SECURITIES ARBITRATION ALERT 2021-04 (2/4/21)

George H. Friedman, Editor-in-Chief

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- ***Gerstenbluth v. Fidelity Brokerage*, FINRA ID No. 19-00913 (Jersey City, NJ Jan. 12, 2021)**

ARTICLES OF INTEREST:

- **Solaiman, Barry, *Mediating Legal Disputes: Implementing The Singapore Convention in The Middle East and Central Asia*, Journal of Social Research and Behavioral Sciences (Dec. 5, 2020).**
- ***Justices Dismiss Arbitrability Dispute*, SCOTUSBlog (Jan. 25, 2021)**
- ***Finra Bars Ex-Merrill Lynch Broker Accused of Fleecing Ex-N.H. Governor*, Financial Advisor Magazine (Jan. 26, 2021)**
- ***Let's Schein Again!* CPR Blog (Jan. 26, 2021)**
- ***Fordham Wins 2021 ABA Arbitration Competition Crown*, ABANet (Jan. 27, 2021)**
- ***Class-action Lawsuit Filed Against Robinhood Following Outrage over GameStop Stock Restriction*, CNN.com (Jan. 29, 2021)**

DID YOU KNOW?

SQUIBS: IN-DEPTH

FINRA YEAR-END STATS 2020: AVERAGE IN SOME RESPECTS; IN OTHER WAYS, A MOST UNCOMMON, EVEN UNIQUE, YEAR. ***This review of the latest***

FINRA dispute resolution stats update is provided by Rick Ryder, President of SAC, Inc. and SAC's ARBchek - securities arbitration's first arbitrator evaluation service. We are delighted to offer this analysis and thank Mr. Ryder! The words that follow are his. FINRA Dispute Resolution Services ("DRS") ended this most challenging year with just short of 4,000 new cases submitted (3,902). That totals about 150 more than 2019 (3,757), for a 4% increase. In similar fashion, FINRA DRS finished 2020 with total close-outs of 3,564, which, while a bit lower than average, fell within the norms of average performance going back to 2013. So, at first glance, 2020 appears as a typical year for case inflow and outflow, but, of course, it was not a common, typical, or average year at all. That DRS staff were able to turn in the numbers to make it appear so is something remarkable on its own.

COVID, COVID, COVID

2020 was the year COVID-19 turned securities dispute resolution, not to mention our daily lives, work habits, and the economy as a whole, topsy-turvy! First, there was the shutdown of live hearings starting in the early Spring that will ultimately stretch at least until 2021's early Spring. Then, the market itself fell into a panic-driven, headlong collapse, losing more than a third of its value. Pundits* predicted a surge in cases flowing into and flooding FINRA DRS -- even as the market began its V-shaped recovery and surpassed by 2,000 Dow points the heady highs of pre-COVID. DRS's monthly statistical report for December 2020 -- closing out this wild year -- tells some of the story of what was happening as the COVID crisis unfolded.

With live hearings blocked and arbitrators and parties stuck at home, FINRA-DR could only offer settlement assistance. With no deadlines driving settlement negotiations and parties asserting their right to a live hearing, stalemate threatened. The answer -- virtual hearings via Zoom -- is now highlighted at the top of FINRA's report, which shows that 222 contested motions for a virtual hearing have arisen in pending customer cases through December and 69% of those decided (128:186) have granted a virtual hearing. In 138 customer cases (which includes those to which parties stipulated), at least one virtual hearing has been held. Arbitrators are granting virtual hearings over party objections in similar fashion on the industry side, albeit there are far more voluntary stipulations (105:155); that's due mostly, we'd venture, to sole expungement proceedings, where party opposition itself is often virtual.

One can see the impact on case adjudication of the COVID hearing moratoriums by reviewing FINRA DRS's pre-COVID March 2020 report. That showed 134 cases closed by "regular hearing" in the first three months of the year, about 13% of all close-outs. At year-end, the number of cases closed after regular hearing was only 335. That's only 9% of all close-outs, but even that level was achieved only by the great majority of the 201 cases utilizing the virtual hearing option. The number of pending cases was driven above the 5,000 (5,138 vs. 4,808 in 2019) level by hearing delays, but the "safety valve" of virtual hearings gave customers and others a choice. The statistics indicate that the virtual option averted the prospect of forced settlements. Settlements overall made up 71% of

case close-outs in 2020 versus 70% in 2019. Withdrawals accounted for the same percentage year-over-year (9%).

