



SECURITIES ARBITRATION ALERT

SECURITIES ARBITRATION ALERT 2023-32 (8/24/23)

George H. Friedman, Editor-in-Chief

SQUIBS:

- [House Bill Introduced to Limit PDAA Use for Servicemembers](#)
- [Federal Court: Unilateral Right to Modify Arbitration Agreement Does Not Render its Terms Illusory or Unconscionable Under California Law](#)

SHORT BRIEFS:

- [Still Few Cases So Far on Digital Forgery at the Year's Midpoint](#)
- [FINRA Issues 2022 Annual Report. A Swing to a Loss Last Year](#)
- [SEC Met Last Week and Again This Week. No Dispute Resolution Items on Either Agenda](#)

QUICK TAKES:

- *In re IBM Arb. Agreement Litig.*, No. 22-1728 (2d Cir. Aug. 4, 2023)
- *H&T Fair Hills, Ltd. v. Alliance Pipeline L.P.*, No. 22-1817 (8th Cir. Aug. 10, 2023)
- *Prospect Funding Holdings (NY) v. Ronald J. Palagi, P.C., L.L.C.*, No. 22-1871 (8th Cir. Aug. 7, 2023)
- *Pope Trading v. Interactive Brokers*, FINRA ID No. 21-03040 (Boca Raton, FL, Jul. 21, 2023)
- *Terry v. Ameriprise Financial*, FINRA ID No. 22-00748 (Little Rock, AR, Jul. 21, 2023)

ARTICLES OF INTEREST:

- Legum, Barton, *Applicable Law in Investment Treaty Arbitration*, Yulchon LLC (Jul. 21, 2023)
- *Investors in the Crypto Asset Markets Should Exercise Caution With Alternatives to Financial Statement Audits: Investor Bulletin*, www.sec.gov (Jul. 27, 2023)
- *Forex Trading: A Beginner's Guide to Understanding the NASD BrokerCheck*, NNN (Aug. 13, 2023)
- *Finra's New Hurdles for Broker Expungements to Take Effect in October*, AdvisorHub (Aug. 14, 2023)
- *SEC-NASAA-Georgia Secretary of State Joint Investor Roundtable*, www.sec.gov (Aug. 14, 2023)
- *ICSID Caseload Statistics (2023 Fiscal Year)*, Lexology (Aug. 15, 2023)

DID YOU KNOW?

- SEC Website has a News Signup Feature

SQUIBS: IN-DEPTH ANALYSIS

HOUSE BILL INTRODUCED TO LIMIT PDAA USE FOR SERVICEMEMBERS.

A bill has been introduced in the House to curb predispute arbitration agreement ("PDAA") use in a range of transactions involving servicemembers. Representative **Katie Porter** (D-CA) on **August 1** introduced [H.R. 5125](#), the purpose of which is: "to amend the [Servicemembers Civil Relief Act](#) ["SCRA"] to limit the use of arbitration to resolve controversies under the Act, and for other purposes." The [text](#) of the *End Servicemember Forced Arbitration Act* would amend the SCRA as follows:

"Notwithstanding any other provision of law, whenever a contract with a servicemember, or a servicemember and the spouse of the servicemember jointly, provides for the use of arbitration to resolve a controversy subject to a provision of this Act and arising out of or

relating to such contract, arbitration may be used to settle such controversy only if, after such controversy arises, all parties to such controversy consent in writing to use arbitration to settle such controversy.” The changes would be effective: “with respect to contracts entered into, amended, altered, modified, renewed, or extended after the date of the enactment of this Act.”

SCRA Primer

The SCRA: “postpones or suspends certain civil obligations to enable service members to devote their full attention to duty and to relieve stress on their families.” The act covers: “Outstanding credit card debt; Mortgage payments; Pending trials; Taxes; Termination of lease; Eviction from housing; and Life insurance protection. The SCRA covers all active duty service members, reservists, and members of the National Guard while on active duty.”

