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The Resolution of Securities Disputes

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ARTICLES

THE RESOLUTION OF SECURITIES DISPUTES*

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 This article is a version of a Chapter from the book entitled *AMERICAN ARBITRATION PRACTICE* to be published by PLI. The final version of said Chapter will be somewhat different from this article.

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INTRODUCTION

As the public increasingly invests in the securities markets—either directly or indirectly through Mutual Funds, IRAs, Keogh plans and other pension devices[1]—litigation between the securities industry and its customers has mushroomed. The cases litigated number in the thousands every year and are expected to rise still further in the future as a result of increased volume and expanded trading on the Internet.[2] At present, these disputes, as well as those between the securities industry and its employees, are being channeled into arbitration or submitted to mediation with greater frequency, usually at forums provided by the various self-regulatory organizations (SROs) such as the New York Stock Exchange (NYSE) and the National Association of Securities Dealers (NASD).[3]

Arbitration and mediation provide the advantage of a speedy resolution of securities disputes by persons knowledgeable in the area, without excessive costs. Unless, however, such procedures

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1. *See* William J. Holstein, et al., *Can the Fed Santa Save Christmas?*, U.S. NEWS & WORLD REP., Dec. 18, 2000, at 40. "Nearly half of U.S. households now have some stake in the market through mutual funds, pension funds, 401(k)'s or direct equity holdings." *Id.*

2. *See* Anne Kates Smith, *Champion of the Investor*, U.S. NEWS & WORLD REP., Dec. 11, 2000, at 78; Pallavi Gogoi, *Rage Against Online Brokers*, BUS. WK., Nov. 20, 2000, at EB 98; Michael Schroeder & Rebecca Buckman, *SEC Chief Wants Online – Trading Firms to Disclose the Rules of Internet Dealing*, WALL ST. J., May 4, 1999, at C23; *see also* Gretchen Morgenson, *Brokerage Puts Limits on Stock Analysts Hold*, N.Y. TIMES, July 11, 2001, § A at 1; Richard Karp, *Dueling for Dollars: If the Bear Returns, Wall Street's Arbitration Wars will Escalate*, BARRON'S, Nov. 16, 1998, at 24; Saul Hansell, *New Breeds of Investors All Beguiled by the Web*, N.Y. TIMES, May 16, 1999, § 3 at 1; C. Evan Stewart, *The Securities Industry in the 21st Century*, N.Y.L.J., Apr. 16, 1999, at 5; Charles Gasparino & Rebecca Buckman, *Horning In: Facing Internet Threat, Merrill To Offer Trading Online For Low Fees*, WALL ST. J., June 1, 1999, at A1; Pat Wechsler, *Commentary, It's 8 P.M., and Mom's Out Trading*, BUS. WK., June 14, 1999, at 44; Macroscope, *A Nation of Shareholders?*, INVESTOR'S BUS. DAILY, June 21, 1999, at A4; Anne Kates Smith, *Roads to Riches*, U.S. NEWS & WORLD REP., June 28, 1999, at 66.

3. *See* Constantine N. Katsoris, *The Arbitration of a Public Securities Dispute*, 53 FORDHAM L. REV. 279 (1984) [hereinafter Katsoris I].

are fair both in fact and in appearance, their popularity as a means of settling securities disputes will greatly diminish, especially if the public is limited to resolving their disputes before SRO forums.

In the last decade, the resolution of public securities disputes has become more complex. To better understand the present rules governing such arbitrations and mediations, we must look to the development of the present system and explore the judicial developments that have directed most of these disputes into SRO forums.[4] In addition, we must examine legislative attempts to alter or influence this area of dispute resolution,[5] as well as the establishment and work of the Securities Industry Conference on Arbitration (SICA), and the oversight role of the Securities and Exchange Commission (SEC or Commission).[6] Finally, we must inquire whether the rules governing securities arbitration and mediation at the SRO forums (or other alternative providers) insure a level playing field for the participants.

I. BACKGROUND OF SECURITIES ARBITRATION

The arbitration of customers' securities disputes can be traced back to the NYSE in 1872.[7] Since that time, numerous other SROs have also established arbitration programs for the settlement of such disputes.[8]

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4. *See infra* notes 9-24 and accompanying text.

5. *See infra* notes 25-26 and accompanying text.

6. *See infra* notes 27-49 and accompanying text.

7. P. Hoblin, SECURITIES ARBITRATION: PROCEDURES, STATEGIES, Case 1-2 (1988). *See also* Derek Roebuck, ANCIENT GREEK ARBITRATION. "The earliest substantial body of evidence of the way a community resolved disputes by arbitration is the Greek language, though there are earlier sources from other civilisations which testify to its regular use. As early as 1700 (or possibly 1900) BC, the bombastic opening of the laws of Hammurabi proclaims him, among all his other astonishing attributes: (the perfect arbitrator)..." *Id.* at 6.

8. P. Hoblin, SECURITIES ARBITRATION: PROCEDURES, STRATEGIES, Case 1-2 (1988); *see* Deborah Masucci & Robert S. Clemente, *Securities Arbitration at Self-Regulatory Organizations: NYSE and NASD Administration and Procedures*, 949 PLI/CORP 99, 106 (Jul. - Aug. 1996).

A. Judicial Developments

An unresolved dispute between an investor and his broker ordinarily winds up in arbitration because of a pre-dispute arbitration agreement entered into at the time the investor opened the brokerage account.[9] Indeed, such agreements are widespread, particularly in the case of margin, option or other accounts involving credit.[10] Under the United States Arbitration Act (Federal Arbitration Act or Arbitration Act), agreements to arbitrate future disputes are generally specifically enforceable.[11] An exception to this mandate, however, was carved out in 1954 by the United States Supreme Court in *Wilko v. Swan*,[12] which was faced with the *Hobson's* choice between the mandate of the Arbitration Act to arbitrate, and provisions in the Securities Act of 1933 (1933 or Securities Act) intended to protect a customer's rights. *After expressing some mistrust of arbitration*, the Court in *Wilko* concluded that Congress' desire to protect investors would be more effectively served by holding unenforceable pre-dispute arbitration agreements relating to issues arising under the 1933 Act.[13]

Subsequently, many federal courts *presumed* that the *Wilko* exception for 1933 Act claims also extended to the Securities Exchange Act of 1934 (1934 Act or Exchange Act), and thus refused to compel arbitration for customers' claims arising under

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9. *See* Katsoris I, *supra* note 3, at 292.

10. *See* Ann C. Stansbury & Justin P. Klein, *The Arbitration of Investor-Broker Disputes: A Summary of Development*, 35 ARB. J. 30, 32 (1980); *see also* C. Fletcher, *Dynamism in Securities Arbitration*, SECURITIES ARBITRATION PRACTICE AND PROCEDURES SEMINAR 14 (1989).

11. 9 U.S.C. §§ 1-14 (1982). Section 2 of the Arbitration Act provides: "[A] written provision in . . . a contract evidencing a *transaction involving commerce* to settle by arbitration, a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.* § 2 (emphasis added). Because the Federal Arbitration Act applies to claims arising from transactions involving interstate commerce, and because securities dealings usually involve such transactions, state securities claims, as well as those arising under the federal securities laws, are usually arbitrable. *See* Katsoris I, *supra* note 3, at 292.

12. 346 U.S. 427 (1953).

13. *Id.* at 438.

the 1934 Act, despite the presence of pre-dispute arbitration agreements.[14] This became problematic when a public customer joined a *non-arbitrable Wilko* federal claim with an *arbitrable* non-federal securities claim. Some courts *bifurcated* the two and ordered that the federal *Wilko* claim be litigated, and the non-federal claim be arbitrated.[15] Other courts, however, found that if the two claims were so *intertwined* that it was impractical or impossible to separate them, both claims should be litigated together.[16]

The intertwining/bifurcation dilemma was settled by the Supreme Court in 1985 in *Dean Witter Reynolds, Inc. v. Byrd*,[17] which held that when an *arbitrable* claim is joined with a *non-arbitrable Wilko* claim, the claims need not be tried together involuntarily. Although *Byrd* was silent as to whether the *Wilko* exemption applied to 1934 Act claims, it rejected the concept of "intertwining", and supported the principle of automatic bifurcation whenever a non-arbitrable *Wilko* claim is joined with an arbitrable claim.[18] In other words, the two claims could be tried separately and simultaneously.[19] Whatever the merits of automatic bifurcation, it would unleash and set in motion two separate forums on a potential collision course.[20]

Fortunately, this potential trauma of forum confrontation did

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14. *See* Constantine N. Katsoris, *Securities Arbitration After McMahon*, 16 FORDHAM URB. L.J. 361, 364-67 (1988) [hereinafter Katsoris II]. *But see* Katsoris I, *supra* note 3, at 301. "Thus, although *Scherk* involved a 10b-5 claim arising out of an international securities transaction, *the Court's suggestion that the Wilko prohibition be limited to 1933 Act claims should be followed in domestic cases as well" Id.* (emphasis added) (citing Scherk v. Alberto-Culver Co., 417 U.S. 506, 515 (1974)).

15. Katsoris II, *supra* note 14 at 366 n.39 (citing Macchiavelli v. Shearson Hammill & Co., 384 F. Supp. 21, 31 (E.D. Cal. 1974)).

16. *Id.* at 366 n.40 (citing Miley v. Oppenheimer & Co., 637 F.2d 318, 335 (5th Cir. 1981); Sibley v. Tandy Corp., 543 F.2d 540, 544 (5th Cir. 1976)).

17. 470 U.S. 213 (1985).

18. *Id.* at 217.

19. *See* Constantine N. Katsoris, *The Securities Arbitrators' Nightmare*, 14 FORDHAM URB. L.J. 3, 8 (1986) [hereinafter Katsoris III]. The essence of the problem is that two separate forums would often be ruling essentially on the same set of facts with the possibility of contradictory findings. *See id.* at 9-11.

20. *Id.*

not last for long. Shortly after the *Byrd* decision, the Supreme Court in *Shearson/American Express, Inc. v. McMahon*,[21] cleared up prior misconceptions by holding that the *Wilko* exemption did not apply to 1934 Act claims. Moreover, soon thereafter, the Supreme Court in *Rodriguez de Quijas v. Shearson/American Express, Inc.*[22] undid the *Wilko* exception entirely and held that pre-dispute arbitration agreements would be upheld, even as to issues arising under the 1933 Act.[23] With the *Wilko* barrier removed by *McMahon* and *Rodriguez*, most securities disputes are now arbitrated at SRO forums pursuant to pre-dispute arbitration agreements.[24]

In the aftermath of the *McMahon* decision, both Congress and the legislatures of several states attempted to render pre-dispute securities arbitration agreements unenforceable.[25] Such efforts, however, have thus far generally proven unsuccessful.[26]

B. Creation of SICA/Role of the SEC

Prior to 1976, most SROs had differing rules for the administration of securities arbitration disputes.[27] In June 1976, the SEC solicited comments from interested persons on the feasibility of developing a "uniform system of dispute grievance procedures for the adjudication of small claims."[28] After conducting a public

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21. 482 U.S. 220 (1987).

22. 490 U.S. 477 (1989).

23. *See Arbitration and the Demise of Wilko v. Swan*, N.Y. L.J., June 15, 1989, at 3.

24. *See* Constantine N. Katsoris, *SICA: The First Twenty Years*, 23 FORDHAM URB. L.J. 483, 487 (1996) [hereinafter Katsoris IV].

25. *See Draft Bill To Restrict Use of Pre-Dispute Agreements*, SEC. ARB. COMMENTATOR, June 1988, at 4; *Markey to SEC: What Happened?*, SEC. ARB. COMMENTATOR, July 1988, at 1; *State Actions on Pre-Dispute Clauses*, SEC. ARB. COMMENTATOR, Aug. 1988, at 9.

26. *See* Stan Hinden, *GAO Asked To Investigate Securities Arbitration Issues*, WASH. POST, Feb. 7, 1990, at 2; *Markey to SEC: What Happened?*, SEC. ARB. COMMENTATOR, July 1988, at 1; *see also Securities Indus. Ass'n v. Connolly - Massachusetts Arbitration Rules Preempted*, SEC. ARB. COMMENTATOR, Aug. 1989, at 2.

27. *See* Katsoris I, *supra* note 3, at 283.

28. Exchange Act Release No. 12,528, 9 SEC Docket 8334 (June 23, 1976).

forum at which written and oral comments were received, the SEC's Office of Consumer Affairs issued a report recommending the adoption of procedures for handling investor disputes and the creation of a new entity to administer the system.[29]

Before implementing the proposal for a new arbitration forum, the Commission invited further public comment.[30] In response to this invitation, several SROs proposed the establishment of a securities industry task force to consider the development of "a uniform arbitration code and the means for establishing a more efficient, economic and appropriate mechanism for resolving investor disputes involving small sums of money."[31] As a result of this suggestion, the Securities Industry Conference on Arbitration (SICA) was established in April 1977, consisting of representatives of various SROs,[32] the Securities Industry Association (SIA)[33] and the public.[34]

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29. Exchange Act Release No. 12,974, 10 SEC Docket 955 (Nov. 30, 1976).

30. *Id.*

31. FIFTH REPORT OF THE SECURITIES INDUSTRY CONFERENCE ON ARBITRATION 2 (Apr. 1986) [hereinafter FIFTH REPORT].

32. The following SROs were represented: the American (ASE), Boston (BSE), Cincinnati (CSE), Midwest (MSE), New York (NYSE), Pacific (PSE), and Philadelphia (PHSE) Stock Exchanges, the Chicago Board Options Exchange (CBOE), the Municipal Securities Rulemaking Board (MSRB) and the National Association of Securities Dealers, Inc. (NASD). *See* FIFTH REPORT, *supra* note 31, at 3. After 1997, the MRSB would not accept new arbitration claims, after which the NASD assumed responsibility for the arbitration of municipal securities disputes. *See MSRB Turns To NASD Arbitration to Handle Municipal Securities Disputes*, SEC. ARB. COMMENTATOR, Oct. 1997, at 5. In 1998, the ASE agreed to merge with the NASD. *See Philadelphia Stock Exchange Proposal to End Its Arbitration Program Approved by SEC*, SEC. ARB. COMMENTATOR, Oct. 1998, at 10. After September 1998, the Philadelphia Stock Exchange would no longer accept new arbitration claims for filing. Instead, members will thereafter become subject to the NASD Code, and will be obliged to abide by that Code, as if they were NASD members. *Id.*

33. FIFTH REPORT, *supra* note 31, at 3. The SIA is a trade association for the securities industry.

34. *See* TENTH REPORT OF THE SECURITIES INDUSTRY CONFERENCE ON ARBITRATION 1 (June 1998) [hereinafter TENTH REPORT]. Peter R. Cella, Jr., Esq., Mortimer Goodman, Esq., and the author served as The Public Members of SICA at its creation in 1977. *Id.* at 3. In 1983, Justin Klein, Esq., was added as the fourth Public Member of SICA. *Id.* Commencing on December 31, 1989, the

The Commission then invited proposals from SICA to improve the methods for resolution of investors' small claims.[35] After holding numerous meetings throughout the country, SICA developed a simplified arbitration procedure for resolving customer claims of $2,500 or less,[36] and issued an informational booklet describing small claims procedures (Small Claims Booklet).[37] Realizing, however, that the development of a small claims procedure was only a first step, SICA then developed a comprehensive Uniform Code of Arbitration (Uniform Code or

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then current public members' terms began to expire, one each year. They were then each eligible for reappointment for one new four-year term. All *new* members, will serve for four years and *are eligible* for reappointment to one additional four-year term. The public members whose terms are not expiring will determine the appointment of new members or their reappointment. The appointment, or reappointment, may be vetoed by a two-thirds vote of the non-public members of SICA. *Id.* Mortimer Goodman concluded his term in 1990 and was replaced by James E. Beckley, a sole practitioner from Wheaton, Illinois, who had extensive securities litigation experience. In 1995 Justin P. Klein concluded his term and was replaced by Thomas R. Grady of Grady & Associates, Naples, Florida, who had extensive experience in representing claimants in arbitration. In July of that same year SICA voted to return the *public membership* to three voting members upon the conclusion of Professor Katsoris' term in 1997. In 1996 Peter R. Cella concluded his term and was replaced by Professor Thomas J. Stipanowich, who has extensive experience in arbitration and other forms of alternative dispute resolution; and was appointed to serve a second term. In 1998, James E. Beckley concluded his term and was replaced by Theodore G. Eppenstein, of Eppenstein and Eppenstein, New York, New York, who had extensive securities and commodities arbitration experience primarily representing customers. *Id.* In 1999 Thomas R. Grady was reappointed to a four year term.

35. *See* Implementation of An Investor Dispute System, Exchange Act Release No. 13,470 [1977-1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 81,136, at 83,905 (Apr. 26, 1977).

36. *See* FIFTH REPORT, *supra* note 31, at 3. SICA subsequently raised the jurisdictional limit of small claims to $5,000, then to $10,000, and then again to the present $25,000. *See* TENTH REPORT, *supra* note 34, at 3.

37. *See* REPORT OF THE SECURITIES INDUSTRY CONFERENCE ON ARBITRATION TO THE SECURITIES AND EXCHANGE COMMISION: *Proposals to Establish a Uniform System for the Resolution of Customer Disputes Involving Small Claims,* "How to Proceed with the Arbitration of a Small Claim" Exhibit D (Nov. 15, 1977) [hereinafter FIRST REPORT].

Code) for the securities industry.[38] The Code established a uniform system of arbitration procedures to cover all claims by investors.[39] In addition, SICA prepared an explanatory booklet for prospective claimants (Procedures Booklet),[40] explaining procedures under the Code. To a large extent, the Code incorporated and harmonized the rules of the various SROs and codified various procedures that the SROs had previously informally followed, but had not officially included them in their existing rules.[41]

The participating SROs adopted the original Code during 1979 and 1980.[42] Between the time of its initial adoption and the *McMahon* case, various revisions were made to both the Code and the Procedures Booklet.[43] With the significant influx of additional and often more complex cases resulting from the *McMahon* decision,[44] numerous issues that previously had only been discussed at SICA (when SRO arbitrations were largely voluntary) were reconsidered, for example:

- expanded discovery procedures;
- selection, qualification, background, training and evaluation of arbitrators;
- challenges for cause;

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38. *See* UNIF. CODE OF ARB. (as amended), *reprinted in* FOURTH REPORT OF THE SECURITIES INDUSTRY CONFERENCE ON ARBITRATION, Exhibit C (Nov. 1984) [hereinafter FOURTH REPORT].

39. FIFTH REPORT, *supra* note 31, at 2.

40. *See* THIRD REPORT OF THE SECURITIES INDUSTRY CONFERENCE ON ARBITRATION 5 (Jan. 31, 1980) [hereinafter THIRD REPORT]; SECURITIES INDUSTRY CONFERENCE ON ARBITRATION, ARBITRATION PROCEDURES (1980) [hereinafter PROCEDURES BOOKLET]. After *McMahon,* SICA consolidated the Small Claims booklet into the PROCEDURES BOOKLET. *See* SIXTH REPORT OF THE SECURITIES INDUSTRY CONFERENCE ON ARBITRATION 3 (Aug. 1989) [hereinafter SIXTH REPORT].

41. *See* Katsoris I, *supra* note 3, at 284.

42. *See* FIFTH REPORT, *supra* note 31, at 4. Once SICA adopts a new rule, each SRO must then generally go back to their respective organization in order to get a rule change which is then usually submitted to the SEC for approval. Accordingly, there is often a time lag between SICA approval and SRO implementation.

43. *See* FIFTH REPORT, *supra* note 31, at 4-6.

44. In the year before *McMahon*, 2,837 cases were filed at the various SROs, whereas in the year following *McMahon,* that figure more than doubled to 6,097 cases filed. *See* TENTH REPORT, *supra* note 34, at 38.

- method of transcribing and preserving the record of arbitration hearings; and,
- burdens on SROs resulting from the anticipated increase in case load.[45]

Although some of the resultant changes nudged SRO arbitration somewhat closer to litigation, these changes were thought necessary in order to prevent trial by surprise and ambush.

To be effective and fair, however, rules cannot be cast in stone. Accordingly, SICA continues to meet, monitor the actual performance of the Code, and further fine-tune and adjust its provisions, as the need arises.[46] In addition to the SEC other organizations such as the Commodities Futures Trading Commission (CFTC), the American Arbitration Association (AAA), and the North American Securities Administrators Association (NASAA) routinely participate by invitation in these meetings.[47] In addition, the *emeritus* public members whose terms have expired regularly attend.

To date, nearly *one hundred thousand* cases, including small claims, have been filed with the participating SROs since the initial approval of the Code.[48] Moreover, since the SEC now requires that future amendments to SRO codes be made in *Plain English*,[49]

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45. See SIXTH REPORT, *supra* note 40, at 1-3.

46. *See* Katsoris II, *supra* note 14, at 364.

47. *Id.*

48. The bulk of these arbitrations are handled before the NASD and the NYSE. A breakdown of the arbitrations handled by the arbitration facilities of the various SROs appears *infra* Appendix A. *See* ELEVENTH REPORT OF THE SECURITIES INDUSTRY CONFERENCE ON ARBITRATION at 106 (July 2001) [hereinafter ELEVENTH REPORT].

49. The SEC indicated that future amendments to the Uniform Code should be made in "Plain English". Through a research project sponsored by the Fordham University School of Law, in cooperation with the NYSE's Department of Arbitration, a draft of the entire Uniform Code was prepared in "Plain English" and submitted to SICA for its consideration. *See* TENTH REPORT, *supra* note 34, at 5; *see also* ABA Satellite Seminar, *"Plain English" in Plain English: A Practical Workshop on How To Create Clear Disclosure Documents Under The SEC's Plain English Rule*, Sept. 15, 1998, at 19; Stephen I. Glover & Lawrence R. Baid, *Title*, NAT'L L.J., March 9, 1998, at 5. The Plain English rules are set forth primarily in rules 421 and 461 of Regulation C under the Securities Act of 1933, and items 501, 502, 503, and 508 of Regulation S-K. New Rule 421(d) requires

SICA translated the entire Uniform Code into Plain English.

In discussing the numerous issues involved in navigating today's terrain on securities arbitration, it appears that tracking the SICA Code would be a logical starting point because it breaks down most of the issues in an organized and orderly fashion. Other issues will, where practicable, be integrated and discussed through the eyes of the Code; otherwise, they will be discussed separately and independently.

II. THE SICA CODE

The Unifrom Code of Arbitration consisted of *thirty-one* sections as of January 19, 2001 ("old version"), when its translated Plain English version ("new version") was adopted by SICA. In so translating the Code, the original sections of the old version were often shifted and/or consolidated, so that the present new version of the Code consists of only *twenty-seven* sections.

In tracking the historical development of the SICA Code (since its adoption over twenty years ago) it is easier, more consistent, and less confusing to refer to the thirty-one sections of the old version of the Code rather than the new translated version which didn't exist until a few months ago. ***Accordingly, all references to the Code in this article refer to the old version thereof, unless otherwise indicated.*** Moreover, both versions of the Code [the old version as it existed on January 19, 2001 and the new version which replaced it on that date] are attached hereto as Appendix B, and appear side-by-side for purposes of comparison.[50]

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issuers to draft the front and back, cover pages, as well as the summary and the risk factors sections of registration statements in Plain English. The rules set forth six Plain English principles with which the issuer must "substantially" comply: (1) short sentences; (2) definite, concrete, everyday language; (3) the active, rather than the passive, voice; (4) tabular presentation or "bullet lists" for complex information whenever possible; (5) no legal jargon or highly technical business terms; and (6) no multiple negatives. Securities Act Rule 421(d)(2) (17 CFR 230.421(d)(2)); *see also* SECURITIES AND EXCHANGE COMMISSION, OFFICE OF INVESTOR EDUCATION AND ASSISTANCE, PLAIN ENGLISH HANDBOOK (Feb. 2001) *available at* http://www.sec.gov/pdf/handbook.pdf (last visited Aug. 18, 2001); Tamara Loomis, *Plain English, SEC Guidelines Give Good Writing a Good Name*, N.Y.L.J., Aug. 10, 2000, at 5.

50. A comparison of the old version of the Code and the translated new

A. Jurisdiction

Section 1 of the Code delineates the jurisdictional boundaries of SRO arbitration, which permits an SRO to accept a matter upon the demand of a customer or nonmember, even absent an agreement.[51] *On the other hand, it also recognizes an SRO's basic right to decline the use of its facilities where the dispute, claim, or controversy is not a proper subject matter for arbitration.*

1. Application of the Code

Section 29 incorporates the Code *by reference* into every duly executed Submission Agreement, which shall be binding on all parties.[52] It also extends the automatic incorporation of the Code to *agreements to arbitrate,* thus insuring that a party to such an agreement who does not sign a Submission Agreement is nevertheless still bound by the provisions of the Uniform Code.

2. Industry Obligation to Arbitrate

SRO rules require that their membership consent to arbitrate disputes upon the demand of their customers.[53] By belonging to the SRO, its members agree to be bound by the SRO's rules. Consequently, customers may compel a member of an SRO to arbitrate even without a written arbitration agreement. Absent a written contract, however, the member cannot compel the customer to arbitrate.[54]

3. Pre-Dispute Arbitration Agreements

Customers or employees are generally not required to arbitrate their disputes with the industry absent a pre-dispute arbitration agreement. Such agreements, however, have become

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version appears *infra* Appendix B. *See* ELEVENTH REPORT, *supra* note 48, at 9.

51. UNIF. CODE OF ARB. § 1, *infra* Appendix B.

52. *Id.* § 29.

53. Hoblin, *supra* note 7, at 2-3 to 2-4.

54. *Id.*

common and widespread.[55] After the *McMahon* decision, Section 31 was added to the Code in order to insure that customers are aware and understand the effect of signing an agreement containing a pre-dispute arbitration clause.[56] It provides that any pre-dispute arbitration clause in agreements with customers must be highlighted and immediately preceded by certain disclosure language that describes arbitration and its effect.[57]

Section 31 further provides that immediately preceding the signature line there shall be a statement which shall be highlighted and *separately initialed* by the customer that the agreement contains a pre-dispute arbitration clause.[58] Nevertheless, no SRO has yet incorporated this separate initialing requirement into their arbitration rules,[59] apparently on the ground that it would cause an administrative burden on its members when they open new accounts. This is clearly an unfortunate consequence, from the perspective of both the broker and the customer. Administrative burden aside, such highlighted disclosure would increase customer awareness of the arbitration requirement, and thus reduce litigation by customers claiming to be unaware of this provision.[60]

Finally, Section 31 is intended to prevent the insertion of restrictive clauses in customers' agreements which would conflict with or render ineffective various provisions of the Code. Section 31 specifically prohibits conditions that: *1) limit or contradict the rules of the SROs, 2) limit the ability of a party to file any claim in arbitration, or 3) limit the ability of the arbitrators to make any award.*[61]

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55. As to customers, this usually occurs when they open an account. *See supra* note 10 and accompanying text. As to employees, this usually occurs when they sign a Form U-4 (Uniform Application for Securities Industry Registration or Transfer). An employee must submit a signed Form U-4 to a broker-dealer before conducting securities business on behalf of the broker-dealer. *Id.*

56. SIXTH REPORT, *supra* note 40, at 12.

57. UNIF. CODE OF ARB. § 31(a), *infra* Appendix B.

58. *Id.* § 31(b).

59. *See* Katsoris IV, *supra* note 24, at 520.

60. *Id.*

61. Since Section 31 was inserted after *McMahon,* it includes a grandfather clause, which provides that the requirements of the section will apply only to new agreements signed, by an existing or new customer, after one year has elapsed from the date of SEC approval to the rule (September 1989). Thus, a broker-

4. Class Actions

The Uniform Code specifically prohibits the submission of a claim as a class action, because SICA felt that SRO forums, for a variety of reasons, are not the proper venue for the resolution of such claims.[62] This prohibition of class actions, however, has no effect upon the *consolidation* or *joinder of claims*, which are specifically permitted by Section 13(d) of the Code.[63] Furthermore, the Code permits claimants to join in a class action pending in Court, despite an agreement to arbitrate; but, the claimants may file such claims in arbitration only if they have elected not to participate in or have withdrawn from the class action.[64]

5. Employment Cases

Many employees in the securities industry are required to enter into an agreement that mandates arbitration before a specific SRO forum for any dispute arising in the course of their employment.[65] In 1991, the Supreme Court in *Gilmer v. Interstate/Johnson Lane Corp.*,[66] held that a claim brought under

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dealer who thereafter attempts to contractually limit an arbitrator's authority to award punitive damages, or a customer's right to select any of the available SROs, may be subject to disciplinary action by any SRO (of which it is a member) that has adopted Section 31. Indeed, both the NASD and the New York Stock Exchange subsequently issued joint notices [Information Memo/Notice to Members 95-16] to their members that they may not include or seek to enforce provisions in customer agreements which can be construed as restricting or limiting either the ability of customers to arbitrate, or the power of arbitrators' to issue awards.

