SECURITIES ARBITRATION ALERT 2023-19 (5/18/23)

George H. Friedman, Editor-in-Chief

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DID YOU KNOW?

- **The Federal Arbitration Act was Passed With No Dissenting Votes**

FEATURE ARTICLE

SEC REVAMPS FINRA'S EXPUNGEMENT PROCEDURES, *BY DAVID E. ROBBINS, ESQ.* Since the February 23, 2023 publication in *Securities Arbitration Alert* of David Robbins' article *FINRA's New Expungement Rules – Balancing*

Interests But Adding Roadblocks, FINRA filed amendments to those rules and the Securities and Exchange Commission approved FINRA's major "modification" to "the current process relating to the expungement of customer dispute information." This new article, *SEC Revamps FINRA's Expungement Procedures*, explains just what the SEC has approved and the implications for financial advisers seeking such "extraordinary relief." *Read more…*
(ed: David E. Robbins, of Kaufmann Gildin & Robbins LLP [www.securitieslosses.com] is a long time member of the board of this publication. He represents investors, brokers and firms and is the author of Securities Arbitration Procedure Manual *and the* Securities Arbitration Practice Commentary for McKinney's Consolidated Laws of New York.*)*
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SQUIBS: IN-DEPTH ANALYSIS

SEC SEEMS TO BE FACING A LATE JUNE DEADLINE TO REPORT TO CONGRESS ON INVESTOR ADVISER ARBITRATION. ***By our reckoning, the SEC may be facing a looming late June deadline to report to Congress on investment adviser arbitration***. We reported in SAA 2023-01 (Jan. 5) that, buried in the 1,600+ page appropriations bill, the *Consolidated Appropriations Act of 2023* (H.R. 2617), signed into law **December 29, 2022**, was language that bars companies with federal defense contracts valued at over $1 million from mandating or enforcing arbitration of Title VII or sexual harassment or assault claims. *Really* buried is what appears to be a mandate to the SEC that it gather data and report to Congress on investment adviser arbitration. Specifically, H.R. 8254 -- the bill making appropriations for Financial Services and General Government -- which we assume was rolled up in the aforementioned *Consolidated Appropriations Act*, was accompanied by House Appropriations Committee Report 117-393, submitted **June 28, 2022**.

Committee Report to SEC: Provide Info on RIA Use of PDAAs
The report, which was issued when the Democrats controlled the House in the 117th Congress, reads (*ed: we added the bulleted format*):

> *Pre-Dispute Arbitration Contracts*.—The Committee is concerned about proliferation of mandatory pre-dispute arbitration contracts by SEC-registered investment advisers. The Committee directs the SEC as follows:
>
> - Gather detailed information about how such contracts are used by SEC-registered investment advisers and the effect such contracts have on investors who are harmed by the conduct of advisers.
> - When such contracts are used, the SEC shall gather information about whether a dispute resolution forum has been designated; whether particular forum rules are designated; whether a venue is designated; whether a class action waiver is included; whether there are limitations on claims that may be asserted or damages that may be awarded; whether the contract includes any fee shifting provision; whether any complaints have been filed against the advisor in accordance with the contract; and

whether the firm has any arbitration awards or unpaid arbitration awards in the last five years.
- The SEC is directed to provide a report to the Committee and to the House Financial Services Committee within 180 days of enactment of this Act.

PIABA: What About RIA Arbitration?
The SEC in **August 2022** issued a notice requesting comments on its draft *Strategic Plan for Fiscal Years 2022-2026.* 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, 2022** 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." As reported in SAA 2022-45 (Dec. 10) the final Plan, announced in a **November 23, 2022** press release, made no references to arbitration, mediation, or dispute resolution.
*(ed: *Our comment in 2022-45 was: "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." **The 180 days would appear to translate to about June 29. We'll certainly track this one!)*
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THIRD CIRCUIT: LOCAL UBER DRIVERS NOT PART OF THE STREAM OF INTERSTATE COMMERCE. ***Local Uber drivers as a class are not workers engaged in interstate commerce, a unanimous Third Circuit holds*.** Our readers know that SCOTUS in **June 2022** decided *Southwest Airlines Co. v. Saxon*, 142 S. Ct. 1783 (2022), ruling unanimously that the Federal Arbitration Act ("FAA") section 1 exemption of "workers engaged in foreign or interstate commerce" includes classes of workers such as airline baggage handlers 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.

