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Fair Play, Consent and Securities Arbitration: A Comment on Speidel

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FAIR PLAY, CONSENT AND SECURITIES ARBITRATION: A COMMENT ON SPEIDEL*

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INTRODUCTION

Professor Richard Speidel has given us an illuminating survey of the situation now facing securities customers when they have disputes with their brokers over the handling of their accounts. As Professor Speidel sums it up, customers have the power in theory to draft virtually any sort of arbitration clause they like and expect judicial enforcement under the Federal Arbitration Act, provided their brokerage firm agrees to the clause. They have wide "freedom to contract."[1]

As a practical matter, however, customers either do not have or elect not to exercise their market power to shape securities industry arbitration agreements or procedures. Having signed an arbitration clause, customers find they have no "freedom from contract" and must abide enforcement of the agreement. As the Supreme Court so aptly put it in *Shearson/American Express, Inc. v. McMahon*,[2] once they sign, customers must be "held to their bargain."[3]

But is securities arbitration a bargain? Despite the pervasiveness of arbitration in the securities industry and its dominance now for nearly a decade as the primary method by which customers and brokers resolve their differences, Professor Speidel argues persuasively that securities arbitration is not as fair as it should be.[4] What, if anything, are we to do about this? Professor Speidel has organized his essay around

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[1] Richard E. Speidel, *Contract Theory and Securities Arbitration: Whither Consent?*, 62 BROOK. L. REV. 1335, 1337 (1996).

[2] 482 U.S. 220, *reh'g denied*, 483 U.S. 1056 (1987).

[3] *Id.* at 233.

[4] Speidel, *supra* note 1, at 1354-56.

the idea of "consent." But as he acknowledges in his conclusion, the issue of arbitration clause enforcement in the securities industry has little to do with ordinary notions of "informed consent, bargaining and realistic market opportunities."[5] At best, securities arbitration rests on a form of tacit, implied or what the law of contract calls "objective" consent.[6] Professor Speidel concludes, and I agree, that this weaker form of consent is an inadequate foundation on which to ground the legitimacy of securities arbitration.

What matters is not consent but basic fairness—both procedural and substantive—of the securities arbitration system. I am therefore sympathetic with Professor Speidel's suggestion that a "new 'public' system" that is "cost effective, procedurally consistent, fair and capable, as a matter of course, of producing outcomes that are accurate and correct"[7] might be in order.

I am somewhat less enthusiastic about the prospect that this new system might require arbitrators to write full-blown opinions and that there be judicial review on selected issues of law.[8] These reforms would, I fear, eliminate the efficiencies arbitration gains us—driving the industry back into the quagmire of the courts.

Overall, however, I agree with both Professor Speidel's analysis and his conclusions. Like Professor Speidel, I believe that the only realistic way for the securities arbitration system to reform itself is via governmental regulatory action in cooperation with self-regulatory organizations ("SROs"), such as the New York Stock Exchange, Inc. and the National Association of Securities Dealers, Inc.

This brief Comment is organized as follows. In Part I, I examine the issue of consent and analyze why, in most instances, securities customers pay so little attention to the securities arbitration agreements they sign. This Part also looks at modern judicial attitudes toward adhesion contracts. Next, in Part II, I review the trends in securities arbitration reform over the past ten years, searching for the political and organizational dynamics driving and blocking reform efforts. Finally,

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[5] Speidel, *supra* note 1, at 1362.

[6] G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CAL. L. REV. 431, 440 (1993).

[7] Speidel, *supra* note 1, at 1360.

[8] Speidel, *supra* note 1, at 1362.

I conclude with some thoughts on what might have to happen in order to trigger the kind of reform that Professor Speidel and I both think is necessary to make the securities arbitration process truly fair.

I. CONSENT AND THE SECURITIES ARBITRATION CLAUSE

Why is consent an issue in the discussion of securities arbitration? The legal reason, of course, is that arbitration is part of a contract, and the existence of a legal contract implies some form of consent by both parties to the terms of the agreement. The problem of consent in securities arbitration goes a bit deeper than that, however. At bottom, consent addresses itself to arbitration's credibility, i.e., its social legitimacy. The industry wants the public and public regulators to accept arbitration as a legitimate and fair substitute for court litigation—as a way to play the "game" of adjudication in this field.[9] Given that we are dealing with a market mechanism and that securities customers are relatively sophisticated adults, both the industry and the courts can reassure themselves that substituting arbitration for regular court procedures is morally justified if they find that the customers have somehow consented to the switch.

