SECURITIES ARBITRATION ALERT 2021-25 (7/8/21)

George H. Friedman, Editor-in-Chief

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- ***Bernstein v. Berthel Fisher & Co. Financial Services, Inc*., FINRA ID No. 20-01898 (Phoenix, AZ, Jun. 10, 2021)**
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DID YOU KNOW?

- **SCOTUS Website Makes it Easy to Track the Oral Hearing Schedule**

WE ARE BACK: SO MUCH HAPPENING! *We are back after a quarterly break, and the news, court decisions and Awards have been piling up in our absence. Hence, this heftier than usual issue. We kick off this quarter with an update from the major ADR institutions on their plans for staff returning to the workplace.* Spoiler alert*: some staff are already back at the office and the rest are returning soon. And so far returning staff won't need to prove vaccination status. We also report that – to our chagrin – SCOTUS has again declined to take up an arbitration-centric case. We also cover the May cumulative stats posted by FINRA Despite Resolution Services and we have our usual collection of Short Briefs, Quick Takes, and Articles of Interest. In other words, a jam-packed new issue of the Alert!*

SQUIBS: IN-DEPTH ANALYSIS

BACK-TO-THE-OFFICE: THE KEY ADR INSTITUTIONS UPDATE US ON THEIR PLANS. ***As more and more financial services firms announce their plans for returning staff to the workplace (see our coverage in SAA 2021-24 (Jun. 24)), we thought we would check in with the major ADR institutions to inquire about their "back-to-the-office" intentions.*** Hard to believe, but it's been over two months since leaders from the American Arbitration Association - ICDR ("AAA"), the International Institute for Conflict Prevention & Resolution, Inc. ("CPR"), FINRA Dispute Resolution Services ("FINRA DRS"), and JAMS, participated in a survey that resulted in our **April 28** blog post, *COVID-19's Continued Impact on ADR Providers: the Key Institutions Update Us on Plans for the Future.* As more financial services firms announce "return-to-the-workplace" policies, we thought it made sense to check back in with a mini-survey asking these leading ADR institutions to reaffirm or update what they said in April on two of the questions, and answer a new question. Joining us again to fill in the blanks are: **Rick Berry**, FINRA Dispute Resolution Services Executive Vice President and Director of Arbitration; **Christine L. Newhall**, AAA Senior Vice President; **Kristine Snyder**, JAMS Senior Public Relations & Content Manager; and **Helena Tavares Erickson**, CPR – SVP, Dispute Resolution Services. We present the responses below. Spoiler alert: some staff are already back at the office and the rest are returning soon. And so far returning staff won't need to prove vaccination status.

Are your administrative offices open and staffed?

AAA: Yes. We have resumed limited on-site operations with strict safety protocols in place, and where state and local guidelines permit, either regular or business essential activities. Office locations where on-site work is being performed include the following: New York City (3 offices), Atlanta, Boston, Buffalo, Charlotte (NC), Chicago, Dallas, Detroit, Fresno, Houston, Los Angeles, Miami (FL), Minneapolis, Philadelphia, Johnston (RI), San Francisco, Somerset (NJ), Voorhees (NJ), and Washington DC (21 out of 28 offices). Starting on **July 12, 2021**, AAA will enter its next phase of returning employees to in-person operations with up to 50% capacity in a majority of AAA offices.

With respect to AAA hearing facilities, AAA offices are open for in-person hearings. AAA has put a number of safety protocols in place in compliance with state and local requirements.

CPR: Our office is not physically open to the public but we have been fully functional remotely since the start of the pandemic. Cases can continue to be filed easily via email. We do recommend payment by credit card or wire to expedite the process, as checks are only collected several times a week.

FINRA DRS: With limited exceptions, our offices are not currently open to the public. FINRA is taking a phased approach and plans to reopen several office locations for staff, on a voluntary basis, in the near future.

JAMS: In accordance with changes to local and federal regulations, almost all JAMS administrative offices are open and staffed in markets where in-person proceedings are taking place. JAMS prioritizes the safety of its staff, neutrals, attorneys and clients and will continue to require face coverings and social distancing in public areas of our Resolution Centers at all times.

