SECURITIES ARBITRATION ALERT 2021-18 (5/13/21)

George H. Friedman, Editor-in-Chief

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- DOL Withdraws Trump-Era Rule that would Have Impacted IAs Operating as Independent Contractors
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- Speak Now or Forever Hold Your Peace on Arbitrator Objections, California Appellate Court Holds
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- ***Rosales v. Uber Technology, Inc.*, No. B305546 (Calif. Ct. App. 2 (Apr. 30, 2021)**
- ***AJZ's Hauling, L.L.C. v. TruNorth Warranty Program of North America*, 2021-Ohio-1190 (Ct. App. 8 Apr. 8, 2021)**
- ***Reis v. LPL Financial, LLC*, FINRA ID No. 19-02867 (Augusta, ME, Apr. 5, 2021)**

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- **Davydenko, Dmitry, *Procedural Force Majeure and Hardship in ADR on the Example of the COVID Pandemic*, MGIMO University, International Law School (May 14, 2021)**
- ***Can Mandatory Arbitration Rein in ERISA Litigation? Appellate Courts Weigh In*, Cohen & Buchmann, P.C. Blog (Apr. 11, 2021)**
- ***Court Holds That Federal Securities Law Claims Are Subject to Delaware Exclusive Forum Bylaw,* Gibson Dunn Blog (May 3, 2021)**
- ***U.S. Department of Education Announces Richard Cordray as Chief Operating Officer of Federal Student Aid*, www.ed.gov (May 3, 2021)**
- ***Arbitration Tech Toolbox: Arbitrators and Their Online Identities, a Double-Edged Sword?* Kluwer Arbitration Blog (May 4, 2021)**

DID YOU KNOW?

- FINRA has a Comprehensive COVID-19 Webpage

SQUIBS: IN-DEPTH ANALYSIS

*****BREAKING: FINRA TO RESUME IN-PERSON HEARINGS IN 62 OF 69 HEARING LOCATIONS EFFECTIVE JULY 5.** ***Independence Day 2021 will be ushered in with a bang for FINRA Dispute Resolution Services ("DRS") constituents yearning for a return to in-person arbitration and mediation hearings. The Authority updated its Webpage around noon Eastern time today (May 10) to reflect that in-person hearings will resume in most DRS hearing locations on July 5.*** The Website

now says: "Beginning July 5, 2021, FINRA DRS will reopen all of its hearing locations for in-person arbitration and mediation proceedings except for the following: Augusta, Boca Raton, Buffalo, Detroit, Philadelphia, Providence and Wilmington. FINRA DRS has postponed all in-person proceedings in these seven locations through July 30, 2021." When hearings resume in July in the 62 locations, all COVID-19 safety protocols such as masking and social distancing will remain in place, and hearings for the time being will not be held at FINRA offices. FINRA has since **March 2020** administratively postponed in-person hearings due to the COVID-19 pandemic. The last update pushed this date to **July 2**, with the proviso: "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."

DRS Pressed to Resume In-Person Hearings
Our special issue – SAA 2021-15 (Apr. 28) – featured a single story, *COVID-19s Continued Impact on ADR Providers. The Key Institutions Updates Us on Plans for the Future*. We noted in a postscript that PIABA had sent to FINRA an **April 26** letter urging the authority to resume in-person hearings. The letter, which was announced in a Press Release, also covered other issues related to the current suspension of in-person hearings, such as PIABA's research showing that courts and other ADR providers have at least partially resumed in-person hearings, or plan to do so soon. The letter concluded: "FINRA needs to address the challenges that have been tackled by courts and other arbitration forums across the country to allow the dispute resolution process to move forward in-person. It is not an easy task, but if FINRA doesn't move forward, it will ensure that investors will continue to languish without justice."

Good News, Whatever the Source
We said in #15: "We will track whether FINRA responds to PIABA, which we are certain it will. We'll also look for FINRA's next update to its July 2 'administratively postponed' date, which typically happens the first week of the month." Whether the pressure from PIABA was the proximate cause of the change in policy remains to be seen, although we suspect DRS has been focused for a while on in-person hearing resumption. Either way, the good news is that in-person hearings are resuming in almost 90% of the DRS hearing locations, including New York City.
*(ed: *This is wonderful news! We'll continue to track the seven locations. **No word on when staff will be returning to the office, although we expect that will roll out in stages.)*
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GENSLER AGAIN GRILLED ON MANDATORY ARBITRATION. ***For the second time in the past few months, SEC Chair Gensler was asked to articulate his views on mandatory securities arbitration, this time at a House Financial Services Committee meeting.*** As reported in SAAs 2021-13 (Apr. 5), -10 (Mar. 18), & -08 (Mar. 4), new SEC Chair **Gary Gensler** said at his **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."

