SECURITIES ARBITRATION ALERT 2024-03 (1/18/24)

George H. Friedman, Editor-in-Chief

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- ***Luo v. Fidelity Brokerage*, FINRA ID No. 22-00317 (San Francisco, CA Nov. 29, 2023)**
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ARTICLES OF INTEREST:

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- ***Broker Awarded $950K After Claiming Co-Workers "Stole" His Business During Mental Illness,* FA Magazine (Jan. 6, 2024)**
- ***California's Law Barring Mandatory Arbitration Agreements Permanently Enjoined*, Lexology (Jan. 8, 2024)**

DID YOU KNOW?

- **AAA Offers AI-powered Transcription Service**

IN MEMORIAM: FORMER AAA EXECUTIVE ROBERT MEADE PASSES AWAY AT AGE 80. *Former American Arbitration Association senior executive Robert E. Meade passed away on January 8 at age 80. Mr. Meade was a fixture at the AAA for over four decades, retiring in 2009. From his obituary: "He began at AAA in 1967 in Syracuse as a case manager and his journey lasted 42 years ending as senior vice president. Along the way there were countless television network appearances, speaking engagements, prestigious awards, friendships established, and impressions made." Adds his obituary: "he was known as 'The Road Warrior.' His work for the AAA brought him*

coast to coast weekly; his schedule was demanding, but his talent for building AAA arbitration, mediation and alternative dispute resolution spanning across industries was impressive and recognized in his field." Your publisher was saddened to learn of Bob's passing. We were colleagues at the AAA for many years. He was my boss (hired me in 1976), mentor, and friend, and I will miss him. His type doesn't come along that often.)

SQUIBS: IN-DEPTH ANALYSIS

SCOTUS SETS FEBRUARY ORAL ARGUMENTS IN TWO ARBITRATION-CENTRIC CASES AND GRANTS *CERTIORAR IN A NEW ONE*. *The Supreme Court has set February oral arguments in* Bissonnette v. LePage Bakeries Park St. LLC*, No. 23-51 and* Coinbase v. Suski*, No. 23-3, two cases involving arbitration in which* Certiorari *was previously granted. The February calendar shows that* Bissonette *will be heard Tuesday February 20 and* Suski *on Wednesday February 28. The Court also granted* certiorari *in another arbitration-related case.*

Bissonnette

As reported in SAA 2023-38 (Oct. 5), the Court granted *Certiorari* in *Bissonnette v. LePage Bakeries Park St. LLC*, No. 23-51, where the **July 17** Petition states: "The Federal Arbitration Act exempts the 'contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.' 9 U.S.C. § 1. The First and Seventh Circuits have held that this exemption applies to any member of a class of workers that is engaged in foreign or interstate commerce in the same way as seamen and railroad employees—that is, any worker 'actively engaged' in the interstate transportation of goods. The Second and Eleventh Circuits have added an additional requirement: The worker's employer must also be in the 'transportation industry.' The question presented is: To be exempt from the Federal Arbitration Act, must a class of workers that is actively engaged in interstate transportation also be employed by a company in the transportation industry?"

Suski

Recall that we reported in SAA 2023-25 (Jun. 29) and blogged in **June 2023** that the Supreme Court had decided *Coinbase, Inc. v. Bielski*, No. 22-105, ruling mostly along ideological lines that courts must stay underlying litigation while an appeal of a denial of a motion to compel arbitration is pending. The 5-4 decision, which was released on June 23, was authored by Justice **Kavanaugh**. He was joined outright by Chief Justice **Roberts**, and Justices **Alito, Barrett**, and **Gorsuch**. Justice **Jackson** wrote a dissenting opinion, in which Justices **Kagan** and **Sotomayor** joined in full, and in which Justice **Thomas** joined for the most part. Buried in a footnote was this landmine: "The Court's judgment today pertains to respondent Abraham Bielski. The writ of certiorari as to respondents David Suski et al. is dismissed as improvidently granted."

We further reported that back with a **June 2023** *Certiorari* Petition were the Suski parties, who raised this issue: "Whether, where parties enter into an arbitration agreement with a delegation clause, an arbitrator or a court should decide whether that arbitration agreement is narrowed by a later contract that is silent as to arbitration and delegation."

