SECURITIES ARBITRATION ALERT 2022-24 (6/23/22)

George H. Friedman, Editor-in-Chief

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DID YOU KNOW?

- **An Arbitration System Designed to Avoid Arbitration**

ALERT! THERE *WILL* BE AN *ALERT* NEXT WEEK. TOO MUCH GOING ON FOR A BREAK RIGHT NOW. *Alert readers know that we usually take a quarterly break in publishing the* Securities Arbitration Alert *at the end of each quarter. That would translate this year to next week's* Alert*. Given the recent pace of activity, however, we've decided to delay our customary break until August. So, look for the* Alert *in your email inbox next week, as usual. One thing we know for sure: SCOTUS is done releasing arbitration-related decisions for now. Several* Certiorari *Petitions remain, however.*

SQUIBS: IN-DEPTH ANALYSIS

SCOTUS DECIDES *ZF* AUTOMOTIVE: YET ANOTHER UNANIMOUS ARBITRATION-RELATED DECISION, THIS ONE HOLDING THAT SECTION 1782 DISCOVERY IN FOREIGN ARBITRATIONS APPLIES ONLY TO GOVERNMENTAL TRIBUNALS. ***The Supreme Court has decided* ZF Automotive US, Inc. v. Luxshare, Ltd.*, No. 21-401, ruling unanimously that 28 U.S.C. § 1782(a), which permits litigants to use American courts to obtain discovery in aid of "a foreign or international tribunal," applies only to governmental fora and does not extend to private commercial arbitral tribunals***. We reported in **December 2021** that the Supreme Court had granted *Certiorari* in four cases involving arbitration, among them *ZF Automotive*, which had been consolidated with *AlixPartners LLP v. The Fund for Protection of Investors' Rights in Foreign States*, No. 21-518. We covered these 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 Below: The Extent of the Discovery in Foreign Arbitrations

The **September 2021** Petition in *ZF Automotive* asserts that the question before the Court: "is substantively identical to the question presented in *Servotronics, Inc. v. Rolls-Royce PLC*, No. 20-794 (oral argument originally scheduled for Oct. 5, 2021; case removed from oral argument calendar Sept. 8, 2021): Whether 28 U.S.C. § 1782(a), which permits litigants to invoke the authority of United States courts to render assistance in gathering evidence for use in 'a foreign or international tribunal,' encompasses private commercial arbitral tribunals, as the U.S. Courts of Appeals for the Fourth and Sixth Circuits have held, or excludes such tribunals, as the U.S. Courts of Appeals for the Second, Fifth, and Seventh Circuits have held." The **October 2021** Petition for *Certiorari* in *AlixPartners*, states: "Whereas the arbitration in *Servotronics* was between two private parties, the arbitration here is between a private party and a foreign state -- an application of Section 1782 upon which the United States has expressed 'particular concern.' The question presented is: Whether an ad hoc arbitration to resolve a commercial dispute between two parties is a 'foreign or international tribunal' under 28 U.S.C. § 1782(a) where the arbitral panel does not exercise any governmental or quasi-governmental authority."

The Oral Argument: Several Attorneys Involved

The oral argument took place **March 23** with all Justices participating. **Justice Thomas** was out ill, but **Chief Justice Roberts** announced up front that he would: "participate in consideration and decision of the cases on the basis of the briefs and the transcripts of oral argument." The transcript is here and the audio recording is here. As reported in SAA 2022-09 (Mar. 10), the Court's **February 28** Order List addressed oral argument time allocation: "the joint motion of the parties for divided argument and for enlargement of time for oral argument is granted. The motion of the Solicitor General for leave to participate in oral argument as amicus curiae, for divided argument, and for enlargement of time for oral argument is granted" (links added by the *Alert*). What were the specifics?

The now-granted joint motion said: "[T]he parties believe that the overall argument time should be expanded to 80 minutes, with each side receiving 40 minutes. In that scenario, the ZF and AlixPartners petitioners agree that ZF should receive 15 minutes of argument time, AlixPartners should receive 10 minutes of argument time, and the United States should receive 15 minutes of argument time. And the ZF and AlixPartners respondents agree that Luxshare and the Fund should each receive 20 minutes of argument time." The discussion here, with five attorneys presenting, consumed nearly two hours.