Several Arbitration Bills Introduced in this Congress So Far

Recall that we had reported in SAA 2023-09 (Mar. 2) that, by the beginning of **March 2021**, with the Democrats then 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 (FAA”), others another federal statute, and some both. We added that, as of press time, with the House now under GOP control, only 14 arbitration-related bills had been sponsored, according to www.govtrack.us. That’s no longer the case, as an impressive 69 [arbitration-related bills](#) have now been introduced. We again point out that not every bill has been introduced by a Democrat (Republicans have sponsored 18), and not every bill is anti-arbitration (see, e.g., H.R. 636 -- the [Forest Litigation Reform Act of 2023](#)).

Prospects for Enactment

We provide here our brief analysis of enactment prospects for a few key bills:

- The reintroduced *FAIR Act* – [H.R. 2953](#) and [S. 1376](#) – was announced in an **April 28 Press Release**. There are just 93 cosponsors in the House and 37 in the Senate, and there are no Republicans in either group. Unlike the last iteration of the *FAIR Act*, which passed in a Democratic-controlled chamber, we don’t see the new bill passing the GOP-controlled House.
- On the other hand, we expect the Porter bill will get bipartisan support. Why? Because, like the **March 2022** enactment of the [Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act](#) (“EFASASHA”), which expressly amended the FAA to make predispute arbitration agreements and class action waivers voidable at the option of the victim, this subject cuts across party lines.
- Also, as reported in SAA 2023-24 (Jun. 22), the *Protecting Older Americans Act of 2023* – [H.R. 4120](#) – was introduced in the House on **June 14**. It would amend the FAA: “with respect to arbitration of disputes involving age discrimination.” Like EFASASHA, the bill would make predispute arbitration agreements and class action

waivers voidable at the option of the victim. This subject, too, cuts across party lines. What makes this bill unusual is that it was introduced by a *Republican*, Rep. **Nancy Mace** (SC).

(*ed: We'll of course check in from time to time.*)

[return to top](#)

FEDERAL COURT: UNILATERAL RIGHT TO MODIFY ARBITRATION AGREEMENT DOES NOT RENDER ITS TERMS ILLUSORY OR UNCONSCIONABLE UNDER CALIFORNIA LAW. A federal court orders customers of the cryptocurrency platform Coinbase to arbitrate their claims against the company, as well as the issue of whether those claims ought to be arbitrated. In the opinion at issue, [Aggarwal v. Coinbase Inc.](#) No. 22-cv-04829 (N.D. Cal. Aug. 2, 2023), the Court rejects arguments that Coinbase's predispute arbitration agreement ("PDAA") is illusory and that its Delegation Clause is unconscionable.

The Dispute

Coinbase Inc. operates an online platform for buying, selling, transferring and storing cryptocurrency. To use its services, a customer must open a Coinbase account and agree to Coinbase's User Agreement. Coinbase periodically updates the User Agreement unilaterally and requires customers to agree to each update as a condition for continued access to their accounts. Two Coinbase customers filed the above-captioned action, alleging that Coinbase allowed hackers to access and drain their accounts and failed to assist them in recovering their lost cryptocurrency. Coinbase moved to compel arbitration.

The Arbitration Agreement Is Not Illusory

The Plaintiffs' first argument in opposition to the motion to compel is that the Arbitration Agreement is illusory, and therefore unenforceable, because Coinbase reserved the right to unilaterally modify its terms at any time at its sole discretion. Indeed, Coinbase modified the Arbitration Agreement while the Plaintiffs were its customers. The Court notes, however, that in California, an agreement permitting one party to modify the PDAA unilaterally is not necessarily illusory because an implied covenant of good faith and fair dealing is implicit in every contract. "If ... a unilateral modification 'is silent as to whether contract changes apply to claims, accrued or known,' the provision 'is impliedly restricted by the covenant ... so that changes do not apply to such claims.'" Here: "Coinbase's unilateral contract modification provision is silent as to whether contract changes apply to claims, accrued or known," and the Arbitration Agreement is therefore not illusory.

The Delegation Clause Is Unambiguous

The next issue is whether the parties delegated the issue of arbitrability to the arbitrator. The Court finds that it unambiguously did so, citing both the express terms of the Delegation Clause in the Arbitration Agreement itself and the fact that that it provides that arbitration "will be administered ... in accordance with the [AAA Consumer](#)

[Arbitration Rules](#),” which includes a similarly clear delegation of the issue of arbitrability to the arbitrator, R-14(a) (see p. 17 of the Rules).

