SECURITIES ARBITRATION ALERT 2022-26 (7/7/22)

George H. Friedman, Editor-in-Chief

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ARTICLES OF INTEREST:

- **Brodlija, F., *Disclosure Standards for Adjudicators in Investment Disputes: The Draft Code of Conduct for ISDS Adjudicators Through the Eyes of State Parties*, Kluwer Arbitration Blog (Jun. 29, 2022)**
- ***Citi Must Pay $1.4M to Financial Advisor Who Called it a 'Boys Club'*, Financial Planning (Jun. 26, 2022)**
- ***Drafting Effective Arbitration Agreements: Lessons Learned and Pitfalls to Avoid*, Willkie Farr & Gallagher LLP Blog (Jun. 27, 2022)**
- ***Tesla Worker Must Arbitrate Job Discrimination, Labor Law Claims*, Bloomberg Law (Jun. 28, 2022)**
- ***UBS Ordered to Pay $976K Over YES Program,* Financial Advisor IQ (Jun. 28, 2022)**
- ***In Wells Fargo Case, FINRA Didn't Manipulate Arb Process: Independent Review*, Think Advisor (Jun. 29, 2022)**

DID YOU KNOW?

- **A Nice Website on Investment Treaty Arbitration**

WE ARE BACK FOR THE SECOND HALF OF 2022, INCLUDING A NEW FEATURE ARTICLE! *We kick off the third quarter with a new feature article,* The SCOTUS "Arbitration Quartet" – What You Need to Know, *by the* Alert*'s publisher and Editor-in-Chief, George Friedman. In it, he reviews the four arbitration-centric cases the Supreme Court decided at the close of this Term. And we have our usual collection of Squibs, Short Briefs, Quick Takes, and Articles of Interest. In other words, a jam-packed new issue of the* Alert*!*

FEATURE ARTICLE

THE SCOTUS "ARBITRATION QUARTET" – WHAT YOU NEED TO KNOW, ***by George H. Friedman***. As our readers know, the Supreme Court just concluded a very busy Term that included an unprecedented five arbitration-centric decisions (all of which we have covered in detail). See Friedman, George, *After a Lull in 2021, a Busy Year Ahead Arbitration-wise for SCOTUS*, 2021:48 SEC. ARB. ALERT 1 (Dec. 23, 2021). Four of these decisions were released in a fairly compact time period in **late May to mid-June 2022** (the fifth case was *Badgerow v. Walters*, No. 20-1143 (Mar. 31, 2022), -- a case involving a FINRA award -- 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 Federal Arbitration Act ("FAA"), even though it does for motions to compel arbitration under section 4). Specifically, the Supreme Court: 1) on **May 23** *decided Morgan v. Sundance Inc.*, No. 21-328; 2) on **June 6** decided *Southwest Airlines Co. v. Saxon*, No. 21-309; 3) on **June 13** decided *ZF Automotive US, Inc. v. Luxshare, Ltd*., No. 21-401; and 4) on **June 15** decided in *Viking River Cruises, Inc. v. Moriana*, No. 20-1573. Here are the key things readers need to know about these four decisions we've termed the "Arbitration Quartet." *Read more…*

(ed: George H. Friedman, Publisher and Editor-in-Chief of the online Securities Arbitration Alert *and an ADR consultant, retired in 2013 as FINRA's Executive Vice President and Director of Arbitration, a position he held from 1998. He also serves as non-executive Chairman of the Board of Directors of Arbitration Resolution Services. He is an Adjunct Professor of Law at Fordham Law School, and is also a member of the AAA's national roster of arbitrators.)*

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SQUIBS: IN-DEPTH ANALYSIS

FINRA AWARD NOT DISCHARGEABLE IN BANKRUPTCY. ***A FINRA arbitration Award was not dischargeable in bankruptcy pursuant to the Bankruptcy Code.*** A FINRA Panel issued an Award in *Ahuja v. Deutshe Bank Securities, Inc. et al*, FINRA ID No. 17-01369 (New York, NY, Jul. 18, 2019), finding the broker (but not the firm) liable to claimants for over $700,000 in compensatory damages. At issue in *Ahuja v. Fleming (In re Fleming)*, 19-51611 (JAM) (Bankr. D. Conn. Dec. 9, 2021) was whether the debt represented by the Award was dischargeable in bankruptcy.

