article

Best Practices for Maintaining Fairness and Integrity In Arbitration In the Context of a Lapse in Arbitrator Appointment

Mark A. Schwartz

Jonothon Raffensperger

By Mark S. Schwartz and Jonathon Raffensperger

Arbitration clauses in reinsurance contracts routinely include "adverse-selection" provisions pursuant to which a party is permitted to appoint an arbitrator for its opponent if the latter does not do so within a specified time period. In some instances, the party that has failed to timely appoint its arbitrator (the "defaulting party") appears and participates in the arbitration; in others, the defaulting party never shows up. Both scenarios can pose difficult ethical dilemmas for an adversely-selected arbitrator. What can the arbitrator discuss with the party that initially contacted him or her (the "selecting party")? What duties and obligations does the adversely-selected arbitrator owe to the defaulting party? After appointment, can that adversely-selected arbitrator communicate with the selecting party about the case? What should the adversely-selected arbitrator do if the defaulting party asks the arbitrator to withdraw? Can the arbitrator (and the other members of the panel) rely on a hold-harmless agreement where the defaulting party fails or refuses to sign? Can the arbitrator accept fees paid by the selecting party? And, finally, how should the panel conduct the proceedings if the defaulting party never appears to defend itself in the arbitration?

The ARIAS·U.S. Code of Conduct does not directly address most of these issues, but its Canons and Comments provide a useful resource for arbitrators who may be forced to confront them. Indeed, the Code of Conduct stresses, above all else, the requirement that arbitrators "uphold the integrity of the arbitration process" and "conduct the dispute resolution process in a fair manner."[1] By keeping these pronouncements in mind, an adversely-selected arbitrator can likely avoid the pitfalls that might arise when navigating appointment under an adverse-selection clause. Still, even with this general guidance, arbitrators may face difficult questions about how to perform their function in instances where one of the parties has failed to timely appoint its arbitrator, and/or where one of the parties fails to participate in the process. This article outlines what we believe to be the best practices for arbitrators to follow when confronted with these thorny issues.

Communications Regarding Appointment

When an arbitrator is contacted by a party and told that the party's opponent failed to appoint its arbitrator within the timeframe required by the parties' agreement, the candidate should recognize that ethical constraints govern her subsequent conduct. Beginning with that first contact, it is incumbent upon the candidate to act in a way that minimizes the risk of a subsequent challenge to her service or, worse, a motion to vacate an award based on arbitrator impropriety. Among other things, the candidate should, from the outset, maintain the fairness and integrity of the arbitral process by avoiding any discussion about the selecting party's (or its counsel's) view of the merits of the pending dispute, since her appointment, if she does choose to serve, will be on behalf of that party's opponent. At the same time, the arbitrator

candidate must be able to obtain sufficient information about the issues and the parties to make an informed decision about whether she can and should accept the appointment.

While the ARIAS·U.S. Code of Conduct does not speak directly to the issue of the appropriate topics for discussion between an arbitrator candidate and the selecting party in this context, its Canons and Comments do contain guidance on when a candidate should or must decline an appointment.[2] And because all arbitrators – including those nominated after a party invokes an adverse-selection clause – must carefully consider whether conflicts or other factors preclude or advise against service, an arbitrator candidate contacted pursuant to an adverse-selection clause must, at minimum, be permitted to learn certain basic facts about the dispute, and may properly do so by discussing the matter with the selecting party or its counsel.

For example, to confirm that there are no disqualifying conflicts, the potential arbitrator must ascertain the identity of the parties to the dispute, the identity of counsel representing such parties, and the identity of any other individuals or entities that have a substantial interest in the matter.[3] And, to ensure that the candidate believes she can "render a decision based on the evidence and legal arguments,"[4] she must also be permitted to obtain sufficient information about the subject matter of the dispute to make an informed decision about her ability to serve.[5] In addition, if the candidate has a strong view on a specific issue – and particularly if she has published articles or provided expert testimony on the topic – she must carefully consider whether she can serve as a party-appointed arbitrator in a case in which that precise issue is in dispute.[6] In short, to enable the adversely-selected candidate to consider the propriety of accepting the appointment, she should be given enough background information to enable her to make an informed decision.

