



SECURITIES ARBITRATION ALERT

SECURITIES ARBITRATION ALERT 2023-38 (10/5/23)

George H. Friedman, Editor-in-Chief

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DID YOU KNOW?

- AAA Website has Archived Rules

SQUIBS: IN-DEPTH ANALYSIS

FINRA DRS POSTS STATS THROUGH AUGUST. A STRONG YEAR IN ARBITRATION FILINGS CONTINUES, BUT IS DEFINITELY SLOWING DOWN A BIT. *FINRA Dispute Resolution Services ("DRS") has posted case [statistics](#) through August, with trends continuing to show a comparatively strong year in arbitration filings – especially industry cases – and a continued drop-off in mediations.*

Headlines

We offer these headlines: 1) overall [arbitration filings](#) through **August** – 2,181 cases – are up 27% for the year (was plus 30% in **July**); 2) cumulative customer claims increased 15% (was plus 19% last month); 3) industry arbitration filings were up 48% (was up 47 in July); and 4) the long-term decline in mediation cases continues, although it appears to be levelling off. There were 267 new arbitrations filed in August compared to 206 new cases in July.

Industry Surge

What’s behind the surge in industry arbitration filings? In part: “employment-relate disputes.” In SAA 2023-30 (Aug. 10), we examined the midyear “Top 15 Controversy Types in Intra-Industry Arbitrations” [stats](#) to determine where employment filings might end up at the end of the year. Specifically, we looked at these controversy types: breach of contract; U-5 related libel or slander; promissory notes; libel, slander, or defamation; discrimination or harassment; and wrongful termination. All six categories are projected to increase as a group by nearly 23%, as this chart shows:

Category	2022	2023 June	2023 Projected	Diff
Breach of contract	225	130	260	35
U-5 libel/slander	84	53	106	32
Promissory notes	84	64	128	44
Libel/slander/defamation	69	36	72	3
Discrimination/harassment	25	14	28	3
Wrongful termination	50	32	64	14
Totals	537	329	658	121

Continued Decline in Mediation

There were 448 [mediation cases](#) in agreement, a 25% 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%.

Potpourri

Overall arbitration turnaround times were 15.5 months (a slight decrease), with hearing cases now taking 18.3 months (a slight increase). There are now 8,347 DRS [arbitrators](#), 4,082 public and 4,265 non-public. This stat was up across the board last month. Pending cases stand at 3,356, up 19 from July.

*(ed: *If the trend holds, the 2,181 arbitrations filed through August straight-lines to nearly 3,275 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](#).)*
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NFA UPDATES ARBITRATION CASE STATS. *The NFA has published updated arbitration case filing stats. This prompts us to do a deep dive into the forum's 2022 numbers.* The [National Futures Association](#) (“NFA”), which operates a [dispute resolution forum](#), issues a periodic *Investor Newsletter* aimed at commodity futures investors. In reporting in SAA 2023-35 (Sep. 14) on the NFA’s third [Newsletter](#) of 2023, we mentioned that stats for 2022 were still not yet posted, and that the *Alert* had asked the NFA for an explanation. We are pleased to report that, in response to our inquiry, the case filing [stats](#) have been updated through **August 31**. We analyze the full-year 2022 numbers here.

Few Arbitrations Opened or Closed

NFA in 2022 had just 21 arbitration cases filed – 20 investor and 1 intra-industry. This stat compares to 49 cases filed in 2020. Some 24 cases were closed by award (30%); 41 (52%) were disposed of by settlement; and 14 (18%) by other means (“cases that are rejected, withdrawn, or terminated for other reasons (e.g., bankruptcy)”).

Potpourri

Customers received damages in 30% of the cases decided by arbitrators. This compares to 36% at [FINRA](#) in 2022. Hearing cases last year took 37 months. This compares to 19.8 months at [FINRA](#). There are no mediation stats.

