SECURITIES ARBITRATION ALERT 2023-17 (5/4/23)

George H. Friedman, Editor-in-Chief

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DID YOU KNOW?

- **In Four Months this Year, AAA Has Passed the 200,000 Cases Filed Mark**

SQUIBS: IN-DEPTH ANALYSIS

INDIANA SUPREME COURT: AFTER-ADDED PDAA AND CLASS ACTION WAIVER IN BANK'S ACCOUNT AGREEMENT NOT ENFORCEABLE. ***A unanimous Indiana Supreme Court holds that a predispute arbitration agreement ("PDAA") and class action waiver unilaterally added by the bank to its account agreement were not enforceable.*** We let the Opinion in *Decker v. Star Financial Group Inc.*, No. 22S-PL-305 (Ind. Mar. 21, 2023), speak for itself.

Facts and Procedural History
"Plaintiffs, Cliff and Wendy Decker, have a checking account with Star Financial Bank, a wholly owned subsidiary of defendant, Star Financial Group, Inc. The Deckers, on behalf of themselves and others similarly situated, filed a class-action complaint alleging the Bank collected improper overdraft fees. Before the Deckers sued, the Bank added an arbitration and no-class-action addendum to the terms and conditions of the Deckers' account agreement. After the Deckers sued, the Bank cited the addendum and responded with a motion to compel arbitration, which the trial court granted."

Issues
"The Deckers raise three arguments on appeal: (1) the Bank buried notice of the addendum at the end of their monthly statement and thus did not provide the contractually required reasonable notice; (2) the account agreement's change-of-terms clause did not allow the Bank to add the addendum; and (3) the continued use of their checking account did not manifest their assent to the addendum…[] For us to affirm the trial court's judgment of dismissal, the Bank must run the table on all three of the Deckers' arguments. In contrast, the Deckers need win only one of their arguments for us to resolve the appeal in their favor. Without expressing any opinion on the merits of the Deckers' first and third arguments, we hold that the specific language of the account agreement's change-of-terms clause did not permit the Bank to add the addendum. Thus, the addendum was not a valid amendment to the account agreement."

Reasoning: Bank's Own Language Limits Changes
"The agreement's operative provision is Section 10, which allows the Bank to 'change any term of this agreement.' The Bank proceeded here as if the account agreement's change-of-terms clause gave it a blank check to amend the agreement any way it saw fit to fend off threatened litigation. But Section 10—which the Bank itself wrote—is not so elastic. This section does not say the Bank can change the agreement however it wants. If the Bank wanted such flexibility, it might have given itself the power to 'change **this** agreement' as desired. Instead, the section is more limited in scope. It limits the Bank to changing '**any term** of this agreement.' Words matter. The difference between a far-reaching power to amend "this agreement" and the narrower power to amend 'any term of this agreement' makes all the difference on this record. The latter—which governs here—limits the Bank to modifying the terms that existed in the original account agreement. Relevant here, the original agreement contained neither a general dispute-resolution provision nor a specific arbitration or no-class-action provision. Thus, there was not 'any term' of that agreement the Bank could 'change' to effectuate the result it sought here through its addendum. Because the original account agreement did not mention dispute resolution generally or arbitration or class action specifically, Section 10 did not permit the Bank to add such provisions by amendment. To conclude otherwise would violate Section 10" (emphasis in original)

