# SECURITIES ARBITRATION ALERT 2021-37 (10/7/21)

*George H. Friedman, Editor-in-Chief*

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- ***Sorkin v. Cetera Advisor Networks, LLC,* FINRA ID No. 20-03256 (Orlando, FL, Aug. 31, 2021)**
- ***Mills v. Vanguard Marketing Corporation,* FINRA ID No. 21-01045 (Boca Raton, FL, Sep. 2, 2021)**

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- ***SEC Charges World's Largest Advertising Group with FCPA Violations,* www.sec.gov (Sep. 24, 2021)**
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- ***Ex-Ameriprise FA's Arbitration Case Heads to the Supreme Court,* Financial Advisor IQ (Sep. 29, 2021)**
- ***Florida Broker to Pay Ex-wife $2.6 Million in Finra Arbitration Claim*, InvestmentNews (Sep. 29, 2021)**
- ***Piaba Pins Hope for Unpaid Arbitration Pool on SEC*, Financial Advisor IQ (Sep. 30, 2021)**

**DID YOU KNOW?**

- **"Arbitration Rock" for Many Years Defined the Border of Brooklyn and Queens**

**WE ARE BACK: SO MUCH HAPPENING!** *We are back after a quarterly break, and the news, court decisions and Awards have been piling up in our absence. Hence, this heftier than usual issue. We kick off this quarter with news of a new PIABA report on unpaid arbitration Awards. Spoiler alert: PIABA is concerned about an increase in*

*unpaid Awards and offers concrete suggestions for addressing the problem. We also report that, while industry arbitration case filings continue to lag, customer claims are actually up through August. We also have our usual collection of Short Briefs, Quick Takes, and Articles of Interest. In other words, a jam-packed new issue of the* Alert*!*

## *SQUIBS: IN-DEPTH ANALYSIS*

### THIRD PIABA REPORT ON UNPAID AWARDS: "IT'S GETTING WORSE"

***PIABA's third report in over five years says the problem of unpaid FINRA awards is getting worse, not better.*** The Report, *FINRA Arbitration's Persistent Unpaid Award Problem*, was announced in a **September 29** Press Release, *PIABA - 30% of 2020 FINRA Arbitration Awards Went Unpaid*, and via a 24-minute Zoom event. The headlines? "The percentage of unpaid customer awards in FINRA arbitration cases increased to nearly 30% and the percentage of unpaid award dollars rose to 24%, according to the Public Investors Advocate Bar Association's (PIABA) new report on unpaid FINRA arbitration awards. PIABA's first report on the topic was published in 2016, and the new update illustrates how the lack of improvement on this critical issue for American investors reflects FINRA's refusal to solve the problem…. In short, the problem is not improving since PIABA's initial 2016 Report."

**Key Findings**

The Release lists several key findings, presented below *verbatim*:

• Due to the COVID-related shutdown of in-person hearings, fewer FINRA arbitration cases were heard in 2020, but the percentage of unpaid customer awards and unpaid award dollars both increased, despite record brokerage firm profits.
• 29.7% of customer awards were unpaid in 2020, up from 26.9% in 2019.
• 24.2% of all dollars awarded in 2020 were unpaid, up from 19.8% in 2019.
• Neither FINRA nor state and federal regulators have directly addressed the lack of meaningful recovery protection, and the problem of unpaid arbitration awards is growing.
• The 2020 figures are consistent with FINRA's previously reported statistics, ranging from 12% of dollars unpaid in 2015 to a high of 34% in 2018, and 22% of awards unpaid in 2015 to a high of 34% in 2017.

**Proposed Solutions**

The Report offers proposed investor protection remedies (again, repeated *verbatim*):

• **Legislative Remedy:** FINRA can solve the problem directly by instituting a national investor recovery pool, but it has steadfastly refused to do so unless ordered by the SEC or Congress. If FINRA remains resolute in its refusal to institute an investor recovery pool absent an instruction from Congress or the SEC, then PIABA asks Congress to intervene to address the problem and order FINRA to do its job and protect investors.
• **SEC Dodd-Frank Remedy**: If Congress cannot or will not act, and FINRA maintains course and refuses to remedy the problem on its own, the SEC has the authority to step in under Section 921 of the Dodd-Frank Act. The SEC could require that, as a condition of including a mandatory arbitration clause in its customer agreements, firms participate in an investor recovery pool.

