SECURITIES ARBITRATION ALERT

SECURITIES ARBITRATION ALERT 2022-04 (2/3/22)

George H. Friedman, Editor-in-Chief

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SQUIBS: IN-DEPTH ANALYSIS

GEORGIA COURT VACATES FINRA AWARD ON SEVERAL BASES, INCLUDING FINRA DRS MISCONDUCT. PIABA CALLS FOR THE FEDS TO INVESTIGATE. *Just as we were finalizing this* Alert*, we learned that a Georgia Trial Court has just vacated a FINRA Award based on multiple Federal Arbitration Act ("FAA") violations, prompting PIABA to call for Congressional and SEC*

investigations. We will cover this story in detail in the next issue, but we wanted to pass along now some basic information. We covered in SAA 2019-30 (Aug. 7) the underlying Award in *Leggett v. Wells Fargo Clearing Services, LLC*, FINRA ID No. 17-01077 (Atlanta, GA, Aug. 1, 2019). We said then that: "The Arbitrators rule for WF, holding [investor] Leggett liable for $51,000 in costs and all forum fees; they also award expungement relief …." The investors moved to vacate in **October 2019**, asserting several acts of arbitrator and FINRA arbitration forum misconduct. One key assertion was that the integrity of the proposed arbitrator list compilation process had been compromised. Fulton County Superior Court Judge **Belinda E. Edwards** vacates the Award in *Leggett v. Wells Fargo Clearing Services, LLC*, No. 2019CV328949 (Ga. Super Jan. 25, 2022). The Court weighed in on interference with the Neutral List Selection System with some scathing verbiage:

> "The Court's factual review of the record evidence leads to its finding that Wells Fargo and its counsel manipulated the FINRA arbitrator selection process in violation of the FINRA Code of Arbitration Procedure, denying the Investors' their contractual right to a neutral, computer-generated list of potential arbitrators. Wells Fargo and its counsel, Terry Weiss, admit that FINRA provides any client Terry Weiss represents with a subset of arbitrators in which certain arbitrators (at least three, but perhaps more) are removed from the list Wells Fargo agreed, by contract, to provide to the Investors in the event of a dispute. Permitting one lawyer to secretly red line the neutral list makes the list anything but neutral, and calls into question the entire fairness of the arbitral forum."

PIABA: Send in the Investigators

In a somewhat rare occurrence, PIABA issued a **February 2** Statement from President **Mike Edmiston** commenting on the court decision and calling for Congress and the SEC to investigate FINRA's operation of its arbitration forum: "On January 25, 2022, a Georgia state court vacated a FINRA arbitration award in favor of Wells Fargo finding that Wells Fargo and its counsel manipulated the arbitration process. The manipulation was accomplished with the help of FINRA Dispute Resolution. []Judge Belinda E. Edwards excoriated the conduct of FINRA Dispute Resolution in managing the arbitration selection process and the arbitration panel for permitting a variety of misconduct by Wells Fargo Clearing Services and its counsel.[]Of immediate concern to PIABA is the apparent corruption of the arbitrator selection process. The Court found Wells Fargo and its counsel manipulated the arbitration process to deny Claimants their right to a neutral arbitration panel. []According to the Order, Wells Fargo and its attorney had an unwritten agreement with FINRA that FINRA would remove certain arbitrators from any list presented to this particular counsel. Judge Edwards found, '[p]ermitting one lawyer to secretly red line the neutral list makes the list anything but neutral, and calls into question the entire fairness of the arbitral forum.'"

FINRA Responds

A FINRA spokesperson offered this response: "There has never been any agreement between FINRA Dispute Resolution Services and attorney Terry Weiss regarding

