

SECURITIES ARBITRATION COMMENTATOR

Publishing since 1988 (Feb. '06)

ISSN: 1041-3057

IN THIS ISSUE

ARBITRATOR SERVICE

This study of the frequency with which arbitrators serve yields some surprising results, as we compare the experiences of the two major SRO forums and contrast the current patterns with those of a study we did pre-list selection..... **1**

IN BRIEF

Survey 2004 Award Results (Attorney Fees, Win Rates & Large NYSE Firms); NASD Stats, 12/05; NYSE Stats, 12/05; NYSE Arbitrator Selection Rule Approved; NASD Mediation Rules Approved; NASD "BD Pays All" Rule Approved; NYSE Drops California Standards Waiver; California Standards Under Attack Again; Update on Arbitral Subpoenas; Neutral Corner, 10/05; Birbrower Amendments Extended; Cardegna Argued; Arbitrator Training Online..... **6**

ARTICLES & CASE LAW

Issues in arbitration pondered and decided..... **13**

SAC's BULLETIN BOARD

News from & about people in securities arbitration..... **30**

SCHEDULE OF EVENTS

Arbitration events scheduled in the coming months..... **32**

SCAN DEMO ONLINE

Have you tried the SCAN Demo? See a step-by-step display of the properties and powers of SCAN Plus and SCAN Premier. You choose when to watch and the speed at which you proceed. View this online demonstration at two Internet sites: the Awards Portal at the NASD-DR WebSite or <http://scan.cch.com>. Learn the power of SCAN!

ARBITRATOR SERVICE SURVEY

*Has List Selection Changed
How Often Arbitrators Serve?*

Introduction

Our purpose in this article is to present and review Award statistics relating to arbitrator selection patterns in the early years of the new Millennium, from 2000-2005, a six-year span that has been characterized by the exclusive use of the Neutral List Selection System by NASD Dispute Resolution and the predominant use of the staff appointment method of arbitrator selection by NYSE Arbitration. By comparing patterns of arbitrator service during the new Millennium years to an earlier study period of July 1994-June 1998, which we surveyed in late 1998 (SAC, Vol. X, No. 6 "1998 Survey"), we hope to open insights into the success of list selection in meeting anticipated objectives.

1998 Arbitrator Service Survey

The 1998 Survey – Background

When we conducted our 1998 survey on arbitrator service patterns at the NASD and NYSE, the smaller or more specialized SRO forums, such as the MSRB, AMEX and PHLX, were collapsing their arbitration programs for the investing public and merging them with the NASD program. AAA was folding its specially developed Securities Arbitration Rules into its Commercial Arbitration Rules and essentially leaving the field. These developments rendered the NASD and NYSE forums as the only practical choices for most securities disputants. The primary difference between their two arbitration facilities was, at that time, the way in which they chose their arbitrators.

Until November 1998, NASD and NYSE both used the staff appointment method ("the old system") as the predominant method for choosing arbitrators to serve on panels. NASD was in the midst of making a big change – a total switch to list selection. We conducted our 1998 Survey in order to preserve statistics about arbitrator service and to see what statistical generalizations might reveal themselves. "Hopefully," we wrote about the Award study, "it will provide insights for our readers, as it has for us, on the virtues and faults of the old system. If nothing else, though, the data we have gathered will serve as a baseline for comparisons to be made, once we have more experience with list selection as a method of getting the 'best' arbitrators for your case."

Staff appointment had its origins in the modest arbitration programs of the 1970s and earlier, when few attorneys in the field knew the arbitrators in their locale better than the arbitration staff. There were no arbitrator disclosure sheets or Award histories to inform the parties and, so, it was left to the staff to balance the Panels with the expertise and talent that would best fit the dispute at hand. With the increasing case volumes and case dollar amounts, however, the staff's ability to match arbitrators to disputes with precision and to employ the widening pools of arbitrators with efficiency grew more doubtful.

