SECURITIES ARBITRATION ALERT 2021-42 (11/11/21)

George H. Friedman, Editor-in-Chief

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ARTICLES OF INTEREST:

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- **Arbitration Goes Way Back II**

LETTER *FROM* THE EDITOR:

- **Sorry About that Chief, But it *Does* Matter Who Appointed the Judge**

AND NOW, A WORD FROM OUR SPONSOR: *We report in this issue on* Martinez-Gonzalez v. Elkhorn Packing Co., LLC, *No. 19-17311 (9th Cir. Nov. 3, 2021), yet another split decision from the Ninth Circuit that to us is more proof that this dependably anti-mandatory consumer/employment arbitration Court has been transformed by several pro-arbitration Trump appointees. We opine on the subject in a Letter From the Editor,* "Sorry About that Chief, But it *Does* Matter Who Appointed the Judge." *We invite those with contrary (or supportive) views to email us at George@SecArbAlert.com. Also in this issue is the promised interview with new PIABA President Mike Edmiston. Spoiler alert: investment advisers and unpaid awards are high on the priorities list.*

SQUIBS: IN-DEPTH ANALYSIS

A FEW MINUTES WITH NEW PIABA PRESIDENT MIKE EDMISTON. ***We reported in SAA 2021-41 (Nov. 4) that the Public Investors Advocate Bar Association ("PIABA") announced in an October 28 Press Release that Michael Edmiston of Jonathan W. Evans & Associates was elected President at its just-concluded annual meeting. As promised, we interviewed Mr. Edmiston about his priorities for this upcoming year.*** The *Alert* congratulates Mr. Edmiston and thanks him for agreeing to answer our questions. We wish him nothing but the best as we head into what promises to be a challenging year on several fronts.

Q: What are PIABA's top three priorities for the coming year?

A: First, we will focus on unpaid arbitration awards both at FINRA and in the Registered Investment Advisor ("RIA") space. Investors who are harmed by the misconduct of brokers or RIAs should have a meaningful opportunity to recover their losses.

Second, we will continue to work to understand the arbitration issues in the RIA space. In addition to the unpaid awards issue, we will focus on arbitrator disclosures, forum rules, and fees, and disclosure of awards. We plan to work with both the SEC and NASAA to resolve the problems.

Finally, we plan to work with the SEC to improve the Form CRS disclosures. For example, the forms should include information material to investors including information about the financial responsibility of firms and what dispute resolution mechanism may apply.

Q: Several bills have been introduced in Congress to curb mandatory predispute arbitration agreement use in the consumer and employment areas – including financial services. Do you think any of these bills have a chance at enactment?

A: The use of forced arbitration clauses in the consumer, employment, and financial services areas is inappropriate. Forced arbitration is risk management to keep aberrant behavior hidden from public scrutiny, prevent vindication of civil rights, and reduce the size of any damages awarded. Forced arbitration stunts the development of case law, effectively freezing the law at the point where forced arbitration was implemented. As the public becomes more aware of the unfairness forced arbitration works on individuals and society, the more likely a bill will pass. Given the absence of a majority in the Senate, it seems unlikely that any of the bills will pass. However, we will continue to work with legislators to ensure they understand the issues faced by investors when subject to mandatory arbitration clauses.

Q: In your October 28 formal statement on assuming the PIABA presidency, you say: "Arbitration has its place in the dispute resolution continuum. But for investor-RIA disputes, arbitration needs to be at the election and option of the investor, not the RIA." Care to elaborate?

A: Arbitration is a proven dispute resolution tool. When used properly between consenting, sophisticated parties, it helps resolve disputes, preserve relationships and returns the parties to business. When a sophisticated party with greater resources perverts arbitration into a shield from disputes or uses it to hide misconduct, it hurts our society.

RIAs are fiduciaries to their clients. They are obligated to put their clients' interests first. It makes no sense that an RIA would take away a client's constitutional right to a jury trial or use the cost of arbitration to stop a client from bringing a dispute and still believe it has put its clients' interests first. If an RIA consents to dispute resolution in the forum of the client's choice, the RIA is doing what is best for the client. If a client, with informed consent, chooses arbitration after the dispute arises, they should be able to proceed in that forum and should not need to receive the consent of the firm.

Q: The COVID-19 pandemic caused lots of changes in the ADR world, including at FINRA. Besides forever getting rid of the middle seat in coach, what's the one change you'd like to see continue?

