



Securities Industry Association

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January 22, 1997

Mr. Jonathan G. Katz, Secretary
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549

RE: SR-NASD 96-47

Dear Mr. Secretary:

This is in response to your request for comments on the proposed rule change to amend its policy and practice concerning the application of eligibility provisions in Rule 10304 of the Code of Arbitration Procedure ("Code") of the National Association of Securities Dealers Inc. ("NASD") to the effect that arbitrators, not the NASD Regulation staff shall determine whether a dispute is eligible for arbitration. On behalf of the Securities Industry Association ("SIA") Litigation Committee, I request that the proposed rule change not be approved by the Securities and Exchange Commission ("Commission"). This proposal was originally filed as SR-NASD-96-37, but was withdrawn. At that time SIA filed a response for comments dated November 12th, 1996 and at this time I wish to refile it in SR-NASD-96-47 and for that purpose a copy of it is enclosed. In addition to the comments made in the November 12th, 1996 letter, the following are some observations on various misstatements which are contained in the current proposal.

The thrust of the eligibility rule¹ that no claim which is older than six years is eligible for arbitration at the NASD. In the filing the NASD speaks about the staff making preliminary eligibility determination and upon the request of a party, the arbitrators could review this determination and that other self-regulatory organizations ("SROs") have followed the same practice. This is not so. That a claim be under six years old is a pre-condition to its filing. From the inception of the eligibility rule by the NASD in 1968 and its later adoption by the SROs, arbitration staffs did not accept matters older than six years. It was not a preliminary determination; it was final and absolute. Only in recent years has the NASD considered it determination to be preliminary. For over 20 years it was never considered as such. With the advent of a number of claims alleging fraudulent concealment, and using this as a basis for extending the six-year period, the NASD staff incorrectly applied tolling concepts to what is a substantive pre-condition or filing a claim. The only tolling provision affecting the eligibility rule appears in Rule 10307 of the Code which provides that the six-year eligibility limitation shall not run for any period of time during which a court has jurisdiction over the matter. Because of the confusion of the staff over tolling, the practice developed of submitting matters which were ineligible for arbitration at the NASD to arbitration in order to determine the question of eligibility.

The mere stating of this procedure shows its impropriety. The other SROs can speak for themselves but the practice outlined by the NASD is not one followed by them.

The submission also states that the practice of the staff making preliminary eligibility determinations is not provided expressly in the Code. Self-evident matters need not be expressed when the nature of the eligibility rule is understood. As stated above, it is a pre-condition to the filing of a claim. The NASD simply does not have the authority to accept a claim which is in excess of six years. It should be self-evident that the persons for processing claims are the ones to either accept or reject then in accordance with the rules. This need not be stated and most certainly was not stated when the rule was adopted because it was not necessary.

The submission also states that eligibility determinations have always involved an element of staff discretion. This is not so. There is no discretion allowed to the staff to disobey their own rules. If a matter is not eligible for arbitration, the staff cannot accept it. This is not a discretionary act. It is a question of following their own rules.

The submission also states that unless otherwise expressly provided in the Code dispositive motions should be decided by the arbitrators because the arbitrators are the designated adjudicators of all issues of fact, law and procedure in an arbitration. This is not so. Arbitrators make no determination of fact or law. Arbitrators made awards based upon equitable considerations. It is akin to a court of equity rather than a court of law which makes determinations. Arbitrators' authority is not unlimited. An arbitrator derives authority from the underlying agreement to arbitrate and the applicable law and rules under which the arbitration takes place. Arbitrators have no authority under NASD rules if a matter is older than six years since such a matter is ineligible to be submitted to an arbitrator. Any actions by an arbitrator in an ineligible matter is voidable and the staff's referral of such an ineligible matter to arbitration does not confer on the arbitrators any authority to act.

Because of the many erroneous assumptions upon which this proposal is based, it should again be withdrawn, or, in the alternative, the Commission should reject it.

The proposal, like its predecessor, states that the procedure for which it seeks approval was put into practice on August 1st, 1996. SIA again repeats its position taken in the November 12th, 1996 letter in paragraph 4 that this retroactive effective date is impermissible since it clearly violates the plain language of the Exchange Act which says, "No proposed rule change shall take effect unless approved by the Commission or otherwise permitted with the provisions of this subsection."² If the Commission were to approve this proposal, it should be effective as of the date of such approval and not August 1st, 1996.

It is respectfully requested that this proposal be withdrawn or disproved so that parties to arbitrations are not thrust into a situation of having to resolve this issue through petitions to the court. If the Commission desires any further information on this issue, SIA will be most happy to assist the Commission in any way possible.

Very truly yours,

William J. Fitzpatrick
Consultant, Litigation

cc: Alden S. Adkins, Esq., NASDRT. Grant Callery, Esq., NASDMembers, NASD BoardMembers, SICA

Footnotes:

1 Section 10304 of the Code of Arbitration Procedures which reads in its entirety: "No dispute, claim, or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy. This section shall not extend applicable statutes of limitation, nor shall it apply to any case which is directed to arbitration by a court of competent jurisdiction."

2 Securities Exchange Act of 1934, Section 19(b)(1).(1986).