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THE ARBITRATION FAIRNESS ACT OF 2013: A WELL-INTENDED BUT POTENTIALLY DANGEROUS OVERREACTION TO A LEGITIMATE CONCERN

*By George H. Friedman**

Introduction

In early May, bills were introduced in the House[1] and Senate[2], attempting to breathe new life into the concept of a federal Arbitration Fairness Act ("AFA"). The bills would amend the Federal Arbitration Act ("FAA")[3] by adding a new chapter invalidating predispute arbitration agreements ("PDAAs") for consumer, investor, employment, or civil rights claims. The proposed legislation is similar to prior failed efforts to similarly amend the FAA going back at least to 2005.[4]

This article analyzes the AFA of 2013 and concludes that, while a well-intended effort to address a legitimate concern – PDAAs imposed via an adhesion contract by dominant parties on weaker parties like consumers and employees – it in fact is a potentially dangerous overreaction that could end up harming those it intends to protect. The article closes with the author's recommendation for a better way to address these concerns.

What the AFA would do and why

The House version of the AFA was introduced on May 7 by Rep. Hank Johnson (D. Ga.). His press release[5] announcing the AFA's reintroduction provides the following purposes:

- Restores the original intent of the FAA by clarifying the scope of its application.
- Amends the FAA by adding a new chapter invalidating agreements that require the arbitration of employment, consumer, or civil rights disputes made before the dispute arises ("PDAAs").
- Restores the rights of workers and consumers to seek justice in our courts.
- Ensures transparency in civil litigation.
- Protects the integrity of the Civil Rights Act, the Equal Pay Act, the Americans with Disabilities Act, and the Age Discrimination in Employment Act, among others.

The Proposed AFA Deconstructed

These are all noble intentions. But a closer look at the proposed statute reveals that not all the assumptions and findings upon which AFA is based are entirely accurate. Indeed, most of the specific findings in section 2 of the bill[6] can be challenged or refuted:

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1. The Federal Arbitration Act (now enacted as chapter 1 of title 9 of the United States Code) was intended to apply to disputes between commercial entities of generally similar sophistication and bargaining power.

Reality: the *Congressional Record* from the FAA's enactment in *1925* is not entirely clear on this point.[7] Moreover, the FAA was enacted almost 90 years ago and for decades has been construed liberally by the Supreme Court to apply to a vast array of disputes, including consumer, securities and employment.[8]

2. A series of decisions by the Supreme Court of the United States have interpreted the Act so that it now extends to consumer disputes and employment disputes, contrary to the intent of Congress.

Reality: The broad statement is of course true – the Court *has* been liberally construing the reach of the FAA, but this has been going on for at least 30 years.[9] And again, it is not entirely accurate to say that this has been against the will of Congress. After all, Congress at any time could have enacted legislation scaling back the reach of the FAA, and it didn't. In fact, one can logically argue that the lack of legislation indicates, if anything, that Congress is evidently OK with the Supreme Court's actions.

3. Most consumers and employees have little or no meaningful choice whether to submit their claims to arbitration. Often, consumers and employees are not even aware that they have given up their rights.

Reality: The first part of this statement is true and, as proposed below, there is a better alternative than banning PDAAs outright and hoping that the parties will agree to arbitration after a dispute arises. After a dispute arises, one party or the other usually has a strategic or tactical interest in not agreeing to arbitrate. As discussed below, this would more often negatively impact the consumer or employee, even in the securities arbitration context.

The second part of the statement is not as accurate. Many employers and businesses make it very clear that the individual is agreeing to arbitrate.[10] This is especially so in the securities industry: FINRA Rules 2263[11] and 2268[12] have very clear requirements about where the PDAA may be placed and what should be in it in both the employment and customer contexts, respectively. For example, among other protections for customers:

- Contracts must contain a highlighted statement immediately before the signature line indicating that there is an arbitration clause, and where in the document it may be found.

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- Investors must be given a copy of the PDAA.

- The arbitration clause must inform the investor of key aspects of the arbitration, such as that they are giving up the right to go to court.

- The PDAA cannot: 1) contradict the rules of an SRO; 2) limit the ability of a party to file an arbitration claim; or 3) limit the ability of the arbitrators to make an award.