The Oral Argument: A Simpler Analysis

This argument to us was not nearly as esoteric as others of recent vintage, although the terms "comity" and "foreign tribunal" stole the spotlight. We concluded our analysis with a mild but prescient prediction: "The Court seems to be leaning against a more expansive application of section 1782 (just as asserted by the United States)." For a comprehensive "chapter-and-verse" analysis, we recommend that readers peruse these **March 23** posts: 1) *Supreme Court Hears Arguments on Whether Section 1782 Allows Discovery for Use Before International Arbitration Tribunals*, offered in the *CPR Blog* on **March 23**; and 2) *High Court Debates U.S. Discovery for Private Arbitration Abroad*, appearing in *Bloomberg Law*.

Unanimous SCOTUS: Section 1782 Limited to Governmental Tribunals

The unanimous Opinion in *ZF Automotive* was authored by **Justice Coney Barrett**. In a clear, well-reasoned 17-page Opinion, she writes: "These consolidated cases require us to decide whether private adjudicatory bodies count as 'foreign or international tribunals.' They do not. The statute reaches only governmental or intergovernmental adjudicative bodies, and neither of the arbitral panels involved in these cases fits that bill…. In sum, we hold that §1782 requires a 'foreign or international tribunal' to be governmental or intergovernmental. Thus, a 'foreign tribunal' is one that exercises governmental authority conferred by a single nation, and an 'international tribunal' is one that exercises governmental authority conferred by two or more nations. Private adjudicatory bodies do not fall within §1782."

Statutory Construction

In another Opinion citing general and law dictionaries, Justice Coney Barrett parses the verbiage in the statute and concludes that it, along with the Federal Arbitration Act ("FAA"), require a narrow application: "So understood, 'foreign tribunal' and 'international tribunal' complement one another; the former is a tribunal imbued with governmental authority by one nation, and the latter is a tribunal imbued with governmental authority by multiple nations.[] Section 1782's focus on governmental and intergovernmental tribunals is confirmed by both the statute's history and a comparison to the Federal Arbitration Act …. From the start, the statute has been about respecting foreign nations and the governmental and intergovernmental bodies they create."

"Tension" with FAA

The Opinion also finds that a broader application of section 1872 would create a conflict with the FAA: "Extending §1782 to include private bodies would also be in significant

tension with the FAA, which governs domestic arbitration, because §1782 permits much broader discovery than the FAA allows…. [*ed: see below for what we left out here*]. Interpreting §1782 to reach private arbitration would therefore create a notable mismatch between foreign and domestic arbitration. And as the Seventh Circuit observed, '[i]t's hard to conjure a rationale for giving parties to private foreign arbitrations such broad access to federal-court discovery assistance in the United States while precluding such discovery assistance for litigants in domestic arbitrations'" (citations omitted; brackets in original).

Involvement of Foreign Government As Party Makes No Difference

That *AlixPartners* involved a foreign government (Lithuania) as a party made for a more difficult analysis, but in the end it didn't matter; the focus is to be on the tribunal: "None of this forecloses the possibility that sovereigns might imbue an ad hoc arbitration panel with official authority. Governmental and intergovernmental bodies may take many forms, and we do not attempt to prescribe how they should be structured. The point is only that a body does not possess governmental authority just because nations agree in a treaty to submit to arbitration before it. The relevant question is whether the nations intended that the ad hoc panel exercise governmental authority. And here, all indications are that they did not."

The Bottom Line

"In sum, only a governmental or intergovernmental adjudicative body constitutes a 'foreign or international tribunal' under §1782. Such bodies are those that exercise governmental authority conferred by one nation or multiple nations. Neither the private commercial arbitral panel in the first case nor the ad hoc arbitration panel in the second case qualifies."

Did SCOTUS Just Limit Discovery Under the FAA?

