RECORD NUMBER: 19-1077

United States Court of Appeals

for the

Fourth Circuit

INTERACTIVE BROKERS LLC,

Plaintiff/Appellee,

– v. –

ROHIT SAROOP; PREYA SAROOP; and GEORGE SOFIS,

Defendants/Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA AT RICHMOND

BRIEF OF *AMICUS CURIAE* PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION IN SUPPORT OF APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

The Public Investors Arbitration Bar Association ("PIABA") is a non-profit international bar association comprised of attorneys who represent investors in securities arbitrations, as well as state securities regulators and faculty at law schools who work on investor issues. PIABA has no parent corporation, and no publicly held corporation owns 10% or more of any of PIABA's stock.

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STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE[1]

PIABA is an international bar association comprised of attorneys who represent investors in securities arbitrations, as well as state securities regulators and faculty at law schools who work on investor issues. Since its formation in 1990, PIABA has promoted the interests of public investors in all securities and commodities arbitration forums, while also advocating for public education regarding investment fraud and securities industry misconduct.

PIABA members regularly represent public investors in securities arbitration disputes against financial advisors, registered representatives and broker-dealers registered by the Securities and Exchange Commission ("SEC") and the Financial Industry Regulatory Authority ("FINRA"). Our members and their clients have a strong interest in protecting public investors and customers of the securities industry from the misconduct of members of the securities industry, and in creating a level playing field for public investors and customers of the securities industry in securities disputes with industry members.

To fulfill its role as a voice for public investors and customers of broker-dealers, PIABA frequently files *amicus* briefs in cases likely to impact the rights and

[1] The Appellants consent to the filing of the proposed amicus brief. The Appellee, Interactive Brokers, consents to the filing of the proposed amicus brief, but notes that it may ask the Court for an extension of its word/page limit to address any arguments the Amici may make that are not duplicative of those made by the Appellants.

protections afforded to public investors and customers of broker-dealers. PIABA identified this case as having statewide or national significance, and files out of concern that the Eastern District of Virginia's rulings will seriously undermine the finality of arbitration, and the strong public policy favoring arbitration. *E.g.*, *Hall Street Assocs. v. Mattel, Inc.*, 552 U.S. 576, 581 (2008).

STATEMENT REGARDING PARTICIPATION

Pursuant to Fed. R. App. P. 29(a)(4)(E), PIABA states that (i) neither party's counsel authored this Brief in whole or in part; (ii) neither a party nor a party's counsel contributed money that was intended to fund preparing or submitting this Brief; and (iii) no person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting this Brief.

ARGUMENT

I. Public policy favors arbitration, which may offer benefits over court.

Courts considering *vacatur* of arbitration awards often invoke the important national policy favoring arbitration. *See, e.g.*, *Hall Street Assocs.*, 552 U.S. at 581. Arbitration has the potential to offer a faster, more efficient alternative to court litigation. For example, FINRA, the self-regulatory organization for the brokerage industry and the provider of the largest securities arbitration forum touts a faster, more efficient alternative to litigation. Financial Industry Regulatory Authority,

FINRA Office of Dispute Resolution Arbitrator's Guide p. 9 (Nov. 2018), *available at* www.finra.org/sites/default/files/arbitrators-ref-guide.pdf. Linda Fienberg, then-president of NASD Dispute Resolution, told the North American Securities Administrators Association in 2004 that "[a]rbitration is … more efficient and cheaper" than litigating in court.[2]

In addition to providing efficiency, FINRA points out other benefits of arbitration. FINRA says "'it is equitable to prefer arbitration to the law court, for the arbitrator keeps equity in view, whereas the judge looks only to the law, and the reason why arbitrators were appointed was that equity might prevail.'" FINRA ARBITRATOR'S GUIDE p. 9 (quoting Domke on Aristotle).

With the promise of arbitration being cheaper and faster than litigation, it is critical that courts not allow arbitration to become a litigation-like process "for protracting disputes." *See Wachovia Sec., LLC v. Brand*, 671 F.3d 472, 478, n.5 (4th Cir. 2012). FINRA member firms are much better funded for prolonging and complicating dispute resolution than a typical customer.[3]

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[2] Remarks of Linda Fienberg, NASAA Listens Forum on Arbitration, National Press Club, Washington, D.C., July 20, 2004 (below, Fienberg Remarks to NASAA). An audio file of Ms. Fienberg's Remarks to NASAA is available at http://www.connectlive.com/events/nasaa/. The text of her remarks is available as Appendix N in Seth Lipner, Joseph Long, & William Jacobson, SECURITIES ARBITRATION DESK REFERENCE (Thomson Reuters 2016-17 ed.).