62. UNIF. CODE OF ARB. § 1(d)(1), *infra* Appendix B.

63. *Id.* § 13(d).

64. *Id.* § 1(d)(3); *see also* Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, will the Class Action Survive?*, 42 WILLIAM & MARY L. REV. 1 (2000).

65. Employees who deal with the public (i.e., brokers, investment executives, etc.) are required to register with each SRO of which their firm is a member by signing a Form U-4 (Uniform Application for Securities Industry Registration or Transfer) and passing the appropriate qualifying examination, if required. *See supra* note 10 and accompanying text.

66. 500 U.S. 20 (1991).

the Age Discrimination in Employment Act of 1967[67] could be subject to compulsory arbitration pursuant to an arbitration provision in a securities registration form known as a Form U-4.[68] *Gilmer* did not decide, however, whether its analysis applied to arbitration provisions in all employment contracts, or what contracts of employment are subject to the FAA.[69] Recently, however, the Supreme Court in *Circuit City Stores v. Adams*[70] in a 5-4 decision held that the exclusion from FAA coverage was restricted to transportation workers.

In any event, having employment discrimination claims tried in SRO forums before arbitrators who were largely inexperienced as to such claims raised much concern and consternation.[71] One lower federal court went so far as to contend that the SRO forum involved was not an adequate forum due to "a structural bias in favor of the industry."[72] In an attempt to diffuse this politically

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67. 81 Stat. 602, as amended, 29 U.S.C. § 621 *et seq.*

68. Gilmer at 20; *see also supra* note 55 and accompanying text.

69. Gilmer at 20; s*ee also* Peter N. Hillman & Bernard W. McCarthy, *Mandatory Arbitration Provisions Enforceable?; U.S. Supreme Court Has Not Yet Addressed All Factual Situations*, N.Y. L.J., Feb. 8, 1999, at 57.

70. Circuit City Stores, Inc. v. Adams, 121 S. Ct. 1302 (U.S. Cal. 2001); *see* Anthony Michael Sabino, *'Circuit City' Marks Leap Forward for Arbitration*, N.Y. L.J., Apr. 17, 2001 at 1; Marcia Coyle, *'Arbitration Heaven' Ahead,* NAT'L L.J., Apr. 2, 2001 at B1. A broader exception would "call into doubt the efficacy of alternative dispute resolution procedures adopted by many of the nation's employers." Coyle at B3 (quoting from Justice Kennedy's opinion in Circuit City); *see also Circuit City: FAA's Contract of Employment*, SEC. ARB. COMMENTATOR, Apr. 2001, at 1; Evan J. Charkes, *Recent Court Decisions Demonstrates That Mandatory Arbitration Is Waning*, N.Y. L.J., April 27, 1999, at 1; *see also U.S. Circuits Split on FAA's Explanation of Employment Cases*, DISP. RESOL., Spring 1999, at 26. *But see Bill To Overturn Circuit City Is Introduced*, 19 ALTERNATIVES 163, (June 2001). This bill (The Preservation of Civil Rights Protection Act of 2001) broadens the FAA exclusion to basically all employees retroactively to "all employment contracts in force before, on or after" the enactment date. *Id.*

71. *Political Pressure Increases to Curb Mandatory Arbitration of Employment Disputes*, SEC. ARB. COMMENTATOR, May 1997, at 9. *See also Circuit City: Backlash is Immediate as Caucus Readies Reversal Bill*, 19 ALTERNATIVES 111 (Apr. 2001).

72. Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 965 F. Supp. 190 (D. Mass. 1997). Although the Court of Appeals in *Rosenberg* agreed with

sensitive issue, some firms voluntarily agreed not to enforce such arbitration obligation against their employees.[73] Similarly, the NASD dropped its requirement in the U-4 employment agreement binding employees to arbitrate discrimination claims; however, this does not prohibit arbitration of other claims, nor does it prevent firms from separately inserting arbitration agreements in employment contracts.[74] On the other hand, the New York Stock Exchange announced that it would not accept employment discrimination claims unless the parties agreed to arbitrate *after* the dispute arose.[75] In view of the current trend, it would appear that the future of mandatory arbitration of discrimination claims at SRO forums is clouded.[76]

6. Six Year Eligibility

From its inception the Uniform Code established a *six year*

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the district court that the motion to compel was properly denied on the facts, it disagreed with the lower court's contention of *structural bias in the SRO forum.* Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 170 F.3d 1 (1st Cir. 1999).

73. Rosenberg, 170 F.3d at 6; *see also* Diane E. Lewis, *Women Get Day In Court*, BOSTON GLOBE, May 16, 1999, at G4; *Political Pressure Increases to Curb Mandatory Arbitration of Employment Disputes*, SEC. ARB. COMMENTATOR, May 1997, at 9. *But see SIA Expresses Vigorous Support for Continuing Arbitration*, SEC. ARB. COMMENTATOR, May 1997, at 9-10.

74. *NASD Proposes Eliminating Mandatory Arbitration of Employment Discrimination Disputes*, SEC. ARB. COMMENTATOR, Sept. 1997, at 11; *see also NASDR EVP Fienberg Speaks at NYAG Hearing on Gender Discrimination*, SEC. ARB. COMMENTATOR, Jan. 1998, at 15, 20; *NASD Files New Rules for Handling Employment Discrimination Disputes*, SEC. ARB. COMMENTATOR, May 1999, at 7; *SEC Approves PCX Pullback from Employment Arbitration*, SEC. ARB. COMMENTATOR, May 1999, at 7.

75. *NYSE Proposes End to Employment Discrimination Arbitration Absent Post-Dispute Agreement*, SEC ARB. COMMENTATOR, Oct. 1998, at 8; *see also SEC Approves PCX Pullback From Employment Arbitration*, SEC. ARB. COMMENTATOR, May 1999, at 7.

76. *See* Evan J. Charkes, *supra* note 70, at 1. *See also* Circuit City Stores, Inc. v. Adams, 121 S. Ct. 1302 (U.S. Cal. 2001); Colin P. Johnson, *Has Arbitration Become A Wolf In Sheep's Clothing?: A Comment Exploring The Incompatibility Between Pre-Dispute Mandatory Binding Arbitration Agreements In Employment Contracts and Statutorily Created Rights*, 23 HAMLINE L. REV. 511 (2000).

limitation for the submission of a claim to arbitrate (Six Year Rule or Eligibility Rule), starting from the time of the occurrence or event giving rise to the claim.[77] This Six Year Rule does not extend applicable statutes of limitation, and was inserted as a matter of administrative convenience at a time when: (i) arbitration was basically voluntary on the public's part; (ii) there were no formal discovery rules; and, (iii) limited partnerships, which were the subject of much litigation since the late 1980's, were not contemplated.[78] It was never the intent of SICA to invalidate claims by this rule, but merely to articulate that claims over six years old could not be submitted to an SRO forum for arbitration.[79]

Unfortunately, the Eligibility Rule has inadvertently and needlessly complicated the arbitration process. Some courts misinterpreted the Six Year Rule as barring such claims.[80] Furthermore, various courts are in conflict as to who should decide the threshold issue of eligibility—the courts or the arbitrators.[81] The AAA has no similar provision, despite securities industry involvement in the development of its securities arbitration rules.[82] This is perhaps one of the reasons brokerage firms do not include the AAA as an alternative forum to the SROs in their arbitration agreements.[83] For these and other reasons, abolition of the Six Year Rule from the SICA Code has been suggested by the author, [84] and subsequently endorsed by the RUDER REPORT.[85]

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77. UNIF. CODE OF ARB. § 4, *infra* Appendix B.

78. *See* Katsoris IV, *supra* note 24, at 493.

79. *Id.*

80. *Id.*; *see also* Robert S. Clemente & Karen Kupersmith, *Pillars of Civilization: Attorneys and Arbitration*, 4 FORDHAM FIN. SEC. TAX L.F. 77, 82 n. 14 (1999) [hereinafter Clemente] (citing Seth E. Lipner & Kenneth E. Meister, *Eligibillity (Six-Year) Rule*, 63 FORDHAM L. REV. 1533, 1534 (1995)). *See, e.g.*, Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Barnum, 616 N.Y.S. 2d 857, 858 (Sup. Ct. 1994).

81. Katsoris IV, *supra* note 24, at 493.

82. *Id.*

83. *Id.* at 494; *see also* SICA's pilot program, *infra* note 295 and accompanying text.

84. *See* Katsoris IV, *supra* note 24, at 494.

85. David S. Ruder et al., *Securities Arbitration Reform: Report of the Arbitration Policy Task Force to the Board of Governors National Association of Securities Dealers, Inc.*, at 28–35 (1996) [hereinafter RUDER REPORT].

Instead of eliminating the Eligibility Rule, SICA amended Section 4 of the Code to provide that all claims are considered eligible unless a challenge to eligibility is made (within twenty (20) business days of the service of the Statement of Claim); and, the Director of Arbitration's decision with respect to such eligibility is final and may only be challenged in court within 20 business days of service of the Director's decision.[86] The amendment further clarified that allegations of fraudulent concealment would not render ineligible claims eligible, and defined "occurrence or event" as the trade date, or (if the claim does not arise from a trade) the date the respondent engaged in or omitted from engaging in the activity that is the subject of the claim.[87] It was also specifically provided that claims determined to be ineligible for arbitration could be filed in court as if no arbitration agreement existed.[88] Unfortunately, no SRO has yet *completed* the 19(b) process[89] regarding this SICA amendment to Section 4.[90]

B. Small Claims/Simplified Arbitration

Section 2 of the Code deals with Simplified Arbitration procedures, so that small claims can be resolved more quickly and at less cost than larger claims. Without this simplified procedure the cost to arbitrate could often exceed any recovery. Initially the section applied to disputes where the dollar amount in controversy did not exceed $2,500; and, over the years, that amount has been gradually raised to the present ceiling of $25,000.[91]

Although the provisions of Section 2 are geared to provide small claimants with the opportunity to resolve their claim in a more expeditious and less costly manner, many procedural safeguards of the Code, such as pre-hearing discovery procedures and the method of selection of arbitrator(s), remain available to

86. *See* TENTH REPORT, *supra* note 34, at 4-5.
87. *Id.*
88. *Id.*
89. Securities Exchange Act of 1934 § 19(b), 15 U.S.C. § 78(b), amended by P.L. 106-554 (Dec. 21, 2000). *See infra* note 259 and accompanying text.
90. SEC. ARB. COMMENTATOR, May 1997, at 7.
91. *Supra* note 36.

the small claimant.[92]

C. Requirement of Hearing

The Uniform Code provides that (except in the case of Small Claims) all disputes, claims or controversies shall require a hearing unless all parties have waived such a hearing in writing and request the matter be resolved solely upon the pleadings and documentary evidence.[93] Nevertheless, despite such a waiver by the parties, a *majority* of the arbitrators may call for and conduct such a hearing.[94] In addition, *any* arbitrator may request the submission of further evidence.[95]

D. Dismissal of Proceedings

The Uniform Code provides that the arbitrators *shall*, upon the joint request of the parties, dismiss the proceedings.[96] Furthermore, the arbitrators *may* on their *own* initiative, or at the request of a party, dismiss the proceedings and refer the parties to their judicial remedies or to any other dispute resolution forum agreed to by the parties without prejudice to any claim or defenses available to any party, or other remedies provided by law.[97] This section also specifically authorizes the arbitrators to dismiss a claim, defense or proceeding with prejudice as a sanction for willful and intentional failure to comply with an order of the arbitrator(s) if lesser sanctions have proven ineffective.[98] As a matter of practice, however, arbitrators generally do not dismiss a matter before the first hearing, often preferring to hear part or all of the case before doing so—particularly in *pro se* cases.[99]

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92. *Id.*
93. UNIF. CODE OF ARB. § 3, *infra* Appendix B.
94. *Id.*
95. *Id.*
96. *Id.* § 5.
97. *Id.*
98. *Id.*
99. *See* Constantine N. Katsoris, *An Arbitrator's Perspective*, PLI, Securities Arbitration 1998: Redefining Practices and Techniques, Vol. 1 at 307 [hereinafter Katsoris V].

E. Settlements

Section 6 of the Uniform Code simply provides that all "settlements submitted shall be at the election of the parties."[100] In 1993, however, the NASD *sua sponte* filed with the SEC a Rule 19(b) filing that would have established [for a two year trial period] a formal procedure for parties (in arbitration proceedings involving at least $250,000 in *total damages*) to make pre-hearing settlement offers (Offer of Award Rule).[101] It would have *required* parties who rejected such settlement offers to pay the offering party's reasonable costs (including expert witness and attorneys fees) incurred *after* the offer was made, *if* the award granted in the ensuing arbitration was not *more favorable* to the rejecting party than the settlement offer.[102]

Although this proposal would seemingly encourage the settlement of large and costly disputes, it was the unanimous conclusion of the Public Members of SICA and most of the other SROs that, on balance, such a rule change would have a coercive effect upon public claimants to accept a settlement offer rather than risk being assessed with the excessive costs and attorneys fees of the offering party.[103] In addition, since the threshold sum of $250,000 included punitive damages, the proposed rule would also have the additional effect of compelling claimants to reduce or eliminate a punitive damage claim so as to avoid crossing the threshold and thereby being subjected to the penalties of the Offer of Award Rule.[104] The NASD withdrew its Offer of Award Rule in 1994.[105]

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100. UNIF. CODE OF ARB. § 6, *infra* Appendix B; *see also* David E. Robbins, *How to Settle a Case*, SEC. ARB. COMMENTATOR, April 1999, at 1.

101. Katsoris IV, *supra* note 24, at 496; *see also* Exchange Act Release No. 33,081, 55 SEC DOCKET 620 (Oct. 20, 1993).

102. Katsoris IV, *supra* note 24, at 496.

103. *Id.*

104. *Id.*

105. *See* Michael Scionolfi, *NASD Withdraws 'Loser Pays' Arbitration Proposal*, WALL ST. J., July 7, 1994, at C1.

F. Tolling of Time Limitations

Section 7 of the Uniform Code provides that Statutes of Limitation for the institution of legal proceedings would be tolled (where permitted by law) when a duly executed Submission Agreement was filed by the Claimant(s), and would continue to be tolled so long as the SRO retained jurisdiction.[106]

Conversely, this section also provides that where the dispute, claim, or controversy has been submitted to a court of competent jurisdiction, the Six Year Eligibility Rule (preventing submission to arbitration) shall be tolled for such period as the court shall retain jurisdiction over the matter submitted.[107]

G. Selection and Challenges to Arbitrators

Section 8 originally *provided* for the number of arbitrators and the manner in which they were selected.[108] It further *provided* that the Director of Arbitration of the SRO choose the panel and its chairperson, and directed that the *majority* of the panel of arbitrators be public arbitrators *(not be* from the securities industry), *unless* the public customer or "non-member" requested otherwise.[109] In addition, Section 10 of the Code *originally provided* that each party would have one peremptory challenge, and unlimited challenges for cause.[110]

This method of selection was recently changed by SICA by amending Code Section 8 (Designation of the Number of Arbitrators),[111] Section 9 (Notice of Selection of Arbitrators), Section 10 (Challenges), and Section 12 (Disqualification or Disability of Arbitrators).[112] These amendments also provided for a hearing with a *single* arbitrator for claims between $25,000 and $50,000, unless either party requests three arbitrators; whereas, for claims over $50,000 (or where no dollar amount is claimed or

106. UNIF. CODE OF ARB. § 7(a), *infra* Appendix B.
107. *Id.* § 7(b); *see also supra* notes 77-90 and accompanying text.
108. Katsoris IV, *supra* note 24, at 497-501.
109. *Id.*
110. *Id.*
111. *Id.*
112. TENTH REPORT, *supra* note 34, at 4-5.

disclosed) three arbitrators will hear the case.[113]

In addition, the definition of a *securities industry arbitrator* has been expanded to include registered investment advisers, and the definition of who *will not be classified a public arbitrator* was broadened to include bank or financial employees engaged in, or supervising those engaged in, affecting transactions in securities.[114]

The most significant change in this series of amendments, however, is the method for the appointment of arbitrators. Previously the SRO selected the arbitrators.[115] The Code now provides that the parties may jointly select the arbitrators; otherwise, they are provided with two randomly generated lists of arbitrators—one of public arbitrators and one of security industry arbitrators—from the SRO's panel (list selection method).[116] Under the list selection method, if three arbitrators hear a case, a party may strike any or all of the names from the lists without providing an explanation; and, number in *order of preference* the remaining names on the lists, if any.[117] Arbitrators are invited to serve based upon the parties' mutual preference ranking.[118] In the event the forum cannot select the arbitrator from the names not

113. *Id.* Furthermore, on Feb 15, 2000, the SEC approved NASD Rule 10336 (Single Arbitration Pilot Program, effective May 15, 2000) which for a two year period allows parties with claims between $50,000.01 and $200,000 to voluntarily choose one arbitrator rather than a three-person panel. Securities Exchange Act Release No. 34-42426 (Feb. 15, 2000)A; *see also* NASD Regulation's THE NEUTRAL CORNER, July 2000, at 1.

114. TENTH REPORT, *supra* note 34, at 4-5.

115. *Supra* notes 108-110 and accompanying text.

116. UNIF. CODE OF ARB. § 9(a), *infra* Appendix B. If only one arbitrator hears the case, each party receives only a list of public arbitrators. *Id.* § 9(b).

117. *Id.* § 10(a)(2). "If one arbitrator hears a case, you may strike any or all of the names from the list without providing an explanation. In the event the forum cannot select the arbitrator from the names not stricken, then a second list will be submitted to the parties. The second list will contain three names. Each side shall be given one strike from the list without providing an explanation." *Id.* § 10(a)(1). The NASD has adopted a different version of list selection, whereunder, each party has unlimited challenges to the original list. If a three member panel is not in place after the parties strike the original list, then the NASD appoints the remaining needed panel members to which there are no automatic strikes, only those for cause. *See* Douglas J. Schulz, *The New NASD Arbitrator Selection Process*, SEC. ARB. COMMENTATOR, Mar. 1999, at 2.

118. TENTH REPORT *supra* note 34, at 4-5.

stricken, then a second list will be submitted to the parties. The second list will contain three names for each vacancy on the panel. Each side shall be given one strike per vacancy from the list without providing an explanation.[119] In the event of a subsequent vacancy, the vacancy will be filled from the parties' list of mutually acceptable arbitrators in order of the parties' indicated preferences.[120] If a full panel, or a vacancy thereon, cannot be appointed through this process, the Director of Arbitration appoints additional arbitrators.[121] If the parties have not used all of their strikes, they may use their unused strikes to challenge any arbitrator appointed by the Director of Arbitration.[122]

H. Disclosures Required by Arbitrators

At the outset, Section 11 required each arbitrator to disclose to the Director of Arbitration any circumstances that might preclude such arbitrator from rendering an objective and impartial determination.[123] After *McMahon*, the section was expanded to parallel Canon II of the Code of Ethics for Arbitrators in Commercial Disputes (Code of Ethics) by explicitly imposing a duty upon the arbitrator to disclose *any* potential conflict—an ongoing duty that continues throughout the proceeding.[124]

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119. UNIF. CODE OF ARB. § 10(a)(2), *infra* Appendix B; *see also* ELEVENTH REPORT, *supra* note 48, at 4.

120. ELEVENTH REPORT, *supra* note 48, at 4; TENTH REPORT, *supra* note 34, at 4-5.

121. UNIF. CODE OF ARB. § 9(d), *infra* Appendix B; TENTH REPORT, *supra* note 34 at 4-5.

122. *Id.* The NYSE has not formally adopted SICA's list selection method. Instead, it offers the parties several choices of arbitration selection methods, including permitting the parties by agreement to pick their own arbitrators. *See* Robert S. Clemente, *Securities Arbitration and Mediation 1999: The Changing Dynamics*, ABA Section of Dispute Resolution Course-book (Apr. 1999); *see also NYSE Arbitration Establishes Program to Offer Multiple Choices on Arbitrator Selection*, SEC. ARB. COMMENTATOR, Oct. 1998, at 7; David L. Carey, Letter to Editor, SEC. ARB. COMMENTATOR, May 1999, at 5.

123. SECOND REPORT OF THE SECURITIES INDUSTRY CONFERENCE ON ARBITRATION (Dec. 1978) at A-5 [hereinafter SECOND REPORT].

124. For example, the Code of Ethics requires that an arbitrator reveal any direct or indirect financial or personal interest in the outcome of the arbitration,

To facilitate this process, arbitrators receive a copy of the Arbitrators' Code of Ethics each time they are assigned to a case in order to highlight the types of disclosures required and also receive a copy of SICA's Arbitrator's Manual which was developed to instruct arbitrators concerning their duties and responsibilities.[125]

Section 11 was also expanded before *McMahon* to authorize the Director to remove an arbitrator before the commencement of the first hearing based upon information disclosed pursuant to the section[126]. This section was recently amended to permit removal of an arbitrator by the Director after hearings have commenced based upon information required to be disclosed, but not known to the parties when the arbitrator was selected.[127]

I. Commencement of Proceedings

1. Pleadings

Section 13 of the Code sets out the requirements for the commencement of an arbitration proceeding. Specifically, Section 13 enumerates the general pleading and service requirements regarding such items as the Statement of Claim, Submission Agreement, Answer, Counterclaim and/or Cross-claims, and

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and existing or past financial, business, professional, family, or social relationships, which are likely to affect impartiality or that might reasonably create an appearance of bias. Am. Arbitration Ass'n & Am. Bar Ass'n, Code of Ethics for Arbitration in Commercial Disputes (1977), available at http://www.adr.org [hereinafter Code of Ethics]; *see also* Constantine N. Katsoris, *The Level Playing Field*, 17 FORDHAM URB. L.J. 419, 437 (1989) [hereinafter Katsoris VI].

125. *Id.*; SECURITIES INDUSTRY CONFERENCE ON ARBITRATION, THE ARBITRATOR'S MANUAL (January, 2001) [hereinafter ARBITRATOR'S MANUAL]; *see also* Rosemary J. Shockman & John N. McKeegan, *Arbitrator Investigation and Selection*, in 1 Securities Arbitration 1995, at 605 (PLI Corp. Law & Prac. Course Handbook Series No. B-899, 1995); Karen Kupersmith, *A Perspective on the Role of the Arbitrator in Securities Arbitration*, 31 WAKE FOREST L. REV. 297 (1996).

126. *See* Katsoris VI, *supra* note 124 at 437.

127. *See* ELEVENTH REPORT, *supra* note 48, at 4.

Claims-over.[128] This section also permits joinder and consolidation, which would be initially ruled upon by the Director of Arbitration, leaving the ultimate decision to the arbitration panel.[129]

Moreover, in an effort to encourage meaningful and timely pleadings, this section empowers the arbitrators to bar evidence at a hearing: (i) where only a general denial was pleaded; (ii) where available defenses were not pleaded;[130] or (iii) where a party fails to file a timely answer.[131]

Following *McMahon*, and largely for purposes of paring escalating costs, SICA amended Section 13 to require the parties to serve upon each other all pleadings *after* the service of the Statement of Claim.[132] The SROs, however, continue to be responsible for serving the Statement of Claim.[133] Thereafter, the parties are required to serve all other parties with the other pleadings, and to file copies with the Director of Arbitration.[134] To facilitate this new procedure, Section 13(b) specifically permits service by mail or other means of delivery.[135]

SICA further amended Section 13(d) to parallel the language of Federal Rule of Civil Procedure 20(a) on permissive joinder.[136] It further clarified that multiple claimants may file together initially, eliminating the implication that filings must first be made separately and then later joined. [137] However, the Director of Arbitration is authorized to sever such claims.[138] Moreover, although the Code permits the Director of Arbitration to consolidate separately filed claims, it also clearly provides that the

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128. SECOND REPORT, *supra* note 123, at A-6 to A-7.

129. *Id.* at A-7.

130. FOURTH REPORT, *supra* note 38, at C-5 to C-6; *see also* UNIF. CODE OF ARB. § 13(c)(i), *infra* Appendix B.

131. FIFTH REPORT, *supra* note 31, at 33-34; *see also* UNIF. CODE OF ARB. § 13(c) (2) (iii), *infra* Appendix B.

132. SIXTH REPORT, *supra* note 40, at 8-9; *see also* UNIF. CODE OF ARB. § 13(a), *infra* Appendix B.

133. UNIF. CODE OF ARB. § 13(a), *infra* Appendix B.

134. *Id.* § 13(c).

135. *Id.* § 13(b).

136. *Id.* § 13(d)(1); *see also* FED. R. CIV. P. 20(a).

137. UNIF. CODE OF ARB. § 13(d)(2); *see also* Katsoris IV, *supra* note 24, at 438-39.

138. UNIF. CODE OF ARB. § 13(d)(2).

arbitrator(s) shall make all final determinations on issues of joinder and consolidation.[139]

Because the pleadings frame the areas of dispute, they should be complete, precise and written in simple English.[140] They are the arbitrators' first exposure to the case, so they should not ramble.[141] The *Statement of Claim* should be expressed in simple language and seek specific relief.[142] It should be concise, yet include sufficient details to convince the arbitrators that the various claims pleaded have substance and the facts alleged are accurate.[143] The damages sought should be clear and as well defined as possible. *Relevant* documents may be attached to the Statement of Claim to assist the arbitrators in understanding the claims.[144]

The *Answer* should be just that—an answer, not just a vague or general denial.[145] It should contain all available defenses.[146] The Answer is the respondent's opportunity to refute the claimant's allegations. It should tell the respondent's version, supplying pertinent information that the claimant neglected to provide.[147] Just as with the Statement of Claim, *relevant* documents may also be attached to the Answer if they will assist the arbitrators in understanding the respondent's side of the story.[148]

2. Acknowledgement of Pleadings by Arbitrators

Section 19 of the Code simply requires that the arbitrators acknowledge that they have read the pleadings filed by the

139. UNIF. CODE OF ARB. § 13(d)(3)-(4), *infra* Appendix B.

140. *See* Katsoris V, *supra* note 99, at 311.

141. Robert S. Clemente, *The Nuts and Bolts of Working Within the System: A Guide to Arbitration at the New York Stock Exchange*, PLI Securities Arbitration 1998: Redefining Practices and Techniques, Vol. 1 at 93.

142. *See* Katsoris V, *supra* note 99, at 311.

143. *Id.*

144. Documents that are irrelevant to the proceedings should not be attached to the pleadings, and in some circumstances can prove counterproductive. *See* Katsoris V, *supra* note 99, at 311.

145. *Id.* at 312.

146. *Id.*

147. *Id.*

148. *Id.*

parties.[149]

3. Amendment to Pleadings

The Code initially provided that amended pleadings would not be permitted after receipt of a responsive pleading without the consent of the arbitrators.[150] This was subsequently changed by establishing a procedure for amending pleadings after receipt of a responsive pleading, *but before the appointment of the arbitration panel.*[151] After *McMahon*, the section was further amended to shift the obligation to serve the new or different pleadings to the party making the changes. [152] Previously, that burden fell upon the Director of Arbitration.[153]

J. Representation by an Attorney

Originally, Section 15 simply provided that all parties have the right to representation by counsel.[154] This permitted parties to be assisted in their presentation at the hearing by anyone they chose, even if that person was not an attorney. For example, parties might choose to be represented by a relative or accountant. In 1991, however, SICA began to receive complaints that claimants were being represented in SRO arbitrations not by their friends, accountants, business associates, or relatives, but by professional groups who were not attorneys (Non-Attorney Representatives, or NARs).[155]

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149. UNIF. CODE OF ARB. § 19, *infra* Appendix B.

