NASD

The Neutral Corner

OCTOBER 2002

WHAT'S INSIDE

Sensitivity to Parties

The National Arbitration and Mediation Committee (NAMC), NASD Dispute Resolution's advisory group, recommended that this newsletter encourage arbitrators to demonstrate sensitivity to parties. The NAMC believes that sensitivity to parties, especially to parties who are terminally ill or elderly, is important, and it is considering ways in which to expedite the arbitration process for such parties. In addition, staff already makes every effort to expedite the administration of such cases upon request.

Arbitrators should do everything in their power to conduct punctual, prompt, and fair proceedings, particularly when parties express concern that unnecessary delays may preclude them from participating in the presentation of evidence because of health reasons. Arbitrators should make a similar effort when claimants or respondents have an important witness who is terminally ill or elderly.

Presiding arbitrators are central hearing participants. Consequently, they should make sure that they are not the cause of unnecessary delays. To accomplish this goal, arbitrators should accept appointment to a panel only when they can serve promptly, diligently, and to the end of the matter. They should avoid causing postponements unless the reason constitutes a genuine emergency. They also need to be prepared, and on time, for all conferences and hearings. Arbitrators who do not perform these ethical responsibilities can cause lengthy and expensive delays and may be removed from the NASD roster of arbitrators. For more on the ethical duties of arbitrators, read the article titled "*Keep Arbitration On Track*" in the June 2001 edition of *The Neutral Corner (TNC)*. Also, review the "Top Ten" Ways To Be A Better Arbitrator. To view both items on our Web Site at *www.nasdadr.com*, follow these links: "Resources for Neutrals; Education & Guidance."

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California Arbitrations

For the latest on the status of California arbitrations, read *NASD Notice to Members 02-68* which announces Securities and Exchange Commission approval of a six-month pilot amendment to IM-10100 of the NASD Code of Arbitration Procedure. The amendment, effective September 30, 2002, requires industry parties in California arbitrations to waive the contested California arbitrator disclosure standards—if all investor/customer parties or persons associated with NASD member firms with claims of statutory employment discrimination waive these standards.

Upon receipt of the waiver forms signed by investors and associated persons with such claims and their counsel, NASD will begin the arbitrator appointment process under NASD arbitration rules and disclosure requirements. If industry parties fail to sign the required waiver, the failure will not stop the arbitrator appointment process. In addition, the failure will be referred for appropriate disciplinary action. To view this *Notice* on our Web Site at *www.nasdadr.com,* follow these links: "*Rules & Procedures; Notices to Members.*"

Arbitrator Update Form

We made our online arbitrator information update form more user-friendly by including fewer mandatory fields. The self-explanatory form allows arbitrators to update or change their arbitrator record at any time, day or night, seven days a week. The form also allows arbitrators to update their narrative summary which is provided to parties to assist them in choosing arbitrators for their case. Please use the improved online form to help you fulfill your continuing duty to disclose any relationship, interest, or circumstance that may affect your impartiality or create an appearance of bias under NASD Rule 10312. To read this rule on our Web Site at *www.nasdadr.com*, follow these links: "Rules & Procedures; Code of Arbitration." View the arbitrator update form on our Web Site at *http://www.nasdadr.com/ArbInfoUpdate.asp.*

Rule Updates

NASD announced that two recently approved amendments to NASD Rule 10314 apply to all claims filed on or after October 14, 2002. *NASD Notice to Members 02-58* contained the announcement relating to the new default procedures that may be elected by all claimants against a suspended, terminated, or defunct NASD member firm or associated person that fails to answer in the arbitration. *NASD Notice to Members 02-59* contained the announcement relating to the specificity of answers; that is answers need only specify relevant facts and defenses to the submitted claim.

View the *Notices* on the NASD Web Site at *www.nasdadr.com* by following these links: "*Rules & Procedures; Notices to Members.*"

Editor's Note

In addition to your comments, feedback, or questions on the material presented in this publication and other arbitration and mediation issues, *The Neutral Corner* invites readers to submit articles on important issues of law and procedure relating to mediation, arbitration, or other alternative dispute resolution processes.

Please send your article to Tom Wynn, Editor, *The Neutral Corner*, NASD Dispute Resolution, 125 Broad Street, 36th Floor, NY, NY 10004. Call the Editor at (212) 858-4392 for editorial guidelines.