[3] As Ms. Fienberg told NAASA, allowing arbitration to become like litigation in court would allow a large, retail brokerage firm to bankrupt a customer asserting a

II. FINRA Rules do not require the claimant to specify any cause of action or legal theory in a claim.

Consistent with the promise of efficiency, FINRA arbitration rules do not require a brokerage firm customer to plead a cause of action or legal theory to initiate an arbitration. Under FINRA Dispute Resolution Rule 12302, a customer needs only to file a signed and dated submission agreement along with the customer's statement of claim. The statement of claim need only "specify[] the relevant facts and remedies requested." *Id.* FINRA Rules do not require a customer to specify or identify any particular legal cause of action.

The customers' statement of claim in this case identified a number of causes of action asserted against IB, but it was not required to do so. *See* Statement of Claim ¶¶46-58, available at Filing 1-10 at CM/ECF p. 96-99.[4] Under Rule 12302(a), a statement of claim specifying only the relevant facts and the remedies the customer requests would have sufficed. As long as the customer also pays the correct fee for commencing the arbitration as provided in Rule 12302(b), then FINRA is obligated

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claim. Fienberg Remarks, *supra* n.1. Ms. Fienberg was referring to the discovery process. The judicial review process is every bit as expensive and time consuming as discovery.

[4] At this time, PIABA does not have access to a copy of the Record or Appendix on Appeal, and accordingly cites to either unpublished opinions available on LEXIS or the CM/ECF citations for the Eastern District of Virginia Case No. 3:17-cv-127 throughout. PIABA would be happy to update these citations after the Appendix is available, at the Court's request.

to serve the statement of claim on the respondent firm, which triggers the respondent firm's obligation to file an answer. FINRA Rule 12302(c). To be clear, if FINRA has served a statement of claim—even a statement of claim that has not identified any cause of action—that necessarily means it was sufficient under FINRA Rules, and the respondent firm has no right or procedure for requiring any further pleading or a more definite statement from the customer.

Thereafter, arbitrators are assigned. FINRA Rules 12400-12403. Following a period for discovery and pre-hearing motion practice, and after the hearing on the merits, the arbitrators issue a written award.

III. FINRA Rules do not require the arbitrators to specify any cause of action or legal theory in an award.

In issuing an arbitration award, FINRA Rule 12904(e) requires arbitrators to: identify the parties (and their representatives) and the arbitrators; state the number, dates, and location of hearing sessions; acknowledge that the arbitrators have read the pleadings and materials submitted by the parties; summarize the issues; state the damages and relief the parties requested; state the damages and relief awarded; allocate the forum fees between the parties; and sign the award.

Rule 12904(f) says arbitrators *may* include a rationale in an ordinary award if *they* choose, but does not require them to do so. *See also United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 598 (1960) ("Arbitrators have no

obligation to the court to give their reasons for an award."). FINRA Rule 12904(g) requires an arbitrator to issue an explained decision if all parties jointly request that they do so. In such a case, the award must state "the general reason(s) for the arbitrators' decision. Inclusion of legal authorities and damage calculations is not required." FINRA Rule 12904(g)(2).[5]

Here, the customers and IB agreed to submit their disputes for decision by FINRA arbitrators, and agreed to abide by FINRA Rules in doing so.[6] The parties in this case did not jointly request that the arbitrators issue an explained decision. Therefore, the arbitrators issued the award containing the components required by Rule 12904(e). As the trial court recognized, the initial award was not an "explained decision." *Interactive Brokers LLC v. Saroop*, 279 F. Supp. 3d 699, 706-07 (E.D. Va. 2017), *appeal dism'd*, 2017 WL 8751822 (4th Cir. Dec. 12, 2017) (the initial award was "not a reasoned one in the usual meaning"). The trial court also recognized that the modified award issued at the court's request changed little from

[5] Even if the arbitrators here were required to issue a reasoned award, "courts have not recognized a failure to do so as a ground for vacating an arbitrator's award." *U.S. ex rel. Coastal Roofing Co. v. P. Browne & Assocs., Inc.*, 771 F. Supp. 2d 576, 583 (D.S.C. 2010).

