SECURITIES ARBITRATION ALERT 2023-23 (6/15/23)

George H. Friedman, Editor-in-Chief

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- ***Broadway v. Morgan Stanley*, FINRA ID No. 22-01003 (Jackson, MS, Apr. 10, 2023)**
- ***Cariati Trust v. Morgan Stanley*, FINRA ID No. 21-00467 (Hartford, CT, Apr. 13, 2023)**

ARTICLES OF INTEREST:

- **MacGrath, Dana, *"How Do You Get to Carnegie Hall?" The Unsung Benefits of Mock Arbitrations,* Kluwer Arbitration Blog (Jun. 1, 2023)**
- ***It May Be Time to Update Those Arbitration Agreements Again!,* Lexology (Jun. 5, 2023)**
- ***SEC Charges Coinbase for Operating as an Unregistered Securities Exchange, Broker, and Clearing Agency*, www.sec.gov(Jun. 6, 2023)**
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- ***Parties Agree to Vacate $36.7 Million Arbitration Award Against Oppenheimer*, Investment News (Jun. 7, 2023)**
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DID YOU KNOW?

- **Like FINRA, AAA Also has a Foundation**

SQUIBS: IN-DEPTH ANALYSIS

FIRST CIRCUIT: ALTHOUGH STATES MAY PROHIBIT ARBITRATION OF DOMESTIC INSURANCE CLAIMS, THE SAME DOES NOT APPLY TO CLAIMS AGAINST FOREIGN INSURERS. ***In a case of first impression, the First Circuit Court of Appeals holds that, while the McCarran-Ferguson Act allows Puerto Rico to reverse-preempt the Federal Arbitration Act ("FAA") by prohibiting arbitration of insurance claims, that statute does not prevent a court from compelling the arbitration of an international insurance dispute.*** Green Enterprises, LLC ("Green"), a

Puerto Rican company, submitted an insurance claim for fire damage against the underwriters of its insurance policy ("Underwriters"), all of whom were syndicates of Lloyds of London. After the Underwriters denied coverage, Green filed a lawsuit against them in federal court, the District Court granted the Underwriters' motion to compel arbitration, and Green appealed. The Court of Appeals affirms in *Green Enterprises, LLC v. Hiscox Syndicates Limited at Lloyd's of London*, No. 21-1542 (1st Cir. May 19, 2023).

The FAA Does Not Apply to Puerto Rican Insurance Claims . . .

The Court's analysis begins with the McCarran-Ferguson Act, which states in relevant part: "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance." As the Court notes, Article 11.190 of the Puerto Rico Insurance Code: "… renders unenforceable any provision in an insurance policy that would channel the resolution of a coverage dispute to a forum other than the courts." As a result, this statute: "would reverse-preempt the FAA's general mandate to enforce arbitration agreements."

. . . But What About an Arbitration Treaty?

However, Article II(3) of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (the "*Convention*") provides: "The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed." The Court describes the key issue as follows: "The parties agree that Green's arbitration agreement -- within a commercial insurance policy issued by foreign underwriters to a domestic United States insured -- is the type of agreement addressed by the Convention.[] The parties also agree that because the Convention is a treaty rather than an 'Act of Congress,' it is not subject to the limiting construction favoring state insurance law to which any such act is subject by virtue of the McCarran-Ferguson Act. Their principal dispute on appeal trains instead on whether and to what extent the Convention is 'self-executing'; that is, is directly enforceable as domestic law, 'without the aid of any legislative provision,' so as to preempt the application of P.R. Article 11.190 in this lawsuit."

Article II(3) of the Convention Is Self-Executing . . .

The Court holds that Article II(3) of the Convention is, indeed, self-executing because it: "by its express terms directly commands courts to channel arbitrable disputes to arbitration…." Nevertheless, Green argues that other provisions of the Convention require legislative action and therefore render the entire Convention non-self-executing. The Court responds that: "we see no reason why the United States could not enter into a treaty that commands court action on one matter while leaving it to Congress to legislate such a command on a related subject matter." The Court also rejects Green's further argument: "that even if Article II(3) appears from its text to be self-executing, it simply cannot function on a standalone basis without the sections that are non-self-executing, and thus Article II(3) itself cannot be considered self-executing." What matters are

"capable of settlement by arbitration" within the meaning of Article II(1), the Court declares, can be determined by reference to Article I of the FAA and the case law interpreting it. As to Green's argument that courts might not be able to confirm the Award: "After the parties have been directed to arbitration pursuant to Article II(3), P.R. Article 11.190 simply has no application; its text cannot be read to conflict with the FAA's call to enforce an award after the parties have already gone through arbitration."