A: FINRA has developed processes for proceeding with hearings online and continues to improve the process. For those investors who want their case to proceed virtually, I hope that FINRA provides that opportunity, while making every effort to fully resume in-person hearings. Additionally, I appreciate the flexibility that virtual platforms provide for mediations. I expect to see more cases appropriately proceeding with virtual mediations in the future.

Q: Rumor has it that at one point in your career, you worked at NASD/FINRA. If so, can you tell us more about that?

A: The rumor is true. While at Pepperdine University School of Law in 1997, I interned at the NASD Office of Dispute Resolution "NASD-ODR" in Los Angeles. **Rick Berry**

was my boss. From the start, Rick had me working with parties, calling counsel, sitting in on hearings, and drafting arbitration awards. It combined my finance, legal, and ADR education and experience and gave me the opportunity to meet all the players in the securities arbitration community. I will always be grateful for that initial experience.

After the bar exam, I returned to NASD-ODR. Rick was a major influence on my early career. Learning from him how to identify interests and thoughtfully work with parties, counsel, arbitrators, staff, administrators, and others to address and solve problems have been invaluable skills.

You [**George Friedman**] also influenced me early in my career. Shortly after you came to the NASD in 1999, you, Rick, and I met the morning of an arbitrator training to discuss arbitrator recruitment and training in Southern California. I prepared a presentation about our office's efforts, and was primed to give you what I anticipated would be a fabulous presentation. When the time came, I could not find the papers. You remained graciously patient while I fumbled through my briefcase. Preparing for any meeting, hearing, or trial, I still recall that humbling morning and organize accordingly. Not too long ago, the shoe was on the other foot with a younger attorney, and I remembered your kindness and smiled while waiting.

The experiences and relationships I've made along the way give me a unique perspective on securities arbitration which I use to serve our clients and PIABA. It is almost 25 years ago, to the day, I met Rick, and I'm excited to be in a place where our shared experiences will allow us to collaborate and find creative solutions to further improve securities arbitration.

Q: Is there anything else you'd like to share with our readers?

A: FINRA has steadily developed its forum into the premier securities arbitration provider and continues to make improvements. Every forum has its flaws, but in its current form and without forced arbitration clauses, I would be comfortable advising clients to consider the FINRA forum. If FINRA leads from the front and voluntarily fixes the unpaid awards problem in the broker-dealer space, I think securities arbitration would blossom from where it is today.
*(ed: *We're happy to see the RIA issues as front and center, something we've been advocating for a while. **Again, our thanks to Mr. Edmiston for sharing his time and views with the* Alert.*)*
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BADGEROW* ORAL ARGUMENT AT SCOTUS: A FEW OF OUR FAVORITE ANALYSES.** ***We covered briefly in last week's* Alert *the oral argument at SCOTUS in* Badgerow, *and promised a full analysis this week. Upon further reflection, we instead decide to pass along references to some excellent analyses we've encountered. To review, as reported in SAA 2021-41 (Nov. 4), with a full complement of Justices, oral argument took place **November 2** before the Supreme Court in the arbitration-centric

Badgerow v. Walters, No. 20-1143, complete with a live audio broadcast. As reported in SAA 2021-19 (May 20), the Supreme Court on **May 17** granted *Certiorari* in this case involving application of the "look through" standard. The Court reviewed *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."

Our High-Level Thoughts

We provided in #41 some overall reactions that we repeat here. It seems to us that the Court will be tasked with reconciling two core countervailing arguments: 1) does it matter that only FAA section 4 (compelling arbitration) has express language supporting the look through doctrine (providing that a motion to compel arbitration can be brought in "any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties") while sections 9 and 10 (confirming/challenging awards) do not?; and 2) the imagined **Justice Scalia** question we identified in our editorial note in # 41: "So let me get this straight: it's OK to apply 'look through' to enforcing the arbitration agreement, but not the eventual award??"

