

Explained Award: Shirvanian v. Citigroup Global Markets, Inc.

EXPLAINED AWARD: *SHIRVANIAN v. CITIGROUP GLOBAL MARKETS, INC.*, AAA ID [#72168 Y 00005 04 NOLG](#) (Los Angeles, CA, 10/26/17).

This well-reasoned 69-page AAA Award carefully lays out several alternative bases for rejecting the claimants' claims.

Kosti Shirvanian, a millionaire who made his fortune as a trash disposal contractor, held a large position in Waste Management, Inc. ("WMI"), which had acquired his former company in 1998. When the value of WMI stock dropped precipitously in 1999, Shirvanian looked to Salomon Smith Barney ("SSB," now Citigroup) to protect his portfolio and provide him with cash while avoiding capital gains taxes. The agreed-upon solution was the use of equity monetization securities ("EMS") transactions. In that strategy, Shirvanian pledged to sell a stated number of WMI shares to SSB, acting as a counterparty, on a later date, for which he was immediately paid cash (in an amount lower than the market price of the stock), but incurred no immediate tax liability. In addition to the foregoing advantages, an EMS included collars that gave Shirvanian the opportunity to benefit from increases in the value of the stock while limiting his exposure to decreases.

A Long Wait

The Arbitrators' decision depends heavily on the procedural history of the case. When Shirvanian and his wife filed their Demand for Arbitration against SSB in 2003, they described the dispute as a "[c]laim for loss on securities." A 2005 discovery response alleged that their broker gave bad advice regarding the EMS account, exceeded the amount he was authorized to trade, failed to protect Shirvanian's portfolio and otherwise negligently handled his accounts, and that SSB had a potential conflict of interest because it also advised WMI. For reasons not clear from the face of the Award, the Shirvanians asked AAA to hold the arbitration in abeyance from 2006 to 2014. When they reactivated it, SSB filed a

motion to dismiss the arbitration for failure to prosecute. While the motion was pending, Claimants filed a “First Amended Statement of Claims” (“FASOC”) that raised additional claims. One of the recurring issues in the case was whether New York law, as set forth in a sample EMS purchase agreement (“EMS agreement”), or California law, applied to the case. Applying New York law, the Panel denied the motion because it was unclear whether SSB suffered prejudice from the delay, given the available documentary evidence. The case then proceeded to 35 days of evidentiary hearing (*ed: there were 37 days of hearings in all, including two days of closing argument*). Claimants sought \$97.9 million in compensatory damages, treble damages and \$200 million in punitive damages.

Last In, First Out

The Panel addresses the FASOC-added claims first. Since the parties agree that all relevant statutes of limitations expired before the FASOC was filed, the only issue is whether the added claims “relate back” to the Demand for Arbitration. Under either California or New York law, the Arbitrators conclude, all the pre-abeyance documents are inadequate to give the notice of the new claims required for them to “relate back,” and they are therefore time-barred. However, even if they do relate back, the Panel discerns another problem: all the new claims are reliant on oral testimony, but the long passage of time has dulled the memories of witnesses on both sides, causing the Panel to finally find enough prejudice to merit dismissal for failure to prosecute.

EMS Claims

That leaves several claims relating specifically to the EMS transactions: that SSB failed to disclose the costs of those transactions, that those costs were excessive, that SSB failed to disclose the commissions it paid to its brokers, that it promised there would be no commissions on them, and that SSB recommended early termination of EMS to generate commissions. On the first claim, the Panel finds that SSB fully disclosed the costs to the Shirvanians, who were really complaining that SSB should have disclosed its own revenue. However, the Panel finds that a brokerage has no duty to do so, especially where, as here, it disclaimed any such duty, and the amount could not be accurately estimated until the sale

was consummated, nor does the amount it earned as an EMS counterparty matter. The claim of failure to disclose, to the extent it is not untimely or barred by failure to prosecute, fails because SSB paid those commissions out of its own revenues. The alleged promise not to pay commissions, if it happened as Shirvanian remembers, was not breached, since he did not pay those commissions. Finally, while Shirvanian did terminate some EMS transactions early, he had valid reasons - earning a profit or acquiring more advantageous collars - for doing so and, if the promised advantages did not always pan out, that did not make the decision to terminate early unsuitable. The Shirvanians' claims are denied *in toto*.

*(ed: *SSB/Citigroup was represented by Terry Ross, Michele R. Underwood and Stacey M. Garrett, Esqs. of Keesal Young & Logan, Long Beach, CA. **Two lessons to take away from this case: spell out one's claim from the beginning and, while AAA does give one the option of holding an arbitration in abeyance, one must think carefully before exercising that privilege, as there can be negative consequences. ***SAC collects securities-related Awards for its Award Database and online ARBchek system from many forums and we appreciate the help of all. The Awards are, in that way, available to all visitors for use in ranking arbitrators or performing customized searches. We hold in particular esteem those who contribute Explained Awards for SAC's PDF Awards Library.)*

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