SECURITIES ARBITRATION ALERT 2023-09 (3/2/23)

George H. Friedman, Editor-in-Chief

SQUIBS:

- **NFA and FINRA Warn of Impostor Regulators**
- **Strict *Atalese* Standard Doesn't Apply to PDAA Between Sophisticated Parties**

SHORT BRIEFS:

- **FINRA DRS Posts Stats Through January: A Strong Start to the Year**
- **FINRA Board Meets in Person Next Week. No Agenda Yet**
- **SEC's Investor Advisory Committee Meets Virtually Today. No Arbitration or Mediation Items on the Agenda, but Investment Adviser Oversight is**
- **SCOTUS Denies *Certiorari* in Another Arbitration-Related Case**

QUICK TAKES:

- ***Escapes! To the Shores Condominium Association, Inc. v. Hoar Construction, LLC*, No. 1210378 (Ala. Feb. 17, 2023)**
- ***Galarsa v. Dolgen California, LLP,* No. F082405 (Calif. Ct. App. 5 Feb. 2, 2023)**
- ***Gibbs v. Holland & Knight, LLP,* 2023 NY Slip Op 30506(U) (Sup. Ct., N.Y. Cty., Feb. 17, 2023)**
- ***Niemann v. Heapps,* FINRA ID No. 20-03539 (Oklahoma City, OK, Jan. 23, 2023)**
- ***Dooley v. Equitable Advisors*, FINRA ID No. 22-00686 (Boca Raton, FL, Jan. 24, 2023)**

ARTICLES OF INTEREST:

- ***Torline, Allison, Looking Back While Looking Up: A Review of Space Arbitration Topics*, Kluwer Arbitration Blog (Feb. 22, 2023)**
- ***Ex-Merrill Trainee Wins Expungement of "Defamatory" Form U5 Language,* Financial Advisor IQ (Feb. 22, 2023)**
- ***Financial Protection Bureau's Proposals to Create Two Public Registries for Nonbanks: What You Need to Know, Part I*, Ballard Spahr Blog (Feb. 23, 2023)**
- ***Bates Releases 2023 SEC Exam Priorities Comparison Chart and Summary*, Bates Group (Feb. 23, 2023)**
- ***Bitcoin Retirement Plans Spark Caution from Regulators*, Technical Ripon (Feb. 24, 2023)**
- ***Tenth Circuit Allows ERISA Arbitration, So Long As There are No Limitations in Remedies*, Lexology (Feb. 24, 2023)**

DID YOU KNOW?

- **Few Arbitration Bills Introduced in this Congress So Far**

IN MEMORIAM: SECURITIES EXPERTS ROUNDTABLE FOUNDER HORWITZ PASSES. *We were saddened to learn of the recent passing of Securities Experts Roundtable ("SER") founding member,* ***Edward B. Horwitz****. We excerpt here from the tribute posted by SER: Eddie, as he was commonly known to the arbitration community, was truly a pioneer among experts who routinely consulted and testified in securities and commodities arbitrations and trials. He was adept at identifying the key issues in his cases and had special expertise in matters involving derivatives. More importantly, he was able to accomplish what few in our business have done – the ability*

to work both sides. Eddie was routinely retained by claimants, respondents, plaintiffs, and defendants, and he seamlessly switched back and forth throughout his testifying career. Steve Young, now senior partner at Keesal, Young & Logan in Long Beach, described Eddie as "a master of communications. He could take complex situations and explain them to people on a jury. He was also a very likable guy." In lieu of flowers, a donation can be made to your favorite charity in memory of Edward B. Horwitz.

SQUIBS: IN-DEPTH ANALYSIS

NFA AND FINRA WARN OF IMPOSTOR REGULATORS. ***The NFA and FINRA have in recent weeks issued warnings about impostor regulators.*** Over the years, we have reported on various impostor scams being perpetrated on the investing public and the financial services industry. For example, we reported in SAA 2019-14 (Apr. 10) on fake FINRA BrokerCheck® reports, as described in an Investor Alert titled, *Broker Imposter Scams: Remember to Ask and Check.* We had previously reported in SAA 2018-27 (July 18) on a **July 2018** Information Notice titled*, FINRA Warns Firms of Regulator Impersonators.* What's the latest?

