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Roadmap to Securities ADR

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ROADMAP TO SECURITIES ADR*

*By Constantine N. Katsoris***

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* This Article is an expansion and update of the article, *The Resolution of Securities Disputes*, which was published at 6 FORDHAM J. CORP. & FIN. L. 307 (2001), and 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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I. INTRODUCTION

As the public increasingly invests in the securities markets — either directly or indirectly through Mutual Funds, IRAs, Keogh plans and other pension devices¹ — litigation between the securities industry and its customers has mushroomed and become more complex. These disputes number in the thousands every year, and are expected to rise still further in the future as a result of increased volume and expanded electronic trading.² Their resolution is largely being channeled into arbitration or submitted to mediation with greater frequency, principally 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 traditionally provide the advantage of a speedy resolution of securities disputes by persons knowledgeable in the area, without excessive costs. Unless, however, such procedures 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 restricted to resolving such disputes before SRO forums.

To better understand the present rules governing such arbitrations and mediations, we must look to the development of the present system

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.”).

2. See Anne Kates Smith, *Champion of the Investor*, U.S. NEWS & WORLD REP., Dec. 11, 2000, at 78; 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 Richard Karp, *Dueling for Dollars*, 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, *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]. See generally Thomas J. Stipanowich, *ADR and 'The Vanishing Trial' What We Know – and What We Don't*, 10 DISP. RESOL. MAG. No. 4, at 7 (Summer 2004).

and explore the judicial developments that have directed most of such disputes into SRO forums.⁴ In addition, we must also 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.

II. BACKGROUND OF SECURITIES ARBITRATION

The arbitration of securities disputes can be traced back to the NYSE in 1872.⁷ Thereafter, numerous other SROs have also established arbitration programs for the settlement of such disputes.⁸

A. JUDICIAL DEVELOPMENTS

An unresolved dispute between an investor and his or her broker ordinarily winds up in arbitration because of a pre-dispute arbitration agreement entered into at the time a customer opens a 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

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

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

6. See *infra* notes 27-48 and accompanying text.

7. P. Hoblin, *SECURITIES ARBITRATION: PROCEDURES, STRATEGIES*, Case 1-2 (1988).

8. *Id.*; see Deborah Masucci & Robert S. Clemente, *Securities Arbitration at Self-Regulatory Organizations: NYSE and NASD Administration and Procedures*, 949 *PLI/CORP.* 99, at 106 (Jul. – Aug. 1996).

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*, *SEC. ARB. PRAC. & PROC. SEM.* 14 (1989).

11. 9 U.S.C. §§ 1-14 (Section 2 of the Arbitration Act provides: “[A] written provision in . . . a contract evidencing a *transaction involving commerce* to settle by

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 customers' 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, most 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 the 1934 Act, despite the presence of pre-dispute arbitration agreements.¹⁴ This became even more 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

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.") (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.

14. See Constantine N. Katsoris, *Securities Arbitration After McMahon*, 16 FORDHAM URB. L.J. 361, 366-67 (1988) [hereinafter Katsoris II]; but see Katsoris I, *supra* note 3, at 301-02 ("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.") (emphasis added) (citing *Scherk v. Alberto Culver Co.*, 417 U.S. 506, 515 (1974)).

15. See Katsoris II, *supra* note 14, at 366.

16. *Id.* at 366-67.

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

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 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 Accordingly, 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

18. *Id.* at 217.

19. See Constantine N. Katsoris, *The Securities Arbitrators' Nightmare*, 14 FORDHAM URB. L.J. 3, 8-11 (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.).

20. *Id.*

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.

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 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

26. See S. Hinden, *GAO Asked To Investigate Securities Arbitration Issues*, WASH. POST, Feb. 7, 1990, at 2; *Markey to SEC: What Happened?*, *supra* note 25, at 1; *Securities Indus. Ass'n v. Connolly - Massachusetts Arbitration Rules Preempted*, SEC. ARB. COMMENTATOR, Aug. 1989, at 2. See also Section IV Alternatives to SRO Arbitration, *infra* notes 284-311 and accompanying text.

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

28. *Settling Disputes Between Customers and Registered Brokers and Dealers*, Exchange Act Release No. 12,528 at 2 (June 9, 1976), 9 SEC Docket 833, at 834 (Mar. - July 1976).

29. *An Integrated Nationwide System for the Resolution of Investor Disputes*, Exchange Act Release No. 12,974 at 1-2 (Nov. 15, 1976), 10 SEC Docket 955, at 955-56 (July - Dec. 1976).

