SECURITIES ARBITRATION ALERT 2021-32 (8/26/21)

George H. Friedman, Editor-in-Chief

SQUIBS:

- **AAA Promulgates New Supplementary Procedures for Multiple Case Filings**
- **Arizona Supreme Court Finds Relevant to PDAA Enforcement Attorney Retainer Agreements Advancing All Costs**

SHORT BRIEFS:

- **FINRA DRS Posts Stats Through July: Customer Arbitration Claims Are Still Even with 2020, While Industry Arbitrations Continue to Plummet. And Mediation Filings are Staging a Comeback**
- **Not An Arbitration Case, But a Cautionary Tale, Nonetheless**
- **NJ Appellate Court: Party Agreement Required for Mediator to Later Serve as Arbitrator in Same Case**
- **NY Trial Court: FINRA Arbitrators "Manifestly Disregarded" the Law in Part**
- **Former SEC Chair Clayton Joins Fireblocks' Advisory Board**

QUICK TAKES:

- ***Kore Meals LLC v Freshii Development LLC,* 2021 ONSC 2896 (CanLII Apr. 19, 2021)**
- ***Romero v. Watkins & Shepard Trucking, Inc.*, No. 20-55768 (9th Cir. Aug. 19, 2021)**
- ***Nixon v. AmeriHome Mortgage Company, LLC*, No. B302754 (Calif. Ct. App. 2 Aug. 16, 2021)**
- ***Falk v. NT Securities, LLC*, FINRA ID No. 21-00163 (Chicago, IL, Jul. 23, 2021)**
- ***Hodorov v. Leumi Investment Services, Inc.*, FINRA ID No. 21-00033 (New York, NY, Aug. 29, 2021)**

ARTICLES OF INTEREST:

- **Manesh, Mohsen, *The Corporate Contract and the Internal Affairs Doctrine*, 71 Am. U. L. Rev. (2021 - forthcoming)**
- ***Has Forum Non Conveniens Gone the Way of the VCR Player? Canadian Court finds the Doctrine Obsolete in Age of Virtual Hearings,* Lexology (Aug. 16, 2021)**
- ***RIA Firm, Principal, Trader Ordered to Pay $9M Over Short Sales,* Financial Advisor IQ (Aug. 18, 2021)**
- ***Filling In The Gaps Left By the US Supreme Court Decision in GE Energy v. Outokumpu: Which Law To Apply?* Kluwer Arbitration Blog (Aug. 19, 2021)**
- ***The Future of Mediation by Video Conference,* Lexology (Aug. 19, 2021)**

DID YOU KNOW?

- **AAA-ICDR Foundation has a Diversity Scholarship Fund**

SQUIBS: IN-DEPTH ANALYSIS

AAA PROMULGATES NEW SUPPLEMENTARY PROCEDURES FOR MULTIPLE CASE FILINGS. ***In what we are certain is a reaction to a flurry of multiple individual arbitrations that relate to the same event, the American Arbitration Association ("AAA") has created* Supplementary Rules for Multiple Case Filings *("Supplementary Rules") effective August 1.*** We have reported several times on cases holding that companies such as Amazon and Postmates have been compelled to arbitrate multiple individual arbitrations with consumers or workers. For example, recall that we

reported on district court cases resulting in Postmates being ordered to participate and pay fees in over 10,000 individual AAA arbitrations involving the same issue -- whether Postmates improperly classified workers as independent contractors, rather than employees. Postmates had sought to enjoin the arbitrations (and its obligation to pay massive administrative fees), contending that the cases amounted essentially to a *de facto* class arbitration which was prohibited by a class action waiver in the arbitration agreement. Postmates then appealed two of these cases to the Eleventh and Ninth Circuits. In an **April 8** article, *Postmates, Couriers Agree To End Mass Arbitration Appeals*, Law360 reported: "Postmates has agreed to drop its attempts to appeal rulings in two cases that compelled the company to arbitrate with thousands of couriers who claimed misclassification as independent contractors, asking the Seventh Circuit and Ninth Circuit to dismiss each of the appeals. In two stipulated motions on Wednesday, Postmates did not specify why it was requesting the dismissals but indicated that the on-demand delivery company had come to an agreement with the couriers and would no longer fight the district court decisions to compel arbitration. The couriers signed off on the motions."

