The Betrayal of McMahon

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Abstract

There is controversy over awarding punitive damages by arbitration in securities disputes. Securities disputes are unique because the vast majority of such disputes are filed at Self Regulatory Organizations (“SROs”) which are subject to SEC oversight. However, other securities disputes are filed at the American Arbitration Association (“AAA”), which is not subject to SEC oversight. As a result differing rules evolved for SRO arbitrations than those applicable at the AAA. No SRO rule directly authorized punitive damages but section 31(d) of the Uniform Code of Arbitration prohibits limiting the ability of arbitrators to make any award. Whereas a AAA rule specifically provided that arbitrators may award any remedy or relief which the arbitrators deem just and equitable. Predictably, the turmoil over punitive damages continued in the courts.

The Ruder Committee Report proposed the imposition of a cap on punitive damages of $750,000. Even if the SEC approved the rigid cap rule in a filing by the National Association of Securities Dealers (“NASD”), the question arises where is the legislative authorization to deprive an investor of relief otherwise available in court? The Supreme Court through McMahon gave an investor the ability to obtain in arbitration whatever relief was available in court, which the Ruder Report’s cap rule clearly violates. The rigid cap rule must be rejected in view of the fact that it bears no reasonable relationship to compensatory damages, its unilateral imposition by an SRO subjects it to questionable validity, it is strongly opposed by the public, it is not imposed at the AAA or at the other SRO arbitration forums, it violates Section 31 of the Uniform Code of Arbitration, it buttresses the argument that the pre-dispute arbitration agreement has become an unenforceable contract of adhesion, it rekindles public distrust of the SRO arbitration process, it violates the spirit under which McMahon was decided, and there are less objectionable ways to solve the securities industry’s fears of a runaway punitive award.

KEYWORDS: securities arbitration, punitive damages
The controversy over the awarding of punitive damages by arbitrators is not limited to securities disputes. Other industries, businesses and professions have also wrestled with the propriety and effects of punitive damage awards. What makes securities arbitration somewhat unique, however, is that the vast majority of such disputes are filed at Self Regulatory Organizations ("SROs"), such as the National Association of Securities Dealers ("NASD") and the New York Stock Exchange ("NYSE"), which are subject to the oversight of the Securities and Exchange Commission ("SEC"). Some securities disputes are also filed at the American Arbitration Association ("AAA"), which is not subject to SEC oversight.

As a result, differing rules evolved for SRO arbitrations than those applicable at the AAA. Indeed, before 1977, many differences also existed among the arbitration rules of the various SROs. Accordingly, with SEC blessing, the Securities Industry Conference on Arbitration ("SICA") was created in 1977 to, inter alia, bring uniformity to the SRO arbitration process. Shortly after its creation, SICA developed a Uniform Code of Arbitration ("Uniform Code" or "U.C. Arb."), which was adopted by all of the participating SROs. Since then, SICA has met regularly and continues to monitor the performance of SRO arbitration, amending the Uniform Code as the need arises. The SEC and the AAA, among others, have been regularly invited guests at SICA meetings.

To a large extent, uniformity of SRO arbitration procedures has been achieved. This uniformity, together with SICA's diversified composition and open discussion of issues over the past twenty
years, has gone a long way towards dispelling mistrust and anxiety on the part of public investors, the courts and regulators about the fairness of the arbitration process.\(^2\) Unfortunately, recent events threaten to undermine SICA's efforts toward maintaining uniformity. One such divisive issue is the awardability of punitive damages in arbitration.

The Garrity Prohibition

In 1976, the year before SICA was created, the New York Court of Appeals rendered its decision (4-3) in *Garrity v. Lyle Stuart, Inc.*,\(^3\) which prohibited arbitrators from awarding punitive damages, "even if agreed upon by the parties."\(^4\) This decision took on added significance because many pre-dispute arbitration agreements contained a New York choice of law clause, regardless of where the customer resided or the transaction took place. Initially, however, the issue of punitive damages was not that pressing, because before 1987, arbitration was largely voluntary on the public's part. That changed with the Supreme Court's decision in *Shearson American Express, Inc. v. McMahon*,\(^5\) which upheld the enforceability of pre-dispute arbitration agreements as to claims under the Securities Exchange Act of 1934 and forced most public customers into arbitration. Thus, after *McMahon*, greater focus was placed upon the *Garrity* decision, and its extra-territorial effect through the use of a New York choice of law clause.