In a three-item Miscellaneous Order released November 3, 2023, SCOTUS granted *Certiorari* in *Suski.* As usual, there was no explanation.

A New *Cert.* Grant

SCOTUS agreed in a **January 12** Miscellaneous Order to take on *Smith v. Spizzirri*, No. 22-1218. As reported in SAA 2023-36 (Sep. 21), the **June 14, 2023** Petition for *Certiorari* states: "This case presents a clear and intractable conflict regarding an important statutory question under the Federal Arbitration Act (FAA), 9 U.S.C. 1-16.[] The FAA establishes procedures for enforcing arbitration agreements in federal court. Under Section 3 of the Act, when a court finds a dispute subject to arbitration, the court 'shall on application of one of the parties *stay the trial of the action* until [the] arbitration' has concluded. 9 U.S.C. 3 (emphasis added).... The question presented is: Whether Section 3 of the FAA requires district courts to stay a lawsuit pending arbitration, or whether district courts have discretion to dismiss when all claims are subject to arbitration."

(ed: See our blog post, First Monday in October Coming Soon: Some Arbitration-Centric Cases Worth Following.*)*

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SEC APPROVES FINRA'S PROPOSED CHANGES TO NON-ATTORNEY REP RULE. *The SEC has approved FINRA's proposal to amend the non-attorney representation rules.* As reported in SAA 2023-40 (Oct. 26), the authority on **October 5** filed SR-FINRA-2023-013, *Proposed Rule Change to Amend the Codes of Arbitration Procedure and Code of Mediation Procedure to Revise and Restate the Qualifications for Representatives in Arbitrations and Mediations.* The text states that the intent is to amend the Codes to (*ed: repeated* verbatim*; bullet format added)*:

- revise and restate the qualifications for representatives in arbitrations and mediations in the forum administered by FINRA Dispute Resolution Services ('DRS');
- disallow compensated representatives who are not attorneys from representing parties in the DRS forum;
- codify that a student enrolled in a law school participating in a law school clinical program or its equivalent and practicing under the supervision of an attorney may represent investors in the DRS forum; and
- clarify the circumstances in which any person, including attorneys, would be prohibited from representing parties in the DRS forum.

Analysis

We had promised to provide further coverage in no. 40, but upon further review we opted to provide links here to some excellent analyses:

- *FINRA Files to Limit Non-Lawyers' Work on Arb Cases,* ThinkAdvisor (Oct. 6, 2023)
- *FINRA Proposes Revisions to Arbitration and Mediation Codes*, Lexology (Oct. 11, 2023)

- *FINRA Seeks to Limit Non-Lawyers From Representing Investors in Arbitration*, AdvisorHub (Oct. 9, 2023)

We also covered the proposal in our **October 25** blog post.

Rule Filing Published; Few Comments Received; Rule Approved

The proposal was published in the *Federal Register* on **October 13** (Vol. 88, No. 197. P. 71051). Our editorial comment in no. 40 – "We imagine there will be many comments!" – was way off. Just five generally supportive comments were received, including letters from **PIABA** and the **St. John's** Securities Arbitration Clinic. FINRA filed a two-page **January 8** response to comments, urging approval. The SEC approved the rule changes in a 17-page **January 11** Order.

Concerns for Claimants with Smaller Claims

The Commission: "recognizes that some claimants with smaller claims who might have otherwise considered representation by a compensated NAR [non-attorney representative] may have more difficulty obtaining representation as a result of the proposed rule change. Similarly, claimants with smaller claims may incur additional costs to retain an attorney or risk worse outcomes by representing themselves at a hearing. However, these concerns are outweighed by the threat of harm, including harm to investors, presented by compensated NARs whose interactions with customers are not subject to professional standards of conduct. Furthermore, because compensated NARs represent only a small percentage (one percent) of parties in the DRS forum, the potential impact of the proposed rule change on representation within the DRS forum may be limited and is thus a reasonable way for FINRA to prevent potential harms caused by compensated NARs without unduly impacting representation within the DRS forum."

