Commentary

Seventh Circuit Creates Novel Rule That Parties May Waive Objection To Appointment Of Substitute Arbitrators Unless They Immediately Apply To A Court For Appointment

By
Matthew D. Slater
and
Nowell D. Bamberger

[Editor's Note: Matthew Slater is a partner in the Washington, D.C. office of Cleary Gottlieb Steen & Hamilton LLP, where he focuses on international arbitration and litigation. He has represented clients in a diverse range of matters, including international arbitration and litigation for sovereigns and sovereign instrumentalities; government regulatory and enforcement matters in the securities, antitrust, banking, professional liability, and environmental areas; constitutional law; commercial and securities matters; and product liability litigation. Mr. Slater is also active in the firm's pro bono practice. Nowell Bamberger is an associate in the Washington, D.C. office of Cleary Gottlieb Steen & Hamilton LLP, where he focuses on corporate and securities litigation and arbitration. *Copyright 2009 by Matthew D. Slater and Nowell D. Bamberger.* *Replies to this commentary are welcome.]*

Introduction

What happens when one member of an arbitration tribunal resigns or becomes unable to serve after the arbitration has commenced? If the arbitration is proceeding under institutional rules, those rules often provide the answer, sometimes allowing the remaining members to proceed alone — particularly where vacancy results from an arbitrator's unwillingness or outright failure to participate in the arbitration[1] — and other times providing a mechanism for a substitute to be appointed.[2]

When the parties are engaged in a strictly *ad hoc* arbitral proceeding, or when the arbitral rules they have adopted do not provide specifically for the situation, the answers are also mixed. The Second Circuit has long held that, unless the tribunal has already reached the point of a final award, the process must start anew.[3] Other courts have recognized that the parties may agree on a procedure for replacement.[4]

But what happens if the parties disagree and the arbitrators decide on a method for selecting a replacement themselves? If the method conflicts with the method for initial selection provided in the parties' arbitration agreement, and one of the parties objects clearly and unmistakably at the time, it has generally been thought that the objecting party may seek to have the final award annulled, or resist its enforcement, in the event of an unfavorable outcome.[5]

In a novel decision, *WellPoint, Inc. v. John Hancock Life Insurance Company*,[6] the United States Court of Appeals for the Seventh Circuit took a dramatically different approach. The court rejected a challenge under Section 10(a)(4) of the Federal Arbitration Act (the "FAA")[7] brought by the John Hancock Life Insurance Company ("John Hancock"), which, having prevailed in the arbitration, was nonetheless dissatisfied with the amount of the award. Although debatable on the facts as found by the lower court, the court of appeals concluded that John Hancock failed to object satisfactorily during the seating of a substitute arbitrator and the conclusion of the arbitration.[8]

It was not surprising, therefore, that the court wrote that the FAA does not "permit a party like [John] Hancock to sit silently by while a substitute arbitrator is selected . . . and then raise an objection to the process only after it has lost."[9]

What was surprising was the Seventh Circuit's stated assumption that even a clear objection would not have sufficed. As the court of appeals construed it, Section 5 of the FAA, which authorizes the district courts to appoint arbitrators in various circumstances, requires that a party dissatisfied with the method of appointment obtain interlocutory review of that appointment, and that failure to so proceed under Section 5 may bar the party from challenging an award under Section 10(a)(4) based on the appointment process. "No 'reservation of right' to challenge the issue on appeal absolves [the party] from this requirement."[10] The court's conclusion is thus at odds with both the district court's conclusion that "[s]ections 5 and 10 of the FAA confer distinct forms of relief,"[11] and with the vast majority of prior decisions from throughout the country, which have recognized that "[a]rbitration awards made by arbitrators not appointed under the method provided in the parties' contract must be vacated."[12]

The WellPoint Setting

WellPoint arose out of an arbitration clause in an agreement by WellPoint Inc. ("WellPoint") to purchase various business operations from John Hancock. A panel of three arbitrators was initially selected in accordance with the arbitration clause, which did not incorporate the rules of any arbitral institution.[13] WellPoint and John Hancock each appointed its own party arbitrator, and, after those two failed to agree, the American Arbitration Association appointed the third. Over the next two years, the parties conducted extensive discovery, with the panel actively involved in resolving discovery disputes and other procedural issues.[14] Then, in mid-2005, John Hancock sent WellPoint a letter increasing its damages demand more than ten-fold, from $42.4 million to $464.6 million. Shortly thereafter, and after obtaining new counsel, WellPoint requested that its party-appointed arbitrator resign from the panel. John Hancock strenuously objected to WellPoint's attempt to remove the arbitrator, but neither WellPoint's resigning arbitrator nor the remaining panel members were sympathetic to the objection.[15]

