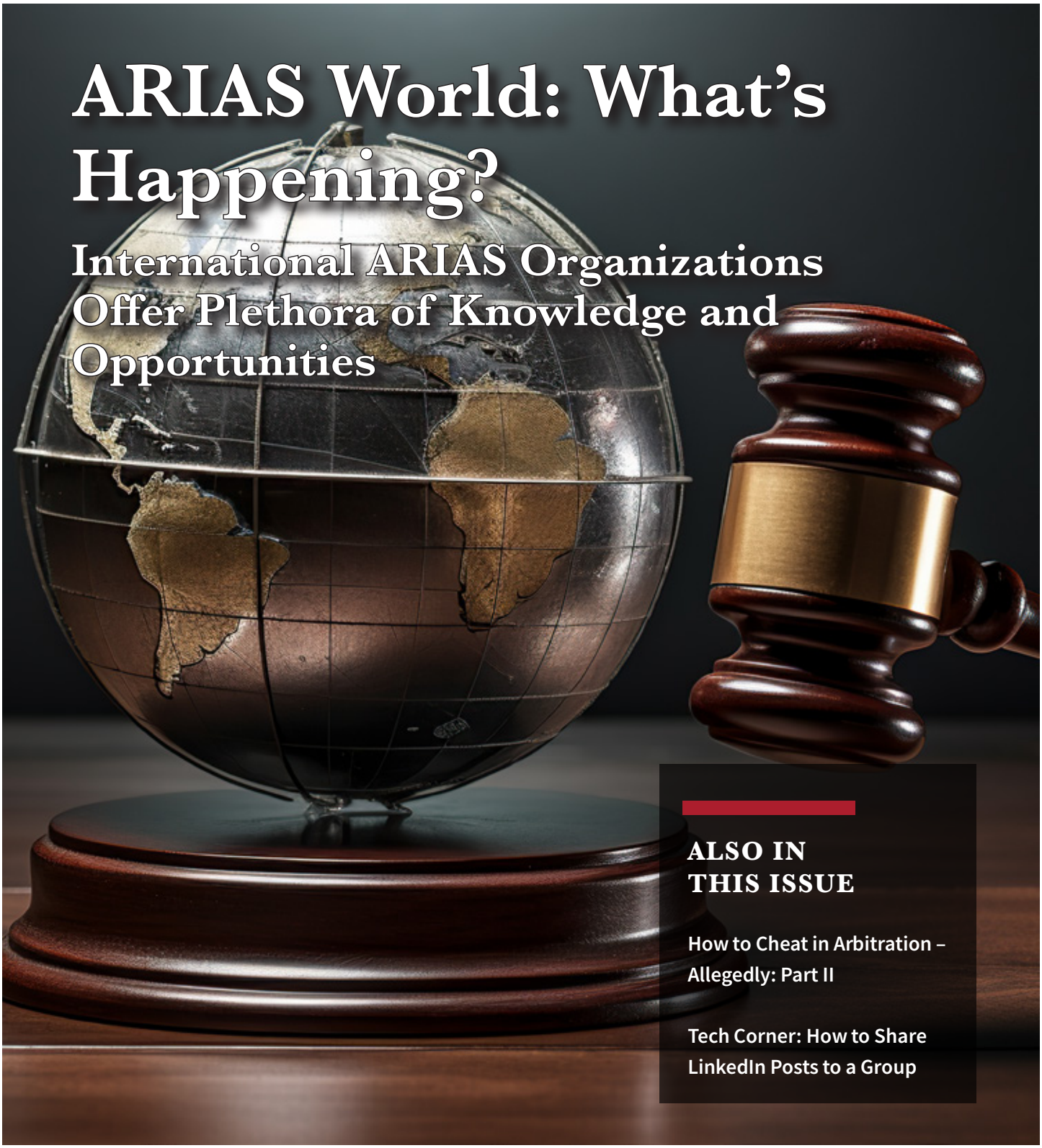
ARIAS U.S.

QUARTERLY



ARIAS World: What's Happening?

International ARIAS Organizations Offer Plethora of Knowledge and Opportunities

ALSO IN THIS ISSUE

Q2 • 2024

TABLE OF CONTENTS

FEATURES

ALSO IN THIS ISSUE

EDITORIAL POLICY — ARIAS·U.S. welcomes manuscripts of original articles, book reviews, comments, and case notes from our members dealing with current and emerging issues in the field of insurance and reinsurance arbitration and dispute resolution. All contributions must be double-spaced electronic files in Microsoft Word or rich text format, with all references and footnotes numbered consecutively. The text supplied must contain all editorial revisions. Please include a brief biographical statement and a portrait style photograph in electronic form. The page limit for submissions is 5 single-spaced or 10 double-spaced pages. In the case of authors wishing to submit more lengthy articles, the *Quarterly* may require either a summary or an abridged version, which will be published in our hardcopy edition, with the entire article available online. Alternatively, the *Quarterly* may elect to publish as much of the article as can be contained in 5 printed pages, in which case the entire article will also be available on line. Manuscripts should be submitted as email attachments. Material accepted for publication becomes the property of ARIAS·U.S. No compensation is paid for published articles. Opinions and views expressed by the authors are not those of ARIAS·U.S., its Board of Directors, or its Editorial Board, nor should publication be deemed an endorsement of any views or positions contained therein.

Get Ready for the 2024 Spring Conference: Celebrating 30th Anniversary in Puerto Rico!

Are you ready for the 2024 Spring Conference? By the time you read this, the Spring Conference will be right around the corner. I hope to see many of you at the El San Juan Fairmont in Puerto Rico where, on May 1, we will kick off the 30th Anniversary with a Gala Celebration including Puerto Rican food and music. If you are not yet registered for the Spring Conference, now is the time to do so, before it is too late. You do not want to miss the 30th Anniversary Gala or the fantastic program the Conference Co-Chairs have planned.

Special thanks to our generous 30th Anniversary sponsors who made the Gala possible. If your firm or company has not yet sponsored the 30th Anniversary, there is still time. The 30th Anniversary Sponsorships provide year-long benefits and recognition at the Spring and Fall Conferences, including discounted or free conference registrations depending on the sponsorship level.

Certified Arbitrators can now update profiles, but must re-populate their data

You may recall that the ability for Certified Arbitrators to update their public profiles on the ARIAS website was broken for some time. That problem is now fixed.

Certified Arbitrators can now log into their member profiles and update their arbitrator experience and information. Instructions have been sent to all arbitrators and placed on the website.

Unfortunately, all Certified Arbitrators must re-populate their data otherwise the public profiles will be blank. If you do not see data on an arbitrator's profile it is because that arbitrator has not re-populated their data. If you are a Certified Arbitrator and have not logged into your ARIAS profile, your public profile will be blank so

please update your profile today. Any arbitrator having issues with updating should let us know at info@arias-us.org.

2024 Offers enhanced memberships benefits

A further reminder about the Enhanced Membership Benefits program for 2024, which provides Certified Arbitrators with a deep discount on all educational programs (other than the Spring and Fall Conference). The enhanced benefits also allow for up to 10 employees of Corporate Members to have free access to those same educational programs.

A discount code is needed when you register for a webinar, seminar or workshop. The discount code is the same for all educational events, so if you have received the discount code, you can use it all year for all educational events. If you need the discount code, please contact me or info@arias-us.org. Take advantage of this great member benefit.

Quarterly issue features Tech Corner, ARIAS international updates, and more

This issue of the Quarterly features two articles and one Tech Corner, along with Law Committee Reports. Did you know that ARIAS is part of a much wider network of insurance and reinsurance arbitration societies? In our feature article, "ARIAS World: What's Happening?" Jonathan Sacher, from Bryan Cave Leighton Paisner LLP and one of our international editorial board members, takes us around the world to summarize what other ARIAS entities have been up to. Thanks to the International Committee for keeping us in the loop with our cousins across the globe.

Next, we have "How to Cheat in Arbitration – Allegedly: Part II," by Daniel L. FitzMaurice and Joseph K. Scully, from Day Pitney LLP. If you thought Part I was exhaustive, wait until you read Part II. The creativity of those trying to put one over does not stop. And guess what, there is a Part III coming. Dan and Joe's articles may provide fodder for the Ethics Panel at the Spring Conference, where a discussion of whether it is time for an enforcement mechanism will take place.

We have revived the Tech Corner from the Technology Committee and I have taken the laboring oar in presenting a brief tutorial on "How to Share LinkedIn Posts to a Group." I hope you find this article useful.

We hope you enjoy this issue of the Quarterly. We continue to need more of you to contribute to future issues. The deadlines and requirements are on the ARIAS website under Publications. We welcome committee reports, letters to the editor, original articles, and repurposed articles from ARIAS CLE programs.

If you are on a panel at the Spring Conference, please turn your presentation into an article. Leverage your thought leadership and publish an article in the Quarterly. Your thought leadership is worthy of publication.

Larry P. Schiffer
Editor

ARIAS World: What's Happening?

International ARIAS Organizations Offer Plethora of Knowledge and Opportunities

By: Jonathan Sacher, Bryan Cave Leighton Paisner LLP

AIDA

ARIAS·U.S. and the various ARIAS organizations around the world are all chapters of 'AIDA,'[http://www.aida.org.uk/] a nonprofit international association formed in 1960 to promote and develop international corporation between its members with a focus on increasing the study and knowledge of international insurance law and related matters.

AIDA has insurance law 'chapters' in some 60 countries, and ARIAS chapters in the US, UK, Germany, Ireland, France, Asia, and Latin America.

AIDA has various committees ("Working Parties") and the AIDA Reinsurance Working Party, which will be of most interest to ARIAS·U.S., meets at various AIDA conferences, and also does online training. This committee is chaired by Ozlem Gurses, a professor of Insurance law at King's College, University of London. Most recently I participated in their online program discussing 'Cut Through Clauses,' which is quite topical at the moment in the light of the Russian aviation claims. The other speakers were Emmanuèle Lutfalla,

of Signature Litigation Paris; and Steve Schwartz, of Chaffetz, Lindsey. Some 50 AIDA members from around the world logged onto that presentation.

AIDA Europe next meets in Athens Greece on 30th May 2024 for its annual conference [https://aidainsurance.org/regional-groupings/aida-europe?mc_cid=c4a388b04c&mc_eid=bbca4b-2ab0]

Who is in the ARIAS 'World'

ARIAS·U.S. is by far the largest organization within the AIDA/ARIAS umbrella, but there are active ARIAS organizations in various locations that have grown in the last few years.

"ARIAS·U.S. is by far the largest organization within the AIDA/ARIAS umbrella, but there are active ARIAS organizations in various locations that have grown in the last few years."

ARIAS UK [https://arias.org.uk/] is chaired by David Scorey KC and has a new vice chair in Davinder Chhatwal of Brit as a Lloyd's representative. A refreshed and eager new committee comprises barristers and a solicitor plus market professionals from Gallagher, Liberty, Swiss Re, Sompo, Convex, and others. It has a program of reengaging with the market on the relevance of arbitration, and particularly the ARIAS UK Arbitration form, and has a series of seminars planned. On 14 March, ARIAS UK hosted a seminar "Arbitration 101: a refresher on the basics," led by barristers Helen Morton and Edward Batrouney of Essex Court Chambers and its 14 April event dealt with an update on ARIAS UK clauses and rules. On 3 July 2024, will be its Annual Conference and Annual General Meeting at Swiss Re's London office.

At **ARIAS Germany** [https://aidainsurance.org/arias-societies/arias-germany], Henning Schaloske of Clyde & Co has recently taken on the Chairman's role. It held its annual conference on March 7 in Düsseldorf with speakers from various insurers including Hannover Re, Allianz, R&V Re, Gothaer, and various German insurance-focused academics. At the Annual General Meeting, ARIAS Germany announced new initiatives, including: a review of its arbitration clause and certification procedure; a launch of an ongoing webinar and training series; and the creation of a young ARIAS Germany.

ARIAS/CEFAREA France [https://aidainsurance.org/arias-societies/cefarea-arias-france] Since Jan 1, 2024, ARIAS France is the new name of CEFAREA ARIAS. With this new identity, ARIAS France aims to give greater prominence to its membership in the worldwide community of ARIAS chapters.

A new ARIAS France website will soon go live. This will be an opportunity to publish a revised version of arbitration rules. In 2023, a new executive committee was elected. Eric Evian is Chairman and Sophie Grémaud, Counsel at Clyde & Co, is Vice-Chairman. Jean Mars Sarafian is Treasurer, and Héloïse Meur is General Secretary.

ARIAS France manages several arbitration proceedings every year. For 2024, the emphasis will be on developing various activities, particularly in the insurance field, whereas historically ARIAS France's arbitration clauses have been used more in reinsurance treaties. Mediation will also be a key focus, as ADR is increasingly popular with insurers and policyholders in France, and is also supported by the government, which is seeking to relieve the courts of their workload.

ARIAS LATAM [https://aidainsurance.org/arias-societies/arias-latam] is headquartered in Chile, as a trade association, and is the host for ARIAS Latin America and the Caribbean. ARIAS LATAM has a collaboration with the law faculty of the Pontifical Catholic University of Chile and has developed activities with them corresponding to an arbitration center.

ARIAS Ireland [https://arbitrationireland.com/arias-ireland-chapter/] was created in 2021 affiliating to AIDA as its seventh ARIAS chapter. It has become active recently and is hoping to develop a program of events.

ARIAS Asia [https://arias-asia.org/] was set up in 2017 and is the brainchild of Professor Robert Merkin, KC, a leading UK insurance academic. It was supported by the Hong Kong Insurance Law Association and currently the Hong Kong arbitration community. It has representatives from Australia, Singapore, Mainland China, Malaysia, Taiwan, and Hong Kong on its management committee and it is hoping to expand into other jurisdictions in the APAC region. Its first Chairman was Mary Thomson, an arbitrator with chambers in Hong Kong, London, and Singapore, and in 2021, she was replaced by Stephen Chu, who is also a barrister and reinsurance specialist based in Hong Kong.

Recent seminars covered ARIAS Asia's Role in Stepped/Multi-Layered Dispute Resolution Clauses and a face-to-face diversity/inclusion event during Hong Kong Arbitration Week, which ARIAS Asia supported on "Barbie-Tration & Kenflict Resolution." In 2023, ARIAS Asia launched its panel of Arbitrators and Mediators as well as its Arbitration and Mediation Rules.

Jonathan Sacher is the co-head of the multi-disciplinary insurance sector at Bryan Cave Leighton Paisner. He has been described in Legal 500 as 'world-class," and was rated in the top five Global Elite Thought Leaders by Who's Who 2019. He is known in the industry as one of the "Reinsurance Gurus." Sacher's focus is on: reinsurance/insurance; arbitration; litigation, and dispute resolution for the UK. He also focuses on reinsurers and brokers for international insurers. Sacher has acted in a number of high-profile reported Insurance/Reinsurance cases covering: Covid-19, hurricanes, personal accident, life, financial institutions, war risks, and most classes of business.

His professional memberships include: ARIAS UK, ARIAS US, the London Court of International Arbitration, British Insurance Law Association, World Traders Livery Company, and associate membership of the Chartered Institute of Arbitrators. Sacher also is a Freeman of the City of London and on the ARIAS (UK) Management Committee.

