



In the Matter of Cowen & Company et al.,  
Appellants,  
v.  
Jeffrey M. Anderson, Respondent.

Court of Appeals of New York

Argued June 6, 1990;

decided July 10, 1990

#### SUMMARY

Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered November 2, 1989, which affirmed a judgment of the Supreme Court (David B. Saxe, J.), entered in New York County in a proceeding pursuant to CPLR article 75, denying a motion by petitioners to stay arbitration of a claim before the American Arbitration Association.

*Matter of Cowen & Co. v Anderson*, 155 AD2d 243, affirmed.

#### HEADNOTES

Arbitration--Agreement to Arbitrate--Securities Accounts--Forum Not Limited to Securities Industry Self-Regulatory Organizations

(1) An "Option Agreement" and "Margin Agreement", entered into between petitioners and respondent in connection with respondent's securities accounts with petitioners, which provided that disputes between the parties should be settled by arbitration in "accordance with the rules then in effect" of the New York Stock Exchange, American Stock Exchange (Amex) or the National Association of Securities Dealers, and gave respondent the option to elect the forum, permit respondent to arbitrate his claims before the American Arbitration Association (AAA) and do not limit him to arbitration before the stated securities industry self-regulatory organizations. The agreements authorize respondent to elect arbitration in accordance with the rules of the Amex, whose constitution defines the term "rules of the Exchange" to "include the Constitution and all rules adopted pursuant thereto" (Amex const, art I, § 3 [a]). The "Arbitration Procedure" of the Amex,

outlined in its constitution, states that "the customer may elect to arbitrate before the American Arbitration Association \* \* \* unless the customer has expressly agreed \* \* \* to submit only to the arbitration procedure of the Exchange". (Amex const, art VIII, § 2 [c].) Inasmuch as respondent did not agree to limit the arbitration to the self-regulating organizations, the plain language of the stock and margin agreements grant him the right under the Amex constitution to elect to arbitrate the dispute before the AAA.

#### TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Stock and Commodity Exchanges, § 11.

NY Jur 2d, Arbitration and Award, § § 8, 14, 77, 78; Associations and Clubs, § § 33, 35, 36, 44. \*319

#### ANNOTATION REFERENCES

See Index to Annotations under Arbitration and Award; Exchanges and Boards of Trade.

#### POINTS OF COUNSEL

*Matthew Farley, Brian F. McDonough and Thomas A. Roberts* for appellants. I. Respondent may not arbitrate his claim at the American Arbitration Association since he agreed to submit his claim to selected organizations. (*Matter of HRH Constr. Corp. [Bethlehem Steel Corp.]*, 45 NY2d 675; *Oriental Commercial & Shipping Co. v Rosseel, N.V.*, 609 F Supp 75; *Rodolitz v Neptune Paper Prods.*, 22 NY2d 383; *Shearson/American Express v McMahon*, 482 US 220; *Piltch v Merrill Lynch, Pierce, Fenner & Smith*, 714 F Supp 537; *Merrill Lynch, Pierce, Fenner & Smith v Georgiadis*, 724 F Supp 120; *PaineWebber Inc. v Pitchford*, 721 F Supp 542; *Bear Stearns & Co. v Karol & Assocs.*, 728 F Supp 499.) II. The procedures and efficacy of American Arbitration Association arbitration are not at issue here.

*Theodore G. Eppenstein and Madelaine Eppenstein* for respondent. I. Commencement by respondent of an arbitration before the American Arbitration Association is in accordance with the plain language of the parties' agreements and applicable law. (*Axelrod & Co. v Kordich, Victor & Neufeld*, 451 F2d 838; *Paine, Webber, Jackson & Curtis v Chase Manhattan Bank*, 728 F2d 577; *Matter of PaineWebber, Inc. v Webb*, 155 AD2d 938; *Piltch v*

*Merrill Lynch, Pierce, Fenner & Smith*, 714 F Supp 537; *Stern v Satra Corp.*, 539 F2d 1305.) II. The decisions of the New York State courts are determinative of the issues on appeal since respondent's agreements provide that New York law shall govern. (*Merrill Lynch, Pierce, Fenner & Smith v Georgiadis*, 724 F Supp 120; *PaineWebber Inc. v Pitchford*, 721 F Supp 542; *Flanagan v Prudential-Bache Sec.*, 67 NY2d 500; *Morgan Guar. Trust Co. v Garrett Corp.*, 625 F Supp 752; *McGowan v University of Scranton*, 759 F2d 287; *Shearson/American Express v McMahon*, 482 US 220; *McMahon v Shearson/American Express*, 896 F2d 17.) III. Appellants' and their *amicus*' opposition to the American Arbitration Association forum is inconsistent with Securities and Exchange Commission endorsement of American Arbitration Association securities arbitration. (*Shearson/American Express v McMahon*, 482 US 220; *Roney & Co. v Goren*, 875 \*320 F2d 1218; *Paine, Webber, Jackson & Curtis v Chase Manhattan Bank*, 728 F2d 577; *Axelrod & Co. v Kordich, Victor & Neufeld*, 451 F2d 838.) IV. Keeping the American Stock Exchange window open is consistent with promoting fairness and protecting the rights of customers like respondent.

