

The Explained Award of Damocles: Protection or Peril in Securities Arbitration

By Barbara Black and Jill Gross*

Since 1987, when *Shearson/American Express, Inc. v. McMahon*¹ made arbitration of customers' disputes with their brokerage firms mandatory, NASD Dispute Resolution (NASD-DR), the principal securities arbitration forum² and a wholly-owned subsidiary of the National Association of Securities Dealers, Inc. (NASD), has instituted many reforms to improve the quality and fairness of the process. Some of these reforms benefit all participants in the process because they establish clear, standardized procedures.³ In 1999, for example, NASD adopted a discovery guide with document production lists setting forth presumptively discoverable documents to provide guidance to parties and arbitrators in resolving often rancorous discovery disputes.⁴ Recent NASD proposed rule changes include a rule setting forth procedures for the issuance of third-party subpoenas that explicitly provide an opportunity for parties to object to their issuance⁵ and an ambitious project to revise the entire customers' code of arbitration procedure to improve its organization and clarity.⁶

Many of NASD's recent rule changes, however, are responses to the reality that many customers may distrust a process that requires them to arbitrate their disputes in an industry-sponsored forum. In 1998, NASD replaced administrative appointment of arbitrators with a procedure that gave the parties input into the selection of the arbitrators who would decide their dispute.⁷ It also continues to propose changes to tighten the

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This article is based on a Comment Letter filed by the Pace Investor Rights Project (PIRP) with the Securities and Exchange Commission (SEC), in response to the NASD's explained awards proposal. See Letter from Jill I. Gross, Barbara Black, and Melanie Serkin, PIRP, to Jonathan Katz, Secretary, SEC, dated August 5, 2005, available at <http://www.sec.gov/rules/sro/nasd/nasd2005032/bblack6853.pdf>. The authors would like to thank the excellent research assistance and insights of Melanie Serkin, a summer 2005 PIRP intern, who played a substantial role in drafting that Comment Letter.

definition of "public" arbitrator to ensure that individuals with significant ties to the securities industry are not classified as "public."⁸

NASD's proposed rule change requiring arbitrators to provide written explanations in arbitration awards upon the customers' request (the "explained award proposal"),⁹ which was published for public comment in July 2005, is the clearest example of NASD's proposing a rule change in response to investors' complaints.¹⁰ "We have found that investors want to know more about how a panel reaches its decision," stated NASD Chairman and Chief Executive Officer Robert R. Glauber in announcing the explained award proposal.¹¹ "By giving investors the option of requiring a written explanation of an arbitration panel's decision, we will increase investor confidence in the fairness of the NASD arbitration process."¹²

I. The Explained Award Proposal

NASD's current rules require that all securities arbitration awards contain certain specified information, including a summary of the issues, the damages and other relief requested and awarded, and a statement of any other issues resolved.¹³ NASD arbitrators are not required to provide reasons or explanations for their award, and they typically do not provide them.¹⁴

Under the explained award proposal, if the customer (or an associated person in an intra-industry dispute), whether as a claimant or respondent,¹⁵ requests an explained decision at least 20 days before the first scheduled hearing date,¹⁶ the arbitration panel must provide "a fact-based award stating the reason(s) each alleged cause of action was granted or denied."¹⁷ The arbitrators need not include legal authorities or damages calculations as part of their explanation.¹⁸ NASD explains that this would lead to "complex and lengthy judicial-type decisions" that would increase the time and effort needed to draft the decision.¹⁹ Each arbitrator will receive an additional \$200 honorarium for writing an explained decision, and half of the additional cost will be allocated to the parties, as determined by the arbitrators.²⁰ As under current practice, arbitrators are expected to render awards within 30 business days from the date the record is closed.²¹ Furthermore, as proposed, the customer's right to request an explanation does not extend to default proceedings and simplified arbitrations proceedings without a hearing (claims not more than \$25,000), in light of the abbreviated nature of these proceedings.²²

In proposing this rule change, NASD does not intend to change the longstanding policy that arbitration awards have no precedential value.²³ To make this clear, if the Securities and Exchange Commission (SEC)

approves the explained decision proposal, every award will include the following language: "If the arbitrators have provided an explanation of their decision in this award, the explanation is for the information of the parties only and is not precedential in nature."²⁴

