SECURITIES ARBITRATION ALERT 2022-36 (9/22/22)

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ARTICLES OF INTEREST:

- **Davidson, Robert & Borofsky, Niki, *Overview of Revised JAMS International Arbitration Rules, Focus on D&I*, Global Arbitration Review (Aug. 22, 2022)**
- ***Boiler Rooms—An Old Stock Scam Gets a Technology Makeover*, Moneyshow (Sep. 13, 2022)**
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DID YOU KNOW?

- **A Nice Resource on SRO Arbitration**

ALERT! NO *ALERT* NEXT WEEK. *Our readers know that we usually take a quarterly break in publishing the* Securities Arbitration Alert *at the end of each quarter. That time is upon us, so we will next week be taking our usual quarterly break. SCOTUS will be reconvening during our break. When we return, we will provide in-depth coverage of arbitration-related* Certiorari *Petitions pending before the Court. Look for the next edition of the* SAA *in your e-mailbox the week of October 2. In the meantime, follow us @SecArbAlert and sign up for updates on our weekly blog posts.*

SQUIBS: IN-DEPTH ANALYSIS

CONSUMER COALITION TO CFPB DIRECTOR CHOPRA: DO SOMETHING ABOUT MANDATORY ARBITRATION. ***A coalition of over a hundred consumer advocacy groups has written to CFPB Director Chopra, urging that the Bureau exercise its Dodd-Frank authority to regulate consumer financial arbitration.*** 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.

Arbitration Not Included on Latest Agency Rule List

We later reported in SAA 2022-27 (Jul. 14) that the CFPB had published its *Spring 2022 Agency Rule List*, which lists regulatory initiatives the Bureau: "reasonably anticipates having under consideration during the period from June 1, 2022 to May 31, 2023." Five items were listed, but arbitration was not one of them. We said in # 14 that, given past events and resource limitations, arbitration's absence from the Bureau's priorities was 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*, a substantially similar reg cannot be reintroduced without the express permission of Congress.

Renewed Call for Action

The broad coalition of consumer advocacy groups wrote to Director Chopra on **September 13,** urging the Bureau to act on curbing mandatory arbitration abuses. The groups recognize the 2017 rule nullification, but note that the enactment earlier this year of the *Ending Forced Arbitration for Sexual Assault and Harassment Act*: "which allows assault and harassment survivors to choose to file a case in court rather than be forced into arbitration, have further underscored how unfair and insidious forced arbitration is and how unpopular it is with the vast majority of the American public." The writers: "representing millions of consumers, call upon the Consumer Financial Protection Bureau (CFPB) to continue its work and exercise its explicit authority to limit the use of forced arbitration requirements utilized by banks and financial institutions to strip Americans of their right to seek justice after being victimized by banking abuses or fraud. The Bureau's own data confirmed that forced arbitration hurts consumers and deprives

the vast majority of banking customers of the right to seek meaningful accountability; that widespread, systemic banking fraud and abuse cannot be effectively addressed in forced arbitration; and that these restrictive clauses are regularly blocking millions of consumers from seeking justice. State and federal laws exist to empower and protect consumers when banks and financial institutions violate the law, but without a regulation to limit forced arbitration, the promise of these laws will never be realized by most consumers. Forced arbitration deprives Americans of their rights in cases of banks' clear and widespread abuse. The CFPB should act to restore those rights."
*(ed: *We're still of the view that the CFPB has other fish to fry, but we'll track this for a response.**For an analysis of why arbitration may not be a CFPB priority see* Report: CFPB Unlikely to Undertake Consumer Arbitration Rulemaking in Near Future *in the September 15 Consumer Finance Monitor.)*
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FIFTH CIRCUIT: FAA SECTION 1 DOES NOT EXEMPT LOCAL DELIVERY DRIVERS. ***Houston area delivery drivers who generally did not cross state lines were not of the class of workers exempt from FAA coverage.*** Whether the Federal Arbitration Act ("FAA") section 1 exemption extends to local delivery drivers was left open by SCOTUS when it decided *Southwest Airlines Co. v. Saxon*, 142 S. Ct. 1783 (Jun. 6, 2022). To review, 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** ruled unanimously in *Southwest* 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.

Question Left Open
The SCOTUS decision in *Southwest* was narrow, and specifically did not embrace the issue of FAA coverage of local 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."

Recent Petition Raised 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.* (Feb. 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?"