Some First-Class Analyses

We read several blog posts analyzing the oral argument and pass along in alpha order of author name information on and a snippet from six of our favorites. These articles cover the interactions between the Justices and counsel in different ways, but collectively convey the tenor of the argument:

- **H. Barker, *High Court Weighs Jurisdiction Over Federal Arbitration Awards*, Bloomberg (Nov. 2, 2021)**: "The U.S. Supreme Court's justices seemed skeptical about a proposed rule that would often deprive federal courts of jurisdiction over certain arbitration awards, as it weighed a circuit split over when such courts have jurisdiction to confirm or vacate an award under the Federal Arbitration Act, Tuesday.[] Depending on how the court rules in *Badgerow v. Walters*, the decision could have significant implications for state-court involvement in resolving disputes over FAA awards."

- **R. Bleemer, *Supreme Court Hears Badgerow, and Leans to Allowing Federal Courts to Broadly Decide on Arbitration Awards and Challenges*, CPR Blog (Nov. 2, 2021)**: "The U.S. Supreme Court expressed skepticism this morning about a petitioner's argument that federal court jurisdiction over an arbitration matter under Federal Arbitration Act Sec. 4 on enforcing the submission to the ADR process does not also carry federal jurisdiction over to later FAA sections on confirming and overturning awards.[] Today's arguments in *Badgerow v. Walters*, No. 20-1143, the sole arbitration case on the current term's docket,

appeared to support the Court affirming a Fifth U.S. Circuit Court of Appeals decision confirming an arbitration award, rather than sending the case back to state court."

- **G. Born, *Of Rats and Lions….or, The Importance of Agreements to Arbitrate*, Kluwer Arbitration Blog (Nov. 8, 2021)**: "During oral argument before the Supreme Court, however, things moved from technical issues of federal subject matter jurisdiction to a more universal theme, "John Steinbeck's classic novella, 'Of Mice and Men,' took a modern day form in the U.S. Supreme Court earlier this week – appropriately enough, for purposes of this blog, in an arbitration matter. As others have commented on social media, during oral argument in *Badgerow v. Walters, Case No. 20-1143 (U.S. S. Ct.)*, the Supreme Court considered the fairly technical question '[w]hether federal courts have subject-matter jurisdiction to confirm or vacate an arbitration award under Sections 9 and 10 of the Federal Arbitration Act when the only basis for jurisdiction is that the underlying dispute involved a federal question.' A transcript of the oral argument can be accessed here…. During oral argument before the Supreme Court, however, things moved from technical issues of federal subject matter jurisdiction to a more universal theme …."

- **J. Lewis, *The Supreme Court Argument Only Underscored the Complexities of Federal Court Jurisdiction Over Arbitration Awards*, Baker Hostetler Employment Class Action Blog (Nov. 9, 2021)**: "So, coming full circle, the gulf remained between the petitioner's position that the language of Section 4 drove the result, while the respondents relied, in part, on an argument that the narrow statutory construction advocated by Badgerow would lead to the questionable result of only diversity cases presenting federal courts with jurisdiction under Sections 9 and 10 but not those raising federal questions. [] **Bottom Line**: Oral argument in Badgerow revealed the lack of any easy answers. If a pure textual approach is followed, some federal arbitral awards could be left in state court, where federal standards are not necessarily followed."

- **R. Mann, *Justices Balance Policy and Text to Guide Jurisdiction Over Motions to Vacate Arbitration Awards*, SCOTUSBlog (Nov.4)**: "You might have expected the justices to take a breather the day after hearing the weighty arguments in *United States v. Texas* and *Whole Woman's Health v. Jackson*. Especially for an argument about the details of federal jurisdiction over efforts to confirm or vacate an arbitration award. But in *Badgerow v. Walters* on Tuesday, the bench was engaged as the justices struggled to find a way to match the text of the Federal Arbitration Act with a palatable jurisdictional framework…. As I've tried to suggest, several of the justices came to the bench well-prepared for discussion – Kavanaugh had a lengthy interchange with [Badgerow's counsel] Geyser about the significance of a law review article from the 1920s – and none

of them expressed a lot of certainty about the outcome. So, although practical concerns with Geyser's position trouble some of them, it is far from obvious how this one will land when they get down to parsing the statute."