According to NASD, one of the most common complaints of parties who either lose in arbitration or consider their recovery insufficient is the lack of explanation for the decision.²⁵ By giving customers the right to request an explanation, it hopes "to increase investor confidence in the fairness of the NASD arbitration process."²⁶ NASD acknowledges that customers have more reason to be suspicious of the securities arbitration process than do industry participants by its decision to allow only customers the right to require an explained decision. It explains that this is for the customers' protection, since they will have to balance their desire for more information with the increased costs, possibility of delay and risk of providing grounds for a court to vacate the award.²⁷ In its view, a fact-based award stating reasons for the outcome (but not including legal authorities or damages calculations) strikes the appropriate balance between providing disappointed customers with the information they desire without unduly increasing the length and expense of the arbitration process.²⁸

II. Traditional Reasons for Not Requiring Awards

It is well-settled that arbitrators are not required to explain or provide reasons for their awards.²⁹ Modern courts trace back this doctrine to Supreme Court *dicta* in *Wilko v. Swan* that the arbitrators' "award may be made without explanation of their reasons."³⁰ While the Court in its earlier decisions referred to the absence of such a requirement as evidence that arbitration was less protective of statutory rights than litigation,³¹ the Court since has used the doctrine to support its holding that the absence of reasoning in an award alone does not provide grounds for vacatur.³² Indeed, in a few short years, the Court converted the absence of explained awards from a factor proving the ineffectiveness of arbitration into a factor supportive of the value of arbitration as an alternative dispute resolution mechanism.

In turn, the lower federal courts have enforced the rule under the Federal Arbitration Act, reasoning that such a requirement would undermine the very purpose of arbitration—to provide a speedy and efficient means of dispute resolution.³³ The Second Circuit Court of Appeals in *Sobel v. Hertz, Warner & Co.* explained that, while requiring arbitrators to explain their awards "would help to uncover egregious failures to apply the law,"³⁴ par-

ties who choose arbitration instead "implicitly accept" the "sacrifice" of "legal precision" that results from the absence of the requirement.³⁵

The SEC acknowledged this trade-off in 1989 when it rejected a request—contained in letters filed by two advocacy groups commenting on a different rule proposal—that the SROs' arbitration forums adopt an explained award requirement.³⁶ The SEC expressed its "concern" that mandating "written opinions at this time could slow down the arbitration process and discourage many persons from participating as arbitrators."³⁷ The SEC concluded that "[a]t present, we do not believe that the benefit obtained from requiring written decisions outweighs these concerns."³⁸ The SEC's carefully crafted language, of course, left open the possibility that it could reconsider requiring explained awards.

The explosive growth of securities arbitration since 1989 has led to a number of criticisms of the current system, including the absence of transparency in awards. Many have expressed concern that the lack of reasoned awards in securities disputes has slowed or even frozen the development of the law governing brokers' disputes with their customers.³⁹ Some courts and commentators contend that the lack of reasons overly protects awards from judicial review,⁴⁰ while others construe the lack of an explanation as evidence that the arbitrators disregarded the law.⁴¹ Yet others advocate for a written explanation only when atypical remedies are awarded, such as punitive damages, because they require special findings.⁴² Finally, those on the losing side of an award—especially customers already angry at the industry for their investment losses—complain that the lack of an explanation frustrates their ability to understand the outcome and leaves them feeling that the process was unfair.⁴³

III. Benefits of Explained Awards

Reforming the system to permit investors to request explained awards will reap benefits for arbitration participants. Written explanations will provide some insight into the arbitrators' reasons for granting an award. Parties may find this beneficial for two reasons. First, if the explanation satisfies the investor (either because it provides insight into the panel's thought process or because it at least demonstrates that the arbitrators took the complaint seriously), the stated purpose for the proposed rule change—to increase investor confidence in the fairness of the process—may be advanced.⁴⁴ The current system, it has been argued, encourages disappointed parties to be dissatisfied with the process and to challenge the outcome by attempting to vacate the award.⁴⁵ In instances where an investor is denied

recovery or is awarded only a small percentage of his claimed damages,⁴⁶ however, there is reason to doubt that an explanation would obviate investors' concerns about the process. Adoption of the explained award proposal, therefore, may be largely cosmetic if it does not improve the securities arbitration process itself, but merely claimants' *perceptions* of the process.

Second, by allowing parties to see how arbitrators previously decided controversies, explanations will also provide valuable information for parties to use when ranking and striking arbitrators during arbitrator selection in future cases. This is a tangible benefit because it will assist parties in selecting arbitrators who they believe will be appropriate decision-makers for their dispute, based on the evidence provided by a panel's explanation.⁴⁷

Moreover, it is possible that requiring arbitrators to explain their decisions will improve the quality of their decision-making and thus lead to an overall improvement of the securities arbitration process, although this benefit is more conjectural. The process of putting an explanation on paper may make it more likely that arbitrators will evaluate carefully all the evidence and reason through their conclusions rather than decide based on compassion, bias, or instinct.⁴⁸ In addition, cognitive psychology research suggests that people take greater efforts to improve the quality of their decision-making when they are more likely to be held accountable for their decisions.⁴⁹ Knowing that an explanation will increase the possibility of subjecting an award to judicial review⁵⁰ should also encourage the panel to be more thoughtful in its awards.

