SECURITIES ARBITRATION ALERT 2022-12 & -13 (3/31/22)

George H. Friedman, Editor-in-Chief

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DID YOU KNOW?

- **ICSID Has A Free, Comprehensive Case Database**

ALERT! NO *ALERT* NEXT WEEK BUT A DOUBLE ISSUE TODAY. *We will be taking our somewhat delayed customary quarterly break in publishing the* Securities Arbitration Alert*. This week's* Alert *is a double issue as a result. Look for the next edition of the* SAA *in your e-mailbox the week of April 10. In the meantime, follow us @SecArbAlert and sign up for updates on our weekly blog posts.*

SQUIBS: IN-DEPTH ANALYSIS

*****THIS JUST IN: SCOTUS DECIDES *BADGEROW*. *Just as we went to press came word that, based on statutory construction, the Supreme Court has decided* Badgerow v. Walters*, No. 20-1143, ruling 8-1 that the "look through" doctrine does not apply to actions to confirm or vacate an arbitration award under sections 9 and 10 of the Federal Arbitration Act ("FAA"), even though it does for motions to compel arbitration under section 4.*** 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 a FINRA Award.

The Case Below

A FINRA Panel rendered an Award denying AP Badgerow's claims against Ameriprise and three "franchise advisors," triggering a petition to vacate by Badgerow in a Louisiana trial court. The Respondents then removed the case to federal court. Thereafter, the District Court confirmed the Award, finding no fraud in its procurement as Badgerow had alleged. Before the Fifth Circuit was whether the District Court acted properly in determining it had federal jurisdiction to support removal.

The FAA and Federal Jurisdiction

Because the FAA does not confer federal jurisdiction, another basis such as diversity of citizenship or a federal question must be present. As reported in SAA 2021-39 (Oct. 21), a wonderful primer on the FAA and federal jurisdiction was provided by the unanimous Connecticut Supreme Court decision in *A Better Way Wholesale Autos, Inc. v. Saint Paul*, No. SC20386 (Conn. Oct. 12, 2021). The case dealt with whether the shorter time to vacate an award under state law – Connecticut General Statutes § 52-420 (b) – was preempted by the FAA. The Court held it was not, because the State's law: "… does not stand as an obstacle to the accomplishment of the federal policy to enforce arbitration agreements."

The "Look Through" Standard Under FAA Section 4 Petitions to Compel

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.

Majority of Circuits Extend the Standard to Award Confirmation

Over the years, a majority of Circuits considering the question (First, Second, Fourth, and Fifth) have extended the "look through" standard to post-award petitions to confirm or

vacate/modify. See, for example, *Doscher v. Sea Port Group Securities, LLC*, 832 F.3d 372 (2d Cir. 2016), where the Second Circuit extended *Vaden's* "look through" jurisdictional test to actions to confirm (FAA section 10) or modify (FAA section 11) awards under the FAA. The Third and the Seventh Circuits have adopted a contrary view, limiting the "look through" standard to actions to enforce arbitration agreements. See, for example, *Goldman v. Citigroup Global Markets Inc.*, 834 F.3d 242 (3d Cir. 2016). The issue identified for review in the granted Petition for *Certiorari*: "Whether federal courts have subject-matter jurisdiction to confirm or vacate an arbitration award under Sections 9 and 10 of the FAA where the only basis for jurisdiction is that the underlying dispute involved a federal question."

SCOTUS: No "Look Through" in Award Enforcement or Challenges

The 8-1 majority (**Justice Breyer** dissenting) holds that the language in FAA sections 9 and 10 does not support application of the look through standard to award enforcement or challenges. Writing for the majority, **Justice Kagan**'s Opinion states: "In *Vaden v. Discover Bank*, 556 U. S. 49 (2009), we assessed whether there was a jurisdictional basis to decide a Section 4 petition to compel arbitration by means of examining the parties' underlying dispute. The text of Section 4, we reasoned, instructs a federal court to 'look through' the Opinion of the Court petition to the 'underlying substantive controversy' between the parties—even though that controversy is not before the court…. If the underlying dispute falls within the court's jurisdiction—for example, by presenting a federal question—then the court may rule on the petition to compel. That is so regardless whether the petition alone could establish the court's jurisdiction.

"The question presented here is whether that same 'look-through' approach to jurisdiction applies to requests to confirm or vacate arbitral awards under the FAA's Sections 9 and 10. We hold it does not. Those sections lack Section 4's distinctive language directing a look-through, on which *Vaden* rested. Without that statutory instruction, a court may look only to the application actually submitted to it in assessing its jurisdiction."

Justice Breyer's Dissent

Justice Breyer asserts that strict statutory construction alone should not carry the day: "When interpreting a statute, it is often helpful to consider not simply the statute's literal words, but also the statute's purposes and the likely consequences of our interpretation. Otherwise, we risk adopting an interpretation that, even if consistent with text, creates unnecessary complexity and confusion. That, I fear, is what the majority's interpretation here will do. I consequently dissent."

