SECURITIES ARBITRATION ALERT 2022-02 (1/20/22)

George H. Friedman, Editor-in-Chief

SQUIBS:

- **FINRA DRS Updates Diversity Data: Impressive Progress Continues**
- **Parties to Pending *Certiorari* Request Challenging California's PAGA Agree to Hold Up Pending Outcome of *Viking River***
- **First Circuit Clarifies Standards for Motions to Compel Arbitration**
- **Alabama Supreme Court Declines to Permit Collateral Action to Vacate Award, Where New York Courts Had Confirmed the Award and Entered Judgment**

SHORT BRIEFS:

- **Already, *Amicus* Briefs Aplenty in *Morgan v. Sundance***
- **Sole Public Arbitrator Finds Robinhood Liable for Trading Halts**
- **ICC Seeking Law School Applicants for Vis Pre-Moot**
- **Robbins *SAPM* Manual Gets New Supplement: Release 25 Brings Fresh Updates and New Material Despite the Pandemic**
- **Securities Experts Roundtable Publishes Its Latest Free Newsletter**

QUICK TAKES:

- ***Tatneft v. Ukraine,* No. 20-7091(D.C. Cir. Dec. 28, 2021)**
- ***Highland Capital Mgmt. v. Dondero (In re Highland Capital Mgmt.),* No. 21-03007-sgj (Bankr. N.D. Tex. Dec. 3, 2021)**
- ***Theresa D. v. MBK Senior Living, LLC,* No. A163312 (Calif. Ct, App. 2 Dec. 21. 2021)**
- ***O'Connor-Roche v. RBC Capital*, FINRA ID No. 20-03784 (New York, NY, Nov. 22, 2021)**
- ***Chang v. JP Morgan Securities, LLC*, FINRA ID No. 21-01836 (San Francisco, CA, Dec. 23, 2021)**

ARTICLES OF INTEREST:

- **T. Akeju, O. Shasore and O, A. Uka, *Investor-State Arbitration and the "Next Generation" of Investment Treaties*, Lexology (Oct. 14, 2021)**
- ***Robinhood Hit With Breach of Contract Fine – Could This be an Opening for Further Litigation?*, Yahoo!Finance (Jan. 12, 2022)**
- ***UBS Faces Purported Class Action Over In-House Options Strategy*, Financial Advisor IQ (Jan. 12, 2022)**
- ***Merrill Lynch Wins Expungement of $20M American Airlines Claim*, FinancialPlanning (Jan. 13, 2022)**
- ***Recurring Online Subscriptions Face a New Arbitration Standard in California*, Lexology (Jan. 13, 2022)**
- ***Sexual Misconduct Bill Inches Closer to Becoming Law*, The Crime Report (Jan. 14, 2022)**

DID YOU KNOW?

- **New ACUS Report on Federal Agency ADR Use**

IN MEMORIAM, JOHN P. BEVILACQUA. *We were profoundly saddened to hear of the death on January 5 of John P. Bevilacqua. The Johns Hopkins University and St. John's School of Law graduate was a longtime fixture in the financial services field, most recently as senior counsel at Fulbright & Jaworski. His bio adds that Mr. Bevilacqua joined Fulbright in 2010: "after eight years with Merrill Lynch, where he most recently*

served as a First Vice President and Senior Counsel. Prior to joining Merrill Lynch, Bevilacqua spent a decade at Salomon Smith Barney as a Director and Associate General Counsel. He previously began his career as an enforcement attorney working with the SEC." His family encourages all eligible New Yorkers who lived or worked south of Canal Street to enroll in the World Trade Center Health Program and complete annual screenings. A Memorial Gathering will take place on Saturday, January 29 from 10am to 1pm at Weigand Brothers Funeral Home, 49 Hillside Ave., Williston Park, NY 11596.

SQUIBS: IN-DEPTH ANALYSIS

FINRA DRS UPDATES DIVERSITY DATA: IMPRESSIVE PROGRESS CONTINUES. ***FINRA Dispute Resolution Services ("DRS") has updated its neutral roster diversity statistics, showing impressive gains in most areas.*** FINRA DRS launched an annual *Neutral Roster Demographic Survey* in **2016**. Recall that this is an annual, voluntary, and confidential survey of neutrals that FINRA relies on to keep its diversity statistics accurate and up-to-date. DRS promises to publish annual survey results at the beginning of each year, and true to its word, the Authority on **December 31** posted updated 2021 demographic survey results.

In Short: Much Progress is Being Made

To track progress, FINRA: "hired a third-party consultant to survey - on an anonymous and voluntary basis - the demographics of the neutrals on our roster from 2017 to 2021. In sharing the findings, FINRA strives to provide transparency about the current makeup of our arbitrator roster. In 2021, we saw increases across a number of categories…."