4. Mandatory arbitration undermines the development of public law because there is inadequate transparency and inadequate judicial review of arbitrators' decisions.

Reality: This statement overlooks some basic inconvenient truths. With apologies to former Vice President Gore,[13] if the AFA were to be enacted, exactly where would the flood of new cases go? The American Arbitration Association had 2,031 employment cases and 2,811 consumer cases filed last year[14] and FINRA had 1,588 employment cases and 2,586 cases with customers as parties.[15] As demonstrated below, if PDAAs are banned, more often than not, there will not be a post-dispute agreement to arbitrate. These cases will have to go somewhere to be resolved, and that somewhere is the court system. However, the courts are already overloaded, and, with criminal cases getting a priority, civil litigants will face long delays getting access to the courts.[16] The delays will only worsen if thousands[17] of formerly arbitrable cases are diverted into the court system in an age of diminishing resources and increasingly rare trials. Indeed, one new source of litigation might be the AFA itself, if enacted as written, since both Form U4[18] and FINRA Rule 12200[19] are arguably PDAAs, and could be challenged as such.

Also, to put it bluntly, litigation stinks and is no place to send consumers or employees. Cases take a long time, cost lots of money, and are subject to a long appeals process. Moreover, class actions, the subject of much angst of late,[20] are not the weaker party's best friend, with the typical payout being cents on the dollar or a discount coupon.[21]

The second part of the finding (inadequate transparency) is also suspect. With the major ADR providers now subscribing to the due process protocols for consumer and employment dispute resolution, or having policies that mirror them, there is adequate transparency.[22] And at FINRA, the process is *very* transparent.

- FINRA is regulated by the SEC (rule approval process; inspections);

- Rules are first approved by the National Arbitration and Mediation Committee, a majority of whom – including the chair – is not affiliated with the securities industry;

- Rules are amended only after proposed rules are published in the *Federal Register,* the public is given a chance to comment, FINRA responds to the comments, and the SEC approves the rules as being consistent with investor protection;

- Awards are public, and available free of charge on FINRA'S Web site, www.finra.org.

Moreover, the major ADR organizations now publish a wealth of statistical data on their consumer programs, either voluntarily or in compliance with state disclosure requirements.[23]

The last part of the finding (inadequate judicial review) is also suspect, given that both the FAA and state arbitration statutes provide for what the Supreme Court says is adequate judicial review.[24]

5. Arbitration can be an acceptable alternative when consent to the arbitration is truly voluntary, and consent occurs after the dispute arises.

Reality: Really? Why is that? First, hoping and praying for all sides to agree to arbitrate after the dispute arises is a fool's errand. Research shows consistently that one side or the other will generally have a reason not to agree to arbitration once a dispute arises.[25] Also why is the process fair only if consent, presumably from the weaker party, comes after a dispute arises? I assert that the consumer arbitration programs as administered by the major ADR services such as the American Arbitration Association or FINRA[26] are extremely fair by any objective measure, and in fact can serve as a template for defining fairness, as discussed below.[27]

But don't take my word for it. FINRA's arbitration program got high marks when measured against the "arbitration fairness index" created by Professor Tom Stipanowich, a leading authority in the arbitration field:

"FINRA has tried to make its operations more transparent and to promote greater public understanding of and access to arbitration. FINRA regulates the content and form of pre-dispute arbitration provisions in investor agreements, requiring highlighted language explaining to investors the implications of the arbitration agreement and 'prohibiting agreements that would limit the ability of any investor to file any claim in arbitration or that limits the power of arbitrators to make any award,' including awards of punitive damages. It regulates fees to ensure that the securities industry bears the majority of administrative fees and waives hearing fees for investors who demonstrate financial hardship. FINRA assists investors in serving claims on brokerage firms. It conducts hearings at any of seventy-two cities nearest the investor's residence. It provides expedited arbitration for senior or seriously ill parties [footnotes omitted]."[28]

And Barbara Roper, Consumer Federation's Director of Investor Protection, has spoken favorably about FINRA's arbitration system.[29]

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Why the AFA would be Harmful

