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# ARTICLE

## PILLARS OF CIVILIZATION: ATTORNEYS AND ARBITRATION

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### I. INTRODUCTION

Arbitration has traditionally possessed the benefits of being a quick, efficient and economical alternate forum for resolving disputes. However, for reasons discussed below, securities arbitration now finds itself burdened with certain encumbrances that may impede these benefits.

These encumbrances include the expansion of disclosure, discovery, and awards. As a consequence, the arbitration process has begun to take on many of the aspects of the judicial system. While some of these aspects may be necessary, and indeed even enhance the system, others may serve only to undermine the basic reasons for arbitration's success in settling disputes throughout the centuries.

What follows is a discussion of the past and the present circumstances surrounding arbitration and the impact each has had on the other.

### II. HISTORICAL BACKGROUND

The year is somewhere around 350 B.C. The place is Greece, in and around the city of Athens. In this time and place lived a

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man who has come to be recognized as one of the greatest thinkers of all time: Aristotle.<sup>1</sup>

The writings and teachings of this philosopher have been discussed, quoted, and debated for over two thousand years. The wisdom of his thoughts has been proven by the very fact that his premises have endured for over two millennia. Aristotle's concept of ethics as it related to humanity was that man accomplished the greatest good and was happiest when completely using that which makes him human.

This philosophy extended to politics as well, for in politics, Aristotle believed the state existed to enable its citizens to live happy and virtuous lives. Aristotle's concept of justice embodied his view of the universe as an ideal world where all would be fair and impartial. He believed that equity, defined as "fairness and impartiality" rather than the law, was the method by which disputes should be resolved. In the words of Aristotle, "Equity is justice in that it goes beyond the written law. And it is equitable to prefer arbitration to the law court, for the arbitrator keeps equity in view, whereas the judge looks only to the law, and the reason why arbitrators were appointed was that equity might prevail."<sup>2</sup>

Athens, the home of this great world philosopher Aristotle, is also the home of one of the greatest architectural achievements in the world, the Parthenon. Constructed in the fifth century B.C. as a temple in honor of Athena, the Goddess of Wisdom and Justice, its design and subsequent execution were considered both mathematically and geometrically to be of the utmost perfection. The Parthenon has had a brilliant history. However, what follows is a glimpse of its downfall, not its brilliance.

The Parthenon remained intact and glorious for over a thousand years. However, in 1687, the center portion was destroyed by an explosion during an attack on Athens involving the Turks and Venetians. In the eighteenth century, the beauty of the remains was recognized once again. Since that time,

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1. References to Greek history and philosophy are from THE COLUMBIA ENCYCLOPEDIA (Barbara Ann Chernow & George A. Vallasi eds., 5th ed. 1995).

2. Rudolphe J.A. DeSeife, *Practice Guide* §2:02, in GABRIEL M. WILNER, DOMKE COMM. ARBITRATION (rev. ed. 1999) (quoting Aristotle).

reconstruction using as many of the original existing fragments as possible has been an ongoing endeavor.

This reconstruction has been hindered by erosion and decay resulting from the chemicals and pollutants of civilization. The Parthenon, a survivor of time, attack, and battle, now finds itself crumbling and in need of scaffolding and protection from the destructive forces of air traffic, tourists, and other scavengers and parasites.

The Parthenon is in danger of extinction. Aristotle, whose footsteps echoed across the grounds of the Parthenon and whose thoughts echoed those of Athena, was deeply concerned about justice and the manner by which he felt justice would be best served—arbitration and equity. These principles of justice were embodied in the goddess Athena, whose temple, the Parthenon, noted for its magnificent pillars, tries nobly to survive the destructive forces of civilization.