Describe any plans to resume in-person office operations.

AAA: The AAA plans to fully resume in-person operations in phases based on our ability to do so safely, in conformance with state and local guidelines, and employee readiness and ability to return to on-site work. We are continuously evaluating the most effective way to accomplish this goal.

CPR: Our physical office is scheduled to reopen in **September 2021**.

FINRA DRS: We have not announced when our offices will be open to the public. FINRA is taking a phased approach and plans to reopen several office locations for staff, on a voluntary basis, in the near future.

JAMS: Most JAMS Resolution Centers are now open for in-person or hybrid sessions, in accordance with local government regulations and guidance issued by the Centers for Disease Control. Detailed information regarding scheduling in-person, hybrid and virtual sessions, as well as what health and safety protocols are being implemented, are available for each JAMS Resolution Center online. A particular panelist's availability to conduct virtual proceedings is available on their bios on the JAMS website and respective case managers can provide availability for in-person, hybrid and virtual sessions.

[New]: If not covered above, do you have a vaccination policy for returning staff? That is, must staff be vaccinated? If so, do they have to prove it?

AAA: At this time, AAA is not mandating employee vaccinations.

CPR: We are monitoring the situation and will make decisions on return policies closer to the date of return in **September 2021**.

FINRA DRS: FINRA has not announced a vaccination policy for returning staff.

JAMS: JAMS will not be requiring staff, neutrals, attorneys, and clients to attest to or prove they have been fully vaccinated prior to entering a JAMS Resolution Center, which is why face coverings and social distancing will continue to remain in place. If you would like more information, please contact your local JAMS case manager or JAMS business manager.
*ed: *We thank these leaders for helping us keep our mutual constituents informed and up-to-date! **We look forward to our fall survey, which we'll title,* The COVID-19 Pandemic is Thankfully Behind Us: Which ADR Changes will be Lasting?*)*
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FINRA DRS POSTS STATS THROUGH MAY: CUSTOMER CLAIMS ARE STILL UP (BARELY), WHILE INDUSTRY CLAIMS CONTINUE TO PLUMMET. AND THE COVID-19 PENDING CASES BACKLOG IS GONE.
FINRA Dispute Resolution Services ("DRS") posted case statistics through May, with the overall case filing trends essentially unchanged from April. In brief, the headlines are: 1) overall arbitration filings through May – 1,258 cases – are down 19%, about the same as in April; 2) customer claims remain *up* at plus 2%; 3) industry disputes are almost halved, down 39%; and 4) for the ninth month in a row, pending cases declined and, as discussed below, the COVID-induced backlog is completely gone. Overall arbitration turnaround times were 13.5 months, with hearing cases now taking 15.4 months. There were just 164 mediation cases in agreement, a 16% decrease. The settlement rate remains high at 84% (it had been 83% in April). There are now 8,390 DRS arbitrators, 3,989 public and 4,401 non-public. The latter figure declined by 43 month-over-month.

Virtual Arbitrations at FINRA
Perhaps of greater interest in the current climate, FINRA's "Virtual Arbitration Hearings" category shows that, since FINRA started cancelling in-person hearings in **March 2020**, 337 cases were conducted with one or more hearings via Zoom (123 customer and 214 industry cases). There were 298 joint motions for virtual hearings (107 customer and 191 industry cases). As reported in SAA 2021-10 (Mar. 18), DRS in March posted two new stats on its Website that allow users to gauge results in hearings conducted by Zoom: *Awards on the Merits of the Case with One or More Zoom Evidentiary Hearings* and *Awards on the Merits of the Case with In-Person Evidentiary Hearings* are both listed under the category, *Result of Customer Claimant Arbitration Award Cases (Regular Hearing Only.*

