SECURITIES ARBITRATION ALERT 2020-36 (9/23/20)

George H. Friedman, Editor-in-Chief

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DID YOU KNOW?

- **Senate Judiciary Committee Has Its Own Webpage**

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THE PASSING OF A GIANT. *We close out the quarter with the sad news of the passing of Supreme Court Justice Ruth Bader Ginsburg at age 87. As described by the Court's Press Release, Justice Ginsburg was appointed by President Clinton in 1993 and served more than 27 years. She was the second woman appointed to the Court. Any*

attempt to describe her many accomplishments would be feeble, but we encourage readers to peruse the Court's Webpage for more on her rich history. As detailed in this week's "Did You Know" section, any nomination will go through the Senate Judiciary Committee, which has its own Webpage at https://www.judiciary.senate.gov/. We expect President Trump will submit his nomination to fill the vacancy during our off-week. We will report on that nominee's arbitration views (if any) when we return.

ALERT! NO *ALERT* NEXT WEEK. *It's the end of another calendar quarter, so we will be taking our customary break in publishing the* Securities Arbitration Alert *as September comes to a close. This week's* Alert *is a bit heftier than usual as a result. Look for the next edition of the* SAA *in your e-mailbox the week of October 4. In the meantime, follow us @SecArbAlert and sign up for updates on our weekly blog posts. Or, take a look at our publisher and Editor-in-Chief George Friedman's short virtual interview with Professor Amy Schmitz of the University of Missouri School of Law and the Center for Dispute Resolution. The interview was part of her podcast series, "The Arbitration Conversation: Interviews the Leading Minds in Arbitration," hosted by www.arbitrate.com. We've also blogged about it.*

SQUIBS: IN-DEPTH ANALYSIS

THIRD CIRCUIT: FAA IS CLEAR – QUESTIONS ABOUT "THE MAKING OF THE AGREEMENT TO ARBITRATE" ARE FOR THE COURTS ABSENT "CLEAR AND UNMISTAKABLE" EVIDENCE OF DELEGATION. ***Relying on Federal Arbitration Act ("FAA") section 4 to answer the "queen of all threshold questions," the Third Circuit joins several other Circuits in adopting the view that courts retain "primary power to decide questions of whether the parties mutually assented to a contract containing or incorporating a delegation provision."*** *MZM Construction Management Co., Inc. v. NJ Building Labor Statewide Benefit Funds*, Nos. 18-3791 & 19-3102 (3rd Cir. Sep. 14, 2020), was an appeal of a lower court ruling regarding the existence of an agreement to arbitrate when "the putative agreement includes an arbitration provision empowering an arbitrator" to decide whether that agreement exists.

Complex Facts, But Stay With Us

Appellants, ("the Funds"), and Defendants, ("MZM"), signed a short-form agreement ("SFA") in **2002** that bound the parties to a collective bargaining agreement ("CBA"). Under the CBA, employers were required to make contributions to the Funds in accordance with the "applicable trust agreement." The agreement was to remain in effect until **April 2007** and would "automatically self-renew on a 'year-to-year' basis" unless terminated by one of the parties." Between **2001** and **2018**, MZM remitted over $500,000 in contributions. Under the CBA, the Funds had the authority to "audit the books of contracting employers to validate all required contributions have been made." The Funds audited the books of MZM between October 2014 and September 2017. The audit determined that MZM owed $230,000 in contributions for that time period. When MZM questioned the basis for "the alleged liability" the Funds pointed to the SFA, and the unsigned 2002 CBA. The Funds informed MZM that if it did not pay, the Funds would

submit the collection dispute to arbitration, which the Funds then unilaterally scheduled to begin in November 2018.

District Court Enjoins Arbitration
MZM filed a complaint against the Funds in District Court in order to enjoin arbitration. MZM also sought declaratory judgment that it was not a signatory to the CBA, that it had no obligation to arbitrate under the CBA, and that it was not liable to the Funds under the CBA. The District Court enjoined arbitration and denied the Funds' motion to dismiss the declaratory judgment. The Funds appealed both those rulings and the Court consolidated the cases.