Changes in the Past Year

What are the results? We reached out to DRS EVP and Director of Arbitration **Rick Berry,** who offered these thoughts: "Our 2021 demographic survey of the roster demonstrates our best results since we began tracking progress in 2016. The 2021 survey showed that we outperformed versus 2020 in key demographic groups. Of the new arbitrators added this year:

- 45% were female (40% in 2020)
- 23% were African-American (14% in 2020)
- 7% were Hispanic/Latino (3% in 2020)
- 6% were Multiracial (3% in 2020)
- 5% were LBGTQ (2% in 2020)
- 4% were Asian (same as 2020)

"It is noteworthy that we had great success despite not being able hold in-person recruitment events due to the pandemic. I'm particularly proud of our recruitment team for being innovative through social media and for continually evolving our recruitment program." As to what this means going forward, Mr. Berry added: "While this remains a long term effort, we are encouraged by these results. The survey results help us determine where we need to target our resources to continue to bolster the diversity of FINRA's

neutral roster. DRS is also exploring ways, perhaps through *Code* changes, to improve the chances for new and diverse arbitrators to be selected."

A Five-Year Lookback

We decided to look back to see what's changed over the last five years. The headlines? The roster has definitely become more diverse, albeit slightly older. We've compiled the results in the chart below (*ed: numbers in groups will not always total 100%):*

Panel Demographic	Pct in 2021	Pct in 2017
Male	66%	72%
Female	32%	25%
Caucasian	78%	84%
African-American	11%	6%
Spanish, Hispanic or Latino	5%	4%
Asian	2%	2%
Multi-racial	3%	2%
American Indian or Alaska Native	0%	0%
LGBT	4%	2%
Age 60 or less	29%	29%
Age 61-69	31%	27%
Age 70 or older	40%	39%

FINRA: We'll Keep at It

The Authority states: "While we are encouraged by these short-term results and incremental progress made, we recognize this is a long-term effort. There is more progress to make and we remain fully committed toward achieving our diversity goals." *(ed: *Kudos to DRS for making this data public, and an* Alert *h/t to Mr. Berry for adding his thoughts. **DRS separately surveyed mediators; the results are similar to those for the arbitration panel, although the roster is older – 82 percent of those responding were 61 or above. ***DataStar conducted the 2021 survey. Consulting firm Alight Solutions conducted the surveys from 2017 to 2020. ****The response rate was 32%, down 5% from last year.)*

return to top

PARTIES TO PENDING *CERTIORARI* REQUEST CHALLENGING CALIFORNIA'S PAGA AGREE TO HOLD UP PENDING OUTCOME OF *VIKING RIVER. With SCOTUS already set to review an FAA preemption challenge to California's PAGA, the parties to a similar pending* Certiorari *Petition have agreed to hold the case in abeyance pending the outcome of the first case.* We have reported many times on *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal.4th 348, 327 P.3d 129 (Calif. 2014), *cert. den*., 135 S. Ct. 1155 (2015), where a divided 4-3 California Supreme Court – complete with partial concurrences and dissents – held that an employee could pursue claims against his employer under the California Private Attorneys General Act ("PAGA"), despite the existence of an arbitration agreement waiving such claims (see, for example, SAA 2015-01 and SAAs 2014-41 & -24).

Cert.* Petition Already Granted in *Viking River
We reported in SAA 2021-47 (Dec. 16) that the Supreme Court issued a **December 15** Miscellaneous Order granting *Certiorari* in *Viking River Cruises, Inc. v. Moriana*, No. 20-1573. The question presented in the granted **May 10** Petition in *Viking River* is: "Whether the Federal Arbitration Act requires enforcement of a bilateral arbitration agreement providing that an employee cannot raise representative claims, including under PAGA." Petitioners seek review of *Moriana v. Viking River Cruises, Inc*., No. B297327 (Cal. Ct. App. 2020), *pet. for review den*., No. S265257 (Cal. 2020), where the Court of Appeal held: "…. *Epic*'s warning about impermissible devices to get around otherwise valid agreements to individually arbitrate claims notwithstanding, *Iskanian* remains good law. We therefore reject Viking's characterization of PAGA claims as a transparent device to preclude individualized arbitration proceedings and follow *Iskanian*, which instead viewed predispute PAGA waivers precluding PAGA actions in any forum as attempts to exempt employers from responsibility for violations of the Labor Code" (footnote omitted).

