SECURITIES ARBITRATION ALERT 2022-27 (7/14/22)

George H. Friedman, Editor-in-Chief

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DID YOU KNOW?

- **FINRA Has an Ombuds Office**

SQUIBS: IN-DEPTH ANALYSIS

IT'S OFFICIAL: CFPB NOT PLANNING TO ACT ON ARBITRATION.

Confirming what we teased in June, the CFPB's recently-released regulatory agenda shows that the agency does not intend to revisit a rule covering arbitration of consumer financial disputes. We reported in SAA 2022-21 (Jun. 2) that the Consumer Financial Protection Bureau ("CFPB") seemed disinclined to act on arbitration. We based this surmise on Director **Rohit Chopra**'s semi-annual report to Congress in **April**, when neither he nor any Senate Banking Committee members mentioned arbitration. The

Committee's two-hour hearing, *The Consumer Financial Protection Bureau's Semi-Annual Report to Congress,* was held **April 26**. Perusal of the hearing video (available here) or Director Chopra's five-page prepared remarks shows that the term "arbitration" was not mentioned.

Now, It's Official
The CFPB recently published its *Spring 2022 Agency Rule List*, which delineates regulatory initiatives the Bureau: "reasonably anticipates having under consideration during the period from June 1, 2022 to May 31, 2023." Five items are listed, but arbitration is not one of them: 1) Consumer Access to Financial Records; 2) Amendments to FIRREA Concerning Automated Valuation Models; 3) Property Assessed Clean Energy Financing; 4) Small Business Lending Data Collection Under the Equal Credit Opportunity Act; and 5) Adverse Information in Cases of Human Trafficking Under the Debt Bondage Repair Act.

No Surprise, Given the Past
Given past events and resource limitations, arbitration's absence from the CFPB's priorities is not surprising. Recall that *Dodd-Frank* section 1028 directs the CFPB to study the use of PDAAs in contracts for consumer financial products and services, to later report to Congress, and to ban, limit or impose conditions on their use if such action "is in the public interest and for the protection of consumers." *Alert* readers may recall that the CFPB did indeed issue the required report to Congress and later promulgated a rule banning class action waivers. However, before it became effective, the Final Rule was retroactively nullified in **November 2017**, when **President Trump** signed into law H.J. Res. 111, a *Joint Disapproval and Nullification Resolution* (see SAA 2017-41). Congress had exercised its authority under the *Congressional Review Act*, ("*CRA*") 5 USC §§ 801 *et seq*., which allows that body to legislatively nullify any regulation within 60 legislative/session days of its publication. Under the *CRA*, the reg cannot be reintroduced without the express permission of Congress.
*(ed: *As we said in # 21, we're not surprised. The CFPB clearly has other fish to fry.**For an analysis of why arbitration is not a CFPB priority see* Don't Hold Your Breath, Professor Sovern! *in the May 13 Ballard Spahr Blog.)*
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NEW *CERT.* PETITION SEEKS ANSWER TO ISSUE LEFT OPEN BY SCOTUS IN *SOUTHWEST*: DOES FAA SECTION 1 EXEMPT DELIVERY DRIVERS?
Domino's Pizza is asking the Supreme Court to determine whether the Federal Arbitration Act ("FAA") section 1 exemption extends to delivery drivers. The Court left this issue open when it decided* Southwest v. Saxon *in June. FAA section 1 exempts from the Act: "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Recall that the Court on **June 6** decided *Southwest Airlines Co. v. Saxon*, No. 21-309, ruling unanimously that that the exemption of "workers engaged in foreign or interstate commerce" includes classes of workers who are part of the flow or stream of interstate commerce, and that there is no FAA requirement that these individuals actually cross state lines. The question

presented in the **August 23** Petition for *Certiorari* was: "Whether workers who load or unload goods from vehicles that travel in interstate commerce, but do not physically transport such goods themselves, are interstate 'transportation workers' exempt from the Federal Arbitration Act." In the case below, *Saxon v. Southwest Airlines Co*., 993 F.3d 492 (7th Cir.), *motion to stay mandate den*. (2021), the worker was: "a ramp supervisor who manages and assists workers loading and unloading airplane cargo for Southwest Airlines Company."