*William J. Fitzpatrick and Gerard J. Quinn* for Securities Industry Association, Inc., *amicus curiae*. I. The Federal Arbitration Act requires arbitration agreements to be enforced as written. II. The agreement in issue requires arbitration under the procedural arbitration rules of three specifically named forums. III. The agreement should be enforced as written.

#### OPINION OF THE COURT

Simons, J.

Petitioner Cowen & Company is a member of the American Stock Exchange (Amex) and petitioner Christopher Stark is one of its registered representatives. They seek to stay arbitration before the American Arbitration Association (AAA) of a dispute with one of their customers, respondent Jeffrey Anderson. The courts below denied the stay. The issue presented is whether the agreements entered into between petitioners and respondent permit respondent to arbitrate his claims before the AAA or limit him to arbitration before various securities industry self-regulatory organizations, i.e., the New York Stock Exchange, the American Stock Exchange or the National Association of Securities

Dealers. We conclude that the agreements permit arbitration before the AAA and therefore affirm the order of the Appellate Division.

In July 1986 respondent opened securities accounts with petitioners. When he did so, he signed an "Option Agreement" [FN1] and "Margin Agreement", [FN2] both in standard form, which contained clauses providing that disputes between the parties should be settled by arbitration in "accordance with the rules, then in effect" of the New York Stock Exchange, American Stock Exchange or the National Association of \*321 Securities Dealers. The agreements gave respondent the option to elect the forum.

FN1 "I agree that any controversy arising out of or relating to my account with you \* \* \* shall be settled by arbitration in accordance with the rules then in effect of the New York Stock Exchange, the American Stock Exchange or the NASD as I may elect."

FN2 "Any controversy arising out of or relating to my accounts \* \* \* shall be settled by arbitration in accordance with the rules, then in effect, of the NASD or the Board of Directors of the New York Stock Exchange, Inc. or the American Stock Exchange, Inc. as I may elect."

On December 29, 1988 respondent served a notice of intention to arbitrate claims arising out of the alleged mishandling of his accounts before the AAA. Petitioners applied for a stay contending that respondent could only elect arbitration before the New York Stock Exchange, the American Stock Exchange or the National Association of Securities Dealers. Respondent maintained in opposition that arbitration before AAA was proper because the "rules of the Amex", referred to in the option and margin agreements, included the "Amex Window" (Amex const, art VIII, § 2 [c]) which authorized him to do so. [FN3]

FN3 The section provides in part:  
"Sec 2. Arbitration shall be conducted under the arbitration procedures of this Exchange, except as follows. \* \* \*  
"(c) if any of the parties to a controversy is a

(Cite as: 76 N.Y.2d 318)

customer, the customer may elect to arbitrate before the American Arbitration Association in the City of New York, unless the customer has expressly agreed, in writing, to submit only to the arbitration procedure of the Exchange."

The Supreme Court denied the stay, holding that the rules of the American Stock Exchange include a right on the part of respondent to "elect to arbitrate before the American Arbitration Association \* \* \* unless the customer has expressly agreed, in writing, to submit only to the arbitration procedure of the Exchange" (quoting Amex const, art VIII, § 2 [c]). The court concluded respondent had not limited himself to arbitration before the Amex in the agreements and, therefore, that the exception precluding arbitration before the AAA did not apply. The Appellate Division affirmed and we granted leave to appeal.

Arbitration agreements are contracts and their meaning is to be determined from the language employed by the parties under accepted rules of contract law (*Matter of American Ins. Co. [Messinger--Aetna Cas. & Sur. Co.]*, 43 NY2d 184, 193-194; *Stanley & Son v Trustees of Hackley School*, 42 NY2d 436, 438-440; *cf.*, *Sablosky v Gordon Co.*, 73 NY2d 133, 137). The option and margin agreements before the court authorize respondent to elect arbitration "in accordance with the rules \* \* \* [of the] American Stock Exchange." The Amex constitution, in turn, defines the term "rules of the Exchange" to "include *the Constitution* and all rules adopted pursuant thereto" (Amex const, art I, § 3 [a] [emphasis added]). The "Arbitration Procedure" of the Amex, outlined in its constitution, states that "the customer may elect to arbitrate before the American \*322 Arbitration Association \* \* \* unless the customer has expressly agreed \* \* \* to submit only to the arbitration procedure of the Exchange" (Amex const, art VIII, § 2 [c]). Inasmuch as respondent did not agree to limit the arbitration to the self-regulating organizations, the plain language of the stock and margin agreements grant him the right under the Amex constitution to elect to arbitrate the dispute before the AAA.