Nature of the Claim is Key

The Court observes that: "A debt is nondischargeable under section 523(a)(19) if two conditions are met: first, the debt must be 'for the violation of certain federal securities laws, state securities laws or regulations under the federal or state securities laws,' or for 'common law fraud, deceit, or manipulation in connection with the purchase or sale of any security.' Second, the debt must result from a judgment, court or administrative order, consent order, decree, or any settlement agreement entered by the debtor" (footnote and citation omitted).

FINRA Award Meets the Standard

Having defined the standard, the Court applies it to the facts at hand. We will let the Opinion speak for itself: "The Court finds that the undisputed facts establish that the Plaintiffs are entitled to judgment as a matter of law on their section 523(a)(19) claim. First, the FINRA Award arose in connection with the Defendant's violation of securities law *or* from common law fraud, deceit, or manipulation in connection with the purchase or sale of a security (emphasis added). Although the Defendant argues that the FINRA Award did not include a specific reference to a violation of a federal or state securities law, that argument does acknowledge that a section 523(a)(19)(A) claim can be established if the debt is for **either** a violation of securities laws *or for common law fraud, deceit, or manipulation in connection with the purchase or sale of a security*. The Statement of Claim alleges, among other things, that the Defendant misrepresented material information about the securities he purchased, failed to disclose material information regarding the riskiness of the securities he purchased, failed to disclose a conflict-of-interest with respect to a security he purchased, and breached the fiduciary duty he owed to the Plaintiffs. The FINRA Award, which was issued 'in full and final resolution of the issues submitted for determination,' and which was confirmed by the Connecticut Superior Court, established that, at the very least, the Defendant made material misrepresentations and omissions regarding the securities he purchased and that he breached his fiduciary duty to the Plaintiffs in connection with the securities he purchased. As such, the Defendant's actions rise to the level of *common law fraud, deceit, or manipulation* in connection with the purchase or sale of any security as set forth in section 523(a)(19)" (emphasis in original).

*(ed: This is the first such case we've seen. **An* Alert *h/t to Editorial Advisory Board member David Robbins for alerting us to this decision. He was counsel for the Claimants in the arbitration.)*

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FINRA PANEL RENDERS $50+ MILLION AWARD AGAINST HEDGE FUND AND EXECS. ***As widely reported in the media, a former D.E. Shaw money manager prevailed to the tune of $52.1 million in his defamation claim against the firm and four senior executives.*** Financial services media widely reported recently that former money manager **Dan Michalow** had won his FINRA arbitration claim in *Michalow v. D.E. Shaw & Co., L.P.*, FINRA ID No. 18-03174 (New York, NY, Jun. 29, 2022). See, for example, *DE Shaw, Execs Must Pay $52 Mln to Ex-money Manager, Arbitration Panel Says*, Reuters (Jun. 30, 2022).We analyze the case below.

Claims Asserted

In Michalow's Statement of Claim: "Claimant asserted the following causes of action: defamation; gender discrimination; violation of New York Labor Law §§ 193, 198 et. seq.; breach of contract; and unjust enrichment. In the Amended Statement of Claim, Claimant asserted the following causes of action: defamation; violation of New York Labor Law §§ 193, 198 et. seq.; breach of contract; and unjust enrichment."

Damages Sought
Michalow sought: "defamation damages of $600,000,000.00; discrimination damages of $600,000,000.00; damages emanating from Respondents' failure to provide Claimant with his deferred compensation, and his 2018 compensation; punitive damages of $600,000,000.00; and such other and further relief, including but not limited to, statutory interest, attorneys' fees, filing fees, and costs. In the Amended Statement of Claim, Claimant requested defamation damages of $600,000,000.00; damages from Respondents' failure to provide Claimant with his deferred compensation and 2018 prorated compensation with statutory interest; liquidated damages to which he is entitled under New York Labor Law § 198; litigation costs, including attorneys' fees; punitive damages; and such other relief as deemed just and proper, including but not limited to, interest, filing fees, and costs. or additional relief and damages which the Panel deemed to be just and equitable."

Respondents' Answer
Respondents: "requested an award dismissing all of Claimant's claims; ordering Claimant to pay Respondents' costs and attorneys' fees; attorneys' fees and costs in defending the defamation claim; and all other and further relief as deemed just and proper."