Question Left Open
The SCOTUS decision in *Southwest* was narrow, and specifically did not embrace the issue of FAA coverage of delivery drivers. For example, the Justices state: "We recognize that the answer will not always be so plain when the class of workers carries out duties further removed from the channels of interstate commerce or the actual crossing of borders. Compare, e.g., *Rittmann v. Amazon.com, Inc*., 971 F. 3d 904, 915 (CA9 2020) (holding that a class of 'last leg' delivery drivers falls within §1's exemption), with, e.g., *Wallace v. Grubhub Holdings, Inc*., 970 F. 3d 798, 803 (CA7 2020) (holding that food delivery drivers do not). In any event, we need not address those questions to resolve this case."

New Petition Raises the Unresolved Issue
We reported in SAA 2022-01 (Jan. 13) *Carmona v. Domino's Pizza, LLC,* No. 21-55009 (9th Cir. Dec. 23, 2021), *petition for reh'g den.* (February 15, 2022), where a unanimous Ninth Circuit embraced the "stream" or "flow" of interstate commerce doctrine. Said the Opinion: "Domino's sells pizza to the public primarily through franchisees. Domino's buys various goods, such as mushrooms, that are used by its franchisees in making pizzas, from suppliers outside of California. Those goods are then delivered by third parties to the Domino's Southern California Supply Chain Center ('Supply Center'). At the Supply Center, Domino's employees reapportion, weigh, package, and otherwise prepare the goods to be sent to franchisees. Domino's franchisees in Southern California order the goods either online or by calling the Supply Center, and the plaintiff drivers ('D&S drivers'), who are employees of Domino's, then deliver the goods to the franchisees." Crossing state lines was not part of the drivers' job." A **June 15** *Certiorari* Petition in *Domino's Pizza, LLC v. Carmona*, No. 21-1572 presents this question: "Whether drivers making solely in-state deliveries of goods ordered by in-state customers from an instate warehouse are nevertheless a 'class of workers engaged in foreign or interstate commerce' for purposes of Section 1 of the Federal Arbitration Act simply because some of those goods crossed state lines before coming to rest at the warehouse?" *(ed: Whether it's this case or another, we think the Court will take on this issue, both for delivery drivers and rideshare drivers for companies such as Uber or Lyft.)*
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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

FINRA BOARD MET IN PERSON THIS WEEK. NO DR ITEMS ON THE AGENDA. FINRA's Board of Governors met in person **July 13 – 14.** The Agenda had no dispute resolution-related items, but we will follow up as usual after the meeting

results are posted. In fact, there are no rulemaking items whatsoever. FINRA's meeting notice says: "As is customary for our mid-year meeting, the Board will engage in a series of general policy discussions; the agenda will include a review of how our industry is evolving, presentations on economic and market trends, and meetings with various policymakers." The schedule for the rest of 2022 is: **September 21 – 22;** and **December 7 – 8**.
(ed: We'll tweet any news as soon as we have it.)
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SEC MET JULY 13. NO ARBITRATION OR MEDIATION AGENDA ITEMS. The SEC on **July 7** announced that the Commission would be meeting on Wednesday, **July 13**. The Agenda, which has no dispute resolution items, consists of just two items (*ed: excepted essentially* verbatim): 1) **Proxy Voting Advice**: The Commission will consider whether to adopt amendments to the proxy rules governing proxy voting advice; and 2) **Shareholder Proposals**: The Commission will consider whether to propose amendments to update certain substantive bases for exclusion of shareholder proposals under the Commission's shareholder proposal rule (Rule 14a-8).
*(ed: *The meeting was webcast at www.sec.gov. **For further info contact Valian Afshar in the Division of Corporation Finance at 202-551-3440 (item 1) or Kasey Robinson in the Division of Corporation Finance at 202-551-3500 (item 2). Other inquiries should be directed to Vanessa A. Countryman from the Office of the Secretary at 202-551-5400.)*
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NEW FEDERAL LAW INCLUDES ADR USE. We're constantly on the lookout for new bills that involve arbitration or mediation, so when one becomes law and supports arbitration, we pay attention. Such is the case with the *Ocean Shipping Reform Act of 2022* -- S. 3580 -- which was signed into law by President **Biden** on **June 16.** A summary states that the new law: "revises requirements governing ocean shipping to increase the authority of the Federal Maritime Commission (FMC) to promote the growth and development of U.S. exports through an ocean transportation system that is competitive, efficient, and economical." Where does arbitration come in? Section 17(b) in the 15-page text provides: "AUTHORIZATION OF OFFICE OF CONSUMER AFFAIRS AND DISPUTE RESOLUTION SERVICES.—The Commission shall maintain an Office of Consumer Affairs and Dispute Resolution Services to provide nonadjudicative ombuds assistance, mediation, facilitation, and arbitration to resolve challenges and disputes involving cargo shipments, household good shipments, and cruises subject to the jurisdiction of the Commission."
*(ed: *Nice to see ADR portrayed positively. **We assume "nonadjudicative" means "not binding.")*
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THINK *VIKING RIVER* IS OFF THE SUPREME COURT'S PLATE? PERHAPS NOT. As our readers know, the Supreme Court on **June 15** held 8-1 in *Viking River Cruises, Inc. v. Moriana*, No. 20-1573, that California's Private Attorney General Act ("PAGA") was in part preempted by the Federal Arbitration Act ("FAA"), insofar as

