SECURITIES ARBITRATION ALERT

SECURITIES ARBITRATION ALERT 2022-08 (3/3/22)

George H. Friedman, Editor-in-Chief

SQUIBS:

SHORT BRIEFS:

QUICK TAKES:

- ***Harshaw v. Harshaw,* No. 21-1423 (7th Cir. Feb. 23, 2022)**
- ***Ramirez v. Charter Communications, Inc.,* No. B309408 (Calif. Ct. App. 2 (Feb. 18, 2022)**
- ***Revis v Schwartz*, 2020 NY Slip Op 08094 (App. Div., 2d Dept. Dec. 30, 2020)**
- ***Zeyafatzadeh v. Robinhood Financial*, FINRA ID No. 21-02256 (Los Angeles, CA, Jan. 21, 2022)**
- ***Williams v. Spartan Capital*, FINRA ID #20-02440 (New York, NY, Jan. 28, 2022)**

ARTICLES OF INTEREST:

- **Holloway, *Approaches to Providing for Mediation in Investment Treaties and Model Clauses*, Kluwer Arbitration Blog (Feb. 26, 2022)**
- ***Judicial Mediator Serving As Deciding Judge In Same Case: An Overreach?*, Lexology (Feb. 22, 2022)**
- ***Court Rejects No Surprises Act IDR Rule*, www.AAMC.org (Feb. 25, 2022)**
- ***Fourth Circuit Takes Pendent Jurisdiction Over Appeal of Trial Court Order to Compel Arbitration Despite A Seeming Prohibition in Federal Arbitration Act*, JDSupra (Feb. 25, 2022):**
- ***Wells Fargo Appeals Ruling Alleging 'Secret' Finra Arbitration Agreement*, FA Magazine (Feb. 25, 2022)**

DID YOU KNOW?

- **Ulysses S. Grant, the Civil War, and Arbitration**

SQUIBS: IN-DEPTH ANALYSIS

SCOTUS NOMINEE KETANJI BROWN JACKSON MAY NOT HAVE DECIDED MANY ARBITRATION-RELATED CASES, BUT SHE SURE KNOWS HER STUFF. ***President Biden's nominee to replace the departing Justice Stephen Breyer has not as far as we can tell decided many arbitration-related cases during her tenure as a judge, but her bio demonstrates significant alternative dispute resolution experience.*** **President Biden** on **February 23** nominated **Ketanji Brown Jackson** to replace the retiring Supreme Court **Justice Breyer**, a White House Press Release

announced. Judge Brown Jackson was appointed by **President Obama** in **2013** to the U.S. District Court for the District of Columbia, and by President Biden last year to the Court of Appeals for the District of Columbia Circuit (to fill the seat vacated by **Merrick B. Garland**).

Few Arbitration-Related Decisions …

Thus far, we have not found many court decisions involving the Judge and arbitration. A comprehensive analysis published **February 25** by the CPR Blog identified eight cases involving arbitration that: "mostly involved confirmation proceedings." One that drew our attention is *CEF Energia, B.V. v. Italian Republic*, No. 19-cv-3443 (KBJ), 2020 WL 421978 (D.D.C. 2020). The case involved a complex set of facts surrounding the attempted confirmation in the United States of two related multi-€ awards rendered against Italy by arbitration panels at the Stockholm Chamber of Commerce. Pending before the Court in Sweden were jurisdictional challenges over award enforcement; the Court had: "issued orders that prohibit the enforcement of the awards pending resolution of the challenge." The prevailing parties then sought award confirmation in the U.S. under the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* and section 207 of the Federal Arbitration Act. In a well-reasoned Opinion, Judge Brown Jackson declined to enforce the award and instead stayed the matter pending resolution of the Swedish proceedings: "Given the ongoing set-aside proceedings that are taking place in Sweden (the primary jurisdiction of the parties' arbitrations) and the significant interests in judicial economy and international comity that weigh in favor of staying this case, Respondent's motion to stay the instant case will be GRANTED, and the instant case will be STAYED until further order of the Court. As set forth in the Order that accompanies this Memorandum Opinion, throughout the pendency of the stay, the parties shall provide the Court with periodic updates regarding the status of the set-aside matter that is working its way through the Svea Court, and they shall notify the Court of the Svea Court's ruling within three business days of its issuance."