NFA Warning

The National Futures Association ("NFA") on **February 9** issued an Investor Advisory, *Beware of NFA Imposters*, warning: "NFA has noticed a recent uptick in scams perpetrated by fraudsters posing as NFA staff or agents. Typically, these scammers promise to assist individuals in recovering funds lost in an investment scheme in return for a fee. NFA reminds investors that NFA staff will never solicit payment or fees from investors for any reason." NFA offers several remedial steps, such as: "Never provide your bank account or credit card information in response to unsolicited requests or to someone you do not know. Investigate and verify the legitimacy of any people, organizations and websites that contact you offering to recover lost funds, particularly when unsolicited…. To verify the legitimacy of any communication or request purportedly sent by an NFA employee, contact NFA's Information Center (information@nfa.futures.org or 312-781-1410 or 800-621-3570)."

FINRA Joins the Chorus

FINRA on **February 23** issued *Cybersecurity Alert - Ongoing Phishing Campaign*, stating: "This notification is to warn member firms of an ongoing phishing campaign that involves fraudulent emails purporting to be from FINRA and using either the domain name '@finra.eu' and '@finrarec.com.'[] The domains of 'finra.eu' and 'finrarec.com' are not connected to FINRA, and member firms or their customers may receive similar phishing emails from other domain names in addition to those identified in this Alert.[] FINRA has requested that the Internet domain registrars suspend services for 'finra.eu' and 'finrarec.com'." The Alert includes examples of fraudulent communications. FINRA also suggests these protective steps: "deleting all emails originating from these domains; and verifying the legitimacy of any suspicious email prior to responding to it, opening any attachments or clicking on any embedded links." Staff also recommends: "that firms and their customers not call phone numbers listed in suspicious emails or text messages…."

(ed: Seems like the scammers keep coming up with new ways to defraud.)
return to top

STRICT *ATALESE* STANDARD DOESN'T APPLY TO PDAA BETWEEN SOPHISTICATED PARTIES. ***In a case of first impression, the New Jersey Appellate Division holds that the strict "waiver of jury trial" requirement for predispute arbitration agreements ("PDAA") involving consumers articulated in* Atalese *and its progeny does not apply to PDAAs between sophisticated parties of relatively equal bargaining positions.*** *Atalese v. U.S. Legal Services Group L.P.*, 219 N.J. 430 (2014), *Cert. den.* 540 U.S. 938 (2015), tells us that, to be enforced in New Jersey, a PDAA in a consumer context must contain a clear, unambiguous waiver of the right to a jury trial. That standard was later extended to employment matters. But does the *Atalese* test apply to a commercial transaction involving sophisticated business parties? "No," say a unanimous Court in *County of Passaic v. Horizon Healthcare Services, Inc.*, No. A-0952-21 (N.J. App. Div. Feb. 8. 2023) (*per curiam*), a case of first impression..

PDAA in Business Contract
The contract between the County of Passaic and Horizon Healthcare Services, Inc. called for the latter to manage the County's self-funded health benefit plan. The PDAA provided: "In the event of any dispute between the parties to this Agreement arising under its terms, the parties shall submit the dispute to binding arbitration under the commercial rules of the American Arbitration Association." There was no express jury trial waiver as mandated by *Atalese.* After a dispute arose, Horizon succeeded in getting an Order compelling arbitration. The County appealed, arguing that: "the arbitration provision is unenforceable because it lacks the explicit waiver of access to the courts prominently featured in the Supreme Court's landmark decision in *Atalese* …."

Appellate Court: *Atalese* is Not Applicable
The Court rejected this argument: "because, even though the arbitration provision does lack such an explicit waiver, the County is a sophisticated contracting party and is not – as in *Atalese* and other authorities – an employee or consumer lacking sufficient bargaining power to resist the extraction of an agreement to arbitrate…. We hold – because the parties are sophisticated and possess relatively equal bargaining power – *Atalese*'s requirement of an express waiver of the parties' right to seek relief in a court of law is inapplicable and the arbitration agreement is enforceable…. *Atalese*, as well as other decisions from our [NJ] Supreme Court, focus on the unequal relationship between the contracting parties or the adhesional nature of the contract when holding that an arbitration agreement could not be enforced without an express waiver of the right to seek relief in a court of law…. This concern for those not versed in the law or not necessarily aware of the fact that an agreement to arbitrate may preclude the right to sue in a court or invoke the inestimable right of trial by jury, on the other hand, vanishes when considering individually-negotiated contracts between sophisticated parties – often represented by counsel at the formation stage – possessing relatively similar bargaining power."
(ed: Makes sense to us.)
return to top

SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

FINRA DRS POSTS STATS THROUGH JANUARY: A STRONG START TO THE YEAR. FINRA Dispute Resolution Services DRS has posted case statistics through **January**, with recent trends showing a strong end to the year in arbitration filings and a slowdown in mediations carrying over into the new year. We offer these headlines: 1) overall arbitration filings through January – 237 cases – are up 24% for the year; 2) cumulative customer claims increased 35%; and 3) industry arbitration filings were up 10%. That all three case filing figures are again improved over the previous month indicates to us that – for the seventh month in a row – arbitration filings have definitely rebounded. Overall arbitration turnaround times were 18.1 months, with hearing cases now taking 22.8 months. There were just 52 mediation cases in agreement, a 32% *decrease* from 2022. This stat has been declining steadily in recent months, and is way down from May 2022's torrid plus 137% pace). The mediation settlement rate is down to 76% (it was 91% at year's end). There are now 8,190 DRS arbitrators, 3,976 public and 4,214 non-public. Pending cases stand at 3,069, a decline of 30 from December.
*(ed: *Wonder what's behind the drop-off in mediated settlements? **We caution readers that one month does not constitute a trend. ***Past year stats can be found here.)*
return to top

FINRA BOARD MEETS IN PERSON NEXT WEEK. NO AGENDA YET. FINRA's Board of Governors will meet in person **March 9 – 10**; thus far, there is no published agenda. As usual, we will follow up after the agenda and meeting results are posted. The schedule for the rest of 2023 is: **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.)
return to top

SEC'S INVESTOR ADVISORY COMMITTEE MEETS VIRTUALLY TODAY. NO ARBITRATION OR MEDIATION ITEMS ON THE AGENDA, BUT INVESTMENT ADVISER OVERSIGHT IS. The SEC Investor Advisory Committee ("IAC") will be meeting virtually on **March 2**. There are no dispute resolution items on the Agenda, but there will be: "a panel discussion regarding the oversight of investment advisers," according to the Sunshine Act Notice. The panel is titled, *Discussion Regarding the Oversight of Investment Advisers: Can Regulators Keep Up with Growth in the Industry*, and features: **Natasha Greiner**, Deputy Director, Division of Examinations; and National Associate Director, Investment Adviser/Investment Company (IA/IC) Examination Program, U.S. Securities and Exchange Commission; **Karen Barr**, President and CEO, Investment Adviser Association; **Stephen Brey**, Michigan Licensing and Regulatory Affairs; and **Micah Hauptman**, Director of Investor Protection, Consumer Federation of America. The moderator is: **Paul Roye**, Retired Senior Vice President, Capital Research and Management Company.

*(ed: *Wonder why FINRA was not invited? **The IAC meeting will be webcast* starting at 10 a.m. Eastern *on the Commission's Website at www.sec.gov. ***For further info, "and to ascertain what, if any, matters have been added, deleted or postponed," contact Vanessa A. Countryman at 202-551-5400.)*
return to top

SCOTUS DENIES *CERTIORARI* IN ANOTHER ARBITRATION-RELATED CASE. The Supreme Court on **February 20** denied *Certiorari* in *CVG Ferrominera Orinoco, C.A. v. Commodities & Minerals Enterprise Ltd*., No. 22-608, another case involving arbitration. The issues identified in the **December 29** Petition were (*repeated* verbatim): 1. Did the Second Circuit err in holding service of a Summons pursuant to Rule 4 of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 4, upon a party covered by the Federal Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1608, is not required in the context of a petition to confirm an arbitration award pursuant to the Federal Arbitration Act, 9 U.S.C. § 201 et seq.? 2. Did the Second Circuit err in holding that allowing enforcement of an arbitration award on a contract was not contrary to United States public policy, pursuant to Article V(2)(b) of the New York Convention, where the agreement was procured by means of a scheme of criminal bribery, corruption, and fraud already adjudicated and confirmed by the Venezuelan courts prior to the issuance of the arbitration award?
*(ed: *We are not surprised. The issues are pretty one-off. **The underlying award was for $12.7 million. ***The case appears on page 4 of the Order List.)*
return to top

