



SECURITIES ARBITRATION ALERT

SECURITIES ARBITRATION ALERT 2022-39 (10/20/22)

George H. Friedman, Editor-in-Chief

SQUIBS:

- [Latest *Neutral Corner* from FINRA Dispute Resolution Services Hits the Electronic Newsstand](#)
- [CFPB Sues MoneyLion for Arbitration Clause Use](#)

SHORT BRIEFS:

- [SEC Says “Never Mind” on Several Past Comment Letter Due Dates. Arbitration May Be Involved](#)
- [First Reg-BI FINRA Disciplinary Action Involved An Arbitration](#)
- [Securities Experts Roundtable Publishes its Latest Free Newsletter](#)
- [Save the Dates: AAA to Hold In-Person November Program on Early Dispute Resolution](#)

QUICK TAKES:

- *Commodities & Minerals Enterprise Ltd. v. CVG Ferrominera Orinoco, C.A.*, No. 20-4248 (2d Cir. Oct. 3, 2022)
- *Zachman v. Hudson Valley Federal Credit Union*, No. 21-999 (2d Cir. Sep. 14, 2022)
- *Airbnb, Inc. v. Rice*, 138 Nev. Adv. Op. No. 65 (Sep. 29, 2022)
- *Huston v. TD Ameritrade*, FINRA ID No. 22-00315 (Denver, CO (Sep. 1, 2022)
- *Meagher v. Cetera Advisor Networks*, FINRA ID No. 21-03114 (Seattle, WA, Sep. 1, 2022)

ARTICLES OF INTEREST:

- Manesh, Mohsen and Grundfest, Joseph A., *The Corporate Contract and Shareholder Arbitration* (Sep. 9, 2022)
- *CFPB Files Complaint Against Online Lender Alleging MLA Violations*, Consumer Finance Monitor (Oct. 7, 2022)
- *Arbitration and Class Action Waiver Provisions - May Be Enforceable*, Lexology (Oct. 10, 2022)
- *Finra Fines, Suspends N.Y. Broker In First Reg-Bi Action*, FA Magazine (Oct. 11, 2022)
- *UBS Yield Enhancement Strategy (YES) Investor Lost 20%, But Wins \$470K FINRA Claim*, Stock Market Today (Oct. 11, 2022)
- *FINRA Says “Heightened Supervision” Didn’t Catch Broker’s Double-dipping*, FinancialPlanning (Oct. 12, 2022)

DID YOU KNOW?

- FINRA Has a Webpage on “Legitimate Avenues for Recovery of Investment Losses”

SQUIBS: IN-DEPTH ANALYSIS

LATEST NEUTRAL CORNER FROM FINRA DISPUTE RESOLUTION SERVICES HITS THE ELECTRONIC NEWSSTAND. *FINRA Dispute Resolution Services (“DRS”)* has posted the latest edition of *The Neutral Corner* newsletter for arbitrators and mediators (“TNC”), on the Authority’s Website. We present essentially verbatim the [table of contents](#) of Volume [2022-3](#):

Mission Statement

Discovery Abuse in Customer Cases (by Nicole Iannarone and Darlene Pasieczny)

DRS and FINRA News

- Arbitration Case Filings and Trends
- Results of Independent Counsel's Report on Arbitrator Selection Process
- Recent Court of Appeals of Georgia Decision
- Proposed Rule Change to Amend the Codes of Arbitration Procedure to Modify the Current Process Relating to the Expungement of Customer Dispute Information
- Regulatory Notice 22-15: Arbitration of Sexual Assault and Sexual Harassment Claims
- COVID-19 Impact to Arbitration and Mediation Hearings
- Vaccination Requirement for In-Person Participants (Except in Florida Hearings Locations)
- Testing Requirement for In-Person Participants (Florida Hearing Locations Only)
- Safety Protocol for In-Person Hearings
- Virtual Arbitration Hearing Statistics
- Pilot Program for Prehearing Conferences by Zoom
- DR Portal
- DR Portal Fee Enhancements
- 2022 Demographic Survey
- Updated Initial Prehearing Conference Script
- Arbitrator Travel Policy and Business Mileage Rate

