SECURITIES ARBITRATION ALERT 2023-16 (4/27/23)

George H. Friedman, Editor-in-Chief

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DID YOU KNOW?

- **Your Publisher Entered the ADR Field 47 Years Ago**

SQUIBS: IN-DEPTH ANALYSIS

ELEVENTH CIRCUIT REVERSES COURSE ON GROUNDS TO VACATE UNDER UN CONVENTION. ***Overruling prior Circuit precedent, the Eleventh Circuit finds that the grounds set forth in FAA section 10 are the sole basis for challenging "foreign" awards under the* Convention on the Recognition and Enforcement of Foreign Arbitral Awards *("*UN Convention*"), where the arbitration took place in the United States.*** An issue dividing the Circuits and some state courts is the grounds for challenging awards under the *UN Convention.* The views range from: 1) application of the grounds in Article V of the *Convention,* as implemented by Federal Arbitration Act ("FAA") Chapter 2's 9 U.S.C. section 207; 2) the grounds set forth in FAA Chapter 1's 9

U.S.C. section 10; and/or 3) both for "foreign" awards resulting from an arbitration conducted in the U.S. For the Eleventh Circuit, *Corporacion AIC, SA v. Hidroelectrica Santa Rita S.A.,* No. 20-13039 (11th Cir. Apr. 13, 2023), represents reversal of precedent dating back over 20 years, and holds unanimously that in *UN Convention* arbitrations conducted in the U.S., *only* the FAA Chapter 1 grounds are available. We borrow liberally from the Opinion.

Background

"The United States is a signatory to the New York Convention, a treaty which regulates international arbitration awards. See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 4739. Congress has implemented the Convention through Chapter 2 of the Federal Arbitration Act. See 9 U.S.C. §§ 201 et seq.[] Our task is to decide what grounds can be asserted to vacate an arbitral award governed by the New York Convention."

Procedural History

"Dissatisfied with the arbitral decision, Corporación AIC filed suit in federal court, seeking to vacate the award. It asserted that the arbitral panel had exceeded its powers, a ground set out in 9 U.S.C. § 10(a)(4), a provision of Chapter 1 of the FAA…. The district court ruled that such a challenge was unavailable because under Eleventh Circuit precedent, namely *Industrial Risk* and *Inversiones*, the grounds for vacatur of an arbitral award governed by the New York Convention are limited to those set out in Article V of the Convention. The district court therefore did not analyze whether the arbitral panel had exceeded its powers."

Prior Precedent …

"*Industrial Risk* [*Insurers v. M.A.N. Gutehoffnungshutte GmbH,* 141 F.3d 1434, 1445–46 (11th Cir. 1998)], decided in 1998, held that when a party seeks vacatur of an arbitral award issued under the New York Convention, a district court can only consider the grounds set out in Article V of the Convention…. Over 20 years later*, Inversiones* [*y Procesadora Tropical INPROTSA, S.A. v. Del Monte International GmbH*, 921 F.3d 1291, 1301–02 (11th Cir. 2019)], adhered to *Industrial Risk* because it constituted binding Eleventh Circuit precedent."

… Overruled

"We hold that in a New York Convention case where the arbitration is seated in the United States, or where United States law governs the conduct of the arbitration, Chapter 1 of the FAA provides the grounds for vacatur of an arbitral award. To the extent that *Industrial Risk* and *Inversiones* are inconsistent with this holding, we overrule them.[] The district court correctly followed *Industrial Risk* and *Inversiones*, which constituted binding precedent at the time, and declined to address Corporación AIC's argument that the arbitral award should be vacated because the panel exceeded its powers under 9 U.S.C. § 10(a)(4). We vacate the judgment in favor of Hidroeléctrica and remand for the district court to consider Corporación AIC's § 10(a)(4) contention" (footnote omitted)

*(ed: *Certiorari was denied in Industrial Risk. **We think this issue cries out for resolution by SCOTUS!)*
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ARIZONA FEDERAL COURT: PARTIAL VACATURS OF AWARDS ARE PERMISSIBLE, BUT NOT IN THIS CASE. ***A district court considering whether to vacate part of a FINRA Award agrees that it should consider that request, but nevertheless confirms the entire Award.*** The decision in question is [*Paynter v. UBS Financial Services Inc.*](#), No. CV-21-02024-PHX-DJH (D. Ariz., Mar. 2, 2023), which affirmed the Award in [*UBS Financial Services Inc. v. Paynter*](#), FINRA No. 17-02850 (Phoenix, AZ, Sept. 27, 2021). That Award found broker William J. Paynter liable for almost $1.9 million in compensatory damages for breach of a promissory note, but also found UBS liable for a total of $300,000 on Paynter's counterclaims for constructive discharge and negligent misrepresentation of the loan programs. Interestingly, the panel ruled that the counterclaim amounts: "shall not be an offset."

