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ДОКУМЕНТ

ИЗ ПРАКТИКИ ТРЕТЕЙСКИХ СУДОВ

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The Death, Disability or Disqualification of an Arbitrator

The death, disability or disqualification of an arbitrator can have a significant economic and procedural effect on the conduct of an arbitration, particularly where it occurs after the hearings have begun or have been completed. As Professor Gary Born has noted, the replacement of an arbitrator during the arbitral proceedings gives rise to questions about the conduct of the arbitration, and in particular, whether the arbitral process must be partially or wholly repeated[2]. This can be a matter of substantial importance, both in terms of expense and delay and to the course of the tribunal's deliberations. This article discusses what some of the consequences of the death, disability or disqualification of an arbitrator during an arbitration are, and what planning devices are available to mitigate their effects.

The Problem

In a case reported in Global Arbitration Review (GAR)[3] the death of Francisco Orrego Vicula, a Chilean arbitrator who was a party-appointed arbitrator in a tribunal which was to hear inter-EU claims in the case of Fynerdale Holdings v. Czech Republic, delayed the hearing of those claims, and a dispute about his replacement surfaced in public filings in the Permanent Court of Arbitration. Apparently, at the time of his death he was also sitting on two other intra-EU claims, and he had recently resigned from several other investor-state arbitrations just before his death.

In an unreported ICC case, where the final award and a dissent had been completely finalized, cite-checked and approved by the tribunal members and the arbitral institution, but had not yet been signed, one of the party-appointed arbitrators died on the weekend before he was scheduled to sign. There was e-mail traffic expressly stating that he had approved the relevant document as was prepared to sign it. The parties were told these facts but not which of the two documents he had been prepared to sign. They were asked whether they would approve the arbitral institution signing for him

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[2] *Born G.B.* Consequences of Removal and Replacement of Arbitrator, in International Commercial Arbitration. 2th ed. Kluwer Law International, 2014. Ch. 12. Sec. 12.06(J). P. 1707–1724.

[3] Global Arbitration Review for 10 October 2018.

and appending the relevant e-mail as proof of his intention. However, the parties declined to approve this approach and asked the institution to replace the deceased arbitrator, giving rise to the risk of 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.

If the death, disability or disqualification of an arbitrator occurs before the case management conference, the disruption is minimal, but where it occurs later in the process, particularly if it occurs during the hearing or after the hearing has been completed, the disruptive effect is magnified. In the second case referred to above, where the award and dissent were nearly ready, the consequences of replacing the deceased arbitrator could have been very costly both in terms of expense and delay. Fortunately, the new arbitrator appointed in that case was comfortable (with some amendment) to agree to sign one of the prepared documents after reviewing the documentary record, including writings reflecting oral testimony, and therefore in that case expense, but not disruption, was the effect.

Current Rule Responses

Article 15 of the 2010 UNCITRAL Rules provides that, where "an arbitrator is replaced, the proceedings shall resume at the stage where the arbitrator who was replaced ceased to perform his or her functions, unless the tribunal decides otherwise"[4]. There are similar rules adopted by various arbitral institutions. For example, the International Arbitration Rules of the ICDR provide that if an arbitrator resigns, is incapable of performing the duties of an arbitrator, or is removed for any reason and the office becomes vacant, a substitute arbitrator shall be appointed unless the parties otherwise agree, and that, unless the parties otherwise agree, the arbitral tribunal shall determine at its sole discretion whether all or part of the case shall be repeated[5]. Similarly, the ICC 2017 Arbitration Rules permit the arbitral tribunal to decide if and to what extent prior proceedings shall be repeated before the reconstituted tribunal[6]. The LCIA Arbitration Rules (2014) approach this somewhat differently by providing that if an arbitrator is to be replaced for any reason, the LCIA Court may determine whether or not to follow the original nominating process for such arbitral appointment. The LCIA Arbitration Rules are silent on the authority of the reconstituted arbitral tribunal to order a repeat of any part of the proceedings, but they give wide discretion to the tribunal regarding the conduct of the proceedings as a whole[7].