Oops! A "C" on Our Take

Our take on the oral argument gets partial credit at best. We said before: "It seems to us that the Court will be tasked with reconciling two core countervailing arguments: 1) does it matter that only FAA section 4 (compelling arbitration) has express language supporting the look through doctrine (providing that a motion to compel arbitration can be brought in 'any United States district court which, save for such agreement, would

have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties'), while sections 9 and 10 (confirming/challenging awards) do not?" That part was spot on. This part was not: "Although a lopsided decision seems unlikely, our money is on the Respondents…. [We are guided by] an imagined **Justice Scalia** question we identified in our editorial note in # 41: 'So let me get this straight: it's OK to apply 'look through' to enforcing the arbitration agreement, but not the eventual award??'"
*(ed: *What does this decision means in practical terms? A party seeking federal jurisdiction to confirm or vacate an award must establish an independent basis for jurisdiction for the petition such as through diversity of citizenship or a federal question. If not, better familiarize yourself with the State court system. **This squib was published in or March 31 blog.)*
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SCOTUS HEARS ORAL ARGUMENTS IN *SOUTHWEST* AND *VIKING RIVER*
The Supreme Court heard oral argument this week in the remaining two of four cases involving arbitration it reviewed over the last two weeks. As reported in SAA 2022-11 (Mar. 24) and in our blog, the Court last 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. This week, SCOTUS heard arguments in *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 offer in this squib a brief review of the cases and the arguments presented.

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.

***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 or is to be construed more broadly to cover those who are part of the "flow" or "stream" of interstate commerce. 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."

The Oral Arguments

Note: The oral arguments took place as scheduled with **Justice Thomas** participating in both remotely. Recall that, as reported in SAA 2022-11 (Mar. 24), Justice Thomas was out ill and did not participate in the oral arguments in *Morgan*, and *ZF Automotive* and *AlixPartners*. **Chief Justice Roberts** had announced up front before both of those arguments that Justice Thomas would: "participate in consideration and decision of the cases on the basis of the briefs and the transcripts of oral argument." **Justice Coney Barrett** did not participate in *Southwest*, but did so in *Viking River*. There was no explanation about her absence in *Southwest*, but we think it was because she authored the Opinion in *Wallace v. Grubhub Holdings, Inc*., 970 F.3d 798 (7th Cir. 2020). The unanimous *Wallace* Court had rejected the drivers' argument that the FAA section 1 carveout covered workers moving goods that had in the past been transported in interstate commerce but who themselves did not regularly move goods or people in interstate commerce. The case was referred to several times during the argument.

Southwest Airlines: The discussion featured repeated references to: drayage; seamen; stevedores; and wharfage. There were also frequent mentions of *Circuit City Stores v. Adams*, 532 U.S. 105 (2001) (FAA section 1 exemption for "workers engaged in interstate commerce" applies only to transportation workers) and *New Prime Inc. v. Oliveira*, 139 S.Ct. 532 (2019) (FAA section 1 covers independent contractors, not just "employees"). The discussion focused more on the narrow question of airline baggage handlers, and seemed to be saving for another day the broader issue of "last mile" or Uber/Lift drivers. Based on the questions from the pro-arbitration wing Justices, it seems to us that a narrow "stream" or "flow" of FAA section 1 engaged in interstate commerce ruling is in the offing. See, for example, the colloquy between **Justice Gorsuch** and Southwest's counsel **Shay Dvoretzky**, beginning with this question on transcript page 12: "Counsel, let's say I -- I agree with everything you just said, but I still have a question about folks who unload cargo from interstate commerce and bring it into the state. Now what evidence is there that railroad workers who did that were or were not covered by this statutory language? And, if they were covered by it, do you lose?" In the spirit of the upcoming Passover holiday, Justice Thomas asked four questions. We recommend that readers peruse the excellent analysis, *Looking for Definitions, the Supreme Court Weighs the Limits of the Federal Arbitration Act's Sec. 1 Exemption*, offered in the *CPR Blog* on **March 28**.

