

Arbitrator Service Survey

How Often and How Come?

With the AAA merging its Securities Arbitration Rules (SAR) into the Commercial Arbitration Rules program and the MSRB, AMEX and PHLX merging their dwindling arbitration programs into the NASD's, the practical choices that await the customer or the broker involved in a brokerage dispute are quickly resolving to just two — NASD or NYSE arbitration. Moreover, if the brokerage firm involved in that dispute is not a NYSE member firm, even the NYSE is unavailable.

To their credit, NYSE and NASD have been introducing some changes in their programs that are designed to give the parties more choices *within* the two systems about how their arbitrations will be run. One such major change relates to the appointment of arbitrators; list selection is the system at NASD (effective November 1998) and an available option now at the NYSE. Allowing the parties to choose their own panels from limited candidate lists replaces the single-choice procedure of the past, where panels were formed by the staff and "party choice" was expressed in the negative — via peremptory and cause challenges.

Our purpose in this article is to present and review some Award statistics relating to arbitrator selection patterns over a recent four-year period. With the old systems on the way out and new systems on the way in, we felt it was timely to survey data concerning arbitrator service. Hopefully, 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.

Examining Arbitrator Selection

Staff selection of arbitrators has an underlying rationale that allowed it to

work in the past, even though it may not work well today. Many think that that rationale relates to speed, which is certainly a quality that administrative appointments offer. In an earlier day, perhaps, securities arbitrations were fewer in number and a cadre of experienced investor advocates was not in evidence. Complementary expertise of panelists was an achievable objective for a less harried staff; the pools of available talent were generally better known to the staff and the choices more plentiful, relative to the demand. Perhaps that ideal never existed, but few would argue that these conditions represent today's environment at NASD Regulation's Office of Dispute Resolution.

Will list selection do what the critics of the old staff selection system have in mind? Even if it does not, will it do any better at getting the "best" arbitrators seated? At the AAA, where list selection has ever been the default mechanism in securities arbitrations, reports indicated that, at least before SAR improvements in 1993, staff selection followed party "strike list" disagreements in the majority of cases.

NYSE Arbitration has received some "bad press" in recent months, especially as to its New York-sited program, from detractors who complain about a relatively low "win rate" and blame it on staff-favored Arbitrators. Still, since its recent switch to a three-option arbitrator selection program (see 10 SAC 2(7) for details on NYSE selection options), NYSE often finds parties consenting to its hybrid "enhanced" procedure to assure a back-stop of staff control where delays from panel selection disagreements are feared.

As Doug Schulz's feature article on NASD's Neutral List Selection System correctly points out, many of the benefits offered by the switch to list selection will be enjoyed only by those

parties who approach its use constructively and in a spirit of cooperation. For instance, those attorneys who seek to "pack" their Panels with arbitrators whom they perceive as sympathetic to their side or who simply go "strike-crazy" for fear that, in retrospect, they will have approved the "wrong" arbitrator will likely frustrate the "party choice" element intended by the use of list selection. For list selection to work well, lawyers on both sides will have to work at it.

NASDR Arbitrator Chart

Then, too, there are preference and availability factors involved in list selection's mechanics. Readers should find enclosed with this issue, photocopied with the NASD's kind permission, a chart published by NASD in its *Neutral Corner* newsletter for arbitrators. That Chart lists the sities generally used by NASD, together with statistics about the number of arbitrators available by situs and the total number of cases filed in 1997, for which NASD Regulation's Office of Dispute Resolution (ODR) appointed Panels. We applaud NASD Regulation for publishing this kind of information, as it helps both practitioners and arbitrators understand selection dynamics a bit better.

