SECURITIES ARBITRATION ALERT 2023-04 (1/26/23)

George H. Friedman, Editor-in-Chief

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SQUIBS: IN-DEPTH ANALYSIS

CFPB PROPOSES REGISTRY FOR ARBITRATION CLAUSE AND CLASS ACTION WAIVER USE. ***The Consumer Financial Protection Bureau ("CFPB" or "Bureau") has proposed a new rule seeking information from nonbanks on among other things arbitration and class action waivers.*** Just a little while ago we reported in SAA 2023-01 (Jan. 5) that the CFPB seemed disinclined to act on arbitration. We based this surmise on the Agency's *Semi-Annual Report to Congress* for the period running **October 1, 2021** through **March 31, 2022**. Like its predecessors, the Report made scant reference to arbitration, referring to it just twice in connection with litigation brought by

the Bureau. Also, the *Spring 2022 Agency Rule List,* which delineates regulatory initiatives the Bureau: "reasonably anticipates having under consideration during the period from June 1, 2022 to May 31, 2023," had five items listed, but arbitration was not one of them. The newly-released *Fall 2022 Agency Rule List*, covering the period from **December 2022** through **November 2023**, is like its predecessors silent about arbitration.

Telltale Sign …

One item, however, caused observers to conclude that mandatory arbitration was back on the CFPB's radar. Listed in the proposed rule stage is "Nonbank Registration – Terms and Conditions." The Bureau describes the item as follows: "a proposed rule that would require supervised nonbank entities to register with the Bureau and provide information about their use of certain terms and conditions in standard-form contracts. In particular, the Bureau is developing a proposal to collect information standard terms used in contracts that are not subject to negotiating or that are not prominently advertised in marketing." The **January 5** *Ballard Spahr Consumer Finance Monitor* Blog said: "The proposed rule would be focused on collecting information on non-negotiable standard terms or terms that are not prominently advertised in marketing. Based on media reports about remarks given by Director Chopra at a September 2022 event, it appears that 'forced' arbitration provisions are among the types of non-negotiated consumer contract terms that the CFPB has in mind."

… Was Spot On …

The Bureau on **January 12** announced via press release that it had filed a rule proposal: "to establish a public registry of supervised nonbanks' terms and conditions in 'take it or leave it' form contracts that claim to waive or limit consumer rights and protections, like bankruptcy rights, liability amounts, or complaint rights…. Under the proposed rule, nonbanks subject to the CFPB's supervisory jurisdiction would need to submit information on terms and conditions in form contracts they use that seek to waive or limit individuals' rights and other legal protections. That information would be posted in a registry that will be open to the public, including to other consumer financial protection enforcers."

… And Covers Mandatory Arbitration Agreements and Class Action Waivers

Any ambiguity about whether the proposed rule covered mandatory predispute arbitration agreements and class action waivers was resolved in the affirmative. Says the release: "Under the proposal, the CFPB would seek information on contract terms and conditions seeking to waive any constitutional, statutory, or common law legal protection, right, or defense; restrict the ability of consumers to complain; limit the time or place for consumers to bring legal actions; limit liability amounts; *waive class action rights; and impose arbitration provisions*. Both company information and information about the use of the terms and conditions would be published" (emphasis added).

(ed: The public comment period: "will remain open for 60 days following publication of the proposed rule on the CFPB's website or 30 days following publication of the proposed rule in the Federal Register, whichever period is longer.")

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FEDERAL APPEALS COURT REFUSES TO GRANT POST-CONFIRMATION NULLIFICATION OF ARBITRATION AWARD. ***The Tenth Circuit affirmed a U.S. district court's denial of a Rule 60(b)(5) motion to vacate its order confirming a Bolivian arbitration award, even though the losing party brought a successful effort to nullify the award in the Bolivian courts after the confirmation.*** The New York Arbitration Convention, incorporated into U.S. law as Chapter 2 of the Federal Arbitration Act ("FAA"), permits a court in a secondary jurisdiction to recognize and enforce a foreign award unless it finds one or more specified grounds for refusing or deferring such recognition or enforcement. In *Compania de Inversiones Mercantiles, S.A. v. Grupo Cementos de Chihuahua S.A.B. de C.V.*, Nos. 21-1196 & 21-1324 (10th Cir. Jan. 10, 2023), one of the issues was whether a lower court that confirmed a foreign award abused its discretion in refusing to vacate that confirmation, based on a post-confirmation nullification of the award in the primary jurisdiction (as the Court termed the country where the arbitration occurred).