Codification of Representation by Clinics

The Approval Order notes: "Currently, a party in arbitration or mediation may be represented by a student enrolled in a law school participating in a law school clinical program or its equivalent and practicing under the supervision of an attorney. This practice, however, is not currently codified in the FINRA rulebook. Accordingly, parties may not be aware that this option is available when they are seeking representation. The proposed rule change should help make customers seeking to use the forum aware of this alternative option for representation. Similarly, it should also provide clarity to law school students and the attorneys that supervise them. Law school clinical programs lack the pecuniary incentive to engage in the conflicted conduct described above and are under the supervision of attorneys, thus helping to ensure that a customer's representative is subject to professional standards of conduct. As such, the proposed rule change reasonably balances the needs of customers who might otherwise be unable to obtain legal representation with protecting parties from the conflicts associated with compensated NARs."

(ed: Next is publication by FINRA of a Regulatory Notice setting the effective date.)

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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

FINRA TO HOLD HYBRID CYBERSECURITY PROGRAM. FINRA will be conducting a day-long hybrid program, *2024 Cybersecurity Conference,* on **February 6**. Says the announcement: "Join us … for a one-day hybrid event and learn about the latest trends, vulnerabilities, the implications of emerging technologies such as generative Artificial Intelligence and how to enhance your firm's resilience against cyber-attacks. The event not only offers informative sessions that can help bolster your cybersecurity program, but also promotes opportunities for attendees to participate, learn tactile best practices through cyber simulations and success stories, and network with an assortment of experts, vendors and practitioners. It will be an interactive and engaging event you won't want to miss!" Specifically, registrants will experience:

- Panel sessions where they will hear from FINRA, law enforcement and industry professionals on the cyber developments relating to various topics, including emerging threats, developing technologies, cyber-enabled fraud, strengthening cybersecurity programs and more.
- Information Stations hosted by FINRA departments, including the Cyber-Enabled Fraud, Cybersecurity Group and Crypto teams, and government-affiliated agencies such as the New York Federal Bureau of Investigation's InfraGard association.
- Networking opportunities to meet with peer firms, regulators, and cybersecurity vendors.

The in-person program will be in New York City. Here's the Agenda.
*(ed: *The hotel location: "will be provided after registering for the event." Is this a security measure? **Rates for the virtual program range from $150 for FINRA members to $250 for non-members. Rates for the in-person program range from $295 for small firm groups to $1,175 for non-members. ***Questions? Call 800-321-6273.)*
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DEADLINE FOR AAA'S HIGGINBOTHAM DIVERSITY FELLOWS PROGRAM IS JANUARY 31. The American Arbitration Association is accepting applications for its A. Leon Higginbotham, Jr. Fellows Program through **January 31**. The AAA created the Fellowship in 2009: "to provide training, mentorship and networking opportunities to up and coming diverse alternative dispute resolution professionals who have historically not been included in meaningful participation in the field of alternative dispute resolution." The core element of the program is: "a one-year program that allows participants to immerse themselves in all aspects of ADR. The program begins with an intensive week of training, seminars, and participation in mock arbitrations and mediations facilitated by leading advocates and panelists. Fellows are provided with serious mentorship opportunities specific to their areas of interest.[] After the week concludes, the AAA provides Fellows with opportunities to participate in training and networking events throughout the year." Candidates can apply online. Final decisions will be announced at the end of **February.**
*(ed: *Questions should be sent to AAAHigginbothamFellows@adr.org. **The 2024 program: "will be hosted at the AAA Headquarters in New York City during the week of*