At a glance, one can see that, in many sities and particularly the major ones, the NLSS rotational system will need to nominate individual arbitrators from limited pools many times in the course of a year to fill the 15-candidate list that every three-member panel optimally requires. To give some examples, we projected from the Chart's figures that, in New York City in 1997, there were 2,711 arbitrator seats or slots to fill (See Chart: 865 X 3; 116 X 1). Multiplying that number times five candidates to fill each slot means that 13,555 nominees would be needed under list selection. There are, as of November 17, 1998, 1,183 available arbitrators in

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the New York pool. Similarly, in Los Angeles in 1997, 1,307 arbitrator slots had to be filled, meaning list selection would require five candidates for each slot or 6,535 nominees. Los Angeles has 527 available arbitrators.

Nominating arbitrators is the first hurdle; will "party-choice" arbitrators be available when selected is the next question. Certainly, given settlements and staggered schedules, there will be few problems if the parties select each arbitrator in the pool an equivalent number of times. This seems unlikely. Those who believe that the staff simply preferred to appoint the idle and dotty may find that, sometimes, arbitrators have served more often than others for reasons that carry validity — experience, expertise, and bipartisan acceptance of her/his fairness. Whether the choices will be the same arbitrators whom the staff has favored or others, the likelihood is that some arbitrators will be in greater demand than others.

Taking that proposition a thought further, if "party-favored" arbitrators are exposed for choice about a dozen times a year, as seems to be the case in many major situses, then they should actually serve more frequently. This will hinge, though, upon whether the parties optimize "party choice" in the list selection process or whether the choice frequently defaults to the staff. One of the less appreciated subtleties of list selection's potential lies in the prospect that arbitrators will understand that getting chosen relies, not upon performance for the staff, but upon party agreement as to their competence and fairness. This dynamic will work best where parties check out their arbitrators thoroughly and confer on their choices with colleagues and their adversaries.

SAC's Service Survey

So, the first Chart in SAC's service survey is the NASD's Chart. The rest of the Charts are ours and contain data primarily drawn from SAC's Award Database for a four-year period, commencing in July 1994. Hopefully, statistics promised at a future point by NASD, when its new NLSS procedure

has been in place long enough, will tell us how often staff appointments still occur, instead of appointment by party agreement, and whether list selection changes the frequency and breadth of arbitrator service. To what will we compare them, though, when and if such statistics are made public?

**CHART I
NASD Arbitrator Service**

SAC's Database does not provide data on how many times arbitrators were nominated to serve or appointed to serve on cases that settled. We can, though, provide a baseline for comparison concerning various ways of viewing arbitrator service. In Chart I, we establish the relative frequency of actual service in the various NASD situses (the Activity Index) and how many of the available pool, over the course of four years, had the opportunity to serve on a case and render an Award (the Use Index). We also analyzed how often the most active arbitrators served within a situs and what percentage of those who actually sat served more than once a year (the Breadth Index).

We tried to follow the data for this Survey to places where we could capably go and in directions that would address readers' most oft-asked questions. We began by using the NASD Chart to develop some comparative data for NASD arbitrations. We then selected common situses for NYSE and NASD arbitrations for relative comparisons concerning arbitrator service. Here, we could only use our Activity and Breadth Indices, as we do not have figures from NYSE regarding Pool Size for particular situses. Finally, we focused on the 56 Most Active Arbitrators, regardless of forum, and examined outcomes in their cases relative to the whole.

Evaluating this data does not necessarily lead to any inescapable conclusions. We anticipate readers will find value in using these Charts, as statistics are generally used, to support or question assumptions and to develop new insights. For the skeptic, a high Activ-

ity Index could immediately warn of arbitrator overuse, especially if accompanied by a low Breadth Index and a low Use Index reading. Combined with a relatively high Use Index, the situation may suggest that the staff is using the available pool to its fullest. Regarding the Use Index, we caution that the Pool Size figure represents ODR's tally for November 1998. Pool size might have been different during our four-year period. We find the November 1998 figure particularly useful, because, after the culling and re-qualifying of late, pool size will not be inflated with people who are no longer available or interested in serving.

