SECURITIES ARBITRATION ALERT 2022-20 (5/26/22)

George H. Friedman, Editor-in-Chief

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DID YOU KNOW?

- **Past Year FINRA Dispute Resolution Stats Are Available**

Enjoy a safe and healthy Memorial Day weekend
Due to the holiday, we will be publishing on Friday next week

SQUIBS: IN-DEPTH ANALYSIS

UNANIMOUS SCOTUS DECIDES *SUNDANCE*: NO PREJUDICE REQUIREMENT TO PROVE WAIVER OF ARBITRATION RIGHTS. ***The Supreme Court has decided* Morgan v. Sundance Inc., No. 21-328, *ruling unanimously* that there is no prejudice requirement under the Federal Arbitration Act ("FAA") for a court to find a waiver of arbitration rights.** We reported in **December 2021** that the Supreme Court had granted *Certiorari* in four cases involving arbitration, among them *Sundance.* Specifically, the Court on **November 15** agreed to review *Morgan v. Sundance Inc*., 992 F.3d 711 (8th Cir. 2021), a case we analyzed in SAA 2021-43 (Nov. 18). In the underlying case, the Eighth Circuit held that a party asserting another had waived its right to arbitrate has to prove prejudice. The Court heard oral argument on **March 21** (the transcript is here; audio recording is here).

Case Below and Waiver of Arbitration Rights

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

Issue Before SCOTUS

The question presented in the **August 2021** *Certiorari* Petition was: "Does the arbitration-specific requirement that the proponent of a contractual waiver defense prove prejudice violate this Court's instruction that lower courts must 'place arbitration agreements on an equal footing with other contracts?' [in] *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)." The Petition notes that there is a significant split on the issue: "This Court should grant certiorari to resolve a longstanding circuit split on the question whether a party asserting waiver of the right to arbitrate through inconsistent litigation conduct must prove prejudice, and if so, how much. This question not only divides the federal courts of appeals, but divides federal courts from geographically co-located state courts of last resort.…"

The Oral Argument

The oral argument took place as scheduled with eight Justices participating. As revealed in a Press Release, **Justice Thomas** was out ill. **Chief Justice Roberts** announced up front before the argument that he would: "participate in consideration and decision of the cases on the basis of the briefs and the transcripts of oral argument." We had thought the issues were fairly simple as framed in the Petition: is this State rule of law, requiring a finding of prejudice, arbitration-specific and thus preempted by the FAA or does it apply to contracts in general and thus FAA compatible? But, the arguments were anything but simple. The discussion at times was esoteric (*ed: not just our view*), with the meanings of waiver, estoppel, forfeiture, and laches being debated. The prejudice requirement was not covered until well into the argument. The debates settled down to whether the outcome was governed by FAA section 3 (" … providing the applicant for the stay [of litigation of an arbitrable matter] is not in default in proceeding with such arbitration") or section 4 ("… if the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof"). At one point, there was a short colloquy about whether the Petition should be dismissed as improvidently granted – just as happened in *Henry Schein, Inc. v. Archer and White Sales, Inc.*, No. 19-963.

Unanimous SCOTUS: No Prejudice Requirement

The unanimous Opinion by **Justice Kagan** holds that the pro-arbitration policy embodied by the FAA does not require a showing of prejudice: "Most Courts of Appeals have answered that question [of waiver] by applying a rule of waiver specific to the arbitration context. Usually, a federal court deciding whether a litigant has waived a right does not ask if its actions caused harm. But when the right concerns arbitration, courts have held, a finding of harm is essential: A party can waive its arbitration right by litigating only when its conduct has prejudiced the other side. That special rule, the courts say, derives from the FAA's 'policy favoring arbitration.'[] We granted certiorari to decide whether the FAA authorizes federal courts to create such an arbitration-specific procedural rule. We hold it does not."