### III. EQUITY AND THE NEW YORK STOCK EXCHANGE

Pillars similar to those of the Parthenon adorn the facade of the New York Stock Exchange. The Exchange has been both a market place for capital formation and a regulator of its participants since 1792. The Exchange has also been a forum for the resolution of disputes through arbitration, based on the principles of equity, since 1817.<sup>3</sup>

In 1817, the disputes arbitrated at the Exchange were limited to those between members involving the purchase of securities. The process was considered so successful that in 1872, the Exchange made arbitration available to customers of members for disputes arising out of the business of its members.<sup>4</sup> The next hundred years or so were relatively quiet and saw few substantive changes. Since public awareness of the availability of arbitration

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3. See Deborah Masucci & Robert S. Clemente, *Securities Arbitration at Self-Regulatory Organizations: NYSE and NASD Administration and Procedures*, in *SECURITIES ARBITRATION* 1996, at 99, 105 (PLI Corp. Law and Prac. Course Handbook Series No. B4-7147, 1996) (outlining Exchange developments in the nineteenth century).

4. *Id.*

was limited, few cases were filed, although some investors did select arbitration as the means to resolve their disputes.

It is important to remember that the reason individuals chose arbitration was to receive equity—the same equity that Aristotle wrote about when he expressed his preference for arbitration over the law thousands of years ago. These people did not want the constraints of a purely legal system. They chose arbitration so that the decision would not be limited by the law, but based instead on that which was fair and just for the particular situation.

This desire for equity was observed and noted in 1908 by distinguished businessman and member of the New York Stock Exchange, Henry Clews.<sup>5</sup> Mr. Clews expressed his views about the merit of arbitration as follows:

The large number of cases on record at the Exchange that have been amicably settled by arbitration within the past few years, in which law would have been formerly considered indispensable, seem to point to a period, probably not far distant, when arbitration will be the great and ultimate court of appeal in the large majority of civil cases. Several considerations will make it the most popular. It is cheaper, less complicated, not subject to vexatious delay; it is more equitable, and the members composing the Arbitration Committees are business men, who are quick to discern, accurate in perception, sound in judgment and decisive in drawing their conclusions on business principles.<sup>6</sup>

#### IV. ARBITRATION AND THE SECURITIES INDUSTRY

In 1987, public awareness of arbitration began a rapid climb as a result of a Supreme Court decision. In *Shearson/American Express, Inc. v. McMahon*,<sup>7</sup> the Court held that any claims alleging a violation of the Securities Exchange Act of 1934 could be compelled to arbitration if the customer had signed an agreement containing a pre-dispute arbitration clause.<sup>8</sup> Awareness continued to climb as the courts expanded the 1987

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5. See HENRY CLEWS, FIFTY YEARS IN WALL STREET 561-62 (New York, Arno Press 1973) (1908) (discussing the traditional advantages of arbitration).

6. *Id.*

7. 482 U.S. 220 (1987).

8. *Id.* at 234-39.

decision and made arbitration virtually the sole forum for resolving securities industry-related disputes.<sup>9</sup>

As a result of this awareness, the number of claims filed at the Exchange escalated dramatically, increasing more than three hundred percent to peak at 1,623 in 1988.<sup>10</sup> As the number of claims grew, so did the concerns of Congress, regulators, and consumer groups. These concerns focused on the perception that arbitration did not afford the same procedural and due process protection as those afforded in judicial proceedings. Over time, in an attempt to alter this perception, rule amendments were made to the Uniform Code of Arbitration.<sup>11</sup> These amendments for the most part codified existing practices that developed in response to due process concerns.

#### V. THE EFFECTS OF HAVING ARBITRATION RESEMBLE LITIGATION

All actions have consequences which expand like the ripples on a still lake. The codification of administrative practices has had an effect on arbitration that continues to ripple throughout the process. Arbitration, traditionally quick, efficient, and economical, suddenly has become burdened with increased costs and reduced efficiency. Collateral issues are litigated with increasing frequency in the courts. Divergent interest groups pull

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9. See *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) (upholding punitive damage award granted by arbitrators in the absence of express provision to the contrary); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23-31 (1991) (holding that a registered representative could be compelled to arbitrate his claim under the Age Discrimination in Employment Act, and reaffirming that the Exchange's arbitration rules provide adequate procedural safeguards of the rights of the parties); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (holding that pre-dispute agreements to arbitrate claims under the Securities Act of 1933 are enforceable, and overruling *Wilko v. Swan*, 346 U.S. 427 (1953)).

