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## Bibliography of Selected Securities Arbitration Resources

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# BIBLIOGRAPHY OF SELECTED SECURITIES ARBITRATION RESOURCES

*Jean J. Davis,\* Michael D. Gellert, Sherry L. Pagton,  
Michael R. Patrick & Louis S. Silvestri*

## INTRODUCTION

To complement this Symposium issue, the *Brooklyn Law Review* has prepared a bibliography of selected securities arbitration and alternative dispute resolution resources. This work primarily describes (1) materials published since 1990, and (2) regularly updated treatises, collections of laws and court cases published prior to 1990. The bibliography includes references to useful print and Internet resources. It focuses on sources discussed at the Symposium, *Securities Arbitration: A Decade After McMahon*, held at Brooklyn Law School on October 25, 1996. This bibliography provides means for locating and obtaining the Ruder Report, the National Association of Securities Dealers' Code of Arbitration Procedure, and the Securities Industry Conference on Arbitration's uniform system for the resolution of disputes involving investors and broker-dealers.

## I. LIBRARY OF CONGRESS SUBJECT HEADINGS

### Arbitration and Award Securities

Researchers should be aware that key securities arbitration materials appear in library catalogs under these very broad subject headings.

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\* Reference Librarian and Adjunct Professor of Law, Brooklyn Law School; Pratt Institute, M.S.L.I.S.; Boston College Law School, J.D.; Duke University, B.A.

## II. INTERNET RESOURCES

### A. *Key Internet Sites Regarding Securities Arbitration*

1. Securities Arbitration Center (last updated May 18, 1997)  
<<http://www.seclaw.com/centers/arbcent.shtml>>

Maintained by Mark J. Astarita, Esq., this site provides a diverse collection of articles, information and rules regarding securities arbitration, mediation and other alternative dispute resolution ("ADR") techniques. Some of its recent materials include: (1) an article relating to the Ruder Report's effect on the development of arbitration and mediation techniques; (2) federal and New York State court decisions regarding securities arbitration; and (3) the names, addresses and telephone numbers of the administrators of various securities arbitration forums across the country, with links to the home pages of the forums that have World Wide Web sites. The site also contains the full text of the National Association of Securities Dealers' ("NASD") Code of Arbitration Procedure, the Uniform Arbitration Act, and the American Arbitration Association's ("AAA") Commercial Arbitration Rules. In addition, this site maintains an archives index which permits a researcher to browse through and recall materials previously featured in the Center. The Center also allows the researcher to search the site by subject matter and provides links to other arbitration sites, including the site maintained by the AAA.

2. American Arbitration Association Home Page  
(last modified May 14, 1997)  
<<http://www.adr.org>>

Maintained by the AAA, this site includes articles on commercial, corporate and international arbitration; rules and procedures of the Association; publications regarding dispute resolution; and the full text of state and federal ADR laws. It also contains a section regarding new developments in ADR law, rules and procedures, and provides access to a roster of "neutrals" available to arbitrate certain corporate and commer-

cial disputes. In addition, some of its AAA subgroups maintain archives indices and provide links to other arbitration resource sites.

3. Arbitration Procedures (last modified Dec. 23, 1996)  
<<http://www.sec.gov/consumer/arbproc/arb1toc.htm>>

Maintained by the Securities and Exchange Commission's ("SEC") Office of Investor Education and Assistance, this site contains the Securities Industry Conference on Arbitration's ("SICA") uniform system for the resolution of disputes involving investors and broker-dealers, which has been adopted by each of the self-regulatory organizations ("SROs"). Some of the issues addressed by the system are (1) eligibility of disputes, (2) challenging of arbitrators, and (3) party notification of the arbitrators' decision. The system also includes a glossary of terms and a list of sponsoring organizations.

4. Securities Fraud and Investor Protection Web Site  
(last modified Oct. 10, 1996)  
<<http://www.securitieslaw.com>>

Maintained by Harry S. Miller, Esq., this site provides a general overview of the law relating to securities fraud and investor protection. It includes sections regarding the duties of brokers to their customers, common complaints against brokers, legal causes of action against brokers and brokerage firms, the arbitration process, and timing issues, eligibility and statutes of limitation.

The Arbitration Process site, located at

<<http://www.securitieslaw.com/arbitration.html>>

discusses issues specific to securities arbitration, including the decision to arbitrate, where to arbitrate, the advantages and disadvantages of arbitration, arbitration procedure and arbitration awards.

5. Arbitration & ADR (updated daily)

<<http://www.ljx.com/practice/arbitration/index.html>>

Sponsored by the AAA, this site is the Arbitration and ADR section of *Law Journal EXTRA!*, a daily publication of the New York Publishing Company. This site provides a comprehensive, up-to-date list of news articles and columns, statutes, governmental resources and other related materials regarding various aspects of arbitration and ADR. It also contains federal and state court decisions interpreting securities and arbitration laws. In addition, this site contains a publisher's catalog, which lists arbitration and ADR indices by publisher, journal or newspaper, and also allows the researcher to list each index by practice area.

6. Hieros Gamos II Alternate Dispute Resolution

(last updated May 24, 1997)

<<http://hg.org/adr.html>>

Sponsored by Lex Mundi, a global association of 133 independent law firms, this site provides lists of, and links to, many international and American ADR organizations, associations, discussion groups and publications. It also provides links to resources regarding ADR, including the AAA's arbitration and mediation rules. This site also has links to Internet and commercial search engines, such as *Law Journal EXTRA!*, Altavista, Excite, Lycos, LEXIS-NEXIS and Westlaw.

7. NASD Regulation—Resolving Disputes

(last modified May 5, 1997)

<<http://www.nasdr.com/2800.htm>>

Maintained by NASD Regulation, Inc., an independent subsidiary of the NASD charged with regulating the securities industry and the Nasdaq stock market, this site contains literature on arbitration procedures for investors, securities mediation and the official NASD Code of Arbitration Procedures.

B. *Electronic Mailing Lists and Usenet Groups Regarding Commercial and Securities Arbitration*

1. Law Lists (last updated Oct. 15, 1996)

<<http://www.lib.uchicago.edu/cgi-bin/law-lists>>

Maintained by Lyonette Louis-Jacques, Foreign and International Law Librarian and Lecturer in Law at the University of Chicago's D'Angelo Law Library, this site provides a comprehensive listing of law-related electronic mailing lists and Usenet groups.

