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SECURITIES ARBITRATION AGREEMENTS

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I. Introduction

Arbitration has been used as a method for dispute resolution for many centuries and seems to be gaining in popularity.[1] It has been used by prominent figures such as George Washington, King Solomon, and Phillip II of Macedon.[2] Also, in the United States

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[1] *See* LEONARD L. RISKIN & JAMES E. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS 251 (West Publishing Co. 1987).

[2] *See id.* (citing F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 2 (1985)). George Washington's will had a clause which indicated that any disputes regarding the will were to by resolved by arbitration. *See* James R. Deye & Lesly L. Britton, *Arbitration By The American Arbitration Association*, 70 N.D. L. REV. 281, 289 (1994) (citing

and England, commercial arbitration has been used for hundreds of years.[3] With regard to securities, investors who bring claims against broker-dealers are increasingly using arbitration to obtain a remedy for the alleged wrong committed against them.[4]

This article addresses the issue of securities arbitration agreements. It will analyze predispute arbitration agreements as well as agreements to arbitrate after a dispute has already arisen. First, this article will begin with a broad overview of arbitration and, more specifically, securities arbitration. Next, it will discuss arbitration legislation and arbitration case law. Then it will analyze securities arbitration case law. Additionally, common securities arbitration issues, such as suitability, misrepresentation or fraud, churning, and unauthorized trading, as well as others, will be analyzed. Then, this article will discuss fora in which securities arbitration may be conducted. Finally, the enforcement and challenge of securities arbitration decisions will be discussed and analyzed as well.

II. Arbitration

Arbitration is a type of dispute resolution in which the decision-maker is a neutral person rather than a judge or an administrative official.[5] Parties may voluntarily and privately agree to

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MARTIN DOMKE, DOMKE ON COMMERCIAL ARBITRATION 187-88 (rev'd ed. 1991)). The section of George Washington's will which provided for arbitration read:

> all disputes . . . shall be decided by three impartial and intelligent men, known for their probity and good understanding; two to be chosen by the disputants, each having the choice of one, and the third by those two—which three men thus chosen shall, unfettered by Law, or legal constructions, declare their sense of the [t]estator's intention; and such decision is, to all intents and purposes, to be as binding on the parties as if it had been given in the Supreme Court of the United States.

Id. at 289 n.52 (quoting George Washington's will).

[3] *See* RISKIN & WESTBROOK, *supra* note 1, at 251 (citing Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 854-55 (1961).

[4] *See* Howard Elisofon, *Documents Relevant To Securities Arbitration Cases*, in SECURITIES ARBITRATION 1993: PRODUCTS, PROCEDURES, AND CAUSES OF ACTION, May 3, 1993, at 777, 779 [hereinafter *Documents Relevant To Securities Arbitration*].

[5] *See* RISKIN & WESTBROOK, *supra* note 1, at 250. Arbitration is "[a] process of dispute resolution in which a neutral third party (arbitrator) renders a decision after a hearing at which both parties have an opportunity to be heard. Where arbitration is voluntary, the disputing parties select the arbitrator who has the power to render a binding decision." BLACK'S LAW DICTIONARY 105 (6th ed. 1990). Arbitration is also defined as "[a]n arrangement for taking and abiding by the judgment of selected persons in some disputed matter, instead of carrying it to established tribunals of

arbitrate prior to a dispute arising or after it has already occurred.[6] Arbitration may also be required by statute or court order.[7]

Arbitration is increasingly being used as a method to resolve business disputes.[8] Generally, arbitration is a faster method of dispute resolution than the traditional alternative of litigation.[9] In addition, arbitration is more informal than litigation.[10] For exam-

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justice, and is intended to avoid the formalities, the delay, the expense and vexation of ordinary litigation." *Id.* (citation omitted).

In arbitration, the arbitrator may have an expertise in the nature of the dispute. *See* Deye & Britton, *supra* note 2, at 281. For example, in the arbitration of a business dispute, the arbitrator may have an expertise in the nature of the dispute which may help facilitate the resolution of the problem. *Id.* "Parties can be reasonably assured that their case will be heard and decided by people with knowledge and experience in their field, and familiarity with the nuances and developments in the industry, as well as a working knowledge of the process of arbitration." Mark A. Buckstein, *Why The Process Works*, N.Y.L.J. 3 (1992).

6 *See* RISKIN & WESTBROOK, *supra* note 1, at 250.

7 *See id.* In certain jurisdictions, judges may order the parties to arbitrate their dispute. *See* Deye & Britton, *supra* note 2, at 282. Each jurisdiction varies as to the criteria required for a judge to order parties to arbitrate. Generally, the criteria include the case's complexity, value, and type. *Id.*

8 *See* Buckstein, *supra* note 5, at 3. Arbitration has increased in popularity. *Id.* It is receiving support and acceptance from the legal community, the courts, and the business community. *Id.*

9 *See id.* Litigation is often accompanied by long delays. *Id.* Delays of five years are not uncommon in some jurisdictions. *Id.* Therefore, it is becoming more common for arbitration clauses to be part of business contracts whereby parties would agree to resolve any future disputes by arbitration rather than by going to court. *Id.* "In 1991, the median processing time for all commercial cases, from filing to award, was 98 days, with an average of one hearing." *Id.* at 4 n. 3. "[A]ccording to the American Arbitration Association . . . , more than one-third of its claims involve amounts below $10,000, while another third involve claims of $10,000 to $50,000 (with an average processing time of less than six months)." Allied-Bruce Terminix Cos., Inc. v. Dobson, ___U.S.___, 115 S. Ct. 834, 843 (1995) (citation omitted).

Arbitration cases move on their own time lines. *See* Buckstein, *supra* note at 5. A case administrator is assigned upon the filing of an arbitration. *Id.* The case administrator is a liaison between the arbitrators, parties, and attorneys, and is also responsible to for overseeing the case's administrative progress. *Id.*

> The case then moves along a predetermined track: lists of proposed arbitrators are distributed; an arbitrator or panel of arbitrators is selected; a hearing is scheduled, with perhaps an administrative conference or preliminary hearing in advance of same; the evidentiary hearing or hearings take place, and a decision (award) of the arbitrators is released.