• **The National Investor Recovery Pool**: The pool would provide recovery funds for investors who pursue a claim all the way through a final award and have exhausted reasonable efforts to collect the award from the respondent. There are a variety of potential sources for such funding: (1) FINRA fine monies assessed against member firms and associated persons violating FINRA rules; (2) assessments on FINRA members; and (3) fees levied on the investing public.

**PIABA: The Money is There**

PIABA asserts that there is more than enough money to support these proposed solutions: "FINRA reported that it issued $57 million in fines in 2020, more than enough money to address the unpaid awards that year. Alternatively, if FINRA were to assess fees, the cost in 2019 would have been $6,350.11 per firm or $107.26 per registered representative. Since neither the SEC nor FINRA have established an insurance requirement, the fees required to fund the pool would be far less than insurance premiums. And while PIABA does not suggest that assessing a direct charge to investors is the best choice, a 2019 pool would have required only 14 cents per investor for real, meaningful recovery protection."

**FINRA Responds**

We reached out to FINRA for a reaction. A spokesperson said: "FINRA remains focused on reducing the amount of unpaid awards, as described in our *2018 Discussion Paper*. FINRA is committed to reducing the number of arbitration awards that go unpaid to customers, which typically result from respondents declaring bankruptcy or going out of business. Since our 2018 report, we have continued to take measures designed to reduce the risks to investors from brokers and firms who may be less likely to pay awards. FINRA appreciates that PIABA recognizes that customer recovery can be a challenge across the financial services industry and dispute resolution forums, and we remain committed to working with all stakeholders on this important issue."

**NASAA Weighs In**

Just as we were putting this *Alert* to bed, NASAA issued an **October 5** Press Release, *NASAA Seeks Public Comment on Proposed Model Rules to Combat Unpaid Arbitration Awards and Fines*. We will prepare an analysis in the next *Alert*, but these are the headlines (*ed: repeated* verbatim): "Specifically, the Model Rules would add the following provisions to the existing rules on dishonest or unethical business practices by broker-dealers, agents, investment advisers and investment-adviser representatives:

- Failing to satisfy an arbitration award resulting from a client or customer-initiated arbitration,
- Attempting to avoid payment of any client or customer-initiated arbitration; or,
- Failing to satisfy the terms of any order resulting from a regulatory action taken against the registrant.

Comments are due **November 4.**

*(ed: We're reasonably certain this is not the last we've heard about this issue!)*

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**THIRD CIRCUIT DISCUSSES SEQUENCE OF STEPS TO BE TAKEN TO DETERMINE FAA APPLICABILITY**. ***The Court looks to precedent in determining the sequence of steps to be taken by the District Court on remand. The* Guidotti *test is a three-part test that requires the District Court to resolve a motion to compel arbitration "under a rule 12(b)(6) standard without discovery's delay" when the facts in the complaint are "sufficient for a decision as a matter of law."*** At issue in *Harper v. Amazon.com Services, Inc.*, No. 20-2614 (3rd Cir. Sep. 8, 2021), was an appeal of a District Court discovery order to determine whether Defendant ("Harper") fell within the Federal Arbitration Act's ("FAA") § 1 exception ("nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce"). Harper began working for the Appellant ("Amazon") under the "Amazon Flex" program. He signed up to deliver packages for Amazon and any affiliated entity through an online application process that required Harper to click on a button stating, "I AGREE AND ACCEPT." The button appeared after the Terms of Service ("TOS") and included a predispute arbitration agreement ("PDAA stating that: 1) Washington state law applied; and 2) Harper could opt out of the process within 14 days. The PDAA also stated that the FAA and any applicable federal law would govern "any dispute that may arise between the parties," while Washington state law would control the rest of the TOS.