IV. Transformation of the Securities Arbitration Process

We have no doubt that the explained awards proposal, once approved, will transform securities arbitration into an even more litigation-like process. First, the period from filing to award will likely be extended, possibly negating NASD's recent efforts to make the process more timely. NASD arbitrators might not be able to write short, clear explanations in 30 days, particularly if there is an exchange of drafts among three arbitrators to permit revisions.⁵¹ It has been suggested that only one arbitrator, presumably the Chair, will write the award. While this might shorten the process, it may reduce the quality of the decision-making. While NASD views delay as a foreseeable cost that investors will take into account when deciding whether to request an explanation, investors may well be disappointed with the delay, particularly if they do not find the outcome or the explanation satisfactory.

Second, while the addition of a few reasons for an award should not change the long-held view that arbitration awards have no precedential value,⁵² several commenters believe that an explained NASD arbitration

award can and should be used as precedent.⁵³ They contend that explained awards make future cases more predictable, allowing investors to make informed decisions, and guiding industry participants in adopting remedial measures.⁵⁴ The proposal's explicit declaration that awards are not "precedential in nature"⁵⁵ may not be sufficient to withstand this development since the proposed rule does not *prohibit* attorneys or arbitrators from citing past awards in future cases. Moreover, while the proposed rule does not *require* arbitrators to cite legal authorities, it also does not prohibit the practice. If the practice of citing both past awards and legal authorities becomes commonplace, awards may come to resemble opinions, despite NASD's efforts to avoid this outcome.

Thus, attorneys, with their training to search for and apply legal precedent, will find the temptation to cite awards as authority nearly irresistible. There is a like potential that arbitrators would accede to this practice. This would be an undesirable development. Arbitrators are tasked with the responsibility of deciding the dispute before them on its own facts, not with deciding disputes based on precedent. Moreover, creation of law is a legislative and judicial function; it is not the role of arbitrators. Indeed, arbitrators are frequently non-lawyers, with no training in analyzing the law, deciding legal issues or writing legal opinions. The pool of arbitrators consists of "a broad cross-section of people" and there is no requirement that public arbitrators have any legal training or experience in the securities industry.⁵⁶ The most commonly expressed concern about arbitrators' performance is that the "skills and training of arbitrators are not always adequate to meet the challenges of contemporary securities arbitration."⁵⁷ Most importantly, they are not required to apply the law.⁵⁸ It would be dangerous to allow this pool of arbitrators to create law in a complex industry.

Third, written explanations will increase judicial review of the process and possibly make it easier for courts to apply a manifest disregard of the law standard.⁵⁹ Lawyers know that succinct and precise writing is difficult to achieve.⁶⁰ It is more likely that "instead of being a window into the rationale of the arbitrators, a written explanation will be used as a platform and blueprint for ... appeal, because it identifies or magnifies targets, meaningful or otherwise, for the losing party to attack."⁶¹ This can lead to prolonged and expensive litigation, again subverting the goals of a quick, efficient, low-cost means of dispute resolution that arbitration seeks to accomplish.⁶² Attorneys' fees and a long, drawn-out court battle will overwhelm small investors, in particular. Instead of providing a basis

for meaningful review in those rare instances of arbitrator misconduct,⁶³ written explanations could open the floodgates to routine judicial review, undermining the finality of arbitrators' awards.

Finally, requiring arbitrators to provide explanations for their outcomes will likely shift—albeit subtly—the locus of their decision-making from equity to law.⁶⁴ Arbitration is considered a forum of equity, as arbitrators may consider “common sense notions of fairness” and other equitable factors when resolving disputes before them.⁶⁵ This focus on equity has been a benefit of securities arbitration for investors, because the law is not investor-friendly in many jurisdictions.⁶⁶ Thus, this push towards law and away from equity is likely to frustrate the investor protection objectives of the proposal.

V. Specific Objections to the Explained Award Proposal

Since it is likely that the SEC will approve the explained awards proposal in some form, we urge regulators to consider revising the proposal to remedy several specific shortcomings.