… But Lots of ADR Experience

A review of Judge Brown Jackson's bio and Senate Judiciary Committee Questionnaire from **April 2021** shows that she has significant experience in and familiarity with arbitration and mediation. We repeat below essentially *verbatim* these entries in her Questionnaire:

- *Hall Street Associates LLC v. Mattel Inc.,* 552 U.S. 576 (2008) (Souter, J., wrote the opinion for the Court): From 2007 to 2008, I was part of a litigation team that represented respondent Mattel in a Supreme Court case involving the section of the Federal Arbitration Act that grants expedited judicial review to confirm, vacate, or modify an arbitration award. I was responsible for reviewing the factual record related to the subject matter of the underlying arbitration, and I drafted parts of both the primary brief for respondent and two supplemental briefs on specified issues the Supreme Court ordered. I also assisted in the preparation of oral argument counsel. The Supreme Court ultimately agreed with Mattel's argument that the Act's grounds for vacatur and modification of arbitration awards are exclusive for parties seeking

expedited review under the FAA, but remanded the case for a determination regarding whether the parties did, in fact, intend for the arbitration proceeding at issue to be governed by the FAA.

- October 27, 2015: Judge, Mock Arbitration, ChIPs Network Global Summit, Washington, District of Columbia. I served as a judge for a mock intellectual property arbitration.

- In 2002, I returned to the District of Columbia and joined The Feinberg Group, a small arbitration and mediation practice, as an associate. While at the Feinberg Group, I assisted in the negotiated (non-litigation) resolution of mass tort claims. I attended arbitration proceedings and advised client corporations regarding trust payment structures for resolving mass-tort liability, such as asbestos claims.

- When I was at The Feinberg Group from 2002 to 2003, my typical clients were large corporations facing mass tort liability. I specialized in mediation and arbitration procedures and in the evaluation of trust structures for the settlement of current and potential (future) tort claims.

Conclusion
Based on the information available, it's hard to say whether the nominee is pro- or anti-arbitration. We certainly don't read anything into the *CEF Energia* Opinion. On the other hand, the Judge certainly is very familiar with arbitration. We don't expect arbitration will be a major point of inquiry in her Senate Judiciary Committee confirmation hearings, but with the recent passage of the *Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act,* you never know.
(ed: SCOTUSBlog on February 25 published a nice general profile on the nominee.)
return to top

AAA STATS FOR 2021: CONSUMER & EMPLOYMENT CASE INFO UPDATES. ***AAA Award Data is updated quarterly by the American Arbitration Association. This analysis of the full-year 2021 update is provided by Rick Ryder, President of Securities Arbitration Commentator, Inc., and by SAC's* ARBchek.com *- securities arbitration's first arbitrator evaluation service***. The American Arbitration Association ("AAA") releases on a quarterly basis a report providing detailed information about its many Consumer and Employment cases. The report issues in the form of an Excel sheet, with each column representing a specific disposition, whether that disposition be in the form of an Award, settlement, withdrawal, or otherwise. AAA has been posting this information on its Consumer and Employment cases since the early aughts, but in five-year tranches. Thus, the latest Report that AAA posted on its Website in February for year-end **2021**, reflects case information for the five years from **2017 to 2021**. We'll review that Report here, focusing primarily on the past year and the latest quarter.