Sensitivity to Parties

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Arbitrators also should do everything in their power to help expedite the discovery of witnesses and other evidence under NASD Rule 10321. If the case involves a public customer party, they should utilize the NASD Discovery Guide to deal with documentary production. In addition, arbitrators need to enforce the provisions of NASD Rule 10321 relating to the required prehearing exchange of documents and identification of witnesses that each party intends to use in its presentations. Equally important to hearing efficiency and fairness, arbitrators must act quickly to prevent abuse or disruption of the process. For example, when arbitrators are determining the reasonableness of requested postponements/adjournments, they should include the health and age of a party or key witness among the facts or circumstances under consideration.

For more on the arbitrator's duty and power to maintain decorum of the proceedings, read the article titled "Decorum" in the August 2002 *TNC*, which also appears on our Web Site at *www.nasdadr.com*.

To help ensure expedited hearings, particularly in cases that involve very ill or elderly parties or important witnesses, arbitrators will soon be utilizing modified versions of the Initial Prehearing Conference Script and Hearing Procedure Scripts containing a joint arbitrator/party commitment to avoid unnecessary postponements, adjournments or other dilatory conduct that may interfere with a prompt, fair proceeding.

An August 1999 analysis of party evaluations of NASD arbitrators found that 92 percent of the parties or representatives who participated in the survey—conducted over a 16-month period—believed that the arbitrators who presided at their evidentiary hearings were sensitive to the parties. The survey's conclusions are contained in a report titled "Party Evaluations of Arbitrators: An Analysis of Data Collected From NASD Regulation Arbitrations." To view the report, visit our Web Site; follow these links: "Resources for Neutrals; Other Information; Information on Evaluation of NASD Arbitrators."

We encourage presiding arbitrators to ensure that sensitivity to parties includes parties and other important forum participants who are elderly or have serious health conditions.

NASD Promotes Settlement Month

By Patrick Kenny

October is Settlement Month at NASD. During this entire month, NASD Dispute Resolution offers quality mediations at reduced rates. On October 30, 2002 Settlement Month is brought to a close with Mediation Settlement Day. This event was first held in New York last October when parties involved in arbitrations and court cases were offered the opportunity to voluntarily settle their disputes through a variety of mediation programs. Many organizations including the Unified Court Systems Office of ADR programs and the Bar Association of the City of New York supported this event. This year many other mediation organizations have agreed to support the event as sponsors have doubled.

The goal of both Mediation Settlement Day and Settlement Month is to educate people about mediation and to encourage parties and counsel to use mediation for the first time. Review below the "Five Cs" of mediation representing an overview of the facets and techniques unique to the mediation process.

Creativity

Mediation offers the parties and mediator an opportunity to use creative ideas and solutions to settle their disputes. The mediation process is not bound by numerous rules or formalities. This allows a mediator to find flexible alternatives to help resolve a dispute between parties. The creativity aspect of mediation allows parties to look at a dispute from a variety of different perspectives that increase the possibility of settlement.

Control

In mediation, the parties control the process. This facet of mediation is vastly different from arbitration and litigation where an arbitrator and judge decide the final outcome of a dispute. Party control in the mediation process is beneficial because parties are more likely to have a compromising attitude rather than a win at all cost frame of mind.

Caucus

Caucuses are meetings held by the mediator privately and separately with each party. They are vital to the success of any mediation. They are the driving force behind a future settlement because they allow parties to open up and be candid with a mediator. The dynamics of the caucus are unique to mediation and allow parties to use the mediator as the bridge to settlement.

Confidentiality

Caucuses are confidential. The confidentiality of the caucus allows parties to open up to the mediator and express their real position in a dispute. Only if a party grants permission will a mediator reveal information disclosed in a caucus. This setting often allows the mediator to move the process towards settlement.

Cost

Most parties would agree that mediation results in time and cost savings. In surveys of parties mediating at this forum, 80 percent of the survey participants agreed that mediation resulted in saving time and 77 percent agreed that mediation resulted in cost savings. It is a myth that mediation is only another time consuming step in the litigation or arbitration process. A successful mediation lowers legal, discovery, and other costs associated with arbitration or litigation.

