SECURITIES ARBITRATION ALERT

SECURITIES ARBITRATION ALERT 2021-07 (2/25/21)

George H. Friedman, Editor-in-Chief

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- ***SEC Awards Almost $3 Million Total in Separate Whistleblower Awards*, www.SEC.gov (Feb. 19, 2021)**

DID YOU KNOW?

- **FINRA DRS Publishes Prior-Year Stats Back to 2012**

A NEW FEATURE ARTICLE, A GUEST SQUIB FROM AN OLD FRIEND AND KEEP YOUR EYES OPEN FOR A RENEWAL NOTICE. *We kick off this* Alert *with a new feature article,* Zoom Zooming Into Mediations in COVID-Times, *by* Alert *Editorial Board member James Yellen. In it, he reviews the changes caused by the pandemic, such as cancellation of in-person arbitrations and the embrace of virtual hearings, and takes us through the virtual hearing process through the eyes of a mediator. Our friend Rick Ryder returns for a guest squib analyzing the most recent AAA consumer and employment stats, and describing some changes. Speaking of changes,*

subscription renewal notices will be going out soon, with yearly renewals effective March 1. Notices will be sent to all subscribers, so please be sure this info gets to the right person in your operation. Here's some basic subscription pricing information for the weekly online Alert*: Individual -- $480 a year (48 issues); Group -- $480 for first subscriber and $100 for each additional. And we have our usual collection of Squibs, Short Briefs, Quick Takes, and Articles of Interest. In other words, another jam-packed new issue of the* Alert*!*

FEATURE ARTICLE

ZOOM ZOOMING INTO MEDIATIONS IN COVID-TIMES, *by James Yellen.* The FINRA dispute resolution market largely dried up as COVID-19 hit major cities starting in March 2020. While employment and broker-dealer disputes in 2020 were way up (plus 31%) and constituted almost half (47%) of all new arbitration filings, customer complaint filings for 2020 declined by 12 percent. In his January 2021 *NYSBA Journal* article, *Zoom & Greet!" 2021's Way To Meet, Network and Socialize at Annual Meeting and Beyond*, author Michael Fox reported that the number one downloaded free app in 2020 according to Apple was Zoom. One year earlier, in 2019, Zoom did not even grace the top twenty. There is no doubt that mediators contributed to that growth, as the advantages of Zoom mediation have become ever more apparent since COVID lockdowns began in March 2020. Using his real-life experience as a mediator, the author in this article demonstrates why virtual mediation is a useful tool that should persist even after the pandemic eases (footnotes omitted). *Read more…*
(ed: James Yellen is the Principal of Yellen Arbitration and Mediation Services, Co-Chair of the N.Y.S.B.A. Securities Law and Arbitration Committee, and serves as a member of the Board of Editors of the Securities Arbitration Commentator. Before starting his mediation practice, Yellen was the Executive Director and Senior Attorney in the Morgan Stanley Law Division, where he tried and supervised major arbitration and regulatory matters for the firm. He is an active lecturer and panel participant in securities arbitration, mediation, and legal writing, and served as an Adjunct Professor in the First Year Legal Writing Program at Fordham University School of Law for the past thirty years.)
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SQUIBS: IN-DEPTH ANALYSIS

AAA STATS, 4th QTR. 2020: CONSUMER & EMPLOYMENT CASE INFORMATION UPDATES. ***(ed: AAA Award Data is updated quarterly by the American Arbitration Association. This analysis of the latest update is provided by Rick Ryder, President of SAC, Inc., and by SAC's ARBchek - securities arbitration's first arbitrator evaluation service.)*** The American Arbitration Association ("AAA") has been publishing information about individual consumer and employee arbitration Awards since **2004**. The AAA disclosures began as a legal requirement, imposed by various states, starting with California and Maryland, but soon, the Association began disclosing the required information about all the relevant Awards, regardless of the hearing location. AAA has also added fields along the way, to enhance the value and completeness of the published data. In this latest quarterly report of AAA's "Consumer and Employment

Arbitration Statistics," AAA made additional changes to the format of the Report, by adding features that permit a collapsing of the fields for ready column comparisons and re-spacing of column sizes so that print within cells can be more easily read.