[6] IB agreed three times—first when it joined FINRA as a member firm, second when it accepted the customers' signatures on its account agreement, and third, when it signed the FINRA Dispute Resolution Uniform Submission Agreement. Filing 1-12 at CM/ECF p. 905-910.

the initial award. *Interactive Brokers LLC v. Saroop*, No. 3:17-cv-127, 2018 U.S. Dist. LEXIS 214023 at *12 (E.D. Va. Dec. 19, 2018).

IV. Courts may only vacate arbitration awards in limited circumstances.

Given the important national policy choice to favor arbitration and the virtue it advances of speedy, efficient dispute resolution, courts can vacate arbitration awards only in very limited circumstances. *See Hall Street Assocs*, 552 U.S. at 581. Otherwise, arbitration would be simply a step in a protracted judicial process; the parties would lose their bargained-for benefits of arbitration. *Wachovia Sec.*, 671 F.3d at 478, n.5 (allowing "probing" judicial "review of arbitral awards would risk changing arbitration from an efficient alternative to litigation into a vehicle for protracting disputes"); *see also Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 568-69 (2013) (arbitration would become more cumbersome and time-consuming).

When a court analyzes a petition to vacate, the court should decide whether the arbitrators did their job—not whether they did the job well or correctly, or even reasonably. *Wachovia Sec.*, 671 F.3d at 478. The court decides whether the arbitrators reached a resolution to an issue within the scope of the disputes the parties agreed to arbitrate. *Id.*; *Raymond James Fin. Servs. v. Fenyk*, 780 F.3d 59, 68 (1st Cir. 2015) ("limited review of arbitral decisions requires us to uphold an award, regardless of its legal … correctness, if it draws its essence from the contract that underlies the arbitration proceeding" (citation and quotes omitted)). As DOMKE ON

COMMERCIAL ARBITRATION says, the focus for a court reviewing an arbitration award is "on whether the arbitrators had authority to reach a[n] issue, not whether the issue was correctly decided." Martin Domke & Gabriel Wilner, 2 DOMKE ON COMMERCIAL ARBITRATION § 39:13 (Thomson Reuters 3d ed. 2018).

"To vacate an award on the ground that the Panel manifestly disregarded the law, 'there must be some showing in the record, *other than the result obtained*, that the arbitrators knew the law and disregarded it." *Brown v. Rauscher Pierce Refsnes, Inc.*, 994 F.2d 775, 785, n.7 (11th Cir. 1993) (emphasis added; quoting *O.R. Securities v. Prof'l Planning Assocs., Inc.*, 857 F.2d 742, 747 (11th Cir. 1988)). The moving party must show that the arbitrators had actual, subjective knowledge of a legal rule that controlled the outcome, *T.Co. Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 339 (2d Cir. 2010) (must be "a subjective element, that is the knowledge actually possessed by the arbitrators") (internal quotes and citations omitted); and then that the arbitrators "explicitly disregarded" that controlling rule. *THI of N.M. at Vida Encontada, LLC v. Lovato*, 864 F.3d 1080, 1088 (10th Cir. 2017) (party seeking vacatur must show "that the arbitrator 'knew the law and explicitly disregarded it"') (quoting *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 932 (10th Cir. 2001)). *See also, e.g., Long John Silver's Restaurants, Inc. v. Cole*, 514 F.3d 345, 349 (4th Cir. 2008) (requiring that the arbitrator was aware of the law, understood it correctly and found it applicable, and chose to ignore it); *Stolt-Nielson*

S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 670, n.3 (2009) (assuming "standard . . . requiring a showing that the arbitrators 'knew of the relevant [legal] principle, appreciated that this principle controlled the outcome . . . , and nonetheless willfully flouted the governing law . . .'").

If the arbitrators simply made an error in deciding fact or law—even if the error is serious—a court cannot vacate their award. *Stolt-Nielson S.A.*, 559 U.S. at 671 ("an error—or even a serious error" is "not enough"); *Fenyk*, 780 F.3d at 67 ("we may not disturb" an award that left court "perplexed, and may have been erroneous").

