SECURITIES ARBITRATION ALERT 2022-37 (10/6/22)

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- ***HDI Global SE v. Phillips 66 Co.*, No. 1:22-cv-00807 (S.D.N.Y. Aug. 26, 2022)**
- ***245 Park Member LLC v. HNA Grp. (Int'l) Co.*, No. 1:22-cv-5136-JGK (S.D.N.Y. Jul. 25, 2022)**
- ***Mason v. Robinhood Financial,* FINRA ID No. 22-00552 (Columbia, SC, Aug. 17, 2022)**
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- ***Coinbase Decision Highlights Importance of Official Rules' Dispute Provisions*, Lexology (Sep. 19, 2022)**
- ***New York Federal Court Finds Arbitration Award Is Subject to Confirmation Even Though It Doesn't Dispose of All Claims Submitted to Arbitration*, JDSupra (Sep. 22, 2022)**
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DID YOU KNOW?

- **AAA Has Administered Over 7 Million Cases Since its Founding**

WE ARE BACK. SO MUCH HAPPENING! *We are back after a quarterly break, and the news, court decisions, and Awards have been piling up in our absence. We kick off this quarter with an analysis of several arbitration-centric* Certiorari *Petitions pending before the Supreme Court. We also offer an analysis of the latest FINRA dispute resolution stats, and report that the Authority's Board recently approved two arbitration-related rulemaking proposals. Plus, we have our usual collection of Short Briefs, Quick Takes, and Articles of Interest. In other words, a jam-packed new issue of the Alert! Please note that we will be publishing on Friday the next two weeks.*

SQUIBS: IN-DEPTH ANALYSIS

FIRST MONDAY IN OCTOBER: SOME ARBITRATION-CENTRIC CASES WORTH FOLLOWING. ***The Supreme Court was back in session on October 3. Here are some arbitration-centric cases worth knowing about, including two where*** **Certiorari** ***was just denied.*** As the Court's Term came to a close last **June,** *Certiorari* Petitions were pending in several matters involving arbitration. While SCOTUS disposed of some petitions during the summer, and two on **October 3**, a few are still pending. We offer a primer on those we've been following in the *Alert,* borrowing heavily from our past coverage.

Court Grants *Cert.*, Reverses, and Remands *Uber v. Gregg* and Others in Light of *Viking River*

As our readers know, the Supreme Court on **June 15** held 8-1 in *Viking River Cruises, Inc. v. Moriana*, No. 20-1573, *pet. for reh'g den.* (Aug. 22, 2022), that California's Private Attorneys General Act ("PAGA") was in part preempted by the Federal Arbitration Act ("FAA"), insofar as PAGA allowed employees to evade a bilateral predispute arbitration agreement. The lone dissenter was **Justice Thomas**, who held to his long-standing view that the FAA does not apply in state courts. That decision broke a logjam of pending *Certiorari* Petitions in cases involving PAGA and FAA preemption. The Court's **June 27** Order List states on page 1 as to *Uber Technologies, Inc. v. Gregg*, No. 21-453; *Uber Technologies, Inc. v. Rosales*, No. 21-526; *Lyft, Inc. v. Seifu*, No. 21-742; *Schipt, Inc. v. Green*, No. 21-1079; and *Hanfy Technologies v. Pote*, No. 21-1121: "The petitions for writs of certiorari are granted. The judgments are vacated, and the cases are remanded to the Court of Appeal of California, Second Appellate District for further consideration in light of *Viking River Cruises, Inc. v. Moriana*, 596 U. S. ___ (2022)."

We reported in SAA 2022-02 (Jan. 20) that the parties in *Gregg* had agreed to hold up, pending the decision in *Viking River*, on the *Certiorari* Petition seeking review of *Gregg v. Uber Technologies, Inc*., No. B302925 (Cal. Ct. App. 2 2021), *pet. for review den.*, No. S269000 (Cal. 2021). 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 2022** response from Uber was: "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')."