Mediation Update

- October is Mediation Settlement Month
- Mediation List Pilot Program
- DRS' Mediation Program for Small Arbitration Claims
- Mediation Case Filings and Trends
- Keep It Current
- Mediator Training Opportunities
- Become a DRS Mediator

Questions and Answers

- Prehearing Conferences by Zoom
- Receiving Exhibits for Hearings by Zoom
- Forms Available in the DR Portal

Education and Training

- Practising Law Institute Securities Arbitration 2022
- American Bar Association 2022 Dispute Resolution Mediation Week: October 19 – 23
- American Bar Association 2022 Dispute Resolution Mediation & Advocacy Skills Institute: December 1 – 3

Quarterly Arbitrator Disclosure Reminder Directory

(ed: TNC is a wonderful resource not only for arbitrators and mediators, but parties as well. Past issues can be found [here](#).)

[return to top](#)

CFPB SUES MONEYLION FOR ARBITRATION CLAUSE USE. *The Consumer Financial Protection Bureau (“CFPB”) has sued online lender MoneyLion in federal court, asserting among other things that the lender’s use of predispute arbitration agreements (“PDA”) violated the Military Lending Act (“MLA”).* The [Complaint](#) in *Consumer Financial Protection Bureau v. MoneyLion Technologies Inc.*, No. 1:22-cv-08308 (S.D.N.Y. Sep. 29, 2022), 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.”

MLA Bars Mandatory PDAAs

The *MLA* ([10 U.S.C. § 987](#)(e)(3)) makes it unlawful where: “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.” 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.”

(ed: We’ll keep our eye on this one.)

[return to top](#)

SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

SEC SAYS “NEVER MIND” ON SEVERAL PAST COMMENT LETTER DUE DATES. ARBITRATION MAY BE INVOLVED. The SEC on **October 7** issued a [proposed order](#) reopening several past comment letter due dates on several Commission rulemaking releases and filings. Citing technical issues, a [Press Release](#), *SEC Reopens Comment Periods for Several Rulemaking Releases Due to Technological Error in Receiving Certain Comments*, says: “The Securities and Exchange Commission today reopened the public comment periods for 11 Commission rulemaking releases and one

request for comment due to a technological error that resulted in a number of public comments submitted through the Commission’s internet comment form not being received by the Commission. The majority of the affected comments were submitted in August 2022; however, the technological error is known to have occurred as early as June 2021.” While none of the impacted Commission filings listed in the Release involved arbitration, the Order adds: “The technological error also may have affected certain comments with respect to the following SRO matters. The Commission will evaluate any comments resubmitted with respect to these matters and consider whether further action is warranted.” It then lists several SRO rule filings, including [SR-FINRA-2022-024](#), *Proposed Rule Change to Amend the Codes of Arbitration Procedure to Modify the Current Process Relating to the Expungement of Customer Dispute Information*. (ed: *Oops! ** Comments on the affected releases may be filed within 14 days after publication of the reopening release in the Federal Register. ***We will track SR-FINRA-2022-024 for further developments.)

[return to top](#)

FIRST REG-BI FINRA DISCIPLINARY ACTION INVOLVED AN

ARBITRATION. The financial services media were abuzz recently over the first Reg-BI related disciplinary action undertaken by FINRA. See, for example, [Finra Fines, Suspends N.Y. Broker In First Reg-Bi Action](#), FA Magazine (Oct. 11, 2022). According to the Letter of Acceptance, Waiver, and Consent (“AWC”), [No. 2021069405501](#): “From July 2020 through November 2021, [broker] willfully violated the Best Interest Obligation under Rule 15l-1 of the Securities Exchange Act of 1934 (Regulation Best Interest or Reg BI) and violated FINRA Rule 2010 by recommending a series of transactions in the account of one retail customer that was excessive in light of the customer’s investment profile and therefore was not in that customer’s best interest.” The broker agreed to: “a six-month suspension from associating with any FINRA member in all capacities; and a \$5,000 fine.” Of particular interest to us was that the matter: “originated from FINRA’s review of a customer-initiated arbitration.” This is a reference to FINRA Regulation’s routine practice of reviewing new arbitration case filings. Also of interest is that the AWC: “does not require that [broker] pay restitution to Customer A because Network 1 has already compensated Customer A in connection with the settlement of an arbitration claim filed by the customer.”

