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District Court Rejects Pre-Award "Stacked Deck" Challenge to Arbitrator Selection Process

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A United States District Court in *Avic International USA, Inc. v. Tang Energy Group, Ltd.,* No. 3:14-CV-2815-K, 2015 WL 477316 (N.D. Tex. Feb. 5, 2015), ruled that it lacked jurisdiction to reconstitute an arbitration panel based on claims that there had been a "lapse" in the arbitration selection process and that the panel selected by the parties amounted to a "stacked deck" against the plaintiffs.

In *Avic*, two plaintiffs (Plaintiffs) and five defendants (Defendants) had entered into a contract forming Soaring Wind Energy, LLC (Contract). The Contract contained a dispute resolution clause that required disputes to be resolved in binding arbitration (Arbitration Clause). The Arbitration Clause, in turn, provided a process for selecting the arbitrators (Selection Process). Each party to the dispute was to select an arbitrator and the arbitrators thus selected were then to select one or two additional arbitrators to serve on the panel. *Id.* at *1.

A Contract dispute arose, and one of the Defendants filed an arbitration demand. All parties to the Contract joined in the dispute and engaged in the Selection Process. Nine arbitrators were selected—two by each of the Plaintiffs; five by each of the Defendants. The seven party-selected arbitrators then chose two additional arbitrators to resolve the dispute. *Id.*

The Plaintiffs filed suit in the Northern District of Texas shortly thereafter. They argued that: (1) there was a "lapse" in the Selection Process; and (2) that the panel as constituted amounted to a "stacked deck" against the Plaintiffs and violated "their constitutional rights to an impartial decision maker." *Id.* at *2–4. The Plaintiffs' stacked-deck challenge was based on the fact that five arbitrators had been selected by the Defendants, but only two had been selected by the Plaintiffs. The Plaintiffs asked the district court to "reconstitute" the panel to eliminate that problem, *i.e.*, so that the panel consisted of "one arbitrator for Defendants collectively and one for Plaintiffs collectively, with a third arbitrator selected by those two arbitrators." *Id.* at *2.

The district court dismissed the Plaintiffs' suit, finding "that it has no jurisdiction under the FAA to entertain Plaintiffs' claim prior to an arbitration award issuing." *Id.* at *5. In reaching its decision, the district court observed that a court's power to become involved in a pre-award arbitrator selection process dispute was limited to three situations:

> (1) if the arbitration agreement does not provide a method for selecting arbitrators; (2) if the arbitration agreement provides a method for selecting arbitrators but any party to the agreement has failed to follow that method; or (3) if there is "a lapse in the naming of an arbitrator or arbitrators."

Id. at *3 (quotations and citation omitted).

The district court then rejected the Plaintiffs' "lapse" argument. According to the court, a "lapse" in the selection process was limited to situations in which there was an arbitrator vacancy, or some other "mechanical breakdown" in the selection process. Because "[e]ach party to this action [had] named an arbitrator, with no resulting delay" there had been no "lapse," the court ruled. *Id.* at *4.

The court was similarly unimpressed with the Plaintiffs' argument that the panel—as constituted—was a "stacked deck" that violated the Plaintiffs' "constitutional rights to an impartial decisionmaker." *Id.* at *4. It held that such challenges were "procedural" and thus, for an arbitrator to decide, and found that it lacked jurisdiction to resolve such a challenge, at least pre-award:

> Under the FAA, courts have no authority to remove an arbitrator prior to an arbitration award being made …. "*[E]ven where arbitrator bias is at issue*, the FAA does not provide for removal of an arbitrator from service prior to an award, but only for potential vacatur of any award."

Id. at *5.

Avic stands as an important reminder that there are very few circumstances that justify a court's intervention in the pre-award arbitration process. It also serves to remind parties of the care that needs to be taken when drafting dispute-resolution clauses.

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