The Award
The Panel finds the Respondents jointly and severally liable for $52,125,000 in compensatory damages for defamation. The Panel also: "specifically finds that Claimant did not commit sexual misconduct." The $93,150 in hearing session fees were assessed as follows: $46,575 against Claimant and $46,575 jointly and severally against Respondents. All other claims were denied.
*(ed: * The third Arbitrator withdrew from this matter, and the parties agreed to continue the hearing with the two remaining Public Arbitrators. **We checked with SAC's Award Database to see how this fit among the largest awards in securities arbitration, etc. The* Michalow *award is the largest award ever issued in an industry-initiated case. According to the database, it is also the tenth largest award in any type of dispute in any forum and the eighth largest compensatory damages award. ***This is definitely one to watch.)*
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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

FINRA BOARD MEETS IN PERSON NEXT WEEK. NO AGENDA YET. FINRA's Board of Governors will meet in person **July 13 – 14**; thus far, there is no published agenda. As usual, we will follow up after the meeting results are posted. The schedule for the rest of 2022 is: **September 21 – 22;** and **December 7 – 8**.
(ed: We'll tweet any news as soon as we have it.)
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***CERT.* DENIED IN ANOTHER INTERNATIONAL ARBITRATION DELEGATION CASE.** SCOTUS has denied *Certiorari* in *Beijing Shougang Mining Investment Company, Ltd. v. Mongolia*, No. 21-1244. As reported in SAA 2022-16 (Apr. 28), the **March 11** Petition sought review of a decision in a case of the same name

reported at 11 F.4th 144 (2d Cir. Aug. 26, 2021). In that case, the second Circuit held: "… that Petitioners-Appellants indisputably put the issue of the arbitrability of their claims to the arbitral tribunal when they consented, along with Mongolia, to the arbitration proceeding in two phases, with a combined jurisdictional and liability phase and, if necessary, a quantum phase. In doing so, the Parties agreed to submit arguments as to the appropriate reach of the arbitrators' jurisdiction over Petitioners-Appellants' claims under the Treaty to the arbitral tribunal. The Parties reached such agreement, moreover, after it had already become clear that the key jurisdictional issue to be argued during the first phase was the scope of the arbitration clause provided in the Treaty, and whether that clause is limited to disputes about compensation, a question clearly implicating 'arbitrability.' Consequently, we hold that the record supplies 'clear and unmistakable' evidence of the Parties' intent to arbitrate issues of arbitrability." The question presented to SCOTUS was: "Whether, as the Second Circuit held, participating in arbitration—including agreeing to a scheduling order as to the timing of jurisdictional objections and making arguments about jurisdiction to the arbitrators—is sufficient to show an agreement to arbitrate arbitrability, and thereby forgo the default *de novo* standard that governs judicial review of arbitrator decisions on arbitrability."
*(ed: *The case appears on page 9 of the June 27 Order List. **The* Cert. *denial came after the Court had granted the motion of Professor George A. Bermann for leave to file an* Amicus *Brief. ***Our editorial comment in # 16 was spot on: "We think this one will result in a denial. The issues to us are a bit one-off.")*
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TO VACATE OR NOT TO VACATE: THE PANEL MUST CONSIDER AN ISSUE, NOT NECESSARILY GET IT RIGHT. The Delaware Court of Chancery denied vacatur in *MHP Management, LLC. v. DTR MHP Management, LLC*, No. 2020-0365-LWW (Del. Ch. Jun. 21, 2022). The case involved multiple firms managing a group of investment funds relating to mobile home parks. The parties entered into an LLC Agreement in 2016, and then executed another document, a Written Consent, in 2017. Plaintiff ("MHP") challenged the validity of the 2017 Written Consent. In 2018, MHP made an "Unsuitability Determination," concluding that defendant ("DTR") had committed an act of "Good Cause" under the 2016 LLC Agreement. DTR filed an arbitration challenging the validity of the Unsuitability Determination. The arbitration panel issued a reasoned award finding the Unsuitability Determination was valid, and stating that it was unnecessary to determine the legal effect of the 2017 Written Consent. MHP then moved to confirm the arbitration award, and DTR cross-moved to vacate the award. DTR argued that the arbitration panel exceeded its authority by not considering the terms of the 2017 Written Consent and that the award was not final because the panel did not consider the 2017 Written Consent. Says the Opinion: "The defendants contend that the Award must be vacated because the arbitration panel exceeded its authority and because the panel's Award was not final and definite. The plaintiff disagrees. For the reasons discussed below, the defendants' arguments fall well short of the high bar they must meet to obtain vacatur of the Award." The court determined that the panel did interpret the parties' contract, and it was not concerned with whether the panel got its