Third Circuit Agrees
In this decision, the Court looks not to the merits of MZM's claim but addresses the three antecedent rulings made by the District Court that the Funds challenged. Those three rulings are "(i) the court has the primary power to decide questions about the formation of an arbitration agreement, (ii) MZM put the formation of the relevant arbitration agreement in issue by stating a claim of fraud in the execution, and (iii) genuine issues of fact need to be explored in discovery before resolving that claim."

FAA Leans Toward Arbitration Agreement Enforcement…
The first ruling concerns the threshold issue, "whether the District Court has the power to resolve questions about the formation or existence of a contract when the putative contract includes a provision delegating 'the authority to decide whether an Agreement exists' to the arbitrator." The Court looked to its ruling in *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99, 104 (3d Cir. 2000), stating that the *FAA* "establishes a strong federal policy in favor of compelling arbitration over litigation." The Court goes on to state that the Supreme Court has "steadily advanced this policy by guarding against unwarranted judicial interference with arbitration." The Court then looks to the "severability doctrine," established by the Supreme Court in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406 (1967) and cited in *Sandvik*. SCOTUS held in *Prima Paint* that "an arbitration clause is 'severable' and independently enforceable from the rest of the contract in which it is contained." The Supreme Court further stated that the party opposing arbitration must "challenge 'the arbitration clause itself.'"

… But There Are Limits
However, the Court states that "without an agreement to arbitrate, there can be no arbitration." The Court looks to the language of the *FAA*, *9 U.S.C. § 4* which provides "that a federal court must compel arbitration 'upon being satisfied that the making of the agreement for arbitration . . . is not in issue.'" The Court further held in *Sandvik* that this provision "'affirmatively requires' a court to decide questions about the formation or existence of an arbitration agreement, namely the element of mutual assent." Based on the Supreme Court rulings and the language of the *FAA*, the Court finds that "when a person rightfully resists arbitration on grounds that it never agreed to arbitrate at all," "it can hardly be said that contracting parties clearly and unmistakably agreed to have an arbitrator decide the existence of an arbitration agreement." The Court reaffirms its

previous decision in *Sandvik* and holds "unless the parties clearly and unmistakably agreed to arbitrate questions of contract formation in a contract whose formation is not in issue, those gateway questions are for the courts to decide."

On the second issue, the Court holds that MZM did state a claim of fraud in the execution of the container contract, which allowed the District Court to adjudicate the claim. Had the claim been one of fraud in the inducement, which is how the Funds attempted to characterize MZM's claim, the claim would have been submitted to the arbitrator rather than the court. Finally, the Court holds that the District Court properly authorized limited discovery on the issue of the formation of the arbitration agreement "to resolve the narrow issue for purposes of deciding whether to submit the matter to arbitration."
(ed.: This Squib was authored by Theodore Ryan, a 3L at St. John's School of Law. He is the Managing Editor of the New York International Law Review at St. John's.)
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FIFTH CIRCUIT APPLIES "LOOK THROUGH" STANDARD TO REMOVAL OF CASE SEEKING TO VACATE FINRA AWARD UNDER FAA. ***The Fifth Circuit holds that the District Court was correct when it applied the "look through" standard to determine that it had jurisdiction to remove a State Court action to vacate an Award.*** A FINRA Panel rendered an Award denying AP Badgerow's claims against Ameriprise and three "franchise advisors," triggering a Petition to vacate in a Louisiana Trial Court. The Respondents then removed the case to federal court. Thereafter, the District Court found it had jurisdiction and later confirmed the Award, finding no fraud in its procurement as Badgerow had alleged. At issue in *Badgerow v. Walters*, No. 19-30766 (5th Cir Sep. 15, 2020), was whether the District Court acted properly in determining it had federal subject matter jurisdiction to support removal.

"Look Through" Standard Under FAA Section 4 Motions to Compel
Although the FAA does not confer federal subject matter jurisdiction, the Supreme Court in *Vaden v. Discover Bank*, 556 U.S. 49 (2009), held that jurisdiction over an FAA section 4 petition to compel arbitration is determined by the nature of the underlying dispute. This was based on FAA section 4 language providing that a motion to compel arbitration can be brought in "any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties." The *Vaden* standard became known as the "look through" test.