In the Meantime, the Fifth Circuit Weighs In

The Court in *Lopez v. Cintas*, No. 21-20089 (5th Cir. Aug. 30, 2022), declines to extend the FAA exemption to local delivery drivers: "Douglas Lopez was a local delivery driver for Cintas Corporation. That means he picked up items from a Houston warehouse (items shipped from out of state) and delivered them to local customers…. The relevant class of workers here do not have such a 'direct and necessary role' in the transportation of goods across borders. Giving § 1 'more limited reach' means limiting its applicability to those 'actively engaged in transportation of those goods across borders,' which is something the class of local delivery drivers here simply does not do. Id. (quotation omitted). Once the goods arrived at the Houston warehouse and were unloaded, anyone interacting with those goods was no longer engaged in interstate commerce. And unlike either seamen or railroad employees, the local delivery drivers here have a more customer-facing role, which further underscores that this class does not fall within § 1's ambit. See *Saxon*, 142 S. Ct. at 1791. As a result, the transportation-worker exemption does not apply to this class of local delivery drivers."

(ed: Domino's *will be considered at the Court's September 28 conference. Whether it's this case or another, we think the Court will ultimately take up 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. TWO DR ITEMS ON THE AGENDA. FINRA's Board of Governors met in person **September 21 – 22.** The Agenda had two dispute resolution-related items: 1) review amendments to the Codes of Arbitration Procedure to make various clarifying and technical changes; and 2) review amendments to increase certain arbitration and mediation forum fees and arbitrator honoraria. As usual, no further insights are offered, but we will follow up after the meeting results are posted. The schedule for the rest of 2022 shows one more meeting, set for **December 7 – 8**.

(ed: We'll tweet any news as soon as we have it.)

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FINRA FILES A PROPOSED TECHNICAL RULE CHANGE: "NEUTRAL LIST SELECTION SYSTEM" WOULD BECOME THE "LIST SELECTION

ALGORITHM." FINRA on **September 15** filed with the SEC SR-FINRA-2022-026, *Proposed Rule Change to Change References in the Codes of Arbitration Procedure from the Neutral List Selection System to the List Selection Algorithm.* According to the Authority's Website, the purpose of the change is to: "change references in the Codes of Arbitration Procedure from the Neutral List Selection System to the list selection algorithm." Why make the change? "From November 1998 until October 2006, the Neutral List Selection System ('NLSS') was the computer system that generated lists of arbitrators from FINRA Dispute Resolution Services' ('DRS') rosters of arbitrators for the selected hearing location for each arbitration proceeding. In October 2006, DRS replaced the NLSS with the Mediation and Arbitration Tracking and Retrieval Interactive Case System ('MATRICS'). As a result, all of the information contained in the NLSS was transferred to MATRICS such that MATRICS now contains the list selection algorithm DRS uses to generate lists of arbitrators from its rosters of arbitrators. However, the Codes refer to the NLSS as a computer system that governs arbitrator list selection in the DRS arbitration forum.[] FINRA is proposing to update the Codes by making technical, non-substantive changes to remove references to the NLSS from those rules describing arbitrator list selection and instead refer to the 'list selection algorithm.' The proposed rule change would provide greater transparency and consistency regarding arbitrator list selection, as the Codes would reflect and align with DRS's existing practices, processes and systems relating to arbitrator list selection" (footnote omitted). FINRA is seeking summary or accelerated effectiveness due to the non-controversial nature of the proposal. What does this mean? Says the rule filing: "FINRA requests that the Commission waive the requirement that the rule change, by its terms, not become operative for 30 days after the date of the filing as set forth in Rule 19b-4(f)(6)(iii), so FINRA can implement the proposed rule change immediately to make the proposed technical, non-substantive changes. FINRA believes this is appropriate in the interest of regulatory transparency and harmonization."
*(ed: *"List Selection Algorithm" – quite a mouthful! **We imagine this one will sail through quickly.)*
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UPDATE: OPPENHEIMER CLAIMS ARBITRATOR BIAS IN $36+ MILLION FINRA PANEL'S AWARD. We reported in SAA 2022-35 (Sep. 15) that a Majority-Public FINRA Panel had hit Oppenheimer with a $36+ million Award arising out of losses suffered by several investors in a Ponzi scheme perpetrated by a former adviser. The claims asserted in *Robinson v. Oppenheimer & Co., Inc.*, FINRA ID No. 21-02234 (Atlanta, GA, Sep. 6, 2022), were for: "violations of FINRA Rules; negligence; breach of fiduciary duty; violation of the Georgia RICO statute; and breach of contract. The causes of action relate to Claimants' investments in Horizon Private Equity III." The Claimants were each awarded almost $5.7 million in compensatory damages and almost $11.4 million in punitive and more than $14.2 million in treble damages pursuant to Georgia's RICO statute -- O.C.G.A. § 16-14-6(c) -- which provides: "Any person who is injured by reason of any violation of Code Section 16-14-4 shall have a cause of action for three times the actual damages sustained and, where appropriate, punitive damages. Such person shall also recover attorneys' fees in the trial and appellate courts and costs of

