SECURITIES ARBITRATION ALERT 2022-45 (12/1/22)

George H. Friedman, Editor-in-Chief

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- ***Olson v. Morgan Stanley*, FINRA ID No. 19-00016 (Chicago, IL, Oct. 5, 2022)**
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DID YOU KNOW?

- **A Nice Compendium of State Arbitration Laws**

SQUIBS: IN-DEPTH ANALYSIS

CFPB AND FTC FILE *AMICUS* BRIEF ARGUING THAT *MILITARY LENDING ACT* BARS PDAA ENFORCEMENT. *The Consumer Financial Protection Bureau ("CFPB" or "Bureau") and the Federal Trade Commission ("FTC" or "Commission") have filed an* Amicus *Brief in federal court, asserting among other things that the lender's use of predispute arbitration agreements ("PDAA") violated*

the* Military Lending Act *("MLA"). The brief, filed in *Louis v. Bluegreen Vacations Unlimited, Inc*., No. 22-12217 (11th Cir.), was announced in a **November 22** post on the CFPB blog. Says the Bureau and Commission: "The message of our brief is simple: when American servicemembers seek to enforce their rights in court, the plain text of the law lets them do that. Congress made clear that when a lender extends a loan to a servicemember that fails to comply with the MLA, the loan is rendered void in its entirety. And there is no doubt that Congress allowed servicemembers to ask federal courts to award restitution for payments made on the illegal loan and provide any other appropriate relief."

MLA Bars Mandatory PDAAs

The *MLA* (10 U.S.C. § 987(e)(3)) makes it unlawful when: "the creditor requires the borrower to submit to arbitration or imposes onerous legal notice provisions in the case of a dispute…." The corresponding regulation (32 C.F.R. § 232.8(c)) states: "Title 10 U.S.C. 987 makes it unlawful for any creditor to extend consumer credit to a covered borrower with respect to which ...[t]he creditor requires the covered borrower to submit to arbitration or imposes other onerous legal notice provisions in the case of a dispute." We covered in SAA 2022-39 (Oct. 20) the CFPB's Complaint in *Consumer Financial Protection Bureau v. MoneyLion Technologies Inc.,* No. 1:22-cv-08308 (S.D.N.Y. Sep. 29, 2022), which states: "The Bureau brings this action to enforce the Military Lending Act's protections for U.S. Military active-duty servicemembers and their dependents and to enforce the Consumer Financial Protection Act's protections for all U.S. consumers. Defendants MoneyLion Technologies, Inc. and the MoneyLion Lending Subsidiaries overcharged servicemembers and their dependents— imposing fees that, together with stated interest-rate charges, exceeded the Act's limit of 36% Military Annual Percentage Rate (MAPR). Defendants collected on these illegal loans and associated fees, failed to give requisite disclosures, and inserted illegal arbitration clauses designed to take away servicemembers' ability to vindicate their rights in court." The Complaint charges that: "from about the fall of 2017 until at least August 2019, MLT and the MoneyLion Lending Subsidiaries made loans to covered borrowers by way of loan contracts requiring the borrowers to submit to arbitration in the case of a dispute, without exceptions for covered borrowers. MLT and the MoneyLion Lending Subsidiaries violated the MLA each time they made such a loan to a covered borrower."

Another Brief Filed Earlier this Year

The Bureau in **January** this year filed an *Amicus* Brief in *Davidson v. Unit Auto Credit Corp.,* No. No. 21-1697 (4th Circuit). The CFPB blog post says: "The MLA also makes it illegal for the lender to require the borrower to waive certain legal rights or to agree to mandatory arbitration. Some car loans, however, are exempt from the MLA. In this case, the government filed a brief arguing that the MLA's exemption for car loans does not apply to 'hybrid loans' that are used to finance both the purchase of a car and also the purchase of a Guaranteed Asset Protection (GAP) insurance policy. Such an interpretation is not only the best reading of the statute but is necessary to ensure that lenders are not able to evade the MLA by packaging MLA-exempt loans with otherwise non-exempt loans."

