APPROVED JANUARY 12, 2005

Minutes of the October 20, 2004 Meeting of the
Securities Industry Conference on Arbitration
Bonita Springs, Florida (PIABA Annual Meeting)

Members Present
Theodore Eppenstein, Public Member
Linda Fienberg, NASD
Jim Flynn, CBOE
George Friedman, NASD
Constantine Katsoris, Public Member and Chair
Karen Kupersmith, NYSE
Steven Sneeringer, Industry Member

Members Participating by Phone
Daniel Beyda, NYSE
Matthew Mennes, Pacific Exchange

Invitees Participating in Person or by Phone
Heather Cook, NFA
John Hanley, NASAA
Catherine McGuire, SEC
Paula Jenson, SEC
Gena Lai, SEC
Helene McGee, SEC

Guests:

Richard Berry, NASD
The Securities Industry Conference on Arbitration ("Conference" or "SICA") convened on October 20, 2004 at noon, Professor Constantine Katsoris, Chair, presiding.

Meeting with PIABA Delegation

The first part of the meeting consisted of a joint working lunch with representatives from the Public Investors Arbitration Bar Association ("PIABA"). Joining SICA were: Philip Aidikoff, Charles Austin (outgoing president), Scott Bernstein, Joseph Borg (NASAA), Pat Sadler (incoming public SICA member), Larry Schultz, Rosemary Shockman (incoming president), and Brian Smiley. The topics of discussion, presented by Mr. Austin, are described below.

(1) SICA's Role: PIABA asked if SICA may be becoming less relevant, and that NASD's National Arbitration and Mediation Committee may be "supplanting" SICA. Ms. McGuire stated that SICA is a very powerful, useful organization, but that SROs are given great deference under the Exchange Act of 1934. Thus, SEC does not require SRO to adopt SICA amendments to the Uniform Code, but does require them in their rule filings to discuss SICA action (or inaction). Ms. McGuire stated that she views SICA as a sounding board, and noted that in some instances, SROs cannot wait for SICA to act. Mr. Friedman and Ms. Fienberg provided several examples of SICA rule changes that NASD had adopted. Ms. Fienberg added that the SROs pay much of the cost of public

member participation in SICA. Mr. Sadler said he had compared the Uniform Code to the major SRO arbitration rules, and found that several "investor friendly" provisions in the SICA Uniform Code had not been adopted by SROs. Result: Mr. Sadler promised to share his research with SICA.

(2) Motions Practice in Arbitration: Mr. Schultz said that motions to dismiss continue to be a problem in arbitration. Ms. Fienberg stated that NASD's Code of Arbitration Procedure reform package, now pending at the SEC, addressed motions practice and dispositive motions. Mr. Schultz stated that, in his view, the NASD and NYSE Codes of Arbitration do not presently allow motions practice. Several Conference members responded that these Codes do not prohibit dispositive motions, either. Mr. Schultz expressed his concern that NASD's training materials encourage arbitrators to grant dispositive motions. Result: Mr. Friedman and Ms. Fienberg disagreed with Mr. Schultz's assertion, but agreed to review NASD's training materials on this topic.

(3) NASD Administrative Staff Manual: NASD was asked if it would make public its administrative manual. Result: Ms. Fienberg responded that this is proprietary information, much of which consists mostly of procedural technicalities, and that NASD would not make this document public.

(4) Motions to Dismiss: Mr. Eppenstein expressed concern about an NASD administrative practice whereby claimants are required to respond to motions to dismiss contained in an Answer. He stated that this was an unreasonably short period of time, especially since the panel will not be appointed for several months, and it is up to the panel to decide if they will entertain such a motion and, if so, to set a briefing schedule. Result: Ms. Fienberg agreed to look into this matter.

(5) Third Party Subpoena Practice: Mr. Friedman noted that the SICA task force on subpoenas had reached a consensus, and that SICA would be reviewing a rule change proposal later in the day. Mr. Austin urged the SROs to adopt the rule if SICA approves it. Result: SICA will take up this topic later in the day.

(6) NASD Interpretation of Rule 10308(c)(4)(B): Mr. Berry stated that NASD disagreed with PIABA's interpretation of this rule (i.e., that NASD believed in-house counsel at member firms were appointable under this rule). Result: NASD agreed to clear up any ambiguity in the rule, when it files technical amendments to the Code of Arbitration Procedure reform package now pending at the SEC.