. . . And, Therefore, the McCarran-Ferguson Act Has No Applicability to This Case
The Court concludes: "The McCarran-Ferguson Act calls for reverse-preemption only of 'Acts of Congress'; any policy preference expressed within it regarding state regulation of insurance does not bear on the relationship between state law and a self-executing treaty provision. And the policy considerations weigh strongly in favor of enforcement here, as 'the emphatic federal policy in favor of arbitral dispute resolution . . . applies with special force in the field of international commerce.'"
*(ed: *We're not sure we agree with this holding. To cite one problem we noticed that the Court fails to address: if the FAA can be used to determine what is "capable of settlement by arbitration" for purposes of the Convention, as the Court recognizes, why can't a reverse-preempting state insurance statute be used to do so as well? **We anticipate that Green will file a petition for* Certiorari *to the U.S. Supreme Court. We'll track it if it does. ***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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BACK TO BASICS ON FAA AWARD ENFORCEMENT: ARBITRATION AGREEMENT MUST BE SUBMITTED WITH CONFIRMATION PAPERS. *A firm's experience in enforcing a FINRA Award underscores the need to comply with the FAA's technical requirements for award confirmation.* Federal Arbitration Act ("FAA") section 13 provides: "The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk: (a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award. (b) The award. (c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application." Must all elements be met? "Yes," says the Court in *UBS Fin. Servs. Inc. v. Harrison*, No. CV-22-00386-PHX-DJH, 2023 WL 3178866 (D. Ariz. Apr. 27, 2023).

Award on Promissory Note
The Arbitrators in *UBS Fin. Servs. Inc. v. Harrison*, FINRA ID No. 19-03751 (Phoenix, AZ, Jul. 29, 2021), awarded the firm $635,492.85 in compensatory damages on seven unpaid promissory note balances; $58.328.67 in interest; $33.01 per diem until the Award is paid; $40,376 in attorneys' fees; and $2,150 in FINRA fees. UBS then moved to confirm the Award under the FAA. The rep did not appear.

Initial Confirmation Attempt Rejected …
The Court rejects UBS' initial Award confirmation attempt because the firm did not comply fully with FAA section 13: "Here, UBS has attached the FINRA Award to its Complaint and alleges that 'neither party seeks to vacate, modify, or otherwise correct the Award'. However, apart from stating the seven promissory notes each contain an arbitration clause, UBS has not provided copies of the alleged promissory notes with the agreements to arbitrate as required under 9 U.S.C. § 13(a)" (internal citation omitted). Is there a cure? Says the Opinion: "The Court will allow UBS to file a supplemental brief to cure this deficiency. Failure to do so will result in the Court's denial of its Motion for Default Judgment."

… But Defect Cured
UBS promptly addressed the defect, as we see in *UBS Fin. Servs. v. Harrison*, No. CV-22-00386-PHX-DJH (D. Ariz. May. 19, 2023): "[T]he Court deferred on conducting a damages analysis because UBS had not yet provided copies of the alleged arbitration agreements as required by Section 13 of the Federal Arbitration Agreement ('FAA'). 9 U.S.C. § 13(a). UBS has since done so. For the following reasons, the Court grants UBS' Motion for Entry of Default Judgment on the basis of the underlying arbitration award."
(ed: Right outcome, but this case is a reminder that the FAA's technical award confirmation requirements must be met.)
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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