But, at the same time, the candidate should avoid unnecessary discussion of the merits of the case with the selecting party (and its attorney), and limit *ex parte* communication to the minimum necessary to decide whether to accept the appointment. This is because, once the candidate accepts the appointment, she will proceed as if she had been appointed by the defaulting party. [7] To further limit the potential for a challenge later, the adversely-selected candidate should, where practicable, refrain from oral conversations, and maintain copies of written communications to substantiate, should it become necessary, that all communications regarding her possible appointment have been appropriate.

A properly invoked adverse-selection provision permits a selecting party to appoint the defaulting party's arbitrator, but it should not operate to enable the selecting party to reap additional benefits that might result from substantive communications about the merits of the parties' dispute. An arbitrator candidate who is contacted to serve pursuant to an adverse-selection provision should recognize that, from the moment of first contact by the selecting party, she might ultimately serve as the defaulting party's arbitrator. The arbitrator should obtain whatever information she needs in order to make an informed decision about whether she can and should serve. She should, however, limit her communications with the selecting party and its attorney to those necessary to obtain only that information, and she should refrain from delving any further than necessary into the merits of the parties' dispute.

Post-Appointment Conduct

Once a candidate accepts an appointment made pursuant to an adverse-selection clause, she should operate in all respects as if she had been appointed by the defaulting party. In other words, having accepted the appointment, the arbitrator should, consistent with the terms of the parties' arbitration agreement and any other agreements reached during the proceedings, conduct herself as she would in any other engagement. Thus, with respect to an adversely-selected arbitrator, references in the ARIAS·U.S. Code of Conduct to the "party who appointed" the arbitrator should be interpreted to mean the defaulting party, not the selecting party.[8]

> An arbitrator appointed pursuant to an adverse-selection clause will likely face unique issues not presented when each side selects its own party-appointed arbitrator.

Upon appointment, the adversely-selected arbitrator should promptly contact the defaulting party and inform it of her designation as the party's arbitrator. To avoid undue prejudice resulting from invocation of the adverse-selection procedure, the arbitrator should immediately advise the defaulting party of any upcoming deadlines, including those regarding umpire selection. If the defaulting party agrees to move forward with the arbitration, then the case should proceed as though the adverse-selection clause had not been triggered. However, if the defaulting party either objects to the arbitrator's service or fails to appear and participate in the proceedings, the arbitrator will likely face additional challenges in determining how to proceed. The following sections provide additional guidance for arbitrators faced with these circumstances.

Scenario 1: The Defaulting Party Asks the Arbitrator to Withdraw

A potentially difficult situation may arise if, upon receiving notice that the arbitrator has been appointed on its behalf, the defaulting party objects to the continued service of the adversely-selected arbitrator. Such a scenario can certainly place the arbitrator in an awkward position. Having accepted the appointment, the arbitrator will necessarily have satisfied herself that she is qualified to serve and that she will be able to conduct the proceeding in a fair manner. Nonetheless, the ar-

bitrator may feel uncomfortable continuing to act in the role of party-appointed arbitrator for a party that does not want her to serve and requests her resignation. Although an arbitrator nominally has an unqualified right to resign and cannot be compelled to serve against her will,[9] her acceptance of an appointment acknowledges a duty to see the arbitration through to its conclusion. Once appointed, and absent the existence of contractual or legal requirements to the contrary, the arbitrator should not withdraw or abandon the appointment unless compelled to do so by unanticipated circumstances making it impossible or impracticable to continue.[10]

Thus, absent independent and unforeseen reasons for withdrawal (such as disability, emergence of an unworkable conflict, etc.), an arbitrator who has accepted an appointment made pursuant to an adverse-selection provision should not withdraw simply because the defaulting party requests that she do so. Indeed, acceding to such a request would frustrate the parties' agreement by effectively nullifying the selecting party's contractual right to adverse selection. This conclusion finds support in the ARIAS·U.S. Code of Conduct. Under the Code, ARIAS·U.S. arbitrators undertake an ethical duty to "exert every reasonable effort to expedite the process,"[11] which includes avoiding conduct that would unnecessarily prolong panel selection. Moreover, the Code advises that, at least after the panel has been fully constituted and accepted by the parties, an arbitrator should withdraw in only limited circumstances.[12]

