SECURITIES ARBITRATION ALERT 2023-30 (8/10/23)

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- ***Jordan v. Primex*, FINRA ID No. 22-01509 (Philadelphia, PA, May 24, 2023)**
- ***Massar v. Wells Fargo,* FINRA ID No. 22-01283 (Milwaukee, WI, May 30, 2023)**

ARTICLES OF INTEREST:

- **Sommers, Roseanna, *What Do Consumers Understand About Predispute Arbitration Agreements? An Empirical Investigation,* University of Michigan Law School (Jul. 25, 2023)**
- ***Attacks on Arbitration Undermine Important Litigation Alternative*, CUNA Magazine (Jul. 27, 2023)**
- ***If Consumers are "Clueless" About Arbitration, it's Not Industry's Fault*, Ballard Spahr Blog (Aug. 1, 2023)**
- ***AMC has Again Asked NYSE and FINRA to Look into the Trading of its Stock,* Morningstar (Aug. 3, 2023)**
- ***Robert Vance & Moloney Securities: A Tale of FINRA Arbitration,* ABS Market Research (Aug. 3, 2023)**
- ***Emoji Context Matters When Judged by Courts and Regulators*, Bloomberg Law News (Aug. 4, 2023)**

DID YOU KNOW?

- **AAA has Signed Diversity, Equity & Inclusion Pledge**

SQUIBS: IN-DEPTH ANALYSIS

SURVEY SAYS: MOST CONSUMERS ARE UNAWARE OF ARBITRATION CLAUSES. ***A new survey of over 1,000 American consumers: "reveal[s] that most consumers do not pay attention to, let alone understand, arbitration clauses in their everyday lives.*"** We excerpt below *verbatim* in bullet format the key findings by Roseanna Sommer of the University of Michigan Law School in *What Do Consumers Understand About Predispute Arbitration Agreements? An Empirical Investigation* (Jul. 25, 2023):

- **Most consumers do not pay attention to, let alone understand, arbitration clauses in their everyday lives.** The vast majority of respondents (over 97%) report having opened an account with a company that requires disputes to be submitted to binding arbitration (e.g., Netflix, Hulu, Cash App, a phone or cable company), yet most are unaware that they have, in fact, agreed to mandatory arbitration (also known as "forced arbitration").

- **Respondents overwhelmingly (over 92%) report that they have never based a decision to use a product or service on whether the terms and conditions contain an arbitration agreement.** They largely endorse the following reasons:

    - they were unaware of the arbitration clause;
    - they did not read the terms and conditions; and
    - they thought they had no choice but to agree to mandatory arbitration.

- **Many respondents presume that if a dispute arises, they will still be able to access the public courts, notwithstanding that they agreed to the terms and conditions.** Consumers are largely unaware of opportunities to opt out of mandatory arbitration.

- **Generally, consumers are unaware that companies like Cash App and Venmo (mobile payment systems utilized by nearly 60% of respondents) allow customers to opt out of mandatory arbitration if they act within a limited time period.** Among the minority of respondents (21%) who stated that they had been given an opportunity to opt out, vanishingly few could name any of the steps that would have been required to opt out successfully.

- **When presented with a run-of-the-mill contract, of the type consumers routinely encounter, most respondents did not take notice of the arbitration clause.** Less than 5% of respondents could recall that the contract they were shown had said anything at all about arbitration.

- **[M]ost consumers misperceive the consequences of signing a predispute arbitration agreement.** Most mistakenly believe that, after agreeing to terms and conditions mandating binding arbitration, they can still: choose to settle their dispute in court, have a jury decide their case, join a class action, and appeal a decision made based on a legal error.

- **In summary, consumers are generally unaware of whether their contracts contain arbitration clauses, and consumers who have agreed to such clauses tend to hold mistaken beliefs about their procedural rights, including wrongly believing they can still sue in court.**