First, to minimize the risk that participants will cite past awards as precedent, the language discouraging this practice should be strengthened. In an earlier version of the proposed rule, a footnote indicated that the template of the award would state that “the award has no precedential value and cannot be cited in any subsequent award.”⁶⁷ The current version of the proposed rule has diluted this language somewhat by removing the second half of the phrase. The text of the rule itself—not just the award template—should include the precise language from the earlier version.⁶⁸

Second, some arbitrators currently on NASD's roster may be philosophically opposed to writing explanations. The proposed rule calls for the request for a written explanation as late as 20 days prior to the first scheduled hearing date, after NASD already has appointed arbitrators and when it is too late for arbitrators to decline the case. A partial solution is to amend the explained award proposal to require investors to indicate at the time of arbitrator selection that they will request a written award. The rule should give the arbitrators the option to decline if they are philosophically opposed to explaining their decisions, or if, because of other commitments, they anticipate they would not be able to write a reasoned explanation within 30 days. Without this amendment, qualified arbitrators may drop out of the pool preemptively.

Third, the explained award proposal does not provide sufficient guidance to arbitrators about how to craft the award. It merely defines an explained decision as a “fact-based award stating the reasons each alleged cause of

action was granted or denied" and states that an explanation need not include legal authorities or damage calculations. However, NASD does not require that arbitration pleadings filed in its forum contain well-pleaded, distinct legal causes of action, unlike pleadings filed in court. Thus, it may be difficult for a panel to identify and address "each alleged cause of action," as required by the current rule proposal. Additionally, the proposal is silent as to whether the explained award would have to address each and every affirmative defense alleged by respondent(s). An award might state that the claimant proved *prima facie* liability on a particular legal theory, but that respondent's affirmative defenses negated that liability, without identifying the alleged affirmative defense. The proposal is also ambiguous concerning the extent of fact-based detail sufficient to constitute an explanation. For example, it is unclear whether a statement such as "we awarded Mrs. Smith \$24,000 because we felt sorry for her" would constitute an adequate explanation. Without further clarity in any of these areas, the panel's "explanation" might not increase investor confidence in the process or improve the quality of decision-making.

For these reasons, we recommend that the language of the rule be amended to require arbitrators to address "each alleged ground for relief" rather than "each alleged cause of action," and also to address each alleged defense. We also suggest that, once approved, NASD should add a component to arbitrator training that specifically provides additional guidance to arbitrators as to how to craft an explained award within the meaning of the new rule.

VI. Conclusion

As we have described, whether the explained awards proposal will increase investor protection and enhance perceptions of fairness is far from clear. We find it difficult to oppose a rule designed to increase transparency and options available to investors participating in the securities arbitration process. Since *McMahon*, reform of the securities arbitration process has focused on making the process more judicial, and the judicial system has become the benchmark for fairness. This is understandable in a system where the investors' consent to arbitration is fictional.⁶⁹ Yet, adding even more judicial characteristics to NASD arbitrations will diminish even further the value of what used to be an alternative to public judging of these disputes.

Industry advocates of securities arbitration have long touted the process as a worthwhile sacrifice of legal precision for an affordable and relatively speedy forum.⁷⁰ While this is a debatable proposition with respect to claims where the investors' alleged losses may approach or exceed sev-

en figures, the statement has validity with respect to small claims. We thus agree with NASD's position that the explained award proposal should not apply to simplified arbitrations, involving customer claims under \$25,000 that are decided on paper submissions. The advantage of a simplified arbitration is its low cost and expedited outcome, which would be vitiated if the arbitrator were required to give an explanation. Moreover, these claims are generally simple and straightforward and the outcome should not need an explanation. If a customer in a simplified arbitration feels strongly about receiving an explanation, he or she can request a hearing and then request an explained award.

For claims beyond \$25,000, does the added transparency justify the increased costs, both direct (loss of speed and increased forum fees) and indirect (threats to finality and equity)? The explained award proposal may be a double-edged sword: in the name of investor protection, a decreased emphasis on equity may lead to overdependence on a body of law that may not adequately protect investor rights. While we laud NASD's investor protection orientation, we are skeptical that the explained award proposal will enhance the fairness of securities arbitration.

NOTES

1. 481 U.S. 220 (1987). Prior to *McMahon*, brokerage firms could not enforce arbitration clauses in customers' agreements as to federal securities claims. See *Wilko v. Swan*, 346 U.S. 427 (1953).

2. Of the 9,225 securities arbitration claims filed in 2004, 8,201 of them, or 89%, were filed with NASD. Securities Industry Conference on Arbitration, *Thirteenth Report* at 9 (Statistical Reports)(Oct. 2005), http://www.nasd.com/web/groups/med_arb/documents/mediation_arbitration/nasdw_015634.pdf.

