SECURITIES ARBITRATION ALERT 2023-48 (12/21/23)

George H. Friedman, Editor-in-Chief

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DID YOU KNOW?

- **Past FINRA DRS Year-end Stats are Available**

ALERT! NO *ALERT* NEXT WEEK. *It's the end of another calendar quarter, so we will be taking our customary break in publishing the* Securities Arbitration Alert *as the quarter and year comes to a close. Look for the next edition of the* SAA *in your e-mailbox January 4. In the meantime, follow us @SecArbAlert and sign up for updates on our weekly blog posts. Or take a look at our publisher and Editor-in-Chief George Friedman's 2014 blog post,* On the 1st day of Christmas/Chanukah/Kwanzaa, My True Love Gave to me … A New Form of ADR, *which has aged well.*

Speaking of next year, we're pleased to announce that, despite inflationary pressures, our pricing for 2024 is unchanged for the weekly online Alert*:* ***Individual*** *-- $480 a year (48 issues).****Group*** *-- $480 for first subscriber and $100 for each additional (a librarian forwarding the* Alert *to another inhouse recipient counts as one subscriber). More details for renewing and becoming new subscribers will be sent next year.*

Our heartfelt thanks to the SAA Editorial Advisory Board, SAC's ARBcheck facility, and Harry Jacobowitz, Esq. for their many contributions this year.

SQUIBS: IN-DEPTH ANALYSIS

DC CIRCUIT AFFIRMS $600 MILLION AWARD AGAINST VENEZUELA. ***The DC Circuit holds that it was bound by full faith and credit to reject Venezuela's challenge to a $600+ million Award rendered against it.*** We borrow heavily from the Opinion in *Valores Mundiales, S.L. v. Bolivarian Republic of Venezuela*, No. 23-7077 (D.C. Cir. Dec. 8, 2023): "The International Centre for Settlement of Investment Disputes ('ICSID') was established in 1966 by a multilateral convention designed to promote international investment. ICSID aims to fulfill the goal of its generating convention by providing reliable dispute resolution processes for member states and nationals of other member states."

ICSID Award Enforcement

"However, ICSID is not authorized to enforce arbitration awards issued pursuant to its procedures. Rather, the parties to any such proceeding must rely on the courts of member states to enforce awards issued by an Arbitral Tribunal convened in accordance with the ICSID Convention. See ICSID Convention, art. 54, 17 U.S.T. 1270. Thus, as a signatory to the ICSID Convention, the United States has agreed that an ICSID award will 'be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States.' 22 U.S.C. § 1650a(a)." This statute

provides that: "[t]he pecuniary obligations imposed by such an award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States."

Section 1650a and the FAA
The Court finds that section 1650a limits a reviewing court's power to disturb ICSID awards: "Section 1650a contains further signals that Congress did not intend federal courts to re-open the merits of ICSID awards. The statute expressly forecloses collateral attack on ICSID awards in federal courts by excluding ICSID enforcement actions from the purview of the Federal Arbitration Act ('FAA'), 9 U.S.C. §§ 1 et seq. See 22 U.S.C. § 1650a(a). The FAA allows an enforcing court to vacate an arbitral award where the award was tainted by fraud, corruption, or misconduct by the arbitrator. 9 U.S.C. § 10(a). By removing ICSID awards from the FAA's purview, Congress rejected the possibility that the FAA's grounds for vacatur could be applied to an ICSID award, thus reducing the scope of judicial review of ICSID awards below even the 'extremely limited' review available under the FAA" (citation omitted).

