SECURITIES ARBITRATION ALERT 2022-47 (12/15/22)

George H. Friedman, Editor-in-Chief

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- ***In re Pacific Fertility Cases*, No. A158155 (Calif. Ct. App. 1 Dec. 1, 2022)**
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SQUIBS: IN-DEPTH ANALYSIS

COURT GRANTS *CERT.*, REVERSES, AND REMANDS *FORWARDLINE* 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. For example, as reported in SAA 2022-25 (Jun. 30), the Court's **June 27** Order List stated 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)."

Another Shoe Drops

We noted in # SAA 2022-37 (Oct. 6) that also pending was *ForwardLine Financial, LLC, v. Ahlmann*, No. 22-75. The **July 22** *Certiorari* Petition in this case raised the same question and sought the same outcome: "Whether, in light of *Viking River Cruises*, a mutual pre-dispute agreement to arbitrate all claims arising from the employment relationship is enforceable as to PAGA claims asserted by an employee-plaintiff arising from Labor Code violations allegedly committed against him, and whether the intervening development of this holding in *Viking River Cruises* calls for the Court to grant the writ of certiorari, vacate the judgment, and remand the case for reconsideration …." That shoe dropped on **December 12**. The Court's Order List on page one states: "The petition for a writ of certiorari is granted. The judgment is vacated, and the case is 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)."

What This Means

We see SCOTUS' recent messages on FAA preemption of PAGA as: "Is anything unclear now? Even the generally anti-mandatory employment arbitration California courts seems to have gotten the message from SCOTUS. For example, we report elsewhere in this *Alert* on *Lewis v. Simplified Labor Staffing Solutions, Inc.*, No. B312871 (Calif. Ct. App. 2 (Dec. 5, 2022), where the court held: "We hold that this rule cannot survive the U.S. Supreme Court's recent decision in *Viking River Cruises, Inc. v. Moriana* (2022) ___U.S.___ [142 S.Ct. 1906] (*Viking River*). We further hold that the *scope* of the arbitration clause is to be determined by the arbitrator, in accordance with the arbitration agreement. Specifically, the parties' dispute about whether nonindividual PAGA claims are governed by the arbitration agreement, in the same way individual PAGA claims are, is an issue for the arbitrator to address. Accordingly, we reverse" (emphasis in original; footnotes omitted).

*(ed: *We're not surprised. **With the FAA-PAGA preemption decks at SCOTUS seemingly cleared, expect that this issue – at least in the courts – is now settled.)*

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EXPUNGEMENT UPDATE: FEW COMMENTS ON AMENDED PROPOSAL. PIABA AND NASAA SUPPORTIVE, BUT SIFMA URGES DISAPPROVAL. ***The comment period closed December 7 on FINRA's proposed changes to its expungement rule filing. We offer an analysis of the few institutional comments.*** We eschew

repeating here the extensive history of the proposed rule. Instead, we recommend readers peruse two *Alert* blog posts: *Institutional Comments, Mostly Supportive But with All Suggesting Further Modifications, on FINRA's Proposed Expungement Changes. Individual Industry Commenters Uniformly Oppose the Rule* (Sep. 14); and *Expungement Update: FINRA Responds to Comments and Files an Amendment; SEC Seeks Comments on Changes and Disapproval* (Nov. 23).

Proposed Changes

We reported in SAA 2022-41 (Nov. 10) that FINRA on **November 10** responded to comments in a 35-page, 148 footnote letter. Although FINRA rejected most changes proposed by the commenters, it filed the same day a proposed amendment offering three significant changes. The SEC describes them as follows: "Amendment No. 1 would modify the proposed rule change in three ways. First, it would amend proposed Rules 12805(c)(3)(A) and 13805(c)(3)(A) to state that all customers whose customer arbitrations, civil litigations or customer complaints are a subject of the expungement request are entitled to attend and participate in all aspects of the prehearing conferences and the expungement hearing. Second, it would modify proposed Rules 12805(c)(8)(C) and13805(c)(9)(C) to state that a panel shall not give any evidentiary weight to a decision by a customer or an authorized representative not to attend or participate in an expungement hearing when making a determination of whether expungement is appropriate. Finally, Amendment No.1 would modify the proposed rule change to provide that an associated person shall not file a claim requesting expungement of customer dispute information from the CRD system if the customer dispute information is associated with a customer arbitration or civil litigation in which a panel or court of competent jurisdiction previously found the associated person liable."