10. SECURITIES INDUSTRY CONFERENCE ON ARBITRATION [hereinafter SICA], TENTH REPORT 37 (1998) [hereinafter SICA TENTH REPORT]. The number of claims filed at all securities forums combined peaked at 6,097 in 1988, and at 7,274 in 1995. *Id.* at 38.

11. See SICA, SIXTH REPORT 1-2 (1989) (describing extensive changes made by SICA to the Uniform Code of Arbitration in line with concerns voiced by the Securities and Exchange Commission and Congress) [hereinafter SICA SIXTH REPORT].

at each other to make sure no one has an edge. Changes made to the arbitration rules as a result of litigation over contested issues have had unintended results in other cases.

One such unintended result concerned the "Time Limitation Upon Submission" rule, also known as the "six-year rule."<sup>12</sup> The intent of this rule was to exclude stale claims from arbitration. There was never any intent to preclude any other remedies available through the courts.<sup>13</sup> Nevertheless, when the timeliness of claims filed became an issue in disputes involving limited partnerships, the courts misinterpreted the six-year rule. Instead of recognizing that the six-year rule went to eligibility for submission to arbitration, the courts regarded the rule as a statute of limitations which, if expired, eliminated recourse to the courts. Furthermore, the courts bolstered their opinion by holding that the signing of a pre-dispute agreement to arbitrate was akin to an election of remedies, which also eliminated any recourse, including use of the courts.<sup>14</sup>

## VI. THE INFLUENCE OF THE LEGAL SYSTEM

While everyone argues over what to do to remedy the unintended effects resulting from amendments, arbitration, historically linked to equity, finds its identity merging with that of the courts. As a result, traditional arbitration may find itself in

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12. N.Y. STOCK EXCH. R. 603, in N.Y.S.E. GUIDE (CCH) ¶ 2,608 (1984). See also Uniform Code of Arbitration § 7, reprinted in SICA TENTH REPORT, *supra* note 8, at 14.

13. See Constantine N. Katsoris, *SICA: The First Twenty Years*, 23 FORDHAM URB. L.J. 483, 493 (1996) ("It was never the intent of SICA to invalidate claims by this rule, but merely to articulate that claims over six years old could not be submitted to an SRO forum for arbitration.").

14. See Seth E. Lipner & Kenneth E. Meister, *Eligibility (Six-Year) Rule*, 63 FORDHAM L. REV. 1533, 1534 (1995) (noting that New York courts have interpreted the "six-year rule" like a statute of limitations, but without any tolling provisions, and foreclosing arbitration as well as litigation after six years). SICA subsequently amended Section 4 of the Uniform Code of Arbitration to make clear that "any claim determined to be ineligible for arbitration may be filed in a court of competent jurisdiction by any Claimant, notwithstanding that a Submission Agreement had been filed, and as if no arbitration agreement had been entered into by the parties." Uniform Code of Arbitration § 4, *supra* note 11, at 13.

danger of extinction. While the Parthenon erodes as the forces of civilization attack its foundation with pollutants unknown at the time of its creation, so too does arbitration erode as the forces of the legal profession attack its foundation with what could also be considered "pollutants."

What are these pollutants which threaten the existence of arbitration? They are those things indigenous to the legal system which are being introduced with ever-increasing rapidity into the domain of equity. The question is not whether these legal elements are appropriate or inappropriate; rather, the question is whether the goal of arbitration, equity, is being enhanced or encumbered. And if encumbered, will the result be erosion and extinction?

