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The Level Playing Field

*By: George H. Friedman**

The Umpire's Role

The baseball season is well underway, with the usual surprises and nuances that make the sport so interesting. It seems like the season just started, but of course the calendar tells us that months have transpired since the first pitches were thrown last April. At that time, grounds crews across America (and in two cities in Canada) were busy preparing the field of play for the upcoming season. Pitching mounds were molded and shaped, infields were manicured, outfields were mowed, regulation distances were marked off and, of course, fields were measured to be sure they were level. This annual rite of Spring caused me to think about that other major part of my life, alternative dispute resolution.

April marked the 25th anniversary of my entry into the dispute resolution field.¹ After spending almost 23 years with the American Arbitration Association, I moved over to the NASD in late 1998 to join Linda Fienberg in leading what was then known as the NASD Regulation Office of Dispute Resolution.² While at the AAA, I spent several years as the executive in charge of the securities book of business. Since joining the NASD, I've spent all of my time focusing on securities dispute resolution. With some two and a half years at the NASD under my belt, I thought it would be a good time to focus on a key issue that's been around for many years in the world of securities dispute resolution, i.e., the concept of the "level playing field" for participants in the process. This article attempts to make a case that SRO-administered securities arbitration provides a level, efficient "playing field" for all users of the forum, especially investors.

An umpire is charged, among other things, with making sure the field of play is level for both teams. Leo Durocher, one of baseball's colorful characters, was known to have his grounds crew soak the basepaths (the ground between each base) to slow down the other team's base stealers. Other managers have ordered the infield grass to be kept high to slow down ground balls and give their aging infielders a chance to field them. One manager even had extra chalk piled up on the foul lines to help steer his skilled bunter's balls back toward the infield. An umpire, as the impartial arbiter and administrator of the baseball game, is supposed to keep an eye out for these things, to keep the playing field level for both teams.

I've heard the same things said about arbitration in general, and securities arbitration in particular. As impartial administrators of the process, we must strive to be sure the case administration process and rules apply equally to all participants in the process. In my experience, that's generally the case; administrators of the arbitration process make Herculean efforts to be sure the process is fair to all parties, and is administered in an even-handed way. In SRO-administered arbitration, addi-

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** George H. Friedman is Senior Vice President of NASD Dispute Resolution, Inc., the world's largest securities dispute resolution administrator. He is also a member of SAC's Board of Editors.*

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tional steps are taken to ensure fairness to investors. Let's look at the facts.

The Court House is Thataway

Jumping to the end of the process, let's look at the case of a customer who prevails in a non-SRO administered arbitration. The case is over, the arbitrators have awarded in favor of the customer, a month has come and gone, but there has been no payment from the broker. A complaint to the non-SRO administrator will fall on sympathetic, but essentially powerless ears. In my past life, I fielded calls on that subject from frustrated prevailing parties who had not been paid. In the end, I essentially had to give them instructions on how to get to the courthouse and begin the process of judicial confirmation of the award.

Contrast that scenario with what happens at the NASD. When the award is issued, both parties are advised that the award must be paid within thirty days (unless someone files a motion to vacate the award). The customer is asked to tell us if he or she has been paid; the firm is required to advise us. If payment is not made (or a motion to vacate filed) within the thirty-day period, the NASD will begin the process of suspending the broker.³ Needless to say, this is a strong inducement to pay the award! So, in this instance, the SROs go beyond the role of mere neutral administrator, and actively assist the customers in getting their award paid (or compelling the broker to de-

cide promptly that it wants to challenge the award in court). The NASD will also discipline a broker that doesn't honor a settlement agreement arising out of an arbitration.⁴ The NASD will also take disciplinary action against a broker that doesn't honor an arbitration award issued by another forum, including a non-SRO forum."⁵

Arbitration on Demand of the Customer

Most brokerage agreements are governed by an arbitration clause, but not every transaction between a customer and a broker can be traced back to a customer-broker agreement. For example, some cash account agreements are not covered by an arbitration clause. In such instances, if a dispute arises and arbitration is sought, a non-SRO arbitration administrator will tell the customer he or she needs to get the broker's consent to arbitrate. Not so at the NASD. Under the Code, a member or associated person must arbitrate disputes with customers that arise in connection with the business of the member or the activities of the associated person, even if there is no arbitration agreement.⁶ On the other hand, the broker cannot compel the customer to arbitrate, absent an arbitration agreement.

At Your Service

Some baseball teams are known to provide somewhat more service than
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PLAYING FIELD *cont'd from page 2*

others to visiting teams, especially in terms of amenities and courtesies like use of the field for extra-batting practice, a hot buffet in the clubhouse, and use of exercise equipment. There's a somewhat analogous situation in securities arbitration when it comes to service of new claims. A party filing an arbitration at a non-SRO forum is required to perfect service on the opposing party or parties; the forum will not serve these parties. This can be a frustrating process if a respondent has moved or has left the securities field. The situation is different at the SROs. For example, the NASD takes responsibility for serving the respondents, alleviating the need for a customer to take on this sometimes-onerous task.

What if a customer filing an NASD arbitration wants to serve directly the respondent(s)? The Code of Arbitration Procedure currently does not provide that option; the NASD serves respondents. However, this will soon change. In response to suggestions from forum users, the NASD Dispute Resolution Board recently authorized staff to file with the SEC a proposed rule change that would give claimants represented by counsel the option of serving respondents directly, if they so desire. Also, the new rule, to be filed shortly, will offer filing parties the flexibility to serve directly some respondents, while asking the NASD to serve others.

Filing Fees and Arbitrator Compensation

It's much less expensive for a customer to "get in the door" at an SRO forum, compared to non-SRO forums. Let's suppose a customer wants to file an arbitration at a non-SRO forum. Typically, he or she will be compelled to pay the entire filing fee; there is no fee assessed to the respondent broker, unless the broker files a counterclaim. In other words, if the firm merely denies liability, it pays no administrative filing fee; the customer bears the entire cost of starting the arbitration. At the NASD, a customer pays a relatively modest filing fee, plus a hearing session

deposit for the first hearing (refunded if there is no hearing).⁷ The member is then assessed a "member surcharge" and, later on, various hearing and process fees. These member fees are always more than what the customer pays to file the arbitration.⁸

Then, there's the issue of arbitrator compensation. At a non-SRO forum, arbitrators are typically compensated at "market rates" ranging from \$750 to \$1,000 per arbitrator, per day. Some arbitrators charge more, and some charge on an hourly basis. The parties are usually required to advance jointly this compensation, subject to final allocation by the arbitrator(s) in the award. So, a customer generally will be required to advance half the cost of compensating the arbitrators on a "pay as you go" basis. Although a prevailing customer may recover arbitrator compensation as part of the award, this does not negate the fact that the customer may be compelled to lay out substantial sums for arbitrator compensation before an award is issued.

This is not the case at the NASD. The forum bears the cost of compensating the arbitrators, at set rates (\$400 per day per arbitrator, with the chair getting \$475. Similarly, at a non-SRO administered arbitration, the parties will advance jointly the costs associated for the rental of any outside hearing room facilities. The forum bears these expenses in an SRO-administered case.

While arbitrators serving in SRO-administered cases can and do assess "forum fees," this is not done until the award is issued. Thus, a customer filing a case at an SRO forum has a relatively low financial investment (in terms of arbitration costs) to get to the point where he or she has an arbitration award in hand, as compared to non-SRO forums.

Home Field Advantage

Most teams enjoy playing on the "home field" rather than on the road. It's much easier to drive from home to the ballpark, instead of packing up the

team and going on the road to play somewhere else. It's also less expensive. The same can be said about arbitrations. Given a choice, most parties prefer not to "go on the road" to arbitrate.

In a typical non-SRO arbitration, the locale of the arbitration will be governed by the parties' arbitration agreement. Failing that, the administrator will decide disagreements over the locale of the arbitration. The claimant, as the filing party, will initially designate the locale. The respondent can, however, contest the claimant's choice of locale, using traditional *forum non conveniens* grounds (e.g., location of parties, counsel, witnesses, records, performance, etc.). All else being equal, the filing party's designated locale will be honored; in other words, the respondent has the burden of showing that the claimant's choice of locale is not appropriate, irrespective of whether the customer or industry member is the claimant.

The NASD follows a similar process, with two important differences. First, the Code gives the Director of arbitration the authority to set the "place of the first meeting of the arbitration panel and the parties..."⁹ The NASD, too, will under this rule look at traditional *forum non conveniens* factors in determining the appropriate initial locale for the arbitration. All else being equal in a case involving a customer, however, the NASD will "select the hearing location closest to the customer's residence at the time the dispute arose,"¹⁰ irrespective of whether the customer is the claimant or the respondent. Second, member rules governing the content of pre-dispute arbitration clauses in customer agreements prohibit the inclusion of a hearing location provision to the extent they limit or contradict the Code.¹¹

Knowing the Umpire

In baseball, it helps to know as much as you can about the umpire. Does he¹² call high or low strikes? Is he

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PLAYING FIELD *cont'd from page 3*

a stickler for the rules, or will he let things slide a bit in the interest of doing justice? Will he tolerate challenges, or throw you out of the game? What's the umpire's track record?

There are some similarities in securities arbitration. Parties are very interested in knowing as much as they can about the arbitrators, either for the purpose of exercising strikes on a list of proposed arbitrators, or for preparing for the arbitration hearing. Typically, parties obtain this information by reviewing past awards of the arbitrator. However, all past awards for all arbitrators are not always available at non-SRO forums. Sometimes, awards will be available, but will have certain identifying information redacted. Securities-related arbitration awards may be publicly available, but not "commercial" awards. Typically, a fee is assessed for getting copies of awards. While brokerage firms can quickly develop institutional memories about arbitrators who have served on their cases in the past, individual customers may find this task somewhat more difficult.

Since 1989, awards at the NASD are made available to the public, without redaction. As of June 1, 2001, thanks to a cooperative arrangement between NASD Dispute Resolution and the Securities Arbitration Commentator ("SAC"), in conjunction with SAC's project partner CCH, Inc., parties and the general public can obtain free of charge awards issued by arbitrators at NASD Dispute Resolution and other forums simply by visiting NASD Dispute Resolution's Web Site located at www.nasadr.com. This new arrangement enables parties to search the awards library by arbitrator name and award date, or by other search terms. The awards – in PDF format – are exact replicas of the arbitrators' awards, without modifications of any kind.¹³ The arbitrator biographies provided to the parties by the NASD contain lists of past arbitration awards rendered by that arbitrator, making it easy for the parties to identify and review those awards.

