2024 Spring Conference Course Materials

2024 Spring Conference

May 1-3, 2024

Puerto Rico

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What Arbitrators Want: A Panel Discussion of Arguments and Litigation Practices Arbitrators Find Persuasive . . . or Not

May 1, 2024

I. Panel Selection

What makes for a successful panel dynamic, and what advice do you have for parties in the panel-selection process to create the best panel dynamic for their objectives?

II. Organizational Meeting

What role do position statements serve for you as an arbitrator, and what tips do you have for litigants to make them most useful for the Panel?

Leading up to the Organizational Meeting there is often a question as to whether litigants will deliver an oral statement at the meeting or stand on their position statements. Under what circumstances do you think it is useful to have oral statements, and what makes for an effective (or ineffective) oral statement?

III. Discovery

In the context of a motion to compel, what can litigants do to convince you that certain documents are relevant and necessary, and the other side should produce them?

IV. Pre-Hearing Briefs

What tips do you have for parties to prepare their party-appointed arbitrator for the briefs and eventual hearing (keeping in mind ex-parte cutoff)?

How do you use the pre-hearing briefs in preparation for the hearing, and what can parties do to make their brief as effective and persuasive as possible for the panel to set themselves up well for the hearing?

What is the best way for litigants to deal with bad facts in their case?

V. Merits Hearing

Often reinsurance treaties will expressly free the panel from a strict application of the rules of law. In that case, to what extent is it persuasive for litigants to base arguments on formal rules (ex. Federal Rules of Civil Procedure or Evidence)?

Same question regarding citation to case law. And, is there any difference in the usefulness of reinsurance-specific case law or case law cited for general legal principles, such as contract interpretation principles?

We also often see treaties either requiring or permitting the panel to consider evidence of industry custom and practice. What advice do you have for litigants for how to best support a custom and practice argument?

What are some tips for how parties can best address, or prepare witnesses to address, umpire and PAA questions (or arbitrators on a neutral panel) during the hearing?

How can litigants best educate the Panel on the significance of key documents through witness testimony?

What additional contribution does expert evidence (reports and testimony) provide in the Panel's understanding of the case? What can litigants do to make their expert most useful to the Panel?

What are some overall best practices for an effective, persuasive closing argument, including both the presentation itself and any accompanying written material?


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The Art of Persuasion

Baughman
Kroup Bosse

Effective Advocacy Depends on Being *Persuasive*

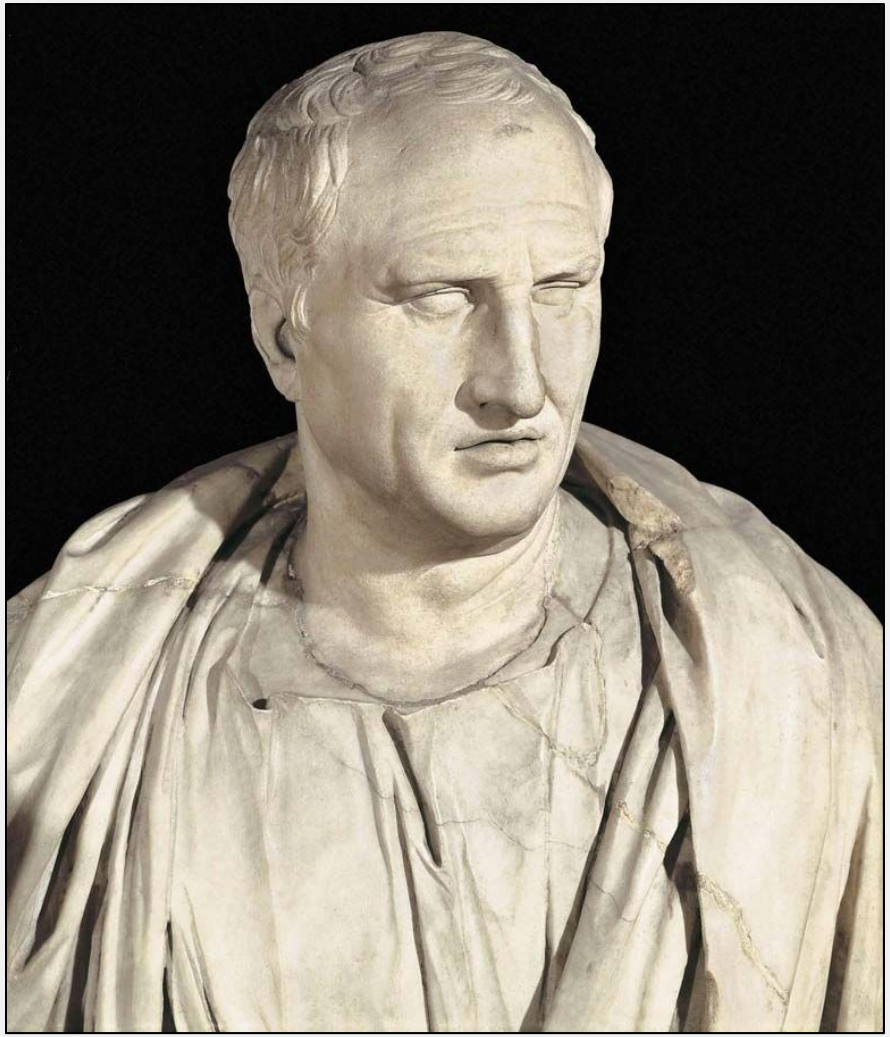
- Judges and juries are decision makers
- The point of advocacy is not to be right
- The goal is to persuade the decision maker to find in your favor

Persuasion skills can be learned.

The Age-Old Search for the Keys to Persuasion

Baughman Kroup Bosse

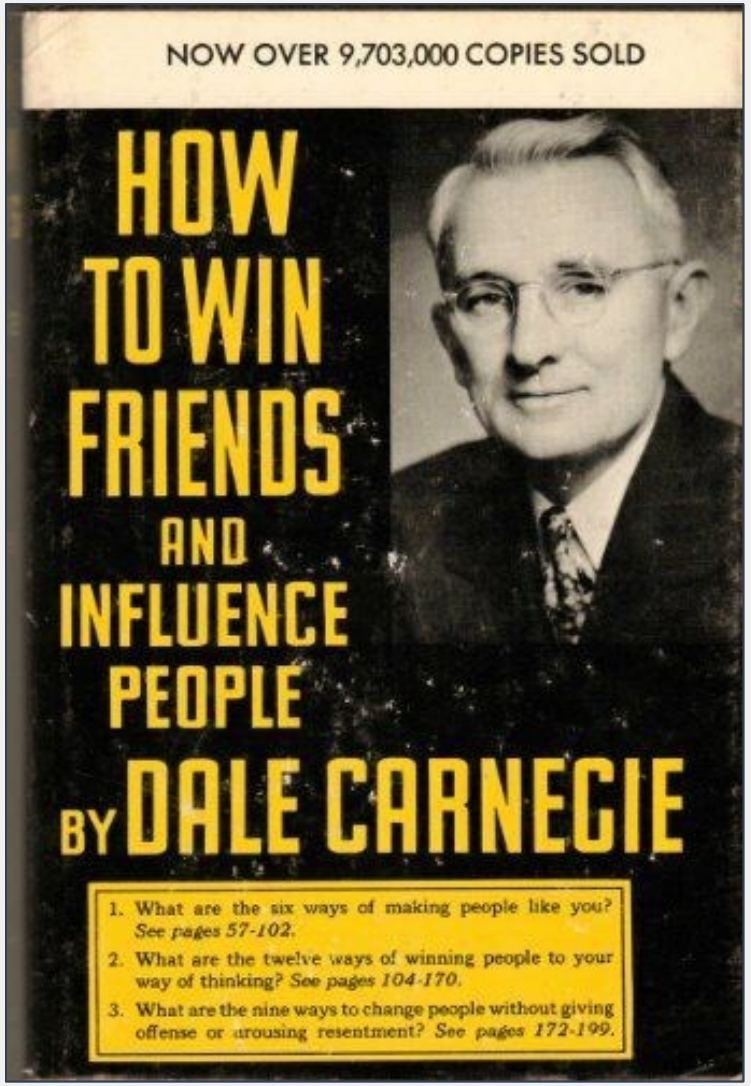
People Have Thought About Persuasion Since Antiquity

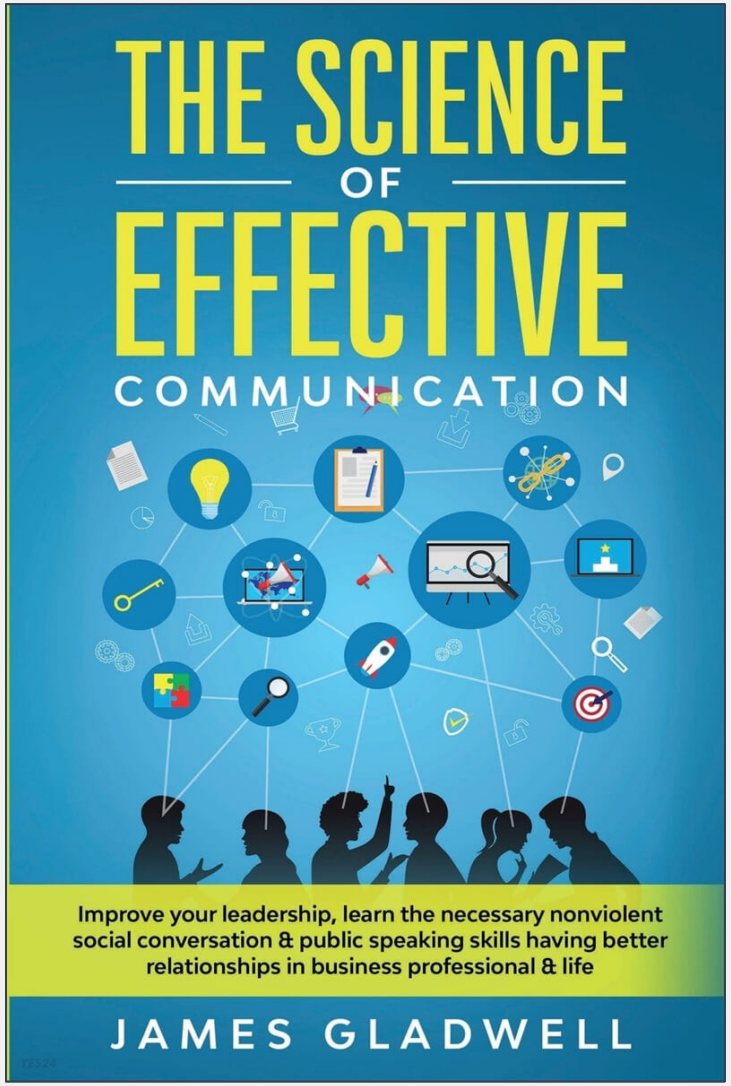


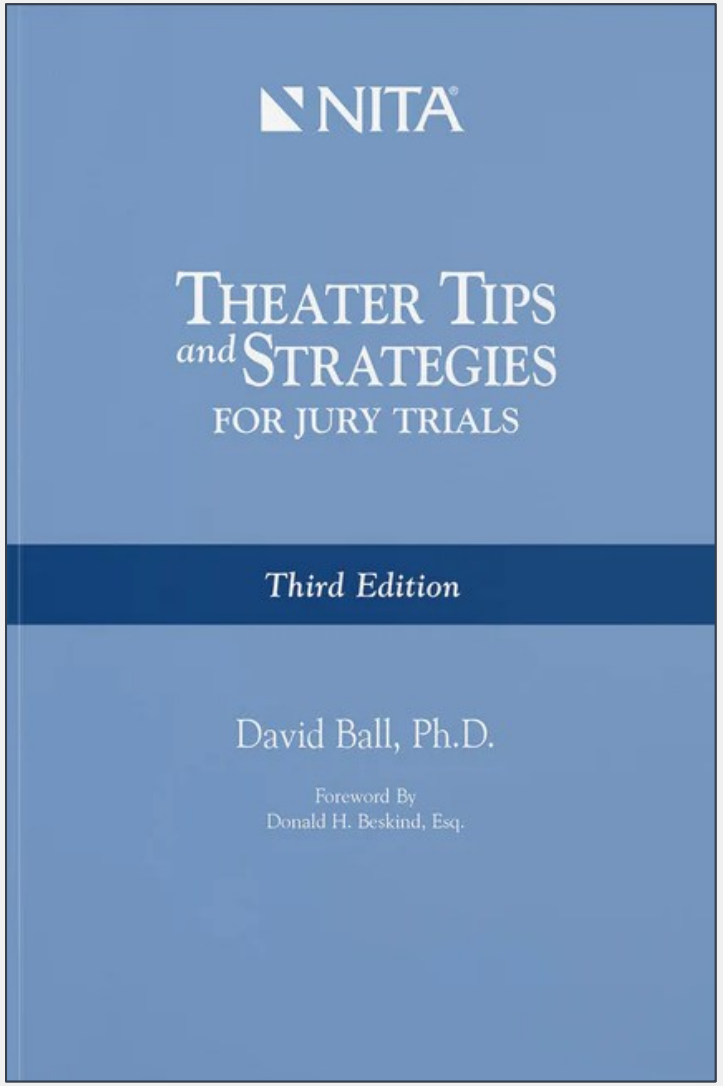
Cicero's Five Elements of Argument:

- Invention
- Arrangement
- Style
- Memory
- Delivery

The Search Continues . . .







Two Key Questions

(1) How do people make decisions?

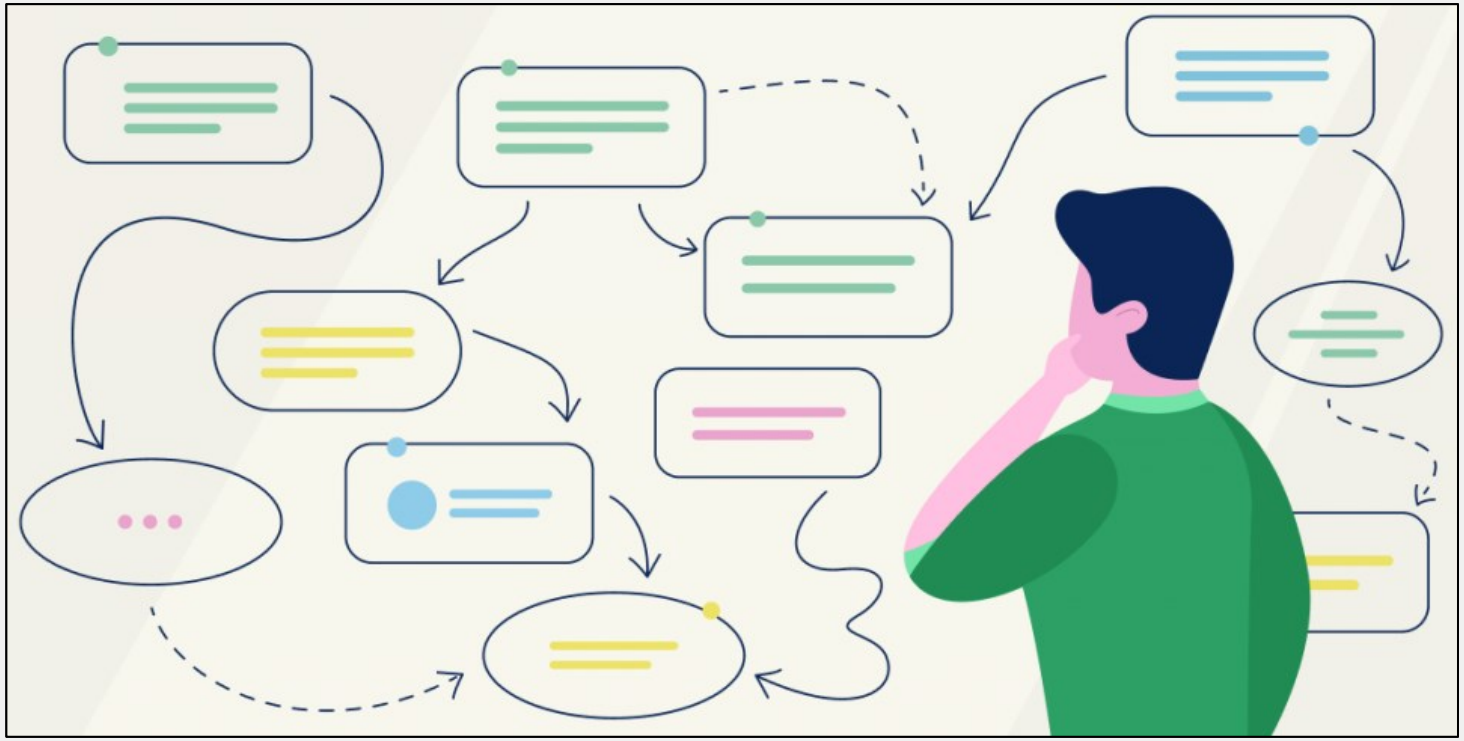
(2) How can you shape your arguments in light of the decision-making process?

The Decision-Making Framework

Baughman Kroup Bosse

People Make Decisions by Creating a Framework

Jurors "engage in an explanation-based decision process: They actively evaluate conflicting claims and **construct a narrative framework** that provides a plausible interpretation of the evidence."



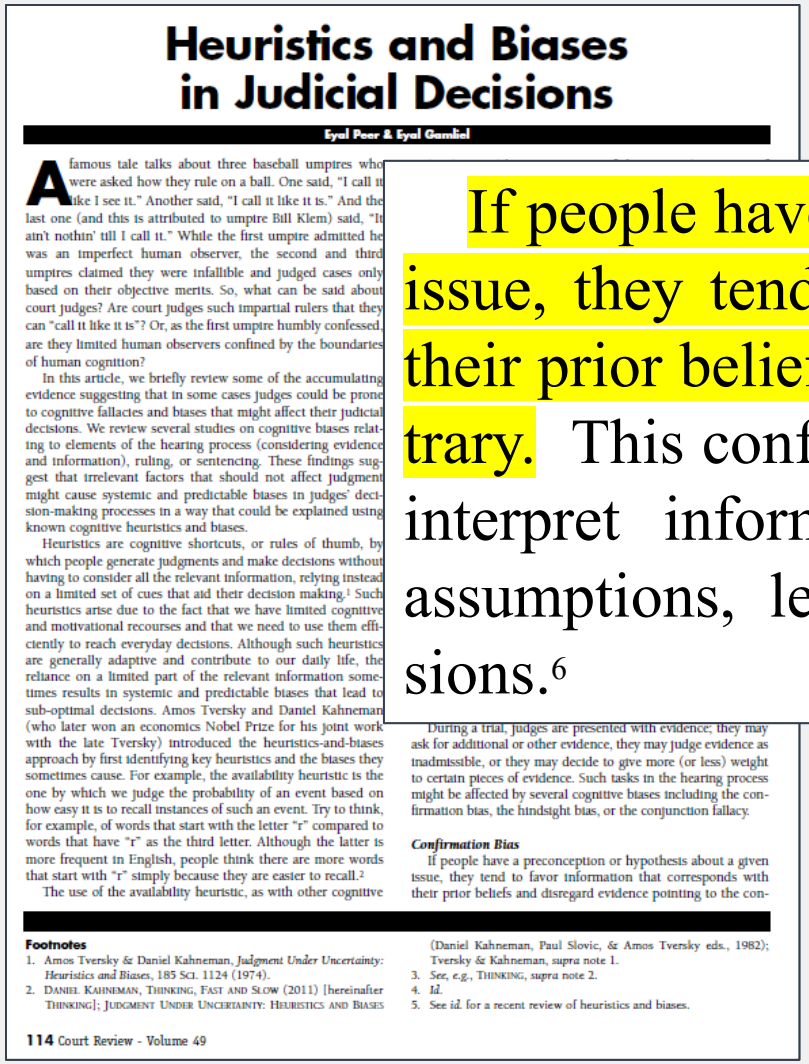
Bornstein & Green, *Jury Decision Making: Implications for and from Psychology* (2011)

How the Framework Works

People create their frameworks **quickly**:

- Process evidence based on framework
- React to evidence as they experience it
- Use less information than they think

People Search for Evidence to Support Their Conclusions



Heuristics and Biases in Judicial Decisions

Eyal Peer & Eyal Gamliel

A famous tale talks about three baseball umpires who were asked how they rule on a ball. One said, "I call it like I see it." Another said, "I call it like it is." And the last one (and this is attributed to umpire Bill Klem) said, "It ain't nothin' till I call it." While the first umpire admitted he was an imperfect human observer, the second and third umpires claimed they were infallible and judged cases only based on their objective merits. So, what can be said about court judges? Are court judges such impartial rulers that they can "call it like it is"? Or, as the first umpire humbly confessed, are they limited human observers confined by the boundaries of human cognition?

In this article, we briefly review some of the accumulating evidence suggesting that in some cases judges could be prone to cognitive fallacies and biases that might affect their judicial decisions. We review several studies on cognitive biases relating to elements of the hearing process (considering evidence and information), ruling, or sentencing. These findings suggest that irrelevant factors that should not affect judgment might cause systemic and predictable biases in judges' decision-making processes in a way that could be explained using known cognitive heuristics and biases.

Heuristics are cognitive shortcuts, or rules of thumb, by which people generate judgments and make decisions without having to consider all the relevant information, relying instead on a limited set of cues that aid their decision making.[1] Such heuristics arise due to the fact that we have limited cognitive and motivational recourses and that we need to use them efficiently to reach everyday decisions. Although such heuristics are generally adaptive and contribute to our daily life, the reliance on a limited part of the relevant information sometimes results in systemic and predictable biases that lead to sub-optimal decisions. Amos Tversky and Daniel Kahneman (who later won an economics Nobel Prize for his joint work with the late Tversky) introduced the heuristics-and-biases approach by first identifying key heuristics and the biases they sometimes cause. For example, the availability heuristic is the one by which we judge the probability of an event based on how easy it is to recall instances of such an event. Try to think, for example, of words that start with the letter "r" compared to words that have "r" as the third letter. Although the latter is more frequent in English, people think there are more words that start with "r" simply because they are easier to recall.[2]

The use of the availability heuristic, as with other cognitive

During a trial, judges are presented with evidence; they may ask for additional or other evidence, they may judge evidence as inadmissible, or they may decide to give more (or less) weight to certain pieces of evidence. Such tasks in the hearing process might be affected by several cognitive biases including the confirmation bias, the hindsight bias, or the conjunction fallacy.

Confirmation Bias

If people have a preconception or hypothesis about a given issue, they tend to favor information that corresponds with their prior beliefs and disregard evidence pointing to the con-

Footnotes

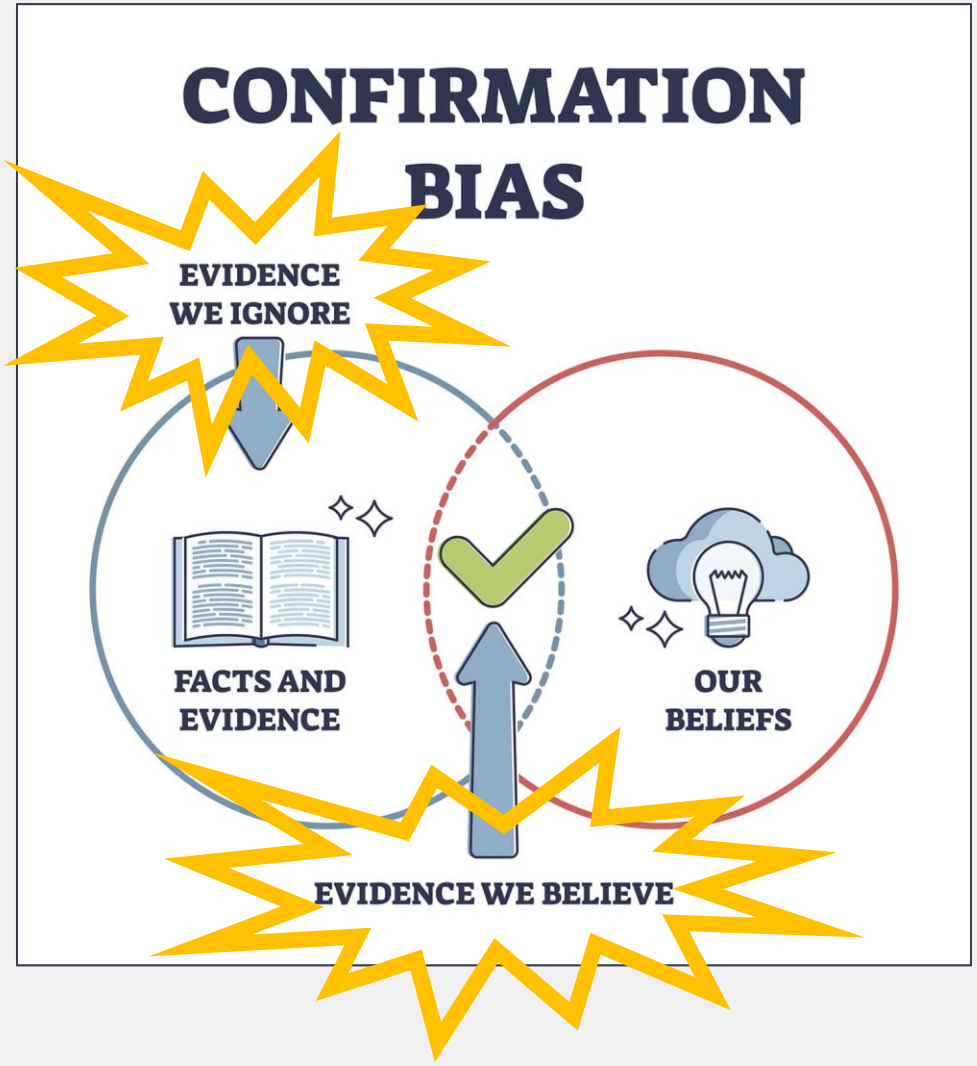
1. Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124 (1974).
2. DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011) [hereinafter THINKING]; JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman, Paul Slovic, & Amos Tversky eds., 1982); Tversky & Kahneman, *supra* note 1.
3. *See, e.g.*, THINKING, *supra* note 2.
4. *Id.*
5. See *id.* for a recent review of heuristics and biases.

If people have a preconception or hypothesis about a given issue, they tend to favor information that corresponds with their prior beliefs and disregard evidence pointing to the contrary. This confirmation bias makes people search, code, and interpret information in a manner consistent with their assumptions, leading them to biased judgments and decisions.[6]

All New Information is Processed Through the Framework

"*First* we pick an answer and *then* we look for facts to support that choice."

Bornstein and Greene, *Jury Decision Making: Implications for and from Psychology* (2011)



People Search for Evidence to Support Their Conclusions

Breonna Taylor

Case 3:22-cr-00086-RGJ Document 15-1 Filed 08/23/22 Page 1 of 6 PageID #: 52

FILED
JAMES J. VILT JR., CLERK
U.S. DISTRICT COURT
W/D OF KENTUCKY
Date: Aug 23, 2022

Plea Agreement Addendum – Kelly Goodlett Factual Basis

- In late 2019 and early 2020, Det. Kelly Goodlett worked in the Place-Based Investigations

- On one occasion, on January 16, 2020, Det. Jaynes and Det. Goodlett had seen J.G. pick up a package at Breonna Taylor's apartment. They did not have any evidence of what was in the package, but based on what they knew of J. G., they suspected that he was picking up drugs or drug proceeds. The detectives therefore wanted to get a warrant for Taylor's home, in the hopes that they would find drugs, currency, or evidence of drug trafficking there. The detectives, knowing that they needed actual evidence, rather than just a gut feeling, to get a warrant, attempted to find evidence supporting this gut belief. They were unable to find any other evidence that J.G. received packages at Taylor's apartment or any evidence that J. G. even went to Taylor's apartment after January 2020.

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- Specifically, Det. Jaynes advised Det. Goodlett that he asked Sgt. J.M. to use his contacts at the U.S. Postal Inspection Service (USPIS) to investigate whether J.G. was receiving packages at Taylor's apartment. About a week later, Det. Goodlett followed up with Det. Jaynes to ask if Sgt. J.M. had responded. Det. Jaynes told her that Sgt. J.M. had found that "there's nothing there," or similar words to like effect (meaning there was no evidence of J.G. getting mail), and that Taylor's address was "not flagged" by Postal for receiving any suspicious packages. Det. Jaynes expressed his disappointment to Det. Goodlett. Det. Goodlett knew from her training and experience that this information cut against their assumption that J.G. kept drugs or drug proceeds at Taylor's home. Det. Goodlett knew

Understanding How the Framework Works

Baughman Kroup Bosse

The Judge's Admonition is Close to Hopeless

M Civ JI 2.06 Jurors to Keep Open Minds

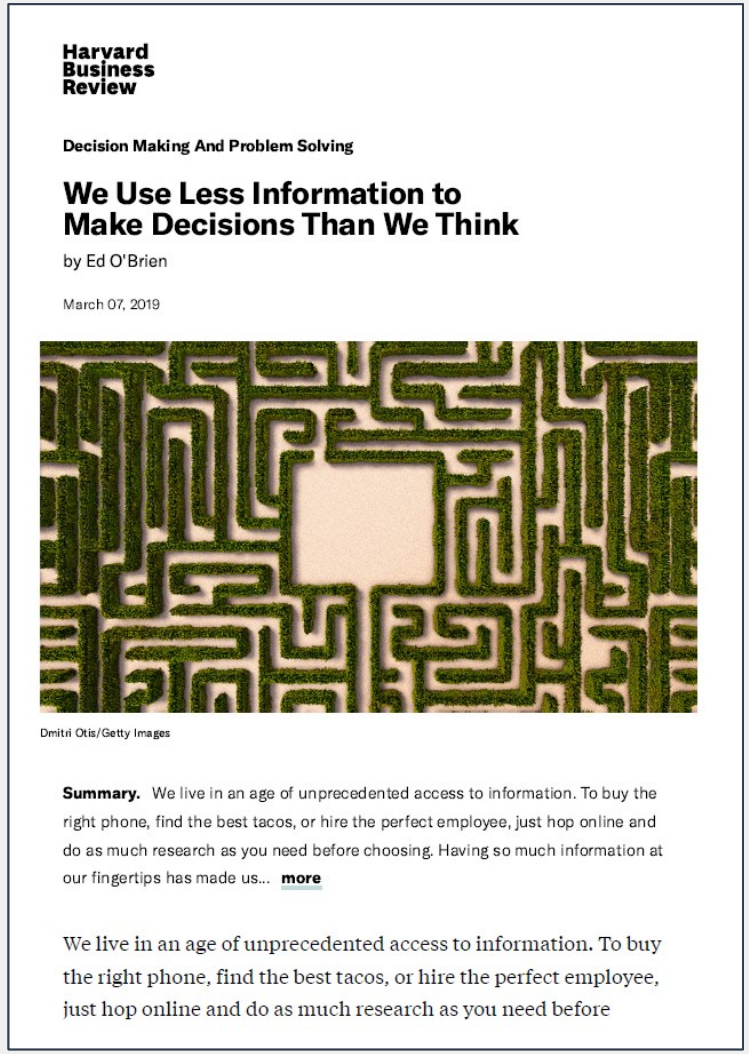
(1) Because the law requires that cases be decided only on the evidence presented during the trial and only by the deliberating jurors, you must keep an open mind and not make a decision about anything in the case until after you have (a) heard all of the evidence, (b) heard the closing arguments of counsel, (c) received all of my instructions on the law and the verdict form, and (d) any alternate jurors have been excused. At that time, you will be sent to the jury room to decide the case. Sympathy must not influence your decision. Nor should your decision be influenced by prejudice or bias regarding disability, gender or gender identity, race, religion, ethnicity, sexual orientation, age, national origin, socioeconomic status or any other factor irrelevant to the rights of the parties.

Each of us may have biases about or certain perceptions or stereotypes of other people. We may be aware of some of our biases, though we may not share them with others. We may not be fully aware of some of our other biases.

Michigan Model Civil Jury Instructions (Updated January 12, 2023)

People React to Information as They Experience It

"The mind isn't just a passive information processor; it's also emotional. In reality, **once people begin to experience that evidence in real time, they will inevitably *react to it* as they go along**. We won't need to see later information if we already love or hate the very first piece."



Harvard Business Review

Decision Making And Problem Solving

We Use Less Information to Make Decisions Than We Think

by Ed O'Brien

March 07, 2019

Dmitri Otis/Getty Images

Summary. We live in an age of unprecedented access to information. To buy the right phone, find the best tacos, or hire the perfect employee, just hop online and do as much research as you need before choosing. Having so much information at our fingertips has made us... **more**

We live in an age of unprecedented access to information. To buy the right phone, find the best tacos, or hire the perfect employee, just hop online and do as much research as you need before

People Believe Information That Aligns With Their Values

"Ordinary members of the public credit or dismiss scientific information on disputed issues **based on whether the information strengthens or weakens their ties to others who share their values**."

Published: 27 May 2012

The polarizing impact of science literacy and numeracy on perceived climate change risks

Dan M. Kahan, Ellen Peters, Maggie Wittlin, Paul Slovic, Lisa Larrimore Ouellette, Donald Braman & Gregory Mandel

Nature Climate Change **2**, 732–735 (2012) | Cite this article

33k Accesses | **1149** Citations | **1474** Altmetric | Metrics

Abstract

Seeming public apathy over climate change is often attributed to a deficit in comprehension. The public knows too little science, it is claimed, to understand the evidence or avoid being misled[1]. Widespread limits on technical reasoning aggravate the problem by forcing citizens to use unreliable cognitive heuristics to assess risk[2]. We conducted a study to test this account and found no support for it. Members of the public with the highest degrees of science literacy and technical reasoning capacity were not the most concerned about climate change. Rather, they were the ones among whom cultural polarization was greatest. This result suggests that public divisions over climate change stem not from the public's incomprehension of science but from a distinctive conflict of interest: between the personal interest individuals have in forming beliefs in line with those held by others with whom they share close ties and the collective one they all share in making use of the best available science to promote common welfare.

People Use Much Less Information than They Think

- MBA students told to write *exactly* the number of essays they believed a professional hiring manager would review.
- Students who wrote too many or too few essays lost the job.
- On average, the students wrote **4 essays**.
- On average, the hiring managers reviewed only **2 essays per applicant**.

The Ford Motor Co. Investment Example

"Boy, do they know how to make a car!"

- Chief Investment Officer

Kahneman, *Thinking, Fast and Slow* (2011)

The Harder the Question, The More People Rely on Peripheral Information

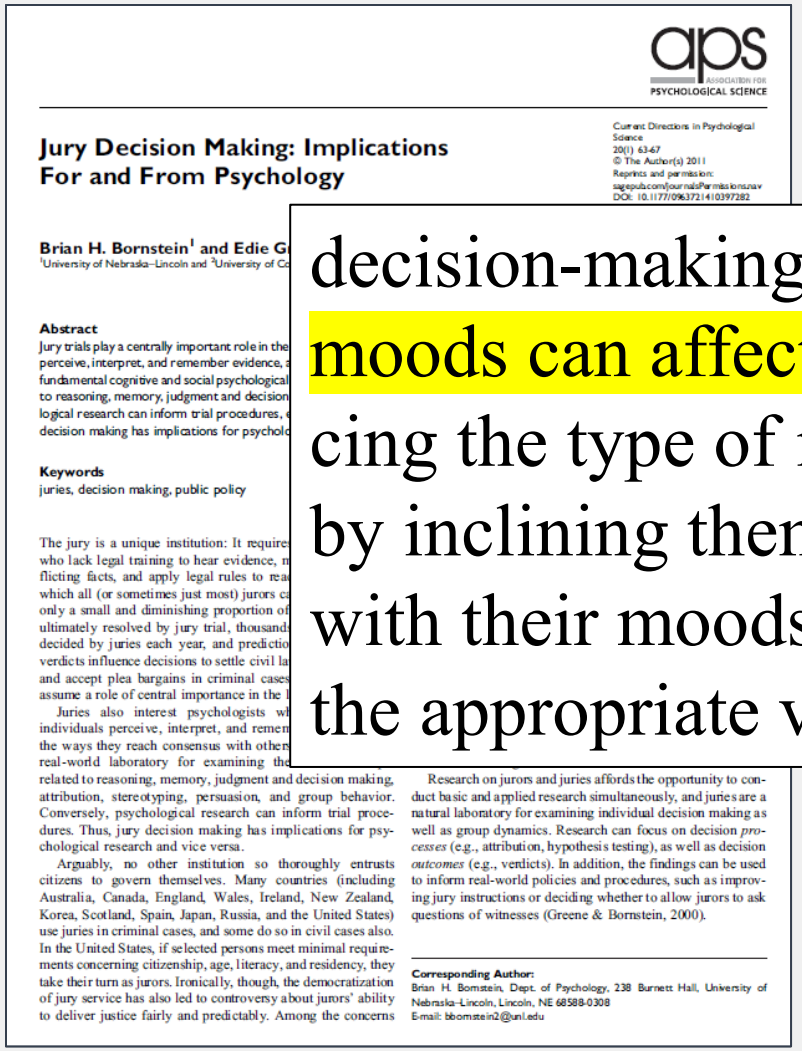
When jurors don't understand a situation, **they focus on aspects they can understand** such as an expert witness's credentials, a counsel's pay, a witness's amiability, etc.

Solerna, Bottoms, Peter-Hagene (2017); Levett & Kovera (2009); Cooper & Neuhaus (2000)

Decision Making is Emotional

Baughman Kroup Bosse

People Process Information Based on Emotion



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DOI: 10.1177/0963721410397282

Jury Decision Making: Implications For and From Psychology

Brian H. Bornstein[1] and Edie G
[1]University of Nebraska–Lincoln and [2]University of Co

Abstract

Jury trials play a centrally important role in the
perceive, interpret, and remember evidence,
fundamental cognitive and social psychological
to reasoning, memory, judgment and decision
logical research can inform trial procedures,
decision making has implications for psychol

Keywords

juries, decision making, public policy

The jury is a unique institution: It require
who lack legal training to hear evidence,
flicting facts, and apply legal rules to rea
which all (or sometimes just most) jurors c
only a small and diminishing proportion of
ultimately resolved by jury trial, thousand
decided by juries each year, and predictio
verdicts influence decisions to settle civil la
and accept plea bargains in criminal cases
assume a role of central importance in the

Juries also interest psychologists w
individuals perceive, interpret, and remem
the ways they reach consensus with other
real-world laboratory for examining the
related to reasoning, memory, judgment and decision making, attribution, stereotyping, persuasion, and group behavior. Conversely, psychological research can inform trial procedures. Thus, jury decision making has implications for psychological research and vice versa.

Arguably, no other institution so thoroughly entrusts citizens to govern themselves. Many countries (including Australia, Canada, England, Wales, Ireland, New Zealand, Korea, Scotland, Spain, Japan, Russia, and the United States) use juries in criminal cases, and some do so in civil cases also. In the United States, if selected persons meet minimal requirements concerning citizenship, age, literacy, and residency, they take their turn as jurors. Ironically, though, the democratization of jury service has also led to controversy about jurors' ability to deliver justice fairly and predictably. Among the concerns

Research on jurors and juries affords the opportunity to conduct basic and applied research simultaneously, and juries are a natural laboratory for examining individual decision making as well as group dynamics. Research can focus on decision *processes* (e.g., attribution, hypothesis testing), as well as decision *outcomes* (e.g., verdicts). In addition, the findings can be used to inform real-world policies and procedures, such as improving jury instructions or deciding whether to allow jurors to ask questions of witnesses (Greene & Bornstein, 2000).

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decision-making outcomes. In addition, jurors' emotions and moods can affect their judgments in various ways: by influencing the type of information processing in which they engage, by inclining them to construe evidence in a direction consistent with their moods, and by providing informational cues about the appropriate verdict (Feigenson, 2010).

Understand Your Impact on Your Audience

I've learned that people will forget what you said, people will forget what you did, but **people will never forget how you made them feel**.

