SECURITIES ARBITRATION ALERT 2021-30 (8/12/21)

George H. Friedman, Editor-in-Chief

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DID YOU KNOW?

- **CPR Updated its Model ADR Clauses**

A NEW FEATURE ARTICLE. *We're delighted to publish a new feature article,* A Survey: When Does Functus Officio Permit an Award's Clarification or Correction?, *offering an analysis of how the doctrine of* functus officio *impacts an arbitrator's ability to correct or modify an Award. Author Nelson Timken, Esq. traces the litigation-based origins of the doctrine and how it came to be applied to arbitration. Along the way, he examines how the major arbitration institutions – including FINRA – have amended their rules and procedures to address Award correction and modification, consistent with arbitration's core objectives of speed, economy, and fairness.*

FEATURE ARTICLE

A SURVEY: WHEN DOES FUNCTUS OFFICIO PERMIT AN AWARD'S CLARIFICATION OR CORRECTION?, *by Nelson Timken.* The term *functus officio* is translated from Latin as "having performed his or her office". The general meaning of the term has historically been understood to be that an officer or official body, once having accomplished its intended task, loses its authority or legal competence. Considering the contractual and temporary nature of arbitrators' mandates, the common law doctrine of *functus officio* holds that (subject to narrowly defined exceptions), arbitrators are prevented from altering their awards after they are rendered. But the practical effect of the rule is that it sometimes conflicts with the arbitral goals of economy and finality by restricting arbitrators from clarifying, correcting and revisiting their determinations when they realize there has been a substantive or technical error on their part. In addition, if the tribunal makes a correction, the party whose interests are not served by the correction is likely to seek vacatur of the amended award, claiming that it was prohibited by the doctrine of *functus officio*. *Read more…*

*(ed: *Nelson Timken is an LLM student in International Dispute Resolution at Fordham School of Law. He has worked as a court attorney for 27 years, and is on the AAA Roster of Mediators, the AAA Panel of Consumer Arbitrators, and the CPR Panel of Neutrals. Mr. Timken is also Vice-Chair of the New York County Lawyers Association ADR Committee, and is a member of the Chartered Institute of Arbitrators, and the New York State Bar Association Dispute Resolution Section.)*

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SQUIBS: IN-DEPTH ANALYSIS

SCOTUS WON'T RECONSIDER DENIED *CERT.* PETITION ON FAA APPLICABILITY TO AMAZON DRIVERS. ***SCOTUS again has eschewed an opportunity to clear up the split over the Federal Arbitration Act's ("FAA") section 1 exemption for workers engaged in commerce, this time by refusing to reconsider its prior* Certiorari *denial***. As reported in SAA 2021-24 (Jun. 24), the Supreme Court on **June 21** denied Amazon's **January 29** Petition for *Certiorari* in *Waithaka v. Amazon.com, Inc.*, No. 19-1848 (1st Cir. Jul. 17, 2020), *petition for reh'g denied* (Sep. 1), a case we had covered in SAA 2020-27 (Jul. 22). To review, there's a clear circuit split on whether the Federal Arbitration Act's ("FAA") section 1 exemption embraces only workers actually moving goods or people in interstate commerce or is to be construed broadly to cover those who are part of the "flow" of interstate commerce. The *Waithaka*

Court had held: "After close examination of the text and purpose of the statute and the relevant precedent, we now hold that the [FAA section 1] exemption encompasses the contracts of transportation workers who transport goods or people within the flow of interstate commerce, not simply those who physically cross state lines in the course of their work."

