SECURITIES ARBITRATION ALERT

SECURITIES ARBITRATION ALERT 2021-22 (6/10/21)

George H. Friedman, Editor-in-Chief

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- ***Aerotek, Inc. v. Boyd*, No. 20-0290 (Tex. May 28, 2021)**
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- ***Spartan Securities Group, Ltd. V. Richards,* FINRA ID No. 19-00926 (Boca Raton, FL May 27, 2021)**
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ARTICLES OF INTEREST:

- **Silberman, Linda, *Discovery, Arbitration, and 28 U.S.C. §1782: Rules or Standards?* NYU School of Law, Public Law Research Paper Forthcoming (June 2, 2021)**
- ***After 75,000 Echo Arbitration Demands, Amazon Now Lets You Sue It*, ARS Technica (Jun. 1, 2021)**
- ***Roundup: Four New Arbitration Petitions Under Consideration at the U.S. Supreme Court*, CPR Speaks Blog (Jun. 1, 2021)**
- ***SEC Awards More Than $23 Million to Whistleblowers,* www.sec.gov (June 2, *2021):***
- ***Professor* Sovern's Opt-In Arbitration Proposal Is Neither New Nor Supportable, JDSupra (Jun. 3, 2021)**
- ***Arbitrators are Male and Overwhelmingly White—Here's Why it Matters*, CNBC (Jun. 7, 2021)**

DID YOU KNOW?

- **Number of FINRA Registered Reps is Declining**

LETTER FROM THE EDITOR:

- **Are We Seeing the Start of a Tectonic Shift on Mandatory PDAAs in the Financial Services Field?**

SO MANY CASES AND AWARDS, SO LITTLE SPACE: AN EXPANDED "QUICK TAKES" SECTION. AND A LETTER FROM THE EDITOR: *It's been over a year since the* Alert *introduced the "Quick Takes" section, covering in summary format court decisions and arbitration awards we thought our readers should know about. From its inception, this section has featured two court cases and one award. Space considerations have required sometimes very difficult editorial decisions about whether a matter is covered in Short Briefs, Quick Takes, or at all. To address that problem, we are with this* Alert *expanding Quick Takes to include more cases and awards. The criteria for inclusion remain the same: cases and awards our readers should know about. Our customary liberal use of links will allow readers to delve further into matters that are of interest to them.*

*Also, be sure to check out your publisher's Letter **from** the Editor observing that we may be witnessing the beginning of the end of mandatory predispute arbitration agreements in the financial services field.*