Ride Service Drivers' Status
Left open was possible FAA exemption for Uber drivers who don't regularly cross state lines. At least one Circuit answers that question in the negative. Says the Court in *Singh v. Uber Technologies, Inc.*, No. 21-3234 (3rd Cir. Apr. 26, 2023): "The Federal Arbitration Act (FAA) compels federal courts to enforce a wide range of arbitration agreements. But it does not apply to arbitration agreements contained in the 'contracts of employment of seamen, railroad employees, or any other class of workers engaged in

foreign or interstate commerce.' 9 U.S.C. § 1. These consolidated appeals ask us to decide whether Uber drivers belong to such a class of workers. We conclude, as have our sister circuits, that they do not. The work of Uber drivers is centered on local transportation. Most Uber drivers have never made a single interstate trip. When Uber drivers do cross state lines, they do so only incidentally, as part of Uber's fundamentally local transportation business. As a result, they are not 'engaged in foreign or interstate commerce' for the purposes of § 1 of the FAA."

What About Drivers Who *Do* Cross State Lines?
What, then, is the status of drivers who do cross state lines? For this Court, the focus must be on the *class* of drivers as a whole: "Is engagement with interstate commerce central to the work of Uber drivers? The District Court found that it was not. We agree. As a class, Uber drivers are in the business of providing local rides that sometimes—as a happenstance of geography—cross state borders. Remove interstate commerce from the equation, and the work of Uber drivers remains fundamentally the same. Plaintiffs have not shown that drivers' infrequent interstate trips are, on the whole, an essential part of their job. Indeed, their statistics demonstrate that most Uber drivers have never made a single interstate trip. Neither have Plaintiffs shown that drivers' intrastate duties, such as driving riders to and from airports, are a 'constituent part' of the interstate movement of goods or people. As a result, we conclude that Uber drivers are not a class of workers engaged in interstate commerce and, accordingly, that they do not fall under the § 1 exception" (citation omitted).
(ed: We're not so sure about drivers who regularly handle airport rides. SCOTUS will, we think, eventually resolve this question.)
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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

FINRA BOARD MEETS IN PERSON THIS WEEK. NO DISPUTE RESOLUTION RULEMAKING ITEMS ON THE AGENDA. FINRA's Board of Governors is meeting in person **May 17–18**; there are no dispute resolution rulemaking items on the Agenda. The Board will, however, make appointments to advisory committees, which presumably includes the National Arbitration & Mediation Committee. As usual, we will follow up after the meeting results are posted. The schedule for the rest of 2023 is: **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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SEC PAYS A RECORD WHISTLEBLOWER AWARD. As announced in a **May 5** Press Release, the SEC has issued its largest-ever whistleblower award. The nearly $279 million award was paid to a whistleblower: "whose information and assistance led to the successful enforcement of SEC and related actions. This is the highest award in the SEC's whistleblower program's history, more than doubling the $114 million whistleblower award the SEC issued in October 2020." Continues the release: "The whistleblower's sustained assistance including multiple interviews and written submissions was critical to the success of these actions …. While the whistleblower's