How to Cheat in Arbitration – Allegedly: Part II

By: Daniel L. FitzMaurice and Joseph K. Scully

Reintroduction

The best strategic advice in arbitration is glaringly obvious: win a favorable award, otherwise, the odds of obtaining relief in court are, at best, remote.[1] The Federal Arbitration Act ("FAA") allows for vacatur on only narrow grounds.[2] The permissible reasons pointedly do not include failures by arbitrators to find the correct facts or to reach the right conclusions.[3] As one court bluntly observed: "The parties bargained for the arbitrator's decision; if the arbitrator got it wrong, then that was part of the bargain."[4] Identifying a viable ground is only one of the difficulties: the petitioner will also need strong evidence to meet the statutory standards and overcome judicial reluctance to undo an arbitral award.[5] Cheaters derive three lessons from these dynamics: (a) employ whatever means appear necessary to obtain victory and (b) choose evidence and argument based on persuasiveness over legitimacy, because (c) a favorable award, even one arising from deception and induced errors, may nevertheless survive.[6]

This article is the second of a three-part series about cheating in arbitration. Part I appeared in the ARIAS Quarterly Q4 2023. The Introduction in Part I explained the series' title and why cheating in arbitration is a topic worthy of publication. Part I also addressed three ways to cheat in arbitration:

- Fabricate an agreement to arbitrate and then wait for the other side to default;
- Sucker the other party into agreeing to a process that favors you; and

- Stack the umpire deck with ringers and unqualified candidates.

Unfortunately, many other improper tactics exist.

In Part II, we cover some other ways to cheat:

- dispose of the other side's arbitrator and/or umpire candidate(s), by threatening or filing a specious challenge in court;
- upgrade your party-appointed arbitrator after umpire selection;
- disqualify the other side's lawyers;
- engage in improper *ex parte* contacts; and
- ensure the umpire knows whom to thank for the appointment.

Our final article in this series will discuss yet other maneuvers.

Tactic: Dispose of the other side's arbitrator and/or umpire candidate(s) by threatening/ filing a specious challenge in court

Maya Angelou offers this wisdom: "If you don't like something change it. If you can't change it, change your attitude."[7] Most of us prefer changing what we dislike over altering our views. In a tripartite arbitration, displeasure with the other side's appointed arbitrator or umpire candidate(s) may lead a party to wish it could dispose of those individuals and force the opponent to use its second choice. The opportunity to deselect an opponent's nominees seldom appears on the menu, however. Contracts do not contemplate one party removing the other's arbitrator or, except as part of the selection process, eliminating the other's umpire candidate(s); nor does the law generally offer that remedy.[8] Then again, rules – whether contractual, procedural, or ethical – do not constrain cheaters.

> "... rules – whether contractual, procedural, or ethical – do not constrain cheaters."

No section of the FAA[9] expressly grants a court the authority to disqualify an arbitrator or umpire candidate during a pending arbitration.[10] A small number of courts, however, have interpreted Section 5 of the FAA[11] to permit challenges based on an individual's failure to meet a specific, contractual requirement – e.g., being an active or retired officer of a life or health insurance company or having a prescribed number of years' experience in a field.[12] This debatable exception becomes even more attenuated when a challenger tries to circumvent the well-established prohibition on pre-award challenges for alleged bias by invoking contractual proxies such as "disinterestedness," "impartiality," or not falling under a party's "control."[13]

Judicial hostility toward challenges[14] may neither dissuade cheaters nor immunize appointees or candidates. Indeed, a cheater intent on disposing of an arbitrator/candidate may be able to achieve its goal without ever convincing a judge of anything. How can a non-starter motion become lethal? The potential for negative publicity may supply all the ammunition that a character assassin needs. Any accusation against a would-be arbitrator can cause reputational harm – even defamatory claims that are, by definition, false. Arbitrators recognize that fact, and cheaters capitalize on it. A motion to disqualify – however baseless – conveys a menacing option to its target: quit or risk a mud bath.

Does anyone fall for this extortion? Some individuals do, especially those who are extremely sensitive to notoriety. Current officers of insurance or reinsurance companies may be more susceptible to this gambit, out of concern that any shade cast on them as arbitrators might spill over to their day jobs or their employers. In addition, umpire candidates have less reason to fight: where resigning costs a party-appointed arbitrator an assignment, a candidate loses only the possibility of selection. Moreover, candidates know that the assault, once made, commits the challenger to eliminating any chance of their selection: the attacker must kill the target's candidacy either by winning in court or using strikes/low rankings during the selection process. Thus, despite holding no legitimate cards, cheaters can succeed if intimidation leads

candidates and arbitrators to dispose of themselves.

Courts may be able to transform the realpolitik behind this tactic. Consider, for example, what happened in *Shamitoff v. Richards*.[15] That matter began when the defendants sued Shamitoff in state court for breach of contract and fraud. Shamitoff won round one: the court granted his motion to compel arbitration. Soon afterward, however, his real and only goal became apparent: blocking the defendants from prosecuting their claims. Shamitoff "embarked on a campaign to thwart the arbitration proceedings by seeking continuances and filing numerous actions" in state court to enjoin the arbitration and disqualify the arbitrator.[16] When those diversions failed, Shamitoff proceeded to federal court, where he requested an injunction against the arbitration. The federal court refused; the arbitration proceeded; and Shamitoff lost. Shamitoff moved to dismiss the now-unnecessary federal suit. The district judge granted dismissal but imposed a noteworthy condition: Shamitoff would have to pay the defendants' attorneys' fees, based on findings that he had forum-shopped and "never had a realistic chance of prevailing on his claims in this Court."[17] Perhaps if other courts levied sanctions for specious attempts to disqualify and otherwise obstruct arbitrations, cheaters might re-evaluate the utility of this tactic. The odds of this happening on a widespread basis, however, are low.

Tactic: Upgrade your party-appointed arbitrator

Disposing of an opponent's arbitrator or umpire candidate is not the only way to reconstitute a panel. What about replacing your own arbitrator? Changes in circumstances might lead a party to reevaluate its chosen arbitrator. For example, after the parties have selected an umpire, a party might wish it had appointed a close friend or respected colleague of the umpire. Similarly, a party might reconsider its chosen arbitrator if he or she proves to be ineffective in preventing (or, worse, joins) the panel's issuance of adverse rulings on discovery issues or interim awards. Can a party simply fire its arbitrator and name a replacement at any time and for any reason? Cheaters certainly have a preferred answer to that question.

In tripartite arbitration, each party usually has the right to appoint one of the three arbitrators.[18] The failure to exercise that right in a timely manner may enable the opposing party to name two arbitrators.[19] The parties' naming of arbitrators is a one-time event: contracts generally do not contemplate an opportunity to revoke the appointment and install a substitute.[20] Nevertheless, parties have on occasion asked their appointees to resign on the expectation that they can appoint someone else.

A request to resign poses practical and ethical issues for an appointed arbitrator. The arbitrator may feel obligated to the party and believe that any future appointments hinge on acquiescing to the request. The appointing party's pleasure, however, is not the only consideration. As one article notes: "Given its potential impact on the parties and the arbitrator's own liability and reputation, resigning from office is a serious decision, and should never be taken lightly."[21] The ARIAS·U.S. Code of Conduct likewise recognizes that resignations can be disruptive. The Code identifies only limited circumstances in which an arbitrator may resign upon one party's request:

> After the Panel has been accepted by the parties, an arbitrator should recognize the consequences to the parties and the process of a decision to withdraw and should not withdraw at his or her own instigation absent good reason, such as serious personal or family health issues. * * * In the event that an arbitrator is requested to withdraw by less than all of the parties, the arbitrator should withdraw only when one or more of the following circumstances exist.
>
> a) when procedures agreed upon by the parties for resolving challenges to arbitrators have been followed and require withdrawal;
>
> b) if the arbitrator, after carefully considering the matter, determines that the reason for the challenge is substantial and would inhibit the arbitrator's ability to act and decide the case fairly; or
>
> c) if required by the contract or law.[22]

Notably, the permissible reasons for resignation do not include the strategic whims of the appointing party. Of course, ethical proscriptions do not deter some parties from requesting resignations or some arbitrators from granting those requests.

Before 2010, some uncertainty existed over whether the resignation of one arbitrator from a tripartite panel might nullify the proceeding. The question arose from precedent in the U.S. Court of Appeals for the Second Circuit[23] holding that the death of an arbitrator from

a tripartite panel negates all rulings in the existing arbitration and requires the parties to "begin anew" before different arbitrators.[24] Other Circuits have declined to follow this approach, finding it wasteful and contrary to section 5 of the FAA, which allows a court to "designate and appoint an arbitrator . . . or umpire" in certain circumstances, including "in filling a vacancy."[25] According to these courts, the appropriate remedy for the loss of an arbitrator – whether because of death, disability, or resignation – is replacement.[26] In 2010, the Second Circuit held that the "begin anew" rule does not apply to an arbitrator's resignation.[27]

Courts and arbitrators have employed various solutions to how to address the vacancy created when a party-appointed arbitrator resigns, including the following:

- Most often, the party whose arbitrator has resigned selects a replacement;[28]
- In one instance (discussed below), the two remaining arbitrators identified a pool of three candidates from which the affected party chose the replacement;
- Some authority allows the resigning arbitrator to choose the successor;[29]
- Another possibility is no replacement – the two remaining arbitrators preside over the balance of the proceedings;[30] and
- The Court may select the replacement arbitrator, especially if the affected party has refused to name a replacement.[31]

Thus, the appointing party may not have an automatic or unrestricted right to name a replacement.

Which of the options above (or some other one) will apply may depend on the wording of the arbitration clause (including the rules of the organization, if any, that administers the arbitration),[32] the stage of the arbitration, what issues remain to be resolved, whether the remaining arbitrators have addressed the issue, and the presence or absence of gamesmanship. For example, in *Zeiler v. Deitsch*,[33] after the panel issued an award on the substantive issue in dispute, the losing party's arbitrator resigned. The other two arbitrators ruled that they would continue to preside without a replacement. The court approved that outcome primarily because only one issue remained – assessing damages.[34] The appellate court rejected the district court's conclusion that the other arbitrators lacked authority to resolve the remaining issue. The Second Circuit found that the district court's approach was not only inconsistent with the parties' contract, it "would enable bad faith manipulation of the arbitration process: in an ongoing and complex arbitration, a party receiving unfavorable rulings would have an incentive to invite the member he designated to resign to forestall an anticipated ultimate defeat . . . ."[35] In other words, by allowing the two arbitrators to proceed, the party that lost an interim ruling would not have an easy way to derail the process (a/k/a "cheat").

> "Courts and arbitrators have employed various solutions to how to address the vacancy created when a party-appointed arbitrator resigns..."

In *IRB-Brasil Resseguros S.A. v. National Indemnity Co.*,[36] the court struggled with how best to replace an arbitrator. NICO requested and obtained the resignation of its arbitrator and then identified as the replacement an individual currently serving as its arbitrator in a parallel proceeding against IRB. IRB asked the court "to prohibit NICO from changing its party-appointed arbitrator . . . or, alternatively, to permit IRB to pick NICO's arbitrator . . . ."[37] The court followed the most common approach by allowing NICO to make the replacement, noting that "IRB has not pointed to a single case in which a court has displaced a party's selection of a replacement arbitrator after that party's initial choice has resigned."[38] Furthermore,

the court reasoned that this outcome was consistent with the right of each party under the arbitration clause to choose an arbitrator "to act as a de facto advocate."[39] At the same time, however, the court recognized the potential for abuse:

> [W]e are . . . **wary of creating an unfettered right to alter the composition of an arbitration panel.** Such a right would enable parties to endlessly delay the arbitration process, thus undermining one of the central reasons that parties enter into arbitration agreements—to provide for a speedy resolution to their disputes. More generally, such a rule would inject an intolerable level of uncertainty into the arbitration system.[40]

Despite these misgivings, the court accepted NICO's replacement for two other reasons specific to that dispute: (a) the parties had not yet selected an umpire;[41] and (b) NICO's choice benefited IRB by increasing the chances of consolidating the pending arbitrations, which IRB wanted.[42]

Ethical considerations aside, in requesting that its arbitrator resign a party risks backlash from the other arbitrators. In *Wellpoint Health Networks, Inc. v. John Hancock Life Insurance Co.*,[43] Wellpoint asked its party-appointed arbitrator to "stand down" two years into an active arbitration.[44] Although he acquiesced in principle, the arbitrator "formally asked the panel to authorize his withdrawal."[45] The umpire questioned Wellpoint's right to name a replacement: "The change in arbiters, absent health, disability or death problems, may not be a unilateral decision by Wellpoint and/or Counsel."[46] Wellpoint identified two possible replacements, but the other arbitrators objected. After much discussion, Hancock's party-appointed arbitrator proposed a compromise that Wellpoint ultimately accepted: the remaining panel members would propose three candidates from which Wellpoint would choose one.[47] Wellpoint's agreement may have been wise: the umpire and the replacement arbitrator later issued an award in Wellpoint's favor.[48]

Any party considering upgrading its arbitrator might want to weigh the misgivings that the Court expressed in *IRB v. NICO* and that led to the compromise in *Wellpoint*. The other arbitrators or a court may conclude the party has no unfettered right to appoint a replacement and, thus, foil the plan. Moreover, even if allowed to proceed, this switcheroo might alienate the umpire and, thus, negate the point of the exercise. After all, why cheat when it will not work or, worse, be counterproductive?

Tactic: Disqualify the other side's lawyers

The ARIAS·U.S. Code of Conduct imposes ethical obligations solely on arbitrators, not parties or counsel.[49] Although some arbitrators have questioned the fairness of that distinction, arbitrators are situated differently than parties or counsel. At least to some degree, arbitrators supervise the parties and counsel and may impose sanctions for unethical behavior or other misconduct. For example, in *Polin v. Kellwood Co.*, the arbitrators unanimously ordered the petitioner's counsel to pay over $150,000 (half of the respondent's costs of the arbitration), after finding that he had defamed the umpire in a letter to the AAA and made false representations to the panel about how a non-party witness would testify.[50] In another case, an arbitrator sanctioned the respondents for fabricating evidence, by barring them from introducing evidence or offering a defense to certain claims, which ultimately led to an adverse award of over $500 million.[51] Moreover, counsel is subject to extensive rules of professional responsibility that govern the practice of law. Cheaters have been known to invoke these legal ethics speciously when attempting to disqualify another party's lawyers.

In *GateGuard, Inc. v. Goldmont Realty Corp.*,[52] a seller of intercom devices sued a real estate management company, claiming the defendant committed

> "The ARIAS·U.S. Code of Conduct imposes ethical obligations solely on arbitrators, not parties or counsel"

fraud and breached the parties' contract. The court ordered the parties to arbitrate the contractual claims. GateGuard then moved to disqualify Goldmont's counsel, claiming that (a) he would be a witness in the arbitration; (b) he had acted unethically in a separate dispute with GateGuard; and (c) his representation of the party to other dispute created a conflict of interest in the current arbitration. The court observed that motions to disqualify are "often interposed for tactical reasons" and, accordingly, the movant must meet a "heavy burden."[53] The court found GateGuard's contention the lawyer would be a witness to be "frivolous."[54] Moreover, the court rejected GateGuard's other arguments for disqualification as "even more frivolous than previous ones, if that is possible."[55] The court denied GateGuard's motion,[56] and, thus, the party's unfounded attempt to dispose of the opposing counsel failed.[57]

In *Employers Insurance Co. of Wausau v. Munich Re*,[58] a retrocessionaire, Wausau, sued to disqualify arbitral counsel for the retrocedent, Munich Re. Wausau alleged that counsel had acquired confidential information when acting as Wausau's counsel in an earlier arbitration. In particular, Wausau claimed counsel had "learned Wausau's thinking and predilections on arbitrators, including party arbitrators and umpires."[59] The court began with a cautionary observation: "[a] district court should be mindful that a disqualification motion might be used as tactical device to delay a case, and impose upon an adversary the costs of defending an issue collateral to the merits of a case."[60] The court noted that "[g]eneral 'litigation thinking'—the general strategic plan or hopes of the lawyer and client on how best to pursue or defend claims—does not satisfy, without more, the substantial relationship test [required to create a conflict because of a past representation]."[61] The court concluded that the lawyers' awareness of Wausau's preferences was not disqualifying:

> Wausau's argument proves too much. Its logical extension would mean that a lawyer's representation of a client in a reinsurance arbitration in the recent past would foreclose that lawyer from representing a party adverse to the former client in a subsequent arbitration. Given the presumed expertise necessary to competently pursue or defend reinsurance arbitrations, such a ruling would create a powerful incentive for parties to spread representations over multiple firms whose lawyers show promise and talent in the field of reinsurance law, in an effort to freeze out such lawyers from future adverse representations.[62]

The court was similarly unimpressed by Wausau's contention that the current arbitration was substantially related to the earlier one, simply because both concerned the number of occurrences. The court observed that disputes over aggregation are frequent in excess of loss contracts and even "Wausau concedes, as it must, that this is a common feature of reinsurance arbitration . . . ."[63] Accordingly, the court denied Wausau's motion to disqualify.

