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When A Party Arbitrator Has To Quit An Arbitration

Law360, New York (August 07, 2009) -- In arbitration proceedings, most disputes regarding the selection of arbitrators are about the initial selection. But complications may arise even where the parties agreed with the initial selection, such as when the selected arbitrator is forced to retire.

Given that the parties' stated desire, as articulated by the underlying arbitration clause, was to avoid litigation, may a court intervene in replacing the arbitrator?

And if a party's retired arbitrator becomes available again during the pendency of the proceedings, can that party be forced to accept this initially selected arbitrator, even if it is against that party's present interest to do so? According to one recent court decision, the answer to those questions is yes.

Court Intervention in Replacing An Arbitrator

In Insurance Company of North America v. Public Service Mutual Insurance Company, 2009 WL 1873585 (S.D.N.Y. June 30, 2009) (the "INA Decision"), Judge Harold Baer, Jr. was faced with those very questions.

In that case, Insurance Company of North America's ("INA") and Public Service Mutual Insurance Company ("PSMIC") were involved in an arbitration when INA's party-appointed arbitrator, John D. Sullivan ("Sullivan") learned that he had cancer that required extensive and immediate treatment. He immediately resigned from the panel.

The parties disagreed about how to proceed, so they sought relief from the district court. The district court assumed that Sullivan was so sick that it applied the "general rule" in the Second Circuit when a party arbitrator dies in the middle of the arbitration and ordered the arbitration start from the beginning.

Thankfully, Sullivan appeared to recover. Unfortunately for Sullivan, INA (the party that had selected him as an arbitrator) soured on Sullivan's continued participation in the arbitration in his absence.[1]

PSMIC, on the other hand, was waiting with open arms for Sullivan's return, and sought to vacate the previous district court order starting the arbitration proceeding from the beginning.

Like INA, PSMIC's position on Sullivan's return likely had little to do with him, but rather PSMIC wanted the benefit of a ruling Sullivan made before retiring from the panel, and argued that with his return (for which they now advocated), the parties should be placed in the positions they were in when Sullivan left the panel.

This left INA in the awkward position of trying to keep their appointed arbitrator, and a cancer survivor at that, off the arbitration panel.

To reinstate Sullivan to the panel, the district court had to vacate its previous order, which was no small task; however, the district court held that there were sufficient grounds to vacate the previous decision under Federal Rule of Civil Procedure 60(b)(2), based on "newly discovered evidence."

The new "evidence," of course, was the surprisingly speedy recovery of Sullivan. PSMIC then sought to have Sullivan appointed to the panel, relying on section 5 of the Federal Arbitration Act, which sets forth a court's authority to appoint an arbitrator when the parties fail to select an arbitrator:

"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." 9 U.S.C. § 5.

The court held that while the agreement provided a method to select an arbitrator, there was no method provided in the arbitration agreement to fill a vacancy created by the death or resignation of an arbitrator.

This silence, the court held, was sufficient reason for the court's exercise of jurisdiction, despite the fact that the court agreed that no party had "fail[ed] to avail itself" under 9 U.S.C. § 5, nor had the party's attempt to seek the court's intervention resulted in a "lapse in naming an arbitrator."

The court reinstated Sullivan to the panel and directed that the parties continue the arbitration from where they left off, when Sullivan retired from the panel.

Avoiding Court Intervention in Arbitrations

Advocates of arbitration assert that arbitrations are a faster and less expensive method of resolving disputes. Court interference almost always causes delay, an increase in costs and results that may be unpredictable.

It is possible, as it was in the INA decision, for a court to have almost plenary power to intervene in an arbitration in the absence of a controlling provision of an agreement.

And furthermore, some circuits are split as to what should happen when an arbitrator retires before a decision has been rendered, creating more unpredictability from court intervention.

Compare Marine Products v. MT Globe Galaxy, 977 F.2d 66 (2d Cir. 1992) (applying the "general rule" in the Second Circuit that restarts an arbitration from the beginning when a party-arbitrator dies in the middle of arbitration) and National American Ins. Co. v. Transamerica Occidental Life Ins. Co., 328 F.3d 462 (8th Cir. 2003) (affirming a district court's appointment of an arbitrator for the remainder of the arbitration pursuant to 9 U.S.C. § 5 when one member resigned).

One way to avoid a court's interference is to provide for an arbitration to be governed by the rules of a particular arbitration agency, like the American Arbitration Association ("AAA") or ARIAS.

The Commercial Arbitration Rules and Mediation Procedures for the AAA provides for the appointment of a replacement arbitrator (or "mediator") "[i]f any mediator shall become unwilling or unable to serve."

In such circumstances, the AAA appoints a replacement mediator in the same arbitrator in the same manner as the original appointment is made.

But see Evanston Ins. Co. v. Kansa Gen. Int'l Ins. Co., No. 94 C 4957, 1995 WL 23063 (N.D. Ill. Jan. 13, 1995) (denying challenge to replacement appointment of arbitrator despite the fact that the parties agreed that the American Arbitration Act rules would apply because vacancy provision of the American Arbitration Act rules not triggered).

Similarly, under the ARIAS Arbitration Rules, "[i]f after appointment any arbitrator or umpire resigns, dies, is unable to act or is otherwise removed from the reference ARIAS will, in default of reappointment within 14 days, upon request by either party or by a remaining member of the tribunal, appoint a replacement arbitrator or umpire."

Another way to avoid the fate of the parties in the INA decision is to agree in advance to what happens in the event that one arbitrator is forced to retire from the arbitration due to death or incapacity.

A court will not intervene unless one party simply refuses to comply with the arbitration agreement, in which case, a court will simply enforce the agreement. Argonaut Midwest Ins. Co. v. Gen Reins. Corp., No. 96 C 6437, 1998 WL 474142 (N.D. Ill. Aug. 6, 1998) ("[o]f course, if the parties had specified in the agreement that they intended such a result, the court would be bound to enforce their contract.").

If the agreement is not governed by an agency's rules and governed merely by the agreement between the parties, the parties should do more than account for a retiring arbitrator, but also account for circumstances when an arbitrator's "status" changes mid-arbitration. See id.

In Argonaut, the arbitration agreement between the parties provided that the parties' arbitrators were required to be active officials of insurance or reinsurance companies. After the parties' arbitrators were selected, one of the arbitrators retired, and ceased to be an active official.

The other party moved to have him replaced and sought relief in court when the party that selected him refused to do so. The court held that the arbitration would proceed with the selected arbitrators despite the fact that his status had changed mid-arbitration.

Avoiding the uncertainty in arbitration is paramount in keeping the parties out of court. Careful drafting of insurance and reinsurance agreements can avoid this uncertainty and prevent the imposition of the courts in the arbitration process.

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[1] In fairness, INA did not change their (presumably) favorable opinion of Sullivan, but rather sought to avoid an adverse ruling by the panel by enforcing the district court's previous order to start over again.