Majority of Circuits Extend the Standard to Award Confirmation
Over the years, a majority of Circuits considering the question (First, Second, Fourth, and Fifth) have extended the "look through" standard to post-award motions to confirm or vacate/modify. See, for example, *Doscher v. Sea Port Group Securities, LLC*, 832 F.3d 372 (2d Cir. 2016), where the Second Circuit extended *Vaden*'s "look through" jurisdictional test to motions to confirm (FAA section 10) or modify (FAA section 11) Awards. The Third and the Seventh Circuits have adopted a contrary view, limiting the

look-through standard to actions to enforce PDAAs. See, for example, *Goldman v. Citigroup Global Markets Inc.*, 834 F.3d 242 (3d Cir. 2016).

Applying the "Look Through" Standard to Removal
Applying the "look through" test to the underlying FINRA arbitration, the Court finds that the District Court had federal subject matter jurisdiction to support removal of the vacatur action filed in State Court. Says the unanimous Opinion: "Applying the look-through analysis, we have held, first, that the district court correctly found that Badgerow's Title VII declaratory judgment claim against Ameriprise in the FINRA arbitration was a federal-law claim. We have held, second, that all of Badgerow's claims against the Principals and Ameriprise in the FINRA arbitration arose from the same common nucleus of operative fact, and that under the principle of supplemental jurisdiction, federal jurisdiction obtains over Badgerow's state-law tortious interference and whistleblower claims. The district court therefore properly held that Badgerow's federal claim against Ameriprise in the FINRA arbitration invested federal jurisdiction over Badgerow's Louisiana petition to vacate the FINRA arbitration award as to the Principals."
*(ed: *Makes sense to us. **Only the jurisdictional issue was before the Fifth Circuit, "not in any instance, the merits of the confirmation of the FINRA arbitration dismissal award.")*
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UNANIMOUS NJ SUPREME COURT REINSTATES PDAA NOT NAMING AN ADR PROVIDER. ***An employment arbitration agreement that didn't name an ADR provider was still valid and enforceable, the New Jersey Supreme Court holds unanimously.*** *Atalese v. U.S. Legal Services Group L.P.*, 219 N.J. 430 (2014), *cert. den.* 540 U.S. 938 (2015), tells us that, to be enforced in New Jersey, a predispute arbitration agreement ("PDAA") must contain a clear, unambiguous waiver of the right to a jury trial. Recall that in SAA 2018-41 (Oct. 31) we reported on *Flanzman v. Jenny Craig, Inc.*, 456 N.J. Super. 613 (App. Div. 2018), where the Court deemed unenforceable a PDAA in an employment contract that clearly waived access to court but did not specify the arbitration forum. The predispute arbitration agreement ("PDAA") in question provided: "Any and all claims or controversies arising out of or relating to Employee's employment, the termination thereof, or otherwise arising between Employee and Company shall, in lieu of a jury or other civil trial, be settled by final and binding arbitration." The unanimous Appellate Division said: "The failure to identify in the arbitration agreement the general process for selecting an arbitration mechanism or setting -- in the absence of a designated arbitral institution like AAA or JAMS -- deprived the parties from knowing what rights replaced their right to judicial adjudication."

Reversal on Appeal
On appeal, a unanimous New Jersey Supreme Court reverses in No. A-66-18 (Sep. 11, 2020). Why? Says Justice **Anne Patterson**'s Opinion: "As did Congress in the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1 to 16, the New Jersey Legislature adopted a policy in favor of arbitration in the New Jersey Arbitration Act (NJAA), N.J.S.A. 2A:23B-1 to -

36. The NJAA, which provides a default procedure for the selection of an arbitrator and generally addresses the conduct of the arbitration, clearly expresses the Legislature's intent that an arbitration agreement may bind the parties without designating a specific arbitrator or arbitration organization or prescribing a process for such a designation."