... And Not Unconscionable

The Plaintiffs’ final argument is that the Delegation Clause is unconscionable. Under California law, the Court explains, this requires a finding that the Delegation Clause is both procedurally and substantively unconscionable, judged: “on a ‘sliding scale’:... ‘[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.’” The Court finds only “minimal procedural unconscionability arising from the adhesive nature of the Delegation Clause” because the Plaintiffs could have chosen a different cryptocurrency platform than Coinbase. Furthermore, Plaintiffs failed to show that the Delegation Clause itself, as opposed to other provisions in the Arbitration Agreement, was substantively unconscionable. Therefore, the Delegation Clause is enforceable.

*(*The same Court reached a contrary result in [Bielski v. Coinbase Inc.](#), which we covered in SAA 2022-16 (Apr. 28), finding the Arbitration Agreement itself to be unconscionable and the Delegation Clause non-severable. The Bielski litigation is currently stayed while an appeal is pending before the Ninth Circuit, as we noted in SAA 2023-25 (Jun. 29). The Court of Appeals’ decision in that case should also apply to Aggarwal. **This Squib was prepared by Harry A. Jacobowitz, President of HAJ Research and Writing LLC. Mr. Jacobowitz, a member of the Pennsylvania bar, and his firm perform legal research and writing for attorneys and handle substantive searches of SAC’s Award database. He can be contacted at harryjacobowitz@optimum.net.)*
[return to top](#)

SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

STILL FEW CASES SO FAR ON DIGITAL FORGERY AT THE YEAR’S MIDPOINT. As reported in SAA 2022-32 (Aug. 18), FINRA in **August 2022** issued a Regulatory Notice reminding firms of their role in guarding against digital fraud. [Regulatory Notice 22-18](#), *FINRA Reminds Firms of Their Obligation to Supervise for Digital Signature Forgery and Falsification*, notes that: “FINRA has received an increasing number of reports regarding registered representatives and associated persons (representatives) forging or falsifying customer signatures, and in some cases signatures of colleagues or supervisors, through third-party digital signature platforms. Firms have, for example, identified signature issues involving a wide range of forms, including account opening documents and updates, account activity letters, discretionary trading authorizations, wire instructions and internal firm documents related to the review of customer transactions.[] These types of incidents underscore the need for member firms that allow digital signatures to have adequate controls to detect possible instances of signature forgery or falsification.” The Notice provided information on: “relevant regulatory obligations; forgery and falsification scenarios firms have reported to FINRA; and methods firms have used to identify those scenarios.” Our editorial note in # 2022-32 was: “We’ll watch for any increases in arbitration filings involving this issue.” We reported in SAA 2023-23 (Jun. 15) that, the *Alert* was unable to note any meaningful

jump in cases filings, after perusing the [April stats](#). That trend has held through the midyear 2023 stats. There were 366 [customer claims](#) involving “fraud,” which tracks to just a 4% increase over last year.

(ed: We'll keep checking in from time to time.)

[return to top](#)

FINRA ISSUES 2022 ANNUAL REPORT. A SWING TO A LOSS LAST YEAR.

FINRA recently issued its [2022 Annual Report](#), showing a net loss of \$218.1 million, compared to net *income* of \$218.8 million in 2021. The Authority had an operating loss of \$60.2 million and net of investment losses of \$166.9 million, offset by other income of \$9.0 million. User revenues were \$327.7 million. The drivers? “Our revenues declined due to a decrease in the number of public offerings and lower Trading Activity Fees. The increase in our operating expenses was driven in part by investments in staff and technology to strengthen our capabilities to fulfill long-standing regulatory responsibilities, address more recent expansions in the scope of our duties, and meet new challenges in the markets. The increased costs also reflect steps we took to manage evolving workforce conditions, including wage inflation and competitive labor markets.” As to whether the losses were anticipated, the *Report* says: “This year’s operating loss was expected, and was in line with our multi-year strategic plan that we outlined in 2020. As part of that plan and consistent with our [Financial Guiding Principles](#), in 2022 we intentionally drew down our reserve portfolio to reduce the overall level of our reserves and to allow for fee increases to be phased in over a reasonable period of time.” There are just a few references to Dispute Resolution, such as: “We provide arbitration and mediation services to assist in the resolution of monetary and business disputes between and among investors, broker-dealers and individual brokers. We also provide dispute resolution services for several exchanges through contractual agreements, thereby offering consistent procedures and the uniformity of a single forum for the resolution of securities industry-related disputes.”

