Navigating the Arbitration Process

*By Mark D. Knoll**

While the annual numbers fluctuate through bull and bear markets, in the last ten years over 63,000 arbitration cases were filed with FINRA Dispute Resolution.[1] In 2009, 7,137 arbitrations were filed, up from 4,982 the year before. While most large firms have significant experience in dealing with customer arbitrations, other firms involved in arbitration proceedings often face an unfamiliar landscape.

Successfully navigating the arbitration process requires thoughtful planning and careful attention to detail. Compliance professionals, working together with counsel, should be active participants in the arbitration process from the start. While experienced defense counsel will provide factual analysis, appropriate legal guidance and tactical know-how, it is the in-house professional who provides counsel with the information and institutional knowledge that are critical to an effective defense. This article offers a primer on the arbitration process to in-house compliance professionals and provides some helpful tips learned from both sides of the attorney-client relationship.

An Introduction to Customer Arbitration

The securities arbitration process is the result of a grand bargain. In exchange for expediency (most arbitrations are resolved in less than 15 months, a far shorter timeframe than typical civil litigation), both parties to an arbitration agree to a streamlined process that limits discovery and judicial review.[2] Rather than juries, as discussed in more detail below, arbitrations are heard by FINRA-trained professionals who are designated as either "public" or "non-public" arbitrators.[3] The rules of evidence are relaxed, and, as a general matter, arbitrations proceed much more informally than the rigid back-and-forth of civil litigation.

The cornerstone of customer arbitration is the agreement to arbitrate. Courts recognize that arbitration is a creature of contract law, and favor it as a means of resolving disputes that avoids the consumption of judicial resources.[4] Rule 12200 of the Code of Arbitration Procedure ("Code") requires that parties must arbitrate a dispute under the code if (i) required by a written agreement, or (ii) requested by the customer.

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The rule also requires that the dispute be between a customer and a member firm or an associated person of a member firm.[5] Importantly, the dispute must arise in connection with the business activities of the member or the associated person (excluding disputes involving insurance business activities of a member that is also an insurance company).

Because customers have a choice whether to arbitrate unless arbitration is required by a written agreement, most customer agreements contain an agreement to arbitrate. Even if there is no written agreement to arbitrate in place at the time the customer relationship is initiated, both parties can later agree to submit disputes to arbitration.[6] In cases where customers initiate proceedings in court despite the existence of an agreement to arbitrate, courts are receptive to motions to compel arbitration in order to return the matter to the agreed-upon forum.[7]

Time Limits

The Code provides that claims must be brought within six years from the "occurrence or event giving rise to the claim."[8] In most cases, the "occurrence or event" giving rise to the claim will be an easily identifiable transaction with a clear execution date, while in others, where there are allegations of ongoing frauds or misrepresentations, determining the exact dates of the "occurrence or event" will be more difficult. Firms should closely examine older claims to determine whether any particular transactions fall outside the six-year window.

FINRA's eligibility rule does not extend applicable statutes of limitations that would apply to claims raised in arbitration. Therefore, if a claim is time-barred under applicable state law, the six year eligibility rule does not otherwise extend the time within which those claims can be brought in a FINRA arbitration.[9]

Even where a claim is dismissed under FINRA's eligibility rule, customers may still pursue those claims in court to the extent they are not barred by the applicable statute of limitations. In addition, motions to dismiss on eligibility grounds are governed by strict procedural requirements.[10] The eligibility rule requires that motions to dismiss under Rule 12206 be made in writing and be filed separately from the answer only after the answer is filed. Motions under the eligibility rule will be decided by a full panel, and the panel may not grant a motion without conducting an in-person or telephonic pre-hearing conference, unless such conference is waived by the parties. Decisions to dismiss for eligibility must be unanimous and must be accompanied by a written explanation. If a panel denies a motion to dismiss for eligibility, a party may not re-file the denied motion unless specifically permitted by the panel.

