

## ARBITRATOR DEATH OR RESIGNATION:

### REPLACE THE ARBITRATOR OR THE WHOLE PANEL (REVISITED)?

by

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#### I. Introduction

On occasion, a member of an arbitration panel dies or resigns for health or other reasons. Seldom do arbitration clauses in reinsurance contracts provide for such a contingency. This situation raises a number of questions. If the resigning arbitrator is a party arbitrator, does the party that appointed him or her simply appoint a new arbitrator and go forward or must the arbitration start over with an entire new panel? Likewise, if it the resigning arbitrator is the umpire, do the party arbitrators simply appoint a new umpire or must the arbitration start over? Obviously, there are time and cost issues with a new panel. Likewise, there are tactical issues *i.e.* one party perceives that it is losing the early skirmishes and wants a new umpire.

The purpose of this article is to review selected case law on point in an effort to synthesize a rule as to when an arbitrator can simply be replaced and when the parties must start over with a new panel.

#### II. Case Law Requiring the Arbitration to Start Over with a New Panel

In *Marine Products Export Corp. v. M.T. Globe Galaxy*, 977 F.2d 66 (2<sup>nd</sup> Cir. 1992), a party arbitrator **died** after the panel issued several interlocutory discovery orders but prior to any further hearings or ruling on the merits. That party sought to have the arbitration begun anew with a new panel. The court stated that “the general rule is that where one member of a three-person panel dies before the rendering of an award and the arbitration agreement does not anticipate that circumstance, the arbitration must commence anew with a full panel.”<sup>1</sup> The court went on to state that the general rule should apply where:

[T]he original panel had not rendered a final decision on any question prior to the death of a member of the panel. Nor were there any other circumstances indicating that there should be a deviation from the general rule. As the vacancy here occurred *in medias res* without any agreement by the parties as to the consequences of the vacancy and

without any special circumstances, the district court properly ruled in its 1987 and 1992 Decisions that the general rule was applicable.<sup>2</sup>

In *Pemex – Refinacion v. Tbilisi Shipping Co.*, 2004 U.S. Dist. Lexis 17478 (S.D.N.Y.), a party arbitrator **died** after a ten year proceeding, sixteen separate hearings and the final hearing on the merits but before post-hearing briefing was complete and before the deliberations of the panel. The court followed the general rule but provided an elaboration on the “special circumstances” that would support the placement of an arbitrator who **died**:

“Special circumstances” meriting the appointment of a replacement arbitrator typically include instances where vacancies have occurred during the very early stages of arbitration or where a panel has rendered a final decision with respect to only some of the issues raised in the arbitration.<sup>3</sup>

Courts have rejected the general rule and appointed replacement arbitrators after a partial final decision was rendered, but always before proceedings had commenced with respect to the unresolved issues. Given the crucial role that arbitrators play, from assessing the credibility of witnesses to serving as advocates for their respective appointees, it makes sense that it is only in instances where a panel is completely without power to revisit an issue that the Court has approved the appointment of a replacement . . . . Therefore, this is the exact type of case that falls under the “general rule” that [an] arbitration must begin afresh upon the death or incapacitation of a panel member.<sup>4</sup>

The umpire issued a unilateral award after a hearing and Aloha’s party arbitrator subsequently resigned from the panel in *Assoc. of Flights Attendants v. Aloha Airlines, Inc.*, 158 F.Supp.2d 1200 (D. Ha. 2001). Aloha attempted to substitute a party arbitrator who sought to concur with the umpire’s unilateral award. The court found that the unilateral award was improper and that a substitute arbitrator who had not heard the evidence could not participate in the decision. Thus, the arbitration had to begin anew.

