SECURITIES ARBITRATION ALERT 2021-33 (9/2/21)

George H. Friedman, Editor-in-Chief

SQUIBS:

- **Longtime Consumer Advocate Roper Joins SEC Senior Staff: Any Implications for FINRA DRS?**
- **Florida Court Puts Brakes on Auto Dealer's Attempt to Invoke Arbitration Rights**

SHORT BRIEFS:

- **SEC's Investor Advisory Committee to Meet Virtually September 9. No Arbitration or Mediation Agenda Items**
- **Yet Another Court Finds That, Unlike the FAA, the UN Convention is Not Preempted by the McCarran-Ferguson Act**
- **ADR Inclusion Network Seeks Speakers**
- **Reminder: PLI's (Virtual) Annual Securities Arbitration Program is September 9. Nice Discount for FINRA Neutrals and *Alert* Readers**

QUICK TAKES:

- ***Beijing Shougang Mining Investment Co., Ltd. v. Mongolia,* No. 19-4191 (2d Cir. Aug. 26, 2021)**
- ***AtriCure, Inc. v. Jian Meng*, No. 19-4067 (6th Cir. Aug. 27, 2021)**
- ***Borough of Carteret v. Firefighters Mutual Benevolent Association, Local 67*, No. A-10-20 (NJ Jul. 8, 2021)**
- ***Noguera v. Aegis Capital Corp.*, FINRA ID No. 18-04305 (Miami, FL, Jul. 27, 2021)**
- ***Bachman v. BrokerBank Securities*, FINRA ID No. 20-03057 (San Francisco, CA, Jul. 29, 2021)**

ARTICLES OF INTEREST:

- **Alexander A. Yanos and Kristen K. Bromberek, *Enforcement Strategies where the Opponent is a Sovereign*, Global Arbitration Review (June 8, 2021)**
- ***The Significance of Nonverbal Communication in Mediation and Arbitration,* Lexology (Aug. 12, 2021)**
- ***N.Y. Life Rep Forged Client Annuity Contracts, Finra Says,* Financial Advisor (Aug. 16, 2021)**
- ***In the Crosshairs: U.S. Congress Again Takes Aim at Arbitration Agreements in Employment Context,* Jackson Lewis PC Employment Trial Report Blog (Aug. 19, 2021)**
- ***As RIA Arbitration Cases Climb, It's Time to Lawyer Up*, ThinkAdvisor (Aug. 25, 2021)**
- ***Wells Broker Clears His Record As Arbitrator Finds Ex-Manager Drummed Up Complaint,* AdvisorHub (Aug. 25, 2021)**
- ***SEC Issues Whistleblower Awards Totaling $2.6 Million,* www.sec.gov (Aug. 27, 2021)**

DID YOU KNOW?

- **FINRA DRS Offers Detailed Guidance on Party and Neutral Portals**

Enjoy your Labor Day Weekend!

SQUIBS: IN-DEPTH ANALYSIS

LONGTIME CONSUMER ADVOCATE ROPER JOINS SEC SENIOR STAFF: ANY IMPLICATIONS FOR FINRA DRS? ***Consumer advocate and mandatory arbitration critic Barbara Roper has joined the SEC's senior staff. What this may mean for FINRA Dispute Resolution Services ("DRS") remains to be seen***. SEC Chair **Gary Gensler** announced on **August 25** that veteran consumer advocate **Barbara Roper** would be joining the Commission's senior staff. A Press Release states: "The Commission today announced the appointment of Barbara Roper as Senior Advisor to the Chair. Ms. Roper's focus will be on issues relating to retail investor protection, including matters relating to policy, broker-dealer oversight, investment adviser oversight, and examinations. She is currently the Director of Investor Protection for the Consumer Federation of America (CFA). Ms. Roper has worked at the CFA for 35 years and has been a leading consumer spokesperson on investor protection issues, particularly the standards that apply to investment professionals investors rely on for advice and recommendations…. She is a graduate of Princeton University with a degree in art history."

A "Forced Arbitration" Opponent

While Ms. Roper has for years been a fierce consumer advocate and a vocal opponent of mandatory consumer arbitration, she has in the past spoken favorably about the FINRA arbitration program. For example, the January 2, 2013, *Indisputably* blog reported: "At the New York State Bar Association's November 2012 'Securities & Mediation Seminar' … Barbara Roper, Director of Investor Protection for the Consumer Federation of America and an arbitration gadfly, has been quoted as saying, 'Consumers in credit card arbitration would think they died and went to heaven if they went to FINRA arbitration.'" Her bio states that: "She has served on numerous advisory committees at the SEC, Financial Industry Regulatory Authority and other entities." One such committee was FINRA's Arbitration Task Force.

