SECURITIES ARBITRATION ALERT 2021-03 (1/28/21)

George H. Friedman, Editor-in-Chief

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DID YOU KNOW?

- **Justia.com: A Wonderful, Free Legal Resource**

A NEW FEATURE ARTICLE: A LOOK AHEAD TO 2021 AND FINANCIAL SERVICES DISPUTE RESOLUTION. *We usually run feature articles every 6-8 weeks, and we already published our first such article of the year,* A Funny Thing Happened on the Way to a Quiet Year in ADR: How a Pandemic Accelerated Profound, Lasting Changes, *just two issues ago. But your publisher and Editor-in-Chief's annual ADR predictions article, which usually posts right after the elections in mid-November, had to wait until the fate of the Senate was finally decided in early January following two*

runoffs in Georgia. Wait no more, as this year's prognostications appear in The Elections are (Finally!) Over: What's in Store for the Arbitration and the Financial Services Worlds? *As your author says: "In a word: lots."*

FEATURE ARTICLE

THE ELECTIONS ARE (FINALLY!) OVER: WHAT'S IN STORE FOR THE ARBITRATION AND THE FINANCIAL SERVICES WORLDS, *by George H. Friedman.* At long last the 2020 elections are behind us [bipartisan cheer], and the Democrats have taken over the White House, Senate and House. What might this mean for arbitration and the financial services worlds? In a word: lots.

- **The anti-arbitration bills will be back, this time with enactments**
- **Repeal of Reg BI and the DOL's rule are on the table**
- **A revitalized CFPB – with a new director and a new arbitration rule**
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Click here to read the entire article or read on for a summary.

The Anti-arbitration Bills will be Back, this Time with Enactments

The Democrats in the last Congress introduced several anti-arbitration bills that predictably went nowhere. The bills will undoubtedly be reintroduced in the new Congress, but the outcomes will be different this time, with the Democrats in charge of Congress and the Oval Office. The Democrats' agenda is clearly anti-mandatory predispute arbitration in the consumer and employment areas, so expect at least some bills to pass and **President Biden** to sign them. My guess is that, rather than again attempt wholesale changes to the *Federal Arbitration Act*, bills will be introduced targeting specific federal laws protecting parties like consumers, investors, and employees. For example, one of the bills introduced in the last Congress was the *Investor Choice Act*, which would have amended the *1934 Act* and the *Investment Advisers Act of 1940* to ban mandatory PDAAs in customer and shareholder relationships. Hopefully, the proposed laws will not be retroactive; I continue to think that retroactive nullification of existing PDAAs invites legal challenges based on the Constitution's Takings Clause.

Repeal of Reg BI and the DOL's Rule are on the Table

Two relatively new regulations impacting financial services may not be long for this world. The SEC issued its final *Reg Best Interest* ("*Reg BI")* rule package in **June 2019**, and published the items in the *Federal Register* on **July 12, 2019**. Also, the Department of Labor's ("DOL") final fiduciary standard rule for those offering retirement investment advice – *Improving Investment Advice for Workers & Retirees* – was published last December in the *Federal Register* (Vol. 85, No. 244. P. 82798), and goes into effect on **February 16, 2021**. The exemption, which is harmonized with *Regulation BI*, allows Investment Advice Fiduciaries to engage in certain prohibited transactions that would otherwise be disallowed under ERISA and the Internal Revenue Code (see our analysis in SAA 2020-25 (Jul. 8)). The long-term fate of both rules is unclear at best, but I suspect

the Democrats will attempt to jettison and replace both *Reg BI* and the DOL rule. And indeed it's already in the offing. On **December 4** House Financial Services Committee Chairwoman **Maxine Waters** (D-CA) wrote to then President-elect Biden urging that *Reg BI* and *Form CRS* be rolled back. How do we know? Under the heading "Investor Protection and Capital Markets," appears this one-word recommendation about *Reg BI*: "Rescind."

