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## Finding Light in Arbitration's Dark Shadow

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# FINDING *LIGHT IN ARBITRATION'S DARK SHADOW*

Nicole G. Iannarone\*

## INTRODUCTION

In “Arbitration’s Dark Shadow,” Professor Benjamin P. Edwards outlines harms arising from industry-wide adoption of pre-dispute arbitration agreements (PDAAs) that remove certain classes of disputes between sophisticated repeat players and consumers with little to no bargaining power from state and federal courts.<sup>1</sup> Edwards discusses the lack of transparency when PDAAs are used, leading to informational asymmetries skewed against consumers.<sup>2</sup> He describes arbitrators who do not apply law, and the unfortunate phenomenon where law ceases to further develop in industries where arbitration is the primary means of dispute resolution.<sup>3</sup> Edwards concludes by suggesting regulatory intervention on behalf of consumer interests as a solution for addressing the harms arising from industry-wide PDAAs.<sup>4</sup>

Edwards’ bleak picture focuses on the dark. But at the edges of the shadow arbitration casts over consumer disputes, a bit of light glimmers. This short essay in response to “Arbitration’s Dark Shadow” examines the light visible at the borders of mandatory arbitration’s shadow in one industry Professor Edwards highlights – securities disputes between an investor customer and a broker-dealer.<sup>5</sup> Though Edwards is correct that mandatory arbitration is often a black box emmeshed in shadow, the few instances where light exists in the form of public data should be highlighted, examined, and studied. We should not close our eyes in the dark. Instead, we should adjust to lessened light and determine what we can learn from the information we can see.

This short essay begins by describing the publicly available information made available by the Financial Industry Regulatory Authority (FINRA) about

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<sup>1</sup> Benjamin P. Edwards, *Arbitration’s Dark Shadow*, 18 NEV. L. J. 427, 428 (2018).

<sup>2</sup> *Id.* at 431 (“Importantly, arbitration also often removes the frequency, type, and result of disputes from the public eye, undercutting reputation’s ability to police market behavior”); *see also id.* (“Arbitration and private dispute resolution remove a discovery and broadcast channel for reputational information, making it less likely that non-legal market forces will deter misbehavior.”).

<sup>3</sup> *Id.* at 432–434.

<sup>4</sup> *Id.* at 435 (“Lifting this shadow may require federal intervention to lessen industries’ ability to impose arbitration on nearly all consumers.”).

<sup>5</sup> *Id.* at 430 (“arbitration agreements also cover nearly all brokerage industry contracts”).

its securities arbitration forum. It then proceeds to evaluate whether those sources provide adequate transparency as they stand, where additional study is required, and whether additional information or different presentation of information is needed. Reviewing the availability and adequacy of data concerning consumer securities arbitration proceedings provides a path for creating more light in an otherwise dark space.

#### I. I. PUBLIC INFORMATION CONCERNING ARBITRATION OF CONSUMER SECURITIES CLAIMS

When a consumer investor has a dispute with a stockbroker, she is almost always required to submit any claims arising therefrom to arbitration before FINRA.<sup>6</sup> Even without a PDAA mandating arbitration, any investor who has a dispute with a stockbroker may initiate arbitration and the broker is required to arbitrate by FINRA rules.<sup>7</sup> Information concerning the facts and resolution of consumers' disputes with a stockbroker are publicly available from several sources, including the arbitration forum and other regulatory forums.

First, and perhaps most intuitively, FINRA Dispute Resolution, the division of FINRA that oversees the securities arbitration process, publicly provides information about the forum and the claims within it.<sup>8</sup> FINRA Dispute Resolution oversees more securities arbitration and mediation proceedings than any other dispute resolution forum in the country, which means that has the ability to provide information from which scholars can study the effect of industry-wide PDAs on consumers.<sup>9</sup> To its credit, FINRA does provide an uncommon level of information about securities arbitration: unlike most indus-

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<sup>6</sup> *Id.* See also FINRA, RULE 12200 (2008) (requiring arbitration of securities disputes between customer and broker if PDAA exists or customer elects arbitration); Barbara Black, *Can Behavioral Economics Inform our Understanding of Securities Arbitration?*, 12 TENN. J. BUS. L. 107, 107 (2011); Jill Gross, *The End of Mandatory Securities Arbitration?*, 30 PACE L. REV. 1174, 1179 (2010) (describing securities industry arbitration forum and near universal arbitration of customer disputes against brokerage firms and brokers before FINRA Dispute Resolution); Christine Lazaro, *Has Expungement Broken BrokerCheck?*, 14 J. BUS. SECUR. L. 125, 127 (2014) (“Notably, nearly every account opening agreement contains a pre-dispute arbitration clause requiring customers to submit disputes that may arise between them and their broker or brokerage firm to FINRA.”).

