SECURITIES ARBITRATION ALERT 2023-15 (4/20/23)

George H. Friedman, Editor-in-Chief

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ARTICLES OF INTEREST:

- **Roos, Hanna, *Arbitration Tech Toolbox: Let's Chat Some More about ChatGPT and Dispute Resolution,* Kluwer Arbitration Blog (Apr. 8, 2023)**
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FEATURE ARTICLE

SCALING THE TIPS OF A CLAIMED INFORMATION ADVANTAGE: A RESPONSE TO "TIPPING THE SCALES: BALANCING CONSUMER ARBITRATION CASES", *by Richard P. Ryder, Esq.*

We reported in SAA 2023-12 (Mar. 23) on a newly-released research paper that questions securities arbitration's fairness and, among other things, recommends that list selection be eliminated. *Tipping*

the Scales: Balancing Consumer Arbitration Cases, was released February 23 by the Stanford Institute for Economic Policy Research ("SIEPR"). The core findings? "1) Arbitration is often assumed to be fair and balanced. But brokerage firms often hold an advantage over consumers. 2) Random selection of arbitrators would increase consumer awards by about $60,000 on average. 3) Industry-friendly arbitrators are 50 percent more likely to be chosen from the arbitrator pool than their consumer-friendly counterparts because securities firms are sophisticated at eliminating consumer-friendly arbitrators." We encouraged readers with views on the report to submit a letter to the *Alert*'s editor. To our happy surprise, **Rick Ryder** has stepped in with this insightful "analysis of the analysis." *Read more…*

(ed: Richard "Rick" Ryder is the Founder and President, Securities Arbitration Commentator, Inc. (SAC), which owns ARBchek, an online facility for searching Arbitrators' Award histories. Mr. Ryder is a member of the SAA*'s editorial Advisory Board.)*

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SQUIBS: IN-DEPTH ANALYSIS

THINK THE "RIGGED PANELS" CASE IS FINALLY DONE? SURE LOOKS LIKE IT. ***Those who thought this one was finished are a step closer to reality, as an appeal that had been filed with the Georgia Supreme Court was recently rejected***. We reported in SAAs 2022-31 (Aug. 11) & -30 (Aug. 4) that the Georgia Court of Appeals had "unvacated" the Award in the so-called "rigged panels" case. The *Alert*'s readers are very familiar with this saga, which we've covered extensively and blogged about on February 2, 9, 25, and 29. We also provided in-depth coverage of the appellate decision in an **August 2022** *Alert* Blog post, *Expanded Coverage: Unanimous Georgia Court of Appeals Tosses Trial Court's Award Vacatur in "Rigged Panels" Case.*

Brief History: Award Vacated

To review succinctly, Fulton County Superior Court Judge **Belinda E. Edwards** in *Leggett v. Wells Fargo Clearing Services, LLC*, No. 2019CV328949 (Ga. Super Jan. 25, 2022), vacated the Award in what might be considered a primer on the basic Federal Arbitration Act grounds for vacating an award (i.e., fraud, arbitrator bias, arbitrator misconduct in not hearing relevant or material evidence or failing to grant a reasonable postponement request; or the panel exceeding authority). Although the Trial Court found these bases for vacating the Award, Judge Edwards weighed in on interference with the Neutral List Selection System with some scathing verbiage:

> The Court's factual review of the record evidence leads to its finding that Wells Fargo and its counsel manipulated the FINRA arbitrator selection process in violation of the FINRA Code of Arbitration Procedure, denying the Investors' their contractual right to a neutral, computer-generated list of potential arbitrators. Wells Fargo and its counsel, Terry Weiss, admit that FINRA provides any client Terry Weiss represents with a subset of arbitrators in which certain arbitrators (at least three, but perhaps more) are removed from the list Wells Fargo agreed, by contract, to provide to the Investors in the event of a dispute. Permitting one

> lawyer to secretly red line the neutral list makes the list anything but neutral, and calls into question the entire fairness of the arbitral forum.

