SECURITIES ARBITRATION ALERT 2022-40 (10/27/22)

George H. Friedman, Editor-in-Chief

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- ***Siani v. Comerica Securities*, FINRA ID No. 21-02801 (San Diego, CA, Aug. 31, 2022)**
- ***Farrell v. Merrill Lynch*, FINRA ID No. 22-00445 (New York, NY, Sep. 2, 2022)**

ARTICLES OF INTEREST:

- **Variath, Adithya Anil, *Maintaining Global Stability through Arbitration: An Analysis of World Trade Organization's Dispute Settlement Process Vis-À-Vis Article 25* (Sep. 22, 2021)**
- ***U.S. Chamber, Trade Groups Suit Claims Consumer Financial Protection Bureau Exceeded Authority*, Mondaq (Oct. 14, 2022)**
- **Appeals Court Finds CFPB Funding Mechanism Unconstitutional, CUNA News (Oct. 19, 2022)**
- ***FINRA Says No One Size Fits All for Reg BI*, www.nasdaq.com (Oct. 19, 2022)**
- ***Wells Fargo Workers Drop Wage Suit, Head to FINRA Arbitration,* Bloomberg (Oct. 20, 2022)**
- ***Samsung's Biometric Data Clash Opens New Mass Arbitration Front,* Bloomberg Law (Oct. 21, 2022)**

DID YOU KNOW?

- **Two Great Websites for All Things Congress**

COMING SOON, A NEW FEATURE ARTICLE. *Appearing soon in the* Alert *will be a new feature article authored by PIABA, "Arbitration of Investor Claims in an Industry-Sponsored Forum - A Look Back at 20 Years of Lessons." The co-authors, Courtney Werning, Jorge Riera, Dave Neuman, and Mike Edmiston, did an incredibly thorough job researching, writing, and analyzing securities arbitration history. Look for it soon!*

SQUIBS: IN-DEPTH ANALYSIS

FINRA DRS POSTS STATS THROUGH 3Q: CUSTOMER AND INDUSTRY ARBITRATION CLAIMS HAVE DEFINITELY STABILIZED. MEDIATION FILINGS ARE STILL UP, BUT CONTINUE TO SLOW DOWN. ***FINRA Dispute Resolution Services ("DRS") has posted case statistics through September, with recent***

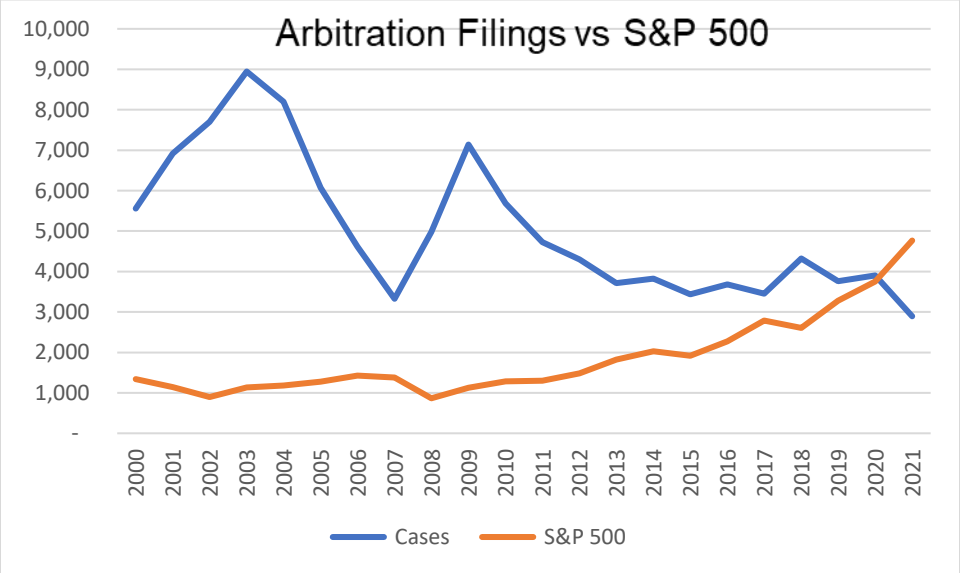
trends persisting. We offer these headlines: 1) overall arbitration filings through the third quarter – 1,955 cases – are down 15% for the year (but up from -17% in August); 2) cumulative customer claims declined by 19% (also up two tics from August); and 3) industry arbitration filings are down 7% (-11% in August). That all three case filing figures are slightly better than the previous month indicates to us that – for the third month in a row – arbitration filing declines have stabilized.