Broad "Financial Services" Category

AAA processes a heavy load of "Financial Services" cases, far more than FINRA, and these disputes comprise a significant segment of the case dispositions in its released Report. FINRA's "Financial Services" disputes are limited to broker-dealers ("BDs") for the most part; AAA covers an array of financial services entities that resembles more the jurisdictional breadth of the CFPB (banks, credit card companies, financing agencies, etc.) than the SEC. Still, today, more securities-related disputes than ever are being arbitrated at AAA and these cases are generally reflected in the AAA's quarterly statistics. Disputes involving independent RIAs -- a growing area for arbitration -- are included in this mix, as are also employment disputes relating to broker-dealers that have, for tactical reasons, named AAA in their PDAAs with employees.

Growth in this Caseload Sector

SAC has more than 140,000 case records in its collection of AAA reports dating back to 2005. Of that number, 17,001 derived from this past year and 5,325 of those were designated by AAA as "Financial Services" disputes. Of these, 223 were employment-related and the rest (5,102) came from the consumer sector (see the chart below). How many involved BDs or RIAs is almost conjectural. The names of the institutional parties are provided in the Report, but determining who's who among these institutions requires individual scrutiny and, due to naming vagaries in the Report, identification would still be elusive.

Growth of Financial Services* Case Dispositions at AAA: 2014-2021

Year	Financial Services	Consumer	Employment	Arbitral decision
2014	298	276	22	64
2015	938	795	143	254
2016	948	798	150	128
2017	1506	1364	142	146
2018	2111	1952	159	139
2019	2111	1827	284	188
2020	2126	1878	248	196
2021	5325	5102	223	209

2021 Financial Services Results

Of the 5,102 "Financial Services" Consumer dispositions, only 195 resulted in Awards. Settled cases, as might be expected, produced many more dispositions (1,300). Withdrawals, surprisingly, accounted for the majority of dispositions (2,747). AAA supplies a Report Legend, which defines the terms used in producing the Reports. "Withdrawals" as a term of art, does not appear to include Settlements. Interestingly, "Dismissals" are a disposition category used by AAA, but the term is undefined. There are clues indicating that non-monetary relief, such as an accounting or a declaratory judgment, may have been granted in some of the matters; the rest of these 94 "Dismissal"

cases may well have been on the law, as many did have monetary claims by one or the other party.

Focus on Awards

Among the 195 "Awarded" cases -- which the AAA legend defines as: "A case in which the arbitrator ... rendered a decision," we found 49 in which monetary relief was awarded to the Consumer. Some of those 195 Awarded matters -- probably collection matters -- assessed the Consumer; in others, a claiming Consumer stated no monetary claim. Seeking a more accurate sense of the "win" rate for claiming Consumers, we counted only those "Awarded" matters (128) where the Consumer party stated a monetary claim. Among those 128 cases, 40 (33% "win" rate) disclosed a monetary award for the Consumer. As to the size of the recovery, we found 17 of the 40 winners were granted a monetary award that either matched or exceeded the claimed amount. Most of the claims were modest, but they covered a wide dollar range as a whole. Two cases claimed millions but won only low five figures; another claimed $300,000 and received an award of $844,512.

Impact of Virtual Hearings is Unclear

AAA provides data on hearing locations, but only dispositions involving "In-Person" hearings report that information. That left us unable to develop statistics on case or Award distributions, but we did learn that only five of the 195 "Awarded" dispositions involved "In-Person" hearings. How did the rest proceed? 49 of the 195 matters were decided on a "Documents Only" basis. Were the remaining 141 cases decided virtually (e.g., Zoom) -- a product of the COVID era?** Trying to judge, we compared these disposition figures to AAA's statistics in a pre-COVID year - 2019. Then, only 1,827 "Financial Services" dispositions were listed among 6000+ Consumer matters. That told us that Consumer cases have grown in number in just two years and that Financial Services cases now comprise a higher percentage of a bigger "pie." The rest left us uncertain. We know that 170 of the 1,827 cases ended in an Award. A larger number (56) of those 170 dispositions were designated Document-Only and a larger number (36) involved In-Person hearings, but how did arbitrators proceed with the nearly 80 other decisions – since virtual hearings were presumably not common three years ago? The statistics leave us uncertain on this point.

