SECURITIES ARBITRATION ALERT 2023-44 (11/23/23)

George H. Friedman, Editor-in-Chief

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- **Daniel, Andrew and Johnstone, Julie, *A Look At 2023 FINRA Arbitration Award Stats: What's Trending, What's Not?*, Bates Group (Nov. 9, 2023)**
- ***Court Confirms $8.7 Million Arbitration Award Against OC Lawyer and Others in Partnership Dispute*, Lexology (Nov. 8, 2023)**
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DID YOU KNOW?

- **A Great (and Free) Source of New Court Decisions**

SQUIBS: IN-DEPTH ANALYSIS

BATES GROUP DOES DEEP DIVE ON FINRA DR STATS. ***The Bates Group recently posted a report analyzing FINRA's dispute resolution stats through September.*** The chart-rich *2023 FINRA Arbitration Award Stats: What's Trending, What's Not?* leads with: "With the year wrapping up soon, we are taking a look at what is and is not trending in matters resolved through FINRA arbitration through the first nine months of 2023. The following analysis utilizes data from Securities Arbitration Commentator and FINRA." These are the headlines (*ed: repeated* verbatim; *footnotes are omitted*):

The Big Picture – Fewer Cases Closing Each Year: Through September of each year, and on an annual basis, the number of disputes closed has been declining. This is a long-term trend going back at least a decade following a similar decline in disputes filed – no real surprise to those who work in the FINRA arbitration space and have experienced the impact of recent bull markets, the transition of advisors away from broker-dealer firms to registered investment advisory firms, and advancements in firms' compliance and supervisory systems.

Types of Disputes: Nearly half (49.2%) of the disputes resolved through the FINRA arbitration process in the first nine months of 2023 were Employee–Member cases, and 29.6% were Customer–Member cases.

Employee–Member Disputes: The majority of allegations for Employee–Member disputes that were arbitrated through September 2023 involve Expungement of Customer Disputes and Reformation of U5 Disclosures. Together, these two allegations represent 95.9% of the total Employee–Member dispute allegations.

Customer–Member Disputes: The main eight allegations associated with Customer–Member disputes that were arbitrated through September 2023 [suitability; misrepresentation; failure to obey customer; loan default; unauthorized trading; breach of contract; misappropriations; churning] are listed in the table below. These allegations represent 82% of the total allegations seen in Customer-Member disputes arbitrated through September 2023.

The Hidden Statistic: A smaller percentage of Customer–Member disputes are being resolved through direct settlement: In 2022 and YTD 2023, FINRA reports the percentage of cases decided by Arbitrators has increased when compared to the prior three years. The same trend is exhibited for cases being decided through mediation, with the percentage of cases decided through direct settlement declining by close to 10%. *(ed: *Kudos to the Bates Group for compiling this analysis. We especially liked the charts and graphs. **Thank you for the h/t to the* Alert.*)*

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LENGTHY EXPLAINED AWARD DENIES RECOVERY TO MORE THAN 130 CUSTOMERS ON CLAIMS AGAINST A CLEARING BROKER-DEALER. ***The three-member FINRA arbitration panel rejects liability against a clearing broker that allegedly facilitated trading in fraudulent securities.*** The 33-page Award, *Cordova Armijos v. Raymond James & Associates, Inc.*, FINRA ID No. 18-02934 (Miami, FL, Nov. 1, 2023), includes 10 pages of explanation, issued after 305 evidentiary hearings, 93 witnesses, the Panel's review of more than 10,000 exhibits, and six days of oral argument. All quotations below are from the Award.

