

Securities Arbitration ©
Spring 2016
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Note: Each numeral indicates a class session, commencing with the inaugural class on Monday, 11 January 2016, et seq.

1. Introduction; What is Arbitration? What Distinguishes It from Litigation? A Brief History of Arbitration; Introduction to the Federal Arbitration Act; Landmark Supreme Court cases upholding the general principles of contemporary arbitration practice.

We will discuss the constitutional and procedural fundamentals of traditional litigation, and then contrast that to alternative dispute resolution (“ADR”), and its roots in traditional arbitration and mediation. We will review the pertinent statutory provisions of the federal law codifying arbitration. More importantly, we will review the Supreme Court landmarks endorsing arbitration as a valid means of dispute resolution.

Materials:

The Federal Arbitration Act, Title 9; *Stolt-Nielsen v. Animalfeeds International*, *American Express Co. v. Italian Colors*, *Concepcion v. AT&T*.

Consult your Course Materials packet, as well as www.sabinolaw.com at the “Articles” tab.

2. Securities Law Background; The 1933 Securities Act; The 1934 Securities and Exchange Act; Rule 10b-5 and Its History; Causes of Act Under the 1934 Act.

Securities arbitration implicates federal securities law. Therefore, we will explore the statutory regimes initiated some seven decades ago, with particular emphasis on the anti-fraud provisions of the 1934 Act. This learning will be a foundation for understanding the causes of action and the countervailing defenses one sees in securities arbitration.

Materials:

1933 Securities Act; 1934 Securities Exchange Act (both Title 15, U.S.C.), Sabino & Sabino, “From *Chiarella* to *Cuban*: The Continuing Evolution of The Law of Insider Trading,” 16 *Fordham Journal of Corporate & Financial Law* 673 (2011); Sabino, “The New Uniform Statute of Limitations for Federal Securities Fraud Actions: Its Evolution, Its Impact, And A Call for Reform,” 19 *Pepperdine Law Review* 485 (1992).

3. Regulation on Wall Street; FINRA and Its Predecessors; The Role of the Self-Regulatory Organization (“SRO”); FINRA Rules.

The SRO on Wall Street; the NASD and NYSE as predecessor regulators; SEC oversight; the promulgation of FINRA Rules.

Materials:

The Maloney Act; NASD and NYSE Charters and former rules; FINRA missions (from the FINRA website and FINRA Manual).

4. Bringing Arbitration to Wall Street; *Shearson v. McMahon, Mastrobuono*, and Similar Landmarks; the Displacement of Traditional Litigation; FINRA Arbitration; FINRA’s Organizational Structure and ADR, including FINRA Mediation; FINRA Resources and Practices.

We trace the watershed event of *Shearson* in 1987, and how securities arbitration irrevocably took hold on Wall Street, subsequent refinements in the case law, and how the lines have since blurred between litigation and arbitration in this forum. We discuss FINRA and its Dispute Resolution function; its responsible officers and staff; FINRA mediation as an alternative; FINRA Manual, Codes, and procedures

Materials:

Shearson/American Express v. McMahon, Mastrobuono v. Shearson, Lehman, Hutton, Inc., FINRA Code of Arbitration Procedure---Customer Cases; FINRA Code of Arbitration Procedure---Industry Cases; FINRA arbitration selection; FINRA mediator selection, Robbins, “Securities Arbitration.”

5. Commencing a Securities Arbitration Case; Initial Steps Representing the Customer; Representing the Aggrieved Industry Professional; Preparing a Defense of the Firm or Industry Professional.

We will explore practical problems and learn practical skills in meeting and interviewing the aggrieved investor or industry member, ascertaining if a viable claim exists for the former, and what defenses are available to the latter,

Materials:

Sample checklists of questions to ask, documents to request from the client.

6. Initial Pleadings; Composing the Statement of Claim; Causes of Action; Composing the Answer; Asserting Defenses; Best Practices v. Lazy Lawyering.