Conclusions

A lot more Financial Services cases were disposed of this past year (5,102 vs. 1,827). In-Person hearings were far more common (36/170 vs. 6/195) in normal times than in the 2020-2021 COVID period. The very large number of Withdrawals -- more than half of the dispositions in 2021 -- may have been occasioned, at least in part, by the serious delays and the live hearing moratorium brought about by COVID.

*(R. Ryder: *The 2,111 figure for financial services cases for 2018 and 2019 is not a typo. **We are trying to figure out what types of hearing one can have, other than live hearings, documents only, or virtual. The stats seem to say there were 100+ cases utilizing virtual hearings in 2021, which could be. But, if so, then the stats also say that there were 80 virtual in pre-COVID 2019. That doesn't seem right. ***Take a look for*

*yourself at AAA's Consumer Arbitration Statistics. Caveat: the downloadable Report contains data for the most recent five-year period only. ****While the majority of the cases involves 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. Importantly, checking for AAA Awards provides an alternative to simply striking a candidate who has no FINRA Awards. If you happen to have a AAA dispute, your appointed arbitrator's C&E case history can lead to a wealth of information that will inform your tactical decisions. *****SAC has the earlier reports on file going back to 2005 and provides Arbitrator Summary Reports in individualized Excel and PDF formats for a very low fee.)*
return to top

FINRA RELEASES 2022 RISK MONITORING AND RISK PRIORITIES. HEAVY FOCUS ON *REG BI* IMPLEMENTATION. *FINRA announced its 2022 risk monitoring and exam priorities in a recently-issued Report, with an emphasis on* Regulation Best Interest *compliance reviews conducted after about a year of effectiveness.* As we have reported several times, the SEC issued its final *Regulation Best Interest* ("*Reg BI")* Rule package in **June 2019**. Two items were effective immediately on publication: *Commission Interpretation Regarding Standard of Conduct for Investment Advisers* (84 FR 33669) and *Commission Interpretation Regarding the Solely Incidental Prong of the Broker-Dealer Exclusion from the Definition of Investment Adviser* (84 FR 33681). Two other items went into effect **September 2019**, specifically *Reg BI* (84 FR 33318) and Final Rule - *Form CRS Relationship Summary and Form ADV Amendments* (84 FR 33492). Although *Reg BI* was effective in September 2019, compliance was not required until **June 30, 2020**.

Report: After a Year, Firm Compliance is Lagging
The 59-page* report, *2022 Report on FINRA's Examination and Risk Monitoring Program*, was announced in a **February 9** press release. It covers: "21 different topics -- including five new subjects -- relevant to an evolving securities industry." The release identifies several core focus areas (*ed: repeated* verbatim); each section has conclusions and recommendations:

- FINRA's initial findings from its Reg BI and Form CRS reviews;
- firms' compliance with certain regulatory obligations related to:
    - the Consolidated Audit Trail,
    - best execution and
    - Rule 606 of Regulation NMS;
- problems with some mobile apps' communications with customers and firms' supervision of activity on those apps, particularly controls around account openings;
- firms' compliance with their regulatory obligations with securities activities involving SPACs;
- the increasing number and sophistication of cybersecurity threats faced by firms and their customers; and

- firms' communications and disclosures made to customers regarding complex products.

Déjà Vu All Over Again
We covered the general topic of firm *Reg BI* compliance in SAA 2021-43 (Nov. 18) (see *NASAA: "Reg BI Not Working Well So Far." SIFMA: "T'aint So!"*). On **November 4,** NASAA issued a report based on an examination of 443 firms from 35 jurisdictions, suggesting that, so far, *Reg BI* was not working as intended. A Press Release, *NASAA Report Finds that Many Broker-Dealer Firms Still Place Their Financial Interests Ahead of Their Customers Despite Implementation of Regulation Best Interest,* identified several "notable findings." SIFMA disagreed in a **November 4** statement from President and CEO **Kenneth E. Bentsen, Jr.**: "The report fails to recognize these significant changes made in response to Reg BI, thereby discounting the true benefits delivered by Reg BI in terms of the positive changes it inspired and requires."

