SECURITIES ARBITRATION ALERT 2023-21 (6/1/23)

George H. Friedman, Editor-in-Chief

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DID YOU KNOW?

- **UN Convention Turns 65 this Month**

SQUIBS: IN-DEPTH ANALYSIS

CALIFORNIA APPELLATE COURT UPHOLDS CLICKWRAP PDAA, LIMITS ARBITRATOR DISCLOSURE REQUIREMENT. ***A California appellate court upholds a "clickwrap" predispute arbitration agreement ("PDAA") and takes a more flexible approach to arbitration disclosure obligations.*** A clickwrap agreement is one to which a party agrees by clicking a button on a computer screen. Maria Perez signed up for health care services from the Kaiser Foundation Health Plan ("Kaiser") through her employer's online benefits process, during which she allegedly agreed to a PDAA by clicking a "SAVE" button on the computer she used. Her daughter, Andrea Perez, filed a medical malpractice suit against Kaiser, which successfully moved to compel arbitration. Thereafter, the sole arbitrator found for Kaiser. A state trial court confirmed the Award

and that decision is affirmed on appeal in *Perez v. Kaiser Foundation Health Plan, Inc.*, No. A165140 (Cal. App. 1 May 16, 2023). In the course of doing so, the Court of Appeal addresses two California statutory provisions.

Clickwrap Arbitration Disclosure Compliance
First, Health and Safety Code section 1363.1, which applies to health care service plan arbitration disclosures, requires that such disclosures, among other things: "shall be prominently displayed on the enrollment form signed by each subscriber or enrollee" and "be displayed … immediately before the signature line provided for the individual enrolling in the health care service plan." The Court holds that the Kaiser arbitration disclosure meets both of these requirements, because: (1) "[t]he disclosure here is typed directly before the sentences explaining that clicking the "SAVE" button serves as an electronic signature on the arbitration agreement, i.e., a functional signature line" and (2) "[b]y using a different typeface, the disclosure stands out from the remainder of the enrollment agreement."

"Pending" Cases Disclosure Requirement
Second, Code of Civil Procedure section 1281.9 requires arbitrators to disclose: "all prior or pending . . . cases involving any party to the arbitration or lawyer for a party for which the proposed neutral arbitrator served or is serving as neutral arbitrator, and the results of each case arbitrated to conclusion." It also incorporates by reference *Ethics Standards for Neutral Arbitrators in Contractual Arbitration*, Standard 7, which requires the disclosure of: "[t]he results of each prior case arbitrated to conclusion…." The Arbitrator made the required initial disclosure, but failed to update it to include the results of three pending Kaiser arbitrations that he decided later. The Court, however, holds that an arbitrator has no duty to disclose the results of arbitrations that were still pending when they made the initial disclosure. Furthermore, although the Arbitrator decided all three of these pending cases in Kaiser's favor, he did so based on a reasonable interpretation of the evidence, and those awards therefore did not indicate any bias on his part.
*(ed: *The Court also rejects the Perezes' contentions that the agreement violated section 1363.1 because it was "unclear" and that Maria Perez did not actually agree to the arbitration agreement. **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. ***Of course, at FINRA, pending case info is provided for proposed arbitrators. Subsequent results can be tracked via FINRA Arbitration Awards Online or via SAC's ArbCheck.)*
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UPDATE: PARTIES AGREE TO VACATE FINRA PANEL'S $36+ MILLION AWARD AGAINST OPPENHEIMER. ***The parties have stipulated to a Consent Order vacating a massive Award rendered against Oppenheimer by a FINRA Panel*.**
We borrow heavily from our past coverage, starting with our report in SAA 2022-35 (Sep. 15) that a Majority-Public FINRA Panel had hit Oppenheimer with a $36+ million

Award. The arbitration arose out of losses suffered by several investors in a Ponzi scheme perpetrated by a former adviser. The claims asserted in *Robinson v. Oppenheimer & Co., Inc.*, FINRA ID No. 21-02234 (Atlanta, GA, Sep. 6, 2022), were for: "violations of FINRA Rules; negligence; breach of fiduciary duty; violation of the Georgia RICO statute; and breach of contract. The causes of action relate to Claimants' investments in Horizon Private Equity III." The Claimants were each awarded almost $5.7 million in compensatory damages and almost $11.4 million in punitive and more than $14.2 million in treble damages pursuant to Georgia's RICO statute – O.C.G.A. § 16-14-6(c) -- which provides: "Any person who is injured by reason of any violation of Code Section 16-14-4 shall have a cause of action for three times the actual damages sustained and, where appropriate, punitive damages. Such person shall also recover attorneys' fees in the trial and appellate courts and costs of investigation and litigation reasonably incurred." The Award also included more than $5.3 million in attorney fees and $98,655 in costs.