150. SECOND REPORT, *supra* note 123, at A-10; *see also supra* notes 130-131 and accompanying text.

151. FOURTH REPORT, *supra* note 38, at C-8; *see also supra* notes 130-131 and accompanying text.

152. SEVENTH REPORT OF THE SECURITIES INDUSTRY CONFERENCE ON ARBITRATION 19 [hereinafter SEVENTH REPORT]; *see also supra* notes 132-135 and accompanying text.

153. SIXTH REPORT, *supra* note 40, at 11.

154. SECOND REPORT, *supra* note 123, at A-8.

155. *Report of the Securities Industry Conference on Arbitration On Representation of Parties in Arbitration by Non-Attorneys*, 22 FORDHAM URB. L.J. 503, 505 (1995) [hereinafter NARs Report]; *SICA Report on Non Attorney Representations*, SEC. ARB. COMMENTATOR, June 1995, at 1; *see also Regulating*

For a variety of reasons, SICA first viewed this as a subject best handled at the state level.[155] The primary reason to leave this to the states is because attorneys general and bar associations have the principal responsibility for dealing with questions relating to business practices, standards and qualifications to practice law.[157] Therefore, they would be better suited to handle this multifaceted problem.[158] But the complaints persisted, and they raised questions as to whether customers were being adequately represented in SRO arbitrations. SICA felt obligated to address this thorny issue.[159]

1. NARs Report

Because of the enormous stakes and widely divergent opinions, SICA decided—for the first time in its history—to solicit public comment, as the SEC and other regulatory agencies do prior to adopting a rule, in order to elicit the view of the public and affected parties.[160] Accordingly, SICA held two special meetings at opposite ends of the country, at which numerous individuals and organizations appeared—including organizations of non-attorney representatives.[161] SICA listened, and in 1995 issued a report on Non-Attorney Representation in Arbitration ("NARs Report").[162] The NARs Report concluded that certain activities of non-attorney representatives ("NARs") constituted the practice of law and indeed might even constitute the unauthorized practice of law.[163] SICA also determined that some NARs made inaccurate and

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Nonlawyers, A.B.A. J., Oct. 1995, at 103.

156. NARs Report, *supra* note 155, at 505.

157. *Id.* at 515.

158. *Id.*

159. *Id.*

160. *Id.* at 505. An interesting development occurred in a California case, where a NAR consented to a permanent injunction whereby it, in essence, agreed not to commence any future arbitration proceedings against the brokerage firm and its employees. Sutro & Co. v. Richard L. Sacks, Case No. 965943, (Sup. Ct. of Cal. San Francisco Co., Nov. 17, 1995).

161. NARs Report, *supra* note 155, at 506; *see also SAC Report on Non-Attorney Representation*, SEC. ARB. COMMENTATOR, Jan. 1994, at 3-6.

162. NARs Report, *supra* note 155 at 507.

163. *Id.* at 522, 524.

misleading claims regarding successful recoveries[164] that raised questions under various state and federal advertising statutes or other consumer protection regulations.[165]

Accordingly, SICA sent the NARs Report to bar associations and to attorney licensing bodies, as well as the attorneys general and state regulatory officials with jurisdiction over advertising in each of the fifty states, the District of Columbia and Puerto Rico, and to the Federal Trade Commission.[166]

Finally, SICA amended Section 15 of the Uniform Code to provide that all parties have the right to be represented by an *attorney* (instead of by counsel, as previously provided).[167] SICA also added that: (i) issues regarding the qualifications of a person to represent a party in arbitration are governed by applicable law and should be determined by an appropriate court or other regulatory agency; and, (ii) in the absence of a court order, the arbitration proceeding shall not be stayed or[168] otherwise delayed pending resolution of such issues.[169]

Subsequent to the issuance of the NARs Report, the Florida Supreme Court ruled that compensated non-lawyer representation in securities arbitration constituted the unauthorized practice of law and enjoined "non-lawyers from representing investors in securities arbitration proceedings for compensation."[170] Moreover,

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164. *Id.* at 524

165. *Id.*; *see also* Michael Scionolfi, *Imperfect Advocate*, WALL ST. J., Nov. 14, 1995, at A1. "In a seductive pitch to injured investors who distrust lawyers, a firm led by former brokers – not lawyers – will represent you in your brokerage disputes, pledging low fees and high returns . . . But a group of IAS clients and former employees complained that the . . . investment recovery firm has instead found a variety of ways to take *them* to the cleaners." *Id.*

166. NARs Report, *supra* note 155, at 524.

167. NINTH REPORT OF THE SECURITIES INDUSTRY CONFERENCE ON ARBITRATION 3, 16 (June 1996) [hereinafter NINTH REPORT].

168. *Id.*

169. UNIF. CODE OF ARB. § 15, *infra* Appendix B.

170. The Florida Bar re: Advisory Opinion on Non-lawyer Representation in Securities Arbitration, 696 So. 2d 1178 (Fla. 1997). Indeed, the Florida Bar Standing Committee on the Unlicensed Practice of Law mulled prohibiting out-of-state lawyers from being the sole representative of a party in NASD cases. *See Florida Bar's UPL Committee Focuses on Out-of-State Attorney's Role in Securities Arbitration*, SEC. ARB. COMMENTATOR, May 1999, at 9; *Out-of-State*

the California Supreme Court held that a law firm that was not licensed to practice in California could not recover fees under a fee agreement for work done within California for a California client involving California law.[171] In addition, the Court found that to the extent the firm practiced law in California, it was engaged in the unauthorized practice of law.[172] The Court further noted that such prohibition extended to arbitration.[173]

Such restrictions on representation in securities arbitration, however, may further exacerbate the difficulty that investors with small claims experience in obtaining counsel. For some investors this may place them in the unenviable position of either having to choose between abandoning their claim altogether, or representing themselves on a *pro se* basis.[174]

2. Clinical Representation

In a separate but related development, then SEC Chairman Arthur Levitt, in an attempt to help small investors, suggested that clinical programs could be developed at local law schools to render assistance by providing representation to investors with small claims.[175] In a cooperative effort, the SEC met with representatives of SICA, several law schools in New York City, and the

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Attorneys, SEC. ARB. COMMENTATOR, Mar. 1999, at 14.

171. Birbrower, Montalbano, Condon & Frank v. Superior Court, 949 P.2d 1, 10 (Cal. 1998); *see Licensing Attorneys for Arbitration Practices*, SEC. ARB. COMMENTATOR, Jan. 1998, at 16; *California Birbrower Bill Signed into Law; Anti-Arbitration Bill Vetoed*, SEC. ARB. COMMENTATOR, Oct. 1998, at 9. The Birbrower bill provided a procedure for non-resident attorneys who are not licensed to practice in California to appear in California arbitration proceedings. *Id.*

172. Birbrower, at 1-3; *see also* Tamara Loomis, *Unauthorized Practice, Many Lawyers Do Not Know They Are in Violation*, N.Y. L.J., Mar. 29, 2001 at 5.

173. Birbrower, at 1-3.

174. Constantine N. Katsoris, *Securities Arbitration: A Clinical Experiment*, 25 FORDHAM URB. L.J. 193, 199 (1998) [hereinafter Katsoris VII].

175. *Id.* at 202; *see also* Diana B. Henriques, *Aid for the Little Guy in Securities Arbitration*, N.Y. TIMES, Oct. 4, 1998, § 3 p 8; Press Release, Securities Exchange Commission, SEC Announces Pilot Securities Arbitration Clinic To Help Small Investors; Levitt Responds To Concerns Voiced At Town Meeting (Nov. 12, 1997).

Association of the Bar of the City of New York (Bar Association).[176] As a result, it was agreed that the Bar Association would screen potential cases and either refer the aggrieved investor to an attorney or, if counsel could not be obtained, to a participating law school clinic.[177] While still in its early stages, this clinical initiative is also under consideration in several cities outside New York.[178]

K. Designation of Time and Place of Hearing

Section 14 of the Code initially provided that "[u]nless the law directs otherwise," the Director of Arbitration determines the time and place for the initial hearing upon notice of at least eight (presently fifteen) business days.[179] Thereafter, the arbitrators would determine the time and place of subsequent hearings.[180]

Subsequent to *McMahon*, SICA eliminated the reference *unless the law directs otherwise* so as to nullify selection of hearing provisions incorporated into brokerage contracts. This prevents a member firm from unfairly controlling the selection of a hearing location, and thereby causing the customer to bear unreasonable expense to pursue a claim.

L. Pre-hearing Procedures

Section 20 of the Uniform Code now incorporates the subject matter originally found in Code Sections 20 (Subpoena Process) and 21 (Power to Direct Appearances).[181] Originally, the Code provided that the parties were expected to voluntarily exchange documents as would "serve to expedite the arbitration" without

176. Katsoris VII, *supra* note 174 at 202.

177. *Id.*; *see also* Victoria Rivkin, *Help For Small Investors; Clinics Provide Guidance on Arbitratiing Claims*, N.Y. L.J., Oct. 22, 1998 at 5.

178. *Id.; see* Katsoris VII, *supra* note 174 at 202-03 n. 60. *See also* ELEVENTH REPORT, *supra* note 48 at 5.

179. SECOND REPORT, *supra* note 123, at A-8. The period for notification was increased from 8 business days to 15 at SICA's September, 1995 meeting. UNIF. CODE OF ARB. § 14, *infra* Appendix B.

180. UNIF. CODE OF ARB. § 14, *infra* Appendix B.

181. *Id.*

establishing any mechanism to ensure cooperation in production.[182] Accordingly, some parties did not produce documents until the day of the hearing. Such practice was patently unfair and often resulted in trial by ambush.[183]

Admittedly, arbitrators always had the inherent authority to resolve discovery disputes in advance of the hearing.[184] Indeed, even before *McMahon*, some SROs forwarded discovery disputes to arbitrators prior to hearings on the merits, giving the panel the authority to resolve discovery issues in advance of the first hearing.[185] On the other hand, some arbitrators, particularly those who were not attorneys, were reluctant to exercise such powers without specific authorization in the Uniform Code.[186]

After *McMahon*, SICA decided to codify the informal practice of some SROs to get the arbitrators involved in discovery disputes before the first hearing.[187] Accordingly, in addition to merging the old Sections 20 and 21 into the present Section 20, SICA added specific provisions relating to pre-hearing conferences, and procedures for pre-hearing document and information production.[188]

Under the revised Section 20, a request for documents or information may be served as soon as twenty business days after service of the Statement of Claim.[189] If a party objects or fails to honor a request, a pre-hearing conference may be requested to resolve the impasse.[190] In order to eliminate protracted and unnecessary bickering over the production of documents considered customary and ordinary, it was suggested that basic lists be created of documents that must be automatically produced.[191]

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182. Katsoris IV, *supra* note 24, at 511.
183. *Id.* at 511.
184. *Id.* at 512.
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*
191. *See* SYMPOSIUM, NEW YORK STOCK EXCHANGE, INC. SYMPOSIUM ON ARBITRATION IN THE SECURITIES INDUSTRY, 63 FORDHAM L. REV. 1495, 1551-61 (1995) [hereinafter NYSE SYMPOSIUM]; RUDER REPORT, *supra* note 85, at 82-83;

Although such lists are helpful, it is the arbitrators who must ultimately decide what is to be produced.[192]

Section 20 further authorizes a sole arbitrator to act on behalf of the panel to issue subpoenas and to set deadlines for compliance with discovery orders.[193] Moreover, the section provides that prior to the initial hearing date, the parties are required to exchange the names and business affiliations of witnesses and the documents they intend to use in their direct case at least 20 days before the first scheduled hearing date. In addition, a list for the production of such documents and witnesses must also be served on the Director of Arbitration,[194] and all parties to a dispute are to receive copies of any subpoenas issued.[195]

In practice, some of the pre-hearing proceedings are conducted by conference call. Although a conference call may be less expensive and more convenient, it is not always the most productive method, particularly in a large or complex case involving several parties. In that case, it is often more effective if the arbitrator overseeing the discovery orders a formal face to face hearing. The best hope for preventing these procedures from dragging out and increasing the cost of the proceedings (as often happens in court litigation) is to have experienced and knowledgeable arbitrators who do not let matters get out of hand. Indeed, in appropriate cases, sanctions should be considered.[196]

Section 20 also permits the sole arbitrator selected for these pre-hearing proceedings to refer any issue to the full panel.[197] In the appropriate cases, the sole arbitrator should not hesitate to do

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83 ; *see also NASD Files Discovery Guide Proposal for Use in NASD Arbitrations*, SEC. ARB. COMMENTATOR, Apr. 1999, at 8, 12-13; ARBITRATOR'S MANUAL, *supra* note 125 at 11-15. In October 1999, the NASD made available a Discovery Guide for use in customer cases, which includes Document Production Lists that provide guidance to parties on which documents they should presumptively exchange without arbitrator or staff intervention, and guidance to arbitrators in determining which documents parties should produce in customer arbitrations. ARBITRATOR'S MANUAL, *supra* note 125 at 11-15.

192. Katsoris V, *supra* note 99, at 2.

193. Katsoris IV, *supra* note 24, at 512.

194. *Id.* at 512-13.

195. *Id.* at 13.

196. *Id.*

197. *Id.*

so because many of the same issues may again resurface before the entire panel during the hearings.[198] Moreover, although the Code omits any reference to *pre-hearing depositions*, the circumstances under which the arbitrators may order such depositions are discussed in SICA's Arbitrator's Manual.[199]

On the whole, these new pre-hearing procedures enhance the arbitration process, although they may initially involve some additional expense and delay. However, these burdens are more than counter-balanced by the equitable consideration of preventing undue surprise and possible prejudice to either party once the hearings on the merits begin. In fact, the resolution of such disputes before the first hearing ultimately saves time and expense, for it sets the tone for orderly hearings.[200]

M. Hearings

1. Attendance at Hearings

The Uniform Code provides that except for parties and their attorneys, the arbitrators decide the attendance or presence of other persons at the hearings.[201] In addition, the Code provides that a hearing be held and an award rendered despite the fact that a party fails to appear at a hearing, after due notice was given.[202]

2. Record of Proceedings

Initially, the Code did not require that a record of arbitration

198. *Id.* Such a scenario also avoids the potential of a disgruntled party seeking review before the entire panel of an adverse discovery ruling by a sole arbitrator.

199. ARBITRATOR'S MANUAL, *supra* note 125, at 10. For example, to preserve the testimony of ill or dying witnesses, or of persons who are unable or unwilling to travel long distances for a hearing and may not otherwise be required to attend the hearing. *Id.*

200. Katsoris IV, *supra* note 24, at 513.

201. UNIF. CODE OF ARB. § 16, *infra* Appendix B.

202. *Id.* § 17; *see also* Constantine N. Katsoris, *I Won't Sit Without a Record*, SEC. ARB. COMMENTATOR, Sept. 1990, at 1 [hereinafter Katsoris VIII].

proceedings be kept,[203] but after *McMahon,* Section 24 was amended to require that a verbatim record of all proceedings be kept either by stenographic reporter or tape recording.[204] The flexibility to select the method of recording takes into account the significant cost differential between a stenographic record and a tape recording. Nevertheless, in a multi-session proceeding spanning over a long period of time, a stenographic record is preferable, because it more easily enables the arbitrators to refresh their recollection of past testimony.[205]

3. Oaths of Arbitrators and Witnesses

Section 25 provides that the oath or affirmation shall be administered to the arbitrators before the first session and that all testimony shall be under oath or affirmation.[206]

4. Adjournments

At the outset, Section 18 merely authorized arbitrators to grant adjournments.[207] Unfortunately, the issue of adjournments became a chronic problem. A horseback survey at several of the SROs revealed that many of the cases had their first hearing date adjourned after the panel had already been appointed.[208] Indeed, even this first adjourned date was often subsequently adjourned one or more additional times before the first actual hearing was held.

Even though all the parties may have stipulated to such adjournments, they still have a crippling effect on the arbitration process. Such repeated adjournments often result in having to replace arbitrators (who have already cleared the selection process),[209] because of their unavailability on the new adjourned

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203. Katsoris IV, *supra* note 24, at 514.

204. At the NSYE the proceedings are recorded by stenographic reporter, whereas at the NASD they are taped.

205. Katsoris IV, *supra* note 24, at 514.

206. *Id.* at 515.

207. SECOND REPORT, *supra* note 123, at A-8.

208. Katsoris IV, *supra* note 24, at 509.

209. *See supra* notes 108-122 and accompanying text.

date or dates. This causes additional delay, because the SRO staff must then seek a replacement arbitrator or arbitrators, who also have to clear the challenge and conflict hurdles *de novo.* Moreover, such repeated adjournments discourage many excellent and qualified arbitrators from serving, either because it results in their replacement after having already qualified, or because of the inconvenience of having to block out dates only to have them subsequently cancelled through adjournments.

In addition, these seemingly harmless adjournments undercut the two advantages of arbitration—speed and economy. First, each adjournment delays resolution of the arbitrated matter. Second, adjournments make the arbitration process more expensive for both the parties and the hosting arbitration forum.

Before *McMahon*, SICA addressed this problem by amending Section 18 to provide that if a party requested an adjournment (after the arbitrators had already been appointed) and the adjournment was granted, that party had to pay a fee equal to the initial deposit of costs, but not to exceed $100.[210] As time went on, it became evident that this penalty was not a sufficient deterrent. Accordingly, after *McMahon,* SICA amended subdivision (b) of Section 18 by providing not only for increased and escalating fees (up to $1,000), but also making them mandatory at the time of the request, unless waived by the Director of Arbitration.[211] Although agreeing with the goal of eliminating needless adjournments, the majority of the Public Members of SICA did not support this amendment because it made the significantly increased fee a *condition precedent* (unless waived by the Director) to *seeking* an adjournment from the arbitrators, which could impose a severe hardship on many public claimants.[212]

5. Evidence

Section 21 provides that arbitrators determine the materiality and admissibility of evidence.[213] As a result, the Federal Rules of

210. Katsoris IV, *supra* note 24, at 510.
211. *Id.*
212. *Id.* at 510-11.
213. UNIF. CODE OF ARB. § 21, *infra* Appendix B.

Evidence, or state evidentiary rules do not bind arbitrators.[214] Nevertheless, it should be kept in mind that although the grounds for vacating an arbitration award are limited under the Federal Arbitration Act, one such ground is that the arbitrators unreasonably refused to hear relevant or material evidence.[215] Accordingly, although arbitrators are not strictly bound by the Federal Rules of Evidence, most arbitrators adhere to some reasonable semblance thereof, often leaning in favor of inclusion rather than exclusion.

6. Reopening of Hearings

Section 27 of the Code authorizes the arbitrators, where permitted by law, to reopen the hearings on their own motion, or in the discretion of the arbitrators (upon application of a party), at any time before the award is rendered.[216] Although the Code is silent on the grounds for such re-opening, they should include such circumstances as perjured or coerced testimony.[217]

N. Rulings of Arbitrators and Awards

1. Interpretation of Code and Enforcement of Arbitrators' Rulings

Section 22 has always provided that arbitrators have the final authority to interpret the provisions of the Code.[218] After *McMahon*, however, it was amended to specifically empower the arbitrators to take appropriate action to obtain compliance with their rulings, including, but not limited to, imposing sanctions pursuant to Section 5 of the Code.[219]

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214. Katsoris IV, *supra* note 24, at 513-14.
215. *Id.* at 514.
216. Katsoris IV, *supra* note 24, at 515.
217. *Id.* at 515-16.
218. *Id.* at 514.
219. *Id.*

2. Determinations of Arbitrators

The Code has always provided that the rulings and determinations of the panel shall be made by a majority of the arbitrators.[220]

3. Awards

Section 28 basically provides that: (i) all awards must be in writing and signed by a majority of the arbitrators;[221] (ii) all awards are deemed final and not subject to review or appeal, except as provided by law;[222] and, (iii) arbitrators should endeavor to render the award within thirty business days from the date the record was closed.[223] Section 28 also prescribes the manner in which the Director of Arbitration is to serve the award on the parties.[224] After *McMahon*, the section was expanded to require that the award be made publicly available and include summary data, such as a description of the issues in controversy and the amounts claimed and awarded.[225] This data is available to the public from various vendors in accordance with the policies of the sponsoring SRO.[226]

The section, however, does not go so far as to require the arbitrators to issue written opinions—*although they are free to do so*.[227] At first blush, this may appear to be a weakness in the Code and of SRO arbitration. The basic argument in favor of written opinions is that they give insight to the parties as to the rationale

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220. UNIF. CODE OF ARB. § 23, *infra* Appendix B; *see also* Tom Wynn, *Handling Key Procedural Issues – The Chairperson's Role*, NASD Regulation's THE NEUTRAL CORNER, Aug. 1996, at 3.

221. UNIF. CODE OF ARB. § 28(a), *infra* Appendix B.

222. *Id.* at § 28(b).

223. *Id.* at § 28(d).

224. *Id.* at § 28(c).

225. Katsoris IV, *supra* note 24, at 516.

226. *Id.*; *see also Award Report*, SEC. ARB. COMMENTATOR, June 1989, at 6-7; *Award Report*, SEC. ARB. COMMENTATOR, Oct. 1989, at 2-7. Indeed, some awards are analyzed and commented upon. *Award Report*, SEC. ARB. COMMENTATOR, Oct. 1989, at 8-10; *see also NYSE Awards on WebSite*, SEC. ARB. COMMENTATOR, Mar. 1999, at 14.

227. Katsoris IV, *supra* note 24, at 516.

for the award,[228] and help the parties in formulating opinions about arbitrators with a view towards exercising their preferences or challenges in the future.[229] Interestingly, a Federal Appellate Court noted the absence of a written opinion to explain the arbitrators' ruling in overturning an arbitration award on the theory of manifest disregard of the facts by the arbitration panel.[230] Although this court did not recommend written opinions in all cases, it did suggest one would be advisable if there was a probability of a reviewing court finding manifest disregard.[231]

On the other hand, *requiring* written opinions would certainly delay the rendering of awards, as they often are arrived at on the basis of consensus.[232] For example, assume three arbitrators (A, B and C): (i) initially separately estimate damages of $10,000, $20,000 and $30,000, respectively; (ii) ultimately agree on a consensus $20,000 award; and, (iii) when they write the opinion, arbitrator A bases the award on unsuitability, arbitrator B on churning, and arbitrator C on unauthorized trading. Can arbitrators A, B and C realistically issue a reasoned award for $20,000, even though they totally disagree on the reasons? Moreover, would they? Nor would opinions necessarily enhance the cause of fairness.[233] Indeed, requiring such opinions might even result in fewer awards in favor of claimants based upon general equity grounds,[234] and would put additional pressure on already strained SRO staffs, while drafts of written opinions are circulated and re-circulated among the various arbitrators for corrections, redrafts, and finalization.[235]

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228. *Id.*

229. *See supra* notes 10808-22 and accompanying text.

230. Halligan v. Piper Jaffray, Inc., 148 F.3d 197 (2d Cir. 1998), *cert. denied*, 526 U.S. 1034 (1999).

231. *Id.* at 204; *see also* Philip J. Hoblin, Jr., *Assessing Halligan Manifest Disregard of the Facts*, SEC. ARB. COMMENTATOR, Apr. 1999, at 6 (arguing that the Halligan case will invite increased challenges and pressure arbitrators to write reasoned opinions); Clemente, *supra* note 80, at 90-92.

232. Katsoris IV, *supra* note 24, at 516.

233. *Id.* at 517.

234. *Id.*

235. *Id.* It must also be kept in mind that not all arbitrators share a common background, i.e., some may be lawyers, accountants, brokers, bankers, business executives, etc.

It is more likely that instead of being a window into the rationale of arbitrators, a written opinion will be used as a platform and blueprint for many more appeals, because it identifies or magnifies targets, meaningful or otherwise, for the losing party to attack.[235] Such appeals are both costly and time consuming and ultimately result in undue delay in the payment of any award.[237]

One area, however, where a written opinion may be advisable is in the case of punitive damages, because of its unusual nature. In this regard, it would appear that specific findings explaining the basis of the award of punitive damages are desirable, so that the offending party and an appellate court can better understand the rationale behind the unusual punishment being meted out.[238]

4. Payment of Awards

Undue delay in the payment of an award is particularly injurious to the small investor, who may have an immediate need for money. SICA was concerned that some brokers unduly delayed payment of awards issued against them. Accordingly, after *McMahon*, Section 28 was amended to require that all monetary awards be paid within thirty (30) days of receipt, (unless a motion to vacate has been filed with a court of competent jurisdiction) and shall bear interest from the date of the award.[239] This payment requirement is a distinct advantage over court-litigated awards, or those issued at non-SRO forums, which lacks disciplinary authority over the broker/dealer. Nevertheless, non-payment or partial payment of awards has remained somewhat of a problem, principally because of defunct broker-dealers.[240]

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236. *Id.*

237. *Id.*; *see also* Norman S. Poser, *Judicial Review of Arbitration Awards: Manifest Disregard of the Law*, 64 BROOK. L. REV. 471 (1998) (discussing the "manifest disregard of the law" standard used in the Halligan case).

238. *See* Katsoris IV, *supra* note 24, at 518.

239. At one point, SICA also considered the inclusion of a bond or escrow requirement in the Uniform Code to insure such prompt payment, but abandoned the idea because it seemed unduly burdensome. *Id.*

240. *Id.*; *GAO 2000 Securities Arbitration Review*, SEC. ARB. COMMENTATOR, Sept. 2000, at 1. There have been particular difficulties with NASD awards, and in an attempt to alleviate the problem, NASD Notice 00-55 was sent to its

5. Scope of Award

In 1992, subdivision (h) was added to Section 28 of the Uniform Code which sought to clarify the extent of arbitrators' authority by providing that "*arbitrator(s) may grant any remedy or relief that the arbitrator(s) deem just and equitable and that would have been available in a court with jurisdiction over the matter.*"[241]

Despite this clear mandate that arbitrators can grant any remedy or *relief*, in 1996 the RUDER REPORT[242] recommended the imposition of an inflexible cap on punitive damages of two times compensatory damages, or $750,000, *whichever is less* (rigid cap rule).[243] In spite of significant opposition, the NASD submitted the rigid cap rule in a 19(b) filing with the SEC.[244] In comparison, no other SRO, nor the AAA has placed, or is considering, a similar cap on punitive damages.[245]

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members outlining procedures aimed at monitoring the collection of such awards. *Id; see also NASDR to require Certification of Compliance with Arbitration Awards*, 32 BNA Federal News No. 35, at 1192.

241. UNIF. CODE OF ARB. § 28(h), *infra* Appendix B (emphasis added).

242. In the fall of 1994, the NASD announced the formation of an Arbitration Task Force ("Ruder Committee" or "Task Force") to explore and propose broad reforms to the arbitration process, including the contentious issue of punitive damages. In early 1996, the Ruder Committee issued its report ("RUDER REPORT") which was over 150 pages in length and contained scores of recommendations—most of them quite constructive. Constantine N. Katsoris, *Ruder Report Is a Delicate Compromise*, 14 ALTERNATIVES 29 (Mar. 1996) [hereinafter Katsoris IX]; *see supra* notes 85 and 191 and *infra* note 283.

243. Constantine N. Katsoris, *The Betrayal of McMahon*, 24 FORDHAM URB. L.J. 221, 225 (1997) [hereinafter Katsoris X]; *see also* Constantine N. Katsoris, *Punitive Damages In Securities Arbitration: The Tower of Babel Revisted*, 18 FORDHAM URB. L.J. 573 (1991) [hereinafter Katsoris XI].

244. Thomas J. Stipanowich, *Punitive Damages and the Consumerization of Arbitration*, 92 NW. U. L. REV. 1 (1997). *But see* David S. Ruder, *Securities Arbitration in the Public Interest: The Role of Punitive Damages*, 92 NW. U. L. REV. 69 (1997); Richard E. Speidel, *Punitive Damages and the Public Interest Model of Securities Arbitration: A Response to Professor Stipanowich*, 92 NW. U. L. REV. 99 (1997).

245. Katsoris X, *supra* note 243, at 225. Although distinguishable from the rigid cap rule, it is of some interest that the United States Supreme Court in *Pollard v. Dupont* recently overturned a cap ($300,000) on certain damages workers can be awarded in cases involving mistreatment in the workplace. *Pollard v. Dupont*, 2001 U.S. LEXIS 4123 (June 4, 2001). *See* Robert S.

From the investor's point of view, a rigid limit of $750,000 is totally inadequate in situations involving large compensatory awards. Curiously, the Ruder Task Force sought to justify its two tiered cap, *whichever is lower*, saying that it "will protect broker-dealers from "runaway" awards that have *no relationship* to compensatory damages."[245] Yet, the Task Force failed to apply this *same* standard to its own proposed remedy. For example, what *relationship* does a $750,000 punitive damages award have to a *$20 million* compensatory award?