In addition, case law holds that, like other questions arising out of arbitration agreements, questions regarding arbitrator vacancies should be resolved by giving effect to the parties' intent as gleaned from their arbitration agreement.[13] Thus, where an arbitration provision contains an adverse-selection clause, the adversely-selected arbitrator should not take action that would nullify the effect of the parties' intent to permit the non-defaulting party to select its opponent's arbitrator when the clause is properly invoked. In *Wellpoint Health Networks, Inc. v. John Hancock Life Ins. Co.*, 547 F. Supp. 2d 899 (N.D. Ill. 2008), *aff'd* 576 F.3d 643 (7th Cir. 2009), one of the parties procured the resignation of its party-appointed arbitrator *after* the panel had been constituted and *after* the arbitration had proceeded for several years. Although the opposing party contended that the resignation triggered an adverse-selection clause permitting it to select the resigning arbitrator's replacement, the umpire permitted the party that had asked its arbitrator to withdraw to name its own replacement, and the arbitration was tried to resolution. The objecting party then moved to vacate the award, arguing, among other things, that the panel lacked authority to issue the award because the replacement arbitrator had not been selected in accordance with the parties' arbitration agreement.

The district court disagreed. In its analysis, the district court first noted that the arbitration agreement did not "contain any provisions addressing what should occur if a duly appointed arbitrator resigns."[14] Thus, the court looked to the language of the contract to glean the parties' intent. Specifically, the court explained that the agreement permitted each side to choose its own arbitrator, with an adverse-selection mechanism kicking in only upon the failure of a party to name an arbitrator within twenty days of the arbitration demand. According to the court, the agreement "evidences the parties' intent that the arbitration proceed before a panel comprised of one arbitrator chosen by each party and a neutral umpire."[15] Because arbitrator selection was timely in the first instance and because the adverse-selection clause had not been invoked by its terms, the court held that the intent of the parties would be furthered by permitting the party whose arbitrator had withdrawn to select his replacement.[16]

Although *Wellpoint* does not directly address the propriety of the arbitrator's decision to resign at the request of the party that appointed her, the decision does provide some valuable insights on how an adversely-selected arbitrator should respond to a request to withdraw. Arbitration is a creature of contract, and the court's focus in *Wellpoint* was first and foremost on the parties' intent as gleaned from the agreement. As the court found, the clear intent of the parties was "that the arbitration proceed before a panel comprised of one arbitrator chose by each party and a neutral umpire."[17]

By contrast, where a party fails to timely select its arbitrator and one is appointed on its behalf by the opposing party pursuant to an adverse-selection clause, the clear intent of the parties as set forth in the arbitration agreement is for the arbitration to proceed before a panel comprised of two party arbitrators, both chosen by the non-defaulting party, and the neutral umpire they jointly select.[18] If an adversely-selected arbitrator agreed to withdraw for the sole reason that she was asked to do so by the defaulting party, she would frustrate the parties' intent and, specifically, would deny the selecting party its contractual right to select the defaulting party's arbitrator. She should therefore deny such a request and continue to serve despite the defaulting party's objection.

Scenario 2: The Defaulting Party Refuses to Execute a Hold-Harmless Agreement

The difficult issue discussed above can become trickier still if, following the arbitrator's denial of a request to withdraw, the defaulting party refuses to sign a hold-harmless agreement.[19] The parties in a reinsurance arbitration are typically asked to indemnify the arbitrators and hold them harmless for any act or omission in connection with the arbitration, and the arbitrators may require the parties to sign a separate hold harmless/indemnification agreement.[20] Indeed, courts have compelled execution of hold harmless agreements where arbitrators refused to proceed without signature by both parties.[21] However, for several reasons, an arbitrator may decide that she is adequately protected even absent a court order requiring execution of a hold-harmless agreement by both parties to a pending arbitration.

First, as a step less drastic (and less disruptive) than refusing to proceed unless and until both parties sign an agreement to indemnify and hold harmless, the arbitrator can instead require that the selecting party execute a hold-harmless agreement that protects the entire panel. The ARIAS·U.S.form hold-harmless agreement contains such language, providing that:

Both parties further agree *jointly and severally*, to protect, defend, indemnify and hold harmless any and all members of the Panel against any and all expenses, costs and fees of any kind incurred by the members of the Panel, and the payment of their reasonable hourly fees, in connection with any claim, action or lawsuit arising or resulting from or out of this Arbitration.[22]

Such language enables an arbitrator to pursue the party that executed the hold harmless agreement for *all* expenses, costs and fees associated with any lawsuit resulting from the arbitration, even where the other party has refused to sign.[23]