2. Index of Dispute Resolution

<[DISPUTE-RES@listserv.law.cornell.edu](mailto:DISPUTE-RES@listserv.law.cornell.edu)>

Dispute resolution teachers and practitioners list. Send the following message to [listserv@listserv.law.cornell.edu](mailto:listserv@listserv.law.cornell.edu):

subscribe dispute-res [yourfirstname yourlastname]

This site also contains an archive of past discussions.

3. Federal Securities Law List

<[FEDSEC@law.ab.umd.edu](mailto:FEDSEC@law.ab.umd.edu)>

Send the following message to [listserv@law.ab.umd.edu](mailto:listserv@law.ab.umd.edu):

subscribe fedsec yourfirstname yourlastname

4. Securities Law List

<[SECURITIESLAW-L@aall.wuacc.edu](mailto:SECURITIESLAW-L@aall.wuacc.edu)>

Send the following message to [listserv@aall.wuacc.edu](mailto:listserv@aall.wuacc.edu):

subscribe securitieslaw-l yourfirstname yourlastname.

## III. NEWSLETTERS

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- C. *Securities Regulation & Law Report*. Washington, DC: Bureau of National Affairs, Inc., 1969-. Weekly.
- D. *Securities Week*. New York, NY: Dow Jones & Company, Inc., 1985-. Weekly.
- E. *Insights: The Corporate & Securities Law Advisor*. Aspen, CO: Aspen Law & Business, a Division of Aspen Publishers, Inc., 1990-. Monthly.
- F. *World Arbitration & Mediation Report*. Yonkers, NY: Juris Publications, Inc., 1996-. Monthly.
- G. *Mealey's International Arbitration Report*. Wayne, PA: Mealey Publications, Inc., 1986-. Monthly.

## IV. LAW REVIEWS AND LAW JOURNALS

A. *Recent Symposia*

- 1. Business Law Symposium: *Commercial Arbitration: A Discussion of Recent Developments and Trends*, 31 WAKE FOREST L. REV. 183 (1996).
- 2. *New York Stock Exchange, Inc. Symposium on Arbitration in the Securities Industry*, 63 FORDHAM L. REV. 1505 (1995).
- 3. Symposium: *Commercial Alternative Dispute Resolution*, 21 GOLDEN GATE U. L. REV. 245 (1991).

4. Symposium: *Achieving Justice in Arbitration*, 65 TUL. L. REV. 1303 (1991).
5. Symposium: *Quality of Dispute Resolution*, 66 DENV. U. L. REV. 335 (1989).
6. Symposium: *Business Tort Litigation*, 19 ST. MARY'S L.J. 541 (1988).
7. Symposium: *The Future of Private International Arbitration; Beyond Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.*, 12 BROOK. J. INT'L L. 579 (1986).
8. Symposium: *Dispute Resolution*, 21 WILLAMETTE L. REV. 425 (1985).

B. *Law Reviews or Journals Focusing on ADR*

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C. *Select Authors Who Write on Securities Arbitration*

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*Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81 (1992).

*Questioning the Quality of Alternate Dispute Resolution*, 62 TUL. L. REV. 1 (1987).



2. Robert S. Clemente

*Trends in Securities Industry Arbitration: A View of the Past, the Present, and the Future: "The Dream, the Nightmare, and the Reality,"* 68 N.Y. ST. B.J. 18 (1996).

3. Kenneth R. Davis

*When Ignorance of the Law Is No Excuse: Review of Arbitration Awards,* 45 BUFF. L. REV. 49 (1997).

*Due Process Right to Judicial Review of Arbitral Punitive Damages Awards,* 32 AM. BUS. L.J. 583 (1995).

*Protected Right or Sacred Rite: The Paradox of Federal Arbitration Policy,* 45 DEPAUL L. REV. 65 (1995).

*A Proposed Framework for Reviewing Punitive Damages Awards of Commercial Arbitrators,* 58 ALB. L. REV. 55 (1994).

4. Harry T. Edwards

*Alternative Dispute Resolution Awards: Panacea or Anathema?,* 99 HARV. L. REV. 668 (1986).

*Hopes and Fears for Alternative Dispute Resolution,* 21 WILLAMETTE L. REV. 425 (1985).

5. C. Edward Fletcher III

*Learning to Live with the Federal Arbitration Act—Securities Litigation in a Post-McMahon World,* 37 EMORY L.J. 99 (1988).

*Privatizing Securities Disputes Through the Enforcement of Arbitration Agreements,* 71 MINN. L. REV. 393 (1987).

6. Mahlon M. Frankhauser

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6. Mahlon M. Frankhauser (cont.)

*An Up-to-Date Review of Judicial, Legislative, and Regulatory Developments in Arbitration with Financial Institutions*, 46 WASH. & LEE L. REV. 583 (1989).

7. Philip J. Hoblin

*The Case for a Single Securities & Commodities Arbitration Forum*, 9 COMMODITIES L. LETTER 3 (1989).

8. Constantine N. Katsoris

*SICA: The First Twenty Years*, 23 FORDHAM URB. L.J. 483 (1996).

*Representation of Parties in Arbitration by Non-Attorneys*, 22 FORDHAM URB. L.J. 503 (1995).

*Should McMahon Be Revisited?*, 59 BROOK. L. REV. 1113 (1993).

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*Securities Arbitration After McMahon*, 16 FORDHAM URB. L.J. 361 (1988).

*The Securities Arbitrators' Nightmare*, 14 FORDHAM URB. L.J. 3 (1986).

*The Arbitration of a Public Securities Dispute*, 53 FORDHAM L. REV. 279 (1984).

9. Norman S. Poser

*Making Securities Arbitration Work*, 50 SMU L. REV. 277 (1996).

## 9. Norman S. Poser (cont.)

*Time Bars in Securities Arbitration*, 29 REV. SEC. & COMMODITIES REG. 185 (1996).

*When ADR Eclipses Litigation: The Brave New World of Securities Arbitration*, 59 BROOK. L. REV. 1095 (1993).

*Arbitrability of International Securities Disputes*, 12 BROOK. J. INT'L L. 675 (1986).

