SECURITIES ARBITRATION ALERT 2022-18 (5/12/22)

George H. Friedman, Editor-in-Chief

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SQUIBS: IN-DEPTH ANALYSIS

SIFMA WEIGHS IN ON FINRA DISCUSSION PAPER ON EXPUNGEMENT. ***Just days after FINRA issued a "Discussion Paper" on expungement, SIFMA has submitted to the SEC a comment letter accusing FINRA of overreaching.*** As reported in SAA 2022-17 (May 5), the Authority on **April 28** issued a 26-page *Discussion Paper – Expungement of Customer Dispute Information*. While a comprehensive analysis was beyond the scope of our coverage in # 17, we offered a high-level synopsis and recommended that readers peruse *FINRA Revives Expungement Proposal that Died After*

Pushback, appearing in in the April 28 *FinancialPlanning* blog. We borrow from our past coverage here.

Rule Withdrawn

As reported in SAA 2021-22 (Jun. 3), FINRA in **May 2021** temporarily withdrew a proposal for improving the expungement process -- SR-FINRA-2020-030 -- which had its origins in the Dispute Resolution Task Force and its *Final Report and Recommendations*. 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 two-page regulatory filing provided no further insights.

The Paper in a Nutshell

The *Paper* starts with a detailed review of the long history of the expungement story, followed by a recitation of the current expungement process and supporting rules and guidelines. Next is data on "the extent of expungement in DRS's arbitration forum" and a description of the court confirmation requirement. There follows a long examination of concerns about expungement and the several steps FINRA has taken to address them. The *Paper* concludes by shifting to possible improvements, and suggests a dual-track approach of approving the proposed changes in the withdrawn rule while at the same time considering new ideas: "A potential alternative approach to expungement would be to develop an administrative process pursuant to which RFPs [FINRA-registered financial professionals] would seek expungement. This process could rely on FINRA and state securities regulators as decision-makers on expungement requests, in place of independent arbitrators in DRS's arbitration forum. Similar to the discussion above regarding any potential changes to the standards expressed in FINRA Rule 2080, development of an administrative process would need to balance the interests of securities regulators, investors, securities firms and the brokerage community in the information in the CRD system. In addition, development of an administrative process for expungement requests would raise the question of who is in the better position to determine such requests -- FINRA, state securities regulators, independent arbitrators in DRS's arbitration forum, the courts, or a combination of the foregoing." The *Paper* points out potential challenges and poses several questions.

SIFMA Weighs In: FINRA Mischaracterizes the Expungement Rule

The *Paper* states that it: "is intended to inform and encourage a continued dialogue regarding potential changes to the process used to resolve requests to expunge customer dispute information." To accomplish this objective: "FINRA plans to organize discussions with other securities regulators and interested parties on the topics raised in this *Paper*, identify additional data or analysis that may help inform effective decision-making in this area, and consider further potential changes to the expungement regime beyond those that FINRA has already initiated." While there was no specific request for comments, SIFMA on **May 6** expresses its views in the form of a *Supplemental Comment*

on FINRA Expungement Rules and Request for Immediate Remedial Relief addressed to the SEC. Citing the *Paper*'s proposed dual-track approach, which recommends that the SEC approve SR-FINRA-2020-030, the comment letter states:

"In the Discussion Paper, FINRA repeated its erroneous assertion – also made in the Proposal – that the grounds on which FINRA arbitrators may grant expungement under Rules 12805(c) and 13805(c) are strictly limited to the three grounds listed in Rule 2080(b)(1) (i.e., error, mistake, or falsity). But that is not what the rules say.

"Rules 12805(c) and 13805(c) state that the arbitration panel must indicate "which of the Rule 2080 grounds for expungement serve(s) as the basis for [the] expungement order. Rules 12805(c) and 13805(c) do *not* limit expungement to the Rule 2080(b)(1) grounds. Rather, the rules explicitly extend to the full 'Rule 2080 grounds' which include *both* Rule 2080(b)(1) *and* (b)(2) grounds.

"FINRA's position is in direct conflict with the plain language of Rule 2080. Rule 2080(b)(2) states, 'If the expungement relief is based on arbitral findings ***other than those described*** above [i.e., in Rule 2080(b)(1)], FINRA . . . also may waive the obligation to name FINRA as a party if it determines that: [the expungement relief and findings are meritorious and would have no material adverse effect on investor protection, CRD system integrity, or regulatory requirements].' (emphasis added). Thus, FINRA arbitrators (and courts) today remain free to grant expungement on equitable grounds, including without limitation the grounds listed in Rule 2080(b)(2)" (ellipse and brackets in original; footnotes omitted).