PAGA allowed employees to evade bilateral predispute arbitration agreements ("PDAA"). That would generally be the end of the case as far as SCOTUS is concerned, but that is not the case here. On **July 6 Moriana** filed a Petition for Rehearing, asking: "Whether the Court's opinion in this case should be modified to remain consistent with the Court's holdings on the merits of the Federal Arbitration Act preemption issues encompassed by the question presented, while avoiding unwarranted and incorrect resolution of the unbriefed issues of contract construction and state law statutory standing upon which the disposition rests." What are the main contentions? "Respondent Angie Moriana respectfully seeks rehearing of the Court's decision in this case solely to the extent the disposition rests on two issues of state law that are outside the question presented, were not briefed by the parties, are inconsistent with a definitive ruling of the state's highest court, and cannot in any event be authoritatively resolved by this Court." What are the two issues? "I. The Court's resolution of the state-law issues departs from its customary practice; and II. The Court's state-law rulings are inconsistent with plain contractual and statutory language and controlling California precedent." What is the ultimate objective? "[T]he Court should grant rehearing solely for the purpose of modifying Part IV of its opinion to state that the Court does not decide the state-law issues of severability and standing and that its disposition is limited to reversal in part of the state court's holding that the *Iskanian* rule is not preempted by the FAA …." *(ed: *Wow! Never seen this before. **No word yet on when Viking River must respond.)*
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ANOTHER GARGANTUAN INVESTMENT-RELATED AWARD, THIS ONE FROM ICSID. Just last week, we reported in SAA 2022-26 (Jul. 7) that a former D.E. Shaw money manager prevailed to the tune of $52.1 million in his defamation claim against the firm and four senior executives (see *Michalow v. D.E. Shaw & Co., L.P.*, FINRA ID No. 18-03174 (New York, NY, Jun. 29, 2022)). Our editorial comment added that we had checked with SAC's Award Database and discovered that, according to the database, it was the tenth largest award in any type of dispute in any forum and the eighth largest compensatory damages award. Little did we know that, as we were putting # 26 together, a much larger award was on the way. Specifically, an International Centre for Settlement of Investment Disputes ("ICSID"**)** panel rendered a $236 million award against Croatia in *MOL Hungarian Oil and Gas Company Plc v. Republic of Croatia*, ICSID Case No. ARB/13/32 (Jul. 5, 2022). Although the award is not yet published, MOL issued a **July 6** Release stating: "The International Centre for Settlement of Investment Disputes (ICSID) delivered its verdict in the arbitration case between the Republic of Croatia and MOL on the 5 July, 2022. MOL filed a request for arbitration against Croatia in 2013 for breaching contractual obligations on multiple occasions under the agreements signed between the parties in 2009 mainly concerning gas trading…. According to the ruling of the arbitration tribunal Croatia caused substantial damages to INA, and thus indirectly to MOL by failure to take over the gas trading business of INA as well as by breaching contractual obligations of natural gas pricing and royalty rate increases, thus awarding MOL with damages in the amount of USD 167.8mn. The tribunal awarded a further USD 16.1mn in damages caused by Croatia by forcing the sale of stored natural gas of INA's subsidiary (Prirodni Plin), for which MOL was awarded