SEC Solicits Comments

We later reported in SAA 2022-44 (Nov. 24) that the Commission on **November 10** noticed the proposed amendment, which was published **November 16** in the *Federal Register* (Vol. 87, No. 220, P. 68779) along with an *Order Instituting Proceedings to Determine Whether to Approve or Disapprove the Proposed Rule Change.* Why the activity on possible disapproval? Says the Order: "The Commission is publishing this order pursuant to Section 19(b)(2)(B) of the Exchange Act to solicit comments on the proposed rule change, as modified by Amendment No.1, and to institute proceedings to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1…. The Commission is instituting proceedings 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" (footnotes omitted). Comments on the amended rule and potential disproval are due **December 7**. Rebuttals are due by **December 21.**

Few Comments

As of press time here were just a handful of comments posted on the SEC's Website. We analyze here the institutional comments received from NASAA, PIABA, and SIFMA.

We describe them as falling into one of three categories: support fully; support but recommend improvements; and urge disapproval. Footnotes are omitted.

Support Fully
PIABA: "PIABA appreciates FINRA's continued efforts to examine the expungement problem and attempt to find solutions to the issues PIABA members have previously identified. On September 7, 2022, in response to FINRA's initial submission of the proposed expungement rules changes, PIABA filed a comment letter largely in support of FINRA's efforts noting that 'SR-2022-024 is a significant improvement over current FINRA rules and FINRA's prior rule proposal concerning expungement, SR-2020-030." FINRA has now refiled the proposed expungement rules changes, modified by Amendment No. 1, in response to comments made during the review period. FINRA has now refiled the proposed expungement rules changes, modified by Amendment No. 1, in response to comments made during the review period…. PIABA reiterates its support for SR-2022-024 as a significant improvement to existing FINRA rules and further supports the revisions contained in Amendment No. 1 as additional improvements to the existing expungement process." The **PIABA Foundation** also submitted a supportive letter.

Support But Recommend Improvements
NASAA: "NASAA supports the first two planks of the proposed amendment and recommends an expansion of the third to further protect the integrity of information in the CRD system." The letter headlines the proposed change as follows: "**NASAA Recommends that the Third Proposed Change be Expanded to Prevent Associated Persons from Seeking Expungement of Customer Dispute Information That Is Made Part of Any Regulatory Finding**."

Urge Disapproval
SIFMA: "… SIFMA finds that the Proposal is not in fact consistent with the requirements of the Exchange Act and the rules thereunder and thus, should be either disapproved, or appropriately amended, by the Commission." The comment letter explains that the proposal is inconsistent with the Exchange Act because (*ed: numbers added by the* Alert): 1) it improperly attempts to amend existing rules and strictly limit the grounds for granting expungement without providing adequate notice, opportunity for comment, or due process generally…. 2) it fails to provide any cost-benefit analysis, or other justification, to support limiting the grounds for granting expungement to those under Rule 2080(b)(1)…. Accordingly, the Proposal should be either disapproved, or otherwise amended to restore the status quo and continue to allow the Rule 2080(b)(2) grounds for granting expungement."
*(ed: *Next was the December 14 deadline for submitting rebuttals. Thereafter, the SEC will act. **After all this effort, we can't see the Commission disapproving the proposal. More likely, there will be approval with suggestion for further improvements.)*
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A LOOK BEHIND THE STATS: EMPLOYMENT FILINGS SEEM HEADED FOR A DOWN YEAR. ***We reported in SAA 2022-45 (Dec. 1) that industry arbitration***

case filings were down 6% through October. It turns out that employment claims are down even more. To review, FINRA Dispute Resolution Services ("DRS") has posted case statistics through **October**, with recent trends persisting. These were the major takeaways: 1) overall arbitration filings through the ten-month mark – 2,179 cases – are down 14% for the year (but up from -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).

