Approved May 1, 1998

Minutes of the
October 16, 1997 Meeting of the
Securities Industry Conference on Arbitration

-Held in Scottsdale, AZ at the Hyatt Scottsdale at Gainey Ranch-

Members Present:
James E. Beckley, Public Member
James E. Buck, NYSE
Robert S. Clemente, NYSE
Philip S. Cottone, NASD
Arlene Collins-Day (by conference call), AMEX
Paul J. Dubow, SIZ
Linda D. Fienberg, NASD
Beth A. Fruechtenicht, PCX
Thomas R. Grady, Public Member
John C. Katovich, PCX
Deborah Masucci, NASD
Nancy Nielsen, CBOE
Fredda Plesser, SIA
Thomas J. Stipanowich, Public Member

Invitees Present:
Paul Andrews, SEC (by conference call)
Robert Love, SEC (by conference call)
Helene McGee, SEC (by conference call)
Catherine McGuire, SEC (by conference call)

Public Members *Emeritus* Present:
Peter R. Cella
Constantine N. Katsoris

Mr. Beckley called the meeting to order at approximately 8:15 a.m. The conference was informed that Beth Fruechtenicht had been appointed Director of Arbitration of the Pacific Exchange.

1. **Approval of the July 10, 1997 minutes:**

Mr. Clemente moved to approve the July 10 minutes. Mr. Stipanowich seconded the motion.

Mr. Dubow suggested certain modifications prior to approval as follows:

a. At Page 4 regarding California Senate Bill 19, the last sentence should read, "It was Mr. Dubow's opinion that Governor Wilson will probably veto this bill."

b. At Page 5 second paragraph under New Business, after "State Supreme Court case" insert – "*Engalla v. Kaiser Permanente*"

The Conference voted unanimously to approve the minutes, as amended.

2. List Selection Rule – Draft dated September 18, 1997.

Mr. Stipanowich moved to approve the List Selection Rule as drafted. Mr. Clemente seconded the motion.

Mr. Love stated that certain issues needed to be resolved and noted suggestions from SEC staff. He informed the Conference that if the rule as drafted was proposed by an SRO to the SEC, the unresolved issues would be raised with whichever SRO first filed the proposed rule change. That review process would probably take more time and be less efficient than addressing the issues now.

Ms. Fienberg noted that the NASD is in the process of designing computer software to facilitate the list selection process. They discovered that the program had to be written as a stand-alone program and an outside computer consultant has been hired to design and code the software. One of the goals of the program was to minimize staff involvement in the selection process. The number of cases on the NASD docket requires automated treatment of the list selection process. Ms. Masucci noted that NASD's list selection version is very similar to the SICA version, and NASD would take comments on both rules and incorporate them as necessary.

Mr. Stipanowich amended his motion to approve the list selection rule in substance and await a new plain English version, and other changes, after working with SEC staff. Mr. Clemente seconded the amended motion, and the Conference approved the rule in substance. *A copy of the draft List Selection Rule, dated September 18, 1997 is attached to these minutes as Exhibit 1.*

Mr. Clemente will confer with Nancy Smith to arrange for making final changes to the rule. Mr. Clemente suggested that the Drafting Subcommittee schedule a conference call to discuss pending changes. A conference call was scheduled for October 30, 1997 at 11:00 a.m. (EST). A conference call will be held with SICA Members to approve the rule in final form.

3. Optional Arbitration.

Ms. Stipanowich raised the topic of optional arbitration for consideration by the Conference.

Ms. Masucci stated that for many people, arbitration is already voluntary where there is no arbitration agreement. She also emphasized that there are other alternatives to arbitration, such as non-binding mediation. She believes that the emphasis should be placed on non-binding alternatives.

Mr. Clemente agreed with Ms. Masucci, but was also concerned about public perceptions. He said the concept we are looking at is a way of avoiding writing so many rules; arbitration was much simpler before McMahon. The Ruder Report recommended a lot of changes and we are becoming overburdened by too many complex rules.

Mr. Clemente stated that the NYSE ran a pilot program offering the AAA as an option several years ago. Six major firms agreed to consider the AAA option on a case by case basis. Certain cases were earmarked by the firms for participation in the program. In addition, customers could request arbitration with the AAA.

Mr. Buck stated that he liked the idea of looking at the AAA alternative again. HE also stated that we (SICA) have to defuse the hostility against arbitration, and that the plaintiff's bar argued that when they were offered the AAA alternative during the NYSE's pilot program, there were too many conditions put on it by the firms.