*(ed: *We think Ms. Roper will be a smart, fair-minded, advisor to Chairman Gensler. **We checked in with the Securities Arbitration Commentator's Rick Ryder, who offered these comments: "We all know Barbara Roper to be bold and outspoken; whether she will remain so inside government we shall see. Retail investor protection being a top area in which she will counsel the Commission, I'd like to see her get the SEC to mandate a*

*parallel RIA requirement that accords arbitration on demand to advisory clients -- that's good for RIA investors and it harmonizes with the BD side; also, predispute arbitration agreement provisions must be regulated, just as they are for BDs." ***We wish Ms. Roper the best of luck.)*
return to top

FLORIDA COURT PUTS BRAKES ON AUTO DEALER'S ATTEMPT TO INVOKE RIGHT TO ARBITRATION. ***The Court of Appeal of the State of Florida holds that a defendant who asserts its arbitration rights a few days before a class certification hearing waives its right to compel.*** *Marino Performance, Inc. v. Zuniga*, No. 4D20-1463 (Fla. Ct. App. 4 Aug. 18, 2021), involves the issue of whether a defendant has waived its right to compel arbitration against unnamed class members when it fails to raise the issue of arbitration in its answer and affirmative defenses, and later moves to compel arbitration days before a class certification hearing.

Procedural History
In December 2018, **Jose Zuniga** and **Juan Zuniga** ("Plaintiffs") filed a class action complaint against automobile dealer **Marino Performance** ("Marino"), alleging that Marino engaged in deceptive practices regarding certain fees. Each contract between Marino and a vehicle purchaser contained an arbitration provision. In its answer, Marino raised seven affirmative defenses but did not raise the issue of arbitration.

In April 2019, the Circuit Court denied Marino's motion for judgment on the pleadings, rejecting Marino's argument that the type of damages sought by the Plaintiffs were unavailable under the Florida Deceptive and Unfair Trade Practices Act. Once again, Marino did not raise the arbitration provision.

In November 2019, Plaintiffs moved to certify the class and a hearing was set. In January 2020, a few days before the hearing, Marino filed a motion to compel arbitration. The Florida Court of Appeal notes that Marino was: "raising arbitration as an issue for the first time fourteen months after the class action complaint had been filed." The court denied Marino's motion and held that Marino waived its right to compel arbitration under both the state and federal test for waiver. Marino then argued that, even if it waived its right to arbitrate as to Plaintiffs, "it did not follow that a waiver occurred as to the unnamed class members." The Court held that Marino waived its right to compel arbitration against the unnamed class members because it: "substantially invoke[d] the litigation machinery prior to demanding arbitration."

Waiving the Right of Arbitration
On appeal, the Fourth District Court of Appeal of the State of Florida holds that Marino waived its right to compel arbitration against the unnamed class members. The court follows the precedent set in *Gutierrez v. Wells Fargo Bank, NA*, 889 F.3d 1230 (11th Cir. 2018), where the Eleventh Circuit concluded that "[a] key factor in deciding [whether there has been a waiver of arbitration] is whether a party has substantially invoke[d] the litigation machinery prior to demanding arbitration." The *Gutierrez* Court also held that

Wells Fargo did not waive its right to arbitration as to the unnamed plaintiffs because, in response to the District Court's scheduling order, Wells Fargo responded that it wished to preserve its arbitration rights against unnamed plaintiffs when the matter became ripe. Additionally, Wells Fargo's answer stated that unnamed plaintiffs had a contractual obligation to arbitrate claims. The Eleventh Circuit noted that a party is not required to file a motion to compel in order preserve arbitration rights against unnamed plaintiffs. The Court also noted that the District Court would not have jurisdiction over a motion to compel arbitration against "possible future adversaries" until the class has been certified. As a result, filing a motion to compel arbitration against unnamed plaintiffs is not necessary; however, the party seeking to preserve its arbitration rights must give notice to unnamed plaintiffs that it is not waiving arbitration.