A Revitalized CFPB – with a New Director and a New Arbitration Rule

The Consumer Financial Protection Bureau ("CFPB") under the Obama administration aggressively exercised its authority under *Dodd-Frank* § 1028(b) to restrict, eliminate, or set conditions on the use of PDAAs in consumer financial products and transactions. This was embodied by a **2017** regulation that would have: 1) permitted predispute arbitration agreements in contracts for consumer financial goods and services; 2) banned class action waivers in PDAAs; and 3) required regulated financial institutions to file customer claims and awards data with the CFPB, which the Bureau intended to publish in redacted form. Later that year, the CFPB's arbitration rule was retroactively nullified, when **President Trump** signed into law H.J. Res. 111, a Joint Disapproval and Nullification Resolution (see SAA 2017-41). Congress had exercised its authority under the *Congressional Review Act*, 5 USC §§ 801 *et seq*., which allows Congress to legislatively nullify any regulation within 60 legislative/session days of its publication. Without question, the Biden CFPB will resurrect the Rule, perhaps this time taking on PDAAs as well as class action waivers. My recommendation would be to build on the old rule, rather than to start from scratch.

Perhaps not waiting for the inevitable, Trump-era Director **Kathy Kraninger** on **January 20** tweeted that she had resigned at the request of President Biden, and the White House immediately announced that the new President had appointed **David Uejio** to serve as Acting CFPB Director. Mr. Uejio, who has been at the Bureau since **2012**, was the CFPB's Chief Strategy Officer. There are already several media reports that Mr. Biden intends to nominate Federal Trade Commission member **Rohit Chopra** as the next Director. Mr. Chopra is viewed as a protégé of Sen. **Elizabeth Warren** (D-MA) – a founder of the CFPB who is anti-mandatory PDAA use in the consumer and financial contexts.

FINRA and SEC Staff Should Invest in Good Walking Shoes

Once the COVID-19 vaccines are fully deployed, FINRA and SEC staffers need to invest in good walking shoes. In the meantime, they should take a skills course on Zoom. Why? First, with a plethora of anti-arbitration bills sure to be introduced, both institutions will be hauled before various Congressional committees non-stop. For those keeping score, in the Senate: Sen. **Dick Durbin** (D-IL) heads up Judiciary and **Sherrod Brown** (D-OH) chairs Banking, Housing and Urban Affairs. In the House: Rep. **Jerrold Nadler** (D-NY) heads the Judiciary Committee and Rep. **Maxine Waters** (D-CA) the Financial Services Committee. Also, look for increased Government Accountability Office examination and oversight activity of FINRA, the SEC, and the financial services industry.

SCOTUS will remain Arbitration-Friendly … Unless the Court is Packed
With a 6-3 conservative majority, and no vacancies anticipated in the conservative wing, we should expect SCOTUS to remain pro-arbitration. This is significant, given that many landmark arbitration-themed decisions from SCOTUS were decided by 5-4 votes. Newer Justices **Gorsuch** and **Kavanaugh** have already authored pro-arbitration opinions, and as I blogged last fall based on a very limited sampling Justice **Coney Barrett** seems to lean pro-arbitration. And, if a SCOTUS vacancy occurs during the Biden presidency's first two years, with the slimmest Democrat Senate majority, a vehemently anti-arbitration, anti-business nominee would likely have a rough time being confirmed. But if the Democrats go ahead with packing the Court, all bets are off….

Conclusion
I'm a bit reluctant to make so many bold predictions, given how wrong we all were in 2020. For example, show me anyone who predicted that FINRA for nearly a year would be canceling in-person arbitration and mediation hearings and using videoconferencing instead. On the other hand, my past arbitration predictions over the years have been pretty good,** so we can compare notes in a year.
*(ed: *George H. Friedman is Publisher and Editor-in-Chief of the online* Securities Arbitration Alert *and an ADR consultant. He retired in 2013 as FINRA's Executive Vice President and Director of Arbitration, a position he held from 1998. He also serves as non-executive Chairman of the Board of Directors of Arbitration Resolution Services. In his extensive career, he previously held a variety of positions of responsibility at the American Arbitration Association, most recently as Senior Vice President. **One 2020 prediction in particular was not so good. In a March 2020 blog post jointly-authored with Rick Ryder, Esq.,* What's Past is Prologue – All Over Again. What's Ahead for Arbitration Filings in the Wake of Recent Volatility, *we predicted massive increases in COVID-driven customer case filings. Wrong! Customer claims in 2020 dropped by 12%, although there was a mini-surge in the last few months of the year (this stat had been down 19% through August). We did correctly predict the increase in employment cases and constituents' embrace of virtual ADR, so it's not like we were completely off on our predictions.)*
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SQUIBS: IN-DEPTH ANALYSIS