appointment of arbitrators. Any assertions to that effect are false.[]We have reviewed all cases involving Terry Weiss as counsel and none of the three arbitrators in question was excluded or removed from ranking lists prior to sending the lists to the parties. In fact, in the case at hand, Arbitrator Pinckney, an arbitrator who served on the *Postell* case, was on the list sent to the parties.[]As the neutral administrator, we continually strive to make the FINRA forum the fairest, most efficient program available and stand behind the integrity of our neutral list selection process."
*(ed: *Ouch! More details next week. **We wonder whether the Court sought input from FINRA? ***Regarding proposed arbitrator lists compiled by the Neutral List Selection System, we've always been advocates of: "If you don't like 'em, strike 'em.")*
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MARCH MADNESS AS SCOTUS SETS "FINAL FOUR" ORAL ARGUMENTS FOR LAST TWO WEEKS IN MARCH. ***We reported in December that the Supreme Court had granted*** **Certiorari** ***in four cases involving arbitration. The Court has just set the cases for oral argument during the last two weeks of March.*** The oral argument calendar released by SCOTUS on **January 28** shows that all four cases have been set for oral argument as follows: **March 21**: *Morgan v. Sundance Inc.*, No. 21-328; **March 23:** *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; **March 28:** *Southwest Airlines Co. v. Saxon*, No. 21-309; and **March 30**: *Viking River Cruises, Inc. v. Moriana*, No. 20-1573.

A Brief Review
We covered these cases in detail in SAA 2021-47 (Dec. 16) and in a feature article, *After a Lull in 2021, a Busy Year Ahead Arbitration-wise for SCOTUS*, 2021:48 SEC. ARB. ALERT 1 (Dec. 23, 2021). We provide below a thumbnail on the issues involved.

***Morgan*:** The question presented in the **August 27** Petition is: "Does the arbitration-specific requirement that the proponent of a contractual waiver defense prove prejudice violate this Court's instruction that lower courts must 'place arbitration agreements on an equal footing with other contracts?' [in] *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)." The Petition notes that there is a significant split on the issue: "This Court should grant certiorari to resolve a longstanding circuit split on the question whether a party asserting waiver of the right to arbitrate through inconsistent litigation conduct must prove prejudice, and if so, how much. This question not only divides the federal courts of appeals, but divides federal courts from geographically co-located state courts of last resort …."

ZF Automotive - AlixPartners: The **September 10** Petition in *ZF Automotive* asserts that the question before the Court "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." The **October 5** Petition for *Certiorari* in *AlixPartners*, which is consolidated with *ZF Automotive,* states: "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."

***Southwest Airlines*:** 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." As we have reported many times, there is a clear Circuit Court split on whether the FAA 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). The question presented in the **August 23** Petition is: "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."

***Viking River*:** 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 their 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). 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 are enforceable under the FAA, implicitly overrule *Iskanian?* The **May 10** Petition in *Viking River* asks: "Whether the Federal Arbitration Act requires enforcement of a bilateral arbitration agreement providing that an employee cannot raise representative claims, including under PAGA."

Déjà Vu All Over Again?

One wonders if SCOTUS is setting up another "Steelworkers Trilogy" scenario, when the Court six decades ago simultaneously decided three landmark arbitration cases involving the United Steelworkers. The three cases, *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp*., 363 U.S. 593 (1960); and *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), were all heard the same week (April 27-28, 1960), and the decisions were all announced *seriatim* on the same day (June 20, 1960). Is SCOTUS planning a redux with the "Arbitration Quartet"? Time will tell.

Unfinished Business
The only arbitration-centric case remaining from the Court's 2021 oral argument docket, *Badgerow v. Walters*, No. 20-1143, was heard **November 2021**. As reported in SAA 2021-19 (May 20), the Supreme Court in **May 2020** granted *Certiorari* in this case involving application of the "look through" standard. Specifically, the Court agreed to review *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. What is this standard? The Supreme Court in *Vaden v. Discover Bank*, 556 U.S. 49 (2009), held that jurisdiction over a petition to compel arbitration under FAA section 4 is determined by the nature of the underlying dispute. This was based on section 4 language 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." The *Vaden* standard became known as the "look through" standard. The specific issue identified for review in the Petition for *Certiorari* in *Badgerow* is: "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."
*(ed: *It's probably just a coincidence, but the cases are being heard in the precise order in which* Cert. *was granted. **One would think a decision in* Badgerow *isn't far away. ***This Squib was published in our blog on January 31.)*
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OUR PROMISED ANALYSIS OF THE FINRA FULL-YEAR 2021 DISPUTE RESOLUTION STATS. ***We reported briefly in SAA 2022-03 (Jan. 27) on FINRA Dispute Resolution Services' ("DRS") full -year 2021 case statistics. Here is the promised in-depth analysis***. The statistics show overall downward arbitration case filing trends continuing from prior months, but with mediations continuing a meteoric rise. As we reported in #03, the headlines are: 1) overall arbitration filings for 2021 – 2,893 cases – were down 26%); 2) cumulative customer claims were down 9% from 2020; 3) industry disputes were way down at minus 45%; 4) the ratio of customer to industry filings – about 2:1– returned to usual levels; 5) arbitrators issued awards in 15% of cases concluded, with customers receiving damages in about a third of these cases; 6) for the sixteenth month in a row, pending arbitration cases declined; 7) mediation cases surged 49%; 8) overall arbitration turnaround times were 15.4 months, with hearing cases now taking 18.1 months (both were up); are 9) there are now 8,269 DRS arbitrators, 3,980 public and 4,289 non-public. We elaborate below on some key takeaways.