The Procedural Posture

Paynter ("Plaintiff") filed a petition to vacate the portion of the Award holding him liable for the promissory notes, initially in state court, arguing manifest disregard of the law and evident partiality. However, UBS had it removed to federal court, and cross-petitioned to confirm the entire Award. Based on the promissory notes and related transition agreements between the parties, the Court holds that: "the Court's review of the Award is governed by (1) the federal procedural rules for arbitration under the FAA [i.e., the [Federal Arbitration Act](#)] as interpreted by the circuit in which the Court sits; (2) New Jersey state law rules for arbitration that are consistent with the FAA; and (3) New Jersey state substantive, decisional law where applicable." Now before the Court are Plaintiff's motion for summary judgment, which added a third basis for vacatur — that the Award was irrational — to the grounds for vacatur, and UBS' cross-motion for summary judgment.

The Court Has the Power to Partially Vacate …

UBS raised three procedural issues. First, it argued that the Court must either vacate or affirm the Award as a whole. The Court, however, finds such a vacatur to be permissible, unless "that part which is void be so connected with the rest as to affect the justice of the case between the parties…. [] Here, whether Plaintiff is liable for payments of the Notes is a divisible issue from whether UBS is liable for constructive discharge and negligent misrepresentation. Both concern independent theories of liability. Plaintiff further proves these issues are separate when noting the award of damages to Plaintiff 'shall not be an offset' to the separate award of damages to UBS." UBS' second argument, that Plaintiff made an insufficiently detailed factual record to prevail, fails for lack of binding precedent in its support.

… And the Plaintiff Preserved All of His Arguments …

Finally, UBS argued that Plaintiff cannot assert that the Award is irrational in his motion for summary judgment because he did not raise it in his Petition, but the Court rejects that

for two reasons: "Here, Plaintiff raised the argument at the outset of his Motion…. Thus, UBS was put on sufficient notice of Plaintiff's argument and afforded a sufficient opportunity to respond, to which UBS has indeed responded.[] Moreover,… by arguing manifest disregard under [Section 10(a)(4)](#) in his Petition to Vacate, Plaintiff implicitly argued the Arbitrators have exceeded their power in this respect. To later argue the arbitrators exceeded their power in another manner—by returning an irrational award—relates back to Plaintiff's initial Section 10(a)(4) theory made in his Petition to Vacate."

… But the Plaintiff Still Loses

The Court also recognizes manifest disregard as a still-viable ground for vacatur. However: "Because the Panel chose not to elaborate on its legal reasoning, there is no available evidence to conclude that the Panel 'appreciated that [the contract defenses] controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it.'... Nor does the Panel indicate their finding of UBS's liability was directly tied to their finding of Plaintiff's liability. It is therefore 'impossible to determine whether they acted with manifest disregard for the law.'" Next: "Plaintiff's irrational award argument merely amounts to an invitation to review the [P]anel's factual findings and legal conclusions[,]' which the Court 'is prohibited from doing [.]'" Finally, Plaintiff waived his evident partiality objection to one of the arbitrators by failing to raise it in front of that arbitrator or any other member of the Panel and, in any case, failed to offer evidence that the arbitrator acted improperly.
*(*Seems right to us. **Although some circuits still recognize manifest disregard of the law as a gloss on the FAA, it is, as Hamlet put it, more honored in the breach than the observance. ***We will keep track of this one. ****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