30. *Id.*

31. FIFTH REPORT OF THE SECURITIES INDUSTRY CONFERENCE ON ARBITRATION 2 (Apr. 1986) (on file with author) [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

Association (SIA)³³ and the public.³⁴

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

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 would assume 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 no longer accepted new arbitration claims for filing. Instead, members thereafter become subject to the NASD Code, and were 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) (on file with author) [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 then current public members' terms would expire, one a year, and 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. In 1995, Justin P. Klein concluded his term and was replaced by Thomas R. Grady of Grady & Associates, Naples, Florida. After nineteen years of service, Peter R. Cella concluded his term in 1996 and was replaced by Thomas J. Stipanowich. Professor Stipanowich was reappointed to serve a second term. In 1997, after twenty years of service, the author concluded his term as a Public Member and the public membership returned to three. In 1998, James E. Beckley concluded his term and was replaced by Theodore Eppenstein, of Eppenstein and Eppenstein, New York, New York. Mr. Eppenstein was reappointed in 2002. In 2000, Mr. Grady was reappointed to a second term and concluded his term on the Conference in 2003. Mr. Grady was replaced by the author who returned to active status and Chair of SICA meetings. Upon the expiration of the term of Professor Stipanowich in 2004, he was replaced in 2005 by Pat Sadler, an attorney from Atlanta, Georgia.

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).

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 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 in their existing rules.⁴¹

The original Code was adopted by the participating SROs 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

36. See FIFTH REPORT, *supra* note 31, at 3. SICA subsequently raised the jurisdictional limit of small claims to \$5,000 then \$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 COMMISSION Exhibit D (Nov. 1977) (on file with author) [hereinafter FIRST REPORT].

38. See UNIF. CODE OF ARBITRATION (Sec. Indus. Conference on Arbitration 1984), reprinted in FOURTH REPORT OF THE SECURITIES INDUSTRY CONFERENCE ON ARBITRATION Exhibit C (Nov. 1984) (on file with author) [hereinafter FOURTH REPORT].

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

40. See THIRD REPORT OF THE SECURITIES INDUSTRY CONFERENCE ON ARBITRATION TO THE SECURITIES AND EXCHANGE COMMISSION 5 (Jan. 1980) (on file with author) [hereinafter THIRD REPORT]; see also SECURITIES INDUSTRY CONFERENCE ON ARBITRATION, *ARBITRATION PROCEDURES* (2001), <http://www.nasd.com/> (follow "Arbitration & Mediation" hyperlink; then follow "Arbitration" hyperlink; then follow "Arbitration Procedures" hyperlink) [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) (on file with author) [hereinafter SIXTH REPORT].

41. 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 action.

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 disclosures, training and evaluation of arbitrators; method of transcribing and preserving the record of arbitration hearings; and, the burdens placed upon SROs resulting from the anticipated increase in case loads). 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, enduring, and fair, however, rules cannot be cast in stone. Accordingly, SICA continues to meet in order to monitor the actual performance of the Code, with a view towards further fine-tuning and adjusting its provisions, as the need arises.⁴⁵ Not only does the SEC regularly attend these meetings, but other organizations such as the Commodities Futures Trading Commission (CFTC), the American Arbitration Association (AAA), and the North American Securities Administrators Association (NASAA) are regularly invited and often attend.⁴⁶ In addition, the *emeriti* public members whose terms have expired are also invited and regularly attend.

To date, over *one hundred forty thousand* cases, including small claims, have been filed with the participating SROs since the initial approval of the Code.⁴⁷ Moreover, since the SEC indicated that the future amendments to SRO codes be made in plain English, SICA translated the entire Uniform Code into “Plain English;”⁴⁸ and, on

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

44. See SIXTH REPORT, *supra* note 40, at 4. 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.

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

46. *Id.*

47. The bulk of said arbitrations are handled before the NASD and the NYSE. See TWELFTH REPORT OF THE SECURITIES INDUSTRY CONFERENCE ON ARBITRATION 33, 39, 40 (Oct. 2003) (on file with author) [hereinafter TWELFTH REPORT]. A composite compilation of the arbitrations and/or mediations handled by the arbitration facilities of the various SROs is attached hereto as Appendices B and C.

48. The SEC indicated that future amendments to the Uniform Code be made in “Plain English.” Through a research project sponsored by the Fordham University School of Law, a draft of the entire Uniform Code was prepared in “Plain English” and

January 18, 2001, replaced the original Code with the translated version.

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

III. THE SICA CODE

The Uniform Code of Arbitration originally consisted of thirty-one sections ("Original Code") and was amended many times over the years, particularly after the *McMahon* decision. On January 18, 2001, the Code as it then existed ("Old Code") was replaced by a translated "Plain English" version ("New Code"). In so translating the Old Code, the original sections were often shifted and/or consolidated, so that the current version of the New Code consists of only twenty-seven sections.⁴⁹ In tracking the development of the SICA Code (since its adoption over twenty-five years ago) we will generally refer to the twenty-seven sections of the New or present Code (which didn't exist until January 18, 2001) rather than the thirty-one sections of the Old

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, NAT'L L.J., Mar. 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 issuers to draft the front and back, the cover pages, the summary, and the risk factors section in "Plain English." The rules set forth six "Plain English" principles. The issuer must "substantially" comply with each of these principles: (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 § 240.421(d)(2)).

49. A copy of the present SICA Code is attached hereto as appendix A. 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] appear side by side for purposes of comparison at 6 FORDHAM J. CORP. & FIN. L. 307, 381-418 (2001) (hereinafter Katsoris X). See also *supra* note 48 and accompanying text.

