

THE PHENOMENON OF THE AILING ARBITRATOR AND ITS CONSEQUENCES

DELOS TagTime

Dr. Stephan Wilske, 25 November 2020

“Some things get better with age. Like me.”

(Keith Richards in Jessica Pallington West,
What Would Keith Richards Do?
Daily Affirmations from a Rock ‘n’ Roll Survivor, 2009, 90)

The Rolling Stones



Content

I. INTRODUCTION	4
II. THE PHENOMENON OF THE AILING ARBITRATOR	8
III. REGULATORY FRAMEWORK DEALING WITH THE AILING ARBITRATOR	13
IV. CONCLUSION AND OUTLOOK	18

I. Introduction

▪ A. Traditional Requirements for Arbitrators

- Impartiality and Independence
- Expertise, Experience and Qualifications
- Nationality

B. Availability

C. Physical and Mental Fitness of Arbitrator

D. Possible Consequences of the Unavailable or Ailing Arbitrator

- Delay
- Possible Legal Recourse against Arbitral Award

II. The Phenomenon of the Ailing Arbitrator

A. The Case of the Allegedly Sleepy and Confused Arbitrator with Serious Hearing Problems

- (Dustex Corporation v. Board of Trustees of the Municipal Electric Utility of the City of Cedar Falls et al; N.D. Iowa June 18, 2014)
- *“[The Chairman] suffered from a ‘significant hearing disability’ that caused him to ignore numerous legal objections and miss witness testimony. Young did not have the ‘cognitive ability’ to recognize the parties or attorneys, confusing their names even after several days of hearings; did not take notes or look at the exhibits in the highly technical case; misstated evidence; and repeatedly appeared to doze off during the proceedings [...].”*

II. The Phenomenon of the Ailing Arbitrator

The Court:

“Dustex makes various arguments asserting that Young did not hear or understand evidence that it presented over the course of the arbitration proceedings, but it provides no legal authority that supports a finding that this behavior deprived it of a fair hearing.”

II. The Phenomenon of the Ailing Arbitrator

B. The Case of the Elderly Arbitrator with an Inoperable Brain Tumor

(Zurich American Insurance Company v. Team Tankers; S.D.N.Y. June 30, 2014)

- Chairman was elected in April 2011
- In 2012 Chairman was diagnosed with an inoperable brain tumor
- On 26 August 2013, the arbitral tribunal issued a 2-1 decision
- In January 2014, Chairman passed away

II. The Phenomenon of the Ailing Arbitrator

The Court:

“Under the FAA, an arbitrator is under no duty to disclose medical conditions. There is no guarantee that an arbitrator is free from conditions which might affect his abilities. Any number of matters – brain tumors, substance issues, marital problems, lack of sleep – might affect an arbitrator’s concentration or faculties. Parties are entitled to unbiased and uncorrupted arbitrators, [...], not perfect arbitrators.”

II. The Phenomenon of the Ailing Arbitrator

C. The Case of the Indian *Ad Hoc* Arbitration Practice

- Backlog of Indian court cases: around 30 million cases
- Backlog of cases in the Indian Supreme Court: around 65,000 cases
- Arbitration in India is mostly done *ad hoc* by ex-judges of High Courts or the Indian Supreme Court.
- Many of these Indian *ad hoc* arbitrators are “*very old, retired judges who are bogged down by the system they were used to*”.
- As a result, problems arising from an ailing arbitrator are very relevant

II. The Phenomenon of the Ailing Arbitrator

D. Other cases

- GAR 3 September 2020, *Veeder's last words on Achmea: „Tribunal chair Veeder signed the award only four days before his death earlier this year.”*
- GAR 15 October 2018, *ICC rejects challenge based on arbitrator's age: „76-year old Swedish arbitrator Sigvard Jarvin has survived an attempt to disqualify him as chair of a billion-dollar construction dispute at the ICC on the grounds that his age meant there was a risk he would fail to finish hearing the case and that the costs of insuring against such an event were prohibitive.”*
- Deborah Cassens Weiss, www.abajournal.com, 5 December 2017, *Judge who allowed law clerk to rule on traffic cases is forced to retire after Alzheimer's diagnosis*
- Deborah Cassens Weiss, www.abajournal.com, 29 May 2019, *Nearing his 100th birthday, former district attorney says it's too late to retire (“...he still continues to work at Wachtell, Lipton, Rosen & Katz”)*
- Deborah Cassens Weiss, www.abajournal.com, 8 December 2016, *Fox Rothschild lawyer dies at 104; he was still practicing law*