Indeed, because various restrictive conditions were beginning to creep into pre-dispute securities arbitration agreements, in 1989 SICA amended §31(d) of its Uniform Code to prohibit any condition in pre-dispute arbitration agreements that "limits the ability of arbitrators to make any award."\(^6\) Despite that amendment, however, no SRO rule directly authorized punitive damages, whereas a AAA rule specifically provided that arbitrators may award "any


\(^4\) 40 N.Y.2d at 357, 353 N.E.2d at 795, 386 N.Y.S.2d at 833.


\(^6\) EIGHTH REPORT OF THE SECURITIES INDUSTRY CONFERENCE ON ARBITRATION 24 (June 1994) [hereinafter *Eighth Report*].
remedy or relief which the arbitrators deem just and equitable and within the scope of the agreement of the parties . . . ."7

In 1991 the U.S. Court of Appeals for the Second Circuit, in Fahnestock v. Waltman,8 affirmed the dismissal of a punitive damage award issued by a NYSE panel, noting that the result might have been different if the NYSE’s rules on arbitral authority were as broad as the AAA’s.9 In response to the Fahnestock reference regarding arbitral authority, SICA added a new subdivision (h) to section 28 of the Uniform Code which provided that arbitrators could grant any remedy or relief that the arbitrators “deem just and equitable and that would have been available in a court with jurisdiction over the matter.”10 Unfortunately, no SRO board approved this change, largely due to the strong lobbying of the Securities Industry Association (“SIA”).

Predictably, the turmoil over punitive damages continued in the courts. In 1994, both the NYSE and the NASD announced plans to address this and other troublesome issues facing SRO arbitrations. The NYSE held a two-day symposium where these issues were openly debated by a wide spectrum of leading experts in the field and, based upon such discussions, issued recommendations in the form of a Report.11

The NASD also sought to calm the troubled waters, but in a different way. In the Fall of 1994, the NASD announced the formation of its own Arbitration Task Force (“Ruder Committee” or “Task Force”) to explore and propose broad reforms to the arbitration process, including the contentious issue of punitive damages.12

8. 935 F.2d 512 (2d Cir. 1991).
9. Id. at 519.
10. EIGHTH REPORT, supra note 6, at 21.
12. The Ruder Committee was headed by Professor David S. Ruder, former Chairman of the SEC, and included distinguished practitioners and academics, most of whom had a background in the securities industry. Of the eight Task Force members, one represented investors, two were senior executives at brokerage firms, and three were lawyers in firms representing brokerage firms. See Scot J. Paltrow, NASD Panel Calls For Big Changes in Arbitration of Investor Disputes, L.A. TIMES, Jan. 23, 1996, at 1.
The practical effect of this action by the NASD was to preclude SICA from seeking a solution to the punitive damage maze, because of the NASD's position to defer further discussion of this issue at SICA pending the issuance of its Task Force's findings.

**Intervention of Mastrobuono**

In 1995 the Supreme Court decided *Mastrobuono v. Shearson Lehman Hutton, Inc.*\(^{13}\) *Mastrobuono* involved a punitive damage award by a NASD panel under an arbitration agreement which contained two seemingly inconsistent clauses: a New York choice-of-law provision and a clause broadly relegating *any controversy* between the parties to arbitration.\(^{14}\) Neither of these clauses referred to punitive damages. In reversing the lower courts, the Supreme Court allowed the punitive award to stand, noting that the two controversial clauses created an ambiguity as to the parties' intent about punitive damages; and, relying on a rule of contract interpretation, reasoned that where an ambiguity exists, it will be construed against the party that drafted it, in this case Shearson.\(^{15}\)

The SEC, in its *amicus brief* in *Mastrobuono* urged the Supreme Court to clarify the effect of §31(d) of the Uniform Code (Rule 21(f)(4) of the NASD Rules of Fair Practice) prohibiting any condition in arbitration agreements that "limits the ability of the arbitrators to make any award."\(^{16}\) The Court, however, avoided the issue by noting that the agreement in *Mastrobuono* was signed in 1985, long before the 1989 amendment to §31, but also acknowledged that, absent any ambiguities, the parties can agree to restrict punitive damages.\(^{17}\)

What, therefore, would prevent counsel for the securities industry from tightening their brokerage agreements by adding language prohibiting punitive damages? Such a unilateral insertion into what is already a contract of adhesion\(^ {18}\) would hardly constitute the free and willing *consent* on the part of the investing public intended

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14. Id. at 1214.
15. Id. at 1219.
16. Id. at 1218 n.6.
17. Id. at 1216.
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by Mastrobuono. Furthermore, any such amendments seeking to restrict an arbitrator’s power to grant punitive damages are sure to run afoul of the clear language of §31(d) of the Uniform Code which prohibits limiting “the ability of arbitrators to make any award”.

