



Arbitrations: From the Starting Gate to the Finish Line



September 2022



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Presenters

Host: Michael Sorrell, *Deputy General Counsel, FIA*

Jim Lundy, *Partner, Foley & Lardner*

Tom Krebs, *Partner, Foley & Lardner*

Ellen Wheeler, *Partner, Foley & Lardner*

Presentation prepared by





Agenda

- Mandatory vs. permissive arbitration
- The enforceability of arbitration agreements
- Available arbitration forums and how they differ
- Filing an arbitration claim
- The arbitrators
- Responding to an arbitration claim
- Motion practice
- The discovery process
- The hearing
- Enforcing or challenging an award



When is Arbitration Mandatory?

- Exchange rules provide that many types of disputes between members are must be arbitrated
- Exchange rules also provide that most disputes with customers shall be arbitrated if the customer elects to arbitrate
- 17 CFR § 166.5 governs what must be set forth in an arbitration agreement with a customer and imposes several restrictions



Arbitration Agreements with Customers

- Customer Arbitration Provisions: Members may, and almost always do, include arbitration provisions in their customer account opening documentation.
- Notable Point & Requirements: To be enforceable, these arbitration agreements must comply with 17 C.F.R. § 166.5, which is the CFTC Rule for Dispute Settlement Procedures.
 - The most relevant requirements are:
 - The arbitration provisions must not condition the signing of the provisions as a condition for the customer to use the services of the CFTC registrant. [See CFTC Rule 166.5(b)(1).]
 - If the arbitration provisions are part of a larger agreement, as opposed to a stand-alone document, the customer must separately endorse the arbitration provisions. [See CFTC Rule 166.5(b)(2).]
 - The arbitration provisions may not require the customer to waive the right to initiate reparations proceedings. [See CFTC Rule 166.5(b)(3).]
 - The arbitration provisions must advise the customer that the customers will have the opportunity to elect a qualified forum for conducting the arbitration upon notifying the CFTC registrant of the customer's intent to arbitrate. [See CFTC Rule 166.5(b)(4).]
 - The arbitration provisions contain the cautionary language set for in subsection (b)(7) of CFTC Rule 166.5. [See CFTC Rule 166.5(b)(7).]



Cautionary Language - Customer Agreements

The arbitration provisions must contain the following cautionary language printed in large boldface type:

THREE FORUMS EXIST FOR THE RESOLUTION OF COMMODITY DISPUTES: CIVIL COURT LITIGATION, REPARATIONS AT THE COMMODITY FUTURES TRADING COMMISSION (CFTC) AND ARBITRATION CONDUCTED BY A SELF-REGULATORY OR OTHER PRIVATE ORGANIZATION.

THE CFTC RECOGNIZES THAT THE OPPORTUNITY TO SETTLE DISPUTES BY ARBITRATION MAY IN SOME CASES PROVIDE MANY BENEFITS TO CUSTOMERS, INCLUDING THE ABILITY TO OBTAIN AN EXPEDITIOUS AND FINAL RESOLUTION OF DISPUTES WITHOUT INCURRING SUBSTANTIAL COSTS. THE CFTC REQUIRES, HOWEVER, THAT EACH CUSTOMER INDIVIDUALLY EXAMINE THE RELATIVE MERITS OF ARBITRATION AND THAT YOUR CONSENT TO THIS ARBITRATION AGREEMENT BE VOLUNTARY.

BY SIGNING THIS AGREEMENT, YOU: (1) MAY BE WAIVING YOUR RIGHT TO SUE IN A COURT OF LAW; AND (2) ARE AGREEING TO BE BOUND BY ARBITRATION OF ANY CLAIMS OR COUNTERCLAIMS WHICH YOU OR [NAME] MAY SUBMIT TO ARBITRATION UNDER THIS AGREEMENT. YOU ARE NOT, HOWEVER, WAIVING YOUR RIGHT TO ELECT INSTEAD TO PETITION THE CFTC TO INSTITUTE REPARATIONS PROCEEDINGS UNDER SECTION 14 OF THE COMMODITY EXCHANGE ACT WITH RESPECT TO ANY DISPUTE THAT MAY BE ARBITRATED PURSUANT TO THIS AGREEMENT. IN THE EVENT A DISPUTE ARISES, YOU WILL BE NOTIFIED IF [NAME] INTENDS TO SUBMIT THE DISPUTE TO ARBITRATION. IF YOU BELIEVE A VIOLATION OF THE COMMODITY EXCHANGE ACT IS INVOLVED AND IF YOU PREFER TO REQUEST A SECTION 14 "REPARATIONS" PROCEEDING BEFORE THE CFTC, YOU WILL HAVE 45 DAYS FROM THE DATE OF SUCH NOTICE IN WHICH TO MAKE THAT ELECTION.