Disciplinary Referrals

If an umpire discovers that a player has committed a serious breach of the rules, he can and will refer this matter to the Commissioner of Baseball for appropriate disciplinary action. What can an arbitrator do in such instances? An arbitrator serving in a non-SRO forum may be in a bit of a quandary. The *Code of Ethics for Commercial Arbitrators in Commercial Disputes* says that an arbitrator cannot use confidential information obtained during the course of the arbitration, to "affect adversely the interest of another."¹⁴ So, if an arbitrator in a non-SRO case believes that a broker has engaged in inappropriate conduct, and refers this matter to the authorities, he or she may be in violation of the *Code of Ethics*.¹⁵

SRO arbitrators have no such quandaries. The *Code of Ethics* also says that if an arbitrator is serving in an administered arbitration, he or she should follow the rules and procedures of the administrator.¹⁶ NASD's rules specifically permit arbitrators to report instances of questionable industry member conduct. Rule 10105 of the Code of Arbitration Procedure provides:

If any matter comes to the attention of an arbitrator during and in connection with the arbitrator's participation in a proceeding, either from the record of the proceeding or from material or communications related to the proceeding, that the arbitrator has reason to believe may constitute a violation of the Association's Rules or the federal securities laws, the arbitrator may initiate a referral of the matter to the Association for disciplinary investigation; provided, however, that any such referral should only be initiated by an arbitrator after the matter before him has been settled or otherwise disposed of, or after an award finally disposing of the matter has been rendered pursuant to Rule 10330 of the Code.

Sometimes arbitrators will order parties to produce documents in connection with the arbitration. While there is no "contempt" authority *per se*

for not obeying the arbitrator's directive, the arbitrator will of course not be pleased about the failure to produce and will likely draw adverse inferences from this conduct. This is the case at both SRO and non-SRO forums. The SRO rules go a bit further, however, to protect a customer in such instances, providing that "it may be deemed conduct inconsistent with just and equitable principles of trade and a violation of Rule 2110 for a member or a person associated with a member to ... fail to produce any document in his possession or control as directed pursuant to provisions of the NASD Code of Arbitration Procedure."¹⁷ Thus, the failure to abide by the arbitrator's directive to produce documents can result in discipline.

Conclusion

It is my strongly-held belief that the securities arbitration process as administered by the SROs is fair to all parties and, perhaps of more importance, is perceived by the participants to be fair. The process as administered by the SROs has additional measures aimed at ensuring that customers, especially, are treated fairly. This is entirely consistent with the SROs' charge to protect the investing public. Survey after survey has confirmed this belief.¹⁸ When customers are given a chance to opt out of the SROs and file at a non-SRO forum, they have generally been reluctant to do so.¹⁹

The playing field is in reality quite level and fair. As Casey Stengel used to say, and as this article hopefully demonstrates, "you can look it up."

ENDNOTES

¹ I remember only three things from April 19, 1976, my first day in the dispute resolution field: 1) the weather was extremely hot - 96 degrees - and the AAA's air conditioning system had not yet kicked in; 2) the Mets beat the St. Louis Cardinals 4 - 3 in a game that went 17 innings; and 3) my future in-laws thought I was working for some sort of CIA front organization, because I couldn't give a good account of exactly what I did for

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a living. Some things, you just don't forget.

² In July 2000, the Office of Dispute Resolution "spun off" from NASD Regulation, and became a wholly-owned subsidiary of the NASD parent, known as NASD Dispute Resolution, Inc.

³ See Notice to Members ("NTM") number 00-55, NASD By-Laws cited therein, and the NASD Manual, Rule 9510 Series. The Rule 9510 Series "sets forth procedures for: (1) summary proceedings authorized by Section 15A(h)(3) of the Act; and (2) non-summary proceedings to impose (A) a suspension or cancellation for failure to comply with an arbitration award or a settlement agreement related to an arbitration or mediation pursuant to Article VI, Section 3 of the NASD By-Laws." The NTM, as well as the Code of Arbitration Procedure, forms, guides, and other useful information is contained on NASD Dispute Resolution's web site, <http://www.nasadr.com>.

⁴ NASD Code of Arbitration Procedure (hereinafter "Code"), and NASD Manual, Rule 9510 Series.

⁵ Code, Rule IM-10100.

⁶ Code, Rule 10301(a).

⁷ Code, Rule 10332(a), (k).

⁸ Code, Rules 10332 and 10333.

⁹ Code, Rule 10315.

¹⁰ See NASD Dispute Resolution, "Uniform Forms Guide" p. 11 (available at www.nasadr.com).

¹¹ NASD Manual, Rule 3110(f)(4): "No [predispute arbitration] agreement shall include any condition which limits or contradicts the rules of any self-regulatory organization or limits the ability of a party to file any claim in arbitration or limits the ability of the arbitrators to make any award."

¹² No "he or she" on this one. As of July 1, 2001, all major league baseball umpires are male.

¹³ Parties without access to the Internet can still obtain copies of awards directly from NASD Dispute Resolution. Continuing current practice, parties in pending cases are entitled to obtain free of charge the last five awards (or all awards issued during the prior 12 months) of every proposed arbitrator.

¹⁴ ABA/AAA, *Code of Ethics for Arbitrators in Commercial Disputes*, Canon VI(A) (1977) (hereinafter "Code of Ethics").

¹⁵ On the other hand, the very first section of the Code of Ethics, Canon I(A), requires the arbitrator to uphold the integrity of the arbitration process and also admonishes the arbitrator to "recognize a responsibility to the public, to the parties whose rights will be decided, and to all other participants in the proceeding." Whether this general language trumps the specific direction not to use confidential information obtained in the arbitration to the detriment of another is not entirely clear.

¹⁶ Code of Ethics, Canon I(F).

¹⁷ Code, Rule IM-10100, "Failure to Act Under Provisions of the Code of Arbitration Procedure."

¹⁸ The NASD routinely surveys parties who arbitrate in the forum. An independent analysis of surveys returned between December 1997 and April 1999 showed that 93% of those responding thought the process was fair (57% "strongly agreed" with that statement; 36% "agreed.").

¹⁹ In January 2000, SICA (the Securities Industry Conference on Arbitration) launched a 2-year pilot project in which customers in qualifying cases at 7 participating firms are given the choice of selecting a non-SRO forum (instead of the SRO forum or forums named in the arbitration agreement). As of June 2001, customers have availed themselves of this opportunity in only 4 cases.



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MEDIATION

HOW EVALUATIVE IS TOO EVALUATIVE?

*By: E. Scott Douglas**

The ensuing discussion is fictional. Two securities litigators are discussing mediation following an NASDR mediation roundtable. During the conference, the terms “facilitative” and “evaluative” had been used to describe different styles of mediation. One of the attorneys, Miles, had successfully used mediation for years and formed some strong opinions on what he liked and disliked about certain mediators and their styles. His counterpart, Kendall, had been mediating more cases lately, but was still assessing the landscape. During the roundtable, a panel mediator’s comments provoked discussion regarding evaluative versus facilitative methods. To Miles and Kendall, it seemed the issue was not whether one was better than the other, but instead what form of evaluation was being provided. Just how far should the mediator go in providing his evaluation? Should his evaluation include the ultimate issues? When should the mediator step aside and allow the parties to control the terms of the settlement? *How evaluative is too evaluative?*

* * *

Miles: All this talk about evaluative versus facilitative styles. I think most good mediators are really a blend of both styles.

Kendall: One mediator I know described herself as facilitative in the morning and evaluative in the afternoon. Or was it vice versa? I obviously want to know they understand the case and have evaluated the issues and facts correctly, but in the end, I still want them to facilitate a settlement that my client and I control. I don’t like it when the mediator tells me what number I should pay or accept in settlement.

Miles: I’m going to say it depends on the case. Sometimes in an all or

nothing claim where the damages are not disputed, I want the mediator to take a strong position. If I’m wrong, tell me. More importantly, be prepared to tell me why. I may disagree, but I want to know a third party’s opinion. If I’m right, I want to know the mediator is telling the other side they are wrong.

Kendall: I think it’s more subtle than that. Some cases are obviously more clear-cut than others. I can think of many cases I’ve handled where the outcome was harder to predict than a Florida election. And haven’t we all been surprised at one time or another by evidence at an arbitration hearing? Or by the result? Geez, where are they getting some of these arbitrators, anyway?

Miles: I’ve got news for you, that part probably isn’t going to change for the better.

Kendall: You’re probably right. Look, what it comes down to in the end is control over the negotiations. I’d like to think I’m a pretty good negotiator. We don’t get that many chances to show off in front of our clients, so when I get the opportunity to demonstrate my negotiation skills, I don’t want some mediator preempting me.

Miles: But isn’t it the result that’s important? I mean, if the mediator evaluates the case to your side’s benefit, isn’t that the best result for you and your client? And good results beget more business.

Kendall: So what you’re saying is it depends on whose ox is gored – if I have a lousy case, or if the mediator simply overvalues my case, I may really like his number. If not, I’m screwed and my client is upset.

Miles: Well, the reality of the matter is that both sides have to agree. If one side perceives that the mediator is favoring the other side, for whatever reason, the likelihood of the case settling is minimal. After all, he’s just the facilitator – he has no real power.

Kendall: In fact, I had a bad mediation experience just recently. We hadn’t been there more than an hour, when the mediator announced that he had determined what the case was worth, and By George W., that was what we should pay.

Miles: He did that in front of both parties? Was he a retired judge?

Kendall: He acted like one.

Miles: I would have fired him on the spot. No, what I am talking about is *one on one* evaluation. Announcing a number in front of both sides is crazy.

Kendall: I’d have to admit we were both caught off guard a bit. The mediation went on for another hour or so, but it was so poisoned and the plaintiff’s expectation level was so skewed, we adjourned miles apart, Miles. Strangely enough, we ended up

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* E. Scott Douglas has been a full-time mediator since 1997, prior to which he was a partner with Keesal, Young & Logan in Long Beach, CA. He mediates securities and investment-related disputes, as well as insurance, employment, and a variety of professional liability and business cases across the Western United States. He serves on the Judicate West, NASD, Federal and Superior Court mediator panels and can be reached via his website at www.douglasmmediation.com.
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MEDIATION *cont'd from page 6*

settling a few weeks later, at a totally different number than the mediator told us we should pay. Turns out, the claimant's attorney disagreed with him as well. Unfortunately, it took him a couple more weeks to bring his client back to reality.

Miles: I heard the mediator took credit for the settlement.

Kendall: If he did, that speaks volumes for his settlement statistics.

Miles: But look at the flip side. You don't want a mediator who is purely facilitative and offers no evaluation. The "milquetoast mediator," we call him. That guy might as well be a messenger between the two rooms.

Kendall: Sometimes that is what's called for, isn't it? I can think of cases which settled at mediation where I think the only thing the mediator did was get the parties together. That, and to be fair, provide a safe and structured process to get the deal done.

Sure, the purely facilitative mediator can be frustrating in the wrong situation. But I think I'd rather have that than the overbearing know-it-all guy who thinks he can intimidate me and my clients into settling. Where does he get off telling us what the claim is "worth" after spending an hour on a case we have lived with for months or even years? He clearly can't know all the facts, since we haven't presented him with 50% of what we know. He doesn't see most of the key witnesses who will testify at arbitration. He probably doesn't even know who the arbitrators are. And what could be more important than that? How can he possibly evaluate the "worth" of the case?