V. The arbitrators did not manifestly disregard the law.

When IB opted for arbitration as its preferred mechanism for dispute resolution, it traded away the opportunity for judicial review for legal errors, choosing instead the simplicity, informality, and expediency of arbitration. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991). Under the applicable standards, the trial court had no basis to vacate the award in this case.

Here, the trial court noted that IB submitted briefing to the arbitrators arguing that FINRA Rules do not provide a private right of action. 2018 U.S. Dist. LEXIS 214023 at *33-34. Not surprisingly, though, the customers also submitted legal briefing to the arbitrators citing legal authorities they contended supported their legal rights to recover from IB. *See* Filing 17 CM/ECF at p.226, n.9. The trial court

observed that the arbitrators said they read the written materials submitted to them by the parties. 2018 U.S. Dist. LEXIS 214023 at *34. That observation does not show the arbitrators knew that any particular rule unequivocally controlled the outcome of this case – and then disregarded that rule. At most, the arbitrators properly performed their job of deciding a legal issue submitted to them.

There is no indication in the record that the arbitrators *actually* knew that FINRA rules do not themselves give rise to a private cause of action. *Cf. Dawahare v. Spencer*, 210 F.3d 666, 670 (6th Cir. 2000) ("Dawahare points to nothing in the record that shows the arbitrators' awareness of the . . . law he alleges to be applicable"). Thus, the arbitrators did not *manifestly* disregard such (supposed) applicable law.

Moreover, it is also important to understand that, independently of what the parties submitted to the arbitrators, and despite the predictable refrain from the industry, *FINRA says customers can rely on rule violations to support arbitration claims*. According to FINRA's predecessor, in arbitration, "[y]ou do not have to have a claim that is cognizable under NASD rules." Fienberg Remarks to NASAA, *supra* note 1 above. Ms. Fienberg also said:

> *You can also assert in your arbitration claim violation of [FINRA] rules*. For example, suitability. There's no statutory claim for suitability. That's a [FINRA] rule. It's much easier to assert and then prevail [on that kind of claim].[7]

[7] *Supra* Note 1 (emphasis added).

VI. The trial court also erred in assuming the arbitrators' rationale.

The trial court also erred by concluding that the only possible predicate rationale for the arbitrators' award in favor of customers was the arbitrators' conclusion that IB violated FINRA Rule 4210. 2018 U.S. Dist. LEXIS 214023 at *21-24. The award does not say that IB's liability was based only on a violation of Rule 4210. As the trial court recognized, the award does not say it based the liability finding on *any* specific cause of action. *Id.* at 21.

Moreover, FINRA Rule 4210 is not the only plausible basis for the arbitrators' award. Perhaps the arbitrators found liability for the customers and against IB based on the widely recognized principle, as the customers argued, that FINRA rules can set a standard of conduct supporting liability under negligence, fraud, or breach of contract. The trial court itself acknowledged this principle. *Id.* at *29. Here (even though they did not need to use or identify a legal cause of action), the customers did plead negligence, breach of contract, fraud, and a violation of the state securities act in their statement of claim. *See* Statement of Claim ¶¶46-58, available at Filing 1-10 at CM/ECF p. 96-99. The arbitrators could have concluded that FINRA Rule 4210 was evidence of a standard of conduct supporting liability under any or all of those causes of action. The arbitrators could have found *both* that IB breached a contractual obligation or a duty of good faith or that IB was negligent *and* found that IB violated Rule 4210. Perhaps the arbitrators knew of statements by FINRA like

those by Ms. Fienberg that customers *can* base claims on FINRA Rule violations, concluding that contrary authority was not controlling.

Perhaps the arbitrators had some other basis for their award, one that the trial court, the parties, or PIABA never considered. In denying IB any recovery on its counterclaims, perhaps the arbitrators decided IB had not satisfied its burden of proof. Since the arbitrators did not state the rationale for their award, no one can say what the arbitrators considered or disregarded in reaching their award. As the trial court below observed in its first opinion in this case, when arbitrators do not explain their award, judicial review for manifest disregard "is impossible." 279 F. Supp. 3d at 707 (citing *O.R. Securities*, 857 F.2d at 747; *Dawahare*, 210 F.3d at 669).

