# SECURITIES ARBITRATION ALERT 2021-17 (5/6/21)

*George H. Friedman, Editor-in-Chief*

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## *SQUIBS: IN-DEPTH ANALYSIS*

**FINRA ISSUES REG NOTICE ON "DO'S AND DON'TS" OF PDAA USE IN CUSTOMER AGREEMENTS.** ***FINRA has issued a Regulatory Notice reminding industry parties on the proper use of predispute arbitration agreements ("PDAA") in***

***customer account agreements.*** Regulatory Notice 21-16, *FINRA Reminds Members About Requirements When Using Predispute Arbitration Agreements for Customer Accounts*, was issued on **April 21**. Why issue the Notice? "FINRA has become aware that customer agreements used by some member firms contain provisions that do not comply with FINRA rules. Member firms with customer agreements that include provisions that do not comply with FINRA rules should take prompt steps to ensure that their customer agreements fully comply with FINRA rules. Failing to comply with FINRA rules related to customer agreements may subject member firms to disciplinary action. This Notice provides examples of provisions in customer agreements that do not comply with FINRA rules …." We excerpt below essentially *verbatim* the key provisions. Footnotes are omitted and links to Rules sections have been added.

*Hearing Locations*
Some customer agreements attempt to dictate the location of the arbitration hearing…. Any such provision does not comply with FINRA Rule 12213, which provides that the Director of Dispute Resolution Services will decide which of FINRA's hearing locations will be the hearing location for the arbitration. Generally, the Director will select the hearing location closest to the customer's residence at the time of the events giving rise to the dispute, unless the hearing location closest to the customer's residence is in a different state, in which case the customer may request a hearing location in the customer's state of residence at the time of the events giving rise to the dispute.

*Time Limitations*
Some customer agreements attempt to shorten or extend applicable statutes of limitations. FINRA Rule 12206 allows arbitration claims to be submitted unless six years have elapsed from the occurrence or event giving rise to the claim. The arbitrator or panel resolves any questions regarding the eligibility of a claim under this rule or under an applicable state statute of limitations. Consequently, customer agreements may not be used to shorten or extend statutes of limitations or require that a question of whether a time limitation applies be judicially determined instead of being submitted to an arbitrator ….

*Class Action Claims*
Some customer agreements attempt to limit a customer's right to pursue class actions in court. Examples include customer agreements that state that the customer waives any right to bring a class action; customer agreements that state that any claims between the parties must be brought in an individual capacity; and customer agreements that state broadly that the agreement to arbitrate constitutes a waiver of the right to seek a judicial forum, without sufficiently indicating that class actions are excepted from this waiver…. [L]imiting a customer's right to pursue class actions in court through a customer agreement, or seeking to enforce such an agreement, does not comply with FINRA rules.

*Claims and Awards*
Some customer agreements attempt to limit the ability of a customer to file a claim or to limit the authority of the arbitrators to make an award, including, for example, through

provisions that purport to limit the member firm's liability for consequential or punitive damages, or damages that do not arise from the member firm's gross negligence or intentional misconduct. Other customer agreements attempt to do so indirectly by incorporating a choice of law or governing law clause. However, "if a choice of law provision is used, there must be an adequate nexus between the law chosen and the transaction or parties at issue in accordance with Notices to Members 95-85 and 95-16."

