SECURITIES ARBITRATION ALERT 2022-38 (10/13/22)

George H. Friedman, Editor-in-Chief

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DID YOU KNOW?

- **SCOTUS Posts Order Lists Most Monday Mornings While in Session**

IN MEMORIAM: CPR FOUNDER HENRY PASSES. *We were profoundly saddened to hear of the passing of* ***James F. Henry,*** *who founded and later served as president and chief executive officer of CPR until his retirement in 2000. He was 91. A CPR Blog post states: "Henry founded CPR in 1977 to continue previous foundation work on social justice issues that included studying poverty, Native American issues, and tropical disease eradication. In due course, it became the Center for Public Resources (later to change to the International Institute for Conflict Prevention and Resolution); its subject focus was business ADR. His delivery devices included new sets of conflict resolution*

rules, tools, initiatives and programs. (A timeline of Henry's and CPR's history is available on CPR's website here)…. Henry correctly projected that private ADR forums initiated by companies and industries would continue to proliferate after CPR's 1980s work." Mr. Henry attended Williams College and received law degrees from the Georgetown University Law Center in Washington, D.C., and the New York University School of Law. A memorial service is planned for November 13 at 3:00 p.m., in Waccabuc, New York. The family asks that those planning to attend contact Stephen Henry at shenry@henrylacey.com.

SQUIBS: IN-DEPTH ANALYSIS

PIABA TO SEC: DRAFT STRATEGIC PLAN SHOULD ADDRESS RIA USE OF MANDATORY PDAAS. ***PIABA has submitted a comment letter to the SEC, urging that its 5-year strategic plan include addressing RIA use of predispute arbitration agreements.*** The SEC on **August 24** issued a notice requesting comments on its draft *Strategic Plan for Fiscal Years 2022-2026*. The draft Plan: "focuses on three goals that advance our mission: 1. Protect working families against fraud, manipulation, and misconduct; 2. Develop and implement a robust regulatory framework that keeps pace with evolving markets, business models, and technologies; and 3. Support a skilled workforce that is diverse, equitable, and inclusive and is fully equipped to advance agency objectives."

PIABA: What About RIA Arbitration?

The SEC notice included solicitation of comments from the public: "to gain the benefit of additional outside perspectives." Among the several comments received was one dated **September 29** from PIABA that focuses on RIA use of mandatory predispute arbitration agreements ("PDAA"). Says the letter: "In reviewing the Strategic Plan, we noted the SEC did not address the issue of dispute resolution for investors, particularly those involving Registered Investment Advisers ('RIAs'). Our members are seeing RIAs take advantage of the lack of oversight and impose oppressive pre-dispute arbitration clauses that prevent their clients from seeking redress. Since the SEC is tasked with protecting the investing public and overseeing more than 14,000 SEC-registered RIAs, the Strategic Plan should call for the SEC to make efforts to control RIAs' use of pre-dispute clauses and require, among other things, standardized pre-dispute clauses, shifting of the majority of arbitration fees to the RIAs using such clauses, increased transparency of the scope and implications of the dispute process, as well as the mandatory disclosure of information regarding an RIA's dispute history so the SEC and investing public may be better informed."

FINRA Dispute Resolution: "A More Accessible Forum with Superior Investor Protections"

After defining the problems associated with expanded RIA use of private arbitration fora, the letter extols the virtues of FINRA Dispute Resolution Services ("DRS"), referring to it as: "a more accessible forum with superior investor protections." We repeat the paragraph in its entirety, omitting footnotes and reformatting it using bullets:

