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Do Arbitrators Have A Special Duty Towards Unrepresented Parties?

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In *0927613 BC Ltd v 0941187 BC Ltd*, 2014 BCJ No 2659, decided on August 21, 2014, the British Columbia Supreme Court stated that in the domestic context, an arbitrator must comply with the rules of natural justice and consider what assistance can be useful to provide unrepresented parties.

The two numbered companies were parties to a joint venture agreement with a third numbered company to purchase three properties for development purposes. The joint venture agreement was later amended. The joint venture agreement and the amended joint venture agreement provided for disputes to be resolved through mediation, and if mediation failed, by commercial arbitration under the domestic *Arbitration Act*, RSBC 1996 c 55 (the "Act").

A dispute arose between the parties over whether the amended joint venture agreement accurately reflected the intentions of the parties. The parties attended mediation, which was unsuccessful. Then, by consent, the parties appointed an arbitrator.

Counsel for the petitioner complained that he was unable to get any instructions from the petitioner, and thus failed to file his materials outlining his client's position and submissions by the agreed deadline. On the day a teleconference between counsel and the arbitrator was scheduled, counsel for the petitioner sent a letter to the arbitrator, copying the petitioner, stating that he was withdrawing as counsel and that the arbitrator would have to deal with the petitioner's principal directly. Without any communications with the petitioner's principal, the arbitrator scheduled the hearing by teleconference three days later. Notice of the hearing was delivered to the petitioner and the respondent. On the day of the hearing, counsel for the respondent attended the teleconference, but the petitioner did not.

In the petitioner's absence, the arbitrator made an award ten days later. In the award, the arbitrator granted the declaration sought by the claimant that the respondent had not made a payment required by the joint venture agreement.

The respondent subsequently applied to the arbitrator for an amendment to the award, without notice to the petitioner. Approximately two months later, without notice to the petitioner, the arbitrator amended the award to award specific performance, an expanded declaration in favour of

the claimant and a substantially increased award of costs.

New counsel for the petitioner requested reconsideration of both the award and the amended award from the arbitrator. The arbitrator refused to reopen the proceedings.

In an oral judgement, the Court set aside both awards.

Section 30 of the Act provides that if an award has been improperly procured or an arbitrator has committed an arbitral error, the court may set aside the award, or remit the award to the arbitrator for reconsideration. An "arbitral error" is defined in section 1 of the Act as an error that is made by an arbitrator in the course of an arbitration that consists of corrupt or fraudulent conduct, bias, excess of jurisdiction or failure to observe the rules of natural justice.

By virtue of section 22(1) of the Act, the Domestic Commercial Arbitration Rules of Procedure of the BCICAC apply to a commercial arbitration in British Columbia, unless the parties agree otherwise. The Court considered a number of these rules, including the requirement of the tribunal to treat each party fairly and to give it the opportunity to present its case, and the requirement to consult with the parties to set the dates for hearings.

The Court commenced its analysis by considering the requirements of natural justice generally required as defined in the case law, noting that the rules of natural justice and the duty of fairness are variable depending on the specific context and circumstances of each case. The Court also considered the rules of natural justice as they apply to unrepresented parties in litigation before the courts and before administrative tribunals, such as disciplinary committees. It found that in both cases guidance and assistance should be provided to the unrepresented litigant. The Court noted that in the context of disciplinary hearings of a law society, a hearing panel must consider what assistance it can usefully provide given the nature of the case, how frequently it will have to assist and what effect its intervention will have on the fairness of the proceedings.

Although it adopted a cautious approach in drawing an analogy between procedures before courts of law or administrative tribunals and arbitral tribunals, the Court held that natural justice in an arbitral setting must include some special consideration for unrepresented parties. Thus when the arbitrator learned that the petitioner's counsel had withdrawn, he had a number of procedural obligations. First, the arbitrator had an obligation to consult with both parties to set the hearing dates. Second, he had an obligation to treat the petitioner fairly and give it full opportunity to present its case, and a further obligation to strive to achieve a determination of the proceeding on its merits. Third, the arbitrator had an obligation to explain to the petitioner's principal the procedural situation in which he found himself.

The Court found that the arbitrator had done none of these things and set aside both the award and the amended award for failure to observe the rules of natural justice. The Court was satisfied that these errors were not mere defects in form or technical irregularities, and that refusing to set aside the award would constitute a substantial wrong or miscarriage of justice.

Although the petitioner sought a ruling that the arbitrator erred by not giving the petitioner the opportunity to set aside the award and amended award, the Court concluded that in light of its ruling, this was not an appropriate case to determine whether an arbitrator has the power to set aside his own award.

According to this case, at least in the domestic context, arbitrators are required to give special

consideration to unrepresented parties in ensuring the fairness of the proceedings. Under most institutional arbitration rules, parties are given the right to choose whether they wish to be represented by counsel or would rather represent themselves. While in the majority of commercial arbitrations parties retain counsel, this is not always the case. In cases where one party is unrepresented, the equality of arms may be affected since the unrepresented party may not understand the procedural aspects of the arbitration process, putting the party in a less advantageous position when it comes to effectively presenting its case. Thus, similar to the role of a judge in court, domestic arbitrators have to ensure that the unrepresented party understands the process, is available to proceed, and has the full opportunity to present its case.

Although cases in which one of the parties is unrepresented will likely be fewer in the case of international commercial arbitration than in the domestic context, the situation does arise. This case offers a rather clear example of where the arbitrator could and should have done more to ensure that the unrepresented party was treated fairly and had an adequate opportunity to present its case. However, other cases may not be so clear and the tension between treating the parties equally and ensuring that an unrepresented party has the required opportunity to present its case may raise difficult issues. In both domestic and international arbitrations, the arbitrator has the obligation to treat the parties both equally and fairly. In the case of an unrepresented party, fairness may require assisting that party to ensure that it has an adequate opportunity to present its case. Depending on the applicable arbitral rules or law, this duty may be articulated differently. In this regard, some rules will provide for a "reasonable opportunity" for a party to be heard while others provide for a "full" opportunity. The procedural rules of UNCITRAL, the LCIA, ICC and ICDR all provide for a "reasonable" or "fair" opportunity to present one's case, while the UNCITRAL Model Law and the laws of various adopting jurisdictions refer to a "full opportunity". Finding the appropriate balance between the equal, impartial treatment of the parties and ensuring fairness may be particularly challenging in cases involving unrepresented parties.

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