Approved October 20, 2004

Minutes of the June 8, 2004 Meeting of the
Securities Industry Conference on Arbitration
NASD Dispute Resolution, New York, New York

Members Present
Daniel Beyda, NYSE
Theodore Eppenstein, Public Member
Linda Fienberg, NASD
George Friedman, NASD
Constantine Katsoris, Public Member and Chair
Karen Kupersmith, NYSE
Thomas Stipanowich, Public Member

Members Participating by Phone
Jim Flynn, CBOE
Jim Yong, National Stock Exchange

Invitees Participating in Person or by Phone
Peter Cella, Law Offices of Peter Cella
Paula Jenson, SEC
India Johnson, AAA
Robert Love, SEC
Helene McGee, SEC

Guests:
Richard Berry, NASD
Barbara Brady, NASD
Kenneth Meister, Prudential Equity Group
Rose Seeman, NASD (Acting Recording Secretary)

The Securities Industry Conference on Arbitration ("Conference" or "SICA") convened on June 8, 2004 at 8:30 a.m., Professor Constantine Katsoris, Chair, presiding.

Scope and Review of Minutes [Tab 1]

The Conference adopted unanimously Mr. Friedman's proposal that the minutes be circulated by the Secretary at least one month in advance of meetings, with comments to be provided by the members no later than seven days before the meeting. The Conference also adopted unanimously Mr. Friedman's proposal that the minutes be prepared in a summary, rather than a narrative, fashion.

Approval of Minutes of October 22, 2003 Meeting [Tab 2]

Corrections submitted by Mr. Eppenstein were proposed and unanimously approved. Mr. Stipanowich to prepare final minutes. Mr. Friedman said that, now that the minutes for all 2003 meetings were approved, he would produce and distribute the updated "SICA Minutes" CD.

Approval of Minutes of March 22, 2004 Meeting [Tab 3]

Correction of one stylistic edit was proposed and unanimously approved. Mr. Friedman to finalize.

Outcome of Email Ballot Vote on Third Party Subpoenas [Tab 4]

Mr. Friedman reported the results of the email ballot on this topic: 5 in favor, 0 opposed, 1 abstention; motion carried. He updated the Uniform Code of Arbitration, with the changes as follows:

Section 23. Pre-Hearing Proceedings

(c) **Subpoenas.** Arbitrators and any counsel of record may issue subpoenas if allowed by law. The party who requests or issues a subpoena must send a copy of the request or subpoena to all parties in a manner that is reasonably expected to cause the request or subpoena to be delivered to all parties on the same day. The parties will produce witnesses and present proof at the hearing whenever possible without using subpoenas. The arbitrator(s) shall have the power to quash or limit the scope of any subpoena. However, if no arbitration panel is in place, a court of competent jurisdiction shall have the power to quash or limit the scope of any subpoena.

Some Conference members expressed concern that although the intent of this change was to require simultaneous notice of subpoena, the use of the language "parties" might allow a party to send the subpoena to the third-party being subpoenaed (i.e. an entity not party to the case) at an earlier date, and still be within the technical meaning of the rule. Mr. Love urged SROs, should they decide to adopt this rule, to take this into consideration when drafting the language for their rule filings.

Chairman Katsoris stated that there continue to be concerns about the rule, citing several letters and emails he had received on the subject from PIABA. Their key concern is the period of time before the appointment of arbitrators.

The Chairman appointed a subgroup consisting of Mr. Eppenstein, Mr. Friedman (Chair), Ms. Kupersmith, Ms. Aly and Mr. Meister to review this issue further and report back at the next meeting.

Language on Confidentiality in SICA Arbitrators' Guide [Tab 5]

Mr. Friedman reported on the proposed changes to the SICA Arbitrators' Guide on the subject of confidentiality. The Conference considered changes proposed by PIABA and those suggested by the subcommittee consisting of Mr. Eppenstein, Mr. Friedman, Ms. Kupersmith and Mr. Sneeringer after they reviewed the article published in the NASD's *Neutral Corner* in late April, entitled "Arbitrators and Confidentiality Orders."

After some discussion about the range of discretion an arbitrator should have in considering First Amendment issues, and some minor modifications to the language, the following changes[1] were approved by a vote of 6 Yes, 0 No, and 1 Abstention:

[1] This draft shows changes to the language proposed by PIABA.
- 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/underline**
- Materials in underlined/highlight were developed at the May 25, 2004 call of the Task Force

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. Absent an agreement or order to the contrary, parties are generally free to disclose details of their own proceeding as they see fit.

Prehearing Conference

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

Confidentiality Issues

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 on 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.

In considering questions about confidentiality, the arbitrator may consider such factors as:

1. Is the information so personal that disclosure would constitute an unwarranted invasion of personal privacy (e.g., an individual's social security number, tax return, or medical information)?
2. Is there a real threat of injury attendant to disclosure of the information?
3. Is the information proprietary containing confidential business plans and procedures or a trade secret?
4. Are there essential competing interests at stake that require confidential treatment of certain portions of the proceedings?
5. Is the information already public (e.g., has it previously been published or produced without confidentiality) or is it already in the public domain?
6. Would a confidentiality order be against the public interest in disclosure?
7. Are there First Amendment or other issues which might be raised by restrictions on the ability of parties to comment freely upon matters in which they are involved?
8. Would a confidentiality order impair the ability of counsel to represent other clients?