Viking River Cruises: With a full complement of Justices, the argument focused squarely on the preemptive effect of the FAA as defined by *Concepcion, Epic Systems,* and *Lamps Plus* versus California's right to enforce its labor laws via private attorneys general using PAGA. The Court's pro-arbitration wing was very quiet, with the bulk of the questions coming from **Justices Breyer, Kagan and Sotomayor**. This might just mean that there are enough votes to find PAGA is preempted by the FAA, so the pro-PDAA Justices saw no need to jump in (although Justice Thomas posed his usual question about the applicability of the FAA in State courts). Justice Sotomayor observed that PAGA was enacted before (*ed: in 2004*) the decisions in *Concepcion, Epic Systems,* and *Lamps Plus,* thus undermining any argument that PAGA was enacted to work around those holdings. Viking's counsel **Paul D. Clement** responded that PAGA was moribund before the SCOTUS rulings, and that PAGA use exploded thereafter with 17 such cases now being filed every day. He also raised an interesting point: if PAGA-type laws were important to the States as an effective labor law enforcement mechanism, why did no other States file *Amicus* Briefs? He described the law as an "outlier" – a point that seemed to resonate with Justice Gorsuch. For a comprehensive "chapter-and-verse" analysis, we recommend that readers peruse these **March 30** posts: *Adding a Claim, and Avoiding Arbitration: The Supreme Court Reviews California's Private Attorneys General Act*, appearing in the *CPR Blog;* and *Supreme Court Weighs Employer's Challenge to California Labor Law* in the *LA Times.*

A Handy Chart on All Four Cases

We again offer the chart below, which has information on the "Arbitration Final Four" cases.

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 exemption scope – is it limited to workers actually moving goods or people over state lines or is part of the "flow" or "stream" enough? Transcript is here; audio recording is here.
March 30: *Viking River Cruises, Inc. v. Moriana*, No. 20-1573: FAA preemption of California's PAGA. Transcript is here; audio recording is here.

*(ed: *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"? ***This squib was published in our blog on March 31.)*
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MORE ON FINRA REG NOTICE ON A PROPOSED RULE TO ACCELERATE ARBITRATIONS FOR SERIOUSLY ILL OR ELDERLY PARTIES. ***Just as we were finalizing SAA 2022-10 (Mar. 17) came word that FINRA had filed Regulatory Notice 22-09, FINRA Requests Comment on a Proposed Rule to Accelerate Arbitration Proceedings for Seriously Ill or Elderly Parties***. We reported briefly on this item in # -10 and promised a full analysis in a future *Alert*.

Background
As reported in SAA 2021-46 (Dec. 9), FINRA's Board of Governors met in **December 2021** and among other actions approved a rule change proposal to codify and improve the existing FINRA Dispute Resolution Services special program to expedite administration of arbitration cases involving senior or seriously ill parties. FINRA CEO **Robert W. Cook**'s post-meeting memo stated: "The Board approved publication of a Regulatory Notice soliciting comment on proposed amendments to the Codes of Arbitration Procedure to accelerate case processing for seriously ill parties and parties who are 75 or older." In keeping with the "new normal" for rule change proposals, the Board had authorized staff to publish a Regulatory Notice seeking comments, rather than a 19b filing with the SEC.

Originally a Voluntary Program
As reported in SAA 2019-10 (Mar. 6), FINRA DRS has since **2004** had a voluntary program to expedite the arbitration process for older (age 65+) or seriously ill investors. While Arbitrators and staff have been trained to speed these cases along, one drawback has always been that the *Codes* don't permit staff to shorten any timeframe in the rules without consent of the parties. Under the existing program: "staff will endeavor to do the following on an expedited basis: Complete the arbitrator selection process; Schedule the initial pre-hearing conference; Serve the final award; and Determine whether the parties are interested in mediation." Arbitrators are sensitized to respond favorably to requests for expedited treatment, specifically: "the arbitration panel is expected to press for hearing dates and discovery deadlines that will expedite the process, yet still provide a fair amount of time for case preparation: Scheduling hearing dates; Considering postponement requests; and Setting discovery deadlines."

The Reg Notice: Codify the Program
Regulatory Notice 22-09 says: "FINRA seeks comment on a proposal to accelerate arbitration case processing when requested by parties who are seriously ill or are at least 75 years old. The proposal would help ensure that these parties are able to participate meaningfully in FINRA arbitration by shortening certain case processing deadlines for parties and arbitrators under the Codes." Addressing the shortcomings of the current voluntary program – such as not significantly speeding up cases* – the Reg Notice lays

out specific proposed changes to the Customer and Industry *Codes of Arbitration Procedure*, that we excerpt essentially *verbatim* (footnotes are omitted):

Turnaround Time. The proposal would provide that a panel in an accelerated case shall endeavor to render the award within 10 months or less and set discovery, briefing and motions deadlines, and schedule hearing sessions, consistent with doing so.

Serving an Answer. The proposal would shorten the deadline for an answer to a statement of claim from 45 to 30 days.

Responding to a Third-Party Claim. The proposal would shorten the deadline for a response to a third-party claim from 45 to 30 days.

Completing Arbitrator Lists. Currently, parties must return the ranked arbitrator lists to FINRA staff no more than 20 days after the lists were sent to the parties. The proposal would shorten this deadline to 10 days.

Discovery in Customer Cases. Currently, parties in customer cases are required to produce to all other parties documents that are described in the Document Production Lists on FINRA's website within 60 days of the date that the answer to the statement of claim is due; explain why specific documents cannot be produced within the required time; or object and file an objection with the Director. The proposal would shorten this deadline to 35 days.