Second, a hold harmless agreement can be at least partially redundant to the extent it simply "codifies (or perhaps, more accurately, solidifies) the immunity accorded to arbitrators as a quasi-judicial body."[24] "Based primarily on the 'functional comparability' of the arbitrator's role in a contractually agreed upon arbitration proceeding to that of his judicial counterpart, the Courts of Appeals that have addressed the issue have uniformly immunized arbitrators from civil liability for all acts performed in their arbitral capacity."[25] Such immunity vests whether objectionable acts are intentional, negligent, or merely erroneous,[26] and applies to all acts done by an arbitrator, "whether proper or improper, unless he acted in the clear absence of jurisdiction."[27]

To be sure, hold harmless agreements can in some instances provide protection and benefits beyond those available based solely on arbitral immunity. Most notably, a properly worded hold harmless agreement not only insulates an arbitrator from liability arising out of his service, but also protects the arbitrator from the costs associated with defending an action against him arising out of that service.[28] Moreover, courts have recognized limits on arbitral immunity that, to some extent, may be contracted around in hold harmless agreements.[29] Thus, to maximize protection against the expense and potential liability arising out of claims stemming from alleged arbitral misconduct, arbitrators are best served by demanding that at least one party execute a hold harmless agreement, and that the executing party agree to be jointly and severally liable as set forth therein.

Scenario 3: The Defaulting Party Refuses to Pay Arbitrator Fees

A similar issue can arise when, following adverse-selection, the defaulting party refuses to pay the adversely-selected arbitrator's fees (or, as discussed below, the defaulting party never appears at all). Assuming the selecting party agrees to pay the adversely-selected arbitrator's fees in the first instance,[30] the arbitrator might question whether she can properly accept fees paid by the selecting party. Again, the Code does not directly address the issue, but its Canons and Comments make clear that all arbitrators, whether adversely-selected or not, must resolve arbitral disputes based on their merits, not based on who is paying their bills. In short, reinsurance arbitrators are to be paid for their service, not for guarantees of favorable awards.

For example, Comment 2 to CANON X provides that "[a]rbitrators shall not enter into a fee agreement that is contingent upon the outcome of the arbitration process."[31] Further, in order to maintain fairness and integrity in the arbitral process, several Canons and Comments prohibit arbitrators from guaranteeing favorable results for the parties that appoint them. CANON II provides that 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."[32] Comment 2 to that Canon provides further guidance: "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."[33] In addition, "[a]rbitrators 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."[34]

> A properly invoked adverse-selection provision permits a selecting party to appoint the defaulting party's arbitrator, but it should not operate to enable the selecting party to reap additional benefits that might result from substantive communications about the merits of the parties' dispute.

Of course, an adversely-selected arbitrator cannot allow the payment of fees by the selecting party to influence her resolution of the parties' dispute. But, so long as the arbitrator abides by the standards discussed above, payment of arbitrator fees by the selecting party should create no ethical issues for the adversely-selected arbitrator.

Scenario 4: The Defaulting Party Never Appears to Defend Itself in the Arbitration

As stated above, once an adversely-selected arbitrator accepts service, she should promptly attempt to contact

the defaulting party about the case. If the defaulting party does not initially respond, the adversely-selected arbitrator should make ongoing efforts, both to ensure that the party has received actual notice of the pending arbitration and to encourage the party to participate. For example, the adversely-selected arbitrator should make reasonable attempts throughout the umpire selection process to engage the defaulting party and encourage that party to provide opinions as to appropriate umpire candidates and strikes. Moreover, after it is constituted, the panel as a whole should take all reasonable steps to ensure that the defaulting party has received actual notice of the pending arbitration. Indeed, such efforts should be made throughout the proceedings. Among other things, the panel should reach out to the defaulting party before the organizational meeting and again before the hearing to advise the defaulting party of these upcoming events. Such efforts should be in writing or, where oral, confirmed in writing, to protect the panel should the defaulting party later claim that it was never notified of the proceedings.

There are, of course, instances in which a defaulting party simply fails or refuses to participate. In such circumstances, the entire panel must take steps to ensure that the arbitration proceeds fairly in the absence of the defaulting party.[35] To ensure fairness and integrity in this context and, more practically, to minimize the potential for a successful challenge later, the panel should not simply grant judgment in favor of the selecting party but should hold an evidentiary hearing in which the selecting party proves its entitlement to the relief being sought.