Expungement Surge - Puerto Rico Dip
Among the other anomalies in the newly submitted 2020 cases is the mix of customer vs. industry cases. Historically, customer cases constitute at least 60% of the new case crop at FINRA, but in 2020, the mix was 53%-47%. The reasons are several. First, industry cases were up significantly (+31%) from 2019, primarily due, we believe, to the pre-September rush to file sole expungement claims before new fees took effect. Also, customer claims were negatively impacted in number by another deadline -- one affecting six-year eligibility -- as a result of which Municipal Bond (148 from 702) claims and Municipal Bond Fund (136 from 717) claims took a deep dive in this past year from 2019 and the years before. The era of the Puerto Rico Bond cases, which overwhelmed the forum some six years before and has fed the system since with thousands of customer claims, ceased in 2020. Whether the surge in expungement cases offset fully the curtain-closing on the Puerto Rico customer claims, one can only speculate. On the other hand, we can certainly expect that 2021 will not have case support from either source!
*(R. Ryder: *When SAC was publishing the* Arb Alert *in the first half of 2020, I wrote an article with George Friedman, in which we projected a surge in customer claims following the big drop in the Dow. We did hedge our bets against a quick recovery (which occurred), but we still predicted that claims from margin liquidations, structured products like the YES amalgam, and other bullish derivative strategies would bring realized losses and claims galore. We gave ourselves six months and not much has materialized. There are reportedly a block of YES cases pending at FINRA, but we hear little of excessive losses from hasty margin sell-outs; the brokerage houses have evidently learned the virtues of discipline and consistent risk management in that arena. We can rationalize/quibble further, but it's time -- pass the crow, my friend! **We touched here upon many aspects of the year-end report, but not the customer win section -- it's pretty bad for the customer, albeit the overall win rate -- a dismal 32% -- is confined to 193 cases vs. a more usual 300-plus. It's hard to blame these results on the virtual hearing dynamic, although some have, because the win rates for Special Proceedings and Paper-Only cases are even worse -- 20% and 29%, respectively. Here's the capper: in 2019, the win rate for customers before a three-person All-Public Panel was 53%; in 2020, it dropped to 33%! ***FINRA did not stop arbitrator recruiting, despite the lack of active assignments. At the end of 2019, there were 7,839 arbitrators on the FINRA roster (4,155 Non-Public; 3,684 Public); in 2020, the number rose above 8,000 for the first time in more than a decade (8,111: 4,291 NPA; 3,820 PA).)*
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VALIDITY OR EXISTENCE? THE TYPE OF CHALLENGE TO THE CONTRACT DETERMINES WHO DECIDES THE ISSUE ***The Supreme Court of North Dakota holds unanimously that challenges to the existence of a contract or about the validity of the arbitration agreement are for the court to decide.*** *Melaas v. Diamond Resorts U.S. Collection Development*, 2021 ND 1 (N. Dakota Jan. 12, 2021) (unpublished), involves the issue of whether a challenge to the existence of a contract

premised on the lack of necessary capacity to consent to the contract must be decided by the court prior to compelling arbitration.

Capacity to Sign the Timeshare Agreement

Kathleen Melaas attended a sales meeting with **Diamond Resorts U.S. Collection Development, LLC** where she was offered a timeshare package. Melaas alleged that the meeting lasted approximately five hours and she was not allowed to leave the meeting until she signed a timeshare agreement. Melaas also alleged that Diamond Resorts knew of her medical condition – that she suffers from diabetes and was fatigued and confused, and that she was a vulnerable adult subject to a durable power of attorney for financial management. Melaas filed suit against Diamond Resorts "claiming undue influence, lack of capacity to consent, and unlawful practices under N.D.C.C. ch. 51-15, and requesting the district court declare her . . . timeshare agreement with Diamond Resorts [] not a valid and binding agreement." The District Court dismissed her complaint and granted Diamond Resort's motion to compel arbitration.