In *Cia de Navegacion Omsil v. Hugo Neu Corp.*, 359 F.Supp. 898 (S.D.N.Y. 1973) the party arbitrator for the respondent **died** after the hearing on the merits but before deliberations. The petitioner sought a order to the effect that respondent should appoint a replacement arbitrator who could get up to speed by reading the record and then participating in the deliberations. The respondent sought to begin anew. The court ruled in favor of a new arbitration:

[The respondent’s party arbitrator’s] questions to witnesses and counsel, his comments along the way, his observations during interim deliberations many have subtle and possibly decisive impacts upon the end result. Whatever advantages there were, or might have been, in such representation have now been irretrievably lost to respondent. The two remaining arbitrators, petitioner’s and the neutral, have worked together and been exposed to each other’s influence. The results of that may have been good, bad, or nil for respondent. But respondent is unable (as is the court) to

know and is unwilling to risk the unknown. It is not fair to impose the risk, which respondent never agreed to accept, by judicial command.<sup>5</sup>

### III. Case Law Not Requiring a New Panel

While not overruling the second circuit “general rule” stated in the *Marine Products* decision, *supra*, this rule was limited to the death of an arbitrator in *Ins. Co. of North America v. Public Service Mutual Ins. Co.*, 609 F.3d 122 (2<sup>nd</sup> Cir. 2010). In this case a party arbitrator resigned after learning that he had cancer and feared that the treatment therefore would render him unable to fulfill his duties. After an extended effort to complete the panel, counsel learned that the arbitrator who had resigned had recovered his health and was accepting new appointments. At issue was the ability to reappoint the original arbitrator or replace the entire panel. The court allowed the reappointment of the original arbitrator distinguishing *Marine Products* as follows.

However, applying a broad rule requiring that a new panel be convened to vacancies occasioned by resignations would open the door to significant potential for manipulation. “[A] party receiving unfavorable interim rulings would have an incentive to invite the member he designated to resign to forestall an anticipated ultimate defeat, or even . . . after securing favorable rulings that are confirmable, to precipitate an arbitrator’s resignation in the hope of avoiding confirmation of a later favorable award.” While no one contends that the instant case involved such manipulation, it would be tempting for a party to pressure its party-arbitrator, implicitly or explicitly, to resign following an adverse ruling so that it could get another shot at winning before a new panel. The concern is not present in the case or an arbitrator’s death. The combination of the risk of manipulation and the inevitable waste in duplicating proceedings that is already present when the *Marine Products* rule is applied to vacancies resulting from death . . . .

We acknowledge the potential unfairness to a party where the substitute arbitrator is appointed and tasked with deciding issues on which the original panel members have had previous argument and discussion. However, given the potential for manipulation and the waste inevitably occasioned by convening a new arbitral panel, we find that this potential unfairness is not sufficiently strong to require application of the *Marine Products* rule to resignations.<sup>6</sup>

Even applying the second circuit “general rule” to an arbitrator resignation, there are a number of exceptions. One is *Zeiler v. Deitsch*, 500 F.3d 157 (2<sup>nd</sup> Cir. 2007) which involved an extended and complex arbitration before a Jewish religious tribunal consisting of three rabbis. After four years, and a number of orders by the panel, a 2003 Agreement was entered into by the parties detailing the obligations of the parties and naming the three rabbis to the arbitration panel, which would resolve any further disputes under such agreement. Subsequently, a tax dispute arose and was referred to the panel and shortly thereafter, a party arbitrator resigned. The party whose arbitrator resigned asked for

a new panel and declined to appear before the remaining two members of the original panel. The two-member panel rendered a decision against that party.

Initially, the *Zeiler* court reached the somewhat surprising conclusion that the 2003 Agreement did not require all disputes be heard by a three-member panel including a party arbitrator for each side:

Since the 2003 Agreement was executed after the three panel members had been identified, the more natural reading of the 2003 Agreement is that the three members were named only to reflect the choices previously made by the parties and their designated members, not to state a limitation on the authority of the panel to continue in the unexpected event that one of the members might resign.<sup>7</sup>

The court held that the panel continuing with two members, subject to an opportunity of the relevant party to appoint a replacement arbitrator, was appropriate to avoid wasted resources and a manipulation of the process:

The panel had already decided the substantive issues between the two sides. All that remained was determination of the amount of tax liabilities in light of the prior determination of the allocation of those liabilities. To read the agreement to require the proceeding to be halted upon the resignation of one member at that late stage of the proceedings would enable bad faith manipulation of the arbitration process; in an ongoing and complex arbitration, a party receiving unfavorable interim rulings would have an incentive to invite the member he designated to resign to forestall an anticipated ultimate defeat, or even, as in the pending case, after securing favorable rulings that are confirmable, to precipitate an arbitrator's resignation in the hope of avoiding confirmation of a later unfavorable award. The agreement should not be read to countenance the waste of resources required to redo a protracted arbitration proceeding in the event that one member of the panel died or otherwise became unable to serve during the proceeding. A more sensible reading of the agreement makes the continuation of the remaining members of the panel (with an opportunity for appointment of a replacement) the default position, subject to an explicit agreement of the parties that only a panel with three originally designated members still serving is authorized to render an award, albeit, by majority vote.<sup>8</sup>

Another second circuit exception to the "general rule" is represented by *Trade & Transport, Inc. v. Natural Petroleum Charters Inc.*, 931 F.2d 191 (2<sup>nd</sup> Cir. 1991). The parties agreed to bifurcate the arbitration as to liability and damages and the panel made a final ruling on liability. Before any further proceedings, a party arbitrator **died** and the lower court allowed that party to appoint a replacement rather than starting the arbitration anew. The second circuit upheld the replacement on the bases: (1) § 5 of the Federal Arbitration Act allows the court to fill a vacancy on the panel which necessarily includes a vacancy on a pending panel; and (2) the relevant arbitration clause was silent on the means of replacing members of the panel.

A collective bargaining dispute provided the factual background for *Success Villages Apartments, Inc. v. Amalgamated Local 376*, 357 F.Supp.2d 446 (D.Ct. 2005). A party arbitrator **died** after the hearing and after the panel's decision had been agreed upon but before the award was delivered. The court upheld the award signed by the two remaining arbitrators noting that the general rule in the second circuit was not applicable: "If, however, the death of one of the arbitrators takes place after the close of the hearings and after all the arbitrators have consulted with each other, but before an award has been made, the remaining arbitrators in all probability retain the authority to make a valid award."<sup>9</sup>

The eighth circuit considered this issue *In re Arbitration between Dow Corning Corp. v. Safety National Cas. Corp.*, 335 F.3d 742 (8<sup>th</sup> Cir. 2003). This involved an insurance arbitration between Safety National and its insured, Dow Corning. A week after the panel was appointed, Safety National's party arbitrator resigned due to a conflict and the remaining members of the panel directed Safety National to appoint a substitute, which the lower court upheld. The circuit court upheld the lower court and characterized the fact situation as distinguishing this case from the "so-called general rule" for the following reasons:

First, because the substitution occurred before the substantive arbitration hearing, the substitute party-arbitrator participated fully in the hearing, the panel's deliberations, and the preparation of the panel's decision. Second, the remaining arbitrators made a reasonable decision to allow Safety to choose its substitute party-arbitrator, the method of selecting party-arbitrators prescribed in the agreement to arbitrate. Third, as Dow Corning well knew, starting over would have deprived Safety of its "win" in the umpire selection process. . . .

Finally, and most importantly, Dow Corning acknowledges that a vacancy in an arbitration panel may be filled in the manner prescribed in the agreement to arbitrate. Here, the remaining arbitrators concluded that the agreement authorized them to proceed with a substitute party-arbitrator. In general, reviewing courts leave procedural issues for the arbitrators to decide.<sup>10</sup>

In *National American Ins. Co. v. Transamerica Occidental Life Ins. Co.*, 328 F.3d 462 (8<sup>th</sup> Cir. 2003), the reinsurer lost several discovery disputes before its party arbitrator resigned for health reasons. Rather than appoint a replacement, the reinsurer sought to begin anew with a new panel. The lower court directed the reinsurer to appoint a replacement arbitrator. The circuit court upheld the lower court, declining to adopt the "general rule" in the second circuit. Citing to *Trade & Transport, Inc. v. Natural Petroleum Charters, Inc.*, *supra*, the circuit court ruled that under § 5 of the Federal Arbitration Act, the district court had the authority to fill a vacancy on a pending panel.<sup>11</sup>

