Times have changed: the role of experts in arbitration cases

PAUL BATTRICK - DIALES EXPERT LOOKS HOW THE ROLES OF EXPERTS HAVE CHANGED IN ARBITRATION CASES OVER TIME.

The ICC-FIDIC Conference on International Construction Contracts & Dispute Resolution took place in Istanbul, Turkey on 29th and 30th March 2016. Paul Battrick of Driver Trett, a sponsor of the event, takes a look back through the years of progress that have been accomplished in the world of dispute resolution and the involvement of experts in his guest column for the International Chamber of Commerce (ICC).

I first had experience of an ICC Arbitration in 1983 when I was asked to support a claimant's lawyers in respect of quantum issues some three months prior to the first hearing; the final hearing was four years later.

It was a lengthy process to say the least, partly envisaged by the timetable that saw the Tribunal deal with firstly legal/contractual issues, then the merits, and finally quantum with interim awards issued at each stage prior to the final award post cost submissions.

However, perhaps the prime cause of delay was the naivety of two nominated Arbitrators, who were Engineers, in selecting a sitting Judge as the Chairman of the Tribunal.

Every time the Respondent saw a difficult day at the hearings ahead, a delay occurred. Whether it was the unavailability of a witness, sickness of a lawyer or whatever, the hearings were postponed often until the next time the Courts were in recess.

I suggest that every facet of the dispute resolution world has matured for the good since the 1980s, such that costly events such as described above would never happen today.

"In respect of third party neutrals, whether they be Mediators, Dispute Board members, Experts that provide determinations or Arbitrators, the ICC provides only those suitable for the task before them."

In construction, the third party neutrals are well versed in the non-legal issues that surround and cause disputes; for instance, they have the ability to disseminate the factual and expert evidence presented to them relative to complex issues concerning extensions of time.

This knowledge and understanding, perhaps a benefit of the large numbers of projects that require some form of intervention to resolve disputes, can only lead to recommendations, determinations, awards or whatever, being closer to the right decision.

> *"Selection of the right expert at the right time can assist the parties, their lawyers and ultimately the Tribunal reach the right decision in the most cost effective manner"*

The ICC is fortunate to have such an array of talent at its disposal to assist warring factions in concluding matters in a cost effective manner. Indeed, by offering such a wide range of methods to resolve disputes, the ICC is playing its part in keeping the costs of resolving disputes to a minimum. Only those disputes where the parties feel that Arbitration is the best forum need go to Arbitration, since the right decision can be made by using quicker and less expensive routes to a resolution.

Experts too have their role in resolving disputes in a timely and cost effective manner. An early sight of an expert was in a trial in 1782[1] where the Judge noted, "The opinion of scientific men upon proven facts may be given by men of science within their own science."

"Selection of the right expert at the right time can assist the parties, their lawyers and ultimately the Tribunal reach the right decision in the most cost effective manner; something the ICC and Courts of England and Wales are both striving to achieve."

It was recognised that the expert should be "a man of science within their own science." Nothing should change to this day; the expert must have expertise in the subject matter and should demonstrate professionalism, understanding, clarity of thinking, flexibility, resilience and be a team player; the latter being of most benefit to the lawyers.

The role of the expert could be considered to be expanding by an early appointment. In this respect, assistance with and preparation of a case is considered to be another benefit to the cost effective management of a case. Such assistance is given, in real terms, when drafting the pleadings, reviewing witness statements, when the lawyers are preparing for cross-examination and generally during the hearing. In addition, the joint expert reports will narrow the issues to be heard - all saving time and costs.

The expert should not, however, be treated as a hired gun. The expert report must be an independent product to be of assistance to the Tribunal. It should be complete stating both the facts and assumptions upon which it is based, including detracting facts. If there is insufficient relevant data upon which to form an opinion, it should be noted.

The lawyers that expect to appoint an expert that is a hired gun are actually doing their clients a dis-service. Cases have turned, and will turn, upon the credible evidence of an expert; for an expert to lose creditability in the eyes of a Tribunal can only harm a case and lead to wasted time and costs. The latter being often dealt with as a penalty within the Tribunal's Cost Award.

Times have certainly changed for the better since 1983. There will always be disputes - that is why there are dispute resolution clauses in Contracts. However, now there are opportunities for the right decision to be reached in a cost effective manner via a number of dispute resolution options. ■

[1] Foulkes and Chadd [1782] 3 DOUG.KB.157

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