Approved June 8, 2004

Minutes of the March 22, 2004 Meeting of the Securities Industry Conference on Arbitration Scottsdale, Arizona

Members Present

Amal Aly, SIA
David Carey, NYSE
Ted Eppenstein, Public Member
Linda Fienberg, NASD
Jim Flynn, CBOE
George Friedman, NASD
Constantine Katsoris, Public Member and Chair
Steve Sneeringer, SIA
Tom Stipanowich, Public Member

By Phone:
Dan Beyda, NYSE
Peter DeMoon, III

Invitees Present:

India Johnson, AAA
Robert Love, SEC
Helene McGee, SEC (phone)

Guests: SIA Guests: Donald Cohen (GCO Services, LLC), Thomas Hommell (Lehman), Peter Byer (Quick & Reilly), Ed Turan (CitiGroup), Andrew Melnick (UBS Financial), George Sullivan (MorganStanley), Daniel Greenstone (CIBC), Deborah Heilizer (DB Alex Brown), Andrew Weinberg (CSFB), Linda Drucker (Schwab), and Kenneth Meister (Prudential Equity Group), Robert Clemente.

The Securities Industry Conference on Arbitration ("Conference" or "SICA") convened on March 22, 2004 at 12:32 p.m., Constantine Katsoris, Chair, presiding.

Meeting Minutes [Tab 1]

There were corrections to October 22, 2003 minutes. Ted Eppenstein proposed changes to the minutes. Ted will draft the changes, clarifying which statements are his. The revised minutes will be distributed to other SICA members to make further changes prior to the next meeting. The Conference did not vote on the October 22, 2003 minutes.

Amal Aly suggested corrections to the minutes from January 16, 2004. The Conference approved the January 16, 2004 minutes, as amended.

We also discussed whether we need a rule to provide that minutes are circulated in advance of meetings, with a window for comments closing seven days before the meeting. George Friedman suggested we also consider the scope of minutes, i.e., whether they are to be narrative or summaries of outcomes. He will prepare an action item on both topics for the next meeting.

Conference Meeting with SIA

The Conference met with the SIA's arbitration committee and discussed the following topics:

Service of Active Litigators as Arbitrators

Amal Aly indicated that the SIA hoped that PIABA lawyers would be eliminated from the industry arbitration pool. David Carey said most lawyers representing investors are classified as public arbitrators. Amal said the SIA was interested in discussing Ted Eppenstein's proposal to exclude all practicing litigators from the pool.

Linda Fienberg indicated that the NASD filed a rule proposal to address arbitrator classification following the Perino Report. George Friedman said that of NASD's 7,000 arbitrators, about 3,100 (about 44%) are attorneys, including in-house counsel. Of those, most are public (2,351), the rest (700+) are industry classified.

Professor Katsoris said he had opposed reducing the limit on law firm income derived from industry representation to 10% from 20% under the NASD's proposal to clarify the definition of public arbitrators. He indicated that it might be appropriate to eliminate the arbitrator classifications altogether. He said he has had bad experiences with inexperienced arbitrators.

Ted Eppenstein re-stated his proposal, which was to eliminate the attorneys practicing in the investor-broker-dealer field from both the public and industry pools. Ted asked about how many NASD arbitrators would be affected. Linda Fienberg asked why in-house attorneys who are not litigators would be treated any differently.

Linda Drucker asked whether the reform should focus on administrative appointments. Linda Fienberg said that the new NASD rule would result in fewer administrative appointments, and fewer strikes. Ted said this might reinforce the need for the proposal. Ken Meister said that rules that reduce the arbitrator pool would increase the length of arbitrations.

Prof. Katsoris said that he was concerned about removing as much as one third of the roster and replacing those arbitrators. He said that if arbitrators are no more experienced

than jurors, chaos might follow. He encouraged the SIA to discuss the issue and return to SICA with further thoughts.

Expungement and Responsible Pleading Practices

Amal Aly discussed the NASD rule adopted in December, which she found confusing because the SEC was soliciting comments on a second piece of the rule. Linda Feinberg indicated that the rule applied to cases filed on or after April 12, 2004.

Amal said that since arbitrators will be making an affirmative decision on expungement, further court action was unnecessary. She expressed concern that plaintiffs take a "shotgun" approach in naming defendants, including persons who have had no contact with the plaintiffs. She raised the possibility of requiring parties or their counsel to certify pleadings. Amal also suggested the need for educational efforts so investors understand the consequences of naming registered persons as defendants. She also raised the possibility of guiding arbitrators as to sanctions for frivolous claims.