## 10. G. Richard Shell

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*Arbitration After the Crash: New Rules Debated by the SEC and a Securities Industry Group Have Failed to Address Some Crucial Issues*, NAT'L L.J., Mar. 21, 1988, at 13.

## 11. Patricia A. Shub

*The Arbitrator's Manual*, 9 J. INT'L ARB. 69 (1992).

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## 12. Richard E. Speidel

*Commentary on Securities Arbitration*, 33 HOUS. L. REV. 369 (1996).

*Arbitration of Statutory Rights Under the Federal Arbitration Act: The Case for Reform*, 4 OHIO ST. J. ON DISP. RESOL. 157 (1989).

## 13. Jeffrey W. Stempel

*Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297 (1996).

*Reconsidering the Employment Contract Exclusion in Section 1 of the Federal Arbitration Act: Correcting the Judiciary's Failure of Statutory Vision*, 1991 J. DISP. RESOL. 259.

*A Better Approach to Arbitrability*, 65 TUL. L. REV. 1377 (1991).

*Pitfalls of Public Policy: The Case of Arbitration Agreements*, 22 ST. MARY'S L.J. (1990).

## 14. C. Evan Stewart

*Securities Arbitration Appeal: An Oxymoron No Longer*, 79 KY. L.J. 347 (1991).

*How to Construct Better Arbitration Clauses*, 36 PRAC. LAW. 79 (1990).

*Will Ruder Report Recommendations Improve NASD Arbitration Process?*, N.Y. L.J., Apr. 12, 1996, at 1.

*No Longer "Simple," "Quick," "Informal," or "Inexpensive,"* N.Y. L.J., June 15, 1995, at 5.

*Punitive Damages in Arbitration*, N.Y. L.J., July 21, 1994, at 1.

## 14. C. Evan Stewart (cont.)

*Are Class Actions Appropriate in Arbitrations?*, N.Y. L.J., June 13, 1991, at 5.

*Punitive Damages in Arbitration: Fish or Cut Bait*, N.Y. L.J., Feb. 21, 1991, at 5.

*A Dissenting Voice on Securities Arbitration*, N.Y. L.J., Aug. 21, 1989, at 7.

## 15. Thomas J. Stipanowich

*Of "Procedural Arbitrability": The Effect of Noncompliance with Contract Claims Procedures*, 40 S.C. L. REV. 847 (1989).

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*Arbitration*, 74 KY. L.J. 319 (1986).

*Punitive Damages in Arbitration: Garrity v. Lyle Stuart, Inc. Reconsidered*, 66 B.U. L. REV. 953 (1986).

## V. RUDER REPORT AND RESPONSES

A. NATIONAL ASSOCIATION OF SECURITIES DEALERS,  
SECURITIES ARBITRATION REFORM: REPORT OF THE  
ARBITRATION POLICY TASK FORCE (1996).

The Arbitration Policy Task Force prepared the Report on Securities Arbitration Reform ("Ruder Report"). The Board of Governors of the National Association of Securities Dealers, Inc. appointed the Task Force in the fall of 1994 for the purposes of studying the securities arbitration process adminis-

tered by the NASD and making suggestions for its reform. The Task Force consisted of eight individuals with diverse backgrounds in securities arbitration: David S. Ruder, Linda D. Fienberg, John W. Bachman, Stephen J. Friedman, Stephen L. Hammerman, J. Boyd Page, Francis O. Spalding and Richard E. Speidel.

The 156-page Ruder Report notes the rapid growth in securities arbitration during the past decade, describes the most significant issues surrounding securities arbitration, and concludes with proposed recommendations for each issue. The Report recommends over seventy reforms, including seven major recommendations on: predispute arbitration agreements, the six-year eligibility rule of arbitration, punitive damages, mediation and early neutral evaluation, simplified arbitration, document production and arbitrator enhancement.

The Ruder Report is not yet available in many libraries. A researcher may obtain it for a nominal fee by calling the NASD's Media Service at (301) 590-6578.

- B. JAMES E. BECKLEY ED., SECURITIES ARBITRATION 1996 (PLI Corp. Law & Practice Course Handbook Series No. B-949, 1996).

This coursebook on securities arbitration contains thirty-nine chapters written by the Practicing Law Institute's faculty members and by other individuals involved in securities arbitration. Certain chapters compare the current rules of securities arbitration with the rules recommended by the Ruder Report.

These chapters include: ch. 2, James E. Beckley, *Equity and Arbitration*; ch. 5, Robert S. Clemente & David L. Carey, *Securities Arbitration at Self-Regulatory Organizations: NYSE and NASD Administration and Procedures*; ch. 12, Laurence Steckman & Lawrence A. Kushnick, *State Statutes of Limitations in Securities Arbitration*; ch. 13, C. Thomas Mason III, *Six-Year Eligibility Rule: State of the Controversy and Survey of the Circuits*; ch. 15, Roger M. Deitz, *Early Neutral Evaluation and Mediation*; ch. 17, Romaine L. Gardner & Joel E. Davidson, *Discovery and Evidentiary Issues in Securities Arbi-*

tration; ch. 19, Terry Ross, *Evidence in the Wild, Wild West: A View from the Defense*; ch. 37, Norman B. Arnoff, *In the Wake of Mastrobuono*.

- C. Joel Seligman, *The Quiet Revolution: Securities Arbitration Confronts the Hard Questions*, 33 HOUS. L. REV. 327 (1996).

In this article, Joel Seligman notes that the Supreme Court left three major questions unresolved regarding broker-customer dispute resolution. These questions, which the Ruder Report attempts to answer, are: when should a customer's relinquishment of rights to litigate federal securities claims be binding, who should arbitrate securities customer claims, and should arbitrators have the power to award punitive damages? Dean Seligman analyzes the Task Force's resolutions to these questions and concludes by commending the Task Force for confronting the hard questions in securities arbitration in a manner that suggests no bias for either brokers or customers.

- D. Anthony Aarons, *Ruder Report Rebellion; ADR Reform in Securities Suits Sparks Concern*, L.A. DAILY J., Feb. 5, 1996, at 5.