*(ed: *We'll keep our eye on this issue.)*
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PA APPELLATE COURT DECLINES TO ENFORCE UBER'S ONLINE PDAA. ***We reported on* Chilutti v. Uber Technologies, Inc., *2022 PA Super 172 (Oct. 12, 2022), in the "Quick Takes" section of SAA 2022-41 (Nov. 3). We've determined that this one is worthy of further analysis.*** First, the basic facts. Chilutti, who is wheelchair bound, was injured in a motor vehicle accident on the way home from a medical appointment, while riding in a car provided by Uber. As our readers know, the online Uber passenger signup app has a predispute arbitration agreement ("PDAA"). The core issue for the Court was: "whether a party should be deprived of their [Pennsylvania] constitutional right to a jury trial when they purportedly enter into an arbitration agreement via a set of hyperlinked 'terms and conditions' on a website or smartphone application that they never clicked on, viewed, or read."

No Clear Consent to Waive Right to a Jury Trial
The Court cited several factors in determining that Chilutti did not waive her right to a jury trial: "Appellants did not click on or access the terms and conditions before their registration process was completed…. Rather, the evidence merely shows that they created a user account for the ridesharing service. Furthermore, we point out that the definition of arbitration is not contained in the agreement and there is no link to the definition. R.R. 130a-31a; R.R. 171a-72a. Likewise, there is no explanation as to the difference between binding and non-binding arbitration in the agreement. See id. Notably, if a party wants to review the AAA Rules that govern the process, they are required to click on a second hyperlink to access that document. See R.R. 131a, R.R. 172a. Further, we believe that the term, 'arbitration,' is ambiguous in that there is nothing to explain its meaning and any non-lawyer subscriber could easily believe that arbitration is simply another step in the litigation process that does not involve relinquishing the constitutional right to a jury trial in its entirety. As such, Appellants were not informed in an explicit and upfront manner that they were giving up a constitutional right to seek damages through a jury trial proceeding" (footnote omitted).

Bottom Line
"[W]hen Appellants filed the negligence lawsuit, Uber, Raiser-PA LLC, Raiser, LLC, (collectively, Uber Appellees) moved to compel arbitration, asserting that the couple's conduct on the company's website and application, when they registered for the ridesharing service, signified that they agreed to be bound by the mandatory arbitration provision found in the hyperlinked terms and conditions, thereby relinquishing their right to a jury trial. The trial court granted the petition, determining the parties had not been forced out of court. In doing so, the court failed to consider that important and protected constitutional right. Because we conclude that Appellants are legally entitled to relief, we reverse the trial court's order granting Uber Appellees' petition. We further opine that Appellants demonstrated there was a lack of a valid agreement to arbitrate; therefore, they are entitled to invoke their constitutional right to a jury trial. Accordingly, we reverse and remand for further proceedings."

(ed: This reminds us of Atalese v. U.S. Legal Services Group, L.P., 219 N.J. 430 (2014), where the NJ Supreme Court held that PDAAs in typical consumer or employment relationships must demonstrate a clear and unambiguous waiver of the constitutional right to court trial.)
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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

FINRA DRS POSTS STATS THROUGH OCTOBER: CUSTOMER AND INDUSTRY ARBITRATION CLAIMS HAVE DEFINITELY STABILIZED. MEDIATION FILINGS ARE STILL UP, BUT HAVE REALLY SLOWED DOWN. FINRA Dispute Resolution Services ("DRS") has posted case statistics through October, with recent trends persisting. We offer these headlines: 1) overall arbitration filings through the ten-month mark – 2,179 cases – are down 14% for the year (but up from minus 15% in September); 2) cumulative customer claims declined by 18% (also up a tic from September); and 3) industry arbitration filings are down 6% (-7% in September). That all three case filing figures are again slightly better than the previous month indicates to us that – for the fourth month in a row – arbitration filing declines have stabilized. Overall arbitration turnaround times were 18.3 months, with hearing cases now taking 19.8 months (both figures are barely changed from the past two months). There were 679 mediation cases in agreement, a 32% increase (but way down from May's torrid plus 137% pace). The mediation settlement rate remains very high at 91%. There are now 8,376 DRS arbitrators, 4,045 public and 4,331 non-public. Pending cases stand at 3,149, a decline of just 8 from September.
*(ed: *If the trend holds, the 2,179 arbitrations filed through September straight-lines to only about 2,600 yearly arbitration filings, a weak year by any measure. Ten years ago, the 2012 stats showed 4,299 yearly arbitration cases filings. The all-time high-water mark was 2003, when that post tech-wreck figure was 8,945 cases. **As we said before, it seems to us the rebound in customer claims will continue. ***Past year stats can be found here.)*
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DESPITE PLEA FROM PIABA, SEC'S 5-YEAR STRATEGIC PLAN DOES NOT ADDRESS RIA USE OF MANDATORY PDAAS. The SEC on **August 24** issued a notice requesting comments on its draft *Strategic Plan for Fiscal Years 2022-2026.* The draft Plan: "focuses on three goals that advance our mission: 1. Protect working families against fraud, manipulation, and misconduct; 2. Develop and implement a robust regulatory framework that keeps pace with evolving markets, business models, and technologies; and 3. Support a skilled workforce that is diverse, equitable, and inclusive and is fully equipped to advance agency objectives." The SEC notice included solicitation of comments from the public: "to gain the benefit of additional outside perspectives." As reported in SAA 2022-38 (Oct. 13), among the several comments received was one dated **September 29** from PIABA that focused on RIA use of mandatory predispute arbitration agreements ("PDAA"). Said the letter: "Since the SEC is tasked with protecting the investing public and overseeing more than 14,000 SEC-registered RIAs, the Strategic Plan should call for the SEC to make efforts to control