***Cert.* Sought in Similar Case …**
As reported in SAA 2021-37 (Oct. 7), still pending is a **September 21** Petition for *Certiorari* seeking review of *Gregg v. Uber Technologies, Inc*., No. B302925 (Cal. Ct. App. 2 Apr. 21, 2021), *pet. for review den.*, No. S269000 (Cal. June 30, 2021). The issue presented in *Uber Technologies, Inc. v. Gregg*, No. 21-453 is: "Whether agreements calling for individual arbitration are enforceable under the Federal Arbitration Act with respect to claims asserted under the California Labor Code Private Attorneys General Act." The Petition relies heavily on intervening SCOTUS rulings, including *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018), holding that class or collective action waivers were enforceable under the Federal Arbitration Act.

… So Let's Hold Off
We had thought that SCOTUS might grant *Cert.* in *Gregg* and then consolidate that case with *Viking River*, but the parties in *Gregg* have mooted that thought. Specifically, Gregg filed a **January 10** request to delay stating: "This case raises the question on which this Court granted certiorari on December 15, 2021, in *Viking River Cruises v. Moriana*, No. 20-1573, and the petition should be held pending the Court's disposition of that case.

Specifically, both cases present the question whether the Federal Arbitration Act (FAA) preempts the California Supreme Court's holding *in Iskanian v. CLS Transportation Los Angeles, LLC*, 327 P.3d 129 (Cal. 2014), that the right to bring a representative action under California's Private Attorneys General Act, or PAGA, cannot be waived in a private agreement, including an arbitration agreement." And the **January 12** response from Uber: "Petitioners agree with Respondent that the Court should hold this petition pending resolution of *Viking River Cruises*. See Pet. 22 n.1 (stating that if this Court grants certiorari in *Viking River Cruises*, 'it should hold this petition until that action is resolved')."
(ed: Makes sense to us. We're sure the Court will agree.)
return to top

FIRST CIRCUIT CLARIFIES STANDARDS FOR MOTIONS TO COMPEL ARBITRATION. ***Section 4 of the Federal Arbitration Act ("FAA") outlines a procedure for deciding whether a dispute is covered by an arbitration agreement and is therefore arbitrable. It does not, however, specify how the court should reach this decision. A recent U.S. Court of Appeals opinion addresses the latter question.*** FAA section 4 states, in relevant part: "The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement…. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof." The opinion in question is *Air-Con, Inc. v. Daikin Applied Latin America, LLC*, No. 19-2248 (1st Cir. Dec. 20, 2021), which found that the existence of an agreement to arbitrate was "in issue."

A Distribution Relationship Turns Sour
The facts may be summarized as follows: Air-Con Inc. ("Air-Con") signed a distribution agreement with Daikin Industries, Ltd. ("Daikin Industries"), authorizing it to sell the latter's air conditioners and refrigeration equipment in Puerto Rico and the Caribbean. The distribution agreement included a clause requiring disputes to be submitted to arbitration in Osaka, Japan and prohibiting assignment of any rights or duties under the agreement without mutual consent, but was not counter-signed by Daikin Industries. Air-Con purchased the foregoing products from Daikin Industry's regional subsidiary, Daikin Applied Latin America, LLC ("Daikin Applied"), signing a sales agreement for each shipment. Each sales agreement contained a separate clause calling for arbitration of disputes before the International Court of Arbitration in Miami. However, Air-Con asserted that Daikin Applied impaired its contractual rights by selling Daikin Industry products to other companies at a lower price than it sold them to Air-Con, arbitrarily raising prices of those it sold to Air-Con, suspending or delaying deliveries, being unresponsive to Air-Con's requests for technical support, and entirely stopping delivery of some products without notice or explanation.

The District Court Orders Arbitration

Air-Con filed suit against Daikin Applied in the Commonwealth Court of Puerto Rico and Daikin Applied removed the case to federal court and filed a motion to compel arbitration. It contended that the case was subject to the arbitration clause in Air-Con's distribution agreement with Daikin Industries or, in the alternative, to the arbitration clauses in Daikin Applied's own purchase agreements with Air-Con. Air-Con argued that the agreement with Daikin was only a draft, since it was not counter-signed and, in any case, Daikin Applied was neither a party nor an assignee of it. The U.S. District Court held that the distribution agreement was an enforceable agreement between Air-Con and Daikin Applied because the two parties operated pursuant to the terms of that agreement throughout their relationship and Air-Con admitted as much in its complaint. It therefore ordered arbitration. Air-Con appealed to the U.S. Court of Appeals for the First Circuit.

First Circuit: What is the Standard?