Concurring Opinion: Right Result But Wrong Reason
Judge Goff concurs in the result, but for a different reason: "I agree with the Court that the Deckers are not bound by the arbitration addendum to their account agreement. But I reach that conclusion for a different reason. In my view, the agreement—taken as a whole—permits the addition of an arbitration addendum. But, given the lack of reasonable opportunity to reject the addendum, the Deckers did not, as I see it, assent to a change in terms."
(ed: We're with Judge Goff.)
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ARBITRATION AWARD MIGHT GIVE MIKE LINDELL SOME SLEEPLESS NIGHTS. ***Although we normally don't cover non-securities arbitration awards, we couldn't resist describing an Award holding that a computer expert won a Mike Lindell-sponsored contest to prove that data files the "My Pillow" purveyor claimed contained November 2020 election data unequivocally included no such thing.***
Businessman Mike Lindell, originally known for his pillows, contends that China fraudulently changed the results of the **2020** presidential election over the internet to prevent Donald Trump's reelection. As part of a "Cyber symposium," at which he promised to present 2020 election data that would prove the alleged Chinese interference, Lindell staged the "Prove Mike Wrong Challenge" (the "Contest") with a $5 million dollar prize. Robert Zeidman, a software developer and expert witness in computer-related intellectual property cases, entered the contest and claimed the promised reward, although the contest judges declared that no one won. The question was resolved by arbitration in *Zeidman v. Lindell Management LLC*, AAA No. 01-21-0017-1862 (Minneapolis, MN, Apr. 19, 2023).

The Rules of the Game …
The three-member Panel considers three issues: 1) whether Mr. Zeidman won the Contest; 2) whether the Contest rules were unconscionable; and 3) whether the respondent ("Lindell LLC") violated the Minnesota Consumer Fraud Act. According to the rules: "to win the Contest, a participant must prove 'that the data Lindell provides, and represents reflects information ***from the November 2020 election***, unequivocally does NOT reflect information related to the November 2020 election . . . ,' in one formulation…. In a later provision, the rules required that a participant provide a written submission that 'proves to a 100% degree of certainty that the data shown at the Symposium is not reflective of **November 2020 election data**'" (emphasis added in the Award). Mr. Zeidman received 11 data files to analyze.

… As Interpreted by the Panel …
The parties agreed that the Contest rules were unambiguous, even as they disagreed on their meaning. The Panel's decision hinges on its interpretation of these rules: "Mr. Lindell and his cyber-expert witnesses admitted that data to be provided from the election was to be in the form of packet data or PCAP data. This is important, as Mr. Lindell explained, because such data can be examined by experts based on time stamps, addresses and other information from the packet to determine whether it was genuine.[]

Defining data as being merely 'about the election' or 'relating to the election' ignores the Contest rules' reference to data 'from the election' and reference to 'election data.' These terms require the data not merely be about the election, but must be from the election process itself. As admitted by Mr. Lindell, this would be packet capture data. Thus, if data is not PCAP data, it is not from the election, and it therefore cannot be 'related to the November 2020 election.'"

… Mean that the Claimant Proved Mike Wrong

After reviewing what Mr. Zeidman determined about the contents of each file, which was that none of it was PCAP data, the Panel concludes: "Based on the foregoing analysis, Mr. Zeidman performed under the contract. He proved the data Lindell LLC provided, and represented reflected information from the November 2020 election, unequivocally did not reflect November 2020 election data. Failure to pay Mr. Zeidman the $5 million prized [sic] was a breach of the contract, entitling him to recover." As a result of this ruling, the Panel concludes that the Contest rules are not unconscionable and denies the Minnesota Consumer Fraud Act claim as moot.

*(*Mike Lindell has declared his intention of seeking to vacate the Award. We will look out for any court decisions on the Award, but we don't expect them to give Mr. Lindell much comfort. **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 DRS POSTS STATS THROUGH 1Q 2023: STILL A STRONG START TO THE YEAR. FINRA Dispute Resolution Services ("DRS") has posted case statistics through **March**, with recent trends continuing to show a strong start to the year in arbitration filings and a recovery in mediations. We offer these headlines: 1) overall arbitration filings through March – 711 cases – are up 13% for the year (was plus 20% in February); 2) cumulative customer claims increased 20% (was plus 34% last month); and 3) industry arbitration filings were up 2% (unchanged from February). Overall arbitration turnaround times were 17.2 months (a slight decrease), with hearing cases now taking 19.7 months (also a slight decline). There were 229 mediation cases in agreement, a 3% decrease from 2022. This stat had been declining steadily in recent months, and although March showed a modest improvement from February, mediations are way down from May 2022's torrid plus 137% pace. The mediation settlement rate was a more historically consistent 82% (it was 76% in January). There are now 8,234 DRS arbitrators, 3,985 public and 4,249 non-public. Pending cases stand at 3,135, up 66 from February.