Viewing the results in Chart I, we note that Los Angeles had the highest Activity Index, with those who served participating in almost five Awards on average over the four-year survey period. The Use Index, which measures how well the pool was utilized, is relatively low for the LA situs, although not outside the norm at 56.5%. At least one arbitrator served 37 times, more than nine Awards per year. On the other hand, the Breadth Index for LA, the highest on the Chart at 30.2%, suggests that the staff may have had problems meeting demand and had to call on a significant number of reliable candidates multiple times.

This pattern is not uncharacteristic of most of the high-volume situses. On the other end of the scale, note the high Use Index figures for Cincinnati (91.7%) and Pittsburgh (98.1%). Activity in these situses (1.9x & 2.5x, respectively) is more in line with the size of the available pool. While it is a little surprising that one or more arbitrators served 10 times in the Pittsburgh situs, when the average was 2.5, the Breadth Index for both situses indicate that very few arbitrators are the subject of above normal usage. In these instances, our conclusion would be that the staff makes full use of the available pool and that overuse of "favored" arbitrators is not abusive.

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CHART I -- NASD ARBITRATOR SERVICE						
Awards Issued 7/94-6/98						
Arbitration Situs	Activity Index		Use Index		Range of Service	Breadth Index
	Avail Slots/#Serving		#Serving/PoolSize			>1x/yr/#Serving
Albany	110/44	(2.5x)	44/70	(62.8%)	1-12	8/44 (18.1%)
Albuquerque	40/22	(1.8x)	22/40	(55.0%)	1-6	2/22 (9.0%)
Anchorage	12/9	(1.3x)	9/24	(37.5%)	1-3	N/A (---)
Atlanta	383/113	(3.4x)	113/155	(72.9%)	1-13	27/113 (23.8%)
Baltimore	123/61	(2.0x)	61/178	(34.2%)	1-7	5/61 (8.1%)
Boston	470/176	(2.7x)	176/285	(61.7%)	1-12	28/176 (15.9%)
Buffalo	111/44	(2.5x)	44/67	(65.6%)	1-10	9/44 (20.4%)
Charlotte	99/48	(2.1x)	48/78	(61.5%)	1-8	4/48 (8.3%)
Chicago	530/242	(2.2x)	242/442	(54.8%)	1-14	26/242 (10.7%)
Cincinnati	64/33	(1.9x)	33/36	(91.7%)	1-5	1/33 (3.0%)
Cleveland	139/48	(2.9x)	48/84	(57.1%)	1-14	9/48 (18.8%)
Columbus	64/35	(1.8x)	35/55	(63.6%)	1-6	2/35 (5.7%)
Dallas	289/117	(2.5x)	117/230	(50.9%)	1-10	14/117 (12.0%)
Denver	270/116	(2.3x)	116/168	(69.0%)	1-14	11/116 (9.5%)
Detroit	41/35	(1.2x)	35/186	(18.8%)	1-3	N/A (---)
Ft Laud/BocaRaton	945/305	(3.1x)	305/640	(47.7%)	1-17	62/305 (20.3%)
Honolulu	33/17	(1.9x)	17/43	(39.5%)	1-6	2/17 (11.8%)
Houston	318/131	(2.4x)	131/201	(65.2%)	1-14	15/131 (11.5%)
Indianapolis	51/34	(1.5x)	34/80	(42.5%)	1-5	1/34 (2.9%)
Kansas City, MO	104/62	(1.7x)	62/115	(53.9%)	1-4	N/A (---)
Las Vegas	59/31	(1.9x)	31/72	(43.1%)	1-9	2/31 (6.4%)
Little Rock	39/29	(1.3x)	29/38	(76.3%)	1-3	N/A (---)
Los Angeles	1379/298	(4.6x)	298/527	(56.5%)	1-37	90/298 (30.2%)
Louisville	73/30	(2.4x)	30/43	(69.8%)	1-8	3/30 (10.0%)
Memphis	40/31	(1.3x)	31/55	(56.4%)	1-3	N/A (---)
Milwaukee	109/42	(2.3x)	42/71	(59.2%)	1-8	7/42 (16.7%)
Minneapolis	307/125	(2.5x)	125/179	(69.8%)	1-13	14/125 (11.2%)
Nashville	64/37	(1.7x)	37/143	(52.1%)	1-6	3/37 (8.1%)
New Orleans	116/51	(2.3x)	51/64	(79.7%)	1-7	6/51 (11.8%)
New York City	2350/609	(3.9x)	609/1183	(51.5%)	1-37	142/609 (23.3%)
Norfolk	16/14	(1.1x)	14/15	(93.3%)	1-2	N/A (---)
Oklahoma City	83/34	(2.4x)	34/63	(54.0%)	1-7	5/34 (14.7%)
Omaha	78/44	(1.8x)	44/55	(80.0%)	1-4	N/A (---)
Philadelphia	414/129	(3.2x)	129/204	(63.2%)	1-14	25/129 (19.4%)
Phoenix	75/57	(1.3x)	57/198	(28.8%)	1-6	1/57 (1.8%)
Pittsburgh	130/52	(2.5x)	52/53	(98.1%)	1-10	7/52 (13.5%)
Portland	100/40	(2.5x)	40/103	(38.8%)	1-8	6/40 (15.0%)
Raleigh	59/30	(2.0x)	30/44	(68.2%)	1-6	2/30 (6.7%)
Richmond	57/33	(1.7x)	33/62	(53.2%)	1-8	2/33 (6.1%)
Salt Lake City	62/25	(2.5x)	25/36	(69.4%)	1-7	5/25 (20.0%)
San Diego	356/100	(3.6x)	100/340	(53.2%)	1-27	24/100 (24.0%)
San Francisco	700/211	(3.3x)	211/340	(62.1%)	1-19	44/211 (20.8%)
Seattle	165/60	(2.8x)	60/115	(52.2%)	1-15	9/60 (15.0%)
St. Louis, MO	152/79	(1.9x)	79/137	(57.7%)	1-7	6/79 (7.6%)
Tampa	652/227	(2.9x)	227/386	(58.8%)	1-18	34/227 (15.0%)
Washington, DC	295/112	(2.6x)	112/246	(45.5%)	1-14	17/112 (15.2%)

