SECURITIES ARBITRATION ALERT 2021-08 (3/4/21)

George H. Friedman, Editor-in-Chief

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WHATEVER HAPPENED TO *MONSTER ENERGY* ON REMAND TO JAMS – PART 2: DISTRICT COURT REJECTS CHALLENGE TO JAMS' NEUTRALITY. *The District Court has rejected a party's challenge to JAMS'*

neutrality as administrator because the provider filed an* Amicus *Brief at the Supreme Court supporting the position taken by its adversary in the same arbitration. First, a review borrowed from our coverage in SAA 2021-01 (Jan. 14). When an Award is vacated, the case typically ends up back at the ADR administrator. If the Award was vacated due to arbitrator misconduct – for example, failure to make a required disclosure – the arbitration typically is reheard before a new arbitrator or panel. Usually, there's not much controversy surrounding these events. Every rule, however, has its exception, as demonstrated by *Monster Energy Co. v. City Beverages, LLC*, 940 F.3d 1130 (9th Cir. Oct. 22, 2019), a case on which we first reported in SAA 2019-41 (Oct. 30).

Case Below

The basic facts as described in the Appellant's Brief: "The Arbitrator in this matter failed to disclose ownership in a firm that has substantial and ongoing business with the prevailing party, Monster Energy. The undisclosed ownership in JAMS -- a for-profit company -- gave the Arbitrator a direct financial interest in up to half of the fees paid in at least 97 arbitrations directed to JAMS by Monster over the last five years and in future fees from the ongoing relationship." A divided *Monster* Panel at the Ninth Circuit vacated the $3 million Award for "evident partiality" under the Federal Arbitration Act ("FAA"), because the Arbitrator failed to disclose an ownership interest in for-profit ADR provider JAMS (even though the arbitration involved a "repeat player"). Then, as reported in SAA 2020-25 (July 8), SCOTUS on **May 28** denied Monster's Petition for *Certiorari* in case No. 19-1333. With the Award vacated, the case was back at JAMS for a new arbitration before a new panel.

JAMS' Neutrality Challenged

So far, so good. However, City Beverages asked the District Court to disqualify JAMS as the administrator, contending in *Monster Energy Co. v. City Beverages LLC*, No. 5:17-cv-00295 (C.D. Calif.), that JAMS was not neutral. How so? City contended that JAMS essentially took sides when it filed an *Amicus* Brief in support of Monster's position when the *Cert.* Petition was pending at SCOTUS (it also had filed an *Amicus* Brief supporting Monster's request for *en banc* review by the Ninth Circuit). In its **December 21** "Motion to Compel Arbitration in a Neutral Forum," City asked the Court to exercise its authority under FAA section 5 to appoint a different administrator such as the AAA, asserting that: "JAMS and its neutrals violated the ongoing impartiality requirement and disqualified themselves from serving as a neutral forum when they decided to support Monster Energy. Even if JAMS were to argue that it can be neutral in this matter, which it has not done, Olympic Eagle has the right to disqualify JAMS [under California's *Ethics Standards for Neutral Arbitrators in Contractual Arbitration* standards (10(a)(2) and (c)] and its neutrals because they have created, at a minimum, reasonable doubt about their impartiality.... In the unique circumstances of this case, the only case where JAMS has filed adversarial briefs taking sides against one party following a JAMS arbitration, Olympic Eagle respectfully asks the Court compel arbitration in a different, neutral forum."

Administrator Bias Argument Rejected
The District Court rejected the challenge on **February 17**. Noting that JAMS in its briefs was taking a position on the issues before the Courts, not the merits of the underlying arbitration, the Court holds: "It would be highly speculative to argue that this position would affect an individual JAMS arbitrator's ability to neutrally consider Olympic's and Monster's dispute. There is therefore no reason to take the drastic step of disqualifying every single JAMS arbitrator – even those with no ownership interest in the company – before the parties have even attempted to arbitrate before JAMS."
*(ed: *We agree! As we said in # 01: "We don't see JAMS as having taken sides – it argued an issue, not on behalf of a party. Other ADR providers have filed* Amicus *Briefs over the years." **Email us at Help@SecArbAlert.com for a copy of the decision.)*
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THIRD TIME NOT THE CHARM: SDNY AGAIN FINDS NY CPLR SECTION 7515 IS PREEMPTED BY THE FAA. ***The U.S. District Court for the Southern District of New York holds for the third time that the Federal Arbitration Act ("FAA") preempts an amendment to New York's arbitration statute banning mandatory predispute arbitration agreements ("PDAA") covering discrimination and harassment claims.*** Readers may recall that New York's arbitration statute, Article 75 of the Civil Practice Law and Rules, was amended in **2018** to add a new section 7515, rendering null and void mandatory predispute arbitration agreements ("PDAA") covering sexual harassment disputes (see SAA 2018-39 (Oct. 17) for our coverage). As we later reported in SAA 2019-25 (Jun. 26), the law was again amended effective **October 2019** to expand section 7515's PDAA ban to embrace *any* "discrimination in violation of laws prohibiting discrimination…."

