Alternative Dispute Resolution

De-mystifying Securities ADR: Reform and Resurgence after McMahon

By Michael P. Coakley and Mary A. Bedikian

In recent years, the pace of change in arbitration has been accelerating at such a rate that practitioners and arbitrators alike are hard pressed to remain well-versed. An anchor for those at sea are the underlying principles of arbitration. It is these principles that make it work, and drive the changes.

Over the last 12 years, the United States Supreme Court has decided 34 cases directly affecting securities arbitration. The broad sweep of these decisions favor arbitration, and set the stage for profound changes in the way responsible practitioners must now handle cases.

This article will first briefly review the changes that inhere in the federal law of arbitration. Next, it will cover recent developments, specifically the Ruder Report, a critical assessment of how arbitration works and should work to raise investor confidence in the viability of the arbitral forum. This is followed by a short discussion of the growth of other ADR methods, attributable in part to a wider use of arbitration. Finally, we will offer a look at the future of securities ADR.

THE ROAD WELL-TRAVELED

The Wilko Decision

The pre-1980s history of mistrust of arbitration found its highest expression in the 1953 United States Supreme Court decision, Wilko v Swann. In Wilko, an investor brought a misrepresentation suit against the brokers from whom he had purchased stock, seeking damages under the civil liabilities provisions of § 12(2) of the Securities Act of 1933. The margin agreement between the parties mandated arbitration of future disputes. Instead, the investor in his suit argued that the arbitration provision was invalid because § 14 of the Securities Act of 1933 prohibited a waiver of any provision in the Act, including the right to sue for fraud. The Supreme Court found in the investor's favor, and held the claim non-arbitrable. In doing so the Court showed its distrust of arbitration as a perceived inferior method of dispute resolution for securities cases:

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Even though the provisions of the Securities Act, advantageous to the buyer, apply, their effectiveness in application is lessened in arbitration as compared to judicial proceedings.

This case requires subjective findings on the purpose and knowledge of an alleged violator of the Act. They must be not only determined but applied by the arbitrators without judicial instruction on the law. As their award may be made without explanation of their reasons and without a complete record of their proceedings, the arbitrators' conception of the legal meaning of such statutory requirements as "burden of proof," "reasonable care" or "material fact," see, note 1, supra, cannot be examined. Power to vacate an award is limited.

As the protective provisions of the Securities Act require the exercise of judicial direction to fairly assure their effectiveness, it seems to us that Congress must have intended s 14, note 6, supra, to apply to waiver of judicial trial and review (FN26)

Congress has afforded participants in transactions subject to its legislative power an opportunity generally to secure prompt, economical and adequate solution of controversies through arbitration if the parties are willing to accept less certainty of legally correct adjustment.

Thus the Supreme Court in Wilko v Swann legitimized judicial disdain for arbitration even in the face of the United States Arbitration Act in a way that required decades to fix. Wilko was later extended by the circuit courts to securities disputes arising out of Section 10(b) of the 1934 Act.

The Erosion of Wilko

A shift away from Wilko occurred in Scherk v Alberto-Culver Co. An agreement
between an American manufacturer and a German citizen provided that any controversy would be settled by arbitration before the International Chamber of Commerce in Paris. A dispute subsequently arose and the United States firm sought relief in American courts, claiming violations of § 10(b) of the Securities Exchange Act and Securities Exchange Commission (SEC) Rule 10b-5. The German citizen moved for a stay of litigation pending arbitration. The district court and Court of Appeals, relying on Wilko, held that the arbitration clause was unenforceable. The Supreme Court reversed, stating the agreement of the parties to arbitrate should be respected and enforced by the federal courts in accordance with the Federal Arbitration Act (FAA). The Supreme Court eloquently explained:

"An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute. The invalidation of such an agreement in the case before us would not only allow the respondent to repudiate its solemn promise but would, as well, reflect a parochial concept that all disputes must be resolved under our laws and in our courts .... We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts. (Citation omitted.)"

