SECURITIES ARBITRATION ALERT 2023-06 (2/9/23)

George H. Friedman, Editor-in-Chief

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DID YOU KNOW?

- **George Washington's Will Called for Arbitration**

SQUIBS: IN-DEPTH ANALYSIS

FINRA INVESTOR ED FOUNDATION RELEASES REPORT ON INVESTOR DEMOGRAPHICS AND ATTITUDES. ***A new FINRA Investor Education report on investor demographics and attitudes showed a younger, less experienced, more risk-tolerant population***. *Investors in the United States: The Changing Landscape* was announced in a **December 15** press release, *New FINRA Foundation Research Examines Changing Investor Demographics, Preferences and Attitudes.* The findings are: "drawn from the Investor Survey component of the FINRA Foundation's *2021 National*

Financial Capability Study (NFCS). A total of 2,824 U.S. adults with investments outside of retirement accounts were surveyed between July and December 2021."

Key Findings

These are the key findings (*ed: excerpted* verbatim *from the release*):

- **New investors.** One in five investors have less than two years of experience. The percentage of investors who began investing in the two years prior to the study (21 percent) is nearly as large as the percentage who began in the preceding eight years (25 percent).
- **Risky behaviors.** Younger investors are more likely to engage in riskier investment behaviors. Thirty-six percent of younger investors report trading options, compared to 21 percent of those ages 35 to 54, and 8 percent of those 55 and older. Nearly a quarter (23 percent) of younger investors report making purchases on margin, compared to 12 percent of those ages 35 to 54, and 3 percent of those 55 and older.
- **Crypto acceptance.** The percentage of investors considering cryptocurrencies has increased to 33 percent, and 27 percent are already invested — up from 18 percent and 12 percent, respectively, in 2018. Among younger investors and those with less than two years' experience, more than half are invested in cryptocurrencies.
- **Meme stock popularity.** Eighteen percent of investors report trading shares of GameStop, AMC or Blackberry (which were popular meme stocks in early 2021). Among younger investors, nearly two in five report buying or selling shares of these stocks, compared to about one in five of those ages 35 to 54, and only 4 percent of those 55 and older.
- **Evolving platform preferences.** Online trading through a website is the most common method for placing trades (62 percent), followed by mobile app (44 percent) and contacting a financial professional (44 percent). The use of mobile apps is up considerably from 30 percent in 2018. Younger investors and newer investors are much more likely to use a mobile app for placing trades than older respondents or more experienced investors.
- **Motivation.** The main motivation for nearly all investors is to make money over the long term (96 percent). However, large majorities also want to make money in the short term (72 percent) and learn about investing (65 percent). Younger investors are much more likely than older investors to invest for reasons other than long-term profits, such as social responsibility, entertainment and social activity.
- **Investment information sources.** When making investment decisions, investors most often rely on research and tools provided by brokerage firms, business and finance articles, financial professionals, and friends, family or colleagues. Among younger investors, a majority (60 percent) use social media as a source of investment information, compared to 35 percent of those ages 35 to 54, and only 8 percent of those 55 and older. Over half of investors under 35 use YouTube (56 percent), and 41 percent use Reddit. YouTube is also among the most popular social media channel for investment information for all ages overall (28 percent).

- **Fee confusion.** Many investors are unaware of or confused about various fees they may pay for investing. Over one in five investors (21 percent) do not think they pay any kind of fee for investing, and 17 percent say they do not know how much they pay. Among mutual fund owners, nearly two in five (38 percent) believe they do not pay mutual fund fees or expenses.
- **Disclosure delivery preference.** Email (38 percent) has overtaken physical mail (30 percent) as the most widely preferred method for receiving disclosures. Preference for email has increased since 2015, while preference for physical mail has decreased.
- **Low investor knowledge.** The average number of correct answers on a 10-question Investor Knowledge Quiz is 4.7. More than two in five respondents (44 percent) think that the past performance of an investment is a good indicator of future results. Less than a third (29 percent) understand that the main advantage of index funds over actively managed funds is generally lower fees and expenses.