Award Challenge Promised …

Our editorial comment in # 35 was: "According to media reports, Oppenheimer may challenge the Award." We later reported in SAA 2022-36 (Sep. 22) that the firm's **September 7, 2022** Form 8-K filed with the SEC stated: "Oppenheimer intends to move to vacate the award in federal court on a number of grounds, including, but not limited to, allowing the hearing to proceed without Mr. Woods and other key parties and witnesses; prematurely rendering an award for damages while a court-appointed receiver continues to collect assets on behalf of all impacted investors, including the Claimants; *issuing an award where there was evident partiality against Oppenheimer by one of the arbitrators;* and allowing the hearing to proceed when the claims were ineligible for arbitration under FINRA rules that relate to statutes of limitations" (emphasis added).

… Promise Fulfilled

Oppenheimer on **October 6, 2022** challenged the Award in the Georgia Superior Court, Dekalb County. The matter was *Oppenheimer & Co., Inc. v. Robinson*, and sought vacatur under Federal Arbitration Act ("FAA") section 10 and O.C.G.A. § 9-9-13, or modification under FAA section 11 and O.C.G.A. § 9-9-14. The Award and challenge were referenced in the firm's quarterly income statement.

Effort to Vacate Seemed to have Failed …

As reported in SAA 2022-10 (Mar. 9), a **January 30** Form 8-K revealed that the Court decided not to upset the Award: "In January 30, 2023, oral argument regarding Oppenheimer's motion to vacate and Claimant's motion to confirm was heard by a judge of the Superior Court who orally ruled to confirm the Robinson Award. Oppenheimer is considering appealing the Superior Court judge's ruling to the Georgia Court of Appeals.[] The Robinson Award was fully reserved for by Oppenheimer in the third quarter of 2022 including accrued interest through December 31, 2022."

… But Not Really

On **March 23** the parties agreed to a Consent Order in *Oppenheimer & Co., Inc. v. Robinson*, No. 22CV8712 (GA Super. Mar. 23, 2023), vacating the Award. The Order

picks up where our prior coverage left off: "After the hearing, but prior to the Court's entry of its written judgment, the parties jointly agreed to the following consent judgment, and pursuant to that consent it is hereby,[] **ORDERED** that Oppenheimer's motion to vacate the arbitration award be **GRANTED** pursuant to O.C.G.A. 9-9-13, and U.S.C. 10 of the Federal Arbitration Act;[] **IT IS FURTIIER ORDERED** that Claimants' cross motion to confirm the arbitration award be **DENIED**" (emphasis in original).
*(ed: *Wow. **Wonder what the terms of settlement were?)*
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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

