Kluwer Arbitration Blog

2025 PAW: Instructing Delay Experts in Construction Arbitration

Kubra Bayramova, Iulia Anghelescu · Saturday, April 12th, 2025

During Paris Arbitration Week ("PAW") 2025, Diales and CIArb hosted a session titled "*Construction Arbitration: Instructing Delay Experts.*" The discussion was opened by David Coyne (DIALES) and Jalal (Jil) El Ahdab (Bird & Bird AARPI), who set the scene with reflections on the evolving role of expert evidence in complex construction disputes.

The panel featured contributions from Samy Markbaoui (White & Case LLP), Gaëlle Filhol (Pinsent Masons LLP), Jacob Jørgensen (Femern A/S/), and Philip Garbutt (XPR). Drawing on a wealth of practical experience, the speakers offered insights into the dynamics of instructing and collaborating with delay experts, highlighting best practices for aligning legal strategy with technical evidence.

Instructing Delay Experts in Complex Construction Arbitration Projects

Jalal El Ahbad opened the session by acknowledging the breadth and complexity of the construction sector. To provide meaningful structure, the discussion began with a high-level overview of the industry, including its macroeconomic significance, before narrowing the focus to delay analysis—an area of particular relevance in construction arbitration.

Samy Markbaoui offered an insightful overview of the construction industry, tracing its evolution from the post–World War II reconstruction boom, through the oil-driven megaprojects of the Gulf in the 1970s and 1980s, to China's rapid infrastructure expansion in the 1990s. Today, he noted, the sector is driven by sustainability and is the second largest industry worldwide after manufacturing.

Highlighting the industry's magnitude, Markbaoui pointed out that it employs over 160 million people globally and contributes more than $12.5 trillion annually (roughly 13% of global GDP). Yet with this scale comes complexity. A typical large-scale infrastructure project involves multinational contractors and subcontractors, consultants, and project managers, often operating across multiple jurisdictions.

Markbaoui concluded that while arbitration may represent only a fraction of the construction sector, construction arbitration itself is uniquely characterized by multi-party, multi-jurisdictional disputes rooted in a web of technical and contractual complexities.

Philip Garbutt emphasized the inherent challenges of collaboration in large-scale construction projects, noting that, unlike manufacturing, construction is typically a one-off endeavour involving parties unfamiliar with one another. While standard contracts and practices can provide structure, complications arise when hybrid or atypical arrangements are used – particularly in multinational projects where differing legal systems, professional cultures, and documentation habits collide.

He pointed out that poor record-keeping and cultural variations in communication styles can severely affect the traceability of project histories, which becomes especially problematic when disputes reach arbitration. These challenges are compounded by misaligned objectives among stakeholders: clients focus on costs, contractors on profit, and designers on functionality.

Moreover, Garbutt warned that when transparency and teamwork are lacking, risks escalate, especially when budget pressures drive shortcuts in design, scheduling, and execution. In his view, it is often these conflicting agendas, rather than technical issues alone, that give rise to disputes.

How Miscommunication and Delays Drive Costs in Construction Arbitration

Gaëlle Filhol drew attention to the everyday realities of construction by referencing a relatable truth: even a home renovation rarely escapes delays. In her view, while delay is a key feature of most disputes, it is almost always intertwined with deeper financial and scoping challenges.

She identified poor scope definition as one of the most common sources of conflict, particularly in pilot projects, such as offshore wind farms, where the absence of technical precedent leads to feasibility concerns and budgetary uncertainty. These uncertainties, she noted, frequently escalate into arbitration when not addressed early.

Filhol also emphasized the often-overlooked impact of communication barriers on project execution. She recounted a dispute involving a Chinese contractor and a Senegalese owner, where language incompatibility – not just in terms of translation, but in fluency and expectations – significantly hampered project coordination.

Further, she stressed that design-related misunderstandings are among the most frequent challenges in construction projects, particularly when the owner is responsible for both the design and parts of the execution, such as excavation. She explained that while design issues might seem solvable in theory, the real problem arises when they trigger delays, because time inevitably translates into money. In arbitration, the core question becomes not about who should fix the design, but rather who should pay for the consequences of the flaw. Filhol illustrated that cost disputes often stem from this misalignment between scope and responsibility, especially when the financial burden of fixing design problems is not clearly allocated.

