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The Camel and the Last Straw or the Frog and the Boiling Water: Pick Your Parable

*by George H. Friedman**

We all know the two parables that title this article. In the first, an already overburdened camel collapses after a piece of straw is added to the pile already on his back. The message of course is that it wasn't a single piece of straw that caused the camel to collapse; it was the cumulative weight of the load. In the second, we are told that a frog will calmly boil to death in a tepid pot of water that's on a high flame; the poor thing doesn't notice the gradual rise in temperature until it's too late. By contrast, if you toss a frog into a pot of boiling water, it will instantly recoil and hop out.

What does all this have to do with securities arbitration? It's my concern that, if approved, FINRA's recently announced arbitrator classification rule filing[1] – on top of the many rule changes over the last several years that have come at the expense of the securities industry[2] – may be the last straw for the industry and FINRA arbitration. Stated differently, the securities industry may step back, see that the securities arbitration pot is boiling, and jump out in whole or in part. And that would not be a good thing – for either side.

The Long and Winding Road

We've come a long way in the more than 25 years since the Supreme Court held that customer-broker arbitration was permissible under both the '33 and '34 Acts.[3] FINRA nicely captured many of the changes in 2007 in *The Arbitration Policy Task Force Report — A Report Card (Ruder Report,)*,[4] and of course there have been more changes since 2007, most of which favored investors to the detriment of the securities industry. Where are we today?

o Investors can opt out of arbitration and into a class action. Class action waivers are not permitted.[5]

o The fee structure favors the investor, with 75% of the costs being borne by the securities industry.[6]

o The hearing is sited where the investor lived when the underlying events occurred.

o The rules severely limit motions to dismiss made prior to the claimant resting his/her case and provide sanctions for frivolous motions.

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o The customer has the option of an all-public panel, cases involving up to $100,000 are heard by a single public arbitrator, and the definition of who qualifies as public arbitrator has been narrowed over the years.

o In close calls, if the investor wants an arbitrator removed for bias, he or she is removed.

Fourteen years ago I wrote an article[7] in this publication contending that the securities arbitration playing field was in fact level and that, if anything, it was slightly tilted toward investors. The last three changes listed above happened after I wrote my article. If the proposed classification rule is approved, I am concerned that the arbitration playing field will be taking on a Titanic-like list from the industry's perspective.

What's not to like in the Proposed Rule?

There are aspects of the proposed rule that each side – including arbitrators[8] – may not like. For example, the customers' bar might not be thrilled to learn that the proposed rule would disqualify as public arbitrators individuals whose firms meet a 10 percent/$50,000 annual income threshold based on serving retail or institutional *investors* "relating to securities matters." One prominent PIABA member, Robert Banks, said of this part of the rule proposal, "There will be a lot of resistance, mostly from the public side. I'm sure there was a big push on the industry side to get that [provision] in. It will be interesting to see when it goes out for comment."[9] It would also appear that significant numbers of customers' attorneys, who now qualify as public arbitrators, will no longer do so.[10] But, I think the industry will be most unhappy. Why?

• **If you ever worked in the Financial Industry, Once a Non-Public Arbitrator, Always a Non-Public Arbitrator**

The first major change impacts arbitrators who worked in the financial industry for any amount of time. The new rule would essentially freeze an arbitrator's non-public classification, if that individual ever worked *for any duration* in the "financial industry" (a broadening of the term "securities business" now in the *Customer* and *Industry Codes of Arbitration Procedure*). Under the current *Codes,* such individuals with a few exceptions can become public arbitrators after a five-year cooling off period. The proposed rule has no exceptions, stating: "Once FINRA classifies an arbitrator as non-public, FINRA would never reclassify the arbitrator as public." FINRA says this change is meant to address concerns expressed by investor reps that some public arbitrators are not truly public.

Why this matters: an expanded non-public roster just when we don't need it: The net effect of this rule change will be to effectively cleanse the FINRA roster of public arbitrators with any securities industry experience whatsoever. I would have less of a problem if this meant that these individuals would simply be disqualified from being a public arbitrator, moving into a "can't serve as an arbitrator category." If that were the

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case, I think the proposed change might have been acceptable to all sides. After all, FINRA has for years been battling a perception that it's not fair to permit mandatory customer-broker arbitration before public arbitrators who have an industry "taint." But the scope of this proposed change goes way beyond that simple concept. How?