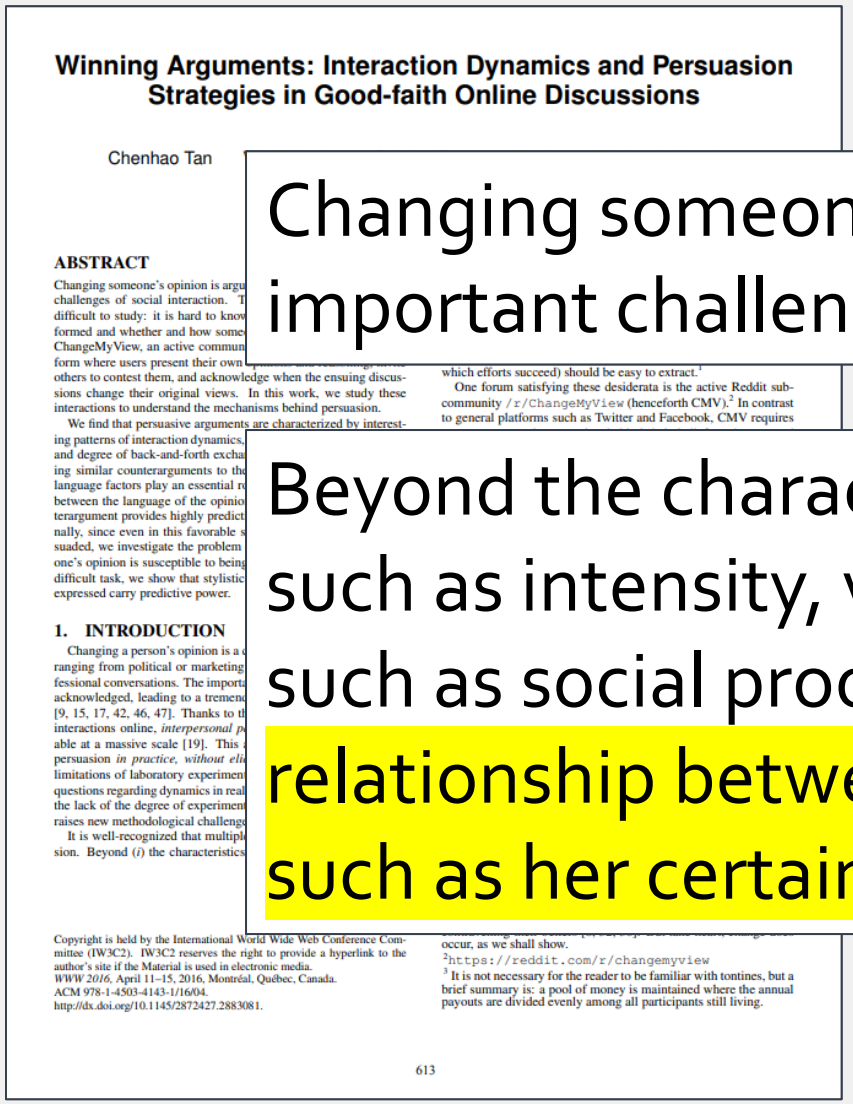
Maya Angelou

American Poet

Changing Minds is Hard

Baughman Kroup Bosse

Changing Someone's Mind is Very Difficult



Winning Arguments: Interaction Dynamics and Persuasion Strategies in Good-faith Online Discussions

Chenhao Tan

ABSTRACT

Changing someone's opinion is argu
challenges of social interaction. T
difficult to study: it is hard to know
formed and whether and how some
ChangeMyView, an active commun
form where users present their own
others to contest them, and acknowledge when the ensuing discus-
sions change their original views. In this work, we study these
interactions to understand the mechanisms behind persuasion.

We find that persuasive arguments are characterized by interest-
ing patterns of interaction dynamics,
and degree of back-and-forth excha
ing similar counterarguments to th
language factors play an essential r
between the language of the opinio
terargument provides highly predict
nally, since even in this favorable s
suaded, we investigate the problem
one's opinion is susceptible to being
difficult task, we show that stylistic
expressed carry predictive power.

1. INTRODUCTION

Changing a person's opinion is a c
ranging from political or marketing
fessional conversations. The import
acknowledged, leading to a tremend
[9, 15, 17, 42, 46, 47]. Thanks to th
interactions online, *interpersonal p*
able at a massive scale [19]. This
persuasion *in practice, without eli*
limitations of laboratory experimen
questions regarding dynamics in real
the lack of the degree of experimen
raises new methodological challeng

It is well-recognized that multipl
sion. Beyond (*i*) the characteristics

which efforts succeed) should be easy to extract.[1]

One forum satisfying these desiderata is the active Reddit sub-community `/r/ChangeMyView` (henceforth CMV).[2] In contrast to general platforms such as Twitter and Facebook, CMV requires

occur, as we shall show.

[2] `https://reddit.com/r/changemyview`

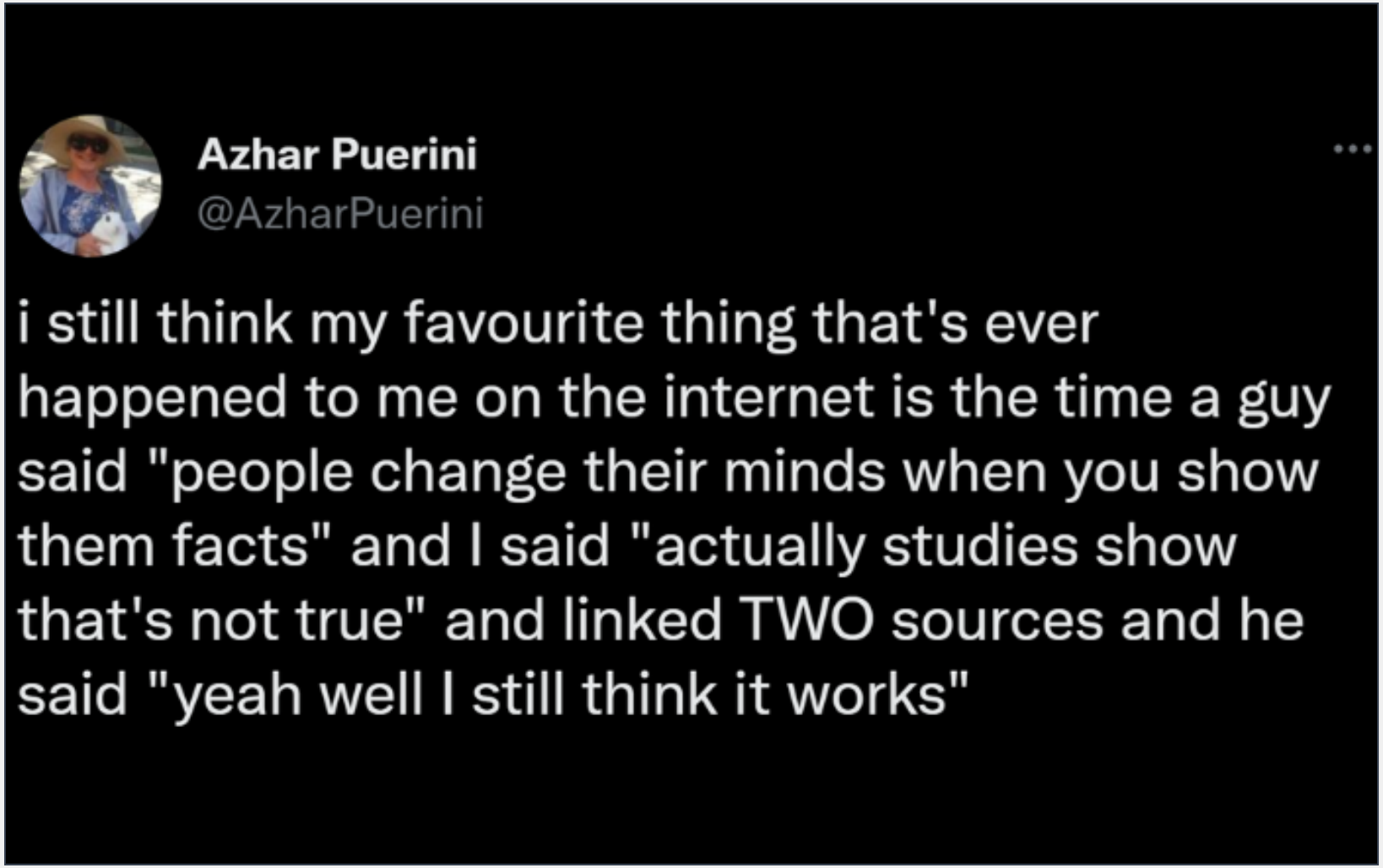
[3] It is not necessary for the reader to be familiar with tontines, but a brief summary is: a pool of money is maintained where the annual payouts are divided evenly among all participants still living.

WWW 2016, April 11–15, 2016, Montréal, Québec, Canada.
ACM 978-1-4503-4143-1/16/04.
http://dx.doi.org/10.1145/2872427.2883081.

Changing someone's opinion is arguably one of the most important challenges of social interaction.

Beyond the characteristics of the arguments themselves, such as intensity, valence and framing, and social aspects, such as social proof and authority, there is also the relationship between the opinion holder and her belief, such as her certainty in it and its importance to her.

Changing Someone's Mind is Very Difficult



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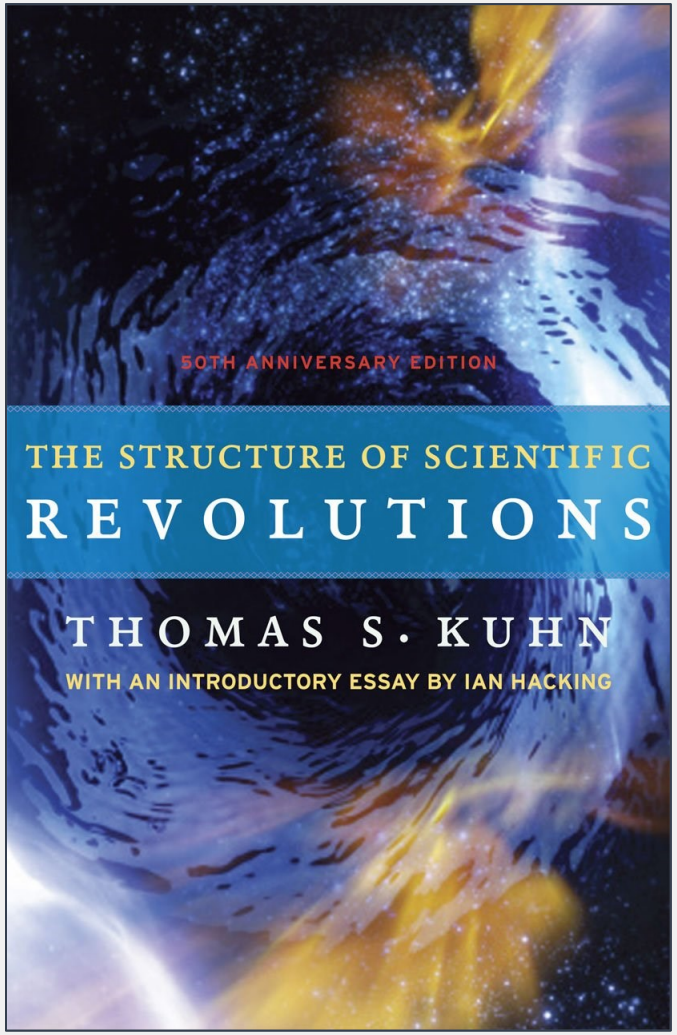
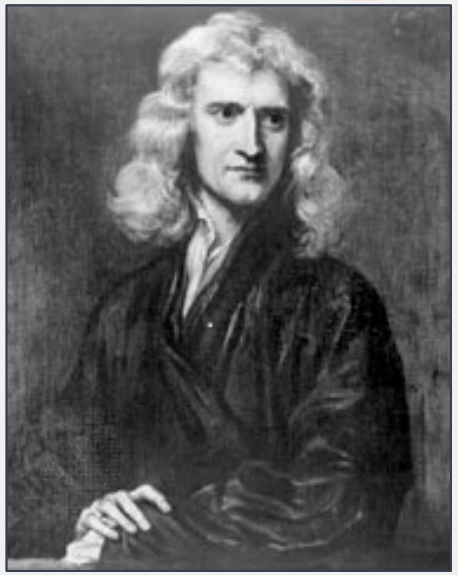
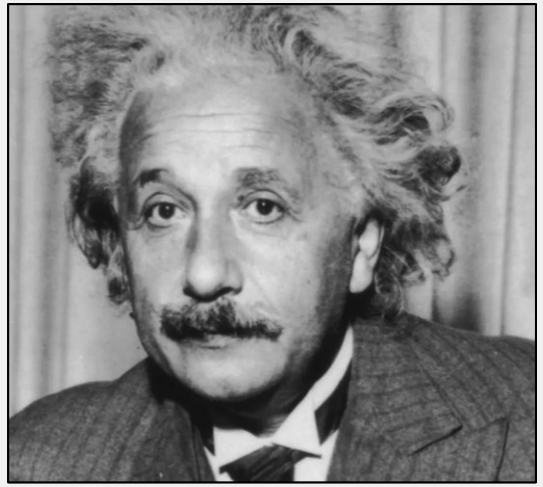






How Does Change Happen? Wisdom In An Old Joke

How many psychiatrists does it take to change a light bulb?

None: the lightbulb has to want to change.

Changing Someone's Mind is Very Difficult

I didn't convert anybody. They saw the light and converted themselves.

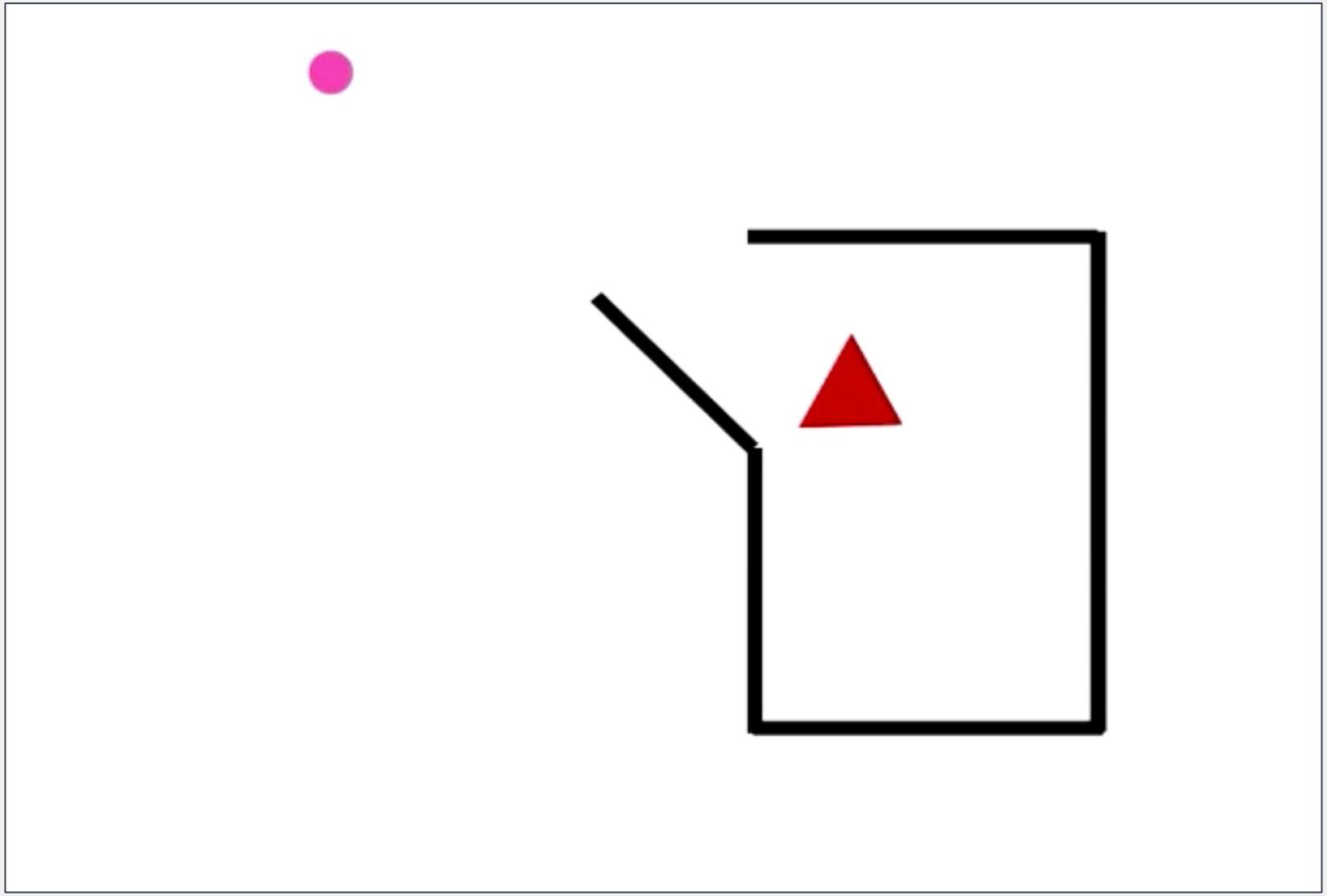
First, you realize that one's perception is one's reality. Whatever somebody perceives becomes their reality, whether it's real or not, it is their reality. It's what they believe. And they only know what they know. So, **if you try to attack somebody's reality, you're going to fail** because it's real to them and they're going to defend it nail and tooth, whether or not their argument makes any sense or not, it's real to them. So you're better off not attacking their reality if you want to see them change.

Daryl Davis

Recommendations for Effective Advocacy

Baughman Kroup Bosse

A Classic Video



People Understand Stories

Baughman Kroup Bosse

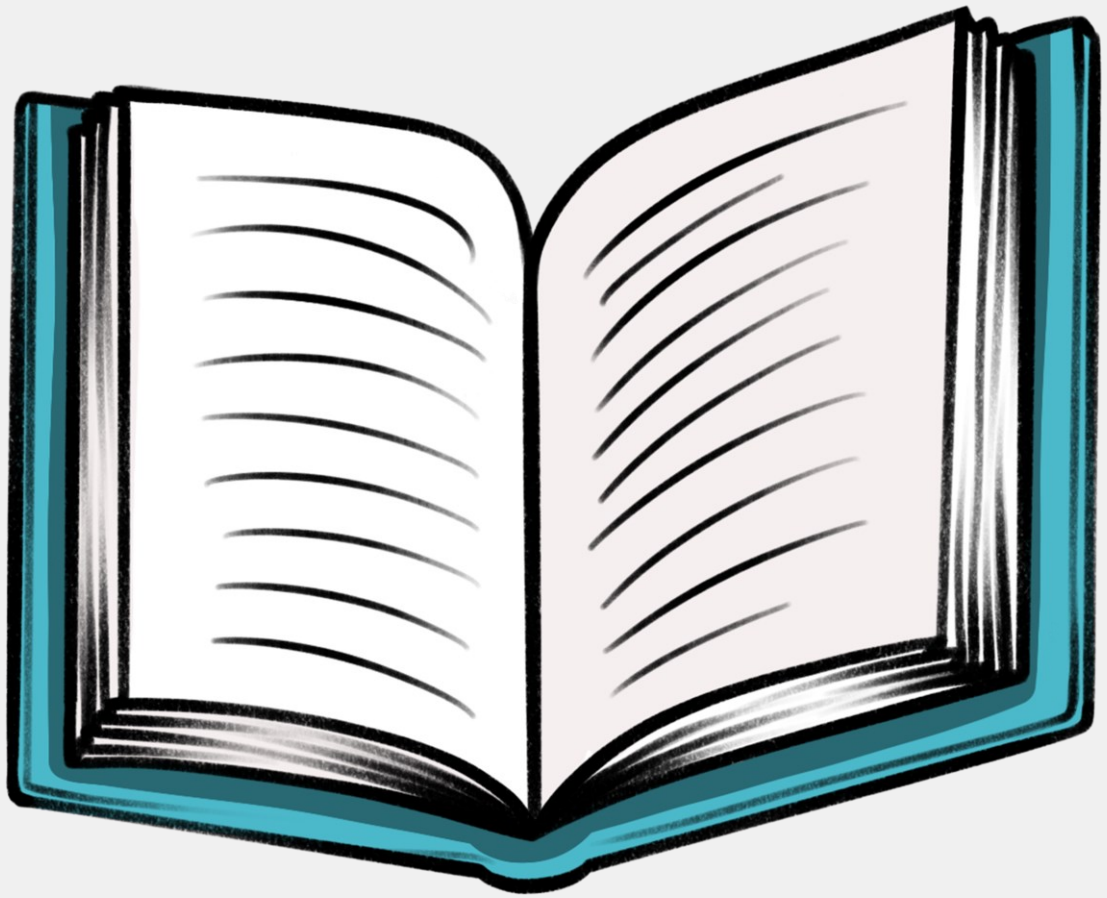
Present Your Case as a Narrative

Stories constitute the single most powerful weapon in a leader's arsenal.

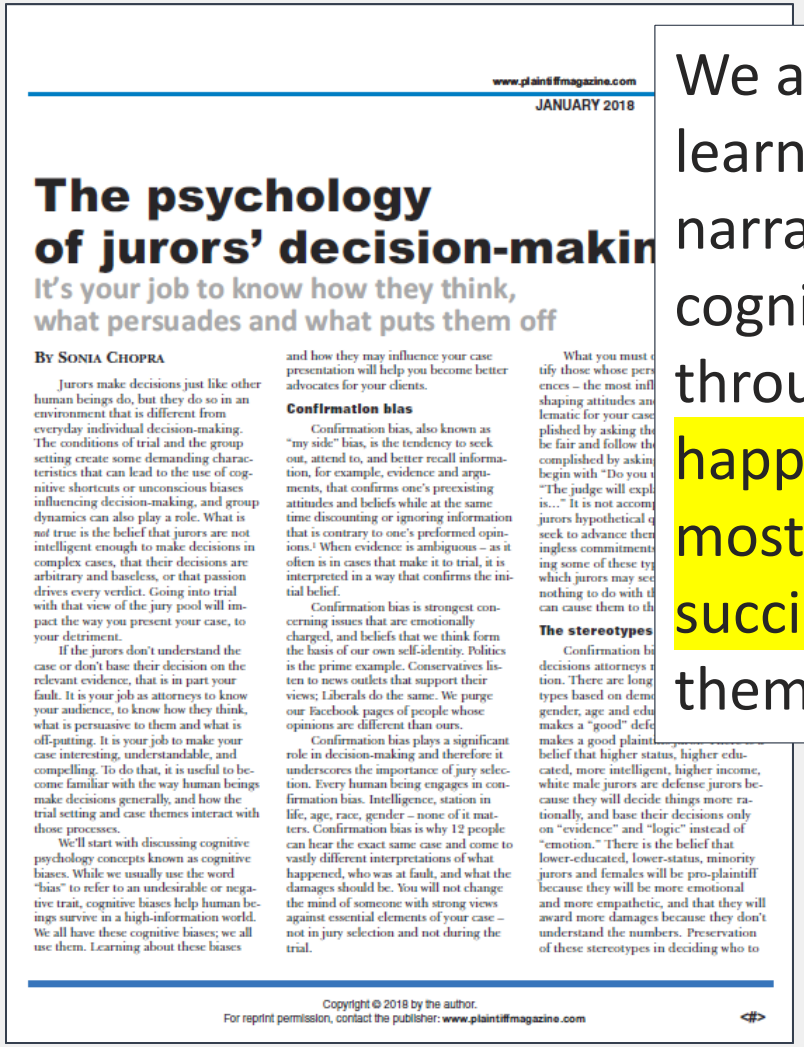
Dr. Howard Gardner

Sometimes reality is too complex. Stories give it form.

Jean Luc Godard



People Understand Stories



www.plaintiffmagazine.com
JANUARY 2018

The psychology of jurors' decision-makin

It's your job to know how they think, what persuades and what puts them off

BY SONIA CHOPRA

Jurors make decisions just like other human beings do, but they do so in an environment that is different from everyday individual decision-making. The conditions of trial and the group setting create some demanding characteristics that can lead to the use of cognitive shortcuts or unconscious biases influencing decision-making, and group dynamics can also play a role. What is *not* true is the belief that jurors are not intelligent enough to make decisions in complex cases, that their decisions are arbitrary and baseless, or that passion drives every verdict. Going into trial with that view of the jury pool will impact the way you present your case, to your detriment.

If the jurors don't understand the case or don't base their decision on the relevant evidence, that is in part your fault. It is your job as attorneys to know your audience, to know how they think, what is persuasive to them and what is off-putting. It is your job to make your case interesting, understandable, and compelling. To do that, it is useful to become familiar with the way human beings make decisions generally, and how the trial setting and case themes interact with those processes.

We'll start with discussing cognitive psychology concepts known as cognitive biases. While we usually use the word "bias" to refer to an undesirable or negative trait, cognitive biases help human beings survive in a high-information world. We all have these cognitive biases; we all use them. Learning about these biases and how they may influence your case presentation will help you become better advocates for your clients.

Confirmation bias

Confirmation bias, also known as "my side" bias, is the tendency to seek out, attend to, and better recall information, for example, evidence and arguments, that confirms one's preexisting attitudes and beliefs while at the same time discounting or ignoring information that is contrary to one's preformed opinions.[1] When evidence is ambiguous – as it often is in cases that make it to trial, it is interpreted in a way that confirms the initial belief.

Confirmation bias is strongest concerning issues that are emotionally charged, and beliefs that we think form the basis of our own self-identity. Politics is the prime example. Conservatives listen to news outlets that support their views; Liberals do the same. We purge our Facebook pages of people whose opinions are different than ours.

Confirmation bias plays a significant role in decision-making and therefore it underscores the importance of jury selection. Every human being engages in confirmation bias. Intelligence, station in life, age, race, gender – none of it matters. Confirmation bias is why 12 people can hear the exact same case and come to vastly different interpretations of what happened, who was at fault, and what the damages should be. You will not change the mind of someone with strong views against essential elements of your case – not in jury selection and not during the trial.

What you must

The stereotypes

belief that higher status, higher educated, more intelligent, higher income, white male jurors are defense jurors because they will decide things more rationally, and base their decisions only on "evidence" and "logic" instead of "emotion." There is the belief that lower-educated, lower-status, minority jurors and females will be pro-plaintiff because they will be more emotional and more empathetic, and that they will award more damages because they don't understand the numbers. Preservation of these stereotypes in deciding who to

<#>

We all use stories to make sense of the world. It is how we best learn and categorize information. A story creates a "schema" or narrative of what we believe happened, and then through other cognitive biases, we tend to filter the evidence and arguments through this schema. Jurors come to trial wanting to know what happened. A good story answers this question in the way that is most beneficial to your client but also fits the evidence most succinctly. . . . An engaging story draws people in and makes them care about what happens.

See also Devine et al., *Jury Decision Making 45 Years of Empirical Research on Deliberating Groups* (2001)

Help The Jurors Build Their Framework

- Do not let the jurors make the narrative framework on their own
- At the beginning of the case, lay out an appealing story for your audience

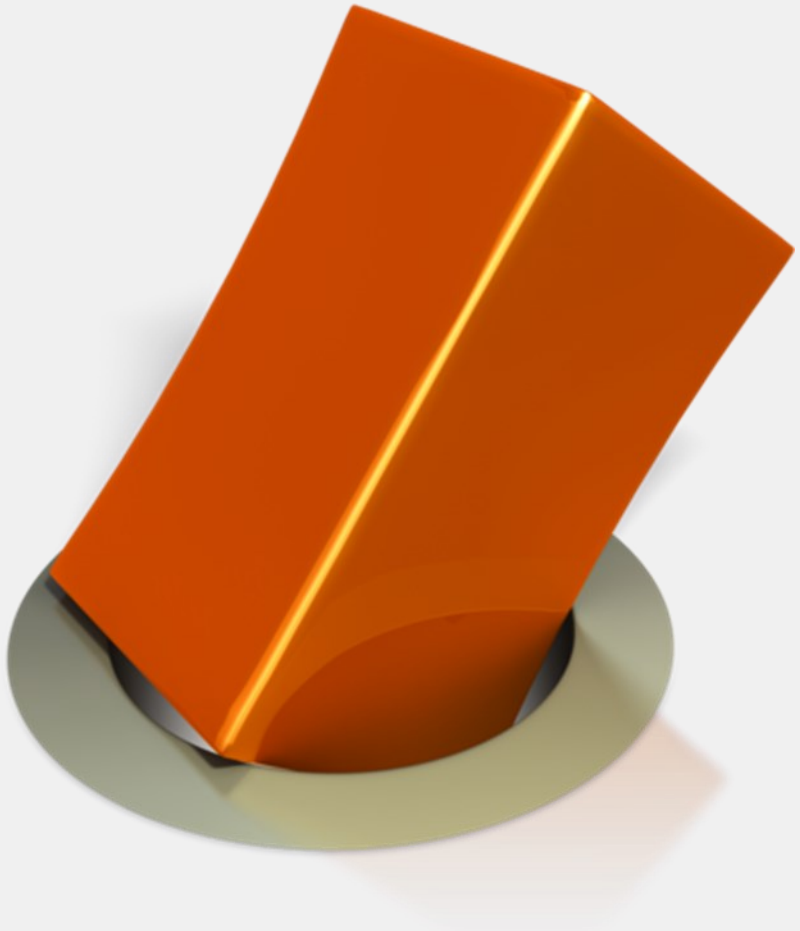
Ladies and gentlemen, this case is about . . .

Hit Your Best Points Early and Often–
Over and Over and Over Again

Baughman
Kroup Bosse

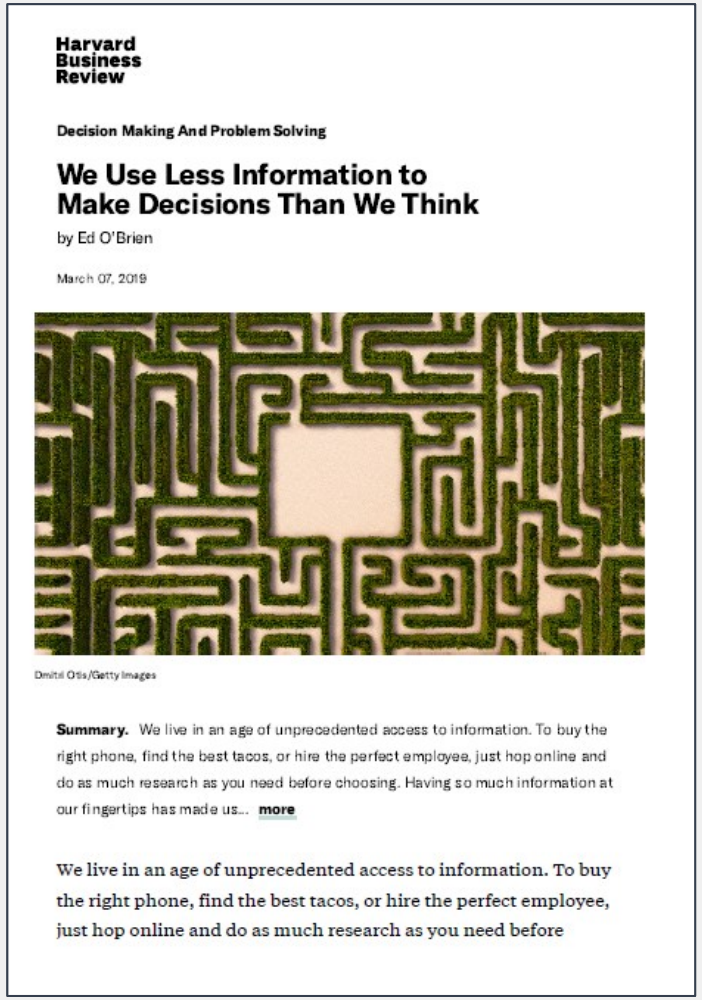
Focus on the Most Important Evidence

- Not every piece of evidence will fit together perfectly. That's okay!
- Focus on the evidence that **matters**



Focus on the Most Important Evidence

"When looking to impress, **dedicate most of your time and energy into fine-tuning *some* information**, rather than worrying and working on every little piece."



Harvard Business Review

Decision Making And Problem Solving

We Use Less Information to Make Decisions Than We Think

by Ed O'Brien

March 07, 2019

Dmitrii Otis/Getty Images

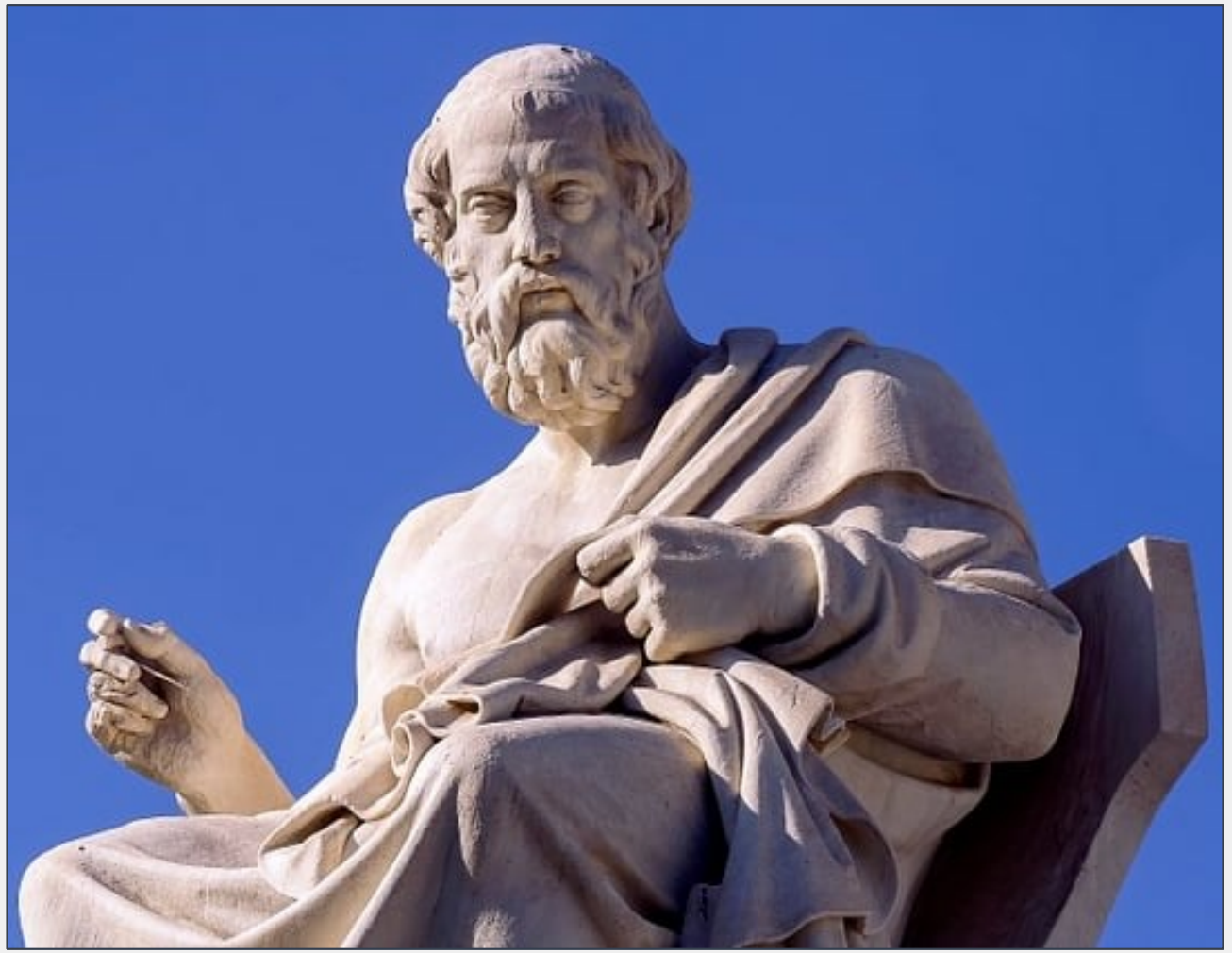
Summary. We live in an age of unprecedented access to information. To buy the right phone, find the best tacos, or hire the perfect employee, just hop online and do as much research as you need before choosing. Having so much information at our fingertips has made us... **more**

We live in an age of unprecedented access to information. To buy the right phone, find the best tacos, or hire the perfect employee, just hop online and do as much research as you need before

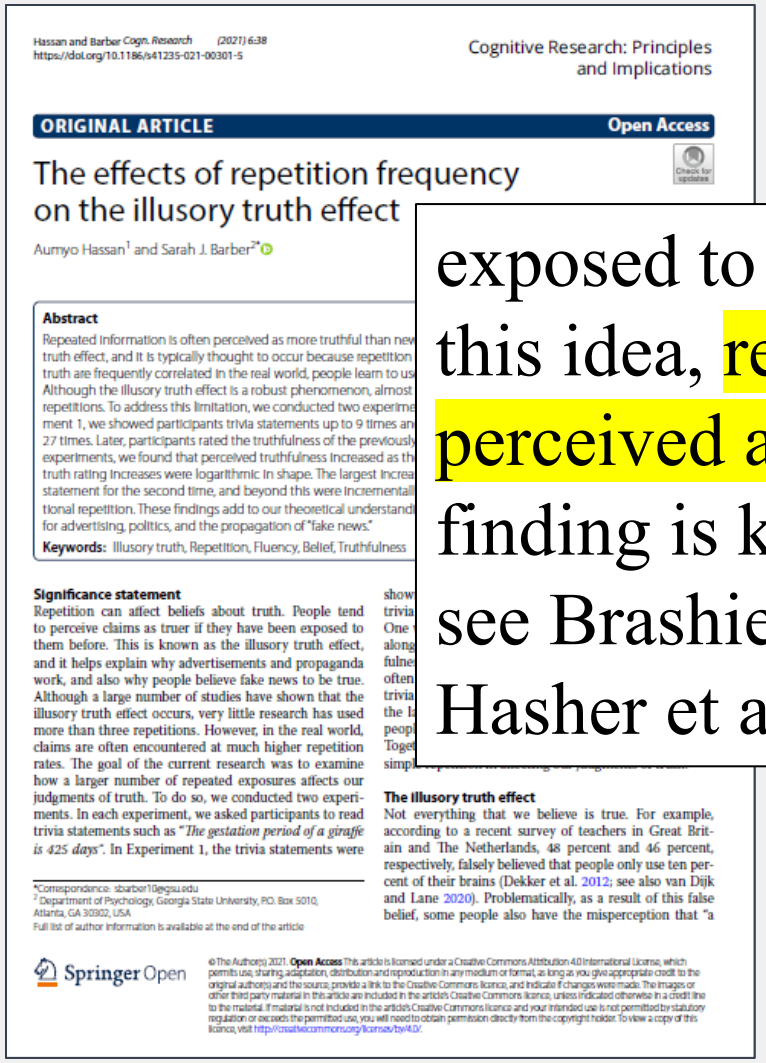
Repetition, Repetition, Repetition

There is no harm in repeating a good thing.

Plato



Repetition, Repetition, Repetition



Hassan and Barber *Cogn. Research* (2021) 6:38
https://doi.org/10.1186/s41235-021-00301-5

Cognitive Research: Principles and Implications

ORIGINAL ARTICLE **Open Access**

The effects of repetition frequency on the illusory truth effect

Aumyo Hassan[1] and Sarah J. Barber[2*]

Abstract

Repeated information is often perceived as more truthful than new truth effect, and it is typically thought to occur because repetition truth are frequently correlated in the real world, people learn to us Although the illusory truth effect is a robust phenomenon, almost repetitions. To address this limitation, we conducted two experime ment 1, we showed participants trivia statements up to 9 times an 27 times. Later, participants rated the truthfulness of the previously experiments, we found that perceived truthfulness increased as th truth rating increases were logarithmic in shape. The largest increa statement for the second time, and beyond this were incrementall tional repetition. These findings add to our theoretical understandi for advertising, politics, and the propagation of "fake news."

Keywords: Illusory truth, Repetition, Fluency, Belief, Truthfulness

Significance statement

Repetition can affect beliefs about truth. People tend to perceive claims as truer if they have been exposed to them before. This is known as the illusory truth effect, and it helps explain why advertisements and propaganda work, and also why people believe fake news to be true. Although a large number of studies have shown that the illusory truth effect occurs, very little research has used more than three repetitions. However, in the real world, claims are often encountered at much higher repetition rates. The goal of the current research was to examine how a larger number of repeated exposures affects our judgments of truth. To do so, we conducted two experiments. In each experiment, we asked participants to read trivia statements such as "*The gestation period of a giraffe is 425 days*". In Experiment 1, the trivia statements were

The illusory truth effect

Not everything that we believe is true. For example, according to a recent survey of teachers in Great Britain and The Netherlands, 48 percent and 46 percent, respectively, falsely believed that people only use ten percent of their brains (Dekker et al. 2012; see also van Dijk and Lane 2020). Problematically, as a result of this false belief, some people also have the misperception that "a

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exposed to this information repeatedly. Consistent with this idea, research has shown that repeated information is perceived as more truthful than new information. This finding is known as the illusory truth effect (for a review, see Brashier and Marsh 2020) and was first reported by Hasher et al. (1977). In this experiment, participants were

Repetition, Repetition, Repetition

I have a dream that one day this nation will rise up and live out the true meaning of its creed: "We hold these truths to be self-evident, that all men are created equal."

I have a dream that one day on the red hills of Georgia, the sons of former slaves and the sons of former slave owners will be able to sit down together at the table of brotherhood.

I have a dream that one day even the state of Mississippi, a state sweltering with the heat of injustice, sweltering with the heat of oppression, will be transformed into an oasis of freedom and justice.