*(ed: *Our thanks to NFA. **See our February 1 [blog post](#) for an analysis of FINRA’s full-year 2022 dispute resolution stats.)*

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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

WE CALLED IT! SCOTUS GRANTS CERTIORARI IN FAA SECTION 1 CASE. It seems like only yesterday we said in SAA 2023-36 (Sep. 21): “We’re reasonably certain another *Cert.* grant is coming this Term.” SCOTUS immediately made good on our prediction in its **September 29 Order List**. Specifically, the Court granted *Certiorari* in [Bissonnette v. LePage Bakeries Park St. LLC](#), No. 23-51, where the **July 17 Petition** states: “The Federal Arbitration Act exempts the ‘contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.’ [9 U.S.C. § 1](#). The First and Seventh Circuits have held that this exemption applies to any member of a class of workers that is engaged in foreign or interstate commerce in the same way as seamen and railroad employees—that is, any worker ‘actively engaged’ in the interstate transportation of goods. The Second and Eleventh Circuits have added an additional requirement: The worker’s employer must also be in the ‘transportation industry.’ The question presented is: To be exempt from the Federal Arbitration Act, must a class of workers that is actively engaged in interstate transportation also be employed by a company in the transportation industry?”

*(ed: *OK. We admit this one was an easy call. **The [underlying case](#) is 59 F.4th 594 (2d Cir. Feb. 22, 2023).)*

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FEDERAL REGISTER PUBLISHES APPROVAL ORDER ON FINRA’S RULE CHANGE PROPOSAL IMPLEMENTING “RIGGED PANELS” INVESTIGATION REPORT RECOMMENDATIONS. We reported in SAA 2023-35 (Sep. 14) that the SEC had approved FINRA’s rule change proposal to implement recommendations resulting from the outside investigation of allegations that the arbitrator selection process was rigged. Specifically, the Commission approved the rule filing on **September 7**, via Release No. [34-98317](#). We also blogged about this topic in a **September 13** [blog post](#). We can now report that the Approval Order was [published](#) in the *Federal Register* on September 13 (Vol. 88, No. 176, P. 62835).

(ed: What’s next? FINRA will publish a Regulatory Notice setting the effective date(s). Along the way there will be staff and arbitrator training.)

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AAA TO HOST FREE INTERNATIONAL COMMERCIAL ARBITRATION PROGRAM IN COLUMBIA. The International Centre for Dispute Resolution® (“ICDR®”), the international division of the American Arbitration Association® (“AAA®”), will be hosting [International Arbitration & Mediation Conference](#) on **October 19** in Bogotá D.C, Colombia. The seminar announcement states that the AAA: “has convened international arbitration and mediation experts to explore the latest developments, innovation, and conflict-management options for today’s complex global commercial transactions.[] This conference’s special focus will be international commercial arbitration, examining trends and regional developments, innovation, and conflict-management options in global infrastructure and construction arbitration. Additional panels will feature an ICSID report with discussions on investment arbitration and the evolving role and powers of the arbitrator in international arbitration.[] A moderator will introduce each session, and the speakers will discuss the approaches and ‘best practices’ they employ, followed by topic-specific presentations and discussions. The audience will submit additional topics and questions, and an audience participation with a question-and-answer period ends each session.” The conference [Agenda](#) boasts several distinguished panelists and sponsors. Simultaneous translation will be available in English and Spanish. No CLE credit is being offered, but: “Upon request, a Uniform Certificate of Attendance can be provided which may be used to submit the program upon [sic] in the attorney’s jurisdiction where allowed.”

*(ed: *Registration is free but participants need to [register online](#). **For more info, contact Alyssa Montano at 212-484-3281 or [MontanoA@adr.org](#). ***The venue is: Grand Hyatt Bogotá, Calle 24 A # 57-60, Bogotá, Colombia, 111321.)*

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

[Winkler v. McCloskey](#), No. 22-55856 (9th Cir. Sep. 28, 2023): “We must decide whether a receiver who is appointed to claw back profits received in a Ponzi scheme is bound by arbitration agreements signed by the receivership company that was the instrument of the Ponzi scheme. The district court, relying on *Kirkland v. Rund (In re EPD Investment Co.)*, 821 F.3d 1146 (9th Cir. 2016), concluded that the receiver was not bound by the arbitration agreements. *EPD*, however, addressed whether a bankruptcy

trustee, not a receiver, was bound by an arbitration agreement; it, therefore, does not control here. We conclude that a receiver acts on behalf of the receivership entity and thus can be bound by an agreement signed by that entity. But here, even applying that rule, it is unclear whether Appellee Geoff Winkler ('Receiver') is bound by the agreements at issue" (footnote omitted).

