SECURITIES ARBITRATION ALERT 2022-43 (11/17/22)

George H. Friedman, Editor-in-Chief

SQUIBS:

- **A Few Minutes with New PIABA President Hugh Berkson**

SHORT BRIEFS:

- **Remember the Case Where a Broker Challenged a Zoom Hearing Ordered Over His Objection? The Broker Just Got an Expungement Award**
- **One of the Recent Changes to AAA's Commercial Rules Authorizes Video Hearings**
- **Former AAA Exec Naimark Joins CPR Dispute Resolution Board**

QUICK TAKES:

- ***Local Union 97 v. NRG Energy, Inc.,* No. 21-2565 (2d Cir. Nov. 10, 2022)**
- ***Taska v. The RealReal, Inc.,* No. A164130 (Calif. Ct. App. 1 Nov. 4, 2022)**
- ***Zhang v. Super. Ct.*, No. B314386 (Calif. Ct. App. 2 Nov. 9, 2022)**
- ***Romano v. Centaurus Financial,* FINRA ID No. 21-01782 (San Diego, CA, Oct. 19, 2022)**
- ***Becker v. Edward Jones,* FINRA No. 22-01321 (Denver, CO, Oct. 21, 2022)**

ARTICLES OF INTEREST:

- **Manesh, Mohsen & Grundfest, Joseph A., *The Corporate Contract and Shareholder Arbitration* (Sep. 9, 2022)**
- ***The Debate: Arbitration or Court: Know the Pros and Cons,* Construction and Procurement Law News (Oct. 27, 2022)**
- ***The Oklahoma Supreme Court Gets Spooked, Refuses to Enforce a Consumer Arbitration Agreement,* Arbitration Nation (Oct. 15, 2022)**
- ***FINRA Creates Industry Diversity Advisory Committee,* www.finra.org (Nov. 9, 2022)**
- ***NFA Orders Chicago, Ill. Introducing Broker Stage 5 Trading Corp. to Pay a $75,000 Fine*, www.nfa.org (Nov. 10, 2022)**
- ***Top 10 Questions About Securities Litigation*, National Law Review (Nov. 10, 2022)**

DID YOU KNOW?

- **Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act Now Codified**

ALERT! EARLY *ALERT* NEXT WEEK. *We usually publish on Thursdays. Because of the upcoming Thanksgiving holiday, we plan to publish next Wednesday afternoon. Look for us in your email box on November 23. Our weekly blog selection will be posted on Friday, as usual. In the meantime, enjoy this 2014 blog post authored by your publisher that has held up well over time:* Just Like Thanksgiving and Black Friday: Five Truisms about Arbitration -- That Aren't True*. Who knew the Pilgrims didn't dress solely in black or wear buckled shoes? Or that, like Solomon, arbitrators don't split the baby in half?*

SQUIBS: IN-DEPTH ANALYSIS

A FEW MINUTES WITH NEW PIABA PRESIDENT HUGH BERKSON. ***We reported in SAA 2022-42 (Nov. 10) that the Public Investors Advocate Bar Association ("PIABA") announced in an October 27 Press Release that Hugh D. Berkson of McCarthy, Lebit, Crystal & Liffman was elected President at its just-concluded annual meeting. As promised, we interviewed Mr. Berkson about his priorities for this upcoming year.***

Q: What are PIABA's top three priorities for the coming year?

A: As I start my term, I expect to focus on three things this coming year. First: PIABA looks forward to working with both FINRA and the SEC to address the problem surrounding unpaid awards in both the broker dealer/RIA contexts. Since PIABA published its first report on FINRA unpaid awards in February 2016, the problem has only grown worse. FINRA's most recent data shows that 37% of all awards in 2020 went unpaid: a figure that should not be countenanced by the industry or regulators. There is no centralized reporting concerning RIA arbitration results, and we look forward to the results of SEC and NASAA efforts to gather data on the subject, so that the bounds of the RIA unpaid award problem can be understood and addressed. Second: PIABA will continue its efforts, started last year under Michael Edmiston, to study and address the myriad of problems surrounding registered investment advisors' imposition of arbitration clauses as shields to immunize themselves from facing claims. RIA arbitration clauses requiring the use of high-cost arbitration forums, far-flung venues, unfavorable choice of law provisions, and hedge clauses designed to scare clients from bringing claims, run afoul of those RIAs' fiduciary duties to their clients. Third, PIABA will maintain its support for the Investor Justice Act, which would require the SEC to establish a grant program to fund qualified investor advocacy clinics.

