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CONSTRUCTION ARBITRATION IN THE U.S.:

ONE CANADIAN'S PERSPECTIVE [1]

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INTRODUCTION

In the U. S., there is a widely held mythology about Canada: we have no guns and no crime; our streets are clean and our buildings are devoid of graffiti; and everyone is polite and nice. Robert F. Kennedy Jr. was once asked to compare Americans to Canadians, and all he could come up with was the observation that "*Canadians stop at red lights at 4 o'clock in the morning*". Combine this with the notion that Canada is known as a country which is quick to volunteer sending our Armed Forces to the four corners of the world to provide neutral, non-partisan peacekeeping services.

This mythology, and these types of impressions of our national character, mean that, in international circles, Canadians have come to be known as law-abiding, peace-loving, honest, fair-minded, impartial and trustworthy -- all good traits for an independent arbitrator.

Recently, I spent a number of months in Chicago, Washington, D.C. and New York in connection with the arbitration of several fairly significant and interesting construction claims.

THE WASHINGTON, D.C. ARBITRATION

The Washington, D.C. arbitration involved a US$16 million claim by a California-based mining and heavy industrial construction contractor against a conglomerate of Italian corporate owners relating the construction of a cement finish mill in West Virginia.

THE CHICAGO ARBITRATION

The seat of the other arbitration was **Chicago**. The dispute involved a claim by a subcontractor against contractor relating to the design, fabrication and erection of structural steel racking and process piping, all in connection with the construction of an oil refinery just north of Salt Lake City, Utah. The subcontract price was only US$6 million, but the claim, which was fraught with many complex factual and legal issues, was for double that amount.

THE IMMIGRATION ISSUE

The Chicago arbitration was set to begin on a Monday in early January, and I arrived at the Toronto airport mid-day on Sunday, ready to depart. I was told by counsel that there could be as many as 37 witnesses standing by, and I was wondering how we were going to hear all their evidence in only the 2 weeks which we had set aside for the hearing. However, there was a more immediate issue at the airport in Toronto.

Despite my obvious law abiding, peace-loving, and trustworthy characteristics, I was denied entry to the U. S. Homeland Security officers cross-examined me as to why I was travelling to Chicago, and when I told them that I was an Arbitrator on my way to a hearing, I was advised that I was taking work away from an American, and that I would require a NAFTA visa.

It was a Sunday, and I was expected to be in Chicago the next day to begin the arbitration hearing at 9:00 a.m.

So I scrambled on that Sunday and Monday to secure some legal advice, and to gather together the necessary paperwork (including my original law degree, which I had to cut out of its 40-year-old frame). After much aggravation and anxiety, and after going through no less than 4 levels of strict security at the airport, I finally obtained my visa[3] and left Toronto late the next day. Counsel waiting in Chicago had agreed to begin the hearing a day late.

The following represents personal observations on some of the procedural and substantive issues arising out of these arbitrations:

JURISDICTION AND AUTHORITY

One must always ask at the outset of any arbitration: What is the source of the Arbitrator's jurisdiction, and are there any limitations on the Arbitrator's authority ? That is a fundamental issue, since it creates boundaries beyond which the Arbitrator is not permitted to tread.

In both the Chicago and Washington arbitrations, as you might expect, the Panel's jurisdiction and authority came from the express terms of the contract between the parties; and that was modified, where necessary, by the issuance by the Arbitration Panel of Procedural and Scheduling Orders from time to time to keep the process moving along, and to aid in resolving disputes or issues which come up during the course of the arbitration process.

The Contracts also incorporated by reference another source of jurisdiction and authority by specifically providing that the arbitrations were to be conducted in accordance with institutional rules and procedures of a recognized ADR organization -- in these cases, we used the JAMS Rules [4].

CONFLICT-OF-INTEREST AND DISCLOSURE

Arbitrators are not to have any conflict of interest which would affect their neutrality, their integrity or their impartiality such that it might disqualify them from acting. So when a prospective Arbitrator is approached, he/she must undertake a conflict search, and must then make full disclosure to the parties.