This article highlights the concerns that plaintiff's attorneys have regarding the Ruder Report's recommendations. The article explains that plaintiff's attorneys are concerned that the recommendations favor the securities industry. The primary concern is the proposed cap on punitive damages.

- E. James J. Eccleston, *Task Force Urges Overhaul for Securities Arbitration Cases*, CHI. DAILY L. BULL., Apr. 22, 1996, at 6.

This article lists and examines some of the significant Task Force recommendations. These recommendations include the continued allowance of predispute arbitration agreements, the suspension of the six-year eligibility rule (which would be replaced by a statute of limitations), the allowance of punitive damages (subject to a cap), and the requirement of automatic document production.

- F. John F.X. Peloso & Stuart M. Sarnoff, *Guide to Recommendations of Ruder's Task Force*, N.Y. L.J., Feb. 15, 1996, at 3.

This article is a practitioner's guide which concentrates on the recommendations impacting the procedures that govern the hearing of investor disputes with broker-dealers. The authors conclude that the recommendations of the Ruder Report are sound proposals, and that the goals of the securities arbitration system would be enhanced by the implementation of the proposed recommendations.

- G. David E. Robbins, *The NASD's Proposed Changes to Its Arbitration Procedures Would Affect Rules on Eligibility, Punitive Damages, Discovery and the Selection of Arbitrators*, NAT'L L.J., Feb. 12, 1996, at B6.

Mr. Robbins, former Director of Arbitration for the American Stock Exchange, is a member of the New York law firm of Kaufman, Feiner, Yamin, Gilden & Robbins. He specializes in securities arbitration and is the author of the *Securities Arbitration Procedure Manual*. In this article, Mr. Robbins states the reasons why the Task Force was formed, examines its major recommendations and commends the Task Force for confronting the issues that have the potential to destroy the basic nature of securities arbitration.

- H. C. Evan Stewart, *Will Ruder Report Recommendations Improve NASD Arbitration Process?*, N.Y. L.J., Apr. 12, 1996, at 1.

In this article, C. Evan Stewart discusses whether implementation of the recommendations made in the Ruder Report will cause the securities arbitration process to revert to an informal, expeditious and inexpensive form of dispute resolution. He concludes that the Ruder Report identifies the basic problems correctly, but does not provide effective solutions to these problems.



## VI. PRIMARY SOURCES

### A. *Key United States Supreme Court Decisions*

The following cases reflect the evolving status of predispute arbitration clauses and their enforceability:

1. *Wilko v. Swan*, 346 U.S. 427 (1953).

Holding that predispute arbitration agreements are not enforceable in actions brought pursuant to section 12 of the Securities Act of 1933, and stating that the anti-waiver provision of the Act reflects Congress' intent to guarantee a judicial forum for protection of substantive rights.

2. *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

Holding that the Federal Arbitration Act ("FAA") preempts state law where application of state law has the effect of undermining substantive policies of the FAA or of precluding the arbitration of claims otherwise within the scope of the FAA.

3. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

Interpreting the FAA as an "emphatic federal policy in favor of arbitral dispute resolution," and holding that the broad arbitration clause between an automobile manufacturer and automobile dealer covers all claims related to the contract; thus also holding that dealer's counterclaim alleging manufacturer's violation of American antitrust laws is subject to enforced international arbitration, wherein Japanese arbitrators would be bound to interpret American laws designed to protect American economic interests.

4. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987).

Upholding validity of predispute arbitration agreements under the Securities Exchange Act of 1934, and reasoning that

the antiwaiver provision of the Act prohibits waiver only of the Act's substantive obligations and that access to court is procedural and therefore waivable.

5. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

Overruling *Wilko* and upholding the validity of arbitration agreements under the Securities Act of 1933.

6. *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468 (1989).

Where parties chose state law, including a provision permitting stay of arbitration pending litigation, upholding stay even though there is no such provision in the Federal Arbitration Act.

7. *First Options of Chicago, Inc. v. Kaplan*, 115 S. Ct. 1920 (1995).

Holding that (1) the issue of parties' intent to arbitrate is a question of fact for the district court, and (2) the district court's determination deserves the presumption of correctness ordinarily accorded a factual determination and should be reversed only when clearly erroneous.

8. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 115 S. Ct. 1212 (1995).

Holding that punitive damages against a brokerage firm are permissible in an arbitration proceeding where the terms of the agreement are ambiguous with regard to punitive damages, even though the agreement contains a New York choice of law provision and under New York law punitive damages cannot be awarded in arbitrations; and reasoning that the arbitration clause provided that the arbitration would be governed by the rules of the NASD, which arguably permit an award of punitive damages.

9. *Doctor's Associates, Inc. v. Casarotto*, 116 S. Ct. 1652 (1996).

Holding that FAA preempts a state statute that conditions enforceability of an arbitration clause on compliance with special notice requirements; and that while the FAA does not preempt a state rule when the state rule determines only the procedure for arbitration, the state rule is preempted under these circumstances because the notice provision "affects the enforceability of the arbitration agreement itself."

The following decisions have altered or clarified the viability of investors' claims in the judicial forum:

10. *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964).

Declaring that an implied private right of action exists under section 14(a) of the Securities Exchange Act of 1934.

11. *Superintendent of Insurance v. Bankers Life & Casualty Co.*, 404 U.S. 6 (1971).

Holding that an implied private cause of action for damages exists under section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5.

12. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976).

Holding that liability under section 10(b) requires the plaintiff to establish the defendant's scienter.

13. *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462 (1977).

Holding that section 10(b) requires a showing of deception or manipulation.

14. Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350 (1991).

Departing from lower court's more liberal tolling period, and adopting a statute of limitations of one year after discovery and in no event more than three years after a violation of section 10(b).

15. Central Bank of Denver v. First Interstate Bank of Denver, 114 S. Ct. 1439 (1994).

Contrary to prior lower courts' interpretations, rejecting aiding and abetting liability in private actions under section 10(b), but leaving uncertain the scope of liability of secondary participants for direct violations of section 10(b).

16. Gustafson v. Alloyd Co., 115 S. Ct. 1061 (1995).

Contrary to prior majority view among lower courts, reasoning that (1) the term "prospectus" in section 12(a)(2) of the Securities Act of 1933 refers only to public offerings, and (2) "oral communications" refers only to communications relating to such prospectuses. Thus, investors have no section 12(a)(2) action against brokers in private or secondary market transactions.