Original View on Reviewability of the District Court's Order Compelling Arbitration

On appeal, the Supreme Court of North Dakota holds that an order compelling arbitration is reviewable, overruling its decision in *Superpumper v. Nerland Oil Inc.*, 1998 ND 144, 582 N.W.2d 647 (1998). The Court held in *Superpumper* that "an order to arbitrate in an embedded proceeding is not appealable, even when the practical result of the order to arbitrate refers all claims to the arbitrator and terminates the proceedings before the court." The court distinguished between independent proceedings -- where the only issue is the request to compel arbitration -- and embedded proceedings -- where that request to compel arbitration is part of a "larger, substantive suit." The decision in *Superpumper* was at the time consistent with the federal courts' interpretation of appealability under the Federal Arbitration Act ("FAA").

Revised View

Since *Superpumper*, the federal interpretation of appealability under the FAA has changed. In both *Green Tree Fin. Corp. v. Randolph* and *Lamps Plus, Inc. v. Varela*, the Supreme Court held that "an order compelling arbitration and dismissing a party's underlying claims is appealable under the FAA." The Supreme Court in *Green Tree* "rejected the argument that an order compelling arbitration was only appealable in an 'independent' proceeding." As a result, the distinction between independent and embedded actions are no longer controlling when determining the appealability of an order compelling arbitration. Recently, most state courts have also held that "a party may appeal from an order compelling arbitration and dismissing the underlying action. Here, the North Dakota Supreme Court holds that "an order compelling arbitration and dismissing the underlying action is appealable [and] *Superpumper* is overruled to the extent that it conflicts with [the] decision in this case." Accordingly, the appeal was proper.

Courts Decide Challenges to the Existence of a Contract

Next, the Court determines whether the District Court erred when it compelled arbitration. The Court notes that there are two types of "validity challenges" raised against a contract. The first type specifically challenges the validity of the arbitration provision. The alternative validity argument challenges the "validity of the contract as a whole." Validity challenges to the contract as a whole must be decided by an arbitrator because an "arbitration provision is severable from the remainder of the contract." However, validity challenges that specifically target the arbitration provision are for the court to decide because it is "an issue which goes to the making of the agreement to arbitrate under § 4 of the FAA." In addition to the two types of validity challenges, courts have held that "challenges to the formation or existence of a contract, and not the contract's validity, are issues for the court to decide before arbitration can be ordered." A challenge to the existence of a contract is for the court to decide because it is an issue that goes to the "making of the agreement to arbitrate."

In the words of **Justice Lisa K. Fair McEvers**, "court[s] must decide whether a contract was formed before ordering arbitration if a party challenges the existence of the contract containing the arbitration agreement" on the basis that the party "did not have the capacity to consent to the agreement." The Court holds that Melaas's argument that the contract did not exist because she did not have the "capacity to consent to the timeshare agreement" was for the District Court to decide. Melaas's other claims--fraud, duress, menace, and undue influence--are for the arbitrator to decide because they challenge the validity of the whole contract and not specifically the arbitration agreement. The Court remanded the case and directed the district court to hold an evidentiary hearing to decide whether a contract exists.
*(ed: *This squib was authored by Ruben Huertero, a 3L at St. John's School of Law. He is the Executive Research Editor of the New York* International Law Review *and Associate Managing Editor of the* Commercial Division Online Law Report *at St. John's.*
***The Court also discussed Diamond Resort's argument that the case should be dismissed under the agreement's forum selection clause. The Court held that the argument is a separate issue from arbitration that should have been raised in the motion to dismiss, and is one that may be waived. However, the District Court must first determine whether the contract exists before deciding the forum selection clause issue and whether it was waived.)*
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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