Indeed, depending on the jurisdiction and body of rules governing the arbitration, an evidentiary hearing might be required. For example, some courts have identified a general rule or principle that "an arbitrator may not issue an award solely on the basis of the default or absence of one of the parties, but must take sufficient evidence from the non-defaulting party to justify the award."[36] Courts have also found a requirement in applicable arbitration rules,[37] court rules,[38] and state insurance regulations that evidence be taken before an award is issued.[39] The Uniform Arbitration Act, to the extent it applies, also requires that an arbitration proceeding *ex parte* hear and decide the controversy "upon the evidence produced."[40] And at least one court has explained that it will not grant an unanswered petition to confirm an *ex parte* award based solely on the losing party's default, holding that the proper standard "is to treat that petition as an unopposed motion for summary judgment," which requires that the court find at least a "barely colorable justification for the outcome reached."[41]

In light of these authorities and, as a practical matter, to facilitate confirmation and avoid potential vacatur of default awards entered in the absence of an evidentiary hearing, the best practice is for the panel to proceed with an *ex parte* hearing in which the selecting party presents its case, even if the defaulting party does not participate. The panel should then issue its ruling based on the evidence presented, making clear in its decision that it invited the defaulting party to participate, that the defaulting party failed to appear, that the selecting party satisfied its burden of proof by presenting a prima facie case, and that the evidence supports the ruling.

Conclusion

An arbitrator appointed pursuant to an adverse-selection clause will likely face unique issues not presented when each side selects its own party-appointed arbitrator. Moreover, the entire arbitration panel will face additional hurdles when a defaulting party not only fails to timely appoint its arbitrator, but fails to participate in the arbitration. By considering the best practices discussed above, arbitrators facing such circumstances should be able to comply with the ARIAS·U.S. Code of Conduct's overarching goal of maintaining the fairness and integrity of the reinsurance arbitration process.

We welcome feedback on the foregoing best practices, so please write in if you have related tips, or contrary views, on how reinsurance arbitrators should conduct themselves in these types of situations.

End Notes

1. *ARIAS-U.S. Code of Conduct* (March 21, 2014), CANONS I and II.
2. Comments 3 and 4 to CANON I provide a non-exhaustive list of circumstances in which a candidate must or should decline an appointment.
3. *Id.,* CANON II, Cmt. 1.
4. *Id.*, CANON I, Cmt. 3.(b).
5. *See id.,* CANON II, Cmt. 1.
6. *See, e.g., id.,* CANON IV, Cmt. 2.(a) ("A candidate for appointment as arbitrator shall ... disclose relevant positions taken in published works or in expert testimony."); CANON II, Cmt. 2 ("Arbitrators ... should refrain from stating a definitive position on any particular issue," and must be able to "decide issues presented in the arbitration objectively.").
7. *See* ARIAS-U.S. Rules for the Resolution of U.S. Insurance and Reinsurance Disputes, § 6.4 ("In the event that either Party fails to appoint an arbitrator within thirty (30) days of commencement of the arbitration, the non-defaulting Party will appoint an arbitrator ***to act as the Party-appointed arbitrator for the defaulting Party.***") (Emphasis added.) *See also* Reinsurance Association of America, Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes, § 6.4 (same).
8. For example, Comment 2 to CANON II of the ARIAS-US Code of Conduct provides that "party-appointed arbitrators may be initially predisposed toward the position of the party who appointed them (unless prohibited by the contract)" but 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." Where an arbitrator is appointed via an adverse-selection mechanism, this permissible initial "predisposition" should be understood to refer to the position of the defaulting party, not the selecting party. *ARIAS-U.S. Code of Conduct*, CANONS II, Cmt. 2.
9. 2 Domke on Com, Arb. § 24:1. *See also Wellpoint Health Networks, Inc. v. John Hancock Life Ins. Co.,* 547 F.Supp.2d 899, (N.D. Ill. 2008) ("It is an arbitrator's prerogative to resign his post if he determines it is in the best interests of the parties to do so.").
10. *See ARIAS-U.S. Code of Conduct*, CANON IV, Cmt. 5.(b) ("In the event that an arbitrator is requested to withdraw by less than all of the parties, the arbitrator should withdraw only when ...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..."); JAMS Ethical Guideline VII (arbitrator should withdraw due to insufficient knowledge of relevant procedural or substantive issues, conflict of interest that has not or cannot be waived, inability to maintain impartiality, physical or mental disability, or if procedural or substantive unfairness appears to have irrevocably undermined the integrity of the proceeding; except where these reasons exist, arbitrator should continue to serve in the matter).
11. *ARIAS-U.S. Code of Conduct*, CANON VII.
12. *Id.*, CANON IV, Cmt. 5. Though Comment 5 to CANON IV is not directly on point (as it speaks to withdrawal *after* a panel has been constituted) the circumstances identified therein provide useful guidance for determining whether it is

appropriate for an adversely-selected arbitrator to withdraw even before the umpire is selected.

