



SECURITIES ARBITRATION ALERT

SECURITIES ARBITRATION ALERT 2023-33 (8/31/23)

George H. Friedman, Editor-in-Chief

SQUIBS:

- [Turns Out FINRA Did Amend Its Rules to Allow Virtual Hearings ... For Disciplinary Hearings](#)
- [ICSID Releases Stats for FY 2023](#)

SHORT BRIEFS:

- [FINRA DRS Posts Stats Through July. A Strong Year in Arbitration Filings Continues, But is Slowing Down a Bit](#)
- [Checking in on Virtual Hearing Stats](#)
- [AAA to Hold Virtual Advanced Impasse Management Strategies Program in September](#)

QUICK TAKES:

- *Ark. Tch. Ret. Sys. v. Goldman Sachs Grp., Inc.*, No. 22-484 (2d Cir. Aug. 10, 2023)
- *Inversiones y Procesadora Tropical INPROTSA, S.A. v. Del Monte International, GMBH*, No. 21-13059 (11th Cir. Jul. 13, 2023) (*per curiam*; unpublished)
- *McPherson v. Walgreens Boot Alliance, Inc.*, 314 Neb. 875 (Aug. 11, 2023)
- *Siegel v. Lucia Securities*, FINRA ID No. 23-00296 (Boca Raton, FL, Jul. 24, 2023)
- *Garrido v. Equitable Advisors*, FINRA ID No. 22-02831 (Boca Raton, FL, Jul. 25, 2023)

ARTICLES OF INTEREST:

- O'Gorman, Kevin and Formby, Erin, *Mexican Energy Measures Impacting Foreign Investment: Update and Potential Investor-state Dispute Remedies*, Norton Rose Fulbright International Blog (May 15, 2023)
- *Colombian Conglomerate Grupo Aval and Its Bank Subsidiary to Pay \$40 Million to Settle FCPA Violations*, www.sec.gov (Aug. 10, 2023)
- *Goldman Sachs Fined \$425K by FINRA for Large Option Reporting Lapses*, Compliance Week (Aug. 17, 2023)
- *Prometheum's License Approval: Republican Lawmakers Challenge SEC and FINRA Decisions*, Blockchain News (Aug. 17, 2023)
- *US SEC Poised to Adopt Rules for \$20 tln Private Fund Industry*, WKZO (Aug. 17, 2023)
- *BREAKING: 11th Circ. Won't Nix Panama Canal Award*, LAW360 (Aug. 18, 2023)
- *FINRA Names Bill St. Louis as New Head of Enforcement*, Traders Magazine (Aug. 21, 2023)

DID YOU KNOW?

- ICSID Website is Rich with Info

*Please note that because of the upcoming Labor Day holiday,
we will be publishing on Friday next week*

Enjoy your Labor Day Weekend!



SQUIBS: IN-DEPTH ANALYSIS

URNS OUT FINRA DID AMEND ITS RULES TO ALLOW VIRTUAL HEARINGS ... FOR DISCIPLINARY HEARINGS. *FINRA has made permanent a temporary pandemic-era rule authorizing virtual hearings for disciplinary hearings. The new rule does not extend to arbitration.* Readers may recall our **May 2020** Letter from the Editor, [Change the Code to Support Virtual Hearings](#), authored during the midst of the COVID-19 pandemic, after FINRA Dispute Resolution Services (“DRS”) had cancelled in-person hearings and moved to virtual hearings. The thrust of the Letter? “While [Rule 12409](#) authorizes Arbitrators to interpret the *Code*, methinks the argument that this extends to directing virtual hearings over a party’s objection would rest on a slender reed under the doctrine of *expressio unius est exclusio alterius* (‘when one or more things of a class are expressly mentioned others of the same class are excluded’). In other words, why spell out in several parts of the *Code* Arbitrator authority to conduct electronic hearings in certain circumstances, but not here? I suggested that FINRA consider a simple rule filing for immediate effectiveness that authorizes Arbitrators – perhaps on a temporary basis or whenever in-person hearings are impractical – to direct that hearings be held by videoconference.”

Temporary Pandemic-Era Rule ...

