# SRO Forum Statistics

## *Focus on Settlement Strategies, Negotiating Tips, and the Role of Mediation in Arbitration*

The arbitration and mediation statistics used in this article were provided by the NYSE, NASD Regulation (NASDR), and some were derived from SAC's Award Database. Together, they offer a current picture of the use of mediation in resolving securities disputes and of the continuing role of securities arbitration.

**NASDR ODR Mediation**

How's mediation doing? In 1997, there were a total of 865 cases closed by NASDR's Office of Dispute Resolution (ODR) after utilizing the mediation process. Not all of these 865 ended in settlements, but 683 did, or 79% of the whole. In 1998, the settlement percentage remained very much the same, notching up to 80%, while cases closed following mediation rose one-third to 1,158. There are at least two things to note about mediation's role in securities dispute resolution, judging from these figures.

a. First, the one-third rise in mediations in 1998 happened against a background of declines in NASD arbitrations filed. New case filings were down 18 % at NASD in 1998, from 5,997 cases to 4,938, respectively. The number of cases closed on the arbitration side stood at 5,880 in 1997 and dropped about 7% in 1998 to 5,484. These figures indicate that mediation's popularity was robust enough to buck a downward trend in 1998!

b. Secondly, despite a much heavier caseload in 1998, mediation staff and the pool of mediators proved equal to the task of maintaining the quality of the program, as evidenced by the high settlement rate of 80%. In fact, throughout the current thrust (43 months through February 1999) into mediation, ODR's Mediation team has maintained an average settlement rate of 80%. Moreover, that rate now applies throughout ODR's four Regional Offices.

NASD's mediation program continues to rely upon its arbitration cases as grist for the settlement mill. More than 90% of the cases entered on the mediation docket are also entered on the NASD's arbitration docket. This suggests that people have not yet learned to use mediation as a pre-arbitration tool for resolving incipient disputes. We understand, though, that mediation staff will be placing a greater emphasis upon encouraging "straight-ins" during 1999 — that is, disputes which flow directly into mediation, rather than ripening first into an arbitration dispute.

**Settlements in Arbitration**

Actually, settlements in arbitration were dropping as a percentage of the whole at NASD as we entered 1999. While the differences were small, NASD statistics reflected a slight decline over the past couple of years in settlements as a percentage of closed cases. As a result, more cases were decided by arbitrators in 1998, despite the 7% drop in closed cases, than in 1997 (1918 vs. 1856). The percentage of cases that were fully adjudicated was consequently higher in 1998, 35%, compared with 31.5% in 1997 (during the three months ending March 1999, the percentage of fully adjudicated cases stood at 34% of all closed cases).

Settlements, as a percentage of all closed arbitration cases, do not appear to be on the increase. On the other hand, mediation, as a catalyst for settlement, has become a greater contributing factor over the past three years. Of the cases that settled in arbitration during 1998, 28% were settled via mediation, whereas in 1997, the percentage was about 19%. Looking back to 1996, we see that settlements by mediation were only 8.5% of the settlement portion of the NASD's arbitration docket.

These impressive mediation results should, one might expect, dramatically reduce average turnaround time for NASD arbitrations. That has not been the case, however. While still under a year (11.8 months), average turnaround time is up from where it was in 1995 (10.5 months), when the mediation program began. Does this mean that mediated settlements, similar to directly negotiated settlements, occur late in the game? If so, much of the potential for saving processing costs via a mediated conclusion would be lost.

NASD mediation statistics measure turnaround time *relative to the mediation process* and that timeframe is short — an average 104 days in 1998 and 83 days thus far in 1999. At what stage in the arbitration process mediation is generally attempted is less clear. Moreover, average turnaround time in the arbitration process is affected by other factors. For instance, ODR officials have reported that party-arbitrator collaboration in scheduling hearing dates during mandatory pre-hearing conferences has lengthened the time to initial hearing from the average attained when the staff was setting dates. List selection is also expected to add to turnaround time.

**Arbitration Today**

How's arbitration doing? Today, there are basically two forums left (except for West Coast disputes, where the Pacific Exchange continues to run an active program). When the American Stock Exchange merged into NASD, investor choice was diminshed, not only by losing the third most active securities arbitration forum, but also by losing what was left of the AmEx Window. The AmEx Window provided a modicum of access to the American Arbitration Association and that option, granted through the AmEx Constitution, was dropped in the merger. Now, the AAA has announced that it is dumping its separate Securities Arbi-

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tration program and handling all securities and commodities disputes under its Commercial Arbitration Rules after June 1999. So, our choices now are more or less just two — NASD and NYSE.