COVID-19 Pending Cases Backlog is Gone
We had reported for months that pending cases had grown in the wake of the onset of the pandemic and in-person hearing cancellations. We've also reported more recently that

parties and counsel appear to have grown more familiar with virtual hearings and that, as a result, the pending cases backlog has been shrinking. As of **May**, it's completely gone; in fact, there's been a net reduction in pending cases since the pandemic started. The last nine months have each experienced declines in pending cases, reflecting a 727 case reduction from last year's high water mark of 5,415 open cases in August. This now leaves a cumulative decrease of 93 pending cases since March 2020.
*(ed: *Kudos to FINRA DRS for eliminating the backlog! We'll be retiring this stat. **Wonder why the number of non-industry arbitrators declined? ***As previously reported, the AAA has posted on its Website stats on various case administration metrics dating back to the start of the COVID-19 pandemic. The interactive Virtual Events page covers March 1, 2020, through April 30, 2021, and shows that there were 5,902 cases with a "virtual event," broken down as follows: evidentiary hearing (8,429); mediation session (937); pre-mediation conference (105); preliminary hearing (1,015); and settlement conference (7). That's a total of 10,493 virtual events. The "Virtual Events By Month" chart reveals that usage increased one hundred fold over the course of the pandemic, from a low of 17 events in March 2020 to 1,779 in March 2021.)*
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AS THE CLOCK WINDS DOWN ON THE TERM, SCOTUS AGAIN DENIES *CERTIORARI* IN AN ARBITRATION-CENTRIC CASE. ***The Supreme Court on June 28 denied* Certiorari** in **Shivkov v. Artex Risk Sols. Inc.**, ***974 F.3d 1051 (9th Cir. 2020), yet another case involving arbitration.*** The core holdings below were: "*First*, we hold that the Agreements are not unenforceable on the grounds Plaintiffs raise. Although Plaintiffs assert that Artex and Tribeca breached a fiduciary duty to point out and fully explain an arbitration clause, they identify no state law authority recognizing such a duty. Addressing an issue of first impression in our circuit concerning the survival of arbitration obligations following contract termination, we hold that the Agreements do not expressly negate the presumption in favor of post-termination arbitration or clearly imply that the parties did not intend for their arbitration obligations to survive termination. *Second*, we hold that the Arbitration Clause encompasses all Plaintiffs' claims. *Third*, we join seven of our sister circuits in holding that the availability of class arbitration is a gateway issue that a court must presumptively decide. The Agreements here do not clearly and unmistakably delegate that issue to the arbitrator. Because the Agreements are silent on class arbitration, they do not permit class arbitration. *Finally*, we conclude that all non-signatory Defendants may compel arbitration pursuant to the Agreements" (emphasis in original).

Again, No Appetite for SCOTUS Review
Shivkov's denied **March 17** Petition for *Certiorari* identified these questions (*ed: repeated* verbatim):

1. The parties' arbitration clause expressly designates the American Arbitration Association ("AAA") as their default dispute-resolution method. The clause did not also specifically mention the AAA Rules themselves, which, according to the AAA, apply whenever parties select a AAA arbitration. Must an agreement that specifies arbitration

before the AAA as the default dispute-resolution method also specifically mention the AAA Rules to avoid being considered ambiguous about whether the parties intended to apply the AAA Rules?

2. Under the plain text of the Federal Arbitration Act, courts -- not arbitrators -- decide gateway issues, such as whether there is an agreement to arbitrate and what controversies does it cover. Procedural questions, however, are reserved for arbitrators. Is the availability of class arbitration a matter for an arbitrator to decide, or for a court to decide?

Just One Arbitration-Related Case Set for Review at SCOTUS
Now that the *Certiorari* dust has settled for this Term, only one case involving arbitration remains on the Court's oral argument agenda for the Fall. As reported in SAA 2021-19 (May 20), the Supreme Court on **May 17** granted *Certiorari* in a case involving application of the "look through" standard. Specifically, the Court will review *Badgerow v. Walters*, 975 F.3d 469 (5th Cir. 2020), a case we analyzed in SAA 2020-36 (Sep. 23). In the underlying case, the Fifth Circuit held that the District Court was correct when it applied the "look through" standard to determine that it could remove a state court action to vacate an Award. The issue identified for review in the granted Petition for *Certiorari*: "Whether federal courts have subject-matter jurisdiction to confirm or vacate an arbitration award under Sections 9 and 10 of the FAA where the only basis for jurisdiction is that the underlying dispute involved a federal question."
*(ed: *Shivkov *is No. 20-1313, appearing on page 3 of the Order List. **For an in-depth analysis of the case, see the June 28 CPR Blog post,* "Supreme Court Again Declines a 'Who Decides?' Case in Class Arbitration." ****Again, while we had hoped SCOTUS might take up the case, we are not surprised by this outcome.* ***Badgerow*, No. 20-1143, *is on page 2 of the Order List.)*
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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

