SECURITIES ARBITRATION ALERT 2021-06 (2/18/21)

George H. Friedman, Editor-in-Chief

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DID YOU KNOW?

- Presidential Support for Arbitration Goes Way Back

IN MEMORIAM: ROBERT GLAUBER. *We are sad to report the passing on February 14 at age 81 of Robert Glauber. Mr. Glauber joined the NASD's Board in 1998 and served as Chairman and CEO from 2000-2006. The Statement of current FINRA President and CEO Robert W. Cook says it all: "Among his many contributions to securities regulation, Glauber led the transition of NASD, now FINRA, away from owning for-profit markets to a not-for-profit organization solely focused on its mission of protecting investors and ensuring market integrity. His legacy lives on in numerous ways at FINRA. He transformed NASD by divesting its Nasdaq and Amex ownership, putting NASD in a sound financial position to pursue its regulatory mission; led the creation of new rules in critical areas such as analyst conflicts of interest and mutual fund breakpoints; created the NASD Investor Education Foundation; established the TRACE*

bond price transparency system; and developed an extensive training program for all examiners, among many other accomplishments." The family is requesting that, in lieu of gifts, readers consider supporting the American Exchange Project. The full obituary can be found here.

SQUIBS: IN-DEPTH ANALYSIS

SURPRISE! FINAL DOL FIDUCIARY RULE WENT INTO EFFECT FEBRUARY 16 AS SCHEDULED. ***In somewhat of a surprise, the Department of Labor ("DOL") allowed the Trump-era fiduciary standard rule to roll out as scheduled on February 12***. We analyzed in SAA 2020-30 (Aug. 12) the thousands of comments received on the DOL's proposed fiduciary standard rule for those offering retirement investment advice – *Improving Investment Advice for Workers & Retirees* – that was published in the *Federal Register* on **July 7** (85 FR 40834; Vol. 85, No. 130, P. 40834). The exemption, which is harmonized with the SEC's *Regulation Best Interest,* 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)). We later reported in SAA 2021-01 (Jan. 14) that the DOL on **December 15** released the massive Final Rule, which was to become effective 60 days after its **December 18** *Federal Register* publication (85 FR 92798Vol. 85, No. 244. P. 82798), or on **February 16, 2021**.

Doubts About Scheduled Effectiveness …

In our most recent coverage in SAA 2021-05 (Feb. 11), we queried whether this would actually happen. As we had said before, the Final Rule's long-term fate was unclear since it was to become effective after Inauguration Day. We had noted that House Financial Services Committee Chairwoman **Maxine Waters** (D-CA) last **December** wrote to then President-elect Biden urging that *Reg BI* and *Form CRS* be rescinded. And there was significant media and interest group speculation that the DOL would at least pause implementation before February 16.

… Were Misplaced

Contrary to our expectations, though, we can now report that the rule went into effect as scheduled. A **February 12** Press Release states: "The U.S. Department of Labor's Employee Benefits Security Administration has confirmed that 'Improving Investment Advice for Worker & Retirees,' an exemption for investment advice fiduciaries, will go into effect as scheduled on Feb. 16, 2021. In the coming days, the agency will publish related guidance for retirement investors, employee benefit plans and investment advice providers." Why this move? Says Deputy Assistant Secretary of Labor for the Employee Benefits Security Administration **Ali Khawar**: "This exemption allows for important investor protections, including a stringent 'best interest' standard of care for fiduciary recommendations of rollovers from ERISA-protected retirement accounts. We recognize that investment advice providers have been preparing for the exemption, and this step will allow them to implement important system changes. That said, we will continue our stakeholder outreach to determine how we might improve this exemption, the rule defining who is an investment advice fiduciary, and related exemptions to build on this

approach." In the meantime, the temporary enforcement policy articulated in *Field Assistance Bulletin 2018-02* will remain in place until **December 20, 2021**.
*(ed: *We are pleasantly surprised. **Your publisher and Editor-in-Chief discussed the fate of the DOL rule and its cousin – Reg BI – in a February 9 feature article,* The Elections are (Finally!) Over: What's in Store for the Arbitration and the Financial Services World*, saying: "My take is that the Democrats believe neither rule goes far enough – including allowing PDAAs – and that Congress and the regulators need to go back to the drawing board. My recommendation is not to toss these regulations, but to build on them" (footnotes omitted). Looks like the Biden DOL feels the same way. ***Keep in mind that Congress has authority under the Congressional Review Act, 5 USC §§ 801 et seq., to nullify legislatively any regulation within 60 legislative/session days of its publication.)*
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THEY'RE BAAAACK! DEMOCRATS REINTRODUCE ANTI-PDAA BILLS. ***As we confidently predicted, the Democrats have reintroduced several bills to curb use of mandatory predispute arbitration agreements ("PDAA")***. Bill texts for the most part have not yet been published, so we'll save for another day an exhaustive analysis. For now, we offer these brief descriptions:

- H.R. 963 – *Forced Arbitration Injustice Repeal (FAIR) Act*: We assume this bill introduced on **February 11** will be similar to the *FAIR Act* proposed in the last Congress, that passed the House but died in the Senate. That prior iteration would have amended the Federal Arbitration Act ("FAA") to eliminate mandatory PDAAs for disputes involving consumer, investor, civil rights, employment, and antitrust matters. It also would have: covered brokers and investment advisers; barred class action/collective action waivers in or out of a PDAA; applied to "digital technology" disputes; reserved for court determination any arbitrability or delegation issues "irrespective of whether the agreement purported to delegate such determinations to an arbitrator;" and extended to sexual harassment claims.. The new bill already has 156 co-sponsors, all Democrat. Recall that only 218 votes are needed for passage.

- Not Yet Numbered – *Protecting the Right to Organize (PRO) Act*: Introduced **February 4** in both houses of Congress, this omnibus bill has a small provision aimed at legislatively overruling *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), where SCOTUS held that the FAA permits employers to use arbitration clauses containing class action waivers, notwithstanding the *National Labor Relations Act's* ("*NLRA*") protections of workers' rights to act collectively. Specifically, the *PRO Act* would amend the *NLRA* to make it an unfair labor practice for *any* employer (not just those dealing with unions) to use class action waivers, "notwithstanding" the FAA.

- H.R. 1023: While not yet named, the bill's purpose is to: "amend title 9 of the United States Code [the FAA] to prohibit predispute arbitration agreements that force arbitration of disputes arising from private education loans, and for other purposes." It was introduced **February 11** and there are already 12 co-sponsors, all Democrats.

The *FAIR Act* was announced by Rep. **Hank Johnson** (D-GA), at a **February 11** hearing, *Justice Restored: Ending Forced Arbitration and Protecting Fundamental Rights*, held by the House Judiciary Committee's Subcommittee on Antitrust, Commercial and Administrative Law. For an excellent analysis of the *FAIR Act* developments, see *House Reintroduces a Proposal to Restrict Arbitration at a 'Justice Restored' Hearing*, CPR Blog (Feb. 12, 2021).
*(ed: *We are sure there are more bills to come. There were over 100 arbitration-related bills introduced in the last Congress. **As for what might be coming down the Congressional road based on what was proposed in the 116th Congress, see Friedman, George,* Surprise! Some of the Anti-Arbitration Bills Introduced in Congress This Year May Actually Become Law (One Already Has)*, 2019:5 SAC 1 (Sep. 2019).)*
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ANALYSIS OF COMMENTS ON REVISED EXPUNGEMENT RULE: SOME SURPRISES (LIKE THE PIABA FOUNDATION AND SIFMA BEING ON THE SAME PAGE). 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."

Some History is in Order
As discussed in SAAs 2020-37 (Oct. 7) & -36 (Sep. 23): "The proposed change, which incorporated comments and suggestions received on Regulatory Notice 17-42, was to 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).

DRS Amends the Filing

DRS responded to comments on **December 18** in a 20-page letter from Assistant General Counsel Mignon McLemore. While urging approval, FINRA agreed to several amendments, which we repeat below essentially *verbatim*:

- FINRA has determined to amend proposed Rule 13805(b)(1) to require that the associated person serve the customers with the statement of claim within 10 days of filing the statement of claim with FINRA and any answer within 10 days of filing each answer with FINRA…. Where the customer does not actively participate in the expungement request, or the matter also involves issues unrelated to expungement, imposing the additional requirement of providing all other documents filed in the proceeding in all circumstances could be unnecessarily burdensome on the associated person.