Over the years there have been conflicting lower court holdings on discovery in general under the FAA and prehearing discovery as well. Seems to us the Court in *dicta* just resolved some open issues. In the "tension with FAA" quote above, Justice Coney Barrett states matter-of-factly: "[T]he FAA permits *only the arbitration panel to request discovery*, see 9 U. S. C. §7, while district courts can entertain §1782 requests from foreign or international tribunals or any 'interested person,' 28 U. S. C. §1782(a). In addition, *prearbitration discovery is off the table under the FAA* but broadly available under §1782" (emphasis added). Seems pretty clear to us.

*(ed: *For an excellent analysis of this decision, see* Supreme Court Bars Discovery Assistance for Private Overseas Arbitration Panels Under U.S. Law, *and* More on Section 1782: Why the U.S. Supreme Court Says the Law Doesn't Permit Discovery Requests from International Arbitrations, *both in the June 13 CPR Blog. **This squib was published June 13 in our blog. ***For a summary of this Term's decisions involving arbitration, see our coverage elsewhere in this* Alert.*)*

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SCOTUS DECIDES *VIKING RIVER*: CALIFORNIA'S PAGA IS PARTIALLY PREEMPTED BY THE FAA. ***In the second arbitration-related decision of the week, the Court on June 15 held 8-1 in Viking River Cruises, Inc. v. Moriana, No. 20-1573, that California's Private Attorney General Act ("PAGA") was in part preempted by the Federal Arbitration Act ("FAA"), insofar as PAGA allowed employees to evade bilateral predispute arbitration agreements ("PDAA"). The lone dissenter was Justice Thomas, who held to his long-standing view that the FAA does not apply in state courts.*** The Opinion at first blush seems murky, starting out with: "ALITO, J., delivered the opinion of the Court, in which BREYER, SOTOMAYOR, KAGAN, and GORSUCH, JJ., joined, in which ROBERTS, C. J., joined as to Parts I and III, and in which KAVANAUGH and BARRETT, JJ., joined as to Part III. SOTOMAYOR, J., filed a concurring opinion. BARRETT, J., filed an opinion concurring in part and concurring in the judgment, in which KAVANAUGH, J., joined, and in which ROBERTS, C. J, joined as to all but the footnote. THOMAS, J., filed a dissenting opinion." We'll help readers grasp the core holdings (it's not as confusing as it first seems), but we encourage readers to read the Opinion and peruse some of the many excellent commentaries and analyses.

Case Below: The Extent of the FAA Preemption of State Laws

We reported in **December 2021** that the Supreme Court had granted *Certiorari* in four cases involving arbitration, among them *Viking River.* Specifically, the Court agreed to review of *Moriana v. Viking River Cruises, Inc*., No. B297327 (Cal. Ct. App. 2020), *pet. for review den*., No. S265257 (Cal. 2020). 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). To review, we have reported many times on *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal.4th 348, 327 P.3d 129 (Calif. 2014), *Cert. den*., 135 S.Ct. 1155 (2015), where a divided 4-3 California Supreme Court – complete with partial concurrences and dissents – held that an employee could pursue claims against their employer under the California Private Attorneys General Act ("PAGA"), despite the existence of an arbitration agreement waiving such claims (see, for example, SAA 2015-01 and SAAs 2014-41 & -24). But did the U.S. Supreme Court's subsequent decision in *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018), holding that class or collective action waivers are enforceable under the FAA, implicitly overrule *Iskanian?* In the case below, the Court of Appeal held: "…. *Epic*'s warning about impermissible devices to get around otherwise valid agreements to individually arbitrate claims notwithstanding, *Iskanian* remains good law. We therefore reject Viking's characterization of PAGA claims as a transparent device to preclude individualized arbitration proceedings and follow *Iskanian*, which instead viewed predispute PAGA waivers precluding PAGA actions in any forum as attempts to exempt employers from responsibility for violations of the Labor Code" (footnote omitted).

Issue Before SCOTUS

The **May 2021** Petition in *Viking River* asked: "Whether the Federal Arbitration Act requires enforcement of a bilateral arbitration agreement providing that an employee cannot raise representative claims, including under PAGA."

