SECURITIES ARBITRATION ALERT 2021-47 (12/16/21)

George H. Friedman, Editor-in-Chief

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- **CPR Has a Protocol on Document Disclosure and Witness Presentation**

SQUIBS: IN-DEPTH ANALYSIS

SERVOTRONICS REDUX*, AS SCOTUS AGAIN DECIDES TO REVIEW FOREIGN ARBITRATION DISCOVERY**. ***The Supreme Court on December 10 granted* Certiorari *in two cases that will resolve a split on the extent of discovery available in foreign arbitrations. The Court in a Miscellaneous Order granted *Certiorari*

Petitions in two cases, *ZF Automotive US, Inc. v. Luxshare, Ltd.*, No. 21-401, and *AlixPartners LLP v. The Fund for Protection of Investors' Rights in Foreign States,* No. 21-518, and ordered them consolidated. The Court also granted the motion of the International Institute for Conflict Prevention & Resolution, Inc. ("CPR") for leave to file an *Amicus* Brief.

A Little Review

We reported in SAA 2021-34 (Sep. 9) that, just a month out from the scheduled **October 5** oral argument, Servotronics 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. As reported in SAA 2021-11 (Mar. 25), the Court on **March 22** had agreed to resolve a major Circuit Court split on whether 28 U.S.C. § 1782 provides for discovery in aid of private, foreign, commercial arbitration or only covers cases administered by governmental arbitration forums. Under this statute, a party to a matter pending in a "foreign or international tribunal" can seek an *ex parte* discovery order in aid of arbitration. Specifically: "The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal … for use in the foreign proceeding." But does section 1782 cover foreign, *private* arbitration proceedings? The answer is "Yes or No," depending on the Circuit.

Two More Bites at the Apple: *ZF Automotive* …

As reported in SAA 2021-41 (Nov. 4), a **September 10** Petition for *Certiorari* was filed in *ZF Automotive*. The question presented: "is substantively identical to the question presented in *Servotronics, Inc. v. Rolls-Royce PLC*, No. 20-794 (oral argument originally scheduled for Oct. 5, 2021; case removed from oral argument calendar Sept. 8, 2021): Whether 28 U.S.C. § 1782(a), which permits litigants to invoke the authority of United States courts to render assistance in gathering evidence for use in 'a foreign or international tribunal,' encompasses private commercial arbitral tribunals, as the U.S. Courts of Appeals for the Fourth and Sixth Circuits have held, or excludes such tribunals, as the U.S. Courts of Appeals for the Second, Fifth, and Seventh Circuits have held."

… And *AlixPartners*

The "Quick Takes" in SAA 2021-28 (Jul. 29) covered *Application of the Fund for the Protection of Investor Rights v. AlixPartners*, No. 20-2653 (2nd Cir. Jul. 15, 2021), where the Court held: "… because the arbitration is between an investor and foreign State party to a bilateral investment treaty [between Lithuania and the Russian Federation], and because the arbitration takes place before an arbitral panel established by that same treaty, we hold that this arbitration is a 'proceeding in a foreign or international tribunal.'" As reported in SAA 2021-43 (Nov. 18), AlixPartners on **October 5** filed a Petition for *Certiorari* stating: "Whereas the arbitration in *Servotronics* was between two private parties, the arbitration here is between a private party and a foreign state -- an application of Section 1782 upon which the United States has expressed 'particular concern.' The question presented is: Whether an ad hoc arbitration to resolve a commercial dispute between two parties is a 'foreign or international tribunal' under 28

U.S.C. § 1782(a) where the arbitral panel does not exercise any governmental or quasi-governmental authority."

