SECURITIES ARBITRATION ALERT

SECURITIES ARBITRATION ALERT 2021-34 (9/9/21)

George H. Friedman, Editor-in-Chief

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- ***Rodriguez-Ocasio v. Midland Credit Management, Inc.,* No. 17-3630 (ES) (D. N.J. Aug. 25, 2021) (not for publication)**
- ***Yeung v. Robinhood Financial, LLC*, FINRA ID No. 21-00946 (San Francisco, CA, Aug. 2, 2021)**
- ***Ward v. Calton & Associates Inc*., FINRA ID No. 19-00571 (Minneapolis, MN, Aug. 4, 2021)**

ARTICLES OF INTEREST:

- **Schmitz, Amy J., *Ordering Online Arbitration in the Age of Covid … and Beyond*, University of Missouri School of Law Legal Studies Research Paper No. 2021-21 (Sep. 2, 2021)**
- ***FA Wins Expungement; Wasn't Even at Firm When Customer Chose Investment,* Financial Advisor IQ (Aug. 30, 2021)**
- ***Madoff Victims Get Second Crack at Citigroup's $343 Million,* Bloomberg (Aug 30, 2021)**
- ***Lawyers Just Say 'No' to Zoom for Finra Arbitration Hearings,* AdvisorHub (Aug. 31, 2021)**
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- ***Compelling a Virtual Arbitration Over Objection*, law.com (Sep. 4, 2021)**

DID YOU KNOW?

- **JAMS Administers International Disputes**

SQUIBS: IN-DEPTH ANALYSIS

SERVOTRONICS ON *CERTIORARI* PETITION: "NEVER MIND!" BUT *BADGEROW* ORAL ARGUMENT IS NOW SET. ***Just a month out from oral argument, Servotronics has notified the Court that it is dismissing its* Certiorari *Petition. That leaves* Badgerow v. Walters, *No. 20-1143, which has been set for oral argument on November 2, as the only arbitration-centric case on the Court's hearing docket.*** One of the late **Gilda Radner**'s many characters was Emily Litella, who would give misguided editorial replies that were inevitably based on her misunderstanding of the facts. When the error was pointed out, she would exclaim, "Oh, that's very different. Never mind!" Channeling Ms. Litella, with oral argument having been set for **October 5**,

counsel for Servotronics has walked back its Petition for *Certiorari* in *Servotronics, Inc. v. Rolls-Royce PLC and the Boeing Company*, No. 20-794.

A Succinct Review

As reported in SAA 2021-11 (Mar. 25), the Court on **March 22** agreed to resolve a major Circuit Court 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 was 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. The request was granted **August 2** and on **August 23,** the Court issued an Order allocating the time for argument.

A Bolt from the Blue

Servotronics' counsel on **September 8** filed a letter with the Court, stating: "I am writing to report that Servotronics anticipates filing a dismissal motion pursuant to Rule 46 of the Rules of the Court within the next few days." No reason is given, but we note that the underlying arbitration in London was concluded recently. The SCOTUS docket has two September 8 entries: "Letter of petitioner notifying the Clerk of intention to file a Rule 46 motion to dismiss filed. (Distributed); REMOVED from the October 2021 ARGUMENT CALENDAR." Or, as Ms. Litella would say, "Never mind!"