Over the ensuing weeks there were many communications between the parties and the panel. John Hancock continued to object to WellPoint's demand that its arbitrator resign, but the arbitrator concluded that it would be impractical for him to continue, and the panel accepted his withdrawal.[16] When WellPoint attempted to appoint a new arbitrator in his stead, John Hancock objected to the replacement arbitrator. It argued that either *it* should be permitted to select WellPoint's arbitrator (treating the withdrawal of WellPoint's prior appointment as a failure to timely appoint an arbitrator under the agreement), that the replacement should be selected by the remaining panel members, or that the American Arbitration Association should be asked to fill the vacancy. But John Hancock did not argue that the entire panel should be disbanded and the arbitration should start over.[17]

At a perceived deadlock, John Hancock's party-appointed arbitrator suggested that the Chair propose a venire of three substitute arbitrators from which WellPoint would be permitted to select one. When WellPoint objected, John Hancock's counsel responded "I believe there is case law that will support this."[18] WellPoint eventually acceded, and selected former Nebraska Supreme Court Chief Justice Norman Krivosha as its party-arbitrator from among several proposed by the remaining members of the panel. Although John Hancock renewed its objection to the first arbitrator's removal, it conceded that Justice Krivosha met the requisite qualifications, and the panel accepted his appointment.[19]

Two more years of arbitration proceedings followed in two phases. On April 23, 2007, the panel issued an award directing WellPoint to pay John Hancock almost $30 million in damages, a substantial portion of its original demand, but a mere fraction of the $464.6 million it ultimately sought.

After each phase of the proceeding, WellPoint filed a petition with the district court seeking confirmation of the resulting award under 9 U.S.C. § 9. After the panel's final award was entered, John Hancock, dissatisfied with the damages it had been awarded, filed a cross-petition seeking to vacate the award under Section 10(a)(4), arguing that the panel was without power to render an award because Justice Krivosha was improperly appointed.[20]

The Interaction Of The Relevant Federal Arbitration Act Provisions

Under Section 9 of the FAA, any party to an arbitration may present a final award to a district court for confirmation to convert the award into a judgment. Section 10 also provides that, whether or not the award has been presented for confirmation, a party dissatisfied with the award may apply to a district court to vacate the award. Vacatur is authorized only in certain limited circumstances related to the fundamental fairness of the arbitration, including "where the arbitrators exceeded their powers."[21]

Federal courts have very limited roles under the FAA concerning the conduct of an arbitration *before* an award is entered. The relevant exception here, under Section 5, provides, *inter alia*, that if "there shall be a lapse in the naming of an arbitrator" either party may petition the district court, which "shall designate and appoint an arbitrator . . . who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein."[22]

Until *WellPoint*, no court had held that an application to the district court for appointment of a replacement arbitrator was mandatory. A few prior decisions, however, had hinted that parties would be well-advised to take advantage of Section 5 procedures, rather than participate in arbitration while *concealing* the belief that the panel was not duly constituted, holding that the award would not be vacated when the objection was not made during the arbitration.[23] But, historically, the issue has been seen as stemming from withholding the objection until after the party saw the final award, not the party's failure to avail itself of Section 5 procedures, as the Fifth Circuit was careful to explain in *Brook v. Peak International, Ltd.*,[24] rejecting the position that an objecting party must "exhaust all of the described avenues of objecting to the arbitrator selection process."[25]

Moreover, no court had ever held that failure to avail oneself of Section 5 procedures would prevent a party from challenging the constitution of the panel in a later proceeding under Section 10. As the district court in *WellPoint* explained, "[t]here is nothing in the text of the FAA to indicate that either form of relief is mutually exclusive, or that an action under Section 5 is somehow a prerequisite to post-award relief under Section 10."[26]

The district court in *WellPoint* confirmed the panel's award, finding that, although John Hancock had not waived its objection, the panel's process for selecting a replacement arbitrator comported with "the general intent of the parties . . . that they each be permitted to appoint an arbitrator."[27] In reaching this conclusion, however, the court reviewed the appointment of Justice Krivosha *de novo*, affording no deference to the panel's own conclusion that it was duly constituted.[28]