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

SCOTUS Majority: FAA Partially Preempts PAGA
The majority Opinion in *Viking River* was authored by **Justice Alito**. The Opinion has several parts, with shifting groups of Justices signing on in part. There are also concurrences and as mentioned above, the expected Thomas dissent. But here's the bottom line on FAA preemption of PAGA: five Justices find that the part of the California statute allowing employees to avoid individual bilateral PDAAs is preempted by the FAA: "We hold that the FAA preempts the rule of *Iskanian* insofar as it precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate. This holding compels reversal in this case." But PAGA is not completely preempted: "The agreement between Viking and Moriana purported to waive 'representative' PAGA claims. Under *Iskanian,* this provision was invalid if construed as a wholesale waiver of PAGA claims. And under our holding, that aspect of *Iskanian* is not preempted by the FAA, so the agreement remains invalid insofar as it is interpreted in that manner." Eight Justices agreed to this language: "*Iskanian*'s indivisibility rule effectively coerces parties to opt for a judicial forum rather than 'forgo[ing] the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution.' *Stolt-Nielsen,* 559 U. S., at 685; see also *Concepcion,* 563 U. S., at 350–351. This result is incompatible with the FAA."
*(ed: *The Court noted that California is free to amend PAGA to conform to the* Viking River *holding. **For two excellent analyses of this decision, see these June 15 blog posts:* Supreme Court Holds That The Federal Arbitration Act Requires Enforcement Of Agreements To Arbitrate Individual Claims Under California's Labor Code Private

Attorneys General Act, *Gibson Dunn Blog; and* Supreme Court Limits California's PAGA Law on Employment Claims, Preempting It in Part under the Federal Arbitration Act, *CPR Blog*. ***For a summary of this Term's decisions involving arbitration, see our coverage elsewhere in this* Alert.*)*
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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

THIS SCOTUS TERM'S ARBITRATION SCORECARD: CPR PODCAST COVERS ALL YOU NEED TO KNOW. As our readers know, the Supreme Court is concluding a very busy Term that included an unprecedented five arbitration-centric decisions (all of which we have covered in detail). Recall that the Supreme Court on **May 23** 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. Then the Court on **June 6** decided *Southwest Airlines Co. v. Saxon*, No. 21-309, ruling unanimously that that the FAA section 1 exemption of "workers engaged in foreign or interstate commerce" includes classes of workers who are part of the flow or stream of interstate commerce, and that there is no FAA requirement that these individuals actually cross state lines. As discussed elsewhere in this *Alert*, the Court: 1) on **June 13** decided *ZF Automotive US, Inc. v. Luxshare, Ltd*., No. 21-401, ruling unanimously that 28 U.S.C. § 1782(a), which permits litigants to use American courts to obtain discovery in aid of "a foreign or international tribunal," applies only to governmental fora and does not extend to private commercial arbitral tribunals; and 2) on **June 15** held 8-1 in *Viking River Cruises, Inc. v. Moriana*, No. 20-1573, that California's Private Attorney General Act ("PAGA") was in part preempted by the FAA, insofar as PAGA allowed employees to evade bilateral predispute arbitration agreements. Putting it all together very nicely is CPR, which on **June 16** released a half-hour podcast, *2021-2022 SCOTUS Arbitration Wrap-Up*. The podcast was moderated by CPR's **Russell Bleemer**, and featured as faculty **Angela Downes**, University of North Texas Dallas College of Law Professor of Practice and Assistant Director of Experiential Education; and Texas attorney/arbitrator **Richard Faulkner**.
*(ed: *The faculty also discussed Badgerow v. Walters, No. 20-1143 (Mar. 31, 2022), where the Court ruled 8-1 that the "look through" doctrine does not apply to actions to confirm or vacate an arbitration award under sections 9 and 10 of the FAA, even though it does for motions to compel arbitration under section 4. **The YouTube video can also be found here. ***Kudos to CPR and Mr. Bleemer for staying on top of this story.)*
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SEC ISSUES AN INVESTOR BULLETIN ON ARBITRATION. The SEC's Office of Investor Education and Advocacy on **June 14** issued an Investor Bulletin titled, *Broker-Dealer/Customer Arbitration*, covering virtually every aspect of the process. The link-rich, FINRA-centric Bulletin was published: "to help educate investors about the arbitration and mediation processes involving a customer dispute with a broker-dealer." We liked the section contrasting arbitration with litigation (*ed: repeated essentially* verbatim; *links in original*):