Replacement of Public Member Professor Thomas Stipanowich [Tab 6]

Professor Stipanowich's term expires on December 31, 2004. The public members agreed unanimously on Pat Sadler as his replacement. Chairman Katsoris will inform Mr. Sadler, and invite him to SICA's October meeting as a non-voting guest.

SIA Proposal on Expungement and Responsible Pleading Practices [Tab 7]

Ms. Aly reported orally on a SIA proposal, as follows:

> Educational materials on expungements and responsible pleadings should be included with all Statements of Claim.
> A Claimant's attorney should be required to provide an attestation that he or she had made reasonable efforts to properly name respondents.

The Conference debated the merits of making any changes that could be viewed as undermining the new expungement rule. Ms. Fienberg noted that this has been a hotly contested issue for many years, and had recently come to a resolution with the approval of the new expungement rule. Chairman Katsoris requested that his opposition to the new expungement rule go on record in the minutes, on the ground that it strips arbitrators who heard and decided the entire case on the merits of the authority to order expungement with some finality. Ms. Aly expressed her deep concern that in light of the SEC preparing to open CRD records to the public, the issue of responsible pleadings was especially germane at this time.

Ms. Aly will submit SIA's written proposal by June 9, 2004. The public and industry members of SICA will review the SIA proposal and report back at the next meeting. The SRO representatives agreed to participate in this effort.

Barring as SRO Arbitrators Attorneys who Represent Parities in Securities Litigation [Tab 8]

Mr. Eppenstein presented his proposal that SICA consider adopting a change to the Uniform Code of Arbitration that would effectively bar as arbitrators attorneys who represent parties in securities litigation.

Ms. Fienberg expressed her opposition to the proposal. She pointed to data that demonstrate this proposal would disqualify many arbitrators and negatively impact NASD's arbitration program at a time when caseloads are increasing and NASD is working on the expansion of hearing locations. She said that the new Arbitrator Classification Rule, which will take effect in mid-July, would address many of the concerns Mr. Eppenstein raised.

Mr. Eppenstein said that he would wait to see the impact of the Classification Rule before he would consider raising this issue again with the Conference.

NASD Update on Out-of-State Attorneys in SRO Arbitration [Tab 9]

Ms. Fienberg reported to the Conference that no final decisions had been made by the state of Florida since the *Rapaport* decision. She said that the NASD's National Arbitration and Mediation Committee is currently exploring this issue. She will report back with their findings at the October meeting.

SRO Arbitrator Recruitment Efforts [Tab 10]

Ms. Brady discussed various arbitrator recruitment initiatives being implemented by NASD to expand its roster of neutrals. Ms. Kupersmith reported on NYSE's arbitrator recruitment efforts.

"Arbitrator by Agreement" Concept [Tab 11]

Mr. Eppenstein discussed his support for the concept of parties conferring in advance to select arbitrators for their case. No action was taken.

Statistical Report on NASD Pilot Expedited Procedures for Elderly/Infirm Parties [Tab 12]

Mr. Friedman reported on NASD's pilot, which was expanded from the Southeast region to a national pilot on June 7, 2004. He noted that the three cases that were completed in the Southeast region took an average of 12 months to administer, in comparison to the average of 17.1 months for non-expedited proceedings. He cautioned that no firm conclusion can be drawn from this limited data and said that he would provide a further update at the October SICA meeting.

Independent Research on Fairness of SRO Arbitrations [Tab 13]

Mr. Friedman updated the Conference on the work of the subcommittee, consisting of Mr. Friedman, Chairman Katsoris, Ms. Kupersmith, and Kenneth Andrichik. They are currently working on picking a vendor to administer the survey on the perceptions of fairness between SRO arbitration and litigation. They hope to have a vendor selected by September 1, 2004. The subcommittee asked for delegated authority to select a vendor, which was approved unanimously. Mr. Friedman will report back at the October SICA meeting.

California Arbitration Ethics Standards Update [Tab 14]

Ms. Fienberg updated the Conference on the status of litigation in California in connection with disclosure standards for arbitrators.

NASD and NYSE Rule Filings Update [Tab 15]

Ms. Fienberg gave the conference an update on recent NASD rule filings. Ms. Kupersmith gave the conference an update on recent NYSE rule filings.

Cases and Articles of Interest [Tab 16]

No discussion.

New Business [Tab 17]

Mr. Love announced that this would be his last SICA meeting because he is moving to a new division of the SEC. Chairman Katsoris thanked him on behalf of SICA for his many years of dedicated service.