The Customer Complaint Phase

The vast majority of arbitrations are brought by aggrieved customers. While the number of arbitrations filed in 2009 was 7,137[11] the number of reported customer sales practice complaints in 2009 was nearly quadruple that amount, at 27,466.[12] Based on these numbers alone, it is clear that not every complaint results in the filing of an arbitration. However, regardless of whether complaints result in arbitration filings, it is at the complaint stage where the firm begins its collection of information, develops its understanding of the facts, and positions the matter for resolution.

For example, firms that are NYSE members are required to acknowledge complaints within 15 business days, and "respond to the issues raised in the complaint within a reasonable period of time."[13] Many non-NYSE member firms also have policies and procedures that call for similar responsiveness to customer complaints. The complaint response phase, then, is the firm's first opportunity to gather and evaluate the facts.[14] If the complaint cannot be resolved at this more informal stage, then, should an arbitration be filed, the work done in connection with the initial complaint review will prevent inefficient duplications of effort.

A thoughtful approach to the initial customer complaint must necessarily consider the possibility that the matter will not be resolved and that an arbitration will be filed. Firms should be aware that where investigations and recommendations are made by non-lawyer compliance professionals, the conclusions and recommendations of those professionals may not be privileged and may be subject to disclosure in a subsequent arbitration.[15] Therefore, to the extent practicable, investigations into customer complaints involving significant alleged damages or substantial claims of fraud or misconduct should be directed by counsel, with

any reports and recommendations made either by counsel or at counsel's direction. While the facts uncovered during the course of any investigation are not privileged, firms should take reasonable steps to protect their internal analyses and recommendations from disclosure. For example, a profit and loss analysis related to a complaining customer's account may be a valuable piece of information for a firm's internal analysis of any claim, but if the analysis is conducted by non-lawyers and not done at the direction of counsel, the firm may be required to disclose it in a subsequent arbitration.

Setting aside privilege concerns, the initial customer complaint phase offers firms the best chance to conduct a thorough investigation of the underlying facts while they are fresh in everyone's minds. Memories fade and documents can be lost in the blizzard of materials generated by firms on a daily basis. The focus of this initial fact gathering should be on communications with the complaining customer. Steps should be taken to identify and collect email and hard-copy communications. Interview the representative (or other employees) to gather the facts and identify in-person meetings and phone calls with the customer. Make sure that new account forms, confirmations and account statements for the transactions at issue are available.

Careful consideration should be given to responses made in writing by the firm to initial customer complaints. Available defenses to any claims should be either asserted or preserved while at the same time the written response should fully address the customers' concerns and complaints. The firm, and particularly the compliance officer, should recognize that if the matter is not resolved at the customer complaint phase, their written communications with respect to that complaint will likely be a part of the record at any arbitration hearing.

Once the Arbitration is Filed

Claimants initiate arbitrations by filing a Statement of Claim with FINRA Dispute Resolution. FINRA's Uniform Forms Guide provides comprehensive step-by-step instructions on everything from how to file arbitration claims to the mediation process to how to find a lawyer.[16] FINRA also now permits claims to be filed online, further simplifying the process for customers wishing to pursue claims.[17] Statements of Claim do not have to cite legal authorities, but must "specify the relevant facts and remedies requested."[18]

Firms are typically notified of the filing of an arbitration claim by FINRA Dispute Resolution. FINRA staff will forward the Statement of Claim to the firm along with a form cover letter that describes the basic arbitration process. Dispute Resolution's form letter contains information on (i) the filing of a Statement of Answer, (ii) the requirement that Uniform Submission Agreements be provided, (iii) the hearing location, (iv) the representation of parties and discovery, (v) motions, including motions to dismiss, (vi) filing counterclaims, cross-claims, or third-party claims, (vii) payments and fees, (viii) expungement requests, and (ix) explained decisions. Most importantly, the cover letter enclosing the Statement of Claim will indicate who the assigned Case Manager at Dispute Resolution will be and will provide that person's contact information.

The securities arbitration process is the result of a grand bargain.