13. *See, e.g., Wellpoint Health Networks, Inc. v. John Hancock Life Ins. Co.*, 547 F. Supp. 2d 899, 916 (N.D. Ill. 2008) ("In the absence of an express term in the agreement governing the contingency involved in this case, the Court looks to the general intent of the parties, as evidenced by their agreement."), *aff'd* 576 F.3d 643 (7th Cir. 2009).

14. *Id*. at 914.

15. *Id*. at 916.

16. On appeal, the Seventh Circuit affirmed, holding that the objecting party forfeited any challenge to the replacement by failing to file a petition pursuant to Section 5 of the Federal Arbitration Act. 576 F.3d at 647-48.

17. 547 F. Supp. 2d at 916.

18. *See Universal Reinsurance Corp. v. Allstate Ins. Co.*, 16 F.3d 125 (7th Cir. 1994) (enforcing adverse-selection provision because a panel comprised of two arbitrators selected by the non-defaulting party and an umpire chosen by those two party arbitrators "is *exactly* what Universal agreed to when it signed off on the language permitting Allstate to select a second arbitrator if Universal failed to do so within thirty days.") (emphasis in original).

19. This issue also arises when the defaulting party simply fails to appear to defend itself in the arbitration. That scenario is discussed later in this article.

20. *See, e.g.,* American Arbitration Association, Supplementary Procedures for Resolution of Intra-Industry U.S. Reinsurance and Insurance Disputes, pg. 8 (No. 7).

21. *See Pacific Employers Insurance Co. v. Moglia*, 365 B.R. 863 (N. D. Ill. 2007) (appeal dismissed for want of jurisdiction in *Moglia v. Pacific Employers Ins. Co. of North America*, 547 F.3d 835 (2008)); *Indemnity Ins. Co. of North America v. Mandell,* 817 N.Y.S.2d 223 (N.Y. App. Div. 2006).

22. ARIAS-U.S. form Hold Harmless Stipulation (emphasis added).

23. *See Central Nat. Ins. Co. of Omaha v. Whitehall Construction*, 1988 WL 23789, at *5 (N.D. Ill. March 4, 1998) (where bonds provided for joint and several liability of the surety and the principal to the obligee, failure of principal to sign the bonds has no effect on the liability of the surety); *Tanco, Inc. v. Houston Gen. Ins. Co.*, 38 Colo. App. 133, 136 (Colo. Ct. App. 1976) (same).

24. *Moglia*, 365 B.R. at 866; *see also Mandell*, 30 A.D.3d at 1129 ("[T]he hold harmless agreement demanded by the arbitrators gives them no more protection than they are already entitled to under the prevailing rule that arbitrators are immune from liability for acts performed in their arbitral capacity...").

25. *Austern v. Chicago Bd. Options Exchange, Inc.*, 898 F.2d 882, 886 (2d Cir. 1990).

26. *See Lundgren v. Freeman*, 307 F.2d 104, 117 (9th Cir, 1962).

27. *Larry v. Penn Truck Aids, Inc.*, 94 F.R.D. 708, 724 (E.D. Pa. 1982) (internal quotations omitted).

28. *See Moglia*, 547 F.3d at 836 ("a hold-harmless agreement ... not only forbids suit against the arbitrators (a contractual supplement to the immunity that arbitrators enjoy at common law) but also requires indemnification of arbitrators sued in the teeth of that immunity, should they incur legal expenses to defend themselves") (internal citations omitted).

29. *See generally* Robert M. Hall, Arbitral Immunity at Common Law, ARIAS Quarterly, Third Qtr. 2006.

30. We say "in the first instance" because, in all likelihood, the selecting party would seek to recover any fees it pays to the adversely-selected arbitrator, as well as half of the umpire's fee, as part of the ultimate award.

31. *ARIAS-U.S. Code of Conduct*, CANON X, Cmt. 2.

32. *Id.,* CANON II.

33. *Id.*, Cmt. 2.