This a tough sale because, as Professor Speidel points out, securities customers usually do not give explicit, informed consent to arbitration. They just sign the form contract handed to them by brokers without reading it. It would be relatively easy to introduce voluntary, explicit consent into securities arbitration. The customer-broker contract could read as follows:

> The Securities and Exchange Commission has found that arbitration is sometimes quicker, cheaper and easier to use than litigation in a court. It is voluntary, however, and you need not agree to arbitration to open this account. You should also understand that if you do not agree to arbitration now, you can choose arbitration later, if and when you have a dispute related to this contract. If you wish

[9] *See* Arthur Isak Applbaum, *Rules of the Game, Permissible Harms, and the Principle of Fair Play*, *in* WISE CHOICES: DECISIONS, GAMES, AND NEGOTIATIONS 301, 304-08 (Richard J. Zeckhauser et al. eds., 1996) (discussing how permission to play games in which someone's rights are compromised can be morally buttressed by obtaining consent of the participants).

to agree to arbitration now as part of this contract, place your signature on the line following this paragraph. Otherwise, leave the line blank.

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This clause or one like it would result in fewer people being bound to arbitration clauses when they open accounts. Nonetheless, my guess is that a significant number of people would end up using arbitration anyway if it gained a credible reputation for fairness. Just the fact that the industry would offer this clause would enhance the system's credibility. As the reputation of the arbitration system increased, people would be likely to turn to it with greater and greater confidence.

But this is not going to happen. The industry does not trust the plaintiffs' bar to forego strike suits and will not place its fate in the hands of the American jury system. The cost to the defendant of a civil trial on a securities fraud or churning claim against a broker, with its pre-trial discovery expenses, tempts plaintiffs' attorneys to file claims of dubious merit in hopes of gaining settlements based on the "nuisance value" of litigation expenses. Meanwhile, the civil jury system subjects securities firms to small but palpable risks that juries will return exorbitant punitive damage awards when sympathetic plaintiffs tell their stories of greedy brokers, bad investment advice and lost life savings. Both of these risks are reduced in arbitration, which limits litigation expense and eliminates the jury.

Why don't customers object to or haggle over the arbitration clauses brokers present to them? It is not that customers lack economic clout or the intelligence to read these clauses. Rather, in terms of negotiation theory, customers sign arbitration clauses because firms leverage two important sources of bargaining power: the authoritative legality of the printed form, and what psychologists call "social proof."

How do these sources of negotiation power work? The power of authority stems from the printed form contract and its appearance as authoritatively "legal."[10] It is apparent to

[10] HERB COHEN, YOU CAN NEGOTIATE ANYTHING 26-30 (Lyle Stuart, Inc. 1980) (discussing the "power of legitimacy" as the power "derived from perceived or imagined authority—often authority that's represented by something inanimate, such as a sign, a form, or a printed document—normally authority that isn't ques-

anyone looking at the printed form that someone in the legal department has given it a lot of thought—much more thought than any single customer wants to give it. Because customers have many things to worry about other than the "boilerplate" of the standard customer-broker agreement, they tend to pass over it as they do boilerplate on everything from parking lot receipts to computer equipment warranties.

Even if customers do read the boilerplate, they are unlikely to focus on the seemingly remote contingency that they will someday want to sue their broker. In the face of these densely typed provisions, none of which have immediate economic consequences to the customer on monetary issues like commission rates, customers simply "defer" to the contract's printed authority.[11] The securities industry stipulates arbitration as the standard solution to the dispute resolution issue, and, in my experience, the legal departments at member firms present a united front in discouraging negotiation on the matter with a customer.