The conventional wisdom supporting the Supreme Court's broad embracement of arbitration in *McMahon* was the idea that an investor may *obtain in arbitration the same relief available in court.*[247] Not only does the RUDER REPORT's rigid cap rule ignore that mandate;[248] but, more importantly, by using the SRO rules as the vehicle for its enforcement it undermines the public's confidence in the fairness of SRO arbitration by rekindling the perception that the SRO process was *stacked against the public investor.*[249]

Greenberger, *Cap Is Lifted On Some Job-Bias Damages*, WALL ST. J., June 5, 2001 at A3.

246. RUDER REPORT, *supra* note 85, at 43 (emphasis added).

247. Katsoris X, *supra* note 243, at 229.

248. Leslie Eaton, *Arbitration Rules Would Give Some Take Some*, N.Y. TIMES, Nov. 17, 1996, at F3 (statement of Linda Feinberg, Esq., Reporter to Ruder Committee). "[T]he new rules are supposed to make sure investors can get in arbitration what they can get in court." *Id. (internal quotations omitted)*; *see also* NYSE SYMPOSIUM, *supra* note 191, at 1495. "Limitations on what arbitrators can do that are not parallel to what judges can do would be hostile to arbitration as a full alternative dispute resolution system." *Id* at 1532. (statement of Catherine McGuire, Esq., Chief Counsel, Market Regulation of the SEC). In addition, "[the FAA] prohibits enforcement of a contractual provision that limits remedies available to customers if the remedies are available in court." *Id.* at 1584. "The way arbitration was sold to both the Supreme Court and the SEC was that essentially you have the same rights in arbitration as you would have in court." *Id.* at 1523 (statement of Boyd Page, Esq. one of the members of the Ruder Committee); Exchange Act Release No. 34-26805, 43 SEC Docket 1417, 1427 (1989). "Agreements cannot be used to curtail any rights that a party may otherwise have in a judicial forum. If punitive damages, or attorneys' fees would be available under applicable law, then the agreement cannot limit parties' rights to request them, nor arbitrators' rights to award them." *Id.*

249. *See* Shearson American Express, Inc. v. McMahon, 482 U.S. 220, 261

After over two years had elapsed after the NASD's filing of the rigid cap rule (with no SEC approval),[250] the NASD (in the spring of 1999) issued a new 19(b) filing (permissive cap rule).[251] Although the permissive cap rule did not directly *impose* a rigid cap, it nevertheless *permits* NASD members to insert punitive damage caps that are *not more restrictive* than the rigid cap rule. Thus, the NASD is attempting to do indirectly through the permissive cap rule what it originally sought to do through its moribund rigid cap rule. Unfortunately, the result to the public is the same.[252]

Interestingly, perhaps some of the securities industry's anxiety about runaway punitive damage awards will be assuaged by the Supreme Court's recent decision in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*[253] In reversing the lower court's affirmation of a punitive damage award, the Court in *Cooper*

(1987) (Blackmun, J., dissenting). "The uniform opposition of investors to compelled arbitration and the overwhelming support of the securities industry for the process suggest that there must be *some* truth to the investors' belief that the securities industry has an advantage in a forum under its own control. *See* N.Y. TIMES, Mar. 29, 1987, at C8 (statement of Sheldon H. Elsen, Chairman, American Bar Association Task Force on Securities Arbitration: 'The houses basically like the present system because they own the stacked deck')." *Id.; see also* Thomas J. Stipanowich, *Punitive Damages in Arbitration: Garrity v. Lyle Stuart, Inc. Reconsidered*, 66 B.U. L. REV. 953 (1986).

250. Joel E. Davidson, *The Case for Mandatory Mediation of Securities Disputes*, SEC. ARB. COMMENTATOR, Dec. 1998, at 1. Indeed, the rigid cap rule proposed by the Ruder Task Force "appears to be dead." *Id.*

251. Constantine N. Katsoris, *Riding The Trojan Horse Back To Wilko?*, SEC. ARB. COMMENTATOR, July 1999, at 1. [hereinafter Katsoris XII]

252. *Id.* Should the permissive cap rule be approved by the SEC, it is probable that the entire securities industry would adopt it, for no general counsel would subject his or her firm to unnecessary exposure. *Id.*

253. 121 S. Ct. 1678 (2001); *see also* Brian F. McDonough, *Toward a New Standard of Review of Punitive Damage Awards in Arbitration*, SEC ARB. COMMENTATOR, June 2001, at 1. "[A]s the law in this area continues to evolve, brokerage firms and other providers of financial services may wish to consider modifying their arbitration agreements to provide that any award of punitive damages in arbitration shall be subject to full independent and de novo review, notwithstanding any other standards of review that may exist under the Federal Arbitration Act or applicable law." McDonough at 4; David G. Savage, *Slicing Punitives*, ABA Journal, July 2001, at 22.

reasoned that the Court of Appeals below should have applied a *de novo* standard of review when passing on the District Court's determination of the constitutionality of the jury's punitive damage award ($50 thousand compensatory vs. $4.5 million punitive damages) instead of applying the less demanding abuse-of-discretion standard.[254] It is not entirely clear, however, whether the Supreme Court's rationale in *Cooper* will extend to punitive damages awarded in arbitration, where the typical grounds for vacating an arbitration award are generally quite narrow.[255]

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254. *Id.; see also* Tony Mauro, *Businesses Win Big on Punitive Jury Awards*, N.Y.L.J., May 15, 2001, at 1. "The Ninth Circuit upheld the verdict under the 'abuse of discretion' standard, but the Supreme Court said it 'might well have' reached a different conclusion if it had conducted a more exacting de novo review - for example, comparing the verdict with other punishments under state law for unfair trade practices." Mauro at 8.

255. A. Goldberg, *A Supreme Court Justice Looks at Arbitration*, 20 ARB. J. 63 § 6.03 at 61 (1965). The typical grounds for vacating an arbitration award are: 1) an undisclosed relationship between the arbitrator and a party or his counsel affected the arbitrator's impartiality or appearance of impartiality; 2) an arbitrator was corrupt; 3) the arbitrators did not schedule or conduct the hearing in a fair and judicious manner; and 4) the arbitrators granted relief that they were not authorized to grant under the contract pursuant to which the arbitration was held. *See id.* § 66.03 at 63; *see also* Section 10 of the United States Arbitration Act, 9 U.S.C. § 10 (1982); B.N. Smiley, *Stockbroker-Customer Disputes: Making a Case for Arbitration*, 23 GA. ST. BAR J. 195 (1987). Accordingly, although courts will not generally set aside an arbitration award for a mistake of law, they will so vacate where the arbitrators have acted in "manifest disregard" of the law. "Manifest disregard" of the law is a judicially created ground for vacating an arbitration award even though not specifically listed under section 10 of the Federal Arbitration Act, (9 U.S.C. § 10). Katsoris XI, *supra* note 243, at 599; *see also* Merrill Lynch, Pierce, Fenner & Smith v. Bobken, 808 F.2d 930 (2d Cir. 1986); Halligan v. Piper Jaffra y, 148 F.3d 197 (2d Cir. 1998), where the court seemingly expanded the manifest disregard of the law standard to manifest disregard of the facts. "We want to make clear that we are not holding that arbitrators should write opinions in every case or even in most cases. We merely observe that where a reviewing court is inclined to find the arbitrators manifestly disregarded the law *or the evidence* and that the explanation, if given, would have strained credulity, the absence of explanation may reinforce the reviewing court's confidence that the arbitrators engaged in manifest disregard." (emphasis added). *Id.* at 204.

O. SRO Arbitration Fees

Section 30 sets forth the schedule of fees and deposits for arbitration, which can be specifically waived by a Director of Arbitration. These fees have varied and increased over the years.[256] Most SROs have, to date, subsidized the process. As the forums' costs have increased, however, whispers have been heard that SRO arbitration should be put on a self-sustaining, pay-as-you-go basis. If that becomes a reality, arbitration no longer would be the relatively inexpensive alternative to courtroom litigation where a lawsuit can be filed at the courthouse for a relatively modest amount.[257] *Such an escalation in costs understandably would lead to renewed efforts that securities claimants no longer be subject to mandatory pre-dispute arbitration agreements, and customers be free to pursue their claims in court.*

P. Large and Complex Cases

Although the Uniform Code does not specifically deal with

256. The NASD was granted permission to increase its fees. *See NASD Fee Hikes and Increased Honoraria Approved by SEC*, SEC. ARB. COMMENTATOR, Mar. 1999, at 13; NASD Regulation, Code of Arbitration Procedure, May 1999, 47-50. Moreover, the NASD submitted a 19(b)(4) filing seeking SEC approval to spin off arbitration to a wholly-owned and self-supporting subsidiary. Self-Regulatory Organizations Notice of Filing of Proposed Rule Change by the Nation Association of Securities Dealers, Inc. Relating to the Creation of a Dispute Resolution Subsidiary, Exchange Act Release No. 34,41510, 64 Fed. Reg. 32,575 (June 10, 1999). Such a subsidiary company "under the umbrella of the [NASD] became operational as a separate company on July 9, 2000". NASD Regulation's THE NEUTRAL CORNER, Nov. 2000, at 1.

257. *See* Anthony Michael Sabino, *Ruling Promotes Arbitration, Warns of Costs*, N.Y. L.J., Jan. 5, 2001 at 1. In commenting on the United States Supreme Court's recent decision in *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000), it cautioned: "Be forewarned, however, that the totality of the Supreme Court's majority and dissent make clear that parties seeking to enforce arbitration from the outset must have taken basic steps to make clear in their arbitration clauses the who, what, and where of the ADR process, *and now, by virtue of Randolph, what it shall cost and who will pay for it.*" *Id.* at 6 (emphasis added); *see also* Caroll E. Neesemann, *High Court Raises Standards*, ABA DISPUTE RESOLUTION MAGAZINE, Winter 2001, at 18; *Green Tree: Appealability & Affordability*, SEC. ARB. COMMENTATOR, Apr. 2001 at 1.

large and complex cases, SICA revised its Procedures Booklet to describe some additional services that are available at various SROs to deal with such cases, including: requests for findings of fact and conclusions of law; expedited hearings; the appointment of arbitrators with special qualifications; and, block-scheduling of hearing dates.[258] Parties seeking such special or additional services should advise the sponsoring SRO at the earliest possible time.

O. Tracing Uniform Code into SRO Codes

The Uniform Code of Arbitration represents a major step in the development of securities arbitration as a fair, economical and expeditious dispute resolution process. It also represents a significant effort to make the securities arbitration rules of the various SROs uniform throughout the country. It should be noted, however, that once SICA adopts a new rule, each SRO generally goes back to their respective organizations for Board approval and, if successful, such rule is then submitted to the SEC for approval in a Rule 19(b) filing.[259] Accordingly, there is often a time lag time between SICA's approval and SRO action, with the result that the SRO codes do not mirror the SICA Code.[260]

Unfortunately, not *all* sections of the Code have been adopted by the SROs. For example, *no* SRO code has adopted the SICA requirement that the predispute arbitration clause be separately initialed,[261] nor has any SRO adopted SICA's rule that arbitrators may grant "any relief they deem just and equitable."[262] Even more troublesome, however, is when SROs *affirmatively* bypass SICA

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258. Katsoris IV, *supra* note 24, at 522 - 23.

259. Katsoris II, *supra* note 14, at 364 n. 19. Under section 19(b) of the 1934 Act, each self-regulatory organization shall file with the SEC any proposed rule or change in the rule of such self-regulatory organization. 15 U.S.C. § 78s(b)(1). Moreover, no such "proposed rule change shall take effect unless approved by the Commission or otherwise permitted in accordance with the provisions of this subsection." *Id.*

260. *Id.*

261. UNIF. CODE OF ARB. § 31, *infra* Appendix B; *see* SEVENTH REPORT, *supra* note 152, at 23; *see also supra* notes 58-60 and accompanying text.

262. UNIF. CODE OF ARB. § 28(h), *infra* Appendix B; *see* NYSE SYMPOSIUM, *supra* note 191, at 1573; *see also supra* note 241 and accompanying text.

and pursue significant rule changes on their own.[263] This is particularly unfortunate since through its Public Members, together with the SEC's oversight role of the SROs, SICA appears to be the mechanism with which most of the public seems comfortable. Over the last few years, the NASD has often adopted a go-it-alone policy,[264] which not only undermines the credibility of the Uniform Code, but also makes it difficult to track its provisions into the various SRO codes.[265] Indeed, inconsistencies among SRO rules often lead to confusion and forum shopping, and can constitute a trap for the unwary.[266]

R. Conduct of Participants

As we have seen, the Uniform Code of Arbitration establishes guidelines as to how SRO arbitrations are to be conducted. Sound procedural rules, however, in and of themselves do not necessarily insure a level playing field. To insure fairness, you must also examine the administration of these rules by the SROs, as well as the conduct of the participants in the arbitration process, i.e., the parties, the lawyers, the witnesses, and the arbitrators. The question becomes, who monitors the conduct of these various players?

Superiors at the SROs supervise SRO personnel. In turn, the

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263. *See supra* notes 101-105, 242-252 and accompanying text.

264. Constantine N. Katsoris, *SICA, Does the Bell Toll for Thee?*, SEC. ARB. COMMENTATOR, Jan. 1994, at 1 [hereinafter Katsoris XIII]. For a tracking of the SICA Code into the SRO codes as of 1996, *see* Katsoris IV, *supra* note 24, at 565-566.

265. *Id. See also* Robert S. Clemente, *Road Map Comparing Arbitration at the NYSE, NASD*, ABA DISPUTE RESOLUTION MAGAZINE, Winter 2000, at 24.

266. Philip J. Hoblin, *The Case For a Single Securities and Commodities Arbitration Forum*, COMMODITIES LETTER 3, 5 (Aug. 1989). There are areas, where some variations among the SRO codes and practices are understandable, in order to provide some flexibility in meeting the needs of their members, for example, regarding: (i) slight variations in the list selection process, *see supra* notes 108-122 and accompanying text; (ii) large and complex case procedures, *see supra* note 258 and accompanying text; (iii) the manner and details of conducting mediation, *see infra* notes 298-309 and accompanying text; and (iv) variations in the manner of recording of the arbitration proceedings, *see supra* notes 203-205 and accompanying text.

SEC exercises oversight authority over the SROs. Arbitrators' conduct is supervised by the courts through appellate review, and by the parties through the list selection process and arbitrator evaluation forms filed with the SROs. That leaves the supervision of the parties, their lawyers and witnesses.

Parties come to arbitration to resolve their disputes in an honest and expeditious manner. They do not expect to be abused or cheated in the process. The same is true for all of the others who participate in the process. It is not unreasonable, therefore, that arbitrators and the host forum should expect a certain standard of conduct on the part of the parties, their attorneys and the witnesses that appear before them. Indeed, as administrators of the process, they have an inherent obligation to insure that unprofessional or uncivil conduct does not affect the quality or outcome of the arbitration proceedings.[267]

Some attorneys seem to believe that a successful result justifies the use of *any* form of advocacy and tactics, even at the expense of ethics and civility. That is most unfortunate, and such tactics often backfire. Arbitrators are never impressed by conduct that is unethical or uncivil. Indeed, such misconduct detracts from, and often taints a client's case. Arbitrators have no difficulty in distinguishing between honest advocacy and incivility; and, while they admire the former, they find the latter distasteful.

Good advocacy is not only proper, it is expected. Indeed, it is the duty of every lawyer not to leave a stone unturned in the representation of their client. This representation, however, must be conducted ethically and civilly.[268] Hopefully, unethical conduct

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267. *See* Deborah Masucci, *Securities Arbitration-A Success Story: What Does the Future Hold?*, 31 WAKE FOREST L. REV. 183, 194-200 (1996).

268. *Id.* "We have much less of a sense of shared values than we used to have. There was a common understanding of how you acted. You zealously represented your client, but you had respect for the other side and treated them with dignity. Can we ever again achieve this level of professionalism? I hope so." Stephen C. Rice, *President's Message: We Need to Come Together as a Profession*, Advocate (Idaho), Jan. 1998, at 4, (quoting Dean Haynsworth of William Mitchell College of Law); *see also* Constantine N. Katsoris, *Farewell to Comrades-In-Arms*, SEC. ARB. COMMENTATOR, Jan. 2000, at 4. [hereinafter Katsoris XIV]. In noting the deaths of two former colleagues—William Fitzpatrick (who for many years represented the SIA at SICA) and James E.

is rare; but, when discovered, it should be addressed and dealt with promptly. How that is handled depends upon the nature of the misconduct, and the effect upon the outcome of the case. It can vary from a slap on the wrist, to reporting the attorney to the appropriate bar association, or to the possible imposition of some sort of sanction.[269]

Similarly, there is no room in arbitration for incivility. Incivility often breeds more incivility, and if unchecked, can become very disruptive to and even undermine the process. What constitutes uncivil conduct can vary from such things as: constant unwarranted interruptions; uncalled-for-rudeness and intimidation of witnesses; throwing documents at an adversary; etc., etc., etc.[270] We are generally not as concerned with isolated incidents, particularly if malice does not appear to be present. As a general rule, arbitrators will know incivility when they see it, and if such misconduct is intentional and disruptive, or repetitive, the arbitrators must put a stop to it. Moreover, incivility can take on many forms and be injected in various ways and at all stages of the proceedings. Such incivility may not only be projected against opposing parties and their attorneys, but may also be directed against witnesses, SRO arbitration staff, and occasionally even against the arbitrators themselves.[271] If allowed to continue, at the very least it renders the proceedings extremely unpleasant, often leads to delay, and on occasion, might even prejudice the outcome of the proceedings. Arbitrators simply cannot allow this.

Arbitrators must be fair and impartial. On the other hand, they should not permit incivility in the proceedings over which they are presiding. What can an arbitration panel do to prevent incivility from occurring or reoccurring? It depends upon the

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Beckley (who was a Public Member of SICA)—SICA acknowledged their enormous contribution to its work; and, further noted that, despite representing divergent viewpoints and constituencies, they found common ground in their desire to improve the arbitration process. ELEVENTH REPORT, *supra* note 48, at 6.

269. *See* Constantine N. Katsoris, *Advocacy With Civility: A Prescription for Success*, NASD Regulation's THE NEUTRAL CORNER, Jan. 2000, at 1. [hereinafter Katsoris XV].

270. *Id.*

271. *Id.*

circumstances. For example, it can vary from calling numerous short recesses while counsel, witnesses, etc., calm down; to imposing sanctions, depending upon the source, seriousness and/or malice of the misconduct; or, in a most egregious case, to dismissing the proceedings without prejudice. Ironically, it is often the malfeasor—whose conduct disrupts and delays the proceedings—who complains that the hearings are taking too long.[272]

An attorney or party who is a victim of such unethical or uncivil conduct by an adversary, should bring it to the attention of the arbitrators. It is then up to the arbitrators to do their utmost to ensure that the proceedings are fair to all sides. By the same token, such control over the proceedings can and should be asserted, when possible, with civility. Little is usually gained by asserting such control in an uncivil manner.

In the final analysis, the duty of ensuring civility historically falls upon the Chairperson. However, if the Chairperson fails in this role, then it is incumbent upon the other arbitrators to step forward. Indeed, if the Chairperson cannot control the proceeding over which he or she is presiding, maybe he or she should not be reappointed as Chairperson in the future.[273]

III. ALTERNATIVES TO SRO ARBITRATION

The *McMahon* decision transformed SRO arbitration from a basically voluntary procedure to a largely mandatory one.[274] Since then, the debate has focused upon whether or not it is fair to force the public to arbitrate their disputes before an SRO forum.[275] As

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272. *Id.*

273. *Id.*

274. *See supra* notes 21-24 and accompanying text.

275. Constantine N. Katsoris, *Should McMahon Be Revisited?*, 159 BROOK. L. REV. 1113 (1993) [hereinafter Katsoris XVI]; *see also* Peter R. Cella, Letters to the Editor, SEC. ARB. COMMENTATOR, Sept. 1997, at 9 [hereinafter Cella]. "If brokerage employees are entitled to a choice of forum for the full and fair enforcement of their rights, how can you deny the same right to the public investors without whom there would be no securities industry?" Cella (commenting on the NASD's proposal to eliminate mandatory arbitration in employment discrimination claims by brokers); *see also* Kenneth R. Davis, *The*

an alternative to returning to a largely voluntary system as it existed before *McMahon*, it has been suggested that: (i) the SRO forums be replaced by a separate *independent forum* to host these disputes; or (ii) permitting alternative providers to compete with the SRO arbitration forums.[276]

A. Single Independent Forum

As SRO arbitration filings exploded and the issues became more complex, the rules of combat became more litigious.[277] This evolution led to complaints that securities arbitration had lost its way—becoming less economical and speedy and more like the courthouse it was designed to avoid.[278]

In 1994, both the NYSE and the NASD announced plans to address the troublesome issues facing SRO arbitrations.[279] The NYSE held a two-day symposium where these issues were openly debated by a wide spectrum of leading experts in the field and, based upon such discussions, issued recommendations in the form of a Report.[280]

The NASD sought to calm the troubled waters in a different way. In the fall of 1994, the NASD announced the formation of an Arbitration Task Force [Ruder Task Force or Task Force] to explore and propose broad reforms to the NASD arbitration process. The Task Force was headed by Professor David S. Ruder, former Chairman of the SEC, and included practitioners and academics with strong backgrounds in arbitration, business and public interest law.[281] The Task Force's mission was to study the

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Arbitration Claws: Unconscionability in the Securities Industry, 78 BOSTON UNIV. L. REV. 255 (1998).

276. *See infra* notes 295-298 and accompanying text.

277. Clemente, *supra* note 80, at 81.

278. *Id.* at 82-92.

279. *See* Katsoris X, *supra* note 243, at 223.

280. NYSE SYMPOSIUM, *supra* note 191 and accompanying text.

281. Michael Siconolfi, *Revised Rules Are Mapped For Securities Arbitration*, WALL ST. J., Nov. 14, 1995, at C1. "Members of the task force represent a crossection of arbitration specialists, including Steve Hammerman, Vice Chairman at Merrill Lynch & Co.; J. Boyd Page of Page & Bacek, an Atlanta law firm representing investors; Frank Spalding, former Chairman of the NASD's National Arbitration Committee, and John Bachmann, managing principal at

factors impacting the arbitration process with a view to improving its efficiency and trimming its costs. Numerous closed sessions were held at which various witnesses appeared, including the Public Members of SICA.[282] Basically, the subjects delved into by the Task Force were similar to those discussed at the NYSE Symposium and in the NYSE Report that followed.

In January 1996, the NASD Task Force issued the RUDER REPORT, which was over 150 pages in length and contained scores of recommendations.[283] This report included several recommendations on SRO funding and governance, namely: (i) the NASD Arbitration Department receive whatever resources are necessary to manage caseload growth and to implement the Report's recommendations; (ii) such increased expenditures should be borne primarily by the NASD and its member firms; and, (iii) the arbitration function be administered as independently as practicable.[284] Indeed, the Public Members of SICA had previously pressed for many of these goals both at SICA and when they appeared before the Task Force. Independence and proper funding for the SRO forums is essential, for even the fairest rules will not guarantee justice if forum independence is suspect, or funding for their operation and implementation is inadequate.[285]

The RUDER REPORT also recommended that consideration be given to the establishment of a single forum *within an existing* SRO.[286] *In contrast*, SICA once considered the creation of a single *independent* forum to administer (with SEC oversight) all securities

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Edward D. Jones & Co." *Id.; see also supra* notes 85, 191 and 242 and accompanying text.

282. James Beckley, Peter Cella, Justin Klein and the author, the then Public Members of SICA, appeared before the Ruder Task Force on January 16, 1995.

283. RUDER REPORT, *supra* notes 85, 191, 242 and 281 and accompanying text.

284. *Id.* at 138-56. In addition, the RUDER REPORT also suggested, *inter alia*: (i) changing the method of screening arbitrators from the then existing method, where the forum selects the panel, to one in which the parties themselves choose the arbitrators from supplied lists; (ii) establishing a mandatory list of discoverable items; and (iii) eliminating of the so-called Six Year Rule which automatically bars consideration of a claim if more than six years have elapsed. *Id.*

285. Katsoris IV, *supra* note 24, at 528.

286. *Id.* at 533.

arbitrations involving the public.[287] While SICA ultimately decided it would not continue to pursue that course at that time (because it was not evident that material economies of scale would result from a single forum), it concluded that it would continue to explore alternative methods of improving the governance and image of SRO arbitration.[288]

Once the Uniform Code had been extensively updated after *McMahon*, some suggested that SICA's role be diminished[289] and be replaced by a system whereby all the SROs collapse their public arbitration programs into one, leaving the public securities arbitration function solely to the NASD.[290] That suggestion, however, is hardly a panacea because the SROs lack the structural independence necessary to insure public confidence due to their close association to the securities industry.[291] Indeed, as the arbitrable issues expand (i.e., employment issues, problems with on-line trading, etc.), and as the stakes grow (i.e., larger compensatory awards and punitive damages issues), the public will increasingly demand that the *rules* of battle be set by a truly independent group.

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287. NYSE SYMPOSIUM, *supra* note 191, at 1643; *see also* Philip J. Hoblin, *The Case for a Single Securities and Commodities Arbitration Forum*, COMMODITIES LETTER 3, 5 (Aug. 1989); Katsoris IV, *supra* note 24, at 534. A single independent forum entails exactly what it indicates—a forum independent from actual, inferential, subtle, practical or any kind of imaginable pressure. The forum should be independent of the industry, independent of the plaintiff's bar, and other than the SEC's general oversight role, independent of that regulatory body. *Id.*

288. Hoblin, *supra* note 7, at 3, 5.

289. *See* Katsoris XVI, *supra* note 275, at 1151; *Feedback*, SEC. ARB. COMMENTATOR, Feb. 1993, at 2, 6. This possibility was also raised by the RUDER REPORT. *See supra* note 276 and accompanying text.

290. Katsoris XVI, *supra* note 275, at 1151; *see also* Roberta S. Karmel, *Should There Be a Single SRO?*, N.Y.L.J., Oct. 21, 1999, at 3.

291. Katsoris XVI, *supra* note 275, at 1152; *see also* NYSE SYMPOSIUM, *supra* note 191, at 1592. "SROs are dominated by industry. I don't mean their staff. I think the New York Stock Exchange has a board half public, half not public. The NASD's board, however, is more largely dominated, so any rules they adopt may reflect or appear to reflect, their affiliation with industry, which is usually in the defense position. I think this is not where I would start a laboratory for tort reform. I don't think it would be perceived as balanced." *Id.* (statement of Catherine McGuire, Esq., Chief Counsel, Market Regulation of the SEC).

In the past, the SEC opposed the idea of a single forum, preferring the competitive choices offered by the various SROs.[292] Perhaps a truly independent single forum is a *Utopian* dream. However, until such a forum can be created, the SEC's theory of competitive forces is preferable—particularly in an atmosphere where arbitration is basically mandatory. Until then, the present system of checks and balances, in place for over 20 years has worked relatively well. It has resulted in steady and meaningful change from the balkanized procedures of the past. It also has prevented some ill-conceived ideas from finding their way into the securities arbitration process.[293]

Under the present system, SICA, an independent body, proposes rule changes. The individual SRO boards approve and file the changes with the SEC. The SEC then approves or disapproves. By that time, all participants have had at least two bites at the apple: the public at the SICA level, and during the comment period of the 19(b) filing; the various SROs at the SICA level, and before their respective boards; the industry at the SICA level, at the SRO level (where it lobbies intensely) and again during the comment period of the 19(b) filing; and the SEC at the SICA level (where SEC representatives and others are invited guests), and as the final word on the 19(b) filing. This pattern for rule changes in securities arbitration should be preserved so long as the present mandatory SRO system remains.[294]

B. Alternative Pilot Program

Many investors sign a customer agreement when they open a securities account at a brokerage firm which contains a clause providing that any disputes regarding their account be resolved by arbitration at one of the SROs. In order to provide investors with a broader choice of arbitration forums (other than SROs), SICA proposed a two-year pilot program (Pilot Program) where

292. *See* NYSE SYMPOSIUM, *supra* note 191, at 1649. It is noteworthy, however, that the number of SRO arbitration forums has dwindled; *supra* note 32.