Besides, list selection was what the parties wanted. It gave the parties

cont'd on page 2

ARBITRATOR SERVICE SURVEY *cont'd from page 1*

more control over the panel choices and allowed arbitrators on the forum rolls a relatively equal chance to serve. Unspoken, but nevertheless a possible benefit of list selection, was the potential for arbitrators to assume responsibility for the cases and to place staff assistance in its proper perspective. Under NLSS, with its rotational selection imperative and party-driven character, no longer would arbitrators be beholden to the staff for their assignments. Surely, too, with list selection, arbitrators could be appointed earlier in the case – or so it was thought — and the staff could withdraw from managing cases and focus on case administration.

The 1998 Survey – Award Results

Awards issued during the four years under study in the 1998 Arbitrator Service Survey revealed that NASD was only using about half of its available arbitrators. In some cities, such as Pittsburgh, the available pool was relatively small and, so, usage was maximal. In other locales, such as Anchorage, pool size was small, but the available arbitrator positions, or “slots,” were insufficient to cover the pool. Nevertheless, in the large urban hearing locations, such as New York City, Los Angeles, Fort Lauderdale/Boca Raton and Chicago, where case volume was ample and arbitrator pools were diverse and sizeable, the usage percentages were only about half.

Moreover, in those same major cities, those Arbitrators who were appointed to serve received multiple

assignments during the four-year period. In other words, while half of the arbitrators received no assignments, those who did serve also served with some frequency. Los Angeles had the highest average multiple, 4.6 times, and New York City came in second, with serving arbitrators gaining assignments in an average of 3.9 arbitrations that produced a decision. Perhaps, those other arbitrators were appointed in cases that were settled, but it was equally as plausible to extrapolate and say that the serving arbitrators in those cities would have gained assignments on an average of six additional cases that then settled during the four years.

Assignment Efficiency Rates

We did not have statistics on pool size by hearing location for NYSE. NASD made its situs-pool statistics publicly available in 1998, while NYSE did not. We were not able to assess NYSE performance in utilizing well its available pool members, but we were able to assess the spread of activity among serving arbitrators. To do this, we calculated the number of “available slots,” three for larger cases and one for the Small Claims cases, among the survey Awards. For instance, among the New York City Awards, we calculated that 1,054 “available slots” were filled by utilizing 309 different NYSE arbitrators. That meant that each Arbitrator who served gained appointments in an average of 3.4 cases during the four-year study period. Put another way, NYSE staff

cont'd on page 3

SECURITIES ARBITRATION COMMENTATOR - Mailing Address: SAC, P.O. Box 112, Maplewood, N.J. 07040. Business Office: 93 Riggs Place, South Orange, NJ 07079. Tel: (973) 761-5880. FAX No. (973) 761-1504. Copyright © 2006 Securities Arbitration Commentator, Inc. Publisher. No part of this publication may be reproduced in any manner without the written permission of the publisher.

SUBSCRIPTION INFORMATION: The *Securities Arbitration Commentator* is published 8 times per year and sells by annual subscription. Regular Subscription: \$290. Preferred Subscription (with weekly e-mail Alerts): \$590. Back issues of SAC are available to subscribers only at \$20 per issue. An attractive SAC-imprinted “D-Ring” binder is also available to store back-issues. The 1.5” blue binder, with grey print on its face and backing, costs \$15.

MANAGING EDITOR

Richard P. Ryder

BOARD OF EDITORS

Howard G. Berg
Jackson, Grant & Co., Inc.

Peter R. Boutin
Keesal Young & Logan

Mary E. Calhoun
Calhoun Consulting Group, Inc.

Robert S. Clemente
Liddle & Robinson, LLP

Patricia E. Cowart
Wachovia Securities, Inc.