#### B. *Key Second Circuit Decisions*

1. Sobel v. Hertz, Warner & Co., 469 F.2d 1211 (2d Cir. 1972).

Holding that due to efficiency concerns, written opinions by arbitrators are generally not required.

2. Merrill, Lynch, Pierce, Fenner & Smith v. Bobker, 808 F.2d 930 (2d Cir. 1986).

Stating that to preserve the finality of arbitration awards, courts should confirm awards with substantive errors unless

the arbitrator intentionally disregarded controlling law; and that as a result, "challenging an arbitration award is usually fruitless."

The following Second Circuit cases relate to the viability of investor claims in the judicial forum:

3. *Marbury Management, Inc. v. Kohn*, 629 F.2d 705 (2d Cir. 1980).

Holding that respondeat superior doctrine is a tenable liability theory in section 10(b) claims. The continued validity of this ruling is uncertain after the Supreme Court's decision in *Central Bank of Denver v. First Interstate Bank of Denver*, 114 S. Ct. 1439 (1994).

4. *Zerman v. Ball*, 735 F.2d 15 (2d Cir. 1984).

Holding that puffery and exaggeration by brokers is not actionable due to lack of justifiable reliance.

5. *Bennet v. United States Trust Company of New York*, 770 F.2d 308 (2d Cir. 1985).

Determining that there is no private right of action for broker's violation of margin requirements.

6. *Wexner v. First Manhattan Co.*, 902 F.2d 169 (2d Cir. 1990).

Interpreting Federal Rule of Civil Procedure 9(b) in the context of section 10(b) pleading requirements, and holding that dismissal of a claim is proper where a plaintiff fails to set forth facts giving rise to a strong inference of fraud.

7. *Brown v. E.F. Hutton Group, Inc.*, 991 F.2d 1020 (2d Cir. 1991).

Holding that where written documents are accurate, allegedly false oral statements are generally not actionable absent a fiduciary relationship.

C. *Key New York Court of Appeals Decisions*

1. *Garritty v. Lyle Stuart, Inc.*, 40 N.Y.2d 354, 353 N.E.2d 793, 386 N.Y.S.2d 831 (1976).

Stating that New York public policy prohibits arbitrators from awarding punitive damages.

2. *CPC International Inc. v. McKesson Corp.*, 70 N.Y.2d 268, 514 N.E.2d 116, 519 N.Y.S.2d 804 (1987).

Holding that there is no private cause of action for a violation of the securities laws of New York State.

D. *Statutes*

1. Federal Arbitration Act, 9 U.S.C. §§ 1-16 (1994).

Under the Federal Arbitration Act ("FAA"), written provisions for arbitration are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The Supreme Court has interpreted this provision to mean that state law "which governs not 'any contract,' but specifically and solely contracts 'subject to arbitration,' conflicts with the FAA and is therefore displaced by the federal measure." *Doctor's Associates, Inc. v. Casarotto*, 116 S. Ct. 1652, 1654 (1996). The FAA also establishes the procedures by which an award governed by the Act may be appealed.

## 2. State Arbitration Statutes

For a compilation of each state's arbitration statute, see *DIGEST OF COMMERCIAL LAWS OF THE WORLD: STATE VARIATIONS OF COMMERCIAL LAW* vols. 1-2 (George Kohlik et al. eds., 1996). The National Conference of Commissioners on Uniform State Laws adopted the Uniform Arbitration Act ("UAA") in 1955. In 1956, the American Bar Association amended and approved the UAA. Thirty-four states and the District of Columbia have adopted the UAA:<sup>1</sup>

- Alaska: ALASKA STAT. § 09.43.01 *et seq.* (1994)  
Arizona: ARIZ. REV. STAT. ANN. § 12-1501 *et seq.* (West 1994)  
Arkansas: ARK. CODE ANN. § 16-108-201 *et seq.* (Michie 1987)  
Colorado: COLO. REV. STAT. § 13-22-201 *et seq.* (1987)  
Delaware: DEL. CODE ANN. tit. 10, § 5701 *et seq.* (1974)  
District of Columbia: D.C. CODE ANN. tit. 16, § 16-4301 *et seq.* (1989)  
Hawaii: HAW. REV. STAT. § 658-1 *et seq.* (1993)  
Idaho: IDAHO CODE § 7-901 *et seq.* (1990)  
Illinois: ILL. REV. STAT. ch. 10, § 101 *et seq.* (1993)  
Indiana: IND. CODE ANN. § 34-4-2-1 *et seq.* (Burns 1986)  
Iowa: IOWA CODE ANN. § 679A-1 *et seq.* (West 1987)  
Kansas: KAN. CIV. PROC. CODE ANN. § 5-401 *et seq.* (Vernon 1982)  
Kentucky: KY. REV. STAT. ANN. § 417.045 *et seq.* (Michie/Bobbs-Merrill 1992)  
Louisiana: LA. REV. STAT. ANN. § 9-4201 *et seq.* (West 1991)  
Maine: ME. REV. STAT. ANN. tit. 14, § 5927 *et seq.* (West 1980)  
Maryland: MD. CODE ANN., CTS. & JUD. PROC. § 3-201 *et seq.* (1995)  
Massachusetts: MASS. GEN. LAWS ANN. ch. 251, § 1 *et seq.* (West 1991)  
Minnesota: MINN. STAT. ANN. § 572.08 *et seq.* (West 1988)  
Mississippi: MISS. CODE ANN. § 11-15-101 *et seq.* (1972)  
(applies only to construction disputes)  
Missouri: MO. ANN. STAT. § 435.350 *et seq.* (Vernon 1992)  
Montana: MONT. CODE ANN. § 27-5-111 *et seq.* (1995)

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<sup>1</sup> A researcher should consult the text of the applicable state's arbitration statute for individual variations from the UAA.