Other Discovery Requests. Currently, parties must respond within 60 days of receipt to requests for other documents or information. The proposal would shorten this deadline to 30 days.

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. A doctor's note would not be required; applicants would attest to their "seriously ill" status.

A Significant Difference (and a Minor One)

One major difference between the existing and proposed regimes is that the current program sets the "older" threshold at age 65; the proposed rule at 75. The Reg Notice explains: "FINRA is proposing a 75-year-old age requirement to focus on those parties who are most likely to need acceleration. Parties who are 75 or older are significantly more likely to become unable to participate in a hearing after a claim is filed than those who are 65 or older, as demonstrated by published rates of adverse health conditions and mortality" (footnote omitted). A relatively minor change is in terminology. The current voluntary program uses the term "senior" while the proposed rule change uses the term "elderly."

*(ed: *The Notice says: "The median time for the 3,125 customer arbitrations in the current program to close was approximately 13.4 months, and the median time for the 8,585 customer arbitrations not in the current program to close was approximately 15.2*

*months, or a difference of less than two months." Recall that we reported consistent findings in a mini-survey published in SAA 2021-48 (Dec. 23). **Comments are due May 16 and must be submitted through one of the following methods: 1) online using FINRA's comment form; 2) emailing comments to pubcom@finra.org; or 3) mailing comments in hard copy to: Jennifer Piorko Mitchell, Office of the FINRA Corporate Secretary, 1735 K Street, NW, Washington, DC 20006-1506. Seven questions are posed to commenters. ***This is a welcome change since, when all is said and done, the existing program does not abrogate the time frames in the* Codes. *****The Dispute Resolution Task Force Report contained recommended improvements in this area.)*
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UNANIMOUS FOURTH CIRCUIT "UNVACATES" FINRA AWARD THAT HAD BEEN OVERTURNED BASED ON "MANIFEST DISREGARD." ***Although "manifest disregard" is alive in the Fourth Circuit, a unanimous Court holds that the District Court erred when it held that "the sky-high standard of judicial review" had been met.*** We covered in SAA 2020-39 (Oct. 21) *Warfield v. ICON Advisors, Inc.,* No. 3:20CV195-GCM (W.D.N.C., 2020), and borrow from our analysis to describe the facts and lower court holding.

FINRA Arbitration for Wrongful Termination
The Plaintiff was employed as a mutual funds wholesaler by Defendants Icon Advisors, Inc. and ICON Distributors, Inc. ("ICON") and was terminated in **November 2017**. Plaintiff thereafter initiated an arbitration against ICON by filing with FINRA a Statement of Claim ("SOC") on **March 14, 2019** (and an amended SOC on **April 11, 2019)**. Plaintiff claimed that ICON's termination explanation in the U5 termination notice ("Form U5") was "false and defamatory," and asserted claims of "wrongful termination, defamation, and unfair and deceptive trade practices." He sought damages and relief exceeding $5 million and expungement of the allegedly "false and defamatory" language in the termination explanation on his Form U5. On **March 18, 2020**, the Arbitrators awarded Plaintiff $1,186,975 in compensatory damages for "the stated claim of 'wrongful termination without just cause.'" Additionally, the Panel recommended that the termination explanation in Plaintiff's Form U5 be expunged and replaced with "Awaiting Financing to Clear Tax Liens." Plaintiff moved to confirm the Award and enter judgment pursuant to Federal Arbitration Act ("FAA") section 9, while ICON moved to vacate the Award.

District Court : "Manifest Disregard" Lives…
The Fourth Circuit recognized the existence of "manifest disregard" of the law as a basis for vacating an award in *Wachovia Securities, LLC v. Brand*, 671 F.3d 472 (4th Cir. 2012), where the Court adopted a two-part test: "(1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrator refused to heed that legal principle." The District Court cites to the nearly identical case of *Raymond James Financial Services, Inc. v. Bishop*, 596 F.3d 183 (4th Cir. 2010). In that case the Court found that, "where arbitrators imply a termination 'for-cause' provision into a private employment agreement that expressly provides for termination 'at-will,' the

arbitrators do more than commit a permissible error of law, they exceed their authority by ignoring the agreement's plain language."

… And is Present Here As to Damages (But Not Expungement)
The District Court found *Raymond James* to be persuasive and held that "at-will employees" such as Plaintiff, have no avenue of relief for wrongful termination because under North Carolina law "no such cause of action exists for 'at-will' employees." The Court further found that ICON had made the Arbitrators aware of the "clear, well-established law" in both North Carolina and the Fourth Circuit. The Court concluded that the Arbitrators chose to disregard that law and that their Award demonstrated a "manifest disregard" of the law and must be vacated. As to the U5 expungement, however, the District Court went the other way: "Unlike the Panel's manifest disregard of the law in their award of damages to Warfield for wrongful termination without just cause, the Court cannot say that the Panel's U5 language exceeded their powers or demonstrated a manifest disregard of the law."