Following the lead of most other Circuits, the Court rules that District Courts must apply the summary judgment standard to motions to compel because: "Section 4's command to 'hear the parties' appears to contemplate the submission and consideration of evidentiary materials -- including materials beyond those attached to the pleadings -- in support of and opposition to a motion to compel arbitration…. Similarly, interpreting the FAA's 'in issue' standard as analogous to the 'genuine dispute of material fact' standard under Federal Rule of Civil Procedure 56 reinforces the FAA's dual goals of respecting private agreements and providing a mechanism for the swift resolution of disputes by requiring the party opposing arbitration to provide prompt notice of 'whatever claims they may have in opposition to arbitration and the evidentiary basis of such claims.'… []Pursuant to the summary judgment standard, the court must construe the record in the light most favorable to the non-moving party and draw all reasonable inferences in its favor…. If the non-moving party puts forward materials that create a genuine issue of fact about a dispute's arbitrability, the district court 'shall proceed summarily' to trial to resolve that question."

Daikin Applied Can't Take Advantage of the Distribution Agreement's Arbitration Clause at This Stage

Turning to the merits of the motion, the Court holds that the District Court erred: "First, the court impermissibly put the burden of disproving the existence of a valid arbitration agreement on Air-Con, the non-moving party." By interpreting Air-Con's complaint as admitting the applicability of the distribution agreement's arbitration clause, it failed to: "consider the competing narrative that Air-Con attributes to these allegations: namely, that Air-Con's relationships with Daikin Industries and Daikin Applied are governed by separate distribution agreements -- the former by the written agreement between Air-Con and Daikin Industries and the latter by an unwritten agreement…. By interpreting the complaint's allegations in a fashion favorable to Daikin Applied, the District Court did not comply with the requirement to draw all reasonable inferences in favor of the non-moving party." Since there was no evidence of a valid assignment of this agreement, Daikin Applied failed to meet its burden of proving it had a right to enforce its arbitration clause.

Nor Do the Sales Agreements' Arbitration Clauses Govern the Dispute
The Court further interprets the identical arbitration clause in each sales contract as governing: "only disputes relating to the particular sale authorized by that contract." Although Air-Con does cite some sales-specific conduct, they are only "examples of the alleged pattern of unfair practices by Daikin Applied that have substantially impaired its distribution relationship with Air-Con. Thus, the claims alleged in the complaint are not governed by the individual arbitration clauses in each sales contract." The Court reverses the District Court's grant of the motion to compel arbitration and remands.
*(*Seems right to us. **Presumably, the next step will be a summary trial to determine whether either arbitration agreement applies. As to this stage, the court opines that the District Court should limit the trial: "to the question of whether the parties agreed to arbitrate[,]" permit only limited discovery targeted to the same issue, and "not rule on the motion to compel arbitration until it resolves any factual disputes that require resolution before it can be determined whether the parties agreed to arbitrate." Otherwise, it leaves the procedure for conducting the trial to the District Court's discretion. *** This Squib was prepared by Harry A. Jacobowitz, President of HAJ Research and Writing LLC. Mr. Jacobowitz, a member of the Pennsylvania bar, and his firm perform legal research and writing for attorneys and handle substantive searches of SAC's Award database. He can be contacted at harryjacobowitz@optimum.net.)*
return to top

ALABAMA SUPREME COURT DECLINES TO PERMIT COLLATERAL ACTION TO VACATE AWARD, WHERE NEW YORK COURTS HAD CONFIRMED THE AWARD AND ENTERED JUDGMENT. ***The Trial Court erred when it allowed to proceed a collateral action seeking to vacate an Award that had already been confirmed in New York, a unanimous Alabama Supreme Court holds.***
The procedural history in *Ex parte Space Race, LLC, In re: Alabama Space Science Exhibit Commission d/b/a U.S. Space* No. 1200685 (Ala. Dec. 30, 2021), is a bit long and murky, so we will try to boil it down: 1) the contract between Space Race, LLC ("Space Race") and the Alabama Space Science Exhibit Commission ("ASSEC") contained an arbitration agreement; 2) ASSEC is a State agency; 3) a dispute arose, and Space Race prevailed in a New York arbitration; 4) ASSEC moved in New York State to vacate the Award, but the Trial Court confirmed and entered judgment, as did the Appellate Division; 5) New York's highest court declined to review the case; 6) ASSEC brought suit in Alabama, seeking Award vacatur; 7) the Alabama Trial Court denied Space Race's motion to dismiss, that had been based on *res judicata* and comity; and 8) this latest proceeding was brought by Space Race, seeking a Writ of Mandamus directing the Trial Court to dismiss the collateral suit attempting to vacate the Award.