FINRA in 2020 indeed took just such steps, but not for arbitrations. FINRA [Rule 9261](#) (Evidence and Procedure in Hearing), which governs disciplinary proceedings, was temporarily amended effective **October 2020** by [SR-FINRA-2020-027](#). Subsection (b) stated: “If a hearing is held, a Party shall be entitled to be heard in person, by counsel, or by the Party’s representative. Upon consideration of the current public health risks presented by an in-person hearing, the Chief Hearing Officer or Deputy Chief Hearing Officer may, on a temporary basis, determine that the hearing shall be conducted, in whole or in part, by video conference.” The Rule bore this header in red: “This version contains temporary amendments introduced with the filing of SR-FINRA-2020-027, which was filed for Immediate Effectiveness. The temporary amendments in SR-FINRA-2020-027 became operative on October 1, 2020, and as extended by SR-FINRA-2020-

042, SR-FINRA-2021-006 and SR-FINRA-2021-019, are in effect through December 31, 2021, pending any future extensions.”

... Now Permanent for Disciplinary Matters

The other shoe dropped with the SEC’s rule change approval on **July 31** (see Securities Exchange Act Release No. 98029 (July 31, 2023), [88 FR 51879](#) (August 4, 2023) (Order Approving File No. SR-FINRA-2023-008)). The authority on **August 16** issued [Regulatory Notice 23-13](#), *FINRA Amends Its Rules to Allow Video Conference Hearings Before the Office of Hearing Officers and the National Adjudicatory Council Under Specified Conditions*. Says the Notice: “FINRA has amended its rules to allow for video conference hearings before the Office of Hearing Officers (OHO) and the National Adjudicatory Council (NAC) under specified conditions. These rule changes make permanent, with some modifications, temporary amendments that allowed OHO and the NAC to order, without a motion, hearings to proceed by video conference based on public health risks related to COVID-19.[U]nder the amended rules, OHO’s and the NAC’s authority to order hearings by video conference extends beyond the public health risks posed by COVID-19 to similar situations in which proceeding in person may endanger the health or safety of the participants or would be impracticable” (footnotes omitted). The changes were effective **August 23**.

FYI, AAA’s Rules Were Amended for Arbitrations

Readers may recall that, just as we were putting SAA 2022-33 (Sep. 1) to bed, came word that the AAA has revised its [Commercial Arbitration Rules and Mediation Procedures](#), effective **September 1, 2022**. We did a more thorough analysis in SAA 2022-34 (Sep. 8) and [blogged](#) on it as well. One of the many changes described in AAA’s [FAQ](#) got our attention: “The revisions ... reflect the opportunity presented by advancements in meeting technology to make the arbitration process more effective and efficient. Rule R-22 includes the use of video conferencing as a method for conducting the preliminary hearing, and Rule R-25 and Expedited Procedure E-7 similarly include video, audio, or other electronic means as a method of hearing, when appropriate. While the AAA has interpreted the previous Rules to allow the arbitrator to order the use of technology to facilitate hearing attendance, *the new Rules specifically provide for this authority*” (emphasis added).

(ed: Your Editor-in-Chief stands by his prior recommendation to DRS.)

[return to top](#)

ICSID RELEASES STATS FOR FY 2023. *ICSID recently released updated caseload stats.* Although we tend to think that most investment disputes in the U.S. are resolved by FINRA, this is not entirely accurate. A case in point: the [International Centre for Settlement of Investment Disputes](#) (“ICSID”) just released its updated caseload [stats](#) through fiscal year 2023 (July 1, 2022 – June 30, 2023). 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 December 31, 2022, 158 countries have signed the *Convention*; the U.S. signed 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.”