FINRA DRS RELEASES NEW ARBITRATOR TRAINING VIDEO. FINRA Dispute Resolution Services ("DRS") has released a new Neutral Workshop video, *Tips for Virtual Hearings*, which was recorded **December 15, 2020**. FINRA Principal Analyst, **Stefanie Kendall**, moderates in the 35-minute video: "a discussion on conducting virtual hearings with arbitrator **Tracy Allen** and forum practitioners **Beverly Jo Slaughter** and **Sam Edwards**. They share best practices for effectively using exhibits and examining witnesses during a virtual hearing. The workshop also features a mock arbitration segment that demonstrates the hearing tips in practice and gives viewers a

peek inside a virtual hearing, as guided by FINRA Case Administrator, **Nora Sassounian**."
*(ed: *The workshops are posted several times a year. **This is a nice "nuts and bolts" video. We especially liked the discussion of handling witnesses and exhibits, and the practical tips for navigating Zoom, such as doing a trial run. ***The last five minutes, starting around marker 28:50, is the really excellent demo of a Zoom hearing.)*
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NO IN-PERSON HEARINGS AT AAA FACILITIES UNTIL JULY 1 AT THE EARLIEST. An AAA arbitrator passed along to us the following notice included in an *Arbitrator News Brief* distributed via a **January 27** email: "**AAA Hearing Facilities Closed Through the End of June**. The AAA is considering very carefully how and when we will reopen our hearing facilities. We take very seriously the matter of figuring out how best to navigate in-person hearings in the current environment. We are closely monitoring and adhering to the recommendations and guidance from federal, state, and local governments and health organizations. All AAA hearing rooms are currently closed through the end of June 2021."
*(ed: *We're not surprised. **Questions? Constituents are asked to contact their case manager or the local AAA office (contact info is at www.adr.org/officelocations.)*
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REMINDER: CHARTERED INSTITUTE OF ARBITRATORS NY-AREA LAW SCHOOL WRITING COMPETITION DEADLINE IS FEBRUARY 9. We reported in SAA 2021-02 (Jan. 21) that the New York Branch of the Chartered Institute of Arbitrators had announced the opening of its third annual *International Arbitration Student Article Competition*. The Competition is: "open to all JD, LLM and JSD students who are enrolled full-time for the 2020/21 academic year at any ABA-accredited law school located in the CIArb NY Branch's territory (i.e., in New York State, New Jersey or Connecticut)." Full details are contained in the Competition Rules. Here's a friendly reminder that the deadline for article submission is **February 9.**
*(ed: *Applications can be submitted online. Email writingcompetition@ciarbny.org with any questions.)*
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***CERTIORARI* SOUGHT IN GARGANTUAN INTERNATIONAL AWARD ENFORCEMENT CASE. BOTH PARTIES WERE INVOLVED IN BRIBERY SCHEME.** *Certiorari* is being sought in *Vantage Deepwater Co. v. Petrobras America, Inc.*, 966 F. 3d 361 (5th Cir. Jul. 15, 2020), a case we first covered in SAA 2019-21 (May 29). To review, at issue in the decision below, No. 4:18-CV-02246 (S.D. Texas 2019), was enforcement in the U.S. of a $734 million foreign Award. Although Petrobras raised several grounds for resisting the Award, the public policy exception was disposed of thusly. Said Judge **Alfred H. Bennett**: "Petrobras raised its contention that the contract was void and unenforceable – alleging it was procured through bribery – during the Arbitration. The Tribunal considered the bribery arguments and claims that the contract was void. Despite Petrobras's arguments, the Tribunal found that Petrobras ratified the