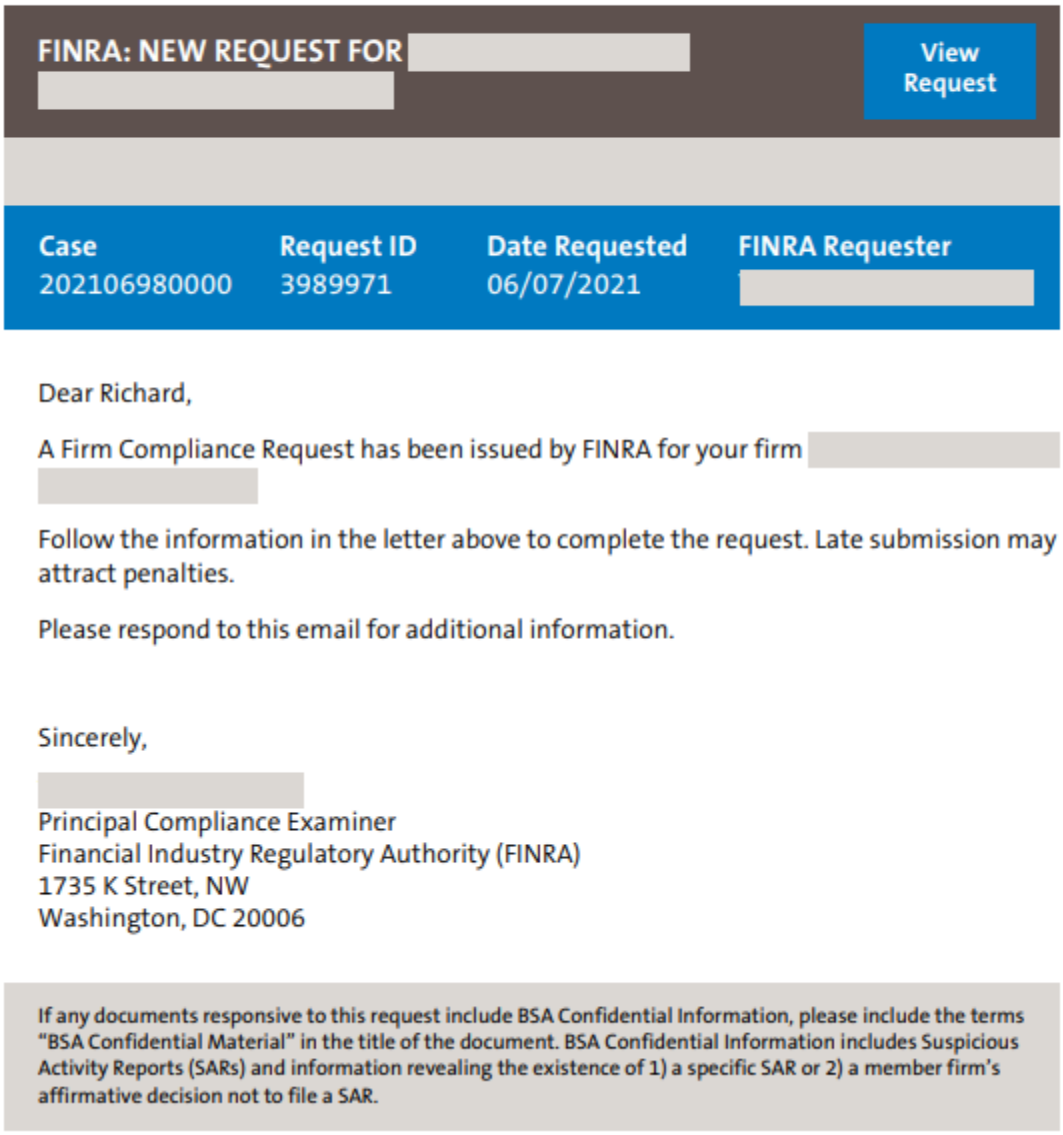
SQUIBS: IN-DEPTH ANALYSIS

A "HEADS-UP" TO FIRMS: FINRA WARNS ABOUT FAKE "PHISHING" EMAILS. ***FINRA is warning firms about a scam attempting to trick them into thinking they are getting commuications from the Authority. Althiough not dispute resolution related news, we pass this along as a public service.*** FINRA on **June 7** issued Regulatory Notice 21-20, *FINRA Alerts Firms to Phishing Email Using "gateway-finra.org" Domain Name.* The core message in the Reg Notice (repeated essentially *verbatim*):

> FINRA warns member firms of an ongoing phishing campaign that involves fraudulent emails [see sample below reprinted with permission] purporting to be from FINRA and using the domain name "@gateway-finra.org." The email asks the recipient to click a link to "view request" and provide information to "complete" that request, noting that "late submission may attract penalties."
>
> FINRA recommends that anyone who clicked on any link or image in the email immediately notify the appropriate individuals in their firm of the incident.
>
> The domain of "gateway-finra.org" is not connected to FINRA and firms should delete all emails originating from this domain name.

Screenshot of Fake Emails
Courtesy of FINRA, we provide screenshots of the fake notices:

From: Name <nam@gateway-finra.org>
Date: Monday, June 7, 2021 at 1:25 PM
To: Name <name@firmname.com>
Subject: New Request for Firm Name



FINRA: NEW REQUEST FOR [redacted]

View Request

Case	Request ID	Date Requested	FINRA Requester
202106980000	3989971	06/07/2021	[redacted]

Dear Richard,

A Firm Compliance Request has been issued by FINRA for your firm [redacted]

Follow the information in the letter above to complete the request. Late submission may attract penalties.