Professor Born notes that the process of rehearing the evidence and submissions, being costly and time-consuming, contradicts the basic purposes of the arbitral process as a cost effective way of resolving disputes. Therefore, he argues that a rehearing should be ordered only when it is required as a matter of procedural fairness[8]. For example, it may be necessary to repeat portions of the proceedings where witness credibility is important or where the new member of the arbitral tribunal has important questions that he or she would have raised during the proceedings and that cannot otherwise be addressed[9].

Precautionary Steps

There are several ways in which parties can minimize the effect of a delay in the proceedings resulting from the death, disability or disqualification of one of the arbitrators during the proceedings. One interesting way is found in the Rules of Arbitration of International Commercial Disputes of the International Commercial Arbitration Court attached to the Russian Chamber of Commerce and Industry (ICAC),

[4] UNCITRAL Arbitration Rules, as revised in 2010.

[5] Art. 15 of the International Arbitration Rules of the International Centre for Dispute Resolution (ICDR), as amended and effective on June 1, 2014.

[6] Art. 15(4) of the ICC 2017 Arbitration Rules.

[7] Art. 14.5 of the LCIA Arbitration Rules, 2014.

[8] *Born G.B.* Op. cit. P. 1723.

[9] Ibid.

which allow a party to appoint a reserve arbitrator at the time it appoints its party-appointed arbitrator for the tribunal[10]. The reserve arbitrator submits the same forms regarding his or her independence and impartiality and availability to serve if called upon, and this would ensure a more speedy process of replacement in the case the party-appointed arbitrator dies, is disabled or disqualified, because the ICAC Rules require the automatic replacement of the reserve arbitrator in case of the death, disability or disqualification of the party-appointed arbitrator[11]. But if a party fails to appoint a reserve arbitrator, then a new arbitrator will have to be appointed or chosen in accordance with the normal appointment provisions of the ICAC Rules[12]. This special provision allowing for the appointment of a reserve arbitrator appears to be unique and not in the rules of any other arbitration institution.

While parties may consider age and health reasons in evaluating whether to challenge an arbitrator appointed by the other party or by the institution, there are limits imposed by antidiscrimination laws. The GAR report for 15 October 2018 reported that the ICC rejected a challenge based on age (76) of a chair appointed by it.

Another precautionary measure is for the parties, or a party, to purchase insurance to cover the additional costs involved in holding a rehearing. While the precise terms of these policies (formally called Formal Proceedings Rehearing Insurance, and informally "spoiled costs insurance") are subject to individual negotiation, in general they provide indemnity for the cost of a "do-over" because of a covered event, such as the death, disablement by accident or illness or legal disqualification of an arbitrator. These policies are written in a specialized part of the London insurance market offering legal risk policies. They are expensive, particularly where the policy is confidential, i.e., where the insured arbitrator is not subject to a medical examination, and should be considered only in large complex cases which are likely to go on for years.

Another precautionary step that should be taken by the parties during an arbitration is to use written witness statements and a transcript of the hearing, including covering the cross examination of witnesses, which could minimize the need for a rehearing.

Also, if a rehearing is ordered by the reconstituted tribunal, consideration should be given to holding the rehearing as a virtual hearing. This would minimize the costs and delay that would otherwise result if the parties, their counsel and the tribunal had to reconvene in person. Virtual hearings are a very new development arising out of the situation the arbitration world finds itself in during the coronavirus pandemic. While there are concerns about using a virtual hearing in place of an in-person hearing, and the technology is still in the early stages of development, its use in the context of a rehearing because of the death, disability or disqualification of an arbitrator where there has already been an in-person hearing, would appear to be appropriate to minimize the costs and delay that would otherwise result if the parties, their counsel and witnesses and the tribunal had to convene in person to rehear all or a portion of the prior hearing.

[10] Sec. 16 (10) of the 2017 Rules of Arbitration of International Commercial Disputes of the International Commercial Arbitration Court Attached to the Russian Chamber of Commerce and Industry (hereafter – "ICAC Rules"). Presumably, the reserve arbitrator is under the same obligation to keep his or her statement of independence and impartiality current.

[11] Sec. 19 (1) of the ICAC Rules.

[12] Ibid.