**District Court: Discovery Needed to Ascertain FAA Section 1 Issue**

Harper filed a complaint with the New Jersey Superior Court and Amazon moved the case to federal court on the basis of diversity jurisdiction. Harper then filed a putative class action in federal court on behalf of other similarly situated Amazon Flex drivers in the State, alleging that Amazon misclassified the Amazon Flex drivers as independent contractors. Harper asserted that the Amazon Flex drivers were employees of Amazon and thus Amazon had violated New Jersey labor laws by failing to pay overtime, minimum wage, and customer tips. When Amazon moved to enforce the arbitration provision under the FAA, Harper argued that the Amazon Flex drivers, "who make some deliveries across state lines," are exempt under § 1 of the FAA. Amazon disagreed but also argued that the dispute was arbitrable under Washington state law as stated in the TOS. The District Court disagreed with Amazon and ordered discovery to determine whether "Harper falls within the § 1 exception to the FAA[.]" Amazon timely appealed the District Court order.

**Third Circuit: FAA Section 1 Discussion**

The Court agreed that the § 1 exception under the FAA may in fact apply to Harper. The Court states that the § 1 exception is to be construed narrowly as to a class of workers, rather than a particular worker. The Court also stresses that it must look to the ordinary meaning of the § 1 exception and to resolve the question of law "without facts outside the well pleaded complaint." The Court is clear, however, that if state law grounds exist that would enforce arbitration even if the FAA does not apply, the Court must turn to the threshold question under the test established in *Guidotti v. Legal Helpers Debt Resolution, L.L.C.*, 716 F.3d 764 (3d Cir. 2013).

**Third Circuit: FAA Section 2 Discussion**
The Court then discusses possible FAA § 2 preemption and finds that State law enforcing arbitration does not create conflict with the FAA. Such a conflict exists only if the "ordinary meaning" of the law itself conflicts. After holding that that there is no conflict here, the Court states: "if federal law does not govern the arbitrability of their contract, *some* law must" (emphasis in original).

**Sequence to Determine Applicable Law**
The Court looks to *Singh v. Uber Techs., Inc.*, 939 F.3d 210, 227 (3d Cir. 2019), where the *Guidotti* test was applied. There are three parts to this test. First, utilizing statutory interpretation, the Court analyzes the facts of the complaint to consider whether: "the agreement applies to a class of transportation workers who 'engaged directly in commerce' or 'work so closely related thereto as to be in practical effect part of it.'" If the worker does not meet this definition, then the § 1 exception does not apply. If the answer is "murky," then the Court assumes that the § 1 exception applies and considers whether the agreement requires any arbitration under applicable state law. If the arbitration clause is unenforceable under state law, then the Court moves to the final step of the *Guidotti* test. Third, the Court returns to federal law and determines whether the § 1 exception applies, utilizing limited and restricted discovery of: "whether the class of workers primarily engage in interstate or foreign commerce."

**Concurrence and Dissent**
Judge **Matey** concurred with the majority but focused on the language of the § 1 exception in his concurrence. While he believed that the FAA itself may require a different approach to its framework, he stated "that change must come from Congress."
Judge **Schwartz** disagreed with the majority and believed that State law was not applicable to the arbitration provision of the TOS. She based her belief on three reasons: 1) the TOS stated that the FAA will govern the arbitration provision; 2) the Court should determine whether *§* 1 exception applies before turning to state law; and 3) other Circuit Courts with similar cases first considered whether the FAA applied before "turning to state law."
*(ed: *This Squib was authored by Theodore Ryan, a recent graduate of St. John's University School of Law.)*
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## *SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW*