Please respond to this email for additional information.

Sincerely,

[redacted]
Principal Compliance Examiner
Financial Industry Regulatory Authority (FINRA)
1735 K Street, NW
Washington, DC 20006

If any documents responsive to this request include BSA Confidential Information, please include the terms "BSA Confidential Material" in the title of the document. BSA Confidential Information includes Suspicious Activity Reports (SARs) and information revealing the existence of 1) a specific SAR or 2) a member firm's affirmative decision not to file a SAR.

*(ed: *A word to the wise. **The Reg Notice is also available in PDF format.)*
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CONNECTICUT SUPREME COURT HOLDS MOTION TO VACATE TIME LIMITS ARE NOT PREEMPTED BY THE FAA, WHILE THE OHIO SUPREME COURT HOLDS THAT MAXIMUM TIME LIMITS TO VACATE ARE NOT GUARANTEED. ***Within two months, two state Supreme Courts issue decisions on the time periods to file a motion to vacate an arbitration award.*** The Supreme Court of

Connecticut held that its statute setting forth 30 days to file a motion to vacate confers subject matter jurisdiction while the FAA does not, meaning that the FAA does not preempt the statute. Additionally, the Supreme Court of Ohio holds that the limitation period for a motion to vacate or correct an award does not guarantee that full window to file the motion if a motion to confirm has been filed.

Connecticut: *Better Way*

Case Below

The parties involved in *A Better Way Wholesale Autos, Inc. v. Saint Paul*, No. SC 20386 (Conn. Apr. 15, 2021), defendant/appellee James St Paul ("St. Paul") and plaintiff/appellant A Better Way Wholesale Autos ("seller"), entered into a financing agreement for the purchase of a car. The financing agreement contained an arbitration clause with a choice of law provision stating that the Federal Arbitration Act ("FAA"), not state law, governs the arbitration agreement. St. Paul filed an arbitration against the seller under the Truth in Lending Act and the Connecticut Unfair Trade Practices Act. The arbitrator found for St. Paul, awarding damages and fees. The seller then filed a motion to vacate the damages in state court under the FAA. The trial court dismissed this motion and the appeals court affirmed on the grounds that Connecticut's General Statutes section 52-420(b), which provides a 30 day window to file a motion to vacate or adjust an arbitration award, controls instead of FAA section 12, which provides a 3 month window to file.

Subject Matter Jurisdiction Lacking

The trial court dismissed this motion because the seller had not filed within the 30 day period required by Connecticut law. Therefore, the court had no subject matter jurisdiction over the arbitration award. The seller argues that § 52-420(b) is a non-jurisdictional statute. The Supreme Court of Connecticut holds that unambiguous case law states that § 52-420(b) is jurisdictional. Citing a myriad of cases, most notably *Middlesex v Castellano*, the Court unequivocally maintains the ruling that the trial court lacked subject matter jurisdiction. The Court goes even further by stating that, even if a party brings a counterclaim to adjust an award outside the 30 day window, the issue is moot.

Federal Preemption Not Present

Next, the seller argues that the choice of law provision means that the FAA's longer time frame for motions to vacate controls. It also argues that, even if the choice of law provision is moot, the FAA should preempt state law. The Court holds that the choice of law provision cannot create or vest the jurisdiction of the state court. The Court also reaffirms the principle that private parties cannot create jurisdiction through agreement or waiver. Next, the Court looks to see if any of the three types of preemption (express preemption, field occupation preemption, and conflict preemption) applied to the case at hand. SCOTUS had already stated that the FAA has no express preemption provisions, nor does it attempt to fully occupy the field to establish field occupation preemption. While on their face, the two provisions appear to conflict, the Court instead looks to FAA section 2, which states that the FAA only preempts state law that discriminates against

arbitration on its face. The FAA leaves many procedural rules in the hands of the states despite setting out its own procedures for federal courts. Additionally, the FAA does not provide jurisdiction, so it also is left in the hands of the states to implement statutes like § 52-420(b).