Id.

Another factor which contributes to arbitration's speed is the limited discovery which takes place in arbitration. *Id.* "While some documentary exchanges usually take place, full-blown litigation-like discovery, complete with depositions, interrogatories and voluminous documentary exchanges, is quite rare." *Id.* (citation omitted).

10 *See id.* at 4. Litigation involves a formal procedure in a courtroom where the

ple, arbitration hearings do not have to take place in a courthouse, but rather may be held in various places, such as conference rooms or the arbitrator's office.[11] Furthermore, there is no standard procedure for a hearing provided that it affords "a full and equal opportunity to all parties for the presentation of any material and relevant evidence."[12]

Another attractive feature of arbitration is its flexibility.[13] In arbitration the parties are permitted to vary the procedures of arbitration by agreement.[14] Also, in arbitration, parties adjudicate their claims and, therefore, arbitrators do not resolve conflicts by assisting in mediation or negotiation.[15] Furthermore, the arbitrator must not discuss a settlement between the parties after the arbitration has already started.[16] Therefore, arbitration has many distinguishing and attractive features.

A. *Securities Arbitration Generally*

Securities arbitration has been in existence since the early 1800s.[17] In 1817, the first written New York Stock Exchange (NYSE) Constitution recognized that arbitration was to be used in

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rules of evidence are applicable, a witness's testimony is conducted under oath, and a formal record of the proceeding is created. *Id.* In arbitration, however, "[a] record is not kept unless requested (and paid for) by the party requesting it[,] [c]onformity to strict legal rules of evidence is not required, and it is not necessary that witnesses testify under oath." *Id.* (citations omitted).

11 *See id.* at 3.

12 *See id.* (citation omitted).

13 *See* Deye & Britton, *supra* note 2, at 288.

14 *See id.*

15 *See id.* (citation omitted).

16 *See id.* (citation omitted). The arbitrator can, however, mediate or negotiate a dispute upon the mutual request of the parties. *Id.* (citing American Arbitration Association, Commercial Arbitration Rules, Rule 10). However,

> [t]here is a danger in having an arbitrator act as a negotiator or mediator during the arbitration process. If the arbitrator also acts as a negotiator or mediator during the arbitration proceeding, he or she may encounter information which may later influence his or her decision as an arbitrator. Thus, negotiation and mediation should be kept out of the arbitration proceeding in order for the arbitrator to make an uninfluenced, unbiased decision.

Id. at 288-89.

17 *See* LEWIS D. LOWENFELS & ALAN R. BROMBERG, SECURITIES INDUSTRY ARBITRATIONS: AN EXAMINATION AND ANALYSIS 7.

resolving securities disputes.[18] Furthermore, an arbitration forum was provided by the New York Stock Exchange in 1872 to assist in resolving disputes between customers and members of this securities exchange.[19] Arbitration fora were additionally provided by the American Stock Exchange (Amex) in 1964, the National Association of Securities Dealers, Inc., (NASD) in 1968, and finally, the Chicago Board Options Exchange, Inc., (CBOE) in 1973.[20] Today, the facilities of the New York Stock Exchange and the National Association of Securities Dealers are where most securities arbitrations with customers are handled.[21] Therefore, some self-regulatory organizations (SROs), which include the National Association of Securities Dealers as well as the New York Stock Exchange, facilitate their members' arbitrations.[22] Similarly, the American Arbitration Association also facilitates arbitrations.[23]

"[A]rbitration panels are not bound by precise legal standards in their decisions and therefore are free to render awards based upon the standards of their own or other self-regulatory organizations as well as upon industry custom or general principles of equity and fairness."[24] Arbitration panels do not make findings of fact, they do not draw conclusions of law, and they do not give reasons for their decisions.[25]

On May 10, 1989, the Securities and Exchange Commission (SEC) approved rule changes developed by the SROs regarding predispute arbitration agreements.[26] According to the SEC,

> 'The [SRO rule changes] . . . require broker-dealers that employ predispute arbitration clauses to place immediately before the clause introductory language that would inform customers that they are waiving their right to seek remedies in court, that arbitration is final, that discovery is generally more limited than in

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18 *See id.* It read, "All questions of dispute in the purchase of stocks shall be decided by a majority of the Board." *Id.*

19 *See id.* The first securities exchange to provide this was the New York Stock Exchange. *Id.*

20 *See id.*

21 *See id.*

22 *See Documents Relevant to Securities Arbitration, supra* note 4, at 777-79.

23 *See id.* The American Arbitration Association (AAA) is a not-for-profit organization which was established in 1926 and is designed to assist in dispute resolution by means other than litigation. Deye & Britton, *supra* note 2, at 281.

24 LOWENFELS & BROMBERG, *supra* note 17, at 16.

25 *See id.*

26 *See id.* at 9.

> court proceedings, that the award is not required to contain factual findings and legal reasoning, and that the arbitration panel typically will include a minority of arbitrators associated with the securities industry.'[27]

Predispute arbitration agreements are not required.[28] Rather, the firm with which a customer does business has the option whether to require such an agreement.[29] For example, customers with options and margin accounts are required by most firms to sign predispute agreements to arbitrate.[30] Also, some firms require predispute arbitration agreements to be signed by customers who have cash accounts, while others do not.[31]

III. Arbitration Legislation And Caselaw

As the following legislation and case law indicates, arbitration is a favored method of dispute resolution. Even though it has been used for many years, it has recently gained in popularity and has become preferred by the courts as well as by federal and state legislatures.

A. *Arbitration Legislation*

Arbitration is governed by an extensive body of case law and statutory law. The main piece of arbitration legislation is the Federal Arbitration Act (hereinafter Act).[32] The Act was enacted to

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27 *Id.* (citation omitted).

28 *See id.* at 10.

29 *See* LOWENFELS & BROMBERG, *supra* note 17, at 10.

30 *See id.* at 16.