What it Means: the Split Remains

The bottom line for now is that the split in the Circuits remains. To review, we covered in SAA 2020-13 (Apr. 8) *Servotronics, Inc. v. The Boeing Co. and Rolls-Royce PLC*, 954 F.3d 209 (4th Cir. Mar. 30, 2020), where, in a case involving a private commercial arbitration being held in England under Chartered Institute of Arbitrators Rules, the Court *upheld* a District Court decision ordering discovery from three Boeing employees residing in South Carolina. The more recent entry in the "no" camp was the Seventh Circuit, which in *Servotronics, Inc. v. Rolls-Royce PLC*, No. 19-1847, 2020 WL 5640466 (Sept. 22, 2020) – a dispute arising out of the *same* arbitration – held that section 1782 does *not* extend to private international commercial arbitration. As described in SAA 2020-37 (Oct. 7), the District Court had barred Servotronics from obtaining discovery documents located in Illinois for use in the same private arbitration pending in London, and the Seventh Circuit (*ed: then-Judge Amy Coney Barrett was not on the Panel deciding the case*) affirmed unanimously. Among the Court's rationales was a perceived conflict between section 1782 and the Federal Arbitration Act: "The discovery assistance authorized by § 1782(a) is notably broader than that authorized by the FAA…. If § 1782(a) were construed to permit federal courts to provide discovery assistance in private foreign arbitrations, then litigants in foreign arbitrations would have access to much more expansive discovery than litigants in domestic arbitrations. It's hard to conjure a rationale for giving parties to private foreign arbitrations such broad access to federal-court discovery assistance in the United States while precluding such discovery assistance for litigants in domestic arbitrations. In sum, what the text and context of § 1782(a) strongly

suggest is confirmed by the principle of avoiding a collision with another statute: a 'foreign or international tribunal' within the meaning of § 1782(a) is a state-sponsored, public, or quasi-governmental tribunal."

We'll Always Have *Badgerow*

The only arbitration-centric case remaining on the Court's docket is *Badgerow v. Walters,* No. 20-1143. As reported in SAA 2021-19 (May 2), the Supreme Court on **May 17** agreed to review (see p. 2 of the Order List) *Badgerow v. Walters*, 975 F.3d 469 (5th Cir. 2020), a case we analyzed in SAA 2020-36 (Sep. 23). In the underlying case, the Fifth Circuit held that the District Court was correct when it applied the "look-through" standard to determine that it could remove a state court action to vacate an Award. The issue identified for review in the granted Petition for *Certiorari*: "Whether federal courts have subject-matter jurisdiction to confirm or vacate an arbitration award under Sections 9 and 10 of the FAA where the only basis for jurisdiction is that the underlying dispute involved a federal question." The **November 2021** calendar shows that the case is set for oral argument on **November 2**.

*(ed: *We're really curious as to why* Servotronics *was suddenly withdrawn. Mootness may be the cause, given this summer's conclusion of the underlying arbitration. Meanwhile, the split remains. **The September 8 CPR blog has an excellent analysis of the dismissal. ***Speaking of oral arguments, the Court on September 8 announced that arguments scheduled for October, November, and December will be in-person. However: "Courtroom access will be limited to the Justices, essential Court personnel, counsel in the scheduled cases, and journalists with full-time press credentials issued by the Supreme Court. Out of concern for the health and safety of the public and Supreme Court employees, the Courtroom sessions will not be open to the public." There will be live audio feeds. ****We'll keep our eye on* Badgerow.*)*

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MORE ON FINRA SAFETY PROTOCOLS FOR IN-PERSON HEARINGS.

FINRA resumed in-person hearings in early August. We now offer an analysis of the health safety guidance being provided to participants. As reported in SAA 2021-22 (Jun. 10), beginning **August 2,** all 69 FINRA Dispute Resolution Services ("DRS") hearing locations opened for in-person proceedings. The Authority updated its Webpage on **June 4** to reflect the change: "Beginning August 2, 2021, all FINRA DRS hearing locations will be open for in-person proceedings." Previously, FINRA DRS had announced the resumption of in-person hearings in 62 of 69 hearing locations, effective **July 5**. The Authority has published a *Safety Protocol for In-Person Hearings* that has been sent to arbitrators and parties. The Website says the Protocols may include (*ed: repeated* verbatim): hearings held in venues large enough to allow social distancing; hand sanitizer provided in each room; masks for all in-person participants and arrangements made to provide masks to participants who do not have them; Plexiglas dividers and face shields provided in the event that testifying witnesses must remove their masks; and in-person participants provided with information on best practices when traveling to and attending the hearing." The notice added: "Details on the exact safety protocols that will

be in place for hearings will be sent to parties and arbitrators in advance of scheduled hearing dates."