FINRA also oversees a forum for the arbitration of claims between members of the securities industry, subject to a slightly different procedural code than that applicable to customer claims. See FINRA, RULE 13000–13905 (2012). Claims overseen by this forum include statutory employment disputes voluntarily submitted to arbitration at the agreement of the parties. FINRA, RULE 13201 (2012).

<sup>7</sup> FINRA, RULE 12200 (2008) (“Parties must arbitrate a dispute under the Code if: ... (2) Requested by the customer; The dispute is between a customer and a member or associated person of a member; and The dispute arises in connection with the business activities of the member or associated person...”).

<sup>8</sup> See, e.g., *Disputes Resolution Statistics*, FINRA, [www.finra.org/arbitration-mediation/dispute-resolution-statistics](http://www.finra.org/arbitration-mediation/dispute-resolution-statistics) (last visited Nov. 25, 2019).

<sup>9</sup> *Arbitration and Mediation*, FINRA, <http://www.finra.org/arbitration-mediation>. [<https://perma.cc/Y6KV-WCRR>] (last visited Nov. 25, 2019) (“FINRA operates the largest securities dispute resolution forum in the United States”).

tries in which PDAAs predominate, the final result of every arbitration proceeding before FINRA, recorded in a document called an award,<sup>10</sup> is published and publicly available.<sup>11</sup> FINRA maintains a searchable database containing all arbitration awards and the limited, basic, information they contain.<sup>12</sup> Each award lists specific information, including: party names, party representatives (who may or may not be lawyers), a summary of the claim and issues, damages requested and awarded, the dates of the institution of the claim and when it concluded via award, where the hearing was located, and the names of the arbitrator(s) in the proceeding.<sup>13</sup> While such large amounts of information might be seen as a treasure trove to researchers, as compared to court orders in litigation, however, FINRA awards are curiously lacking: the vast majority of FINRA awards do not contain any detail as to how or why the arbitration panel reached its decision.<sup>14</sup> Instead, after outlining the general nature of the dispute and the procedural posture, with few words, an award concludes with a bare assertion of the proceeding's outcome.<sup>15</sup>

Outside of its Dispute Resolution forum and part of its broader regulatory function, FINRA makes some available information concerning consumer complaints and arbitration proceedings. Counterintuitively, BrokerCheck, a resource that regulators encourage consumer investors to use to vet potential stockbrokers before hiring them,<sup>16</sup> contains the details and resolution of investor complaints.<sup>17</sup> BrokerCheck's records on individual stockbrokers provide more information than the FINRA awards database, listing informal complaints consumers make directly to brokerage houses related to the associated person as well as formal, filed arbitration proceedings.<sup>18</sup> This information is derived from information FINRA receives as part of its regulatory watchdog function.<sup>19</sup> Under the FINRA regulatory framework, when a broker and a customer have a dispute, the broker and her firm are required to report it, and it is then included

<sup>10</sup> FINRA, RULE 12100(c) (2017) ("An award is a document stating the disposition of a case."). Awards are rendered whether the customer initiating the case wins or loses the underlying arbitration case. FINRA, RULE 12904 (2018).

<sup>11</sup> FINRA, RULE 12904(h) (2018) ("All awards shall be made publicly available.").

<sup>12</sup> See *Arbitration Awards Online*, FINRA, <https://www.finra.org/arbitration-mediation/arbitration-awards> [<https://perma.cc/UT84-FEH7>] (last visited Nov. 25, 2019).

<sup>13</sup> FINRA, RULE 12904(e) (2018) (listing requirement elements of all awards).

<sup>14</sup> *Id.* See also Edward Brunet, *Toward Changing Models of Securities Arbitration*, 62 BROOK. L. REV. 1459, 1484 (1996) ("Awards remain inscrutable documents that give the losing party no idea whatsoever of the basis for decision. A statement summarizing the issues in an arbitration is a far cry from a statement of reasons. The arbitration loser wonders why the loss occurred and whether the arbitrators really understood the issues presented.").

<sup>15</sup> *Id.*

<sup>16</sup> BrokerCheck, [www.brokercheck.finra.org](http://www.brokercheck.finra.org) (last visited Nov. 25, 2019) ("BrokerCheck is a free tool to research the background and experience of financial brokers, advisers and firms.").

<sup>17</sup> Seth E. Lipner, *The Expungement of Customer Complaint CRD Information Following the Settlement of a FINRA Arbitration*, 19 FORDHAM J. CORP. FINANC. L. 57, 65–67 (2013) (describing customer complaint information and inclusion on broker's CRD records).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

within the Central Registration Depository (CRD) record of the broker.<sup>20</sup> Web CRD, operated by FINRA, is “the central licensing and registration system used by the U.S. Securities industry and its regulators” and “contains the registration records of broker-dealer firms and their associated individuals including their qualification, employment and disclosure histories.”<sup>21</sup> Broker CRD records include a wide variety of customer complaints because regulators have broadly characterized what constitutes a dispute.<sup>22</sup> Thus oral and written complaints, whether a FINRA arbitration claim is initiated or not, must be reported on the broker’s CRD.<sup>23</sup> After a dispute is reported, its resolution is recorded, and a broker has the opportunity to respond to the customer’s allegations.<sup>24</sup> Though not all information contained within Web CRD is publicly accessible, a subset of the information is used to populate FINRA’s BrokerCheck tool, an online searchable system that allows the public to research stockbrokers and broker-dealer firms.<sup>25</sup>