In another case where Wausau, as a reinsurer, sought to disqualify the cedent's counsel, the court found Wausau's arguments sufficiently plausible to allow the case to proceed. The dispute in that case, *Utica Mutual v. Wausau*,[64] arose after Utica settled coverage litigation with an insured and billed Wausau. Utica used the same law firm to arbitrate as it had in the coverage litigation. Wausau claimed that Utica's lawyers were disqualified because their role in the coverage litigation made them (a) necessary witnesses and (b) Wausau's lawyers.[65] While acknowledging that Wausau was not a client of the firm "in the traditional sense," the court found that Wausau had raised a factual issue over the existence of "sufficient aspects of an attorney-client relationship" to warrant disqualification.[66] The procedural context of this case may help to explain its outcome. Dismissing the Wausau's counterclaim would not have ended the litigation because controversies over other relief Utica sought would remain. Moreover, discovery was incomplete, including Wausau's requests for information relevant to disqualification.[67] Finally, the court expressly recognized that Utica could renew its motion after the completion of discovery.[68] Thus, the court applied only a plausibility standard and did not scrutinize the merits of Wausau's claims.[69]

In *Utica v. INA Re*, Utica was the party seeking to disqualify opposing counsel in an arbitration. [70] A lawyer with the firm representing INA Re had previously performed legal work for Utica while working at other firms. Although this lawyer was "walled off" from the arbitration, Utica claimed her previous work concerned the same or a substantially related matter[71] and, thus, created an "imputed conflict of interest" that disqualified the firm.[72] INA Re argued that the matters were unrelated because the lawyer had joined the firm before the underlying settlement occurred or any reinsurance dispute arose. The district court concluded that an ethical wall was adequate protection and denied Utica's motion to disqualify;

the Second Circuit, while taking no position on the sufficiency of the ethical wall, affirmed the ruling as falling within the district judge's discretion.[73]

> "A party's request that a court disqualify opposing counsel poses a real 'danger that such motions can become tactical derailment weapons for strategic advantage.'"

A party's request that a court disqualify opposing counsel poses a real "danger that such motions can become tactical derailment weapons for strategic advantage."[74] Even if the motion fails (as often happens), the pendency of the motion can stop the arbitration in its tracks for months – a goal unto itself for some parties.[75] In addition, disqualification, if granted, could impose significant costs on the opponent, arising from the new firm's need to ramp up.[76] Although a cheater may find it alluring to tax the opponent and delay the process, this tactic comes with some significant risks. Courts recognize the dynamics of attempts to disqualify counsel. Accordingly, a party moving to disqualify an opposing party's counsel should expect to meet a heavy burden, including having to demonstrate a strong relationship between any prior representation and the current dispute.[77] Reluctant to deprive a party of the right to choose its counsel, the court will scrutinize the motives behind the motion,[78] its timing,[79] and the completeness of the record.[80] Moreover, when it comes to targeting and intimidation, umpire candidates and arbitrators may be easy pickings as compared to lawyers. Thus, a party seeking to disqualify opposing counsel should come prepared with strong evidence and arguments. If those are unavailable, a cheater may want to consider other tactics.

Tactic: Engage in improper ex parte contacts

Ex parte contacts take place when counsel or another representative of a party communicates unilaterally with a decision-maker on a matter of substance.[81] As discussed below, some *ex parte* communications are permissible: for example, it is common in tripartite arbitration to allow a party and its appointed arbitrator to communicate with each other before the final stages of the process.[82] *Ex parte* communications with the umpire or a neutral arbitrator, however, are almost always problematic. Indeed, they are generally prohibited for the same reasons they might appeal to cheaters: the potential for unfairness, the absence of balance, and the denial of due process.[83]

Adversarial processes rest on the notion that open confrontation advances not only fairness but also the decision-maker's ability to assess the reliability and truth of the evidence and arguments presented.[84] *Ex parte* communications foreclose the opportunity to respond that lies "at the heart of our adversarial system."[85] Consequently, "improper *ex parte* contacts are among the most pernicious of ethical violations."[86] In one case, two judges from the Ninth Circuit found deeply troubling the fact that "[t]he arbitrator engaged in 'extensive post-hearing ex parte communications with [the employee] and the Union,' including an unauthorized $6,000 settlement offer to [the employee] of which [the employer] was unaware."[87] Although the dissenting judge would have confirmed the award, the majority insisted that the "*ex parte* communications and an unauthorized settlement offer reflect consummate bias and lack of commitment to a transparent proceeding."[88]

Ex parte contacts with party-appointed arbitrators usually present fewer problems than communications with neu-

trals. For example, the Ninth Circuit saw nothing wrong with a party having *ex parte* discussions its party-appointed arbitrator before any panel deliberations:

> The reinsurance contracts empowered the arbitrators to craft their own rules of procedure. The [panel's unanimous] decision to permit *ex parte* contacts was open and above board. There was nothing sinister or inherently one-sided about the contacts. Absent evidence of prejudice, therefore, we decline to vacate the award on this ground.[89]

In a later reinsurance matter, this same court refused to vacate an award where a tripartite panel retained independent experts and met with those experts on an *ex parte* basis.[90] Importantly, the parties were aware in advance of this *ex parte* process, submitted suggestions about it, and had an opportunity to contest any conclusions from it. On the other hand, the Sixth Circuit concluded that, under Michigan law, *ex parte* communications between the reinsurer's counsel and its party-arbitrator warranted vacatur of an award in excess of $25 million for "misconduct prejudicing a party's rights" – even though a majority of the arbitration panel had determined that those *ex parte* communications took place at a permissible time.[91]

As noted above, not every *ex parte* contact is problematic. For example, the court in a large insurance dispute refused to condemn the umpire for engaging in *ex parte* communications conducted after the arbitration was completed and that did not concern either the award or how it was reached.[92] The court reached that outcome even though the *ex parte* communications took place between the panel's issuance of the award and the court's remand of the award back to the same panel for clarification of the award.[93]

In another insurance arbitration, the umpire did not act improperly by speaking separately with each side about administrative matters, because all counsel were unavailable at the same time.[94] In that case, the umpire advised each lawyer that, in order to expedite the hearing, any expert testimony should be limited to witnesses who had direct experience and education in the issues in dispute. The losing party, the policyholder, took issue with these discussions, claiming misconduct and accusing the umpire of evident partiality, in violation of Sections 10(a)(2) and (3) of the FAA. The district court rejected the policyholder's misconduct complaint, and the Eighth Circuit likewise rejected the evident partiality claim. These courts concluded that the discussions were consistent with "his role as umpire and the attendant duty to assure that the arbitration proceeded in an efficient manner."[95] Neither the trial nor appellate court found this procedure, even if it departed from prevailing ethical norms for arbitrators, prejudicial to the policyholder, whose expert testified extensively at the arbitral hearing. Another court found nothing improper in an umpire communicating about his travel arrangements with counsel for one party, where opposing counsel was aware of the discussions and did not object.[96]

When attempting to engage in an *ex parte* communication with a neutral, a cheater takes a huge leap. The effort may backfire. Most neutral arbitrators are keenly aware of the ethical proscriptions on *ex parte* contacts. For example, Canon V of the ARIAS·U.S. Code, subject to a few narrow exceptions, prohibits its umpires from discussing a case "with a single arbitrator, party or counsel in the absence of the other arbitrator, party or counsel . . . ." ARIAS·U.S., *Code of Conduct—Canon V.8.* This Canon also addresses written communications:

> Whenever the umpire receives any written communication concerning the case from one party on subjects relating to the conduct of the arbitration that has not already been sent to every other party, the umpire should promptly forward the written communication to the other arbitrators and party.

Id., Canon V.7. Although the opportunity to persuade through unopposed content may seem enticing, the mode of transmission places the cheater in direct jeopardy: the umpire may (a) deeply resent the cheater's implicit insult to his or her integrity, (b) overcompensate for the obvious unfairness to the opposing party, or (c) both. Moreover, *ex parte* communications may contaminate an award and support vacatur. [97] Accordingly, the tactic of communicating with the decision-maker on an *ex parte* basis is fraught with risk – appropriately so.

Tactic: Ensure the umpire knows whom to thank for the appointment

In the context of arbitration, "affiliation bias" refers to "the implicit bias of the arbitrator to favor the appointing party."[98] One study found evidence of affiliation bias in a purely hypothetical exercise.[99] Researchers tested for affiliation bias in an experiment involving 257 experienced arbitrators and arbitral

> “Various rules and procedures that ARIAS·U.S. has adopted reflect concern over affiliation bias.”

lawyers, each of whom agreed to serve as the single arbitrator to resolve a mock dispute. The mock arbitrators were told that one of four sources accounted for their appointment: (a) the claimant; (b) the respondent; (c) a joint action by the parties; and (d) no identified source -- an appointment without attribution.[100] At issue was how to award costs for a hypothetical arbitration: to the winner, the loser, or neither (each side to bear its own costs). The results of this experiment were revealing. Rulings by mock arbitrators appointed by the parties jointly or without attribution were fairly consistent; however, the mock “arbitrators nominated by one of the two parties to the litigation tended to make decisions more favorable to that party compared with arbitrators appointed by the opposite party.”[101] In particular, “[o]n average, arbitrators were about 18 percentage points more likely to award all costs to the winning party when they were appointed by the winner rather than the loser.”[102] Thus, affiliation bias appeared in a mock exercise in which volunteer arbitrators received no apparent benefit. In real arbitrations, cheaters not only recognize affiliation bias, they try to use it to their advantage whenever possible.

Various rules and procedures that ARIAS·U.S. has adopted reflect concern over affiliation bias. The ARIAS·U.S. Neutral Panel Rules and the Insurance Panel Rules both include the following:

> Under no circumstances will the Parties or ARIAS·U.S. disclose to the Panel who nominated the arbitrators/umpire for service or what ranking the Parties gave the arbitrators.[103]

Similarly, the ARIAS·U.S. Rules screen umpire candidates from individual parties and party-arbitrators to avoid telegraphing the source of the nomination:

> Unilateral contact between a Party, its Party-appointed arbitrator or its representative(s) on the one hand, and an individual considered for appointment as an umpire on the other hand, shall not be permitted unless and until the Panel, after being duly constituted, so permits.[104]

Chapter 2 of the ARIAS·U.S. Practical Guide recommends the following procedure to avoid suggesting to an umpire candidate the source of the nomination:

> Comment D: Any communications with prospective umpire candidates (e.g., to determine their availability to serve as umpire) should be made either jointly by counsel for both parties or jointly by both arbitrators.[105]

Despite these measures, neutral arbitrators and umpires may learn the source of their nominations, by mistake or design (or by inference).[106] *Allstate v. OneBeacon*[107] concerned an inadvertent disclosure. OneBeacon attached to a filing an addendum that included sufficient information to determine that the umpire had been its candidate. [108] Allstate sued to enjoin the arbitration, insisting that the proceedings were tainted and demanding a do-over of the selection process.[109] According to the court, however, Allstate failed to show either it was likely to succeed on the merits or that it was irreparably harmed. The court rejected Allstate’s claim that it would be futile to proceed before this umpire and held that, if the umpire proved to be partial, Allstate could challenge the award.[110] In other words, affiliation bias may affect some individuals but not others. The immunity of some arbitrators to affiliation bias means that a losing party cannot establish evident partiality merely by showing that the umpire knew the winning party had proposed his or her appointment; proving actual bias requires more.

One battle in the litigation saga known as *IRB v. NICO*[111] involved the purposeful disclosure of the nomination source to certain umpire candidates. In an affidavit, IRB’s party-arbitrator alluded to the fact that he had contacted IRB’s nominees in advance to “confirm their interest, ability, and willingness to serve as IRB’s Umpire Candidate.”[112] Although NICO pointed to the ARIAS·U.S. Practical Guide’s proscription against this practice, IRB insisted that unilateral contracts with potential

candidates commonly occurred in "ad hoc" arbitrations like this one, which the Practical Guide did not govern.[113] The court observed that whether IRB's conduct "violates best industry practice is of no importance here."[114] What mattered was that NICO sought relief that was unavailable in court – namely to disqualify one of IRB's candidates in advance of the arbitral award (indeed, in advance of umpire selection).[115] Thus, whatever the merits of NICO's accusation of cheating, any claims of bias would have to await completion of the arbitration.

> "Arbitrators who conduct themselves with honesty, fairness, and integrity may be the best defense to cheating in arbitration..."

The *Allstate* and *IRB* cases offer at least one clear lesson: parties should not expect judges to intercede and fix problems in ongoing arbitrations. There is, however, an alternative: arbitrators have authority to ensure the ethical integrity of the process, including dealing with affiliation bias. What should an umpire or umpire candidate do upon learning the source of the appointment? The ARIAS·U.S. Code has some answers. Canon 1 concerns "Integrity" and begins by observing that "[t]he foundation for broad industry support of arbitration is confidence in the fairness and competence of arbitrators."[116] The next part of Canon 1 admonishes that "[a]rbitrators owe a duty . . . to be honest; to act in good faith; to be fair, diligent, and objective in dealing with the parties and counsel and in rendering their decisions . . . ."[117] In addition, paragraph 3 of Canon 1 takes affiliation bias head on:

> There are certain circumstances where a candidate for appointment as an arbitrator must refuse to serve:
> e) where the candidate is nominated for the role of umpire and the candidate was contacted prior to nomination by a party, its counsel or the party's appointed arbitrator with respect to the matter for which the candidate is nominated as umpire.[118]

Thus, the Code requires that an umpire candidate refuse to serve if contacted in advance, as in *IRB v. NICO*. Moreover, although an appointed umpire does not need to resign upon later learning the source of the nomination, he or she should reflect on whether this information (alone or in combination with any other) will affect his or her ability to be fair. If the conclusion of that candid self-assessment is that the umpire cannot be fair, then Canon II directs the umpire to withdraw:

> Arbitrators shall conduct the dispute resolution process in a fair manner and shall serve only in those matters in which they can render a just decision. If at any time the arbitrator is unable to conduct the process fairly or render a just decision, the arbitrator should withdraw.[119]

Arbitrators who conduct themselves with honesty, fairness, and integrity may be the best defense to cheating in arbitration, including any parties, party-arbitrators, or lawyers that try to use affiliation bias to tilt the field.