YOU NEED NOT SIGN THIS AGREEMENT TO OPEN OR MAINTAIN AN ACCOUNT WITH [NAME]. SEE 17 CFT 166.5.

[See CFTC Rule 166.5(c)(7).]



Arbitration Forums

17 CFR § 166.5(5) *Election of forum.*

(i) Within ten business days after receipt of notice from the customer that he or she intends to submit a claim to arbitration, or at the time a Commission registrant notifies the customer of its intent to submit a claim to arbitration, the Commission registrant must provide the customer with a list of organizations whose procedures meet Acceptable Practices established by the Commission for dispute resolution, together with a copy of the rules of each forum listed. The list must include:

(A) The **designated contract market**, if applicable and if available, upon which the transaction giving rise to the dispute was executed or could have been executed;

(B) A **registered futures association**; and

(C) At least **one other organization** that will provide the customer with the opportunity to select the location of the arbitration proceeding from among several major cities in diverse geographic regions and that will provide the customer with the choice of a panel or other decision-maker composed of at least one or more persons, of which at least a majority are not members or associated with a member of the designated contract market, if applicable, or employee thereof, and that are not otherwise associated with the designated contract market (mixed panel), if applicable: Provided, however, that the list of qualified organizations provided by a Commission registrant that is a floor broker need not include a registered futures association unless a registered futures association has been authorized to act as a decision-maker in such matters.

(ii) The customer shall, within forty-five days after receipt of such list, notify the opposing party of the organization selected. A customer's failure to provide such notice shall give the opposing party the right to select an organization from the list.



Arbitration Forums

- CFTC’s Reparations Program
- Designated Contract Market
 - CME Group
 - ICE Futures US
- Registered Futures Association
 - National Futures Association
- One “other organization”
 - American Arbitration Association



CFTC's Reparations Program

- The CFTC's Reparations Program bills itself as an inexpensive and efficient alternative to other arbitration forums:

The CFTC's Reparations Program, administered through the Office of Proceedings, provides an inexpensive, expeditious, and fair forum to resolve disputes between derivatives customers and registered trading professionals. If you have tried and cannot resolve the matter on your own, and your complaint meets the filing requirements, the issue can be decided by a CFTC judgment officer who specializes in commodity derivatives law. Litigating your complaint through the CFTC Reparations Program can save you both time and money when compared to other forums.

- Filing requirements:
 - The respondent must be registered with the CFTC at the time of the alleged wrongdoing or at the time the complaint is filed
 - The respondent must be alleged to have violated the Commodity Exchange Act
 - There must not be a related action pending elsewhere
 - The respondent is not in bankruptcy or receivership proceedings
- See <https://www.cftc.gov/LearnAndProtect/ReparationsProgram/index.htm>



CFTC's Reparations Program

- Types of proceedings
 - Voluntary (all parties consent, no oral hearing, no appeal, no award of attorneys' fees, costs, or punitive damages)
 - Summary (not voluntary, claim does not exceed \$30,000, oral hearing only if judgment officer determines it is necessary, decision can be appealed to the Commission, award may not exceed \$30,000 plus interest, fees, and any costs deemed recoverable)
 - Formal Proceedings (not voluntary, claim exceeds \$30,000, in-person oral hearing, decision can be appealed to the Commission, award may not exceed amount of damages claimed, plus interest, fees, and any costs deemed recoverable)
- Nature of claims
 - Judgment Officer has issued three initial/final decisions in 2022, three in 2021, and nine in 2020
 - Claims include unauthorized trading, forced liquidation, failure to execute in accordance with instructions, misrepresentations regarding margin calculations, etc.
- See <https://www.cftc.gov/LearnAndProtect/ReparationsProgram/ChooseTheAppropriateProceeding>



CME Group

- Mandatory Arbitration – CME Rule 600.A, B, C
 - Claims between members that (1) relate to or arise out of any transaction or subject to the rules of the Exchange, (2) relate to ownership of, interests in, of trading rights on the Exchange, and (3) relate to the enforceability of financial arrangements concerning resolution of error trades set forth in an employment agreement
 - Claimants between members or between members and non-member employees relating to non-compete clauses to the extent that they relate to the Exchange or terms of employment on the trading floor
 - Claims against the Exchange
- Permissive Arbitration – CME Rule 600.D
 - Seven categories of permissive arbitration, including claims of customer against a member (permissive for the customer; not the member)