Arbitration Again Doesn't Make the Cut
In 2017, Dispute Resolution was included in FINRA's regulatory priorities for the first time in years. That was not the case this year nor the four prior years, although there is one passing reference to past arbitrations in "Counterparty Exposure." That's not necessarily a bad thing; if there were perceived problems with the program, we're sure it would be a focus area. Of course, with FINRA having retained outside counsel to investigate the "rigged panels" allegation, the arbitration program now *is* a *de facto* priority.
*(ed: *Kudos again to FINRA for letting firms (and investors) know on what areas the Authority intends to focus. **The Report is also available in PDF format. ***Not to be sticklers, but the FINRA release and Website says "70-pages" but we count 59.)*
return to top

SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

UPDATE: *ENDING FORCED ARBITRATION OF SEXUAL ASSAULT AND SEXUAL HARASSMENT ACT* STILL AWAITS THE PRESIDENT'S SIGNATURE. The *Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act*, which was passed by Congress on **February 10**, still awaits action by **President Biden**. As reported in SAAs 2022-07 (Feb. 24) and -05 (Feb. 10), H.R. 4445 passed the House on **February 7** by a bipartisan vote of 335-97, and the Senate by voice vote on **February 10**. The Constitution provides that the President has ten days from "presentment" of the approved bill (not including Sundays and holidays or the day of presentment). It's not clear when -- or even if -- the bill was "presented"* but we have to assume President Biden will act soon. His approval is a foregone conclusion since the President issued a **February 2** statement supporting the legislation). World events we are sure have impacted this approval process, and even if he doesn't act in time, the bill will become law.
*(ed: *According to Congress.gov, the last action was on February 10, when the Senate formally notified the House that the bill had been passed. **As our coverage points out, the new law definitely affects securities arbitrations, since the Act amends the FAA (see*

*the House text). We think the impact at FINRA will be in two main areas: 1) opting out; and 2) intertwining. ***As enacted, the new law raises many questions in our view. For details, see our feature article.)*
return to top

FINRA TO FIRMS: PAY ATTENTION TO RUSSIA SANCTIONS. FINRA on **February 28** issued an Alert, *Sanctions Alert: Russia-Related Sanctions*. As a service to the public, we quote below *verbatim* the core message (links in original):

> On February 26, 2022 the White House released a Joint Statement on Further Restrictive Economic Measures with leaders of the European Commission, France, Germany, Italy, the United Kingdom, and Canada that, amongst other things, stated, "we commit to ensuring that selected Russian banks are removed from the SWIFT messaging system. This will ensure that these banks are disconnected from the international financial system and harm their ability to operate globally." According to The White House press briefing on February 26, 2022, "[t]he list of banks that will be de-swifted will be finalized by the EU, since SWIFT is under Belgian jurisdiction."
>
> The U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) has also announced a series of additional sanctions related to Russia's activity in Ukraine. Specifically, on February 28, 2022, OFAC prohibited United States persons from engaging in transactions with the Central Bank of the Russian Federation, the National Wealth Fund of the Russian Federation, and the Ministry of Finance of the Russian Federation, and added the Russian Direct Investment Fund, its CEO, Kirill Aleksandrovich Dmitriev, its management company, and one of the managing company's subsidiaries to the Specially Designated Nationals (SDN) List. This follows the imposition of sanctions against Vladimir Putin, Sergei Lavrov, and other members of Russia's Security Council on February 25, 2022, and the imposition of sanctions against 24 Belarusian individuals and entities on February 24, 2022.