Request for Immediate Relief

The letter closes with a *Request for Immediate SEC Remedial Relief*, as follows: *"*[***W]e respectfully request that the SEC direct FINRA to immediately cease and desist from misstating the grounds for granting expungement under FINRA Rules, and to promptly publish corrections to each publication, including without limitation all notices to members, arbitrator training materials, and the Discussion Paper, in which FINRA has misstated the ground for granting expungement***" (emphasis in original). *(ed: *Well, we said in our editorial comment in # 17: "We are certain the Paper will spur reactions, which we will follow." Check that one off. Seems to us SIFMA may have a point. **Copies were sent to: FINRA CEO Robert W. Cook, Chief Legal Officer Robert L.D. Colby, and Executive Vice President and Director of Arbitration Richard W. Berry. ***The original SIFMA October 2020 comment letter is here. **** We will track this one and report on other developments.)*

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FINRA PANEL DISMISSES INELIGIBLE CLAIMS WITH PREJUDICE. ***In spite of the fact that arbitration claims that violate FINRA's six-year eligibility rule must be dismissed without considering additional grounds for dismissal and without prejudice to the claimant's or claimants' right to pursue the claims in court, the Panel in this Award dismisses an ineligible case on another ground with prejudice. Rimini v. J.P.***

Morgan Securities LLC, FINRA ID No. 21-01831 (NYC, Apr. 13, 2022), involved *pro se* broker Thomas Rimini's allegations of employment discrimination, defamation, tortious interference and breach of contract against two broker-dealers, J.P. Morgan Securities, LLC ("J.P. Morgan") and Bear Stearns Asset Management Inc. ("Bear Stearns"), which J.P. Morgan purchased in 2008.

The Eligibility Rule and Dismissals

Rule 13206 of the Industry Arbitration Code (as well as its Customer Code equivalent, Rule 12206) provides in relevant part (boldface in original): "(a) **Time Limitation on Submission of Claims[]** No claim shall be eligible for submission to arbitration under the Code where six years have elapsed from the occurrence or event giving rise to the claim. The panel will resolve any questions regarding the eligibility of a claim under this rule.[] **(b) Dismissal under Rule[]** Dismissal of a claim under this rule does not prohibit a party from pursuing the claim in court. By filing a motion to dismiss a claim under this rule, the moving party agrees that if the panel dismisses a claim under this rule, the non-moving party may withdraw any remaining related claims without prejudice and may pursue all of the claims in court…. (7) If the party moves to dismiss on multiple grounds including eligibility, the panel must decide eligibility first.[] if the panel grants the motion to dismiss the case on eligibility grounds on all claims, it shall not rule on any other grounds for the motion to dismiss."

The Panel's Ruling

Because the claimant alleged a statutory discrimination claim, an all-public Panel was appointed and, because Bear Stearns was no longer a FINRA member, the Panel did not decide the claims against it. J.P. Morgan filed a pre-hearing motion to dismiss on at least two grounds, eligibility and *res judicata* (the latter pursuant to Rule 13504(a)(6)(C)). The Award states: "On March 29, 2022, the Panel granted the Motion to Dismiss on the grounds that the claim is not eligible for arbitration because it does not meet the six-year eligibility requirement. In addition, the Panel ruled that the claim at issue has previously been litigated and disposed of in Respondent J.P Morgan Securities, LLC's favor. Since Respondent Bear Stearns no longer exists, the entire case must be dismissed and all of Petitioner's other applications are therefore denied." The kicker is in the conclusion: "Claimant's claims, including statutory discrimination claims, are dismissed, with prejudice, pursuant to FINRA Rule 13504." In short, the Panel bars the claimant from pursuing his ineligible claims in court and dismisses on a different ground, in apparent violation of Rule 13206(b).