- **M. Rozen, *Arbitration "Rat" Shows Up at Supreme Court Hearing for Broker's Case*, AdvisorHub (Nov. 4, 2021)**: "During a hearing on Tuesday, Supreme Court justices tried to parse the maze of jurisdictional questions in a case brought by a Louisiana broker about when litigants may ask a state versus a federal judge to vacate an arbitration award. The nearly 60 minutes of oral arguments signaled no easy predictions about how the nine justices would rule. But the justices did manage to squeeze in some fun, referring to a hypothetical 'arbitration rat' who seeks to avoid arbitration proceedings, and with Associate Justice Stephen Breyer detailing how that 'ratitude' might manifest itself.... During the hearing, after Breyer introduced the 'rat', Chief Justice John Roberts followed suit and also articulated the difficulties of navigating through the various applicable, but contradicting jurisdictional rules. 'So you could call them an arbitration rat or a judicial lion, I suppose,' Roberts told Geyser, prompting laughter."

*(ed: *Although a lopsided decision seems unlikely, our money is on the Respondents. **The audio transcript and recording were posted later that day. We recommend the Oyez recording, which highlights the corresponding part of the transcript along with the audio, and a photo of the Justice speaking.)*

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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

ANOTHER BIPARTISAN BILL INTRODUCED TO CURB PDAA USE IN SEXUAL HARASSMENT DISPUTES. As reported in SAA 2021-29 (Aug. 5), the *Ending Forced Arbitration of Sexual Assault & Sexual Harassment Act of 2021* was reintroduced in the Senate (S. 2342 on **July 14** by Sens. **Kirsten Gillibrand** (D-NY) and **Lindsey Graham** (R-SC)) and in the House (H.R. 4445 on **July 16** by Reps. **Cheri Bustos** (D-IL), and **Morgan Griffith** (R-VA)). According to a Press Release issued by Sen. Gillibrand, the proposed law: "would stop perpetrators from being able to push survivors of sexual harassment and assault into the secretive, biased process of forced arbitration. This important legislation would invalidate forced arbitration clauses that prevent sexual assault and sexual harassment survivors from seeking justice and public accountability under the laws meant to protect them." The stated objective is: "To amend title 9 of the United States Code [the Federal Arbitration Act] to prohibit the enforcement of predispute arbitration agreements with respect to sexual assault claims." The bill was approved by the Judiciary Committee on **November 4**, and has been "reported out" for consideration by the full Senate. On **November 2,** Sen. **Joni Ernst** (R-IA) introduced S. 3143, "A bill to amend title 9 of the United States Code to prohibit the enforcement of predispute arbitration agreements with respect to claims of sexual assault *and to ensure that fair procedures are used in arbitrations involving sexual harassment claims*" (emphasis added). What's different? Although the bill's text is not yet available, the italicized language to us indicates that the bill would establish procedural fairness standards where all parties agree to post-dispute arbitration.

*(ed: *We'll track this one and report when the text becomes available. **Although neither bill has many cosponsors right now, we continue to think these bipartisan bills have a really good shot at becoming law.***Senator Ernst divulged in 2019 that she was sexually assaulted while in college.)*
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UN'S SINGAPORE CONVENTION ON MEDIATION: AN UPDATE. We reported in SAA 2019-31 (Aug. 14) that the 2019 *UN Convention on International Settlement Agreements Resulting from Mediation* ("*Singapore Convention*") was off to a flying start, with nearly 50 countries signing up. Mirroring its arbitration counterpart, the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, the *Singapore Convention* establishes procedures for recognizing and enforcing international mediated settlement agreements. A *Convention* signing ceremony was held **August 2019**, with some 46 nations, including the United States and China, signing the *Convention*. We noted then that the *Convention* would become effective six months after three nations had ratified it. As reported in SAA 2020-35 (Sep. 16), that transpired on **March 12, 2020,** when Qatar ratified the *Convention*, following Fiji and Singapore in February). Thus, the *Convention* became effective on **September 12, 2020.** What's been happening in the ensuing months? As of press time, the UN reports that some 55 states have signed up (Australia the latest on **September 10**) and 8 states have ratified or approved (Belarus, Ecuador, Fiji, Honduras, Qatar, Saudi Arabia, Singapore, and Turkey). As for the U.S., we're still assuming the Senate will need to ratify the *Convention* and that implementing legislation will be proposed at some point. Noting that thus far nothing has been introduced, ABA President **Reginald M. Turner** on **October 5** wrote to Secretary of State **Blinken,** urging him to seek Senate approval.
(ed: The October Squire Patton Boggs Blog has an excellent primer on the Convention *titled* Recent Developments in International Dispute Resolution: Australia Signs the Singapore Convention.*)*
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DIVIDED NINTH CIRCUIT: "ECONOMIC DURESS" CAN VITIATE ARBITRATION AGREEMENT, BUT NOT HERE. The Federal Arbitration Act permits predispute arbitration agreements to be challenged based on state contract law, such as California's "economic duress" ground. A divided Ninth Circuit acknowledges this fact, but finds the standard has not been met in *Martinez-Gonzalez v. Elkhorn Packing Co., LLC*, No. 19-17311 (9th Cir. Nov. 3, 2021). We'll let the majority opinion speak for itself: "For three consecutive lettuce-harvesting seasons, Dario Martinez-Gonzalez worked as a farm laborer for Elkhorn Packing Company and D'Arrigo Brothers (collectively, 'Elkhorn'). After quitting his job in the middle of the third season, Martinez-Gonzalez sued his former employers, alleging violations of federal and state labor and wage laws. Elkhorn later moved to compel arbitration under agreements signed by Martinez-Gonzalez after he traveled to the United States and started harvesting lettuce. The district court refused to enforce the arbitration agreements, holding that Martinez-Gonzalez signed them under economic duress and undue influence. We reverse and remand." Judge Johnnie B. Rawlinson dissents: "I disagree with the majority and