The CEAS Report issues quarterly in Excel format with an available "Report Legend" that explains each of the 30-plus fields of provided information. As a caution, one AAA protocol that complicates our analytic efforts to a degree calls for separate accounting for each claimant and respondent in a case, thereby leading to multiple records for a single case and the danger of double-counting. Only a hundred-plus cases overall and only 271 records among the 3,258 records covering the fourth quarter are affected. Of the "Financial Services" cases that went to Award, only one matter in the fourth quarter was affected by these multiple case records; 12 of the "Awarded" cases in all Dispute SubTypes are affected. We'll deal with this dynamic as we proceed.

Case Classifications & Totals -- 4th Quarter 2020 Overview

For our survey, we gathered statistical results from the Award information published by AAA for the final quarter of **2020**. This is the freshest information available from AAA and offers a view of the size of AAA's consumer and employment programs. From **October to December 2020**, AAA lists in its public Report 3,258 rows of information concerning more than 3,000 resolved cases. These cases are resolved through various outcomes, including settlements, dismissals, withdrawals and award orders. Unlike FINRA reports, AAA provides case information about each settlement, albeit *not* the amount of the settlement. Many times, though, the arbitrator has been appointed prior to settlement and her/his name is disclosed in those instances. This is true of all dispositions, an attribute that allows an evaluation of an arbitrator's total experience at AAA, at least with these types of disputes. The name of the Consumer's attorney is disclosed in all disposition situations, a fact conducive to "networking" the arbitrator.

The main Types of Dispute listed are "Consumer" and "Employer." Among the SubTypes of both of those main dispute types is "Financial Services." Within the 627 case records that are classified as "Financial Services" disputes, 533 are listed as Consumer and the other 94 are called "Employer" cases. Actually, 85 of the 94 "*Employer*" cases were initiated by the "*Employee*" party and only the remaining nine by the "Business." Among the other business groups identified in the case records are "Retail," "Energy," "Restaurant/Food," "New Home," "Renovation/Addition," "Automotive," "Healthcare," "Telecommunications," "Construction" and more. We'll stick to the "Financial Services" category, which makes up about a fifth of the whole.

Consumer & Employee Dispositions – Financial Services

"Financial services" disputes cover a much wider swath than the disputes we see at FINRA and the "Employment" or "Employer" cases generally include banks, more than broker-dealers and RIAs. All but two of the 533 Consumer case records show the "Consumer" as the initiating party, so AAA, like FINRA, clearly does not serve as a collection arm for the Financial Services industry. Most of the Consumer cases settled, according to the AAA (381/533 or 72%), not dissimilar to what we see in FINRA's

monthly statistical reports. AAA has had a moratorium on live hearings, too, going back to the early months of 2020. The Report indicates that 47 of the 533 "Financial Services" records (510 *cases*) reflected decisions by the arbitrator, but no indication is given whether the matter was heard telephonically or virtually; a distinction is made between "in-person" and document only matters.

In FINRA's January 2021 Report, we noted that the percentage of decided cases has now fallen to single digits, versus a more traditional low 20s percentage; when one allows for multiple-record cases, AAA's decided-case percentage has also fallen to single digits, at least for Financial Services cases involving the public. We found 17 Customer "wins" (Award = >0) among the 45 individual Customer decisions. That left only two "Awarded" matters on the Employer side, within the "Financial Services" category, and they were both "wins" for the initiating Business: one for $32,292 and the other for $315,642.

Consumer "Awarded" Cases

Reviewing the 45 "Awarded" case records involving Consumers and the Financial Services sector, we found only one instance where an arbitrator served in more than one case. Forty-four arbitrators for 45 cases suggests a staff emphasis on a policy of diversity in appointing neutrals to cases. This serves a number of goals, not the least of which is mitigating perceived arbitrator conflicts with "repeat players" and avoiding scheduling conflicts. It also shows the strength and range of the AAA Commercial Arbitration roster. Eighteen of the 44 arbitrators were women (by name), six were evidently retired judges, and one used an academic prefix ("Professor"). Almost all of the listed neutrals displayed an "Esq." or "JD" after their names. AAA remains tied to a recruiting practice that favors lawyers, it seems; and in this way, its roster differs dramatically in philosophy and policy from the FINRA neutral roster. That approach by AAA also promises different dynamics in the pre-hearing management and hearing sides of the case.

The dollar-size of the claims by consumers were all over the lot. Most were small -- 33 would merit small claims treatment at FINRA -- but some asked six digits and several fell into the $1 - $3 million frame. Arbitrator fees were commonly either $1,500 or $2,500, with a handful in the $6,000 - $13,000 category. Virtually all were charged to the Business, no matter what the outcome. The awarded amounts for the 17 "wins" generally fell under $12,000; United Capital was the respondent in the second largest "Awarded" case, where a claim of $318,392 by the Consumer resulted in an award of $266,102. PayPal incurred the largest Consumer award in the "Financial Services" category: $1.5 million on a claim of the same amount.