The availability of a broad class of consumer complaints, disputes, resolutions, and broker commentary on those disputes via BrokerCheck makes it a richer data set than FINRA’s arbitration awards database. FINRA’s awards database makes available final awards, meaning that an award is only available if a claim proceeds through the entire arbitration process and the arbitration panel renders a decision, while BrokerCheck will list an arbitration claim involving a stockbroker (whether or not she is personally a party) and describe what happened within that arbitration even if it did not proceed to a final hearing.<sup>26</sup> Unlike the FINRA awards database, BrokerCheck records on stockbrokers contain information about how any type of customer dispute, including those that never

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<sup>20</sup> *Id.* at 66 (“The record of customer complaints on a broker’s CRD is called “customer dispute information.” Customer dispute information includes: (a) written complaints, (b) arbitrations that name the broker as a party, (c) litigation that names the broker as a party, and (d) arbitration awards and civil judgments. In addition, since 2009, arbitrations and litigations in which the broker is not named as a party must be reported on CRD if the pleading alleges that the broker was involved in a sales practice violation.”)

<sup>21</sup> *Central Registration Depository (Web CRD)*, FINRA, <http://www.finra.org/industry/crd> [<https://perma.cc/7DU9-QCW3>] (last visited Nov. 25, 2019).

<sup>22</sup> Lazaro, *supra* note 6 at 128–29 (describing detailed questions related to customer disputes that brokers must answer as part of their disclosure obligations); Lipner, *supra* note 17 at 66.

<sup>23</sup> Lipner, *supra* note 17 at 66.

<sup>24</sup> Kaitlyn Kiernan, *Your Broker Has a Customer Complaint on BrokerCheck. Now What?*, FINRA (May 6, 2015), <https://www.finra.org/investors/insights/your-broker-has-customer-complaint-brokercheck-now-what> [<https://perma.cc/USN2-RZUP>] (“When a broker reports a customer complaint, they are given an opportunity to provide comments about the matter.”).

<sup>25</sup> Lazaro, *supra* note 6 at 130 (“Today, the public may access information about brokers through FINRA’s BrokerCheck system, an internet portal which provides the public with access to only some of the information contained in the CRD database.”); *About BrokerCheck*, FINRA, <http://www.finra.org/investors/about-brokercheck> [<https://perma.cc/78TQ-4K6Y>] (last visited Nov. 25, 2019). BrokerCheck can be accessed at <https://brokercheck.finra.org> [<https://perma.cc/82VG-YVD8>].

<sup>26</sup> *Compare Decision & Award*, FINRA, <https://www.finra.org/arbitration-mediation/decision-award> [<https://perma.cc/UT84-FEH7>] (last visited Nov. 25, 2019) (describing when arbitration awards issued and content of awards) *with About BrokerCheck*, *supra* note 25 (describing content of BrokerCheck records).

evolved into a formal arbitration claim, was resolved, and if settled, the amount of the settlement.<sup>27</sup>

BrokerCheck's disclosure feature sets FINRA-registered representatives apart from other professionals like doctors and lawyers.<sup>28</sup> FINRA urges customers to use BrokerCheck when evaluating potential stockbrokers, though it is not clear how many investors are aware of this tool or use it prior to retaining a stockbroker.<sup>29</sup> Nevertheless, CRD disclosures serve the public interest of providing information about the backgrounds of stockbrokers.<sup>30</sup> BrokerCheck serves as an equally valuable source for researchers and is an underutilized data source for those interested in evaluating consumer experiences in FINRA arbitration proceedings.<sup>31</sup> Because of the wide range of information required to be reported, filed arbitration claims are described on an individual broker's CRD whether or not the broker is named in the arbitration proceeding.<sup>32</sup> BrokerCheck thus serves as the broadest source of publicly available information about consumer experiences in arbitration, and is arguably a more important resource to consumers than the FINRA awards database.

Other information concerning the consumer experience in securities arbitration can be found on the Arbitrator Disclosure Reports FINRA prepares for every person within the FINRA arbitrator pool.<sup>33</sup> The information on these reports detail the background, experience, award history, and potential conflicts of interest of all neutrals who may be called upon to serve on a panel and ulti-

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<sup>27</sup> *About BrokerCheck*, *supra* note 25. Though outside the scope of this short response essay, the public availability of arbitration claims filed against brokers and their resolution, including settlement, on CRD records mandates further research and study, which this author is undertaking, as to the public utility and feasibility of expanding FINRA's awards database to include stipulated settlements and prohibiting broker dealers and their associated persons from including confidentiality clauses in settlement agreements with investor customers.