The Seventh Circuit affirmed, but on radically different grounds from those articulated by the district court. On appeal, John Hancock argued that, where the arbitration agreement does not provide for the appointment of a replacement arbitrator, a vacancy generally necessitates the adjournment and reconstitution of the entire arbitration. In support, it relied in part on the Second Circuit decision in *Marine Products Export Corp. v. M.T. Globe Galaxy*, which held that "where one member of a three-person arbitration 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."[29] As in *WellPoint*, the decision in *Marine Products* concerned a vacancy in the arbitral panel once discovery was well underway, but before the panel rendered a final decision on any issue.[30] Courts in the Second Circuit depart from this "general rule" only in cases where a full and final partial decision has been rendered, or where the arbitration is at the very early stages. As one court explained:

> 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.[31]

The Seventh Circuit rejected this proposition, finding "no such inflexible and wasteful rule in the law of arbitration."[32] Instead, the court ruled "the FAA itself sets forth a rule that applies to the mid-stream loss of an arbitrator."[33] The court's analysis centered on the its stated unwillingness to permit Section 5 and Section 10(a)(4) to serve as alternative means for challenging vacancies under the belief that doing so would "not give full effect to each part of the statute"

— "[i]f the statute were read to permit an objecting party to take a 'wait and see' approach, no one would ever have an incentive to use § 5."[34]

But "wait-and-see" is a false dichotomy — all courts have rejected challenges to awards where the objecting party has sat on its objection until after an unsatisfactory award is rendered. The germane question is whether, in *addition to* making known to the other party and remaining arbitrators that it objects to a non-consensual means of replacement, the objecting party must also immediately apply to the district court under Section 5 or suffer waiver of its objection.[35]

There is a further fundamental infirmity in the Seventh Circuit's decision. At oral argument in *WellPoint*, Judge Diane Wood also drew a distinction between the initial appointment of arbitrators and arbitrator replacement, although no such distinction appears in the court's precedents. In the 1995 case *R.J. O'Brien & Assoc. v. Pipkin*, the Seventh Circuit explained "in order to enforce an arbitration award, the arbitrator must be chosen in conformance with the procedure specified in the parties' agreement to arbitrate."[36] Yet, as Judge Wood conceded, the procedure employed to seat Justice Krivosha was "certainly nothing like the original procedure."[37] Nonetheless, she explained, the court's role in reviewing the arbitrators' decision, in the absence of a request under Section 5, should be quite limited, and "unless there is some sign of bias or impropriety in the panel that actually sat, we should let the arbitration award stand."[38] She thus implied that the panel's jurisdiction to construe the arbitration agreement extends to review of the method by which a replacement arbitrator was selected. As courts around the country have held, however, "arbitrators are without authority where they are not chosen as provided in the parties' arbitration agreement."[39] Courts routinely review their own jurisdiction, but arbitrators' decisions concerning the constitution of the panel generally are given no deference, "because the determination of how they should be selected obviously had to precede their selection."[40]

Thus. under the prevailing doctrine that a panel not constituted in accordance with the arbitration agreement is powerless, it would seem that the parties have at least three options when a member of the panel resigns and the agreement does not provide for a replacement: First, as the Second Circuit recognized in *Marine Products*, the parties could adjourn the arbitration, empanel a new proceeding, and begin anew. Second, the parties could consent to the appointment of a new arbitrator, thereby amending (at least *de facto*) the terms of the consent to arbitration. Third, the parties could resort to the Section 5 procedure, requesting that the district court appoint an arbitrator over the objection of one of the parties.

Before *WellPoint*, however, there was no authority for the proposition that the panel could take upon itself the task of prescribing a new method for appointing a substitute arbitrator. Nor had any court suggested that a party would waive its right to challenge the constitution of the panel, after making a timely objection, by failing to seek interlocutory review. On the contrary, as the Seventh Circuit previously explained in the context of arbitrability, so long as a party "clearly and explicitly reserves the right to object," its "participation in the arbitration does not preclude [it] from challenging the arbitrator's authority in court."[41]

In short, *Wellpoint* is an anomaly.