Award "Unvacated"

Wells appealed, and, in a unanimous decision, the Georgia Court of Appeals reinstated the Award in *Wells Fargo Clearing Services, LLC v. Leggett*, No. A22A1149 (Ga. Ct. App. Aug. 2, 2022). The unanimous decision rejects all bases upon which Judge Edwards vacated the Award. As to "secret deals" between FINRA and Wells' then-attorney Terry Weiss, the Court says:

> Nothing indicates that Wells Fargo 'manipulated' the arbitrator pool. It simply asked that [Arbitrator] Pinckney be removed under FINRA Rule 12407. We fail to see how the Director's decision to grant that request — which was made after all parties had a chance to address the issue — constituted manipulation by Wells Fargo.[] Although the investors claim that a 'secret agreement' existed between FINRA and Weiss to automatically exclude the *Postell* arbitrators from any arbitrator list generated on a case involving Weiss, there is no evidence that such agreement was at play here, given Pinckney's inclusion on the initial list. Even if an agreement exists, the investors have not shown that it impacted this arbitration."

Appeal to Georgia Supreme Court Filed .. and Denied

Our editorial comment in # 31 was: "Dare we say it? Barring further appeals, this might be the end of this one …." Alas, as reported in SAA 2022-42 (Nov. 10), Leggett on **August 22, 2022** filed a Petition for *Certiorari*, seeking review by the Georgia Supreme Court. On **April 4,** a unanimous Court declined to review the case: "Certiorari – Writ denied …. All the Justices concur, except Boggs, C. J., not participating."
*(ed: *Again, we can't say we are surprised. **The case is* Leggett v. Wells Fargo Clearing Services, LLC, *No. S23C0074 and can be found at https://www.gasupreme.us/docket-search/. ***Dare we say it? Barring SCOTUS review, this might be the end of this one.)*
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FINRA PANEL DECLINES REQUEST TO EXPLAIN ITS DECISION. ***A panel of three arbitrators rejects a unilateral request for an explained Award under Rule 12904(g) of the FINRA Customer Code of Arbitration Procedure ("Code"), as well as a motion to disqualify an expert.*** The Award in question, *ODS Capital, LLC v. Pershing LLC et al.*, FINRA ID No. 20-03928 (Boca Raton, FL, Mar. 24, 2023), also results in a multi-million-dollar award of damages on a counterclaim against the claimant which, despite its name, was a customer and not a brokerage. All quotations below are from the Award.

Claims and Counterclaims

ODS Capital brought the arbitration against three broker-dealers: Pershing LLC ("Pershing"), Merrill Lynch Professional Clearing Corporation ("MLPRO") and Celadon Financial Group, LLC ("CFG"). According to the Award, Claimant accused them of:

"breach of fiduciary duty; breach of implied duty of good faith; breach of contract; civil theft; conversion; fraud; accounting; unjust enrichment; restitution; and disgorgement. The causes of action relate to Respondents' debit of funds from Claimant's accounts based on Claimant's short-selling activity of Dole Food Company, Inc. and a litigation settlement involving the common stock at issue." MLPRO filed a counterclaim alleging: "two causes of action for breach of contract. The causes of action relate to Claimant's alleged failure to furnish payments relating to lawsuit settlements after the Starz-Lionsgate merger and the Calamos merger."

No Need for an Explained Decision

Code Rules 12904(g) and 13904(g) (applicable, respectively, to claims by or against customers and to intra-industry claims) both state in relevant part: "(1) This paragraph (g) applies only when all parties jointly request an explained decision.[] (2) An explained decision is a fact-based award stating the general reason(s) for the arbitrators' decision. Inclusion of legal authorities and damage calculations is not required." Claimant filed a Request for Explained Decision Pursuant to Rule 12904(g), arguing: "among other things, that an explained decision would serve the public interest and would facilitate regulatory oversight." The Respondents opposed this request and jointly: "responded, among other things, that: Rule 12904(g) only authorizes the Panel to render an explained decision if all parties agree; the nature of Claimant's claims is not a relevant consideration under Rule 12904(g); the public interest is not a relevant consideration under Rule 12904(g); and the Panel is not a quasi-regulatory body." The Panel denies the motion.

Respondents' Expert May Testify

The Claimant also: "filed a Motion to Strike and Disqualify Respondent's Expert Witness in which it asserted, among other things, that the expert witness was the Managing Director & Deputy General Counsel for the Depository Trust & Clearing Corporation ("DTCC") and that the expert witness's employer, and its subsidiary DTC, were directly involved in the present claim as DTC allegedly facilitated the improper removal of funds from Claimant's account." The Respondents: "argued, among other things, that: Claimant did not argue the expert witness's lack of expertise because it would fail on that argument; the expert did not have any personal knowledge of the 2017 debit at issue in this case and is not a fact witness; DTCC was not involved in the 2017 debit at issue in the case; and, even if the expert had a personal interest in this arbitration, it would not be a basis to exclude him." The Panel also denies this Motion.