<sup>28</sup> Lazaro, *supra* note 6 at 125 ("Brokers have broad disclosure obligations and, unlike most other occupations, these obligations require the disclosure of even mere allegations of wrongdoing against a broker."); Lipner, *supra* note 17 at 95 ("The fact that CRD provides easy public Internet access to information about arbitrations filed by customers of brokerage firms is unique in filling a significant gap in the public record.").

<sup>29</sup> *BrokerCheck*, FINRA, <https://brokercheck.finra.org> [<https://perma.cc/82VG-YVD8>] (last visited Nov. 25, 2019) ("BrokerCheck helps you make informed choices about brokers and brokerage firms-and provides easy access to investment adviser information.").

<sup>30</sup> Lazaro, *supra* note 6 at 127 ("Without disclosures from FINRA, customers would not be able to determine whether other customers had filed complaints about a particular broker or, if such complaints had been filed, how many there are").

<sup>31</sup> Though outside the scope of this piece, in a separate project, the author and Professor Charlotte Alexander are currently exploring uniting BrokerCheck and FINRA Awards Database data to explore the full range of customer experiences in securities dispute resolution.

<sup>32</sup> Lipner, *supra* note 17 at 66.

<sup>33</sup> *See Arbitrator Disclosure*, FINRA, <https://www.finra.org/arbitration-mediation/arbitrator-disclosure> [<https://perma.cc/3WKT-DLRC>] (last visited Nov. 25, 2019) ("Neutrality starts with complete and accurate disclosures in FINRA's arbitrator application. FINRA uses the application as the foundation for the Arbitrator Disclosure Report (Disclosure Report)-a summary of an arbitrator's background-which is provided to parties to help them make informed decisions during the arbitrator selection process.")

mately issue an award in a FINRA arbitration.<sup>34</sup> Filed arbitration cases require the appointment of an arbitrator, and FINRA uses a Neutral List Selection System (NLSS) to generate lists of potential arbitrators from which a striking and ranking process will be used to identify the panel that will decide a FINRA arbitration claim.<sup>35</sup> Contemporaneously with the provision of lists, FINRA provides arbitrator disclosure reports to the parties and their counsel.<sup>36</sup> FINRA shares a sample arbitrator disclosure report on its website showing the substantial demographic and experiential information available on each arbitrator on a list.<sup>37</sup> Though this information is arguably available as it is provided to some parties, it is not widely publicly available at any point other than the arbitrator selection process within a specific proceeding.<sup>38</sup> Lawyers who represent large brokerage firms or whose practices focus on the representation of consumer investors benefit the most from arbitrator disclosure reports, as do parties who share the disclosure reports they receive through trade associations. This informational asymmetry disadvantages parties with fewer resources and connections, a concern highlighted by Edwards.<sup>39</sup> Though FINRA does not provide the underlying information in bulk to the public, it does make some general information available about the pool of arbitrators from which a customer's panel may be composed. For example, FINRA reports the number and types of arbitrators in each hearing location.<sup>40</sup> In response to critiques concerning the lack of diversity in its arbitrator pool,<sup>41</sup> FINRA undertook formal efforts to diversify the arbitrator roster and it now provides demographic information concerning

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<sup>34</sup> See, e.g., *Sample Arbitrator Disclosure Report*, FINRA <https://www.finra.org/sites/default/files/ArbMed/p122952.pdf> [https://perma.cc/668L-WPAE] (last visited Nov. 25, 2019).

<sup>35</sup> See FINRA, RULE 12403 (2017) (discussing arbitrator list and selection process in proceedings with three arbitrators).

<sup>36</sup> FINRA, RULE 12403(b)(1) (2017) (“The Director will send the lists generated by the Neutral List Selection System to all parties at the same time . . . The parties will also receive employment history for the past 10 years and other background information for each arbitrator listed.”); see also Stephen Choi et al., *Attorneys as Arbitrators*, 39 J. L. STUD. 109, 113–14 (2010) (describing neutral list selection system and arbitrator disclosure reports provided as a part thereof).

<sup>37</sup> See, e.g., *Arbitrator Disclosure*, *supra* note 33 (“Arbitrator disclosure is the cornerstone of FINRA arbitration, and the arbitrator's duty to disclose is continuous and imperative. Disclosure includes any relationship, experience and background information that may affect—or even appear to affect—the arbitrator's ability to be impartial and the parties' belief that the arbitrator will be able to render a fair decision.”); *Sample Arbitrator Disclosure Report*, *supra* note 34.

<sup>38</sup> See *Arbitrator Disclosure*, *supra* note 33.

<sup>39</sup> Edwards, *supra* note 1 at 428.

<sup>40</sup> *Arbitrators by Type and Location*, FINRA, <https://www.finra.org/arbitration-and-mediation/dispute-resolution-statistics#arbitratorsbytype> [https://perma.cc/87HN-TUMJ] (last visited Nov. 25, 2019).