The Full Year at AAA

More than 11,000 customer and employer matters were processed at AAA during the full length of 2020. We estimate there were about 500 "duplicate" or multiple records, so let's say results in some 10,600 cases from 2020 have been disclosed through the quarterly reports. More than 2,000 of those cases fall into the "Financial Services" category and the dispositions pretty much align with the dispositions for all cases generally. In other

words, about 70-75% of the cases settled and approximately 10% or less were decided by arbitrators. We tallied 188 Financial Service Awards: 171 Consumer Awards and 17 Employer Awards. By our count, 69 of the 171 Consumer Awards resulted in a monetary award for the customer -- a 40% "win" rate. The total amount awarded tallied $2.6 million -- an average award of about $37.000. There were only six wins among the 17 Awards on the Employer side; the largest monetary award was assessed against Athene Asset Management -- a $1 million claim that drew an award of $169,605. For the year as a whole, turnaround time for the "Financial Services" cases averaged 228 days; those that went the distance and resulted in an award took 310 days on average *(R. Ryder: *Take a look for yourself at AAA's Consumer Arbitration Statistics. While the majority of the cases involve non-securities disputes, considerable arbitrator overlap exists between FINRA and AAA, making this an excellent secondary source of arbitral activity when performing FINRA arbitrator evaluations. Checking for AAA Awards is a great way to evaluate a candidate who has no FINRA Awards. **Kudos to AAA staff for recognizing that parties use this valuable Award information to review arbitrator Award histories; these recent improvements to the Report reflect that concern. ***Securities arbitration disputants are making greater use of the AAA forum, especially in the case of RIAs and those locked in employment controversies. ***The downloadable Report contains data for five years; SAC has the earlier reports on file going back to 2005 and provides Arbitrator Summary Reports in both Excel and PDF formats for a very low fee.)*
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THE DIFFICULTY IN VACATING AN ARBITRATOR AWARD – EVEN IN CALIFORNIA. ***A California Court of Appeal affirms a decision to confirm an arbitration award, and demonstrates why vacating an award is difficult.*** *Subaru of America, Inc. v. Putnam Automotive Inc.*, No. A159686 (Calif. Ct. App. 1 Feb. 2, 2021) involves an attempt to vacate an Arbitrator's award based on arguments that the Arbitrator exceeded his powers because he lacked federal and state subject matter jurisdiction; the Arbitrator rendered an award even though the agreement to arbitrate is illegal; and the award was contrary to public policy.

The Satellite Service Agreement and the Burlingame Dealer Agreement
On March 25, 2009, **Putnam Automotive Inc.** and **Subaru of America Inc.** entered in into an agreement titled Subaru Dealer and Standard Provisions Agreement ("Burlingame Dealer Agreement"). The Burlingame Dealer Agreement authorized Putnam to sell and service motor vehicles at the Burlingame dealership. The parties also entered into a Dealer Satellite Service Facility Agreement (Satellite Service Agreement), which provided for service operations only at the facility in San Francisco. The Satellite Service Agreement contained an arbitration agreement and was only operative for five years but could be extended.

On September 23, 2013, Subaru exercised its right to extend the Satellite Service Agreement signed in 2009. All provisions in the previous agreement remained in effect. Thereafter, Putnam attempted to convince Subaru to relocate the Satellite Service Facility. However, on November 6, 2017, Subaru rejected the proposed relocation and

told Putnam that it would not renew the Satellite Service Agreement when it expired in 2019.

On November 13, 2017, Putnam filed two administrative protests with the New Motor Vehicle Board ("Board"): 1) a termination protest under Vehicle Code Section 3060(a); and 2) a modification protest under Section 3060(b). On March 14, 2018 Subaru sought an order to compel arbitration pursuant to the arbitration provision in the Satellite Service Agreement. On June 22, 2018, the trial court granted the petition to compel arbitration but did not grant the request to compel Putnam to dismiss the Board protests.

On April 25, 2019, the Arbitrator held that Subaru was required to show good cause for terminating the Satellite Service Agreement pursuant to Sections 3060 and 3061 because the agreement was a franchise. On October 1, 2019, the Arbitrator held that Subaru met its burden to show good cause. The trial court confirmed the arbitration award on November 15, 2019 despite Putnam's opposition. On January 8, 2020 Putnam appealed the judgment confirming the arbitration award.