***Atalese* Standard Satisfied …**
The Court rejects specifically the argument that the PDAA failed the standard articulated in *Atalese*. How? "The Agreement clearly and unmistakably informs the parties that for '[a]ny and all claims or controversies arising out of or relating to [Flanzman's] employment, the termination thereof, or otherwise arising between' Flanzman and JC USA, 'final and binding arbitration' will take the place of 'a jury or other civil trial.' Although the Agreement provides only a general concept of the arbitration proceeding that would replace a judicial determination of Flanzman's claims, it makes clear that the contemplated arbitration would be very different from a court proceeding" (brackets in original).

… And FAA and NJ's Arbitration Statute Cure the Problem
We noted in our analysis in #2018-41 that the Appellate Division's Opinion didn't mention Federal Arbitration Act section 5, which allows the court to designate an arbitrator if the agreed-upon method fails. The New Jersey Supreme Court, however, addresses this matter head-on: "As did Congress when it enacted 9 U.S.C. § 5, the Legislature ensured in the [New Jersey Arbitration Act] that a court can act when the parties have not agreed on a specific arbitrator or designated a method of choosing an arbitrator, or when an agreed upon selection process has failed.... N.J.S.A. 2A:23B-11(a)."
(ed: We're detecting a pro-arbitration shift by this Court, which seems to be bracketing Atalese*'s reach. Recall that we analyzed in SAA 2020-32 (Aug. 26)* Skuse v. Pfizer, Inc.*, No. A-86-18 (NJ Aug. 18, 2020). There, a somewhat divided NJ Supreme Court – citing* Atalese *– held that an arbitration agreement announced and "acknowledged" by email to employees was valid and enforceable because it adequately explained that continuing employment would constitute assent to the Agreement's terms, including arbitration.)*
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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

FINRA SUBMITS RULE FILING ESTABLISHING A SPECIAL PANEL FOR EXPUNGEMENTS. We reported in SAA 2019-38 (Oct. 9) that FINRA's Board of Governors in **September 2019** approved a dispute resolution rulemaking proposal to create a special arbitrator roster for certain expungement requests. The post-meeting memo to firms from President and CEO **Robert W. Cook** reported that the Board: "approved proposed amendments to the *Codes of Arbitration Procedure* to create, among other things, a roster of arbitrators with enhanced training and experience from which a panel would be selected in certain instances to decide an associated person's request to expunge customer dispute information. The proposed amendments will next be filed with the SEC." We later reported in SAA 2020-35 (Sep. 16) that, speaking **September 10** at the Practising Law Institute's annual securities arbitration seminar, FINRA Dispute

Resolution Services' Executive Vice President **Richard W. Berry** said that the proposed rule changes would be filed "very soon" and before end of September. True to its word, FINRA on **September 22** filed with the SEC SR-FINRA-2020-030, *Proposed Amendments to the Codes of Arbitration Procedure Relating to Requests to Expunge Customer Dispute Information, Including Creating a Special Arbitrator Roster to Decide Certain Expungement Requests*. What are the specifics? The proposed rule change would amend the *Codes* to: "(1) impose requirements on expungement requests (a) filed during an investment-related, customer initiated arbitration ('customer arbitration') by an associated person, or by a party to the customer arbitration on-behalf-of an associated person ('on-behalf-of request'), or (b) filed by an associated person separate from a customer arbitration ('straight-in request'); (2) establish a roster of arbitrators with enhanced training and experience from which a three-person panel would be randomly selected to decide straight-in requests; (3) establish procedural requirements for expungement hearings; and (4) codify and update the best practices of the *Notice to Arbitrators and Parties on Expanded Expungement Guidance* (*Guidance*) that arbitrators and parties must follow. In addition, the proposed rule change would amend the *Customer Code* to specify procedures for requesting expungement of customer dispute information arising from simplified arbitrations. The proposed rule change would also amend the *Codes* to establish requirements for notifying state securities regulators and customers of expungement requests" (footnote omitted) Comments will be due 21 days after the filing is published in the *Federal Register*. Check here for updates.
*(ed: *Recall that, in keeping with the "new normal" when it comes to rulemaking, the Board previously authorized staff to publish what became Regulatory Notice 17-42,* FINRA Requests Comment on Proposed Amendments to the Codes of Arbitration Procedure Relating to Requests to Expunge Customer Dispute Information. *The comment period ended February 2018. The massive rule filing responds to the comments. **We will do a more thorough analysis in the next* Alert.*)*
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FINRA DRS POSTS STATS THRU AUGUST: *STILL* NO "COVID CRASH" SURGE IN CUSTOMER CLAIMS, BUT INDUSTRY DISPUTES *STILL* WAY UP. AND CASES ARE PILING UP. FINRA Dispute Resolution Services ("DRS") posted case statistics through **August**, with past trends persisting. The headlines are: 1) while overall arbitration filings are up 2%, customer claims are now down 19%; 2) industry disputes remain up (plus 43%); and 3) pending cases are piling up. Industry claims remain almost half (49%) of all new filings. Overall arbitration turnaround times were 15.1 months, with hearing cases taking 14.2 months. There were 283 mediation cases in agreement, a 24% decrease. The settlement rate remains extremely high at 82%. There are now 7,953 DRS arbitrators, 3,740 public and 4,213 non-public; these figures are down slightly across the board for the second month in a row. Last, FINRA's new "Virtual Arbitration Hearings" category shows that through August: 45 cases were conducted with one or more hearings via Zoom (19 customer and 26 industry). There were 63 joint motions for virtual hearings (15 customer and 48 industry cases).
*(ed: *As we've said many times before, while there is no sustained pandemic-induced surge yet in customer disputes, such claims usually take a while to develop. If past is*