***Clanton v. Oakbrook Healthcare Centre, Ltd.*, 2023 IL 129067 (Sep. 21, 2023):**

"Plaintiff, Nancy Clanton, as the independent administrator of the estate of the decedent, Laurel Jansen, brought an action against defendants, Oakbrook Healthcare Centre, Ltd., Lancaster, Ltd., and May Flor Andora, R.N. The complaint alleged that Jansen was negligently cared for in a nursing facility, suffered injuries as a result, and subsequently died from her injuries.[] Defendants filed a motion to compel arbitration pursuant to the contract for admission to the nursing facility. The Cook County circuit court denied the motion to compel, and the First District affirmed. 2022 IL App (1st) 210984.[] On appeal to this court, defendants contend that the denial by the trial court of their motion to compel arbitration under the nursing facility contract was erroneous.... In this case, applying well-established rules of contract interpretation, we conclude that the contract, including the arbitration clause, terminated upon Jansen's death. Thus, when this action was brought after Jansen's death, arbitration as a contractual forum was no longer an available option, even for alleged negligent conduct that occurred prior to Jansen's death."

***El Jen Medical Hospital, Inc. v. Tyler*, 139 Nev. Adv. Op. No. 36 (Nev. Sep. 21, 2023):**

"Nevada's wrongful death statute, [NRS 41.085](#), provides separate causes of action for the decedent's estate and the statutory heirs. Following the death of her husband, Gary Tyler, respondent Stacy Tyler asserted wrongful death claims individually and on behalf of Gary's estate and their minor child, and was joined by two adult statutory heirs, against appellant El Jen Convalescent Hospital and Retirement Center (El Jen). The district court compelled the estate's claims to arbitration pursuant to an arbitration agreement signed during Gary's admission to El Jen but found that the statutory heirs were not bound by the agreement, which they did not sign, and declined to compel arbitration of their claims. El Jen appeals, and we affirm. Arbitration is a matter of contract. NRS 41.085 provides the statutory heirs with separate causes of action arising upon the death of the decedent that require the heirs' agreement if arbitration is to be compelled. While the heirs' claims derive from the injury to the decedent, that does not authorize the decedent to bind the heirs to arbitration absent their agreement, which the district court correctly determined was lacking here."

***Southeast Investments NC Inc. v. Prewette*, FINRA ID No. 23-00454 (Charlotte, NC, Aug. 18, 2023):** Claimant broker-dealer loses its breach of contract case seeking indemnification relating to its allegation that it was erroneously named in a prior FINRA expungement case (Case Number 22-02082), brought by Respondent. However, Claimant is awarded monetary sanctions in the form of attorney fees relating to the late filing of Respondent broker's Final Submissions. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

[Busch v. Morgan Stanley Smith Barney LLC](#), FINRA ID No. 21-00203 (New York, NY, Aug. 21, 2023): An investor is awarded \$1.8 million in compensatory damages from Respondent broker-dealer relating to her purchase of a stock called WisdomTree Investments Inc. Two non-party brokers lose their respective requests for expungement of this matter from their CRD record. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*
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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Rao, Weijia Rao, [Large Corporations and Investor-State Arbitration](#), Kluwer Arbitration Blog (Aug. 18, 2023): “In May 2023, more than thirty members of the U.S. Congress sent a letter to the Biden administration, arguing that ‘[l]arge corporations have weaponized [investor-state dispute settlement (ISDS)] to benefit their own interests’ and that “the broken ISDS system has time and time again worked in favor of big business interests.” This criticism against ISDS is not new. ISDS has often been perceived as a system primarily utilized by large corporations to serve their interests, despite evidence to the contrary. This perception is driven by some high-profile victories secured by large corporations (e.g., *Occidental v. Ecuador*), as well as significant cases brought by large corporations that challenged public health or environmental regulations of host countries (e.g., *Philip Morris v. Australia*; *RWE v. Netherlands*), which led to concerns of ‘regulatory chill.’ Partly due to such concerns, several countries have terminated their bilateral investment treaties and international investment agreements that contain ISDS provisions. Despite such criticism and backlash, we still know relatively little about the users of the system, let alone which users are more likely to win cases or to use the system to chill regulations. This post summarizes the key findings of a recent article (the ‘Article’) that introduces a new dataset on the characteristics of claimants in ISDS cases up to 2020, focusing on the users and beneficiaries of ISDS, and the implications of these findings for ongoing ISDS reform.”