Parties and Allegations

The Second Amended Complaint increased the number of claimants (requiring a two-page caption to list them all), but three of them later withdrew without prejudice; therefore, the Award refers to them as "Amended Claimants" in the Case Summary and "Remaining Amended Claimants" when explaining the Panel's ruling. The respondents were: Raymond James & Associates, Inc. ("RJA"), Raymond James Financial Services, Inc. ("RJFS") and Insight Securities, Inc., the last of which the Remaining Amended Claimants voluntarily dismissed from the case. RJA had clearing agreements with the claimants, whose introducing brokers, "E.H. and her team," were affiliated with: "non-SEC (Securities and Exchange Commission) and non-FINRA (Financial Industry Regulatory Authority) registered, offshore broker-dealer Biscayne Capital BVI, Ltd. ('Biscayne Capital'), a British Virgin Islands entity." The Amended Customers: "were victims of a massive fraud orchestrated by the developers of a series of real estate projects in Florida that were in financial distress. Amended Claimants, primarily individual citizens of the Republic of Ecuador as well as Ecuadorian business entities and a religious organization, alleged that they suffered financial losses after having purchased in their investment accounts, knowingly or not, propriety products of the Biscayne Capital related companies."

Normal Clearing Firm Functions

The Panel finds that the Remaining Amended Claimants did not prove that RJA violated any law, regulation, rule or industry standard in its role as their clearing firm. "Upon the trade clearing, RJA would send out a confirmation to the account holder which reflected the price provided by Biscayne Capital…. RJA would also provide a link on the confirmation that would reroute to the SEC EDGAR website to permit the purchasing claimant to review the prospectus for the product purchased." Both of these, according to the arbitrators, were normal clearing firm functions, nor was there any evidence that any of the Remaining Amended Claimants used the link to view any of the relevant prospectuses. "RJA valued the Biscayne Capital proprietary bonds on the monthly statements it prepared through use of a value it obtained from a recognized third-party vendor. Remaining Amended Claimants presented no evidence that the valuation was not accurate." Otherwise, RJA merely cleared and custodied the securities at issue. "Consequently, the Panel finds, based on the evidence presented, that RJA had no substantial role in the sale or purchase of any of the Biscayne Capital propriety bonds to Remaining Amended Claimants."

No Red Flags and No Ponzi Scheme Until Afterward
RJA stopped clearing for Biscayne Capital accounts: "by the end of 2016. In 2017, some of the Biscayne Capital proprietary products, for the first time, stopped paying interest…. The Biscayne Capital proprietary bonds collapsed in late 2017, and the hint of a possible Ponzi scheme arose." In fact, "Remaining Amended Claimants presented no contemporaneous proof that the Biscayne Capital proprietary products were a Ponzi scheme when Remaining Amended Claimants' Biscayne Capital accounts were custodied at RJA," nor did they convince the Panel that there were any "red flags" of which RJA should have been aware at that time. The Panel finds that the Remaining Amended Claimants' "whistleblower," E.H., lacks credibility because she was, in fact, one of the brokers who engaged in the questionable trading and was trying to deflect blame from herself to RJA.

No Liability Against Raymond James Financial
The Panel also rejects the claim against Respondent RJFS. "A key to this claim is that one of Biscayne Capital's principals, F.C., as an independent contractor, maintained a branch for a few months at RJFS," which occurred in 2008. However, none of the Remaining Amended Claimants opened accounts at RJFS until after the collapse of the Biscayne Capital proprietary products in 2017, when two of the Remaining Amended Claimants transferred their accounts from Insight Securities. "There was no evidence presented at the hearing to even remotely suggest that F.C. had any involvement with these two accounts."