Request for Reconsideration
We missed that Amazon on **June 29** filed a Petition for Rehearing stating: "In accordance with this Court's Rule 44.2, petitioners respectfully seek rehearing of the Court's order denying certiorari based on the intervening decision in *Hamrick v. Partsfleet, LLC*, ___ F.3d ___, 2021 WL 2546405 (11th Cir. June 22, 2021). The Eleventh Circuit's ruling -- one day after the denial of certiorari here -- directly conflicts with the First and Ninth Circuits' rulings on the same legal question and facts. Indeed, the Eleventh Circuit expressly endorsed the dissenting view in the Ninth Circuit, eliminating any doubt about whether a circuit split exists." We reported on *Hamrick* in the "Quick Takes" section of SAA 2021-26 (Jul. 15), quoting liberally from the Court's Opinion: "This [section 1] 'exemption,' we've said, excludes from the reach of the Federal Arbitration Act employees who are in a class of workers: (1) employed in the transportation industry; and (2) that, in the main, actually engages in interstate commerce. See *Hill v. Rent-A-Center, Inc.*, 398 F.3d 1286, 1290 (11th Cir. 2005). The issue in this case is whether (despite agreeing to arbitrate any dispute with their employer) final-mile delivery drivers -- drivers who make local deliveries of goods and materials that have been shipped from out-of-state to a local warehouse -- are in a 'class of workers engaged in foreign and interstate commerce' and, thus, exempt under the Federal Arbitration Act from having to arbitrate their Fair Labor Standards Act claims. The district court concluded that they were exempt and refused to compel them to arbitrate their claims under the Federal Arbitration Act. But the district court misapplied *Hill* and wrongly determined that the exemption applied. We reverse the part of the district court's order denying the employer's motion to compel arbitration under the Federal Arbitration Act and remand for the court to determine whether the drivers are in a class of workers employed in the transportation industry and whether the class, in general, is actually engaged in foreign or interstate commerce." SCOTUS on **August 2** summarily denied the reconsideration Motion (see page 1 of Order List).
*(ed: *The SCOTUS case is* Amazon.com, Inc. v. Waithaka, *No. 20-1077, appearing on page 4 of the Order List. **We really think SCOTUS should take on this significant split in the Circuits. ***For an in-depth analysis of the issue, see Huertero, Ruben,* Supreme Court Declines to Engage in the Interpretation of "Engaged in Commerce", *2021:15 SEC. ARB. ALERT 1 (Apr. 29, 2021).)*
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UNANIMOUS ALASKA SUPREME COURT: ARBITRATORS EXCEEDED AUTHORITY BY AWARDING BEYOND AUTO INSURANCE POLICY'S COVERAGE. ***The Panel exceeded its authority under the auto insurance policy and the arbitration clause contained in it when it awarded damages not covered by the policy, a unanimous Alaska Supreme Court holds.*** *Allstate Insurance Company v.*

Harbour, No. S-17307 & S-17610 (Alaska Jul. 23, 2021), is one of those decisions we really enjoy because the basic facts, procedural history, and holding can be communicated by simply quoting the unanimous Opinion. We do so below.

Procedural History
"Two insureds with identical Allstate Insurance Company medical payments and uninsured/underinsured motorist (UIM) insurance coverage settled with their respective at-fault drivers for applicable liability insurance policy limits and then made medical payments and UIM benefits claims to Allstate. Allstate and the insureds were unable to resolve the UIM claims and went to arbitration as the policy required. The arbitration panels initially answered specific questions submitted about the insureds' accident-related damages. At the insureds' requests but over Allstate's objections, the panels later calculated what the panels believed Allstate ultimately owed the insureds under their medical payments and UIM coverages and issued final awards."

Post-award Activity
"Allstate filed superior court suits to confirm the initial damages calculations, reject the final awards as outside the arbitration panels' authority, and have the court determine the total amounts payable to the insureds under their policies. The judge assigned to both suits affirmed the final arbitration awards; Allstate appealed both decisions, which we consolidated for consideration and decision."

