SECURITIES ARBITRATION ALERT

SECURITIES ARBITRATION ALERT 2024-06 (2/8/24)

George H. Friedman, Editor-in-Chief

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ARTICLES OF INTEREST:

- **Frankel, Richard, *Fighting Mass Arbitration: An Empirical Study of the Corporate Response to Mass Arbitration and Its Implications for the Federal Arbitration Act* (Jan. 24, 2024)**
- ***"Poison-Pill" Provision Voided Entire Arbitration Agreement,* Lexology (Jan. 25, 2024)**
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DID YOU KNOW?

- **AAA Surpasses 8 Million Cases Filed Since its Founding**

A TECHNICAL CHANGE. *Google and Yahoo!'s new guidelines for bulk email senders went into effect February 1 for entities like the* Alert *that send bulk or marketing emails. Constant Contact has authenticated our emails to ensure that the weekly* Alert *continues to be delivered. This means that our "from address" has been changed to: george-secarbalert.com@shared1.ccsend.com. The change has no other impact.*

SQUIBS: IN-DEPTH ANALYSIS

AMICUS* BRIEFS APLENTY IN *BISSONNETTE* AND *SUSKI*. *With oral arguments just weeks away, the* amicus *briefs have been piling up. We reported in SAA 2024-03 (Jan. 18) that the Supreme Court had set February oral arguments in *Bissonnette v. LePage Bakeries Park St. LLC*, No. 23-51 and *Coinbase, Inc. v. Suski*, No. 23-3, two

cases involving arbitration in which *Certiorari* was previously granted. The February calendar shows that *Bissonette* will be heard on Tuesday **February 20** and *Suski* on Wednesday **February 28**. We recap below, borrowing heavily from our past coverage.

Bissonette
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.

***Amicus* Briefs**
Several briefs for both cases have already been filed. Noteworthy briefs in *Bissonnette* were filed by Amazon.com, the California Employment Law Council, and the Chamber of Commerce of the United States. Noteworthy briefs in *Suski* were filed by the American Bankers Association, the American Tort Reform Association, the Atlantic Legal Foundation Cato Institute, and the Chamber of Commerce of the United States. *(ed: *We're sure more briefs will be filed. **The oral argument audio will be livestreamed at www.supremecourt.gov. Transcripts will be found here, and audio files*

here.***See our *blog post*, First Monday in October Coming Soon: Some Arbitration-Centric Cases Worth Following.*)*
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SECOND CIRCUIT ORDERS DISTRICT COURT TO RECONSIDER REFUSAL TO PRELIMINARILY ENJOIN AN ARBITRATION. ***Accepting an appeal from the denial of a preliminary injunction against arbitration, the Court remands the case to the lower court with instructions to reevaluate the appellant's likelihood of success and the potential irreparable harm of not granting relief.*** The decision, *The Resource Group International Ltd. v. Chishti*, No. 23-286 (2nd Cir. Jan. 22, 2024), originated with a Preferred Stock Purchase Agreement ("SPA") containing an arbitration clause. However, the issue of arbitrability became more complicated after the parties signed a Release Agreement, which requires the district court's further consideration of whether to enjoin the arbitration.

First, the Facts …
The Resource Group International Ltd. ("TRGI") received a $30 million infusion of cash from outside investors, including an investment fund, in exchange for stock in TRGI, pursuant to the SPA. The SPA required TRGI's Chairman, Muhammad Chishti, who was one of its signatories, to use his voting power to elect two of the investment fund's nominees to TRGI's board. Fearing that Chishti would violate this mandate after he resigned his position in the wake of sexual assault allegations, the investors agreed to repurchase Chishti's shares, provided that the two investor candidates were elected to the board and that Chishti signed a Release Agreement prohibiting him from bringing any claims against TRGI. Chishti later filed an arbitration proceeding against TRGI and others, alleging a violation of the SPA. In response, TRGI and three other respondents in the arbitration ("the TRGI Plaintiffs") brought suit in the U.S. District Court for the Southern District of New York against Chishti, alleging that the arbitration proceeding violated the Release Agreement.