Nebraska: NEB. REV. STAT. § 25-2601 *et seq.* (1995)  
Nevada: NEV. REV. STAT. ANN. § 38-015 *et seq.* (Michie 1986)  
New Mexico: N.M. STAT. ANN. § 44-7-1 *et seq.* (Michie 1978)  
North Carolina: N.C. GEN. STAT. § 1-567.1 *et seq.* (1996)  
North Dakota: N.D. CENT. CODE § 32-29.2-01 *et seq.* (1996)  
Oklahoma: OKLA. STAT. ANN. tit. 15, § 801 *et seq.* (West 1993)  
Pennsylvania: PA. CONS. STAT. ANN. tit. 42, § 7301 *et seq.*  
(West 1982)  
South Carolina: S.C. CODE ANN. § 15-48-10 *et seq.* (Law. Co-op.  
1976)  
South Dakota: S.D. CODIFIED LAWS ANN. § 21-25A-1 *et seq.*  
(1987)  
Tennessee: TENN. CODE ANN. § 29-5-302 *et seq.* (1980)  
Texas: TEX. REV. CIV. STAT. ANN. art. 224 *et seq.* (West 1973)  
Vermont: VT. STAT. ANN. tit. 12, § 5651 *et seq.* (1973)  
Virginia: VA. CODE ANN. § 8.01 *et seq.* (Michie 1992)  
Wyoming: WYO. STAT. § 1-36-101 *et seq.* (1988)

Fourteen other states have adopted arbitration statutes that do not track the UAA but which, like the UAA, require enforcement of agreements to arbitrate both existing and future disputes:

California: CAL. CIV. PROC. CODE § 1280 *et seq.* (West 1982)  
Connecticut: CONN. GEN. STAT. ANN. § 52-408 *et seq.* (West 1991)  
Florida: FLA. STAT. ANN. § 682.01 *et seq.* (West 1990)  
Georgia: GA. CODE ANN. § 9-9-80 *et seq.* (1993) (applies only to construction disputes)  
Michigan: MICH. COMP. LAWS ANN. § 600.5001 *et seq.* (West 1987)  
New Hampshire: N.H. REV. STAT. ANN. § 542:1 *et seq.* (1974)  
New Jersey: N.J. STAT. ANN. § 2A:24-1 *et seq.* (West 1987)  
New York: N.Y. CIV. PRAC. L. & R. § 7501 *et seq.* (McKinney 1980)  
Ohio: OHIO REV. CODE ANN. § 2711.01 *et seq.* (Baldwin 1992)  
Oregon: OR. REV. STAT. § 33.210 *et seq.* (1995)  
Rhode Island: R.I. GEN. LAWS § 10-3-1 *et seq.* (1985)  
Utah: UTAH CODE ANN. § 78-31a-1 *et seq.* (1996)  
Washington: WASH. REV. CODE ANN. § 7.04.010 *et seq.* (West 1992)



Wisconsin: WIS. STAT. ANN. § 788.01 *et seq.* (West 1981)

Two other states have adopted statutes providing for enforcement only of agreements to arbitrate existing disputes:

Alabama: ALA. CODE § 6-6-1 *et seq.* (1993)

West Virginia: W. VA. CODE § 55-10-1 *et seq.* (1994)

## VII. CODES AND RULES OF THE SELF-REGULATORY ORGANIZATIONS

### A. ANTHONY W. DJINIS & JOSEPH A. POST, SECURITIES ARBITRATION: PRACTICE AND FORMS (1991).

This looseleaf service contains: the National Association of Securities Dealers Arbitration Rules; the New York Stock Exchange Arbitration Rules; the American Stock Exchange Arbitration Rules; the Chicago Board Options Exchange Arbitration Rules; the Securities Industry Conference on Arbitration Uniform Code of Arbitration; the American Arbitration Association Securities Arbitration Rules; and the ENDISPUTE Rules and Procedures for Mediation of Securities Disputes.

### B. DAVID E. ROBBINS, SECURITIES ARBITRATION PROCEDURE MANUAL (2d ed. 1995).

This looseleaf service contains: the Code of Arbitration Procedure; the State Arbitration Statutes; the Federal Arbitration Act; the New York arbitration statute; the National Association of Securities Dealers Code of Arbitration Procedure; the New York Stock Exchange Arbitration Rules; the Arbitration Rules of the American Arbitration Association; the Arbitrator's Manual; and the American Arbitration Association Securities Mediation Rules.

*Securities Arbitration: Practice and Forms* and the *Securities Arbitration Procedure Manual* are looseleaf services. They are updated annually and biennially, respectively, and thus the codes or rules found therein are only as current as the most recent insert. To obtain the current version of any self-regulatory organization code or rules, a researcher should con-

tact the specific SRO. The *Securities Arbitration: Practice and Forms* looseleaf lists the address and telephone number of each SRO.

- C. Mark J. Astarita, Esq., *Securities Arbitration Forums*  
(last modified Feb. 2, 1997)  
<<http://www.seclaw.com/arbforum.htm>>

A researcher may also obtain the most current version of a particular SRO's code or rules through the Internet. This Internet site contains the names, addresses, and telephone and fax numbers of eleven organizations, and provides links to the Internet sites of the National Association of Securities Dealers, the New York Stock Exchange, the American Stock Exchange, the American Arbitration Association and the Philadelphia Stock Exchange.

## VIII. INDICES OF LEGAL MATERIALS IN PRINT

### A. BOWKER'S LAW BOOKS AND SERIALS IN PRINT

*Bowker's* is updated ten times per year through supplemental materials and is organized into three volumes: subjects, authors and titles. This index lists legal books and serials in print for the current year. The Subjects Index uses headings similar to the Library of Congress Subject Headings. Although most of the key books are found under the broad subject headings of "Securities" and "Arbitration and Award," the Author Index lists books written by experts in securities arbitration. By looking under "Securities Arbitration . . ." in the Titles Index, researchers can also locate many of the comprehensive treatises. Researchers can find the latest in print materials by searching WESTLAW's "BIP" database with the query "(arbitration or securities) and da(aft [year])."

### B. A.L. STERN ED., LEGAL LOOSELEAFS IN PRINT

*Legal Looseleafs* is an annually updated subject and title index of available legal looseleafs. In the Subject Index, researchers should look under "Arbitration" and "Securities."

Each listing in the Subject Index contains the name of the looseleaf, its publisher and a page number to the Title Index. The entry in the Title Index gives complete information about the looseleaf, including the authors, publisher, year of publication, number of volumes, price to purchase, method of updating, price to renew and helpful library call numbers. Contacting a particular publisher is also simplified through the use of the "Publishers' Directory."