The trial court miscited *O.R. Securities* and *Dawahare* 279 F. Supp. 3d at 707 (after citing *O.R. Securities*, "[t]he Court will therefore remand this award to the arbitrators …"). When *O.R. Securities* and *Dawahare* say an arbitration award with no explanation of the arbitrators' rationale makes review for manifest disregard *impossible*, they mean what they say: a court must deny a petition for *vacatur* of an award based on manifest disregard when the award states no rationale or explanation. *O.R. Securities*, 857 F.2d at 748; *Dawahare*, 210 F.3d at 669-71. At least one other district court in this Circuit has correctly applied this rule. *See, e.g.*, *First Baptist Church of Glenarden v. New Mkt. Metalcraft, Inc.*, 2010 U.S. Dist. LEXIS 77238, *8-10 (D. Md. July 30, 2010) (with no explanation it is "impossible

for the court to conclude the arbitrator understood and correctly stated the law, but disregarded it" so court confirmed award) (internal quotes and citations omitted); *Impossible Choice Hotels Int'l, Inc. v. Felizardo*, 278 F. Supp. 2d 590, 596 (D. Md. 2003) ("[A]rbitrators are not required to explain their decisions. If they choose not to do so, it is all but impossible to determine whether they acted with manifest disregard for the law.").

As the Court said in *O.R. Securities*, when the arbitrators "declined to state reasons for their conclusions, *[t]his ends the inquiry*" into manifest disregard, and a request for *vacatur* must be denied. 857 F.2d at 748 (emphasis added). That is what should have happened in this case when the parties were before the trial court for confirmation of the initial award. It is what should have happened after the second award. It is what should happen now.

Whatever the arbitrators actually thought – but did not express – is irrelevant to both the trial court's and this Court's review. The arbitrators resolved a dispute squarely within the scope of what the parties agreed the arbitrators would decide. They did not say they actually knew any particular legal rule controlled the outcome, nor explicitly disregard such rule. There is a plausible logic under which the arbitrators could have reached their award without consciously intending to disregard a controlling legal rule. The Court can go no further in assessing an

arbitration award. *Cf. T.Co. Metals*, 592 F.3d at 339 ("barely colorable justification" requires confirmation).

This case is already an illustration of arbitration losing its benefits of speed and efficiency – based, in part, on rules that do not require either parties or arbitrators to specify causes of action. This case is already an illustration of a well-funded brokerage firm converting arbitration to protracted litigation. This case is what mandatory brokerage industry-administered arbitration should not be permitted to become.

VII. Courts do not have authority to reverse and render arbitrable claims.

Courts do not have authority under the Federal Arbitration Act ("FAA") to adjudicate the merits of claims subject to arbitration. 9 U.S.C. § 1 et seq.; *THI of N.M.*, 864 F.3 at 1083-84 ("courts are not authorized to reconsider the merits of an award …."; internal citations and quotes omitted). Certainly nothing in the text of the FAA authorizes a court to reverse and render the merits of a claim that has been decided by arbitrators. Even if a court believes the arbitrators erred, the arbitrators' decision "holds, however good, bad, or ugly." *Oxford Health Plans*, 569 U.S. at 573.

Deciding the merits of customers' arbitrable—indeed, already arbitrated—claims is what the trial court seems to have done in this case. The trial court explicitly vacated the award in favor of the customers, implicitly terminating the customers' claims against IB on the merits. The trial court also explicitly vacated the denial of

IB's counterclaims, and explicitly remanded the counterclaims to a new panel of arbitrators. 2018 U.S. Dist. LEXIS 214023 at *38-39.

This Court should state clearly that the trial court did not have authority to terminate the merits of the customers' claims. If this Court allows the trial court's *vacatur* of the award to stand in any part, then the entire case should be completely remanded back to the original arbitrators for a new award on all disputes.

CONCLUSION

For these reasons, the judgment of the district court should be reversed.

Dated: April 18, 2019

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify the following:

This brief complies with the length limitations of Fed. R. App. P. 29(a)(5) because it contains no more than one-half the maximum length authorized by this Court's rules for a party's principal brief, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). The brief contains 3,584 words.

This brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Times New Roman 14-point font.

Dated: April 18, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of April, 2019, a true and correct copy of the foregoing was filed with the Clerk of the United States Court of Appeals for the Fourth Circuit via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

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