31 *See id.* at 10. The policies of firms with regard to predispute arbitration agreements is somewhat flexible. *Id.* In deciding whether to require such an agreement, brokers also consider factors which include, but are not limited to, the amount of business which has been conducted with the particular client and his or her reputation and occupation. *Id.*

32 *See* Carroll E. Neesemann & Maren E. Nelson, *The Law of Securities Arbitration, in* SECURITIES ARBITRATION 1995, May 7, 1995, at 135, 140. According to section 2 of the Act:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

"place an arbitration agreement 'upon the same footing as other contracts, where it belongs,' . . . and to make clear to both state and federal courts that they must enforce, as a matter of contract law, private agreements to arbitrate."[33] Therefore, according to the Act, an agreement to arbitrate may be privately contracted by the parties.[34]

As the Act exemplifies, agreements to arbitrate are favored by federal policy.[35] Therefore, courts are required by the Act to "liberally [ ] construe the scope of arbitration agreements covered by that Act."[36] When there is a written agreement to arbitrate specific issues, the Act requires district courts to order the parties to arbitrate those issues.[37] In deciding whether arbitration is required, courts must determine whether the disputed issues are included in

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Id. (quoting 9 U.S.C. § 2 (1925)).

In addition, pursuant to section 3 of the Act, "a court must stay its proceedings if it is satisfied that an issue before it is arbitrable under the agreement." Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 226 (1987). Also, section 4 "authorizes a federal district court to issue an order compelling arbitration if there has been a 'failure, neglect, or refusal' to comply with the arbitration agreement." *Id.*

According to the Act, "the party opposing arbitration carries the burden of showing that Congress intended in a separate statute to preclude a waiver of judicial remedies, or that such a waiver of judicial remedies inherently conflicts with the underlying purposes of that other statute." Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 483 (1989) (citing *McMahon*, 482 U.S. at 226-27). In addition, the party who is opposed to arbitration may also be granted relief by the courts under section 2 of the Act if the party presents evidence that the arbitration agreement resulted from fraud or economic power which would result in a contract being revoked. *Id.* at 483-84 (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 627 (1985)).

33 Neesemann & Nelson, *supra* note 32, at 140 (quoting H.R. Rep. No. 96, 68th Cong., § 1, 1 (1924)).

34 *See* Stephen H. Kupperman & George C. Freeman III, *Selected Topics in Securities Arbitration: Rule 15c2-2, Fraud, Duress, Unconscionability, Waiver, Class Arbitration, Punitive Damages, Rights of Review, and Attorneys' Fees and Costs*, 65 TUL. L. REV. 1547, 1548 (June 1991) (citations omitted).

35 *See id.* "The Arbitration Act thus establishes a 'federal policy favoring arbitration[.]'" *McMahon*, 482 U.S. at 226 (quoting Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)). The Act requires that "'we rigorously enforce agreements to arbitrate.'" *Id.* (quoting Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 221 (1985)).

36 Kupperman & Freeman, *supra* note 34, at 1548 (quoting *Mitsubishi Motors Corp.*, 473 U.S. at 627). Similar to other contracts, the intentions of the parties are extremely important with regard to arbitration agreements. *Id.* (citing *Mitsubishi Motors Corp.*, 473 U.S. at 626).

37 *See id.* at 1549 (citing *Byrd*, 470 U.S. at 218). "'As a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language

the arbitration agreement.[38] If the issues are included in the agreement, then the court must then decide whether arbitration is prohibited because of legal restrictions outside of the agreement to arbitrate.[39] With regard to step two of this inquiry, "an arbitration agreement should be held unenforceable only if congressional intent, expressed in a statute or legislative history, definitively precludes enforcement of the agreement."[40]

Historically, United States courts followed the English courts in their refusals to enforce arbitration agreements.[41] Therefore, when the Act was passed by Congress in 1925, it was 'primarily motivated by a desire to change the anti-arbitration rule."[42] According to the Supreme Court in *Allied-Bruce Terminix Companies, Inc. v. Dobson*, "[t]he basic purpose of the Federal Arbitration Act is to overcome courts' refusals to enforce agreements to arbitrate."[43] Furthermore, the Court stated, "it intended courts to 'enforce [arbitration] agreements into which parties had entered,' . . . and to 'place such agreements 'upon the same footing as other contracts[.]'"[44]

According to the Court, in *Southland Corp. v. Keating*, it held that state law is preempted by the Federal Arbitration Act and state statutes which have the effect of invalidating agreements to arbitrate may not be applied by state courts.[45] The Court explained that in its 1967 decision in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, it held that the Act "'is based upon and confined to the incontestable federal foundations of 'control over interstate commerce and over admiralty.'"[46]

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itself or an allegation of waiver, delay, or a like defense to arbitrability.'" *Id.* (quoting *Moses H. Cone Memorial Hosp.*, 460 U.S. at 24-5).

38 *See id.* at 1549.

39 *See id.* (citing *Mitsubishi Motors Corp.*, 473 U.S. at 628).

40 *Id.*

41 *See Allied-Bruce Terminix Cos.*, ___ U.S. ___, 115 S. Ct. 834, 838 (1995).

42 *Id.* (citations omitted).

43 *Id.*

44 *Id.* (citations omitted).

45 *See id.* (citing *Southland Corp.*, 465 U.S. at 15-16.

46 *Allied-Bruce Terminix Cos.*, ____ U.S. ____, 115 S.Ct. at 838 (quoting Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 405 (1967) (quoting H.R. Rep. No. 96, 68th Cong., §1, 1 (1924))).

B. *Arbitration Caselaw*

> "[T]he Supreme Court has established a strong national policy favoring arbitration and has expressly approved securities arbitration as fair."[47]

In *Allied-Bruce Terminix*, the Supreme Court of the United States considered whether section 2 of the Federal Arbitration Act, which "makes enforceable a written arbitration provision in 'a contract evidencing a transaction involving commerce[,]'" should be read broadly to extend the reach of the Act to Congress' power under the Commerce Clause.[48] In *Allied-Bruce Terminix*, Steven Gwin purchased a Termite Protection Plan from Allied-Bruce Terminix Companies which provided that the Gwin's house would periodically be inspected by Allied-Bruce to protect it from termites and that the company would repair any damage up to $100,000 which is caused by new termites.[49] The Plan also contained a provision which provided that "'any controversy or claim . . . arising out of or relating to the interpretation, performance or breach of any provision of this agreement shall be settled exclusively by arbitration.'"[50]

Before the Gwins sold their house to the Dobsons, Allied-Bruce reinspected the house for termites and indicated that it was clean. The Gwins subsequently sold the house to the Dobsons in addition to transferring the Termite Protection Plan. However, even though Allied-Bruce found the house to be free of termites, the Dobsons found termites swarming in the house. The Dobsons were not satisfied with Allied-Bruce's efforts to treat and repair the house and as a result, they sued the Gwins, Allied-Bruce, and Terminix in state court in Alabama.