New Rules

The AAA created the *Supplementary Rules*: "to streamline the administration of large volume filings involving the same party, parties, and party representative(s), or related party, parties and party representative(s) for disputes where the Employment/Workplace Fee Schedule or the Consumer Fee Schedule apply." The *Supplementary Rules*: "are intended to provide parties and their representatives with an efficient and economical path toward the resolution of multiple individual disputes." The *Rules* also encourage the participants to agree to: "additional processes that make the resolution of Multiple Case Filings more efficient," such as (*ed: repeated essentially* verbatim):

• A Scheduling Order setting forth deadlines across multiple cases, including those for submission of documents and witness lists, completion of discovery, and filing of motions.
• An agreement to appoint a special master to oversee procedural issues common to the cases, such as discovery, choice of law, and statute of limitations.
• An agreement that cases be heard on the documents, rather than by in-person, telephone, or videoconference hearings.
• An agreement to assign multiple cases to a single arbitrator, making the scheduling of conferences and hearings more efficient. Each case will still be heard and decided individually by the arbitrator.
• An agreement on the form of award.
• An agreement limiting briefs, motions, and discovery requests.
• An agreement allowing testimony via affidavit or recorded deposition, rather than requiring live witness testimony.

Applicability

The *Supplementary Rules* have ten sections, and give the AAA discretion on whether to apply them. Like other supplementary procedures, they overlay existing rules but govern if there are conflicts. "Multiple Case Filings" are defined as: "twenty-five or more similar

Demands for Arbitration (Demand(s)) filed against or on behalf of the same party or related parties … where representation of the parties is consistent or coordinated across the cases." The *Supplementary Rules* apply: "whether or not such cases are filed simultaneously." Rule MC-10 provides that a special, tiered reduced rate "Multiple Case Filings Administrative Fee Schedule" applies in these cases. See for example the employment fee schedule starting on page three.
(ed: We reported in SAA 2021-22 (Jun. 10) that Amazon had dropped its customer predispute arbitration agreement and replaced it in the Conditions of Use 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.")
return to top

ARIZONA SUPREME COURT FINDS RELEVANT TO PDAA ENFORCEMENT ATTORNEY RETAINER AGREEMENTS ADVANCING ALL COSTS. ***The Supreme Court of Arizona in a case of first impression holds that a fee agreement between a Plaintiff and her attorney is relevant to determining the client's ability to pay arbitration costs and whether the arbitration agreement is unconscionable.*** *Rizzio v. Surpass Senior Living LLC*, No. CV-20-0058-PR (Ariz. Aug. 17, 2021), involves the novel issue of whether a fee agreement where the attorney agrees to advance the costs of arbitration should be considered when determining if an arbitration agreement is substantively unconscionable.

The Arbitration Agreement
In April 2017, **Deborah Georgianni** ("Georgianni"), acting on behalf of her mother, **Concetta Rizzio** ("Rizzio"), signed two contracts with Mariposa Point, which is managed by **Surpass Senior Living LLC** ("Surpass"). Each contract contained a predispute arbitration clause ("PDAA") and a severability provision (the "Agreement"). The Agreement also contained a "cost-shifting provision," which stated that if Rizzio made a claim against Surpass, she must bear "[c]osts of arbitration, including [defenses]'s legal costs and attorney's fees, arbitration fees and similar costs." The severability provision stated that "[i]f any provision of this Arbitration Agreement is held to be invalid or unenforceable, the remainder of the agreement shall remain in full force and effect."

Procedural History
In February 2018, Rizzio was attacked by another Mariposa Point resident and Georgianni filed a suit on her behalf against Surpass. Georgianni alleged "negligence and abuse of a vulnerable adult and sought compensatory and punitive damages." Surpass filed a motion to compel arbitration pursuant to the Agreement. Georgianni argued that the Agreement was unenforceable because it was procedurally and substantively unconscionable. The Trial Court denied Surpass's motion to compel arbitration and held that the Agreement was "unduly oppressive, unenforceable, and unconscionable."