Miles: Along those lines, one time I had a client who insisted on settling for way more than the case was worth, simply because the court set the trial during his vacation. The mediator had no clue.

Kendall: That's a good example of why mediators should not try to play judge. Why risk alienating one or both sides by acting omnipotent when the parties surely know more than the mediator does about how they value the case? And the parties' evaluation is often affected by hidden motivations.

The other concern I have when a mediator tries to control the settlement terms is the issue of allegiance. How do you know the mediator isn't biased for one side or the other, perhaps even subconsciously? You know darn well he gets a lot of business from the same repeat customers. He doesn't want to do anything to upset them. That bias can really present an issue if he is the one picking the number rather than us.

Miles: But don't you agree it may be appropriate for the mediator to pick a number when the parties have reached an impasse or have clearly hit a standstill?

Kendall: Big difference, my friend, between making a mediator's proposal and the mediator announcing to the parties what he thinks in his infinite wisdom the case is "worth." In a mediator's proposal, I expect the mediator to suggest a figure at which both sides might meet. Whether he thinks that number equates to the settlement value of the case is unimportant, because he may disagree with the value the parties have given it and at which they are willing to settle. Your vacationing client is a perfect example.

Miles: So what you want is the mediator to allow the parties to get as close as they can on their own, but if they impasse, to get more aggressive, even to the point of picking a number.

Kendall: That's just my personal preference. Remember, the mediator gets to be in both rooms. I am using him to feel out the other side just as they are using him to assess our position. Once he has hammered both sides on the facts, law or whatever he can do to get

the parties moving, I want him to turn facilitative. I want a mediator who uses his skills to keep the negotiations going. As long as he can do that, the case *will* settle – and on the *parties'* terms, not his. If we can't get it done in that fashion, I expect him to reach into his bag of tricks. The good ones don't give up, even if we don't settle at the first session.

Don't get me wrong, Miles, I want evaluation. I think analysis is useful for the parties and I appreciate hearing the honest assessment of someone I trust. That's why I hire a mediator I respect and whom I think the other side will respect. But I personally prefer a mediator who limits his evaluation to the issues and facts. At the end of the day, I want to pick my own number and so does my client. That's the bottom line.

Miles: Well, you know what your objective is and are more comfortable with your own evaluation of the case value than many people. Not everyone has that level of confidence or experience. Maybe a certain percentage of the population wants someone to make the decision for them.

Kendall: Hey, if they want the mediator's opinion on the dollar value of a case, they can always ask in a private session. The mediator may or may not give it to them. But that's a different issue altogether than the mediator taking the next step and either poisoning the negotiations by announcing the "value" of the case in front of everyone or trying to cram his number down my client's throat. That I can do without.

Miles: Good thing there are lots of mediators to choose from. You can pick the one whose style suits the needs of your particular case or particular client.

Kendall: You got that right, brother.

IN BRIEF

U.S. SUPREME COURT ON ARBITRATION: *This has been a busy Term for the Court, with respect to defining arbitration law; two more arbitration-related cases were decided within the past two weeks.* These two decisions, *C&L Entp., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.* (Dkt. No. 00-292, 4/30/01) and *Major League Baseball Players Assn. v. Garvey* (Dkt. No. 00-1210, 5/14/01), concern arbitration proceedings in the construction and labor areas and are not the usual FAA-type cases that directly implicate concepts applicable to securities arbitration. Nevertheless, the Court's treatment of issues relating to judicial review and choice-of-law clauses provide important insights. We mention the cases as an alert to interested readers. The decisions in each case have been summarized in the *Securities Litigation Alert (SLA 01-20)*

GAO STUDY CRITICIZES SIPC: *In a 95-page Report, the U.S. General Accounting Office cites deficiencies in the Securities Investor Protection Corporation's operation and suggests steps for improvement.* The Report, entitled "Securities Investor Protection: Steps Needed to Better Disclose SIPC Policies to Investors," can be found on the GAO's WebSite (GAO-01-653 at www.gao.gov). The Study was initiated at the request of Rep. John D. Dingell (D-MI), a member of the Committee on Energy and Commerce. Among other things, it discusses SIPC's policies in liquidations regarding unauthorized trading, an area of concern to investors who won arbitration Awards against Stratton Oakmont and other bankrupt broker-dealers. GAO observes that SIPC has "missed opportunities" to disclose to investors how they can go about seeking SIPC coverage and recommends that it revise its informational materials and its WebSite to describe the steps investors must take to document an unauthorized trading claim. The Study also finds that the "SEC's SIPC Oversight Program faces some challenges." Among other things, it suggests that SEC require broker-dealers to distribute to customers informational materials about SIPC and points out that the substantive differences between SIPC and FDIC coverage are noteworthy and not well-understood by the investing public. The Report is dated May 2001 and was released on June 21, 2001.

GAO FOLLOW-UP STUDY: *Responding to Congressional requestors, the U.S. General Accounting Office reported on events and developments following its June 2000 study of unpaid arbitration awards.* The GAO's evaluation of the steps taken by the SEC and the SROs to address GAO recommendations are contained in a letter-form Report dated April 27, 2001. The earlier Study (see 11 SAC 7 for a detailed summary) "revealed that a significant proportion of awards against brokers had not been paid to investors." In reaching that conclusion, GAO relied upon survey responses and other techniques to sample "247 of the 845 monetary awards NASD-DR arbitrators made in 1998." It reported in the June Study that an estimated 52% of the Awards issued in 1998 were "totally unpaid and 12 percent were only partially paid." In the latest review, the GAO was not dependent upon survey responses, but could access ready statistics taken from the NASD's new monitoring program. Starting in September 2000, NASD began requiring members to report when Awards remained unpaid after 30 days and urging investors who won monetary awards to report if the award remained unpaid. From these figures, GAO was able to report that, "as of December 31, 2000, 38 awards (about 13 percent) out of 296 awards — decided since September 18, 2000, that granted investors monetary relief against a broker-dealer or individual broker — had not been paid in full." The new monitoring process also allowed NASD Regulation to take immediate action against delinquents. As to 12 of the unpaid Awards, NASDR instituted summary or non-summary suspension proceedings. The remaining 26 unpaid Awards related to parties no longer in the business. In addition, GAO reports that NASD investigated reported payment lapses cited by GAO in its earlier report and found that, in all instances, payment had been made, settlements had been reached, or disciplinary action had been taken to address the nonpayment. "NASD-DR's follow-up effort was effective in that it documented that 18 awards had been paid or otherwise satisfied and resulted in actions taken to eliminate 3 non-payers from the securities industry." It regards these and other enumerated steps as "positive" and indicates that, while further monitoring is necessary, "[w]e are not making any further recommendations at this time." (*ed: Reference number for the new report is GAO-01-654R and for the earlier Report, GAO/GGD-00-115, 6/15/00.*)

NASD NTM 01-29 (DEFUNCT FIRMS): *Among the initiatives NASD has taken in response to the GAO's 2000 Report on unpaid Awards is a new rule closing its arbitration forum to defunct members.* The new rule, an amendment to NASD Rule 10301, was approved by the SEC in April (SAA 01-17). It prohibits a broker-dealer "whose membership has been terminated, suspended, canceled, or revoked, or that has been expelled from the NASD, or that is otherwise defunct, from enforcing a predispute arbitration agreement against a customer in the NASD forum, unless the customer agrees to arbitration in writing after the claim has arisen." Notice to Members 01-29 explains that, as part of the implementation of this new Rule, NASD-DR will institute a procedure whereby customers are notified, prior to service of their claims, if a Respondent firm falls into one of the enumerated statuses (stati?). If so, the customers may elect "to proceed in arbitration, to file their claim in court, or to take no action." The rule change applies to all claims served on or after June 11, 2001. (*ed: Query about this new rule — "defunct," according to American Heritage Dictionary, means "[h]aving ceased to exist or live." Broadly*

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IN BRIEF *cont'd from page 8*

defined, that could include any NASD member that files a BD-W. Might not customers with claims against NASD-only firms that have been acquired, for instance, be able to avoid arbitration through this Rule's exception? The big firms would be unaffected, as the NYSE forum will likely be an alternate choice in the pre-dispute agreement.)

NFA RULE CHANGES: *The National Futures Association recently received full approval from the CFTC to implement a number of amendments to its Code of Arbitration.* The six rule changes affect fees, mediation, single-arbitrator thresholds, and non-payment breaches by industry parties; similar changes apply to the Member Arbitration Rules. Section 4(a) raises the dollar limit for proceedings decided by one Arbitrator to \$50,000. Parties can opt for a three-person Panel if the amount claimed lies between \$25,000 and \$50,000. Summary proceedings (§9(i)) will be the rule for claims that do not exceed \$25,000; parties may opt for an oral hearing on claims over \$5,000. Section 10(g) clarifies that industry parties who fail to abide by NFA-mediated settlements, including those reached through the new (§14) "pre-arbitration mediation" program, will be subject to suspension. Filing and hearing fees are lowered (!) for certain one-arbitrator proceedings. Finally, the parties and NFA may serve certain documents by facsimile or electronic mail (§16(b)). The latter change, plus the mediation and non-payment revisions, were effective upon approval. The fee changes and the single-arbitrator revisions apply to cases filed on or after May 1, 2001.

NFA ARB TRAINING ON CD-ROM: *This new vehicle for training arbitrators accompanies the introduction at NFA of mandatory training requirements.* Arbitrators for the National Futures Association should watch for their copy of this new multimedia training device to arrive in the mail. We received our copy in June, popped it in the CD Drive, and spent about an hour and a half clicking our way through the Program. The CD-ROM represents a truly professional job, using QuickTime movies, interactive screens, audio instruction, slides and reading material to move the trainee through a series of modules on the commodity futures industry, why people file claims, and the arbitration procedures that characterize NFA Arbitration. A helpful Glossary and a FAQ (Frequently Asked Questions) section round off the presentation. Arbitrators can skip material and click forward or backward as they wish, but, as they complete the substantive sections, they are presented with quizzes to test what they have learned. Too many of the answers are simply "call NFA," but, in most instances, the questions are well-designed to measure understanding and judgment, not just memorization. The test taker must score 11 correct answers among the 16 questions. (*ed: We attempted to double back on a question we missed and take the quiz again, but the CD retained the first (incorrect) answer, try as we might to change it.*) This program will be especially helpful to NFA, which has many arbitrators scattered across the country (about 2000) and has few cases to offer them (4,000 over 17 years). Mandatory requirements are difficult to impose, where traveling road-shows are the method of instruction. CD-ROMs allow NFA to deliver quality instruction in a controlled environment, but in a personal and convenient way for the busy neutral.