Full Faith and Credit vs. Immunity Arguments
We'll quote liberally from the Opinion to follow the arguments. "The United States Constitution [art. IV, § 1] requires courts in Alabama to give full faith and credit to the judicial proceedings of every other State." This would support the Alabama courts accepting the court decisions from New York. "ASSEC, however, asserts that the New

York trial court's judgment confirming the arbitration award is not entitled to full faith and credit and res judicata effect because, ASSEC asserts, that court did not have 'adjudicatory authority over the subject matter.'" Why not? "According to ASSEC, the New York trial court did not have subject matter jurisdiction over Space Race's action to confirm the arbitration award because, ASSEC claims, ASSEC is immune from suit in New York state courts." On what basis would there be immunity for ASSEC? "ASSEC argued that it enjoys sovereign immunity [under Ala Const. Article I, § 14], that it cannot waive that immunity [per *Atkinson v. State*, 986 So. 2d 408, 410 (Ala. 2007)], and that its alleged immunity deprived the New York trial court of subject-matter jurisdiction over the action to confirm the arbitration award."

Whether New York was Right Doesn't Matter

Although immunity was not argued before the Arbitrators, it was fully argued during the Award reviews before the New York judiciary. This was a key factor for the Alabama Supreme court. ASSEC had argued that the reviewing New York Courts erred when they rejected its argument that it should: "be equated with the State of Alabama for purposes of interstate sovereign immunity." The Court, however, finds that whether New York was correct doesn't matter. How so? "Whether the New York trial court's judgment is entitled to full faith and credit does not necessarily turn on whether this Court agrees with the New York trial court's conclusion that ASSEC should not be considered the equivalent of the State of Alabama for purposes of interstate sovereign immunity. Rather, the judgment is entitled to full faith and credit if the immunity issue was fully and fairly litigated in New York…. It is clear that the jurisdictional issue was indeed fully and fairly litigated in the New York trial court…. Because the New York judgment confirming the arbitration award against ASSEC is entitled to full faith and credit and res judicata effect, we grant Space Race's mandamus petition."

(ed: We first thought that the outcome was controlled by C&L Enterprises, Inc. v. Potawatomi Indian Tribes of Oklahoma*, 532 U.S. 411, 121 S.Ct. 1589 (2001), which held that immunity can be waived when the sovereign agrees to arbitration. But the argument here was whether the judgment confirming the Award was entitled to full faith and credit.* Potawatomi *dealt with enforceability of the arbitration agreement.)*

return to top

SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

ALREADY, *AMICUS* BRIEFS APLENTY IN *MORGAN V. SUNDANCE*. We reported in SAA 2021-43 (Nov. 18) that, having just heard argument in this term's only arbitration-related case then on the oral argument docket, SCOTUS on **November 15** agreed to review *Morgan v. Sundance Inc*., 992 F.3d 711 (8th Cir. Mar. 30, 2021), another case involving arbitration. The question presented in the **August 27** Petition for *Certiorari* in *Morgan v. Sundance, Inc*., No. 21-328, is: "Does the arbitration-specific requirement that the proponent of a contractual waiver defense prove prejudice violate this Court's instruction that lower courts must 'place arbitration agreements on an equal footing with other contracts?' [in] *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)." The Petition notes that there is a multi-faceted split on the issue: "This Court should grant certiorari to resolve a longstanding circuit split on the question whether a

party asserting waiver of the right to arbitrate through inconsistent litigation conduct must prove prejudice, and if so, how much. This question not only divides the federal courts of appeals, but divides federal courts from geographically co-located state courts of last resort …" We checked the docket, and already several *Amicus* Briefs have been filed, all on behalf of the Petitioner: the Attorneys General of 19 states; American Association for Justice; National Academy of Arbitrators; Public Citizen; and several law professors.
*(ed: *The case is listed on page 1 of the Order List. **The AGs are from a mix of red and blue states. ***Oral argument is not yet scheduled; we continue to track it.)*
return to top

SOLE PUBLIC ARBITRATOR FINDS ROBINHOOD LIABLE FOR TRADING HALTS. The sole Public Arbitrator in *Jose Batista v. Robinhood Financial, LLC*, FINRA ID No. 21-01206 (Hartford, CT, Jan. 6, 2022), finds Robinhood liable for damages the investor suffered because he was unable to execute sell orders after Robinhood had restricted trades. The customer's complaint alleged that: "the causes of action relate to Respondents placing trade restrictions on numerous stocks on January 28, 2021, including, but not limited to 'KOSS' and 'EXPR' on its trading platforms in the midst of an unprecedented stock rise. The Arbitrator finds: "Respondents Robinhood Financial, LLC and Robinhood Securities, LLC are jointly and severally liable for and shall pay to Claimant the sum of $29,460.77 in compensatory damages."
*(ed: *Robinhood in January 2021 restricted trades in GamesStop and other tech stocks after volatile price runups. **A relatively modest Award does not by itself constitute a major development, but it may be a harbinger of things to come. This was a theme of several media reports. Then again, see Simeri v. Robinhood Financial, LLC, FINRA ID No. 21-01660 (Los Angeles, CA, Dec. 28, 2021), where the Arbitrator denied a claim involving an attempted purchase of GameStop and other shares.)*
return to top