CME Group

- Member Claims are heard by member panel consisting of co-chair of the Arbitration Committee and five members
- Customer Claims are heard by mixed panel consisting of co-chair of the Arbitration Committee and five Arbitration Committee members, three of whom are not associated with a member
- Most awards in member cases are appealable to an Appellate Panel; awards in customer cases are not appealable



ICE Futures US

- Any customer claim must be settled by arbitration at ICE if the customer so elects
- Any “allowable claim” between members must be settled by arbitration at ICE
 - “Allowable Claim” shall mean a Claim for losses arising directly from (i) any order or Transaction for the purchase, sale, exercise or expiration of an Exchange Futures Contract or Exchange Option, (ii) any cash market transaction which is part of, or directly connected with, any Transaction, (iii) any documented loan made to a Member by his Clearing Member guarantor for the express purpose of acquiring a Membership, (iv) any dispute concerning the purchase, sale, transfer or ownership of a Membership and (v) the performance of the Clearing Member guarantor’s obligations pursuant to the terms of its Guaranty Agreement
- Other claims may be settled by arbitration at ICE if all the parties consent
- Chair of Arbitration Committee selects panel; if amount at issues exceeds \$5,000, panel will consist of at least three individuals
- Customers can request a mixed panel, in which case a majority of the panelists must not be associated with a member or contract market



The American Arbitration Association

- The AAA constitutes an “other organization that will provide the customer with the opportunity to select the location of the arbitration proceeding from among several major cities in diverse geographic regions and that will provide the customer with the choice of a panel or other decision-maker composed of at least one or more persons, of which at least a majority are not members or associated with a member of the designated contract market, if applicable, or employee thereof, and that are not otherwise associated with the designated contract market (mixed panel), if applicable.”
- Unless otherwise specified in arbitration agreement, the AAA’s Commercial Arbitration Rules should apply
- Unlike other forums, may not find a panel with any industry experience
- Filing and other fees may be substantially higher
- May have more access to discovery/depositions



Background of NFA

- In 1974, Congress established the Commodity Futures Trading Commission (CFTC). The same legislation that established the CFTC also authorized the creation of registered futures associations, giving the industry the opportunity to create a self-regulatory organization.
- NFA's formal designation as a "registered futures association" was granted by the CFTC on September 22, 1981. NFA began its regulatory operations in 1982.
- The NFA offers an affordable and efficient arbitration program to help customers and "Members" resolve futures- and forex-related disputes.
- See <https://www.nfa.futures.org/about/index.html>.



Controversies Subject to Arbitration – Customer Claims

- Customer Perspective:
 - Absent a signed and enforceable agreement to arbitrate, NFA arbitration is voluntary for a customer intending to bring a claim involving commodities futures contracts against an NFA member or a person associated with an NFA member. [See NFA Customer Code of Arbitration, Section 2(a); Procedural Guide for NFA Arbitrators, p. 5.]
- Member Perspective:
 - By virtue of their membership with NFA, NFA members are obligated to arbitrate customer claims made against them involving commodity futures contracts unless:
 - The customer is an FCM, floor broker, member or associated person;
 - The dispute involves solely cash market transactions that are not part of or directly connected with a commodity futures transaction. [See NFA Customer Code of Arbitration, Section 2(a)(1)(i)(a) and (b).]



Controversies Subject to Arbitration - Member and Member/Associate Disputes

- Claims between Members:

- Disputes involving commodity futures contracts between NFA members must be arbitrated before NFA unless:
 - There is a valid and binding arbitration agreement between the parties requiring arbitration before another forum.
 - The parties to the dispute are all required by the rules of another SRO to arbitrate their claims before that SRO.
 - All the parties to the dispute are members of a contract market that has jurisdiction over the dispute.
 - One of the parties is a party to a dispute pending in another forum and files a cross-claim of third-party claim in that forum that arises out of an act or transaction that is the subject of the claim pending in that forum.
 - At the election of the Member with the claim, the Member respondent is no longer an NFA member.

[See NFA Member Code of Arbitration, Section 2(a)(1)-(5).]

- Claims between Members and Associates:

- Disputes between Members and Associates and between Associates shall be arbitrated under these Rules, at the election of the person filing the claim, unless:
 - There is a valid and binding arbitration agreement between the parties requiring arbitration before another forum.
 - The parties to the dispute are all required by the rules of another SRO to arbitrate their claims before that SRO.
 - All the parties to the dispute are members of a contract market that has jurisdiction over the dispute.

[See NFA Member Code of Arbitration, Section 2(b)(1)-(3).]