information did not prompt the opening of the Commission's investigation, their information expanded the scope of misconduct charged."
(ed: "Payments to whistleblowers are made out of an investor protection fund, established by Congress, which is financed entirely through monetary sanctions paid to the SEC by securities law violators. No money has been taken or withheld from harmed investors to pay whistleblower awards.")
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***CERTIORARI* PETITION COMING IN SECOND CIRCUIT CASE HOLDING THAT CFPB FUNDING METHOD *IS* CONSTITUTIONAL?** We reported in SAA 2023-14 (Apr. 13) that, in a split with its sister Circuit, the Second Circuit held unanimously in *CFPB v. Law Offices of Crystal Moroney*, No. 20-3471 (2d Cir. Mar. 23, 2023), that the Consumer Financial Protection Bureau's ("CFPB") funding mechanism does not violate the Constitution's Appropriations Clause. Said the Opinion: "As a threshold matter, we cannot find any support for the Fifth Circuit's conclusion in Supreme Court precedent. To the contrary, the Court has consistently interpreted the Appropriations Clause to mean simply that 'the payment of money from the Treasury must be authorized by a statute.' We are not aware of any Supreme Court decision holding (or even suggesting) that the Appropriations Clause requires more than this 'straightforward and explicit command.' Here, Congress expressly appropriated the CFPB's funding by enacting the CFPA [Consumer Financial Protection Act], see 124 Stat. at 1955–2113, and we are 'not at liberty to depart from binding Supreme Court precedent, "unless and until the [Supreme] Court reinterprets" [such] precedent' itself.[] We likewise find no support for the Fifth Circuit's reasoning in the Constitution's text" (citations omitted). Our editorial comment in # 14 was: "We suspect SCOTUS will have the last word!" That seems to be coming true, as Maroney on **April 28** asked the Second Circuit to stay issuing a mandate, pending its seeking *Certiorari*.
(ed: We reported in SAA 2023-10 (Mar. 9) that the Supreme Court had granted a Certiorari *Petition seeking review of* Community Financial Services Ass'n of America v. CFPB, *No. 21-50826 (5th Cir. Oct. 19, 2022). There, a unanimous Fifth Circuit held that the CFPB's funding method is unconstitutional. We see a* Cert. *grant in* Maroney, *and then the two cases being consolidated.)*
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NFA INVESTOR NEWSLETTER HITS THE ELECTRONIC NEWSSTAND. The National Futures Association ("NFA"), which operates a dispute resolution forum, issues a periodic *Investor Newsletter* aimed at commodity futures investors. It's designed to keep investors up to date on recent NFA initiatives, events, and resources that investors may find helpful. In the second *Newsletter* of **2023**, distributed under a summary email dated **May 4**, NFA lists several highlights which we explore in the order presented: **Investor Education** reports on: *Money Smart Week*, which was held virtually **April 15-21**; and *Financial Literacy Month: Learn How to Keep Your Money Safe from Scammers*. The **Investor Protection** section contains three items: a NASAA Informed Investor Advisory: *Does Crypto Threaten Your Investment Accounts*; an SEC Investor Alert: *Exercise Caution with Crypto Asset Securities*; and an NFA Investor Advisory: *Beware of*

NFA Imposters. As usual, the *Newsletter* signs off with a list of the quarter's enforcement actions, with links to final decisions in each, complaints that were issued, and final orders in registration cases. The *Newsletter* Webpage also contains: 1) a link to BASIC; 2) an online complaint form; 3) a link to past issues of the *Newsletter* and 4) a subscription form.
*(ed: *Another informative issue. **The enforcement actions database allows searches by subject matter, such as arbitration. ***Stats may be found here; for 2021, NFA had just 22 arbitration cases filed – 19 investor and 3 intra-industry. Stats for 2022 are still not yet posted.)*
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QUICK TAKES: CASES AND AWARDS WORTH READING

***International Brotherhood of Teamsters Local 947 v. National Labor Relations Board*, No. 19-12745 (11th Cir. May 3, 2023)**: "After careful review, and with the benefit of oral argument, we hold that the Board applied an erroneously narrow standard for determining whether Anheuser-Busch's motion [to compel arbitration] had an illegal objective. We therefore grant the petition for review of the Board's order dismissing the complaint, vacate the decision of the Board, and remand for consideration of whether enforcement of the Dispute Resolution Policy against Brown would violate the NLRA."