Award Must Be Enforced
"On the record before this court, it is clear that Valores's ICSID awards against Venezuela are owed full faith and credit. No party contests the jurisdiction of ICSID or the authenticity of the awards rendered by the Arbitral Tribunal and the Annulment Committee. Following the Supreme Court's elaboration of the full faith and credit standard, we look to whether ICSID would treat the award as binding. Neither the parties nor the record suggests otherwise. Based on a straightforward application of Section 1650a, the ICSID awards are enforceable against Venezuela" (citations omitted).
(ed: Seems right.)
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NINTH CIRCUIT CLARIFIES HOW TO CHALLENGE A DELEGATION CLAUSE IN AN ARBITRATION AGREEMENT. ***Although the Court agrees that the lower court had sufficient grounds to challenge the unconscionability of a delegation clause, it reverses the decision invalidating the clause.*** A delegation clause is a provision of an arbitration agreement that delegates to the arbitrator the authority to resolve issues on the arbitrability of the dispute, divesting courts of the opportunity to make that decision before compelling arbitration, unless the delegation clause itself is legally invalid. The validity of such a delegation clause was the issue before the Court in *Bielski v. Coinbase, Inc.*, No. 22-15566 (9th Cir. Dec. 5, 2023).

The Case
We covered the decision below in SAA 2022-16 (Apr. 28), from which we excerpt, mostly *verbatim*, the following summary of *Bielski v. Coinbase, Inc.*, No. C21-07478 (N.D. Cal. Apr. 8, 2022), the case below: Defendant Coinbase Inc. operates a currency exchange that also allows its users to trade in cryptocurrency. One of these users, Plaintiff Abraham Bielski ("Mr. Bielski") was the victim of a scammer who transferred more than $31,000 out of his digital wallet. When Mr. Bielski turned to Coinbase for help, he was

unable to reach a human representative or to receive a satisfactory response. He then filed a class action on behalf of similarly situated Coinbase users, alleging that the currency platform violated the Electronic Funds Transfer Act and Regulation E. Coinbase petitioned to compel arbitration under an arbitration agreement contained in the user agreement Mr. Bielski signed. Mr. Bielski objected on the ground that the arbitration agreement in general and the delegation clause in particular are unconscionable. The district court found that the delegation clause was unconscionable and, thus, unenforceable, and further found that the delegation clause was not severable from the arbitration agreement, which was also unconscionable. For these reasons, the court denied the petition to compel arbitration. Coinbase appealed.

How to Challenge a Delegation Clause

The Court begins by declaring: "Because he specifically challenged the delegation provision, Mr. Bielski's enforceability challenge belongs with the court, not an arbitrator." Citing *Rent-a-Center, West, Inc. v. Jackson*, 561 U.S. 63, 74 (2010), the Court considers the appropriate standard the party challenging the clause must meet before it may reach the merits of the challenge: "In sum, we hold that to sufficiently challenge a delegation provision, the party resisting arbitration must specifically reference the delegation provision and make arguments challenging it… [A] party may use the same arguments to challenge both the delegation provision and arbitration agreement, so long as the party articulates why the argument invalidates each specific provision." In the case before it: "Mr. Bielski specifically challenged the delegation provision: he not only mentioned it, but crafted arguments directly addressing its unconscionability. That Mr. Bielski argued the arbitration agreement was unenforceable for the same reasons does not defeat his challenge. Because Mr. Bielski specifically challenged the enforceability of the delegation provision under Section 2 of the FAA, the district court correctly considered the challenge."

The Delegation Clause in Context

The next issue is whether the District Court erred in considering the provisions of the arbitration agreement as a whole when conducting its unconscionability analysis of the delegation clause, rather than considering the latter on its own terms. Finding no error, the Court explains: "There are two important reasons to allow a court to look past the words of the delegation provision and to the context of the contract as a whole. First, the provision itself may not provide enough information for the court to evaluate the challenge, especially where the delegation provision incorporates defined terms …. Second, restricting a court's review may incentivize contract drafters to write sparse delegation provisions to evade meaningful review. Drafters could hide layers upon layers of unconscionable provisions in the arbitration agreement…. [S]pecifically challenging the delegation provision would require a party to reference the language from other parts of the contract, and the court would need to evaluate these parts of the contract to appreciate the meaning of the delegation provision."

