



ISSN : 1875-4120
Issue : Vol. 14, issue 2
Published : May 2017

This paper is part of the TDM *Non-Legal Adjudicators in National and International Disputes* Special prepared by:



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History's Guide to Best Practices in Non-Legally Trained Adjudicator (NLA) Selection

by J. Palmos

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History's Guide to Best Practices in Non-Legally Trained Adjudicator (NLA) Selection

by Jay Palmos*

Abstract

The spectrum of international commercial disputes is infinite and beyond imagination. Whether a case should be decided by a non-legally trained adjudicator (hereinafter "NLA"¹) depends upon the circumstances. Some case types are better suited to those with specialized, but not necessarily legal, backgrounds.

The forums selected for review have notably long and internationally replicated histories; and each has withstood the test of time with only minor adjustments to the qualifications required to perform as an adjudicator. The history of: (1) patents, (2) small claims courts and (3) the HCGRA² provide insight into three semi-judicial forums which have developed lasting NLA selection criteria.

Each of the above forums will be presented in an abbreviated history and the underlying principles of present day NLA selection-criteria development examined. The "lessons learned" from each section will be applied to different case types. The results are stated in three principles:

- 1. Local is better than foreign;*
- 2. Legal is better than non-legal; and*
- 3. Technical understanding is essential when scientific or engineering subject matter is in dispute.*

Each principle is summarized in a chart which prioritizes qualifications for different case types.

Study Limitations

Below is a list of jurisdictions which have one of the selected forums in use today. The jurisdictions listed comprise a wide international group. The three categories represent patent, small claims, and HGCRA dispute resolution forum. Each forum group has jurisdiction(s) presented in bold letters. The bolded jurisdiction has been selected to be "representative" of the NLA skillset requirement for that category. These are the qualifications which history has indicated make good NLA.

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¹ An NLA is anyone who does not hold a current license to practice law in the jurisdiction whose law applies to the dispute. This necessarily includes anyone without a legal education, including all post-graduate or certificate courses in law and, technically, almost every non-local lawyer. These credentials were selected because they represent the demarcation point when the subject matter in dispute becomes the law itself and thus legally requires a current license to practice in the jurisdiction.

² Housing, Construction, Grants and Regeneration Act, 1996. Also, as to be further discussed below, the HGCRA was expanded in 2011.

Patent³

Albania, Algeria, Armenia, Australia, Austria, Bahrain, Belarus, Belgium, Bosnia and Herzegovina, Brazil, Burkina Faso, Burundi, Canada, Côte d'Ivoire, Croatia, Cuba, Czech Republic, Democratic People's Republic of Korea, Denmark, Estonia, **European Patent Organization (EPO)**, Finland, France, Gambia, Germany, Ghana, Greece, Haiti, Hungary, Ireland, Israel, Italy, Japan, Kazakhstan, Kenya, Kyrgyzstan, Latvia, Lebanon, Liberia, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Monaco, Montenegro, Netherlands, Nigeria, Oman, Poland, Portugal, Republic of Moldova, Romania, Russian Federation, San Marino, Sao Tome and Principe, Saudi Arabia, Serbia, Slovakia, Slovenia, Spain, Sudan, Swaziland, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Togo, Turkey, Uganda, Ukraine, **United Kingdom, United States of America**, Uzbekistan, Zambia.⁴

Small Claims

Australia, Brazil, Canada, England and Wales, Ireland, Israel, New Zealand, Singapore, Scotland, South Africa, Hong Kong, and the **United States**.⁵

HGCRA

England & Wales, Ireland, all states of Australia, New Zealand, Singapore, Hong Kong, and Malaysia

Table 1. Jurisdictions with Patent, Small Claims, or Construction Legislation forums

It should be noted that while all jurisdictions have the same basic qualifications each has its own unique *regional* standards. These distinctions have created variations to the *representative* skillsets described herein. So, beware, not all of the NLA requirements are the same throughout the forums – though, to be fair, each has a common origin and function and *essential* NLA selection criteria.

Further, it should be clearly stated that each of the above NLA forums require *some* legal knowledge, whether gained in a formal educational setting or studied independently. This limitation is implicit in every section of this report. For example, a United States patent *agent* applicant does not need any legal education: but they must pass an examination which is heavily dependent upon application of patent law. Small claims judges or justices who are not required to have legal backgrounds before election to their post have mandatory professional development regimes which teach legal skills and knowledge. HGCRA does not proscribe any legal training, but in practice adjudicators are required to demonstrate competence in their written decision statements.