The Appellate Court Has Jurisdiction …
The first issue is whether the Court of Appeals may accept the appeal in the first place. The Court explains: "Section 16 of the Federal Arbitration Act ('FAA') limits the Court's authority to review interlocutory appeals by providing that 'an appeal may not be taken from an interlocutory order . . . refusing to enjoin an arbitration that is subject to [the FAA].'… Section 16's constraint on appellate jurisdiction, however, is not absolute because the Supreme Court has held that parties may 'specify by contract the rules under which th[e] arbitration will be conducted,' including 'state rules of arbitration.'" Here, the SPA states: "the arbitration procedures described in this Section [] and any Final Arbitration Award (as defined below) shall be governed by, and shall be enforceable pursuant to, the Uniform Arbitration Act as in effect in the State of New York from time to time." Although New York State did not adopt the Uniform Arbitration Act, the Court interprets this provision to mean: "that the parties opted out of the FAA and expressly elected New York state law to govern any arbitration procedures and awards between them through their SPA." Since "under New York state law, a decision granting or

denying a stay of arbitration, such as the district court's order here, is an appealable final order," the Court holds that it does have jurisdiction.

… And Sends the Matter Back to the District Court

Turning to the merits of the preliminary injunction, the Court first rules: "The Release Agreement, by way of its Forum Selection and Merger Clauses, supersedes the Stock Purchase Agreement's arbitration clause as it relates to the subject matter of the Release Agreement." Although the Release Agreement does not specifically mention arbitration: "In this Circuit, an agreement to arbitrate is superseded by a later-executed agreement containing a forum selection clause if the clause 'specifically precludes' arbitration, but there is no requirement that the forum selection clause [definitively] mention arbitration." By not considering this rule: "the district court incorrectly determined that the TRGI Plaintiffs failed to demonstrate a likelihood of success on the merits. Accordingly, on remand, the district court should determine the scope of the Release Agreement and thereby consider which claims are arbitrable in the first instance for purposes of ruling on the preliminary injunction." Furthermore: "forced arbitration of inarbitrable claims may constitute irreparable harm when the arbitration is one 'for which any award would not be enforceable" and for which "the time and resources . . . expend[ed] in arbitration is not compensable by any monetary award of attorneys' fees or damages.'" This means that: "rather than focusing on the potential inarbitrable nature of the claim, the critical issue for the Court to consider is whether the proffered injury is compensable—specifically here, whether attorneys' fees and arbitration costs are available to a prevailing party.[] Accordingly, on remand, the district court must consider in the first instance whether the harm the TRGI Plaintiffs identify is a harm for which they would adequately be compensated if they are in fact correct as to the inarbitrable nature of any of the claims in dispute."

*(ed: *Seems right. However, how the Supreme Court rules on* Coinbase, Inc. v. Suski*, which is the subject of a newly-issued writ of* certiorari *(see above), will affect whether the Court was correct in holding that the Release Agreement superseded the SPA as to arbitrability. This might therefore affect the district court's ruling on remand with respect to the irreparable harm prong of the preliminary injunction test. **An* Alert *h/t to Peter R. Boutin, Esq. of Keesal Young & Logan in Los Angeles, CA for alerting us to this decision. ***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 FOCUSES ON EXPUNGEMENT TRAINING. As we reported in SAA 2023-15 (Apr. 20), the SEC approved the final version of SR-FINRA-2022-024, which makes substantial reforms to the process for expunging customer dispute information from brokers' CRD records and profoundly limits the ability of brokers to seek such relief in the first place. When FINRA issued Regulatory Notice 23-12, setting the **October 16** effective date for the rule changes, we described which cases would be governed by the