Wellpoint Creates A Strategic And Practical Dilemma For Parties

The court's analysis in *WellPoint* puts litigants in a difficult strategic and practical position whenever a dispute arises regarding the replacement of an arbitrator. At the threshold, the case law is clear that a party may not simply sit quietly as a substitute is appointed, only to challenge that appointment later under Section 10. Rather, the party must object to the substitution during the arbitration.[42]

WellPoint creates substantial ambiguity regarding what a prudent party should do if its objection is overruled. Prior case law prescribed that, having preserved its objection to the constitution of the panel, the party should participate in the remaining phases of arbitration and then challenge the panel's constitution under Section 10(a)(4) if necessary.[43] *WellPoint* teaches, however, that any further participation in the arbitral proceeding may be construed to waive the opportunity to challenge the award based on improper constitution of the panel. Thus, faced with the imminent appointment of a replacement arbitrator by a means not to its liking, the case seems to impose on a party the obligation to apply to the district court under Section 5.[44]

This puts parties in a quandary. On the one hand, the party can permit the arbitration panel to approve the substitution by a method not prescribed in the arbitration agreement, thereby waiving any objection. On the other hand, the party can request the district court to appoint the replacement. Section 5, however, only authorizes the court to "designate and appoint an arbitrator";[45] it does not appear to vest jurisdiction in the court to vacate an appointment already made. As at least one court has put it, "[t]here is no statutory authority for judicial intervention during the course of arbitration proceedings, with the sole exception of a § 5 petition if there has been 'a lapse . . . in filling a vacancy' in the panel of arbitrators."[46] This suggests that the party may not safely engage in negotiations with the other party and arbitrators to seek to persuade them to follow the parties' agreement (if they had one) or to reach agreement (if they did not), while preserving its objection if unsuccessful.

Forcing immediate resort to court runs counter to the collaborative aspect of arbitration. It also requires judicial involvement that might ultimately have been avoided altogether — if the party aggrieved by the selection is satisfied with the final award, it is unlikely to challenge it, whether on the basis of the selection or any other ground.[47] Importantly, it also risks alienating the remaining members of the tribunal, who typically do not welcome judicial interference. It is unfair to make the party risk inviting the possibility of animosity among those who will decide the merits in order to preserve the party's statutory and contractual rights as to the selection of arbitrators.

The requirement to resort to court also risks inviting strategic resignations, as perhaps this one was.[48] A party dissatisfied with the progress of an arbitration or the performance of its designated arbitrator could be tempted to try to precipitate the arbitrator's resignation, knowing that its adversary would face considerable pressure to compromise on the selection of a replacement, both to avoid the animosity of the panel as just discussed, and to avoid delay in the arbitration which litigation under Section 5 (or reconstituting the panel) would entail.

The *WellPoint* decision raises additional questions concerning international arbitration, whether conducted in the United States or elsewhere. If the seat of the tribunal is in the U.S., then the award may be vacated under FAA standards, and the losing party may also resist enforcement on the grounds provided by the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention").[49] Under *WellPoint*, a party involved in international arbitration in the U.S. could not object to the method used to fill a vacancy on the panel as a basis to set aside the award under Section 10, but rather would need to proceed on an interlocutory basis under Section 5. But under Article V(1)(d) of the New York Convention, a court may decline enforcement (as opposed to vacate) an award when the "composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties." After *WellPoint*, would a court in the Seventh Circuit also deem failure to invoke interlocutory judicial assistance as waiver of the benefit of Article V(1)(d), even when the party made clear and timely objection to the method used to replace an arbitrator? Awards rendered in other countries may also be brought to the U.S. for recognition and enforcement, in which case the New York Convention would again provide the grounds for declining enforcement. Should the answer as to potential waiver of Article V(1)(d) differ depending on whether the award was made in or outside the United States? It would seem strange if it did, considering, as the Second Circuit has explained, that the method of appointment "is more than a trivial matter of form," as indicated by the fact that "failure to comport with an agreement's requirements for how arbitrators are selected is one of only seven grounds for refusing to enforce an arbitral award" under the New York Convention.[50] Until now, courts have not drawn distinctions between the FAA and New York Convention standards concerning arbitrator appointment.[51]

Raising more questions than it answers, the court in *WellPoint* "le[ft] for another day . . . any further speculation about what might justify bypassing § 5."[52] Thus, future decisions will determine whether *WellPoint* is an outlier, constrained in narrow application to its own facts, or the harbinger of a new requirement that parties exhaust interlocutory remedies before challenging arbitral procedure under Section 10 of the FAA. In the meantime, the decision casts a shadow of uncertainty over those engaged in arbitrations based, or subject to enforcement, in the states of the Seventh Circuit.