The Fairness Act

The Court of Appeal holds that the Arbitrator *had* subject matter jurisdiction under Federal Law. Under the *Fairness Act*, (15 U.S.C. section 1226(a)(2): "whenever a motor vehicle franchise contract provides for the use of arbitration to resolve a controversy … arbitration may be used …. only if after such controversy arises all parties … consent in writing to use arbitration to settle such controversy." For a contract to be considered a motor vehicle franchise contract under Section 1226(a)(1) a motor vehicle manufacturer must sell the vehicles to another person for resale and authorize the person to repair and service the vehicles. The Arbitrator based his decision on a provision in the Satellite Service Agreement, which states that "[t]he Parties agree that this Agreement is a separate, negotiated contract apart from the [Burlingame] Dealer Agreement, and is supported by consideration separate and apart from the [Burlingame] Dealer Agreement." The Court of Appeal affirms the Arbitrator's decision that: "the two agreements were not intended to constitute a single contract" and thus, the Satellite Service Agreement is not a motor vehicle franchise contract under the *Fairness Act*.

Sections 3060 and 111713.3 Under California Law

The Court also holds that the Arbitrator did not exceed his powers under California Law. Under Section 3060(a)(1), a franchisor must give the Board and the franchisee written notice prior to terminating a franchise. Additionally, a franchisor must have a good cause for termination under Section 3060(a)(2). Furthermore, Section 11713.3(*l*) makes it unlawful "[t]o modify, replace, enter into, relocate, terminate, or refuse to renew a franchisee violation of Article 4 (commencing with Section 3060)." Putnam had argued that these provisions prohibit arbitration because they grant the Board exclusive jurisdiction. Despite Putnam's argument, the Appeal Court upholds the trial court's determination that Section 11713.3 does not prohibit arbitration. The Satellite Service Agreement was entered into in 2009, when a previous version of Section 11713.3 was in effect. Section 11713.3(g) of the version that governed in 2009 stated that "[t]his

subdivision does not, however, prohibit arbitration before an independent arbitrator." As a result, a controversy under an agreement to arbitrate would not need to be referred to the Board. Additionally, the current version of Section 11713.3(g)(3)(D) states that "[t]his subdivision does not ... affect the enforceability of any contract entered into on or before December 31, 2011." As a result, the Court holds that under Sections 3060 and 11713.3, arbitration agreements are enforceable. The Court also notes that Section 11713.3 was meant to track the language of the *Fairness Act*. As already discussed, the Fairness Act has a narrow exception to arbitration for motor vehicle franchise contracts. The Court holds that Section 11713.3(g)(1)(D) is inapplicable to the Satellite Service Agreement because it is not a motor vehicle franchise contract.

Illegality

Next, the Court of Appeal holds that the agreement to arbitrate was valid and rejects Putnam's arguments under Section 11713.3 subdivision (g)(1)(b) and (c). Section 11713.3 subdivision (g)(1)(b) prevents a manufacturer or distributor from "Limit[ing] or constrain[ing] the right of a dealer to file, pursue, or submit evidence in connection with a protest before the board." The Court agrees with the trial court's determination that this provision only applies if there is a "protest before the board." Here, there was no protest before the board. Additionally, Section 11713.3 subdivision (g)(1)(c) prohibits a manufacturer from "[r]equir[ing] a dealer to terminate a franchise." The Court holds that this provision does not make the enforcement of the arbitration agreement illegal because the statute as a whole "allows disputes to be resolved by arbitration."

The Arbitrator's Decision Was Not Contrary to Public Policy

The Court also holds that the Arbitrator's decision was not contrary to the purposes of either the *Fairness Act* or the *New Motor Vehicle Board Act*. The purpose of these acts is "to protect motor vehicle dealers from unfair trade practices by manufacturers . . . and to ensure that dealers have opportunity to exercise their rights before specialized state boards." However, the Satellite Service Agreement does not fall within these protections because it is not a motor vehicle franchise contract. The Court decides not to extend the Fairness Act and section 11713.3's "narrow exception" to the Satellite Agreement. In the words of **Presiding Justice Anthony J. Kline**, "We are not permitted to second guess Congress's decision to create the Fairness Act's narrow exception to the FAA, which by its terms does not apply to the Satellite Service Agreement." The Court holds that the Arbitrator's decision was consistent with the Fairness Act and the New Motor Vehicle Board Act.