293. *See supra* notes 101-105, 242-52 and accompanying text.

294. Katsoris IV, *supra* note 24, at 536.

investors may resolve disputes with their brokerage firm in non-SRO forums.

SICA developed guidelines for the Pilot Program. The guidelines provide for the voluntary participation of brokerage firms who will designate one or more non-SRO forums where customers may file a claim. The choice to go to a non-SRO forum is up to the customer. The guidelines also establish minimum due process requirements that the non-SRO forums must meet to be eligible for the Pilot Program. At present, seven of the largest retail brokerage firms have volunteered to participate in the pilot program involving two non-SRO forums.[295] Collectively the firms have agreed to *arbitrate to an award* a minimum of 100 cases at the non-SRO forums during the two-year pilot.[296]

Beginning in January 2000, a customer who has a dispute with one of the participating firms may choose to arbitrate at a non-SRO forum. Customers whose claims qualify under the Pilot Program may file directly with the non-SRO forum selected by the firm. Customers who file a claim with an SRO against one of the seven participating firms will be advised, if the claim qualifies, that they may arbitrate the dispute at the non-SRO forum. The customer may then choose whether to proceed at that non-SRO forum or remain at the SRO forum.

In order for a claim to qualify for the pilot, the events giving rise to the dispute must have occurred less than four years before

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295. Stephen G. Sneeringer, *Securities Arbitration Pilot Program*, SEC. ARB. COMMENTATOR, Jan. 2000, at 1. The two non-SRO forums are the AAA and JAMS; and, the seven participating securities firms are: Merrill Lynch, Morgan Stanley Dean Witter, Paine Webber, Prudential Securities, Solomon Smith Barney, A.G. Edwards, and Raymond James. *Id.* Because the program is voluntary and a matter of contract, it does not seem to require SEC approval to be implemented. *See* ELEVENTH REPORT, *supra* note 48 at 5; *NASD to Enforce Settlement and Decisions from All Forums*, SEC. ARB. COMMENTATOR, May 1999, at 8.

296. Since many cases settle before the arbitrators issue an award, the actual number of cases eligible for the Pilot Program may be significantly higher. Whether this number of non-SRO filings will be reached is speculative in view of the anticipated increased cost at said forums. *See* Lisa I. Fried, *New Arbitration Pilot Program for Securities Brokers*, N.Y.L.J., Jan. 27, 2000, at 5 (stating that "Arbitrator fees, which are frequently split between the parties, range from $200 to $400 per hour at JAMS, and $700 to $1,100 per day at AAA.").

the date the Pilot Program commences or six years before filing, whichever is shorter. Disputes involving limited partnerships and disputes naming registered representatives or non-participating firms are not eligible for the Pilot Program unless the registered representative or non-participating firm consents to arbitration at the non-SRO forum. Nor are claims involving *pro se* claimants eligible for the Pilot Program.[297]

IV. MEDIATION

Mediation provides parties with a voluntary, non-adversarial, and informal process that can often result in the resolution of a dispute with a minimal expenditure of time and money.[298] It is a voluntary process in which parties present their positions to a neutral third party, a mediator, in an attempt to reach a mutually acceptable resolution of their dispute.[299] Mediation is voluntary, and thus the parties are free to withdraw from mediation at any time.[300]

Mediation differs from arbitration in several ways. Unlike arbitration, mediation usually is non-binding.[301] Thus, a mediator cannot force parties to settle their disputes.[302] If the parties cannot

297. Admittedly, the cost of arbitration at these alternate forums is greater than at SRO forums and SICA did not feel *pro se* litigants would benefit from participating in the pilot program at this stage. *See* Fried, *supra* note 296, at 5.

298. J. Boyd Page et al., *The Role of Mediation and Early Evaluation in Facilitating Settlement Negotiations*, in 2 Securities Arbitration 1995, at 60 (PLI Corp. Law & Prac. Course Handbook Series No. B-899, 1995); *see also* Paul Katzeff, *Mediation Can Lead to Low-Cost Solutions*, INVESTORS BUSINESS DAILY, October 13, 2000, at B1; Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L.Q. 47 (1996).

299. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L.Q. 47 (1996).

300. Roger M. Deitz, *Alternative Dispute Resolution*, N.Y. L.J., Apr. 12, 1999, at 9. *But see* Joel E. Davidson, *The Case For Mandatory Mediation Of Securities Disputes*, SEC. ARB. COMMENTATOR, Dec. 1998, at 1.

301. *See* R. Douglass Campbell, Alternative Dispute Resolution: "Waiver of Trial" Clause Mandating Arbitration of Securities Disputes Should Require the Application of State Law, *Saint Mary's Law Journal 2000 Symposium: Effective Resolution of Disputes in the New Millennium: Perceptions, Myths and the Law*, 31 ST. MARY'S L.J. 1039, 1042.

302. *Id.*

reach a resolution of their dispute through mediation, they may proceed either to arbitration or to court.[303] Mediation is also usually more informal, speedier and less expensive than arbitration, and attempts to *assist* the parties in reaching an acceptable resolution of their dispute.[304] Mediation helps parties focus on their dispute and better define the issues that need to be resolved.

When parties attempt to settle disputes on their own, they often lose sight of the real issues in dispute as personal feelings, hostile attitudes, and misunderstandings get in the way.[305] A mediator can also help the parties by giving an unbiased view of the case, and by discussing with each party the merits, or lack thereof, of their positions. Finally, a mediator can be a source of creative resolutions to a problem that the parties may never have had on their own.[306]

The NASD has successfully operated a mediation program for securities industry disputes for several years,[307] and the NYSE has also instituted a mediation program on a trial basis.[308] Although most of its members philosophically favor mediation, SICA has not to date provided for mediation in its Uniform Code, because it is

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303. J. Boyd Page, et al., *supra* note 298, at 61; *see also* Joel Davidson & Romaine L. Gardner, *Mediation – The Best Surprise Is No Surprise*, ABA Section of Litigation, SECURITIES NEWS, Vol. 7, No. 3, Fall 1997, at 8.

304. *See* Thomas J. Stipanowich, *Beyond Arbitration: Improvement and Evolution in the United States Construction Industry*, 31 WAKE FOREST L. REV. 65, 94 (1996).

305. J. Boyd Page, et al., *supra* note 298, at 61; *see also* Davidson & Gardner, *supra* note 303, at 8.

306. *Id.; see also Model Standards of Conduct for Mediators Endorsed by AAA, ABA, and SPIDR*, 6 WORLD ARB. & MEDIATION REP., No. 10 at 215 (Oct. 1995).

307. J. Boyd Page, et al., *supra* note 298, at 62; *see also* Katsoris V, *supra* note 99, at 476 n.415; *Getting Serious about Mediation, An Interview with Kenneth L. Andrichick*, SEC. ARB. COMENTATOR, Dec. 1995, at 9-10; *A Great Beginning for NASD Mediation Program*, NAT'L CORNER, Dec. 1995, at 1; *Mediation Celebrates Fourth Anniversary*, NASD Regulation's THE NEUTRAL CORNER, Nov. 1999, at 1.

308. *NYSE Rules Package Places NYSE Arbitration Program on Competitive Par With NASD*, SEC. ARB. COMMENTATOR, Dec. 1998, at 9; Clemente, *supra* note 122. A breakdown of the mediations handled by the SROs appears *infra* Appendix C. *See* ELEVENTH REPORT, *supra* note 48, at 127.

usually a voluntary procedure that generally precedes arbitration. With greater frequency, however, mediation is being sought at all stages of the dispute, even after hearings have begun.

Accordingly, SICA should explore the possibility of expanding the Uniform Code to address mediation issues that are related to arbitration. For example, should commencement of an SRO mediation toll the statute of limitations, or have any effect on the Six Year Eligibility Rule?[309] Moreover, in an attempt to encourage mediation before litigation commences, perhaps a combined aggregate fee schedule could be arranged which would give a discount (to the aggregate separate fees involving mediation and arbitration,) where mediation was sought *at the outset.*[310]

CONCLUSION

No one can predict what the averages of the various markets will be five or ten year from now, and one can only *surmise* what new technologies will drive future trading and what new competitors and products will surface.[311] Moreover, what will be

309. *See supra* notes 77-90 and accompanying text.

310. *See SRO Forum Statistics*, SEC. ARB. COMMENTATOR, Apr. 1999, at 9. The NASD mediation staff "will be placing a greater emphasis upon encouraging 'straight-ins' that is disputes that flow directly into mediation, rather than ripening first into an arbitration dispute." *Id.* In any event, if someone has sat as a mediator on a matter, they should not later be asked to arbitrate that same matter between the parties. As a mediator, one is privy to many confidential revelations that could cause troublesome conflicts if he or she later also served as an arbitrator in the same matter.

311. Dominic Bencivenga, *SEC Takes Solomonic Approach to Regulation*, N.Y.L.J., Apr. 30, 1998, at 5; *see also* Rebecca Buckman, *Island ECN Raises Capital to Become a Stock Exchange*, WALL ST. J., May 11, 1999, at C20; Diana B. Henriques, *Testing an Emerging Market*, N.Y. TIMES, May 12, 1999, at C1; Diana B. Henriques, *Big Board to Speed Plans for Evening Sessions*, N.Y. TIMES, May 25, 1999, at C4; Greg Ip, *Firms Create Systems as Rivals to Big Board*, WALL ST. J., June 8, 1999, at C1. Indeed, the volatility of future markets will no doubt be complicated by the widespread use of derivatives and expanded trading of foreign securities in foreign currency denominations. Mitchell Pacelle & Randall Smith, *Long Term Capital Prepares for New Era*, WALL ST. J. EUR., June 21, 1999, at 18. "After outsized investment gains early in its life, Long Term Capital nearly collapsed in the autumn, as bad trading debts wiped out more than 90% of its value. The carnage exacerbated panicked selling in global bond, stock, and

the effect of extended trading hours upon the liquidity and stability of the markets?[312] Furthermore, what obligation do the securities industry and its regulators have to investors regarding such issues as suitability of investments, analysts' independence, improper or poor executions of orders, maintaining orderly markets, or to adequately explain the risks of trading for a nominal charge through a discount or online broker?[313] Indeed, what dispute resolution in the securities industry will look like a decade from now is truly anyone's guess.[314]

In any event, in resolving its future disputes with the securities industry, the public will not accept a mandatory arbitration system where its rights and remedies are stripped unilaterally or limited by a non-negotiated pre-dispute arbitration agreement.[315] Simply put, whatever relief is available in court should generally also be

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currency markets." *Id.*; *ECB Moves To Brake Yen's Rise*, INT'L HERALD TRIB., June 19-20, 1999, at 9; *see also* James L. Cochrane, *Are U.S. Regulatory Requirements for Foreign Firms Appropriate?*, 17 FORDHAM INT'L L.J. S 58 at S 60.

312. *See* Ann Davis & Rebecca Buckman, *SEC Censures Datek Online Brokerage For Allegedly Dipping Into Client Funds*, WALL ST. J., May 19, 1999, at B10; *Open All Night*, BUS. WK., June 14, 1999, at 42. If one of your stocks starts to plunge around 10 P.M. due to volatile trading, you could wake up to an early morning margin call from your broker. *Id.*

313. *See* NASD Notice to Members 01-23 (Apr. 2001) (dealing with Online Suitability); Aaron Elstein and Stacy Forster, *Online-Brokerage Firms Aren't Exempt From Suitability Rules, Regulators Say*, WALL ST. J., Mar. 21, 2001 at C18; *see also* Michael Schroeder & Rebecca Buckman, *SEC Chief Wants Online-Trading Firms to Disclose the Rules of Internet Dealing*, WALL ST. J., May 4, 1999, at C23; *see also* Jeff D. Opdyke, *Soon, Analysts Must Disclose: 'Yeah, I own it'*, WALL ST. J., July 3, 2001 at C1; Gretchen Morgenson, *SEC Warns Investors On Analysts*, N.Y. TIMES, June 30, 2001, at C1. "Maintaining the legitimacy and the quality of equity research is vital to preserving investor confidence and the efficiency of the public markets." *Id.*

314. *See* C. Evan Stewart, *While Rome Burns: Fiddling With Reforming in the Securities Industry*, Nat'l Legal Center For Pub. Interest, Vol. 2, No. 11, Nov., 1998 at 21-25; *see also* George H. Friedman, *Securities Arbitration Still Effective as the Millenium Dawns*, WORLD ARB. & MEDIATION REP., Vol. 10, No. 5, May, 1999, 134.

315. *See* Katsoris IV, *supra* note 24, at 536. As for disputes between the industry and its employees, it would appear that the latter would not be bound in the future by pre-dispute arbitration agreements; *see also supra* notes 65-76 and accompanying text.

available in arbitration. That was the mandate of *McMahon*.[315]

The alternative of throwing thousands of cases back to congested court calendars is certainly not the answer. In such a scenario, the securities industry would be plagued by excessive litigation costs, which either directly or indirectly would ultimately be borne by the public as the industry's cost of doing business. Ironically, the public would often be denied justice because of the excessive cost and delay associated with courtroom litigation.[317] Yet, the present mandatory process will work only so long as the playing field is perceived to be, and in fact remains *level for all.*

In this regard, SICA's stabilizing influence, together with the SEC's oversight role, continues to generate investor confidence in the SRO arbitration system. Just as the investing public is well served by an independent Financial Accounting Standard Board ("FASB") in the formulation of financial reporting rules (with SEC oversight), so too is it well served by an *independent* SICA in establishing and maintaining a level playing field (with similar SEC

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316. *See supra* notes 247-249 and accompanying text; *see also* Katsoris XII, *supra* note 251, at 1. *But see* William J. Fitzpatrick, *Beware of Greeks Bearing Myths*, SEC. ARB. COMMENTATOR, Oct. 1999, at 1; Constantine N. Katsoris, *The Trojan Horse: Love It or Leave It*, SEC. ARB. COMMENTATOR, Oct. 1999, at 1 [hereinafter Katsoris XVII].

> The Trojan Horse article also alleges that the conventional wisdom after *McMahon* was that an investor should obtain in arbitration whatever relief was available in court. Not only is that my opinion, but, as I outlined in FN34 (in over 20 lines and over 200 words) of my article, *The Betrayal of McMahon* (24 FORDHAM URB. L.J. 221 at 229)(1997)), that is the opinion of several other highly respected commentators. As far as Bill's rejection of the adhesion argument, I think that serious commentators would wince at the implication that the industry—through the use of pre-dispute arbitration agreements—can dictate the terms of dispute resolution, no matter how unfair or unreasonable. My understanding of adhesion contracts is that it is a cumulative thing and, sooner or later, the industry will add one condition too many, such as the punitive damage cap, which in effect will be the final straw that breaks the camel's back. Now that I have introduced the camel to the Trojan Horse, I feel I have said enough!

Id.

317. *See Business Cases Clog Courts*, 17 NAT. L.J., Aug. 7, 1995, at 1; *see also* Arleen Jacobius, *California Three-Strikes Law Gobbling Up Jurors*, 81 Dec. A.B.A. J. 29 (1995).

participation) should a controversy arise.[318] Indeed, SICA's very presence during these past twenty-four years, like the cop on the beat, has been reassuring to the regulators, the courts, and the public.

In addition, mediation as a prelude to or even during arbitration is an option to be encouraged. Using mediation to arrive at settlements that each party believes are fair can avoid the delay, expense and trauma of courtroom litigation or arbitration. Every effort should be made to explore the use of mediation, where the results to date have been quite favorable.[319]

Our securities markets are the envy of the world, both because of their relative stability and because the degree and quality of disclosure required for registration thereon is generally higher than is required elsewhere. Despite this confidence, however, even our markets gyrate, as they reflect the daily change in investor sentiment as to the status of the economy. To a large extent, market performance controls investment and political decisions at every level of our lives. Maintaining healthy markets, therefore, is essential to the well being and stability of our society, and healthy markets require investor confidence and trust.

To insure public investment we must retain the public's confidence—confidence in the markets themselves and confidence that should a dispute arise, it will be fairly resolved. "This confidence, however, can only be earned by maintaining a *de facto*

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318. *See* Katsoris IV, *supra* note 24, at 537; *see also SEC's Chief Accountant Stresses Importance of an Independent FASB*, 32 BNA, Feb. 16, 1996, at G1; Lee Berton, *SEC Chairman Will Resist Any Move to Boost Business Influence on FASB*, WALL ST. J., Feb. 9, 1996, at B6; Itzah Sharav, *No Accounting for this Plan*, N.Y. TIMES, Mar. 24, 1996, at C13. "The business executives, financial analysts, accountants, and lawyers who agreed on an independent F.A.S.B., did so out of enlightened self-interest, knowing it was the only *alternative to government takeover*... Especially troublesome is the institute's proposal that a third party organization should control and oversee F.A.S.B. agenda. With its independence thus in jeopardy, the board's stature and ability to improve financial disclosure would diminish." *Id.* (emphasis added).

319. *See SRO Forum Statistics*, SEC. ARB. COMMENTATOR, Apr. 1999, at 9. In 1997 and 1998, over 2,000 cases were closed by NASDR's Office of Dispute Resolution after utilizing the mediation process and approximately 80% of said cases ended in settlement. *Id.*

as well as a *de jure* image of fairness."[320] In the final analysis, however, we can never become complacent and feel as though we have achieved the perfect dispute resolution system. In a less-than-perfect world, "*[l]aws and institutions are constantly tending to gravitate... [and] [l]ike clocks, they must be occasionally cleansed and wound up, and set to true time.*"[321]

320. Constantine N. Katsoris, statement before the Securities and Exchange Commission (Dec. 8, 1977); Katsoris I, *supra* note 3, at 313; *see also* James E. Buck, Statement of the New York Stock Exchange before the Securities Exchange Commission Hearing on Release Number 34-12974, at 5 (Feb. 9, 1977) (testimony of Secretary of NYSE urging the creation of SICA). "The Exchange does believe that the development of a uniform system of arbitration to be used by the self regulatory agencies would be in the interest of investors and the securities industry." *Id.*

321. Henry Ward Beecher, Life Thoughts 129 (1858) (emphasis added).

APPENDIX A: SRO ARBITRATION STATISTICS

	A	B	C	D	E	F	G
1	AMERICAN STOCK EXCHANGE, INC.						
2				Total Cases		Public	
3		Total	Small	Concluded	Small	Customer	Awards in
4		Cases	Claims	Including	Claims	Cases	Favor of
5	Year	Received	Received	Settlements	Concluded	Decided	Public
6	1980	45	18	41	11	35	16
7	1981	39	7	40	11	42	22
8	1982	37	9	31	4	16	10
9	1983	41	14	42	8	10	6
10	1984	69	16	53	14	41	24
11	1985	64	21	58	14	45	26
12	1986	63	20	60	28	31	14
13	1987	92	34	74	24	41	24
14	1988	100	21	63	29	27	12
15	1989	69	26	73	15	26	13
16	1990	69	21	72	21	25	15
17	1991	51	15	64	22	25	17
18	1992	45	12	55	15	23	8
19	1993	48	11	55	12	15	8
20	1994	68	13	46	9	10	3
21	1995	252	86	63	28	14	8
22	1996	81	49	142	49	8	3
23	1997	43	18	116	38	8	5
24	1998	20	2	37	14	7	5
25							
26							
27	**** AMEX Merged with the NASD						

	A	B	C	D	E	F	G
1	BOSTON STOCK EXCHANGE, INC.						
2				Total Cases		Public	
3		Total	Small	Concluded	Small	Customer	Awards in
4		Cases	Claims	Including	Claims	Cases	Favor of
5	Year	Received	Received	Settlements	Concluded	Decided	Public
6	1980	2	2	2	2	2	0
7	1981	2	2	2	2	0	0
8	1982	1	1	1	1	1	1
9	1983	2	2	2	2	2	1
10	1984	0	0	0	0	0	0
11	1985	0	0	0	0	0	0
12	1986	2	2	2	2	2	0
13	1987	0	0	0	0	0	0
14	1988	0	0	0	0	0	0
15	1989	0	0	0	0	0	0
16	1990	0	0	0	0	0	0
17	1991	1	0	0	0	0	0
18	1992	1	0	1	0	0	0
19	1993	0	0	1	0	0	0
20	1994	0	0	0	0	0	0
21	1995	1	0	0	0	0	0
22	1996	0	0	1	0	0	0
23	1997	0	0	0	0	0	0
24	1998	0	0	0	0	0	0
25	1999	0	0	0	0	0	0
26	2000	0	0	0	0	0	0
27							
28							

	A	B	C	D	E	F	G
1	CHICAGO BOARD OPTIONS EXCHANGE, INC.						
2				Total Cases		Public	
3		Total	Small	Concluded	Small	Customer	Awards In
4		Cases	Claims	Including	Claims	Cases	Favor of
5	Year	Received	Received	Settlements	Concluded	Decided	Public
6	1980	44	11	31	11	18	6
7	1981	41	10	32	8	12	3
8	1982	50	6	38	6	14	3
9	1983	75	5	45	4	13	6
10	1984	91	24	56	16	4	3
11	1985	64	10	38	5	0	0
12	1986	72	16	44	9	12	9
13	1987	130	29	93	33	22	9
14	1988	149	22	89	27	48	12
15	1989	71	17	105	20	43	14
16	1990	67	16	85	18	32	16
17	1991	46	5	62	12	13	9
18	1992	28	7	28	5	11	5
19	1993	15	3	18	4	6	2
20	1994	23	1	24	3	4	1
21	1995	15	6	26	6	5	0
22	1996	19	6	10	4	1	0
23	1997	12	2	18	4	5	2
24	1998	20	3	18	3	5	3
25	1999	22	8	22	7	6	2
26	2000	14	4	17	4	1	0
27							
28							

	A	B	C	D	E	F	G
1	CHICAGO STOCK EXCHANGE, INC.						
2				Total Cases		Public	
3		Total	Small	Concluded	Small	Customer	Awards in
4		Cases	Claims	Including	Claims	Cases	Favor of
5	Year	Received	Received	Settlements	Concluded	Decided	Public
6	1980	2	1	2	0	1	1
7	1981	2	0	2	0	0	0
8	1982	1	0	0	0	0	0
9	1983	2	0	2	0	0	0
10	1984	1	0	0	0	0	0
11	1985	1	0	0	0	0	0
12	1986	4	1	0	0	0	0
13	1987	5	1	3	1	1	1
14	1988	1	0	7	0	0	0
15	1989	5	0	6	0	0	0
16	1990	4	0	3	0	1	1
17	1991	5	0	2	0	0	0
18	1992	1	0	2	0	0	0
19	1993	1	0	0	0	0	0
20	1994	1	0	1	0	0	0
21	1995	1	0	0	0	0	0
22	1996	1	0	1	0	0	0
23	1997	0	0	0	0	0	0
24	1998	1	0	1	0	0	0
25	1999	1	0	0	0	0	0
26	2000	2	0	2	0	0	0

	A	B	C	D	E	F	G
1	MUNICIPAL SECURITIES RULEMAKING BOARD						
2				Total Cases		Public	
3		Total	Small	Concluded	Small	Customer	Awards In
4		Cases	Claims	Including	Claims	Cases	Favor of
5	Year	Received	Received	Settlements	Concluded	Decided	Public
6	1980	21	7	21	7	3	2
7	1981	25	5	25	5	7	4
8	1982	33	7	16	7	13	6
9	1983	78	17	40	9	14	5
10	1984	113	20	80	17	34	21
11	1985	91	31	118	35	54	31
12	1986	82	30	89	21	30	15
13	1987	106	38	90	34	42	24
14	1988	115	49	126	52	63	37
15	1989	108	41	93	40	50	36
16	1990	75	41	90	32	40	22
17	1991	94	35	82	41	38	18
18	1992	45	12	68	19	31	14
19	1993	30	15	47	18	34	6
20	1994	12	3	23	8	11	5
21	1995	9	1	5	3	1	1
22	1996	10	1	6	1	5	1
23	1997	6	2	15	1	9	4
24							
25	**** The NASD now administers MSRB arbitrations						
26							
27							

	A	B	C	D	E	F	G
1	NASD DISPUTE RESOLUTION, INC.						
2				Total Cases		Public	
3		Total	Small	Concluded	Small	Customer	Awards in
4		Cases	Claims	Including	Claims	Cases	Favor of
5	Year	Received	Received	Settlements	Concluded	Decided	Public
6	1980	318	134	234	113	122	56
7	1981	422	142	422	177	242	118
8	1982	606	157	435	139	276	140
9	1983	768	216	549	147	272	161
10	1984	1,108	298	747	244	381	196
11	1985	1,400	377	962	250	434	232
12	1986	1,587	390	1,199	327	476	248
13	1987	2,886	458	1,625	325	642	364
14	1988	3,990	1,084	2,169	539	934	432
15	1989	3,651	1,417	4,050	967	2,097	1,130
16	1990	3,617	703	4,019	900	1,530	826
17	1991	4,150	787	4,037	665	1,419	775
18	1992	4,379	793	4,375	717	1,552	821
19	1993	5,419	852	4,327	801	1,329	730
20	1994	5,570	992	4,561	725	1,111	532
21	1995	6,055	994	5,680	1,159	1,523	788
22	1996	5,631	849	6,331	1,155	1,815	977
23	1997	5,997	778	5,880	750	1,497	875
24	1998	4,938	540	5,484	628	1,573	937
25	1999	5,608	983	4,767	594	1,148	697
26	2000	5,558	828	5,473	1,009	1,396	734
27							
28							
29							
30							

	A	B	C	D	E	F	G
1	NEW YORK STOCK EXCHANGE, INC.						
2				Total Cases		Public	
3		Total	Small	Concluded	Small	Customer	Awards In
4		Cases	Claims	Including	Claims	Cases	Favor of
5	Year	Received	Received	Settlements	Concluded	Decided	Public
6	1980	367	131	327	110	221	119
7	1981	477	117	433	134	214	111
8	1982	558	109	473	113	214	118
9	1983	713	136	532	122	276	137
10	1984	1,008	176	796	183	259	113
11	1985	1,095	198	962	190	424	221
12	1986	965	181	1,004	205	432	210
13	1987	1,050	225	1,000	204	378	200
14	1988	1,623	263	1,196	235	440	228
15	1989	1,407	201	1,458	229	527	267
16	1990	1,378	222	1,466	199	499	256
17	1991	1,403	187	1,496	199	451	185
18	1992	873	83	1,166	119	317	137
19	1993	810	72	837	62	205	92
20	1994	711	62	795	74	186	80
21	1995	810	53	784	61	175	74
22	1996	648	21	783	42	146	49
23	1997	546	26	695	34	110	48
24	1998	544	26	528	24	105	47
25	1999	602	28	507	35	102	45
26	2000	553	29	604	37	116	55
27							
28							
29							
30							

	A	B	C	D	E	F	G
1	PACIFIC EXCHANGE, INC.						
2				Total Cases		Public	
3		Total	Small	Concluded	Small	Customer	Awards in
4		Cases	Claims	Including	Claims	Cases	Favor of
5	Year	Received	Received	Settlements	Concluded	Decided	Public
6	1980	24	12	28	11	4	3
7	1981	24	17	20	17	9	5
8	1982	31	15	21	11	10	7
9	1983	35	17	29	17	23	10
10	1984	45	21	26	11	10	7
11	1985	50	12	40	18	20	12
12	1986	41	9	37	13	18	8
13	1987	64	27	58	11	23	13
14	1988	99	30	77	40	45	20
15	1989	61	19	93	27	86	37
16	1990	93	25	68	25	45	26
17	1991	86	21	82	17	33	21
18	1992	58	16	65	13	27	16
19	1993	199	130	54	22	23	12
20	1994	102	37	93	57	38	18
21	1995	76	15	166	118	79	39
22	1996	106	10	100	16	36	17
23	1997	34	13	121	12	21	9
24	1998	33	7	31	9	11	5
25	1999	41	8	28	6	8	6
26	2000	29	5	41	4	18	11
27							
28							