agree with the district court, primarily because the district court did not clearly err in concluding, after a bench trial, that the atmosphere surrounding the signing of the Arbitration Agreements rose to the level of a wrongful act."
*(ed: *For those keeping score at home, the majority Panel members were Patrick Bumatay (a Trump appointee) and Eugene E. Siler -- Sixth Circuit Judge sitting by designation -- (George H.W. Bush). Dissenter Rawlinson is a Clinton appointee. **This is another case indicating to us that the notoriously anti-mandatory arbitration Ninth Circuit is no more, due to the influence of the generally pro-arbitration Trump appointees. For more, see our "Letter From the Editor" elsewhere in this Alert.)*
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SECURITIES EXPERTS ROUNDTABLE PUBLISHES ITS LATEST FREE NEWSLETTER. The latest issue of the Securities Experts Roundtable's ("SER") quarterly newsletter, *The Expert's Examiner* (*"TEE"*) volume 2021-03*,* covering **July – October 2021**, hit the electronic newsstand **November 3.** This *free*, link-rich publication, which can be found on the Website's landing page ("newsletter" tab), offers a wealth of information on financial services arbitration and ADR in general. Among the regular features are: **Recent News from the Arbitration Front; Expert Opinions: What are the Courts (and Arbitrators) Thinking?; Heard Through the Regulatory Grapevine -- Comment Letters and Speeches;** and **Statistics, Events & Resources.** Content is provided by the Roundtable's members; the *Alert* is also a contributor. Signup is available online.
*(ed: *The non-profit SER, which was founded in 1992, is: "a group of professionals with significant experience as testifying and consulting experts in securities, business and investment-related litigation." **The* TEE *is a wonderful resource for the arbitration bar. Past issues are grouped here. ***Full disclosure:* SAA*'s publisher and editor-in-Chief George Friedman is an active member of the SER.)*
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QUICK TAKES: CASES AND AWARDS WORTH READING

***Gezu v. Charter Communications*, No. 21-10198 (5th Cir. Nov. 2, 2021)**: "Because Charter sufficiently demonstrated that Gezu both received notice of and accepted the modification to his employment contract, a valid agreement to arbitrate employment-related disputes exists between Gezu and Charter. And because Gezu does not assert on appeal that his particular claims are not covered by the arbitration agreement, we affirm the district court's grant of Charter's motion to compel arbitration."

***Sanfilippo v. Match Group LLC*, No. 20-55819, 2021 U.S. App. Lexis 29263 (9th Cir. Sep. 28, 2021)**: "In the absence of any indication of oppression or surprise, the adhesive nature of the arbitration agreement in this case 'give[s] rise to a low degree of procedural unconscionability at most.' As for substantive unconscionability, Sanfilippo points only to the fact that Match Group reserved the right to unilaterally modify the terms of the agreement. There is no evidence Match Group *did* unilaterally modify the arbitration agreement, and even assuming the unilateral modification provision is substantively unconscionable, our court has explained that an unconscionable unilateral modification

clause in an arbitration agreement does not 'make[] the arbitration provision or the contract as a whole unenforceable.' Because the arbitration agreement gives rise to a low degree of procedural unconscionability and Sanfilippo did not establish any substantive unconscionability that infects the arbitration agreement as a whole, the agreement is enforceable" (citations omitted; brackets in original).

