SAC SECURITIES ARBITRATION COMMENTATOR

SECURITIES ARBITRATION ALERT 2017-45 (11/29/17)

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KEEPING ARBITRATOR NAMES ACCURATE ON ARBchek: *Some arbitrators have similar names and many have variations in the way their names appear in different Awards. Others change their names between Awards, due to marriage or other reasons. FINRA has a unique identifier for its arbitrators; we can't -- and we also deal with Awards from other forums, so we must match these name variations that appear in the Awards to the right arbitrator name in SAC's Award Database. To do so, our Award inputters are trained to watch for name variations, to review the signature and other telltale indicators to assure accuracy in our identity comparisons. From one Award to the next -- resorting as well to external documents and sources -- we build the most complete form of the arbitrator's name, including pertinent titles. This makes it more likely that customers can match the arbitrator to the information on the arbitrator's disclosure sheet before searching the arbitrator's name. We check and double-check the accuracy of the arbitrator* *name before we add an Award record to ARBchek and we regularly scour the long list of arbitrator names in our database, looking for any discrepancies that might have evaded detection. When an arbitrator does change his or her name, we link the names to make sure that all the arbitrator's Awards appear in a single search, no matter which name is searched. That's why SAC's data is the best!*

WHO's ON FIRST? MORE DRAMA AT CFPB, AS AGENCY HAD *TWO* ACTING DIRECTORS VYING FOR CONTROL. *The Consumer Financial Protection Bureau ("CFPB") continues to be in the news in the wake of Director Richard Cordray's announcement that he was departing the Bureau by the end of November.* We apologize in advance for the length of this squib, but the events of the past several days are in our experience both bizarre and unprecedented.

Mick Mulvaney is CFPB Acting Director

As we reported in SAA 2017-43, Director Cordray announced via a November 15th email to staff that he would be departing the Bureau by the end of the month. This immediately led to conjecture that the President would name as Acting Director the current head of Office of Management and Budget, Mick Mulvaney (see SAA 2017-44). On November 24th, President Trump issued a Statement making this official: "The President looks forward to seeing Director Mulvaney take a common sense approach to leading the CFPB's dedicated staff, an approach that will empower consumers to make their own financial decisions and facilitate investment in our communities. Director Mulvaney will serve as Acting Director until a permanent director is nominated and confirmed."

Or is He?

Our editorial note to SAA 2017-44 had said: "The President would appear to be acting under authority of the Federal Vacancies Reform Act of 1998, 5 U.S. Code § 3345, which authorizes the President to name as Acting Director an individual who has already been confirmed by the Senate as an executive agency officer (the Senate in February confirmed Mr. Mulvaney as OMB Director)." But we added: "Some, however, argue that Dodd-Frank requires that the Deputy Director be named." "Some," it turned out, included Director Cordray, who announced on November 24th that he was leaving at the end of the day, and as a parting act immediately issued a Press Release naming Leandra English Deputy Director. Ms. English, "who had been most recently serving as the agency's chief of staff, has previously held key leadership positions at the CFPB, the Office of Management and Budget, and the Office of Personnel Management." Mr. Cordray acted under authority of Dodd-Frank section 1011(b)(5)(B) (12 U.S. Code § 5491), which provides that the Deputy Director is appointed by the Director and will "serve as acting Director in the absence or unavailability of the Director."

Trump Administration: Law Supports Us

The Administration believes the Vacancies Reform Act trumps (*ed: sorry*) the cited part of Dodd-Frank, a position supported in the Justice Department's eight-page November 25th

Memorandum to the President's Counsel. The Bureau's General Counsel - a Cordray appointee - later issued a Memo to CFPB senior staff on November 26th supporting Mr. Mulvaney's assumption of the Acting Directorship. The President clearly was not happy with this situation or with former Director Cordray. Late on November 25th, he tweeted: "The Consumer Financial Protection Bureau, or CFPB, has been a total disaster as run by the previous Administration's pick. Financial Institutions have been devastated and unable to properly serve the public. We will bring it back to life!" Minutes later, he added: "Check out the recent Editorial in the Wall Street Journal @WSJ about what a complete disaster the @CFPB has been under its leader from previous Administration, who just quit!"