Adding to this, Markbaoui illustrated how interconnected challenges in construction projects can quickly escalate due to miscommunication, particularly in relation to site conditions and risk allocation. He shared a case involving three bulk power plants in North Africa, where a contractor encountered expansive clay soil—first at the designated site, and then again after relocation, only a kilometer away. Despite geotechnical reports suggesting potential issues, the risk had been overlooked. The dispute ultimately revolved around responsibility: whether it was the contractor’s duty to identify and account for the soil conditions, or the owner’s, especially given prior knowledge of similar failures nearby. Markbaoui’s example underscored how inadequate

communication and unclear risk management can lead to costly, prolonged delays and disputes in construction arbitration.

Garbutt pointed out the direct link between delays and financial repercussions in construction projects. He explained that clients often attempt to minimize upfront investment, particularly in areas like ground investigations and design, to reduce early project risks. However, this tactic can result in incomplete or suboptimal designs, leading to delays and significant long-term costs. Using the example of a liquefied natural gas (LNG) terminal project, Garbutt illustrated how shortcuts taken by the client led to a two-year delay, causing a €600 million total loss—far exceeding the initial project cost. He pointed out that such financial losses, along with reputational damage, are often passed onto consumers in public or semi-public projects. Despite these risks, some clients continue to take chances, assuming they can resolve issues later through litigation.

The Crucial Role of Delay and Quantum Experts and the Challenges of Multi-jurisdictional Collaboration

Jacob Jørgensen, in this regard, emphasized that the primary role of an expert in arbitration is to assist the tribunal in making an informed decision, providing impartial and technical expertise rather than subjective advice. The expert's duty is to maintain neutrality, ensuring their credibility remains intact. It is crucial that experts do not become involved in strategizing or advising on communication with contractors to avoid blurring the lines between an independent expert and a biased consultant. Furthermore, large projects often employ both independent experts for technical matters and consultants for strategic support, working together to address both immediate and long-term project needs. This dual-expert approach ensures the project runs smoothly while maintaining objectivity when disputes arise.

Garbutt, on the other hand, highlighted that delay analysis is a critical first step before addressing quantum, as it directly impacts financial calculations. Accurate data is essential, requiring thorough verification and cross-checking. A delay expert must assess the nature of the delay (external or internal) and its financial consequences, including additional costs like labor and overheads. Once the delay is established, it helps determine the project's extension of time, which is crucial for calculating the true cost of delays. Effective collaboration between delay and quantum experts ensures that both the time and financial aspects are accurately quantified, optimizing the overall analysis. In this respect, Ms. Filhol emphasized that, in theory, there should be no inherent conflict between the two types of experts, as critical path analysis and quantum assessments serve distinct functions.

David Coyne, moreover, emphasized the variation in expertise across different jurisdictions, particularly the fact that in certain jurisdictions such as the UK, quantum is recognized as a separate specialty, so quantum specialists are used to manage costs on the project, while others, such as France, use accountants or economists for this purpose. While cost managers have hands-on construction experience crucial for understanding quantum issues, accountants, despite their growing influence in cost estimation, often lack practical construction experience. This disconnect can complicate the management of costs on construction projects.

Regarding issues of independence and impartiality, Filhol noted that under French law, there is no specific legal requirement for expert independence, though reasoning by analogy and *the CIArb*

Guidelines on Party-appointed and Tribunal-appointed Experts provide helpful references. She further remarked that concerns around independence are largely theoretical, as most experts are reputable professionals who maintain their integrity and are not hesitant to challenge counsel when necessary. Coyne explained that in the past, it has not been a problem for both experts to come from the same firm.

Closing Remarks

The panelists concluded that although the party-appointed model is not flawless, it remains preferable to tribunal appointment. Practical tips were also discussed, including the need for detailed letters of engagement—particularly regarding independence and potential conflicts—as well as the importance of early and clear communication between legal teams and experts. It was recommended to designate a single point of contact for experts and to avoid overly detailed factual backgrounds in expert reports, as experts should focus on critical path analysis rather than duplicating legal fact-finding.

This post is part of Kluwer Arbitration Blog's coverage of ***Paris Arbitration Week 2025****.*

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