SECURITIES ARBITRATION ALERT 2023-46 (12/7/23)

George H. Friedman, Editor-in-Chief

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- ***Dowlah v American Arbitration Assn*., 2023 NYSlipOp 05658 (NY Sup. Ct., App Div., 1st Dept. Nov. 9, 2023)**
- ***Carlor v. Merrill Lynch*, FINRA ID No. 23-00488 (Jersey City, NJ, Oct. 17, 2023)**
- ***Pearlman v. UBS Financial*, FINRA ID No.19-02681 (New York, NY, Oct. 27, 2023)**

ARTICLES OF INTEREST:

- **Ng, Camille, Guys, Martin, and Jakovcic, Jadranka, *Unravelling NAFTA and Entering the USMCA Era,* Lexology (Nov. 21, 2023)**
- ***Do Arbitrators Have the Power to Order Third-Party Discovery in California Arbitrations?,* Lexology (Nov. 19. 2023)**
- ***U.S. Treasury Announces Largest Settlements in History with World's Largest Virtual Currency Exchange Binance for Violations of U.S. Anti-Money Laundering and Sanctions Laws,* www.treasury.gov (Nov. 21, 2023)**
- ***Delaware-based Vocational Education Company Misled Students on Loans, Must Void Debts,* Delaware Online (Nov. 22, 2023)**
- ***States Comply Less With Investment Treaty Arbitration Awards: Insights from a 2023 Report on Compliance,* Kluwer Arbitration Blog (Nov. 26, 2023)**
- ***Finra Sidelines Ex-Wells Fargo Broker Over Outside Account in Wife's Name*, AdvisorHub (Nov. 27, 2023)**

DID YOU KNOW?

- **JAMS has a Searchable Neutrals Database**

SQUIBS: IN-DEPTH ANALYSIS

FINRA DRS POSTS STATS THROUGH OCTOBER. INDUSTRY CASES ARE SURGING. ***FINRA Dispute Resolution Services ("DRS") has posted case statistics through October, with trends continuing to show a comparatively strong year in arbitration filings – especially industry cases – and a continued drop-off in mediations.*** We offer these headlines at the year's ten-month mark: 1) overall arbitration filings

through **October** – 2,929 cases – are up 34% for the year (was plus 25% in **September)**; 2) cumulative customer claims increased 12% (was plus 14% last month); 3) industry arbitration filings were up a whopping ***72%*** (this stat was up 43% in September); and 4) the long-term decline in mediation cases continue. There were 486 new arbitrations filed in October, compared to 262 new cases in September.

The Industry Surge
What's behind the industry surge in case filings? In brief: employment-related matters. The *Top 15 Controversy Types in Intra-Industry Arbitrations* stat shows that several categories through October already exceed 2022's full-year case filings:

- Breach of contract: At 248 cases, already exceeds full-year 2022's 225 cases
- Promissory notes: At 132 cases, already exceeds full-year 2022's 84 cases
- Libel or slander on Form U-5: At 90 cases, already exceeds full-year 2022's 84 cases
- Libel, slander, or defamation: At 79 cases, already exceeds full-year 2022's 69 cases
- Wrongful termination: At 61 cases, already exceeds full-year 2022's 50 cases

The DRS forum is quickly becoming dominated by industry cases; almost half (47%) of this year's arbitration filings are industry disputes.

Continued Decline in Mediation
There were 544 mediation cases in agreement, a 27% decrease from 2022. Although this stat ticked up in September, it has resumed its long-term decline and has mostly been declining steadily in recent months. This stat 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 15.1 months (a slight decrease), with hearing cases now taking 18.1 months (also a slight decrease). There are now 8,431 DRS arbitrators, 4,118 public and 4,313 non-public. This stat was up across the board last month. Pending cases stand at 3,494, up 162 from September.
*(ed: *If the trend holds, the 2,929 arbitrations filed through October straight-lines to about 3,500 yearly arbitration filings, still a decent year by recent measures. Last year there were 2,671 arbitration case filings for the entire year. 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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ELEVENTH CIRCUIT: NEW YORK CONVENTION DOES NOT GIVE COURT CONFIRMING A FOREIGN AWARD JURISDICTION OVER ASSETS OF LOSING RESPONDENT IN CONTROL OF ANOTHER COURT. ***A federal court of appeals overturns a district court's injunction against the disbursement of a debtor's funds needed to pay a Singapore arbitration monetary award, because it would***