As drafted, the rule would provide that an individual once classified as non-public would stay that way forever. So, for example, someone could have left the securities industry many, many years ago, with their knowledge of it going stale, yet the rule would say they are still non-public. Thus, given the unlimited strikes of proposed non-public arbitrators now given to all parties,[11] my surmise is that the securities industry parties will end up striking these ersatz non-public arbitrators, resulting in the appointment of all-public arbitration panels in almost every customer case and the eventual disappearance of the non-public arbitrator in customer cases.[12] This in turn will of course strain the public roster which, as discussed above, will also be shrinking. Let's also remember that FINRA's customer case filings are now at multi-year lows. If past is prologue, a market downturn or major product failure will spike case filings, placing further demands on the public roster.

Also, one wonders why there is no cooling off period that would suffice? Similarly, is there no period of time necessary for the "taint" to develop? For example, should an arbitrator applicant who did a three-month summer internship at a brokerage firm 20 years ago be forever tainted? Remember that we need to beef up the public ranks – casting good arbitrators aside forever seems to be draconian.

• Professionals Serving the Financial Industry

Another key change involves lawyers, accountants, and other professionals who provide services to the industry. Currently, these individuals are classified as non-public if they devoted 20 percent or more of their "professional work" to the securities industry in the last two years, but they can become public arbitrators after a two-year cooling off period after they stop providing these services, unless they provided services to the industry for 20 or more years during their careers. In that case, they are "permanently disqualified" from ever being a public arbitrator. The proposed new rule expands, contracts and clarifies the current rule. Expanded is: 1) the look-back period, which goes from two to five years; and 2) the application of the rule not only to the financial industry but also to "persons or entities associated" with it. Contracted is the 20-year permanent disqualification criteria, which is reduced to 15 years. The rule filing points out that the 15 years need not be consecutive. Clarified is the term "professional work," which becomes "professional time" because it is easier for prospective arbitrators to calculate.

Why this matters: While the shorter permanent disqualification period lessens the impact of the proposed change, the net effect is that it will take three years longer for these individuals to become public arbitrators, and more arbitrators with diminished securities experience will be classified as non-public because of the broadened definition of what constitutes providing services to the industry. This most likely will not be seen by the securities industry as a benign change. Also, one wonders whether it is also time for the arbitration *Codes* to define the term "professional." FINRA has declined in the past to define this term in the arbitration *Codes*, yet it could be construed expansively. For example, is a journalist who covers the financial field, and who has a significant industry subscriber base, a "professional" providing services to the industry?

• Employment Attorneys and Other Professionals

The proposed rule would also disqualify as public arbitrators attorneys, accountants and other professionals who devote 20 percent or more of their professional time within the last five years to "serving parties in investment or financial industry *employment* disputes." But another part of the proposed rule classifies these individuals as non-public. While most of these arbitrators could become public after the five-year cooling off period, they would stay non-public forever if they accumulated 15 years of service in their career.

Why this matters: The bottom line here is that these individuals: 1) cannot be public while serving in this capacity, but can be cleansed after five years; and 2) will be non-public if they meet the 20% threshold (forever if they did this for a cumulative 15 years). But here's the rub: although the rule filing says the change is meant to assuage industry concerns about public arbitrators "who represent or provide services to *investors* in securities disputes" [emphasis added], the actual rule language would classify as non-public arbitrators "attorneys, accountants, and other professionals who devoted 20 percent or more of their professional time, within the past five years, to serving *parties* in investment or financial industry employment disputes" [emphasis added].

That's right – any party. For example, as I read it, the proposed rule would classify as non-public attorneys making their living bringing claims on behalf of employees against the securities industry. So, for example, the president of the National Employment Lawyers Association, whose service mark is "Advocates for Employee Rights," could be classified as non-public. One can imagine this discussion in a non-statutory employment case being heard by a majority-public panel:[13]

> **Employer**: Let me get this straight. The non-public arbitrator on the panel in this employment case is an attorney who represents *employees* bringing cases against brokerage firms? Did I read that correctly?
>
> **Staff:** Yup.