FINRA RELEASES SENIOR INVESTOR PROTECTION PODCAST. FINRA on **April 18** released a half-hour audio podcast, *[2023 Senior Investor Protection Conference: The Latest Trends, Scams and Schemes](#)*. This newest "FINRA Unscripted" episode reports on the **March** Senior Investor Protection Conference: "a one-day event dedicated to sharing the most up-to-date regulatory information, effective strategies and solutions for protecting senior and other vulnerable investors from exploitation." The episode takes: "an abridged look at one of the conference sessions on the various trends, scams and schemes currently impacting investors." **Brooks Brown**, Senior Director of FINRA's High-Risk Representative Unit, moderates the panel, consisting of: **Amy Nofziger**, Director of Victim Support for the AARP's Fraud Watch Network; **Mayur Patel**, Senior Principal Intelligence Specialist with FINRA's Financial Intelligence Unit; and **Elizabeth Yoka**, Manager with FINRA's Vulnerable Adults and Seniors team.
(ed: Nicely done.)
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SEC CHAIR GENSLER APPEARS BEFORE HOUSE FINANCIAL SERVICES COMMITTEE. SEC Chair **Gary Gensler** testified at an **April 18** hearing of the House Financial Services Committee, titled *Oversight of the Securities and Exchange Commission*. Neither his prepared remarks nor the staff memo mentioned arbitration, and there were only a few passing references to FINRA. FINRA came up several times at the four-hour hearing, but not arbitration.
(ed: No surprises here.)
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FEW TAKERS SO FAR FOR JUSTICE FOR ALL ACT. As reported in SAAs 2023-10 (Mar. 9) & -09 (Mar. 2), the *Forced Arbitration Injustice Repeal (FAIR) Act of 2019,* which was approved by a mostly party-line vote in the House of Representatives in the last Congress but died in the Senate, appeared to have been reintroduced **February 1** by Rep. **Rashida Tlaib** (D-MI) as H.R. 697 - the *Justice for All Act of 2023* (*JFA*), with a greatly expanded scope. When we last reported on the *JFA,* there were just eight cosponsors – all Democrats. Things haven't changed much over the last several weeks. As of press time, there were only 14 cosponsors – again all Democrats. To review, the 55-page text – which incorporates the old *FAIR Act* – reveals that if enacted, the *JFA* would amend the Federal Arbitration Act and several other federal laws to eliminate mandatory predispute arbitration agreements and class action waivers for disputes involving "consumer, civil rights, employment, and antitrust." It definitely covers brokers and investment advisers; bars class action/collective action waivers in or out of a predispute arbitration agreement; extends to "digital technology" disputes; reserves for court determination any arbitrability or delegation issues "irrespective of whether the agreement purports to delegate such determinations to an arbitrator;" and clearly extends to sexual harassment claims. A long preamble states: "Recent court decisions, including *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), and *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), have interpreted the Federal Arbitration Act to broadly preempt rights and remedies established under substantive State and Federal law. As a result, these decisions have enabled business entities to avoid or nullify legal duties created by congressional enactment, resulting in millions of people in the United States being unable to vindicate their rights in State and Federal courts." The *JFA* would apply to claims made after the effective date.
*(ed: *The nonpartisan www.GovTrack.us Website gives the bill just a 2% chance of enactment. We agree. Unlike the* FAIR Act*, which passed in a Democratic-controlled chamber, we don't see the* JFA *passing the GOP-controlled House.)*
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QUICK TAKES: CASES AND AWARDS WORTH READING

***Granados v. Lending Tree, LLC*, No. 3:22-cv-504-MOC (W.D. N.C. Mar. 28, 2023)**:
"This is a class action lawsuit, in which Plaintiff brings various claims against Defendant LendingTree, LLC, based on purported harms stemming from a 2022 cyberattack perpetrated against LendingTree, during which third-party criminals gained 'unauthorized access' and were able to 'exfiltrate[e] . . . highly sensitive and personal

information' of current, former, and prospective LendingTree consumers. (Compl. ¶¶ 1–2). In a motion to compel arbitration, Defendant contends that, as a LendingTree consumer, Plaintiff's claims are encompassed by a mandatory arbitration clause in LendingTree's Terms of Use Agreement, and Plaintiff is, therefore, required to arbitrate the claims brought here…. Plaintiff has failed to show that the magistrate judge's decision was clearly erroneous or contrary to law. As Judge Cayer noted in the Recommendation, the arbitration clause at issue is broad enough to encompass the claims brought by Plaintiff in this lawsuit. Furthermore, Judge Cayer rejected Plaintiff's arguments that he should not be bound by the clause because he was not put on constructive notice of the clause when he assented to Defendant's Terms of Use Agreement. Judge Cayer correctly applied the law in concluding that Plaintiff is bound by the arbitration clause at issue."