Controversy and Security Types: the Top Fives
A few years ago, DRS began sorting the controversy and security types in descending order. We follow that pattern below, showing the top five in each category (*ed: note that a single case can have multiple controversy or security types*): **Controversy**

Types in Customer Arbitrations: 1) breach of fiduciary duty; 2) negligence; 3) failure to supervise; 4) misrepresentation; and 5) breach of contract. **Security Types in Customer Arbitrations**: 1) common stock; 2) real investment trust; 3) business development company; 4) private equities; and 5) mutual funds. **Controversy Types in Intra-Industry Arbitrations**: 1) breach of contract; 2) promissory notes; 3) libel or slander on Form U-5; 4) compensation; and 5) wrongful termination.

Customer "Win Rate"

FINRA has a stat showing the percentage of cases where customers were awarded damages. It is not a "win" or "recovery" rate; it simply shows the percent of the cases where awards were issued (about 13% of customer cases concluded) where a customer was awarded damages of *any* amount. Whether one finds this stat useful, it does allow year to year comparisons. This figure stood at 31% for all (i.e., hearings, special procedures, and paper) awarded customer cases in 2021, down from 32% in 2020 and 45% in 2019. The picture is somewhat brighter when only hearing cases are considered: 37% (2021); 34% (2020); 45% (2019). There does seem to have been a slight "Zoom Effect" in that customers received damages in 44% of 166 cases with at least one evidentiary hearing conducted by Zoom, as compared to 48% of 80 cases conducted entirely in-person.

Pending Cases Continue to Decline

For months after the pandemic's onset in March 2020, the pending cases stat built up to a high of 5,415 open cases in August 2020. The last sixteen months, however, have each experienced declines in pending cases, reflecting a 1,499-case reduction from last year's high water mark. Closed cases were up 13% last year, while pending cases were down 24%. Again, kudos to FINRA DRS for eliminating the backlog.

Checking in on Virtual Hearings

The virtual hearing stats show continued use of Zoom for at least some hearings or parts of hearings. The cumulative FINRA "Virtual Arbitration Hearings" for the last year: 635 arbitration cases conducted one or more hearings via Zoom (269 customer cases and 366 industry cases). There were 492 total joint motions for virtual hearings (209 in customer cases and 283 in industry cases). Customers prevailed in 61% of contested motions for virtual hearings. As we've said before, while the **August 2021** return of in-person hearings at FINRA DRS will continue to erode use of virtual hearings, we don't see this option ever going away entirely. Recall that our **January 2021** 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.

Speaking of Mediation

There were 617 mediation cases in agreement for the year, a significant 49% increase over 2020. With 55 mediations, December was the fifth month in a row with a significant increase in monthly and cumulative mediation filings. Recall that, as reported in SAA 2021-46 (Dec. 9), Director of Arbitration **Rick Berry** attributed the dramatic increase to: the return to in-person hearings; ending waiver of postponement fees for all cases