SCOTUS SEEMS SET TO DECIDE *COINBASE V. BIELSKI* SOON: The Supreme Court seems poised to soon decide *Coinbase, Inc. v. Bielski*, No. 22-105, which as reported in SAAs 2023-12 (Mar. 23), -11 (Mar. 16), and -07 (Feb. 16), was heard on **March 21**. With the Court's Term ending later this month, we note that the SCOTUS Website shows that opinions are being released today and Friday. As reported in SAA 2023-47 (Dec. 15), the issue in this matter is a technical one, as described in the **July 2022** Petition: "Under § 16(a) of the Federal Arbitration Act, when a district court denies a motion to compel arbitration, the party seeking arbitration may file an immediate interlocutory appeal. This Court has held that an appeal 'divests the district court of its control over those aspects of the case involved in the appeal.' *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) (per curiam).[] The question presented is: "Does a non-frivolous appeal of the denial of a motion to compel arbitration oust a district court's jurisdiction to proceed with litigation pending appeal, as the Third, Fourth, Seventh, Tenth, Eleventh and D.C. Circuits have held, or does the district court retain discretion to proceed with litigation while the appeal is pending, as the Second, Fifth, and Ninth Circuits have held?" (links added by the *Alert*).
*(ed: *The oral argument audio is here and the transcript can be found here. See also our March 23 blog post. **Our editorial comment after oral argument was: "We're not willing to hazard a prediction as to where the Court will land, although to us the pro-arbitration wing seemed sympathetic to Coinbase's arguments.")*
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FEW CASES SO FAR ON DIGITAL FORGERY. As reported in SAA 2022-32 (Aug. 18), FINRA in **August 2022** issued a Regulatory Notice reminding firms of their role in guarding against digital fraud. Regulatory Notice 22-18, *FINRA Reminds Firms of Their Obligation to Supervise for Digital Signature Forgery and Falsification*, notes that: "FINRA has received an increasing number of reports regarding registered representatives and associated persons (representatives) forging or falsifying customer signatures, and in some cases signatures of colleagues or supervisors, through third-party digital signature platforms. Firms have, for example, identified signature issues involving a wide range of forms, including account opening documents and updates, account activity letters, discretionary trading authorizations, wire instructions and internal firm documents related to the review of customer transactions.[] These types of incidents underscore the need for member firms that allow digital signatures to have adequate controls to detect possible instances of signature forgery or falsification." The Notice provides information on: "relevant regulatory obligations; forgery and falsification scenarios firms have reported to FINRA; and methods firms have used to identify those scenarios." Our editorial note in # 2022-32 was: "We'll watch for any increases in arbitration filings involving this issue." Alas, the *Alert* was unable to note any meaningful jump in cases filings, after perusing the **April** stats. We found no listed customer claims, and just one intra-industry filing involving "fraud" ("forgery" itself is not listed as a controversy type).
(ed: We'll keep checking in from time to time.)
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SEVERAL ARBITRATION BILLS INTRODUCED IN THIS CONGRESS SO FAR. File this one under "be careful what you wish for." We reported in SAA 2023-9 (Mar. 2) that by the beginning of March 2021, with the Democrats then in control of the Senate and House, scores of bills had been introduced to limit mandatory arbitration. Some bills sought to amend the Federal Arbitration Act, others another federal statute, and some both. We added that, as of press time, with the House now under GOP control, only 14 arbitration-related bills had been sponsored, according to www.govtrack.us. That's no longer the case, as an impressive 45 arbitration-related bills have now been introduced. We again point out that not every bill has been introduced by a Democrat (Republicans have sponsored 13), and not every bill is anti-arbitration (see, e.g., H.R. 636 -- the *Forest Litigation Reform Act of 2023*).
*(ed: *The reintroduced* FAIR Act -- *H.R. 2953* and *S. 1376* -- *was announced in an April 28 Press Release. **There are 91 cosponsors in the House and 37 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 passing the GOP-controlled House.)*
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******EVENT TODAY*: SEC, NASAA, AND FINRA HOSTING FREE ELDER ABUSE WEBINAR.** The SEC, NASAA, and FINRA are co-hosting a free Webinar today (**June 15**): "on identifying and reporting the financial exploitation of senior

investors. Firms can use this webinar to help train associated persons about how to identify and report financial exploitation of senior and vulnerable adult investors." As described in a press release, the *Senior Safe Act Webinar* will take place between 4:00 p.m. and 5:00 p.m. ET, and includes as panelists **Lori Schock**, Director, SEC Office of Investor Education and Advocacy; **Rich Szuch**, Enforcement Chief, New Jersey Bureau of Securities; **Gerri Walsh**, President, FINRA Foundation; and **Olivia Valdes**, Senior Researcher, FINRA Foundation. June 15 is World Elder Abuse Awareness Day.
(ed: Registration is done online.)
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QUICK TAKES: CASES AND AWARDS WORTH READING

