SECURITIES ARBITRATION ALERT 2023-34 (9/7/23)

George H. Friedman, Editor-in-Chief

SQUIBS:

- **Applying FAA Chapter 1, Eleventh Circuit Finds Lack of Arbitrator Disclosure Did Not Warrant Vacatur**
- **Another Study Shows Most Consumers are Unaware of Online Arbitration Clauses**

SHORT BRIEFS:

- **FINRA Board Meets in Person Next Week**
- **FINRA Issues Guidance on Bond Pricing**
- **ISCID Publishes Report on 2022 Rules Revisions**
- **Coming Soon: Securities Experts Roundtable to Host Live Reg BI Zoom Broadcast**

QUICK TAKES:

- ***Stafford v. Int'l Bus. Machs. Corp.*, No. 22-1240 (2d Cir. Aug. 14, 2023)**
- ***Lastephen Rogers v. Tug Hill Operating, LLC*, No. 22-1480 (4th Cir. Aug. 7, 2023)**
- ***Kielar v. Super. Ct.*, No. C096773 (Calif. Ct. App. 3 Aug. 16, 2023)**
- ***Hanlon Trust v. UBS Financial*, FINRA ID No. 19-92012 (Boston, MA, Jul. 18, 2023)**
- ***Wechsler v. TD Ameritrade*, FINRA ID No. 22-02161 (New York, NY, Jul. 20, 2023)**

ARTICLES OF INTEREST:

- **O'Gorman, Kevin and Formby, Erin, *Energy Measures Impacting Foreign Investment: Update and Potential Investor-state Dispute Remedies*, Norton Rose Blog (Aug. 17, 2023)**
- ***ICSID has Published a Review of the First Year of Practice Under its 2022 Rules*, Practical Law Arbitration Blog (Aug. 18, 2023)**
- ***New Study Targets Arbitration Opt-outs in Online Contracting, but Misses the Point*, Ballard Spahr Consumer Finance Monitor (Aug. 21, 2023)**
- ***Is Arbitration Becoming "Just Somebody That We Used to Know"? — The Beginning of the End of Arbitration*, Proskauer California Employment Law Update (Aug. 22, 2023)**
- ***Morgan Stanley Told to Pay $1.8M for Overconcentrating Client in Stock*, FinancialPlanning (Aug. 22, 2023)**
- ***SEC Reopens Comment Period for Enhanced Safeguarding Rule for Registered Investment Advisers Proposal*, www.sec.gov (Aug. 23, 2023)**

DID YOU KNOW?

- **FINRA has a Webpage Dedicated to Financial Reports and Policies**

SQUIBS: IN-DEPTH ANALYSIS

APPLYING FAA CHAPTER 1, ELEVENTH CIRCUIT FINDS LACK OF ARBITRATOR DISCLOSURE DID NOT WARRANT VACATUR. ***Relying on recently-announced Eleventh Circuit precedent -- 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 – the Court finds***

that the Arbitrators' alleged lack of complete disclosure did not warrant Award vacatur. 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. As reported in SAA 2023-16 (Apr. 27), *Corporacion AIC, SA v. Hidroelectrica Santa Rita S.A.*, 66 F.4th 876, 880 (11th Cir. Apr. 13, 2023) (en banc), represented reversal of Eleventh Circuit precedent dating back over 20 years, with the Court holding unanimously that in *UN Convention* arbitrations conducted in the U.S., *only* the FAA Chapter 1 grounds are available.

Prior Precedent Overruled

Said the Opinion: "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).

Applying the New Standard, Award Upheld

Applying the new standard, the Court finds in *Grupo Unidos por el Canal, S.A. v. Autoridad del Canal de Panama*, No. 21-14408 (11th Cir. Aug. 18, 2023), that allegedly inadequate Arbitrator disclosures did not warrant Award vacatur. We quote liberally from the Opinion, starting with the facts and procedural history: "After Grupo Unidos por el Canal, S.A., received two adverse awards amounting to more than a quarter-billion dollars in an arbitration arising out of its construction work on the Panama Canal, Grupo Unidos sought wide-ranging disclosures from each of the three members of the panel pertaining to possible bias. Each arbitrator disclosed for the first time that he had served on panels in other, unrelated arbitrations in which an arbitrator or counsel involved in Grupo Unidos's arbitration also participated. Following the disclosures of the new information, Grupo Unidos challenged the impartiality of the arbitrators before the International Court of Arbitration ('ICA') of the International Chamber of Commerce. The ICA agreed that some arbitrators failed to make a few disclosures but, notably, did not find any basis for removal and rejected Grupo Unidos's challenges on the merits. Thereafter, Grupo Unidos moved -- unsuccessfully -- for the vacatur of the awards in the United States District Court for the Southern District of Florida. Autoridad del Canal de Panama, in turn cross-moved for confirmation of the awards, which the district court granted." And the holding on appeal: "Because we agree with the International Court of Arbitration and the district court that Grupo Unidos has presented nothing that comes

near the high threshold required for vacatur, we affirm the denial of vacatur and the confirmation of the awards."
*(ed: *This outcome is not surprising. We find that courts are reluctant to second-guess ADR administrators on this issue.)*
return to top