## IX. KEY MATERIALS IN PRINT

### A. *Looseleafs*

#### 1. BUREAU OF NATIONAL AFFAIRS, SECURITIES REGULATION & LAW REPORT (1997).

The weekly issues of this looseleaf summarize recent developments in federal securities and corporate law. Each issue covers a variety of topics, which are organized under sections such as: Federal Securities & Corporate Developments; State Developments; Commodities Regulation; Accounting & Disclosure; No-Action Letters; and Journal. A useful index, usually on the second page, enables the reader to find information by topic, case name, or section name.

In addition to arbitration related news, the Federal Securities & Corporate Developments section highlights such topics as jurisdiction and procedure, class actions, attorney sanctions, damages, broker-dealer regulation, SEC enforcement, and Congressional activity. The State Developments sections reports on changes or additions to states' securities and corporate law. Enforcement actions taken by the Commodity Futures Trading Commission, along with recent court rulings, are summarized in the Commodities Regulation section. Reporting requirements and news related to the Financial Accounting Standards Board are discussed in the Accounting & Disclosure section. The No-Action Letters section contains details on transactions that the SEC staff has recently reviewed. In addition, a table at the end of this section lists significant no-action, exemptive or interpretive no-action letters recently issued

by the Division of Investment Management. Finally, the Journal section contains a schedule of upcoming conferences on securities law.

For subscription information, contact The Bureau of National Affairs at 1231 25th Street, N.W., Washington, D.C. 20037.

2. COMMERCE CLEARING HOUSE, *FEDERAL SECURITIES LAW REPORTER* (1997).

This source helps a researcher locate the Securities and Exchange Commission's comments on proposed rule changes to a self-regulatory organization's code of arbitration.

3. ANTHONY W. DJINIS & JOSEPH A. POST, *SECURITIES ARBITRATION: PRACTICE AND FORMS* (1991).

This looseleaf, updated annually, is a comprehensive guide to the entire arbitration process for all participants, including investors, attorneys, brokerage firms, SRO staff and arbitrators. Designed as a tool to be used at any stage of the arbitration process, this looseleaf deals with various issues, questions and problems that may arise. It emphasizes practice and procedure as illustrated by the use of checklists, numerous sample forms and practice aids, as well as advice from experienced securities lawyers.

4. IAN R. MACNEIL, RICHARD E. SPEIDEL & THOMAS J. STIPANOWICH, *FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT* (1994 & Supp. 1996).

This five-volume looseleaf is a comprehensive authority on the Federal Arbitration Act. Volume I outlines the Act. Volume II examines the enforceability of arbitration agreements. Chapter 16 in Volume II discusses the enforcement of arbitration agreements from a public policy perspective. Volume III highlights what to look for in selecting an arbitrator and a forum. Volume IV analyzes the interplay of arbitration awards in the

judicial courts. Volume V contains many helpful appendices, covering statutes, treaties, judicial rules, institutional arbitration rules, forms, court cases, rules and an index.

5. DAVID E. ROBBINS, *SECURITIES ARBITRATION PROCEDURE MANUAL* (2d ed. 1995).

Designed as a step-by-step guide on how to bring a securities arbitration claim, this looseleaf contains a complete discussion of the issues that practitioners encounter when representing clients. Chapter 3 contains a helpful review of the applicable law, including cases and statutes, while Chapter 5 aids attorneys in evaluating the potential success of their cases. The appendices include the complete text of important arbitration rules, statutes and guides. The author is a former special deputy attorney general in the Securities Bureau of the New York Department of Law; former American Stock Exchange arbitration director; arbitrator for the National Association of Securities Dealers, New York Stock Exchange, American Stock Exchange, and American Arbitration Association; member of the AAA's Securities Arbitration Task Force; Practice Commentator to McKinney's Consolidated Laws of New York; and chairman of the annual Practising Law Institute—American Arbitration Association programs on securities arbitration.

#### *B. Books and Treatises*

1. HAROLD S. BLOOMENTHAL, *SECURITIES LAW HANDBOOK* (1997).

A thorough and current handbook on securities laws generally. Chapter 30 discusses securities arbitration.

2. MARILYN BLUMBERG CANE, *SECURITIES ARBITRATION LAW & PROCEDURE* (1991).

A guide for attorneys, arbitrators and securities industry professionals involved in arbitration, this book covers the claims and defenses in securities arbitration and discusses the legal effect and scope of arbitration clauses. Appendix A con-

tains contact information for the arbitration forums. Appendix P provides an annotated bibliography listing resources in securities arbitration.

3. JULIUS HENRY COHEN, *BUSINESS ARBITRATION—WHAT YOU NEED TO KNOW* (4th ed. 1991).

Written by the president of the American Arbitration Association, this book assists the reader in making use of alternate dispute resolution for commercial disputes, under the rules of the AAA. *Business Arbitration* may help attorneys eliminate uncertainties about settlement procedures. One appendix contains a code of ethics for arbitrators of commercial disputes.

4. ANTHONY D. DETORO & BETTE J. ROTH, *SECURITIES ARBITRATION SPECIAL REPORT* (1989).

This book discusses the cases and regulatory developments since *McMahon* concerning the arbitration of securities disputes and contains sample forms for use in court and in arbitration.

5. DANNY ERTEL & RALPH C. FERRARA, *BEYOND ARBITRATION—DESIGNING ALTERNATIVES TO SECURITIES LITIGATION* (1991).

This book discusses the alternatives to securities litigation. Chapter 7 discusses the use of alternative dispute resolution in SEC enforcement actions.

6. C. EDWARD FLETCHER, *ARBITRATING SECURITIES DISPUTES* (1990).

While guiding the reader through the steps of a securities arbitration case, this book discusses the development of the statutory and common law foundation of modern securities arbitration. The author also addresses contractual clauses most commonly in use, as well as procedural and strategic considerations. In addition to providing the rules of the various arbitration forums in appendices, Appendix 11 contains forms that can be used by practitioners.

7. STUART C. GOLDBERG ED., PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION'S 1991 PUBLIC INVESTOR RECOVERY GUIDE AND ARBITRATOR SOURCE BOOK TO STOCKBROKER FRAUD AND SECURITIES ARBITRATION (1991).