After a claim is filed, the respondent must serve the claimant (and any other parties) with a signed and dated Uniform Submission Agreement[19] and an Answer, specifying the relevant facts and available defenses to the Statement of Claim within forty-five (45) days of receipt of the Statement of Claim. Firms may also include any additional documents supporting the Answer to the Statement of Claim. Failing to respond in the time provided may subject the firm to a default proceeding under Rule 12801. Answers may include any counterclaims against the claimant or cross-claims and third party claims against other respondents. Any counterclaims, cross-claims or third-party claims must specify all relevant facts and remedies requested just as is the case with a Statement of Claim filed by a customer. When firms serve third-party claims, copies of all documents previously served by any party must be provided to each new respondent/party.

The Answer is the firm's first opportunity to set forth a counter-narrative to the Statement of Claim. As such, it is important that Answers be thorough and that they detail all applicable defenses to the claims. Attaching relevant documents that support critical defenses or would otherwise enhance the

panel's understanding of the issues is encouraged. The respondent should always preserve the right to amend the Answer to the Statement of Claim in the event that facts developed through the discovery process lead to the availability of additional relevant defenses.

As noted above, a thorough pre-claim investigation into the initial customer complaint will go a long way toward setting up the firm for the submission of a thorough and detailed Answer to the Statement of Claim. When firms receive a copy of the Statement of Claim, it should be circulated immediately to relevant firm personnel, including registered representatives who are the subject of the complaint, their supervisors, and any Compliance or Legal personnel whose input into the Answer should be solicited. Respondents should be aware of the requirements of Rule 12308, which could potentially bar them from presenting certain defenses or facts at the hearing if they fail to include those defenses or relevant facts in their answer that were known to them at the time the Answer was filed.[20] There is little guidance regarding how or when panels should make decisions to bar a defense or the presentation of facts. Firms are cautioned, however, that bad faith attempts to hide facts for later presentation at the hearing will be more likely to result in those facts or claims being barred.

Successfully navigating the arbitration process requires forethought and attention to detail, from the initial customer complaint phase through the final award.

Before an arbitration panel is appointed, the parties are liberally permitted to amend any pleadings. However, once a panel is appointed, parties may amend their pleadings only after the panel grants a motion to amend.

The Arbitrator Selection Process

After the claim is filed and served, the parties typically will receive three lists from the case administrator. They will receive a public, non-public and chairperson list which includes eight (8) names in each category. FINRA requires that arbitrators have at least five years of business or professional experience and at least two years of college level credits.[21] "Non-Public" arbitrators, generally speaking, include those who are, or within the past five years have been either (i) associated with a broker dealer, (ii) registered or associated with a firm that is a member of a commodities exchange or futures association.[22] "Non-public" arbitrators also include attorneys, accountants or other professionals who have devoted 20% or more of their time to clients in the securities industry as well as employees of banks or other financial institutions who either effect transactions in securities or supervise those who do.[23] "Public" arbitrators are those are otherwise qualified to be arbitrators who do not fall under the definitions of "non-public." "Public" arbitrators also cannot be the spouse or immediate family member of a person engaged in the securities business.

After receiving the proposed panelists, the parties are permitted to strike up to four (4) arbitrators from each list.[24] In single arbitrator cases, the parties will receive a list of eight (8) arbitrators from the chairperson roster.[25] Chairpersons are selected from a public chairperson roster. Therefore, all three-person arbitration panels will consist of one non-public arbitrator and two public arbitrators, one of whom will be selected from the public chairperson roster unless the parties agree in writing otherwise.[26] The lists will be generated by Dispute Resolution's Neutral Lists Selections System and will be sent to the parties within approximately thirty (30) days after the last Answer is due. By rule, the parties will also receive the employment history for each of these potential arbitrators and other background information for each arbitrator listed, including a list of recently decided arbitration cases.