(September 2021); comfort at being in person after inauguration of DRS's mandatory vaccination policy; growing use of Zoom for mediations; and the return of Mediation Settlement Month. The strong settlement rate also continues, with nine out of ten mediation cases (88%) continuing to result in a settlement.
*(ed: *Overall and hearing processing times have ticked up the past few months. We again wonder if the resumption of in-person hearings in August is somehow linked to it, given that it is easier to schedule and attend virtual hearings than those conducted in-person? **We also wonder whether industry "return to the office" and vaccine mandates will cause employment and promissory note cases to increase in 2022?)*
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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

SEC LOOKING FOR INVESTOR ADVISORY COMMITTEE CANDIDATES. The SEC announced on **January 19,** that it is: "seeking candidates for appointment to the Investor Advisory Committee ["IAC"] to help protect investors and improve securities regulations.[]The committee was established under the Dodd-Frank Wall Street Reform and Consumer Protection Act to advise the Commission, protect investor interests and promote the integrity of the securities marketplace. Committee members represent the interests of investors, are knowledgeable about investment issues and have reputations for integrity." Candidates for vacancies on the IAC will be: "identified by a nominating committee composed of staff from across the SEC's divisions and offices. The nominating committee is chaired by **Robert A. Marchman,** Senior Policy Advisor for Diversity and Inclusion in the Office of Minority and Women Inclusion.[]The nominating committee will identify candidates based on functional membership categories published on the SEC's website. The Commission last **August** announced new IAC nomination procedures. The IAC: "advises and consults with the Commission on: Regulatory priorities of the Commission; Issues relating to the regulation of securities products, trading strategies, fee structures, and the effectiveness of disclosure;
Initiatives to protect investor interests; and Initiatives to promote investor confidence and the integrity of the securities marketplace."
(ed: There is no official application form. Members of the public interested in serving: "should promptly email a letter of interest with applicable information about their relevant experience." The address is: IAC-Candidates@sec.gov.)
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FOR ENFORCEMENT IN THE US OF A FOREIGN AWARD, UN CONVENTION REQUIRES THAT ARBITRATION AGREEMENT BE VALID. As the name implies, the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* ("*Convention*") may be used to enforce in the United States an arbitration award rendered abroad." Federal Arbitration Act ("FAA") Chapter 2 implements the *Convention,* and in section 207 requires a court to confirm the foreign arbitration award: "unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention." Moreover, Article II, § 2 provides: "The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, *signed by the parties* or contained in an exchange of letters or

telegrams" (emphasis added). Considering these facts, does a District Court considering foreign award enforcement need to validate the underlying arbitration agreement? "Yes," says Judge **Anita B. Brody** in *Jiangsu Beier Decoration Materials Co. v. Angle World LLC*, No. 2:21-cv-02845 (E.D. Pa. Oct. 28, 2021): "To satisfy the Convention's 'agreement in writing' requirement, JBDM points to a Memorandum of Understanding from July 10, 2018 ('MOU'). The MOU does contain a clause on arbitration, but it is not signed by Angle World…. JBDM does not have any other agreement in writing that is signed by both parties, as required by the Convention.[]Even without a signed arbitration agreement or clause, the award is still enforceable if JBDM can show an agreement to arbitrate in an exchange of letters…. But JBDM has not produced any exchange of letters showing Angle World's agreement to arbitrate, as required by the plain language of the Convention, nor have they shown any law to suggest that conduct or face-to-face meetings are relevant to validity under the Convention. Absent an agreement to arbitrate that is either signed by both parties or shown in an exchange of letters, a foreign arbitration award should not be enforced under the Convention" (citations and footnote omitted).
*(ed: *Seems right. **Note that FAA Chapter 1, section 2, which in domestic transactions requires a written agreement to arbitrate, makes no mention of signatures.)*
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MAINE HIGH COURT DECLINES TO ENFORCE UBER'S SIGNUP PDAA. In a case of first impression, the Maine Supreme Judicial Court declines to enforce the predispute arbitration agreement ("PDAA") contained in Uber's signup agreement. *Sarchi v. Uber Technologies, Inc*., 2022 ME 8 (Jan. 27, 2022), is an excellent primer on the enforceability of PDAAs contained in online Terms of Service, known variously as browsewrap, clickwrap, scrollwrap, or sign-in wrap agreements. The Opinion nicely lays out the facts, issues, and the Court's reasoning: "Uber Technologies, Inc., and Rasier, LLC, (collectively, Uber) appeal from an order denying their motion to compel arbitration…. Uber moved to compel arbitration pursuant to the Terms and Conditions (Terms) of its user agreement after Patricia Sarchi, a user of Uber's ride-sharing service, and the Maine Human Rights Commission (the Commission) filed a complaint against Uber for violating the Maine Human Rights Act, 5 M.R.S. §§ 4592(8), 4633(2) (2021). We agree with Sarchi's contention that the Terms were not binding upon her under the circumstances and affirm the court's denial of Uber's motion to compel arbitration…. We conclude that [a] two-step analysis, focusing on notice and assent, is appropriate for determining the enforceability of online contracts generally, and we turn to the question whether a contract was formed between Uber and Sarchi during the 2015 registration process, through the November 2016 email, or both…. Uber could have designed its rider app to incorporate scrollwrap or clickwrap contracts that provided adequate notice of Uber's original and updated Terms and required consumers to express actual assent, and it apparently decided not to do so. The consequence of that choice is that Sarchi was not bound by either the original Terms or the updated Terms" (footnote omitted).
(ed: Seems right to us, given that the making of contracts – including PDAAs – is a matter of state law.)
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ICC REPORTS STRONG FILINGS IN 2021. The International Chamber of Commerce ("ICC") on **February 1** released preliminary **2021** stats showing there were 853 new arbitration cases filed in 2021. This figure: "is comparable but lower than the record number [946] of filings reported in 2020. Of the 853 new cases, 840 were filed under the *ICC Rules of Arbitration.*"