No Losses Suffered at Raymond James Either
Finally, the Panel accepts the testimony of the Respondents' damages expert, who testified that the Remaining Amended Claimants earned a profit when their accounts were custodied at RJA, over the Remaining Amended Claimants' damages expert, who: "assumed that every dollar invested by claimants with E.H. and her team at B.C. Corp. that was lost was chargeable to RJA, no matter where the product was purchased, no matter where the product was custodied, and no matter whether the product was transferred into or out of RJA." Remaining Amended Claimants' claims are denied in their entirety.
*(ed: *A SAA h/t to Terry R. Weiss, Esq., a partner at Duane Morris LLP in Atlanta, GA, who was one of RJA's and RJFS' attorneys, for alerting us to this Award. **For those wondering why the name of the case begins with a double surname, that is a convention of names in Spanish-speaking American countries; it combines both parents' surnames, beginning with that of the father. ***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.)*
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OH, WHAT A TANGLED WEB: DISTRICT COURT UPHOLDS FINRA PANEL'S $100K SANCTION FOR PERJURY. *Seested, III v. Schultz*, No. 9:22-cv-81047-DMM (S.D. Fla. Nov. 8, 2023), is a fine example of the consequences of lying in an arbitration. Here are the basic facts: "After the four-week hearing, the panel issued its Award, granting Seested $500,000.00 in compensatory damages jointly and severally against Schultz, Rothman, and Teichberg, and ordered them to reimburse Seested's costs related to the arbitration. Those portions of the Award have been paid and therefore all issues related to them are now moot. However, the panel also sanctioned Rothman $100,000.00 for his conduct during the hearing, and Rothman, through his Cross Petition, now challenges the legitimacy of that portion of the Award" (internal citations omitted). Specifically, the Award stated: "the panel finds that Respondent Rothman engaged in perjury by falsely testifying as to the creation of certain exhibits during the hearing and hereby awards sanctions of $100,000.00 against Respondent Rothman and in favor of Claimant." And the holding: "The gravamen of Rothman's Cross Petition is that the panel either exceeded its power or resolved an issue not properly submitted to it by finding that he 'engaged in perjury by testifying falsely.' Both arguments fail. The record shows that the panel was presented with the issues of whether Rothman testified falsely at the hearing and, if so, whether it should sanction him for it. Those issues were resolved in Seested's favor, and under the applicable arbitration rules, the panel was authorized to sanction Rothman—which is all it did. Rothman thus fails to clear the 'high hurdle' for vacatur or modification, and I therefore must confirm the sanction." The Court also finds that the FINRA panel acted consistent with the *Code of Arbitration Procedure*: "I am satisfied that the panel at least 'arguably' interpreted the Code, found that Rothman lied while under oath, and then applied the Code by sanctioning him. Thus, there is no basis to vacate the award…. And, despite Rothman's protestation, the use of the word 'perjury' in the panel's Award does not change anything."
*(ed: *Seems right. **Email us at Help@SecArbAlert.com for a copy of the decision.)*
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SDNY LAYS OUT GROUNDS FOR JURISDICTION UNDER THE UN CONVENTION. Most ADR practitioners are familiar with the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* ("Convention"), which has been adopted by 172 nations, including the United States when it enacted Chapter 2 of the Federal Arbitration Act in 1970. Less familiar are the requirements for federal court jurisdiction. *Exclusive Trim, Inc. v. Kastamonu Romania, S.A.*, No. 1:23-cv-03410 (S.D.N.Y. Oct. 12, 2023), offers a nice primer on the topic. First Judge **Andrew L. Carter** articulates the core jurisdictional elements: "An arbitration agreement falls within the scope of the New York Convention if four requirements are met: '(1) there must be a written agreement; (2) it must provide for arbitration in the territory of a signatory of the convention; (3) the subject matter must be commercial; and (4) it cannot be entirely domestic in scope.'" Applying the law to the facts of the case, the Court finds that it has jurisdiction: "The arbitral agreement in this matter falls within the scope of the New York Convention as the four jurisdictional requirements are satisfied. See *Dumitru*, 732 F. Supp. 2d at 335; 9 U.S.C. § 202. First, the Supply Agreement is a written agreement…. Second, both the United States and Romania

are signatories of the New York Convention. See New York Convention. Third, the subject matter of the Supply Agreement is commercial in nature. See Supply Agreement. Lastly, the Respondent is a foreign corporation and therefore the New York Convention applies. *Drip Cap., Inc.*, —F.Supp.3d—, 2023 WL 2707202, at *5 (collecting cases); *Commodities & Mins. Enter. Ltd.*, 49 F.4th at 809 (holding that an arbitration award is 'not considered domestic' if it is an award 'involving parties domiciled or having their principal place of business outside the enforcing jurisdiction') (quoting *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 932 (2d Cir. 1983)). Thus, the Court has jurisdiction under the New York Convention over this Petition."
(ed: Well-said!)
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FINRA SEEKS SUMMER INTERNS. FINRA recently posted on X (formerly known as Twitter) that it was seeking summer intern applicants: "Are you looking for an impactful and mission-driven internship? @FINRA might be the place for you…. Become a part of the #FINRAFam today!" The invitation links to FINRA's internship page, which states: "FINRA's Corporate Internship Program—a paid 10-week program—offers practical 'hands-on' experience with the largest self-regulatory organization for securities firms doing business in the United States. Our program offers interns opportunities to build their careers—and supplement what they've learned in the classroom—by meeting and working with employees throughout our organization.[] Our program runs from late-May through mid-August. Interns work a maximum of 40 hours per week at a competitive hourly pay rate."
*(ed:*Candidates can apply at this interactive search engine. **So far, we don't see any ADR-related positions, but it's early yet.)*
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QUICK TAKES: CASES AND AWARDS WORTH READING

