SECURITIES ARBITRATION ALERT 2021-45 (12/2/21)

George H. Friedman, Editor-in-Chief

SQUIBS:

- **FINRA Board Meets In Person This Week. A Dispute Resolution Item is on the Agenda!**
- **Legislative Update: The Latest from Congress**
- **Split Puerto Rico Supreme Court: Continued Employment Constitutes Consent to PDAA for FAA Purposes**

SHORT BRIEFS:

- **FINRA Zooming Ahead with Hybrid Virtual/In-person Hearings**
- **TIME SENSITIVE REMINDER: SEC's Investor Advisory Committee to Meet Virtually This Morning. No Obvious Arbitration or Mediation Agenda Items**
- **A *Cert.* Petition to Watch**
- **CPR Video Covers the Latest Doings at SCOTUS**

QUICK TAKES:

- ***McKenzie v. Brannan, No.* 20-2170 (1st Cir. Nov. 22, 2021)**
- ***Hengle v. Treppa,* No. 20-1062 (4th Cir. Nov. 16, 2021)**
- ***Chambers v. Crown Asset Management, LLC,* No. D079074 (Calif. Ct. App. 4 (Nov. 12, 2021)**
- ***Ingram v. UBS Financial*, FINRA ID No. 19-00684 (Boca Raton, FL, Oct. 21, 2021)**
- ***Vido v. SunTrust Investment Services,* FINRA ID No. 20-02359 (Tampa, FL, Oct. 23, 2021)**

ARTICLES OF INTEREST:

- **A. Zwolankiewicz, *Hardship and Force Majeure as Grounds for Adaptation and Renegotiation of Investment Contracts: What Is the Extent of the Powers of Arbitral Tribunals?* ERASMUS LAW REVIEW, Vol. 14, No. 2, (Nov. 19, 2021)**
- ***SEC Issues Whistleblower Awards Totaling Approximately $10.4 Million*, www.sec.gov (Nov. 22, 2021)**
- ***Morgan Stanley Asks Court to Toss Client Associate's $63K Arbitration Award in Defamation Case*, AdvisorHub (Nov. 22, 2021)**
- **Opinion: *Corporate America's Parallel Justice System is a Recipe for Unfairness*, Financial Times (Nov. 23, 2021)**
- ***Appeals Court Upholds Ex-UBS Rep's $11M+ Defamation Award*, Financial Advisor IQ (Nov. 24, 2021)**
- ***Build Back Better Act Threatens Class and Collective Action Waivers,* Lexology (Nov. 24, 2021)**
- ***ASA Launches the Arbitration Toolbox: A First-of-its-Kind Interactive Tool in the Field of International Arbitration,* Kluwer Arbitration Blog (Nov. 28, 2021)**

DID YOU KNOW?

- **Arbitration Goes Way Back III**

SQUIBS: IN-DEPTH ANALYSIS

FINRA BOARD MEETS IN PERSON THIS WEEK. A DISPUTE RESOLUTION ITEM IS ON THE AGENDA! ***Two things are happening this week that have not occurred since before the pandemic: 1) the FINRA Board is meeting in person; and 2) that body is considering an arbitration-related rule change proposal.*** As reported in SAA 2021-44 (Nov. 24), FINRA's Board of Governors is meeting **December 1 – 2.**

According to a FINRA spokesperson, the meeting will be conducted in person. This would be the first non-virtual meeting since pre-pandemic days.

An Arbitration Rulemaking Item
CEO **Robert W. Cook**'s pre-meeting memo of **November 29** shows an arbitration-related rulemaking item: "proposed amendments to the *Codes of Arbitration Procedure* to accelerate the processing of arbitration proceedings for elderly or seriously ill parties ...." As reported in SAA 2019-10 (Mar. 6), FINRA's Office of Dispute Resolution ("ODR") has since **2004** had a special program to expedite the arbitration process for older (age 65+) or seriously ill investors. While Arbitrators and staff have been trained to speed these cases along, one drawback has always been that the *Codes of Arbitration Procedure* don't permit staff to shorten any timeframe in the rules without consent of the parties. The proposed change would address that problem.