*(ed: *Obviously doesn't seem right to us. However, it might not matter in the long run, because if the causes of action date back to 2008 or earlier, they will probably be barred by the statute of limitations, and courts recognize the doctrine of* res judicata *as well.*
***The Panel might have been confused by this part of Rule 13206(b)(7): "If the panel grants the motion to dismiss on eligibility grounds on some, but not all claims, and the party against whom the motion was granted elects to move the case to court, the panel shall not rule on any other ground for dismissal for 15 days from the date of service of the panel's decision to grant the motion to dismiss on eligibility grounds." The Award issued 15 days after the Panel granted the Motion. If so, this was a mistake, because the*

*Panel did not say that any claims against J.P. Morgan were eligible and even if it had, it wouldn't justify dismissing the ineligible claims with prejudice. ***We could not find any broker named Thomas Rimini at either Bear Stearns or J.P. Morgan through a search of FINRA's BrokerCheck. ****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. He can be contacted at harryjacobowitz@optimum.net.*

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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

REMINDER: COMMENTS DUE MAY 16 ON REG NOTICE 22-09. This is a friendly reminder that comments are due **May 16** on Regulatory Notice 22-09, *FINRA Requests Comment on a Proposed Rule to Accelerate Arbitration Proceedings for Seriously Ill or Elderly Parties.* We will provide a full analysis in a future *Alert*. 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 the exiting 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 the **March 16** Regulatory Notice seeking comments, rather than a 19b filing with the SEC. *(ed: *See our full analysis in a SAA 2022-12 & -13 (March 31). **Comments 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.)*

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FINRA BOARD MEETS IN PERSON THIS WEEK. NO DISPUTE RESOLUTION ITEMS ON THE AGENDA. As reported in SAA 2022-17 (May 5), FINRA's Board of Governors will meet in person **May 11 – 12**. The published agenda has no evident dispute resolution items, but we note that the Board will be approving new advisory committee members which we assume includes the National Arbitration and Mediation Committee. Also, our hunch is that the Audit Committee will get a report on progress to date on the independent investigation of the "rigged panels" accusation. As usual, we will follow up after the meeting results are posted. The schedule for the rest of 2022 is: **July 13–14**; **September 21–22;** and **December 7–8**.
(ed: We'll tweet any news as soon as we have it and will cover the results in a future Alert.*)*

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ALABAMA SECURITIES COMMISSION INTERVENES TO OPPOSE EXPUNGEMENT. The financial news media were buzzing the last several days with reports that the Alabama Securities Commission ("ASC") had in **February** moved in Florida to oppose an expungement recommended by a FINRA Arbitrator. See, for example, *In Potential Landmark, State Regulator Intervenes in Expungement Case*, Financial Planning (May 3, 2022), covered in this *Alert's* "Articles of Interest." The case involves Arbitrator **Harvey R. Linder**'s decision in *Kirby v. UBS Financial Services, Inc.*, FINRA ID No. 21-01152 (Nashville, TN, Sep. 17, 2021). Through the good offices of ASC Commissioner **Joseph Borg**, the *Alert* has obtained copies of the pleadings and will provide an analysis in our next issue.
(ed: Expungement is a never-ending source of Alert *content.)*
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CALIFORNIA APPELLATE COURT: *ISKANIAN* IS STILL GOOD LAW. 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 decisions such as 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?* "No," says the Court in *Wing v. Chico Healthcare & Wellness Centre, LP*, No. B310232 (Calif. Ct. App. 2 Apr. 28, 2022), because the issues in the instant case are different than in the cases decided by SCOTUS. Says the unanimous Court: "Starting with *Epic Systems*, we need not repeat the reasoned analysis by the courts that have rejected the argument that *Epic Systems* disapproved *Iskanian*…. We agree with them.[] Adding *Kindred Nursing* to the equation does not change the legal sum. As in *Epic Systems, Kindred Nursing* involved private actions between private parties asserting private rights. It did not involve an action between an employer and a representative of the state to recover civil penalties on the state's behalf to benefit the general public. To put it directly, *Kindred Nursing* did not address whether a worker may waive the right to bring a representative action on behalf of a state government" (footnote and citation omitted).
*(ed: *SCOTUS will have the final say when it decides* Viking River Cruises, Inc. v. Moriana, *No. 20-1573, which was argued March 30. **An* Alert *h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this case.)*
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MISSOURI SUPREME COURT: DELEGATION PROVISION EMPOWERS ARBITRATOR TO NAME SUBSTITUTE ADR FORUM. Our readers know that arbitrability may be decided by an arbitrator based on "clear and unmistakable" evidence of party intent, and that Federal Arbitration Act section 5 generally authorizes the court to name a substitute ADR provider when the institution named in the arbitration agreement is not available. But can an arbitrator acting under color of a delegation clause designate a