The AFA if enacted would hurt the very individuals it was designed to protect: consumers, investors, and employees.[30] First, as the author noted in an article appearing in this publication's May 2013 issue, *"Defining who is a Customer in FINRA Arbitration: Time to Clear Things Up!,"* (2012 SAC, No. 6), FINRA Rule 12200 – which requires brokers to arbitrate upon the demand of a customer disputes arising out of the broker's business[31]– would doubtless be attacked by the securities industry as unfair. The Securities and Financial Markets Association took this position when the AFA of 2007 was pending, stating: "Opponents of predispute arbitration agreements, however, seek neither fairness nor equality; rather, they seek an unfair strategic advantage. They want investors to retain their right to arbitrate as they see fit, but to deprive investment firms of the same right."[32] This would lead to uncertainty and potentially years of litigation before the issue is resolved.

Second, if I am correct that arbitration case filings would dry up in an era of exclusively voluntary post-dispute, bi-lateral agreements to arbitrate,[33] then arbitral institutions like FINRA and AAA might find untenable maintaining their fora in a time of greatly reduced and inconsistent case filings.[34] Stated differently, when you break the glass and ring the fire alarm, you want to be sure there's a fire brigade to respond.

Third, the proposed AFA as written would apply retroactively (it would invalidate existing agreements to arbitrate in millions of contracts), subjecting it to Constitutional challenge and uncertainty. For example, a legally tenable claim might be made that this aspect of the AFA runs afoul of the Fifth Amendment's Takings Clause, which states in pertinent part: "No person shall … be deprived of life, liberty, or property, without due process of law." There are property rights associated with contracts. Predispute arbitration agreements under the FAA are contracts, which stand on their own according to the Supreme Court.[35] Thus, a statute such as the AFA that retroactively invalidated contracts such as PDAAs could be subject to challenge based on an impermissible governmental "taking," absent a compelling governmental interest.[36] While the Court in the past has allowed retroactive application of laws banning, for example, contracts containing racially restrictive covenants,[37] I am not so sure banning PDAAs would be held in the same regard, even in the face of the AFA's explicit language on retroactivity.

A Better Way?

During my long career as an executive, I usually approached naysayers with this retort: "OK, so what's your plan?" Having demonstrated why the AFA is problematic, I do believe there are legitimate concerns Congress needs to address. For example, I believe it is unfair to require a consumer to agree to arbitration when a contract is signed as a condition of the dominant party providing goods or services. Ditto for employees. It's not that the arbitration process is unfair, assuming basic standards of procedural fairness are maintained. It's that *perceptions* of fairness require a choice for the weaker party.[38]

Also, some of the arbitration systems imposed on consumers and employees – again not those of the established ADR providers – have aspects that are not fair. For example, requiring consumers to travel hundreds of miles for a hearing involving relatively small amounts of money is not fair.[39] Allowing the dominant party to select a captive ADR provider isn't fair. Burying the arbitration agreement in the midst of a dense contract is not fair. There are better approaches, which: 1) address perceptions that it is not fair for a dominant party to force a consumer or employee to agree to a PDAA as a condition of obtaining goods or services or employment; and 2) ensure procedural fairness:

The Friedman AFA

So, here's my plan. At a very high level, I propose an AFA that provides:

- in a consumer contract, any predispute arbitration agreement must be separately signed or clicked by the consumer;
- a consumer cannot be denied goods or services if the consumer declines the arbitration option;
- in an employment contract that is not individually negotiated, any predispute arbitration agreement must be separately signed by the employee;
- a prospective or current employee cannot be denied employment if the employee declines the arbitration option; *and*
- clear procedural fairness guidelines be followed in any consumer or employment arbitration.

To avoid Constitutional challenges, the law should be prospective; it should apply to contracts entered into or revised after the effective date.