Q: Several bills have been introduced in Congress to curb mandatory predispute arbitration agreement use in the consumer and employment areas – including financial services. We know that President Biden on March 3 signed the ***Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021,*** **which** expressly amended the Federal Arbitration Act to make predispute arbitration agreements voidable at the option of the victim. **Do you think any of the other bills have a chance at enactment before this Congress expires January 3?**

A: Not only is passage of the referenced bill a substantively good measure in and of itself, I take some comfort seeing that, where arbitration is being flagrantly abused, Congress is willing to act in a bipartisan manner to address the problem. I hope that the spirit of cooperation continues and allows Congress to address other situations in which individuals are denied access to justice regarding matters of critical importance. PIABA will continue to shine the light on problematic issues concerning arbitration in the financial services industry – whether they relate to broker/dealers or registered investment advisors – and bring those matters to legislators' and regulators' attention.

Q: In your October 27 formal statement on assuming the PIABA presidency, you say: "The recent market volatility indicates that claims will likely increase, which will, in turn, highlight the problems brought about by problematic investment advisor mandatory arbitration clauses and awards that go unpaid by financial services professionals. Thus, the coming year is poised to be a crucial one for investor protection." Care to elaborate?

A: Absolutely, and thanks for the opportunity to explain. As the United States has moved away from a retirement system principally based upon defined benefit retirement plans, and toward defined contribution ones, people are often entirely dependent on their hard-earned 401K plan balances to fund their retirement. Much of the industry's marketing is focused on convincing people that they do not have the skills to manage those funds, and therefore require the use of a financial professional to ensure their 401K accounts will be sufficient to meet their needs. When those professionals act inappropriately, and needlessly deplete their clients' retirement plans, those clients have no meaningful safety net save Social Security – which was never designed to fund the entirety of those clients' retirement plans.

As the market volatility continues, and as account balances fall, financial professionals' wrongdoing will inevitably be exposed, which will lead to more investors bringing claims related to negligence, breach of fiduciary duty, and fraud. If those claims are hindered thanks to arbitration provisions that make it impossible to actually bring claims, or a system that makes it impossible to collect on hard-fought arbitration awards, the investors who did everything right - they worked hard, saved as much as possible, and used a professional to manage their funds – will find themselves in dire straits.

In short: the down market will almost certainly reveal the unintended consequences of the current situation. Baby Boomers are starting to retire in record numbers, and American investors will soon acknowledge that the status quo is intolerable.

Q: The COVID-19 pandemic caused lots of changes in the ADR world, including at FINRA. Besides forever getting rid of the middle seat in coach, what's the one change you'd like to see continue?

A: As someone who has long-embraced technological aids to my practice, I look forward to seeing how tech continues to be adopted in the dispute resolution process. While we're all getting more comfortable with presenting witness testimony, or conducting entire arbitrations, via videoconferencing, I'm especially curious to see how well we can integrate video feeds with effective document presentation.

Q: Is there anything else you'd like to share with our readers?

A: PIABA has grown in a meaningful way since its inception. While originally formed to help curb abuses found in the NASD and NYSE arbitration spaces, we've evolved into a full-fledged investor advocate bar association. Robin Ringo, our executive director for

the last 26-odd years, has been instrumental in overseeing and guiding that growth. She is retiring at the end of March 2023, and her successor, Jennifer Shaw, will take the reins. Robin's presence will be missed terribly, and yet we very much look forward to working with Jennifer in the years to come.
*(ed: *The* Alert *congratulates Mr. Berkson and thanks him for agreeing to answer our questions. We wish him nothing but the best as we head into what promises to be a challenging year on several fronts. **We also wish both Ms. Ringo and Ms. Shaw the best of luck in their respective new endeavors.)*
return to top

SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

REMEMBER THE CASE WHERE A BROKER CHALLENGED A ZOOM HEARING ORDERED OVER HIS OBJECTION? THE BROKER JUST GOT AN EXPUNGEMENT AWARD. We reported in **mid-2020** on *Legaspy v. FINRA*, No. 1:20-cv-04700, which was filed in the U.S. District Court for the Northern District of Illinois, alleging breach of contract because the FINRA *Code of Arbitration Procedure* doesn't expressly authorize hearings to be held by videoconference absent party agreement. We monitored the telephonic argument held **August 2020**, that included as participants counsel for FINRA, Legaspy, and the other parties in the underlying arbitration. Here's what thereafter transpired:

- In a thorough 10-page decision issued that summer, District Judge **Lefkow** went through each of the Plaintiff's assertions and rejected them.
- Legaspy appealed immediately to the Seventh Circuit, which in a one-page Order posted the same day (**August 14, 2021**) declined to issue either a temporary or preliminary injunction or to expedite briefing. Then-Judge **Coney Barrett** was part of the Panel.
- The hearings proceeded as scheduled via Zoom starting **August 17, 2020** for 38 sessions through **February 2021.**
- The Customers in **November 2020** settled and withdrew their claims against Legaspy and Insight Securities, leaving Pershing as the sole remaining Respondent.
- The Award in *Anton v. Insight Securities, Inc., Pershing LLC and Legaspy,* FINRA ID No. 19-00474 (New York, NY, Mar. 25, 2021), denied all claims against Pershing, but sanctioned it $250,000 for discovery abuse.
- Pershing moved in New York State court to vacate the sanctions part of the Award in **April 2021**, contending that the Arbitrators exceeded their authority under the Federal Arbitration Act and New York's arbitration statute.

Here's an update: The court challenge was discontinued without prejudice **May 7, 2022**, and broker Legaspy recently received an Award in *Legaspy v. Insight Securities, Inc.*, FINRA ID No. 21-01761 (Chicago, IL, Nov. 7, 2022), recommending expungement under FINRA Rule 2080(B) ("the registered person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation or conversion of fund").
(ed: We think that should wrap things up.)
return to top

ONE OF THE RECENT CHANGES TO AAA'S COMMERCIAL RULES AUTHORIZES VIDEO HEARINGS. Readers may recall that, just as we were putting SAA 2022-33 (Sep. 1) to bed, came word that the AAA has revised its *Commercial Arbitration Rules and Mediation Procedures*, effective **September 1**. We did a more thorough analysis in SAA 2022-34 (Sep. 8) and blogged on it as well. One of the many changes described in AAA's FAQ got our attention: "The revisions … reflect the opportunity presented by advancements in meeting technology to make the arbitration process more effective and efficient. Rule R-22 includes the use of video conferencing as a method for conducting the preliminary hearing, and Rule R-25 and Expedited Procedure E-7 similarly include video, audio, or other electronic means as a method of hearing, when appropriate. While the AAA has interpreted the previous Rules to allow the arbitrator to order the use of technology to facilitate hearing attendance, *the new Rules specifically provide for this authority*" (emphasis added).
*(ed: *This to us is a lesson learned from coping with the COVID pandemic. **We've been urging since May 2020 that FINRA similarly amend the* Codes. *See our "Letter From the Editor" titled:* Letter from the Editor: Change the Code to Support Virtual Hearings.*)*
return to top

FORMER AAA EXEC NAIMARK JOINS CPR DISPUTE RESOLUTION BOARD. Retired long-time AAA Executive **Richard W. Naimark** has joined the CPR Dispute Resolution Board, a **November 8** Press Release announced. CPR Dispute Resolution is: "a subsidiary of CPR and a leading alternative dispute resolution (ADR) provider for business-to-business disputes, as well as employment disputes." The Release states that Mr. Naimark is: "an experienced neutral with a distinguished history of service in ADR. In addition to his leadership at AAA, he was the founder of the International Center for Dispute Resolution (ICDR) and the Global Center for Dispute Resolution Research. He also served as Permanent Secretary – North America, Court of Arbitration for Sport. His experience includes consulting in the establishment of international ADR centers and trainer and leader of seminars on mediation and arbitration in the U.S. and globally. He received a B.A. from the University of Rhode Island and a Master of Science – Business Policy from Columbia University Business School."
(ed: Your publisher worked with Mr. Naimark for many years when they were both officers of the AAA, and can vouch for his ADR acumen. A fine choice!)
return to top

