SECURITIES ARBITRATION ALERT 2023-08 (2/23/23)

George H. Friedman, Editor-in-Chief

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- ***2022 in Review: Looking Back on Investor-State Arbitration-Related Developments in the EU,* Kluwer Arbitration Blog (Feb. 13, 2023)**
- ***FINRA Fines Long Island BD Over Reg BI,* Think Advisor (Feb. 13, 2023)**
- ***New York Statute Offers Alternative Mechanism for Seeking Discovery in Aid of Private Arbitration Given Narrowed Scope of 28 U.S.C. § 1782*, National Law Review (Feb. 14, 2023)**

DID YOU KNOW?

- **"Silent Cal," the Creator of Modern Arbitration?**

A NEW FEATURE ARTICLE. *Appearing in this week's* Alert *is a new feature article authored by arbitration practitioner and SAA Editorial Advisory Board member David E. Robbins, Esq.,* FINRA's New Expungement Rules – Balancing Interests But Adding Roadblocks. *In it, he offers a detailed, yet succinct analysis of FINRA's comprehensive package of proposed expungement rule changes awaiting SEC approval. And we have our usual*

collection of Squibs, Short Briefs, Quick Takes, and Articles of Interest. In other words, another jam-packed new issue of the Alert*!*

FEATURE ARTICLE

FINRA'S NEW EXPUNGEMENT RULES – BALANCING INTERESTS BUT ADDING ROADBLOCKS, *by David E. Robbins, Esq.* Pending SEC approval, FINRA's significant changes to its expungement procedures will later this year be implemented. The first thing practitioners will see is that there are so many moving parts that getting a customer complaint or arbitration permanently removed from a broker's record will become much more difficult. While the three grounds for expungement remain the same – (1) the information to be expunged is factually impossible or clearly erroneous; (2) the person was not involved in the sale practice violations; or (3) the allegations are false – without a firm grasp of the new requirements, the odds of securing a broker's expungement will drop precipitously. This article explains the new era of expungements. *Read more…*

(ed: David E. Robbins, of Kaufmann Gildin & Robbins LLP [www.securitieslosses.com] is a long time member of the board of this publication. He represents investors, brokers and firms and is the author of Securities Arbitration Procedure Manual *and the* Securities Arbitration Practice Commentary for McKinney's Consolidated Laws of New York*.)*

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SQUIBS: IN-DEPTH ANALYSIS

SPLIT NINTH CIRCUIT HOLDS CALIFORNIA'S AB-51 IS PREEMPTED BY THE FAA. *A divided Ninth Circuit Panel holds that California's AB-51 is preempted by the Federal Arbitration Act ("FAA").* Enacted in 2019, AB-51 is a law that restricts predispute arbitration clauses ("PDAA") in employment relationships. It provides: "A person shall not, as a condition of employment, continued employment, or the receipt of any employment-related benefit, require any applicant for employment or any employee to waive any right, forum, or procedure for a violation of any provision of the California Fair Employment and Housing Act [FEHA] (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code) or this code, including the right to file and pursue a civil action or a complaint with, or otherwise notify, any state agency, other public prosecutor, law enforcement agency, or any court or other governmental entity of any alleged violation…. An employer shall not threaten, retaliate or discriminate against, or terminate any applicant for employment or any employee because of the refusal to consent to the waiver of any right, forum, or procedure…." There are also criminal penalties for violations: "It is an unlawful employment practice for an employer to violate [the law]…. Any person violating this article is guilty of a misdemeanor."

Basic Litigation History

As reported in SAA 2021-36 (Sep. 23), a split Ninth Circuit in *Chamber of Commerce of the United States v. Bonta*, 13 F.4th 766 (9th Cir. 2021), ruled on the validity of AB-51. The divided Court held that the mandatory PDAA use preclusions in the new law withstood FAA preemption scrutiny, but the criminal and civil penalties for mandatory PDAA use do not. In **October 2021**, the Chamber and the other challengers filed a Motion for *En Banc* Review. We later reported in SAA 2021-48 (Dec. 23) that the State and other Respondents filed their response in **December 2021**. The thrust of the argument, as expressed in their brief (*ed: repeated essentially* verbatim):

1) the Panel decision respects the FAA and Supreme Court precedent; 2) the Panel decision creates no intra- or inter-Circuit conflict; and 3) there is no special need to review this decision.