- FINRA has determined to amend proposed Rule 13805(b)(2) to provide that the Director will notify these customers of the time, date and place of any prehearing conferences using the customers' current address provided by the party seeking expungement.

- FINRA has also determined to amend proposed Rule 13805(c)(3)(A) to clarify that the customer is entitled to appear at prehearing conferences. FINRA will continue to consider customer participation in expungement hearings, including ways to further encourage customer participation (footnote omitted).

- Proposed Rule 13805(c)(4) would be amended to clarify that all parties from investment-related, customer-initiated arbitrations or civil litigations, and customers whose customer complaints gave rise to the customer dispute information that is a subject of the expungement request shall have the right to be represented at the prehearing conferences.

Few Comments, Mostly Seeking an SEC Hearing

As reported in SAA 2021-03 (Jan. 28) just a few comments were received by the **January 19** due date or in rebuttal. By and large the comments were not enthusiastically supportive, including the somewhat startling sight of the PIABA Foundation and SIFMA both urging disapproval, but several commenters urge that the SEC conduct hearings. We present below just a few excerpts from institutional responders, grouped by main position. Footnotes are omitted throughout.

SEC Should Hold a Hearing

Consumer Federation of America: "Like most commenters, we recognize the good faith effort by FINRA to address shortcomings in the current approach to expungement requests. Nevertheless, serious questions have been raised by state securities regulators,

attorneys who specialize in representing investors in arbitration, and securities law scholars about the adequacy of the proposed changes. In light of these concerns, the PIABA Foundation has requested that the Commission conduct a hearing as part of its consideration of the FINRA proposal. I am writing on behalf of the Consumer Federation of America (CFA) to voice my support for that hearing request."

NAASA: "In its comment letter, PIABA raised concerns with the Amended Proposal and asked the Commission to conduct a hearing as part of its consideration of the changes summarized above. Given the importance of this issue for regulators, investors, and the securities industry, NASAA would urge the Commission to grant PIABA's request to hold a hearing or convene such other process by which PIABA and other parties could discuss important concerns about the Amended Proposal with Commission staff."

PIABA Foundation: Has objections (see below) but also requests hearings.

PIABA: Supports the rule (see below) but also requests hearings.

Supportive, But More Should be Done
NASAA: "We write first to express our appreciation for the fact that the Proposed Amendment would amend the Code of Arbitration Procedure for Customer Disputes, and the Code of Arbitration Procedure for Industry Disputes, to establish requirements for notifying state securities regulators of expungement requests earlier in the expungement process. While notification at the onset of a request for expungement would not afford NASAA members the opportunity to become involved in the FINRA arbitration forum, earlier notice would allow NASAA members additional time to evaluate the request and determine the appropriate regulatory response, including but not limited to investigations, enforcement actions, or intervention in subsequent court proceedings seeking to confirm an award."

PIABA: "PIABA continues to support much of FINRA's proposed incremental changes to the expungement process. PIABA also supports broader fundamental changes in order to solve more of the systemic problems in expungement proceedings. Until the expungement process is moved from FINRA DR's arbitration forum to a better-suited and streamlined regulatory process, PIABA supports the recommendation of The PIABA Foundation that an Advocate be created and embedded into the expungement process to represent and protect the CRD. Such an Advocate would protect the state records of the CRD, the interests of state and federal regulators who use the CRD to make regulatory and enforcement decisions, the customers and investors who are told to use BrokerCheck (which is based on filtered CRD information) to select financial professionals, and the future employers of brokers who are obligated to use the CRD to perform due diligence on prospective hires."

Opposed
PIABA Foundation: "We thank the Commission for requesting comment on the Revised

Proposal. For the reasons set forth below, the PIABA Foundation opposes the Revised Proposal and requests a hearing pursuant to Rule 19b-4." The organization first lists the specific problems followed by proposed solutions. We present the headlines here *verbatim*: **Problems with FINRA's Revised Proposal**: A. Straight-In Requests cases are not treated as adversarial proceedings by the parties. B. Three arbitrators are no better than one. C. The Special Arbitrator Roster may compound the problem. D. Customers will remain unable to meaningfully participate in expungement proceedings. **Proposed Solutions to FINRA's Revised Proposal Based on Data**: A. The SEC should create an Advocate in the expungement process that serves a role like that of a *guardian ad litem* in court proceedings. B. The arbitrators on the Special Arbitrator Roster should be moved to the nonpublic arbitrator pool so that parties in customer disputes have unlimited strikes.

