

**Minutes of the January 12, 2005 Meeting of the
Securities Industry Conference on Arbitration
New York, New York**

Members Present:

Amal Aly, SIA
Theodore Eppenstein, Public Member
George Friedman, NASD
Constantine Katsoris, Public Member and Chair
Karen Kupersmith, NYSE
Pat Sadler
Jim Yong, National Stock Exchange

Members Participating by Phone:

Linda Fienberg, NASD
Jim Flynn, CBOE

Invitees Participating in Person or by Phone:

Peter Cella, Law Offices of Peter Cella
Lourdes Gonzalez, SEC
Paula Jenson, SEC
India Johnson, AAA
Helene McGee, SEC

Guests:

Ken Andrichik, NASD
Richard Berry, NASD
Barbara Brady, NASD
George Kramer, SIA
Kenneth Meister, Prudential Equity Group
Rose Seeman, NASD (Recording Secretary, pro-tem)

The Securities Industry Conference on Arbitration ("Conference" or "SICA") convened on January 12, 2005 at 8:30 a.m., Professor Constantine Katsoris, Chair, presiding.

Welcome to Pat Sadler: Election of the Secretary [Tab 1]

Chairman Katsoris welcomed SICA's new public member, Pat Sadler. Chairman Katsoris bid farewell to Tom Stipanowich and Robert Love, and asked that the record reflect SICA's profound appreciation for their hard work and accomplishments over the years. Ms. Aly announced that this would be her last meeting with SICA, as she is moving on to new assignments at SIA. She introduced her replacement on the Conference, George Kramer.

It was determined that, going forward, whoever is hosting the meeting would be responsible for the preparation and distribution of the minutes.

Approval of Minutes of October 20, 2004 Meeting [Tab 2]

Amendments submitted by Mr. Eppenstein were approved unanimously. Mr. Friedman will finalize and distribute the minutes, and will distribute an updated SICA minutes CD, containing the minutes from all meetings held in 2004.

Changes to SICA's Arbitrators' Manual on Witness Attendance [Tab 3]

This item was carried over from the October SICA meeting. The Conference considered a proposal by Mr. Eppenstein on behalf of the Subcommittee (Eppenstein, Friedman, Kramer, and Kupersmith) to amend the SICA *Arbitrators' Manual* to permit claimants to bring an additional fact witness or family member to be present at their arbitration hearing.

Several Conference members expressed their concern the Subcommittee's proposal, as currently written, is too vague, and could potentially diminish the arbitrators' authority over the hearing. Chairman Katsoris said that in any event, this part of the *Manual* should be revised to put the sections in a more logical order and thus to clarify that the arbitrators remain empowered to determine who may or may not be permitted to attend a hearing. There was a general consensus that the issue raised by Mr. Eppenstein should be reviewed by SICA.

Result: Chairman Katsoris directed Mr. Eppenstein to re-work his proposal, and review it with the Subcommittee (Eppenstein, Friedman, Kupersmith, and Kramer) and report back to SICA at its March meeting.

Schedule of Remaining 2005 Meetings [Tab 4]

The schedule of remaining meetings for 2005 is as follows:

- March 15th at the New York Stock Exchange with SIA representatives (Ms. Kupersmith to host).
- June 23rd in New York at Fordham Law School (Chairman Katsoris to host).
- October 11th in Chicago at CBOE with PIABA (Mr. Flynn to host).

SIA Proposal on Responsible Pleading Practices [Tab 5]

Ms. Aly presented the SIA's proposal regarding responsible pleadings, which would require SROs to: 1) prepare and distribute educational materials on expungements and responsible pleadings and; 2) require claimants to provide a signed attestation that he or she had made reasonable efforts to properly name the respondents.

There was a general consensus among the Conference members that it would be a positive step to develop and provide educational materials to parties pertaining to responsible pleadings. However, several Conference members questioned the necessity of requiring a signed attestation.

Ms. Fienberg said that she would not be inclined to endorse any proposal that could give the appearance that SROs are attempting to dictate the number of respondents that can be named in an arbitration. Other Conference members said there was potential for discouraging customers from asserting legitimate claims. Mr. Eppenstein mentioned that investors usually don't have all of their records and facts when cases are filed. An attestation clause would post a danger to

customers who lose in arbitration and then would be subject to facing a lawsuit based on an attestation on the pleading.

Result: Chairman Katsoris asked Mr. Kramer to reconvene the working group (Eppenstein, Friedman, Kupersmith, Kramer, Meister, and Yong) to explore the issue further and report back to SICA with their findings at its March meeting.

Motion Practice in Arbitration [Tab 6]

At PIABA's request, Mr. Berry and Ms. Brady reviewed NASD Dispute Resolution's rules, procedures, and arbitrator training materials concerning dispositive motions.

Ms. Brady presented her memorandum, which shows that NASD's arbitrator training materials are neutral, well balanced, and clear in their direction to arbitrators to deny dispositive motions if there are any doubts on the issues of eligibility, statute of limitations, or appropriateness of the forum.

Mr. Berry reported that, effective January 31, 2005, NASD will amend its practice on motions contained in answers and that thereafter customers will not need to respond immediately to such motions; NASD will instead refer such issues to the panel to be appointed.

Result: Mr. Sadler will share Ms. Brady's report with the PIABA leadership.