Further, Justice White, in his concurring opinion, suggested that Rule 10b-5 claims under the Securities and Exchange Act of 1934 may be arbitrable because such claims are implied, not express. In fact, by the time Byrd was decided by the Supreme Court, district courts had already ordered arbitration of Rule 10b-5 claims. In the same year, the Supreme Court held that the FAA was designed to alleviate traditional judicial hostility to arbitration and establish a policy in its favor. With Byrd, arbitration was beginning to throw off the negative cloak covering it since Wilko v Swann and began to realize the promise of arbitration Congress made possible with the 1925 Act.

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decision, the Court found unanimously that claims involving violations of the Racketeer Influenced and Corrupt Organizations (RICO) Act are arbitrable.

It was this case that showed, more than any prior case, the apparent tension between the FAA and the federal securities acts. The primary purpose of both the Securities Act of 1933 and the Securities Exchange Act of 1934 is the protection of the investing public. Section 14 of the 1933 Act and Section 29(a) of the 1934 Act prohibit any “condition, stipulation, or provision” binding a plaintiff to waive compliance with provisions of the acts and the rules and regulations of the SEC. Under the 1933 Act, investors are provided an express right to a private cause of action for fraud. Under the 1934 Act and Rule 10b-5, investors have an implied right to a private cause of action.

The primary purpose of the FAA is to provide for the enforcement of agreements to arbitrate future disputes and to enforce the awards issued for transactions involving interstate commerce. Some felt that this policy favoring arbitration potentially conflicts with the securities acts when a broker seeks to compel an aggrieved investor to arbitrate based on a pre-existing arbitration agreement between the parties. However, in McMahon the Supreme Court found that arbitration provided adequate protection to investors with the oversight of the SEC and this gave the first indications it may overrule Wilko.

Thus, the mistrust of arbitration that formed the basis for the Wilko opinion in 1953 is difficult to square with the assessment of arbitration that has prevailed since that time.

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Even if Wilko’s assumptions regarding arbitration were valid at the time Wilko was decided, most certainly they do not hold true today for arbitration procedures subject to the SEC’s oversight authority.

Two years after deciding McMahon, the Supreme Court in Rodriguez de Quijas v Shearson/American Express, Inc. addressed the open question of the arbitrability of 1933 Act claims, holding that such disputes were indeed capable of resolution by arbitration under a “future disputes” clause. The Court stated:

The Court’s characterization of the arbitration process in Wilko is pervaded by what Judge Jerome Frank called “the old judicial hostility to arbitration.”

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To the extent that Wilko rested on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants, it has fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.

Wilko was completely overruled.

THE REFORM MOVEMENT: A CRITICAL ASSESSMENT BY THE SECURITIES INDUSTRY

Once judicial opinion on the feasibility of arbitration was clearly pronounced and understood in the securities arena, the industry, prompted by investor criticism, took an inward look at its procedures.

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In September 1994, the Board of Governors of the National Association of Securities Dealers, Inc. (NASD), appointed the Arbitration Policy Task Force (commonly referred to as the “Ruder Commission”) to evaluate the securities arbitration process administered by the NASD and to suggest possible reforms. In January 1996, a 200-page comprehensive report was introduced. The “most significant” issues identified were:

- The increased litigiousness in arbitration;
- The growth in the use of predispute arbitration agreements;
- The six-year eligibility rule;
- The use of discovery in arbitration; and
- Punitive damages.

The task force believed that many of these issues are causing a stray from a "model of informal, expeditious and inexpensive dispute resolution." The task force stressed that securities arbitration must provide “clear and significant advantages over the civil litigation system it has replaced.”

Predispute Arbitration Agreements

The task force found that investor and employee representatives were critical of the perceived industry practice of requiring individual investors and prospective employees to sign predispute arbitration agreements before opening an account or obtaining employment. The negative impact of this perceived compulsory arbitration is the focus of the recommendations for change.