Employment Claims

We examined the "Top 15 Controversy Types in Intra-Industry Arbitrations" stats to determine where employment filings might end up at the end of the year. Specifically, we looked at these controversy types: breach of contract; U-5 related libel or slander; promissory notes; libel, slander, or defamation; discrimination or harassment; and wrongful termination. As a group, projected year-end filings will decline from 640 cases to 558, a 12.8% decline. Of the six categories, only two – U-5 related slander or libel and generic libel or defamation – are projected to increase, with the remaining ones all declining. See the chart below:

Category	2021	2022-Oct	2022 Proj	22-21 Diff
Breach of contract	268	184	221	-47
U-5 libel/slander	89	75	90	1
Promissory notes	126	73	88	-38
Libel/slander/defamation	59	62	75	16
Discrimination/harassment	36	22	27	-9
Wrongful termination	62	47	57	-5
Total	**640**		**558**	**-82**

[*projections are rounded up*]

Impact of New Law

A new statute might impact the "discrimination/harassment" controversy type going forward. The *Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act* ("*Act*" or "EFASASHA") was signed into law by President Biden on **March 3** at a White House ceremony. The statute gives the employee or class/collective representative the right under the Federal Arbitration Act to opt out of predispute arbitration agreements and class action waivers by invalidating them after a dispute arises. FINRA on **May 13** filed with the SEC SR-FINRA-2022-012, *Proposed Rule Change to Amend the Code of Arbitration Procedure for Industry Disputes ("Code") to Align the Code with the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021*. The changes, which were approved by FINRA's Board of Governors last **March**, were effective immediately, as provided in the *Notice of Filing and Immediate Effectiveness* published in the *Federal Register* on **May 24** (Vol. 87, No. 100, P. 31592). Although the changes were immediately effective on **May 13**, the Authority on **July 15** issued *Regulatory*

Notice 22-15. The rule change language is contained in Attachment A. Among the changes: Rule 13201 was amended by adding new paragraph (c) to provide that a party alleging a sexual assault claim or sexual harassment claim that has agreed to arbitrate before the dispute arose may elect post-dispute not to arbitrate the claim under the Code. New paragraph (c) also provides that the claim may be arbitrated if the parties have agreed to arbitrate it after the dispute arose.
*(ed: *Seems to us that EFASASHA will minimally impact case filings at FINRA. **Past year stats can be found here.)*
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NJ APPELLATE COURT HOLDS THAT *EFASASHA* IS NOT RETROACTIVE. ***A New Jersey appellate court has ruled that the* Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act *("Act" or "EFASASHA") is not to be applied retroactively, where the employee's claims accrued before the law's effective date.*** As we have reported many times, **President Biden** on **March 3** signed the *Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021*, which expressly amended the Federal Arbitration Act ("FAA") to make predispute arbitration agreements ("PDAAs") voidable at the option of the victim. The new law has been codified as FAA Chapter 4. It consists of § 401 (definitions) and § 402 (no validity or enforceability).

Troublesome Language
The law was effective immediately for: "any dispute or claim that arises or accrues on or after the date of enactment of this Act." From the start, we've been concerned about this aspect of the Act. For example, when exactly does a claim "accrue"? What if a case is filed after March 3, 2022, but the claim is governed by a PDAA signed before that date? As we've said before, SCOTUS has ruled several times that arbitration agreements are separate contracts. Does a law allowing retroactive nullification of existing PDAAs invite legal challenges based on the Constitution's Takings Clause?

