SECURITIES ARBITRATION ALERT

SECURITIES ARBITRATION ALERT 2022-21 (6/2/22)

George H. Friedman, Editor-in-Chief

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DID YOU KNOW?

- **FINRA Has Stats on Virtual Hearings**

SQUIBS: IN-DEPTH ANALYSIS

FINRA FILES FOR IMMEDIATE EFFECTIVENESS RULE CHANGES NEEDED TO CONFORM INDUSRTY CODE TO *ENDING FORCED ARBITRATION OF SEXUAL ASSAULT AND SEXUAL HARASSMENT ACT*. *As authorized in March by its Board, FINRA has filed a rule change proposal to conform*

the Industry Code to the newly-enacted **Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act.** As reported in SAA 2022-10 (Mar. 17), FINRA's Board of Governors met in person **March 9 – 10**. Among other items on the Agenda were: "proposed amendments to rules related to arbitration of sexual assault and sexual harassment claims to conform to the *Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act*." The results, posted on **March 16**, added little to the previously-announced Agenda item: "The Board approved the submission to the SEC of proposed amendments to align FINRA rules with the *Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021*." The post-meeting video (*ed: see starting around marker 0:20*) was similarly cryptic.

New Law Drove Needed Changes

Recall that we said in our feature article, *President Biden Signs Into Law the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act. It Became Effective Immediately – Part I,* 2022:08 SEC. ARB. ALERT 1 (Mar. 3, 2022): "The new law definitely affects securities arbitrations, since the *Act* amended the FAA. We think the impact at FINRA will be in two main areas: 1) opting out; and 2) intertwining…. We suggest that FINRA will need to amend the *Industry Code* and its administrative procedures to accommodate the *Act*'s PDAA opt-out provisions…. FINRA will [also] need to address the intertwining issues identified above." We gave models to emulate in each area. As described below, FINRA has addressed our concerns.

The Rule Filing: Opting Out and Intertwining

The Authority on **May 13** filed with the SEC SR-FINRA-2022-012, *Proposed Rule Change to Amend the Code of Arbitration Procedure for Industry Disputes ("Code") to Align the Code with the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021*. The changes are effective immediately, as provided in the *Notice of Filing and Immediate Effectiveness* published in the *Federal Register* on **May 24** (Vol. 87, No. 100, P. 31592). Here are the changes (*ed: excerpted essentially* verbatim; *footnotes omitted*):

Amendments to FINRA Rule 13100

FINRA is proposing to amend FINRA Rule 13100 to add definitions of "sexual assault claim" and "sexual harassment claim" that are consistent with the definitions of "sexual assault dispute" and "sexual harassment dispute" in the Act. Specifically, proposed FINRA Rule 13100(aa) would provide that "[t]he term 'sexual assault claim' means a claim involving a nonconsensual sexual act or sexual contact, as such terms are defined in section 2246 of title 18 of the United States Code.

Amendments to FINRA Rule 13201 FINRA is proposing to amend FINRA Rule 13201 to align it with the Act by adding new paragraph (c) to provide that a party alleging a sexual assault or sexual harassment claim that has agreed to arbitrate before the dispute arose may elect post dispute not to arbitrate the claim under the Code. Proposed paragraph (c) would also provide that the claim may be arbitrated if the parties agreed to arbitrate it after the dispute arose. Further, paragraph (c) would provide that sexual

assault and sexual harassment claims would be administered in the forum under FINRA Rule 13802, which establishes the procedural requirements for administering SD [statutory employment discrimination] claims in DRS's arbitration forum today."

Amendments to FINRA Rule 13803: FINRA is proposing amendments to FINRA Rule 13803 ["Coordination of Statutory Employment Discrimination Claims Filed in Court and in Arbitration"] to ensure that sexual assault and sexual harassment claims are administered consistently with how SD claims are currently administered in DRS's arbitration forum. Under the current framework, sexual harassment and sexual assault claims would be administered under FINRA Rule 13803 to the extent such claims constitute SD claims. The proposed rule change would add the terms "sexual assault claim" and "sexual harassment claim" to the title of FINRA Rule 13803 and throughout the rule to make explicit that it applies to the coordination of sexual assault and sexual harassment claims filed in court and other related claims that may be filed at DRS's arbitration forum.