Petitioners rely on several Federal cases to support their contention that the option and margin agreements were intended to and did override the provision of the Amex constitution and limit arbitration to one of the three specifically named self-regulatory bodies. However, the contract language in three of those cases is significantly different from the

language petitioners used. Thus, in *Merrill Lynch, Pierce, Fenner & Smith v Georgiadis* (903 F2d 109, 110 [2d Cir]), the customer signed a "Standard Options Agreement" which stated, "[a]ny controversy between us \* \* \* shall be settled by arbitration *only before* the National Association of Securities Dealers, Incorporated, or the New York Stock Exchange, or an Exchange located in the United States upon which listed options transactions are executed" (emphasis added). When the customer attempted to invoke the "Amex Window" by filing a demand for arbitration with the AAA, the Court of Appeals construed the language of the agreement strictly and limited arbitration to one of several designated fora. Although the "Amex Window" allowed the customer to arbitrate before the AAA, the parties had agreed otherwise and their agreement was held controlling.

Similarly, in *Piltch v Merrill Lynch, Pierce, Fenner & Smith* (714 F Supp 537 [D DC]), the customers signed a standard option agreement providing in part that "[a]ny controversy \* \* \* arising out of such option transactions or this agreement shall be settled by arbitration before the National Association of Securities Dealers, Incorporated, or the New York Stock Exchange, or the American Stock Exchange, *only.*" (714 F Supp, at 537 [emphasis added].) The court held that because they had agreed to settle all disputes before the three self-regulatory organizations listed in the options agreement, they were not entitled to use the "Amex Window" to elect the AAA forum (*see also, PaineWebber Inc. v Pitchford*, 721 F Supp 542, 543 [SD NY], *affd sub nom. PaineWebber, Inc. v Rutherford*, 903 F2d 106 [no arbitration before AAA where customer agreement stated "(a)ny controversy between us \* \* \* shall be settled by arbitration, in accordance with the rules, then obtaining, of either the *Arbitration Committee* of the New York Stock Exchange, American Stock Exchange, National Association of Securities Dealers or where appropriate, Chicago Board Option Exchange or Commodities Futures Trading Commission" (emphasis added)]).

These cases, rather than supporting petitioners' argument, illustrate that they could easily have limited the forum for arbitration to one of the three named organizations by so stating in the option and margin agreements had they chosen to do so. Unlike the clauses in the agreements in the cases cited above, however, petitioners' agreements do not expressly state that respondent is bound to arbitrate their claim "only before" the three self-regulatory organizations or that the customer must submit to

arbitration in accordance with the procedures of a particular entity. They state instead arbitration shall be "in accordance with the rules" of the New York Stock Exchange, the American Stock Exchange or the National Association of Securities Dealers. The term "rules" is not defined or limited by the agreements and respondent is, therefore, entitled to rely on the provision in the Amex constitution.

Petitioners have cited some Federal District Court cases which refused to interpret the term "rules of the Amex" to encompass the Amex Window provision in the Amex constitution and construed customer agreements similar to those at issue here as foreclosing arbitration before the AAA (*see, Hybert v Shearson Lehman/American Express*, 1989 WL 64450 [US Dist Ct, ND Ill, June 8, 1989]; *Bear Stearns & Co. v Karol & Assocs.*, 728 F Supp 499, 500, 503-504 [ND Ill]; *PaineWebber Inc. v Astrella*, No. 89-2268 [US Dist Ct, NJ, Sept. 6, 1989]). We prefer to rest our decision upon settled rules of contract law and read the language according to its clear meaning. Indeed, even if the language of petitioners' agreements could be considered ambiguous we would construe it most strongly against petitioners and favorably to respondent because petitioners drafted the agreements (*Matter of PaineWebber, Inc. v Webb*, 155 AD2d 938; *see, Jacobson v Sassower*, 66 NY2d 991, 993; *67 Wall St. Co. v Franklin Natl. Bank*, 37 NY2d 245, 249). \*324

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Judges Kaye, Alexander, Titone, Hancock, Jr., and Bellacosa concur; Chief Judge Wachtler taking no part.

Order affirmed, with costs. \*325

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N.Y. 1990.

COWEN & CO. v ANDERSON

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