

Choosing the right weapon

As construction-related arbitration is given globally and locally, there is an emphasis on technical knowledge and expertise.

Antonios Dimitracopoulos, partner, BSA LLP, looks at the additional elements that qualify well-chosen arbitrators

Arbitration is almost by default the standard dispute resolution mode built into construction contracts. But is it always as efficient and suitable for the purpose it is meant to be? Or is it so only under certain conditions which, if left uncared for, can result in an erosion of what was meant to be an improvement to litigation.

The fact is that arbitration is not always a path to a smooth and trouble-free dispute resolution process: there are a number of things that could go wrong. Arbitration is no less of a trial than that taking place in Court – it is just not public. Obviously judges in court litigation possess legal qualifications and extensive jurisprudential experience. In addition, lawyers represent the litigants and raise legal arguments that judges can appreciate and determine their judicial validity.

There is hardly an arbitration where no lawyers are involved, so it follows logically that their audience should ideally be a tribunal that can be equally proficient in understanding legal arguments as Court judges are – in addition to perhaps technical issues – thus giving an added edge to this mode of dispute resolution.

Furthermore, application of the law, both substantive and procedural, is more closely connected to the knowledge and interpretational skills of a legally qualified arbitrator and, ultimately, to his or her sense of justice.

This is important for two reasons: Firstly, because it is not always clear from the beginning whether a construction dispute that ends up in arbitration will develop ultimately into a legal dispute. If so, lawyers can very easily baffle a non-legally proficient tribunal, procrastinate proceedings and divert attention to legal and procedural issues often alien to the jurisdiction from which the arbitrators draw their training or experience. They can also, of course, distil disputes to critical legal points, the interpretation of which the tribunal would have no choice – if not accustomed to the legal topic at hand – but to delegate to a third legal professional for their, final and all-determining, opinion.

That could result in the entire purpose of the arbitration process being defeated: cardinal issues of what in any event is a legal dispute debated by locally qualified lawyers maybe decided upon not by the party appointed arbitrators or the chairman but by a random third party far removed from the choosing mechanism that is so characteristic of arbitration proceedings.

Legal expertise should ideally not be delegated to third parties or arbitrator-appointed experts: that would pass on the potentially most decisive factor of a construction dispute (i.e. the legal position) to a third party who is far removed from the control or choice of both the claimant



and the respondent. It would also result in a demotion of legal aspects in favour of purely technical ones, with which a non-legally qualified panel may feel more familiar.

By contrast, technical aspects, especially if too specialised, can be delegated to third parties on what can be more appropriately be considered as a fact finding or fact substantiating mission. After all, engineering is a science and as such far better designed than law for accurate statements of data.

Even in instances where the dispute appears to be one of facts rather than law, lawyers representing the parties are very much likely to engage into a war of evidence. And what does or does not constitute evidence is, of course, a legal issue.

A further reason is connected with enforceability: there can be little doubt that a locally experienced legal professional

appointed as an arbitrator in a construction dispute would be particularly alert to the risks of the final arbitral award falling foul of mandatory provisions of the UAE Civil Procedure Law.

Particularly those legal professionals that have acted as representatives of a party to a local construction dispute, would be familiar with the procedural loopholes available. If left unidentified, they could pave the way to award nullification at the enforcement stage. It is, therefore, crucial for parties to be conscious of the fact that arbitrators, even if legally qualified, may have a tendency to apply the law of their home jurisdiction, with which they are more familiar, as opposed to the one agreed in the relevant construction contract. Hence familiarity with local laws and practices is as important a qualification of a well chosen arbitrator as is general legal aptitude.