Some Details
Way back in SAA 2019-10 (Mar. 6), we reported on this possible change. Specifically, we said that, according to a **March 2019** Financial Adviser IQ story, *This Arbitration Rule Change Could Dramatically Affect Many Older Respondents*, ODR Director of Arbitration **Richard Berry** had said that staff would be presenting to the National Arbitration and Mediation Committee a rule proposal to codify expedited treatment for investors age 75 and over. The story quoted Mr. Berry as follows: "We encourage parties to shorten deadlines and for the panel to expedite the cases. It's not working as well as we'd like. We want to make sure we have a program that really works." What else might be in store? We'll have to await the results of the meeting, but one major change we note: the existing program sets the "older" threshold at age 65; the proposed rule at 75. Also, in the above-referenced interview, Mr. Berry was asked about specifics. He replied: "For example, we could decide to shorten the answer deadline, shorten the time to submit a list or shorten discovery deadlines."
(ed: The Dispute Resolution Task Force Report contained recommended improvements in this area. Interestingly, the January 2019 Final Status Report *on pages 11 and 12 marked this one as "implemented." **We'll cover the results in a future* Alert.)
return to top

LEGISLATIVE UPDATE: THE LATEST FROM CONGRESS. *The looming Thanksgiving break did not deter Congress from moving ahead with proposed legislation governing arbitration use.* We have reported episodically on efforts afoot in Congress to regulate, limit, or ban, mandatory predispute arbitration agreement ("PDAA") use or enforcement in certain situations. Here's a brief update on some recent activity.

***Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act* Passes House Judiciary Committee**
The House Judiciary Committee on **November 17** approved the *Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act* by a bipartisan vote of 27-14.

As reported in SAA 2021-29 (Aug. 5), the Act 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 Senate bill was approved by the Judiciary Committee on **November 4**,and has been "reported out" for consideration by the full Senate. Having been passed by the subcommittees, the identical bills (see, e.g., the House text) -- both of which have significant bipartisan cosponsorship -- are now ripe for consideration by the full Senate and House.

Bills Introduced in Congress to Exempt from FAA Higher Ed Enrollment Agreements

Bills were introduced **November 18** in the Senate and House to: "provide that chapter 1 of title 9 of the United States Code, relating to the enforcement of arbitration agreements [the FAA], shall not apply to enrollment agreements made between students and certain institutions of higher education, and to prohibit limitations on the ability of students to pursue claims." S. 3251 was introduced by Sen. **Richard Durbin** (D-IL) and H.R. 6055 by Rep. **Maxine Waters** (D-CA). The text provides: "Chapter 1 of title 9 of the United States Code (relating to the enforcement of arbitration agreements) shall not apply to an enrollment agreement made between a student and an institution of higher education." The bills would also amend section 487(a) of the Higher Education Act of 1965 (20 U.S.C. 1094(a)) so that a higher ed institution: "will not require any student to agree to, and will not enforce, any limitation or restriction (including a limitation or restriction on any available choice of applicable law, a jury trial, or venue) on the ability of a student to pursue a claim, individually or with others, against an institution in court." The law would take effect a year after enactment. Thus far, all co-sponsors are Democrats.

***Build Back Better Act* Would Ban Collective Action Waivers**

The *Build Back Better Act* (H.R. 5376), which passed the House on **November 19**, would legislatively overrule the Supreme Court's ruling in *Epic* Systems Corp. v. Lewis, 138 S.Ct. 1612 (2018), by banning predispute collective action waivers. Nestled in the bill's text is language that would make it an unfair labor practice for an employer to: "enter into or attempt to enforce any agreement, express or implied, whereby prior to a dispute to which the agreement applies, an employee undertakes or promises not to pursue, bring, join, litigate, or support any kind of joint, class, or collective claim arising from or relating to the employment of such employee in any forum that, but for such agreement, is of competent jurisdiction…." The bill would also ban "coercion." Violations carry civil penalties, including fines up to $100,000 per offense. Collective bargaining agreements between unions and management are exempted.

