ROBBINS TO BADER TO LIPNER: A SECURITIES ARBITRATION TRIPLE PLAY

Introduction —

As the fall classic approaches, baseball analogies frequently sneak into the litigator's lexicon. The "triple play" analogy seems apt. Three top securities practitioners, an all-star infield for any team in any league, recently completed treatises that add measurably to the securities arbitration field.

Separately, each will be handy on the practitioner's shelf. Together, there's not much more one need have for the field.

ROBBINS: Securities Arbitration Procedure Manual —

David E. Robbins's classic desk-side guide, Securities Arbitration Procedure Manual, aspires to be one-stop shopping for both the experienced and novice securities arbitrator. Most of the two-volume set is arranged like a hornbook, explaining rules, procedures, and important cases in the development of securities arbitration. But unlike a normal academic guide, the text is also interspersed with relevant techniques and tips that a more stodgy text might leave out.

Since 1990, Robbins has regularly updated the text, and with the three-ring binding, the faithful reader is not required to repurchase the entire book after each update. The Fifth Edition adds valuable new information on how to chair a hearing, presents a new discovery guide, explains the nuances of injunctive relief under the FINRA rules, and also details the malpractice standards in a securities arbitration.

Like any good teaching book, the guide begins with the familiar — an easy to follow comparison between arbitration and litigation. The guide, unsurprisingly, is biased towards arbitration, but it backs up this bias with FINRA statistics that show how many arbitrations are filed each year, how many are closed, how they were closed, the causes of action, and the results.

Just as in Bader's book, the manual walks the reader through the process of a securities arbitration. It's important to begin before the actual arbitration, and the manual starts with pre-dispute arbitration clauses, the reasoning behind recent modifications to FINRA's rules on these clauses, and a few sample clauses. Then, as a refresher for the seasoned arbitrator and an

introduction for the novice, there is a review of the legal history of securities arbitration, both before and after Shearson v. McMahon. This chapter focuses primarily on the arbitrability of 10b-5, RICO, and 12(2) claims.

Robbins also presents an effective overview of when courts will require parties to arbitrate claims and everything counsel should know before commencing an arbitration claim. Robbins includes an evaluation of some potential types of cases, particularly those dealing with 10b-5, and analyzes whether the factual dispute justifies a claim in each one.

The layman should take note of Chapter 6, where the manual gives tips on whether an attorney is even necessary for the claim and advises the reader that small claims arbitrations can be handled pro se with the proper preparation. One of the more valuable troubleshooting sections of the manual is how to overcome the challenge of taking over an arbitration already in progress. Poorly filed pleadings can be a hindrance, but Robbins shows that it is not an insurmountable problem.

On the subject of responsive pleadings, the manual wisely gives advice from the perspective of seasoned defense counsel to help less experienced counsel and pro se claimants gain insight from more experienced attorneys. Next, the discovery chapters focus on the documents to request in particular scenarios. If you're a brokerage firm embroiled in an arbitration and want to know which of your opponents' documents you should review, Robbins has included all of the documents that you need to request.

In contrast to normal litigations, in an arbitration you get to pick your referee. If you're bewildered about this process you have good reason — most people don't learn how to do this in law school. The Securities Arbitration Procedures Manual gives an overview of the standards required of arbitrators by all the major arbitration organizations as well as advice on selecting arbitrators for different types of cases.

Arbitration rules are not entirely foreign to experienced litigators who are familiar with civil procedure, but Robbins has boiled down hearing rules to their essential components. Throughout the manual, Robbins emphasizes not only rules but also techniques for how to best use these rules to be an effective advocate in an arbitration. Robbins discusses a wide range of hearing presentation techniques that exploit the arbitration rules.

The manual's updates ensure that this guide will always be current. For instance, the damages chapter has a nuanced and contemporary discussion about punitive damages in securities arbitrations in light of recent Supreme Court decisions. There is also discussion of industry arbitrations not dealing with customers, and how these arbitrations differ from others discussed earlier in the manual.

Securities Mediation is not ignored, though it is only given a short review so that potential claimants can weigh the pros and cons of using mediations rather than an arbitration. Robbins includes a brief walk-through of the entire mediation process, though this subject could very well be the subject of an entire book.

The appendix has the potential to be the most used portion of the manual for the experienced arbitrator or attorney. Here the rules of the American Arbitration Association and New York Stock Exchange are printed in full. In addition, state and federal arbitration statutes are included. There is also a short discovery guide, a concise summary of material previously covered earlier in the manual.

