SECURITIES ARBITRATION ALERT 2022-11 (3/24/22)

George H. Friedman, Editor-in-Chief

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- **Know What An *Ore Tenus* Motion Is? (Neither Did We)**

ALERT! THERE *IS* AN *ALERT* NEXT WEEK, ALBEIT A DAY LATER THAN USUAL. *We would next week typically be taking a break in publishing the* Securities Arbitration Alert, *as the quarter comes to a close. Given the oral hearings scheduled for next week in two SCOTUS cases involving arbitration, we've decided to defer our break for a week, to allow timely coverage of the arguments. For the same reason, we will be publishing on Friday instead of Thursday. See our chart for easy access to materials on the cases.*

SQUIBS: IN-DEPTH ANALYSIS

SCOTUS HEARS ORAL ARGUMENTS IN *MORGAN* AND *ZF AUTO*. TWO MORE TO GO. ***The Supreme Court heard oral argument this week in two of four cases involving arbitration it will review within a fortnight.*** We reported in December that the Supreme Court had granted *Certiorari* in four cases involving arbitration. Then SAA 2022-04 (Feb. 3) advised that the Court calendar released by SCOTUS on **January 28** had set the cases for oral argument during the last two weeks of **March**. The Court this week heard oral argument on **March 21** in *Morgan v. Sundance Inc.*, No. 21-328, and on **March 23** in *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. We offer in this squib a brief review of the cases and the arguments presented, and a look ahead to next week's arguments.

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: Case Below and Waiver of Arbitration Rights: Cases involving whether a party has waived its right to compel arbitration typically involve whether that party participated in litigation and waited too long. The basic elements are whether the offending party: 1) had knowledge of its right to demand arbitration; 2) acted inconsistently with that right; and 3) thereby prejudiced the other party. The case below focused on the third element, with the Eighth Circuit majority holding that Sundance did not wait too long to press its arbitration rights and its conduct had not prejudiced Morgan: "The district court found Morgan was prejudiced by having to respond to Sundance's motion to dismiss over the eight-month span of litigation. We disagree. Four months of the delay entailed the parties waiting for disposition of Sundance's motion to dismiss. No discovery was conducted. And, the record lacks any evidence that Morgan would have to duplicate her efforts during arbitration. Instead, most of Morgan's work focused on the quasi-jurisdictional issue, not the merits of the case. For these reasons, we hold Morgan was not prejudiced by Sundance's litigation strategy. [] In the absence of a showing of prejudice to Morgan, we conclude Sundance did not waive its contractual right to invoke arbitration."

Morgan: Issue Before SCOTUS: 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."

The Oral Arguments

Note: The oral arguments took place as scheduled with eight Justices participating. As revealed in a Press Release, **Justice Thomas** was out ill. **Chief Justice Roberts** announced up front before both arguments that he would: "participate in consideration and decision of the cases on the basis of the briefs and the transcripts of oral argument."

Morgan: We had thought the issues were fairly simple as framed in the Petition: is this State rule of law, requiring a finding of prejudice, arbitration-specific and thus preempted by the FAA or does it apply to contracts in general and thus FAA compatible? But, the arguments were anything but simple. The discussion at times was esoteric (*ed: not just our view*), with the meanings of waiver, estoppel, forfeiture, and laches being debated. The prejudice requirement was not covered until well into the argument. The debates settled down to whether the outcome was governed by FAA section 3 (" … providing the applicant for the stay [of litigation of an arbitrable matter] is not in default in proceeding with such arbitration") or section 4 ("… if the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof"). At one point, there was a short colloquy about whether the Petition should be dismissed as improvidently granted – just as happened in *Henry Schein, Inc. v. Archer and White Sales, Inc.,* No. 19-963. Recall that, as reported in SAA 2021-03 (Jan. 28), the Court in **January 2021** in a one-line per curiam Order reversed its decision to grant *Certiorari* in its second look at *Henry Schein*, despite having just heard oral argument the previous **December.** We won't make any predictions – the Justices' questions were all over the map and didn't to us indicate where they might be heading – but we recommend that readers peruse the excellent analysis, *Supreme Court Reviews the Role of Prejudice to a Party in Determining Arbitration Waiver*, offered in the *CPR Blog* on **March 21**.