Conclusion and Preview

If you have any doubts about the enormous range of human creativity, attend a play, a concert, or an art exhibit. A devious variant of ingenuity, however, generates a seemingly endless list of ways to cheat in arbitration. In Part III, we will cover the following tactics:

- Make evidence appear, disappear, and transform;
- Add persuasive force to your case through bribery and incentives;
- Better understand what the panel is thinking by obtaining access to their deliberations;
- Help others and yourself by ghostwriting decisions or dissents;
- Bait the arbitrator(s) into making errors that are potentially fatal to an adverse award; and
- When all else fails, destroy everything!

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Dan is actively engaged in AIDA Reinsurance and Insurance Arbitration Society, ARIAS·U.S., having served on the Board of Directors and as chair, and as a member and co-chair of the Arbitration Task Force. He currently serves on the Forms and Procedures Committee and Member Services Committee of ARIAS·U.S. Dan also publishes and speaks frequently on issues relating to reinsurance, financial services, and trial practice.

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Joseph has tried complex civil disputes in courts throughout New England, as well as Delaware, Maryland, New York, Ohio and Texas. Clients seek out his experience taking matters to trial in state and federal courts and litigating numerous arbitrations through final hearings. He is also sought out for his handling of appeals before courts, including the First Circuit Court of Appeals and state appellate courts in Connecticut, Massachusetts, New York and Rhode Island.

Joseph has been published and quoted on insurance and reinsurance topics in a number of publications, including Law360 and the Connecticut Law Tribune. He is a former member of the Board of Editors of Connecticut Supreme Court History, the journal of the Connecticut Supreme Court Historical Society. He currently serves on the Board of the Greater Hartford Legal Aid Foundation.

Endnotes

1 Finding reliable, empirical data on the chances of success for a petition to vacate an arbitral awards is challenging at best. A law review article evaluating data from 2010 to 2020 regarding whether courts in multiple countries enforced or vacated international, commercial awards found that, "without significant variations between courts in various jurisdictions," awards were enforced in 73% of the cases and vacated in only 23% of the cases. R. Alford, et al., *Empirical Analysis of National Courts Vacatur and Enforcement of International Commercial Arbitration Awards*, 39 J. In'tl Arb. 299 (2022), file:///H:/Downloads/SSRN-id4233396.pdf An annotation identifies the chance of vacatur under the FAA at 10% of those instances in which awards have been challenged. Andrew M. Campbell, Annotation, *Construction and Application of § 10(a)(1)-(3) of Federal Arbitration Act (9 U.S.C.A. § 10(a)(1)-(3)) Providing for Vacating of Arbitration Awards Where Award Procured by Fraud, Corruption, or Undue, Means, Where Arbitrators Evidence Partiality of Corruption and Where Arbitrators Engage in Particular Acts of Misbehavior*, 141 A.L.R. Fed. 1, § 2[a] (2012) ("courts have, correspondingly, shown little inclination to vacate arbitration awards on any ground, vacating awards in approximately 10% of the instances in which they have been challenged under the Act.") Notably, the Annotation does not identify any source for the "approximately 10%" value it reports.

2 *See, e.g., Cont'l Cas. Co. v. Certain Underwriters at Lloyds of London*, 10 F.4th 814, 816 (7th Cir. 2021) (noting that "[t]he FAA spells out a narrow set of reasons that may support a court's . . . vacatur . . of an award" and referring to the "exceedingly narrow scope for judicial review of a final arbitral award").

3 *See, e.g., Martinique Properties, LLC v. Certain Underwriters at Lloyd's of London, Subscribing to Pol'y No. W1551E160301*, 60 F.4th 1206, 1208 (8th Cir. 2023) (affirming confirmation of an award where the challenging party asserted only factual errors affecting the merits of the award which fell outside the scope of review). Several U.S. Courts of Appeal allow for vacatur where the award is "irrational," but other Circuit Courts do not recognize this ground because it does not appear in the FAA. *See, e.g., Star Dev. Grp., LLC v. Darwin Nat'l Assurance Co.*, 813 F. App'x 76, 88 (4th Cir. 2020); *HayDay Farms, Inc. v. FeeDx Holdings, Inc.*, 55 F.4th 1232, 1241 (9th Cir. 2022); *Ario v. Underwriting Members of Syndicate 53 at Lloyds for the 1998 Year of Account*, 618 F.3d 277, 295-96 (3rd Cir. 2010); *Abbott v. L. Off. of Patrick J. Mulligan*, 440 F. App'x 612, 618–19 (10th Cir. 2011); *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union AFL-CIO-CLC v. Wise Alloys, LLC*, 642 F.3d 1344, 1352 (11th Cir. 2011); *but see Porzig v. Dresdner, Kleinwort, Benson, N. Am. LLC*, 497 F.3d 133, 139 (2d Cir. 2007) (noting that several other Circuits have adopted a non-statutory ground of "completely irrational" but declining to follow them); *Vaughn v. Leeds, Morelli & Brown, P.C.*, 315 F. App'x 327,

330 (2d Cir. 2009) ("we have specifically rejected a challenge to the rationality of an award"); *Med. Shoppe Int'l, Inc. v. Turner Invs., Inc.*, 614 F.3d 485, 489 (8th Cir. 2010) (the previously recognized ground of "completely irrational" did not survive the U.S. Supreme Court's decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 582, 128 S.Ct. 1396, 170 L.Ed.2d 254 (2008).)

4 *Beumer Corp. v. ProEnergy Servs.*, LLC, 899 F.3d 564, 566 (8th Cir. 2018). To a certain extent, this view frames vacatur in terms of whether the arbitration process or award materially breached the parties' agreement to arbitrate their disputes: the award will stand unless it resulted from or reflected a process seriously antithetical to the one the parties envisioned – e.g., through fraud. In *Beumer*, the losing party argued that the arbitrators violated the contract's governing law provision, but the court concluded that the parties' bargain encompassed the possibility the arbitrator might misconstrue the law. *Id.* ("If the arbitrator mistakenly overlooked Missouri decisions that favored a contrary result, then he might have made an error of law in applying the contract, but such an error of law does not justify vacating the award.") Stated differently, when parties agree to arbitrate, they are deemed to know the law, including the restrictions on post-award recourse under the FAA.

5 *See, e.g., Certain Underwriting Members of Lloyds of London v. Fla., Dep't of Fin. Servs.*, 892 F.3d 501, 505–06 (2d Cir. 2018) ("The party challenging the award must prove the existence of evident partiality by clear and convincing evidence.") (citations omitted); *NuVasive, Inc. v. Absolute Med., LLC*, 71 F.4th 861, 871 (11th Cir. 2023) (to warrant vacatur for an award allegedly procured by fraud must "establish the fraud by clear and convincing evidence").

6 *Certain Underwriting Members of Lloyds of London v. Fla., Dep't of Fin. Servs.*, 892 F.3d 501, 505–06 (2d Cir. 2018) may serve as a good example of where uncovering apparent cheating might not suffice to undo an arbitral award.

A cedent, Insurance Company of the Americas ("ICA"), initiated a tripartite arbitration against its reinsurers ("Underwriters") concerning disputed billings for two substantial claims under workers compensation policies. At the organizational meeting, ICA's party-appointed arbitrator ("Campos") denied having any business relationship with ICA or its corporate parent. When the arbitration hearing commenced, Campos had the opportunity to update his disclosures but made none, even though during the interim Campos had hired as the CFO of his company an individual who had served as Treasurer, Secretary, and Director of ICA ("Rios"). Moreover, Rios was also a fact witness and attended the entire hearing as ICA's company representative. During the hearing, Campos and Rios acted as if they did not know each other. Campos also failed to disclose relationships he had with other ICA officers, and the fact that his company operated out of the same suite in the same office building as ICA.

Underwriters lost the arbitration and then moved to vacate the award based on Campos's alleged misconduct. The district judge found Campos's many undisclosed relationships significant. In addition, the court noted:

> I find it troubling that neither Arbitrator Campos nor Ricardo Rios acknowledged that they knew one another throughout the three-day arbitration. This apparent willful avoidance suggests that they were intentionally hiding their relationship from the other arbitrators and the representatives of Underwriters I.

Certain Underwriting Members at Lloyd's of London v. Ins. Co. of the Americas, No. 16-CV-323 (VSB), 2017 WL 5508781, at *11 (S.D.N.Y. Mar. 31, 2017), *vacated and remanded sub nom. Certain Underwriting Members of Lloyds of London v. Fla., Dep't of Fin. Servs.*, 892 F.3d 501 (2d Cir. 2018).. Thus, while recognizing the high burden to overturn an award, the district ourt granted the petition to vacate. *Id.* at *11-*12.

The Court of Appeals reversed and remanded, however. The appellate court directed "the district court to determine whether the Underwriters have shown by clear and convincing evidence that the failure to disclose by party-appointed arbitrator Campos either violates the qualification of disinterestedness or had a prejudicial impact on the award." 892 F.3d at 511. Thus, absent some exceedingly difficult-to-obtain evidence, the award might remain intact.

After the Second Circuit's ruling, Underwriters resolved this matter with the Florida Department of Financial Services, as successor to ICA. *Certain Underwriting Members of Lloyds of London v. Fla., Dep't of Fin. Servs.*, No. 16-CV-323(VSB), ECF#87 (filed Dec. 6, 2018) (Stipulation and Order Discontinuing ICA I and ICA II Proceedings).

7 *Maya Angelou: In her own words*, BBC (May 28, 2014), https://www.bbc.com/news/world-us-canada-27610770

8 *See, e.g., Serv. Partners, LLC v. Am. Home Assur. Co.*, No. CV-11-01858-CAS EX, 2011 WL 2516411, at *5 (C.D. Cal. June 20, 2011) ("There is nothing in the Agreement which allows for one party to disqualify or even object to the other's arbitrator. Had AHAC wanted the ability to disqualify or object to Service's appointed arbitrator, they could have included a contractual provision that provided an opportunity to do so.").

9 9 U.S.C. §§ 1-16. The FAA applies to most insurance and reinsurance disputes because these contracts involve interstate or foreign commerce. 9 U.S.C. §2; *see, e.g., McNichols v. GEICO Gen. Ins. Co.*, No. 3:20-CV-01497 (KAD), 2021 WL 3079783, at *7 (D. Conn. July 21, 2021) (FAA applied to appraisal provision in insurance contract as the policy is a contract that affects interstate commerce); *DAK Prop. Holdings, Inc. v. Indep. Specialty Ins. Co.*, No. 2:23-CV-417-SPC-KCD, 2023 WL 5108503, at *3 (M.D. Fla. July 31, 2023), *objections overruled*, No. 2:23-CV-417-SPC-KCD, 2023 WL 6519552 (M.D. Fla. Sept. 14, 2023) (the U.N. Convention, chapter II of the FAA, governs arbitration provision in contract between a Florida corporation and insurers from London). Complex issues under the McCarran-Ferguson Act, however, may cause certain state laws to "reverse preempt" the FAA, except for international contracts to which the U.N. Convention applies. *Green Enterprises, LLC v. Hiscox Syndicates Ltd. at Lloyd's of London*, 68 F.4th 662 (1st Cir. 2023) (notwithstanding the McCarran-Ferguson Act, the U.N. Convention, 9 U.S.C. § 201, preempted Puerto Rico Insurance Code provision prohibiting insurance policies from depriving policyholders of access to courts); *Gov't Emps. Ins. Co. v. Elkholy*, No. CV2116255MASDEA, 2022 WL 2373917, at *10 (D.N.J. June 30, 2022) (concluding that, although the insurance company's claims against health care pro-

viders for common law fraud and unjust enrichment were subject to arbitration, the claim under New Jersey's Insurance Fraud Prevention Act ("IFPA") could proceed in court because the IFPA regulates insurance and, thus, reverse-preempts the FAA).

In some international disputes, foreign law may govern whether and under what conditions an arbitrator may be removed from a pending proceeding. *See, e.g., Endurance Specialty Ins. Ltd. v. Horseshoe Re Ltd. on behalf of Separate Accts. HS0083 & HS0084, No. 23-CV-1831 (JGK)*, 2023 WL 4346605, at *6 (S.D.N.Y. July 5, 2023) (where the parties agreed that the Bermuda Arbitration Act governed, the Court concluded that (a) the Bermuda statute vests the authority to remove an arbitrator exclusively in the Supreme Court of Bermuda; and (b) even if the court did have the authority, it would not disqualify the arbitrator because the petitioner failed to identify a reasonable basis for removal), appeal pending No. 23-1-51, U.S. Court of Appeals (2d Cir. July 24, 2023).

10 *Savers Property and Cas. Ins. Co. v. National Union Fire Ins. Co. of Pittsburg, PA*, 748 F.3d 708 (6th Cir. 2014) (reversing an injunction the district court issued stopping an ongoing arbitration based on allegations that the ceding company was breaching the reinsurance contract through its relationship with the party-arbitrator); *Gulf Guar. Life Ins. Co. v. Connecticut General Life Ins. Co.*, 304 F.3d 476, 490 (5th Cir. 2002); *Aviall, Inc. v. Ryder System, Inc.*, 110 F.3d 892, 895 (2d Cir. 1997); *John Hancock Life Ins. Co. (U.S.A.) v. Emps. Reassurance Corp.*, No. 15-CV-13626, 2016 WL 3460316, at *3 (D. Mass. June 21, 2016) ("[t]he FAA contains no provision expressly granting Courts the authority to remove a party-appointed arbitrator prior to the conclusion of the arbitration."); *Travelers Cas. Ins. Co. of Am. v. Papagiannopoulous as trustee of John Galanis Realty Revocable Tr.*, No. 8:22-CV-02314-LKG, 2023 WL 4826184, at *6 (D. Md. July 27, 2023) (dismissing for lack of subject matter jurisdiction lawsuit seeking a judgment declaring that the policyholder's appraisers are implicitly biased); *Certain Underwriters at Lloyd's London v. Argonaut Ins. Co.*, 264 F. Supp. 2d 926, 937 (N.D. Cal. 2003) ("other courts have consistently held that courts do not have the power under the FAA to disqualify an arbitrator while proceedings are pending"); *Nat'l Cas. Co. v. OneBeacon Am. Ins. Co.*, No. CIV.A. 12-11874-DJC, 2013 WL 3335022 (D. Mass. July 1, 2013), *aff'd sub nom. Emps. Ins. Co. of Wausau v. OneBeacon Am. Ins. Co.*, 744 F.3d 25 (1st Cir. 2014). (rejecting application to disqualify umpire candidate); *In re Arbitration Between Certain Underwriters at Lloyds, London*, 1997 WL 461035, at *4, *5 (N.D. Ill. Aug.11, 1997) (rejecting reinsurers' petition seeking to disqualify as the cedent's appointed arbitrators two executives from one insurance company based on their alleged bias from being responsible for similar disputes between their employer and the reinsurers).

11 Section 5 of the FAA, 9 U.S.C. § 5, provides as follows:

> 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.