- Arbitration may be cheaper and quicker than litigating a dispute in court. There are fees associated with arbitration, described on FINRA's website at Potential Fees in Arbitration Cases.
- Instead of a judge or jury, the parties select a neutral arbitrator or panel of arbitrators to decide if wrongdoing occurred and, if so, how to compensate the wronged party for it.
- As in litigation, an arbitration decision is binding on the parties. Unlike in litigation, arbitration decisions can only be appealed on limited grounds. Thus, arbitration decisions are rarely overturned.
- FINRA arbitrators must follow FINRA's Code of Arbitration Procedure and Code of Ethics. Arbitrators are not required to follow state or federal rules of evidence and are not bound by legal precedent.
- In contrast to litigation, arbitrators generally do not provide a written decision that explains their rationale, unless the parties agree to receive a written decision before the first hearing.
- Parties may obtain documents from each other in arbitration, but the discovery process is more streamlined than in litigation.

(ed: This is a very nice overview of securities arbitration.)
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AAA SEEKING SUBMISSIONS FOR THE *ADR JOURNAL*. The American Arbitration Association is soliciting submissions for its flagship *Dispute Resolution Journal*® according to a recent communication sent to panelists. The notice states that the *Journal* has since 1937: "worked to advance the AAA's educational mission by publishing articles on a wide range of topics in ADR. We welcome article submissions from panelists."
(ed: Manuscripts can be submitted for consideration to publications@adr.org.)
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QUICK TAKES: CASES AND AWARDS WORTH READING

***Field v. Rusco Operating*, No. 22-20054 (5th Cir. Jun. 7, 2022)**: "A movant attempting to intervene in an action must show that it has a sufficient interest in the litigation to do so. Our would-be intervenors today are two companies that offer an online application (an 'app' in today's parlance) that connects oil field workers looking for work with oil-and-gas operators looking for workers. The companies seek to intervene here because some app-using workers have opted-in as plaintiffs alleging claims for unpaid overtime, under the Fair Labor Standards Act, against an operator that used the app to hire them. The app companies' asserted interests in the litigation relate to arbitration agreements between them and the workers, their belief that a win by the workers would destroy their business model, and a demand for indemnity allegedly made by the defendant operator for liability it might incur as to plaintiffs' claims. The district court found these interests insufficient to justify intervention and denied leave. Because we conclude that the arbitration agreements at issue give rise to a sufficient interest in this action to support the app companies' intervention, we reverse the judgment of the district court and remand for further proceedings."

***CCC Intelligent Solutions Inc. v. Tractable Inc*., No. 19-1997 (7th Cir. Jun. 6, 2022)**: "As we said, some legal disputes are simple. This is one. It is so simple that the courts of Illinois (whose law applies) have not found it necessary to address during the last 80 years the question whether C can claim rights under a contract that has only A and B as parties. The court's answer was "no." *Gallopin v. Continental Casualty Co*., 290 Ill. App. 8 (1937). The potential exception for third-party beneficiaries does not apply, which leaves the dominant rule. Tractable is not a party to this contract, so it cannot demand arbitration."