*(ed: *To quote the late Arte Johnson: "Verrry interesting!" **As usual, we wonder what this means in terms of future arbitration filings?)*
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EFASASHA DIDN'T INVALIDATE EMPLOYMENT PDDA, BUT UNCONSCIONABILITY DID. ***Because the employee's sexual harassment lawsuit predated the March 2022 effectiveness of the* Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 *("EFASASHA"), the law could not be used to invalidate the predispute arbitration agreement ("PDAA") in question, but the PDAA was unconscionable and thus unenforceable***. EFASASHA was signed into law on **March 3, 2022**. It expressly amended the Federal Arbitration Act ("FAA") to make predispute arbitration agreements and class action waivers voidable at the option of the victim, and to make arbitrability an issue for the court, not arbitrators. The new law has been codified as FAA Chapter 4. It consists of § 401 (definitions) and § 402 (no validity or enforceability).

No Retroactive EFASASHA Application …
As to retroactivity, the statute says: "This Act, and the amendments made by this Act, shall apply with respect to any dispute or claim that arises or accrues on or after the date of enactment of this Act." This language, a unanimous Court finds in *Murrey v. Superior Court of Orange County*, No. G061329 (Calif. Ct. App. 4 Jan. 30, 2023), means that EFASASHA cannot apply, because the claim and suit accrued well before March 2022: "We regret that this new legislation does not apply retroactively to Casandra Murrey's complaint filed in March 2021…. Murrey filed her case approximately one year before the Act was enacted. 'During debate, Congress clarified that the Act is retroactive "as to contracts currently signed," but not to 'cases currently pending.' In other words, the Act is only applicable to cases filed after its enactment."

… But the PDAA is Unconscionable
The Court finds, however, that the arbitration clause is unconscionable and therefore unenforceable: "The arbitration agreement in this case contained a high degree of

procedural unconscionability. If these provisions had not been challenged in litigation, Murrey would have been at a significant disadvantage during arbitration. There were also multiple substantively unconscionable provisions, some of which would require us to substantially rewrite the agreement to remove the offending provisions, which we cannot do. When we consider the procedural and substantively unconscionable provisions together, they indicate a concerted effort to impose on an employee a forum with distinct advantages for the employer. As in *Armendariz*, we conclude 'the arbitration agreement is permeated by an unlawful purpose.' Accordingly, we vacate the court's order granting the motion to compel arbitration" (citations omitted).

Not to Be Sticklers, but …

Although not central to the Opinion, we take issue with this language in the first paragraph (*ed: bold highlighting added*): "In March 2022, President Joseph R. Biden signed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (the Act) (9 U.S.C. §§ 401, 402), representing **the first major amendment of the Federal Arbitration Act (FAA) (9 U.S.C. § 1 et seq.) since its inception nearly 100 years ago**. This legislation, having bipartisan support, **voids predispute arbitration clauses** in cases, such as the one before us now, involving sexual harassment allegations."

- First, there *have* been major amendments to the FAA since its passage in 1925. For example, there was a significant amendment in 1988 (section 15 -- Inapplicability of Act of State Doctrine). Also, the additions of Chapters 2 and 3 were in our view "major." And there were others....
- Second, the new law makes the clauses *voidable* at the option of the victim, not *void ab initio*. Says the law: "… **at the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute, or the named representative of a class or in a collective action alleging such conduct**, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute."

*(ed: *Despite our linguistic critique, we think the case was rightly decided. **Your editor worked in the AAA's Legal Department in the early 1980s and was involved preparing an* Amicus *Brief for the appeal giving rise to the referenced 1988 FAA amendment effort. ***An Alert h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this decision.)*

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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

E.D.N.Y.: ICSID NOT A "FOREIGN OR INTERNATIONAL TRIBUNAL" FOR SECTION 1782 DISCOVERY. Our readers know that the Supreme Court last **June** decided *AlixPartners, LLP v. The Fund for Protection of Investors' Rights in Foreign States*, 142 S. Ct. 638 (2021), which had been consolidated with *ZF Automotive US, Inc. v. Luxshare, Ltd.*, No. 21-401), ruling unanimously that 28 U.S.C. § 1782(a), which permits litigants to use American courts to obtain discovery in aid of "a foreign or international tribunal," applies only to governmental fora and does not extend to private

