

INVOLVING YOUR EXPERTS EARLY - KPMG FORENSIC

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With the economic downturn, litigation is on the rise, but parties are now much more reluctant to find surprises along the way

Parties are increasingly calling on experts to advise in disputes at a very early stage, assessing strengths and weaknesses from an economic standpoint, says Fernando Cuñado, Partner of KPMG Forensic in Madrid. "Coming back to the earliest stage, which is the contract (SPAs or alike) itself, this is what is known within forensic accounting as 'agreement vetting' – to avoid grey areas within the economic definitions and price adjustment mechanisms where experts complete an in-depth review of these clauses".

This is a definite trend, says Alberto Rabano, Manager also at KPMG Forensic, due to the huge increase in litigation that has seen warranty claims arise in around 50 percent of transactions closed over the past five years.

Also proving as a trend is making provision for a Dispute Review Board – made up of experts that provide recommendations when disputes arise – in particular in long-term contracts – giving an independent view of economic events and transactions "This is so that if deviations and discrepancies arise, they can be dealt with straight away, and not escalate becoming far more difficult to settle years after," explains Cuñado.

And they are increasingly being asked to add value, especially in international infrastructure projects, where clients are calling for experts – usually engineers and accountants. "We have also been seeing an increase in the use of 'expertise clauses', whereby the parties agree that any matter in dispute be put to an expert for an independent report following the ADR procedure established in the contract," says Rabano. "If the parties are not happy with the outcome, then they can still go ahead with an arbitration."

These precursors to launching an arbitration process are fast becoming the norm, says Cuñado. "And in terms of preventing conflict, it has become key to get experts involved, and we advise doing as

early as drafting stages of any contract."