Endnotes

1. *See* JAMS, JAMS International Arbitration Rules, Art. 11 (Apr. 2005) (permitting the majority of a panel of three or more arbitrators to continue with the arbitration in the event a member is unwilling or persistently fails to participate).

2. *See* American Arbitration Association ("AAA"), Commercial Arbitration Rules and Mediation Procedures, R-19 (June 1, 2009) (setting forth a procedure by which AAA will recognize and fill a vacancy in an arbitration panel); International Chamber of Commerce ("ICC"), Rules of Arbitration, Art. 12 (Jan. 1, 1998) (providing for the appointment of replacement arbitrators by the ICC's International Court of Arbitration upon a vacancy); International Centre for Settlement of Investment Disputes ("ICSID"), Rules of Procedure for Arbitration Proceedings, Rules 7-12 (Apr. 10, 2006) (providing a procedure for filling vacancies on a tribunal, generally by the method by which the arbitrator being replaced was initially appointed); United Nations Commission on International Trade Law ("UNCITRAL"), UNCITRAL Arbitration Rules, Arts. 12-13 (Dec. 15, 1976) (providing for the appointment of replacement arbitrators by the method prescribed for the original arbitrator's appointment).

3. *See, e.g.*, *Marine Prods. Exp. Corp. v. M.T. Globe Galaxy*, 977 F.2d 66, 68 (2d Cir. 1992); *Trade & Transp., Inc. v. Natural Petroleum Charterers Inc.*, 931 F.2d 191, 195 (2d Cir. 1991); *see also Success Village Apartments, Inc. v. Amalgamated Local 376, Int'l Union United Auto. Aerospace & Agric. Implement Workers of Am.,* 357 F. Supp. 2d 446, 448 (D. Conn 2005) (noting the general rule); *In re Ins. Co. of N. Am.*, No. 08 CV 7003 (HB), 2008 WL 5205970 (S.D.N.Y. Dec. 12, 2008) (ordering arbitration to begin anew).

4. *See Pemex-Refinacion v. Tbilisi Shipping Co.*, No. 04 Civ. 02705 (HB), 2004 WL 1944450, at *6 (S.D.N.Y. Aug. 31, 2004) ("parties may waive the right to new arbitration after the death of a panel member, *all* parties, not just the party who lost its representative, must waive their right."); *Conoco Shipping Co. v. Palm Shipping, Inc.*, No. 86 Civ. 4550 (CSH), 1987 WL 6166, at *2 (S.D.N.Y. Jan. 23, 1987) (noting that the defendant "could agree to such a procedure [for replacement of an arbitrator] if it wished; but that willingness is not present, and I do not think it right to compel the procedure").

5. *See, e.g.*, *Brook v. Peak Int'l, Ltd.*, 294 F.3d 668, 673 (5th Cir. 2002) ("where federal courts vacated arbitration awards because of irregularities in the process for selecting arbitrators, the complaining party preserved its objection during the arbitration proceeding."); *Int'l Ass'n of Machinists & Aerospace Workers, Lodge No. 1777 v. Fansteel, Inc.*, 900 F.2d 1005, 1009 (7th Cir. 1990) (holding that an "explicit reservation of rights . . . allows the Company to participate in an arbitration hearing and reserves the Company's right to challenge the arbitrator's authority in a subsequent court proceeding.").

6. 576 F.3d 643 (7th Cir. 2009) (hereinafter *WellPoint II*).

7. 9 U.S.C. §§ 1 *et seq*.

8. *WellPoint Health Networks, Inc. v. John Hancock Life Ins. Co.* (hereinafter "*WellPoint I*"), 547 F. Supp. 2d 899, 916 (N.D. Ill. 2008).

9. *WellPoint II*, 576 F.3d at 647.

10. *Id.* at 648.

11. *WellPoint I*, 547 F. Supp. 2d at 913.

12. *Cargill Rice, Inc. v. Empresa Nicaraguense Dealimentos Basicos*, 25 F.3d 223, 226 (4th Cir. 1994); *see also Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc.*, 403 F.3d 85, 91 (2d Cir. 2005) (refusing to enforce an award on the basis that "appointment of a third arbitrator was premature").