Here, **Judge Martha Warner** states that Marino "did nothing to signal that it was preserving its arbitration right in the event of class certification. Marino did not assert or reserve its right to arbitration in its answer, where it raised seven affirmative defenses. It also did not object to discovery of unnamed class members. The Court notes that Marino "attempt[ed] to have the entire action dismissed on the merits and then, when that was unsuccessful, it attempted to compel arbitration months later, but just days prior to the hearing on the motion for class certification." Marino substantially invoked the litigation machine when it filed its answer and engaged in discovery. As a result, the court holds that Marino waived its right to arbitration because it failed to demand arbitration prior to invoking the litigation machine.
*(ed: *This squib was authored by Ruben Huertero, J.D. He is a recent graduate of St. John's University School of Law.* **The Court of Appeal notes that the reasoning in *Gutierrez* has been embraced by several jurisdictions.)*
return to top

SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

SEC'S INVESTOR ADVISORY COMMITTEE TO MEET VIRTUALLY SEPTEMBER 9. NO ARBITRATION OR MEDIATION AGENDA ITEMS. The SEC on **August 30** announced that its Investor Advisory Committee would be meeting virtually on Thursday, **September 9** from 10:00 a.m. to 3:30 p.m. Eastern Time. The Agenda, which has no dispute resolution items, includes: "welcome remarks; approval of previous meeting minutes; panel discussion: *Reimagining Investor Protection in a Digital World: the Behavioral Design of Online Trading Platforms*; panel discussion regarding competition and regulatory reform at the PCAOB; discussion of a recommendation regarding 10b5-1 Plans; discussion of a recommendation regarding SPACs; and subcommittee reports."
(ed: The meeting will be webcast at www.sec.gov.)
return to top

YET ANOTHER COURT FINDS THAT, UNLIKE THE FAA, THE UN CONVENTION IS NOT PREEMPTED BY THE MCCARRAN-FERGUSON ACT. The virtually unlimited reach of Federal Arbitration Act ("FAA") preemption can be checked by a contrary federal statute, such as the McCarran-Ferguson Act, 15 U.S.C. §

1012(b). The Act protects state laws regulating the business of insurance from federal preemption, in effect "reverse-preempting" the FAA: "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance …." But what if the arbitration-friendly federal statute is not the FAA but the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* ("UN Convention")? There is no reverse preemption and the Washington law barring arbitration is preempted, says the Court in *CLMS Management Services Limited Partnership v. Amwins Brokerage of Georgia, LLC*, No. 20-35428 (9th Cir. Aug. 12, 2021), a case of first impression. Why? Because the *UN Convention* is a *treaty* and not an "Act of Congress" as defined by the statute: "Article II, Section 3 of the Convention on Recognition and Enforcement of Foreign Arbitral Awards is self-executing, and it requires enforcement of the parties' arbitration agreement. Because the Convention is not an 'Act of Congress' subject to reverse-preemption by the McCarran Ferguson Act, the district court correctly granted defendants' motion to compel arbitration."
(ed: We covered in SAA 2020-31 (Aug. 19) a case to the same effect, J.B. Hunt Transport, Inc. v. Steadfast Insurance Co.*, No. 5:20-cv-05049 (W.D. Ark. 2020). That Court cited with favor* McDonnel Group, L.L.C. v. Great Lakes Ins. SE, UK Branch*, 923 F.3d 427 (5th Cir. 2019), a case to the same effect we covered in SAA 2019-21 (May 29).)*
return to top

ADR INCLUSION NETWORK SEEKS SPEAKERS. The ADR Inclusion Network announced that it is compiling a Diversity Speakers Bureau. The purpose is to: "provide a list of talented professionals who are ready, willing, and able to speak and train on a variety of Alternative Dispute Resolution topics, and who self-identify as a member of a historically underrepresented community, including but not limited to: a person of color, a member of the LGBTQ+ community, as having a disability, or identify as a woman." The organization intends to make the database available to the public by the end of the year.
*(ed: *Founded in 2017, the ADR Inclusion Network's mission is: "to promote diversity and inclusion in alternative dispute resolution. **Applications can be found at https://www.adrdiversity.org/adr-speakers-bureau.)*
return to top

REMINDER: PLI'S (VIRTUAL) ANNUAL SECURITIES ARBITRATION PROGRAM IS SEPTEMBER 9. NICE DISCOUNT FOR FINRA NEUTRALS AND *ALERT* READERS. As reported in SAAs 2021-29 (Aug. 5) & -25 (Jul. 8), the Practising Law Institute ("PLI") program *Securities Arbitration 2021* will be taking place via live Webcast and groupcast on **September 9, 2021**. As noted in our past reporting, the program boasts a large (25+) and impressive faculty, including FINRA Dispute Resolution Services' Executive Vice President & Director of Arbitration **Richard W. Berry** and other FINRA staffers. Returning as Program Chair is **Sandra D. Grannum** (Faegre Drinker Biddle & Reath LLP). CLE credit is available.