Letter on Safety Protocols

We were curious about the scope of the expanded safety protocols and were able to obtain from FINRA a copy of the form letter sent to all in-person participants. The letter repeats the safety measures described above, and then states that *all* in-person participants -- including arbitrators -- must submit a daily health certification through FINRA's survey system (FINRA will email a link to the certification to be submitted electronically each day). FINRA will send the chairperson (or an arbitrator designated by the chairperson): "a daily report of any in-person participants who did not fill out the certification." The consequence of non-compliance? "Individuals may not participate in the hearing until they have filled out the certification for that day." While the *Health Certification Form* surveys participants on COVID-19 symptoms and possible exposure, it does not inquire about vaccination status.

New Code of Conduct

The letter encloses a new *Code of Conduct for Hearing Participants* and adds: "By appearing at the hearing, the in-person participant agrees to comply with the *Code of Conduct* requirements." What are they? We cite them below *verbatim;* emphasis in original:

Before Leaving Home

- Follow relevant guidance provided by the CDC, or your local health authority.
- Adhere to government issued travel restrictions and guidance issued by the region you will be traveling to and the region you are traveling from.
- Evaluate your own health and that of people you are in close contact with; if you have concerns contact your FINRA case administrator.
- Stay home if you feel unwell or are experiencing flu-like symptoms.

On-Site

- In the hearing room, the arbitrator(s) will monitor proceedings and ensure all participants are complying with the local, state, and CDC COVID recommendations.
- A Health Certification will be sent to you via email to complete each morning. Paper copies will not be available - all Health Certifications must be completed on-line prior to arrival.
- **Masks must always be worn (covering nose and mouth) while in meeting room and at least 6 feet of physical distance must be maintained between all individuals at all times**. Chairs will be placed 6 feet apart, but please keep distance in mind while entering, exiting, and moving around the room.
- Hand sanitizer and extra masks will be provided, but you are welcome to wear your own face covering, if at least 2-ply.
- Adhere to social distance protocols put in place by the event organizers and respect others' personal space.

- Immediately notify the panel and leave the meeting if you feel unwell or are experiencing flu-like symptoms.

Post-Event

- Based on current contact tracing guidelines, if you test positive or are presumed positive for COVID-19 up to 14 days after the hearing, please contact your FINRA case administrator.

The *Code* closes with a bolded attestation: "**I understand that by traveling to and attending an in-person event I am accepting the risks associated with COVID-19, and I agree to comply with the above requirements in order to mitigate those risks**."
*(ed: *This all makes sense, but we are puzzled by the lack of any references to vaccination status. In some locations, such as New York City, individuals are required to furnish proof that they are vaccinated before entering certain indoor public venues. **Our thanks to FINRA for furnishing a copy of the form letter and attachments. Nice transparency!)*
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A WONDERFUL PRIMER ON THE LIMITED SCOPE OF JUDICIAL REVIEW UNDER THE FAA. ***We share with our readers the Seventh Circuit's own words describing the very limited scope of judicial review under the Federal Arbitration Act ("FAA").*** The unanimous Opinion in *Continental Casualty Co. v. Certain Underwriters at Lloyds of London*, No. 20-2892 (7th Cir. Aug. 23, 2021), is a terrific primer on the very limited scope of judicial review available under the FAA. We offer below select quotes from the Opinion. We've added links to cited precedents.

Judicial Review of Awards: The FAA Reigns Supreme
"It would be difficult to overstate the strength of the Supreme Court's support for arbitration when the parties have elected to resolve their disputes using that mechanism. The Federal Arbitration Act ('FAA'), 9 U.S.C. § 1 *et seq*., embodies a 'national policy favoring [arbitration] and plac[ing] arbitration agreements on equal footing with all other contracts.' *Hall Street Assocs., L.L.C. v. Mattel, Inc*., 552 U.S. 576, 581 (2008), (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)). Arbitration and adjudication in court differ in a number of meaningful ways."