The Public Investors Arbitration Bar Association ("PIABA") was formed in 1990 by attorneys in thirteen different states to supply public investors with attorneys in arbitrations. The PIABA has three main objectives: (1) to educate members through publications and commissioning studies; (2) to conduct seminars so members can gain access to important experience and information; and (3) to launch legislative proposals with the goal of insuring that the securities arbitration process becomes as fair and impartial as is systemically possible.

Written in a clear question-and-answer format, this book can be used by investors to learn about: the different types of stockbroker fraud and defenses, and how securities arbitration works. Part III discusses the non-sequestration of expert witnesses and is probably helpful only to attorneys and arbitrators. The arbitration codes for the NASD, SICA and AAA are included in the appendices. Appendix E contains charts from PIABA's 1991 Report on Punitive Damages in Securities Arbitration.

8. STUART C. GOLDBERG ED., 1991 REPORT OF THE PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION AS TO THE AUTHORITY OF ARBITRATOR TO AWARD PUNITIVE DAMAGES IN SECURITIES ARBITRATION (1991).

This study details forty-four securities arbitration awards, issued from June 1987 through the end of 1990, in which punitive damages totaling \$9,657,541 were awarded. The report is organized into two parts: (1) an analysis of the forty-four punitive damage awards issued in securities arbitrations since the *McMahon* decision in June 1987; and (2) a review of the existing law on the issue of the powers of arbitrators to award punitive damages in securities disputes up to *Barbier v. Shearson Lehman Hutton, Inc.*, 752 F. Supp. 151 (S.D.N.Y. 1990), *aff'd in part, rev'd in part, remanded*, 948 F.2d 117 (2d Cir. 1991).

Part I summarizes, in various tables, information sorted by helpful categories such as broker-dealer distribution, state distribution and forum distribution. The details of each case study are then included after summary information on each broker-dealer. Part II addresses the controversy of the availability of punitive damages in securities arbitration. The author analyzes the scope of *Garrity v. Lyle Stuart*, the treatment of that case in other jurisdictions, and the future the case will and should play in securities arbitration both outside and inside New York. 40 N.Y.2d 354, 353 N.E.2d 793, 386 N.Y.S.2d 831 (1976). Appendices 5 to 8 illustrate, using tables, the impact of attorney's fees, costs and interest as elements in punitive damages.

9. J. KIRKLAND GRANT, *SECURITIES ARBITRATION FOR BROKERS, ATTORNEYS, AND INVESTORS* (1994).

Written for practitioners, brokers and investors, this book gives an overview of arbitration starting with the history of arbitration. The book analyzes agreements to arbitrate securities disputes and discusses the conflicts between arbitration and the securities laws. Chapter 11 details the types of securities claims that are arbitrable. Chapter 12 contains a complete walk-through of how to bring a securities arbitration claim. Chapter 16 discusses post-award matters and appeal procedures. Appendices include the Federal Arbitration Act, New York's arbitration statute, SICA Arbitration Procedures, NYSE Arbitration Rules, and AAA Securities Arbitration Rules.

10. PHILIP J. HOBLIN & JAMES H. SCHROPP, *SECURITIES ARBITRATION: NEW APPROACHES TO SECURITIES COUNSELING & LITIGATION AFTER McMAHON* (1988).

One of the earlier books to come out after the *McMahon* decision, this book is comprised of letters, decisions, key speeches and rules on the topic of securities arbitration. This book may assist a researcher in locating earlier materials on the interpretation of *McMahon's* impact.



11. PHILIP J. HOBLIN, *SECURITIES ARBITRATION PROCEDURES, STRATEGIES, CASES* (2d ed. 1992).

Written by a founding member of the Securities Industry Conference on Arbitration, this book, updated annually, gives an in-depth review of the arbitration process from the standpoints of the arbitrators, attorneys, parties and witnesses. In addition to discussing the benefits and drawbacks of arbitration, the author highlights the organization of the various forums and the procedure on how to file a claim. This book contains a useful chapter on preparing for arbitration hearings, including how to organize evidence and handle witnesses. Pertinent documents, letters and proposed statutes issued since *McMahon* are included as exhibits.

12. MASSACHUSETTS BAR ASSOCIATION, *FUNDAMENTALS OF SECURITIES ARBITRATION* (1992).

A compendium of information prepared for a 1992 Massachusetts Bar Association education program is assembled into this source. Included in the Section I discussion of arbitration forum rules and procedures are materials written by Robert S. Clemente, Director of Arbitration at the NYSE, and Deborah Masucci, Vice President of Arbitration at the NASD. Section II includes articles and viewpoints from both sides of the securities arbitration bar.

13. THOMAS H. OEHMKE, *OEHMKE COMMERCIAL ARBITRATION* (1995).

A comprehensive and up-to-date treatise that refers to statutes, case law, AAA rules, customs and procedures. Part 5 of Chapter 56 discusses the arbitrability of securities claims.

14. NORMAN S. POSER, *BROKER-DEALER LAW AND REGULATION: SECURITIES ARBITRATION* (revised ed. 1997).

Part B of *Broker-Dealer Law and Regulation* provides a comprehensive discussion and analysis of the law and practice relating to the arbitration of disputes between brokerage firms and their customers. It also covers arbitration of intra-industry

disputes: i.e., disputes between brokerage firms and their employees, and between brokerage firms. The subjects discussed include an overview of the Federal Arbitration Act, including federal jurisdiction under the Act; the rules and procedures of the principal securities arbitration forums, including the National Association of Securities Dealers; arbitrability of securities disputes; defenses against arbitrability, including fraud in the inducement, unconscionability, waiver and statute of limitations; awards, including punitive damages, attorneys' fees, prejudgment interest, and collateral estoppel and res judicata effect of arbitration awards; and judicial review of arbitration awards. The book also includes material on mediation of securities disputes.

15. JAMES E. BECKLEY ED., *SECURITIES ARBITRATION 1996* (PLI Corp. Law & Practice Course Handbook Series No. B-949, 1996).

This is a two-volume series published annually. Faculty members and practitioners specializing in securities arbitration examine issues of current interest and provide practical insights. The 1996 volumes also include responses to the Ruder Report.