The Final Holding
"The primary issue in these consolidated appeals is the scope of an Automobile insurance policy's arbitration provision…. Because the arbitration panels had no authority to determine anything beyond the insureds' damages arising from their accidents and because Allstate withheld its consent for the panels to determine anything else, we reverse the superior court's decisions and judgments. We also reverse some aspects of the court's separate analysis and rulings on legal issues that the panels improperly decided. Given (1) the arbitration panels' damages calculations and (2) our clarification of legal issues presented, we remand for the superior court to determine the amount, if any, Allstate must pay each insured under their medical payments and UIM coverages…. The arbitration panels exceeded their authority by purporting to determine the total benefit amounts Allstate owed the insureds under their coverages; the panels had authority to determine only each insured's damages arising from the at-fault driver's conduct."
(ed: Seems right to us. The parties through their arbitration agreement breathe life into the arbitrator and can set limits on the latter's authority.)
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MICHIGAN SUPREME COURT FOLLOWS OTHER JURISDICTIONS IN DECIDING TEST FOR DETERMINING IF CLAIMS ARE "RELATED TO EMPLOYMENT." ***The Michigan Supreme Court vacated and remanded a Court of Appeals holding that "claims of sexual assault cannot be related to employment."*** The consolidated case of *Lichon v. Morse*, No. 159492 (Mich. Jul. 20, 2021), involves an

attempt by defendant to compel arbitration of two former employees' sexual assault cases against defendant and his law firm.

Facts and Case Below

Plaintiffs **Samantha Lichon** and **Jordan Smits** were both former employees of the **Mike Morse Law Firm** (the Morse firm). In their complaints, they alleged that they were sexually assaulted and harassed by **Michael Morse** while employed at the Morse firm. When hired, Lichon and Smits had signed the firm's Mandatory Dispute Resolution Procedure agreement ("MDRPA"), which stated in relevant part that: "[t]his Mandatory Dispute Resolution Procedure shall apply to all concerns you have over the application or interpretation of the Firm's Policies and Procedures relative to your employment . . . ." Defendants claimed the MDRPA required that these claims be arbitrated. The Court of Appeals confirmed the district court's dismissal of Smit's individual claims against Morse personally and reversed the decision requiring arbitration of the claims against the Morse firm, as per the MDRPA. The Court of Appeals held that, even though the assault would not have happened but for Lichon's and Smit's employment at the Morse firm, sexual assault claims can never be "related to" employment.

The Court's Analysis and Borrowed Test

The Michigan Supreme Court's analysis begins with the contractual nature of arbitration clauses and reiterates the core concept that parties cannot be forced to arbitrate claims they did not agree to arbitrate. In stating this, the majority also declines to expand its ruling in *Kaleva-Norman-Dickson School Dist. No. 6 v. Kaleva-Norman-Dickson School Teachers' Assoc.*, 393 Mich. 583 (1975), which lower courts have taken to mean that parties are bound to arbitrate claims if the issue is "arguably" covered by the arbitration clause.

Regarding whether Lichon's and Smits's claims fall under the MDRPA, the majority disagrees with the Court of Appeals that sexual assault claims are, *per se*, not related to employment. Rather, the court chooses to follow the analysis used in several other jurisdictions, whereby a claim is considered unrelated to employment "if the action could be maintained without reference to the contract of relationship at issue" (internal citations and edits omitted.) The majority spends considerable time attempting to clarify this analysis by using the Eleventh Circuit case of *Doe v. Princess Cruise Lines, Ltd.*, 657 F.3d 1204 (2011), as an example. In *Doe*, a cruise ship bar server was drugged and raped by coworkers. Doe's supervisor confined her to the ship and did not allow her to leave to seek medical treatment for three weeks. Doe brought 10 claims against Princess Cruise Line, her employer; five were related to her status as a "seaman" and five were common-law tort claims. The court in *Doe* held that the claims related to Doe's status as a seaman were subject to arbitration, as being a seaman required an employment relationship, while the common-law tort claims were not. The majority then also illustrates what it means to have claims be related to employment by asking what the outcome would have been if Morse's actions had been directed at a client or opposing counsel. Because the majority determined that this analysis was not considered by the district courts or the Court of

Appeals, all cases were remanded to the district courts to apply this framework in making their decisions.
*(ed: *This Squib was written by Eli Weingast, a recent graduate of St. John's University School of Law. **The court also responded to the dissent's textual argument, suggesting that the dissent's interpretation of the language of the MDRPA leads to the "absurdity" that the MDRPA would require arbitrating any and all claims against the Morse firm. *** A more detailed analysis of the Court of Appeals decision in Lichon v. Morse, Nos. 159492, 159493 (Mich. Jul. 20, 2021, can be found in SAA 2019-13 (Apr. 3).)*
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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

