

Securities Arbitration ©
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SYLLABUS

Course Description:

This course shall examine the specialized field of securities arbitration, as it is presently conducted on Wall Street. Students shall first learn the rudiments of arbitration, primarily the Federal Arbitration Act, and the specifics of securities law that underlie disputes between investors and brokers, principally the anti-fraud provisions of the Securities Exchange Act of 1934. They will witness how the modern arena of securities arbitration thus came to be, and has now involved into a unique forum of dispute resolution. In doing so, students will also learn of litigation document drafting, the discovery process, elements of trial practice, and other invaluable skills, which can also be applied to a broad variety of practice areas.

There are no prerequisites.

Learning Objectives:

After the successful completion of this course, students should:

- Have an understanding and appreciation of the general efficacy of arbitration as an alternative means to resolve disputes;
- Understand the fundamentals of federal securities laws prohibiting fraud and misfeasance in connection with the buying and selling of securities (i.e., stocks and bonds);
- Have acquired the rudiments of making the initial analysis of the claims and defenses of claimants and respondents, respectively;
- Be knowledgeable regarding, among other things, the Statement of Claim, Respondent's Answer, arbitrator selection, and the conduct of discovery in securities arbitration cases;
- Have an understanding of the preparation and execution of a claimant's prosecution of a claim and a respondent's defense thereto at an arbitration hearing, including, but not limited to, direct examination, cross-examination, and other tools of the adversarial process; and
- The rendering and finality of an arbitration award.

Skills the Student Shall Acquire:

Students taking this course will be eligible for 1 skill credit. Substantial class time shall be devoted to substantive skills instruction, including, but not limited to, legal research, legal analysis and reasoning, problem solving, communication (both verbal and

written), negotiation, mediation, and trial advocacy. Exercises related thereto will be assessed by the instructor, and such assessments will factor into the student's class participation grade.

While the primary goal is to provide students with the skills necessary to litigate the prosecution or defense of a securities arbitration case, the skills acquired herein shall be invaluable to the students in a number of other endeavors, including, but not limited to, arbitration generally, securities law, securities litigation, and trial practice.

Upon completion of the course, the law student will have: significantly increased her knowledge of alternative dispute resolution in all fields; gained specific knowledge of securities law, trial practice, and evidence; have specific knowledge of securities arbitration, making her an attractive candidate for employment in the securities arbitration field and elsewhere.

Class Sessions and Assignments:

Note: Each numeral indicates a class session, commencing with the inaugural class on Monday, 23 January 2017, 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 emphasize 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*.

Course Content:

The details of the course content are as follows:

- 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 (*Stolt-Nielsen*, *Italian Colors*, *Concepcion v. AT&T*, et al.).
- 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.
- Regulation on Wall Street; FINRA and Its Predecessors; The Role of the Self-Regulatory Organization (“SRO”); FINRA Rules.
- Bringing Arbitration to Wall Street; *Shearson v. McMahan*, *Mastrobuono*, and Similar Landmarks; the Displacement of Traditional Litigation.
- FINRA Arbitration; FINRA’s Organizational Structure and ADR, including FINRA Mediation; FINRA Resources and Practices.
- Commencing a Securities Arbitration; Initial Steps Representing the Customer; Representing the Aggrieved Industry Professional; Preparing a Defense of the Firm or Industry Professional.
- Initial Pleadings; Composing the Statement of Claim; Causes of Action; Composing the Answer; Asserting Defenses; Best Practices v. Lazy Lawyering.
- Arbitrator Selection; the Process; Common Strategies; Common Myths.
- Discovery; Document Discovery; How to Conduct Discovery Without Depositions; Motions to Compel Discovery; Rebuffing Improper Discovery Requests.
- The Initial Pre-Hearing Conference; The Reality and the Myth of IPHCs; Limited Motion Practice.
- 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.
- Mediation as an Option before the Arbitration; FINRA Procedures; Mediator Selection; Making the Best Use Out of Mediation; The Truth About Settlements.
- Conduct of the Actual Arbitration Hearing; What to Expect; Expect the Unexpected; Opening and Closing Arguments; Motions During the Hearing.
- The Arbitration Award; Confirming the Arbitration Award; There is No Appeal--- Usually; “Manifest Disregard” and Other Quirks.

Readings:

Readings for the course shall be as follows:

- The Federal Arbitration Act (found within Title 9, U.S.C.)
- The 1933 Securities Act
- The 1934 Securities Exchange Act
- The aforementioned Supreme Court cases
- FINRA Code of Arbitration Procedure---Customer Code
- FINRA Code of Arbitration Procedure---Industry Code
- FINRA Rules
- FINRA materials for arbitration
- Loss & Seligson, “Securities Regulation”
- Robbins, “Securities Arbitration”

Grading:

Reminder: this is a paper class, not a final examination class.

Grading shall be based upon the following:

- Final Paper---35 %
- Three (3) Short Intermediate Written Homeworks---20 % each (total 60%)
- “Intangibles,” i.e., class participation-----5 %

Your Final Grade shall be a **Letter Grade**. Grading will conform to Law School policy for electives and a class enrollment of this size.

Email and Office Hours:

My email is as abovenoted. Feel free to communicate with me at any reasonable time. As a Special Professor, I do not maintain an on-campus office. Nevertheless, I am available to you, and, in fact, encourage you to speak with me before or after class or during the break. I place a premium on face to face communication, and therefore you should not hesitate to speak with me.

Attendance & Lateness:

You are expected to arrive on time and prepared for each class.

Moreover, the rules of the New York State Court of Appeals and the American Bar Association require law students to be in good and regular attendance in the courses for which they are registered. To comply with these rules, you must attend at least 85% of the regularly-scheduled classes for this course.

There shall be a sign-in sheet for each regularly-scheduled class. **Your signature (or lack thereof) on these sheets shall presumptively determine your attendance at (or absence from) any given class.** Each student is individually responsible for signing the attendance sheet in. Falsification of sign-in sheets (by, for example, signing another student’s name) is a violation of the Code of Academic Conduct.

If you exceed the permitted absences by not attending class, or by failing to sign in, you will be administratively withdrawn from the course. Any such withdrawal may have serious ramifications for your financial aid, academic standing, and date of graduation. If you are excessively absent from several classes, you may face additional sanctions, including but not limited to denial of certification of good and regular attendance to the New York State Board of Law Examiners, or other state bar examiners.

The Office of Student Affairs has authority to excuse class absences for religious reasons and in cases of truly compelling hardship. If you wish to claim a particular absence as excused, and thus not counted against your maximum number of allowable absences, you must take that issue up with the Office of Student Affairs. I shall mark an absence as excused if and only if I receive a note or email from the Office of Student Affairs to that effect.

Lastly, late arrivals are disruptive to the class. For this and other reasons, please make every effort to arrive on time to class.

Laptop Computers:

You may bring and use laptops in this class.

However, “mute” them (or type quietly, whatever) so as not to disturb your classmates.

Utilize them to take notes and/or refer to class-related information.

And just so we are clear, checking your Facebook page, ESPN, and the like are impermissible uses of your laptop. Refer to the “Intangibles” portion of your grade.

Certification:

The instructor hereby certifies that the study and research time outside the classroom that each student must complete exceeds the minimum requirements, as set by American Bar Association standards.

Respectfully submitted,

Anthony Michael Sabino
Special Professor of Law

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