*(ed: *We continue to think that, while the House version will pass in that legislative body, the* Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act *faces an uncertain future in the deadlocked Senate. However, the nonpartisan www.govtrack.us Website now gives it a 13% chance of enactment, up from just 3% last summer. **Recall that, as reported in SAA 2021-42 (Nov. 11), Sen. Joni Ernst (R-IA) on November 2 introduced S. 3143, which would amend the FAA to provide: "Notwithstanding any other provision of this title, a predispute arbitration agreement shall have no force or effect with respect to a sexual assault claim." ***Instead of amending the FAA to ban mandatory arbitration, the higher ed bills would simply say the Act doesn't apply to higher ed enrollment agreements. As the late Arte Johnson would say, "very interesting." ****The full Senate is next for the* Build Back Better Act. *****An* Alert *h/t to Lexology for covering the collective action aspect of the bill in its November24 post,* Build Back Better Act Threatens Class and Collective Action Waivers.*)*
return to top

SPLIT PUERTO RICO SUPREME COURT: CONTINUED EMPLOYMENT CONSTITUTES CONSENT TO PDAA FOR FAA PURPOSES. ***In a case of first impression, a divided Puerto Rico Supreme Court holds that: 1) under the Federal Arbitration Act ("FAA"), continued employment constitutes consent to a predispute arbitration agreement ("PDAA"); and 2) a signature is not required.*** For the facts in *Aponte v. Pfizer Pharmaceuticals, LLC*, CC 2018-748, 2021TSPR148 (Nov. 10, 2021), we borrow from the **November 15** JacksonLewis Blog post, *Puerto Rico Supreme Court Rules Continued Employment is Valid Consent to an Arbitration Agreement*: "All employees who would be covered by the program were notified by email. Additional emails with links to the arbitration agreement, a list of questions and answers, and a learning module explaining the program were sent to the employees, including the 25 plaintiffs. *In all communications and documents, employees were advised that, if they began employment or continued employment 60 days after receiving the arbitration agreement, they would be subject to agreement's terms*. Signing the agreement was not a requirement because consent was given by merely continuing working. A paper copy of the agreement was not provided, but employees had the option of printing the document or reviewing it online" (emphasis added).

Majority: Consent By Continued Employment
The 5-3 majority finds that continued employment beyond the 60-day cutoff was valid consent to arbitration under the FAA, and that a signature was not required. After concluding that the employees had actual notice of the PDAA, Justice **Feliberti Cintrón**'s Opinion* for the majority states that: "continuity in employment is a valid form of tacit consent to an arbitration agreement, so that, in circumstances such as those of the present case, it will not be necessary for its validity that the arbitration agreement is signed by the parties."

Dissent
Chief Justice **Maite Oronoz** dissented, asserting that a PDAA without an opt-out was not valid consent: A voluntary arbitration agreement is one that provides employees the

option not to subscribe it, without entailing the drastic consequence and inescapable loss of your job." Justice **Luis Estrella** wrote a separate dissent, joined by Justice **Colón Pérez**, contending that mandatory PDAAs were *ab initio* not voluntary and thus violated Puerto Rico public policy: "Today, a majority of this Court legitimizes legally the practice in which an employer imposes unilaterally on an employee an arbitration clause, whose main effect is their involuntary renunciation of guarantees that our legal system recognizes."
*(ed: *The Opinion is in Spanish. The English quotes are based on Google Translate. **We're with the majority. ***The JacksonLewis Blog post points out that: "none of the[se] dissents seem to consider the fact that the FAA preempts state law and that the U.S. Supreme Court has consistently held that a state or territory cannot impose special requirements to an arbitration agreement that do not apply to other types of contracts in that jurisdiction.")*
return to top

SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

FINRA ZOOMING AHEAD WITH HYBRID VIRTUAL/IN-PERSON HEARINGS. One of the pandemic-induced changes we would like to see continue as things slowly return to normal is the use of virtual hearings. So does FINRA CEO **Robert Cook**, who said in a **November 16** interview with *ThinkAdvisor*: "While all of FINRA's arbitration locations are now open, there's still demand to do hearings by Zoom. FINRA's arbitration task force is going to help us figure out how to have a hybrid [arbitration] environment going forward." Recall that our **January 20** feature article, *A Funny Thing Happened on the Way to a Quiet Year in ADR: How a Pandemic Accelerated Profound, Lasting Changes*, predicted this development: "[V]ideo hearings are here to stay: Having been exposed to the time and money benefits of online ADR and video hearings, some participants will never return to traditional case administration or in-person hearings in every arbitration or mediation…. Not every case will be a Zoom candidate. We see a hybrid, with some cases remaining all-virtual (think smaller, single-arbitrator cases), and others having at least some arbitrators, counsel, or witnesses participating remotely, especially those in a high-risk group. Mind you, virtual hearings are not a panacea, and resistance in some quarters will persist ('I want to be there to see witness faces;' 'the case is too complicated;' 'I want to be sure the witness is not being coached'), but virtual hearings for at least parts of cases will eventually become the new normal."
*(ed: *Recall that all 69 FINRA hearing locations resumed in-person hearings on August 2. **Mr. Cook also said that FINRA had conducted 85,000 exams online, and that "in appropriate circumstances," the Authority will continue to facilitate online exam-taking.)*
return to top

→ TIME SENSITIVE REMINDER: SEC'S INVESTOR ADVISORY COMMITTEE TO MEET VIRTUALLY THIS MORNING. NO OBVIOUS ARBITRATION OR MEDIATION AGENDA ITEMS. As reported in SAA 2021-44 (Nov. 25), the SEC on **November 18** announced that its Investor Advisory Committee would be meeting virtually on Thursday, **December 2** from 10:00 a.m. to

4:00 p.m. Eastern Time. The Sunshine Act Notice offers this description of items to be covered: "opening remarks, announcement of new officers, and announcement regarding a disclosure subcommittee; welcome remarks; approval of previous meeting minutes; a panel discussion regarding crypto and digital assets: helping to ensure investor protection and market integrity in the face of new technologies; a panel discussion regarding the SEC's potential role in addressing elder financial abuse issues; a discussion of a recommendation regarding individual retirement accounts; subcommittee reports; and a non-public administrative session." The Agenda has no obvious dispute resolution items. *(ed: *While we say "no obvious dispute resolution items," we note that one of the panelists for the discussion on elder abuse is Professor Christine Lazaro, Director of the St. John's Law School's Securities Arbitration Clinic, a past PIABA President, and an* SAA *Editorial Advisory Board member. **The meeting will be webcast at www.sec.gov. ***Questions? Contact Vanessa A. Countryman at 202-551-5400.)*
return to top

A *CERT*. PETITION TO WATCH. A Petition for *Certiorari* was filed last **September** that bears watching. The question presented in *Branch Banking and Trust Company v. Sevier County Schools Federal Credit Union*, No. 21-365, is: "Whether the Federal Arbitration Act displaces a state common-law rule forbidding companies from adding an arbitration requirement to their standard form contract with customers unless the contract already includes a dispute-resolution clause." We covered the case below in SAA 2021-16 (Apr. 29), where a divided Sixth Circuit held in *Sevier County Schools Federal Credit Union v. Branch Banking & Trust Co.*, 990 F.3d 470 (6th Cir. Mar. 5, 2021), that, although the deposit agreement permitted the bank to make unilateral changes, adding an arbitration clause was not permissible. Said the majority: "The first reason … is because BB&T provided the Plaintiffs with no opt-out opportunity. This left the Plaintiffs with no choice other than to acquiesce to the new arbitration provision or to close their high-yield savings accounts. And closing their accounts is a totally unreasonable option because doing so would obviate the very essence of the Plaintiffs' accounts -- the promise of a perpetual 6.5% annual interest rate." The majority also found that: "the purported imposition of the arbitration provision would violate the common law's implied covenant of good faith and fair dealing." How so? "BB&T did not act reasonably when it added the arbitration provision years after the Plaintiffs' accounts were established … thus violating the implied covenant of good faith and fair dealing in its attempt to use the original change-of-terms provision to force the Plaintiffs to arbitrate." Judge **Griffin** dissented: "Because plaintiffs assented to this arbitration agreement, and because it is neither adhesive nor unconscionable …."
*(ed: *We said in #16 that, as far as we could recollect, this was the first time we had seen a court invalidate an after-added arbitration clause because the dominant party violated the implied covenant of good faith and fair dealing. **We think the Court may be interested in taking on this issue. ***For a contrary view, see* In re National Football League's Sunday Ticket Antitrust Litigation*, No. L 15-2668 PSG (JEMx) (C.D. Calif. Apr. 20, 2021), where the Court rejected an implied covenant of good faith and fair dealing argument regarding an after-added PDAA: "In sum, because the changes in the 2017 version of Plaintiffs' agreements did not deprive them of their reasonable*