RIAs' use of pre-dispute clauses and require, among other things, standardized pre-dispute clauses, shifting of the majority of arbitration fees to the RIAs using such clauses, increased transparency of the scope and implications of the dispute process, as well as the mandatory disclosure of information regarding an RIA's dispute history so the SEC and investing public may be better informed." Alas, the final Plan, announced in a **November 23** press release, makes no references to arbitration, mediation, or dispute resolution. *(ed: *Of course, this doesn't mean RIA PDAA use will not be on the Commission's agenda. Recall that Dodd-Frank section 921 gives the SEC authority to limit or bar PDAA use, or set conditions for their use, but it has not done so. This includes clients of any broker, dealer, or municipal securities dealer, or investment advisers. **Other comments, which were due September 29, may be viewed here.)*
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SEC'S INVESTOR ADVISORY COMMITTEE TO MEET VIRTUALLY NEXT WEEK. NO ARBITRATION OR MEDIATION AGENDA ITEMS. The SEC Investor Advisory Committee ("IAC") will be meeting virtually on **December 8**; no dispute resolution items are on the Agenda. Says the Sunshine Act Notice: "The agenda for the meeting includes: welcome, announcement of a new access and inclusion working group, and opening remarks; approval of previous meeting minutes; a panel discussion on account statement disclosure entitled 'Do client statements adequately serve investors?'; a panel discussion regarding corporate tax transparency; a panel discussion regarding single-stock exchange-traded funds; subcommittee reports; access and inclusion working group report, and a non-public administrative session." *Alert* Editorial Advisory Board member Prof. **Christine Lazaro**, who is Professor of Law and Clinic Director at St. Johns Law School, will be moderating a panel discussion, "Do Client Statements Adequately Serve Investors?"
*(ed: *The IAC meeting will be webcast starting at 10 a.m. Eastern on the Commission's website at www.sec.gov. **For further info, "and to ascertain what, if any, matters have been added, deleted or postponed," contact Vanessa A. Countryman at 202-551-5400.)*
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CFPB SEEKS *CERTIORARI* ON FIFTH CIRCUIT DECISION HOLDING FUNDING METHOD UNCONSTITUTIONAL. We reported in SAA 2022-40 (Oct. 27) on *Community Financial Services Ass'n of America v. CFPB*, No. 21-50826 (5th Cir. Oct. 19, 2022), where a unanimous Court held that, although the Consumer Financial Protection Bureau ("CFPB") did not exceed its authority in promulgating the Payday Lending Rule, its funding method is unconstitutional. Said the Court: "Congress's decision to abdicate its appropriations power under the Constitution, i.e., to cede its power of the purse to the Bureau, violates the Constitution's structural separation of powers. We thus reverse the judgment of the district court, render judgment in favor of the Plaintiffs, and vacate the Bureau's 2017 Payday Lending Rule." Our editorial comment in # 40 said: "We suspect a Petition for *en banc* review is next." Eschewing that route, the CFPB has instead gone right to the Supreme Court. Specifically, the Bureau on **November 14** filed a *Certiorari* Petition identifying this question: "Whether the court of appeals erred in holding that the statute providing funding to the Consumer Financial