Potpourri

Overall arbitration turnaround times were 17.7 months, with hearing cases now taking 19.6 months (both figures are slight increases from the past two months). There were 465 mediation cases in agreement, a 109% increase (but down from May's torrid plus 137% pace). The mediation settlement rate remains very high at 89%. There are now 8,448 DRS arbitrators, 4,061 public and 4,387 non-public. Pending cases stand at 3,344, a decline of 101 from May.

A Down Year Still in the Offing?

At the half-way mark we said: "If the trend holds, the 1,260 arbitrations filed through June straight-lines to only about 2,500 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." Our thinking? "[A]rbitration case filings are countercyclical to the capital markets. Translation: people fight when they lose money; not so much when they make money. This subject was covered in a **2020** blog post jointly-authored by your publisher and **Rick Ryder, Esq.**, *What's Past is Prologue – All Over Again. What's Ahead for Arbitration Filings in the Wake of Recent Volatility*. The *Alert* offered this updated chart as further proof; of course, this year's market volatility may ultimately impact filings."



Where do thing stand now? Straight lining the 1,955 cases filed through September projects to 2,606 yearly case filings. But if the recent monthly increases persist, one can assume over 2,700 case filings – still a down year but not a record low.
*(ed: *As we said before, it seems to us the rebound in customer claims will continue. This stat is a trailing indicator of market performance. **Past year stats can be found here.)*
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SCOTUS GRANTS *CERT*., REVERSES, AND REMANDS *DOMINO'S - CARMONA* IN LIGHT OF *SOUTHWEST*. *The Supreme Court has acted on a* Certiorari *Petition raising an issue left open in* Southwest: does *FAA section 1 exempt delivery drivers?* Domino's Pizza had asked the Supreme Court to determine whether the Federal Arbitration Act ("FAA") section 1 exemption for transportation workers extends to delivery drivers. The Court left this issue open when it decided *Southwest v. Saxon* in **June.** To review, FAA section 1 exempts from the Act: "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." The Court's **June 6** decision in *Southwest Airlines Co. v. Saxon*, No. 21-309, held unanimously that the exemption of "workers engaged in foreign or interstate commerce" includes classes of workers who are part of the flow or stream of interstate commerce, and that there is no FAA requirement that these individuals actually cross state lines. The SCOTUS decision in *Southwest* was narrow, and specifically did not embrace the issue of FAA coverage of delivery drivers.

Post-*Southwest* Petition
We reported in SAA 2022-01 (Jan. 13) on *Carmona v. Domino's Pizza, LLC,* No. 21-55009 (9th Cir. Dec. 23, 2021), *petition for reh'g den.* (Feb. 15, 2022), where a unanimous Ninth Circuit embraced the "stream" or "flow" of interstate commerce doctrine. Said the Opinion: "Domino's sells pizza to the public primarily through franchisees. Domino's buys various goods, such as mushrooms, that are used by its franchisees in making pizzas, from suppliers outside of California. Those goods are then delivered by third parties to the Domino's Southern California Supply Chain Center ('Supply Center'). At the Supply Center, Domino's employees reapportion, weigh, package, and otherwise prepare the goods to be sent to franchisees. Domino's franchisees in Southern California order the goods either online or by calling the Supply Center, and the plaintiff drivers ('D&S drivers'), who are employees of Domino's, then deliver the goods to the franchisees." Crossing state lines was not part of the drivers' job." A **June 15** *Certiorari* Petition in *Domino's Pizza, LLC v. Carmona*, No. 21-1572 presented this question: "Whether drivers making solely in-state deliveries of goods ordered by in-state customers from an in-state warehouse are nevertheless a 'class of workers engaged in foreign or interstate commerce' for purposes of Section 1 of the Federal Arbitration Act simply because some of those goods crossed state lines before coming to rest at the warehouse?"