ZF Automotive – AlixPartners: As reported in SAA 2022-09 (Mar. 10), the Court's **February 28** Order List addressed oral argument time allocation: "the joint motion of the parties for divided argument and for enlargement of time for oral argument is granted. The motion of the Solicitor General for leave to participate in oral argument as amicus curiae, for divided argument, and for enlargement of time for oral argument is granted" (links added by the *Alert*). What were the specifics? The now-granted joint motion says: "[T]he parties believe that the overall argument time should be expanded to 80 minutes, with each side receiving 40 minutes. In that scenario, the ZF and AlixPartners petitioners agree that ZF should receive 15 minutes of argument time, AlixPartners should receive 10 minutes of argument time, and the United States should receive 15 minutes of argument time. And the ZF and AlixPartners respondents agree that Luxshare and the Fund should each receive 20 minutes of argument time." The discussion here, with five attorneys presenting, consumed nearly two hours. This one to us was not nearly as esoteric – although the terms "comity" and "foreign tribunal" stole the spotlight – but the Court seems to be leaning against a more expansive application of section 1782 (just as asserted by the United States). For a comprehensive "chapter-and-verse" analysis, we recommend that readers peruse the **March 23** posts: 1) *Supreme Court Hears Arguments on Whether Section 1782 Allows Discovery for Use Before International Arbitration Tribunals*, offered in the *CPR Blog* on **March 23**; and 2) *High Court Debates U.S. Discovery for Private Arbitration Abroad*, appearing in *Bloomberg Law*.

The Week Ahead: Two More Arguments

On tap for next week are: *Southwest Airlines Co. v. Saxon*, No. 21-309 on **March 28**, and *Viking River Cruises, Inc. v. Moriana*, No. 20-1573 on **March 30**. We provide below a thumbnail on the issues involved, and refer readers to an excellent post in the **March 22** *CPR Blog*.

***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."

A Handy Chart on All Four Cases
The chart below has information on the "Arbitration Final Four" cases. Oral arguments are audio livestreamed via the SCOTUS Website. The Court's Website posts audio recordings and transcripts the same day as arguments.

March 21: *Morgan v. Sundance Inc.*, No. 21-328: prejudice requirement for waiver of arbitration rights. Transcript is here; audio recording is here.
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; 18 USC 1782: discovery in foreign arbitration. Transcript is here; audio recording is here.
March 28: *Southwest Airlines Co. v. Saxon*, No. 21-309: FAA section 1 preemption scope – is it limited to workers actually moving goods or people over state lines or is part of the "flow" or "stream" enough?
March 30: *Viking River Cruises, Inc. v. Moriana*, No. 20-1573: FAA preemption of California's PAGA.

*(ed: *Our bottom line prediction? Both cases are too close to call.* **Amicus *Briefs aplenty were filed in all four cases and can be found by clicking on the link to each case.* ***As we've said before, 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. ****This squib was published in our blog on March 24.)*
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FAIR ACT* PASSES HOUSE (JUST AS WE PREDICTED)**. ***The* Forced Arbitration Injustice Repeal (FAIR) Act – *H.R. 963* – *on March 17 passed the House by a narrow party-line 222-209 vote, with just one Republican supporting the bill. Recall that we reported in SAA 2021-06 (Feb. 18) that Democrats had reintroduced several bills to curb use of mandatory predispute arbitration agreements ("PDAA"). Among them was the *FAIR Act* – introduced **February 2021** by Rep. **Henry "Hank" Johnson Jr.** of Georgia.

Features
We reviewed the bill's text and offered a detailed analysis in SAA 2021-10 (Mar. 18) and our blog. If enacted, it would ban mandatory arbitration for almost every conceivable transaction that's not a business-to-business or union-management matter. Specifically, this bill would amend the FAA to eliminate mandatory predispute arbitration agreements for disputes involving: 1) consumer; 2) investor; 3) employment (including independent contractors); and 4) antitrust matters. It would cover brokers and investment advisers; bar class or collective action waivers in or out of a PDAA; apply to "digital technology" disputes; reserve for court determination any arbitrability or delegation issues "irrespective of whether the agreement purported to delegate such determinations to an arbitrator;" and extend to a broad range of civil rights matters, including sexual harassment claims.

Passage a Foregone Conclusion in the House …
We said in SAA 2022-07 (Feb. 24) and our feature article, *President Biden Signs Into Law the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act. It Became Effective Immediately – Part I*, 2022:08 SEC. ARB. ALERT 1 (Mar. 3, 2022), that the proposed *FAIR Act* seemed to be inexorably moving toward at least House passage (it already had 202 cosponsors (all but one were Democrats), with 218 votes needed for passage).