NASD NTM 01-36: *Entitled "Interfering with Customer Account Transfers — Proposed Interpretive Material," this Notice to Members proposes important changes to NASD policy on customers' access to their accounts.* NTM 01-36 publishes for comment an Interpretation of "just and equitable principles" regarding account transfers that says, in essence, "let it happen." A proposed change to Rule 2110 would make it a violation of the SRO's rules to interfere "with the ability of a customer to transfer his or her account." Referring to the "raiding" and "broker recruiting" wars that use litigation tactics to hamper brokers from departing with customer accounts, NASD Regulation announces a policy that allows customers "the freedom to choose the registered representatives and firms that service their brokerage accounts." The Notice adds that the new proposal "would not prohibit a firm from seeking to enforce employment agreements with their former registered representatives;" at the same time, it states that "obtaining temporary restraining orders to prevent customers from following a registered representative to a different firm may be similar to the unfair practice of delaying transfers that the SEC warned of in its notice [referring to a statement in the late 70's by the Commission]." While NTM 01-36 carefully exempts from the proposal injunctive actions to enforce non-solicitation agreements, this statement of policy from a major SRO will surely have an impact upon judges considering the restrictive dimensions of TROs in aid of expedited arbitration under NASD Rule 10335. A copy of NTM 01-36 may be obtained by visiting the NASD Regulation WebSite (www.nasdr.com).

ABOUT NASD AWARDS ONLINE: *As reported in the last Arb Alert, the NASD Portal to the SCAN (SAC-CCH Awards Network) Library of Awards opened for business on June 1, 2001.* Here is how it works. Visitors to the NASD Dispute Resolution WebSite (www.nasadr.com) are directed (look for a button on the HomePage that says, "Get Arbitration Awards") to a WebPage on the NASD-DR site that will serve as a jumping-off point to the NASD Awards Portal. Double-click to depart the NASD-DR WebSite and be transported from the Site to the Portal Page. At the Portal Page, parties and others interested in arbitration will be able to locate Awards from all active securities arbitration forums. The Portal offers free access to more than 25,000 Awards, dating back to the beginning of the Public Awards Program in May

IN BRIEF *cont'd from page 9*

1989. That access is established through a search mechanism that gives one a choice between a "Docket# Search" and a "Text Search." The Docket # Search will be particularly useful to parties in arbitration who want to locate Awards that are listed on their Arbitrator Disclosure Reports by docket number and issue date. By selecting "Docket # Search" on the Portal Page, entering the docket number (e.g., 98-00573), and setting the month and year of issuance (e.g., August 1998), the relevant Award (e.g., *Belle v. State Capital Markets*) will be isolated for display. Click on the Award number you want 998-00573) and a PDF version of that Award will appear (if you have Adobe Reader) for further searching, printing or review. The "Text Search" works the same way, from the viewpoint of the user, and enables one to search for people's names, specific securities, allegations, or otherwise, again by setting the month and year of Award issuance that you wish to survey. (*ed: This new online display is only an alternative to the Awards procurement program that NASD has offered in the past. Parties to arbitration may use the online capability either separately or in tandem with the NASD Awards Request Program. Procedures for that Program are spelled out on the NASD-DR WebSite at www.nasdr.com/awards_request.asp.*)

NASD-DR STATS, 5/01: *The surge in filings at NASD Dispute Resolution continued into May, as a record 660 new cases were added to the new case docket.* That number, 660, is the largest monthly tally in recent history and probably ever! In March 1999, there was a sudden, episodic rise in filings, 647 for the month, as investors rushed to file before big fee hikes took effect. Now, with those fee hikes in place, and despite fairly significant cost differences between NASD and NYSE, Claimants' choice of NASD-DR for arbitrating their securities disputes has caused a 27% rise in new cases this year. Close-outs are on track with last year's healthy pace, but, because of the filing surge, there are about 650 more new filings than closed cases for the first five months of 2001. Programs like the SICA Non-SRO Pilot Project or the Single Arbitrator Pilot are not assisting greatly. Of 110 cases that have been deemed eligible for transfer to JAMS or AAA, only 4 have entered the Non-SRO Program. Four is also the number of cases agreeing to try the Single Arbitrator Pilot over the past year, even though some 359 cases met the criteria. Even mediation is down, about 11%, as 430 cases have entered mediation this year, versus 483 "Cases in Agreement" for the first five months of 2000. The success rate is off, too, dropping to 75% from a high of 85% in 1999. Mediated settlements account for only about 17% of the settled cases thus far in 2001, when they comprised 24% of the settlements in 2000. The matters in controversy cover the spectrum, with mini-surges in the online trading and margin call areas (about 12% of the cases served involve these two areas of controversy, versus about 9% in 2000). Mutual funds were up significantly last year, as a product in dispute, and will be again this year. Options disputes, too, are on the rise. Will the quality of claims be getting better? Well, the "win" rate for customers is running at 55% this year, versus 53% for 2000, but (a) that is a small difference, and (b) it may be due to an increasing reluctance to settle at the brokerage houses – a cyclical tendency to bullheadedness in bear markets that permits more meritorious claims to reach the arbitrators. (*ed: The Non-SRO Program may have been ill-starred, but the seeming failure of the single arbitrator concept puzzles us. It makes one wonder about the ability of counsel to agree on anything or whether cost reduction is a serious priority at all.*)

GREEN TREE DEVELOPMENTS: *The National Arbitration Forum revised its fee schedule to shift forum costs to companies and employers in disputes with consumers and employees.* An article in JAMS' new *Dispute Resolution Alert* (Vol. I, No. 8, Sum. '01) indicates that JAMS, too, has revised its procedures as they pertain to pre-dispute employment arbitration agreements. According to the article, *JAMS Policy on Employment Arbitration: Minimum Standards of Procedural Fairness (11/00)* specifies that "the employee cannot be compelled to pay more than the equivalent of the trial court filing fee and that only agreements imposing mutual obligations to arbitrate a type of claim will be enforced." ■

INFORMATION REQUESTS:

SAC aims to concentrate in one publication all significant news and views regarding securities/commodities arbitration. To provide subscribers with current, useful information from varying perspectives, the editor invites your comments/criticism and your assistance in bringing items of interest to the attention of our readers. Please submit letters/articles/case decisions/etc. to:

SECURITIES ARBITRATION COMMENTATOR
 ATTN: Richard P. Ryder, Editor
 P. O. Box 112
 Maplewood, N.J. 07040.

Articles & Case Law

As a regular feature, SAC summarizes articles and case decisions of interest in the field of securities/commodities arbitration law. If you find one we missed or are involved in a case that produces an interesting decision, please write and send us a copy. As it is our objective to cover all relevant decisions, we will sometimes include decisions in the current "Articles & Cases" section that issued a year or more ago. We also summarize unpublished decisions and orders. For these reasons, readers are cautioned to cite-check cases to assure they have not been overruled and may be cited in accordance with local court rules. We thank our readers who have contributed court opinions and who, by their efforts, help us all to keep informed. Credit is given to contributors at the end of the relevant case summaries.

STORY LISTINGS

Arguing Arbitration: Some lawyers say arbitration isn't working; Judges should take note, by Mike McGee, THE RECORDER (Law.com, 6/12/01).

Bradford Partners Win Arbitrations, by Rosalyn Retkwa, REGISTERED REPRESENTATIVE MAGAZINE (Online, 6/1/01) (J.C. Bradford partners leaving the new UBS PaineWebber).

Broker Charm School, by Pete Michaels, REGISTERED REPRESENTATIVE MAGAZINE (April 2001), p. 52 (9 tips about toning down your appearance and polishing up your manners in preparation for arbitration — e.g., Tip #5: "Ditch the jewelry. Take off the pinky ring and wear the simplest watch you own....")

Broker Poker, by Julie Rawe, TIME MAGAZINE (6/01, p. Y15) (Advice on avoiding problems and when to file arbitration).

Day Traders Seek Cash in the Courts: Blame Losses on Misleading Ads, Practices; Difficult Burden of Proof, by Stephen Gandel, CRAIN'S NEW YORK BUSINESS (6/18-24/01), p.1 (all about All-Tech's problems).

Deals and Suits, DAILY BUSINESS REVIEW (6/15/01) (Discusses a \$2.9 million Award, *Woodley v. Auerbach Pollak*, NASD ID #98-04806 (Fla., 5/29/01), won by well-known West Palm Beach attorney Lonnie K. Martens — see SAA 01-24).

GAO Report Faults SIPC, SEC, by Dan Jamieson, REGISTERED REPRESENTATIVE MAGAZINE (7/2/01) (SAC covered the Report in SAA 01-26).

Just Cause Terminations, by James Eccleston, ON WALL STREET MAGAZINE (7/01, p. 76) (Discusses *Agron & Liang* decisions, offering dicta that arbitration and employment at will are antithetical).

Lawyers' Group Asks NASD to Redefine 'Public' Arbitrator, by Rusty Jacobs, SECURITIES WEEK (6/18/01), p. 7 (PIABA President Seth Lipner expresses concern in letter that individuals with industry backgrounds are still classified as public arbitrators).

Legal: How to Scare Away Plaintiffs' Lawyers, by Vincent DiCarlo, REGISTERED REPRESENTATIVE MAGAZINE (Online, 7/1/01) (Advice from a plaintiffs' lawyer to brokers).

NASAA Release: Statement on the GAO's SIPC Report (www.nasaa.org) published press release, stating that "the larger issue [raised by the Report] is whether the SIPC fund is adequate or coverage should be expanded to include other kinds of investor losses.")

NASDR Proposes TRO Restrictions, by Rosalyn Retkwa, REGISTERED REPRESENTATIVE MAGAZINE (Online, 6/1/01) (NASD proposal against BD interference with customer transfers).

Non-Compete Agreements: A New Trend Against Enforcement? by Lawrence F. Carnevale & Jaime A. Wilsker, SECURITIES WEEK (7/2/01), p. 8

(SoapBox article — authors answer question "no").

Number of Arbitration Cases Sets New Record, by Lisa Gewirtz, WALL ST. LETTER (6/25/01), p. 2 (NASD receives 660 new cases in May).

Putting Some Weight Behind Arbitration, by Gretchen Morgenson, N.Y. TIMES (6/10/01), Sec. 3, p. 10 (Discusses suspension of Interfirst Capital (11 SAC 11(9)) for not paying arbitration Award on a timely basis).

SEC Presses Industry on Ops Capability, WALL ST. LETTER (7/23/01), p. 9 (SEC issues Report citing industry capacity responsibilities and SIA issues "legal alert.")

Suits Spread Blame for IPOs Gone Bad, by Stephen Gandel, CRAIN'S NEW YORK BUSINESS (6/25/01), p. 3 (Merrill Lynch, fund sponsor of B2B Internet Holdrs Trust, subject of eight shareholder suits)

Take Needed Steps to Protect Nest Eggs Before They Break, by Ruth Simon, WSJ.com (7/17/01).

The NAIP at Five, by T. Sheridan O'Keefe, REGISTERED REPRESENTATIVE MAGAZINE (July 2001), p. 76 (The National Association of Investment Professionals reaches its 5th anniversary.)

Under Investigation, by Elizabeth Baird, ON WALL STREET MAGAZINE (7/01, p. 77) (advice on post-termination requirement to keep license current and registration requirements for research personnel).