(*ed: *The program 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 registering. ****For more information, please contact PLI at the number above or at info@pli.edu.)*
return to top

QUICK TAKES: CASES AND AWARDS WORTH READING

***Beijing Shougang Mining Investment Co., Ltd. v. Mongolia*, No. 19-4191 (2d Cir. Aug. 26, 2021)**: "On appeal, Petitioners-Appellants' primary argument is that the district court erred by declining to review the arbitrability of their investment claims *de novo* before rejecting Petitioners-Appellants' petitions and confirming the arbitral award. We reject the appeal and hold that Petitioners-Appellants were not entitled to *de novo* review of the arbitrability of their investment claims. While the bilateral investment treaty in this case does not contain a clear statement empowering arbitrators to decide issues of arbitrability, we hold that Petitioners-Appellants and Respondent-Appellee Mongolia (collectively, the 'Parties') nonetheless 'clear[ly] and unmistakabl[y]' agreed to submit questions of arbitrability to the arbitral tribunal in the course of the dispute between them" (brackets in original).

***AtriCure, Inc. v. Jian Meng*, No. 19-4067 (6th Cir. Aug. 27, 2021)**: The majority holds: "the [Federal Arbitration] Act's text compels states only to treat arbitration contracts the same way that they treat 'any contract.' 9 U.S.C. § 2. So the Supreme Court has since held that courts considering whether arbitration clauses cover nonparties should neutrally apply the relevant state law that otherwise governs. *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630–32 (2009). The Court did not say that any policy favoring arbitration should influence things. We thus see no room for this federal 'dice-loading' rule of construction to resolve the state-law question.… Instead, we must ask whether Ohio law, when fairly read, permits the defendants to enforce the arbitration clause even though they did not sign the contract. The defendants rely on two 'equitable estoppel' theories and one 'agency' theory as their grounds to do so. But their first estoppel theory rests on the outdated circuit decisions, which adopted a much broader estoppel test than the test applied by the Ohio Supreme Court. And the defendants forfeited their second estoppel theory. That said, the district court failed to ask the right question under Ohio law when rejecting the defendants' agency theory. All told, then, while we agree that equitable estoppel does not apply, we remand one defendant's agency claim for further proceedings. We thus affirm in part and reverse in part the district court's order denying a stay of this suit pending arbitration" (some citations omitted).

***Borough of Carteret v. Firefighters Mutual Benevolent Association, Local 67*, No. A-10-20 (NJ Jul. 8, 2021)**: Albeit a labor case, a unanimous, arbitration-related, state high court decision is always worth noting: "The arbitrator's award is supported by a reasonably debatable interpretation of the disputed provision, and therefore, the award should have been upheld on appeal…. An arbitrator's award resolving a public sector

dispute will be accepted so long as it is 'reasonably debatable.' Under that standard, a court may not substitute its judgment for that of the arbitrator, regardless of the court's view of the correctness of the arbitrator's position. If two or more interpretations of a labor agreement could be plausibly argued, the outcome is at least reasonably debatable." (*ed: from the Court's summary*.)

***Bachman v. BrokerBank Securities, Inc.*, FINRA ID No. 20-03057 (San Francisco, CA, Jul. 29, 2021)**: An Arbitrator grants a broker's request for expungement of a customer complaint from appearing on his CRD record and in a rare move also awards the broker nominal damages ($1) against Respondent broker-dealer: "Pursuant to FINRA Rule 2080(b)(1)(A), the claim is false, because the actions that led to the Customer's dissatisfaction were those of fraud on the part of Bay Area Equity Group ('BAEG'), not Claimant's. Claimant had no association with BAEG and he did not have any association with the Customer beyond assisting her in reaching Provident to open the account requested. Claimant was not involved with any fraudulent behavior. The claim is clearly erroneous, because Claimant had no contractual agreement with the Customer. The Customer could not identify the existence of a contract or a contractual provision which Claimant can be said to have violated." *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Noguera v. Aegis Capital Corp.*, FINRA ID No. 18-04305 (Miami, FL, Jul. 27, 2021)**: An All-Public Panel grants Respondent broker-dealer's Motion for Directed Verdict based on Florida Statutes Chapter 517. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*
return to top

ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Alexander A. Yanos and Kristen K. Bromberek, *Enforcement Strategies where the Opponent is a Sovereign*, Global Arbitration Review (June 8, 2021): "Enforcement proceedings against sovereigns present unique challenges that do not arise in enforcement proceedings against private entities. As an initial matter, states enjoy sovereign immunity such that sovereigns that decide not to pay have powerful weapons at their disposal to shield their assets from enforcement. The national laws implementing the principle of sovereign immunity vary around the world. In the United States, to take one important example, foreign sovereigns are immune from attachment and execution of their property in the United States, subject to certain limited exceptions. Unique rules for personal jurisdiction and service applicable to sovereigns can further complicate efforts to enforce" (footnotes omitted).