FAA Does Not Support An Arbitration-Specific Rule

Justice Kagan adds that an arbitration-specific rule – even one fostering arbitration – is not supported by the FAA: "[T]he FAA's 'policy favoring arbitration' does not authorize federal courts to invent special, arbitration-preferring procedural rules…. And indeed, the text of the FAA makes clear that courts are not to create arbitration-specific procedural rules like the one we address here. Section 6 of the FAA provides that any application under the statute—including an application to stay litigation or compel arbitration—'shall be made and heard in the manner provided by law for the making and hearing of motions' (unless the statute says otherwise). A directive to a federal court to treat arbitration applications 'in the manner provided by law' for all other motions is simply a command to apply the usual federal procedural rules, including any rules relating to a motion's timeliness. Or put conversely, it is a bar on using custom-made rules, to tilt the playing field in favor of (or against) arbitration. As explained above, the usual federal

rule of waiver does not include a prejudice requirement. So Section 6 instructs that prejudice is not a condition of finding that a party, by litigating too long, waived its right to stay litigation or compel arbitration under the FAA."

No "Arbitration Quartet"

We had in past coverage wondered out loud if SCOTUS was setting up another "Steelworkers Trilogy" scenario, in which 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'?, we mused. Now, we have our answer.

*(ed: *As described above, the briefs and oral argument featured many issues. The Court avoids them: "We decide today a single issue, responsive to the predominant analysis in the Courts of Appeals, rather than to all the arguments the parties have raised…. Our sole holding today is that it may not make up a new procedural rule based on the FAA's 'policy favoring arbitration.'" **The May 23 CPR Blog has a nice analysis:* Supreme Court Rejects Prejudice Requirement for Defeating a Motion to Compel Arbitration. ****We eschewed predicting the outcome here, opining that the case was "too close to call." *****This squib was published May 23 on our blog.)*

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SCOTUS DENIES *CERTIORARI* IN ANOTHER ARBITRATION-RELATED CASE. *The Supreme Court on May 16 denied a* Certiorari *Petition* *in* Robertson v. Intratek Computer, Inc., *No. 20-1229, a case we covered in SAA 2020-39 (Oct. 21).*

We ran a teaser in SAA 2022-19 (May 19) and promised a detailed analysis this week. We borrow heavily from our past coverage to discuss below this latest rejection by SCOTUS of the chance to take on another arbitration-centric case. Spoiler alert: we are not surprised.

Case Below

A federal statute -- 41 U.S.C. § 4712 – aims to protect whistleblowers and among other things bars waivers of protections provided by the law, including the right to sue. Specifically: "The rights and remedies provided for in this section may not be waived by any agreement, policy, form, or condition of employment." The statute, however, does not ban predispute arbitration agreements ("PDAA") or even mention arbitration. A core question under review in *Robertson v. Intratek Computer, Inc*., 976 F.3d 575 (5th Cir. 2020), was whether the statute barred enforcement of a PDAA covering a whistleblower. Relying on several SCOTUS decisions and the statutory language, the Fifth Circuit found unanimously in the case of first impression that this federal whistleblower protection statute yields to the Federal Arbitration Act ("FAA"), because it does not expressly ban PDAAs.

SCOTUS Has Clearly Spoken …
The Court offered a primer on Supreme Court jurisprudence, holding that, unless a competing federal statute *specifically and expressly* bars arbitration, the FAA's presumption of arbitration agreement validity and enforcement will trump application of that statute to restrict arbitration. Citing among other cases *Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20 (1991), *CompuCredit Corp. v. Greenwood*, 565 U.S. 95 (2012), and *Epic Systems Corp. v. Lewis*, 137 S. Ct. 809 (2018), the Court states: "These cases reflect the Supreme Court's dogged insistence that Congress speak with great clarity when overriding the FAA…. That long line of decisions has also given Congress even more reason to use pellucid language in antiwaiver provisions…. As the Court observed in *Epic Systems*, Congress has 'shown that it knows how to override the Arbitration Act when it wishes.' It didn't do that with 41 U.S.C. § 4712" (citations omitted).

