# WORLD ARBITRATION & MEDIATION REPORT

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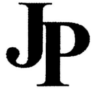

## READER'S RESPONSE

*Reader's Response*

[**Editor's Note:** Mr. Friedman's article responds to a story that appeared in the February 1999 issue of WAMR. *See* 10-2 WAMR 31 (Feb. 1999). The story was entitled "Mediation Seen as Highly Effective ADR Process," and contained the following statement: "The NASDR no longer believes that arbitration is quicker, easier, and cheaper than going to court." *Citing* Rothman, *NASDR Praises Mediation to Resolve Disputes,* Bank Investment MKT (Nov. 1, 1998). NASDR disagreed with that statement, and offers Mr. Friedman's article in response.

Mr. Friedman contends that NASDR's new program in mediation in no way compromises its usage of or commitment to arbitration—that there is a sufficient number of disputes with sufficiently diverse characteristics to warrant recourse to different remedies. Although reasonable people can differ about the potential effect of combining these remedial frameworks, Mr. Friedman has submitted an excellent article—well-written and highly informative about the NASDR, its policies and purposes, and its future direction. WAMR is most appreciative of Mr. Friedman's efforts and delighted to publish the article. WAMR acknowledges that NASDR's position is that its commitment to the usage of arbitration has not been altered in any respect, and that its mediation program is intended simply to provide enhanced client service and choice. Finally, WAMR would welcome future contributions from NASDR. Mr. Friedman's article is a very useful piece that makes a distinct contribution to public understanding about the process of securities arbitration.]

## SECURITIES ARBITRATION: STILL EFFECTIVE AS THE MILLENIUM DAWNS


by
George H. Friedman, Esq.[1]
Senior Vice-President and Director, NASD Regulation's Office of Dispute Resolution (ODR)


One of the few Latin maxims I still retain from law school is *expressio unius est exclusio alterius,* meaning "the expression of one thing is to the exclusion of another." Lately, this term seems to have made its way into the alternative dispute resolution world, when comparing an emerging form of ADR such as mediation to arbitration. It seems that in order to sing the praises of mediation—of which there are many—we feel this need to denigrate the arbitration process. I am not sure why this is so. In any event, the various forms of ADR that have developed over the last several years can and should be evaluated on their own merits. This article will make the case that arbitration remains a good, viable way of resolving securities disputes as we enter the new Millennium.

### Benefits of Arbitration: Still There

Let's look at the perceived benefits of arbitration, all of which are still available to the users of the process:

**Speed:** Although the arbitration process has become more complex as larger, more involved disputes are resolved by arbitration, it is still a relatively swift process. In 1998, there were 5,045 cases filed with NASD Regulation's Office of Dispute Resolution (ODR). Some 1,527 of these cases—which typically involve about $100,000 in dispute—were decided by an award, in an average processing time of 15.9 months. Simplified

[1] The research assistance of William B. Kimme, Senior Attorney at NASD Regulation's Office of Dispute Resolution's (ODR) Chicago Regional Office, is gratefully acknowledged.

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cases—those involving $10,000 or less (since increased to $25,000 for cases filed on and after November 17, 1998)—took even less time, only 7.4 months.[2] In arbitration there is no "calendar" to speak of; cases proceed to hearing when they are ready, and the simplified discovery process in arbitration saves months, if not years, for the parties.

**Picking the "Judge":** One of the major features of arbitration is the parties' ability to pick their arbitrator(s). In November 1998, ODR implemented the Neutral List Selection System (NLSS). The parties, provided with a computer-generated list of proposed arbitrators, and biographical information, are now directly involved in selecting the arbitrators who will decide their dispute.

**Expertise of the Neutral:** Coupled with the ability to select their "judge" from a list of proposed arbitrators is another cornerstone benefit of arbitration: having experts decide cases. To serve the parties, ODR currently maintains a panel of 6,742 arbitrators[3] with diverse areas of expertise. The roster has arbitrators with experience and knowledge of a broad range of stock issues, annuities, commodities futures, various bonds, real estate investment trusts, stock index futures, warrants, and employment issues, to name a few. About 40% of the arbitrators are attorneys.