FINRA ISSUES 2020 ANNUAL REPORT. A BIG, POSITIVE SWING FROM LAST YEAR. FINRA on **June 25** issued its *2020 Annual Report,* showing net income of $19.8 million. The Authority had operating income of $30.9 million, net of investment gains of $11.1 million. User revenues were $306.5 million. The drivers? "[I]ncreased revenues, due primarily to higher trading volumes and a large number of public offerings, partially offset by an increase in operating expenses and lower interest and dividend income." FINRA's balance sheet stands at $1.5 billion in equity. Noteworthy is this explanatory comment: "An increase in the number of initial and secondary public offerings year over year primarily drove the increase in user revenues, partially offset by declines in qualification examination enrollment and the number of arbitration hearing sessions held as a result of the COVID-19 pandemic."
*(ed: *DRS' income is not listed separately, but we know that it accounts for 4-5% of revenue. **FINRA maintains a separate Webpage containing financial reports and policies.)*
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JAMS INTERNATIONAL RULES REVISED EFFECTIVE JUNE 1. JAMS recently announced that its *International Arbitration Rules* were amended effective **June 1.** Why the amendments? A **June 11** Press Release states: "The revised Rules update and clarify certain procedures regarding international arbitrations, including filing, commencement and service of documents. These changes were adopted to align the procedures with those used in domestic arbitrations at JAMS. To support access to case documents throughout the proceedings, Article 2 allows electronic filing and service through JAMS Access, a centralized, secure online case management platform. Additional rules expand the authority of a tribunal to change the location of a hearing for the health and safety of a participant and to proceed with remote hearings, which may be conducted via conference call or videoconference. The revised Rules further clarify the parameters of dispositive motion." A comprehensive description of the changes is contained in a Factsheet.
(ed: We like the "health and safety" amendment, and still suggest that FINRA promulgate a similar rule.)
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HOUSE BILL WOULD BAR PDAAS IN HEALTH INSURANCE POLICIES. A bill introduced recently in the House would bar use of predispute arbitration agreements ("PDAA") in health insurance policies. H.R. 3947– the *Justice for Patients Act* – was introduced **June 16** by Rep. **Katie Porter** (D-CA). Its purpose is: "To prohibit the inclusion of mandatory predispute arbitration clauses and clauses limiting class action lawsuits in health insurance contracts." Rather than attempting a revision of the Federal Arbitration Act ("FAA") the bill targets the *Public Health Service Act, ERISA,* and the *IRS Code.* The text shows similar language amending all three statutes to: 1) ban PDAA use; 2) prohibit class action waivers; and 3) provide that courts, rather than arbitrators, determine arbitrability, even in the face of a delegation clause. For example, Part D of title XXVII of the *Public Health Service Act* (42 U.S.C. 300gg–111 et seq.) would be amended by adding at the end the following new language: ''(a) PROHIBITION ON MANDATORY PREDISPUTE ARBITRATION.—A group health plan and group or individual health insurance coverage shall not include any predispute arbitration clause that requires the arbitration of claims under such plan or coverage. (b) PROHIBITION ON LIMITATION OF CLASS ACTIONS.—A group health plan and group or individual health insurance coverage shall not include any limitation on the ability of an enrollee of such plan or coverage to engage in a class action lawsuit relating to the administration of such plan or coverage."
*(ed: *The proposed legislation is silent as to retroactive application. **The bill was announced in a June 17 Press Release.)*
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NOT A SECURITIES CASE, BUT SCOTUS HOLDS NO ARTICLE III STANDING TO SUE FOR CLASS MEMBERS NOT SUFFERING "CONCRETE INJURY." In a decision that may have ramifications for investors and the financial services industry, the Supreme Court holds 5-4 that only class members who suffered a "concrete injury" have Article III standing to sue. *TransUnion LLC v. Ramirez*, No. 20-

