

## What's Costime got to do with Arbitration?

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Albert Einstein published his Special Theory of Relativity in 1905. This showed that space and time did not exist independently but that the Universe comprised a 4 dimensional framework of existence that he called Spacetime. Other scientists had reached this conclusion earlier but Mr Einstein's genius was to formulate the mathematical framework for Spacetime<sup>1</sup>.

In Arbitration, cost and time do not exist independently. There is only Costime. Time always comes at a cost; the longer a dispute drags on, the more it costs the parties. Costs are almost all based on time. Cost is not just incurred directly in money but also indirectly in lost management time and business disruption. Minimising time will reduce the cost. The interests of the parties are to minimise both the time and cost of an arbitration.

I won't drag the analogy any further but will try to set out some factors that can help to reduce arbitration Costime, avoiding stating the obvious to practitioners. The 2022 Pinsent Masons – QMUL survey<sup>2</sup> (the **2022 Report**) is a great source of guidance as it gathered the recent experience and needs of the players who bear the cost – the parties.

The graph on page 30 of the 2022 Report shows that around 30% of respondents put Speed as among their top choices of important features of arbitration. Page 32 noted that “*Exactly half of all respondents selected ‘expedited procedures (including faster constitution of arbitral tribunals and time limits for awards)’ as being amongst the most important factors*”. Early dismissal of unmeritorious claims is a big plus (or minus?), but some tribunals have displayed “*procedural paranoia*” in being reluctant to do this. Assessing an assertion of unmeritorious claims by a party is easier/faster if the tribunal includes someone with the technical expertise to evaluate such claims. Perhaps procedural paranoia is less likely with a technical arbitrator on the panel. I do not suggest nor believe that a technical arbitrator should act as their own expert but that the evidence provided by the parties will make sense to them.

Arbitra member Adrian Cole<sup>3</sup> practiced as a quantity surveyor before becoming a full-time arbitrator. He is now one of the top arbitrators internationally for construction disputes. Adrian has allowed me to quote him directly<sup>4</sup>:

*“Well informed parties have always taken care with the selection of arbitrators. As disputes become more technically complex, parties have realised the benefits of appointing tribunals that are specialist in their field. Parties can avoid the costs of learning curves and avoid the risk of arbitrator misunderstanding. Arbitrators who speak the language of the industry are best placed to assimilate submissions and evidence most effectively. It is nevertheless vital that arbitrators decide cases as presented to them and not make assumptions based on past experience.”*

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<sup>1</sup> The calculations require time and space to use the same units. This is done by dividing the distance in space by  $c$ , the speed of light, to give a distance in terms of how many seconds it would take for light to travel that distance. The interval length travelled through Spacetime can then be calculated using Seconds as units.

<sup>2</sup> <https://arbitration.qmul.ac.uk/media/arbitration/docs/Future-of-International-Energy-Arbitration-Survey-Report.pdf>

<sup>3</sup> <https://arbitra.co.uk/arbitrators-mediators/profile/AdrianCole>

<sup>4</sup> <https://whoswholegal.com/adrian-cole>

Page 6 of the 2022 Report notes that:

*“After an arbitration has been commenced, respondents identified the most important procedural elements as being the technical expertise of the arbitrators (76%). Technical expertise in that context was understood by respondents broadly, to cover both an understanding of the underlying legal and technical facets of the case, and experience in shaping the dispute resolution process to the commercial needs of the parties.”*

Page 31 shows that the top response at 76% to the question about the most important procedural element for energy related arbitrations was *“Technical expertise (tribunal / counsel / experts)”*.

Where a dispute has both complex technical and legal issues, having a mixture of technical and legal expertise on the tribunal is likely to lead to a more efficient arbitration (= less Costime) as the survey respondents recognised. I have heard lawyers question the appointment of a technical arbitrator because they might act as their own technical experts and carry out their own investigations. I’ve never heard anyone question the appointment of a lawyer because they might act as their own legal experts.

The survey did address the time taken to issue an award. In a multi-million (choose your favourite currency) dispute it’s normal to form a tribunal of 3 arbitrators, none of which are yet ChatGPT. Their main constraint on the time taken to issue an award is the time that the 3 of them have available to coordinate and finalise that award. Ideally they will start drafting during the arbitration so that by final submissions, the work is 80% done. Still it can take many months or years to get the award. I was involved in one arbitration with a settlement value of nearly \$400m as a tribunal appointed expert witness, appointed in October 2016. The award was issued in July 2020. There are two main ways to reduce this time. The most powerful is to put a time limit into the arbitration agreement or adopt a procedural law that requires awards to be issued within a defined period of time. The Report notes on page 6:

*“Half of all respondents (and 66% of end users) selected expedited procedures (including faster constitution of arbitral tribunals and time limits for awards)”*

Another way is to appoint arbitrators who can give the necessary time to complete the award expeditiously by selecting those who do not have a huge number of concurrent cases. This also has the beneficial impacts of opening up appointments to newer arbitrators as well as reducing the direct cost; those in greatest demand can demand the greatest fees. This also helps to expand the pool of available arbitrators as concentrating many appointments to the care of a favoured few makes it much harder for new arbitrators to get tribunal appointments. Both methods can be used; set an absolute upper limit on the time to make the award and ensure that the arbitrators have the time to deal with the case.