*(ed: *DRS' income is not listed separately, but we know that it accounts for 4-5% of revenue. **FINRA maintains a separate [Webpage](#) containing financial reports and policies.)*

[return to top](#)

SEC MET LAST WEEK AND AGAIN THIS WEEK. NO DISPUTE

RESOLUTION ITEMS ON EITHER AGENDA. The SEC met in closed session on **August 17**. According to the Sunshine Act [notice](#), there were no evident dispute resolution-related items on the Agenda. Discussed were: “Institution and settlement of injunctive actions; Institution and settlement of administrative proceedings; Resolution of litigation claims; and the matters relating to examinations and enforcement proceedings.” An open meeting was held **August 23**, again with no DR-related items listed on the [Agenda](#). The topics were: 1) Exemption for Certain Exchange Members; and 2) Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews. *(ed: For further information contact Vanessa A. Countryman, Office of the Secretary, at 202-551-5400.)*

[return to top](#)

QUICK TAKES: CASES AND AWARDS WORTH READING

In re IBM Arb. Agreement Litig., No. 22-1728 (2d Cir. Aug. 4, 2023): “On appeal, Plaintiffs argue that (1) the filing deadline in their separation agreements is unenforceable, and (2) the district court abused its discretion by granting IBM’s motion to seal. We disagree. First, the piggybacking rule does not apply to arbitration and, in any event, it is not a substantive right under the ADEA. Second, the presumption of public access to judicial documents is outweighed here by the Federal Arbitration Act’s strong policy in favor of enforcing arbitral confidentiality provisions and the impropriety of counsel’s attempt to evade the agreement by attaching confidential documents to a premature motion for summary judgment.”

H&T Fair Hills, Ltd. v. Alliance Pipeline L.P., No. 22-1817 (8th Cir. Aug. 10, 2023): “We agree with the district court that the damages issues are subject to arbitration for the plaintiffs whose easements contain an arbitration provision. Plaintiffs make two arguments against sending any issues to arbitration: (1) Plaintiffs’ claims cannot be within the scope of the arbitration provisions because the claims allege lack of compensation for “ongoing yield losses” not “damages to crops” and (2) Plaintiffs’ claims arise under the State Agreements, which do not have arbitration provisions. We find the arbitration agreements to be enforceable and to cover all issues.”

Prospect Funding Holdings (NY) v. Ronald J. Palagi, P.C., L.L.C., No. 22-1871 (8th Cir. Aug. 7, 2023): “The dispute between Prospect and Palagi and his firm does not contain a federal question, so diversity of citizenship between the parties must exist. Here, the application to vacate the 2021 awards does not identify any jurisdictional basis whatsoever. Crucially, Palagi and his firm failed to plead the parties’ citizenship in the application. Even if we could consider Prospect’s and Palagi’s firm’s citizenships as pleaded in the action for the 2017 awards, Palagi’s individual citizenship has never been pleaded before the court. Diversity of citizenship has not been established so the district court lacked jurisdiction over the case.”