investigation and litigation reasonably incurred." The award also included more than $5.3 million in attorney fees and $98,655 in costs. Our editorial comment was: "According to media reports, Oppenheimer may challenge the Award." According to a **September 15** *InvestmentNews* story, that certainly appears to be the case. The article states that the firm is alleging "evident partiality" by one of the arbitrators. The specifics? "[T]he lawyer for the eight claimants, some of whom had been in the service and went on to be airline pilots, shed light on the broker-dealer's claim of bias, saying that an attorney for Oppenheimer took issue with an informal conversation between one of the arbitrators, who had been in the military, and one of the investor claimants…. Oppenheimer wants to argue that the common military experience created a conflict because of the affinity that arose from that.'" The story said that Oppenheimer will shortly move to vacate the Award. This next step is referenced in the firm's **September 7** Form 8-K filed with the SEC: "Oppenheimer intends to move to vacate the award in federal court on a number of grounds, including, but not limited to, allowing the hearing to proceed without Mr. Woods and other key parties and witnesses; prematurely rendering an award for damages while a court-appointed receiver continues to collect assets on behalf of all impacted investors, including the Claimants; *issuing an award where there was evident partiality against Oppenheimer by one of the arbitrators;* and allowing the hearing to proceed when the claims were ineligible for arbitration under FINRA rules that relate to statutes of limitations" (emphasis added).
(ed: We will keep our eye on this one and will share the expected Motion to Vacate when we get it.)
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QUICK TAKES: CASES AND AWARDS WORTH READING

***The University of Notre Dame (USA) in England v. TJAC Waterloo, LLC*, No. 21-1558 (1st Cir. Sep. 22, 2022)**: "Because an award can only be subject to judicial confirmation if it is binding on the parties, we do not think an award can be 'made' under [9 U.S.C.] § 207 until the award is binding on the parties. Interpreting 'is made' to require only that a foreign arbitral award 'is issued' by an arbitrator would permit the statute of limitations to run even where the 'non-binding' exception to confirmation in Article V(1)(e) prevented the winning side from securing judicial confirmation of the issued award. See New York Convention art. V(1)(e)…. Our conclusion that an award 'is made' within the meaning of 9 U.S.C. § 207 when it becomes binding on the parties is consistent with our precedent in the context of domestic arbitral Awards…."

***Zachman v. Hudson Valley Federal Credit Union*, No. 21-999 (2d Cir. Sep. 14, 2022)**: "We conclude that the record is insufficiently developed on the issue of whether the parties entered into an agreement to arbitrate and, as a consequence, we cannot determine the matter of arbitrability 'as a matter of law.' Therefore, we remand for the district court to consider further evidence or, if necessary, hold a trial. See 9 U.S.C. § 4 ('If a factual issue exists regarding the formation of the arbitration agreement, however, remand to the district court for a trial is necessary'" (case citation omitted).

***R & C Oilfield Services LLC v. American Wind Transport Group, LLC*, No. 21-2742 (3rd Cir. Aug. 15, 2022)**: "R and C Oilfield Services LLC ('R&C') was ordered to arbitrate its dispute with American Wind Transport LLC and, seventeen months later, told the District Court that it had no plans to do so. As a result, the District Court dismissed the case with prejudice pursuant to Federal Rule of Civil Procedure 41(b) for failure to prosecute. R&C asks us to review both the Rule 41(b) order and the interlocutory order compelling arbitration, after it took no action to seek interlocutory review as permitted under the Federal Arbitration Act ('FAA') and steadfastly refused to proceed to arbitration. Under those circumstances, prudence counsels against merging the interlocutory order with the final Rule 41(b) order. As a result, the interlocutory order is not part of the final order, and we therefore lack jurisdiction to review it. As to the Rule 41(b) order, the District Court did not abuse its discretion in dismissing the case and so we will affirm."