Code. Accordingly, all references to the Code in this article refer to the New or present Code unless otherwise indicated. In analyzing its provisions, we will generally follow the order of the Code; however, from time to time, we will digress from that pattern, sometimes substituting or changing headings, and occasionally leapfrogging back and forward to related sections, so the discussion will be more orderly and cohesive.

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. *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.*⁵⁰

1. Application of the Code

Section 2 incorporates the Code *by reference* into every duly executed Submission Agreement, which shall be binding on all parties. 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.⁵¹ By belonging to the SRO, its members agree to be bound by the SRO's rules. Consequently, customers of an SRO may compel a member of an SRO to arbitrate even without a written agreement to arbitrate. Absent a written contract, however, the member cannot compel the customer to arbitrate.⁵²

50. See UNIF. CODE OF ARBITRATION § 1(b) (Sec. Indus. Conference on Arbitration 2005), *infra* app. A [hereinafter UNIF. CODE].

51. See Hoblin, *supra* note 7, at 2-3 to 2-4. See also UNIF. CODE, *supra* note 50, § 1.

52. *Id.*

3. Pre-Dispute Arbitration Agreements

Customers are generally not required to arbitrate their disputes with the securities industry absent a pre-dispute arbitration agreement. Such agreements, however, have become common and widespread.⁵³ After the *McMahon* decision, section 3 was added to the Code (section 31 of the Old Code) in order to insure that customers are aware and understand the effect of signing an agreement containing a pre-dispute arbitration clause.⁵⁴ 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.⁵⁵

Section 3 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.⁵⁶ Unfortunately, none of the SROs have incorporated this *separate initialing* requirement into their arbitration rules, apparently on the ground that it would cause an administrative burden.⁵⁷ This is regrettable, because from the point of view of both the customer and the broker, such separate initialing would more clearly call the arbitration clause to the customer's attention, and thus more likely reduce the need for litigation based upon the customer's alleged lack of awareness of the clause.⁵⁸

Finally, in order to prevent the insertion of restrictive clauses in customers' agreements which would conflict with, or render ineffective various provisions of the Code, section 3(d) also specifically prohibits conditions that limit or contradict the rules of the SROs, or limit the ability of a party to file any claim in arbitration, or limit the ability of the arbitrators to make any award.⁵⁹

53. See *supra* note 10 and accompanying text (as to customers, this usually occurs when they open an account); Uniform Application for Securities Industry Registration or Transfer (as to employees, when they sign a U-4 form); but see *infra* notes 62-73 and accompanying text.

54. See SIXTH REPORT, *supra* note 40, at 12.

55. See UNIF. CODE, *supra* note 50, § 3(b).

56. *Id.*

57. See Katsoris IV, *supra* note 24, at 520. For other examples of deviations from the Uniform Code, see *infra* notes 265-75 and accompanying text.

58. *Id.*

59. Since this section was inserted after *McMahon*, it included a grandfather clause,

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.⁶⁰ This prohibition of class actions, however, has no effect upon the *consolidation* or *joinder of claims*, which is specifically permitted by section 8 of the Code. 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.⁶¹

5. Employment Cases

Many employees in the securities industry were often required to enter into an agreement that, should a dispute arise in the course of their employment, it will be arbitrated before a specific SRO forum.⁶² In 1991, the Supreme Court in *Gilmer v. Interstate/Johnson Lane Corp.*,⁶³ held that a claim brought under the Age Discrimination in Employment Act of 1967⁶⁴ could be subject to compulsory arbitration pursuant to an arbitration provision in a securities registration form known as a Form

which provides that the requirements of the section would 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-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 that has adopted this provision of which it is a member. Indeed, both the NASD and the NYSE 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 the ability of customers to arbitrate or arbitrators' powers to issue awards.

60. See UNIF. CODE, *supra* note 50, § 1(d)(1).

61. See UNIF. CODE, *supra* note 50, § 1(d)(3); see also Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, will the Class Action Survive?*, 42 WM. & MARY L. REV. 1 (2000).

62. Employees who deal with the public (i.e., brokers, investment executives, etc.) are required to register with each SRO that their firm is a member of by signing a U-4 (Uniform Registration and Transfer) Form.

63. 500 U.S. 20 (1991).

64. 29 U.S.C.S. § 621 *et seq.*

U-4.⁶⁵ *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.⁶⁶ Accordingly, a number of courts distanced themselves from mandatory arbitration of discrimination claims.⁶⁷

In any event, having employment discrimination claims tried at SRO forums before arbitrators who were largely inexperienced as to such claims raised much concern and consternation.⁶⁸ One lower federal court went so far as to contend that the SRO forum involved was not an adequate forum due to what the district court referred to as a "structural bias in favor of the industry."⁶⁹ In an attempt to diffuse this politically sensitive issue, some firms voluntarily agreed not to enforce such arbitration obligations against their employees.⁷⁰ Furthermore, 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 prohibit firms from separately inserting arbitration agreements in employment contracts.⁷¹

65. See also note 53 and accompanying text.

66. See 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 S7.

67. See Evan J. Charkes, *Recent Court Decisions Demonstrate 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; *Seus v. John Nuveen & Co., Inc.*, 146 F.3d 175 (3d Cir. 1998), *cert denied*, 525 U.S. 1139 (1999).