As for claim amounts, the ICC says: "Early statistics also show a sharp increase in the average amount in dispute in new cases registered between January and October 2021, with US$184 million in dispute compared with US$54.1 million for new cases filed between January and December 2020. For the same period, figures indicate that the median amount in dispute was similar to the previous year (US$5.7 million in 2021 compared to US$5.6 million in 2020)."

*(ed: *We look forward to seeing the final stats, which we think will show that the agency administered some financial services cases. **Full statistics for 2020 can be found here.)*

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QUICK TAKES: CASES AND AWARDS WORTH READING

***Ferrell v. Cypress Environmental Management-TIR, LLC*, No. 20-5092 (10th Cir. Nov. 30, 2021)**: "At bottom, we find the application of 'concerted misconduct estoppel' appropriate for two reasons. First, Ferrell's claims against SemGroup unquestionably comprise 'substantially interdependent and concerted misconduct' with Cypress…. Cypress employed Ferrell, paid his wages, and withheld his taxes.... Ferrell only performed work for SemGroup by virtue of his employment with Cypress. Given these facts, any FLSA violations committed by SemGroup, a nonsignatory to Ferrell's employment agreement, are inherently 'interdependent' on the alleged misconduct of Cypress, a signatory to Ferrell's employment agreement…. Second, as we emphasized in *Reeves* [*v. Enter. Prod. Partners, LP*, —F.4th—, 2021 WL 5183636 (10th Cir. Nov. 9, 2021)], estoppel is an equitable doctrine. As such our analysis is necessarily driven by considerations of fairness…. It is clear to us that Ferrell is employing the same tactics we rejected in *Reeves*. By bringing FLSA claims against SemGroup, Ferrell is trying to use his contract with Cypress to his advantage when it suits him and disavow it when it does not…. We conclude the appropriate course of action is to require Ferrell to honor the contract he agreed to. Accordingly, we hold that Ferrell should be estopped from avoiding arbitration and the entirety of his claim should be adjudicated by an arbitrator in accordance with his agreement with Cypress" (some citations omitted).

***Hayslip v. U.S. Home Corp*., No. SC19-1371 (Fla. Jan. 27, 2022)**: The lower court: "certified the following question as one of great public importance.... DOES A DEED COVENANT REQUIRING THE ARBITRATION OF ANY DISPUTE ARISING FROM A CONSTRUCTION DEFECT RUN WITH THE LAND, SUCH THAT IT IS BINDING UPON A SUBSEQUENT PURCHASER OF THE REAL ESTATE WHO WAS NOT A PARTY TO THE DEED? We answer the rephrased certified question in the affirmative and approve the decision of the Second District Court of Appeal" (caps in original)…. Finally, as to notice, the Hayslips also dispute the existence of a valid arbitration agreement because, by not being signatories to the Original Deed, they did not intend to be bound by the arbitration provision. However, a deed covenant may be

enforced against a successor grantee so long as the successor grantee had notice of the covenant…."