In the fall of 1996 the New York Appellate Division, First Department, in Mulder v. Donaldson Lufkin & Jenrette, citing Mastrobuono, set the stage for a new era by lifting the Garrity prohibition against arbitrators awarding punitive damages. Thus, unless the parties have clearly and freely agreed otherwise, punitive damages are broadly awardable in arbitration, subject to appropriate state restrictions, if any.

The Ruder Committee Recommendations

In early 1996, the Ruder Committee, whose meetings and deliberations were shrouded in secrecy, issued its report (“Ruder Report”) which was over 150 pages in length and contained scores of recommendations—most of which are quite constructive. Unfortunately, the two most significant recommendations—(i) the imposition of a cap on punitive damages of two times compensatory damages, or $750,000, whichever is less (rigid cap rule); and, (ii) the elimination of the so-called six year rule—met with significant

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19. See supra note 6 and accompanying text. See also joint NASD/NYSE Information Memo/Notice to Members 95-16, which advised their members that they may not include provisions in customer agreements which can be construed as restricting or limiting the ability of customers to arbitrate or arbitrators’ powers to issue awards (on file with the Fordham Urban Law Journal).


22. The so-called six year rule stems from Section 4 of the Uniform Code of Arbitration and it sets a six year time limitation for the submission of a claim to arbitration from the time of the occurrence or event giving rise to the claim. EIGHTH REPORT, supra note 6, at 9. It was never intended as a bar to the claim in court and was inserted merely as a matter of administrative convenience at a time when: (i) arbitration was basically voluntary on the public’s part; (ii) there were no formal discovery rules; and, (iii) limited partnerships, which have been the subject of much litigation since the late 1980’s were not contemplated. See NYSE SYMPOSIUM, supra note 11, at 1534. Unfortunately, some courts have interpreted the six year rule as barring such claims. Id. To solve this misunderstanding, SICA, on July 12, 1996, unanimously agreed to a bright line test as to when the six year period began; and, if the claim was not eligible for submission to arbitration, it would survive to be heard in court. See
opposition at SICA and elsewhere, including all of the Public Members of SICA.\textsuperscript{23}

At a meeting on January 28, 1997, the Board of Governors of the NASD approved, in concept, an amendment regarding the six year rule that more resembled the solution agreed to at SICA than the Ruder Committee's recommendation;\textsuperscript{24} and, for this, the NASD Board of Governors is to be commended. Unfortunately, however, despite significant opposition, the NASD Board of Governors continued to press for the rigid cap rule.\textsuperscript{25} By way of comparison, no other SRO, nor the AAA has placed or (to this author's knowledge) is considering a similar cap on punitive damages.\textsuperscript{26} Even the NASD's timing is awkward, seeking to impose this restriction on the public after the \textit{Mastrobuono} and \textit{Mulder} cases clearly sanctioned the public's right to receive punitive damages in arbitration.

From the investor's point of view, a rigid limit of $750,000 must be rejected out of hand, since it is totally inadequate in situations

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\textsuperscript{23} The opposition by the Public Members has been expressed to the NASD on numerous occasions, including: (i) the SICA meeting held at Fordham Law School on February 8, 1996; (ii) at the special SICA meeting held at the NASD on November 8, 1996; and, (iii) in a joint letter on December 9, 1996 to Chairman Daniel P. Tully, of the Board of Governors of the NASD (on file with the Fordham Urban Law Journal). See also Reactions to Ruder Report, \textit{SEC. ARB. COMMENTATOR}, March, 1996, at 1; \textit{PIABA Conference: Ruder Commission Issues}, \textit{SEC. ARB. COMMENTATOR}, Nov. 1996, at 1; Thomas J. Stipanowich, \textit{NASD Should Reconsider Its Punitive Cap}, 15 \textit{ALTERNATIVES} 13 (Feb. 1997).


\textsuperscript{25} See supra notes 22-23 and accompanying text. See also \textit{NASD Parent Board Ratifies Punitive Caps Proposal}, \textit{SEC. ARB. COMMENTATOR}, Feb. 1997, at 4 [hereinafter Punitive Caps Proposal].