13. The agreement provided, in relevant part:

    A panel of three (3) arbitrators will decide any dispute or difference between the parties. All arbitrators must be (a) disinterested officers or retired officers of life insurance or life reinsurance companies other than parties to this Agreement or their Affiliates, or (b) disinterested persons of comparable experience. Each of the parties agrees to appoint one

of the arbitrators. In the event that either party should fail to appoint its arbitrator within twenty (20) Business Days following receipt of the notice demanding arbitration set forth in Section 15.2 hereof, the party demanding such arbitration may appoint the second arbitrator before entering upon arbitration. The two party-appointed arbitrators shall select a third arbitrator. In the event that the two party-arbitrators shall not be able to agree on the choice of the third arbitrator within twenty (20) Business Days following their appointment, the parties may agree on a third arbitrator within the next twenty (20) Business Days, and if they have not then so agreed, the Denver, Colorado office of the American Arbitration Association shall, at the request of either party, appoint as such third arbitrator a person who meets the qualifications specified in the second sentence of this Section 15.3.

WellPoint II, 576 F.3d at 646.

14. *WellPoint I*, 547 F. Supp. 2d at 906.

15. *Id.* at 913-14.

16. *WellPoint II*, 576 F.3d at 646.

17. *WellPoint I*, 547 F. Supp. 2d at 916.

18. *Id.* at 905.

19. *Id.*

20. *Id.* at 906-07.

21. 9 U.S.C. § 10(a)(4).

22. 9 U.S.C. § 5.

23. *See, e.g.*, *Dow Corning Corp. v. Safety Nat'l Cas. Corp.*, 335 F.3d 742, 749 (8th Cir. 2003) ("In these circumstances, the district court correctly declined to vacate the award on this ground.").

24. 294 F.3d 668 (5th Cir. 2002).

25. *Id.* at 674.

26. *WellPoint I*, 547 F. Supp. 2d at 913.

27. *WellPoint I*, 547 F. Supp. 2d at 916 ("the PSA does not address the contingency of an arbitrator's withdrawal (regardless of the reason), but the general intent of the parties was that they each be permitted to appoint an arbitrator.").

28. *Id.* at 917 & n.8 ("[t]he Court does not agree . . . that we must defer to the panel's decision").

29. 977 F.2d 66, 68 (2d Cir. 1992) (quoting *Trade & Transport Inc. v. Natural Petroleum Charterers Inc.*, 931 F.2d 191, 194 (2d Cir. 1991)).

30. The *Marine Products* court distinguished the Second Circuit's prior decision in *Trade & Transport, supra* n.29, in which the court held that the general rule requiring that an arbitration begin anew in case of a vacancy did not require the reopening of issues on which a "final decision" had been rendered by the panel. 931 F.2d at 195.

31. *Pemex-Refinacion*, 2004 WL 1944450, at *6. U.S. domestic practice retains somewhat greater tolerance for partisan arbitrators, if expressly agreed by the parties, than is now generally the case in international arbitration. By way of illustration, Rule 17(a) of the AAA's Commercial Arbitration Rules allows that "[t]he parties may agree in writing . . . that arbitrators directly appointed by a party . . . shall be nonneutral, in which case such arbitrators need not be impartial or independent. . . ." In contrast, Article 7 of AAA's International Dispute Resolution Procedures, International Arbitration Rules (June 1, 2009) includes no such exception, providing definitely that "[a]rbitrators acting under these Rules shall be impartial and independent."

32. *Wellpoint II*, 576 F.3d at 647. The Eighth Circuit has also declined to adopt the Second Circuit's "general rule," *Nat'l. Am. Ins. Co. v. Transamerica Occidental Life Ins. Co.*, 328 F.3d 462, 466 (8th Cir. 2003), but has not required resort to Section 5 as the means to challenge the process for replacement.

33. *WellPoint II*, 576 F.3d at 647.

34. *Id.*

35. Ironically, during the arbitration, WellPoint's counsel represented, "[John Hancock] will have an

opportunity at the end of the case, if they don't like the award, to challenge the award on the basis the panel was improperly chosen. They have a remedy." *WellPoint I,* 547 F. Supp. 2d at 914 n.6. WellPoint dismissed this comment on appeal as "an offhand remark by one of WellPoint's lawyers." Brief of Respondents-Appellees at 50, *WellPoint Health Networks, Inc. v. John Hancock Life Ins.*, No. 08-2283 (7th Cir. Oct. 20, 2008).