Ninth Circuit Ruling Vacated and Remanded for Reconsideration
The Court's **October 17** Order List buttons up the open issues: "The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United

States Court of Appeals for the Ninth Circuit for further consideration in light of *Southwest Airlines Co. v. Saxon*, 596 U. S. --- (2022)."
*(ed: *We're not sure what this means. Southwest left open the precise issue raised in Domino's. That the Ninth Circuit's decision is vacated is clear enough, but where does that leave us on FAA coverage of delivery drivers? **We had said before: "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." We give ourselves partial credit.)*
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CFPB'S FUNDING METHOD IS UNCONSTITUTIONAL, UNANIMOUS FIFTH CIRCUIT HOLDS. ***Although the Consumer Financial Protection Bureau ("CFPB") did not exceed its authority in promulgating the Payday Lending Rule, its funding method is unconstitutional, a unanimous Fifth Circuit holds***. We will let the Opinion in *Community Financial Services Ass'n of America v. CFPB*, No. 21-50826 (5th Cir. Oct. 19, 2022), speak for itself.

The Arguments
"Community Financial Services Association of America and Consumer Service Alliance of Texas (the 'Plaintiffs') challenge the validity of the Consumer Financial Protection Bureau's 2017 Payday Lending Rule. The Plaintiffs contend that in promulgating that rule, the Bureau acted arbitrarily and capriciously and exceeded its statutory authority. They also contend that the Bureau is unconstitutionally structured, challenging the Bureau Director's insulation from removal, Congress's broad delegation of authority to the Bureau, and the Bureau's unique, double-insulated funding mechanism. The district court rejected these arguments."

The Holding
"We agree that, for the most part, the Plaintiffs' claims miss their mark. But one arrow has found its target: 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."

The Court's Rationale
"The Bureau did not exceed its authority under either the Act or the APA in promulgating its 2017 Payday Lending Rule. The issuing Director's unconstitutional insulation from removal does not in itself invalidate the rule, and the Plaintiffs fail to demonstrate cognizable harm from that injury. Nor does the Bureau's rulemaking authority transgress the nondelegation doctrine. We therefore AFFIRM the district court's entry of summary judgment in favor of the Bureau in part. But Congress's cession of its power of the purse to the Bureau violates the Appropriations Clause and the Constitution's underlying structural separation of powers. The district court accordingly erred in granting summary judgment in favor of the Bureau and denying judgment in favor of the Plaintiffs. We

therefore REVERSE the judgment of the district court on that issue, RENDER judgment in favor of the Plaintiffs, and VACATE the Bureau's Payday Lending Rule."
(ed: We suspect a Petition for en banc *review is next.)*
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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

UPDATE: COMMENTS DUE NOVEMBER 1 ON SEVERAL PAST SEC RULEMAKING FILINGS. We reported in SAA 2022-39 (Oct. 20) that the SEC on **October 7** issued a proposed order reopening 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." Additional comments on the affected releases were to be filed within 14 days after publication of the reopening release in the *Federal Register*. That took place with the **October 18** publication of Vol. 87, No. 200, P. 63016, which establishes a **November 1** due date.
(ed: 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. *We will track SR-FINRA-2022-024 for further developments.)*
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ICSID RELEASES ANNUAL REPORT FOR FY 2022. Although we tend to think that most investment disputes are resolved in the U.S. by FINRA, this is not entirely accurate. A case in point: the International Centre for Settlement of Investment Disputes ("ICSID") just released its *Annual Report* for fiscal year 2022, that among other things contains case statistics. According to its Website: "ICSID is an international facility available to States and foreign investors for the resolution of investment disputes. Established in 1966 by the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (the *ICSID Convention*), it is the only global institution dedicated to international investment dispute settlement." As of June 30, 2022, 164 countries have signed the *Convention*. The U.S. signed the Convention in 1965. ICSID has arbitration rules and provides an arbitration forum; arbitrations "are entirely voluntary and require consent of both the investor and State concerned." The 71-page report is laden with a wealth of statistical data, such as: "A total of 346 ICSID cases were administered in FY2022, compared to 332 cases in the previous fiscal year. This is the

largest number of cases ever administered at ICSID in a single fiscal year. Overall, ICSID has administered 888 cases under the ICSID Convention and Additional Facility Rules since the first case was registered in 1972. A separate page is dedicated to detailed case statistics.
(ed: ICSID does a service to its constituents by publishing this information.)
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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 fourth *Newsletter* of **2022**, distributed under a summary email dated **October 24**, NFA lists several highlights which we explore in the order presented: **Investor Education** reports on: *Webinar: Digital Assets and Customer Protection: Answering Common Questions*; and *Investor Bulletin: World Investor Week 2022,* which was in **October.** The **Investor Protection** section contains: an SEC Investor Alert: *Social Media and Investment Fraud;* and a NASAA, Informed Investor Advisory*: Finfluencers*. 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. YTD 2022 stats are not posted.)*
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QUICK TAKES: CASES AND AWARDS WORTH READING