***Edmundson v. Klarna, Inc*., No. 22-557-cv (2d Cir. Nov. 3, 2023)**: "There is no dispute that Klarna's terms include a mandatory arbitration provision, and that Edmundson's claims fall within the scope of that provision. Indeed, Edmundson concedes that if the arbitration provision is deemed enforceable as to her, she would be prohibited from adjudicating her claims against Klarna before the district court. Therefore, the only issues on appeal are whether (1) notice of Klarna's terms (and thus the arbitration provision contained therein) was reasonably clear and conspicuous such that a reasonable internet or smartphone user would be on inquiry notice of them, and (2) Edmundson objectively and unambiguously manifested assent to the terms. Because we conclude that Edmundson's interaction with the Klarna Widget satisfied these requirements, we conclude, as a matter of law and pursuant to this Court's precedents, that Edmundson agreed to arbitrate her claims against Klarna" (footnote omitted).

***McMurray Contracting, LLC v. Hardy*, No. SC-2023-0287 (Ala. Nov. 3, 2023)**: "In sum, on February 8, 2023, the circuit court entered an order denying McMurray's first motion to compel arbitration, which was based on the arbitration provision in the Authorization Agreement. On April 25, 2023, McMurray appealed the circuit court's

order denying McMurray's second motion to compel arbitration, which also was based on the arbitration provision in the Authorization Agreement. McMurray did not appeal the circuit court's February 8, 2023, order within 42 days of the entry of the order, and McMurray did not file a postjudgment motion that would have tolled the time for taking an appeal of the February 8, 2023, order. 'An appeal shall be dismissed if the notice of appeal was not timely filed to invoke the jurisdiction of the appellate court.' Rule 2(a)(1), Ala. R. App. P. Thus, we are compelled to dismiss McMurray's appeal."

***Brown v. GoJet Airlines, LLC*, No. SC99961 (Mo. Nov. 7, 2023)**: "GoJet Airlines, LLC, (GoJet) appeals the circuit court's judgment overruling its motion to compel arbitration in a breach of contract action filed by Hampton Brown (Brown). This Court has jurisdiction. Mo. Const. art. V, sec. 10. Because the parties' agreement is governed by the Missouri Uniform Arbitration Agreement (MUAA) and contains a delegation provision delegating threshold issues to an arbitrator Brown failed to challenge, the circuit court erred in refusing to compel arbitration. The circuit court's order overruling GoJet's motion to compel arbitration is vacated, and the case is remanded to compel arbitration."

***Badii v. UBS Financial*, FINRA ID No. 23-00625 (Los Angeles, CA Sep. 25, 2023)**: An Arbitrator awards Claimant broker expungement of one customer complaint from his CRD record, but denies his request for expungement of five more customer complaints after finding that none of these complaints meet the criteria under FINRA Rule 2080 for granting such relief. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Perry v. UMB Financial*, FINRA ID No.22-02618 (Kansas City, MO, Sep. 28, 2023)**: A broker loses her request for reformation of her Form U5 record, after the Arbitrator finds that she did not prove any of the allegations in her complaint seeking expungement and that the entries contained in the Form U5 were all accurate and fair. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*
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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Daniel, Andrew and Johnstone, Julie, *A Look At 2023 FINRA Arbitration Award Stats: What's Trending, What's Not?*, Bates Group (Nov. 9, 2023): "With the year wrapping up soon, we are taking a look at what is and is not trending in matters resolved through FINRA arbitration through the first nine months of 2023....The Big Picture – Fewer Cases Closing Each Year: Through September of each year, and on an annual basis, the number of disputes closed has been declining. This is a long-term trend going back at least a decade following a similar decline in disputes filed – no real surprise to those who work in the FINRA arbitration space and have experienced the impact of recent bull markets, the transition of advisors away from broker-dealer firms to registered investment advisory firms; and advancements in firms' compliance and supervisory systems (footnotes omitted). (*ed: See our coverage elsewhere in this* Alert.)