<sup>41</sup> Jill Gross, *PIABA Releases Study Criticizing Lack of Diversity of FINRA Arbitrator Pool*, INDISPUTABLY, (Oct. 7, 2014) <http://www.indisputably.org/?p=5965> [https://perma.cc/T6RK-M5US] (describing Public Investors Arbitration Bar Association (PIABA) study concluding that FINRA arbitrator roster is 80% male with nearly 50% of arbitrators over 70 years of age).

its arbitrator pool.<sup>42</sup> Such moves set FINRA apart from critiques other arbitral forums have suffered for a lack of diversity.<sup>43</sup>

Another source of information about customer experiences in arbitration arises, somewhat counterintuitively, when brokers wish to remove, or expunge, information from their CRD record.<sup>44</sup> Studies suggest that expungement is frequently sought after a broker settles a FINRA arbitration proceeding with a customer.<sup>45</sup> In the process of removing all information concerning the customer's dispute from her CRD, the broker asserts a claim for expungement in the FINRA arbitration forum, the result of which is then recorded as an award and publicly available like all other FINRA arbitration awards.<sup>46</sup> Expungement awards provide light as to an underlying arbitration claim, often a claim the broker settled. The standard FINRA requires for the extraordinary relief of expungement is very high, requiring the broker to show the dispute on the CRD is false or erroneous.<sup>47</sup> Nevertheless, researchers have recorded exceptionally high success rates in expungement claims arising from a settled FINRA customer arbitration.<sup>48</sup> Thus, while expungement awards may provide additional detail in the FINRA awards database, the high success rate of expungement claims may discount the public's perception of and reliability of the information.

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<sup>42</sup> See *Our Commitment to Achieving Arbitrator and Mediator Diversity at FINRA*, FINRA, <https://www.finra.org/arbitration-and-mediation/diversity-and-finra-arbitrator-recruitment> [<https://perma.cc/5SJ7-PT2L>] (last visited Nov. 25, 2019) (listing overall arbitrator demographic information).

<sup>43</sup> For example, businessman and rapper Jay-Z challenged the fairness of the American Arbitration Association (AAA) as an arbitral forum for a complex commercial dispute, claiming that the AAA lacks diversity as it has only two African-Americans who would be able to hear his dispute in a pool of several hundred total arbitrators. See Brendan Pierson, *Citing Racial Bias, Jay-Z Seeks to Halt Arbitration Against Iconix*, REUTERS (Nov. 28, 2018), <https://www.reuters.com/article/us-people-jayz-lawsuit/citing-racial-bias-jay-z-seeks-to-halt-arbitration-against-iconix-idUSKCN1NX2JM> [<https://perma.cc/HMR6-V9U9>]. The dispute ultimately proceeded to arbitration before AAA after five African American arbitrators were made available and the panel was increased from one to three arbitrators. Jonathan Stempel, *Jay-Z Wins Fight for African-American Arbitrators in Trademark Case*, REUTERS (Jan. 30, 2019), <https://www.reuters.com/article/us-people-jayz-lawsuit/jay-z-wins-fight-for-african-american-arbitrators-in-trademark-case-idUSKCN1PO32T> [<https://perma.cc/W2M8-LMDQ>].

<sup>44</sup> FINRA, RULE 2080 (2009); FINRA, RULE 12805 (2009).

<sup>45</sup> Lipner, *supra* note 17 at 61 (“Expungement applications are made in over one-fifth of all settled cases.”).

<sup>46</sup> FINRA, RULE 2080 (2009); FINRA, RULE 12805 (2009).

<sup>47</sup> Lazaro, *supra* note 6 at 148 (describing extraordinary nature of expungement remedy); FINRA, RULE 2080; FINRA, RULE 12805.

<sup>48</sup> See, e.g., Lazaro, *supra* note 6 at 146–47 (describing results of Public Investor Arbitration Bar Association study of expungement claims); Lipner, *supra* note 17 at 91–95 (surveying expungement awards from first six months of 2013 and finding arbitrators granted 93.66% of expungement requests to remove information from a broker's CRD). FINRA amended its rules to prohibit a practice of brokers conditioning settlement of consumer arbitration claims on “the customer's agreement to consent to, or not to oppose, the member's or associated person's request to expunge such customer dispute information from the CRD system.” FINRA, RULE 2081 (2014).