Just a hunch but I don't see this sitting particularly well with the securities industry, especially when one bears in

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mind that FINRA intends *all* proposed changes to apply to the *Industry Code* as well as the *Customer Code*.

My Concerns about a Possible Industry Defection

I should pause here to discuss briefly the rule approval process at FINRA.[14] This rule was not created in a vacuum. First, the National Arbitration and Mediation Committee[15] ("NAMC") would have been asked to weigh in. This is a majority-public committee, whose chair is always public. Among its other functions the NAMC "makes recommendations on rules, regulations and procedures that govern the conduct of arbitration, mediation, and other dispute resolution matters before FINRA."

So, the NAMC approved the rule and, since FINRA does not reveal NAMC votes, we cannot tell from the rule filing if there was more than a "party-line" vote endorsing this proposal. Then, the FINRA Board of Governors[16] – also a majority public body – voted to authorize staff to file the rule proposal with the SEC.[17] Because FINRA also does not reveal Board votes in its rule filings, we cannot tell if there was broad support for this proposal.

That said, I am concerned that the proposed rule may cause the securities industry to rethink its support of arbitration, in whole or in part. As discussed below, the industry might decide it is comfortable arbitrating smaller cases but not larger ones. Why? Because the stakes for the securities industry become much higher when dealing with: 1) large claims; 2) being heard by panels having questionable qualifications; 3) coupled with the very limited judicial review of arbitration awards available under the Federal Arbitration Act.[18] Granted, I may be totally off on this, but then again, I have a pretty good track record predicting future events and trends in the ADR field.[19] Why, specifically, am I concerned?

• **Brokerage firms do not have to use predispute arbitration agreements:**

It's worth remembering that there is nothing in the FINRA rules that requires the securities industry to use predispute arbitration agreements ("PDAAs"). Yes, the rules govern the content and placement of PDAAs in customer-broker agreements,[20] but that only applies if the broker chooses to use a PDAA. And of course the broker under FINRA Rule 12200 has to arbitrate if a customer wants to.[21] But nothing stops brokerage firms from deciding tomorrow to drop PDAAs. It's my belief that they could also include in PDAAs the option of using other ADR providers,[22] court, or a bifurcation with smaller cases going to arbitration and larger ones to court, as long as they don't attempt to extinguish the investor's right to demand FINRA arbitration.

• **While large firms have strongly supported PDAAs, many small firms have not.**

While we tend to think of the securities industry as a monolith, it is not. Many smaller firms have been leery of arbitration, mostly because one arbitration award can put a smaller firm out of net capital compliance.[23] Larger firms have steadfastly supported arbitration, but I fear this support is not infinite. For example, when the Optional All-Public Panel rule was being piloted, some large firm reps expressed concerns about what they perceived as the long-term anti-industry drift of the rules. The same concerns were voiced when the rule proposing limits to motions to dismiss was being debated.

• **The securities industry may give up on FINRA arbitration, at least for large cases.**

On top of the changes over the last several years, I am concerned that the arbitrator classification rule if approved is going to lead the industry to consider abandonment of PDAAs, at least PDAAs that solely list FINRA as the arbitration forum or send all cases to arbitration irrespective of size. The alternative might be PDAAs that offer other dispute resolution providers like AAA or JAMS or– dare I say it – going to court, for all or larger cases.

The possibility that the industry will decide to forgo PDAAs for larger cases is not total conjecture. In recent years, there have been several instances where a large, institutional investor sought to compel arbitration of a multi-million dollar dispute under Rule 12200, only to have the broker oppose arbitration on the ground that the investor was not its "customer" within the meaning of the FINRA rules.[24] And in fact some brokerage firms already do not require institutional investors to sign PDAAs.[25] Connecting these dots, it isn't much of a logical stretch to envision the industry rethinking PDAAs for larger disputes. The demise or diminishment of FINRA arbitration would not be good for investors or for that matter the securities industry. And if the past is any indication, few investors would be attracted to a non-SRO arbitration forum such as AAA or JAMS.[26]

