SECURITIES ARBITRATION ALERT 2022-16 (4/28/22)

George H. Friedman, Editor-in-Chief

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- ***Avery v. Fidelity Brokerage,* FINRA ID No. 21-01994 (Louisville, KY, Mar. 24, 2022)**
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- ***SEC Uncovers $194 Million Penny Stock Schemes that Spanned Three Continents*, www.sec.gov (Apr. 18, 2022)**
- ***UBS Wires $14.1M to Ex-Compliance Officer Capping Off Battle over Defamation Award*, AdvisorHub (Apr. 19, 2022)**
- ***Finra Bars FA Fired Over Bogus Statements, Client Checks,* FinancialAdvisorIQ (Apr. 20, 2022)**
- ***French Supreme Court, Arbitration Agreements and Jurisdictional Challenges: Parties Cannot Have Their Cake and Eat It,* Kluwer Arbitration Blog (Apr. 20, 2022)**

DID YOU KNOW?

- **2022 Marks 20 Years Since the End of the SICA Non-SRO Arbitration Forum Pilot**

SQUIBS: IN-DEPTH ANALYSIS

SEC'S DIVISION OF EXAMINATIONS RELEASES 2022 EXAM PRIORITIES – DISPUTE RESOLUTION AGAIN NOT ON THE LIST. ***The SEC's Division of Examinations ("DOE") has issued its exam priorities for 2022. Once again, FINRA's dispute resolution program isn't included.*** The 32-page DOE Report was announced in a **March 30** Press Release. Division of Examinations Acting Director **Richard R. Best**

articulates these objectives: "In this time of heightened market volatility, our priorities are tailored to focus on emerging issues, such as crypto-assets and expanding information security threats, as well as core issues that have been part of the SEC's mission for decades – such as protecting retail investors. Our priorities cover a broad landscape of potential risks to investors that firms should consider as they review and strengthen their compliance programs."

Specific Priorities
The specific priorities within the main categories are nicely summarized in the Release, which establishes several key exam priority categories: "The Division will focus on private funds, environmental, social and governance (ESG) investing, retail investor protections, information security and operational resiliency, emerging technologies, and crypto-assets. The Division publishes its examination priorities annually to provide insights into its risk-based approach, including the areas it believes present potential risks to investors and the integrity of the U.S. capital markets."

FINRA Spotlight
FINRA is covered for the most part starting on page 23 as the sixth of nine **Exam Priorities**: "EXAMS conducts risk-based oversight examinations of FINRA. It selects areas within FINRA to examine through a risk assessment process designed to identify those aspects of FINRA's operations important to the protection of investors and market integrity, including FINRA's implementation of new investor protection initiatives." This section also has a description of the Authority: "FINRA oversees approximately 3,400 brokerage firms, 153,000 branch offices, and 618,000 registered representatives through examinations, enforcement, and surveillance."

And Dispute Resolution?
Dispute resolution was again not included in DOE's exam priorities. It is, however, mentioned in passing on page 23, where the Report describes FINRA at a high level using the same language it did last year: "In addition, FINRA, among other things, *provides a forum for securities arbitration and mediation ….*" (emphasis added). The scant references to dispute resolution are not necessarily a bad thing; if there were perceived problems with the program, we're sure it would be a focus area. Of course, with FINRA having retained outside counsel to investigate the "rigged panels" allegation, the arbitration program now *is* a *de facto* priority. Perhaps DOE intends to examine Dispute Resolution Services where the Report states that the Division: "… conducts risk-based oversight examinations of FINRA. It selects areas within FINRA to examine through a risk assessment process designed to identify those aspects of FINRA's operations important to the protection of investors and market integrity, including FINRA's implementation of new investor protection initiatives."
*(ed: *As usual, DOE warns that the list is not exhaustive and that priorities may change as the year unfolds. **Last year's Report was 42 pages long, and was dominated by COVID-19. This year, the pandemic is mentioned just four times. ***The Bates Group published an excellent April 14 Report and chart,* SEC 2022 Exam