NASD mediation has proven to be a valuable form of dispute resolution that works along side of arbitration. Now that Settlement Month is here, it is time for parties to benefit from the many advantages of NASD Mediation. To obtain more information in regard to Mediation Settlement Month and Mediation Settlement Day, visit our Web Site at www.nasdadr.com.

Patrick Kenny is currently an Arbitration Administrator at NASD Dispute Resolution. In December 2002, he will receive his JD from New York Law School. Patrick received his BA in Government and Communications from Hamilton College where he was chosen as a Levitt Scholar for work on his senior thesis on welfare reform.

Industry Neutrals Wanted

The Administrator of the Merrill Lynch Claim Resolution Process is seeking qualified arbitrators from the securities industry to serve as neutral panel members for arbitration hearings conducted under the Claim Resolution Process (CRP) established as part of the settlement of the Cremin v. Merrill Lynch, Pierce, Fenner & Smith Incorporated gender discrimination class action litigation.

To qualify as an industry/non-public neutral, an arbitrator must be (i) associated with a broker/dealer, municipal securities dealer, government securities broker, or government securities dealer, (ii) registered under the Commodity Exchange Act or a member of a registered futures association or any commodities exchange or associated with any such person, (iii) associated with any of the above within the past three years, or (iv) retired from any of the above. In addition, the arbitrator must not have been employed in management or as counsel in the securities industry.

Qualified arbitrators who wish to apply should request application materials from the Merrill Lynch CRP Administrator, Northwestern University School of Law, 850 N. Lake Shore Drive, Suite 409, Chicago, Illinois 60611; Telephone: (800) 780-0209; Facsimile: (800) 510-6353; E-mail: *merrillclaims@nwu.edu.*

Making A Better Award—An Essential Arbitrator Function

By Richard P. Ryder[1]

NASD and New York Stock Exchange (NYSE) arbitration Awards need more content. When I say that they need more content, I am not suggesting that arbitrators must provide reasoning or explanations or, even, findings of fact. I think those are individual panel decisions, sometimes party-driven, sometimes driven by the circumstances of the case. I am stating that NASD and NYSE Awards need more content in terms of describing the dispute, and I believe history and precedent support this position. This article focuses on this important deficiency; suggests a solution and procedures to help alleviate the problem; and explains why better Award content will benefit many, including users of the process.

Disclosure

As any fair arbitrator must, let's start with disclosures that might affect my view that NASD and NYSE need to improve Award content. As a former NASD Arbitration Director (1978-80) and litigation manager for one of the major wire houses (1982-88), I was stimulated by the boom in securities arbitration in the late 1980s to start the *Securities Arbitration Commentator (SAC),* a monthly newsletter that, over the ensuing 14 years, has tracked events and developments in securities/commodities arbitration.

In April 1988, when the first issue of *SAC* was drafted, the events and developments at hand were exciting and momentous for arbitration. Among them were: (1) the fall-out from the Market Crash of October 1987; (2) the positive "pull" from the Securities and Exchange Commission (SEC) to create real arbitration reform; and (3) the negative "push" from Congressional efforts to overturn the Supreme Court's 1987 *McMahon* decision with legislative "reform."

As a consequence of these events, an omnibus rules package was drafted by the Securities Industry Conference on Arbitration (SICA) and uniformly adopted by the active Self-Regulatory Organization (SRO) arbitration forums. The SEC approved these rules changes and overhauled every facet of the process, from pleadings, through discovery, to arbitrator disclosure and selection, to hearing and, finally, to the Award. In the interest of enhancing the "perception of fairness" with the investing public, the Award, previously "bare-bones" and confidential, suitable for distribution on the back of a napkin, became instead a vehicle for presenting arbitration's case for public inspection. The formula: Add information content to the Awards and make all SRO Awards available to the public (Public Awards Program).

1 Richard P. Ryder served as Assistant Director and Counsel of NASD Enforcement in the New York District Office until 1978, when he became NASD Director of Arbitration. During most of the 1980s, he was litigation head for Paine Webber. In 1988, Mr. Ryder started the *Securities Arbitration Commentator (SAC)* as a newsletter service and in 1989 created, with Ms. Samantha Rabin, the *SAC* Award Database. He has participated in securities arbitration activities from every perspective, acting in past years as an attorney in arbitration, as an expert witness, and as arbitrator and mediator. The *SAC* Web Site address is *www.sacarbitration.com*. Mr. Ryder's e-mail address is *searco@comcast.net*, in the event you would like to comment directly to him concerning this article.