new rules and the numerous ways these rules limit brokers' opportunities to request expungement through FINRA arbitration (see SAA 2023-31 (Aug. 17)). The main set of rules applicable to expungements under the new regime are: Rule 12800(d)-(f), which applies to expungement requests during simplified arbitrations of customer-initiated cases (involving $50,000 in damages or less); 2) Rule 12805, which applies to expungement of other customer-initiated arbitrations (more than $50,000 in, or an unspecified amount of, damages); and 3) Rules 13805 and 13806, which apply to "straight-in" expungement proceedings, those initiated by brokers for the purpose of expunging customer complaints. We can now report that a **January 31** FINRA tweet announces: "Are you a FINRA public chair arbitrator? Are you interested in hearing expungement cases under FINRA's revised rules? Check out our Enhanced Expungement Training!" The training Webpage states: "Effective October 16, 2023, FINRA revised the Codes of Arbitration Procedure to modify the process relating to the expungement of customer dispute information. For a comprehensive overview of the revised expungement rules, please watch the *2023 Neutral Workshop: General Expungement Training*. For experienced, public chairs interested in serving on the Special Arbitrator Roster, please complete the *Enhanced Expungement Training* available on the DRS learning system."
(ed: See our October 11 feature article detailing the changes.)
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FAIR ACT STILL A SLOW GO. The reintroduced *FAIR Act* – H.R. 2953 and S. 1376 – was announced in an **April 2023** Press Release. The bill would: "(1) prohibit predispute arbitration agreements that force arbitration of future employment, consumer, antitrust, or civil rights disputes; and (2) prohibit agreements and practices that interfere with the right of individuals, workers, and small businesses to participate in a joint, class, or collective action related to an employment, consumer, antitrust, or civil rights dispute." There are just 98 cosponsors in the House (up just two from the summer) and 37 in the Senate (unchanged), and there are no Republicans in either group.
(ed: Unlike the last iteration of the FAIR Act*, which passed in a Democratic-controlled chamber, we don't see the new bill passing the GOP-controlled House. The non-partisan www.govtrack.us gives the chances of enactment as between 2 and 6 percent.)*
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GOOGLE FOUND TO HAVE WAIVED ARBITRATION RIGHTS. The Court in *In re Google Assistant Privacy Litig.*, 19-cv-04286-BLF (SVK) (N.D. Cal. Jan. 23, 2023), finds that, four years into a complex litigation, Google waived its right to compel arbitration. The facts: "Plaintiffs allege that Google Assistant sometimes causes audio to be recorded and transmitted to Google even when the user has not uttered hot words or manually activated Google Assistant. This might happen if words similar to hot words are spoken near the device. As with audio recordings transmitted after intentional activation of Google Assistant, Google utilizes audio recordings transmitted after unintentional activation to improve functionality and to target personalized advertising." Next, the contentions: "According to Plaintiffs, Google's utilization of audio recordings created when the users have not uttered hot words or manually activated Google Assistant violates the users' rights under federal and state law privacy statutes, the California

constitution, and California common law." Years into litigation, Google moved to compel arbitration. The Court denies the motion: "The motion comes four years into this litigation, after the parties have engaged in substantial motion practice, after completion of fact and expert discovery, and after the Court has certified a class. Plaintiffs contend that Google waived its right to compel arbitration. The Court finds that Plaintiffs have established waiver, and on that basis Google's motion is DENIED" (emphasis in original).
*(ed: *Seems right. **An* Alert *h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this decision.)*
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QUICK TAKES: CASES AND AWARDS WORTH READING

***The Resource Group International Limited v. Chishti*, No. 23-286 (2nd Cir. Jan. 22, 2024)**: "This appeal arises from a dispute as to the propriety of pending arbitration proceedings. The Plaintiffs-Appellants seek to avoid arbitration, while Defendant Appellee seeks to enforce what he contends to be a valid arbitration agreement to resolve his claims against Plaintiffs-Appellants. This case asks the Court to determine: first, whether it has jurisdiction under New York state law, notwithstanding Section 16 of the Federal Arbitration Act; then, if it does, whether an agreement to arbitrate is superseded by a later-executed release agreement containing a forum selection clause that does not specifically mention arbitration; and finally, the circumstances under which improperly being forced to arbitrate can satisfy the irreparable harm prong of the preliminary injunction inquiry." (*ed: We analyze this case elsewhere in this* Alert.)

***In re Google Assistant Privacy Litig.*, 19-cv-04286-BLF (SVK) (N.D. Cal. Jan. 23, 2023)**: Defendants Google LLC and Alphabet Inc. (collectively, 'Google') move to compel arbitration. The motion comes four years into this litigation, after the parties have engaged in substantial motion practice, after completion of fact and expert discovery, and after the Court has certified a class. Plaintiffs contend that Google waived its right to compel arbitration. The Court finds that Plaintiffs have established waiver, and on that basis Google's motion is DENIED. (*ed: We analyze this case elsewhere in this* Alert.)

***Suarez v. Super. Ct.*, No. D082429 (Calif. Ct. App. 4 Jan. 24, 2024)**: "After plaintiff Onecimo Sierra Suarez sued his employer for alleged wage and hour violations, the employer successfully moved to stay the court action and proceed to arbitration as provided in the employment agreement that the employer drafted. When the employer waited more than 30 days to pay its share of the arbitrator's initial filing fee, Suarez unsuccessfully moved to vacate the arbitration stay. He now seeks writ relief directing the trial court to find that the employer has waived its right to arbitration pursuant to Code of Civil Procedure sections 1281.97 et seq. We agree and grant the petition" (footnote omitted).