***Alberto v. Cambrian Homecare*, No. B314192 (Calif. Ct. App. 2 May 11, 2023)**: "Jennifer Playu Alberto, the respondent, is a former employee of appellant Cambrian Homecare. When she was hired, Alberto signed a written arbitration agreement. Alberto brought wage-and-hour claims against Cambrian. Cambrian petitioned for arbitration. The trial court denied the petition. The trial court found that even if the parties had formed an arbitration agreement, the agreement had unconscionable terms, terms that so permeated the agreement they could not be severed. We affirm. The agreement, read together—as it must be—with other contracts signed as part of Alberto's hiring, contained unconscionable terms. The trial court had discretion to not sever the unconscionable terms, and to refuse to enforce the agreement."

***Matter of Great Northern Ins. Co. v. Schwartzapfel*, 2023 NY Slip Op 02515 (App. Div., 2d Dept., May 10, 2023)**: "Where an insurance policy contains an agreement to arbitrate, CPLR 7503(c) requires a party, once served with a notice of intention to arbitrate, to move to stay such arbitration within 20 days after service of such notice, or else he or she is precluded from objecting…. Despite receiving the demand to arbitrate on December 13, 2019, Great Northern did not commence this proceeding until January 29, 2020, which was beyond the 20-day statute of limitations. Contrary to Great Northern's contention, it did not establish that the demand for arbitration was deceptive and intended to prevent it from timely contesting the issue of arbitrability (*see Matter of Ameriprise Ins. Co. v Sandy*, 158 AD3d at 625; *Matter of United Servs. Auto. Assn. Prop. & Cas. Ins. Co. v DeRosa*, 36 AD3d 925; *cf. Rider Ins. Co. v Marino*, 84 AD2d 832). The cover letter dated December 10, 2019, clearly indicated that a demand for arbitration was included as an exhibit to the letter. Moreover, Great Northern failed to proffer an affidavit from someone with personal knowledge to support its contention that it had been deceived (*see*

Matter of Ameriprise Ins. Co. v Sandy, 158 AD3d at 625; *Matter of Nationwide Ins. Co. v Singh*, 6 AD3d 441, 444)."

***McCoy v. Charles Schwab*, FINRA ID No. 22-00807 (Kansas City, MO, Mar. 27, 2023)**: Although the Panel found that Claimants proved that negligence occurred during a telephone call with one named Respondent broker-dealer, regarding the money that could be gained from rolling their Chipotle puts, they failed to establish their entitlement to damages. As such, the Panel dismissed their case. Non-Party broker is awarded expungement of this matter from his CRD record. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Estate of Gard v. Merrill Lynch*, FINRA ID No. 22-01292 (Los Angeles, CA, Apr. 5, 2023)**: A customer estate alleging breach of contract with respect to the distribution of trust assets is awarded over $450,000 in compensatory damages (inclusive of interest) from Respondent broker-dealer. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

James McGlaughlin, *ECT Modernisation Perspectives: Big Shoes to Fill? Governing Foreign Energy Investments in an Energy Charter Treaty Lacuna*, Kluwer Arbitration Blog (May 9, 2023): "Much has been written already about the future of the Energy Charter Treaty ('the ECT') – or perhaps lack thereof. Briefly, attempts to modernise the ECT began in earnest in 2017 with the aim of better aligning the treaty's substantive provisions with its contracting parties' climate law obligations. On 24 June 2022, those discussions culminated in the ECT contracting parties reaching an 'Agreement in Principle.' The modernised ECT text forming the basis of the Agreement is notable in one key respect: it does not remove fossil fuel investments from the ECT's scope of investment protection. The modernised definition of protectable 'investments' is drafted broadly to include 'every kind of asset' without differentiating between those that further or hinder the transition to green energy. While the modernised text proposes to incorporate a flexibility mechanism granting full discretion to its contracting parties to decide whether to exclude fossil fuel investments from ECT protection, and if so, on what basis, to date only two parties (the UK and the EU) have said they would trigger that mechanism on limited terms."