• **Arbitration filings – at least for larger cases – may dry up.**

If I am correct about the industry's reaction, then FINRA arbitration case filings would likely dry up because the only source of cases would be Rule 12200. An arbitral institution like FINRA might find it untenable to maintain its forum in a time of greatly reduced and inconsistent case volume.[27] FINRA becoming a small claims forum would also pose problems. Indeed, FINRA President Linda Fienberg at an SEC Investor Advisory Committee meeting in 2010, "… expressed concern that, if the small claims came to arbitration while the larger claims were pursued in court, FINRA's arbitration forum would lose money as it relies on the filing fees and costs of the larger claims to fund its operations."[28] As I wrote in this publication a year ago, when you break the glass and ring the fire alarm, you want to be sure there's a fire brigade to respond.[29]

• **FINRA Dispute Resolution is the fairest, most economical game in town.**

Private providers like AAA and JAMS are fair, but don't come close to FINRA in terms of rules and fees.[30] This point

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was well-made by former SICA chair Tom Stipanowich, a leading authority in the arbitration field. FINRA's arbitration program got high marks when measured against the "arbitration fairness index" he created.[31] In addition to the changes at FINRA over the last several years already discussed above, here are just a few of the major investor-friendly aspects of the FINRA rules not found elsewhere:

> FINRA serves the claim on the broker with whom the investor has a complaint. This rule saves the investor time and money.
>
> There are FINRA hearing locations in all 50 states (at least one in each state).
>
> Parties have access to the FINRA *Discovery Guide* and codified discovery provisions in the *Code of Arbitration Procedure for Customer Disputes*.
>
> Awards are public, in a searchable database, and available free of charge on the web. Statistical data on the program are also available on the web.
>
> FINRA will enforce arbitration awards against the securities industry party.

• **Court is usually no place for either party to be**.

Going to court is terrible for all parties, especially investors. Granted, in some parts of the country litigation is relatively quick and inexpensive, and an investor occasionally gets a large jury verdict against the securities industry,[32] but in general it takes a long time, is very costly, and is subject to both extensive discovery and relatively liberal dismissal standards. I know that a significant portion of the investors' bar supports the idea of having the option to go to court, but I suspect this rests on a belief that FINRA Rule 12200, which gives customers the unilateral right to require arbitration of disputes with their broker, will always exist. As I've written in this publication, if PDAAs go away, the securities industry would surely call for the abolition of Rule 12200.[33] Indeed, the Securities and Financial Markets Association took this position when the Arbitration Fairness Act of 2007 was pending, stating: "Opponents of predispute arbitration agreements, however, seek neither fairness nor equality; rather, they seek an unfair strategic advantage. They want investors to retain their right to arbitrate as they see fit, but to deprive investment firms of the same right."[34]

If arbitration is eliminated, I stand by my belief that litigation would be a poor way for the parties to resolve their differences. I recently blogged on this very topic, pointing out the top ten things critics of arbitration won't tell you about the awful realities of litigation.[35] With apologies to David Letterman and Marketwatch.com, here they are:

1. Actually, litigation is pretty awful
2. We like to denigrate arbitration, but it's actually pretty fair
3. You may never get your day in court
4. If you manage to get your day in court, it's going to take forever
5. Be prepared to disrupt your life to litigate
6. Class actions benefit the lawyers, not individual consumers
7. Discovery in court is awful, and you really can get adequate discovery in arbitration
8. Litigation really costs much more than arbitration
9. We like to say arbitrators tend to split the baby in half, but that's not really so
10. The strict rules of evidence don't really make litigation better than arbitration

Again, bear in mind these realities apply to *both* sides.

What to do?

This rule proposal is clearly well-intended but in my opinion it could have negative consequences if approved. I suggest FINRA go back to the drawing board:

1) Keep it Simple. The arbitrator classification system, as it exists and as it may exist in the future, is a complicated mousetrap with many moving parts. I urge FINRA to try to keep things simple, something that can only help parties, arbitrators, and staff. This point was made six years ago by Fordham Law School's Professor Constantine Katsoris, the "Dean of Securities Arbitrators."[36] A reasonably good model to emulate is the AAA's *Securities Arbitration Supplemental Procedures*,[37] where arbitrators must fall into one of two categories, "affiliated with the securities industry" or "not affiliated with the securities industry," or they can't be arbitrators.