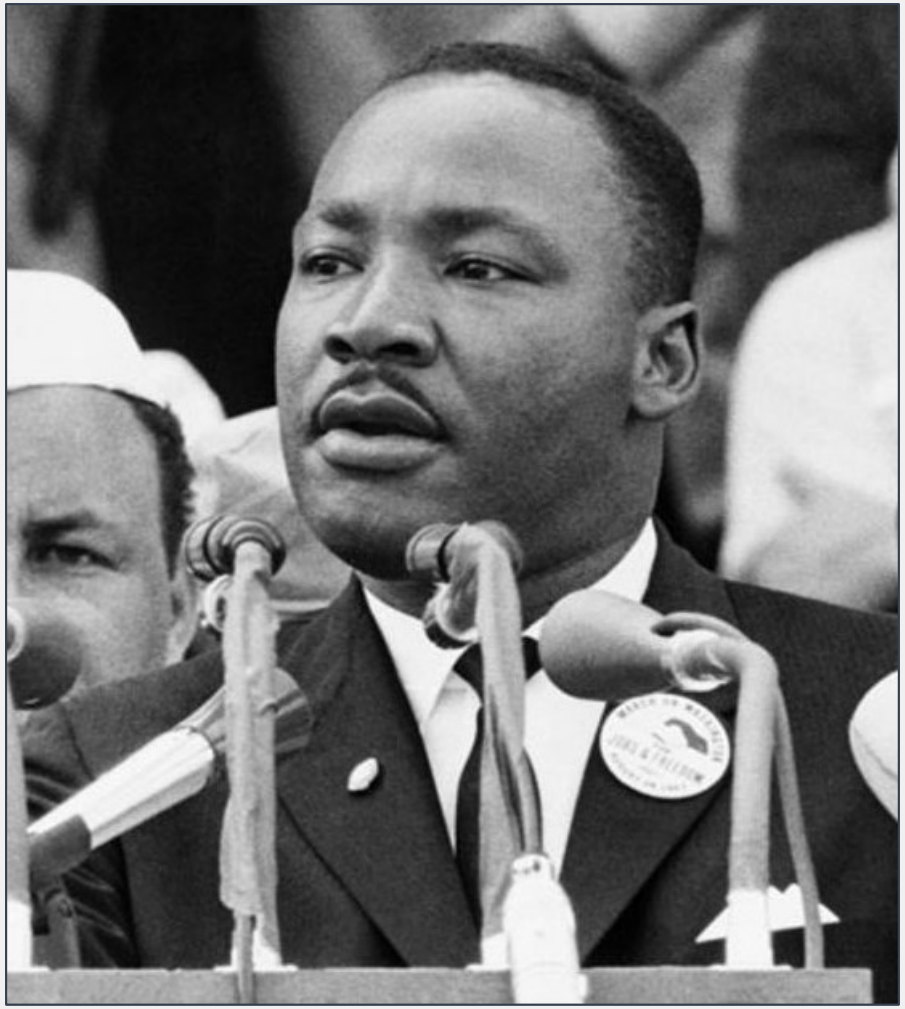
I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character.

I have a dream today!

I have a dream that one day, down in Alabama, with its vicious racists, with its governor having his lips dripping with the words of "interposition" and "nullification" -- one day right there in Alabama little black boys and black girls will be able to join hands with little white boys and white girls as sisters and brothers.

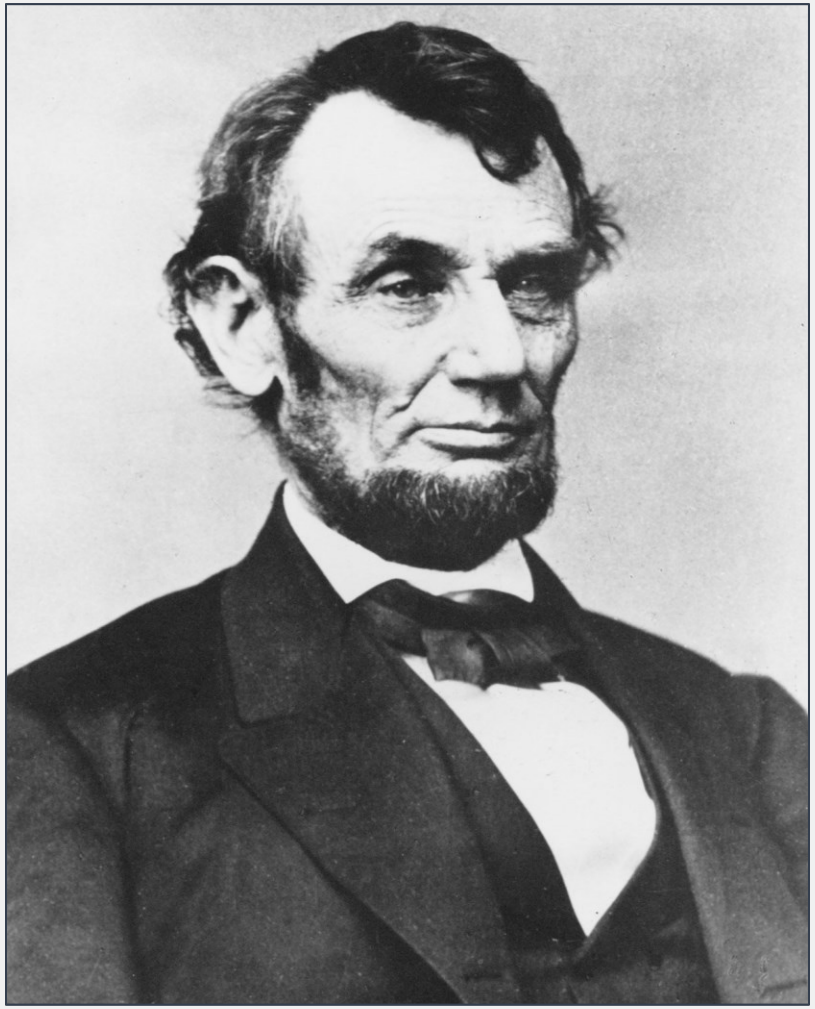
I have a dream today!

I have a dream that one day every valley shall be exalted, and every hill and mountain shall be made low, the rough places will be made plain, and the crooked places will be made straight; "and the glory of the Lord shall be revealed, and all flesh shall see it together."



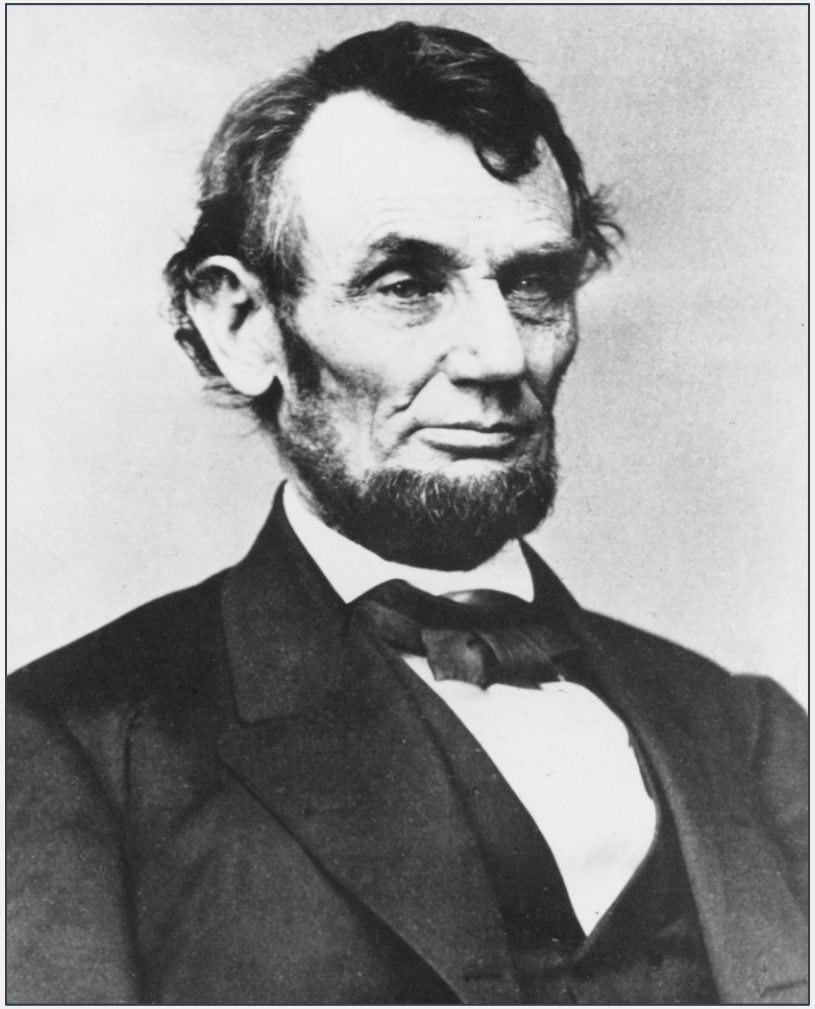
Use Sententia

A Historical Example of Sententia



"We are now well into our fifth year since a policy was initiated with the avowed object and confident purpose of putting an end to slavery agitation. However, under the operation of that policy, that agitation has not only not ceased but has constantly augmented. In my opinion, it will not cease until a crisis shall have been reached and passed."

A Historical Example of Sententia



"We are now well into our fifth year since a policy was initiated with the avowed object and confident purpose of putting an end to slavery agitation. However, under the operation of that policy, that agitation has not only not ceased but has constantly augmented. In my opinion, it will not cease until a crisis shall have been reached and passed. ***A house divided against itself cannot stand.***"

Sententia in the Courtroom

Beware of Paltering

The Bill Clinton Interview

The Bill Clinton Interview

Lehrer: "No improper relationship." Define what you mean by that.

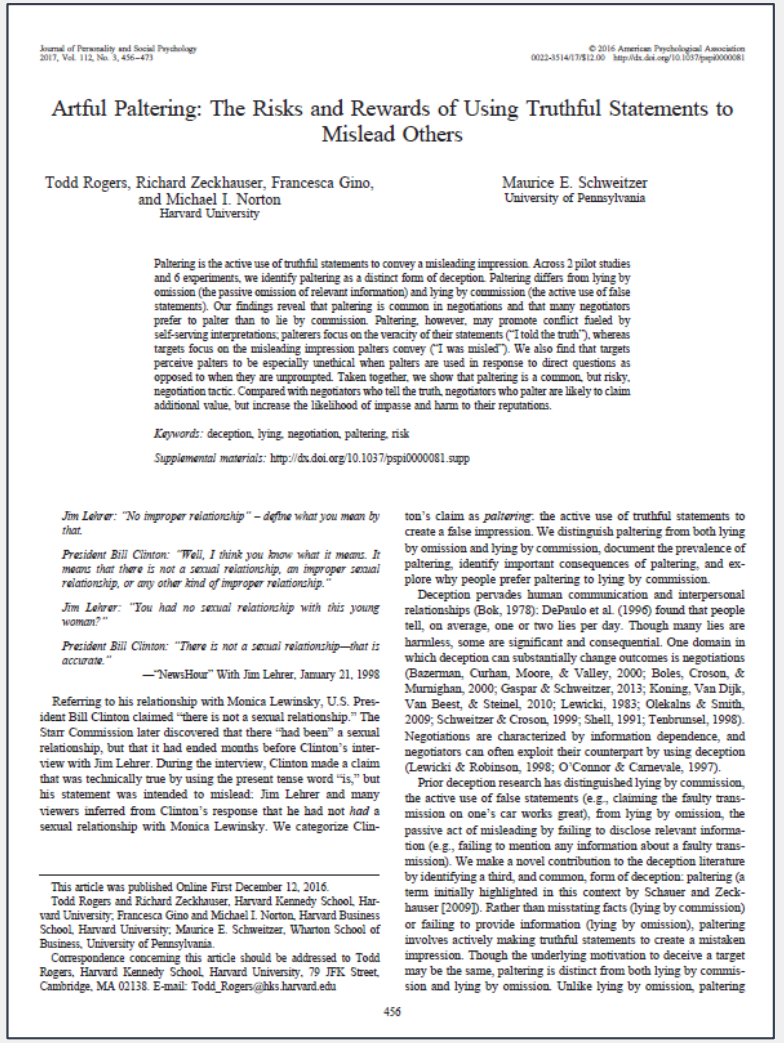
Clinton: Well, I think you know what that means. It means that there is not a sexual relationship, an improper sexual relationship, or any other kind of improper relationship.

Lehrer: You had no sexual relationship with this young woman?

Clinton: There is not a sexual relationship – that is accurate.

People Don't Like Being Misled

Paltering: The active use of truthful statements to create a false impression



Journal of Personality and Social Psychology
2017, Vol. 112, No. 3, 456–473

0022-3514/17/$12.00 http://dx.doi.org/10.1037/pspi0000081

Artful Paltering: The Risks and Rewards of Using Truthful Statements to Mislead Others

Todd Rogers, Richard Zeckhauser, Francesca Gino, and Michael I. Norton
Harvard University

Maurice E. Schweitzer
University of Pennsylvania

Paltering is the active use of truthful statements to convey a misleading impression. Across 2 pilot studies and 6 experiments, we identify paltering as a distinct form of deception. Paltering differs from lying by omission (the passive omission of relevant information) and lying by commission (the active use of false statements). Our findings reveal that paltering is common in negotiations and that many negotiators prefer to palter than to lie by commission. Paltering, however, may promote conflict fueled by self-serving interpretations; palterers focus on the veracity of their statements ("I told the truth"), whereas targets focus on the misleading impression palters convey ("I was misled"). We also find that targets perceive palters to be especially unethical when palters are used in response to direct questions as opposed to when they are unprompted. Taken together, we show that paltering is a common, but risky, negotiation tactic. Compared with negotiators who tell the truth, negotiators who palter are likely to claim additional value, but increase the likelihood of impasse and harm to their reputations.

Keywords: deception, lying, negotiation, paltering, risk

Supplemental materials: http://dx.doi.org/10.1037/pspi0000081.supp

Jim Lehrer: "No improper relationship" – define what you mean by that.

President Bill Clinton: "Well, I think you know what it means. It means that there is not a sexual relationship, an improper sexual relationship, or any other kind of improper relationship."

Jim Lehrer: "You had no sexual relationship with this young woman?"

President Bill Clinton: "There is not a sexual relationship—that is accurate."

—"NewsHour" With Jim Lehrer, January 21, 1998

Referring to his relationship with Monica Lewinsky, U.S. President Bill Clinton claimed "there is not a sexual relationship." The Starr Commission later discovered that there "had been" a sexual relationship, but that it had ended months before Clinton's interview with Jim Lehrer. During the interview, Clinton made a claim that was technically true by using the present tense word "is," but his statement was intended to mislead: Jim Lehrer and many viewers inferred from Clinton's response that he had not *had* a sexual relationship with Monica Lewinsky. We categorize Clinton's claim as *paltering*: the active use of truthful statements to create a false impression. We distinguish paltering from both lying by omission and lying by commission, document the prevalence of paltering, identify important consequences of paltering, and explore why people prefer paltering to lying by commission.

Deception pervades human communication and interpersonal relationships (Bok, 1978): DePaulo et al. (1996) found that people tell, on average, one or two lies per day. Though many lies are harmless, some are significant and consequential. One domain in which deception can substantially change outcomes is negotiations (Bazerman, Curhan, Moore, & Valley, 2000; Boles, Croson, & Murnighan, 2000; Gaspar & Schweitzer, 2013; Koning, Van Dijk, Van Beest, & Steinel, 2010; Lewicki, 1983; Olekalns & Smith, 2009; Schweitzer & Croson, 1999; Shell, 1991; Tenbrunsel, 1998). Negotiations are characterized by information dependence, and negotiators can often exploit their counterpart by using deception (Lewicki & Robinson, 1998; O'Connor & Carnevale, 1997).

Prior deception research has distinguished lying by commission, the active use of false statements (e.g., claiming the faulty transmission on one's car works great), from lying by omission, the passive act of misleading by failing to disclose relevant information (e.g., failing to mention any information about a faulty transmission). We make a novel contribution to the deception literature by identifying a third, and common, form of deception: paltering (a term initially highlighted in this context by Schauer and Zeckhauser [2009]). Rather than misstating facts (lying by commission) or failing to provide information (lying by omission), paltering involves actively making truthful statements to create a mistaken impression. Though the underlying motivation to deceive a target may be the same, paltering is distinct from both lying by commission and lying by omission. Unlike lying by omission, paltering

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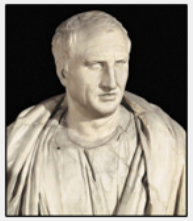
Visual Argument

Baughman Kroup Bosse

Capitalize on the Power of Visual Argument

People Have Thought About Persuasion Since Antiquity

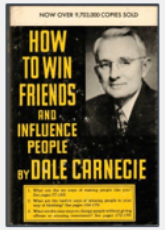


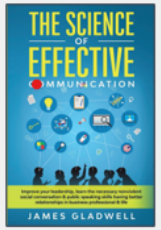
Cicero's Five Elements of Argument:

- Invention
- Arrangement
- Style
- Memory
- Delivery

6

The Search Continues . . .





7

Two Key Questions

(1) How do people make decisions?

(2) How can you shape your arguments in light of the decision-making process?

8

The Decision-Making Framework

9

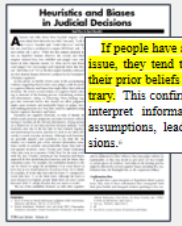
How the Framework Works

People create their frameworks quickly:

- Process evidence based on framework
- React to evidence as they experience it
- Use less information than they think

11

People Search for Evidence to Support Their Conclusions

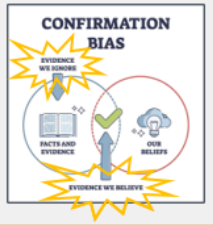


If people have a preconception or hypothesis about a given issue, they tend to favor information that corresponds with their prior beliefs and disregard evidence pointing to the contrary. This confirmation bias makes people search, code, and interpret information in a manner consistent with their assumptions, leading them to biased judgments and decisions.

12

All New Information is Processed Through the Framework

"*First* we pick an answer and *then* we look for facts to support that choice."



13

People Believe Information That Aligns With Their Values

"Ordinary members of the public credit or dismiss scientific information on disputed issues based on whether the information strengthens or weakens their ties to others who share their values."

14

Understanding How the Framework Works

The Judge's Admonition is Close to Hopeless

M Civ JI 2.06 Jurors to Keep Open Minds

(1) Because the law requires that cases be decided only on the evidence presented during the trial and only by the deliberating jurors, you must keep an open mind and not make a decision about anything in the case until after you have (a) heard all of the evidence, (b) heard the closing arguments of counsel, (c) received all of my instructions on the law and the verdict form, and (d) any alternate jurors have been excused. At that time, you will be sent to the jury room to decide the case. Sympathy must not influence your decision. Nor should your decision be influenced by prejudice or bias regarding disability, gender or gender identity, race, religion, ethnicity, sexual orientation, age, national origin, socioeconomic status or any other factor irrelevant to the rights of the parties.

Each of us may have biases about or certain perceptions or stereotypes of other people. We may be aware of some of our biases, though we may not share them with others. We may not be fully aware of some of our other biases.

People React to Information as They Experience It

"The mind isn't just a passive information processor; it's also emotional. In reality, once people begin to experience that evidence in real time, they will inevitably *react to it* as they go along. We won't need to see later information if we already love or hate the very first piece."

People Use Much Less Information Than They Think

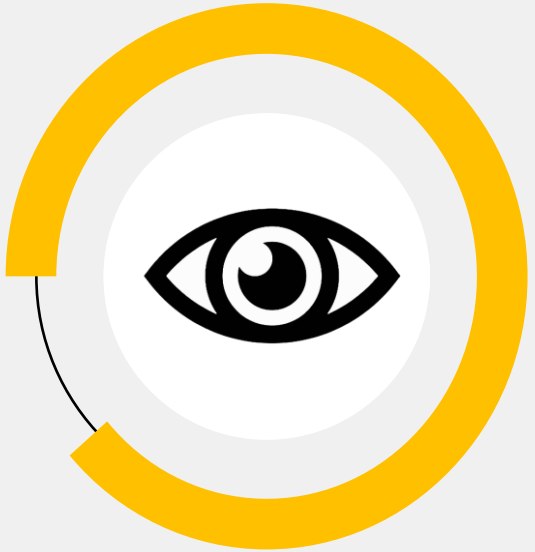
- People thought they would need to taste 3-4 cups of juice to decide if they like it.
- People actually needed only a few sips to decide if they liked the juice.

Capitalize on the Power of Visual Argument

10%
of what we read

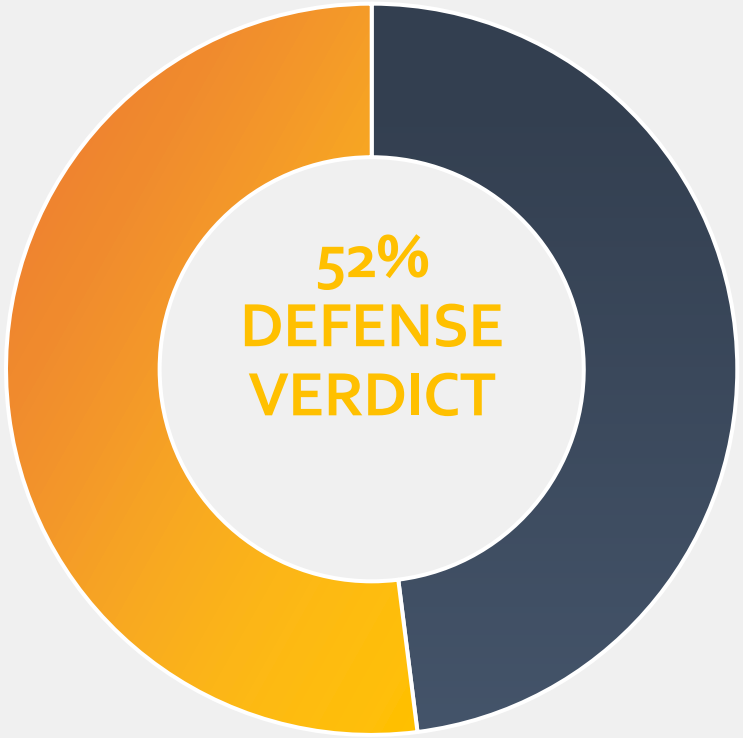
20%
of what we hear

80%
of what we see and do

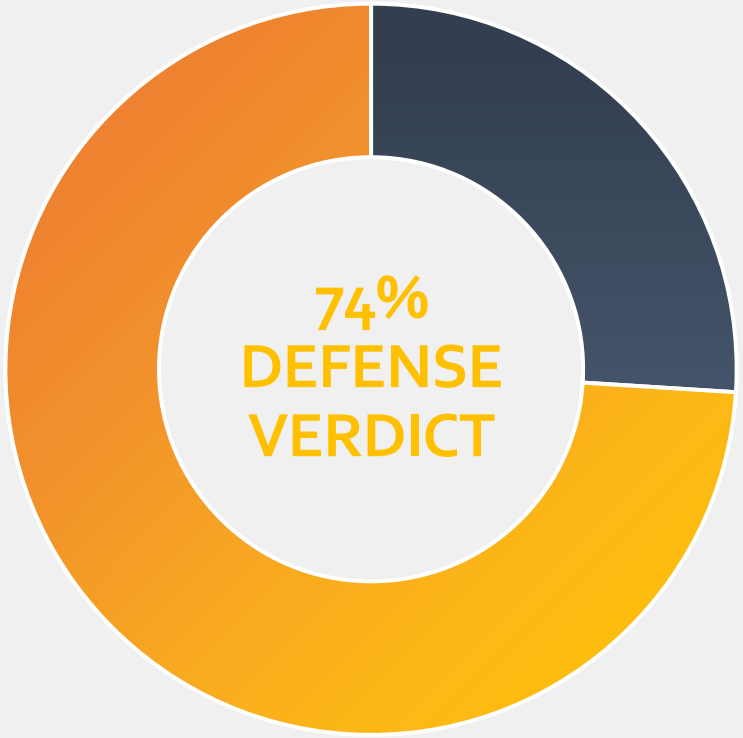


https://blog.hubspot.com/marketing/power-of-visual-communication-infographic

Capitalize on the Power of Visual Argument



Plaintiffs used visuals
Defendants did not



Defendants used visuals
Plaintiffs did not

Park, J. & Feigenson, N. (2012). Effects of a Visual Technology on Mock Juror Decision Making. Applied Cognitive Psychology, 235-246.

Additional Key Concepts

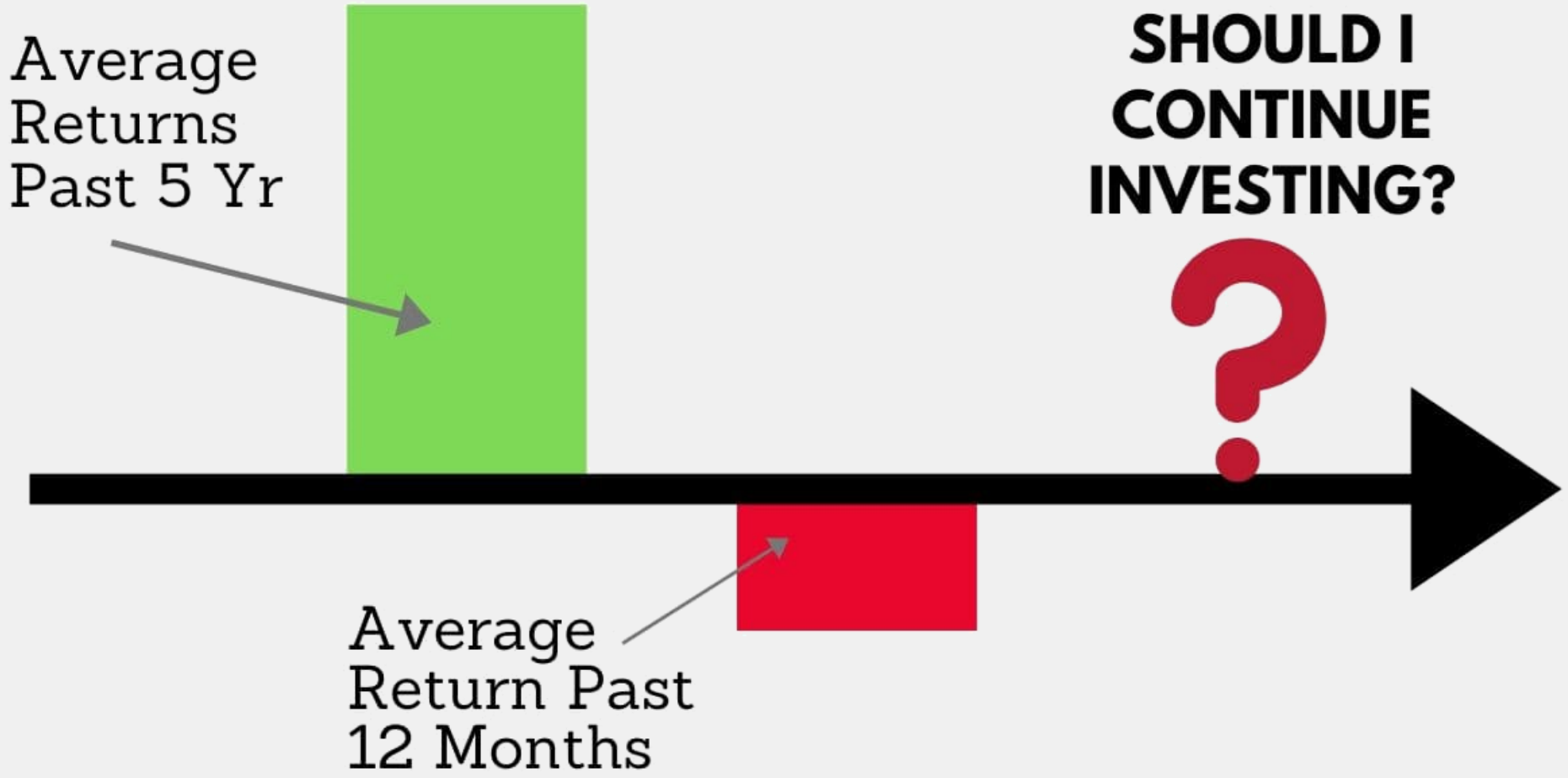
Capitalize on the Primacy Effect

The ***Primacy Effect*** is the tendency to remember the first pieces of information we receive better than information presented later on.

Capitalize on the Primacy Effect

The ***Primacy Effect*** is the tendency to remember the first pieces of information we receive better than information presented later on.

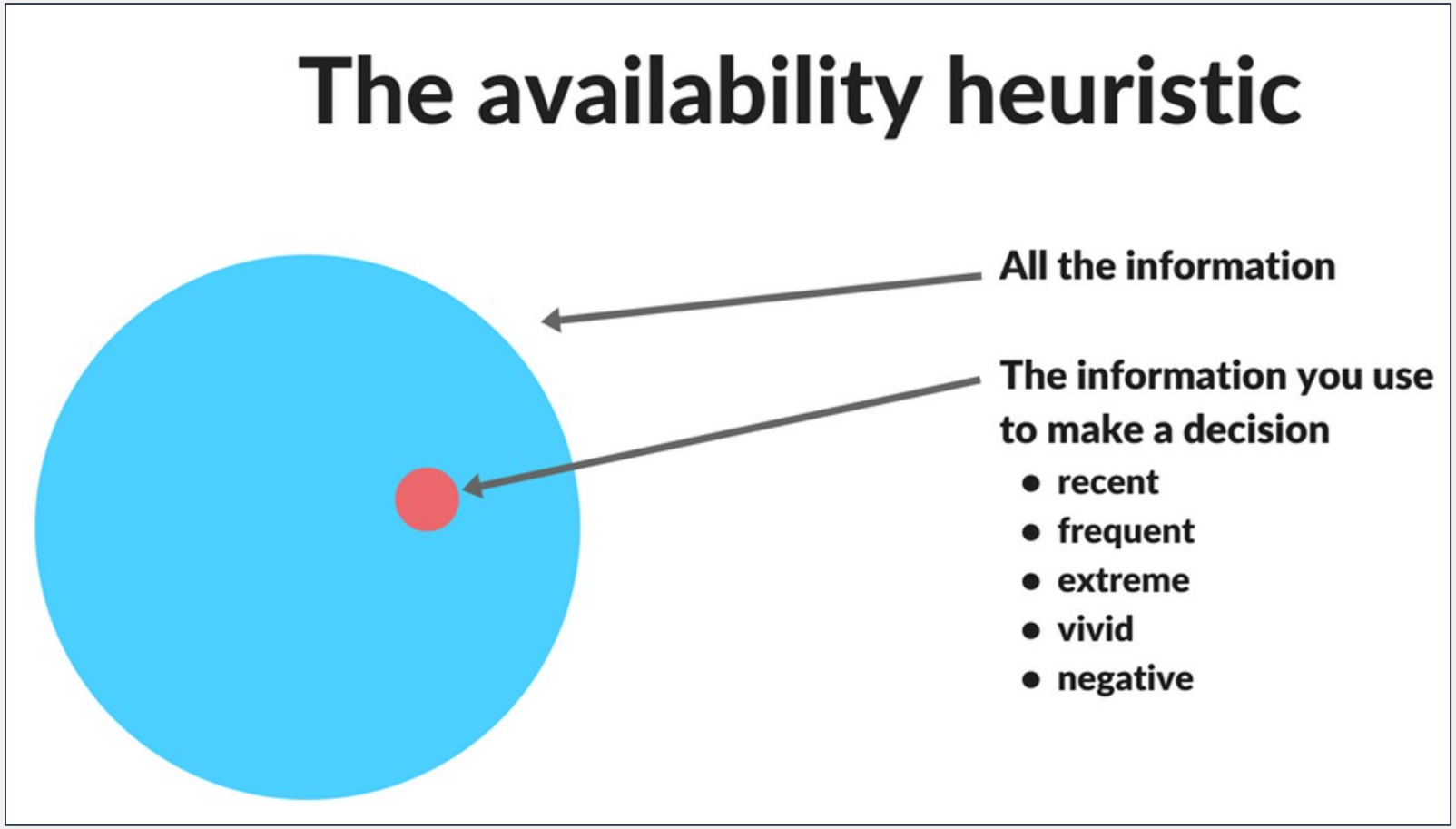
. . . And Remember Recency Bias



Capitalize on the Anchoring Effect

The ***Anchoring Effect*** is the human tendency to be overinfluenced by the first number we hear (the anchor) and to reach an inaccurate judgment by starting at the anchor and insufficiently adjusting downward or upward.

Capitalize on the Availability Bias



The ***Availability Bias*** is the human tendency to overweigh evidence that is easy to remember.

We base our decisions on information that is *available* in our mind.

Make Arguments All Jurors Can Understand

- In a jury, half the people do 70% of the talking.
- If one of those people can't understand your arguments, you are at a disadvantage.

Am. College of Trial Lawyers, *Improving Jury Deliberations through Jury Instructions Based on Cognitive Science* (2019)

People Commit More Strongly to Decisions They Make

"Don't tell the jurors what to do or what to think. Persuasion is much more effective when you lay out the pieces and lead them to conclude them on their own. **When jurors come up with themes and analogies and decisions about the behavior of the parties, it is much more powerful then when you tell it to them.**"

Chopra., *The Psychology of Jurors' Decision-Making* (2018)

What About Judges?

Theories of Judging: Formalism

- The judge's job is to determine the law "not according to his own private judgment but according to the known laws and customs of the land." - Blackstone
- The judge is a "highly skilled mechanic." - Bix
- "The rule of law, as established by precedent or statutory authority, is the equation which guides the judge's decision. Once ascertained, the rule is the scrupulously applied to the case after the judge has examined and determined the relevant facts." - Capurso

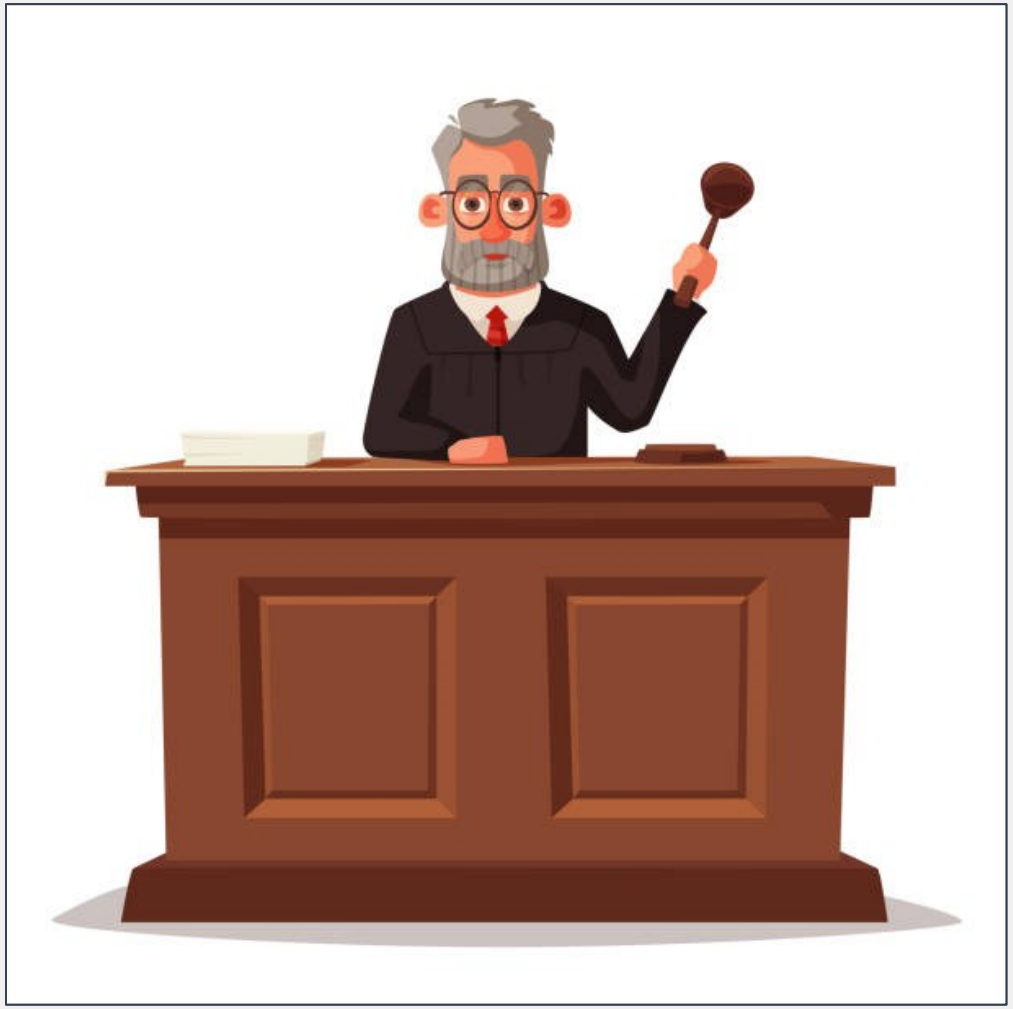
Brian Bix, *Jurisprudence: Theory and* Context; Thomas Capurso, *How Judges Judge: Theories on Judicial Decision Making*

Theories of Judging: Realism

Judges follow an intuitive process to reach conclusions for which they only later rationalize by deliberative reasoning. The judge "decides by feeling, and not by judgement; by 'hunching' and not any ratiocination." The only later use deliberative faculties "not only to justify that intuition to himself, but to make it pass muster."

Joseph C. Hutcheson, *The Judgement Intuitive: the Function of the 'Hunch' in Judicial Decision;* see also Jerome Frank, *Law and the Modern Mind*

So Which is It? Judges are People Too



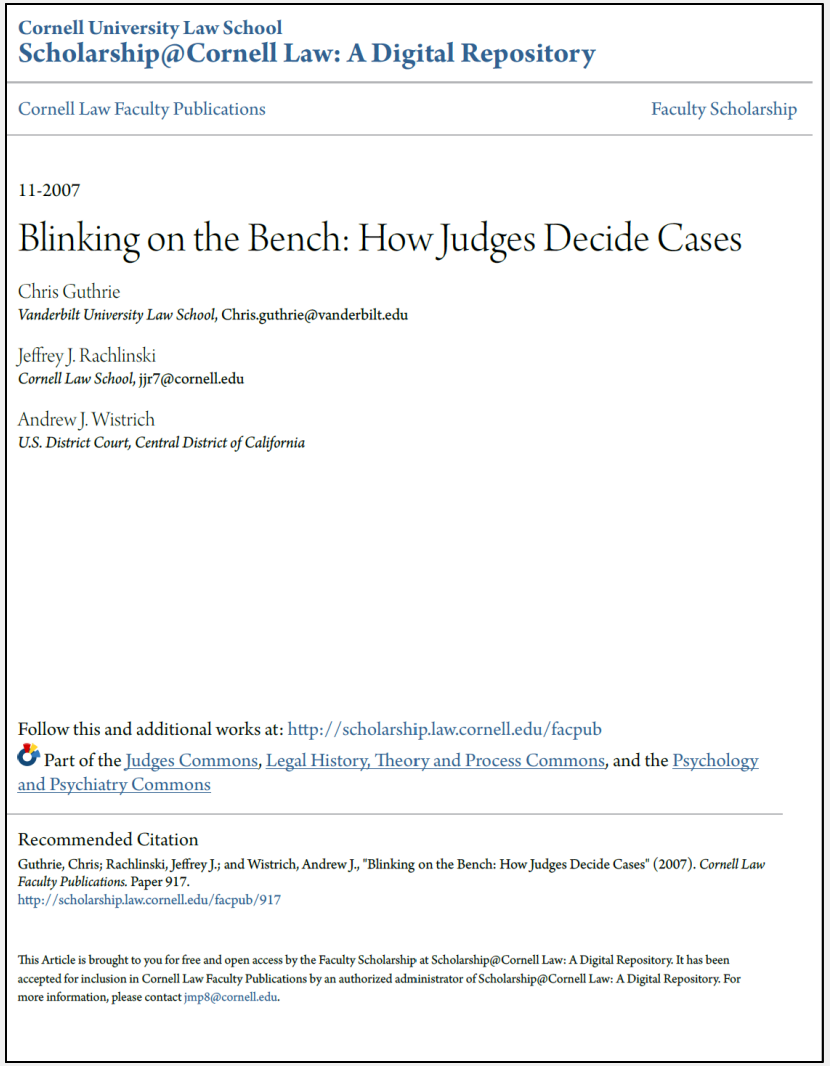
"Judges are predominantly intuitive decision makers, and intuitive judgments are often wrong."

Guthrie, Rachlinksi, Wistrich (2007)

"At the constitutional level where we work, ninety percent of any decision is emotional. The rational part of us supplies the reasons for supporting our predilections."