(ed: Past year stats can be found here.)

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SCOTUS HEARS ARGUMENT IN (SOMEWHAT) ARBITRATION-RELATED CASE. The Supreme Court on **April 25** heard oral argument in *Yegiazaryan v. Smagin*,

No. 22-381, a case that in part involves arbitration. The issue identified in the *Certiorari* Petition reveals the connection to arbitration: "In *RJR Nabisc*o, this Court, applying the presumption against extraterritoriality, held that a civil RICO plaintiff states a cognizable claim under RICO's private right of action only if it alleges a 'domestic'—not foreign—injury. 579 U.S. 325, 354 (2016). The Court left unresolved, however, what legal test determines whether an injury is foreign or domestic…. Since *RJR Nabisco*, the Courts of Appeals have divided three ways as to the proper legal test for assessing whether a foreign plaintiff suffers a 'domestic' injury to intangible property—such as court judgments, *arbitration award*s, contract rights, patents, and business reputation or goodwill. The question presented is: Does a foreign plaintiff state a cognizable civil RICO claim when it suffers an injury to intangible property, and if so, under what circumstances" (emphasis added). The case involves attempted enforcement under the *UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards* of an award rendered in London.
(ed: The transcript is here and the audio recording is here.)
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FAIR ACT REINTRODUCED IN HOUSE AND SENATE. 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, was reintroduced **April 27** by Rep. **Hank Johnson** (D-GA) and Sen. **Richard Blumenthal** (D-CT). The text of both H.R. 2953 and S. 1376 appears to be identical to the 2019 version of the *FAIR Act*. If enacted, the *FAIR Act* would amend the Federal Arbitration Act ("FAA") 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. As reported in SAAs 2023-16 (Apr. 27), -10 (Mar. 9) & -09 (Mar. 2), Rep. **Rashida Tlaib** (D-MI) on **February 1** introduced H.R. 697 - the *Justice for All Act of 2023* (*JFA*), To review, the 55-page text – which incorporates the old *FAIR Act* – reveals that if enacted, the *JFA* would amend the FAA *and several other federal laws* to eliminate a broad range of mandatory predispute arbitration agreements and class action waivers. Both the *JFA* and the *FAIR Act* would apply to claims made after the effective date.
*(ed: *The* FAIR Act *was announced in an April 28 Press Release. **There are 83 cosponsors in the House and 36 in the Senate. There are no Republicans in either group. ***Unlike the old* FAIR Act, *which passed in a Democratic-controlled chamber, we don't see the new bill or the* JFA *passing the GOP-controlled House.)*
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QUICK TAKES: CASES AND AWARDS WORTH READING

***Jackson v. Amazon.com, Inc*., No. 21-56107 (9th Cir. Apr. 19, 2023)**: "Drickey Jackson seeks to represent a class of individuals, known as Amazon Flex drivers, claiming

damages and injunctive relief for alleged privacy violations by Amazon.com, Inc. ('Amazon'). Jackson contends that Amazon monitored and wiretapped the drivers' conversations when they communicated during off hours in closed Facebook groups. The district court denied Amazon's motion to compel arbitration, holding that the dispute did not fall within the scope of the applicable arbitration clause in a 2016 Terms of Service Agreement ('2016 TOS')…. Amazon appeals, arguing that the district court should have applied the broader arbitration clause in a 2019 Terms of Service Agreement ('2019 TOS'), and that even if the arbitration clause in the 2016 TOS applied, this dispute fell within its scope. We reject Jackson's threshold contention that we lack appellate jurisdiction, hold that the 2016 TOS governs, and affirm the denial of Amazon's motion to compel arbitration because this dispute falls outside the scope of the 2016 TOS's arbitration provision."