*(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 denies Putnam's due process argument because Putnam failed to show its rights were substantially prejudiced by the asserted lack of notice. ***The Court also rejects Putnam's challenge to the arbitrator's finding that Subaru acted with good cause, calling the argument an impermissible attempt to question the factual and legal findings of the Arbitrator.)*

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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

FINRA DRS POSTS STATS THROUGH JANUARY: A ROUGH START TO THE YEAR. FINRA Dispute Resolution Services ("DRS") posted case statistics through **January**, with key metrics starting the year well below 2020's numbers. In brief the headlines are: 1) overall arbitration filings through January – 211 cases – are down 25%; 2) customer claims are down 12%, similar to last year; 3) industry disputes are *down* a whopping 41%, a stark reversal from last year's 31% increase; and 4) for the fifth month in a row, pending cases declined. Overall arbitration turnaround times were 14.6 months, with hearing cases now taking less than a year (11.4 months); the latter stat was 14.7 months at the end of 2020. There were just 29 mediation cases in agreement, a 48% decrease. The settlement rate remains extremely high at 87%. There are now 8,200 DRS arbitrators, 3,872 public and 4,328 non-public. Last, FINRA's "Virtual Arbitration Hearings" category shows that, since FINRA started cancelling in-person hearings almost a year ago, 177 cases were conducted with one or more hearings via Zoom (71 customer and 106 industry cases). There were 180 joint motions for virtual hearings (59 customer and 121 industry cases).

*(ed: *Rough start to the year, but we caution readers that one month does not constitute a trend. **The "Previous Year-End Dispute Resolution Statistics" page has been updated to reflect full-year 2020. ***As the chart below shows, the last five months have shown reductions in pending cases, reflecting a 350+ case decline from last year's cumulative high water mark of 5,415 open cases. We also note that hearing case processing times have dropped significantly. Our theory remains that, with the resumption of in-person hearings remaining an elusive goal, more parties are coming to embrace the virtues of virtual hearings.)*

Month	Open cases	Change	Cum
Mar	4,781	-	-
Apr	4,824	43	43
May	4,897	73	116
June	4,958	61	177
July	5,062	104	281
August	5,415	353	634
Sep	5,392	-23	611
Oct	5,304	-88	523
Nov	5,205	-99	424
Dec	5,138	-67	357
Jan 2021	5,047	-91	266

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FINRA BOARD MEETS VIRTUALLY NEXT WEEK: NO AGENDA YET. FINRA's Board of Governors will next meet virtually **March 3 – 4**; thus far, there is no published Agenda. As usual, we will report on whether the eventual Agenda reflects any dispute resolution-related items, and we will of course follow up after the meeting results are posted. The schedule for the rest of the year is: **May 18 – 19; July 21 – 22; September 23 – 24;** and **December 1 – 2.** We imagine these meetings will continue to be virtual until conditions permit them to be held in-person.
(ed: We'll tweet any news as soon as we have it and will cover the topic in the next Alert.*)*
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ROBINHOOD RESPONDS TO SENATOR WARREN: "OPEN TO REVIEWING" PDAA POLICY. In the wake of the uproar resulting from trading restrictions it imposed during the GameStock short squeeze, online platform Robinhood Financial's Chief Executive Officer **Vladimir Tenev** received a **February 2** letter from **Senator Elizabeth Warren** (D-MA). Among other topics, the Senator stated that she was: "troubled by Robinhood's inclusion of forced arbitration clauses in its customer agreement, which suggests that investors will not have sufficient opportunity to pursue their claims and seek relief" (footnote omitted)…. Secretive arbitration processes deny customers a fair hearing, undermine public accountability, and hamper efforts to assemble a thorough and complete understanding of events. Investors harmed by Robinhood's trading restrictions should be able to argue their case in court, rather than in closed-door proceedings that are too often rigged against claimants." Senator Warren also posed several questions about Robinhood's arbitration policy and experience. In his response, dated **February 12**, the firm's Deputy General Counsel **Lucas Moskowitz** reported that it had 24 pending arbitrations and that one case was concluded by Award in 2020, in the firm's favor. He added that Robinhood: "is open to reviewing its use of arbitration and will continue to be guided by what is in its customers' best interests with respect to resolving customer complaints."
*(ed: *Copies of Robinhood's reply were sent to Acting SEC Chair Allison Herren Lee and FINRA CEO Robert Cook. **As usual, we chafe at the assumption that arbitration is unfair and that lawsuits are a panacea.)*
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WARREN TO FINRA'S COOK: LOOK INTO MANDATORY INVESTOR ARBITRATION. Speaking of Senator **Warren**, Robinhood, and arbitration, a **February 16** letter from the Senator to FINRA President and CEO **Robert Cook** in part asks the Authority to undertake a review of its arbitration program. Under the header **FINRA Must Review Forced Arbitration Agreements By Broker-Dealers Like Robinhood**, she says: "Furthermore, in reviewing how forced arbitration clauses may have been used to hurt investors, FINRA must also review its own arbitration practices and provide the public with information and data on arbitration outcomes, arbitration awards, the demographics of arbitrators, and whether wronged investors actually receive their arbitration awards. I am deeply concerned about reports that indicate that FINRA's pool of arbitrators lacks diversity, and that in 'the five years from 2012 through 2016, a total