… As Has Congress
Has Congress ever expressly banned PDAAs? The answer is "yes it has." For example, *Dodd-Frank* section 922 amends the *Securities Exchange Act of 1934* to prohibit use of PDAAs in *Sarbanes-Oxley* whistleblower disputes. Section 748 similarly amends the *Commodity Exchange Act*. Also, *Dodd-Frank* section 1414 bans outright PDAAs in residential mortgage contracts. And, there have also been relatively recent enactments: the *Taxpayer First Act* – H.R. 3151 in section 1405 bans mandatory arbitration of IRS whistleblower claims. And, of course, the *Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act* that **President Biden** signed on **March 3** expressly amends the FAA to make PDAAs voidable at the option of the victim.

A Clear Bottom Line
To us, the law is clearly defined: If Congress intends to prohibit PDAAs, it will say so expressly. Failing that, the FAA will require PDAA enforcement, except where sexual harassment or assault is involved. For the Fifth Circuit: "The principal question on appeal is one of first impression in our Circuit: whether Robertson can use 41 U.S.C. § 4712 to escape the arbitration agreement he signed. Statutory text says no. So does Supreme Court precedent. And the legislative history is irrelevant." In other words, as we say often: "When in doubt, spell it out."
*(ed: *The case is on page 2 of Order List. **The Fifth Circuit's decision and the* Cert. *denial were no-brainers in our view. ***As we said in our editorial comment in # 2020-39, how many times must the rule of law be reiterated?)*
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FORMER MERRILL BROKER HIT WITH A $7.5 MILLION AWARD MONTHS AFTER RELEASE FROM PRISON. ***As widely reported in the media, a former Merrill Lynch broker, who had earlier this year been released from prison after serving a three-plus year sentence resulting from his misconduct, was hit with a more than $7 million Award.*** Financial services media widely reported recently that former broker Tom Buck had been released from prison in **January** after serving a 40-month sentence for "overcharging clients by more than $2 million" (see, for example, *Months After Release from Prison, Ex-Merrill Broker Tom Buck Ordered to Pay $7.5 Mln*, reported

May 9 by AdvisorHub. On May 9 the All-Public Panel in *Compton v. Merrill Lynch and Buck*, FINRA ID No. 20-02468 (Memphis, TN), rendered an Award of over $7.5 million against him (the claims against Merrill were voluntarily withdrawn with prejudice.) We analyze the case below.

Claims Asserted
In the customer's Statement of Claim: "Claimant asserted the following causes of action: violation of Indiana's Corrupt Business Influence Act - Operating An Enterprise Through A Pattern Of Racketeering; violation of Indiana Corrupt Business Influence Act - Use Of Racketeering Proceeds to Operate an Enterprise; violation of the Racketeer Influenced and Corrupt Organization Act - Operating An Enterprise Through A Pattern Of Racketeering; Civil Recovery Under Indiana's Crime Victim Statute; breach of fiduciary duty; fraud; and negligent supervision and ratification. The causes of action relate to overtrading of long-term securities and overcharging of commissions by Respondent Buck in Claimant's MLPFS accounts, and the alleged lack of supervision by Respondent MLPFS."

Damages Sought
Compton sought: "an amount equal to the returns Claimant lost due to Respondents' alleged failure to prudently manage her accounts (e.g. well-managed damages); disgorgement of the balance of the commissions Claimant had not recovered to date from the SEC's Victim's Fund; pre-judgement interest at the highest rate allowed by law; treble damages; attorneys' fees, costs and expenses; punitive/exemplary damages; and such other, different or additional relief and damages which the Panel deemed to be just and equitable."