Priorities and Chart: Retail Investor Protection, Private Funds, ESG, Cybersecurity and Crypto-Assets Top this Year's List.*)*
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NINTH CIRCUIT: AN ARBITRATION TERMINATED FOR NON-PAYMENT OF FEES SATISFIES SECTION 3 OF THE FAA, SO THE LITIGATION MUST PROCEED. ***Although the JAMS arbitration was short-circuited for non-payment of fees, an arbitration "has been had" for purposes of lifting the staying of the underlying litigation.*** Section 3 of the Federal Arbitration Act ("FAA") provides, in relevant part, that if a federal lawsuit is referrable to arbitration under a written arbitration agreement, the court: "shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

Arbitration Terminated for Non-payment of Fees
The issue in *Noble Capital Fund Management, L.L.C. v. US Capital Global Investment Management, L.L.C.*, No. 21-50609 (5th Cir. Apr. 13, 2022), was when an "arbitration has been had." The case arose from an unsuccessful joint venture, US Capital/Noble Capital Texas Real Estate Investment Fund, LP ("the Fund"). The parties initially filed a JAMS arbitration to resolve their dispute, but after the arbitrators froze the Fund's assets and no other party agreed to pay the Fund's share of the arbitration fees, the JAMS panel terminated the arbitration. Noble Capital then brought the current suit.

Fifth Circuit: Arbitration was "Had" Under the FAA …
Affirming the District Court's denial of US Capital's motion to stay judicial proceedings and compel arbitration, the Fifth Circuit rules: "Here the parties' arbitration agreements called for arbitration pursuant to the JAMS *Comprehensive Arbitration Rules and Procedures*, which included the right of JAMS to terminate the arbitration proceedings for nonpayment of fees by any party. Exercising this right, JAMS terminated the arbitration proceeding following the Fund's nonpayment. Following the lead of our sister circuits, we conclude that arbitration 'has been had.' Even though the arbitration did not reach the final merits and was instead terminated because of a party's failure to pay its JAMS fees, the parties still exercised their contractual right to arbitrate prior to judicial resolution in accordance with the terms of their agreements."

… So, Stay Can Be Lifted
What's next? The FAA-generated stay of litigation can be lifted. Continues the Opinion: "US Capital argues that the circumstances of the arbitration's termination, here for non-payment by a party, should control. But the statute does not ask why the arbitration terminated and thus the inquiry over whether arbitration 'has been had' does not require us to examine the cause of the arbitration's termination, only that arbitration has been had in accordance with the terms of the agreement. There is no arbitration to return this case to and parties may not avoid resolution of live claims through compelling a new arbitration proceeding after having let the first arbitration proceeding fail."

*(ed: *Seems right to us. **This Squib was prepared by Harry A. Jacobowitz, President of HAJ Research and Writing LLC. Mr. Jacobowitz, a member of the Pennsylvania bar, and his firm perform legal research and writing for attorneys and handle substantive searches of SAC's Award database. Contact him at harryjacobowitz@optimum.net.)*
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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