Ohio: *BST*

Statutes in Play
The statutes in contention in *BST Ohio Corp. v. Wolgang*, No. 2021-Ohio-1785 (May 27, 2021), are Ohio Rev. Codes sections 2711.09 and 2711.13. The former states that any party may file a motion to confirm within one year, and the courts shall grant this motion unless a motion to vacate or correct is filed. Section 2711.13 provides a three-month limitation period, during which a motion to vacate or correct can be filed. The question before the Court: read in tandem, do these statutes create a guaranteed window of three months to file a motion to vacate or correct an award?

Facts
BST Ohio Corporation ("corporations"), along with other corporations and individuals, brought an arbitration against Evan Gary Wolgang and Massillon Management Company ("Wolgang") alleging mismanagement of a warehouse property. The arbitrator awarded the corporations substantial damages, and the corporations filed a motion to confirm the award the next day in Ohio state court. Wolgang then filed a motion to vacate or correct the award in California state court. Wolgang never filed a motion to vacate or correct the award in the Ohio proceeding, instead opting to file a motion to stay or continue the proceedings under an alleged mandatory waiting period under § 2711.13. The trial court denied this motion and without an opposing motion to vacate or correct, confirmed the award for the corporations. Wolgang filed an appeal, and the Court of Appeals held that when sections 2711.13 and 2711.09 are read together, they do indeed create a guaranteed three-month waiting period for motions to vacate or correct.

Three-Month Limitation is a Maximum
The Supreme Court of Ohio reverses, finding instead that sections 2711.09 and 2711.13 operate both in tandem and independently. Instead of creating a three-month guaranteed window to file a motion, section 2711.13 acts as a *maximum* limitation on filing which can be shortened when another party files a motion to confirm. The Court reasons that this would handicap the discretion of trial judges and provide litigants an unfair advantage by allowing them to wait until the last minute to file a motion to vacate or correct. However, the Court reaffirms the trial court's discretion to hold off a confirmation hearing for the three month period, while stating that the court is not required by law to wait. Instead, the trial court here acted properly under the law by confirming the award when no motion to vacate or correct had been made, despite considerable time available and plenty of warning to Wolgang. The Court stresses the necessity to file a motion to vacate or correct with haste. Along with this, the Court expressly stated that placeholder or conclusory motions shall be permitted with the guidance of the trial court as the proceedings continue.

*(ed: *This squib was authored by Hayes Favinger, a 3L at St. John's School of Law. He is an intern with the Securities Arbitration Clinic at St. John's. **The issues in these cases remind us a bit of FINRA Rules 9554 and 12904(j), which together require an industry party to challenge an award well before the time allowed by the FAA or face suspension. Parties asserting in court that FINRA cannot abridge the three months provided by the FAA have generally not been successful.)*
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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

*****BREAKING: FINRA TO RESUME IN-PERSON HEARINGS IN ALL HEARING LOCATIONS EFFECTIVE AUGUST 2.** Beginning **August 2**, all 69 FINRA Dispute Resolution Services ("DRS") hearing locations will be open for in-person proceedings. The Authority updated its Webpage on **June 4** to reflect the change. The Website now says: "In-person proceedings at the following hearing locations are postponed through July 30, 2021: Augusta, Boca Raton, Buffalo, Detroit, Philadelphia, Providence and Wilmington. Beginning August 2, 2021, all FINRA DRS hearing locations will be open for in-person proceedings." Previously, FINRA DRS had announced the resumption of in-person hearings in 62 of 69 hearing locations, effective **July 5**.
*(ed: *This is wonderful news! **No word on when staff will be returning to the office, although we expect that will roll out in stages.)*
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WELLS' CEO TELLS SENATE BANKING COMMITTEE FIRM IS LIBERALIZING CUSTOMER ARBITRATION AGREEMENTS. Wells Fargo's Chief Executive Officer and President, **Charles W. Scharf**, testified at a **May 26** Senate Banking Committee hearing that the firm is in the process of improving the predispute arbitration agreement ("PDAA") it uses in customer account agreements. In prepared remarks, Mr. Scharf said: "[W]e are in the process of removing confidentiality restrictions in all types of customer arbitration agreements that have them, thereby increasing the transparency of the arbitration process. Moreover, we will be updating all consumer arbitration agreements to provide for reimbursement of filing fees where the customer prevails." As to what's driving the changes, he said: "This is designed to ensure the costs of filing for arbitration do not prevent consumers from bringing justified disputes to the Bank's attention. These changes follow our decision last year to end the use of mandatory arbitration for future employee claims of sexual harassment. We are committed to maintaining a thoughtful approach to resolving disputes fairly and efficiently." A **May 26** *ThinkAdvisor* story added: "In a statement to ThinkAdvisor the same day, Wells Fargo said that 'Wells Fargo Advisors follows the FINRA dispute resolution process rules, which already state that arbitrators may assess fees against either party even if Wells Fargo prevails.'" The same story reported that PIABA President **David Meyer** said in an email: "removing the arcane confidentiality restrictions is appropriate and reflects basic decency but if WF truly was committed to resolving disputes fairly and efficiently, it would agree to permit its brokerage firms customers to

