

# USE OF EXPERT EVIDENCE IN DELAY & DISRUPTION CASES BEFORE ARBITRAL TRIBUNALS; THE TECHNICAL TRUTH

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## Prologue

Maria Fisentzou has based this article on her dissertation for the MSc degree in Construction Law and Dispute Resolution at King's College London. Her dissertation work was supervised by Professor John Uff CBE QC and it was completed in September 2011.

Maria's dissertation primarily refers to English law and examines both the reasons why delay and disruption expert witness evidence before arbitral tribunals may differ and the techniques that arbitral tribunals put into practice to analyse differing opinions. In this article Maria focuses on the latter.

## Introduction

Delay and disruption analysis is not about describing how the engineering project would work or what the standard of care of engineers or architects ought to have been; it is all about analysing the facts to try to determine what has caused the delay and what the effect was. Because of the complexity, both contractually and technically, of construction projects, determining delay is not such a straight forward process. If two delay analysts are asked to ascertain, independently, the delay of a project based on the same factual matrix, it is likely that the result of their individual analyses would differ.

Construction delay and disruption expert impartial evidence is required to educate and advise the tribunal to help it arrive at the right conclusion on cause and effect. In other words, this expert evidence assists the tribunal to understand what delay and disruption has been caused and what the effect of this was, so that the tribunal can assess the appropriate extension of time and loss and expense.

In the arbitration world, it is common for the parties to appoint their own expert witness. In construction delay and disruption disputes this results in having two, possibly differing opinions on the extension of time entitlement that the arbitral tribunal will need to analyse.

## The Role of the Arbitral Tribunal

What can the arbitral tribunal do in order to minimise the risk of having differing experts' opinions? What does or can the tribunal do in order to analyse conflicting opinions?

### *Minimising Assumptions & Factual Matrix Uncertainties*

In a number of delay and disruption claims arbitral tribunals are requested by the parties to make findings of fact before delay experts ("experts") proceed with their analyses. This can significantly narrow the options the experts have to consider. Otherwise the experts would need to make a whole series of assumptions to fill in all possible gaps in the pleadings or in the facts of the case. This may give rise to different possibilities of analysis and interpretation of facts. But what is the process to get the two opposing experts to agree on case parameters and facts so that assumptions can be minimised?

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In accordance with CPR<sup>1</sup> r.35.12 the arbitral tribunal may order discussions between the experts. Experts' meetings are generally held 'without prejudice', the conduct of the discussions is governed by CPR r.35.12 and the aim is to reach an agreed opinion on issues in the proceedings. The Practice Direction which supplements CPR Part 35 at Dir. 9.2 makes it explicit that the purpose of these meetings is not for the experts to negotiate or to settle cases but to agree and narrow issues.

Following such discussions the tribunal may direct the experts to prepare a statement listing out the issues upon which they agree, the issues upon which they disagree and a summary of the reasons for disagreeing. Copies of this jointly prepared statement are distributed to both the tribunal and the parties.

For the process to be effective the parties' experts are encouraged to meet at an early stage of the proceedings and before the exchange of the reports. From my discussions with Professor John Uff I understand that he is of the opinion that delay and disruption expert witnesses meetings may take place with the presence of a facilitator. The facilitator might be the tribunal's appointed delay and disruption expert witness or a professional that may or may not have extensive knowledge on delay and disruption analysis. The facilitator would act as chairman and would assist in the execution of the meetings and if proficient on the matter will aid the decision making. His/her mandate would be to assist the experts so that they will either agree on the majority of the issues discussed – if agreement on all issues cannot be reached – or agree on those items that have minor contributions to the analysis and can be ignored.

My own experience has shown that experts' meetings are extremely valuable for economising time and money. (The effectiveness is measured against the size of the project and the disputed claim values.) If the many factual issues and technical delay analysis parameters can be agreed at an early stage rather than leaving them in dispute until the hearing, where the whole team of legal and technical professionals sit, then time and consequently money is saved, most likely benefiting both sides. Also the gap in the experts' opinions narrows down if these parameters and factual matrix are agreed in advance of the experts forming their opinions.