QUICK TAKES: CASES AND AWARDS WORTH READING

***Local Union 97 v. NRG Energy, Inc*., No. 21-2565 (2d Cir. Nov. 10, 2022)**: A labor case applying the presumption of arbitrability. "Appeal from United States District Court for the Northern District of New York (Gary L. Sharpe, J.) dismissing Local Union 97, International Brotherhood of Electrical Workers, AFL-CIO's ('Local Union 97') complaint against NRG Energy, Inc. Local Union 97 brought a complaint compelling arbitration based on a dispute between NRG and Local Union 97 over retiree benefits. Because the presumption of arbitrability applies to the parties' collective bargaining agreement, we reverse and remand for further proceedings consistent with this opinion."

***Taska v. The RealReal, Inc*., No. A164130 (Calif. Ct. App. 1 (Nov. 4, 2022)**: "This is an appeal from judgment in a wrongful termination and retaliation lawsuit. An arbitrator initially resolved the dispute in favor of defendant The RealReal, Inc. (TRR), and against its former employee, plaintiff Elizabeth Taska, but denied the parties' respective requests for attorney fees and costs (April 3, 2020 Award). However, the arbitrator then issued a revised award that added an award of approximately $73,000 in attorney fees and costs to TRR (June 29, 2020 Corrected Final Award). Taska petitioned the trial court only to vacate the newly rendered attorney fees and costs award. TRR, in turn, petitioned the court to confirm the June 29, 2020 Corrected Final Award in full. The trial court sided with Taska and struck the award of attorney fees and costs, reasoning the arbitrator exceeded her authority by making substantive changes to the April 3, 2020 Award. The court otherwise confirmed the arbitrator's award and entered judgment in favor of TRR. 2 TRR contends the court's order to strike the award of attorney fees and costs was legally and factually wrong. We disagree and affirm." (*ed: An* Alert *h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this decision.)*

***Zhang v. Super. Ct*., No. B314386 (Calif. Ct. App. 2 Nov. 9, 2022)**: "Petitioner sought a writ of mandate, which we denied. The Supreme Court granted review and transferred the case back to us, directing us to issue an order to show cause. We did so, and now again deny the petition. We agree with the trial court that the parties delegated questions of arbitrability to the arbitrator. The arbitrability issues in this case include whether petitioner is an employee who may invoke Labor Code section 925 and require the merits of the dispute to be resolved in California instead of New York. We reject petitioner's contention that, because he invoked section 925, the New York court is not 'a court of competent jurisdiction' (Code Civ. Proc., § 1281.4) that can order arbitration of this dispute." We covered the referenced California Supreme Court decision in SAA 2022-09 (Mar. 10), where we wrote: ***Zhang v. Superior Court (Dentons U.S.)*, No. S272152 (Calif. Feb. 16, 2022)**: "The petition for review is granted. The matter is transferred to the Court of Appeal, Second Appellate District, Division Eight, with directions to vacate its order denying mandate and to issue an order directing respondent court to show cause why the relief sought in the petition should not be granted. (Cal. Rules of Court, rule 8.528(d).) The request for a stay of the trial court's order lifting its injunction against the New York arbitration is granted, subject to further consideration by the Court of Appeal." (*ed: An* Alert *h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this decision.)*

***Romano v. Centaurus Financial*, FINRA ID No. 21-01782 (San Diego, CA, Oct. 19, 2022)**: A group of customers alleging elder abuse and unsuitability with respect to investments in various real estate investment trusts and mutual funds, including the Apollo Institutional Income Fund, are awarded monetary relief, including punitive damages, pursuant to California Code, Civil Code §3294 against a named Respondent broker's estate. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Becker v. Edward Jones*, FINRA No. 22-01321 (Denver, CO, Oct. 21, 2022)**: An Arbitrator explains why he has decided to: 1) grant without prejudice Respondent broker-dealer's Prehearing Motion to Dismiss pursuant to FINRA Rule 13206 (Six-year Eligibility Rule for Industry Disputes): and 2) ultimately deny Claimant's request for reformation of alleged defamatory information appearing on his CRD record. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*
return to top

ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Manesh, Mohsen and Grundfest, Joseph A., *The Corporate Contract and Shareholder Arbitration* (September 9, 2022): "This analysis differs substantially from arguments that charters and bylaws are not contracts and, therefore, not subject to the FAA. This Article instead embraces what the courts have repeatedly stated, that charters and bylaws are contracts, but broadens the analysis to emphasize the need for state assent as a precondition to contract formation. Because that assent is not forthcoming in Delaware with respect to mandatory arbitration provisions that would preclude or unreasonably burden securities fraud class actions, there can be no agreement to adopt those inequitable provisions in the corporate charter or bylaws, and absent the assent necessary for contract formation, the plain text of the FAA makes clear that the FAA cannot apply."