Non-Summary Suspension Proceeding [Tab 7]

Mr. Friedman reported that NASD's National Arbitration and Mediation Committee was aware of this issue, and was awaiting SICA action so a coordinated approach could be taken. The Conference discussed the proposal and identified two issues and possible approaches: 1) extending the jurisdiction of NASD to enforce non-summary suspension proceedings against member firms for non-payment of any SRO awards; and 2) amending the Uniform Code to establish a uniform SRO rule providing for non-summary suspension for non-payment of the forum's awards. Mr. Friedman noted that SROs take diverse approaches to non-payment of awards, and that non-summary suspension processes are not common. Right now, NASD will apply non-summary suspension only when NASD awards are not paid; regular disciplinary processes apply where awards from other SROs (or the AAA) are not paid. Ms. Jenson suggested that it would be appropriate at this time for her to seek the views of her colleagues at the SEC, and promised to do so before the March SICA meeting.

Result: Chairman Katsoris asked Ms. Jenson to take this issue back to the SEC staff, and report back at the March SICA meeting.

Law School Securities Arbitration Clinics [Tab 8]

Mr. Andrichik asked the Conference to help influence the expansion of law school securities arbitration clinics across the United States. The Conference members agreed that law school securities arbitration clinics have been a positive development for investors of limited means and they have added credibility to the arbitration process. Chairman Katsoris said that he would send

letters to pertinent organizations, including the SEC, NASAA, and the Law School Clinics Association, to encourage the expansion of these clinics.

Result: SICA will first identify where these programs are most needed. Chairman Katsoris' letters will follow.

NASD Update on Tolling for Arbitrator Information Requests [Tab 9]


Mr. Eppenstein noted that the NASD rules do not provide for automatic tolling on list return dates when a party asks for additional information, whereas NYSE's rules do provide for tolling. Mr. Friedman reported that NASD Dispute Resolution would be willing to explore this issue further after the Code of Arbitration Procedure ("Code") simplification rule is published. Mr. Friedman will keep SICA updated on the progress of the Code simplification project.

NASD Update on Out-of-State Attorneys [Tab 10]

Mr. Berry reported that the NASD Board, at its November meeting, approved a rule amendment to the Code of Arbitration Procedure providing in essence that, if a party elects to have an attorney, that person must be admitted to practice somewhere in the United States. Mr. Friedman noted that this rule was not intended to preempt state law.

Result: Chairman Katsoris will distribute SICA's report on this topic from approximately 10 years ago.

Independent Research on Fairness of SRO Arbitrations [Tab 11]

 Mr. Andrichik updated the Conference on the status of the SICA survey on the perceptions of fairness of SRO arbitration. He reported that the Subcommittee has chosen Professors Barbara Black and Jill Gross of Pace University School of Law to administer the survey. The Subcommittee will meet again shortly to design the questionnaire.

Result: Mr. Andrichik will update SICA on the survey's progress at its March meeting.

SRO Arbitrator Appointment Process [Tab 12]

Mr. Eppenstein discussed his concerns with the Conference regarding the manner in which arbitrators are selected. Ms. Brady stated that NASD Dispute Resolution's arbitrator selection process uses the Neutral List Selection System (NLSS) to select on a rotational basis the names of arbitrators offered to parties. This system allows the parties to rank the arbitrators according to their preference, and to strike any proposed arbitrators not to their liking. She emphasized that this system permits the parties' great flexibility in determining the ultimate composition of their arbitration panel. Mr. Friedman pointed out that NASD had recently filed with SEC a proposed amendment to switch to a random system of selection, replacing the current rotational system, which is very complicated to maintain.

In response to Mr. Eppenstein's request that parties be able to select arbitrators by agreement, regardless of whether or not they are listed on the SRO's roster of neutrals, Mr. Friedman and Ms. Kupersmith both said that their staff would normally accommodate such a request on a case-by-case basis.

Mr. Friedman and Ms. Kupersmith both felt that Mr. Eppenstein's call for preemptory challenges for replacement arbitrators would run counter to SRO efforts to make the arbitration process more expeditious.

Mr. Eppenstein stated that administrative appointments without preemptory challenge are a problem. He gave an example of a case where the appointed industry arbitrator: 1) did not appear to meet the definition; 2) refused to answer specific questions about his background; and 3) failed to disclose serious challenges to his arbitrator conduct and relationship with the respondent and respondent's attorneys.

Result: Mr. Eppenstein said that he would draft a proposal on this topic for SICA to review at its next meeting.

NASD Update on Direct Communication Rule [Tab 13]

Mr. Berry reported on the status of NASD's new rule permitting the parties to communicate directly with the arbitrators when all parties and arbitrators agree. He said that anecdotal evidence suggested that it is going well, but there was not enough meaningful data available to present to the Conference at this time. Mr. Eppenstein noted that he has found this rule to be very helpful to him and his clients.

Preparation for SICA's 13th Report [Tab 14]

Chairman Katsoris volunteered to handle the preparation of SICA's 13th Report. Ms. Kupersmith will gather SRO statistics for the Report.

NASD and NYSE Rule Filings Update [Tab 15]

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

California Arbitration Ethics Standards Update [Tab 16]

Mr. Friedman updated the conference on the status of litigation in connection with disclosure standards for arbitrators.

Cases and Articles of Interest [Tab 17]

No discussion.

New Business [Tab 18]

Mr. Friedman reported that Seth Lipner had withdrawn his request that SICA prepare an "all in one" document containing all rules, statutes, and key cases, as he is pursuing this on his own.

There being no other business, the meeting adjourned at 1:20 p.m.

Respectfully submitted by:

Approved March 15, 2005

George H. Friedman