The Award
The claims against Merrill were dismissed voluntarily with prejudice, leaving the claims asserted against Buck individually. After denying Bucks' motion to dismiss based on timeliness and eligibility, the Panel awarded as follows (*ed: presented essentially* verbatim):

- $770,269 in compensatory damages.
- interest on the well-managed damages amount of $5,812,948.80, which represents 80% of the overall loss value of the accounts requested by Claimant, at the rate of 8% per annum from March 25, 2018, through and including March 25, 2022. The total interest awarded is $1,860,144. Please note that the Panel is not awarding the well-managed damages amount of $5,812,948.80. It is only basing its interest calculations on the amount of well-managed damages.
- $2,310,806 in treble damages pursuant to 18 U.S.C. 1964(c) - the Racketeer Influenced and Corrupt Organization Act, and the Indiana Corrupt Business Influence Act (Indiana Code Ann. § 35-45-6-2).
- $2,585,232 in attorneys' fees pursuant to 18 U.S.C. 1964(c) - the Racketeer Influenced and Corrupt Organization Act, and the Indiana Corrupt Business Influence Act (Indiana Code Ann. § 35-45-6-2).

- $375, which represents the non-refundable portion of the filing fee previously paid by Claimant to FINRA Dispute Resolution Services.

The $40,050 in hearing session fees were assessed as follows: $6,412.50 against Claimant; $5,512.50 jointly and severally to Merrill and Buck; $28,125.00 to Buck.
*(ed: *We checked with SAC's Award Database to see how this fit among the largest awards in securities arbitration, etc. The* Buck *award is the largest compensatory award in a customer-initiated case, with sole liability assessed against an individual by a FINRA Panel. There are a fair number of bigger awards against individuals where punitive damages were the bulk of the award. Thus, the "compensatory" qualifier. "Sole liability" is also key, because there have been many larger joint and several awards against two or more individual respondents. **We reached out to one of Buck's attorneys, David Robbins, who said: "I had the distinct privilege to be on teams of attorneys in Indiana and New York, with the significant participation of a stellar expert from Ohio, representing Tom Buck in the criminal case in Indiana and in the one arbitration filed against him, in Tennessee. We have discussed the options available to Tom and he is considering them." ***This is definitely one to watch.)*
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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

FINRA BOARD APPROVES CHANGES TO EXPUNGEMENT RULES. As reported in SAAs 2022-18 (May 12) & 17 (May 5), FINRA's Board of Governors met in person **May 11 – 12**. While the published agenda had no evident dispute resolution items, the results described in a **May 20** Press Release were to the contrary. Specifically, the Release says: "**Changes to the Previously Filed Proposal for Special Arbitration Procedures for Expungement Relief** – The Board approved proposed amendments to a proposal that was previously filed with the SEC establishing specialized arbitration panels for expungement requests." The Release provides no other details, and the Board update memo and video contained therein were similarly cryptic (*ed: Board member **Jim Crowley** refers to it briefly from 1:49 – 2:05*). Recall that, 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*. And, as later reported in SAA 2022-17 (May 5), the Authority on **April 28** issued a 26-page *Discussion Paper – Expungement of Customer Dispute Information*. The *Paper* suggests 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.
*(ed: *The Board also approved new advisory committee members, which we assume included the National Arbitration and Mediation Committee. The video mentions briefly that the Board has adopted term limits for committees. **Also, while our pre-meeting hunch was that the Audit Committee would get a report on progress to date on the independent investigation of the "rigged panels" accusation, the Release contains no info on that subject. ***The schedule for the rest of 2022 is: July 13–14; September 21–22; and December 7–8.)*
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NASAA APPROVES FINAL MODEL RULE ON UNPAID AWARDS. The North American Securities Administrators Association ("NASAA") on **May 20** finalized the *Unpaid Customer Arbitration Awards Model Rule*. As described in a **May 20** Press Release: "The model rule would make it a dishonest or unethical practice for registrants to fail to pay any investment-related, customer-initiated arbitration award or judgment, fine, civil penalty, order of restitution, order of disgorgement, or similar monetary payment obligation imposed by any state securities regulator, the SEC, or FINRA. Registrants may also avoid licensing actions under the model rule by entering into and staying current with alternative payment arrangements related to obligations covered by the model rule. Ultimately, the model rule would provide an additional basis for enforcement actions related to unpaid awards and could help encourage registrants to satisfy their monetary obligations to customers, clients, and regulators." As reported in SAA 2021-37 (Oct. 7), NASAA last Fall released draft model rules for public comment (see the **October 5, 2021** Press Release, *NASAA Seeks Public Comment on Proposed Model Rules to Combat Unpaid Arbitration Awards and Fines.)*
(ed: For more details, we recommend NASAA Approves Model Rule Targeting Unpaid Arbitration Awards*, Wealth Management (May 23, 2022).)*
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SEC BEEFS UP CRYPTO ASSETS & CYBER UNIT. The SEC announced via a **May 3** Press Release that it is dramatically increasing the unit charged with crypto and cyber supervision and enforcement. *SEC Nearly Doubles Size of Enforcement's Crypto Assets and Cyber Unit* states: "The Securities and Exchange Commission today announced the allocation of 20 additional positions to the unit responsible for protecting investors in crypto markets and from cyber-related threats. The newly renamed Crypto Assets and Cyber Unit (formerly known as the Cyber Unit) in the Division of Enforcement will grow to 50 dedicated positions…. The infusion of 20 additional positions into the Crypto Assets and Cyber Unit will bolster the ranks of its supervisors, investigative staff attorneys, trial counsels, and fraud analysts in the agency's headquarters in Washington, DC, as well as several regional offices." This news comes as no surprise. As reported in SAA 2022-16 (Apr. 28), the SEC's Division of Examinations ("DOE") has issued its exam priorities for 2022. The 32-page DOE Report was announced in a **March 30** Press Release, where Division of Examinations Acting Director **Richard R. Best** articulated 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" (emphasis added).
(ed: Thus far, this security type has not made it into FINRA Dispute Resolution Services' "top 15" list, but arbitration filings are typically a lagging indicator.)
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TEXAS APPELLATE COURT: POST-JUDGMENT INTEREST IS AVAILABLE EVEN THOUGH NOT IN AWARD. The underlying Award in *Bluestone Resources,*