USD 16.1mn. Together with interest MOL was awarded a total of around USD 236 mn in damages." The SAC Award Database shows only two larger awards, both of which were more than $400 million (including punitive damages). They are: *Sanchez v. Perusquia*, NYSE No. 2000-008556 (Houston, TX, Nov. 15, 2001), and *STMicroelectronics NV v. Credit Suisse*, FINRA ID No. 08-00512 (New York, NY, Feb. 12, 2009).
*(ed: *Wow! **According to its Website, "ICSID is an international facility available to States and foreign investors for the resolution of investment disputes. Established in 1966 by the* Convention on the Settlement of Investment Disputes between States and Nationals of Other States *(the ICSID Convention), it is the only global institution dedicated to international investment dispute settlement.")*
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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 2022-02*,* covering **April – June 2022**, hit the electronic newsstand **July 12**. 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.)*
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QUICK TAKES: CASES AND AWARDS WORTH READING

***United Steelworkers v. National Grid*, No. 21-1833 (1st Cir. Jun. 28, 2022)**: *Ed: the case involves arbitrability of ERISA claims for pension benefits. Although it's a labor case, it is nevertheless instructive.* "It is up to an arbitrator, not a court, to determine the matters described above. The arbitrator will determine whether the JPC [Joint Pension Committee] has the power to resolve the disputes, and, if so, whether the arbitrator should proceed to address the merits in the wake of the JPC's deadlock."

***Polychain Capital LP v. Pantera Venture Fund II LP*, C.A. No. 2021-0670-PAF (Del. Ch. Jul. 6, 2022)**: "Polychain has not established sufficient grounds to excise portions of the Final Award that contain the Arbitrator's reasoning and analysis. The Arbitrator's decision on the appropriate form of award, which carefully considered the Arbitration Provision in the context of the incorporated JAMS Rules, is entitled to deference. In addition, the court cannot conclude that the Arbitrator's decision on this issue, in the

context of the parties' conduct during the entire arbitration, reflect that he exceeded his authority under Section 10(a)(4) of the FAA."

***Town of North Providence v. Fraternal Order of Police, Lodge 13*, No. 21-58 (RI Jun. 29, 2022)**: *Ed: although this is another labor case, it is instructive.* "… [Rhode Island General Laws] § 28-9-18 specifically provides that courts may vacate an arbitration award when a party establishes that the arbitrator exceeded their power, or so imperfectly executed that power that a mutual, final, and definite award upon the subject matter was not made…. Upon review of the record of the case at bar, cognizant that 'the role of the judiciary in the arbitration process is extremely limited,' we conclude that the arbitration award decision reflects an interpretation of the CBA [Collective Bargaining Agreement] that contravenes the 'essence of the contract'; the award derives from a 'manifest disregard' of the relevant provisions of the CBA and produces 'completely irrational' results. In short, we conclude that the arbitrator so imperfectly executed his powers that he failed to make a mutual, final, and definite award upon the subject matter. See § 28-9-18(a)(2)" (citations omitted).

***Rockefeller v. Wells Fargo*, FINRA ID No. 22-00146 (Phoenix, AZ, May 24, 2022)**: In this small claims arbitration, a customer alleging unauthorized trading with respect to his investment in Moderna Inc. stock loses his case against Respondent broker-dealer. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Tapia Sanchez v. Merrill Lynch et al*, FINRA ID No. 20-03591 (Phoenix, AZ, May 26, 2022)**: The Panel finds two Respondent brokers liable on the claims of misrepresentation, manipulation and fraud and awards Claimant customer compensatory damages. The Panel also finds one named Respondent broker-dealer liable on the claims of negligence and failure to supervise and awards the customer compensatory damages. Respondent Merrill Lynch was not assessed any portion of the awarded amount. Respondents Morgan Stanley and Francisco Javier Valenzuela were assessed damages. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Alschner, A., *From a Backlash Against Investment Arbitration to a Backlash by Investment Arbitrators?* Kluwer Arbitration Blog (Jul. 4, 2022): "States have spent the last decade and a half rebalancing the design of their international investment agreements (IIAs). In their new-generation IIAs, states have clarified core protective standards, omitted controversial clauses, and inserted new carve-outs and general exceptions. These reformed treaties, it was hoped, would provide investment tribunals with 'new analytical devices for adjudicating disputes involving competing policy objectives' and alleviate concerns over the undue restraints earlier IIAs had placed on states' right to regulate.[] These new-generation IIAs are now beginning to be litigated and the first series of awards under them suggests that the hopes they raised have been disappointed. Instead, new treaties have produced old outcomes."