\textsuperscript{26} See Katsoris, \textit{Delicate Compromise}, supra note 22, at 29.
involving large compensatory awards. In this regard, the rigid cap rule is unlike the tort reform bill enacted last year in Congress—and rejected by the President—in that said tort reform bill did not have an arbitrary rigid ceiling, but rather sought to impose a flexible punitive damage limit of $250,000 or two times compensatory damages, \textit{whichever is greater}.\footnote{See Neil A. Lewis, Democrat is Disputing President on Lawsuits, N.Y. TIMES, Mar. 20, 1996, at D23. Interestingly, \textit{a recently} sponsored products liability bill \textit{proposes} to cap punitive damages at \textit{either} $250,000 or two times compensatory damages, \textit{depending on the size of the business defendant}; however, because the American Bar Association \textit{does not support} broad federal products liability legislation, it \textit{will oppose} the new bill. \textit{See Kenneth Jost, Tort Issues Resurrected, }ABA JOURNAL, March 1997, at 18.} The Task Force seeks to justify its two tiered cap, whichever is \textit{lower}, saying that it \textit{will protect broker-dealers from \textquoteleft runaway\textquoteright awards} that have \textit{no relationship} to compensatory damages.\footnote{See \textit{Ruder Report}, supra note 21, at 43 (emphasis added).} Yet, the Task Force fails to apply that \textit{same} standard to its own proposed remedy. For example, what \textit{relationship} does a $750,000 punitive damage award have to a $20 \textit{million} compensatory award? To impose an arbitrary cap on punitive damages in arbitration which bears no relationship to the injury inflicted and which is not similarly imposed in court condones unconscionable conduct and relegates arbitration to a second class forum—a result never intended by \textit{McMahon}.\footnote{See Katsoris, \textit{Delicate Compromise,} supra note 22, at 29. \textit{See also Leslie Eaton, Arbitration Rules Would Give Some, Take Some, }N.Y. TIMES, Nov. 17, 1996, at 3 [hereinafter Eaton].}

It has also been suggested that the Ruder Report is a mosaic of compromised remedies, delicately balanced by the Task Force to forge consensus in resolving the many differing problems prevalent in SRO arbitration, and that a challenge to any of the parts would destroy the cohesiveness of this mosaic.\footnote{\textit{See also} Eaton.} Indeed, it has more recently been suggested that the two most significant and controversial issues covered by the Ruder Report—the six year rule and the punitive damage cap—were paired against each other. \textit{\textquoteleft We believe the compromise we have finally gotten goes part way to satisfying both of our constituencies—investors and member firms . . . [I]t does not give either side everything they want."} In point of fact, neither of the Ruder Committee's recommendations involving the six year rule or the cap on punitive damages favor the public. Not only should the six year rule never have been enacted, but the
solution to its dilemma was resolved by consensus within SICA itself, whereas the NASD’s rigid cap rule clearly favors the industry, so where is the quid pro quo? Moreover, assuming arguendo that there is quid pro quo, it is hardly justifiable to suggest to someone who has filed a timely claim in arbitration—regarding a devastating loss suffered by the outrageous, unethical and fraudulent conduct of an unscrupulous broker or firm—that their claim for punitive damages was bargained away by a task force eager to solve a totally unrelated issue regarding tardily filed claims.

In any event, even if the SEC approved the rigid cap rule in a 19b filing by the NASD, there is a serious question whether such a rule has validity and would be enforceable. Simply put, where is the legislative authorization to deprive an investor of relief otherwise available in court?

31. See supra notes 22-23 and accompanying text. See also SICA-Modified Version, supra note 24, at 4; Punitive Caps Proposal, supra note 25, at 4.

32. Under § 19(b) of the 1934 Act, each SRO shall file with the SEC any proposed rule or change in the rules of such self-regulatory organization. 15 U.S.C. § 78s(b)(1) (1988 & Supp. IV 1992). Moreover, no such “proposed rule change shall take effect unless approved by the Commission or otherwise permitted in accordance with the provisions of this subsection.” Id.