commercial arbitral tribunals. Going forward, disputes over application of section 1782 will hinge on the foreign forum's governmental status. Such was the case in *In re Application of Alpene, Ltd.*, No. 21 MC 2547 (E.D.N.Y. Oct. 27, 2022), where Magistrate **Robert M. Levy** finds that the International Centre for Settlement of Investment Disputes ("ICSID"**)** does not qualify for section 1782's application. Says the Order: "[T]he inquiry is whether the treaty parties, in this case Malta and China, indicated an intent 'to imbue the body in question [here, the ICSID arbitration panel] with governmental authority.'" After acknowledging that there is no bright line test for deciding the issue, Magistrate Levy holds: "As was the case with the ad hoc arbitration panel in *AlixPartners*, the applicable treaty did not itself create the ICSID panel, which 'consists of individuals chosen by the parties and lacking any official affiliation with [the treaty nations.]' The treaty is also silent as to whether it was the parties' intent 'to imbue [the ICSID] with governmental authority' …. This court's research uncovered no case law post-*AlixPartners* analyzing whether an ICSID arbitration panel is an international tribunal. But it bears noting that until *AlixPartners*, federal courts uniformly held that investor-state arbitrations were eligible for § 1782 discovery. While the Supreme Court did not address ICSID investor-state arbitrations specifically, by reaching out to decide this issue absent a circuit split, it did signal a desire to limit the availability of discovery in U.S. courts for international commercial arbitrations" (brackets in original; citations omitted).
*(ed: *Seems right. **According to its Website: "ICSID is an international facility available to States and foreign investors for the resolution of investment disputes. Established in 1966 by the* Convention on the Settlement of Investment Disputes between States and Nationals of Other States *(the ICSID Convention), it is the only global institution dedicated to international investment dispute settlement." As of June 30, 2022, 163 countries have ratified the Convention. The U.S. did so in 1965.)*
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CALIFORNIA COURT OF APPEAL REJECTS EMPLOYEES' "I DON'T RECALL SEEING PDAA" DEFENSE. The employees in *Iyere v. Wise Auto Group*, No. A163967 (Calif. Ct. App. 1 Jan. 19, 2023), admitted they had signed several documents when they reported to work, but asserted that they did not recall seeing the predispute arbitration agreement ("PDAA"). While this defense to PDAA enforcement worked at the trial court level, it failed on appeal. Says the Court: "That evidence does not create a factual dispute as to whether plaintiffs signed the agreement. The declarations explicitly acknowledge that plaintiffs signed a 'stack of documents' and do not deny that the stack included the [arbitration] agreement. Although the plaintiffs state they do not recall signing the agreement, there is no conflict between their having signed a document on which their handwritten signature appears and, two years later, being unable to recall doing so. In the absence of any evidence that their purported signatures were not their own, there was no evidence that plaintiffs did not in fact sign the agreement." The Court of Appeal also held that the PDAA was not unconscionable.
(ed: Sounds right.)
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SEC RELEASES FEBRUARY INVESTOR QUIZ. The SEC on **February 2** released its monthly Investor Quiz via its www.investor.gov Website. The ten-question quiz invites investors to: "test your knowledge on this question and others on investment fraud, steps you can take to protect your money …" The quiz keeps score and explains the correct response.
*(ed: *We found the quiz to be relatively easy and scored 100%, but we think the typical investor will be challenged by some of the scenarios. **Unlike the Bill Murray movie "Groundhog Day," we assume the quiz won't repeat every day!)*
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QUICK TAKES: CASES AND AWARDS WORTH READING

***Fairstead Capital Management LLC v. Blodgett*, No. 2022-0673-JTL (Del. Ch. Ct. Jan. 6, 2023)**: "Applying principles of equitable estoppel, this decision concludes that the LLCs are bound by the arbitration agreement. Principles of equitable estoppel support binding a nonsignatory to an arbitration agreement when the non-signatory has accepted a direct benefit under the contract containing the arbitration agreement. The doctrine of equitable estoppel prevents the non-signatory from accepting the benefits of the contract without also accepting its burdens, including the arbitration agreement. In this case, the LLCs accepted the benefits of the services that the fund principal provided under the employment agreement. That agreement contemplated the formation of the LLCs, called for the former fund principal to provide services to the LLCs, and specified that in return for his services, the fund principal would receive member interests in the LLCs. That is exactly what happened. The LLCs therefore cannot evade the arbitration agreement."