Arbitration as a method of dispute resolution has a long, rich tradition behind it. It has been a well-established means to settle disputes quickly and economically, with origins tracing back to the dawn of humanity, when man first sought the wisdom of a tribal elder to determine who was wrong and who was right, rather than destroy his foe with his stone ax.<sup>15</sup> The tradition continued and throughout early history, arbitration was used to resolve disputes between buyers and sellers wherever commerce was highly developed.<sup>16</sup> There was no debate over who the arbitrator would be, and no attempt to have an advantage over your adversary by selecting an arbitrator who shared your point of view. There was no arguing about what could or could not be included with the pleadings. There was no arguing about discovery, depositions, or interrogatories. There was no arguing about objections, no badgering behavior, and no limitation of remedies.<sup>17</sup> To the contrary, each side sat down with the arbitrator and presented his story, that is, his version of the facts, as fully and completely as he could. At the conclusion, the arbitrator made his decision based on everything he had heard.

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15. See Rudolphe J.A. DeSeife, *supra* note 2, §2:01 (considering possible prehistoric origins of arbitration).

16. See *id.* (describing early examples of commercial arbitration).

17. See, e.g., Aaron Lucchetti, *NASD Faces More Criticism on Arbitration*, WALL ST. J., Aug. 26, 1998, at C1 (discussing a controversial cap on punitive damages awards proposed by the NASD).



Today, there is arguing about virtually everything. With the introduction of each new legal element or pollutant into the domain of equity, new problems are created and new arguments postured to deal with them. The pollutants themselves are easily identified and fall into three main categories: disclosure, discovery, and decisions.

It is noteworthy that in America, a few of the earliest examples of arbitration occurred within the trades, including the stock exchanges, with the Philadelphia Stock Exchange having arbitration as early as 1790.<sup>18</sup> In all of the early arbitration hearings, lawyers were for the most part excluded. Rules existed to exclude lawyers since, “[t]o permit participation by counsel as a matter of right would be fatal to the efficacy of arbitration.”<sup>19</sup> Now, it is the tools of lawyers that may be fatal to arbitration.

#### A. Disclosure

Prior to 1988, arbitrator selection was a reasonably simple procedure. Individuals who had been approved to serve as arbitrators were catalogued by city on 3" x 5" index cards. Each card noted the person's name, address, telephone number, social security number, and profession. Yellow cards signified security arbitrators and blue cards signified public arbitrators.<sup>20</sup>

An attorney from the Exchange Arbitration Department would appoint arbitrators for a particular claim by flipping through the box, locating the appropriate city, pulling the cards, and making phone calls to see who was available on the proposed date and had no conflicts with any of the parties. A “hearing notice,” listing the names of the arbitrators and stating their designation as “public” or “securities,” was sent to the parties. If the parties desired more information about any or all of the

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18. See Rudolphe J.A. DeSeife, *supra* note 2, §2:04 & n.1 (describing early arbitration tribunals in America).

19. Matter of Kayser (Skulnik), N.Y.L.J., Jan. 14, 1925, at 1417 (N.Y. Sup. Ct.) (Wagner, J.), *aff'd*, 212 A.D. 870, 208 N.Y.S. 885 (1st Dep't 1925).

20. Karen Kupersmith, *A Perspective on the Role of the Arbitrator in Securities Arbitration*, 31 WAKE FOREST L. REV. 297, 297 (1997) (reviewing early Exchange arbitration procedures).

arbitrators, they could make a request to the Arbitration Department, and the information would be provided if possible.<sup>21</sup>

This reasonably simple procedure underwent a major alteration following the *McMahon* decision in 1987. As a result of *McMahon* and arbitration becoming the sole forum for resolving securities industry-related disputes, many changes have occurred, both in the selection process for arbitrators and in the disclosures that arbitrators are required to make.<sup>22</sup>

The blue and yellow index cards have been replaced by "profiles," four-page forms that are entered into a computerized database. These profiles contain the information on the index cards.<sup>23</sup> They also contain information regarding the arbitrator's employment history, a narrative of the arbitrator's business and professional background, a list of all securities accounts and relationships with brokerage firms, and a description of arbitration experience and training.