SAC began gathering the Awards, once they became publicly available in May 1989, and putting them into a database that allowed it to perform statistical surveys for publication in the newsletter and to sell Award searches to parties in arbitration. Then and today, one of the most popular search requests that *SAC* receives from parties is one that seeks all available Awards in which a particular arbitrator has served. When that information became publicly available, it led to an increase in *SAC* revenues. Then and now, an increase in the information content of Awards helps the business of this author.

I do not believe, however, that this disclosure prevents me from fairly advocating the premise that more information content in Awards serves the public interest and assures conformity with Award requirements. Using the analogy of an SRO arbitrator with extensive subject matter expertise, I would argue that I am more enabled than disabled by my familiarity with the subject. With that caveat, I will continue to serve as the author of this article; however, each reader who disagrees has the ability to effectuate my recusal by choosing not to read further.

Precedent

Today's "Case Summary" section of NASD and NYSE Awards needs repair and it is arbitrators who should fix it. What is wrong with the "Case Summary" sections crafted in today's Awards? Too often, they simply recite the names of causes of action (e.g., "Claimant alleges unsuitability, churning, unauthorized trading, and failure to supervise…") gleaned from the claimant's pleading and say little or nothing about the factual circumstances that led to the dispute. Is this what was intended? To answer that, we need to take a look at what the "founders" of the Public Awards Program contemplated when they made the sweeping arbitration rule changes of May 1989.

In September 1987, SEC Enforcement Director Richard G. Ketchum, wrote to the SROs, acknowledging that "SRO-sponsored arbitration may become the primary forum for the resolution of disputes between broker/dealers and investors" and setting forth many recommendations to improve the process in preparation for this major change. On the subject of Awards, the letter[2] advised that the "[i]nformation available regarding awards should include the names of the parties in each case, a summary of the issues in the dispute, a summary of the legal issues, including jurisdictional issues, resolved…."

The Ketchum letter states that "[i]t is important for the public and other infrequent users of the system to have ready access to

2 Letter from Richard G. Ketchum, Director of Division of Market Regulation, SEC, to SICA members, SEC Initiatives for Changes in SRO Arbitration Rules, SECURITIES ARBITRATION 1988, at 257, 286 app. A (PLI Corp. Law & Practice Course, Handbook Series No. 601, 1988). The author wishes to thank David E. Robbins, the moderator of the PLI annual program on securities arbitration and the editor of that series' annual course book materials, for supplying a copy of the Ketchum letter and SICA's initial response letter in December 1987. Id. at 292.

summary results of arbitration cases and, therefore, have some ability to evaluate the system." Clearly, it is not helpful to the reading public to see in the Award that the decided dispute concerned "suitability, churning, etc.," unless this recitation is accompanied by a summary of the factual issues that led to the itemization of claims. When the Securities Industry Conference on Arbitration (SICA), which is comprised of public, industry, and forum representatives, first responded to these recommendations in December 1987, it had not yet accepted many of the SEC premises as to what should be in the Awards or whether the Awards themselves should be made publicly available (as opposed to "maintaining a list of cases…"). However, SICA agreed without qualification that "the general subject matter of each case" should be disclosed in Awards.

In May 1989, NASD and NYSE Arbitration Rules were changed to include, as a required element of each publicly available Award, language not dissimilar to that proposed by the SEC: "a summary of the issues… [and] a statement of any other issues resolved…." In subsequent years, with the recognition that greater disclosure in the Awards was a good thing, the Public Awards Program has been enhanced. In 1993, the NASD moved to make publicly available all Awards, including those relating to industry disputes. At the same time, NASD disclosed the names of the arbitrators in all Awards, not only prospectively, but also retrospectively, as to the customer-related Awards it had been publicly distributing since May 1989.[3]

SICA, too, has re-visited the Public Awards Program to enhance the information content of Awards. In the early 1990s, it proposed, and the SROs agreed to add as required Award elements, the names of party representatives in the arbitration and the investment product involved in the dispute. At no time has SICA, NASD or NYSE taken any retrenchment action through rulemaking to reduce the required elements added in May 1989 or to restrict the information content available to the public. The formal actions taken over the years have only served to enlarge the categories and content of public Awards.