297 (Jun. 25, 2021), involved individuals who brought a *Fair Credit Reporting Act* class action because their credit reports flagged the consumer's name as possibly being on the Treasury Department's Office of Foreign Assets Control list of: "terrorists, drug traffickers, and other serious criminals." Writing for the majority **Justice Kavanaugh** states: "For 1,853 of the class members, TransUnion provided misleading credit reports to third-party businesses. We conclude that those 1,853 class members have demonstrated concrete reputational harm and thus have Article III standing to sue on the reasonable-procedures claim. The internal credit files of the other 6,332 class members were *not* provided to third-party businesses during the relevant time period. We conclude that those 6,332 class members have not demonstrated concrete harm and thus lack Article III standing to sue on the reasonable-procedures claim."
*(ed: *Joining Justice Kavanaugh were Chief Justice Roberts and Justices Alito, Gorsuch, and Barrett. Dissenting were Justices Breyer, Kagan, Sotomayor, and Thomas. **Clearly this decision will have some impact in the financial services arena, but time will tell as to the extent. For instance, FINRA Rule 12204 allows customers to either arbitrate or participate in a class action. We wonder whether this holding will drive some claimants to individual arbitration?)*
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NO JURISDICTION OR EQUITABLE ESTOPPEL AGAINST MOLDOVA. *Gater Assets Ltd. v. AO Moldovagaz*, No. 19-3550(L) (2d Cir. Jun. 22, 2021), is one of those cases where simply quoting the Opinion at length conveys the facts and holding (*ed: we added the bullet formatting for ease of reading*): "Gater sought to renew a default judgment, which the district court entered in 2000, that enforced a Russian arbitration Award in favor of Lloyd's Underwriters against the appellants. Lloyd's assigned its default judgment to Gater in 2012. The district court entered a renewal judgment in Gater's favor after concluding that it had personal jurisdiction over the appellants as well as subject-matter jurisdiction over the renewal claims. We disagree with those conclusions.

- First, the district court lacked personal jurisdiction over Moldovagaz. The Due Process Clause prohibits federal courts from exercising personal jurisdiction over Moldovagaz because Moldovagaz has no contacts with the United States. We have recognized an exception to this rule when a defendant is a foreign sovereign or a sovereign's alter ego. But contrary to the district court's conclusion, Moldovagaz is not an alter ego of the Republic of Moldova.

- Second, the district court lacked subject-matter jurisdiction over Gater's claim for renewal against the Republic of Moldova. The Foreign Sovereign Immunities Act ('FSIA'), 28 U.S.C. §§ 1330, 1391(f), 1441(d), 1602-11, provides that federal courts lack subject matter jurisdiction over claims brought against foreign states unless one of the FSIA's immunity exceptions applies. The Republic of Moldova is a foreign state and no immunity exception applies to Gater's claim against it.

- The district court invoked the FSIA's exception for confirming awards that are issued pursuant to a qualifying arbitration agreement 'made by the foreign state.' 28 U.S.C. § 1605(a)(6). The Republic of Moldova, however, was not a party to the underlying arbitration agreement and no equitable theory, even assuming such theories apply under § 1605(a)(6), supports abrogating the Republic's sovereign immunity in this case."

(ed: Seems right on all counts.)