It is recommended that firms carefully examine the backgrounds of potential arbitrators and conduct research into the final decisions of each arbitrator in order to gain some insights into how particular arbitrators may handle particular cases. The key item to be on the lookout for is whether particular arbitrators appear to have balanced arbitration award records or whether their award history appears to be unduly weighted towards claimants or respondents. In many cases it is helpful to contact outside counsel to see if they have any experience with any potential arbitrators to gain any insights

into the arbitrator's experience and temperament.

Once firms make their selections from the public, non-public and chairperson lists, those selections are provided to FINRA Dispute Resolution. Copies of the selections are typically not exchanged with opposing counsel.

While rare, arbitrators may be disqualified under 12410 at the request of a party if it is "reasonable" to infer a conflict of interest or bias. Arbitrators are required by their oath and by rule to disclose any potential conflicts of interest or biases that may influence their ability to fairly decide the matter before them.

The Pre-Hearing Conference

After a panel is appointed, the Director will schedule an initial pre-hearing conference (IPHC). Prior to that pre-hearing conference, firms should coordinate the scheduling of potential hearing dates with outside counsel. It is usually best to determine ahead of time three or four possible sets of hearing dates and then communicate those possible hearing dates to opposing counsel or the claimant (if unrepresented) in order to arrive at a mutually agreeable set of hearing dates prior to the initial pre-hearing conference. It is also advisable to speak with claimant or claimant's counsel about discovery schedules ahead of time.

Pre-hearing conferences are typically held by telephone and, in most cases, arbitrators will follow the initial pre-hearing conference script provided to them in the Arbitrator's Reference Guide.[27] As part of this conference, the arbitrators will introduce themselves and make any disclosures that they are required to make under FINRA rules that had not already been made. After reviewing any additional disclosures, the parties will be asked to confirm the composition of the panel. Once the panel is confirmed, then the arbitrators will confirm that they have submitted their oaths to FINRA Dispute Resolution. Following the confirmation that oaths have been submitted, the Chairperson will typically identify the pleadings that have been received but will not generally go into the substance of those pleadings. It is important to note that the initial pre-hearing conference is typically not the time to conduct any detailed review of the facts or claims or defenses of the arbitration. The initial pre-hearing conference is primarily a scheduling conference and is not designed or intended to be a forum to resolve any pre-hearing or discovery disputes.

During this conference the Chair will remind the parties about FINRA's "successful, voluntary mediation program." Whether to mediate is a decision to be made after a clear-eyed assessment of the facts of a particular matter. Thereafter, the Chair will work with the parties to select arbitration hearing dates and set any dates for either discovery cut-offs or conferences as appropriate. The Chair will also inquire as to whether the parties intend to make any motions and, if so, the Chair will set schedules for filing and responding to those motions along with motion hearing dates. The Chair will also ask the parties whether there are any "unique legal issues" that would warrant the filing of briefs in this case. As a general matter, parties will reserve the right to file briefs on unique legal issues but do not necessarily commit themselves at the IPHC stage to such briefs. Finally, the parties will be asked whether they would like to communicate directly with the arbitration panel or through FINRA Dispute Resolution. Whether the parties would like to engage in direct communications with the Panel or go through FINRA is typically a matter of personal preference and experience. The firm should consult with their outside counsel or experienced in-house personnel regarding the best way to proceed. Following the initial pre-hearing conference, the Chair will submit a scheduling order to FINRA Dispute Resolution for dissemination to the parties.

After the IPHC – The Discovery Process

Courts have recognized that the efficiency of arbitration is a "characteristic at odds with full-scale litigation in the courts, and especially at odds with the broad-ranging discovery made possible by the Federal Rules of Civil Procedure."[28] As noted above, a streamlined discovery process is an essential element to an effective and efficient arbitration. FINRA's arbitration rules recognize this and contain several rules and guides to assist the parties through the discovery phase of an arbitration.