**FINRA DRS POSTS STATS THROUGH AUGUST: CUSTOMER ARBITRATION CLAIMS ARE UP A BIT, WHILE INDUSTRY ARBITRATIONS CONTINUE TO FALL. AND MEDIATION FILINGS ARE DEFINITELY STAGING A COMEBACK.** FINRA Dispute Resolution Services ("DRS") posted case statistics through August, with the overall arbitration case filing trends essentially unchanged from prior months and a noticeable change in mediation stats. In brief, the headlines are: 1) overall arbitration filings through **August** – 2,068 cases – are down 22%, about the same as in **July**; 2) for the third month in a row, cumulative customer claims remain essentially unchanged from **2020** (plus 1%); 3) industry disputes remain way down at

minus 46%; 4) mediation cases are surging; and 5) for the twelfth month in a row, pending cases declined. Overall arbitration turnaround times were 14.4 months, with hearing cases now taking 16.4 months (the latter figure a full month higher than in July). There were 330 mediation cases in agreement, a significant 17% *increase* over 2020 (and a major improvement from July's minus 2%). The mediation settlement rate remains high at 85% (it had been 87% in July). There are now 8,393 DRS arbitrators, 3,996 public and 4,397 non-public. Pending cases stand at 4,441, a decline of 107 from July. The last twelve months have each experienced declines in pending cases, reflecting a 974 case reduction from last year's high water mark of 5,415 open cases in **August 2020**. This now leaves a cumulative *decrease* of 340 pending cases since the onset of the COVID-19 pandemic in **March 2020.**
*(ed: *Again, kudos to FINRA DRS for eliminating the backlog. **Wonder what's fueling the surge in mediations?)*
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**FINRA BOARD MET VIRTUALLY IN LATE SEPTEMBER. AS EXPECTED, NO DR ITEMS WERE ON THE AGENDA.** As reported in SAA 2021-36 (Sep. 23), FINRA's Board of Governors met virtually **September 23 – 24**. The published Agenda did not have any dispute resolution-related items, and the post-meeting press release and video report confirms this. Says the Authority's Website: "FINRA's Board of Governors met on September 23 and 24, and approved a proposal to establish a modest fee for individuals who choose to complete continuing education (CE) to remain qualified for up to five years following the termination of the individual's registration. The Board also approved two rulemaking items and reaffirmed FINRA's *Financial Guiding Principles*."
*(ed: *The next meeting on the schedule is December 1 – 2. **As we've said before, we imagine these meetings will continue to be virtual until conditions permit the Authority to hold them in-person.)*
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**NEW NASAA PRESIDENT: EXPUNGEMENT REFORM NEEDED.** Incoming NASAA President **Melanie Senter Lubin** said during her address at the organization's annual meeting in Chicago that further reform is needed in the expungement process. Speaking **September 21,** the Maryland Securities Commissioner said: "Those of you who know me know of my longstanding concern with expungement.[] You'll also know that it is has always been NASAA's position that expungement is an extraordinary remedy that should only be allowed in very limited circumstances. Despite most everyone's best intentions, the current system of arbitrator-awarded expungements does not operate within these parameters. I look forward to continuing to work this year with the SEC and FINRA on changes to the expungement process to ensure that the remedy is obtained only under appropriate circumstances. Tightening the standards and procedures surrounding expungements is critical to stop the ongoing threat to the integrity of recordkeeping and to critical information needed by regulators making licensing decisions, firms making hiring decisions, and investors deciding whom to trust with their financial wellbeing."