New Report on Case Stats

The [Report](#), which was announced in an **August 8 Press Release**, is laden with a wealth of statistical data, going back to 1972. Here are some highlights repeated *verbatim* from the release:

- ICSID registered 45 cases in FY2023 ... under its procedural rules for resolving international investment disputes. Arbitrations under the ICSID Convention accounted for the largest share of new cases (40 cases), followed by arbitrations applying the ICSID Additional Facility Rules (five cases).
- As of June 30, 2023, ICSID had registered a total of 933 cases under the ICSID Convention and Additional Facility Rules.
- An additional 22 cases were administered under other procedural rules—marking a new record. Most (16 cases) applied the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL).
- The majority of newly registered cases in FY2023 (37%) asserted ICSID jurisdiction on the basis of a bilateral investment treaty (BIT). This is a smaller share than the trend in previous years—overall, 59% of ICSID cases have invoked BITs.
- A variety of multilateral agreements also accounted for a significant share of new cases, most notably the Energy Charter Treaty (13% of cases), the North American Free Trade Agreement (12% of cases), and the United States-Mexico-Canada Agreement (12% of cases). Parties also instituted proceedings relying on the Dominican Republic-Central America Free Trade Agreement (4% of cases), the ASEAN-China Investment Agreement (2% of cases), the Canada-Peru Free Trade Agreement (2% of cases), and for the first time, the Mexico, Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua FTA (2% of cases).
- A further 10% of cases were brought on the basis of contracts between a host State and investor, and 6% on domestic investment laws.

The Release adds that: “This issue of the caseload statistics introduces a new format that makes it easier to compare annual and historical data on ICSID cases.”

(ed: ICSID does a service to its constituents by publishing this information.)

[return to top](#)

SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

FINRA DRS POSTS STATS THROUGH JULY. A STRONG YEAR IN ARBITRATION FILINGS CONTINUES, BUT IS SLOWING DOWN A BIT.

FINRA Dispute Resolution Services (“DRS”) has posted case [statistics](#) through **July**, with trends continuing to show a very strong year in arbitration filings – especially industry cases – and a continued drop-off in mediations. We offer these headlines: 1) overall [arbitration filings](#) through July – 1,914 cases – are up 30% for the year (was plus 35% in **June**); 2) cumulative customer claims increased 19% (was plus 22% last month); 3) industry arbitration filings were up 47% (from up 58% in June); and 4) the long-term decline in mediation cases continues. There were 206 new arbitrations filed in July, compared to 226 new cases in June. Overall arbitration turnaround times were 15.7 months (a slight decrease), with hearing cases now taking 18.0 months (a slight increase). There were 407 [mediation cases](#) in agreement, a 23% 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 was steady at 85%. There are now 8,273 DRS [arbitrators](#), 4,037 public and 4,236 non-public. This stat was up across the board last month. Pending cases stand at 3,337, up 15 from June.

*(ed: *If the trend holds, the 1,914 arbitrations filed through July straight-lines to nearly 3,300 yearly arbitration filings, still a decent year by recent measures. [Last year](#) there were 2,671 arbitration case filings. The all-time high-water mark was in 2003, when that post tech-wreck figure was 8,945 cases. **Past year stats can be found [here](#).)*

[return to top](#)

CHECKING IN ON VIRTUAL HEARING STATS. Readers may recall that, in the midst of the COVID-19 pandemic, FINRA shifted toward virtual hearings. Some time thereafter, the Authority began tracking this metric as part of its monthly stats report. With the pandemic behind us, we thought we would check in on this one. The [category](#) through **July** reveals the following:

<u>Contested Motions for Virtual Hearings</u>	<u>Granted</u>	<u>Denied</u>	<u>Open</u>	<u>Total</u>
Customer	284 (62%)	175 (38%)	0	459
Intra-Industry	152 (75%)	50 (25%)	0	202
Total Customer & Intra-Industry	436 (66%)	225 (34%)	0	661

Adds the Webpage: “Since the [March 2020] postponement of in-person hearings, as of July 31, 1,581 arbitration cases have conducted one or more hearings via Zoom (628 customer cases and 953 industry cases).[] There are 783 total joint motions for virtual hearings (343 in customer cases and 440 in industry cases).”

(ed: The last part validates one of our predictions: that post-pandemic, parties would gravitate toward voluntary use of virtual hearings in many cases.)