***Court Confirms $8.7 Million Arbitration Award Against OC Lawyer and Others in Partnership Dispute*, Lexology (Nov. 8, 2023):** "Orange County Superior Court Judge

William D. Claster confirmed an $8.7 million arbitration award against Orange County lawyer Steven A. Silverstein and two other defendants. The prevailing plaintiffs, Megan and Rob Ekstrom, are 50% limited partners in a family partnership formed with their parents in 1997 to purchase industrial property in the City of Industry. Following the divorce of their parents and their father's death in 2015, the charitable foundation formed by their father (Stanley W. Ekstrom Foundation) assumed the role of general partner. The Foundation is controlled by their father's lawyer (Silverstein) who serves as its president and Lawrence C. Felix, the former president of the Ekstrom family's powder coating business (Cardinal Paint and Powder). Mr. Silverstein also concurrently served as legal counsel to the partnership, the Foundation and Cardinal, and as chairman of the board of Cardinal."

***The Law on ERISA Plan Arbitration Provisions Remains Unsettled*, Lexology (Nov. 8, 2023)**: "Highlights: Courts continue to disagree over the enforceability of mandatory arbitration provisions containing class action waivers set forth in benefit plans governed by the Employee Retirement Income Security Act of 1974 (ERISA).[] In the absence of U.S. Supreme Court resolution, uncertainty will persist regarding the validity and enforceability of individual arbitration provisions in ERISA plans.[] Plan sponsors should expect to see more litigation over the arbitrability of ERISA Section 502(a)(2) claims in the near term, and thoughtfully drafted arbitration provisions are key to minimizing the risk of potential class action litigation."

***Which Came First: Forum Selection Clause or Arbitration Provision? SCOTUS to Decide*, JD Supra (Nov. 8, 2023):** "For the second time in as many years, the Supreme Court of the United States has agreed to hear an appeal from a prominent cryptocurrency exchange regarding the enforceability of its arbitration clause in the exchange's user agreements. The latest case involves a decision from the Ninth Circuit which affirmed a lower court's decision to deny the defendant's motion to compel arbitration, finding that a forum selection clause in a Sweepstake's 'Official Rules" superseded an arbitration clause in a user agreement.'

***The 2 Biggest Fights Brewing Over DOL's New Fiduciary Rule*, Think Advisor (Nov. 9, 2023)**: "Industry officials have been poring over the Labor Department's new fiduciary rule since it was released on Oct. 31, and while there are many noteworthy aspects to the plan, its treatment of rollover advice and insurance agent status is catching the most attention."

***Arbitrator Who Issued $14.9B Award Against Malaysia Indicted*, Law360 (Nov. 13, 2023)**: "Embattled Spanish arbitrator Gonzalo Stampa will face criminal charges in Madrid next month after awarding a $14.9 billion arbitral award against Malaysia in a territorial dispute with the heirs of the last sultan of Sulu, a proceeding decried by the country as a 'sham and abusive' arbitration."
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DID YOU KNOW?

A GREAT (AND FREE) SOURCE OF NEW COURT DECISIONS. One source of new case law we rely on is Justia. Says the Website: "Justia Daily Opinion Summaries is a free newsletter service with over 65 newsletters covering every federal appellate court and the highest court in each U.S. state.[] Justia also provides weekly practice area newsletters in 60+ different practice areas. All daily and weekly Justia Newsletters are free. You may request newsletters or modify your preferences by visiting daily.justia.com. You may freely redistribute this email in whole." There's an "Arbitration & Mediation" practice area."

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Mail to: 194 Carlton Terrace, Teaneck, NJ 07666
T: 917-841-0521
Web: www.SecArbAlert.com
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