Rejection of an outright ban on predispute arbitration clauses was conceded by the task force. It concluded that arbitration, even with its flaws, is preferable to civil litigation. Significantly, it also found that the available statistics do not support the conclusion that industry-sponsored arbitration is biased against the investor. Finally, the task force believes that its recommendations are pro-investors.

The language of the predispute agreement was a focus. Proposed changes include:

- Self-Regulatory Organization (SRO) rules as well as arbitration agreements expressly stating that the FAA, and not state arbitration law, governs securities arbitration;
- Predispute arbitration agreements should incorporate uniform language on critical substantive and procedural issues;
- Rewrite agreements in “plain English” and publish in “user friendly” designs; and
- Expand existing disclosures regarding the differences between court litigation and arbitration to include putting the customer on notice regarding time limitations on bringing claims.

The Six-Year Eligibility Rule

Section 15 of the NASD code imposes a six-year eligibility rule on claims. Unlike many statutes of limitations, the eligibility period is not subject to the doctrines of equitable tolling or estoppel. Nor does the rule extend any applicable statute of limitations.

Problems that the Ruder Commission found with the eligibility rule included: frequent post-claim litigation results; and an increase in litigation results in the NASD...
being named as a defendant which drains resources. In the arbitration process itself, the eligibility rule caused problems also in that it lacked definition of the "triggering event" and there was disagreement between industry members and investor representatives regarding who should make the eligibility determination.29

The task force recommends that the eligibility rule be suspended for a three-year period and that it be replaced with procedures to allow motions on statute of limitations grounds. In particular, it suggests that the NASD create procedures allowing defendant to move to dismiss on statute of limitations grounds before the merits hearings and that such motions be decided as soon as is practicable. There is a recommendation that Section 6 of the NASD code be amended to preclude a party that has made the determination of eligibility, the proposal, the director of arbitration would be named as a defendant which drains resources. The report suggests that punitive damages be available in arbitration to the same extent in court for the same claims. The controlling state law of the investor's state of residence at the time of filing would determine punitive damages.30

In addition, a modified eligibility rule has been adopted by the Securities Industry Conference on Arbitration (SICA) which, after comment, was to be submitted to the SRO rule-making bodies. Under this proposal, the director of arbitration would make the determination of eligibility, the event or occurrence is defined as the trade date, and claims determined to be ineligible for arbitration may be prosecuted in court.31

SICA, then, has rejected the task force recommendation, but hopes to end the eligibility controversy with its own proposal.

Punitive Damages

Polarization is wide between investors and the securities industry on the punitive damage issue in securities arbitration.32 Lack of due process protection is the most prominent argument asserted against the awarding of punitive. The task force came up with a compromise. The report suggests a cap of the lessor of two times compensatory damages or $750,000. It also would preclude awards of both RICO and punitive damages for the same claim and recommends that punitive damages be available in arbitration to the same extent in court for the same claims. The controlling state law of the investor's state of residence at the time of filing would determine punitive damage availability.33

Discovery

Today, arbitration functions more like truncated litigation. This is because discovery requests have proliferated, and hardball litigation tactics have escalated. Suggestions made by the task force to alleviate this concern are:34

- Automatic production of "essential documents" within 45 days of the filing of the respondent's answer;
- A ban on depositions except in exigent situations; and
- All discovery disputes would be resolved by the arbitrators, preferably by prehearing telephone conference.35

Many steps away from implementation, approval is required by the Board of Governors and NASD's National Arbitration and Mediation Committee for action. SICA, the SROS, and SEC will have the final say on which proposals to put into place.36

The major arbitration forums of the securities SROs have been issuing arbitration awards publicly for seven years—since May 10, 1989.

- No additional document requests without a showing that they are "reasonably likely to be relevant and important to the resolution of the issues in dispute";
- A limit on the number of information requests similar to that imposed by the Federal Rules of Civil Procedure;
- A ban on depositions except in exigent situations; and
- All discovery disputes would be resolved by the arbitrators, preferably by prehearing telephone conference.35

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THE "PUBLIC" VIEW OF ARBITRATION: HOW DO INVESTORS FARE?