33. The inquiry will revolve around the Congressional delegation of authority to the SEC regarding securities arbitration and related federal and state issues. See 15 U.S.C. §78s(b)(i) (1988 and Supp. IV 1992). Authorizing the SEC to approve all SRO rule changes in arbitration is hardly a legislative mandate to involuntarily strip a claimant of relief otherwise available in court. Indeed, in the Prudential global settlement with the SEC, two important rights were waived: the respondent could not assert a defense of statute of limitations and the claimant could not claim punitive damages; but, participating in the procedure was optional. Securities and Exchange Commission v. Prudential Sec. Inc., C.A. No. 93-2164, 1993 WL 473189 (D.D.C. Oct. 21, 1993) Fourth Quarterly Report of Claims Administrator. See NYSE SYMPOSIUM, supra note 11, at 1575. Proponents of the rigid cap rule point to the $300,000 limit imposed by 42 U.S.C. § 1981a(b)(3) as support for the rigid cap rule. RUDER REPORT, supra note 21, at 43. Congressional enactment of such a statutory limit, however, has a narrow and specific application within the framework of the Civil Rights Act of 1964 and the Americans with Disabilities Act of 1990. It hardly constitutes Congressional authorization to the NASD to enact caps on its own initiative. Moreover, the rigid cap rule itself violates that very same Congressional statutory limit of $300,000 by limiting punitive awards to two times compensatory damages. See Markey Seeks Review on Mandatory Arbitration, WALL STREET LETTER, Feb. 10, 1997, at 10 [hereinafter Markey]. Still others have argued that the ability to collect punitive damages is not a “right” of the claimant, for it is rather intended to punish the wrong-doer; accordingly, the NASD can restrict this so-called right. To carry such an argument to its logical conclusion the NASD, absent enabling legislation, would have the power to restrict RICO (treble damages) or any other federally mandated multi-damage statute merely by amending its rules—a result hardly contemplated by the Supreme Court in McMahon. See Cole v. Burns Int'l Security Servs., No. 96-7042, 1997 WL 51684 (D.C. Cir. Feb. 11, 1997).
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The conventional wisdom underlying the broad embracement of arbitration by the Supreme Court in McMahon was an investor's ability to obtain in arbitration whatever relief was available in court. The Ruder Report's rigid cap rule clearly violates that mandate. Furthermore, such a unilateral imposition by an SRO of a rigid cap will undermine the public's perception of the fairness of SRO arbitration, and return us to pre-SICA days, when many suggested that the process was stacked against the public investor.

rights, the Court of Appeals in Cole emphasized that "[b]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." Id. at *15 (citing Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 481 (1989)). In any event, adoption of the rigid cap rule by the NASD will surely be challenged in the courts. See also Deborah Lohse, NASD Rule for Damages Is Criticized, WALL ST. J., Feb. 3, 1997, at C1.

34. See Eaton, supra note 29, at 3 (statement of Linda Feinberg, Esq., reporter to Ruder Committee). "The new rules are supposed to make sure investors can get in arbitration what they can get in court." Id. See also NYSE SYMPOSIUM, supra note 11, at 1532. "Limitations on what arbitrators can do that are not parallel to what judges can do would be hostile to arbitration as a full alternative dispute resolution system." Id. (statement of Catherine McGuire, Esq., Chief Counsel, Market Regulation of the SEC). In addition, "[the FAA] prohibits enforcement of a contractual provision that limits remedies available to customers if the remedies are available in court." Id. at 1584. "The way arbitration was sold to both the Supreme Court and the SEC was that essentially you have the same rights in arbitration as you would have in court." Id. at 1523 (statement of Boyd Page, Esq. one of the members of the Ruder Committee). See also Securities Exchange Act Release No. 34-26805, 43 SEC Docket 1417, 1427 (1989) "Agreements cannot be used to curtail any rights that a party may otherwise have in a judicial forum. If punitive damages, or attorneys' fees would be available under applicable law, then the agreement cannot limit parties' rights to request them, nor arbitrators' rights to award them." Id. See also U.C. Arb. § 31(d), EIGHTH REPORT, supra note 6, at 24 (prohibiting any condition in pre-dispute arbitration agreements that "limits the ability of the arbitrators to make any award"). See also U.C. Arb. § 28(h), EIGHTH REPORT, supra note 6, at 21 (providing that arbitrators could grant "any remedy or relief that the arbitrators deem just and equitable and that would have been available in a court with jurisdiction over the matter").