choose between court and arbitration after a dispute arises and do away with pre-dispute forced arbitration altogether."
*(ed: *Interesting! We wonder if other firms will follow suit? **We also wonder whether Wells is trying to position itself for a day when investors will get to choose whether to agree to PDAAs? ***"Customer prevails" will need to be defined.)*
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GOLDMAN SACHS SAYS IT'S WILLING TO REVIEW EMPLOYMENT ARBITRATION POLICY. Goldman Sachs on **June 4** announced that it was yielding to a shareholder proposal that it review the firm's employment arbitration policy. *Goldman Sachs Issues Statement on Arbitration Policy Review*, states: "We are appreciative of the dialogue we have had with our shareholders in recent months on the issue of employee arbitration. Providing our employees a safe and inclusive workplace that is free of discrimination and harassment is among our highest priorities. In consideration of the feedback we have received, as well as the results of the recent shareholder vote at our Annual Meeting, we believe it is appropriate to undertake a review to assess this issue comprehensively. We look forward to sharing further information with our shareholders once this review is completed."
(ed: Same observation as above as to employment PDAAs.)
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***CERTIORARI* SOUGHT IN DELAWARE CASE HOLDING NO SECOND BITE AT THE ARBITRATION APPLE VIA COLLATERAL ARBITRATION ATTACKING AWARD**. *Certiorari* is being sought in *Gulf Energy, LLC v Eni USA Gas Marketing, LLC*, No. 22, 2020 (Del. Nov. 17, 2020), a case we covered in SAA 2020-44 (Nov. 25). To review, at issue in the case below was an Award of several hundred million dollars. Said the Majority: "We agree with the Court of Chancery that it had jurisdiction to enjoin a collateral attack on a prior arbitration award. The parties agreed that the Federal Arbitration Act ("FAA") governed their dispute. Under the FAA, the courts have the exclusive power to review and enforce arbitration awards. A party cannot escape the FAA's time-limited and exclusive review procedure by filing a follow-on arbitration attacking the outcome of the prior arbitration." The Court, however, reversed that part of the Chancery Court decision that allowed some of the claims to proceed in the second arbitration, finding that all issues arising out of the conduct of the first case should have been raised as part of an FAA-sanctioned challenge to the Award. Justice Vaughn dissented: "The parties agreed to arbitrate 'any dispute,' and 'dispute' is defined to include 'any dispute over arbitrability or jurisdiction.'" The **April 15** *Certiorari* Petition in *Eni USA Gas Marketing LLC v. Gulf LNG Energy, LLC*, No. 20-1462, identifies this question for review: "Whether the Federal Arbitration Act permits a court to refuse to enforce an arbitration agreement delegating all questions, including questions of arbitrability, to an arbitrator where a party contends that the claim sought to be arbitrated represents a 'collateral attack' on a prior arbitration award."
(ed: This issue is a bit one-off, so we don't see SCOTUS having much interest in reviewing it. The Court is scheduled to consider the Petition on June 17.)
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MERE POSSIBLE ERROR OF LAW NOT ENOUGH TO WARRANT AWARD VACATUR. Whether the Arbitrator's decision was legally erroneous was irrelevant, where the Award on its face did not: "violate[] a strong public policy, [was not] irrational, or exceed[] a specifically enumerated limitation on the arbitrator's power," the Court holds in *Gibson, Dunn & Crutcher LLP and World Class Capital Group, LLC*, Nos. 2021-00104 & 2020-04806 (NY App. Div., 1st Dept. May 20, 2021). The underlying arbitration involved a $700,000 legal fee dispute. In affirming the Trial court's Award confirmation, the unanimous Court holds: "The law and public policy upon which respondents rely is the requirement that an attorney provide a client with a written letter of engagement (22 NYCRR 1215.1), with their main argument being that an attorney's claim for breach of contract is unsustainable against a client who did not enter into a written engagement. However, even if the arbitrator had made an error of law or fact in concluding that respondents had breached the retainer agreements, this alone would not justify vacating the award." The Trial Court also: "properly rejected respondents' argument that the arbitrator's decision was totally irrational and/or manifested a disregard for the law in awarding a contractual late fee of 1% per month in addition to prejudgment statutory interest of 9% per year. There was nothing totally irrational about awarding late fees, which were prescribed by the contract, in addition to statutory interest, which is imposed by law …."
(ed: The arbitration agreement was evidently in the retainer agreement.)
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AMAZON DROPS PDAA FROM CONDITIONS OF USE. We covered in SAA 2021-08 (Mar. 4) the case of *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 Conditions 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 news that Amazon has dropped the PDAA, and replaced it in the Conditions as of **May 3** with this dispute resolution language:, "Any dispute or claim relating in any way to your use of any Amazon Service will be adjudicated in the state or Federal courts in King County, Washington, and you consent to exclusive jurisdiction and venue in these courts. We each waive any right to a jury trial." Media conjecture is that the high fees associated with the tens of thousands of Alexa-based arbitrations drove the change.
*(ed: *Wow! As we read it, all claims will be litigated in Kings County, WA. **For an example of media coverage, see this issue's "Articles of Interest")*
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QUICK TAKES: CASES AND AWARDS WORTH READING