Allied-Bruce and Terminix asked the court to stay the proceeding and let the dispute be resolved by arbitration as indicated in the Plan's arbitration clause and in section 2 of the Federal Arbitration Act. The stay was denied and, upon appeal, the Supreme Court of Alabama affirmed the denial of the stay.[51] The Supreme Court of the United

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47 LOWENFELS & BROMBERG, *supra* note 17, at 11.

48 *Allied-Bruce Terminix Cos.*, ____ U.S. ____, 115 S. Ct. at 836 (quoting 9 U.S.C. § 2).

49 *See id.* at 837 (citation omitted).

50 *See id.* (citation omitted).

51 *See id.* The stay was denied based upon an Alabama statute which made written, predispute agreements to arbitrate invalid and unenforceable. *Id.* (citation omitted). The Court found the Federal Arbitration Act, which preempts conflicting state law,

States granted certiorari to settle the conflict between some state and federal district courts which "have interpreted the Act's language as requiring the parties to a contract to have 'contemplated' an interstate commerce connection[,]" and some federal appellate courts which "have interpreted the same language differently, as reaching to the limits of Congress' Commerce Clause power."[52]

The issue in *Allied-Bruce Terminix* was "whether [the] Act used language about interstate commerce that nonetheless limits the Act's application, thereby carving out an important statutory niche in which a State remains free to apply its antiarbitration law or policy."[53] The Court held that it does not.[54] The Court opined that states are not permitted to enforce the basic terms of a contract as being fair and yet refuse to enforce the arbitration clause.[55] According to the Court, this type of state policy is unlawful under the Act.[56] The Court reasoned that arbitration clauses would be on an unequal "footing," which is not consistent with the language of the Act and the intent of Congress.[57] The Court accepted a "'commerce in fact' interpretation, reading the Act's language as insisting that the 'transaction' in fact 'involve[s]' interstate commerce, even if the parties did not contemplate an interstate commerce connection."[58] In this case, the transaction involved interstate commerce.[59] Terminix and Allied-Bruce were multistate in nature and Allied-Bruce's materials which were used to perform its duties under the Plan were from outside Alabama.[60] Therefore, the Supreme Court of the United States reversed the decision of the Supreme Court of Alabama.[61]

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not applicable to the contract for the termite control. *Id.* According to the Court, the Federal Arbitration Act was not applicable because "the connection between the termite contract and interstate commerce was too slight." *Id.* The court proffered that the Federal Arbitration Act is applicable to a contract if "'at the time [the parties entered into the contract] and accepted the arbitration clause, they contemplated substantial interstate activity.'" *Id.* (citations omitted) (alteration in original). The court found that the transaction which was contemplated by the parties was mostly local in nature and not substantially interstate. *Id.*

52 *Id.* (citation omitted).

53 *Allied-Bruce Terminix Cos.*, ___ U.S. ___, 115 S. Ct. at 839.

54 *See id.*

55 *See id.* at 843.

56 *See id.*

57 *See id.*

58 *Allied-Bruce Terminex Cos.*, ___ U.S. ___, 115 S. Ct. at 843.

59 *See id.*

60 *See id.*

61 *See id.*

C. *Caselaw on Securities Arbitration*

Case law relating to arbitration in the securities field has evolved from the courts' early positions which disfavored arbitration to the currently held view which favors securities arbitration. The following cases discuss and illustrate this trend.

In 1953, the United States Supreme Court decided *Wilko v. Swan*, in which the Court held that predispute agreements to arbitrate were not enforceable.[62] However, in the 1970s, the Supreme Court began to question *Wilko* and, by the 1980s, the Court started chipping away at its previously held position against arbitration.[63]

In *Shearson/American Express, Inc. v. McMahon*, the Supreme Court considered two issues concerning whether predispute agreements to arbitrate are enforceable as between brokers and customers.[64] According to Justice O'Connor, writing for the Court, "The first [issue] is whether a claim brought under § 10(b) of the Securities Exchange Act of 1934 (Exchange Act) . . . must be sent to arbitration in accordance with the terms of an arbitration agreement."[65] The Justice further stated, "The second [issue] is whether a claim brought under the Racketeer Influenced and Corrupt Organizations Act (RICO) . . . must be arbitrated in accordance with the terms of such an agreement."[66]

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62 *See* Kupperman & Freeman, *supra* note 34, at 1549 (citing Wilko v. Swan, 346 U.S. 427, 432-38 (1953)). In support of its decision regarding the unenforceability of predispute arbitration agreements under section 12(2) of the Securities Act of 1933, the Court in *Wilko* held that the statute failed to support enforcement of those agreements and that arbitration is not an adequate forum to protect the substantive rights under the statute. *Id.* at 1549-50 (citing *Wilko*, 346 U.S. at 435-37). Lower courts extended the holding in *Wilko* to claims brought under the Securities Exchange Act of 1934. *Id.* at 1550 (citations omitted).

63 *See id.* (citations omitted). The Court began "emphasizing congressional policy favoring arbitration and expressing confidence in the arbitration process." *Id.* (citations omitted). In *Shearson/American Express, Inc. v. McMahon*, the Supreme Court stated,

> 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. This is especially so in light of the intervening changes in the regulatory structure of the securities laws. 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.

482 U.S. at 233.

64 *See id.* at 222.