***Hernandez v. Webull Financial*, FINRA ID No. 22-00680 (Los Angeles, CA, Jul. 29, 2022)**: In this small claims arbitration, a customer alleging unauthorized trading with respect to option investments loses his case against Respondent broker-dealer. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***McDavid v. Morgan Stanley*, FINRA ID No. 20-01553 (Atlanta, GA, Jul. 29, 2022)**: An Arbitrator grants a broker's request for expungement of a complaint from his CRD record despite the objection of the customer involved.
Provided courtesy of SAC's ARBchek facility (www.arbchek.com).
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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Davidson, Robert & Borofsky, Niki, *Overview of Revised JAMS International Arbitration Rules, Focus on D&I*, Global Arbitration Review (Aug. 22, 2022): "JAMS updated its International Arbitration Rules in 2021. The updated rules provide mechanisms for an efficient and cost-effective process, such as interim relief that follows the UNCITRAL Model Rules. The update acknowledges the impact that the covid-19 pandemic has had on arbitration, which now includes revisions intended to expedite the process. Diversity, equitable access and inclusion continue to be a focus, and JAMS has introduced several initiatives to encourage arbitrator appointments from diverse backgrounds."

***Boiler Rooms—An Old Stock Scam Gets a Technology Makeover*, Moneyshow (Sep. 13, 2022)**: "While tactics may have changed, 'boiler room' operations are still used to pitch dubious investment schemes, says Christine Kieffer of the FINRA Investor Education Foundation.[] Typically run as outbound call centers, boiler rooms target retail investors with highly speculative—often fraudulent—investments. In addition to phone calls, today's boiler rooms also rely on messaging apps and social media to contact potential investors.[] Regardless of the method of contact, the scammer's goal is the same: Use high pressure tactics and persuasive language to convince investors to purchase specific investments that will ultimately enrich the scammer."

***Report: CFPB Unlikely to Undertake Consumer Arbitration Rulemaking in Near Future*, JD Supra (Sep. 16, 2022)**: "According to a report appearing in today's Law360, CFPB Director Rohit Chopra has indicated that the agency appears unlikely, at least in the near future, to undertake new rulemaking that would regulate the use of consumer arbitration agreements. The CFPB's previous rule—which would have forbidden companies from including class action waivers in consumer arbitration agreements—was overridden by Congress in 2017 under the Congressional Review Act. Director Chopra reportedly acknowledged that the Act prohibits the agency from implementing a substantially similar rule." (*ed: See our coverage elsewhere in this* Alert.)

***FINRA Takes 'First Step' to Improve Arbitrator Selection Process*, ThinkAdvisor (Sep. 18, 2022)**: "The Financial Industry Regulatory Authority is seeking approval from the Securities and Exchange Commission to provide greater transparency and consistency regarding arbitrator list selection.[] In a rule filing with the SEC, FINRA has proposed to change references in the Codes of Arbitration Procedure from the Neutral List Selection System to the list selection algorithm." *(ed: See our coverage elsewhere in this* Alert.*)*

***Utah Federal Court Rejects Constitutional Challenge to CFPB's Funding Mechanism*, Ballard Spahr Blog (Sep. 19, 2022**): "A Utah federal district court has rejected the attempt of The Center for Excellence in Higher Education (CEHE) to invalidate a civil investigative demand (CID) issued by the CFPB based on a challenge to the constitutionality of the CFPB's funding mechanism."

***Wells Fargo Dodges Class-Action Claims in Overtime Dispute*, Financial Advisor IQ (Sep. 19, 2022)**: "A Missouri judge has effectively dismissed a potential class-action lawsuit alleging that Wells Fargo Clearing Services withheld overtime pay from qualifying employees at its broker-dealer offices.[] Judge Sarah Pitlyk issued the ruling last Wednesday, granting a motion, filed by Wells Fargo's attorneys, to reverse a prior ruling that would have allowed the matter to proceed as a class action."
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DID YOU KNOW?

A NICE RESOURCE ON SRO ARBITRATION. The Pace Law Library offers a free *Securities Law Research Guide: SROs & Arbitrations*. The link-rich page has these sections: **Self-regulatory Organizations (SROs); World Stock Exchanges; SRO Rulemaking and Enforcement; ADR News & Articles; Arbitration & Mediation; and Market News**. It was last updated **February 2022**.
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