(7) Three-Arbitrator Threshold: PIABA reiterated its support for raising the three-arbitrator threshold from $50,000 to $100,000. Professor Katsoris noted that SICA had already amended the Uniform Code to increase the threshold. Mr. Friedman noted that the Code of Arbitration Procedure reform package increases the threshold to $100,000, but allows three arbitrators for claims between $50,000 and $100,000, at the option of a party. Ms. McGuire stated that the SEC staff supported increasing the threshold. Result: No further action was taken.

(8) Neutral List Selection System: PIABA asked that NASD explain its proposal to move from a rotational to random list selection system. Mr. Friedman provided a brief description, noting that the system will work much like a "lotto" selection system. Ms. Fienberg stated that after a year of use, NASD would commission an independent study of the results, to verify that the system was working as promised. Mr. Bernstein volunteered to help NASD locate an acceptable commercially available randomizing system. Result: No further action was taken.

The joint SICA-PIABA meeting adjourned at 2:07 p.m.

Approval of Minutes of June 8, 2004 Meeting [Tab 1]

The minutes were approved unanimously as submitted.

Third Party Subpoenas [Tab 2]

Mr. Friedman submitted the task force's recommended rule, appearing in Tab 2. A discussion ensued about whether to delete that part of the proposed amendment that would exempt from the 10-day notice requirement documents held by other brokerage firms. Ms. Fienberg proposed that this part of the rule be dropped. Ms. McGuire stated that she supported this proposed change.

Result: Mr. Friedman accepted the proposed amendment, and the motion carried, 6 in favor, 1 opposed, 0 abstentions. Mr. Sneeringer asked that the record reflect he opposed the rule change. Mr. Friedman will update the Uniform Code of Arbitration, with the changes as follows:

Underlining is new text; ~~strikethrough~~ is deleted text

Section 23. Pre-Hearing Proceedings

. . .

(c) **Subpoenas.**

(1) Arbitrators and any counsel of record may issue subpoenas ~~if allowed~~ as provided by law. The party who requests or issues a subpoena must send a copy of the request or subpoena to all parties and the entity receiving the subpoena in a manner that is reasonably expected to cause the request or subpoena to be delivered to all parties and the entity receiving the subpoena 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.~~

(2) No subpoenas seeking discovery shall be issued to or served upon non-parties to an arbitration unless, at least 10 days prior to the issuance or service of the subpoena, the party seeking to issue or serve the subpoena sends notice of intention to serve the subpoena, together with a copy of the subpoena, to all parties to the arbitration.

(3) In the event a party receiving such a notice objects to the scope or propriety of the subpoena, that party shall, within the 10 days prior to the issuance or service of the subpoena, file with the Director, with copies to all other parties, written objections. The party seeking to issue or serve the subpoena may respond thereto. The arbitrator appointed pursuant to this Code shall rule promptly on the issuance and scope of the subpoena.

(4) In the event an objection to a subpoena is filed under paragraph (c)(3), the subpoena may only be issued or served prior to the arbitrator's ruling if the party seeking to issue or serve the subpoena advises the subpoenaed party of the existence of the objection at the time the subpoena is served, and instructs the subpoenaed party that it should preserve the subpoenaed documents, but not deliver them until a ruling is made by the arbitrator.

(5) Rule 23(c)(2) and (3) do not apply to subpoenas addressed to parties or non-parties to appear at a hearing before the arbitrators.

(6) The arbitrator(s) shall have the power to quash or limit the scope of any subpoena.

Proposed Operational Rule on Voting on New Business Items [Tab 3]
Chairman Katsoris proposed that the Conference not vote on any item not on the agenda, except in extraordinary circumstances.

Result: No formal vote was taken, but the consensus of the Conference was to follow this informal rule of operation going forward.

Location of Future SICA Meetings [Tab 4]

Chairman Katsoris asked that SICA revisit the determination made at the June meeting, that SICA not meet at the annual meetings of PIABA and the SIA Compliance and Legal Division, which are typically held at resort locations. He stated that, in his view, SICA's presence at these events outweighed the cost factors. Ms. Fienberg and Mr. Beyda noted that in addition to cost issues, the SROs were concerned about perceptions and the difficulty (logistical and expense-wise) some members and invitees, such as the SEC staff, would have attending a meeting at a resort location. Ms. Fienberg stated that SICA could have meetings with PIABA's leadership and the SIA Arbitration Committee at more appropriate locations, such as New York, Chicago, or Washington. Ms. Fienberg moved that SICA reaffirm its determination not to have future meetings at the resort locations.