***The Significance of Nonverbal Communication in Mediation and Arbitration*, Lexology (Aug. 12, 2021)**: "Nonverbal communication may impact participants' thoughts and emotions in a mediation or arbitration and should be considered when evaluating communication feedback during these sessions. While the words that are spoken are critical to assessing communication, assessing the meaning of words through evaluating nonverbal gestures and cues, body language and eye contact may be equally or

even more important in sending a message and evaluating a message in the alternative dispute resolution context or in any context of human communication."

***N.Y. Life Rep Forged Client Annuity Contracts, Finra Says*, Financial Advisor (Aug. 16, 2021)**: "A former New York Life Insurance investment representative has agreed to a lifetime bar for forging clients' signatures on annuities contracts and for denying her actions during a disciplinary interview with the Financial Investment Regulatory Authority (Finra), the regulator announced. Finra said it found that [name deleted] forged four different annuities contracts for clients she had never met, earning $68,000 in commissions between May 2017 and February 2018."

***In the Crosshairs: U.S. Congress Again Takes Aim at Arbitration Agreements in Employment Context,* Jackson Lewis PC Employment Trial Report Blog (Aug. 19, 2021):** "In the U.S. Congress' latest proposal to strike against arbitration, Judiciary Committee Chairman Jerrold Nadler and Labor Committee Chairman Robert C. "Bobby" Scott introduced the Restoring Justice for Workers Act. The proposed legislation seeks to put an end to pre-dispute arbitration clauses in the employment context. Significantly, a similar bill was introduced in October 2018 but did not receive a U.S. Senate vote and died in session. The 2021 version of the bill will likely suffer a similar fate. Although frequently under attack, pre-dispute arbitration agreements remain an important and effective tool for employment dispute resolution."

***As RIA Arbitration Cases Climb, It's Time to Lawyer Up*, ThinkAdvisor (Aug. 25, 2021)**: "**What You Need to Know**: Many complaints are without merit but still should be reported to a firm's errors and omissions carrier; Be advised that the volume of AAA arbitrations involving advisory firms have increased, possibly due to the fee-based RIA model change; Arbitration is an alternative to a more traditional state or federal court lawsuit. It can be unsettling to receive a letter of complaint from a customer or be served with an arbitration filing."

***Wells Broker Clears His Record As Arbitrator Finds Ex-Manager Drummed Up Complaint*, AdvisorHub (Aug. 25, 2021)**: "An arbitrator [in *Parry v. UBS Financial Services Inc*., FNRA ID No. 20-00524 (Los Angeles, CA, Aug. 18, 2021)] has paved the way for a 24-year industry veteran to clear his record of a long-ago client dispute after finding that a former PaineWebber manager had called the broker's clients to drum up issues after he left the firm in 2000."

***SEC Issues Whistleblower Awards Totaling $2.6 Million*, www.sec.gov (Aug. 27, 2021):** "The Securities and Exchange Commission today announced awards of approximately $2.6 million to five whistleblowers who provided information and assistance in three separate enforcement proceedings."
return to top

DID YOU KNOW?

FINRA DRS OFFERS DETAILED GUIDES ON PARTY AND NEUTRAL PORTALS. The *Alert*'s readers and followers know that today virtually all aspects of case administration at FINRA Dispute Resolution Services ("DRS") are handled through the Authority's online Dispute Resolution Portal. Specifically, DRS has a party portal and neutral portal. But did you know that FINRA has published detailed guides on both? The image and link-rich guide for case participants can be found here; the guide for arbitrators and mediators here. Each publication is accompanied by an FAQ (participants; neutrals). *return to top*

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Editor's Note & Disclaimer: While we undertake considerable efforts to present information in this publication in a fair and accurate manner, we caution that readers should access referenced material themselves as the best source. Our analyses make liberal use of links, and we offer courtesy copies of materials not on the Internet. Similarly, readers should not rely solely upon our summaries in making legal decisions or consider our commentary to be rendering legal, accounting, or other professional advice or service. If legal advice or other expert assistance is required, the services of a competent professional person should be sought. — *adapted from the Declaration of Principles jointly adopted by a Committee of the American Bar Association and a Committee of Publishers and Associations.*

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