Third Time Not the Charm
In **June 2019**, the **2018** amendment was deemed preempted by the FAA in *Latif v. Morgan Stanley & Co., LLC*, No. 18cv11528 (S.D.N.Y. 2019) (see SAA 2019-29 (Jul. 31)). The 2019 amendment was next to be held preempted in *Whyte v. WeWork Companies, Inc*., No. 20cv01800 (S.D.N.Y. June 11, 2020), a case we covered in SAA 2020-24 (Jun. 24). And now, for the third time in less than two years the Southern District of New York holds that CPLR section 7515 is preempted by the FAA. District Court Judge **Lewis J. Liman**, citing *Latif* and *Whyte*, holds in *Gilbert v. Indeed*, No. 20-3826, 2021 WL 169111 (S.D.N.Y. Jan. 19, 2021), that: "… New York State cannot exempt Plaintiffs' federal employment discrimination and state law claims from mandatory arbitration under the FAA. Congress did not intend that discrimination claims be exempted from the FAA or its requirement that arbitration agreements requiring private dispute resolution be enforced 'save upon such grounds as exist at law or in equity for the revocation of any contract.'" Citing FAA section 2, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991), and *Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc.*, 191 F.3d 198, 203 (2d Cir. 1999), Judge Liman concludes: "New York State lacks power to reach a contrary conclusion and to exclude such claims from the FAA when Congress has chosen not to do so. See *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984). The same conclusion also follows for Plaintiffs' state and city statutory

claims. Claims under both federal and state and city discrimination laws generally can be the subject of mandatory arbitration."
*(ed: *Not to say we told you so, but we told you so. We said when the law was enacted in 2018 and amended in 2019 that the statute "faced serious FAA preemption challenges." Looks like we were right. **See to the same effect,* Crawford v. The Goldman Sachs Group, Inc., *No. 159731/2020 (Sup. Ct. NY Cty. Feb. 23, 2021), covered in this issue's "Quick Takes." ***Section 7515 has a carveout for SRO-administered arbitrations.)*
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CITING SCOTUS PRECEDENT, VERMONT SUPREME COURT HOLDS FAA APPLIES AND PREEMPTS STATE LAW. ***In a case of first impression, the Vermont Supreme Court in a unanimous 5-0 holding – with two "reluctant" occurrences – finds that: 1) the Federal Arbitration Act ("FAA") is to be construed broadly as to interstate commerce; 2) the FAA preempts a Vermont statute requiring a separate "Acknowledge of Arbitration;" 3) FAA section 2 requires that arbitration agreements be put on the "same footing" as contracts in general; and 4) the sole grounds for moving to vacate are those articulated in the FAA.*** *Masseau v. Luck*, 2021 VT 9 (Feb. 19, 2021), has a fact pattern that reminds us of several Supreme Court cases we will discuss later. Here, homeowners sued a national home inspection service for failing to disclose the presence of asbestos. The firm countered by moving successfully to compel arbitration based on the predispute arbitration agreement ("PDAA") in the parties' contract. The appeal in *Masseau* focuses on these core issues: 1) the FAA's applicability; 2) the PDAA's validity and enforceability under Vermont law; and 3) whether the eventual Award could be challenged on "manifest disregard of the law" grounds. The Court holds for the inspection firm across the board, citing SCOTUS precedent along the way.

The FAA is Broadly Construed as to Interstate Commerce
Citing *Citizen's Bank vs. Alafabco*, 539 U.S. 52 (2003), and *Allied-Bruce Terminix v. Dobson*, 513 U.S. 265 (1995), the Court holds that the FAA is to be construed broadly as to its applicability and interstate commerce: "… the reach of the FAA extends to the full extent of Congress's authority under the Commerce Clause. Second, the transaction between the parties in this case falls within the broad scope of Congress's authority under the Commerce Clause."