SCOTUS ON *HENRY SCHEIN II CERTIORARI* GRANT: "NEVER MIND!" ***The Supreme Court has reversed in a summary dismissal its decision to grant* Certiorari *in its second look at* Henry Schein*, despite having heard oral argument in December.***
One of the late **Gilda Radner**'s many characters was Emily Litella, who would give misguided editorial replies that were inevitably based on her misunderstanding of the facts. When the error was pointed out, she would exclaim, "Oh, that's very different. Never mind!" Channeling Ms. Litella, after hearing oral argument last **December,** SCOTUS has walked back its decision to hear the arbitration-centric *Henry Schein, Inc. v. Archer and White Sales, Inc*., No. 19-963 (*Henry Schein II*).

A Succinct Review
We refer readers to SAA 2020-47 (Dec. 17) for our analysis of the oral argument (*ed: see the transcript and audio recording*.) As we reported in SAA 2020-23 (Jun. 17), the Supreme Court in **June 2019** agreed to review an open issue from its ruling in *Henry Schein, Inc. v. Archer and White Sales, Inc.*,139 S. Ct. 524 (2019), where the Court held unanimously that there is no delegation carveout under the Federal Arbitration Act for "wholly groundless" assertions of arbitrability. The predispute arbitration agreement ("PDAA") provided for AAA arbitration of: "Any dispute arising under or related to this Agreement (except for actions seeking injunctive relief and disputes relating to trademarks, trade secrets or other intellectual property of [the manufacturing company]) …." (brackets in original). Left unresolved after the first trip to SCOTUS was whether *this PDAA* constituted clear and unmistakable delegation of all issues of arbitrability or carved out injunctive relief. The issue for review in Schein's granted Petition for *Certiorari* was: "Whether a provision in an arbitration agreement that exempts certain claims from arbitration negates an otherwise clear and unmistakable delegation of questions of arbitrability to an arbitrator."

SCOTUS Validates our Uncertainty
Our take after the oral argument was: "To us, a very obvious common theme was the sense that members of the Court realized that, in retrospect, they might have taken up the related issue of whether incorporating the AAA's Rules constitutes clear and unmistakable evidence of delegation. While we usually make bold predictions on where the Court may land, this one is murky at best. If forced, we would say the odds favor Schein, but we're not betting on it." SCOTUS evidently harbored second-thoughts, because in a one-line *per curiam* Order the Court decides: "The writ of certiorari is dismissed as improvidently granted." Or, as Ms. Litella would say, "Never mind!"

What it Means
We endorse the views expressed in the **January 25** CPR blog: "The immediate effect is that respondent Archer and White Sales sees a big win: It will get the determination of whether its long-running case over a medical equipment contract dispute is to be arbitrated made by a judge, not an arbitrator. A Fifth U.S. Circuit Court of Appeals decision now stands. See *Archer & White Sales, Inc. v. Henry Schein, Inc*., 935 F.3d 274 (5th Cir. 2019) …."
*(ed: *Dismissals by the Court after oral argument are relatively rare, but they happen. See, for example,* And After All That Work!: The Dreaded U.S. Supreme Court "DIG," *The Washington Legal Foundation's The Legal Pulse (Jan. 31, 2013). We can't recall SCOTUS ever taking similar action in an arbitration-related case. If anyone has contrary recollections, email us at Help@SecArbAlert.com. **An* Alert *h/t to CPR's Russ Bleemer for quickly blogging on this one.)*
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CERTIORARI* DENIED IN SIXTH CIRCUIT CASE HOLDING THAT AAA RULES ARE "CLEAR AND UNMISTAKABLE" EVIDENCE THAT QUESTIONS OF ARBITRABILITY ARE FOR THE ARBITRATOR. *SCOTUS has