Mr. Dubow stated that the NYSE's AAA pilot program experience varied from firm to firm. Dean Witter had no objection to it, but they would not agree to it for cases in Florida. Mr. Dubow stated that under the pilot program, the plaintiff had to request AAA arbitration and the industry was not allowed to put conditions on it. But the major deterrent to the plaintiff's bar was the cost of AAA arbitration – AAA fees were far greater than SRO fees.

Mr. Dubow also stated that publicly about an alternative forum will not defuse complaints about arbitration. Claimants and attorneys will still argue that they were forced to go to arbitration and that arbitration procedures are unfair. Mr. Dubow found the AAA proposal interesting, but expressed concern about AAA rules not containing an eligibility provision. Mr. Dubow would prefer to have the eligibility rule retained, regardless of forum, due to the fact that arbitrators do not often dismiss cases on statute of limitations grounds. Mr. Dubow generally thought that the AAA has good panels in San Francisco.

Mr. Clemente stated that Mr. Stipanowich's proposal goes a little further, - it goes to opting out of ADR, altogether, perhaps at a specific dollar amount. Mr. Clemente noted that the proposal would require that one side file a notice of intent to opt out of SRO arbitration which starts clock, and that the other side would have a certain amount of time to object. The parties could agree and pursue matters in court, or select mediation, or another forum.

Mr. Beckley suggested that perhaps it is time for SICA do what it did with non-attorney representatives (NARs) and attempt to collect opinions from all sectors – firm in-house counsel, plaintiff's bar, and people in position to get complaints, like AARP. Another advantage of Mr. Stipanowich's proposal is that this would be the first comprehensive survey of arbitration since McMahon.

Mr. Clemente opened that SICA may be at point where it can no longer do an effective job of all of these complaints. Ms. Masucci stated that participants don't wait to realize the benefits of one improvement before tinkering with the improvements. She also noted that the length of hearing is becoming a problem. The NASD is seeing lawyerly tactics that are breaking down the process and they have tried to address the problem by adopting more rules to clarify procedures. However, this has created more rules for lawyers to manipulate. She also said that the NASD was seeing situations where lawyers are treating the Panel as their adversary, and that arbitrators are being accused of bias if they try to impose limits on the parties. Professor Katsoris stated that a strong chair should not let that happen.

Mr. Dubow stated that a major issue is the need for good arbitrators – concern about repeat arbitrators is silly. Attorneys don't want repeat arbitrators because they want nonexpert arbitrators who fall for their lines, like juries.

Mr. Cella stated that he'd like to point out that the view just expressed indicates the need for more experienced chairs. We are all now subject to the endless hearing syndrome.

Ms. Masucci stated that the most important thing is that list selection will help address the criticisms. If parties are more involved in the selection process, they will not criticize the arbitrators selected. Eventually the result will be a more professional roster of arbitrators. In addition, parties do not want to choose arbitrators with no award history and routinely strike them.

Ms. Plesser raised the issue of the perception problem and that arbitration at the SROs is still viewed as a secret society. She suggested that SICA be more proactive about educating the public about arbitration. Education would achieve the same end as the proposal.

Ms. Fienberg stated that she didn't think education would solve the perception problem as long as arbitration is mandatory at an SRO forum. Ms. Plesser responded that the term "mandatory" is filled with emotion. If it is truly the case that customers understand how arbitration works, the bad perceptions would possibly be diminished.

Mr. Clemente stated that those opposing arbitration are the ones that make the most noise. The list selection rule is good, but objections are already coming that as long as SROs are determining who is in pool, there will be perception problem.

Mr. Clemente moved to establish a SICA subcommittee to consider options to SRO-sponsored arbitration including the AAA alternative, opt-out provisions and other forms of ADR, as well as educational programs aimed at public customers and registered representatives. Mr. Grady seconded the motion. The Conference unanimously approved.

Mr. Buck then interposed that the Conference might consider putting the options alternative in the context of the PIABA petition to the SEC to have a 19(c) proceeding. Mr. Cottone suggested that the subcommittee come back with ideas about their own mission. Mr. Beckley stated that he dimly remembered that there may have been an SEC release on firm agreements not limiting customers to just one forum. Ms. Masucci reminded the Conference that in 1987 the SEC recommended that SROs consider giving the option of AAA as a forum.