***Holmes v. Baptist Health South Florida, Inc*., No. 21-22986-Civ-Scola (S.D. Fla. Jan. 21, 2022)**: "After careful review of the briefing and the relevant legal authorities, the Court **grants** the motion…. Given the FAA's pro-arbitration policy, as well as the rarity with which courts apply the effective vindication doctrine, the Court declines to follow the *Smith* *[v. Brd. of Dirs. of Triad Mfg., Inc.,* 13 F.4th 613, 621 (7th Cir. 2021)] rationale and holds that the arbitration agreement at issue is valid and enforceable. While the arbitration agreement prohibits the recovery of some Plan-wide monetary relief, such relief is only available to those who bring a representative or class action…. And as the Eleventh Circuit has already held that a waiver of the right to bring a class action in arbitration is permissible, the concomitant waiver of remedies associated with class actions is also permissible" (citation omitted; emphasis in original).

***Fibonacci Capital v. Sanctuary Securities*, FINRA ID No. 21-00369 (New York, NY, Dec. 28, 2021)**: In deciding to award the customer damages, a Majority Public Panel finds that the awarding of compensatory damages was due to the excessive markup on the purchase of Ginnie Mae mortgage-backed securities for said customer's account: "The [$40,788.65 in] compensatory damages awarded are attributable to the excessive markup on the transaction. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Hays v. Parkland Securities*, FINRA ID No. 21-00377 (Indianapolis, IN, Jan. 7, 2022)**: An Arbitrator explains why he has decided to grant Respondent broker-dealer's Pre-Hearing Motion to Dismiss pursuant to FINRA Rule 13206(a) (Six-year Eligibility Rule for Industry Disputes).
Provided courtesy of SAC's ARBchek facility (www.arbchek.com).
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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

C. Carswell and L. Winnington-Ingram, *Challenges to Arbitrators Under the ICSID Convention and Rules*, Lexology (Jan. 25, 2022): "The year 2020 saw a record (of at least) 12 decisions on proposals to disqualify arbitrators and ad hoc committee members within the International Centre for Settlement of Investment Disputes (ICSID) context (beating the previous record in 2018). Having regard to the public availability of decisions and this flurry of activity, this chapter will focus on challenges to arbitrators (and committee members) brought under the ICSID Convention. The chapter begins by setting out the grounds for disqualification under the ICSID Convention and Rules, before briefly detailing the prevailing legal standard as developed through ICSID jurisprudence. The majority of this chapter will be devoted to a discussion of three categories of alleged conflict, concentrating on the reasoning of publicly available decisions published during 2018 to 2020" (footnotes omitted).

***NFL Files Motion to Dismiss Jon Gruden Lawsuit, Compel Arbitration*, NFL.com (Jan. 19, 2022)**: "The NFL [has] filed a motion to dismiss lawsuits filed by Jon Gruden

on Nov. 12 against the league and Commissioner Roger Goodell alleging the parties sought to raze Gruden's career with the release of private emails in which the former Raiders head coach used misogynistic, homophobic and racist terms.[]Another motion was filed to compel arbitration. Both motions were filed in Clark County (Nev.) District Court.[]Gruden's lawsuit alleges that the NFL and Goodell aimed to 'destroy the career and reputation of Jon Gruden.'"

***FINRA Fines Credit Suisse $9 Million for Violating Customer Protection Rule*, Chief Investment Officer (Jan. 26, 2022)**: "The Financial Industry Regulatory Authority (FINRA) has fined Credit Suisse Securities $9 million for violating provisions of the Securities and Exchange Commission (SEC)'s so-called 'Customer Protection Rule,' which requires firms to safeguard their customers' investment assets.[]The regulator said the US broker/dealer (B/D) subsidiary of Credit Suisse Group failed to maintain possession or control of billions of dollars of fully paid and excess margin securities it carried for customers, as required by law. It also said the firm failed to accurately calculate the amount of cash or securities it was required to maintain in a special reserve bank account."