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SAVE THE DATE: PLI'S (VIRTUAL) ANNUAL SECURITIES ARBITRATION PROGRAM IS SEPTEMBER 9. The Practising Law Institute ("PLI") program *Securities Arbitration 2021* will be taking place via live Webcast and groupcast on **September 9, 2021**. According to PLI's Website, "This year's Securities Arbitration program will feature FINRA Dispute Resolution leadership and arbitrators, as well as noted academics and experienced attorneys who represent both customers and industry. Our faculty will provide practical tips for arbitrating and mediating cases. The ethical challenges involved in litigating elder abuse claims and diversity and inclusion and the elimination of bias in the forum will be explored. Finally, they will take a look at the latest hot topics and future trends in securities arbitration for 2021." The program boasts a large (25+) and impressive faculty, including FINRA Dispute Resolution Services' Executive Vice President **Richard W. Berry** and other FINRA staffers. Returning as Program Chair is **Sandra D. Grannum** (Faegre Drinker Biddle & Reath LLP).
(*ed: *Don't miss PLI's annual Securities Arbitration program, which will be presented virtually. **The registration fee is $1,850. A discounted rate is available for FINRA Arbitrators and Mediators and SAA readers. Scholarships are available to attend this program. Visit learning.pli.edu/scholarship.****Register via the event webpage or contact PLI at (800) 260-4PLI. Provide the code "LMV1 SA921" when you register. *****For more information, please contact PLI at the number above or at info@pli.edu.)*

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QUICK TAKES: CASES AND AWARDS WORTH READING

***Boykin v. Family Dollar Stores of Michigan, LLC*, No. 20-1153 (6th Cir. Jul. 1, 2021)**: "Timothy Boykin filed an employment suit against Family Dollar Stores. Asserting that Boykin 'e-signed' an arbitration contract covering his claims, Family Dollar moved to compel arbitration and dismiss Boykin's complaint for improper venue under Federal Rule of Civil Procedure 12(b)(3)…. Although the Federal Arbitration Act requires a court to summarily compel arbitration upon a party's request, the court may do so only if the opposing side has not put the making of the arbitration contract 'in issue.' 9 U.S.C. § 4. The district court in this case should have evaluated whether Boykin adequately challenged the making of the contract using the standards that apply on summary judgment. And Boykin's evidence created a genuine issue of fact over whether he electronically accepted the contract or otherwise learned of Family Dollar's arbitration policy. Although his affidavit denying that he accepted the contract may have been 'self-serving,' that description alone does not provide a valid basis to ignore it."

***EHM Productions, Inc. v. Starline Tours of Hollywood, Inc.*, No. 20-55426 (9th Cir. Jun. 24, 2021)**: From the Court's syllabus: "The panel held that the district court did not abuse its discretion in denying Starline's Rule 59(e) motion and failing to vacate the arbitration award for evident partiality based solely on the arbitrators' failure to disclose JAMS's nontrivial business dealings with TMZ or its counsel prior to arbitration. The panel concluded that *Monster Energy [Co. v. City Beverages, LLC*, 940 F.3d 1130 (9th Cir. 2019)] requires disclosure only when an arbitrator holds an ownership interest in JAMS and JAMS engages in nontrivial business dealings with a party to the arbitration. Further, *Monster Energy* does not require disclosure of nontrivial business dealings with a party's counsel." Noteworthy is the unanimous concurrence: "In Judge Friedland's *Monster Energy Company v. City Beverages, LLC* dissent, she predicted the majority's decision was 'likely to generate endless litigation over arbitrations that were intended to finally resolve disputes outside the court system.' 940 F.3d 1130, 1141 (9th Cir. 2019) (Friedland, J., dissenting). This case is certainly some evidence that her warning was warranted. The result here was required by *Monster Energy*, which the opinion faithfully applies. But because I share many of the same reservations about the *Monster Energy* decision that Judge Friedland so aptly articulates in her dissent, I encourage my colleagues to reconsider *Monster Energy en banc*."

***Reulbach v. Life Time Fitness, Inc*., No. 1:21 CV 1013 (N.D. Ohio, Jun. 23, 2021)**: "Upon review, the Court finds that there is a valid agreement to arbitrate between the parties. Defendants' electronic message via Workday [the company's online HR system] regarding the Agreement constituted an offer to enter into an agreement to arbitrate future claims. This electronic message specifically informed plaintiff that Life Time had adopted an arbitration program for resolving employee disputes. This message also specified that the failure to opt out within 15 days would bind him to the Agreement. This message also included the full text of the Agreement via a hyperlink. The evidence also indicates that plaintiff accepted defendants' offer and manifested his assent to be bound. Plaintiff's Workday records confirm that plaintiff logged onto the Workday system on September 30, 2019, and viewed the message containing the Agreement. He then clicked the 'I Agree' button at the bottom of the page, acknowledging that he had received the message and the attached Agreement. Plaintiff then continued to work for defendants without opting out of the Agreement within 15 days. Such actions evidence plaintiff's assent to be bound by the Agreement" (footnote omitted).