Last November ODR undertook a major arbitrator updating process. A mailing was sent to each arbitrator, asking that he or she provide detailed, updated biographical information. The updated biographical information has been entered into the NLSS database, providing the parties with the most up-to-date arbitrator data available. As provided in ODR's Code of Arbitration (Code), in a three-arbitrator customer-broker case, a majority of the arbitrators, although knowledgeable in securities matters, will not be affiliated with the securities industry. The same holds true in single-arbitrator cases; the arbitrator will not be affiliated with the industry.

**Informality**: Arbitration remains a simplified process, when compared to litigation. In arbitration, discovery is generally limited to necessary documents, the rules of evidence are not strictly enforced, hearing procedures are simplified, and the arbitrator is free to fashion equitable relief as he or she deems appropriate.

**Finality**: The decision of the arbitrator is essentially final and binding. Under the Federal Arbitration Act,[4] as well as all state arbitration statutes, the grounds for court review of arbitration awards are limited. Unless a party can prove arbitrator bias, fraud, misconduct, or that the arbitrator exceeded his or her authority, the statutes generally provide that the award be enforced. Overlay more than three decades of steadfast support of the arbitration process by the U.S. Supreme Court,[5] and this feature becomes even more impressive.

**Relative Economy**: In many instances, it is less expensive for parties to file a lawsuit than it is to file an arbitration. By looking holistically at the issue of the relative economies of arbitration, however, the process remains relatively economical.

**Speed Pays**: Simply stated, time is money.

**Limited Discovery**: Less discovery means less money spent in direct costs (attorneys fees, and court reporter charges), and indirect costs (time lost by the parties while participating in discovery);

**Panel Expertise**: Because cases are heard by experts in the field, less time is spent educating a judge (and sometimes a jury) about the technical nuances of a dispute;

**Limited Appeals:** The relative finality of arbitration, as compared especially to litigation, translates to less money spent on appeals.

At ODR, there are additional economies. In most private ADR fora, the parties are responsible for payment of arbitrator compensation and expenses, as well as the cost of hearing room rentals and other related costs. Under the Code, these expenses are borne not by the parties, but by the forum. For customer-claimants, there are still more economies, such as a reduced-rate filing fee schedule. Therefore, even with the ODR fee increases approved by the SEC in February,[6] the process remains relatively inexpensive.

[2] Statistical data provided on March 26, 1999 by William N. Bonilla, ODR's Assistant Director of Technology & Finance. Note that the *average* amount claimed for cases filed in 1998 was $796,418; the average was skewed, however, by several large claims. The typical claim amount is clustered around the $100,000 mark.

[3] Statistical data provided on March 26, 1999 by Gary Tidwell, ODR's Director of Neutral Development.

[4] 9 U.S.C. sec. 1 et seq.

[5] See, e.g., Prima Paint v. Flood & Conklin, 388 U.S. 395, (1967), Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983), Southland Corp. v. Keating, 465 U.S. 1 (1984), Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985), Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987), Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989), Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991), and Allied-Bruce Terminex v. Dobson, 513 U.S. 265 (1995).

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## Reports of Arbitration's Demise Are Greatly Exaggerated

The February 1999 issue of the *World Arbitration and Mediation Report* contained an article reporting that my office had essentially thrown in the towel on arbitration in favor of mediation. It is certainly time that ODR be gearing up to promote its highly successful, highly respected mediation program. Since 1995, over 2,500 disputes have been submitted to the program, which boasts an 80% settlement rate.[7] The article was *not* correct, however, in reporting the demise of our arbitration program. Quite the contrary, ODR's arbitration program remains alive and well.

Last year, nearly 5,000 cases were submitted to ODR's arbitration program. While this is a decline from the 6,000 cases filed in 1997, it is not at all unusual for a bull market and was quite consistent with historical trends at ODR. Stated differently, parties generally are less likely to have disagreements when they are making money.