35. See Shearson American Express, Inc. v. McMahon, 482 U.S. 220, 243 (1987)(Blackmun, J., dissenting). "As even the most ardent supporter of arbitration would recognize, the arbitral process at best places the investor on an equal footing with the securities-industry personnel against whom the claims are brought. Furthermore, there remains the danger that, at worst, compelling an investor to arbitrate securities claims puts him in a forum controlled by the securities industry. This result directly contradicts the goal of both securities Acts to free the investor from the control of the market professionals. The Uniform Code provides some safeguards but despite them, and indeed because of the background of the arbitrators, the investor has the impression, frequently justified, that his claims are being judged by a forum composed of individuals sympathetic to the securities industry and not drawn from the public." Id. at 260-61. "The uniform opposition of investors to compelled arbitration and the overwhelming support of the securities industry for the process suggest
In the final analysis, such a rigid cap will be questioned by a justifiably suspicious public who will ask the obvious question: why is this restriction being imposed at an SRO forum and not at forums such as the AAA, where there is no punitive damage cap whatsoever? This inquiry takes on added significance when one considers that despite concerted efforts by the SEC, the SIA and SICA to insert the AAA as an alternate forum in securities arbitration agreements, the industry has ignored that plea, thus largely excluding the less restrictive AAA as an alternate forum.\(^{36}\)

**Alternative Solutions**

If the industry fears large punitive damage awards in arbitration (even when punitives reasonably relate to compensatory damages), then perhaps claims involving punitive damages of more than $750,000 should be removed from arbitration, either automatically or at the option of the respondent, and the entire matter returned to the courts where the parties have the procedural safeguard of an appeal more readily available.\(^{37}\)

Another possible solution would be to set a *threshold amount* for punitive damages in arbitration. If a panel exceeded the threshold amount the respondent would have the option to appeal the punitive award under an SRO appellate procedure before it became a final award, unless the claimant agreed to accept the threshold amount. Thus, the threshold amount would not be a cap, as recommended by the Ruder Report; instead, it would become a trigger for an appeal, with the cost of the appeal being borne by the respondent.

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36. At one point, the SEC, SICA and the SIA all endorsed the suggestion that the AAA be included as an alternative forum in brokerage account pre-dispute agreements. *See* Constantine N. Katsoris, *SICA: The First Twenty Years, 23 FORDHAM URB. L.J. 483, 525 (1996) [hereinafter SICA]. Such a suggestion, however, has little chance of adoption because of the securities industry's certain opposition to the AAA's lack of either a punitive damage cap or a six year rule.

37. It would be preferable to remove the entire case to court when punitive damages in excess of $750,000 are pleaded so as to avoid bifurcated proceedings—i.e., the compensatory damages phase tried in arbitration and the punitive phase tried in court. *See* Constantine N. Katsoris, *The Securities Arbitrators' Nightmare*, 14 FORDHAM URB. L.J. 3 (1986).
The suggestion that punitive damage awards in securities arbitration be appealable is not a new concept, and such an alternative solution was presented to SICA at its January 17, 1997 meeting in Los Angeles. Unfortunately, because of enormous industry pressure outside of SICA, this suggestion has been stalled. Indeed, so long as the NASD continues to dangle a rigid cap rule, there is no incentive for the SIA to seek reasonable alternatives.

Conclusion

Either of these alternative solutions—removal to court where punitive damages are pleaded in excess of $750,000, or an internal SRO appeal (where punitive damages are awarded in excess of the trigger amount)—would avoid the objections posed by a mandatory rigid cap suggested by the Ruder Report, while still affording a reasonable measure of protection for the securities industry. Most important, however, is that neither of these alternative solutions would violate the covenant that a public investor receive the same relief in arbitration as is available in court, albeit under different procedures. It is rather puzzling why the NASD has adopted an inflexible Maginot Line mentality as to the rigid cap rule. It is even more puzzling why the SEC would even consider approving the rigid cap rule in a 19b filing.

38. See Katsoris, Tower of Babel, supra note 18, at 599-600. Presumably, the appellate process could instead go through the courts, but that approach would no doubt require an amendment to the Federal Arbitration Act. See NYSE SYMPOSIUM, supra note 11, at 1669.

39. See Joint Memorandum presented to SICA by Professors Thomas J. Stipanowich and Constantine N. Katsoris, Public Members at SICA (Jan. 7, 1997)(on file with the Fordham Urban Law Journal). At the SICA meeting on November 8, 1996, a subcommittee (including the two aforementioned Public Members) was appointed to draft alternative solutions to the punitive damage dilemma. Numerous other suggestions were also considered by the subcommittee, such as a de novo retrial on the punitive issue in court if the punitive damage award in arbitration exceeded a certain amount; however, such suggestions were rejected as being more burdensome than the SRO appeal process. See also Saika v. Gold, 56 Cal. Rptr.2d. 922, 927 (Cal. Ct. App. 1996) (holding that a clause in a doctor-patient agreement providing for a trial de novo in court in the event an arbitration award exceeded $25,000 was unenforceable against a patient for public policy reasons). The attractiveness of the internal appeal process is that it provides the industry with an additional measure of protection from a runaway punitive award, yet preserves the rights of claimants to obtain relief similar to what is available in court.