interfere with a different court's control over those funds. The decision in question is *Noble Prestige Limited v. Galle*, No. 22-11520 (11th Cir. Oct. 16, 2023). Noble Prestige Limited ("Noble") lent Paul Thomas Horn ("Horn") $500,000 to pursue litigation against AT&T in consideration for either $5 million or five percent of the recovery, if the latter would equal a larger amount. During the litigation, the Denver Probate Court ("Probate Court"), a Colorado state court, declared Horn mentally incompetent and appointed as conservator Horn's litigation attorney, Craig Thomas Galle ("Galle"). Galle subsequently settled the litigation for $57.5 million and placed the proceeds into the conservatorship estate, but the Probate Court refused to approve the payment of $5 million to Noble because of its concerns about the legality of the agreement.

The Arbitration and District Court Follow-Up

Noble filed an arbitration at the Hong Kong International Arbitration Center ("HKIAC") to determine its entitlement to payment, in accordance with an arbitration clause in the loan agreement. The Probate Court appointed Galle to represent Horn in the arbitration and hire local Hong Kong counsel, but the arbitration panel ruled that Galle had no authority under Hong Kong law to represent Horn, and prohibited him from participating in the arbitration until he obtained such authority (which he never did). The arbitration proceeded without any representation on behalf of Horn, resulting in an award of $5 million in compensatory damages, attorney fees, costs (amounting to 7 million Hong Kong dollars) and interest. Noble filed a petition to confirm and enforce the Award in the U.S. District Court for the Southern District of Florida, naming Horn, Galle and Galle's law firm as respondents. Noble also filed an *ex parte* application for a temporary restraining order prohibiting respondents from transferring any money out of their accounts beyond the amount due on the Award. The District Court granted the "temporary restraining order," ordering Galle and his firm not to "dissipate, transfer, send, sequester, or deplete, or cause or permit the dissipation, transfer, sending, sequestration, or depletion of, the sum of US$ 10,000,000" of the amount remaining from the litigation settlement on behalf of Horn, but did not set an expiration date for this order.

The Federal Court Has No Jurisdiction Over the Conservatorship …

On appeal, the U.S. Court of Appeals accepts jurisdiction over the "temporary restraining order," which would normally be unappealable, deeming it to be a temporary injunction, since it changed the *status quo* and had no expiration date, and since respondents opposed the motion in the District Court. Turning to the merits, the appellate Court vacates the order for two reasons. First, it rules, the District Court lacks jurisdiction to issue the order because the Probate Court has "prior exclusive jurisdiction" over the conservatorship with control over the funds. Noble argues in part that, because the U.S. Constitution gives federal law primacy over state law, and the New York Convention, as incorporated into the Federal Arbitration Act, authorizes district courts to enforce foreign Awards, the district court's injunctive order in this case likewise trumps the Probate Court's jurisdiction over the AT&T settlement proceeds. The Court disagrees: "Whether the district court had the power to issue preliminary injunctive relief that would interfere with the Denver Probate Court's prior exclusive jurisdiction over the AT&T settlement funds

does not implicate any conflict between the New York Convention and state law, or any other law for that matter. If anything, the prior exclusive jurisdiction doctrine implicates potential conflicts between the exercise of jurisdiction of state courts and federal courts over a *res* – not conflicts between state and federal law."

… And Claimant Made No Request for Final Equitable Relief

Second, the Court holds that "since Noble's Petition seeks only legal (not equitable) relief, the district court lacked the power to issue preliminary injunctive relief freezing Respondents' assets pursuant to Rule 65." The request for a temporary restraining order was not one for final relief, and Noble's only request for final relief was to confirm and enforce the Award. Although Noble had a security interest in the settlement proceeds: "in pursuing arbitration before the HKIAC Tribunal, Noble elected to obtain an award against Horn *in personam* on the underlying debt, rather than attempt to foreclose on its security interest.…[] Accordingly, the Awards issued by the HKIAC Tribunal were legal, rather than equitable in nature. An action in district court to confirm and enforce an *in personam* award rendered by an arbitral panel remains the confirmation of an *in personam* award…. Nor does Noble's generic request for 'such other relief as this Court deems just and proper, including costs,' transform the confirmation of an *in personam* award into an action seeking equitable relief."