No Unconscionability Here

However, the Court departs from the District Court's unconscionability analysis on the merits. Under California law, a court must determine whether there is a sufficient combination of procedural and substantive unconscionability before voiding a contract provision. "Under California law, procedural unconscionability addresses contract negotiation and formation and focuses on 'oppression or surprise due to unequal bargaining power.'" Because Mr. Bielski was required to accept the delegation provision as a condition of opening a Coinbase account, the Court recognizes that it is a take-it-or-leave-it adhesion contract that always contains some procedural unconscionability. On the other hand, it holds, the arbitration agreement explains the dispute resolution procedures in plain language and legible font and the procedures themselves are neither onerous nor beyond the user's reasonable expectations. Substantive unconscionability focuses on the fairness of the agreement's terms. "It is undisputed," the Court explains, "that only Coinbase's users must engage in the pre-arbitration dispute resolution process, giving Coinbase a 'free peek' at users' potential claims without affording users that same opportunity. But we do not find these pre-arbitration procedures to be overly harsh or unfairly one-sided…. Here, a lack of mutuality in the delegation provision, combined with the pre-arbitration dispute resolution process establishes, at most, a low level of substantive unconscionability.[] Ultimately, we hold that the delegation provision's low levels of procedural and substantive unconscionability fail to tip the scales to render the provision unconscionable and therefore unenforceable. Therefore, the district court erred in refusing to enforce the delegation provision."

*(ed: *Our faithful readers might remember our coverage in SAA 2023-25 (Jun. 29) of the U.S. Supreme Court's decision in* Coinbase, Inc. v. Bielski*, No. 22-105 (Jun. 23, 2023), which we described as: "ruling mostly along ideological lines that District Courts must stay underlying litigation while an appeal of a denial of a motion to compel arbitration is pending." They might also remember our coverage in SAA 2023-32 (Aug. 24) of* Aggarwal v. Coinbase Inc. *No. 22-cv-04829 (N.D. Cal. Aug. 2, 2023), which rejected a similar challenge to the same delegation clause. **Circuit Judge Eric D. Miller agreed with the majority's holding and reasoning, but partially dissented on the sole ground that the majority misstated the rulings of other federal circuits. ***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 BOARD MET THIS MONTH. THERE *WAS* A DISPUTE RESOLUTION RULEMAKING ITEM ON THE AGENDA. FINRA's Board of Governors met **December 6–7.** We incorrectly reported in SAA 2023-47 (Dec. 14) that there were no dispute resolution rulemaking items on the Agenda. In fact, there was one such item. The Regulatory Policy Committee reviewed: "a proposal regarding the applicability of document production lists in simplified customer arbitrations." The posted results state: "The Board approved proposed amendments to the Code of Arbitration Procedure for

