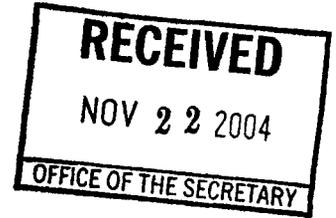


LIDDLE & ROBINSON, L.L.P.

685 THIRD AVENUE  
NEW YORK, N.Y. 10017

(212) 687-8500  
FACSIMILE: (212) 687-1505  
www.liddlerobinson.com



SAMUEL FINKELSTEIN (1906-1996)  
MIRIAM M. ROBINSON (RETIRED)

JAMES A. BATSON  
BLAINE H. BORTNICK  
ETHAN A. BRECHER  
MICHAEL E. GREVERT  
JAMES B. HUBBARD\*  
JEFFREY L. LIDDLE  
CHRISTINE A. PALMIERI  
MARC A. SUSSWEIN

\*ADMITTED ONLY IN FLORIDA,  
THE DISTRICT OF COLUMBIA  
AND NORTH CAROLINA

AFFILIATE OFFICES:  
THE LAW OFFICE OF JAMES R. HUBBARD  
TOWERS BUILDING  
11300 U.S. HIGHWAY ONE, SUITE 400  
NORTH PALM BEACH, FL 33408  
(561) 615-8100  
E-MAIL: rclemente@liddlerobinson.com

ROBERT S. CLEMENTE  
OF COUNSEL  
DAVID I. GREENBERGER  
DAVID MAREK  
JAMES C. MALLIOS  
CANDACE M. ADIUTORI  
LEILA I. NOOR  
JEFFREY ZIMMERMAN  
TED J. SWIECICHOWSKI  
JOHN A. KAROL  
ALYSON C. BRUNS

November 18, 2004

Jonathan G. Katz, Secretary  
U.S. Securities and Exchange Commission  
450 Fifth Street, N.W.  
Washington, DC 20549-0609

Re: File Number SR-NYSE-2004-29  
Proposed Agreement – NYSE Rule 607 – Appointment of Arbitrators

Dear Mr. Katz:

I welcome the opportunity to comment on the New York Stock Exchange's ("NYSE" or "Exchange") proposal to amend NYSE Rule 607 as it relates to the selection of arbitrators. As a former NYSE Director of Arbitration, a position I held from 1991 through the fall of 2003, and as a current practitioner in both NYSE and NASD arbitrations, I take the liberty of offering some facts that are either missing or inaccurately stated in the Exchange's filing.

Let me first note that the NYSE's filing offers no reason or explanation why this proposal does not: (1) bear the imprimatur of the Securities Industry Conference on Arbitration (SICA), where in the past the NYSE, as the SRO that led the lobbying effort for the creation of SICA in 1977, virtually always followed SICA's model Code; (2) explain why it is eliminating party's choices as well as the second list, where necessary; and, (3) why after nearly six years<sup>1</sup> it

<sup>1</sup> In 1998, after SICA adopted "list selection" as part of the Uniform Code of Arbitration ("UCA") the NYSE launched an informal pilot, subject to mutual consent, to gauge its acceptance by the Exchange's constituency. The informal pilot was filed as a formal pilot program with the SEC in 2000. Although initial statistics indicated that less than 20% of claims filed at the NYSE sought to use the "pilot", it was later determined by this writer through

is maintaining "list selection" as a pilot wherein both parties must agree. It is also particularly troubling that in an environment of increased disclosure and accountability the Exchange has failed to consult with its constituency (or at least those who represent investors)<sup>2</sup> prior to proposing this rule change.

I recommend the SEC request the Exchange withdraw this filing and submit a new filing that either follows the SICA rule or a rule that reflects the realities of what experienced practitioners in SRO arbitration believe best serves the fairness and integrity of the process. As it is presently drafted, this rule proposal does neither. Absent a voluntary withdrawal, the SEC should commence proceedings to determine whether the proposed rule change should be disapproved.

While some practitioners (such as the author and his firm) prefer to have arbitrators selected by knowledgeable administrators it is apparent that the overwhelming majority of attorneys who represent customers in arbitration prefer the list selection method. What would be preferable to the current NYSE proposal would be a rule that provided claimant the right to unilaterally select the method of arbitrator selection – either administrative appointment or list selection – upon the initial arbitration filing.

Although there are critics of the list selection method (as it exists at NASD), the criticisms are mainly directed at the quality of the arbitrators appointed administratively after all of the names on the list have been stricken. While the NASD is working to resolve this issue in consultation with its constituency, the NYSE's proposal appears to be the opposite of what is desirable and called for at this time. In fact, despite the fact that the limitation on the number of proposed arbitrators each party may strike is intended to result in at least three arbitrators remaining, the reality is that those arbitrators not stricken may nevertheless be unavailable to serve due to undisclosed conflicts of interest or scheduling conflicts. Thus, the NYSE proposal will result in more random administrative appointments, a prospect widely opposed by practitioners of all stripes.

As Representative Barney Frank (D-Mass.) has recently called for Congress to examine the securities industry arbitration process, perhaps now is the time for the SEC to re-examine its 1977 decision to allow the SROs to control the arbitration process as well as the Commission's 1986 decision to support the enforcement of mandatory arbitration of securities industry disputes. Certainly the factors considered by the SEC in 1977 and 1986 either no longer exist or have greatly changed.

---

direct conversations with a cross sampling of claimant and respondent attorneys that the vast majority of claimant (customers or non-member) attorneys preferred list selection while most respondent (Member Firm) attorneys did not. The Exchange's statistics, which indicated a lack of interest in the alternative arbitrator selection methods, were based on the number of cases where a party affirmatively advised the Exchange that they wished to use one of the pilot arbitrator selection methods and did not factor in those cases where the parties discussed the issue directly without informing the Exchange. It was these cases where one party wanted to use an alternative arbitrator selection method and the other side refused consent.

<sup>2</sup> See Securities Exchange Act Release No. 34-50510 (October 8, 2004) footnote 8.

LITTLE & ROBINSON, L.L.P.

Jonathan G. Katz

-3-

November 18, 2004

I thank you for your consideration. If you have any questions or require additional information please contact me.

Respectfully yours,

  
Robert S. Clemente

RSC/dlw