

REPLACING ARBITRATORS

by

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What happens when an arbitrator on a sitting arbitration panel is no longer there? The judicial decisions which answer the question have created a roadmap for dealing with that unusual situation. The reason for an arbitrator's absence could be illness, death, disqualification, resignation or simply a failure by a party to designate its arbitrator in a timely manner. For example, in *Certain Underwriters at Lloyd's, London v. Argonaut Insurance Co.*,² Argonaut demanded arbitration but didn't designate its arbitrator within the time required. Underwriters at Lloyd's designated an arbitrator for Argonaut, and petitioned the court to confirm the appointment of the two arbitrators Lloyd's had selected. Both parties moved for summary judgment. The district court granted summary judgment in favor of Underwriters and the Sixth Circuit affirmed, noting "when the parties do not otherwise determine by contract, deadlines included in arbitration agreements under the Convention³ will admit of no exceptions."⁴

The general rule is that when an arbitrator dies before the rendering of an award, a new panel must be selected and the arbitration commenced anew.⁵ When an arbitrator resigns because of illness, however, a different rule will apply. In *Insurance Company of North America v. Public Service Mutual Insurance Co.*,⁶ the arbitrator appointed by the Insurance Company of

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² 444 F.Supp.2d 909 (N.D. Ill. 2006), *aff'd.*, 500 F.3d 571 (6th Cir. 2007). Later case, *Certain Underwriters at Lloyd's London v. Argonaut Insurance Co.*, No. 04 C 5852, N.D. Ill., Eastern Div., September 24, 2009, 2009 U.S. Dist. LEXIS 87827.

³ United Nations' Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"), codified at 9 U.S.C. §§ 201-207.

⁴ *Id.*, 500 F. 3d 571, 582. See also *Universal Reinsurance Corp. v. Allstate Ins. Co.*, 16 F.3d 125 (7th Cir. 1994).

⁵ See *Marine Products Export Corp. v. M.T. Globe Galaxy*, 977 F.2d 66 (2d Cir. 1992); *cf.*, *Trade & Transport, Inc. v. Natural Petroleum Charterers, Inc.*, 931 F.2d 191 (2d Cir. 1991).

⁶ 609 F.3d 122 (2d Cir. 2010).

North America (“INA”) resigned because of illness before a final award was rendered, but after the panel had granted a motion for summary judgment in favor of Public Service Mutual Insurance Company (“PSMIC”) which rejected INA’s defense. INA moved for reconsideration.

While INA’s motion for reconsideration was pending, the remaining two panel members directed INA to appoint a replacement arbitrator, but INA suggested that a new panel would have to be appointed to hear the dispute *de novo*. PSMIC indicated it was unwilling to commence a new arbitration and wanted either INA or the court to appoint a replacement for the ill arbitrator. When the parties were unable to reach an agreement, INA filed a petition in the U.S. District Court for the Southern District of New York seeking a stay of the arbitration, an order disqualifying the panel, and an order compelling the arbitration to start over with a new panel. PSMIC filed a cross-petition to compel INA to proceed before the two remaining panel members and for the court to appoint a substitute for the arbitrator who had resigned.

The district court, following the general rule in death cases, agreed with INA and ordered that a new panel be appointed and the arbitration commenced anew. PSMIC appealed, but while the appeal was pending, the health of the arbitrator who had resigned improved sufficiently to permit him to resume his duties as an arbitrator. The district court then exercised its power under 9 U.S.C. § 5⁷ and reappointed the arbitrator who had resigned. When that arbitrator refused the reappointment, the court directed INA to appoint a replacement, which it did.

INA appealed, arguing that the district court abused its discretion because the law in the Second Circuit is that “whenever an arbitrator dies *or resigns* the panel must automatically be reconstituted anew absent ‘special circumstances’”⁸ that were not present. The Second Circuit rejected that view and affirmed the district court, holding that the *Marine Products*⁹ rule requiring the appointment of a new panel when an arbitrator dies does not apply to vacancies

⁷ 9 U.S.C. § 5 provides: If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

⁸ *Id.*, slip op. at *12.

⁹ *Marine Products Export Corp. v. M.T. Globe Galaxy*, 977 F.2d 66 (2d Cir. 1992).

resulting from resignations. The court pointed out that application of the *Marine Products* rule “in that context would create problems that do not arise in the case of vacancies caused by an arbitrator's death -- principally the potential for manipulation by a party that, perceiving itself to be losing the arbitration, could disrupt the arbitration and obtain a new proceeding by pressuring its appointed arbitrator to resign.”¹⁰

When an arbitrator resigns, the arbitration agreement will govern how a replacement arbitrator is to be appointed. Where the arbitration agreement is silent as to how a replacement arbitrator is to be selected, then the court will appoint the replacement.¹¹ When an arbitral forum becomes unavailable¹² or does not exist,¹³ the court will appoint an arbitrator.

Most arbitral organizations have provisions in their rules dealing with arbitrator replacement. For example, Rule R-11(b) of the American Arbitration Association (“AAA”) Commercial Arbitration Rules provides, in pertinent part, “If . . . acceptable arbitrators are unable to act, . . . the AAA shall have the power to make the appointment from among . . . members of the National Roster” In the case of *ad hoc* arbitrations, the best practice would seem to be to make provisions in the arbitration agreement for the replacement of arbitrators should the situation so require.

¹⁰ *Id.*

¹¹ *See In re Salomon Inc. S'holders Derivative Litig.*, 68 F.3d 554, 560 (2d Cir. 1995) (noting power of court to appoint arbitrator where there has been a lapse in filling a vacancy); *AIG Global Trade & Political Risk Ins. Co. v. Odyssey Am. Reinsurance Corp.*, No. 05 Civ. 9152, 2006 U.S. Dist. LEXIS 73258 (S.D.N.Y. Sept. 21, 2006) (appointing replacement umpire where arbitration agreement did not provide for replacement procedure); *The Home Ins. Co. v. Banco de Seguros del Estado*, No. 98 Civ. 6022, 1999 U.S. Dist. LEXIS 22479 (S.D.N.Y. Mar. 29, 1999) (appointing replacement umpire after original umpire retired); *Cae Indus. Ltd. v. Aerospace Holdings Co.*, 741 F. Supp. 388 (S.D.N.Y. 1989) (appointing arbitrator where arbitration agreement required a single arbitrator but provided no method for appointment).

¹² *Khan v. Dell Inc.*, 669 F.3d 350 (3d Cir. 2012); *Adler v. Dell Inc.*, Case No. 08-cv-13170, E.D. Mich., December 3, 2009, 2009 U.S. Dist. LEXIS 112204 at *5 (“As a general rule, when the arbitrator named in the arbitration agreement cannot or will not arbitrate the dispute, the court does not void the arbitration agreement. Instead, it appoints a different arbitrator, as provided in the Federal Arbitration Act; . . .”); cf., *Carideo v. Dell, Inc.*, No. C06-1772JLR, W.D. Wash., October 26, 2009, 2009 U.S. Dist. LEXIS 104600, 2009 WL 3485933.

¹³ *See GAR Energy and Associates, Inc. v. Ivanhoe Energy, Inc.*, Case No.: 1:11-CV-00907 AWI JLT, E.D. Cal., December 27, 2011, 2011 U.S. Dist. LEXIS 148424.