ARTICLES & CASE LAW *cont'd from page 11***ARTICLE CITATIONS**

The Journal of Dispute Resolution is published by the University of Missouri-Columbia School of Law, in conjunction with the Center for the Study of Dispute Resolution. This latest edition of the Journal contains an excellent selection of timely articles on important arbitration issues, so much so that we opted to list all of the articles in the edition:

The Revised Uniform Arbitration Act: Modernizing, Revising, and Clarifying Arbitration Law, by Timothy J. Heinz, JNL. OF DISP. RES. (2001, No. 1), p.1.

Federal Preemption and Vacatur: the Bookend Issues under the Revised Uniform Arbitration Act, by Stephen L. Hayford, JNL. OF DISP. RES. (2001, No. 1), p.67.

Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements, by Stephen J. Ware, JNL. OF DISP. RES. (2001, No. 1), p.89.

To Litigate or Arbitrate? No Matter- The Credit Card Industry is Deciding For You, by Johanna Harrington, JNL. OF DISP. RES. (2001, No. 1), p.101.

Waiver? Not Yet: After More Than Eight Years of Pre-Trial Litigation the Second Circuit Orders Arbitration, by David A. Geisler II, JNL. OF DISP. RES. (2001, No. 1), p.119.

Class Action vs. Arbitration: does TILA Support Class Actions in Arbitration Where Statutory Rights are Concerned? by Christina S. Lewis, JNL. OF DISP. RES. (2001, No. 1), p.133.

Mandatory Arbitration of an Employee's Statutory Rights: Still a Controversial Issue or are We Beating the Proverbial Dead Horse? by Andrea L. Myers, JNL. OF DISP. RES. (2001, No. 1), p.145.

Clarifying the Intent of Congress: Are the Federal Arbitration Act's Venue

Provisions Permissive or Mandatory? by Darynne L. O'Neal, JNL. OF DISP. RES. (2001, No. 1), p.157.

Read the Fine Print — Alabama Supreme Court Rules that Binding Arbitration Provisions in Written Warranties are Okay, by Garrett S. Taylor, JNL. OF DISP. RES. (2001, No. 1), p.165.

SAC Editors Roger M. Deitz and Joel E. Davidson moderated two Panels on "Securities Arbitration: Hot Topics 2001" at the CityBar Center on the evening of June 6, 2001. Below are listed the articles contributed by the speakers:

Experts in Mediation: Catalysts for Resolution, by Roger M. Deitz.

Margin Basics, by Amy Bard.

Mediation from the Perspective of Claimants' Counsel: Not Whether, But When, To Mediate, by Seth E. Lipner.

NASD Discovery Guidelines: NTM 99-90, by Sandra D. Grannum.

NYSE Arbitration - Update 2001, by Robert S. Clemente.

Post-Halligan Developments, by Marcia L. Ford.

Selective Developments at NASD Dispute Resolution, by Kenneth L. Andrichik.

The Case for Dispositive Motions to Dismiss in Securities Arbitration, by Joel E. Davidson.

ARTICLE SUMMARY

Adding Value: Making the Strongest Case for Evaluation, by Jeff Kichaven, ALTERNATIVES, Vol. 19, No. 6 (CPR Inst. For Disp Res., 6/01), p.151.

Mr. Kichaven, an independent mediator based in Los Angeles, bases his argument favoring evaluative techniques upon a simple truism — parties do not come to the table with equal strengths. "It is only the evaluative mediator," writes the author, (paraphras-

ing Greek literature), "who prevents the strong from doing any more than they can, and the weak from suffering any more than they must." When a client has a weak case and the lawyer is unable to tell the client, an evaluative mediator can say what must be said and can help counsel break the news in a way that saves the relationship.

Similarly, strong cases often produce clients that do not understand high legal costs and protracted proceedings. "This lawyer needs help making sure that his client directs his unhappiness at the plaintiff, where it belongs, not at the lawyer, where it does not. Again, the mediator adds value." When the demand is excessive and the case needs to be defended, the mediator may not be able to make the parties come to terms, but evaluation may help the client understand his/her own lawyer's assessment of the case. "The case had to be defended, and the client [after the mediation] understood exactly why."

In this way, the evaluative mediator does not attempt to create "balance" between the two sides, but, rather, deals with the reality of the situation. "With these and other evaluative techniques, mediators can and will prevent the strong from doing more than they can, and the weak from suffering more than they must. Who is to say," the author concludes, "that is not a legitimate definition of justice?"

NAFTA Chapter 11: Arbitration and the Fisc: NAFTA's "Tax Veto," by William W. Park, CHICAGO JNL. OF INTL. LAW, Vol. 2, No. 1 (Spring 2001), p.231.

Arbitration is peculiarly suited to handling disputes in which foreign investors take issue with the actions of a sovereign nation, as that nation's tribunals would otherwise be the arbiter of the dispute. Providing for a fair and independent arbitral process to which nations are bound by treaty provides comfort to foreign investors. NAFTA, the North American Free Trade Agreement, "gives foreign investors an automatic right to elect arbitration of claims for improper nationalization, pursuant to rules drafted by either the United Nations or the World Bank.

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ARTICLES & CASE LAW *cont'd from page 12*

The author describes the process and focuses upon an exception, which allows the investor's state and the "respondent" state to veto arbitration when taxation measures are at the heart of the claimed expropriation. This "tax veto" has its underpinnings, the author explains, in a concern about challenges to

the tax structure and in a "perception that loss of taxing power poses a special threat to national sovereignty. While recognizing the validity of these concerns, the author (a Prof. of Law, Boston University) questions why arbitrators should be excluded from this single area.

"In any event," the article concludes, "[t]ax authorities ... should be encouraged to use their veto power sparingly. Overly zealous intervention by governments would tear at the fabric of neutral arbitration that underpins much investor confidence in cross-border capital flows."

Cases

SUMMARY OF DECISIONS

(ed: The court decisions summarized below are arranged by major subject heading first and digested in a single sentence. This enables readers to quickly refer to the courts or topics that are of key interest. The decisions are then arranged in alpha order by Plaintiff and summarized more fully. Bolded headnotes also facilitate quick scanning for topics or issues of interest. In some instances, the summaries appeared first in SAC's other newsletter service, the Securities Litigation Commentator, and were written by Contributing Editors to that publication. In those instances, the author's first initial and last name will appear at the end of the summary. We thank the SLC Contributing Editors for their assistance in providing these case summaries.)

ATTORNEY FEES: *Interest on an attorney fee award in arbitration runs from the date a court determines entitlement to the fees, not from the date of the arbitration Award.* BARRON CHASE SECURITIES, INC. v. MOSER (FL App.)

ATTORNEY FEES: *Attorney's fees may be awarded to a party for confirming an Award, where the proceedings required substantial preparation and analysis of counsel.* KORUGA v. FISERV (D. OR)

BREADTH OF AGREEMENT: *An associated person may be compelled to arbitrate even if jurisdiction over a party cannot be compelled.* GOLDSTEIN v. VISCONTI (S.D. NY)

BREADTH OF AGREEMENT: *Absent agency or a similar relationship with a party to an arbitration agreement, an express intent to include a third party must be evident.* KEGG v. MANSFIELD (OH App.)

BREADTH OF AGREEMENT: *Non-signatories to arbitration agreement may be bound, if they are intended successors to the interests of a signatory.* JANSEN v. SALOMON SMITH BARNEY, INC. (NJ App.)

BREADTH OF AGREEMENT: *Once compelled to arbitrate, a party cannot avoid the obligation by switching his legal stratagem.* PAUL REVERE VARIABLE ANNUITY INS. CO. v. Zang & Beck (1st Cir.)

IRRATIONALITY: *Where the evidence supports a conclusion of the arbitrators, it cannot be held "completely irrational."* HRUBAN v. STEINMAN (E.D. PA)

RATIONALE OF AWARD: *Arbitrators must indicate whether statutory claims allowing attorney fee awards were sustained or dismissed.* KESLER v. CHATFIELD DEAN & CO. (FL Sup. Ct.)

SCOPE OF AGREEMENT: *The agreement to arbitrate disputes in the Form U-4 covers only those claims that applicable SRO rules require to be arbitrated.* KROSBY v. UNITED FINANCIAL GROUP (NY App. Div.)

SELLING AWAY: *Where investors are not "customers" in the ordinary sense, the broker-dealer is entitled to limited discovery to explore whether they should be deemed "customers" under NASD arbitration rules.* INVESTORS CAPITAL CORP. v. BROWN & BRAGG (ICC/Brown I)(M.D. FL)

SELLING AWAY: *Whether investors relied upon a relationship with the broker-dealer in making their investments will determine if they are "customers" for purposes of NASD arbitration rules.* INVESTORS CAPITAL CORP. v. BROWN & BRAGG (ICC/Brown II)(M.D. FL)

SELLING AWAY: *Although the subject investments were sold "away" from the brokerage firm, investors are "customers" who may demand arbitration under NASD arbitration rules.* INVESTORS CAPITAL CORP. v. RIMMLER (M.D. FL)

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ARTICLES & CASE LAW *cont'd from page 13*

VACATUR OF AWARD: *An Award that reflects an ad damnum of \$82,430 and an order for payment of almost \$300,000 is without rational basis, contains an evident miscalculation, demonstrates evident partiality, and exceeds arbitral authority.* MORRIS v. RAYMOND JAMES & ASSOCIATES, INC. (FL Cir. Ct.)

WAIVER: *For waiver purposes, time spent in litigation is measured from filing until arbitration is sought, not from the date the dispute first arose.* SAO v. CREDIT SUISSE FIRST BOSTON S.D. NY)

Cases

Barron Chase Securities, Inc. v. Moser, Case No. 2D98-4009 (Fla. App., 2DCA, 6/8/01): **Attorney Fees — Damage Calculations (Interest) — Judicial Authority, Scope Of.**

When the Florida Supreme Court remanded this case, it did so with some modifications to the original trial court order. The trial court's order granting attorney fees to a prevailing Claimant in NASD Arbitration was reinstated; however, the amount of those fees must be reconsidered. This Court interprets the remand order and sends it on to the trial court with two points of instruction.

Upon reconsideration, the trial court should modify the amount of the attorney fee award to cover only the fees related to the arbitration proceeding and to demonstrating entitlement to the attorney fee award. "Attorney's fees may be awarded for litigating the issue of entitlement to fees but not for time expended litigating the amount of fees." Secondly, the interest granted on the fee award should run from the date entitlement is determined. Since the circuit courts, not arbitrators, generally decide entitlement, interest should not have run from the date of the NASD Award; rather, it should accrue "from the date of the trial court's original order awarding attorney's fees." (*ed: The Florida Supreme Court's directive to Florida arbitrators in its April 5 Moser decision (SLA 2001-16) should ensure that Awards will make clear the entitlement of a prevailing party to attorney fees. Thus, in the usual case, the post-Award proceedings should be concerned with the amount to be awarded, not the entitlement issue.*)

Goldstein v. Visconti, 2001 U.S. Dist. LEXIS 7102 (S.D. N.Y., 5/30/01): **Agreement to Arbitrate — Ar-**

bitration Agreement (SRO Requirement) — Award Challenge — Manifest Disregard of Law — Confirmation of Award — Breadth of Agreement — Jurisdiction Issues.