The Dispute and the Award

The arbitration involved a dispute between co-shareholders of a Bolivian company. Compania de Inversiones Mercantiles, S.A. ("CISMA") alleged that Grupo Cementos de Chihahua S.A.B. de C.V. ("GCC") violated its right of first refusal before selling its shares of a Bolivian cement company to a third party. GCC had originally agreed to sell its shares to CISMA, then demanded additional terms of sale which CISMA rejected, and sold its shares to the third party after CISMA demanded that it adhere to the original agreement. The shareholder agreement between CISMA and GCC provided for binding arbitration. The arbitration panel bifurcated the proceedings and issued a 2013 Merits Award in favor of CISMA and a 2015 Damages Award ordering GCC to pay $34 million in compensatory damages and $2 million in fees and costs.

Complex Judicial Proceedings

The post-award proceedings were complicated by various constitutional objections to prior court rulings. To summarize: Although the arbitration agreement waived the parties' right to seek nullification of an award, GCC sought to nullify both Awards in Bolivia, the primary jurisdiction. It failed with respect to the Merits Award but was initially successful in securing nullification of the Damages Award. However, in 2017, a chamber of the Plurinational Constitutional Tribunal (PCT) found that the annulment proceeding violated CISMA's constitutional rights. In 2015, CISMA sought confirmation of the Award in the U.S. District Court for the District of Colorado (the secondary jurisdiction), but it was unable to find GCC and was therefore unable to serve it until 2018, when it obtained a court order authorizing alternative service on GCC's U.S. counsel. The district court confirmed the Awards in March 2019 and the Tenth Circuit affirmed that decision the following year. Meanwhile, in May 2019, GCC initiated a new challenge to the 2017 PCT decision, which succeeded in a different chamber of the PCT, and the judge who issued the nullification order reinstated it in 2020. GCC then moved to vacate the Colorado confirmation order under Rule 60(b)(5), but the district court denied it in a 2021 opinion and GCC appealed that decision to the Court of Appeals.

Balancing Competing Interests
Reviewing for abuse of discretion, a majority of a three-judge panel of the Court of Appeals affirms the district court's denial in an 87-page opinion, although one of its members issued a strong dissent. The majority explains: "A district court may decline to enforce a primary jurisdiction's annulment order if the order itself is repugnant *or* if enforcing that order would offend public policy [italics in original]." Here: "Based on GCC's repeated attempts to challenge the Damages Award, the district court determined that granting GCC relief would undermine the finality of the Confirmation Judgment and the arbitral award by 'encourag[ing] an endless barrage of challenges to unfavorable arbitral awards or court orders.'"

Three U.S. Public Policies Favor Affirmance
The majority agrees: "Three strong United States interests support this conclusion: (1) protecting the finality of judgments, … (2) upholding parties' contractual expectations, and (3) the policy in favor of arbitral dispute resolution." First: "In every case affirming a district court's decision not to confirm an arbitral award due to a foreign court's annulment, the movant had sought annulment in the primary jurisdiction before confirmation of the arbitral award in the United States…. Here, unlike any of those cases, the highest Bolivian court had rejected annulment of the Damages Award years before the district court confirmed it, and then GCC launched a new attempt at annulment after confirmation." Second: "Other courts have honored parties' contractual expectations in declining to give effect to a foreign court's annulment of an arbitral award….[] Here, 'the parties' agreement demonstrates that the arbitration award became binding upon issuance for purposes of the New York Convention.'" Finally: "A corollary to the policy favoring enforcement of agreements to arbitrate is a strong interest in enforcing the resulting award." It concludes: "Had we considered the Rule 60(b)(5) motion as a district court in the first instance, we may have found that comity outweighed any competing public policy concerns and granted the motion. But we review only for abuse of discretion and 'may not substitute our own judgment for that of the trial court.'"