***Rock Hemp Corp. v. Dunn*, No. 22-1171 (7th Cir. Oct. 11, 2022)**: "Appellant, Rock Hemp, contracted with an entity called CBDINC to purchase 6,000 hemp seeds. CBDINC is a fictitious business name used by Appellees, Adam Dunn, Ryan Davies, and Shawn Kolodny. The contract contains an arbitration clause requiring '[a]ny dispute arising out of this Agreement' be resolved through 'binding arbitration' in Denver, Colorado. Disappointed with CBDINC's CBDINC, in Wisconsin state court. After Rock Hemp made clear to Appellees that the amount in controversy exceeded the jurisdictional minimum, Appellees removed the case to federal court and filed a motion to dismiss the case for failure to comply with the arbitration clause. In response, Rock Hemp filed a motion to remand pursuant to 28 U.S.C. § 1447.The district court granted Appellees' motion to dismiss, denied Rock Hemp's motion to remand, entered judgment in favor of Appellees, and denied Rock Hemp's subsequent motion for reconsideration under Federal Rule of Civil Procedure 60. Rock Hemp appeals these rulings. For the following reasons, we affirm the judgment of the district court."

***Costa v. Road Runner Sports*, No. D079393 (Calif. Ct. App. 4 Oct. 18, 2022)**: "Road Runner asserts O'Connor is bound by an arbitration provision it added to the online terms and conditions of the loyalty program, some three years after he enrolled. Although Road Runner concedes O'Connor did not have actual or constructive notice of the arbitration provision, it contends O'Connor created an implied-in-fact agreement to arbitrate when he obtained imputed knowledge of the arbitration provision *through his counsel in the course of litigation* and failed to cancel his membership. We disagree this is sufficient under California law to prove consent to or acceptance of an agreement to arbitrate. Accordingly, we affirm the trial court's order denying Road Runner's motion to compel arbitration" (emphasis in original).

***Leger v. R.A.C. Rolling Hills LP*, No. D080705 (Calif. Ct. App. 4 Oct. 17, 2022)**: R.A.C. Rolling Hills LP, dba ActivCare at Rolling Hills Ranch, and ActivCare Living, Inc. (together, ActivCare), appeal from an order denying their petition to compel arbitration in the elder abuse lawsuit filed by Mary Leger. (Code Civ. Proc., § 1281.2.) ActivCare contends the trial court erred in concluding that it had waived its right to arbitration because it moved with alacrity by seeking to compel arbitration less than 30 days after filing its answer. Under the unique facts of this case, we conclude substantial evidence supported the trial court's waiver finding and affirm the order" (footnote omitted). (*ed: An* Alert *h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this decision*.)

***Siani v. Comerica Securities*, FINRA ID No. 21-02801 (San Diego, CA, Aug. 31, 2022)**: Registered Rep is granted his request for reformation of alleged defamatory and misleading information from appearing on his Form U5 record. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Farrell v. Merrill Lynch*, FINRA ID No. 22-00445 (New York, NY, Sep. 2, 2022**): A broker is granted expungement of only one customer complaint from his CRD record and is denied his request for a second. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*
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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Variath, Adithya Anil, *Maintaining Global Stability through Arbitration: An Analysis of World Trade Organization's Dispute Settlement Process Vis-À-Vis Article 25* (Sep. 22, 2021): "Settlement of disputes through the instrumentality of arbitration has over the last few decades seen an unprecedented growth both in terms of academic literature and general international practice specially dovetailing commercial arbitration. Despite the extensive knowledge disseminated about the general practice of international commercial arbitration, certain niche areas like settlement of dispute amongst 'Sovereign States' remain a relatively unexplored realm. The World Trade Organization (WTO) Dispute Settlement System is one such domain that has ensured compliance by consensus by the Member States with the international trade-related treaties and arrangements within the framework of the WTO through Arbitration proceedings. With the establishment of a