Legal Struggle for Control

The latest CFPB feud was big national news, with coverage on the Sunday morning news shows that spilled over into the workweek. Things only became more confused late Sunday night, November 26, when Ms. English sued President Trump and Mr. Mulvaney, seeking both an emergency temporary restraining order and declaratory relief recognizing her as the Bureau's Acting Director. The nine-page complaint in *English v. Trump and Mulvaney*, No. 1:17-cv-02534 (Nov. 26, 2017), filed in the U.S. District Court for the District of Columbia, states: "As the rightful Acting Director of the Bureau, Ms. English brings this action against President Trump and Mr. Mulvaney seeking a declaratory judgment and, on an emergency basis, a temporary restraining order to prevent the defendants from appointing, causing the appointment of, recognizing the appointment of, or acting on the appointment of an Acting Director of the Consumer Financial Protection Bureau via any mechanism other than that provided for by [Dodd-Frank]." The filing was accompanied by a Press Release,issued by her personal attorney and not the CFPB. Hours later, White House Press Secretary Sarah Sanders issued a Statement asserting: "The administration is aware of the suit filed this evening by Deputy Director English. However, the law is clear: Director Mulvaney is the Acting Director of the CFPB." On November 28, Judge Timothy J. Kelly - a recently-confirmed Trump appointee - denied the request for an emergency TRO, ruling from the bench: "The court will deny the request."

Mulvaney Seems to be in Charge for Now

As if to demonstrate the facts on the ground, a photo was tweeted out early Monday morning showing Mr. Mulvaney already at work at the Director's desk, with a "Consumer Financial Protection Bureau Transition Briefing Book" in the foreground. During the afternoon, Mr. Mulvaney conducted a 20-minute press conference at which he announced 30-day freezes on hiring, rules, regulations, and guidance. Later that day, the CFPB Website and org chart were updated to show Mr. Mulvaney as Acting Director. On November 28, Mr. Mulvaney established a Twitter account, @CFPBDirector. His first tweet was: "Busy day at the @CFPB. Digging into the details," accompanied by a photo of the Acting Director sitting at his desk.

*(ed: *It's somewhat ironic that this fight ended up in court, given that the Bureau's nullified Arbitration Rule might have played a role in Mr. Cordray's departure. **Speaking of lawsuits, we previously reported in SAA 2017-20 that the D.C. Circuit reheard* en banc *on May 24* PHH Corporation v. Consumer Financial Protection Bureau, *839 F.3d 1 (2016). In*

that now-vacated decision, a divided D.C. Circuit had held that the CFPB's structure, which has a single Director with virtually unlimited, unchecked authority, was unconstitutional. The Court had directed that the CFPB be restructured to make the Director terminable-at-will by the President. Query: Where's the decision? It's been six months since the case was argued. SCOTUS took just four months to decide Federal Arbitration Act preemption case Kindred Nursing Centers v. Clark & Wellner, *137 S.Ct. 1421 (May 15, 2017). ***We wonder what all this will mean for consumer financial arbitration reform? ****This situation is obviously fluid; be sure to follow us on Twitter @SACDispRes for further updates as they happen.)* (SAC Ref. No. 2017-45-01)

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FINRA STATS., 10/17: OCTOBER WAS A *RELATIVELY* STRONG MONTH IN A VARIETY OF DISPUTE RESOLUTION ACTIVITIES. ***The tenth month of the year has now passed, the October statistics are posted, and FINRA Dispute Resolution for 2017 as a whole has been on a steady, albeit slow-moving, track for both filings and close-outs.*** New case filings stand almost precisely where they stood two years ago at this time; in 2015, there were 2,854 new submissions and, in 2017, there have been 2,848. 2016 was no banner year for new filings either, but the average through October was running at more than 300 (3,081), while the surrounding years averaged about 280, and 70% of the new case inflow was coming from customers.

The composition of claims in 2015 and 2017 is quite different from 2016; in 2015, 68% (1,935) of the case filings were customer-related and, in 2017, 65% (1,856) are customer-related. Another difference -- somewhat of a surprise -- concerns the October filings. In both 2015 and 2017, new cases for the month numbered over 300 (315 in 2015 and 311 in 2017). Curiously, October was a relatively weak month in 2016, with only 277 new cases recorded.