One perception perpetuated in connection with securities arbitration is that investors do not fare as well when recovery is achieved. A companion perception is that investors do not prevail as often as in litigation. Both are misperceptions.

The major arbitration forums of the securities SROs have been issuing arbitration awards publicly for seven years—since May 10, 1989. Recently, a customer award survey was conducted.37 This survey focused on investor disputes with brokerage firms. The survey looks at 10,000 awards involving investor-initiated claims—SRO,

SIZE OF CLAIM BREAKDOWN
(With Punitive Award Results)

<table>
<thead>
<tr>
<th>Claim Amount</th>
<th>Customer Wins</th>
<th>Punitive Awards</th>
</tr>
</thead>
<tbody>
<tr>
<td>$0-10</td>
<td>3,395</td>
<td>1,683</td>
</tr>
<tr>
<td></td>
<td>29</td>
<td>238</td>
</tr>
<tr>
<td>$10-50</td>
<td>2,309</td>
<td>1,274</td>
</tr>
<tr>
<td></td>
<td>48</td>
<td>1,289</td>
</tr>
<tr>
<td>$50-100</td>
<td>1,183</td>
<td>660</td>
</tr>
<tr>
<td></td>
<td>33</td>
<td>2,572</td>
</tr>
<tr>
<td>$100-500</td>
<td>1,653</td>
<td>991</td>
</tr>
<tr>
<td></td>
<td>59</td>
<td>13,134</td>
</tr>
<tr>
<td>$500-1000</td>
<td>246</td>
<td>163</td>
</tr>
<tr>
<td></td>
<td>10</td>
<td>2,070</td>
</tr>
<tr>
<td>Over 1 Million</td>
<td>189</td>
<td>118</td>
</tr>
<tr>
<td></td>
<td>13</td>
<td>8,352</td>
</tr>
<tr>
<td>Money Not Specified</td>
<td>555</td>
<td>280</td>
</tr>
<tr>
<td></td>
<td>18</td>
<td>1,794</td>
</tr>
</tbody>
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AAA and the National Futures Association (NFA) awards included.

The chart on page 179 shows the distribution of awards over a seven-year period.

A n analysis of the seven-year period (5/10/89 to 6/30/95) showed a steady downward trend in the "customer win" rate. Since this rate corresponds directly with a rise in the settlement rate, it is natural to assume a link. Customer win rates have exceeded 60 percent at some arbitration forums. The General Accounting Office's 1992 study of securities arbitration reported a 59 percent "win" rate for customers at the SRO forums (60 percent at AAA) and a 60 percent "recovery" rate (vs. 57 percent at AAA).

Arbitrators awarded punitive damages in only about 2.1 percent of the awards. Arbitrators exceeded a punitive-to-compensatory award ratio of 3-to-1 in 12 percent of the punitive damages cases and exceeded a 5-to-1 ratio in only seven percent of such awards. The 2.1 percent average, was spread among awards with claims of all sizes.

The AAA began making securities awards publicly available in May 1993. Only awards filed after that date and filed under the Securities Arbitration Rules are formally subject to the Public Award Program. The Securities Arbitration Commentator (SAC) also publishes awards and statistics. SAC has relied in the past solely upon the statistics released by AAA concerning its securities arbitration program. Today, we can refer to statistics developed from AAA's database of publicly available AAA awards.

<table>
<thead>
<tr>
<th>AAA Securities Awards</th>
</tr>
</thead>
<tbody>
<tr>
<td>Customer-Initiated Arbitrators Only</td>
</tr>
<tr>
<td>From 5/1/93 to 6/30/95</td>
</tr>
<tr>
<td>83 total awards, 58 customer wins</td>
</tr>
<tr>
<td>46 awards w/money claimed,</td>
</tr>
<tr>
<td>32 customer wins</td>
</tr>
</tbody>
</table>

Despite disparities among the various states, each state seems to stay in character. If it's an option, practitioners' state situs choice may prove to be tactically worthwhile.