Amendments to FINRA Rule 2263: FINRA is proposing a conforming amendment to FINRA Rule 2263 to incorporate the language in proposed FINRA Rule 13201(c) into the written statement a member firm must provide to an associated person regarding the predispute arbitration clause in Form U4. Thus, firms would be required to disclose to the associated person that a party alleging a sexual assault or sexual harassment claim that has agreed to arbitrate before the dispute arose may elect post dispute not to arbitrate such a claim under the Code, and that such a claim may be arbitrated if the parties have agreed to arbitrate it after the dispute arose.

Immediate Effectiveness
As we predicted in our editorial note in # 10: "FINRA has filed the proposed rule change for immediate effectiveness and has requested that the Commission waive the requirement that the proposed rule change not become operative for 30 days after the date of the filing. The operative date will be the date of the filing of the proposed rule change [May 13]."
*(*Comments may be filed through June 14 at https://www.sec.gov/rules/sro.shtml. **Our comment in # 10 was spot on: "We imagine this rule filing will be for immediate or accelerated effectiveness." ***We still wonder what other ADR institutions like AAA, CPR, and JAMS are doing?)*
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SEVERAL COMMENTS, MOSTLY SUPPORTIVE BUT WITH MANY SUGGESTING FURTHER CHANGES, ON FINRA'S REG NOTICE ON A PROPOSED RULE TO ACCELERATE ARBITRATIONS FOR SERIOUSLY ILL OR ELDERLY PARTIES. *The comment period closed in mid-May on Regulatory Notice 22-09*, FINRA Requests Comment on a Proposed Rule to Accelerate Arbitration Proceedings for Seriously Ill or Elderly Parties. *The comment letters – including those from PIABA, NASAA, and SIFMA – were almost all supportive, but with most suggesting further improvements.* 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 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 authorized staff to publish the **March 16** Regulatory Notice seeking comments, rather than submitting a 19b filing with the SEC. Nine questions were posed to commenters (*ed: see our full analysis in a SAA 2022-12 & -13 (March 31)).*

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.

Several Comments, Almost All Supportive, But Suggesting Improvements
Comments were due **May 16**, and as of press time just fourteen letters were posted on the FINRA Website. We present below some representative institutional comments. Footnotes have been omitted. Given space limitations, we encourage readers to consult the letters for details and specifics, especially as to comments on the nine questions. We characterize all of the institutional comments as of the "yes, but…" category, with the most prevalent suggestion that the move to an age 75 qualifier be reconsidered:

PIABA: "PIABA applauds FINRA's efforts to protect a vulnerable population of investors. For many who are elderly or seriously ill, the FINRA arbitration process is unduly burdensome and works against the investor's ability to participate meaningfully in the arbitration process. However, there are serious concerns regarding some of the proposed rule provisions that may result in a greater burden for, or act as a bias against, investors…. With regard to the age threshold proposed in RN 22-09, PIABA strongly believes FINRA should maintain the current threshold of 65 years of age. There are two primary reasons: (1) most states with civil and/or criminal statutes protecting vulnerable populations from financial or physical abuse have an age threshold of 65; and (2) setting the threshold at 75 may unfairly exclude or otherwise create disparities for portions of the population who may have lower life expectancies.[] By keeping the age threshold at 65 years old, FINRA will remain consistent [with] most states with statutes that create a private right of action for financial elder abuse that also maintain age 65 as the threshold and be more inclusive of a broader demographic of investors. PIABA strongly urges FINRA to maintain the 65-year-old threshold for the purposes of consistency and inclusion."