Ted Eppenstein said it is often difficult for investors and their attorneys to determine who is involved in the circumstances surrounding a claim. He said that he has faced counterclaims or affirmative defenses that are frivolous and are pleaded for harassment purposes to encourage settlement.

Result: George Friedman suggested SIA prepare a written proposal and Amal said that the SIA would present a proposal for the June meeting.

Conflict of Interest Disclosures

Linda Fienberg indicated that the NASD has new training modules for arbitrators on disclosure obligations. Ms. Heilizer said she understood that if an arbitrator is disqualified late in the case, list selection is not possible. She said that late disclosures are problematic.

Ms. Fienberg said that the NASD has an aggressive program to remove arbitrators for inappropriate conduct, based on verifiable comments from users, including serious non-disclosures. She said that she signs about one removal letter a week. She urged people to raise specific issues.

Steve Sneeringer said his firm is running across serious situations, including knowing and willful nondisclosure. He provided examples.

Ted Eppenstein urged attendees to write questions to potential arbitrators to ferret out conflicts. He said that arbitrators often recuse themselves when conflicts surface.

India Johnson suggested that in some cases, it might be valuable to have a third party arrangement to handle ethical issues.

Result: It was agreed that Amal Aly and Steve Sneeringer would develop a proposal for the June SICA meeting.

SICA Position Paper on Multi-Jurisdictional Practice

Amal mentioned the MJP proposal before the Florida Supreme Court. SIA is interested in having SICA make a brief statement that could be cited. George Friedman said that the comment period passed.

The meeting with SIA ended at 2:07 local time. The Conference reconvened without the SIA Committee and Robert Clemente.

Third Party Subpoenas [Tab 2]

George Friedman reported the recommendation of the subcommittee. A separate recommendation would permit arbitrators and a court of competent jurisdiction to quash or limit the scope of the subpoena. George said that discussions indicated that the latter language should be finalized to clarify that arbitrators would have this authority. If no panel is in place, however, a court of competent jurisdiction would have the authority to quash or limit the subpoena.

A proposal was made to alter the language of the committee as follows:

> "The arbitrators shall have the power to quash or limit the scope of any subpoena. However, if no panel is in place, then a court of competent jurisdiction shall have the power to quash or limit the scope of any subpoena."

Dan Beyda asked that a vote await the final language. The Conference approved a motion to that effect. George Friedman said he would circulate the language for an email vote within four weeks.

Ted Eppenstein noted that the SIA proposal was not in the notebook. He encouraged the inclusion of that information to reflect the background of the discussion.

Arbitrator Classification – Removing Litigating Attorneys from the Arbitrator Pool [Tab 3]

Ted asked whether it would be possible to bar litigating attorneys from administrative appointment. Linda Fienberg indicated that, whenever the parties do not accept the administrative appointment, a reason has to be inserted in the NASD's database. Changes would require a rule filing with the SEC.

An alternative, according to David Carey, would be to shift the burden to the parties to challenge for cause a litigating attorney who is administratively appointed.

Steve Sneeringer suggested that it might be appropriate to do a survey to determine the impact of a rule eliminating litigators as SRO arbitrators. With respect to the Carey suggestion, he also questioned how many arbitrators would be subject to challenges for cause.

George Friedman said the SROs could provide information on the demographics of the roster for the next meeting. Linda Fienberg questioned what limits would apply on representation, if litigators were excluded from the pool. Ted Eppenstein said he would compare draft rules with the SIA on the subject.

Result: The SROs will provide demographic information on their rosters for discussion at the June meeting.

NASD Update on Expediting Cases for Elderly and Infirm Parties [Tab 4]

George Friedman reported on a pilot active since June 2003 in Florida in which staff and arbitrators are expediting cases (within the limits of the rules) for elderly and infirm parties. He said that there was an article in *The Neutral Corner* on the pilot. The NAMC has thus far resisted changes to the Code of Arbitration, but the pilot project will be taken nationally, "fairly soon." All NASD regional offices will undertake the pilot for a year. There will be statistical data on these cases available for the next SICA meeting.

There was also a SICA subcommittee meeting on the subject. Ted Eppenstein applauded the concept of a nationwide pilot project. Ted suggested that we should also change the Uniform Code. He said that 48 of 50 NASD cases were expedited in the NASD's Florida pilot alone. The pilot features shortening the certain time frames for these cases, such as the time to get to a pre-hearing conference or for discovery. He mentioned the NFA as a model for specific time frames. The item will be on the agenda for the June meeting.

