie Reid of Debevoise & Plimpton, Monica Costa of TozziniFreire, Gregory Gallopoulos, General Counsel of General Dynamics, and me. That discussion was the genesis of this article, and I appreciate the thought contribution of the other panelists. A similar article appeared in the Spring 2020 Newsletter of the Business and Corporate Litigation Committee of the American Bar Association's Business Law Section.

Faster resolution is a key benefit that arbitration is intended to provide, leading to the frequent selection of binding arbitration in dispute resolution clauses ("ADR clauses") for many business contracts. When a particularly fast outcome is needed, expedited or fast-track proceedings may be stipulated in the contract or when a dispute arises. This article briefly identifies practical issues for effective expedited proceedings.[1]

FUNDAMENTAL TRADE-OFF

Expedited proceedings should be acknowledged as the intentional trade-off of shorter time period, which impacts the scope of the proceedings, in return for speedier outcome. Entering into expedited proceedings with unrealistic expectations of full scope is likely to result in frustration across counsel, parties and tribunal. The tradeoff is implicitly acknowledged in the rules of the American Arbitration Association ("AAA") that apply its Expedited Procedures Rules E-1 through E-10 only if no disclosed claim or counterclaim is more than $75,000 or if the parties agree.

COLLABORATION AT A PREMIUM

Data collected by the American Arbitration Association in its arbitrators evaluation survey[2] and by the College of Commercial Arbitrators in its 2009 National Summit on Business-to-Business Arbitration[3] attended by in-house counsel, outside counsel, case management organizations and arbitrators highlights the importance of counsel and party cooperation in achieving arbitrations that are cost- and time- effective. Cooperation among parties, saving disputes for the true substantive issues, is particularly critical for expedited proceedings.

SUITABILITY OF DISPUTE

To state the obvious, expedited proceedings are best implemented where the inherent tradeoffs are appropriate for the issues involved. Matters that are well-suited for expedited proceedings may include early stages or gating issues in a longer relationship, including in some mutual value-creation situations where both parties are motivated to get certainty and move on. High-stakes matters, such as existential threats and broad impacts on numerous people, are likely not well-suited for the tradeoff involved.

HOW AND WHEN TO DESIGNATE

The decision to expedite may be written into an ADR clause with or without other gating criteria, such as the size of dispute, where the parties can be comfortable in advance with the tradeoff calculus. Stipulating expedited proceedings in a contract with reasonably foreseeable disputes that aren't suitable is risky. In that situation, the parties could provide in the ADR clause that the parties will meet and confer to determine whether expediting is suitable for any dispute that arises. Of course, even without a trigger in the clause the parties may choose expedited proceedings via a revision of the ADR clause or submission agreement made before or upon initiating arbitration proceedings. Tailoring specific features, including those covered in this article, to a known dispute helps achieve a very workable process. That tailoring can occur in a revised ADR clause, submission agreement, or initial management order following the preliminary hearing with the tribunal.

TIME TO AWARD

Under ADR provider rules, the expedited proceeding may range from an award 45 days from arbitrator appointment (American Arbitration Association Rules E-7 and E-9) to an award 75 to 100 days from case commencement (hearing held within 60 days, closed within 30 additional days and award issued within 14 days of closing—Rules 8.3 and 10 of CPR's Fast-Track Arbitration Rules). The New York Arbitration Week panelists convened recognized that some contracts may specify as little as 4 weeks, but generally viewed a 6- to 9-month timeframe as being more prevalent for commercial or corporate disputes.

ARBITRATOR SELECTION

Ease of scheduling and speed of every decision will be greatly facilitated by using one arbitrator rather than three. Data published by the AAA show that in 68% of cases with awards issued in 2016 with claims of $1.0 million or more, the parties had selected a single arbitrator. The AAA noted one case with claims of $390 million in which the parties selected a single arbitrator.[4] Designating a standing or standby arbitrator, or greatly reducing the field of choice, may also help speed up the selection process. CPR has an ongoing initiative regarding transactional dispute prevention and solutions focused around the use of standing and standby neutrals.

JURISDICTION

The pattern of parties disputing jurisdiction is increasingly prevalent. If there is a legitimate jurisdictional issue, seek to reach consensus among the parties whether to accept the tribunal's jurisdiction to hear that dispute rather than getting entangled in the ping pong back and forth between tribunal and courts. Skip any long-shot, likely losers and get to the substance of the case.