Cases Closed on the Upswing

One statistic that has moved upwards steadily in the past three years is the number of cases closed -- this, despite a relative stasis on the new claim side. Thus far in 2017, 3,126 cases have been concluded; in 2016, the tally was 2,949 and in 2016, 2,890 cases closed. That net outflow of cases has meant that the number of pending cases -- those in some state of progress in the forum's case pipeline -- has trended downward, from 4,621 in October 2015 to 4,463 in October 2017.

Focus on Certain Claims

2015 ended the year with 3,435 new cases filed, a relatively strong finish; 2016 recorded a total of 3,681 cases. New cases for 2017 seem likely to end the year below 2015's result, and that will make 2017 the lowest year, in terms of new case volume, since 2007 and the second lowest year in the Millennium. On the customer side, Blue Sky Violations, Manipulation and Errors-Charges are the only three controversy types that show more claims among the new filings than in the two past years. On the industry side, claims are actually more plentiful (992 vs. 933 and 919, respectively) in the current year than in either of the past two years, so we find more claims than in the two past years in seven Controversy Types: Commissions, Suitability (*ed: what's that?*); Breach of Fiduciary Duty; Misrepresentation; Clearing Disputes; Unauthorized Trading; and Indemnification (but not Raiding and not Discrimination/Harassment claims).

Arbitrator Recruitment Back Up

We want to comment on two areas in closing: the status of arbitrator recruitment and (since October was Mediation Settlement Month), the status of mediation at FINRA. FINRA suffered a small setback -- let's call it a respite -- in its roster-building efforts in the past few months, but it has since recovered. In June 2017, the forum's Neutral Roster stood at a total of 7,229 (3,290 PAs; 3,939 NPAs). That total figure dropped to 7,186 in September. There have not been many months like that in the past year or more at FINRA, so we took note. We were pleased to see in October that recruiting produced a net increase of 51 new arbitrators (7,239 total), with 21 new Public Arbitrators (3,324) and 30 new Non-Public Arbitrators (3,913) added in the past month.

Mediation Strong DR Component

FINRA's case resolution chart indicates that 607 cases closed in mediation with an 83% success rate. That compares with only 500 last year, with a 78% success or settlement rate. Cases in Agreement -- cases entering the FINRA mediation program -- are up as well from last year, despite the lower number of new submissions and the reduced pending caseload. 544 Cases in Agreement have been recorded through October 2017, as compared with 508 through October 2016. That's a 7% increase in Cases in Agreement, a 21% increase in cases closed in mediation, and a 29% increase (504 vs. 390) in cases mediated to settlement! According to FINRA's case resolution chart, 13% of the cases closed in the past ten months have been through mediated settlements. That's the highest percentage in at least the past five years. Mediation plays a strong role in FINRA's dispute resolution program!

(SAC Ref. No. 2017-45-02)

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AN OBSCURE STATUTE WORTH NOTING FOR USE IN INTERNATIONAL ARBITRATIONS. ***Although we've seen it invoked only rarely, 28 U.S.C. § 1782 was the subject of two recent federal court decisions, making the statute a worthy candidate for*** **Alert** ***coverage.*** When we first saw *In Re Application for an Order Pursuant to 28 U.S.C. § 1782 to Conduct Discovery for Use in a Foreign Proceeding*, No. 17-mc-1466 (D.D.C. Aug. 18, 2017), we declined to cover it because we thought the statute in question, 28 U.S.C. § 1782, was a bit too one-off and obscure for the *Alert.* When we saw that the same law was the subject of *Australia and New Zealand Banking Group Ltd. v. APR Energy Holding Ltd.*, No. 1:17-mc-00216 (S.D.N.Y. Sept. 1, 2017), we decided to let readers know it exists and can be invoked in arbitration-related proceedings. The statute provides in pertinent part: "The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal..." These two cases tell us that 28 U.S.C. §1782 can in theory be used to compel attendance or production in arbitration-related matters, but there are limits to it use in practice.