ICSID PRESSES FORWARD ON SUBSTANTIAL CHANGES TO INVESTOR-STATE RULES, INCLUDING NEW MEDIATION PROCEDURES. As we've said before, not every investment-related dispute is administered by FINRA. For example, the International Centre for Settlement of Investment Disputes ("ICSID"), established in 1966 pursuant to the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, asserts that it is "the world's leading institution devoted to international investment dispute settlement." The organization of course has arbitration rules and, as reported in SAA 2018-34 (Sep. 5), ICSID announced via an **August 2018** Press Release that it was proposing substantial changes for the first time in over a decade. The Release said the proposals "update ICSID's existing rules for arbitration, conciliation and fact-finding, and introduce a new set of mediation rules…. The proposed amendments to the ICSID rules are the most far reaching in over 50 years. They draw on input received from governments, the private sector and the public." Where does the project stand today? ICSID on **June 15** released *Working Paper 5,* describing the current state of affairs. The update covers proposed new rules for mediation and fact-finding. The changes are analyzed in an excellent Herbert Smith Freehills LLP Blog **July 26** blog post, *ICSID Releases Revised Proposed Mediation Rules*.
*(ed: *Member State comments are due August 31. **Prior working papers and comments are available at https://icsid.worldbank.org/resources/rules-amendments.)*
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NFA INVESTOR NEWSLETTER HITS THE ELECTRONIC NEWSSTAND. The National Futures Association ("NFA"), which operates a dispute resolution forum, issues a periodic *Investor Newsletter* aimed at commodity futures investors. It's designed to keep investors up-to-date on recent NFA initiatives, upcoming events, and resources that investors may find helpful. In the third *Newsletter* of 2021, distributed under a summary email dated **July 29**, NFA lists several highlights which we explore in the order presented, excerpted essentially *verbatim*: The **Investor Protection** section states: *Understand Risks and Markets before Reacting to Internet Hype*: Recent posts on online message boards and social media platforms have been cited as contributing to increased volatility in markets for certain commodities…. Read the CFTC's Investor Alert to learn what you should consider before jumping into any trade; *Phishing, Smishing, and Vishing Scams*: Phishing, smishing, and vishing are types of scams where a fraudster tries to trick individuals into providing sensitive personal or financial information by posing as an