Inc. v. First National Capital, LLC, No. 05-20-00776-CV (Tex. Ct. App. Apr. 29, 2022), did not address interest one way or the other. At issue in this case was whether a court confirming the Award could nevertheless tack on post-judgment interest until the Award is paid. "Yes," says a unanimous Texas Court of Appeals. The Trial Court: "held the trial court's addition of post-award interest was an impermissible modification of the award, reasoning there was no provision in the Texas Arbitration Act that authorized interest on an award when such interest was not awarded by the arbitrator." In reversing, the Court of Appeals holds: "Interest on a money judgment accrues automatically and is recoverable even if it is not specifically awarded. We see no reason why a judgment confirming an arbitration award, which is a 'money judgment of a court of this state,' would be exempt from this rule. See TEX. FIN. CODE ANN. § 304.003 (citations omitted; link to statute added by the *Alert*).
(ed: Seems right.)
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QUICK TAKES: CASES AND AWARDS WORTH READING

***Dalla-Longa v. Magnetar Capital LLC*, No. 20-2978-cv (2d Cir. May 12, 2022)**: "Appeal from an order of the United States District Court for the Southern District of New York (Schofield, J.) dismissing a petition to vacate an arbitration award on the basis that petitioner-appellant failed to properly and timely serve notice of the motion to vacate within three months of the date the arbitration award was filed or delivered, as required by the Federal Arbitration Act, 9 U.S.C. § 12. On the last day of the three-month period, petitioner-appellant emailed the petition to counsel for respondent-appellee; petitioner-appellant contends that email service was proper because respondent-appellee had agreed to email service in the underlying arbitration. The district court rejected the argument, holding that the consent to email service in the arbitration proceedings did not carry over to the judicial proceedings…. In other words, pursuant to Rule 5[(b)(2)(E)], a party may serve papers by email only if the person being served has 'consented' to service by email 'in writing'.... Dalla-Longa argues that Magnetar's agreement to accept papers by email in the arbitration proceedings extends to service of motion papers in the district court to vacate the arbitration award. We are not persuaded."