<u>Ensure the individual has a choice of agreeing to arbitrate, but at the time of contracting</u>

My AFA would state that no individual would be denied goods or services or employment if he or she declined the arbitration option. This would provide the consumer/employee the choice the AFA proponents want, but move it up to the time when the contract is signed to avoid the practical realities of getting a bi-lateral post-dispute agreement to arbitrate. This requirement would give the dominant party a reason to offer incentives to the weaker party to agree to arbitrate, and – dare I say it – sell the process.[40] Imagine a world where the dominant party says, in effect:

> We think arbitration is good for both of us. Here's why [list reasons]… If you agree to arbitrate any disputes we have in the future, we'll give you [list inducements]… If you agree to arbitrate now, you have a week to change your mind. And if you don't want to agree to arbitrate,

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that's OK. We'll still do business with you either way."

By following this approach, the AFA would provide meaningful choice, but in a practical way.

Ensure that there is a knowing and voluntary agreement to arbitrate by requiring in the statute that the individual separately initial/click the arbitration agreement

The Friedman version of the AFA would deal with the problem of ensuring a truly "knowing and voluntary" agreement to arbitrate by requiring that the arbitration agreement be separately signed, initialed or clicked by the consumer/employee.[41] The Supreme Court having held many times that the arbitration agreement is a separate contract, let's treat it that way. By so doing, my AFA would eliminate any uncertainty that the weaker party didn't know what they were getting into.

Ensure procedural fairness safeguards

The new AFA would also require that any consumer or employee arbitration system adhere to basic tenets of procedural fairness. These are not hard to find; the challenge if anything will be narrowing down the list.

The Friedman AFA would incorporate the best of:

• **The standards articulated by the Supreme Court in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30-31 (1991)**. There, the Court exhaustively laid out indicia of procedural fairness, among them: "… competent, conscientious, and impartial arbitrators;" limited discovery; written decisions; and the power to fashion equitable relief.

• **The Due Process Protocols for Consumer[42] and Employment,[43] as the case may be.** These standards were developed years ago to ensure procedural fairness and include requirements for independent administration, independent neutrals, reasonable cost, reasonable discovery, right to counsel, a reasonably convenient location for hearings, fair hearings (with the understanding that smaller claims can be accomplished more efficiently through electronic or telephonic means or document review),[44] the availability of the same relief as in court, and explained awards upon request.

• **The Arbitration Fairness Index:** As developed by Professor Stipanowich, the major elements are: 1) meaningful consent, clarity, and transparency; 2) independent and balanced administration; 3) quality and suitable arbitrators; 4) fair hearing; and 5) fair outcomes (awards and remedies).[45] There are several more sub-elements under each heading that describe the standard in more detail:

- Meaningful Consent, Clarity, and Transparency
  - Meaningful consent to arbitrate
  - Adequate notice and disclosure
  - Clear guidance for program users ("roadmap") and access to helpline
  - Ease of court oversight
  - Published program statistics
- Independent and Balanced Administration
  - Independent and impartial administration
  - Balanced input in rules and policies
- Quality and Suitability of Arbitrators
  - Balanced input in roster of arbitrators
  - Diversity
  - Experience and training
  - Disclosure and challenge mechanism
  - Ethics standards and complaint mechanism
- Fair Hearing
  - Reasonable costs and fees
  - Legal counsel
  - Reasonable hearing location
  - Access to information and discovery
  - Limitations period
  - Expeditious process
  - Fair hearing
  - Availability of class action
- Fair Outcomes (Awards and Remedies)
  - Access to remedies available in court
  - Publication of reasoned awards
  - Outcomes

• **The arbitration rules of FINRA and AAA.** For example, FINRA's rules are extremely investor-friendly:[46]

- FINRA serves the claim;
- The fee structure favors the investor;
- The hearing is cited where investor lived when underlying events occurred;
- There are hearing locations in all 50 states (at least one in each);
- A motion to dismiss rule that severely limits motions made prior to the claimant resting his/her case, and provides sanctions for frivolous motions.
- The *Discovery Guidelines* and codified discovery provisions in the April 2007 Code of Arbitration Procedure revisions;
- A customer option of an all-public panel;
- In close calls, if the investor wants an arbitrator removed for bias, he or she is removed; and
- Awards are public, and available free of charge on the Web.