QUICK TAKES: CASES AND AWARDS WORTH READING

***Escapes! To the Shores Condominium Association, Inc. v. Hoar Construction, LLC*, No. 1210378 (Ala. Feb. 17, 2023)**: "After considering the Association's requests, the arbitration panel informed the Association that the additional balcony-construction photographs that it had failed to admit during the hearing -- specifically, those taken from November 2006 through April 2007 -- were admitted for consideration but that the Association's 'motion to reopen discovery' to compel a search for additional photographs was denied. Under the facts presented, the arbitration panel acted well within its discretion in denying the Association's request to reopen discovery to compel a search for evidence that may not even exist. More importantly, both sides were provided a full opportunity to present their evidence and arguments; as indicated, the arbitration panel heard testimony from 18 witnesses, including experts, and considered over 300 exhibits. Accordingly, the arbitration panel's decision to deny the Association's motion to reopen discovery to compel a search for additional evidence did not rise to the level of misconduct described in [FAA] § 10(a)(3), nor did it yield a fundamentally unfair hearing under the FAA."

***Galarsa v. Dolgen California, LLP*, No. F082405 (Calif. Ct. App. 5 Feb. 2, 2023)**: **"**First, we conclude *Viking River* and the Federal Arbitration Act (FAA; 9 U.S.C. § 1 et seq.) do not invalidate the rule of California law that a provision in an arbitration agreement purporting to waive an employee's right to pursue representative actions is not

enforceable as to representative claims pursued under PAGA. Second, the severability clause in the arbitration agreement allows the unenforceable waiver provision to be stricken from the arbitration agreement. Third, we interpret the surviving provisions of the agreement to require arbitration of the PAGA claims that seek to recover civil penalties for Labor Code violations *suffered by plaintiff.* Consequently, those claims must be sent to arbitration in accordance with the principles established by *Viking River* and the FAA.[] We further conclude the PAGA claims seeking to recover civil penalties for Labor Code violations *suffered by employees other than plaintiff* may be pursued by plaintiff in court. Thus, we disagree with the United States Supreme Court's conclusion that California law requires the dismissal of those claims. More specifically, we conclude plaintiff is an aggrieved employee with PAGA standing and the general rule against splitting a cause of action does not apply to the two types of PAGA claims" (emphasis in original). (*An* Alert *h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this decision.*)

***Gibbs v. Holland & Knight, LLP*, 2023 NY Slip Op 30506(U) (Sup. Ct., N.Y. Cty., Feb. 17, 2023)**: "The Plaintiff's motion to vacate the Arbitrator's (hereinafter defined) award of attorneys' fees and costs to the Defendant in the Final Award (hereinafter defined) must be denied because there is no misconduct, fraud, or partiality, and the Arbitrator did not exceed his power (CPLR 7511[b][1]). Contrary to the Plaintiff's argument, the award of attorneys' fees to the Defendant does not violate public policy. Nor is it irrational such that the Arbitrator exceeded his power (*New York Transit Authority v Transport Workers' Union of America, Local 100, AFL-CI*O, 6 NY3d 332, 336). The Defendant's cross-motion to confirm the Final Award must be granted." (*An* Alert *h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this decision.*)

***Niemann v. Heapps*, FINRA ID No. 20-03539 (Oklahoma City, OK, Jan. 23, 2023)**: In this very long and detailed case, an arbitration Panel provides the factual background and explains why it decides to deny Claimant broker's requests for damages under the theory of unjust enrichment, finding that whatever overrides Respondent broker has gained from the Three Advisors' revenues generated at his office of supervisory jurisdiction (OSJ) does not constitute unjust enrichment, and no part of such overrides is recoverable as equitable damages. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Dooley v. Equitable Advisors*, FINRA ID No. 22-00686 (Boca Raton, FL, Jan. 24, 2023)**: An Arbitrator explains why he has decided to deny two brokers' requests for expungement of a customer complaint, finding that the evidence presented failed to persuasively establish that the allegations of the complaint were clearly erroneous and false pursuant to FINRA Rule 2080. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

return to top

ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Torline, Allison, *Looking Back While Looking Up: A Review of Space Arbitration Topics*, Kluwer Arbitration Blog (Feb. 22, 2023): "Over the past several years, interest in space-related activities has boomed. Countries increased the number of missions undertaken. Moreover, private actors have become increasingly interested in space activities, particularly in the field of telecoms and satellites, but also advertising and space tourism. This increase in space activity brought with it a rise in discussions within the legal community concerning the resolution of space-related disputes. This article provides an up-to-date overview of recent discussions and developments."