12 *See, e.g., Jefferson-Pilot Life Ins. Co. v. LeafRe Reinsurance Co.*, No. 00 C 5257, 2000 WL 1724661, at *1 (N.D. Ill. Nov. 20, 2000) (denying a motion to dismiss complaint seeking to enjoin an arbitration where the AAA appointed three individuals as arbitrators who did not meet the contractual requirement of being "active or retired officer[s] of a life or health insurance company"); *B/E Aerospace, Inc. v. Jet Aviation St. Louis, Inc.*, No. 11 CIV. 4032 SAS, 2011 WL 2852857, at *1 (S.D.N.Y. July 1, 2011) (although the court denied the petitioner's application to enjoin the arbitration, it concluded that it had authority under FAA § 5 to determine whether the arbitrators selected by the defendant and the AAA met the specific criteria in the contract – "professional business persons knowledgeable of the aircraft industry"); *Oakland-Macomb Interceptor Drain Drainage Dist. v. Ric-Man Const., Inc.*, 304 Mich. App. 46, 54–55, 850 N.W.2d 498, 503 (2014) (remanding and directing the trial court to order the AAA to appoint a panel member who meets the contractual criteria of being a construction lawyer with the specified years' experience in construction litigation).

13 *See, e.g., Trustmark Ins. Co. v. John Hancock Life Ins. Co. (U.S.A.)*, 631 F.3d 869, 871 (7th Cir. 2011) (reversing and concluding that the district court erroneously concluded that the cedent's appointed arbitrator did not meet the contractual requirement of being "disinterested"); *Emps. Ins. Co. of Wausau v. Certain Underwriters at Lloyds of London*, No. 09-CV-201-BBC, 2009 WL 3245562, at *4 (W.D. Wis. Sept. 29, 2009) (refusing to disqualify one side's party-appointed arbitrator based on claims that he does not meet the contractual requirements that arbitrators be "impartial and disinterested); *Pollock v. Fed. Ins. Co.*, No. 21-CV-09975-JCS, 2022 WL 4624820 (N.D. Cal. Sept. 30, 2022) (denying motion to disqualify appraiser on the ground that he did not meet the contractual requirement of impartiality); *IRB-Brasil Resseguros S.A. v. Nat'l Indem. Co.*, No. 11 CIV. 1965 NRB, 2011 WL 5980661, at *6 (S.D.N.Y. Nov. 29, 2011) (rejecting attempt to disqualify umpire candidate as allegedly failing to meet a requirement that he was not under the control of the reinsurer, based on the well-established rule that "parties are precluded from attacking the partiality of an arbitration panel until after an award has been issued"); *but see Gahn v. Columbia Cas. Ins. Co.*, No. CV 03-630 TUC DCB, 2005 WL 8160591, at *3 (D. Ariz. Nov. 29, 2005) (granting motion to disqualify a party-appointed appraiser because the party "has failed to comply with the [contractual] provision to select a competent and impartial appraiser."). The court in *Jefferson-Pilot* – the case that may be the most-cited decision for allowing for challenges based on contractual qualifications – was careful to distinguish challenges based on claims of bias. *Jefferson-Pilot Life Ins. Co. v. LeafRe Reinsurance Co.*, No. 00 C 5257, 2000 WL 1724661, at *2 (N.D. Ill. Nov. 20, 2000) (noting the existence of "little disagreement among courts that . . . .allegations of an arbitrator's bias or impartiality cannot be litigated at the pre-award stage.").

14 Where an organization, such as the

American Arbitration Association ("AAA") or the International Centre for Dispute Resolution ("ICDR"), oversees the arbitral process, the operative rules may allow a party to request that the administrator disqualify an arbitrator. *See, e.g., In re Sussex, 781 F.3d 1065, 1068* (9th Cir. 2015) (granting mandamus where the district court had granted a motion to disqualify an arbitrator whom the AAA refused to disqualify); *Adam Techs. Int'l S.A. de C.V. v. Sutherland Glob. Servs., Inc.*, 729 F.3d 443, 452 (5th Cir. 2013) (affirming dismissal of a complaint seeking to reinstate a party-appointed arbitrator whom the ICDR had disqualified because he previously mediated the same dispute between the parties).

15 *Shamitoff v. Richards*, No. 2:14-CV-00024-MCE, 2014 WL 6610919, at *1 (E.D. Cal. Nov. 19, 2014).

16 *Id.* at *1.

17 *Id.* at *3.

18 *See, e.g. Savers Prop. & Cas. Ins. Co. v. Nat'l Union Fire Ins. Co. of Pittsburg, PA*, 748 F.3d 708, 712 (6th Cir. 2014))("Each party was to appoint its own arbitrator, and then the two party-appointed arbitrators would select a neutral umpire); *U.S. Life Ins. Co. v. Superior Nat. Ins. Co.*, 591 F.3d 1167, 1170–71 (9th Cir. 2010) ("The panel . . . consisted of an arbitrator appointed by each party and a neutral arbitrator selected by the parties' arbitrators . . . .").

In *Trout v. Organizacion Mundial de Boxeo, Inc.*, 965 F.3d 71, 79 (1st Cir. 2020), the First Circuit addressed an arbitration agreement that gave one party, the World Boxing Organization, the authority to select all of the arbitrators who would resolve all disputes that a boxer, Austin Trout, raised. The circuit court concluded that this one-sided provision was unconscionable and remanded the case to the district court to determine whether the clause was severable from the remainder of the arbitration provision.

19 *See, e.g., Ancon Ins. Co. (U.K.) v. GE Reinsurance Corp.*, 480 F. Supp. 2d 1278, 1279-80 (D. Kan. 2007) (arbitration clause in a reinsurance contract provided, in part, "[i]f either party refuses or neglects to appoint an arbitrator within thirty days after the receipt of written notice from the other party requesting it to do so, the requesting party may appoint two arbitrators"); *Universal Reinsurance Corp. v. Allstate Ins. Co.*, 16 F.3d 125, 127 (7th Cir. 1993) (in a reinsurance dispute, a provision in arbitration clause provided that a party would have the right to appoint two arbitrators in the event the other party failed to appoint its arbitrator in 30 days); *Encompass Ins., Inc. v. Hagerty Ins. Agency, Inc.*, No. 1:08-CV-337, 2009 WL 160776, at *14 (W.D. Mich. Jan. 22, 2009) (quoting a similar provision in the arbitration clause in an insurance agency agreement).

20 *See, e.g., Krohmer Marina, LLC v. Certain Underwriters at Lloyd's, London*, 655 F. Supp. 3d 1124, 1133 (E.D. Okla. 2023) (quoting arbitration clause in insurance policy providing that a party "will commence arbitration by appointing an arbitrator . . . [and the] respondent must appoint an arbitrator . . . within 14 days . . . ."); *Lincoln Gen. Ins. Co. v. Clarendon Nat'l Ins. Co.*, No. 4:08-CV-0582, 2008 WL 11367525, at *5 (M.D. Pa. Aug. 15, 2008) (arbitration clause in reinsurance agreement provided, in part, as follows: "One arbitrator will be chosen by each party . . . .").

21 Judith Levine, *Ethical Dimensions of Arbitrator Resignations*, AJIL Unbound, 2019; 113:290-95. Doi: 10.1017/aju.2019.40 (16 Sept. 2019) (internal quotation marks and footnote omitted), https://www.cambridge.org/core/journals/american-journal-of-international-law/article/ethical-dimensions-of-arbitrator-resignations/0415C18C52328CC937296C468BB32BA6.

22 ARIAS·U.S., Code of Conduct—Canon IV, 5, http://www. ARIAS·us.org/index.cfm?a=30.

23 The U.S. Court of Appeals for the Second Circuit handles appeals from U.S. District Courts located in Connecticut, New York, and Vermont. United States Court of Appeals for the Second Circuit, *About the Court*, https://www.ca2.uscourts.gov/about_the_court.html#:~:text=The%20United%20States%20District%20Courts,New%20Haven%2C%20Hartford%2C%20Bridgeport).

24 *Marine Products Export Corp. v. M.T. Globe Galaxy*, 977 F.2d 66, 68 (2d Cir. 1992) (referring to "the general rule that upon the death of a member of an arbitration panel the arbitration should begin anew before a new panel.").

25 9 U.S.C. §5.

26 *See WellPoint, Inc. v. John Hancock Life Ins. Co.*, 576 F.3d 643, 647 (7th Cir. 2009) ("The *Marine Products* court did not discuss § 5 in its brief opinion. That section would never have any room to operate, however, if every time an unanticipated vacancy occurred, the clock were automatically set back to zero."); *Nat'l Am. Ins. Co. v. Transam. Occidental Life Ins. Co.*, 328 F.3d 462, 465–66 (8th Cir.2003) (noting that the Eighth Circuit has not adopted the "general rule" referenced in *Marine Products* and declining to do so).

27 *Ins. Co. of N. Am. v. Pub. Serv. Mut. Ins. Co.*, 609 F.3d 122, 132 (2d Cir. 2010) (affirming order requiring a party whose appointed arbitrator had resigned for health reasons to appoint a new arbitrator, and rejecting the argument that the court should have ordered that the arbitration begin anew).

28 *See Nw. Nat. Ins. Co. v. Insco, Ltd.*, No. 11 CIV. 1124 SAS, 2011 WL 1833303, at *2 (S.D.N.Y. May 12, 2011) (maintaining that the party whose arbitrator resigned should choose the replacement, because "while courts have the power to replace an arbitrator where the arbitration agreement provides no procedure for doing so, it is prudent to preserve the balance of arbitrators intended by the parties if possible."); *Ins. Co. of N. Am. v. Pub. Serv. Mut. Ins. Co.*, 609 F.3d 122, 132 (2d Cir. 2010); *In re Louisiana Pac. Corp.*, 972 S.W.2d 63, 64 (Tex. 1998) (rejecting the argument that the arbitration clause allowed the party to appoint only once and holding that the party had the right to appoint a substitute arbitrator after it had withdrawn the appointment of an individual whom it subsequently retained to act as its counsel in litigation with the opponent); *Companion Prop. & Cas. Ins. Co. v. Allied Provident Ins., Inc.*, No. 13-CV-7865, 2014 WL 4804466, at *14 (S.D.N.Y. Sept. 26, 2014) (where a party-appointed arbitrator resigned for poor health, the appropriate course was for that party to appoint a replacement.).

29 *See, e.g., ABF Freight Sys., Inc. v. Int'l Bhd. of Teamsters*, 728 F.3d 853, 860 (8th Cir. 2013) ("Generally, a disqualified arbitrator may name a replacement if the rules allow it.").

30 *See, e.g., Zeiler v. Deitsch*, 500 F.3d 157 (2d Cir. 2007).

31 *Nat'l Am. Ins. Co. v. Transamerica Occidental Life Ins. Co.*, 328 F.3d 462, 464 (8th Cir. 2003) (noting that the parties' reinsurance "agreements do not stipulate a method to replace an arbitrator in the event of a va-

cancy on the arbitration panel. Because the agreements are silent on this issue, this dispute is governed by 9 U.S.C. § 5 . . . .").

32 For example, under the arbitration rules of the United Nations Commission on International Trade Law ("UNCITRAL"), upon the death or resignation of an arbitrator, the replacement happens through the same process that governed the initial appointment. UNCITRAL Arbitration Rules Art. 13, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arb-rules.pdf

33 *Zeiler v. Deitsch*, 500 F.3d 157 (2d Cir. 2007).

34 *Id.* at 160.

35 *Id.* at 167.

36 *IRB-Brasil Resseguros S.A. v. Nat'l Indem. Co.*, No. 11 CIV. 1965 NRB, 2011 WL 5980661, at *4 (S.D.N.Y. Nov. 29, 2011).

37 *Id.* at *3.

38 *Id.* at *4.

39 *Id.*

40 *Id.* at *4-*5 (emphasis added).

41 The stage of the arbitration, a factor that influenced the Court in *IRB v. NICO*, also appears in paragraph 5 of ARIAS·U.S. Canon IV, quoted above. Paragraph 5 applies when an arbitrator considers resigning "[a]fter the parties have accepted the panel." ARIAS U.S., Code of Conduct—Canon IV, 5. Thus, NICO's request that its original arbitrator resign did not implicate Canon IV.

42 *Id.*

43 *Wellpoint Health Networks, Inc. v. John Hancock Life Ins. Co.*, 547 F. Supp. 2d 899, 917–18 (N.D. Ill. 2008), aff'd sub nom. *WellPoint, Inc. v. John Hancock Life Ins. Co.*, 576 F.3d 643 (7th Cir. 2009).

44 *Id.*, 547 F. Supp. 2d at 903.

45 *Id.*, 576 F.3d at 645.

46 *Id.*, 547 F. Supp. at 903.

47 *Id.*, 547 F. Supp. at 905.

48 *Id.*,547 F. Supp. at 906. John Hancock later sought to vacate the award under Section 10 of the FAA. The district court ultimately rejected this request finding that the resignation of WellPoint's first arbitrator and the belabored appointment of the replacement did not deprive the panel of the authority to render an award. In reaching this conclusion, the court rejected WellPoint's argument that John Hancock had waived a challenge to the constitution of panel by not seeking relief under Section 5 of the FAA at the time of the appointment of WellPoint's replacement arbitrator. The court explained that, although a failure to bring a timely objection to the selection process during the arbitration waives that issue, a party that timely objects and maintains the objection can either bring a petition under Section 5 immediately or wait for an award to raise that issue in a petition to vacate under Section 10. *Id.* at 913. On appeal, the Seventh Circuit took a different and more nuanced view. The appellate court criticized Hancock, finding it had recourse to contest the appointment during the arbitral process under Section 5 of the FAA and consciously chose not to use it until it lost. 576 F.3d at 647-488 (commenting that parties generally cannot play "'heads I win, tails you lose'" under the FAA). The Seventh Circuit declined to announce a universal requirement that a party opposing replacement must always go to court under Section 5). *Id.* at 488 ("There 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.").

49 ARIAS·U.S., Code of Conduct, Purpose ("***the parties and their counsel are expected to conform their own behavior to the Canons and avoid placing arbitrators in positions where they are unable to sit or are otherwise at risk of contravening the Canons.***" (emphasis in original), https://www. ARIAS·us.org/ARIAS·us-dispute-resolution-process/code-of-conduct/.

50 *Polin v. Kellwood Co.*, 103 F. Supp. 2d 238 (S.D.N.Y. 2000), aff'd, 34 F. App'x 406 (2d Cir. 2002).

51 *Seagate Tech., LLC v. W. Digital Corp.*, 854 N.W.2d 750 (Minn. 2014) (affirming appellate court's order confirming arbitral award granting sanctions against parties for fabricating evidence).

52 *GateGuard, Inc. v. Goldmont Realty Corp.*, 641 F. Supp. 3d 66 (S.D.N.Y. 2022).

53 *Id.* at 69.

54 *Id.* at 71.

55 *Id.* at 75.

56 *Id.*

57 For an example of where a party succeeded in disqualifying counsel for the other side, *see, e.g., Nw. Nat. Ins. Co. v. Insco, Ltd.*, No. 11 CIV. 1124 SAS, 2011 WL 4552997, at *10 (S.D.N.Y. Oct. 3, 2011) (disqualifying counsel for obtaining access to the arbitrators' deliberative communications).

58 *Emps. Ins. Co. of Wausau v. Munich Reinsurance Am., Inc.*, No. 10 CIV. 3558 PKC, 2011 WL 1873123 (S.D.N.Y. May 16, 2011).

59 *Id.* at *5.

60 *Id.* at *4 (citation omitted).

61 *Id.* at *5.

62 *Id.* at *6. The court raised the possibility that a party might intentionally retain multiple law firms to prevent them from representing counterparties in the niche field of reinsurance disputes. Others have expressed concern about this tactic, known as "conflicting out" lawyers, in relation to other practice areas, such as celebrity divorces. *See* J. Landers, *How "Conflicting Out" Top Divorce Attorneys Can Impact Your Divorce*, Forbes (April 17, 2012) (describing the tactic of "conflicting out" top divorce lawyers and referring to it as a "dirty trick"), https://www.forbes.com/sites/jefflanders/2012/04/17/how-conflicting-out-top-divorce-attorneys-can-impact-your-divorce/?sh=f4cc434148a2.