***Quach v. Cal. Commerce Club*, No. B310458 (Calif. Ct, App. 2 May 10, 2022)**: "Quach argued below that Commerce Club had waived its right to arbitrate by waiting 13 months after the filing of the lawsuit to move to compel arbitration, and by engaging in extensive discovery during that period. Quach claimed the delay prejudiced him by forcing him to expend time and money preparing for litigation. The trial court agreed, finding Commerce Club had waived the right to arbitrate by propounding a 'large amount of written discovery,' taking Quach's deposition, and expending 'significant time meeting and conferring.' We disagree with the trial court. Our Supreme Court has made clear that participation in litigation alone cannot support a finding of waiver, and fees and costs incurred in litigation alone will not establish prejudice on the part of the party resisting arbitration." (*ed: An* Alert *h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this decision*.)

***In the Matter of the Claim for Damages Filed By Josh Longwell With the Wyoming Game and Fish Department*, 2022 WY 56 (Apr. 28, 2022)**: "In this case, the district court modified the arbitration award under § 1-36-115(a)(ii), which states: (a) Upon application made within ninety (90) days after delivery of a copy of the award to the applicant, the court shall modify or correct the award where: . . . (ii) The arbitrators awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted …. The arbitrators were required to address the matters presented to them within the confines of the law, including the Commission's regulations. By directing that Mr. Longwell be compensated not only for those calves the parties agreed had been 'confirmed by the Department to have been killed by trophy game animals but also for those calves Mr. Longwell 'believed' were missing as a result of trophy game animals, the arbitrators did not follow the law and decided an issue that was not presented to them. Because the arbitrators 'made an award on a matter not submitted to them,' we affirm the district court's modification of the arbitrators' award with respect to Mr. Longwell's calf damage claim."

***Loynd v. Coastal Equities*, FINRA ID No. 21-02300 (Phoenix, AZ, Apr. 6, 2022)**: Claimant broker loses his request for a declaratory judgment with respect to the enforceability of an indemnification clause and is held liable to Respondent broker-dealer for damages on its Counterclaim pursuant to the contract between the parties. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Zinser v. LPL Financial*, FINRA ID No. 21-00303 (San Diego, CA, Apr. 11, 2022)**: A group of customers alleging negligence and seeking up to $5.8 million in damages relating to their IRA Account lose their case against Respondent broker-dealer and broker. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*
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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Gore, K. N., *Delaware as a Next Generation Hub for International Arbitration Practice: Building the Case for the First State* (April 5, 2022). Forthcoming in: *Beaumont, Fouchard & Brodlija, International Commercial Arbitration: Quo Vadis?* (Kluwer 2022): "This chapter builds the case for Delaware, the 'First State,' as an important next generation hub for international arbitration practice in the United States. It argues that the international arbitration community should more inquisitively and systematically engage with the state, its body of relevant law and precedent, and its legal community. In support of this argument, the chapter discusses Delaware's special relationship to U.S. corporations and its role in shaping U.S. corporate law. It then considers Delaware as a venue for litigation in aid of and in support of international arbitration, including for ancillary discovery, injunctions and conservatory measures, confirmation and enforcement of arbitral awards, and asset recovery in aid of award creditors. Next, it looks at Delaware as a potential seat for arbitration, including examination of Delaware's Rapid Arbitration Act. Finally, the chapter concludes with forward looking remarks."

***Don't Hold Your Breath, Professor Sovern!*, Ballard Spahr Blog (May 13, 2022)**: "In Wednesday's edition of Consumer Law & Policy Blog, Professor Jeff Sovern laments that during Director Rohit Chopra's recent testimony before the Senate Banking Committee and the House Financial Services Committee, neither he nor any member of the Committees mentioned "arbitration" as an action item on the CFPB's agenda. Professor Sovern expresses hope that the arbitration issue will nevertheless appear on the CFPB's regulatory agenda when it is soon published. Don't hold your breath, Professor Sovern![] There are many reasons why it would be foolish for the CFPB to revisit arbitration."