2) Move to "pure public" arbitrators as the rule proposes but *do not* designate all newly-reclassified arbitrators as non-public. Move these arbitrators to a "can't be an arbitrator" category. This is similar to how the *Codes* now handle individuals like spouses of brokers, or others disqualified from being public but who don't otherwise qualify as non-public.

3) Do not keep arbitrators non-public forever. Move arbitrators to the "no-man's-land/can't be an arbitrator" status after they are not involved in or with the industry for a number of years.

4) Go back to an "affiliated with the securities industry" classification, especially for the *Industry Code*. If customers don't want arbitrators from the industry they will strike them. But we can't expect the securities industry to accept a "non-public" roster bloated by arbitrators who don't know the industry, or who are attorneys representing employees.

5) Do a cost-benefit analysis on the rule's potential impact (or reveal the results if one has been done). Having spent fourteen years at FINRA

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and being very familiar with its corporate culture, my guess is that it conducted an impact analysis of some sort. But, if FINRA has done such an analysis, it's not referenced in the rule filing. This leaves the first blush impression that the net impact of the proposal would be to reduce the number of public arbitrators – currently 3,562[38] – while demand for them increases because almost every customer case will end up with a public panel. At the same time, it would appear that the ranks of the non-public roster will expand while demand for such arbitrators declines.[39] If such an analysis has been done, FINRA should release the results. If not, then FINRA must do one. For that matter, a cost-benefit analysis of a potential elimination of PDAAs by the securities industry might be a good idea.

Conclusion

Industry abandonment of arbitration for some or all cases might look like a good thing to some on both sides, but as Henry Ford once said, "If I had asked people what they wanted, they would have said faster horses."[40] The author realizes he is treading in a potential minefield. After spending close to four decades building trust among a diverse group of constituents in the alternative dispute resolution community, it's possible that, with this article, I will manage to offend my friends in both the customers' bar and the securities industry, and at FINRA.

But a good friend tells his or her friends when they are heading for trouble. My purpose in authoring this article is to warn both sides that a potential securities industry abandonment of arbitration will be a bad thing for both sides. On the other hand, annoying both sides is a well-known mediator's tactic to drive the parties together with a common cause. So, if I manage to unite all sides in their anger with me, perhaps some consensus will emerge. Who knows, we may see PIABA and SIFMA joining hands to craft an improved, simplified classification rule. Then another parable – the lion and the lamb – will come into play.

Endnotes

1. See SR-FINRA-2014-028, available at http://www.finra.org/web/groups/industry/@ip/@reg/@rulfil/documents/rulefilings/p532202.pdf. Also, *Federal Register* vol. 17, no. 128, p. 38080 (July 3, 2014) Notice of Filing, available at http://www.finra.org/web/groups/industry/@ip/@reg/@rulfil/documents/rulefilings/p544264.pdf <both visited July 6, 2014>.

2. And some rule changes that were proposed but abandoned. For example, in 2005 NASD proposed a rule that would have given investors the unilateral right to require an explained decision from the arbitrators. See *New Arbitration Rule Requires Award Explanations upon Investor Request* (Jan. 27, 2005), available at http://www.finra.org/newsroom/newsreleases/2005/p013145 <visited July 3, 2014>. The proposal was withdrawn after both sides didn't support it, albeit for different reasons.

3. See *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (1934 Act) and *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477 (1989) (1933 Act).

4. Available at http://www.finra.org/web/groups/industry/@ip/@reg/@guide/documents/industry/p036466.pdf/ <visited 7/1/2014>.

5. FINRA went to war with Schwab over this very issue, and won. See *Board Decision Finds Charles Schwab & Co. Violated FINRA Rules by Adding Waiver Provisions in Customer Agreements Prohibiting Customers From Participating in Class Actions; Reverses FINRA Hearing Panel Decision* (Apr. 24, 2014), available at http://www.finra.org/newsroom/newsreleases/2014/p493587 <visited July 1, 2014>.