Deficiency

In the past, the "Case Summary" section of NASD Awards often contained two and three pages of narrative about pleading contents. While laudable, this effort required far more work than was necessary to satisfy any reasonable definition of the "summary of issues" requirement. Since staff usually did the drafting, composing the Award became an administrative "bottleneck" that impeded panels from meeting the 30-day commitment within which to render a timely decision.

3 NYSE, from the outset in May 1989, has disclosed arbitrator names in the publicly available Awards and has made all Awards part of the Public Awards Program.

Unfortunately, the pendulum has swung too far in the opposite direction. Several pages of "Case Summary" have become one or two short sentences and the task has been made clerical. Today, the typical "Case Summary" is a reflection of "controversy" and "product" statistics, e.g., "Claimant alleges unsuitability and churning ["Controversies"]…. The dispute involves options ["Product"]." At the same time, NASD is able to claim today a better than 90 per cent success rate in issuing awards within 30 days of the final hearing session.

Understanding why we now have Awards with inadequate "Case Summary" sections more than 85 percent of the time does not excuse the fact that the required element of a "summary of the issues" is not being met. The "Case Summary" section is the place where the reading public is supposed to learn what the parties are fighting about. In other words, we need a summary that describes the "general subject matter" of the dispute, as SICA outlined to the SEC. We do not need two or three pages of detailed factual allegations and defenses. We do need a summary—with one or two paragraphs—that sets forth the primary factual issues that divided the parties.

Solution

How can we get to this very desirable objective, while recognizing that an overburdened staff cannot spare the time to learn the essential facts of each case on the docket? The answer lies in the simple proposition that the Award is the arbitrators' work product. Awards are now regularly posted on the Internet, available 24 hours a day, seven days a week for everyone to view. They are the one document that survives the close of the arbitration and retains lasting value. Parties regularly scrutinize past awards when they consider the selection of arbitrators to their panels. They are utilized to develop statistical analyses; to make risk management decisions; to negotiate settlements; to establish probabilities in mediation discussions; and to pinpoint problem areas of specific firms or branch offices.

Awards need meaningful "Case Summary" sections that describe—in one or two paragraphs—the primary factual issues that divided the parties. Chairpersons can help accomplish this essential panel responsibility —for the benefit of forum users and the arbitration public—by using procedures that enlist the assistance of counsel.

Add to the equation that arbitrators are increasingly encouraged to take charge of their own cases and to operate more independently of the staff in managing a case from prehearing conference through discovery to hearing. It started with the staff attorney allowing arbitrators to operate the tape recorder when she/he had to leave the hearing room. Today, NASD staff rarely attends the hearing and arbitrators have graduated to more difficult

tasks. Handling the tape, listing the exhibits, gathering the documents for the record file, and writing up the outcome and special issues are tasks that arbitrators regularly perform without staff involvement. Arbitrators are expected to run the initial prehearing conference, write up the case scheduling and discovery orders, and otherwise guide the parties through the process. Arbitrators have adjusted to this and call on the staff only when unusual procedural circumstances arise.

Today, NASD staff has been removed from the arbitrator selection process. The Neutral List Selection System (NLSS) generates lists of arbitrator names on a rotational basis for party selection. Even when the parties strike all of the arbitrator names on a list, the staff must appoint the next eligible name on the NLSS rotation to fill the slot. The arbitrator must stand on his/her own reputation and record to be chosen by the parties. Taking charge of the process is the mandate facing arbitrators.

Taking greater responsibility for the content of the Award lies naturally in the arbitrators' bailiwick. Last year, the Florida Supreme Court ordered arbitrators—not the staff—to indicate specifically in their Awards whether statutory claims allowing for attorney fees have been sustained. In statutory employment discrimination cases, NASD Rule 10214 now provides for "a statement regarding the disposition of any statutory claim(s)" in the Award. In several jurisdictions, Awards containing reasoning have either been encouraged or demanded by top appellate courts. Although this article is not about reasoned Awards, underlying this judicial nudging is an insistence that arbitrators take greater control of their own work product. Awards today are focal in importance and drafting them should not be considered a clerical task.