NASAA: "NASAA submits this letter principally to restate our longstanding opposition to mandatory arbitration clauses and secondarily to comment on the substance of the Proposal…. Notwithstanding our preference for an end to the use of mandatory arbitration clauses, NASAA supports the Proposal's rule amendments which would institute a new nonbinding goal for panels to complete arbitration proceedings within 10 months upon the request of qualifying parties who are seriously ill or at least 75 years old…. NASAA supports the goal of making arbitrations involving seniors and seriously-ill persons as speedy as possible. But NASAA would not support this objective if we thought the Proposal might threaten claimants' rights or if it were used as [a] tool by defense counsel to attempt to circumvent discovery in the guise of moving the matter along expeditiously. We believe, on whole, that the Proposal poses little risk for claimants if properly administered by FINRA's dispute resolution staff. Given that the benefits and costs of the Proposal seem favorable for retail investors, we accordingly support it."

SIFMA: "SIFMA supports the intent of the Notice to ensure that parties to FINRA arbitration are able to participate meaningfully in their proceedings and obtain a fair outcome. We do, however, have several concerns about the proposed rules, namely: (1) whether the proposed rules are necessary or warranted given the current program; (2) regardless, whether the proposed rules are sufficient to prevent abuse; and (3) whether some of the rule-based case deadlines have been cut too short such that they may undermine the fairness of the process."

Financial Services Institute: "FSI supports FINRA's efforts to accelerate arbitration proceedings for those who meet the prerequisite qualifications of being seriously ill or at least 75 years old. We offer select comments on the proposal aimed at balancing the need for accelerated proceedings with ensuring the time necessary to collect and provide information needed for a panel to assess the matter before it…. [For example,] FSI believes that the proposed shortened discovery timeframes should be revisited to ensure that a fulsome record can be established for the arbitration panel to consider. Discovery inevitably takes time – from identifying individuals with information and knowledge at each firm to finding relevant documents, reviewing them, and producing the documents. FSI suggests the discovery deadline for items on FINRA's Document Production Lists for customer cases should be reduced from 60 days to 45 days. The current proposal of 35 days is too short and could undercut the ability to establish a full factual record for the panel's consideration."

Law School Securities Arbitration Clinics: Comments were received from six clinics: **Cardozo, Cornell, Drexel, Miami, Pace,** and **St. John's**. All were supportive but suggested improvements. We quote from the Pace clinic's letter: "We believe FINRA's proposal to require a party, under the cutoff age, to certify their reasonable belief that accelerated processing is necessary to prevent prejudicing their interest in the arbitration strikes the right balance. A possible alternative to the proposed method would be to require investors to provide medical records or a note from their physician documenting a particular health issue. However, we believe this would be an unnecessary invasion of investors' privacy and could deter valid requests for accelerated processing. Further, members of certain marginalized communities may be reluctant to disclose their medical information due to higher levels of institutional distrust. This alternate method could have a disproportionate negative impact on such investors." Other changes are also suggested. *(ed: *What's next? Most likely staff will return to the National Arbitration & Mediation Committee or the Board with changes resulting from the comments received. **As we've said before, 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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SCOTUS DENIES *CERTIORARI* IN TWO MORE ARBITRATION-RELATED CASES. *The Supreme Court on May 31 denied* Certiorari *Petitions in two arbitration-related cases we've covered in the past.* Neither denial came as a surprise to us. In fact, the other shoe was inevitably going to drop on one of them. We analyze both below.