65 *Id.*

66 *Id.*

According to the facts in *McMahon*, the McMahons were customers of the brokerage firm of Shearson/American Express, Inc.[67] Julia McMahon signed customer agreements which contained agreements to arbitrate if a controversy arose.[68] The McMahons alleged that Shearson/American Express, Inc. and one of its representatives violated section 10(b) of the Exchange Act and Rule 10b-5.[69] According to the McMahons, the violations occurred when their accounts were fraudulently and excessively traded and when false statements were made and material facts were omitted from advice which the McMahons received.[70] The McMahon's also alleged in their complaint a RICO claim, in addition to breach of fiduciary duties and fraud claims under state law.[71]

Shearson/American Express, Inc. and its representative, Mary Ann McNulty, made a motion to compel arbitration of the claims asserted by the McMahons.[72] The District Court held that the 10(b) claims should be arbitrated as provided for in the agreement, as should the state law claims.[73] However, the District Court also held that the RICO claim should not be arbitrated.[74] The RICO and state law issues of arbitrability were affirmed by the Court of Appeals.[75] However, the Court of Appeals reversed on the issue of the arbitrability of the Exchange Act claims.[76] The Supreme Court granted certiorari to determine whether section

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67 *See id.* at 222-23.

68 *See McMahon*, 482 U.S. at 223. According to the arbitration agreement,

> [u]nless unenforceable due to federal or state law, any controversy arising out of or relating to my accounts, to transactions with you for me or to this agreement or the breach thereof, shall be settled by arbitration in accordance with the rules, then in effect, of the National Association of Securities Dealers, Inc. or the Boards of Directors of the New York Stock Exchange, Inc. and/or the American Stock Exchange, Inc. as I may elect.

Id. (citation omitted).

69 *See id.*

70 *See id.*

71 *See id.*

72 *See id.* The motion to compel arbitration was made according to section 3 of the Federal Arbitration Act (9 U.S.C. § 3). *Id.*

73 *See McMahon*, 482 U.S. at 223-24.

74 *See id.* at 224. According to the District Court, the RICO claim is not subject to arbitration "'because of the important federal policies inherent in the enforcement of RICO by the federal courts.'" *Id.* (citation omitted).

75 *See id.* (citation omitted).

76 *See id.*

10(b) claims and RICO claims are arbitrable.[77] The Supreme Court held in *McMahon* that predispute agreements to arbitrate claims which arise under the Exchange Act are enforceable.[78] The Court also held that the McMahon's agreement to arbitrate was also enforceable with regard to their RICO claim.[79]

Then, in 1989, the Supreme Court decided *Rodriguez de Quijas v. Shearson/American Express, Inc.*[80] In *Rodriguez*, the agreement which the petitioners signed had an arbitration clause which provided that any controversies relating to their $400,000 securities investment would be settled by binding arbitration.[81] The petitioners sued Shearson/American Express, Inc. and its broker, who was responsible for petitioners' accounts, alleging that unauthorized and fraudulent transactions occurred which resulted in monetary loss to the petitioners.[82] In their complaint, the petitioners alleged violations of state and federal laws.[83] This included claims arising under section 12(2) of the Securities Act of 1933 as well as claims arising under sections of the Securities Exchange Act of 1934.[84]

The District Court held that the only claims which should not be arbitrated were those arising under section 12(2) of the Securi-

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77 *See id.* at 225 (citation omitted).

78 *See McMahon*, 482 U.S. at 238. According to the Court, "Congress did not intend for § 29(a) to bar enforcement of all predispute arbitration agreements." *Id.* Therefore, the Court also stated, "[I]n this case, where the SEC has sufficient statutory authority to ensure that arbitration is adequate to vindicate Exchange Act rights, enforcement does not effect a waiver of 'compliance with any provision' of the Exchange Act under § 29(a)." *Id.*

79 *See id.* at 242. According to the Court,

> In sum, we find no basis for concluding that Congress intended to prevent enforcement of agreements to arbitrate RICO claims. The McMahons may effectively vindicate their RICO claim in an arbitral forum, and therefore there is no inherent conflict between arbitration and the purposes underlying § 1964(c). Moreover, nothing in RICO's text or legislative history otherwise demonstrates congressional intent to make an exception to the Arbitration Act for RICO claims. Accordingly, the McMahons, 'having made the bargain to arbitrate,' will he held to their bargain. Their RICO claim is arbitrable under the terms of the Arbitration Act.

Id.

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

81 *Id.* at 478.

82 *See id.*

83 *See id.* at 478-79.

84 *See id.* at 479.

ties Act.[85] Upon reconsideration, the District Court reaffirmed its holding and entered a default judgment against the broker.[86] The Court of Appeals reversed and held that the agreement to arbitrate was enforceable.[87] Then, the Supreme Court granted certiorari.[88]

In dicta, the Court cited *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, in which the Court stated, "'[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'"[89] According to the Court in *Rodriguez*, *Wilko* was incorrectly decided.[90] The Court stated that the *Wilko* decision is "inconsistent with the prevailing uniform construction of other federal statutes governing arbitration agreements in the setting of business transactions.[91] The Court, therefore, overruled the *Wilko* decision.[92]

The Court opined that the 1933 and 1934 Acts "'constitute interrelated components of the federal regulatory scheme governing transactions in securities.'"[93] The Court stated that the inconsistent decisions in *Wilko* and *McMahon* are contrary to this principle and, therefore, should not simultaneously exist.[94] In *Rodriguez*, the petitioners' claims under the 1934 Act were arbitrable, and their claim under the 1933 Act was not arbitrable, but rather

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85 *Rodriguez de Quijas*, 490 U.S. at 479. The District Court based its decision that the section 12(2) claims must be tried in a court action on *Wilko v. Swan*. *Id.*

86 *See id.*

87 *See id.* The Court of Appeals reasoned that "this Court's subsequent decisions have reduced *Wilko* to 'obsolescence.'" *Id.* (citation omitted).

88 *See id.* (citation omitted).

89 *Id.* at 481 (quoting *Mitsubishi Motors Corp.*, 473 U.S. at 628). This further represents the Court's movement of arbitration away from the views expressed in the *Wilko* case. *Id.* According to the Court, "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." *Id.*

90 *See Rodriguez de Quijas*, 490 U.S. at 484.