*May 6, 2024. This year's program coincides with the AAA's Annual Board Meeting." ***Kudos to the AAA.)*
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SECURITIES EXPERTS ROUNDTABLE PUBLISHES ITS LATEST FREE NEWSLETTER. The latest issue of the Securities Experts Roundtable's ("SER") quarterly newsletter, *The Expert's Examiner* (*"TEE"*) volume 2023-04*,* covering **October - December 2023**, hit the electronic newsstand **January 5**. This *free*, link-rich publication, which can be found on the Website's landing page ("Newsletter" tab), offers a wealth of information on financial services arbitration and ADR in general. Among the regular features are: **Recent News from the Arbitration Front; Expert Opinions: What are the Courts (and Arbitrators) Thinking?; Heard Through the Regulatory Grapevine -- Comment Letters and Speeches; Practice Management Tips**; and **Statistics, Events & Resources.** Content is provided by the Roundtable's members; the *Alert* is also a contributor. Signup is available online.
*(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." **The* TEE *is a wonderful resource for the arbitration bar. Past issues are grouped here. ***Full disclosure:* SAA*'s publisher and Editor-in-Chief George Friedman is an active member of the SER.)*
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QUICK TAKES: CASES AND AWARDS WORTH READING

***Imperial Pacific International (CNMI), LLC v. Commonwealth Casino Commission*, No. 23-522 (SCOTUS Jan. 4, 2024)**: The Supreme Court denies the Petition for *Certiorari* in this case. At issue: "1. Is 'clear and unmistakable' delegation to the arbitrator to decide arbitrability negated by a carve-out to arbitrability in the arbitration clause, particularly if it is arguable that the underlying substantive dispute falls within the carve-out? 2. Is 'clear and unmistakable' delegation negated if the arbitration clause stipulates that arbitration is permissive instead of mandatory or if the arbitration is non-binding?"

***Flores v. National Football League*, No. 22-CV-0871 (VEC) (S.D.N.Y. Jan. 4, 2024)**: "Regarding the Unconscionability Issue, the Second Circuit already rejected the argument that, as a matter of law, the NFL Commissioner cannot fairly arbitrate claims regarding the NFL's conduct. See Arbitration Opinion at 22–23 (discussing *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n,* 820 F.3d 527, 548 (2d Cir. 2016)); Reconsideration Opinion at 13–14 (same). Plaintiffs have not cited any applicable state law that would require a contrary result. [] As for the Effective Vindication Issue, the Supreme Court has not recognized alleged structural bias in arbitration agreements as grounds for applying the effective vindication doctrine. To the contrary, Justice Kagan warned that the Supreme Court's jurisprudence would enable companies to appoint 'obviously biased' arbitrators. Moreover, contrary to Plaintiffs' position, federal law does provide protection against biased arbitrators. It does so, however, by allowing arbitration awards to be overturned upon a showing of 'evident

partiality or corruption,' not by preventing arbitration from the get-go" (some citations omitted). (*An* Alert *h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this decision*.)

***Lochan v. Binance Holdings Limited*, 2023 ONSC 6714 (Ontario [Canada] Super. Dec. 13, 2023)**: "Binance, as the party that designed and whose professionals drafted the contract, engineered the arrangement to take advantage of the complexity that was hidden behind the superficially benign appearance of an arbitration clause. The inequality of information and inequality of power in the bargaining relationship that resulted from this informational deficit was at a maximum. Under English law as well as Canadian law, "Unconscionability is an equitable doctrine that is used to set aside 'unfair agreements [that] resulted from an inequality of bargaining power'": *Uber*, at para. 54, quoting John D. McCamus, *The Law of Contracts* (2nd ed. 2012), at p. 424.[] I find Binance's arbitration agreement to be unconscionable, and therefore unenforceable."

***Luo v. Fidelity Brokerage*, FINRA ID No. 22-00317 (San Francisco, CA Nov. 29, 2023)**: "Although a Panel denies Respondent broker-dealer's Motion for Directed Verdict alleging that Claimant failed to meet his burden of proof with respect to his claims in this matter, the Panel also denies Claimant's claims. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Samples v. Edward Jones*, FINRA ID No. 23-01694 (Dallas, TX, Dec. 7, 2023)**: An Arbitrator grants with prejudice Respondent broker-dealer's Prehearing Motion to Dismiss Claimant broker's request for reformation of alleged defamatory information from his Form U5 record, after finding that the request is time-barred under Rule 13206 of the Code (Six-year Eligibility Rule for Industry Disputes). *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Mariam Gotsiridze, *Is the Time Right for a Multilateral Investment Treaty?*, Kluwer Arbitration Blog (Jan. 6, 2024): "The world has witnessed significant developments in the field of investment protection and dispute settlement in the past decades. This includes both investment treaty negotiations as well as investor-state dispute settlement (ISDS) practices. This field of law has also been subject of a heated debate and a desire for reform. In view of these developments, this blog post intends to analyze the feasibility of multilateral investment treaty (MIT) negotiations.[] The idea of a MIT is not new – it is actually quite old and precedes the practice of bilateral investment treaties (BIT). In fact, the reason why states decided to regulate investment protection on a bilateral basis is the number of failed attempts at developing a multilateral framework on substantive treaty guarantees. The last failed attempt was made in April 1998, when governments launched negotiations for a multilateral agreement on investment (MAI) within the Organization for Economic Cooperation and Development (OECD)."