Recognizing the rapidly evolving situation, the Alert adds: "As noted in FINRA Regulatory Notice 22-06, FINRA encourages member firms to continue to monitor the Department of Treasury's Office of Foreign Asset Control (OFAC) website for relevant information."
(ed: We will track this one, and tweet out any news between Alerts.*)*
return to top

FINRA DRS POSTS STATS THROUGH JANUARY: CUSTOMER ARBITRATION CLAIMS DECLINE, WHILE INDUSTRY ARBITRATIONS STAGE A COMEBACK. AND MEDIATION FILINGS CONTINUE TO SOAR. FINRA Dispute Resolution Services ("DRS") posted case statistics through **January**, with the overall case filing trends changed a bit from last year. While we caution that a single month does not constitute a trend, we offer these headlines: 1) overall arbitration

filings through January – 193 cases – are down 13% (halving 2021's decline); 2) cumulative customer claims declined by 23% (up from 2021's decline of 9%); 3) industry arbitration filings were *up* 5% (reversing last year's 45% decline); 4) mediation cases continue to soar; and 5) pending cases continue to decrease. Overall arbitration turnaround times were 18.1 months, with hearing cases now taking 20.0 months (both figures are up substantially from last year). There were 77 mediation cases in agreement, a gargantuan 166% increase (besting 2021's torrid 49% pace). The settlement rate remains high at 91% (it had been 89% last year). There are now 8,303 DRS arbitrators, 3,998 public and 4,305 non-public. Pending cases stand at 3,785, a decline of 131 from December.
*(ed: *Again, kudos to FINRA DRS for eliminating the backlog. **We again wonder if hearing processing times are the result of the resumption of in-person hearings in August 2021, given that it is easier to schedule and attend virtual hearings than those conducted in-person. ***Past year stats can be found here.)*
return to top

FINRA BOARD MEETS IN PERSON NEXT WEEK. NO AGENDA YET. FINRA's Board of Governors will meet in person **March 9 – 10**; thus far, there is no published agenda. As usual, we will follow up after the meeting results are posted. The schedule for the rest of 2022 is: **May 11 – 12**; **July 13 – 14**; **September 21 – 22;** and **December 7 – 8**.
*(ed: *We believe this is the first post-pandemic Board meeting not conducted virtually. **We'll tweet any news as soon as we have it and will cover the topic in the next* Alert.*)*
return to top

UPDATE ON FINRA "RIGGED PANELS" ACCUSATION: WELLS APPEALS. The *Alert*'s readers are very familiar with this ongoing story, which we've covered extensively and blogged about on February 2, 9, and 25. To review, Fulton County Superior Court Judge **Belinda E. Edwards** in *Leggett v. Wells Fargo Clearing Services, LLC*, No. 2019CV328949 (Ga. Super Jan. 25, 2022), found that the potential arbitrator list preparation process had been compromised. This prompted: 1) subsequent calls by PIABA for Congressional and SEC investigations; 2) a denial from Wells and a vow to appeal; 3) a **February 9** letter to FINRA from Sen. **Elizabeth Warren** (D-MA) and **Rep. Katie Porter** (D-CA) demanding answers by **February 23***; and 4) a **February 18** Press Release from FINRA announcing that the Authority had: "hired the Lowenstein Sandler law firm to conduct an independent review of how FINRA Dispute Resolution Services (DRS) complied with its rules, policies and procedures for arbitrator selection in an arbitration proceeding whose award was recently vacated by an Atlanta Superior Court judge…." Another shoe dropped **February 24** when Wells filed the promised appeal in the Superior Court of Fulton County, Georgia, according to news reports in *FA Magazine* and *ThinkAdvisor*.
*(ed: *So far, we have not seen a response from FINRA, which referred us to the legislators. Inquiries to the offices of Sen. Warren and Rep. Porter were not responded to as of press time. **As we've said early and often, this is not the end of it.)*
return to top

QUICK TAKES: CASES AND AWARDS WORTH READING

***Harshaw v. Harshaw*, No. 21-1423 (7th Cir. Feb. 23, 2022)**: "The arbitrator awarded Anne $435,000, half the increase in value of Donald's retirement savings during their years of unmarried cohabitation. Donald appealed the award but lost in the state courts. After that loss became final, Donald declared bankruptcy and sought to discharge the arbitrator's award. He asserted that the award was for a money judgment and thus subject to discharge in the bankruptcy. Anne opposed his claim, arguing that the arbitrator had awarded her an interest in specific property so that the award could not be discharged in Donald's bankruptcy. The bankruptcy court sided with Anne. The district court reversed and sided with Donald. We agree with the district court and affirm its judgment."

