FACTORS CONSIDERED BY COURTS WHEN APPOINTING AN ARBITRATOR: THE ARBITRATOR MUST BE READY TO "HIT THE GROUND RUNNING"

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You have an arbitration clause in your contract, but it is silent on the type of arbitrator and the process for appointing him or her. After a dispute arises, you and your counterparty propose different arbitrators and are unable to agree on one. What do you do?

First step – you ask the Court to appoint an arbitrator under section 10(1)(a) of the Ontario *Arbitration Act, 1991* (the "Act"). This section provides the Court with broad discretion to appoint an arbitrator when the arbitration clause "provides no procedure" for doing so.[1]

However, how does the Court decide who among several qualified candidates to appoint? The Ontario Superior Court addresses this question in its recent decision in *Van Doorn v. Loopstra Nixon*, 2023 ONSC 1782 ("*Van Doorn*"). After reviewing guiding principles from prior case law, Van Doorn confirms that the court's task is to select the best candidate for the specific facts and issues involved. This will often mean that the court will be inclined to appoint the person with the most adjudicative experience regarding the subject-matter at issue.

Background

Van Doorn involved a law firm partnership dispute. The applicant lawyer proposed a former judge of the Ontario Superior Court who, before becoming a judge, was a litigation partner at a large firm. He had 20 years of adjudicative experience, had served as an arbitrator in many partnership disputes and had presided over a trial involving a partnership dispute which decision was upheld on appeal.

The partnership agreement required all disputes to be "referred to arbitration in accordance with and subject to the provisions of the *Arbitrations Act (Ontario)* [sic]"[2] but was silent as to the procedure for appointing an arbitrator.

The respondent law firm proposed two different individuals – a litigation partner at a large firm who also serves as an arbitrator, and a former litigation partner of a large firm who now serves as an arbitrator. Both individuals are recognized by numerous legal ranking services, are members of various arbitration organizations and have

adjudicative experience, but neither had adjudicated a partnership dispute.[3]

When they were unable to agree on which arbitrator of the three to appoint, the applicant asked the Court to do so under s. 10(1)(a) of the Act.

The applicant argued that the former judge is the best candidate, given his long history of serving as an adjudicator (both as arbitrator and judge) and his specific experience adjudicating partnership disputes.

The respondent argued that either one of its candidates should be preferred on the basis that they both have more recent experience as law firm partners and in dealing with partnership governance than the former judge.

Analysis

The Court began by noting that s. 10(1)(a) of the Act does not expressly identify any factors to be considered when exercising its broad discretion to appoint an arbitrator. That said, the Court identified the following guiding principles from prior decisions:

1. The arbitrator must be impartial and independent of the parties and have sufficient qualifications to arbitrate the dispute;[4]
2. Where there are several qualified candidates, the Court is to select the arbitrator who is "best qualified by a profession or occupation to decide the matter in issue" or, put another way, the person best suited for the role "given the nature of the questions that arise for determination and the factual matrix in which the issue arose";[5]
3. Relative experience adjudicating disputes is often a decisive consideration;[6]
4. Expertise in the technical subject-matter of the dispute, without more, is not sufficient;[7] and
5. Among other secondary factors to consider are accreditation, expertise, availability, location and cost.[8]

The Court acknowledged that all three proposed arbitrators are well recognized in the field of arbitration and are generally qualified.

The Court, however, found the former judge to be the best arbitrator for the case based on the fact that he has more experience as an adjudicator (generally, and regarding partnership disputes) than the respondent's candidates. While the respondent's candidates had more recent experience as law firm partners, the Court did not find that to be the necessary or most important factor in adjudicating this dispute.

Noting that the question really is "who is in the better position to 'hit the ground running' with little, if any, introduction to the subject-matter of the dispute", the Court found that person to be the former judge based on his greater prior adjudicative experience (generally, and with respect to partnership disputes specifically).[9]

Key Takeaways

The key takeaways from this decision are as follows:

1. Generally speaking, relative adjudicative experience will trump expertise in the technical subject-matter of the dispute.
2. All other things being equal, courts will be more inclined to appoint the person with the greater adjudicative experience, particularly if they have prior experience adjudicating similar subject-matter. They will be best able to "hit the ground running".
3. The choice of arbitrator is one of the more important decisions to be made by parties to a dispute. Why leave the qualifications and attributes of your potential arbitrator to chance when you can spell them out expressly in your arbitration clause? If you want an arbitrator with specific subject-matter expertise, qualifications or experience, make sure the arbitration clause contains the necessary language.
4. Finally, why incur the costs of bringing a motion to have the court appoint your arbitrator? Parties are at liberty to adopt, in their arbitration clauses, ready-made arbitral rules published by various arbitration organizations that deal expressly with, among other things, the appointment of arbitrators. For example, the ADR Institute of Canada, Inc.'s Arbitration Rules contain provisions that permit parties to ask the Institute to make the required appointment when they cannot agree. The Institute will deliver identical lists of arbitrator names to the parties and eliminate those to which an objection is made until a list of mutually acceptable names is reached, and from that list, will appoint the arbitrator having regard to the parties' requested qualifications, preferences and the nature of the dispute.

[1] *Arbitration Act*, 1991, S.O. 1991, c. 17.
[2] *Van Doorn* at para 4.
[3] *Ibid.*, at para 14.
[4] *Ibid.*, at paras 18 and 21.
[5] *Ibid.*, at para 17.
[6] *Ibid.*, at para 19.
[7] *Ibid.*, at para 20.
[8] *Ibid.*, at para 18.
[9] *Ibid.*, at para 28.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against

making any decisions based on this material alone. Rather, specific legal advice should be obtained.