ANOTHER STUDY SHOWS MOST CONSUMERS ARE UNAWARE OF ONLINE ARBITRATION CLAUSES. ***A new study shows that most consumers are unaware of, or don't read, arbitration agreements in online Terms of Use ("TOU")***. We covered in SAA 2023-30 (Aug. 10) a study by Roseanna Sommer of the University of Michigan Law School, *What Do Consumers Understand About Predispute Arbitration Agreements? An Empirical Investigation* (Jul. 25, 2023). The main finding was: "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." Along the same lines is a forthcoming article by Tim Samples, Katherine Ireland, and Caroline Kraczon, *TL;DR: The Law and Linguistics of Social Platform Terms-of-Use*, to be published in the BERKELEY TECHNOLOGY LAW JOURNAL (*ed: "TL;DR" stands for "Too long; didn't read"*). We excerpt below *verbatim* in bullet format the key findings in the Abstract:

- Online terms-of-use (TOUs) are the most widely used form contracts in human history. But TOUs are as poorly understood as they are ubiquitous.

- Their proliferation has fueled a yawning gap between contract law and consumer reality.

- The notion that users read and understand online TOUs, disproven in academic research, is the subject of pop culture mockery. Yet contract law assumes something very different. Because classic legal doctrines apply to online contracts, consumers routinely find themselves legally bound to contracts they have not—and often could not—read.

- Our interdisciplinary study examines an original dataset of 196 contracts (TOUs, privacy policies, and community guidelines) for seventy-five apps.

- Our analysis highlights a decoupling of contract doctrine and consumer reality in the smartphone age of online contracting.

- Our results show that this divergence is fueled by extraordinary volume, complexity, and asymmetries in platform-to-consumer contracts. In addition, our results offer evidence that the decoupling has grown in recent years.

Opt-Outs are Largely Ephemeral
The paper acknowledges the existence of arbitration opt-out provisions, but concludes they are largely ephemeral. Why? "[O]pt-out rights have major limitations. Many expire

within a relatively short period—thirty days, for instance. Also, the instructions for opt-out procedures are buried within arbitration clauses. Our results show that these clauses tend to be long and exceptionally complicated. It is unknown, and perhaps doubtful, whether many consumers read and exercise their optout rights…. Opt-out procedures, practically speaking, create significant transactional friction. Opting-out requires fairly sophisticated knowledge and proactive steps by the user. Sometimes procedural burdens are substantial" (footnotes omitted).

One Reaction

Reaction from the pro-arbitration world was swift. *New Study Targets Arbitration Opt-outs in Online Contracting, but Misses the Point*, appearing in the August 21 Ballard Spahr Consumer Finance Monitor, states: "Professor Jeff Sovern, who recently joined the University of Maryland Francis King Carey School of Law faculty, has recently blogged about a forthcoming Study by academicians at other institutions that will be published in the Berkeley Technology Law Journal. The Study, titled 'TL;DR: The Law and Linguistics of Social Platform Terms-of-Use,' examines the content and readability of online terms of use and, according to Professor Sovern, 'illustrates how crazy arbitration opt-outs have become.' The Study concludes that '[internet] platform-to-consumer contracts have become increasingly difficult in recent years' as exemplified by 'the frequency of arbitration clauses and class waivers, and onerous opt-out procedures'" (brackets in original).

(ed: We suspect this debate is not over.)

return to top

SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

FINRA BOARD MEETS IN PERSON NEXT WEEK. FINRA's Board of Governors is meeting in person **September 13–14**; the Agenda is not yet posted. As usual, we will follow up after the meeting Agenda is released. The schedule for the rest of 2023 is: **September 13–14**; and **December 6–7**.)

(ed: We'll tweet any news as soon as we have it.)

return to top

FINRA ISSUES GUIDANCE ON BOND PRICING. FINRA on **August 17** issued an "Investor Insight" titled *What Is TRACE and How Can It Help Me?* Reads the description; "When securities are listed on a centralized exchange, such as the New York Stock Exchange or Nasdaq, transaction information such as price and trade history is readily available to investors through the exchange. But how can you get information about bonds and other fixed income securities that are *not* listed on a national securities exchange? Information about these securities, known as over-the-counter (OTC) debt securities, is provided by TRACE®—the Trade Reporting and Compliance Engine®."