41. See supra notes 21-28 and accompanying text.

42. See supra note 29-31 and accompanying text.

43. The Maginot Line was a mighty system of fixed fortifications along the eastern frontier of France. See THE COLUMBIA ENCYCLOPEDIA 1658 (5th ed. 1993).
Many of the Ruder Report recommendations—i.e., a list selection process where the parties choose the arbitrators from a designated list instead of having the arbitrators selected by the SRO—do not require uniformity among the SRO's. As to a cap on punitive damages, however, uniformity among the SRO's is required; otherwise, it would lead to extensive and often confusing forum shopping. With this in mind, if the NASD rigid cap rule is approved by the SEC, will the SEC then press for uniformity among the SROs on this point? Should that happen, it would establish a dangerous precedent whereby the NASD unilaterally changes the rules, and the other SROs are expected to follow.

Such a scenario of following the first SRO to file is hardly reassuring to the investing public no matter how well meaning; for, what other "directives" can the public expect in the future from the Ruder Committee, or any other SRO appointed task force or committee? Moreover, it would surely lead to the demise of SICA, which would be most unfortunate, because it was SICA that

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44. Indeed, the Ruder Report itself suggests that its recommendations "will be most effective if applied uniformly and consistently by all self-regulatory organizations (SROs) that offer arbitration forums." RUDER REPORT, supra note 21, at 1.

45. See NYSE SYMPOSIUM, supra note 11 (statement of Catherine McGuire, Esq., Chief Counsel, Market Regulation of the SEC). "SROs are dominated by industry. I don't mean their staffs. I think the New York Stock Exchange has a board half public, half not public. The NASD's board, however, is more largely dominated, so any rules they adopt may reflect or appear to reflect, their affiliation with industry, which is usually in the defense position. I think this is not where I would start a laboratory for tort reform. I don't think it would be perceived as balanced." Id. at 1592. See also Katsoris, SICA, supra note 36, at 534. "From time to time, it has been suggested that, because the Uniform Code has been extensively updated since McMahon, SICA's role has diminished, implying that like old soldiers, it should fade away. The scenario then suggests, in the interest of uniformity and economy, that all the SROs collapse their public arbitration programs into one, leaving the public securities arbitration function solely to the NASD. This suggestion is ludicrous because SROs by their very makeup, presently lack the structural independence necessary to insure public confidence. Indeed, as the arbitrable issues expand (i.e., employment issues), and as the stakes grow (i.e., larger compensatory awards and punitive damages issues), the public will increasingly demand that the rules of battle be set by a truly independent group." Id. at 534.

46. See Constantine N. Katsoris, SICA: Does the Bell Toll for Thee?, SEC. ARB. COMMENTATOR, Jan. 1994, at 1. Under the present system, SICA, an independent body, proposes rule changes. The SRO boards approve and file them with the SEC. The SEC then decides what the rule will be. By that time, all participants have had at least two bites at the apple: the public at the SICA level, and at the 19(b) filing; the various SROs at the SICA level, and at their board's level; the industry at the SICA level, at the SRO level (where it lobbies intensely), and again at the 19(b) filing; and, the SEC at the SICA level (where SEC representatives and others are invited guests), and as the final word at the 19(b) filing. See generally Katsoris, SICA, supra note 36. This pattern for rule changes in securities arbitration should be preserved. As an
helped eliminate the widespread distrust of arbitration on the part of the public, the legislatures and the courts.\textsuperscript{47} In many ways, SICA can be compared to the Financial Accounting Standards Board\textsuperscript{48} in that: both were born out of crisis; both have been independent; both involve SEC oversight or participation; and, both are a buffer between the investing public on the one hand and the securities or business community on the other.\textsuperscript{49} SICA cannot be replaced by the SIA, or PIABA (the claimants’ bar),\textsuperscript{50} or any of the SROs or their committees, or any combination thereof, for each basically has its own special interests or constituencies to serve.

