Section of Litigation Alternative Dispute Resolution

Court Intervention When the Parties' Arbitrator Appointment Process Fails

By Gilda R. Turitz – March 27, 2013

Most arbitration clauses are explicit about the number of arbitrators to hear a dispute. The process by which the arbitrators will be selected is usually spelled out or will be governed by the rules of the administering tribunal. But no clause can fully anticipate and address every future dispute or arbitrator selection problem that may be presented. When a dispute involves satisfaction of arbitrator qualifications or multiple parties selecting a panel, the arbitrator selection process may reach an impasse for which the parties may seek court intervention. But when can the courts exercise authority over the process? And how far can they go in shaping a remedy? May they strike an arbitrator from service, or order a panel to be chosen in a different manner or with a different number or arbitrators specified by the parties' clause?

Limited Court Power in Arbitrator Selection and Remedy for Multiple Parties
Under the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, a court's jurisdiction to intervene into the arbitral process before issuance of an award is limited. Section 5 of the FAA, 9 U.S.C. § 5, provides that a district court may intervene in the arbitral process to select arbitrators on a party's application if the parties fail to avail themselves of a method for arbitrator selection set forth in their agreement or if there is a "lapse in the naming of an arbitrator or arbitrators." A recent Fifth Circuit case addressed the scope of a court's discretion to appoint arbitrators and to fashion a remedy in the context of a three-party dispute under an arbitration agreement that contemplated a two-party dispute. The court held that while the parties' impasse authorized the district court to exercise appointment power, it erred by ordering arbitration before a five-member panel when the parties' express agreement was to arbitrate before a three-member panel. *BP Exploration Libya Ltd. v. ExxonMobil Libya*, 689 F.3d 481 (5th Cir. July 30, 2012).

In *BP v. Exxon*, a contractor agreed to provide ExxonMobil Limited Libya (Exxon) with a rig for offshore drilling of deep water oil wells in Libyan waters. With the contractor's consent, Exxon assigned the drilling contract to BP Exploration Libya Limited (BP). A dispute arose among the parties as to when BP took possession of the rig and whether it met required standards. BP informed the contractor and Exxon that they had materially breached the assignment agreement and disclaimed any payment obligation to either party.

The assignment agreement's arbitration clause contemplated that three arbitrators would determine any dispute between Exxon and BP in accordance with the International Rules of the American Arbitration Association, with each party to appoint one arbitrator who would appoint the third as chair. It also contemplated that any dispute to which the contractor was a party would be governed by a provision in the drilling agreement to arbitrate under the rules of the Arbitration and Conciliation Act 1990 (ACA) (incorporated as part of the Laws of the Federation of Nigeria). The ACA rules called for the first party to appoint its arbitrator, then for the responding party to appoint its arbitrator and, finally, for the two arbitrators to appoint a presiding arbitrator.

Because neither BP nor Exxon was paying the contractor at the rate it believed it was entitled to, the contractor, as a party to a dispute arising out of the assignment agreement, served an arbitration demand on BP and Exxon and designated its arbitrator in accordance with the ACA rules. Because there would be no neutral arbitrator to preside, BP and Exxon would neither agree to a joint appointment of an arbitrator, nor to each designate an arbitrator. BP filed suit in federal district court in Houston, Texas, which determined that there was an impasse allowing it to exercise its authority under the FAA to appoint arbitrators. The court then ordered arbitration before five arbitrators, with three party-appointed arbitrators to unanimously choose two neutrals. The Fifth Circuit Court of Appeals upheld the district court's determination that the FAA allowed it to intervene to select an arbitrator because there was a "lapse" under 9 U.S.C. § 5 in naming an arbitrator. However, the Fifth Circuit held that the district court violated the FAA by appointing five arbitrators instead of three, as provided in the parties' agreement. It directed the court on remand to enter an order appointing three arbitrators; to consider