However, the profiles do not cease there. Regulatory information and information about bankruptcies, prior lawsuits and arbitrations, felonies, and misdemeanors is requested and required to be disclosed. The parties are also able to request whatever additional information they desire about the arbitrators.

The requests about the backgrounds of the arbitrators have grown in both volume and depth of inquiry. It is not unusual to have requests that ask for detailed information regarding an arbitrator's personal history, past experience with litigation and the legal process, employer, duties as an employee, background

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21. *Id.*

22. See N.Y. STOCK EXCH. R. 607, in N.Y.S.E. GUIDE (CCH) ¶ 2,607 (1992) (governing designation of arbitrators); N.Y. STOCK EXCH. R. 610, in N.Y.S.E. GUIDE (CCH) ¶ 2,610 (1989) (mandating certain disclosures by arbitrators); See also *NYSE Arbitration Establishes Program to Offer Multiple Choices on Arbitrator Selection*, SEC. ARB. COMMENTATOR, Oct. 1998, at 7-8 (discussing changes to arbitrator selection procedures at the Exchange, including randomly generated lists and the availability of peremptory challenges); *List Selection Program Implemented on Schedule by NASDR Arbitration*, SEC. ARB. COMMENTATOR, Nov. 1998, at 6 (reporting the implementation of computerized selection procedures for arbitrators by the NASD, and its move to revise arbitrator profiles).

23. Some SRO forums have questionnaires of up to 16 pages.

and experience in the type of investment at issue and other types of investment, testimony if ever an expert witness, and involvement in other cases in different arbitration forums.

These requests closely resemble the type of information that an attorney would try to obtain using the *voir dire* procedure in the courtroom. The role of arbitrators, however, more closely resembles that of judges than of jurors.<sup>24</sup> It is, therefore, arguable that incorporating a courtroom-type procedure into the realm of arbitration may serve to undermine and weaken the very foundation of the pillars that hold the arbitration forum in place.

### B. Discovery

Some critics say that the *McMahon* decision was actually the downfall of securities arbitration. Prior to 1987, and traditionally since the earliest days of arbitration, there was little discovery, if any. Discovery, with its inherent costs and delays, is perhaps the single greatest incentive to avoid traditional litigation and choose arbitration.

However, after *McMahon*, compromises were made in response to those “trial lawyers” who lobbied and campaigned in the name of “the public investor” and his courtroom procedural safeguards.<sup>25</sup> One such compromise pertained to discovery. Trial lawyers argued that, if they were required to arbitrate as opposed to litigate, they must have access to full and formal pre-hearing discovery procedures.

Before this turn of events, arbitration was truly fast and efficient. Despite the lack of formal discovery processes, parties were able to prepare adequately their cases. Previously, the sole discovery provision required the parties to “cooperate in the voluntary exchange of such documents and information as will serve to expedite the arbitration.”<sup>26</sup> Rarely, and only when

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24. See SICA, THE ARBITRATOR'S MANUAL 34 (1996) (“Arbitrators are quasi-judicial officers ....”).

25. See Uniform Code of Arbitration § 20, *supra* note 11, at 25-27 (governing exchange of documents and information); SICA SIXTH REPORT, *supra* note 9, at 2 (noting amendments to the Uniform Code of Arbitration, § 20, to accommodate discovery).

26. N.Y. STOCK EXCH. R. 619 (1985) (amended 1995) (on file with the *Fordham Finance, Securities, and Tax Law Forum*).

warranted, could a party seek the arbitrators' intervention in obtaining necessary discovery.