*Indemnity and Hold Harmless Provisions*
Some customer agreements contain indemnification or hold harmless provisions, such as broad provisions that require that the customer indemnify and hold harmless the member firm from all claims and losses arising out of the agreement. Indemnification and hold harmless provisions do not comply with FINRA Rule 2268 where the provisions, if given effect, would limit the customer from bringing a claim or receiving an award from the member firm or associated person that they would otherwise be entitled to receive.… In addition, a well-developed line of case law has held that it is contrary to public policy for a person to seek indemnity from a third party for that person's own violation of the federal securities laws. Accordingly, FINRA believes that it would be unethical and not in compliance with FINRA Rule 2010 for a member firm or associated person to attempt to seek indemnity from customers of costs or penalties resulting from the firm's or associated person's own violation of the securities laws or FINRA rules.
*(ed: *These are pretty strong admonitions. We expect some well-publicized disciplinary actions will follow. **The Reg Notice adds that: "the provisions in customer agreements that potentially do not comply with FINRA rules are not limited to those discussed in this Notice." ***The Notice is also available in PDF format.)*
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**NINTH CIRCUIT RULES ON CALIFORNIA AB-5. CAN AB-51 BE FAR BEHIND?** ***The Ninth Circuit just ruled on the validity of AB-5 -- California's "Gig Worker" protection law. Can we expect a decision soon on AB-51, which would restrict predispute arbitration clauses ("PDAA") in employment relationships?*** A divided Ninth Circuit held on **April 28** that AB-5 – which established worker classification rules – was not preempted as to truckers by the *Federal Aviation Administration Authorization Act* (see *California Truck Ass'n v. Bonta*, No. 20-55106)). This news prompts us to wonder when we might expect a decision from this Court on another new California law facing a federal preemption challenge?

**California AB-51: A Review**
We reported in SAA 2020-47 (Dec. 27, 2020), that the Ninth Circuit on **December 7, 2020** heard oral argument on a Federal Arbitration Act ("FAA") preemption challenge to AB-51. As reported in SAA 2020-05 (Feb. 5), the federal District Court in *Chamber of Commerce of the United States v. Becerra*, No. 2:19-at-01142 (E.D. Calif. Dec. 6, 2019), had issued a preliminary injunction staying the planned **January 1, 2020** implementation of California AB-51, pending final determination on the merits of a suit challenging the statute. The law would have essentially banned mandatory arbitration of employment discrimination, sexual harassment, and wage law disputes. The statute also provides that

an employer can't: "threaten, retaliate or discriminate against, or terminate" an employee or job applicant who refuses to consent to waiver. There are both civil and criminal penalties for violations, but the law has some carve-outs seemingly included to avoid FAA and federal securities acts preemption. The Plaintiffs were seeking declaratory and injunctive relief -- based on FAA preemption -- to block effectiveness of AB-51.

**Preliminary Injunction Issued, Appeal Filed**
After temporarily restraining California from enforcing the law, the District Court in a Minute Order issued **January 31** granted in full the request for a preliminary injunction enjoining California from enforcing the new law. District Court Judge **Kimberly Mueller**'s 36-page Opinion found that the Plaintiffs were likely to prevail on their FAA preemption arguments and would suffer irreparable harm in the interim. The State then appealed to the Ninth Circuit on **February 24,** and filed its brief on **May 18.** The core argument in the 66-page brief? "The district court abused its discretion, committing legal error, by assuming the Federal Arbitration Act (FAA) and its preemption jurisprudence applied to the new sections of the California Labor Code and Government Code added by California Assembly Bill 51 (AB 51). But the two key substantive provisions of AB 51, Labor Code Section 432.6 subdivisions (a) and (b), do not prohibit parties from entering into arbitration agreements or prevent their enforcement. Instead, they regulate employer conduct, prohibiting actions by employers that require applicants or employees to waive rights as a condition of employment, and prohibiting discrimination, retaliation, and termination of employees that decline to enter into such waivers."