³ World International Intellectual Property (WIPO) patent law treaty nations.

⁴ [online] Available at: World Intellectual Property Organization-Administered Treaties, Contracting Parties, Patent Law Treaty [accessed March 25, 2016].

⁵ Whelan, C. (1990) *Small Claims Courts: A Comparative Study*, Oxford: Clarendon Press. P181.

Patent Law

“A year-long exclusive right to exploit...”

The law of patents is an unlikely one. It has withstood the test of time virtually unchanged since 721 B.C. Back then, the Sybarites were so desperate for the ‘best food ever’ that they invented the concept of patents. They also “introduced the custom of bringing chamber-pots to banquets”⁶ so you would have to imagine that they were absolutely serious when they published a proclamation that looked like this:

AETEFIIIMNAM
MMAMONONEY
AIXONTZNAAK

All letters were capitalized and there were no spaces between words back then, but a fair translation seems to be:

“Ruler will reward any cook who invents a peculiar and extraordinary dish ‘with a year-long exclusive right to exploit that recipe’.”⁷

The concept of patents disappeared during the dark ages, along with the Sybarites and civilization and writing and literacy and reasonable lifespan expectations. When they reappeared they were known as “letters patent” - sovereign documents which provided monopolistic right to prohibit others from producing the same goods or services, for a time.

Letters patent were to become the financial vehicle upon which trade guilds flourished and are the foundation of today’s *intellectual* property rights. Some believe that the industrial revolution was stimulated by England’s expansion of the term *invention* to include *improvement* of an already existing thing.⁸ “Improvements” in steam engine parts, printing press technology, and automobile manufacture were among the most influential patents awarded during that period.

Between then and now the law has changed considerably. Obviously the definition has expanded beyond the culinary arts; however, the original concept of fostering innovation by awarding an exclusionary monopolistic right remains.

“To be granted a patent [in the United Kingdom today about 2,738 years after the Sybarites], *your invention must be all of the following: (1) Something that can be made or used; (2) New; and (3) Inventive - not just a simple modification to something that already exists*”⁹ (*Underline for emphasis*)

⁶ Yonge, C.D. (1854) [online] Available at: <http://www.attalus.org/old/athenaeus12a.htm> [Accessed Feb. 17, 2017]

⁷ Foster, H. and Shook, R. (1989). *Patents, Copyrights & Trademarks*, John Wiley & Sons, New York. P.3.

⁸ Dutton, H. I. (1984). *The Patent System and Inventive Activity during the Industrial Revolution, 1750 – 1852*. Manchester, University Press, p.232.

⁹ [online] Available at: www.gov.uk/patent-your-invention/what-you-can-patent [Accessed Feb. 9, 2017].

Albert had failed to "fully master machine technology"

Albert Einstein began working at the Swiss Patent Office (SPO) because he couldn't get an academic position. He called it his "cobbler's job" and reported a strict daily regime: work 8 hours study 8 hours and sleep 8 hours.¹⁰ However, he struggled to advance at the SPO.

Towards the end of his second year he published *Annus Mirabilis* (what is now called 'special relativity') which did *not* lead to advancement in the patent office. In fact, he did not get his first promotion - from technical assistant level 3, to technical assistant level 2 - until almost half way through his 3rd year.¹¹

Albert had failed to "fully master machine technology" and this left him behind his more "up-to-date" colleagues.¹²

This goes to show that in a patent office, even if you were as brilliant as Einstein you would not be a *better* patent examiner unless you knew more than he did about "machine technology".

Today, a patent *agent* (who is authorized to do everything that a patent *attorney* can do, including litigate) must have:

*An undergraduate degree in science or engineering or equivalent experience.*¹³

No amount of legal education will substitute, though many European nations have begun requiring legal degrees *in addition* to a scientific background.

