

# Challenges in Expert Evidence in Memorial Style Pleadings in the Arbitration



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In recent times, there has been an increase in the parties favouring memorial style pleadings over more traditional common law pleadings. A memorial style pleading requires an expert assessment to determine the claims pleaded by a party to the case. Naturally, this would increase the role and the responsibility of the Expert in any dispute. The article briefly discusses the challenges Expert's face in providing Expert Evidence to the Tribunal in memorial style pleadings. My experience predominantly lies in matters of Delay and Quantum; hence I shall discuss challenges faced by experts in these matters.

In my opinion, the primary reason for parties to adopt this approach is (1) the substantially reduced timelines for the arbitration process in memorial style when compared with common law pleadings; (2) the reduction in expenses caused due to the corresponding impact of these reduced timelines; (3) the parties may have set out their respective positions and failed in an amicable resolution despite extensive discussions; and (4) due to volume of dispute may not be huge. Accordingly, the parties consider these factors when selecting the generally cost-efficient memorial style of pleadings.

Memorial style pleadings involve preparation of the Statement of Case/ Defence by both parties, supported by Witness Statements and Expert Reports. In contrast, the common law pleadings provide opportunities for initial pleadings submissions (Statement of Case, Defence, Counterclaims and Rejoinders), exchange of documents/disclosure exercises between the parties, Witness Statements, after which there are various rounds of Expert Reports.

An onerous task lies on the Expert's shoulders in Memorial Style pleadings. The Expert needs to provide his/her/their opinion while only being aware of an initial set of documents made available to them. In most cases, the Expert will only have the documents provided by the Counsel that provided them instruction to act in an arbitration. There is a high probability that this set of documents do not provide the 'full picture' of the dispute as they are documents available with one of the parties involved in the dispute (mostly one side of the story). In most cases, this hinders the Expert in arriving at an impartial and complete assessment of the matter. In such cases, Experts have the additional challenge of being proactive and seeking

information from the Counsel / Party, which is incomplete despite the Counsel/ Party attempt to provide the information sought.

In any dispute involving a complex construction project, delay and quantum assessment are common, besides technical assessment on specialisation in rare cases.

When it comes to delay assessment (forensic delay analysis), the Expert is provided with information available contemporaneously in a Project by the Counsel / Party. In most Projects, the arbitration phase commences after the execution of works, and therefore retrospective methodologies of delay analysis has to be relied on. I wish to quote that "There is some evidence from court and board decisions, to conclude that a Retrospective analysis should generally be substantiated in a forensic evaluation by an observational method of analysis to determine what actually occurred on the project's as-built critical path, should be utilized. In such cases, as-built schedule based delay analysis techniques are best utilised."

In Retrospective methodologies, the most relied on approach in my experience is the As-Planned vs. As-Built (APAB) tool for delay analysis. Such a methodology heavily relies on facts of the Project for delay analysis by the Expert. In preparation of Expert Report for memorial style pleadings, the Expert is initially provided with data such as EOT applications during the course of the Project, baseline programme revisions and updates during the Project, work completion logs, work completion documentation etc. In my experience, multiple data sources provide conflicting information concerning dates applicable for the analysis. This makes the Expert's task quite challenging as APAB is a method that relies very much on the accuracy of the As-built dates used for the correctness of the analysis. The Expert is then left with the task of arriving at the actual as-built data gleaned from multiple sources.

The Expert faces a subsequent challenge in arriving at the critical path for analysis. There would be multiple critical paths that the Expert would encounter from the contemporaneous Project documents. Sometimes, it would confuse the Expert when contemporaneous critical paths are compared with the ones in the baseline programme and updated programmes. It

would even be complicated if the Expert attempts to verify or check the critical paths represented in contemporaneous claims and responses. Therefore, the Expert faces the challenging task of ascertaining the actual as-built critical path with the information made available to him from one of the parties in the arbitration, by breaking down of period into several windows. In memorial style pleadings, the primary challenge any Delay Expert would encounter is no opportunity to discuss and exchange his/ her views with the other side (opposing party) Expert; and would not even get to know about other side Expert views and approaches on the number of windows and critical paths (even though delay Expert from both parties would disagree (sometimes partially)) as this opportunity is available with the trading common law pleadings.