LEGEND: "Available Slots" represents the number of arbitrator seats that had to be filled; "#Serving" reflects how many individual arbitrators were actually used to fill the "Avail. Slots." "PoolSize" indicates the number of arbitrators available for service, per NASD, a/o 11/17/98. "Range of Service" shows the highest rate of service for the most active arbitrator(s) (e.g., "1-12" means at least one arbitrator served 12 times during the four-year survey period. The number of arbitrators who served more than once per year (≥5 times in 4 years) appears under the ">1x/yr" heading, which demonstrates the relative size of the most active group. Thus, for the Albany situs, 110 seats were filled by 44 arbitrators, meaning the average serving arbitrator was seated 2.5 times. 62.8% of the available pool was utilized. 18.1% of the serving arbitrators were seated 5 times or more.

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Why did we choose a four-year period for our Survey, rather than comparing directly to the 1997 figures on NASD's Chart? We felt that, during a four-year period, an Arbitrator ready and willing to serve would likely have the opportunity, at least once, to do so. In the course of a single year, that arbitrator might not have been asked to serve, might have been unavailable to serve when asked, or might have served on a case that settled — all for easily understandable reasons. We wanted to establish a range for which the expectation would be that one would serve. We did not expect a 100% reading on the Use Index for any situs, but we did feel

that, with a four-year overview, one could anticipate a fairly reliable norm to develop.