(ed: Nice to see the positive role played by arbitration.)

[return to top](#)

SECURITIES EXPERTS ROUNDTABLE PUBLISHES ITS LATEST FREE

NEWSLETTER. The [latest issue](#) of the Securities Experts Roundtable’s (“SER”) quarterly newsletter, *The Expert’s Examiner* (“TEE”) volume 2022-02, covering **July – September 2022**, hit the electronic newsstand **October 4**. This *free*, link-rich publication, which can be found on the [Website’s](#) landing page (“newsletter” tab), offers a wealth of information on financial services arbitration and ADR in general. Among the regular features are: **Recent News from the Arbitration Front; Expert Opinions: What are the Courts (and Arbitrators) Thinking?; Heard Through the Regulatory Grapevine – Comment Letters and Speeches; and Statistics, Events & Resources.**

Content is provided by the Roundtable's members; the *Alert* is also a contributor. [Signup](#) is available online.

*(ed: *The non-profit SER, which was founded in 1992, is: "a group of professionals with significant experience as testifying and consulting experts in securities, business and investment-related litigation." **The TEE is a wonderful resource for the arbitration bar. Past issues are grouped [here](#). ***Full disclosure: SAA's publisher and editor-in-Chief George Friedman is an active member of the SER.)*

[return to top](#)

SAVE THE DATES: AAA TO HOLD IN-PERSON NOVEMBER PROGRAM ON EARLY DISPUTE RESOLUTION. The AAA will be conducting an in-person seminar, [Resetting the Bar: Using Early Dispute Resolution \(EDR\) to Resolve Disputes Economically and Fairly](#), **November 8 – 9** in New York City. Says the Webpage announcement: "Learn the [Early Dispute Resolution Institute Protocols](#) and powerful risk-analysis tools to help parties resolve disputes early, economically, and fairly.[] We will teach you the Protocol's four steps: Initial dispute assessment; Information and document exchange (including experts if needed); Risk analysis; and Final resolution.[] We also will train you in depth in how to create and use decision trees to help parties realistically analyze risk, value their case, and then develop principled brackets for negotiating resolution of their dispute." The program is geared toward: mediators, judges, litigators, in-house litigation counsel, settlement counsel, and dispute resolution educators. Serving as faculty are: **Harold Coleman, Jr., Esq.**, CCA, Mediator, Arbitrator, Trainer; Executive Director, AAA Mediation.org®; Senior Vice President, AAA-ICDR®; **Michael Hawash, Esq.**, EDR Institute Trustee and Faculty, AAA-ICDR Panel; **Anne Jordan, Esq.**, EDR Institute Trustee and Faculty, AAA-ICDR Panel; and **Peter R. Silverman, Esq.**, EDR Institute Founder, Trustee and Faculty, AAA-ICDR Panel. CLE credit is available.

*(ed: *Registration, which is done [online](#), is \$695. **The program will take place at the AAA's Office at 150 East 42nd Street (17th Floor) in Manhattan. ***Questions? Email Michael Rodriguez at CustomerService@AAAMediation.org or call 877-252-0426.)*

[return to top](#)

[QUICK TAKES: CASES AND AWARDS WORTH READING](#)

[Commodities & Minerals Enterprise 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. Second, Ferrominera contends that the district court erred in confirming the arbitral award based on purported lack of jurisdiction by the arbitral panel, issues with the scope of the award, and conflicts with United States public policy. Third, it argues that the district court abused its discretion in awarding attorney's fees and costs

in favor of CME. As to the first point, we hold that a party is not required to serve a summons in order to confirm a foreign arbitral award under the New York Convention. We further conclude that the district court properly enforced the arbitral award, but that it erred in awarding attorney's fees and costs."

Zachman v. Hudson Valley Federal Credit Union, No. 21-999 (2d Cir. Sep. 14, 2022): "We conclude that the record is insufficiently developed on the issue of whether the parties entered into an agreement to arbitrate and, as a consequence, we cannot determine the matter of arbitrability 'as a matter of law.' *Meyer*, 868 12 F.3d at 74. Therefore, we remand for the district court to consider further evidence or, if necessary, hold a trial. See 9 U.S.C. § 4.... Unfortunately, the record does not contain screenshots of the webpage(s) used to register HVCU customers for online banking. Therefore, we cannot engage in this analysis, and it was error for the district court to engage in the inquiry notice analysis based on the copy of the Internet Banking Agreement, which does not depict the content and design of the webpage as seen by users signing up for online banking."