Corporate Governance This Time

At a **May 6** House Financial Services Committee hearing, *Game Stopped? Who Wins and Loses When Short Sellers, Social Media, and Retail Investors Collide, Part III*, Rep. **Carolyn B. Maloney** (D-NY) – the senior member of the Committee – had an exchange with Chairman Gensler focused on mandatory predispute arbitration agreement ("PDAA") use in corporate governance documents of publicly-traded companies. The excerpted quotes below appeared in a Press Release issued by Rep. Maloney:

Maloney: Do you believe it would violate Federal securities law if a public company inserted a forced arbitration provision into its bylaws and governance documents?

Gensler: The SEC has said consistently to issuers, as I understand it, that it would be best not to put this into these corporate charters. And I think that the American public needs to be able to have redress to their courts. That's a sort of a fundamental piece to be able to go straight to the courts. And that's been true in terms of issuers for decades. And I think that's worked well.

Déjà Vu All Over Again: A Twisting Path

Readers may remember our coverage of the Carlyle Group IPO in SAA 2012-07 (Feb. 15), when that private equity group attempted to incorporate a class action waiver and PDAA in its registration statement as it prepared to go public in **2012**. Carlyle gave up after withering criticism that included jawboning from SEC staff. In **October 2017**, the Treasury Department issued a Report, *A Financial System That Creates Economic Opportunities*. Appearing on pages 34 and 205 of the massive Report, right after the discussion of class actions, is the following recommendation: "Treasury recommends that the states and the SEC continue to investigate the various means to reduce costs of securities litigation for issuers in a way that protects investors' rights and interests, including allowing companies and shareholders to settle disputes through arbitration." Then, we reported in SAA 2018-05 (Jan. 31) that, more than five years after strongly discouraging the use of predispute arbitration agreements for IPO shareholder disputes, the SEC appeared to be considering changing course.

Reactions to SEC Trial Balloon

Within weeks of the idea being floated, the Commission appeared to back away from it. We reported in SAA 2018-08 (Feb. 21) that Congressional testimony from then-Chairman **Jay Clayton** indicated that he was not in a hurry to make the change. Specifically, during a **February 2018** Senate Banking Committee hearing on

cryptocurrency, Mr. Clayton was asked about this topic by Senator Warren. During the three-minute exchange, starting around marker 1:08 of the hearing video, Chairman Clayton said he was "not anxious to see a change in this area" and also noted that the process toward change would be thorough and time-consuming. He added that, in terms of his priorities, "this is not an area that is on my list …"

Rep. Maloney has been Consistent in Her Opposition

We later reported in SAA 2018-17 (May 2) that this position was reaffirmed in the Chairman's **April 2018** letter to Rep. Maloney, who had written in **March** on behalf of all Democratic Committee members, expressing concerns about the proposal: "As a threshold matter, and recognizing the complexity and importance of this issue, I reiterate my personal view that any analysis of this issue or decisions by the Commission in the context of a registered IPO by a U.S. public company should be conducted in a measured and deliberative manner." He added his belief that any rulemaking would be done by Commission action and not by delegated authority. And, we reported in SAA 2018-27 (Jul. 18), that the Treasurers of California, Illinois, Iowa, Oregon, Pennsylvania and Rhode Island joined to write a **July 2018** letter to Chairman Clayton, urging that the Commission not permit mandatory IPO arbitration or class action waivers. Finally, as reported in SAA 2018-33 (Aug. 29), a 133-member coalition of national and state consumer and investor rights advocates sent an **August 2018** letter to Mr. Clayton, urging that the Commission not permit publicly-traded companies to mandate individual arbitration of shareholder disputes. The letter built on a 50-page Whitepaper, *A SETTLED MATTER: Mandatory Shareholder Arbitration is Against the Law and the Public Interest,* issued August 21st by the Consumer Federation of America. Around this time, we opined that we sensed a lack of enthusiasm by the Commission, and that turned out to be the case as the issue faded away.

And Don't Forget the *Investor Choice Act*

As reported in SAA 2021-14 (Apr. 22), the *Investor Choice Act of 2021* ("*ICA*") was reintroduced **April 15** by Sen. **Jeff Merkley** (D-OR) and by Rep. **Bill Foster** (D-IL). This iteration of the ICA – H.R. 2620 and S. 1171 – is essentially the same as the old one in that it would amend the FAA, the *Securities Exchange Act of 1934,* and the *Investment Adviser Act of 1940,* to ban the use of mandatory predispute agreements by broker-dealers and investment advisers and guarantee class action participation. The *ICA* also retains a section amending the *Securities Act of 1933* to state: "A security may not be registered with the Commission if the issuer, in its bylaws, registration statement, or other governing documents mandates arbitration for any disputes between the issuer and the shareholders of the issuer."