specific Dispute Settlement Body, Arbitration was given juridical legitimacy by its incorporation under Article 25 of the Dispute Settlement Understanding (DSU). This article traverses one of the most obliterated provisions in the World Trade Organization's comprehensive body of agreements, videlicet, Article 25 and considers the manoeuvring [sic]of arbitration as an alternative expedient of dispute settlement under the DSU. The article also focuses on the possibility whether a parallel dispute settlement system can be established via Article 25 as a temporary panacea to deblock the Appellate Body deadlock and to ensure global governance and the WTO imperative in the new world disorder."

***U.S. Chamber, Trade Groups Suit Claims Consumer Financial Protection Bureau Exceeded Authority*, Mondaq (Oct. 14, 2022)**: "The U.S. Chamber of Commerce and six trade groups have filed suit in the U.S. District Court for the Eastern District of Texas against the Consumer Financial Protection Bureau (CFPB) alleging the Bureau is exceeding its authority as granted by Congress…. The lawsuit was filed in connection with CFPB's update to the Unfair, Deceptive, Abusive or Practices (UDAAP) section of the Manual. This section of the Manual has been amended to provide CFPB regulatory authority over what constitutes unfair discrimination."

***Appeals Court Finds CFPB Funding Mechanism Unconstitutional,* CUNA News (Oct. 19, 2022)**: "The 5th U.S. Circuit Court of Appeals found the Consumer Financial Protection Bureau's (CFPB) funding mechanism is unconstitutional Wednesday. CUNA has long supported placing the CFPB under the traditional appropriations process. The three-judge panel found placing the bureau's funding outside of the process violates the U.S. Constitution's structural separation of powers." (*ed: See our coverage elsewhere in this* Alert.)

***FINRA Says No One Size Fits All for Reg BI*, www.nasdaq.com (Oct. 19, 2022)**: "The resounding takeaway from a recent FINRA conference call is that the regulatory body is taking a 'no one-size-fits-all' approach to Reg BI compliance. FINRA explained that it is moving away from good faith efforts reviews and into 'deeper dives' on how firms comply with Form CRS and the Reg. BI Care, Compliance, Disclosure, and Conflicts of Interest obligations. The conference call focused on FINRA's expectations during exams and the types of violations that its exam teams will refer to their enforcement colleagues. FINRA mentioned several common violations that it will refer to its Department of Enforcement, including the failure to recognize the applicability of Reg BI and Form CRS deficiencies related to incorrectly answering the disciplinary history question."

***Wells Fargo Workers Drop Wage Suit, Head to FINRA Arbitration*, Bloomberg (Oct. 20, 2022)**: "Two Wells Fargo Clearing Services LLC client associates agreed to drop their wage-and-hour litigation and take their claims to a FINRA arbitrator instead, a federal judge in Missouri said Thursday.[] Marcus D'Addio and Michael Silvestro accuse the financial services firm of not allowing them to report work hours beyond their scheduled shifts, even though they regularly work overtime. The workers must arbitrate

their allegations before the Financial Industry Regulatory Authority, the US District Court for the Eastern District of Missouri said."

***Samsung's Biometric Data Clash Opens New Mass Arbitration Front*, Bloomberg Law (Oct. 21, 2022)**: "A legal tactic of flooding companies with thousands of individual arbitration claims is now appearing in disputes alleging biometric privacy law violations in Illinois, prompting attorney warnings to businesses about carefully considering the provisions they include in contracts with consumers and workers.[] Last week, nearly 50,000 consumers asked an Illinois federal court to force Samsung Electronics Inc. to honor the arbitration provisions the company placed in user agreements. The consumers alleged that the tech giant violated the state's Biometric Information Privacy Act by collecting, without proper consent, biometric data drawn from photos they took of themselves using Samsung phones and devices."

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DID YOU KNOW?

TWO GREAT WEBSITES FOR ALL THINGS CONGRESS. Two excellent, free, Websites we recommend for pretty much anything related to Congress or legislation are: www.Congress.gov and www.Govtrack.us. Both allow visitors to set up alerts to track bills.

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

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