The Code "encourages" the voluntary exchange of documents.[29] Unless the parties agree to modify or extend the schedule, the parties must either (i) produce documents from the Discovery Guide and applicable Document Production Lists (also called the "99-90" disclosures; the term comes

from the former Notice to Members 99-90, published in November 1999), (ii) identify and explain why certain documents on the lists cannot be produced, or (iii) object to the production of certain documents within 60 days after the Answer is due.[30] FINRA expects this document exchange to happen automatically, without intervention by the Staff or the Panel. The Code requires that parties approach their document production obligations in "good faith" and if a document cannot be produced within the time required, "a party must establish a reasonable timeframe to produce the document."

The Document Production Lists are arranged topically. Lists 1 and 2 identify documents from both the firm and the customer that are "presumptively discoverable" and should be produced in "all customer cases." These lists call for the production of documents that include customer agreements and new account forms, account statements, confirmations, holding or posting pages, correspondence between the firm and the customer, notes, and recordings of telephone calls between the firm and the customer. While these categories are "presumptively discoverable," firms should note that the production is, in most cases, specifically limited to the "transaction at issue."[31]

Each party's discovery obligations are guided by the requirement that each should use "good faith" in complying with the discovery rules. FINRA rules define "good faith" as using "best efforts" to produce documents within the required time, and if documents cannot be produced within the required time, then the party must establish a reasonable timeframe to produce the document."[32] Under the Discovery Guide, parties are required to produce documents within their "possession or control."[33] And while this concept intends to cover those situations where a firm may not be in physical "possession" of certain documents, they may still be within the firm's "control" by virtue of their relationship with the party holding the records (for example, a clearing firm). The "control" concept can also be useful in obtaining certain documents (records from other firms, tax records) that claimants may not have physical possession of, but may be able to obtain.

However, the direction to use "good faith" efforts does not mean that, in certain cases, it may be appropriate to object to the production of documents, even if they are part of the Discovery Guide's "presumptively discoverable" categories of documents.[34] For example, in some cases where the transaction at issue is limited, certain objections to the scope of documents called for in the Document Production Lists will be well-taken if they are raised in the interest of promoting an efficient arbitration.

Discovery tends to get more contentious when the parties exchange any supplemental discovery requests, which is permitted under the Rule. These include additional document requests as well as "information requests"[35] which call for specific information that may not be otherwise available from the documents (e.g., identities of supervisors or other personnel – to the extent relevant). In some cases, the ability to serve supplemental requests is abused by parties who forget that arbitrations are, by their nature, supposed to be "efficient" processes to resolve disputes. As noted above, certain kinds of claims, like class actions and derivative suits, are not subject to arbitration. Discovery that would be more suited to those types of claims is also not welcome in arbitration. However, where certain identifiable categories of documents may be relevant to the issues at hand, those documents should be collected and produced. The production of these sorts of materials is not without limits, though, and arbitrators are directed to consider the relevance of requested documents and the "costs and burdens" on the parties from whom production is sought.[36] As with any objections to discovery, objections to supplemental discovery requests should be specific and parties should avoid boilerplate objections. In particular, parties must "specifically identify which document or requested information it is objecting to and why."[37]

If objections cannot be resolved, motions to compel production can be (and often are) brought to the arbitrator. Motions require a statement of attempts to resolve the discovery dispute.[38]

The failure to comply with the discovery provisions of the Code can subject a party to sanctions.[39] Sanctions can be imposed not only for failing to produce required documents, but also for "frivolously objecting to the production of requested documents or information."[40] Possible sanctions can include monetary penalties, precluding a party from presenting evidence, making an adverse infer-

ence against a party, assessing postponement and/or forum fees, assessing attorneys' fees, costs and expenses or dismissing a claim outright.

Discovery – Best Practices

Organization and thoroughness are the watchwords to successfully navigating the discovery process. To the extent that core documents were gathered during the customer complaint phase (if applicable) then the discovery process should be a thorough, gap-filling exercise that should begin as soon as possible after the Statement of Claim is received. Firm compliance and legal professionals should use the Document Production Lists as a checklist for the categories of documents that should be gathered in the first instance. Compliance and legal should always be asking "where else" when it comes to identifying and locating key documents. For example, a financial advisor may keep a hard copy file at his desk, but consistent follow ups of "where else" could lead to a key file in storage or behind the sales assistant's workstation.