Result: The motion carried, 4 in favor, 2 opposed, 1 abstention. Chairman Katsoris and Mr. Eppenstein requested that the record reflect they opposed this motion. Mr. Friedman will circulate dates for the April 2005 meeting to be held in New York City, at which SICA will meet with the SIA Arbitration Committee.

SIA Proposal on Expungement and Responsible Pleading Practices [Tab 5]

Ms. Aly was not present to report on this matter.

Result: Matter tabled until the January meeting.

Non-Summary Suspension Proceedings for Awards Issued at Other SROs [Tab 6]

Mr. Sadler was not present to report on this matter.

Result: Matter tabled until the January meeting.

Uniform Submission Agreement and Party Representatives Agreeing to be Bound by the SRO Rules [Tab 7a]

Chairman Katsoris called the participants' attention to an August 12, 2004 letter from David Robbins suggesting that the Uniform Submission Agreement be amended to require party representatives to agree to be bound by SRO Rules.

Result: After a brief discussion, it was determined that this topic should be added to the agenda of items being considered by Amal Aly's subgroup on responsible pleading.

NASD System of Arbitrator Classification [Tab 7b]

Chairman Katsoris commented that NASD's new arbitrator classification rule would likely result in the loss of some good arbitrators. Mr. Friedman stated that NASD surveyed its entire roster in advance of the July 19th implementation of the rule. The updating process is nearly complete, and as NASD had expected, less than five percent of the arbitrators on the active roster were dropped as a result of the rule. Ms. Fienberg added that NASD did not welcome losing good arbitrators, but the rule change was absolutely necessary to ensure confidence in arbitrator neutrality.

Result: No further action was taken.

"A Life Without SICA" [Tab 8a]

Inasmuch as this topic was discussed at length during the joint SICA-PIABA meeting earlier in the day, no further discussion took place.

Respondents' Motions to Dismiss at the Beginning of a Case [Tab 8b]

Inasmuch as this topic was discussed at length during the joint SICA-PIABA meeting earlier in the day, no further discussion took place.

Requiring Arbitrators to Answer Questions Seeking More Information [Tab 8c]

Mr. Eppenstein referred to his letter of October 6, 2004, contained in the meeting materials. He noted that the Uniform Code of Arbitration Rule 17(b)(5) provides:

> Any party may ask the Director for additional information about the background of a potential arbitrator.
>
> The request for additional information must be made within the twenty days the party has to return the list(s) as provided in Section 17(c). The [SRO] shall obtain the information from the arbitrator without advising the arbitrator which party requested the

> information and shall send the arbitrator's response to all parties at the same time. The Director in his/her discretion may limit the additional information requested from the arbitrator.
>
> The request for more information will toll the time for returning the list(s) to the Director. The tolling period shall commence from the date the request for additional information is received by the [SRO] to the date a response to the additional information requested is received. The Director may extend the deadline for requesting additional information and returning the list(s) if the Director finds a reasonable basis for this extension.

He added that NASD's rule on this topic says NASD "may" toll the time to return the lists, but that NASD only does this when all parties agree. Mr. Berry confirmed that this is NASD practice, but added that the parties generally agree to tolling. Mr. Eppenstein proposed that NASD amend its procedures to conform to the practice articulated in the Uniform Code, and suggested a five to fifteen day tolling period.

Result: After a brief discussion, Ms. Fienberg agreed that NASD would review its tolling procedure.

Mr. Eppenstein then raised the issue of the letter the SROs send to arbitrators forwarding questions that parties' raise under their respective rules on this topic. Mr. Friedman commented that NASD's rule is fairly clear: NASD must send the request to the arbitrators, who *may* respond. NASD does not compel arbitrators to respond, but encourages them to do so. Mr. Friedman noted that a party could strike from the list an arbitrator who fails to respond to requests for additional information. Ms. Kupersmith stated that NYSE also does not require arbitrators to answer every question, since some questions are invasive or otherwise inappropriate. Mr. Eppenstein suggested that the SROs review their form letters on this topic, to be sure they do not discourage arbitrators from providing this information.