***Ramirez v. Charter Communications, Inc.*, No. B309408 (Calif. Ct. App. 2 (Feb. 18, 2022)**: "Plaintiff Angelica Ramirez and defendant Charter Communications, Inc. (Charter) are parties to an arbitration agreement. After Charter terminated Ramirez's employment, Ramirez filed suit alleging claims under the Fair Employment and Housing Act (Gov. Code, § 12940, et. seq.; FEHA)1 against Charter, and Charter filed a motion to compel arbitration. Finding the arbitration agreement unconscionable, the trial court denied Charter's motion, and Charter appealed. On appeal, Charter contends the trial court erred in concluding the arbitration agreement is unconscionable and in refusing to sever any provisions the court considered unconscionable. We affirm the trial court's order denying the motion to compel arbitration (though we disagree with certain particulars of the trial court's reasoning). In affirming, we also disagree with *Patterson v. Superior Court* (2021) 70 Cal.App.5th 473 (Patterson), which considered the enforceability of a provision in the same arbitration agreement at issue here that awards attorney fees to the prevailing party on a motion to compel arbitration." (*ed: we covered* Patterson *in the Quick Takes section in SAA 2021-40 (Oct. 28).*)

***Revis v Schwartz*, 2020 NY Slip Op 08094 (App. Div., 2d Dept. Dec. 30, 2020)**: "When the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract. Under such circumstances and without more, a court possesses no authority to decide the arbitrability issue.[]In this case, the defendants established, as a matter of law, that the plaintiff Darrelle Revis entered into an agreement with the defendant Neil Schwartz pursuant to which they agreed to arbitrate 'gateway' questions of arbitrability. The defendants further established that, given the allegations in the complaint, the remaining parties to this lawsuit are bound by the same broad arbitration clause. Under these circumstances, the Supreme Court properly granted the defendants' motion to compel arbitration and to stay the action pending completion of the arbitration."

***Zeyafatzadeh v. Robinhood Financial*, FINRA ID No. 21-02256 (Los Angeles, CA, Jan. 21, 2022)**: In this small claims arbitration, a customer alleging unauthorized transfers is awarded damages from Respondent broker-dealer. Please note: this matter proceeded pursuant to Rule 12800 of the *Code. Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Williams v. Spartan Capital*, FINRA ID #20-02440 (New York, NY, Jan. 28, 2022)**: - An Arbitrator denies a broker's request for expungement of a customer complaint from his CRD record for his failure to pursue the request and dismisses the case without prejudice. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*
return to top

ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

A. Holloway, *Approaches to Providing for Mediation in Investment Treaties and Model Clauses*, Kluwer Arbitration Blog (Feb. 26, 2022): "In 2021, ICSID conducted an extensive survey of dispute resolution clauses in bilateral investment treaties (BITs), free trade agreements (FTAs) and other treaties (including model treaties). The data set comprised more than 900 treaties, from which nearly 350 clauses were identified for closer analysis. The overarching goal of the survey was to see to what extent, and how, existing dispute resolution clauses already provide for mediation and/or other forms of amicable dispute resolution, and to provide the investor-state dispute settlement ('ISDS') community with a useful resource for addressing the question of the role that mediation can and should play in the resolution of investor-state disputes."

Judicial Mediator Serving As Deciding Judge In Same Case: An Overreach?*, Lexology (Feb. 22, 2022)**: "'Mediating judges have largely slipped through the cracks of widespread academic discussion. . . . ***Yet, some practices create the perception or the reality of judicial overreach in ways that elude standard judicial accountability measures.' Prov. Melissa B. Jacoby, "Other Judge's Cases," at 68 (January 22, 2022) (emphasis added). A new opinion illustrating "the perception" of such judicial overreach is *PIA McAdams v. Robinson*, Case No. 21-1087 (4th Cir. decided Feb. 10, 2022). What follows is an attempt at summarizing the case."