Inequitable Conduct is Also a Factor
The majority also discerns: "[n]o abuse of discretion in the district court's additional analysis finding that GCC's conduct also weighed against relief. The record supports the court's conclusion that GCC acted inequitably by (1) initiating another challenge to the Damages Award in Bolivian courts only after its efforts against enforcement of the arbitral award in the United States failed and (2) delaying proceedings in the United States by frustrating service of process for nearly three years and refusing to satisfy the arbitral award."
*(*The Court also affirmed the lower court's order that GCC turn over its Mexican assets to the Court. That portion of the decision begins at p. 66. **The dissent, by Judge Rossman, runs 54 pages. ***We doubt the Supreme Court would grant* Certiorari *in this case, if petitioned to do so, because of its one-off nature. **** This Squib was prepared by Harry A. Jacobowitz, President of HAJ Research and Writing LLC. Mr. Jacobowitz, a member of the Pennsylvania bar, and his firm perform legal research and writing for*

attorneys and handle substantive searches of SAC's Award database. He can be contacted at harryjacobowitz@optimum.net.)
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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

REMINDER: COMMENTS DUE SOON ON FINRA'S RULE CHANGE PROPOSAL IMPLEMENTING "RIGGED PANELS" INVESTIGATION REPORT RECOMMENDATIONS. Just a friendly reminder that, as reported in SAA 2023-03 (Jan. 19), the proposed rule was published in the *Federal Register* on **January 12** (Vol. 88, No. 8, P. 2144), making comments due **February 2**. We reported in SAA 2023-01 (Jan. 5) that, on the eve of the year-end holiday break, FINRA had filed a rule change proposal that would implement recommendations resulting from the outside investigation of allegations that the arbitrator selection process was rigged. As summarized in SAA 2022-38 (Oct. 13), FINRA in **June 2022** 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. 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 have been implemented or were "in progress." The latest step was accomplished on **December 23, 2022**, when FINRA filed with the SEC SR-FINRA-2022-033, *Proposed Rule Change to Amend the Codes of Arbitration Procedure.* The filing describes it as: "a proposed rule change to amend the Code of Arbitration Procedure for Customer Disputes ('Customer Code') and the Code of Arbitration Procedure for Industry Disputes ('Industry Code') (together, 'Codes') to make changes to provisions relating to the arbitrator list selection process in response to recommendations in the report of independent counsel Lowenstein Sandler LLP. The proposed rule change also makes clarifying and technical changes to requirements in the Codes for holding prehearing conferences and hearing sessions, initiating and responding to claims, motion practice, claim and case dismissals, and providing a hearing record."
*(ed: *Use this link to submit a comment. **The rule filing's progress can be tracked here.)*
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COINBASE PDAA CONSTITUTED "CLEAR AND UNMISTAKABLE" EVIDENCE OF DELEGATION. Cryptocurrency platform Coinbase customers were compelled to arbitrate because the predispute arbitration agreement ("PDAA") in the online User Agreement demonstrated "clear and unmistakable" evidence of an intent to delegate arbitrability issues, the Court holds in *Coinbase Global, Inc. v. Donovan*, No. 22-cv-02826-TLT (N.D. Calif. Jan. 6, 2023). The PDAA provided: "The arbitrator shall have exclusive authority to resolve any Dispute, including, without limitation, disputes arising out of or related to the interpretation or application of the Arbitration Agreement, including the enforceability, revocability, scope, or validity of the Arbitration Agreement