Ms. McGuire suggested that the SROs amend their user surveys to ask parties to comment on arbitrator responsiveness to requests for additional information, and to track in their internal arbitrator records whether arbitrators refuse to provide such information.

Result: The SROs agreed to review their form letters on additional information requests.

Respondent's Corporate Representative [Tab 8d]

Mr. Eppenstein referred to his letter of October 6, 2004, contained in the meeting materials. He suggests that there is an unfair advantage in cases where a broker is named and appears separately, because both the broker and the firm's "corporate representative" can attend, but the customer cannot bring in a fact witness to sit in at the hearings or to support or assist. He proposed that the SICA *Arbitrators' Manual be* reviewed to provide clearer guidance on this subject. The *Manual* provides:

> **Attendance of Witnesses at the Hearing**
>
> Arbitrators have the authority under the Uniform Code to determine who may attend the hearing. Sometimes there is a disagreement among the parties as to whether an expert

witness should be permitted to attend. Arbitrators should consider that expert witnesses often serve an important role in assisting parties and their counsel in the presentation of their cases, and also may be asked to testify about what has been said at the hearing in addition to the facts known to them prior to the hearing. Barring countervailing reasons, expert witnesses who are assisting parties in the presentation of their cases should be permitted to attend all hearings. Generally, there is a presumption that expert witnesses, as opposed to witnesses testifying as to the facts pertinent to the case, will be permitted to attend the entire proceedings. Parties must be allowed to attend the hearing. A corporate party may designate a representative to attend the hearing.

Result: A consensus emerged that SICA should review this section of the *Manual.* Chairman Katsoris requested that a small group consisting of Mr. Eppenstein (chair), Mr. Friedman, Ms. Kupersmith, and Mr. Sneeringer, meet before the January meeting, to propose changes to the *Manual.*

NASD Update on Out of State Attorneys [Tab 9]

Ms. Fienberg advised that NASD's National Arbitration and Mediation Committee had voted to propose an amendment to the Code of Arbitration Procedure providing in essence that, if a party elects to have a paid representative, that person must be admitted to practice somewhere in the United States. She noted that this rule addresses the non-attorney representative issue head on, but does not attempt to raise a preemption issue as to state regulation of attorneys. The NASD Dispute Resolution Board will take up this matter at its November meeting.

Result: NASD will provide an update at the January SICA meeting.

Independent Research on the Fairness of SRO Arbitration [Tab 10]

Mr. Friedman reported that his subgroup, consisting of Ken Andrichik, Chairman Katsoris, Ms. Kupersmith, and Mr. Stipanowich, had conferred to review the proposals submitted by outside vendors. One of the prior applicants, the Pace Law School Securities Clinic, had originally withdrawn its proposal, but later reconsidered. Mr. Friedman stated that the group is down to two finalists, and would be conferring within a few weeks to make a selection.

Result: Mr. Friedman will provide an update at the January SICA meeting.

Statistical Report on NASD's Pilot Expedited Procedures for Elderly/Infirm Parties [Tab 11]

Mr. Berry reported on NASD's pilot, which was expanded from the Southeast region to a national pilot on June 7, 2004. Since the national launch, there were 94 recorded instances of requests for expedited administration. Seventy-three requests were granted, none were denied, and the balance was being processed. He noted that the 14 cases that were completed in the pilot took an average of 9.6 months to complete, in comparison to the average of 14.9 months for non-expedited proceedings closed during the same period. The sole case decided thus far by arbitrators took 7.5 months to process, compared with 17.6 months for cases in general closed by award during the same period. He cautioned that no firm conclusion can be drawn from this limited data and said that he would provide a further update at the January SICA meeting.

Result: NASD will provide an update at the January SICA meeting.

California Arbitration Ethics Standards Update [Tab 12]

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 13]

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 14]

No discussion.

New Business [Tab 15a]

Mr. Friedman stated that secretary Tom Stipanowich was rotating off SICA after this meeting, and that a new secretary was needed. Chairman Katsoris asked Conference members to consider volunteering to serve as secretary.

Result: This matter was tabled until the January SICA meeting.

Future Meetings [Tab 15b]

The next SICA meeting will take place on January 12, 2005 at NASD Dispute Resolution's New York City office. Mr. Friedman will circulate dates for the April 2005 meeting to be held in New York City, at which we will meet with the SIA Arbitration Committee.

There being no other business, the meeting adjourned at 4:33 p.m.

Respectfully submitted by:
George H. Friedman