More on the Relisting Question

Recall that we noted in SAA 2021-56 (Dec. 9) that these cases had been set for consideration at the Court's **December 3** conference, but both cases had been relisted for consideration at the **December 10** conference. At that time, we said: "Hard to discern what happened, and conjecture is pointless." For those readers like us who can't let it go, SCOTUSBlog offers some answers to the question: "It is almost impossible to know exactly what is happening when a particular case is relisted, but a few different things could be going on. One justice could be trying to pick up a fourth vote to grant review, one or more justices may want to look more closely at the case, a justice could be writing an opinion about the court's decision to deny review, or the court could be writing an opinion to summarily reverse (that is, without briefing or oral argument on the merits) the decision below. In 2014, the court appears to have adopted a general practice of granting review only after it has relisted a case at least once; although we don't know for sure, presumably the court uses the extra time resulting from a relist to make sure that the case is a suitable one for its review."

*(ed: *The cases are listed on page 1 of the Order. One hour is allotted for oral argument. **The controlling case number will be 21-401. ***Not to brag, but we called this one. Our past editorial comment was: "We think at least one of these cases has a good shot, since SCOTUS obviously has an interest in this issue." ****Kudos to CPR, which on November 5 filed the Motion for leave to file an* Amicus *brief stating: "CPR takes no position on the merits of the question presented by the petition of AlixPartners, LLP for a writ of certiorari. Rather, CPR submits this amicus brief solely to support the petitioner's request that the Court take up the case and grant certiorari to resolve definitively and promptly the interpretation of the Phrase 'foreign or international tribunal' in Section 1782.")*

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AND THEN THERE WERE FOUR: SCOTUS TAKES ON FOURTH ARBITRATION-RELATED CASE IN A MONTH. ***In about a month, the Supreme Court has gone from no arbitration-centric cases set for review to four (five if you double count a consolidated case).*** Just a month ago, we were reporting in SAA 2021-43 (Nov. 18) that, having just heard argument in this Term's only arbitration-related case then on the oral argument docket (*Badgerow v. Walters,* No. 20-1143), SCOTUS on **November 15** agreed to review *Morgan v. Sundance Inc.*, No. 21-328. Then, as reported directly above, the Court in a **December 10** Miscellaneous Order granted *Certiorari* in two cases, *ZF Automotive US, Inc. v. Luxshare, Ltd.*, No. 21-401, and *AlixPartners LLP v. The Fund for Protection of Investors' Rights in Foreign States*, No. 21-518, and immediately consolidated them. The same Miscellaneous Order also grants *Certiorari* in *Southwest Airlines Co. v. Saxon*, No. 21-309 (*ed: to be honest, we missed this case at both the District Court and Court of Appeals levels*). And, just as we went to press the Court issued a **December 15** Miscellaneous Order granting *Certiorari* in *Viking River Cruises, Inc. v. Moriana*, No. 20-1573. We discuss that latter two cases in this Squib.

***Southwest*: Split on Transportation Worker Definition**
Federal Arbitration Act ("FAA") section 1 exempts from the Act: "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." In *New Prime, Inc. v. Oliveira*, 139 S. Ct. 532 (2019), SCOTUS held unanimously that the FAA exempts from coverage independent contractors – i.e., not just "employees" – engaged in interstate commerce. As we have reported many times, though, there is a clear Circuit Court split on whether the section 1 exemption embraces only workers actually moving goods or people in interstate commerce (Fifth, Seventh, and Eleventh Circuits) or is to be construed more broadly to cover those who are part of the "flow" or "stream" of interstate commerce (First and Ninth Circuits). See, for example, *Waithaka v. Amazon.com, Inc*., 966 F.3d (1st Cir. 2020), *Cert. den.* (Jun. 21, 2021), *reconsideration den.* (Aug. 2, 2021). Compare to then-Judge **Coney Barrett's** Opinion in *Wallace v. Grubhub Holdings, Inc*., 970 F.3d 798 (7th Cir. 2020), covered in SAA 2020-31 (Aug. 19): "But to fall within the exemption, the workers must be connected not simply to the goods, but to the act of moving those goods across state or national borders."