	A	B	C	D	E	F	G
1	PHILADELPHIA STOCK EXCHANGE, INC.			Total Cases		Public	
2		Total	Small	Concluded	Small	Customer	Awards In
3		Cases	Claims	Including	Claims	Cases	Favor of
4	Year	Received	Received	Settlements	Concluded	Decided	Public
5	1980	7	16	0	4	4	2
6	1981	2	2	2	2	0	0
7	1982	2	1	2	1	0	0
8	1983	23	14	19	10	10	2
9	1984	29	6	19	8	10	3
10	1985	23	15	26	11	11	3
11	1986	21	11	18	13	12	4
12	1987	24	24	21	17	9	3
13	1988	20	5	15	14	2	1
14	1989	32	9	22	10	15	7
15	1990	29	5	34	9	15	7
16	1991	33	13	32	15	15	8
17	1992	21	2	18	3	4	1
18	1993	40	5	24	3	5	3
19	1994	44	8	37	6	7	4
20	1995	52	8	63	7	21	9
21	1996	14	2	31	5	3	1
22	1997	27	3	24	1	2	0
23	1998	19	5	12	6	3	2
24							
25							
26							
27	**** Cases administered by the NASD						

	A	B	C	D	E	F	G
1	COMPOSITE ARBITRATION FIGURES						
2				Total Cases		Public	
3		Total	Small	Concluded	Small	Customer	Awards in
4		Cases	Claims	Including	Claims	Cases	Favor of
5	Year	Received	Received	Settlements	Concluded	Decided	Public
6	1980	830	332	686	269	410	205
7	1981	1034	302	978	356	526	263
8	1982	1319	305	1017	282	544	285
9	1983	1737	421	1260	319	620	328
10	1984	2464	561	1777	493	739	367
11	1985	2788	664	2204	523	988	525
12	1986	2837	660	2453	618	1013	508
13	1987	4357	836	2964	649	1158	638
14	1988	6097	1474	3742	936	1559	742
15	1989	5404	1730	5900	1308	2844	1504
16	1990	5332	1033	5837	1204	2187	1169
17	1991	5869	1063	5857	971	1994	1033
18	1992	5451	925	5778	891	1965	1002
19	1993	6562	1088	5363	922	1617	853
20	1994	6531	1116	5580	882	1367	643
21	1995	7271	1163	6787	1382	1818	919
22	1996	6510	938	7405	1272	2014	1048
23	1997	6665	842	6869	840	1652	943
24	1998	5575	583	6111	684	1704	999
25	1999	6274	1027	5324	642	1264	750
26	2000	6156	866	6137	1054	1531	800
27							
28							
29							
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APPENDIX B: UNIFORM CODE OF ARBITRATION

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Section 1: Arbitration	**Section 1: Arbitration (unchanged)** This section covers who may file an arbitration claim and which parties are required to submit to arbitration. It also covers those types of claims that may not be appropriate for arbitration.
(a) Any dispute, claim, or controversy between a (customer or non-member) and a (member, allied member, member organization, and/or associated person) arising in connection with the business of such (member, allied member, member organization, and/or associated person) in connection with his activities as an associated person shall be arbitrated under the Constitution and Rules of the (name of self-regulatory organization) as provided by any duly executed and enforceable written agreement or upon the demand of the customer or non-member.	**(a) Who must submit to arbitration.** (1) Members and associated persons must arbitrate a claim under the Constitution and Rules of an SRO if: • the claim concerns the business activities of the member; and • arbitration is requested by a customer or non-member. Allied members, member organizations and associated persons are also required to submit to arbitration. (2) Customers or non-members may be required to arbitrate a claim under the Constitution and Rules of an SRO if: • the claim concerns the business activities of the member; and • arbitration is required by a written agreement.
(b) Under this Code, the (name of self-regulatory organization) shall have the right to decline the use of its arbitration facilities in any dispute, claim, or controversy where having due regard for the purposes of the (name of self-regulatory organization) and the intent of this Code – such dispute, claim, or controversy is not a proper subject matter for arbitration.	**(b) When arbitration is not appropriate.** The [SRO] may choose not to accept a claim for arbitration if the subject matter of the claim is not proper for arbitration, given the purposes of the [SRO] and the arbitration rules.
(c) Claims which arise out of transactions in a readily identifiable market may, with the consent of the Claimant, be referred to the arbitration forum for that market by the (name of self-regulatory organization).	**(c) Claims from a specific market.** Several SROs offer arbitration programs. A SRO may refer a claim to the arbitration forum for a specific market if: • that market where the transactions

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	took place is identifiable; and • the Claimant agrees to the referral.
(d) Class Action Claims (1) A claim submitted as a class action will not be eligible for arbitration under this Code at the (name of self-regulatory organization).	(d) Class Action Claims (1) Class action claims will not be arbitrated under this Code.
(2) Any claim filed by a member or members of a putative or certified class action is also ineligible for arbitration at the (name of self-regulatory organization) if the claim is encompassed by a putative or certified class action filed in federal or state court, or is ordered by a court to a non self-regulatory organization arbitration forum for class-wide arbitration. However, such claims shall be eligible for arbitration in accordance with Rule (SRO rule [allowing investors to submit any claim to arbitration]) or pursuant to the parties' contractual agreement, if any, if a claimant demonstrates that it has elected not to participate in the putative or certified class action or, if applicable, has complied with any conditions for withdrawing from the class prescribed by the court.	(2) Any claim that is included in a court-certified class action or a putative class action or is ordered by a court for arbitration at a non-SRO for class-wide arbitration will not be arbitrated under this code. If a party can show that it is not participating in the class action, or has withdrawn from the class according to any conditions set by the court, the claim is eligible for arbitration under this Code.
Disputes concerning whether a particular claim is encompassed by a putative or certified class action shall be referred by the Director of Arbitration to a panel of arbitrator(s) in accordance with Section 2 or Section 8 of the Code, as applicable. Either party may elect instead to petition the court with jurisdiction over the putative or certified class action to resolve such disputes. Any such petition to the court must be filed within ten business days of receipt of notice that the Director of Arbitration is referring the dispute to a panel of arbitrator(s).	The Director of Arbitration ("Director") will refer to a panel of arbitrators any dispute as to whether a claim is part of a class action unless either party petitions the court hearing the class action to resolve the dispute. The petition must be filed with the court within 10 business days of receipt of notice that the dispute is being referred to a panel of arbitrators.
(3) No member or associated person shall seek to enforce any agreement to arbitrate against a customer, other member or person associated with a member who has initiated in court a putative class action or is a member of a putative or certified class with respect to	(3) A member or associated person may not try to enforce any arbitration agreement against a member of a putative or certified class action until: • the class certification is denied;

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any claims encompassed by the class action unless and until: (A) the class certification is denied; (B) the class is decertified; (C) the customer, other member or person associated with a member is excluded from the class by the court; or (D) the customer, other member or person associated with a member elects not to participate in the putative or certified class action or, if applicable, has complied with any conditions for withdrawing from the class prescribed by the court.	◦ the class is decertified; ◦ that person is excluded from the class by the court; or ◦ that person decides not to participate in the class or withdraws from the class.
(4) No member, allied member, member organization and/or associated person shall be deemed to have waived any of its rights under this Code or under any agreement to arbitrate to which it is party except to the extent stated in this paragraph.	(4) No person waives any rights under this Code or under any agreement except as stated in this paragraph.
Section 29. Agreement to Arbitrate This Code shall be deemed a part of and incorporated by reference in every agreement to arbitrate under the Constitution and Rules of the (name of self-regulatory organization) including a duly executed Submission Agreement.	Section 2. Agreement to Arbitrate (Section 29) This Code is part of every agreement to arbitrate under the Constitution and Rules of the [SRO] and is incorporated by reference into all arbitration agreements.
Section 31. Requirements When Using Pre-Dispute Arbitration Agreements With Customers	Section 3. Requirements When Using Pre-Dispute Arbitration Agreements With Customers (Section 31)
(a) Any pre-dispute arbitration clause shall be highlighted and shall be immediately preceded by the following disclosure language (printed in outline form as set forth herein) that shall also be highlighted:	(a) Member organizations must highlight any pre-dispute arbitration clause and immediately precede it by the following disclosure language, in outline form as shown here, that must also be highlighted:
(1) Arbitration is final and binding on the parties. (2) The parties are waiving their right to seek remedies in court, including the right to jury trial. (3) Pre-arbitration discovery is generally more limited than and different from court proceedings. (4) The arbitrators award is not required to include factual findings or legal reasoning and any party's right to appeal or to seek	(1) Arbitration is final and binding on the parties. (2) The parties are waiving their right to seek remedies in court, including the right to jury trial. (3) Pre-arbitration discovery is generally more limited than and different from court proceedings.

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modification of rulings by the arbitrators is strictly limited. (5) The panel of arbitrators will typically include a minority of arbitrators who were or are affiliated with the securities industry.	(4) The arbitrators' award is not required to include factual findings or legal reasoning and any party's right to appeal or to seek modification of rulings by the arbitrators is strictly limited. (5) The panel of arbitrators will typically include a minority of arbitrators who were or are affiliated with the securities industry.
(b) Immediately preceding the signature line, there shall be a statement that shall be highlighted and separately initialed by the customer that the agreement contains a pre-dispute arbitration clause. This statement shall also indicate at what page and paragraph the arbitration clause is located.	(b) Member organizations must include a highlighted statement, immediately before the signature line, that the agreement contains a pre-dispute arbitration clause, and state where the clause is located. The customer must separately initial the statement.
(c) A copy of the agreement containing any such clause shall be given to the customer who shall acknowledge receipt thereof on the agreement or on a separate document.	(c) The member organization must give a copy of the agreement with the arbitration clause to the customer, who must acknowledge its receipt on the agreement or on a separate document.
(d) No agreement shall include any condition that limits or contradicts the rules of any self-regulatory organization or limits the ability of a party to file any claim in arbitration or limits the ability of the arbitrators to make any award.	(d) The agreement may not include any condition that limits or contradicts: (1) the rules of any SRO; (2) the ability of a party to file a claim in arbitration; or (3) the ability of the arbitrators to make an award.
(e) All agreements shall include a statement that "No person shall bring a putative or certified class action to arbitration, nor seek to enforce any pre-dispute arbitration agreement against any person who has initiated in court a putative class action; who is a member of a putative class who has not opted out of the class with respect to any claims encompassed by the putative class action until: (i) the class certification is denied; or (ii) the class is decertified; or (iii) the customer is excluded from the class by the court. Such forbearance to enforce an agreement to arbitrate shall not constitute a waiver of any rights under this agreement except to the extent stated herein."	(e) All agreements shall include a statement that "No person shall bring a putative or certified class action to arbitration, nor seek to enforce any pre-dispute arbitration agreement against any person who has initiated in court a putative class action; who is a member of a putative class who has not opted out of the class with respect to any claims encompassed by the putative class action until: (i) the class certification is denied; or (ii) the class is decertified; or (iii) the customer is excluded from the class by the court. Such forbearance to enforce an agreement to arbitrate shall not constitute a waiver of any rights under this agreement except to the extent stated herein."
(f) The requirements of subsection (5) shall apply only to new agreements signed by an existing or new customer of a member or member organization after one year has elapsed from the date of Commission	

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approval.	(f) The requirements of subsection (e) will apply only to new agreements signed by an existing or new customer of a member or member organization after one year has elapsed from the date of Commission approval.
Section 15: Representation by an Attorney All parties shall have the right to be represented by an attorney at any stage of the proceedings. Issues regarding the qualifications of a person to represent a party in arbitration are governed by applicable law and may be determined by an appropriate court or other regulatory agency. In the absence of a court order, the arbitration proceeding shall not be stayed or otherwise delayed pending resolution of such issues.	**Section 4. Representation by an Attorney (Section 15)** (a) All parties have the right to be represented by an attorney at any stage of the arbitration. (b) If a party challenges a person's qualifications to represent a party, the arbitration will proceed, unless a court orders otherwise.
Section 7: Tolling of Time Limitation(s) for The Institution of Legal Proceedings (a) Where permitted by law, the time limitation(s) that would otherwise run or accrue for the institution of legal proceedings shall be tolled when a duly executed Submission Agreement is filed by the Claimant(s). The tolling shall continue for such period as the (name of self-regulatory organization) shall retain jurisdiction upon the matter submitted.	**Section 5. Tolling time limitations for filing a claim in court or arbitration (Section 7)** (a) If the law permits, when a claimant files a signed submission agreement, the time limits that would ordinarily run for filing a claim in court will be tolled. Tolling will continue while the SRO retains jurisdiction.
(b) The six (6) year time limitation upon submission to arbitration shall not apply when the parties have submitted the dispute, claim, or controversy to a court of competent jurisdiction. The six (6) year time limitation shall not run for such period as the court shall retain jurisdiction over the matter submitted.	(b) When the parties have submitted the claim to a court, the 6-year time limit to submit a claim to arbitration will not run, while the court retains jurisdiction.
Section 13: Initiation of Proceedings (b) Service and Filing with the Director of Arbitration. For purposes of the Code of Arbitration Procedure, service may be effected by mail or other means of delivery. Service and filing are accomplished on the date of mailing either by first-class postage prepaid or by means of overnight mail service or, in the case of other means of service, on the date of delivery. Filing with the Director of Arbitration shall be made on the same date as service.	**Section 6. Filing and Service Requirements. (Section 13(b))** The parties may file documents with the Director and serve the other parties by first-class mail, overnight mail, or other means. Filing and Service are accomplished on the date of mailing

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Section 13: Initiation of Proceedings
Except as otherwise provided herein, an arbitration proceeding under this Code shall be instituted as follows:

(a) Statement of Claim

The Claimant shall file with the Director of Arbitration an executed Submission Agreement, a Statement of Claim, together with documents in support of the claim, and the required deposit. Sufficient additional copies of the Submission Agreement and the Statement of Claim and supporting documents shall be provided to the Director of Arbitration for each party and for each arbitrator. The Director of Arbitration shall endeavor to serve promptly by mail or otherwise on the Respondent(s) one (1) copy of the Submission Agreement and one (1) copy of the Statement of Claim.

(b) (see above)

(c) Answers – Defenses, Counterclaims, and/or Cross-Claims

(1) Within twenty (20) business days from receipt of the Statement of Claim, the Respondent(s) shall serve each party with an executed Submission Agreement and a copy of Respondent(s) answer. An executed Submission Agreement and Answer of the Respondent(s) shall also be filed with the Director of Arbitration with sufficient additional copies for the arbitrator(s), along with any deposit required under the schedule of fees. The answer shall specify all available defenses and relevant facts that will be relied upon at the hearing. It also may set forth any related Counterclaim the Respondent(s) may have against the Claimant, any Cross-Claim the Respondent(s) may have against any other named Respondent(s), and any Third-Party

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either by first class or overnight mail or, in the case of other means of service, on the date of delivery. The parties must file documents with the Director on the same day as service on the parties.

Section 7. Starting an Arbitration (Section 13)
This section covers how to start an arbitration, how to answer a claim, and the time periods for filing and service of documents. It also covers when a party will not be allowed to defend against a claim, and the procedure to add third parties. If the claim for damages is $25,000 or less, see *Section 9 – Simplified Arbitration.*

(a) **Initial Filing Requirements.** Claimant must submit to the Director, with copies for each party and each arbitrator:

- a Submission Agreement, signed by Claimant;
- a Statement of Claim; specifying relevant facts and remedies requested;
- the non-refundable filing fee and deposit specified in Section 11; and
- documents supporting the claim.

The Director will send the Respondent the Submission Agreement and the Statement of Claim.

(b) Answer and Counterclaim Requirements.

(1) **Requirements Generally.** Within 20 business days of receipt of the Statement of Claim, the Respondent must serve each party with a signed Submission Agreement; and an Answer to the claim. At the same time, Respondent must file the signed Submission Agreement and Answer with the Director, with additional copies for the arbitrators.

(2) **Content of the Answer.** The Answer must include all available defenses and facts to be relied upon at the hearing. The Answer may also include:

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Claim against any other party or person based upon any existing dispute, claim, or controversy subject to arbitration under this Code.

(2) (i) A Respondent, Responding Claimant, Cross-Claimant, Cross-Respondent, or Third-Party Respondent who pleads only a general denial as an answer may, upon objection by a party, in the discretion of the arbitrators, be barred from presenting any fact or defenses at the time of the hearing.

(ii) A Respondent, Responding Claimant, Cross-Claimant, Cross-Respondent, or Third-Party Respondent who fails to specify all available defenses and relevant facts in such party's answer may, upon objection by a party, in the discretion of the arbitrators, be barred from presenting such facts or defenses not included in such party's answer at the hearing.

(iii) A Respondent, Responding Claimant, Cross-Claimant, Cross-Respondent, or Third-Party Respondent who fails to file an answer within twenty (20) business days from receipt of service of a claim, unless the time to answer has been extended pursuant to paragraph (c)(5), may, in the discretion of the arbitrators, be barred from presenting any matter, arguments, or defenses at the hearing.

(3) Respondent(s) shall serve each party with a copy of any Third-Party Claim. The Third-Party Claim shall also be filed with the Director of Arbitration with sufficient additional copies for the arbitrator(s), along with any deposit required under the schedule of fees. Third-Party Respondent(s) shall answer in the manner provided for response to the Claim, as provided in (1) and (2) above.

(4) The Claimant shall serve each party with a reply to a Counterclaim within ten (10) business days of receipt of an Answer

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- any related counterclaims;
- any cross-claims against another Respondent; and
- any third-party claims.

If an answer contains a counterclaim, cross-claim or third-party claim, the Respondent must submit the non-refundable filing fee and deposit as specified in Section 11 with the answer.

(3) Answering Counterclaims. Claimant must answer any counterclaim within 10 business days of receipt. The answer must comply with paragraph (2) above. Claimant must serve the answer on each party and file a copy with the Director, with copies for each Arbitrator.

(4) Third-Party Claims. To initiate a Third-Party Claim, a party must:

- serve each party with a copy of the Third-Party Claim;
- file a copy with the Director, with copies for each Arbitrator; and
- pay the non-refundable filing fee and hearing deposit as specified in Section 11.

(5) Answering Third Party Claims. Third-Party Respondents must answer the claim as specified in (1) and (2) above.

(6) Loss of the Right to Defend.

(a) Upon objection of a party, the Arbitrator(s) may bar a party from presenting defenses or other facts at the hearing if:

- the answer to any claim contains only a general denial, without reference to the facts; or
- available defenses or relevant facts are not specified in the answer;

(b) Upon objection of a party or at its discretion, the panel may bar a party from presenting defenses or other facts at the hearing if the party does not file a timely answer.

(7) Extending Time Periods. The Director

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containing a Counterclaim. The reply shall also be filed with the Director of Arbitration with sufficient additional copies for the arbitrator(s).

(5) The Director of Arbitration may extend any period in this section (whether such be denominated as a Claim, Answer, Counterclaim, Cross-Claim, Reply, or Third-Party pleading).

Section 13: Initiation of Proceedings

(d) Joining and Consolidation – Multiple Parties

(1) Permissive Joinder. All persons may join in one action as claimants if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these parties will arise in the action. All persons may be joined in one action as respondents if there is asserted against them jointly, severally or any right to relief in respect of or in the alternative, arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all respondents will arise in the action. A claimant or respondent need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the claimants according to their respective rights to relief, and against one or more respondents according to their respective liabilities.

(2) In arbitrations where there are multiple claimants, respondents and/or third party respondents, the Director of Arbitration shall be authorized to determine preliminarily whether such parties should proceed in the same or separate arbitrations. Such determinations will be considered subsequent to the filing of all responsive pleadings.

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may extend any of the above time periods.

Section 8. Joining and Consolidating Claims for Multiple Parties (Section 13 (d))
This section covers when multiple parties may start an arbitration or be named as respondents in an arbitration.

(a) **Multiple Claimants.** Several claimants may join together in one arbitration if their claims:

- contain common questions of law or fact, common to all the parties; and
- arise out of the same event, transaction, or series of events or transactions.

Each Claimant is not required to seek the same relief demanded by the other Claimants. Each Claimant may receive an award based on that Claimant's individual right to relief.

(b) **Multiple Respondents.** A Claimant may join separate Respondents into one arbitration if the claims against the Respondents:

- contain common questions of law or fact common to all the parties; and
- assert any right to relief arising out of the same event, transaction, or series of events or transactions.

Each Respondent is required to defend against only those claims for relief that are directed at

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(3) The Director of Arbitration shall be authorized to determine preliminarily whether claims filed separately are related and shall be authorized to consolidate such claims for hearing and award purposes.	that Respondent. Each Respondent may have an award issued against them based on their individual liability.
(4) All final determinations with respect to joining, consolidation, and multiple parties under this subsection shall be made by the arbitration panel.	(c) Upon request of a party, the Director may make an initial determination to consolidate separate but related claims into one arbitration. After all pleadings are filed, if any party objects to the consolidation of the claims, the Director will make an initial determination whether the parties should proceed in the same or separate arbitration.
Section 2: Simplified Arbitration	(d) Upon the request of a party, the Director's decision with respect to consolidating claims is subject to review by the arbitrators. The arbitrator(s) makes all final decisions regarding joining and consolidating multiple parties and claims.
(a) Any dispute, claim, or controversy arising between a public customer(s) and an associated person or a member subject to arbitration under this Code involving a dollar amount not exceeding $25,000, exclusive of attendant costs and interest, shall be arbitrated as hereinafter provided.	Section 9. Simplified Arbitration (Section 2) This section applies only to claims involving customers where damages of $25,000 or less are claimed. (a) Qualifying Claims. Simplified arbitration only applies to claims involving customers where the dollar amount of the claim is $25,000 or less, not including costs and interest.
(b) The Claimant shall file with the Director of Arbitration an executed Submission Agreement and a copy of the Statement of Claim of the controversy in dispute and the required deposit, together with documents in support of the Claim. Sufficient additional copies of the Submission Agreement and the Statement of Claim and supporting documents shall be provided to the Director of Arbitration for each party and the arbitrator. The Statement of Claim shall specify the relevant facts, the remedies sought, and whether a hearing is demanded.	(b) How to Start a Claim. A Claimant must submit the following documents to the Director, with copies for each party and arbitrator: • a signed and notarized Submission Agreement; • a Statement of Claim, specifying relevant facts, remedies requested and whether a hearing is requested; • additional documents supporting the claim; and • the non-refundable filing fee and required deposit, specified in Section 11.
(c) The Claimant shall pay a filing fee and shall remit a hearing deposit as specified in Section 30 of this Code upon the filing of the Submission Agreement. The final disposition of the fee or deposit shall be determined by the arbitrator.	Upon receipt, the Director will promptly send each Respondent a copy of the Submission

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(d) The Director of Arbitration shall endeavor to serve promptly by mail or otherwise on the Respondent(s) one (1) copy of the Submission Agreement and one (1) copy of the Statement of Claim. Within twenty (20) calendar days from receipt of the Statement of Claim, Respondent(s) shall serve each party with an executed Submission Agreement and a copy of Respondent's Answer. Respondent's executed Submission Agreement and Answer shall also be filed with the Director of Arbitration with sufficient additional copies for the arbitrator(s) along with any deposit required under the schedule of fees for customer disputes. The Answer shall designate all available defenses to the Claim and may set forth any related Counterclaim and/or related Third-Party Claim the Respondent(s) may have against the Claimant or any other person. If the Respondent(s) has interposed a Third-Party Claim, the Respondent(s) shall serve the Third-Party Respondent with an executed Submission Agreement, a copy of Respondent's Answer containing the Third-Party Claim, and a copy of the original Claim filed by the Claimant. The Third-Party Respondent shall respond in the manner herein provided for response to the Claim. If the Respondent(s) files a related Counterclaim exceeding $25,000 exclusive of attendant costs and interest, the arbitrator may refer the Claim, Counterclaim, and/or Third-Party Claim, if any, to a panel of three (3) arbitrators in accordance with Section 8 of this Code, or he may dismiss the Counterclaim and/or Third-Party Claim, without prejudice to the Counterclaimant(s) and/or Third-party Claimant(s) pursuing the Counterclaim and/or Third-party claim in a separate proceeding. The costs to the Claimant under either proceeding shall in no event exceed the total amount specified in Section 30 of this Code.

(e) All parties shall serve on all other parties and the Director of Arbitration, with sufficient

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Agreement and Statement of Claim.

(c) Answer and Counterclaim Requirements.

(1) Within 20 days of receipt of the Statement of Claim, the Respondent(s) must send each party a signed and notarized Submission Agreement and an Answer. At the same time, the Respondent must file additional copies of the signed Submission Agreement and Answer with the Director with additional copies for the arbitrator.

(2) A Respondent's Answer must include all available defenses. The Answer may also include any related counterclaims and/or third-party claims. If a counterclaim or third-party claim is asserted, the Respondent must submit to the Director the non-refundable filing fee and required deposit specified in Section 11.

(3) The Claimant must send a reply to any counterclaim to each party within 10 days of receipt of the counterclaim. However, if the amount of the counterclaim exceeds the original claim, the Claimant may withdraw the original claim and discontinue the proceeding. After withdrawal, either party may refile their claim to initiate a new proceeding.

(4) If the Respondent asserts a third-party claim, the Respondent must serve on the Third-Party Respondent:

- a signed and notarized Submission Agreement,
- the Third Party Claim, and
- the original Statement of Claim and Answer.

A Third-Party Respondent must respond as if answering an original Statement of Claim.

(5) If a counterclaim exceeds $25,000, not including costs and interest, the arbitrator may:

- refer the entire case to a panel of 3 arbitrators for resolution pursuant to the procedures in general arbitration; or

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additional copies for the arbitrator(s), a copy of the Answer, Counterclaim, Third-Party Claim, Amended Claim, or other responsive pleading, if any. The Claimant, if a Counterclaim is asserted against him, shall within ten (10) calendar days either

(i) serve on each party a reply to any Counterclaim or,

(ii) if the amount of the Counterclaim exceeds the Claim, shall have the right to file a statement withdrawing the Claim. If the Claimant withdraws the Claim, the proceedings shall be discontinued without prejudice to the rights of the parties.

(f) The dispute, claim, or controversy shall be submitted to a single arbitrator knowledgeable in the securities industry selected pursuant to Section 9. Unless the public customer demands or consents to a hearing, or the arbitrator calls a hearing, the arbitrator shall decide the dispute, claim, or controversy solely upon the pleadings and evidence filed by the parties. If a hearing is necessary, such hearing shall be held as soon as practicable at a locale selected by the Director of Arbitration.

(g) The Director of Arbitration may grant extensions of time to file any pleading upon a showing of good cause.

(h) (1) The arbitrator shall be authorized to require the submission of further documentary evidence as he, in his sole discretion, deems advisable.

(2) If a hearing is demanded or consented to in accordance with Section 2(f), the General Provision Governing Pre-Hearing Proceedings under Section 20 shall apply.

(3) If no hearing is demanded or consented to, all requests for document production shall be submitted in writing to the Director of Arbitration within ten (10)

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- dismiss the counterclaim or the third-party claim, and allow it to be re-filed in a separate arbitration.

Costs to a customer may not exceed the amount specified in Section 11.

(d) Documents to be Served on All Parties and Filed with the Director of Arbitration.

Where applicable, all parties must send a copy of the following documents to all other parties and to the Director, with copies for the arbitrator:

- the Answer;
- any Counterclaim;
- any Third-Party Claim;
- any Amended Claim; and
- any other pleading.

(e) Time Extensions.

The Director may grant extensions of time to file any pleading for good cause.

(f) The Arbitrator Deciding the Claim.

(1) The claim will be submitted to a single arbitrator knowledgeable in the securities industry, selected as described in Section 17. The arbitrator will decide the claim on the evidence and pleadings filed by the parties unless the customer requests or consents to a hearing, or the arbitrator calls a hearing. If a hearing will be held, the Director will select the hearing location and schedule the hearing date as soon as possible.

(2) The arbitrator deciding the claim may request the appointment of two additional arbitrators. Where there is more than one arbitrator, the majority of the arbitrators will be public arbitrators as defined in Section 16.

(g) Document Production.