Our take: All decisions are vacated and remanded with instructions to reconsider in light of Viking River. Note that also pending is ForwardLine Financial, LLC, v. Ahlmann*, No. 22-75. The July 22 Petition raises the same question and seeks the same outcome: "whether the intervening development of [the] holding in* Viking River Cruises *calls for the Court to grant the writ of certiorari, vacate the judgment, and remand the case for reconsideration …." It was set for review at the Court's September 28 conference.*

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 FAA section 1 exemption extends to delivery drivers. The Court left this issue open when it decided *Southwest v. Saxon* in June. 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." The Court's **June 6** decision in *Southwest Airlines Co. v. Saxon*, No. 21-309, held 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 SCOTUS decision in *Southwest* was narrow, and specifically did not embrace the issue of FAA coverage of delivery drivers. 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 in-state 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?"

Our take: 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. The Petition was set for consideration at the Court's September 28 conference.

Ukraine Fails to Get *Certiorari* on Applicability of *Forum Non Conveniens* to UN Convention Award Enforcement

We reported in the "Quick Takes" section of SAA 2022-02 (Jan. 20) on *PAO Tatneft v. Ukraine*, No. 20-7091(D.C. Cir. Dec. 28, 2021). There, a unanimous DC Circuit Panel had held: "Pao Tatneft (Tatneft), a Russian company, filed a petition in district court to confirm and enforce its [$112 million] 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*…. Under the *forum non conveniens doctrine,* a court may decline to exercise jurisdiction if it determines it is an inappropriate forum…. Ukraine argues that the parties should litigate this case in Ukraine, the locus of both the controversy and the major portion of the assets with which

Ukraine would satisfy any judgment. But we have squarely held 'that *forum non conveniens* is not available in proceedings to confirm a foreign arbitral award because only U.S. courts can attach foreign commercial assets found within the United States." On **July 1,** Ukraine filed a *Certiorari* Petition presenting this question: "Whether the doctrine of *forum non conveniens* is available in proceedings to confirm a foreign arbitral award in the United States." The Court on **October 3** denied *Certiorari*.

Our take: The SCOTUS case is Ukraine v. PAO Tatneft*, No. 22-19, and was considered at the Court's September 28 conference. The* Cert. *denial is on page 43 of the October 3 Order List. This issue to us seemed one-off and we thought correctly that it would not draw the Court's attention.*

Scientology Rejected in Attempt at SCOTUS Review of PDAA Non-Enforcement

The Church of Scientology had sought SCOTUS review of California court rulings declining to enforce a predispute arbitration agreement with a congregant who had left the Church. We hate to say we told you so, but we told you so. First, a review:

- We reported in the "Short Briefs" section of SAA 2022-03 (Jan. 27) on *Bixler v. Superior Court (Church of Scientology)*, No. B310559 (Calif. Ct. App. 2 Jan.19, 2021). There, the California Court of Appeal said:
  > "The trial court granted the motion to compel, and petitioners sought writ relief. We issued an order to show cause, and now grant the petition. Individuals have a First Amendment right to leave a religion. We hold that once petitioners had terminated their affiliation with the Church, they were not bound to its dispute resolution procedures to resolve the claims at issue here, which are based on alleged tortious conduct occurring after their separation from the Church and do not implicate resolution of ecclesiastical issues. We issue a writ directing the trial court to vacate its order compelling arbitration and instead to deny the motion."
- As reported in SAA 2022-05 (Feb. 10), the Church on **February 3** petitioned for a rehearing. The 40+ page filing asserted several bases for the Petition. Here's part of the introduction:
  > "This Court became the ***first in the nation*** to hold that 'freely executed' religious agreements cannot be enforced over the First Amendment objections of a party who claims to be a 'non-believer.' This holding adopts a distinct rule concerning the enforcement of religious arbitration agreements that discriminates against religions and violates the Federal Arbitration Act ('FAA'). The Opinion contains numerous other unbriefed issues, mistakes of law, and misstatements of fact, all of which require rehearing" (emphasis in original).
- We reported in SAA 2022-17 (May 5) that, following denial of the rehearing request, the California Supreme Court on **April 20** denied a Petition for Review of the decision. A docket entry says: "The petition for review is denied. The requests for an order directing publication of the opinion are denied."