Other Claims Subject to NFA Arbitration

- **Counterclaims/Cross-Claims/Third-Party Claims:**
 - Counterclaims, cross-claims and third-party claims may be asserted if they arise out of an act or occurrence that is the subject of the affirmative arbitration claim. [See NFA Customer Code of Arbitration, Section 2(a)(2); NFA Member Code of Arbitration, Section 2(c).]
- **President's Discretion for Customer Securities Claims:**
 - Upon *any* party's request, and at the discretion of the President of NFA, the securities portion of a dispute involving unrelated futures and securities claims may be arbitrated before NFA. [See NFA Customer Code of Arbitration, Section 2(b)(1).]
- **Unrelated Disputes:**
 - Other disputes involving commodity futures contracts may also be arbitrated, at the President's discretion, if the parties agree to arbitrate those disputes. [See NFA Customer Code of Arbitration, Section 2(b)(2).]
- **Collection of Debit Balances:**
 - Debit balance collection cases by an NFA member against a customer are considered by NFA to be discretionary claims.
 - NFA will accept this type of claim when the parties have consented to have the dispute heard by NFA.
 - Valid and enforceable pre-dispute arbitration agreement if the member complied with the notice requirements of CFTC Rule 166.5.
 - Both parties sign NFA consent forms.

[See NFA Arbitration: Customer Guide, p. 5.]



Time Period to Initiate NFA Arbitration

- **Affirmative Claims:** An arbitration claim or a notice of intent to arbitrate must be received by NFA within two years from the date when the party filing the arbitration claim knew or should have known of the act or transaction that is the subject of the controversy. [See NFA Customer Code of Arbitration, Section 5; NFA Member Code of Arbitration, Section 4.]
- **Notice of Intent to Arbitrate:** This Notice can be submitted to NFA orally, or in writing by letter or through NFA's website, but the claimant must serve an arbitration claim on NFA within 35 days of being provided by NFA with a copy of the NFA Code of Arbitration or NFA will deem the Notice to be abandoned. [See NFA Customer Code of Arbitration, Section 6(a); NFA Member Code of Arbitration, Section 5(a).]
 - The submission of the Notice of Intent to Arbitrate stays the two-year period to file an NFA arbitration claim during the 35-day period, but the clock begins to run again after the 35-day period has expired if an NFA arbitration claim has not been filed. [See NFA Arbitration: Customer Arbitration Guide, pg. 6.]
 - **Note:** If the parties' arbitration agreement contains a shorter limitations period, the Member can still raise that argument either prior to or during the hearing. [*Id.* at 4.]



Timing/Guidance from NFA

- If you are considering filing a claim and are approaching the two-year time limit for filing a claim, NFA advises that you should consider submitting a Notice of Intent.
- A Notice of Intent does not obligate you to file a claim, but it temporarily suspends the two-year time limit to provide you with extra time to file a claim.
- NFA must receive a Notice of Intent within the two-year time limit period in order to extend the time period allowed to file a claim.
- NFA guidance provides that customers should consider filing claims if they believe that they've lost money because of unfair or improper treatment by an NFA Member.
- See <https://www.nfa.futures.org/arbitration/index.html>.



NFA Arbitration Claim

- Location: The NFA arbitration claim form can be found at: https://www.nfa.futures.org/arbitration/forms/cust_claim.pdf
- Contents: The claim form requires the claimant to provide the following information:
 - Information relating to the claimant, including name, addresses, phone numbers and the name of the attorney representing the claimant, if any.
 - Information relating to the claim, including, among other things, the names of the Respondents, the dates of the acts or transactions that are the subject of the dispute, the specific date on which the claimant first learned of the dispute and the amount of damages sought
 - A description of the claim (parties represented by attorneys almost always attach a stand-alone statement of claim detailing the claimant's allegations).
 - Signature of claimant certifying that claimant has read the NFA Code of Arbitrations and agrees to submit claimant's claims to arbitration before NFA.
- NFA Review: NFA then reviews the claim to ensure that it is complete; if it is complete, NFA will serve the named respondents with the claim.
[See Procedural Guide for NFA Arbitrators, p. 6.]