entity they know or trust, such as an investment firm or a bank…. To better understand these types of scams and how to ensure your investment, financial and personal information remains secure, read the SEC's Investor Alert; and *CFTC/SEC Investor Alert: Funds Trading in Bitcoin Futures*: Investors considering a fund with exposure to the Bitcoin futures market or underlying Bitcoin market should carefully weigh the potential risks and benefits of the investment…. To learn more about the volatility of Bitcoin and the Bitcoin futures market, as well as the lack of regulation in the underlying Bitcoin market, read the CFTC and SEC's Investor Alert. **Investor Education** reports: *NFA's Online Investor Resources*: offers a variety of online investor education materials intended to arm the public with the skills needed to protect themselves from fraud and safely participate in the derivatives markets. Investors can find the following educational materials, along with other information, on NFA's website. One of the resource bullets is: "Arbitration Services -- Learn about NFA's affordable and efficient arbitration program that helps customers and Members resolve futures-related and forex-related disputes." As usual, the *Newsletter* signs off with a list of the quarter's enforcement actions, with links to final decisions in each, complaints that were issued, and final orders in registration cases. The *Newsletter* Webpage also contains: 1) a link to BASIC; 2) an online complaint form; and a link to past issues of the *Newsletter* and a subscription form.
*(ed: *An informative issue, as usual. **The enforcement actions database allows searches by subject matter, such as arbitration. ***Nice to see the arbitration program again highlighted. Speaking of which, the stats may be found here; through June NFA has had just 10 arbitration cases filed – 9 investor and 1 intra-industry.)*
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SCOTUS GRANTS GOVERNMENT'S MOTION TO PARTICIPATE IN *SERVOTRONICS* ORAL ARGUMENT. The Supreme Court has agreed to permit the Acting Solicitor General to participate in the scheduled **October 5** oral argument *in Servotronics, Inc. v. Rolls-Royce PLC and the Boeing Company*, No. 20-794. As reported in SAA 2021-11 (Mar. 25), the Court on **March 22** agreed to resolve a major split on whether 28 U.S.C. § 1782 provides for discovery in aid of private, foreign, commercial arbitration or only covers cases administered by governmental arbitration forums (see Servotronics' **December 2020** Petition and page 1 of the Order List). We reported in SAA 2021-27 (Jul. 22) that: 1) the oral argument calendar for October shows that the case is set for **Tuesday, October 5;** and 2) on **June 28**, the Government filed an unopposed Motion for leave to participate in oral argument and for divided argument. Specifically: "Respondents have agreed to cede ten minutes of argument time to the United States and therefore consent to this motion." The request was granted **August 2**: "The motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument is granted."
*(ed: *No surprise. **As previously reported, several* Amicus *Briefs have already been filed and can be viewed here. Among the more noteworthy, the United States filed a Brief on behalf of Respondents urging narrow application of 28 U.S.C. §1782. Other noteworthy Briefs were filed by: the International Chamber of Commerce (in support of neither party); Institute of International Bankers (Respondents); and the International*

*Arbitration Center in Tokyo (Respondents). ***Our past coverage was blogged on March 22. ****We will continue to track this one.)*
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TRUMP ORGANIZATION TRUMPED IN EFFORT TO INVOKE EQUITABLE ESTOPPEL. The "Quick Takes" section in SAA 2020-16 (Apr. 29) reported on *Doe v. Trump Corp.*, 453 F. Supp. 3d 634 (S.D.N.Y. 2020), as follows: "The Court denies the non-signatory Trump Organization's efforts to compel arbitration, finding that equitable estoppel was not present and that defendants had waived any arbitration rights by waiting eight months to assert them: 'At issue on this motion is whether Plaintiffs agreed to arbitrate with Defendants, on a theory of either equitable estoppel or agency. The Court finds that Plaintiffs did not agree to arbitrate with Defendants. A second issue in the alternative is, if there was such an agreement, did Defendants waive their right to compel arbitration of these claims. The Court finds that they did.' We can now report that the appeal reached the same results in *Doe v. The Trump Corporation*, No. 20-1228 (2d Cir. Jul. 28, 2021). Although there were several issues argued, on equitable estoppel the unanimous Court says: "Where, however, the nonsignatory is alleged to be a third-party wrongdoer as it is here, we have made clear that the arbitration contract 'in no way' extends to the non-signatory."
*(ed: *Not that it matters, but we were curious about whether any of the Panelists were Trump appointees. Here's the result of our search: Denny Chin (Obama); Raymond Lohier, Jr. (Obama); and Robert David Sack (Clinton). **An* Alert *h/t to Editorial Board member David Robbins, Esq., of Kaufmann Gildin & Robbins LLP, for alerting us to this decision.)*
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SIXTH CIRCUIT: EMPLOYMENT AGREEMENTS' REFERENCE TO RESOLVING DISPUTES VIA ADR WAS NOT AN AGREEMENT TO ARBITRATE UNDER THE FAA. It is hornbook law that the Federal Arbitration Act ("FAA") requires that there be a clear agreement to arbitrate. At issue in *Southard v. Newcomb Oil Co., LLC*, No. 20-5318 (6th Cir. Aug. 4, 2021), was the scope of the dispute resolution clause in the employee handbook and employment application and the meaning of the term "arbitration" – which the Court notes is not defined by the FAA. First, after citing several decisions, the Court defines arbitration as: "1) 'a final, binding remedy by a third party,' 2) 'an independent adjudicator,' 3) 'substantive standards,' and 4) 'an opportunity for each side to present its case.'" Applying this standard to the clauses present, the unanimous Court concludes there was no agreement to arbitrate: "The parties point to three provisions that could give rise to an enforceable arbitration agreement. First, in Southard's application for employment: 'As a condition of employment, I accept that any complaint or conflict that cannot be resolved internally may be referred to Alternative Dispute Resolution, unless prohibited by law, before any other legal action is taken.' Second, midway through the employee handbook: 'As an employee of Newcomb Oil Co., you agree to Alternative Dispute Resolution a forum or means for resolving disputes, as arbitration or mediation, that exists outside the state or federal judicial system, unless prohibited by law, as a means to resolve any disputes and/or complaints