declined to resolve whether the AAA's Rules are "clear and unmistakable" evidence of delegation of arbitrability issues. First, some review from our past coverage. We reported in SAA 2019-42 (Nov. 6) on the case below, *Blanton v. Domino's Pizza Franchising, LLC*, No. 18-13207 (E.D. Mich. 2019). The facts were relatively straight-forward. The Plaintiffs, all former employees of Domino's franchisees, signed employment agreements containing a predispute arbitration agreement ("PDAA"). They sued Domino's (but not the franchisees) for violations of state and federal anti-trust laws, because Domino's required its franchisees to agree not to hire employees from other franchisees. This anti-poaching provision, the Plaintiffs asserted, unlawfully suppressed wages and competition. Domino's countered that the Plaintiffs were bound to arbitrate by virtue of the PDAAs they had signed with their employers. The District Court granted Domino's' motion to dismiss and compel individual arbitrations under the Federal Arbitration Act.

District Court: There was Delegation Via AAA's Rules

After determining that Domino's had standing to assert arbitration rights, District Judge **Victoria A. Roberts** turned to *who* – a judge or arbitrator – should decide arbitrability, holding that the PDAAs provided for delegation by virtue of their incorporating the AAA Rules. Said the Court: "Federal district courts in the Sixth Circuit regularly find that incorporation of AAA rules is clear and unmistakable evidence that questions of arbitrability are for the arbitrator. Although the Sixth Circuit has not definitively made such a ruling, it has delegated gateway questions of arbitrability to the arbitrator based on a contract that incorporated AAA rules…. The Court finds that incorporation of AAA rules and procedures is clear and unmistakable evidence that questions of arbitrability are for the arbitrator…."

Sixth Circuit: We Agree …

As we reported in SAA 2020-26 (Jul. 15), on appeal, a unanimous Sixth Circuit affirmed in *Piersing v. Domino's Pizza Franchising LLC*, 962 F.3d 842 (6th Cir. June 17, 2020) (*ed: Blanton was co-lead Plaintiff in the case below and elected not to join Piersing's appeal*). In a witty, humorous Opinion, the Court said: "In his arbitration agreement, Piersing agreed that '[t]he American Arbitration Association ("AAA") will administer the arbitration and the arbitration will be conducted in accordance with then-current [AAA Rules].' And those Rules provide that '[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.' The question for us is whether that's 'clear and unmistakable' evidence that Piersing agreed to arbitrate 'arbitrability.' There are good reasons to think it is" (footnote and internal and external citations omitted; brackets in original).

… and So Does Every Other Circuit

The Court also noted that "every one of our sister circuits to address the question -- eleven out of twelve by our count -- has found that the incorporation of the AAA Rules (or similarly worded arbitral rules) provides 'clear and unmistakable' evidence that the parties agreed to arbitrate arbitrability. And the one remaining circuit has precedent

suggesting that it would join this consensus. Indeed, it's possible that our circuit has already joined too. But to the extent that there's any ambiguity in our prior decisions, we officially do so today" (citations omitted).

SCOTUS Declines to Put the Issue to Rest

We had said several times that this issue would eventually present itself to the Supreme Court, and it did. As reported in SAA 2020-45 (Dec. 3) a *Certiorari* Petition was filed **November 20** in *Piersing v. Domino's Pizza Franchising LLC*, No. 20-695, raising this question for review: "There must be 'clear and unmistakable evidence' of parties' intent to have arbitrability decided by an arbitrator for a court to find that they agreed to upend the usual rule that courts decide arbitrability questions. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)…. Silence or ambiguity is insufficient. Id. at 945. The question presented is: In the context of a form employment agreement, is providing that a particular set of rules will govern arbitration proceedings, without more, 'clear and unmistakable evidence' of the parties' intent to have the arbitrator decide questions of arbitrability?" Although we thought SCOTUS might want to resolve the issue, the Court on **January 25** summarily denied *Certiorari* (see page 4 of the Order List).
(ed: Count us among the surprised and disappointed, especially given the belated dismissal of Henry Schein II*. This issue comes up often, so we thought and hoped that the Court would grant* Cert*. And given the December 8 oral argument in* Henry Schein, Inc. v. Archer and White Sales, Inc., *No. 19-963 – where several Justices seemed to lament not taking up the issue in that case – we're surprised the Court eschewed the opportunity. Our editorial comment in SAA 2020-47 (Dec. 17) was: "To us, a very obvious common theme was the sense that members of the Court realized that, in retrospect, they might have taken up the related issue of whether incorporating the AAA's Rules constitutes clear and unmistakable evidence of delegation." Perhaps the Court might be signaling this issue is well-settled?)*
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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