Respondent Visconti, associated person, secured a loan from Petitioner Goldstein, an associated person with a different broker/dealer, on behalf of non-member JCC. Goldstein sued Visconti, JCC and its broker-dealer affiliate, Joseph Charles & Associates (JCA). JCC objected to jurisdiction and the Arbitrators agreed, but they proceeded against JCA and Visconti.

The Court holds, in response to a petition for vacatur, that the NASD arbitration rules required arbitration and encompassed this dispute. It further found that the arbitrators acted correctly and, therefore, affirmed the award of \$1,000,000 against Visconti. The fact that JCC, the recipient of the loan, is not subject to NASD jurisdiction does not affect the case. (*P. Hoblin: The Court alludes to the doctrine of manifest disregard but does not base its jurisdiction on the doctrine.*)

Hruban v. Steinman, No. 00-4285, 2001 U.S. Dist. LEXIS 4906 (E.D. Pa., 4/19/01): **Award Challenge — Confirmation of Award — Evidentiary Standards — FAA (§10) — Public Policy — Irrationality.**

Under Pennsylvania's Wage Payment and collection Law (WPCL), employers can be liable to employees for back pay, interest, liquidated damages and attorney's fees. Here, Joseph Hruban was a managing member of LMP Hedge Fund ("LMP") and Barry Steinman was a trader for LMP. Steinman brought an arbitration claim for bonus compensation under the WPCL against LLM and Hruban. The Arbitrators found for Steinman and specifically concluded that Hruban was an employer of Steinman under the WPCL

(*Steinman v. LMP Hedge Fund*, NASD ID #98-04152, Philadelphia, 7/24/00). Hruban was held jointly and severally liable with LMP for back wages (\$566,000), interest (\$59,000), liquidated damages (\$141,000), and attorney's fees (\$325,000). Hruban moved to vacate, alleging that the Award was "completely irrational."

The Court holds that LMP's certificate of organization, describing Hruban as an organizer, and LMP's Application for Authority under the Limited Liability Company Law, describing Hruban as a managing director, precluded a challenge to the Award. The Panel's finding that Hruban was an employer under the WPCL "cannot be completely irrational if there is some evidence to support such a finding." Similarly, the finding that Steinman was an employee was upheld and the petition to vacate dismissed. (*Opinion summary contributed by David Carey, Senior Counsel, New York Stock Exchange*)

Investors Capital Corp. v. Brown & Bragg, 129 F.Supp.2d 1340 (M.D. Fla., 12/28/00): **Agreement to Arbitrate — Arbitrability — Selling Away — SRO Rules (NASD Rule 10301).**

We recently summarized a Magistrate's Report in this case (SLA 2000-37), wherein the Magistrate recommended compelling arbitration of this action before the NASD. The District Court Judge initially adopted the Report, but in this brief Opinion vacates its Order and sustains ICC's objections to the Report. The issue that the Court finds too close to call, without granting ICC limited discovery, is whether the Defendants are "customers" of ICC for purposes of NASD Rule 10301. ICC was the party which sought a declaratory judgment on this point, after Defendant-investors submitted

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their disputes to arbitration, and the Court determines that the discovery it requests is warranted.

Investors Capital Corp. v. Brown & Bragg, Case No. 6:00-cv-595-Orl-31JGG (M.D. Fla., 5/21/01): **Arbitrability — Arbitration Agreement (SRO Requirement) — FAA (4) — SRO Rules (NASD Rule 10301) — Transaction Causation/Reliance.**

ICC had requested a declaratory judgment enjoining investors who commenced NASD arbitration against it, on grounds that they are not “customers” of ICC, for purposes of NASD Rule 10301. ICC argues that the promissory notes purchased by the Defendants were first bought from the salespeople involved before they became associated with ICC and that, thereafter, the notes were simply renewed or extended. ICC did not open accounts for this purpose and does not appear to have received any commissions (although the salespeople did).

The Court previously granted ICC limited discovery to explore the status of the Defendants as “customers” and now rules that the evidence is not sufficiently clear to grant summary judgment. While the investors’ affidavits state that they relied upon their brokers’ affiliation with ICC in making the “repurchases” of the FACT Notes at issue, the Court sees evidence that contradicts that position as well. As a legal matter, the investors did not become “customers” simply by virtue of doing business with ICC’s representatives. “[I]n joining the NASD, ICC agreed to arbitrate disputes with its customers, rather than the customers of every person associated with ICC.”

A nexus must also be established with ICC. Absent “any objective evidence that the Defendants established such an informal relationship – e.g., correspondence to or from ICC...,” a material question of fact continues to exist which only a jury trial under Section 4 of the FAA can resolve. (*ed: The question of “Customer” status is a threshold arbitrability issue, the Court rules, rather than one concerning the scope of an existing arbitration agreement, and, as such, the presumption*

favoring arbitration is not yet in play. “Until it is determined that an agreement to arbitrate was reached, the court must keep its thumb off the scales.”) (*Thanks to Burton W. Wiand, Fowler White, Tampa, FL, for alerting us to this decision. Mr. Wiand, along with Katherine C. Lake, represented ICC in this proceeding.*)

Investors Capital Corp. v. Rimpler, 2001 U.S. Dist. LEXIS 5591 (M.D. Fla., 2/5/01): **Agreement to Arbitrate — Arbitrability — Statutory Definitions (“Customer”) — Selling Away — SRO Rules (NASD Rule 100301) — Stay of Litigation.**

Without reference to a similar case pending before a different Judge in the same District (see *ICC v. Brown*, above), the Court considers the petition for declaratory relief filed by ICC and denies the request. ICC maintains that the investors, who purchased certain promissory notes from two of ICC representatives, were not customers of ICC, did not maintain accounts with ICC or do business with it, and that its representatives were not acting on ICC’s behalf when selling the promissory notes.

Nevertheless, states the Court, the investors have submitted affidavits which cannot be ignored. They aver that, “before the purchases, Smith and Tomaske identified themselves as securities brokers who worked for Investors, and repeatedly represented themselves as such to the Rimplers....” They also swear that they purchased the notes in reliance upon these facts and believed themselves to be customers of ICC.

NASD Rule 10301 allows a “customer” of a broker-dealer member to demand arbitration, even though an agreement to arbitrate does not otherwise exist and the Court rules that, if these investors conducted business with Plaintiff’s registered representatives, they were also conducting business with and became customers of ICC. A motion for limited discovery is denied and the parties are ordered to NASD arbitration. (*ed: The Court’s disposition of the case resolves all issues pending before it, but is the Court’s order immediately appealable? The FAA would*

say no, if the order is “interlocutory.” In that regard, the Court stays the action, instead of dismissing it with prejudice, directs the Clerk to “administratively close” the matter, and orders the parties to file regular status reports on the arbitration’s progress.)

Jansen v. Salomon Smith Barney, Inc., A-2341-00T2, 2001 N.J. Super. LEXIS 212 (N.J. App., 5/16/01): **Agreement to Arbitrate — Contractual Issues (Non-Signatories) — Derivative Liability (Successor Liability) — Breadth of Agreement.**

The Court states the question before it thusly: “...whether the putative beneficiaries of a retirement account are bound by an arbitration clause signed by decedent and his financial advisors.” The Jansen children sued Smith Barney, charging that the firm negligently advised their father that an interest in his Keogh account would pass to the children when he died; in fact, the wife’s consent was necessary for that to happen.

The trial court refused to compel arbitration, as it felt the children’s rights as disenfranchised heirs were independent of those of the decedent or his estate. “We disagree with this conclusion and reverse,” writes this Court on appeal; “we view plaintiffs’ claim as essentially derivative of the decedent’s rights.” It is true that an independent duty of care may extend to protect the economic interests of intended beneficiaries, but there is also “a substantial nexus ... between the subject matter of the arbitration agreement and the claim raised by plaintiffs.”

It is the funds in the accounts and the transactions therein that are the focus of this dispute and all of the claims “arose out of or related to the decedent’s accounts.” Plaintiffs claim they were the intended successors to these funds and, so, they must also be bound by the agreements that governed the accounts. (*Thanks to Matthew Farley, Drinker Biddle & Reath, LLP, New York, NY, for alerting us to this decision. Mr. Farley’s partner, Brian F. McDonough, argued the case for Smith Barney on appeal.*)

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ARTICLES & CASE LAW *cont'd from page 15***Kegg v. Mansfield**, 2000 Ohio App. LEXIS 334 (Ohio App., 5Dist., 1/31/00): **Agreement to Arbitrate — Arbitration Agreement — Breadth of Agreement.**

During the time that Wendell Kegg used the financial planning and investment services of Appellants, he signed several customer agreements with broker-dealers through which Appellants did business, all of which contained pre-dispute arbitration provisions ("PDAAs"). He signed two such agreements with Capital Analysts, Inc. in 1992 and 1993 and a third agreement in 1996 with LNC Equity Sales Corp. and clearing broker National Financial Services Corp.

When Mr. Kegg filed his suit against Appellants, none of the brokerage firms were named as defendants, yet Appellants sought to invoke the PDAAs to compel arbitration. The trial court denied the motions and, on appeal, this Court affirms. "Each of the three documents signed by appellee simply contained an agreement to arbitrate disputes only between the parties thereto.... "There is no evidence in the record that appellants were agents of either Capital Analysts, Inc. or LNC..., [n]or is there any implication in the record as to any relationship between appellants and [the broker-dealers]." (*ed: To the extent the Mansfield defendants were not included within the PDAAs, the brokerage firms presumably made a strategic decision not to include such planner/advisers. Had the brokerage firms been named in an arbitration, a cross-claim in the arbitration would not be permitted – or, if the broker-dealer is also named in litigation, it might compel arbitration, but the planner-adviser would stay in court. Not providing for the planner-adviser to be "at the table" seems tactically short-sighted to us. We covered a second decision in this case in the Lit Alert, SLA 01-21, in which all of plaintiff's claims were dismissed on summary judgment motion based on statute of limitations defenses. Clt: 2001 Ohio App, LEXIS 2035 (Ohio App., 5Dist., 4/30/01).)*

Kesler v. Chatfield Dean & Co., No. SC00-259 (Fla., 6/21/01): **Attorney Fees — Judicial Authority, Scope Of — Rationale of Award — Remedies (Remand to Arbitrators).**

David Kesler filed an arbitration claim against Chatfield Dean in which he alleged both common law claims (which do not give rise to attorney fees) and claims arising under the state securities statute (which do allow for the award of attorney fees).

The NASD-DR arbitration Panel, sitting in Florida, awarded Kesler \$6,300 on claims exceeding \$100,000, and denied his request for attorney fees (NASD ID #93-05349, 1/1/96). The arbitrators did not set forth the basis of the decision but simply set forth the facts that were presumably laid out in the complaint. Kesler therefore moved in court for his attorney fees, as permitted by Florida law. He prevailed, but the District Court of Appeal reversed, holding that the Panel's failure to specifically set forth the basis of its decision was fatal to Kesler's fee claim.