***Wolf v. Hollis Operating Co., LLC*, 2022 NY Slip Op 06954 (App. Div. 2d Dept. Dec. 7, 2022)**: "Since the defendants failed to meet their prima facie burden of demonstrating the existence of a valid agreement to arbitrate, we need not consider the sufficiency of the plaintiff's submissions in opposition (see *Listwon v. 500 Metro. Owner, LLC, 188 AD3d 1028*, 1030).[] Under the circumstances, the Supreme Court should have held an evidentiary hearing to determine whether the plaintiff possessed the requisite authority to bind the decedent to arbitration (see *Pirraglia v. Jofsen, Inc.*, 148 AD3d 648, 648-649; *Matter of Jalas v Halperin*, 85 AD3d 1178, 1181-1182 …. Accordingly, we remit the matter to the Supreme Court, Queens County, for that purpose, and for a new determination of the defendants' motion to compel arbitration thereafter" (some citations omitted).

***Howard Center v. AFSCME Local 1674*, 2023 VT 6 (Jan. 20, 2023)**: "The Vermont Arbitration Act (VAA) identifies five circumstances under which a court must vacate an award. See 12 V.S.A. § 5677(a)(1)-(5). We have not yet decided whether to recognize 'manifest disregard of the law' as an additional basis for vacating an arbitration award, although other courts have done so.... We review de novo the legal question of whether to recognize the manifest disregard standard. Assuming arguendo that the standard applies, we also review de novo whether the arbitrator manifestly disregarded the law in this case…. For the reasons set forth below, we conclude, as in *Masseau*, that 'even assuming that courts are empowered to vacate an arbitrator's decision based on manifest disregard

of the law—which we do not decide—the asserted legal error in the arbitrator's decision here does not rise to the level of manifest disregard'" (citations omitted; links added by the *Alert*).

***Hashemi v. TD Ameritrade*, FINRA ID No. 22-01513 (San Francisco, CA, Dec. 19, 2022)**: In this small claims arbitration, an Arbitrator explains why he has decided to deny the customer's case regarding a margin account, finding that, pursuant to the Client Agreement, the customer agreed to the terms it carried under Margin Trading and is not entitled to an extension of time on a margin call. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Nakamura v. Avantax Investment*, FINRA ID No. 22-00549 (San Francisco, CA, Dec. 20, 2022)**: A broker (acting as a customer) and a group of customer trusts, alleging misrepresentation and elder abuse against Respondent broker-dealers and registered rep, lose their case. The broker and registered rep also lose their requests for expungement from their respective CRD records due to lack of evidence. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*return to top
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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Korzun, Vera, *Enforcing Soft Law in International Investment Arbitration*, 56:1 VANDERBILT JOURNAL OF TRANSNATIONAL 1 (Jan. 2023): "Drawing examples from international environmental law, sustainable development, and corporate social responsibility, this Article examines the evolving role of international investment arbitration in the enforcement of non-binding soft law rules of international law. In doing so, the Article explains how investment tribunals can, and have been called upon to, interpret and, paradoxically, enforce soft law instruments. The Article calls for reevaluation of the nature of soft law and the role of investor-state dispute settlement in international rulemaking and enforcement. It also argues that for international environmental law and law on sustainable development, where the lack of an enforcement mechanism has long been identified as the single major weakness of the system, investor-state dispute settlement might be a viable option for increasing compliance with and enforcement of international law obligations of the sovereign states."

***California Court of Appeal Calls Into Question Evidentiary Value of Electronic Signatures*, Cozen O'Connor Blog (Jan. 24, 2023)**: "On January 19, 2023, the California Court of Appeal, First District, Division 4, issued a troubling decision regarding the evidentiary value of electronic signatures in *Iyere v. Wise Auto Group*.[] First, a caveat. The troubling part is dicta, not the core decision. The core decision is perfectly sound. That said, the dicta is troubling enough to warrant this alert.… The Court of Appeal soundly reversed, holding that the plaintiffs' inability to recall signing the arbitration agreement is largely irrelevant because they do not deny that their respective personal signatures appear on the document. Absent testimony that the physical signatures were forged or inauthentic, testimony that they did not recall signing is

insufficient to create a factual dispute.[] However, the Court of Appeal made it clear that this decision was based largely on the fact that the signatures were personal, physical signatures, not electronic ones. 'While handwritten and electronic signatures have the same legal effect once authenticated, there is a considerable difference between the evidence needed to authenticate the two. Authenticating an electronic signature, if challenged, can be quite daunting'" (footnote omitted). (*ed: See our coverage elsewhere in this* Alert.*)*