***Positano Place at Naples I Condominium Association, Inc. v. Empire Indemnity Insurance Company*, No. 22-11059 (11th Cir. May 31, 2023)**: "After careful review, and with the benefit of oral argument, we conclude that the district court's order compelling appraisal and staying the proceedings pending appraisal is an interlocutory order that is not immediately appealable under 28 U.S.C. § 1292(a)(1)…. We also conclude that the order compelling appraisal and staying the action pending appraisal is not immediately appealable under the Federal Arbitration Act ("FAA"). Accordingly, for the reasons stated below, we dismiss the appeal for lack of appellate jurisdiction."

***Houston AN USA, LLC v. Shattenkirk*, No. 22-0214 (Tex. May 26, 2023)**: "The issue in this employment-discrimination suit is whether an arbitration agreement is unconscionable, and thus unenforceable, on the ground that the costs associated with arbitration are so excessive they would foreclose the employee from pursuing his claims. The court of appeals held that the agreement is unconscionable and affirmed the trial court's order denying the employer's motion to compel arbitration. Because the burden is on the party resisting arbitration to prove unconscionability, and because the evidence does not rise above the speculative 'risk' that the employee will actually incur prohibitive costs, we reverse the court of appeals' judgment…. As explained, the agreement's silence on arbitration costs does not foreclose the 'risk' that Shattenkirk will be saddled with prohibitive costs, but neither does it indicate that he will actually be charged such costs. The silence cuts both ways, so it is no evidence of either. Accordingly, we hold that, at this point, the evidence is legally insufficient to support a finding that excessive arbitration fees prevent Shattenkirk from effectively pursuing his claims in the arbitral forum."

***Ford Motor Credit Co. v. Miller*, No. 22-0007 (W. Va. May 30, 2023)**: "When Mr. Miller filed a class-action counterclaim to challenge Ford Credit's collection practices, Ford Credit moved to compel arbitration and attached to its motion a copy of a retail installment contract containing the arbitration provisions that Ford Credit sought to enforce. Mr. Miller did not deny that he signed the retail installment contract or that the copy attached to Ford Credit's motion was authentic. In fact, he attached a copy of the same retail installment contract to his own brief opposing Ford Credit's motion. Nevertheless, the circuit court found that Ford Credit failed to offer any 'admissible evidence' in support of its right to arbitration and denied Ford Credit's motion to compel

arbitration. Ford Credit appeals from this decision, and, after review, we find that the circuit court erred in determining that Ford Credit failed to meet its light evidentiary burden to show the existence of an arbitration agreement. Accordingly, we reverse the circuit court and remand this case to the circuit court for further proceedings consistent with this opinion."

***Broadway v. Morgan Stanley*, FINRA ID No. 22-01003 (Jackson, MS, Apr. 10, 2023)**: A Claimant alleging that Respondents wrongfully and overly influenced her adoptive mother (a mentally incapacitated adult) into making written changes to her investment account beneficiaries is awarded compensatory damages. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Cariati Trust v. Morgan Stanley*, FINRA ID No. 21-00467 (Hartford, CT, Apr. 13, 2023)**: Two customers alleging unauthorized trading with respect to their purchase of Google and Amazon stock lose their case against Respondent broker-dealer. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

MacGrath, Dana, *"How Do You Get to Carnegie Hall?" The Unsung Benefits of Mock Arbitrations*, Kluwer Arbitration Blog (Jun. 1, 2023): "Mock arbitrations are an excellent way for clients and counsel to refine their hearing presentation and prepare witnesses to testify so the key arguments, evidence and themes resonate with the tribunal. Having served as both mock arbitrator and counsel in mock arbitrations, I have seen first-hand the positive impact that mock arbitrations can have on a party's arbitration and/or settlement strategy. I have also observed that the counsel teams involved in mock arbitrations are increasingly diverse, with women playing a more substantial role in recent years, which is consistent with the increased representation of women generally as arbitrators and lead counsel."