***Ex-Merrill Trainee Wins Expungement of "Defamatory" Form U5 Language*, Financial Advisor IQ (Feb. 22, 2023)**: "A former Merrill Lynch advisor trainee has been granted expungement of 'defamatory' language in the Form U5 the wirehouse filed after his resignation, a regulatory filing shows.[] A Financial Industry Regulatory Authority arbitrator on Friday issued a ruling in favor of [rep], who voluntarily resigned from Merrill in November 2020. In a subsequent disclosure filing, Merrill termed [rep's] departure an 'employment separation after allegations,' which it specified as 'Conduct inconsistent with Firm standards related to the Firm's Do Not Call list.'"

***Financial Protection Bureau's Proposals to Create Two Public Registries for Nonbanks: What You Need to Know*, *Part I*, Ballard Spahr Blog (Feb. 23, 2023)**: "The CFPB recently issued two proposals that would require nonbanks to register with and submit information to the CFPB for publication in an online, publicly available database. The proposals represent an aggressive attempt by the CFPB to enhance its supervisory and enforcement authorities and carry significant potential implications for nonbanks that would be required to register.[] In Part I of this two part episode, we look at the proposal that would require companies to register when, as a result of settlements or otherwise, they become subject to orders from local, state, or federal agencies and courts involving violations of consumer protection laws."

***Bates Releases 2023 SEC Exam Priorities Comparison Chart and Summary*, Bates Group (Feb. 23, 2023)**: "In late March, 2022, the SEC Division of Examinations ('Exams Division') set forth strategic priorities for the year to restore 'trust necessary for our markets to thrive,' during a 'time of heightened market volatility.' According to leadership, last year's emphasis was on 'emerging issues, such as crypto-assets and expanding information security threats, as well as core compliance gaps affecting retail investors.' …While there is overlap concerning subject matter between last year and this year (see Bates annual priorities comparison chart below), the priority shift toward ensuring compliance with the new rules has important implications for all regulated market participants. Here is our summary of the announced priorities for 2023."

***Bitcoin Retirement Plans Spark Caution from Regulators*, Technical Ripon (Feb. 24, 2023)**: "Even as the crypto market continues an impressive recovery from the 2022 bear market, the industry continues to draw the wrath of regulators around the world, especially in the United States. Three US financial watchdogs recently issued stern

warnings to individuals seeking to invest in pension funds that offer exposure to digital assets."

***Tenth Circuit Allows ERISA Arbitration, So Long As There are No Limitations in Remedies*, Lexology (Feb. 24, 2023)**: "On February 9, 2023, the U.S. Court of Appeals for the Tenth Circuit refused to enforce an arbitration clause contained in an employee stock ownership plan ('ESOP') document. In a 41-page opinion, the Court held that the ESOP Plan improperly limited the ESOP beneficiaries' rights and remedies granted under the Employee Retirement Income Securities Act ('ERISA'). As such, the provision denying beneficiaries these ERISA rights and remedies was found null and void."
return to top

DID YOU KNOW?

FEW ARBITRATION BILLS INTRODUCED IN THIS CONGRESS SO FAR. By this point two years ago, with the Democrats in control of the Senate and House, scores of bills had been introduced to limit mandatory arbitration. Some bills sought to amend the Federal Arbitration Act, others another federal statute, and some both. As of press time, with the House now under GOP control, only 14 arbitration-related bills had been sponsored, according to www.govtrack.us. Not every bill has been introduced by a Democrat (Republicans have sponsored four), and not every bill is anti-arbitration (see, e.g., H.R. 636 -- the *Forest Litigation Reform Act of 2023*). The *Forced Arbitration Injustice Repeal (FAIR) Act of 2019,* which was approved by a mostly party-line vote in the House of Representatives in the last Congress but died in the Senate, appears to have been reintroduced **February 1** by Rep. **Rashida Tlaib** (D-MI) as H.R. 697 - the *Justice for All Act of 2023*. We'll do a full analysis of the text in a future *Alert.*
return to top

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.*

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