A Case in Point
Some of these issues were front and center in *Zuluaga v. Altice USA*, No. A-2265-21 (N.J. App. Div. Nov. 29, 2022) (*per curiam*). The broad PDAA between the employee and her employer was contained in a contract signed in **November 2020**. Problems in the workplace unfolded in the spring and summer of 2021. Then: "On July 20, 2021, plaintiff's attorney advised Altice that plaintiff would not be returning to work as the company's 'actions and inactions led to the constructive discharge of [her] employment.'" In **October 2021**, plaintiff filed a lawsuit against Altice under New Jersey's *Law Against Discrimination* ("*LAD*"). Section 1(a) – codified later as N.J. Stat. § 10:5-12.7 – provides: "A provision in any employment contract that waives any substantive *or procedural* right or remedy relating to a claim of discrimination, retaliation, or harassment shall be deemed against public policy and unenforceable" (emphasis added). And section 1(b) adds: "No right or remedy under the 'Law Against Discrimination,' 12 P.L.1945, c.169 (C.10:5-1 *et seq*.) or any other statute or case law shall be prospectively waived."

EFASASHA Not to Be Applied Retroactively Here
The Court finds that, based on the facts of the case, EFASASHA is not to be retroactively applied here because the claim "accrued" when the Plaintiff filed her suit in October 2021: "We reject plaintiff's argument that the EFAA [*ed: the Court's abbreviation for the Act*], which amended the FAA, should be applied retroactively to allow her to proceed with her sexually hostile work environment and constructive discharge claims pursuant to Section 12.7 of the NJLAD. The notes accompanying the EFAA and the language of the EFAA state the provisions in the enactment shall not apply retroactively. EFAA § 3, 136 Stat. at 28 ('This Act, and the amendments made by this Act, shall apply with respect to any dispute or claim that arises or accrues on or after the date of enactment of this Act.'). Because plaintiff's sexual harassment claim arose no later than October 27, 2021, the date she filed her complaint, the EFAA does not apply, and her sexually hostile work environment and constructive discharge claims must be arbitrated…. Because Section 12.7 conflicts with the FAA as amended by the EFAA as to claims that accrued before March 3, 2022, it is preempted as to those claims"
(ed: The core question in our mind remains: can EFASASHA be applied to retroactively invalidate an existing PDAA where the claim clearly arises after March 3, 2022?)
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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