(ed: Helpful advice!)

return to top

ISCID PUBLISHES REPORT ON 2022 RULES REVISIONS. The International Centre for Settlement of Investment Disputes (**"ICSID"**) just released a Report on its

Rules and Regulations, which were effective **July 1, 2022**. According to its Website: "[A]fter six years of collaboration with stakeholders including State officials and legal counsel, [the Rules] were designed to make the administration of ICSID cases more efficient and transparent and to ensure ICSID's facilities are accessible to a broader range of cases. The 2022 ICSID Rules and Regulations comprise modernized rules for arbitration, conciliation and fact-finding and introduce mediation rules." *The First Year of Practice Under the 2022 ICSID Rules* is: "an overview highlighting observations on the applicability of the 2022 ICSID Rules and Regulations and the cases administered to date under the amended rules." The Report contains various metrics, and covers: Institution Rules; Arbitration Rules; Conciliation Rules; Administrative and Financial Regulations; Additional Facility Proceedings and Other mechanisms; Additional Facility Rules and Regulations; Fact-Finding Rules and Regulations; and Mediation Rules and Regulations. There's also an Appendix of cases administered under the new Rules.
(ed: ICSID is: "an international facility available to States and foreign investors for the resolution of investment disputes. Established in 1966 by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States *(the ICSID Convention), it is the only global institution dedicated to international investment dispute settlement.")*
return to top

COMING SOON: SECURITIES EXPERTS ROUNDTABLE TO HOST FREE LIVE REG BI ZOOM BROADCAST. The Securities Experts Roundtable ("SER") will be hosting a live Webinar, *Reg BI - Business As Usual, or Meaningful Change?* on **September 22** from 3:20-4:20 pm eastern. Says the announcement: "Reg BI became effective over three years ago, but did it make a difference? To what extent is Reg BI fundamentally different than the suitability standard that it replaced, and how much change did the securities industry need to make in order to comply with it? Join our first time public broadcast (via Zoom) of an SER Annual Conference session to hear leading authorities and regulators discuss their views as to how well, and to what extent the brokerage industry has implemented Reg BI and share their expectations for future developments. Moderated by SER member and Past President Jeffery Schaff, this session is geared toward securities attorneys, experts and compliance professionals." Full annual meeting details are here. The Webinar is free, but registration is required by **September 15**.
*(ed: *The non-profit SER, which was founded in 1992, is: "a group of professionals with significant experience as testifying and consulting experts in securities, business and investment-related litigation." **Full disclosure:* SAA*'s publisher and editor-in-Chief George Friedman is an active member of the SER.)*
return to top

QUICK TAKES: CASES AND AWARDS WORTH READING

***Stafford v. Int'l Bus. Machs. Corp*., No. 22-1240 (2d Cir. Aug. 14, 2023)**: "On appeal, IBM argues that (1) the petition to confirm became moot once IBM paid the award, and (2) the district court erred in unsealing the confidential award. We agree. First, Stafford's petition to confirm her purely monetary award became moot when IBM paid the award in

full because there remained no 'concrete' interest in enforcement of the award to maintain a case or controversy under Article III. Second, any presumption of public access to judicial documents is outweighed by the importance of confidentiality under the FAA and the impropriety of Stafford's effort to evade the confidentiality provision in her arbitration agreement. We thus **VACATE** the district court's confirmation of the award and **REMAND** with instructions to dismiss the petition as moot. We **REVERSE** the district court's grant of the motion to unseal" (emphasis in original).

***Lastephen Rogers v. Tug Hill Operating, LLC*, No. 22-1480 (4th Cir. Aug. 7, 2023)**: "These numerous provisions in the Agreement preclude any conclusion that the Agreement was entered into *solely or directly for the benefit of Tug Hill*, such that Tug Hill could enforce it as a third-party beneficiary. Accordingly, the district court erred in granting Tug Hill's motion to dismiss and compelling Rogers, under the arbitration agreement between him and RigUp, to proceed to arbitration with respect to his FLSA claim against Tug Hill" (emphasis in original).

***Kielar v. Super. Ct.*, No. C096773 (Calif. Ct. App. 3 Aug. 16, 2023)**: "The superior court's ruling followed this court's earlier decision in *Felisilda v. FCA US LLC* (2020) 53 Cal.App.5th 486 (*Felisilda*) and concluded Hyundai—a nonsignatory manufacturer—could enforce the arbitration provision in the sales contract between Kielar and his local car dealership under the doctrine of equitable estoppel. This issue is now on review. In the meantime, we join those recent decisions that have disagreed with *Felisilda* and conclude the court erred in ordering arbitration. (*Montemayor v. Ford Motor Co.* (2023) 92 Cal.App.5th 958, 968-971 (*Montemayor)*; *Ford Motor Warranty Cases* (2023) 89 Cal.App.5th 1324, 1333-1336, review granted July 19, 2023, S279969 (*Ford Motor*).) Therefore, we shall issue a preemptory writ of mandate compelling the superior court to vacate its June 16, 2022 order and enter a new order denying Hyundai's motion."