3. For a description of the early post-*McMahon* changes, see Barbara Black & Jill I. Gross, *Making It Up As They Go Along: The Role of Law in Securities Arbitration*, 23 *Cardozo L. Rev.* 991, 1001-1003 (2002).

4. See NASD Discovery Guide, available at http://www.nasd.com/web/groups/med_arb/documents/mediation_arbitration/nasdw_009420.pdf.

5. Self-Regulatory Organizations; Nat'l Ass'n of Sec. Dealers, Inc.; Notice of Filing of Proposed Rule Change to Provide for a 10-Day Notice Requirement Before a Party Issues a Subpoena to a Non-Party for Pre-Hearing Discovery, 70 Fed. Reg. 40411 (July 13, 2005).

6. Self-Regulatory Organizations; Nat'l Ass'n of Sec. Dealers, Inc.; Notice of Filing of Proposed Rule Change and Amendments Nos. 1, 2, 3, and 4 Thereto to Amend NASD Arbitration Rules for Customer Disputes, 70 Fed. Reg. 36442 (June 23, 2005).

7. Self-Regulatory Organizations; Order Granting Approval to Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval to Amendments 3 and 4 to Proposed Rule Change by Nat'l Ass'n of Sec. Dealers, Inc., Relating to Selection of Arbitrators in Arbitrations Involving Public Customers, 63 Fed. Reg. 56670 (Oct. 22, 1998).

8. See, e.g., Self-Regulatory Organizations; Nat'l Ass'n of Sec. Dealers, Inc.; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto Relating to Amendments to the

Classification of Arbitrators Pursuant to Rule 10308 of the NASD Code of Arbitration, 70 Fed. Reg. 51395 (Aug. 30, 2005).

9. See Self-Regulatory Organizations; Nat'l Ass'n of Sec. Dealers, Inc.; Notice of Filing of Proposed Rule Change and Amendments Nos. 1 and 2 Thereto, to Provide Written Explanations in Arbitration Awards Upon the Request of Customers, or Associated Persons in Industry Controversies, 70 Fed. Reg. 41065 (July 15, 2005).

10. See Susanne Craig, *New Rule May Lead More Arbitrations into the Courtroom*, Wall St. J., Feb. 4, 2005, at C-1 (reporting that the proposal is "widely hailed as a victory for small investors").

11. News Release, NASD, New Arbitration Rule Requires Award Explanations Upon Investor Request (Jan. 27, 2005), http://www.nasd.com/web/idcplg?IdcService=SS_GET_PAGE&ssDocName=NASDW_013145.

12. News Release, NASD, New Arbitration Rule Requires Award Explanations Upon Investor Request (Jan. 27, 2005), http://www.nasd.com/web/idcplg?IdcService=SS_GET_PAGE&ssDocName=NASDW_013145.

13. Rule 10330(e), NASD Code of Arbitration Procedure (2005), available at http://www.nasd.com/web/groups/med_arb/documents/mediation_arbitration/nasdw_013098.pdf [hereinafter NASD Arbitration Code].

14. NASD does not prohibit arbitrators from setting forth the reasons for their decision, and some arbitrators even have written extensive "opinions." The best known example, *Koruga vs. Wang*, NASD Arb. No. 98-04276 (Sept. 28, 2000), is discussed in Black & Gross, *supra* note 3, at 1043-47.

15. NASD Proposed Rule 10330(j)(1)(A).

16. NASD Proposed Rule 10321(c)(2). NASD explains that, currently, disappointed parties occasionally request an explanation only after the award is issued. The deadline for requesting an explained decision under the proposal is the date when parties are required to exchange documents and lists of witnesses they intend to present at the hearing. NASD believes this deadline gives parties sufficient time to decide whether to request an explained decision and gives arbitrators sufficient notice of their increased responsibilities. Notice of Filing, *supra* note 9, at 41066.

17. NASD Proposed Rule 10330(j)(2). An explained decision relates to all claims involved in the case, regardless of which party brought them. NASD Proposed Rule 10330(j)(3).

18. NASD Proposed Rule 10330(j)(2).

19. Notice of Filing, *supra* note 9, at 41065.

20. NASD Proposed Rule 10330(j)(5). Each arbitrator receives a \$200 honorarium for each hearing session (defined as a meeting that lasts no more than four hours), with the chairperson receiving an additional \$75 per hearing session. Arbitrators may also receive \$200 for deciding discovery-related motions without a hearing session. IM-10104. Arbitrators' Honorarium, NASD Arbitration Code, *supra* note 13.