The second circuit "general rule" was again rejected in *Wellpoint, Inc. v. John Hancock Life Ins. Co.*, 576 F3d 643 (7<sup>th</sup> Cir. 2009). Wellpoint asked its party arbitrator to resign when it hired a new law firm to handle the arbitration. When the arbitrator did so, there were disputes over the method of selecting a replacement. Hancock's party arbitrator suggested a method of selecting a replacement, which was used to complete the panel. When the panel rulings were not sufficiently favorable to Hancock, it sought to vacate the award on the basis that the panel exceeded its authority in accepting the

resignation of the original arbitrator and proceeding to a conclusion with the replacement. Noting the irony in Hancock's position, the court ruled in favor of replacement:

Hancock asserts that because the arbitration agreement does not expressly address the process for replacing a panel member, the entire arbitration process must begin anew. This, it maintains, is the general rule whenever a vacancy is created before a full and final award has been entered and the arbitration award has not anticipated the precise situation that arose. . . . Hancock contends that because the panel failed to comply with this alleged general rule, the panel's merits award was beyond its power and must be vacated.

We find so no such inflexible and wasteful rule in the law of arbitration.<sup>12</sup>

*Arista Marketing Associates, Inc. v. The Peer Group, Inc.*, 720 A.2d 659 (N.J.Sup.Ct.App.Div. 1998) involved an arbitration pursuant the commercial rules of the AAA. One party attempted to appoint its outside counsel as its party arbitrator but he was disqualified by the court. That party then attempted to have the entire panel dismissed and to start the arbitration anew. The court rejected use of the general rule where one party attempted to appoint an arbitrator with evident partiality.

#### **IV. Analysis and Conclusions**

Even in the second circuit, where the "general rule" of panel replacement originated, it has been limited to the death of a panel member. Even that fact situation has major exceptions for: (1) the power of the court to appoint replacement arbitrators under § 5 of the Federal Arbitration Act; (2) the avoidance of the time and cost of a brand new proceeding; and (3) the avoidance of manipulation of the arbitration process by engineering a resignation to obtain a new panel *i.e.* a new umpire. A growing number of other courts have rejected the "general rule" directly.

Perhaps the better approach is to allow the appointment of a replacement if the replacement is able to participate live in the testimony, arguments and deliberations with respect to dispositive motions that remain at issue as well as the hearing on the merits. This will provide the replacement arbitrator with the nuance of the issues, the credibility of the witnesses and the interaction with counsel and the other panel members that allows the replacement arbitrator to properly fulfill his or her role.

#### **ENDNOTES**

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<sup>1</sup> 977 F.2d 66 at 68 citing a lower court case as well as Annotation, *Effect of vacancy through resignation, withdrawal, or death of one of multiple arbitrators on authority of remaining arbitrators to render award*, 49 A.L.R.2d 900 (1956).

<sup>2</sup> *Id.* (emphasis in the original).

<sup>3</sup> 2002 U.S. Dist. Lexis 174788\*16 (internal citations omitted).

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- <sup>4</sup> 2004 U.S. Dist. Lexis 17478\*19-20 (internal citations omitted).  
<sup>5</sup> 359 F.Supp. 898 at 899.  
<sup>6</sup> 609 F.3d 122, 130 (internal citations omitted).  
<sup>7</sup> 500 F.3d 157 at 166-7.  
<sup>8</sup> *Id.* at 167-8.  
<sup>9</sup> 357 F.Supp.2d at 448.  
<sup>10</sup> 335 F.3d 742 at 749 (internal citations omitted).  
<sup>11</sup> 328 F.3d 462 at 466.  
<sup>12</sup> 576 F.3d 643, 646-7.