

PERSPECTIVES

LEAN ARBITRATION: PLANNING FOR EFFICIENCY AND PREVENTING ARBITRAL WASTE

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Parties' love/hate relationship with arbitration is well documented. Studies consistently show that while arbitration's flexibility and finality are valued, issues with high costs and a lack of productivity persist. This article will review a practical strategy for encouraging efficiency and economy in arbitration through the use of project management and lean methodology – systems that were largely created to achieve these goals.

The Association for Project Management defines a 'project' as a "Unique, transient endeavour, undertaken to achieve planned objectives". 'Project management' is further described as the "Application of processes, methods, knowledge, skills and experience to achieve the project objectives".

The benefits of project management include effective use of resources, management of risks and adapting to change in order to achieve strategic goals and benefits.

The use of project management tools is often associated with construction, information technology (IT) or manufacturing activities where it is utilised to study and improve workflow. In recent years, legal project management also developed in law firms and in-house legal departments to help manage contracts, mergers and acquisitions (M&As) integration and litigation. While similar to traditional case management, the Association for Corporate Counsel notes that project management has become particularly important in-house

because “[Business] clients now expect more than substantive legal knowledge; they require in-house counsel to have business acumen and to provide legal services in an efficient, predictable, and consistent manner”. Project management accomplishes this through more effective planning, cost control, resource allocation and risk management.

If project management tools can be utilised by corporations and law firms to study and improve business and legal processes, why not apply these techniques to arbitration as well? Arbitration is certainly intended to be a unique and temporary endeavour, largely undertaken to achieve the economical and efficient resolution of a dispute. Moreover, the inclusion of a framework that is



specifically focused on process efficiency and risk avoidance in arbitration can only be a force of good. Hence, project management in arbitration involves the application of processes, methods, knowledge, skills and experience to achieve the parties' objectives in electing arbitration as their dispute resolution mechanism.

In this scenario, the arbitrator is best-suited to serve as the principal project manager. Parties may wish to manage their approach to the arbitration utilising legal project management techniques as a sort of sub-project administration. Nonetheless, the arbitrator is responsible for providing the tools to encourage a strict adherence to schedule, clear communications about process expectations, risk management plans and maintenance of the critical path to a quality process. In this way, the arbitrator takes responsibility at the outset of the proceedings for looking at the 'project' holistically, understanding where the speed bumps will likely appear, identifying them in a constructive manner with the parties and their counsel, and planning ahead for how to work with them. Obstacles to an efficient arbitration might include anything from the potential for an unwieldy e-discovery process, jurisdiction over third parties or complications over basic scheduling concerns, and

even the communication issues that haunt many proceedings.

However, the arbitrator cannot create efficiency in a vacuum. She or he requires the support of parties and their advocates. While the arbitrator is charged with mapping out a fair and efficient process,

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it is helpful for these concerns to be supported by parties. Though unconventional, in a project management approach to arbitration, parties and advocates become members of the quasi-project team that is led by the arbitrator – all working toward the common goal of achieving a fair and efficient process that concludes as expediently as possible.

At the outset of a project, it is critical to establish scope. In arbitration, this includes an articulation of the issues before the arbitrator, parties to the process and party expectations for how the arbitration will be conducted, in terms of information gathering, hearing length, award type and so on. It

is not uncommon for parties to disagree on scope – whether the issues presented are arbitrable, whether depositions are necessary and so forth, requiring the arbitrator to seek clarity on the issue as early in the process as possible.

Some guidelines for establishing scope include an analysis of what is needed from the process in order to reach a conclusion that is in line with the parties' original agreement. The scope should be reviewed with parties and counsel prior to a preliminary hearing and should further be memorialised in a subsequent scheduling or procedural order. A clear scope enables the arbitrator and parties to develop a sensible schedule for the arbitration, while also shedding light on the costs involved. At this early stage, a communications protocol should also be arranged whereby the arbitrator will set regularly scheduled check-ins with the parties to ensure progress. These check-ins do not need to be laborious, nor present a risk for driving up costs by inviting more work. But there should be regular communication to ensure that deadlines are met and issues are resolved in real time.

The planning stage follows. It is here that lean analysis comes into play, and the need to analyse facets of the arbitration process for the value they will bring or the waste they will produce. Lean is an approach to process improvement that focuses on identifying inefficiencies, known as 'waste', and promoting value. While lean generally provides several different categories of waste, over-

production and defects are two of the most relevant groupings for this exercise.

'Over-production' is a reliance on excessive processes or the rendering of more services than is reasonably necessary. This is often one of the biggest party complaints about arbitration – that the process is too lengthy, cumbersome and expensive. 'Defects' are mistakes. The faulty arbitration clause is a good example of a defect, and one that should be addressed as soon as possible. Flawed drafting, or over-drafting of the dispute resolution procedure can bring added expense and confusion once the arbitration is underway.

After the potential for waste is discovered, the project team should endeavour to determine whether these elements should be eliminated or modified in order to bring about the best path to a quality process. While the initial case management conference is an ideal setting for this review, some issues will not avail themselves until later into the process. Here the American proclivity for exhaustive discovery – document requests, exchanges, compounded by depositions – comes to mind. Examining this tendency, derided as one of the biggest challenges to an efficient arbitration, through the lens of Lean, it most likely falls into the over-production waste bin. This is not to say that all information exchange is bad, but that moderation and proportionality are usually good. Further, once you have a defective clause, for example no law identified, no rules or perhaps a

confusing step clause that no human could possibly follow, it is not necessarily easy to ignite consensus around a solution for clause deficiencies. But a risk management process that best suits the issue is necessary.

Arbitration is ultimately the parties' process, and the arbitrator must take care to be fair, open-minded and to work in keeping with the parties' agreement. But it is possible to do this while drawing attention to the potential risks to efficiency of the process and offering suggested solutions for a more effective

path. Inserting common project management paradigms into the arbitration process can assist the arbitrator and parties in monitoring for obstacles to arbitration efficiency and developing solutions for those problems before they spiral. **CD**



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