*prologue, customer cases will surge in the fall. Either that, or we're wrong. **As we've said before, we expect there will be a flurry of under-the-wire expungement requests ahead of the effective date of the mid-September expungement fee increases. Unfortunately, we won't be able to verify that, because FINRA-DRS does not break out expungement claims in its (otherwise) comprehensive monthly statistical reports. We do note that intra-industry disputes are still way up so far this year, and increased by a healthy amount in August. ***We said in SAA 2020-27 (Jul. 22): "Looks to us like the pending cases count is going up, most likely because parties in a number of cases are awaiting resumption of in-person hearings." We tested out that theory after the June stats come out and again after the latest stats were posted. The chart below seems to bear out our theory, with a hefty jump in August:*

Month	Open Cases	Increase	Cum. Increase
Mar	4,781	-	-
Apr	4,824	43	43
May	4,897	73	116
June	4,958	61	177
July	5,062	104	281
August	5,415	353	634

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FINRA'S BOARD MET VIRTUALLY RECENTLY. NO DISPUTE RESOLUTION ITEMS BUT ONE ITEM OF INTEREST TO OUR READERS. As reported in SAA 2020-34 (Sep. 9), FINRA's Board of Governors met virtually **September 9 - 10**. The Agenda showed no dispute resolution-related items, and the results posted **September 18** by Press Release confirm this. As reported in #34, however, there was a regulatory rulemaking proposal of interest. FINRA now reports that: "The Board approved the filing with the SEC of proposed amendments to FINRA Rule 1010 (Form U4 Filing Requirements) to permit firms to obtain an electronic signature on the Uniform Application for Securities Industry Registration or Transfer (Form U4) and a conforming amendment to FINRA Rule 2263 (Arbitration Disclosure to Associated Persons Signing or Acknowledging Form U4)."
*(ed: *Although some rule change proposals are floated in a Regulatory Notice seeking comments, this one seems to be going right to a 19b filing with the SEC. **The Board will meet next on Dec. 2-3.)*
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NEW EXCHANGE LAUNCHED. FINRA *CODES OF ARBITRATION PROCEDURE* ADOPTED. The Members Exchange ("MEMX"), a "market operator founded by members to benefit all investors," began operations as an equity market on **September 21**. According to a Press Release: "MEMX will initially offer live trading in seven symbols before progressing to Phase Two of its rollout, in which it will trade all