On appeal, the Court of Appeals agreed the Agreement was substantively unconscionable. However, it reversed the trial court's decision that the Agreement was procedurally unconscionable. The Court of Appeals also noted that the severability provision allowed severance of the cost-shifting provision. It held that the remainder of the Agreement was not unconscionable because in the retainer agreement between Rizzio and her attorney, the attorney agreed to advance all costs. As a result of the retainer agreement, Rizzio would not be responsible for arbitration costs and the court rejected the argument of substantive unconscionability.

Substantive Unconscionability

The PDAA between Rizzio and Surpass is governed by the Federal Arbitration Act ("FAA"). Section 2 of the FAA makes arbitration agreements "valid, irrevocable, and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract." The Supreme Court in *Doctors Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996), held that "generally applicable contract defenses, such as . . . unconscionability may be applied to invalidate arbitration agreements without contravening § 2." Under Arizona law, substantive unconscionability focuses on whether the terms of the contract are "overly oppressive or unduly harsh to one of the parties." A court will hold that an arbitration is unenforceable under substantive unconscionability grounds if "a party cannot effectively vindicate her rights in the arbitral forum due to the prohibitive costs of arbitration."

The Supreme Court of the State of Arizona adopted the framework in *Clark v. Renaissance W., LLC*, 232 Ariz. 510 (App. 2013), to determine whether arbitration costs prevented Rizzio from effectively vindicating her rights. Under the *Clark* framework, the party who seeks to invalidate an arbitration agreement must show: 1) arbitration costs with reasonable certainty; and 2) that the party is financially unable to bear the costs of arbitration. A court will also consider "whether the agreement permits a party to waive or reduce arbitration costs because of financial hardship. The Arizona Supreme Court noted that the determination of substantive unconscionability is fact dependent and requires a case-by-case analysis.

The Retainer Agreement

As discussed above, the retainer agreement between Rizzio and her attorney stated that the attorney would advance all costs. The Arizona Supreme Court holds that the fee agreement is relevant to determine whether the Plaintiff would be able to pay the arbitration costs. The Court notes that this is a case of first impression because: "[n]o published Arizona decision has considered what relevance, if any, a fee agreement has" when assessing a claim of substantive unconscionability. Relying on the Arizona Rule of Evidence 401, the Arizona Supreme Court holds that the fee agreement is relevant because it makes it more probable that Rizzio could afford the arbitration costs and arbitrate her claims. The Court also rejects Rizzio's argument that consideration of a fee agreement will have a "chilling effect" since attorneys will be reluctant to advance costs because the party will be forced to arbitrate. Instead, the Court notes that the fee agreement is not dispositive in determining whether a party can afford to arbitrate her

claims and that courts will still have to engage in a fact-intensive analysis on a case-by-case basis.

Rizzio's Ability to Arbitrate Her Claims

The Arizona Supreme Court also holds that the Agreement between Rizzio and Surpass is not substantively unconscionable. The Court notes that Rizzio failed to provide sufficient evidence of the total arbitration costs she would incur. Similarly, Rizzio failed to present evidence of her inability to pay the arbitration costs. **Justice William G. Montgomery** states that: "[s]uprisingly, the evidence of Rizzio's financial position presented at the hearing offered the barest summary, and her representative testified that she was unaware Rizzio's assets would be addressed." Since the evidence of arbitration costs and Rizzio's finances were speculative, the Arizona Supreme Court held that the Agreement was not substantively unconscionable and holding otherwise would be "inconsistent with policies favoring arbitration agreements."

*(ed: *This squib was authored by Ruben Huertero, J.D. He is a recent graduate of St. John's University School of Law. **The Arizona Supreme Court also rejects the argument proposed by the Amici Arizona Association for Justice and Arizona Trial Lawyers Association that consideration of a fee agreement would violate the collateral-source rule because the collateral-source rule does not apply in the court's determination of substantive unconscionability.)*