To overcome from the challenges, the Expert, when making a delay assessment, he or she should consider the following:

- Not to solely rely on the programming data,
- Verify the contemporaneous updated programmes, particularly the actual start, actual finish and completion status at each window periods.
- Verify and validate the accuracy of the progress or as-built data being entered into the programme derived from the factual data and records.
- Determine the total floats and be cautious about the same.
- Sort out the most reliable data and understand how the project was planned to be completed vis-à-vis how it was actually completed.
- Properly break the period of analysis and select an appropriate number of windows through a sensible approach.
- Determine the critical path contemporaneously through a common-sense approach.
- Take a simplified approach to ensure a non-technical forum can understand the same.
- ensure, fully considered opinion is formed after considering all data and analysing information multi-direction.
- Do not to try matching the results with the claims.

In Quantum analysis, the instructing Counsel or the Party follows a 'kitchen sink approach' in providing quantum related data to the Expert. The data, in most cases, is not provided in a structured manner as the quantum claims are mostly not in place by the party at the initial stages of memorial style pleadings. In this case, the Expert has the challenging task of distilling the information, checking their veracity and structuring them according to the claims of the party. In most cases, this is like a financial audit of the accounts of the party.

In traditional common law pleading, there is scope for Experts from both sides to adopt a mutually acceptable sampling approach to verify the quantum claims of both parties. This approach streamlines the work of the Expert to complete their analysis and provide the Expert Report. However, in a memorial style

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pleading, such a process of agreement on sampling is unattainable. Therefore, the Expert is left with the challenge of preparing a quantum assessment with complete evidence in a structured manner by evaluating the full set of evidence. Furthermore, suppose the Expert unilaterally follows the sampling approach in memorial style pleading. In that case, it most definitely will be challenged by the Expert appointed by the opposing party as to why a certain sample was preferred over the other. To overcome these challenges, the Expert would need to assess the complete set of evidence instead of the sampling approach.

Along with challenges faced by the Expert, the instructing Counsel is also left with the added challenge of preparing detailed instructions during the appointment phase of the Expert. In traditional common law pleadings, when instruction is issued to the Expert, the Statement of Case from both parties is already in place. In such a scenario, the Counsels have advanced knowledge of the case. They can use the Statement to specifically instruct the areas where the Expert needs to focus their assessment on. During memorial style pleading, the Counsel generally does not have the cushion of advanced knowledge of the case. The Statement of Case would not be prepared, and they only have Project documents from the party. This makes preparation of instructions to the Expert an arduous task. There is a high probability that the Counsel misses out on key areas that the Expert may require to investigate or provide Expert evidence.

In conclusion, it is evident that both memorial style pleading and traditional common law pleadings have

their own set of advantages and challenges. Therefore, it is for the party, instructing Counsel and Expert to navigate the process of arbitration if memorial style pleading is selected while being cognizant of the challenges that it entails. To overcome these challenges, the Expert should consider the additional time required initially for kitchen sink analysis and indulge in a detailed investigation of all the facts, data, and information, come up with a few alternative analyses, and then submit a fully considered opinion.

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Mr Tanner is a Fellow of the Royal College of Surgeons, a member of the British Association of Plastic Reconstructive and Aesthetic Surgeons (BAPRAS) and the British Association of Aesthetic Plastic Surgeons (BAAPS) where he has also been a member of the council. He regularly attends international meetings in Dubai, British Virgin Islands, Rome, Nice, USA and Singapore, giving lectures and pursuing new techniques and innovations. He also gives many lectures all around the UK and mentors young consultants.

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