I have a personal experience that illustrates the obstacles many customers face in trying to dicker with their securities firm over the arbitration agreement. In early 1996, I opened several new customer accounts with the securities firm of Smith Barney. In reviewing the customer agreements, I noticed that the firm was using a choice-of-law clause that attempted, very indirectly and obscurely, to eliminate the possibility of punitive damages in arbitration.[12] I knew this because I was doing research for a law review article at the time and knew from that research that the choice-of-law clause in question had been ruled to be in violation of SRO rules by the

tioned").

[11] ROBERT B. CIALDINI, INFLUENCE: THE PSYCHOLOGY OF PERSUASION 218 (William B. Morrow & Co. 1993) (Cialdini writes that once a request is made in a legitimately authoritative manner, people "rarely agonize . . . over the pros and cons of authority's demands. In fact, our obedience frequently takes place in a *click, whirr* fashion, with little or no conscious deliberation. Information from a recognized authority can provide us a valuable shortcut for deciding how to act in a situation.").

[12] The clause read as follows: "This Agreement, all the terms herein, and its enforcement shall be governed and construed in accordance with the laws of the State of New York . . . regarding damages recoverable in arbitration without giving effect to principles of conflict of laws." Smith Barney Shearson Client Agreement at 3, ¶ 7 (July 1995) (on file with author).

New York Stock Exchange. I decided not to sign the agreement until this language was removed and began to seek a way to negotiate this.

First, I tried to discuss the matter with Smith Barney's legal department, but no one I could get on the phone knew what I was talking about, and, in any event, none were willing to discuss changing the standard language in the agreement. Next I tried calling someone at the Securities and Exchange Commission ("SEC"). This person understood what I was talking about but could do nothing to help me other than to suggest I call the New York Stock Exchange. I called the New York Stock Exchange's legal department and once again had trouble locating someone who understood the significance of choice-of-law clauses on possible punitive damage awards. It was, after all, an obscure matter that only a law professor or a securities firm lawyer being paid to draft the best possible contract for the firm would be likely to know about.

After several telephone referrals within the Exchange, I finally spoke with the New York Stock Exchange "coordinator" for Smith Barney. This person not only knew about the punitive damages controversy, but was also surprised and upset to hear about the offending clause. When she placed a call to Smith Barney, the response was swift and came from the very top—Smith Barney's General Counsel. He agreed to send me express written confirmation that Smith Barney had waived its choice-of-law clause for my accounts, and he subsequently did so.[13]

This might sound like a success story, but it is worth remembering that I succeeded only in getting the firm to drop a clause from my own personal accounts that had been banned by the New York Stock Exchange. It is easy to imagine the trouble an ordinary customer faces when he or she tries to negotiate an arbitration provision that is legal under SRO rules.

The industry also has going for it the power of "social proof"—a phenomena that psychologist Robert Cialdini de-

[13] Letter from Alan G. Brewer to Professor G. Richard Shell dated Feb. 6, 1996 (stating that "Smith Barney will not seek to interpose New York law as a defense to a claim for punitive damages" on specified customer accounts) (on file with author).

scribes as our tendency to "use the actions of others to decide on proper behavior for ourselves, especially when we view those others as similar to ourselves."[14] To the extent customers think about the arbitration clause at all, my guess is that they say to themselves: "There are a lot of people like me investing in the stock market and they all signed this contract, too. Some of them must have given this some thought even if I am too busy to do so. It must be OK."

So the best kind of consent the industry can point to as support for the legitimacy of the system is tacit or objective consent. Tacit consent is what we used to give when we took an international airline flight and "consented" to the standard $75,000 limit on claims of personal injury or wrongful death that might arise from an airplane accident. This limitation, formerly dictated by the Warsaw Convention as modified by the Montreal Agreement, was incorporated into virtually every international airline ticket until the limit was lifted by major carriers in early 1997.[15] We "consented" to this limitation not because we bargained over it, traded it off, or agreed with it. Rather, we accepted it because we chose to fly to another country rather than take a boat, drive or stay home. The limitation came with the airplane ride. With respect to the securities industry, we "consent" to arbitration because we want to buy securities rather than put our money in a bank or mutual fund; the arbitration system comes with the privilege to buy and sell securities whether we like it or not.