return to top

SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

FINRA DRS POSTS STATS THROUGH JULY: CUSTOMER ARBITRATION CLAIMS ARE STILL EVEN WITH 2020, WHILE INDUSTRY ARBITRATIONS CONTINUE TO PLUMMET. AND MEDIATION FILINGS ARE STAGING A COMEBACK. FINRA Dispute Resolution Services ("DRS") posted case statistics through July, with the overall case filing trends essentially unchanged from prior months. In brief, the headlines are: 1) overall arbitration filings through **July** – 1,804 cases – are down 20%, about the same as in **June**; 2) for the second month in a row, cumulative customer claims remain unchanged from **2020**; 3) industry disputes remain way down at minus 43%; and 4) for the eleventh month in a row, pending cases declined. Overall arbitration turnaround times were 14.2 months, with hearing cases now taking 15.3 months (both figures ticked up a bit in July). There were 262 mediation cases in agreement, just a 2% decrease (an improvement from June's minus 7%). The settlement rate remains high at 87% (it had been 86% in June). There are now 8,358 DRS arbitrators, 3,974 public and 4,384 non-public. Pending cases stand at 4,548, a decline of 51 from June. Recall that we had reported for months that pending cases had grown in the wake of the onset of the pandemic and in-person hearing cancellations. The last eleven months have each experienced declines in pending cases, reflecting an 867 case reduction from last year's high water mark of 5,415 open cases in **August 2020**. This now leaves a cumulative decrease of 233 pending cases since **March 2020.**

*(ed: *Again, kudos to FINRA DRS for eliminating the backlog. **Wonder what's fueling the mini-surge in mediations?)*

return to top

NOT AN ARBITRATION CASE, BUT A CAUTIONARY TALE, NONETHELESS. The COVID-19 pandemic accelerated an inexorable movement toward online case administration in the legal world, and arbitration was no exception. For example, today virtually all aspects of case administration at FINRA Dispute Resolution Services are handled through the Authority's online Dispute Resolution Portal. While not an arbitration-related case, *Rollins v. Home Depot USA, Inc.*, No. 20-50736 (5th Cir. Aug. 9, 2021), is in the Court's words a "cautionary tale" for participants about the importance of email management. What happened? "Kevin Rollins brought suit against his employer for personal injury. The employer filed a motion for summary judgment on the eve of the parties' agreed deadline for dispositive motions. But Rollins's counsel never saw the electronic notification of that motion. That's because, by all accounts, his computer's email system placed that notification in a folder that he does not regularly monitor. Nor did he check the docket after the deadline for dispositive motions had elapsed. As a result, Rollins did not file an opposition to the summary judgment motion. So the district court subsequently entered judgment against Rollins." Did Federal Rule of Civil Procedure 59(e) allow this administrative snafu to excuse counsel's failure to respond? "No," says a unanimous Court: "To be sure, we do not question the good faith of Rollins's counsel. But it is not 'manifest error to deny relief when failure to file was within [Rollins's] counsel's 'reasonable control.' Notice of Home Depot's motion for summary judgment was sent to the email address that Rollins's counsel provided. Rule 5(b)(2)(E) provides for service 'by filing [the pleading] with the court's electronic-filing system' and explains that 'service is complete upon filing or sending' … That rule was satisfied here. Rollins's counsel was plainly in the best position to ensure that his own email was working properly -- certainly more so than either the district court or Home Depot. Moreover, Rollins's counsel could have checked the docket after the agreed deadline for dispositive motions had already passed" (citations omitted; brackets in original).
(ed: We can see the same outcome had this been a FINRA case.)
return to top

NJ APPELLATE COURT: PARTY AGREEMENT REQUIRED FOR MEDIATOR TO LATER SERVE AS ARBITRATOR IN SAME CASE. Two forms of hybrid ADR are med-arb (mediation followed by arbitration) and arb-med (arbitration followed by mediation). One option the parties have in either process is having the same individual serve as both mediator and arbitrator. *Pami Realty, LLC v. Locations XIX Inc.*, 2021 WL 2961473 (N.J. Super. Ct. App. Div. July 15, 2021), featured a new form of ADR: "arb-med-arb" – arbitration, followed by mediation, and then arbitration after impasse – with the same person playing the role of neutral throughout. The question before the Court was whether the arbitrator/mediator/arbitrator exceeded authority by resuming his role as arbitrator after the mediation impassed, absent party agreement. "Yes," says a unanimous Appellate Division, "but the agreement need not be in writing." Says the Court: "We address first the motion judge's interpretation and application of *Minkowitz* [*v. Israeli*, 433 N.J. Super. 111, 142-47 (App. Div. 2013)] because it appears to be the basis of the decision to deny defendant's motion to confirm and grant plaintiff's motion to vacate the arbitration award. We agree *Minkowitz* applies and that it stands for