(1) If there is a hearing, Sections 15 and 23 will govern information exchange and pre-

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business days of notification of the identity of the arbitrator selected to decide the case. The requesting party shall serve simultaneously its request for document production on all parties. Any response or objections to the requested document production shall be served on all parties and filed with the Director of Arbitration within five (5) business days of receipt of the requests for production. The appointed arbitrator shall resolve all requests under this Section on the papers submitted.	hearing activity. (2) If a hearing will not be held, the parties must make all requests for documents in writing within 10 business days of notice of the arbitrator's appointment. A request must be sent at the same time to all parties and filed with the Director. (3) Parties must respond or object to the requests in writing, with copies to all parties, within 5 business days, and file a copy with the Director. The arbitrator will resolve objections on the papers submitted without a hearing.
(i) Upon the request of the arbitrator, two (2) additional arbitrators shall be selected to the panel which shall decide the matter in controversy.	(h) **Additional Documents.** (1) With the permission of the arbitrator the parties may submit additional documents relating to the pleadings. (2) Upon the request of a party or at the discretion of the arbitrator(s), the arbitrator(s) may order the submission of additional documentation relating to the pleadings.
(j) In any case where there is more than one (1) arbitrator, the majority will be public arbitrators.	
(k) In his discretion, the arbitrator may, at the request of any party, permit such party to submit additional documentation relating to the pleadings.	(i) **General Arbitration Rules.** The general arbitration rules of the [SRO] apply to Simplified Arbitration, unless otherwise specified.
(l) Except as otherwise provided herein, the general arbitration rules of the (name of self-regulatory organization) shall be applicable to proceedings instituted under this code.	
Section 14: Designation of Time and Place of Hearings The time and place for the initial hearing shall be determined by the Director of Arbitration and each hearing thereafter by the arbitrators. Notice of the time and place for the initial hearing shall be given at least fifteen (15) business days prior to the date fixed for the hearing by personal service, registered, or certified mail to each of the parties unless the parties shall, by their mutual consent, waive the notice provisions under this section. Notice for each hearing, thereafter, shall be given as the arbitrators may determine. Attendance at a hearing waives notice thereof.	**Section 10. The Arbitration Hearing (New)** This section deals with the scheduling of the Arbitration Hearing, how parties may waive a hearing, and postponement of a scheduled hearing date. (a) **Time and Place of Hearings (Section 14)** (1) The Director decides when and where to

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Section 3: Hearing Requirements - Waiver of Hearing

(a) Any dispute, claim, or controversy, except as provided in Section 2 (Simplified Arbitration) shall require a hearing unless all parties waive such hearing in writing and request that the matter be resolved solely upon the pleadings and documentary evidence.

(b) Notwithstanding a written waiver of a hearing by the parties, a majority of the arbitrators may call for and conduct a hearing. In addition, any arbitrator may request the submission of further evidence.

Section 18: Adjournments

(a) The arbitrators may, in their discretion, adjourn any hearing(s) either on their own initiative or on the request of any party to the arbitration.

(b) Unless waived by the Director of Arbitration, a party requesting an adjournment after arbitrators have been appointed shall deposit a fee, equal to the initial deposit of forum fees for the first adjournment and twice the initial deposit of forum fees, not to exceed $1,000, for a second or subsequent adjournment requested by that party. If the adjournment is not granted the deposit shall be refunded. If the adjournment is granted, the arbitrators may direct the return of the adjournment fee.

(c) Upon receiving a third request consented to by all parties for an adjournment, the arbitrators may dismiss the arbitration without prejudice to the Claimant filing a new

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hold the initial hearing. The Director must give notice of the time and place of the initial hearing to each party at least 15 business days before the hearing. Notice will be sent by personal service, or registered or certified mail, unless the parties waive notice.

(2) The arbitrator(s) decide when and where to hold subsequent hearings, and how to notify the parties of those hearings.

(3) A party attending a hearing waives the right to object to lack of notice of that hearing.

(b) Waiver of the Hearing Requirement (Section 3)

(1) A hearing will be held in every claim unless:

- The SRO is processing the case as a Simplified Arbitration; or
- All parties waive a hearing, in writing, and request a decision by the arbitrators based upon the pleadings and documentary evidence alone.

(2) Even if the parties waive the hearing, a majority of the arbitrators may call for a hearing. Also, any arbitrator may request that further evidence be provided.

(c) Postponements (Section 18)

A postponement is any delay or cancellation of a hearing date. This section covers how to request a postponement of the hearing date and describes the costs and possible consequences of such postponements.

(1) Arbitrators may postpone hearings on their own, or at the request of any party.

(2) Unless waived by the Director, a party that requests a postponement after arbitrators have been appointed must:

- for the first request, deposit a fee equal to

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arbitration.	the initial hearing session deposit. • for the second and any subsequent requests, deposit an amount equal to twice the initial hearing session deposit, but not over $1,000. If the arbitrators do not grant a postponement, any postponement fees paid will be refunded. The arbitrators may also direct the refund of a postponement fee if a postponement is granted.
Section 30. Schedule of Fees	(3) If the arbitrators receive a third request for postponement that is consented to by all parties, the arbitrators may dismiss the arbitration. A claimant, however, may later file a new arbitration on the same claim.
(a) At the time of filing a Claim, Counterclaim, Third-Party Claim, or Cross-Claim, a party shall pay a non-refundable filing fee and shall remit a hearing session deposit with the (name of self-regulatory organization) in the amounts indicated in the schedules below unless such fee or deposit is specifically waived by the Director of Arbitration.	**Section 11. Schedule of Fees (Section 30)** All claims require that the filing party must pay a filing fee and hearing session deposit. This section also covers the amount of fees required and describes how the arbitrators may assess fees. **(a) Filing Fees and Hearing Session Deposits.** (1) When filing a Claim, Counterclaim, Third-Party Claim, or Cross-Claim, that party must pay a non-refundable filing fee and a hearing session deposit to the SRO, as indicated in the fee schedules below, unless waived by the Director.
Where multiple hearing sessions are required, the arbitrator(s) may require any of the parties to make additional hearing deposits for each additional hearing session. In no event shall the amount deposited by all parties per hearing session exceed the amount of the initial hearing deposit made by any party under the schedule below.	(2) When multiple hearing sessions are scheduled, the arbitrators may require any party to make additional hearing session deposits. The sum of the hearing session deposits shall not exceed the amount of the largest initial hearing session deposit times the number of scheduled hearing sessions.
(b) A hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference, which lasts four (4) hours or less. The forum fee for a pre-hearing conference with an arbitrator shall be the amount set forth in the schedules below as a hearing session deposit for a hearing with a single arbitrator.	**(b) Hearing Session Defined.** A hearing session is any meeting between the parties and
(c) The arbitrators, in their award, shall determine the amount chargeable to the parties as forum fees and shall determine who shall pay such forum fees. Forum fees	

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Section 13(d) of this Code, the hearing deposit and forum fees assessable per hearing session after joinder or consolidation shall be based on the cumulative amount in dispute. The arbitrator(s) shall determine by whom such forum fees shall be borne.	determine, and state in the award, the amount of costs incurred, including costs incurred under Sections 10(c) (Postponements), 15 (Information Exchange and Pre-Hearing Proceeding), and 25(d) (Record of Proceedings). The arbitrators will determine other costs and expenses of the parties and arbitrators that are within the scope of the agreement of the parties unless applicable law directs otherwise. The arbitrators will decide who will pay those costs.
(e) If the dispute, claim, or controversy does not involve, disclose or specify a money claim, the non-refundable filing fee for a public customer shall be $250 and the nonrefundable filing fee for an industry party shall be $500. The hearing session deposit to be remitted by a party shall be $600 or such greater or lesser amounts as the Director of Arbitration or the panel of arbitrators may require, but shall not exceed $1,000.	(d) **Joined or Consolidated Claims.** For claims filed separately and subsequently joined or consolidated, the arbitrators will base the hearing deposits and forum fees on the total amount in dispute. The arbitrators will decide who will pay those fees.
(f) The (name of self-regulatory organization) shall retain the total initial amount deposited as hearing session deposits by all the parties in any matter submitted and settled or withdrawn within eight business days of the first scheduled hearing session other than a pre-hearing conference.	(e) **Non-monetary Claims.** If the claim does not involve or specify a money claim, the non-refundable filing fee for a customer or non-member is $250 and the non-refundable filing fee for an industry party is $500. The hearing session deposit is $600 or an amount determined by the Director or the panel of arbitrators which will not exceed $1,000.
(g) Any matter submitted and thereafter settled or withdrawn subsequent to the commencement of the first hearing session, including a pre-hearing conference with an arbitrator, shall be subject to an assessment of forum fees and costs incurred pursuant to Sections 18, 20 and 24 based on hearing sessions held and scheduled within eight business days after the (name of self-regulatory organization) received notice that the matter has been settled or withdrawn. The arbitrator(s) shall determine by whom such forum fees and costs shall be borne.	(f) **Claims Settled or Withdrawn Prior to the Initial Hearing.** The SRO will retain all hearing session deposits submitted by the parties in any matter settled or withdrawn within eight business days of the first scheduled hearing session other than a pre-hearing conference.
Section 4: Time Limit on Eligibility for Arbitration	(g) **Claims Settled or Withdrawn After the Initial Hearing.** The arbitrators may assess forum fees and any costs incurred for any matter settled or withdrawn after the beginning of the first hearing session, including a pre-hearing conference with an arbitrator. The arbitrators will base the fees on hearing sessions held or scheduled within eight business days after the SRO received notice that the matter is settled or

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chargeable to the parties shall be assessed on a per hearing session basis and the aggregate for each hearing session may equal but shall not exceed the amount of the largest initial hearing deposit deposited by any party, except in a case where claims have been joined subsequent to filing in which cases hearing session fees shall be computed as provided in paragraph (d). The arbitrators may determine in the award that a party shall reimburse to another party any non-refundable filing fee it has paid.	the arbitrators, including a pre-hearing conference, which lasts 4 hours or less. The fee for a pre-hearing conference with one arbitrator is the same as the hearing session deposit for one arbitrator.
If a customer is assessed forum fees in connection with an industry claim, forum fees assessed against the customer shall be based on the hearing deposit required under the industry claims schedule for the amount awarded to industry parties to be paid by the customer and not based on the size of the industry claim. No fees shall be assessed against a customer in connection with an industry claim that is dismissed; however, in cases where there is also a customer claim, the customer may be assessed forum fees based on the customer claim under the procedure set out above.	(c) **Forum Fees.** (1) **General assessment of forum fees.** Forum fees are charges assessed against one or more of the parties for the hearing. The arbitrators, in their award, will decide the forum fee amount chargeable to the parties, and determine who must pay such fees. Forum fees will be assessed based upon the number of hearing sessions. The total forum fees for each hearing session may not exceed the amount of the largest initial hearing deposit of any party, except when claims are joined after filing. Forum fees for claims joined after filing are provided in paragraph (d). The arbitrators may decide that a party will reimburse another party for non-refundable filing fees. (2) **Customer fees for an industry claim.** In an industry claim, the arbitrators may assess forum fees against the customer. In such case, the arbitrators will base their assessment on the hearing deposit for the amount actually awarded to the industry party, rather than the amount of the industry claim. If an industry claim against a customer is dismissed, the arbitrators may not assess fees against a customer. However, if the case also involves a customer claim, the arbitrators may assess fees against the customer based upon the schedule of fees for customer claims.
Amounts deposited by a party shall be applied against forum fees, if any.	(3) **Application of Deposits.** A party's deposits will be applied against forum fees assessed against that party, if any. The Director will refund a party's hearing deposit if forum fees are not assessed against that party, unless the arbitrators direct otherwise.
In addition to forum fees, the arbitrator(s) may determine in the award the amount of costs incurred pursuant to Sections 18, 20, and 24 and, unless applicable law directs otherwise, other costs and expenses of the parties and arbitrator(s) which are within the scope of the agreement of the parties. The arbitrator(s) shall determine by whom such costs shall be borne.	(4) **Other costs.** The arbitrators may also
If the hearing session fees are not assessed against a party who had made a hearing deposit, the hearing deposit will be refunded unless the arbitrator(s) determine otherwise.	
(d) For claims filed separately and subsequently joined or consolidated under	

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(a) Eligibility: No Tolling for Fraudulent Concealment

The Director of Arbitration, upon the request of a party pursuant to subsection (c) below, shall find a dispute, claim or controversy to be ineligible for arbitration under this Code when, at the time of filing, six (6) years have elapsed from the occurrence or event giving rise to the dispute, claim or controversy. An allegation of fraudulent concealment does not render an otherwise ineligible claim eligible, but may be considered in connection with any other time bar defense (e.g. statute of limitations). Any damages suffered by the Claimant prior to the period described in this section shall not be part of any award that might be rendered by the arbitrators but may be pursued in a court proceeding described in subsection (d) below.

(b) Occurrence or Event Defined

"Occurrence or event" means the trade date for the security upon which the claim is based. If the claim does not arise from a trade, then the occurrence or event refers to the date that the Respondent engaged (or omitted or refrained from engaging) in the activity that is the subject of the claim

(c) Challenge to Eligibility

(1) If any responding party has a good faith basis to allege that a claim is ineligible, then such party, within twenty (20) business days after service of the claim upon it, shall request that the Director of Arbitration decide whether the claim is ineligible or eligible. The opposing party may submit a response to the Director of Arbitration no later than ten (10) days after service upon the party of the request. The period within which to file a responsive pleading to an eligible claim shall be tolled from the date a request is filed under this subsection until twenty (20) business days after service upon it of the Director's decision. The Director shall decide the issue of eligibility and shall endeavor to notify the parties of its decision within thirty (30) days of the request. The Director's decision shall

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withdrawn. The arbitrators must decide who will pay the forum fees and costs.

(Schedule of fees appears as a chart on last page.)

Section 12. Determining time limits on eligibility of a claim and how to challenge a claim's eligibility for arbitration (Section 4)
This section describes which claims may not be eligible for arbitration because of the passage of time. It also describes how the claim's eligibility will be reviewed and decided by the Director.

(a) **Time Limits on Eligibility**

(1) At any party's request, the Director shall find a claim not eligible for arbitration if six years have passed between the time of filing and the event giving rise to the dispute, claim or controversy.

(2) An allegation of fraudulent concealment does not make an otherwise ineligible claim eligible. However, arbitrators may consider fraudulent concealment in connection with any other defense to the claim based on lapse of time (e.g., statute of limitations).

(3) If more than six years have passed since the event that is the subject of the claim, damages are not recoverable in arbitration. However, the Claimant may proceed in court with such claim.

(b) **Defining the Event Causing the Controversy.** "Event" means the trade date for the security on which the claim is based. If the claim is not based on a trade, event means the date that the responding party acted (or failed to act), creating the controversy that is the subject of the claim.

(c) **How to Challenge Eligibility.**

(1) The party challenging the eligibility of the claim must:

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be deemed a final decision for purposes of court jurisdiction.	• have a good faith basis to allege that the claim is not eligible for arbitration; and • within 20 business days of service of the claim, request in writing a ruling on the claim's eligibility from the Director.
(2) Any party may dispute the Director's decision by filing an action against the opposing party in a court of competent jurisdiction challenging the Director's eligibility decision under subsection (c)(1) above. Such court action must be filed within twenty (20) business days after service of the Director's decision. The filing of an action challenging the Director's decision that a claim is eligible shall constitute a stipulation by the filing party that the claims are ineligible for arbitration and the opposing party may immediately proceed with the claim in court as allowed in Section 4(d).	(2) The party opposing the challenge to eligibility may respond in writing to the Director within 10 business days after service of the challenge. Such a challenge extends the deadline for filing an answer until 20 business days after receipt of the Director's decision on eligibility.
(3) If no action is filed within the aforementioned period, then the Director's decision shall be final and may not be subsequently challenged in any forum. If an action is filed challenging the Director's decision, then the filing date of any responsive pleading in the arbitration shall continue to be tolled until twenty (20) business days after the date that the action is finally resolved.	(3) The Director will decide the issue of eligibility and attempt to notify the parties of the decision within 30 days of the challenge. This decision is final for purposes of court jurisdiction.
(4) No party shall submit the issue of eligibility to a court prior to submission of the issue to the Director, or once submitted, prior to the Director's decision as provided for in paragraph (c) of this Rule.	(4) Any party may dispute the decision of the Director by filing an action in a court within 20 business days after receipt of the Director's decision. A party who disputes the Director's decision that a claim is eligible is admitting that the claim is not eligible for arbitration, and the opposing party may then immediately file a claim in court as allowed in Section 12(d).
(d) **Ineligible Claims** Any claim determined to be ineligible for arbitration may be filed in a court of competent jurisdiction by any Claimant, notwithstanding that a submission agreement had been filed, and as if no arbitration agreement had been entered into by the parties, provided, however, the parties agree to consolidated any or all claims related to a dispute to a single forum. All applicable time bars (including statutes of limitations and repose) are tolled in accordance with all	(5) If no action is filed in court within the 20 business days after receipt of the Director's decision, the decision is final and may not be subsequently challenged in any forum. If an action is filed challenging the Director's decision, then the filing date of any answer or other pleading in the arbitration will be extended until 20 business days after the court action is finally resolved.

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applicable law and/or Section 7 during the pendency of any arbitration claim filed pursuant to the rules of this forum, and for twenty (20) business days after service of the Director's decision.

(e) Statute of Limitations
This section shall not extend or limit applicable statutes of limitations, nor shall it apply to any claim which is directed to arbitration by a court of competent jurisdiction upon the motion of an opposing party.

Section 26: Amendments

(a) After the filing of any pleadings, if a party desires to file a new or different pleading, such change must be made in writing and filed with the Director of Arbitration with sufficient additional copies for each arbitrator. The party filing a new or different pleading shall serve on all other parties a copy of the new or different pleading in accordance with the provisions set forth in Section 13(b). The other parties may, within ten (10) business days from the receipt of service, file a response with all other parties and the Director of Arbitration in accordance with Section 13(b).

(b) After a panel has been appointed, no new or different pleadings may be filed except for a responsive pleading as provided for in (a) above or with the panel's consent.

Section 6: Settlements

All settlements submitted shall be at the election of the parties.

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(6) No party shall submit the issue of eligibility to a court prior to the submission of the issue to the Director, or once submitted, prior to the Director's decision.

(d) Claims Not Eligible for Arbitration.
(1) If the Director decides that a claim is not eligible, any party may file the claim in court as if no arbitration agreement existed between the parties, even though a submission agreement has been filed.

(2) If permitted under applicable law and/or Section 5, when eligibility is contested, the time limits that would ordinarily run for filing a claim in court will be tolled (e.g., statute of limitations and repose). This tolling will continue from the filing of an arbitration claim until 20 business days after service of the Director's decision on eligibility.

(e) Statute of Limitations (Time Limits).
(1) This section does not extend or limit any statutes of limitations.

(2) If a party files a claim in court and the party against whom the claim is brought requests the court to order arbitration, that party may not later challenge the eligibility of the claim to be arbitrated.

Section 13. Amendments (Section 26)

(a) If a party wants to file a new or different pleading that party must:

- file the new or different pleading in writing with the Director, with copies for each arbitrator; and
- serve all other parties with a copy.

Other parties may file a response within 10 business days of receipt of the new or different pleading. Parties must send their response to all other parties and the Director, with copies for each arbitrator.

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Section 20: General Provisions Governing a Pre-hearing Proceeding	
	(b) Parties serving new or different pleadings or responses under this section must follow Section 6 (Service and Filing Requirements).
(a) Requests for Documents and Information The parties shall cooperate to the fullest extent practicable in the voluntary exchange of information to expedite the arbitration. Any request for documents or other information should be specific, relate to the matter in controversy, and afford the party to whom the request is made a reasonable period of time to respond without interfering with the time set for the hearing.	(c) Parties may not file new or different pleadings after the panel of arbitrators is appointed without the panel's consent. Parties may, however, respond to a pleading that was filed before the panel's appointment.
	Section 14. Settlements (Section 6)
	Parties to an arbitration may agree to settle their dispute at any time.
(b) Document Production and Information Exchange	**Section 15. Exchange of Documents and Information (Section 20 a-c)** This section covers the documents and information that the parties must provide to each other before the hearing.
(1) Any party may serve a written request for information or documents ("information request") upon another party twenty (20) business days or more after service of the Statement of Claim by the Director of Arbitration or upon filing of the Answer, whichever is earlier. The requesting party shall serve the information request on all parties and file a copy with the Director of Arbitration. The parties shall endeavor to resolve disputes regarding an information request. Such efforts shall be set forth in the objection.	(a) **General Rules** (1) Parties must cooperate by voluntarily exchanging documents and information to expedite the arbitration. (2) Requests for documents and information must be specific, relate to the controversy, and allow the responding party a reasonable time to respond without interfering with the hearing date.
(2) Unless a greater time is allowed by the requesting party, information requests shall be satisfied or objected to within thirty (30) calendar days from the date of service. Any objection to an information request shall be served by the objecting party on all parties and filed with the Director of Arbitration.	(b) **Requests for Documents and Information** (1) A party may request in writing documents and information from another party the earlier of: • 20 business days after service of the Statement of Claim by the Director; or • upon filing of the Answer.

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(3) Any response to objections to information requests shall be served on all parties and filed with the Director of Arbitration and within ten (10) calendar days of receipt of the objection.

(4) Upon the written request of a party who does not receive the sought information, the matter will be referred by the Director of Arbitration to either a pre-hearing conference under paragraph (d) of this section or to a selected arbitrator under paragraph (e) of this section.

Section 8: Determining the Number and Type of Arbitrators

This section covers the number and type of arbitrators who may hear a dispute, claim or controversy (a case) with a public customer or a non-member as a party, other than those cases covered by Section 2 (Simplified Arbitration). Throughout these rules, "you" refers to a party to the arbitration.

(a) For Claims of $25,001 to $50,000

If any party is a public customer or a non-member and the total amount claimed in your case is from $25,001 to $50,000 (excluding costs and interest):

(1) One public arbitrator will hear your case, unless you or any party asks for three arbitrators.

(2) If you want three arbitrators, you must make your request when you file your first documents, your Statement of Claim or your Answer, with the [Name of SRO]. You must pay an additional hearing session deposit for three arbitrators when you make your request.

(3) If three arbitrators hear your case, two will be public arbitrators, unless:

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(2) The party requesting information must serve copies of the request upon all parties, and file a copy with the Director.

(c) Complying or Objecting

(1) A party who receives a document and information request must satisfy or object to the request within 30 days from service of the request. The requesting party may allow a greater time to respond to the request.

(2) Before formally objecting to a document and information request, parties must try to resolve disputes among themselves. The objecting party must describe those efforts in the written objection.

(3) Any party who objects to a document and information request must serve the objection on all parties, and file a copy with the Director.

(4) Within 10 days of receipt of the objection, a party may serve a response to the objection on all parties and file a copy with the Director.

(5) If a party does not receive the requested documents and information, upon written request, the Director will refer the matter to either a pre-hearing conference or to a selected arbitrator. (See Section 23)

Section 16. Determining the Number and Type of Arbitrators (Section 8)

This section covers the number and type of arbitrators who will decide a claim with a customer or a non-member as a party, when the amount in dispute exceeds $25,000. For claims of $25,000 or less involving customers or non-members, see Section 9 (Simplified Arbitration).

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- In a case between a public customer and an industry party, the public customer requests that the panel include two or three arbitrators from the securities industry.
- In a case between other non-members and a member, a non-member requests that the panel include two or three arbitrators from the securities industry.

(4) You must ask for two or three arbitrators from the securities industry within ten days after the Answer is due. This deadline is not extended if an extension is granted for filing an Answer.

(5) Even if you or another party does not ask for three arbitrators, your arbitrator may decide that three arbitrators should hear the case.

(b) Claims above $50,000 or Where No Dollar Amount is Claimed or Disclosed.

Three arbitrators will hear and decide claims above $50,000 (excluding costs and interest), or where no dollar amount is claimed or disclosed.

(1) Two of your three arbitrators will be public arbitrators, unless:

In a case between a public customer and an industry party, the public customer requests that the panel include two or three arbitrators from the securities industry.

In a case between other non-members and a member, a non-member requests that the panel include two or three arbitrators from the securities industry.

(2) You must ask for two or three arbitrators from the securities industry within ten days after the Answer is due. This deadline is not extended if an extension is granted for filing an Answer.

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(a) For claims of $25,001 to $50,000

If any party is a customer or a non-member and the total amount claimed in the case is from $25,001 to $50,000 (excluding costs and interest):

(1) One arbitrator, classified as public and knowledgeable in the securities industry, will hear the case unless any party or the arbitrator asks for three arbitrators.

(2) If a party requests three arbitrators, the request must be made when that party files its first documents (Statement of Claim or Answer) with the SRO. The requesting party must pay an additional hearing session deposit for three arbitrators when it makes its request.

(3) If three arbitrators are requested, two will be classified as public arbitrators, unless the customer or non-member requests that the panel includes two or three arbitrators classified as being from the securities industry.

(4) The customer or non-member must ask for two or three arbitrators classified as being from the securities industry within ten days after the answer is due. This deadline is not extended even if an extension is granted for an answer.

(b) Claims above $50,000 or where no dollar amount is claimed or disclosed

Three arbitrators will hear and decide claims

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(c) How We Classify Securities Industry Arbitrators

If you select arbitrators from the [Name of SRO]'s pool, there are only two types of arbitrators that may hear your case. We classify arbitrators as either securities industry or public arbitrators.

An arbitrator is from the securities industry if that arbitrator:

(1) is or is associated with either:
- a member of a self-regulatory organization ("SRO")
- a securities broker/dealer
- a government securities broker
- a government securities dealer
- a municipal securities dealer;
- {a registered investment advisor};
- a member of a registered futures association or any commodity exchange.
- a person registered under the Commodity Exchange Act; or

(2) has been associated with any of the above within the last three years; or,

(3) has retired from {or spent a substantial part of a career with} any of the above; or,

(4) is an attorney, accountant, or other professional who, within the last two years devoted 20 percent or more time to securities industry clients, such as broker/dealers or registered representatives.

(d) How Public Arbitrators are Classified

A public arbitrator is anyone in the [Name of SRO]'s pool of arbitrators who is not classified as a securities industry arbitrator.

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above $50,000 (not including costs and interest) or where no dollar amount is claimed or disclosed.

(1) Two of the three arbitrators will be classified as public arbitrators, unless the customer or non-member requests that the panel includes two or three arbitrators classified as being from the securities industry.

(2) A request for two or three arbitrators classified as being from the securities industry must be made within 10 days after the answer is due. This deadline is not extended even if an extension is granted for an answer.

(c) How Securities Industry Arbitrators Are Classified

If the parties select arbitrators from the SRO's pool, there are two types of arbitrators who may hear the case. Arbitrators are classified as either securities industry or public arbitrators.

An arbitrator is classified as being from the securities industry if that arbitrator:

(1) is or is associated with either:
- a member of an SRO
- a securities broker/dealer,
- a government securities broker
- a government securities dealer
- a municipal securities dealer
- {a registered investment adviser}[1]
- a member of a registered futures association or any commodity exchange,

[1] This is optional among SICA SRO members.

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Also, a person will not be a public arbitrator if a spouse or member of a household:

- Could be classified as a securities industry arbitrator under paragraph (c)(1) of this section; or,
- Is employed by a bank or financial institution, and
- Effects transactions in securities, or
- Supervises employees who effect transactions in securities, or,
- Monitors compliance with the securities laws of the employees who effect transactions in securities.

(e) Who Will Not be Classified as a Securities Industry Arbitrator or a Public Arbitrator

(1) A person will not be classified as a securities industry or public arbitrator if the person is employed by a bank or financial institution and:

- effects transactions in securities, or
- supervises employees who effect transactions in securities, or
- monitors compliance with the securities laws of the employees who effect transactions in securities.

(2) A person will not be classified as a securities industry or public arbitrator if the [Name of SRO] believes the person may not qualify as an arbitrator.

Section 9: Selecting Arbitrators

(a) Sources of Arbitrators

(1) The (Name of SRO) will provide lists of potential arbitrators to you. But if every party in your arbitration agrees, you may jointly select arbitrators who are not on the (Name of SRO's) list.

(2) The Director of Arbitration will designate the chair for each panel, unless all the parties agree to a chair.

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- a person registered under the Commodity Exchange Act; or

(2) has been associated with any of the above within the last three years; or

(3) has retired from {or spent a substantial part of a career with}[1] any of the above; or

(4) is an attorney, accountant, or other professional who within the last two years devoted 20 percent or more time to securities industry clients, such as broker/dealers or registered representatives

(d) How Public Arbitrators are Classified

(1) A public arbitrator is anyone in the SRO's pool of arbitrators who is not classified as a securities industry arbitrator.

(2) A person will not be classified as a public arbitrator if a spouse or member of the household could be classified as a securities industry arbitrator under paragraph (c)(1) of this section. In addition, a person will not be classified as a public arbitrator if a spouse or member of the household is employed by a bank or financial institution, and:

- effects transactions in securities, or
- supervises employees who effect transactions in securities, or
- monitors compliance with the securities laws of the employees who effect transactions in securities.