SIFMA: "For the reasons stated below, we recommend that the Proposal, as modified by Amendment No. 1, be disapproved as inconsistent with the requirements of the Exchange Act, among other things. We hereby incorporate by reference all of our prior comments and recommendations on the Proposal. We further comment and recommend as follows" (headlines listed *verbatim*):

- The Proposal Limits the Grounds for Granting Expungement to the Three Grounds Listed in Rule 2080(b)(1), and Excludes Other Grounds, Including, Without Limitation, Those Listed in Rule 2080(b)(2), in Violation of the Exchange Act.

- The plain text of FINRA Rules 12805, 13805, and 2080 does not limit the grant of expungement to the grounds in Rule 2080(b)(1).

- A misstatement in the SEC's preamble text approving then new FINRA Rules 12805 and 13805 did not have the effect of amending the plain text or meaning of the new rules.

- A FINRA notice that repeats a misstatement made in the SEC order approving new FINRA Rules 12805 and 13805 does not have the force or effect of rulemaking.

- The Proposal Should Amend the Text of the Proposed Rule Change to Explicitly Clarify and Reaffirm that a Member Firm or Associated Person May Seek Expungement Relief in Court.

(ed: We normally sign off by noting that an Approval Order is next in the administrative process. Not so here, however. The rule change proposal will either be approved or disapproved, or there will be a hearing. We are betting on the last one.)
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FINRA RELEASES 2021 RISK MONITORING AND RISK PRIORITIES. ARBITRATION AGAIN NOT ON THE LIST. ***FINRA announced its 2021 risk monitoring and exam priorities in a 46-page Report. As has been the case for the past few years, arbitration is not on this list.*** The **February 1** Press Release, *FINRA*

Publishes 2021 Report on FINRA's Examination and Risk Monitoring Program, announces: "The *Report* identifies the applicable rule and key related considerations for member firm compliance programs, summarizes noteworthy findings from recent examinations, outlines effective practices that FINRA observed during its oversight, and provides additional resources that may be helpful to member firms in fulfilling their compliance obligations. and provides additional resources that may be helpful to member firms in fulfilling their compliance obligations."

Core Focus Areas

The *Report* lists several areas of inquiry, organized into four categories: **Firm Operations**, **Communications and Sales**, **Market Integrity**, and **Financial Management**. As was the case last year, literally at the top of the list is *Reg BI*. The key specific topics include (*ed: repeated* verbatim):

- Regulation Best Interest and Form CRS;
- Consolidated Audit Trail compliance;
- Cybersecurity;
- Communications with the Public;
- Best Execution;
- Variable Annuities; and
- Anti-Money Laundering, among others.

COVID-19 Not Forgotten

The elephant in the room is not forgotten, but is to be covered separately. Says the *Report*: In Regulatory Notice 20-16 (FINRA Shares Practices Implemented by Firms to Transition to, and Supervise in, a Remote Work Environment During the COVID-19 Pandemic), we shared common themes FINRA noted through discussions with firms about the steps they reported taking in response to the pandemic and in connection with their move to remote work environments. This Report does not address exam findings, observations or effective practices specifically relating to how firms adjusted their operations during the pandemic. Those reviews are underway now and will be addressed in a future publication."

Arbitration Again Doesn't Make the Cut

In 2017, Dispute Resolution was included in FINRA's regulatory priorities for the first time in years. That was not the case this year nor the three prior years, although there is one passing reference to past arbitrations in "Counterparty Exposure." That's not necessarily a bad thing; if there were perceived problems with the program, we're sure it would be a focus area.

*(ed: *Kudos again to FINRA for letting firms (and investors) know on what areas the Authority intends to focus. **The* Report *combines and replaces two previously published annual reports (*Report on Examination Findings *and* Observations and the Risk Monitoring and Examination Program Priorities Letter*). It is also available in PDF format. ***FINRA invites comments or suggestions on how it can improve the* Report*. Send to: Ursula Clay, Senior Vice President, Member Supervision at 646-315-7375 or*

Ursula.Clay@finra.org or Elena Schlickenmaier, Senior Principal Analyst, Member Supervision, at 202-728-6920 or Elena.Schlickenmaier@finra.org.)
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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