that cannot be resolved internally.' Third, the final page of the employee handbook states: 'If there is a conflict that cannot be resolved between the employee and the company, both agree that the matter will be referred to mediation' …. The above provisions make it apparent that Newcomb and Southard agreed to alternative dispute resolution generally, not arbitration specifically."
*(ed: *As we often say about arbitration agreements, "when in doubt, spell it out." **We think the Court could also have construed the ambiguity against the drafter- employer.)*
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MICHIGAN SUPREME COURT CONSTRUES STATE'S MEDIATION CONFIDENTIALITY STATUTE. Many states have laws that protect the confidentiality of mediation communications, and Michigan is no exception. *Tyler v. Findling and the Findling Law Firm*, No.162016 (Mich. Aug. 4, 2021) (*per curiam*), evaluated the reach of these protections. The unanimous *per curiam* decision first explains the facts and appellate court holding: "In finding that the communication was not subject to the MCR 2.412 confidentiality requirement, the Court [of Appeals] first reasoned that the expectation of confidentiality, pursuant to MCR 2.412(C), belongs only to the mediation parties and that Findling, as a receiver, was not a party. Second, the Court held that Findling's statements to Wright were not 'mediation communications' covered by MCR 2.412(B)(2) since the communication did not occur during the actual mediation process but rather before mediation had begun. Finally, the Court determined that the conversation at issue did not relate to the mediation itself or the process of the mediation" (internal citations omitted). In reversing the Court of Appeals, a unanimous Michigan Supreme Court: "… conclude[s] that the Court of Appeals erred by reversing the trial court. Findling's statements were 'mediation communications' under MCR 2.412(B)(2) and were therefore confidential under MCR 2.412(C). The term 'mediation communications' is defined expansively to include statements that 'occur during the mediation process' as well as statements that 'are made for purposes of . . . preparing for . . . a mediation.' MCR 2.412(B)(2). The conversation between Findling and Wright took place within the mediator's designated 'plaintiff's room' while parties to the mediation were waiting for the mediation session to start and were thus part of the 'mediation process" …. We also reject the Court of Appeals' conclusion that '[t]he expectation of confidentiality belongs to the mediation parties.' The plain language of the court rule contains no such limitation" (internal citations omitted).
(ed: We like any decision that encourages mediation by protecting communications.)
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QUICK TAKES: CASES AND AWARDS WORTH READING

***Dr. Robert L. Meinders, D.C., Ltd. v. United HealthCare Services, Inc*., No. 20-2832 (7th Cir. Jul. 30, 2021)**: "In 2013, Dr. Robert L. Meinders, D.C., Ltd., received a single fax advertisement from United Healthcare Services, Inc., a company with whom Meinders had done business for around seven years. Meinders believed that, by sending the fax, United violated the Telephone Consumer Protection Act. Accordingly, Meinders sued, and after seven years of litigation, a threshold question remains: Should the litigation proceed in federal court, or should United be allowed to force Meinders to

arbitrate? The answer to that question turns primarily on resolving whether United assumed the duties that a related company, American Chiropractic Network, Inc., promised to perform for Meinders in a provider agreement. The district court held that United had assumed ACN's obligations and as a result could enforce an arbitration clause Meinders had agreed upon with ACN. We agree with the district court, and thus affirm." (*ed: Seven years? So much for speedy conflict resolution*.)