Customer Disputes to clarify that Document Production Lists apply in simplified customer arbitrations in which the customer requests a regular hearing, and to give customers the option to request for Document Production Lists to apply in the remaining types of simplified arbitrations." This was the final meeting for 2023. The 2024 schedule is: March 6–7; May 8–9; July 24–25; September 18–19; and December 4–5.
*(ed: *Makes sense to us. **The* Alert *regrets the error.)*
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DISTRICT COURT: WHERE NAMED ADR PROVIDER IS DEFUNCT, COURT CANNOT COMPEL ARBITRATION BEFORE A DIFFERENT ADMINISTRATOR. *Baker Hughes Saudi Arabia Co. v. Dynamic Industries, Inc.*, No. 2:23-cv-01396 (E.D. La. Nov. 6, 2023), raises an interesting question: where the ADR provider named in the predispute arbitration agreement ("PDAA") is defunct, under the Federal Arbitration Act ("FAA") can a court compel arbitration at a different institution? Courts are split on the issue, with the "no" courts holding that the ADR provider is an essential part of the arbitration agreement. The "yes" courts tend to rely on FAA section 5, which empowers the court to name an arbitrator if the method named in the PDAA fails. Joining the "nos" is the *Baker Hughes* Court. What happened? "The Dubai International Financial Center London Court of International Arbitration ('DIFC LCIA') was an arbitration center located in Dubai that applied international rules for arbitration based on those used in the London Court of Arbitration. However, in 2021, the government of Dubai issued a decree abolishing the DIFC LCIA and replacing it with the Dubai International Arbitration Center ('DIAC'). Plaintiff thus argues that the Contract's arbitration provision is unenforceable because the selected forum, the DIFC LCIA, no longer exists" (internal citations omitted). And the holding? "As the Fifth Circuit explained, this Court 'cannot rewrite the agreement of the parties and order the [arbitration] proceeding to be held" in a forum to which the parties did not contractually agree. *Nat'l Iranian Oil Co*., 817 F.2d at 334. Nor can the Dubai government. Whatever similarity the DIAC may have with the DIFC LCIA, it is not the same forum in which the parties agreed to arbitrate. That forum is no longer available, and this Court thus cannot compel Plaintiff to arbitrate. Accordingly, no enforceable forum selection clause compels the dismissal of this case on the ground of *forum non conveniens.*"
(ed: There is no mention of FAA section 5.)
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AAA LAUNCHES AAAi LAB. The AAA announced via a **December 6** press release the launch of AAAi Lab, a cutting-edge resource center created by the AAA-ICDR. AAAi Lab is designed to advance ADR through innovative and responsible uses of generative AI. The release states that it is: "a web center supporting AAA users, arbitrators, in-house counsel and law firms with policy guidance, educational webinars and tools for embracing generative AI in alternative dispute resolution…. The AAAi Lab will be a collaborative center for the ADR community, providing a platform to engage with the AAA's ongoing efforts in leading product and service innovations and to participate in defining the future of ADR. At kick-off, the Lab will feature the AAA's

guidance on AI and ADR, and link to contributions made by others in the ADR community. The Lab will also include News, and Event pages with updates on AAAi Lab's work, which will show how the AAA is using AI for improving internal processes and external services and products." The dedicated Webpage has a signup for: "a ClauseBuilder AI (Beta) demo, upcoming events, webinars, policy documents, and white papers."
*(ed: *Very interesting. We'll keep an eye on this new service. **The Webpage already has several articles, papers, and videos.)*
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ICC ISSUES DISABILITY GUIDE. The International Chamber of Commerce ("ICC") on **October 30** released a *Guide for Disability Inclusion in International Arbitration and ADR*. As described in a press release: "ICC has released a guide on Disability Inclusion in International Arbitration and ADR. Produced by the ICC Commission on Arbitration and ADR, the ground-breaking publication provides clear guidance to address and accommodate the needs of people with disabilities participating in arbitral and ADR procedures or other activities and events in the field of dispute prevention and resolution.[] By providing actionable guidance to practitioners, arbitrators, arbitral institutions, and associations, the guide aims to drive disability inclusion within the field of dispute resolution by providing specific recommendations and checklists along with other practical tools." The Guide has three main sections: 1) Recommendations and disability inclusion toolkit, including sample wording for Procedural Order no. 1; 2) Understanding disability; and 3) Disability inclusion in international arbitration and ADR.
(ed: Kudos.)
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QUICK TAKES: CASES AND AWARDS WORTH READING

***Hernandez v. MicroBilt Corp*., No. 22-3135 (3rd Cir. Dec. 5. 2023)**: "The arbitration provision delegates disputes over its existence, scope, and validity to arbitrators, but it permits administrators to apply the [AAA's Consumer Due Process] Protocol in declining to administer cases, even when the underlying claims are withheld from arbitrators. Categorizing *how* the Protocol applies—as opposed to *whether* it applies—as an arbitrability issue would effectively rewrite the provision. It would require arbitrators to exercise a power that the provision allows administrators to exercise. Because arbitration is a creature of contract, the parties were free to allow administrators to exercise this power. And under [FAA] § 4, we lack the authority to rewrite their agreement" (emphasis in original).