Assuring that the nature of the dispute is adequately described in the Award resides, lastly and finally, with the individual panel. Indeed, at training sessions and seminars, senior staff regularly insists that arbitrators control the Award and, if the arbitrators want the Award to contain a better description of the issues in dispute, they should make that known to the staff. This also is borne out in my many case-related conversations with arbitration staff. The "Case Summary" is the place in the Award where the particular or unique character of the dispute should be reflected. If you, as an arbitrator, believe that NASD or NYSE staff holds the view that the "Case Summary" section should be stark and vacuous, you fail to consider that the staff is merely tending to its responsibility, i.e., producing an Award for signature within the allowed period. It is unreasonable to expect the staff, given limited contact with a specific case and cursory knowledge of the material issues, to write a meaningful "Case Summary."

Procedures

How can arbitrators help expedite the Award drafting process and, at the same time, ensure that their work product meets all required Award elements, including a meaningful

"summary of the issues"? Set forth below is one set of procedures the Chairperson can follow to produce a meaningful summary that parties can readily accept and that staff can easily incorporate into the final Award format.

1. At the Initial Prehearing Conference (IPHC), instruct all attorneys to draft and submit a summary of the factual issues from their standpoint. Advise them that the purpose relates to composing a "Case Summary" section for the final Award; that their summary should not be more than two average-size paragraphs; and that the drafts should be submitted at the commencement of the first evidentiary hearing session.
2. Add the above instruction to the IPHC Scheduling Order form (Item #5 "Other Rulings"), so that the staff will include it in the memorandum to parties that follows the IPHC. See the IPHC Scheduling Order in the Arbitrator's Reference Guide on the NASD Dispute Resolution Web Site at www.nasdadr.com by clicking on Resources for Neutrals and then Education & Guidance.
3. As Chairperson, instruct the staff to send a reminder to the parties about six to eight weeks before the evidentiary hearing as to the required 20-day prehearing exchange of documents and witness lists. See NASD Rule 10321 on the NASD Dispute Resolution Web Site. Ask the staff to include in this reminder a statement that case summaries must be submitted at the first evidentiary hearing session.
4. Once the case summaries are in hand, the Chairperson and other panel members can edit the summaries at appropriate breaks during the course of the hearing. The panel can either agree as to the text of the "Case Summary" and make it the panel's own or the attorneys' submissions can be labeled as such and introduced in the Award with a preface which states: "Claimant's counsel described the Claimant's case as follows:…" and "Respondent's counsel described the Respondent's defenses as follows:…" By the end of the case, the summary will be ready for submission to the staff.
5. NASD staff provides the arbitrators with the Award Information Sheet. This document leads the panel through a question and answer process to help the staff draft an Award that follows the arbitrators' directions. Question 7 in this document is an appropriate place to instruct the staff to incorporate the case summary drafts into the "Case Summary" section of the Award. Be sure to attach the case summaries to the Award Information Sheet. See the Award Information Sheet in the Arbitrator's Reference Guide on the NASD Dispute Resolution Web Site.

Conclusion

I believe that reviewing courts that are distrustful of "bare-bones" Awards—and suspect that the sameness of Awards signifies the lack of attention and care attending "back-room" decision-making—will find a meaningful "Case Summary" evidence that the panel understood the issues and is not hiding behind its right to remain silent.

As noted previously, arbitrators can achieve optimal Award content by taking an interest in fashioning the Award to fit their arbitration. Some panels may choose to include written explanations or findings of fact, in which case the "summary of issues" will flow naturally as the reasons for the panel's conclusions unfold. In most cases, arbitrators will forego the inclusion of reasoning, but, by including a meaningful "Case Summary" in the Award, they will exhibit their understanding of the factual issues in the dispute and their attention to the main arguments posed by the parties.

Making the "Case Summary" section of the Award case-specific or unique in character also allows parties in pending arbitrations and the rest of the arbitration public to categorize the cases as representing one kind of dispute or another. For instance, online trading disputes as a category may or may not be characterized in the typical "Case Summary" today as such, but even if an Award states that online trading was involved, the "Case Summary" ordinarily will not reflect that the dispute related to an order to cancel that failed; to a market order to purchase that was executed at an unexpectedly high price or for an unexpectedly large number of shares; to a system failure at the firm which interfered with attempts to trade; or to unsuitable purchases that were purportedly recommended or endorsed by ads or promotions on the broker-dealer's Web Site. Yet, it is this additional information or "color" that makes all the difference.