Does tacit consent take care of the legitimacy question? There is an honored philosophical tradition that treats consent and its relationship to the moral question of whether we should abide by law. The philosopher John Locke used an argument based on tacit consent to assert that everyone who possesses or enjoys the use of land in the territory of a government has an obligation to obey that government's laws.[16]

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[14] CIALDINI, *supra* note 11, at 142.

[15] Shell, *supra* note 6, at 471 (discussing the $75,000 liability limitation and the Supreme Court's approach to it); *U.S. Carriers to Lift Limit on Liability on Overseas Flights*, WALL ST. J., Feb. 10, 1997 (announcing that twelve major U.S. carriers have agreed to lift the $75,000 liability limit).

[16] JOHN LOCKE, TWO TREATISES ON GOVERNMENT (1690), Second Treatise, § 119 (Peter Laslett ed., 1963).

Locke was careful to limit the scope of the obligation he found to the special possession or use being made of the land in question. He required the much more rigorous concept of "explicit consent" to create a permanent and general obligation to a government.[17] H.L.A. Hart and John Rawls went further to establish a general obligation to obey the law based on our obligation to do our "fair share" in schemes of social cooperation from which we willingly benefit—even if we do not explicitly consent.[18] Extending these philosophical arguments, perhaps it is sufficient to say that the "use" and "benefit" of the securities markets enjoyed by customers is sufficient justification for an obligation by customers to obey industry rules related to securities arbitration.

The problem with this argument is that it concedes too much autonomy to private ordering by the securities industry without public, governmental oversight. Would we view as legitimate comprehensive systems of dispute resolution established by parking garages, ski slope operators and airlines on the basis of the receipts and tickets these entities issue? Who would guarantee the fairness of these systems? Locke, Hart and Rawls are talking about an obligation to obey the *government's* law, not some rule of a private association, industry group or gated residential community enforced by an equally private system of adjudication.

There was a time when the courts in general, and the Supreme Court in particular, served an oversight role regarding contracts that were based, at best, on tacit consent. As I have explored in detail elsewhere, however, those days are gone.[19] The modern Supreme Court approves strict and literal enforcement of adhesion contracts in virtually every case in which the issue arises.[20]

My favorite Supreme Court adhesion contract case is *Carnival Cruise Lines, Inc. v. Shute*.[21] *Shute* involved a Washington state couple on a seven-day Carnival cruise off the coast of California and Mexico. They received their tickets a few days before leaving. The tickets contained several fine print terms

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[17] *Id.*

[18] Applbaum, *supra* note 9, at 303.

[19] Shell, *supra* note 6, at 487-95.

[20] Shell, *supra* note 6, at 487-95

[21] 499 U.S. 585 (1991).

on the back, including a stipulation that all litigation must take place before a court located in Florida, and a provision stating that "[t]he Carrier shall not be liable to make any refund to passengers in respect of . . . tickets wholly or partly not used by a passenger."[22] In essence, these two clauses meant that the Shutes either accepted the forum limitation clause or forfeited their fares.

Mrs. Shute was injured on the ship, and when the couple returned home, they sued Carnival for negligence in federal district court in their home state of Washington. The appeals court ruled for the Shutes on the grounds that consumer contracts such as this were not enforceable because they were so manifestly unfair. The Supreme Court reversed.[23]

In *Shute*, there was no evidence of consent to or even *notice* of the forum stipulation. The Court attempted to finesse the notice issue by claiming it had been conceded by the plaintiffs. The best the Court could muster as evidence of this concession, however, was to say that the plaintiffs "essentially . . . conceded that they had notice" of the provision, citing to a portion of the plaintiffs' brief in which their lawyer stated that the clause was communicated "as much as three pages of fine print can be communicated."[24]

The Court therefore supported its decision to enforce the clause entirely with arguments related to its own assumptions regarding economic efficiency. The Court first noted that all cruise lines would save money in the future by being able to consolidate potential suits by far-flung passengers in one jurisdiction.[25] Next, the Court observed that both passengers and cruise lines would save money by avoiding pretrial litigation on the issue of lawsuit location.[26] Finally, and most revealingly, the Court said that enforcement of the forum selection clause was especially good for passengers because "it stands to reason that passengers who purchase tickets containing a forum clause like that at issue in this case benefit in the form of reduced fares reflecting the savings that the cruise line enjoys

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[22] *Id.* at 597 (Stevens, J., dissenting).
[23] *Id.*
[24] *Id.* at 590.
[25] *Id.* at 593.
[26] 499 U.S. at 594.

by limiting the fora in which it may be sued."[27] Of course, without information on the competitiveness of the market in question, this assertion only "stands to reason" if you want it to.