At ODR, we are enthusiastically gearing up for this year and the new century that beckons over the horizon. Let's look at some new initiatives and plans for the future:

**NASD Dispute Resolution, Inc.:** If all goes according to plan, the year 2000 will witness the birth of a new entity, NASD Dispute Resolution, Inc., by which ODR will become a wholly-owned subsidiary of the parent corporation, NASD, Inc. With its own board and structure, this planned spin-off will provide a greater level of independence and importance to the NASD's dispute resolution program.

**Streamlining:** ODR is serious about streamlining the arbitration process. In February 1999, a new, streamlined case intake process was rolled out, promising more rapid service of new claims. An enterprise-wide review of how we administer the arbitration process is now taking place, with a goal of providing crisp, first-rate administration to the parties.

**Improving the Quality of Service:** ODR provides a service. As such, we must strive to deliver a consistent, high-quality service to users of our system. Attaining this goal challenges us to develop new ways of thinking about how we do our jobs every single day. We will continue to explore pilot projects, such as one to encourage the greater use of a single arbitrator, and other innovations and streamlining, to improve the quality of the administrative services we provide. At every turn, we will look at our process and ask ourselves if we cannot make them simpler and more expedient.

**Educating Users and Staff on Rules and Procedures**: In order to meet all of our goals, we must be sure both users and staff are fully informed on our rules and procedures. For staff, this will take the form of the creation of a nationally-directed staff training and development program. With the recent appointment of the Assistant Director for Staff Training, we took an important first step toward achieving this objective. We intend to roll out a comprehensive staff training program that will be a key tool for providing uniform, consistent, and predictably high-quality service to our users. For users—- both parties and neutrals—- attaining this goal will take the form of new, high-quality training programs. In short, we will endeavor to "get the word out"—- both internally and externally.

**Increase the Use of Mediation**: Clearly, ODR has a winner with its successful mediation program. Indeed, mediation has emerged in the 1990s as the ADR method of choice for many parties. We intend this year to build on our success by developing and implementing a nationally-directed mediation program that is priced right, and can compete with that of any other organization. We intend to let people know about this loud and clear.

**Improve the Quality of Our Roster of Neutrals**: The cornerstone of ODR's service is the roster of neutrals. The best administrative service will not be perceived as high quality unless we also provide a qualified, trained, diverse roster of neutrals to resolve disputes as we enter the next century. This year, ODR is rolling out a nationally-directed program for neutral roster development, maintenance, and training. We will actively analyze where we need to conduct recruitment and training, with a greater degree of coordination and accuracy. By the end of the year, we will have reviewed the entire roster to ensure that the information we provide to the parties is complete, accurate, and up-to-date.

**Measure, Monitor, and Evaluate NLSS**: Last year, at the request of our users and the SEC, ODR rolled out the Neutral List Selection System. Because NLSS represents a

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[6] SEC Release No. 34-41056 (Feb. 16,1999). This was the first ODR fee increase since 1990. As the SEC noted, when inflation is taken into account, the increases are relatively modest and, in some cases, reflect a decrease in constant dollars.

[7] Statistical data provided on March 26, 1999 by Kenneth Andrichik, ODR's Director of Mediation.

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significant change in the way we appoint arbitrators, it is important that we closely monitor how it works. Our goal is to measure the impact of NLSS on things like processing times and party perceptions of panel quality, and to look at how NLSS works from a technical and process perspective. This analysis will drive possible changes and enhancements to NLSS.

## An Arsenal of ADR Tools

Arbitration has for the better part of this century been an effective way of resolving disputes. The emergence of new forms of ADR should not be viewed as increased competition for limited dispute resources——there will always be plenty of disagreements to go around. Rather, we should view the impressive array of dispute resolution techniques as an ever-growing arsenal of tools the parties can use to resolve disputes in a cost-effective, prompt, and satisfying manner. ❑

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