- Currently, FINRA's Dispute Resolution arbitration program is the only securities industry-sponsored forum. FINRA rules mandate that FINRA-registered firms use the forum if requested by the investor, regardless of other forum selection language in an investor account agreement.
- FINRA rules also provide certain protections and prohibitions regarding dispute resolution, including the mandate that member firms must provide clear, prominent disclosures about the presence and terms of the arbitration clause.
- FINRA, through the CRD, also tracks the number of investor complaints, whether the complaint was brought to arbitration and whether the arbitration resulted in an award, vital information for an investor who is considering engaging a member firm to manage their hard-earned savings.
- Further, FINRA member firms subsidize the bulk of FINRA arbitration forum fees, and while additional forum fees may be assessed against the investor at the end of a FINRA hearing, investors can proceed with their FINRA arbitration claim by paying only the initial filing fee, ranging between $50 to $2,300: sums that are significantly less than the fees charged by private forums.
- The Director of FINRA Dispute Resolution may also waive the initial filing fee for investors.
- Even if the FINRA member firm or associated person does not timely pay their share of forum fees, FINRA allows the case to proceed. This is a significant difference from private arbitration forums.
- By comparison to what RIAs are imposing through forced arbitration clauses, FINRA's rules and regulations relating to the arbitration of customer disputes with broker-dealers provide a more accessible forum with superior investor protections.
- While PIABA does not believe forcing customers into arbitration for securities disputes is ever appropriate, at a minimum, there needs to be sufficient protections at the levels FINRA provides in its arbitration forum so investors with RIAs are not doubly abused.

*(ed: *We'll track any changes to the draft. **Other comments, which were due September 29, may be viewed here. ***We suggest DRS keep the comment letter handy for use when the Authority next appears before a congressional committee.)*
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FINRA WEBSITE SHOWS PROGRESS ON "RIGGED PANELS" INVESTIGATION REPORT RECOMMENDATIONS. ***FINRA has launched a dedicated Webpage tracking the institutions' follow-up on recommendations resulting from the outside investigation of allegations that the arbitrator selection process was rigged.*** FINRA on **June 29** released a 37-page *Report of the Independent Review of FINRA's Dispute Resolution Services – Arbitrator Selection Process*, which was announced in a corporate Press Release and a separate statement from the Audit Committee. The investigation was directed by **Christopher Gerold**, a partner in Lowenstein Sandler LLP's Securities Litigation and Corporate Investigations & Integrity Practice Groups.

Recommended Changes
After discussing methodology and the operation of the Neutral List Selection System, the Report concluded there were no irregularities, and it closed with recommendations for improvement. The core recommendations are (*ed: presented* verbatim *from the Release*):

- Implementing ongoing, mandatory training for staff;
- Requiring written explanations, upon a party's request, of approval or denial of a causal challenge to the selection of an arbitrator or an arbitrator removal by the DRS Director for cause;
- Conducting an updated external procedural review of the arbitrator selection algorithm to determine if it is still the most effective means for creating random, computer-generated arbitrator lists; and
- Updating the DRS Manual and rules to clarify staff roles and procedures, and to ensure consistency and transparency.

FINRA's Follow-up
FINRA's management accepted all recommendations, and now posts on its Website a live progress report on implementation. *Status Report on Lowenstein Sandler LLP Recommendations* shows that most items are "in progress" but one – establishing a policy to provide a written explanation "every time a challenge, or a party's request to remove an arbitrator, is decided" – was already implemented on **September 1**.
*(ed: *As stated above, the Report recommended that explanations be given upon request, but FINRA notes it has gone beyond the recommendation. **Kudos to FINRA for its transparency.)*
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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

FINRA'S PROPOSED TECHNICAL RULE CHANGE IS PUBLISHED AND IN EFFECT: "NEUTRAL LIST SELECTION SYSTEM" IS NOW THE "LIST SELECTION ALGORITHM." We reported in SAA 2022-36 (Sep. 22) that FINRA on **September 15** filed with the SEC SR-FINRA-2022-026, *Proposed Rule Change to Change References in the Codes of Arbitration Procedure from the Neutral List Selection System to the List Selection Algorithm.* According to the Authority's Website, the purpose of the change is to: "change references in the Codes of Arbitration Procedure from the Neutral List Selection System to the list selection algorithm." FINRA was: "proposing to update the Codes by making technical, non-substantive changes to remove references to the NLSS from those rules describing arbitrator list selection and instead refer to the 'list selection algorithm.' The proposed rule change would provide greater transparency and consistency regarding arbitrator list selection, as the Codes would reflect and align with DRS's existing practices, processes and systems relating to arbitrator list selection" (footnote omitted)." FINRA sought summary or accelerated effectiveness due to the non-controversial nature of the proposal. Said the rule filing: "FINRA requests that the Commission waive the requirement that the rule change, by its terms, not become operative for 30 days after the date of the filing as set forth in Rule 19b-4(f)(6)(iii), so FINRA can implement the proposed rule change immediately to make the proposed technical, non-substantive changes. FINRA believes this is appropriate in the interest of