**Oral Argument December 2020**
The Ninth Circuit last December heard oral argument in *Chamber of Commerce of the US v. Becerra*, No. 20-15291. The Court posted in several formats audio and video recordings of the 43-minute oral argument. The Chamber's brief can be found here; the State's here. The Panel that heard the appeal was: **Carlos Lucero** (Clinton appointee, sitting by designation), **William Fletcher** (Clinton), **Sandra Segal Ikuta** (G.W. Bush). Judge Ikuta also heard *California Trucking* and sided with the Majority.
*(ed: *We don't read anything into what the AB-5 decision portends regarding a determination on AB-51 FAA preemption. **We continue to see this one as eventually destined for SCOTUS no matter what happens at the Ninth Circuit. As we've said before, we're betting on the Plaintiffs. ***As reported previously, the U.S. Chamber has a Webpage dedicated to this case. ***We will continue to track this one.)*
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## *SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW*

**AGENDA PUBLISHED FOR VIRTUAL FINRA ANNUAL CONFERENCE LATER THIS MONTH. NO DISPUTE RESOLUTION PANELS AS FAR AS WE CAN TELL.** We reported in SAAs 2021-13 (Apr. 15) & -02 (Jan. 21) that FINRA's *Annual Conference* will take place **May 18 – 20** and will be conducted virtually. This event: "provides the opportunity for practitioners, peers and regulators to exchange ideas on timely compliance and regulatory topics. Nowhere else will you find this unique

combination of the highest-caliber speakers discussing issues that matter most for the financial services industry." We said in #13 that the Agenda had not yet been posted, so we didn't know if there were dispute resolution panels. Both questions have now been answered. By that we mean that the Agenda is now published and lists as speakers several FINRA Dispute Resolution Services ("DRS") staffers, but as far as we can tell there are no panels featuring dispute resolution or these individuals as faculty. The program brochure does report that DRS will have a "Demo Booth" where attendees can: "Meet the FINRA Dispute Resolution Services staff to learn more about the FINRA arbitration and mediation programs." Our guess is that the listed DRS personnel will be staffing these day-long virtual demos. The conference also features "Office Hours" that: "provide[] an opportunity for conference attendees to meet one-on-one with FINRA staff. FINRA employees will be available for 15-minute appointments to answer questions and discuss firm-specific issues." DRS staff are not listed for this activity.
*(ed: *Registration – greatly reduced from past in-person rates – ranges from $199 for government agency registrants to $399 for non-members, with group discounts available. Conference fees: "include access to the conference attendee hub, attendance to all sessions and conference materials." **We were surprised not to see Director of Arbitration Rick Berry listed as a speaker. ***It's unfortunate there are no panels involving DRS. How the forum met the COVID-19 challenges, and its plans going, forward would have been interesting topics.)*
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**SEC'S NEW HEAD OF ENFORCEMENT RESIGNS SUDDENLY.** The SEC's Division of Enforcement Director **Alex Oh** resigned her post unexpectedly on **April 28,** the Commission announced in a Press Release. The Release cites "personal reasons" but the *Wall Street Journal* on **April 28** reported that: "Ms. Oh decided to resign after U.S. District Judge Royce Lamberth, in an order issued Monday, questioned her conduct during a deposition in a lawsuit filed against Exxon Mobil. Ms. Oh's law firm, Paul Weiss, represents Exxon in the matter." **Melissa Hodgman**, who had served as Acting Director earlier this year, will return to that position.
*(ed: Numerous media reports termed Ms. Oh's departure as shocking. Whatever the reason, we would have to agree since she was appointed on April 22.)*
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**NFA INVESTOR NEWSLETTER HITS THE ELECTRONIC NEWSSTAND.** The National Futures Association ("NFA"), which operates a dispute resolution forum, issues a periodic *Investor Newsletter* aimed at commodity futures investors. It's designed to keep investors up-to-date on recent NFA initiatives, upcoming events, and resources that investors may find helpful. In the second *Newsletter* of 2021, distributed under a summary email dated **April 22, 2021**, NFA lists several highlights which we explore in the order presented, excerpted essentially *verbatim*: **Investor Education** reports: *Webinar*: NFA and the CFTC held a free webinar entitled, *Investor Education: What to Know before Investing*, on Wednesday, April 14, 2021. The webinar covered important investor protection-related topics such as: Conducting due diligence; Red flags to watch for when investing; Cybersecurity tips; and Educational resources for investors; *Money*

