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Choosing An Arbitrator: Subject Matter Expertise vs. Risk of Bias

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Choosing a commercial arbitrator with special subject matter expertise requires extra care to avoid potential conflicts arising from existing professional relationships between the arbitrator and potential witnesses, according to an Ontario court which dismissed an arbitrator in a franchise dispute because he had once hired an expert for a similar case.

One of the advantages of arbitration is the opportunity to choose an arbitrator with subject matter expertise. In commercial fields, such as technology licensing, franchising or international trade, this may be particularly important.

But a recent Ontario case demonstrates the risks associated with choosing an arbitrator who is also actively involved in litigation in the same field.

In *MDG Computers Canada Inc. et al. v. MDG Kingston Inc. et al*., 2013 ONSC 5436 (CanLII), the court removed an arbitrator because of a prior connection with an expert witness who was to testify in the arbitration.

The case involved a dispute between a franchisee and franchisor over compliance with Ontario's franchise disclosure legislation. The arbitrator was an experienced franchise lawyer and the parties were aware that he had acted for a franchisee in a case that involved similar issues. When the franchisee delivered an expert report, it emerged that the arbitrator had used the same expert in other franchise cases where he was acting as counsel. The franchisor asked the arbitrator to remove himself. When the arbitrator refused to do so, the franchisor went to court.

The franchisor argued that, even though the other cases had been settled, there was a reasonable apprehension that the arbitrator was biased in favour of an expert he had previously retained. Therefore, the arbitrator could not fairly determine the expert's qualifications, expertise and credibility, or assess the expert evidence in the arbitration regarding similar issues.

The franchisee argued that the particular expert was one of many the arbitrator had worked with in the past and there was no evidence of any actual bias. The franchisee also argued that the franchise area is small and specialized, with a small pool of experts. A finding of bias in these circumstances would make it more difficult for future arbitrator-practitioners in specialized areas.

The court said that the test is objective, and no actual or intended bias need be shown. The test for whether a reasonable apprehension of bias exists is whether an informed person, viewing the matter realistically and practically, and having thought the matter through, would conclude the arbitrator is seized with an attitude or predilection for bias.

The court found that the professional relationship between the arbitrator and the expert on a number of similar franchise disputes did give rise to a reasonable apprehension of bias. The arbitrator was removed and the parties were directed to appoint a new arbitrator.

(The franchisor was also awarded costs by the court. Together with the costs already thrown away on the arbitration, this was a very expensive issue.)

What can parties and arbitrators do to avoid this potential problem?

Parties should disclose all of their witnesses as soon as they have been identified. The arbitrator should disclose any prior contacts with any of the witnesses.

The party proposing an expert witness who gives rise to a potential conflict may decide to replace the witness with another expert who does not have a conflict. Or both parties may agree that the arbitrator can continue despite the prior contacts. Or they may agree that the arbitrator should withdraw and they will appoint a new arbitrator – assuming they can agree on someone with equivalent expertise who does not have potential conflicts.

The parties and their counsel must ask themselves how seriously a potential conflict would prejudice the case. Is it worth the cost of replacing a witness or replacing the arbitrator?

Are there other suitably qualified and experienced witnesses? Can the parties agree on a replacement arbitrator? Do they also have potential conflicts? And who pays the costs thrown away on the expert(s) or arbitrator who must be replaced?

These are all questions that bear serious thought when commencing an arbitration and choosing an arbitrator in a field that requires special subject matter expertise.

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