(ed: *Dodd-Frank *section 921 gives the SEC authority to limit or eliminate PDAAs or set conditions for their use, but it has not done so. **The Maloney-Gensler exchange, which was more extensive than the excerpts above, can be seen here. ***Again, we're sensing a lack of enthusiasm by the Commission on corporate governance arbitration. ****What this all means for PDAA use in customer account documents remains to be seen.)*

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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

FINRA BOARD MEETS VIRTUALLY NEXT WEEK: NO AGENDA YET. FINRA's Board of Governors will next meet virtually **May 18 – 19**; thus far, there is no published Agenda. As usual, we will report on whether the eventual Agenda reflects any dispute resolution-related items, and we will of course follow up after the meeting results are posted. The schedule for the rest of the year is: **July 21 – 22; September 23 – 24;** and **December 1 – 2.** We imagine these meetings will continue to be virtual until conditions permit them to be held in-person. But our hunch is that in-person meetings – at least for the vaccinated – will return by the next meeting, with some members participating via Zoom.
(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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DOL WITHDRAWS TRUMP-ERA RULE THAT WOULD HAVE IMPACTED IAS OPERATING AS INDEPENDENT CONTRACTORS. On the eve of its effectiveness, the Department of Labor ("DOL") announced in a **May 6** Press Release that it has withdrawn a Trump-era "Independent Contractor Rule" effective immediately. The Rule, which was to go into effect **May 8,** aimed to: "make[] it easier to identify employees covered by the [Fair Labor Standards] Act, while recognizing and respecting the entrepreneurial spirit of workers who choose to pursue the freedom associated with being an independent contractor." Why the withdrawal? Said Secretary of Labor **Marty Walsh**: "By withdrawing the Independent Contractor Rule, we will help preserve essential worker rights and stop the erosion of worker protections that would have occurred had the rule gone into effect. Legitimate business owners play an important role in our economy but, too often, workers lose important wage and related protections when employers misclassify them as independent contractors. We remain committed to ensuring that employees are recognized clearly and correctly when they are, in fact, employees so that they receive the protections the Fair Labor Standards Act provides."
(ed: It was believed that the now-withdrawn rule would have impacted investment advisers operating as independent contractors.)
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SERVICE OF PETITION TO CONFIRM AWARD BY EMAIL AND FEDEX WAS SUFFICIENT WHERE AAA RULES WERE USED AND DOCUMENTS WERE IN FACT RECEIVED. The Magistrate in *TVL Int'l, LLC v. Zhejiang Shenghui Lighting Co.*, No. 3:19-CV-00393-RJC-DCK (W.D.N.C. Feb. 2, 2021), finds that service of the confirmation notice by email and FedEx met the requirements of Federal Arbitration Act ("FAA") section 9, which provides: "If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court." How so? Because notice was actually received and service by alternate means was agreed to by the parties when they

