Arbitrators in 3-D: Death, Disability and Disqualification

By Michael Lampert

Like taxes for the population as a whole, death, disability and disqualification of arbitrators after hearings have begun will inevitably happen. The purpose of this article is to discuss what the consequences are and what planning devices are available to mitigate the effects of the 3-Ds. First, we look at the problem, then look at current rule responses and finally turn to precautionary steps including insurance.

The Problem

The Global Arbitration Review (GAR), on 10 October 2018, reported on the death of the Chilean arbitrator, Fancisco Orrego Vicuña (died 2 October 2018). The article noted that his death was delaying intra-EU claims in *Fynerdale Holdings v. Czech Republic*. The dispute about his replacement as a wing surfaced in the Permanent Court of Arbitration where there were public filings about his replacement. GAR further reported that at his death he still sat on two other intra-EU claims. It also reported he had resigned from several investor state arbitrations due what turned out to be his last illness.

There are other, less reported, cases of arbitrators dying while sitting. In one case known to the author, both the majority and the dissent had been completely finalized, cite-checked, approved by tribunal members and the institution.They were circulating for execution; two signatures already had been collected when the wing died over the weekend he was expected to sign. There was email traffic expressly stating that he had approved the relevant document and was prepared to sign it. The parties were told these facts but not which of the two documents he had been about to sign; they were asked whether they would approve the institution signing for him and appending the relevant email as proof of his intention. They declined and asked for a replacement to be appointed brought up to speed, deliberate and participate in the award process. *Cf. Yovino v. Rizo*, 586 U.S. ____ (2019) (Ninth Circuit Judge cannot posthumously make the majority in an en banc).

More frequent than death is disability of an arbitrator requiring withdrawal, or disqualification.

If any of these happen before the preliminary conference, while there is a disruption most would agree it is minimal. But from that point on, the disruptive effect of the need to change an arbitrator due to any of the 3-Ds or any other reason, grows. The arbitration cited above, where awards and dissent were nearly ready to release, meant the parties risked substantial expense in counsel and tribunal fees, as well as delay in finding hearing dates and disruption for witnesses and party representatives having to appear again in person in the rehearing process. Fortunately the substitute wing was comfortable (with some amendment) agreeing to one of the prepared documents after a review of the documentary record (including writings reflecting testimony). Expense but not disruption was the effect.

Current Rule Responses

The UNCITRAL Rules provide:

> **REPLACEMENT OF AN ARBITRATOR Article 13**
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> 1. In the event of the death or resignation of an arbitrator during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure provided for in articles 6 to 9 that was applicable to the appointment or choice of the arbitrator being replaced.
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> 2. In the event that an arbitrator fails to act or in the event of the de jure or de facto impossibility of his performing his functions, the procedure in respect of the challenge and replacement of an arbitrator as provided in the preceding articles shall apply.
>
> REPETITION OF HEARINGS IN THE EVENT OF THE REPLACEMENT OF AN ARBITRATOR Article 14
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> If under articles 11 to 13 the sole or presiding arbitrator is replaced, any hearings held previously shall be repeated; if any other arbitrator is replaced, such prior hearings may be repeated at the discretion of the arbitral tribunal.

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The rules of various arbitral organizations provide similar but not identical procedures for replacement and on whether a do over is required. *See*, e.g., ICDR Article 15 (no distinction between chair and wings; remaining two decide how to proceed), AAA Commercial R-20 (similar, but if parties agree how to proceed that governs), CPR Administered International 7.9-7.12 (for successor chair or sole arbitrator that person decides need to repeat; otherwise tribunal decides) (its other rule sets are similar), JAMS International Articles 11 and 12 (JAMS decides procedure, after consultation), ICC Article 15 (ICC Court always decides replacement procedure, and after closure of proceedings how to proceed; until closure tribunal decides procedure), LCIA Article 11-12 (seems to address refusal, but not 3-Ds), SIAC Rules 17 -18 (largely UNCITRAL).