"Exceedingly Narrow" Review Under FAA
"One central distinction relates to the exceedingly narrow scope for judicial review of a final arbitral award. Whereas a decision by a court of first instance is usually subject to *de novo* review for questions of law, and more deferential, yet still meaningful, review for questions of fact, arbitration awards are largely immune from such scrutiny in court. The FAA spells out a narrow set of reasons that may support a court's confirmation, vacatur, or modification of an award, see 9 U.S.C. §§ 10–11, and the Supreme Court held that these 'provide exclusive regimes' for review. *Hall Street Assocs*., 552 U.S. at 590" (brackets in original).

Award Challenge Here
"Recognizing this unfavorable terrain, Continental Casualty Co. and Continental Insurance Co. (collectively, 'Continental') nevertheless seek in this appeal to set aside an arbitral award. The award arose out of a dispute between Continental and Certain Underwriters at Lloyds of London ('Underwriters') over the way in which reinsurance furnished by Underwriters should be calculated and billed. As required by contract, Underwriters submitted this matter for arbitration, and the arbitral panel ('the Panel') ruled in their favor. When all is said and done, this dispute is nothing more than one between two insurance entities -- a cedant and a reinsurer -- about the way in which certain claims should be billed and the consequences for failing to use the proper methodology."

The Bottom Line
"The arbitrators reasonably thought that they needed information about both past billings and future amounts due. In the two post-Final Award orders, they specified how the named accounts should be treated. It is possible to find an interpretive route to those two orders. The arbitrators may have thought that the only way to implement the purpose of the agreement was to preclude all of the asbestos bills for the three named companies. The agreement gave them the power to resolve the case on general principles, not just legal entitlements, and that seems to be what they did.… Given the narrow scope of our role in reviewing arbitral awards, we must decline Continental's invitation to revisit this dispute. We conclude that the arbitrators did not stray beyond the boundaries of their authority, and so we AFFIRM the judgment of the district court confirming [the] Interim Order…."
(ed: Readers experiencing déjà vu *might be thinking of the landmark SCOTUS holding in* Commonwealth Coatings Corp. v. Continental Casualty Corp.*, 393 U.S. 145 (1968),* reh. den. *393 U.S. 1112 (1969), where the Court in a plurality decision ruled that an arbitrator's failure to disclose a minor, sporadic, relationship with an arbitration participant created an "impression of possible bias" under the FAA.)*
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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

FINRA ANNOUNCES INDUSTRY BOARD ELECTION RESULTS. FINRA on **September 1** announced via Press Release the election or appointment of five industry members to its 22-member Board of Governors We present the results below essentially *verbatim*: Seven of the 10 industry seats on FINRA's Board are decided via election, and large, mid-size and small firms decide the Governors who represent their respective firm categories in those seats. At the Annual Meeting of FINRA Firms on September 1, firms elected the following Governors to fill the three open elected seats: **Timothy C. Scheve**, President and Chief Executive Officer (CEO) of Janney Montgomery Scott LLC – who was unopposed – was re-elected as a Large Firm Governor, one of three representatives of large firms on the Board. **James T. Crowley**, CEO of Pershing Advisor Services LLC – who also ran unopposed – was elected as the sole Mid-Size Firm Governor on the FINRA Board. **Paige Pierce**, President and Chief Executive Officer of the Bley

