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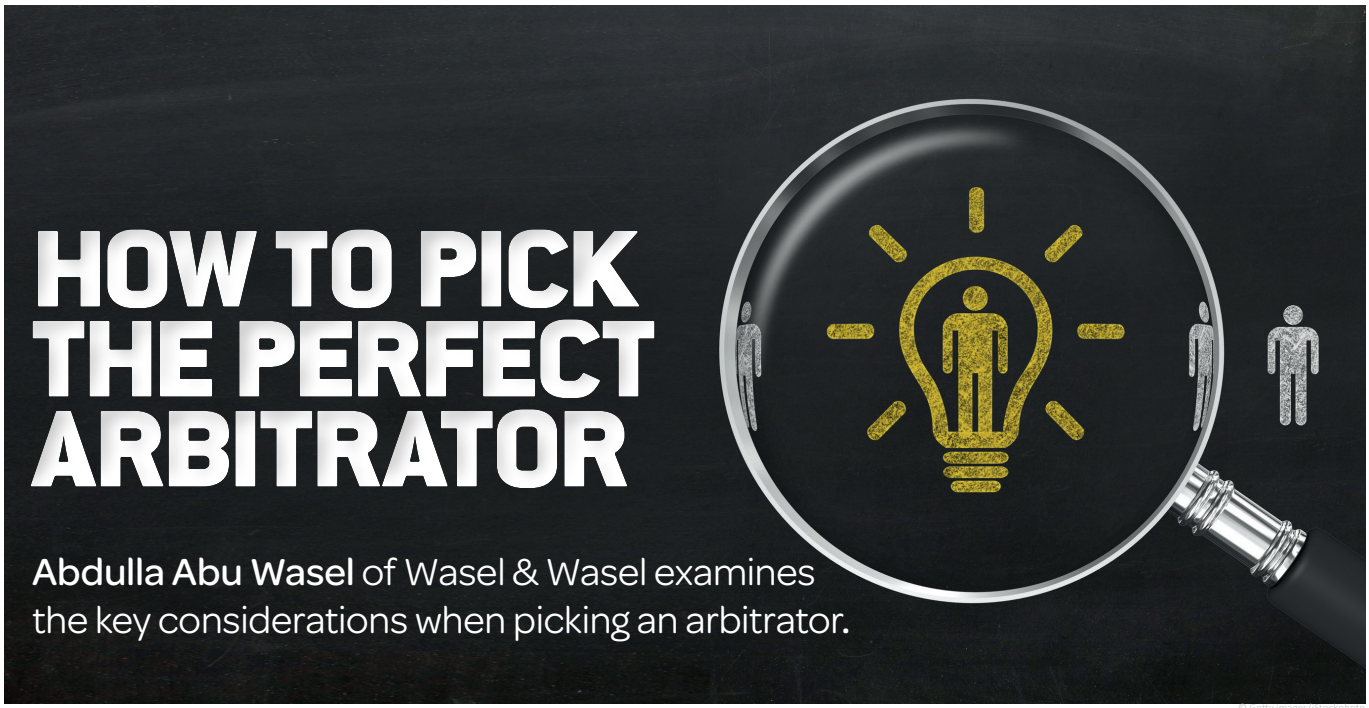

HOW TO PICK THE PERFECT ARBITRATOR

Abdulla Abu Wasel of Wasel & Wasel examines the key considerations when picking an arbitrator.

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When it comes to picking an arbitrator the first consideration is the subject-matter expertise of the arbitrator. Unless the parties are involved in a niche issue, the arbitrator does not have to be an expert in all legal areas but it is important they have experience in the subject-matter of the dispute and have a deep knowledge of the relevant industry. Making this choice on this basis will save the parties time and money.

For example, if the dispute involved a doping scandal in an athletic competition it would be good to have an arbitrator who was well-versed in sports disputes. Parties should ask to see a copy of the arbitrator's CV if they have not already provided this as this will allow them to check their expertise and experience.

The next step is to check the arbitrator's schedule to ensure they can provide the assistance required. It can be worth having a personal conversation with the potential arbitrator to really check on this point and ensure the arbitrator will actually be available and has the required knowledge on the subject-matter of the dispute. Then after checks have been made on the potential arbitrator's knowledge and availability, it is important that parties think about the arbitrator's personality, and to assess their people management skills. A good arbitrator needs to be able to appropriately balance between observing and actively navigating the proceedings. Any cultural differences of the parties should also be taken into account and the parties should think about whether the proposed arbitrator will be able to deal with those cultural differences and any tensions which might eventually run high during the proceedings. The arbitrator's ability to manage of the parties is an important factor in ensuring the dispute is managed efficiently and with an effective judicial demeanor.