A Win for the Respondents

The Panel denies ODS Capital's claim and finds it liable on the counterclaim to MLPRO for $533,643.43 in compensatory damages for the two merger claims and the following attorney fees and costs: $1,312,080.60 to MLPRO, $892,512.73 to Pershing and $75,385.92 to CFG. It awards all of the attorney fees and costs: "pursuant to their broker/customer agreement…." Altogether, ODS Capital is liable for more than $2.8 million.

*(*Nothing in the rules would have prevented the Panel from explaining its decision, whether or not any party requested them to do so. **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

THAT WAS FAST! SEC APPROVES EXPUNGEMENT RULE CHANGES. Time really does fly. Just a week ago we were reporting in SAA 2023-14 (Apr. 13) that there had been a flurry of activity regarding FINRA's proposed rule changes on expungement, SR-FINRA-2022-024. See specifically the **April 3** proposed further amendments and response to comments by Associate General Counsel **Mignon McLemore**. It didn't take the SEC long to act, as the Commission approved the rule filing on **April 12**. Recall that appearing in SAA 2023-08 (Feb. 23) was 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 offered a detailed, yet succinct analysis of FINRA's comprehensive package of proposed expungement rule changes then awaiting SEC approval. Mr. Robbins has agreed to update his article to reflect the final, approved rule. Look for it in a future *Alert.*
*(ed: *According to an April 14* InvestmentNews *story: "NASAA supported many of the changes Finra proposed but believes there is more to be done," NASAA President Andrew Hartnett said in a statement, 'These changes are a step in the right direction however, we remained concerned that the fundamental flaws with Rule 2080 will continue to result in large numbers of investor complaints being expunged from regulatory records.'" **After* Federal Register *publication of the Approval Order, FINRA will publish a Regulatory Notice setting the effective date.)*
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NJ APPELLATE DIVISION: FORMAL, SIGNED AGREEMENT NEEDED TO ENFORCE MEDIATED SETTLEMENT. Pretty much all training materials urge mediators to get at least a signed or clicked confirmation of basic settlement terms before the parties leave the room – virtual or physical. At least in New Jersey, that guidance may be extended to include getting a signed, formal settlement agreement. In *Gold Tree Spa, Inc. v. PD Nail Corp.*, No. A-3748-21(N.J. Super. App. Div. Mar. 23, 2023), the parties informally settled their dispute via mediation. The settlement fell apart, however, before a formal settlement agreement could be executed. A unanimous Court finds the informal settlement agreement is not enforceable: "*Willingboro* [*Mall, Ltd. v. 240/242 Franklin Ave., LLC*, 215 N.J. 242, 262 (2013)] clearly applies and its holding is unambiguous: '[t]o be clear, going forward, a settlement that is reached at mediation but not reduced to a signed written agreement will not be enforceable.' 215 N.J. at 263. The parties did not sign the draft settlement agreement and, therefore, it is unenforceable under *Willingbor*o's broad, bright-line rule. See id. at 262-63. While there is a distinction between the various

forms of mediation, as indicated in N.J.S.A. 2A:23C-3, the differences are irrelevant when considering the policy behind the Willingboro decision."
(ed: **The Opinion was referring to court-annexed vs. private mediation when it referenced "various forms of mediation." **Our guess is that FINRA would have used Rule 9554(a) to go after an industry party that engaged in in this behavior. The Rule provides for possible suspension: "of a member, person associated with a member or person subject to FINRA's jurisdiction [that] fails to comply with an arbitration award or a settlement agreement related to an arbitration or mediation under Article VI, Section 3 of the FINRA By-Laws….")*
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CPR AND OTHERS TO HOST MAY 16 PROGRAM ON DIVERSITY. CPR will be hosting a free event: "in partnership with Howard University School of Law, The Ray Corollary Initiative (RCI), the ABA Dispute Resolution Section's Women In Dispute Resolution committee (WIDR), the Minority Corporate Counsel Association, and the ACC Foundation." *Bringing Together Neutrals and Selectors To Reduce Obstacles to Diverse Selections* will take place on **May 16** from 6:00 – 9:00 pm Eastern. It is: "designed to inspire greater diversity in the selection of neutrals for dispute resolution.[] The first, shorter part of the event will be a panel presentation on how to disrupt the hidden or implicit biases that impact decision-making in selecting neutrals.[] The second part of the event will be a structured networking opportunity during which neutrals and appointers will have ample time to meet and get to know one another."
*(ed: *The program event will take place at Howard University School of Law, 2900 Van Ness Street, NW, Washington, DC 20008. **This event is free, but online registration is required. ***Questions? Contact CPR VP of Advocacy & Educational Outreach Ellen Waldman.)*
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QUICK TAKES: CASES AND AWARDS WORTH READING

