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Time Performance of Construction Arbitration

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ABSTRACT

One of the main concerns among disputants in arbitration is that the duration is taken to resolve their disputes. Although it's has been suggested that sole arbitrators and multi-member tribunals should conclude arbitration cases within 3 and 6 months, respectively, it remains unclear why some disputes take longer than others to resolve.

The importance of timely resolution of construction disputes can't be exaggerated. Studies have established resolution time as one of the essential considerations in selecting dispute resolution methods. Conflicts that take an extended time to resolve essentially fracture business relationships escalate construction costs, delay projects, cause emotional stress, and damage reputation, reducing business turnover.

Users of construction arbitration expect their disputes to be resolved rapidly, economically, and satisfactorily. Studies have shown that arbitration remains one of the foremost popular methods of construction dispute resolution because of its perceived attributes, including flexibility, expertise, perceived time efficiency, cost-effectiveness, and fair and just outcomes. Unfortunately, due to increased judicialization, arbitration has recently attracted a fair share of criticism, failing to achieve its intended objectives. Thus, its effectiveness as a method of dispute resolution has been put into serious doubt. Consequently, construction arbitration has become costlier, time-consuming and its awards increasingly face enforcement challenges.²

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² Abwunza, 2020; Al-Humaidi, 2014; Besaiso et al., 2018; El-Adaway et al., 2009; Moza & Paul, 2017

resolution methods. Conflicts that take an extended time to resolve essentially fracture business relationships escalate construction costs, delay projects, cause emotional stress, and damage reputation, reducing business turnover.³ Conversely, disputes that take a brief time to resolve may foster cooperative behavior among the disputants due to lower conflict intensity and lower levels of hostility.

Dispute Factors influencing Time Performance

The general duration is taken to resolve a dispute mainly depends on four dispute factors. The primary factor is the complexity of the conflict, which refers to the ease of resolving the dispute. The complexity of a dispute ranges from normal to complex. Such complexity depends on the character of the cause of the dispute, with some disputes involving quantum disagreements while others involve complex facts requiring contract interpretation. During this study, quantum refers to the amount owing, while contract interpretation refers to the process of establishing the contractual and/or legal basis of the disputed issues.

Simple disputes mainly imply disagreements over quantum and are generally easy to resolve. However, disputes involving complex facts and contract interpretation are likely to require considerable time as disputants choose lengthy procedures derived from litigation. Consequently, such disputes require a high quantum of proof and have a tendency to be characterized by numerous sittings and long awards.

The secondary factor is the competency of the tribunal. Competence refers to the "ability or capability, which can enable satisfactory completion of some task." Arbitrators' competence entails the knowledge; skills and attitudes required to efficiently and satisfactorily resolve disputes placed before them. Arbitrators require specialized expertise within the discipline of the dispute and an understanding of the arbitration practice and procedure. They are appointed to handle the right attitudes to help in facilitating the effective resolution of the conflicts. Disputants may evaluate an arbitrator as pro-industry, anti-industry, or balanced depending on the favorability of the award to the gauging disputant. Pro-industry arbitrators are likely to make awards in favor of contractors; anti-industry arbitrators can rule against contractors, while balanced arbitrators are the potential to rule either way. Thus, disputants intuitively evaluate arbitrators supported assessing damages, deciding issues of law and evidence, examining witnesses, dealing with discovery requests, and handling procedural matters.

³ 2021. [online] Available at: <https://www.researchgate.net/profile/Huimin-Li-19/publication/275183062_Factors_That_Affect_Transaction_Costs_in_Construction_Projects/links/5e9c0e0ba6fdcca789245ed8/Factors-That-Affect-Transaction-Costs-in-Construction-Projects.pdf> [Accessed 18 July 2021].

The importance of the arbitrators' competence on the method and outcome of arbitration has led to the widely held maxim that "arbitration is only as good as the arbitrator."

The last factor is the approach to the presentation of evidence. Such approaches include meticulous documentation, number of experts and fact witnesses, and techniques for preparing and presenting evidence. *Firstly*, good documentation includes adequate, well suggested and formatted, referenced, relevant and non-confusing documents regarding meticulousness of documentation. In contrast, poor documentation entails excessive, irrelevant, unreferenced, poorly prepared and poorly formatted documents. *Secondly*, the number of experts and fact witnesses may determine the time performance of arbitration⁴. This possibility is attributed to the hearing time required to look at and cross-examine the witnesses and experts. *Lastly*, choice of techniques for preparing and presenting evidence features a pertaining to the time performance of arbitration, with poor choices likely lengthy examination of witnesses affecting the time performance negatively and vice versa. The final factor is that the perceived adequacy of the dimensions of the tribunal. Nonetheless, the tribunal must use its powers in reigning in any intransigence to make sure that such approaches are streamlined for procedural efficiency. Finally, complex disputes may require multi-member tribunals to deal with competence inadequacies inherent in sole arbitrators. Disputants may evaluate an arbitrator as pro-industry, anti-industry, or balanced depending on the favorability of the award to the gauging disputant. Pro-industry arbitrators are likely to make awards in favor of contractors; anti-industry arbitrators can rule against contractors, while balanced arbitrators are the potential to rule either way.