[return to top](#)

AAA TO HOLD VIRTUAL ADVANCED IMPASSE MANAGEMENT

STRATEGIES PROGRAM IN SEPTEMBER. The AAA will be conducting a virtual program, [Advanced Impasse Management Strategies](#), **September 16 – 30**. The program

will consist of live components and prerecorded self-study. Says the AAA Website: “This course will take a deep dive into impasse and barriers to settlement building. It will equip serious mediators and advocates alike with the tools and tried and proven strategies required to manage and work past impasse at every turn. Buckle up and hold on for a unique advanced skills-building journey[] you won't want to miss it.” Serving as faculty are: **Lou Chang, Esq.**, Mediator/Arbitrator, Louis Chang APLC; **Harold Coleman, Jr., Esq.**, CCA Mediator, Arbitrator, Educator, Senior Vice President, AAA-ICDR®, AAA Mediation.org®; **Debra Dupree, Psy.D.**, Psychologist, Mediator, Educator, Relationships at Work; and **Peter Silverman, Esq.**, Mediator, EDR Practices Neutral. (ed: *Registration is \$495; cancellations are \$25. **“Registrants desiring CLE credit for this program (or those professionals in a discipline other than the practice of law) will be able to download a certificate of completion, which may be used for self-pursuit of CLE credit in their jurisdiction” ***Questions? Contact Michael Rodriguez at 877-252-0426 or via email at CustomerService@AAAMediation.org.)

[return to top](#)

QUICK TAKES: CASES AND AWARDS WORTH READING

Ark. Tchr. Ret. Sys. v. Goldman Sachs Grp., Inc., No. 22-484 (2d Cir. Aug. 10, 2023):

“Shareholders of Defendant-Appellant Goldman Sachs Group, Inc. brought this class action lawsuit against Goldman and several of its former executives, claiming defendants committed securities fraud in violation of § 10(b) of the Securities Exchange Act of 1934 and Rule 10b–5 promulgated thereunder by misrepresenting Goldman’s ability to manage conflicts of interest in its business practices. After a number of appeals and subsequent remands, including an appeal to the Supreme Court, the district court once again certified a shareholder class under Federal Rule of Civil Procedure 23(b)(3). For the reasons that follow, we reverse the district court’s class certification decision with instructions to decertify the class.”

Inversiones y Procesadora Tropical INPROTSA, S.A. v. Del Monte International, GMBH, No. 21-13059 (11th Cir. Jul. 13, 2023) (per curiam; unpublished): “This appeal requires us to determine whether Del Monte is entitled, as a contempt sanction, to disgorgement of money that INPROTSA made selling pineapples to third parties in violation of a district court’s order expressly enjoining it from doing so. The district court rejected Del Monte’s disgorgement request. For the reasons that follow, we hold that the district court did not abuse its discretion in doing so.”

McPherson v. Walgreens Boot Alliance, Inc., 314 Neb. 875 (Aug. 11, 2023): “At oral argument before this court, Patera suggested that the removal of snow and ice from a Walgreens pharmacy in Omaha should be viewed as a purely local activity. But we have recognized that interstate commerce can be implicated even by purely local activities, and we have consistently stated that transactions involving commerce include contracts for services between parties of different states. Here, parties from different states contracted for snow and ice removal services on commercial properties in Nebraska. We agree with Ferrandino that the subcontract involves a transaction that comes within the scope of the

FAA and that the arbitration provision in the subcontract is therefore governed by the FAA” (footnotes omitted).

[Siegel v. Lucia Securities](#), FINRA ID No. 23-00296 (Boca Raton, FL, Jul. 24, 2023): Two customers alleging that Respondent broker-dealer misrepresented to them that the investment strategies they were placed in were safe, stable, and low risk settle their case. Non-Party registered representative is awarded expungement of this matter from his CRD record. *Provided courtesy of SAC’s ARBchek facility (www.arbchek.com).*

[Garrido v. Equitable Advisors](#), FINRA ID No. 22-02831 (Boca Raton, FL, Jul. 25, 2023): Claimant broker is awarded expungement of two customer complaints from his CRD record, as well as reformation of defamatory information from his Form U5 record. *Provided courtesy of SAC’s ARBchek facility (www.arbchek.com).*
[return to top](#)

ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

O’Gorman, Kevin and Formby, Erin, **[Mexican Energy Measures Impacting Foreign Investment: Update and Potential Investor-state Dispute Remedies](#)**, Norton Rose Fulbright International Blog (May 15, 2023): “This article provides an update on state-to-state consultations between the United States, Canada and Mexico and explores potential remedies for international investors whose investments may be impacted by Mexican energy policy.”