FINRA DRS POSTS STATS THROUGH APRIL: A VERY STRONG START TO THE YEAR IN ARBITRATION FILINGS. FINRA Dispute Resolution Services ("DRS") has posted case statistics through **April**, with recent trends continuing to show a very strong start to the year in arbitration filings and a drop-off in mediations. We offer these headlines: 1) overall arbitration filings through April – 1,042 cases – are up 24% for the year (was plus 13% in March); 2) cumulative customer claims increased 23% (was plus 20% last month); 3) industry arbitration filings were up *26%* (from up only 2% in March); and 4) the long-term decline in mediation cases has resumed. There were 331 new arbitrations filed in April. Overall arbitration turnaround times were 16.6 months (a slight decrease), with hearing cases now taking 19.0 months (also a slight decline). There were 272 mediation cases in agreement, a 12% decrease from 2022. This stat has 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 83% (it was 76% in January). There are now 8,308 DRS arbitrators, 4,014 public and 4,294 non-public. Pending cases stand at 3,220, up 85 from March.
*(ed: *The big increase in industry cases filings bears watching. **If the trend holds, the 1,042 arbitrations filed through April straight-lines to 3,126 yearly arbitration filings, a decent year by recent measure. Last year showed 2,671 arbitration cases filings. The all-time high-water mark was 2003, when that post tech-wreck figure was 8,945 cases. ***Past year stats can be found here.)*
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FINRA BOARD MET IN PERSON EARLIER THIS MONTH. NO DISPUTE RESOLUTION RULEMAKING ITEMS WERE ON THE AGENDA. As reported in SAA 2023-19 (May 18), FINRA's Board of Governors met in person **May 17–18**; there are no dispute resolution rulemaking items on the Agenda. The Board did, however, make appointments to advisory committees, which presumably includes the National Arbitration & Mediation Committee. President and CEO **Robert W. Cook**'s post-meeting update says: "During its May 17 and 18 meeting, the FINRA Board of Governors appointed new public governor Lisa Fairfax, approved FINRA's 2022 Annual Financial Report and appointed new members to FINRA Advisory Committees."
(ed: The remaining schedule is: July 12–13; September 13–14; and December 6–7.)
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END OF THE ROAD FOR CALIFORNIA'S AB-51? We reported in SAA 2023-08 (Feb. 23) that a divided Ninth Circuit Panel held in *Chamber of Commerce of the United States v. Bonta*, No. 20-15291 (9th Cir. Feb. 15, 2023), that California's AB-51 was preempted by the Federal Arbitration Act. Enacted in 2019, AB-51 was a law that restricted predispute arbitration clauses in employment relationships. It provided: "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 were 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." A **May 18** story in Lexology, *The End of AB 51?*, says the decision is now final: "On Feb. 15, 2023, the Ninth Circuit in *Chamber of Commerce v. Bonta* issued its ruling on the ongoing question of Assembly Bill (AB) 51's enforceability in relation to arbitration agreements, where the court once again affirmed that the Federal Arbitration Act (FAA) preempts AB 51…. Employers should not expect the decision to be appealed to the California Supreme Court, as there are strict requirements that a party must file a petition for review within 10 calendar days after the Court of Appeal decision becomes final, which generally is 30 days after the decision is filed. The Ninth Circuit filed its ruling on Feb. 15, 2023. Accordingly, the deadline to submit a petition to the California Supreme Court has passed."
(ed: We doubt SCOTUS will be interested in reviewing this one.)
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QUICK TAKES: CASES AND AWARDS WORTH READING

***Alabama Somerby, LLC, v. L.D.*, No. SC-2022-0828 (Ala. May 12, 2023)**: "Alabama Somerby, LLC, d/b/a Brookdale University Park IL/AL/MC; Brookdale Senior Living, Inc.; and Undrea Wright, who are defendants in the action below, appeal from the Jefferson Circuit Court's order denying their motion to compel arbitration of the claims asserted against them by the plaintiff, L.D., as the next friend of her mother, E.D.[] Accordingly, because the trial court erred in denying the Brookdale defendants' request to compel arbitration, we reverse the trial court's order denying the motion to compel arbitration and remand the case for further proceedings consistent with this opinion."

***Castelo v. Xceed Financial Credit Union*, No. B311573 (Calif. Ct. App. 2 May 18, 2023)**: "Elizabeth Castelo sued her former employer Xceed Financial Credit Union (Xceed) for wrongful termination and age discrimination in violation of the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.) The case was

submitted to binding arbitration pursuant to the stipulation of the parties. The arbitrator granted summary judgment in favor of Xceed on the ground Castelo's claims were barred by a release in her separation agreement. The arbitrator rejected Castelo's assertion that the release violated Civil Code section 1668, which prohibits pre-dispute releases of liability in some circumstances. Castelo moved to vacate the arbitration award, arguing the arbitrator exceeded his powers by enforcing an illegal release. The trial court denied the motion to vacate and entered judgment confirming the arbitration award. We affirm. We review the arbitrator's ruling for clear error. The arbitrator correctly ruled the release did not violate Civil Code section 1668."

***Kinder v. Capistrano Beach Care Center*, No. B316937 (Calif. Ct. App. 2 May 18, 2023)**: "Nancy Kinder was a resident at a residential skilled nursing facility when she sustained injuries in a fall. She sued the facility, Capistrano Beach Care Center, LLC dba Capistrano Beach Care Center (CBCC), and its operator, Cambridge Healthcare Services, LLC (collectively, defendants). Defendants petitioned to compel arbitration, claiming Kinder was bound by arbitration agreements purportedly signed on her behalf by her adult children, Barbara Kinder (Barbara) and James Kinder (James). The trial court denied the petition, concluding defendants had failed to prove Barbara or James had actual or ostensible authority to execute the arbitration agreements on Kinder's behalf. We affirm. CBCC did not meet its initial burden to make a prima facie showing that Kinder agreed to arbitrate by submitting arbitration agreements signed by Kinder's adult children. CBCC presented no evidence that Barbara or James had actual or ostensible authority to execute the arbitration agreement on Kinder's behalf, beyond their own representations in the agreements. A defendant cannot meet its burden to prove the signatory acted as the agent of a plaintiff by relying on representations of the purported agent alone."