Be clear about the need to gather notes or other evidence of communications with the customer. Make certain that, at a minimum, emails are searched for communications between the customer and anyone at the firm who (within reason) the customer may have communicated with. In connection with email and phone records searches, firms should serve prompt supplemental information requests seeking all email addresses and phone numbers used by the customer to communicate with the firm.

To the extent that you will need documents from third-parties, subpoenas should be prepared and sent to the panel for issuance. Only arbitrators can issue subpoenas. FINRA rules also provide that arbitrators have the power to compel production of documents without a subpoena from FINRA-member firms.[41]

After the documents have been gathered, any questions about whether the documents will be produced, or whether certain information (such as names or identifying information of other customers) needs to be redacted, should be discussed with counsel. Document productions should be organized in the manner the documents are kept by the firm and should be "Bates"[42] numbered and indexed for future reference.

The Hearing

Twenty (20) days prior to the start of the hearing, by rule, the parties are to exchange their "20-day" disclosures. These disclosures typically include an identification of the documents to be used during the hearing, as well as the identification of any witnesses that the parties intend to call at the hearing. "Parties may not present any documents or other materials not produced or any witnesses not identified" in the 20-day exchange "unless the Panel determines that good cause exists for the failure" to do so.[43] According to the Code "good cause includes the need to use documents or call witnesses for rebuttal or impeachment purposes based on developments during the hearing."[44]

The hearing location, which will likely already have been identified in the letter providing the date for the initial pre-hearing conference, will be confirmed at the 20-day period.[45] Hearings can be postponed by agreement of the parties, however, two or more joint postponements can result in a dismissal and loss of a panel.[46] Therefore, as a practical matter, respondents should consider simply "not opposing" rather than "joining" any postponement requests made by claimants. In some circumstances, a hearing "may" be postponed if, for example, the Director determines that it should be postponed due to "extraordinary circumstances," or if the Panel decides to postpone on its own discretion, or upon motion of a party. Parties requesting a postponement on their own motion must show "good cause" for the requested postponement.[47]

During the course of the hearing, the Panel has the discretion to determine what evidence to admit and what it will exclude. "The Panel is not required to follow state or federal rules of evidence."[48] The Panel will also determine the order of the presentation of the evidence and argument.[49] Once the Panel "closes the record" no further submissions will be accepted from any party, unless the Panel either requests or agrees to accept additional submissions. If so, the Panel will inform the parties when the submissions are due and when the record will close.[50] While the Panel has the power to "re-open the record" on its own initiative or upon motion of any party, such power is used sparingly.[51]

Before the arbitrators issue an award in a pending case following the hearing, or at any other time, the parties can settle their matter and jointly agree to dismiss the arbitration proceeding.[52] If the parties settle, they must notify FINRA. While the parties are not required to disclose the terms of any settlement agreement to FINRA, they must nonetheless inform FINRA in writing and they remain responsible for any fees incurred under the Code.[53]

If the parties do not settle their dispute, the Panel will issue a written award which does not, unless the parties request, need to contain any discussion of the facts or rationale for the award. If the parties jointly request an "explained decision," the Panel will provide a "fact based award stating the general reasons for the arbitrators' decision."[54] The arbitrators do not need to include any legal authority or damage calculations in an explained decision. If the parties want an explained decision, they must request one no later than the time for the pre-hearing exchange of documents and witness lists under Rule 12514(d). Generally speaking, explained decisions remain the exception rather than the rule. As a general matter, panels will "endeavor to render an award within 30 business days" from the date the record is closed.[55] All awards are publicly available on FINRA's website.

Written awards will contain not only a decision on the merits but also will assess any fees or other costs imposed by the arbitrators under the Code to each of the parties. By rule, all monetary awards must be paid within 30 days of receipt, unless a motion to vacate the award has been filed with a court of competent jurisdiction. Awards bear interest from the date of the award if not paid within 30 days of receipt, if the award is the subject of a motion to vacate which is denied, or as specified by the Panel.