NFA Arbitration Statistics

Cases Filed			
Calendar Year	Customer	Member	Total
2021	19	3	22
2020	45	4	49
2019 ³	319	4	323
2018	29	8	37
2017	26	2	28

Cases Closed			
Calendar Year	Customer	Member	Total
2021	31	4	35
2020	88	3	91
2019	40	3	43
2018	26	7	33
2017	30	0	30

See <https://www.nfa.futures.org/arbitration/arbitration-statistics.html>

NFA Arbitration Statistics

Number of Closed Cases by Reason					
Calendar Year	Oral Hearings	Summaries	All	Settlements	Other
2021	4	2	6	12	17
2020	1	1	2	47	42
2019	0	2	2	12	29
2018	5	0	5	11	17
2017	4	5	9	9	12

Awards in Customer Cases			
Calendar Year	Total Awards	Awards to Customers	Average % of Compensatory Claim
2021	5	1	84%
2020	2	0	N/A
2019	1	1	32%
2018	2	0	N/A
2017	9	6	44%

See <https://www.nfa.futures.org/arbitration/arbitration-statistics.html>

FINRA Arbitration Statistics

Hearing Statistics Through July 2022 & recent years data:

Cases Decided by Arbitrators	2022 (% of Cases)	2021	2020	2019	2018
After Regular Hearing	343 (16%)	497 (12%)	335 (9%)	527 (13%)	517 (14%)
After Special Proceeding Hearing	15 (1%)	34 (1%)	13 (0%)	12 (0%)	n/a
After Review of Documents (Paper Cases)	43 (2%)	102 (2%)	101 (3%)	96 (2%)	130 (4%)
Total	401 (19%)	633 (15%)	449 (13%)	635 (16%)	647 (17%)

Year	Cases Filed	Cases Closed
2022	1,474	2,149
2021	2,893	4,029
2020	3,902	3,564

See <https://www.finra.org/arbitration-mediation/dispute-resolution-statistics>



Common Claim Types in NFA Arbitrations

- Churning:
- Failure to Supervise:
- Suitability
- High Pressure Sales
- Misrepresentation/Risk Disclosure
- Unauthorized Trading
- Breach of Fiduciary Duty
- Order Execution
- Excessive Commissions

See <https://www.nfa.futures.org/arbitration/arbitration-resources/files/legal-and-procedural-issues.PDF>



Consolidation of Separate Claims

- NFA has the right under the Code to consolidate claims brought by different claimants that involve common questions of fact or which arise from the same act or transactions into one consolidated hearing. [See NFA Customer Code of Arbitration, Section 6(m); NFA Member Code of Arbitration, Section 5(m).]
 - Standard: NFA must believe that the consolidation is in the interest of providing a fair, equitable and expeditious resolution to the disputes. [*Id.*]
 - Example: A market event that causes losses to multiple customers.



The Arbitrators

- Arbitrators:
 - There are currently over 1,700 individuals on NFA's arbitrator roster.
 - According to the NFA, arbitrators come from various professions and backgrounds, but the skills they share are integrity, impartiality and sound judgment.
 - To apply to become an NFA arbitrator, you must complete an Arbitrator Profile using NFA's online system.
 - While training is essentially on-the-job, once you agree to serve on a case, NFA offers online training to help you meet your mandatory training requirements and understand your responsibilities as an NFA arbitrator.
 - Technical expertise in the commodity futures markets is not a requirement.

See <https://www.nfa.futures.org/arbitration/index.html>



Panel Composition

- Appointment: Panels are appointed by NFA's secretary. [See NFA Customer Code of Arbitration, Section 4; NFA Member Code of Arbitration, Section 3.]
- Customer disputes: Panel will consist of NFA members or individuals connected therewith unless customer timely requests non-member panelists.
 - Single Arbitrator Panel: Single arbitrator arbitrations will be decided by a non-NFA member who is not connected to an NFA member.
 - Three-Person Panel: Both the chairman and one other panelist must not be an NFA member or connected with any member.

[See NFA Customer Code of Arbitration, Section 4.]

- Member Disputes: Panels consist entirely of NFA members or individuals connected therewith.

[See NFA Member Code of Arbitration, Section 3.]



Panelist Numbers

- **Number of Panelists – Customer Disputes**

- One: Claims of \$50,000 or less will have one panelist.
- One or Three: Claims greater than \$50,000 but not more than \$150,000 will have one panelist unless the parties *jointly* request a three-person panel.
- Three: Claims greater than \$150,000 will have three panelists.

[See NFA Customer Code of Arbitration, Section 4(a)(1) and (2).]

- **Number of Panelists – Member Disputes**

- One: Claims of \$50,000 or less will have one panelist.
- One or Three: Claims greater than \$50,000 but not more than \$250,000 will have one panelist unless the parties *jointly* request a three-person panel.
- Three: Claims greater than \$250,000 will have three panelists.

[See NFA Member Code of Arbitration, Section 3(a)(1) and (2).]