Through these survey results, parties and their attorneys may appreciate that the publishing of arbitration awards could contribute to settlement negotiations; better inform of tactical choices; and guide participants' strategic planning.

THE MOVEMENT TOWARD OTHER FORMS OF ADR

The success of arbitration has triggered intense interest in other ADR methods. Chief among them is facilitative mediation, a process in which a neutral, appointed either by an administrative agency or the parties directly, assists the parties in resolving their dispute on their own terms.

The NASD has implemented a pilot Early Neutral Evaluation (ENE) program, that will be "incorporated into the existing dispute resolution services in 1997." ENE involves a neutral evaluation of the merits of a case. The pilot program encompassed some 25 percent of larger arbitration cases.

Also, effective August 1, 1995, the NASD began a program for voluntary and non-binding mediation of customer disputes. To encourage participation, NASD is waiving fees for pending arbitrations. The mediation rules amend Part IV of the NASD rules, starting with Section 50. Copies may be obtained from any NASD office. The four arbitration offices will also be in charge of mediation.

Michigan is included as one of the 10 most active states granting securities arbitration awards.
various procedures are available through any AAA regional office. A party may list a case with the AAA and request that the AAA invite the other party to join in a submission to mediation, as well as other ADR programs. The AAA will, upon request, provide a form to do so. Upon receipt of various requested information, AAA will contact the other party or parties to the dispute. If there is no agreement among the parties to submit the dispute to an ADR procedure, there is no charge to the filing party. If the matter settles as a result of AAA contact with the parties, the filing party will pay a $150 fee. If there is a submission to an ADR procedure, the fee schedule in the appropriate AAA rules or procedures will apply.

Michael P. Coakley is a senior principal in the Detroit office of Miller, Canfield, Paddock and Stone, P.L.C. He received his law degree from the University of Michigan Law School and his B.A. from Richard Stockton State College. He is a member of the American, Michigan, Detroit, Federal and Oakland County Bar Associations, and the American Arbitration Association. He is an arbitrator for the New York Stock Exchange, Inc., National Association of Securities Dealers, American Stock Exchange, Inc., and the Chicago Board Options Exchange. He is also an arbitrator training instructor for these same associations, and mediates for the Wayne and Oakland County circuit and district courts.

Mary A. Bedikian is the regional vice-president of the American Arbitration Association (AAA)—Michigan Regional Office. She has been a member of the adjunct faculty at the University of Detroit Mercy School of Law since 1989 and developed a model course in ADR that she currently teaches at both U of D and Wayne State University Law Schools. She serves as a volunteer mediator for the 46th District Court in Southfield, and is a member of the pro bono employment panel in the United States District Court. She is a member of the State Bar of Michigan and the American, Federal, Oakland County, and Armenian Bar Associations. She is the former chair of the State Bar Section on Alternative Dispute Resolution.

THE FUTURE OF SECURITIES ADR

Modern technology has and will continue to permeate the securities ADR field. Lawyers specializing in representing investors in arbitration are now located on the Internet. In June, a Florida law firm, Parker, Perlstein and Co., set up the “Internet Center for the Abused Investor” (http://www.investoraid.com). An investor may secure from this site information concerning the kinds of complaints commonly filed in arbitration.

In April 1996, the U.S. Supreme Court decided Doctors Associates v Casarotto. This ruling clarified the pre-emptive effect of the FAA. In Casarotto, the Court held that a Montana law, requiring arbitration clauses to be written in capital letters and underlined on the first page of contracts subject to arbitration, is inconsistent with the FAA because it limits the validity of arbitration agreements and is thus preempted by the Act. According to the Court, Montana’s law “places arbitration agreements in a class apart from ‘any contract’ and singularly limits their validity.”

Casarotto may mean that Michigan’s distinction between so-called “statutory” versus “common law” arbitration is on the blocks, because the requirement that to be irrevocable the agreement must state the award may be enforced “in a court of competent jurisdiction,” could be considered a limit on the validity of arbitration agreements thereby placing them in a class “apart from ‘any contract,’” which Casarotto held impermissible.