In Theory, "Yes," But in Practice, "No"

Australia holds that the Constitution's due process requirements extend to a non-party subpoena issued pursuant to a pending foreign arbitration, in that the Court, prior to enforcement, must establish personal jurisdiction over the subpoenaed entity. Specifically, non-party ANZ Bank, which was headquartered in Australia and had only one of 1,127 branches, and 140 of 46,554 full-time employees in New York City, was deemed not to be "found" in the Southern District of New York. "Regardless of what section 1782 requires, the Constitution's due process protections apply. To lawfully exercise personal jurisdiction, a federal court must satisfy three primary requirements: (1) there must be proper service, (2) there must be a statutory basis to exercise personal jurisdiction, and (3) the exercise of personal jurisdiction must comport with constitutional due process.... The Court need not reach the issue of whether section 1782 provides a basis to exercise personal jurisdiction ... because the constitutional requirements are not satisfied here.... There is no nexus between ANZ Bank's New York contacts and the subject matter of the discovery sought by APR pursuant to the section 1782 subpoena" (citation omitted).

In Re Application concerned a court proceeding in The Hague seeking to reinstate $50 billion in vacated arbitration Awards against the Russian Federation. The *In Re* Court declined to enforce discovery subpoenas issued to law firm Baker Botts, LLP and one of its partners. The Court noted that Section 1782 contains three statutory requirements that were met here: "(1) the person from whom discovery is sought must reside in or be found within the district; (2) the discovery must be for use in a proceeding before a foreign or international tribunal; and (3) the application must be made by a foreign or international tribunal or any interested person." Why, then, was the subpoena not enforced? The general tests for subpoena enforcement still apply. "In this case, the relevance of the requested discovery to the Dutch appeal proceeding is tenuous and sufficiently in question, and the burden on the respondents sufficiently onerous, to warrant denial of the petitioners' request.... In contrast to the thin relevance of the requested discovery, the burden it would impose on the respondents is substantial.... These concerns are simply too significant to warrant granting the Application absent a showing that the requested discovery would be of even moderate relevance."

(ed: Although in both cases the subpoenas were not enforced, arbitration practitioners nonetheless need to be aware that the statute exists.) (SAC Ref. No. 2017-45-03)

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EXPLAINED AWARD: *SHIRVANIAN v. CITIGROUP GLOBAL MARKETS, INC.*, AAA ID #72 168 Y 00005 04 NOLG (Los Angeles, CA, 10/26/17). ***This well-reasoned 69-page AAA Award carefully lays out several alternative bases for rejecting the claimants'***

claims. Kosti Shirvanian, a millionaire who made his fortune as a trash disposal contractor, held a large position in Waste Management, Inc. ("WMI"), which had acquired his former company in 1998. When the value of WMI stock dropped precipitously in 1999, Shirvanian looked to Salomon Smith Barney ("SSB," now Citigroup) to protect his portfolio and provide him with cash while avoiding capital gains taxes. The agreed-upon solution was the use of equity monetization securities ("EMS") transactions. In that strategy, Shirvanian pledged to sell a stated number of WMI shares to SSB, acting as a counterparty, on a later date, for which he was immediately paid cash (in an amount lower than the market price of the stock), but incurred no immediate tax liability. In addition to the foregoing advantages, an EMS included collars that gave Shirvanian the opportunity to benefit from increases in the value of the stock while limiting his exposure to decreases.

A Long Wait

The Arbitrators' decision depends heavily on the procedural history of the case. When Shirvanian and his wife filed their Demand for Arbitration against SSB in 2003, they described the dispute as a "[c]laim for loss on securities." A 2005 discovery response alleged that their broker gave bad advice regarding the EMS account, exceeded the amount he was authorized to trade, failed to protect Shirvanian's portfolio and otherwise negligently handled his accounts, and that SSB had a potential conflict of interest because it also advised WMI. For reasons not clear from the face of the Award, the Shirvanians asked AAA to hold the arbitration in abeyance from 2006 to 2014. When they reactivated it, SSB filed a motion to dismiss the arbitration for failure to prosecute. While the motion was pending, Claimants filed a "First Amended Statement of Claims" ("FASOC") that raised additional claims. One of the recurring issues in the case was whether New York law, as set forth in a sample EMS purchase agreement ("EMS agreement"), or California law, applied to the case. Applying New York law, the Panel denied the motion because it was unclear whether SSB suffered prejudice from the delay, given the available documentary evidence. The case then proceeded to 35 days of evidentiary hearing *(ed: there were 37 days of hearings in all, including two days of closing argument)*. Claimants sought $97.9 million in compensatory damages, treble damages and $200 million in punitive damages.