Investment Group, Inc., was re-elected by small firms to one of the three Small Firm Governor seats on the FINRA Board. At its July meeting, the FINRA Board appointed two new Governors: Vanguard Chairman and CEO **Mortimer J. "Tim" Buckley** and Commonwealth Financial Network SVP and General Counsel **Peggy Ho**.
(ed: We did a quick check of the FINRA Arbitration Awards Online database, and none of these individuals appear to be FINRA arbitrators or parties to past awarded cases.)
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FAIR ACT SEEMS TO BE STALLED IN THE HOUSE. Recall that we reported in SAA 2021-06 (Feb. 18) that Democrats had reintroduced several bills to curb use of mandatory predispute arbitration agreements ("PDAA"). Among them was H.R. 963 – the *Forced Arbitration Injustice Repeal (FAIR) Act* – introduced **February 11** by Rep. **Henry "Hank" Johnson Jr.** of Georgia. If enacted, it would ban mandatory arbitration for almost every conceivable transaction that's not a business-to-business or union-management matter. Specifically, this bill would amend the Federal Arbitration Act to eliminate mandatory predispute arbitration agreements ("PDAA") for disputes involving consumer, investor, employment (including independent contractors), and antitrust matters. It would cover brokers and investment advisers; bar class action/collective action waivers in or out of a PDAA; apply to "digital technology" disputes; reserve for court determination any arbitrability or delegation issues "irrespective of whether the agreement purported to delegate such determinations to an arbitrator;" and extend to a broad range of civil rights matters, including sexual harassment claims. We reviewed the bill's text and offered a detailed analysis in SAA 2021-10 (Mar. 18) and our blog. Most recently, we said in SAA 2021-28 (Jul. 29) that the proposed *FAIR Act* seemed to be inexorably moving toward at least House passage: "It already has 196 cosponsors (all Democrats), with 218 votes needed for passage." Turns out we may have been overly optimistic. When last we checked, the cosponsor list was stuck at 196, with the last entry dated **July 21**. The companion bill – S. 505 – has been stuck at 39 cosponsors (all Democrats) since **March 1.**
*(ed: *The prospects for House passage still seem very good in our view. As we've noted before, the prior iteration of the Act passed the House in the last Congress. Although the Democrats' House majority is now slimmer, we think there are enough votes for House passage this time around. **A Bill Summary issued by the Congressional Research Service reads in its entirety: "This bill prohibits a predispute arbitration agreement from being valid or enforceable if it requires arbitration of an employment, consumer, antitrust, or civil rights dispute.")*
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NOT AN ARBITRATION-RELATED CASE, BUT A GOOD EXAMPLE OF DISCOVERY ABUSE AND ITS CONSEQUENCES. *Prattico v. City of Rochester*, No. 291CA 20-00526 (NY App. Div., 4th Dept. Aug. 26, 2021), does not involve an arbitration, but it offers a nice example of discovery abuse and its consequences. What happened? We'll quote liberally from the unanimous appellate court's Opinion:
"Discovery ensued in this action, during which Supreme Court* directed defendants to provide various materials to plaintiff. After determining that defendants failed to comply,

the court repeatedly directed defendants to provide those and other discovery materials, and imposed sanctions on defendants for their failures to comply. No appeal was taken with respect to those directions. Plaintiff then moved, inter alia, pursuant to CPLR 3126 for an order striking defendants' answer and deeming the allegations in the malicious prosecution cause of action admitted, and defendants, inter alia, moved for an order granting them summary judgment dismissing the amended complaint against them. Defendants now appeal from an order that, inter alia, granted plaintiff's motion and denied defendants' motion." And the consequences? "Here, plaintiff established on his motion that defendants repeatedly failed to comply with discovery orders, that such failure was willful, contumacious and in bad faith, and that plaintiff was precluded by that failure from establishing a prima facie case on his malicious prosecution cause of action…. Consequently, we conclude that the court properly exercised its discretion by striking defendants' answer and deeming the allegations in the malicious prosecution cause of action admitted" (citations omitted).
*(ed: *The New York State Supreme Court is a court of original trial jurisdiction. **We see a similar result in a FINRA arbitration.* Code of Arbitration Procedure *Rule 12212 empowers arbitrators to sanction parties failing to comply with their directives. Among the enumerated actions are: "precluding a party from presenting evidence [and/or] making an adverse inference against a party." This Rule also provides: "(c) The panel may dismiss a claim, defense or arbitration with prejudice as a sanction for material and intentional failure to comply with an order of the panel if prior warnings or sanctions have proven ineffective.")*
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FINRA ANNOUNCES FREE "ASK THE SENIOR STAFF" WEBINAR. FINRA will be conducting a free one-hour Webinar from 1:00 to 2:00 pm Eastern on **October 12.** Says the *Ask FINRA Advertising Regulation Senior Staff Webinar* announcement: "Join this free virtual discussion with senior staff from FINRA's Advertising Regulation Department to hear how to navigate current developments in FINRA's communications rules and industry marketing practices including mobile apps, social media, and other digital channels. Panelists answer questions on how to embrace the future of communications while remaining compliant."
*(ed: *Registration for this free Webinar can be done through the Website. **For further info call 800-321-6273 or use email. ***The event is open to the media.)*
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QUICK TAKES: CASES AND AWARDS WORTH READING