U.S. Supreme Court Chief Justice Charles Evans Hughes (1939)

Modern Research: the Intuitive Override Model



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Blinking on the Bench: How Judges Decide Cases

Chris Guthrie
Vanderbilt University Law School, Chris.guthrie@vanderbilt.edu

Jeffrey J. Rachlinski
Cornell Law School, jjr7@cornell.edu

Andrew J. Wistrich
U.S. District Court, Central District of California

- "Judges generally make intuitive decisions but sometimes override their intuition with deliberation."
- Empirical studies show judges are susceptible to:
  - Primacy bias
  - Recency bias
  - Anchoring
  - Inappropriate inferences
  - Implicit bias
  - Justification by hindsight
- The significance of opinion writing is unclear.

Advice to the Advocate: What Does Move Judges?

Candid judges consistently cite three factors as being persuasive:

(1) Be prepared

(2) Be confident

(3) Maintain your credibility

Two Nations Separated by a Common Language

Arbitration Is No Exception: A Comparison Between US and UK Procedure

2024 Spring Conference

May 1-3, 2024

Puerto Rico

CELEBRATING ARIAS U.S. 30 YEARS

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TWO NATIONS SEPARATED BY A COMMON LANGUAGE ARBITRATION IS NO EXCEPTION: A COMPARISON BETWEEN US AND UK PROCEDURE

Panel

Moderator : Susie Wakefield (Shoosmiths, London)

Christine Russell (Chubb) of the US cedent, PAYCO, instructing US and UK lawyers

Jonathan Sacher (BCLP, London) – the UK solicitor appointed by PAYCO

Deirdre Johnson (Mintz, US), US attorney appointed by PAYCO

Howard Denbin – the US arbitration appointee

Mark Chudleigh (Kennedys, Bermuda) – the UK arbitration appointee

TWO NATIONS SEPARATED BY A COMMON LANGUAGE ARBITRATION IS NO EXCEPTION: A COMPARISON BETWEEN US AND UK PROCEDURE

Facts

US cedent (PAYCO) is seeking to make a recovery for its US Covid losses on two Excess of Loss Reinsurance treaties. The recoveries are due from its US reinsurer (PAYLESSCO) and London company (LONPAYLESSCO) and Lloyd's Syndicate reinsurers. There are two separate treaties with different arbitration clauses, one applying ARIAS (US) rules and the other applying ARIAS (UK) rules. The UK version of the clause applies English substantive law.

TWO NATIONS SEPARATED BY A COMMON LANGUAGE ARBITRATION IS NO EXCEPTION: A COMPARISON BETWEEN US AND UK PROCEDURE (CONT'D)

Issues for discussion by the Panel

Appointment of the arbitrator

Appointment of the Third Arbitrator/Umpire

Organisational meeting/UK timetable

Witnesses/discovery

ARIAS (UK) ARBITRATION CLAUSE

All disputes and differences arising under or in connection with this contract shall be referred to arbitration under ARIAS (UK) Arbitration Rules.

…

The Arbitrators shall be persons (including those who have retired) with not less than ten years' experience of insurance or reinsurance within the industry or as lawyers or other professional advisers serving the industry.

…

The proper law of this contract shall be the law of England and Wales

SAMPLE "US" ARBITRATION CLAUSE WITH HONORABLE ENGAGEMENT LANGUAGE

…

All arbitrators must be disinterested active or former officials of insurance or reinsurance companies or Syndicates at Lloyd's having at least ten (10) years of insurance or reinsurance experience and not under the present or former control or management of either party to this Agreement …

…

Within 30 calendar days after the appointment of all arbitrators, the panel must meet with the parties. Prior to such meeting, the panel may require the parties to, respectively, submit a writing detailing the nature of the dispute, the issues, and the resolution sought. At the meeting, the panel shall determine, among other items, the scope of and time frame for submitting briefs, beginning and ending dates for discovery (including the scope of discovery), schedule for hearings, use of confidentiality agreements, and the cut-off date for ex-parte communications between the parties and their party-appointed arbitrator…

…

The panel will be relieved of all judicial formality and will not be bound by rules of procedure and evidence.

ARIAS (UK) DIRECTIONS ORDER

1. The Respondent is to serve its Defence before [date]
2. The Claimant is to serve its Reply and Defence to Counterclaim by [date]
3. Requests for disclosure are to be made by [date]
4. Any submissions in response to requests for disclosure are to be served by [date]
5. By no later than [date] the parties are to inform the Tribunal of any objections to any of the requests for disclosure in each case with a brief statement of the reasons for the objection
6. The Tribunal will endeavour to rule on any matters in dispute under paragraph 5 above by [date]

ARIAS (UK) DIRECTIONS ORDER (CONT'D)

7. Documents agreed or ordered to be disclosed are to be produced by [date]
8. The parties have liberty to call expert evidence (if so advised) as follows:
    (a) One claims expert to address ….
    (b) One underwriting expert to address ….
9. Signed statements of witnesses of fact are to be exchanged by [date]
10. Signed reply statements of fact are to be exchanged by [date]
11. Signed Experts reports are to be exchanged by [date]

ARIAS (UK) DIRECTIONS ORDER (CONT'D)

12. Expert meetings are to take place by [date]
13. Supplementary expert reports are to be exchanged by no later than [date]
14. Joint memoranda of experts are to be signed by no later than [date]
15. A pre trial procedural hearing be fixed by agreement with the Tribunal
16. The parties are to seek to agree a List of Issues by [date]
17. In the event of failure to agree the List of Issues the parties may apply to the Tribunal
18. Skeleton arguments and agreed hearing bundles are to be served by no later than [date]
19. The hearing is listed for 5 days commencing [date] and will take place at the International Dispute Resolution Centre at 1 Paternoster Square, St Paul's Churchyard, London

AGENDA FOR THE ORGANIZATIONAL MEETING (ARIAS (US))

1. Disclosures: Panel members should disclose contacts/connections with--

   a. each other;
   b. parties;
   c. counsel; and
   d. potential witnesses, if known.

      Disclosures, which should be made by panel members, counsel, and parties, should include contacts of a business, professional, and personal nature. Business and professional contacts should include, when applicable, both individuals and their organizations. Discussion of continuing disclosure requirement.

2. Formal acceptance of panel or challenges.

3. Hold Harmless Agreement

AGENDA FOR THE ORGANIZATIONAL MEETING (ARIAS (US)) (CONT'D)

4. Special arrangements, if necessary or appropriate, for payment of the umpire's fees, e.g., escrow account.

5. Confidentiality

6. Ex parte communications with panel members. Possible cutoffs: (1) immediately, (2) at the end of discovery, (3) upon the filing of pre-hearing briefs, and (4) at commencement of hearing.

7. Brief position statements by counsel, if necessary. Generally, they will not be necessary if the usual pre-meeting position papers have already been filed. Their purpose is to give the panel a general understanding of substantive issues in the case to enable the panel to rule on procedural items.

8. Witnesses: anticipated number of both deposition and hearing witnesses. Need for/anticipated use of expert witnesses (if appropriate). Date for exchange of witness lists.

AGENDA FOR THE ORGANIZATIONAL MEETING (ARIAS (US)) (CONT'D)

9. Discovery
    A. Types
        1. Document production
        2. Interrogatories, bills of particulars, or the like
        3. Audit
        4. Depositions
            a. fact witnesses
            b. experts

    B. Privilege issues
        1. Privilege logs
        2. In-camera review

    C. Schedule

10. Procedures for dealing with discovery disputes
    A. Correspondence
        1. between counsel
        2. to panel
    B. Conference calls/meetings
    C. Requirements for decision
        1. entire panel
        2. umpire alone
        3. umpire (after consultation with arbitrators)

AGENDA FOR THE ORGANIZATIONAL MEETING (ARIAS (US)) (CONT'D)

11. Collateral estoppel/res judicata issues (if appropriate)
12. Other preliminary issues (if appropriate)
13. Pre-hearing security (if appropriate)
14. Pre-hearing briefs: (1) sequential or simultaneous; (2) page limit, if any; and (3) schedule
15. Hearing dates, location, and length
16. The form of the final award: written, reasoned

DISCLOSURE SCHEDULE (ARIAS (UK))

IN THE MATTER OF AN ARBITRATION

AND IN THE MATTER OF THE ARBITRATION ACT 1996

BETWEEN:

PAYCO

Claimants

-v-

LONPAYLESSCO AND LLOYD'S REINSURERS

Respondents

DISCLOSURE SCHEDULE (ARIAS (UK)) (CONT'D)

No.	DOCUMENTS OR CATEGORY OF DOCUMENTS REQUESTED	RELEVANCE AND MATERIALITY	OBJECTIONS TO DOCUMENT REQUEST	REPLY TO OBJECTIONS TO DOCUMENT REQUEST	RESPONSE TO REPLY TO DOCUMENT REQUEST	TRIBUNAL'S RULINGS
1.	All documents generated between 1 January 2020 and January 2021 showing why there are variations between the Event Definition clause (2001) and the Event Definition clause appearing in Reinsurance Agreement ("the Reinsurance Agreement")	The Respondent has pleaded that the Event Definition clause in the Reinsurance Agreement is not identical to the 2001 clause. It is relevant and material to the plea of "background matrix of facts" to determine why there are variations in the terms of the Event Definition clause appearing in the Reinsurance Agreement. See paragraphs 7 and 8, Points of Claim ("PoC") and paragraphs 18 and 19 Points of Defence ("PoD").	To the extent that these documents do not appear on the Placing Files that have been disclosed, they are unlikely to exist. Furthermore, the requested documents are irrelevant to the issues that the Tribunal has to determine. Evidence of the parties' pre-contractual negotiations is inadmissible as an aid to construction. The Tribunal will not be assisted by a review of these documents (even if they do exist).	This request is not pursued. No ruling from the Tribunal is required.	It is noted that the request is not pursued.	


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ARIAS
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30
YEARS

TWO NATIONS SEPARATED BY A COMMON LANGUAGE

ARBITRATION IS NO EXCEPTION: A COMPARISON BETWEEN US AND UK PROCEDURE

Panel

Moderator : Susie Wakefield (Shoosmiths, London)

Christine Russell (Chubb) of the US cedent, PAYCO, instructing US and UK lawyers

Jonathan Sacher (BCLP, London) – the UK solicitor appointed by PAYCO

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Howard Denbin – the US arbitration appointee

Mark Chudleigh (Kennedys, Bermuda) – the UK arbitration appointee

TWO NATIONS SEPARATED BY A COMMON LANGUAGE

ARBITRATION IS NO EXCEPTION: A COMPARISON BETWEEN US AND UK PROCEDURE

Facts

US cedent (PAYCO) is seeking to make a recovery for its US losses on two Excess of Loss Reinsurance treaties. The recoveries are due from its US reinsurer (PAYLESSCO) and London company (LONPAYLESSCO) and Lloyd's Syndicate reinsurers. There are two separate treaties with different arbitration clauses, one applying ARIAS (US) rules and the other applying ARIAS (UK) rules. The UK version of the clause applies English substantive law.

Issues

Our panel will address the key differences between the two Arbitration processes, focusing particularly on the following areas:

Appointment of the arbitrator

Appointment of the Third Arbitrator/Umpire

Organisational meeting/UK timetable

Witnesses/discovery

ARIAS (UK) ARBITRATION CLAUSE

All disputes and differences arising under or in connection with this contract shall be referred to arbitration under ARIAS (UK) Arbitration Rules.

The Arbitration Tribunal shall consist of three arbitrators, one to be appointed by the Claimant, one to be appointed by the Respondent and the third to be appointed by the two appointed arbitrators.

The third member of the Tribunal shall be appointed as soon as practicable (and no later than 28 days) after the appointment of the two party-appointed arbitrators. The Tribunal shall be constituted upon the appointment of the third arbitrator.

The Arbitrators shall be persons (including those who have retired) with not less than ten years' experience of insurance or reinsurance within the industry or as lawyers or other professional advisers serving the industry.

Where a party fails to appoint an arbitrator within 14 days of being called upon to do so or where the two party-appointed arbitrators fail to appoint a third within 28 days of their appointment, then upon application ARIAS (UK) will appoint an arbitrator to fill the vacancy. At any time prior to the appointment by ARIAS (UK) the party or arbitrators in default may make such appointment.

The Tribunal may in its sole discretion make such orders and directions as it considers to be necessary for the final determination of the matters in dispute. The Tribunal shall have the widest discretion permitted under the law governing the arbitral procedure when making such orders or directions.

The seat of arbitration shall be London, England

The proper law of this contract shall be the law of England and Wales

Sample "US" Arbitration Clause with Honorable Engagement Language

Any dispute arising out of, relating to, or in connection with this Agreement, whether relating to the interpretation, performance, formation, and/or validity of this Agreement, and whether arising before or after its termination or expiration, shall be referred to and exclusively resolved by arbitration as set forth herein. The parties hereto agree that time is of the essence under this Article.

All disputes will be referred to and resolved by a panel of three arbitrators. Arbitration shall be initiated by one party (the "Petitioner") sending a written demand (the "Arbitration Demand") to the other party (the "Respondent") via a method that produces an acknowledgement of the Respondent's receipt, which writing shall set forth the following information (i) reinsurance contract(s) that is (are) the subject of the arbitration, (ii) the parties, (iii) the nature of the dispute and (iv) the name of the arbitrator appointed by the Petitioner.

The Respondent shall respond in writing via a method that produces a written acknowledgement of the Petitioner's receipt within 15 calendar days of receipt of the Arbitration Demand, and such written response shall include the following information: (i) the name of the arbitrator appointed by the Respondent and (ii) any counterclaims. If the Respondent fails to appoint its arbitrator within the 15-calendar day timeframe or fails to notify the Petitioner of the name of the arbitrator so appointed, the arbitration shall proceed with the single arbitrator so chosen by the Petitioner. If the Respondent appoints its arbitrator within the time so allotted, both the Petitioner's and the Respondent's arbitrators shall, within 30 calendar days of the appointment of the Respondent's arbitrator, choose a neutral third arbitrator who shall preside at the hearing as the umpire.

If the two arbitrators are unable to agree upon the appointment of the third arbitrator within 30 calendar days of the appointment of the Respondent's arbitrator, the selection of the umpire shall be governed by the "Candidate Ranking and Umpire Selection Procedure" established by ARIAS US - Umpire Selection Procedure.

All arbitrators must be disinterested active or former officials of insurance or reinsurance companies or Syndicates at Lloyd's having at least ten (10) years of insurance or reinsurance experience and not under the present or former control or management of either party to this Agreement. In no event shall an arbitrator, including the third arbitrator who shall act as the umpire, be chosen who has no availability to attend the organizational meeting and the hearing within six (6) months of his or her appointment.

Within 30 calendar days after the appointment of all arbitrators, the panel must meet with the parties. Prior to such meeting, the panel may require the parties to, respectively, submit a writing detailing the nature of the dispute, the issues, and the resolution sought. At the meeting, the panel shall determine, among other items, the scope of and time frame for submitting briefs, beginning and ending dates for discovery (including the scope of discovery), schedule for hearings, use of confidentiality agreements, and the cut-off date for ex-parte communications between the parties and their party-appointed arbitrator. In making such determinations, the panel shall be mindful that time is of the essence under this Article and shall take into consideration the costs associated with an elongated discovery and hearing timeframe, and may make any orders in relation to shortening the number of witnesses, the number of depositions, and the outside timeframe for the hearing, as it deems to be in the best interests of the arbitration and in effecting the purposes of this Article.

The panel will be relieved of all judicial formality and will not be bound by rules of procedure and evidence. Unless the panel agrees otherwise, the arbitration will take place in Knoxville, Tennessee, although hearings may take place in different locations as agreed to between the parties; provided, however, that the location of such hearings shall have no bearing on the

substantive or procedural law to be used, to the extent the panel looks to a jurisdiction's substantive or procedural law.

The panel will interpret this Agreement as an honorable engagement rather than strictly as a legal obligation and will make its decision in writing, taking into consideration the custom and practice of the insurance and reinsurance industry and the evidence presented by the parties.

The panel is empowered to grant interim relief as it may deem appropriate, including pre-award security; provided, however, that the panel is required to mandate that pre-answer security to secure a potential award be provided in the event that the Reinsurer is no longer actively writing or reinsuring business, but is, instead, running off its current books of business. The panel may, in its sole discretion, make such orders and directions as it considers necessary for the final determination of the matters in dispute, and shall have the widest discretion permitted under any applicable evidentiary laws in making such orders or directions. The panel shall also have the power to impose sanctions for failure to comply with an interim ruling by the panel or for discovery-related abuse. The decision of the majority of the arbitrators when rendered in writing will be final and binding.

The panel shall provide the parties with a reasoned award, no later than 30 calendar days following the termination of the hearing(s), which shall set forth (i) the resolution of the disputed issues, (ii) the amount of the award, and such other relief granted by the panel, if any, and (iii) the panel's reasons for reaching its decision. Judgment upon the award may be entered in any court having jurisdiction thereof.

Example of US Arb Clause with Honorable Engagement Language - 15/04/2024 08:28:43

Sample "US" Arbitration Clause without Honorable Engagement Language

(a) Except as set forth in Section 7.5, any dispute or difference arising out of or relating to this Agreement and the performance of the duties and obligations arising under the Agreement shall be settled by binding arbitration. Subject to any express provisions of this Article, the arbitration will be administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules.

(b) The arbitration panel will consist of two disinterested party-appointed arbitrators and an umpire. Arbitration shall be initiated by the delivery of a written notice of demand for arbitration by one Party to the other sent by registered mail or its equivalent. Such notice of demand shall set out the reason for the request for arbitration.

(c) Each Party shall choose an arbitrator and the two so appointed shall then appoint an umpire. If either Party refuses or neglects to appoint an arbitrator within thirty (30) days after a request by the other to do so, the other Party may appoint both arbitrators. The two arbitrators shall then agree on an impartial umpire within thirty (30) days of their appointment. The arbitrators and umpire shall be active or retired officers of insurance or reinsurance companies and disinterested in the Parties and the outcome of the arbitration. Umpire candidates shall complete disclosure statements at the request of a Party.

(d) The arbitration hearings shall be held in New York, New York or another location if mutually agreed. Each Party shall submit its case to the arbitration panel within sixty (60) days of the appointment of the umpire or within such longer periods as may be agreed by the Parties or directed by the arbitration panel.

(e) Each Party shall pay the fees and expenses of its own arbitrator. The Parties shall equally divide the fees and expenses of the umpire and other expenses of the arbitration, unless such fees and expenses are otherwise allocated by the arbitration panel. The arbitration panel is precluded from awarding punitive, treble or exemplary damages, however denominated, provided however that in the event the relief sought by a Party includes indemnification for punitive, treble or exemplary damages paid or incurred by that party, such amounts may be included in any award rendered by the panel. The panel shall have the power to award reasonable attorneys' fees to either party, including fees incurred in connection with the arbitration or any litigation commenced to stay or dismiss arbitration.

(f) Except as expressly permitted by this Agreement, no Party will commence or voluntarily participate in any court action or proceeding concerning a dispute, except (x) for enforcement pursuant to the Federal Arbitration Act, 9 U.S.C.§§ l et seq., (y) to restrict or vacate an arbitral decision based on the grounds specified under Applicable Law, or (z) for interim relief as provided in paragraph (g) below.

(g) Notwithstanding any other provision to the contrary herein, each Party acknowledges that the breach of certain obligations may cause irreparable injury and damages, which may be difficult to ascertain. Without regard to paragraph (a) above, each Party immediately shall be entitled to seek injunctive relief with respect to such breaches by the other Party and without the requirement of posting a bond. This provision shall not in any way limit such other remedies as may be available to any Party at law or in equity.

IN THE MATTER OF AN ARBITRATION

AND IN THE MATTER OF THE ARBITRATION ACT 1996

BETWEEN:

PAYCO

Claimants

-v-

LONPAYLESSCO AND LLOYD'S

Respondents

_____

ARIAS (UK) DIRECTIONS ORDER

_____

1. The Respondent is to serve its Defence before [date]
2. The Claimant is to serve its Reply and Defence to Counterclaim by [date]
3. Requests for disclosure are to be made by [date]
4. Any submissions in response to requests for disclosure are to be served by [date]
5. By no later than [date] the parties are to inform the Tribunal of any objections to any of the requests for disclosure in each case with a **brief** statement of the reasons for the objection
6. The Tribunal will endeavour to rule on any matters in dispute under paragraph 5 above by [date]
7. Documents agreed or ordered to be disclosed are to be produced by [date]
8. The parties have liberty to call expert evidence (if so advised) as follows:
    a. One claims expert to address ….
    b. One underwriting expert to address ….
9. Signed statements of witnesses of fact are to be exchanged by [date]
10. Signed reply statements of fact are to be exchanged by [date]
11. Signed Experts reports are to be exchanged by [date]

12. Expert meetings are to take place by [date]

13. Supplementary expert reports are to be exchanged by no later than [date]

14. Joint memoranda of experts are to be signed by no later than [date]

15. A pre trial procedural hearing be fixed by agreement with the Tribunal

16. The parties are to seek to agree a List of Issues by [date]

17. In the event of failure to agree the List of Issues the parties may apply to the Tribunal

18. Skeleton arguments and agreed hearing bundles are to be served by no later than [date]

19. The hearing is listed for 5 days commencing [date] and will take place at the International Dispute Resolution Centre at 1 Paternoster Square, St Paul's Churchyard, London

AGENDA FOR THE ORGANIZATIONAL MEETING (ARIAS (US))

1. Disclosures: Panel members should disclose contacts/connections with--
   a. each other;
   b. parties;
   c. counsel; and
   d. potential witnesses, if known.

      Disclosures, which should be made by panel members, counsel, and parties, should include contacts of a business, professional, and personal nature. Business and professional contacts should include, when applicable, both individuals and their organizations. Discussion of continuing disclosure requirement.

2. Formal acceptance of panel or challenges.

3. Hold Harmless Agreement

4. Special arrangements, if necessary or appropriate, for payment of the umpire's fees, e.g., escrow account.

5. Confidentiality

6. Ex parte communications with panel members. Possible cutoffs: (1) immediately, (2) at the end of discovery, (3) upon the filing of pre-hearing briefs, and (4) at commencement of hearing.

7. Brief position statements by counsel, if necessary. Generally, they will not be necessary if the usual pre-meeting position papers have already been filed. Their purpose is to give the panel a general understanding of substantive issues in the case to enable the panel to rule on procedural items.

8. Witnesses: anticipated number of both deposition and hearing witnesses. Need for/anticipated use of expert witnesses (if appropriate). Date for exchange of witness lists.

9. Discovery
   - A. Types
     1. Document production
     2. Interrogatories, bills of particulars, or the like
     3. Audit
     4. Depositions
        - a. fact witnesses
        - b. experts
   - B. Privilege issues
     1. Privilege logs
     2. In-camera review
   - C. Schedule

10. Procedures for dealing with discovery disputes
    - A. Correspondence
      1. between counsel
      2. to panel
    - B. Conference calls/meetings
    - C. Requirements for decision
      1. entire panel
      2. umpire alone

3. umpire (after consultation with arbitrators)

11. Collateral estoppel/res judicata issues (if appropriate)

12. Other preliminary issues (if appropriate)

13. Pre-hearing security (if appropriate)

14. Pre-hearing briefs: (1) sequential or simultaneous; (2) page limit, if any; and (3) schedule

15. Hearing dates, location, and length

16. The form of the final award: written, reasoned

IN THE MATTER OF AN ARBITRATION

AND IN THE MATTER OF THE ARBITRATION ACT 1996

BETWEEN:

PAYCO

Claimants

-v-

LONPAYLESSCO AND LLOYD'S REINSURERS

Respondents

_____

DISCLOSURE SCHEDULE

(ARIAS (UK))

_____

No.	**DOCUMENTS OR CATEGORY OF DOCUMENTS REQUESTED**	**RELEVANCE AND MATERIALITY**	**OBJECTIONS TO DOCUMENT REQUEST**	**REPLY TO OBJECTIONS TO DOCUMENT REQUEST**	**RESPONSE TO REPLY TO DOCUMENT REQUEST**	**TRIBUNAL'S RULINGS**
1.	All documents generated between 1 January 2020 and January 2021 showing why there are variations between the Event Definition clause (2001) and the Event Definition clause appearing in Reinsurance Agreement ("**the Reinsurance Agreement**")	The Respondent has pleaded that the Event Definition clause in the Reinsurance Agreement is not identical to the 2001 clause. It is relevant and material to the plea of "*background matrix of facts*" to determine why there are variations in the terms of the Event Definition clause appearing in the Reinsurance Agreement. See paragraphs 7 and 8, Points of Claim ("**PoC**") and paragraphs 18 and 19 Points of Defence ("**PoD**").	To the extent that these documents do not appear on the Placing Files that have been disclosed, they re unlikely to exist. Furthermore, the requested documents are irrelevant to the issues that the Tribunal has to determine. Evidence of the parties' pre-contractual negotiations is inadmissible as an aid to construction. The Tribunal will not be assisted by a review of these documents (even if they do exist).	This request is not pursued. No ruling from the Tribunal is required.	It is noted that the request is not pursued.	
2.	All Documents showing the Catastrophe Excess of Loss Reinsurance	The Respondent has alleged that the Claimant ought to have been able to	Irrelevant and confidential.	(1) Article 9(2((a) of the IBA Rules requires grounds of commercial or technical	Without prejudice to the Claimants' contention that these documents are	

No.	**DOCUMENTS OR CATEGORY OF DOCUMENTS REQUESTED**	**RELEVANCE AND MATERIALITY**	**OBJECTIONS TO DOCUMENT REQUEST**	**REPLY TO OBJECTIONS TO DOCUMENT REQUEST**	**RESPONSE TO REPLY TO DOCUMENT REQUEST**	**TRIBUNAL'S RULINGS**
	Programme placed to protect the Direct and Facultative ("**D&F**") Property Account for the 2021 year of account	recover for these losses under its reinsurance programme (subject to the terms and conditions of any such cover) and claimed that to the extent any recovery has been made, the Claimants' loss to that extent has been diminished. It is, therefore, relevant and material to the outcome of this arbitration to produce the requested document/s. See paragraph 11 of the PoD.	The Claimants have, in their Reply, explained that the renewal terms quoted by the Respondent were unacceptable; and that the Claimants therefore chose not to renew with the Respondent and did not obtain cover for the same layer from any other reinsurance provider for the 2021 year of account. The Claimants' reinsurance protections for other layers for the 2021 year of account are irrelevant to the Issues that the Tribunal has to determine, and are also likely to include confidential material.	confidentiality to be determined by the Tribunal "*to be compelling*" for document production to be withheld on this ground. The Respondent submits that is not the case here as the Placing Files already disclosed by the Claimant contain a copy of the Claimant's year of account Catastrophe Excess of Loss Reinsurance Programme and the Claimant has also already produced the reinsurance slip for one layer of the 2021 programme placed with the relevant Syndicate and AZ Insurance Company.	irrelevant, please see the attached Evidence of Cover and schematic diagram showing the Catastrophe Excess of Loss Reinsurance programme placed to protect the 2021 year of account.	

BCLP
Bryan Cave Leighton Paisner

ARIAS REINSURANCE ARBITRATIONS: ENGLAND / US COMPARISONS

	ENGLAND	US
I. The Arbitration Clause and Its Interpretation		
	Courts interpret and apply the clause like any other contract. Courts favour arbitration. The Arbitrators can rule on their own jurisdiction.	Courts interpret and apply the clause like any other contract. Courts favour arbitration. The Arbitrators can rule on their own jurisdiction
II. The Arbitrators		
Selection Process	Limited beauty parades, no discussion of issues. Appointment process not usually controversial.	Parties interview potential party-appointed arbitrators for their views on the issues. Appointment of umpire often time-consuming and sometimes controversial.
Qualifications	Governed by arbitration agreement. Active/retired underwriters/ market people/lawyers. Often KCs or retired judges.	Governed by the arbitration agreement. Most require some past or present affiliation with an insurer or reinsurer.
Grounds for Disqualification	Limited. Actual bias or lack of qualifications required.	Award may be vacated for "evident partiality" of arbitrator.
The Role of the Party-Appointed Arbitrator	Strictly neutral. Party-appointed arbitrator is not advocate for appointer.	Party-appointed arbitrator often expected to advocate for appointing party.

	ENGLAND	US
III. Arbitration Procedure		
Governing Law or Rules	Arbitration Act 1996 for procedure if not set out in agreement (new draft Arbitration Act under review). ARIAS UK Rules often apply.	Federal Arbitration Act provides very general framework. Parties often specify ARIAS US.
Indemnities for Arbitrators	Not usually required. Act confers immunity.	Usually requested and given in reinsurance arbitrations.
Ex Parte Communications with Party-Arbitrators	All communications addressed/available to all parties, *i.e.*, no ex parte.	Allowed until point at which parties agree or panel decides they should cease.
Security for Costs	Arbitrators can in certain circumstances order security for Respondent's legal costs.	Rarely done, if ever.
Security for Award	Not available.	Panel may order security for award in certain circumstances.
Discovery	Limited to documents, depositions very unlikely.	Document and Deposition common.
Privilege	Litigation and solicitor-client privilege.	Panels normally recognize attorney-client privilege.
Confidentiality	Confidential by common law.	Parties usually agree to keep arbitration confidential, but are not required to.

	ENGLAND	US
Summary Judgment	Provisional orders if agreed. Also, awards on specific parts of the dispute may be made at different stages. New draft Bill will broaden this.	Arbitrators can decide disputes based on written submissions only, but rarely do.
Importance of "the Law," including Choice of Law	If English Law is specified, arbitrators obliged to apply. Honourable engagement not common.	Arbitrations frequently relieve arbitrators of duty to follow the law.
Involvement of the Courts during the Arbitration	Available at various stages of the English procedure if parties cannot agree.	Very limited other than to confirm interim awards of security.
IV. The Award		
Reasoned Awards	Yes, unless parties agree otherwise.	Infrequent.
Compromise Awards	Unlikely	Frequent.
Punitive Damages	Not available	Rarely, although arbitrators do have power to award them
Non-Monetary Remedies	Yes	Yes
Winning Party's Costs	Generally awarded (amount typically 70-80%).	Parties generally bear their own costs unless arbitration agreement provides otherwise.

	ENGLAND	US
V. Judicial Review/Appeal		
	Appeals available in any event on substantive jurisdiction, serious irregularity. Also, on point of law unless parties agree otherwise. Also, agreement to dispense with reasoned award deemed to be agreement to exclude jurisdiction of Courts. In fact very difficult to appeal on point of law.	ery limited. Grounds to vacate award: "evident partiality" of arbitrators; misconduct; or arbitrators exceeded their powers. Rarely awards can be vacated for manifest disregard of law or facts.

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Law, Economics, and Risk in Puerto Rico

ARIAS – US 2024 Spring Conference

General Session #4: Law, Economics and Risk in Puerto Rico

Brief Description of PROMESA and Status of the Restructuring of Puerto Rico Public Debt

Melba Acosta, Esq.
Counsel, McConnell Valdes LLC

The Puerto Rico Oversight Management and Economic Stability Act (PROMESA)[1] was enacted during the summer of 2016 to provide Puerto Rico with a legal mechanism to restructure its public debt, which was necessary after the Government defaulted on the payment of part of its public debt, this after Puerto Rico went through a nine-year recession, from 2006 to 2015, when the public debt was declared unsustainable. The new regime established by PROMESA, including a stay of legal proceedings, provided the mechanism needed at the time, to deal with an extremely difficult financial situation, which was exacerbated after the devastation wreaked by two hurricanes in 2017, several earthquakes during 2019 and 2020, and finally the COVID-19 pandemic in 2020, events that shattered our economy.

On December 13, 2012, Puerto Rico received the first of several downgrades to its credit rating by *Moody's Investor Services,* about $38 billion in debt was downgraded with a negative outlook. The agency explained the reasons for its action as follows:

> The downgrade to Baa3 and the assignment of a negative outlook reflect four primary rating drivers:
>
> > Economic growth prospects remain weak after six years of recession and could be further dampened by the commonwealth's efforts to control spending and reform its retirement system, both of which are needed to stabilize the commonwealth's financial results. The lack of significant economic growth drivers and the commonwealth's declining population have also reduced prospects for a strong economic recovery.
> >
> > Debt levels are very high and continue to grow.
> >
> > Financial performance has been weak, including lackluster revenue growth and large structural budget gaps that have led to a persistent

[1] Puerto Rico Oversight, Management, and Economic Stability Act, Pub. L. No. 114-187, 130 Stat. 549 (2016).

> reliance on deficit financings and serial debt restructurings to support operations in recent years.
>
> Lack of meaningful pension reform and no clear timetable to do so. Reform of the commonwealth's severely underfunded retirement systems is needed to avoid asset depletion and future budget pressure.

In summary, weak economy, high levels of debt, recurring budget deficits and high pension liability in the different pension systems of the Government were the factors for the downgrade. Many factors contributed to the deterioration of the Government's finances, among some of them:

- Repeal of Section 936 of the U.S. Internal Revenue Code - Year 2006 was the last year of the 10-year phase-out of Section 936, the federal tax incentive that attracted pharmaceuticals, medical device makers and other US manufacturers to the island. Since 1976, Section 936 provided significant tax advantages to US corporations that established manufacturing subsidiaries on the island. The Government of Puerto Rico also offered tax grants to reduce their Puerto Rico tax liability. In addition, if the earnings from Puerto Rico sources were deposited in local banks, no Puerto Rico withholding taxes would be imposed on dividends paid afterwards. This treatment, known as the 2(j) Income, provided vast liquidity to the Puerto Rico banking sector. As a result of Section 936, Puerto Rico developed a substantial manufacturing sector, with a sizeable number of manufacturing jobs as well as jobs in other sectors that provided goods and services to the manufacturing companies. The federal exemption from corporate taxes was one of the main drivers of industrialization and growth of Puerto Rico's economy, formerly based on agricultural production, mainly sugar cane. The elimination of Section 936 resulted in the loss of more than half of the manufacturing jobs, from around 160,000 to some 78,000. After 2006, Puerto Rico's economy shrunk nearly every year, and unemployment rates climbed as high as 12%.

- Continued Use of Deficit Financing to Cover Budget Deficits – For example, during fiscal years 2008-09 to 2012-13, approximately $9.1 billion of COFINA bonds, a long-term debt, was issued to maintain the operating expenses of the Government. Given the economic situation, Governments revenues continue decreasing and the Government used debt to fill in the gaps and continue running the Government.

- Debt Refinancing - The lack of sufficient resources to pay operating expenses and its debt service as contracted led the government to use debt refinancing to reduce the annual debt service. This practice consists of reducing the debt service by

> refinancing part of the debt with new bonds, by replacing the old debt with new debt, and lengthening the maturity of the bonds. This practice can be beneficial, for example, if debt with higher interest rates is replaced by debt with lower rates. The problem arises when the practice becomes necessary every year to configure and "balance" the budget in accordance with our Constitution. So, for several years, budgets did not include the total annual debt service payment as contracted, but rather a smaller amount was budgeted based on the expectation of a refinancing.

With this background, the Government faced a difficult fiscal situation where it was not able anymore to pay the debt service of its public debt while at the same time, run government operations to provide basic services, this while revenues were constantly falling. Before the approval of PROMESA, the government explored what options Puerto Rico had to file bankruptcy and restructure its debt. Chapter 9 of the Federal Bankruptcy Code, the regime that allows municipalities and public corporations to file bankruptcy, used to be applicable to Puerto Rico, but an obscure 1984 amendment eliminated its applicability to the island, removing its sole legal mechanism to file for bankruptcy. Curiously, the motive for this amendment has not been discovered in Congressional records.

After several congressional hearings on Chapter 9 and on the Government's finances,[2] discussions about providing Puerto Rico with a broader tool took place. The mechanism was dubbed the *Big Chapter 9,* under which restructuring the Commonwealth's debt would be allowed. Although initially the idea was positively received, there was reluctance to approve something seen as an advantage for Puerto Rico over the states. Within this context a bankruptcy regime applicable to the territories was devised, different from that applicable to the states, giving rise to the concept of the *Territorial Chapter 9*, which later developed into PROMESA.

PROMESA provided a better option for Puerto Rico. Chapter 9 allows municipalities and public corporations to file for bankruptcy, such as Detroit and Jefferson County, but not to the states. Thus, Chapter 9 would not have solved Puerto Rico's problems because only public corporations such as the Puerto Rico Electricity and Power Authority (PREPA) could legally avail themselves of it to file for bankruptcy protection. Chapter 9 could not provide the relief that the Government's finances needed, which included the debt of the Commonwealth of Puerto Rico and other issuers.

The approval of PROMESA brought uncertainty as to how its implementation would affect governmental processes in Puerto Rico, particularly those related to managing the finances of the

[2] https://www.finance.senate.gov/imo/media/doc/Melba%20Acosta-Febo%20U.S.%20Senate%20Testimony%209-29-2015%20(Final%20with%20exhibits).pdf (last visited July 1, 2023).

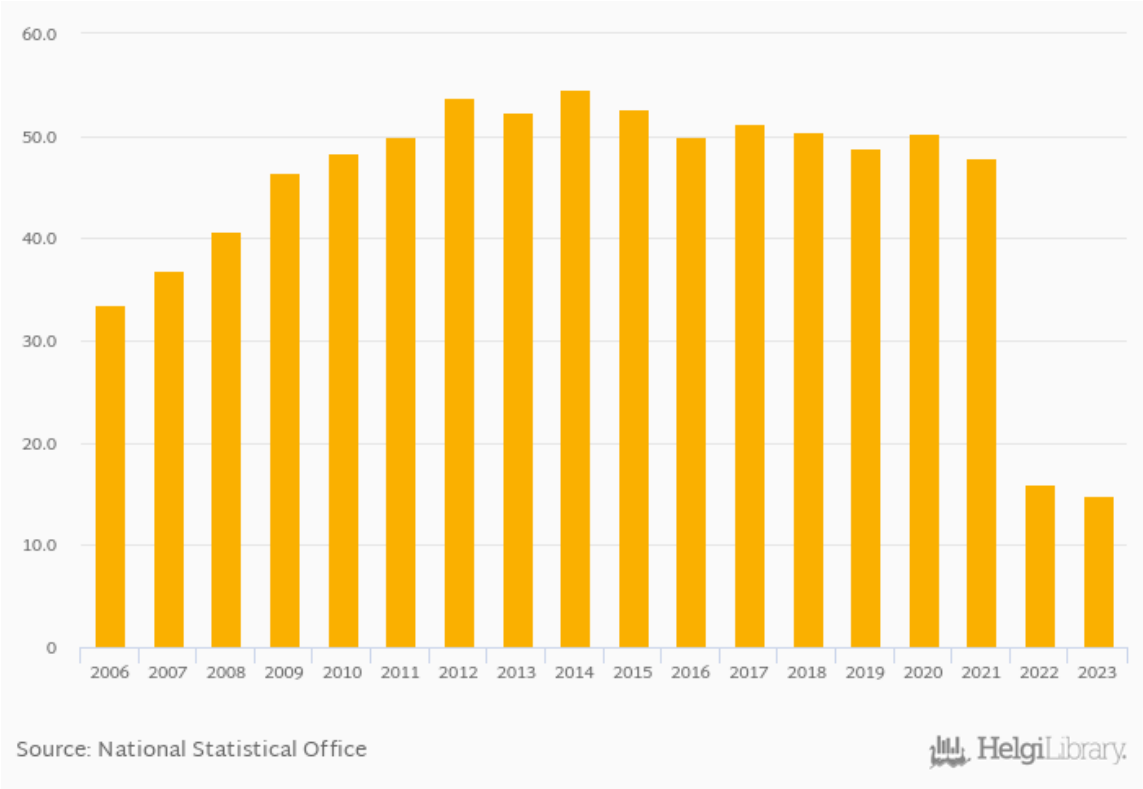
Commonwealth of Puerto Rico (Commonwealth). For one, the preparation of the budget would have to follow a certified fiscal plan for the first time, a step not considered in the Organic Law of the Office of Management and Budget, Act 147-1980, as amended. PROMESA became law after the US Supreme Court decisions in *Commonwealth of Puerto Rico v. Sanchez Valle* and *Commonwealth of Puerto Rico et al. v. Franklin Cal. Tax-Free Trust et al*., seminal cases that re-interpreted basic aspects of the relationship between Puerto Rico and the United States Congress in fiscal matters and criminal law, paving the way for PROMESA's approval and a new management regime of Puerto Rico's finances.

PROMESA brought the Financial Oversight and Management Board for Puerto Rico, (the Oversight Board), a new entity that is basically in charge of the finances of Puerto Rico, including the preparation of Fiscal Plans and the Budgets. The definitions of the powers and limits of the Board vs the Executive and the Legislative Branch were developed through judicial decisions in many lawsuits, with each party winning some and losing some. However, the main tool provided by PROMESA, the legal authority to restructure the public debt through a consensual process through its Chapter VI or a court administered process through its Chapter III, was crucial to restructure our debt to a sustainable amount.