***Applicable Law in Investment Treaty Arbitration*, Yulchon LLC (Jun. 15, 2022):** "This article is an extract from The Investment Treaty Arbitration Review, 7th Edition. Click here for the full guide."

***NFL Arbitration Clauses at Issue – Again*, Constangy Brooks Smith & Prophete LLP Blog (Jul. 6, 2022)**: "On June 21, the NFL and the defendant clubs filed a motion in federal court in the Southern District of New York to compel arbitration. In its brief, the NFL makes the same arguments that it did in the Gruden case: first, that the plaintiff-coaches agreed to broad arbitration provisions, which require any dispute to be referred to the Commissioner; and second, that courts have historically deferred to sports leagues' management of internal affairs.[] Will the NFL do better this time?"

***FINRA Fines Broker-Dealer $9 Million for Allegedly Attempting to Influence the Market for Offered Securities*, Shearman & Sterling LLP Blog (Jul. 7, 2022)**: "On June 23, 2022, FINRA's Department of Enforcement announced a settlement in which a broker-dealer agreed to pay $3.6 million in fines, $4.77 million in disgorgement, and partial restitution of over $625,000 to resolve the broker-dealer's alleged misconduct under the Exchange Act and NASD and FINRA Rules in connection with three IPOs and seven follow-on offerings between June 2016 and December 2018 for which the broker-dealer acted as underwriter, as well as for other supervisory and operational violations."

***Reg BI Makes FINRA's Dispute Resolution Stats List and Other Notable Arbitration Developments*, Bates Group (Jul. 7, 2022**): "An inevitable—if somewhat subtle—milestone was reached this month for Regulation Best Interest. Posted on FINRA's monthly dispute resolution statistics page are numbers related to the top 15 security types in customer arbitrations, and coming in at number 14 (through May 2022) was Reg BI. Other recent developments in dispute resolution include movement on rule proposals concerning accelerating processes for elderly claimants, and amendments to align the arbitration code with a new federal law on sexual assault and harassment. FINRA also committed to producing a plan to enhance the transparency of the arbitrator selection process. In addition, the SEC has issued a new primer on arbitration and mediation."

***Arbitration's Year at the Supreme Court*, Reuters (Jul. 8, 2022)**: "With four Federal Arbitration Act (FAA) cases on the Supreme Court's 2021-2022 docket — each involving a different, frequently litigated issue — expectations were high for significant new guidance regarding the FAA's protection of arbitration agreements. Those seeking a limit to the FAA's reach were hoping for an end to what they saw as a string of pro-arbitration rulings. Others anticipated expansion of prior FAA holdings enforcing arbitration agreements.[] The Court did neither. It instead issued unanimous, or virtually unanimous, decisions that ruled narrowly — reaffirming prior principles and expanding them marginally but declining to address broader questions teed up by the parties and amici. These consensus holdings, avoiding the polarized 5-4 divide in a number of prior FAA cases, demonstrate broad acceptance of the Court's FAA precedents and no interest in substantial modifications of current law."

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DID YOU KNOW?

FINRA HAS AN OMBUDS OFFICE. *Alert* readers know that two avenues of resolving disputes at FINRA are via its dispute resolution forum or its regulatory arm. But did you know you can resolve disputes *with* FINRA through its Office of the Ombudsman? The group's Webpage states: "FINRA's Office of the Ombudsman is an impartial, confidential and independent resource that works informally to assist in finding solutions to issues, or concerns you may have with FINRA. You should contact the Ombudsman's Office if you believe you cannot resolve the concern through normal channels, cannot determine the proper avenue for handling your concern, or if you require anonymity. As a neutral party, the ombudsman considers the interests and concerns of all parties in the situation, with the objective of achieving a fair outcome." Submit complaints or inquiries: 1) online ("anonymously, if preferred"); 2) by calling 888-700-0028, weekdays from 9 a.m. to 5 p.m., ET; 3) by fax to 240-386-6271; 4) via email; or 5) by surface mail to: FINRA Ombudsman, 9509 Key West Avenue, Rockville, MD 20850.

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

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