FINRA DRS POSTS YEAR-END 2020 STATS: CONTINUED REVERSIONS TO MEAN, BUT MORE DETAILS NEXT WEEK. FINRA Dispute Resolution Services ("DRS") posted cumulative case statistics through **December**, with most numbers slowly continuing their return to near-normal during this abnormal year. We'll save for one week our usual exhaustive year-end analysis -- to be written by a surprise guest author -- but here are some highlights. Overall, 3,902 arbitrations were filed in **2020**, up 4% from **2019**. Customer claims were down 12%, but industry disputes were way up (plus 31%) and constituted almost half (47%) of all new arbitration filings. There were 413 mediation cases in agreement, a 30% decrease. The settlement rate was a robust 85%. Overall arbitration average turnaround times were 14.5 months, with hearing cases taking 14.7 months – a 13% decrease. There are now 8,111 DRS arbitrators, 3,820 public and 4,291 non-public.
*(ed: *We think the reduction in processing times for cases decided after hearings reflects the impact of the pandemic. With a second wave of the pandemic ongoing and herd immunity from the vaccines still months away, the resumption of in-person hearings*

remains an elusive goal. Parties seem to have embraced the benefits of virtual hearings, which common sense tells us are easier and faster to schedule and keep on schedule.)
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REMINDER: REBUTTAL COMMENTS ON PROPOSED EXPUNGEMENT RULE AMENDMENTS DUE FEBRUARY 1. We reported in SAA 2021-01 (Jan. 14) that the SEC on **December 28** had published in the *Federal Register* (Vol. 85, No. 248, P. 84396), Notice indicating potential disapproval of FINRA Dispute Resolution Services' proposed rule 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.* Recall that the Commission on **December 18** issued Release No. 34-90734, *Notice of Filing of Amendment No. 1 and Order Instituting Proceedings to Determine Whether to Approve or Disapprove the Proposed Rule Change, as modified by Amendment No. 1, to Amend the Codes of Arbitration Procedure Relating to Requests to Expunge Customer Dispute Information, Including Creating a Special Arbitrator Roster to Decide Certain Expungement Requests*. The purpose? "To solicit comments on Amendment No. 1 from interested persons and to institute proceedings to determine whether to approve or disapprove the Proposed Rule Change, as modified by Amendment No. 1." Just a few comments were received by the **January 19** due date, most notably from, NASAA, the PIABA Foundation, and SIFMA. Rebuttal comments are due by **February 1**.
*(ed: *Rebuttal comments may be submitted online, referencing SR-FINRA-2020-030. **We'll save our comments analysis for after February 1.)*
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THAT DIDN'T TAKE LONG: ALLISON HERREN LEE NAMED ACTING SEC CHAIR, REPLACING ROISMAN. SEC Chairman **Jay Clayton** left the Commission at the end of **2020** (see the Agency's **November 16** Press Release). As reported most recently in SAA 2021-02 (Jan. 14), the Commission announced on **December 28** that President Trump had appointed **Elad L. Roisman** (Republican) as acting Chair. Mr. Roisman has been a Commissioner since **2018** and is former Chief Counsel of the Senate Banking Committee. This changed **January 21** when **President Biden** named **Allison H. Lee** (Democrat) as Acting Director. The remaining Commissioners on the roster are: **Caroline Crenshaw** (Democrat) and **Hester M. Peirce** (Republican).
(ed: *Media reports that first surfaced on January 13 posit that the new SEC Chair will be former CFTC Chair Gary Gensler.)*
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THAT DIDN'T TAKE LONG II: KRANINGER QUITS AS CFPB DIRECTOR; BIDEN NAMES ACTING DIRECTOR. Just a week ago we said in SAA 2021-02 (Jan. 1): "… we are pretty certain **President Biden** will replace Trump-era Director **Kathy Kraninger** with his own nominee who will pursue the Democrats' anti-mandatory predispute arbitration agenda in the consumer and employment areas. And, as reported elsewhere in this *Alert*, there is already media speculation that Mr. Biden intends to nominate Federal Trade Commission member **Rohit Chopra** as the next Director." As