ICC SEEKING LAW SCHOOL APPLICANTS FOR VIS PRE-MOOT. The International Chamber of Commerce on **January 6** posted a notice encouraging law schools to participate in the *ICC Vis Pre-Moot* taking place in-person **March 31 – April 1** in Paris. The Pre-Moot last year was virtual. The event's purpose is to help teams prepare for the virtual *29th Willem C. Vis International Commercial Arbitration Moot* taking place in mid-**April**. 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 teams will be selected to compete. Teams must include at least 2 students, and only one team per school may apply.
*(ed: *As we understand it, the Pre-Moot will be in-person, but the actual Vis Moot will be held virtually. See: "[W]e have decided to host the oral hearings of the Vis Moot on an online hearing platform again.... Deciding now to go for another Virtual Vis Moot also allows much greater opportunities to deal with planning and logistics from an organisational perspective." **Applications are done online. ***Contact*

*iccpremoot@iccwbo.org for further information. ****The 2020 Moot was cancelled due to the pandemic.)*
return to top

ROBBINS *SAPM* MANUAL GETS NEW SUPPLEMENT: RELEASE 25 BRINGS FRESH UPDATES AND NEW MATERIAL DESPITE THE PANDEMIC. We just finished paging through the new supplement to **David E. Robbins'** *Securities Arbitration Procedures Manual ("SAPM").* The *SAPM* – a true *tour de force* – is now 31 years in the making, starting publication in 1990 and continually updated by the author and practitioner over the years, as the practice evolves and new rules and procedures adjust to an ever-changing landscape. Author Robbins, a long-time member of the SAA Board of Editors, has chronicled securities arbitration's modern history and participated at the center of events and developments that have shaped it. This latest supplement is published by Lexis Nexis/Matthew Bender as "Release 25" and according to the author: "I don't just tell you *what* the cases say; I suggest ways you can use the holdings of those cases as standards for your cases. Throughout this two-volume book, I provide the standards for you to present to arbitrators, mediators and your adversaries to judge the conduct you present to them." As to what's new, Author Robbins adds: "For this new release of *Securities Arbitration Procedure Manual*, I have added and supplemented many subjects, adding and editing approximately 150 pages of text, despite working remotely most of the year due to the Covid-19 virus." Covering ADR's gradual emergence from the grip of the pandemic, Mr. Robbins writes: "With the return to in-person hearings, attorneys who liked virtual hearings are using them in so-called hybrid hearings. That is, the arbitrators and some witnesses are in the hearing room and other witnesses are virtual. The same will probably go for mediations, particularly because of the cost factor."
*(ed: *What has set SAPM apart and has made it the enduring leader in its field has been the dedicated efforts of its author to update and revise the book every year without fail and to inform those updates and revisions with the practical knowledge and observations of a versatile and respected practitioner. To us, David Robbins occupies a special place of honor in the field of securities arbitration. **The two-volume SAPM, which is approximately 4,000 pages long, is available in both print form and as an e-book (Library of Congress Card Number: 2004615234; ISBNs: 978-0-327-16188-2 (print); 978-0-327-16800-3 (eBook)). For more information, go to the Lexis/Nexis Store. ***Cite as: [Vol. no.] David E. Robbins,* Securities Arbitration Procedure Manual *§ [sec. no.] (Matthew Bender 2021).)*
return to top

SECURITIES EXPERTS ROUNDTABLE PUBLISHES ITS LATEST FREE NEWSLETTER. The latest issue of the Securities Experts Roundtable's ("SER") quarterly newsletter, *The Expert's Examiner* (*"TEE"*) volume 2021-04, covering **October – December 2021**, hit the electronic newsstand **January 13.** This *free*, link-rich publication, which can be found on the Website's landing page ("newsletter" tab), offers a wealth of information on financial services arbitration and ADR in general. Among the regular features are: **Recent News from the Arbitration Front; Expert Opinions:**