• **The core procedural safeguards that were contained in the not-enacted Fair Arbitration Act of 2011 (S.1186)**. For example, this bill required that, in order to be binding on the parties, a contract containing an arbitration clause had to:

(1) have a heading that reads "ARBITRATION CLAUSE" printed in bold, capital letters;

(2) state explicitly whether participation in arbitration is mandatory or optional;

(3) identify a source where a consumer may find information regarding the arbitration program; and

(4) provide notice that all parties retain the right to resolve a dispute in a small claims court for a claim of $50,000 or less.

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The PDAA also had to entitle each party under arbitration to:

(1) a competent, neutral arbitrator and independent, neutral administration of the dispute;
(2) representation by an attorney or other representative at such party's expense;
(3) a fair arbitration hearing;
(4) a face-to-face hearing;
(5) the right to present evidence and cross examine witnesses;
(6) a written explanation of the basis for the arbitrator's decision; and
(7) the right to opt out of binding arbitration and into the small claims court (for claims of $50,000 or less).[47]

As stated above, the trick will be to narrow down the list, which is very long, overlaps in several areas, and conflicts in others. What makes perhaps more sense is to establish model consumer and employment arbitration procedures that would pass muster under my proposed AFA. This would be an ambitious undertaking, but it's been done before.[48] Whether through model rules or established procedural standards, by so doing, my proposed AFA would address any potential issues over what defines a fair arbitration process.

Conclusion

In the meantime, we should allow the Dodd-Frank approach to play out. The Act in sections 921(a) and (b) vests authority in the SEC to evaluate PDAAs in customer-broker and investment adviser agreements. Specifically, section 921 amended the Securities Exchange Act of 1934 and the Investment Advisers Act of 1940 to authorize, but not require, the SEC to "… limit or prohibit use of pre-dispute arbitration agreements arising under the Federal securities laws, the rules and regulations thereunder, or the rules of a self-regulatory organization if it finds that such prohibition, imposition of conditions, or limitations are in the public interest and for the protection of investors."[49]

The law also established a new Consumer Financial Protection Bureau ("CFPB"), and *requires* it to study PDAAs in consumer financial products and services contracts (section 1028(a)), and authorizes it to limit or ban their use (section 1028(b)). Already, in February 2013 CFPB enacted regulations implementing Dodd-Frank's ban on PDAAs in mortgages and home equity loans. More is sure to follow.

In short, we need to think, and think carefully, before we act.

ENDNOTES

1. H.R. 1844, available at http://www.govtrack.us/congress/bills/113/hr1844/text <visited May 25, 2013>.
2. S. 878, available at http://www.govtrack.us/congress/bills/113/s878/text <visited May 25, 2013>.
3. 9 U.S.C §§ 1 et seq.
4. Prior iterations were similar but not exactly the same. For example, the 2011 version would have covered franchise agreements.
5. Available at http://hankjohnson.house.gov/press-release/rep-johnson-re-introduces-bill-protect-legal-rights-consumers <visited May 23, 2013>.
6. See http://www.govtrack.us/congress/bills/113/hr1844/text <visited May 24, 2013>.
7. See generally as to the 2007 version, Rutledge, Peter, *Who can be Against Fairness? The Case against the Arbitration Fairness Act,* 9 CARDOZO J. OF CONFLICT RES. 267 (2008), available at. http://cardozojcr.com/vol9no2/267-282.pdf <visited May 25, 2013>.
8. See for example, *Shearson v. McMahon*, 482 U.S. 220 (1987); *Volt Info. Sciences, Inc. v. Stanford*, 489 U.S. 468 (1989); *Allied-Bruce Terminex v. Dobson*, 513 U.S. 265 (1995); *Circuit City v. Adams*, 532 U.S. 105 (2001); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); and *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665 (2012).
9. See, for example, *Moses H. Cone Mem'l. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).
10. See, for example, Instagram's arbitration clause, available at http://instagram.com/about/legal/terms/ <visited May 25, 2013>. This clause allows the user to opt out.
11. See FINRA Rule 2263, available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=8554 <visited June 2, 2013>.
12. See FINRA Rule 2268, available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=9955 <visited May 27, 2013> and *Notice to Members* 05-09 (January 2005), available at http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p013203.pdf <visited May 24, 2013>.
13. An Inconvenient Truth is the former Vice President's 2006 documentary on global warming. See http://www.imdb.com/title/tt0497116/ <visited June 1, 2013>.
14. Data provided by Ryan Boyle, AAA VP-Statistics and In-House Research in an email to the author dated May 28, 2013 (on file).
15. http://www.finra.org/ArbitrationAndMediation/FINRADisputeResolution/AdditionalResources/Statistics/ <visited May 26, 2013>. A very small number of cases were brokerage firm vs. brokerage firm and, thus, were not either consumer or employment. And not every customer in a FINRA case is a "consumer;" for example; although the data are not broken out on the FINRA web site, some customers in the FINRA forum are institutional investors.
16. See Refo, Patricia, *The Vanishing Trial,* 30:2 LITIGATION 2 (WINTER 2004), available at http://www.americanbar.org/content/dam/aba/publishing/litigation_journal/04winter_openingstatement.authcheckdam.pdf <visited May 25, 2013>.
17. I don't mean to imply that every one of these cases is a consumer or employment case, or that every dispute that's subject to a PDAA will end up in court. On the other hand, AAA and FINRA are not the only ADR institutions in the U.S. that administer consumer or employment arbitrations.
18. This is an industry-wide uniform SRO registration form completed by brokers. It contains a predispute arbitration clause in paragraph 15A(5) providing:

> I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the SROs indicated in Section 4 (SRO REGISTRATION) as may be amended from time to time and that any arbitration award rendered against me may be entered as a judgment in any court of competent jurisdiction

See http://www.finra.org/web/groups/industry/@ip/@comp/@regis/documents/appsupportdocs/p015112.pdf <visited June 2, 2013>.

19. FINRA Rule 12200, available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4106 <visited May 27, 2013>. This rule requires brokers to arbitrate upon the demand of a customer any disputes arising out of the broker's business.
20. See, e.g. *Schwab Eliminates Class Action Waiver for Clients*, available at http://online.wsj.com/article/SB10001424127887323582904578488751635885808.html <visited May 25, 2013>.
21. See, e.g., *Class Action Suits Benefit Few but Attorneys,* available at http://news.investors.com/ibd-editorials-perspective/022013-645120-high-court-to-decide-whether-arbitration-hurts-consumers-rights.htm?p=full <visited May 19, 2013>.
22. See, for example, Stipanowich, Thomas, *The Arbitration Fairness Index: Using a Public Rating System to Skirt the Legal Logjam and Promote Fairer and More Effective Arbitration of Employment and Consumer Disputes*, 60 Kansas L. Rev. 985, 1024-5 (2012), available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2004543) <visited May 26, 2013>. See also

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the JAMS *Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural Fairness* (2009), available at http://www.jamsadr.com/rules-consumer-minimum-standards/ <visited May 26, 2013>.