Small Claims Courts

"[T]hey are one people, and they have all one language..."¹⁴

When Athens was prospering, a new system of NLA selection was invented. The jurists voted and justice was meted out in public by "the citizens". To qualify as a "citizen" of Athens you had to be: free, meaning not a slave (which happened more often than you'd think), and local, meaning no "foreigners".¹⁵

Most other Greek oligarchies of the time required land-ownership for full citizenship, but Athenian democracy was more inclusive. Plato viewed the lack of separation between landownership and citizenship as one of the "characteristic evils of democratic government" and went on to deride the "cobblers and other rude mechanicals whose votes, in his view,

¹⁰ [online] Available at: www.ipi.ch/en/about-us/einstein/einstein-at-the-patent-office. [Accessed Jan. 17, 2017].

¹¹ Id.

¹² Galison, P. (2000). *Einstein's Clocks: The Question of Time. Critical Inquiry*. Chicago: The University of Chicago Press. pp. 355–389.

¹³ 37 CFR 11.7: Requirements for registration.

¹⁴ Genesis, chapter 11.

¹⁵ Joint Association of Classical Teachers. (1984). *The World of Athens: An introduction to classical Athenian culture*, Cambridge University Press. p 154.

controlled the decisions of the *ekklesia* and law courts”.¹⁶ Justice, at the end of the day, was merely an expression of *Athenian* custom.¹⁷

Thus it was, at the dawn of democracy, that innate *regional* characteristics dictated legal decision-making. Citizenship meant that everyone spoke the same language, knew all the locals, their customs, and family history. Most jurists were literate and had a common understanding of *regional* justice.¹⁸ So, the only real qualification of a juror was being a *respected* citizen.

It is interesting to notice the similarities between ancient Athenian customs and today’s qualification-set for a Justice of the Peace candidate in Houston, Texas:

*The applicant must be a U.S. citizen and 18 years old. Have been Texas residents for one year, residents of the district they will serve in for six months and win a local election.*¹⁹

Less than 40 shillings

Fortunately the jury system survived where literacy did not, in Britain, as Vikings intermittently ransacked the nation. There were seven kings (known as the *heptarchy*) when English law finally began to take shape.²⁰

At that time, a king would ride around with his entourage and say something along the lines of “I am here to bring the peace!” and the Lords would negotiate peace agreements and say “...and we’ll provide you with men and money so that you can keep the peace regionally” (meaning *outside* that Lord’s personal jurisdiction – i.e. his land holdings). And that was it, legally speaking. The *peace* had arrived and if there were any appeals from a local decision then the regional king would decide it when he was next around.²¹

After Henry II ascended the throne the procedure changed: the new practice required meeting the king in a prearranged spot with a “jury ... of twelve neighbors, who knew the facts of a situation” personally, and then he would make a decision based on the jury’s findings.²²

As power solidified in England, kings began sending *qualified* representatives to adjudicate regional matters. This is the origin of today’s “common law” system.²³ It was *common* in as much as all cases were decided by the king’s personal representatives, which meant that the “king’s laws” were carried out uniformly around the kingdom.²⁴

However, to put the “law” of those days into context: in a really tough case it was often required claimants complete an “ordeal” such as grabbing a red-hot metal poker. If their

¹⁶ Id. at p 179.

¹⁷ The Athenian Society (1912) *The Wasps*. p 285.

¹⁸ Joint Association of Classical Teachers. (1984). *The World of Athens: An introduction to classical Athenian culture*, Cambridge University Press. p 284.

¹⁹ [online] Available at: <https://www.sos.state.tx.us/elections/candidates/guide/qualifications.shtml#d> [Accessed Jul 30, 2016].

²⁰ Harding, A. (1973). *A social history of English Law*, Penguin Books Ltd. pp 13-15.

²¹ Id. At p 153.

²² Id, at p 27; Baker, J.H. (2002). *An introduction to English Legal History*, 4th Edition. p. 73.

²³ Baker, at p. 39.

²⁴ Id. at p. 13.

hands “festered” they were a liar and would probably be put to death. Another common method of determining the truth was to “dunk” the accused: if they *floated* they were guilty.²⁵

Notwithstanding this, in 1278 the Earl of Gloucester introduced the concept of small claims courts by requiring all claims of “less than 40 shillings” to be handled locally – or at least not in a King’s court.²⁶ From that time forward, legal claims were separated by the amount in controversy.