***Ribadeneira v. New Balance Athletics, Inc*., No. 21-1831 (1st Cir. Apr. 6, 2023)**: "Ribadeneira and Superdeporte subsequently filed a motion in the district court to vacate the arbitration awards. The awards had to be vacated, they contended, because they were nonsignatories of the Distribution Agreement, and hence not subject to its arbitration clause. Agreeing that the arbitrator had improperly exercised jurisdiction over Ribadeneira and Superdeporte, the district court vacated the awards. Because we conclude that theories of assumption and equitable estoppel apply here to support arbitral jurisdiction over appellees, we reverse the judgment of the district court" (footnote omitted).

***Direct Biologics v. McQueen*, No. 22-50442 (5th Cir. Apr. 3, 2023)**: "Direct Biologics, LLC ('DB') brought claims for breach of covenant to not compete and misappropriation of trade secrets against Adam McQueen, DB's former employee, and Vivex Biologics, Inc. ('Vivex'), McQueen's new employer. After granting DB a temporary restraining order based on its trade secret claims, the district court denied DB's application for a preliminary injunction. Finding that DB's claims were subject to arbitration, the district

court also dismissed DB's claims against McQueen and Vivex and entered final judgment. For the following reasons, we VACATE the district court's orders denying DB's motion for a preliminary injunction and dismissing DB's claims, and REMAND for further proceedings consistent with this opinion."

***Ford Motor Warranty Cases*, No. B312261 (Calif. Ct. App. 2 Apr. 4, 2023**): "This is an appeal of an order denying the motion of defendant Ford Motor Company (FMC) to compel arbitration of plaintiffs' claims relating to alleged defects in vehicles it manufactured. We agree with the trial court that FMC could not compel arbitration based on plaintiffs' agreements with the dealers that sold them the vehicles. Equitable estoppel does not apply because, contrary to FMC's arguments, plaintiffs' claims against it in no way rely on the agreements. FMC was not a third party beneficiary of those agreements as there is no basis to conclude the plaintiffs and their dealers entered into them with the intention of benefitting FMC. And FMC is not entitled to enforce the agreements as an undisclosed principal because there is no nexus between plaintiffs' claims, any alleged agency between FMC and the dealers, and the agreements. Because we conclude that FMC was not entitled to compel arbitration, we need not consider whether it waived any right to so do." (*ed: An* Alert *h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this decision*.)

***Morris v. NPB Financial*, FINRA ID No. 22-00187 (Los Angeles, CA, Mar. 1, 2023)**: An Arbitrator explains in detail why she decided to grant without prejudice Respondent broker-dealer's Prehearing Motion to Dismiss pursuant to FINRA Rule 12206 (Six-year Eligibility Rule), finding that the event or occurrence giving rise to all five of the customers' causes of action contained in the Statement of Claim relate to a purchase that occurred in 2015 (i.e., more than six years ago). *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Drada v. Mutual of Omaha*, FINRA ID No. 21-02584 (Tampa, FL, Mar. 3, 2023)**: Despite the parties' settlement of all claims, a Panel denies a broker's request for reformation of alleged defamatory information from his Form U5 record, as he failed to present any evidence or testimony that would support an Order for such relief. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*
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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Roos, Hanna, *Arbitration Tech Toolbox: Let's Chat Some More about ChatGPT and Dispute Resolution*, Kluwer Arbitration Blog (Apr. 8, 2023): "ChatGPT is short for 'Chat Generative Pre-Trained Transformer'. It is an artificially intelligent text generation bot that can have a conversation…. I recently had the pleasure of discussing this new development on a soon-to-be-released podcast co-hosted by Delos Dispute Resolution and Orrick. Adith Haridas (co-founder of the digital disruptor AirPMO) provided insights from a chatbot developer's perspective. Tunde Oyewole (counsel at Orrick) explored whether it could and should be used in advocacy. In this blog post, I take a step back and

ask about the ethics of the whole exercise – in particular whether a chatbot is something the legal community could and should embrace."