FINRA DRS POSTS 3Q STATS: CUSTOMER ARBITRATION CLAIMS ARE STILL WAY DOWN, BUT INDUSTRY CASES ARE NOW UP. MEDIATION FILINGS CONTINUE TO BE STRONG. FINRA Dispute Resolution Services ("DRS") posted case statistics through **March,** with the overall case filing trends – with one exception – about the same as before. While we will do a full analysis in the next *Alert*, we offer these headlines for the first quarter of **2022**: 1) overall arbitration filings through **March** – 632 cases – are down 19%; 2) cumulative customer claims declined by 29%; 3) industry arbitration filings are now *up* 4% (reversing last month's 5% cumulative decline); 4) mediation cases continue to rise; and 5) pending cases continue to decrease. Overall arbitration turnaround times were 17.5 months, with hearing cases now taking 18.2 months (both figures are slight improvements from last month). There were 236 mediation cases in agreement, a gargantuan 125% increase (besting 2021's torrid plus 49% pace). The settlement rate remains very high at 92% (it had been 89% last year). There are now 8,361 DRS arbitrators, 4,019 public and 4,342 non-public. Pending cases stand at 3,594, a decline of 54 from **February**.
(ed: Here's a spoiler alert: There does seem to have been a "Zoom Effect" in that customers received damages in 44% of 39 cases with at least one evidentiary hearing conducted by Zoom, as compared to 31% of 13 cases conducted entirely in-person. We caution that the sample size for this stat is very small.)
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SPEAKING OF EXPUNGEMENT, HAPPY BIRTHDAY TO A YEAR-OLD PUBLIC PETITION. Although most proposed SRO rule changes are initiated by the involved SRO or the SEC, the Commission's Rules of Practice, Rule 192 (17 CFR 201.192), allow for public petitions for rulemaking. The SEC's Website states: "Any person may request that the Commission issue, amend or repeal a rule of general application. Petitions must contain the text or substance of any proposed rule or amendment or specify the rule or portion of a rule requested to be repealed. Persons submitting petitions must also include a statement of their interest and/or reasons for requesting Commission action.[] All petitions will be forwarded to the appropriate office or division of the Commission for consideration and recommendation. Following submission of the staff's recommendation to the Commission, petitioners will be notified of any action taken by the Commission." We just came across Petition 4-770, which was submitted in **March 2021** by **Paul J. Bazil**, of Pickard Djinis and Pisarri LLP. The thrust is: "to request that the SEC amend Financial Industry Regulatory Authority ("FINRA") Rules 12904 and 13904 to allow FINRA to cease publication of expunged arbitration awards and to redact identifying information in expunged arbitration awards." The specific proposed rule language in the 12-page Petition: "Section (h): All awards shall be

made publicly available, except in the following instances: (i) Arbitration awards that have been expunged from the Central Registration Depository, or that contain information about expunged events, shall be removed from publication, or shall be redacted so that all identifying information about the individual(s) or firm(s) involved is removed; (ii) Arbitration Awards may be removed from publication or redacted for any other reason if FINRA determines, in its discretion, that publishing unredacted versions of the award would violate fundamental notions of fairness and work an injustice." As far as we can tell, there has been no SEC action in over a year, aside from posting the Petition on the Commission's Website.
*(ed: *The Petition is well-written and has an excellent history of the many twists and turns of the expungement story. In our opinion it should at least see the light of day. **Speaking of expungement, as reported in SAA 2021-22 (Jun. 3), FINRA in May 2021 temporarily withdrew a proposal for improving the expungement process. A Press Release,* FINRA Statement on Temporary Withdrawal of Specialized Arbitrator Roster Rule Filing, *announced: "Following consultations with the SEC staff, we temporarily withdrew from SEC consideration our rule filing establishing specialized arbitration panels for expungement requests so that we can further consider whether modifications to the filing are appropriate." The regulatory filing provided no further insights.)*
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SCOTUS DENIES *CERT.* IN ONE WE MISSED. The Supreme court on **April 18** denied *Certiorari in Dahiya v. Neptune Shipmanagement Services, PTE, Limited,* No. 21-1097, a case we missed the first time around when the Petition was filed on **February 2**. The Petitioner had sought review of *Neptune ShipManagement Services PTE., Ltd. v. Dahiya*, No. 20-30776 (5th Cir. Oct. 1), *reh. denied* (Nov. 4, 2021), where the Court held: "This case involves even more protracted litigation arising out of an arbitration agreement. In a dispute dating back to the last century, the parties have turned to Louisiana state court, federal court, civil court in India, and arbitration to resolve their dispute. Although Vinod Kumar Dahiya has secured an arbitral award for his maritime injuries, he continues to pursue litigation against the alleged wrongdoers—and he still disputes that there was an enforceable agreement to arbitrate at all. The district court concluded that, after two decades, the dispute was finally at an end. It confirmed the Indian arbitration award and enjoined further litigation. We agree and affirm." The case is listed on page 3 of the Order List.
*(ed: *We're not surprised by the Court's lack of interest. **1999! So much for speedy dispute resolution.)*
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***CERT.* SOUGHT IN ANOTHER INTERNATIONAL ARBITRATION DELEGATION CASE.** SCOTUS review is being sought in *Beijing Shougang Mining Investment Company, Ltd. v. Mongolia*, No. 21-1244. The **March 11** Petition seeks review of a decision in a case of the same name reported at 11 F.4th 144 (2d Cir. Aug. 26, 2021). In that case, the second Circuit held: "… that Petitioners-Appellants indisputably put the issue of the arbitrability of their claims to the arbitral tribunal when they consented, along with Mongolia, to the arbitration proceeding in two phases, with a