of 268 awards (27 percent of the cases where investors were successful) or $199 million in awards (29 percent of total damages awarded to investors) have gone unpaid …. I urge you to consider these issues seriously and take immediate action to provide the public with information about arbitration before FINRA" (footnotes omitted). The Senator's letter also poses these specific questions (*ed: stated* verbatim): Please explain FINRA's current mandatory arbitration rules and practices, including information about FINRA's pool of arbitrators and FINRA's requirements for payment of arbitration awards. Are Robinhood's terms consistent with existing rules and practices? Does FINRA obtain records or notice of Robinhood's settled arbitration cases? If not do you believe this presents a potential barrier to effective regulation by your agency?
*(ed: *Much of the information requested, such as award payment data, FINRA's views on the unpaid award problems, case outcomes, and panel demographics, is already published om FINRA's Webpage. **Copied on the letter were: Eileen Murray, FINRA Chairperson and Public Governor; Allison Herren Lee, Acting SEC Chair; and Vladimir Tenev, Chief Executive Officer, Robinhood. ***Again, we chafe at the assumption that arbitration is unfair and that lawsuits are a panacea.)*
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SCOTUS DENIES *CERT.* PETITION ON FAA APPLICABILITY TO AMAZON DRIVERS. The Supreme Court on **February 22** denied *Certiorari* in *Amazon.com, Inc. v. Rittmann,* No. 20-622. To review, we reported in SAA 2020-42 (Nov. 12) on *Rittmann v. Amazon.com, Inc.*, No. 19-35381 (9th Cir. Aug. 19, 2020), where a divided Ninth Circuit held that Federal Arbitration Act section 1 exempted from coverage Amazon "last mile" drivers, who delivered goods that had moved in interstate commerce, even though the drivers did not cross state lines. The majority sided with those Circuits finding it sufficient that the goods have been part of the "stream" of interstate commerce. Recall that it is hornbook law that the FAA enforces predispute arbitration agreements involving just a hint of interstate commerce. Section 1, however, has a carveout providing: "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Amazon's **November 9** Petition for *Certiorari* presented this question: "whether the Federal Arbitration Act's exemption for classes of workers engaged in foreign or interstate commerce prevents the Act's application to local transportation workers who, as a class, are not engaged to transport goods or passengers across state or national boundaries."
*(ed: *The case is listed on page 5 of the Order List. **We were hoping SCOTUS would take on the significant split in the Circuits. In fact, there's a split within a Circuit. As reported in SAA 2020-37, a different Ninth Circuit Panel* in Grice v. United States District Court for the Central District of California, *No. 20-70780 (9th Cir. Sep. 4, 2020), sided with the more stringent "cross state lines" standard, in a case involving Uber drivers who regularly picked up arriving passengers at Huntsville International Airport and Birmingham-Shuttlesworth International Airport. Although the passengers clearly had crossed state lines, the Uber drivers did not. ***The* Alert *was referenced twice in Amazon' Reply Brief, on pages 3 and iv. ****There's also a January 29* Certiorari *Petition pending in* Amazon.com, Inc. v. Waithaka, *No. 20-1077, a case we* covered in *SAAs 2021-05 (Feb. 11) & 2020-27 (Jul. 22). The Petition seeks review of* Waithaka v.