*(ed: We reported in SAA 2021-22 (Jun. 3) that FINRA on May 28 issued a Press Release,* Statement on Temporary Withdrawal of Specialized Arbitrator Roster Rule Filing, *announcing: "Following consultations with the SEC staff, we temporarily withdrew from SEC consideration our rule filing [SR-FINRA-2020-030] establishing specialized arbitration panels for expungement requests so that we can further consider whether modifications to the filing are appropriate.")*
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**FOLLOWING UP ON WITHDRAWAL OF *SERVOTRONICS CERTIORARI* PETITION: DISMISSAL IS OFFICIAL**. We reported in SAA 2021-34 (Sep. 9) that, just a month out from the scheduled October 5 oral argument, Servotronics had notified the Supreme Court that it was dismissing its Petition for Certiorari in *Servotronics, Inc. v. Rolls-Royce PLC and the Boeing Company*, No. 20-794. Specifically, 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 was given, but we noted that the underlying arbitration in London was concluded during the summer. The SCOTUS docket had 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." We later reported in SAA 2021-36 (Sep. 23) that we had checked the SCOTUS docket and as of press time the dismissal motion had not been posted. We also advised that Petitioner's counsel informed us that the motion would be filed that week. We can now confirm that the parties on **September 22** filed a Joint Stipulation to Dismiss, stating: "Pursuant to Rule 46.1 of the Rules of this Court, all parties stipulate that this case be dismissed. No fees are due to the Clerk, and each party will bear its own costs. The parties accordingly respectfully request that the Clerk enter an order of dismissal pursuant to Rule 46.1."
*(ed: As reported in #36, the remaining arbitration-centric case on the Court's docket,* Badgerow v. Walters, *No. 20-1143, has been set for oral argument on November 2, according to the November 2021 calendar.)*
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**UBER SEEKS TO TAKE ON CALIFORNIA'S PAGA VIA *CERT.* PETITION.** We have reported many times on *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal.4th 348, 327 P.3d 129 (Calif. 2014), *cert. den.*, 135 S. Ct. 1155 (2015), where a divided 4-3 California Supreme Court – complete with partial concurrences and dissents – held that an employee could pursue claims against his employer under the California Private Attorneys General Act ("PAGA"), despite the existence of an arbitration agreement waiving such claims (see, for example, SAA 2015-01 and SAAs 2014-41 & -24)). Although SCOTUS declined to review the original holding in *Iskanian,* Uber is taking another run at the issue via a **September 21** Petition for *Certiorari* seeking review of *Gregg v. Uber Technologies, Inc.*, No. B302925 (Cal. Ct. App. 2 Apr. 21, 2021), *petition for review denied*, No. S269000 (Cal. June 30, 2021). The issue presented is: "Whether agreements calling for individual arbitration are enforceable under the Federal Arbitration Act with respect to claims asserted under the California Labor Code Private

Attorneys General Act." The Petition relies heavily on intervening SCOTUS rulings, including *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018), holding that class or collective action waivers were enforceable under the Federal Arbitration Act.
*(ed: *The SCOTUS case is* Uber Technologies, Inc. v. Gregg, *No. 21-453. **Stating the obvious, the Court's composition has changed quite a bit since SCOTUS eschewed review of the original* Iskanian *holding in 2015.)*
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***CERTIORARI* DENIED IN DELAWARE CASE HOLDING NO SECOND BITE AT THE ARBITRATION APPLE VIA COLLATERAL ARBITRATION ATTACKING AWARD**. SCOTUS got back to work the first Monday in October, and among its immediate acts was to deny *Certiorari* in *Gulf Energy, LLC v Eni USA Gas Marketing, LLC*, No. 22, 2020 (Del. Nov. 17, 2020), a case we covered in SAA 2020-44 (Nov. 25). To review, at issue in the case below was an Award of several hundred million dollars. Said the Majority: "We agree with the Court of Chancery that it had jurisdiction to enjoin a collateral attack on a prior arbitration award. The parties agreed that the Federal Arbitration Act ("FAA") governed their dispute. Under the FAA, the courts have the exclusive power to review and enforce arbitration awards. A party cannot escape the FAA's time-limited and exclusive review procedure by filing a follow-on arbitration attacking the outcome of the prior arbitration." The Court, however, reversed that part of the Chancery Court decision that allowed some of the claims to proceed in the second arbitration, finding that all issues arising out of the conduct of the first case should have been raised as part of an FAA-sanctioned challenge to the Award. Justice **Vaughn** dissented: "The parties agreed to arbitrate 'any dispute,' and 'dispute' is defined to include 'any dispute over arbitrability or jurisdiction.'" As reported in SAA 2021-22 (Jun. 10), the **April 15** *Certiorari* Petition in *Eni USA Gas Marketing LLC v. Gulf LNG Energy, LLC*, No. 20-1462, had identified this question for review: "Whether the Federal Arbitration Act permits a court to refuse to enforce an arbitration agreement delegating all questions, including questions of arbitrability, to an arbitrator where a party contends that the claim sought to be arbitrated represents a 'collateral attack' on a prior arbitration award."
*(ed: *The case is referenced on page 8 of the October 4 Order List. **Our editorial comment in # 22 was spot on: "This issue is a bit one-off, so we don't see SCOTUS having much interest in reviewing it.")*
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**CALIFORNIA AB-51 UPDATE: EXTENSION GRANTED ON TIME TO MOVE FOR *EN BANC* REHEARING.** We reported in SAA 2021-36 (Sep. 23) on *Chamber of Commerce of the United States v. Bonta*, No. 20-15291 (9th Cir. Sep. 15, 2021), where a split Ninth Circuit ruled on the validity of California AB-51 – a law that would restrict predispute arbitration clauses ("PDAA") in employment relationships. The divided Court held that the mandatory PDAA use preclusions in the new law withstand Federal Arbitration Act preemption scrutiny, but the criminal and civil penalties for mandatory PDAA use do not. Our prescient editorial note in #36 was: "We continue to see this one as destined for SCOTUS, with perhaps a petition for *en banc* review along the way." The