***Southwest*: Case Below**
This is precisely the question presented in the **August 23** Petition in *Southwest Airlines*: "Whether workers who load or unload goods from vehicles that travel in interstate commerce, but do not physically transport such goods themselves, are interstate 'transportation workers' exempt from the Federal Arbitration Act." In the case below, *Saxon v. Southwest Airlines Co*., 993 F.3d 492 (7th Cir. Mar. 31, 2021), *motion to stay mandate den.* (Apr. 23, 2021), a unanimous Seventh Circuit held: "Latrice Saxon is a ramp supervisor who manages and assists workers loading and unloading airplane cargo for Southwest Airlines Company. After she brought a lawsuit against her employer, Southwest invoked the Arbitration Act. Saxon asserted that she was an exempt transportation worker, but the district court found her work too removed from interstate commerce and dismissed the case.[] We reverse. The act of loading cargo onto a vehicle to be transported interstate is itself commerce, as that term was understood at the time of the Arbitration Act's enactment in 1925. Airplane cargo loaders, as a class, are engaged in that commerce, in much the way that seamen and railroad employees were, and Saxon and the ramp supervisors are members of that class. It therefore follows that they are transportation workers whose contracts of employment are exempted from the Arbitration Act."

***Viking River*: PAGA in the Spotlight**
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).

No SCOTUS Review…
But did the U.S. Supreme Court's subsequent decision in *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018), holding that class or collective action waivers were enforceable under the Federal Arbitration Act, implicitly overrule *Iskanian?* The Supreme Court has up to now eschewed the opportunity to review whether PAGA is preempted by the FAA. For example, as reported in SAA 2021-49 (Oct. 21) the Court on **October 12** declined to review *Campbell v. DoorDash, Inc.*, No. A159296 (Cal. Ct. App. 2020), *pet. for review den.*, No. S266497 (Cal. Mar. 10, 2021), where that Court held: "*Iskanian* is good law and California courts remain bound by it." The **August 9** Petition for *Certiorari* in *DoorDash, Inc. v. Campbell*, No. 21-220, had presented this question: "Whether agreements calling for individual arbitration are enforceable under the Federal Arbitration Act with respect to claims asserted under California's Private Attorneys General Act, Cal. Lab. Code § 2698 *et seq*."

…Until Now
The question presented in the granted **May 10** Petition in *Viking River* is: "Whether the Federal Arbitration Act requires enforcement of a bilateral arbitration agreement providing that an employee cannot raise representative claims, including under PAGA." Petitioners sought review of *Moriana v. Viking River Cruises, Inc.*, No. B297327 (Cal. Ct. App. 2020), *pet. for review den.*, No. S265257 (Cal. 2020), where the Court of Appeal held: "…. *Epic*'s warning about impermissible devices to get around otherwise valid agreements to individually arbitrate claims notwithstanding, *Iskanian* remains good law. We therefore reject Viking's characterization of PAGA claims as a transparent device to preclude individualized arbitration proceedings and follow *Iskanian*, which instead viewed predispute PAGA waivers precluding PAGA actions in any forum as attempts to exempt employers from responsibility for violations of the Labor Code" (footnote omitted).

… And Another Case is Still Pending
As reported in SAA 2021-37 (Oct. 7), still pending is 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 there 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*. See *Uber Technologies, Inc. v. Gregg*, No. 21-453.
*(ed: *Wow. An arbitration quartet is in the offing – a first. Up until now, the record was a trilogy of arbitration related cases in a single Term. The last time SCOTUS agreed to hear multiple cases involving arbitration was the 2018-19 Term, when the Court accepted for review:* Henry Schein, Inc. v. Archer & White Sales, Inc.*, No. 17-1272;* Lamps Plus v. Varela, *No. 17-988; and* New Prime, Inc. v. Oliveira, *No. 17-340. SCOTUS hadn't before heard three arbitration cases during the same Term since 1960, when the Court decided three landmark arbitration cases involving the United*