***Snow v. Eventbrite, Inc.*, No. 3:20-cv-03698-WHO (N.D. Calif. Sep. 2, 2021)**: "Plaintiffs Sherri Snow and Linda Conner bought tickets to events through defendant Eventbrite, Inc. ('Eventbrite') that were cancelled or postponed because of the COVID-19 pandemic. They allege, on behalf of themselves and a proposed class, that Eventbrite was required to reimburse them. I previously denied Eventbrite's motion to compel arbitration and identified specific evidentiary deficiencies in the showing it made. It now brings a renewed motion, which is granted. Eventbrite has produced an agreement that each plaintiff would have seen when she signed up for the events in question. Those

agreements put the plaintiffs on notice that they were agreeing to arbitrate their claims under standard contract principles." (*ed: the Court stated that: "Eventbrite's conduct in this litigation, and that of and its attorneys, has been troubling." Email us at Help@SecArbAlert.com for a copy of the decision*.)

***Rodriguez-Ocasio v. Midland Credit Management, Inc*., No. 17-3630 (ES) (D. N.J. Aug. 25, 2021) (not for publication)**: "At issue here is whether the arbitration provisions of the Account Agreements bind Plaintiffs to arbitrate claims that they have against MCM. MCM argues that it is entitled to compel arbitration because it is an agent of Midland and Midland purchased the rights to enforce arbitration from Synchrony. (Plaintiffs respond that Synchrony did not transfer its right to compel arbitration to Midland through the Purchase Agreements -- because the Purchase Agreements transferred only rights under the 'Receivables,' not under the 'Accounts.') .... The plain meaning of the Purchase Agreements indicates that Midland did not purchase and was not assigned the right to compel arbitration" (footnotes and internal citations omitted).

***Yeung v. Robinhood Financial, LLC*, FINRA ID No. 21-00946 (San Francisco, CA, Aug. 2, 2021)**: In this small claims arbitration, an Arbitrator explains why he has decided to deny a customer's request for damages against Respondent broker-dealer, finding that there was no breach of any duty: "The issue raised was whether Respondents breached a fiduciary duty, or, any duty at all, by enacting their 'Risk Check' procedure contained in Section 10 of the Options Agreement.[] The Arbitrator, upon review of all documents submitted, finds there was no breach of any duty." *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Ward v. Calton & Associates Inc*., FINRA ID No. 19-00571 (Minneapolis, MN, Aug. 4, 2021):** A Respondent broker-dealer and two brokers are held jointly and severally liable to two customers for over $500,000 in damages, inclusive of $150,000 in punitive damages. The Respondent broker-dealer was also ordered to pay the customers $414,000 as a monetary sanction for its continued failure to comply with the Panel's Orders regarding the production of discovery. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Schmitz, Amy J., *Ordering Online Arbitration in the Age of Covid … and Beyond*, University of Missouri School of Law Legal Studies Research Paper No. 2021-21 (Sep. 2, 2021): "Arbitration has been moving online for some time, especially with the growth of Online Dispute Resolution ('ODR'), which includes using technology to assist online negotiation, mediation, arbitration, and variations thereof. Online Arbitration ('OArb') is nonetheless a unique subset of ODR because it usually culminates in a final and binding award by a neutral third party that is enforceable under the Federal Arbitration Act ('FAA') and other arbitration laws. Indeed, I have written about OArb on prior occasions, due to its unique status. However, OArb was relatively limited until the

COVID-19 pandemic sparked its acceleration. It became the norm while in-person gatherings halted and courts closed, or severely limited the cases they could hear. Furthermore, most opine that OArb is here to stay due to its convenience and cost savings. What happens, however, when a party objects to virtual hearings? This Article will explore this important question and offer analysis that balances efficiency and fairness."