Protection Bureau (CFPB), 12 U.S.C. 5497, violates the Appropriations Clause, U.S. Const. Art. I, § 9, Cl. 7, and in vacating a regulation promulgated at a time when the CFPB was receiving such funding."
*(ed: *We imagine the Bureau will ask the Fifth Circuit not to issue a mandate until the* Cert. *application is decided. **The SCOTUS case is* Consumer Financial Protection Bureau v. Community Financial Services Association of America, Limited, *No. 22-448. ***We'll follow this one!)*
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CPR CONDUCTING A VIRTUAL MEDIATION CONFERENCE DECEMBER 7. CPR will be holding a virtual program, *Mediating Business Disputes: Here, There and Everywhere*, as part of the organization's 2022 Global Conference. The panel will be held on Wednesday, **December 7**, 11:00 am to 4:00 pm Eastern. Says the program description: "This virtual conference* will have four panel discussions on the cutting-edge uses of mediation in various regions of the world, organized by CPR's esteemed International Advisory Boards and CPR's Y-ADR Steering Committee." NY CLE credit hours and category designations for this program are currently pending.
*(*The conference: "may also include in-person elements such as watch parties or cocktail hours hosted in each region." **Registration is free and is done online.)*
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QUICK TAKES: CASES AND AWARDS WORTH READING

***Commodities & Minerals Enter. Ltd. v. CVG Ferrominera Orinoco, C.A.*, No. 20-4248 (2d Cir. Oct. 3, 2022)**: "Respondent-Appellant CVG Ferrominera Orinoco, C.A. ('Ferrominera'), appeals from the judgment of the United States District Court for the Southern District of New York (Andrew L. Carter, Jr., Judge) confirming a foreign arbitral award and granting attorney's fees and costs in favor of Petitioner-Appellee Commodities & Minerals Enterprise Ltd. ('CME'). Ferrominera challenges the judgment on three grounds. First, it argues that the district court lacked personal jurisdiction because CME never served a summons on Ferrominera in connection with its motion to confirm the arbitral award.... [W]e hold that a party is not required to serve a summons in order to confirm a foreign arbitral award under the New York Convention."

***Ace Am. Ins. Co. v. Univ. of Ghana*, No. 1:21-cv-6472-NRB (S.D.N.Y. Aug. 15, 2022)**: "The language of this clause is unambiguous: 'the place of arbitration **shall be** London, UK.' Id. (emphasis added). The parties' agreement to arbitrate in New York is expressly contingent upon the triggering of a condition precedent, and a highly improbable condition at that. Specifically, arbitration in New York is permissible only if it impossible to conduct an arbitration anywhere in the United Kingdom due to a force majeure event occurring there. Petitioner does not allege that the force majeure condition precedent has been satisfied, nor could it: there is in fact an ongoing arbitration between UG and CPA in London. Since the condition precedent to arbitration in New York has not occurred, the Court cannot infer that respondent has consented to personal jurisdiction here.[] This is consistent with the handful of cases that have addressed the issue of unsatisfied

conditions precedent in the analogous context of consent to suit clauses" (footnote omitted; emphasis in original).

***Republic of Guatemala v. IC Power Asia Dev. Ltd.*, No. 22-CV-00394(CM) (S.D.N.Y. Aug. 5, 2021)**: The underlying arbitration in this case indisputably involves foreign parties. The issue in this case is whether the arbitral award arose out of a 'commercial' legal relationship…. [T]he Tribunal itself recognized in the Award that, 'The subject matter of the dispute concerns [ICPA's] investment in the energy 10 distribution market of Guatemala through the purchase of two Guatemalan companies . . . and the measures taken by the Government with respect to back taxes allegedly owed by the Distributors.' (Award ¶3). Because ICPA's 'investment in the energy distribution market of Guatemala through the purchase of two Guatemalan companies' (id.) was a commercial transaction, and because the arbitrators themselves described the dispute as commercial in character, I conclude that the dispute arose out of a commercial legal relationship, and this court has subject matter jurisdiction over the Petition to confirm the award."

***Olson v. Morgan Stanley*, FINRA ID No. 19-00016 (Chicago, IL, Oct. 5, 2022)**: A customer (acting in his individual capacity and as Trustee), alleging that he was placed in unsuitable investments despite his stated financial objectives, loses his case against Respondents. Respondent brokers are also granted expungement of this matter from their CRD records. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***O'Donnell v. TD Ameritrade*, FINRA ID No. 19-01839 (Baltimore, MD, Oct. 18, 2022)**: A customer alleging that her securities accounts lost about 80 percent of their value due to the deficiencies of Respondents, and that alleged unauthorized trading took place with respect to the accounts, is awarded damages against one named Respondent broker-dealer and Respondent broker in his capacity as a financial service. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Ibukunoluwa Owa & Efemena Iluezi-Ogbaudu, *Arbitrators Applying the Law: Can a Tribunal Decide on a Law that was not Pleaded by the Parties?* Kluwer Arbitration Blog (Nov. 17, 2022): "An arbitrator's authority to rely on a law that was not pleaded [sic] by the parties has been the subject of extensive discussions in the literature. Anecdotal evidence suggests that civil law jurisdictions broadly tend to adopt a more liberal approach to recognizing such authority in international arbitration, while common law jurisdictions, on the other hand, tend to adopt a more restrictive approach. This authority is derived from the principle *iura novit curia* which means 'the court knows the law.' It entails the adjudicator's power to determine matters relying on a law that was not pleaded by the parties…. This blog post reviews and compares the application of *iura novit curia* in arbitration practice across common and civil law jurisdictions, as well as in investor-state arbitration, to ascertain similarities and differences in its application, posits the application of *iura novit curia* as a principle of transnational international arbitration