… But Not in the Senate
Our other editorial comment in # -07 was also spot on: "The companion Senate bill – S. 505 – has been stuck at 39 cosponsors (all Democrats) since **March 1.** While we think the *FAIR Act* will eventually pass the House – as it did in the last Congress – we don't see this attempt to amend the FAA to invalidate a broad swath of PDAAs passing the Senate (same as last time)." We have reported episodically on efforts afoot in Congress to regulate, limit, or ban, mandatory predispute arbitration agreement use or enforcement in certain situations (see for example our **December 2021** blog post, *Legislative Update: The Latest from Congress*). Does the **March 3** enactment of the *Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act* ("*Act*") portend the dominos will fall with the passage of the *FAIR Act*? As we said in # -07: "While the new law clearly gives these bills some momentum, we don't think it translates to large-scale enactments. Why not? We see the *Act* as one-off in that it involved a sensitive issue that cut across party lines. We just don't sense that with all but one of the other bills, at least as to garnering the ten Republican Senate votes needed to advance the legislation." We're sticking with that prediction.
(ed: Next of course, is the Senate.)
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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

COMMISSIONER LEE TO DEPART SEC. SEC Commissioner **Allison Herren Lee** (Democrat) announced on **March 15** that she will be leaving the SEC. Her statement says: "My term as Commissioner expires in June of this year, and I have notified President Biden that I intend to step down from the Commission once my successor has

been confirmed. Serving investors and the public as a Commissioner and as Acting Chair has been an extraordinary honor. My fellow Commissioners and the Commission staff are dedicated and tireless public servants, and working alongside them has been the privilege of a lifetime. Over the coming weeks and months, I will remain actively engaged in the Commission's critically important work, and I look forward to continued progress in advancing the Commission's regulatory agenda." Ms. Lee has been a Commissioner since **2018.** Chair Gensler also issued a statement that added: "I have been fortunate to rely on Allison's expertise throughout my time at the SEC on matters as wide-ranging as agency administration, enforcement, and policy issues. She always maintains a clear sense of purpose on behalf of the American public, and we have benefited greatly from her service. Allison has agreed to serve until her replacement is appointed, and I look forward to continuing our work together in the coming months." The remaining Commissioners on the roster are: **Gary Gensler** (Chair); **Caroline Crenshaw** (Democrat) and **Hester M. Peirce** (Republican). **Elad L. Roisman** (Republican) left the SEC at the end of **January** and has not yet been replaced.
(ed: No word yet on possible replacements for either vacancy.)
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IF AT FIRST YOU DON'T SUCCEED: J&J SHAREHOLDERS' ARBITRATION PROPOSAL IS BACK ON THE ANNUAL MEETING AGENDA. The issue of shareholder arbitration is in the news again, this time in the renewal of a Johnson & Johnson shareholders' proposal for arbitration of: "disputes between a stockholder and the Corporation and/or its directors, officers or controlling persons relating to claims under federal securities laws in connection with the purchase or sale of any securities issued by the Corporation to be exclusively and finally settled by arbitration under the Commercial Rules of the American Arbitration Association (AAA), as supplemented by the Securities Arbitration Supplementary Procedures…." The proposal by Hal Scott and the Doris Behr 2012 Irrevocable Trust, for consideration at J&J's **April 28** annual meeting appears on page 124 of the *Annual Meeting Notice & Proxy Statement*. Management recommends against adoption, because: "The Board of Directors does not believe that this proposal is in the best interests of Johnson & Johnson or its shareholders…. Notably, other than the proponent of this shareholder proposal, none of our other shareholders have expressed to us an interest in having us adopt a mandatory arbitration bylaw." The shareholders also brought suit in the District of New Jersey, seeking a preliminary injunction requiring Johnson & Johnson to inform shareholders that arbitration is permissible under federal law.
*(ed: *If this seems familiar, it should. We've reported several times on this shareholder's thus-far unsuccessful efforts to promote shareholder arbitration at J&J, most recently in SAA 2021-26 (Jul. 15). **Our editorial comment in # 2021-26 was prescient: "Maybe it's our natural skepticism, but we suspect this is not the last we've heard of this issue.")*
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DC CIRCUIT PANEL (NOT INCLUDING SCOTUS NOMINEE BROWN JACKSON): IMF DID NOT WAIVE IMMUNITY VIA PDAA. Although the International Monetary Fund had seemingly waived its statutory immunity by signing a