***Finra Bars Former LPL, RayJay Rep who Borrowed $850,000 from Clients*, InvestmentNews (Apr. 3, 2023)**: "Chattanooga, Tennessee-based [rep] was registered with LPL Financial from 2007 to 2012 and then with Raymond James Financial Services."

***DST 401(k) Investors Get Nod for $12 Million Arbitration Awards*, Bloomberg (Apr. 4, 2023)**: "DST Systems Inc. must pay about $12 million in individual arbitration awards to 55 participants in its retirement plan, but similar awards covering 122 more participants won't be confirmed or transferred to Manhattan, a Missouri federal judge ruled.[] Judge Nanette K. Laughrey of the US District Court for the Western District of Missouri confirmed the arbitration awards of 55 individual DST plan participants after concluding that she had jurisdiction over these disputes based on the parties' citizenship in different states. But she declined to confirm the remaining awards at issue, saying she lacked jurisdiction …."

***5 Banned Firms in his Past, a Broker Now Faces Fraud Charges*, Financial Planning (Apr. 6, 2023)**: "Before [broker's] arrest on securities fraud and other charges in March, the former broker had worked for five firms that were eventually banned from the industry.[] And his latest employer, Aegis Capital — a New York-based brokerage and advisory firm that's still in business — has 38 disclosures of customer complaints and other questionable dealings on its records. Any one of those bits of information should have been a huge red flag to investors who were considering taking advice from [broker], said Craig McCann, the president of the research group SLCG Economic Consulting and a frequent expert witness in securities fraud cases."

***GS Fined $3M for Marking 60 Million Short-Sale Orders Wrongly*, Business Insider (Apr. 7, 2023)**: "A Wall Street watchdog, the US Financial Industry Regulatory Authority, or Finra, hit Goldman Sachs with a $3 million fine for mixing up 60 million stock orders, the brokerage regulator said in a Tuesday filing.[] The culprit? A single line of missing code in a software update.[] Goldman Sachs had mismarked 'short' sales orders totaling more than 14 billion shares as 'long' sales orders between October 2015 and April 2018, per the filing, which was signed by both, Finra and the investment banking giant."

***Arizona District Court Confirms Arbitration Award, Denies Cross-Motion to Vacate*, Lexology (Apr. 10, 2023):** "Relying on the Federal Arbitration Act (FAA) and noting that the FAA 'enumerates limited grounds on which a federal court may vacate, modify, or correct an arbitral award,' the U.S. District Court for the District of Arizona granted defendants UBS Financial Services Inc. and UBS Credit Corp.'s motion to confirm an arbitration award and denied the plaintiff's motion to vacate that award. *Paynter v. UBS Financial Services Inc.*, No. 2:21-cv-02024 (D. Ariz. Mar. 2, 2023)."

***Arbitrators Award Double Damages to Florida Investor Over Broker's "Egregious" Lies*, AdvisorHub (Apr. 11, 2023):** "A Financial Industry Regulatory Authority arbitration panel doubled the damages that a former broker must pay to a Florida investor based on the 'particularly egregious' lies that the broker told in convincing her client to invest most of her net worth in a sham, according to a decision issued this week.[] The claimant, Jasminka Ilich-Ernst, a retired professor at Florida State University, accused her former advisor … of breach of fiduciary duty, gross negligence, selling away and fraud, according to the award finalized on Monday. The panel granted her $458,236 in compensatory damages, another $458,236 in punitive damages and $145,000 in interest."
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DID YOU KNOW?

NOT A LATE APRIL FOOL'S DAY JOKE: THERE'S AN ARBITRATION BOARD GAME. You know arbitration has gone mainstream when they come out with a board game named for it. Need proof? Check out *Arbitration: A Game of Decision Making*. "This is a party game based on Rock, Paper, Scissors. Players roll a die to move on the board and read a question from four categories depending on which color they landed. For each question, all players must secretly pick one of three categories corresponding to Rock, Paper or Scissors and answer the question. The player who rolled the die must then pick another player whom he thinks he will beat on a Rock, Paper, Scissors challenge resolved with the categories they just selected. The player who wins the contest picks up a Win token. Answer sheets are collected and read out loud. If the player who won the contest correctly identifies the loser's answer, he wins a second token. The first player to get 2 Win tokens in every category wins the game."
(ed: The arbitration connection escapes us, but we'll give it a try.)
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