SCOTUS and *Viking River*

With the issue joined, as reported in SAA 2022-07 (Feb. 24), a majority of the Ninth Circuit Panel in **February 2022** *sua sponte* issued an Order deferring consideration of the Petition until after the Supreme Court decided *Viking River Cruises, Inc. v. Moriana*, No. 20-1573, set for argument **March 30, 2022**. The question presented in the granted **May 2021** Petition for *Certiorari* in *Viking River* was: "Whether the Federal Arbitration Act requires enforcement of a bilateral arbitration agreement providing that an employee cannot raise representative claims, including under [California's Private Attorney General Act] PAGA." As our readers know, the United States Supreme Court in **June 2022** held 8-1 in *Viking River* that PAGA was in part preempted by the Federal Arbitration Act, insofar as PAGA allowed employees to evade bilateral predispute arbitration agreements. That would generally have been the end of the case as far as SCOTUS was concerned, but that was not the case here. In **July 2022,** Moriana filed a Petition for Rehearing, suggesting: "[T]he Court should grant rehearing solely for the purpose of modifying Part IV of its opinion to state that the Court does not decide the state-law issues of severability and standing and that its disposition is limited to reversal in part of the state court's holding that the *Iskanian* rule is not preempted by the FAA…."

A Bolt From the Blue

The reargument request was denied without comment by SCOTUS on **August 22, 2022.** As reported in SAA 2022-33 (Sep. 9), that same day the Ninth Circuit Panel issued a two-page Order *sua sponte* withdrawing the original decision and dissent and ordering a rehearing, stating: "A majority of the panel has voted sua sponte to grant panel rehearing. Judge Fletcher and Judge Ikuta voted in favor of rehearing, and Judge Lucero voted against rehearing. The opinion and dissent filed on September 15, 2021 … are withdrawn, and the case is resubmitted. The petition for rehearing en banc … is **DENIED** as moot" (emphasis in original; internal citations omitted).

Upon Further Review, FAA Preempts AB-51

Upon reconsideration, a divided Court holds in *Chamber of Commerce of the United States v. Bonta*, No. 20-15291 (9th Cir. Feb. 15, 2023), that the FAA preempts AB-51: "We therefore conclude that the approach adopted by the Supreme Court in *Casarotto* and *Kindred Nursing* for determining whether the FAA preempts a state rule limiting the ability of parties to form arbitration agreements applies to state rules that prevent parties from entering into arbitration agreements in the first place…. We agree with our sister circuits that the FAA preempts a state rule that discriminates against arbitration by discouraging or prohibiting the formation of an arbitration agreement." In sum: "AB 51's deterrence of an employer's willingness to enter into an arbitration agreement is antithetical to the FAA's 'liberal federal policy favoring arbitration agreements.'… Because the FAA's purpose is to further Congress's policy of encouraging arbitration, and AB 51 stands as an obstacle to that purpose, AB 51 is therefore preempted."

Dissent: AB-51 Conforms to the FAA

Judge **Lucero** dissents, contending that the statute does not run afoul of the FAA: "AB 51's purpose matches the FAA's purpose. The clear language of the FAA and those cases neither state

nor imply that an employer may compel arbitration as a condition of employment, as the majority declares. Instead, the FAA's history, legislative purpose, and caselaw all demonstrate its intention to honor agreements freely agreed to according to the terms voluntarily submitted to by both parties. AB 51 advances that purpose. AB 51 ensures contracts are "entered into as a matter of voluntary consent, not coercion." … This does not form an obstacle to the FAA's purpose of ensuring consensual agreements are honored."
(ed: We are not surprised. Our editorial comment after the Court declared a "do-over" was: With Judge Fletcher joining [original] dissenter Ikuta, it seems to us that AB-51 may be standing on shaky legs.")
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FOREIGN SOVEREIGN IMMUNITIES ACT NO BAR TO INTERNATIONAL AWARD ENFORCEMENT. ***Applying the arbitration exception to the Foreign Sovereign Immunities Act ("FSIA"), the District Court in Zhongshan Fucheng Industrial Investment Co., Ltd. v. Republic of Nigeria, No. 2022-0170 (D. D.C. Jan. 26, 2023), enforces a multi-million dollar Award against Nigeria under the*** **UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards.** The $65 million+ Award was rendered in the United Kingdom. China, Nigeria, the U.K., and the United States, are all *Convention* signatories. We will let Chief Judge **Beryl L. Howell**'s words speak for themselves.