***Stephens Wins $18.2 Million in Raiding Claim Against Ben Edwards*, AdvisorHub (Jan. 26, 2022)**: "In a split decision, Stephens, Inc. won nearly $18.2 million in an arbitration claim accusing regional brokerage competitor Benjamin F. Edwards & Company of raiding an Arkansas branch, according to an [explained] award issued last week." See FINRA ID No. 17-02378 (Memphis, TN, Jan. 21, 2022).

***Court Sets Quiet March Argument Calendar*, SCOTUSBlog (Jan. 28, 2022)**: "The Supreme Court ended a week of momentous news on a much more low-key note, releasing on Friday afternoon the argument calendar for the justices' March arguments. The court will hear eight hours of oral arguments over six days, on topics ranging from arbitration to international child-custody law." (*ed: See our coverage elsewhere in this* Alert.)

***ICSID Reform: Balancing the Scales?*, Kluwer Arbitration Blog (Jan. 28, 2022)**: "On January 20, 2022, ICSID submitted its amended rules to the Administrative Council for a vote, marking the end of the five-year-old process of modernizing the ICSID Rules. ICSID members are expected to cast a vote on the amended rules by March 21, 2022, and if approved, the rules will enter into force on July 1, 2022. The ICSID Convention Arbitration and Conciliation Rules and the Institution Rules require the approval of two-thirds of the Administrative Council for the rules to be amended. As we await the outcome of the voting procedure, this post provides an overview of the most noteworthy features of the amended rules."

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DID YOU KNOW?

AAA IS CLOSING IN ON 7 MILLION CASES ADMINISTERED. This venerable institution, which will celebrate its 100th anniversary in **2026**, reports that it has administered 6,983,636 cases since its founding in **1926.** See landing page banner.
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LETTER TO THE EDITOR

LETTER TO THE EDITOR: *We always welcome comments on current items of interest in the* Alert. *Here's one from* ***Richard P. Ryder****, President & Founder, Securities Arbitration Commentator, and an SAA Editorial Advisory Board Member, which came in response to an item we published last week. We reply below:*

RYDER: Regarding your editorial comment in SAA 2022-03 (Jan. 27) about PIABA's fight against RIAs who weaponize PDAAs by choosing expensive arbitral fora, I applaud your suggestion that RIAs utilizing PDAAs include FINRA as a forum choice for customers. It makes great sense, because, as PIABA President Edmiston notes, FINRA arbitrators make firms "pay 80% to 90% of arbitration fees" in investor disputes. SAC's Award Database has corroborated that statistical result in our forum fee surveys time and again. Our surveys have even found that FINRA firms are often charged the bulk of fees when they prevail.

While in agreement with you, I also see a practical obstacle to your suggestion in that FINRA's stated policy allows either party to block forum access where the RIA is not a member (or, at least, where no "anchor" member is named as a party). This policy is outdated and has created jurisdictional confusion. Technically speaking, where RIAs include FINRA as a forum choice, either party can resort to the courts for a motion compelling arbitration at FINRA (and FINRA, I am certain, would honor such an order without fail), but that's an expensive process in and of itself.

A far better solution would be for FINRA to recognize its "investor protection" responsibilities as a securities SRO, acknowledge that individual investors have migrated in great numbers to the RIA space, and that justice often requires open inclusion of both RIA and BD respondents in the same forum. Fragmentation of a dispute, just like unnecessary delay and excessive fees, thwarts the goal of justice. FINRA should rise to the call and open its doors to RIA client disputes whenever, under the provisions of a PDAA, a client seeks use of its arbitration forum. Adopting this policy approach would facilitate action by the SEC and NASAA, as RIA regulators, to give RIA clients the choice to use the FINRA forum.

SAA: *We agree! We've reached out to FINRA Dispute Resolution Services EVP and Director of Arbitration* ***Rick Berry*** *to see if he wants to respond for the next* Alert.*)*
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Send any messages or inquiries to: George@SecArbAlert.com

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