National Market System (NMS) listings. The initial seven securities are Acasti Pharma Inc. (ACST), Alphabet Inc. (GOOG), BlackBerry Ltd. (BB), Consolidated Edison Inc. (ED), Exxon Mobil Corporation (XOM), Ford Motor Co. 6.20% Notes Due June 1, 2059 (F-B), and the iShares Ultra Short-Term Bond ETF (ICSH)." Chapter IX of the Rules incorporates by reference the FINRA *Codes of Arbitration Procedure*.
(ed: The "Other Exchanges Using FINRA's Forum" part of the FINRA Webpage has not yet been updated.)
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ELEVENTH CIRCUIT PANEL "UNVACATES" FINRA AWARD: THERE ARE NO MULLIGANS IN ARBITRATION. There's a classic scene in the movie *A League of Their Own* where manager Tom Hanks says to a tearful female baseball player: "There's no crying in baseball!" Borrowing a page from that script, a split Eleventh Circuit panel holds that there are no "mulligans" (golfing term for a do-over) in arbitration. We let the majority's eloquent words in *Gherardi v. Citigroup Global Markets, Inc.*, No. 18-13181 (11th Cir. Sep. 17, 2020), speak for themselves: "[Broker and investment adviser] Christian Gherardi won a substantial arbitration award against his former employer, Citigroup Global Markets. Unhappy with its loss, Citi sought vacatur in federal court. Citi argued that because Gherardi had been an at-will employee, the arbitrators exceeded their powers by finding that he had been wrongfully terminated. The district court agreed. Gherardi's appeal presents two questions of contract interpretation. First, did the parties agree to arbitrate wrongful termination disputes? Second, was Gherardi a purely at-will employee, or did some provision in his agreements with Citigroup offer a way to contest his treatment? Our answer to the first, much easier question relieves us of the need – and the authority – to answer the second question. Citi and Gherardi agreed to arbitrate *all* disputes about Gherardi's employment. Under the Federal Arbitration Act, the merits of Gherardi's dispute were thus committed to the arbitrators. Citi does not get a mulligan in federal court because it identifies a possible legal error in arbitration. No doubt this is a tough rule, but it applies to employer and employee alike. The district court erred by substituting its own legal judgment for that of the arbitrators. We reverse its vacatur of the award" (emphasis in original).
*(ed: *Judge Martin dissents because the Arbitrators "awarded Mr. Gherardi compensatory damages for wrongful termination, which is not a form of relief available to at-will employees…. Here, the actions of the Arbitrators flatly contradicted the express language of a contract between these parties." **We're with the majority. There's also no second-guessing in arbitration. ***The nearly $4 million Award rendered by the Majority-Public panel in Gherardi Citigroup Global Markets, Inc., FINRA ID No. 16-01001 (Miami, FL Feb. 28, 2018), can be viewed here.)*
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UNEXPLAINED EXPUNGEMENT DENIAL VACATED AS "EXCEEDING POWERS." The underlying arbitration was brought by AP Stanczak against Robert W. Baird & Co., Inc. ("Baird"), seeking expungement of a Customer complaint and $1 in compensatory damages (later dropped). His core argument? FINRA "dinged" his CRD record, even though: 1) he was not involved in the underlying sales practice violation;