Mr. Beckley asked Mr. Love if he had any recollection of a release on the issue. Mr. Love noted that the SEC's brief in Roney, as well as a subsequent litigation release stated that predispute arbitration clauses that limited SRO arbitration choices otherwise available by rule were invalid.

Upon request from Mr. Beckley for volunteers for the new subcommittee, the following persons volunteered:

> Mr. Clemente, Mr. Cottone, Ms. Fienberg, Ms. Plesser, Ms. Fruechtenicht, Mr. Dubow, Ms. Masucci, Ms Nielsen, Mr. Stipanowich, Mr. Beckley, and Professor Katsoris.

The subcommittee scheduled its first meeting for October 28, 1997 at 4:30 p.m. (EST).

4. Pilot Clinical Program

Paul Andrews spoke on behalf of the SEC and stated that the pilot clinical program is designed to offer help to small investors in New York who have claims that attorneys typically won't take due to the small dollar amount. Five law schools in New York City have expressed an interest in the program. The schools that have firmly committed to participating initially are Pace University and Fordham University. Professor Katsoris also noted that there would be a teaching component for students.

The Association of the Bar in New York City also is working with the project and is enthusiastic about the program. The Association intends to refer claims of less than $15,000 to the clinic programs. The Association will first try to obtain a lawyer for cases between $15,00 to $30,000 before referring them to the clinics.

Mr. Dubow stated that the SIA had problems with the clinic program because the Association has no input into case management. He noted that Professor Ruder had a pilot program at Northwestern University and that students seemed to only want to try the cases and never consider settlement. He stated that it was important to have an experienced person running the program. Mr. Andrews stated that all of the schools are cognizant of the issues and are interested in teaching all aspects of handling a case, including settlement negotiations.

Mr. Buck opined that the proposal was a very responsible response to Arthur Levitt's suggestion that there be clinics for small cases, and that such a program is highly desirable.

5. Presentation by PIABA of the 19c Petition to amend the NASD Code of Arbitration Procedure re: 1) AAA opt-out; 2) Panel Composition; and, 3) Rotational Selection of Arbitrators.

On behalf of PIABA, Rosemary Shockman and Professor Joseph Long, presented the Conference with PIABA's 19(c) Petition. Ms. Shockman stated that the origin of the petition was the frustration claimants' lawyers have with composition of panels and the arbitrator selection process. PIABA's opinion is that the list selection procedures seems to be taking a long time to be adopted, and they are also frustrated that the AAA option has gradually disappeared from arbitration agreements (Schwab dropped AAA in 1997). Thus, the ability to use AAA has been largely foreclosed and PIABA feels strongly that a neutral forum should be available. Ms. Shockman also stated that the administration process at AAA is much more consumer-sensitive and that AAA has been very able to respond to requests for hearings.

Mr. Buck said that the NYSE had a AAA pilot program several years ago. Claimants were provided with information on AAA, and it was purely voluntary. The NYSE found that not very many plaintiffs requested to go to the AAA.

Mr. Beckley stated that his experience with the NYSE pilot program was that he met with resistance from the defense bar, specifically Shearson. When Mr. Beckley tried to go to AAA, the firm wanted to negotiate several things that were not consistent with AAA rules.

Ms. Shockman stated that another reason why AAA hasn't been used more was that the claimants' lawyer may have been unaware that the provision was in the agreement due to the fact that when clients would request a copy of their customer agreement, the firms would refuse to provide it.

Ms. Shockman and Professor Long were advised that the NASD Board has adopted a list selection process. The NASD is writing compute code to get a new system to cull out conflicts and make

geographical selections so that staff is not involved in the selection process. Ms. Masucci stated that the NASD has been attempting to address complaints. The NASD is in the final process of appointing arbitrators to cases soon after pleadings have been closed, and that the scheduling of hearing dates is now in the control of the parties. Ms. Masucci indicated that changes take time, but that things are moving in the right direction. Ms. Masucci also stated that she was not convinced that a large number of the plaintiffs' bar would choose the AAA.

Ms. Shockman stated that the submission of this rule is not a criticism of personnel at NASD who are trying for change. She stated that with the AAA the public customer gets a more neutral panel, in addition, the AAA does not have the 6-year eligibility rule.