63 *Id.*

64 *Utica Mut. Ins. Co. v. Emps. Ins. Co. of Wausau*, No. 6:12-CV-1293 NAM/TWD, 2014 WL 4715712, at *2 (N.D.N.Y. Sept. 22, 2014).

65 *Id.* at *4-*5.

66 *Id.* at *5-*6.

67 *Id.* at *8-*9.

68 *Id.* at *9.

69 After the court's ruling, Utica filed a motion to reconsider and, before that motion was resolved, the parties stipulated to dismiss the litigation with prejudice. *Utica Mut. Ins. Co., v. Emps. Ins. Co. of Wausau*, No. 6:12-CV-1293(NAM/TWD), ECF. #84 (Oct. 6, 2014) & #91 (Dec. 18, 2014).

70 *Application of Utica Mut. Ins. Co. v. INA Reinsurance Co.*, 468 F. App'x 37 (2d Cir. 2012).

71 Under Rule 1.10 of the New York State Rules of Professional Conduct, a law firm is disqualified in a dispute that is "same

as or substantially related to a matter in which the newly associated lawyer, or a firm with which that lawyer was associated, formerly represented a client. NY ST RPC Rule 1.10 (McKinney).

72 An imputed conflict of interest usually requires that the subject attorney previously had substantial responsibility in representing the moving party in the same matter or a substantially related matter. *See, e.g., Seaman Corp. v. Zurich Am. Ins. Co.*, 643 F. Supp. 3d 790, 796 (N.D. Ohio 2022) (disqualifying Zurich's counsel because a lawyer who joined the firm previously had substantial responsibilityle in providing legal services to the insured in the same matter).

73 *Application of Utica Mutual Ins. Co.*, 468 F. App'x at 38.

74 *Gordon v. Skylink Aviation, Inc.*, 28 Misc. 3d 1235(A), 960 N.Y.S.2d 341 (Sup. Ct. 2010) (internal quotation marks and citation omitted).

75 *See, e.g., Application of Nomura Sec. Int'l, Inc*., 221 A.D.2d 279, 279, 634 N.Y.S.2d 95, 96 (1995) (noting that the movant lacked factual support for its claims, had filed only six days before the arbitration was commenced based on information it possessed for months, and that disqualification "could stall and derail the proceedings, redounding to the strategic advantage of one party over another.") (internal quotation marks and citation omitted).

76 *Octaform Sys., Inc. v. Johnston*, No. 216CV02500APGEJY, 2023 WL 3645965, at *8 (D. Nev. May 25, 2023) ("new counsel would need to be sourced and significant time would be required for that counsel to become fully familiar with the long history of this dispute.").

77 *See, e.g., SITEL Corp. v. Stonebridge Life Ins. Co.*, No. CV CCB-06-3457, 2007 WL 9780537, at *5 (D. Md. July 23, 2007) (denying motion to disqualify and concluding that the "current dispute . . . . does not appear to relate substantively to any work" the law firm performed for the movant's corporate affiliates).

78 *See, e.g., Santander Sec. LLC v. Gamache*, No. CV 17-317, 2017 WL 1208066, at *8 (E.D. Pa. Apr. 3, 2017) (concluding that the party seeking disqualification had failed to identify any confidential information that the former counsel possessed that was relevant to the new dispute and noting that the lack of evidence suggests that the party was irate that it former counsel would accuse it of unfair competition and that the party "disingenuously seeks to hobble [its opponent] at the outset of [the arbitration].").

79 *Nomura Sec. Int'l, Inc. v. Hu*, 240 A.D.2d 249, 251, 658 N.Y.S.2d 608, 610 (1997) (commenting on the seven-month delay in pursuing the motion to disqualify and the burden placed on the other party of being deprived of its counsel of choice, well into the arbitration).

80 *See, e.g., Hibbard Brown & Co. v. ABC Fam. Tr.*, 959 F.2d 231 (4th Cir. 1992) (upholding district court's refusal to consider motion to disqualify counsel that would interfere with the arbitration because the facts surrounding the claim and that bore on the motion were not fully developed.).

81 *See, e.g., North v. United States Dep't of Just.*, 17 F. Supp. 3d 1, 3 (D.D.C. 2013) ("An *ex parte* communication is defined as a 'communication between counsel and the court when opposing counsel is not present.'") (quoting *Black's Law Dictionary* 316 (9th ed. 2009)); *Cobell v. Norton*, 237 F. Supp. 2d 71, 74, n. 2 (D.D.C. 2003) ("'[A]n *ex parte* contact is generally thought to be one between a person who is in a decision-making role and a person who is either a party or counsel to a proceeding before him that takes place without notice and outside the record.'") (quoting Richard E. Flamm, *Judicial Disqualification* § 14.3.1, at 410 (1996).).

82 *See, e.g., U.S. Life Ins. Co. v. Superior Nat. Ins. Co.*, 591 F.3d 1167, 1171 (9th Cir. 2010) (referring to the practice of allowing a party to engage in *ex parte* contacts with its appointed arbitrator before the submission of pre-hearing briefs as being "customary in tripartite arbitration."); ARIAS·U.S. , *Practical Guide to Reinsurance Arbitration Procedure*, ¶3.9 (recommending that the cut-off for *ex parte* communications be established at the organizational meeting and noting the "wide range of views about the most appropriate cut-off"); *see also ARIAS·U.S. Code of Conduct – Canon V* ("2. Party-appointed arbitrators may communicate with the party who is considering appointing them about their fees and, excepting those who by contract are required to be 'neutral' or the equivalent, may also communicate about the merits of the case prior to acceptance of the appointment until the date determined for the cessation of *ex parte* communications.").

83 *Costco Wholesale Corp. v. Int'l Bhd. of Teamsters, Loc. No. 542*, 850 F. App'x 467, 468 (9th Cir. 2021) (vacating an arbitral award for violating the rule of fundamental fairness where, among other things, the arbitrator engaged in "extensive post-hearing *ex parte* communications" with the winning party); *Johnson v. Dep't of Air Force*, 50 F.4th 110, 115 (Fed. Cir. 2022) ("*ex parte* communications that introduce new and material information to the deciding official will violate the due process guarantee of notice.") (citation and internal quotation marks omitted); *Iowa Supreme Ct. Bd. of Pro. Ethics & Conduct v. Rauch*, 650 N.W.2d 574, 578 (Iowa 2002) ("To facilitate a balance of representations by opposing advocates, we require lawyers to fulfill certain procedural requirements before engaging in *ex parte* communications. In general, a lawyer may not discuss with the court *ex parte* matters related to the merits of a pending proceeding. Such matters may be either substantive or procedural.") (citation omitted).

84 *See, e.g., Crawford v. Washington*, 541 U.S. 36, 62, 124 S. Ct. 1354, 1370, 158 L. Ed. 2d 177 (2004) ("adversarial testing 'beats and bolts out the Truth much better.'") (*quoting* M. Hale, *History and Analysis of the Common Law of England* 258 (1713).); *see also US Masters Residential Prop. (USA) Fund v. New Jersey Dep't of Env't Prot.*, 239 N.J. 145, 163, 216 A.3d 137, 148 (2019) (referring to the arbitrator's order precluding one party from presenting certain evidence as resulting in a failure to fulfill "the truth-seeking function of adversarial proceedings"); *but cf.* Ga. ADR Prac. & Proc § 2:6 ("Unlike adversarial litigation, which relies solely on the conflicting presentations of the parties to ascertain the truth, arbitration is an inquisitory process.")

85 *Cannon v. State*, 866 N.E.2d 770, 773 (Ind. 2007)

86 *Id.*

87 *Costco Wholesale Corp. v. Int'l Bhd. of Teamsters, Loc. No. 542*, 850 F. App'x 467, 468 (9th Cir. 2021).

88 *Id.* at 469.

89 *Emps. Ins. of Wausau v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 933 F.2d 1481, 1484-85, 1491 (9th Cir. 1991). In reaching this decision, the court noted that the losing party

had "itself engaged in some of the very *ex parte* contacts to which it objects," rendering it "ill-positioned to make this challenge." *Id.* at 1490. Essentially, if you are going call someone's behavior cheating, then it would be advisable not to have partaken in that very conduct yourself.

90 *U.S. Life Ins. Co. v. Superior Nat. Ins. Co.*, 591 F.3d 1167, 1173 (9th Cir. 2010).

91 *Star Ins. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 656 F. App'x 240, 253 (6th Cir. 2016).

92 *Hartford Steam Boiler Inspection & Ins. Co. v. Underwriters At Lloyd's & Companies Collective*, 121 Conn. App. 31, 58, 994 A.2d 262, 280 (2010).

93 *Id.* at 39-40. The court reasoned, in part, that, absent express agreement to the contrary, a ban on *ex parte* communications ends upon issuance of a final award. Although the trial court had remanded that award to the panel for clarification, the trial court clearly instructed that the panel could not change the substance of its decision – just clarify the basis for it. Parties and practitioners should be cautious, therefore, about engaging in *ex parte* communications after a final award if they think there is some basis for challenging it on substantive grounds.

94 *Dow Corning Corp. v. Safety Nat'l Cas. Corp.*, 335 F.3d 742, 750 (8th Cir. 2003).

95 *Id.* at 751 (describing and quoting the District Court's finding).

96 *PEG Reinsurance Co. LTD v. Discover Reinsurance Co.*, No. CV064026304S, 2006 WL 3360692, at *3 (Conn. Super. Ct. Nov. 7, 2006).

97 Although the Court in *Star Ins. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 656 F. App'x 240 (6th Cir. 2016) concluded that *ex parte* contacts were prohibited at the time that counsel and the party-appointed arbitrator communicated, the arbitrator and the umpire issued an earlier ruling that reached the opposite conclusion – relating that the panel had determined in advance that *ex parte* communications could resume. Significantly, neither the arbitrator nor the counsel ever concealed or denied the existence of their discussions, which substantiates the fact they believed the communications were permissible. Thus, the communications appear to reflect what was, at most, a misunderstanding, rather than any intentional misconduct. This episode underscores the value of the salutary practice that has emerged since this case of the arbitrators' including in any interim award a provision addressing whether *ex parte* communications may resume.

98 Sergio Puig, Anton Strezhnev, *Affiliation Bias in Arbitration: An Experimental Approach*, 46 J. Legal Stud. 371, 373 (2017).

99 *Id.*

100 *Id.* at 373.

101 *Id.*

102 *Id.* at 381.

103 ARIAS·U.S. Neutral Panel Rules, R. 6.10; ARIAS·U.S. Panel Rules for the Resolution of Insurance and Contract Disputes, R. 6.10.

104 ARIAS·U.S. Rules for the Resolution of U.S. Insurance and Reinsurance Disputes, R. 6.7(d).

105 ARIAS·U.S. Practical Guide, 2.1, cmt. D, https://www. ARIAS·us.org/wp-content/uploads/2019/09/Practical-Guide-to-Reinsurance-Arbitration-Procedure-2018-Updated-9.4.19.pdf.

106 In practice, the identity of the nominating party may not mystify the umpire. Circumstances may make it easy to infer the source: for example, if the umpire has been nominated in the past several months in other arbitrations in which one of the current parties, its arbitrator, or lawyers, are involved (and no one from the other side), then the source of the current nomination is fairly apparent.

107 *Allstate Ins. Co. v. OneBeacon Am. Ins. Co.*, 989 F. Supp. 2d 143 (D. Mass. 2013).

108 *Id*. at 146.

109 *Id*. at 149.

110 *Id.* at 148-150.

111 *IRB-Brasil Resseguros S.A. v. Nat'l Indem. Co.*, No. 11 CIV. 1965 NRB, 2011 WL 5980661 (S.D.N.Y. Nov. 29, 2011)).

112 *Id.* at *5.

113 *Id.*

114 *Id.*

115 *Id.* at *5-*6.

116 ARIAS·U.S., *Code of Conduct—Canon* I, 1.

117 ARIAS·U.S., *Code of Conduct—Canon* I, 1.

118 ARIAS·U.S., *Code of Conduct—Canon* I, 3.

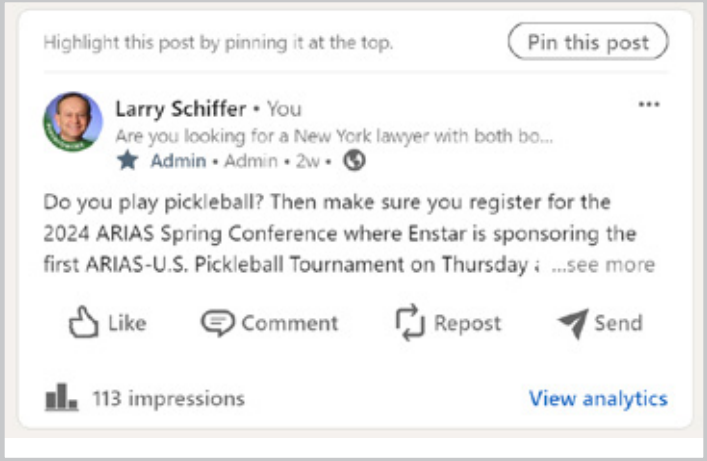
119 ARIAS·U.S., *Code of Conduct—Canon* II.

How to Share LinkedIn Posts to a Group

By: Larry P. Schiffer, Schiffer Law & Consulting PLLC

If you want to share your post or a post made by someone else to a LinkedIn Group, like our ARIAS·U.S. Group, here's how you do it.