68. See *Political Pressure Increases to Curb Mandatory Arbitration of Employment Disputes*, SEC. ARB. COMMENTATOR, May 1997, at 9.

69. *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 965 F. Supp. 190 (D. Mass. 1997). Although the Court of Appeals in *Rosenberg* agreed with 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 at the SRO forum*. 170 F.3d 1 (1st Cir. 1999).

70. See *Rosenberg*, 170 F.3d at 5 (1st Cir. 1999); 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.

71. See *NASD Proposes Eliminating Mandatory Arbitration of Employment Discrimination Disputes*, SEC. ARB. COMMENTATOR, Sept. 1997, at 11. See also *NASD Files New Rules for Handling Employment Discrimination Disputes*, SEC. ARB.

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.⁷² Thus, it would appear that the future of mandatory arbitration of employment claims at SRO forums is somewhat clouded.⁷³

6. Six Year Eligibility Rule

From its inception the Uniform Code established a six year 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.⁷⁴ This Six Year Rule, however, 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 in the late 1980s, were not contemplated.⁷⁵ 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.⁷⁶

COMMENTATOR, May 1999, at 7; *SEC Approves PCX Pullback from Employment Arbitration*, SEC. ARB. COMMENTATOR, May 1999, at 7.

72. See *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.

73. See Charkes, *supra* note 67, at 1. See also *Circuit City v. Adams*, 532 U.S. 105 (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 *HAMLIN L. REV.* 511 (Spring, 2000); Michael Bobelian, *Employees Raise Concerns About High Costs of Arbitration*, N.Y. L.J., Aug. 12, 2004, at 1; *Discrimination Claims & Arbitration Fees*, SEC. ARB. ALERT, 2005-49, Dec. 22, 2005, at 1 (On October 24, 2005, the SEC approved a new fee schedule for brokerage employees filing statutory discrimination claims with NASD Arbitration, which effectively charges all but \$200 to the employing broker-dealer). See also Robert Clemente, *Securities Industry Arbitration Employment Disputes: A (former) Insider’s Perspective*, *THE N.Y. EMP. ADVOC.*, Vol. 12, No. 4, Feb. 2004, at 6.

74. See UNIF. CODE, *supra* note 50, § 12(a).

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

76. *Id.* See also Barry Temkin, *Statutes of Limitations in Securities Arbitration*,

Unfortunately, this Rule inadvertently and needlessly complicated the arbitration process. Some courts misinterpreted the Six Year Rule as barring such claims altogether. Furthermore, various courts differed as to who should decide the threshold issue of eligibility — the courts or the arbitrators.⁷⁷ The AAA had no similar provision, despite securities industry involvement in the development of its securities arbitration rules.⁷⁸ This is perhaps one of the reasons brokerage firms did not include the AAA as an alternative forum to the SROs in their arbitration agreements.⁷⁹ For these and other reasons, elimination of the Six Year Rule from the SICA Code has been suggested by the author, and subsequently endorsed by the Ruder Report.⁸⁰

Instead of eliminating the Eligibility Rule, however, SICA amended section 12 of the Code (section 4 of the Old Code) to provide that all claims are considered eligible unless a challenge to eligibility is made to the SRO's Director of Arbitration (within twenty business days of the service of the Statement of Claim), and the Director'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.⁸¹ The amendment further clarified that allegations of fraudulent concealment would not render otherwise stale claims eligible by defining "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.⁸² It was also specifically provided that claims so determined to be ineligible for arbitration could be filed in court as if no arbitration agreement existed.⁸³

B. SMALL CLAIMS / SIMPLIFIED ARBITRATION

Section 9 of the Code (section 2 of the Old Code) deals with

N.Y. L.J., June 16, 2005, at 4.

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

78. *Id.*

79. *Id.* at 494; see also *infra* notes 302-06 and accompanying text (discussing SICA's pilot program).

80. See Katsoris IV, *supra* note 24, at 494. See also *infra* note 194 and accompanying text.

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

82. See UNIF. CODE, *supra* note 50, § 12(d).

83. *Id.*

Simplified Arbitration procedures, so that small claims can be resolved more quickly and at less expense than larger claims — otherwise the cost to arbitrate could often exceed any potential recovery. Initially its provisions 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 \$25,000.⁸⁴

Although the provisions of section 9 are geared to providing small claimants with the opportunity of resolving their claim in a more expeditious and less costly manner, many procedural safeguards of the Code — i.e., pre-hearing discovery procedures and the method of selection of arbitrators — remain available to the small claimant.⁸⁵

C. REQUIREMENT OF HEARING

The Uniform Code provides (except in the case of Small Claims) that 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.⁸⁶ Nevertheless, despite such a waiver by the parties, a majority of the arbitrators may call for and conduct such a hearing.⁸⁷ In addition, any arbitrator may request the submission of further evidence.⁸⁸