**CHART II
NASD/NYSE Comparison**

Having examined service frequency for NASD arbitrators in Chart I, we turned next to a comparison of NASD and NYSE arbitrator service. We limited the comparison to the top seven NASD situs and, in this portion of the survey, began to isolate the most active arbitrator groups at the two forums for separate examination. Because NASD has considerably more volume than

NYSE, we defined the NASD Most Active Group as those arbitrators who had participated in 25 or more Awards during the four-year period. We defined the NYSE Most Active Group as those arbitrators who had participated in 10 or more NYSE Awards. We quickly found that the great majority (22 of 27) of the NYSE Most Active Group were sited in New York City. Thus, our comparison of the two groups in Chart II is limited to that city.

As we have observed in earlier Award surveys, NYSE performs a much greater percentage of its arbitrations in New York City than does NASD.

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CHART II -- NASD/NYSE ARBITRATOR SERVICE COMPARISONS					
Arbitration Forum	Activity Index Avail Slots/#Serving	Range of Service	Breadth Index >1x/yr/#Serving	LEGEND II	
NEW YORK CITY					
NASDR ODR	2350/609 (3.9x)	1-37	142/609 (23.3%)	"Available Slots" represents the number of arbitrator seats that had to be filled during the four-year survey period; "#Serving" reflects how many individual arbitrators were actually used to fill the "Avail. Slots." "Range of Service" shows the highest rate of service for the most active arbitrator(s) (e.g., "1-37" means at least one arbitrator served 37 times). The number of arbitrators who served more than once per year (≥5 times in 4 years) appears under the ">1x/yr" heading, which demonstrates the relative size of the most active group. Thus, for the New York City situs, 2350 seats were filled by 609 arbitrators, meaning serving arbitrators were seated an average 3.9 times. 23.3% of the serving arbitrators were seated 5 times or more at NASD; at NYSE the percentage was 22%.	
NYSE ARBTN	1054/309 (3.4x)	1-24	68/309 (22.0%)		
FORT LAUDERDALE/BOCA RATON					
NASD ODR	945/305 (3.1x)	1-17	62/305 (20.3%)		
NYSE ARBTN	208/52 (4.0x)	1-21	11/52 (21.1%)		
LOS ANGELES					
NASD ODR	1379/298 (4.6x)	1-37	90/298 (30.2%)		
NYSE ARBTN	70/37 (1.9X)	1-6	4/37 (10.8%)		
SAN FRANCISCO					
NASD ODR	700/211 (3.3x)	1-19	44/211 (20.8%)		
NYSE ARBTN	45/29 (1.6x)	1-5	1/29 (3.4%)		
TAMPA/CLEARWATER					
NASD ODR	652/227 (2.9x)	1-18	34/227 (14.9%)		
NYSE ARBN	85/39 (2.2x)	1-7	1/39 (2.5%)		
CHICAGO					
NASD ODR	530/242 (2.2x)	1-14	26/242 (10.7%)		
NYSE ARBTN	120/50 (2.4x)	1-7	9/50 (18.0%)		
BOSTON					
NASD ODR	470/176 (2.7x)	1-12	5/176 (2.8%)		
NYSE ARBTN	77/32 (2.4x)	1-7	3/32 (9.3%)		

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Whether this phenomenon relates to NASD having regional arbitration offices, to a misimpression that NYSE does not service the entire country with its arbitration program, or some other factor, we are uncertain. In any case,

roughly 40% of NYSE's Customer/Member cases were arbitrated in New York City, whereas the percentage at NASD was 15%. (*ed: Given the recent changes NYSE has made to its program — promoting mediation and adminis-*

trative conferences, putting Awards on its WebSite, offering arbitrator selection options — and the increased forum fee differential between the two forums, out-of-state practitioners should do a fresh review of their forum selection determinations).