***SUNZ Insurance Company v. Butler American Holdings Inc.*, No. 21-1679 (8th Cir. Jun. 6, 2022)**: "SUNZ Insurance Company ('SUNZ') appeals from the denial of its motion to dismiss or, in the alternative, to compel arbitration of the crossclaims filed in this procedurally complex insurance dispute. SUNZ argues the district court lacked subject matter jurisdiction over the crossclaims between non-diverse parties in the underlying interpleader action and otherwise erred by denying arbitration. We reverse and remand…. Challenges to the validity of an agreement to arbitrate are distinct from challenges to the entire contract, which include claims such as fraudulent inducement or whether the unlawfulness of one of the contract's provisions renders the entire contract invalid. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 (2006). The Supreme Court has made clear that 'unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance." Id. at 445–46; see also *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402–03 (1967). Payday does not challenge the validity of the arbitration clause itself but instead contends the Program Agreement has been superseded by the Policy, which rendered it void. This is a challenge to the contract's validity that, under Buckeye, shall be considered by an arbitrator, not a court. The district court erred when it denied SUNZ's alternative motion to compel arbitration."

***Stifel Nicolaus v. Pratt*, FINRA ID No. 21-01934 (Philadelphia, PA, May 13, 2022)**: A broker is held liable to his former employer for the amounts due and owing pursuant to the terms of a promissory note agreement, and is ordered to pay Claimant broker-dealer monetary sanctions after being held in contempt by the Arbitrator. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Dertouzos v. Wells Fargo*, FINRA ID No. 18-03981 (New York, NY, May 17, 2022)**: A broker asserting that Respondent broker-dealers were culpable with Credit Suisse's alleged scheme to steal his deferred compensation and seeking $5.5 million is awarded nearly $1 million in compensatory damages. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

H. Ziehms and A. Baird, *A Record-Breaking Year in M&A: The Consequences for Damages in Post-M&A Dispute Resolution in Arbitration*, Kluwer Arbitration Blog

(Jun. 16, 2022): "2021 was a record-breaking year for mergers and acquisitions (M&A). The total global deal value amounted to USD 5.9 trillion, an increase of 64% compared to 2020 and the highest ever recorded, driven by high valuations and fuelled [sic] by access to cheap financing…. While the M&A market declined in the first half of 2022, in part because of renewed disruptions caused by the COVID-19 pandemic as well as the shocks to markets caused by the war in Ukraine, the recent surge in deal volumes, combined with exceptionally high valuations in 2021, have already led to a wave of post-deal disputes.[] Most of these disputes are resolved in arbitration: according to one recent estimate, more than 75% of Sale and Purchase Agreements (SPAs) have arbitration clauses, a particularly high percentage among commercial disputes. Statistics published by arbitration institutions show, further, that shareholder, share purchase, or joint venture agreements represent a significant fraction of their overall caseload. For example, these types of agreements represented 14% of the cases administered by the LCIA in 2021."

***Davis Wright Tremaine Combines With McGonigle, One of the Nation's Preeminent Financial Services Boutique*, www.dwt.com (Jun. 10, 2022)**: "Davis Wright Tremaine LLP is combining with McGonigle P.C., one of the nation's preeminent financial services boutiques. With McGonigle's 44 lawyers, Davis Wright more than doubles the size of its banking and financial services practice, enhances its presence in Washington, D.C., and New York, and establishes its first Chicago office.[] The combination was driven by transformative changes occurring in financial services, a core strength of both firms. It joins McGonigle's experience in securities regulation with Davis Wright's nationally recognized strength in consumer banking, payments, and FinTech." The merger is effective **July 1**. (*ed: SAA Editorial Advisory Board member Theodore A. ("Ted") Krebsbach will be Senior Counsel at the firm.*)

***More on Section 1782: Why the U.S. Supreme Court Says the Law Doesn't Permit Discovery Requests from International Arbitrations,* CPR Blog (Jun. 13, 2022**): "Here is a deeper dive into today's U.S. Supreme Court consolidated decision in *ZF Automotive US Inc. v. Luxshare Ltd*., No. 21-401, which was consolidated with and covers *AlixPartners LLP v. Fund for Protection of Investor Rights in Foreign States*, No. 21-518. Does the new decision, which restricts discovery under a law aiding foreign governmental entities in U.S. courts, also limit discovery under the Federal Arbitration Act? …. In today's unanimous 9-0 opinion, available here, the Court held that the use of 28 U.S.C. § 1782 for discovery in international proceedings was limited. 'Only a governmental or intergovernmental adjudicative body constitutes a "foreign or international tribunal" under 28 U. S. C. §1782,' wrote Justice Amy Coney Barrett in her first arbitration decision since ascending to the bench in 2020, 'and the bodies at issue in these cases do not qualify.'"