I found that the disclosure requirement in the U. S. to be much more rigorous, extensive and intense than I had experienced in Canada. For example, disclosure had to include not only any of my own and my firm's previous professional and personal dealings with either of the disputing parties, but also extended to any previous dealings (i) with their counsel; (ii) with anyone associated with either counsel in the private practice of law, and (iii) with all fact witnesses and expert witnesses. I was also asked to disclose whether any member of my family had any professional, financial, or personal association with either counsel or either party.

Additionally, the disclosure requirement is not a singular, one-time event; rather, it is a continuing obligation. For example, in my Chicago arbitration, when the Claimant's counsel introduced one of the expert witnesses, one of my colleagues on the Panel immediately recognized the expert as being someone with whom he had dealt 15 years earlier, when he was counsel on another case. So, for the record, my Panel colleague sent an e-mail to both counsel disclosing the previous connection to the expert witness, and both counsel replied, for the record, that they waived any potential conflict.

GOVERNING LAW

In both arbitrations, the contracts between the parties also contained a mandate regarding the Governing Law. With regard to the Chicago arbitration, it was interesting to observe that, although the construction project was located in Utah, the laws of Texas were to apply. Furthermore, all discovery depositions (and there were to have been 37 of them) were to be conducted in accordance with the *U.S. Federal Rules of Civil Procedure*.

Needless to say, when it came to both the law of Texas and the *U.S. Federal Rules of Civil Procedure*, I was a "*stranger in a strange land*". But, at least as far as Texas law was concerned, I was not alone. One of my colleagues on the Arbitration Panel was from San Francisco and the other was from Virginia. Neither of them had any familiarity with Texas law. Similarly, counsel for the Claimant was from Minneapolis (Minnesota), and counsel for the Respondent was from Kansas City (Missouri). Not one of the 37 fact and expert witnesses on the parties' witness lists were from Texas, and in fact only a handful were from Utah.

SEAT OF ARBITRATION HEARING

In the Chicago arbitration, we also saw that the contract between the parties contained a provision calling for the seat of the arbitration hearing to be Denver, Colorado, even though neither party, and neither counsel, and none of the Arbitrators was located, or carried on business, or resided in Denver, and even though none of the listed 37 fact and expert witnesses (who were from all over the U.S.) had any connection to Denver. In my first conference call with counsel, I determined that there was no nexus to Denver, other than it was *neutral ground*. Since the Denver airport is sometimes known for getting fogged in in winter, we all decided to change the seat of the hearing to Chicago, which was generally not too far from everyone.

ELECTRONIC PRODUCTION OF DOCUMENTS

There is always a tension between the requirement to produce absolutely everything which might have a hint of relevance, as opposed to only producing a much more limited range of documents which counsel, essentially using their own discretion, feel are generally relevant. My experience is that, in arbitration, the latter approach is less expensive, more expedient, much preferred and usually mandated.

With the collaboration of counsel, they can create an agreed-upon body of electronic, consecutively-numbered exhibits, for which there is a minimum of dispute as to admissibility. We should be mindful of the fact that Arbitrators tend to let in most evidence, on the premise that its evidentiary value is subject to weight. This serves to eliminate many disputes about admissibility. With the collaborative approach to the electronic production of exhibits, all parties, as well as the Arbitration Panel, can walk into the arbitration hearing room with only a laptop and a flashdrive of exhibits.

PRESENTATION STRATEGIES AT THE HEARING

When I am acting as Arbitrator, I have some reasonable expectations of counsel. There are 3 types of documents which I hope counsel for the parties will submit to the Arbitration Panel at the outset of the hearing:

(i) a **GLOSSARY OF TECHNICAL TERMS**;

(ii) a **CHRONOLOGY OF FACTS** (even if components of the chronology may be in dispute); and

(iii) a **LIST OF PERSONNEL**, setting out the names, job titles and dates of employment of the persons who had a higher level of involvement in both the project and the dispute.

The counsel in both the Chicago and Washington arbitrations were well-respected, senior counsel, and each of them did an excellent job for their respective clients; and yet, to my surprise, none of them felt the necessity to assist the Panel in this regard.