substitute ADR forum? "Yes," says a unanimous Missouri Supreme Court in *Car Credit, Inc. v. Pitts*, No. SC99335 (Mo. Apr. 26, 2022), sitting *en banc*. There, because the named ADR provider – the National Arbitration Forum – was unavailable, the Claimant initiated an arbitration at the AAA. The arbitration agreement covered among other things: "… any question regarding whether a matter is subject to arbitration under this Arbitration Agreement." The Court holds that the forum designation issue was properly delegated to the Arbitrator by the Court below and that the Award naming AAA as the substitute forum was valid: "The enforceability of the Arbitration Agreement due to the unavailability of the NAF is a matter of threshold arbitrability that is properly subject to arbitration so long as the Delegation Clause, standing alone, is valid. Because Pitts failed to specifically challenge the Delegation Clause, this Court must treat it as valid under 9 U.S.C. § 2 'and must enforce it under §§ 3 and 4, leaving any challenge to the validity of the Agreement as a whole for the arbitrator' *Rent-A-Ctr*…." (footnote omitted).
(ed: Seems right.)
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SAVE THE DATE: ICC'S NEW YORK CONFERENCE ON INTERNATIONAL ARBITRATION IS SEPTEMBER 28-29. The International Chamber of Commerce ("ICC") will be holding its 17th *New York Conference on International Arbitration* on **September 28 – 29**. The event will be in-person. Says the brochure: "Join us at the 17th edition for thought-provoking discussions and insights into the latest North American arbitration trends.[] The conference features experts in the field as well as representatives from the ICC International Court of Arbitration, all on hand to engage with professionals wanting to keep pace with the latest arbitral developments. A prime networking opportunity, this one-day conference has become a major event in the international arbitration calendar. It is a must-attend event for arbitration professionals in North America." An ICC Institute training will take place the following day, topic TBD.
*(ed: *Registration is not yet open, and pricing info is not yet available. **For further info, contact ICCGlobalEvents@iccwbo.org.)*
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QUICK TAKES: CASES AND AWARDS WORTH READING

***Bissonnette v. LePage Bakeries*, No. 20-1681-cv (2d Cir. May 5, 2022)**: "Plaintiffs, who deliver baked goods in designated territories in Connecticut, brought this action in the United States District Court for the District of Connecticut (Dooley, J.) on behalf of a putative class against the manufacturer of the baked goods that plaintiffs deliver. The plaintiffs allege unpaid or withheld wages, unpaid overtime wages, and unjust enrichment. The district court compelled arbitration pursuant to an arbitration agreement that is governed by the Federal Arbitration Act ("FAA") and Connecticut law. Plaintiffs claim that they are not subject to the FAA because Section 1 of the FAA excludes contracts with 'seamen, railroad employees, [and] any other class of workers engaged in foreign or interstate commerce.' 9 U.S.C. § 1. The exclusion is construed to cover 'transportation workers.' The district court held that the plaintiffs did not qualify as transportation workers, ordered arbitration, and dismissed the case…. We hold that the plaintiffs are not 'transportation workers,' even though they drive trucks, because they

are in the bakery industry, not a transportation industry" (brackets in original). Judge Jacobs concurred in a separate opinion, and Judge Pooler dissented in a separate opinion.

***Hawkins v. Cintas Corp.*, No. 21-3156 (6th Cir. Apr. 27, 2022)**: "This case presents issues of first impression for this court. The weight of authority and the nature of § 502(a)(2) [of the Employment Retirement Income Security Act of 1974] claims suggest that these claims belong to the plan, not to individual plaintiffs. Therefore, the arbitration provisions in these individual employment agreements— which only establish the Plaintiffs' consent to arbitration, not the plan's—do not mandate that these claims be arbitrated. Further, the actions of Cintas and the other defendants do not support a conclusion that the plan has consented to arbitration. We therefore affirm the district court's denial of the motion to compel arbitration."

***In re Whataburger Restaurants LLC*, No. 21-0165 (Tex. Apr. 22, 2022)**: "An accelerated appeal from an interlocutory order denying arbitration under the Federal Arbitration Act (FAA) may be noticed within 20 days after the order is signed. If a party adversely affected by such an order does not receive notice of it within 20 days, Texas court rules outline a procedure for restarting the appellate clock, but 'in no event' may the clock start 'more than 90 days after the judgment or order was signed.' We hold that a party who does not receive notice of the order in time to appeal because of the trial court clerk's error may seek review by mandamus. We also hold that the arbitration agreement at issue here is not illusory, and we direct the trial court to order arbitration" (footnotes omitted).