CHART III -- AWARD RESULTS (NYC Only)						LEGEND III The Award results in Chart III include a calculation of Win Rates and Recovery Rates for investor-claimants at NASD and NYSE, broken out to reflect outcomes for two groups of arbitrators: those who were "most active" (≥25 Awards for NASD and, for NYSE, ≥10 Awards) and those who served, but do not qualify as "most active." Recovery rate measures the ratio between the amounts awarded to claimants in the winning Awards and the compensatory claims asserted by those same winning claimants.
Customer/Member Awards 7/94-6/98 (\$000's omitted)						
Arbitration Forum	#Total Awds	#Clmt Wins	% Win Rate	\$AwardAmt./ \$CompensClmd <small>(figures relate to win Awds)</small>	Recovery Rate (%)	
NASD ODR	495	252	50.2%	18,828/50,537	37.2%	
Most Active	257	129	50.1%	10,469/33,953	30.8%	
Others (<25)	238	123	51.6%	8,559/16,584	50.4%	
NYSE ARBTN	132	60	45.4%	4,279/31,012	13.7%	
Most Active	78	42	53.8%	3,321/26,808	12.3%	
Others (<10)	54	18	33.3%	958/4,204	22.7%	

In Chart II, one sees that NASD's Activity Index is much higher than NYSE's, in major situses outside New York City. So, too generally, are the Range and Breadth Index figures, signifying that, while NYSE performs proportionately fewer arbitrations outside New York, it has been able to provide a relatively broader mix of arbitrators when forming Panels. For New York City, the Activity and Breadth Indices are in line with one another and are both relatively high.

Chart III
Award Results (NYC Only)

Chart III provided some surprising results. This tabulation of Customer/Member Award outcomes in New York City, broken down by forum and by more active and less active arbitrator groups, provided some interesting insights. We see, for instance, that recovery rates (i.e, collective award amounts related to compensatory claims) are substantially lower at both NASD and NYSE for the "More Active" group. More surprising, however, is the considerable disparity in NYSE "win" rates between the More Active group (53.8%)

and the "Others" (33.3%). What is one to make of such an outcome variance, particularly when it is not verified by a similar disparity between the Most Active group and the Others on the NASD side?

In any case, it is noteworthy that the Most Active groups at both NASD and NYSE display "win" rates in Customer/Member cases that are within or above the norm. What impressed us most about the Chart III comparison, however, was the relative ubiquity of the Most Active group in the New York Awards. We do not mean to imply that an arbitrator's presence on a three-person panel necessarily provides any more than a one-third influence on the outcome. Still, it is surprising that, as to both forums, a small cadre of arbitrators, perhaps 5-10% of the whole (27/609 at NASD; 22/309 at NYSE), participated in more than half (52% at NASD; 59% at NYSE) of the larger customer-initiated decisions during our survey period.

We decided, as a result of this revealing observation, to focus on the most active arbitrators as a group. There

are 56 arbitrators who have each served 25 times or more during the four-year survey period. The most active Arbitrator served 57 times and, collectively, the group participated in rendering some 1,524 Awards, about 18% of the 8,458 Awards issued and extant in SAC's Award Database. So, the first thing we learned was that, once outside New York, the relative ubiquity of this most active group diminished considerably.

The second thing we learned was that, in treating these arbitrators as a group for statistical purposes, we should also recognize that, as individual professionals, they have quite different profiles, experiences, and records. Just looking at the statistics as to each person, we observed win-rate percentages that ranged from the 20's to the 80's. While the great majority were concentrated in New York City (28), Los Angeles (10), San Francisco (6) and Fort Lauderdale (4), 21 of the 56 served on arbitrations in three or more situses and seven served in five or more situses.

Finally, we learned that, while these 56 arbitrators served on average more

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than six times per year during our survey period and another 410 served an average 2.5x/year or more, in excess of 5,000 other individuals also served as arbitrators during this time frame. Concededly, the Use Index percentages in Chart I do not provoke awe, but it does seem overall that the forums have utilized many of the qualified arbitrators available to them. It will be interesting to see whether, under list selection, such wide distribution of the work will occur or whether parties will tend, for their own reasons, to concentrate their arbitrator selections.