and 2) the prior Award against Baird in *Tobel v. Robert W. Baird & Co., Inc. et al,* FINRA ID No. 12-01900 (Southfield, MI June 10, 2014), did not name Stanczak as a party or refer to his conduct. Neither Baird nor the involved customers participated in the expungement arbitration, which was conducted by telephone. The sole Public Arbitrator, without citing the Rule 2080 ground(s) upon which expungement was sought or explaining the basis for his decision, rendered an Award in *Stanczak v. Robert W. Baird & Co., Inc.*, FINRA ID No. 18-04331 (Detroit, MI Jul. 23, 2019), denying the request for expungement and $1 in damages (*ed: yes, we know we said it had been withdrawn*). Stanczak then moved to vacate the Award, naming FINRA as an additional defendant. The Trial Court in *Stanczak v. Robert W. Baird & Co., Inc. and FINRA,* No. 19-885-CB (Mich. Cir. Ct. undated) issues an Order vacating the Award: "The Court finds that Stanczak has met his burden for this Court to review the arbitrator's award by showing that the arbitrator [sic] process prejudiced Stanczak's rights and/or the arbitrator exceeded his or her powers. The arbitrator denied Stanczak's request for expungement without citing any factual or legal reasons for the denial. Furthermore, the arbitrator made a ruling on damages, even though the damages claim was withdrawn by Stanczak's counsel during the hearing." The Court directs FINRA to convene a new Panel to rehear the case.
*(ed: *We can see why the Award was a head-scratcher for the Court, although a close reading of FINRA Rule 12805 shows that it requires an explanation of the basis for the expungement request "in order to grant expungement…." Here, of course, expungement was denied. **The date of the Court Order is not legible.)*
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SECURITIES EXPERTS ROUNDTABLE PUBLISHES LATEST NEWSLETTER. The latest issue of the Securities Experts Roundtable's ("SER") periodic newsletter, *The Expert's Examiner ("TEE"),* covering **May – August**, hit the electronic newsstand recently. This free, link-rich publication, which can be found on the landing page of the organization's Website, offers a wealth of information on financial services arbitration and ADR in general. Among the regular features are: **Recent News from the Arbitration Front; Expert Opinions: What are the Courts Thinking?; Comment Letters, Speeches, and Testimony;** and **Statistics, Events & Resources.** Content is provided by the Roundtable's members; the *Alert* is also a content contributor. Signup is available online. The non-profit SER, which was founded in 1992, is: "a group of professionals with significant experience as testifying and consulting experts in securities, business and investment-related litigation."
*(ed: *The* TEE *is a wonderful resource for the arbitration bar. **Full disclosure: SAA's publisher George Friedman is an active member of the SER.)*
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QUICK TAKES: CASES AND AWARDS WORTH READING

***Moritz v. Universal Studios, Inc*., No. B299083 (Calif. Ct. App. 2 Sep. 2, 2020)**: Appellants contend the court erred by deciding whether the Hobbs & Shaw dispute was arbitrable under the arbitration agreements contained in the Fast & Furious [FF] contracts, as those agreements are valid and binding on all parties and delegate the

question of arbitrability to an arbitrator. We disagree, and therefore affirm…. Here, the parties agreed to arbitrate 'any controversy, claim, or dispute arising out of or relating to' the FF6 and FF7 agreements. But the Hobbs & Shaw dispute neither arises from nor relates to the FF6 or FF7 agreements."

***Credit Suisse Securities (USA) v. Galli*, No. 2020-0709-BLS 2 (Mass. Super. Aug. 31, 2020)**: The Court declines to disturb a FINRA Majority Public Panel's Award in *Galli* v. *Credit Suisse Securities (USA)*, FINRA ID No. 17-01489 (Boston, MA Feb. 14, 2020), of over $400,000 in attorneys' fees to the broker/former employees. Says Superior Court Judge **Janet Sanders:** "Credit Suisse placed the issue of fees before the panel, and cannot now be heard to complain that the arbitrators exceeded their powers." (*ed: An SAA h/t to Brian Neville, Esq., of Lax and Neville, for letting us know about the decision. The firm represented the APs.)*

***Matthews v. Taylor Capital Management Inc.*, FINRA ID No. 19-00350 (Charlotte, NC, Sep. 11, 2020):** After severing her claims against a broker in order to pursue a default judgment, a customer wins $258,000 in compensatory and punitive damages and attorney fees against the broker's employer. The fact that the broker-dealer did not appear for the hearing no doubt helped to seal its fate. *Submitted by Harry Jacobowitz, Esq. He can be reached at harryjacobowitz@optimum.net.*
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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Wilske, Stephan, *The Impact of COVID-19 on International Arbitration—Hiccup or Turning Point?* Contemporary Asia Arbitration Journal, Vol. 13, No. 1, pp. 7-44 (May 2020): "COVID-19 had an immediate and significant impact on the practice of international arbitration. Nevertheless, arbitral institutions, arbitral tribunals, counsel and other participants learned quickly how to deal with this new challenge. The crucial question is whether there will be long-term impacts by these COVID-19 experiences on international arbitration even once this pandemic is over. The spontaneous and probably correct answer would be 'Yes'. Most probably, more elements of a typical arbitration that were based on physical presence will from now on occur contactless, i.e. in virtual reality. However, it is not only helpful but also necessary to identify which elements of international arbitration could easily take place in virtual reality and for which elements physical presence is and remains desirable or maybe even indispensable. In the end, COVID-19 will most probably speed up processes aimed at more efficiency that had already commenced prior to the outbreak of COVID-19, but will not change the core elements of international arbitration, i.e. the search for impartial and independent and -- hopefully in most cases fair and just -- decision-making in cross-border disputes through a voluntary and flexible process."