6. See "On an annualized basis, investors pay approximately 25 percent of all case fees and industry parties pay about 75 percent," appearing in *Securities and Exchange Commission Investor Advisory Committee - Panel on Securities Arbitration (May 17, 2010), Financial Industry Regulatory Authority Statement on Key Issues*, available at https://www.sec.gov/spotlight/invadvcomm/iacmeeting051710-finra.pdf <visited July 1, 2014>.

7. See Friedman, George, *The Level Playing Field,* XI:12 SECURITIES ARBITRATION COMMENTATOR 1 (JULY 2001), available at http://www.proffriedman.com/files/Level.PDF <visited July 1, 2014>.

8. Yes, arbitrators, large numbers of whom may end up being disqualified or reclassified. Just how many one cannot say; FINRA provided no indication in the rule filing that it has conducted any impact analysis.

9. See Schoeff, Mark, *Finra seeks to tighten investor dispute rules* (June 18, 2014), available at http://www.investmentnews.com/article/20140618/FREE/140619905 <visited July 14, 2014>.

10. But again we can't tell from the rule filing how many arbitrators could be impacted by this change. See n.8, *infra*.

11. See FINRA Rule 12403(c), available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4141 <visited July 2, 2014>.

12. Rick Ryder, founder of this publication, saw this coming over five years ago. See *The Disappearing Non-public Arbitrator – is the Debate over Eliminating the Industry Arbitrator About to become Moot?* 2008:3 SECURITIES ARBITRATION COMMENTATOR 1 (FEB. 2009).

13. See Rule 13402(b), available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4237 <visited July 8, 2014>.

14. Nicely described at http://www.finra.org/industry/regulation/finrarules/rulemakingprocess/ <visited July 3, 2014>.

15. See http://www.finra.org/aboutfinra/leadership/committees/p197363 <visited July 3, 2014>.

16. See http://www.finra.org/aboutfinra/leadership/p009756 <visited July 3, 2014>.

17. See *Update: FINRA Board of Governors Meeting* (Feb. 13, 2014), available at http://www.finra.org/industry/regulation/guidance/communicationstofirms/p445719 <visited July 3, 2014>.

18. See 9 U.S.C. § 10(a), available at http://codes.lp.findlaw.com/uscode/9/1/10 <visited July 8, 2014>.

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19. See, *Trust me on this, I'm from the Future! Confessions of an Accidental Futurist* (Feb. 20, 2014), available at http://www.wfs.org/blogs/george-friedman/trust-me-one%E2%80%94im-future-confessions-accidental-futurist and *Trust me on this, I'm from the Future! - Part II* (Apr. 2014), available at http://www.wfs.org/blogs/george-friedman/trust-me-one%E2%80%94im-future-%E2%80%94-part-ii <both visited July 3, 2014>.

20. See FINRA Rule 2268, available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=9955 and *Notice to Members* 05-09 (January 2005), available at http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p013203.pdf <both visited July 2, 2014>.

21. FINRA Rule 12200, available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4106 <visited July 2, 2014>. This rule requires brokers to arbitrate upon the demand of a customer disputes arising out of the broker's business.

22. See Sneeringer, Steven, *Securities Arbitration Pilot Program* (Jan. 2000), available at http://www.sacarbitration.com/pilot.htm <visited July 2, 2014>. Under the two-year pilot, seven brokerage firms agreed to allow a number of investors to opt for AAA or JAMS rules and administration. There were few takers – only 8 out of 277 eligible cases. See *Final Report – Securities Industry Conference on Arbitration Pilot Program for Non-SRO-Sponsored Arbitration Alternatives*, available at http://www.lgesquire.com/SICA_Pilot_Report.pdf <visited July 2, 2014>.

23. See Briton, Diana, *A Cautionary Tale: How One Arbitration Can Topple a Firm* (July 8, 2011), available at http://wealthmanagement.com/legal-compliance/cautionary-tale-how-one-arbitration-can-topple-firm. Also, *Notice to Members 07-17*, available at http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p018897.pdf, and in general the industry comments opposed to increasing the single-arbitrator threshold from $50,000 to $100,000, available at http://www.sec.gov/rules/sro/finra/2009/34-59340.pdf <all visited July 2, 2014>.