D. DISMISSAL OF PROCEEDINGS

The Uniform Code also provides that the arbitrators *shall*, upon the joint request of the parties, dismiss the proceedings.⁸⁹ 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.⁹⁰ This section also specifically authorizes the arbitrators to dismiss a claim, defense or proceeding with prejudice as a

84. See TENTH REPORT, *supra* note 34, at 3.

85. See UNIF. CODE, *supra* note 50, § 9(i).

86. See UNIF. CODE, *supra* note 50, § 10.

87. *Id.*

88. *Id.*

89. See UNIF. CODE, *supra* note 50, § 22(c).

90. *Id.* § 22(a).

sanction for willful and intentional failure to comply with an order of the arbitrator(s) if lesser sanctions have proven ineffective.⁹¹ 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.⁹²

E. SETTLEMENTS

Section 14 of the Code simply provides that parties to an arbitration “may agree to settle their dispute at any time.”⁹³ 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).⁹⁴ 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.⁹⁵

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 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.⁹⁶ In addition, since the threshold sum of \$250,000 included punitive damages, the proposed rule would also have had 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

91. *Id.* § 22(b).

92. See Constantine N. Katsoris, *An Arbitrator’s Perspective*, PLI/SEC. ARB.: Redefining Practices and Techniques, vol. 1, at 307 (1998) [hereinafter Katsoris V].

93. See UNIF. CODE, *supra* note 50, § 14; see also David E. Robbins, *How To Settle A Case*, SEC. ARB. COMMENTATOR, Apr. 1999, at 1.

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

95. See Katsoris IV, *supra* note 24, at 496.

96. *Id.*

Offer of Award Rule.⁹⁷ The NASD withdrew its Offer of Award Rule in 1994.⁹⁸

F. TOLLING OF TIME LIMITATIONS

The Code also 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.⁹⁹

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.¹⁰⁰

G. CLASSIFICATION AND QUALIFICATION OF ARBITRATORS

Although the Code always provided that the majority of the arbitrators on any panel involving a public customer or non-member be *public arbitrators* (i.e., not affiliated with the securities industry), no further guidance was given by the original Code regarding who qualified as a public arbitrator.¹⁰¹ The original version of the Procedures Booklet, however, described public arbitrators as “individuals who are neither associated with, nor employed by a broker-dealer or securities industry organization.”¹⁰² SICA initially left this test flexible so that the experience of many needed and qualified persons would not be lost. As time went on, however, it became apparent that the category of public arbitrators had to be more clearly defined. Accordingly, Guidelines for the Classification of Public Arbitrators were added to the Procedures booklet.¹⁰³

97. *Id.*

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

99. See UNIF. CODE, *supra* note 50, § 5(a).

100. *Id.* § 5(b).

101. Katsoris IV, *supra* note 24, at 498.

102. *Id.*

103. See Constantine N. Katsoris, *The Composition of SRO Panels?*, SEC. ARB.

After *McMahon*, however, SICA further tightened the classification of public arbitrators by amending the Code to specifically exclude as public arbitrators: (1) brokers and registered investment advisers and persons who are retired from the securities industry; (2) persons who had been employed in the industry in the past three years; (3) professionals (i.e., attorneys or accountants) who devote 20% or more of their work efforts to securities industry clients; and (4) spouses of industry personnel.¹⁰⁴

In addition, section 16 of the new Code was subsequently amended to further restrict those who could be classified as *public arbitrators* by providing that an attorney, accountant or other professional whose *firm* derives 20% or more of its annual income from securities industry representation cannot be classified as a *public arbitrator*.¹⁰⁵ Similarly, an employee of a bank or financial institution engaged in or supervising those engaged in effecting transactions in securities cannot be classified a public arbitrator;¹⁰⁶ this definition was later expanded to also exclude registered investment advisers.¹⁰⁷

Furthermore, the Code defines a securities arbitrator to include an individual who is registered under the Commodities Exchange Act or is a member of a registered futures association or any commodities exchange or is associated with any such person(s).¹⁰⁸

As is evident from the aforementioned discussion, the battle to define who is an *industry* arbitrator and who is a *public* arbitrator has been an ongoing struggle since the two classifications were first

COMMENTATOR, Oct. 2003, at 3 [hereinafter Katsoris VI].

104. Katsoris IV, *supra* note 24, at 498.

105. See Katsoris VI, *supra* note 103. In discussing the merits of such amendment, one of the key issues for SICA was percentage-wise, how low to set the bar. Shortly after SICA adopted the twenty percent threshold, the NASD unilaterally cut that threshold in half to *ten percent* over a two year period. Regardless of the merits of percentage disqualification, I respectfully suggest that a 10% threshold is too low because it is largely unenforceable and will create too large a dragnet. As well intentioned as the rule may be, I suspect that the net effect will be to cause administrative discomfort for the SROs and cull from the ranks of *public arbitrators* many knowledgeable and outstanding candidates of impeccable credentials and integrity, at a time when SRO caseloads are exploding and the substance of the cases is becoming more complicated and complex. *Id.*

106. See UNIF. CODE, *supra* note 50, § 16(e).

107. *Id.* § 16(d)(2).