Finally, although the raw data are generally not available to the public, FINRA maintains some aggregate data drawn from all of the claims initiated in its Dispute Resolution forum that is publicly reported.<sup>49</sup> The total number of cases filed and closed each year is recorded,<sup>50</sup> as are the most prevalent categories of claims<sup>51</sup> and products at issue.<sup>52</sup> FINRA's statistics report data concerning the resolution of all arbitration cases filed in the forum.<sup>53</sup> Aggregate data concerning the number of customer cases decided and the percentage of cases in which customers are awarded damages are available.<sup>54</sup>

## II. OPPORTUNITIES AND SHORTFALLS OF AVAILABLE INFORMATION

Information concerning the FINRA arbitration forum is provided in the name of transparency and to ensure consumer trust in the financial markets.<sup>55</sup>

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<sup>49</sup> *Dispute Resolution Statistics*, FINRA, <https://www.finra.org/arbitration-and-mediation/dispute-resolution-statistics> [https://perma.cc/U5V2-MWBN] (last visited Nov. 25, 2019).

<sup>50</sup> *Historical Statistics for Cases Filed and Closed*, FINRA, <https://www.finra.org/arbitration-and-mediation/dispute-resolution-statistics#historicalarbstats> [https://perma.cc/WU6A-7LJA] (last visited Nov. 25, 2019).

<sup>51</sup> *Top 15 Controversy Types in Customer Arbitrations*, FINRA, <https://www.finra.org/arbitration-and-mediation/dispute-resolution-statistics#top15controversycustomers> [https://perma.cc/XHW4-E3J8] (last visited Nov. 25, 2019).

<sup>52</sup> *Top 15 Security Types in Customer Arbitrations*, FINRA, <https://www.finra.org/arbitration-and-mediation/dispute-resolution-statistics#top15securitycustomers> [https://perma.cc/T4YT-DQ5U] (last visited Nov. 25, 2019).

<sup>53</sup> *How Arbitration Cases Close*, FINRA, <https://www.finra.org/arbitration-and-mediation/dispute-resolution-statistics#howcasesclose> [https://perma.cc/J9XB-M4VV] (last visited Nov. 25, 2019). In 2018, for example, 54% of FINRA arbitration proceedings were resolved between the parties through direct settlement, 13% were settled through a formal mediation process, 9% were withdrawn. *Id.* Only 17% of FINRA claims were resolved by an arbitrator and reduced to a publicly available award. *Id.*

<sup>54</sup> *Results of Customer Claimant Arbitration Award Cases*, FINRA, <https://www.finra.org/arbitration-and-mediation/dispute-resolution-statistics#resultscustomerclaimant> [https://perma.cc/BK4N-WFUZ] (last visited Nov. 25, 2019). The data are further parsed to provide outcomes in traditional hearing cases and so-called "paper" cases whereby smaller claims are essentially on the pleadings. *Id.* See also FINRA, RULE 12800 (2018) (describing simplified, paper proceedings).

<sup>55</sup> See, e.g., Jill I. Gross, *The Historical Basis of Securities Arbitration as an Investor Protection Mechanism*, 2016 J. DISP. RESOL. 171, 173–174 (2016) ("While offering a speedy, efficient, and fair forum was important to the industry when choosing to offer and encourage arbitration, far more important was the use of arbitration as a mechanism to protect investors from unscrupulous brokers and brokerage firms, thus building trust and credibility in the securities exchanges, and, in turn, facilitating investors' use of the exchanges for their securities trading."); *FINRA Dispute Resolution Task Force Recommendations: Final Status Report*, FINRA, [https://www.finra.org/sites/default/files/DR\\_task\\_report\\_status\\_011519.pdf](https://www.finra.org/sites/default/files/DR_task_report_status_011519.pdf) [https://perma.cc/EQ8Q-5MT4] (last visited Nov. 25, 2019) (describing FINRA's charge to Dispute Resolution Taskforce, including "to suggest strategies to enhance the transparency, impartiality, and efficiency of FINRA's securities dispute resolution forum for all participants."); *Our Commitment to Achieving Arbitrator and Mediator Diversity at FINRA*, FINR, <https://www.finra.org/arbitration-and-mediation/diversity-and-finra-arbitrator-recruitment>

These sources of information present opportunities to learn more about consumer investor experiences in the forum, including shedding light on what can be discerned as well as highlighting shortfalls where information exists but cannot be used to further investor protection goals.

Customer arbitration awards are an untapped resource that should be more fully studied to shine light on the experience of the regular consumer investor in arbitration proceedings.<sup>56</sup> Because the awards provide standardized information and are available over a wide range of time, much can be learned from them. Indeed, this data set has been studied by scholars and practitioners alike.<sup>57</sup> For instance, legal scholars investigated impacts that arbitrators who are trained as lawyers have in FINRA arbitration proceedings<sup>58</sup> as well as the role that an arbitrator's background plays in a FINRA arbitration award.<sup>59</sup> Other studies have addressed whether repeat players in securities arbitration – the firms against whom customers bring their claims – have an advantage in arbitrator selection.<sup>60</sup> Lawyers representing customers in the FINRA arbitration forum have evaluated the awards in a given year when a customer prevailed against her stockbroker to determine if any lessons can be learned for lawyers

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[<https://perma.cc/2F83-FKEM>] (last visited Nov. 25, 2019) (“FINRA strives to provide transparency about the current makeup of our arbitration roster.”).