23. See, for example, as to AAA: http://www.adr.org/cs/idcplg?IdcService=GET_FILE&dID=8623&dDocName=ADRSTG_005017 <visited May 25, 2013>; and as to FINRA: http://www.finra.org/ArbitrationAndMediation/FINRADisputeResolution/AdditionalResources/Statistics/ <visited May 26, 2013>.
24. See, e.g. *Shearson v. McMahon*, 482 U.S. 220, 230 (1987) ("although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute").
25. See generally Black, Barbara, *How to Improve Retail Investor Protection After the Dodd-Frank Wall Street Reform and Consumer Protection Act,* 13:1 UNIV. OF PA. L. REV. 59, 104 - 106 (2011), available at https://www.law.upenn.edu/journals/jbl/articles/volume13/issue1/Black13U.Pa.J.Bus.L.59%282010%29.pdf <visited May 26, 2013>.
26. The fact that I spent over 35 years working at both institutions is purely coincidental.
27. See Gross, Jill, *The End of Mandatory Securities Arbitration?* 30 PACE L. REV. 1174, 1186-89 (2010), available at http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1736&context=plr <visited May 27, 2013>.
28. See Stipanowich at 1024-25.
29. See *Surprise! Fiduciary Advocate Calls FINRA Best Hope for Progress,* available at http://www.investmentnews.com/article/20120905/FREE/120909978 <visited May 26, 201>. Also, http://www.indisputably.org/?p=4234 <visited May 26, 2013>.
30. See generally Black at 104-6.
31. FINRA Rule 12200, available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4106 <visited May 27, 2013>.
32. See SIFMA/SIFMACL, *Whitepaper on Arbitration in the Securities Industry* 3 (Oct. 2007), available at http://www.sifma.org/issues/item.aspx?id=21334 <visited May 27, 2013>.
33. At least initially. I'm pretty sure that, after being exposed to the awful reality of litigation, the parties would react sort of like the subjects of Picasso's *Guernica* and come running back to arbitration with open arms.
34. See Gross, Jill, *The End of Mandatory Securities Arbitration?*, 30 PACE L. REV. 1174, 1189-93 (2010), available at http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1736&context=plr <visited May 26, 2013>. See also Black at 105-6.
35. See *Prima Paint Corp. v. Flood & Conklin Mfg. Corp.*, 388 U.S. 395 (1967*); Buckeye Check Cashing Inc. v. Cardegna,* 546 U.S. 440 (2006).
36. See, e.g., *Landgraf v. USI Film Products*, 511 U.S. 244, 271 (1994) ("The largest category of cases in which we have applied the presumption against statutory retroactivity has involved new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance"). See also *Covino* v. *Reopel,* 89 F.3d 105, 107 (2d Cir. 1996) ("[A] presumption against retroactivity normally applies to new provisions affecting contractual or property rights.").
37. See generally, Congressional Research Service, *When Congressional Legislation Interferes with Existing Contracts: Legal Issues* (Aug. 2012), *available at* http://www.fas.org/sgp/crs/misc/R42635.pdf <visited May 26, 2013>.
38. See Black, Barbara & Gross, Jill, *When Perception Changes Reality: an Empirical Study of Investors' Views on the Fairness of Securities Arbitration,* 2008 J. DISPUTE RES. 349 (2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1118430## <visited May 26, 2013>.
39. For example, FINRA Rule 12800 presumes that cases involving less than $50,000 will be resolved on documents only, unless the investor requests a hearing. See http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4185 <visited May 27, 2013>.
40. I wish this were my idea, but it's not. I attribute it to my former colleague, FINRA Dispute Resolution SVP and Chief Counsel Ken Andrichik, who has been advocating this view for years.
41. Again, not my idea. The Uniform Code of Arbitration of the Securities Industry Conference on Arbitration has for years had a rule along these lines. See *SICA Uniform Code of Arbitration* Rule 3(b), available at http://www.finra.org/web/groups/arbitrationmediation/@arbmed/@arbtors/documents/arbmed/p120019.pdf <visited June 3, 2013>.
42. Available at http://www.in.gov/dfi/2623.htm <visited May 27, 2013>.
43. Available at http://www.foreclosuremediationfl.adr.org/sp.asp?id=28535 <visited May 27, 2013>.
44. See e.g., the rules of Arbitration Resolution Services, Inc., which in consumer cases presumes the case will be resolved by online documentary review, unless a party requests a telephonic hearing. See *Business and Individual Dispute Resolution Program, Rules and Regulations* sec. 5, available at https://arbresolutions.com/static/b2crules <visited May 25, 2013>.
45. Stipanowich at 1030-31.
46. See FINRA Code of Arbitration Procedure for Customer Disputes, available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4096 <visited May 27, 2013>.
47. See http://www.govtrack.us/congress/bills/112/s1186#summary/libraryofcongress, <visited May 26, 2013>. Summary prepared by the Congressional Research Service, which is a nonpartisan division of the Library of Congress.
48. For example, SICA created a Uniform Code of Arbitration Procedure for securities disputes. See Katsoris, Constantine, *SICA: the First Twenty Years*, 23:3 FORDHAM URBAN L. J. 483 (1995), available at http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1593&context=ulj <visited May 26, 2013>. And the UN did so for international trade disputes. See http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html <visited May 26, 2013>.
49. See http://www.dodd-frank-act.us/Dodd_Frank_Act_Text_Section_921.html <visited May 26, 2013>.