Because the judicial branch—at least at the Supreme Court level—has abandoned any role in policing contracts for fair play, pressure has built for regulatory reform of various contract terms within the legislative and executive branches. For example, the U.S. government recently entered into a new agreement through the International Civil Aviation Organization that permits U.S. Airlines to waive the $75,000 liability limitation for international air flights.[28] In the case of securities arbitration, the spotlight turned toward the SEC and SROs in the wake of the Supreme Court's 1987 decision in *Shearson/American Express, Inc. v. McMahon*.[29] It is thus to the post-*McMahon* reform efforts that I turn next.

II. *MCMAHON* AND ITS AFTERMATH: WHITHER REFORM?

It is striking to me that we are discussing issues of securities arbitration reform in 1996. It is nearly ten years since the Supreme Court decided in *McMahon* that claims by securities customers alleging that their brokers had violated Section 10(b) of the Securities Exchange Act of 1934 and related provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO") were subject to final resolution by securities industry arbitrators rather than federal courts. The decision was a great victory for the securities industry, and one might have expected the industry to have stabilized its dispute resolution system by now. After all, the industry argued at the time that arbitration would save money for everyone by creating a trustworthy, reliable and efficient alternative to the court system.[30]

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[27] *Id.*

[28] Lee S. Kreindler, *The End of Airline Liability Limits*, N.Y. L.J., Aug. 30, 1996, at 3 (reporting that U.S. is set to approve a new International Air Transport Association agreement to eliminate the $75,000 liability limit on international air carriers); *see supra* note 11.

[29] 482 U.S. 220, *reh'g denied*, 483 U.S. 1056 (1987).

[30] William Glaberson, *When the Investor Has a Gripe*, N.Y. TIMES, Mar. 29, 1987, § 3, at 1 (summarizing industry arguments for arbitration prior to Supreme

With a decade's worth of perspective, I am still confused about the industry's motives over the last ten years. The cynic in me says that *McMahon* and its progeny were really nothing more than a program by securities industry lawyers to protect their clients from damage claims for broker misconduct, not an attempt to create an efficient system of "alternative justice." How else to explain why securities firms have gone to such devious lengths to bar punitive damages under the guise of obscure choice-of-law provisions or to litigate so aggressively to restrict customer access to the American Arbitration Association ("AAA")?[31]

On the other hand, I have come to know some of the good people who manage the securities arbitration systems of the various SROs, and they are genuinely trying to make the system work for everyone. My sense is that the SROs, with occasional help from regulatory agencies, have fought a decade-long, low-intensity campaign against the brokerage firm legal departments over securities arbitration issues and that the SROs have lost more battles than they have won.

In preparation for this conference, and as a way of measuring just how far we *have* come, I pulled out a faded copy of the *Wall Street Journal* from March 3, 1987, the day the Court heard arguments in *McMahon*. On that day, I published an op-ed article in the *Journal* pointing out the importance of the case and arguing that, if handled correctly, arbitration of federal statutory claims would be good for both customers and brokers.[32] I went on to express my hope, however, that *McMahon* would "spark Congress and the Securities and Exchange Commission to reexamine and reform the rules governing securities

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Court decision in *McMahon*).

[31] Litigation by industry defendants to prevent customers from choosing the AAA under the so-called "AMEX Window" rule has been typical of this anti-AAA sentiment. *See* John C. Coffee, Jr., Commentary, 33 HOUS. L. REV. 376, 385 (1996); Perry Wallace, *Securities Arbitration After* McMahon, Rodriguez *and the New Rules: Can Investors Really Be Protected?*, 43 VAND. L. REV. 1199, 1235 (1990).