*(ed: *The District Court may still confirm the Award and Noble may then seek to enforce it in Colorado. However, the New York Convention gives Respondents at least two good faith defenses to confirmation and enforcement of the Award: "(a) The parties to the agreement … were, under the law applicable to them, under some incapacity…. or[] (b) The party against whom the award is invoked was … unable to present his case." On the other hand, if the district court confirms the Award and the inevitable appeal affirms that decision, the Probate Court might have no option but to enforce the Award. We will track this one. **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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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

***AMICUS* BRIEFS ALREADY COMING IN ON FAA SECTION 1 CASE AT SCOTUS**. We reported in SAA 2023-38 (Oct. 5) that the Supreme Court's **September 29** Order List contained a *Certiorari* grant 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?" Perusal of the case's docket reveals that several *Amicus* briefs have already been filed, among them from: American Association for Justice; National Academy of Arbitrators; National Employment Law Project; National Employment Lawyers Association; and Public Justice. Most recently, a coalition of Democratic attorneys general (from California, Colorado, the District of Columbia, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington) filed an amicus brief: "to urge reversal of the court of appeals, which incorrectly held that the exemption in Section 1 of the Federal Arbitration Act ('FAA') for 'contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce,' 9 U.S.C. § 1, applies only to workers employed by a company in the transportation industry."
*(ed: *Oral argument has not yet been scheduled. **The underlying case is 59 F.4th 594 (2d Cir. Feb. 22, 2023).***Cert. has also been granted in another arbitration-centric case,* Coinbase v. Suski, *No. 23-3, but no* Amicus *briefs have been filed so far.)*
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WYOMING SUPREME COURT FINDS NO WAIVER OF ARBITRATION RIGHTS. Waiver of the right to require arbitration pursuant to a predispute arbitration agreement is typically determined by assessing the degree to which that party participated in litigation and whether this prejudiced the other side. A case in point is *Empres at Riverton, LLC v. Osborne*, 2023 WY 112 (Nov. 20, 2023). In this unanimous Opinion, the Wyoming Supreme Court weighs these factors and finds no waiver: "Appellees were aware that Wind River Rehabilitation would invoke its right to arbitration as early as the proceedings before the Medical Review Panel. The right to arbitration was again asserted as an affirmative defense in the Answer. Those early filings were consistent with an intent to arbitrate. The litigation activity that followed was limited: the motion to admit pro hac vice counsel was a nominal activity requiring no response by Appellee, and the filing of a jury demand and exchange of initial disclosures were timely required by rule. See W.R.C.P. 26 (requiring timely initial disclosures), 38(b)(1) (specifying the deadline to file jury demand). It does not appear from the record that other discovery was extensive. No motions practice or decisions on the merits had yet occurred which could indicate that Wind River Rehabilitation was seeking to avoid an adverse outcome or seeking a different forum. And we find no indication in the record that the delay in filing was willful or in bad faith.… However, delay, even an unreasonable delay, is not enough to establish intent to relinquish the right to arbitration given the nature and scope of litigation that had occurred in this case prior to the motion to compel arbitration."
(ed: Seems right.)
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AAA OFFERS RECORDED WEBINAR ON RECOVERING ATTORNEYS' FEES AND COSTS. The AAA is offering *Everything an Advocate Needs to Know About Winning Attorney Fees and Costs in an Arbitration*, a self-paced recorded 90-minute Webinar. Says the event Webpage: "Attorney fees, arbitration costs and interest often constitute a significant portion of an arbitration award. This Webinar focuses on how

arbitrators decide whether to award attorney fees, arbitration costs and interest, and in what amounts. This perspective will help you better advance your client's interests in arbitration whether you are seeking, or opposing, fee and cost awards." Serving as faculty are: **Jonathan Polland** of Polland Resolution Services and **Dana Welch** of Dana Welch ADR. Registration is $50 and is done online. The AAA does not offer CLE for online programs, but registrants: "may be able to use a copy of the certificate available at the conclusion of the course to submit for CLE credit on your own …."
(ed: Questions? Contact AAA Education Services at aaaeducation@adr.org or 212-484-4096.)
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QUICK TAKES: CASES AND AWARDS WORTH READING