meaning right or wrong. The court further explained that the panel did consider the 2017 Written Consent, and therefore issued a final award.
*(ed: *This short brief was authored by Mackenzie Connick, a 2L at St. John's University School of Law interning at the Securities Arbitration Clinic.)*
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UPDATE: DAVIS WRIGHT TREMAINE – MCGONIGLE MERGER GOES INTO EFFECT. We reported in the "Articles of Interest" section of SAA 2022-24 (Jun. 23) that Davis Wright Tremaine LLP was combining with McGonigle P.C.. A **June 10** Press Release says: "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 merger became effective **July 1**. SAA Editorial Advisory Board member **Theodore A. ("Ted") Krebsbach** is Senior Counsel at the newly-constituted firm.
(ed: We wish the firm success.)
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QUICK TAKES: CASES AND AWARDS WORTH READING

***Attix v. Carrington Mortgage Services, LLC*, No. 20-13575 (11th Cir. May 26, 2022)**: "Attix conceded that he had agreed to arbitrate claims arising from his use of Speedpay's service, including the claims he had asserted against Carrington, but argued that a provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. No. 111- 203, 124 Stat. 1376, prohibited enforcement of the parties' arbitration agreement…. Carrington argues that the district court erred in even deciding whether the Dodd-Frank Act prohibits enforcement of the parties' arbitration agreement. Carrington asserts that, by agreeing that an arbitrator would decide 'what is subject to arbitration' and would 'rule on his or her own jurisdiction,' the parties agreed that an arbitrator would decide such threshold arbitrability issues. Second, Carrington argues that, in any case, the district court erred in finding that the Dodd-Frank Act prohibits enforcement of the parties' arbitration agreement. Carrington is right on the first point, which means the second is not for us to decide. In the terms and conditions governing Attix's use of Speedpay's service, Attix and Carrington clearly and unmistakably agreed that an arbitrator would decide all threshold questions about the arbitrability of Attix's claims, including whether their arbitration agreement is enforceable."

***Smith v. Lindemulder*, 2022 MT 119 (Jun. 21, 2022)**: "Samuel Lindemulder (Sam) appeals the Twenty-Second Judicial District Court's Order Granting Motion to Approve Settlement Agreement (Order), in which the court approved a settlement agreement reached in mediation (Agreement) involving Sam, his brother Dan Lindemulder (Dan), and their siblings Lily Smith and Vernon Lindemulder (Petitioners). The Agreement resolved claims involving the Alice M. Lindemulder Trust (Trust), established by the parties' mother, which held approximately 2,151 acres of land in Stillwater County…. Sam does not specifically contest any of the District Court's factual findings, but argues he was unduly influenced in several ways. He argues the conditions under which he attended the mediation—remotely and ill with COVID-19—prevented him from

understanding the mediation's terms and properly participating, and therefore any consent he gave was the result of 'the parties and his counsel taking an unfair advantage of [his] 'weakness of mind.' He also argues that Petitioners' counsel, his brother Dan, and their joint counsel threatened him with legal action if he did not agree to the mediation's terms. Further, Sam contends that this undue influence 'continued after the mediation' up to his signing of the Agreement, because his attorneys continued to 'pressure[]' him by referring to future litigation. However, these arguments do not justify a conclusion the District Court erred in determining Sam validly consented to the Agreement" (brackets in original).

***SR Construction, Inc. v. Peek Brothers Construction, Inc*., 138 Nev. Adv. Op. No. 41 (Jun. 2, 2022)**: "In sum, the MSA [master subcontract agreement] provision incorporates the prime contract provision, which is broad, so the presumption of arbitrability applies, which Peek fails to rebut. The dispute is therefore arbitrable. And even construing the MSA provision narrowly, this dispute is arbitrable because it fits within the face of the arbitration provision: SR must arbitrate whether costs included in a change order are reasonable and reimbursable under the prime contract's arbitration agreement. Further, the prime contract and the MSA both include consolidation-of-arbitration provisions, and UHS is involved in this dispute because it has a potential financial interest in it, thus permitting consolidation of the Peek/SR and SR/UHS disputes. We therefore reverse the district court's order denying SR,'s motion to compel and remand with instructions to the district court to order that this matter proceed to arbitration."

