Focus ALTERNATIVE DISPUTE RESOLUTION

One chance to choose arbitrator

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Arbitration offers parties a benefit not available in the court system: the ability to have a hand in selecting the individual(s) who will decide your dispute. The advantages of engaging the parties in selecting their arbitrator are obvious. The parties are best placed to select an arbitrator with particular expertise relevant to the dispute, and involvement in the selection of the arbitrator should provide both parties with confidence in the arbitrator's ability to fairly determine the dispute. One would expect that parties who have had a hand in choosing their arbitrator will be more willing to accept his or her determination of the outcome of the dispute.

Once afforded this privilege, however, the importance of exercising it effectively cannot be overstated. Once an arbitrator is selected—either through agreement or through the intervention of the court in the absence of agreement—there is very little ability to later challenge the selection.

A decision last November of the Court of Appeal for Ontario serves as a helpful reminder of the consequences of parties' failure to agree on an arbitrator. In *Toronto Standard Condominium Corp. No. 2130 v. York Bremner Developments Ltd.* [2014] O.J. No. 5455, the parties had entered into a contract with a broad arbitration clause, which provided that either party could apply to a judge of the Superior Court of Ontario for the appointment of a single arbitrator in the event that they could not agree on a proposed arbitrator within 10 days of receiving a notice of arbitration. This provision was generally in line with Section 10(1) of the *Arbitration Act, 1991*, which provides: "The court may appoint the arbitral tribunal, on a party's application, if, (a) the arbitration agreement provides no procedure for appointing the arbitral tribunal; or (b) a person with power to appoint the arbitral tribunal has not done so after a party has given the person seven days notice to do so." Importantly, s. 10(2) explicitly precludes an appeal from the court's appointment of an arbitral tribunal.

The condominium corporation issued a notice of arbitration and proposed an arbitrator. The respondents, York Bremner Developments Limited et al, did not respond to the arbitrator proposal within 10 days. The condo corporation brought an application seeking the appointment of an arbitrator, which the respondents disputed on the basis that none of the issues in the condominium corporation's notice of arbitration fell within the ambit of the arbitration agreement. The application judge disagreed and appointed an arbitrator to determine his or her own jurisdiction. York Bremner Developments Limited appealed the application judge's appointment of an arbitrator (albeit on the basis that the application judge erred in not determining which, if any, of the issues in the notice of arbitration were arbitrable before appointing the arbitrator, and not based on the identity of the arbitrator), which the Court of Appeal quashed on the straightforward basis that the appeal was barred by s. 10(2).

In other words, once the court is dragged into a determination of who will arbitrate a dispute, the court's decision is final. It is better, of course, to reach a negotiated resolution. Because of the general rule, as articulated by the Supreme Court, that "in any case involving an arbitration clause, a challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator," (*Dell Computer Corp. v. Union des consommateurs* [2007] S.C.J. No. 34), parties would be well advised to resolve as between themselves the identity of an agreeable arbitrator, even if they continue to disagree about whether the dispute is subject to arbitration.

The importance of selecting an appropriate arbitrator at first instance is heightened due to the practical difficulties of obtaining a new arbitrator or differently constituted arbitral panel following any appeal of the award. Section 45 of the *Arbitration Act, 1991*, which permits a party to appeal an arbitral decision on questions of law, does not specifically contemplate remitting an arbitral award to a new tribunal. However, where a party seeks to set aside an award on the basis of one or more of the grounds listed in s. 46, subsection (7) does provide: "When the court sets aside an award, it may remove the arbitral tribunal or an arbitrator and may give directions about the conduct of the arbitration."

In *Board of Regents of Victoria University v. GE Canada Real Estate Equity* [2014] ONSC 7435, Justice Herman Wilton-Siegel rejected a party's request to remove the original arbitral tribunal and direct a newly constituted panel of arbitrators to re-hear the dispute. The party had appealed the original arbitral award on a question of law. Justice Wilton-Siegel declined to recognize an ancillary power under s. 46(7) in an appeal under s. 45, and ultimately remitted the dispute to the same arbitration panel for a re-hearing.

The ability to select an arbitrator is a significant advantage, and one that should be exercised carefully and co-operatively for the benefit of all parties.

Rebecca Jones is a lawyer at Lenczner Slaght Royce Smith Griffin. Laura Robinson, student at law, contributed to this article. The firm acted for the appellant GE Canada entities in the above appeal before Justice Wilton-Siegel.