Since then low-value disputes have been decided using local custom – only those which attracted big penalties, like death or a large tax had to wait for the King’s decision. The benefits of timely local adjudication were obvious and litigants could always appeal an unfavorable decision to the king.²⁷

With a modicum of imagination, and by adding historical terminology, one can guess that the types of cases tried then would today be called:

*Traffic and other Class C misdemeanor cases punishable by fine only; civil cases with up to \$10,000 in controversy; landlord and tenant disputes; truancy cases; etc.*²⁸

Payment In Construction Legislation

Guild membership provided instant credibility...

For almost everyone in medieval England there was no real point to travel: they didn’t know anyone, couldn’t write or communicate with anyone far away²⁹; unknown roads sometimes had robbers; accident and plague were the final dissuaders (before the time of medicine³⁰). Everyone was parochial, no one knew much about what was happening elsewhere and so it was that local laws continued to grow strong within their communities, and like in Athens before them, this created a stable field of *localized* justice.³¹

Stonemasons inhabited a different realm: peripatetic by necessity, he moved from construction site to construction site. The rules of the stonemason’s guild were comprised of international design and structural practices developed through the ages. Where others could not learn from afar the stone masons provided training (and testing) to ensure education and quality standards. The cathedrals, guild houses and castles of the time remain as an international testament today.

The “foreign” experience and technical capabilities of a master stone mason would have been awesome to anyone living at the time. Guild membership provided instant credibility: long

²⁵ Davies, O. (1999) *Witchcraft: the spell that didn't break*, History Today, 49, 8, pp. 7-13, Humanities Full Text (H.W. Wilson), EBSCOhost, [viewed Mar. 1, 2017].

²⁶ Harding pp. 180-181.

²⁷ Id, at p. 230.

²⁸ <https://county.org/texas-county-government/texas-county-officials/Pages/Justice-of-the-Peace.aspx>

²⁹ Medieval England, pp 201-210.

³⁰ Roser, M. (2017). *Child Mortality*. [online] Available at: OurWorldInData.org. Retrieved from: <https://ourworldindata.org/child-mortality/> [Accessed Mar. 9, 2017].

³¹ Summerson, H.R. (1979). *The Structure of Law Enforcement in Thirteenth Century England*, Am J Leg Hist, 23 (4): p. 314.

hands-on apprenticeships, common training, testing procedures, and excellent work - that was the mark of a guild (and where the term trademark originated).³²

The corporate structures of guilds were well suited for the protections offered by patent law. “Letters patent” gave guilds the opportunity to distinguish between valuable trades. The stonemason’s guild morphed into the non-secular, but semi-religious, Freemason’s guild of the middle ages. In the 19th Century trade-guilds experienced the same splintering associated with *improvements* as technical patents: both architects (1837)³³ and surveyors (1868)³⁴ emerged from the building guilds before them.

To be a senior member of the guild was prestigious. “The role of guilds in public life was celebrated in such processions as that of the Lord Mayor in London.”³⁵ In the middle ages the requirements to become a ‘master’ guild-member consisted of:

*(1) an apprenticeship, which lasted from 2 to 7 years’ depending on the particular trade, and (2) after a period of experience as a journeyman, could submit a piece of his best work to the appropriate guild for assessment and approval. If this ‘master piece’ was accepted he could become a master craftsman and set up his own workshop and train apprentices.*³⁶

The most financially powerful dispute-resolution mechanism created

In a time when trade unions and guild-type professional societies were losing membership, the future Sir Michael Latham (conservative MP of Melton) was tasked with detailing “structural problems in the UK construction industry” (abbreviated for clarity). His report “*Constructing the Team*” was published in July 1994 and a small “C” section was added to the HGRA legislation.³⁷ Passed through parliament in 1996 Latham’s report recommendations form the basis of today’s HGCRA.³⁸

Only 14 sections of a 151-section Act provide a comprehensive dispute resolution mechanism for the expansively defined “construction industry”. Word for word it is perhaps the most financially powerful legal mechanisms created: construction, as defined in the Act, includes a significant part of every nation’s gross domestic product (GDP).

Specifically, the Act includes all construction contract activity³⁹ (which represents between 1.2% and 50% of many nation’s GDP, though a more common estimate is around 3% in

³² Kegan, D., *The Western Heritage*, Macmillan Publishing Co., USA, 1979. P 288.