II. The Phenomenon of the Ailing Arbitrator

- Tony Mauro, www.law.com, 22 September 2016, „*Supreme Court Justices won't answer questions about their health: „The US Constitution provides no mechanism for the removal of impaired or disabled Justices, other than impeachment. Fifty of the courts 112 Justices through history have died in office.*“
- David J. Garrow, *Mental Decrepitude on the U.S. Supreme Court: The Historical Case of a 28th Amendment*, University of Chicago Law Review, Vol. 67 (2000), 995-1087: „... during his last term, [Minton] became persuaded his mental faculties were declining. He became exceedingly upset when, upon returning to his chambers, he could not remember what had been said only moments before in oral argument.“ (p. 1044)

E. Stereotypes to Be Avoided

- Experience in national courts: many Justices serve beyond age seventy-five without suffering mental or physical decline
- Do not use the age or fragility of an arbitrator to explain why you lost the case

III. Regulatory Framework Dealing with the Ailing Arbitrator

A. National Arbitration Laws

1. UNCITRAL Model Law on International Commercial Arbitration
2. U.S. Federal Arbitration Act
3. English Arbitration Act

B. Institutional Arbitration Rules

1. ICC Arbitration Rules 2021
2. LCIA Arbitration Rules 2020
3. Vienna Rules 2018
4. DELOS Rules of Arbitration 2020

III. Regulatory Framework Dealing with the Ailing Arbitrator

A. National Arbitration Laws

1. UNCITRAL Model Law on International Commercial Arbitration

- No provision to avoid the appointment of an ailing arbitrator
- Possibility to request a court or other authority to decide on the termination of the mandate of an arbitrator, if such arbitrator becomes *de facto* unable to perform his functions (Article 14)

2. U.S. Federal Arbitration Act

- No provision to avoid the appointment of an ailing arbitrator
- No provision to remove an ailing arbitrator

3. English Arbitration Act

- No provision to avoid the appointment of an ailing arbitrator
- Explicit provision to allow the removal of an arbitrator who is “*physically or mentally incapable of conducting the proceedings*”

III. Regulatory Framework Dealing with the Ailing Arbitrator

B. Institutional Arbitration Rules

1. ICC Arbitration Rules 2021

- Article 13(1): Possibility to avoid confirmation of an ailing arbitrator if “*availability and ability to conduct the arbitration in accordance with the Rules*” is an issue
- Article 15(2): Ailing arbitrator may be replaced on the ICC Court’s own initiative when it decides that the arbitrator is prevented *de facto* from fulfilling his or her functions

2. LCIA Arbitration Rules 2020

- Article 5.4: The arbitrator candidate has to declare in writing before an appointment “*whether the candidate is ready, willing and able to devote sufficient time, diligence and industry to ensure the expeditious and efficient conduct of the arbitration.*”
- Article 10.1: “*The LCIA Court may revoke any arbitrator’s appointment upon its own initiative, at the written request of all other members of the Arbitral Tribunal or upon a written challenge by any party if: [...] (ii) that arbitrator falls seriously ill, refuses or becomes unable or unfit to act [...]*”.

III. Regulatory Framework Dealing with the Ailing Arbitrator

3. Vienna Rules 2018

- Article 16(3): Declaration on availability mandatory
- Article 21(2): *“Either party may request that an arbitrator be removed from office if the arbitrator is prevented from performing his duties more than temporarily or otherwise fails to perform his duties, including also the duty to proceed without any undue delay.”*

4. DELOS Rules of Arbitration 2020

- Article 6.6(b): DELOS has discretion whether or not to confirm a nominated arbitrator
- Article 6.10: *“... DELOS may revoke an arbitrator’s appointment if DELOS determines that said arbitrator has become unable or unfit to act.”*

IV. Conclusion and Outlook

- Ailing arbitrator can result in a lose-lose situation for all participants
- Appointment of an “ailing arbitrator” can be an extremely efficient guerrilla tactic to delay and obstruct proceedings

How to avoid both situations:

- Arbitration institutions should use their power consciously in the appointment process and in any removal process
- Parties to an arbitration should outline in their first submission the required qualifications, skills, capabilities and experiences of arbitrators
- Arbitrator candidates should inquire what the case is about and require a full picture of the efforts required prior to accepting challenging arbitrator mandates

It is cheap mocking The Rolling Stones for their age and appearance but...



“Aging and Ailing, yet the Rolling Stones Rock Milan”.

(New Zealand Herald’s July 12, 2006)

“They may have a combined age of 248 years, and a guitarist who has just recovered from head injuries sustained when falling out of a tree, but the Rolling Stones proved that they can still entertain.”



... but the conclusion

“Some things get better with age. Like me.”

... is correct for Keith Richards but, maybe, not for every arbitrator.

Gleiss Lutz

謝謝指教。

**THANK YOU VERY MUCH
FOR YOUR ATTENTION**