Back to our Most Active Arbitrator Group (MAA group — ≥25 Awards overall) — the vast majority were classified as Public Arbitrators. There were 44 males and 12 females. Thirteen served entirely with NASD, 42 served both as NASD arbitrators and with other forums, and one served with other forums and not NASD. Talk about lumping people together — we made the initial assumption that the 27 NYSE

arbitrators whom we identified as most active (≥10 Awards) with NYSE would form the core for the active group. Wrong — only nine of the 56 arbitrators in the MAA group served 10 times or more with NASD and NYSE! Just 19 served five times or more with each forum. 29 of the 56 served the qualifying 25 times or more with NASD alone. Only one served enough (28x) at NYSE to qualify.

Identification of people in the MAA group as Public Arbitrators was achieved by reference to their service in customer-initiated Small Claims proceedings, where a single Public Arbitrator decides the case. Forty-five of the 56 served at least once in this capacity. Thirty-four handled “on the papers” cases three times or more and one NASD Arbitrator was assigned 29 such cases over the four years reviewed. One might expect (without condoning) that this particular task would concentrate in a particular arbitrator group. It does not follow, though, that it should

be the same group that also presides most actively over hearing-type cases!

Whether the forums “favored” certain arbitrators — and to what degree that occurred — are questions that might concern arbitrators, but there is no logical leap from that proposition to any inference that those who did actively serve performed in any manner other than one that was honorable and fair to both claimants and respondents. We hear criticism that frequent service operates to bad effect on arbitrators (the jading and beholden arguments). While there is some rhetorical appeal to these arguments, most recognize them as a simplistic view of the arbitration universe. Experience, expertise and honed wisdom all take time to achieve and all have a smoothing (may we say refining) effect on us; still, these qualities are generally viewed as a virtue in arbitrators. In fact, arbitrator expertise is one of the definitional attributes of arbi-

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CHART IV -- MOST ACTIVE ARBITRATOR AWARD RESULTS							
Awards By Type/Dispute 7/94-6/98							
Awards Involving 56 Most Active Arbitrators							
(\$000's omitted)							
Type of Dispute	#Total Awds	#Clmt Wins	%Win Rate	\$AwardAmt./ \$CompensClmd <small>(figures relate to win Awds)</small>	Recovery Rate (%)	#Puni Awards	#AttyFee Awards
Customer/ Member	818	427	52.2%	40,521/95,296	42.5%	19	38
Small Claims (≤\$10M)	292	139	47.6%	506/771	65.6%	1	3
Employee/ Member	171	100	58.4%	13,160/62,950	20.9%	1	13

LEGEND IV

The Award results in Chart IV include a calculation of Win Rates and Recovery Rates for investor- and broker-claimants, covering all forums and broken out by three major types of dispute. The outcomes displayed in this Chart relate solely to those Awards in which one of the 56 Most Active Arbitrators participated in the decision. As to the Small Claims cases, the Most Active Arbitrator was generally the sole arbitrator making the determination, whereas in the other matters, one or more less active arbitrators may have participated in the decision. Win Rate is a percentage comparison of the “#Total Awds” with those where Claimant won some monetary amount (#Clmt.Wins). Recovery Rate measures the ratio between the amounts awarded to claimants in the winning Awards and the compensatory claims asserted by those same winning claimants.

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tration, i.e., one reason why it is speedy, inexpensive and final.

Chart IV
Most Active Arbitrators

In any case, one finds little to support the jading and beholden fears in Chart IV. In this final tabulation, we group together the Award outcomes for our 56 most active arbitrators for analysis. It is remarkable that this small number of persons has served in almost 20% of the cases, but we found nothing remarkable about their aggregated win- and recovery-rate percentages. SAC's general Award surveys, covering 10,000 Awards (see, e.g., 8 SAC 2) have produced win- and recovery-rate percentages that are not dissimilar to those in Chart IV.