combined jurisdictional and liability phase and, if necessary, a quantum phase. In doing so, the Parties agreed to submit arguments as to the appropriate reach of the arbitrators' jurisdiction over Petitioners-Appellants' claims under the Treaty to the arbitral tribunal. The Parties reached such agreement, moreover, after it had already become clear that the key jurisdictional issue to be argued during the first phase was the scope of the arbitration clause provided in the Treaty, and whether that clause is limited to disputes about compensation, a question clearly implicating 'arbitrability.' Consequently, we hold that the record supplies 'clear and unmistakable' evidence of the Parties' intent to arbitrate issues of arbitrability." The question presented is: "Whether, as the Second Circuit held, participating in arbitration—including agreeing to a scheduling order as to the timing of jurisdictional objections and making arguments about jurisdiction to the arbitrators—is sufficient to show an agreement to arbitrate arbitrability, and thereby forgo the default *de novo* standard that governs judicial review of arbitrator decisions on arbitrability."
*(ed: *We think this one will result in a denial. The issues to us are a bit one-off. **Here's another arbitration taking forever to be resolved. This one goes back to 2010!)*
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NINTH CIRCUIT WON'T REVIEW *EN BANC* WHETHER UBER DRIVERS ARE ENGAGED IN INTERSTATE COMMERCE. The Court of Appeals for the Ninth Circuit will not review *en banc* its prior holding that Uber drivers are not engaged in interstate commerce under a nationwide standard, and must therefore arbitrate their claims. That was the original holding in *Rogers v. Lyft, Inc.*, 452 F. Supp. 3d 904, 915 (N.D. Cal. 2020)), which involved the issue of whether Uber drivers are engaged in foreign or interstate commerce and thus exempt from mandatory arbitration under Federal Arbitration Act ("FAA") section 1. The District Court decision was upheld in No. 20-15689 (9th Cir. Feb. 16, 2022): "We recently decided this question in *Capriole. v. Uber Technologies Inc.*,7 F.4th 854 (9th Cir. 2021), holding that rideshare drivers 'do not fall within the "interstate commerce" exemption from the FAA.' Id. at 861. Because *Capriole* controls the outcome in this case, we affirm the judgment of this district court." Rogers sought *en banc* review, which was denied in a one-page Order on **April 14**: "The panel has voted to deny the appellant's petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc."
*(ed: *See our coverage* of Capriole *in SAA 2021-10 (Mar. 18). **We are not surprised. We think this Court is waiting for SCOTUS to resolve this question.)*
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QUICK TAKES: CASES AND AWARDS WORTH READING

***In re: Romanzi*, No. 20-2278 (6th Cir. Apr. 8, 2022)**: "Fieger & Fieger now appeals, alleging that (1) remand was inappropriate and the district court should instead have vacated the award, (2) the arbitrators' decision on remand was barred by the doctrine of *functus officio*, and (3) the supplemental award should likewise have been vacated. Nathan, cross-appealing, seeks to revive the conversion claim dismissed by the bankruptcy court. Neither party's critique of the lower courts is persuasive. As to Fieger & Fieger's claims, none of the grounds for vacating an arbitral decision apply, and

remand was appropriate under the clarification exception to *functus officio*. As to Nathan, he failed to present evidence for a key element of his statutory-conversion claim. We therefore affirm the judgments of the district court and bankruptcy court."