for the Democratic Party's arbitration views, we added in an editorial note: "See, e.g., *2020 Democratic Party Platform*, p. 24: 'Consumers, workers, students, retirees, and investors who have been mistreated by businesses should never be denied their right to fight for fair treatment under the law. Democrats will support efforts to eliminate the use of forced arbitration clauses in employment and service contracts, which unfairly strip consumers, workers, students, retirees, and investors of their right to their day in court.'" Looks like we were right on all counts. Evidently not waiting for the inevitable, Ms. Kraninger tweeted that she had resigned on **January 20** at the request of President Biden**,** and the White House immediately announced that President Biden had appointed **David Uejio** to serve as Acting CFPB Director. Mr. Uejio, who has been at the Bureau since 2012, was the CFPB's Chief Strategy Officer. He will serve until Mr. Chopra's Senate confirmation.
*(ed: *These were easy calls. **The Bureau has posted a revised org chart.)*
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DC CIRCUIT CONFIRMS $58 MILLION AWARD, BUT DISTRICT COURT MUST DETERMINE CURRENCY FOR PAYMENT. To describe the history in *LLC SPC Stileks v. Republic of Moldova*, No. 19-7106 (D.C. Cir. Jan. 15, 2020), as convoluted is a gross understatement. We'll skip that to focus on an issue of interest: the currency to be used to satisfy the judgment confirming the Award, and we'll let the Court's unanimous Opinion speak for itself: "As the district court recognized, the Moldovan lei had depreciated significantly since the arbitral award was issued on October 25, 2013. At the time of the arbitral award, the currency exchange rate of lei to dollars was 12.9207 lei to 1 dollar. As of the date of the district court's order, the rate was 17.8856 lei to 1 dollar. Thus, the Moldovan lei depreciated nearly 30 per cent over the relevant period. But neither Stileks nor the district court explained why Moldova alone should bear the cost of currency depreciation. In sum, we conclude the district court inadequately accounted for the reliance interests Moldova may have reasonably developed based on Energoalliance's actions during arbitration…. However, the district court should have considered whether Moldova had a settled expectation that the award would be paid in Moldovan lei. Thus, we vacate the October 2, 2019, order entering judgment against Moldova in the amount of $58,591,058.50. On remand, the district court should evaluate Moldova's reliance interest, if any, that may have been created by Energoalliance's requests for a lei-denominated award."
(ed: Seems right, but we can't help but notice the Award was issued in 2013 and remains unpaid.)
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QUICK TAKES: CASES AND AWARDS WORTH READING

***Setty v. Shrinivas Sugandhalaya LLP*, No. 18-35573 (9th Cir. Jan. 20, 2021)**: On remand from the Supreme Court for reconsideration in light of *GE Energy Power Conversion France SAS v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637 (2020), a divided Panel holds that: "equitable estoppel precludes a party from claiming the benefits of a contract while simultaneously attempting to avoid the burdens that contract imposes." The majority concludes that: "the district court properly exercised its discretion

in rejecting defendant's argument that plaintiffs should be equitably estopped from avoiding arbitration" (*ed: quotes are from the staff summary accompanying the Opinion*.)

***Doe v. Carmel Operator, LLC*, No. 21S-CT-15 (Ind. Jan. 15, 2021)**: A unanimous Indiana Supreme Court: "reverse[s] the trial court's determination that Certiphi can compel Guardian to arbitrate her claims against it -- nothing in the record shows that Certiphi is an agent of CSL or that the traditional elements of equitable estoppel are satisfied. As to CSL, Spectrum, and Sullivan, however, we affirm the trial court's order compelling Guardian to arbitrate."