***Collision Course: The Consequences of Conflicting Forum-Selection Provisions*, Lexology (Jan. 26, 2023)**: "On January 6, 2023, Vice Chancellor Laster issued an opinion in *Fairstead Capital Management LLC v. Blodgett* concerning a 'dispute-resolution collision' between two applicable forum-selection clauses. The collision arises from the termination of a principal of an investment fund, whose partners fired him for allegedly breaching his employment agreement and also cancelled his member interests in two LLCs that owned rights to the profits generated by the fund. Unhappy with his ouster, the former principal wanted to litigate against his former partners and the LLCs. But that raised the question at the core of this Vice Chancellor Laster's opinion: where to litigate?" (*ed: See our coverage elsewhere in this* Alert.*)*

***Consumer Financial Protection Bureau Proposes Mandatory Registration of Terms and Conditions: Nonbank Student Loan Servicers Among Those Potentially Impacted*, Duane Morris UpdatED Blog (Jan. 30, 2023)**: "On January 11, 2023, the Consumer Financial Protection Bureau ('CFPB' or the 'Bureau') announced designs to create a public registry of terms and conditions in form contracts. Under the proposed rule ('Rule'), certain nonbank entities, including nonbank student loan servicers, would be required to register and submit information related to its terms and conditions that purport to waive or limit consumer rights and protections, along with identifying company information. The Bureau has opened up the Rule for a sixty-day comment period (closing on March 13, 2023), after which decisions will be made on its final form.

***Finra Bars Ex-UBS Broker in Texas who Sold Phony Annuities*, InvestmentNews (Jan. 30, 2023)**: "A 25-year veteran financial advisor who worked for UBS Financial Services Inc. in Waco, Texas, was barred from the securities industry Friday by the Financial Industry Regulatory Authority Inc. for his role in off-the-books, private securities transactions, according to Finra.[] The financial advisor … was involved in private securities transactions from 1997 to 2021 without notifying UBS, an infraction of industry rules, Finra said. He began working at the firm in 1996."

***TR-"Oh No": Bank Ordered to Pick up Wells Fargo's Legal Tab in Non-solicit Fight*, AdvisorHub (Jan. 31, 2023)**: "Firms may want to heed an arbitration panel's award this week of more than $800,000 to Wells Fargo Advisors in a long-running client solicitation dispute before taking a departing advisor to court.[] A panel of Financial Industry Regulatory Authority arbitrators has ordered Commerce Brokerage Services Inc. to cover $812,332 in compensatory damages, the equivalent of the legal tab that Wells and a broker it hired had incurred in defending against the brokerage's parent bank's request

for a temporary restraining order, according to an award finalized on Monday. Wells had accused Commerce in the arbitration of unfair competition, tortious interference and 'improperly' interfering with Wells' customers' right to choose their broker."
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DID YOU KNOW?

GEORGE WASHINGTON'S WILL CALLED FOR ARBITRATION. With Presidents Day coming soon, we thought we would again share the fact that our nation's first President's* Last Will and Testament called for arbitration to resolve disputes among his heirs. **George Washington's** July 1799 Will provided: "[M]y will and direction expressly is, that all disputes (if unhappily any should arise) shall be decided by three impartial and intelligent men, known for their probity and good understanding; -- two to be chosen by the disputants -- each having the choice of one -- and the third by those two -- which three men thus chosen, shall unfettered by Law, or legal constructions, declare their sense of the Testator's intention ... and shall be binding as if issued by the U.S. Supreme Court."
*(ed: *To be absolutely accurate, George Washington was elected in 1789 as the first President of the **Constitutional Republic** known as the United States of America. In 1781, **John Hanson** was the first person elected President of the U.S. under the **Articles of Confederation**, the precursor to the Constitution. He evidently didn't have a very good press agent because no one remembers that fact.)*
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