[Fordham Law Review](https://ir.lawnet.fordham.edu/flr)

Volume 63 | Issue 5 Article 1

1995

New York Stock Exchange, Inc. Symposium on Arbitration in the Securities Industry - Foreword

Constantine N. Katsoris
Fordham University School of Law

FOREWORD

Our securities markets are the envy of the world, both because of their relative stability and because the degree and quality of disclosure required for registration thereon is generally higher than is required elsewhere. Despite this confidence, however, even our markets gyrate, as they reflect the daily change in investor sentiment as to the status of our economy. To a large extent, market performance controls investment and political decisions at every level of our lives. Maintaining healthy markets, therefore, is essential to the well being and stability of our society, and healthy markets require investor confidence and trust.

The public is increasingly investing in the securities markets, either directly or indirectly, through IRAs, Keogh plans, and other pension devices.[1] Moreover, the products being offered to the public—limited partnerships, ADRs, derivatives, etc.—are becoming more complex and sophisticated. As a result of this increased activity, litigation between the public and members of the securities industry has increased dramatically. How are these disputes to be resolved?

The courthouse, of course, is one avenue of resolution. Experience has shown, however, that this method is both expensive and time consuming, and relief unduly delayed or made prohibitively expensive often results in the denial of justice. With greater frequency, such disputes are being channelled into arbitration, which is supposed to provide the advantage of a speedy and economical resolution of disputes by persons knowledgeable in the area. Unless arbitration procedures are fair both in fact and in appearance, however, their present popularity, as a means of resolving securities disputes, will begin to wane.

Arbitration is hardly a modern day phenomena. Aristotle wrote:

> Equity is justice in that it goes beyond the written law. And it is equitable to prefer arbitration to the law court, for the arbitrator keeps equity in view, whereas the judge looks only to the law, and the reason why arbitrators were appointed was that equity might prevail.[2]

The use of arbitration to resolve securities disputes between the industry and its customers can be traced back to 1872 at the New York Stock Exchange ("NYSE").[3] Since that time, numerous other self-regulatory organizations ("SROs") have established arbitration programs for the settlement of such disputes.

1. *See* Arthur Levitt, *Today's SEC: Putting Investors First*, Participant, February 1995, at 12.

2. *See* Securities Industry Conference on Arbitration, The Arbitrator's Manual i (1992).

3. Philip J. Hoblin, Jr., Securities Arbitration: Procedures, Strategies, Cases § 1-2 (1988).

Industry members could be forced into an arbitration forum even absent a pre-dispute arbitration agreement because of the rules of the various SROs to which they belong.[4] The public, however, could not be so required unless a pre-dispute arbitration agreement was in place.[5] Moreover, before 1987, the public could largely escape arbitration, despite an arbitration agreement, if it alleged violations under the 1933 and 1934 Securities Acts.[6] After the *McMahon*[7] and *Rodriguez*[8] decisions, however, this escape route was closed.[9]

Since then, not only have the number of SRO arbitrations mushroomed, but the cases have become much more complex. Not only are arbitrators now asked to weigh the merits of increasingly sophisticated products, but they also are required to delve into the intricacies of RICO claims, punitive damages, discrimination cases, and 1933 and 1934 Act violations.

The simpler SRO rules of the 1970s gave way to the Securities Industry Conference on Arbitration's more detailed Uniform Code of Arbitration rules of the 1980s.[10] Now in the 1990s, complaints are arising that arbitration has lost its way and, in fact, is becoming more like the courthouse. The present method of resolving securities disputes is clearly at a crossroad.

Can the industry and its customers and employees agree on the ground rules of arbitration combat, or should we again revert to the voluntary atmosphere that existed before *McMahon*?[11] Before we jump at the latter suggestion, however, we must consider the unthinkable effect of unleashing thousands of arbitration disputes back into a court system that itself is on the verge of collapse.

Indeed, many still feel that arbitration should be the primary means of settling securities disputes. If that requires some further adjustments to the process, so be it. The price will be small enough in view of the advantages of arbitration to both the industry and the public. The public's perception of fairness, however, must be zealously guarded, for it extends far beyond the issue of arbitration. It goes to the very heart of the public's trust in the securities markets themselves. This trust must be preserved for those markets to stay healthy.