predispute arbitration agreement ("PDAA"), an express retention of immunity in the contract documents trumped the PDAA, a unanimous DC Circuit Panel holds. We will let speak for itself the Opinion in *Leonard A. Sacks & Associates P.C. v. International Monetary Fund*, No. 21-7034 (D.C. Cir. Feb. 25 2022) (*ed: links have been added by the* Alert). First, the procedural history: "Plaintiff Leonard A. Sacks & Associates, P.C. (Sacks) sued the International Monetary Fund (Fund or IMF) to modify or vacate an arbitration award it obtained against the Fund. The Fund asserted its immunity, and the district court dismissed the case." Next, the issues: "Sacks does not dispute the Fund's general entitlement to immunity under its Articles of Agreement, which have legally binding effect in the United States pursuant to the Bretton Woods Agreements Act (Bretton Woods Act). But Sacks claims that, by including in the parties' contract an agreement to arbitrate under the rules of the American Arbitration Association (AAA) and the laws of the District of Columbia, the Fund effected a limited waiver of that immunity to allow judicial enforcement, modification, or vacatur of any resulting arbitration award." Last, the holding: "Sacks' argument makes good sense: Both the AAA Rules and D.C. law contemplate judicial involvement in the enforcement of arbitral awards, so arguably the contract does as well. But a waiver of the immunity of an international organization must be explicit. Because the Fund's contract with Sacks expressly retains the Fund's immunity, reiterating it even within the arbitration clause itself, we affirm."
*(ed: *Seems right to us. Recall that SCOTUS held in C&L Enterprises, Inc. v. Potawatomi Indian Tribes of Oklahoma, 532 U.S. 411, 121 S.Ct. 1589 (2001), that the Tribe had waived sovereign immunity when it agreed to arbitrate. But here, the Court notes, there was an express retention of immunity both in the contract and the PDAA. **SCOTUS nominee Ketanji Brown Jackson was not involved at either the District Court or Court of Appeals levels.)*
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TEXAS SUPREME COURT: INCONSISTENT TERMINOLOGY IN PDAA DID NOT RENDER IT UNENFORCEABLE. Although the predispute arbitration agreement ("PDAA") in the parties' employment contract contained somewhat inconsistent terminology, the Appellate Court erred when it ruled the PDAA was too ambiguous to enforce. An action seeking wrongful death and survival damages had been brought by decedent employee/passenger Hernandez's family, alleging that: "the Club continued serving [co-worker and driver] Salazar alcohol after knowing she was clearly intoxicated." A divided Court of Appeals had held that: "because the use of three terms in the parties' contract—'relationship,' 'license,' and 'this agreement'—is not always perfectly clear, there was no meeting of the minds, and both the contract and its arbitration provision are unenforceable." A unanimous Texas Supreme Court reverses, holding in *Baby Dolls Topless Saloons, Inc. v. Sotero*, No. 20-0782 (Tex. Mar. 18, 2022) (per curiam), that the meaning of the parties' arbitration agreement was clear enough and in any event was separable from the rest of the contract. Says the *Per Curiam* decision: "The Family's argument, and the court of appeals' holding, that Hernandez and the Club never had a meeting of the minds on the contract blinks the reality that they operated under it for almost two years, week after week, before Hernandez's tragic death. We hold

that the parties formed the agreement reflected in the contract they signed." The Court also held that whether the PDAA had expired or had been automatically renewed was an arbitrability issue that had been clearly delegated to an arbitrator (although, in the Court's language, the duration clause was "unartfully drafted").
(ed: Seems right.)
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QUICK TAKES: CASES AND AWARDS WORTH READING

***Hause v. City of Sunbury*, No. 20-1933 (3rd Cir. Mar. 11, 2022)**: "[O]nly a pure question of law remains: whether the District Court should have addressed the motion to compel arbitration before the contemporaneously-filed motion to dismiss under Rule 12(b)(6). Although neither party has raised the question of the prioritization of the motion to compel arbitration on appeal, we can rule on this question since it is a pure question of law that requires correction. *Barna v. Bd. of Sch. Dirs. of Panther Valley Sch. Dist.*, 877 F.3d 136, 148 (3d Cir. 2017) (noting that declining to decide a forfeited 'pure question of law' 'would problematically permit the District Court's pure legal error to stand uncorrected'). Since '[i]t is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below,' *Singelton v. Wulff*, 428 U.S. 106, 120 (1976), we will remand so that the District Court can decide the issue in the first instance." (*ed: An* Alert *h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this decision*.)