34. *Id.*; *see also, e.g., id.,* CANON X ("Arbitrators should make decisions justly, exercise independent judgment and not permit outside pressure to affect decisions.").

35. There is no real question that a panel may hear and decide the case notwithstanding the failure of a party to appear as long as that party was duly notified and the arbitration agreement and/or applicable rules or statutes permit it. *See, e.g., Capozio v. American Arbitration Association,* 490 A.2d 611, 618 (D.D.C. 1985) (upholding arbitration award issued on an *ex parte* basis where the defaulting party was properly notified and the arbitration agreement incorporated the AAA rules.). And while Section 4 of the FAA provides that an aggrieved party may initiate court proceedings to compel a defaulting party to arbitrate, 9 U.S.C.A. § 4, courts have consistently held that this procedure is permissive and not mandatory. *See Amalgamated Meat Cutters and Butcher Workmen of N.A. v. Penobscot Poultry Co.*, 200 F. Supp. 879, 882-83 (D. Maine 1961) (citing multiple court of appeals decisions in which "the court held that the terms of Section 4 of the Arbitration Act were permissive and not mandatory, and that it was not necessary for the aggrieved party to initiate court proceedings under Section 4 before proceeding to arbitration in accordance with the terms of its contract.").

36. *See, e.g., Hernandez v. Gaucho*, 2013 WL 951145, at *3 (Mich. Ct. of App. Feb. 19, 2013).

37. *See, e.g., Medicine Shoppe Intern., Inc. v. Prescription Shoppes, LLC*, 2015 WL 901457, at * (E.D. Mo. Mar. 3, 2015) (holding that "under Rule 15 of the USA&M Arbitration rules, when one party defaults an award may be made in the absence of that party *provided the non-defaulting party submits evidence supporting its claims*.") (emphasis added); American Arbitration Association Commercial Arbitration Rules and Mediation Procedures, R-31 ("An award shall not be made solely on the default of a party. The arbitrator shall require the party who is present to submit such evidence as the arbitrator may require for the making of an award.").

38. *See, e.g., Harmer v. Reynaud*, 2004 WL 2223046, at *10 (Cal. Ct. App. Oct. 5, 2004) (noting that, pursuant to the California Rules of Court, "[i]n the event of a default by defendant, the arbitrator shall require the plaintiff to submit such evidence as may be appropriate for the making of an award.").

39. *See, e.g., Transamerica Ins. Co. v. Kemper Ins. Co.*, 79 A.D.2d 69, 72 (4th Dept. 1981) (holding that New York regulations governing mandatory arbitration "do not give the arbitrators authority to default a party...").

40. Unif. Arbitration Act (2000) § 15 (c).

41. *Trustees of New York City Dist. Council of Carpenters Pension Fund v. Metropolitan Fine Mill Work Corp.*, 2015 WL 2234466, at *3-4 (S.D.N.Y. May 12, 2015). *See also Trustees of New York City Dist. Council of Carpenters Pension Fund v. Anthony Rivara Contracting LLC*, 2014 WL 4369087, at *3 (S.D.N.Y. Sept. 3, 2014) (noting that "[t]he arbitrator's opinion reflects a considered judgment, reached after reviewing the substantial and credible evidence submitted by the petitioners.").

◆

Mark A. Schwartz

Mark Schwartz concentrates his practice in complex commercial litigation and reinsurance litigation and arbitration. He has represented clients in a variety of commercial litigation matters, ranging from contract disputes involving restrictive covenants, allegations of breach of contract and fiduciary breach, and defense of legal malpractice claims. He has prosecuted cases involving allegations of widespread fraud, and is currently defending an insurance company in a high stakes coverage dispute. In his reinsurance practice, Mark has litigated and arbitrated issues related to allocation, bad faith, misrepresentation and non-disclosure, claim handling, and agency. Illinois Super Lawyers named Mark as a Rising Star in 2011 and 2012 and he was named as a leader in business litigation in 2013-2015.

Jonathon Raffensperger

Jonathon Raffensperger is a litigation associate and focuses his practice on complex commercial litigation. Jon has represented clients in state and federal court, and has trial experience that includes witness preparation, outlining direct and cross examination, and drafting dispositive motions and responses. He also has significant pretrial litigation experience that includes taking, assisting in and preparing for depositions, drafting and arguing discovery motions, drafting dispositive motions and motions in limine, and conducting all aspects of written discovery.