Airbnb, Inc. v. Rice, 138 Nev. Adv. Op. No. 65 (Sep. 29, 2022): "In this appeal, we must apply the United States Supreme Court's holding in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, that, under the Federal Arbitration Act (FAA), a court has no power to determine the arbitrability of a dispute where the contract delegates the arbitrability question to an arbitrator, even if the argument that the arbitration agreement applies to the dispute is 'wholly groundless.' --- U.S. ---, 139 S. Ct. 524, 528 (2019) (internal quotations omitted). Because the agreement in this case is governed by the FAA and includes a delegation provision, *Henry Schein* requires that the arbitrability question be decided by the arbitrator. Accordingly, we conclude that the district court erred in denying the motion to compel arbitration and refusing to submit the arbitrability determination to an arbitrator." See, to the same effect, **Uber Technologies, Inc. v. Royz**, 138 Nev. Adv. Op. No. 66 (Sep. 29, 2022).

Huston v. TD Ameritrade, FINRA ID No. 22-00315 (Denver, CO (Sep. 1, 2022): A customer alleging unauthorized trading and execution errors and seeking punitive and treble damages loses her case against Respondent broker-dealer. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com)*.

Meagher v. Cetera Advisor Networks, FINRA ID No. 21-03114 (Seattle, WA, Sep. 1, 2022): An Arbitrator explains why she has decided to deny a broker's request for expungement of a customer complaint from his CRD record, finding that the broker acknowledged his negligence was the source of the complaint. As such, the complaint does not meet the expungement standard. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com)*.

[return to top](#)

ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Manesh, Mohsen and Grundfest, Joseph A., **The Corporate Contract and Shareholder Arbitration** (Sep. 9, 2022): "Longstanding U.S. Supreme Court precedents

interpreting the Federal Arbitration Act (FAA) coupled with more recent corporate law decisions in Delaware have sparked concerns that publicly traded corporations may adopt arbitration provisions precluding shareholder lawsuits, particularly securities fraud class actions. These concerns are misplaced. Delaware law, which governs the majority of publicly traded corporations, requires that charter and bylaw provisions be ‘twice tested:’ they must be both legal and equitable to be enforceable. Arbitration provisions precluding securities fraud class actions are inequitable because, among other considerations, they would deny the vast majority of shareholders a remedy for violations of federal law; transfer wealth from smaller shareholders to the largest; insulate managements and boards from accountability in a manner inconsistent with established Delaware precedent; and rupture the balance between federal and state regulation of public corporations.”

[CFPB Files Complaint Against Online Lender Alleging MLA Violations](#), **Consumer Finance Monitor (Oct. 7, 2022)**: “On September 29, 2002, the Consumer Financial Protection Bureau (‘CFPB’) filed a complaint against online lender MoneyLion Technologies, Inc, and several dozen of its subsidiaries (collectively, ‘MoneyLion’), alleging violations of the Military Lending Act (‘MLA’). The complaint alleges that MoneyLion (i) overcharged servicemember and their dependents by imposing fees that, together with stated interest rates, exceeded the MLA’s 36% Military Annual Percentage Rate (‘MAPR’), (ii) failed to provide required disclosures, and (iii) included arbitration clauses prohibited by the MLA. The Bureau further alleges that servicemembers became ‘trapped’ in MoneyLion’s membership program after taking out their loans, and were unable to cancel their membership – which required the payment of monthly fees – without first paying off their loans.” (*ed: See our coverage [elsewhere](#) in this Alert*).

[Arbitration and Class Action Waiver Provisions - May Be Enforceable](#), **Lexology (Oct. 10, 2022)**: “The Second Circuit ruled that a ‘buried’ hyperlink is not, alone, fatal to enforcing arbitration and class action waiver provisions contained in an agreement that is incorporated by cross-reference via a web-based contract. Design, layout, and content of the webpage are significant factors to determining whether the contract terms were available and conspicuous, and thus enforceable.”