*Steelworkers Union. These decisions were later dubbed, the "Steelworkers Trilogy." **Notice that SCOTUS previously denied* Cert. *in* Waithaka*? We think the question presented in that case – whether the FAA section 1 exemption for classes of workers engaged in foreign or interstate commerce applied to Amazon "Last Mile" drivers – may have been too narrow, while that in* Southwest *is broader. ****Campbell *is listed on page 5 of the October 12 Order List. ****There have been other recent California Court of Appeal cases to the same effect as* Campbell: *see* Winns v. Postmates Inc., *No. A155717 (Calif. Ct. App. Dist. 1 Jul. 20, 2021)*; Herrera v. Doctors Medical Center of Modesto, Inc., *No. F080963 (Calif. Ct. App. 5 Aug. 5, 2021); and* Williams v. RGIS, LLC, *No. C091253 (Calif. Ct. App. 3 Oct. 18, 2021). *****As we've said before, stating the obvious, the Supreme Court's composition has changed since SCOTUS declined to review the original* Iskanian *holding in 2015.)*
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UNANIMOUS ALL-PUBLIC PANEL GRANTS MOTION TO DISMISS BASED ON MEDIATED SETTLEMENT. ***A prior settlement via mediation was validated by the arbitrators, resulting in the unanimous Panel granting a Motion to Dismiss.*** One of the few valid grounds for a successful Motion to Dismiss before the end of a party's case-in-chief appears in FINRA's *Customer Code of Arbitration Procedure* Rule 12504(a)(6)(A), where: "the non-moving party previously released the claim(s) in dispute by a signed settlement agreement and/or written release…." This was precisely at issue in *Drew v. Morgan Stanley*, FINRA ID No. 21-00833 (Boca Raton, FL, Dec. 2, 2021), where the All-Public Panel granted Morgan Stanley's motion to dismiss.

Evidence of Prior Mediated Settlement is Admissible
Lisa Drew filed the $3+ million arbitration as Successor Trustee of the Tullio and Maria DeFilippis Joint Revocable Trust, as Personal Representative of the Estate of Tullio DeFilippis, and individually. The causes of action related to: "the confessed conversion and mismanagement of assets in Claimant's account by Respondent's former associated person." Morgan Stanley moved to dismiss based on a prior mediated settlement. Drew countered that evidence of the settlement was inadmissible attorney work product, which was denied by the Panel. The main argument? "Respondent asserted, among other things, that reference to settlement documents is permissible for the purpose of enforcing a settlement, and that both Florida and New York law allow for emails between counsel to constitute valid settlements."

Motion to Dismiss Granted
Having accepted the evidence, the next issue was whether there had in fact been a settlement. The unanimous Panel grants the Motion to Dismiss filed under Rule 12504(a)(6)(A), finding that there had indeed been a validly executed settlement agreement. On what basis? "Respondent asserts the parties previously entered into a settlement agreement at mediation, which was memorialized through material terms confirmed and accepted via an email acknowledgment by Claimant's former counsel. Claimant asserts the email signed by Claimant's counsel is not enforceable under the FINRA Rules as a written agreement and release. Upon reviewing the pleadings, FINRA

regulations and opinion guidance, case law guidance, evidence and hearing oral arguments by the parties' counsel, this Panel unanimously finds the electronic signature acknowledging agreement of the material settlement terms is sufficient to enforce the mediated settlement agreement and release in this matter. The material terms set forth in the mediator's email dated December 22, 2020, provided for a settlement and release of all claims, payment of $425,000.00, standard confidentiality provision, Morgan Stanley to pay the mediator's fee, which were accepted by Claimant and the Trust via electronic signature by Claimant through her counsel. Thus, the Panel finds there was sufficient evidence to establish a settlement of this matter between the parties."
*(ed: *Seems right to us. **Morgan Stanley had evidently not yet paid the $425,000 settlement, because the Award adds: "The settlement agreement entered into by the parties is hereby enforced and the parties shall comply with its terms in full, which includes Respondent Morgan Stanley making the $425,000.00 payment to Claimant of the settlement amount in exchange for a full release of all claims in accordance with those material terms.")*
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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