Vermont's Law is Preempted by the FAA
The *Vermont Arbitration Act* in 12 V.S.A. § 5652(b) requires a separate "Acknowledgement of Arbitration" provision that was admittedly not present here. Citing among other cases *Southland v. Keating*, 465 U.S. 1 (1984), and *Doctor's Associates v. Casarotto*, 517 U.S. 681 (1996), the Court finds that the Vermont law is preempted by the FAA: "Because the FAA applies, it preempts the notice and acknowledgment requirement of the VAA. Although the U.S. Supreme Court has held that state law may be applied 'if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally,' courts cannot invalidate

arbitration agreements under state laws applicable only to arbitration provisions…. The FAA therefore preempts the VAA to the extent that the VAA requires a specific notice and acknowledgment" (citation omitted).

The Award Cannot Be Vacated for a Mistake of Law

The case proceeded to arbitration and an Award was eventually rendered in the inspection service's favor. The homeowners moved without success to vacate the award on the basis of "manifest disregard of law." What was the problem? "They [homeowners] argue that the arbitrator manifestly disregarded the law here by declining to credit their factual allegations and dismissing them as 'conclusory' when he was required to accept them as true for the purposes of his evaluation of inspectors' motion to dismiss…." The Court holds that under *Hall Street v. Mattel*, 552 U.S. 52 (2008), the sole grounds for moving to vacate are those articulated in the FAA. And, while "manifest disregard of the law" may still be viable under *Hall Street*, Awards cannot be vacated for what here is alleged to be an ordinary error of law: "We do not decide whether 'manifest disregard' of the law is a basis for vacating an arbitrator's award because we conclude that any error in the arbitrator's legal analysis did not rise to the level of 'manifest disregard.'"

*(ed: We think the case was rightly decided. **Chief Justice Reiber, joined by Justice Cohen, "reluctantly" concurs: "I write separately to make the point that the FAA was not intended to apply in this instance, and this outcome deprives the citizens of our state a remedy under the Vermont Arbitration Act (VAA) that offers greater protection than the FAA.")*

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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

FINRA DRS POSTPONES IN-PERSON HEARINGS THROUGH JUNE 4. FINRA's Office of Dispute Resolution Services ("DRS") has again administratively postponed all in-person arbitration and mediation hearings. The **March 3** announcement now includes hearings through **June 4**; the previous date was **April 30**. As was the case before, the DRS Website notice adds: "Please note that postponing a hearing will not affect other case deadlines. All case deadlines will continue to apply and must be timely met unless the parties jointly agree otherwise." The updated announcement offers fee waivers for stipulated postponement of hearings set through **August 31, 2021.** Why the latest date pushback? Says DRS: "Currently, none of the 69 hearing locations demonstrate public health conditions that are consistent with CDC guidance for activities such as in-person hearings." What if participants want to hold an in-person hearing nonetheless? Says DRS: "Note that if all parties and arbitrators agree to proceed in-person based on their own assessment of public health conditions, the case may proceed provided that the in-person hearing participants comply with all applicable state and local orders related to the COVID-19 pandemic."

(ed: With the vaccine rollout moving ahead, the President stating that most adults will be inoculated by the end of May, and some states lifting COVID-19 restrictions, we suspect in-person hearing resumption at least in some locations will come this summer.)

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FINRA BOARD MET VIRTUALLY THIS WEEK. NO DISPUTE RESOLUTION ITEMS. FINRA's Board of Governors met virtually **March 3 – 4**. As we expected, the published Agenda did not reflect any dispute resolution-related items. We will of course follow up after the meeting results are posted, just to be sure. The schedule for the rest of the year is: **May 18 – 19; July 21 – 22; September 23 – 24;** and **December 1 – 2.** We imagine these meetings will also be virtual until conditions permit them to be in-person. *(ed: We'll tweet any news as soon as we have it and will cover the topic in the next* Alert*.)*

