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Self-Represented Parties in Arbitrations: Practice Tips and Recent Case Law

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This article provides commentary on the duties and responsibilities of the arbitrator and the parties in arbitrations involving self-represented parties and practical advice on effective management of such arbitrations.

Self-represented parties in arbitrations can create challenges for arbitrators. Self-represented parties may turn to the opposing party's counsel or the arbitrator for guidance through the arbitration process, potentially creating procedural concerns, conflicts, evidentiary issues and other difficulties.

This article focuses on the role of an arbitrator in arbitrations involving self-represented parties. The unenviable position of finding a balance between fairness to all parties and efficiency of the arbitration process, without creating an apprehension of bias may seem daunting in circumstances where self-represented parties do not understand the arbitral process, how to present their case or their responsibilities as participants in the process.

In a November 6, 2015 decision in ***0927613 B.C. Ltd. v. 0941187 B.C. Ltd.***, 2015 BCCA 457, the British Columbia Court of Appeal overturned a B.C. Supreme Court order which set aside an arbitration award. The B.C. Supreme Court found that the arbitrator had failed to observe the rules of natural justice and had breached his duty to act with procedural fairness in an arbitration involving a self-represented party who had, among other things, failed to attend the hearing. The Supreme Court held that natural justice in an arbitral setting must include some special consideration for unrepresented parties.

The Court of Appeal found that there are no special rules for a self-represented party in an arbitration. In this case, the Court found that the self-represented party had "wilfully chosen not to participate in the arbitration process" and that in such circumstances, "the arbitrator had no further natural justice obligation...than providing [that party] with the opportunity to participate in the process". Once the self-represented party had deliberately chosen not to participate, the arbitrator's natural justice obligations to that party ended.

The B.C. Court of Appeal set out two guiding principles relating to arbitral proceedings, whether they involve self-represented parties or not:

(1) Natural justice requirements in arbitration have not changed, the parties should expect an impartial arbitrator, notice of the proceedings, and a fair and reasonable opportunity to make submissions and to respond to the other side's case; and

(2) All parties, including self-represented parties, have an obligation to be respectful and to familiarize themselves with the law and the relevant practices and procedures of the arbitration process.

In reversing the B.C. Supreme Court decision, the Court of Appeal recognized the underlying uniqueness of the arbitral process – that it is governed by an agreement between the parties who have the freedom to choose the applicable rules and procedures, among other things. As such, the duty of fairness of an arbitrator must be tailored to the circumstances of each case.

An arbitrator may determine that to give a fair opportunity to a self-represented party to present his or her case, certain modifications of the procedure, additional directions or explanations are needed. Arbitrators should, within limits, be ready to assist with certain procedural matters and be ready to grant self-represented parties a certain degree of latitude in presenting their case. Effective management of the procedure may include some of the following practices:

- Scheduling an initial procedural hearing or conference call early in the process to address procedural issues and to answer any questions the parties may have. This allows the arbitrator to ascertain the self-represented party's experience and familiarity with the applicable rules and arbitration process.

- Either reach agreement regarding process and a timetable or issue a procedural direction that in plain language sets out the dates for each step in the process, the responsibilities of the self-represented party as a party to the arbitral process and the consequences of failing to meet deadlines or other obligations.

- The arbitrator should be prepared to answer questions from self-represented parties, advising them that in doing so the arbitrator is not giving legal advice, to ensure they understand the process and can meaningfully present their case.

- The arbitrator should not deny relief based on technical deficiencies that can easily be rectified or which do not prejudice the other party.

- The arbitrator should be flexible in the manner in which evidence is presented, the application of the rules of evidence and procedure – not to the prejudice of the represented party – but to ensure that lack of familiarity of the process does not prejudice the self-represented party.

- A self-represented party may be more comfortable presenting his or her closing submissions orally. Setting time limits for oral submissions or page limits for written submissions may also ensure the parties are given a fair and reasonable opportunity to present their case.

These practical tips will help ensure a fair and effective process and avoid complaints by self-represented parties if the award is not in their favour. They are meant to be practical points, not to detract from the very sensible decision of the B.C. Court of Appeal that there are no special rules for self-represented parties in arbitration beyond the natural justice requirements owed to any party.

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