***Wynlake Residential Association, Inc. v. Hulsey*, No. 1200242 (Ala. Oct. 22, 2021)**: A unanimous Alabama Supreme Court finds untimely an appeal of a lower court decision confirming an arbitration award: "[T]he defendants had 42 days from the date the postjudgment motion was denied by operation of law on December 1, 2020, to file a notice of appeal.... Accordingly, the defendants had until January 12, 2021, to file a notice of appeal. However, the defendants did not file the notice of appeal to this Court until January 20, 2021, the same day the circuit court purported to rule on the Rule 59 motion, after the time for filing a notice of appeal had expired.... Thus, because the defendants' notice of appeal was untimely, we lack jurisdiction and must dismiss the appeal. Although no party has questioned this Court's jurisdiction, 'jurisdictional matters are of such magnitude that we take notice of them at any time and do so even ex mero motu." (*ed: Never heard that term before! Black's Law Dictionary's definition: "Of his own mere motion; of his own accord; voluntarily and without prompting or request."*)

***Bush v. Mid Atlantic Capital Corporation*, FINRA ID No. 19-02152 (San Francisco, CA, Sep. 30, 2021)**: Although a majority of the Panel awarded the customers damages on their suitability claim, one Arbitrator writes a long dissent explaining why he would not have awarded damages and would find for Respondent broker-dealer on its statute of limitations defense. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***UBS Financial v. Paynter Services, Inc*., FINRA ID No. 17-02850 (Phoenix, AZ, Sep. 27, 2021)**: A broker is held liable to two Claimant broker-dealers for damages relating to the amounts due and owing on four promissory note agreements, while the broker-dealers are found liable on the claims constructive discharge and negligent misrepresentation on the broker's Counterclaim. Of particular interest: unlike other arbitration awards arising under similar circumstances, the award to the broker was not offset from the amount he owed pursuant to the Notes. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com.)* (*ed: The Award simply states: "This award shall not be an offset."*)
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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

M. Valasek and E. Hernández, *Group, Class and Collective Arbitration: Recent Developments in US Commercial Arbitration*, Norton Rose Fulbright Blog (Nov. 4, 2021): "Group arbitration can offer certain advantages over class litigation (not least, the ability to enforce awards across multiple jurisdictions). However, the consent-based nature of arbitration can lead to jurisdictional obstacles for such claims. This article explores the US line of authorities dealing with group arbitration of commercial disputes, one of the most developed globally."

***New PIABA President Takes Aim At Unpaid Arbitrations Awards*, Financial Advisor (Nov. 1, 2021)**: "Brokers and advisors who close up shop and declare bankruptcy to sidestep paying arbitration awards to the investors they defrauded are the scourge of every investor advocate attorney, and a particular focus for Michael Edmiston, new president of the Public Investor Advocate Bar Association (PIABA).[] A former attorney with both Finra's predecessor NASD and JAMS Arbitration Services and a member of Finra's National Arbitration and Mediation Committee, Edmiston has seen the challenges with securities arbitration firsthand, but one case stuck with him."

***Supreme Court Hears Badgerow, and Leans to Allowing Federal Courts to Broadly Decide on Arbitration Awards and Challenges*, CPR Blog (Nov. 2, 2021**): "The U.S. Supreme Court expressed skepticism this morning about a petitioner's argument that federal court jurisdiction over an arbitration matter under Federal Arbitration Act Sec. 4 on enforcing the submission to the ADR process does not also carry federal jurisdiction over to later FAA sections on confirming and overturning awards."

***RayJay Wins Arbitration Award Against Missing FA*, Financial Advisor IQ (Nov. 3)**: "Raymond James has won an arbitration award against one of its former financial advisors but will likely face problems collecting on it because the advisor -- charged last year with stealing millions of dollars from clients -- appears to be missing.... Raymond James filed an arbitration claim in February this year against [adviser], accusing him of breach of contract related to the independent branch owner contract it had with him, according to an award document published by the Financial Industry Regulatory Authority last week. The firm sought $542,445 in compensatory damages plus 10% interest accruing from the time the expense was incurred, as well as lawyers' fees and costs and any other relief deemed appropriate, Finra says."