Last In, First Out

The Panel addresses the FASOC-added claims first. Since the parties agree that all relevant statutes of limitations expired before the FASOC was filed, the only issue is whether the added claims "relate back" to the Demand for Arbitration. Under either California or New York law, the Arbitrators conclude, all the pre-abeyance documents are inadequate to give the notice of the new claims required for them to "relate back," and they are therefore time-barred. However, even if they do relate back, the Panel discerns another problem: all the new claims are reliant on oral testimony, but the long passage of time has dulled the memories of witnesses on both sides, causing the Panel to finally find enough prejudice to merit dismissal for failure to prosecute.

EMS Claims

That leaves several claims relating specifically to the EMS transactions: that SSB failed to disclose the costs of those transactions, that those costs were excessive, that SSB failed to disclose the commissions it paid to its brokers, that it promised there would be no commissions on them, and that SSB recommended early termination of EMS to generate commissions. On the first claim, the Panel finds that SSB fully disclosed the costs to the Shirvanians, who were really complaining that SSB should have disclosed its own revenue. However, the Panel finds that a brokerage has no duty to do so, especially where, as here, it disclaimed any such duty, and the amount could not be accurately estimated until the sale was consummated, nor does the amount it earned as an EMS counterparty matter. The claim of failure to disclose, to the extent it is not untimely or barred by failure to prosecute, fails because SSB paid those commissions out of its own revenues. The alleged promise not to pay commissions, if it happened as Shirvanian remembers, was not breached, since he did not pay those commissions. Finally, while Shirvanian did terminate some EMS transactions early, he had valid reasons - earning a profit or acquiring more advantageous collars - for doing so and, if the promised advantages did not always pan out, that did not make the decision to terminate early unsuitable. The Shirvanians' claims are denied *in toto*.

*(ed: *SSB/Citigroup was represented by Terry Ross, Michele R. Underwood and Stacey M. Garrett, Esqs. of Keesal Young & Logan, Long Beach, CA. **Two lessons to take away from this case: spell out one's claim from the beginning and, while AAA does give one the option of holding an arbitration in abeyance, one must think carefully before exercising that privilege, as there can be negative consequences. ***SAC collects securities-related Awards for its Award Database and online ARBchek system from many forums and we appreciate the help of all. The Awards are, in that way, available to all visitors for use in ranking arbitrators or performing customized searches. We hold in particular esteem those who contribute Explained Awards for SAC's PDF Awards Library.)*

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SHORT BRIEFS:

OMB CONCLUDES REGULATORY REVIEW OF DOL PROPOSAL DELAYING FIDUCIARY RULE PHASE II IMPLEMENTATION. *FEDERAL REGISTER* PUBLICATION FOLLOWS SWIFTLY.Recall that in SAA 2017-44, we checked in on the status of the Department of Labor's ("DOL") proposal to delay until July 2019 the planned January 2018 implementation of Phase II of its Fiduciary Standard Rule. We reported in SAA 2017-43 that the Office of Management and Budget ("OMB") on November 1st published notification that it had received from DOL proposed notice of final amendments on the delay (see RIN 1210-ZA27, "18-Month Extension of Transition Period and Delay of Applicability Dates; Best Interest Contract Exemption; Class Exemption for Principal Transactions; PTE 84-24"), and that DOL expected OMB to complete its inter-agency regulatory review around November 22. That came to pass on November 27th when OMB updated its Website to show that regulatory review had been completed. *Federal Register* publication followed just two days later; the citation is 82 FR 56545 (Vol. 82, No. 228, P. 56545, November 29, 2017), accessible as a Webpage and PDF.