SPLIT SIXTH CIRCUIT UPHOLDS DELEGATION CLAUSE. The facts in *In re: StockX Customer Data Security Breach Litigation*, No. 21-1089 (6th Cir. Dec. 2, 2021), are a bit murky, so we will simplify them. Putative plaintiffs sought class certification against StockX for damages arising out of a significant data breach. Based on the predispute arbitration agreement ("PDAA") and class action waiver in the online signup agreement, StockX moved to compel individual arbitrations. The majority first articulates the test to be applied: *First*, we resolve any challenge that pertains to the *formation* or *existence* of the contract containing the delegation provision. If a contract exists, we proceed to step two. *Second*, we decide any remaining *enforceability* or *validity* challenge only if it would 'affect the [delegation provision] alone' or 'the basis of [the] challenge [is] directed specifically to the [delegation provision].' *Rent-A-Center*, 561 U.S. at 71-72. 'We review *de novo* a district court's decisions regarding both the existence of a valid arbitration agreement and the arbitrability of a particular dispute'" (brackets in original; emphasis in original; some citations omitted). Applying this standard to the facts at hand, the majority affirms the District Court's order compelling arbitration: "Because a contract exists and the delegation provision itself is valid, we have 'no business weighing the merits' of any challenge to the arbitration agreement or the October 2018 Terms. See *Henry Schein*, 139 S. Ct. at 529; *Granite Rock*, 561 U.S. at 299. It bears emphasis, however, that today's decision is narrow. As this court has said before: 'It's not about the *merits* of the case. It's not even about *whether* the parties have to arbitrate the merits. Instead, it's about *who should decide* whether the parties have to arbitrate the merits'" (emphasis in original; some citations omitted).
*(ed: *Judge Karen Nelson Moore dissents: "I would hold that a minor who has disaffirmed a contract is not subject to the contract's delegation provision.... I also take issue with the majority's assertions that plaintiffs' unconscionability arguments 'do not relate specifically to the delegation provision.'" **In keeping with our view that it* does *matter who appointed the judge, we note for the record that the pro-arbitration majority*

judges – Julia Smith Gibbons (G.W. Bush) and Ralph B Guy, Jr. (Reagan) – were appointed by Republican Presidents and dissenter Moore by President Clinton.)
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ADOPTING AAA OR JAMS RULES IS CLEAR AND UNMISTAKABLE EVIDENCE OF DELEGATION: D. N.J. It is well-established that arbitrability issues are for courts to decide, absent "clear and unmistakable evidence" of delegation. A growing body of case law also provides that, by incorporating the AAA or JAMS rules, the parties have manifested such evidence of delegation. That was the core holding in *VR Consultants, Inc. v. J.P. Morgan Chase & Co*., No. (D. N.J. Nov. 23, 2021) (not for publication), where Chase's arbitration agreements called for the rules of either institution. What was the crux of the parties' positions? "… Plaintiff argues that arbitration clauses in the DAA [Deposit Account Agreement] and Online Agreement apply to disputes regarding a Chase deposit account, and do not apply to Chase's other financial products such as PPP [Paycheck Protection Program] loans. In response, Defendant asserts that these agreements delegate any questions of scope and enforceability to the arbitrator to decide in the first instance, and in any event, Plaintiff's claims are covered by the relevant arbitration provisions." Both the AAA's *Commercial Arbitration Rules* R-7(a), and JAMS' *Comprehensive Arbitration Rules & Procedures* Rule 11(b) in the Court's words: "give the arbitrator the ability to decide whether the arbitrator has jurisdiction to hear the matter, including the scope of an arbitration agreement." Accordingly, writes District Judge **Claire C. Cecchi**: "the parties' inclusion of AAA and JAMS procedures in the contested arbitration agreement is clear evidence that they intended the arbitrator to decide questions related to scope."
(ed: Makes sense to us. We see the same outcome in a FINRA arbitration.)
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ATTENTION LAW SCHOOLS! TODAY IS THE APPLICATION DEADLINE FOR CPR'S 2022 VIRTUAL INTERNATIONAL MEDIATION COMPETITION. As reported in SAA 2021-46 (Dec. 9), CPR's virtual *2022 International Mediation Competition* has been set for **March 26 - April 3.** This is a gentle reminder that pre-registration, which is done online, is open until today, **December 16**.
(ed: Again, the competition problem: "will involve an international business dispute mediated pursuant to the CPR International Mediation Procedure.")
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QUICK TAKES: CASES AND AWARDS WORTH READING