The AAA and perhaps other organizations impose on each arbitrator a duty to report to the organization when any arbitrator—including themselves—shows signs of being unfit. Medical or other problems that prevent an arbitrator from hearing evidence or deliberating need to be reported. AAA's *Standards and Responsibilities*, in its second main point provides:

> The AAA/ICDR requires arbitrators and mediators to be fit to engage in cases…. Arbitrators and mediators must advise AAA/ICDR of any personal, physical, or mental condition that may impair their ability to fully execute their responsibilities during all phases of a case. In addition, this responsibility extends to any such condition an arbitrator or mediator observes in another AAA/ICDR arbitrator or mediator or co-panelist…

Occasionally, where there has been an emergency arbitrator ruling on an application parties have agreed to have that person fill a vacancy on the panel. On the one hand that person is somewhat familiar with the matter, on the other they may have expressed a view of that merits based on the expedited procedure before them that worries one of the parties (although not inevitably; sometimes the emergency can be dealt with based on simply concluding that preservation matters, whatever the merits).

Precautionary Steps

While parties may consider age and health issues in their appointment absent strictures imposed by antidiscrimination law, there are limits on the parties' ability to implement them against an arbitrator selected by the administrating organization or other parties.GAR reports (15 October 2018) that the ICC rejected a challenge based on age (76) of a chair it appointed.

Another approach is what is sometimes called "spoiled costs insurance" or more formally "Formal Proceedings Rehearing Insurance." While the precise terms of policies such as these are subject to individual negotiation, in general they provide indemnity for the cost of a "do over" because of a covered event.

While these policies are mainly used in litigation in the High Court of England and Wales, they cover arbitrations.The standard preprinted form pays if an "insured person" can't produce a "decision" in a "proceeding" for one of three covered reasons. Section 3.2 includes an "award" in the definition of a decision. Section 3.5 includes "arbitration" in the definition of "proceeding." The three covered reasons are: (1) death, (2) disablement by accident or illness, or (3) legal disqualification.

There are 11 exclusions. While some are expected (radioactive or chemical attacks; inadequate disclosure of risks knows or that should be known by reasonable inquiry) some seem odd in light of the purpose. Pregnancy, suicide, drug abuse, alcoholism, and hazardous activities fit into this category.

As a rough estimate, if the policy is confidential (the "insured life" is not subject to a medical examination) the policy is about seven times more than that.

While not entirely clear, these policies seem not to run afoul of the usual prohibition of insuring the life of another absent an insurable interest (allowing such insurance would create in the beneficiary an economic interest in the insured's death). For a recent review and application of this principle by the Supreme Court of New Jersey, see *Sun Life Assurance Company of Canada v. Wells Fargo Bank, N.A.*, (June 4, 2019) https://njcourts.gov/attorneys/assets/opinions/supreme/a_49_17.pdf?c=hgb . Rather, Formal Proceedings Rehearing Insurance seems to be seen as a policy of indemnity- compensating an out of pocket loss caused by an insured event-not life insurance.

The websites of two English insurance brokers—Gallagher and The Judge—offer many alternatives for these and other legal risk policies.There may well be other brokers, but this is a specialized and limited market. One underwriter reported writing one or two policies in this area a year.

Such policies are largely unknown in U.S. litigation and arbitration. Perhaps because juries and alternates minimize the risk, or perhaps because some states do regard it as illegal insurance on the life of another. In any event, these policies are available in international arbitration and certainly those with some English connection.

Whether they are worth it is complex. Between written witness statements, in many cases a sound recording or transcript of hearings including cross examination and some of the alternatives and the organizational rules above, perhaps the cost of a rehearing due to replacement is a risk the parties will bear. But in some complex and lengthy cases, perhaps it should be underwritten by another. In any event, the question of risk tolerance should be expressly considered.