### ***Tribunal's Power to Appoint Experts, Legal Advisers or Assessors***

Despite the fact that arbitration remains an essentially adversarial process, like litigation, there might be cases where the arbitral tribunal would resort to appointing its own expert who will be independent and impartial of the parties. This may take place when the tribunal feels unprepared to reach a solution from the two (or more) conflicting opinions suggested by the parties' experts.

The independent expert or assessor as in *Esso Petroleum Co Ltd v Southport Corporation [1956] AC 218* assists the tribunal by providing specialist technical opinion or explanation so that the tribunal can sufficiently understand complex technical matters and can better evaluate the parties' experts' opinions. He/she does not act as the tribunal's witness but may help the tribunal in say drafting those questions to be put forward at the evidentiary hearing, during which the expert may sit with the tribunal. In accordance with *Hussman v Al Ameen [2000] 2 Lloyd's Rep 83* a tribunal appointed expert may report not only on technical matters but he/she may also give an opinion on questions on foreign law; however the consent of the parties is a prerequisite in requesting the expert opinion.

<sup>1</sup>Ministry of Justice, *The Civil Procedure Rules Part 35 Experts and Assessors*, 1998, Rev. October 2009.

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In *Fox v PG Wellfair* [1981] 2 Lloyd's Rep 514 the Court of Appeal comprising Lord Denning, Dunn LJ and O'Connor LJ, held that an arbitrator should not in effect give evidence to himself without disclosing the evidence on which he relies to the parties, or if only one, to that party. An arbitrator can use his own expert knowledge but there is distinction made in the cases between general expert knowledge and knowledge of special facts relevant to the particular case. He cannot use his special knowledge, and should not use it, to provide evidence on behalf of the defendants which they have not chosen to provide for themselves.

Both the UNCITRAL Model Law<sup>2</sup> (Art.26) and English Arbitration Act 1996 (s.37 (1)) confer upon the tribunal the right to appoint its own expert. Also several arbitration rules such as UNCITRAL<sup>3</sup> or ICC<sup>4</sup> or LCIA<sup>5</sup> provide for the appointment of an expert or an assessor to advise the tribunal on specific technical issues.

The timing of the independent expert appointment is important and ideally it should be done before the final hearing. This is to allow time for the independent expert to understand fully the context of the issue prior to the oral hearing and thus be able to assist the tribunal in understanding the reports produced by each party's expert and in raising relevant questions ready for the examination and cross-examination session. The tribunal should not carry out its own delay analysis but it may run tests on analyses made by the experts. In *Eastern Countries Railway Co v Eastern Union Railway Co (1863) De G J Sm 610* it was held that the tribunal is not bound by its expert's opinion and it cannot and must not delegate its obligation to reach its own decision without the consent of the parties.

Normally the expense of the experts or assessors engaged by the arbitral tribunal would be recoverable under the costs of the arbitration. The tribunal has a general duty to '*adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense...*' (English Arbitration Act 1996, s.37(2) and s.33(1)(b)). It is therefore of paramount importance for the tribunal to weigh the advantages and disadvantages carefully and consider the doctrine of proportionality when deciding about the benefits of the appointment of an independent expert.

### ***Can the Tribunal Make its Own Enquiries?***

Section 34(2)(g) of the English Arbitration Act 1996 is one of the most significant provisions of the Act and confers upon the arbitral tribunal the right to step out from the traditional common law adversarial process and adopt instead an inquisitorial approach whereby the initiative is taken by the arbitrators. It is noted that this provision is subject to agreement by the parties. In *Norbrook Laboratories v Tan* [2006] EWHC 1055 (Comm) the court appeared to accept the right of the tribunal to act inquisitorially and thus contact witnesses directly. However, it held that the tribunal's failure to inform the parties that it had done so thus depriving the parties of the opportunity to be present, and its failure to keep or disclose a record of what it was discussed, again depriving the parties of a chance to comment, amounted to serious irregularity.

<sup>2</sup>United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration, 1985, with amendments as adopted in 2006.

<sup>3</sup>United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, 1998, Art 27.1 or UNCITRAL Arbitration Rules (as revised in 2012), Art 29.

<sup>4</sup>International Chamber of Commerce Rules of Arbitration, 1 January 2012, Art. 25(4).

<sup>5</sup>London Court of International Arbitration, Arbitration Rules, 1 January 1998, Art 21.