***Arabian Motors Group W.L.L. v. Ford Motor Co*., Nos. 20-2152 & 20-2112 (6th Cir. Dec. 3, 2021)**: "Arabian Motors Group and Ford Motor Company have been in and out of arbitration and federal court for nearly six years with respect to the same dispute. At issue at this stage of the case is whether the district court should have stayed or dismissed this federal court action to permit the remaining claims to be arbitrated under the Federal Arbitration Act. On this record, the court should have stayed the action. We reverse the district court's contrary decision…. Because a dismissal, unlike a stay, permits an objecting party to file an immediate appeal, a district court dismissal order undercuts the

pro-arbitration appellate-review provisions of the Act. Section 16 of the Act allows immediate appeals of court orders that *deny arbitration* (such as the refusal of a stay under § 3) but defers appellate review of decisions *in favor of arbitration* (such as the grant of a stay or a refusal to enjoin arbitration). 9 U.S.C. § 16. If a district court could freely dismiss cases in this setting, it would upend this approach. It would allow a party normally required to bring an appeal at the end of the action to sidestep the clear policy preference of the Act—that pro-arbitration decisions are not appealable until the confirmation stage of the case—and continue to litigate the issues in federal court and thus disrupt the arbitration" (emphasis in original).

***Subway International B.V. v. Subway Russia Franchising Company, LLC*, No. 1:21-cv-07362-SR (S.D.N.Y. Dec. 8, 2021)**: "Before the Court are cross-petitions to confirm and vacate an arbitration award. The underlying dispute concerns control over the network of Subway sandwich shops in Russia. Despite the highly deferential standard of review under the Federal Arbitration Act, the Court concludes that the arbitration award must be vacated, because 'a mutual, final, and definite award upon the subject matter submitted [to arbitration] was not made.' 9 U.S.C. § 10(a)(4). Specifically, the Final Award, issued following what were essentially cross-motions for partial summary judgment, purported to render decision on all the claims and counterclaims, even though the supporting opinion acknowledged that one claim pled in the alternative was reserved for trial and the arbitrator therefore did not address it. Full resolution of the case was therefore inappropriate, and it is necessary to remand the case to decide the remaining claim" (brackets in original; link added by the *Alert*). (*ed: we rarely see this ground asserted for vacating awards.*)

***DeLeon v. Defendants Pinnacle Property Management Services, LLC*, No. G059801 (Calif. Ct. App. 4 Dec. 8, 2021)**: "The [trial] court denied the motion [to compel arbitration] because it determined the arbitration agreement was procedurally and substantively unconscionable. As to the former, the court noted the agreement was unconscionable because plaintiff Anthony De Leon was required to sign the arbitration agreement as a precondition to his employment. As to the latter, the court found the agreement was substantively unconscionable because of its limits on discovery and because it shortened the statute of limitations to one year on all claims. On appeal, defendants contend the arbitration agreement had low procedural unconscionability and contained only one substantively unconscionable provision—the statute of limitations provision. They alternatively claim the court erred by failing to sever any unconscionable provisions. For the reasons below, we agree with the court's unconscionability findings. The court also did not abuse its discretion by refusing to sever any portion of the arbitration agreement. We accordingly affirm." (*An* Alert *h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this decision.*)

***Ennis v. Merrill Lynch*, FINRA ID No. 21-00685 (New York, NY, Nov. 17, 2021)**: An Arbitrator explains his reasoning for granting Claimant broker's request for reformation of his Form U5 record, finding the statements set forth in the amended Form U5 are false, would tend to harm the broker's business, trade, or profession, and are defamatory in

nature: “The Arbitrator recommends expungement based on the defamatory nature of the information. The above recommendations are made with the understanding that the registration records are not automatically amended. Lawrence Casey Ennis must forward a copy of this Award to FINRA’s Credentialing, Registration, Education and Disclosure Department for review.” *Provided courtesy of SAC’s ARBchek facility (www.arbchek.com).*