First, you must be a member of the LinkedIn Group that you want to share the post with. So if you aren't already a member, join the Group. If you have not joined the ARIAS·U.S. LinkedIn Group, please do so! You can find us by searching, "ARIAS-U.S." on LinkedIn, or visiting: https://www.linkedin.com/groups/4328272/



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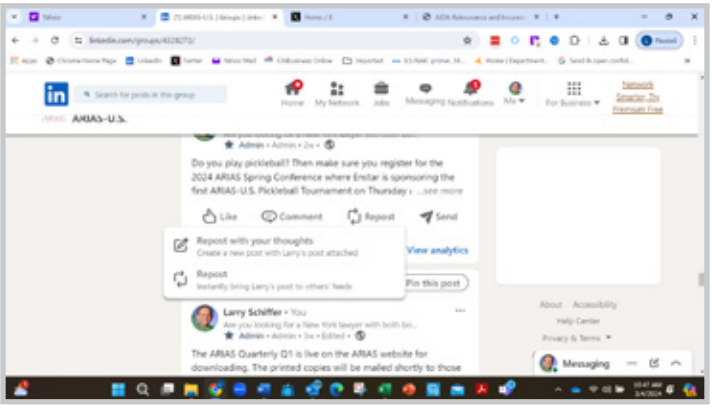

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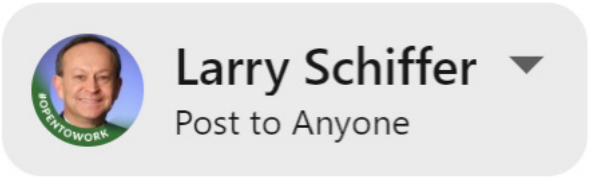

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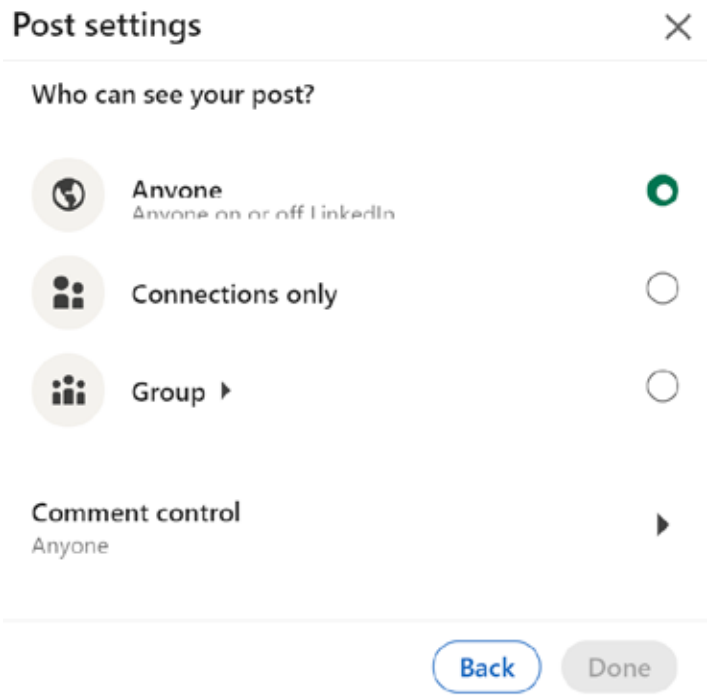

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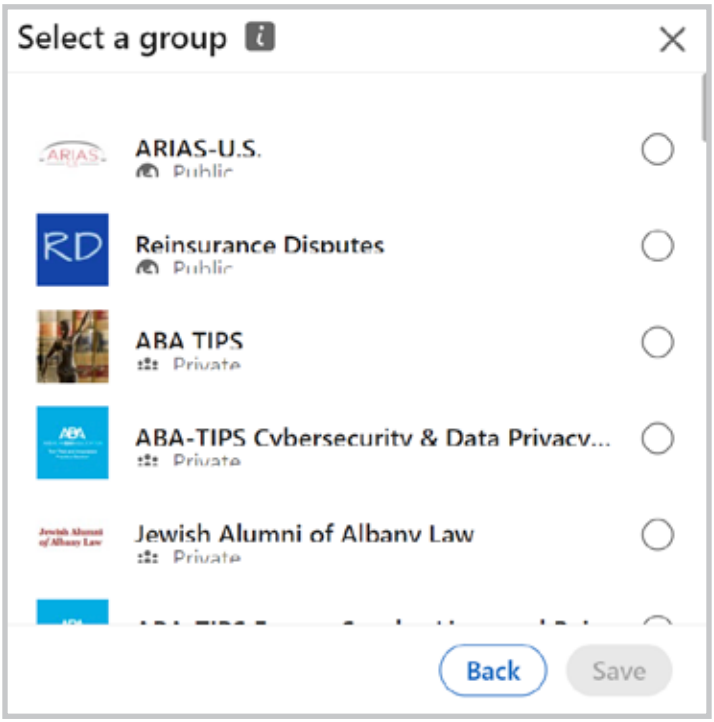

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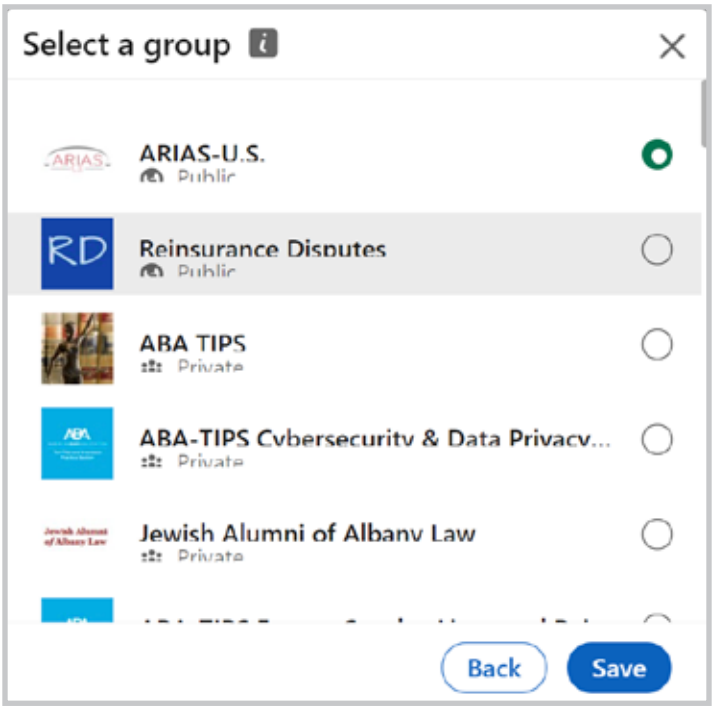

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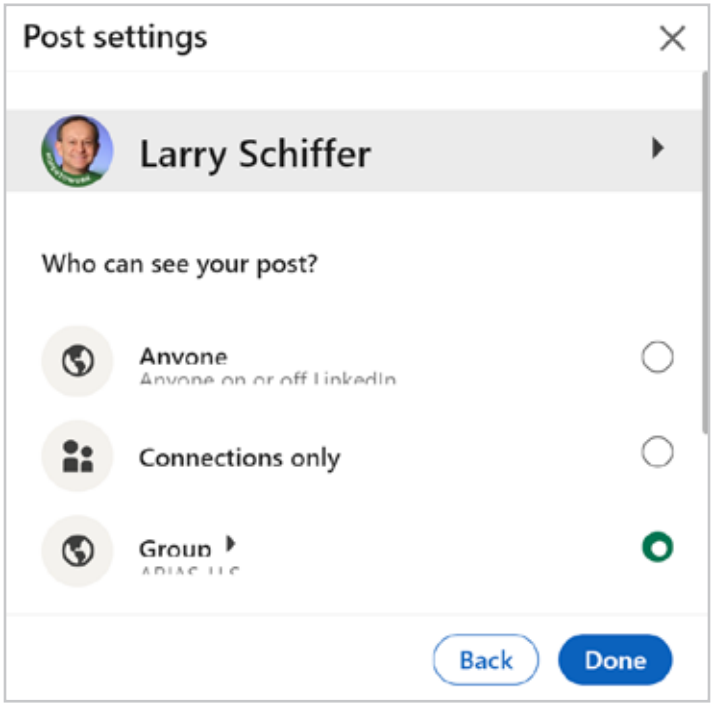
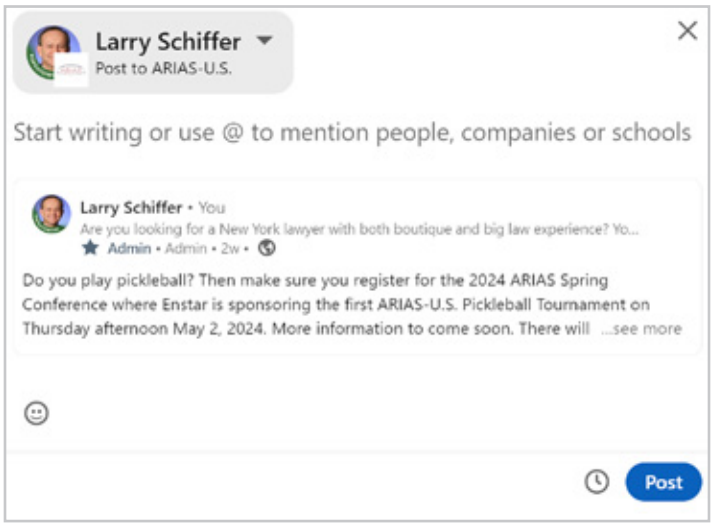
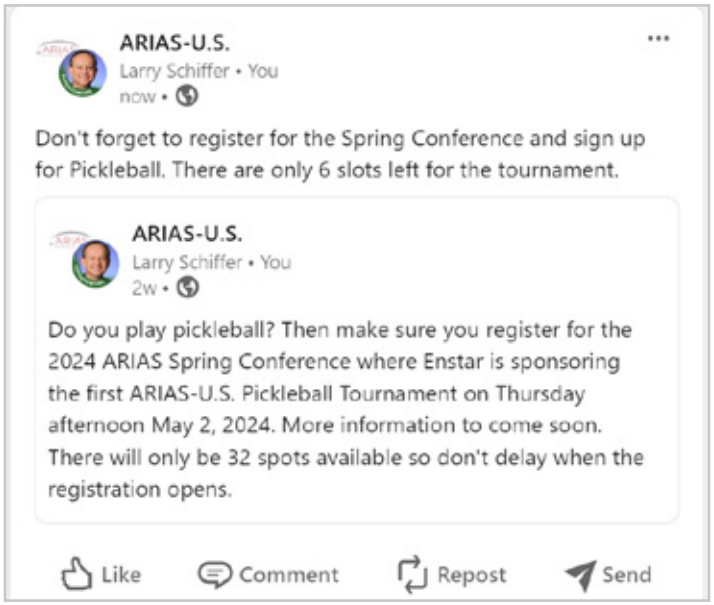


Click the radio button for Group and then Done:



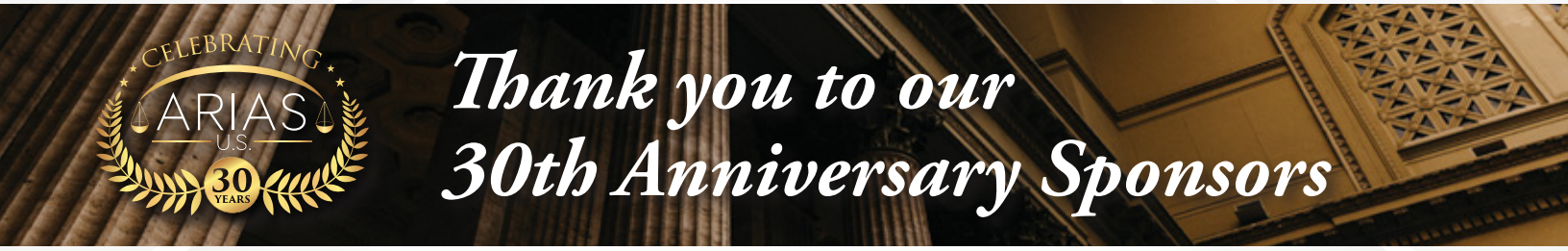
And then add some commentary (a narrative introduction) and **Post**:



That's it. Simple.

Larry Schiffer launched his independent legal and consulting practice on August 1, 2020, after 38 years with boutique and global law firms. He practices complex commercial, insurance, and reinsurance litigation, arbitration, and mediation. He also advises on coverage, insurance insolvency, and contract wording issues for a variety of insurance and reinsurance relationships. Schiffer serves as an expert witness, mediator, and arbitrator, and consults on insurance and reinsurance issues.

Schiffer is the Executive Director of ARIAS·U.S., the editor of the ARIAS·U.S. Quarterly, past Chair and current member of the ARIAS·U.S. Technology Committee, a member of the ARIAS·U.S. Ethics Discussion Committee, and a recipient of the ARIAS·U.S. Dick Kennedy Award. Schiffer is a member of the ABA's Tort Trial & Insurance Practice Section, where he is Chair of the Cybersecurity and Data Privacy Committee, and past Chair of the Excess, Reinsurance & Surplus Lines Committee. He also was Chair of the New York State Bar Association Committee on Association Insurance Programs for nine years.



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Court Weighs in on Applicability of Policy Exclusions Under Professional Liability Policy

In *Genworth Financial. Inc.. v. AIG Specialty Insurance Co.*, the Superior Court of Delaware found that the policies' underwriting and claims reserves exclusions did not apply, but that issues of fact remained as to whether the premium exclusion applied to bar coverage.

Plaintiffs Genworth Financial, Inc. and affiliates (collectively, "Genworth") sell various financial products, including long-term care ("LTC") insurance plans at issue in this case. Genworth was insured during the relevant period by a professional liability coverage tower that provided approximately $80 million in coverage in excess of Genworth's $25 million self-insured retention. AIG Specialty Insurance Company issued the primary policy to which the eight excess policies followed form (the "Policies").

This coverage dispute arose from Genworth's settlement of three class action lawsuits brought by LTC policyholders alleging that Genworth failed to disclose material information regarding likely or potential rate or premium increases on their LTC policies. Genworth sought coverage for the settlement payments and related costs and fees under the Policies. The Insurers denied coverage based on three policy exclusions addressed by the Superior Court on the parties' cross motions for summary judgment under applicable Virginia law.

First, the Policies excluded coverage for claims "based upon, arising out of or attributable to the underwriting of insurance, including any decisions involving the classification, selection, and renewal of risks as well as the rates and premiums charged to insure or reinsure risks (the "Underwriting Exclusion"). The Underwriting Exclusion contained an exception for claims arising out of the "sale and marketing of insurance or investment products." The insurers maintained that this exclusion applied because the claims against Genworth challenged the rates and premiums charged for the LTC renewal policies. The court rejected this argument and found that class action lawsuits did not challenge Genworth's underwriting, only its alleged non-disclosures of premium increases, which fell directly within its "sale and marketing of insurance" and was not excluded from coverage.

The court also found inapplicable the Policies' "Claim Reserve Exclusion," which excludes coverage for claims arising out of "the inadequacy of any claim reserves." Understanding this exclusion to bar coverage for Genworth's losses "if such losses arise from the inadequacy of Genworth's claim reserves," the court rejected its application to the class action lawsuits, which challenged Genworth's disclosures regarding LTC premium rate increases.

Case: *GENWORTH FINANCIAL, INC. v. AIG SPECIALTY INSURANCE CO., 2023 WL 6160426 (Del. Sup. Ct. Sept. 21, 2023) (Unpublished)*

Issues Discussed: Applicability of policy exclusions under professional liability policy.

Court: Delaware Superior Court

Submitted by: Michele L. Jacobson and Michele Pahmer, Steptoe LLP

The third exclusion excluded coverage for losses to the extent they constitute "premiums, return premiums or commissions" (the "Premiums Exclusion"). Although the court found the language of the exclusion to be unambiguous in excluding coverage for losses consisting of premium payments being returned to policyholders, it found the existence of factual issues precluding summary judgment based on the construction of the settlement agreements and the computation of cash payments offered class members. One of the alternative

remedies class members could elect under the settlement agreements included "a damages payment equal to premiums paid during the time period beginning January 1, 2016 through December 31, 2019." The court acknowledged that the calculation of the damage payments "appears to include calculating how much in premium payments were made by the class members during the relevant policy period, and returning those amounts back to the class members who opt for that alternative." Although the court believed that Genworth had the better argument that the exclusion applies "when Genworth has to return premiums and then seeks indemnification" and that the class actions did not seek the return of premium, it found the existence of a factual issue as to whether portions of the settlement payments made under the settlement agreements consisted of premiums or return premiums, and therefore, denied summary judgment on the application of this exclusion.

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April 30, 2024
Fairmont El San Juan Hotel

2024 Umpire Masterclass
November 13, 2024
New York Hilton, Midtown

Court Offers Mixed Ruling Regarding Privileges As Applied to a Reinsurance Dispute

In *Certain Underwriters at Lloyd's London v. The North River Insurance Co.*, the United States District Court for the District of New Jersey granted in part and denied in part plaintiff's motion to compel documents.

Plaintiffs reinsured defendants for loss payments made under insurance policies issued to Mine Safety Appliances Company ("MSA"), subject to the terms and conditions of the applicable reinsurance agreements.