or any portion of the Arbitration Agreement …." District Judge **Trina L. Thompson** also holds that the delegation clause itself is not unconscionable: "In sum, the delegation provision is not substantively unconscionable. Therefore, the delegation provision is enforceable, and the Court finds that the Coinbase Plaintiffs' challenges to arbitrability have been delegated to the arbitrator."
*(ed: *Seems right. **The PDAA called for the AAA. ***Judge Thompson was appointed by President Biden in January 2022. ****The same court previously held that the Coinbase arbitration agreement's delegation clause* was *unenforceable on the ground of unconscionability, in* Bielski v. Coinbase, Inc., *No. C21-07478 (N.D. Cal. Apr. 8, 2022), which we covered in SAA 2022-17 (May 5).)*
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NY CITY BAR ANNUAL SECURITIES & ENFORCEMENT INSTITUTE IS FEBRUARY 8. The Association of the Bar of the City of New York will be holding its annual *Securities Litigation & Enforcement Institute 2023* on **February 8** from 9 am to 5 pm via live webcast. The program description states: "This full-day program will provide a comprehensive overview of recent trends, developments and cutting-edge issues in securities litigation, Delaware Law, SEC regulation and enforcement and ESG. The panels will include prominent securities litigators, senior in-house counsel at major financial institutions and corporations, and nationally recognized trial lawyers and former SEC and others with government as a regulator experience…. We expect the very active role played by **Garry Gensler** in leading the SEC will continue and will come up during several panels." The program offers CLE credit from California, New Jersey, New York, and Pennsylvania.
(ed: Registration ranges from $249 for government/nonprofit/academic/judiciary who are Association members to $649 for nonmembers and can be done online.)
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SECURITIES EXPERTS ROUNDTABLE PUBLISHES ITS LATEST FREE NEWSLETTER. The latest issue of the Securities Experts Roundtable's ("SER") quarterly newsletter, *The Expert's Examiner* (*"TEE"*) volume 2022-04, covering **October – December 2022**, hit the electronic newsstand **January 16**. This *free*, link-rich publication, which can be found on the Website's landing page ("Newsletter" tab), offers a wealth of information on financial services arbitration and ADR in general. Among the regular features are: **Recent News from the Arbitration Front; Expert Opinions: What are the Courts (and Arbitrators) Thinking?; Heard Through the Regulatory Grapevine -- Comment Letters and Speeches; Practice Management Tips**; and **Statistics, Events & Resources.** Content is provided by the Roundtable's members; the *Alert* is also a contributor. Signup is available online.
*(ed: *The non-profit SER, which was founded in 1992, is: "a group of professionals with significant experience as testifying and consulting experts in securities, business and investment-related litigation." **The* TEE *is a wonderful resource for the arbitration bar. Past issues are grouped here. ***Full disclosure:* SAA*'s publisher and editor-in-Chief George Friedman is an active member of the SER.)*
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QUICK TAKES: CASES AND AWARDS WORTH READING

***Banca Pueyo SA v. Lone Star Fund IX*, No. 21-10776 (5th Cir. Dec. 22, 2022)**: "The principal issue in this appeal of a 28 U.S.C. § 1782(a) discovery order is whether, in response to the ex parte order authorizing discovery by 'interested parties' for use in foreign litigation, the respondents have a right to challenge the order's validity pursuant to statutory requirements and the Supreme Court's 'Intel factors.' See *Intel Corp. v. Advanced Micro Devices, Inc*., 542 U.S. 241, 124 S. Ct. 2466 (2004). The district court here misconstrued our precedent and erroneously rebuffed respondents' challenge on its face. Accordingly, we must REVERSE and REMAND" (links added by the *Alert*).

***Johnson v. Walmart, Inc*., No. 21-16423 (9th Cir. Jan. 10, 2023)**: "Walmart, Inc. ('Walmart') appeals the district court's denial of its motion to compel arbitration of the claims asserted against it by Kevin Johnson ('Johnson'). Johnson brought this putative class action for breach of contract and breach of the duty of good faith and fair dealing arising out of a lifetime tire balancing and rotation service agreement that Johnson purchased from a Walmart Auto Care Center. The district court denied Walmart's motion and we affirm…. The two contracts—though they involve the same parties and the same tires—are separate and not interrelated. Therefore, the arbitration agreement in the first does not encompass disputes arising from the second."

***Vaughn v. Tesla, Inc.,* No. A164053 (Calif. Ct. App. 1 Jan. 4, 2023)**: "Plaintiffs initially worked for Defendant through staffing agencies before signing employment letters prepared by Defendant in July 2017. Plaintiffs' complaint alleged the discrimination occurred before and after the letters were signed. We determine the trial court properly relied on the language in an arbitration provision contained in the letters to exclude from arbitration those claims based on conduct occurring during periods Plaintiffs were employed by staffing agencies rather than directly by Defendant. We also conclude the trial court properly declined to mandate arbitration of Plaintiffs' request for a public injunction. On that issue, we reject Defendant's two principal contentions. First, we hold that injunctions sought under the Fair Employment and Housing Act (FEHA) (Gov. Code, §§ 12900 et seq.) may be considered 'public injunctions.' Second, we rule the Federal Arbitration Act (FAA) (9 U.S.C. § 1 et seq.), as interpreted in *Viking River Cruises, Inc. v. Moriana* (2022) ___U.S. ___ [142 S.Ct. 1906, 213 L.Ed.2d 179] (*Viking River*), does not preempt the California rule prohibiting waiver of the right to seek such injunctions." (*ed: An* Alert *h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this decision*.)