***Top Ten Things to Know About Securities Class Action Mediations*, Association of Corporate Counsel (May 2, 2023)**: "Many complex and large lawsuits end up in mediation. However, because of various characteristics of securities class actions, including the law and procedures that are applicable to securities claims and the way the insurance is generally structured (as well as other reasons described below), it is difficult to manage mediations of these cases. We believe it should be of value to understand these challenges."

***Oppenheimer Ordered to Pay Another $14M Over Ponzi Scheme*, ThinkAdvisor (May 5, 2023)**: "Oppenheimer & Co. has been ordered by a Financial Industry Regulatory Authority arbitration panel to pay another $14 million over alleged supervisory failures related to its role in a sketchy fund that was later identified as part of a Ponzi scheme.[] According to an award that was signed by a three-person public arbitration panel on Wednesday and posted on FINRA's website on Thursday, Oppenheimer was at least partially responsible for the losses reported by multiple clients of the firm after they were convinced by a broker at the company to invest in Horizon Private Equity III, a fund that promised huge returns but never delivered any profits."

***FINRA Fines Centaurus, Ex-Broker for Recommending More Costly UITs, REITs to Clients*, Wealth Management (May 8, 2023)**: "A former Centaurus Financial broker shuffled clients' investments into a unit investment trust when more affordable options of the product were available, according to a settlement between the advisor, firm and the Financial Industry Regulatory Authority."

***The U.S. Court of Appeals for the Eleventh Circuit Puts End to "Circuit Split" on Applicable Grounds for Vacatur of "Nondomestic" Awards*, Lexology (May 9, 2023)**: "On April 13, 2023, in *Corporación AIC v. Hidroelectrica Santa Rita*, the U.S. Court of Appeals for the Eleventh Circuit overturned *en banc* more than two decades of prevailing precedent (*Industrial Risk* and *Inversiones*) which held that international arbitral awards rendered in the U.S. (known as 'nondomestic awards') may only be vacated (set aside) on the grounds set out in Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). The Eleventh Circuit instead ruled that only Chapter 1, Section 10, of the Federal Arbitration Act (FAA) provides the grounds to vacate these nondomestic awards rendered in the U.S. As a result of this ruling, the Eleventh Circuit has now joined the Second, Third, Fifth, Sixth, and Seventh Circuits to put an end to the long-standing circuit split on this issue" (footnotes omitted).

***SEC Charges HSBC and Scotia Capital with Widespread Recordkeeping Failures*, www.sec.gov (May 11, 2023)**: "The Securities and Exchange Commission today charged HSBC Securities (USA) Inc. and Scotia Capital (USA) Inc. for widespread and longstanding failures by both firms and their employees to maintain and preserve electronic communications. To settle the charges, HSBC and Scotia acknowledged that their conduct violated recordkeeping provisions of the federal securities laws and agreed to pay penalties of $15 million and $7.5 million, respectively."

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DID YOU KNOW?

THE FEDERAL ARBITRATION ACT WAS PASSED WITH NO DISSENTING VOTES. The Federal Arbitration Act ("FAA") was enacted in 1925 and went into effect a year later. The FAA abrogated the existing law, which was based on Common Law hostility to arbitration, making written promises to arbitrate matters involving interstate commerce (and maritime transactions) specifically enforceable, and establishing very limited judicial review of arbitration awards. The FAA was passed by both houses of

Congress, *without a dissenting vote* (my, how things have changed), was signed into law by President Calvin Coolidge on February 12, 1925, and went into effect January 1, 1926. *return to top*

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