***JP-Richardson, LLC v. Pacific Oak SOR Richardson Portfolio JV, LLC*, No. G059479 (Calif. Ct. App. 4 Jun. 29, 2021)**: "[T]he 'manifest disregard of the law' standard requires a party seeking to vacate an arbitration award to prove the arbitrator was aware of a clearly defined and governing legal principle but ignored it. The record shows the arbitrator was not only aware of the Supreme Court authority, but also interpreted and applied the case. Accordingly, the arbitrator did not manifestly disregard the law by relying, in part, on adverse inferences in entering the final award." (*ed: note that there were other challenges to the award that were rejected. An* Alert *h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this decision.)*

***Bernstein v. Berthel Fisher & Co. Financial Services, Inc*., FINRA ID No. 20-01898 (Phoenix, AZ, Jun. 10, 2021)**: An All-Public Panel explains why it has decided to grant the remaining Respondent broker-dealer's Pre-Hearing Motion to Dismiss pursuant to FINRA Rule 12206 (Six-year Eligibility Rule): "There was no dispute that any involvement that Berthel Fisher had with Claimants ended when Claimants' accounts were transferred to another broker dealer. The registered representative handling those accounts left Berthel Fisher's employ to handle those accounts at the new broker-dealer firm. All of this occurred more than six years before the Statement of Claim in this case was filed. Likewise, no actions were taken by Berthel Fisher after the registered representative and Claimants' accounts were transferred out, nor did it owe any further duty to Claimants, that would give rise to a finding of equitable tolling of the eligibility period." *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Purshe Kaplan Sterling Investments, Inc. v. Vungarala*, FINRA ID No. 19-03153 (Detroit, MI, Jun. 8. 2021)**: Claimant broker-dealer is awarded nearly $21 million in compensatory damages on behalf of itself and as Assignee for the Saginaw Chippewa Indian Tribe of Michigan from a non-appearing registered representative relating to money paid as part of an arbitration settlement and pursuant to the terms of an Independent Contractor Agreement and Security Sales Agreement. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Huang, Tuo, *The Two Voices of Federal Law on 'Arbitrability': Substantive Common Law, Federalism, and Choice of Law for International Commercial Arbitration Agreements*, Journal of Law and Commerce (March 4, 2021): "The Supreme Court's 2020 decision in *GE Energy v. Outokumpu* clarified that nonsignatories to an international commercial arbitration agreement might nevertheless have the right to enforce the agreement under doctrines such as equitable estoppel and that the New York Convention does not prohibit such enforcement. However, misunderstandings and confusions continued regarding the appropriate governing law for such questions of enforcement involving nonsignatories. Some recent appellate court jurisprudence and scholarship point to application of federal substantive law based on the long-standing proposition that federal law uniformly governs questions of 'arbitrability.' While this proposition is technically correct, it does not support the application of federal substantive law to determine substantive contract law questions in enforcement of international commercial arbitration agreements. This article sets out to clarify the misunderstandings surrounding the 'federal substantive law of arbitrability' through a review of all Supreme Court decisions invoking the concept of 'arbitrability.'"

***SEC Awards More Than $1 Million to Whistleblower*, www.sec.gov (Jun. 24, 2021)**: "The Securities and Exchange Commission today announced an award of more than $1 million to a whistleblower whose information and assistance led to multiple successful SEC enforcement actions. The whistleblower provided SEC staff with valuable

information and ongoing assistance, which included participating in interviews with the staff."