An exercise in practical skills in drafting the Statement of Claim, the Answer, and the elements of each, *and* some hard lessons in how sloppy lawyers stand out from the first document they submit to FINRA, and the consequences.

Materials:

Sample Statements of Claim and Answers, Sabino, “Awarding Punitive Damages in Securities Industry Arbitration,” 27 U. of Richmond Law Review 33 (1992), *BMW v. Gore, Campbell v. State Farm*.

7. Arbitrator Selection; the Process; Common Strategies; Common Myths.

FINRA utilizes a sophisticated hybrid system of arbitrator selection, combining computer selection with human input from the parties. We will explore how the “machines” make the first cut, but, more importantly, the role counsel and parties play in finalizing the selections, and what strategies to employ.

Materials:

Sample arbitrator selection lists, sample arbitrator profiles.

8. Discovery; Document Discovery; How to Conduct Discovery Without Depositions; Motions to Compel Discovery; Rebuffing Improper Discovery Requests.

Discovery is discovery, whether in arbitration or litigation. We will explore the similarities and the differences.

Materials:

FINRA Rules of Document Discovery; sample discovery demands, responses, motions to compel, and motions in opposition.

9. The Initial Pre-Hearing Conference (“IPHC”); The Reality and the Myth of IPHCs; Limited Motion Practice.

Never underestimate the IPHC; it is more than picking hearing dates. But it has limits to its efficacy. We will explore the differences. Securities arbitration is a unique forum in that it is almost free of motion practice. We will explore the why and how of that special circumstance.

Materials:

FINRA rules, sample IPHC Chair’s script.

10. Preparing for the Arbitration Hearing; Preparing the Client; Making Ready for Direct and Cross-Examination; Rules of Evidence and Procedure; Federal v. State Rules; Lining Up Witnesses.

Fortune favors the prepared. We will emphasis skills in client communication, preparing the client for direct and cross-examination, assuaging client clients, dealing with client “jitters,” preparing question scripts for witnesses, discuss strategies for adaptive questions, evidentiary issues, pertinent rules, and subpoenas.

Materials:

Sample question scripts, sample client advisories, Federal Rules of Evidence, sample FINRA subpoenas.

11. Mediation as an Option before the Arbitration Hearing; FINRA Procedures; Mediator Selection; Making the Best Use Out of Mediation; The Truth About Settlements.

We will explore the mediation option always presented to parties prior to the start of an arbitration hearing. Discussion will center about the mediation process, mediator selection and cost-bearing, presentation strategies, negotiation skills, and achieving and crafting a settlement.

Materials:

FINRA Mediation materials, sample mediator retention, sample mediation preparation script.

12. Conduct of the Actual Arbitration Hearing; What to Expect; Expect the Unexpected; Opening and Closing Arguments; Motions During the Hearing.

Oriented towards practical skills building, we will run through the actual process of an actual arbitration hearing, with special emphasis on the crafting of persuasive opening and closing statements, typical in-hearing motions, and pay special attention to tactics, both reasonable and unscrupulous, utilized by the opposition to derail your case.

Materials:

Sample opening and closing arguments, FINRA Rules on motion practice, Federal Rules of Civil Procedure on in-trial motions.

13. The Arbitration Award; Confirming the Arbitration Award; There is No Appeal---Usually; “Manifest Disregard” and Other Quirks.

We will review the parameters of the arbitration award, its legal impact, and steps necessary to confirm the award pursuant to federal or state law. The unavailability of an appeal shall be reaffirmed, but with coverage given to the extremely limited grounds by which an arbitration award can be challenged, particularly under the “manifest disregard” standard.

Materials:

Sample arbitration awards, Federal Arbitration Act, New York State C.P.L.R. Article 78, *Halligan v. Piper Jaffray, Inc.*, *First Options of Chicago v. Kaplan*.

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