Conclusions and Implications

This paper aimed to elucidate the factors influencing time performance of construction arbitration. Time performance is influenced directly by two main factors: the complexity of the dispute and approaches to the presentation of evidence, and indirectly by the distribution of control and competence of the tribunal. Through a structural model, the study helped establish the mediating role of competence and therefore the approaches to presenting evidence on the influence of both complexity and distribution of control on time performance of construction arbitration.

The findings reinforce the self-interested nature of the disputants, suggesting that in construction arbitration, where decision control is vested within the arbitrator, disputants

⁴ Abwunza, A., Peter, T. and Muigua, K., 2021. Explaining Time Performance of Construction Arbitration. [online] Academia.edu. Available at: <https://www.academia.edu/44924402/Explaining_Time_Performance_of_Construction_Arbitration> [Accessed 18 July 2021].

could even be more interested by exercising greater process control with a view of receiving favorable awards⁵. Recognizing that distribution of process control is likely to determine hostilities among disputants, tribunals must make adequate use of their competence domains through conferred powers to instill the much-desired discipline in the resolution process also in guiding the disputants on appropriate evidence presentation approaches matching their case complexities. Whereas such competence is instrumental in streamlining the approaches to the production of evidence, its utility in the resolution process is likely to depend on the extent to which such competence is appropriately matched to the complexities of the various cases. The conclusion arises that time performance is expected to match case complexities and the tribunal's competence. The tribunal utilizes its powers and competence in instilling discipline and streamlining evidence for procedural efficiency.

Results also indicate that the duration taken to resolve the disputes increased from the least complex cases to the moderately difficult ones, with the foremost problematic issue taking the longest time. This complexity was mainly determined by the character of the explanation for the dispute, within the least complex cases leaned more toward disagreement over quantum and required fewer sittings. As compared, the foremost challenging case required more sittings to deal with issues requiring contract interpretation. The conclusion arising from this finding is that the duration taken to resolve the dispute may vary depending on the convolvement of the dispute, with cases requiring contract interpretation taking considerably longer to resolve.

Both parties and appointing institutions must make sure that they select suitable arbitrators to deal with the case complexities. Parties got to perform sufficient due diligence before setting or agreeing to the appointment of arbitrators. Such due diligence may take cognizance of the arbitrators' functional abilities to make sure that they possess the right competence domain to handle their cases. Besides, appointing institutions must maintain an active panel of arbitrators' competencies and request parties to supply sufficient details to match such competencies to case complexities. The dispute resolution clause can be customized to ensure that the parties requesting for the appointment of arbitrators include details on the desired competence of the tribunal and the nature of the explanation for the dispute which will enable these institutions to form informed decisions. While it is difficult to predict the nature of the cause of the conflict when drafting a contract, parties to the agreement, through their consultants, can customize dispute resolution clauses to include minimum qualifications of

⁵ Abwunza, A., Peter, T. and Muigua, K., 2021. Explaining Time Performance of Construction Arbitration. [online] Available at: <<https://ascelibrary.org/doi/10.1061/%28ASCE%29LA.1943-4170.0000460>> [Accessed 18 July 2021].

arbitrators.

The inverse relationship between complexity and the approaches to the presentation of evidence requires a formal gathering and documentation of evidence during contract administration. Such a system, which also requires timely notification of events that may impact project performance, will probably reduce the time necessary for hearings. The mediating role of the competence of the tribunals and the approaches to the presentation of evidence calls for more proactive tribunals in streamlining the production of evidence and instilling discipline among the disputants and their representatives to reduce misconduct. Finally, there's a requirement to incorporate arbitration rules provisions for guiding arbitrators, parties, and their representatives on the duration, being a maximum of 6 and 12 months for cases handled by sole arbitrators and multi-member tribunals, respectively. With such a guide, participants within the arbitral process can complete their matters within the required ceiling while giving room to form necessary adjustments depending on justified circumstances unique to every case.