***Westmoreland v. Kindercare Education LLC*, No. A164090 (Calif. Ct. App. 2 Apr. 24, 2023):** "In sum, having exercised our discretion to hear Kindercare's appeal as a writ of mandate, we conclude that the arbitration agreement is invalid by operation of the unambiguous 'Savings Clause and Conformity Clause.' As a consequence of Kindercare's drafting decisions, and absent further stipulation between the parties, the arbitration agreement is 'invalid' and so Kindercare must litigate all of Westmoreland's claims in court." (*ed: An* Alert *h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this decision.*)

***Santana v. SmileDirectClub, LLC*, ___ A.3d ___, 2023 WL 2746270 (N.J. Super. App. Div. Apr. 3, 2023)**: "The arbitration agreement was located within a clearly hyperlinked document-the very first hyperlinked document on the screen entitled 'Informed Consent.' That document included not only the arbitration agreement but also explanations of the benefits and risks of using the aligners, representations by plaintiff regarding his oral health, and his consent to the treatment. The title of the hyperlinked document clearly put plaintiff on reasonable inquiry notice that when he checked the 'I Agree' box next to the link, he was agreeing to something that specifically asked for his informed consent. Moreover, within the hyperlinked 'Informed Consent' document, the title of the arbitration provision-'**AGREEMENT TO ARBITRATE'**-was the only fully capitalized and emboldened text, which would have alerted a consumer to the importance of the provision in relation to all others…. We conclude that nothing in the structure of SDC's website denied plaintiff reasonable inquiry notice of the arbitration agreement, the contents of which plaintiff has not challenged as deficient under *Atalese* or any of the Court's other decisions involving consumer sales." (emphasis in original).

***Matter of TCR Sports Broadcasting Holding, LLP v WN Partner, LLC*, 2023 NY Slip Op 02090 (NY Apr. 25, 2023):** In a unanimous decision, New York's highest court holds: "New York's well-established rules of contract law, which apply to arbitration agreements, provide that courts will enforce a commercial contract between sophisticated and counseled parties according to the contract's terms. In this case, two Major League Baseball (MLB) teams and their co-owned regional sports network are in a dispute regarding the fair market value of certain telecast rights. By affirming the confirmation of

the second arbitration award and directing that the money judgment be vacated, we hold the highly sophisticated parties to the terms of their agreement…. In the end, these sophisticated and counseled parties agreed to arbitrate their telecast rights fees dispute before the RSDC and to follow a stated procedure concerning nonpayment of those fees. The parties have failed to establish any basis to deviate from that contract. Accordingly, the order appealed from and so much of the 2017 Appellate Division order brought up for review should be modified, without costs, in accordance with this opinion and, as so modified, affirmed*." (ed: "The settlement agreement sets forth a three-step procedure for resolving telecast rights fee disputes: (1) a 30-day mandatory negotiation period; (2) if negotiation failed, non-binding mediation before one of two designated forums; and (3) if mediation failed, MLB's Revenue Sharing Definitions Committee (the RSDC) would determine the fair market value of the telecast rights fees. The RSDC is an MLB standing committee composed of three representatives from MLB teams, with rotating membership."*)

***Tetrault v. Ameritas Investment*, FINRA ID No. 32-02928 (Houston, TX, Mar. 2, 2023)**: The All-Public Panel granted Respondent broker-dealer's Prehearing Motion to Dismiss without prejudice, pursuant to FINRA Rule 12206 (Six-year Eligibility Rule). *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*
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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Siino, Benjamin & Tsarova, Maria, *Kyiv Arbitration Days 2022: How to Enforce Against the Russian Federation?*, Kluwer Arbitration Blog (Apr. 21, 2023): "Although the COVID-19 restrictions have been lifted almost everywhere and in-person events have returned to full swing, Kyiv Arbitration Days 2022 (KAD), the most famous Ukrainian arbitration event, was still held online. The title of the conference – 'After the war: The legal battles' – speaks for itself. While the war is still ongoing and Ukrainian solders are fighting Russia on the battlefields, the Ukrainian and international arbitration community is thinking about the legal battles they will face once the war in Ukraine is over. It is also no coincidence that one of the panel sessions was dedicated to enforcement of awards against the Russian Federation. With Russia's history of non-compliance with arbitral awards and foreign judgments, this question becomes key. This post summarises the discussion held during this particular panel."