FINRA PUBLISHES REG NOTICE ON CHAIR HONORARIA INCREASE, EFFECTIVE FOR CASES FILED APRIL 19. We reported in SAA 2020-48 (Dec. 24) that the SEC on **December 17** approved *Notice of Filing of a Proposed Rule Change to Amend the FINRA Codes of Arbitration Procedure to Increase Arbitrator Chairperson Honoraria and Certain Arbitration Fees* (SR-FINRA-2020-035). We later reported in SAA 2021-01 (Jan. 14) that the Approval Order was published in the *Federal Register* on **December 23** (Vol. 85, No. 247, P. 84053). We said in #01: "Next is publication of a FINRA Regulatory Notice setting the effective date." We can now report that this occurred on **February 12** with FINRA's publication of Regulatory Notice 21-04. What are the specifics? The Notice states: "FINRA has amended its Codes of Arbitration Procedure for Customer and Industry Disputes (Codes) to: (1) increase the additional hearing-day honorarium chairs receive for each hearing on the merits from $125 to $250 and (2) create a new $125 chair honorarium for each prehearing conference in which the chair participates. To fund the increase in payments to chairs, the amendments make minimal increases to certain arbitration fees" (footnote omitted). The increases are effective for cases filed on or after **April 19, 2021**.
*(ed: *As we've said before, this is really good news. $850 a day – $600 for two hearing sessions plus $250 – is decent compensation, and the "extra" for IPHCs is fair. **We had guessed that effectiveness would be "hearings held" versus "cases filed" but we got that wrong.)*
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FIRST ARBITRATION BILL OF THE NEW CONGRESS IS PRO-ARBITRATION AND INTRODUCED BY REPUBLICANS. We cover elsewhere in this *Alert* the several arbitration-centric bills introduced by the Democrats in early **February.** We would have bet that the first arbitration-related bill in the 117th Congress would be introduced by Democrats and would be anti-mandatory arbitration, but we would have lost. Introduced on **January 4** by **Rep. Earl "Buddy" Carter** (R-GA) was the *FairTax Act of 2021* (H.R. 25), a massive proposal: "abolishing the Internal Revenue Service, and enacting a national sales tax to be administered primarily by the States." Nestled in the text is section 405(i), which provides: "The Secretary shall establish an Office of Revenue Allocation to arbitrate any claims or disputes among administering States as to the destination of taxable property and services for purposes of allocating revenue between or among the States from taxes imposed by this subtitle. The determination of the Administrator of the Office of Revenue Allocation shall be subject to judicial review in any Federal court with competent jurisdiction. The standard of review shall be abuse of discretion."
*(ed: *There are 15 cosponsors, all Republicans. **The non-partisan Govtrack Website gives the bill a 1% chance of enactment, which we think may be generous.)*
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CALIFORNIA APPELLATE COURT: *MCGILL* IS STILL GOOD LAW AND IS NOT PREEMPTED BY THE FAA. *Maldonado v. Fast Auto Loans, Inc.*, G058645 (Cal. Ct. App. 4 Jan. 11, 2021), is one of those nice cases where the decision's essence can be derived by quoting liberally from the Opinion: "In this putative class action, plaintiffs … (collectively referred to as 'the Customers' unless otherwise indicated), assert Fast Auto Loans, Inc., (Lender) charged unconscionable interest rates on loans in violation of [California] Financial Code sections 22302 and 22303. Lender filed a motion to compel arbitration and stay the action pursuant to an arbitration clause contained within the Customers' loan agreements. The court denied the motion on the grounds the provision was invalid and unenforceable because it required consumers to waive their right to pursue public injunctive relief, a rule described in *McGill v. Citibank, N.A.*, (2017) 2 Cal.5th 945 (*McGill*). On appeal, Lender asserts the '*McGill Rule*' does not apply, but even if it did, other claims were subject to arbitration. Alternatively, Lender contends the *McGill Rule* is preempted by the Federal Arbitration Act (FAA; 9 U.S.C. § 1 et seq.)…. Insofar as Lender thinks *McGill* was wrongly decided, the argument fails, as we are bound to follow the precedent of the California Supreme Court…. Moreover, we find its analysis to be legally sound and persuasive, as does the Ninth Circuit…. We conclude Lender's arguments the FAA preempts the *McGill Rule* lack merit, and there is no basis to stay this appeal" (citations omitted)
*(ed: *Makes sense to us. ***An* SAA *h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this decision.)*
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FINAL REMINDER: ANNUAL CITY BAR ASSOCIATION'S SECURITIES & ENFORCEMENT INSTITUTE STARTS FEBRUARY 26. As reported in SAAs 2021-04 (Feb. 4) & -02 (Jan. 21), the Association of the Bar of the City of New York will be holding its *9th Annual Securities & Enforcement Institute* via two half-day live Webcasts on **February 26** and **March 19**. The faculty features several prominent securities litigators, senior in-house counsel at major financial institutions and corporations, nationally recognized trial lawyers, jury consultants, and economists who will conduct eight panels, the Day 1 and Day 2 Agendas reveal. The program offers CLE credit from California, Connecticut, New Jersey, and New York.
*(ed: *Last year, this pre-COVID event was held in person for one full day. **The Webinars will be held from 11:30 a.m. to 5 p.m. on February 26, and noon to 4:30 p.m. on March 19. ***Registration ranges from $249 for government/nonprofit/academic/judiciary who are Association members to $649 for nonmembers and can be done online.)*
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QUICK TAKES: CASES AND AWARDS WORTH READING