(e) Who will not be classified as a securities industry arbitrator or a public arbitrator

(1) A person will not be classified as a securities industry or a public arbitrator if the person is employed by a bank or financial institution and:

- effects transactions in securities, or
- supervises employees who effect transactions in securities, or

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(b) Lists of Potential Arbitrators and Background Information.

(1) If one arbitrator hears a case, the Director of Arbitration will send each party a list of public arbitrators.

(2) If three arbitrators hear a case, the Director of Arbitration will send each party two lists- one of public arbitrators and one of securities industry arbitrators.

(3) The Director of Arbitration will send the lists to you within thirty days after the Answer to the initial claim is due. If the Answer arrives on time and contains a third-party claim, the lists will be sent within thirty days from the time the Answer to the third-party claim is due.

(4) Along with the lists, you will also receive the employment histories of the listed arbitrators for the past 10 years, and any information disclosed under Section 11 (Disclosures Required by Arbitrators).

(5) You may ask the Director of Arbitration for additional information about the background of a potential arbitrator.

The request for additional information must be made within the twenty (20) days you have to return the lists as provided in Section 9(c)(1). The (Name of 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 additional information will toll the time for returning the lists to the Director. The tolling period shall commence from the date your request for additional information is received by the (Name of SRO)

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- monitors compliance with the securities laws of the employees who effect transactions in securities.

(2) A person will not be classified as a securities industry or a public arbitrator if the (SRO) believes the person may not qualify as an arbitrator.

Section 17. Selecting Arbitrators (Section 9)

(a) Sources of Arbitrators

(1) The (SRO) will provide lists of potential arbitrators to the parties. If every party, however, agrees, they may jointly select arbitrators whether or not on the SRO's list.

(2) The Director will designate the chair for each panel unless all the parties agree to a chair.

(b) Lists of Potential Arbitrators and Background Information.

(1) If one arbitrator hears a case, the Director will send each party a list of public arbitrators.

(2) If three arbitrators hear a case, the Director will send each party two lists, one of public arbitrators and one of securities industry arbitrators.

(3) The Director will send the list(s) to the parties within 30 days after the answer to the initial claim is due. If however, the answer is filed on time and contains a third party claim, the list(s) will be sent within 30 days from the time the answer to the third party claim is due.

(4) Along with the list(s), the parties will also receive the employment histories of the listed arbitrators for the past 10 years and any information disclosed under Section 19 (Arbitrator's Required Disclosure).

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to the date you receive a response to the additional information requested. The Director may extend the deadline for requesting additional information and returning the lists if the Director finds a reasonable basis for this extension.

(c) You Must Return Your Lists Within 20 Days

(1) You must return your list or lists to the Director within twenty (20) days from the date you received it, as extended by the parties' use of the tolling period. You must:

- strike through the names of any unacceptable arbitrators. Your strikes are limited as explained in Section 10 (Objecting to Arbitrators) below; and,
- rank the remaining names in order of your preference, with "1" being the arbitrator that you most strongly prefer.

(2) If you do not return your list(s) on time, the Director will proceed as if every arbitrator on the list(s) is acceptable to you.

(3) The (Name of SRO) will ask arbitrators to serve in the order of the parties' mutual preference. We determine mutual preferences by adding together the numbers assigned to each arbitrator and selecting arbitrators with the lowest numbers first.

(d) The Director Will Propose Arbitrators If No Acceptable Arbitrators Are Left On The List.

The Director will propose one or more arbitrators for the panel from the [Name of SRO]'s pool of arbitrators if:

- the parties do not agree on a complete panel;
- acceptable arbitrators are unable to serve; or,
- arbitrators cannot be found on the lists for any other reason.

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(5) 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.

(c) Return of lists.

(1) The parties must return their list(s) to the Director within 20 days of the date they receive it, or as extended by the parties' use of the tolling period. A party must:

- Strike through the names of any unacceptable arbitrators on each list. A party's strikes are limited as explained in Section 18 (Objecting to Potential Arbitrators); and
- Rank the remaining names on each list in order of preference, with "1" being the arbitrator you most strongly prefer.

(2) A party accepts all arbitrators on the lists(s) when they do not return the lists on time.

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Section 10: Objecting to Potential Arbitrators

You may use a limited number of strikes to remove arbitrators from a list. Arbitrators may also be removed from the list if they are successfully challenged for cause.

(a) Automatic Strikes

(1) If one arbitrator hears a case, you may strike any or all of the names from your list without providing a reason. In the event the [Name of SRO] cannot select the arbitrator from the names not stricken, then a second list will be submitted to the parties. The second list will contain three names. Each side shall be given one strike from the list without providing an explanation.

(2) If three arbitrators hear a case, you may strike any or all of the names from your lists without providing an explanation. In the event the [Name of SRO] cannot select the panel from the names not stricken, then a second list will be submitted to the parties. The second list will contain three names for each vacancy to fill out the panel. Each side shall be given one strike per vacancy from the list without providing an explanation.

(3) In cases where there are two or more people making a claim or responding to a claim, all the people making the claim will share one set of automatic strikes, and all the people responding to the claim will share one set of automatic strikes. If a claim is made against two or more third parties, the third parties will share one set of automatic strikes.

(4) Section 9 (Selecting Arbitrators) provides the deadlines for exercising automatic strikes.

(5) The Director of Arbitration may allow additional automatic strikes if the Director determines that justice would be served by

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(3) The SRO will ask arbitrators to serve in the order of the parties' mutual preferences. Mutual preferences are determined for each classification of arbitrator by adding together the numbers assigned to each arbitrator and selecting arbitrators with the lowest numbers first.

(d) Appointment of Arbitrators.

The Director will appoint one or more arbitrators for the panel from the SRO's pool of arbitrators if:

- the parties do not agree on a complete panel;
- acceptable arbitrators are unable to serve; or
- arbitrators cannot be found from the lists for any other reason.

Section 10. Challenging Potential Arbitrators (Section 10)
This section deals with striking unacceptable arbitrators and ranking those that are acceptable. Arbitrators may also be challenged for cause.

(a) Peremptory strikes

(1) If one arbitrator hears a case, a party may strike any or all of the names from the list without providing an explanation. This is called a peremptory strike. In the event the forum cannot select the arbitrator from the names not stricken, then a second list will be submitted to the parties. The second list will contain three names. Each side shall be given one peremptory strike from that list.

(2) If three arbitrators hear a case, a party may strike any or all of the names from the lists. In the event the forum cannot select the arbitrators from the names not stricken, then a second list

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doing so.	will be submitted to the parties. The second list will contain three names for each vacancy to fill out the panel. Each side shall be given one strike per vacancy from the list without providing an explanation.
(b) Challenges for Cause.	
You have an unlimited number of challenges for cause. The Director of Arbitration will determine whether to remove an arbitrator because of a challenge for cause.	(3) In cases where there are two or more people making a claim or responding to a claim, all the people making the claim will share one set of peremptory strikes and all the people responding to the claim will share one set of peremptory strikes. If a claim is made against two or more third parties, the third parties will share one set of peremptory strikes.
Section 11: Disclosures Required by Arbitrators	(4) Section 17 (Selecting Arbitrators) provides the deadlines for exercising peremptory strikes.
(a) Each arbitrator shall be required to disclose to the Director of Arbitration any circumstances that might preclude such arbitrator from rendering an objective and impartial determination. Each arbitrator shall disclose:	(5) The Director may allow additional peremptory strikes if the Director determines that justice would be served by doing so.
(1) Any direct or indirect financial or personal interest in the outcome of the arbitration.	**(b) Challenges for Cause.**
(2) Any existing or past financial, business, professional, family, social, or other relationships that are likely to affect impartiality or that might reasonably create an appearance of partiality or bias. Persons requested to serve as arbitrators should disclose any such relationships that they have with any party or its counsel, or with any individual whom they have been told will be a witness. They should also disclose any such relationship involving members of their families, or their current employers, or their current employers' partners or business associates.	The parties have an unlimited number of challenges for cause. The Director will determine whether to remove an arbitrator because of a challenge for cause.
(b) Persons who are requested to accept appointment as arbitrators should make a reasonable effort to inform themselves of any interests or relationships described in paragraph (a) above.	**Section 19. Arbitrator's Required Disclosures (Section 11)**
(c) The obligation to disclose interests, relationships, or circumstances that might preclude an arbitrator from rendering an	(a) **Disclosures Generally.** Before accepting appointment, each arbitrator must disclose to the Director any circumstances that might preclude the arbitrator from rendering an objective and impartial decision, including:
	(1) any direct or indirect financial or personal interest in the result of the arbitration;
	(2) any past or present financial, business, professional, family, social or other relationships

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objective and impartial determination described in subsection (a) hereof is a continuing duty that requires a person who accepts appointment as an arbitrator to disclose, at any stage of the arbitration, any such interests, relationships, or circumstances that arise, or that are recalled or discovered.	between: • themselves, their immediate families or household members, their employers and their professional or business associates, and • the parties, their attorneys, and witnesses;
(d) The Director of Arbitration may remove an arbitrator based on information disclosed pursuant to this section. The Director of Arbitration shall also inform the parties of any information disclosed pursuant to this section if the arbitrator who disclosed the information is not removed.	(3) any relationship that might reasonably create the appearance of partiality or bias; and
(e) Once the hearings have commenced, the Director may remove an arbitrator based only on information required to be disclosed under subsection (a), not known to the parties when the arbitrator was selected. The Director's authority under this subsection (e) may not be delegated.	(4) the nature and extent of any prior knowledge the arbitrator may have of the dispute. **(b) Duty to Investigate.** Arbitrators must make a reasonable effort to investigate all relationships described in paragraph (a) above. **(c) Continuing Duty to Disclose.** An arbitrator must disclose any circumstances described in paragraph (a) above as they arise, are discovered, or recalled, throughout the arbitration.
Section 12: Filling Arbitrator Vacancies (a) Filling Vacancies Before the First Hearing Date. (1) If an arbitrator must withdraw before the first hearing date, the Director of Arbitration will invite the next acceptable arbitrator on the parties' list(s) of arbitrators to fill the vacancy. If there are no remaining names, or if the vacancy cannot be filled from the names on the list(s), the Director will propose an arbitrator. You will receive: • the arbitrator's name and employment history for the last 10 years, and • any information disclosed under Section 11 (Disclosures Required by	**(d) Arbitrator Removal and Disclosure.** **(1) The Director may remove an arbitrator, before the first pre-hearing or hearing session, based on the disclosure of information described above.** **(2) The Director will inform the parties of any information disclosed under this section if the arbitrator is not removed.** **(3) Once the hearings have commenced, the Director may remove an arbitrator based only on information required to be disclosed under**

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Arbitrators).

(2) You may ask the Director of Arbitration for additional information on the proposed arbitrator's background. You may challenge the arbitrator as provided in Section 10 (Objecting to Potential Arbitrators).

(b) Filling Vacancies After the First Hearing Starts.

(1) If an arbitrator cannot serve after the start of the first hearing, the case may continue with the remaining arbitrators unless any party objects. If you object, you must advise the Department of Arbitration on whichever occurs earlier:

- within 5 days of receiving notice of the vacancy; or,
- before the next scheduled hearing session.

(2) If any party objects to continuing without a full panel, the Director of Arbitration will fill the vacancy from the remaining names on the parties' lists of acceptable arbitrators. If there are no remaining names, or if the vacancy cannot be filled from the names on the lists, the Director will propose an arbitrator.

(3) When the Director of Arbitration proposes a replacement arbitrator, you will receive the following as soon as possible:

- the arbitrator's name and employment history for the last 10 years, and
- any information disclosed under Section 11 (Disclosures Required by Arbitrators).

(4) You may ask the Director of Arbitration for additional information on the proposed arbitrator's background. You may challenge the arbitrator as provided in Section 10 (Objecting to Potential

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subsection (a), not known to the parties when the arbitrator was selected. The Director's authority under this subsection may not be delegated.

Section 20. Filling Vacancies of Arbitrators (Section 12)

(a) Filling vacancies before the first hearing

(1) If an arbitrator must withdraw before the first hearing, the Director will invite the next acceptable arbitrator on the parties' list(s) of arbitrators to fill the vacancy. If there are no remaining names, or if the vacancy cannot be filled from the names on the lists, the Director will appoint an arbitrator.

The parties will receive:

- The arbitrator's name and employment history for the last 10 years, and
- Any information disclosed under Section 19 (Arbitrator's Required Disclosure).

(2) Any party may ask the Director for additional information on the proposed arbitrator's background. Any party may challenge the arbitrator as provided in Section 18 (Objecting to Potential Arbitrators).

(b) Filling Vacancies After The First Hearing Starts

(1) If an arbitrator cannot serve after the start of the first hearing, the case may continue with the remaining arbitrators unless any party objects. If any party objects, that party must advise the Director on whichever occurs earlier:

- Within 5 days of receiving notice of the vacancy, or
- Before the next scheduled hearing session.

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Arbitrators).	(2) If any party objects to continuing without a full panel, the Director will fill the vacancy from the remaining names on the parties' lists of acceptable arbitrators. If there are no remaining names, or if the vacancy cannot be filled from the names on the lists, the Director will appoint an arbitrator.
Section 25: Oaths of the Arbitrators and Witnesses Prior to the commencement of the first session, an oath or affirmation shall be administered to the arbitrator(s). All testimony shall be under oath or affirmation.	(3) When the Director appoints a replacement arbitrator, the parties will receive the following as soon as possible: • The arbitrator's name and employment history for the last 10 years, and • Any information disclosed under Section 19 (Arbitrator's Required Disclosure).
Section 23: Determinations of Arbitrators All rulings and determinations of the panel shall be by a majority of the arbitrators.	
	(4) Any party may ask the Director for additional information on the appointed arbitrator's background. Any party may challenge the arbitrator as provided in Section 18 (Objecting to Potential Arbitrators).
Section 22: Interpretation of the Code and Enforcement of Arbitrator Rulings The arbitrators are empowered to interpret and determine the applicability of all provisions under this Code with the exception of the eligibility determination required to be made pursuant to Section 4. The arbitrators are empowered to take appropriate action to obtain compliance with any ruling by the arbitrators, including but not limited to imposing sanctions pursuant to Section 5. Such interpretations and actions to obtain compliance shall be final and binding upon the parties.	**Section 21. Arbitrator Rulings (New)**
	(a) Oaths of the Arbitrators (Section 25) Arbitrators will take an oath or affirmation before the first pre-hearing or hearing session begins or before issuing any ruling.
Section 5: Dismissal of Proceedings	**(b) Majority Agreement Requirement (Section 23)** The arbitrators will make any ruling or determination by a majority vote, except as provided under Section 23 (Pre-Hearing Procedures).
(a) At any time during the course of an arbitration, the arbitrators may, either upon their own initiative or at the request of a party, dismiss the proceeding and refer the parties to their judicial remedies or to any other agreed upon dispute resolution forum without prejudice to any claims or defenses available to any party, or other remedies as	**(c) Interpretation and Enforcement of Arbitrator Rulings (Section 22)** The arbitrators may interpret and enforce all

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provided by law.	provisions of this Code, except for the provision regarding the eligibility of claims for arbitration (see Section 12). Arbitrators also may take appropriate action to obtain compliance with their rulings, including imposing penalties (see Section 22). Arbitrators' interpretations and actions to obtain compliance are final and binding upon the parties.
(b) The arbitrators may dismiss a claim, defense or proceeding with prejudice as a sanction for willful and intentional failure to comply with an order of the arbitrator(s) if lesser sanctions have proven ineffective.	
(c) The arbitrators shall, upon the joint request of the parties, dismiss the proceedings.	
Section 20: General Provisions Governing a Pre-hearing Proceeding	**Section 22. When Proceedings May be Dismissed (Section 5)**
(d) Pre-Hearing Conference	(a) Any time during an arbitration, the arbitrators may, either upon their own initiative or at the request of a party, dismiss the proceeding and refer the parties' to their judicial remedies or any other dispute resolution forum agreed to by the parties. Any such referral shall be without prejudice to any claims or defense.
(1) Upon the written request of a party, an arbitrator, or at the discretion of the Director of Arbitration, a pre-hearing conference shall be scheduled. The Director of Arbitration shall set the time and place of a pre-hearing conference and appoint a person to preside. The pre-hearing conference may be held by telephone conference call. The presiding person shall seek to achieve agreement among the parties on any issues that relate to the pre-hearing process or to the hearing including, but not limited to, the exchange of information, exchange or production of documents, identification of witnesses, identification and exchange of hearing documents, stipulations of facts, identification and briefing of contested issues, and any other matters that will expedite the arbitration proceedings.	(b) Arbitrators may dismiss a claim or a defense with prejudice when: • a party intentionally fails to comply with an arbitrator's order; and • lesser penalties have not produced compliance.
(2) Any issues raised at the pre-hearing conference that are not resolved may be referred by the Director of Arbitration to a single member of the Arbitration Panel for decision.	(c) The arbitrators will dismiss the proceedings when requested to do so by all parties.
	Section 23. Pre-Hearing Proceedings (Section 20 d-h) This section covers the procedures to be followed to resolve disputes over the exchange of documents and information before the hearing.
	(a) Pre-Hearing Conference

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(e) Decisions by Selected Arbitrator
The Director of Arbitration may appoint a single member of the Arbitration Panel to decide all unresolved issues referred to under this section. Such arbitrator shall be authorized to act on behalf of the panel to issue subpoenas, direct appearances and production of documents, and set deadlines. Decisions under this paragraph shall be based on the papers submitted by the parties, unless the arbitrator calls a hearing. The arbitrator may elect to refer any issue under this paragraph to the full panel.

(f) Subpoenas
The arbitrator(s) and any counsel of record to the proceeding shall have the power of subpoena process as provided by law. All parties shall be given a copy of the subpoena upon its issuance. The parties shall produce witnesses and present proofs to the fullest extent possible without resort to the subpoena process.

(g) Power to Direct Appearance and Production of Documents
The arbitrator(s) shall be empowered, without resort to the subpoena process, to direct the appearance of any person employed by or associated with any member or member organization of the self-regulatory organization and/or the production of any records in the possession or control of such persons or members. Unless the arbitrator(s) directs otherwise, the party requesting the appearance of a person or the production of documents under this section shall bear all reasonable costs of such appearance and/or production.

Section 20: Exchange of Documents and Information

(c) Pre-hearing Exchange

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(1) The Director will schedule a pre-hearing conference at the written request of a party, or an arbitrator. The Director may also schedule a pre-hearing conference at his or her own discretion.

(2) The Director will decide where and when to hold a pre-hearing conference, and appoint a person to preside over it. The conference may be held by telephone.

(3) The presiding person will seek to achieve agreement among the parties on:

- pre-hearing information and document exchange;
- witness lists;
- stipulations of facts;
- identification and briefing of contested issues; and
- any other matter that will expedite the arbitration.

(4) The Director may refer any unresolved issues from the pre-hearing conference to a member of the Arbitration Panel for decision.

(b) Decisions by a Single Arbitrator on Pre-hearing Issues. The Director may appoint a member of the Arbitration Panel to decide all unresolved pre-hearing issues on behalf of the panel. The arbitrator may:

- issue subpoenas for witnesses or documents;
- direct appearances of witnesses;
- direct production of documents; and
- set deadlines for document or witnesses production.

The arbitrator will decide issues under this section based on the papers submitted by the parties, or may call for a hearing. The arbitrator may refer any issues to the full panel for decision.

(c) Subpoenas. Arbitrators and any counsel of record may issue subpoenas if allowed by law.

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At least twenty (20) calendar days prior to the first scheduled hearing date, all parties shall serve on each other copies of documents in their possession and shall identify witnesses they shall identify witnesses they intend to present at the hearing. The parties may provide a list of those documents that have already been produced pursuant to the other provisions of this Section 20 instead of the actual documents. A list of such documents served under this paragraph shall be served on the Director at the same time and in the same manner as service on the parties. The arbitrators may exclude from the arbitration any documents not exchanged or identified or witnesses not identified in accordance with the requirements of this paragraph. This does not require service of copies of documents or of a list identifying witnesses that parties may use for cross examination or rebuttal.

Section 16: Attendance at Hearings
The attendance or presence of all persons at hearings, including witnesses, shall be determined by the arbitrators. However, all parties to the arbitration and their attorneys shall be entitled to attend all hearings.

Section 25 : Oaths of the Arbitrators and Witnesses
Prior to the commencement of the first session, an oath or affirmation shall be administered to the arbitrator(s). All testimony shall be under oath or affirmation.

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The party who requests or issues a subpoena must send a copy of the subpoena to all parties when it is issued. The parties will produce witnesses and present proof at the hearing whenever possible without using subpoenas.

(d) **Power to Direct Appearance and Production of Documents.** Arbitrators may, without using subpoenas, direct:

- the appearance of any employee or associated person of a member or member organization of the SRO; and
- the production of any records in the possession or control of persons or members.

The party requesting the appearance or document production will pay reasonable costs related to the request unless the arbitrator directs otherwise.

Section 24. Pre-Hearing Exchange of Documents and Witness Lists (Section 20-c)
This section deals with the requirement of the parties to exchange documents and names of witnesses with each other before the hearing.

(a) All parties must serve on each other, no later than 20 days before the first scheduled hearing, copies of documents in their possession and the names of witnesses they intend to present at the hearing. Witnesses are to be identified by name, address, and business affiliation.

(b) Parties may provide a list of documents, rather than copies of the documents, if they have previously produced the documents to the other parties.

(c) All parties must serve on the Director, at the same time and in the same manner as service on other parties:

- a list of documents they have produced to other parties; and

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Section 19: Acknowledgment of Pleadings
The arbitrators shall acknowledge to all parties present that they have read the pleadings filed by the parties.

Section 24: Record of Proceedings
A verbatim record by stenographic reporter or tape recording of all arbitration hearings shall be kept. If a party or parties to a dispute elect to have the record transcribed, the party or parties making the request shall bear the cost of such transcription unless the arbitrators direct otherwise. The arbitrators may also direct that the record be transcribed. If the record is transcribed at the request of any party, a copy shall be provided to the arbitrators.

Section 21: Evidence
The arbitrators shall determine the materiality and relevance of any evidence proffered and shall not be bound by rules governing the admissibility of evidence.

Section 17: Failure to Appear
If any of the parties, after due notice, fail to appear at a hearing or at any continuation of a hearing session, the arbitrators may, in their discretion, proceed with the arbitration of the controversy. In such cases, all awards shall be rendered as if each party had entered an appearance in the matter submitted.

Section 27: Reopening of Hearings
Where permitted by law, the hearings may be reopened by the arbitrators on their own motion or in the discretion of the arbitrators upon application of a party at any time before the award is rendered.

Section 28: Awards

(a) All awards shall be in writing and signed by a majority of the arbitrators or in such manner as is required by law. Such

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- their witness lists.

(d) The arbitrators may exclude from consideration documents not exchanged and witnesses not identified as required under this section.

(e) Parties are not required to serve copies of documents or names of witnesses that they may use for cross examination or rebuttal.

Section 25. Hearing Procedures (New)
This section covers the procedures that will be followed at a hearing.

(a) Who May Attend Hearings (Section 16)
The arbitrators will decide who may be present at the hearings. The parties and their attorneys are always entitled to attend hearings.

(b) Oaths of Witnesses (Section 25)
All witnesses will testify under oath or affirmation.

(c) Acknowledgment of Pleadings (Section 19)
Arbitrators will acknowledge at the hearing that they have read the pleadings.

(d) Recording the Proceedings (Section 24)
All arbitration hearings will be recorded verbatim by stenographic reporter or tape recording. Any party may request that the record be transcribed. A party requesting a transcript will bear the cost, unless the arbitrators direct otherwise. If the record is transcribed, the parties will provide the arbitrators with a copy of the transcript. The arbitrators may also direct that the record be transcribed.

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awards may be entered as a judgment in any court of competent jurisdiction.	
(b) Unless the law directs otherwise, all awards rendered pursuant to this Code shall be deemed final and not subject to review or appeal.	
(c) The Director of Arbitration shall endeavor to serve a copy of the award: (1) by facsimile transmission or other electronic means; or (2) by registered or certified mail upon all parties or their counsel, at the address of record; or (3) by personally serving the award upon the parties; or (4) by filing or delivering the award in such a manner as may be authorized by law.	
(d) The arbitrator(s) shall endeavor to render an award within thirty (30) business days from the date the record is closed.	
(e) The award shall contain the name of the parties, the name(s) of counsel, if any, a summary of the issues, including the type(s) of any security or product, in controversy, the damages and/or other relief requested, the damages and/or other relief awarded, a statement of any other issues resolved, the names of the arbitrators, and the signatures of the arbitrators concurring in the award.	
(f) Summary information contained in the awards shall be made publicly available in accordance with the policies of the sponsoring self-regulatory organization.	
	(e) Evidence (Section 21) The arbitrators decide if evidence is material or relevant, and are not required to follow the rules governing whether evidence is admissible.
	(f) Failure to Appear at a Hearing (Section 17) If a party, after receiving notice of a hearing, does not attend the hearing or its continuation, the arbitrators may proceed in their discretion; and make an award as if each party had entered an appearance in the arbitration.
	Section 26. Reopening of Hearings Before a Decision is Rendered (Section 27) Unless prohibited by law, the arbitrators may reopen the hearing before an award is rendered by application of a party, or on their own initiative.
	Section 27. Awards This section covers the contents of the arbitrators' award, and what happens after the award is rendered.
	(a) The arbitrators may grant any remedy or relief that they deem just and equitable and that would have been available in any court with jurisdiction over the matter.
	(b) The arbitrators must make all awards in writing, and a majority of the arbitrators must sign the award. The arbitrators may also make awards in any other manner required by law. A court may enter a judgment on any award.
	(c) Unless the law directs otherwise, awards made in accordance with this Code are final and not subject to review or appeal.
	(d) The Director will send the parties or their counsel a copy of the award by one of the following methods:

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(g) All monetary awards shall be paid within thirty (30) days of receipt unless a motion to vacate has been filed with a court of competent jurisdiction. An award shall bear interest from the date of the award:

(1) if not paid within thirty (30) days of receipt,

(2) if the award is the subject of a motion to vacate which is denied, or

(3) as specified by the arbitrator(s) in the award. Interest shall be assessed at the legal rate, if any, then prevailing in the state where the award was rendered, or at a rate set by the arbitrator(s).

(h) The arbitrator(s) may grant any remedy or relief that the arbitrator(s) deem just and equitable and that would have been available in a court with jurisdiction over the matter.

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- facsimile transmission or other electronic means;
- registered or certified mail to the address of record;
- personal service; or
- any other method of filing or delivery authorized by law.

(e) The arbitrators will attempt to render their award within 30 business days after the record is closed.

(f) The award will contain the following:

- names of the parties;
- names of counsel, if any;
- summary of the issues in controversy;
- type of security or product in controversy;
- damages and/or other relief requested;
- damages and/or other relief awarded;
- statement of any other issues resolved;
- names of the arbitrators; and
- signatures of the arbitrators concurring in the award.

(g) The SRO will make the awards publicly available, in accordance with its policies.

(h)(1) A party must pay any monetary relief awarded within 30 days of receipt of the award unless any party has filed a motion to vacate the award in a court.

(2) Monetary relief awarded will bear interest from the date it is issued if:

- the award is not paid within 30 days of receipt, or;

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	• a motion to vacate the award was denied, or; • specified by the arbitrators in the award. Interest shall be assessed at the legal rate then prevailing in the state where the award was rendered, or at a rate set by the arbitrators.

APPENDIX C: SRO MEDIATION STATISTICS

NASD Dispute Resolution, Inc.

Year	Mediations Held[1]	Settled[2]	Impasse[3]	Percentage Settled
1998	506	406	100	80.2
1999	461	365	96	79.2
2000	477	381	96	79.9

New York Stock Exchange, Inc.

Year	Mediations Held[1]	Settled[2]	Impasse[3]	Percentage Settled
1998	11	7	4	63.6
1999	51	26	25	50.9
2000	54	30	24	55.5

Composite Mediation Statistics

Year	Mediations Held[1]	Settled[2]	Impasse[3]	Percentage Settled
1998	517	413	104	79.8
1999	512	391	121	76.3
2000	531	411	116	77.4

1 Cases where an actual mediation session was held.
2 Parties advised case settled pursuant to mediation.
3 No settlement – proceeded to arbitration.