expectations under the pre-dispute agreements, DirecTV did not violate the implied covenant of good faith and fair dealing.")
return to top

CPR VIDEO COVERS THE LATEST DOINGS AT SCOTUS. The **November 23** CPR Speaks Blog post, *The Latest #SCOTUS #Arbitration: Process 'Preference'; Int'l #Discovery; Federal Courts' Arb #Jurisdiction*, features a panel discussion on the latest arbitration-related developments at SCOTUS. The panel for the 50-minute YouTube video was **Angela Downes**, Assistant Director of Experiential Education and Professor of Practice Law at the University of North Texas-Dallas College of Law; attorney-arbitrator **Richard Faulkner**, and **Philip J. Loree Jr**., of the Loree Law Firm. Serving as moderator was **Russ Bleemer**, editor of CPR's *Alternatives to the High Cost of Litigation*. The panel discussed: *Badgerow v. Walters*, No. 20-1143 (argued **November 2**); *Morgan v. Sundance Inc.*, No. 21-328 (*Certiorari* granted **November 15**); and *AlixPartners LLP v. The Fund for Protection of Investors' Rights in Foreign States*, No. 21-518, and *ZF Automotive US Inc. v. Luxshare Ltd.*, No. 21-401 (*Certiorari* Petitions to be considered **December 3**).
(ed: This is an excellent resource for arbitration practitioners.)
return to top

QUICK TAKES: CASES AND AWARDS WORTH READING

***McKenzie v. Brannan*, No. 20-2170 (1st Cir. Nov. 22, 2021)**: "Famous artwork, business relationships, and contract law collide in today's case. The matter lands here amidst a tangle of litigation involving an art publisher, the personal representative of the estate of a famous American artist, and the agreement(s) between them. The publisher says the parties' original contract, which included an arbitration provision, was terminated and supplanted by a superseding contract, which did not contain an agreement to arbitrate. According to the publisher, the arbitrability of the parties' dispute about this newer contract's enforceability and impact on the earlier agreement to arbitrate should be decided by the court, not arbitrators. So, in the publisher's telling, the district court erred when, in accordance with the original agreement's arbitration clause, it sidestepped the potential effect of the newer contract and concluded that the gateway question of arbitrability was for the arbitrators. The estate, of course, says the district court got its analysis just right.[] After careful review of this nuanced matter, we vacate the grant of the motion to compel arbitration, the dismissal of the request for a preliminary injunction, and the dismissal of the complaint, and we remand for further proceedings."