The FSIA's "Arbitration Exception" …
"At issue here is the [FSIA's] arbitration exception, 28 U.S.C. § 1605(a)(6), which permits U.S. courts to confirm an arbitration award rendered outside of the United States in certain instances. The exception provides, in pertinent part:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the action is brought . . . to confirm an award made pursuant to . . . an agreement to arbitrate, if . . . the agreement or award is or may be governed by a treaty or other international agreement in force . . . calling for the recognition and enforcement of arbitral awards'" (footnote omitted; ellipses in original; links added by the *Alert*).

… Applies Here
And the holding: "Petitioner has met its burden of production as to all three requirements under the arbitration exception. First, as to the existence of the arbitration agreement, petitioner has alleged, without dissent from Nigeria, that both parties consented to the arbitration—Nigeria via Art. 9 of the China-Nigeria BIT [bilateral investment treaty], which provided that either party may submit a dispute to an ad hoc tribunal, and Zhongshan via filing a Request for Arbitration.… Petitioner has also met its burden as to the second and third requirements by producing the Final Award and referring to the New York Convention.… Nigeria, meanwhile, has failed to discharge its burden of persuasion to establish that this arbitral award falls outside the scope of the New York Convention …. Resultantly, the Court finds that the arbitration exception to the FSIA applies, stripping Nigeria of sovereign immunity and establishing the Court's subject-matter and personal jurisdiction over the case" (citations omitted).
(ed: This dispute has a long history. We've simplified things.)
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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