Fourth Circuit: "Manifest Disregard" Not Present Here
The unanimous Fourth Circuit panel in *Warfield v. Icon Advisers, Inc*., No. 20-1690 (4th Cir. Feb. 24, 2022), finds that the stringent grounds to support vacating an award under the FAA have not been met: "The district court refused to enforce the award, holding that North Carolina is an 'at-will' employment state that does not recognize a cause of action for wrongful termination without just cause. The court determined that the arbitrators manifestly disregarded the law in finding to the contrary and vacated the award on that basis. Warfield appeals, and … ICON has not made the exceedingly difficult showing necessary to demonstrate that the arbitrators acted with manifest disregard of the law…. In this case, as in almost all manifest disregard cases, the sky-high standard of judicial review is the beginning and the end of our analysis. Neither North Carolina law nor our decision in *Raymond James* established 'binding precedent requiring a contrary result' from the outcome that the arbitrators reached. *Jones*, 792 F.3d at 403. And even if there were such a binding precedent, ICON has not met its heavy burden of showing that the arbitrators knew of and 'refused to heed' that precedent…. Therefore, the judgment of the district court is *REVERSED*."
*(ed: *Seems right. As we say with regularity, we think "manifest disregard" is on life support in general, and that SCOTUS, if given a chance, would administer a* coup de grâce. ***The original squib was authored by Theodore Ryan, at the time a 3L at St. John's School of Law.)*
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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

FINRA DRS POSTS STATS THROUGH FEBRUARY: ARBITRATION CLAIMS ARE DOWN ACROSS THE BOARD, BUT MEDIATION FILINGS CONTINUE TO SOAR. FINRA Dispute Resolution Services ("DRS") posted case statistics through **February**, with the overall case filing trends about the same as in **January**. While we still caution that results after two months are a small sample, we offer these headlines: 1) overall arbitration filings through February – 381 cases – are down 21%; 2) cumulative

customer claims declined by 31%; 3) industry arbitration filings were down 5% (reversing last month's 5% increase); 4) mediation cases continue to soar; and 5) pending cases continue to decrease. Overall arbitration turnaround times were 17.6 months, with hearing cases now taking 19.4 months (both figures are slight improvements from last year). There were 154 mediation cases in agreement, a gargantuan 166% increase (besting 2021's torrid plus 49% pace). The settlement rate remains very high at 93% (it had been 89% last year). There are now 8,333 DRS arbitrators 4,010 public and 4,323 non-public. Pending cases stand at 3,648, a decline of 137 from January.
*(ed: *Again, kudos to FINRA DRS for eliminating the backlog. **Past year stats can be found here.)*
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UPDATE ON FINRA "RIGGED PANELS" ACCUSATION: ALL'S QUIET ON THE FINRA -WARREN/PORTER FRONT. FINRA may have responded to the latest letter on this matter from Sen. **Elizabeth Warren** (D-MA) and **Rep. Katie Porter**, but if so it's a well-kept secret. We've covered extensively this ongoing story, which we also blogged about on February 2, 9, and 25. To review, Fulton County Superior Court Judge **Belinda E. Edwards** in *Leggett v. Wells Fargo Clearing Services, LLC*, No. 2019CV328949 (Ga. Super Jan. 25, 2022), found that the potential FINRA arbitrator list preparation process had been compromised. This prompted: 1) subsequent calls by PIABA for Congressional and SEC investigations; 2) a denial from Wells and a vow to appeal; 3) a **February 9** letter to FINRA from Sen. **Elizabeth Warren** (D-MA) and **Rep. Katie Porter** (D-CA) demanding answers by **February 23**; 4) a **February 18** Press Release from FINRA announcing that the Authority had retained the Lowenstein Sandler law firm to conduct an independent review; 5) a **February 24** appeal by Wells (according to news reports in *FA Magazine* and *ThinkAdvisor*); 6) a FINRA reply to Sen. Warren and Rep. Porter in a **February 21** letter from CEO and President **Robert W. Cook**; and 7) as reported in SAA 2022-10 (Mar. 17), a **March 7** letter from Sen. Warren and Rep. Porter announced in a Press Release. The legislators' latest letter posed several questions and demanded a response by **March 22.** Seeing nothing new after that date on the FINRA or Congressional Websites or social media, we asked for a status update from FINRA, which referred us to Sen. Warren and Rep. Porter. Inquiries to the legislators remain unanswered as of press time.
(ed: As we've said early and often, this is by no means the end of it. It's just the latest chapter in what is sure to be a lengthy process.)
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ICSID FINALIZES SUBSTANTIAL CHANGES TO INVESTOR-STATE RULES, INCLUDING NEW MEDIATION PROCEDURES. As we've said before, not every investment-related dispute is administered by FINRA. For example, the International Centre for Settlement of Investment Disputes ("ICSID"), established in 1966 pursuant to the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, asserts that it is "the world's leading institution devoted to international investment dispute settlement." The organization, of course, has arbitration rules and, as