***Performance Builders, LLC v. Lopas*, No. 1190977 (Ala. May 28, 2021)**: The Alabama Supreme Court holds unanimously: "[T]he movants have the burden of proving the existence of an arbitration agreement and that the contract containing the arbitration agreement evidences a transaction affecting interstate commerce. To that end, the movants introduced the inspection agreement, which bears the electronic signature of Scott [Lopas]. The movants further presented the affidavit testimony of Clark and the ISN records explaining how Scott, or his agent, reviewed the inspection agreement and electronically signed it. There is no dispute that the transaction at issue in this case affects interstate commerce. The evidence presented by the movants proves the existence of the inspection agreement, which contains an arbitration clause, and proves that the inspection agreement affects interstate commerce."

***Bannister v. Marinidence Opco, LLC*, A159815 (Cal. Ct. App. Apr. 30, 2021)**: "Substantial evidence supports the trial court's conclusion that Marinidence failed to authenticate the electronic signature on the arbitration agreement as Bannister's. Marinidence's evidence did not establish that Bannister was assigned a unique, private user name and password such that she is the only person who could have accessed the onboarding portal and signed the agreement; instead, the evidence showed that the requisite 'Client ID' and pin code was not employee-specific, and Matson had access to the information necessary to access the onboarding portal via employee personnel records."

