SELECTING THE RIGHT ARBITRATOR

One of the critical differences between the civil litigation system and arbitration is that parties who go to court do not get to choose their motions court or trial judges. The heavy caseload of criminal and family law cases necessarily results in judicial appointments of lawyers with experience in those fields. And where this is not the case, judges whose practices lie in other areas have to get up to speed quickly simply because of the heavy demand for judging in these two fields.

While the Toronto branch of the Superior Court of Ontario has developed a commercial bench with a high degree of specialization and concentration in a variety of fields such as corporate, commercial, bankruptcy and insolvency, this is not the case outside Toronto where judges who are generalists may rely more on counsel in areas of law that are less familiar.

One of the principal advantages of arbitration is the right of the parties to select their arbitrator. In some cases the parties decide to select an odd number of arbitrators. An arbitral panel of three is common where each side in a two sided conflict selects one arbitrator and the two selected name a third arbitrator who may or may not act as the chair for the purpose of ruling on any procedural issues.

The importance of selecting the arbitrator(s) is very simply that knowledge of the subject matter of the dispute makes it easier for the arbitrators to understand the evidence, ask questions where clarification is needed and provide solid reasons in their award. The legitimacy of the outcome of an arbitration can and most probably will reflect the knowledge and understanding the arbitrators have not merely of the subject matter of the dispute but also of the norms and standards in the particular industry.

There are different ways of measuring that knowledge. The most obvious is practical experience in the particular industry or business. For example, in the construction field an arbitration panel may include one or more individuals with both academic and on-site experience. This kind of experience and knowledge is vital to determining whether one party or another has made technical errors. However,

arbitration also requires a high degree of literacy from the preliminary first meeting of the parties, to any follow up meetings that deal with emerging problems, through to the arbitration hearing itself.

Perhaps of greatest importance is the ability of the arbitrators to set out the facts as they find them, list the legal issues that those facts trigger and come to a legal conclusion supported by the relevant case law. What this means is that in some fields a combination of academic and practical on-site experience, and legal expertise are critically necessary. In other words, in some arbitrations selection of a multi-disciplinary panel is the best approach.

Regardless of the particular occupational backgrounds that each arbitrator brings to the table, integrity is central to the legitimacy of the process. Just because arbitration is a voluntary, consensual and private process is no reason for those who act as arbitrators not to act fairly, impartially and with integrity, free of bias or conflicts of interest. Indeed our arbitration statutes require precisely that.

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