***Gilbert v. I.C. System, Inc.*, 2021 U.S. Dist. LEXIS 16279, No. 19-CV-04988 (N.D. Ill. Jan. 28, 2021)**: The Court denies the Motion to compel arbitration of a Fair Debt Collection Practices Act class action: "ICS has not met its burden of establishing a valid agreement to arbitrate, because it has not shown that Gilbert assented to the Terms and

Conditions. ICS has not provided a signed contract. Instead, it has provided a website printout – the Terms and Conditions provide a list of actions Gilbert could undertake to accept them besides signing, including opening a box, or activating, using, attempting to use, or paying for Sprint services…."

***FSI Construction, Inc. v. Martin*, CV H-20-3636, 2021 WL 260218 (S.D. Tex. Jan. 26, 2021)**: The arbitration Award is confirmed: "Respondent does not argue that the Arbitrator 'exceeded her powers' under the parties' contract. He does not point to any 'express limitations of [the] contractual mandate' that the Arbitrator strayed beyond.... Instead, Respondent argues that the Final Award is unenforceable because the Arbitrator exceeded her powers under Texas law. This is not a basis for vacatur under 9 U.S.C. § 10(a)(4). Federal courts have consistently held that even 'manifest disregard of the law' is not an independent ground for challenging an arbitral award.... Thus, despite superficially mirroring the language of 9 U.S.C. § 10(a)(4), Respondent does not state grounds for vacatur under the statute. As such, Respondent's arguments concerning the Award's perceived departures from Texas law are improper and cannot be considered by this court" (footnotes and citation omitted; brackets in original).

***Stacy v. Morgan Stanley*, FINRA ID No. 20-01785 (Cincinnati, OH Jan. 26, 2021)**: The sole Public Arbitrator in this explained Award articulates why expungement was denied: "Notwithstanding the absence of any input from the underlying customers or any opposing witnesses, Claimant failed to present sufficient evidence to merit the exceptional remedy of expungement. The grossly inadequate direct examination was not only unusually brief but consisted largely of unspecific, leading questions to Claimant, the sole witness. The direct examination was without any reference whatsoever to the produced documents and answered similarly. Indeed, counsel did not initially provide his witness, who was in a separate location, a copy of any documents. Such direct examination provided little factual support to the allegations in the pleadings."
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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Masumy, Naimeh, *Key Considerations in Drafting Dispute Resolution Clause in the COVID-19 Era; Pitfalls to Avoid*, The American Arbitration Review 2020 (November 11, 2020): "The COVID-19 pandemic continues to pose challenges to the arbitral process in an unprecedented manner. It has propelled the arbitration regime across the board in which virtual hearings have predominately replaced face-to-face hearings. As it remains uncertain whether it will be safe for parties to congregate in the same room, it is apparent that virtual arbitrations will continue to proliferate. To this end, many leading arbitral institutes have introduced guidelines and best practices for virtual hearings to ensure a fair and viable alternative to arbitrating in person. Similarly, some jurisdictions have taken substantial steps in recognizing the validity of virtual hearing by producing rulings to circumvent a possible objection to the finality of award. Whilst there is a growing acceptance of virtual hearing amongst the stakeholders of international arbitration, as a potent mechanism, there still exists a lingering concern over due process considerations pertaining to virtual hearings. Such concern may invite overzealous

judicial scrutiny of the final award, undermining the expeditious and smooth resolution of the dispute. As such, if the parties elect to conduct a virtual hearing, it is even more critical to carefully tailor a dispute resolution clause that is suited to the specific characteristics of the virtual proceedings and ensure efficient resolution of the dispute" (footnotes omitted).

