PRE-HEARING MTDs *cont'd from page 2*

view of the seemingly growing practice of routinely filing motions to dismiss before evidentiary hearings are held, I believe requiring a written opinion by the arbitrators — if they dismiss before hearings are held — would also be appropriate. Such a requirement would not be a challenge to arbitrator authority, but would merely seek an explanation as to why further hearings are unnecessary.

Imposing this additional safeguard would impress upon the arbitrators the unusual nature of the relief sought – finality without an evidentiary hearing – and, as a result, might help to weed out motions that are abusive and intended only to discourage or punish adversaries. Indeed, if this does not prove adequate, perhaps consideration can be given to an additional requirement that pre-hearing motions to dismiss should be granted with prejudice only when the panel is unified, enabling the hearing to proceed if one panelist thought it advisable.

Together, these measures will continue to permit appropriate motions to dismiss to be considered, while curbing abuses. Sharpening arbitrator awareness with respect to abusive motions might also discourage parties in the first place from filing such motions, for if arbitrators find that they are filed in bad faith, they can always impose costs or sanctions.

ENDNOTES

1 Wilkinson Professor of Law, Fordham University School of Law; J.D. 1957, Fordham University School of Law; LL.M. 1963, New York University School of Law. Public Member of Securities Industry Conference on Arbitration 1977-97); Active Emeritus Public Member (1998-2003); reappointed Public Member and Chair (2004-Present). Public Member of National Arbitration Committee of the NASD, 1974-81. Public Arbitrator at NASD (since 1968) and NYSE (since 1971). Arbitrator and Chairperson Trainer at NASD and NYSE (since 1994). Mediator at NASD (since 1997) and NYSE (since 1999). Arbitrator at First Judicial Dept. (since 1972). Private Judge at Duke Law School's Private Adjudication Center (since 1989). Arbitrator at the American Arbitration Association ("AAA") (since 1991). Professor Katsoris is also a member of SAC's Board of Editors.

2 §7 of the Uniform Code of Arbitration.

3 §22 of the Uniform Code of Arbitration.

4 *See* Constantine N. Katsoris, An Arbitrator's Perspective, PLI/Sec. Arb.: Redefining Practices and Techniques, Vol. 1 at 307 (1998).

5 *See* Constantine N. Katsoris, ROADMAP TO SECURITIES ADR, 11 Fordham J. Of Corporate and Financial Law 413, at 458-460 (2006).

6 *Id* at 460. ■

SIDEBAR SURVEY: Motions to Dismiss

If pre-hearing dispositions are a rarity, then motions seeking them become abusive, when they become routine, just as routinely pursuing vacatur – a rarely granted remedy — represents an abusive practice in a post-hearing context. We wanted to establish how frequently motions to dismiss are being made in customer cases and whether the practice has become a common or substantial presence in the average arbitration. NASD Awards generally indicate that a motion to dismiss was made by one or more Respondents in the "Other Issues" section of the Award and whether or not the motion was denied or granted.

Recording such motions in the Award is not an express requirement, but it responds to the Rule 10330 mandate to provide a "statement of any other issues resolved..." and the practice has been a standard one at NASD for many years. The Chart below reflects survey results from SAC's Award Database for Customer-Member Awards issued from 2002-2006. We restricted our search criteria to customer-initiated matters reflecting compensatory claims above the Small Claims threshold, because evidentiary hearings are not standard practice in Small Claims cases, and we measured results only in the first nine months of each year (for easier comparison to the 2006 results). ■

MTD AWARDS SURVEY (5-Year Period)

(Mtns to Dismiss/Customer-Member/NASD Awards Only)

Time Period Surveyed (first 9 months)	# C/M Awards (Total for Period)	# C/M Awards (MTDs Recorded)	MTD Reported Total for Period
2006 (Jan-Sep)	989	279	28%
2005 (Jan-Sep.)	1,583	310	20%
2004 (Jan-Sep)	1,508	152	10%
2003 (Jan-Sep)	1,126	195	17%
2002 (Jan-Sep)	957	65	7%