the concept that 'parties engaged in arbitration must explicitly agree to permit [an] arbitrator [to] continue hearings as arbitrator after conducting a mediation.' We disagree that *Minkowitz* held the agreement must be in writing" (brackets in original).
*(ed: *On the question of a written agreement, the Court adds: "No doubt, the better course is to put the agreement in writing. Litigants could avoid the imbroglio in which these parties now find themselves. But we see nothing in the [NJ Arbitration] Act or in* Minkowitz *requiring the agreement to be in writing or that would cause us to set aside bedrock contract law establishing the validity of oral contracts and agreements." **We agree that the better practice is to reduce the agreement to writing. As we say all the time: "When in doubt, spell it out.")*
return to top

NY TRIAL COURT: FINRA ARBITRATORS "MANIFESTLY DISREGARDED" THE LAW IN PART. A FINRA panel manifestly disregarded the law when it deemed deferred compensation "wages" under New York law. It's award of interest at less than the statutory rate was acceptable, however. The Award in *DellaRusso v. Credit Suisse Securities (USA) LLC*, FINRA ID No. 17-01406 (New York, NY, Nov. 8, 2019), found Respondent liable to Claimants DellaRusso and Lerner for compensatory damages. It also found Respondent liable for Claimants' attorneys' fees "pursuant to New York Labor Law § 198 (1-a)." This aspect of the Award troubles the Court, resulting in a partial vacatur in *In re Lerner v. Credit Suisse Securities (USA) LLC*, No. 2020-03381 2020-05002N (Sup. Ct., NY Cty. Apr.29, 2021): "The arbitration panels manifestly disregarded the law in determining that the Labor Law applied and awarding liquidated damages and/or attorneys' fees thereunder. The subject deferred equity-based compensation did not constitute 'wages' within the meaning of Labor Law § 190(1) because, although it was initially awarded in recognition of each employee's personal performance, its ultimate value was dependent on the future market value of the company stock (see *Truelove v Northeast Capital & Advisory*, 95 NY2d 220, 223-224 [2000]; *Beach v Touradji Capital Mgt., LP*, 128 AD3d 501 [1st Dept 2015]; *Guiry v Goldman, Sachs & Co.*, 31 AD3d 70 [1st Dept 2006], appeal withdrawn 7 NY3d 809 [2006]). The fact that the employees' rights to this compensation had already vested is irrelevant...." The Panel awarded interest at less than the statutory rate. Was this, too, manifest disregard? "No" says the Court: "However, DellaRusso and Sullivan failed to demonstrate that the arbitral panel refused to apply or ignored 'well defined, explicit, and clearly applicable' law in awarding prejudgment interest at a rate of 4% rather than the statutory 9% …." (citation omitted).
(ed: Hmm. Not to second-guess the Court, but we're unconvinced the Arbitrators' conduct constituted "manifest disregard.")
return to top

FORMER SEC CHAIR CLAYTON JOINS FIREBLOCKS' ADVISORY BOARD. Former SEC Chairman **Jay Clayton** has joined the Advisory Board of online cryptocurrency platform, Fireblocks. An **August 19** Press Release, *Former U.S. SEC Chairman Brings High-Level Market and Regulatory Expertise to Fireblocks' Advisory Board*, says Mr. Clayton will: "help Fireblocks and its customers navigate the evolving

market and regulatory dynamics affecting the development and deployment of solutions for the emerging digital asset infrastructure."
(ed: Mr. Clayton left the Commission at the end of 2020 (see the Agency's November 2020 Press Release).)
return to top