Unfortunately, as this practice was not acceptable to those accustomed to formal discovery in litigation and the motion practice that accompanies it, the compromise regarding discovery led to the birth of the "pre-hearing" process. Accordingly, a new rule was implemented in 1989 to address the concerns of those wanting formal discovery.<sup>27</sup> While this new rule still required the parties to cooperate voluntarily,<sup>28</sup> a formal discovery procedure was added to the process.<sup>29</sup> The rule now provides a time frame for making and responding to discovery requests.<sup>30</sup> It also preserves the laudable, if impractical, requirements that the parties cooperate voluntarily and that "the parties shall endeavor to resolve disputes regarding an information request prior to serving any objection to the request".<sup>31</sup>

Stalemates over discovery continue to occur in spite of the new rule. In this situation, a party may request a pre-hearing conference. Initially, arbitration counsel, a neutral administrator whose job is to assist the parties and keep the case on track towards a swift resolution, intervenes to aid the parties in reaching a mutually agreed upon resolution of discovery disputes. At the Exchange, a well-seasoned staff attorney,<sup>32</sup> who has reviewed the pleadings and is familiar with the practical aspects of most types of claims and the documents generated by the securities industry, helps the parties resolve discovery disputes

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27. N.Y. STOCK EXCH. R. 619 (1989) (amended 1995) (on file with the *Fordham Finance, Securities, and Tax Law Forum*).

28. *See id.* (a).

29. Rule 619, as amended in 1989, was expanded into six subsections: (a) Requests for Documents and Information, (b) Document Production and Information Exchange, (c) Pre-Hearing Exchange, (d) Pre-Hearing Conference, (e) Decisions by Selected Arbitrator, (f) Subpoenas, and (g) Power to Direct Appearance and Production of Documents. *Id.*

30. *See* N.Y. STOCK EXCH. R. 619(e), *in* N.Y.S.E. GUIDE (CCH) ¶ 2,619 (1995) (as amended) (expanding provisions governing pre-hearing exchange of documents). Rule 619 preserves the calendar requirements for responses to information and documents. *Id.* (b).

31. *Id.* (b).

32. The Exchange staff attorneys' average experience in arbitration is approximately 13 years.

based upon what arbitrators have typically ordered in the past under similar circumstances.

Unfortunately, the intervention of the staff attorney does not always settle the parties' differences of opinions over what should be produced. As noted earlier, trial lawyers' familiarity with motion practice leads them in far too many cases to move towards the next step, a pre-hearing conference with an arbitrator. While in some instances it may be necessary for an arbitrator to intervene for the resolution of a discovery dispute, more often than not the party's true purpose in requesting an arbitrator is to provide a preview of their case theory. An attorney speaking at a seminar on arbitration not long ago stated that he used the pre-hearing conference for precisely that purpose and would even begin conferences by delivering what was essentially his opening statement.<sup>33</sup> Apparently, trial lawyers may be unable to remove themselves from the courtroom mindset, which focuses on gaining a psychological advantage. As such, this is a tactic far afield from the purpose of arbitration and the reason arbitrators are appointed.

Today, one often sees multiple discovery requests seeking in excess of fifty items. Yet once an arbitrator becomes involved and a pre-hearing conference is held, many of the items are withdrawn or agreed upon by the parties. When the issue of what should be produced is decided, the parties are able to accomplish their true purpose in seeking the pre-hearing conference: making motions and testing their theory of the case. Whether conducted over the telephone or before a panel, these pre-hearing conferences too often consume the better part of a day, which is neither efficient nor economical.

However, even these new "courtroom-like" procedures did not satisfy all the desires of litigators. Consequently, a call was made for required disclosure,<sup>34</sup> an experiment which was not successful in the courts. The underlying intent apparently was to

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33. Speaker's comments at *Arbitration Comes of Age*, PLI Securities Arbitration Seminar (1997).

34. Constantine N. Katsoris, *An Arbitrator's Perspective*, in SECURITIES ARBITRATION 1998, at 307, 312 (PLI Corp. Law and Prac. Course Handbook Series No. B0-001K, 1998) (noting that a call for required lists of documents has been made by various industry and investors' bar groups).

remove the arbitrators' discretion and impose an artificial burden upon one side or the other to produce an unreasonable and unnecessary amount of documents.