[Colombian Conglomerate Grupo Aval and Its Bank Subsidiary to Pay \\$40 Million to Settle FCPA Violations](#), www.sec.gov (Aug. 10, 2023): “The Securities and Exchange Commission today charged Colombian conglomerate Grupo Aval Acciones y Valores S.A., aka Grupo Aval S.A., and its bank subsidiary, Corporación Financiera Colombiana S.A. (Corficolombiana), with violating the Foreign Corrupt Practices Act (FCPA). Grupo Aval, whose shares are traded on the New York Stock Exchange, agreed to pay \$40 million to settle the SEC charges.”

[Goldman Sachs Fined \\$425K by FINRA for Large Option Reporting Lapses](#), Compliance Week (Aug. 17, 2023): “Goldman Sachs agreed to pay \$425,000 as part of a settlement with the Financial Industry Regulatory Authority (FINRA) addressing allegations of reporting and supervision violations regarding more than 1 million over-the-counter (OTC) options positions.[] The bank failed to report or inaccurately reported OTC options positions to the large options positions reporting (LOPR) system in violation of FINRA Rule 2360(b)(5), according to the self-regulatory organization’s disciplinary action published Wednesday. Goldman neither admitted nor denied FINRA’s findings.”

[Prometheum's License Approval: Republican Lawmakers Challenge SEC and FINRA Decisions](#), Blockchain News (Aug. 17, 2023): “Digital asset company called Prometheum Ember Capital LLC has recently gained attention for being named the first Special Purpose Broker-Dealer (SPBD) for digital assets. Republican members of the

House Financial Services Committee have expressed reservations about this decision, leading them to [ask](#) the Securities and Exchange Commission (SEC) and the Financial Industry Regulatory Authority (FINRA) for explanation.[] The House Financial Services Committee, spearheaded by Chair Patrick McHenry and supported by 22 other members, [dispatched](#) letters to both FINRA and the SEC on August 9, 2023. These letters question the ‘timing and circumstances’ of Prometheus's approval, especially given the concurrent legislative discussions on digital asset market regulations.”

[US SEC Poised to Adopt Rules for \\$20 tln Private Fund Industry](#), WKZO (Aug. 17, 2023): “(Reuters) – Wall Street’s top regulator is set next week to adopt new transparency rules for the \$20-trillion private investment fund industry, according to an official notice, acting on a proposal that has drawn sharp industry objections.[] The five-member U.S. Securities and Exchange Commission is also due to vote on Aug. 23 on a proposal, initially unveiled in 2015, that would require more broker-dealers to register with the Financial Industry Regulatory Authority (FINRA).”

[BREAKING: 11th Circ. Won't Nix Panama Canal Award](#), LAW360 (Aug. 18, 2023): “The Eleventh Circuit refused Friday to vacate \$285 million in arbitral awards issued to the operator of the Panama Canal in a contentious dispute over a multibillion-dollar project to expand the famous waterway, rejecting arguments that hidden ties between the arbitrators had created an impression of bias.”

[FINRA Names Bill St. Louis as New Head of Enforcement](#), Traders Magazine (Aug. 21, 2023): “FINRA announced today that it has appointed Bill St. Louis as Head of Enforcement, effective immediately. St. Louis, an Executive Vice President, was most recently head of FINRA’s National Cause and Financial Crimes Detection Program (NCFC). St. Louis will be responsible for the management of approximately 350 enforcement staff in 11 offices across the United States and will report directly to FINRA CEO Robert Cook.”

[return to top](#)

[DID YOU KNOW?](#)

ICSID WEBSITE IS RICH WITH INFO. Our coverage [elsewhere](#) in this *Alert* on the [International Centre for Settlement of Investment Disputes](#) (“ICSID”) reminds us that this organization has a wonderful Website loaded with all manner of interesting info. Among other features are rules, procedures, stats, and a searchable [cases database](#).

[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