

# ASA Below 40

## The Pros and Cons of Fast-Track Arbitration

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# The Grace of Fast-Track Arbitration

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- Saving time, money and grace
- Focus on the real issues in dispute
- Reduced effects on operational, business and financial resources of the parties
- Smaller reputational losses
- Fewer conflicts of interest for arbitrators
- Overall efficiency
- Client satisfaction

But is not that what arbitration should be all about?

# The Nightmare of Fast-Track Arbitration

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## Fast? Schnell? Rapido? Bystro? Terminological Babylon

- There are as many interpretations of fast-track arbitration as there are lawyers, arbitrators, and clients
  - A distinct sub-system of arbitration playing by its own rules?
  - Accelerated dispute resolution with non-extendable deadlines?
  - A due process discount?

# Fast? Schnell? Rapido? Bystro?

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## Institutional Thinking: The Magic Number Six

Arbitration rules prove that the meaning of speed is relative

- **ICC regular-track rules, Art. 24:** The award must be rendered within *six months* from the terms of reference
- **DIS fast-track rules, Sec. 1.2:** The proceedings cannot exceed *six months* from the statement of claim, or nine months in case of a three-member tribunal
- **SCC regular-track rules, Art. 37:** The award must be rendered within *six months* from the transmission of the case to the arbitrator
- **Swiss fast-track rules, Art. 42(1):** The award must be rendered within *six months* from the transmission of the file to the tribunal
- **CIETAC regular-track rules, Art. 42(1):** The award must be rendered within *six months* from the composition of the tribunal
- **CPR draft fast-track rules:** The award must be rendered within *six month* from the commencement of the arbitration

# Fast? Schnell? Rapido? Bystro?

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## Cultural Interpretations: Russians are not Swiss

- The notion of speed and efficiency varies in different cultures

*“The longer the ride, the further you will get”* (Russian proverb)

*“Better sell with regret than keep with regret”* (Swiss proverb)

- Fast-track arbitration has little chance in arbitration-skeptical cultures

“. . . given the arbitral institutions that have provided for expedited arbitration of parties who have set fast-track arbitration clauses, one could think that fast-track and accelerated arbitrations could successfully occur in, or with parties from, Austria, France, Ireland, Switzerland, Hong Kong, Australia, Mexico (at least for procedural segmentation) and the United States.”

*Benjamin Davis; Odette Lagacé; Michael Volkovitsch, When Doctrines Meet - Fast -Track Arbitration and the ICC Experience*

# The Russian Roulette

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- Agreeing on fast-track arbitration in advance is a big gamble

“ . . . at the time a transaction is concluded, the decision to conduct a legal dispute by shortening any deadlines is mainly risky because the allocation of the roles of claimant and defendant, as well as the subject and value of the dispute and the evidence situation are still uncertain, more than ever with such a complex matter . . . ”

*Alice Broichmann, Disputes in the Fast Lane: Fast-Track Arbitrations  
in M&A Disputes*

- Impossible to predict if your party would be claimant or respondent
- Impossible to predict the complexity and intensity of a dispute
- Impossible to predict if your party would resist or try to enforce an award

# Arbitration Haute Couture: One Dress Does Not Fit All

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- Fast-track arbitration works in a very limited number of contexts, such as sport disputes, domain name cases, mergers & acquisitions, or commodities “look/sniff” quality disputes

“ . . . Fast-track or expedited proceedings can only be used for issues which are capable of being resolved in such a manner. Price and quality determination are good examples. Sports disputes can also be resolved within a few days.”

*Julian D.M. Lew, Loukas A. Mistelis and Stefan M. Kröll, Comparative International Commercial Arbitration*

- Fast-track is unmanageable in multiparty disputes
- Fast-track is not suitable in arbitrations involving sovereign parties

# Arbitration Haute Couture: You Can't Wear Swatch and Rolex on One Wrist

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- Subjecting only certain subsets of disputes to fast-track opens the Pandora box of battling over what falls under them
- Segmentation of disputes causes the risk of two parallel sets of proceedings; fast-track and regular-track

# The Bad Cop Always Wins?

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- Fast-track arbitration is dependent on the team work of everyone involved – clients, counsel, arbitrators and institutions

“Unfortunately, . . . no (fast-track) system would work properly unless all the parties and the arbitral tribunal were ready to co-operate in achieving accelerated timetables.”

*Redfern & Hunter, Law and Practice of International Commercial Arbitration*

- There are countless ways to torpedo the arbitral proceedings

“Since there are rarely any efficient means to force a party to conform should an attempt be made to obstruct the procedure and deviate from the agreement, the procedure is dependent on the parties sticking to the agreed terms and perhaps agreeing to new terms during the proceedings.”