***Belhaven Senior Care, LLC. v. Smith*, No. 2022-CA-00050-SCT (Miss. Apr. 6, 2023)**: "Betty Smith brought a negligence and wrongful death lawsuit against Belhaven Senior Care, LLC (Belhaven)—a nursing home facility in which her mother, Mary Hayes, had resided shortly before Hayes's death. Belhaven sought to compel arbitration, citing the arbitration provision in the nursing home admissions agreement Smith signed when admitting her mother. The trial judge denied arbitration, finding that Smith lacked the legal authority to bind her mother to the agreement. Belhaven appealed…. Smith is not estopped from contesting the validity of the arbitration agreement. Nor was Hayes bound as a third-party beneficiary of the agreement. And because Belhaven failed to prove that Smith was her mother's statutory healthcare surrogate when admitting her to the nursing home, its motion to compel arbitration was properly denied. For this same reason, Hayes was not bound by the invalid agreement and is not a third-party beneficiary to a nonexistent contract. This Court therefore affirms the trial court's decision not to compel arbitration" (footnote omitted).

***TotalEnergies E&P USA, Inc. v. MP Gulf of Mexico, LLC*, No. 21-0028 (Texas Apr. 14, 2023)**: "The parties in this case dispute whether their contracts require them to resolve their controversies through arbitration, but they also clash over whether they agreed that an arbitrator, rather than the courts, must resolve that dispute. We hold that (1) the parties clearly and unmistakably delegated arbitrability issues to the arbitrator by agreeing to arbitrate their controversies in accordance with the AAA Commercial Rules; (2) the fact that the parties may have agreed to arbitrate only some controversies while carving out others does not affect the clear and unmistakable delegation of the arbitrability decision to the arbitrator; and (3) in accordance with these parties' agreements, the courts must defer to the arbitrator to decide whether this controversy falls within the arbitration agreement's scope. Based on these holdings, we affirm the court of appeals' judgment." (*ed: Justice Bland filed a concurring opinion and Justice Busby filed a dissenting opinion. Justices Huddle and Young did not participate*.)

***Stewart v. Charles Schwab*, FINRA ID No. 22-02345 (Washington, DC, Feb. 28, 2023)**: In this small claims arbitration, two customers alleging that Respondent broker-dealer fabricated a fake trade confirmation for nine additional put options, when they

only put in an order to buy four put options, lose their case. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Mucerino v. Citigroup Global*, FINRA ID No. 22-00982 (New York, NY, Mar. 2, 2023)**: A customer alleging unsuitability with respect to his purchase of municipal bond mutual funds settles his case against Respondent broker-dealer, but objects to the granting of expungement of this matter from a Non-Party broker's CRD record. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*
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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Jedrzejowski, Paulina, *Breyer on Arbitration: The Retired Justice Goes Public on Class Waivers and More*, CPR Blog (Apr. 17, 2023): "Retired U.S Supreme Court Justice Stephen G. Breyer provided a broad picture about the interrelationship of courts and arbitration tribunals as the keynote speaker at Columbia Arbitration Day at Columbia Law School in New York .... Breyer discussed seminal arbitration cases that were a part of his 28-year career on the nation's top Court.[] During his hour-long conversation, Breyer stated that courts have two roles. First and foremost, they resolve disputes. And they also clarify, create, explain, and update law. Since, unlike courts, arbitration does not follow precedent, if cases are taken away from courts, then courts cannot update commercial law, he said.[] He also said that arbitration is often not cheaper or faster. To Breyer, who retired from the Court last summer, arbitration simply has better judges, i.e., judges with more expertise and people who really understand commercial law. Thus, if people lose faith in courts, arbitration is an alternative way to resolve disputes."