incorporated the AAA's *Commercial Arbitration Rules* in their arbitration agreement. Says Magistrate **David C. Keesler**: "[G]iven SengLED's specific consent to service by mail and email through its established practice in the underlying arbitration proceeding, the AAA Commercial Arbitration Rules' applicability to court actions to confirm an arbitration award and SengLED's consent to be bound by such rules, and the actual notice that SengLED received of this action, it would be manifestly unjust to allow a motion to dismiss to proceed on deficient service of process grounds. See *Collins v. D.R. Horton, Inc*., 361 F. Supp. 2d 1085, 1092 (D. Ariz. 2005) (holding that service by mail was permissible with respect to a motion to confirm an arbitration award even considering the FAA's service by marshal requirement where the parties had agreements in which they consented to be bound by AAA rules that permitted service by mail). SengLED's insistence on service by marshal with respect to the SengLED USA, Inc. entity in Georgia as provided by the FAA at 9 U.S.C. § 9 and service via the Hague Convention and the Chinese Central Authority under Rule 4(f)(1) is consequently misguided" (internal citation omitted).
(ed: Compare O'Neal Constructors, LLC v. DRT America, LLC, *2021 WL 1220710 (11th Cir. Apr. 1, 2021), covered in SAA 2021-14 Apr. 22), which dealt with FAA section 12 and a motion to vacate served by email. There, the Court was not persuaded that Rule R-44 of the AAA's* Construction Arbitration Rules *was evidence of consent: "Subsection (a) of the Rule provides for service by mail or personal service for the paper, notices, or process it covers. It does not provide for service by email. Subsection (b) does provide for service by email, but only for service of 'the notices required by these rules,' meaning the AAA Construction Rules. Notice of a motion requesting a court to vacate an arbitration award is nowhere required or provided for in the AAA Construction Rules.")*
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SPEAK NOW OR FOREVER HOLD YOUR PEACE ON ARBITRATOR OBJECTIONS, CALIFORNIA APPELLATE COURT HOLDS. One of the few cases your publisher remembers from law school involved a party who had a reason to object to an Arbitrator's continued service, but only raised a challenge after receiving an adverse Award. In rejecting the effort to vacate the Award, the Court said essentially: "You can't play Russian Roulette by waiting to see if you win before challenging the arbitrator. Raise your objections or waive them." Channeling that decision is *Alper v. Rotella*, No. G058088 (California Ct. App. 4 May 5, 2021), where the Arbitrator was seen openly taking pain medication during the hearings. The unanimous Court relied on California Code Civ. Proc. § 1281.91(d), which provides: "If any ground specified in Section 170.1 exists, a neutral arbitrator shall disqualify himself or herself upon the demand of any party *made before the conclusion of the arbitration proceeding*" (emphasis added). Here, no objection was raised during the nine days of hearings. Says the Court: "The trial court denied the petition based on principles of forfeiture: the losing partners failed to demand -- at any point during the nine-day hearing -- that the arbitrator needed to disqualify himself. Absent the legal jargon, the term 'forfeiture' essentially means: 'You snooze, you lose.' We agree with the trial court. Thus, we affirm the court's order denying the petition to vacate the arbitration award."

*(ed: *We agree! **The Court uses the term "forfeiture;" we used the more familiar term "waive.")*
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AAA TO CONDUCT LIVE WEBINAR ON TECH FOR MEDIATORS. The American Arbitration Association will be conducting a live Webinar, *Beyond Zoom: Technology and Psychology for Tomorrow's Digital Mediator*, on **May 19** from| 4:00 - 5:30 pm EDT. The program description states: "This interactive webinar will dive more deeply into the innovation pipeline and highlight some of the most useful tools to help you in your continuing virtual world. With a focus on mediating employment claims, expert faculty will share insights and recommendations not only on the unique features of emerging technology, but also the nuances of online psychology so vital to the success of tomorrow's 'digital mediator.' Moderating will be **Harold Coleman, Jr., Esq**., Senior Vice President, AAA-ICDR®, AAA Mediation.org® (San Diego), and serving as faculty are: **Debra Dupree**, Psy.D., Mediator, Relationships-at-Work (San Diego); **Susan Guthrie, Esq**., Mediator, LearntoMediateOnline (Chicago); and **Michael Leech, Esq**., Mediator/Arbitrator, Talk Sense Mediation (Philadelphia). The target audience is: "lawyers, clients and mediators desiring to master their mediation advocacy, client relations, and overall effectiveness with remote mediation and those generally interested in the field of client-focused employment mediation."
*(ed: *Registration is $49 and may be done online. **The AAA has not applied for and is not offering CLE credit.)*
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QUICK TAKES: CASES AND AWARDS WORTH READING

***Rosales v. Uber Technology, Inc*., No. B305546 (Calif. Ct. App. 2 (Apr. 30, 2021)**: "Defendant contends plaintiff cannot bring a PAGA claim in court unless or until an arbitrator first decides whether she has standing to bring a PAGA [Private Attorney General Act] claim -- that is, whether she is an employee who can seek penalties under PAGA on behalf of the state, or an independent contractor who cannot. We conclude, as has every other California court presented with this or similar issues, that the threshold question whether plaintiff is an employee or an independent contractor cannot be delegated to an arbitrator."

***AJZ's Hauling, L.L.C. v. TruNorth Warranty Program of North America*, 2021-Ohio-1190 (Ct. App. 8 Apr. 8, 2021)**: "Defendant-appellant TruNorth Warranty Programs of North America ('TruNorth') brings this appeal challenging the trial court's judgment denying TruNorth's motion to stay proceedings and compel arbitration, or alternatively, to dismiss for lack of jurisdiction and improper venue. TruNorth argues that the trial court erred by declining to apply the doctrine of res judicata, erred by declining to enforce the applicable arbitration and forum selection provisions, and erred by denying TruNorth's motion without holding a hearing. After a thorough review of the record and law, this court affirms."