***Henqle v. Treppa*, No. 20-1062 (4th Cir. Nov. 16, 2021)**: "The named plaintiffs in this case, all Virginia consumers, received short-term loans from online lenders affiliated with a federally recognized Native American tribe. Eventually the borrowers defaulted and brought a putative class action against tribal officials and two non-members affiliated with the tribal lenders to avoid repaying their debts, which they alleged violated Virginia and federal law. The defendants moved to compel arbitration under the terms of the loan agreements and to dismiss the complaint on various grounds.[] The district court denied the motions to compel arbitration and, with one significant exception relevant here,

denied the motions to dismiss. Four of those rulings are now before us in this interlocutory appeal. First, the district court found the arbitration provision unenforceable as a prospective waiver of the borrowers' federal rights. Second, the district court denied the tribal officials' motion to dismiss the claims against them on the ground of tribal sovereign immunity. Third, the district court held the loan agreements' choice of tribal law unenforceable as a violation of Virginia's strong public policy against unregulated lending of usurious loans. Fourth, the district court dismissed the federal claim against the tribal officials, ruling that the Racketeer Influenced and Corrupt Organizations Act (RICO) does not authorize private plaintiffs to sue for injunctive relief. For the reasons explained below, we affirm all four rulings on appeal."

***Chambers v. Crown Asset Management, LLC*, No. D079074 (Calif. Ct. App. 4 (Nov. 12, 2021)**: "Pamela Sheree Chambers filed a putative class action lawsuit against Crown Asset Management, LLC (Crown) based on alleged violations of the California Fair Debt Buying Practices Act (CFDBPA; Civ. Code, § 1788.50 et seq.). Crown moved to compel arbitration. It relied on an affidavit from an employee of Chambers's original creditor, Synchrony Bank (Synchrony), who stated in part that 'Synchrony's records' show a credit card account agreement containing an arbitration clause was mailed to Chambers. Chambers objected to the affidavit on various evidentiary grounds. The trial court sustained the objections and denied Crown's motion to compel arbitration.[] Crown appeals. It contends the trial court erred by sustaining Chambers's evidentiary objections and denying the motion to compel. We disagree and affirm."

***Ingram v. UBS Financial*, FINRA ID No. 19-00684 (Boca Raton, FL, Oct. 21, 2021**): Two customers, a father and son, seeking over $5 million in total damages relating to Respondent broker-dealer's Yield Enhancement Strategy, lose their case. The Non-Party broker is granted his request for expungement of this matter from his CRD record: "With an ultrahigh net worth, Ingram has over forty (40) years of stated investment experience. Ingram is a sophisticated entrepreneur, successful businessperson, and well-seasoned professional. The Panel finds that Ingram aggressively pursued options strategies before, during and after Ingram was Respondent's client. Unnamed Party's[] testamentary evidence (that the Panel finds credible) and the documentary evidence (including several executed documents by Ingram) confirms Ingram's full understanding that YES was 'aggressive' and 'high risk.' The latter being 'tolerance,' which Ingram accepted and acknowledged in writing." Provided courtesy of SAC's *ARBchek facility (www.arbchek.com).*

***Vido v. SunTrust Investment Services*, FINRA ID No. 20-02359 (Tampa, FL, Oct. 23, 2021)**: In a dispute arising over the transfer of assets held in all of a decedent's accounts payable on death, two individuals holding a power-of-attorney are granted their requests to be named 50/50 beneficiaries with respect to these assets, and are also awarded costs incurred in the arbitration. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

return to top

ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

A. Zwolankiewicz, *Hardship and Force Majeure as Grounds for Adaptation and Renegotiation of Investment Contracts: What Is the Extent of the Powers of Arbitral Tribunals?* ERASMUS LAW REVIEW, Vol. 14, No. 2, (Nov. 19, 2021): "The change of circumstances impacting the performance of the contracts has been a widely commented issue. However, there seems to be a gap in legal jurisprudence with regard to resorting to such a remedy in the investment contracts setting, especially from the procedural perspective. It has not been finally settled whether arbitral tribunals are empowered to adapt investment contracts should circumstances change and, if they were, what the grounds for such a remedy would be. In this article, the author presents the current debates regarding this issue, potential grounds for application of such a measure and several proposals which would facilitate resolution of this procedural uncertainty."

***SEC Issues Whistleblower Awards Totaling Approximately $10.4 Million*, www.sec.gov (Nov. 22, 2021**): "The Securities and Exchange Commission today announced awards totaling approximately $10.4 million to several whistleblowers who provided information and assistance in three separate covered actions."