***Supreme Court Holds That The Federal Arbitration Act Requires Enforcement Of Agreements To Arbitrate Individual Claims Under California's Labor Code Private Attorneys General Act*, Gibson Dunn Blog (Jun. 15, 2022)**: "Today, the Supreme Court held that individual claims arising under California's Labor Code Private Attorneys General Act ('PAGA') can be compelled to arbitration…. **Issue**: Does the Federal Arbitration Act require enforcement of a bilateral arbitration agreement with respect to an individual claim under PAGA? **Court's Holding**: Yes. The FAA preempts the California

Supreme Court's *Iskanian* decision insofar as it precludes the division of PAGA actions into individual and non-individual claims. Viking may compel arbitration of Moriana's individual PAGA claim, and the remaining non-individual PAGA claims must be dismissed because Moriana lacks statutory standing under PAGA without her having an individual claim in the action. The FAA, however, does not preempt Iskanian's prohibition on wholesale waivers of PAGA claims."

***Supreme Court Limits California's PAGA Law on Employment Claims, Preempting It in Part under the Federal Arbitration Act*, CPR Blog (Jun. 15, 2022)**: "The U.S. Supreme Court ruled this morning that employers may require their workers to arbitrate employment disputes under California's Private Attorneys General Act, a 2003 law that allows Californians to file suit on behalf of the state for employment-law violations.[] The Federal Arbitration Act, the Court found today in *Viking River Cruises Inc. v. Moriana*, No. 20–1573, preempts at least in part the California state PAGA law, which had been the source of tens of thousands of court claims in the face of arbitration requirements, according to an industry interest group formed to fight the PAGA arbitration ban."

***Laid-Off Crypto Staff Welcome at Finra*, Financial Advisor IQ (Jun. 16, 2022)**: "Employees being laid off from struggling cryptocurrency firms are welcome at the Financial Industry Regulatory Authority, according to news reports.[] The industry's self-regulator is in need of more resources related to monitoring crypto, as several dozens of its members now trade digital assets and some allow access to digital assets for their customers, chief executive officer Robert Cook said at a trading industry conference this week, according to Reuters."

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DID YOU KNOW?

AN ARBITRATION SYSTEM DESIGNED TO AVOID ARBITRATION. With the delayed baseball salary arbitration season well underway, we decided to discuss here "Last Best Offer" or "Baseball" arbitration, which works as follows: The parties negotiate to their last and best offer (in major league baseball, the player's last demand and team's last offer). A single arbitrator hears unresolved disputes, and can award only one figure or the other, nothing in between, above, or below. Typically, there are no opinions. The theory behind this form of ADR is that, knowing that the arbitrator can only pick one figure or the other, the parties will negotiate in good faith and settle most cases. In other words, *it is an arbitration system designed to avoid arbitration.* And that indeed is the case; the overwhelming majority of cases settle (see, for example the MLB stats on www.spotrack.com). The American Arbitration Association has since January 2015 offered *Final Offer Supplementary Arbitration Rules*, or as the official title adds "Also referred to as Baseball or Last Best Offer Arbitration Supplementary Rules."

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

Editor's Note & Disclaimer: While we undertake considerable efforts to present information in this publication in a fair and accurate manner, we caution that readers should access referenced material themselves as the best source. Our analyses make liberal use of links, and we offer courtesy copies of materials not on the Internet. Similarly, readers should not rely solely upon our summaries in making legal decisions or consider our commentary to be rendering legal, accounting, or other professional advice or service. If legal advice or other expert assistance is required, the services of a competent professional person should be sought. — *adapted from the Declaration of Principles jointly adopted by a Committee of the American Bar Association and a Committee of Publishers and Associations.*

Mail to: 194 Carlton Terrace, Teaneck, NJ 07666
T: 917-841-0521
Web: www.SecArbAlert.com
Blog: www.sacarbalert.com/blog/; Twitter: @SecArbAlert