We said in our editorial comment to # 17: "We suspect this won't be the end of it, which means SCOTUS is the next stop." Affirming our prediction, the Church on **July 19** filed a *Cert.* Petition presenting this arbitration-related question: "Where a parishioner freely executes a religious arbitration agreement with her church, does the First Amendment prohibit enforcement of the agreement if the parishioner leaves the faith?" The Court denied *Certiorari* on **October 3**.

Our take: The SCOTUS case is Church of Scientology International v. Bixler, *No. 22-60, and was considered at the Court's September 28 conference. The* Cert. *denial is on page 43 of the October 3 Order List."*

Conclusion
We're reasonably certain another *Cert.* grant is coming this Term. Time will certainly tell, but closing the loop on FAA section 1 coverage of delivery and rideshare drivers seems very likely.
*(ed: *Stating the obvious, the Court seemed to have lined up the arbitration-involved Petitions for consideration at its September 28 conference. **There are other pending requests to review arbitration-related cases. Readers can find them on SCOTUSBlog at https://www.scotusblog.com/case-files/petitions-were-watching/.)*
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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

FINRA BOARD MET LATE SEPTEMBER. TWO DR ITEMS WERE APPROVED. 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. Other than noting Board approval, the results posted **September 28** were similarly cryptic (as was the short video accompanying the results). Staff are authorized to file both rules directly with the SEC, rather than the "new normal" of a Regulatory Notice seeking comments. The schedule for the rest of 2022 shows one more meeting, set for **December 7 – 8**.
(ed: We'll have to wait for the rule filings to ascertain the precise changes.)
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FINRA DRS POSTS STATS THROUGH AUGUST: CUSTOMER AND INDUSTRY ARBITRATION CLAIMS ARE STILL DOWN, BUT HAVE DEFINITELY STABILIZED. MEDIATION FILINGS ARE STILL WAY UP, BUT CONTINUE TO SLOW DOWN. FINRA Dispute Resolution Services ("DRS") has posted case statistics through **August**, with recent trends persisting. We offer these headlines: 1) overall arbitration filings through August – 1,716 cases – are down 17% (but up from -18% in July); 2) cumulative customer claims declined by 22% (also up a tic from July); and 3) industry arbitration filings are down 11% (-9% in July). That two of the three percentages are up from **July** to us indicates that – for the second month in a row – customer arbitration filing declines have stabilized. Pending

arbitration cases stand at 3,207, a decline of 29 from July. Overall arbitration turnaround times were 18.3 months, with hearing cases now taking 20.2 months (both figures are slight increases for the fourth consecutive month). There are now 8,415 DRS arbitrators, 4,076 public and 4,339 non-public; all three figures are down from July. Mediation cases continue to run well ahead of 2021, but have slowed down substantially. There were a cumulative 596 mediation cases in agreement, a 91% increase (but way down from **May**'s torrid plus 137% pace). The mediation settlement rate remains very high at 91%. *(ed: *It seems to us the rebound in customer claims will continue. This stat is a trailing indicator of market performance. **Hearing processing times have increased for the fourth month in a row, after decreasing earlier this year. We will continue to keep an eye on this one, since we continue to wonder if the resumption of in-person hearings in August 2021 is somehow linked to this stat. Common sense tells us it is easier to schedule and attend virtual hearings, than those conducted in-person. ***Past year stats can be found here.)*
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CPR UPDATES EMPLOYMENT MASS CLAIMS PROTOCOL. CPR on **September 19** announced that it had updated its *Employment Related Mass Claims Protocol*. A blog post explains: "The new Version 2.1 ERMCP amendments arise from CPR's administrative experience under the Protocol. These changes relate to payments under the Protocol as well as additional clarifications on timing and the opportunity to mediate cases outside the mediation process…. The *Protocol:* "provides an innovative mechanism for more efficient and effective resolution of a mass of employment-related cases. The Protocol features a 'Test Case Process' followed by a global mediation process informed by the Test Cases." Details are covered in an FAQ. As reported in SAA 2019-43 (Nov. 13), the organization launched the *Protocol* in **November 2019**: "to take into account the needs of various stakeholders and offer … a procedure for fairly and efficiently resolving these matters."
(ed: The changes are effective September 19.)
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QUICK TAKES: CASES AND AWARDS WORTH READING

