

Notice to Members

MAY 2005

SUGGESTED ROUTING

Legal and Compliance

KEY TOPICS

Arbitration

Dispute Resolution

Foreign Hearing Locations

GUIDANCE

Foreign Hearing Locations

SEC Approves Amendments to IM-10104 and Rule 10315 to Permit Arbitrations in Foreign Hearing Locations; **Effective June 6, 2005**

Executive Summary

The Securities and Exchange Commission (SEC) has approved amendments to IM-10104 and Rule 10315 of the *NASD Code of Arbitration Procedure* (Code) to permit parties to have their hearings in a foreign hearing location, and to allow the director of arbitration to authorize a higher or additional honorarium for the use of a foreign hearing location.¹

The text of the amendments is set forth in Attachment A. The amendments will be effective on **June 6, 2005**, and will apply to any arbitration claims filed on or after June 6, 2005.

Questions/Further Information

Questions regarding this *Notice* may be directed to Mignon McLemore, Assistant Chief Counsel, NASD Dispute Resolution, at (202) 728-8151 or mignon.mclemore@nasd.com.

Discussion

NASD has amended IM-10104 and Rule 10315 of the Code to permit parties to have their hearings in a foreign hearing location, and to allow the director of arbitration to authorize a higher or additional honorarium for the use of a foreign hearing location.

Background

In accordance with NASD Rule 10315, the director of arbitration (Director) sets the hearing location for NASD arbitration cases. Currently, for cases involving public customers who reside in the United States (U.S.), the Director generally designates the hearing location that is closest to the public customer's residence at the time of the events in dispute.² However, for claimants who reside outside of the U.S., the Director sets the hearing in the NASD hearing location that is most logical for the case. Generally, when the claimant resides outside the U.S., the Director will consider a number of factors in determining a hearing location, including the preferences of the parties, the location of counsel or witnesses, and the availability of transportation routes to cities in the U.S.

In an effort to accommodate parties who reside outside the U.S., NASD has amended the Code to permit parties to have their hearings in a foreign hearing location and to allow the Director to authorize a higher or additional honorarium for the use of a foreign hearing location.

The first foreign hearing location for NASD arbitrations will be in London. NASD has entered into an agreement with the Chartered Institute of Arbitrators (CIArb) under which CIArb will make its neutrals available for NASD's roster in London. CIArb is based in London and maintains a worldwide roster of neutrals, providing dispute resolution services for banking, finance, business, commercial, and international issues. NASD believes that its agreement with CIArb will provide those international constituents of NASD with access to a local roster of experienced neutrals,³ as well as the convenience and cost efficiency of conducting hearing sessions within a reasonable distance from their place of business or residence.

Determination of a Foreign Hearing Location

Rule 10315 permits arbitrations to be held in a foreign hearing location. Under the rule, use of a foreign hearing location will be voluntary. For an arbitration to be held in a foreign hearing location, a claimant residing outside of the U.S. will file with NASD the claim information, submission agreements, payment, and other related documents currently required by NASD rules. At this point, the claimant can request that the arbitration be held in a foreign hearing location, or NASD staff will notify the claimant of the option of using a foreign hearing location, based on a review of the claim filing information. If the claimant wishes to use a foreign hearing location, NASD staff will seek the written agreement of the respondents.

Foreign Hearing Location Surcharge

As a condition of using a foreign hearing location, the parties must agree to accept the foreign hearing location surcharge, which the Director may authorize under IM-10104. NASD will assess the daily foreign hearing location surcharge to parties agreeing to use the foreign hearing location to cover the additional daily cost of the foreign neutrals' service, which may be higher than the arbitrator honorarium rates paid by NASD. This surcharge will be used solely to pay additional honorarium to the foreign neutrals, and will not be used to cover any other NASD expenses. The amount of the surcharge will vary depending on factors such as the daily rates for neutrals in a foreign hearing location and the currency exchange rates.

This surcharge will be apportioned equally among the parties, unless they agree otherwise. However, the foreign arbitrators will have the authority to apportion the surcharge as provided in NASD Rules 10205 and 10332.⁴

Effective Date

The amendments described in this *Notice* are effective on **June 6, 2005**, and will apply to any arbitration claims filed on or after June 6, 2005.

Endnotes

- 1 Exchange Act Release No. 51324 (March 7, 2005) (File No. SR-NASD-2004-042), 70 Federal Register 12257 (March 11, 2005).
- 2 NASD Dispute Resolution maintains a roster of qualified neutrals (*i.e.*, arbitrators and mediators) in 68 cities in the U.S. and Puerto Rico, and has at least one hearing location in every state and the District of Columbia.
- 3 CIArb's neutrals are required to complete a rigorous training program and to pass testing and interview requirements before being qualified for appointment to cases. CIArb's neutrals must meet NASD's background qualification requirements. In addition, NASD has conducted training for CIArb neutrals on NASD arbitration rules and procedures.
- 4 The Code will govern all case administration in instances where the parties elect to use a foreign hearing location.

©2005. NASD. All rights reserved. *Notices to Members* attempt to present information to readers in a format that is easily understandable. However, please be aware that, in case of any misunderstanding, the rule language prevails.

ATTACHMENT A

New language is underlined; deletions in brackets.

Code of Arbitration Procedure

* * *

IM-10104. Arbitrators' Honorarium

All persons selected to serve as arbitrators pursuant to the Association's Code of Arbitration Procedure shall be paid an honorarium for each hearing session (including a prehearing conference) in which they participate.

The honorarium shall be \$200 for each hearing session and \$75 per day additional honorarium to the chairperson of the panel. The honorarium for a case not requiring a hearing shall be \$125.

The honorarium for travel to a canceled hearing session shall be \$50. If a hearing session other than a prehearing conference is adjourned pursuant to Rule 10319(d), each arbitrator shall receive an additional honorarium of \$100.

The Director may authorize a higher or additional honorarium for the use of a foreign hearing location.

* * *

10315. [Designation of Time and Place] Determination of Hearing Location

(a) Designation of Time and Place of Hearing

The Director shall determine the time and place of the first meeting of the arbitration panel and the parties, whether the first meeting is a pre-hearing conference or a hearing, and shall give notice of the time and place at least 15 business days prior to the date fixed for the first meeting by personal service, registered or certified mail to each of the parties unless the parties shall, by their mutual consent, waive the notice provisions under this Rule. The arbitrators shall determine the time and place for all subsequent meetings, whether the meetings are pre-hearing conferences, hearings, or any other type of meetings, and shall give notice as the arbitrators may determine. Attendance at a meeting waives notice thereof.

(b) Foreign Hearing Location

(1) If the Director and all parties agree, parties may have their hearing in a foreign hearing location and conducted by foreign arbitrators, provided that the foreign arbitrators have:

(A) met NASD background qualifications for arbitrators;

(B) received training on NASD arbitration rules and procedures; and

(C) satisfied at least the same training and testing requirements as those arbitrators who serve in U. S. locations of NASD.

(2) The parties shall pay an additional surcharge for each day of hearings held in a foreign hearing location. The amount of the surcharge will be determined by the Director and must be agreed to by the parties before the foreign hearing location may be used. This surcharge shall be specified in the agreement to use a foreign hearing location and shall be apportioned equally among the parties, unless they agree otherwise. The foreign arbitrators shall have the authority to apportion this surcharge as provided in Rules 10205 and 10332.

* * * *