***Arbitration Agreement's Non-Compliance with AAA Rules Dooms Arbitration Bid*, Lexology (Jan. 3, 2024)**: "A defendant was not aggrieved by the plaintiffs' failure to arbitrate, and thus was not entitled to an order staying litigation and compelling arbitration, where the plaintiffs sought arbitration but the AAA refused to take their cases because of the defendant's noncompliance with AAA rules.

***Mandatory Arbitration Clauses in Registered Investment Advisor Agreements Draw Scrutiny from Regulators*, Reuters (Jan. 4, 2024)**: "In the conclusion of its analysis, the OIAD has expressed the opinion that not only should restrictive terms be prohibited in mandatory arbitration agreements, but that the SEC should go a step further and consider 'temporarily suspending the use of mandatory arbitration clauses in advisory agreements until further exploration of the associated costs and benefits to advisory clients is undertaken.' As part of the effort to conduct this exploration, the OIAD is also recommending that RIAs be required to uniformly disclose information related to arbitrations."

***The Crucial Role of Expert Evidence in Complex International Arbitration*, JD Supra (Jan. 4, 2024)**: "An arbitral tribunal must process complicated facts, technology, and science underlying the dispute, the outcome of which can have sensitive geopolitical ramifications. By nature of the parties included—nations and/or global companies—these disputes will likely involve large commercial contracts that require intricate financial determinations. With different languages, a litany of various laws, and differing cultural backgrounds, the need for expert witnesses is apparent."

***DOL Reviewing 19,000 Fiduciary Rule Comments*, ThinkAdvisor (Jan. 5, 2024)**: "The Labor Department is now 'carefully' reviewing and analyzing the more than 19,000 submissions it received on its new fiduciary rule proposal, a Labor spokesperson told ThinkAdvisor Friday.[] During the public comment period, which ended on Jan. 2, 'many of these submissions were unique, while the vast majority were petitions that were submitted in common by numerous people,' the spokesperson said."

***Broker Awarded $950K After Claiming Co-Workers "Stole" His Business During Mental Illness*, FA Magazine (Jan. 6, 2024)**: "A broker has been awarded about $950,000 by Finra in a case where he claimed his book of business was 'stolen' from him by his business associates during a time when he was suffering from severe mental illness…. [Broker], 57, of Waterford, N.Y., claimed in a filing in October that his partner and co-workers at CP Capital Management of Clifton Park, N.Y., took advantage of his mental incapacitation and 'coerced' him into signing documents that resulted in him giving up his book of business without any compensation."

***California's Law Barring Mandatory Arbitration Agreements Permanently Enjoined*, Lexology (Jan. 8, 2024)**: "A federal district court has entered a permanent injunction barring the State of California from enforcing Assembly Bill (AB) 51, California's law that purports to preclude employers from requiring arbitration agreements as a condition of employment, as it is preempted by the Federal Arbitration Act (FAA). *Chamber of*

Commerce of the USA et al. v. Becerra et al., No. 2:19-cv-02456 (E.D. Cal. Jan. 1, 2024)."
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DID YOU KNOW?

AAA OFFERS AI-POWERED TRANSCRIPTION SERVICE. Announced last **September**, "AI-powered transcription during hearings facilitated by AAA-ICDR utilizes voice recognition to create transcripts, which are also subject to two levels of human review and editing. The combination of AI technology and human review gives the AAA-ICDR's transcription platform a word accuracy of 99%." Here's a Factsheet.
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