***Frost v. LPL Financial*, FINRA ID No. 20-01763 (Columbus, OH, Nov. 19, 2021)**: An All-Public Panel grants Respondent broker-dealer's Motion for Directed Verdict based on a lack of presentation of evidence to support the claims for relief. The Non-Party broker loses his request for expungement of this matter from his CRD record. The causes of action related to Respondent broker-dealer’s alleged failure to follow the customer's instruction concerning the liquidation of his account. *Provided courtesy of SAC’s ARBchek facility (www.arbchek.com).*

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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

T. Meshel and M. A. Yahya, *Crypto Dispute Resolution: An Empirical Study*, Journal of Law, Technology and Policy, Vol. 2021, No. 2 (2021): “Cryptocurrencies, such as Bitcoin and Dogecoin, are taking the financial world by storm. Like all financial instruments, these cryptocurrencies and the crypto exchanges they are traded on give rise to complex legal issues. This article concerns an understudied yet crucial aspect of crypto trading, namely crypto disputes and their resolution. The sheer number and growing popularity of cryptocurrencies means that disputes arising from their trading are likely to increase, yet it remains unclear how they are being, or will be, resolved. Novel issues surrounding the identity of traders, the jurisdictional limits of domestic courts, the applicable governing law(s), and complex technical evidence may mean that traditional non-binding mechanisms—such as negotiation and mediation, as well as binding legal mechanisms—such as litigation and arbitration, may be ill-equipped in the crypto context. At the same time, tailored crypto-specific dispute resolution mechanisms are only at nascent stages of development. In this article, we take a first empirical look at the mechanisms by which cryptocurrencies and crypto exchanges choose to resolve disputes with their users.… We find that crypto platforms predominantly resort to domestic litigation and international arbitration to resolve future disputes. Moreover, we find that the ability to prohibit class proceedings seems to be the strongest explanatory factor in crypto platforms’ choice of international arbitration. In contrast, providing for the venue seems to be most strongly linked with choosing domestic litigation.”

***District Court Says Bank’s Arbitration Clauses Apply to PPP Loans*, Lexology (Dec. 3, 2021)**: “On November 23, the U.S. District Court for the District of New Jersey granted a national bank’s motion to compel arbitration in an action concerning the bank’s alleged mishandling of Paycheck Protection Plan (PPP) loan applications…. The court stayed the case and granted the bank’s motion to compel arbitration, noting that the bank’s deposit account agreement and online services agreement both include arbitration clauses. These

clauses, the court stated, are 'clear evidence' that the bank intended an arbitrator to decide questions related to scope." (*ed: See our coverage elsewhere in this* Alert.)

***Bill Banning Mandatory Arbitration in Financial Services One Step Closer to Becoming Law*, Freeman Mathis & Gary, LLP Blog (Dec. 6, 2021)**: "Most retail investors have signed a customer agreement requiring that all claims against their broker or financial advisor be resolved through arbitration. Last week, the House Financial Services' Committee took a step toward making such mandatory arbitration provisions a thing of the past by passing H.R. 2620, the 'Investor Choice Act.' If made into law, the bill would amend the Securities Exchange Act of 1934 to prohibit broker-dealers from entering into agreements with customers if those agreements mandate arbitration or restrict a customer's ability to select a forum or participate in a class action. The bill would also amend the Investment Advisors Act of 1940 to prohibit investment advisors from entering into similar agreements."