SCOTUS TO TAKE UP FAA SECTION 16 QUESTION. Reversing a recent trend, the Supreme Court has agreed to review an arbitration-related case this Term. Specifically, the Court's **December 9** Order List grants *Certiorari* in *Coinbase, Inc. v. Bielski*, No. 22-105. The issue in this case is a technical one, as described in the **July 29** Petition: "Under § 16(a) of the Federal Arbitration Act, when a district court denies a motion to compel arbitration, the party seeking arbitration may file an immediate interlocutory appeal. This Court has held that an appeal 'divests the district court of its control over those aspects of the case involved in the appeal.' *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) (per curiam).[] The question presented is: Does a non-frivolous appeal of the denial of a motion to compel arbitration oust a district court's jurisdiction to proceed with litigation pending appeal, as the Third, Fourth, Seventh, Tenth, Eleventh and D.C. Circuits have held, or does the district court retain discretion to proceed with litigation while the appeal is pending, as the Second, Fifth, and Ninth Circuits have held?" (links added by the *Alert*).
*(ed: *We covered in SAA 2022-17 (May 5) the trial court decision below,* Bielski v. Coinbase, Inc.*, No. C21-07478, 2022 WL 1062049 (N.D. Cal. Apr. 8, 2022). There, the District Court, applying California contract law, held that the predispute arbitration agreement covering the case before it was both substantively and procedurally unconscionable. The subsequent District Court and Ninth Circuit decisions declining to stay the case pending the appeal are unreported. **A prediction in our October 3 blog post,* First Monday in October: Some Arbitration-Centric Cases Worth Following*, gets partial credit. "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.")*
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FINRA BOARD MEETING IN PERSON THIS WEEK. MYSTERY DISPUTE RESOLUTION ITEM ON THE AGENDA. FINRA's Board of Governors met in person **December 14 – 15.** The Agenda has a somewhat mysterious dispute resolution-related item: "review amendments to the Codes of Arbitration Procedure to make various clarifying, technical and procedural changes." As usual, we will follow up after the meeting results are posted. This was the last meeting for **2022.** Next year's schedule is: **March 9–10; May 17–18; July 12–13; September 13–14;** and **December 6–7.**
*(ed: *We'll tweet any news as soon as we have it.)*
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CPR PUBLISHES A COMMERCIAL ARBITRATION RULES COMPARISON. CPR Dispute Resolution Services has released an excellent commercial arbitration rules comparison. The free 14-page document, *Commercial Arbitration Rules Comparison Tool*, is: "a simplified guide intended to provide an overview of the similarities and differences in key provisions applied in commercial domestic arbitration rules by three of the major arbitral institutions: CPR, the American Arbitration Association (AAA), and JAMS." It provides a nice section-by-section comparison of several key aspects of case administration (*ed: repeated* verbatim): Confidentiality; Arbitrator Appointment; Expedited Procedure; Mediation; Time to Hearing; Award; Arbitration Costs; Disposition of a Claim; Cybersecurity; Discovery/Disclosure; Appeal; and Diversity, Equity & Inclusion.
(ed: Hats off to CPR!)
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NASAA IS HIRING. A **December 5** twitter post from NASAA informs the public that the institution is hiring. The embedded link goes to the NASAA career page, which, at last look, listed three positions in the Corporate Office in Washington, D.C. The page also shows internships and openings in NASAA Member Agencies.
(ed: FINRA's searchable career page is https://www.finra.org/careers.)
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CALIFORNIA APPELLATE COURT: YUP, *VIKING RIVER* PREEMPTS PAGA. The story of *Lewis v. Simplified Labor Staffing Solutions, Inc.*, No. B312871 (Calif. Ct. App. 2 (Dec. 5, 2022), can be told by quoting the Opinion. First, the procedural history: "This is an appeal of an order denying the motion of defendant and appellant Simplified Labor Staffing Solutions, Inc. (Simplified) to compel arbitration of plaintiff and respondent Sylvia Lewis's claims brought under the California Private Attorneys General Act of 2004, Labor Code section 2698 et seq. (PAGA). Simplified's motion was based on Lewis's predispute agreement to arbitrate all claims arising from their employment relationship. The trial court understandably denied the motion based on a rule followed by numerous California Courts of Appeal that predispute agreements to arbitrate PAGA claims are unenforceable." And the holdings: "We hold that this rule cannot survive the U.S. Supreme Court's recent decision in *Viking River Cruises, Inc. v. Moriana* (2022) ___U.S.___ [142 S.Ct. 1906] (*Viking River*). We further hold that the *scope* of the

arbitration clause is to be determined by the arbitrator, in accordance with the arbitration agreement. Specifically, the parties' dispute about whether nonindividual PAGA claims are governed by the arbitration agreement, in the same way individual PAGA claims are, is an issue for the arbitrator to address. Accordingly, we reverse" (emphasis in original; footnotes omitted).
(ed: Seems right.)
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QUICK TAKES: CASES AND AWARDS WORTH READING

***Immediato v. Postmates*, No. 22-1015 (1st Cir. Nov. 29, 2022):** "This appeal requires us to determine whether couriers who deliver goods from local restaurants and retailers are transportation workers engaged in interstate commerce such that they are exempt from the Federal Arbitration Act (FAA or Act). See 9 U.S.C. § 1. The district court concluded that they were not exempt, compelled arbitration of the parties' dispute, and dismissed the appellants' suit. The appellants assign error: they insist that our decision in *Waithaka v. Amazon.com, Inc.*, in which we held that Amazon delivery drivers responsible for the final leg of interstate package deliveries were exempt from the FAA, demands a different outcome. 966 F.3d 10, 13 (1st Cir. 2020). The appellants are comparing plums with pomegranates. Unlike the Amazon delivery drivers in *Waithaka*, the couriers here are not actively engaged in the interstate transport of goods and, thus, are not within a class of workers exempted from the Act. Accordingly, we affirm the judgment below."