***Olin Holdings Ltd. v. State of Libya*, No. 1:21-cv-04150 (S.D.N.Y. Mar. 23, 2022)**: "The parties agree that the petition is governed by the New York Convention…. When a party seeks to confirm an arbitral award under the New York Convention, '[t]he court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the ... Convention.' *Europcar Italia, S.p.A. v. Maiellano Tours, Inc*., 156 F.3d 310, 313 (2d Cir. 1998) (citing 9 U.S.C. § 207). Article V of the New York Convention 'provides the exclusive grounds for refusing confirmation under the Convention.'" *Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc*., 126 F.3d 15, 20 (2d Cir. 1997)."

***Nunez v. Cycad Management LLC*, No. B306986 (Calif. Ct. App. 2 Apr. 11, 2022)**: "Substantial evidence supports factual findings that the Agreement is adhesive because it was presented to Nunez as a nonnegotiable condition of his employment. It is procedurally unconscionable because it was given to Nunez in English, which he cannot read, without adequate explanation or a fee schedule. It is substantively unconscionable because it allows the arbitrator to shift attorney fees and costs onto Nunez and drastically limits his ability to conduct discovery. We affirm the denial of Cycad's motion to compel arbitration." (*ed: An* Alert *h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this decision.)*

***Avery v. Fidelity Brokerage*, FINRA ID No. 21-01994 (Louisville, KY, Mar. 24, 2022)**: A group of customers seeking compensatory damages of $285 quintillion lose their case after the Majority-Public Panel grants Respondent broker-dealer's Prehearing Motion to Dismiss pursuant to FINRA Rule 12206 (Six-year Eligibility Rule). In the Statement of Claim, Claimants requested: "$57,165,259,439,025,500.00 from the trades and 'up to $285 Quintillion in forfeiture of impaired trades additionally requesting to deliver rather than 4.7946892 Septillion 5.71653E+32. As the quantity of bitcoins owed at a price of $0.0000000000000001 per bitcoin, acting as whistleblower forces Claimants to request 135% of the award.'" *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Stephens v. Morgan Stanley*, FINRA ID No. 21-01841 (Boca Raton, FL, Mar. 25, 2022):** A Sole Public Arbitrator explains why he has decided to grant Respondent broker-dealer's Prehearing Motion to Dismiss pursuant to FINRA Rule 13206 (Six-Year Eligibility Rule for Industry Disputes), after finding that Claimant's request for reformation of his Form U5 record fell within the parameters of the rule as the entry was reported back in 2007. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*
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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

M. Bezant and J. Nicholson, *International Arbitration After the Pandemic*, Lexology (Mar. 2022): "This article uses macroeconomic data to evidence the extraordinary

growth in cross-border trade and investment over the last 20 years, and surveys the concurrent very strong growth in international arbitration activity both in traditional centres [sic] of dispute resolution and in emerging centres, using data from arbitration institutions and the authors' own experience. The authors then survey major industries and regions for past and future trends in international arbitration activity, based on the collective experience of FTI Consulting's global and industry-leading team of expert witnesses active in the field."

***SEC Uncovers $194 Million Penny Stock Schemes that Spanned Three Continents*, www.sec.gov (Apr. 18, 2022)**: "The Securities and Exchange Commission today announced charges against 16 defendants, located in the Bahamas, the British Virgin Islands, Bulgaria, Canada, the Cayman Islands, Monaco, Spain, Turkey, and the United Kingdom, for participating in multi-year fraudulent penny stock schemes that generated more than $194 million in illicit proceeds. The SEC investigations leading to these charges involved assistance from securities regulators and other law enforcement authorities in more than 20 countries and are associated, in part, with parallel criminal actions announced by the United States Attorney's Office for the Southern District of New York."