Amazon.com, Inc., *No. 19-1848 (1st Cir. Jul. 17, 2020), where the Court held: "… the exemption encompasses the contracts of transportation workers who transport goods or people within the flow of interstate commerce, not simply those who physically cross state lines in the course of their work." The* Waithaka *Petition acknowledged that the* Rittman *Petition was also pending before the Court, and urged that Cert. be granted in at least one of the cases.)*
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SCOTUS DENIES *CERTIORARI* IN GARGANTUAN INTERNATIONAL AWARD ENFORCEMENT CASE WHERE BOTH PARTIES WERE INVOLVED IN BRIBERY SCHEME. The Supreme Court on **February 22** denied *Certiorari* in *Petrobras America, Inc, v. Vantage Deepwater Co.*, No. 20-1032. We reported in SAA 2021-04 (Feb. 4) that *Certiorari* was 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 by District 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** *Certiorari* Petition identified 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: *The case is listed on page 8 of the Order List. **As we said before, the trial and appellate decisions looked right to us. We also predicted that* Cert. *would not be granted here, because the issue was a bit one-off.)*
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FLORIDA SUPREME COURT: MAGNUSON-MOSS WARRANTY ACT "SINGLE DOCUMENT RULE" DOESN'T REQUIRE PDAA DISCLOSURE. Over forty-five years ago, the *Magnuson-Moss Warranty Act of 1975* was enacted, with the

overarching purpose of creating several consumer rights regarding warranties. The law also gave the Federal Trade Commission ("FTC") regulatory authority to protect consumers. The Act in 15 U.S. Code § 2310 encourages establishment of "informal dispute settlement mechanisms." The FTC later adopted a "Single Document Rule" -- 16 C.F.R. § 701.3 -- requiring that nine enumerated items be clearly disclosed in a single document, including "information respecting the availability of any informal dispute settlement mechanism elected by the warrantor in compliance with Part 703 of this subchapter." At issue in *Kroll v. FCA US, LLC*, No. SC-19-952 (Fla. Feb. 18, 2021), was whether the binding arbitration agreement in the used truck purchase agreement had to be disclosed in the warranty single document. A 5-1 majority of the Florida Supreme Court says, "no, because final, binding arbitration is not an informal dispute resolution mechanism." Says the majority: "The rule that the FTC adopted … says that the decisions of an informal dispute settlement mechanism 'shall not be legally binding on any person.' 16 C.F.R. § 703.5(j). And the FTC's rule further requires that consumers be informed that they may pursue 'legal remedies' if they are dissatisfied with the results of the informal dispute resolution process. 16 C.F.R. § 703.5(g)(1). It would thus be unreasonable to conclude that the single document rule's reference to an 'informal dispute settlement mechanism elected by the warrantor in compliance with part 703 of this subchapter' encompasses a binding arbitration agreement."
*(ed: *Seems right. **Justice Labarga dissents, because he believes the Act: "expresses Congress' intent that any arbitration agreement must be disclosed within the written warranty and not as a stand-alone document…." (emphasis added). Justice Grosshans did not participate.)*
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QUICK TAKES: CASES AND AWARDS WORTH READING

***DiCarlo v. MoneyLion, Inc*., No. 20-55058 (9th Cir. Feb. 19, 2021)**: "The panel affirmed the district court's conclusion that the Agreement's arbitration provision was valid and enforceable because it allowed public injunctive relief in arbitration and therefore did not violate California's *McGill* rule. The Agreement authorized the arbitrator to award all injunctive remedies available in an individual lawsuit under California law. DiCarlo argued that she could secure public injunctive relief only by acting as a private attorney general, which the Agreement explicitly prohibited. The panel, however, held that public injunctive relief under California's UCL, FAL, and CLRA is available in an individual lawsuit without a plaintiff acting as a private attorney general." (*ed: quoted from the Court's staff summary*.)

***Bacall v. Shumway*, No. B302787 (Cal. Ct. App. 2 Feb. 18, 2021) (unpublished)**: "An arbitrator issued an award against appellants Jeffrey Shumway and Timaeus Group, LLC (together, Appellants) and in favor of respondents Michael Bacall and RBC Entertainment, Inc. (together, Respondents) in a contract dispute. The arbitrator partially rescinded the contract after finding Shumway provided legal services without an active license…. Appellants contend the arbitration award must be vacated because the arbitrator exceeded his authority by declaring the 2016 and 2017 agreements illegal, violating public policy and their statutory rights, concluding Shumway engaged in the

unlicensed practice of law, and ruling Shumway is liable for repayment of the commissions. They also contend the arbitrator engaged in misconduct by refusing to allow them to address issues related to attorney fees and costs. We disagree with each of these contentions." (*ed: the decision appears at the end of this article published in* Hollywood Reporter.)