***Finra Arbitrators Order J.P. Morgan, Former Brokers to Pay $19 Million*, InvestmentNews (Feb. 8, 2021):** "Finra arbitrators ordered J.P. Morgan Securities Inc. and two former brokers to pay a retailing matriarch $19 million for unauthorized trading of complex products in her account — transactions that were executed by her grandsons. A three-person Financial Industry Regulatory Authority Inc. arbitration panel in Boca Raton, Florida found the firm and former brokers Evan A. Schottenstein and Avi Elliot Schottenstein liable for constructive fraud and abuse of fiduciary duty, as well as fraudulent misrepresentations and omissions in trading done on behalf of Beverley Schottenstein, who is Evan and Avi's grandmother, according to the Feb. 5 award. In addition, the arbitrators found J.P. Morgan and the grandsons liable for elder abuse under Florida law. The evidentiary hearing in the case was conducted remotely via Zoom."

***What Can Employers Expect from the Biden Administration? [PODCAST]*, National Law Review (Feb. 10, 2021)**: "[Allan Bloom] Legislation, rulemaking or executive orders, and the like, and because the Supreme Court has said that arbitration is legal that class-action waivers are legal, President Biden will need Congress to pass a law that says they aren't. Sure the Senate is now controlled by Democrats, with Vice President Harris casting the tie-breaking vote so Congress certainly could legislate mandatory pre-dispute arbitration out of existence. In the employment context and the consumer context and also make class-action waivers unlawful, but there is always the possibility of a filibuster, which still exists. Under the Senate rules, forty-one senators can block a vote on almost any legislation around these lines. So if they wanted to, the Senate Republicans could filibuster laws that would impact arbitration and class-action waivers. We'll have to wait and see how that plays out in the Senate."

***Could an Appellate Review Mechanism "Fix" the ISDS System?* Kluwer Arbitration Blog (Feb. 11, 2021)**: "In the past few years, the world has been following the Investor-State Dispute Settlement (ISDS) reform debate under the aegis of the United Nations Commission on International Trade Law (UNCITRAL). This discussion started in 2017, when the UNCITRAL Working Group III began its work on ISDS reform. Among the proposals submitted by member States and other stakeholders, two systemic reform proposals call for the particular attention of academics and practitioners, as they may involve the replacement (total or partial) of the ISDS system. These are proposals for: (i) the establishment of a multilateral investment court; and (ii) the creation of an appellate mechanism."

***Finra Bars Ex-Wells Broker Accused of Improperly Seeking Virus Relief Loan*, AdvisorHub (Feb. 12, 2021)**: "The Financial Industry Regulatory Authority has barred a former Wells Fargo bank-base 'business support' from the Small Business

Administration, according to a letter of settlement finalized Wednesday. The regulator opened its investigation of Orlando, Florida-based rep … after she was fired in November 2020 for applying for relief from the SBA 'when [she] admitted she did not have a pre-existing formal business as required,' according to Finra and Wells' U5 notice published on her BrokerCheck profile."
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DID YOU KNOW?

PRESIDENTIAL SUPPORT FOR ARBITRATION GOES WAY BACK. Former President Trump was a big proponent of arbitration, but did you know that presidential support for arbitration goes way back to our nation's first President?* That's right, **George Washington's** Will from July 1799 calls for arbitration to resolve disputes among his heirs. In honor of Presidents Day, we've updated our 2016 blog on the topic, which now bears the name, *The Presidents and Arbitration: from Washington to Biden: An Update*. *(ed: *To be absolutely accurate, George Washington was elected in 1789 as the first President of the Constitutional Republic known as the United States of America. In 1781, John Hanson was the first person elected President under the Articles of Confederation, the precursor to the Constitution. He evidently didn't have a very good press agent because no one remembers that fact!)*
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