***Process and Industrial Developments Limited v. Federal Republic of Nigeria*, No. 21-7003 (D.C. Cir. Mar. 11, 2022)**: "Process and Industrial Developments Limited ('P&ID') petitioned for confirmation of an arbitral award against the Federal Republic of Nigeria and its Ministry of Petroleum Resources (collectively, 'Nigeria') that today stands at roughly $10 billion. Nigeria moved to dismiss for lack of jurisdiction and asserted sovereign immunity under the Foreign Sovereign Immunities Act ('FSIA'). 28 U.S.C. § 1602 *et seq*. The district court denied the motion on the ground that Nigeria impliedly waived sovereign immunity by joining The Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention'), June 10, 1958, 21 U.S.T. 2517— an international treaty obligating member states to recognize and enforce arbitral awards issued in other member states—and agreeing to arbitrate its dispute with P&ID in a Convention state. *See* 28 U.S.C. § 1605(a)(1). We affirm but rely instead on the arbitration exception to the FSIA. *See id*. § 1605(a)(6). We conclude that a foreign court's order ostensibly setting aside an arbitral award has no bearing on the district court's jurisdiction and is instead an affirmative defense properly suited for consideration at the merits stage."

***Sutey Oil Co. v. Monroe's High Country Travel Plaza, LLC*, 2022 MT 50 (Mar. 15, 2022)**: In a unanimous decision, the Court holds: "Monroe's High Country Travel Plaza and Marvin Monroe (collectively Monroe) appeal the First Judicial District Court's order denying their motion to vacate or modify an arbitration award to correct an "evident miscalculation of figures." Section 27-5-313(1)(a), MCA…. Concluding that the District Court applied an overly narrow legal standard, we reverse for the court to submit the

matter to the arbitrator for clarification of the amount of the award pursuant to § 27-5-217, MCA…. The Arbitrator may clarify, however, whether the total award simply miscalculated Sutey's damages by neglecting to subtract the two items in the Master Report for which Sutey—and the Arbitrator—determined Monroe was entitled to credit" (footnote omitted; links added by the *Alert*.)

***Sullivan v. Principal Financial*, FINRA ID No. 21-01946 (Dallas, TX, Feb. 14, 2022)**: A Sole Public Arbitrator explains why he decided to deny a broker's request for expungement of a customer complaint from appearing on his CRD record, finding that a prior Panel found in favor of the customer and that no documents from the prior arbitration exist to be able to grant such relief to Claimant: "The arbitration hearing that considered the issue of whether or not the investment was misrepresented and unsuitable occurred 31 years ago. The Customer is deceased and the only other potential witness who might have shed light on that arbitration proceedings did not appear. The original arbitration panel, who had direct access to the individuals involved and the documents provided, found in favor of the Customer, fully reimbursing her losses and costs. To grant expungement under Rule 2080(b)(1)(a) or (c), this Arbitrator would have to determine that the original arbitration panel erred in their award - and there are no existing documents or other hard evidence available to substantiate such a determination" (link added by the *Alert*). *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Anderson v. TD Ameritrade*, FINRA ID No. 21-00506 (Nashville, TN, Feb. 15, 2022**): The Majority-Public Panel granted Respondent broker-dealer's Motion for Directed Verdict with prejudice pursuant to FINRA Rule 12504(b) (not involved with the security, account, or conduct in dispute). The customer's claims involved the selling of Tesoro Enterprises Inc. stock: "During the evidentiary hearing on February 10, 2022, and after the conclusion of Claimant's case-in-chief, Respondent made an ore tenus Motion to Dismiss pursuant to Rule 12504(b) of the Code of Arbitration Procedure…. The Panel granted the Motion" (link added by the *Alert*). *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

S. Heavenrich, *Concerted Arbitration*, 132 YALE LAW JOURNAL FORUM (Forthcoming 2022): "Companies have broad power to funnel employment disputes into individualized arbitration, thereby preventing employees from vindicating workplace rights in court. Recently, however, plaintiff-side lawyers discovered how to simultaneously file thousands of individual arbitration claims. Faced with this mass arbitration deluge, corporations have shifted from encouraging arbitration to trying to thwart it. This Essay argues that they cannot, because mass arbitration is a "concerted activity" protected by the NLRA. Even though, after Epic Systems, the NLRA no longer guarantees employees a right to bring class actions, it guarantees them a right to mass arbitration."