Future Meetings [Tab 18]

Ms. Fienberg proposed that starting with the October meeting, SICA not meet at the annual meetings of SIA or PIABA. In her opinion, the resort locations at which these meetings typically take place are both expensive and inconvenient to travel to for most Conference members and invitees. She noted that the SIA Arbitration Committee meets in New York and can easily coordinate with a planned SICA meeting. She also believed that PIABA representatives would be agreeable to the change in venue. Mr. Beyda

stated the NYSE held the same views. Chairman Katsoris objected to changing the venue mid-year and asked that his objection be noted for the record.

Ms. Fienberg moved that SICA adopt a practice of not having meetings in conjunction with the SIA and PIABA annual meetings, starting with the October 2004 meeting, having them instead in major cities. Mr. Beyda seconded the motion, which carried 4 Yes, 3 No, 1 Abstention. The Conference agreed to meet on either October 5 or 6, 2004 in New York City at the offices of the NYSE. Ms. Kupersmith will finalize the date and coordinate the October meeting.

Mr. Friedman suggested that the Conference also establish the date and place of the January 2005 meeting. After a brief discussion, the Conference elected to have the January 2005 meeting in New York City, at the offices of NASD Dispute Resolution. Mr. Friedman will circulate proposed dates.

There being no other business, the meeting adjourned at 1:42 p.m.

Respectfully submitted by:
Rose E. Seeman

Memorandum

To: SICA

From: George Friedman

Date: May 20, 2004

INFORMATION ITEM

Issue: Independent Research on Fairness of SRO Arbitration

Background

In July 2002, the SEC retained Professor Michael Perino to assess the adequacy of NASD and NYSE arbitrator disclosure requirements, and to evaluate the impact of the recently adopted California Ethics Standards on the SRO's current conflict disclosure rules.

The Perino Report, released on November 4, 2002, recommended several amendments to SRO disclosure and related rules that, according to the Report, might "provide additional assurance to investors that arbitrations are in fact neutral and fair."

SICA and the SROs have already acted on the Perino Report's recommendations to improve the rules as to arbitrator classification and disclosure requirements. However, the Report also recommended that the SROs sponsor a survey to gauge user perceptions of the arbitration process. Specifically, the Report stated:

> **Sponsor Independent Research to Evaluate Fairness of SRO Arbitrations.** Given the unquestioned significance of securities arbitrations, it is crucial that the SROs resolve any lingering concerns about pro-industry bias. To date, available empirical evidence, particularly with respect to investor perceptions of the arbitration process, is fairly limited and only suggests that there are no substantial systemic problems in SRO arbitrations. As a result, this Report recommends that the SROs sponsor additional independent studies to further evaluate the impartiality of the SRO arbitration process.

At the April 9, 2003 SICA meeting, the Conference coalesced around some key issues:

1) the survey should be conducted under SICA's auspices;
2) the survey should be paid for by NASD and NYSE; and
3) to ensure that the results are perceived to be truly independent, editorial control over the final questions should repose in SICA.

At the January 16, 2004 SICA meeting, the chair charged Messrs. Carey, Friedman, and Stipanowich (Task Group) with discussing the issue of a "fairness survey" and making recommendations to SICA on how to proceed with the survey.

At the March 22, 2004 meeting, SICA decided to move ahead with its original plan to provide editorial control over an "SRO Fairness Survey" to be paid for by the SROs. In addition, SICA decided that the survey should be nationwide in scope, and should focus on SRO arbitration. Finally, it was determined that the survey would have two major parts:

1) perceptions of parties and attorneys who have used the SRO arbitration process; and
2) a quantitative analysis of outcomes in arbitration as compared to litigation.

In moving forward, SICA decided that the Task Group should be expanded and directed that the Task Group work with the SROs to evaluate the three bids received by NASD and to select a vendor to conduct the survey.

Results

The Task Group (now consisting of George Friedman, Tom Stipanowich, Constantine Katsoris, Karen Kupersmith, and Kenneth Andrichik) met on May 18, 2004. We reviewed the proposals received from the three vendors in light of the refined focus for the survey. We discussed the difficulty of collecting quantitative analysis of outcomes in litigation, given the likely paucity of information on court outcomes in customer-broker disputes. However, Ms. Kupersmith suggested that it might be more appropriate to attempt a comparison of **perceptions** of fairness between SRO arbitration and litigation.

The Task Group decided to prepare a revised "bid notice " to allow all vendors a chance to revise their bid and methodology to address the revised concept of comparison to litigation. This should help to standardize the bids and allow a comparison of the bids on an equal footing. The Task Group expects to notify the vendors of the new proposed survey parameters on or before June 15, 2004. The revised bids will be due within 30 days of the new "bid notice." The Task Group will review the proposals and will represent to the vendors that SICA will select a vendor by September 1, 2004. **Since SICA will not meet until October**

20, 2004, we suggest that authority to select a vendor be delegated to the Task Group.

Once the vendor has been selected, that vendor will be expected to produce a proposed survey instrument. SICA, guided by the Task Group, will exercise editorial control over the final survey questions to ensure that the results are perceived to be truly independent. The Task Group will continue to report progress on this initiative.