Awaiting judicial and/or legislative guidance over the next few years could prove interesting, eventful, and in some cases unsettling. It

4. Constantine N. Katsoris, *The Level Playing Field*, 17 Fordham Urb. L.J. 419, 423 n.27 (1990).

5. *Id.*

6. *See* Wilko v. Swan, 346 U.S. 427, 432 (1953); Katsoris, *supra* note 4, at 423-26.

7. Shearson/American Express Inc. v. McMahon, 482 U.S. 220 (1987).

8. Rodriquez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989).

9. Katsoris, *supra* note 4, at 426.

10. *Id.* at 427-31.

11. *See* Constantine N. Katsoris, *Should* McMahon *Be Revisited?*, 59 Brooklyn L. Rev. 1113 (1993).

would be preferable, for all concerned, if some of these issues instead could be resolved consensually.

With this in mind, the New York Stock Exchange recently sponsored a *Symposium On Arbitration in the Securities Industry*, which spanned two days, November 21 and December 5, 1994. Participants included leading experts in the field of securities arbitration, including, academics, economists, investment bankers, brokers, investors, accountants, regulators, attorneys, and students.

Although many subjects were discussed, the Symposium focused on seven specific areas:

(1) pre-dispute arbitration agreements;
(2) the eligibility (six-year) rule;
(3) discovery;
(4) non-attorney representation;
(5) employment discrimination;
(6) arbitration training and selection; and
(7) punitive damages.

In addition, one speaker discussed the banking industry's experience with arbitration, and another explained a study that sought to streamline the SRO arbitration process by unifying all such arbitrations into a single and independent forum.

The focus of the presentations ranged from a detailed analysis of the relevant issues to a practical and frank discussion of the problems involved. As a result of these open discussions, some immediate improvements are achievable, for example, in the areas of discovery and arbitrator training and selection. In other areas, such as employment discrimination, a dialogue was established from which future consensus hopefully can be reached.

Because of its extreme importance, the issue of punitive damages was singled out and exhaustively discussed at both sessions of the Symposium by two separate sets of panelists. Since the Symposium, the United States Supreme Court issued its landmark decision in *Mastrobuono v. Shearson Lehman Hutton, Inc.*,[12] which, *inter alia*, upheld arbitrators' authority to award punitive damages.[13]

Although no one at the time knew what the outcome of *Mastrobuono* would be, the possible effects of the decision, regardless of the outcome, were thoroughly discussed at the Symposium. Perhaps now that the decision is out, much of the extensive anticipatory discussion that took place can be revisited for further consideration. How this issue is handled could very well determine whether the arbitration

12. No. 94-18, 1995 U.S. Lexis 1820 (U.S. Mar. 6, 1995), *rev'g* 20 F.3d 713 (7th Cir. 1994).

13. *Id.* at *21 (holding that the arbitration panel's punitive award was within the scope of the parties' contract).

of securities disputes will remain essentially mandatory or revert to the basically voluntary procedure it was before *McMahon*.[14]

A special thanks goes to William H. Donaldson, Richard A. Grasso, and James E. Buck, Chairman, President, and Secretary, respectively, of the NYSE, for conceiving the idea for this most timely Symposium. Down the road, jurists, academics, legislators, and practitioners will point to the frankness and openness of these discussions, which exhaustively fleshed out these most sensitive issues.

I also would like to thank my co-moderator, Professor John C. Coffee, Jr., Berle Professor of Law at Columbia Law School, for his able assistance. His sharp wit and piercing questions further stimulated an already lively discussion.

This issue of the *Fordham Law Review* represents the edited synopsis of the colloquy of the Symposium, with footnotes added for clarity and synthesis. In this regard, a special thanks to Robert S. Clemente, the Director of Arbitration of the NYSE, for helping to plan and execute the nuts, bolts, and logistics that make such a Symposium work and for his tireless assistance in the editing of the very lengthy transcript that resulted. I also would like to thank the editors of the *Fordham Law Review* for their invaluable suggestions and assistance in editing and expediting the publication of this document.

CONSTANTINE N. KATSORIS
Wilkinson Professor of Law
Fordham University School of Law

14. *See* Katsoris, *supra* note 11, at 1153-54.