Situation is Different at FINRA
We note that FINRA Rule 2268 aims to eliminate these surprises. Section (a) states: "Any predispute arbitration clause shall be highlighted and shall be immediately preceded by the following language in outline form:[] This agreement contains a predispute arbitration clause. By signing an arbitration agreement the parties agree as follows …." And, section (b)(1) provides: "In any agreement containing a predispute arbitration agreement, there shall be a highlighted statement immediately preceding any signature line or other place for indicating agreement that states that the agreement contains a predispute arbitration clause. The statement shall also indicate at what page and paragraph the arbitration clause is located."
*(ed: *We are not surprised by the survey results. **The survey analysis is also available in PDF format.)*
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FORUM SELECTION CLAUSE CALLING FOR STATE COURT AWARD CONFIRMATION DID NOT OUST DISTRICT COURT OF JURISDICTION. ***The Second Circuit holds unanimously that: 1) parties cannot contractually agree to oust federal courts of their jurisdiction; and 2) a forum selection clause covering award confirmation is permissive, not mandatory.*** The clause in the settlement agreement in *Rabinowitz v. Kelman*, No. 22-1747 (2d Cir. Jul. 24, 2023): "contained several key provisions, including an arbitration agreement and a forum selection clause. For dispute resolution, it required that claims arising out of the Settlement Agreement be submitted 'exclusively to binding arbitration conducted by' a rabbinical court known as the Bais Din Maysharim ('Bais Din') 'without the right of appeal.' As to the forum selection clause governing enforcement of any arbitral award by the Bais Din (the 'Settlement Agreement Forum Selection Clause'), the parties agreed [to] be bound by the judgment of 'any court having jurisdiction' over the award and to 'submit to the jurisdiction' of certain courts" (footnotes and internal citation omitted)

Procedural History
"Rabinowitz moved to confirm the award in the United States District Court for the Southern District of New York (Nelson S. Román, Judge), but the court dismissed the petition for lack of subject matter jurisdiction. The court held that a forum selection clause in the parties' arbitration agreement required that any confirmation action be brought in the state courts of New Jersey or New York, and that this deprived the district court of subject matter jurisdiction."

Forum Selection for Award Confirmation was Permissive, Not Mandatory
"We conclude that the district court erred in two respects. First, we hold that the petition adequately pleaded subject matter jurisdiction based on diversity of citizenship under 28 U.S.C. § 1332. Because parties cannot contractually strip a district court of its subject matter jurisdiction, it was error to conclude that the forum selection clause did so.[] Second, we interpret the relevant forum selection clauses as permissive arrangements that merely allow litigation in certain fora, rather than mandatory provisions that require litigation to occur only there. Accordingly, applying the modified *forum non conveniens*

framework, we hold that the forum selection clauses did not bar proceedings from going forward in the United States District Court for the Southern District of New York. We therefore vacate the judgment of dismissal and remand to the district court for further proceedings."
(ed: Seems to be correct.)
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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

A LOOK BEHIND THE FINRA DRS MIDYEAR STATS THROUGH JUNE: THE SURGE IN INDUSTRY CASES. As reported recently, FINRA Dispute Resolution Services ("DRS") has posted case statistics through **June**, with recent trends continuing to show a very strong year in arbitration filings – especially industry cases – and a continued drop-off in mediations. To review briefly, overall arbitration filings through June – 1,708 cases – are up 35% for the year (was plus 37% in **May**), while industry arbitration filings were up 58% (from up 64% in May). What's behind the industry surge in industry arbitration filings? In part: "employment-relate disputes." We examined the "Top 15 Controversy Types in Intra-Industry Arbitrations" stats to determine where employment filings might end up at the end of the year. Specifically, we looked at these controversy types: breach of contract; U-5 related libel or slander; promissory notes; libel, slander, or defamation; discrimination or harassment; and wrongful termination. All six categories are projected to increase as a group by nearly 23%, as this chart shows:

Category	2022	2023 June	2023 Projected	Diff
Breach of contract	225	130	260	35
U-5 libel/slander	84	53	106	32
Promissory notes	84	64	128	44
Libel/slander/defamation	69	36	72	3
Discrimination/harassment	25	14	28	3
Wrongful termination	50	32	64	14
Totals	**537**	**329**	**658**	**121**

*(ed: *We will look at customer disputes in a future* Alert. ***Past year stats can be found here.)*
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NO ARTICLE III "CASE OR CONTROVERSY" FEDERAL JURISDICTION FOR CITIBANK BRANCH SEEKING TO ENFORCE PDAA. We'll let the Opinion in *The branch of Citibank, N.A., established in the Republic of Argentina v. De Nevares*, No. 22-424 (2d Cir. Jul. 12, 2023), speak for itself. The facts and procedural history: "In this case, respondent-appellant Alejandro De Nevares obtained a judgment (the