***ChatGPT, AI and Arbitration: Are We Approaching a Turning Point*?, Orrick, Herrington & Sutcliffe LLP Blog (Apr. 20, 2024)**: "Join this conversation about the potential impact of ChatGPT and other forms of generative artificial intelligence on dispute resolution, featuring Tunde Oyewole (International Arbitration Of Counsel at Orrick), Hanna Roos (formerly of Quinn Emanuel and now head of Aavagard LLP), and Adith Haridas (tech engineer, entrepreneur and lead of AI products at the Digital Gate).[] Topics discussed in this podcast include: Ethical considerations surrounding the impact of ChatGPT/generative AI on dispute resolution; The impact that ChatGPT/generative AI may have on the quality of advocacy in the near future."

***Indiana Supreme Court Reverses Order Compelling Arbitration in "Overdraft Fee" Class Action*, Lexology (Apr. 21, 2023)**: "The Supreme Court of Indiana recently reversed and remanded a trial court's order compelling arbitration of two bank customers' putative class action complaint. In so ruling, the Court held that the account agreement's change-of-terms clause did not allow the defendant bank to add an addendum compelling arbitration and restricting class actions to the terms and conditions of the customers' account agreement. *Cliff Decker, et al. v. Star Financial Group Inc*." (*ed: See our coverage* elsewhere *in this* Alert.)

***Influx of New Investors was Not a Pandemic Fad, Finra Foundation Study Finds*, FA Magazine (Apr. 24, 2023)**: "There was a lot of conjecture after 2020 that many of the first-time investors who opened up their first brokerage accounts during the pandemic would be quickly washed away or lose interest when the world returned to normal.[] Not true, finds the latest study from the Finra Investor Education Foundation and the National Opinion Research Center (NORC) at the University of Chicago. The team of researchers, which surveyed investors in 2020 and repeated the exercise during 2021-2022, found the influx of new investors into taxable, non-retirement accounts has remained steady, albeit with some interesting characteristics—namely, some enter through cryptocurrency accounts—since 2020."

***Leveraging FINRA Rules 12504(a)(6)(B) and 13504(a)(6)(B) for an Early Motion to Dismiss*, Arnold & Porter Blog (Apr. 24, 2023)**: "Although FINRA arbitration proceedings are expedited and generally less costly than standard court proceedings, FINRA arbitration nonetheless can be a time-consuming distraction, especially when claims are not meritorious. While motions to dismiss are disfavored in FINRA arbitrations, FINRA Rules 12504(a)(6)(B) and 13504(a)(6)(B) (the Rules) provide one route for an early dismissal by permitting an arbitration panel to dismiss a claim before the conclusion of the case in chief when 'the moving party was not associated with the account(s), security(ies), or conduct at issue.' Although not as broad as Rule 12(b)(6) of the Federal Rules of Civil Procedure, the FINRA rules can nevertheless be used in appropriate circumstances to dispose of improper claims against respondents, particularly in the third-party context."

***House Committee Passes Bills Aimed at Expanding 'Accredited Investor' Pool*, Financial Advisor IQ (Apr. 27, 2023)**: "The House Financial Services Committee approved several bills expanding retail investors' access to unregistered securities and private placements, primarily through the expansion of the definition of 'accredited investor.'[] Among the bills approved is the Accredited Investor Definition Review Act, which would bestow the title on holders of certain certifications or credentials; the Equal Opportunity for All Investors Act, which aims to introduce a Financial Industry Regulatory Authority-administered test for 'sophisticated-but-not-wealthy individuals' to qualify as accredited investors; and the Fair Investment Opportunities for Professional Experts Act …'"

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DID YOU KNOW?

IN FOUR MONTHS THIS YEAR, AAA HAS PASSED THE 200,000 CASES FILED MARK. According to a banner on the American Arbitration Association's landing page, this venerable institution has had 207,736 cases filed so far this year (through **May 1**). It has administered 7,614,667 cases since its founding in **1926**.
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