[contract]. Petrobras cannot now use the public policy defense to question the merits of the Final Award in an attempt to relitigate its bribery claims before this Court…. It does not violate public policy to enforce an arbitration award against parties who were alleged to have mutually engaged in misconduct during the formation of a contract, particularly when the contract was later ratified. Accordingly, Petrobras has not met its burden of showing that the Tribunal's contact interpretation violates some explicit public policy." The District Court's decision was later affirmed unanimously by the Fifth Circuit. The **January 25** Petition in No. 20-1032 identifies this question for review: "The Panama Convention and the New York Convention authorize the courts of Contracting States to refuse enforcement of an arbitral award where enforcement would violate domestic public policy. There is confusion among the circuits about how United States courts should treat determinations of the arbitrators on issues that bear on this defense. Should United States courts review de novo an arbitrator's conclusions on issues of law or mixed questions of law and fact bearing on the ultimate question of whether United States public policy should prevent enforcement of an arbitral award?"
*(ed: *As we said before, the trial and appellate decisions look right to us. **We would bet against* Cert. *being granted here. The issue is a bit one-off.)*
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SHADES OF *WAFFLE HOUSE*! NY STATE HUMAN RIGHTS AGENCY NOT BOUND BY EMPLOYEE'S ARBITRATION AGREEMENT. Nearly twenty years ago, the Supreme Court held in *EEOC v. Waffle House, Inc*., 534 U.S. 279 (2002), that the Equal Employment Opportunity Commission ("EEOC") was not bound to an employee's agreement to arbitrate disputes with the employer. Six years later in *Preston v. Ferrer*, 552 U.S. 346 (2008), the Court ruled that: "when parties agree to arbitrate all questions arising under a contract, state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA." In *Charter Communications, Inc. v. NY Division of Human Rights*, No. 20-cv-915, 2021 WL 37726 (W.D.N.Y. Jan. 4, 2021), the Court holds that *Waffle House* controls and that *Preston* is distinguishable: "For the reasons that follow, the court concludes that this case is more like *Waffle House* than like *Preston*. Ms. Derfert and Charter entered into the Arbitration Agreement under which they mutually committed to arbitrate all employment-related claims, including discrimination claims. The Agreement recognized the possibility that Ms. Derfert might choose to pursue a claim before an administrative agency, but stipulated that any such proceeding 'on the merits or for damages will be subject to arbitration.' Since Ms. Derfert and Charter agreed to arbitrate such issues, 'state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA.' But such 'jurisdiction' refers to jurisdiction '*to decide* an issue that the parties agreed to arbitrate.' The FAA does not supersede an agency's authority to act 'as prosecutor, pursuing an enforcement action in its own name or reviewing a discrimination charge to determine whether to initiate judicial proceedings'" (citations omitted).
*(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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UNANIMOUS ALABAMA SUPREME COURT: TWO-YEAR DELAY ASSERTING ARBITRATION RIGHTS AND SUBSTANTIAL PARTICIPATION IN LAWSUIT CONSTITUTES WAIVER. Waiver of the right to compel arbitration typically results where a party to an arbitration agreement substantially invoked the litigation process, resulting in prejudice to the other party. That was pretty much the situation in *The Health Care Authority for Baptist Health v. Dickson*, No. 1190179 (Ala. Jan. 15, 2021), where a unanimous Alabama Supreme Court upholds the Trial Court's waiver ruling. Says the Court: "Dickson commenced the lawsuit in May 2017 -- more than two years before the HCA entities filed their motion to compel arbitration in June 2019. Subsequent to the filing of the complaint, the HCA entities filed a motion to dismiss; supported the attempt by BHI to be dismissed from the action …; filed motions to stay discovery; opposed Dickson's nonparty subpoenas; submitted briefs to and participated in hearings in the Montgomery Circuit Court; successfully had the case transferred to the trial court; participated in motion practice and hearings in the trial court; answered Dickson's complaint on the merits, and, as noted, did not invoke arbitration; conducted and participated in class related discovery, including noticing Dickson's deposition; and joined with Dickson's counsel to prepare a class discovery/certification schedule. Indeed, the HCA entities' actions during the more than two-year period between the filing of the complaint and the filing of their motion to compel arbitration were 'inconsistent with any desire that [they] may have had to resolve the case by arbitration'" (internal citation omitted; brackets in original). As for the required element of prejudice, the Court holds: "In this case, Dickson incurred substantial time and expense in opposing the HCA entities' motion to dismiss or, alternatively, for a change of venue and in responding to their opposition to serving subpoenas on several nonparty witnesses, expenses that Dickson would have been spared had the HCA entities sought to invoke their right to arbitration earlier."
*(ed: *Seems right, as there were in the Court's view plenty of opportunities for arbitration rights to be asserted. **The Court notes, however, that: "the HCA entities' failure to include the defense of arbitration in their answer, alone, does not compel the conclusion that they have waived their right to compel arbitration.")*
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NFA INVESTOR NEWSLETTER HITS THE ELECTRONIC NEWSSTAND. The National Futures Association ("NFA"), which operates a dispute resolution forum, issues a periodic *Investor Newsletter* aimed at commodity futures investors. It's designed to keep investors up-to-date on recent NFA initiatives, upcoming events, and resources that investors may find helpful. In the first *Newsletter* of 2021, distributed under an email dated **January 21, 2021**, NFA lists several highlights which we explore in the order presented. **NFA's Online Investor Resources** states: "NFA offers a variety of online investor education materials intended to arm the public with the skills needed to protect themselves from fraud and safely participate in the derivatives markets. Investors can find the following educational materials, along with other services, on NFA's website: *Investor Education & Resources* -- Access materials that explain the purpose of the derivatives industry and the role NFA plays in ensuring market integrity. *Webinars* --