***Financial Services Industry Groups Oppose CFPB's Proposed "Fine Print" Registry*, JDSupra (Apr. 17, 2023)**: "Financial services industry groups are staunchly opposing a proposal by the Consumer Financial Protection Bureau (CFPB or Bureau) to require supervised nonbank entities to provide information about their use of certain terms and conditions in standard-form contracts. The CFPB would then compile this information into a registry available to the public. In individual letters dated April 3, the U.S. Chamber of Commerce, American Financial Services Association, Independent Community Bankers of America, Online Lenders Alliance, Financial Technology Association, INFiN, Association of Credit and Collection Professionals (ACA International), and National Association of Federally-Insured Credit Unions, as well as a coalition of 11 other industry associations (the Associations), expressed their collective displeasure with the idea."

***SEC Grants "Accelerated Approval" of FINRA Proposal on Expungement of Customer Complaint Information*, Lexology (Apr. 17, 2023)**: "The SEC granted 'accelerated approval' of a FINRA rule proposal, as modified by 'Amendments Nos. 1 and 2,' to change the process relating to the expungement of customer dispute information. The rule changes would amend FINRA Rule 12000 Series ('Code of Arbitration Procedure for Customer Disputes') and FINRA Rule 13000 Series ('Code of Arbitration Procedure for Industry Disputes'). Under the proposal, including the rule

amendments, FINRA would modify the expungement process of customer dispute information."

[ICSID Releases Complete 2022 Caseload Statistics](), Lexology (Apr. 18, 2023): "The second edition of the ICSID [caseload statistics]() of 2022, which covered the period up to 30 June 2022, already hinted at a slight decline in cases administered by the Centre. This trend is confirmed by the latest edition which includes the Centre's activity up to 31 December 2022 and evidences a significant decrease in the number of cases. While 66 cases were registered in 2021, this number dropped to 41 in 2022. 19 were started in the first half of the year, with 22 started in the second.[] Despite this decline in 2022 (compared to 2021), the long-term trend of ICSID administering a larger caseload continues." (*ed: See our coverage [elsewhere]() in this* Alert.)

[2nd Circ. Panel Considers ERISA Arbitration Request in Light of Viking River](), Lexology (Apr. 19, 2023): "U.S. Court of Appeals for the Second Circuit panel recently heard oral arguments over whether a proposed class action concerning alleged overcharges to an employee stock ownership plan (ESOP) should go to individual arbitration. ESOP plan trustee Argent Trust Co., employer Strategic Financial Solutions, and other executives and financial services companies appealed after a federal district court judge denied their motion to compel arbitration in November 2021. The judge found that an arbitration provision blocked rights violating the Employee Retirement Income Security Act (ERISA), making it invalid under the Federal Arbitration Act (FAA)'s effective vindication doctrine."

[Finra Bars Securities America Rep, Claiming He Took $135K from Customer Bank Account](), FA Magazine (Apr. 20, 2023): "The Financial Industry Regulatory Authority has barred a Securities America rep who it said transferred $135,000 from a client's bank account to himself. [Rep], a registered rep in Seattle, had been registered with Finra since November 2020 as an investment company and variable contracts products representative through his association with Securities America. Before that, he had been associated with another firm, KMS Financial Services, since 2018, according to the SEC and Finra.[] The Finra letter barring [rep] said he began paying personal expenses for the customer at the customer's request as early as August 2018."
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DID YOU KNOW?

YOUR PUBLISHER ENTERED THE ADR FIELD 47 YEARS AGO. April 19 marked nearly a half-century since your publisher entered the ADR field, fresh out of college. It was April 1976, I was getting married in November, and my parents and future in-laws were in: "for Heaven's sake, go get a job already!" mode. This and a new bachelor's degree brought me to the American Arbitration Association, which hired this young, inexperienced guy with vague plans to go to law school at night at some point in the future, to be a Tribunal Administrator (that's what Case Administrators were called in those days). My starting salary was $8,300 a year, or a bit over $43,000 today. The rest, as they say, is history, which you can read about in this 2021 [blog post](). *(ed: I remember*

only three things from April 19, 1976, my first day in the dispute resolution field: 1) the weather was extremely hot - 96 degrees - and the AAA's air conditioning system had not yet kicked in; 2) the Mets beat the St. Louis Cardinals 4 - 3 in a game that went 17 innings; and 3) my future in-laws thought I was working for some sort of CIA front organization, because I couldn't give a coherent account of exactly what I did for a living. Some things, you just don't forget.)

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