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In order to ascertain facts the arbitral tribunal may not only question or have discussions with witnesses who have been involved in the events leading up to the dispute but it may also conduct site visits to witness the state of progress of the project and/ or observe the details of construction sequence, methodologies and strategies. This evidence collected by the tribunal may be used for analysing the conflicting experts' opinions and determining the correctness and truthfulness of those opinions.

We have looked at the role that an arbitral tribunal can play in order to minimise the gap between the parties' experts' conflicting opinions before these opinions are concluded and submitted to the tribunal; But what means are available to the tribunal for analysing conflicting evidence after this is submitted?

### ***Witness Conferencing***

Expert Witness Conferencing, otherwise known as 'duelling of experts' or colloquially known as 'hot tubing' is a process that a number of experienced international arbitrators, notably Wolfgang Peter, have developed in order to test the parties' cases themselves when deciding between widely differing experts' opinions. The Technology and Construction Court has adopted this process and has incorporated it in its TCC Guide, Second Edition, Second Revision, October 2010 at s.13.8.2(d).

It is an adventurous path for an arbitral tribunal to take, but it provides an effective way of identifying areas of disagreement and agreement between witnesses. Wolfgang Peter notes that it improves experts witness hearings without compromising quality. It speeds up the hearings, brings out the points that are relevant, sheds light and clarifies issues to an extent that goes beyond traditional hearings. It enhances efficiency and eliminates the need for experts to be appointed by the tribunal, it reduces the solemnity of the procedural process, brings the best out of the expert witnesses and lastly is very conducive to a settlement.

Professor John Uff has told me that delay and disruption expert witnesses reports may be successfully and efficiently analysed by employing this method. The assumptions made on facts, the factual interpretation as to delay cause and effect, the suitability of the experts' chosen delay analysis methods, the correctness and suitability of the delay analysis models developed by the experts, may all be dealt with on the spot. Irrelevant factual information and technical parameters will be revealed and eliminated.

My discussions with Professor John Uff brought to the surface two further techniques that Professor Uff has developed through the years and applied in several international disputes that resorted to arbitration. We have baptised them as '*Questions with the Experts for the Experts*' and '*Thinking Together*'.

### ***'Questions with the Experts for the Experts'***

With regards to the first technique the arbitral tribunal will meet up with the experts together and in the presence of the parties if they so wish, after the parties' experts had submitted their reports. The objective is for the tribunal together with the experts to draft a list of questions to be put to the experts in open session and which will form the basis of the witness conferencing.

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During the hearing at which the experts will be present together the tribunal will ask the experts to provide answers to those questions. This process will generate discussion between the experts and possibly the parties' legal representatives and other witnesses, if present, on matters predefined by the experts. The discussion will be guided and chaired by the tribunal in an attempt to fill in possible gaps in the experts' reports, to minimise discrepancies and to narrow the gap between the differing experts' evidence. The questions may alternatively be drafted by the parties' legal advisors. The remainder of the process would stay the same.

### ***'Thinking Together'***

To best demonstrate how the *'Thinking Together'* technique operates I will share with you the following example. In an international arbitration the sub-contractor's (claimant's) delay and disruption expert witness applied the Impacted As-Planned method to analyse the delay; the main contractor's (respondent's) delay expert applied the Collapse As-Built method. Because of the fundamental differences of the methodologies applied the experts' opinions were diametrically opposed.

The technique of witness conferencing was applied. Following discussions between the experts the tribunal revealed that the experts did actually agree on most of the facts related to the delay events. Professor Uff, thereafter, asked the experts to re-analyse the events using an, what I would call, ad-hoc method and bring together on a single bar chart the findings from their individual analysis and the points of agreement. The experts did finally agree on a common programme and the result of this was adopted by the tribunal for making its award.

### **Conclusions**

Delay and disruption analysis is not an exact science. It is a multi-faceted, investigatory, analytical process which, depending on the factual matrix, deploys methodologies that are based on mathematical models. My experience has shown me that delay and disruption expert opinions, even if based on the same facts, may still vary.

Encouraging discussions between the parties' appointed experts, appointing their own advisors, deploying special hearing processes such as *Witness Conferencing*, *Questions with the Experts for the Experts* or *Thinking Together* are some of the techniques that tribunals put into practice in order to analyse differing opinions.