***Iraq Telecom Ltd. v. IBL Bank S.A.L.*, No. 22-540-cv (2d Cir. Aug. 5, 2022)**: "Appeal from an order of the United States District Court for the Southern District of New York (Cote, J.) reducing an order of attachment in aid of arbitration. The district court had initially granted an *ex parte* order in favor of petitioner-appellant, an Iraqi cell phone company, attaching up to $100 million of the assets of respondent-appellee, a Lebanese bank. Thereafter, the district court exercised its discretion and reduced the amount of the attachment to $3 million in part because of concerns the attachment would have an adverse impact on the Lebanese economy. The Iraqi cell phone company appeals. AFFIRMED IN PART, VACATED IN PART, AND REMANDED" (emphasis in original).

***HDI Global SE v. Phillips 66 Co*., No. 1:22-cv-00807 (S.D.N.Y. Aug. 26, 2022)**: "Because Decision One was a final award, the court must confirm it unless there is a

basis for vacating, modifying, or correcting it. 'There is nothing malleable about "must grant," which unequivocally tells courts to grant confirmation in all cases, except when one of the "prescribed" exceptions applies.' Respondent presents none of the grounds for not confirming the award, aside from the rejected contention that the award is interlocutory. None of the conditions for vacatur is present, and because the undisputed facts show that the moving party is entitled to judgment as a matter of law, the Tribunal's decision requiring P66 to reimburse Gerling's payment is confirmed.[] Unlike Decision One, Decision Two is a partial award that does not 'finally dispose of an independent claim.' Instead, it serves as an intermediate procedural decision …." (citations omitted).

***245 Park Member LLC v. HNA Grp. (Int'l) Co*., No. 1:22-cv-5136-JGK (S.D.N.Y. Jul. 25, 2022)**: "As explained in the Attachment Decision, the arbitrator considered, and rejected, the respondent's request for discovery and an evidentiary hearing in the well-reasoned Scheduling Decision.[] While the arbitrator in this case did not hold an evidentiary hearing, she considered extensive submissions by the parties in connection with both the scheduling decision and the final merits decision. The arbitrator considered the parties' competing interpretations of the Guaranty and concluded that the respondent was not entitled to discovery or a hearing. This is not fundamental unfairness."

***Mason v. Robinhood Financial*, FINRA ID No. 22-00552 (Columbia, SC, Aug. 17, 2022)**: In this small claims arbitration, an Arbitrator grants with prejudice Respondent broker-dealer's Prehearing Motion to Dismiss pursuant to FINRA Rule 12504(a)(6)(A) (Release of Claims), as the customer had already accepted a one-time payment from Respondent broker-dealer releasing it from any further obligation. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Tastyworks Incorporated v. Thrower*, FINRA ID No. 21-00712 (Houston, TX, Aug. 22, 2022)**: A Majority Public Panel bars Respondent customer from presenting evidence in this matter as a sanction for his failure to comply with discovery requests, and holds him liable to Claimant broker-dealer for damages relating to a debit balance incurred in his options account. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*
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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Miller, Meredith R., *Time's Up: Against Shortening of Statutes of Limitation by Employment Contract*, VILLANOVA LAW REVIEW, Vol. 68, No. 2 (forthcoming 2023): "Employers are increasingly adding clauses to contracts with employees that purport to shorten the statutes of limitation for employees to pursue claims against their employers ('SOL Clauses'). SOL Clauses are being imposed on employees in various stages of the contracting process. They have turned up in job applications, offer letters, arbitration clauses, employment agreements and employee handbooks. Where they have been enforced by the courts, the justification has been a prioritization of 'freedom of contract' over any other policy concerns. This Article argues that, in the employment context, 'freedom of contract' should not be prioritized over other competing concerns, which

include the potential for overreaching given the inherent imbalance of bargaining power between employer and employee."