[32] G. Richard Shell, *Keep Broker-Client Disputes Out of Court*, WALL ST. J., Mar. 3, 1987, at A22.

arbitration"[33] because it seemed to me then, as now, that the system was tilted toward the industry in ways that undercut its credibility.

I called for five reforms, all of which were part of the academic and professional dialogue of the day. First, recognizing that *McMahon* was limited to the 1934 Securities and Exchange Act and RICO, I thought Congress should clear the statutory underbrush from this whole field and declare that *all* statutory claims arising from customer-broker disputes should be subject to "voluntary, contractual arbitration."[34] I thought that this might save everyone a lot of trouble because I felt sure that this would be the ultimate result. Congress did not act, and it took several additional rounds of Supreme Court litigation to wrap up the "statutory claims" question—a story well-summarized by Professor Speidel.[35]

Second and most radically, I called for the SEC to adopt regulations guaranteeing "free choice" to customers who might not want to sign a take-it-or-leave-it arbitration clause.[36] I referenced Commodity Futures Trading Commission regulations that prohibit a commodities professional from requiring a customer to sign an arbitration agreement as a condition of utilizing the services offered by the professional. This provision requires the standard brokerage agreement to state that "You need not sign this [arbitration] agreement to open an account with [name of broker]."[37] I felt then that an "informed" or "explicit" consent standard would greatly improve the credibility of securities arbitration with customers. As I mentioned earlier, the industry is unlikely to take this suggestion for fear of plaintiffs' lawyers and the American jury.

Third, I argued that customers should be given a greater role in selecting their arbitrators than was the case in 1987.[38] I contended that securities industry arbitration should adopt the "list method" of arbitrator selection used by the AAA. The Ruder Commission, on which Professor Speidel served, recom-

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[33] Shell, *supra* note 32.
[34] Shell, *supra* note 32.
[35] Speidel, *supra* note 1, at 1340-44.
[36] Shell, *supra* note 32, at A22.
[37] 17 C.F.R. 180.3(b)(1) (1990).
[38] Shell, *supra* note 32, at A22.

mended exactly this reform in its 1996 report.[39] Time will tell if the industry moves toward the AAA model in response to this latest recommendation.

Fourth, I urged that the definition of a "public arbitrator" be tightened to reduce the perception that such arbitrators might be biased toward the industry.[40] This issue is also still troubling securities arbitration. The Ruder Commission noted that a retired lawyer who, three years before, concluded an entire career of representing industry defendants is considered a "public arbitrator."[41] Based on its hope that the industry will adopt the AAA "list system" to select arbitrators, the Commission saw the "public arbitrator" problem fading away because customers would be playing a bigger role in constructing the panel.[42]

Finally, I argued that arbitrators should be required to certify in writing that they considered and decided each of the federal statutory claims put to them by the parties.[43] As I understand the practice in most SRO arbitration forums, this is now done. Professor Speidel wonders whether this requirement should be expanded to include a full-blown opinion followed by judicial review of questions of law.[44] As I explained earlier, I object to this suggestion on the grounds of efficiency. These requirements would eliminate any incentive the industry might have to prefer arbitration over court proceedings, thus thrusting everyone into a situation in which only lawyers would win.

The major issue missing from my 1987 list was the matter of whether arbitrators may award punitive damages against brokers.[45] This issue perhaps more than any other has revealed the fault lines between industry SROs and their own member firms regarding arbitration. Some member firms have fought what amounts to a guerilla war against punitive dam-

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[39] NATIONAL ASSOCIATION OF SECURITIES DEALERS, SECURITIES ARBITRATION REFORM: REPORT OF THE ARBITRATION POLICY TASK FORCE 94-96 (1996) [hereinafter RUDER REPORT].

[40] Shell, *supra* note 32, at A22.

[41] RUDER REPORT, *supra* note 39, at 96-97.

[42] RUDER REPORT, *supra* note 39, at 96-97.

[43] Shell, *supra* note 32, at A22.

[44] Speidel, *supra* note 1, at 1362.