³³ The Royal Institute of British Architects was granted its Royal Charter in 1837 by the Privy Council under King William IV, [online] Available at: <https://www.architecture.com/RIBA/Aboutus/Whoweare/Ourhistory.aspx>. [Accessed Jan. 17, 2017]

³⁴ Westminster Palace Hotel on 15 June 1868 to approve the resolutions and elect the first Council, <http://www.rics.org/uk/about-rics/who-and-what/history/#>. [Accessed Jan. 17, 2017]

³⁵ Mackenney, R. *Guild*. Grove Art Online. Oxford Art Online. <http://www.oxfordartonline.com/subscriber/article/grove/art/T035555>. [accessed March 19, 2017].

³⁶ Kegan, D. (1979), *The Western Heritage*, Macmillan Publishing Co., USA. p. 289.

³⁷ Latham, M. (1994), *Constructing the Team: Final Report*, Joint Review of Procurement and Contractual Arrangements in the United Kingdom Construction Industry, HMSO.

³⁸ Housing Grants, Construction and Regeneration Act 1996, First published 1996, Reprinted 2001.

³⁹ Id, at Section 104.

some nations⁴⁰); all of the purchases associated with that construction (Home Depot kept the industry supplied in 2016 with a reported revenue of \$88.51 billion⁴¹); insurance providers (for builder's warranties); banks (developers have lenders for the land and project, builders have loans for machinery and bonds, etc.); the list can go on. Suffice it to say that "construction disputes" are of national relevance.

Most countries of the world do not have the HGCRA or anything like it. For most countries "failure to pay" is one of the three oldest and most popular contractor excuses for project delay and cost overrun and continues to be listed in recent academic studies.⁴²

The most impressive aspect of this small piece of legislation is that it has changed the legal landscape of "construction law" in England & Wales, Ireland, all states of Australia (within 5 years), New Zealand, Singapore, Hong Kong, and Malaysia.

The Act does not dictate any specific qualifications to become an adjudicator, however in practice adjudicators are usually required to have senior membership in a professional society. In the UK commonly referred professional bodies for construction Act disputes are the Royal Institution for Chartered Surveyors (RICS) and the Royal Institute of British Architects (RIBA). Entry level qualifications for both professional bodies require:

"Relevant" first degrees (in Architecture for RIBA⁴³ and QS/BS for RICS⁴⁴); between 2-7 years of experience in the field; and that applicants pass a knowledge-based test.

⁴⁰ Multi-yearly enterprise statistics - subcontracting for industry and construction (NACE Rev. 2, B-F) Last update: 23-01-2017. Africa-investor.com, 2010. Construction sector contributes 3% to Nigeria's GDP. [online] Available at: <<http://www.africa-investor.com/article.asp> [Accessed 15 September 2010]; Embassy of Lebanon, Washington D.C., 2010. Profile of Lebanon - The Economy. [online] Available at http://www.lebanonembassyus.org/country_lebanon/economy.html [Accessed 5 September 2010]; MENAFN.Com - Qatar News Agency, 2010. Kuwait's economy forecast to grow 3.3% in 2010. [online] Available at: <http://www.menafn.com/qn_news_story_s.asp?StoryId=1093301970> [Accessed 10 June 2010]; Malaysian-German Chamber of Commerce, 2010. Market Watch Malaysia 2010, Construction Industry [online] Available at: http://malaysia.ahk.de/fileadmin/ahk_malaysia/Dokumente/Sektorreports/Market_Watch_2010/Construction_2010__ENG_.pdf [Accessed 12 September 2010]; Maartemo V. and Ekonomi, E., 2008. Analysis of the Turkish Economy. Electronic Publications of Pan-European Institute, [online] Available at: <<http://www.tse.fi/pei>> [Accessed 22 June 2010].

⁴¹ [online] Available at: <http://ir.homedepot.com/financial-reports/annual-reports/recent>. [Accessed Feb. 9, 2017].

⁴² Kamanga, M.J. et. Al. (2013) *Causes of delay in road construction projects in Malawi*. Journal of the South African Institution of Civil Engineering, Vol.55(3), pp.79-85; Abd El-Razek, M.E. (2008) *Causes of delay in building construction projects in Egypt*. Journal of Construction Engineering and Management, 134(11), 831-841; Sweis, G., Sweis, R., Abu Hammad, A., Shboul, A. (2008) *Delays in construction projects: The case of Jordan*. International Journal of Project Management, 26(6), 665-674; Koushki P.A., Al-Rashid K., Kartam N. (2005) *Delay and cost increase s in construction of private residential projects in Kuwait*. Construction Management and Economics, 23(3), 285-94; etc.