NASD Update: Firms Failure to Sign Uniform Submission Agreement [Tab 5]

Linda indicated that NASD perceived a problem with firms not signing the Uniform Submission Agreement. The NAMC was proposing a series of steps addressing the problem.

Research on Fairness of SRO Arbitrations [Tab 6]

David Carey summarized the report of the subcommittee. A subcommittee was appointed to help evaluate bidders: George Friedman, David Carey and Professor Katsoris will be on the subcommittee. Steve Sneeringer said that SIA representatives should not be on the committee. Tom Stipanowich said that CPR Institute would not be involved as a bidder, so he was added to the subcommittee.

Arbitrator Compensation for "Last Minute": Postponements/Settlements [Tab 7]

Linda Fienberg indicated that the NASD rule proposal on this subject is out for public comment. The rule requires that each time a case settles within 3 days of a hearing date, each arbitrator will receive $100.

Ethics Code for Arbitrators [Tab 8]

David Carey summarized the changes to the America Bar Association *Code of Ethics for Arbitrators in Commercial Disputes.* No changes to the *Arbitrator's Manual* appear to be required.

Unauthorized Practice of Law and Arbitration [Tab 9]

No action taken at this meeting. NASD reported that the NAMC is taking another look at this issue.

Result: Tabled until June 8th meeting. NASD will provide an update at the meeting.

Review of Arbitrator's Manual Language on Confidentiality [Tab 10]

The conference reviewed changes to the SICA *Arbitrator's Manual (*on the subject of confidentiality provisions), proposed by PIABA. The SICA members suggested further changes. George Friedman was tasked with compiling all the proposed changes into a single document, and circulating it for consideration at our June 2004 meeting. Here are the changes:

- Language already in the SICA Arbitrators Manual is in plain text. Additions proposed by PIABA are underlined.
- Deletions to PIABA's proposed changes are denoted by ~~strikethrough~~.
- Additions to PIABA's proposed changes are denoted by **bold/underlined** text.

Confidentiality of Arbitration Proceedings

Arbitrators must consider all aspects of an arbitration to be confidential. Records of the arbitration hearing should not be provided by the arbitrators to nonparties. Awards in customer cases are available to the public under the rules of each SRO. An arbitrator should not distribute awards. This confidentiality provision applies only to the arbitrators; it does not apply to the parties. ~~It is important for the arbitrators and the parties to understand that, while arbitration is meant to be a "private" proceeding, it is not intended to be a confidential or secret proceeding insofar as the parties are concerned~~. Nothing in this provision should be interpreted as either imposing a blanket of confidentiality on the parties to the

arbitration or preventing the arbitrators from entering a confidentiality order as to certain documents and information exchanged between the parties in the course of the arbitration and in accordance with the provisions set forth in the "Prehearing Conference" section of this manual.

Prehearing Conference

[**NOTE:** The language appearing below appears after subsection "B" of the "Prehearing Conference" section ("Employment Cases").

If a party objects to document production on grounds of privacy or confidentiality, the arbitrator(s) may suggest a stipulation between the parties that the document(s) in question will not be disclosed and/or not used in any manner outside of the arbitration of the particular case or issue a confidentiality order.

Ideally, the parties will agree on the form and content of any confidentiality order. In ~~many~~ **some** instances, however, the parties will not agree what is or is not confidential. When deliberating contested requests for confidentiality orders, the arbitrator(s) should bear in mind that the party asserting/requesting confidentiality has the burden of establishing that the documents or information in question are ~~legally~~ entitled to confidential treatment. Arbitrators should not ~~routinely~~ **automatically** designate all discovery as confidential. When the party requesting confidentiality has met the burden of establishing the need for confidentiality of certain documents or information, the arbitrator(s) should strive to accomplish the confidentiality sought in the least restrictive manner possible.

California Arbitration Ethics Standards Update [Tab 11]

Linda Fienberg updated the conference on the status of litigation in California in connection with disclosure standards for arbitrators. Professor Katsoris updated the conference on the growth of law school clinics assisting small investors.

NASD and NYSE Rule Filings of Interest [Tab 12]

No discussion.

Cases and Articles of Interest [Tab 13]

No discussion.

Future Meetings [Tab 14]

The upcoming SICA meetings are as follows:

June 8th at NASD in New York City
October 20th (with PIABA in Bonita Springs, Florida).

Dan Beyda disconnected from the conference call at 2:35 p.m.
Helen McGee disconnected from the conference call at 3:00 p.m.
Tom Stipanowich retired at 3:32 p.m.
Jim Flynn retired at 3:36 p.m.

The Conference adjourned at 3:55 p.m.

Respectfully submitted by David Carey