Panelist Challenges

- Panelist can be challenged and removed only “for cause.”
 - Bias
 - Financial interest in the result of the arbitration
 - Significant past or present relationships with the parties.

[See NFA Customer Code of Arbitration, Section 4(c); NFA Member Code of Arbitration, Section 3(c).]

- Comparison to FINRA Arbitrations: Process is significantly different than in FINRA Arbitrations, which provide for much more input from the parties:
 - Striking potential panelists
 - Ranking panelists



Answers

- Timing:
 - 20 days following service for claims of \$50,000 or less.
 - 45 days following service for claims greater than \$50,000.

[See NFA Customer Code of Arbitration, Section 6(e); NFA Member Code of Arbitration, Section 5(e)(f).]

- Form of Answer:
 - Traditional approach
 - Responsive narrative with general denial of claims not specifically admitted
 - Combination of a general narrative and a specific denial.



Counterclaims/Cross-Claims/Third-Party Claims

- Form of Counterclaims/Cross-Claims/Third-Party Claims:
 - Similar form to affirmative arbitration claim.
- Inclusion of Counterclaims, Etc. in Answer:
 - Counterclaims, cross-claims and third-party claims arising out of the same act or transaction must (customer)/may (member) be asserted as part of the answer. [See NFA Customer Code of Arbitration, Section 6(f) and (h); NFA Member Code of Arbitration, Section 5(f) and (h).]
- Timing of Replies to Counterclaims/Cross-Claims/Third-Party Claims:
 - 10 days following service for claims of \$50,000 or less.
 - 20 days following service for claims greater than \$50,000.

[See NFA Customer Code of Arbitration, Section 6(e)(f) and (h); NFA Member Code of Arbitration, Section 5(e)(f) and (h).]



Prehearing Motions (Non-Discovery)

- Motions To Dismiss:
 - Motions to dismiss for failure to state a claim are not allowed. [See NFA Customer Code of Arbitration, Section 8(e)(1); NFA Member Code of Arbitration, Section 7(f)(1).]
 - Motions to dismiss based on other theories are permissible but must be included in a timely-filed answer or reply. [*Id.*]
 - Barred by NFA's two-year period
 - Barred by other statute of limitations
 - Full panel must consider a motion to dismiss. Procedural Guide for NFA Arbitrators, p. 11.
- Motions for Summary Judgment: Motions for summary judgment may be raised at any time. [See NFA Customer Code of Arbitration, Section 8(e)(1); NFA Member Code of Arbitration, Section 7(f)(1).]
- Motions in Limine: Motions in limine are often filed.
- Response Time: Response time generally is 10 days from service unless parties agree to more time. [See NFA Customer Code of Arbitration, Section 8(e)(2); NFA Member Code of Arbitration, Section 7(f)(2).]
- Replies: Replies are not contemplated by the Code, but the panel can allow them at its discretion.



Filing and Serving Papers

- NFA's process for filing and serving papers is much more informal than FINRA, which has an automated filing system like all federal and almost all state courts.
- Parties file and serve papers by email unless a party does not have an email address.
- Emails should be directed to the NFA case administrator assigned to the case.
 - Case administrators are assigned by NFA to the case early on in the proceedings.



Discovery - Documents

- Automatic Exchange: Early in the proceedings, NFA will provide the parties with a list of documents that the parties must voluntarily exchange. [See NFA Customer Code of Arbitration, Section 8(a)(2); NFA Member Code of Arbitration, Section 7(a)(2).]
- Timing: Documents must be exchanged no later than 15 days after the last pleading is due. [*Id.*]
- Document and Information Requests Served by Parties
 - Permitted
 - No specific numbers limitation
- Timing: For claims exceeding \$50,000, Requests must be served no later than 30 days after the last pleading is due. [See NFA Customer Code of Arbitration, Section 8(a)(3)(ii); NFA Member Code of Arbitration, Section 7(a)(3)(ii).]
- Objections/Responses/Productions: Due within 30 days after service. [*Id.*]



Discovery Continued – Subpoenas

- To NFA Members: Prehearing document subpoenas to NFA Members and their associates are permitted. [See NFA Customer Code of Arbitration, Section 9(d)(7); NFA Member Code of Arbitration, Section 8(d)(7).]
 - Need to file a motion requesting issuance of subpoena
 - Must explain why documents are necessary and explain steps taken to obtain documents voluntarily. [See Procedural Guide for NFA Arbitrators, p.10.]
- To Non-NFA Members: Prehearing document subpoenas to non-NFA Member are permitted “as authorized by law.” [*Id.*]
 - Need to file motion to requesting issuance of subpoena.
 - Will need to enforce the panel-issued proceeding through a court proceedings.
 - Process takes time so make sure to ask the panel to issue Non-Member subpoenas early in the proceedings.