reported in SAA 2018-34 (Sep. 5), ICSID announced via an **August 2018** Press Release that it was proposing substantial changes for the first time in over a decade. The Release said the proposals "update ICSID's existing rules for arbitration, conciliation and fact-finding, and introduce a new set of mediation rules…. The proposed amendments to the ICSID rules are the most far reaching in over 50 years. They draw on input received from governments, the private sector and the public." We later reported in SAA 2021-30 (Aug. 12) that ICSID in **June 2021** released *Working Paper 5,* describing the current state of affairs. Member State comments were due **August 31, 2021**. On **March 21** of this year, ICSID announced that it has finalized the changes, which will go into effect **July 1**. The announcement adds: "Over the coming months, ICSID will publish guidance notes to assist users in applying the updated rules, as well as offer briefings and courses by request." Wilmer Cutler Pickering Hale and Dorr LLP on **March 24** published an excellent analysis of the changes that offers this description: "The rules have been redrafted in plain, modern, gender-neutral language and have been structurally reorganized in a user-friendly way. The substantive changes to the rules are aimed at reducing the time and cost of proceedings, ensuring greater use of technology, and increasing transparency. There are also new stand-alone rules on mediation (for all or part of a dispute) and fact-finding."
(ed: Visit https://icsid.worldbank.org/resources/rules-amendments for prior working papers.)
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FLORIDA SUPREME COURT: PDAA LANGUAGE WAS CHOICE OF LAW PROVISION, NOT A FORUM SELECTION CLAUSE. Because the contractual clause in question was a choice of law provision rather than a forum selection clause, neither the arbitration clause nor the Florida arbitration statute could be used to establish personal jurisdiction, a unanimous Florida Supreme Court holds in *Tribeca Asset Management, Inc. v. Ancla International, S.A.*, No. SC21-24 (Fla. Mar. 24, 2022). The clause at issue in the contract between these foreign parties stated: "**SEVENTH. APPLICABLE LAW**. This agreement will be governed by the laws of the State of Florida of the United States of America (USA), a jurisdiction accepted by the parties irrespective of the fact that the principal activity of the beer project will be conducted in Colombia." We'll let the Opinion speak for itself. As to the procedural history: "Ancla filed a petition in a Florida circuit court to compel arbitration. Tribeca moved to dismiss the petition arguing that the circuit court did not have personal jurisdiction over Tribeca, a nonresident defendant. The circuit court dismissed for lack of personal jurisdiction, ruling that Article 7 in the Agreement did not contain a forum selection clause and 'merely contain[ed] a choice of law provision.' The Third District reversed, stating 'that the legal basis for personal jurisdiction in this case stems from a provision in the Florida Arbitration Code [section 682.18(1), Florida Statutes (2012)].' *Ancla*, 315 So. 3d at 56 n.1. The Third District concluded that the circuit court had personal jurisdiction over Tribeca because 'the language "Florida . . . a jurisdiction accepted by the parties" confers jurisdiction on Florida courts to enforce the Agreement.' Id. at 57." And the holding: "Based on the Third District's erroneous conclusion that Article 7 contains a forum selection clause, it proceeded to rely on section 682.18(1)2 of the Florida Arbitration

Code to establish personal jurisdiction without analyzing the due process requirement of minimum contacts…. Among other requirements, section 682.18(1) only applies where an agreement 'provid[es] for arbitration in [Florida].' Here, the Agreement does not provide for arbitration in Florida. Accordingly, section 682.18(1) does not apply according to its express language …."
(ed: Hmm. Wonder whether the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards and FAA chapter 2 could have been used to compel arbitration? 9 U.S.C. § 206 states: "A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States.")
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PIABA TO HOLD VIRTUAL MID-YEAR MEETING APRIL 21. The Public Investors Advocate Bar Association ("PIABA") will be holding its Mid-Year Meeting via Zoom on Thursday, **April 21** from 12 pm to 6 pm eastern. The theme is *Getting Grandma's Nest Egg Back*, and: "will focus on senior issues throughout the client-financial professional relationship and resolving disputes once problems are uncovered." Topics include: "State and Civil Claims and Overview of a Financial Elder Abuse Case; Compliance Supervision and Best Interests in Senior Citizen Accounts; Dealing with People with Diminished Capacity; Economic and Non-Economic Damages When Dealing with FINRA Arbitrations Involving Senior Citizens; and Strategies and Techniques in Dealing with FINRA Arbitrations Involving Senior Citizens." The program, which is open to all, is: "designed for attorneys, paralegals, regulators, educators, experts, consultants, mediators and (securities) arbitrators." CLE credit will be available.
*(ed:*Registration fees range from $250 for speakers and PIABA members to $300 for educators, experts, mediators, non-members, and regulators. **Registration will close at 10 am eastern on April 21.)*
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QUICK TAKES: CASES AND AWARDS WORTH READING