***Smith v. Securities America*, FINRA ID No. 22-02428 (Albany, NY, Dec. 27, 2023)**: Respondent broker-dealer and a group of registered reps are held liable to Claimant

broker for nearly $1 million, despite the Claimant broker being held liable for damages on the Counterclaim. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***US Bancorp v. Smith*, FINRA ID No. 23-01610 (Portland, OR, Jan. 2, 2024)**: A non-appearing broker is held liable to Claimant member firm for the amounts due and owing under a Repayment Agreement. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Frankel, Richard, *Fighting Mass Arbitration: An Empirical Study of the Corporate Response to Mass Arbitration and Its Implications for the Federal Arbitration Act* (Jan. 24, 2024): "Recently, consumer and employee advocates have responded to a ban on class actions by filing thousands of individual actions, exposing corporations to millions of dollars in filing fees and resulting in large settlements. This practice has become known as 'mass arbitration.' Although corporations have cried foul, courts so far have allowed mass arbitrations to occur. Mass arbitration represents the newest battleground between corporations and consumer and employee advocates over mandatory arbitration and access to justice."

***"Poison-Pill" Provision Voided Entire Arbitration Agreement*, Lexology (Jan. 25, 2024)**: "The appellate court rejected the bank's argument that the waiver provision did not constitute a 'wholesale waiver' of plaintiffs' PAGA claims, but instead was an enforceable waiver pertaining only to plaintiffs' 'nonindividual' PAGA claims, though the waiver provision made no distinction between 'individual' and 'non-individual' PAGA claims. Furthermore, the waiver provision contained a 'poison-pill provision' that stated that if the waiver provision were severed in any way, the entire arbitration agreement would be voided. Thus, the Court concluded that the 'poison pill' clause invalidated the entire arbitration agreement."

***SEC Charges Northern Star SPAC for Material Misrepresentations in its IPO-Related Disclosures*, www.sec.gov (Jan. 25, 2024)**: "The Securities and Exchange Commission today announced that Northern Star Investment Corp. II, a special purpose acquisition company (SPAC), agreed to settle charges that it made misleading statements in forms filed with the SEC as part of its January 2021 initial public offering (IPO).[] According to the SEC's order, Northern Star stated in its SEC filings that neither the company, nor anyone acting on its behalf, had initiated any substantive discussions with any potential target companies prior to the IPO. However, the SEC's order finds that Northern Star had engaged in discussions with a target company and that company's controlling shareholder in connection with a potential SPAC business combination dating back to December 2020 and continuing for several weeks. Furthermore, according to the SEC's order, after announcing a merger agreement with the target company, Northern Star did not adequately disclose its interactions with the target company in its Form S-4 filings."

***RIAs Using Top-Dog Schwab More Likely to Switch, Add Custodians*, Financial Advisor IQ (Jan. 26, 2024)**: "Charles Schwab might rank top among its custodial rivals, but the thousands of registered investment advisor firms using its platform are more likely to consider other options on the market, according to a recent Technology for Today (T3) and Inside Information Software survey.[] Roughly 20% of Schwab-affiliated advisors said they plan to either change or add a new custodial relationship within the next 18 months, compared to 17% and 10% for Pershing- and Fidelity-affiliated advisors, respectively."

***Tax-related Measures in Investor-State Arbitration*, JDSupra (Jan. 26, 2024)**: "The right to tax constitutes a core attribute of State sovereignty. As U.S. Supreme Court Justice Oliver Wendell Holmes Jr. said, 'Taxes are the price we pay for civilization.' However, States may voluntarily limit their taxation powers by concluding investment protection treaties limiting their right to regulate, including their right to tax."

***Securities America Appeals $95K Finra Arbitration Penalty*, FA Magazine (Jan. 31, 2024)**: "Securities America is appealing a Finra arbitration panel ruling that requires the broker-dealer to pay $95,800 in damages to a broker the company fired two years ago.[] The company is arguing that the panel's ruling is invalid because it amounts to paying commissions to an unregistered broker, according to a petition filed by the company with the U.S. District Court for the Northern District of New York.[] Securities America also said the panel's decision should be vacated because a Finra arbitrator in the case disclosed a conflict of interest after the arbitration hearing."
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DID YOU KNOW?

AAA SURPASSES 8 MILLION CASES FILED SINCE ITS FOUNDING.
According to a banner announcement on its home page, www.adr.org, the American Arbitration Association has received its eight millionth case filing since its inception in **1926**. The notice shows 8,004,003 cases through **February 5**, including 54,226 this year.
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Send any messages or inquiries to: George@SecArbAlert.com

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