***Raymond James Lays Off More Than 500 Employees*, Advisorhub.com (Sep. 15, 2020)**: "Raymond James Financial on Tuesday said it is laying off close to 4% of its employees, or about 500 people, in response to the coronavirus-induced economic slowdown."

***Judge Upholds Award of Attorneys' Fees to Brokers Who Left CS for UBS*,** **AdvisorHub.com (Sep. 16, 2020)**: "Credit Suisse has lost another attempt to overturn an arbitration decision awarding millions of dollars in deferred compensation and fees to brokers who defied its plan to have them join Wells Fargo Advisors after the Swiss bank's 2015 decision to close its U.S. brokerage business. This time it was the brokers' lawyers who were the winners. Massachusetts Superior Court Judge Janet Sanders on August 31 refused to modify or vacate a FINRA arbitration panel's award of $1.6 million in compensatory damages, more than $83,000 in costs and almost $411,000 in attorneys' fees to four Boston brokers who joined UBS five years ago."

***Credit Suisse Defeats Arbitration Appeal in Compensation Suit*, Bloomberg Law (Sep. 18, 2020)**: "Credit Suisse Securities USA successfully defended a district court order compelling arbitration of individual claims in a proposed class action brought by a former financial adviser claiming the investment bank cheated him and other former employees out of contractually owed deferred compensation. The U.S. Court of Appeals for the Ninth Circuit affirmed on Friday the conclusion that the class action waiver included under the Employee Dispute Resolution Program agreed to by plaintiff Christopher M. Laver and other financial advisers was enforceable." (*ed: We covered in SAA 2018-25 (Jun. 27) the case below*, Laver v. Credit Suisse Securities (USA) LLC, *2018 WL 3068109 (N.D. Cal 2018), and we will cover in the next* Alert Laver v. Credit Suisse Securities (USA), LLC, *No. 18-16328 (9th Cir. Sep. 18, 2020).*)

***FINRA Advances Rules on Senior Exploitation, E-Signatures*, ThinkAdvisor (Sep. 18, 2020)**: "The Financial Industry Regulatory Authority's board has approved two rule proposals on financial exploitation of seniors and e-signatures. At its September meeting, the board approved publishing a Regulatory Notice soliciting comment on proposed amendments to FINRA Rule 2165 (Financial Exploitation of Specified Adults). The plan would permit extending the hold period in a case of suspected fraud if the member firm had reported the matter to a state regulator or agency or a court of competent jurisdiction; and placing temporary holds on transactions in securities when there is suspected financial exploitation…. As to e-signatures, the board approved filing with the Securities and Exchange Commission proposed amendments to FINRA Rule 1010 (Form U4 Filing Requirements) to permit firms to obtain an electronic signature on the Uniform Application for Securities Industry Registration or Transfer (Form U4)…."

***SEC Charges Index Manager and Friend With Insider Trading*, www.sec.gov (Sep. 21, 2020**): "The Securities and Exchange Commission today charged Yinghang 'James' Yang, a senior index manager at a globally recognized index provider, and his friend Yuanbiao Chen, a manager at a sushi restaurant, with perpetrating an insider-trading scheme that generated more than $900,000 in illegal profits."
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DID YOU KNOW?

SENATE JUDICIARY COMMITTEE HAS ITS OWN WEBPAGE. We're pretty sure there will be lots of activity during our week-long end-of-quarter publication break concerning the vacancy created by the death of Supreme Court **Justice Ruth Bader Ginsburg**. Any nomination will go through the Senate Judiciary Committee, which has its own Webpage at https://www.judiciary.senate.gov/. The Committee also has a separate page dedicated to Supreme Court nominations, at https://www.judiciary.senate.gov/nominations/supreme-court
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Send any messages or inquiries to: George@SecArbAlert.com

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