***Stephens v. Morgan Stanley*, FINRA ID No. 21-01841 (Boca Raton, FL, Mar. 25, 2022)**: An 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 because the entry was reported back in 2007. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Novak v. Charles Schwab*, FINRA ID No. 19-01455 (Syracuse, NY, Apr. 2, 2022**): A Majority Public Panel explains why it has decided to deny a customer's claims, finding that he failed to prove by a preponderance of the evidence that he was negligently referred to the Non-Member parties in this case by Respondent Charles Schwab. Provided *courtesy of SAC's ARBchek facility (www.arbchek.com).*
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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

O. Cojo & A. Portocarrero, *Fine Line? A New Case on Arbitrators' Power to Impose Sanctions*, Kluwer Arbitration Blog (May 5, 2022): "It is not uncommon in arbitration proceedings for interim measures to be necessary to avoid the relief intended on the merits from being frustrated. Interim measures in support of arbitration can now fortunately be ordered not only by national courts but also by arbitrators in most jurisdictions. In most instances, interim measures granted by arbitral tribunals are usually

observed voluntarily by the parties. But what happens when they are not? Indeed, do arbitrators have any power to compel a party to comply with an interim measure? This is precisely the question that arose in an ICC case in which we were recently involved and that we discuss in this article" (footnote omitted).

***FINRA Publishes 2022 Industry Snapshot*, www.finra.org (May 2, 2022)**: "FINRA today published the *2022 FINRA Industry Snapshot*, the annual statistical report on the brokerage firms, registered representatives and market activity that FINRA oversees. This year's edition adds new data about special purpose acquisition companies (SPACs), customer margin debt, the Consolidated Audit Trail (CAT) and other areas."

***FINRA: Dual Registrants Outnumber B/D-Only Reps For the First Time*, Wealth Management (May 3, 2022)**: "The number of dually-registered representatives with the Financial Industry Regulatory Authority (FINRA) has exceeded the number of individuals registered solely with broker/dealers for the first time, according to FINRA's 2022 Industry Snapshot, which examined 2021 data.[] The number of b/d-only reps has outpaced dually-registered reps—those registered with a b/d and registered investment advisor—since 2012, though the gap has been closing during the past decade.[] But in 2021, there were 307,590 dually-registered reps, compared to 304,867 b/d-only reps; in 2020, those numbers were 317,936 and 299,613, respectively.[] The total number of FINRA-registered individuals dipped slightly in 2021 compared to the prior year, continuing a multi-year streak of steady but miniscule declines. The number of registered individuals fell from 617,531 in 2020 to 612,457 in 2021."

***In Potential Landmark, State Regulator Intervenes in Expungement Case*, Financial Planning (May 3, 2022)**: "In a rare move carrying a huge potential impact on FINRA arbitration, a state regulator is seeking to overturn the expungement of a client's complaint from a UBS broker's record. [Arbitrator] Harvey R. Linder's decision last year giving approval for the erasure of five client complaints from financial advisor Kent Kirby's record was the result of the FINRA arbitrator's misconduct, exceeding or imperfectly carrying out his powers and 'fraud, corruption or undue means,' according to a Feb. 22 motion by the Alabama Securities Commission to vacate the award in Florida state court. Financial Planning is the first outlet to review the filings in the public, yet previously unreported, case." (*ed: Link to the Award added by the* Alert.)

***UBS Ordered to Pay $3.86 Million to 'YES' Investors*, AdvisorHub (May 6, 2022**): "A Financial Industry Regulatory Authority arbitration panel awarded $3.86 million in compensatory damages and attorney fees to a Houston couple that had invested in UBS Wealth Management USA's embattled Yield Enhancement Strategy—the latest in a string of mixed decisions for the wirehouse.... The wirehouse broadly denied all the claims, but the all-public arbitration panel awarded the [investors] $2,896,972.00 in compensatory damages and $965,657.33 in attorneys' fees. The three-person panel also assessed $24,500 of $28,000 in hearing fees to UBS, while splitting obligations for the remaining $6,400 in hearing-related fees between the sides."
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DID YOU KNOW?

AAA OFFERS ROBUST GUIDANCE ON ADR CLAUSE DRAFTING. The AAA has a Webpage devoted to ADR clause drafting. The dedicated page offers several model clauses for general use, videos on the topic, and the 36-page *Drafting Dispute Resolution Clauses: A Practical Guide*. Best of all in our view is the online *ClauseBuilder® online tool*, "a simple, self-guided process to assist individuals and organizations in developing clear and effective arbitration and mediation agreements."

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Send any messages or inquiries to: George@SecArbAlert.com

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