*Smart Week 2021* -- held virtually from April 10-17, 2021 -- is a national public education program coordinated by the Federal Reserve Bank of Chicago and delivered by a network of supporters. *Money Smart Week* empowers people with the knowledge and skills to make better-informed personal financial decisions around the key financial pillars of saving, spending, borrowing and planning; and *FINRA's Courses on Smart Investing*: FINRA offers investor education courses on topics ranging from setting investment goals to understanding risks and returns. The six courses are designed to fit into a busy lifestyle and are available on demand for all levels of investors. The **Investor Protection** section states: *Customer Advisory: Understand Risks and Markets before Reacting to Internet Hype*: The CFTC advises customers to be especially vigilant when it comes to internet hype around market events and urges customers to understand the associated risks; *Conduct Due Diligence with NFA's BASIC*: Conducting due diligence is an important first step investors should take before starting a new business relationship with a firm or associate in the derivatives industry; and *NFA's Arbitration Program*: NFA offers an affordable and efficient arbitration program to help customers and Members resolve futures and forex-related disputes. As usual, the *Newsletter* signs off with a list of the quarter's enforcement actions, with links to final decisions in each, complaints that were issued, and final orders in registration cases. The *Newsletter* Webpage also contains: 1) a link to BASIC; 2) an online complaint form; and a link to past issues of the *Newsletter* and a subscription form.
*(ed: *An informative issue, as usual. **The enforcement actions database allows searches by subject matter, such as arbitration. ***Nice to see the arbitration program highlighted. Speaking of which, the stats may be found here.)*
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**MINOR CHILDREN OF AMAZON ACCOUNT HOLDERS NOT REQUIRED TO ARBITRATE DISPUTES OVER VOICE RECORDING BY "ALEXA" DEVICES**. We covered in SAA 2021-08 (Mar. 4) *Tice v. Amazon.com, Inc*., No. 20-55432 (9th Cir. Feb. 19, 2021) (unpublished), in a Short Brief titled: *"Alexa … Do I Have to Arbitrate My Dispute with Amazon?" Yes You Do, According to a Divided Ninth Circuit*. The Plaintiff had sought class certification under California's *Invasion of Privacy Act*, 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 ("PDAA") in the Terms of Use. The divided Ninth Circuit compelled arbitration, holding: "[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.*'" Now comes a slightly different Ninth Circuit panel, which holds unanimously in *B.A. v. Amazon, Inc*., No. 20-35359 (9th Cir. Apr. 23, 2021) (unpublished), that equitable estoppel cannot be used to compel arbitration involving claims asserted by the minor children of account holders. The Court states that: "It is undisputed that, if the parents brought the same claims as Plaintiffs, the terms to which they agreed would bind them to arbitration. Thus, the sole issue is whether the Plaintiffs, as non-signatories, are nonetheless bound to arbitrate." Applying Washington law, the