***Kim v. Tinder, Inc*., No. 22-55345 (9th Cir. Dec. 5, 2023)**: "Objector-Appellants Rich Allison and Steve Frye (Objectors) appeal, for a second time, the district court's final approval of a class action settlement between Defendant-Appellees Tinder, Inc., Match Group, LLC, and Match Group, Inc. (collectively, Tinder) and Plaintiff-Appellee Lisa Kim. In the first appeal, a panel of our court reversed the district court's approval of a settlement between Tinder and Kim because its terms were suggestive of collusion. On

remand, the parties entered into a revised settlement, which the district court again approved over objections. Because we agree with the Objectors that Kim is not an adequate representative of the putative class, we vacate the district court's order approving the revised settlement, reverse, and remand" (citations omitted)

***Baglione v. Health Net of California*, No. B319659 (Calif. Ct. App. 2 Dec. 6, 2023)**: "Health Net of California, Inc. (Health Net) appeals the trial court's order denying its motion to compel arbitration of the breach of contract and bad faith causes of action brought against it by its insured, plaintiff Salvatore Baglione. The trial court found that the agreement between Health Net and plaintiff's employer, the County of Santa Clara (County), did not satisfy the disclosure requirements of Health and Safety Code1 section 1363.1, rendering the arbitration provision of plaintiff's enrollment form unenforceable. Health Net contends it satisfied those disclosure requirements on the enrollment form signed by plaintiff.[] We hold that the enrollment form does not comply with the requirements of section 1363.1. We also agree with the trial court that the County's agreement with Health Net is not compliant either, and an arbitration agreement, which is part of a health plan, is not enforceable unless both the enrollment form and the County agreement are compliant. Accordingly, we affirm the trial court's order."

***Gardiner v. Equitable Advisors*, FINRA ID No. 23-00332 (Baltimore, MD, Oct. 18, 2023)**: An Arbitrator grants Respondent broker-dealer's Prehearing Motion to Dismiss, pursuant to FINRA Rule 13206 (Six-year Eligibility Rule for Industry Disputes). denying Claimant's request for reformation of his Form U5 record, after finding the claim was not filed within the time frame allotted under the rule. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Spencer v. IMA Wealth*, FINRA ID No. 23-02152 (Wichita, KS, Nov. 1, 2023)**: In this raiding case, the Panel finds in favor of Respondent broker-dealer and grants in part its request for permanent injunction prohibiting Claimant broker, for two years, from soliciting or contacting 85 clients that he serviced while employed by Respondent. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*
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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

George H. Friedman, *Time to Modernize the FAA* in Richard A. Bales & Jill I. Gross, THE FEDERAL ARBITRATION ACT: SUCCESSES, FAILURES, AND A ROADMAP FOR REFORM (Cambridge University Press, forthcoming 2024): "Before 1926, enforcing predispute arbitration agreements and arbitration awards was very difficult. Parties could walk away from their promise to arbitrate, and arbitration awards were virtually unenforceable. Congress enacted the FAA in 1925 and it went into effect a year later. The FAA abrogated existing law (which was based on common law hostility to arbitration agreements), made written promises to arbitrate matters involving interstate and maritime commerce specifically enforceable, and established very limited judicial review of arbitration awards. The FAA was passed by both houses of Congress *without a dissenting vote*…. The FAA needs updating, as the statute's text is a far cry from plain

English, with many long sentences using stilted language. This chapter will discuss the archaic language used throughout the statute, critique the gender bias evident on the face of the Act, and identify some parts that have become obsolete as technology advances."