***Holborn v. Cadaret Grant*, FINRA ID No. 19-03321 (Buffalo, NY Jan. 25, 2021)**: An All-Public Panel granted Respondent broker-dealers and broker's Pre-Hearing Motion to Dismiss pursuant to FINRA Rule 12206 (Six-year Eligibility Rule) finding that the customer's case was not subject to tolling. The customer's claims involved an investment in Welsch/CNL Properties I LLC Real Estate Investment Trust. (*ed: Provided courtesy of SAC's ARBchek facility, www.arbchek.com*.)
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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Zena Prodromou, *The Public Policy Exception under Article V(2)(b) of the New York Convention in the Time of Covid-19*, Kluwer Arbitration Blog (Feb. 17, 2021): "Exceptional times call for exceptional measures. We have all been experiencing a global pandemic for almost a year now. In an era where the legal exception tends to become the mainstream rule, one is left to wonder how far can this reversal of odds go. Is the global public health crisis susceptible to calling into question standard principles of international arbitration such as the recognition and enforcement of foreign arbitral awards under the New York Convention ('NYC')? Faced with this question, this post examines whether the global health crisis may give rise to requests for courts to refusal to recognise [sic] and enforce arbitral awards under Article V(2)(b) of the NYC and assesses the circumstances and conditions under which such claims may be upheld in court. The post reflects a more detailed analysis of these issues in light of the current global health crisis, contained in a recent publication assessing the public policy exception under Article V(2)(b) of the NYC."

***Of Pandemic and Perseverance: NYCLA's ADR Committee Makes Lemonade Out of Lemons in 2020*, Mediate.com (February 2021)**: "While there was tremendous conflict and disagreement throughout 2020, it was anything but a year of perfect vision (even for ophthalmologists and optometrists). Among many challenging occurrences, the deadly coronavirus pandemic, protest-related violence resulting from deplorable civil rights violations, natural disasters, and all-too-regular political shockwaves -- ultimately culminating in unprecedented siege and sorrow at the Capitol -- definitively made 2020 humanity's 'year of the lemon.' Nonetheless, the leadership and members of the New York County Lawyers Association ('NYCLA') and its Alternative Dispute Resolution ('ADR') Committee pressed on through it all, embracing and adapting to constantly-changing circumstances …."

***No Surprises Act and Its Arbitration Provisions*, Lexology (Feb. 11, 2020)**: "On 28 December 2020, the federal No Surprises Act (Act) was enacted. The Act seeks to protect patients from so-called "surprise medical bills" in certain emergency and nonemergency

settings for out-of-network patients. This alert focuses on the Act's arbitration provisions but first provides necessary background to those provisions."

***Robinhood Open to Reviewing Its Arbitration Policy*, ThinkAdvisor (Feb. 17, 2021)**: "Robinhood Financial has 24 customer arbitrations pending against it, and 'is open to reviewing' its mandatory arbitration policy, Lucas Moskowitz, deputy general counsel and head of government affairs at Robinhood Markets Inc., told Sen. Elizabeth Warren, D-Mass. On Feb. 2, Warren probed Robinhood CEO Vladimir Tenev in a letter as to why the brokerage firm 'abruptly changed the rules' for retail investors by restricting trades and imposing other limits during the frenzy in GameStop and other heavily shorted stocks the week of Jan. 25." (*ed: See our coverage elsewhere in this* Alert.)

***SEC Awards Almost $3 Million Total in Separate Whistleblower Awards*, www.SEC.gov (Feb. 19, 2021)**: "The Securities and Exchange Commission today announced two separate whistleblower awards for total payments of almost $3 million. In the first order, the SEC awarded a whistleblower over $2.2 million for providing important, high-quality information that aided an investigation. The whistleblower's tip helped the SEC bring an enforcement action that resulted in the return of millions of dollars to harmed clients. In the second order, the SEC awarded almost $700,000 to a whistleblower who alerted SEC staff to a fraudulent reporting scheme, prompting the opening of the investigation. The whistleblower provided critical evidence to the staff, and helped identify key documents and witnesses."

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DID YOU KNOW?

FINRA DRS PUBLISHES PRIOR-YEAR STATS BACK TO 2012. FINRA for years has published a wealth of statistical data on its dispute resolution program, updating caseload stats on a monthly basis. But did you know that stats on past years may be found as well? Check out "Previous Year-End Dispute Resolution Statistics" which has year-end data going back to 2012.

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Send any messages or inquiries to: George@SecArbAlert.com

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