As of March 2024, under PROMESA the Government has restructured the debt of most of its numerous debt issuers, among them, the Puerto Rico Sales Tax Financing Corporation (COFINA), the Government Development Bank for Puerto Rico (GDB or the Bank), the Commonwealth of Puerto Rico's General Obligation bonds (GOs), the Public Building Authority (PBA), the Employees of the Commonwealth Retirement System (ERS), and the Puerto Rico Highway and Transportation Authority (Highway Authority) as well as other debt guaranteed by the Commonwealth, and other issuers whose debt service was tied to the Government, including those whose revenues were "clawed-back" by the Government-- all in all, approximately 80% of its total debt. Still pending is the restructuring of the debt of the Puerto Rico Electric and Power Authority (PREPA, in the approximate amount of $8.3 billion). According to a report issued by the United States Government Accountability Office (GAO) to Congress dated June 2023 on the Public Debt Outlook for United States Territories, the restructuring of Puerto Rico's debt completed represents a 55% reduction, from $63.1 billion to $28.6 billion, and a reduction in debt service from 25% of revenue to 6.1 percent of revenues in 2022. The debt service is annually fixed on $1.15 billion through 2049.[3] Puerto Rico public debt, as a % of GDP, fell 7.27% to 14.8% in 2023.

[3] https://www.gao.gov/assets/gao-23-106045.pdf (last visited on July 1, 2023). The webpage of the Oversight Board reflects different amounts: a reduction of 57% from $71 billion to $31 billion (https://oversightboard.pr.gov/debt/, last visited on September 25, 2023).

Public Debt (As % of GDP) fell 7.27% to 14.8% in Puerto Rico in 2023
Public Debt (As % of GDP) (%), 2023[4]



In the immediate future, Puerto Rico will lack access to the municipal market to obtain financing, in part because of conditions imposed by PROMESA as well as certain conditions imposed by the Plan of Adjustment (PDA) that governs the restructured debt of the Commonwealth. Thus, during the next several years, the Government will have to rely on federal disaster recovery funds to develop and maintain its infrastructure. After Hurricane Maria, the Federal Emergency Management Agency (FEMA) estimated that it would invest approximately $50 billion in the reconstruction of Puerto Rico. In addition, the federal Department of Housing and Urban Development (HUD) allocated $20 billion for housing, infrastructure and other recovery and mitigation programs. The total of the two grants, over $70 billion, represents close to two and a half years of consolidated budgets of the Commonwealth and all its components. To this amount, we must add approximately $43 million that Puerto Rico received in financial aid due

[4] https://www.helgilibrary.com/charts/public-debt-as-of-gdp-fell-727-to-148-in-puerto-rico-in-2023

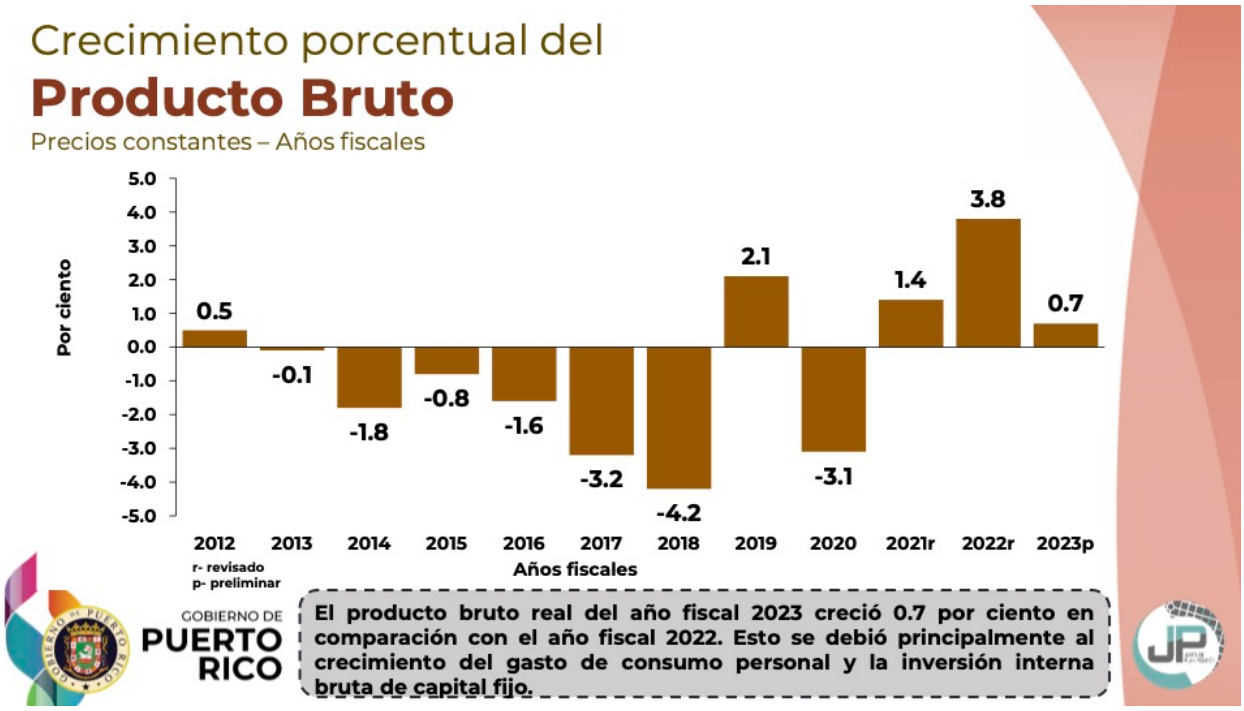
to the catastrophic effects of COVID 19 and additional disaster recovery funds that were received as a result of the damages caused by Hurricane Fiona during September of 2022.

Puerto Rico's financial and economic situation, with its new restructured debt, has been improving. Revenues have been increasing, according to a report issued by the Oversight Board:[5]

- General Fund revenue collections year-to-date (YTD) through the second quarter (Q2) of FY2024 were $540 million higher than the mid-year FY2024 forecast and $401 million higher than the same period in FY2023. This performance was driven primarily by strong collections of income taxes, sales and use taxes, and motor vehicle taxes.

- As of December 31, 2023, the Treasury Single Account (TSA), which is the Commonwealth's main operating account, had a balance mid-year of $8.9 billion.

The economy is also starting to show positive results, this after some difficult years with negative growth in our Gross National Product. Finally, the trend is reversing, as statistics of Puerto Rico's Planning Board for years 2021 to 2023 demonstrate: [6]



[5] https://drive.google.com/file/d/1pSFxOcb_gEq8xV1ga01v-wQZ-FbDbTrS/view

[6] https://jp.pr.gov/wp-content/uploads/2024/03/PRESENTACION-ECONOMIA-DE-PR-2023-2025.pdf

Puerto Rico has faced significant economic and fiscal challenges, including the severe recession that led the Government to file for bankruptcy under PROMESA in 2017. Puerto Rico's economy has been gradually recovering and the Government has recently emerged from bankruptcy. The economy is bouncing back, and as of mid-2022 private-sector employment was at a fifteen-year high. The medical manufacturing cluster remains a key part of the island's economy, although employment in this industry is still below its peak levels of 2005. Puerto Rico's tourism sector is still relatively small, but it has been one of the Commonwealth's strongest job creators in recent years. In addition, a fledgling aerospace industry has emerged around Aguadilla and Arecibo. We can consider that the Island is making progress in resolving and rebounding from its extensive fiscal crisis. Much still needs to be done.

McConnell Valdés LLC

Legislative developments impacting the insurance industry in Puerto Rico

2021-2024 Legislative Term

ARIAS-US Spring Conference

May 2, 2024

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Legislative Assembly

- Puerto Rico has a bi-chamber Legislative Assembly:

- Senate – 27 senators . There are 12 senators from the Popular Democratic Party (PPD), 10 senators from the New Progressive Party (PNP), 2 senators from Movimiento Victoria Ciudadana (MVC), one senator from the Puerto Rico Independence Party (PIP), one senator from Proyecto Dignidad (PD), and one independent senator (Sen. José Vargas Vidot).

- House of Representatives - 51 representatives, of which 25 are from the PPD, 21 from the PNP, two from MVC, one from the PIP, one from PD and one independent (Rep. Luis Raúl Torres).

Challenges and Opportunities

- Composition of the Legislative Assembly has presented both challenges and opportunities.
  - No party holds an absolute majority in any of the bodies.
  - The approval of measures has entailed, on many occasions, a greater analysis and writing effort than in other legislative terms.
  - However, there has been no substantial decrease in the amount of legislation approved and both the Executive and the Legislative Branch have demonstrated the ability to be able to work together.

Participation of the private sector

- This legislative term has also demonstrated the importance of both citizens and organizations (professionals, unions, cultural, non-profit) participating in the legislative process.
- A substantial number of legislative measures have started as a result of initiatives presented by the private sector. The private sector has also contributed significantly to the analysis and improvement of legislative initiatives of the Executive and the Legislature.
- Interaction with legislators across party lines has proven to be essential.

Legislative Sessions

- The Legislature meets for two legislative sessions a year.
- In an election year, such as 2024, there is only one session (January to June).
- However, the Governor has the power to call the Legislature for an extraordinary session, via the issuance of an executive order setting forth the specific measures to be worked on during said extraordinary session.
- The mechanism of the extraordinary session is frequently used by governors in this period after the last ordinary session, for appointments (judges, prosecutors, etc.) and to address matters that remain unfinished at the close of the ordinary session.

Legislative Sessions

- It is essential to keep an eye on legislative activity even after the end of the last ordinary session of the term.
- Legislative measures that remain unapproved at the end of the legislative term do not transfer to the next term.

Presentation

- For the purposes of this presentation we will focus on measures that directly impact the property and casualty insurance industry.
- We will briefly present a summary of the measures presented during the current legislative term, with emphasis on some that we consider to be of particular importance.

Summary of measures presented

- As of April 15, 2024, approximately 15 bills impacting the property and casualty sector have been presented in the House and Senate:
  - House Bills: 153, 332, 579, 941, 1025, 1048, 1533, 1551, 1664.
  - Senate Bills: 260, 721 (A67), 722 (A68), 816, 883, 1352.
- Two Senate resolutions were also presented, RS 612 and RS 852, related to a legislative investigation that was conducted by the Senate Committee on Finance, Budget and Fiscal Oversight Board, in relation to certain actions by the Office of the Commissioner of Insurance.

Partial payment – SB 816

- SB 816, presented by Senators Marially González and Gretchen Hau, both of the Popular Democratic Party (“PPD”), seeks to amend Article 27.166 of the Insurance Code, to force property and casualty insurers to issue partial payments or advances as for parts of claims as to which there is no controversy, when a state of emergency has been declared by the Governor of Puerto Rico.
  - The law, as it currently reads, empowers the Insurance Commissioner to order insurers to make such payments. The amendment would require insurers to make partial payments without the Commissioner's intervention.
  - The bill was referred to the Senate Legal and Economic Development Committee on June 14, 2023.

Accord and Satisfaction – HB 153 and HB 1025

- HB 153, authored by a group of representatives of the PPD, sought to amend Article 27.161 of the Insurance Code in order to establish that no insurance company may extinguish an obligation through accord and satisfaction without first providing the insured with a detailed explanation, in writing and orally, regarding the scope and consequences of accepting said payment.
- It was approved by the House and Senate and vetoed by the Governor via pocket veto.
- It was refiled as HB 1025, approved by the House and Senate, and vetoed again by the Governor via written veto.

Public adjuster fees – PC 332

- HB 332, authored by Representative Yashira Lebron (PNP), seeks to amend certain provisions of Chapter 9 of the Insurance Code, for the purpose of limiting the contingent fees that a public adjuster may charge to 10% of the amount recovered by the insured as payment for the claim. It would also require people who act as arbitrators in appraisal processes to present reports of their efforts to the Insurance Commissioner.
- The measure was approved by the House of Representatives on June 7, 2022, and by the Senate, with amendments, on March 4, 2024. A conference committee is pending to be convened to agree on the final language of the measure before remittance to the Govenor for his signature.

Catastrophic reserve – Act 12-2022 (HB 579)

- Act 12-2022, which was presented in the House of Representatives by Representatives Carlos Méndez and Yashira Lebron (PNP) as PC 579, amends Article 25,030 of the Insurance Code to provide how the amount of the catastrophic reserve should be reflected in the insurer's annual statement.
- PC 579 became Act 12-2022 on March 25, 2022.
- PC 941, authored by Angel Matos (PPD) is duplicative of PC 579.

Medical malpractice – HB 1551

- HB 1551, authored by Rep. José (Quiquito) Meléndez Ortiz (PNP), amends provisions of the Judiciary Law to create a Specialized Court for in Medical Malpractice cases.
- It was presented on November 1, 2022, referred to the House Legal Affairs Commitee on that same date and is pending further processing.

Corporate governance – Act 70-2022 (SB 721)

- Act 70-2022 creates a new Chapter 32 of the Insurance Code for the purposes of establishing the requirements on the Annual Corporate Governance Disclosure report of domestic insurers.
- It originates from SB 721, which was presented by the PNP delegation as an administration project (A67)
- It is one of only two projects on the subject of insurance (the other being SB 722) presented as an administration project.

Reinsurance – Act 37-2022 (SB 722)

- Act 37-2022 amends several provisions of Chapter 46 of the Insurance Code for the purpose of adopting standards applicable to reinsurance operations in reciprocal jurisdictions, in accordance with the model legislation of the National Association of Insurance Commissioners (NAIC).
- It originates from SB 722, which was presented by the PNP delegation as an administration project (A68).

Special Premium Tax – Cooperative Insurers – Act 7-2022 (SB 260)

- Act 7-2022 amends Article 7.022 of the Insurance Code to clarify that the special premium tax imposed through said article does not apply to cooperative insurers.
- SB 260 was authored by the President of the Senate, Hon. José Luis Dalmau, and was signed into Act 7-2022 on March 7, 2022.

Home Insurance (Dwelling) – PS 883

- PS 883, authored by Senator Carmelo Ríos, would amend certain provisions of Chapters 9 and 27 of the Insurance Code to guarantee the right of the insured to freely choose their insurer and producer.
- The project was referred to the Senate Legal and Economic Development Committee and is pending processing.

FHLB – Act 75-2021 (HB 1048)

- Act 75-2021 was enacted for the purpose of amending Article 3.070 and certain provisions of Chapter 40 of the Insurance Code, in order to facilitate the process for insurance companies in Puerto Rico to become members of the Federal Home Loan Bank (FHLB) and to modify certain stay provisions and voidable transfers with respect solely to instances in which the creditor in an insurer involvency proceeding is the FLHB.
- It was filed as HB 1048, by the Speaker of the House, Rafael (Tatito) Hernández.

Damage assessment – HB 1533

- Amends sections 2.030 and 27.166(a) of the Insurance Code to empower the Insurance Commissioner to determine the amount of damages to be paid in property insurance claims.
- Authored by Rep. Estrella Martínez Soto (PPD) and Rep. José Torres Zamora (PNP).
- On June 5, 2023, the Commission on Consumer Rights, Banking Services and the Insurance Industry issued a positive report recommending approval of the measure.
- The measure is pending approval by the House of Representatives.

Controlled Business – HB 1664

- HB 1664, authored by Rep. Estrella Martínez, seeks to amend the provisions of Chapter 9 of the Insurance Code regarding controlled business, in order to absolutely prohibit an insurance producer from requesting controlled business, as defined in Article 9.080 of the Code.
- The bill is before the Committee on Consumer Rights, Banking Services and Insurance Industry, chaired by Rep. Martínez herself. It was the subject of public hearings on April 9, 2024. The Commission has yet to issue its report.

International Insurers – Act 49-2024 (SB 1352)

- Act 49-2024 amended Chapter 61 of the Puerto Rico Insurance Code (International Insurers and Reinsurers Act) for the purpose of clarifying that no provision of said law may be interpreted as limiting the power of an international insurer or reinsurer to underwrite or reinsure business in the US, provided that it complies with the laws and regulations of the state in which it intend to do business.

International Insurers – Act 49-2024 (SB 1352)

- SB 1352 was presented by Senator Juan Zaragoza (PPD) as a result of the investigation that the Finance, Budget and Fiscal Supervision Board Commission carried out, under the protection of SR 612, on the actions of the Office of the Insurance Commissioner with regarding the loss and subsequent recovery of accreditation of the Office of the Insurance Commissioner by the NAIC.

Investigation into actions of the OCI related to the loss of accreditation – SR 612

- SR 612 was filed by Senator Juan Zaragoza, for the purpose of investigating the reasons why the Office of the Insurance Commissioner ("OCI") lost its NAIC accreditation, the measures taken by said office to regain accreditation, and the impact on the insurance industry of such actions.
- The Finance, Budget and Fiscal Oversight Board Committee issued a First Partial Report with the results of its investigation up to that point.
- Among other issues, said report recommended the approval of legislation aimed at clarifying certain aspects of the International Insurers and Reinsurers Law, which led to the presentation of SB 1352, which became Act 49-2024.

Censure Resolution – SR 852

- SR 852 was presented by Senator Juan Zaragoza in reaction to certain actions of the Insurance Commissioner Atty. Alexander S. Adams Vega, as were discovered through the investigation conducted pursuant to SR 612, and public statements made by Commissioner Adams against the Finance, Budget and Fiscal Oversight Board Commission, that were understood by the Committee to have been false and libelous.
- SR 852 was approved by the full Senate on November 14, 2023, with votes from all legislative delegations, except that of the PIP.

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PUERTO RICO INTERNATIONAL INSURANCE CENTER:

International Insurers Consulting Group

Topics

- Background, Puerto Rico International Insurance Regime (IIC)
- IIC Value Proposition
- IIC Legal Environment
- Protected Cell Companies in the IIC
- IIC-Status

WHY PUERTO RICO?

- A privileged geographical location, providing open access to United States.
- Cultural affiliation with Latin America
- Fiscal & Tax autonomy with special United States tax distinctions.
- Experienced domestic insurance industry among top three in Premium volume in Latin America, with NAIC based insurance practices
- Insurance Regulator member of both NAIC and ASSAL.
- Internationally recognized banking and financial services industries.
- Modern infrastructure in transportation and communication.
- State-of-the-art meeting facilities.
- Access to well educated and bilingual workforce (Spanish and English) at competitive cost.
- Legal protection is provided to capital under both federal and state constitutions, with legal redress venues in federal or commonwealth courts should individual requirements be met.

International Insurance Center

US Jurisdiction (Currency, Banking, FRS implications)

Special, Tested, Flexible Int. Insurance Legislation

Powerful Segregated Asset Plan Environment

Authorization, Exit Process under control

Competitive Tax Environment for Insurer and Providers

Legal, Financial, Administrative Expertise

Optional Financial Reporting (US GAAP, Statutory, FRS)

International Insurance Center

PURPOSE OF LEGISLATION

- Chapter 61 of the Insurance Code of Puerto Rico structured a comprehensive tax and insurance regulation system to encourage and regulate the formation of specialty international insurers in Puerto Rico, to write insurance on foreign risks, reinsurance and Puerto Rico excess lines risks.

OBJECTIVES

- To encourage and regulate the formation of specialty international insurers to write insurance on foreign risks, reinsurance and Puerto Rico excess lines.
- Have Puerto Rico contribute to the general development of international insurance markets.
- Take advantage of the unique position of Puerto Rico as a U.S. jurisdiction with its own tax system.
- Become the jurisdiction of choice for:
  - Specialty insurers and reinsurers of US and non-US risks
  - Latin American off-shore operations
- Provide an alternative to other jurisdictions
  - Off-Shore: Bermuda, Barbados, Cayman Islands, BVI, Panama
  - On-Shore: Vermont, Colorado, Hawaii

International Insurance Center Legal framework

Law 399 2004: known as the International Insurers and Reinsurers Act of Puerto Rico establishes the legal basis for the International Insurance Center of Puerto Rico through which insurers and reinsurers, or business entities organized as such, can export and import insurance and services related to the insurance industry

Law 98, 2011: Secure Long-term tax status with decree system. Improve tax treatment to Non-Residents beneficiaries of Life & Health Products

Law 39-2014: Allows captives to assume 51% of Third-Party Risks; New Class of Authority for International Insurers; domestic vs international business parameters

International Insurance Center Legal framework

Law 60 2019: PR Incentive Code: Confirms Tas Environment for International Insurers and Reinsurers Act of Puerto Rico within PR Incentive Regime rance industry

Law 49 2024: Confirms that IIs can conduct insurance business in US and other markets. Imposes to OCI the duty to prioritize the development of IIC and reporting duties to the Legislature.

IIC Legal framework

- Rule 80: Sets forth the rules governing the establishment, authorization, operation, and supervision of International Insurers
- Rule 81: Sets forth the rules governing the authorization, operation, and supervision of Protected Cell companies
- Rule 82 : Sets forth the rules governing the creation, authorization, operation, and supervision of International Insurers Holding Companies
- Rule 100: Standards to regulate reinsurance contracted by International Insurers in Puerto Rico
- Ruling Letter CN-2011-123-CIS Mandates individual registration of Protected Cells Captives

PRINCIPAL PROVISIONS & STRUCTURE OF THE LAW

CAPITAL AND SURPLUS, APPLICATION FEES REQUIRED - GENERAL APPLICATION FEE: $350.00 USD

TYPE OF LICENSE	DESCRIPTION	MINIMUM CAPITAL AND SURPLUS	APPLICATION FEE
CLASS 1 PURE CAPTIVE	A company that may not insure any risk other than those of its parent, affiliated companies and/or controlled unaffiliated businesses.	$500,000.00 USD	$750.00 USD
CLASS 2 ASSOCIATION CAPTIVE	A company that can insure the risks of the parent and/or affiliated companies or its members, as well as those arising from its business transactions.	$750,000.00 USD	$1,000.00 USD
CLASS 3 PROPERTY- CASSUALTY	A company that can transact business for traditional insurance or reinsurance foreign risks in property & casualty except life and disability; also, high limit casualty and property catastrophe reinsurance	$1,500,000.00 USD	$2,500.00 USD
CLASS 4 UNRESTRICTED PROPERTY-CASSUALTY	A company that can transact business for traditional insurance and reinsurance foreign risks in property & casualty, including high limit property and casualty reinsurance. Can not transact life and disability reinsurance.	$100,000,000.00 USD	$25,000.00 USD
CLASS 5 UNRESTRICTED LIFE-DISABILITY	A company that can transact business for traditional insurance and reinsurance foreign risks in life and disability.	$750,000.00 USD	$750.00 USD
CLASS 6 ILS Insurer	A company with a securitization program.	N/A	$25,000.00

IIC Structures

Direct Insurers

Reinsurers

Holding Companies

PR corporation holding interest in an International Insurer/Reinsurer

Branch

Commercial unit of a Foreign Insurer operating as a PR Trust

Segregated Asset Plan /Protected Cell Companies

BUSINESS ENTERPRISES & OPERATIONAL STRUCTURES

PROTECTED CELLS
(§61.020 (14); §61.160, R.81)

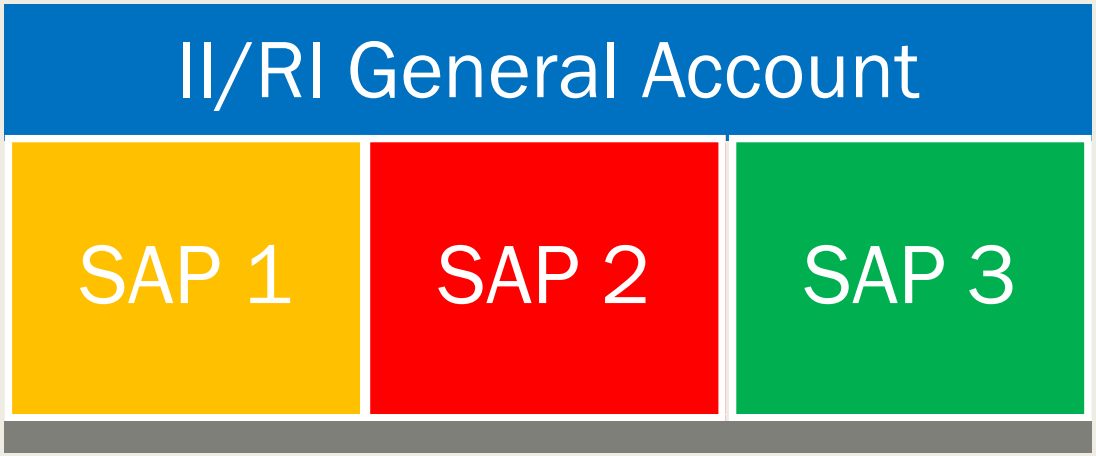
A group of assets that are identified and administered in a separate an integrated fashion by an International Insurer, for the purpose of fulfilling a group of obligations that are identified and administered under an operational plan.

- PROTECTED CELL COMPANY
  - *Segregates identified assets and liabilities from insurer's general account or other separate accounts.*
  - *Accounting and insolvency separation.*
  - *Cells may have separate ownership and/or management.*
  - *Assets of protected cell will be available only for payment of obligations specifically identified in the plan.*
  - *"Rent-a-Captive": Captive owned and operated by an unrelated company. Insures similar risks of multiple insureds.*
  - *The International Insurer has to submit the operational plan of the protected cell for approval.*

Benefits:

- *Protected Cells do not have legal separate entity.*
- *Captives: cells may serve as separate captive entities.*
- *Securitizations: Cells may issue insurance linked financial instruments.*
- *No difference in Puerto Rico tax treatment for International Insurer with protected cells.*

Segregated Assets Plans



- Plan of Operation approved by the OCI-PR
- Legal separation of Assets /Liabilities
- Not a legal entity although a tax entity in P& C business
- International recognition

Puerto Rico offshore insurance center-tax regime

TAX REGIME

- 4% of tax over $1.2m of net income, on a stand alone captive or protected cell basis. Total exemption from other taxes including premium and property tax
- Guaranteed tax treatment for 15 year with Tax Decree
- No United States taxation for Non-United States Sources (Latin America, Asia, etc.)

PRINCIPAL PROVISIONS & STRUCTURE OF THE LAW

- TAX INCENTIVES
- The tax exemptions conferred under the International Insurers and Reinsurers Act of Puerto Rico include:

1. Preferred Tax Rate for international insurers.
2. Exemption from income obtained by the International Insurer and by qualifying International Insurer Holding Companies,
3. Exemption on dividends, and other profit distributions made by the International Insurer of the International Insurer Holding Company,
4. Exemption on municipal franchise and real and personal property taxes.
5. Exemption to the International Insurer and qualifying International Insurer Holding Company from withholding taxes on payments of dividends and other profit distributions made to third parties, and from filing tax returns with the Puerto Rico Internal Revenue Service.

Summary - Tax Exemptions:

	Regular Tax	Branch Profit Tax	Dividend Withholding Tax	Distribution in Liquidation	Filing Requirement	Municipal License Tax	Property Tax
Domestic Life Insurance Company	**(only on gain from sale of property)**	**No**	**Yes**	**Yes**	**Yes**	**No**	**Yes**
Insurance Company (not Life Insurance)	**Yes**	**Yes**	**Yes**	**Yes**	**Yes**	**No**	**Yes**
International Insurer	**4% of Net Income over $1.2m**	**No**	**No**	**No**	**No**	**No**	**No**
International Insurer Holding Co.	**No**	**No**	**No**	**No**	**No**	**No**	**No**

U.S. Tax Considerations

Puerto Rico is an offshore jurisdiction for U.S. Tax Purposes

Controlled Foreign Corporation (CFC) , Subpart F Income, GILTI, PFIC all apply to Puerto Rico.

Most captives avoid these tax consequences by filing a 953(d) election. A decision to be taxed as a U.S. corporation.

International Insurance Center: authorization and Compliance Review

■ Thorough Application process with emphasis of soundness, capital source and economic viability of Plan of Operation.

■ Annual Audited Statement on US GAAP, with statutory reconciliation notes per Rule 80, National Association of Insurance Commissioners Annual Statement or IFRS basis.

■Subject to Office of the Commissioner of Insurance Examination and Receivership procedures.

■ Resident Principal Representation.

■ Minimum Capital & Surplus.

■Premium to Surplus ratio

■Comply with Liquidity Ratio (80% Liquid Assets to Total Liabilities).

Annual Compliance Requirements

- Prepare and Submit Financial Statements on GAAP basis with statutory reconciliation notes per Rule 80. The Annual Statements for International Insurers Class 2 to Class 5 shall be accompanied with an opinion of an actuary
- Comply with Minimum Capital & Surplus.
- Comply With Solvency (Premium) Ratios
- Comply with Liquidity Ratio (Liquid Assets to Total Liabilities): 80 %

Class	Ratio
1	5:1
2	5:1, 3:1 for non related Premium
3	3:1
4	2:1
5	Feasibility Study

RENEWAL FEES

Premium range	Contribution
No greater than $25,000,000	$5,000.00
$25,000,000 to $50,000,000	$10,000.00
$50,000,000 to $75,000,000	$20,000.00
$75,000,000 to $100,000,000	$35,000.00
$100,000,000 to $150,000,000	$50,000.00
$150,000,000 to $250,000,000	$65,000.00
Greater than $250,000,000	$75,000.00

IIC Status, 2022

		SAP
Class 1	7	--
Class 2	1	
Class 3	7	5
Class 3 & 5	4	3
Class 5	13	6
	32	14

- Written and Assumed Premium: $1.6b
- Segregated Asset Plan (Non-L&H) : 418
- International Insurers Holding Companies: 6
- Inactive/Dissolved entities: 22

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Harnessing Data and Analytical Tools for Large Complex Economic Damages

2024 Spring Conference

May 1-3, 2024

Puerto Rico

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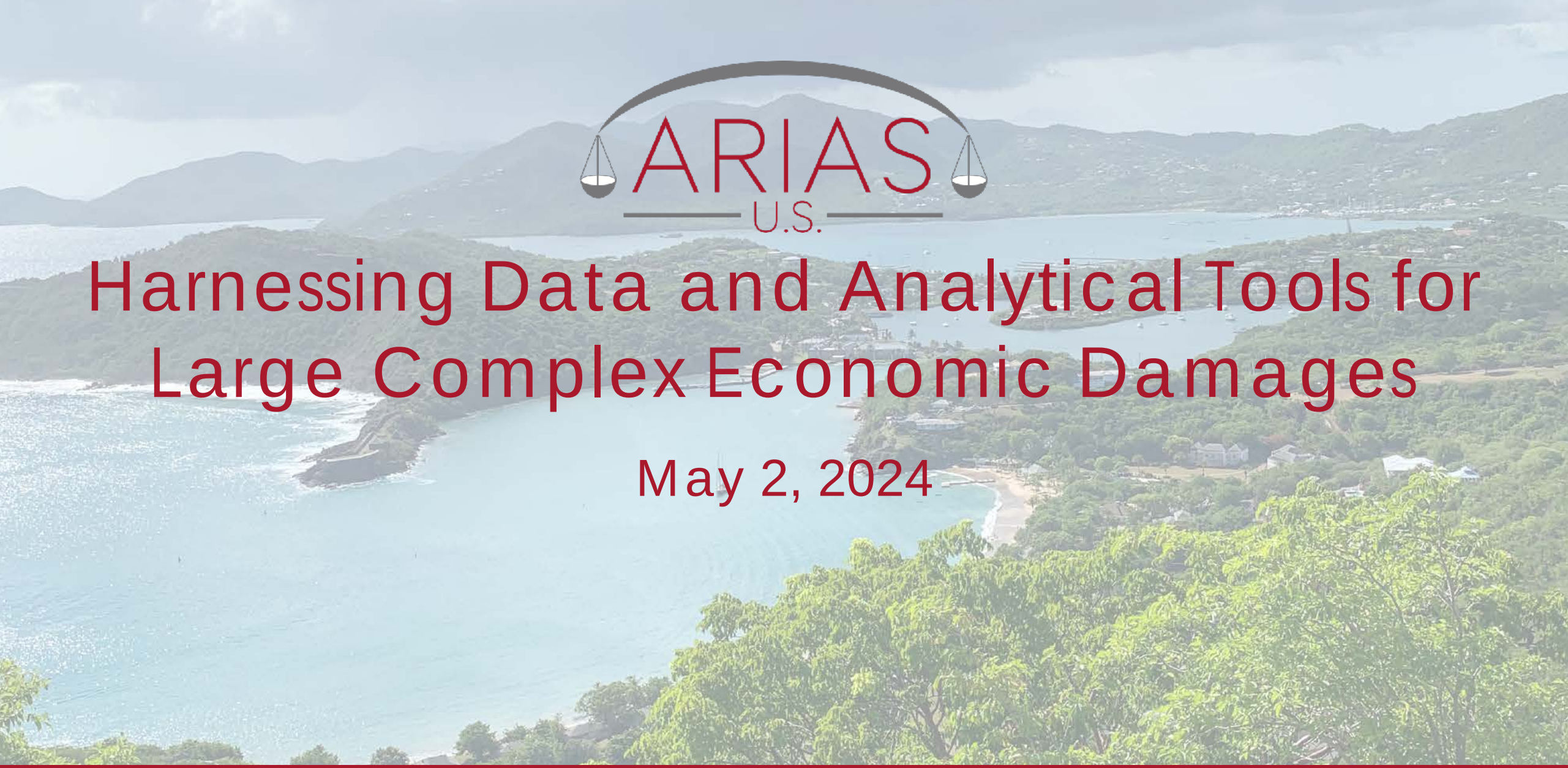

Harnessing Data and Analytical Tools for Large Complex Economic Damages

May 2, 2024

Agenda

- Introductions
- Key Issues in Complex Claims
- Management of Data
- Going Beyond the Data

Meet your presenters

Simon Oddy
FCA, CFE, MCIArb
Partner
Baker Tilly US, LLP

Brendan Gray CPA, MBA
Director
Baker Tilly US, LLP

Eileen Kennelly Sorabella
EVP & General Counsel
Reinsurance
Arch Re

Current Climate / Key Issues

- Getting a handle on claims data volume
- Damages – policy allocations
- Policies exhaustion – excess carrier concerns
- Business interruption claims and complex liability analysis
- Data management and analysis - Transparency

Examples of Use

- Application of data analytics and data tools:
    - Managing of insurance claim
        - Damages exposure, both claims management and litigation
    - Internal reporting
        - Requesting authority
        - Setting Reserves
        - Establishing Settlement Appetite
    - Analyze reinsurance coverage - Who's POV?

Applications

- Product Recall & Liability Cases
- Sexual Abuse and Other Complex Cases
- Wage & Hour Disputes
- Legal Fee Reviews
- Commercial / Economic Disputes

Forensic Accounting & Analysts

EXPOSURE ANALYSIS

MODELS

MODEL AUDIT

DATA ANALYSIS AND CASE MANAGEMENT

DETAILED LOSS CALCULATIONS

EXPERT WITNESS WORK

DEPOSITION / TRIAL WORK

Case Study

- Use of a “forever chemical” in manufacturing
- Resulted in adverse health effects for employees, end users, and surrounding communities
- **Estimated that thousands of lawsuits will be filed in MDL.**
- Hundreds of millions in both indemnity exposure and defense costs.

Management of Data

Where do I begin with no data?

- Claims - Early Phase - little to no data – options;
    - Examine policies in question
    - Study cases of similar nature
    - Use historical data and other publicly available information
    - Develop extrapolations from minimal data

Managing large data?

- Forensic technology and A.I.
- Streamlining review process - use of A.I. and other tools to extract and standardize data
- Provides analytical results and understanding of the makeup of the raw data before any further analysis is done
- Creation of platforms and tools to manage / compile data for ease of use.

Going Beyond the Data

Building the Model

Example Case Issues:

- Policy chart provided is 30+ years of coverage
- Complex tower of insurance that changed year-over-year
- Inclusion of Defense Costs
- Application of retentions and deductibles
- Application of policies as per-occurrence vs. aggregate
- Policy exclusions
- Allocation Methodology
- Future Claims
- Overlapping Insurance

Building the Model

- Analyze and understand the inner-workings of the coverage charts
- Review policy language
- Review legal guidance provided by counsel
- Review claimant data

Analyzing the Data Received

Building the Model – What The Client Sees

Criteria

General:	
Claims Value	PMV
Allocation Methodology	Pro-Rata
Allocation Dates	Mix
Number of Occurrences (A)	One Per Claim
1972 - 1975 Policy Allocation:	
Drop Down	No
Professional Liability (A)	No
Policy Application	Per Term
Policy Limit	Per Occurrence
1985 - 1986 Policy Allocation:	
Drop Down	No
Policy Limit	Per Occurrence
1991 - 1992 Policy Allocation:	
Drop Down	No
Policy Limit	Per Occurrence

** User controlled fields are denoted in purple*

Key Results

Description	N/A	1/1/1961 to 7/14/1972	7/15/1972 to 7/1/1975	7/2/1975 to 7/31/1985	8/1/1985 to 7/1/1986	7/2/1986 to 6/30/1991	7/1/1991 to 7/1/1992	7/2/1992 to 12/31/2008	Total
Claim Count (B):									
Severe Abuse	0	34	27	75	22	40	21	46	265
Non-Severe Abuse	0	153	117	396	78	195	102	280	1,321
Total Claim Count	**0**	**187**	**144**	**471**	**100**	**235**	**123**	**326**	**1,586**
Total Exposure	**$0**	**$37,305,727**	**$21,438,327**	**$175,645,029**	**$12,190,920**	**$85,442,677**	**$18,498,173**	**$140,229,147**	**$490,750,000**
Of Which:									
Primary Policy	n/a	n/a	$21,438,327	n/a	$12,190,920	n/a	$18,498,173	n/a	
Excess Policy	n/a	n/a	$0	n/a	$0	n/a	$0	n/a	
Other Excess Policies	n/a	n/a	$0	n/a	$0	n/a	$0	n/a	
XXX Exposure	n/a	n/a	**$0**	n/a	**$0**	n/a	**$0**	n/a	**$0**

Criteria

General:	
Claims Value	PVM
Allocation Methodology	Pro-Rata
Allocation Dates	
Number of Occurrences (A)	
Settlement Value Discount	0.00%

Trigger
Pro-Rata

Collaborative Effort

Modeling Deliverables

- All tools have pros and cons – and often a combination is best.

Excel

- Great for rapid prototyping
- Broadly familiar

Tableau/PowerBi

- Great for communicating insights on LOTS of data
- Can be shared in-browser

Python/R

- Enormously flexible and performant
- Specialized

Cloud Hosting

- Provides client-available inputs and controlled access for specialized tools

Decision Tree Analysis

Example Decision Tree

Panel Discussion

Questions?

How Should Arbitrators Address Potential for Settlement With the Parties? Opportunities, Limits and Ethics

How Should Arbitrators Address Potential For Settlement With the Parties? Opportunities, Limits, and Ethics

Elaine Caprio + David Ichel + Silvia Marroquin + Carlos Romero

May 2, 2024

Arbitrator Involvement in Settlement: Potential Tools

Will discuss some tools for arbitrator involvement, but bearing in mind:

- The Arbitrator's duty to protect enforceability of the Award.
- The Arbitrator's duty of neutrality/to decide the case on the merits.

When to Mediate—the Parties' Choice

1. The parties may agree to mediate at any time
2. The panel can suggest mediation at any time
3. Suggestions on timing (and benefits and disadvantages):

- During the organizational meeting
- After discovery cutoff
- After submission of expert reports
- After submission of summary judgment motions but before final hearing
- After partial decision of targeted issues agreed upon by the parties
- Even after the hearing or the Award

Potential Tools: “Mediation Window” in the Arbitration

1. ADR provisions may require mediation before arbitration.

2. Provided by some arbitral organizations as default (with the possibility to opt-out)(e.g., AAA).

3. May be raised at initial organizational meeting/CMC/preliminary hearing.

4. What are the consequences? “Pause” or “stay” the proceedings.

Potential Tools: Asking the Parties; Addressing Specific Situations

1. Simply asking the parties early in the arbitration if they have discussed settlement is a pretty informal, light-touch, no pressure technique.

2. Might be asked early in the arbitration or at a later conference in connection with discussing whether to have a "mediation window."

3. Alternatively, asking when the case calls for it (e.g., when a party appears to assent to a demand or injunctive relief by the other party).

4. Arbitrators can ask parties questions on the merits that show the risks to each side.

Potential Tools: Bifurcation; Leaving Time Before Drafting Award Convert Settlement to Consent Award? *Functus Officio* Status?

1. Commonly used in insurance arbitration; bifurcation leaves room for settlement on damages amount after a liability ruling.

2. Setting aside time after the close of the liability/full hearing for parties to discuss settlement before the Award is drafted.