The 2010 survey done by White & Case and QMUL<sup>5</sup> (the **2010 Report**) on page 28 noted that

*“Availability was a specific issue focused on by respondents and interviewees: many felt that arbitrators should be required to publish information about their pending commitments (without the need to mention specific case names) so parties could have a better idea of the time the arbitrator would have to commit to the matter, as this is a factor that can lead to delays.”*

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<sup>5</sup> [https://arbitration.qmul.ac.uk/media/arbitration/docs/2010\\_InternationalArbitrationSurveyReport.pdf](https://arbitration.qmul.ac.uk/media/arbitration/docs/2010_InternationalArbitrationSurveyReport.pdf)

The 2018 Queen Mary University survey on international arbitration<sup>6</sup> (the **2018 Report**) had some findings relevant to this article. The survey asked questions about Tribunal diversity but this referred to gender, age, cultural and geographical origin rather than having a panel with diverse capabilities. Several parts of the survey point to the need for a wide and diverse pool of arbitrators. The 2018 Report noted that “... *actual appointments still fail to reflect the larger pool of available arbitrators and rather continue to perpetuate the nomination of repeat players*”.

The graph on page 30 of the 2022 Report shows that the category “*Choice of arbitrators - diversity of arbitrator candidates*” scored low on the Report in terms of importance at 15%, with only “*Commitment to ‘greener’ arbitrations*” scoring lower. In the explanation on page 31, diversity is not mentioned. It is likely that the survey respondents took the word to mean diversity of gender/nationality/religion as that is the common use of the word. It is useful to take a closer look at this.

A research project at the University of Michigan compared the performances of diverse v homogenous teams. The report **Groups of diverse problem solvers can out-perform groups of high-ability problem solvers**<sup>7</sup> stated:

*“We find that when selecting a problem-solving team from a diverse population of intelligent agents, a team of randomly selected agents outperforms a team comprised of the best-performing agents. This result relies on the intuition that, as the initial pool of problem solvers becomes large, the best-performing agents necessarily become similar in the space of problem solvers. Their relatively greater ability is more than offset by their lack of problem-solving diversity.”*

By “problem-solving diversity”, the report refers to “*differences in how people encode problems and attempt to solve them*”. These results are identified in other studies; the Kellogg School of Management published a paper **Better Decisions Through Diversity**<sup>8</sup> which concluded that:

*“In the study, diverse groups outperformed more homogeneous groups not because of an influx of new ideas, but because diversity triggered more careful information processing that is absent in homogeneous groups.”*

A significant percentage of a technically complex dispute costs will come from the fees of the Expert Witnesses and the time taken to deal with them and their reports. If the Tribunal has no technical expertise, the expert reports must be written in a way to educate the Tribunal on these complex issues, so it becomes partly a tutorial. This makes the report longer – costs more - than it would otherwise be.

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<sup>6</sup> [http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey--The-Evolution-of-International-Arbitration-\(2\).PDF](http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey--The-Evolution-of-International-Arbitration-(2).PDF)

<sup>7</sup> See <https://sites.lsa.umich.edu/scottepage/wp-content/uploads/sites/344/2015/11/pnas.pdf>

<sup>8</sup> [https://insight.kellogg.northwestern.edu/article/better\\_decisions\\_through\\_diversity](https://insight.kellogg.northwestern.edu/article/better_decisions_through_diversity)

The experts for each party will probably answer different questions and with different sets of evidence in their first reports. Disclosure of documents after the submission of expert reports may require first round reports to be updated. This is quite inefficient. An improvement would be for the Tribunal to set out the substantive matters that they want the Experts to opine on early in the process, provided of course that the nature of the dispute has been clearly defined. The Tribunal could also instruct the Parties to place all relevant documents into a shared online resource, available to both Experts. Both Experts then work on the same questions from the same data set, which shortens the drafting process. The Experts must also be able to follow evidence and bring to light anything that they think is important for the Tribunal to consider which was not known or obvious from the start.

This bullet point leaps out of page 25 of the 2010 Report:

- 50% of respondents have been disappointed with arbitrator performance.

I couldn't find any similar reference in the 2022 Report but I note that it's probably not a coincidence that 50% of parties will have been on the losing side of an arbitration!

### **Summary**

- 1) Control of Costime is very much in the hands of the Parties. Their most important choice is that of their arbitrator, probably followed by the choice and use of experts.
- 2) A tribunal that has "problem solving diversity" and technical expertise related to the dispute is more likely than a homogenous panel to produce a better award and to reduce Costime.
- 3) Management of expert evidence and early dismissal of unmeritorious claims is enhanced with technical expertise on the Tribunal.