What are the Courts (and Arbitrators) Thinking?; Heard Through the Regulatory Grapevine -- Comment Letters and Speeches; and **Statistics, Events & Resources.** Content is provided by the Roundtable's members; the *Alert* is also a contributor. Signup is available online.
*(ed: *The non-profit SER, which was founded in 1992, is: "a group of professionals with significant experience as testifying and consulting experts in securities, business and investment-related litigation." **The* TEE *is a wonderful resource for the arbitration bar. Past issues are grouped here. ***Full disclosure:* SAA*'s publisher and editor-in-Chief George Friedman is an active member of the SER.)*
return to top

QUICK TAKES: CASES AND AWARDS WORTH READING

***Tatneft v. Ukraine*, No. 20-7091(D.C. Cir. Dec. 28, 2021**): "Pao Tatneft (Tatneft), a Russian company, filed a petition in district court to confirm and enforce its arbitral award against Ukraine. The district court granted the petition, rejecting Ukraine's arguments that the court should have declined to enforce the award under The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), June 10, 1958, 21 U.S.T. 2517, and should have dismissed the petition on the basis of *forum non conveniens*. As explained *infra*, we agree with the district court and affirm its judgment."

***Highland Capital Mgmt. v. Dondero (In re Highland Capital Mgmt.)*, No. 21-03007-sgj (Bankr. N.D. Tex. Dec. 3, 2021)**: "In summary, this court accepts Highland's argument that the LPA [Limited Partnership Agreement] was an executory contract duly rejected pursuant to Bankruptcy Code section 365, and that the Arbitration Clause should likewise be considered a separate executory agreement that was rejected. Accordingly, Highland cannot be forced to specifically perform under the Arbitration Clause or the LPA by mandatorily participating in arbitration of Counts V, VI, and VII…. The court defers to the compelling reasoning of Judge Godbey in *Janvey* on this point. The court, like Judge Godbey, also finds as a matter of fact that requiring arbitration in this case would impose undue and unwarranted burdens and expenses on the parties to the detriment of Highland's creditors."

***Theresa D. v. MBK Senior Living, LLC*, No. A163312 (Calif. Ct. App. 2 Dec. 21. 2021)**: "The question here is not whether Tennier, as plaintiff's daughter, had authority to place plaintiff in Muirwoods, and we will assume for purposes of our analysis that she did. The question is whether in the course of so doing she also had authority to bind plaintiff to arbitration…. [H]ere, although the arbitration clause was placed within the admission agreement, the agreement itself recited that agreeing to arbitration was not a condition of admission, and Tennier was so informed. Because the arbitration provision was optional, with its own signature line, it was in essence a separate agreement, and defendants have not shown Tennier, who did not act pursuant to a durable power of attorney or similar authorization, could bind a plaintiff to an arbitration agreement as part of authorizing her admission to an RCFE."

***O'Connor-Roche v. RBC Capital*, FINRA ID No. 20-03784 (New York, NY, Nov. 22, 2021)**: A broker acting as a customer on behalf of an estate and alleging breach of bonus agreement as well as seeking $2.3 million in compensatory damages loses her case against Respondent broker-dealer and registered representative. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Chang v. JP Morgan Securities, LLC*, FINRA ID No. 21-01836 (San Francisco, CA, Dec. 23, 2021)**: An Arbitrator explains why he has decided to grant Respondent broker-dealer's Pre-Hearing Motion to Dismiss pursuant to FINRA Rule 13206 (Six-year Eligibility Rule for Industry Disputes). Claimant broker had sought reformation of her Form U5 record. The Award states: "The 'occurrence or event giving rise to' Claimant's expungement request was the disclosure of Claimant's termination on Claimant's Form U5. This occurred on February 21, 2014, which is more than six years before Claimant filed her Statement of Claim. Therefore, based on the expressed language of Rule 13206, Claimant's expungement claim is ineligible for arbitration.... The authorities cited in Respondent's moving papers and reply support the Arbitrator's determination that the 'occurrence or event' triggering the claim for expungement in this case was the submission of the Form U5 by Respondent to the CRD records." *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*
return to top

ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Akeju, O. Shasore and O, A. Uka, *Investor-State Arbitration and the "Next Generation" of Investment Treaties*, Lexology (Oct. 14, 2021): "Investor–state arbitration has grown over the years to become one of the most dynamic and controversial features of international investment law. Across the world, most states have entered into at least one International Investment Agreement (IIA) to promote and protect investments within their territories. From its days of humble beginnings, when the first Bilateral Investment Treaty (BIT) was executed between West Germany and Pakistan in 1959,2 to the present day, which is characterised by a multi-layered and multifaceted IIA regime featuring more than 3,300 known IIAs3, investor–state arbitration has come a long way…. The chapter analyses the current framework regulating investor–state arbitration. The chapter begins with a consideration of the areas of key stakeholders' concerns with the ISDS regime by highlighting select ISDS decisions around topical areas in need of reform. Next, the chapter undertakes an overview of select BIT programmes. Thereafter, we highlight recent reform measures aimed enhancing confidence in the stability of the investment environment. These reforms range from procedural matters such as exhaustion of local dispute resolution framework as a prerequisite to investor–state arbitration to substantive matters such as the host state's rights to legislate freely around FET requirements, etc., subject of course to public international law standards. The chapter concludes with policy recommendations for policymakers in future IIAs."