***K.F.C. v. Snap Inc*., No. 21-2247 (7th Cir. Mar. 24, 2022)**: "In order to open a Snapchat account, a person must agree to Snap's terms and conditions. One of these is arbitration of disputes. K.F.C. acknowledges that she accepted these terms but denies that the arbitration clause (or any other part of the agreement) binds her. She concedes that she continued using Snapchat after turning 13 but maintains that this is irrelevant, because she was (and still is) under 18. The district court was not persuaded, ordered the parties to arbitrate, and dismissed the suit. 2021 U.S. Dist. LEXIS 108695 (S.D. Ill. June 10, 2021). The judge held that the arbitrator, not a court, must decide whether K.F.C.'s youth is a defense to the contract's enforcement. Because the judge dismissed the suit outright, 9 U.S.C. §16(a)(3) allows her to appeal, see *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79 (2000), and she did so…. All of these matters are for the arbitrator."

***French v. Ascent Resources-Utica, LLC*, 2022-Ohio-869 (Mar. 24, 2022)**: "This discretionary appeal from a judgment of the Seventh District Court of Appeals presents a

single question: is an action seeking a determination that an oil and gas lease has expired by its own terms a controversy 'involving the title to or the possession of real estate' so that the action is exempt from arbitration under R.C. 2711.01(B)(1)? … The answer to that question is yes. An oil and gas lease grants the lessee a property interest in real estate that affects the title to the land and permits the lessee to physically occupy the land to the extent reasonably necessary to the production of oil and gas—i.e., the lessee acquires the right to enter the property and construct wells, buildings, telephone lines, pipelines, powerlines, and roads. And once an oil and gas lease expires under its own terms, the property interest granted under the lease reverts to the lessor by operation of law and the lessee no longer has any right to occupy the land. Consequently, an action seeking a determination that an oil and gas lease has expired is a controversy involving the title to or the possession of real estate and, under R.C. 2711.01(B)(1), the action is not subject to arbitration" (link added by the *Alert*).

***Chancellor Senior Management, Ltd. v. McGraw*, No. 20-0794 (W. Va. Mar. 22, 2022)**: "Even a cursory examination of the arbitration provision at issue reveals that it fails to 'comply with its own stated standards' set forth in the AHLA Rules [American Health Lawyers Association *Alternative Resolution Service Rules of Procedure for Arbitration*]; indeed, the arbitration provision is internally inconsistent with the requirements of Rule 2.1. Specifically, the arbitration provision is not contained in a separate agreement as required by Rule 2.1, but rather is buried in the Residency Agreements. Additionally, it fails to contain any language specifying that it is a 'voluntary agreement,' which is also required by Rule 2.1. The arbitration provision further fails to advise residents that the provision of health care is not contingent on their signing the agreement to arbitrate, and it does not provide a thirty-day period to rescind the agreement after it has been signed. According to Rule 2.4, if an arbitration provision fails to comport with the requirements of Rule 2.1, the arbitrator 'will issue a Final Award terminating the arbitration.' Thus, the circuit court did not err in determining that the arbitration agreement was not valid."

***Booker v. Fidelity Brokerage*, FINRA ID No.20-03596 (Cleveland, OH, Feb. 22, 2022)**: A customer seeking recoupment of $4.5 million in alleged stolen funds loses her case. The Panel granted Respondent broker-dealer's Motion for Directed Verdict after finding that the customer failed to provide credible testimony or reliable evidence in support of her claims. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Awan v. Fidelity Brokerage*, FINRA ID No. 21-00928 (Los Angeles, CA, Feb. 25, 2022)**: An Arbitrator dismisses with prejudice the customer's case pursuant to FINRA Rules 12212 and 12511 (Discovery) after granting Respondent broker-dealer's Motion for Sanctions based on the customer's failure to reply to requests for discovery and for ignoring deadlines set forth in the Arbitrator's Initial Pre-Hearing Conference Order concerning the production of discovery (*ed: links added by the* Alert). *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

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C. Roger and F. Brodlija, *So, You Think You Know Arbitrators? Test Your Knowledge with Arbitrator Intelligence's Arbitrator Perspectives Quiz*, Kluwer Arbitration Blog (Mar. 24, 2022): "Arbitrators make many decisions that affect the outcome of a case. The most obvious decisions are, of course, their decisions on the merits. But arbitrators also make a host of other procedural and case management decisions that can affect the outcome of a case. Procedural and case management decisions may include rulings on briefing and hearing schedules, interim measures and security for costs, document production, bifurcation or trifurcation, proposed settlements, awards of costs and fees, and (if they are party-appointed arbitrators) the choice of presiding arbitrator.[] Despite the fact that they may affect the outcome of a case, arbitrators' perspectives on these various procedural and case management issues often elude standard forms of research. Procedural and case management issues are not generally detailed in published awards. Apart from a few, arbitrators only rarely have publications about their views on these issues."