91 *Id.*

92 *See id.* According to the Court, "[a]lthough we are normally and properly reluctant to overturn our decisions construing statutes, we have done so to achieve a uniform interpretation of similar statutory language, . . . and to correct a seriously erroneous interpretation of statutory language that would undermine congressional policy, as expressed in other legislation[.]" *Id.* (citations omitted). The court opined that by overruling *Wilko*, both of these purposes would be served. *Id.*

93 *Id.* at 484-85 (quoting Ernst & Ernst v. Hochfelder, 425 U.S. 185, 206 (1976)).

94 *See id.* at 484.

was required to be brought in court.[95] According to the Court, this is not a desirable result because the claims and the facts are similar and they should fall under one federal regulatory scheme.[96] Another reason for overruling *Wilko*, the Court stated, was with regard to the inconsistency between the decisions in *Wilko* and *McMahon*, "undermines the essential rationale for a harmonious construction of the two statutes, which is to discourage litigants from manipulating their allegations merely to cast their claims under one of the securities laws rather than another."[97]

Therefore, in *Rodriguez*, the Court held that a "predispute agreement to arbitrate claims under the Securities Act was enforceable."[98] According to the Court, "[a]lthough our decision to overrule *Wilko* establishes a new principle of law for arbitration agreements under the Securities Act, this ruling furthers the purposes and effect of the Arbitration Act without undermining those of the Securities Act."[99] Finally, the Court opined, "Our conclusion is reinforced by our assessment that resort to the arbitration process does not inherently undermine any of the substantive rights afforded to petitioners under the Securities Act."[100]

In *Mastrobuono v. Shearson Lehman Hutton, Inc.*, the United States Supreme Court addressed the issue of punitive damage awards in a securities arbitration.[101] In *Mastrobuono*, there was a dispute regarding the punitive damages which were awarded by an arbitration panel even though the contract had a clause providing that it "shall be governed by the laws of the State of New York[.]"[102] According to the New York Court of Appeals, arbitrators may not award punitive damages.[103] Therefore, in *Mastrobuono*, the District Court and the Seventh Circuit held that the punitive damages should not have been awarded by the arbitration panel.[104]

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95 *See Rodriguez de Quijas*, 490 U.S. at 485.

96 *See id.*

97 *Id.*

98 *Id.*

99 *Id.* at 485.

100 *Rodriguez de Quijas*, 490 U.S. at 485-86.

101 Mastrobuono v. Shearson Lehman Hutton, Inc., ___U.S.___, 115 S. Ct. 1212, 1214 (1995).

102 *Id.* at 1214.

103 *See id.* at 1215 (citing Garrity v. Lyle Stuart, Inc., 40 N.Y.2d 354 (1976)). In *Garrity*, the New York Court of Appeals held that punitive damages may be awarded by judicial tribunals, but not by arbitrators. *Id.*

104 *See id.*

In *Mastrobuono,* the question presented to the Supreme Court was "whether the arbitrators' award is consistent with the central purpose of the Federal Arbitration Act to ensure 'that private agreements to arbitrate are enforced according to their terms.' "[105] According to the Court, "If contracting parties agree to *include* claims for punitive damages within the issues to be arbitrated, the FAA ensures that their agreement will be enforced according to its terms even if state law would otherwise exclude such claims from arbitration."[106] Therefore, the Court considered the parties' contract.[107] According to the contract, it "'shall be governed by the laws of the State of New York[,]'" and "'any controversy' arising out of the transactions between the parties 'shall be settled by arbitration' in accordance with the rules of the National Association of Securities Dealers (NASD), or the Boards of Directors of the New York Stock Exchange and/or the American Stock Exchange."[108]

Therefore, the Supreme Court held that the award of punitive damages by the arbitration panel should be enforced.[109] According to the reasoning of the Court,

> We think the best way to harmonize the choice-of-law provision with the arbitration provision is to read 'the laws of the State of New York' to encompass substantive principles that New York courts would apply, but not to include special rules limiting the authority of arbitrators. Thus, the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration; neither sentence intrudes upon the other.[110]

The aforementioned case law shows that the trend of the courts is to expand the scope of arbitration in securities disputes. The case law seems to indicate a public policy favoring arbitration as an alternative to adjudication for resolving disputes. As the next section illustrates, there are various securities issues which are commonly arbitrated.

IV. Examples Of Common Securities Arbitration Issues

Some common securities arbitration issues are: suitability, mis-

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105 *Id.* at 1214 (quoting Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989)).

106 *Mastrobuono,* ____ U.S. ____, 115 S.Ct. at 1216.

107 *See id.* at 1216-17.

108 *Id.* at 1216-17 (citation omitted).

109 *See id.* at 1219.

110 *Id.*

representation or fraud, churning, and unauthorized trading.[111] In addition, other examples of arbitrable claims include: disputes over margin deficiencies, improper execution of customer orders and when customers are instructed by brokers to sign blank new account forms or when the broker signs the new account form with the customer's name.[112] Damages recoverable by a customer against his or her broker are usually also recoverable against the broker's firm.[113]

A. *Suitability*

Suitability involves determining whether certain investments or investment strategies were right for a particular customer.[114] In arbitration, suitability is a common cause of action.[115] Some of the factors considered when determining the suitability of an investor for investments or investment strategies are: age, income, net worth, investor sophistication, education, employment, investment objectives, account where trading occurred, and the brokerage firm's portrayal of the investment.[116] Pursuant to Art. III, § 2 of the NASD Rules of Fair Practice,

> 'In recommending to a customer the purchase, sale or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other security holdings and as to his financial situation and needs.'[117]

Therefore, "customers are often able to recover damages from

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111 *See Documents Relevant to Securities Arbitration, supra* note 4, at 779.

112 *See* LOWENFELS & BROMBERG, *supra* note 17, at 18.