21. Rule 10330(d), NASD Arbitration Code, *supra* note 13.

22. The SEC specifically requested comment on this exclusion. Notice of Filing, *supra* note 9, at 41066.

23. Notice of Filing, *supra* note 9, at 41065, n. 8. Courts have held that arbitration awards have no precedential value because they are so fact-specific. See, e.g., *Garcia v. Federal Ins. Co.*, 46 N.Y.2d 1040, 1041-42 (1979); see also Barbara Black & Jill I. Gross, *Economic Suicide: The Collision of Ethics and Risk in Securities Law*, 64 Pitt. L. Rev. 483, 507-508 (2003).

24. Notice of Filing, *supra* note 9, at 41065, n. 8.

25. Notice of Filing, *supra* note 9, at 41065, n. 8.

26. Notice of Filing, *supra* note 9, at 41065.

27. *Id.* Where an arbitration panel provides no explanation for its award, it is virtually impossible for a court to determine whether the panel manifestly disregarded the law, a nonstatutory

ground for vacating awards recognized by the Supreme Court in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 941-42 (1995) (dictum).

28. Notice of Filing, *supra* note 9, at 41065.

29. See, e.g., *Dawahare v. Spencer*, 210 F.3d 666, 669 (6th Cir. 2000); *Stroh Container Co. v. Delphi Indus., Inc.*, 783 F.2d 743, 750 (8th Cir. 1986).

30. 346 U.S. 427, 436 (1953), overruled on other grounds by *Rodriguez v. Shearson/American Express*, 490 U.S. 477 (1989); see also *Bernhardt v. Polygraphic Co. of America, Inc.*, 350 U.S. 198, 203 (1956) (stating that arbitrators “need not give their reasons for their results”).

31. *Bernhardt*, 350 U.S. at 203-04 (arguing that the “change from a court of law to an arbitration panel may make a radical difference in ultimate result”); *Swan*, 346 U.S. at 435-36 (stating that the provisions of Securities Act of 1933 are less “effective [] in application” in arbitration).

32. See *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960) (in labor arbitration under collective bargaining agreement, stating that “[a]rbitrators have no obligation to the court to give their reasons for an award.”).

33. See, e.g., *Sobel v. Hertz, Warner & Co.*, 469 F.2d 1211, 1214-15 (2d Cir. 1972) (“forcing arbitrators to explain their award even when grounds for it can be gleaned from the record will unjustifiably diminish whatever efficiency the process now achieves”); *Antwine v. Prudential Bache Securities, Inc.*, 899 F.2d 410, 412 (5th Cir. 1990) (“If arbitrators were required to issue an opinion or otherwise detail the reasons underlying an arbitration award, the very purpose of arbitration—the provision of a relatively quick, efficient and informal means of private dispute settlement—would be markedly undermined”); *Eljer Mfg., Inc. v. Kowin Dev. Corp.*, 14 F.3d 1250, 1254 (7th Cir. 1994) (“Such a requirement would serve only to perpetuate the delay and expense which arbitration is meant to combat”); *Sargent v. Paine Webber Jackson & Curtis, Inc.*, 882 F.2d 529 (D.C. Cir. 1989) (stating that “an explanation requirement would unjustifiably undermine the speed and thrift sought to be obtained by the ‘federal policy favoring arbitration’”) (citation omitted).

34. *Sobel v. Hertz, Warner & Co.*, 469 F.2d 1211, 1214 (2nd Cir. 1972).

35. *Sobel v. Hertz, Warner & Co.*, 469 F.2d 1211, 1214 (2nd Cir. 1972); see also *Pfeifle v. Chemoil Corp.*, 73 Fed. Appx. 720 (5th Cir. 2003) (affirming district court’s refusal to vacate unexplained award and cautioning parties that “when they contract for arbitration, parties should be aware that they get what they bargain for and that arbitration is far different from adjudication”).

36. See Self-Regulatory Organizations; Order Approving Proposed Rule Changes by the New York Stock Exchange, Inc., National Association of Securities Dealers, Inc., and the American Stock Exchange, Inc. Relating to the Arbitration Process and the Use of Predispute Arbitration Clauses, 54 Fed. Reg. 21144 (May 10, 1989). The proposed rule change recommended, *inter alia*, that SRO arbitration awards contain additional content and be made publicly available. Two advocacy groups, Plaintiff Employers Lawyers Association and Public Citizen, wrote in their Comment Letters that this proposal does not go far enough and should also mandate that arbitrators provide reasons for their awards. 54 Fed. Reg. 21144 at *16 (May 10, 1989).