108. *Id.* § 16(c)(1).

established by SICA over 25 years ago. *Looming on the horizon*, however, is a related and more fundamental issue, namely suggestions that the *industry* arbitrator classification be eliminated altogether, leaving only a shrinking pool of *public* arbitrators on SRO panels.¹⁰⁹ Understandably, such an action will be viewed by the industry as an attempt to “stack the deck” against it.

It should also be noted that the dual classification system was established by SICA at a time when SRO arbitration was in its infancy and basically a voluntary process; and it was in effect when the issue of fairness of arbitration was raised before the Supreme Court in *Shearson/American Express, Inc. v. McMahon*. Not insignificantly, over one hundred forty thousand arbitrations have been filed under this dual classification system at the various SROs since the enactment of the SICA Code. During that time, I have participated as a *public arbitrator* in scores of such cases; and, more recently, I have assisted in the establishment of a securities resolution clinic at Fordham to represent investors who found it difficult to obtain counsel. Absent isolated complaints of conflicts or incompetence of arbitrators which surface from time to time regarding both classifications, I have personally found the overall competence and integrity of arbitrators to be excellent. Although constantly improving the pool of arbitrators is and always should be a priority, my feeling is that the present dual classification system, together with the list selection procedure has, to date, brought a balance to the process.

Nevertheless, no system is perfect and alternatives should be explored, particularly since SRO arbitration is now mandatory and the caseload has increased tenfold over the last twenty-five years. The time may be ripe, therefore, to explore a more simplified system of arbitrator selection to replace the present one that increasingly *micro-manages*¹¹⁰

109. See Katsoris VI, *supra* note 103, at 4; see also Susanne Craig, *Wall Street Panels for Settling Fights Draw Renewed Fire*, WALL ST. J., Mar. 17, 2005, at A1; see also *PIABA vs. Industry Arbitrator*, SEC. ARB. COMMENTATOR, Nov. 2005, at 10.

110. Indeed, in applying a firm's industry representation disqualification rule for *public* arbitrators (10% for NASD, 20% for SICA) the NASD will surely have to hire a set of auditors just to monitor the process. See Katsoris VI, *supra* note 103. For example:

In applying this percentage rule [SICA's 20% threshold], differences of opinion will surely surface as to how to calculate income from securities industry representation. For example, is drawing a lease of office space for the parent, subsidiary or major shareholder of a brokerage firm considered industry representation? Similarly, what

the qualification guidelines between the *public* and *industry* — a system which is making the SROs' management role increasingly difficult and, at the same time, excludes many fine arbitrators from qualifying under either classification.¹¹¹ Instead, perhaps the time has come to let the lawyers do their lawyering. Accordingly, this author has for several years suggested that the present system may no longer be practical, and that the dual classification system be replaced by one all-inclusive pool of qualified arbitrators, coupled with a potpourri of: list selection; a reasonable number of preemptory challenges; and unlimited challenges for cause.¹¹²

is the effect of representing a brokerage firm together with several other unrelated claimants or defendants in a non-securities matter? Are fees from representing a broker *against* his or her firm considered income from securities industry representation? Do the fees of mediators in securities disputes count, at least in part, as securities industry representation? Moreover, how do you handle the dilemma where, in the same year a *firm* receives 20% of its income from an industry client, it also derives 25% of its income from representing third parties against the industry?

Another problem is the shifting landscape of one's practice, as it cuts across calendar years. Suppose my firm's practice was 15% industry in 2003, 28% in 2004 and 12% in 2005; and, I was appointed a public arbitrator on a long case late in 2003 that unavoidably spanned three calendar years. Does my status change in 2004 or 2005? In addition, what is the effect if an arbitrator miscalculates, and inadvertently sits on a case as a *public member*, then renders a decision and subsequently discovers he has violated the percentage guidelines. Can there be a challenge to the award?

There are also timing issues as to when and how much income is recognized. For example, in calculating income percentages do we use the cash method, the accrual method or some hybrid method? Moreover, are we interested in net or gross income; or instead, in gross receipts (billable time plus disbursements) or net receipts (without disbursements)?

Id.

111. *Id.* Moreover, it is interesting to note that in the last few years, the NASD (for a variety of reasons) shrank its arbitrator pools from about 9,000 to about 6,340 — 3,692 of whom are Public and 2,646 of whom are Non-Public. *NASD Arbitrators*, SEC. ARB. COMMENTATOR, Nov. 2005, at 12. Furthermore, "The 'Public' number will likely be culled further, if the new 'affiliate' rules are approved." *Id.* Thus, if the industry classification is eliminated, that will leave about 3,600 as qualified arbitrators to handle the NASD's enormous caseload nationwide.