"perhaps" prediction was validated on **September 22** when plaintiffs-appellees filed a motion for a 21-day extension on the time to file a petition for rehearing *en banc*. The basis? *Chamber of Commerce* is: "… a decision in which the dissent identified a circuit split on a rule of national application, a basis for rehearing *en banc* under Ninth Circuit Rule 35-1." The Court granted the unopposed motion **September 28**.
*(ed: *The new due date is October 20. **As we understand it, the injunction against enforcement of AB-51 remains in effect at least until the motion is decided by the Court. ***Email Help@SecArbAlert.com for a copy.)*
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## *QUICK TAKES: CASES AND AWARDS WORTH READING*

***McCoy v. Walmart, Inc*., No. 20-2181(8th Cir. Sep. 17, 2021)**: "Despite actively litigating this case in federal court for more than a year, Walmart claims that the dispute really belongs in arbitration. The question is whether the company waived its right to arbitrate. Like the district court, we conclude that it did.... Arbitration is a waivable contractual right. It can be waived in a variety of circumstances, including by 'substantially invok[ing] the litigation machinery' rather than promptly seeking arbitration. Specifically, when a party '(1) kn[ows] of an existing right to arbitration; (2) act[s] inconsistently with that right; and (3) prejudice[s] the other party [with its] inconsistent acts,' waiver occurs. As we recently explained, when the relevant conduct happens in court, waiver is for the judge, rather than an arbitrator, to decide" (citations and footnote omitted; brackets in original).

***Hodges v. Comcast Cable Communications, LLC*, No. 19-16483 (9th Cir. Sep. 10, 2021)**: "We conclude that the district court misconstrued what counts as 'public injunctive relief' for purposes of the *McGill* rule and that it therefore erred in concluding that the complaint here sought such relief. Because Hodges' complaint did not seek such relief, the *McGill* rule is not implicated, and the arbitration agreement should have been enforced. We therefore reverse the district court's denial of Comcast's motion to compel."

***DotConnectAfrica Trust v. Internet Corporation for Assigned Names and Numbers*, No. B302739 (Calif. Ct. App. 2 Sep. 16, 2021)**: "We affirm the trial court's application of judicial estoppel in this case about internet names.... DotConnect appealed to ICANN's internal dispute resolution program, which resulted in a two-year arbitration.[] DotConnect told the arbitrators they should grant it seven procedural advantages during the arbitration—advantages like interim relief and an independent standard of review. DotConnect's argument to the arbitrators was, when it applied to ICANN for .africa, DotConnect had waived its right to sue ICANN in court, and this waiver meant it was only fair that DotConnect enjoy these procedural advantages during the arbitration. The arbitrators accepted DotConnect's arguments and gave DotConnect the advantages it sought.... DotConnect declined to seek arbitral review of this new ICANN decision. Rather it sued ICANN in Los Angeles Superior Court. The trial court held a bench trial and ruled against DotConnect on grounds of judicial estoppel. DotConnect appealed. The

respondents are ICANN and ZA. We affirm. DotConnect has estopped itself from suing in court by convincing ICANN's arbitrators DotConnect could not sue in court." (*ed: An* Alert *h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this decision.*)