\textsuperscript{47} In 1953, the United States Supreme Court in \textit{Wilko v. Swan}—expressing some mistrust of arbitration—concluded that pre-dispute arbitration agreements would not be enforceable as to issues arising under the Securities Act of 1933. 346 U.S. 427, 438 (1953). In 1976 the New York Court of Appeals in \textit{Garrity v. Lyle Stuart, Inc.}, expressing similar distrust of arbitration, held that arbitrators lacked authority to award punitive damages. 353 N.E.2d 793, 794 (1976). SICA was created in 1977. It is noteworthy that in 1987 the majority opinion in \textit{McMahon} reflected upon the previous mistrust of arbitration as follows: “[T]he mistrust of arbitration that formed the basis for the Wilko opinion in 1953 is difficult to square with the assessment of arbitration that has prevailed since that time. This is expressly so in light of the intervening changes in the regulatory structure of the securities laws.” 482 U.S. 220, 223 (emphasis added). Similarly, in a dissenting opinion in \textit{McMahon}, Justice Blackmun observed that “[i]t is true that arbitration procedures in the securities industry have improved since Wilko’s day. Of particular importance has been the development of a code of arbitration by the Commission with the assistance of representatives of the securities industry and the public.” \textit{Id.} at 258. Moreover, Justice Blackmun reasoned that:

This code has been used to harmonize the arbitration procedure among the SROs. Constantine N. Katsoris, \textit{The Arbitration of a Public Securities Dispute}, 53 \textit{Fordham L. Rev.} 279, 283-384 (1984). As the Commission explained: [T]his [Code] marks a substantial improvement over the various arbitration procedures currently being utilized by the securities industry and represents an important step towards establishing a uniform system for resolving investor complaints through arbitration. \textit{Id.} at 258 n.16 (emphasis added). It is respectfully suggested that the single most important intervening event bridging the mistrust of arbitration expressed by both \textit{Wilko} and \textit{Garrity}, and the subsequent confidence evidenced in \textit{McMahon} was the creation of SICA in 1977.


\textsuperscript{49} \textit{See} Katsoris, \textit{Level Playing Field, supra} note 2, at 476.

\textsuperscript{50} The Public Investors Arbitration Bar Association (“PIABA”) is an association of attorneys representing investors and others in the resolution of their claims against the securities industry.
SICA on the other hand has been a melting pot of special interests, and that is why it has commanded widespread credibility.51

Arbitration was not intended to be used as a Trojan Horse from which to deny relief otherwise available in court.52 That was not the foundation upon which McMahon was decided. If brokerage agreements force the public investor into SRO arbitration with an arbitrary cap on punitive damages imposed by the very same SRO at which the hearing is held, then we have arrived at the point where, in reality, the fox is guarding the henhouse; and, the time has come to revisit the issue of whether securities arbitration should once again become voluntary, as it was before McMahon.53

Accordingly, in view of the fact that it bears no reasonable relationship to compensatory damages,54 its unilateral imposition by an SRO subjects it to questionable validity,55 it is strongly opposed by the public,56 it is not imposed at the AAA or at the other SRO arbitration forums,57 it violates §31 of the Uniform Code,58 it buttresses the argument that the pre-dispute arbitration agreement has become an unenforceable contract of adhesion,59 it rekindles public distrust of the SRO arbitration process,60 it violates the spirit under which McMahon was decided,61 and there are less objectionable ways to solve the securities industry's fears of a runaway punitive award,62 the rigid cap rule must be rejected.

51. An example of SICA's independence was evident regarding the thorny issue of non-attorney representation—a subject largely avoided by many bar associations. Despite some unfavorable publicity and pressure, SICA did not hesitate to seek a solution. It held meetings at both ends of the country, openly solicited comments, and finally wrote a well respected report which was published and widely distributed. See Report of the Securities Industry Conference on Arbitration on Representation of Parties in Arbitration by Non-Attorneys, 22 FORDHAM URB. L.J. 503 (1995).

52. See Katsoris, Tower of Babel, supra note 18, at 593-96.

53. See Constantine N. Katsoris, Should McMahon Be Revisited?, 59 BROOK. L. REV. 1113, 1147 (1993). Moreover, such a restriction on arbitral authority would itself violate U.C. ARB. § 31(d) which prohibits arbitration agreements that limit “the ability of the arbitrators to make any award.” See Eighth Report, supra note 6, at 24. See also Markey, supra note 33, at 10.

54. See supra note 27 and accompanying text.

55. See supra note 33 and accompanying text.

56. See supra note 23 and accompanying text.

57. See supra note 26 and accompanying text.

58. See supra note 19 and accompanying text.

59. See supra note 18 and accompanying text.

60. See supra note 35 and accompanying text.

61. See supra notes 34-35 and accompanying text.

62. See supra notes 37-40 and accompanying text.