BADER: Securities Arbitration: Practice and Forms

Second, Securities Arbitration: Practice and Forms, edited by W. Reece Bader, is designed to be a one-volume reference guide to securities arbitrations. Structurally it is divided into two parts: Practice and Forms. The "Practice" portion of the text is a series of chapters written by different authors, covering various aspects of securities arbitration. It is basic enough to give a novice all of the information he needs to get started but also thorough enough to be an essential component of any securities litigator's library.

Each chapter in the "Practice" section features the work of a different contributor. The first chapter details the history of securities arbitration from its roots in the Constitution of the New York Stock Exchange to the present day. This chapter is written by Bader himself and provides a regulatory framework for the field of securities arbitration. From here, the text takes on each aspect of a securities arbitration in turn, in the order that a litigator would naturally tackle them. The next chapter discusses jurisdiction and the often tricky ways to ascertain personal and subject matter jurisdiction when interpreting the rules of arbitration agreements.

Whether an arbitration agreement is explicit or implied can present particularly thorny issues of arbitrability. Securities Arbitration helps clear the air in a number of these situations. In the thorough analysis, many prominent cases are incorporated into the text to help illustrate the particular problems analyzed. Practical advice is then presented on how to draft an effective arbitration agreement, told with the ease and forcefulness of an experienced legal draftsman.

The second part of Securities Arbitration is by far the most useful part of the book for the experienced litigator. Here, Bader provides a series of quick reference guides and forms that securities litigators need to consult. This includes a comprehensive list of arbitration and mediation forums. While the Financial Industry Regulatory Authority ("FINRA") remains the most popular forum, many other options are available. Bader has also thoughtfully included the full text of the oft-cited Federal Arbitration Act. As an addendum to the arbitration procedures covered in the first part of the book, there is also the NASD Code of Arbitration Procedure (including the procedure for customer and industry disputes) as well as a comparison chart of the old and new arbitration codes of customer disputes. This last chart is indispensable for the practitioner who wants to see at a glance all of the changes to the old code.

FINRA has created its own reference guide to dispute resolution. Though there is much overlap with the information in the first part of the book, it is included in full. As with any other endeavor in the law, it is often helpful to consult a variety of different opinions before deciding a given course of action and FINRA's guide is included in recognition of this fact.

Both the New York Stock Exchange (for pre-August 2007 cases) and the Chicago Board Options Exchange have their own arbitration rules and these can be found towards the back of Bader's guide. Finally, there are the uniform submission agreement claimant and respondent forms that are necessary to submit to FINRA to initiate an arbitration. Each of the elements in the "Forms" section of the book may be available elsewhere, but the value of Bader's book is that it is a compendium of a variety of resources on securities arbitration. Any seasoned securities arbitration attorney will function better with access to a copy of this book.

LIPNER: Securities Arbitration Desk Reference —

Anchoring the triple play is Professor Seth Lipner and Joseph Long's Securities Arbitration Desk

Reference. There is some overlap between this book and Bader's Securities Arbitration: Practice and Forms. Both include the full text of the following: The Federal Arbitration Act, NASD Procedures and Rules, and the NYSE Arbitration Rules. However, the Securities Arbitration Desk Reference is a more comprehensive guide around all of the federal and state statutes and rules that are involved in securities arbitration. It includes not only the full text of all the statutes, rules and regulations, but also offers commentary and cross-references to comparable statutes allowing for further research.

The Desk Reference begins with the full text of the Federal Arbitration Act ("FAA"). The FAA is applicable in federal courts. It also has limited applicability in state courts; it preempts any state law that restricts the enforceability of arbitration agreements. While the FAA applies to general arbitration, the authors' commentary focuses on how it applies to investor-related arbitrations taking place under the auspices of the National Association of Securities Dealers, Inc. ("NASD") and the New York Stock Exchange ("NYSE").

The following chapters give the full text of the Uniform Arbitration Act ("UAA") and the Revised Uniform Arbitration Act ("RUAA"). The UAA had been adopted with slight variations in all the states except New York, where it was still used as a model. The commentary includes comparisons between the UAA and other acts including the FAA and the NY CPLR. The RUAA was completed in 2000. As of April 23, 2007, the RUAA has been adopted in twelve states. It is expected that most states will follow suit within the next few years, making it essential for practitioners to be familiar with it. Again, the commentary includes comparisons to other acts and practices. It also points out where the RUAA differs from the UAA.