3. Conversion of Settlement Agreement into Consent Award. (*Albtelecom SH.A v. UNIFI Communs., Inc.*, 2017 U.S. Dist. LEXIS 82154 (S.D.N.Y. May 30, 2017))

4. When does a settlement render Arbitrator *functus officio*? (*Martin Dawes v. Treasure & Son Ltd [2010] EWHC 3218 (TCC))*

Potential Tools: “Arb/Med”

1. Written agreement a must—whether by written agreement or consent panel order.
2. After the final hearing is completed, then mediation is scheduled.
3. Mediation is scheduled after the final award is issued and sealed pending mediation session.
4. Advantage: Both parties have seen each other’s case and arguments.
5. Disadvantage: Expensive.

Potential Tools: “Med/Arb”

1. Written agreement a must.
2. Mediation at the outset before arbitration proceeding.
3. Here, the mediator is generally also the arbitrator.
4. Advantage: Has the potential to reduce costs with settlement before arbitration.
5. Disadvantage: Has the potential problem of parties biasing arbitrator in *ex parte* communications.

Potential Tools: Other Party-Agreed Arbitrator Involvement

- Other Case Management Techniques, *see* ICC 2023 Report on Facilitating Settlement in International Arbitration
- Prague Rules, Article 2.4(e) (non-binding preliminary views), Article 9 (assistance in amicable settlement)
- Wing-arbitrators work with both sides
- Arbitrator(s) at a joint settlement conference
- Giving off-the-record preliminary, non-binding views
- Managing enforcement concerns

Thank you!

Elaine Caprio + David Ichel + Silvia Marroquin + Carlos Romero

Hot Off the Presses: Recent COVID UK, Life & Voluntary Payments Doctrine Cases

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Breakout Session C

Thursday, May 2, 2024

Voluntary Payment and Reinsurance

Does the Legal Doctrine of Voluntary Payment Have a Place in the Reinsurance Relationship?

May 2, 2024

Bruce M. Friedman, Gallo Vitucci Klar LLP

What is Voluntary Payment?

"[A] common law doctrine [that] bars recovery of payments voluntarily made with full knowledge of the facts, and in the absence of fraud or mistake of material fact or law."

Dillon v. U-A Columbia Cablevision,
100 N.Y.2d 525, 526 (2003)

Are there Exceptions to the Voluntary Payment Doctrine?

- Involuntary payments, e.g., under protest or subject to a reservation of rights
- Made without full knowledge of the facts (unless arising from a lack of due diligence)
- Induced by fraud of the payee

Aioi Nissay Dowa Ins. Co. v. ProSight Specialty Mgmt., 2013 WL 3111349 at *11 (S.D.N.Y. 2013);
Dillon v. U-A Columbia Cablevision, 100 N.Y.2d 525, 526 (2003);
U.S. Bank, N.A. v. Cordero, 191 A.D.3d 490, 491 (1st Dep't 2021)

Are there Exceptions to the Voluntary Payment Doctrine?

- Is the bad faith of the payee an exception?
- Bad faith exception recognized by *Metro. Prop. & Cas. Ins. Co. v. GEICO Gen'l. Ins. Co.*, 186 A.D.3d 1513 (2d Dep't 2020). However, Utica relied upon *Merchants Mut. Ins. Grp. v. Travelers Ins. Co.*, 24 A.D.3d 1179 (4th Dep't 2005), to argue there is no bad faith exception.
- Appellate Division, Fourth Department, did not recognize a bad faith exception here.

Facts Giving Rise to the Dispute in Utica Ins. Co. v. Munich Reinsurance

- Munich Re facultatively reinsured umbrella policies that Utica had issued, and which contained certain language regarding payments of expenses:

> With respect to any occurrence not covered by the policies listed in the schedule of underlying insurance … but covered by the terms and conditions of this policy … the company shall:
>
> (a) defend any suit against the insured …

- Utica paid expenses in addition to the umbrella policy limits and then billed Munich Re for its share.

Facts Giving Rise to the Dispute in Utica Ins. Co. v. Munich Reinsurance

- Munich Re paid the billings, including the portion for expenses in addition to the umbrella policy limits.
- Munich Re did not have copies of the terms & conditions of Utica's umbrella policies at the time it made its initial payments pursuant to the facultative certificates.
- Munich Re later obtained copies of the terms & conditions during an audit.

Facts Giving Rise to the Dispute in Utica Ins. Co. v. Munich Reinsurance

- Munich Re requested reimbursement for the erroneous expense payments, and Utica refused.
- In the context of dispositive motions, the trial court and appellate court both determined that the umbrella policies unambiguously did not cover expenses in the circumstances presented.
- Utica and Munich Re both also moved for summary judgment on whether Munich Re was entitled to recover the erroneous expense payments.

Court Decisions on Summary Judgment

- The trial court held Munich Re was collaterally estopped from disputing its payments were voluntary, based on prior litigation between the same parties in Federal Court concerning a different original insured. *Utica Mut. Ins. Co. v. Am. Re-Ins.*, EFCA 2013-002587, NYSCEF Doc. 749, June 28, 2022 (Justice Gilbert, NY Sup. Ct. Oneida Cty).
- The appellate court rejected the trial court's finding of collateral estoppel, but held that Munich Re's payments were voluntary, on the ground that Munich Re failed to act with due diligence prior to making the erroneous payments. The appellate court also rejected the existence of a bad faith exception as applicable here. *Utica v. Am. Re-Ins.*, CA 22-01242, NYSCEF Doc. 29, July 28, 2023 (App. Div. 4th Dep't).
- Munich Re sought, but was denied, reargument before the appellate court.

The Voluntary Payment Doctrine Has No Place in the Reinsurance Relationship – Contradicts Custom

- Duty of utmost good faith

  "uberrimae fidei and its translation, 'of the utmost good faith,' has long been used to characterize the core duty accompanying reinsurance contracts."

  In re Liquidation of Union Indem. Ins. Co., 89 N.Y.2d 94, 106 (1996)

- No duty to inquire

  "The doctrine of utmost good faith imposes no duty of inquiry upon a reinsurer."

  United Fire & Cas. Co. v. Arkwright Mut. Ins. Co.,
  53 F. Supp. 2d 632, 641 (S.D.N.Y. 1999)

- Right of offset

The Voluntary Payment Doctrine Has No Place in the Reinsurance Relationship – Practical Problems

- Facultative Reinsurance
  - Is a reinsurer now obliged to make all payments subject to a reservation of rights?
  - Will reinsurers have to make inquiry or audit prior to honoring reinsurance billings?
  - Could application of the doctrine disrupt continuity of payments?
- Treaty Reinsurance
  - All of the above even more difficult:
    - Policies not yet written
    - Losses under proportional treaties reported by bordereau; no individual loss notifications

If this issue had been decided by a panel of arbitrators, rather than judges, would the outcome have been different?

California Anti-Lapse Litigation

McHugh v. Protective Life Ins. Co., 12 Cal. 5th 213 (2021)

May 2, 2024
Shermineh C. “Shi” Jones
Troutman Pepper Hamilton Sanders LLP

Key Issue

Whether California's anti-lapse protection statutes apply to all life insurance policies in force as of the date they were enacted — regardless of when those policies had originally been issued — or only to policies that went into effect after their enactment.

The Anti-Lapse Protection Statutes

Section 10113.71 of the California Insurance Code

Grace periods not less than 60 days from premium due date; notice of termination of policy

a) Each life insurance policy issued or delivered in this state shall contain a provision for a grace period of not less than 60 days from the premium due date. The 60-day grace period shall not run concurrently with the period of paid coverage. The provision shall provide that the policy shall remain in force during the grace period.

(b)(1) A notice of pending lapse and termination of a life insurance policy shall not be effective unless mailed by the insurer to the named policy owner, a designee named pursuant to Section 10113.72 for an individual life insurance policy, and a known assignee or other person having an interest in the individual life insurance policy, at least 30 days prior to the effective date of termination if termination is for nonpayment of premium.

(2) This subdivision shall not apply to nonrenewal.

(3) Notice shall be given to the policy owner and to the designee by first-class United States mail within 30 days after a premium is due and unpaid. However, notices made to assignees pursuant to this section may be done electronically with the consent of the assignee.

(c) For purposes of this section, a life insurance policy includes, but is not limited to, an individual life insurance policy and a group life insurance policy, except where otherwise provided.

The Anti-Lapse Protection Statutes

Section 10113.72 of the California Insurance Code

(a) An individual life insurance policy shall not be issued or delivered in this state until the applicant has been given the right to designate at least one person, in addition to the applicant, to receive notice of lapse or termination of a policy for nonpayment of premium. The insurer shall provide each applicant with a form to make the designation. That form shall provide the opportunity for the applicant to submit the name, address, and telephone number of at least one person, in addition to the applicant, who is to receive notice of lapse or termination of the policy for nonpayment of premium.

(b) The insurer shall notify the policy owner annually of the right to change the written designation or designate one or more persons. The policy owner may change the designation more often if he or she chooses to do so.

(c) No individual life insurance policy shall lapse or be terminated for nonpayment of premium unless the insurer, at least 30 days prior to the effective date of the lapse or termination, gives notice to the policy owner and to the person or persons designated pursuant to subdivision (a), at the address provided by the policy owner for purposes of receiving notice of lapse or termination. Notice shall be given by first-class United States mail within 30 days after a premium is due and unpaid.

Factual Background

March 2005 William McHugh purchases $1 million 60-year term life insurance policy.

- Policy provides for 31-day grace period before cancellation for non-payment of premium.
- All premiums paid through January 2012.

January 1, 2013 California's new anti-lapse statutes take effect.

January 9, 2013 Premium due for that year – McHugh fails to pay.

February 9, 2013 The policy's 31-day grace period expires without McHugh paying the premium due.

February 18, 2013 Insurer extends time for McHugh to pay until March 12, 2013.

March 12, 2013 The period expires without McHugh paying the premium due. Insurer terminates policy for non-payment of premium without complying with the new statutory requirements.

Trial Court Proceedings

Jury Verdict for the Insurer

- Plaintiffs argued that Sections 10113.71 and 10113.72, which came into effect on January 1, 2013, applied to policies issued before this effective date, and that Protective Life failed to comply with the statutes' requirements before it terminated McHugh's policy.
- Protective Life argued the statutes did not apply to policies issued before January 1, 2013, relying, in part on purported agency interpretations of the statutes.
- The trial court rejected Protective Life's argument, concluding that the statutes applied to McHugh's policy.

Jury finds for Protective Life concluding that:

(1) Protective Life and McHugh entered into an insurance contract;

(2) McHugh failed to do all, or substantially all, of what the contract required him to do, but he was excused from doing so;

(3) all conditions required for Protective Life's performance occurred and were not excused;

(4) Protective Life did something the contract prohibited; but

(5) plaintiffs were not harmed by Protective Life's failure.

McHugh's policy is governed by the regulations in effect when it was issued in 2005, and the subsequently enacted sections 101

McHugh v. Protective Life Ins. **(2019) 40 Cal.App.5th 1166, 253 Cal.Rptr.3d 780**

Intermediate Appellate Decision

Trial Court Ruling Affirmed

- Plaintiffs argue that the trial court erred by declining to decide as a matter of law whether Protective Life had complied with Sections 10113.71 and 10113.72, and instead permitting the jury to decide that issue.

- Protective Life requested the Court of Appeal affirm the judgment on the additional ground that Insurance Code sections 10113.71 and 10113.72 do not apply retroactively to McHugh's policy, and the trial court erred as a matter of law when it ruled otherwise in denying the directed verdict motion.

- The Court of Appeal affirmed the judgment on this additional ground.

"McHugh's policy is governed by the regulations in effect when it was issued in 2005, and the subsequently enacted sections 10113.71 and 10113.72 are not incorporated into the policy."

McHugh, *supra*, 40 Cal.App.5th at p. 1177, 253 Cal.Rptr.3d 780.

California Supreme Court Decision

The Anti-Lapse Statutes Apply to All Policy Inforce on the Date of Enactment (Regardless of when they were issued)

- As with any question of statutory construction, our core task here is to determine and give effect to the Legislature's underlying purpose in enacting the statutes at issue.
- The Court considered the following canon of statutory construction : "[A] statute may be applied retroactively only if it contains express language of retroactivity *or* if other sources provide a clear and unavoidable implication that the Legislature intended retroactive application."
- "Consistent with the presumption's underlying logic, our cases defining 'retroactivity' have principally focused on whether the statutory change in question *significantly* alters settled expectations: by changing the legal consequences of past events, or vitiating substantial rights established by prior law."
- "The key is the nature of the new law's impact — whether it works a substantial change in the contracting parties' rights or obligations."
- Finding: "The grace period and notice obligations added by sections 10113.71 and 10113.72 do not impact a life insurer's liability for past, preenactment defaults. Nothing in these sections compels insurers to reinstate any policy cancelled preenactment less than 60 days after a missed premium payment. Nor do the changes otherwise impinge on a contracting party's substantial rights or unfairly upset the bargain memorialized in the insurance policy, for example, by requiring an insurer to provide substantially expanded coverage without also giving it an opportunity to raise premiums. "

Covid-19: The Foxton Decision

UnipolRe v. Covéa/Markel v. Gen Re

[2024] EWHC 253 (Comm)

May 2, 2024

Daryn Rush, O'Melveny

Key Issues

[W]hether Covid-19 losses . . . arose out of and were directly occasioned by one catastrophe on the proper construction of the Reinsurances.

Covéa and Markel Tribunals: **Yes**

Key Issues

[W]hether the effect of the respective "Hours Clauses"[], which confined the right to indemnity to the "individual losses" within a set period, had the effect that the reinsurances only responded to payments in respect of the closure of the insured's premises during the stipulated period.

Covéa Tribunal: **No**
Markel Tribunal: **Yes**

Key Facts

- “Non-damage BI cover” for nurseries and childcare facilities
- March 2, 2020 – first recorded Covid-19 death in UK
- March 5, 2020 – Covid-19 made a “notifiable disease”
- March 18, 2020 – UK gov’t closure order (eff. March 20, 2020)
- June 1, 2020 – phased re-opening began
- June 23, 2020 – all restrictions lifted eff. July 4, 2020

Loss Occurrence/Event

all individual losses arising out of and directly occasioned by one catastrophe

Covéa's Case

"[O]utbreak of cases of Covid-19 in the UK in the period immediately preceding the closure of schools and nurseries on 20 March 2020 was a catastrophe"

Alternatively (post-*Stonegate*)—gov't orders or decisions constituted one catastrophe

Markel's Case

Initially—"all of the losses arise from the occurrence of cases of Covid-19 within the United Kingdom, or from any one such case"

Amended (post-*Stonegate*)—"all of the losses arise from the UK Governmen's decision on 18 March 2020 that all nurseries [] most close with effect from [] 20 March 2020"

Covéa Award

“[T]he outbreak of Covid-19 in the United Kingdom, reflected in an exponential increase in the number of infections during a period up to and including 18 March 2020, was a ‘catastrophe’ within the meaning of Condition 2(10).”

Markel Award

UK Government's March 18, 2020 Order "may be described as a catastrophe, both in general and for the purposes of this treaty"

"the order cannot be viewed separately from the pandemic which demanded (however controversial) its response"

Construction of Aggregation Clauses

Aggregating language “take[s] its meaning from the surrounding terms of the policy including the object being sought to be achieved”

“Aggregation clauses are to be construed ‘in a balanced fashion without a predisposition towards a narrow or a broad interpretation.’”

Wordings Are “Always Speaking”

“[M]arket reinsurance wordings which are used for lengthy periods against a background of developments in the relevant book of business of the reinsured are, in a sense, ‘always speaking’ in the manner of statutes.”

Catastrophe ≠ Sudden or Violent

"I reject the [reinsurers'] argument that a catastrophe must necessarily be 'sudden' in onset, or short in duration, or that it must be 'violent.'"

“Catastrophe” - Dictionary Definitions

Definitions include concepts other than “sudden event”:

- “significant break with the position up to that point”
- “something which is seriously adverse in its nature or effects”
- “sudden or widespread or noteworthy”

Unities Test

"In ordinary speech an event is something which happens at a particular time, at a particular place, in a particular way. . . . A cause is to my mind something altogether less constricted. It can be a continuing state of affairs; it can be the absence of something happening. Equally, the word 'originating' was in my view consciously chosen to open up the widest possible search for a unifying factor in the history of the losses which it is sought to aggregate."

Axa v. Field [1996] 1 WLR 1026

- cause
- locality
- time
- intention

Unities Test

"As Sir Jeremy Cooke observed in Simmonds v Gammell [2016] EWHC 2515 (Comm), the 'unities' are merely an aid to determining whether a series of losses involve such a degree of unity as to satisfy the contractual aggregation requirement."

“Commercial and Contractual Context”

i. “must be something capable of directly causing individual losses”

ii. “must be something which, in the context of the terms of the Reinsurances . . . can fairly be regarded as a coherent, particular and readily identifiable happening, with an existence, identity and ‘catastrophic character’ which arise from more than the mere fact that it causes losses”

iii. “it ought to be possible, in a broad sense, to identify when the catastrophe comes into existence and ceases to be, even if” subject to debate

iv. “will involve an adverse change on a significant scale from that which preceded it”

Justice Foxton's Ruling (Covéa)

i. Covid-19 outbreak directly occasioned the losses

ii. outbreak "can fairly be regarded as a coherent and discrete happening, with an existence, identity and 'catastrophic character'"

iii. outbreak came into existence in relatively short period

iv. wholesale disruption of life qualifies an adverse change on significant scale

Justice Foxton's Ruling (Markel)

i. March 18, 2020 closure order directly occasioned the losses

ii. closure order and emergency of devastating pandemic can fairly be regarded as a coherent and discrete happening

iii. closure order occurred at specific time

iv. closure order and emergency resulted in "subversion of the ordinary and natural course of things" and the "grave infringement of personal liberty"


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Hot Spots and Hot Policies: Political Risk Insurance in Today's Volatile World

2024 Spring Conference

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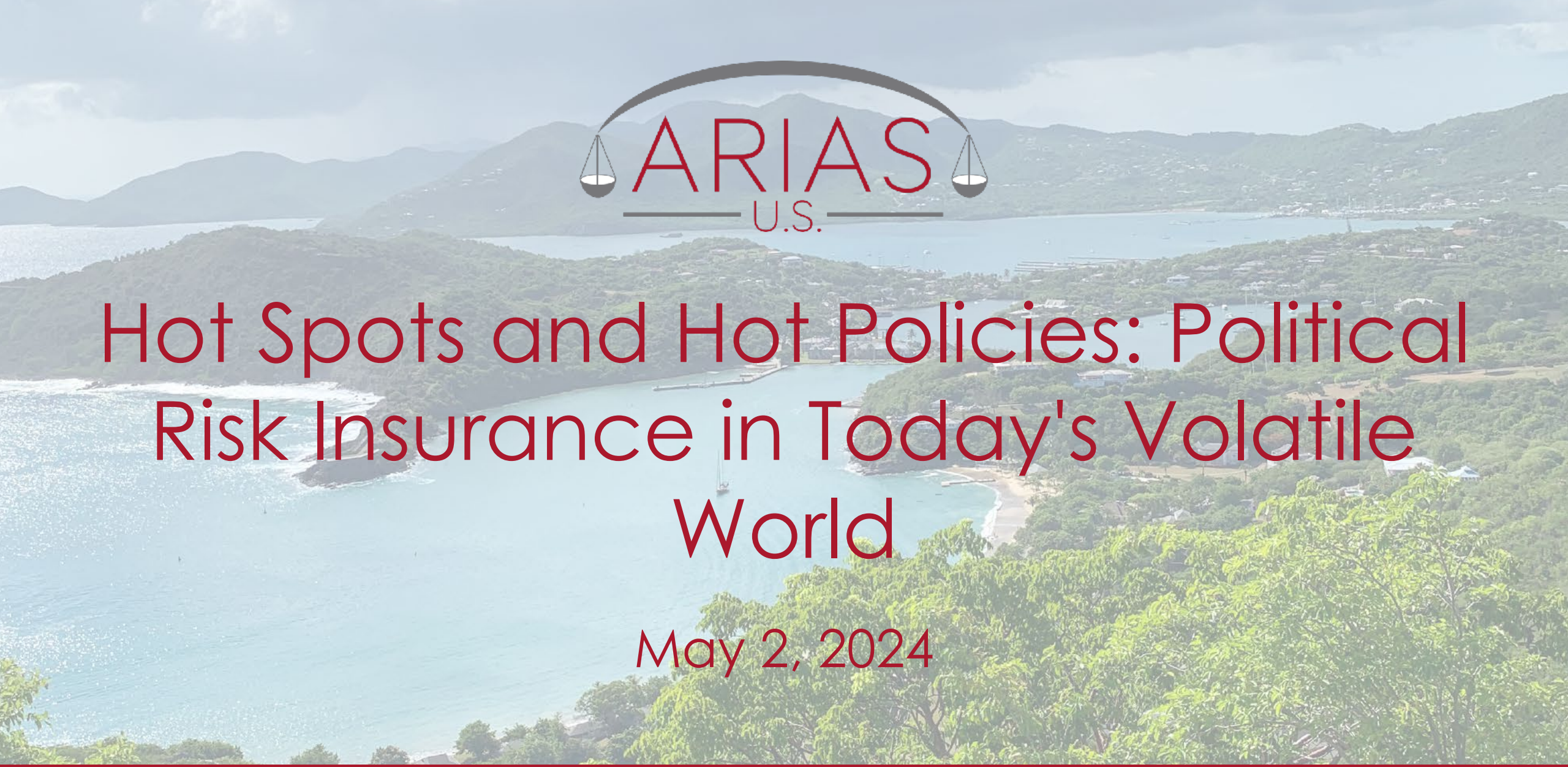
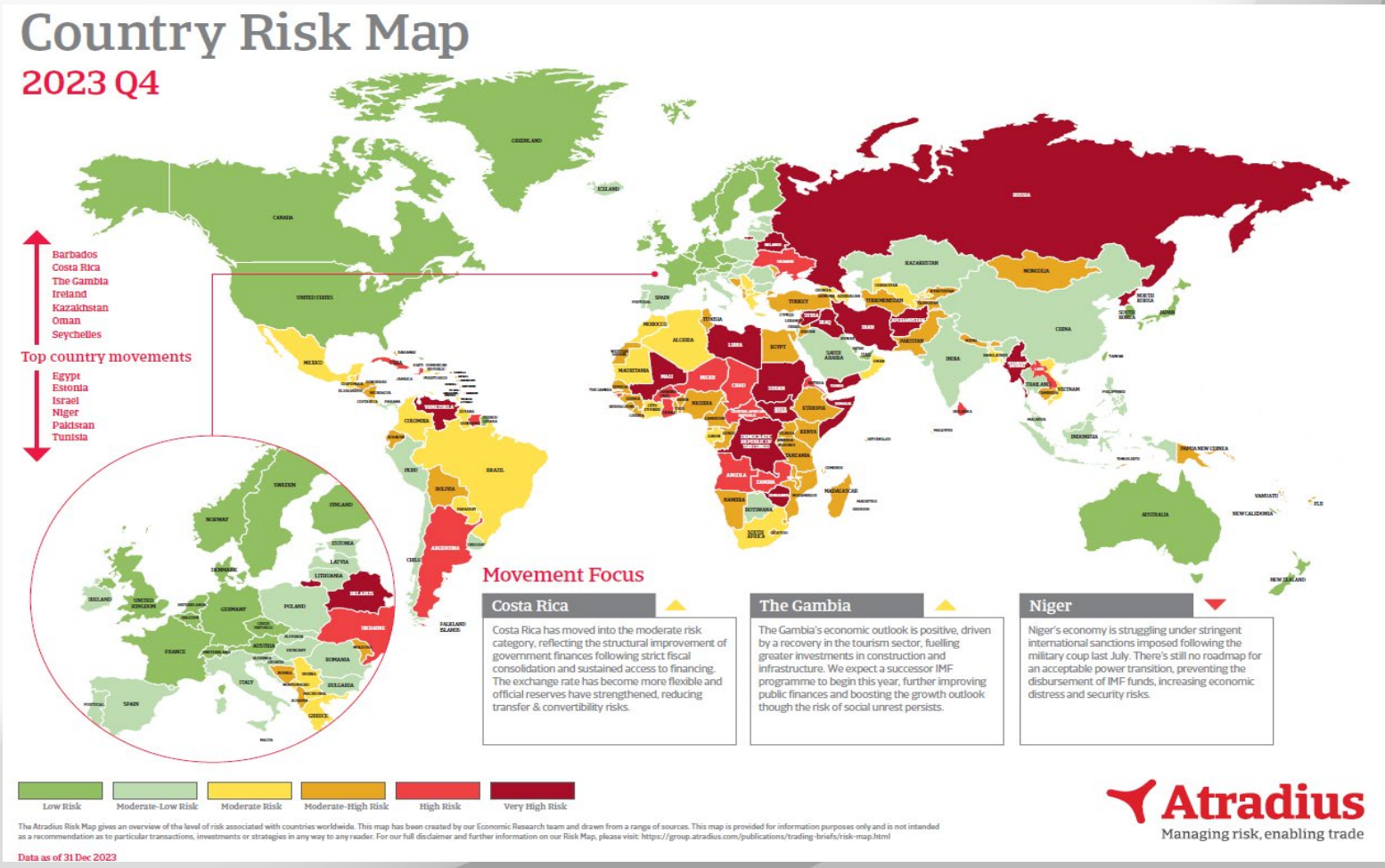


Hot Spots and Hot Policies: Political Risk Insurance in Today's Volatile World

May 2, 2024

Investor Protections in an Uncertain World: Political Risk Hot Spots



The Basics

What Is Political Risk Insurance (PRI)?

- Insureds can be **lenders or equity** investors
- Covers actions taken by host Government or possibly others (if PV)
- Basic perils covered: **Expropriation/CEND** (including Creeping Expro), **Political Violence** (PV), **Currency Inconvertibility/Non Transfer** (CI/NT)
- **Arbitration Award Default** can be added on where a parastatal has entered into a commercial contract
- For Expropriation/CEND and CI/NT, **waiting period** usually 180 days. Zero WP for PV.
- PV may require a deductible. Programmes usually QS except large multicountry programmes are primary/excess
- **Subrogation** is key

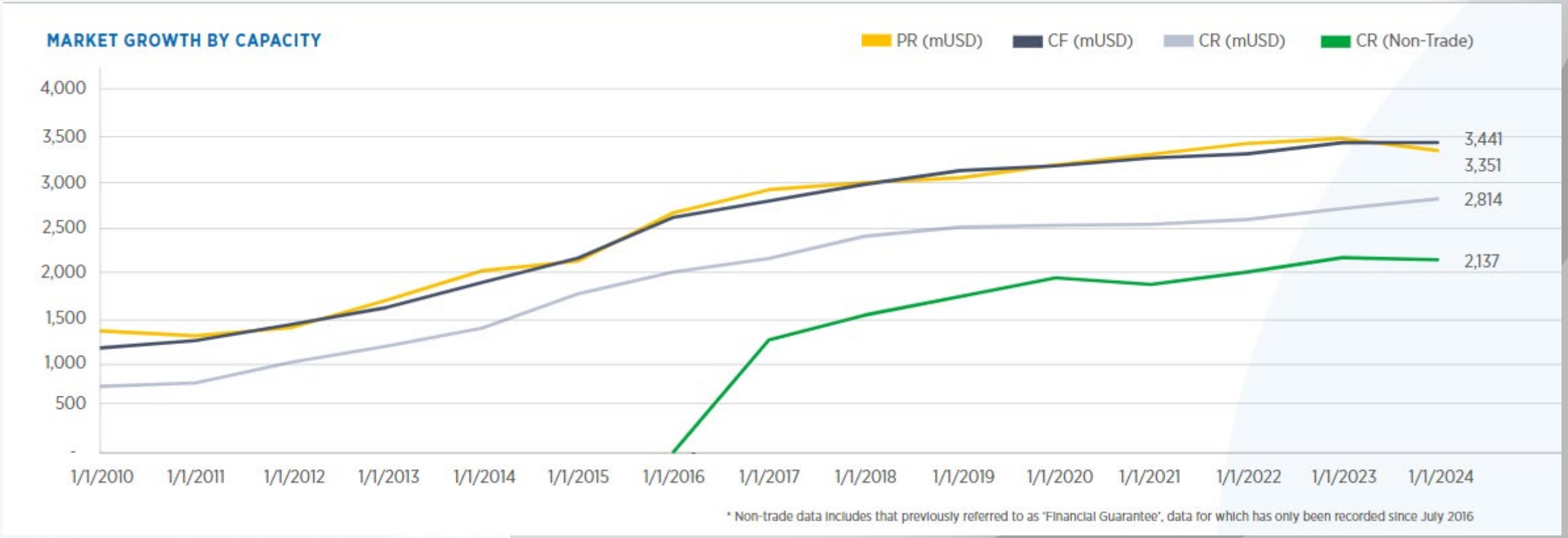
What Are International Investment Agreements(IIAs)?

- Agreements between states set minimum standards of protections for investors, may be bilateral (BITs) or multilateral (MITs) or in free trade agreements (FTAs)
- Covers investors based on *nationality*, but only for covered "investments"
- Only covers actions by *host states and instrumentalities*
- **Basic protections:** National Treatment, Most-Favored Nation Treatment, Fair and Equitable Treatment, Full Protection and Security, Expropriation
- **Enforcement:** Investor can initiate arbitration proceedings against the state

PRI Perils

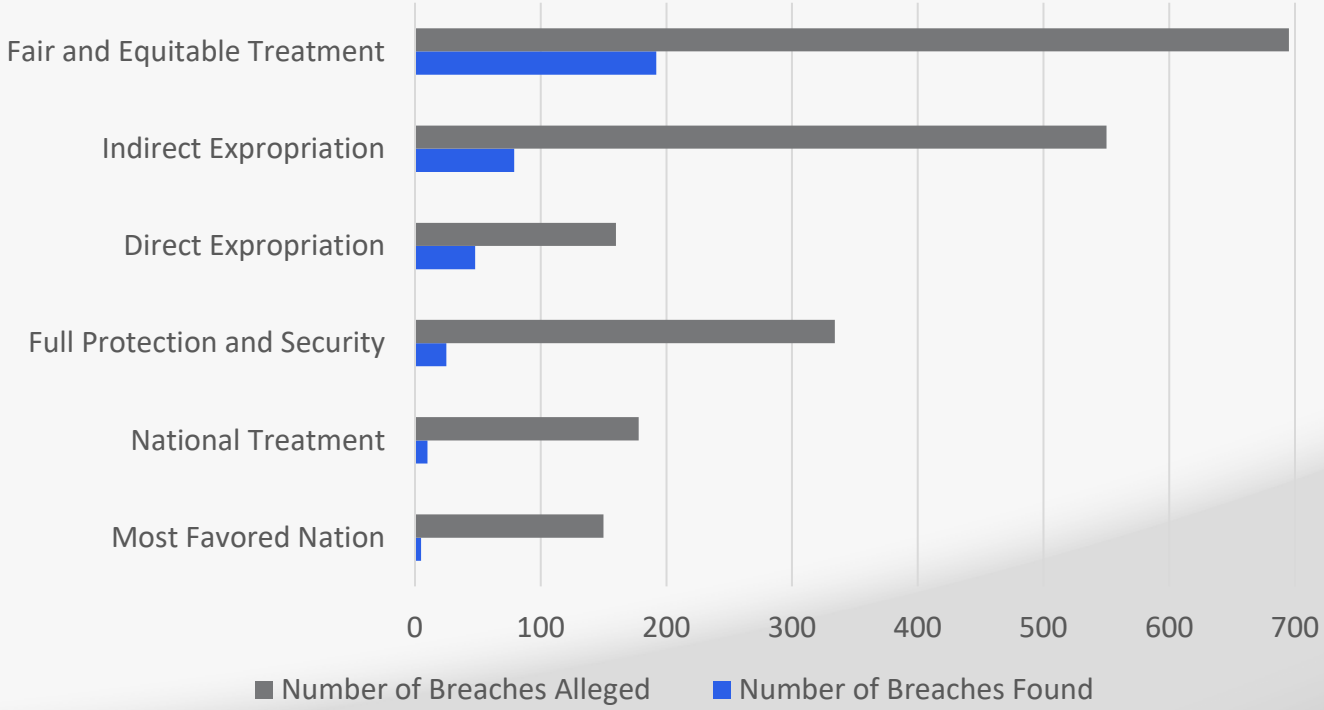
Expropriation	License Cancellation	Sabotage
Confiscation	Import & Export Embargo	Terrorism
Nationalisation	Currency inconvertibility	(Usurped Power)
Deprivation	Non transfer	Forced Abandonment
Requisition	Political Violence	Arbitration Award Default
Sequestration	War & civil war	Denial of Justice
Law, order, decree, administrative action	Insurrection, revolution, rebellion	Non certification
Selective Discrimination	Coup d'etat	Unfair Calling of Bonds
Forced Divestiture	Strikes, Riots, Civil Commotion	Fair Calling of Bonds

Size and Growth of PRI Market

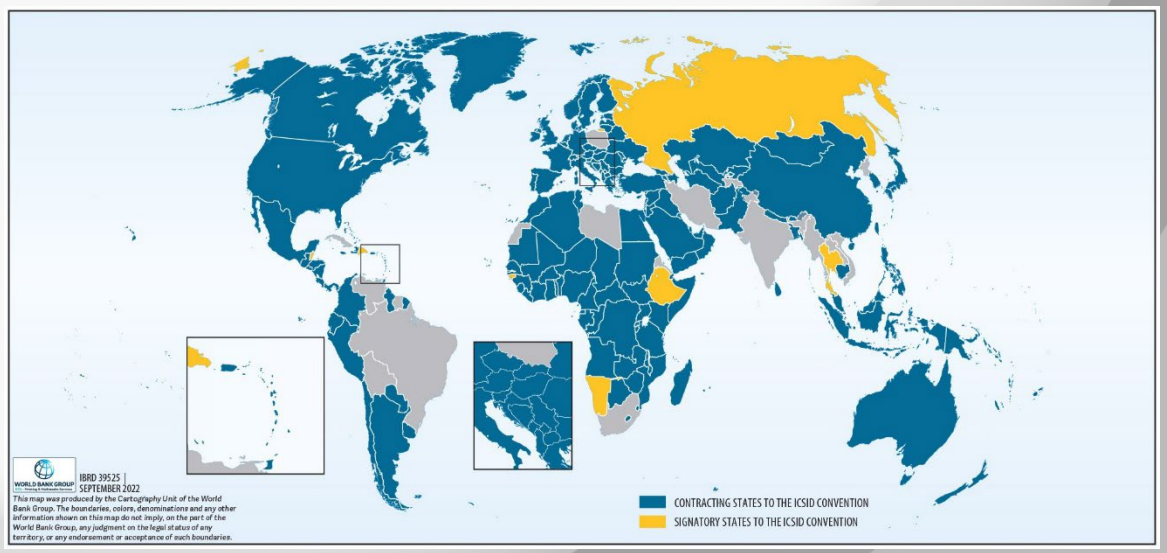


Investment Treaty Protections

Investment Treaty Breaches Through December 31, 2023 – Alleged and Found (Source: UNCTAD)



States Party to the ICSID Convention



Expropriation / CEND

Political Risk Insurance

- Slight differences between **Confiscation** (physical taking), **Expropriation** (property rights), **Nationalization** (by exec or legislative order)
- Permanent deprivation
- **Deprivation**: denied the possession of whole or part of (mobile) assets
- **Selective Discrimination, Forced Divestiture**
- **License Cancellation**
- **Import/Export Embargo**
- **Non-certification** (of invoices or documentation)
- **Creeping Expropriation** – term used for cumulative effect of many smaller government actions

International Investment Agreements

- A host state cannot **expropriate** an investor's property unless the expropriation is:
  - (1) for a public purpose;
  - (2) non-discriminatory;
  - (3) accompanied by "prompt, adequate, and effective compensation"; and
  - (4) carried out in accordance with due process of law.
- Expropriation may be "direct" or "indirect"

Expropriation/CEND

Case Studies

***Agroinsumos Ibero-Americanos v. Venezuela* (2016)**

- Spanish agricultural firm owned 59 stores across Venezuela and employed 2,000 workers.
- The government under Hugo Chavez carried out a series of judicial and administrative measures that effectively transferred control of the business to the state.
- Agroinsumos alleged the government actions amounted to direct expropriation

***Clorox v. Venezuela* (2015-2023)**

- Clorox Venezuela, a subsidiary of Clorox Spain, had been operating in Venezuela since the 1990s.
- The Maduro government implemented various measures that affected Clorox's ability to do business, including setting mandatory price controls below Clorox's the cost of production and limiting its ability to access to foreign currency.
- These measures ultimately caused Clorox Venezuela to shut down operations. After Clorox shut down, the government moved into its factories and began manufacturing "Clorox" products, which it sold domestically.

Discrimination

Political Risk Insurance

- "The imposition of any law, order, decree, regulation or import/export restriction selectively and discriminately imposed specifically against the Foreign Enterprise within the Policy Period by the Government of the Host Country which, in circumstances beyond the control of the Insured expressly and selectively prevents the operation of the Foreign Enterprise so as to cause the permanent and total cessation of the Foreign Enterprise's Activities."

International Investment Agreements

- These types of measures may violate:
  - **Expropriation**
  - **Fair and Equitable Treatment**: State action that is arbitrary, abusive, or amounts to a denial of justice
  - **National Treatment**: Host state must treat foreign investors no less favorably than domestic investors
  - **Most Favored Nation Treatment**: Host state must treat foreign investor subject to treaty no less favorably than investors from any third state

Discrimination

Case Studies

***Total v. Argentina* (2011)**

- Total owns gas distribution and electricity generation investments in Argentina.
- Argentina freezes gas tariffs and then introduces price and volume controls; rewrites the regulatory regime for electricity generation and dispatch
- Total forced to sell its assets and leave the country
- ICSID tribunal finds measures inconsistent with Total's legitimate expectations and breach of duty of fair and equitable treatment; no state of necessity

***Lemire v. Ukraine* (2013)**

- U.S. investor in Ukraine radio frequencies sough tot expand business, but denied the opportunity to purchase additional radio frequencies, where local companies received preferential treatment.
- ICSID tribunal found breach of fair an equitable treatment, including test for discrimination
- Also found denial of justice in failure to protect rights in local courts.

Currency Inconvertibility/Non-Transfer

Political Risk Insurance

- Inability to convert local currency into hard currency (convertibility)
- Inability to transfer hard currency out of host country
- Insurer is subrogated to the local or foreign currency in host country
- Value of recoveries improve over time as economy improved
- Devaluation NOT covered.
- Shareholder loans / dividends / foreign bank loan repayments

International Investment Agreements

- These types of measures may violate:
  - **Expropriation**
  - **Fair and Equitable Treatment**: State action that is arbitrary, abusive, or amounts to a denial of justice.

Political Violence

Political Risk Insurance

- Covers **physical/property damage** caused by political violence
- **Forced abandonment (FA)**: insured is formally required to abandon foreign assets/evacuate staff due to unsafe environment. **Not necessarily property damage**
- Usually has a deductible (except when a lender is insured)
- **Business interruption** following PV as an add on

International Investment Agreements

- May violate host state's obligation to provide investment with "**full protection and security**."
  - Host state may not directly harm investors/investments through force or military action
  - Host state must take active measures to protect investors and investments against harm inflicted by non-state actors

Political Violence

Case Studies

***Coca Cola v. Certain Underwriters at Lloyd's*, 2017 WL 1282159 (N.D. Ga. 2017)**

- Coca Cola owned a bottling plant in Nepal. It relied on trade across the India/Nepal border to import materials and export product.
- In 2015, the Nepalese Government implemented a new constitution that discriminated against a minority group, the Madhesi.
- The Madhesi began widespread protests, including blockading the India/Nepal border.
- As a result, Coca Cola had to shut down its bottling operations for 6 months.

***Ampal-American Israel Corp. v. Egypt* (2012)**

- U.S. incorporated companies were shareholders in Egyptian company that owned a natural gas pipeline.
- Pipeline was attacked 14 times by terrorists during the Arab Spring uprising.
- Egyptian government failed to protect pipeline from attacks even though previous attacks showed pipeline was susceptible

Exclusions

Political Risk Insurance

- **Host Government as a counter party**
- Possibly **5 Great Powers** (though less common now)
- **Bone fide** government actions (environmental protection very topical. Covid lockdowns also good example)
- Corruption / **illegal acts** by Insured
- **Cyber actions** (for PV only, which is a Lloyds requirement)

Also note that policies are **CONFIDENTIAL** and existence cannot be disclosed

International Investment Agreements

- **"Right to Regulate"/Public Policy Exceptions**: Measures by host government necessary to protect human/environmental health, conservation of natural resources
- **Security Exceptions**: Measures by host government necessary for maintenance of public order

Quantum/Damages

Political Risk Insurance

Loss calculations are prescriptive.