Initially, there was a proposal for documents to be produced according to "suggestive" lists that were usually very broad and dealt with claims brought both by investors and employees. However, trial lawyers remained dissatisfied. For the last several years there has been a drive toward mandatory disclosure. One major arbitration forum just obtained approval of a rule that contains extensive lists of "presumptively discoverable" documents.<sup>35</sup>

Not only does mandatory discovery undermine the basic principles of arbitration, it also undermines the arbitrators' authority. After all, requiring certain documents to be disclosed in every case or even in certain categories of cases reflects a lack of confidence in arbitrators' abilities. If arbitrators are not capable of deciding discovery issues, how can they possibly be trusted to decide the cases themselves?

One could surmise from what has happened recently that arbitration is nearing its end and that traditional litigation will once again prevail. That may be far from reality. In spite of the fact that trial lawyers continue their push for arbitration to mimic courtroom litigation, parties maintain their faith in the wisdom of the arbitrators and the usefulness of arbitration. Most plaintiffs' lawyers realize that time constraints and economics dictate that survival may not be possible if all cases are litigated. Defense lawyers, particularly those in-house, also know that they cannot afford to litigate most cases. This, coupled with the fact that most disputes are eventually settled, forces most trial lawyers to seek the benefits of arbitration.

The fact that discovery in arbitration is not as closely supervised as it is in court further complicates the efficiency of

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35. See Self-Regulatory Organizations; Order Granting Approval to Proposed Rule Change by the National Association of Securities Dealers, Inc. Creating a Discovery Guide for Use in NASD Arbitrations, Exchange Act Release No. 41,833, 64 Fed. Reg. 49,256, at 49,257 (Sep. 10, 1999) (granting permission to NASD Regulation to formalize the discovery process by creating a "Discovery Guide" which deems certain documents "presumptively discoverable").

the arbitration process. Substantial abuses and delays occur, resulting in crucial matters often being left until the last minute. Needless to say, the outcome is a disruption of the hearing schedule and more inconvenience to the parties.<sup>36</sup> Indeed, in a recent decision pertaining to discovery in arbitration, Judge Jose A. Cabranes of the United States Court of Appeals, Second Circuit, noted the strong federal policy underlying arbitration, and said that in private tribunals, the use of broad-ranging discovery as permitted under federal statute “would undermine one of the significant advantages of arbitration.”<sup>37</sup>

And so, the attempt of trial lawyers to expand and manipulate discovery to serve their own ends creates yet another undermining of the foundation that supports the pillars of arbitration. The erosion continues, and the support system sustaining arbitration in its pure form of equity becomes even more perilous.

### C. Awards

The final challenge is the arbitrators' award. Traditionally, in securities arbitration as well as in other areas of arbitration, arbitrators' awards have been short and simple, usually stating whether the claimant lost or won, and the amount of any recovery.

The New York Stock Exchange Arbitration Rules provide for the form and content of the awards.<sup>38</sup> They must contain the

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36. With this in mind, the Exchange is seeking to foster mutually agreed-upon solutions. In 1998, the Exchange adopted two pilot programs aimed at assisting dispute resolution. One pilot calls for arbitrators to be appointed and an administrative conference scheduled within 30 days after the answer is filed. The administrative conference is designed to explore ways to expedite the process, focusing on discovery and establishing deadlines for the production of documents. The second pilot provides for early consideration of mediation. Both pilot programs are intended to expedite large cases—those in excess of \$500,000. It is hoped that with these procedures, the arbitration process will be better administered by having the arbitrators, as opposed to the parties, control the pre-hearing process.

37. *National Broadcasting Co. v. Bear Stearns & Co.*, 165 F.3d 184, 191 (2nd Cir. 1999).