PIABA TO SEC: FINRA SHOULD CREATE DATABASE TRACKING DIRECTOR DECISIONS ON ARBITRATOR REMOVALS. We analyzed in SAA 2023-07 (Feb. 16) the few comments posted on the SEC's Website on SR-FINRA-2022-033, *Proposed Rule Change to Amend the Codes of Arbitration Procedure to Make Various Clarifying and Technical Changes to the Codes, Including in Response to Recommendations in the Report of Independent Counsel Lowenstein Sandler LLP*. In conducting our analysis, we missed that PIABA's letter contained the following proposal: "PIABA believes that Director's decisions regarding party-initiated challenges should be placed in a publicly available database, such as the one currently maintained for FINRA awards. Such release would provide helpful precedents for future parties to consider in evaluating potential arbitrators. Moreover, such a database would give parties insight that would help them in understanding what FINRA considers to be a legitimate ground for a challenge to a potential arbitrator and provide greater transparency, consistency and fairness to the process. PIABA understands FINRA's likely reluctance to have such a database contain the name(s) of the arbitrator(s) at issue, and would support the redaction of those names from the database records."
*(ed: *Interesting. **An* Alert *h/t to* AdvisorHub*, which ran a story on this topic on February 17. *** FINRA on February 14 extended to April 12 the SEC's time to act.)*
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NINTH CIRCUIT: EVEN WITH LESS STRINGENT *MORGAN* STANDARD, NO WAIVER OF ARBITRATION RIGHTS HERE. The Supreme Court last **May** decided *Morgan v. Sundance Inc.*, No. 21-328, ruling unanimously that there is no prejudice requirement under the Federal Arbitration Act ("FAA") for a court to find a waiver of arbitration rights. Noting that: "the usual federal rule of waiver does not include a prejudice requirement," **Justice Kagan** wrote: "the FAA's 'policy favoring arbitration' does not authorize federal courts to invent special, arbitration-preferring procedural rules…. And indeed, the text of the FAA makes clear that courts are not to create arbitration-specific procedural rules like the one we address here…." Did the result in *Morgan* portend courts migrating toward more waiver of arbitration rights holdings? Not according to the unanimous holding in *Armstrong v. Michael Stores, Inc.*, No. 21-15397 (9th Cir. Feb. 13, 2023). Says the Opinion: "Following *Epic Systems* and *Morgan*, we recognize that there is no longer a thumb on the scale in favor of arbitration, and that the party opposing arbitration no longer bears a 'heavy burden' to show waiver of the right to arbitration. Even in this new landscape, Armstrong has failed to establish that Michaels acted inconsistently with exercising its right to arbitrate." What had transpired? "Michaels repeatedly reserved its right to arbitration, did not ask the district court to weigh in on the merits, and did not engage in any meaningful discovery. Indeed, the only significant motion filed was Michaels's motion to compel arbitration. Although Michaels did not immediately move to compel arbitration, its actions do not amount to a relinquishment of the right to arbitrate."
(ed: 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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WHITE HOUSE'S PROPOSED RENTERS BILL OF RIGHTS WOULD BAR MANDATORY ARBITRATION CLAUSES. The Biden Administration's proposed *Blueprint for a Renters Bill of Rights* contains a ban on mandatory predispute arbitration clauses ("PDAA") in residential leases. The *Blueprint*, which was released **January 26**, states: "**Second Principle: Clear and Fair Leases**: Renters should have a clear and fair lease that has defined rental terms, rights, and responsibilities. Leases *should not include mandatory arbitration clauses*, unauthorized terms, hidden or illegal fees, false representations, or other unfair or deceptive practices" (italics added). On the other hand, the Principle on eviction prevention seems to encourage *voluntary* alternative dispute resolution as a way for renters to avoid eviction: "Renters should be able to access resources that help them avoid eviction, ensure the legal process during an eviction proceeding is fair, and avoid future housing instability…. Renters should be able to avoid an eviction filing through alternatives to the eviction system, such as eviction diversion and grievance procedures that prevent formal legal proceedings *through negotiation, mediation, or arbitration*" (italics added).
*(ed: *The draft is supported by a Factsheet. **The* Blueprint*: "is a white paper published by the White House Domestic Policy Council and National Economic Council. It is … a statement of principles; it is not binding and does not itself constitute U.S. government policy. It does not supersede, modify, or direct an interpretation of any existing Federal, state, or local statute, regulation, or policy.")*
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FINRA ARBITRATION PANEL AWARDS MORE THAN $20 MILLION IN RAIDING CASE. The Award in question, *Wells Fargo Advisors LLC v. Raymond James Financial Services Inc.*, FINRA No. 20-02796 (Little Rock, AR, Feb. 2, 2023), was amended the same day to correct a significant error in the amount awarded. The claimant, Wells Fargo, brought the arbitration against five of its former brokers and the broker-dealer to which they moved, Raymond James, alleging: "that it was damaged by Respondents' coordinated raid of Claimant's branch office in Mountain Home, Arkansas, which targeted all of the employees of the Mountain Home Branch and resulted in its closure." The Counterclaim by the five brokers: "alleged that subsequent to their departures from Claimant, Claimant assigned Individual Respondents' clients to replacement financial advisors and that the replacement financial advisors, through untruths and/or deception, improperly caused clients to sever their relationship with Individual Respondents." The Statement of Claim requested unspecified compensatory and punitive damages, attorney fees and costs, and the Counterclaim requested only unspecified compensatory damages, but: "[a]t the hearing, Claimant specified its request for damages in excess of $12,300,000.00…." About half-way through the schedule of 40 hearings, Wells Fargo voluntarily dismissed their claims against four of the brokers, and after the hearings ended, the four brokers voluntarily withdrew their Counterclaims, leaving only Wells Fargo's claims against Raymond James and the one remaining broker, Kent Rhoades, and Rhoades' Counterclaim. In the Amended Award, the Panel held these remaining respondents jointly and severally liable to Wells Fargo for a total of $20,647,000, consisting of $15,300,000 in compensatory damages, $1,000,000 in punitive damages (only $1,000 in the original, erroneous version of the Award), $3,500,000 in attorney fees, and $847,000 in costs. It denied Rhoades' Counterclaim.