***Hanlon Trust v. UBS Financial*, FINRA ID No. 19-92012 (Boston, MA, Jul. 18, 2023)**: A customer alleging that Respondent's Yield Enhancement Options Strategy was unsuitable for his investment needs, and seeking rescission of this investment, loses his case. Three Non-Party brokers lose their requests for expungement of this matter from their CRD records. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Wechsler v. TD Ameritrade*, FINRA ID No. 22-02161 (New York, NY, Jul. 20, 2023)**: A customer alleging that his request to expedite a transfer of his shares in Leafly Holdings Inc. was not executed in a timely manner is awarded compensatory damages from Respondent broker-dealer. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

return to top

ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

O'Gorman, Kevin and Formby, Erin, *Energy Measures Impacting Foreign Investment: Update and Potential Investor-state Dispute Remedies*, Norton Rose Blog (Aug. 17, 2023): "This article provides an update on state-to-state consultations between

the United States, Canada and Mexico and explores potential remedies for international investors whose investments may be impacted by Mexican energy policy."

***ICSID has Published a Review of the First Year of Practice Under its 2022 Rules*, Practical Law Arbitration Blog (Aug. 18, 2023):** "ICSID has published a review of the first year of practice under its 2022 Rules, highlighting observations on the applicability of the 2022 ICSID Rules and Regulations, and the cases administered to date under the amended rules, as well as setting out some statistics on those cases." (*ed: See our coverage elsewhere in this* Alert.)

***New Study Targets Arbitration Opt-outs in Online Contracting, but Misses the Point*, Ballard Spahr Consumer Finance Monitor (Aug. 21, 2023)**: "Professor Jeff Sovern, who recently joined the University of Maryland Francis King Carey School of Law faculty, has recently blogged about a forthcoming Study by academicians at other institutions that will be published in the Berkeley Technology Law Journal. The Study, titled 'TL;DR: The Law and Linguistics of Social Platform Terms-of-Use,' examines the content and readability of online terms of use and, according to Professor Sovern, 'illustrates how crazy arbitration opt-outs have become.' The Study concludes that '[internet] platform-to-consumer contracts have become increasingly difficult in recent years' as exemplified by 'the frequency of arbitration clauses and class waivers, and onerous opt-out procedures'" (brackets in original). (*ed: See our coverage elsewhere in this* Alert.)

***Is Arbitration Becoming "Just Somebody That We Used to Know"? — The Beginning of the End of Arbitration*, Proskauer California Employment Law Update (Aug. 22, 2023)**: "When Congress passed and President Biden signed *the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act* ("the Act") last year, we predicted it was just the beginning of an all-out federal assault on arbitration. We weren't wrong – so far, there are additional bills pending in Congress to exempt age and race discrimination and harassment claims from arbitration. See H.R.4120 – *Protecting Older Americans Act of 2023*; S. 1408 – *Ending Forced Arbitration of Race Discrimination Act of 2023*."

***Morgan Stanley Told to Pay $1.8M for Overconcentrating Client in Stock*, FinancialPlanning (Aug. 22, 2023)**: "Morgan Stanley owes a brokerage client $1.8 million over allegations that it had recommended an overconcentration in a financial services company's stock.[] So ruled an arbitration panel administered by the Financial Industry Regulatory Authority, the brokerage industry's self-regulator, on Friday. According to FINRA, an investor named Karen Busch sought $1.6 million plus interest, as well as punitive damages and compensation for attorney's fees and other expenses, from Morgan Stanley over its recommendations that she invest in the New York-based fund management company WisdomTree."

***SEC Reopens Comment Period for Enhanced Safeguarding Rule for Registered Investment Advisers Proposal*, www.sec.gov (Aug. 23, 2023)**: "The Securities and

Exchange Commission today reopened the comment period on its proposed rule that would redesignate and amend the current custody rule under the Investment Advisers Act of 1940 to enhance protections of customer assets managed by registered investment advisers, which was proposed by the Commission on February 15, 2023. The initial comment period ended on May 8, 2023…. The comment period will remain open until 60 days after the date of publication of the reopening release in the *Federal Register*."
return to top

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FINRA HAS A WEBPAGE DEDICATED TO FINANCIAL REPORTS AND POLICIES. Located at https://www.finra.org/about/annual-reports, visitors can find: Annual Reports; Fines Reports; Annual Budgets; and Financial Policies. Prior year reports are also available.
return to top

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