Next, the Desk Reference provides the arbitration laws specific to New York. Securities arbitration occurs frequently in New York because New York is often the choice-of-law state in customer agreements and because of its nature as a financial center. This chapter includes the New York Civil Practice Law and Rules ("NY CPLR") Article 75, NY CPLR Article 2, and NY CPLR Article 50, regarding not only arbitration laws but also statutes of limitations and calculations of interest. In addition, the chapter includes the New York General Obligations Law and New York General Construction Law.

Chapters Five through Nine delineate the rules of the NASD, now FINRA. The section begins with the older NASD Code of Arbitration Procedure, which has been revised and is only

applicable to cases filed before April 16, 2007. This is followed by the revised version: the NASD Code of Arbitration Procedure for Customer Disputes, effective for all cases filed on or after April 16, 2007. The authors' commentary compares the old rules with the new rules. Also included are the NASD Mediation Rules. Lipner and Long emphasize that, while mediation is non-binding, the rules are no less important than the rules of arbitration. The section concludes with the NASD Discovery Guide, and the NASD Registration, Conduct Rules, and By-Laws.

The next two chapters detail the NYSE Arbitration Rules and the NYSE Conduct Rules. Since the merger of the NYSE Arbitration Department into FINRA, the NYSE Rules will still be in effect for any cases filed before the merger date. Thus, it will still be important to know and be familiar with these Rules. The commentary in these chapters compare the NYSE Rules to the FINRA Rules whenever possible.

Next, the book describes civil recovery under general securities acts and under the Federal Securities Act. Included is an overview of federal securities law and state securities regulation. The federal government regulates securities under two statutes: the Securities Act of 1933 and the Securities and Exchange Act of 1934. Additionally, every state has its own statutes regulating securities. The Desk Reference also provides commentary on the Uniform Securities Act of 1957 and compares it to the Uniform Securities Act of 2002. Around thirty states have used the 1957 Act as the basis for their own statutes.

The Desk Reference also offers useful state-by-state charts showing the different versions of the Uniform Securities Act that each state has adopted. There are charts delineating the differences in liability across the states, followed by the full text of each state's civil liability statute. Another two charts compare the statutes of limitations across the states under non-registration and misrepresentations and omissions. Most helpful for nationwide practitioners, Lipner and Long include charts at the end showing the differing judgment interest rates across the states and rate tables for certified interest rates in each state.

Critique and Conclusion

The critiques of these books are picayune. Robbins's work could benefit from more compelling war stories from his vast arsenal on both sides of the bar and as a former regulator and present member of FINRA's arbitration oversight committee. Bader's book could have more practical

illustration from its contributors. And yes, Professor Lipner's book could use a better spine. But overall, this reviewer was left near agape at the end of the three treatises. Nothing seems to be left out. The latest developments are there. So, as a critique, my parting observation is that this is not an easy field to summarize. The more we practice, the more we need to practice. And, as with any field where money and investments are pitted against the vicissitudes of the market while subject to layers of SRO, state, and federal regulation, you simply cannot make up the stories and facts of real people and what befalls them. So in the end, if you can write on this subject in a more experienced, insightful, or inclusive manner, go do it. For now and the foreseeable future, however, I'll stick with Robbins to Bader to Lipner, and score it a triple play.

Reference:

These are the saddest of possible words:
"Tinker to Evers to Chance."
Trio of bear cubs, and fleeter than birds,
Tinker and Evers and Chance.
Ruthlessly pricking our gonfalon bubble,
Making a Giant hit into a double —
Words that are heavy with nothing but trouble:
"Tinker to Evers to Chance."

-The reviewer is founder and President of Yellen Arbitration and Mediation Services LLC. He is a member of the Editorial Board of the Securities Arbitration Commentator and Co-Chair of the Securities Law Committee of the State Bar Association. He is a FINRA, NFA, and AAA arbitrator and mediator. Mr. Yellen is an Adjunct Professor of Law at Fordham Law School, where he teaches Legal Writing to first year law students.
The reviewer expresses his gratitude to Catherine Chiou and Jonathan Forgang, second year students at Fordham Law, for their assistance with this Review.

-"Tinkers to Evers to Chance is a 1910 baseball poem by Franklin Pierce Adams. The poem is presented as a single, rueful stanza from the point of view of a New York Giants fan seeing the Chicago Cubs' talented infield complete a double play. All these players were inducted into the Hall of Fame in 1946 and it is speculated the fame they enjoyed through the poem by Adams contributed to their selection. Here, the reviewer posits the Hall of Fame status of these three

authors has been achieved on their own records unrelated to this Review.