***Sorkin v. Cetera Advisor Networks, LLC*, FINRA ID No. 20-03256 (Orlando, FL, Aug. 31, 2021)**: An All-Public Panel explains why it has decided to grant Respondent broker-dealer's Prehearing Motion to Dismiss without prejudice pursuant to FINRA Rule 12206 (Six-year Eligibility Rule): "Claimants filed the Statement of Claim on September 15, 2020. The securities at issue in this case were purchased in April 2010, November 2010, January 2012, January 2014, and May 2014. On July 16, 2014, Claimants' trustees signed an account opening agreement with a different brokerage firm and on August 26, 2014, signed account transfer instructions for the securities at issue to move these securities to the new brokerage firm, which dates were more than six years prior to the filing of the Statement of Claim. The acts or omissions alleged as the basis of the claim therefore occurred more than six years prior to the filing of the Statement of Claim, and, under FINRA Rule 12206(a), the claim is not eligible for submission to arbitration." *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Mills v. Vanguard Marketing Corporation*, FINRA ID No. 21-01045 (Boca Raton, FL, Sep. 2, 2021)**: An Arbitrator explains why he has decided to deny a customer's claim, finding that Respondent broker-dealer did not breach any duty to said customer. The case involved the claimant's investment in Moderna stock in his IRA: "The evidence, and in particular the recording of the subject call, are consistent with Respondent's position. While it is unfortunate that Claimant did not either complete the transaction he wanted, or ask Respondent to do so, that was due to no fault of Respondent. Respondent's employee who took Claimant's call was clear and professional. Claimant did not request that Respondent's employee do anything that he didn't do, even when asked if there was anything else he could do for him. Respondent's employee did not represent that he had confirmed Claimant had completed the order. There is no evidence of breach of any duty by Respondent." *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*
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## *ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT*

**C. Mark Baker and Denton Nichols, *Recovering Costs of Enforcement and Interest*, Norton Rose Fulbright Blog (June 2021)**: "In any dispute resolution process, the war does not necessarily end upon receipt of an award or judgment. Where a losing party refuses to honour [sic] the award, the winning party will need to go through the legal process of recognition and enforcement of the award in all jurisdictions where the losing party has assets. In doing so, the winning party can incur not-insignificant costs. An important question for parties seeking enforcement is whether a court will grant a winning party their lawyer's fees, interest on the award and costs of court. In the United States, the answer may well be 'yes' on all three counts, as illustrated in the recent case of *Gulf Haulage Heavy Lift Co v. Swanberg International*."

***California's Attack on Arbitration Will Survive in Part, According to the Ninth Circuit*, Paul Hastings LLP Blog (Sep. 16, 2021**): "On September 15, 2021, the Ninth Circuit issued its long-awaited decision in *Chamber of Commerce v. Bonta*, which revives, in part, controversial legislation that sought to prohibit pre-dispute employment arbitration agreements in California.[] AB 51, signed into law by Governor Newsom on October 10, 2019, imposed several restrictions on the formation of employer/employee arbitration agreements, including the possibility of civil or criminal penalties for employers. The Eastern District of California previously issued a preliminary injunction prohibiting the enforcement of AB 51 against arbitration agreements covered by the Federal Arbitration Act (the "FAA"), finding that AB 51 likely 'is preempted by the FAA because it discriminates against arbitration and interferes with the FAA's objectives.' [] The State appealed that ruling to the Ninth Circuit, which has now reversed in part the District Court's injunction. The 2-to-1 decision revives some of AB 51's restraints on pre-dispute employment arbitration agreements. But the panel's decision probably is not the final word; the Chamber of Commerce is likely to seek review by the full Ninth Circuit, and if unsuccessful, by the U.S. Supreme Court" (footnotes omitted).

***SEC Charges World's Largest Advertising Group with FCPA Violations*, www.sec.gov (Sep. 24, 2021)**: "The Securities and Exchange Commission today announced that London-based WPP plc, the world's largest advertising group, has agreed to pay more than $19 million to resolve charges that it violated the anti-bribery, books and records, and internal accounting controls provisions of the Foreign Corrupt Practices Act (FCPA)."