***Robinhood Hit With Breach of Contract Fine – Could This be an Opening for Further Litigation?*, Yahoo!Finance (Jan. 12, 2022)**: "In what might represent the first in a long

series of lawsuits, the Financial Industry Regulatory Authority (FINRA) [arbitration panel] ruled that Robinhood was liable for almost $30,000 in damages to a retail investor following losses. In his claim against Robinhood, Jose Batista, a 27-year-old retail investor, asserted breach of contract, breach of the implied covenant of good faith and fair dealing, negligence, breach of fiduciary duty, unjust enrichment, non-disclosure or concealment, intentional interference with prospective economic advantage and negligent interference with prospective economic advantage, according to the FINRA filing." See *Jose Batista v. Robinhood Financial, LLC*, FINRA ID No. 21-01206 (Hartford, CT, Jan. 6, 2022). (*ed: See our coverage elsewhere in this* Alert.)

***UBS Faces Purported Class Action Over In-House Options Strategy*, Financial Advisor IQ (Jan. 12, 2022):** "UBS is facing a lawsuit seeking class action status over a complex in-house options trading strategy that has already resulted in dozens of arbitration claims, according to news reports. []Christian Dumontet has filed the suit last month in federal court in New York on behalf of himself and 1,500 other clients who invested in the firm's Yield Enhancement Strategy, or YES, Barron's writes. Dumontet accuses the company of misrepresentation and is seeking damages, restitution and disgorgement of allegedly ill-gotten gains, according to the publication."

***Merrill Lynch Wins Expungement of $20M American Airlines Claim*, FinancialPlanning (Jan. 13, 2022)**: "A client arbitration complaint in which a broker's living trust sought $20 million in damages will be removed from another financial advisor's record after a panel granted the expungement. The Amended and Restated … Living Trust had settled the case against Merrill Lynch for $595,000 a couple of months before the Jan. 11 decision by a Boca Raton, Florida-based panel approving the removal of the complaint from the FINRA BrokerCheck record of [broker]. [The Trust] had accused Merrill Lynch of negligence, breaches of contract and fiduciary duty, and omissions to state a material fact, among other claims connected to the trust's investments in 'primarily' stock of American Airlines Group."

***Recurring Online Subscriptions Face a New Arbitration Standard in California*, Lexology (Jan. 13, 2022)**: "In a case of first impression, the California Court of Appeal, Fourth District (San Diego), considered 'under what circumstances a "sign-in wrap" agreement … is valid and enforceable' between consumers and online companies that offer subscription-based products or services on a recurring basis. Here for the first time, an appellate court applied the 'clear and conspicuous' standard from California's Automatic Renewal Law (ARL) to the analysis of whether the consumer entered into a binding contract by agreeing to online terms of use that contained an arbitration provision and class action waiver. []This decision potentially changes the landscape for similarly situated companies that desire all disputes with their customers go to individual arbitration" (footnotes omitted).

***Sexual Misconduct Bill Inches Closer to Becoming Law*, The Crime Report (Jan. 14, 2022)**: A U.S. Senate measure known as the *Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021*, which would remove a legal hurdle blocking many

employees from suing over workplace sexual misconduct, could become law after advancing out of committee and receiving the backing from 10 Republican senators, reports Bloomberg News. The bill would bar enforcement of mandatory arbitration clauses, which often prevent workers from suing an employer over allegations of workplace sexual misconduct and force them instead to seek redress through an out-of-court dispute resolution process, in cases where employees are alleging they were sexually harassed or assaulted at work."
return to top

DID YOU KNOW?

NEW ACUS REPORT ON FEDERAL AGENCY ADR USE. The Administrative Conference of the United States ("ACUS") on December 17 issued *Alternative Dispute Resolution in Agency Administrative Programs*. The 76-page report, authored by Kristen Blankley, Kathleen Claussen & Judith Starr: "studies how federal agencies use and might better use different types of ADR -- including mediation, conciliation, facilitation, factfinding, minitrials, arbitration, and the use of ombuds -- in the programs Congress has entrusted them to administer. It also addresses the use of ADR to resolve disputes before the initiation of a formal agency adjudicative proceeding or litigation involving the agency's enforcement authority."
return to top

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