113 *See id.* The reason why arbitration panels often hold brokerage firms liable as well as brokers is because of the duties of supervision which are imposed upon firms by self-regulatory organizations. *Id.* Hence, arbitration panels often consider the liability of a broker to be attributable in part to a failure of the firm to supervise the broker. *Id.* "This, of course, is not significantly different from court litigation where common law doctrines of respondeat superior and securities law doctrines of controlling person mandate similar liabilities for brokerage firms whose employees have violated the law." *Id.*

114 *See* Howard R. Elisofon & David M. Elkins, *Evaluation of Arbitration Cases, in* SECURITIES ARBITRATION 1995, May 9, 1995 at 27, 34-35 [hereinafter *Evaluation of Arbitration Cases*].

115 *See id.* at 7.

116 *See id.* at 8-15.

117 LOWENFELS & BROMBERG, *supra* note 17, at 16 (quoting Art. III, § 2 of the NASD Rules of Fair Practice, NASD Manual CCH par. 2152 (1988)). *See also* NYSE Rule 405,

brokers in arbitration upon the grounds that the investments recommended by the broker were unsuitable to the customer based upon the latter's other security holdings, financial situation and needs."[118]

B. *Misrepresentation or Fraud*

Generally, misrepresentation or fraud involving securities is when brokers make misleading or false statements to customers.[119] Misrepresentation or fraud could also occur when the broker mentions the benefits of investments, but omits the potential risks and losses.[120] In arbitration, the customer will be awarded damages if the arbitration panel believes that "the broker failed to reveal or misstated certain important information to the customer relevant to the security purchased[.]"[121]

However, if the customer wants to bring an action in court against the broker for a misrepresentation or omission, then under Securities Exchange Act § 10(b) and Rule 10b-5, the customer must prove:

> '(1) damage to plaintiff, (2) caused by reliance on defendant's misrepresentations or omissions of material facts, or on a scheme by defendant to defraud, (3) made with an intent to deceive, manipulate or defraud (scienter), (4) in connection with the purchase or sale of securities, and (5) furthered by defendant's use of the mails or any facility of a national securities exchange . . .'[122]

Also, similar elements must be proved under a cause of action for common law fraud.[123]

C. *Churning*

"Churning occurs when a broker excessively trades a securities account to generate large commissions."[124] To maintain a success-

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2 NYSE Guide CCH par. 2405 (1970) ("know your customer" rule); Amex Rule 411, 2 Amex Guide CCH par. 9431 (1988) (suitability rule).

118 LOWENFELS & BROMBERG, *supra* note 17, at 16

119 *See id.* at 17.

120 *See id.*

121 *Id.* at 17.

122 *Id.* (citations omitted).

123 *See* LOWENFELS & BROMBERG, *supra* note 17, at 17.

124 *See Evaluation of Arbitration Cases, supra* note 114, at 17-18 (citing Olson v. E.F. Hutton & Co., 957 F.2d 622, 628 (11th Cir. 1991); Ceres Partners v. GLC Associates, 918 F.2d 349, 360 (2d Cir. 1990); Laird v. Integrated Resources, Inc. 897 F.2d 826,

ful action for churning under the Securities Exchange Act § 10(b) and 10b-5, the customer must prove: "(1) that the broker in question exercised control over the trading in the account; (2) that the trading in the account was excessive in light of the customer's investment objectives; and (3) that the broker acted with intent to defraud or with willful and reckless disregard for the customer's interests."[125]

D. *Unauthorized Trading*

One type of unauthorized trading case is when a broker intends to conceal from the customer the purchase or sale of securities.[126] Another type of unauthorized trading case is called "soft discretion."[127] Soft discretion occurs when the broker is granted oral permission to trade an account but fails to obtain the requisite power of attorney.[128] Finally, another major type of unauthorized trading is when transactions are effected by third parties instead of the named party who has control of the account.[129] There are equitable defenses for a claim of unauthorized trading, such as waiver, estoppel, ratification, and laches.[130] Aside from arbitration, to recover in federal court under a claim of unauthorized trading, customers must establish fraud under Securities Exchange Act § 10(b) and Rule 10b-5 and the customer must also prove

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838-39 (5th Cir. 1990)). In addition to occurring in speculative trading, churning can also occur in conservative trading. *Id.* at 18. An example of a type of conservative trading is mutual funds. In churning involving mutual funds, the "broker may switch a client in and out of a family of funds, especially if the switches are below break points." *Id.*

125 LOWENFELS & BROMBERG, *supra* note 17, at 16-17 (citing Miley v. Oppenheimer & Co., Inc., 637 F.2d 318, CCH par. 97,872 (1981 Transfer Binder (5th Cir. 1981))).

126 *See Evaluation of Arbitration Cases, supra* note 114, at 20-21.

127 *See id.* at 21.

128 *See id.* Rule 408 of the Rules of the NYSE prohibits discretionary trading when there is a lack of written authorization. *Id.* This type of violation may cause the broker and broker's firm to have regulatory exposure. *Id.* However, if it can be proven that there was oral authorization, ratification, or estoppel, then full recovery is not necessarily created by a violation.

Also, "[d]iscretionary trading may have been authorized because the customer's occupation made prior approval of trades impracticable or because the customer's trading strategy required rapid trades that could not be implemented if prior permission was always required." *Id.*

129 *See id.*

130 *See Documents Relevant to Securities Arbitration Cases, supra* note 4, at 779.

scienter.[131]

E. *Examples of Other Arbitrable Claims*

In addition to the foregoing common arbitrable claims, the following are examples of some other types of claims for which arbitration may be sought. First, disputes over margin deficiencies may be brought before an arbitration panel by customers.[132] The 'small print' of basic margin agreements entered into by customers and brokers gives the brokers:

> power to liquidate customer positions immediately in order to satisfy margin calls, arbitration panels often feel that industry custom requires some prior notice to the customer in order to give him/her a brief but reasonable time under the circumstances to furnish additional funds in order to avoid the drastic action of liquidation.[133]

Brokers may also be liable to customers if more securities than necessary are liquidated by the brokers to cover a margin deficiency.[134] Also, brokers may be liable if they mistakenly liquidate because they thought the customer failed to timely pay or had insufficient collateral on deposit.[135] Another cause of action brought by a customer before an arbitration panel involves incorrectly executed or untimely orders, or orders which were not executed.[136]

Finally, an example of another issue which may be brought before an arbitration panel is when customers are instructed by brokers to sign blank new account forms.[137] Arbitration panels carefully review this type of transaction.[138] Another major issue is when the broker signs the new account form with the customer's name and

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131 *See* LOWENFELS & BROMBERG, *supra* note 17, at 17.