One Case Below: An After-Added Arbitration Clause

We covered in SAA 2021-16 (Apr. 29) *Sevier County Schools Federal Credit Union v. Branch Banking & Trust Co.*, 990 F.3d 470 (6th Cir. 2021), where a divided Sixth Circuit held that, although the deposit agreement permitted the bank to make unilateral changes, adding an arbitration clause was not permissible. Said the majority: "The first reason … is because BB&T provided the Plaintiffs with no opt-out opportunity. This left the Plaintiffs with no choice other than to acquiesce to the new arbitration provision or to close their high-yield savings accounts. And closing their accounts is a totally unreasonable option because doing so would obviate the very essence of the Plaintiffs' accounts -- the promise of a perpetual 6.5% annual interest rate." The majority also found that: "the purported imposition of the arbitration provision would violate the common law's implied covenant of good faith and fair dealing." How so? "BB&T did not act reasonably when it added the arbitration provision years after the Plaintiffs' accounts were established … thus violating the implied covenant of good faith and fair dealing in its attempt to use the original change-of-terms provision to force the Plaintiffs to arbitrate." Judge **Griffin** dissented: "Because plaintiffs assented to this arbitration agreement, and because it is neither adhesive nor unconscionable …." As reported in SAA 2021-45 (Dec. 2), a Petition for *Certiorari* was filed last **September** in *Branch Banking and Trust Company v. Sevier County Schools Federal Credit Union,* No. 21-365. presenting this question: "Whether the Federal Arbitration Act displaces a state common-law rule forbidding companies from adding an arbitration requirement to their standard form contract with customers unless the contract already includes a dispute-resolution clause."

The Other Shoe: *Cert.* Sought in Case Like *Morgan-Sundance*

The Petition filed **January 18** in *International Energy Ventures Management, L.L.C., Petitioner v. United Energy Group, Ltd*. No. 21-1028, sought review of *International Energy Ventures Management, L.L.C. v. United Energy Group, Limited*, 999 F.3d 257 (5th Cir. 2021). What happened below? Said the Petition: "The district court in this case found, as a factual matter, that Respondent did not suffer prejudice from Petitioner's failure to immediately press its right to arbitration. The court of appeals reversed. But instead of finding the district court committed clear error (the standard of review for factual findings) it simply announced that the district court's factual findings were due no deference, and that Respondent had suffered prejudice." Noting that resolution of the core issue would be impacted by SCOTUS' decision in *Morgan v. Sundance Inc.*, No. 21-328, the parties asked the Court to defer ruling on its *Cert*. application: "This Court is currently considering *Morgan v. Sundance,* No. 21-328, on the merits. That case squarely presents whether prejudice is part of the test for litigation conduct waiver in the context of an arbitration clause. Should the Court hold this petition pending the disposition of *Morgan*, and then grant, vacate, and remand in light of the standards for prejudice announced in that case?" As our readers know, the Supreme Court on **May 23** decided *Morgan*, ruling unanimously that there is no prejudice requirement under the Federal Arbitration Act for a court to find a waiver of arbitration rights. Thus, the *Cert.* denial in *International* was inevitable.

*(ed: *Sevier appears on page 4 of the Order List; International on page 1. **We said in # 2021-16 that, as far as we could recollect,* Sevier *was the first time we had seen a court invalidate an after-added arbitration clause because the dominant party violated the implied covenant of good faith and fair dealing. ***For a contrary view, see* In re National Football League's Sunday Ticket Antitrust Litigation*, No. L 15-2668 PSG (JEMx) (C.D. Calif. Apr. 20, 2021), where the Court rejected an implied covenant of good faith and fair dealing argument regarding an after-added PDAA: "In sum, because the changes in the 2017 version of Plaintiffs' agreements did not deprive them of their reasonable expectations under the pre-dispute agreements, DirecTV did not violate the implied covenant of good faith and fair dealing.")*
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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