***Stokes v. LPL Financial*, FINRA ID No. 22-02036 (San Diego, CA, Apr. 11, 2023**) - An Arbitrator explains in detail why he has decided to grant Respondent broker-dealer's Prehearing Motion to Dismiss pursuant to FINRA Rule 13206 (Six-year Eligibility Rule for Industry Disputes), finding that Claimant's request for reformation of his Form U5 record was outside the applicable eligibility period as the termination entry was supplemented 11 years ago. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Raymond James v. Deutsche Bank*, FINRA ID No. 21-02318 (New York, NY, Apr. 18, 2023)**: Claimants are awarded over $16 million in compensatory damages and interest after the Panel finds Respondent broker-dealer liable for damages due under the Maryland Secured Lending, Cargill, WTC AB Structure, Colina, Westchester Airport Financing, NYPC Loan, and MPTC Loan Transactions as well as the Investor Servicing Agreements. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*
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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Herman, Lawrence, *Investor-State Disputes: The Record and the Reforms Needed for the Road Ahead*, C.D. Howe Institute working paper (May 9, 2023): "Current efforts to reform international investment law focus on the impact of investor-state dispute settlement (ISDS) on the regulatory power of the sovereign state. Sovereign states are encouraged to safeguard the right to regulate in their investment treaties but also to impose obligations on foreign investors to promote responsible business conduct. Yet, beyond the name and nationality as alleged in arbitration filings, very little is known about the claimants themselves. Who are the primary beneficiaries and users of international investment law and dispute resolution? Are they predominantly large multinational corporations as it is commonly perceived? Are there any individuals able to bring claims in ISDS? Do they relate to one another?[] This article seeks to answer these questions by providing empirical data on claimants—companies and individuals—that have brought investment treaty arbitration claims in ICSID arbitrations from January 1, 2010, to December 31, 2019. It further analyzes these data to better understand how investor protection treaties affect the flows and structure of foreign investments and decisions by companies and individuals to bring a claim in ISDS. In doing so, it seeks to contribute to our understanding of the functioning of the international investment regime and whether it achieves its goal of increasing the inflow of foreign investments into the host state's economy. The article concludes by reconciling the goals of investor protection with the collected empirical data on claimants in ISDS and offering normative prescriptions for investment treaty-making."

***FINRA Facts and Trends: May 2023*, JDSupra (May 18, 2023)**: "Welcome to the latest issue of Bracewell's FINRA Facts and Trends, a monthly newsletter devoted to condensing and digesting recent FINRA developments in the areas of enforcement, regulation and dispute resolution. This month, we report on FINRA's appearance at SIFMA, new Reg BI guidance, and the SEC's approval of further changes to the expungement process. Read about these issues, along with notable enforcement actions and regulatory notices, below."

***Wells Fargo Rep Made His Friend a Client's Beneficiary: FINRA*, Think Advisor (May 22, 2023)**: "The Financial Industry Regulatory Authority suspended a Wells Fargo broker from associating with any FINRA member in any capacity for 45 days and fined him $5,000 after asking a client to designate his friend as a beneficiary of the client's accounts, in violation of FINRA Rules 3241 and 2010."

***Finra Bars Ex-MLB Pitcher for Evading Investigation*, FA Magazine (May 24, 2023)**: "A former Major League Baseball player has been barred by the Financial Industry Regulatory Authority for refusing to produce information requested for an investigation.[] Christopher John Carpenter, who had been with LPL Financial in Charlotte, N.C., since March 2020, was fired by the firm in February 2023. Finra said a Form U5 termination notice filed by LPL on February 1 revealed that LPL was reviewing Carpenter's 'alleged participation in unapproved real estate investments with customers.'"

***Vanguard Fined $800K Over Statement Errors*, ThinkAdvisor (May 26, 2023)**: "The Financial Industry Regulatory Authority has fined Vanguard Marketing Corp. $800,000 and censured the brokerage firm for inaccuracies on millions of account statements and for failing to quickly address customer reports about the problems.[] From November 2019 to September 2020, the Vanguard Group business overstated projected yield and annual income for nine money market funds, affecting roughly 8.5 million account statements, FINRA found."
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DID YOU KNOW?

UN CONVENTION TURNS 65 THIS MONTH. Most ADR practitioners are familiar with the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* ("*New York Convention*"), which has been adopted by 172 nations, including the United States when it enacted Chapter 2 of the Federal Arbitration Act in 1970. The *Convention,* which was promulgated June 10, 1958, turns 65 this month. This short video prepared for the 60th anniversary in 2018 offers some fascinating insights.
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