law, and suggest best practice recommendations for the exercise of the power conferred on the court under this principle."

***SEC Opens New Comment Period for FINRA Proposal on Expunging Customer Complaint Information*, Lexology (Nov. 16, 2022)**: "The SEC opened a new comment period to consider whether to approve a FINRA proposal that would amend the Code of Arbitration Procedure for Customer Disputes ('Customer Code') and the Code of Arbitration Procedure for Industry Disputes ('Industry Code') to impose additional requirements for expunging customer dispute information.[] The proposal was first published in the Federal Register on August 15, 2022 (see previous coverage). FINRA later consented to an extension of the period for the SEC to approve the proposal until November 11, 2022.[] The SEC instituted the proceedings in order to 'allow for additional analysis and input concerning whether the proposed rule change, as modified by Amendment No. 1, is consistent with the Exchange Act and the rules thereunder.'"

***Crypto Broker Suspends Withdrawals, Blames FTX Collapse*, Financial Advisor IQ (Nov. 17, 2022):** "Crypto financial services firm Genesis Trading says it has suspended withdrawals at its lending unit, blaming the decision on the 'unprecedented market turmoil' resulting from the collapse of crypto exchange FTX, according to news reports.[] New York–based Genesis, which lets clients loan out their digital coins for up to 10% yields, said it decided to halt redemptions and new loan originations after seeing 'abnormal withdrawal requests which have exceeded our current liquidity,' according to The Financial Times."

***Ramp-and-Dump Schemes on the Rise, FINRA Warns*, Investment Executive (Nov. 17, 2022)**: Initial public offerings by foreign small-cap issuers are increasingly being used in a sort of pump-and-dump scheme, the Financial Industry Regulatory Authority Inc. (FINRA) warns.[] The U.S. self-regulatory organization issued an alert about an elevated fraud threat involving small-cap IPOs being used in manipulative trading schemes, also known as ramp-and-dump schemes.[] 'FINRA has observed significant unusual price increases on the day of or shortly after the IPOs of certain small-cap issuers, most of which involve issuers with operations in other countries,' it said.[] In particular, the SRO said it's concerned about 'apparent manipulative limit order and trading activity' in brokerage accounts that invest in small-cap IPOs."

***Federal Agencies Finalize Independent Dispute Resolution Regulations Implementing No Surprises Act*, Hall Benefits Law, LLC Blog (Nov. 18, 2022)**: "The DOL, HHS, and IRS have finalized portions of the regulations concerning the independent dispute resolution (IDR) process of the No Surprises Act. The agencies also have provided a fact sheet summarizing the finalized regulations. Congress enacted the No Surprises Act as part of the Consolidated Appropriations Act of 2021 (CAA) to address various issues involving surprise medical billing. The major aim of the legislation is to protect consumers from surprise bills from out-of-network emergency and non-emergency services, including air ambulance services."

***Nasdaq FINRA and NYSE Address Small Cap IPO Fraud Concerns*, National Law Journal (Nov. 18, 2022)**: "Yesterday, each of Nasdaq, FINRA and NYSE released Regulatory Alerts highlighting concerns surrounding fraudulent activities in Small-Cap IPOs. Each of these alerts raises similar issues, highlights the importance of the Underwriter in the process, and stresses the obligations that Underwriters have as Gatekeepers in the IPO Process. Below is a link to each of these Alerts and some relevant excerpts from them."
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DID YOU KNOW?

A NICE COMPENDIUM OF STATE ARBITRATION LAWS. Cornell Law School's Legal Information Institute maintains an excellent (and free) list of state arbitration statutes, with links to each. Bookmark this one!
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