regulatory transparency and harmonization." The proposed rule was published in the *Federal Register* on **September 28** (Vol. 78, No. 187, P. 58854), and was granted immediate effectiveness **September 15**.
*(ed: *We said in our editorial comment in # 36: "We imagine this one will sail through quickly" and it did. **Comments are still permitted, by October 18. ***The* Codes *have already been updated. See, e.g., Rule 12400.)*
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REPORT: CFPB MAY REVIEW ARBITRATION (DESPITE WHAT WE SAID IN A PREVIOUS *ALERT*). We reported in SAA 2022-36 (Sep. 22) that a coalition of over a hundred consumer advocacy groups had written to Consumer Financial Protection Bureau ("CFPB") Director **Rohit Chopra**, urging that the Bureau exercise its Dodd-Frank authority to regulate consumer financial arbitration. We noted that, before it became effective, the Bureau's Final Rule -- which banned class action waivers -- 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*, a substantially similar reg cannot be reintroduced without the express permission of Congress. We closed with: "We're still of the view that the CFPB has other fish to fry, but we'll track this for a response. For an analysis of why arbitration may not be a CFPB priority see *Report: CFPB Unlikely to Undertake Consumer Arbitration Rulemaking in Near Future* in the **September 15** Consumer Finance Monitor Blog." Now comes Bloomberg, which takes the opposite view in a **September 14** post, *Forced Arbitration on Table With CFPB Contract Clause Review*.
*(ed: *Our prediction? One of these is correct. **Our guess is that the outcome will depend on the interpretation of "substantially similar." For example, is a new reg with an outright ban on predispute arbitration clauses, but silent on class action waivers, "substantially similar" to the nullified rule? Time will tell.)*
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THIRTEENTH ANNUAL SECURITIES DISPUTE RESOLUTION TRIATHLON – VIRTUAL AGAIN THIS YEAR – IS OCTOBER 15 - 16. The *2022 Securities Dispute Resolution Triathlon* will take place **October 15 - 16**. As was the case last year, the event will be virtual. The Triathlon, which has its own Webpage, is a joint initiative of the Hugh L. Carey Center for Dispute Resolution of St. John's University School of Law and FINRA: "The Triathlon provides student teams from participating law schools with an opportunity to demonstrate their advocacy skills in negotiation, mediation and arbitration of a securities dispute." Attorneys and FINRA neutrals are invited to serve as judges in this annual event. Attorneys who serve as judges during the Triathlon will receive CLE credit from the law school.
*(ed: *The event will take place via Zoom. **Questions about competition logistics should be sent using this link.)*
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RITES SET FOR FORMER AAA PRESIDENT BILL SLATE. We reported in SAA 2022-23 (Jun. 16) that **William K. ("Bill") Slate II**, longtime President of the American Arbitration Association, had passed away in **June**. Mr. Slate served as the AAA's leader from 1994 until his retirement in 2013, succeeding **Robert Coulson**. We noted in # 23 that a memorial service was being planned. We've now received notice that his funeral service will be held Saturday, **October 22**, at St. Bartholomew's Church, 325 Park Ave, in Manhattan at 11am. A Celebration of Life will follow at *Inside Park at St. Barts*. *(ed: Memorial contributions may be made to either www.AAAICDRFoundation.org in honor of William K. Slate II or Girard College www.Girardccollege.edu.)*
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QUICK TAKES: CASES AND AWARDS WORTH READING