Conclusion

Successfully navigating the arbitration process requires forethought and attention to detail, from the initial customer complaint phase through the final award. Handled appropriately, the process can be an effective and efficient means of dispute resolution.

ENDNOTES

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1 FINRA Dispute Resolution Statistics, March 2010. <http://www.finra.org/ArbitrationMediation/About FINRADR /Statistics/index.htm> (last visited April 12, 2010).

2 Arbitration awards are reviewable only under the limited grounds provided for in the Federal Arbitration Act, 9 U.S.C. § 10. The FAA lists four specific grounds for vacating an award: (1) if the award was procured by fraud; (2) if there was "evident partiality or corruption of the arbitrators"; (3) the arbitrators refused to consider material evidence, refused without cause to postpone a hearing or committed other acts which prejudiced the litigants; or (4) the arbitrators "exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." *Id.* Whether another previously-recognized ground for vacatur – that the arbitrators showed "manifest disregard of the law" – remains a viable means of challenging an arbitration award is questionable in light of the Supreme Court's ruling in *Hall Street Assocs., LLC v. Mattel, Inc.*, 128 S.Ct. 1396 (2008).

3 As of year-end 2009, the number of FINRA arbitrators totaled 6,197. Of those, 2,715 were "non-public", or industry arbitrators, and 3,482 were "public" arbitrators. *See* n. 2, *supra*. All FINRA arbitrators must have five years "business or professional" experience. The criteria for a "non-public" arbitrator is defined in the Code of Arbitration Procedure at Rule 12100(p), and includes those who have been (i) registered with a broker or dealer; (ii) registered or associated with a person or firm registered under the Commodity Exchange Act; (iii) a member of a commodities exchange or registered futures association; (iv) attorneys, accountants or other professionals who has devoted 20% of his or her professional work to clients engaged in the securities industry; or (v) certain bank or financial industry back-office and compliance personnel. In contrast, "public" arbitrators are those who are not engaged in the securities industry, but who otherwise qualify to serve as an arbitrator (i.e. five years of professional or business experience). Rule 12100(u).

4 *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24—25 (1983).

5 However, not all disputes between customers and firms are arbitrable, most notably class action claims and shareholder derivative claims. *See* Rules 12204 and 12205.

6 *See* Rule 12201.

7 *See*, *e.g.*, *Federal Arbitration Act*, 9 U.S.C. § 1 et seq.; *Moses H. Cone Mem'l Hosp.*, *supra,* n. 5; *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 107 S. Ct. 2332 (1987).

8 Rule 12206(a).

9 *See* Rule 12206(c)

10 *See* Rul3 12206(b).

11 FINRA Dispute Resolution Statistics, March 2010, *see supra* note 2.

12 FINRA Central Review Group, Investor Complaint Trends (through Q42009) (FINRA 2010) (copy on file with author).

13 NYSE Rule 401A(a). FINRA has not yet announced whether an analog of this rule will be proposed for addition into the Consolidated FINRA Rulebook.

14 In addition, it is at this phase that the firm must make initial reportability determinations under Rules 351(d) and 3070. Whether a particular customer complaint must be

reported is a subject beyond the scope of this article, but, as a general matter, written customer complaints that allege that a registered person was involved in a sales practice violation and that contain a claim for compensatory damages in the amount of $5,000 or more or that allege that the registered person was involved in forgery, theft or misappropriation or conversion of funds or securities. *See* Rev. Form U4, Question 14I(3) (05/2009). Different reporting considerations apply to filed arbitrations (discussed *infra* at p. ___) and to matters settled for $15,000 or more.