***NY Governor Ready to Sign Bill Barring Noncompetes ... with Caveat*, FinancialAdvisorIQ (Dec. 7, 2023)**: "Gov. Kathy Hochul said she supports a ban on noncompetes on workers earning less than $250,000, according to news reports.[] Legislation in the state of New York that would ban noncompete agreements for all but the highest earners could become law in a matter of weeks, according to news reports.[] Governor Kathy Hochul told news channel NY1 last week that she's in favor of a bar on such agreements, though she indicated that the 'well-taken-care-of Wall Street hedge fund financiers and top-paid lawyers' don't need such protections, according to FA-IQ sister publication Ignites.... Wealth management firms have relied on noncompetes to go after departing brokers and advisors."

***CFPB Rulemaking on Post-dispute Consumer Arbitration Agreements Not Mentioned in Fall 2023 Rulemaking Agenda: Is there Significance?* Ballard Spahr Blog (Dec. 11, 2023)**: "As we reported, the CFPB just released its Fall 2023 rulemaking agenda as part of the Fall 2023 Unified Agenda of Federal Regulatory and Deregulatory Actions.[] I have been contacted by many clients who have asked me whether we should read any significance into the fact that the anti-arbitration Petition for Rulemaking submitted to the CFPB by a consortium of consumer advocacy groups on September 13 is not mentioned in the new rulemaking agenda…. Unfortunately, I do not draw any significance from the omission of the Petition for Rulemaking from the agenda. That is because the agenda states that it is accurate as of August 17 and the Petition for Rulemaking was filed with the CFPB about one month later on September 13."

***Ninth Circuit Sets Low Bar for Challenges to Delegation Clauses in Arbitration Agreements and Allows Expansive Review by District Courts*, JD Supra (Dec. 12, 2023)**: "When parties are battling over whether a court should compel a putative class action to arbitration, the outcome often turns on who decides the 'gateway' arbitrability issues of whether a valid arbitration agreement exists and whether it encompasses the dispute at issue, the court or the arbitrator. If the arbitration agreement contains a delegation clause that assigns these gateway issues to the arbitrator, plaintiffs will frequently argue that the provision is unenforceable because it is unconscionable. How exactly do these battles play out?" (*ed: See our coverage elsewhere in this* Alert.)

***AI in the Law - Friend or Foe?* JDSupra (Dec. 13, 2023)**: "A recent government report has highlighted solicitors as one of the occupations most exposed to AI applications. BCLP's 2023 Arbitration Survey found that 37% of practitioners are already using AI tools for tasks such as document translations but also, 24% are using AI for document analysis. These reports are amongst a number of reports and surveys which are heralding the growing presence of generative AI within the legal sector. The way in which the legal sector is embracing generative AI is unsurprising for those at BCLP—as a firm, we have

been an early adopter and strong proponent of using AI, as discussed in the recent Q&A blog with our in-house Forensic Technology team."

***Inflation and Supply Chain Issues will Lead to Renewed Energy Arbitration*, Lexology (De. 13, 2023)**: "Arbitration for disputes concerned with energy supplies will again come to the fore in 2024. These will likely be driven by ongoing geopolitical tensions from the Russia-Ukraine war, continuing global inflation and difficulties in fulfilling energy supply contracts.[] As of October 2023, disputes over oil, gas and mining contracts represented 27% of the cases heard at the International Centre for Settlement of Investment Disputes in Washington. An additional 15% of cases related to matters of 'electricity and other energy sources'.[] These waves of energy litigation are being fueled by continuing conflict around the Energy Charter Treaty (which Russia is still bound by) and the decarbonisation [sic] agenda in the United States."
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DID YOU KNOW?

PAST FINRA DRS YEAR-END STATS ARE AVAILABLE. As the new year approaches, we remind our readers that past-year Dispute Resolution Services stats can be found on the FINRA Website, at https://www.finra.org/arbitration-mediation/dispute-resolution-statistics/previous-year-end-dispute-resolution-statistics. Numbers back to 2012 are available.
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