***Bissonnette v. LePage Bakeries*, No. 20-1681 (2d Cir. Sep. 26, 2022)**: "Plaintiffs, who deliver baked goods in designated territories in Connecticut, brought this action in the United States District Court for the District of Connecticut (Dooley, J.) on behalf of a putative class against the manufacturer of the baked goods that plaintiffs deliver. The plaintiffs allege unpaid or withheld wages, unpaid overtime wages, and unjust enrichment.[] The district court compelled arbitration pursuant to an arbitration agreement that is governed by the Federal Arbitration Act ('FAA') and Connecticut law. Plaintiffs claim that they are not subject to the FAA because Section 1 of the FAA excludes contracts with 'seamen, railroad employees, [and] any other class of workers engaged in foreign or interstate commerce.' 9 U.S.C. § 1. The exclusion is construed to cover 'transportation workers.' The district court held that the plaintiffs did not qualify as transportation workers, ordered arbitration, and dismissed the case. For the reasons below, we affirm.[] Judge Jacobs concurs in a separate opinion, and Judge Pooler dissents in a separate opinion."

***In re Petition of Federal Republic of Nigeria*, No. 1:21-mc-00007 (S.D.N.Y. Sep. 14, 2022)**: "The Federal Republic of Nigeria ('Nigeria') requests permission to conduct discovery for use in a foreign proceeding pursuant to 28 U.S.C. § 1782. Nigeria seeks leave to serve subpoenas on VR Advisory Services, VR Advisory Services (USA) LLC, VR Global Onshore Fund, L.P., VR Argentina Recovery Onshore Fund II, L.P., Jeffrey Johnson, and Ashok Raju (collectively, 'Respondents'). Respondents oppose the application…. For the reasons that follow, the application is granted.... In short, because Respondents are located in the Southern District of New York, the requested discovery is 'for use' in the English Proceeding, and Nigeria is an interested person, the statutory requirements of Section 1782 are satisfied" (internal citations omitted).

***Kingery Construction Co. v. 6135 O Street Car Wash, LLC*, 312 Neb. 502 (Sep. 23, 2022)**: "Kingery Construction Co. (Kingery) sued 6135 O Street Car Wash, LLC (OSCW), for breach of contract and later moved to stay the case for arbitration under 9 U.S.C. § 3 (2018) of the Federal Arbitration Act (FAA). OSCW opposed Kingery's motion, arguing that Kingery waived its right to arbitration by its litigation-related conduct. The district court found that there was no waiver because OSCW was not

prejudiced by Kingery's in *Good Samaritan Coffee Co. v. LaRue Distributing*, which adopted a three-part test of waiver based on litigation-related conduct used by the U.S. Court of Appeals for the Eighth Circuit. OSCW appealed. While the appeal was pending, the U.S. Supreme Court ruled in *Morgan v. Sundance, Inc*. that the Eighth Circuit erred in conditioning a waiver of the right to arbitration on a showing of prejudice. In light of *Morgan*, we reverse, and remand for further proceedings" (footnotes omitted).

***Oliver v. Key Investment*, FINRA ID No. 19-03331 (Hartford, CT, Aug. 16, 2022)**: A broker is awarded over $1 million in damages on his retaliation and owed compensation claims, along with reformation of defamatory information on his Form U5 record. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Pickett v. TD Ameritrade*, FINRA ID No. 21-02073 (Louisville, KY, Aug. 18, 2022)**: In this small claims arbitration, the Arbitrator explains why he has decided to grant Respondent broker-dealers' Prehearing Motions to Dismiss pursuant to FINRA Rules 12511(b) and 12212(c). The Motions were granted against the customer as a sanction for his failure to comply with the Arbitrator's Order regarding the production of discovery. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*
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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Shatrunjay Bose & Hongwei Dang, *Arbitration Tech Toolbox: Training Arbitration Practitioners to Resist Cyber Attacks*, Kluwer Arbitration Blog (Oct. 2, 2022): "Since the beginning of its activities in late 2020, CyberArb has aimed to provide practical tools and educational pieces, including its newly launched newsletter, to bridge the gap between theory and practice. To this end, CyberArb has partnered with ArbitrateUniversity.com to offer a new online training module on cybersecurity essentials in international arbitration, dedicated to all arbitration practitioners. The module begins with a brief introduction by Karina Albers (independent arbitrator, Chair of the London Branch of CIArb and member of CyberArb's Executive Board), who explains that cyber-attacks are a growing threat worldwide. The Covid-19 pandemic has compelled us to move to a hybrid work environment, one that relies heavily on the Internet and that results in an escalation of cyber-attacks. The international arbitration community has pioneered virtual hearings, which, on the one hand, have put parties at ease but, on the other hand, have made arbitral institutions and law firms especially vulnerable to cyber-attacks."