*(*The link contains the Amended Award, followed by the original Award. Both Awards are provided courtesy of SAC's ARBchek facility (www.arbchek.com). **This was the largest FINRA raiding Award in more than six years and the fifth largest award in any FINRA arbitration within the past year. ***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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QUICK TAKES: CASES AND AWARDS WORTH READING

***Kamisha Stanton v. Cash Advance Centers, Inc.*, No. 22-1466 (8th Cir. Feb. 7, 2023)**: "The notice of appeal also names Cash Advance Centers, Inc., the party defendant, as an appellant. But while attorneys purporting to represent Cash Advance Centers, Inc., filed a notice of appeal, counsel acknowledged at oral argument that she represented only non-party Advance America, Cash Advance Centers of Missouri, Inc., and not Cash Advance Centers, Inc…. Because the attorneys who filed the notice of appeal on behalf of Cash Advance Centers, Inc., concededly did not represent that party, the notice of appeal was unauthorized and invalid" (citation omitted).

***Oberstein v. Live Nation Entertainment, Inc.*, No. 21-56200 (9th Cir. Feb. 13, 2023)**: "This appeal arises from a motion to dismiss in favor of compelled arbitration. Plaintiffs-Appellants represent a putative class of ticket purchasers ('Ticket Purchasers') against Defendants-Appellees Ticketmaster LLC and Live Nation Entertainment, Inc. ('Appellees'). Ticket Purchasers sued Appellees in federal district court alleging anticompetitive practices in violation of the Sherman Act. Appellees moved to compel arbitration on the basis of their websites' terms of use ('Terms'). The court granted the motion and dismissed the case, holding that the Terms constituted a valid agreement between the parties and that the requirements for mutual assent were met. For the following reasons, we affirm."

***JPV I L.P. v. Koetting*, No. A163491 (Calif. Ct. App. 1 Feb. 7, 2023)**: "After purchasing the judgment from the TLEs, JPV I L.P. (JPV) moved to amend the judgment to add the Koettings as judgment debtors on an alter ego theory. On appeal from the denial of that motion, JPV contends the trial court abused its discretion by: … disregarding the collateral estoppel effect of the arbitrator's findings underlying the judgment against the LLCs…. We agree with JPV that, with respect to the collateral estoppel and alter ego issues, the trial court made erroneous legal assumptions and misunderstood the proper scope of its discretion. Accordingly, we will vacate the trial court's order and remand for further proceedings consistent with this opinion."

***Young v. Webull Financial*, FINRA ID No. 22-01856 (Denver, CO, Jan. 5, 2023)**: In this small claims arbitration, an Arbitrator explains in detail why he decided to deny the customer's case, finding that the customer did not cite any contract breaches, regulatory violations, or other bases for relief in his favor against Respondent broker-dealer. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Morgan Stanley v. Baird*, FINRA ID No. 20-02339 (Buffalo, NY, Jan. 17, 2023)**: A non-appearing broker is found liable to Claimants for over $1.2 million in damages relating to the

amounts due and owing on three promissory note agreements. The Panel also assessed a monetary sanction against Respondent broker for his failure to comply with the Panel's Orders regarding the production of discovery, and dismissed with prejudice his Counterclaim pursuant to FINRA Rules 13511(b) and 13212(c). *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*
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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Radicati di Brozolo, Luca G, *Competition between Cross-Border Dispute Settlement Mechanisms: Domestic Courts, Arbitration and International Commercial Courts - Procedural and Substantive Options for Litigants*, in C. Benicke and S. Huber (eds), *Festschrift fur Herbert Kronke, Verlag Ernst und Werner Giesekind*, Bielefeld, 2020, p. 447 ff: "This paper is based on the proposition that dispute settlement mechanisms are what determines the rights and obligations of the parties to any transaction. An efficient and trustworthy system for the settlement of international commercial disputes is crucial to international business. The New York Convention of 1958 gave rise to a truly transnational system of adjudication as an alternative to the fragmented and parochial regime of domestic jurisdictions. It is essential for litigants to have an option between alternative dispute settlement mechanisms. The recent establishment of international commercial courts in several jurisdictions is not yet a game-changer because such courts do not offer the same advantages in terms of neutrality and suitability to deal with transnational commercial disputes as international arbitration."