Pope Trading v. Interactive Brokers, FINRA ID No. 21-03040 (Boca Raton, FL, Jul. 21, 2023): A customer alleging that its securities account with Respondent broker-dealer was subject to margin liquidation due to an allegedly flawed risk system loses its case. *Provided courtesy of SAC’s ARBchek facility (www.arbchek.com).*

Terry v. Ameriprise Financial, FINRA ID NO. 22-00748 (Little Rock, AR, Jul. 21, 2023): A customer alleging that Respondent broker forged documents in order to make herself the primary beneficiary of the Decedent's accounts -- thus removing him as beneficiary -- and seeking declaratory relief loses his case against Respondents. *Provided courtesy of SAC’s ARBchek facility (www.arbchek.com).*
[return to top](#)

ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Legum, Barton, [Applicable Law in Investment Treaty Arbitration](#), Yulchon LLC (Jul. 21, 2023): “At first glance, the determination of the applicable law in resolving disputes, particularly in investment treaty arbitration, is a straightforward matter; however, as foreign investment is regulated by both international law and domestic law, the issue becomes more complex. Investments involve a variety of transactions governed by the host state's local laws and regulations, including administrative, commercial, corporate, tax, real estate, labour [sic], financial and foreign exchange laws, as well as other legal systems that govern different areas. Nevertheless, there are several substantive international laws that protect foreign investors, primarily through bilateral investment treaties (BITs) and multilateral treaties. Additionally, customary international law, encompassing aspects of state responsibility, is also relevant. The applicable law in investment treaty arbitration, therefore, has two planes: international law, including the treaty itself, and the domestic law of the host state.”

[Investors in the Crypto Asset Markets Should Exercise Caution With Alternatives to Financial Statement Audits: Investor Bulletin](#), [www.sec.gov](#) (Jul. 27, 2023): “The SEC’s Office of Investor Education and Advocacy, along with the Office of the Chief Accountant, is issuing this Investor Bulletin to alert investors in the crypto asset markets of the risk of relying on audits not conducted following SEC rules and Public Company Accounting Oversight Board (‘PCAOB’) standards.”

[Forex Trading: A Beginner's Guide to Understanding the NASD BrokerCheck](#), NNN (Aug. 13, 2023): “Forex trading has gained immense popularity in recent years due to its potential for high returns. As a beginner in the forex market, it is crucial to educate yourself about various aspects of trading, including regulatory compliance. One such regulatory requirement is the NASD BrokerCheck. In this article, we will delve into the details of the NASD BrokerCheck, its significance, and how it can benefit you as a forex trader.”

[Finra’s New Hurdles for Broker Expungements to Take Effect in October](#), [AdvisorHub](#) (Aug. 14, 2023): “Come October, brokers may have a tougher time erasing customer disputes from their public record.[] The Financial Industry Regulatory Authority has adopted a raft of reforms to tighten the expungement process and set an October 16 implementation date, according to a regulatory notice published on Friday.[] The reforms are part of a three-year-old rulemaking package that was approved by the Securities and Exchange Commission in April. Among the changes are a requirement that expungement cases be decided unanimously by a three-member panel of public arbitrators with ‘enhanced expungement training’ rather than the current sole arbitrator option.”

[SEC-NASAA-Georgia Secretary Of State Joint Investor Roundtable](#), [www.sec.gov](#) (Aug. 14, 2023):“ The SEC is partnering with the North American Securities Administrators Association (NASAA) and Georgia Secretary of State for two joint investor roundtables. One will be hosted on Oct. 4 at the University of North Georgia and

the second will be on Oct. 5 at Dalton State College.[] These public roundtables will be an opportunity for investors, regulators, and members of the investment community to share their experiences with SEC staff. They will offer unprecedented access to hear directly from retail investors on topics that are important to them, such as securities fraud and feedback on SEC rulemaking. These events are designed to listen to investors and better understand their needs in future policy and practice.”

[*ICSID Caseload Statistics \(2023 Fiscal Year\)*](#), Lexology (Aug. 15, 2023): “The ICSID Caseload Statistics have now been updated with new data for the fiscal year 2023 (‘FY2023’) to capture statistics drawn from cases registered under the ICSID Convention, the Additional Facility Rules and other ICSID-administered cases between 1 July 2022 and 30 June 2023.”

[*return to top*](#)

DID YOU KNOW?

SEC WEBSITE HAS A NEWS SIGNUP FEATURE. The [SEC Website](#)’s landing page has a signup feature: “**E-mail Updates: Sign up for emails that will deliver SEC News direct to your inbox.**” It appears at the lower, right corner. Users need only to enter their e-mail address to sign up.

[*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

Retired

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 © 2023 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