EXPERT WITNESSES

Similarly, when dealing with expert witnesses, I had expected more:

(i) **IDENTIFICATION**: In my experience in Canada, counsel will usually submit a curriculum vitae ("c.v.") to the Panel as soon as the expert takes the witness stand. That c.v. should of course contain details of the expert's educational, employment and professional history, as well an indication as to whether that person had ever testified before, and whether his/her credentials had been accepted before by any court or Arbitration Panel;

(ii) **QUALIFICATIONS OF EXPERT:** Additionally, my Canadian experience also dictated that the expert witnesses would then have to be properly qualified before being permitted to give their evidence. Sometimes this qualification process is in the form of a *voir dire*, where the expert's experience, expertise and credentials are reviewed. Expert witnesses are known to have been challenged and even disqualified (before testifying); and

(iii) **EXPERT'S REPORT**: Typically, in my Canadian experience, the expert's report is tabled at the outset of his/her testimony, and is often referred to throughout.

In both my Chicago and Washington arbitrations, there were no less than 9 expert witnesses. However:

- not one of the counsel submitted any c.v.'s to the Arbitration Panel;
- not one of the experts was properly qualified. The Panel had to scramble to write down the expert witnesses' names, educational and employment history, their professional publications, and so on;
- not one of the counsel submitted an expert's report to the Arbitration Panel. Instead, in most cases, the experts, in their testimony, relied almost exclusively on PowerPoint presentations; and
- not one counsel challenged any expert. This last point was a bit surprising to me, since a few of the experts, in my view, were either not experts at all, or were actually consultants who were intimately involved in drafting the claim or the response to the claim, such that they had lost their credibility as experts and were clearly advocates for their clients.

When I described my concerns about these practices to my Panel colleagues, they replied that the Canadian approach, while having merit, appeared to be based upon the rigour of a more formalistic British system of law and evidence. On reflection, though, maybe it had more to do with the fact that, unlike the rules and procedures in Canada, our U. S. colleagues have an opportunity to depose the expert witnesses prior to the hearing, so that they have more of an opportunity, in advance of the hearing, to evaluate the expert's credentials and report.

ENGAGING WITH FACT WITNESSES

(i) **THE EXAMINATION SEQUENCE**: Each fact witness was

- first examined,
- then cross-examined,
- then re-examined

But imagine my surprise when my American Panel colleagues asked counsel whether there was any further cross-examination coming out of the re-examination; and then whether there was any further re-examination coming out of that further cross-examination.

In my experience, the Panels bent over backwards to ensure that no question remained un-asked; and

(ii) **CONSULTING WITH WITNESSES DURING THEIR TESTIMONY**: You may recall reading reported decisions in the Ontario courts where counsel was rebuked for talking with his/her own witness, during a break in the proceedings, while opposing counsel was in the middle of cross-examination. However, in both the Chicago and Washington arbitrations, no one paid any attention to it. It seems that talking to (or coaching) your own witness, in the middle of his/her cross-examination, is permissible (or at least not challenged).

GOVERNING LAW (again)

I had earlier talked about the concept of "Governing Law" in the context of the Arbitrator's jurisdiction and authority. As you can appreciate, the Governing Law may *also* affect remedies, damages, costs, and pre-judgment interest, as well as the way the courts in different jurisdictions deal with certain issues.

One example of this is the "notice" issue which in fact came up at both arbitrations.

In Canada, we have seen that if a construction contract requires the provision of notice of a claim for damages for delay, the courts have tended to hold that the formal and timely submission of detailed written notice is a condition precedent to making a claim, and, if such notice is *not* given, then the claim may fail. No doubt you all remember the splash made some years ago by the B. C. Court of Appeal decision in *Doyle Construction Co. v. Carling O'Keefe Breweries of Canada Ltd.* [1988] B.C.J. No. 832 (B.C.C.A.).

This leaves open the issue as to whether other forms of notice (written or oral) would be sufficient. For example, if a delay claim is discussed at a site meeting, and then recorded in the minutes of that meeting, does that constitute "written notice" ? Many Canadian courts have strictly applied the notice requirement, and have rejected the site meeting minutes as constituting proper notice; but in the U.S., there is a range of approaches from state to state on this and other similar technical issues.

This is where Governing Law comes into the picture. Almost every state has its own theme as to how to deal with notice issues. Some states, like California, may be more liberal,

whereas other states, like Connecticut, tend toward a more strict approach. So this becomes a challenge when you are conducting an arbitration as a "*stranger in a strange land*". Everyone asks: as Arbitrator, are you expected to know Texas law or West Virginia law ? And of course the answer is "*no*". You learn it as you go along and as you may need it.