37. Self-Regulatory Organizations; Order Approving Proposed Rule Changes by the New York Stock Exchange, Inc., National Association of Securities Dealers, Inc., and the American Stock Exchange, Inc. Relating to the Arbitration Process and the Use of Predispute Arbitration Clauses, 54 Fed. Reg. 21144 at *17 (May 10, 1989).

38. Self-Regulatory Organizations; Order Approving Proposed Rule Changes by the New York Stock Exchange, Inc., National Association of Securities Dealers, Inc., and the American Stock Exchange, Inc. Relating to the Arbitration Process and the Use of Predispute Arbitration Clauses, 54 Fed. Reg. 21144 (May 10, 1989).

39. See, e.g., *Making It Up*, *supra* note 3, at 992-93; see also *Rex R. Perschbacher & Debra Lyn Bassett, The End of Law*, 84 B.U. L. Rev. 1, 29 (2004) (arguing that the rise of commercial arbitration has frozen the law in certain commercial areas).

40. E.g., *Dawahare*, 210 F.3d at 669-70; *Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 1410, 1413 (11th Cir. 1990); see also Marilyn Blumberg Cane & Marc J. Greenspan, *Securities Arbitration: Bankrupt, Bothered and Bewildered*, 7 *Stan. J. L. Bus. & Fin.* 131, 151-52 (2002) (“Manifest disregard has no practical application without written explanation of the award.”).

41. E.g., *Halligan v. Piper Jaffray*, 148 F.3d 197, 204 (2d Cir. 1998); *Siegel v. Titan Indus. Corp.*, 779 F.2d 891, 894 (2d Cir. 1985); see also Lynn Katzler, Comment, *Should Mandatory Written Opinions Be Required In All Securities Arbitrations*, 45 *Am. U. L.Rev.* 152 (1995).

42. See Constantine N. Katsoris, *SICA: The First Twenty Years*, 23 *Fordham Urb. L.J.* 483, 518 (1996) (stating that “specific findings explaining the basis of the award of punitive damages are desirable, so that the offending party and an appellate court can better understand the rationale behind the unusual punishment being meted out”).

43. See Testimony of Linda D. Fienberg, President, NASD-DR, Before the U.S. House Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises of the House Financial Services Committee, 109th Cong. (Mar. 17, 2005), available at <http://financialservices.house.gov/media/pdf/031705wfg.pdf>.

44. See Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 *UCLA L. Rev.* 949, 1085 (2000) (noting that explained awards contribute to the parties’ acceptance of the award).

45. See Stephen L. Hayford, *A New Paradigm for Commercial Arbitration: Rethinking the Relationship between Reasoned Awards and the Judicial Standards for Vacatur*, 66 *Geo. Wash. L. Rev.* 443, 446 (1998).

46. NASD reports that customers had a monetary recovery in 47% of cases decided in 2004. *NASD Dispute Resolution Statistics, Results of Customer Claimant Arbitration Award Cases (2005)*, http://www.nasd.com/web/idcplg?IdcService=SS_GET_PAGE&nodeId=516&ssSourceNodeId=12. In many instances, customers recover only a small portion of the claimed damages.

47. Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 *UCLA L. Rev.* 949, 1085 (2000).

48. Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 *UCLA L. Rev.* 949, 1085 (2000).

49. See Sarah Rudolph Cole, *Fairness in Securities Arbitration: A Constitutional Mandate?*, 26 *Pace L. Rev.* 73 (2005).

50. Barbara Black & Jill I. Gross, *Making It Up As They Go Along: The Role of Law in Securities Arbitration*, 23 *Cardozo L. Rev.* 991, 1001-1003, at 1030 (2002) (explaining that written explanations will increase the chance of judicial review).

51. Barbara Black, *Do We Expect Too Much From NASD Arbitrators?* *Securities Arbitration Commentator* (Oct. 2004), at 1, 4.

52. See, e.g., *Garcia v. Federal Ins. Co.*, 46 N.Y.2d 1040, 1041-42 (1979); see also Barbara Black & Jill I. Gross, *Economic Suicide: The Collision of Ethics and Risk in Securities Law*, 64 *Pitt. L. Rev.* 483, 507-508 (2003).