⁴³ [online] Available at: <https://www.architecture.com/RIBA/JoinTheRIBA/Practices/Eligibility.aspx> [Accessed Jan. 23, 2017].

⁴⁴ [online] Available at: <https://www.rics.org/Global/Membership%20Assessment%20Requirements%20Overview.pdf> [Accessed Jan. 25, 2017].

Legal Qualifications

How important a legal background can be...

There is often a point at which an NLA can progress no further in a dispute. This point is often reached when the issue in dispute requires an interpretation of the law itself. An example of this occurred in the then newly created field of nuclear physics. On that occasion there was serious need for someone with both technical and legal knowledge to help Robert Oppenheimer defend his patent for: “the explosive part of a nuclear reaction” (paraphrased for clarity)⁴⁵.

Now that was a seriously technical patent, but the problem really was not about what was included in the patent or not. The problem was that the Government desperately wanted to use his patent – permission or not. In 1942 competing with the Nazis for “the explosive part of a nuclear reaction” had become top priority.

Yet Oppenheimer stuck to his guns and said words to the effect of “No, it’s my intellectual property and you can’t use it unless *I* am in charge.” So the U.S. government took him to court looking for a legal loophole “...for the public good!” But they lost, and were forced leave the fate of the nation to Oppenheimer (so they put him in charge of the Manhattan Project and all worked out). But it goes to show the power of patents and how important a legal background can be.

Conclusion

The NLA principles developed above have been applied in Table 2 to four “Dispute *Types*”: (1) legal, (2) common/regional, (3) industry-specific, and (4) technical.

1. A “legal” dispute, in this context, is one where the subject matter in dispute is of a legal nature, i.e. interpretation of a law – as done by Oppenheimer’s attorney(s).
2. “Common/regional” disputes include those where the amount in controversy is “small” (\$10-25,000 or less in many western jurisdictions); or when a deep understanding of the location where a dispute took place is valuable (e.g. knowledge of local customs and practices).
3. “Industry-specific” disputes have industry-specific problems – failure to pay is the most often cited reason for construction delay outside Commonwealth nations.
4. “Technical” disputes are those which have scientific or engineering issues at their core – distinguishing next-generation breakthroughs in “machine technology” where Einstein could not.

Each qualification-set has been designated by region, either a local or foreigner (from the dispute jurisdiction). The qualifications then derived from the 3 sets of skills described in the forum above:

1. “Technical” qualifications include scientific or engineering degrees and/or experience.
2. “Industry” specific knowledge requires specialized degrees and/or experience, i.e. architecture.

⁴⁵ Ironically, soon after Einstein left the patent office it was flooded with a wave of nuclear patents.

3. “Law” means someone with legal training and/or experience.
4. “Law + Tech/Industry” represents the combination of legal and technical or industry-specific qualifications.

Practicing law without a license is prohibited. Few exceptions exist and there is no question that history has shown legally trained individuals are best qualified to deal with all issues of legal interpretation. For that reason, the first two columns have been shaded to represent those with local law licenses who are by *definition* not NLAs.

“N.Q.” represent that the Qualification Set indicated in the table is not qualified, or at least no more qualified than any other described skillset, for that Dispute Type.

Numbers represent their priority, 1 for best qualified, 2 for 2nd best, etc.

Dispute Type	Qualifications					
	Local			Foreign		
	Law + Tech / Industry	Law	Tech / Industry	Law + Tech / Industry	Law	Tech / Industry
Legal	1	2	N.Q.	N.Q.	N.Q. ⁴⁶	N.Q.
Common/Regional	1	2	3	N.Q.	N.Q.	N.Q.
Industry-specific	1	5	2	3	6	4
Technical	1		2	3	N.Q.	4

Table 2. Priority of NLA selection based upon claim type and qualifications.

⁴⁶ A legal background from a foreign jurisdiction may be of benefit if the law applicable to the dispute is from a similar *type* of legal jurisdiction, the most common types of jurisdiction are: common law, civil law, and sharia law.