***Narra v. Skyhop Technologies, Inc.*, No. 23-cv-01587-PCP (N.D. Calif. Nov. 22, 2023)**: "Petitioners were awarded $1,073,899 in a contract dispute arbitration. They petitioned this Court to confirm the award pursuant to the Federal Arbitration Act. Respondents paid the award in full three days later. They then moved to dismiss the petition to confirm the award as moot. For the reasons that follow, the petition is not moot because Petitioners still have a concrete interest in confirmation. The motion to dismiss is therefore denied." (*ed: An* Alert *h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this decision.*)

***State of Cal. v. Alco Harvest*, No. B327137 (Calif. Ct. App. 2 Nov. 22, 2023**: "Plaintiff and respondent Jesus Guzman is a foreign worker hired by defendant and appellant Alco Harvesting LLC to work at farms owned by defendant and appellant Betteravia Farms. He later brought employment claims against appellants. Alco moved to compel arbitration pursuant to an arbitration agreement presented to and signed by Guzman at his orientation. The trial court found the agreement void and denied the motion. It considered arbitration a 'material term and condition' of Guzman's employment, and as such, a job requirement that Alco should have disclosed during the H-2A certification process. We affirm."

***Dowlah v American Arbitration Assn*., 2023 NYSlipOp 05658 (NY Sup. Ct., App Div., 1st Dept. Nov. 9, 2023)**: "The complaint is also barred on the basis of res judicata and collateral estoppel. On plaintiff's previous appeal, in which he also sought to set aside the arbitration award, this Court rejected the same argument that he makes in this action — namely, that the arbitration award is invalid and must be set aside under CPLR article 75 because the arbitration proceeding was improper and because the findings by arbitrator Gaines were unsupported by the record and were arbitrary and capricious. That plaintiff has pleaded different causes of action and included new parties is of no moment. Although the parties in both actions are not identical, plaintiff, the party against whom preclusion is sought, was a party in the earlier action. In addition, the current claims are based on the same transaction as in the earlier action, and are therefore barred even though they are based upon different theories.[] Dismissal of the complaint is warranted on other grounds, as well. Both AAA and Gaines are protected by immunity, as their acts were performed in their arbitral capacity" (footnotes omitted).

***Carlor v. Merrill Lynch*, FINRA ID No. 23-00488 (Jersey City, NJ, Oct. 17, 2023)**: A Panel unanimously grants Respondent broker-dealer's Prehearing Motion to Dismiss after finding that Claimant's request for reformation of his Form U5 record is time-barred under the one-year statute of limitations and pursuant to Rule 13504 (res judicata). He already entered into a settlement and release with Respondent broker-dealer regarding the same claims." *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Pearlman v. UBS Financial*, FINRA ID No.19-02681 (New York, NY, Oct. 27, 2023)**: Two customers alleging unsuitability with respect to their placement in Respondent broker-dealer's Yield Enhancement Options Strategy (YES) and seeking rescission of their investment, are awarded over $3 million in compensatory damages. Non-Party broker loses his request for expungement of this matter from his 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

Ng, Camille, Guys, Martin, and Jakovcic, Jadranka, *Unravelling NAFTA and Entering the USMCA Era*, Lexology (Nov. 21, 2023): "On 1 July 2020, the North American Free Trade Agreement (NAFTA) was replaced by another tripartite agreement: the Agreement between the United States of America, the United Mexican States and Canada (USMCA).2 While NAFTA may have been terminated, its investor-state dispute settlement (ISDS) regime continues to define disputes today. Up until 1 July 2023, the USMCA preserved ISDS rights for legacy investments under NAFTA. Necessitating this preservation of rights was the radical overhaul of the ISDS regime under the USMCA. The significant tightening of the substantive rights for US investors in Mexico and Mexican investors in the United States, especially those who are not parties to a covered government contract, and Canada's blanket exclusion from the ISDS mechanism, count among the disadvantages of the USMCA compared to NAFTA."