*Eva Müller, Fast-Track Arbitration: Meeting the Demands of the Next Millennium*

- Probability of successful post-award challenges is very high

# Unfair Game

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- Fast-track arbitration raises due process concerns

“Any fast-track arbitration, be it in the area of sport or otherwise, must strike the difficult balance between due process and speed. Any rules for accelerated proceedings must allow for the risk of a decision that will not withstand judicial review.”

*Gabrielle Kaufmann-Kohler, Formula 1 Racing and Arbitration: The FIA Tailor-Made System for Fast Track Dispute Resolution*

- Fast-track arbitration allows for a limited possibility to consider dispute fully

“. . . fast-track arbitral proceedings reduce the parties’ and the arbitrators’ chances to concern themselves with the dispute. This is an inevitable result of the limitation of time spent on the arbitration. It goes without saying that if the arbitral award shall be rendered within a shorter time than is normally the case in traditional arbitral procedure, some elements must be sacrificed.”

*Eva Müller, Fast-Track Arbitration: Meeting the Demands of the Next Millennium*

- Fast-track raises deeper equality concerns

“. . . equality between the parties and compliance with due process would be almost impossible, as the claimant would have ample time to prepare its case in depth before initiating the proceedings, whereas the defendant would be unable to do so.”

*Fouchard, Gaillard, Goldman on International Commercial Arbitration*

# The Riddle of Finding Mr. Right

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- The pressure of a name - all bets are on a sole arbitrator.
- It is hard to find a suitable expert arbitrator prepared to spend enough time on a new case on a short notice

“ . . . it may be difficult to enlist the desired arbitrator most suitable for a concrete mandate because of his special expert knowledge, especially if he must be almost exclusively available for this single arbitral proceeding on relatively short notice.”

*Alice Broichmann, Disputes in the Fast Lane: Fast-Track Arbitrations in the M&A Disputes*

“The arbitrators entrusted with the resolution of fast-track disputes must be individuals with relevant expertise, capable of conducting the procedure in an expedited manner until its conclusion, and available to do so.”

*Mirèze Philippe, Are Specific Fast-Track Arbitration Rules Necessary?*

# The Christmas Sales Effect: Who Saves?

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- Lower costs are often an illusion

“Shorter proceedings do not necessarily mean lower costs: whether the arbitrators and counsel devote a total of X hours to a case over a period of 18 months or 6 months, in the end, the total time spent remains the same.”

*Alice Broichmann, Disputes in the Fast Lane: Fast-Track Arbitrations in the M&A Disputes*

- In the law firm context, intense schedule often means double-teaming
- Costs of vacatur and enforcement proceedings can exceed arbitration costs by far

# The Promise of the Future

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- In fast-track arbitration, there is a greater possibility of successful post-award challenges, vacatur or enforcement

“. . . procedural limitations may still come as a surprise. This may result in a party successfully challenging the arbitral award claiming that such procedural limitations as provided for in the fast-track rules cannot be applied without the parties' explicit consent and that the party was unaware of the existence of the limitations.”

*Eva Müller, Fast-Track Arbitration: Meeting the Demands of the Next Millennium*

- As a result, arbitration can be shifted back to slow gear

“The arbitral tribunal, conscious of the need for an opportunity to be heard and acting in the absence of a background time-limit that is not extendable, may be loathe to set stricter time-limits to avoid challenge of the award on these grounds”

*Benjamin Davis; Odette Lagacé; Michael Volkovitsch, When Doctrines Meet - Fast - Track Arbitration and the ICC Experience*

# Shifting Priorities?

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- Most of the features of the fast track must be the everyday attributes of the regular track

“The forms of fast-track arbitration about which we have heard and read in recent years are often presented as novel exceptions to a procedure which is not, by nature, fast. This appears to be a complete inversion of the long history of international commercial arbitration . . . ”

*Lord Mustill, Comments on Fast-Track Arbitration (1993)*

# Shifting Priorities?

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- Focus on disciplining the regular-track process: return to arbitration as some still remember it . . .

“May I illustrate this by going back to the time, nearly forty years ago, when I first became concerned with international arbitration? The procedure was, by definition, fast-track. That was why the parties chose it as their method of resolving disputes. What has changed in the last forty years is the creation of the new, slow-track arbitration which is the kind of arbitration which is the subject of almost everything written and spoken on the subject.”

*Lord Mustill, Comments on Fast-Track Arbitration (1993)*

“These Expedited Rules for Commercial Arbitration (the “Expedited Rules”) delineate a process for the resolution of commercial disputes quickly, economically, and fairly, to restore the fundamental advantage of commercial arbitration over litigation and other forms of dispute resolution.”

*CPR Draft Expedited Rules for Commercial Arbitration (2008)*

## Do We Need the Fast Lane?

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Fast-track arbitration must remain the feature of party autonomy: if they want to travel express, the green light must be always on

## **Fast response guaranteed by:**

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