***UBS Claws Back More Than $1 Million in Notes Owed by Two Former Brokers*, AdvisorHub (Sep. 24, 2021)**: "UBS Wealth Management USA this week was successful in clawing back from two of its former brokers more than $1 million owed in promissory notes.[] In the larger of the awards, a Bank of America private banker who had left UBS in September 2016 has been ordered by a panel of Financial Industry Regulatory Authority arbitrators to pay back more than half a million dollars owed in promissory notes, according to an award finalized Tuesday."

***Florida Broker to Pay Ex-wife $2.6 Million in Finra Arbitration Claim*, InvestmentNews (Sep. 29, 2021)**: "A former registered rep on Monday was ordered to pay $2.6 million in damages to his ex-wife in an arbitration claim that centered on margin, day trading and shorting stock. The broker … denied the allegations listed in the Award, which was issued by a panel under the auspices of the Financial Industry Regulatory Authority Inc. The claimant … filed the claim in November 2018, named J.P. Morgan Securities and Deutsche Bank Securities as claimants, along with her ex-husband, and requested damages of $5.1 million."

***Ex-Ameriprise FA's Arbitration Case Heads to the Supreme Court*, Financial Advisor IQ (Sep. 29, 2021)**: "A former Ameriprise financial advisor's case challenging the outcome of a Financial Industry Regulatory Authority arbitration is now heading to the highest court in the country, which could end up setting a precedent for other challenges

to arbitration awards. Denise Badgerow joined the financial services industry in 2014, registering with Ameriprise Financial Services, according to her BrokerCheck record. As part of her employment agreement with Ameriprise unit REJ Properties, Badgerow signed an arbitration agreement to take any employment dispute with the firm or any of its affiliates to arbitration, writes The CPR Institute, a conflict prevention and resolutions nonprofit."

***Piaba Pins Hope for Unpaid Arbitration Pool on SEC*, Financial Advisor IQ (Sep. 30, 2021)**: "The Public Investors Advocate Bar Association is again calling for a national investor recovery pool to cover unpaid Financial Industry Regulatory Authority arbitration awards. The group says the Securities and Exchange Commission may be the only hope for getting this done.[] Piaba says 24% of the money awarded by arbitrators in 2020 remains unpaid. That's equal to $5 million from 19 awards unpaid out of a total of $21 million from 64 awards, Piaba data shows." (*ed: See our coverage elsewhere in this* Alert.)
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## *DID YOU KNOW?*

**"ARBITRATION ROCK" FOR MANY YEARS DEFINED THE BORDER OF BROOKLYN AND QUEENS.** Did you know that arbitration was used to settle a colonial-era border dispute between Queens and Brooklyn, and that a boulder known as "Arbitration Rock" was used to mark the border? "Arbitration Rock, as it is called, helped settle decades of border disputes during the colonial period between the towns of Bushwick and Newtown (Ridgewood's birth name) and, subsequently, Kings and Queens counties. [] All parties involved in the border dispute formed the boundary in January 1769 based on the rock's location about 300 feet northwest of the Onderdonk House, where warehouses north of Flushing Avenue now stand. For decades thereafter, the border based on Arbitration Rock defined many property disputes among nearby owners, but the boulder's topographical importance was diminished in 1898 after Brooklyn and Queens became part of New York City." *(ed: Alas, "Arbitration Rock" was relocated in 2001, but still exists – albeit no longer as a boundary marker).*
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## *ERRATA*

**ERRATA:** Our reporting in SAA 2021-32 (Aug. 26) contained an incorrect case citation and court description. We regret the error, and have rewritten the Short Brief below:

> **NY APPELLATE 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. Its 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 Appellate Court, resulting in a partial vacatur in *In re Lerner v. Credit Suisse Securities (USA) LLC*, No. 2020-03381 & 2020-05002N (N.Y. App. Div., 1st Dept. Apr.29, 2021). Reversing two Trial Court decisions, the Appellate Division holds: “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.”)*

Attorney **Barry R. Lax** of Lax & Neville LLP advises the *Alert* that the firm is seeking leave to appeal to the Court of Appeals (New York’s highest court).

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Send any messages or inquiries to: George@SecArbAlert.com

***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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