Joel E. Davidson
Davidson & Grannum

Roger M. Deitz
Mediator • Arbitrator

Paul J. Dubow
Arbitrator • Mediator

Robert Dyer
Allen Dyer Doppelt Milbrath & Gilchrist

George H. Friedman
NASD Dispute Resolution

Philip J. Hoblin, Jr.
Attorney at Law

Constantine N. Katsoris
Fordham University School of Law

Theodore A. Krebsbach
Krebsbach & Snyder

Deborah Masucci
Arbitrator • Mediator

Sam Scott Miller
Orrick Herrington & Sutcliffe

Gerald F. Rath
Bingham McCutchen LLP

David E. Robbins
Kaufmann Feiner Yamin Gildin & Robbins

Michael B. Roche
Schuyler Roche & Zwirner

Stephen G. Sneeringer
A.G. Edwards & Sons, Inc.

James D. Yellen
Attorney at Law

ARBITRATOR SERVICE SURVEY *cont'd from page 2*

spread appointments in 1,054 instances among 309 arbitrators, leading to an "assignment efficiency" rate of only 29%.

NASD had a similarly low rate for New York City in the 1998 Survey – 26% — only 609 arbitrators were used to fill 2,350 "available slots." However, we also knew that NASD had an available pool size of just 1,183 NYC-based arbitrators, so the maximum "assignment efficiency" percentage that could be achieved was only about 50% (1,183/2,350). We saw then that pool size affects a forum's ability to spread the assignments with optimal efficiency among the available arbitrators. Favoritism in the assigning of arbitrator appointments might have a role, but practical considerations, such as availability, pool size, and conflict disclosure certainly played a role in determining whom the staff could place on cases.

Overall, NASD's average "assignment efficiency" percentage was 35% in our 1998 Survey. NASD utilized 4,222 arbitrators* to fill 12,126 available slots between 1994 and 1998, when it had a national pool in excess of 8,000. The comparable

NYSE average efficiency rate was about 33%, slightly lower than the overall NASD rate, even though, in five of the seven cities tested, NYSE achieved a higher rate than NASD. Both rates, though, pointed to inefficient utilization of the pool, given the overall number of arbitrators available for appointment. Would list selection offer an opportunity for more arbitrators to serve and for parties to have a greater variety of talent and experience from which to choose?

2006 Arbitrator Service Survey

The 2006 Survey - Background

More than seven years have passed since NASD adopted list selection. NYSE adopted a voluntary set of supplemental procedures for appointing arbitrators in the late 90s, among which was a list selection option, but both sides had to agree to its use. As a consequence of that requirement, in the new Millennium years, NYSE has continued, in all but about 15% of its cases, to utilize staff appointment procedures to select Panels. Going into this Survey, then, we expected to see little change in the "assignment efficiency" rates for NYSE.

For NASD, we anticipated that list selection would favor the use of a greater percentage of arbitrators than had served during the 1994-1998 period. We reasoned that parties would make their panel choices on different bases than the staff had. The consequence would be that many candidates previously overlooked would receive nomination from the democratic NLSS and parties would be more likely to choose a wider array of panelists from a wider array of candidates. Then, too, NASD was actively recruiting to deal with the rapid growth in case volume engendered by the market events of 2000-2002. Many of those new arbitrators would surely be selected for service. To our lights, an "assignment efficiency" rate for NASD of 70-80% did not seem unlikely. What were the actual results?

The 2006 Survey – Award Results

This time around, we surveyed the NASD and NYSE Awards year-by-year, developing an assignment efficiency percentage for each forum on an annual basis. We wanted to see what changes would be evident and whether any patterns would form as the years progressed to the present. The

cont'd on page 4

ARBITRATOR SERVICE SURVEY						
SRO	Year	Slots	1xService	>1xServices	# Arbs Servg	AssgnEff%
NASD	2000	2,756	1,475	592	2,067	75%
NASD	2001	3,061	1,508	596	2,104	69%
NASD	2002	3,792	1,471	1,154	2,625	69%
NASD	2003	4,928	1,552	1,490	3,042	62%
NASD	2004	6,622	1,524	1,962	3,486	53%
NASD	2005	6,206	1,533	1,854	3,387	55%
NYSE	2000	228	161	30	191	84%
NYSE	2001	193	147	19	166	86%
NYSE	2002	454	261	91	352	78%
NYSE	2003	434	267	75	342	79%
NYSE	2004	708	314	169	483	68%
NYSE	2005	458	260	94	354	77%

ARBITRATOR SERVICE SURVEY *cont'd from page 3*

study results for 2000-2005 are reflected in Chart I (see below).