132 *See id.*

133 *See id.*

134 *See id.* at 17-18.

135 *See id.*

136 *See* LOWENFELS & BROMBERG, *supra* note 17 at 18. In determining these issues, the arbitration panel considers previous trading patterns in the account and the customer's credibility. *Id.*

137 *See id.* When customers sign blank new account forms, there is usually an understanding that the broker will then fill in the investment objectives, the approved trading strategies, and the suitability criteria. *Id.*

138 *See id.* The problem of customers signing blank new account forms "is particularly acute when the new account form authorizes trading in some of the more exotic products such as puts and calls and the customer is relatively unsophisticated." *Id.*

claims he or she had authorization to do so.[139]

V. Securities Arbitration Fora

There are many arbitration fora which may be utilized to resolve securities disputes. Examples of different fora include the American Arbitration Association (AAA), the New York Stock Exchange (NYSE), the American Stock Exchange (Amex), the National Association of Securities Dealers (NASD), the Chicago Board Options Exchange (CBOE), the Cincinnati Stock Exchange, the Boston Stock Exchange, the Midwest Stock Exchange, the Pacific Stock Exchange, the Philadelphia Stock Exchange, and the Municipal Securities Rulemaking Board.[140]

In addition to arbitration in the AAA and the self-regulatory organizations (SROs), some cases may be arbitrated under the "Amex Window" at the AAA.[141] The "Amex Window" is "a provision of the American Stock Exchange Const. Art. VIII, § 2 (c) (1992) which provides that if any of the parties to a controversy is a customer, the customer may elect to arbitrate before the AAA in the city of New York, unless the customer has expressly agreed in writing to submit only to the arbitration procedure of the American Stock Exchange."[142]

The Securities Industry Conference on Arbitration (SICA) created the Model Code of Arbitration.[143] This Model Code is used as an example upon which the major exchanges base their own arbitration rules.[144]

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139 *See id.*

140 *See* LOWENFELS & BROMBERG, *supra* note 17, at 20. In 1994, 6,486 arbitration cases were received by self regulatory organizations (SROs) and 5,542 cases were concluded. Deborah Masucci & Robert S. Clemente, *Securities Arbitration at the New York Stock Exchange, Inc. and National Association of Securities Dealers, Inc.—Administration and Procedures, in* SECURITIES ARBITRATION 1995, May 1, 1995, at 291, 298. The cases that were concluded included settlements. *Id.* The Chicago (Midwest) Stock Exchange and the Philadelphia Stock Exchange are not included in the 1994 figures. *Id.* However, in 1993, 6,561 cases were received for arbitration by the SROs and 5,363 cases were concluded. *Id.* In 1994, 5,570 cases were received by NASD, and 4,561 cases were concluded. *Id.* at 299.

141 *See* George H. Friedman & Florence M. Peterson, *When You Have a Choice of Forum: The Differences Between Securities Arbitration at the AAA and the SROs, in* SECURITIES ARBITRATION 1995, May 25, 1995, at 555, 557.

142 *Id.* at 557-58.

143 *See id.* at 558.

144 *See id.*

In predispute arbitration agreements, the customer may sometimes choose the forum in which to arbitrate in the event a dispute arises between the customer and the broker.[145] Also, after a dispute has already arisen, the customer and the broker may sometimes agree upon a forum to arbitrate.[146]

VI. Enforcing And Challenging Securities Arbitration Decisions

If a broker does not honor an arbitration award in favor of a customer in an SRO arbitration, the broker may be suspended by the SRO.[147] However, under an AAA arbitration, the AAA does not have the power to penalize either party after the rendering of an award. [148] Furthermore, the SEC constantly reviews the arbitration procedures of the SROs. There is not as much oversight of the AAA by the SEC.[149]

It is difficult to challenge a securities arbitration decision.[150] Furthermore, if a brokerage firm does not pay an arbitration award promptly, then the SRO which conducted the proceeding may impose penalties upon the firm.[151] Even though decisions are usually final and difficult to appeal, individual state laws as well as federal law provide ways to appeal the arbitration decisions.[152] The statutory grounds to modify, vacate, or correct an arbitration award under the Federal Arbitration Act are contained in two sections.[153]

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145 *See* LOWENFELS & BROMBERG, *supra* note 17, at 20.

146 *See id.*

147 *See id.* at 23.

148 *See id.*

149 *See id.*

150 *See* LOWENFELS & BROMBERG, *supra* note 17, at 63.

151 *See id.*

152 *See id.* at 64.

153 *See id.* at 65. According to section 10 of the Federal Arbitration Act,

> In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
> (a) Where the award was procured by corruption, fraud, or undue means.
> (b) Where there was evident partiality or corruption in the arbitrators, or either of them.
> (c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
> (d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Also, under the common law, arbitration awards have been challenged with limited success as well.[154] The three main common law challenges are: (1) that the arbitrator "manifestly disregarded the law"; (2) if the award is contrary to public policy; and (3) if the award is completely irrational.[155]

VII. Conclusion

As the aforementioned discussion illustrates, resolving securities disputes by arbitration is becoming a more popular practice. The trend of the courts has been to enforce arbitration agreements. Therefore, lawyers must be aware of arbitration and must be able to counsel clients as to the utilization of this growing area of the law. As a matter of public policy, arbitration helps alleviate some of the burden of a heavy caseload from the judiciary and is a viable method to resolve disputes in a relatively quick and efficient manner.

> (e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

Id. (quoting 9 U.S.C.A. § 10). Furthermore, according to section 11 of the Federal Arbitration Act,

> In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—
> (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
> (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
> (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.
> The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

Id. (quoting 9 U.S.C.A. § 11).

154 *See id.* at 68.

155 *See* LOWENFELS & BROMBERG, *supra* note 17, at 68-70 (citations omitted).