FINRA DRS POSTS STATS THROUGH APRIL: CUSTOMER ARBITRATION CLAIMS ARE STILL WAY DOWN, BUT INDUSTRY CASES REMAIN UP. MEDIATION FILINGS CONTINUE TO BE VERY STRONG. FINRA Dispute Resolution Services ("DRS") has posted case statistics through **April,** with the overall case filing trends about the same as before. We offer these headlines for the first third of **2022**: 1) overall arbitration filings through **April** – 840 cases – are down 18%; 2) cumulative customer claims declined by 30%; 3) industry arbitration filings are *up* 5% (building on last month's 4% cumulative increase); 4) mediation cases continue to rise; and 5) pending cases continue to decrease. Overall arbitration turnaround times were 17.4 months, with hearing cases now taking 18.5 months (both figures are slight changes from last month). There were 310 mediation cases in agreement, a gargantuan 130% increase (besting full-year 2021's torrid plus 49% pace). The settlement rate remains very high at 91%. There are now 8,381 DRS arbitrators, 4,023 public and 4,358 non-public. Pending cases stand at 3,518, a decline of 76 from **March**.
*(ed: *If the trend holds, the 840 arbitrations filed through April straight-lines to about 2,500 yearly arbitration filings, a weak year by any measure. Time will tell. **Hearing processing times ticked up a bit through April, after decreasing earlier this year. We will keep an eye on this one, since we again wonder if the resumption of in-person hearings in August 2021 is somehow linked to this stat. Common sense tells us it is easier to schedule and attend virtual hearings, than those conducted in-person. ***We again wonder whether industry "return to the office" and vaccine mandates will cause employment and promissory note cases to increase in 2022? See, for example,* Firms Face Pushback Over Return-to-Office Arrangements*, appearing in the May 27 Financial Advisor IQ. So far, only the "libel, slander or defamation" category has increased. ****Past year stats can be found here.)*
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FINRA DRS PLANNING MOVE TO ZOOM-ONLY PREHEARING CONFERENCES IN JULY. FINRA Dispute Resolution Services ("DRS") intends to move to Zoom-only prehearing conferences effective **July 1**, unless the parties otherwise agree or arbitrators otherwise direct. Speaking at a **May 13** Bressler, Amery & Ross Webinar, *A Recap of 2021 Virtual Proceedings: 2nd Annual Hearings in Review*, DRS

EVP & Director of Arbitration **Rick Berry** said that the move was based on the results of a survey of arbitrators, parties, and counsel conducted under the auspices of the Zoom Task Force. These were the high level results, which were covered starting around marker 04:00 of the webinar video:

- **Satisfaction with the Zoom platform**: 91% of arbitrators and 74% of parties/counsel responded "exceptional" or "good"
- **Move prehearing conferences to Zoom**: 75% of arbitrators and 77% of parties/counsel said "yes"
- **Move discovery prehearing conferences to Zoom**: 80% of arbitrators and 83% of parties/counsel said "yes"
- **Move other prehearing conferences to Zoom**: 85% of arbitrators and 86% of parties/counsel said "yes"

Mr. Berry added that the concept was being tested via a pilot project in four offices.
*(ed: *This move is not at all surprising, given the continued use of virtual hearings as reflected in the DRS monthly stats. **Mr. Berry stated his view that the lower parties/counsel percentage who were satisfied with Zoom reflected the fact that the survey was conducted after cases had been awarded. ***This hour-long Webinar was very interesting and worth a listen.)*
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CFPB SEEMS DISINCLINED TO ACT ON ARBITRATION. Consumer Financial Protection Bureau ("CFPB") Director **Rohit Chopra** delivered his agency's semi-annual report to Congress in **April**, but neither he nor any Senate Banking Committee members mentioned arbitration. The Committee's two-hour hearing, *The Consumer Financial Protection Bureau's Semi-Annual Report to Congress,* was held April 26. Perusal of the hearing video (available here) or Director Chopra's five-page prepared remarks shows that the term "arbitration" was not mentioned. Recall that *Dodd-Frank* section 1028 directs the CFPB to study the use of PDAAs in contracts for consumer financial products and services, to later report to Congress, and to ban, limit or impose conditions on their use if such action "is in the public interest and for the protection of consumers." *Alert* readers may recall that the CFPB did indeed issue the required report to Congress and later promulgated a rule banning class action waivers. However, before it became effective, the Final Rule was retroactively nullified in **November 2017**, when **President Trump** signed into law H.J. Res. 111, a *Joint Disapproval and Nullification Resolution* (see SAA 2017-41). Congress had exercised its authority under the *Congressional Review Act*, ("*CRA*") 5 USC §§ 801 *et seq*., which allows that body to legislatively nullify any regulation within 60 legislative/session days of its publication. Under the *CRA*, the reg cannot be reintroduced without the express permission of Congress.
*(ed: *We're not surprised. The CFPB clearly has other fish to fry. **For an analysis of why arbitration is not a CFPB priority see Don't Hold Your Breath, Professor Sovern! in the May 13 Ballard Spahr Blog.)*
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***Ind. Steel Construction, Inc. v. Lunda Construction Co.*, No. 21-2242 (8th Cir. May 13, 2022)**: "Here, the arbitrator at least arguably construed the parties' agreement in awarding attorney's fees and expert costs to Lunda. The final award expressly relies on the AAA Construction Industry Rules in awarding attorney's fees and expert costs to Lunda, stating, '[T]he Arbitrator has reviewed R-48 of the Construction Industry Rules of the AAA and finds that an award of attorneys' fees and costs is appropriate in this matter.' The parties' agreement provided that those rules would govern any procedural matters not otherwise specified in the contract. And the mention of ISC's liability for Lunda's attorney's fees was stricken from the parties' agreement. Thus, we can conclude that the arbitrator at least arguably construed the agreement not to address Lunda's fees, determined liability for fees to be a 'procedural matter not specified' in the agreement, and applied the Construction Industry Rules to fill in the gap, as provided by the contract."