***Investor Who Lost in Arbitration Files Class Claim Against UBS and Four Advisors Over 'YES' Losses*, AdvisorHub (Dec. 6, 2021)**: "UBS Financial Services and the creators of the Yield Enhancement Strategy, an options strategy that went awry during market volatility in 2018 and 2020, devised it so the firm could 'double-dip' charging fees on clients' invested assets while failing to disclose the risks the product created for investors, according to a proposed class action lawsuit filed Dec. 5.[]The lawsuit was filed by investor Christian Dumontet on behalf of some 1,500 customers he said participated in the strategy. It is his second bite of the apple after a Financial Industry Regulatory Authority arbitration panel earlier denied his individual damage claim. Dumontet alleges the Finra panel dismissed his related claim on Dec. 3, 'without receiving any discovery or confidential information or documents from UBS,' according to the class complaint." (*ed: Sounds to us like there was a dismissal without prejudice, rather than a "no damages" award from the panel. We can't find a FINRA award involving this customer.*)

***Morgan Stanley Prevails Over Late Client's Daughter Seeking $3.6M*, Financial Planning (Dec. 6, 2021)**: "Morgan Stanley's settlement with a late client's estate for hundreds of thousands of dollars led to the dismissal of a FINRA arbitration claim seeking several millions of dollars in damages.[] Three arbitrators granted Morgan Stanley's motion to dismiss a case filed by Lisa Drew, the successor trustee of the Tullio and Maria DeFilippis Joint Revocable Trust, based on the wirehouse's settlement of any claims by the family involving an unidentified former registered representative for $425,000, according to the Dec. 2 award document…. [T]he deceased couple's daughter, had requested more than $3.6 million in damages under laws against exploitation of vulnerable adults, negligence, fraudulent misrepresentation and other claims." (*ed: See our coverage elsewhere in this* Alert.)

***SEC Issues Whistleblower Nearly $5 Million Award*, www.sec.gov (Dec. 7, 2021):** "The Securities and Exchange Commission (SEC) today announced an award of nearly $5 million to a whistleblower who provided critical information and assistance that led to the

success of a covered action. The whistleblower's information helped the SEC to more quickly and efficiently bring an action that returned millions of dollars to harmed investors."

***Wells Fargo Settles Another FINRA Case Over Client Records for $2.3M*, Financial Planning (Dec. 8, 2021)**: "A blunder by a Wells Fargo team tasked with managing the firm's last FINRA case involving the 'Write Once Read Many' format led to another one five years later, according to the regulator. Wells Fargo Clearing Services, the parent firm of Wells Fargo Advisors, as well as its independent brokerage, the Wells Fargo Advisors Financial Network, failed to store 13 million records that are 'an integral part of an anti-money laundering program' in the required WORM format over the past 17 years, a Dec. 6 letter of acceptance, waiver and consent shows. A working group found out about the problem in November 2016 but didn't notify another team at Wells Fargo overseeing its FINRA reporting obligations, according to investigators."

***Court Adds a Third Arbitration Case in Friday's Cert Granted Order List*, CPR blog (Dec. 10, 2021)**: "In addition to the two cert grants this afternoon on the international arbitration discovery issue in 28 U.S.C. § 1782, the U.S. Supreme Court accepted a third arbitration case for oral arguments.[] *Southwest Airlines Co. v. Saxon*, No. 21-309, presents a Federal Arbitration Act Sec. 1 question: 'Whether workers who load or unload goods from vehicles that travel in interstate commerce, but do not physically transport such goods themselves, are interstate 'transportation workers' exempt from the Federal Arbitration Act.'" (*ed: See our coverage elsewhere in this* Alert.)
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DID YOU KNOW?

CPR HAS A PROTOCOL ON DOCUMENT DISCLOSURE AND WITNESS PRESENTATION. CPR recently updated its *Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration*. Says the introduction: "The CPR Protocol addresses concerns often expressed by users of arbitration, that there is, particularly in disputes involving parties of different legal cultures, a lack of predictability in the ways in which the arbitration proceedings are conducted and that arbitration is becoming increasingly more complex, costly, and time-consuming. The Protocol addresses these concerns by providing guidance in the form of recommendations as to practices that tribunals may follow in administering proceedings before them, including proceedings conducted under CPR rules or under other ad hoc or institutional rules. The practices recommended deal with ways in which reasonable limitations may be placed on disclosure and efficiencies gained in the presentation of witness testimony in arbitration hearings."
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