View the latest free webinar hosted by the CFTC and NFA entitled, *Investor Education: Understanding the Investing World and How to Protect Yourself*. *BASIC* -- Search a comprehensive database of CFTC registration, NFA membership, disciplinary and financial information regarding futures, retail forex firms and salespeople. *Arbitration Services* -- Learn about NFA's affordable and efficient arbitration program that helps customers and Members resolve futures-related and forex-related disputes." **Learn More About the Derivatives Markets** features a staff-written article, *A Clear Look at the World of Derivatives.* The third highlight, **Investor Protection**, features an SEC Investor Alert, *Investment Scam Complaints on the Rise.* As usual, the *Newsletter* signs off with a list of the quarter's enforcement actions, with links to final decisions in each, complaints that were issued, and final orders in registration cases. The *Newsletter* Webpage also contains: 1) a link to BASIC; 2) an online complaint form; and a link to past issues of the *Newsletter* and a subscription form.
*(ed: *An informative issue, as usual. **The enforcement actions database allows searches by subject matter, such as arbitration.)*
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REMINDER: ANNUAL CITY BAR ASSOCIATION'S SECURITIES & ENFORCEMENT INSTITUTE IS FEBRUARY 26 AND MARCH 19. As reported in SAA 2021-02 (Jan. 21) the Association of the Bar of the City of New York will be holding its *9th Annual Securities & Enforcement Institute* via half-day live Webcasts on **February 26** and **March 19**. The faculty features several prominent securities litigators, senior in-house counsel at major financial institutions and corporations, nationally recognized trial lawyers, jury consultants, and economists who will conduct eight panels, the Day 1 and Day 2 Agendas reveal. The upcoming February 26 program: "will feature panels of outstanding practitioners. The securities litigation panel will address *Cyan, Goldman* and several other important cases that will have a meaningful impact on future practice. The SEC panel which will include the outgoing co-head of enforcement of the SEC, **Stephanie Atavian**, and the outgoing head of enforcement of the CFTC, **Jamie MacDonald**, who will comment on recent developments as well as changes that may occur as a result of the new administration. A third panel will be made up of top practitioners who are experienced in Delaware practice and will comment on what are the most important issues in current litigation. We are also delighted to welcome back Vice Chancellor **Joseph R. Slights** of the Delaware Chancery Court for this panel." The program offers CLE credit from California, Connecticut, New Jersey, and New York.
*(ed: *Last year, this event was held in person for one full day. **The Webinars will be held from 11:30 a.m. to 5 p.m. on February 26, and noon – 4:30 p.m. on March 19. ***Registration ranges from $249 for government/nonprofit/academic/judiciary who are Association members to $649 for nonmembers and can be done online.)*
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ICC SEEKING LAW SCHOOL APPLICANTS FOR VIS PRE-MOOT. The International Chamber of Commerce ("ICC") on **January 28** posted a notice encouraging law schools to participate in the first-ever virtual *ICC Vis Pre-Moot* taking place **March 18-19.** The event's purpose is to help teams prepare for the *28th Willem C. Vis*