Discovery Continued – Depositions

- Agreement: Parties may agree to pre-hearing depositions. [See Procedural Guide for NFA Arbitrators, p. 10.]
- Good Cause: If there is not an agreement, evidence depositions are permitted only if the party seeking the deposition can show good cause. [See NFA Customer Code of Arbitration, Section 8(h); NFA Member Code of Arbitration, Section 7(i).]
 - Illness of witness
 - Witness resides in a foreign country
- Discovery Depositions: The Code does not provide for discovery depositions. [See Procedural Guide for NFA Arbitrators, p. 10.]



Discovery Continued – Motions to Compel

- Permitted
- Timing: Must be served no later than 10 days after written objections. [See NFA Customer Code of Arbitration, Section 8(a)(4); NFA Member Code of Arbitration, Section 7(a)(4).]
- Certification: Motion to compel must include a certification that the filing party made a good faith effort to resolve the matters that are the subject of the motion to compel. [See NFA Customer Code of Arbitration, Section 8(a)(5); NFA Member Code of Arbitration, Section 7(a)(5).]
- Decision: Decided on the papers unless the panel requests oral argument. [See NFA Customer Code of Arbitration, Section 8(a)(6); NFA Member Code of Arbitration, Section 7(a)(6).]



Summary Proceedings

- An oral hearing may not be required
- Section 9(i) of the Member Code of Arbitration provides that:
 - The proceedings shall be conducted entirely through written submissions when:
 - (1) the aggregate amount of the claims (exclusive of interest and costs) does not exceed \$50,000, unless the Secretary of the Panel directs otherwise; or
 - (2) the Panel has consented to the written agreement of the parties to waive the oral hearing. A written agreement is not required of any party that has waived its right to an oral hearing under any other provision of these Rules.
- Section 9(i) of the Customer Code provides that:
 - The proceedings shall be conducted entirely through written submissions when:
 - (1) the aggregate amount of the claims (exclusive of interest and costs) does not exceed \$50,000, unless the Secretary of the Panel directs otherwise; or
 - (2) the aggregate amount of the claims (exclusive of interest and costs) is more than \$25,000 but not more than \$50,000, unless a customer serves a written request for an oral hearing on NFA, accompanied by an additional filing fee of \$1,250 and an additional hearing fee of \$500, no later than 30 days after the last pleading is due; or
 - (3) the Panel has consented to the written agreement of the parties to waive the oral hearing. A written agreement is not required of any party which has waived its rights to an oral hearing under any other provision of this Code.



Hearing Location

- Code Provisions: Code provides that the NFA Secretary had sole discretion to determine the place and time of the hearing, but will try to accommodate the preferences of the parties. [See NFA Customer Code of Arbitration, Section 9(b); NFA Member Code of Arbitration, Section 9(b).]
- Practice Pointer: NFA typically accommodates the preferences of the customer in customer cases and will ignore valid hearing location provisions in the parties' agreements.



Final Prehearing Matters

- Hearing Plan: The Code requires the parties to cooperate in filing a hearing plan. [See NFA Customer Code of Arbitration, Section 8(c); NFA Member Code of Arbitration, Section 7(c).]
 - Contents: The hearing plan should include the following information:
 - The names of the parties to the dispute;
 - The nature of the case, including a summary of the claims, answers, counterclaims and replies;
 - Any agreed upon facts;
 - A list of the disputed factual and legal issues;
 - A list of the witnesses to be presented by each side; and
 - A list of the exhibits to be presented by each side. [*Id.*]
- Exhibit Exchange: Exhibits must be exchanged 10 days prior to the first day of the hearing. [See NFA Customer Code of Arbitration, Section 8(b); NFA Member Code of Arbitration, Section 7(b).]



The Hearing Itself

- As with any arbitration or trial, each party (or the party's representative) may present opening and closing arguments, and examine any other party or witness and any evidence produced
- The Panel need not apply the technical rules of evidence
- There will not be a court reporter unless a party agrees to take on the expense
- The Panel may consider affidavits but shall give them such weight as it deems appropriate after considering objections to them
- The Panel may order Members, employees or associates to testify and produce documentary evidence
- The Panel may issue subpoenas to non-Members as authorized by law.
- The parties must submit all subpoena requests to the Panel; subpoenas issued by the Panel may be enforced in a court of competent jurisdiction
- The party requesting the appearance of a non-party witness shall bear all reasonable costs of such appearance



The Arbitration Award - Timing

- The Panel shall notify NFA of its decision within 30 days after the record is closed. NFA shall then prepare a written award form, to be dated and signed by the Panel members. NFA shall promptly serve a copy of the award on each party or its representative. The award shall be that of the Panel majority.