[Finra Fines, Suspends N.Y. Broker In First Reg-Bi Action](#), **FA Magazine (Oct. 11, 2022)**: “In its first disciplinary action related to Reg BI, the Financial Industry Regulatory Authority has levied a \$5,000 fine and a six-month suspension on a broker for allegedly causing a client to pay tens of thousands in commissions on an account of less than \$30,000. [Broker], who worked for Network 1 Financial Securities of Huntington Station, N.Y., at the time of the alleged violation, accepted and consented to the agency’s findings without admission or denial, according to a copy of the agreement released by Finra.[] It is the first time Finra has taken action against a broker for alleged violations of the SEC's Reg-BI fiduciary rule, Finra spokesman Ray Pellechia confirmed.” (*ed: See our coverage [elsewhere](#) in this Alert*).

[UBS Yield Enhancement Strategy \(YES\) Investor Lost 20%, But Wins \\$470K FINRA Claim, Stock Market Today \(Oct. 11, 2022\)](#): “UBS is once again at the receiving end of a ruling by the Financial Industry Regulatory Authority (FINRA) in a case regarding their Yield Enhancement Strategy, also known as YES, an options trading strategy created by the firm. In this particular case, they have been asked to pay \$470K to the claimants who sought damages for losses incurred.”

[FINRA Says “Heightened Supervision” Didn't Catch Broker's Double-dipping, Financial Planning \(Oct. 12, 2022\)](#): “A financial advisor on heightened supervision by his employer after a half dozen client complaints still managed to sell customers hundreds more products that hit them with extra fees, according to FINRA.[] In a Sept. 27 case against Centaurus Financial and ex-advisor [], the regulator accused the midsize wealth management firm of failing to conduct any reviews about 83 clients who purchased unit investment trusts and nine customers who invested in alternative products — all at [adviser’s] recommendation. The investments carried hefty fees, raising the question of whether they were suitable for the clients. FINRA said [adviser’s] clients paid more than \$350,000 in unnecessary sales commissions that went to the advisor and Centaurus, according to investigators. Centaurus denied FINRA's allegations.”

[return to top](#)

[DID YOU KNOW?](#)

FINRA HAS A WEBPAGE ON “LEGITIMATE AVENUES FOR RECOVERY OF INVESTMENT LOSSES” Our readers know that arbitration is a good way for investors to recover losses, but did you know that FINRA has a [Webpage](#) dedicated to “Legitimate Avenues for Recovery of Investment Losses”? Among the additional recovery methods listed: “Restitution from SEC and FINRA Enforcement Actions; Fair Funds and Disgorgement Plans; SIPC Protections; Class Action Lawsuits; and Corporate Bankruptcy Proceedings.” The page has links to key resources.

[return to top](#)

Editorial Advisory Board

George H. Friedman

Editor-in-Chief

Peter R. Boutin

Keesal Young & Logan

Roger M. Deitz

*Distinguished Neutral
CPR International*

Paul J. Dubow

Arbitrator • Mediator

Constantine N. Katsoris

*Fordham University
School of Law*

Theodore A. Krebsbach

Davis Wright Tremaine

Christine Lazaro

*Professor of Law/
Clinic Director
St. Johns Law School*

Deborah Masucci

*Independent Arbitrator
and Mediator*

William D. Nelson

*Lewis Roca Rothgerber
Christie LLP*

Robert W. Pearce

*Robert Wayne Pearce,
P.A.*

David E. Robbins

*Kaufmann Gildin &
Robbins LLP*

Richard P. Ryder

*President & Founder,
Securities Arbitration
Commentator*

Ross P. Tulman

*Trade Investment Analysis
Group*

James D. Yellen

J. D. Yellen & Associates

The Editorial Advisory Board functions in an advisory capacity to the Editor. Editorial decisions concerning the *Securities Arbitration Alert* are not the responsibility of the Board or its members; nor are the comments and opinions expressed in the newsletter necessarily the views of the Board, any individual Board member, or any organization with which they may be affiliated.

Send any messages or inquiries to: George@SecArbAlert.com

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.*

Copyright © 2022 Securities Arbitration Alert, LLC

Mail to: 194 Carlton Terrace, Teaneck, NJ 07666

T: 917-841-0521

Web: www.SecArbAlert.com

Blog: www.sacarbalert.com/blog/; Twitter: @SecArbAlert