53. See, e.g., Letter from Franklin L. Widmann, President, North American Securities Administrators Association, Inc. (NASAA) and Chief, New Jersey Bureau of Securities, to Jonathan G. Katz, Secretary, SEC, Sept. 13, 2005, at 3, available at <http://www.sec.gov/rules/sro/nasd/nasd2005032/flwidmann5172.pdf> (noting that written decisions will lead to an “evolution of a securities jurisprudence in arbitration cases”). In its Comment Letter, NASAA went even further, and urged NASD to amend the rule to require an explained award to contain not only a “fact-based” explanation, but also legal authorities and damage calculations.

54. See H. Thomas Fehn, *Arbitration Awards... Where the Sun Don’t Shine*, *Securities Arbitration Commentator* (Feb. 2005), at 3 (“If arbitrators articulate the factors underlying their decisions, industry participants will learn where they went wrong and can then develop corrective

measures. Similarly, customers can revise their expectations of the behavior they can reasonably demand from industry professionals.”).

55. Notice of Filing, *supra* note 9, at 41065, n.8.

56. See NASD, Arbitrator Recruitment (2006), http://www.nasd.com/web/idcplg?IdcService=SS_GET_PAGE&nodeId=543&ssSourceNodeId=12.

57. See David S. Ruder, Chair, Securities Arbitration Reform: Report of the Arbitration Policy Task Force to the Board of Governors National Association of Securities Dealers, Inc. 107 (1996) (“Ruder Report”).

58. See *Prima Paint v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) (Black, J., dissenting); *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465, 1477 (D.C. Cir. 1997).

59. See *Dawahare v. Spencer*, 210 F.3d at 669 (noting that if arbitrators do not explain their award, it is all but impossible to determine whether they acted with manifest disregard for the law); *Sargent*, 882 F.2d at 532 (“Clearly, insistence on an explanation would increase the ability of courts to spot the sort of ‘manifest disregard’ of the law that justifies overturning an arbitral award”).

60. See, e.g., *Hardy v. Walsh Manning*, 341 F.3d 126 (2d Cir. 2003) (remanding an award for clarification as the brief written opinion was so ambiguous that it could not be enforced because it could have been interpreted as if the arbitrators manifestly disregarded the law).

61. Constantine Katsoris, *SICA: The First Twenty Years*, 23 *Fordham Urb. L.J.* 483, 518 (1996).

62. Martin Domke, *Domke on Commercial Arbitration* § 34:6 (3d ed. 2003) (“The general view is that a detailed opinion written by a layman might expose the award to challenge in the courts, jeopardizing both the speed and finality of arbitration.”).

63. The manifest disregard standard is designed to correct situations where arbitrators “willfully flouted” the governing law, not where they have made a mistake. *Westerbeke Corp. v. Daihatsu Motor Co.*, 304 F.3d 200, 217 (2d Cir. 2002).

64. See, e.g., Letter from Edward G. Turan, Chairman, Securities Industry Association (SIA) Litigation and Arbitration Committee to Jonathan Katz, Secretary, SEC, Aug. 2, 2005, at 1, 2, available at <http://www.sec.gov/rules/sro/nasd/nasd2005032/egturan7870.pdf>.

65. Aegis J. Frumento, *Can’t Get No Satisfaction! How Explained Decisions Will Undermine the Arbitration Process*, *Securities Arbitration Commentator* (Apr. 2005), at 3.

66. See Barbara Black & Jill I. Gross, *Making It Up As They Go Along: The Role of Law in Securities Arbitration*, 23 *Cardozo L. Rev.* 991, 1001-1003 at 1047 (2002).

67. See National Association of Securities Dealers, Form 19b-4, File No SR-2005-032, Amendment No. 1 to Proposed Rule Change to Provide Written Explanations in Arbitration Awards Upon the Request of Customers or of Associated Persons in Industry Controversies, Apr. 14, 2005, at 9, n.7, available at http://www.nasd.com/web/groups/rules_regs/documents/rule_filing/nasdw_013823.pdf.

68. If NASD deleted the second part of the phrase because it believed that prohibiting citation of awards for any reason might be overly restrictive, the language of the phrase could be amended to prohibit the citation of only the “fact-based explanation” or the reasons underlying the award. Thus, parties would be prohibited from citing past awards as legal precedent, but not from citing past awards for other purposes.

69. See Richard E. Speidel, *Contract Theory and Securities Arbitration: Whither Consent?*, 62 *Brooklyn L. Rev.* 1335 (1996), for a discussion of this assertion.

70. See Letter from Edward G. Turan, Chairman, Securities Industry Association (SIA) Litigation and Arbitration Committee to Jonathan Katz, Secretary, SEC, Aug. 2, 2005, at 1, 2, available at <http://www.sec.gov/rules/sro/nasd/nasd2005032/egturan7870.pdf>.