***Investment Losses from Russian Economic Retaliation May be Recoverable in International Arbitration*, Hunton Andrews Kurth LLP Blog (Mar. 18, 2022)**: "Russia has responded to sanctions imposed by the US and EU, among others, with legislation and presidential decrees designed to restrict, control, and potentially seize foreign-owned assets. For investors with stakes in Russian assets, these retaliatory measures pose a significant risk of loss. Investors may have a path to recoup such losses, however, in an arbitration action brought pursuant to a Bilateral Investment Treaty (BIT) with Russia.[] BITs are agreements between states whereby the states promise that investments made in their state will be afforded a certain level of protection. These agreements are governed by international law and may be enforced, in most cases, through binding international arbitration. While there is no US-Russia BIT, Russia has over 60 BITs with other states, including many EU member states, the UK, Japan, South Korea, and Switzerland. To seek relief under a BIT, an investor must be a national of or incorporated in a jurisdiction with an active BIT."

***ANALYSIS: #MeToo Law May Keep Entire 'Case' In Court*, Bloomberg Law (Mar. 21, 2022)**: "The precise scope of a new law ending forced arbitration and joint-action waivers for victims of workplace sexual misconduct has yet to be determined, but the law presents many interesting questions surrounding federal policy as well as statutory and contract interpretation.[]There are several compelling factors supporting a broad reading of the *Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021* that may keep more cases and claims in court and out of arbitration than might otherwise be expected, given courts' historically strong pro-arbitration stance.[] A deeper dive into language chosen for the new law, which amends the Federal Arbitration Act, reveals several conflicting elements that could influence its interpretation."

***FINRA Dispute Resolution Update: The More Things Change . . .* , JDSupra (Mar. 21, 2022)**: "As it was for the rest of the world, 2021 was an interesting year for the Financial Industry Regulatory Authority (FINRA). For those unfamiliar with ongoing

developments at FINRA—including its dispute resolution process, expungement concerns, efforts to protect vulnerable investors, and response to the pandemic—a review of the Section's Securities Litigation Journal article summarizing FINRA's efforts in 2020 might be of interest as a starting point. As the pandemic roared into 2021, FINRA obviously made efforts to evolve the dispute resolution process to address the ever-changing COVID-19 landscape. In addition, FINRA withdrew proposed rule changes and sought to significantly amend a rule implemented roughly three years earlier. These changes and more are discussed in detail below."

***Supreme Court Asked to Clarify Arbitration Rules in Taco Bell Case*, Courthouse News Service (Mar. 21, 2022)**: " An Iowa woman's lawsuit against a Taco Bell franchisee that began as an effort to prove the fast-food chain shortchanged employees like her on overtime pay wound up before the U.S. Supreme Court on Monday [March 21] in an esoteric discussion of federal arbitration law that could affect similar cases across the nation.[] During oral arguments, the justices gave little indication of where they are leaning as they struggled with whether Robyn Morgan's claims should have been resolved through arbitration and whether the case should be decided under state or federal contract law."

***High Court Debates U.S. Discovery for Private Arbitration Abroad*, Bloomberg Law (Mar. 24, 2022)**: "Eight members of the U.S. Supreme Court heard oral argument Wednesday in a set of cases that will determine the reach of the nation's vast and uniquely complex civil discovery apparatus.[]Justice Clarence Thomas is sitting the arguments out after being hospitalized for an infection on March. 18. But Chief Justice John G. Roberts Jr. said in a Sunday press release that he will participate in the consideration of any cases he misses due to his illness.[] The appeals, *ZF Automotive US Inc. v. Luxshare Inc.* and *AlixParters LLP v. Fund for Protection of Investors' Rights in Foreign States*, revolve around the scope of 28 U.S.C. §1782, which authorizes federal district courts to order discovery for use in a 'foreign or international tribunal.'"
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DID YOU KNOW?

ICSID HAS A FREE, COMPREHENSIVE CASE DATABASE. Our coverage elsewhere in this *Alert* of amendments to the arbitration rules of the International Centre for Settlement of Investment Disputes ("ICSID") prompts us to inform our readers that this institution also maintains a free, searchable case database covering: "all cases registered at ICSID. Search for cases and case-related materials by claimant, respondent, case number, applicable rules and other terms."
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Send any messages or inquiries to: George@SecArbAlert.com

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