112. *Id.* See also *Insurance and Government Sponsored Enterprises: Hearing Before the House Financial Services Subcommittee on Capital Markets*, March 17, 2005 (Statement of Constantine Katsoris); see also Katsoris VI, *supra* note 103, at 104. Interestingly, my suggestion to permanently eliminate the present public/industry classifications (coupled with the safeguard of a generous number of preemptory challenges) has spawned many hybrid look-alike proposals; however, don't always judge a book by its cover. For example, one such proposal recently surfaced which on

Finally, an interesting challenge to the qualification of SRO arbitrators arose several years ago in the State of California when it adopted its own stringent arbitration disclosure rules designed to prevent conflicts of interest by arbitrators.¹¹³ After failing to win an exemption from such requirements, the NYSE and the NASD filed suit in federal court in California contending that the California standards are preempted by the national system of federal securities regulation;¹¹⁴ and, both SROs stopped appointing arbitrators to California panels.¹¹⁵ In March of 2005, the United States Court of Appeals for the Ninth Circuit ruled that the application of the California standards to the SROs is preempted by the Exchange Act and the comprehensive system of federal regulation of the securities industry established pursuant to the Exchange Act.¹¹⁶ A similar result was reached two months later by the

its face superficially called for the elimination of the dual classification system, but then proceeded to provide: for *unlimited* peremptory challenges; and, if a panel could not be so constituted (which is highly likely because of the *unlimited* peremptories), the SRO could then administratively appoint arbitrators from a newly created pool of super-screened arbitrators, basically consisting of those who were never even remotely connected with the industry either directly or indirectly. To carry this hybrid philosophy to its extreme, one could similarly argue that a judge, who at one point in their career had been a prosecutor, is presumptively unfit to sit on a criminal case.

113. See *Pitt Rebukes NYSE, NASD Over Refusal to Empanel California Arbitrators*, 34 SEC. REG. & L. REP., No. 36, Sept. 16, 2002, at 1498.

114. *Id.* See also *Application of California Arbitration Standards to SROs Preempted, District Court Decides*, 35 SEC. REG. & L. REP., No. 18, May 5, 2003; Ann Theresa Palmer, *California Securities Arbitration at a Standstill*, REGISTERED REP., Sept. 2002, at 9 (“‘This is a serious issue,’ says Constantine N. Katsoris, a law professor at Fordham University and one of three of the original public members of the Securities Industry Conference on Arbitration [SICA]. SICA was conceived ‘with the SEC’s blessing . . . to create a uniform set of rules for all exchanges so that we could have a national securities market,’ says Katsoris. ‘You can’t have different people getting different relief depending on which state they’re in.’”).

115. Palmer, *supra* note 114.

116. See *Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d 1119, 1128 (9th Cir. 2005); see also M. Perino, *Report to the Securities and Exchange Commission regarding Arbitrator Conflict Disclosure Requirements in NASD and NYSE Securities Arbitrations*,

http://www.nasd.com/web/groups/med_arb/documents/mediation_arbitration/nasdw_012481.pdf [hereinafter *Perino Report*]. Professor Perino’s report concluded that there is little if any indication that undisclosed arbitrator conflicts represent a significant problem in SRO-sponsored arbitrations. Nevertheless, Professor Perino recommended minor enhancements to disclosure and other related rules to provide additional

Supreme Court of California.¹¹⁷

H. SELECTION OF AND CHALLENGE TO ARBITRATORS

Initially, the Code 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.¹¹⁸ In addition, the Code *originally provided* that each party would have one peremptory challenge, but was later amended to also provide for unlimited challenges for cause.¹¹⁹

This method of the selection was later significantly changed by SICA and reflected in sections 16 and 17 of the New Code,¹²⁰ which, until recently, provided for: a hearing with a *single* arbitrator for claims between \$25,000 and \$100,000, *unless* either party requests three arbitrators; whereas, with claims over \$100,000 (or where no dollar amount is claimed or disclosed), *three* arbitrators will hear the case.¹²¹ As of March 21, 2006, however, sections 16(a) and (b) of the SICA Code were amended so as to presently provide that claims: (a) over \$25,000 and up to \$100,000 *must* be heard by a single arbitrator; (b)

assurances to investors that arbitrators are in fact neutral and impartial. Professor Perino’s report made four recommendations:

- (1) Amend arbitration rules to emphasize that all arbitrators’ conflict disclosures are mandatory;
- (2) Re-examine the definitions of public and non-public arbitrators;
- (3) Provide greater transparency with respect to challenges for cause by including the cause standard in the rules;
- (4) Sponsor independent research to evaluate fairness of SRO arbitrations.

See also TWELFTH REPORT, *supra* note 47, at 4.

117. *See* Jevne v. Superior Court of Los Angeles County, 111 P.3d 935, 962 (Cal. Sup. Ct. 2005); *see also* State Arbitration Standards Preempted by Federal Rules, Calif. High Court Holds, 37 SEC. REG. & L. REP., No. 22, May 30, 2005, at 949.

118. *See* Katsoris IV, *supra* note 24, at 497-501.

119. *Id.* at 500.

120. *Id.* *See also* UNIF. CODE, *supra* note 50, §§ 16-17.