We do find, however, a relatively low percentage of punitive-damage and attorney-fee Awards. For instance, we have found, historically, that the incidence of punitive damage Awards was about 2% for all Awards and about 3.4% for Customer/Member Awards (see 6 SAC 11&12(13)). Our own "horseback" surveys since that 1993 Survey indicate that the percentage in more recent years has risen and is now closer to 5% for Customer/Member Awards nationwide. Yet, the 19 punitive-damage Awards in the Customer/Member category of Chart IV represent only 2.3% of the whole.

Readers will have to decide for themselves whether these low percentages are meaningful. The sample is too small for us to state a conclusion, one way or the other. Moreover, half of the MAA group is based in New York, so a larger percentage of all Awards in the MAA group sample (about 40%) are New York Awards. We did not attempt to compensate for the potential skewing effect that might have on the punitive-damage and attorney-fee figures. (In our 1993 Punitive Damage Survey, the incidence of punitive-damage assessments in New York Awards was .8%).

CONCLUSION

List selection of arbitrators will be the ongoing and predominant approach to appointing panels in securities arbitration. Assuming parties exercise the power implicit in the list selection method, there will be greater party input in the most important stage of the arbitration process — choosing the decisionmakers.

At this juncture, there is insufficient experience with list selection to know if it will achieve its promise, but the changeover offered a timely opportunity to review past Awards on some focal points related to that issue. For one thing, we hoped to develop some information about how well the staff selection method had worked. Secondly, staff selections will still be around, as the default method at NYSE and a "last resort" method at NASD. Thirdly, we wanted to establish a baseline against which list selection can be compared in the new millennium.

"How often" and "How come" was the way we put the issue of arbitrator service in this article's title. Pretty often was what we found when we tallied up the number of Awards in which the most active arbitrators have participated. We found, too, that while they were quite different groups, the most active arbitrators serving the NASD and those serving the NYSE were based primarily in the New York City situs. We can think of a half dozen reasons why this might be so, but none of them relates to the even distribution and rotational use of one's arbitration pool.

Still, we do not really expect an evenly distributed use of available arbitrators under list selection, so why fault staff selection if use is uneven but performance is good? That's where the "how come" side of the question becomes important. Unable to divine from our Award Database what motivations directed repeated selection of an arbitrator, we tried to drop to the bottom line. Could we find any difference in the outcomes between the very

active and less active groups? If so, would that not say something about performance?

Overall, our analysis of Award results for the Most Active Arbitrator group disclosed little divergence from the "norm." In Chart III, we made the puzzling finding that the NYSE "Most Active" group's win rate was significantly higher than the NYSE "Other" group. Furthermore, in Chart IV, we found a relatively low percentage of punitive-damage and attorney-fee awards by the MAA group. This was not enough, we thought, to credit the "Darth Vader" and "Evil Empire" suspicions to which, as Doug Schulz tells us in this edition's feature article, some sophisticated arbitration practitioners subscribe. It did, though, leave some issues unresolved.

That most of the MAA group were Public Arbitrators suggested that administrative convenience or, perhaps, a shortage of qualified arbitrators often caused reliance upon the MAA group. This impression was strengthened, in our view, by the allocation of multiple Small Claims assignments to this busy group, a seemingly incongruent allocation of arbitral resources. If the bunching of assignments truly relates to shortages, parties will want to adjust their selections. If not, then ways to improve must exist for better execution in future administrative appointments.

In the coming times, it will be interesting to see if the patterns change and, if they do, whether the changes are beneficial. Will the parties utilize more arbitrators — people who are willing and able to serve, but who have not been called? Will broader usage encourage recruitment and retention of the arbitrator pools? Will a new MAA group form? Will it grow as a result of concentrated party demand or will it arise from appointments made in default of party cooperation and choice? List selection was designed for the benefit of the parties. If the parties choose the Panels they want, then these questions will answer themselves.