'Argentinian Judgment') in the Republic of Argentina against his former employer, Citibank, N.A. ('Citibank'). Petitioner-appellee – 'The branch of Citibank, N.A., established in the Republic of Argentina' (the 'Branch') -- brought this action below to compel arbitration and enjoin De Nevares from taking steps to enforce the Argentinian Judgment against the Branch. The district court ruled in favor of the Branch." And the holding: "We hold that the Branch has not carried its burden of demonstrating that it enjoys separate legal existence from the corporate entity, Citibank. Although Citibank is the real party in interest, it did not seek to substitute itself for the Branch. Because this action has therefore lacked adverse parties, it has not presented a case or controversy within the jurisdiction of the federal courts, as established by Article III of the U.S. Constitution. The district court therefore did not have subject matter jurisdiction. We REVERSE the district court's orders and REMAND with instructions to dismiss for want of jurisdiction."
(ed: Strange one!)
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FOURTH CIRCUIT: FAA TRANSPORTATION WORKER EXEMPTION DOES NOT APPLY TO COMMERCIAL CONTRACT BETWEEN BUSINESS ENTITIES. The Fourth Circuit in *Ahaji Amos v. Amazon Logistics, Inc*., No. 22-1748 (4th Cir. Jul. 25, 2023), holds that the Federal Arbitration Act ("FAA") section 1 exemption for transportation workers does not apply to commercial contracts between business entities. To review, FAA section 1 exempts from the Act: "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." The Supreme Court's decision in *Southwest Airlines Co. v. Saxon*, 142 S. Ct. 1783 (2022), held unanimously that the exemption of "workers engaged in foreign or interstate commerce" includes classes of workers who are part of the flow or stream of interstate commerce, and that there is no FAA requirement that these individuals actually cross state lines. The SCOTUS decision in *Southwest* was narrow, and specifically did not embrace the issue of FAA coverage of delivery drivers. At issue in *Ahaji* was whether the case involved a contract of employment of a transportation worker. Says the Fourth Circuit: "For several reasons, however — chief among them being that the binding commercial contract is a business services deal struck between two corporate entities, not a 'contract of employment' — the FAA's so-called 'transportation worker' exemption is inapplicable in these circumstances. The FAA thus mandates arbitration of all the plaintiffs' claims, leaving us constrained to affirm the district court's Arbitration Order."
(ed: Seems right.)
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QUICK TAKES: CASES AND AWARDS WORTH READING

***Perez v. Discover Bank*, No. 22-15322 (9th Cir. Jul. 24, 2023)**: "Discover Bank seeks to compel Iliana Perez to arbitrate her claims that Discover Bank unlawfully discriminated against her based on citizenship and immigration status when it denied her application for a consolidation loan for her student loan. Discover Bank argues that two arbitration agreements—one Perez made in connection with the student loan and one she made in

connection with the application for the consolidation loan—require arbitration here. The district court declined to compel arbitration, finding that neither agreement required arbitration. We affirm."

***JMA Painters, LLC v. The McDonnel Group, LLC and Travelers Casualty and Surety Company of America*, 2023 WL 4530114 (La. App. 4 Cir. Jul. 13, 2023)**: "We find no indication that TMG or Travelers lodged any objection with the arbitration panel to any delay in issuing its awards. Instead, more than three months after the evidentiary hearing, in the wake of the panel chairman's illness, the parties agreed to submit the case to the two remaining arbitrators. Only after the award was rendered, while before the district court, TMG and Travelers raised their complaint that the award was null as untimely, in their reply memorandum in support of their motion to vacate. Under the AAA Rules to which the parties agreed, this argument is waived. We find no merit in their position that the arbitrators lost or exceeded their jurisdiction to issue their awards, such that the awards are null."

***Sanders v. Savannah Highway Automotive Company*, No. 28168 (S. Car. Jul. 26, 2023)**: "The Federal Arbitration Act (FAA) sometimes requires the arbitrator to decide not only the merits of a dispute but also the gateway question of whether the dispute is arbitrable in the first instance. Petitioners Rick Hendrick Dodge Chrysler Jeep Ram (Rick Hendrick Dodge) and Isiah White contend this is such a case. Specifically, Petitioners argue the arbitrator—not the circuit court— must decide whether they can enforce an arbitration provision in a contract even after that contract has been assigned to a third party. The court of appeals rejected this argument and affirmed the circuit court's determinations that (1) the circuit court was the proper forum for deciding the gateway question of whether the dispute is arbitrable and (2) Petitioners could not compel arbitration because Rick Hendrick Dodge assigned the contract to a third party. We hold the *Prima Paint* doctrine requires the arbitrator to decide whether the assignment extinguished Petitioners' right to compel arbitration" (citation and footnotes omitted).