The case then proceeded to the Florida Supreme Court. In the interim, the Supreme Court held in *Moser v. Barron Chase Securities, Inc.* (SLA 01-16) that the proper procedure in cases of this nature is to remand the matter to the arbitration Panel so that it can specifically state the causes of action upon which the claimant prevailed. Thus, in this case, the Supreme Court follows the route that it took in *Moser*. (*P. Dubow: The issue of bifurcated proceedings where attorney fees are demanded has plagued Florida courts for years. It would disappear if Florida were to adopt the Revised Uniform Arbitration Act. Section 21 of the Act states that "(a)n arbitrator may award attorney's fees if such an award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding." Although Section 21 might not help in a situation where the arbitrators award attorney fees but fail to specify the basis thereon, its presence could reduce such instances. An astute advocate would urge the panel in closing argument to refer to the appropriate statute if they chose to award attor-*

ney fees, citing the local equivalent of Section 21. Counsel might also argue that there was an agreement of the parties where the claimant demanded attorney fees and the respondent failed to assert that the claimant was not entitled to them under the law. Section 21 would also eliminate or substantially reduce remands and the problems that are sometimes caused by them. The ancient theory of functus officio holds that an arbitration panel ceases to function once it issues an initial decision. Although courts and legislators have tended to ignore this theory of late, it is really quite practical. An arbitration panel is one or more human beings who may not be available for one reason or another when a matter is remanded (in this case, 5 years later). This is quite different from a state or federal court, which is a legal entity that can reassign a remanded matter when the original judge is not available.)

Koruga v. Fiserv, CV 00-1415-MA (D. Ore., 4/20/01): **Award Challenge — Confirmation of Award — Attorney Fees — Arbitration Agreement (SRO Requirement) — Damage Calculation (Interest Rate) — Clearing Broker Liability — State Law, Applicability Of.**

Having won judgment (SLA 2001-09) confirming a \$1.7 million NASD Award (NASD ID #98-04276) against the defendant clearing broker-dealer, the Koruga Plaintiffs now move the Court to grant attorney's fees relative to the confirmation/vacatur proceedings. The Court first rejects the argument that attorney fees cannot be awarded in confirmation proceedings. In this case, substantial preparation and analysis was required of counsel. Plaintiffs' claims alleged secondary liability for violations of the California and Washington Securities Acts — and for fraudulent concealment under the Restatement of Torts § 551.

The Washington statute provides for reasonable attorney's fees and, therefore, the Washington Plaintiffs may recover fees. "Because the action was not brought on the contract between the parties, the California plaintiffs are not

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entitled to recover attorneys' fees," the Court rules. It grants Plaintiffs' motion to set fees, commenting that the appropriate method by which to calculate an award of attorneys' fees is the lodestar method. Though Plaintiffs' counsel failed to submit supporting affidavits from other comparable attorneys indicating their rates, the Court found that Plaintiffs' counsel's qualifications and expertise justified a rate of \$200 per hour in the Portland area.

Accordingly, the Court awarded the Washington Plaintiffs an additional \$24,200 in attorneys fees. Defendants win reconsideration of the post-judgment interest rate set. While federal law usually controls in diversity cases, here the parties agreed to follow NASD Rules and NASD Rule 10330(h) follows the legal rate in the forum state. "The award was rendered in Oregon, where the current rate of interest is 9% [simple]." (*M. Ford*)

Krosby v. United Financial Group, No. 3978, 2001 N.Y. App. Div. LEXIS 4076 (N.Y. App. Div., 1Dept., 4/26/01): **Agreement to Arbitrate — Arbitration Agreement (Form U-4) — Common Law Claims (Breach of Fiduciary Duty) — Jurisdiction Issues — Misrepresentations/Omissions — SRO Rules (Generally).**

Signing a Form U-4 generally obliges the registered representative to arbitrate disputes with her employer, among others, but that requirement does not apply if the employer does not become a member of the NASD or another SRO. In this case, Ms. Krosby signed a standard Form U-4, in order to register and work at United Financial Group. However, for reasons not explained in the Opinion, UFG "did not ultimately join the NASD."

As a consequence, the Court rules, "the arbitration provision in the U-4 form never became binding upon plaintiff." Ms. Krosby undertook only to arbitrate such disputes as NASD rules required and those rules "only require arbitration of claims against NASD members." Thus, Plaintiff's claims are not subject to arbitration. The Court also affirms the striking of an UFG affirmative defense, one predicated

upon the absence of a fiduciary relationship. "[S]ince plaintiff's claim of negligent misrepresentation is not necessarily dependent upon the existence of a fiduciary relationship, but may be premised instead upon a relationship of 'near privity,'" the defense is inapplicable.

Morris v. Raymond James & Associates, Inc., Case No. CIO-00-000420 (Fla. Cir. Ct., 12/7/00): **Arbitrator Bias/Evident Partiality — Award Challenge — Irrationality/Rational Basis — Exceeding Powers — Modification of Award — Vacatur of Award.**

This case gets more and more peculiar. First, the Claimant, an investor who complained of bad advice on a fairly esoteric Indonesian investment pursued his claim *pro se* and won damages well in excess of his claim for relief. (NASD ID #98-04207, 3/24/00). Secondly, the Raymond James agreement with the customer contains a "judicial review" clause that invites a reviewing court to re-examine the arbitration transcript and exhibits *de novo* — an invitation this Court earlier rejected as creating "an entirely new type of action that is not based on a review of the arbitration panel's decision" (SLA 2000-38).

The Court did agree to provide traditional review of the Award and, in this brief Order, does so. However, it substitutes its view of the appropriate outcome (\$78,356.03) for that of the Panel and, without reasoning, modifies the Award, simply listing four bases upon which it concludes the Tampa Panel went wrong. (*Thanks to Burton W. Wiand, Fowler White, Tampa, FL for alerting us to this new development in the Morris case. Mr. Wiand represents Raymond James in the post-Award proceedings.*) (*ed: Vacatur—or modification, for that matter — of an Award is a serious matter, remote in its occurrence and individual in its circumstance. This Court radically changed this Award and seriously questioned its underpinnings, but did so in a brief Order. Such an approach simply invites the losing party to seek further review; in fact, as we understand, an*

appeal has been taken to the Fifth District Court of Appeals.)

Paul Revere Variable Annuity Ins. Co. v. Zang & Beck, 2001 U.S. App. LEXIS 8032 (1st Cir., 5/3/01): **Agreement to Arbitrate — Contractual Issues (Non-Signatories) — FRCP (Rule 60(b)) — Breadth of Agreement — Stay of Arbitration.**

We have reviewed and commented on two earlier related decisions (see SLA 2000-11 and 2000-29). Zang and Beck joined 15 other employees in filing state employment actions against six interrelated companies, including Paul Revere Variable Annuity Ins. Co. ("Variable"), which, alone among the six, was a member of the NASD. The companies moved to compel arbitration by virtue of the employees' registrations with claims against Variable and the motions to compel arbitration as to them were dismissed. Zang and Beck elected to oppose the motions.

The District Court entered an order compelling Zang and Beck to submit their claims against the six companies to arbitration. Faced with this order, Zang and Beck reversed course and decided to dismiss their claims against Variable. After doing so, they filed a motion under (FRCP) Rule 60(b), arguing that the remaining five companies lacked standing on their own to compel arbitration. The District Court denied the Rule 60(b) motion and Zang and Beck appealed from both the denial and the initial order compelling arbitration.

The Court affirms, noting that the discretionary power granted to the District Court by Rule 60(b) is not for the purpose of relieving a party from "free, calculated, and deliberate" choices made as part of a strategy of litigation. Zang and Beck persisted in their claim against Variable, knowing that the risk could lead to mandatory arbitration.

The dismissal of the motions to compel against the other employees made it reasonably likely that this consequence could be avoided by Zang and Beck if they dismissed Variable. That likelihood having been borne out, they could not change direction and then ask the district Court to "correct for their

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Arbitrator Training Programs

FYI, Approved NASD Arbitrators: As scheduled dates approach, the NASD Arbitration Department will notify you regarding the details of upcoming programs in your area, at which time you can contact the person listed regarding your attendance.

September 12: "Panel Member Training," sponsored by NASD Dispute Resolution, Inc., at the NASD Offices, 125 Broad Street, 9:30 AM, **New York, NY.** (Speakers: L. Angelson; Andrew Carnell). For info., contact Emelita Moy, 212-858-4432.

September 12: "Panel Member Training," sponsored by NASD-DR, at the NASD Office, 1:00 PM – 4:00 PM, **Boca Raton, FL.** (Speakers: R. Schindler; Diane Perry). For info., contact Lanette Cajigas, 561-447-4911.

September 13: "Chairperson Training," sponsored by NASD Dispute Resolution, Inc., at the NASD Office, 9:30 AM – 4:30 PM, **Boca Raton, FL.** (Speakers: R. Schindler; Garry O'Donnell). For info., contact Lanette Cajigas, 561-447-4911.

September 18: "Panel Member Training," sponsored by NASD Dispute Resolution, Inc., 9:00 AM – 1:00 PM, **Seattle, WA** (site TBA). (Speakers: Judith Hale Norris; Rick Berry). For info., contact Rick Agbay, 415-882-1243.

September 18: "Chairperson Training," sponsored by NASD Dispute Resolution, Inc., 1:00 PM – 5:00 PM, **San Francisco, CA** (site TBA). (Speakers: Judith Hale Norris; Rick Berry). For info., contact Rick Agbay, 415-882-1243.

September 19: "Panel Member Training," sponsored by NASD Dispute Resolution, Inc., at the Radisson Hotel, 9:00 AM – 1:00 PM, **Detroit, MI.** (Speaker: Edward T. Anderson). For info., contact Susan M. Zavis, 312-899-4433.

September 19: "Chairperson Training," sponsored by NASD Dispute Resolution, Inc., at the Radisson Hotel, 1:30 PM – 4:30 PM, **Detroit, MI.** (Speaker: Edward T. Anderson). For info., contact Susan M. Zavis, 312-899-4433.

September 21: "Chairperson Training," sponsored by NASD Dispute Resolution, Inc., 9:30 AM, **Norfolk, VA** (site TBA). (Speakers: L. Angelson; Donald Vaden). For info., contact Emelita Moy, 212-858-4432.

September 24: "Chairperson Training," sponsored by NASD Dispute Resolution, Inc., at the NASD Offices, 125 Broad Street, 8:30 AM, **New York, NY.** (Speakers: L. Angelson; Robert Herschman). For info., contact Emelita Moy, 212-858-4432.

October 17: "Panel Member Training," sponsored by NASD-DR, at the Radisson Memphis Hotel, 1:00 PM – 4:00 PM, **Memphis, TN.** (Speakers: W. Cassidy; TBA). For info., contact Lanette Cajigas, 561-447-4911.