Casarotto is simply more evidence of the very strong policy favoring arbitration as a method of securities dispute resolution enunciated by the U.S. Supreme Court in Byrd, McMahon, and Rodriguez v Quijas. This favored status has led directly to a wider use of other ADR forms, namely early neutral evaluation and facilitative mediation. The strong policy favoring arbitration is largely unchanged, and it is likely to remain so for the foreseeable future. It therefore seems destined to provide the engine driving growth and wide acceptance of all ADR mechanisms for all securities disputes.

Footnotes

2. Section 14 of the Securities Act of 1933 provides: “Any condition, stipulation, or provisions binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void.”
7. Scherk v US 520, 521, S Ct 2457, LEXIS 23, no L ED 2d.
8. Scherk v US 539, S Ct 2457, LEXIS 21, 22, no L ED 2d.
10. 9 USC 1 et seq.
12. Id.
16. 15 USC 78(b).
18. 18 USC 1961 et seq.
19. 15 USC 77a et seq.
23. 490 US 480-481.
24. Orrick, Herrington & Sutcliffe, January 30, 1996, Memorandum to Our Clients & Friends regarding Ruder Commission
Lawyers and Judges AA/NA Groups

MEETING DATES

Monday 12:00 PM
St. Joseph Hospital East
Bailey Room A
Parkview and North Streets
Mt. Clemens

Monday 12:30 PM
Detroit Bar Association
3rd Floor, Buhl Building
Detroit

Monday 6:30 PM
Freeland United Methodist Church
205 E. Washington
(Across the street from post office)
Freeland

Monday 7:00 PM
Prince of Peace Lutheran Church
19100 Ford Road
(Ford Road, just west of Southfield Freeway)
Dearborn

Wednesday 12:00 PM
First Presbyterian Church
(Conference Room—Lower Level)
321 W. South St.
Kalamazoo

Wednesday 6:00 PM
Kirk In The Hills Presbyterian Church
1540 West Long Lake Road
(1/2 mile west of Telegraph)
Bloomfield Hills

Wednesday 6:00 PM
Unitarian Church
2474 South Ballenger Road
Lower Level, Room 2C
(1 block south of Miller Road)
Flint

Thursday 8:00 PM
Central Methodist Church, 2nd Floor
Corner of Capitol and Ottawa Streets
Lansing

Lawyers and Judges Counseling Helpline
1-800-996-5522

ADR

25. Id. at 2.
26. Id. at 2.
27. Id. at 2, 3.
28. Id. at 3.
29. Id. at 3.
30. Id. at 3.
31. See SEC ARB COMMENTATOR, Vol VIII, No 5, pp 1-7 (9/10/96).
33. Id. at 4.
34. Id. at 4, 5.
35. Id. at 5.
36. Id. at 5.
38. Id. at 4.
39. "Customer win" rate and "customer recovery" rate terms are used often. Customer win rate compares the total number of awards to those in which the claimant prevails. It also is one in which the customer—claimant was granted some monetary award by the arbitrator(s). Thus, a survey sample of 1,000 awards that discloses 500 awards in which the claimant prevailed has a 50 percent customer win rate. Comparing the amount won with the losses claimed is also important. It establishes the average recovery rate. All awards through 1995 are included.
40. Id. at 4.
41. Id. at 8.
42. Id. at 9.
43. Id. at 8.
44. Id. at 9.
45. Id. at 5.
46. Id. at 1. Note: For more detailed charts and analysis see the complete article, Richard P. Rynder, Public Customer Award Survey: The First 10,000 Awards, SEC ARB COMMENTATOR, May, 1996 at 1.}
47. Id.
48. AAA Securities Mediation Rules at 5.
49. Id. at 5.
50. Id. at 5.
51. Id. at 6.
52. Id. at 6.
53. Id. at 6.
56. Id. at 910.
57. Id.