DISPOSITIVE MOTIONS

Most rules give the Tribunal authority to hear and decide dispositive motions on a showing of likelihood to prevail—resulting in a mini-briefing or hearing on whether to hear the motion. Dispositive motions touching on factual issues or attempting to dispose of the entire case are rarely granted. Eliminate dispositive motions or bring them unless there are really no facts at issue and are highly likely to prevail, narrowing the scope of discovery or the eventual hearing.

PRELIMINARY HEARING

The ever-important preliminary hearing that yields a roadmap of the case is even more critical in expedited proceedings. Whether or not the tribunal requires that the parties meet and confer in advance of the hearing, it is very beneficial for counsel to have thoroughly reviewed the preliminary hearing agenda, collaborated on the points where agreement is possible, and minimize any conflicting views for resolution with the tribunal in the preliminary hearing. The specific items mentioned in this article need particular attention, in addition to other customary items such as cybersecurity protocol. Having party representatives participate is particularly useful in achieving shared expectations around scope.

CASE MANAGEMENT

Should disputes arise even after a solid preliminary hearing, counsel should meet and seek to resolve them quickly. In the preliminary hearing, set up a process for easy and early access to the tribunal to address any disputes as soon as the parties have attempted but been unsuccessful in resolution to avoid the snowballing effect. Arbitrators need to be up to the task of reasonable accessibility and enforcing limits and scope. The New York Arbitration Week panel agreed on the importance of this oversight as well as keeping parties (not just outside counsel) informed and aware if rocky procedural matters emerge.

STRATEGIC FOCUS

Expedited proceedings shine a light on the need for scoping each aspect to what really matters, and self-selecting against redundant information or side issues that distract from the core concepts. Strategic approach to discovery and pre-hearing submissions are particularly important.

SCOPE OF DISCOVERY

While it could be said of any arbitration that "this ain't litigation",[5] expedited proceedings information-sharing may differ from traditional discovery even more sharply. Focusing requests on truly essential information is key. Understanding the inherent limits of third-party discovery imposed by the Federal Arbitration Act (i.e., subpoenas enforceable only for the hearing) saves time and counsel embarrassment.

SETTLEMENT DISCUSSIONS / MEDIATION

Requiring a time for the parties to meet and discuss settlement or engage in separate mediation is useful and timely in expedited proceedings, even if mandatory mediation previously occurred pursuant to a step-clause. Discovery may well reveal new perspectives to one or both sides. A required discussion of settlement is recognized by advocates as a desirable way of avoiding the game of chicken by creating a face-saving means to open discussions. Where mediation has been conducted prior to the arbitration proceedings, this author may require that the parties meet to discuss settlement prospects, with mediation strictly optional to the parties.

EVIDENTIARY HEARING AND WITNESS ISSUES

Sound and focused strategy for case presentation is especially important in an abbreviated timeline. Evaluate where witness statements, coupled with cross-examination opportunities, are appropriate for the case. Joint experts or expert witness-conferencing, otherwise known as "hot-tubbing" (an unfortunate moniker and image if there ever is one), can be a very time-effective way to address technical issues with the tribunal.

AWARD

The arbitration clause and/or rules selected dictate the type of award. The dual advantages of a reasoned award --promoting a sense of closure through understanding and mitigating risks of vacatur—may still be needed in expedited proceedings. The parties and tribunal may agree to a best-of-both-worlds process, such as sharing the decision within 48-72 hours of the hearing close, with the reasoned award to come at some specified time such as 14 days from hearing close.

CONCLUSION

Attending to these considerations, supplemented by the advocates' own experience in arbitrations, aids in effective expedited arbitrations.

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[1] How to achieve the promise of arbitration generally is a broader topic for a different article.

[2] **https://go.adr.org/arbitrator-survey.html**

[3] **https://www.ccarbitrators.org/wp-content/uploads/CCA_Protocols.pdf**

[4] https://www.adr.org/sites/default/files/document_repository/AAA173_Commercial_Arbitration_Infographic.pdf

[5] The title of an ABA On-Demand CLE recorded by Serena Lee, Dana Welch, and William Crosby Jr. in 2017.