***Coinbase Decision Highlights Importance of Official Rules' Dispute Provisions*, Lexology (Sep. 19, 2022)**: "What is perhaps most interesting at this point about the court's decision is its ruling on the defendants' attempts to move the dispute to arbitration. While the court granted Coinbase's motion, it denied Marden-Kane's, leaving the agency in the awkward position of having to defend the case in court while its client is in arbitration. In reaching its decision, the court relied on the fact that all entrants agreed to the Coinbase user agreement and its arbitration provision when they created an account, which was required to enter the sweepstakes. While Marden-Kane argued that it should also be able to enforce that arbitration provision, the court rejected that argument because Marden-Kane was not a party to the Coinbase user agreement. Thus, Marden-Kane was left to rely on the sweepstakes' Official Rules, which it was party to, but unfortunately the Official Rules did not include an arbitration provision."

***New York Federal Court Finds Arbitration Award Is Subject to Confirmation Even Though It Doesn't Dispose of All Claims Submitted to Arbitration*, JDSupra (Sep. 22, 2022)**: "In a recent decision, a New York federal district court considered whether two arbitration awards issued by a tribunal in an ongoing arbitration were 'mutual, final, and definite' and thus subject to confirmation proceedings in the district court."

***Third Circuit Confirms Invalidly Assigned Arbitration Agreements May Still Be Enforceable*, Lexology (Sep. 26, 2022)**: "A recent decision by the Third Circuit examined the circumstances under which an arbitrator must decide gateway questions of arbitrability in cases involving challenged loan assignments. In *Zirpoli v. Midland Funding, LLC*, the plaintiff took a loan pursuant to a contract that contained an arbitration agreement with a delegation clause. The lender then assigned the contract to another company that purchased the plaintiff's delinquent account from the lender. The assignee tried to collect on the loan, prompting the plaintiff to file a putative class action alleging unlawful collection practices."

***What's Up With WhatsApp and Text Messaging? SEC and FINRA Weigh In*, JDSupra (Sep. 26, 2022)**: "The SEC requires broker-dealers to maintain originals of all communications received and copies of all communications sent by the broker-dealer relating to its business for three years. The SEC has explained that Rule 17a-4 'serves the important governmental interest of assisting adequate supervision of broker-dealers by the Commission and the SROs' and forms the basis for effective investor protection. See Commission Guidance to Broker-Dealers on the Use of Electronic Storage Media under the Electronic Signatures in Global and National Commerce Act of 2000 With Respect to Rule 17a-4(f), Release No. 34-44238, § III.D.1. It should come as no surprise that the SEC and FINRA recently have focused on the use of unapproved messaging channels ranging from the use of WhatsApp to simple texting on a personal device."

***Morgan Stanley Was Too Harsh in Chicago Broker's U5 Notice*, Arbitrator Says, AdvisorHub (Sep. 29, 2022)**: "In a David vs. Goliath victory for a fired broker, Morgan Stanley must redo termination forms of one of its ex-brokers in Chicago whose high-producing team was discharged two years ago.[] Tara M. Schutz, a 12-year broker who is now with independent broker-dealer Kestra Investment Services, 'good faith' and merely following guidance from a superior when she allegedly ran afoul of firm policy by using an unapproved customer data management system, according to an arbitration award finalized September 23."
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DID YOU KNOW?

AAA HAS ADMINISTERED OVER 7 MILLION CASES SINCE ITS FOUNDING. According to a banner on the American Arbitration Association's landing page, this venerable institution has administered 7,306,088 since its founding in **1926**. This year, 455,145cases were filed through **October 3**.
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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.*

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