Court declines to apply equitable estoppel: "Plaintiffs are not asserting any right or looking to enforce any duty created by the contracts between their parents and Amazon. Instead, Plaintiffs bring only state statutory claims that do not depend on their parents' contracts. In other words, irrespective of those agreements, Amazon would owe to Plaintiffs the legal duty that Plaintiffs claim has been violated."
*(ed: *Judges Bumatay and Easton (sitting by designation) were on both Panels; the latter dissented in* Tice. ***A key fact was that the minor children were not attempting to benefit from their parents' contracts with Amazon while trying to avoid the PDAA. ****Perhaps we should have headlined this Short Brief:* "Alexa … Do I Have to Arbitrate My Dispute with Amazon?" Yes You Do, But Not Your Kids.*)*
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**ALL-PUBLIC PANEL DISMISSES ARBITRATION FILED MORE THAN SIX YEARS AFTER EVENTS GIVING RISE TO THE CLAIM**. FINRA's *Code of Arbitration Procedure for Customer Disputes* (*"Code*") Rule 12206 -- the so-called "Six-Year Eligibility Rule -- reads: "No claim shall be eligible for submission to arbitration under the *Code* where six years have elapsed from the occurrence or event giving rise to the claim. The panel will resolve any questions regarding the eligibility of a claim under this rule." Motions under this rule are decided by the full panel. Dismissals can be granted after a telephonic hearing (unless waived), and any grants must be unanimous and contained in an explained award. This is precisely what took place in *Ecenbarger v. H Beck, Inc.*, FINRA ID No. 20-03743 (Indianapolis, IN, Apr. 5, 2021), where the arbitration was filed more than six years after the events underlying the claim. Says the All-Public Panel: "This case was opened on **November 5, 2020.** The only act or omission specifically alleged as a basis for liability involved the purchase of two securities in **July of 2014**. There is no alleged act or omission of Respondent which occurred thereafter that could be a basis for liability. Accordingly, the claim, is not eligible for arbitration pursuant to Rule 12206(a) of the Code."
*(ed: The Panel adds that the dismissal: "is granted by the Panel without prejudice to any right Claimants have to file in court; Claimants are not prohibited from pursuing their claims in court pursuant to Rule 12206(b) of the* Code*.")*
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## *QUICK TAKES: CASES AND AWARDS WORTH READING*

***Bossé v. New York Life Insurance Co.*, No. 19-2240 (1st Cir. Mar. 30, 2021)**: "The district court refused to enforce arbitration clauses in the Employment Agreement between Ketler Bossé and New York Life, which expressly require that any disputes about arbitrability be referred to the arbitrator to decide. The Supreme Court decisions in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019), *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), and other cases result in our reversing that decision because the decision on whether the dispute is arbitrable belongs to the arbitrator and not to the court." Judge Barron dissents.

***Cognac Ferrand S.A.S. v. Mystique Brands LLC*, No. 20 Civ. 5933 (S.D.N.Y. Jan. 31, 2021)**: "The governing arbitration clause expressly gave the Arbitrator the authority to

'award to the prevailing party, if any, *as determined by the arbitrator*, all of its costs and fees,' and did not impose any textual limit on that authority. Agreement § 21.1 (emphasis added [by the Court]). It is therefore indisputable that the arbitrator 'had the power' to reach the issues of which party, if either, had prevailed, and what that party's costs and fees were…. Further, the Arbitrator's judgment that Ferrand's failure to sustain its claims for more than $10 million in damages rendered Mystique the prevailing party provided, at the very least, a 'barely colorable justification' for the outcome reached."

***Nakamura v. Wells Fargo Clearing Services, LLC*, FINRA ID No. 20-03691 (San Diego, CA, Apr. 9, 2021)**: "An Arbitrator granted Respondent broker-dealer's Prehearing Motion to Dismiss Claimant broker's request for reformation of his Form U5 pursuant to FINRA Rule 13206 (Six-year Eligibility Rule for Industry Disputes). (*ed: Provided courtesy of SAC's ARBchek facility, www.arbchek.com*.)
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## *ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT*

**Nola, David L. and Clopton, Zachary D., *An Arbitration Agenda for the Biden Administration*, 2021 U. Ill. L. Rev. Online 104 (Apr. 30, 2021)**: "Since the 1980s, the major institutional driver of expansions in arbitration law has been the Supreme Court. Congress occasionally makes noises about its interest in addressing arbitration. But as we have explored in prior work, federal administrative agencies and executive departments play an important, if underappreciated, role in addressing arbitration. The Biden administration, however, has taken only a handful of public actions to address arbitration's negative effects on private enforcement. In this essay -- prepared for the University of Illinois *Law Review*'s symposium on the Biden administration's first 100 days -- we take the opportunity to highlight the tools available to agencies and executive departments to address the effects of forced arbitration and offer suggestions for how they might be used. Executive branch action alone cannot undo all of the arbitration's effects on private enforcement; but it can do much to restore this engine of the U.S. legal system."