***The Debate: Arbitration or Court: Know the Pros and Cons*, Construction and Procurement Law News (Oct. 27, 2022)**: "Many construction contracts used in the industry include clauses mandating that any disputes be decided by binding arbitration rather than a jury or bench trial. The standard AIA forms provide the parties with the option of court or arbitration. Trial courts, overwhelmed by a flood of cases and supported with strong caselaw and statutory precedent, regularly enforce arbitration clauses. Yet the decision to choose arbitration over litigation is a major business decision when drafting and negotiating contracts that should not be made lightly."

***The Oklahoma Supreme Court Gets Spooked, Refuses to Enforce a Consumer Arbitration Agreement*, Arbitration Nation (Oct. 15, 2022)**: "Just in time for the Halloween season, the Oklahoma Supreme Court gives us a scary tale about buying a new car. In *Sutton v. David Stanley Chevrolet, Inc.*, 2020 OK 87, ¶ 1 the Court finds that an arbitration clause in a consumer contract was induced by fraud because the structure of the transaction was misleading."

***NFA Orders Chicago, Ill. Introducing Broker Stage 5 Trading Corp. to Pay a $75,000 Fine*, www.nfa.org (Nov. 80, 2022)**: "NFA has ordered Stage 5 Trading Corp. (Stage 5) to pay a $75,000 fine. Stage 5 is an introducing broker (IB) Member of NFA located in Chicago, Illinois.[] The Decision, issued by NFA's Business Conduct Committee (BCC), is based on a Complaint issued by the BCC and a settlement offer submitted by Stage 5, in which the firm neither admitted nor denied the allegations in the Complaint. The BCC's Complaint charged Stage 5 with doing business with an unregistered forex IB and using a website that did not distinguish clearly between Stage 5 and the unregistered

forex IB. The Complaint also charged Stage 5 with failing to diligently supervise the firm's forex operations."

***FINRA Creates Industry Diversity Advisory Committee*, www.finra.org (Nov. 9, 2022)**: "FINRA announced today that it has established an Industry Diversity Advisory Committee, advancing its commitment to diversity, equity and inclusion (DEI) in the securities industry.[] The FINRA Board of Governors appointed members to the new committee at its September meeting, implementing a recommendation by FINRA's Racial Justice Task Force (RJTF).[] FINRA now has 13 advisory committees that provide feedback on rule proposals, regulatory initiatives, and industry issues."

***Top 10 Questions About Securities Litigation*, National Law Review (Nov. 10, 2022)**: "Individuals, companies, and firms involved in all aspects of the securities industry face litigation risks daily. From whistleblower lawsuits and U.S. Securities and Exchange Commission (SEC) enforcement actions to Financial Industry Regulatory Authority (FINRA) arbitration and private-right-of-action cases under the Securities Exchange Act of 1934, all types of securities litigation present risks for civil liability. In some cases, securities litigation can present risks for criminal penalties as well."
return to top

DID YOU KNOW?

ENDING FORCED ARBITRATION OF SEXUAL ASSAULT AND SEXUAL HARASSMENT ACT NOW CODIFIED. As we have reported many times, **President Biden** on **March 3** signed the *Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021* ("the Act"), which expressly amended the Federal Arbitration Act ("FAA") to make predispute arbitration agreements ("PDAAs") voidable at the option of the victim. The law was effective immediately for: "any dispute or claim that arises or accrues on or after the date of enactment of this Act." FINRA 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, which were approved by FINRA's Board last **March**, were 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). Although the changes were immediately effective on **May 13**, the Authority on **July 15** issued *Regulatory Notice 22-15*. The rule change language is contained in Attachment A. Readers should know that the new law has been codified as FAA Chapter 4. It consists of § 401 (definitions) and § 402 (no validity or enforceability).
return to top

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