***Pillar Project AG v. Payward Ventures, Inc.*, No. A160731 (Calif. Ct. App. 5 May 24, 2021)**: "Plaintiff Pillar Project AG (Plaintiff) hired a third party to exchange Plaintiff's cryptocurrency on an online exchange platform owned by Defendant Payward Ventures, Inc. (Defendant). Plaintiff had funds stolen from the third party's account with Defendant, and sued Defendant. Defendant moved to compel arbitration pursuant to an arbitration provision in its terms of service, which the third party had agreed to when it created the account on Defendant's platform some years earlier. The trial court denied the motion, finding Plaintiff was not bound by the arbitration agreement between Defendant and the third party. We affirm." (*ed: The Opinion offers a terrific review of the equitable estoppel doctrine*. *An* Alert *h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this decision.*)

***Aerotek, Inc. v. Boyd*, No. 20-0290 (Tex. May 28, 2021)**: "Under [Texas Uniform Electronic Transactions Act] Section 322.009's framework for electronic-signature attribution, once Aerotek proved its security procedures, the burden shifted to the Employees to demonstrate how their electronic signatures could have wound up on the MAAs [Mutual Arbitration Agreements] without their having placed them there themselves. Mere denials do not suffice…. In sum, Aerotek's evidence of the security procedures for its hiring application and its operation is such that reasonable people could not differ in concluding that the Employees could not have completed their hiring

applications without signing the MAAs. The Employees' simple denials are no evidence otherwise." (*ed: This was an 8-1 decision; Justice Boyd dissented.*)

***WV Dept. of Health and Human Resources v. Denise*, No. 20-0487 (W. Va. Jun. 2, 2021)**: In a unanimous decision, the West Virginia Supreme Court declines to apply equitable estoppel: "In the present case, the fact that DHHR has chosen to utilize the services of a third party, Sunbelt, to manage the hiring of employees or consultants, rather than hiring them directly, does not warrant the application of estoppel in this matter. On the facts of this case, we do not find that Ms. Denise is attempting to 'have her cake and eat it too'; accordingly, we decline to find that DHHR, as a non-party to the CEA, may utilize the doctrine of estoppel to compel Respondent to arbitrate her statutory claims against it."

***Spartan Securities Group, Ltd. v. Richards*, FINRA ID No. 19-00926 (Boca Raton, FL May 27, 2021)**: An interesting Award, featuring high-powered lawyers, large amounts at stake, 34 hearing session conducted by videoconference, a significant award of punitive damages, and an explained decision. (*ed: Provided courtesy of SAC's ARBchek facility, www.arbchek.com.*)

***Van Geffen v. Raymond James Financial Services, Inc*., FINRA ID No. 20-02571 (New Orleans, LA Apr. 29, 2021):** A broker loses his request for expungement of one occurrence from appearing on his CRD record, but is granted his request for reformation of his Form U5 record despite the objection of Respondent broker-dealer. . (*ed: Provided courtesy of SAC's ARBchek facility, www.arbchek.com.*)
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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Silberman, Linda, *Discovery, Arbitration, and 28 U.S.C. §1782: Rules or Standards?* NYU School of Law, Public Law Research Paper Forthcoming (June 2, 2021): "This particular paper explores the tensions between standards and rule as it relates to U.S. judicial assistance for use in a 'foreign or international tribunal', as provided for in 28 U.S.C. § 1782. Professor Silberman traces the history of § 1782 and discusses the first and only Supreme Court decision, *Intel Corp. v. Advanced Micro Devices. Inc*., interpreting the statute. She then focuses on the question of whether a 'foreign or international tribunal' under § 1782 includes private commercial arbitration, an issue before the Court in *Servotronics, Inc. v. Rolls-Royce PLC* to be argued next term. Professor Silberman highlights the Circuit split on this issue and surveys the competing arguments on both sides. Referencing arbitration specific statutes in other jurisdiction, Professor Silberman observes a distinction between judicial assistance for discovery purposes and for use in a plenary proceeding. Professor Silberman suggests that 'rules' rather than 'standards' would be preferable in the arbitration context and suggests a legislative solution to create such rules."

***After 75,000 Echo Arbitration Demands, Amazon Now Lets You Sue It*, ARS Technica (Jun. 1, 2021)**: "Amazon quietly changed its terms of use last month, dropping a clause

that forced customers into arbitration. Now, people can sue the company individually or in a class action. The change apparently was brought about by a surge in arbitration demands over revelations that Amazon's Echo devices were sometimes recording and saving conversations without consent, including those involving children. Those recordings allegedly ran afoul of laws in several states that require consent before recording and data collection." (*ed: see our coverage elsewhere in this* Alert.)