The arbitrator's nationality should also be considered as there are some arbitral institutions which prohibit an arbitrator from having the same nationality as any of the parties. For example, the International Chamber of Commerce requires this in Article 13(1) of the ICC Rules. Linked to this is the arbitrator's language capabilities, as the language in which the proceedings are to be conducted needs to be taken into account. The choice of language in the proceedings, is normally stated in the arbitration agreement and plays a significant role, as communication will be in the language indicated in the arbitration agreement.

This also raises a question of whether an implicit agreement between the parties on the language of the arbitration would be allowed if it has not been covered in the arbitration agreement.

Making an incorrect choice in an arbitration agreement can lead to the need for translation and interpretation for the majority of the proceedings, which is likely to severely impact the cost and duration of the proceedings. Finally, if the arbitration is to be conducted in English, in a country where English is not the official language, it helps to have an arbitrator who can speak both English and the primary language of the seat of arbitration, in order to be able to deduce and analyse the parties' submission on application of legislation to the dispute and the legislator's intent in the drafting of a law, or provisions, as the parties present. As a result, when it comes to the proceedings, the choice of language can be a decisive factor in the interpretation of the law and facts, and almost important as the right choice of arbitrator.

ARBITRATOR SPOTLIGHT

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ASEL EL HOUSAN

HOW DO YOU FIND THAT YOUR IMMENSE EXPERTISE IN ENGINEERING AND CONSTRUCTION, ASSISTS YOUR CAPACITY TO ACT AS AN ARBITRATOR?

I have considerable experience of engineeringand construction The construction industry is a unique and complicated field, where a large number of technical details need to be considered. What can seem simple on the face of it, in areas such as payments or taking over work, can vary significantly when it comes to construction from how these areas operate in other fields. In addition, when considering a construction dispute areas such as the work measurement, time extensions. time for completion and deciding on the applicability of the rates to be used, are factors which all need to be taken into account. There area also some areas such as construction and valuation methods which are constantly being updated and it is important an arbitrator working on a construction dispute keeps up with all these changes.. In short construction and engineering disputes are highly complex and an experienced professional eye is needed if they are to be correctly adjudicated. I have found as a result that being an engineer who works hands on in construction activities, on a daily basis, it is easier for me to keep up to date with all these changes. It also helps me better understand the complexity of issues which can be relevant in a construction dispute.

HOW DOES YOUR ENGINEERING EXPERIENCE HELP YOU ADJUDICATE DISPUTES IN OTHER INDUSTRIES OUT WITH CONSTRUCTION?

Having an engineering background has helped me develop flexibility in thinking and also given me the ability to go into specific areas in detial while still keeping the macro picture in mind. I can transfer this skill into any aspect in life and I also find it eases the process of adjudicating other types problem no matter how complex they seem. In part this is because engineering training involves learning to dissect a problem and investigate every aspect of it, before reaching any conclusions which is also a good approach when it comes to arbitration,

IS THERE A COMMON MISTAKE PARTIES MAKE WHEN GOING INTO CONSTRUCTION-RELATED ARBITRATION DISPUTES?

Each construction arbitration is exceptional and small changes can affect the experience required in an arbitral tribunal. I find that parties in dispute often fail to consider this point when selecting their arbitrators.

For example, if you have a dispute involcing an underground physical condition, at least one arbitrator should have sufficient geological knowledge and experience to understand this. However, if the dispute is very legally based, you will need a lawyer. As a result, selecting the right arbitrators is crucial and this should be done based on the dispute in hand not simply who you have used in the past. Despite this, mistakes are often made with arbitrator selection. Mistakes are also frequently made onthe selection of experts. It is important tohave the right experts as they can provide valuable insights which often aide the parties in their disputes. Despite this, parties often select the firm and oversee selection of the expert(s) who will be in charge of the case and appear at the hearing, without taking into account what valuable insight(s) those expert(s) may or may not be able to present to the tribunal.

HOW HAS YOUR EXPERTISE IN AS A FIDIC ACCREDITED TRAINER AND AFFILIATE MEMBER HELPED YOU?