***FA Wins Expungement; Wasn't Even at Firm When Customer Chose Investment*, Financial Advisor IQ (Aug. 30, 2021)**: "A Merrill Lynch financial advisor has won her arbitration claim seeking the expungement of information related to a customer dispute from 2009…. Last week, Lynne Gomez, the sole public arbitrator on [advisor's] Chimera's expungement claim, ruled that Chimera's expungement request should be granted, but denied all other claims. 'The customer's underlying complaint is not true,' Gomez wrote. 'Claimant had not even been hired at the time the customer chose the investment, and her later interactions with the customer were primarily of an administrative nature.'"

***Madoff Victims Get Second Crack at Citigroup's $343 Million*, Bloomberg (Aug 30, 2021**: "Victims of Bernard Madoff will get another chance at recovering $343 million from Citigroup Inc. after a federal appeals court overturned a ruling dismissing a claim against the bank.[] The U.S. Court of Appeals in New York on Monday reinstated a suit against Citi by Irving Picard, the trustee charged with recovering money for Madoff's victims, over funds transferred to the bank. Picard claimed Citi failed to act on red flags concerning Madoff, but a bankruptcy court dismissed the suit, finding the trustee had not shown the bank acted with 'willful blindness' to possible fraud."

***Lawyers Just Say 'No' to Zoom for Finra Arbitration Hearings*, AdvisorHub (Aug. 31, 2021)**: "Pandemic-triggered virtual arbitration hearings have hardly ranked as a smash hit at the Financial Industry Regulatory Authority. In 57%, or 453, of the 792 disputes that have taken place since hearings went virtual in mid-March 2020, one of the parties has objected to a Zoom arbitration and opted to delay until the regulator resumed in-person sessions, according to Finra data as of July 31. Since hearings went virtual in mid-March 2020, one of the parties has objected to Zoom arbitration in 57%, or 453, of the 792 cases, according to Finra data as of July 31. Expect even more objections to Zoom hearings to ensue since Finra on August 2 reopened in-person options for hearings, lawyers for both firms and investors said. There is too much room for error when the arbitrators, broker-dealers, brokers and clients are not in the same physical room to hear disputes, according to lawyers."

***SEC Inquiry into Online Brokers Could Redefine Recommendations*, InvestmentNews (Aug. 31, 2021)**: "A Securities and Exchange Commission's examination of how financial advisers use online platforms to attract clients could result in redefining an investment recommendation and expanding the reach of the broker advice standard.[] Last week, the SEC released a request for comment about the 'digital engagement practices' used by investment advisers and broker-dealers. The agency said it is looking

into ways that advisers use tools that appeal to investors' behavioral tendencies — such as game-like features known as gamification — to shape their activities on websites, portals and mobile apps."

***When SEC/FINRA Come Knocking, Don't Blame Your Technology*, FA Magazine (Aug. 31, 2021)**: "Registered investment advisors and broker-dealers have spent untold millions on technology to meet new investment advice regulations, yet some firms are still running afoul of regulators.[] The problem is almost always lack of implementation, said Mark Alcaide, senior managing director of consulting at Foreside, a regulatory and compliance solutions firm that serves over 2,400 financial services clients. A firm can pay for the best systems and the most evolved technology and reports, but if managers don't use and act on the information at their fingerprints, bad things happen and regulators tend to find out."

***Compelling a Virtual Arbitration Over Objection*, law.com (Sep. 4, 2021)**: "Rarely pre-pandemic would parties have contemplated engaging in a virtual arbitration. The question arises whether an arbitrator can order a virtual arbitration to take place over a party's objection, whether it is for the best or worst of reasons. The answer lies in the rules of the governing arbitration forum."
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DID YOU KNOW?

JAMS ADMINISTERS INTERNATIONAL DISPUTES. Our readers know that AAA, FINRA, and other ADR institutions administer international arbitrations, but did you know that JAMS does as well? Visit https://www.jamsadr.com/global/ to learn more.
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