***Blanchard v. First Financial*, FINRA ID No. 20-01189 (Reno, NV Jan. 7, 2021)**: A rare prehearing dismissal under FINRA *Code of Arbitration Procedure* Rules 12200, 12201 and 12504 is detailed in this explained Award: "Only the Blanchard Family Trust was Respondent's customer, not the Claimant, Valeria Blanchard, or her son, Lauren Koch. The Trustees have not authorized Mr. Koch to proceed on behalf of the Trust. Dismissal is appropriate under Rules 12200 and 12201 because the claim was not brought by Respondent's customer.... Mr. Koch never had an account with or received services from Respondent. Dismissal of any claims he has brought on his own behalf is appropriate under Rules 12200 and 12201 because he is not a customer and cannot compel Respondent to submit to arbitration."
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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Nicholas J. Diamond (Georgetown Law) and Kabir A.N. Duggal (Columbia Law School), *Securities Arbitration Law 2020 in Review: The Pandemic, Investment Treaty Arbitration, and Human Rights*, Kluwer Arbitration Blog (Jan. 19, 2021): "It will come as no surprise to the readers of this blog that the ongoing COVID-19 pandemic has had a significant impact on international arbitration (see blog coverage here). In this post, we take a look back at 2020 to consider the intersection of the pandemic, investment, and human rights…. This post first considers the ongoing effects of the pandemic on investment and human rights in 2020. Second, it considers the degree to which human rights considerations have been specifically reflected in IIAs signed in 2020. Notably, it does not address disputes because 2020 was a quiet year for investment treaty arbitration decisions that substantively engage with human rights considerations. Third, and finally, it looks ahead to consider the potential trajectory of the intersection of investment and human rights in 2021."

***District Court Denies Motion To Compel Arbitration Of FCRA Claim Due to Insufficient Declaration*, Lexology (Jan. 20, 2021)**: "On January 13, 2021, the U.S. District Court for the District of Columbia denied a motion to compel arbitration filed by First Premier Corp. ('First Premier') in a Fair Credit Reporting Act case, on the grounds that First Premier did not sufficiently establish that the card agreement containing the arbitration clause was mailed to the cardholder. *Proctor v. First Premier Corp*., 2021 U.S. Dist. LEXIS 6502 (D.D.C. Jan. 13, 2021)."

Further Guidance on Conflicts of Interest in International Arbitration: The Role of Experts, **Clyde & Co. Blog (Jan. 21, 2021)**: "A recent English Court of Appeal judgment provides important guidance on the role of expert witnesses in international arbitration, with an emphasis on potential conflicts of interest and duties owed by expert witnesses to their clients. The English Court of Appeal in *Secretariat v A Company* [2021] EWCA Civ 6 upheld an injunction granted by the English Technology and Construction Court (TCC), preventing an international consulting firm from providing expert witness services for opposing sides in two separate but closely related international construction arbitrations. This is the first occasion on which the Court of Appeal has been required to adjudicate (i) duties imposed on an expert concurrently engaged in two potentially conflicting retainers, and (ii) whether those duties shackle all relevant entities within the expert organisation" (footnote omitted)

Ex-Wells FAs Ordered to Pay the Wirehouse $2.5M Over Promissory Notes, **Financial Advisor IQ (Jan. 25, 2021)**: "Wells Fargo has prevailed in another multimillion dollar arbitration this month, with a Finra panel ordering two of its former financial advisors to pay the company around $2.5 million over promissory notes."

Tenth Circuit Holds That Contract Formation Issues Are for the Court, Not the Arbitrator, Notwithstanding an Express Delegation Clause**, Verdict (Jan. 25, 2021)**: In *Fedor v. United Healthcare*, the U.S. Court of Appeals for the Tenth Circuit has clarified the outer limits of the severability doctrine that the Supreme Court has developed to limit challenges to the validity of arbitration agreements to situations where a party is able to challenge the arbitration clause itself without bringing in the validity of the agreement as a whole."

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DID YOU KNOW?

JUSTIA.COM: A WONDERFUL, FREE LEGAL RESOURCE. One of our favorite Web resources is www.justia.com. This excellent resource offers a wealth of info, including state and federal court decisions and statutes. Users can also sign up for weekly updates on arbitration-related cases of interest.

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Send any messages or inquiries to: George@SecArbAlert.com

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