In the underlying litigation, MSA was the subject of litigation regarding its products. Thereafter, MSA and defendants became involved in lawsuits concerning the scope of coverage for the claims against MSA under the insurance policies issued to MSA by defendants. Defendants and MSA reached a global settlement, which was memorialized in a confidential settlement agreement executed in July 2018 (the "MSA Settlement"). Here, plaintiffs alleged that defendants allocated the MSA Settlement "in a manner intended to increase [defendants'] recovery" by apportioning the MSA Settlement to Higher Layer Joint Underwriting Policies on which defendants have more available reinsurance and avoiding allocating to Lower Layer Joint Underwriting Policies where defendants have less available reinsurance. Plaintiffs asserted claims against defendants for breach of contract and breach of the implied covenant of good faith and fair dealing, and sought a declaratory judgment that plaintiffs were not obligated under the reinsurance agreements for certain billings or to indemnify defendants for losses occurring outside the applicable period of reinsurance. Defendants filed counterclaims against plaintiffs for breach of contract based upon plaintiffs' purported failure to pay certain outstanding billings and sought a declaratory judgment regarding Plaintiffs' responsibilities under the reinsurance agreements.

During discovery in the matter, plaintiffs sought to compel the disclosure of documents relating to defendants' payment and allocation of the MSA Settlement, including a pre-settlement analysis. Defendants objected to the production of the subject documents arguing that they are protected from disclosure by various privileges.

Plaintiffs argued that defendants should produce all documents responsive to plaintiffs' document requests which were "previously withheld as privileged." The court found that although plaintiffs are entitled to discovery pertaining to the MSA Settlement and North River's allocation decisions, "[t]he entry of such an order, without limitation, requiring North River to produce any and all documents responsive to Plaintiffs' immensely broad discovery requests previously withheld as privileged is neither justified by Plaintiffs' arguments nor supported by any authority cited by Plaintiffs." Further, while courts have "affirmed the relevance of discovery related to an insurer's allocation decisions, insurers are not barred from asserting claims of privilege over otherwise relevant discovery."

Case: *Certain Underwriters at Lloyd's London v. The N. River Ins. Co.*, No. 19-17231 (JMV) (D.N.J. Aug. 29, 2023)

Issues Discussed: Privileges as applied to a reinsurance dispute.

Court: United States District Court for the District of New Jersey

Submitted by: Michele L. Jacobson and Gilana Keller, Steptoe LLP

The court addressed the parties' arguments as to three specific categories of information: First, plaintiffs requested documents relating to the MSA Settlement, including defendants'

pre-settlement analysis, payments to MSA, and defendants' allocation. Second, plaintiffs sought all documents, including those not in defendants' possession, relating to work performed by a company, which was identified by defendants as "an economic consultant providing modeling services to defendants' attorneys." Third, plaintiffs sought documents relating to various mediations between defendants and MSA, which had been withheld by the defendants on the basis of Pennsylvania's mediation privilege.

Regarding the first category of documents, defendants argued that "Plaintiffs have asked for untold thousands of documents" and "have not even identified the specific documents they want rulings on, let alone asked for in camera inspection of any individual documents or set of documents." The Court found that "Plaintiffs' wholesale approach to the present dispute has left [Defendants] in an unwinnable position and the Court in an untenable one." The court held that "to the extent that any of the documents withheld 'explicitly seek or give legal advice,' they may be properly withheld." Plaintiffs also challenged privilege as to documents relating to two individuals who were employed as in-house counsel and involved in the representation of defendants in the coverage actions. Denying plaintiffs' motion without prejudice, the court found that "more precise challenges" could show that defendants improperly withheld communications illustrating that the two individuals "were acting outside their capacity as attorneys or documents reflecting [Defendants'] 'insurance administrators' rationale for the billing to [Plaintiffs], which would have been prepared whether there was litigation or not.'"

The court also noted that "courts have made clear that in the reinsurance context, an insurer does not place the advice of his counsel 'in issue' simply by seeking coverage." Thus, "[r]elevance is not the standard for determining whether privileged information should be produced, 'even if one might conclude the facts to be disclosed are vital, highly probative, directly relevant or even go to the heart of an issue.'" The court found plaintiffs failed to demonstrate that the defendants waived privilege by placing the advice of its counsel at issue. Further, plaintiffs failed to establish that the information could only be obtained through privileged materials by not yet "explor[ing] the non-privileged evidence available [to] them, including by securing non-privileged deposition testimony from [Defendants'] counsel."

Ruling on the second category of documents, the court directed defendants to conduct a review of any responsive documents withheld as privileged communications or work product and to provide plaintiffs with a detailed privilege log. The court cautioned defendants that documents reflecting the "rationale for the billing to [plaintiffs], which would have been prepared whether there was litigation or not," are not privileged and must be produced.

In response to documents in the third category, the court found that while the mediation communications and related documents "may be relevant to the reasonableness of the settlement, that relevancy does not operate as a waiver of the mediation privilege." The court further held that defendants waived mediation privilege protecting mediation communications or documents it provided to its E&O Insurers, a third-party not involved in the mediations and which appeared to have been in an adversarial relationship with defendants during the time the mediation statement was shared.

Third Circuit Upholds Ruling: Delaware Department of Insurance Must Comply with IRS Summons in Captive Insurance Probe

In *United States of America v. State of Delaware Department of Insurance*, the Third Circuit Court of Appeals affirmed the decision of the United States District Court for the District of Delaware, which held that the Delaware Department of Insurance's (the "Department") obligation to maintain the confidentiality of documents and information it receives from captive insurance companies pursuant to Section 6920 of the Delaware Insurance Code ("Section 6920") does not constitute the business of insurance and consequently, an IRS summons seeking those documents cannot be reverse-preempted by Section 6920 pursuant to the McCarran-Ferguson Act ("MFA").

This case arises from the Internal Revenue Service's ("IRS") investigation into Artex Risk Solutions, Inc. ("Artex"), and Tribeca Strategic Advisors, LLC ("Tribeca"), a wholly owned subsidiary of Artex, and specifically whether they were liable for penalties under 26 U.S.C. § 6700 for promoting abusive tax shelters via the establishment of captive insurance companies in Delaware.

The investigation spawned from two email chains between Artex and the Delaware Department that Artex had been compelled to produce to the IRS in response to two prior summonses that caused the IRS to question whether Tribeca was mass-producing "micro-captive" insurance companies to serve as illegal tax shelters for clients. The first e-mail related to the issuance of a certificate of authority to be issued by the Department to an Artex client, and the second involved a breakfast meeting between Artex and six Department employees.

Given its suspicions, on October 30, 2017, the IRS issued a summons to the Delaware Department for testimony and certain records relating to filings by and communications with Artex, Tribeca, or others working with those companies, including all emails between the Department and Artex and/or Tribeca related to the "Captive Insurance Program." The summons defined the "Captive Insurance Program" as "any arrangement managed by Artex or Tribeca wherein captive insurance companies, defined by [Chapter 69 of the Delaware Insurance Code], provide either insurance and/or reinsurance."

Case: *United States of America v. State of Delaware Department of Insurance,* No. 21-3008, 2023 WL 3030247 *1 (3rd Cir., April 21, 2023).

Issues Discussed: Whether the McCarran-Ferguson Act compels a finding that section 6920 of the Delaware Insurance Code, which requires the Delaware Department of Insurance to maintain the confidentiality of documents and information received from captive insurers, reverse-preempts an IRS summons seeking the production of such documents and information by the Department

Court: United States Court of Appeals for the Third Circuit

Submitted by: Michele L. Jacobson and Beth K. Clark, Steptoe LLP

At the time of the summons, the IRS believed that the Department had issued 191 certificates of authority to micro-captive insurance companies created by Artex and Tribeca.

In response, the Delaware Department issued written objections to the summons, which included an objection to producing responsive documents pursuant to Section 6920. Specifically, Section 6920 provides that the Commissioner of the Delaware Department must keep all portions of license applications reasonably designated confidential by an applicant captive insurer, and all examination reports, recorded information, and other documents produced or obtained by or submitted or disclosed to the Commissioner in connection with an examination confidential, unless the captive insurer provides consent in writing to the disclosure of this material. The statute includes exceptions to this requirement, including allowing disclosure "to a law-enforcement official or agency of the United States of America so long as such official or agency agrees in writing to hold it confidential and in a manner consistent with this section." Del. Ins. Law § 6920.

The IRS refused to agree in writing to abide by the confidentiality requirements of Section 6920; thus, the Department refused to produce any emails or other documents related to specific captive insurers created by Artex and Tribeca, and it refused to produce a representative to provide testimony.

As such, the IRS filed a petition in the United States District Court for the District of Delaware seeking to compel the Delaware Department to comply with the summons. In response, the Department argued that under the MFA, Section 6920 reverse-preempts the IRS's summons.

The U.S. Magistrate Judge who initially heard the case recommended a ruling against the Department. Specifically, the Magistrate Judge concluded that in order for there to be reverse-preemption pursuant to the MFA, the "business of insurance" had to be involved, and it was not in this instance. The Magistrate Judge concluded that, in fact, the conduct at issue in the case was the Department's maintenance and/or dissemination of information, documents, and communications and, therefore, the Department was required to produce documents in response to the IRS summons. The Department objected to the Magistrate's Report and Recommendation before the District Court, but it, too, held that the Department was required to produce documents regarding the Captive Insurance Program on the same grounds – i.e., that the Department's compliance with Section 6920 did not constitute the business of insurance. Thereafter, the Department appealed to the Third Circuit.

The Third Circuit analyzed whether the MFA applied, focusing on whether the Department's activity constituted the "business of insurance". The Third Circuit relied on precedent from the United States Supreme Court which held that the "business of insurance" included policy issuance, fixing of insurance rates, the selling and advertising of insurance policies, the licensing of the companies and their agents, and activities of insurance companies that relate to their status as reliable insurers – *i.e.*, the activity that impacts the relationship between insurers and policyholders. The Third Circuit emphasized, however, that under that same precedent, not all activity that impacts policyholders constitutes the business of insurance; the more remote the activity is from the insurer-policyholder relationship, the less likely it is insurance business.

As relevant to the case, the Third Circuit held that the Department's refusal to comply with the summons is not the business of insurance because (1) it does not involve core insurance business such as policy issuance or activity that is closely related to an insurer's reliability and (2) it cannot be understood to constitute other insurance activity that falls in the same class. Rather, the Third Circuit held that the conduct at issue was too removed from the relationship between the insurance company and the policyholder to constitute the business of insurance and fell in a different category.

With respect to the Department's argument that captive insurers in its jurisdiction would be less forthcoming if Section 6920 does not reverse-preempt the IRS's summons authority, the Third Circuit found it held no water. The Third Circuit concluded that because the Department will still be entitled to the same type and amount of documentation and information from applicants and established captive insurance companies, nothing would actually change. Accordingly, the Third Circuit rejected the Department's argument that its adherence to Section 6920 constitutes the "business of insurance" and affirmed the District Court's decision.

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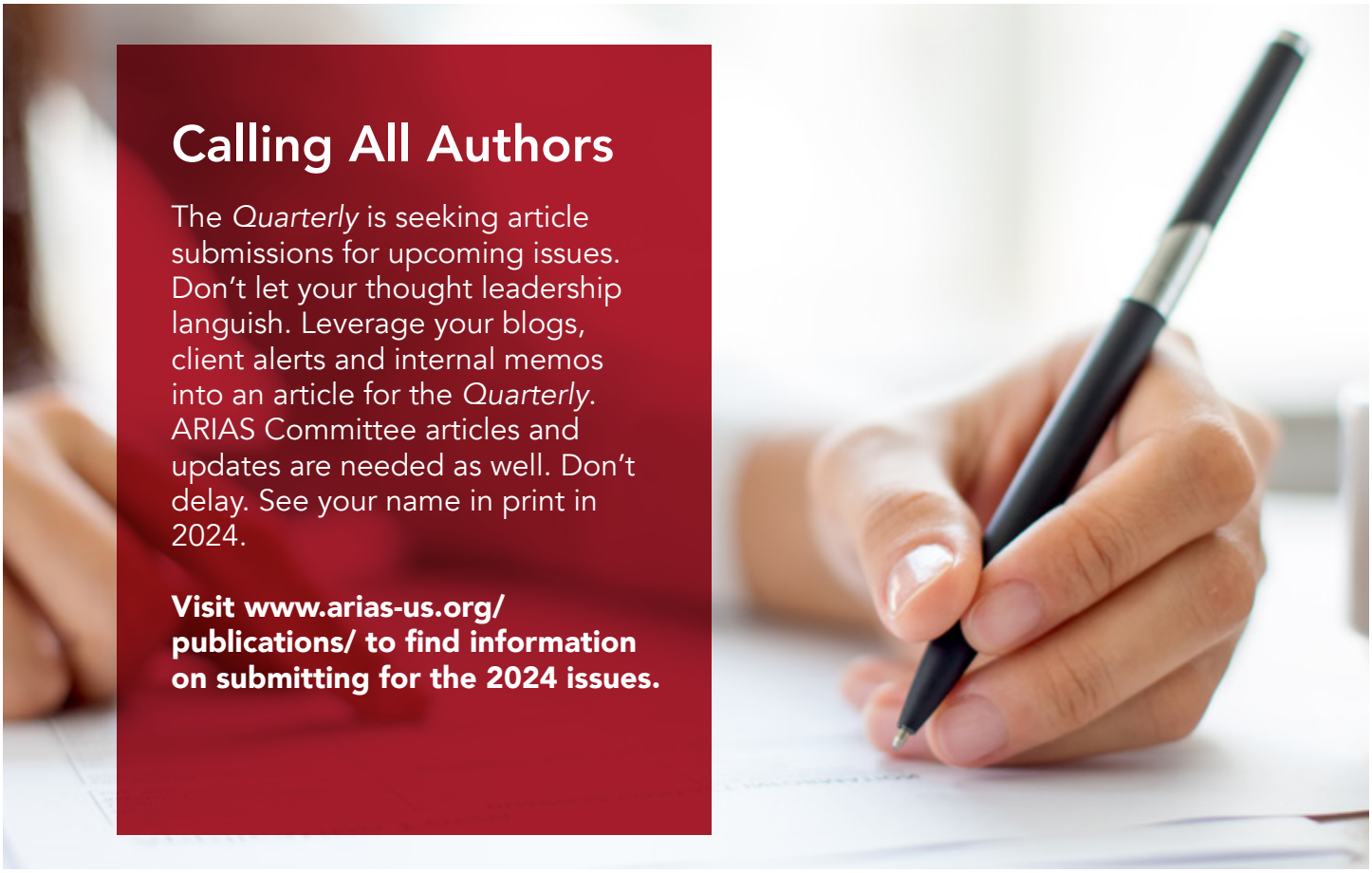
Jeff Burman

Jeff Burman is executive vice president, general counsel and secretary of the Fortitude Re Group of companies, which manages approximately $75 Billion in reserves and assets and administers more than 4.5 million insurance policies.

As General Counsel, a role he has held since the Company's inception, Jeff is responsible for the Company's legal, compliance, and regulatory matters.

Jeff's career spans over 25 years of broad experience in (re)insurance dispute resolution, transactions, and regulatory. Prior to joining Fortitude Re, Jeff was chief reinsurance legal officer and deputy general counsel at AIG, where he led the legal function for several groups, including Reinsurance; Multinational; Insurance Company Governance; and Bermuda, Canada, and Latin America regions. Before AIG, Jeff practiced at two major New York law firms where he represented insurers, reinsurers, investment banks, and hedge funds in a broad array of matters including dispute resolution, M&A, ILS, and regulatory strategy. Jeff is a member of the Bars of New York and New Jersey.



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