***Do Arbitrators Have the Power to Order Third-Party Discovery in California Arbitrations?*, Lexology (Nov. 20. 2023**): "Let's begin by defining what a 'third-party subpoena' is. A third-party subpoena is any subpoena issued in the course of a proceeding to someone who is not a plaintiff, defendant or intervenor in the lawsuit, or, in the arbitral forum, someone who is not a claimant or respondent. This includes eyewitnesses and custodians of records for organizations. California's Civil Discovery Act allows parties to obtain evidence from a third party via three methods: oral deposition, in which a witness provides sworn testimony on the record; written deposition, in which a witness provides written answers under penalty of perjury; and production of business records and other materials."

***U.S. Treasury Announces Largest Settlements in History with World's Largest Virtual Currency Exchange Binance for Violations of U.S. Anti-Money Laundering and Sanctions Laws*, www.treasury.gov (Nov. 21, 2023)**: "The U.S. Department of the Treasury, through the Financial Crimes Enforcement Network (FinCEN), the Office of

Foreign Assets Control (OFAC), and IRS Criminal Investigation (CI), has taken unprecedented action to hold Binance Holdings Ltd. and its affiliates (collectively, Binance) accountable for violations of the U.S. anti-money laundering (AML) and sanctions laws that protect American national security and the integrity of the international financial system. Binance is the world's largest virtual currency exchange, responsible for an estimated 60% of centralized virtual currency spot trading.[] Today, Binance settled with FinCEN and OFAC for violations of the Bank Secrecy Act (BSA) and apparent violations of multiple sanctions programs. The violations include failure to implement programs to prevent and report suspicious transactions with terrorists …."

Delaware-based Vocational Education Company Misled Students on Loans, Must Void Debts, **Delaware Online (Nov. 22, 2023)**: "Student lender and supposed online job training program Prehired must pay more than $30 million to student borrowers nationwide after an investigation by the Consumer Protection Unit, according to the Delaware Department of Justice…. Prehired then refiled the cases on Ejudicate, an online arbitration platform, even though students did not agree to arbitrate on the platform. A judgment filed Monday by the U.S. District Bankruptcy Court for Delaware requires Prehired and its two associated LLCs to repay $4.2 million in redress to affected customers and void $27 million in outstanding loans from students. It also bans the company from advertising, marketing, selling or helping to sell any vocational education services, including collecting debts."

States Comply Less With Investment Treaty Arbitration Awards: Insights from a 2023 Report on Compliance**, Kluwer Arbitration Blog (Nov. 26, 2023)**: "In light of the termination of intra-EU international investment agreements (IIAs), the failure to approve the modernized Energy Charter Treaty (ECT) by the EU and its member states as well as the ongoing discussions of reforming the Investor-State Dispute Settlement (ISDS) mechanism, in particular within UNCITRAL Working Group III, this Report takes stock of the track record of States' compliance with adverse ISDS awards compared to the first report published in October 2022."

Finra Sidelines Ex-Wells Fargo Broker Over Outside Account in Wife's Name**, AdvisorHub (Nov. 27, 2023)**: "The Financial Industry Regulatory Authority fined and suspended a former Wells Fargo advisor in Paramus, New Jersey for maintaining an unreported outside brokerage account in his wife's name, according to a letter of settlement. [Advisor], a 27-year industry veteran, accepted a $10,000 fine and six-month suspension for violating Finra's rule prohibiting brokers from holding an account in which they have a 'beneficial interest' at another firm without their employer's approval and its catch-all Rule 2010 requiring "high standards" of conduct, according to the letter."

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DID YOU KNOW?

JAMS HAS A SEARCHABLE NEUTRALS DATABASE. The Search Neutrals Directory database allows searches by: neutral name; keyword(s); neutral role; location;

practice areas; judicial background; or language. Results can be filtered for diversity. Full bios can be printed or saved in PDF format.
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Mail to: 194 Carlton Terrace, Teaneck, NJ 07666
T: 917-841-0521
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