[See Sections 10 of the Member Rules of Arbitration and the Customer Code]



The Arbitration Award - Relief

- Compensatory Damages
- Punitive Damages:
 - Section 11 of NFA's Code of Arbitration and the Member Arbitration Rules allows an NFA arbitration panel to award punitive damages (NFA counsels arbitrators to ask the parties to provide briefs in the event there is any question whether applicable allows for punitive damages)
 - To award punitive damages, the arbitrators must find that the party acted with malice, ill will, or conscious disregard of the consequences to others.
 - The size of the punitive damages award must be reasonable given the circumstances of the case. In deciding what is reasonable, the arbitrators should consider the following: 1) what is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually occurred; 2) the degree of reprehensibility of the defendant's conduct, duration of the conduct, the defendant's awareness, whether there was any concealment, and existence and frequency of similar conduct; 3) the profitability to the defendant of the wrongful conduct and the desirability of removing profit and of having the defendant also sustain a loss; 4) the financial position of the defendant; 5) all costs of the litigation; 6) the imposition of criminal sanctions on the defendant for its conduct is to be taken into account for mitigation; and 7) the existence of other civil awards against the same defendant for the same conduct is to be taken into account in mitigation. [See <https://www.nfa.futures.org/arbitration/arbitration-resources/files/legal-and-procedural-issues.PDF>]
- Attorneys Fees:
 - Not awarded just because a party wins the arbitration, but may be awarded when:
 - the parties had a contract which provides for attorneys' fees;
 - the party receiving attorneys' fees recovered damages under a statute that provides for attorneys' fees; or
 - the party who must pay the attorneys' fees filed a frivolous or bad faith claim, raised a frivolous or bad faith defense, or engaged in willful acts of bad faith during the arbitration. [See NFA Code of Arbitration Section 12, NFA Member Arbitration Rules Section 12.]



The Arbitration Award - Finality

- Sections 10(c) of the Member Rules and Customer Code provide only a limited basis to change awards:

The Panel's award shall be final on the date thereof. The award may be modified by the Panel if a party submits a written request for modification which is received by NFA within 20 days from the date of service of the award on the parties, and the Panel deems modification necessary because:

- (1) there is an evident material miscalculation of figures or an evident material mistake in the description of any person, thing or property referred to in the award;
- (2) the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted; or
- (3) the award is imperfect in matter of form not affecting the merits of the controversy.

NFA will not forward a modification request to the Panel unless it is based on one of the grounds listed above. The timely filing of a request for modification shall stay automatically the finality of any award until NFA rejects the request or the Panel either modifies the award or denies the request for modification.



The Arbitration Award – Appealability

- Sections 10(d) of the Member Arbitration Rules and Customer Code provide that an arbitration award is not appealable
- Section 10 of the Federal Arbitration Act provides that a court may vacate an arbitration award:
 - (1) where the award was procured by corruption, fraud, or undue means;
 - (2) where there was evident partiality or corruption in the arbitrators, or either of them;
 - (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
 - (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10

- In an increasingly small number of jurisdictions, arbitration awards can be challenged on the grounds that the panel exhibited manifest disregard for the law, but the standard is extremely high, “requires more than a simple error in law or a failure by the arbitrators to understand or apply it,” and arbitrators are given “extreme deference.” *Matter of Daesang Corp. v NutraSweet Co.*, 2018 NY Slip Op 06331, Appellate Division, First Department (Sept. 27, 2018)



Compliance/Confirmation

- Members are subject to suspension if they fail to comply with an arbitration awards
- In order to enforce an arbitration award, the prevailing party must file a petition to confirm the arbitration award with the appropriate court; after which the arbitration award is the equivalent of a court judgment



Thank you to our presenters!

Host: Michael Sorrell, *Deputy General Counsel, FIA*

Jim Lundy, *Partner, Foley & Lardner*

Tom Krebs, *Partner, Foley & Lardner*

Ellen Wheeler, *Partner, Foley & Lardner*

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10:00 – 11:00 AM ET

FIA

The logo consists of three letters: 'F', 'I', and 'A'. The 'F' is a solid dark grey. The 'I' is a solid dark grey. The 'A' is formed by overlapping two shapes: a light green triangle pointing downwards and a light blue triangle pointing upwards. The background features large, overlapping geometric shapes in light green, light blue, and light grey.