<sup>56</sup> This short response focuses on the consumer experience in FINRA arbitration. FINRA's industry arbitration also provides a rich data set from which research has been conducted. Researchers focused on such investigation have noted that the consumer claims provide more information to study as there are more awards in that arena. See David B. Lipsky, *et al.*, *The Arbitration of Employment Disputes in the Securities Industry: A Study of FINRA Awards, 1986–2008*, 65 APR DISP. RESOL. J. 12, 53 (2010) (“an analysis of the securities customer-broker cases would clearly be valuable (since there are so many more of them).”). Nevertheless, significant research has been done on employment discrimination claims in FINRA industry arbitration. See *id.* (“This article reports on the results of our recent study of 3,200 arbitration awards issued in employment cases administered under the auspices of FINRA, its predecessor the National Association of Securities Dealers (NASD), and the New York Stock Exchange (NYSE).”); J. Ryan Lamare & David B. Lipsky, *Employment Arbitration in the Securities Industry: Lessons from Recent Empirical Research*, 35 BERKELEY J. EMP. LAB. L 113, 118 (2014) (“We provide the most comprehensive analysis of employment arbitration within the FINRA system to date.”); Lamare, J. Ryan, *The Arbitration of Employment Discrimination Cases in the Securities Industry*, 68 DISP. RESOL. J. 97 (2013) (studying FINRA industry arbitration awards from 1986–2007 to evaluate outcomes of discrimination versus other industry claims and finding smaller damage awards in discrimination cases and, when looking only at Title VII violations, finding lower recoveries in gender, race, and religion claims than in age, disability and whistleblower claims).

<sup>57</sup> See Choi, *et al.*, *supra* note 36 at 116–19 (describing literature prior to 2010 studying fairness of FINRA arbitration); Jill Gross & Barbara Black, *When Perception Changes Reality: An Empirical Study of Investors' Views of the Fairness of Securities Arbitration*, 2008 J. DISP. RESOL. 350, 391–92 (2008) (review of studies concerning customer results in FINRA arbitration proceedings).

<sup>58</sup> *Id.*

<sup>59</sup> Stephen Choi, Jill E. Fisch & A.C. Pritchard, *The Influence of Arbitrator Background and Representation on Arbitration Outcomes*, 9 VA. LAW BUS. REV. 43 (2014).

<sup>60</sup> Mark L. Egan, *et al.*, *Arbitration with Uninformed Consumers*, NBER WORK. PAP. SER. WORK. PAP. 25150 (2018), <http://www.nber.org/papers/w25150> [<https://perma.cc/7YUM-FSYH>].

practicing before the FINRA forum.<sup>61</sup> Other practitioners have looked at how customers fare against brokers in different hearing locations.<sup>62</sup> These studies provide information and guidance to attorneys representing customers in FINRA proceedings, helping them better represent their clients and use data to drive case strategy. In that sense, FINRA's arbitration awards database has and continues to shed light into arbitration's dark shadow.<sup>63</sup>

Nevertheless, securities arbitration remains a dark place. Though, at first glance, a set of awards containing standardized information seems to provide substantial transparency, the FINRA awards data set contains significant limitations.<sup>64</sup> Awards within the data set may, but are not required to and typically do not, contain the reasoning behind the final decision.<sup>65</sup> Very few awards are rendered each year, and awards capture a very small proportion of the filed arbitration claims. In 2018, for example, only 17% of the closed FINRA arbitration cases were resolved via an arbitrator's award, which means that over 80% of investor disputes so significant that they led to the initiation of a claim cannot be examined through the FINRA awards database.<sup>66</sup> The standardized infor-

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<sup>61</sup> See, e.g., Howard B. Prossnitz, *Who Wins FINRA Cases and Why? An Empirical Analysis*, 19 *PIABA Bar J.* 141 (2012) (studying non-settlement customer arbitration awards in 2011); Thomas K. Potter, III, *FINRA Arbitrations: Behind Claimant "Win" Statistics* Lexology, <https://www.lexology.com/library/detail.aspx?g=31d62cdd-e573-4b65-a109-c23d20cb88de> [<https://perma.cc/43VX-K8GP>] (discussing results of study of 103 FINRA customer awards in 2015 when the customer prevailed against her stockbroker).

<sup>62</sup> Ryan Cook, *FINRA Arbitration Customer Win-Rates: A Survey by Jurisdiction*, 24 *PIABA BAR J.* 57 (2017) (survey covering FINRA awards from January 1, 2014 through December 31, 2016).

<sup>63</sup> The author and Professor Charlotte Alexander are working to determine whether the FINRA Awards Database provides sufficient information from which to describe consumer experiences in FINRA arbitration by applying data analytical techniques to the corpus of available FINRA data. The researchers' processed data set of all FINRA arbitration awards post 2007 was also provided to students at the Georgia State University Robinson College of Business Masters of Data Analytics program and College of Law in a cross-listed Legal Analytics course to apply and assess students' learning of data analytics techniques in a substantive legal setting.