***The Terminix International Co., L.P. v. Dauphin Surf Club Association, Inc*., Nos: 1200846 & 1200854 (Ala. May 13, 2022)**: In a unanimous decision, the Court holds: "Because the designation of the NAF as the arbitral forum in the arbitration agreements between Terminix and DSC and Terminix and Stonegate is ancillary to the agreements to arbitrate, rather than an integral and essential part of the agreements, the trial court correctly granted the DSC plaintiffs' and the Stonegate plaintiffs' petitions to compel arbitration under the authority of § 5 of the FAA." (*ed: Speaking of Terminix and this Court, recall that SCOTUS in* Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995), rejected the Alabama Supreme Court's view that the presence of interstate commerce was to be determined by whether the parties contemplated it.*)

***Trinity v. Life Insurance Company of North America*, No. B312302 (Calif. Ct. App. 2 May 17, 2022)**: Fiona Trinity sued … for discrimination, harassment and wrongful termination. The LINA parties moved to compel arbitration based on an agreement they alleged Trinity had electronically acknowledged in 2014 during her employment with LINA. The trial court denied the motion, finding the LINA parties had not established the existence of an agreement to arbitrate and, even if they had, the purported agreement could not be enforced because it was procedurally and substantively unconscionable. We affirm." (*ed: An* Alert *h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this decision*.)

***Fasanella v. Cetera Advisors*, FINRA ID No. 20-02425 (Orlando, FL, Apr. 28, 2022)**: A broker is awarded $3 million in compensatory damages on his wrongful termination and defamation claims, and is granted reformation of defamatory information from his Form U5 record. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Cong v. E*Trade Securities*, FINRA ID No. 21-03098 (Los Angeles, CA, Apr. 29, 2022)**: In this small claims arbitration, an Arbitrator denies a customer's claim, finding that she did not sufficiently prove her case and that Respondent broker-dealer had made an effort to resolve the customer's complaint by initiating an investigation into potentially

fraudulent activity connected to her account. However, Respondent broker-dealer was not given the documentation it needed to prove the customer's account was subject to fraud. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*
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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

McDermott, E. P. & Obar, R., *Perceptional Differences between Mediation Parties and Their Influence on Resolution of Employment Rights Disputes at the EEOC*, EMPLOYEE RIGHTS AND POLICY JOURNAL, Vol. 24, No. 2 (2020): "Mediation vindicates employee rights far more often than judicial or arbitration processes. Hence, analysis of the mediation process is critical to understanding the resolution of employment rights disputes. This study examines how mediation participants' perceptions of the procedural and distributive justice aspects of their mediation influence the likelihood that an employment rights dispute is resolved. The significance of this research lies in a methodology that analyzes the perceptions of parties to the same mediation and compares their contemporaneous self-reported perceptions of the same process centered on the resolution of an employment rights dispute.[] The data represent the actual differences in the perception of the charging parties and respondents involved in the same mediation session. This particularized approach offers important insights into the dynamics of the mediation process that can be lost when aggregate measures (i.e., average ratings) are used."