***Ex-Edward Jones FA Wins $40M Award Over 'Smear Campaign'*, Financial Advisor IQ (Nov. 4)**: "An ex-Edward Jones advisor has won nearly $40 million in damages from the firm and former colleagues after a jury ruled in his favor in a case involving a 'smear campaign' that included fake gay sex ads on Craigslist.[] The judgement in [adviser's] favor was entered in September in the Glenn County Superior Court in California."
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DID YOU KNOW?

ARBITRATION GOES WAY BACK II. The "Did You Know? in SAA 2021-38 (Oct. 14) reported that **George Washington's** Will (July 1799) provided for arbitration to resolve his heirs' disputes. But did you know that arbitration support from heads of state goes *way* back. For example, litigation was evidently a problem in China hundreds of years ago. This prompted the **Emperor K'ang-Hsi** (1661-1722) to weigh in with some very strong language endorsing arbitration – and denigrating litigation:

> *This Emperor, considering the immense population of the empire, the great division of territorial property and the notoriously litigious character of the Chinese, is of the opinion that lawsuits would tend to increase to frightful extent if*

> *people were not afraid of the [courts] and if they felt confident of always finding in them ready and perfect justice… I desire, therefore, that those who have recourse to the courts should be treated without pity and in such a manner that they shall be disgusted with law and tremble to appear before a magistrate. In this manner … the good citizens who may have difficulties among themselves will settle them like brothers by referring them to the arbitration of some old man…. As for those who are troublesome, obstinate, and quarrelsome, let them be ruined in the law-courts — that is the justice that is due to them.*

Even back then, litigation was awful and arbitrators were being stereotyped.
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LETTER FROM THE EDITOR

SORRY ABOUT THAT, CHIEF, BUT IT *DOES* MATTER WHO APPOINTED THE JUDGE. In the old "Get Smart" comedy series, secret agent Maxwell Smart would often say to his boss, "Sorry about that, Chief," after he messed up. Now, Chief Justice John Roberts isn't exactly my boss, and I don't think I've made a mess of things, but I find myself disagreeing with the Chief Justice. So I, too, say: "Sorry about that, Chief … but I think you're wrong."

A Recent Pro-arbitration Split Decision

We report elsewhere in this *Alert* on *Martinez-Gonzalez v. Elkhorn Packing Co., LLC*, No. 19-17311 (9th Cir. Nov. 3, 2021). In this case, a majority acknowledges that the Federal Arbitration Act permits predispute arbitration agreements to be challenged based on state contract law, such as California's "economic duress" ground, but finds the standard has not been met. Noteworthy is that the majority Panel members in this pro-arbitration decision were Patrick Bumatay (a Trump appointee) and Eugene E. Siler -- Sixth Circuit sitting by designation -- (George H.W. Bush). Dissenter Rawlinson is a Clinton appointee.

More Evidence of an Emerging Balanced Court

To your Editor, this is another case indicating that the notoriously anti-mandatory consumer/employment arbitration Ninth Circuit is no more, due to the influence of the generally pro-arbitration Trump appointees. For example, see *Brice v. Plain Green, LLC*, No. 19-15707 (9th Cir. Sep. 16, 2021) (SAA 2021-36 (Sep. 23)), where a split Court compelled arbitration of a dispute arising out of tribal lender payday loan agreements. There, the majority Panel members -- Danielle J. Forrest and Lawrence VanDyke -- were Trump appointees, and dissenter William A. Fletcher was a Clinton appointee. And the Majority in the split decision in *Chamber of Commerce of the United States v. Bonta*, No. 20-15291 (9th Cir. Sep. 15, 2021) (*motion for rehearing en banc pending*), upholding most of California AB-51, which bans employment mandatory predispute arbitration agreements? Carlos Lucero (Clinton appointee, sitting by designation), William Fletcher (Clinton). The dissenter? Sandra Segal Ikuta (G.W. Bush). And there are other examples.

Sorry About That, Chief
With all due respect, I disagree with Chief Justice Roberts, who said in 2018: "We do not have Obama judges or Trump judges, Bush judges or Clinton judges…. There's no difference between Obama and Trump appointees." With 10 Trump appointees, and none so far from President Biden (four nominations are pending), the Ninth Circuit membership has gone from a net majority of 11 judges appointed by Democratic Presidents to just three. And there *has* been a difference, at least in the arbitration realm.

Sorry about that, Chief.

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