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SEC CHAIR NOMINEE GENSLER HAS AN "OPEN MIND" ON MANDATORY ARBITRATION. SEC Chair nominee **Gary Gensler** said at a **March 2** Senate Banking Committee confirmation hearing that he was "open" to reconsidering the industry's use of binding mandatory arbitration for resolving customer disputes. Although the topic was not addressed in either Chairman **Sherrod Brown's** (D-OH) opening statement or Mr. Gensler's prepared remarks, it came up in an interchange with Sen. **Elizabeth Warren** (D-MA), who asked: "Hypothetically, for example, if Robinhood cheated individual investors, hypothetically, should that company be able to use forced arbitration clauses to avoid getting sued and held accountable?" Mr. Gensler replied: "While arbitration has its place, it's also important that investors – or, in that case, customers – have an avenue to redress their claims in the courts." Dodd-Frank section 921 gives the SEC authority to limit or eliminate predispute arbitration agreements or set conditions for their use, but it has not done so.
*(ed: *Hard to say where this will go, but very interesting, nonetheless. **The quotes were in an InvestmentNews article,* Gensler Quizzed on Climate Disclosure, Mandatory Arbitration in Confirmation Hearing*, published March 2. ***The exchange starts around marker 01:44:30 of the archived hearing video.)*

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WE PROMISED MORE DETAILS ON THE RECENTLY REINTRODUCED *FAIR ACT,* BUT WE NEED TO SEE THE TEXT. We reported in SAA 2021-06 (Feb. 18) that, as we had confidently predicted, the Democrats had reintroduced several bills to curb use of mandatory predispute arbitration agreements ("PDAA"). We noted that bill texts for the most part had not yet been published, and promised more expansive coverage after that had occurred. Alas, very little has changed since we last reported on the bills. Here's a recap:

- H.R. 963 – *Forced Arbitration Injustice Repeal (FAIR) Act*: While still not published, 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 now has 164 co-sponsors, all Democrats. Recall that only 218 votes are needed for passage.

- *Protecting the Right to Organize (PRO) Act* – still not yet numbered: 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 – still 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.

*(ed: *Not sure what the holdup is. **As we said in #06, we are sure there are more bills to come. There were over 100 arbitration-related bills introduced in the last Congress.)*
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"ALEXA … DO I HAVE TO ARBITRATE MY DISPUTE WITH AMAZON?" YES YOU DO, ACCORDING TO A DIVIDED NINTH CIRCUIT. Amazon's voice-driven "Alexa" device can generally be activated one of three ways: 1) intentionally by the account holder; 2) by someone else in the area; or 3) through "surreptitious recordings" when the device: "sporadically records conversations without prompting and permission from anyone in the household." The device transmits the recordings to Amazon, to be used for marketing purposes. In *Tice v. Amazon.com, Inc*., No. 20-55432 (9th Cir. Feb. 19, 2021) (unpublished), Tice sought class certification under California's *Invasion of Privacy Act* ("*CIPA*") asserting: "she and other class members were injured because Amazon's voice-activated device, Alexa, recorded Tice's communications without her consent." Amazon sought to compel arbitration at the AAA based on the predispute arbitration agreement in the Terms of Use. The District Court compelled arbitration of the first two types of claims, but declined to do so for the third category. On appeal, a divided Ninth Circuit reverses the last part of the District Court's ruling: "[T]he arbitration clauses apply to '*any dispute* or claim *relating in any way* to . . . use of any Amazon Service, or to *any products* or *services* sold or distributed by Amazon or through Amazon.com' and to '[a]ny dispute or claim arising from *or relating to* this Agreement or *Alexa*.' As a result, it is for the arbitrator to decide whether Tice's 'surreptitious recording' claim is beyond the scope of any arbitration" (ellipse and emphasis in original). The majority also found irrelevant that the surreptitious recordings may also have been criminal offenses since Tice's claims were limited to seeking damages for civil violations.

*(ed: *Seems right. **Judge Bumatay concurs in the result only. Judge Eaton dissents, asserting that non-signatories who were surreptitiously recorded should not be bound to arbitrate.)*
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QUICK TAKES: CASES AND AWARDS WORTH READING

***Jasicki v. Morgan Stanley Smith Barney LLC*, No. A-1629-19T1 (N.J. App. Div. Jan. 21, 2021) (*per curiam*) (unpublished)**: "Here, similar to *Skuse* [*v. Pfizer, Inc*., 244 N.J. 30 (2020)], plaintiff does not dispute that she received the CARE email. The email subject line and its body unmistakably pertained to the CARE Arbitration Program. Contrary to plaintiff's argument, the outcome in *Skuse* did not turn on the multiplicity of communications sent by Pfizer. Rather, as the *Skuse* Court noted, an employee's failure to review the contents of an email does not invalidate an arbitration agreement. Moreover, arbitration was not unilaterally imposed; plaintiff had time to either opt out or, as in *Skuse*, assent to arbitration by continuing to work for Morgan Stanley. For these reasons, we reject plaintiff's argument this dispute centers on metadata or that defendants were required to prove the extent to which she read the CARE email, beyond presenting objective evidence that she received the email, in order to compel arbitration of plaintiff's claims."