***The AAA Updates its Commercial Arbitration Rules: What Are the Key Changes?* Freshfields Blog (Sep. 28, 2022)**: "The American Arbitration Association (AAA) recently issued amendments to its Commercial Arbitration Rules. The Commercial Arbitration Rules are the AAA's rules used for business-to-business disputes. The revisions, effective September 1, 2022, are the culmination of a two-year review process that included contributions from stakeholders, including arbitrators, parties, and AAA case managers…. We summarize the most notable changes below."

***Finra Dusts Off Sanction Guidelines, Eliminates Suggested Fine Cap*, AdvisorHub (Sep. 30, 2022)**: "The Financial Industry Regulatory Authority is updating its sanction guidelines used by its enforcement officials to determine the appropriate fines or penalties to levy on firms and individual brokers, according to an announcement.[] The changes are mostly symbolic as the guidelines are merely a rough outline of potential fines and had not been closely followed, lawyers said.[] Finra's September 2022 guidelines, for example, eliminates a recommended upper limit of $310,000 on fines, according to an announcement on Thursday. Finra, however, had frequently levied fines in excess of that amount, including a record $70 million penalty against trading app Robinhood Financial."

***Court Grants Nigeria's Second § 1782 Application for Discovery in Foreign Proceeding in Dispute Over $10B Arbitration Award Related to Gas Supply Agreement*, JDSupra (Oct. 1, 2022**): "The U.S. District Court for the Southern District of New York granted the 28 U.S.C. § 1782 application of the Federal Republic of Nigeria to issue subpoenas on four U.S. entities and two individuals, the respondents, in aid of an upcoming fraud trial against Process and Industrial Developments Ltd. (P&ID) before the English High Court of Justice in London, England. In that proceeding, Nigeria seeks to set aside a $10 billion arbitral award, which arose from a gas supply and processing agreement between P&ID and Nigeria that Nigeria claims was fraudulently procured. According to Nigeria, P&ID is a 'shell entity whose only asset' is the arbitration award. Nigeria sought to issue a subpoena to each respondent concerning the acquisition of P&ID, financial records, P&ID's business operations relating to the agreement and the arbitral award, and other issues." (*ed: See our coverage elsewhere in this* Alert.)

***Why the CFPB's Anti-Arbitration Bias is Bad for Consumers*, U.S. Chamber of Commerce (Oct. 6, 2022)**: "Almost five years to the date since the CFPB's arbitration rule was shut down by Congress, the CFPB, now under the leadership of Director Rohit Chopra, is looking to bring the rule back from the dead. Chopra, under pressure from progressive groups, recently gave a speech where he alluded to the possibility of promulgating a new arbitration rule.[] If the CFPB decides to go down this route and attempts to issue a new arbitration rule, consumers and businesses will lose. These contracts do not require more regulation. The CFPB would be wise not to try to it again."
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DID YOU KNOW?

DID YOU KNOW? SCOTUS POSTS ORDER LISTS MOST MONDAY MORNINGS WHILE IN SESSION. With the first Monday in October behind us, we thought it was a good time to remind readers that the Supreme Court's Website, https://www.supremecourt.gov/, offers a wealth of information. Besides being a place to find Opinions, the site posts an Order List at 9:30 a.m. most Monday mornings when the Court is in session. We use this feature to check on *Certiorari* Petition status. The landing page also has an easy-to-use Court oral argument calendar.
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Send any messages or inquiries to: George@SecArbAlert.com

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