***Court Rejects No Surprises Act IDR Rule*, www.AAMC.org (Feb. 25, 2022)**: "The U.S. District Court for the Eastern District of Texas issued a decision on Feb. 23 that the No Surprises Act is unambiguous regarding the independent dispute resolution (IDR) process in stating that the qualifying payment amount (QPA) is only one of several factors to be considered in resolving a billing dispute between an out-of-network provider and an insurer. The decision was issued in response to a challenge filed by the Texas Medical Association (TMA) to the IDR process that was finalized as part of the No Surprises Act interim final rule.[]The court also agreed with the TMA's contention that the Department of Health and Human Services should not have issued an interim final rule but should have complied with the Administrative Procedures Act which requires notice and comment rulemaking. The judge vacated the IDR portion of the interim final rule, meaning that it is no longer in effect nationwide."

***Fourth Circuit Takes Pendent Jurisdiction Over Appeal of Trial Court Order to Compel Arbitration Despite A Seeming Prohibition in Federal Arbitration Act*, JDSupra (Feb. 25, 2022)**: "The Federal Arbitration Act establishes a federal policy in favor of arbitration agreements and provides for enforcement in federal court of many agreements to arbitrate. 9 USC §§ 1, 4. Section 16(b) of the Arbitration Act goes so far as

to say that a federal trial court's interlocutory order compelling the parties to engage in arbitration in accordance with the arbitration agreement may not be appealed. Notwithstanding that prohibition against appeals from trial court orders directing parties to proceed to arbitration, the United States Court of Appeals for the Fourth Circuit recently accepted and decided an appeal of such an order, and reversed the trial court's order compelling arbitration. The Fourth Circuit held that it could do so under the seldom used doctrine of pendent appellate jurisdiction. *Lyons v. PNC Bank*, – F3d – (Fourth Circuit Slip Op. No. 21-1058, February 15, 2022).

***Wells Fargo Appeals Ruling Alleging 'Secret' Finra Arbitration Agreement*, FA Magazine (Feb. 25, 2022):** "Wells Fargo is appealing a controversial court decision that accused the bank and its outside counsel with committing fraud and perjury, and striking a secret deal with Finra in an arbitration proceeding.[]Wells Fargo filed its appeal in the Superior Court of Fulton County, Ga., yesterday, seeking to overturn Judge Belinda Edwards's ruling in January that Finra and Wells Fargo's lawyer appeared to have a secret agreement to strike certain people from a list of arbitrators." (*ed: See our coverage elsewhere in this* Alert.)
return to top

DID YOU KNOW?

ULYSSES S. GRANT, THE CIVIL WAR, AND ARBITRATION. Recent world events made us think about how arbitration has been used to avert war or settle post-war disputes. A case in point is the Treaty of Washington of 1871. After the Civil War the United States asserted claims against Britain, whose shipbuilders had supplied warships to the Confederacy. Things got serious and according to History Central: "at one point, a claim was made that Britain was responsible for half the cost of the war, and that the U.S. would consider Canada proper payment. This shocked the British and they realized they had better come to some agreement soon." At the urging of **President Grant,** the Treaty included an arbitration clause to resolve the claims. The matter was submitted to arbitration in Geneva before a five-person arbitration tribunal. Arbitrators were designated by the heads of state of Britain, the United States, Brazil, Italy, and Switzerland. How did it turn out? Although in the end it got to keep Canada, Britain had to pay the U.S. $15,500,000 – well over $300 million today – and say they were sorry.
return to top

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

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.*

Mail to: 194 Carlton Terrace, Teaneck, NJ 07666
T: 917-841-0521
Web: www.SecArbAlert.com
Blog: www.sacarbalert.com/blog/; Twitter: @SecArbAlert