***Tufariello v. Joseph Gunnar*, FINRA ID No. 20-00366 (New York, NY, May 25, 2022)**: An All-Public Panel awards a customer over $100,000 in punitive damages pursuant to case law relating to her purchase of various stocks, including VIA Motors Inc. and ZocDoc Inc. Respondent broker-dealer loses its request for expungement on behalf of a Non-Party broker. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Mazur v. Merrill Lynch*, FINRA ID No. 19-03635 (San Francisco, CA, May 26, 2022**): A Panel grants Respondent broker-dealer's Motion for Directed Verdict with prejudice pursuant to FINRA Rule 13504(b), as Claimant broker failed to prove any of his causes of action, including his claim for age discrimination. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Brodlija, F., *Disclosure Standards for Adjudicators in Investment Disputes: The Draft Code of Conduct for ISDS Adjudicators Through the Eyes of State Parties*, Kluwer Arbitration Blog (Jun. 29, 2022): "Two years since it was published, the draft of the Code of Conduct for Adjudicators in International Investment Disputes is still subject to discussion and refinement by States and other stakeholders participating in the UNCITRAL Working Group III (WG III). This evolving instrument, developed jointly by the ICSID and UNCITRAL Secretariats, is the first attempt to develop universal rules

of conduct for arbitrators, judges and other decision-makers in investment disputes (commonly referred to as 'adjudicators')."

***Citi Must Pay $1.4M to Financial Advisor Who Called it a 'Boys Club'*, Financial Planning (Jun. 26, 2022)**: "A decade after a former Citigroup financial advisor said the firm first cut off her access to its stock allocation system, she received vindication in the form of a FINRA arbitration award.[] [Advisor] won an award of more than $1.4 million from Citigroup Global Markets and other Citi entities for compensatory damages plus interest and attorney fees — along with an expungement of her U5 termination disclosure — after a New York panel ruled on June 24 that the firm had violated the section of the Civil Rights Act prohibiting discrimination in employment. The award also held Citi liable for breaching its own code of conduct and New York state laws against harassment and a hostile work environment, as well as a law forbidding retaliation."

***Drafting Effective Arbitration Agreements: Lessons Learned and Pitfalls to Avoid*, Willkie Farr & Gallagher LLP Blog (Jun. 27, 2022)**: "Parties generally agree to refer their disputes to arbitration as a matter of contract (an 'arbitration agreement'). The arbitration agreement is usually included in the contract to which it relates. Because arbitration proceedings are creatures of contract, the parties have significant flexibility – via their arbitration agreement – to develop bespoke procedural rules that will apply to any dispute that arises between them. It is thus crucial that parties treat the arbitration agreement as an essential component of each contract and obtain appropriate legal advice when the contract is being drafted" (footnote omitted).

***Tesla Worker Must Arbitrate Job Discrimination, Labor Law Claims*, Bloomberg Law (Jun. 28, 2022**): "Tesla Inc. can require an employee to arbitrate claims that he faced race harassment, lost out on promotions because he is Black, and was constructively discharged by the auto maker after appearing in an Audi Super Bowl ad, a Los Angeles federal judge ruled Tuesday [June 28]."

***UBS Ordered to Pay $976K Over YES Program*, Financial Advisor IQ (Jun. 28, 2022)**: "A Financial Industry Regulatory Authority arbitration panel has ordered UBS to pay close to a million dollars over alleged violations related to an in-house options trading strategy.[] [Investors] filed a claim against UBS in December 2020 alleging breach of fiduciary duty, negligent supervision and fraud, among other infractions, in connection to the firm's Yield Enhancement Strategy, according to a letter of acceptance, waiver and consent published by the industry's self-regulator."

***In Wells Fargo Case, FINRA Didn't Manipulate Arb Process: Independent Review*, Think Advisor (Jun. 29, 2022)**: "An independent review of an arbitration decision in favor of Wells Fargo that was thrown out in court when a judge ruled that the wirehouse had manipulated the Financial Industry Regulatory Authority's arbitrator selection process 'found no evidence of an improper agreement to remove certain arbitrators from arbitration cases,' according to the Lowenstein Sandler law firm, FINRA reported Wednesday.[] However, the review — ordered by FINRA and conducted by Lowenstein

Sandler — recommended that FINRA provide greater transparency to the arbitrator selection process."
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DID YOU KNOW?

A NICE WEBSITE ON INVESTMENT TREATY ARBITRATION. We often cover awards and court cases arising out of investment treaties. One resource we like and recommend is Investment Treaty Arbitration (www.italaw.com). This free Website has a searchable database that includes case info and awards; a newsletter; and other resources. Visitors can also sign up for updates.
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