***Roundup: Four New Arbitration Petitions Under Consideration at the U.S. Supreme Court,* CPR Speaks Blog (Jun. 1, 2021)**: "Four recent petitions for writs of certiorari pending before the U.S. Supreme Court raise a number of interesting arbitration issues. While the Court may decline to hear these cases, they are worth following because they could help to define the scope of arbitration in both consumer and commercial contexts. The cases are being briefed and will be scheduled for conferences. If accepted, they likely would be argued in the 2021-2022 Court term beginning Oct. 4."

***SEC Awards More Than $23 Million to Whistleblowers*, www.sec.gov (June 2, 2021)**: "The Securities and Exchange Commission today announced awards of approximately $13 million and $10 million to two whistleblowers whose information and assistance led to successful SEC and related actions. The whistleblowers' substantial assistance, provided to the SEC and another federal agency, included submitting information and documents, participating in interviews, and identifying key individuals who engaged in the misconduct at issue."

***Professor Sovern's Opt-In Arbitration Proposal is Neither New Nor Supportable*, JDSupra (Jun. 3, 2021)**: "Professor Jeff Sovern recently proposed that the CFPB issue a supposedly 'new' arbitration rule 'that prevents companies from blocking consumers from suing in court unless consumers specifically opted in to the arbitration clause' after being given a CFPB-mandated disclosure that if they do not sign and their rights are violated, they 'may still sue us in court or later agree to arbitration.' In truth, there is nothing 'new' about this proposal. It is just the latest spin on the decades-old argument by consumer advocates that arbitration agreements should only be entered into after a dispute has occurred, not before, because consumers are not fully cognizant of their rights until then."

***Arbitrators are Male and Overwhelmingly White—Here's Why it Matters,* CNBC (Jun. 7, 2021)**: "A new report from the American Association for Justice released Monday shows that arbitrators at JAMS, American Arbitration Association and the Financial Industry Regulatory Authority, three of the largest arbitration service providers in the country, are mostly male and overwhelmingly white."
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DID YOU KNOW?

NUMBER OF FINRA REGISTERED REPS IS DECLINING. The *Alert*'s focus is financial industry dispute resolution, but other factors may indirectly influence things like arbitration case filings. A case in point: did you know that the number of FINRA

registered reps has been declining in recent years? The recently-published *2021 Industry Snapshot* indicates there were 617,549 reps in 2020, down from 634,662 in 2019. This stat has declined each of the last five years.
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LETTER FROM THE EDITOR
Are We Seeing the Start of a Tectonic Shift on Mandatory PDAAs in the Financial Services Field?

This is less a letter and more your editor's musings, but I wonder whether we are seeing the start of a tectonic shift on mandatory predispute arbitration agreements ("PDAA") in the financial services field? For example:

- 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. To me this indicates that the Commission will at a minimum exercise its Dodd-Frank section 921 authority to study securities arbitration.

- As reported in this *Alert*, two major firms -- Wells Fargo and Goldman Sachs -- are rethinking PDAA use in the investor and employment realms, respectively.

- The proposed *FAIR Act,* which would among other things ban PDAA use in employment and investor contracts, is inexorably moving toward at least House passage. It already has 183 cosponsors.

- 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 new proposed *ICA* also retains a section from the last one 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."

- Last, a bipartisan bill was introduced in the House **April 30** that would bar application of mandatory predispute arbitration agreements to sexual assault claims. Specifically, Representatives **Karen Bass** (D-CA) and **Debbie Lesko** (R-AZ) introduced H.R. 2906, the purpose of which is: "To amend title 9 of the

> United States Code to prohibit the enforcement of predispute arbitration agreements with respect to sexual assault claims."

As our editorial notes suggest, perhaps these BDs are trying to position themselves for a day when customer and/or employees will get to choose whether to agree to PDAAs? I also wonder whether other firms will follow suit. Time will tell….

George

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