***New York Federal Court Confirms Arbitration Award Under Cyprus-Libya Bilateral Investment Treaty*, JDSupra (Apr. 18, 2022)**: "On March 23, 2022, a New York federal court confirmed an award in an arbitration before a tribunal of the International Chamber of Commerce (ICC) between Olin Holdings Ltd. and the state of Libya under a bilateral investment treaty. In the underlying ICC arbitration, Olin claimed that the Libyan government obstructed the operation of, and ultimately expropriated, Olin's dairy factory in Libya's capital city Tripoli in violation of the bilateral investment treaty between Libya and Cyprus, where Olin was formed. Olin sought $147,882,000 as compensation for the damages it allegedly incurred as a result." (*ed: See* Olin Holdings Ltd. v. State of Libya, *No. 1:21-cv-04150 (S.D.N.Y. Mar. 23, 2022), and our coverage elsewhere in this* Alert.)

***UBS Wires $14.1M to Ex-Compliance Officer Capping Off Battle over Defamation Award*, AdvisorHub (Apr. 19, 2022)**: "A drawn-out legal dispute that has spanned four years and multiple appeals has concluded with a $14.1 million wire transfer from UBS Wealth Management USA to a former compliance officer in Chicago.[] UBS Financial Services paid the total on April 12 to … its former regional compliance manager in Chicago, whom it had fired in 2018. [He] sued later that year for defamation and won $11.1 million in an arbitration award the following year.[] UBS waged lengthy court battles that were seen as a message to others who may consider taking on the firm in court, but ultimately failed to vacate the award. On March 31, the Supreme Court of Illinois denied UBS its final appeal without offering an explanation."

***Finra Bars FA Fired Over Bogus Statements, Client Checks*, FinancialAdvisorIQ (Apr. 20, 2022)**: "The Financial Industry Regulatory Authority says it has barred a veteran financial advisor after he failed to cooperate with its investigation into his

discharge last month…. [I]n the course of Finra's investigation into the discharge, [FA] twice failed to appear for testimony on the scheduled dates, for which the self-regulator banned him, according to a letter of acceptance, waiver and consent published by the industry's self-regulator…. [FA] consented to the bar without admitting or denying the findings, Finra says.'"

***French Supreme Court, Arbitration Agreements and Jurisdictional Challenges: Parties Cannot Have Their Cake and Eat It*, Kluwer Arbitration Blog (Apr. 20, 2022)**: "On 9 February 2022, the French Supreme Court ('*Cour de cassation*') **held that** a respondent party in arbitration cannot sabotage proceedings by refusing to pay its share of the advance on costs, then subsequently challenge the jurisdiction of national courts in favour [sic] of arbitration. Such behaviour [sic], according to the French Supreme Court, constitutes a breach of the parties' duty of procedural loyalty, and will prevent a successful jurisdictional challenge in favour of arbitration (*Cour de cassation*, n° 21-11.253)."
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DID YOU KNOW?

2022 MARKS 20 YEARS SINCE THE END OF THE SICA NON-SRO ARBITRATION FORUM PILOT. Launched in 2000, the two-year voluntary pilot program conducted under the auspices of the Securities Industry Conference on Arbitration ("SICA") allowed selected customers of six participating firms to opt for a non-SRO arbitration forum such as the AAA or JAMS. See the description here. The results after two years? Only 8 of 277 potential customer participants opted in. Why such poor results? A post-survey poll cited the high costs associated with non-SRO arbitration fora and greater familiarity with SRO arbitration forum rules.
(ed: We're planning to publish a 20-year retrospective feature article on the pilot.)
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