***Supreme Court Decision Makes It Easier to Waive Right to Arbitration*, Covington & Burling Blog (May 24, 2022)**: "On May 23, 2022, the Supreme Court unanimously held that a party opposing arbitration is not required to demonstrate prejudice to show that the other party has waived its contractual arbitration rights.[] Before today's decision, nine federal courts of appeals had adopted the rule that a 'party can waive its arbitration right by litigating only when its conduct has prejudiced the other side.' *Morgan v. Sundance*, 596 U.S. __ (2022). Two other circuits had held no showing of prejudice was required."

***Federal Judge Grants Stay in Amazon Delivery Driver Suit Pending SCOTUS Arbitration Decision*, Lexology (May 25, 2022)**: "A judge for the U.S. District Court for the Western District of Washington has granted Amazon.com, Inc.'s motion to stay a lawsuit alleging that the company wrongfully withheld tips from contract delivery drivers.[] The court determined that a decision in *Southwest Airlines Co. v. Saxon*, a pending case before the U.S. Supreme Court concerning exemptions under the Federal Arbitration Act, impacts a serious legal question in the Amazon case. If forced to move forward with the litigation, the judge reasoned, Amazon could suffer irreparable harm, depending on the outcome of the Saxon appeal.... Since the *Saxon* case addresses a legal question relevant to *Miller v. Amazon.com Inc et al.*, case number 2:21-cv-00204, the Washington judge chose to stay the case pending the high Court's decision."

***New! B2B Dispute Resolution Planning*, CPR Blog (May 25, 2022)**: "CPR Dispute Resolution has launched a pilot program, B2B Dispute Resolution Planning. Parties to a commercial dispute will work with an independent, impartial neutral (a process design

facilitator) to plan out and design an efficient dispute resolution process based on the parties' needs, interests, and the nature of the dispute. During the pilot program, the facilitator will work with the parties for four hours free of charge."

***Securities Group OKs Model Rule on Unpaid Arbitration, Judgments*, Financial Advisor IQ (May 25, 2022)**: "The North American Securities Administrators Association says its members have approved a model rule aimed at companies and individuals who don't pay arbitration awards or regulatory fines.[] The rule, which NASAA proposed in October, adds several provisions to what qualifies as "dishonest or unethical business practices" among investment advisors, broker-dealers, agents and investment advisor representatives, as reported.[] The model rule makes it unethical or dishonest for an entity to fail to pay investment-related, customer-initiated Financial Industry Regulatory Authority arbitration awards or satisfy orders resulting from regulatory actions, such as paying fines, orders of restitution or other monetary penalties."

***RayJay Developing Master Agreement for FAs and Clients*, Financial Advisor IQ (May 26, 2022)**: "Raymond James is developing an agreement for advisors and their clients that will encompass the entirety of their relationship, making it easier for clients to open additional accounts.[] The 'mastery advisory agreement' will cover the overall client-advisor relationship, according to Jeff Dowdle, the firm's chief operating officer and president of its asset management group.[] For example, when a client signs up to open a separately managed account, and that client eventually wants open a Freedom account or an Ambassador account, the client can do that without having to fill out any paperwork, Dowdle said."
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FINRA HAS STATS ON VIRTUAL HEARINGS. Our readers know that FINRA publishes dispute resolution stats every month (see the **April** numbers, covered elsewhere in this *Alert*). But did you know that virtual hearing stats are available too, at https://www.finra.org/arbitration-mediation/dispute-resolution-statistics#virtual? The latest update shows that, since the mid-**March 2020** suspension of in-person hearings: "as of April 30, 802 arbitration cases have conducted one or more hearings via Zoom (341 customer cases and 461 industry cases).[] There are 598 total joint motions for virtual hearings (255 in customer cases and 343 in industry cases)." The Website also shows the outcome of contested motions.
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Send any messages or inquiries to: George@SecArbAlert.com

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