***Eubanks v. GasBuddy, LLC*, No. 22-cv-10334-ADB (D. Mass. Nov. 16, 2022)**: "Putting aside the reliability of the Wayback Machine archive, or whether the Court may even take judicial notice of the website's materials for their truth, GasBuddy has still adequately demonstrated, through this testimony and the related exhibits, that the checkbox button was a part of the sign-up process when Eubanks signed up for the service and that it obtained his affirmative assent to the agreement. Further, though Eubanks has argued that the checkbox button may not have been there when he signed up, he has not supported that claim with any specific evidence."

***In re Pacific Fertility Cases*, No. A158155 (Calif. Ct. App. 1 Dec. 1, 2022)**: "Plaintiffs in these coordinated cases contracted with defendant Pacific Fertility Center (Pacific) for fertility-related services, including egg and embryo cryopreservation and long-term freezer storage. They filed suit after one of the cryogenic storage tanks (Tank Four) used to preserve their eggs and embryos failed. Defendant and appellant Chart Inc. (Chart) manufactured the storage tank. Defendants and appellants Praxair, Inc., and Praxair Distribution, Inc. (collectively, Praxair sold the tank to Pacific and assisted with its installation. Plaintiffs signed informed consent agreements and arbitration agreements with Pacific, but not with Chart or Praxair. Chart and Praxair nevertheless filed motions to compel arbitration on equitable estoppel grounds, which the trial court denied. On appeal, they continue to press their equitable estoppel arguments. We affirm…. As the trial court concluded, the legal duties allegedly breached by Chart and Praxair did not 'arise from the agreement[s] containing the arbitration clause.' For this reason, alone, the trial court's order denying arbitration withstands challenge on appeal" (footnotes

omitted). (*ed: An* Alert *h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this decision.*)

***Barker v. Charles Schwab*, FINRA ID No. 21-02847 (Augusta, ME, Oct. 25, 2022)**: A customer alleging that securities in his account were misappropriated and that Respondent broker-dealer engaged in fraud in violation of the Electronic Fund Transfer Act loses his case. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Sholty v. Banc of America*, FINRA ID No. 21-01929 (Los Angeles, CA, Nov. 2, 2022)**: A Panel grants one named Respondent broker-dealer's Prehearing Motion to Dismiss Claimant rep's requests for expungement on eligibility grounds (pursuant to Rule 13206) and also denies his remaining request for expungement of another customer complaint. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*
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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Dmytro Derkach and Andriy Stetsenko, *Ukrainian Supreme Court Corrects Deficiencies in the Enforcement of ICSID Awards*, Kluwer Arbitration Blog (Dec. 2, 2022): "Despite the ongoing Russian full-scale invasion of Ukraine and constant terror, Ukrainian courts continue to function and deliver justice. Recently, the Supreme Court has adopted a landmark judgment regarding the enforcement of ICSID awards in Ukraine, which is set to change judicial practice going forward.[] Our colleagues previously highlighted the deficiencies of the Ukrainian court practice on the enforcement of ICSID awards, namely, the erroneous application of the New York Convention. In this blog post we examine the legal framework and previous judicial practice relevant to the enforcement of ICSID awards in Ukraine and examine the consequences of the Supreme Court's most recent judgment on ICSID award enforcement."