QUICK TAKES: CASES AND AWARDS WORTH READING

***Kore Meals LLC v Freshii Development LLC*, 2021 ONSC 2896 (CanLII Apr. 19, 2021)**: From Canada comes this decision on whether the advent of virtual arbitration leads to the demise of *forum non conveniens*. "In the age of Zoom, is any forum more *non conveniens* than another? Has a venerable doctrine now gone the way of the VCR player or the action in assumpsit? …. It is by now an obvious point, but it bears repeating that a digital-based adjudicative system with a videoconference hearing is as distant and as nearby as the World Wide Web. With this in mind, the considerable legal learning that has gone into contests of competing forums over the years is now all but obsolete. Judges cannot say *forum non conveniens* we hardly knew you, but they can now say farewell to what was until recently a familiar doctrinal presence in the courthouse…. And what is true for *forum non conveniens* is equally true for the access to justice approach to the arbitration question. Chicago and Toronto are all on the same cyber street. They are accessed in the identical way with a voice command or the click of a finger. No one venue is more or less unfair or impractical than another."

***Romero v. Watkins & Shepard Trucking, Inc.*, No. 20-55768 (9th Cir. Aug. 19, 2021)**: "The panel held that the district court correctly concluded that Romero, a truck driver who did not himself cross state lines but delivered goods that had once crossed state lines, fell within FAA § 1's exemption for transportation workers engaged in interstate commerce. The panel held that the district court also correctly ruled that the exemption cannot be waived by private contract." (*ed: from the Court's summary*.)

***Nixon v. AmeriHome Mortgage Company, LLC*, No. B302754 (Calif. Ct. App. 2 Aug. 16, 2021)**: "The choice-of-law provision in the Employment and Confidentiality Agreement broadly states the agreement will be 'governed by, construed under, and interpreted and enforced in accordance with' California law; thus, as in *Mt. Diablo* [*Medical Center v. Health Net of California, Inc.*, 101 Cal.App.4th 711 (2002)], the provision may reasonably be construed 'to incorporate California procedural law governing the enforcement of their agreement to arbitrate' -- the first step. But unlike Code of Civil Procedure section 1281.2, Labor Code section 229, which exempts wage claims from arbitration, unquestionably 'reflects a hostility to the enforcement of arbitration agreements that the FAA was designed to overcome.' And, as discussed, neither the choice-of-law provision nor the arbitration agreement contains 'unambiguous language' making it 'unmistakably clear' that the parties intended to incorporate section 229 while agreeing to arbitrate 'any dispute or controversy arising out of or relating to' Nixon's employment at AmeriHome." (*ed: An* Alert *h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this decision.*)

Falk v. NT Securities, LLC, **FINRA ID No. 21-00163 (Chicago, IL, Jul. 23, 2021)**: An Arbitrator dismisses Claimant broker's request for reformation of his Form U5 record on the grounds that the request is ineligible for arbitration pursuant to FINRA Rule 13206 (Six-year Eligibility Rule for Industry Disputes): "The Statement of Claim was filed on January 22, 2021. The basis for the claim arose in 2004. More than sixteen years have passed since then. Accordingly, the Statement of Claim is dismissed for untimeliness pursuant to Rule 13206." *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

Hodorov v. Leumi Investment Services, Inc.**, FINRA ID No. 21-00033 (New York, NY, Aug. 29, 2021)**: The Majority-Public Panel recommends expungement based on *Code of Arbitration Procedure* ("*Code*") Rule 13805: "The Panel has made the following Rule 2080 affirmative finding of fact: "The claim, allegation, or information is false. The Panel has made the above Rule 2080 finding based on the following reasons: In December 2011, the customer claimed that an open end mutual fund was purchased without permission. Respondent recorded all customer calls and kept a log of its investigations and results. The log stated that the recording of the order verified that the customer gave clear instructions to place the order."
return to top

ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Manesh, Mohsen, *The Corporate Contract and the Internal Affairs Doctrine*, 71 Am. U. L. Rev. (2021, forthcoming): "In the landmark ruling *Salzberg v. Sciabacucchi*, the Delaware Supreme Court upheld the validity of a corporate charter provision restricting the rights of shareholders to bring federal securities law claims. Although rights arising under federal securities law lie beyond the internal affairs doctrine, which has traditionally defined the boundaries of state corporate law, the *Salzberg* court ruled that such rights may be regulated by the 'corporate contract,' created by state corporate law and comprised of a corporation's charter and bylaws. Embracing contractarian precepts, the *Salzberg* court thus rejected the lower Chancery Court's concession theory of the corporate contract as inextricably bound by the internal affairs doctrine. [] *Salzberg*'s contractarianism has wide-ranging implications for the role of the internal affairs doctrine, the reach of the corporate contract, and the rights of shareholders arising under both state corporate law and federal securities law…. Most significantly, the decision opens the path to using the corporate contract to compel bilateral arbitration for all shareholder claims.… Whether a mandatory arbitration provision set forth in a corporation's governing documents is enforceable against shareholders will turn on how the Delaware legislature or the federal courts ultimately resolve this contract-concession tension."

Has Forum Non Conveniens Gone the Way of the VCR Player? Canadian Court finds the Doctrine Obsolete in Age of Virtual Hearings**, Lexology (Aug. 16, 2021)**: "The COVID-19 pandemic has normalized virtual hearings. According to the Ontario Superior Court, this has made the doctrine of *forum non conveniens* obsolete. In *Kore Meals LLC v Freshii Development LLC*, 2021 ONSC 2896, in the context of an application to stay

Canadian court proceedings in favour [sic] of arbitration in the U.S., the Ontario Superior Court questioned whether the doctrine of forum non conveniens has 'gone the way of the VCR player'. The Court answered yes. 'In the age of zoom… no one forum is more convenient than another'. The core finding of this decision is that forum non conveniens no longer applies to stay applications because all forums are equally convenient for virtual hearings." (*ed: see our coverage elsewhere in this* Alert.)

***RIA Firm, Principal, Trader Ordered to Pay $9M Over Short Sales*, Financial Advisor IQ (Aug. 18, 2021)**: "The Securities and Exchange Commission says it has settled with an investment advisory firm and two associated individual over alleged short-selling violations.[] From June 2016 through October 2017, its principal, and its trader, allegedly provided erroneous order-making data on hundreds of sale orders of their hedge fund client to the hedge fund's brokers, according to an SEC administrative document published on Tuesday" [names deleted]. As a result of the allegedly wrong information, the regulator claims, the hedge fund's brokers mismarked sales as long positions and failed to borrow or locate shares before executing sales. That was a violation of the requirement of Regulation SHO, the rule governing short sales of securities, according to the SEC."

***Filling In The Gaps Left By the US Supreme Court Decision in GE Energy v. Outokumpu: Which Law To Apply?* Kluwer Arbitration Blog (Aug. 19, 2021)**: "The United States Supreme Court's June 2020 decision in *GE Energy Power Conversion France SAS v. Outokumpu Stainless USA, LLC* ('*GE Energy*') made clear that, under U.S. law, a non-signatory to an arbitration agreement may invoke equitable estoppel to compel arbitration under Article II(3) of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention') (for more on *GE Energy*, see here). The Supreme Court did not, however, decide what law should be applied to determine whether equitable estoppel is available for arbitration agreements under the New York Convention – i.e., whether this should be determined by reference to federal or state law."

***The Future of Mediation by Video Conference*, Lexology (Aug. 19, 2021)**: "There are two significant ways in which mediation by video conference will change construction law and both are a function of removing the need to travel. First, video conferencing allows more people to attend a mediation without significantly affecting the cost and trouble of the attendance. Second, mediation by video conference opens the doors for mediators to expand a localized mediation practice to a national one. While these two changes may also impact other specialty areas of law, they are particularly relevant to construction law."

return to top

DID YOU KNOW?

AAA-ICDR FOUNDATION HAS A DIVERSITY SCHOLARSHIP FUND. Did you know that the AAA-ICDR Foundation has a Diversity Scholarship Fund? The AAA Website says: "The fund grants diverse law students/professionals with up to $2,000 of

financial assistance towards participation in a degree program or fellowship in alternative dispute resolution or attendance at a well-recognized conference. The mission of the Diversity Scholarship Fund is to encourage diversity and inclusion within the field of ADR by supporting the pursuit of knowledge and skill development through training experiences that encourage inclusive leadership growth in the field of ADR." Applications are reviewed every quarter "until the year's funding has been disbursed." *return to top*

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