Mr. Stipanowich inquired of Ms. Shockman what role she (and PIABA) want SICA to take on this issue. Ms. Shockman responded that PIABA's first goal is to have SICA support the rule change, and to the extent there is no support, to forestall negative comments from SICA.

Mr. Buck asked if SICA gave its support or implemented some rule changes, would this be what PIABA wants, without PIABA seeking an actual 19(c) proceeding. Ms. Shockman stated that PIABA cares more about the goal than the publicity.

This concluded the presentation by PIABA.

Mr. Beckley asked the SEC Staff what their procedure would be in the absence of any intervention by SICA. Ms. McGuire stated that the Staff would review the Petition in due course and determine what to recommend to the Commission.

Mr. Dubow moved that the SEC be asked to defer consideration of PIABA's 19c Petition without prejudice until after the SICA subcommittee on options to arbitration completed its study. (there is not record of a second to the motion, if any).

Mr. Stipanowich suggested that the motion would better come from SICA as a whole, rather than from the SIA. The Conference indicated general agreement with that statement. By general agreement, **SICA as a whole moved to request PIABA to withdraw its 19(c) petition without prejudice pending completion of the subcommittee's study.**

It was the understanding of the Conference that PIABA would be asked to provide information to assist the subcommittee in the study.

6. Translating the Uniform Code of Arbitration into Plain English.

Professor Katsoris discussed the Fordham project, using the services of two third-year law students on the Fordham Law Review. He anticipated that the rewrite project would be completed by the end of October. He would submit the draft to SICA well in advance of the February meeting.

7. NASD's Proposal to Extend the Time to Answer (UCA Section 13).

The meeting then considered the NASD's proposal to amend UCA Section 13c regarding the time for Respondents to file answers. NASD proposes that the time period be changed from the current 20

business days (with a two-week extension generally granted), to 45 calendar days with no further extensions, except in dire circumstances. Ms. Masucci stated that the change came from the NASDR arbitration counsel who had been barraged by requests for additional time to answer in the majority of cases each year.

Mr. Buck noted that the Federal Rule is only 20 days, and that most states provide 30 days in which to answer. Mr. Dubow stated that he saw no reason to amend the rule. Respondents will only ask for more time, Mr. Buck stated that if the rule is to be changed, SICA would adopt the federal rule. Mr. Beckely stated that under state and federal practice, defendants typically ask for additional time and that the request is usually part of a "feeling-out" process which promotes settlement.

Due to the general opposition to the proposal, the NASD withdrew its proposal to amend UCA Section 13(c), indicating that the NASD would pursue it as a pilot program.

8. New Business

Ms. Masucci stated that the NASD's "Mediation Week" was very successful. An NASDR press release was distributed to the Conference on the issue. Ms. Masucci reported that 12 cases were successfully mediated telephonically and the NASD would attempt to extend this approach.

Ms. Masucci also distributed a letter from Frank Zarb delineating the difference between mandatory arbitration for customers and the NASD's position on employment arbitration.

Ms. Fienberg discussed the changes in the CRD system and additions to the NASD web site.

Mr. Stipanowich noted the National Conference on Uniform State Laws will be meeting in Houston at the end of October to draft additional portions of the revised Uniform Arbitration Act. He offered to make available NCUSA materials.

The next meeting of SICA will be held on February 6, 1998 at the Pacific Exchange in San Francisco, CA.

The Spring meeting of SICA was set for May 1, 1998 in New York at the NASD's new offices.

There being no other new business or matters for discussion, the Meeting was adjourned.

Minutes Approved: ________________
(Date)

Exhibits to Minutes: 1 (List Selection Rule – draft dated 9/18/97)

hoped-for result will be a set of proposals to SICA, which we hope will in turn become one or more proposals to the SEC.

In light of this action, we respectfully request that the SEC postpone consideration of the Petition submitted by PIABA regarding a 19(c) proceeding to amend the NASD arbitration rules. While we concur that alternatives should be examined, we would like to explore the possibilities fully before more rule changes are made.

Thank you again for your continuing assistance. Feel free to contact me at any time regarding the status of the Committee's work.

Sincerely,

Thomas J. Stipanowich
Chair, SICA Committee on Creative Options
on behalf of:
Jim Beckley
Robert Clemente
Phil Cottone
Paul Dubow
Linda Fienberg
Beth Fruechtenicht
Gus Katsoris
Deborah Masucci
Nancy Nielsen
Fredda Plesser

TJS:bd