*(ed: *Although the Rule permits use of predispute arbitration agreements in BICs, class action waivers are not allowed. **Recall that the entire Fiduciary Standard Rule is still*

under a review ordered February 3 by President Trump (see SAA 2017-30), and that the Department has stated that it does not intend to defend the anti-class action waiver part of the Rule (see SAA 2017-33).) (SAC Ref. No. 2017-45-04)

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OFFICIAL CITATIONS AND LINKS TO CFPB ARBITRATION RULE WITHDRAWAL. Just as SAA 2017-44 went to press on Thanksgiving eve, we reported that the Consumer Financial Protection Bureau ("CFPB") on November 22nd officially removed the now-defunct Arbitration Rule from the *Code of Federal Regulations ("CFR")*, by publishing a brief notice in the *Federal Register.* Just to close the loop, we wanted to provide our readers with citations and links. The *CFR* Rule citation is 12 CFR Part 1040. The *Federal Register* withdrawal citation is 82 FR 55500 (Vol. 82, No. 224, P. 55500, November 22, 2017), accessible as a Webpage and PDF. Also, the CFPB's Website, www.cfpb.gov, was again updated November 22nd to indicate that the Rule has been officially withdrawn: "On Nov. 22, 2017, the Bureau published a notice removing the Arbitration Agreements Rule from the Code of Federal Regulations." The Bureau is maintaining its separate Arbitration Rule materials Webpage "for reference only."

(ed: Barring unexpected developments, this should conclude our reporting on the Arbitration Rule. R.I.P.) (SAC Ref. No. 2017-45-05)

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AAA OPENS BUFFALO LOCATION TO SERVE GROWING NO-FAULT CASELOAD. The American Arbitration Association announced via a November 16 Press Release that it has opened a Buffalo, New York office in response to a surge in no-fault automobile insurance arbitrations. Under New York law and insurance regulations, disputes over no-fault auto insurance coverage between insurance companies and their insureds go to arbitration at the AAA. Says the release: "Historically, most arbitration requests to settle no-fault claims have been filed with AAA in downstate New York, but there has been a significant rise in upstate filings in recent years. In fact, no-fault arbitration filings in Buffalo increased by 68 percent between 2012 and 2016, and spiked at 12,336 filings in 2015." The office is located at 250 Delaware Avenue. (SAC Ref. No. 2017-45-06)

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INTERNATIONAL ARBITRATION YEAR-END REVIEW PROGRAM TAKING PLACE DECEMBER 7 IN NEW YORK. The International Institute for Conflict Prevention and Resolution Young Attorneys in Dispute Resolution (CPR Y-ADR), Debevoise & Plimpton LLP, and the New York International Arbitration Center will be presenting *Y-ADR Annual Year-in-Review* on Thursday, December 7th. The free 90-minute event is described as "a spirited discussion of the hot topics in dispute resolution in 2017." It will be held at Debevoise & Plimpton, 919 Third Avenue in Manhattan, starting at 5:30 p.m. No agenda had been posted by press time.

(ed: The program includes a reception. Register online at

https://media.debevoise.com/20/807/landing-pages/rsvp-blank.asp?sid=blankform. Email rhoover@debevoise.com for further information.)

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SAVEANDINVEST NOVEMBER NEWSLETTER HITS THE ELECTRONIC NEWSSTAND, FEATURING MOSTLY NEW MATERIAL. The latest issue of the FINRA Investor Ed Foundation's SaveAndInvest.org *Newsletter* for military service members and their families was distributed by email November 20th, featuring mostly new material. The *Newsletter*'s first item is an article from FINRA's *Alert Investor*, *This Veteran's Day, Let's Recognize How Vets Fare Financially*, reporting that "each November 11, we recognize the many accomplishments and sacrifices made by our 22 million U.S. military veterans. We pay tribute to their bravery and service to our country, and hear many personal stories of what it means to be a veteran in America today. One story worth telling is how America's veterans fare financially." The article links to a September 2017 Foundation study. Next is an article describing changes coming in 2018 to TRICARE benefits. TRICARE is a health program for active duty and retired members of the armed services and their families. The third new item is another *Alert Investor* article, *New FINRA Exam to Open Doors to Financial Industry*, reporting: "Looking to break into the financial services industry? You may have new opportunities thanks to the new Securities Industry Essentials (SIE) exam." The article links to an October Press Release and Regulatory Notice 17-30, describing the SEC's approval of Rule changes effective October 2018 to: "restructure the representative-level qualification examinations by creating a general knowledge examination called the Securities Industry Essentials (SIE) and transforming the representative-level examinations into specialized knowledge examinations." The last item is news of an updated FINRA Fund Analyzer; we reported on this one in SAA 2017-41. The Fund Analyzer is a free Web app that "helps investors understand the impact of fees and possible discounts on mutual funds, exchange-traded funds, exchange-traded notes and money market funds."