***Online Video Technology and Virtual Hearings with Jeff Zaino, Vice President of Commercial Division with AAA*, Corporate Counsel Business Journal (Mar. 12, 2021) (podcast)**: "Vice President of the Labor, Employment and Elections Division of the American Arbitration Association, Jeff Zaino joins host, Kristin Calve to discuss the benefits and challenges of virtual hearings and the future of hybrid models."

***Finra Suspension of In-person Arb Hearings Harms Investors, PIABA Says*, InvestmentNews (Apr. 27, 2021)**: "Finra's ongoing suspension of in-person arbitration hearings protects brokers while harming investors involved in disputes, the Public Investors Advocate Bar Association asserted Monday. The Financial Industry Regulatory Authority Inc. halted in-person arbitration proceedings when the coronavirus pandemic broke out more than a year ago. It has extended the postponement through July 2. PIABA President David P. Meyer criticized the broker-dealer self-regulator for not explaining what health thresholds must be met to resume in-person hearings."

***Uber Can't Compel Arbitration of PAGA Claim According to California Court*, JDSupra (Apr. 30, 2021)**: "On April 21, 2021, the Second Appellate District of the Court of Appeal of the State of California filed an unpublished opinion rejecting Uber's attempt to enforce an arbitration provision that waived an employee's right to bring a claim under the California Private Attorneys General Act (PAGA). This statute authorizes 'aggrieved employees' to file lawsuits to recover civil penalties from employers for violations of the California labor code."

***Broker's Annuity Strategy Nets $275K Fine For Ohio National Life Subsidiary*, FA Magazine (May 3, 2021)**: "An Ohio National Life Insurance subsidiary was fined $275,000 Friday after the Financial Industry Regulatory Authority said one of its top producers recommended unsuitable investment strategies to 76 customers involving variable annuities and whole life policies. Finra is also requiring the subsidiary, the O.N. Equity Sales Company, or ONESCO, to give more than $1 million back to the customers."

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## *DID YOU KNOW?*

**CPR'S 2021 ANNUAL REVIEW IS NOW LIVE**. The International Institute for Conflict Prevention & Resolution ("CPR") on **April 27** published its *2021 Annual Review*. The link and chart-rich 26-page *Review* offers a wealth of information. Past *Reviews* can be found here.

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## *LETTER TO THE EDITOR*

*We always welcome comments on current items of interest covered in the* Alert. *Our recent issue dedicated to where the major ADR institutions are today and plan to go in the future post-COVID prompted a letter to the editor opining on this topic from* ***Mark Norych****, President and CEO of cloud-based ADR provider Arbitration Resolution Services, Inc.*

**Norych:** I very much enjoyed the last *Alert* and blog post, *COVID-19's Continued Impact on ADR Providers: The Key Institutions Update Us on Plans for the Future*, where you checked in with the four ADR institutions surveyed a year ago. I am President and CEO of Arbitration Resolution Services ("ARS"), a cutting-edge legal solution which since 2010 has provided a proprietary cloud-based service that integrates technology with expert arbitrators and mediators for a revolutionary approach to dispute resolution. The company's Arb-IT™ software fully automates the step-by-step process of mediation and binding arbitration.

While ARS was not part of the "where things stand" survey conducted at the start of the pandemic over a year ago, we should certainly be part of the "going forward" discussion. The COVID-19 pandemic greatly accelerated a movement toward cloud-based online ADR that was already under way. As your latest survey shows, there's simply no going

back to the old pre-pandemic days of multiple participants all gathering to conduct an arbitration or mediation in-person that has been administered manually.

**SAA:** Great perspective and spot on! While a switch may have been abruptly turned off in March 2020, we don't see it being flipped back in the "new normal" post-pandemic world. We agree there's no going back to the old ways of conducting arbitrations and mediations.
*(ed: Full disclosure: the* Alert's *publisher and Editor-in-Chief George Friedman is non-executive Chairman of the Board of ARS.)*
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