<sup>64</sup> Gross, *supra* note 57 at 392 ("The inability to assess the merits of the claims and the absence of comparable statistics for settled cases makes this evidence of limited value. However, we are aware of no study that has measured the substantive fairness of securities arbitration, taking into account both the merits of the claims and the outcomes of settled cases, nor do we think one could be readily accomplished without more transparent awards and a healthy volume of comparable cases in court or an independent arbitration forum."); Choi, *et al.*, *supra* note 59 at 116 ("First, in the absence of a basis for assessing the merits of the claims, studies of win rates or award ratios suffer from the lack of a baseline with which to compare them. Second, efforts to assess potential arbitrator bias empirically are hampered by the lack of background information on individual arbitrators.").

<sup>65</sup> FINRA, RULE 12904(f) (2018). If the parties jointly request it, FINRA arbitrators are required to provide an explained decision, "a fact-based award stating the general reason(s) for the arbitrators' decision." FINRA, RULE 12904(g) (2018). Explained awards need not include a description of the law or damages. *Id.*

<sup>66</sup> *How Arbitration Cases Close*, FINRA, <https://www.finra.org/arbitration-and-mediation/dispute-resolution-statistics#howcasesclose> [<https://perma.cc/P8L8-SNHK>] (last visited Nov. 25, 2019).

mation that FINRA requires be included within each award does not contain much substance from which an arbitrator's decision can be analyzed.<sup>67</sup> FINRA's aggregate statistics available on its website do not disclose underlying raw data and methodology, and at least some researchers have not been able to recreate FINRA's results.<sup>68</sup>

FINRA could address these concerns and limitations by taking steps to provide additional information and design a uniform data collection and reporting protocol. In so doing, FINRA should aggregate customer dispute information required to be included in the CRD system, arbitrator disclosure reports, and arbitration awards in one publicly available, searchable database. FINRA should also publicly release the underlying data and its methodology for producing its aggregate statistics. To truly study and evaluate the data, underlying pleadings – including statements of claim and answers – would be necessary, and the time may have come to evaluate whether information concerning the merits of claims should be available beyond truncated CRD disclosures. These solutions do not remedy the concerns Edwards highlights in “Arbitration's Dark Shadow.” FINRA arbitrators are not required to explain how they reach a decision, let alone even apply law.<sup>69</sup> Despite these concerns, FINRA's efforts to provide a little light indicate that further study of available data leading to discussion of their promise and limitations may encourage regulators to provide more robust data, ultimately leading to true transparency.

#### CONCLUSION: EXPANDING THE LIGHT

Studying available information concerning consumers' experiences in arbitration is not, by itself, enough to elucidate the shadows arbitration casts. While FINRA should be commended for being among the few to provide any publicly available data concerning consumer experiences in mandatory arbitration, that does not mean that the current disclosures are sufficient.<sup>70</sup> Moreover, the availability of data concerning arbitration results must be publicized so that consumers and researchers alike are aware of its availability. Raw data and research results should be made available to all parties involved in arbitration and not only those with the greatest resources or bargaining power. In addition, work should be done to illustrate the need for additional data and to fuel eval-

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<sup>67</sup> See Prossnitz, *supra* note 61 at 141 (arguing little knowledge available about factors that lead to success in FINRA customer arbitration cases due in part to limited information available in awards).

<sup>68</sup> Cook, *supra* note 62 at 64–65 (results of study of source FINRA arbitration awards does not match FINRA aggregate data); Prossnitz, *supra* note 61 at 166 (“At this point, the general statistics published by FINRA do not provide sufficient information for additional analyses.”).

<sup>69</sup> See FINRA, RULE 12904(f) (2018) (no reason for award required); *Office of Dispute Resolution Arbitrator's Guide*, FINRA, 63 (2019), available at <https://www.finra.org/sites/default/files/arbitrators-ref-guide.pdf> [<https://perma.cc/A4LX-S3SN>] (“Arbitrators are not strictly bound by legal precedent or statutory law.”).

<sup>70</sup> Prossnitz, *supra* note 61 at 166 (“The need for more hard data remains critical.”).

uation of the utility, effectiveness, and potential harms of substantive and procedural rulemaking in the FINRA arbitration forum.

Securities arbitration's few rays of light do not eliminate the dark shadow that arbitration writ large casts over consumers subject to PDAAs. Nevertheless, the scant light in one industry provides opportunity to expand transparency to other industries where PDAAs are also the norm. The hidden light in FINRA arbitration may provide fuel to sustain Edwards' suggestion that regulators do more to protect consumers subject to PDAAs. Instead of relying upon anecdotes and perceived harms, when available, the availability of data should be noted, publicized, studied, and used to inform change that lessens the shadow cast by mandatory arbitration.