***Jacksen v. Chapman Scottsdale Autoplex, LLC*, 2021 U.S. Dist. LEXIS 136043, No. CV-21-00087-PHX-DGC (D. Ariz. Jul. 21, 2021)**: "The Court cannot conclude, however, that Chapman acted inconsistently with its right to arbitrate. Upon being formally added as a party, Chapman promptly moved to compel arbitration. And the initial case management and discovery matters undertaken by CAG in the few months before Chapman was brought into the case do not constitute 'active litigation' aimed at taking advantage of being in federal court…. Jacksen has also failed to establish prejudice. She has not 'expended considerable time and money,' only later to be 'deprived of the benefits for which [she] has paid by a belated motion to compel'" (brackets in original).

***Law Finance Group, LLC v. Key*, No. B305790 (Calif. Ct. App. 2 Jul. 30, 2021)**: "Code of Civil Procedure section 1288 requires that a petition to vacate an arbitration award must be filed and served not later than 100 days after service of the award. Section 1288.2 imposes the same deadline on a response to a petition to confirm an arbitration award when the response requests that the award be vacated. These deadlines are jurisdictional…. Neither Key's petition to vacate the arbitration award nor her request to vacate the award in her response to LFG's petition to confirm were filed within the 100-day limit. Thus, the trial court lacked jurisdiction to consider Key's request to vacate, and the arbitration award must be confirmed" (footnote and citation omitted). (*ed: An* Alert *h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this decision. In the interest of full disclosure, his partner Skip Keesal served as lead counsel for Plaintiff at the arbitration. An appellate firm handled the appeal from the Order denying the Petition to Confirm the arbitration Award.*)

***Pastorino v. Sandlapper Securities, LLC,* FINRA ID No. 20-02475 (Los Angeles, CA, Jul. 8, 2021)**: A Majority Public Panel explains why it denied a customer's claims (including the claim of elder abuse) against a group of Respondent broker-dealers and three brokers, finding that although Respondents Miller and Sandlapper Securities were negligent by selling unsuitable securities, the customer failed to prove his damages. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Sharp v. Ameriprise Financial Services, Inc.*, FINRA ID No. 20-02916 (San Francisco, CA, Jul. 12, 2021)**: An Arbitrator explains why he decided to deny a broker's request for expungement of two customer complaints from appearing on his CRD record, finding that the broker sold the customers unsuitable REITs and falsely represented that he did not contribute toward the settlement agreement. The customers associated with the

complaints also opposed the broker's request for expungement. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*
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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Blankley, Kristen and Votruba, Ashley M and Bartz, Logen and PytlikZillig, Lisa, *ADR is Not a Household Term: Considering the Ethical and Practical Consequences of the Public's Lack of Understanding of Mediation and Arbitration*, 99:4 Nebraska Law Review 797 (2021): "This Article confirms what many dispute resolution professionals have long feared - that alternative dispute resolution (ADR) processes, such as mediation and arbitration, are still not well understood by the general public. This paper provides the results of an empirical study on whether the public and ADR professionals understand key features of these processes. While the study generally supports the hypothesis that dispute resolution professionals have similar understandings of what these processes are, the lay sample uncovered key misunderstandings. These misunderstands have serious ethical implications for lawyers, courts, and dispute resolution professionals. Given the importance of informed decision-making, the authors recommend increased communication with clients about alternative processes and how those processes may meet client needs."

***SEC Approves Finra's Deposit Requirement Rule for High-Risk Firms*, AdvisorHub (Aug. 3, 2021):** "Past is prologue for firms and brokers who have engaged in misconduct, according to the Financial Industry Regulatory Authority's new rule, which the Securities and Exchange Commission approved on July 30. Finra's Rule 4111, which will take effect in January 2022, allows the industry self-regulator to impose 'new obligations' on broker-dealers that it designates as high risk, based on if they, or their brokers, have surpassed thresholds of risk-related or investor-harming disclosures than their similarly sized peers, the SEC said."