***Crawford v. The Goldman Sachs Group, Inc.*, No. 159731/2020 (Sup. Ct. NY Cty. Feb. 23, 2021)**: Another court – this one a New York State trial court – finds that CPLR section 7515 is preempted by the FAA: "… defendants' motion to compel arbitration is granted as the claims fall within the scope of the arbitration clause and are not barred by CPLR 7515 as this dispute is governed by the FAA, see *Gilbert v. Indeed, Inc*., 2021 WL 169111 (S.D.N.Y. January 19, 2021); *Latif v. Morgan Stanley & Co*., 18-CV-11528, 2019 WL 2610985, at *3 (S.D.N.Y. June 26, 2019); and it is further ORDERED that plaintiff shall arbitrate her claims against defendants in accordance with the parties' contract …." (*ed: email us at Help@SecArbAlert.com for a copy of the decision. An* Alert *h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this decision.)*

***Schottenstein v. JP Morgan*, FINRA ID No. 19-02053 (Boca Raton, FL Feb. 5, 2021):** Respondent broker-dealer and two brokers are found liable on the claims of constructive fraud, misrepresentation, and elder abuse in violation of Chapter 415, Fla. Statutes and are each held liable to Claimants for compensatory damages and costs totaling nearly $19 million. The Claimants are also awarded rescission of their investment by the All-Public Panel. (*ed: Provided courtesy of SAC's ARBchek facility, www.arbchek.com*.)
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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Alexander, Nadja Marie, *Opening the Mediation Window in the Arbitration House*, 20 Canadian Arbitration and Mediation Journal 37 (2011): "Throughout the 20th century the arbitration house has dominated the landscape of international commercial dispute resolution with the court house providing another part of the structural landscape.

In the 21st century foundations are being laid for construction of a free-standing mediation house in international dispute resolution practice. Meanwhile a closer inspection of arbitration house reveals the ongoing construction of mediation and other ADR windows in its design. In this paper I explore how and why mediation windows are being built, their structural and functional soundness and the extent to which they may open up and transform arbitration."

SEC Awards More Than $9.2 Million to Whistleblower for Successful Related Actions, Including Agreement With DOJ, **www.sec.gov (Feb. 23, 2020)**: "The Securities and Exchange Commission today announced an award of more than $9.2 million to a whistleblower who provided information that led to successful related actions by the U.S. Department of Justice, one of which was a non-prosecution agreement (NPA) or deferred prosecution agreement (DPA). The whistleblower previously received an award for contributions to an SEC enforcement action based on the same information that supported the award for the related actions, a prerequisite for eligibility for a related-action award."

Mandatory Registration for New York Based Investment Advisors**, Shustak Reynolds & Partners, P.C. Alert (Feb. 23, 2021)**: "On February 1, 2021, a new amendment to the New York Investment Advisory Act went into effect, now requiring investment advisor representatives ("IARs") doing business in the state of New York to register themselves with the New York Attorney General. Registration is accomplished by filing a Form U4 application with state regulators via the Investment Adviser Registration Depository ("IARD") after completing any required examinations."

Turning of the Tide in Employment Arbitration: Could Congress Ban Mandatory Employment Arbitration? **Seyfarth Shaw LLP Blog (Feb. 25, 2021)**: "Arbitration agreements with class and collective action waivers can help employers limit litigation exposure, especially to wage and hour claims. In recent years, however, in light of the 'Me Too' movement, state and federal lawmakers have sought to limit or prohibit employment arbitration. Unlike in past years, the make-up of the new Congress, plus a more receptive Presidential administration, means efforts at the federal level have a greater chance of enactment than ever before. This blog series will follow these developments as they occur."