***Watch The Fine Print: Ninth Circuit Majority Opinion Requires Heightened Standards for Reasonably Conspicuous Notice of Browsewrap Terms to Compel Arbitration*, Foley & Lardner LLP Blog (May 16, 2022)**: "A recent decision from the Ninth Circuit illustrates that to be enforceable, website agreement terms must be 'reasonably conspicuous' and users must 'manifest unambiguous assent' to those terms. In *Berman v. Freedom Financial Network, LLC*, No. 20-16900, 2022 U.S. App. LEXIS 9083 (9th Cir. Apr. 5, 2022), plaintiffs filed a putative class action on behalf of consumers who allegedly received unwanted calls or text messages from defendants in violation of the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227 et seq. Defendants moved to compel arbitration, arguing that by using their websites the named plaintiffs agreed to hyperlinked terms and conditions, including a mandatory arbitration provision. The district court denied defendants' motion, concluding that the webpages' content and design did not conspicuously indicate the arbitration terms to users.[] A panel for the Ninth Circuit affirmed, holding there was *no reasonably conspicuous notice* of the arbitration terms and users did not *manifest unambiguous assent* to the websites' browsewrap agreement" (emphasis in original).

***Finra Considers Having A Regulator Take Over Brokers' Appeals Over Records*, FA Magazine (May 18, 2022)**: "The Financial Industry Regulatory Authority is considering overhauling its scandal-plagued process for reps trying to erase customer complaints from their records. One of those ideas is to possibly get rid of the arbitration process altogether and have Finra directly (or through some other combination of authorities) oversee the process of expunging blotted records—an idea mentioned by a Finra official speaking at the self-regulator's annual conference today.[] Nathaniel Stankard, a senior vice president and the senior advisor to Finra's CEO, said there has been a lot of discussion about creating a process outside the arbitration forum: 'Something that is administered by Finra and the states or the SEC. So, there is a bunch of different combinations, but what they all share in common is that they require a lot of stakeholders, they require a lot of careful thought. And that is going to require time.'[] As a shorter-term fix, Stankard said Finra could keep arbitration but move forward with the creation of a special roster of arbitrators, who will be trained to handle expungements."

***Some Ideas In Response To FINRA's Recent "Discussion Paper" On Expungement*, JDSupra (May 18, 2022)**: ""FINRA recently published a 'Discussion Paper' on expungement of customer dispute information in which it outlines its plans going forward

on revising the expungement process. (Let me just start by applauding FINRA for trying hard to get this right. The current patchwork of expungement rules and guidance could use some improvements, and there are no easy answers – although I'll provide some ideas at the end of this post.)[] The upshot of the Discussion Paper is that FINRA is contemplating dual paths: (1) in the short term, revising and resubmitting some of its proposed rule changes that it withdrew from the SEC's consideration back in May 2021, and (2) in the long term, creating an administrative process where FINRA or state regulators make expungement decisions, which would replace the current system of seeking expungement in arbitration. Let's discuss."

***[NY] Commercial Division Permanently Stays International Arbitration*, JDSupra (May 20, 2022)**: "Earlier this year, in *In re New York State Dept. of Health (Rusi Tech. Co., Ltd.)*, Albany County Commercial Division Justice Richard Platkin issued a decision to permanently stay the arbitration before the China International Economic and Trade Arbitration Commission ('CIETAC') brought by a Chinese company ('Rusi') against the New York State Department of Health ('DOH') regarding a purchase contract for KN-95 masks. This decision, which harkens back to the chaotic early days of the pandemic, provides a good reminder for practitioners regarding the 'meeting of the minds' requirement of a contract" (footnote omitted).

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DID YOU KNOW?

PAST YEAR FINRA DISPUTE RESOLUTION STATS ARE AVAILABLE. Our readers know that FINRA publishes dispute resolution stats every month. But did you know that past-year stats are available too, at https://www.finra.org/arbitration-mediation/previous-year-end-dispute-resolution-statistics?

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