International Commercial Arbitration Moot in late **March.** The notice states that the Pre-Moot will enable teams to: "Measure up against and interact with other students from a wide range of different jurisdictions and legal systems; Receive comments from and interact with arbitrators from different professional, cultural and legal backgrounds; Practice and improve their advocacy skills; and Refine and adjust their oral arguments just before participating in the virtual Vis Moot of Vienna." Twenty-eight teams will be selected to compete. Teams must include at least 2 students, and only one team per school may apply. The ICC is also seeking arbitrators to assist in the Pre-moot.
*(ed: *The deadline for law school applications, which are done online, is February 7. **Contact iccpremoot@iccwbo.org for further information. ***Last year's* Vis Moot *was cancelled due to the pandemic.)*
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QUICK TAKES: CASES AND AWARDS WORTH READING

***Shelton v. Comcast Corp*., No. 20-1763 (E.D. Pa. Jan. 21, 2021)**: The Court compels arbitration of a non-signatory's Fair Credit Reporting Act claim, "premised on his allegations that Comcast checked his credit report without a permissible purpose." On what basis? Says Judge **Nitza I. Quiñones Alejandro**: "In light of the undisputed record evidence, this Court finds that Plaintiff actively sought and obtained benefits provided pursuant to the Subscriber Agreement, such that he is equitably estopped from avoiding the Arbitration Provision contained therein."

***Garcia v. Haralambos Beverage Co.*, No. B296923 (Calif. Ct. App. 2 Jan. 4, 2021)**: "Substantial evidence supported the trial court's finding that defendant's delay impaired plaintiffs' ability to realize the benefits and efficiencies of arbitration. During the two-year period of litigation, defendant agreed to participate in classwide mediation, which resulted in plaintiffs incurring additional expenses to retain experts to assess defendant's ability to pay a classwide settlement. Plaintiffs also expended time and resources propounding and pursuing classwide discovery, which was useful for their class claims, but not for their individual claims…. Finally, plaintiffs expended resources in filing a motion to compel further discovery responses and for attorney fees. On this record, substantial evidence supported the trial court's conclusion that plaintiffs were prejudiced by defendant's unreasonable delay in seeking arbitration of plaintiffs' individual claims."

***Gerstenbluth v. Fidelity Brokerage*, FINRA ID No. 19-00913 (Jersey City, NJ Jan. 12, 2021)**: In a rare explained Award in a small claim arbitration involving a $40,000 margin call liquidation, the sole Arbitrator finds: "Testimony clearly demonstrated that as a result of the volatility of the market on that day and the Claimant's portfolio concentration, as well as the heavy trading of stocks on that day, the value of Claimant's stock was dropping significantly. This impacted the Claimant's equity in the account. The Respondent properly concluded that a sale of Claimant's stocks needed to be effectuated immediately. The Arbitrator [finds] that Respondent, pursuant to the authorization given to it under both the Customer and Margin Account Agreements, acted reasonably in issuing the margin call on December 26, 2018 and, after considering all relevant factors

affecting the market on that day, acted reasonably in making a determination to sell 870 shares from the Claimant's margin account."
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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Solaiman, Barry, *Mediating Legal Disputes: Implementing The Singapore Convention in The Middle East and Central Asia*, Journal of Social Research and Behavioral Sciences (Dec. 5, 2020): "The signing of the Singapore Convention in 2019 represents a significant international development in the resolution of disputes. For the first time, businesses will benefit from legal certainty surrounding the enforcement of mediation agreements. Such agreements now have the potential to propel in importance alongside arbitration agreements which have typically been the mainstay for commercial dispute settlements. Countries in the Middle East have been among those at the forefront of the ratification process in 2020, cementing their pivotal role in this development. This article argues that countries in Central Asia and the Middle East ought to take the lead in signing the Convention and ratifying it. It is also proposed that there should be a common and robust legislative framework in the countries analyzed. By signing the Convention and creating the necessary legal structures for successful implementation, businesses can derive greater legal certainty in the region to the benefit of regional trade."