*(ed: *Kudos for the third consecutive "all or mostly new material" issue. **The public can subscribe to this free publication at http://apps.finra.org/contact_us/2/Subscribe.aspx?lists=sai. ***We remind readers that FIEF has a liberal use policy: "You have our permission to republish any of the information in this newsletter. All we ask is that you attribute the content to SaveAndInvest.org, a project of the FINRA Investor Education Foundation.")* (SAC Ref. No. 2017-45-07)

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ARBITRATION BY ANY OTHER NAME (MEDIATION) IS STILL ARBITRATION, NEW JERSEY APPELLATE COURT HOLDS. If it looks like an arbitration, functions like an arbitration, walks like an arbitration, and talks like an arbitration, it's an arbitration irrespective of what you call it. So rules a unanimous New Jersey Appellate Division in *Marano v. The Hills Highlands Master Ass'n.*, No. A-5538-15T1 (Nov. 16, 2017) (*per curiam*). The dispute between the property owners and the homeowners' association involved a flooding condition. The Association's Bylaws contained an arbitration agreement, and the parties did in fact engage in an alternative dispute resolution process, with a retired judge, holding that the Association should make the required repairs. What was the problem? When the homeowners moved to confirm the decision, the Association resisted, contending that the parties had engaged in *mediation*, not binding *arbitration*. Why the confusion? The Association early on had contended it was not obliged to arbitrate because the homeowners' dispute was with the adjacent neighbor, not the Association. It agreed, however, that it would submit to "ADR." Also, the retired judge Neutral had the parties execute a "civil mediation agreement." In affirming the Trial Court's Order confirming the Award, the Appellate Division observed that, "although at times the parties' use of the words 'arbitration' and 'mediation' in the record had been inconsistent, there was no question but that the parties engaged in binding arbitration before the retired judge." The Court cited several indicia of arbitration: 1) the homeowners' attorney consistently referred to arbitration, without objection from opposing counsel; 2) the Association's counsel referred several times to "the Arbitrator;" 3) the homeowners' attorney pointed out that the wrong submission form was used and the Association's counsel did not object; 4) Counsel for the Association wrote a letter stating, "the parties are currently in the middle of an arbitration" and that certain information was needed "in the near future so that the parties may resume arbitration;" and 5) the Neutral issued an "Award in Arbitration." Thus, the Court concludes, "[w]ith the exception of the retired judge's mistake in having the parties execute a document memorializing the terms of a 'civil mediation,' there is no doubt that the parties agreed to and in fact participated in binding arbitration."

*(ed: *Seems right to us. **This case to us underscores the value of administered arbitration, where we doubt such an identity crisis would occur. ***The decision bears this legend in bold: "This opinion shall not constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. [R. 1:36-3](#).")* (SAC Ref. No. 2017-45-08)

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DID YOU KNOW? SAC's WISH WAS GRANTED. The DYK in SAA 2017-44 described a comprehensive yet manageable resource on international arbitration, *[Arbitration in New York](#)*, a 42-page brochure excerpted from a larger work by William Lowery and Jeremy Wilson of CMS Cameron McKenna LLP (London). One of our editorial comments was: "While we think the brochure is a great resource, we suggest addition of a section on literally <u>where</u> to find New York-based international arbitration institutions." Lo and behold, no sooner do we make that observation than we learn of a new brochure, *[Why Choose New York for International Arbitration,](#)* published by the New York State Bar Dispute Resolution Section and the New York International Arbitration Center. This excellent publication has four main sections: A Legal Framework that Strongly Supports International Arbitration; Neutral Courts that Enforce Arbitration Agreements and Awards; Leading Arbitral Institutions, Arbitrators, Mediators, and Lawyers; and Infrastructure for Any Type of Case. Answering our prayer is Annex II, which contains a list of international arbitration institutions in New York, and extensive logistical information.

*(ed: *We suggest FINRA ODR's New York office be added to the list. **Our second favorite part was the century-old photo taken at the Lake Mohonk Conference on International Arbitration. ***The brochure was developed by Richard Mattiaccio, Stephanie Cohen, and Mark W. Friedman.)* (SAC Ref. No. 2017-45-09)

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