38. N.Y. STOCK EXCH. R. 627, *in* N.Y.S.E. GUIDE (CCH) ¶ 2,627 (1992).

names of the parties and their counsel, a summary of the issues, the damages and any other relief requested, the damages and relief awarded, a statement regarding any other issues resolved, the names of the arbitrators, the date of filing, the date of award, the dates and number of hearing sessions, the location of the hearing, and the arbitrators' signatures.<sup>39</sup> However, the Rules have no specific provision for an opinion of the arbitrators regarding the reasons for their award or lack thereof.<sup>40</sup> There may be many reasons for this.

Primarily, unlike a legal proceeding, cases heard in equity have no precedential value—each case heard by the arbitrators stands or falls on the merits of the facts and issues presented, rather than on what has transpired previously in other unrelated matters. Equity is unique in this respect.

Additionally, the grounds for an appeal are very limited.<sup>41</sup> And with such limited grounds, an opinion for the basis of the award loses much of its importance. Also, while judges have law clerks who supply them with substantiation for their opinions, there are no such law clerks to assist the arbitrators, not all of whom are lawyers or even familiar with legal protocol.

There has been much discussion over the years of greater use of "reasoned awards."<sup>42</sup> These reasoned awards set forth the basic grounds for the arbitrators' decision. They need not resemble an appellate court opinion, but rather just be a brief recitation of why the arbitrators decided the issues the way they

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39. *See id.* (e).

40. *See* SICA, ARBITRATION PROCEDURES 20 (1996) (providing that a party may request an opinion of the arbitrators no later than the hearing date). Any awards, reports, or opinions "shall be made publicly available in accordance with the policies of the sponsoring self-regulatory organization." THE ARBITRATOR'S MANUAL, *supra* note 22, at 34.

41. *See* N.Y. C.P.L.R. § 7511 (McKinney 1999) (citing the grounds for an appeal of an arbitration award as: (i) corruption, fraud, or misconduct in procuring the award; (ii) partiality of an arbitrator; (iii) an arbitrator exceeded his power; or, (iv) failure to follow the procedure of N.Y. C.P.L.R. Article 75.) *See also* Federal Arbitration Act, 9 U.S.C. § 10 (1994) (grounds for vacation of arbitration award).

42. *See* Constantine N. Katsoris & John F.X. Peloso, *Punitive Damages*, 63 *FORDHAM L. REV.* 1571, 1574 (1995) (noting NASD consideration of a proposal for "reasoned" punitive damages awards in arbitration).



did. Arbitrators generally use this vehicle when they dismiss a case on statutory grounds such as a statute of limitation, when the award is less than what was sought, when one party's conduct is particularly egregious, or when the claim is wholly without merit.

There are valid arguments both for and against pushing for courtroom-like decisions. Arguably, the parties want to know the basis for their win or loss; such knowledge permits closure and eliminates the frustration of not knowing the reasons for the award, particularly when the decision is not a full and decisive victory. Yet those cases that actually proceed to hearing, rather than being settled, are cases where both parties are often absolutely convinced that they are entirely correct on all issues. Under these circumstances, where nothing but total victory will suffice, it is unlikely that any decision, despite how much reasoning it contains, will satisfy the losing party.

The lack of legal training possessed by the arbitrators, the lack of law clerks, the lack of precedential value of cases heard in equity, and even the fact that the award may represent a compromise of three individuals, argue against expanded decisions. For now, there is no way to know whether decisions resembling those issued in courts of law will become a part of arbitration. And if they do, will they contribute to the undermining of the foundations of the pillars supporting arbitration?

## VII. CONCLUSION

Arbitration has survived and blossomed through not only centuries, but millennia. One can be virtually certain that, unlike the Parthenon, its future will be secure on the foundations that support it. So many things are but a passing fancy, as seen by fads and trends which come and fade so quickly, they merit hardly a notation in books and annals of history. Arbitration, a survivor throughout time, has proven its worth and value. May this be recognized by all who benefit from its vast advantages and eternal equitable powers. As with many other institutions that survived the pendulum swings of opposing views, arbitration shall again return to balance the goal of expeditious dispute resolution against due process.