October 18: "Chairperson Training," sponsored by NASD Dispute Resolution, Inc., at the Radisson Memphis, 9:30 AM – 4:30 PM, **Memphis, TN.** (Speakers: R. Schindler; Garry O'Donnell). For info., contact Lanette Cajigas, 561-447-4911.

October 19: "Panel Member Training," sponsored by NASD Dispute Resolution, Inc., at the NASD Offices, 9:00 AM – 1:00 PM, **San Francisco, CA.** (Speakers: Judith Hale Norris; Rick Berry). For info., contact Rick Agbay, 415-882-1243.

October 19: "Chairperson Training," sponsored by NASD Dispute Resolution, Inc., at the NASD Offices, 1:00 PM – 5:00 PM, **San Francisco, CA.** (Speakers: Judith Hale Norris; Rick Berry). For info., contact Rick Agbay, 415-882-1243.

October 25: "Panel Member Training," sponsored by NASD Dispute Resolution, Inc., at the Denver District Office, 9:00 AM – 1:00 PM, **Denver, CO.** (Speaker: John C. Barlow). For info., contact Susan M. Zavis, 312-899-4433.

October 25: "Chairperson Training," sponsored by NASD Dispute Resolution, Inc., at the Denver District Office, 1:30 PM – 4:30 PM, **Denver, CO.** (Speaker: John C. Barlow). For info., contact Susan M. Zavis, 312-899-4433.

November 13: "Panel Member Training," sponsored by NASD Dispute Resolution, Inc., at the NASD Offices, 9:00 AM – 1:00 PM, **Los Angeles, CA.** (Speakers: Judith Hale Norris; Rick Berry). For info., contact Rick Agbay, 415-882-1243.

November 14: "Panel Member Training," sponsored by NASD-DR, at the Hyatt Westshore, 1:00 PM – 4:00 PM, **Tampa, FL.** (Speakers: R. Schindler; John Cullem). For info., contact Lanette Cajigas, 561-447-4911.

November 14: "Chairperson Training," sponsored by NASD Dispute Resolution, Inc., at the NASD Offices, 9:00 AM – 1:00 PM, **Los Angeles, CA.** (Speakers: Judith Hale Norris; Rick Berry). For info., contact Rick Agbay, 415-882-1243.

November 15: "Chairperson Training," sponsored by NASD Dispute Resolution, Inc., at the Hyatt Westshore, 9:30 AM – 4:30 PM, **Tampa, FL.** (Speakers: R. Schindler; John Cullem). For info., contact Lanette Cajigas, 561-447-4911.

November 17: "Panel Member Training," sponsored by NASD Dispute Resolution, Inc., at the Louisville Marriott, 9:00 AM – 1:00 PM, **Louisville, KY.** (Speaker: John C. Barlow). For info., contact Susan M. Zavis, 312-899-4433.

November 17: "Chairperson Training," sponsored by NASD Dispute Resolution, Inc., at the Louisville Marriott, 1:30 PM – 4:30 PM, **Louisville, KY.** (Speaker: John C. Barlow). For info., contact Susan M. Zavis, 312-899-4433.

November 28: "Chairperson Training," sponsored by NASD Dispute Resolution, Inc., at the NASD Offices, 125 Broad Street, 9:30 AM, **New York, NY.** (Speakers: L. Angelson; James O'Neill). For info., contact Emelita Moy, 212-858-4432.

SAC's Bulletin Board

The *Bulletin Board* is open to all subscribers who wish to post a message related to arbitration practice or process, free of charge. When insufficient room is available, you may not see your message until the next issue. Feel free to check with us if you are uncertain.

People

Goodkind Labaton Rudoff & Sucharow, LLP are pleased to announce that **Philip R. Michael** has become Of Counsel to the Firm, resident in the New York office. Address: 100 Park Avenue, 12th Floor, New York, NY 10017. Tel: 212-907-0700. Fax: 212-818-0477.

Relocations

Susan F. Drogin, Attorney at Law, will be relocating the firm's offices on August 1, 2001. The new address, telephone numbers, and facsimile number will be : 262 Washington Street, 4th Floor, Boston, MA 0218. Tel: 617-371-0901. Direct Dial: 617-371-0910. FAX: 617-371-0911.

Other Announcements

The June 2001 issue of *The Neutral Corner* announces that **Kenneth Andrichik** was promoted to Vice President in January 2001. In addition, **Jean Feeney** assumed the new title of Chief Counsel at NASD Dispute Resolution in April 2001. Mr. Andrichik is best known as the Director of Mediation at NASD-DR. In that role, he "established and supervised what is now the most successful and largest securities mediation program nationwide." Mr. Andrichik is also in charge of the development of new business ventures and strategies. Development and oversight of the NASD-DR WebSite have also been managed by Mr. Andrichik. Ms. Feeney is based in the Washington, DC office and was accorded her new title, the *Corner* states, "in recognition of her responsibilities and accomplishments as Special Advisor to NASD Dispute Resolution President Linda D. Fienberg."

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earlier improvident choice." (*W. Nelson*)

Sao v. Credit Suisse First Boston, 00 Civ. 4584 (LMM), 2001 U.S. Dist. LEXIS 1897 (S.D. N.Y., 2/27/01): **Waiver — Timeliness Issues — Prejudice to Party.**

Former CSFB employee Sao charges age discrimination in this lawsuit and CSFB responded with a motion to compel arbitration. The only issue in dispute, and the subject of this decision, is whether CSFB waived its right to arbitrate. To make that determination, the Court teaches, it must consider "(1) the time elapsed from commencement of litigation to request to arbitrate; (2) the amount of litigation; and (3) proof of prejudice to plaintiff including 'taking advantage of pre-trial discovery not available in arbitration, delay and expense....'"

Mr. Sao charges that CSFB "refused" to arbitrate for almost 18 months, but the Court finds no allegation that

Plaintiff sought arbitration "under CSFB's Employment Dispute Resolution Program." Accordingly, CSFB's delay in requesting arbitration must be measured from the time the lawsuit was commenced. From that benchmark date, CSFB waited only 50 days to request arbitration, not the 18 months that Mr. Sao alleges. Prejudice is not proved by the fact that Mr. Sao underwent the expense of hiring an attorney to file a claim with the EEOC. Even if CSFB had demanded arbitration at an earlier date, Mr. Sao would not have been precluded from, and may well have proceeded with, filing an EEOC claim. The motion to compel arbitration is granted.

AWARD COPIES

Award Database subscribers can order photocopies of any of the arbitration Awards mentioned in this issue or otherwise. Just supply us with the Forum ID numbers of the Awards you want. We'll photocopy the Award and send it to you promptly. Prices are \$5 per Award, regardless of length. Minimum order: \$15.00. FAX service is also available for an additional \$5 per Award.

SCHEDULE OF COMING EVENTS

If you know of an arbitration event scheduled in the coming quarter, please tell us and we'll post it here.

Aug. 2-4: "14th Annual Summer Dispute Resolution Program: Six Simultaneous Professional Skills Workshops," sponsored by Pepperdine University School of Law, offers 18 hours of MCLE Credit and will be held at the Odell McConnell Law Center at Pepperdine University in **Malibu, CA**. The six programs are "Negotiation and Settlement Advocacy Skills," "Mediating Construction Disputes," "Environmental and Public Policy Dispute Settlement Skills," "Mediation Skills and Settlement Conference Advocacy," "Arbitration Law, Procedure and Practice," and "Advanced Mediation Skills." Regis. Fee: \$895 (tuition, meals & materials). For info., contact Struass Institute for Dispute Resolution, 310/506-4655.

Aug. 9-10: "Advanced Securities Law Workshop," sponsored by the Practising Law Institute, will be held at the Loew's Coronado Bay Resort, **San Diego, CA**. Issues on the agenda for this two-day seminar include SEC Rulemaking and Corporate Practice, Rethinking Offering Disclosure, Regulation FD, Current M&A Trends, Materiality Revisited, Corporate Governance, Litigation Developments, Delaware Update, Enforcement Update and Ethical Standards. Regis. Fee: \$1,295. For info., contact PLI at 800/260-4PLI or register online at www.pli.edu.

Aug. 15: "Securities Arbitration 2001: How do I Do It? How Do I Do It Better?" sponsored by the Practising Law Institute, represents the 15th annual program moderated by **David E.**

Robbins. This year's Program will be held at the PLI Education Center in **New York, NY** and features "experienced customer and defense attorneys, arbitrators, experts and administrators [who] will teach you how to represent customers, firms and brokers in specific types of securities arbitration cases. There is an extensive list of speakers and, for attendees, a securities coursebook accompanies the live program. Regis. Fee: \$695. Course Handbook only, \$149. For info., contact PLI, 800/260-4PLI. Internet: www.pli.edu.

Aug. 16: "Experts Roundtable" — Are You Coming?

Sep. 10-11: "Securities Trading on the Internet," sponsored by the American Conference Institute, will be held at the Marquis Hotel in **New York, NY**. John R. Hewitt, Mayer Brown, and Michael J. Hogan, CSFBdirect, are the co-chairs and the scheduled topics include online suitability, latest regulatory initiatives, best execution, and arbitrating Internet trading claims. Regis. Fee: \$1,599. For info., call ACI, 888-ACI-2480. Online: www.americanconference.com.

Sep. 10-11: "Securities Litigation 2001," sponsored by the Practising Law Institute, will be held at the New York Hilton in **New York, NY**. Class actions, corporate governance, criminalization issues, and developments in derivative & state court suits will be some of the topics covered by a faculty of 20 speakers chaired by Jay B. Krasner, Skadden Arps. Regis. Fee: \$1,395. For info., call PLI, 800-260-

4PLI. (See below, SF Program in October).

Sep. 10-11: "Understanding the Securities Laws," sponsored by the Practising Law Institute, will be held at PLI's California Center in **San Francisco, CA**. A faculty of practitioners, academics, and regulators participate to offer attendees a basic understanding of the federal securities laws and how to approach securities law questions in a practical fashion. Regis. Fee: \$1,295. Similar programs will also be held in **New York** (10/4-5), **Boston** (Video, 10/4-5), **Chicago** (10/15-16), **Houston** (11/5-6), and **New York** (12/13-14). For info., call PLI at 800-260-4PLI.

Oct. 4 & 5: "Suitability for Traditional and Online Brokers: Building Effective Procedures to Avoid Suitability Violations," sponsored by National Regulatory Services, will be held at the Roosevelt Hotel in **New York, NY**. Details will be announced as the date draws near. For info., call Sally Cole, 860-435-2541. X1851.

Oct. 25-26: "Securities Litigation 2001," sponsored by the Practising Law Institute, will be held at the PLI California Center in **San Francisco, CA**. Class actions, corporate governance, criminalization issues, and developments in derivative & state court suits will be some of the topics covered by a faculty of 20 speakers chaired by Bruce G. Vanyo, Wilson Sonsini. Regis. Fee: \$1,395. For info., call PLI, 800-260-4PLI.

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