ADR Institute of Canada Inc.

ADR Perspectives
Perspectives PRD

April 2015 / *avril 2015*

Who Appoints An Arbitrator?

Ludmila B. Herbst

Arbitration is often marketed as offering participants their choice of decision-maker. Certainly parties' opportunities to become involved in the selection process are generally greater than in court proceedings. However, clients should be mindful of limitations on their role even in the arbitration context. Though arising out of relatively unusual circumstances, the recent decision of the Alberta Court of Appeal in TransAlta Generation Partnership v Balancing Pool, 2014 ABCA 294 serves as a good reminder that the reality may fall short of arbitrating parties' expectations.

The dispute underlying the *TransAlta* decision arose out of a generator failure at a power plant owned by TransAlta Generation Partnership ("TransAlta"). The power purchase arrangement which governed the sale of electricity from that plant by TransAlta to Enmax Energy Corporation ("Enmax") defined TransAlta and Enmax as "Parties" and contained an arbitration clause (within Article 19) which provided, among other things, that "...all disputes with respect to this Arrangement shall...be forwarded to and resolved by binding arbitration...by a board of arbitrators in accordance with the following provisions: (a) Each Party shall appoint its own arbitrator...The two arbitrators thus appointed shall appoint a third arbitrator..."

The complicating factor in this case arose out of the fact that participants in the arbitration would be not simply TransAlta and Enmax, but also what is called the Balancing Pool. The Balancing Pool was created in 1999 to assist in Alberta's transition to a competitive electricity industry. That assistance was at issue here. Ordinarily, Enmax was responsible for making capacity payments to TransAlta, but if there had been an event of *force majeure*, the Balancing Pool was responsible for stepping in to make the payment instead. In this case, those involved disagreed about whether a *force majeure* event had occurred. Enmax's position was that it had not. Though this would leave Enmax, rather than the Balancing Pool, responsible to make the capacity payment, it would also leave TransAlta liable to Enmax for a penalty well in excess of that payment.

The power purchase arrangement specified that "[i]n any instance where the Balancing Pool may be required to make a payment to either Party...it shall, with respect to the settlement of disputes that arise between it and the Owner or the Buyer, have rights and obligations under Article 19 as if it were a party to this Arrangement". As noted above, Article 19 contained the arbitration provisions in the power purchase arrangement. Taking this to heart, when TransAlta and Enmax each appointed an arbitrator, the Balancing Pool purported to appoint the third. The question was whether it could do so.

The Court of Appeal's decision was "no": the Balancing Pool could not appoint an arbitrator. The arbitration agreement did not contemplate that the Balancing Pool would appoint a third arbitrator. Rather, Article 19 specified a process where the "Parties" (as noted above, defined as TransAlta and Enmax) would each appoint one arbitrator, and those two arbitrators would appoint the third. Further, wording which would permit the Balancing Pool to appoint an arbitrator should not be read in. The Balancing Pool's "right to participate as if it were a party" does not necessarily imply a right to appoint an arbitrator. The Court of Appeal noted that "[t]here is no free-standing right to appoint an arbitrator" and "[t]he extent of the power to appoint an arbitrator, if any, depends on the wording of the instrument which adopts the arbitration procedure".

In the course of its discussion, the Court of Appeal pointed to other examples where participants in an arbitration did not necessarily appoint an arbitrator. The Court noted that single arbitrators may resolve multi-party disputes, and that three-arbitrator panels may resolve disputes involving more than three parties. Likewise, participation of the Balancing Pool in the arbitration here did not require its involvement in the selection of an arbitrator.

The Court's examples serve as an important reminder that, as noted in the introductory paragraph, the reality may fall short of parties' expectation of having a role in selecting an arbitrator. Take the common situation of a single arbitrator presiding over a domestic commercial arbitration. There are situations where the parties may consult and agree on a single name for appointment. However, if they do arrive at a single name, this is often the result not of immediate and enthusiastic endorsement, but of considerable back-and-forth between counsel, and a compromise of sorts. To the extent that there is client input in negotiations between counsel, the client may have a limited role, and indeed given the nature of arbitration, has a limited amount of information available to him or to her as the basis for forming a preference. The client generally will not be able to review past arbitral decisions made by a given candidate and will be relying, at best, on subjective impressions gleaned by others. More starkly, on other occasions the parties will not be able to reach agreement at all, even after back-and-forth, and an arbitral institution or a court will need to step in to appoint the arbitrator instead. Some role for the parties may be retained in this process – at least initially, an arbitral institution may circulate lists of candidates to the parties for input, or the court may hear submissions from the parties on particular individuals to be considered – but to characterize this as control over the process would be going too far.

For clients particularly interested in being involved in the choice of an arbitrator, the above process may be unsatisfactory. Consider in advance whether steps may be taken in the arbitration agreement to provide for additional control. This may militate in favour of a multi-arbitrator panel, with express provision (unlike in the Balancing Pool's case) for each party's selection of at least one of those arbitrators; the client should be aware, however, that this arbitrator will simply be part of a larger pool of decision-makers. Another possibility would be to set out in the arbitration agreement qualifications which the individual ultimately to be selected as the arbitrator must have, ensuring that the parties retain control at least over those parameters (even if not over the arbitrator's actual identity). Of course, the above possibilities must be balanced against the attendant cost and scheduling complications of having additional arbitrators, and the potential lack of flexibility where qualifications are set in advance. Further and more fundamentally, it may be that party expectations – if set or left too high – may often not be entirely fulfilled.

Ludmila B. Herbst is a partner at Farris, Vaughan, Wills & Murphy LLP. She practises in the areas of civil litigation and commercial arbitration, and is a co-author of Commercial Arbitration in Canada: A Guide to Domestic and International Arbitrations (Carswell).

http://www.farris.com/farris-lawyers/profile/Ludmila-B-Herbst/