***Morgan Stanley Asks Court to Toss Client Associate's $63K Arbitration Award in Defamation Case*, AdvisorHub (Nov. 22, 2021)**: "Morgan Stanley asked a New York state court to toss an arbitration decision [in *Bondi v. Morgan Stanley*, FINRA ID No. 20-01834 (New York, NY, Oct. 21, 2021)] that ordered the wirehouse to expunge her termination record and pay her roughly $63,000 in defamation-related damages and fees.[] The award, which was issued by a solo public arbitrator, is 'totally irrational,' the firm's lawyers wrote in a November 19 petition to vacate filed in New York Supreme Court. The firm claimed that the panelist's ruling wrongly held Morgan Stanley responsible for defamation even though the arbitrator had found that the U5 disclosure filing was accurate."

Opinion: *Corporate America's Parallel Justice System is a Recipe for Unfairness*, Financial Times (Nov. 23, 2021): "US companies have been inserting mandatory arbitration clauses into the small print of contracts for everything from jobs to credit cards and nursing homes. These state that any dispute with the company will be resolved by arbitration rather than the courts: a simpler and more informal system where an arbitrator hears both sides and makes a decision. Typically the company selects the arbitration provider, the proceedings are behind closed doors and there is little chance to appeal."

***Appeals Court Upholds Ex-UBS Rep's $11M+ Defamation Award*, Financial Advisor IQ (Nov. 24, 2021)**: "An appeals court has upheld an $11 million defamation award UBS was ordered to pay two years ago to a fired market area supervisory officer in Chicago.[] In December 2019, a Finra arbitration panel ordered the wirehouse to pay more than $11 million to [the rep] and recommended that the reason for his termination on the Form U5 filed by UBS be expunged and his reason for termination changed to 'Terminated without cause.'"

***Build Back Better Act Threatens Class and Collective Action Waivers*, Lexology (Nov. 24, 2021)**: "The U.S. House of Representatives on November 19, 2021, passed the Build Back Better Act (H.R. 5376), ambitious climate protection/social spending legislation that now awaits deliberation in the Senate. Tucked inside the massive bill are numerous provisions of interest to employers. For example, there is a provision that effectively may prohibit employers from adopting class and collective action waivers. By creating significant civil penalties, the bill calls into question the ongoing viability of the U.S. Supreme Court's 2018 decision in *Epic Systems Corp. v. Lewis*, which condoned the use of class and collective action waivers in employment arbitration agreements pursuant to the Federal Arbitration Act." (*ed: See our coverage elsewhere in this* Alert.)

***ASA Launches the Arbitration Toolbox: A First-of-its-Kind Interactive Tool in the Field of International Arbitration*, Kluwer Arbitration Blog (Nov. 28, 2021)**: "In June 2020, the Swiss Arbitration Association (ASA) launched its much-awaited Arbitration Toolbox, an online and interactive tool that guides a user through the various stages of an arbitration…. This post introduces the Arbitration Toolbox, its purpose, functionality and potential to assist arbitration practitioners, scholars and enthusiasts with their work."
return to top

DID YOU KNOW?

ARBITRATION GOES WAY BACK III. 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. We later noted in SAA 2021-42 (Nov. 11) that litigation was evidently a problem in China hundreds of years ago, prompting the **Emperor K'ang-Hsi** (1661-1722) to weigh in with some very strong language endorsing arbitration – and denigrating litigation. But do you know that arbitration use goes even further back? For example, the *Babylonian Talmud Sanhedrin* – compiled around the year 400 – says on page 6b: "Settlement by arbitration is a meritorious act, for it is written, 'Execute the judgment of truth and peace in your gates.' Surely where there is strict justice there is no peace, and where there is peace, there is no strict justice! But what is that kind of justice with which peace abides? — We must say: Arbitration."
return to top

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.*

Mail to: 194 Carlton Terrace, Teaneck, NJ 07666
T: 917-841-0521
Web: www.SecArbAlert.com
Blog: www.sacarbalert.com/blog/; Twitter: @SecArbAlert