***It May Be Time to Update Those Arbitration Agreements Again!*, Lexology (Jun. 5, 2023)**: "Back in the 'good old days,' arbitration agreements barred just about any type of civil litigation that was filed in court. Then, as we reported in 2014, the California Supreme Court determined that Private Attorneys General Act ('PAGA') claims are immune from arbitration in *Iskanian v. CLS Transp. Los Angeles, LLC* – which, unsurprisingly, led to an avalanche of PAGA claims being filed as plaintiffs' lawyers scrambled to make their cases arbitration-proof (at least as to those pesky PAGA claims)."

***SEC Charges Coinbase for Operating as an Unregistered Securities Exchange, Broker, and Clearing Agency*, www.sec.gov (Jun. 6, 2023)**: "The Securities and Exchange Commission today charged Coinbase, Inc. with operating its crypto asset trading platform as an unregistered national securities exchange, broker, and clearing agency. The SEC also charged Coinbase for failing to register the offer and sale of its crypto asset staking-as-a-service program."

***Ex-Edward Jones Rep Fined, Suspended for Texting Client Doc*, Think Advisor (Jun. 6, 2023)**: "A former Edward Jones broker accepted a 15-month suspension and $15,000 fine by the Financial Industry Regulatory Authority for using her personal mobile phone to text client documents to a co-worker and then lying about it when questioned by the company, according to a FINRA regulatory filing on Thursday.[] The suspension is longer than usual for a broker who violates FINRA rules but isn't barred from the industry."

***Parties Agree to Vacate $36.7 Million Arbitration Award Against Oppenheimer*, Investment News (Jun. 7, 2023)**: "A $36.7 million Finra arbitration award against Oppenheimer & Co. Inc. was vacated earlier this year, but it appears the investors harmed by an alleged Ponzi scheme perpetrated by one of the firm's former brokers still received a substantial amount of damages.[] The claimants in the case, several investors including Donald Robinson, and Oppenheimer agreed to vacate the award, according to a March 27 order signed by Judge Yolanda Park-Smith of the DeKalb County Superior Court in Georgia.... The order to vacate the arbitration award was first reported by the *Securities Arbitration Alert* in its May 31 edition. (*ed: We reported on this story in SAA 2023-21 (May 31), and blogged about it.*)

***Ex-Morgan Stanley FA Pleads Guilty to Stealing from Clients*, Financial Adviser IQ (Jun. 8, 2023)**: "A former Morgan Stanley advisor, barred from the brokerage industry last summer, has pleaded guilty to charges of misappropriating at least $1.5 million from clients, according to the U.S. Attorney's Office for the Eastern District of Texas.[] [Adviser], who worked out of a Morgan Stanley branch in Southlake, Texas, used client funds to pay for personal trips, cruises, meals, salon treatment and other personal expenses, U.S. Attorney Damien Diggs alleged in an announcement yesterday. [Adviser], 58, faces as much as 10 years in prison, to be determined upon completion of a pre-sentence investigation, according to the announcement."

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DID YOU KNOW?

LIKE FINRA, AAA ALSO HAS A FOUNDATION. Most of our readers are familiar with the FINRA Investor Education Foundation, but did you know the American Arbitration Association also has a foundation? The American Arbitration Association-International Centre for Dispute Resolution Foundation® (AAA-ICDR Foundation®) was established by the AAA in **2015**: "to fund projects that promote conflict resolution and prevention in communities across the country and around the world." The Foundation: "is a 501(c)(3) not-for-profit organization with primary funding from the AAA® and its Roster of Arbitrators and Mediators. Its mission aligns with the American Arbitration Association-International Centre for Dispute Resolution® (AAA-ICDR®) which, for nearly a century, has dedicated itself to promoting and improving approaches to alternative dispute resolution." Here is the Foundation's 2022 annual report.

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

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