***Credit Suisse Loses $1.3 Million Arbitration Over Deferred Compensation*, Barron's (Feb. 9, 2023)**: "A Finra arbitration panel ordered Credit Suisse to pay one of its former financial advisors approximately $1.3 million for alleged breach of contract, according to a Feb. 2 award.[] It's the latest in a series of lengthy legal battles between Credit Suisse and dozens of advisors who have accused it of wrongly withholding their deferred compensation following the Swiss bank's announcement in late 2015 that it would shutter its U.S. wealth management unit." (*ed: Link to Award added by the* Alert.)

***2022 in Review: Looking Back on Investor-State Arbitration-Related Developments in the EU*, Kluwer Arbitration Blog (Feb. 13, 2023)**: "In our 2021 in Review post, we predicted that 2022 would not disappoint; it would be another busy year with several investment arbitration-related developments in the European Union (EU). In line with the Blog's traditional 'year-in-review' series, this post is the moment of truth for our prediction. In what follows, I will offer an overview of the developments that marked 2022 as we covered them in the Blog."

***FINRA Fines Long Island BD Over Reg BI*, Think Advisor (Feb. 13, 2023)**: "In its third enforcement action this year related to the Securities and Exchange Commission's Regulation Best Interest, the Financial Industry Regulatory Authority has censured and fined a Long Island broker-dealer firm.[] Long Island Financial Group was ordered to pay a $35,000 fine for failing, since June 30, 2020, to establish, maintain and enforce written policies and procedures reasonably designed to achieve compliance with Reg BI."

***New York Statute Offers Alternative Mechanism for Seeking Discovery in Aid of Private Arbitration Given Narrowed Scope of 28 U.S.C. § 1782*, National Law Review (Feb. 14, 2023)**: "On June 13, 2022, in *ZF Automotive US, Inc. v. Luxshare, Ltd*., the U.S. Supreme Court narrowed the scope of 28 U.S.C. § 1782 ('Section 1782') by holding that 'only a governmental or intergovernmental adjudicative body' is a 'foreign or international tribunal' under Section 1782 and that Section 1782 does not apply to private arbitration…. While the Supreme Court's ruling, as well as subsequent district court decisions, narrow the reach of Section 1782 and remove the option for parties in a non-governmental or non-intergovernmental proceeding to seek foreign discovery, parties to a private arbitration may turn to New York's Civil Practice Law and Rules (CPLR) § 3102 to obtain discovery in aid of arbitration from parties who are subject to the jurisdiction of New York courts."
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DID YOU KNOW?

"SILENT CAL," THE CREATOR OF MODERN ARBITRATION? In keeping with our Presidents Day theme of our Chief Executives and arbitration, *Alert* readers know that the Federal Arbitration Act ("FAA") was enacted in 1925 and went into effect a year later. The FAA abrogated the existing law, which was based on Common Law hostility to arbitration, made written promises to arbitrate matters involving interstate commerce specifically enforceable, and established very limited judicial review of arbitration awards. The FAA was passed by both houses of Congress, *without a dissenting vote*, and with the urging of then-Secretary of Commerce, **Herbert Hoover**. And who do we have to thank in part for the FAA? President **Calvin Coolidge**, who signed it into law on February 12, 1925.
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Send any messages or inquiries to: George@SecArbAlert.com

Editor's Note & Disclaimer: While we undertake considerable efforts to present information in this publication in a fair and accurate manner, we caution that readers should access referenced material themselves as the best source. Our analyses make liberal use of links, and we offer courtesy copies of materials not on the Internet. Similarly, readers should not rely solely upon our summaries in making legal decisions or consider our commentary to be rendering legal, accounting, or other professional advice or service. If legal advice or other expert assistance is required, the services of a competent professional person should be sought. — *adapted from the Declaration of Principles jointly adopted by a Committee of the American Bar Association and a Committee of Publishers and Associations.*

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