THE NON-SUIT

In the Washington arbitration, immediately after the Claimant had completed its case, the Respondent's lawyer jumped to his feet and declared that, in his view, the Claimant had not met its burden. I asked him whether he was bringing a motion for a non-suit, and put him to an election (as to whether or not he intended to call defence evidence). He did not know what I was talking about, nor did the Claimant's lawyer. You could see that both counsel were nervous and confused, thinking that there was something that they should know, but did not.

This raised the issue as to what are the Arbitrator's options at that point. Typically, the Panel would want to hear all of the evidence of both sides. It was clear to us that the Respondent's counsel was not prepared to bring a motion at that time for a directed verdict (which was more familiar to him under U. S. law and practice). I suspect that my purporting to put him to his election disarmed him and defused the drama resulting from his exclamatory comment, and he simply proceeded to put in his case.

MOTION FOR SUMMARY DISPOSITION

In the Washington arbitration, the Respondent brought a rather significant pre-hearing motion for Summary Disposition, in an attempt to persuade the Panel to dismiss the claim without a full hearing. Essentially, the Respondent was saying that, now that we have seen all of the Claimant's productions; now that we have had the benefit of deposing the witnesses; and now that we have completed our review of the law of West Virginia, we feel that the Claimant cannot possibly succeed. The motion was hotly contested, with both sides providing the Panel with large binders of affidavits, exhibits and legal authorities. And a conference call was convened so that both counsel (one in New York and the other in Washington) could make oral submissions to the Panel (one in Atlanta, one in Seattle, and one in Toronto). After reviewing all submissions, and hearing oral argument, the Panel dismissed the motion.

However, no submissions were made by either counsel regarding the costs of the unsuccessful motion; no one was invited to submit a Bill of Costs in accordance with any tariff; and no consideration was given by the Panel to the issue of awarding costs. Another cultural difference. It seemed that the prevailing view was that, although the costs of the Summary Disposition motion were likely substantial, we would consider them (in a vague and general way) in the fullness of time, after making a decision on the merits of the claim at the actual arbitration hearing.

CONCLUSION

By the end of these arbitration hearings, all of us had learned about anchor bolts, isometric drawings, process piping, and structural steel erection methods. And, from a legal perspective, we learned what West Virginia law says about termination for convenience and bad faith, and what Texas law has to say about damages for delay, acceleration, and loss of productivity.

But, despite the cultural differences, we muddled through, and the Panels ultimately issued awards that were reasoned, fair and just.

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[1] This paper constitutes the author's speaking notes for a presentation made by him on May 28, 2010 at the 13th Annual Conference of the Canadian College of Construction Lawyers in Halifax.

[2] B.A. (Tor.), LL.B. (Osg.), LL.M. (Harv.), C. Arb., C.S. Senior Partner and Co-Chair of Construction and Infrastructure Group, Osler, Hoskin & Harcourt LLP; the only Canadian Arbitrator and Mediator with the Global Engineering and Construction Group of "JAMS" (Judicial Arbitration and Mediation Services), the largest private provider of alternative dispute resolution services in the United States; and Chair of the Construction, Engineering and Infrastructure Panel of ADR Chambers.

[3] A "TN" (NAFTA) visa is issued by the U.S. Department of Homeland Security (U.S. Customs and Border Protection) at the Toronto airport. The immigration and customs preclearance officer would typically direct an applicant to a nearby auxiliary security office, and, if all the paperwork were to be in order, the application process would likely take approximately one hour. The application requires the filing of a sponsoring letter from the U.S. "employer" (in my case, "JAMS" [Judicial Arbitration and Mediation Services]), a letter from the Canadian company providing the legal service (in my case, Osler, Hoskin & Harcourt LLP), my *original* law degree (lawyers are covered by a special regulation), and the payment of a $50.00 fee. The application may be for one to three years in duration, and the visa, once issued, is good for multiple entries to the U.S. (on the assumption that the each entry is for the same employer). Upon the expiry of the visa, a new application may be made, which presumably would require the same process.

[4] "JAMS" (Judicial Arbitration and Mediation Services) is the largest private provider of alternative dispute resolution services in the United States. JAMS' Rules may be accessed at http://www.jamsadr.com.