If most of the online trading cases fall into one of these sub-categories of disputes, compliance managers and systems technicians will want to address the source of that problem. Risk managers will want to weigh the potential claims that await a decision to offer online trading. Arbitration practitioners will want to know the "win" rates for claims in each of the sub-categories and whether those statistics differ markedly depending upon the nature of the dispute. They also will want to know, not only that an arbitrator nominee in a pending arbitration has decided an online trading case, but also what the general subject matter of that case involved. Stating in the Award only that online trading was involved does not satisfy these legitimate business and tactical Award uses. Providing information about the general subject matter in dispute or the factual issues that underlay the online trading dispute allows categorization and analysis.

When NASD and the NYSE inaugurated a Public Awards Program containing arbitration Awards with required information elements, they greatly enhanced the perception of fairness in securities arbitration. There is substantial truth in the observation that more information exists in the public domain about outcomes in securities arbitration, broken out by state, by hearing location, by dollar size, by broker-dealer, by product, and by forum than can be reasonably gathered about any category of litigation in our "public" courts. This "open window" into arbitration has allowed surveys of all types to be performed that shed light and generate perspective among users of the forums. Public Awards have provided the data to deflate the cynical myths about SRO arbitration that periodically gain currency. The Public Awards Program permits people to devise their own hypotheses about arbitration outcomes and to test those theories for application in a variety of ways. This Program helps risk managers, internal auditors, examiners, compliance personnel, insurance carriers, neutrals, experts and, not incidentally, parties and their counsel.

Today, administrative exigencies have substantially curbed the information content in Awards. As a result, the usefulness of the Public Awards Program has been unnecessarily limited. This unfortunate condition persists at a time when courts are demanding more information in SRO awards; when other industries are using arbitration agreements abusively and weakening arbitration's judicial and media image; when state legislators are requiring arbitrators to disclose more specific information about their past awards; and when new products and investing mechanisms are changing our markets and creating new categories of investor disputes.

Since the Public Awards Program was designed to serve a far wider audience than the parties in the individual case, SRO arbitrators owe a duty to that broader public to produce an Award that accurately and specifically describes the case they decided. By simply doing what judges do – enlisting counsel's help to ease the court's task – SRO arbitrators can help fill the information gap that has developed in Awards. In so doing, they will help ensure that the promise of what should be disclosed in SRO Awards is faithfully kept, and provide the investing and arbitration public with valuable information about the outcomes of the many kinds of disputes that populate the exciting and distinctive world of securities arbitration.

Questions & Answers on NASD Arbitrator Classification

Question: I recently received a letter advising that I've been preliminarily accepted to the NASD arbitrator roster, pending successful completion of training. The letter indicated that I've been classified as a "non-public" arbitrator. Is that the same as an "industry" arbitrator?

Answer: Yes.

Question: If so, does that mean that I should play a partisan role when I get appointed to a case, and conduct myself as the arbitrator on behalf of the industry?

Answer: No.

Classification of arbitrators isn't meant to imply a party-appointed arbitrator system. All NASD arbitrators must be impartial/neutral in appearance, as well as in fact. The duty of neutrality continues throughout and after your service on any arbitration proceeding and is central to the success of the NASD arbitration program. NASD Rule 10312 requires arbitrator neutrality. To read this rule on our Web Site at *www.nasdadr.com,* follow these links: "*Rules & Procedures; Code of Arbitration Procedure.*" For more on neutrality, see the Code of Ethics on our Web Site by following these links: "*Resources for Neutrals; Rules; AAA/ABA Code of Ethics for Commercial Arbitrators.*"

As a matter of fact, required neutrality accounts, in part, for our changing the term "industry arbitrator" to "non-public arbitrator" so as to avoid any misconception that classification might mean partiality to industry parties. Arbitrators classified as "public" also must meet this neutrality requirement.

The goal of NASD Dispute Resolution is to provide arbitrators who will deliver fair dispute resolution services to all of our forum users—the investing public, brokerage firms, and their employees. If you fail to conduct yourself neutrally, the award may be set aside or vacated by a court of law because non-neutrality by one arbitrator affects the entire panel. Even if your failure to be neutral does not result in vacation of the award, it nevertheless reflects negatively on this forum's most essential asset—its reputation for fairness—an asset not easily restored once it is diminished.

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