***Justices Dismiss Arbitrability Dispute*, SCOTUSBlog (Jan. 25, 2021)**: "The Supreme Court on Monday issued a one-sentence order revoking its decision to review *Henry Schein Inc. v. Archer and White Sales Inc.* as 'improvidently granted.' After an argument at which few of the justices sympathized with the position of Archer and White Sales, the dismissal is a resounding victory for Archer and White, as it leaves in place the decision of the U.S. Court of Appeals for the 5th Circuit that a federal district court – rather than an arbitrator – should decide whether the dispute with Henry Schein is subject to arbitration. Because the district court already held once that the case is not arbitrable, Archer and White has to like its chances back in that forum."

***Finra Bars Ex-Merrill Lynch Broker Accused of Fleecing Ex-N.H. Governor*, Financial Advisor Magazine (Jan. 26, 2021)**: "The Financial Industry Regulatory Authority has barred a former Merrill Lynch broker who was at the center of a $26.25 million settlement with New Hampshire over allegations including unauthorized and excessive trading to the state and the account of the state's former governor and his family."

***Let's Schein Again!* CPR Blog (Jan. 26, 2021)**: "The International Institute for Conflict Prevention and Resolution presents a CPR Speaks blog discussion of the 1/25/2021 U.S. Supreme Court *per curiam* decision dismissing *Henry Schein Inc. v. Archer and White Sales Inc.*, No. 19-963, and a same-day order declining to hear *Piersing v. Domino's Pizza Franchising LLC*, No. 20-695. Alternatives to the High Cost of Litigation Editor Russ Bleemer hosts Prof. Angela Downes, University of North Texas-Dallas College of Law, and arbitrator-advocates contributors Richard Faulkner, also of Dallas, and Philip J. Loree Jr. in New York. The panel returns to CPR Speaks and YouTube to analyze the

Monday *Henry Schein* dismissal – a one-line decision – just a month after the Court heard oral arguments on the issue of how a contract carve-out removing injunctions from arbitration affects the delegation of the entire matter to arbitration."

Fordham Wins 2021 ABA Arbitration Competition Crown, **ABANet (Jan. 27, 2021)**: "This year's topic was Contracts and Warranties…. The Arbitration Competition promotes greater knowledge in arbitration by simulating a realistic arbitration hearing. Participants prepare and present an arbitration case, including opening statements, witness examinations, exhibit introductions, evidentiary presentations, and summations."

Class-action Lawsuit Filed Against Robinhood Following Outrage over GameStop Stock Restriction**, CNN.com (Jan. 29, 2021):** "A Robinhood customer filed a class-action lawsuit against the stock-trading app Thursday after the company barred traders from buying shares of GameStop promoted by WallStreetBets, a popular Reddit group for investors. The lawsuit, filed in the Southern District of New York, claims that Robinhood's actions rigged the market against its customers…. The company imposed the stock-trading restrictions Thursday citing 'recent volatility.' The company said in a blog post it will only allow users to close out their positions in those stocks, which include GameStop (GME), AMC (AMC), Bed Bath & Beyond (BBBY), and Nokia (NOK)."

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DID YOU KNOW?

THERE CAN BE "SNOW DAYS" FOR VIRTUAL HEARINGS. The monster snowstorm that rocked the northeast this week got us to thinking: are there snow days in dispute resolution even in this era of virtual hearings -- when many participants are home anyway? The short answer is "perhaps." When kids who might otherwise be at school get the day off and are home, arbitration and mediation participants (parties, representatives, witnesses, and neutrals) may find it difficult to be part of a Zoom hearing. There's also the possibility of power and internet outages. And then there's shoveling…. The best bet in our view is to check with the administrator on the status of a virtual hearing.

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Editor's Note & Disclaimer: While we undertake considerable efforts to present information in this publication in a fair and accurate manner, we caution that readers should access referenced material themselves as the best source. Our analyses make liberal use of links, and we offer courtesy copies of materials not on the Internet. Similarly, readers should not rely solely upon our summaries in making legal decisions or consider our commentary to be rendering legal, accounting, or other professional advice or service. If legal advice or other expert assistance is required, the services of a competent professional person should be sought. — *adapted from the Declaration of Principles jointly adopted by a Committee of the American Bar Association and a Committee of Publishers and Associations.*

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