

Current Workplace Issues

Alternative Dispute Resolution

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The business world is showing increased interest in alternative methods of resolving disputes (ADR), including commercial arbitration, mediation, and contractually - agreed methods for the valuation of disputed assets. ADR mechanisms show up in commercial contracts, and referees may be appointed when the need arises. These responses to an overburdened court system can make for speedier resolution of conflict, but there are pitfalls, as a recent decision in the Supreme Court of British Columbia reminds us.

In *International Fence-Crete Installations Ltd. v. Pacific Prebenched Ltd.* (June 24, 1996), the two companies had agreed to the appointment of a special referee to do an accounting of joint venture monies owed by Pacific to International. There was a subsequent application to the Court to have the identity of the referee and his terms of reference confirmed. Over a year later, after the referee's draft report was delivered to the companies, International perceived it to have been prepared in an extremely biased manner. It applied to the Court to discharge the special referee on the grounds of apprehended bias.

International complained that during his investigation, the special referee had spent more time meeting with representatives of Pacific to review documents than was warranted and had done so in the absence of anyone representing International's interests. The draft report's reference to International's "unusual purchases" was challenged, since the special referee had not asked International about these purchases. Moreover, it complained that the referee had not provided an opportunity for any interested party to raise concerns, give evidence, or cross-examine the other party's witnesses.

Even in this situation, where there was no statutory tribunal, but, rather, a privately-agreed, Court sanctioned ADR mechanism, the Court applied the principles which are fundamental to determining whether a decision-maker should be relieved of his or her duties due to real or perceived bias. It makes no difference whether the decision-maker be a valuator or an accountant; special referees of this sort are to act in a judicial manner and within the confines of their terms of reference.

Based on the evidence, the Court discharged the special referee, noting with regret that such a step would set back resolution of the parties' issues by a considerable length of time. However, the Court had to ensure that justice should not only be done, but be seen to be done.

When negotiating the terms of a commercial ADR mechanism, caution must be exercised, in cases of doubt, to provide for effective Court endorsement. Moreover, a party- or Court-appointed arbitrator, valuer, or referee should be well acquainted with his or her terms of reference and the basic principles of fundamental justice. If the referee does not adhere to standard legal principles in carrying out the mandate, one party or the other may successfully seek discharge by the Court.

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