[Channeling Shakespeare, Court Orders Samsung to Pay Millions in Arbitration Fees](#), **Consumer Finance Blog (Sep. 13, 2023):** “Alleging violations of the Illinois Biometric Information Privacy Act (BIPA), approximately 50,000 Samsung customers filed individual arbitration demands with the American Arbitration Association (AAA) pursuant to an arbitration clause in Samsung’s customer agreement. Samsung refused to pay its share of the AAA’s administrative fees, totaling about \$4 million, and the AAA closed the matters for lack of payment. The customers then petitioned the U.S. District Court for the Northern District of Illinois to compel arbitration. Although the court dismissed some of the petitioners without prejudice for improper venue, it granted the petition as to more than 35,000 petitioners and ordered Samsung to pay its share of the AAA’s administrative fees so that the petitioners could arbitrate their claims.”

[Consumer Advocates Petition CFPB to Undertake Rulemaking to Prohibit Pre—dispute Consumer Arbitration Clauses](#), **Ballard Spahr Blog (Sep. 18, 2023):** “Earlier this week, a group of consumer advocate organizations filed a Petition for Rulemaking

with the CFPB that would prohibit the use of pre-dispute arbitration clauses in consumer contracts in favor of arbitration clauses that would permit consumers to choose between arbitration and litigation only after a dispute has arisen. There are numerous compelling reasons why the CFPB should not engage in such rulemaking.”

[Finra Brings Reg BI Case Against Ex-Broker Over Improper Non-Traded REIT Sale, AdvisorHub \(Sep. 19, 2023\)](#): “The Financial Industry Regulatory Authority continues to bring enforcement actions over violations of the three-year-old Regulation Best Interest rule and this week fined and suspended a former broker who put 81% of her customer’s net worth into a single non-traded real estate investment trust.”

[Former Compliance Officer Suspended, Fined for Alleged Role in Fraud, FA Magazine \(Sep. 19, 2023\)](#): “Finra has fined and suspended a former broker and ex-chief compliance officer for a defunct RIA formerly affiliated with LPL Financial for allegedly playing a role in a representative’s \$1 million wire fraud scheme.[] Without admitting or denying the findings that he helped falsify a wire transfer form at his firm, [IA], formerly of Georgia-based Hamilton Investment Counsel (HIC), agreed to a four-month suspension from associating with any Finra member and a \$10,000 fine.[] The wire was requested by [his] former business partner ..., also a former Hamilton Investment Counsel principal, who settled charges with the SEC in July 2020 that he misappropriated at least \$1.7 million from two advisory clients and one brokerage customer.”

[SEC Charges CBRE, Inc. with Violating Whistleblower Protection Rule, www.sec.gov \(Sep. 19, 2023\)](#): “The Securities and Exchange Commission today announced settled charges against CBRE, Inc. (CBRE), a Dallas-based commercial real estate services and investment firm and subsidiary of publicly traded CBRE Group, Inc., for using an employee release that violated the SEC’s whistleblower protection rule.[]According to the SEC’s order, between 2011 and 2022, as a condition of receiving separation pay, CBRE required its employees to sign a release in which employees attested that they had not filed a complaint against CBRE with any federal agency. The SEC’s order finds that by conditioning separation pay on employees’ signing the release, CBRE took action to impede potential whistleblowers from reporting complaints to the Commission.”

[FINRA: Broker Barred After Investing \\$2M Without Firm’s Approval, Think Advisor \(Sep. 21, 2023\)](#): “The Financial Industry Regulatory Authority barred an ex-broker who was affiliated with Momentum Independent Network after he participated in 19 private securities transactions involving promissory notes totaling \$2 million between about February 2018 and August 2022 without first getting his firm’s approval.”

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DID YOU KNOW?

AAA WEBSITE HAS ARCHIVED RULES. The AAA Website contains [links](#) to its rules now in effect. But did you know the Association also archives past versions? See

<https://adr.org/ArchiveRules> Here, for example, are the **July 1, 1999** [*Securities Arbitration Supplementary Procedures*](#).
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