New York Ban on Arbitration of Discrimination Claims Repeatedly Struck Down as Inconsistent With Federal Law**, Kramer Levin Blog (Feb. 26)**: "In April 2018, New York enacted Section 7515 of the New York Civil Practice Law and Rules (CPLR 7515), which invalidated pre-dispute agreements to arbitrate sexual harassment claims, except where inconsistent with federal law.' New York expanded the prohibition on pre-dispute arbitration agreements to all claims of discrimination in 2019. As outlined in our previous alert, the Southern District in *Latif v. Morgan Stanley & Co. LLC, et al*., No. 18-CV-11528 was the first court to address the validity of the purported prohibition and found that CPLR 7515 was preempted by the Federal Arbitration Act (FAA). This alert examines federal and state court cases in New York decided since *Latif* addressing the

validity of Section 7515's prohibition of pre-dispute arbitration agreements, and provides guidance for maximizing the enforceability of such agreements."
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DID YOU KNOW?

USING AN ARBITRATION RESOLUTION SERVICES ARBITRATION CLAUSE? THE CLOUD-BASED ADR PROVIDER WANTS TO KNOW. Online ADR provider Arbitration Resolution Services ("ARS") recently posted to its Website a confidential *Arbitration Clause Survey Form* asking for help measuring use of arbitration agreements naming ARS as administrator. Says the survey: "While Arbitration Resolution Services, Inc. ("ARS") does not require that users register their predispute arbitration agreements ("PDAA"), we would still like to know who's using us as an arbitration or mediation service in their contracts. If your company uses a PDAA referring to ARS, or if your law firm recommends that clients do so, please help us by completing this simple, confidential form." ARS' Website states that it was created: "to revolutionize the way disputes are resolved throughout the country. By integrating state-of-the-art technology with experienced and knowledgeable professionals, ARS has developed the ideal environment to bring alternative dispute resolution, using mediation and binding arbitration, to virtually everyone, anywhere in the country."
*(ed: *We encourage our readers to respond to the survey. **Full disclosure: the* Alert*'s publisher and Editor-in-Chief is non-executive Chairman of ARS.)*
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LETTER TO THE EDITOR

We always welcome comments on current items of interest. Recent Alerts *have covered efforts to legislatively restrict arbitration. Here's a letter from trial counsel, arbitrator, and mediator – and SAA Editorial Advisory Board Member – David Robbins, Esq., opining on this topic. We reply below:*

Robbins: I wish to speak about the present, misguided intention of Congress to abolish a dispute resolution avenue for investors that has benefited them for decades and that has been covered in the *Alert* in recent weeks.

I have been an attorney for 45 years, almost exclusively representing investors, brokers and firms in dispute, serving as an arbitrator and mediator and being the author, for 30 years, of a treatise utilized by law schools and law firms throughout the country on the subject of resolving such disputes. I am a former New York State Special Deputy Attorney General in the Securities Bureau, a former Director of Compliance and Director of Disciplinary Hearings for the American Stock Exchange, a Practice Commentator for *McKinney's Consolidated Laws of New York,* co-chair the New York State Bar Association program on the subject, a recipient of the Public Investors Advocate Bar Association award for life-time service to investor rights and a frequent speaker at law schools.

From that breadth of experience - representing both investors and financial advisors - I know in my heart and from my experience that FINRA securities arbitration provides the necessary dispute resolution alternative to better, swifter and fairer results than litigation in state and federal courts, where pleading requirements, destructive motion practice, expensive and dilatory discovery, clogged trial calendars and jurors who have no understanding of investor rights and brokerage firm obligations would discourage victims of investment fraud and negligence from pursing such an avenue.

It is my belief, as a litigator and arbitration attorney, that should predispute arbitration clauses in customer agreements be rendered a nullity by ill-informed politicians, investors will suffer and abusive industry practices will flourish unabated. When I'm a mediator, my goal is to get the parties to appreciate "how the song will end" and why it makes more sense to resolve the dispute at that time. From my decades-long experience representing investors, I know "how the song will end" should predispute arbitration agreements be banned: the melody will be discordant, leaving in its wake investors abused by the process of litigation.

FINRA has come a long way to protect investor rights. Arbitration panels, whom the parties select, are highly diverse and arbitrators "know it when they see it." Most cases settle in months rather than years and it is my observation that due process is the hallmark of every arbitration hearing.

David E. Robbins
Kaufmann Gildin & Robbins LLP

SAA: Great perspective and spot on! If the system needs improvement – and as Mr. Robbins notes much has been done by FINRA in this regard – let’s have at it. But outright bans on a process that works to us makes little sense.

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

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