By 2000, with NLSS fully in gear, NASD had moved from an average assignment efficiency rate of 35% to 75%, signifying that every four available arbitrator slots went, on average, to three different arbitrators. The majority of serving arbitrators (1,475) appears in only one Award during 2000 and a smaller minority (592) appears more frequently. The promise of list selection and NLSS, as a list selection mechanism, appears to have been realized. More arbitrators are serving and parties are exercising free choice from an adequate pool of candidates.

Explaining Chart I Results - NASD

What happened, then, in subsequent years, when the NASD efficiency percentage dropped year after year to its current 55% rate at the end of 2005? Well, it could be that parties honed in on the "best" arbitrators to fill the available slots and continually returned to those candidates, whenever they were offered. We have seen this "better-the-devil-you-know" rationale in the mediation field, where too much demand is chasing a short supply of "star" mediators, so it is not an explanation to be readily discarded.

Here is another possible explanation, strictly for the reader's consideration. Instead of increasing its arbitrator ranks to handle the heightened caseload during the early years of the new Millennium, NASD actually culled its ranks. We know that in 1998 NASD had 8,059 arbitrators on its rolls. That number climbed to 9,000-plus thereafter, but NASD also embarked upon a number of campaigns that eliminated or sidelined active arbitrators. Among such actions were: (1) the re-classification of arbitrators, which left several hundred arbitrators (some say far more) without the ability to qualify as either Public or Non-Public Arbitrators; (2) a general effort to eliminate arbitrators who were no

longer truly available for service; and, (3) disqualification of arbitrators who did not take mandatory expungement training. Today, the NASD-DR WebSite reports that 6,340 arbitrators are actually available for service.

No matter how you approach it, the number of NASD arbitrators available for service has shrunk, not expanded, and these 6,340 arbitrators are now stretched over 68 hearing locations, as opposed to the 46 locations covered by NASD in 1998. Refer back to Chart I. One sees that the number of arbitrators who serve only once each year stays relatively stable from year to year. As the number of slots rises, though, the number of arbitrators who serve more than once during the year also rises. As a consequence, the assignment efficiency rate drops. Chart I does show that the total number of arbitrators serving in a given year went up as the number of available slots increased, but not enough to avoid a slackening of the assignment efficiency percentage. Note that the assignment efficiency rate dropped to 53%, its lowest showing in the six-year survey, in 2004; likewise, in 2004 the number of available slots hit its highest point – 6,622 seats to fill, just for the decided cases. With only 6,000-plus arbitrators on its rolls, NLSS was under stress and working overtime.

Explaining Chart I Results - NYSE

Look now at the NYSE side of the Chart. NYSE has 2,000-3,000 arbitrators, fewer than NASD by far, but NYSE only needed to fill 400-700 slots each year. The Exchange slipped a little to 68% in 2004, when it had to appoint arbitrators to 708 available slots, but, in every other year, the Exchange has managed to deliver an assignment efficiency percentage in excess of 75%. In our view, this fortifies the conclusion that the 33% overall showing in the 1998 Survey was due, in good part, to Exchange staff focusing case appointments on a small cadre of veteran arbitrators. It also indicates that, with effort, the process can change without

necessarily changing the selection method.

Other statistics confirm NYSE's more efficient use of its arbitrator pool. In the 1998 Survey, there were 27 NYSE arbitrators who appeared on enough cases during the 1994-1998 study period to produce at least ten Awards in four years; 22 of those 27 were New York City-based arbitrators. The most active arbitrator served enough to produce 24 Awards, probably about 60 times! In our current Survey, only five NYSE arbitrators produced ten Awards; meanwhile, the total number of Awards issued by NYSE was 60% higher in this Survey than in the earlier one! Finally, the five arbitrators in the current Survey are spread around the country and the most active among them appears in only 13 Awards.