***Hermes v. Royal Alliance*, FINRA ID No. 21-01609 (Cleveland, OH, Dec. 6, 2022)**: In this small claims arbitration, decided "on the papers" and without a hearing, pursuant to FINRA Rule 12800, two customer trustees are awarded compensatory damages after alleging that Respondents sold shares in their accounts without permission resulting in losses. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***[Sivatitikul v. Jaroensabphayanont](#)*, FINRA ID No. 22-00953 (Seattle, WA, Dec. 9, 2022)**: In this Rule 12801 default judgment case, an Arbitrator holds a non-appearing broker liable to Claimants for damages (including punitive damages), after finding he violated the provisions of the RCW 21.20.010 statute. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*
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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Esmé Shirlow, *[Teaching International Investment Arbitration: Global Perspectives](#)*, Kluwer Arbitration Blog (Jan. 17, 2023): "Teachers of international investment arbitration face numerous choices before they walk into the classroom. What topics should be included in such courses? What temporal outlook should be adopted? What should the course aim to do, and who should it be pitched to? What classroom activities should be included, and what course resources should underlie them? Of course, many of these choices will be constrained by practical considerations: it is near impossible, for example, to do justice to such a rich and diverse field in the space of the usual teaching term or semester. Perhaps more so than in other areas of law, however, designing an investment arbitration course demands that the teacher reflect upon the scope, boundaries, and blind-spots associated with this area of law and in this sense pedagogy mixes closely with the teacher's own perspectives (and biases) in relation to the field as a whole."

***[FINRA Proposes Updates to Arbitrator Selection Process](#)*, Lexology (Jan. 17, 2023)**: "FINRA proposed updates to the arbitrator list selection process in the Code of Arbitration Procedure for Customer Disputes ('Customer Code') and the Code of Arbitration Procedure for Industry Disputes ('Industry Code').[] Per the recommendations of a report conducted by an outside counsel, the proposal would clarify the expectations and requirements relating to identifying potential conflicts of interest during the selection process and removing an arbitrator prior to commencing a hearing. The proposal would also make technical changes to (i) the requirements for holding prehearing conferences and hearing sessions, (ii) initiating and responding to claims, (iii) motion practice, (iv) claim and case dismissals and (v) providing a hearing record."

***[FINRA 'Ready to Act' if SEC Finalizes Best-Execution Rules: CEO](#)*, ThinkAdvisor (Jan. 18, 2023)**: "FINRA CEO Robert Cook said Wednesday that the self-regulatory organization is prepared to act swiftly to ensure its members are not subject to confusion regarding best-execution standards when enacting trades and other transactions for clients.[] Cook made that suggestion during a live discussion hosted in New York by The Securities Industry and Financial Markets Association's Compliance & Legal Society that featured Cook and Greg Ruppert, executive vice president of member supervision at the Financial Industry Regulatory Authority."

***[Big Law's Orrick and Buckley to Merge, Eyeing Banks, Tech Work](#)*, Bloomberg Law News (Jan. 18, 2023)**: "San Francisco-founded Orrick, Herrington & Sutcliffe is merging

with Washington-based Buckley, the firms announced on Thursday. The combined firm will have upwards of 1,000 lawyers and total gross revenue of more than $1.46 billion, according to recently reported figures by The American Lawyer. The pair are joining forces to respond to a growing demand from companies and financial institutions for 'forward-looking' regulatory and enforcement advice, the firms said in a press release announcing the merger."

***Financial Crimes Makes Debut in FINRA Annual Priorities Preview*, National Law Review (Jan. 18, 2023)**: "FINRA punctuated its annual post-New Year's Report on FINRA's Examination and Risk Monitoring Program (the 'Report'), by including a new target category 'Financial Crimes.' The inclusion of this category is noteworthy not only for its newness but also because FINRA, as a non-governmental self-regulatory organization, does not have authority to prosecute criminal activity.[] The annual Report, colloquially known as FINRA's priorities letter, is designed to provide insight on FINRA's examination and risk monitoring program."

***Morgan Stanley Claws Back $1Mln From FL Broker Accused of Abandoning Post*, AdvisorHub (Jan. 21, 2023)**: "Morgan Stanley executives have extolled the payoffs of selective hiring, but in a reminder that not all moves work out, one broker was ordered this week to repay more than $1 million after his career with the firm fizzled."
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DID YOU KNOW?

CPR HAS A NEW WEBSITE. CPR on **January 17** announced that it had launched a new Website. Says CPR: "Although it has a new look, the website continues to provide resources, tools, news and events related to alternative dispute resolution and dispute prevention.[] CPR Institute members will find that the new website provides easier-than-ever access to membership benefits and connections to the CPR member community."
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