***Court Grants Wells Fargo's Request to Send Broker's Age Claim to Arbitration*, AdvisorHub (Jun. 25)**: "A federal court has granted Wells Fargo' motion to compel an Idaho-based broker with 47 years in the industry to arbitrate his age-discrimination claims he filed against the wirehouse. The broker … had filed his case in court while he was fighting Wells Fargo's bid in arbitration to claw back $78,186 he owed on a promissory note. In its May 13-filed motion to compel, Wells Fargo's lawyers argued that [the broker] was already 'arbitrating claims related to his employment at Wells Fargo' in a proceeding before the Financial Industry Regulatory Authority. Among [broker's] Finra claims was 'the same claim being alleged before this Court,' Wells Fargo's lawyers argued."

***Finra Records $19.8 Million Profit in 2020*, Investment (Jun. 25, 2021)**: "Finra Achieved a $19.8 Million Profit in 2020, a sharp turnaround from its $45.9 million loss in 2019 that was driven in large part by the revenue generated from the trading activity and income of its member firms. The Financial Industry Regulatory Authority Inc. recorded $1.1 billion in operating revenue last year while collecting $57 million in fines for $1.16 billion in net revenue, according to its 2020 annual financial report. Both numbers represented gains from 2019, when the broker-dealer self-regulator showed $899 million in operating revenue and assessed $39.5 million in fines." (*ed: see our coverage elsewhere in this* Alert.)

***Merrill Ordered to Pay $11.7M Over Supervisory Failures*, Financial Advisor IQ (Jun. 25, 2021)**: "The Financial Industry Regulatory Authority has ordered Merrill Lynch to pay $11.7 million in restitution and fines over the supervision of early rollovers of unit investment trusts by its registered representatives. Between January 2011 and December 2015, Merrill executed roughly $2.5 billion in early UIT transactions, according to Finra. The products were sold more than 1,000 days before their maturity date, with some or all the proceeds used to buy more UITs, the self-regulator says."

***FINRA Orders Record Financial Penalties Against Robinhood Financial LLC*, www.FINRA.org (Jun. 28, 2021)**: "FINRA announced today that it has fined Robinhood Financial LLC $57 million and ordered the firm to pay approximately $12.6 million in restitution, plus interest, to thousands of harmed customers. The sanctions represent the largest financial penalty ever ordered by FINRA and reflect the scope and seriousness of the violations. In determining the appropriate sanctions, FINRA considered the widespread and significant harm suffered by customers, including millions of customers who received false or misleading information from the firm, millions of customers affected by the firm's systems outages in March 2020, and thousands of customers the firm approved to trade options even when it was not appropriate for the customers to do so."

***Ex-J.P. Morgan Brokers Push for $4-Mln Settlement with Grandmother in Schottenstein Case*, Advisor Hub (Jul. 1, 2021)**: "Two ex-J.P. Morgan Securities brokers claim their grandmother reneged on terms to resolve their high-profile, high-dollar intrafamily dispute and are seeking to enforce a $4 million settlement of the issues they say she wrongfully dragged back to court, according to new filings. [The] retail matriarch …, 95, earlier this month filed a motion in U.S. District Court in the Southern District of Florida to reopen the case to confirm her $19 million arbitration award, issued in February by three Financial Industry Regulatory Authority panelists against her grandsons and their former employer over alleged unauthorized trading in her account and elder abuse."
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SCOTUS WEBSITE MAKES IT EASY TO TRACK THE ORAL HEARING SCHEDULE. Readers and followers know that the Supreme Court's Website, https://www.supremecourt.gov/, offers a wealth of information about past and pending cases. But did you know that you can easily check on the oral hearing schedule for cases the Court has agreed to hear? Navigate to the "Oral Arguments" tab and then click on "Calendars and Lists" to find the current and past oral argument calendars. Or simply bookmark https://www.supremecourt.gov/oral_arguments/calendarsandlists.aspx.
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Send any messages or inquiries to: George@SecArbAlert.com

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Mail to: 194 Carlton Terrace, Teaneck, NJ 07666
T: 917-841-0521
Web: www.SecArbAlert.com
Blog: www.sacarbalert.com/blog/; Twitter: @SecArbAlert