***Jordan v. Primex*, FINRA ID No. 22-01509 (Philadelphia, PA, May 24, 2023)**: A broker is held solely liable to a customer for compensatory damages relating to the latter's investment in GWG Holdings Inc. L Bonds. As part of the relief granted, Claimant customer is also awarded rescission of his investment. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Massar v. Wells Fargo*, FINRA ID No. 22-01283 (Milwaukee, WI, May 30, 2023)**: A customer alleging that Respondents failed to obey her instructions with respect to the liquidation and transfer of her assets into a newly established investment account, loses her case after the Panel grants the Respondents' Prehearing Motion to Dismiss pursuant to FINRA Rule 12504(6)(A) (Release of Claims). Respondent brokers are each granted their requests for expungement of this matter from their CRD records
Provided courtesy of SAC's ARBchek facility (www.arbchek.com).
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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Sommers, Roseanna, *What Do Consumers Understand About Predispute Arbitration Agreements? An Empirical Investigation*, University of Michigan Law School (Jul. 25, 2023): "The results of a survey of 1,071 adults in the United States reveal that most consumers do not pay attention to, let alone understand, arbitration clauses in their everyday lives. The vast majority of survey respondents (over 97%) report having opened an account with a company that requires disputes to be submitted to binding arbitration (e.g., Netflix, Hulu, Cash App, a phone or cable company), yet most are unaware that they have, in fact, agreed to mandatory arbitration (also known as "forced arbitration"). Indeed, over 99% of respondents who think they have never entered into an arbitration agreement likely have done so." (*ed: See our coverage elsewhere in this* Alert.)

***Attacks on Arbitration Undermine Important Litigation Alternative*, CUNA Magazine (Jul. 27, 2023)**: "CUNA joined other organizations Wednesday to strongly oppose numerous bills attempting to prohibit arbitration clauses.[] 'These attacks on arbitration are inaccurate, unnecessary, and would undermine an important alternative to litigation that has benefited consumers, employees, and businesses for decades, and on which many of them now rely,' the letter reads.[] The organizations note arbitration has been an alternative dispute resolution mechanism since the enactment of the Federal Arbitration Act in 1925."

***If Consumers are "Clueless" About Arbitration, it's Not Industry's Fault*, Ballard Spahr Blog (Aug. 1, 2023)**: "Last week, Professor Jeff Sovern of St. John's University School of Law published a blog post discussing a new empirical study by Roseanna Sommers, Assistant Professor of Law at the University of Michigan Law School, dealing with consumer understanding of predispute arbitration agreements. According to Professor Sovern, the Sommers study augments his earlier (2014) study of this subject and confirms that "consumers are generally unaware of whether their contracts contain arbitration clauses, and consumers who have agreed to such clauses tend to hold mistaken beliefs about their procedural rights …." This week, in a follow-up blog post concerning the Sommers study, Professor Sovern asserts that consumers are 'clueless' about arbitration opt-out provisions because companies use "dark patterns" on their websites to mislead them." *ed: See our coverage elsewhere in this* Alert.)

***AMC has Again Asked NYSE and FINRA to Look into the Trading of its Stock*, Morningstar (Aug. 3, 2023)**: "AMC has repeatedly gone to the NYSE and FINRA to 'keep this entire situation on their radar,' says CEO Adam Aron.[] AMC Entertainment Holdings Inc. has again asked the New York Stock Exchange and the Financial Industry Regulatory Authority to look into the trading of its stock, with CEO Adam Aron citing a high number of 'fail to deliver' shares."

***Robert Vance & Moloney Securities: A Tale of FINRA Arbitration*, ABS Market Research (Aug. 3, 2023)**: "You may have lost money because of unsuitable advice. Maybe you were a victim to negligence on the part of your investment advisor. Then you are not alone. You are not alone. What if you could recover your losses? What if there

were a beacon in the financial wilderness that could give you hope? FINRA Arbitration comes into play."

***Emoji Context Matters When Judged by Courts and Regulators*, Bloomberg Law News (Aug. 4, 2023)**: "Emojis are now ubiquitous, and have become the subject of court decisions and regulatory initiatives. The problem with applying legal principles to emojis, particularly by regulators like FINRA, is the difficulty of considering context of the emojis and the background of the sender and receiver."
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DID YOU KNOW?

AAA HAS SIGNED DIVERSITY, EQUITY & INCLUSION PLEDGE. The AAA announced via an **April 11** Press Release that it has signed the: Ray Corollary Initiative™ (RCI™) *Pledge for Alternative Dispute Resolution (ADR) Providers*, an industry effort to increase the number of women and racially and ethnically diverse ADR professionals who serve as arbitrators, mediators, and other neutrals."
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