***Advisors Could "Skirt the Rules" Under FINRA Home Office Plan: PIABA*, ThinkAdvisor (Dec. 2, 2022)**: **"**The Public Investors Advocate Bar Association says the Financial Industry Regulatory Authority's plan to allow a home office to be considered a non-branch 'residential supervisory location' under certain conditions is 'fundamentally flawed' and 'leaves considerable opportunity for advisors working from home to skirt the rules.'[ ] FINRA filed with the Securities and Exchange Commission in July its proposed changes to FINRA Rule 3110 to allow a home office to be considered a non-branch 'residential supervisory location' under certain conditions."

***Federal Law Prohibiting Pre-Dispute Arbitration of Sexual Harassment and Sexual Assault Claims Not Retroactive, New Jersey Court Confirms*, Proskauer Rose LLP Blog (Dec. 5, 2022)**: "A new federal law invalidating pre-dispute arbitration agreements for sexual harassment and sexual assault claims does not apply retroactively, a New Jersey appeals court recently confirmed.[] In *Zuluaga v. Altice USA* (N.J. App. Div. Nov. 29, 2022), the plaintiff had signed an arbitration agreement waiving her right to bring employment-related disputes in court when she joined her employer, Altice USA, in

November 2020. In October 2021, the plaintiff sued Altice for sexual harassment and constructive discharge claims under the New Jersey Law Against Discrimination ('NJLAD')." (*ed: See our coverage elsewhere in this* Alert.)

***FINRA, Nasdaq, and NYSE Warn Firms of Pump-and-Dump Schemes Following IPOs of Small-Cap Issuers*, Goodwin Procter Blog (Dec. 5, 2022)**: "FINRA, Nasdaq, and NYSE published separate notices to alert their members about recent observations related to initial public offerings (IPOs) for certain small capitalization (small-cap) issuers listed on US stock exchanges and to remind members, including underwriters and other market participants, regarding associated regulatory obligations. These notices follow recent reports by several news outlets that listings of small-cap companies have been subject to enhanced scrutiny by Nasdaq over the last few months, as well as statements indicating that Nasdaq has halted IPOs of small Chinese companies. That said, Nasdaq has not announced any amendments to its listing rules."

***First Circuit Delivers Win to Companies Hungry to Enforce Mutual Arbitration Agreements With Couriers Who Rarely Cross State Lines*, Lexology (Dec. 9, 2022)**: "**Seyfarth Synopsis**: Couriers who transport goods from restaurants and grocers who have connected to consumers via the Postmates app are not 'engaged in foreign or interstate commerce, according to a recent decision by the First Circuit Court of Appeals. As a result, the couriers don't satisfy the 'transportation worker' exception to the Federal Arbitration Act (FAA), and they can be compelled to have their claims heard in arbitration on an individual basis rather than court on potentially a class basis."

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DID YOU KNOW?

INTERNATIONAL ARBITRATION IS NOT NEW. The Venezuelan Crisis of 1895 was a border dispute between the United Kingdom and Venezuela. According to Wikipedia, it had something to do with "Britain's refusal to include in the proposed international arbitration the territory east of the 'Schomburgk Line', which a surveyor had drawn half a century earlier as a boundary between Venezuela and the former Dutch territory of British Guiana." The real fight was about gold. The dispute escalated into a major crisis with the possibility of armed conflict, and **President Cleveland,** citing the Monroe Doctrine, intervened to compel the parties to arbitrate the dispute. The parties ultimately agreed to a five-member arbitration panel, consisting of two arbitrators chosen by the U.K., two representing Venezuelan interests – but named by the U.S. – and the neutral chair to be selected by these four arbitrators. The two arbitrators selected by the U.S. were the sitting Chief Justice and an Associate Justice of the Supreme Court, and the chair was a Russian judge and diplomat. The tribunal ultimately held hearings in Paris in 1898, and a year later ruled largely in favor of the Brits.

Postscript: Losing party resistance to adverse awards is not new, either. Venezuela still claims most of Guyana, having renounced its acceptance of the arbitration award in 1962 after learning that one of its counsels believed that the Russian chair and British arbitrators made a deal and then forced the American arbitrators to go along under threat of an even more pro-British majority decision if they didn't.

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