24. See generally, Friedman, George, *Defining who is a Customer in FINRA Arbitration: Time to Clear Things Up!"* 2012:6 SECURITIES ARBITRATION COMMENTATOR 1 (MAY 2013), available at http://www.proffriedman.com/files/Defining_Who_is_a_Customer.pdf <visited July 11, 2014>.

25. See Ryder, Richard, *Institutional Investors & PDAAs – Will the Twain Soon Meet?"* 2009:3 SECURITIES ARBITRATION COMMENTATOR 1 (APRIL 2010).

26. See *Final Report, supra* note 22, at 3. A survey of investors eligible to participate in the pilot "reaffirmed the basic themes that higher costs, more familiarity with the SRO forums, and possible additional delays were the main reasons claimants did not choose the non-SRO forums."

27. See Gross, Jill, *The End of Mandatory Securities Arbitration?* 30 PACE L. REV. 1174, 1189-93 (2010), available at http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1736&context=plr <visited July 1, 2014>.

28. See *Securities and Exchange Commission Investor Advisory Committee - Minutes of May 17, 2010 Meeting*, available at http://www.sec.gov/news/other-webcasts/2010/iac051710-minutes.pdf <visited July 1, 2014>.

29. Friedman, George, *The Arbitration Fairness Act: a Well-intentioned but Potentially Dangerous Overreaction to a Legitimate Concern,* 2013:1 SECURITIES ARBITRATION COMMENTATOR 1 (JUNE 2013), available at http://www.proffriedman.com/files/SAC_AFA_Article__final_06-2013_.pdf <visited July 2, 2014>.

30. See, Leiby, Larry, *What Does it Cost for AAA, JAMS, or CPR to Administer an Arbitration Case and how do the Initial Filings Vary?* 88:7 FLA BAR JOURNAL 1 (JUL/AUG 2014), available at http://tinyurl.com/nsf9gj4 <visited July 1, 2014>.

31. See Stipanowich, Thomas, *The Arbitration Fairness Index: Using a Public Rating System to Skirt the Legal Logjam and Promote Fairer and More Effective Arbitration of Employment and Consumer Disputes*, 60 KANSAS L. REV. 985, 1024-5 (2012), available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2004543) <visited July 1, 2014>.

32. See, e.g., Barlyn, Suzanne, *South Carolina jury awards $8.1 million to investor who was misled by BB&T* (June 30, 2014), available at http://www.reuters.com/article/2014/07/01/us-adviser-verdict-exclusive-idUSKBN0F52RF20140701 <visited July 3, 2014>.

33. See Friedman, *supra* note 29.

34. See SIFMA/SIFMACL, *Whitepaper on Arbitration in the Securities Industry* (Oct. 2007), available at http://www.sifma.org/issues/item.aspx?id=21334 < July 3, 2014>.

35. See *Ten Things about Litigation that Arbitration Critics won't Tell You* (May 2013), published in the author's Arbitration Resolution Services blog, available at http://home.arbresolutions.com/ten-things-about-litigation-that-arbitration-critics-wont-tell-you/#.U7QDT_ldX84 <visited July 2, 2014>.

36.. See Katsoris, Constantine, *Securities Arbitrators Do Not Grow on Trees,* 14:1 FORDHAM J. OF CORP. FINANCIAL LAW 49 (2008), available at http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1079&context=jcfl <visited July 8, 2014>.

37. Effective June 1, 2009, available at https://www.adr.org/cs/groups/commercial/documents/document/dgdf/mda0/~edisp/adrstg_004107~1.pdf <visited July 1, 2014>.

38. Statistics available at http://www.finra.org/ArbitrationAndMediation/FINRADisputeResolution/AdditionalResources/Statistics/ <visited July 16, 2014>.

39. These points are very thoroughly addressed in Peters, Sarah Scott, Ward, Bryan M. and McCormick, Andrew M., *Everybody Out of the (Public Arbitrator) Pool,* Law 360 (July 3, 2014), available at http://www.law360.com/articles/552840/everybody-out-of-the-public-arbitrator-pool <visited July 8, 2014>.

40. See http://www.goodreads.com/quotes/15297-if-i-had-asked-people-what-they-wanted-they-would <visited July 3, 2014>.