[45] Speidel, *supra* note 1, at 1358.

ages, using arcane, ambiguous choice-of-law clauses piggybacking on tacit consent arguments to rid themselves of this liability risk. The Supreme Court has rejected their interpretations of these clauses,[46] however, and the SROs have written rules prohibiting contractual provisions that limit the "ability of arbitrators to make any award."[47] Finally, a Commission appointed by the National Association of Securities Dealers, Inc. ("NASD") recently proposed, and the NASD accepted, a reform under which punitive damages will be allowed in arbitration but capped at three times compensatory damages or $750,000, whichever is less. It remains to be seen whether the SEC will approve this new rule.[48]

Punitive damages notwithstanding, many of the controversies that were clearly visible on the horizon in 1987 are still with us. We have thus spent a decade litigating, studying, recommending and arguing as arbitration proceedings have gotten longer, awards higher, and the grounds for appeal based on such things as choice-of-law clauses more technical. Over the years, industry dissatisfaction has grown to levels that almost (but not quite) equal the dissatisfaction that customers felt right from the start. In short, securities arbitration has not turned out to be the simple alternative to the courts that everyone hoped it would be, and the industry has brought itself some bad publicity as well as legal complexity by fighting reform at virtually every opportunity.

CONCLUSION

Where do we go from here? As Professor Speidel points out, the Ruder Commission Report is the current focal point for securities arbitration reform. It contains many helpful recommendations, but it advocates expressly permitting (and cap-

[46] Mastrobuono v. Shearson Lehman Hutton, Inc., 115 S. Ct. 1212 (1995).

[47] *See* NYSE Information Memorandum No. 95-16 (Apr. 17, 1995) (on file with author); NASD, Notice to Members No. 95-16, 1995 NASD LEXIS 28 (Mar. 1995).

[48] RUDER REPORT, *supra* note 39; Leslie Eaton, *Arbitration Rules Would Give Some, Take Some*, N.Y. TIMES, Nov. 17, 1996, § 3, at 3 (noting that the NASD had approved the Ruder Commission proposal regarding punitive damages and stating that the SEC "must still approve the changes").

ping) punitive damage awards—a bitter pill for the industry to swallow that will not necessarily cure the system's credibility problem.

And if the industry does not have sufficient incentives to engage in the major reforms that are needed to create the perception of a fair, credible arbitration system, what other groups or institutions might? Securities arbitration reform has waned as an issue in Congress with republican majorities in both the House and Senate. Even with a democratic Congress, arbitration issues never got past the hearings stage. And the SEC has many important issues now facing it, in addition to arbitration, including the implementation of the Private Securities Litigation Reform Act of 1995.[49]

It is instructive to note that, according to one commentator, the airlines pushed for eliminating the $75,000 liability limit for international flights only after the limitation became "politically untenable" and threatened to "severely affect" component and aircraft manufacturers by making these manufacturers alternative targets for "adequate damages."[50] Using this as a test case for the political economy of adhesion contract reform, it might be helpful for securities customers to target accounting firms, law firms or the securities exchanges in their litigation. This is fanciful, however. There are no legal grounds I know of for such suits against third parties that would add to the pressure for securities arbitration reform.

Another catalyst for change might be a second major stock market crash along the lines of the October 1987 drop. This is a fate I do not wish on any of us, but a crash would send a new generation of individual investors into the arbitration system in a big, unhappy group. Regulators and legislators might then be forced to respond to cries that the system still looks unfair to the average person.

In summary, we are left with commentators arguing that reform is the "right thing to do" on the grounds of justice, fairness and the industry's own enlightened self-interest. The

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[49] Pub. L. No. 104-67, 109 Stat. 737 (codified as amended at 15 U.S.C.A. §§ 77a to 78u-s (1996)).

[50] Kreindler, *supra* note 28, at 3.

brokerage industry, meanwhile, continues to rely on the theory of tacit consent to win enforcement in the courts of any clause they can get past their SROs.

Occupying the ground between customers and brokers are the real guardians of arbitration—the SROs themselves. The SROs struggle yearly to make as much progress toward reform as the general counsels of their member firms will permit. It is a tough job, and the SROs deserve all the support we can give them until some major political or economic event gives them the political leverage they need to create the alternative system of justice Professor Speidel advocates and securities customers deserve.