36. *64 F.3d 257, 263 (7th Cir. 1995)*.

37. Audio Recording: Oral Argument in *WellPoint v. John Hancock Life Insurance Co.*, U.S. Court of Appeals for the Seventh Circuit (Aug. 8, 2009), *available at* http://www.ca7.uscourts.gov/fdocs/docs.fwx?submit=showbr&shofile=08-2283_002.mp3.

38. *Id*.

39. *See, e.g.*, *Hugs & Kisses, Inc. v. Aguirre*, 220 F.3d 890, 893 (8th Cir. 2000); *Szuts v. Dean Witter Reynolds, Inc.*, 931 F.2d 830, 831 (11th Cir. 1991) (refusing enforcement of award rendered by two arbitrators where agreement required arbitration before at least three).

40. *Cargill*, 25 F.3d at 226.

41. *AGCO Corp. v. Anglin*, 216 F.3d 589, 593 (7th Cir. 2000).

42. *See, e.g.*, *Brook*, 294 F.3d at 674 ("This court has previously held that objections to the composition of arbitration panels must be raised at the time of the hearing.") (citation omitted).

43. *See AGCO Corp*., 216 F.3d at 593; *Nat'l Wrecking Co. v. Int'l Bhd. of Teamsters Local 731*, 990 F.2d 957, 960 (7th Cir. 1993); *Int'l Ass'n of Machinists & Aerospace Workers, Lodge No. 1777*, 900 F.2d at 1009.

44. The Seventh Circuit left some wiggle room, explaining "[t]here may be some situations where a motion under § 5 cannot address the problem; in addition, there may be times when a party can show good cause to overcome a forfeiture of the § 5 process and can raise its objections at the § 10(a)(4) stage." *WellPoint II*, 576 F.3d at 648. But such ambiguous language will give little comfort to a party facing the decision whether to invoke Section 5.

45. 9 U.S.C. § 5.

46. *Transportacion Maritima Mexicana, S.A. v. Companhia de Navegacao Lloyd Brasileiro*, 636 F. Supp. 474, 475 (S.D.N.Y. 1983). *See also Nat'l. Am. Ins. Co.*, 328 F.3d at 466 (holding that Section 5, and not Section 4, is the proper avenue to judicial relief to fill a vacancy).

47. John Hancock's conduct is the exception that proves the rule. Interestingly, because the issue of arbitrator selection could be mooted by the final award, it is the type of issue that a court of appeals would not consider amenable to interlocutory appeal in federal court under the collateral order doctrine. *See, e.g.*, *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 376-78 (1981) (explaining the limited scope of the doctrine). It is ironic that the court has imposed an extra judicial step in the ostensibly more streamlined process of arbitration.

48. On appeal, John Hancock argued that Wellpoint had obtained the resignation of its party arbitrator to gain a strategic advantage by reversing a trend of unfavorable interim decisions, and because its potential liability had increased substantially. Reply Brief of Appellants at 22, *WellPoint Health Networks, Inc. v. John Hancock Life Ins.*, No. 08-2283 (7th Cir. Nov. 24, 2008). The court did not address this argument, noting merely that Wellpoint's arbitrator had resigned "for reasons not apparent from the record," *Wellpoint II*, 576 F.3d at 645, leaving open the question of whether a party's improper conduct in facilitating an arbitrator's resignation could affect a later challenge to the method of replacement.

49. *See Yusuf Ahmed Alghanim & Sons W.L.L. v. Toys "R" Us, Inc.*, 126 F.3d 15, 19 (2d Cir. 1997).

50. *Encyclopaedia Universalis*, 403 F.3d at 91.

51. In *Encyclopaedia Universalis*, for example, the district court declined enforcement of a foreign award on the basis of both Article V(1)(d) of the New York Convention and Section 10(a)(4) of the FAA due to the failure to constitute the panel as provided in the

parties' agreement. The court of appeals vacated the latter decision, not because the standards differed, but because the New York Convention provides the sole basis on which a U.S. court may act in respect of enforcement of a foreign arbitral award. *See* 403 F.3d at 92.

52. *WellPoint II*, 576 F.3d at 648. ■