***Second Circuit Affirms Judge Schofield's Denial of Motion to Compel Arbitration for Trump-Related Multi-Level Marketing Scheme Claims*, Steptoe & Johnson LLP SDNY Blog (Aug. 3, 2021)**: "Last week, the Second Circuit affirmed Judge Schofield's decision last year to deny the motion by Donald Trump, the Trump Corporation, and other Trump family members to compel arbitration of claims related to the multi-level marketing scheme ACN …. Defendants argued that, because the plaintiffs had agreed to arbitrate any claims they might have against ACN, the same arbitration clause should force arbitration of any claims against the Trump defendants related to their endorsement of ACN." (*ed: see our coverage elsewhere in this* Alert.)

***Finra's Risky Broker-Dealer Rule Has Significant Gaps, PIABA President Says*, FA Magazine (Aug. 4, 2021):** "The Financial Industry Regulatory Authority's rule to require risky broker-dealers to set aside funds in reserve to pay arbitration awards and other regulatory penalties is a first step, but it has gaps due to the grandfathering of outstanding unpaid awards and the fact that so many disciplinary events are expunged from firms' records, the president of the Public Investors Advocate Bar Association said. The new

rule, which the Securities and Exchange Commission has greenlighted, grants Finra the authority to impose reserve account obligations on firms with significantly higher levels of risk-related disclosures -- such as sales-practice related events -- than their similarly sized peers. These firms will now be classified as 'restricted firms,' Finra said."

***Vanguard to Staff: Your Proof of Vaccination is Worth $1,000*, Financial Advisor IQ (Aug. 4, 2021)**: "Vanguard is taking a more carrots-than-sticks approach to nudge its staff to get the Covid-19 vaccine, offering anyone who gets vaccinated by October $1,000, according to news reports. The company is making the offer to all its employees, including those who have been inoculated prior to the offer, Bloomberg writes, citing a person familiar with the matter. A Vanguard spokeswoman has confirmed that the firm is offering 'a vaccine incentive' to those who show proof of vaccination, according to Bloomberg."

***NFA Orders New York, N.Y. Introducing Broker Tullett Prebon Financial Services LLC to Pay a $150,000 Fine*, www.nfa.futures.org (Aug. 5, 2021):** "NFA has ordered New York, N.Y. introducing broker Tullett Prebon Financial Services LLC (TPFS) to pay a $150,000 fine. The Decision, issued by NFA's Business Conduct Committee (BCC), is based on a Complaint issued by the BCC and a settlement offer submitted by TPFS, in which it neither admitted nor denied the allegations. The Committee found that TPFS failed to keep full, complete and systematic records of all transactions relating to TPFS's business of dealing in commodity interests. The Committee also found that TPFS failed to supervise its employees' recordkeeping activities and failed to review and supervise its associated persons' communications."

***UBS Racks Up Attorney Fees in 16-Year Promissory Note Dispute*, Advisor Hub (Aug. 6, 2021)**: "UBS Wealth Management USA has gone to court to confirm an arbitration award in a promissory note battle that has extended for 16 years and underscores the length of time and amount of effort and money wirehouses are willing to expend to pursue brokers who leave without paying back promissory note balances. The UBS motion seeks to confirm an arbitration award based on one of its ex-brokers' alleged failure to repay a $53,246 loan balance, which the wirehouse alleges first came due 13 years ago in 2008, according to a filing in mid-July in U.S. District Court for Eastern California." (*ed: Sixteen years? Again, so much for speedy conflict resolution.*)
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DID YOU KNOW?

CPR HAS UPDATED ITS MODEL ADR CLAUSES. Our readers are aware that the AAA, CPR, and JAMS offer free model ADR clauses, and that FINRA Rule 2268 governs the content and placement of arbitration agreements, but did you know that CPR does as well? We just learned that CPR in **June** updated its *Model Clauses for Domestic Disputes*. Among the additions are a Diversity Commitment Clause and a Concurrent Mediation-Arbitration Model Clause.
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Send any messages or inquiries to: George@SecArbAlert.com

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