At NASD, new case filings were down 18% in 1998 from the year before (4,938 vs. 5,997), but they began to recover in the final quarter. That recovery turned into a rebound in the first quarter of 1999, when new filings jumped 27%! First quarter filings rose to 1,498, 27% more than in the same quarter 1998 (1,181), while 6% less than in 1997 (1,599). This apparent upward shift is confirmed by the NYSE's filing statistics. The NYSE's filings were dead even, if one compares 1998 to 1997 — 544 vs. 545 — but, through the first quarter of 1999, they are up 21%.

Another NYSE surprise for the first quarter of 1999 lay with its settlement rate. NYSE has recently instituted a mediation and pre-hearing conference program for cases over $500,000 (about 20% of the filings) and this should help in managing and settling these larger cases (see 10 SAC 4(9)). The impact of that program had not kicked in during the first quarter, yet NYSE experienced a settlement rate for its customer cases of 77%! If we were inclined to think that the rise in case filings could be attributed to a sudden, tougher settlement stance by NYSE firms in the early review phase of incipient disputes, that belief would be firmly challenged by this post-filing settlement rate of 77%.

**Forum Fees & Forum Selection**

A significant factor in the NASD's burst of new case filings may well be one that, in future quarters, will depress case volume at the forum. On March 18, 1999, ODR began imposing a new fee schedule on filing parties, one that our calculations (see "Forum Fee Survey," 10 SAC 1(1)) have demonstrated will cost customers (and employee-claimants) about 32% more at the NYSE. Broker-dealers will pay three times more at NASD, as opposed to NYSE. Since 647 of the 1,498 cases filed at NASD in the first quarter were filed during the month of March, it may be that the filing surge was caused in part by parties filing before the big fee hike took effect.

Longer-term, it will be interesting to see the influence of a large forum fee increase upon claimants' choice of forum. Of course, claimants who arbitrate with NASD-only members will not have the choice to file with NYSE, but those who have a choice may consider other factors, besides cost, to be more important in selecting a forum. Some may, paradoxically, view cost as a weapon, reasoning that the trebling in costs to the opposing brokerage firm boosts settlement leverage and makes it worth paying the NASD's fees.

In 1998, 36% of the NYSE Awards in SAC's Award Database involved the five top retail wirehouses. At NASD, the percentage was 16%, but that 16% accounted for more than 80% of the Awards at the two forums involving those five houses. We will want to see if these percentages begin to shift. A significant cost differential should be a material factor in forum selection, plus the claimant's ability to make the choice should affect pre-arbitration settlement dynamics. For example, a brokerage firm could save money by agreeing in advance to pay Claimant's NYSE fees, should the Claimant select that forum.

NYSE now has responded to many of the programs and initiatives that set NASD apart from the other forums in the past. List selection, publicly available Awards, nationwide situs coverage, an active mediation program, early appointment of arbitrators and case management conferences are amongst the areas opened by NASD, where today NYSE has taken action and created new programs. Whether investors and their counsel, particularly those outside New York State, will be influenced by these new conditions to select NYSE is a question that bears watching.

As for those investors arbitrating against NASD-only firms, the choices are fewer. AAA arbitration may be available where the brokerage firm is interested in avoiding the non-allocable member surcharges and process fees that will still make NASD more expensive fore the brokerage firm. At AAA, the charges are all allocable and are usually split between the parties, whereas at NASD, if the customer wins, the industry side pays the bulk of the allocable fees the majority of the time and splits the fees in most of the remaining cases (see 1994-1997 Chart, "Fee Allocation Survey," 9 SAC 9(13)). AAA will be more expensive for the customer, at least after June (see 10 SAC 6(14)), when securities disputes will be processed under the AAA's Commercial Arbitration Rules, but, for the customer who wants AAA, the additional cost may be worth it.

**Conclusion**

Award and forum statistics will not make a bad case better and playing the statistical odds will not assure victory. Knowing the probabilities, though, and keeping track of the trends will help practitioners make more informed decisions. Today, more than ever, with fewer forums, greater differences among the forums' procedures and fees, and increased party input in making critical choices — between the existing forums, between adjudication or mediation, between arbitrator pools and selection systems — "weighing the probabilities" does not mean hefting a coin and flipping it. The informed practitioner, one who knows the process and is both willing and able to negotiate along the way on key tactical judgments, has keen advantages to exercise in representing the arbitration client. ■