To be an accredited trainer, you need to have a deep understanding of the FIDIC books and what they say, as well as an understanding of the hidden, relationship between the clauses. My training work has definately improved my understanding of the conditions. While training and working in different continents has given me to gain global experience whichhas also helped my work as an arbitrator.

WHAT ARE YOUR FUTURE PLANS?

Currently, I am in charge of the AEH Consultancy branch in the UK. After this comes to an end il plan on completing my PhD in Construction Dispute Resolution and expanding the branch to cover Europe.

Asel El Housan is an Arbitrator with Wasel & Wasel Arbitrator Services Inc, and is the Founder and CEO of AEH Consultancy, a powerhouse consultancy firm with a focus on claims management and dispute resolution.

Asel is also a FIDIC Accredited Trainer, an Associate of the Chartered Institute of Arbitrators.

In addition, Asel is a member of the Engineering Union in Lebanon and Syria.

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ARBITRATION CASE FOCUS

RECENT KEY ARBITRATION CASES

Case No .... ACC 1120/2021 issued on 6 December 2021
Jurisdiction ....Abu Dhabi
Court ....Abu Dhabi Court of Cassation
Recommended by ....Wasel & Wasel Arbitrator Services Inc.

WHAT DID THIS CASE INVOLVE?

The shareholders of a limited liability company included an arbitration agreement in the memorandum of association at the time of the company's incorporation. The memorandum was attested by the public notary and registered with the commercial registrar.

The arbitration agreement between the parties stated that 'In the event that any dispute arises regarding the interpretation, implementation, or application of the agreement [the memorandum of association] provisions or for any other reason, it shall be resolved by amicable means agreed upon between the parties. If this is not agreed upon, the dispute shall be referred to an arbitration tribunal composed of three arbitrators'.

Subsequently, one of the shareholders sold all their shares to the other shareholder and the amended memorandum of association which reflected the new share ownership was attested by a public notary and registered with the commercial registrar.

Clause 6 of the amended memorandum expressly stated that with the exception of the amendments stated, the rest of the terms of the original memorandum of association remained in effect.

However, the amended memorandum did not include an arbitration agreement. Later the shareholders disagreed and a lawsuit was lodged with the Abu Dhabi Courts. The Courts applied their jurisdiction to adjudicate the dispute on the basis that the amended memorandum did not include its own respective arbitration agreement and the parties were not bound by the arbitration agreement which had been found in the original memorandum of association.

ABU DHABI COURT OF CASSATION JUDGMENT

The Abu Dhabi Court of Cassation found the referral to the original memorandum of association contained in clause 6 of the amended memorandum did not imply the express consent of the parties to the arbitration agreement in the original memorandum and it was not considered to be a clear and express reference to the arbitration agreement in the original memorandum.

The Court decided the reference to the original memorandum of association was just a general reference to its texts without specifying the arbitration agreement and did not prove the parties' knowledge of the presence of the arbitration agreement in the original memorandum. Therefore the general referral to the provisions of the original memorandum of association did not extend to the arbitration agreement in it.

The Court added that if the reference to the substantive agreement was just a general reference to the texts of the agreement without specifying the arbitration agreement and evidencing the parties knew of its presence in the substantive agreement which had beem referred to, then the referral did not also extend to the arbitration agreement. As a result arbitration could not be considered as having been agreed on by the contracting parties. This is the same as the position when there are annexes or schedules to a substantive agreement.

The parties do not have to sign and state these schedules and appendices are considered as an integral part of the agreement, as these annexes and schedules are nothing more than a detailed statement of the essential issues agreed on by the parties. However, the exception to this is where an exceptional condition such as the arbitration agreement is included in these annexes and schedules. In such cases an arbitration agreement does not apply to the parties unless they have signed that annex.

WHY'S IT SIGNIFICANT?

This judgment is significant as its sheds light on the judicial approach the Courts will take in interpreting Article 7(2)(b) of Federal Law No. 6/2018. This allows arbitration clauses to be incorporated by reference to any model contract, international agreement, or any other document containing an arbitration clause. They specifically do so when interpreting corporate constitutional documents. Where shareholders have an arbitration agreement in their memorandum of association, this judgment provides guidance on the position of the courts will take if any amendments are made to the original memorandum without an explicit arbitration agreement governing that amendment. As a result, amendments to memorandum of association, or registered share transfer deeds, should be reviewed to ensure they reflect express consent to the arbitration agreement in the original memorandum as this helps to ensure the validity of that arbitration agreement.

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