- For CEN, Selective Discrimination and Forced Abandonment, usual calculation of loss is **Net Investment Value**
- For Deprivation: **Book Value**
- Forced Divestiture: **Net Investment Value less salvage from selling shares**
- PV: **repair for damage or Book Value**
- Licence Cancellation: **Net Investment Value**

Net Investment Value example: equity + pro rata RE + shareholder loans + bank loans + A/P less A/R from insured [+equipment carried on foreign enterprise's books].

International Investment Agreements

- Treaties usually silent on methods of valuation
- Common approaches:
  - **Fair Market Value**: What a willing buyer would pay to a willing seller prior to state's wrongful act
  - **Discounted Cash Flow Analysis/"But for" counterfactual**: value of investment "but for" state's wrongful act
- Modern approach is to award compound interest

Hot Topic 1: Russia/Ukraine

- **PV Ukraine** claims under multi-country policies although many markets weren't writing Ukraine since 2014
- **CI/NT Russia** claims (non convertibility of dividends, shareholder loans or share sales)
- Is leaving Russia as a "good corporate citizen" **Forced Divestiture?**
- Other **Expropriations?**
- **Political events** have also triggered losses under Credit Insurance Policies
  - Commercial loans have defaulted due to non receipt of USD/EUR from a sanctioned entity
  - Sales of loans into the secondary market have crystallized losses for the haircut amount
- **What about IIA claims?**

Hot Topic 2: Sovereign Debt Defaults

- Not covered by PRI but covered by **Contract Frustration (CF) cover**
- Recent sovereign debt defaults highlight volatility of emerging markets for lenders and contractors (Sri Lanka, Zambia, Suriname, Ghana, Congo, Ethiopia)
- Sovereigns may trigger a non payment event covered by a CF policy either via a wholesale debt restructuring or selective default under specific contracts
- Purpose of obligation (lending vs wheat importation) and prioritization are key

- **What about IIA claims?**

Two Sides of the Same Coin: Effective Risk Management Through PRI & IIA Rights

- PRI provides comparatively rapid relief, provides investor "breathing room" to pursue investment claims as required under any insurance compensation
- Recovery under both PRI and IIAs possible but need to be careful
- Differing standards of protection may allow investor protection where coverage is barred under the other
- Differing standards of compensation: Full value + interest vs. policy limits

Questions?

Handling Complex Claims: A Latin American Perspective

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Handling Complex Claims: A Latin American Perspective

Emmanuel Muñoz. P&C Director Chubb Puerto Rico

Francisco Colon. Partner Colon Ramirez Lawfirm based in Puerto Rico

Lorena Avila. Foreign Legal Consultant (Not Admitted to Practice Law in Florida. Partner (Qualified in Venezuela) for Kennedys

3 MAY 2024

- General Overview on the Legal System. Particularities.
- Choice of Law and Jurisdiction Clauses.

  Alternatives Methods of Dispute Resolution. Arbitration, Mediation.
- Validity of the Arbitration Clause.

- Claims Control vs Claims Cooperation
- The establishment of Condition Precedents and Warranties
- Exclusions and their Interpretation
- Timelines of Response
- Adjustment of Claims. The role of the adjuster in Latin America and differences with the public adjusters.
- The adjustment report. Nature and ways to challenge it.
- Reservation of Rights Letters

- Insured Amount and Defense Costs
- Direct Action against the Insurance Company
- Times for Response

- Levels of Litigiousness in the Region
- Amounts of Indemnities
- Interests and Indexation


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Table 12 – Legislation governing claims adjusters

	Regulated activity? †	Relevant legislation
Argentina	✓	• Regulator Resolution No. 26385 – on claims settlement and general average activities.
Bolivia	✓	• Regulations on auxiliary insurance professionals
Brazil	✗	✗
Chile	✓	• Insurance Law (No. 251) • Supreme Decree of the Ministry of Finance No. 1055
Colombia	✗	✗
Costa Rica	✗	• Law governing the insurance market (auxiliary insurance services)
Dominican Republic	✓	• Law No. 146-02, on insurance and guarantees
Ecuador	✓	• Codification of the resolutions issued by the banking superintendent, book ii, title xi, chapter ii – rules for the performance of insurance advisor producer, reinsurance intermediary and insurance adjuster activities • General Insurance Law
El Salvador	✗	✗

† To operate as an adjuster, registration with or authorization from the regulator is required.

continued...

...continued

	Regulated activity? [†]	Relevant legislation
Guatemala	✓	• Law on the Insurance Business, Decree 25-2010 • Resolution JM-13-2011 – regulations for the registration of insurance and reinsurance intermediaries and independent insurance adjusters.
Honduras	✓	• Regulations on loss adjusters and auxiliary insurance professionals
Mexico	✗	• Law on insurance and guarantee institutions • Single Circular Letter on insurance and guarantees
Panama	✓	• Law No. 12 – April 3, 2012 • Resolution no. 04, December 13, 2012
Paraguay	✓	• Law No. 827 – insurance • Resolution No. 14/96 regulating registries of insurance auxiliary professionals and insurance brokers.
Peru	✓	• Law 26702 – General Law of the Financial and Insurance Systems and the Organic Law of the Superintendency of Banking and Insurance (section three – title iv, chapter iii) • Resolution SBS 1797-2011 – regulations on auxiliary insurance professionals and intermediaries.
Puerto Rico	✓	• Chapter 9a of the Puerto Rico Insurance Code

[†] To operate as an adjuster, registration with or authorization from the regulator is required.

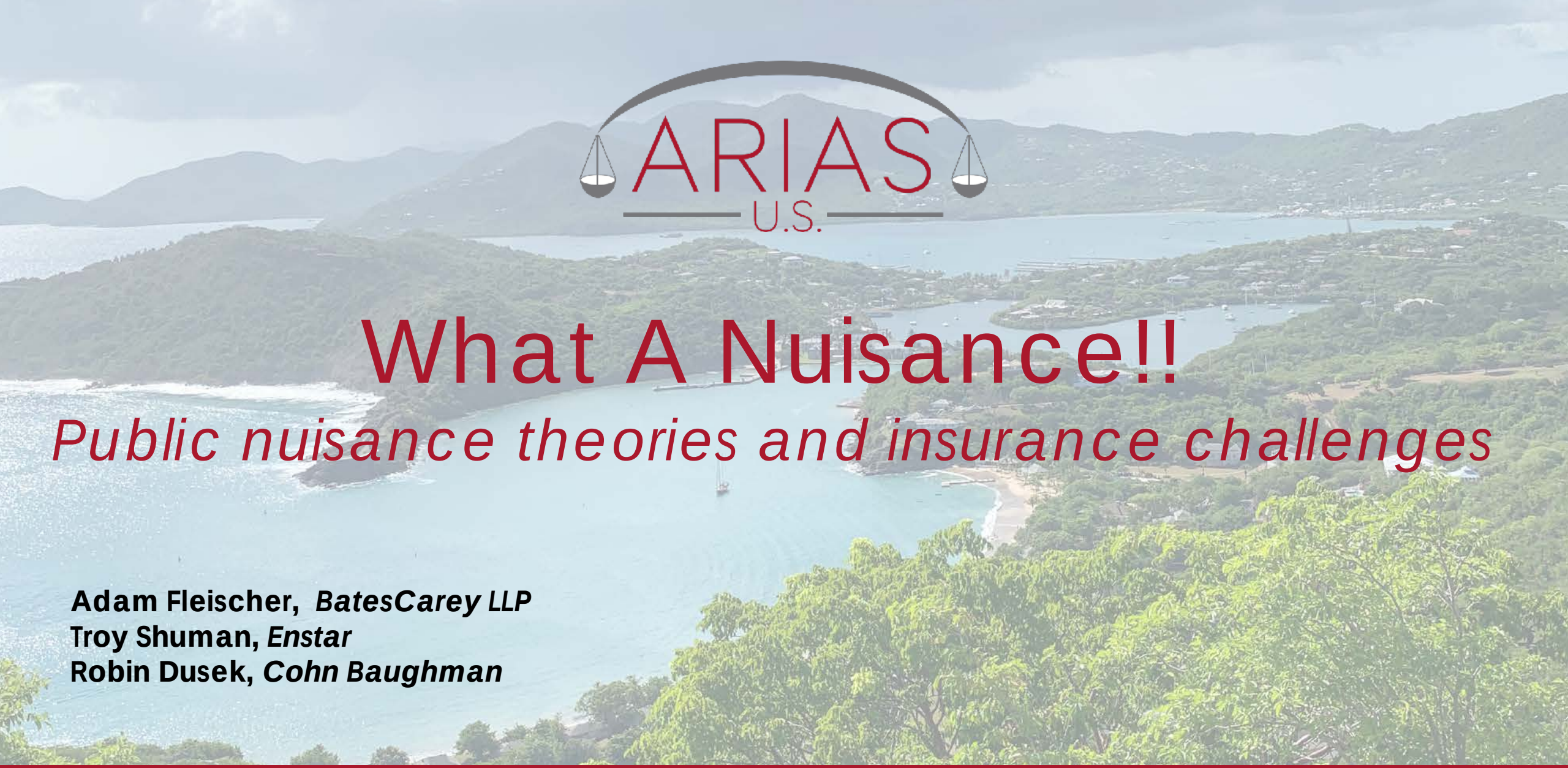
	Regulated activity? †	Relevant legislation
Uruguay	✗	✗
Venezuela	✓	• Administrative Decision (providencia) 1521 – regulations on the procedure for obtaining authorization to operate as an adjuster, loss assessor or risk inspector in insurance activities.
Spain	✓	• Law 20/2015 (July 14) on the organization, supervision and solvency of insurers and reinsurers and Royal Decree 1060/2015 (November 20) on the organization, supervision and solvency of insurers and reinsurers.
Portugal	✗	✗

† To operate as an adjuster, registration with or authorization from the regulator is required.

Table 13 – Designation of adjusters by insurers/reinsurers

	Allowed by law?
Argentina	Yes
Bolivia	Yes
Brazil	Yes
Chile	No
Colombia	Yes
Costa Rica	Yes
Dominican Republic	Yes
Ecuador	Yes
El Salvador	Yes
Guatemala	Yes
Honduras	No
Mexico	Yes
Panama	Yes
Paraguay	Yes
Peru	No
Puerto Rico	Yes
Uruguay	Yes
Venezuela	Yes
Spain	Yes
Portugal	Yes

What a Nuisance! The Evolution of Public Nuisance Theories and Insurance Challenges



What A Nuisance!!

Public nuisance theories and insurance challenges

Adam Fleischer, ***BatesCarey LLP***
Troy Shuman, ***Enstar***
Robin Dusek, ***Cohn Baughman***

Q: So, exactly why are public nuisance theories a thing? A: *BET THE COMPANY CLAIMS*

Amerisource, Cardinal Health, McKesson, agreed to pay **$19.5 billion** for global resolution of opioid public nuisance claims pending against them. *Feb. 2022*

CVS to pay **$4.9 billion** to resolve opioid public nuisance claims against it.

Walgreens to pay **$4.79 billion** to resolve public nuisance opioid claims.

Kroger to pay **$1.2 billion** ***for opioid public nuisance claims.***

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What is a public nuisance claim?

12th Century: A *criminal action* brought by the Crown for infringing on public property, public roads, public waterways.

What is a public nuisance claim?

16th Century: Tort was expanded to allow some “special damages” for private individuals whose rights were intertwined with a public right.

What is a public nuisance claim?

Modern Day:

- "Unreasonable interference with a public right"
- Public nuisance causes of action are incorporated into law via statutes, enforceable mostly by governments, or those with a "special injury."
- Noise emanating from a bar causing neighbors to lose sleep is a public nuisance. Or sewage facility that creates noxious odors in surrounding neighborhood.
- ***WHY HAS PUBLIC NUISANCE ATTRACTED P's ATTYS?***

Can public nuisance theory replace products?

- **TOBACCO:** Public nuisance theories were used by governments. settlements, *but the legal theories were never tested.*

- **OPIOIDS:** Evolution of public nuisance torts continued . . .
  - 3,000 suits in national Multi-District Litigation
  - Claims brough by states, cities, counties
  - Defendants have been all players in opioid commercial chain
  - Public nuisance theories have evolved to allow massive claims to proceed <u>without requirements of product ID or medical causation</u>
  - And billions of dollars in settlements have begun to flow. . . .
  - ***But so have legal rulings that test public nuisance as a mass tort theory.***

CREDIBILITY?
Can public nuisance theory replace products?

City of New Haven, Connecticut Superior: Dismissed opioid public nuisance claims of 37 municipalities against 25 drug companies.

These claims do not involve the righteous manifestation of a government vindicating the public good. These are claims for plaintiffs to gain money solely for themselves. If we are to safeguard a rational legal system, courts cannot endorse a wildly complex and ultimately bogus system that pretends to measure the indirect cause of harm to each municipality and fakes that it can mete out proportional money awards for it.

VIABILITY? CREDIBILITY?
Can public nuisance theory replace products?

Meanwhile, in West Virginia, Alaska, Georgia:

- City of Huntington, S.D. W. Va: Opioid defendants NOT LIABLE because public nuisance theories only apply to conduct that interferes with a public property right. Otherwise, floodgates would be open.
- W. Virginia state mass litigation panel: Public nuisance claims are NOT LIMITED to property disputes, and the opioid distributors had indeed interfered with a public right involving the public's health.
- *W. Va. Supreme:* In March, the Fourth Circuit Court of Appeals certified the *City of Huntington* issues to the West Virginia Supreme Court to determine the permissible scope of public nuisance.

- *State of Alaska v. Walgreen co. et al.*, March 4, 2024, Dismissed public nuisance as a viable theory for mass torts. And here is how that court explained it . . .

Can public nuisance theory replace products?

"Public nuisance doctrine historically has been both a vast and a vague area of law. Described 130 years ago as the 'wilderness of law' and a 'legal garbage can' full of vagueness, uncertainty and confusion,' it led Justice Blackmun to proclaim that 'one searches in vain . . . for anything resembling a principle in the common law of nuisance."

State of Alaska v. Walgreen co. et al., Order Granting Motion to Dismiss, March 4, 2024.

- *Publix* has now asked the opioid MDL to certify public nuisance to the Georgia Supreme Court.

But plaintiff's attorneys have continued to pursue public nuisance theories as Robin will explain ...

The future of public nuisance? Climate change

- ***MORE THAN 2 DOZEN CASES PENDING!***
- *City of Chicago v. BP America, et al.*
  - Alleging that the defendant fossil fuel companies—Exxon Mobil, Shell, BP, ConocoPhillips, and Chevron—and the oil and gas industry's largest trade association, the American Petroleum Institute, engaged in disinformation campaign to conceal the link between fossil fuel production and climate change.
- *State of Delaware v. Chevron, et al. (Ruling 1/9/24)*
  - Limits the scope of lawsuit to claims for injury to land directly owned by the State (not in public trust) from air pollution originating in Delaware;
  - Dismisses all claims alleging misrepresentations (with leave to amend);
  - Dismisses the State's Delaware Consumer Fraud Act claim as time barred.
- *Aloha Petro v. Nat. Union Fire* (D. Hawaii) (Hawaii Sup. Ct)
  - Whether "recklessness" can be an accident or "occurrence"?
  - Whether greenhouse gases are "pollutants"?
  - Hawaii Supreme Court has accepted certification

The future of public nuisance? Social media claims

- 200 school districts have brought public nuisance claims in Oakland against Facebook IG, Snapchat, Youtube, Tik Tok, Discord, alleging addictive apps damage teen health.
- 3 TYPES OF SUITS:
  - Individual bodily injury: Teen mental health claims; individual children harmed (not public nuisance, but part of same MDL)
  - School districts: Nuisance suits. School districts allege students have misbehaved and caused trouble bc of social media platforms (costs incurred like detention)
  - Attorney general complaints: Similar to school districts. Impacting general public. Caused all these problems and need to be abated.

The future of public nuisance? What's coming next?

- Cigarette butt claims?
- Obesity or sugar claims?
- Vaping? (JUUL $1.7 billion settlement v. schools and others)
- Cannabis?
- Deepfakes/AI
- Counties now passing their own public nuisance laws to tag insurance money!
- **BUT ARE PUBLIC NUISANCE RISKS REALLY INSURABLE?**

Are public nuisance claims really insurable?

- Unlike traditional claims, public or social harms have no “unharmed insureds” to carry the damages of those harmed. i.e. COVID.
- A policyholder’s liability to the “public at large” is impossible to predict or calculate, particularly with no historic claim data.
- Claims handling? How are insurers to investigate causation? Compensate those injured? Mediate or settle the injuries?

Where do the policies address any public nuisance issues?

Where are the coverage issues?

Public nuisance claims are not claims seeking damages "because of bodily injury"

First, the Good News: Courts finding NO COVERAGE for public nuisance

- ***Cincinnati Ins. Co. v. Richie Enterprises LLC*, No. 1:12-CV-00186-JHM, 2014 WL 3513211 (W.D. Ky. 2014) (applying Kentucky law):** A Kentucky federal court held the insurer had no duty to defend an opioid distributor because the State of West Virginia's claim did not depend on proof of injury to any individual. The underlying allegations of addiction and death "only explains and supports the claims of the actual harm complained of: the economic loss to the State of West Virginia."
- ***Travelers v. Anda, Inc.*, 90 F. Supp. 3d 1308 (S.D. Fla. 2015) (applying Florida and New Jersey law):** The district court held that insurers had no duty to defend an opioid distributor because the State of West Virginia's payments for medical care were for its own economic losses, rather than "for bodily injury" to its citizens.
- ***ACE Am. Ins. Co. v. Rite Aid Corp.*, 270 A.3d 239 (Del. Jan. 10, 2022) (applying Pennsylvania and Delaware law):** Delaware's high court held that "bodily injury" coverage is limited to three categories of claims:
    1. Claims for compensation brought by the injured person.
    2. Claims to compensate an individual's injury, brought ON BEHALF OF the injured person. Causation still must be proven.
    3. Claims to reimburse those that treated the injured person, when the existence and cause of the injury is at issue. i.e., a lien.
- ***Rite Aid*** was persuasive:
    - ***Acutiy*** (Ohio Supreme); ***Quest*** (6th Circuit); **CVS** (Delaware, and ongoing dispute)

Where are the coverage issues?

Public nuisance claims are not claims seeking damages “because of bodily injury”

Now, the bad news: The H.D. Smith Problem

- ***Cincinnati Ins. Co. v. H.D. Smith, LLC*, 829 F.3d 771 (7th Cir. 2016)** (applying Illinois law): The Seventh Circuit found that the State of West Virginia’s claim against an opioid distributor for reimbursement of healthcare costs alleged “damages because of bodily injury” and finding a duty to defend.

  Public nuisance is like a parent seeking to recover medical expenses incurred to care for an injured child, reasoning that if the parent’s damages are because of the child’s “bodily injury,” the State’s damages are likewise because of injuries to its citizens.

- ***Walmart v. ACE American et al.*, (Benton Cty, Ark)(Dec. 29, 2023)**
  - Coverage turns on the “nature or type of liablity faced by the policyholder in the underlying suit.”
  - The public nuisnace claims seek compensation for monies spent to treat bodily injury, and therefore are the same nature of liablity as a bodily injury claim.
  - Walmart’s global settlement agreement shows that the money is being used to pay for future care of bodily injuries

  - PROBLEM: Court focussed on THE NATURE OF DAMAGES not so much on the NATURE OF LIABLITY.

- ***DOES THE SIDE OF THE OCEAN MATTER?***
  - Duty to defend mindset in U.S. vs. The “catastrpohic damages” mindset in London
  - New York law is the only law that matters in the U.K. (??)
  - Level or rate: impossible with a public nuisance risk
  - Continuous appraisal: could be more advantageous than U.S. “expected and intended”
- ***SO WHAT IS THE INSURANCE INDUSTRY TO DO?***
  - Support our policyholders in contesting public nuisance as a mass tort or product liability substitute
  - To exclude or not to exclude?
  - NOTE: focus on the underlying NATURE OF THE RISK, not on the damages at issue (think notice)


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Ethics Enforcement: Has the Time Come?

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Ethics Enforcement: Has the time Come?

General Session 7

What are our Members Telling us and How Can we Best Use that Information

- Presentation of Results

  Neal Moglin *Foley & Lardner LLP*

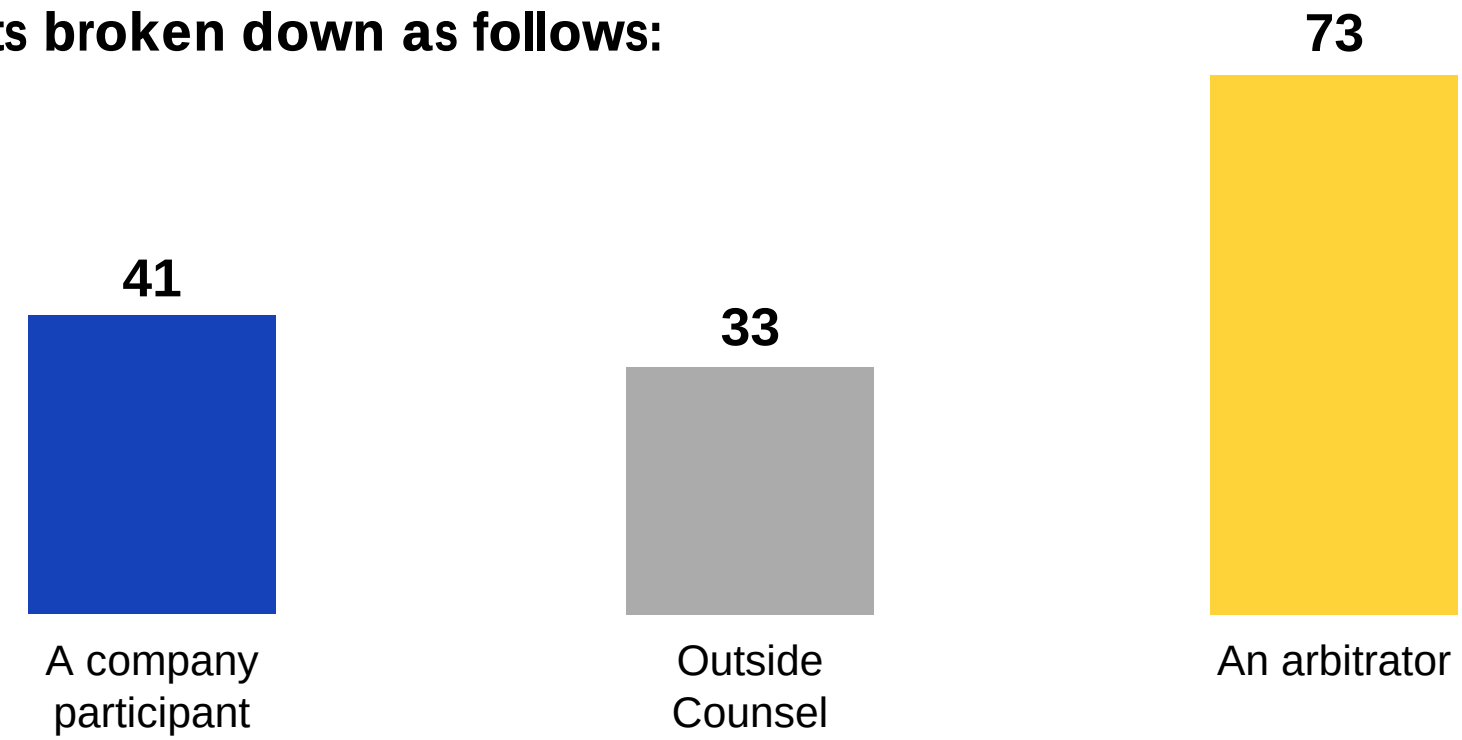
- Roundtable Discussion

  Alysa Wakin *Odyssey Group* (Moderator)

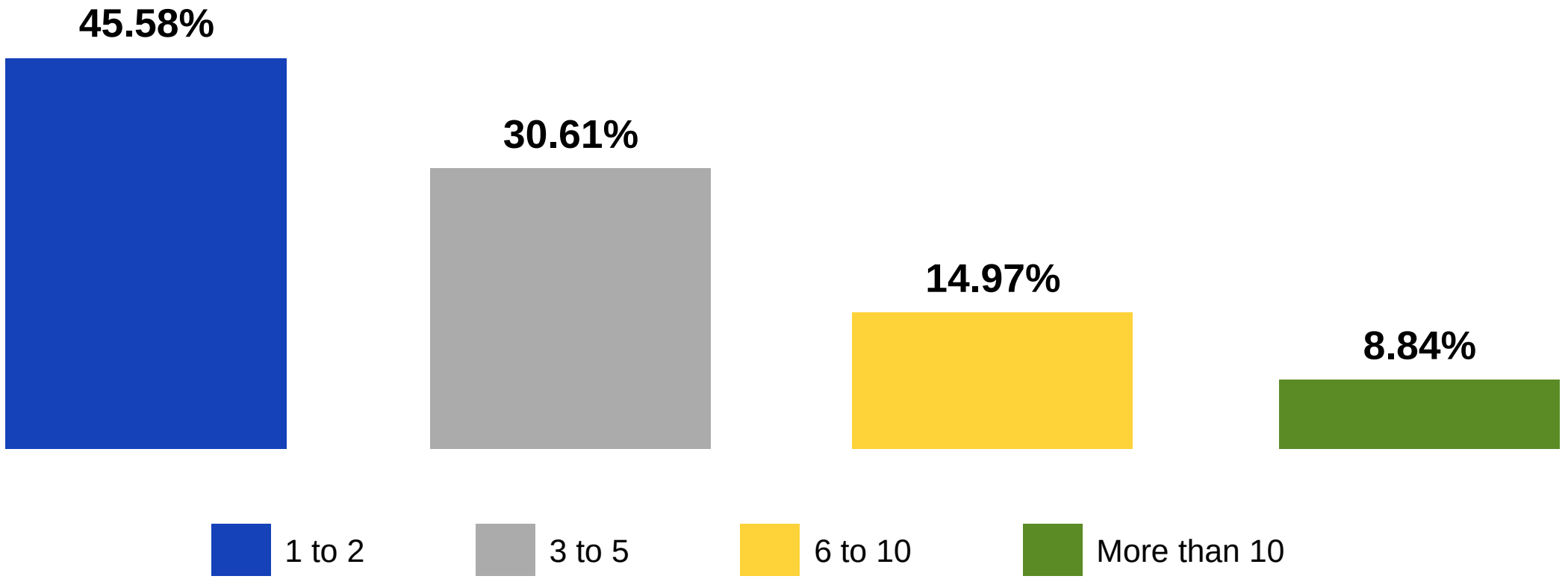
  Suman Chakraborty *Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.*
  Lawrence Greengrass *Arbitrator*
  Susan Mack *Arbitrator*
  Neal Moglin *Foley & Lardner LLP*

Q1: What is your primary role with respect to arbitrations?

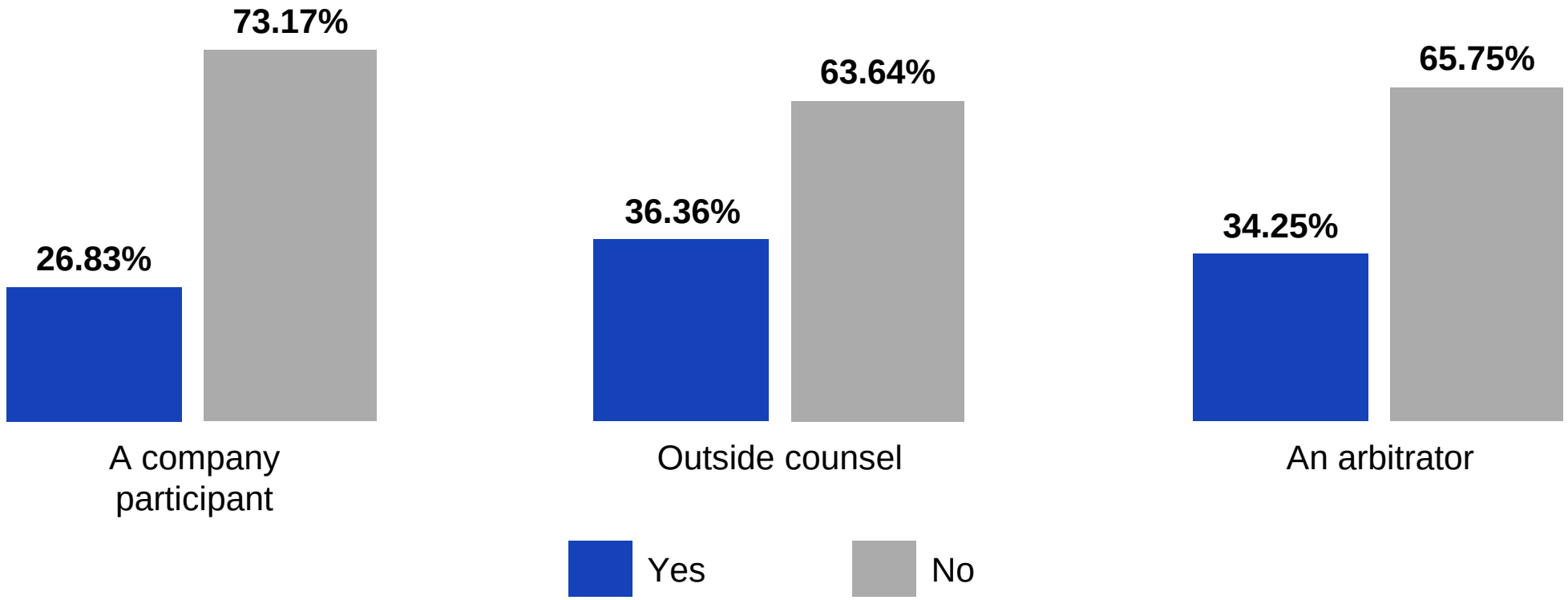
147 Respondents broken down as follows:



Q2: How many arbitrations are you involved in on average in a year?



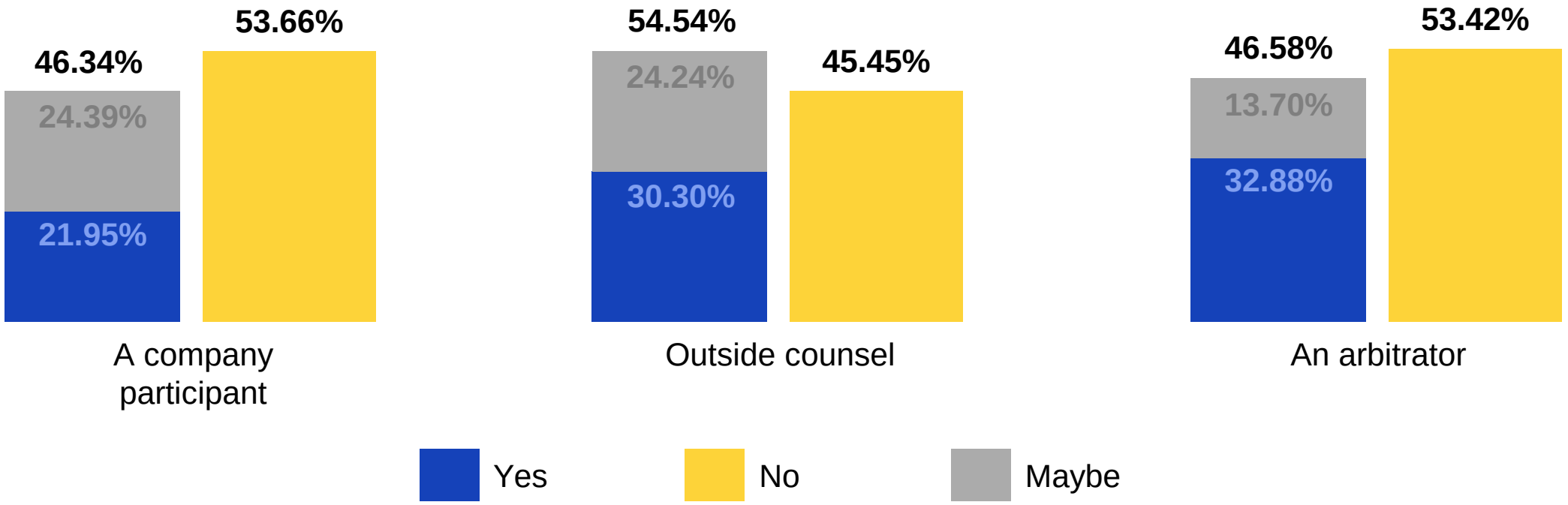
Q4: Have you been involved in any situations where you have sought, or wished to seek, guidance on the Code of Conduct?



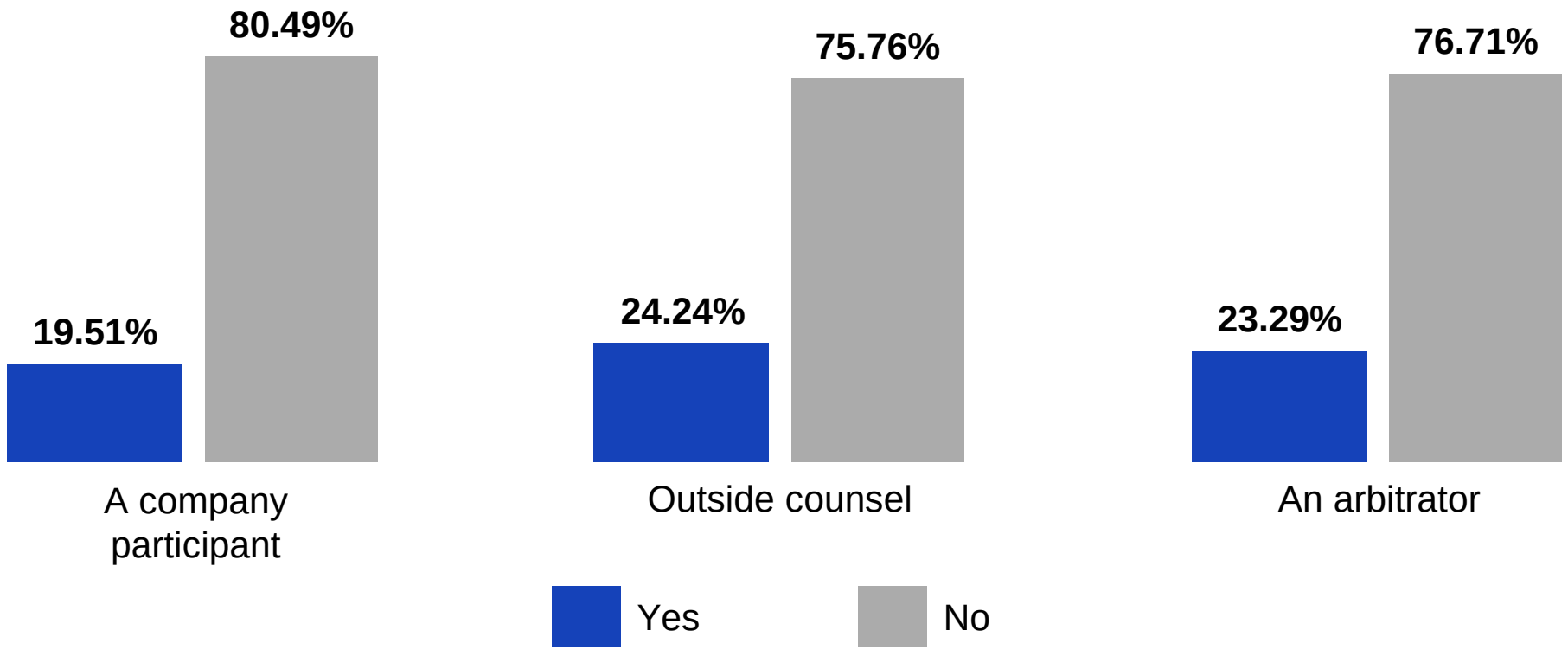
Respondents report consulting (or wanting to consult) the Code to resolve questions about:

- Panel qualifications/conflicts
- Exclusion of party arbitrator from deliberations/communications
- Breaches of *ex parte* communication ban
- Breaches of panel confidentiality
- Breaches of confidentiality regarding related or similar matters
- Breaches of decorum/name calling

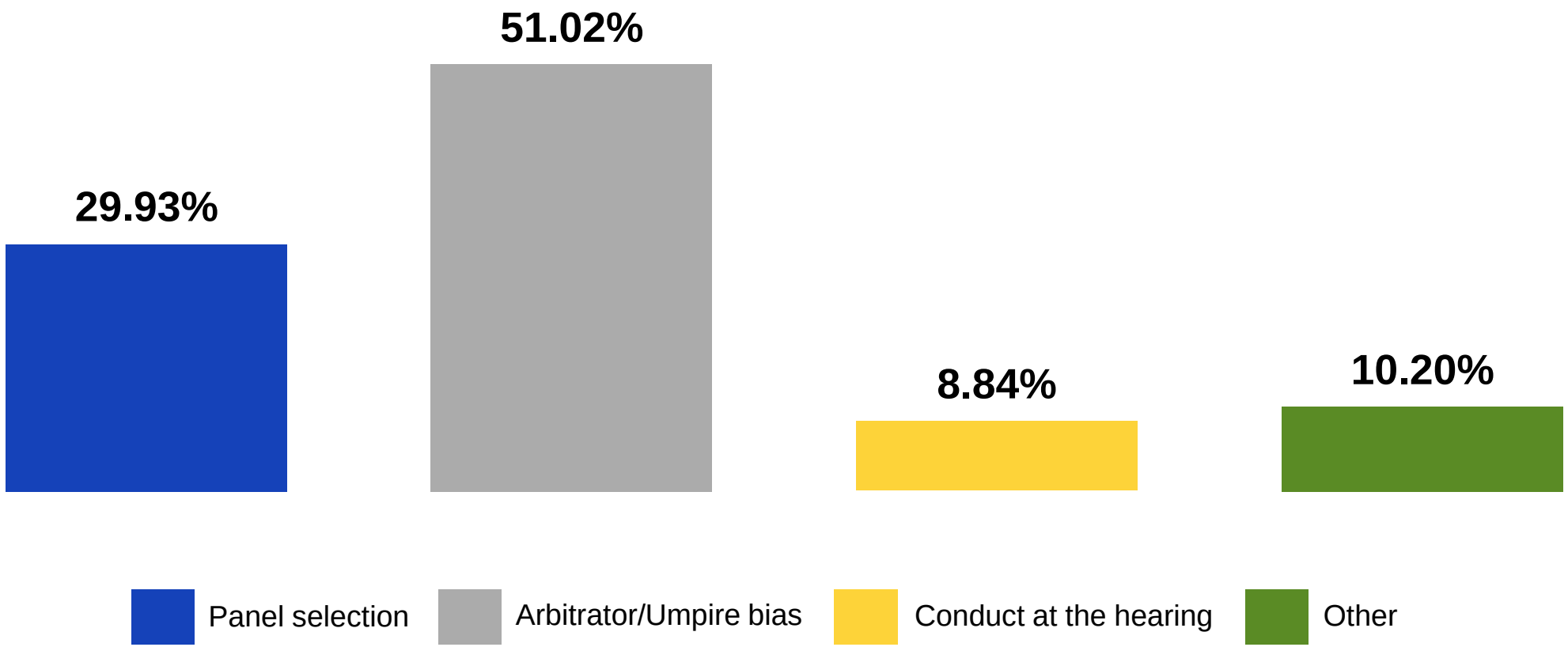
Q6: Have you been involved in any situations where you believe an arbitrator has violated the Code of Conduct?



Q8: Have you been involved in any situations where you believe a party, or its counsel, has placed an arbitrator in a position where the arbitrator is unable to sit or is otherwise at risk of contravening the Code of Conduct?



Q11: What are the biggest ethical dilemmas facing ARIAS·U.S.?