It seems clear that a conscious and effective effort was made by NYSE staff to avoid "overuse" of particular arbitrators, especially when other arbitrators were eligible for and awaiting appointment to cases. We can think of no other explanation for the sudden shift between 1998 and 2000 (and continuing thereafter). Staff appointment allows the Exchange staff to optimize the use of the NYSE arbitrator pool by tracking assignments and assuring that individual arbitrators are not committed in any other cases before appointing them. While the choices are not party-driven, as they are with list selection, at least the perceptions of favoritism and of jaded or stale arbitrators are muted by the consistently broad use of the arbitrator pool.

On the NASD side, there are similar indications of greater breadth in utilizing the arbitrator pool. They are not as pronounced as the changes at NYSE, and Chart I indicates they may be receding, but they can be seen in the Award statistics, nonetheless. In the 1998 Survey, arbitrators with 25 or more NASD Awards during the four-

cont'd on page 5

ARBITRATOR SERVICE SURVEY *cont'd from page 4*

year survey period numbered 29. While there were about 45% more NASD Awards in our current survey period than in the 1998 survey period, only eleven arbitrators in our current Survey qualified for that same distinction. None of the eleven was primarily based in New York City – there were three from Michigan and two from Ohio. As a group, these most active arbitrators were geographically dispersed and, as to several individuals, their case assignments were geographically dispersed.

Conclusion

Summing up the 1998 Survey, we wrote: "It will be interesting to see whether, under list selection, ...wide distribution of the work will occur or whether parties will tend, for their own reasons, to concentrate their arbitrator selections." Seven years hence, we have that opportunity and the results have surprised us. NYSE is utilizing its arbitrator rolls at seemingly optimal levels. NASD has realized benefits from list selection as expected, but obstacles remain.

Most surprising in the current study was the move by NYSE to expand the distribution of the available slots in its arbitrations around the country and thereby move from a dismal assignment efficiency percentage of 33% in the 1998 Survey

to a very respectable range of 75-85%. NYSE did not achieve this by adopting list selection, but the forum evidently decided to distribute the work more equitably when making arbitrator appointments. If we are correct, then this seems a commendable achievement.

NASD, which did adopt list selection as its exclusive method of selecting arbitrators, took the staff out of the selection equation, created NLSS, and initially did achieve a much higher assignment efficiency rate. In the 1998 Survey, NASD used the same arbitrators repeatedly to fill available slots, leading to a 35% assignment efficiency rate. By 2000 that performance had changed markedly, so that three-quarters of the time available slots were being filled with arbitrators who had not previously served that year.

But, then, a funny thing happened on our way to completing the Arbitrator Service Survey for 2000-2005. NASD's assignment efficiency rate dropped from 75% in 2000 to 53% in 2004 and 55% in 2005. More cases than ever before were positioned for empanelment in these years and the surge appears to have overwhelmed an arbitrator pool that was being filled with new recruits and purged of deceased, inactive, inattentive and re-classified arbitrators. The promise of

list selection – better use of the available arbitrator pool and the opportunity for parties to select the arbitrators they want – is best realized when a sufficient pool of neutrals allows the parties' first choices to serve.

Assignment efficiency still improved under list selection; even at 55%, the distribution of work among arbitrators was demonstrably better than during the 1998 survey period. To the extent that case volume returns to more modest historical levels, as it did in 2005, the opportunities will grow to assure parties who choose A as their arbitrator that they will get A. NASD now has a recruiting director, who will presumably work on restoring pool size, so that the promise of list selection can be maximized, even in times of heightened case volume.

ENDNOTES

* We recognize that the actual use figure may be lower, since some arbitrators serve in more than one hearing location. This practice of arbitrator service in more than one hearing location grew more prevalent in the later period under NASD list selection and has become institutionalized by NASD's recent campaign to create hearing locations in every state (and to "man" the new locations, in part, with existing arbitrators).

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

TO: Richard P. Ryder, Editor
Securities Arbitration Commentator
P. O. Box 112
Maplewood, N.J. 07040.