[15] The attorney-client privilege is applicable to protected communications of both in-house lawyers and outside lawyers. Nevertheless, the use of outside counsel may reduce the risk of a finding that privilege is inapplicable. The issue of whether a communication with a lawyer is generated for the purpose of giving or receiving legal advice "usually arises in the context of communications to and from corporate in-house lawyers who also serve as business executives. . . . So the question usually is whether the communication was generated for the purpose of obtaining or providing legal advice." Pritchard v. County of Erie, 473 F.2d 413, 419 (2d Cir. 2007); In re Grand Jury Subpoena Duces Tecum, 731 F.2d 1032, 1036-37 (2d Cir. 1984) (citations omitted).

[16] See http://www.finra.org/web/groups/arbitrationmediation/@arbmed/@tools/documents/arbmed/p007954.pdf.

[17] *See* http://www.finra.org/ArbitrationMediation/Parties/ArbitrationProcess/ArbitrationOnlineClaimFiling/.

[18] *See* Rule 12302(a)(1).

[19] According to FINRA: "The Submission Agreement is the document that shows you have presently selected arbitration as your means of solving a dispute. The arbitration process cannot begin without it. The Submission Agreement is also your agreement to be bound by the decision of the arbitrators." See FINRA " A Tour of the Arbitration Process" http://www.finra.org/ArbitrationMediation/Parties/Overview/Overview
OfDisputeResolutionProcess/

[20] *See* Rule 12308. "If a party answers a claim that alleges specific facts and contentions with a general denial, or fails to include defenses or relevant facts in its Answer that were known to it at the time the Answer was filed, the panel may bar that party from presenting the omitted defenses or facts at the hearing."

[21] *See* http://www.finra.org/ArbitrationMediation/Neutrals/BecomeAnArbitrator/FAQ/

[22] *See* Rule 12100 (p).

[23] *Id.*

[24] *See* Rule 12404.

[25] *See* Rule 12403(a)(1).

[26] *See* Rule 12402(b).

[27] *See* http://www.finra.org/ArbitrationMediation/Neutrals/ArbitrationProcess/ ArbitrationCaseGuidanceResources/ArbitratorsReferenceGuides/index.htm

[28] *NBC Inc. v. Bear Stearns & Co.*, 165 F.3d 184, 190 (2d Cir. 1999).

[29] *See* Rule 12505.

[30] *See* Rule 12506(a)-(b). Note that the 60-day window is based on the date that the Answer was originally due. Extensions to the document production schedule must be separately agreed to.

[31] *See*, e.g., Document Production List 1, Nos. 2, 5, 10.

[32] *See* Rule 12506(b)(2).

[33] *See* Rule 12506(b).

[34] The Discovery Guide notes that documents on Lists 1 and 2 are "presumptively discoverable" and should be exchanged "absent a written objection."

[35] But note that "information requests" should not amount to a set of interrogatories such as would be used in general civil litigation. *See* Rule 12507(a)(1) ("Standard interrogatories are generally not permitted in arbitration."). Depositions, common in civil litigation, are generally also not permitted in arbitration, except in extraordinary circumstances. See Rule 12510.

[36] *See* Rule 12508(c) ("In making any rulings on objections, arbitrators may consider the relevance of documents or discovery requests and the relevant costs and burdens to produce this information."

[37] *See* Rule 12508(a).

[38] *See* Rule 12509.

[39] *See* Rule 12511.

[40] *Id.*

[41] *See* Rule 12513.

[42] For our more digitally-inclined colleagues, to solve one longstanding legal mystery, the term "Bates" numbering comes from the hand-held numbering machine that was used in the pre-digital age (and continues in use to this day). For those interested, see http:www.en.wikipedia.org/wiki/bates_numbering.

[43] *See* Rule 12514(c).

[44] *Id.*

[45] *See* Rule 12600.

[46] *See* Rule 12601(c).

[47] *See* Rule 12601(a)(2).

[48] *See* Rule 12604(a).

[49] *See* Rule 12607.

[50] *See* Rule 12608(c).

[51] *See* Rule 12609.

[52] *See* Rule 12700.

[53] *See* Rule 12701.

[54] *See* Rule 12904(g)(1).

[55] *See* Rule 12904(d).

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