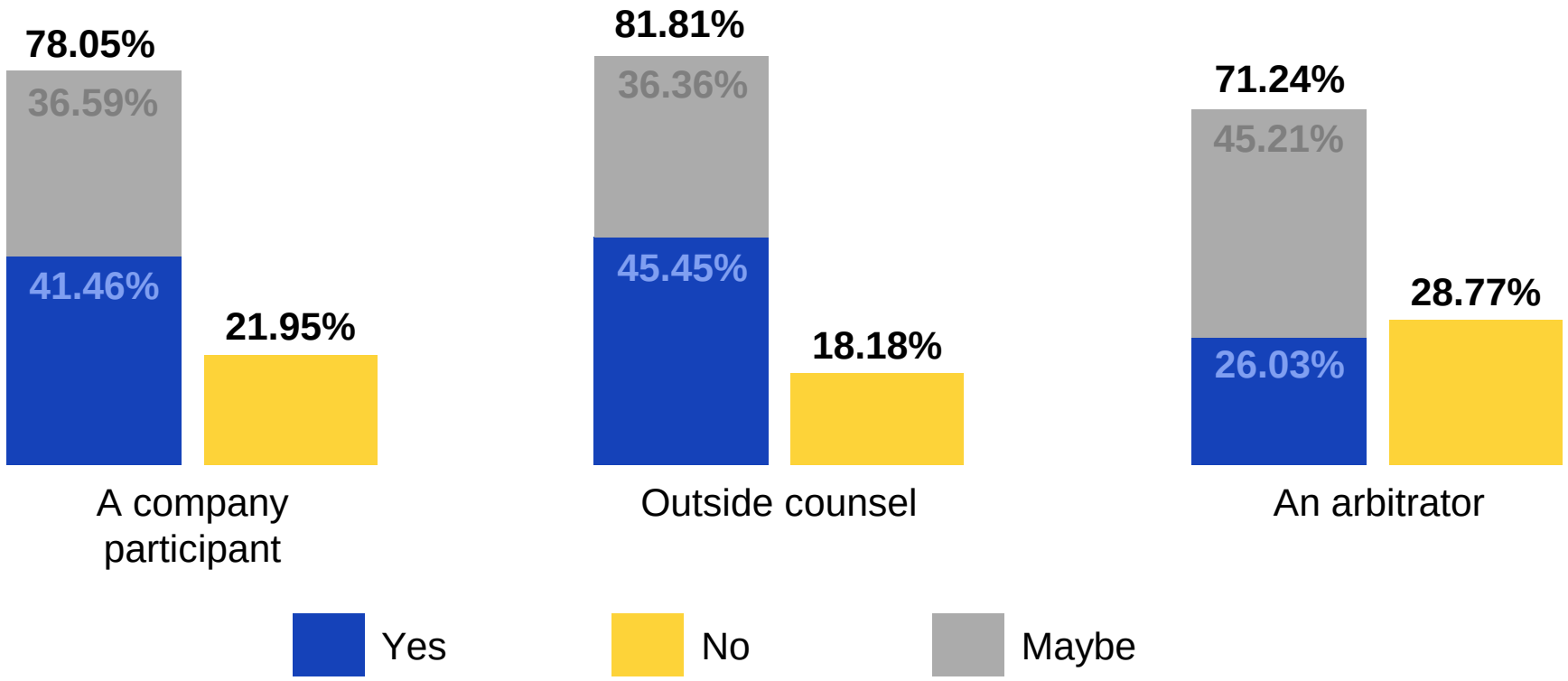


Reported examples of ethical breaches

- Gamesmanship relating to Panel selection/composition including
  - Improper contact of potential umpire candidates
  - Baselessly pressuring Panel members to recuse themselves/resign from Panel
  - Encouraging or forcing one's own party arbitrator to resign during arbitration

- Failure to disclose potentially disqualifying relationships
- Prohibited *ex parte* communications
- Exclusion of party arbitrator from deliberations
- Inclusion by Panel member of evidence/facts not placed in the record by the parties—sometimes from other confidential proceedings
- Bullying/intimidation/threats made to arbitrators by counsel, parties, and co-panelists
- Disclosure of confidential Panel communications

Q10: Should ARIAS·U.S. establish a formal ethical grievance and sanctioning body and procedure?



Responses Favoring Consideration of Enforcement Mechanism

Outside Counsel

"There are perceptions among clients that some arbitrators may be biased or are acting in their own best interests…ARIAS would be wise to be proactive on this front."

Company Representative

"I find it weird that we don't already have a method in place for dealing with grievances."

"There needs to be teeth behind the rules. At a minimum, arbitrators who fail to follow the rules should be suspended and ultimately, depending on their conduct, removed from the ARIAS Panel of Certified Arbitrators. Other sanctions could also be appropriate."

"If it could be confidential and/or anonymous that would be helpful."

Responses Favoring Consideration of Enforcement Mechanism

Arbitrator/Umpire

"Most organizations have an ethics committee… why else adopt a code of conduct?"

"Bringing some of the shenanigans into the light will help deter companies from wanting to be associated with the less than reputable arbitrators who are out there."

"Familiarity" within the community "may encourage unethical behavior, especially without any formal oversight or enforcement."

"Many arbitrators want to function in the manner in which ARIAS US expects/requires but not all can withstand" the "pressured expectations" placed on them by counsel and the appointing parties.

Responses Opposing Consideration of Enforcement Mechanism

Outside Counsel

“I am not sure this is an area ARIAS should be wading into.”

“It would be nice to have a process of getting advisory opinions, but I worry that a formal governing board would be potentially weaponized by counsel.”

Company Representative

“I am not in favor of establishing an ARIAS sanctions board because there is a potential of serious misuse of it by parties and the practical difficulties of creating a process that is perceived…to be reasonably fair and effective are too great.”

“I am concerned” about tactical weaponization. “I am also concerned that ethics board members would hesitate to sanction more powerful players in the industry while making examples out of easier targets.”

Responses Opposing Consideration of Enforcement Mechanism

Arbitrator/Umpire

“An enforcement procedure is likely to make arbitration even more expensive, time consuming and bitter.”

“While creating a formal grievance and sanction process is a commendable effort, it is quite difficult to develop and enforce.”

“Difficult topic. Tread carefully.”

“A guidance body rather than a sanctioning one seems preferable, with sanctioning only following judicial determination of malfeasance.”

PANEL DISCUSSION

Arbitrator Responses- *Ex Parte* Violations

Arbitrators have engaged in prohibited *ex parte* communications with the counsel/parties who appointed them (including during a hearing).

Please note that this issue was also raised by counsel, who discerned a prohibited ex parte exchange between an arbitrator and umpire by reviewing the umpire's bill.

Arbitrator Responses-Umpire Deficiencies

Umpires have voted in “lock step” with the arbitrators/parties who they believed were responsible for their appointment.

Umpires have failed to allow all panel members to address objections fairly.

Arbitrator Responses-Confidentiality and Evidentiary Violations

Arbitrators have disclosed confidential panel deliberations to the counsel/parties who appointed them.

Arbitrators have disclosed confidential panel deliberations in the context of filing dissents.

Panel members have imported evidence/results of factual investigations outside the record into panel deliberations (including materials from other confidential arbitrations).

The Role of Counsel – Comment 1

A respondent reported that in one case, a party appointed a former employee to serve as an arbitrator under a clause prohibiting that behavior. The party refused to appoint a replacement and ***the arbitrator refused to step down, deferring to appointing counsel's aggressive argument that the arbitrator had not been an employee*** during the specific time frame at issue in dispute. (emphasis added).

The Role of Counsel – Comment 2

One respondent reported that a party arbitrator's written panel communications changed after the close of the *ex parte* communication window. Specifically, the communications became "upgraded" both stylistically and substantively, prompting questions as to whether opposing counsel had begun ghost writing those communications.

SUMMARY OF RESPONSES

TO ARIAS ETHICS SURVEY QUESTIONS 5, 7 AND 9

Broken Down by Category of Respondent

QUESTION 5:

Under what situations have you sought (or did you wish to seek) guidance under the ARIAS Code of Conduct?

OUTSIDE COUNSEL RESPONSES

How to deal with umpire excluding my client's party arbitrator from deliberations?

Whether an umpire/arbitrator was required to reject appointment/recuse him/herself?

Whether it would be appropriate to nominate a particular individual for umpire based on specific facts?

Discussions with original drafters regarding why certain rules operate as they do.

How to deal with aggressive ex parte communications from opposing party's arbitrator to umpire—revealed by reviewing umpire bill?

How to deal with opposing counsel violating/ignoring panel orders for the express purpose of placing previously excluded evidence in front of panel (i.e., what do you do when the sanctions a Panel can impose are insufficient to undue the harm)?

ARBITRATOR/UMPIRE RESPONSES

Whether to withdraw from service?

How to deal with misconduct by a co-arbitrator including breaches of decorum/name calling and behavior demonstrating a clear lack of objectivity?

How to deal with an arbitrator's breach of confidentiality regarding panel communications (including via a dissent filed by that arbitrator)?

How to deal with a co-arbitrator advising opposing counsel of arguments/strategies that had been successful in a prior confidential arbitration involving the same contract but involving different counsel?

How to deal with outside counsel/parties steering new assignments to a sitting umpire?

How to deal with requests to resign based upon prior exposure to a witness in another case?

COMPANY REPRESENTATIVE RESPONSES

How to deal with an arbitrator's representation of a party in several arbitrations, all arising out of the same occurrence/contracts/facts and specifically the potential that the arbitrator will be exposed to different facts/evidence in one case that will not be available to his party's opponent in other cases or to his party's counsel to the extent counsel is different in some of the cases?

How to deal with arbitrator misconduct during deliberations including yelling, foul language and other forms of intimidation

How to deal with the fact that some umpire candidates with clear conflicts submit questionnaires (as opposed to simply declining to do so) as this forces a party to effectively waste a strike?

QUESTION 7

Generally describe situations in which you believe arbitrators or umpires violated the ARIAS Code of Conduct.

OUTSIDE COUNSEL RESPONSES

A respondent reported that in one case, a party appointed a former employee to serve as an arbitrator under a clause prohibiting that behavior. The party refused to appoint a replacement and the arbitrator refused to step down, deferring to appointing counsel's aggressive argument that the arbitrator had not been an employee during the specific time frame at issue in dispute.

Ethical lapses reported by more than one respondent include the following:

Panel members failed to adequately disclose prior involvements in cases where issues in dispute were "similar."

Arbitrators engaged in *ex parte* merits discussions with umpires without involving their counterparty arbitrators.

Arbitrators disclosed panel deliberations to counsel/parties who appointed them.

Arbitrators engaged in substantive, prohibited *ex parte* discussions with the counsel/parties who appointed them.

Arbitrators de facto agreed to serve as pocket votes by accepting multiple engagements involving the same parties/counsel/issues.

ARBITRATOR/UMPIRE RESPONSES

An arbitrator allowed counsel to write dissents for that arbitrator and also violated prohibitions on *ex parte* communications.

> *NOTE: In this matter of public record, the counsel involved was removed from the case and referred to the relevant state's bar association conduct committee for further action.*

One respondent reported that a party arbitrator's written panel communications changed after the close of the *ex parte* communication window. Specifically, the communications became "upgraded" both stylistically and substantively, prompting questions as to whether opposing counsel had begun ghost writing those communications.

One respondent reported that a party arbitrator "feigned fatigue" during deliberations as a means of pressuring the umpire to reach a quick resolution to matter.

One respondent reported an instance where his/her counterparty arbitrator and the umpire "colluded" on an outcome without that respondent having an opportunity to participate in the deliberations.

One respondent reported that a party arbitrator made pointed remarks about the female gender to his opposing party arbitrator (the sole woman on the panel) during deliberations.

Ethical lapses reported by more than one respondent include the following:

Counsel have engaged in a practice akin to "swatting" whereby they have used frivolous/false claims of conflict or bias to pressure umpires to decline appointments or recuse themselves.

Arbitrators have disclosed confidential panel deliberations to the counsel/parties who appointed them.

Arbitrators have disclosed confidential panel deliberations in the context of filing dissents.

Arbitrators have engaged in prohibited *ex parte* communications with the counsel/parties who appointed them (including during a hearing).

Panel members have imported evidence/results of factual investigations from outside the record into panel deliberations (including material from other confidential arbitrations).

Arbitrators have assumed the role of advocate (beyond acting as the appointing parties' representatives to the panel).

Umpires have voted “in lock step” with the arbitrators/parties who they believed were responsible for their appointment.

Arbitrators have accepted more assignments from particular parties/counsel in a short period of time “than ethically permissible.”

Umpires have failed to allow all panel members to address objections fairly.

COMPANY REPRESENTATIVE RESPONSES

One respondent reported that an arbitrator engaged in *ex parte* communications with the counsel/party who appointed him/her during a hearing.

One respondent reported that an arbitrator attempted to engage in prohibited *ex parte* communications with the counsel/party who appointed him/her during an industry event.

Ethical lapses reported by more than one respondent include the following:

Arbitrators and umpires have refused to decline engagements where the ARIAS rules prohibited service (including instances where there was an active dispute between the umpire and one of the parties).

Arbitrators and umpires have downplayed or failed to disclose the extent of their contacts/ relationships with other panel members/counsel/parties.

Counsel and/or parties have contacted potential umpire candidates in advance of their nomination for service—either to “signal” that they would be nominated or to create grounds for “disqualifying” those persons from serving.

Arbitrators have offered testimony/evidence for the party who appointed him/her during hearing (including instances where the information in question was derived from other confidential proceedings).

QUESTION 9

Generally describe situations in which you believe a party or its counsel placed an arbitrator in a position where the arbitrator was unable to sit or was otherwise at risk of contravening the Code?

OUTSIDE COUNSEL RESPONSES

Opposing counsel/appointing party asked their party arbitrator to resign well into an arbitration.

Opposing counsel contacted umpire candidates in advance of the nomination process, ostensibly to check their availability.

After Mr. X joined a unanimous ruling against the party who appointed him in an arbitration involving similar treaties, the same book of business and the same party as a second arbitration, the appointing party refused to pay Mr. X's fees in the first matter and took other unspecified actions to cause Mr. X to resign as arbitrator in the second arbitration.

ARBITRATOR/UMPIRE RESPONSES

Opposing counsel asserted the existence of a conflict allegedly disqualifying a party arbitrator from serving. Opposing counsel's subsequent behavior regarding that petition and generally was so hostile that the party arbitrator ultimately determined he/she could not be objective anymore and withdrew for that reason.

Counsel asked a party arbitrator to review/comment on draft briefs.

After a party appointed replacement counsel in an arbitration, that counsel asked/demanded that the party's appointed arbitrator resign so replacement counsel could appoint someone with whom he/she had more of a relationship.

An arbitrator engaged in prohibited *ex parte* communications with counsel.

The counsel/party who appointed an arbitrator "personally threatened" that arbitrator if he/she did not agree to dissent to any adverse rulings.

COMPANY REPRESENTATIVE RESPONSE

One respondent reported that an arbitrator who had been appointed by one party to a concluded arbitration wherein that arbitrator was exposed to confidential information subsequently accepted an appointment in a second case involving related facts/parties from the company that had been on the other side of the concluded case. The arbitrator clearly had a conflict but refused to decline the appointment.

Multiple respondents reported instances where counsel/parties appointed arbitrators they know were conflicted (including in one instance, appointing arbitrators with connections to the companies or contracts involved in the disputes) or otherwise not qualified and then refused to withdraw the appointment.

Multiple respondents also reported instances of improper *ex parte* contact including one who stated "*ex parte* conduct occurs often during arbitration – mostly mild and irrelevant, but not always."

QUESTION 12

Please provide any other comments with respect to ethical issues you have faced or ethical dilemmas with which you have been involved.

OUTSIDE COUNSEL COMMENTS

"It would be nice to have a process of getting advisory opinions but I worry that a formal governing board would be potentially weaponized by counsel."

"There are perceptions among clients that some arbitrators may be biased or are acting in their own best interests. I do not generally share these concerns, but I do hear them from clients and therefore believe ARIAS would be wise to be proactive on this front.

"I am not sure this is an area ARIAS should be wading into."

"We should consider what we can do as an organization to discourage meritless court applications to disqualify arbitrators. This adds expense and uncertainty to our dispute resolution process."

"In my view, arbitration was never intended to provide a primary source of income to retired executives. The need to 'earn' repeat engagements has, in my view, destroyed the efficacy of the tripartite process."

"Tying disinterested to financial interest in the outcome leaves room for situations where an arbitrator has no direct financial interest (and thus can serve) but is objectively invested in some other way or might have personal knowledge of relevant facts that may unfairly influence the outcome."

"Supplemental disclosures throughout an arbitration proceeding can sometimes present thorny issues."

ARBITRATOR/UMPIRE COMMENTS

"Most organizations have an ethics committee and procedure to help clarify non-ethical behavior consistent with the code, why else adopt a code of conduct?"

"Bringing some of the shenanigans out into the light will help deter companies from wanting to be associated with the less than reputable arbitrators who are out there."

"Over time, the arbitrator community and counsel who participate in this community have become very familiar with one another. This familiarity may encourage unethical behavior, especially without any formal oversight or enforcement."

"We addressed this issue many years ago in connection with the code of conduct and were unable to incorporate rules that could even be applied let alone be enforced against counsel and the parties [who are] the primary sources of pressured expectations on the arbitrators. Many arbitrators want to function in the manner in which ARIAS US expects/requires but not all can withstand these pressures."

"While creating a formal grievance and sanction process is a commendable effort, it is quite difficult to develop and enforce."

"Difficult topic. Tread carefully."

"A guidance body rather than a sanctioning one seems preferable, with sanctioning only following judicial determination of malfeasance."

"While ethics are an important issue, an enforcement procedure is likely to make arbitration even more expensive, time consuming and bitter."

"Attorneys do things in the course of an arbitration which would be sanctioned in court. They act unethically and seem to believe there are no consequences."

"Umpire selection remains problematic. I don't know what the solution is frankly."

"The UK only permits neutral panels. [Were] this the case in the US, it would reduce the gamesmanship prevalent in US reinsurance arbitrations."

"I think there is a lot of talk about ethics, but the truth is most protagonists and counsel care more about winning than having an ethical proceeding. I do not know how to change this, but it is a problem. The only way to avoid it is to have ARIAS appoint the entire panel."

"Limiting arbitrators' assignments with a particular company (or law firm) would not seriously or broadly affect many arbitrators but might greatly improve the overall integrity and impartiality of the process."

"Generally, in my experience, there has been fairly consistent adherence to the code of conduct."

COMPANY REPRESENTATIVE COMMENTS

"I find it weird that we don't already have a method in place for dealing with grievances."

"There needs to be teeth behind the rules. At a minimum, arbitrators who fail to follow the rules should be suspended and ultimately, depending on their conduct, removed from the ARIAS panel of certified arbitrators. other sanctions could also be appropriate.

"It is very risky to lodge a complaint as that arbitrator will be in future matters. If it could be confidential and/or anonymous, that would be helpful."

"No process which relies on the choice of an umpire, or coin flip results, whose bias is usually clear can be seen to be fair and ethical."

"Rather than vague ethical standards that are difficult to specifically enforce, it would be better to develop specific rules designed to fight against at least the appearance of bias or unethical behavior. For example, a rule that an arbitrator may only sit on one or two active arbitrations for a party at a given time. Or preventing an umpire from having more than two on going arbitrations that involve the same party appointed."

“I am not in favor of establishing an ARIAS sanctions board because there is a potential of serious misuse of it by parties and the practical difficulties of creating a process that is perceived by parties and arbitrators to be reasonably fair and effective are too great.”

“I am concerned that a formal grievance and sanctioning board will be used as a tactical weapon by counsel and parties. I am also concerned that ethics board members would hesitate to sanction more powerful players in the industry while making an example out of easier targets. If an arbitration is fundamentally unfair due to an ethical breach, the aggrieved party should go to court and publicize it that way. Having an ARIAS process is a terrible idea.”

January 1, 2019

ARIAS•U.S. Code of Conduct

This version of the Code of Conduct was revised and became effective as of January 1, 2019, for conduct taking place after that date. It is an integration, with significant updates and amendments, of the original Guidelines and the Additional Ethics Guidelines adopted by ARIAS·U.S. in 2010. The date on the PDF version of the Code reflects subsequent amendments to the Code as approved by the Board.

Revisers note to Canon I, Comment 5

Comment 5 is intended to cover situations where the mandatory prohibitions of Comment 3 almost apply. Typically, this occurs where the candidate has a relationship described in Comment 3 with an entity that is related to a party to the current arbitration, but where the Code's definition of affiliate or party is not met. Comment 5 establishes a rebuttable presumption that a candidate will decline to serve in such situations unless the relationship is remote.

Following are three examples covered by Comment 5:

Example 1. Assume there is an entity that is related to a party to the current arbitration, although not "affiliated" as the Code of Conduct defines affiliated because the related entity owns only 49 percent (not 50.1 percent) of the party to the arbitration. Assume the same individuals manage both entities' reinsurance disputes (those of the related entity and the party to the current arbitration).

A candidate is solicited to serve as the party-appointed arbitrator in the current arbitration by the party that is 49 percent owned by the related entity, while already serving as the umpire in an arbitration involving the related entity. Under the Code of Conduct, the definition of affiliate isn't met, and Comment 3's mandatory prohibitions (here Comment 3(f)) are not triggered. Under Comment 5, the candidate must not serve in this circumstance because the relationship is not remote (49 percent ownership and the same people managing the two disputes).

Example 2. Similarly, assume a candidate currently serves as the lawyer for an entity that owns 49 percent of the party to the current arbitration. Assume the same individuals manage both entities' reinsurance disputes (those of the entity that owns 49 percent of the party to the current arbitration and the party). The candidate is solicited to serve as the party appointed arbitrator for the party that is 49 percent owned by the entity for which the candidate serves as a lawyer. Under the Code, the definition of party is not met, and Comment 3(c)'s mandatory prohibitions are not triggered. Under Comment 5, the candidate must not serve in this circumstance because the relationships are not remote.

Example 3. In a third example, assume there are two entities that are separately owned, but whose losses are entirely reinsured by the same entity. Assume also that the two separate entities' reinsurance disputes are managed by the same individuals who are employed by the

common reinsurer. A candidate is solicited by one of the two reinsured entities to serve as its party-appointed arbitrator in the current arbitration while already serving as the umpire in an arbitration involving the second of the two reinsured entities.

Under the Code, the definition of affiliate isn't met (the two reinsured entities are separately owned, even if reinsured by the same entity) and Comment 3(f)'s mandatory prohibitions are not triggered. Under Comment 5, the candidate must not serve, because the relationship is not remote (there is a common reinsurer at risk for all losses, and the same individuals are managing both disputes).

These examples are not meant to be exhaustive, but illustrative. Admittedly, Comment 5 requires candidates to exercise judgment rather than follow a black-and-white rule. Nevertheless, Comment 5 serves an important purpose: it is intended to advance the general principle that in upholding the integrity of the arbitration process, a candidate should not get too close to the edge on issues of ethics.

INTRODUCTION

ARIAS·U.S. is a not-for-profit corporation organized principally as an educational society dedicated to promoting the integrity of the arbitration process in insurance and reinsurance disputes. Through seminars and publications, ARIAS·U.S. trains knowledgeable and reputable professionals for service as panel members in industry arbitrations. The ARIAS·U.S. Board of Directors certifies as arbitrators, individual members who are qualified in accordance with criteria and procedures established by the Board.

The continued viability of arbitration to resolve industry disputes largely depends on the quality of the arbitrators, their understanding of complex issues, their experience, their good judgment and their personal and professional integrity. In order to properly serve the parties and the process, arbitrators must observe high standards of ethical conduct and must render decisions fairly. The provisions of the Code of Conduct should be construed to advance these objectives.

PURPOSE

The purpose of the Code of Conduct is to provide guidance to arbitrators in the conduct of insurance and reinsurance arbitrations in the United States, whether conducted by a single arbitrator or a panel of arbitrators, whether or not certified by ARIAS•U.S. and regardless of how appointed. Comments accompanying the Canons explain and illustrate the meaning and purpose of each Canon. These Canons are, however, not intended to override the agreement between the parties in respect to arbitration and do not displace applicable laws or arbitration procedures. Though these Canons set forth considerations and behavioral standards only for arbitrators, ***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.*** *Parties and counsel should provide prospective arbitrators and umpires with sufficient information concerning the dispute and all of its potential participants so that they may fairly consider whether to serve.*

DEFINITIONS

1. Affiliate: an entity whose ultimate parent owns a majority of both the entity and the party to the arbitration and whose insurance and/or reinsurance disputes, as applicable, are managed by the same individuals that manage the party's insurance and/or reinsurance disputes;

2. Arbitrator: a person responsible to adjudicate a dispute by way of arbitration, including the umpire on a three (or more) person panel of arbitrators;

3. Party: the individual or entity that is named as the petitioner or respondent in an arbitration, as well as the affiliates of the named party;

4. Umpire: a person chosen by the party-appointed arbitrators, by an agreed-upon procedure, or by an independent institution to serve in a neutral capacity as chair of the panel.

CANON I

INTEGRITY: Arbitrators should uphold the integrity of the arbitration process and conduct the proceedings diligently.

COMMENTS:

1. The foundation for broad industry support of arbitration is confidence in the fairness and competence of the arbitrators.

2. Arbitrators owe a duty to the parties, to the industry, and to themselves 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, including procedural and interim decisions; and not to seek to advance their own interests at the expense of the parties. Arbitrators should act without being influenced by outside pressure, fear of criticism or self-interest.

3. The parties' confidence in the arbitrator's ability to render a just decision is influenced by many factors, which arbitrators must consider prior to their service. There are certain circumstances where a candidate for appointment as an arbitrator must refuse to serve:

a) where the candidate has a material financial interest in a party that could be substantially affected by the outcome of the proceedings;

b) where the candidate does not believe that he or she can render a decision based on the evidence and legal arguments presented to all members of the panel;

c) where the candidate currently serves as a lawyer for one of the parties (where the candidate's law firm, but not the candidate, serves as lawyer for one of the parties the

candidate may not serve as an arbitrator unless the candidate derives no income from the firm's representation of the party and there is an ethical wall established between the candidate and the firm's work for the party);

d) where the candidate is nominated for the role of umpire and is currently a consultant or expert for one of the parties;

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; or

f) where the candidate sits as an umpire in one matter and the candidate is solicited to serve as a party-appointed arbitrator or expert in a new matter by a party to the matter where the candidate sits as an umpire.

4. Consistent with the arbitrator's obligation to render a just decision, before accepting an appointment as an arbitrator the candidate should consider whether any of the following factors would likely affect their judgment and, if so, should decline the appointment:

a) whether the candidate has a financial interest in a party;

b) whether the candidate currently serves in a non-neutral role on a panel involving a party and is now being proposed for an umpire role in an arbitration involving that party;

c) whether the candidate has previously served as a consultant (which term includes service on a mock or shadow panel) or expert for or against one of the parties;

d) whether the candidate has involvement in the contracts or claims at issue such that the candidate could reasonably be called as a fact witness;

e) whether the candidate has previously served as a lawyer for either party;

f) whether the candidate has previously had any significant professional, familial or personal relationships with any of the lawyers, fact witnesses or expert witnesses involved such that it would prompt a reasonable person to doubt whether the candidate could render a just decision;

g) whether a significant percentage of the candidate's appointments as an arbitrator in the past five years have come from a party involved in the proposed matter;

h) whether a significant percentage of the candidate's appointments as an arbitrator in the past five years have come from a law firm or third-party administrator or manager involved in the proposed matter;

i) whether a significant percentage of the candidate's total revenue earned as an arbitrator, consultant or expert witness in the past five years has come from a party

involved in the proposed matter;

j) whether a significant percentage of the candidate's total revenue earned as an arbitrator, consultant or expert witness in the past five years has come from a law firm or third-party administrator or manager involved in the proposed matter; and

5. Relationship between Comments 3 and 4. If a candidate has a relationship described in Comment 3 with an entity that does not fall strictly within the scope of Comment 3, but the relationship is sufficiently significant that the principles set out in Comment 3 are clearly implicated, then in these circumstances the candidate should refuse to serve in the current arbitration, in line with the general principle that in upholding the integrity of the arbitration process arbitrators will avoid the perception of bias. If, however, the relationship described above is remote and pursuant to Comment 4, would not affect the candidate's judgment, then the candidate may choose to serve.

6. The parties to a proceeding in which an individual is sitting as an umpire or is being proposed as umpire may, by agreement reached without the involvement, knowledge, or participation of the umpire or candidate, waive any of the provisions of paragraphs 3 (c), (d), (e), or (f) above and 5. The umpire or candidate shall be informed of such agreement.

7. Consistent with the arbitrator's obligation to render a just decision, an arbitrator should consider whether accepting an appointment as a consultant or expert in a new matter by a party to the arbitration where the person sits as an arbitrator would likely affect his or her judgment in the matter where he or she sits as an arbitrator.

CANON II

FAIRNESS: 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.

COMMENTS:

1. Before accepting an appointment, a person contacted to serve as an arbitrator should consider whether the identity of the parties and their counsel, or factual issues anticipated to be implicated in the matter (as well as related issues that might be relevant such as the identity of affiliates of the parties, third-party managers, intermediaries, witnesses, etc.), would impact the arbitrator's ability to render a just decision in a fair manner.

2. Arbitrators should refrain from offering any assurances, or predictions, as to how they will decide the dispute and should refrain from stating a definitive position on any particular issue. Although party-appointed arbitrators may be initially predisposed toward the position of the party who appointed them (unless prohibited by the contract), they should avoid reaching a judgment on any issues, whether procedural or substantive, until after both parties have had a full and fair opportunity to present their respective positions and the panel has fully deliberated on the issues. Arbitrators should advise the appointing party, when accepting an appointment, that they will ultimately decide issues presented in the arbitration objectively. Party-appointed arbitrators are obligated to act in good faith and with integrity and fairness, should not allow their appointment to influence their decision on any matter before them, and should make all decisions justly.

3. Party-appointed arbitrators should not offer a commitment to dissent, or to work for a compromise in the event of a disagreement with the majority's proposed award. Party-appointed arbitrators may advise the party appointing them whether they are willing to render a reasoned decision if requested.

4. After accepting an appointment, arbitrators should avoid entering into any financial, business, professional, family or social relationship, or acquiring any financial or personal interest, that would likely affect their ability to render a just decision.

CANON III

COMPETENCE: Candidates for appointment as arbitrators should accurately represent their qualifications to serve.

COMMENTS:

1. Candidates should provide up-to-date information regarding their relevant training, education and experience to the appointing party (or parties if nominated or selected to serve as the umpire) to ensure that their qualifications satisfy the reasonable expectations of the party or parties.

2. Individuals who serve on arbitration panels have a responsibility to be familiar with the practices and procedures customarily used in arbitration that promote confidence in the fairness and efficiency of the process as an accessible forum to resolve industry disputes.

CANON IV

DISCLOSURE: Candidates for appointment as arbitrators should disclose any interest or relationship likely to affect their judgment. Any doubt should be resolved in favor of disclosure.

COMMENTS:

1. Before accepting an arbitration appointment, candidates for appointment as arbitrators should make a diligent effort to identify and disclose any direct or indirect financial or personal interest in the outcome of the proceeding or any existing or past financial, business, professional, family or social relationship that others could reasonably believe would be likely to affect their judgment, including any relationship with persons they are told will be arbitrators or potential witnesses. Such disclosures should include, where appropriate and known by a candidate, information related to the candidate's current employer's direct or indirect financial interest in the outcome of the proceedings or the current employer's existing or past financial or business relationship with the parties that others could reasonably believe would be likely to affect the candidate's judgment.

2. A candidate for appointment as arbitrator shall also disclose:

a) relevant positions taken in published works or in expert testimony;

b) the extent of previous appointments as an arbitrator by either party, either party's counsel or either party's third party administrator or manager; while it may be true in some circumstances that only the party technically appoints the arbitrator, the purpose of this rule is to require disclosure of the relationships between the candidate and the parties as well as the candidate and either parties' counsel or third party administrator or manager; such relationships that must be disclosed include appointments as an arbitrator where the party's counsel and/or the party's third party administrator or manager acted as counsel or third party administrator or manager for a party making the appointment; and

c) any past or present involvement with the contracts or claims at issue.

3. No later than when arbitrators first meet or communicate with both parties, arbitrators should disclose the information in paragraphs 1 and 2 above to the entire panel and all parties. When confronted with a conflict between the duty to disclose and the obligation to preserve confidentiality, an arbitrator should attempt to reconcile the two objectives by providing the substance of the information requested without identifying details, if that can be done in a manner that does not breach confidentiality and is not misleading. An arbitrator who decides that it is necessary and appropriate to withhold certain information should notify the parties of the fact and the reason that information has been withheld.

4. It is conceivable that the conflict between the duty to disclose and some other obligation, such as a commitment to keep certain information confidential, may be irreconcilable. When an arbitrator is unable to meet the ethical obligations of disclosure because of other conflicting obligations, the arbitrator should withdraw from participating in the arbitration, or, alternatively, obtain the informed consent of both parties before accepting the assignment.

5. 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 by all parties to withdraw, the arbitrator must do so. In the event that an arbitrator is requested to with-draw 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.

6. The duty to disclose all interests and relationships is a continuing obligation throughout the proceeding. If any previously undisclosed interests or relationships described in -paragraphs 1 and 2 above are recalled or arise during the course of the arbitration, they should be disclosed immediately to all parties and the other arbitrators together with an explanation of why such disclosure was not made earlier.

CANON V

COMMUNICATION WITH THE PARTIES: Arbitrators, in communicating with the parties, should avoid impropriety or the appearance of impropriety.

COMMENTS:

1. If an agreement between the parties or applicable arbitration rules establish the manner or content of communications among arbitrators and the parties, those procedures should be followed.

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.

3. A party-appointed arbitrator should not review any documents that the party appointing him or her is not willing to produce to the opposition. A party-appointed arbitrator should, once all members of the Panel are selected, disclose to the other members of the Panel and the parties all documents that they have examined relating to the proceeding. Party-appointed arbitrators may consult in confidence with the party who appointed them concerning the acceptability of persons under consideration for appointment as the umpire.

4. Except as provided above, party-appointed arbitrators may only communicate with a party concerning the dispute provided all parties agree to such communications or the Panel approves such communications, and then only to the extent and for the time period that is specifically agreed upon or ordered.

5. When party-appointed arbitrators communicate in writing with a party concerning any matter as to which communication is permitted, they are not required to send copies of any such written communication to any other party or arbitrator.

6. Where communications are permitted, a party-appointed arbitrator may (a) make suggestions to the party that appointed him or her with respect to the usefulness of expert evidence or issues he or she feels are not being clearly presented; (b) make suggestions about what arguments or aspects of argument in the case to emphasize or abandon; and

(c) provide his or her impressions as to how an issue might be viewed by the Panel, but may not disclose the content or substance of communications or deliberations among the Panel members. An arbitrator should not edit briefs, interview or prepare witnesses, or preview demonstrative evidence to be used at the hearing.

7. Whenever the umpire communicates in writing with one party on subjects relating to the conduct of the arbitration or orders, the umpire should at the same time send a copy of the communication to each other arbitrator and party. 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.

8. Except as provided above or unless otherwise provided in applicable arbitration rules or in an agreement of the parties, the umpire should not discuss a case with a single arbitrator, party or counsel in the absence of the other arbitrator, party or counsel, except in one of the following circumstances:

a) Discussions may be had with a single arbitrator, party or counsel concerning ministerial matters such as setting the time and place of hearings or making other arrangements for the conduct of the proceedings. However, the umpire should promptly inform the other arbitrator, party or counsel of the discussion and should not make any final determination concerning the matter discussed before giving each arbitrator, party or counsel an opportunity to express its views.

b) If all parties request or consent to it, such discussion may take place.

c) If a party fails to be present at a hearing after having been given due notice, the panel may discuss the case with any party or its counsel who is present and the arbitration may proceed.

CANON VI

CONFIDENTIALITY: Arbitrators should be faithful to the relationship of trust and confidentiality inherent in their position.

COMMENTS:

1. Arbitrators are in a relationship of trust with the parties and should not, at any time, use confidential information acquired during the arbitration proceeding to gain a personal advantage or advantage for others, or to affect adversely the interest of another.

2. Unless otherwise agreed by the parties, or required or allowed by applicable rules or law, arbitrators should keep confidential all matters relating to the arbitration proceedings and decision.

3. Arbitrators shall not inform anyone of an arbitration decision, whether interim or final, in advance of the time it is given to all parties, or assist a party in post-arbitral proceedings, except as is required by law. An arbitrator shall not disclose contents of the deliberations of the arbitrators or other communications among or between the arbitrators. Notwithstanding the previous sentence, an arbitrator may put such deliberations or communications on the record in the proceedings (whether as a dissent or in a communication to all parties and panel members) to the extent (but only to the extent) reasonably necessary to expose serious wrongdoing on the part of one or more panel members, including actions that are contemplated by Section 10(a) of the Federal Arbitration Act.

4. Unless otherwise agreed by the parties or by applicable rules, arbitrators are not obligated to return or retain notes taken during the arbitration. Notes, records and recollections of arbitrators are confidential and shall not be disclosed to the parties, the public, or anyone else, unless (1) all parties and the panel agree to such disclosure, or (2) a disclosure is required by law.

CANON VII

ADVANCING THE ARBITRAL PROCESS: Arbitrators shall exert every reasonable effort to expedite the process and to promptly issue procedural communications, interim rulings, and written awards.

COMMENTS:

1. When the agreement of the parties sets forth procedures to be followed in conducting the arbitration or refers to rules to be followed, it is the obligation of the arbitrators to comply with such procedures or rules unless the parties agree otherwise.

2. Individuals should only accept arbitration appointments if they are prepared to commit the time necessary to conduct the arbitration process promptly.

3. Arbitrators should make all reasonable efforts to prevent delaying tactics, harassment of parties or other participants, or other abuse or disruption of the arbitration process.

4. Arbitrators should be patient and courteous to the parties, to their lawyers and to the witnesses, and should encourage (and, if necessary, order) similar conduct of all participants in the proceedings.

5. Arbitrators may question fact witnesses or experts during the hearing for explanation and clarification to help them understand and assess the testimony; however, arbitrators should refrain from assuming an advocacy role and should avoid interrupting counsel's examination unless clarification is essential at the time.

CANON VIII

JUST DECISIONS: Arbitrators should make decisions justly, exercise independent judgment and not permit outside pressure to affect decisions.

COMMENTS:

1. When an arbitrator's authority is derived from an agreement between the parties, arbitrators should neither exceed that authority nor do less than is required to exercise that authority completely.

2. Arbitrators should, after careful review, analysis and deliberation with the other members of the panel, fairly and justly decide all issues submitted for determination. Arbitrators should decide no other issues.

3. Arbitrators should not delegate the duty to decide to any other person. Arbitrators may, however, use a clerk or assistant to perform legal research or to assist in reviewing the record.

4. In the event that all parties agree upon a settlement of issues in dispute and request arbitrators to embody that agreement in an award, they may do so, but are not required to do so, unless satisfied with the propriety of the terms of settlement. Whenever arbitrators embody a settlement by the parties in an award, they should state in the award that it is based on an agreement of the parties.

CANON IX

ADVERTISING: Arbitrators shall be truthful in advertising their services and availability to accept arbitration appointments.

COMMENTS:

1. It is inconsistent with the integrity of the arbitration process for persons to solicit a particular appointment for themselves. However, a person may indicate a general willingness to serve as an arbitrator.

2. Arbitrators shall make only accurate and truthful statements about their skills or qualifications. A prospective arbitrator shall not promise results.

3. In an advertisement or other communication to the public, an individual who is an ARIAS·U.S. certified arbitrator or umpire may use the phrase "ARIAS·U.S. Certified Arbitrator (or Umpire as the case may be)" or "certified by ARIAS·U.S. as an arbitrator (or umpire as the case may be)" or similar phraseology.

CANON X

FEES: Prospective arbitrators shall fully disclose and explain the basis of compensation, fees and charges to the appointing party or to both parties if chosen to serve as the umpire.

COMMENTS:

1. Information about fees should be addressed when an appointment is being considered. The better practice is to confirm the fee arrangement in writing at the time an arbitration appointment is accepted.

2. Arbitrators shall not enter into a fee agreement that is contingent upon the outcome of the arbitration process. Arbitrators shall not give or receive any commission, rebate or similar remuneration for referring a person for alternative dispute resolution services.

ARIAS Spring 2024 Conference

Ethics Presentation- Ground Rules

Larry Greengrass

These Ground Rules for arbitrations would be incorporated into a set of arbitration procedures in one of three ways:

1. Mandatory application to all prospective arbitrators in an arbitration.

2. Mandatory application solely to prospective umpire candidates.

3. As an option for parties to agree to if they are so inclined, as to 1 or 2 above.

After review of the candidates disclosures, the parties agree that under the following circumstances, the candidate may not serve in this arbitration. (Note that references to the "party" include affiliates.)

1. A candidate is currently serving as either an expert witness or party-appointed arbitrator for either party or for either counsel.

2. A candidate currently represents or has represented either party as counsel within the last five (5) years.

3. A candidate is or has been an officer or employee of either party or affiliated with either counsel within the last 5 years.

4. A candidate has been a party-appointed arbitrator or expert witness (or combination thereof) for or on behalf of either party [or counsel?] on three (3) or more prior occasions within the past five (5) years. Arbitrations which did not proceed after the Organizational Meeting shall not be counted.

5. A candidate states that he/she is unwilling to abide by the ARIAS-U.S. Code of Conduct.

In the event of any conflict between these Ground Rules and any other section of the ARIAS Code, these Ground Rules shall apply.