***Reis v. LPL Financial, LLC*, FINRA ID No. 19-02867 (Augusta, ME, Apr. 5, 2021)**: A broker alleging discrimination in violation of the Maine Human Rights Act loses his claim against Respondent broker-dealer: "At the conclusion of Claimant's case-in-chief, Respondent made a Motion to Dismiss and Claimant opposed the motion. After due deliberation, the Panel granted the motion to dismiss on the grounds that Claimant failed to produce evidence sufficient to make a *prima facie* case on both counts of Claimant's claim." (*ed: Provided courtesy of SAC's ARBchek facility*, www.arbchek.com.)
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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Davydenko, Dmitry, *Procedural Force Majeure and Hardship in ADR on the Example of the COVID Pandemic*, MGIMO University, International Law School (May 14, 2021): "Not only the performance of a commercial contract but also the implementation of the chosen method of resolving a dispute may become impossible or excessively burdensome due to unexpected circumstances, such as the effect of restrictive measures during a pandemic. This puts in question the civil legal concepts of 'force majeure' and 'hardship.' Usually, they are applied to substantive legal relations such as rendering services or delivery of goods. However, they arguably should be applied also to procedural legal relations. Unlike in substantive law, the main purpose of the application of these concepts does not consist in avoiding liability for failure to perform one's duties but to authorize the dispute resolution provider to adapt the procedural form or timeframe to the unforeseeable circumstances. Legal concepts of force majeure and hardship should not normally excuse a party from fulfilling its agreement to arbitrate or mediate, or for the dispute resolution provider to refrain from administering ADR. Instead, they should constitute a ground to adapt the procedure to changed circumstances."

Can Mandatory Arbitration Rein in ERISA Litigation? Appellate Courts Weigh In, Cohen & Buchmann, P.C. Blog (Apr. 11, 2021): "Can ERISA plan participants be denied their day in court?… Mandatory arbitration of fiduciary breach claims is the latest and most significant battleground. ERISA is silent on arbitration, but the Federal Arbitration Act encourages arbitration of disputes. Two relatively recent Supreme Court decisions upheld arbitration clauses in the employment context, although the Supreme Court has not specifically addressed the permissibility of mandatory arbitration under ERISA. In the meantime, federal courts are grappling with these issues in inconsistent decisions."

***Court Holds That Federal Securities Law Claims Are Subject to Delaware Exclusive Forum Bylaw*, Gibson Dunn Blog (May 3, 2021)**: "On April 27, 2021, a federal court in the Northern District of California dismissed federal and state law claims brought derivatively on behalf of The Gap, Inc., holding that the California proceedings were foreclosed by a forum selection bylaw designating the Delaware Court of Chancery as the exclusive forum for derivative suits (the "Forum Bylaw"). See *Lee v. Fisher*, Case No. 20-cv-06163-SK, ECF No. 59. This decision strikes a blow against what has become a new tactic of the plaintiff's bar: asserting violations of the federal securities laws in the guise of shareholder derivative claims. This ruling furthers the purpose of exclusive

forum bylaws to prevent duplicative litigation in multiple forums, and highlights the benefits these bylaws may achieve for companies."

***U.S. Department of Education Announces Richard Cordray as Chief Operating Officer of Federal Student Aid*, www.ed.gov (May 3, 2021)**: "The U.S. Department of Education (ED) announced today that it has selected Richard Cordray as the Chief Operating Officer of Federal Student Aid. Cordray is the former Director of the Consumer Financial Protection Bureau and the former Attorney General of Ohio. Federal Student Aid is responsible for managing the student financial assistance programs authorized under Title IV of the Higher Education Act of 1965, including grants, work-study and loans for students attending college or career school."

***Arbitration Tech Toolbox: Arbitrators and Their Online Identities, a Double-Edged Sword?* Kluwer Arbitration Blog (May 4, 2021)**: ""Social media are meant to facilitate connections. They make it possible to meet inspiring people from all over the world, especially now that we are subject to travel bans due to the protracted sanitary emergency. Connections are indeed a wonderful asset. However, as professionals involved in disputes, have we reflected thoroughly on how these connections could be perceived from an outside perspective? And how do we secure our virtual environment?"
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DID YOU KNOW?

FINRA HAS A COMPREHENSIVE COVID-19 WEBPAGE. Our readers know from our lead Squib that FINRA Dispute Resolution Services has a Webpage dedicated to the forum's COVID-19 status, but did you know the rest of the Authority has such a page? Visit https://www.finra.org/rules-guidance/key-topics/covid-19 to ascertain the latest pandemic-related developments impacting the organization.
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