***Cetera B-D on Hook for $2.66 Million Arbitration Claim Stemming from REITs, Annuities*, InvestmentNews (Mar. 14, 2022)**: "First Allied Securities Inc. lost a Finra

arbitration claim Friday to two investors who received $2.66 million in damages stemming largely from the sale of nontraded real estate investment trusts and annuities.[]The two claimants … filed the claim against First Allied and two other broker-dealers in 2018, alleging negligence, misrepresentation, failure to supervise and other charges in the matter, according to the Financial Industry Regulatory Authority Inc. arbitration panel award."

***JPMorgan Seeks to Overturn Ex-Advisor's Defamation Award*, Barron's (Mar. 14, 2022)**: "JPMorgan Chase's brokerage unit is asking a federal court to overturn a $1.4 million arbitration award that an advisor won against the company for alleged defamation.[] The bank claims in a six-page legal filing that the three-person arbitration panel exceeded its authority and disregarded the law in siding with the advisor … a former JPMorgan employee who was terminated in June 2017."

***Trial Courts Are Staying PAGA Actions While Awaiting the Viking River Cruises Decision*, JDSupra (Mar. 15, 2022)**: "As one court explained, 'absent a stay, there is a real risk that the parties will needlessly litigate an issue that is ultimately sent to arbitration.' *Caldera v. Glasswerks LA, Inc.*, No. 20STCV45749 (L.A. Super. Ct. Mar. 4, 2022) (Hammock, J.) (tentative affirmed by court). Another explained that 'needlessly litigating the claims' would result in 'significant waste.' *Abreau v. Prospect Med. Holdings, Inc.*, No. 20STCV21447, slip op. at 3 (L.A. Super. Ct. Feb. 28, 2022) (Murphy, J.). Other decisions are in accord. *E.g.*, *McKillop v. OneHalloweenNight, Inc.*, No. 34-2017-00206815-CU-OE-GDS, slip op. at 5 (Sacramento Super. Ct. Feb. 23, 2022) (Sueyoshi, J.) ('[J]udicial economy and substantial justice compel the determination that this matter be stayed pending a decision in the U.S. Supreme Court.'); *Canakie v. Safran Cabin, Inc.*, No. 30-2021-01222644-CU-OE-CXC (Orange Super. Ct. Jan. 27, 2022) (Wilson, J.) (accord)."

***FINRA Plans New Rule to Accelerate Arb Cases for Those Who Are Ill, Over 75*, ThinkAdvisor (Mar. 16, 2022)**: "FINRA is seeking feedback by May 16 on adding a new rule to the Codes of Arbitration Procedure to allow any party to request accelerated processing of an arbitration proceeding if they are: at least 75 years old; or certify that they have received a medical diagnosis and prognosis, and that based on that information they have a reasonable belief that accelerated processing is necessary to prevent prejudicing their interest in the arbitration.[] The Director of Dispute Resolution Services would make an 'objective determination as to whether the requesting party is at least 75 or has submitted the required certification,' FINRA states."

***House Passes Bill to End Mandatory Arbitration of Legal Disputes*, Reuters (Mar. 17, 2022)**: "The U.S. House of Representatives on Thursday approved a bill that would prohibit companies from enforcing increasingly common agreements that require workers and consumers to bypass court and bring legal disputes in private arbitration.[]The Democrat-led House voted 222-209 to pass the Forced Arbitration Injustice Repeal (FAIR) Act over the objections of Republicans and business groups who say it will

deprive workers, consumers and companies of a faster and cheaper alternative to court." (*ed: See our coverage elsewhere in this* Alert.)
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DID YOU KNOW?

KNOW WHAT AN *ORE TENUS* MOTION IS? (NEITHER DID WE). Your publisher and editor-in-chief has reached that stage in life where he's not at all reluctant to confess that he doesn't know (or remember) something. With that theme in mind, we came across the term *ore tenus* in this *Alert*, and had to look up its meaning. For the record, BLACK'S LAW DICTIONARY says it means an oral motion made at a hearing. Who knew?
(ed: For SAA 2022-10 (Mar. 17), we had to look up the definition of "anodyne," which was used in a recent letter from Sen. Elizabeth Warren (D-MA) and Rep. Katie Porter (D-CA) to FINRA CEO and President Robert W. Cook. According to Websters, it means: "not likely to offend or arouse tensions" or "serving to alleviate pain.")
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