121. *See* UNIF. CODE, *supra* note 50, § 16 (a)-(b). Furthermore, on Feb. 15, 2000, the SEC approved NASD Rule 10336 (Single Arbitrator Pilot Program, effective May 15, 2000) which for a two year period allowed parties with claims between \$50,000 and \$200,000 to voluntarily choose one arbitrator rather than a three-person panel. *NASD Dispute Resolution Launches Single Arbitrator Pilot Program*, THE NEUTRAL CORNER, July 2000, at 1.

over \$100,000 and up to \$200,000 will be heard by a single arbitrator *unless* either party requests three arbitrators; and (c) over \$200,000 (or where no dollar amount is claimed or disclosed) will be heard by three arbitrators.

Moreover, instead of the SRO selecting the arbitrators, 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).¹²² 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 list, if any.¹²³ Arbitrators are invited to serve based upon the parties' mutual preference ranking.¹²⁴

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 for each vacancy to fill out the panel. Each side shall be given one strike per vacancy from the second list without providing an explanation.¹²⁵ 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.¹²⁶ If a full panel, or a vacancy thereon, cannot be appointed through this process, additional arbitrators are appointed by the Director of

122. See UNIF. CODE, *supra* note 50, § 17. If one arbitrator hears the case, each party receives only one list of public arbitrators. *Id.* § 17(b).

123. See UNIF. CODE, *supra* note 50, § 18. If one arbitrator hears a case, each party may strike any or all of the names from the list without providing an explanation. *Id.* § 10(a)(1). The NASD has adopted a different version of list selection, where each party has unlimited challenges to 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.

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

125. See UNIF. CODE, *supra* note 50, § 18. The NASD does not provide for a second list, whereas the NYSE did under a pilot program; however, the NYSE has now also eliminated this second list. See *NYSE List Selection*, SEC. ARB. ALERT, 2005-47, Dec. 7, 2005, at 2; see also Constantine N. Katsoris, *A Life Without SICA*, SEC. ARB. COMMENTATOR, July 2004, at 1 [hereinafter Katsoris VII].

126. See UNIF. CODE, *supra* note 50, § 17(c)(3); TENTH REPORT, *supra* note 34, at 4-5.

Arbitration.¹²⁷ To reduce the risk that such administrative action would result in the appointment of a replacement arbitrator who was unacceptable to either party, SICA amended the Code to permit one overall peremptory challenge per case to each side to such SRO appointments.¹²⁸

I. DISCLOSURE REQUIRED BY ARBITRATORS

Section 19 (section 11 of the Old Code) requires each arbitrator “to disclose to the Director of Arbitration any circumstances which might preclude such arbitrator from rendering an objective and impartial determination.”¹²⁹ 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 which continues throughout the proceeding.¹³⁰ To facilitate this process, arbitrators receive a copy of the Arbitrators’ Code of Ethics when 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.¹³¹

Before *McMahon*, the Director had been authorized to remove an arbitrator before the commencement of the first hearing based upon information disclosed pursuant to the section,¹³² after *McMahon*, the Director was further empowered to effect such removal after hearings

127. See UNIF. CODE, *supra* note 50, § 17(d); TENTH REPORT, *supra* note 34, at 4-5.

128. See UNIF. CODE, *supra* note 50, § 20.

129. SECOND REPORT OF THE SECURITIES INDUSTRY CONFERENCE ON ARBITRATION TO THE SECURITIES AND EXCHANGE COMMISSION A-5 (Dec. 1978) (on file with author) [hereinafter SECOND REPORT].

130. 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, 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. See Katsoris IV, *supra* note 24, at 501 & n.113.

131. *Id.* at 501; SECURITIES INDUSTRY CONFERENCE ON ARBITRATION, THE ARBITRATOR’S MANUAL (Jan. 2001), <http://www.nasd.com/> (follow “Arbitration & Mediation” hyperlink; then follow “Resources for Arbitrators & Mediators” hyperlink; then follow “General Information and Reference” hyperlink; then follow “Arbitrator’s Manual” hyperlink) [hereinafter ARBITRATOR’S MANUAL].

132. Katsoris IV, *supra* note 24, at 501; ARBITRATOR’S MANUAL, *supra* note 131.

had already commenced based upon information required to be disclosed, but not known to the parties when the arbitrator was selected.¹³³ To further clarify the Director's authority to remove sitting arbitrators, section 19(d)(1) of the Code was recently amended to specifically provide that the Director will remove or disqualify from appointment any arbitrator who the Director concludes *intentionally* has failed to disclose *material* information as to his or her background, experience, potential or existing conflicts of interest or bias.¹³⁴

In 2002, the Securities and Exchange Commission sponsored a study by Professor Michael Perino regarding the operation of arbitrator disclosure requirements in securities arbitration.¹³⁵ Among other things, Professor Perino sought empirical data on the experience of investors in securities arbitration, and determined that the most comprehensive study of investor outcomes was the GAO's 1992 report, *Securities Arbitration: How Investors Fare*,¹³⁶ which examined results in arbitration over an eighteen-month period between 1989 and 1990. The report found "no evidence of a systematic pro-industry bias" in arbitrations sponsored by the NASD, NYSE, and other SROs when compared to arbitrations conducted by the AAA. Among other things, the GAO noted, in SRO arbitrations, panels found for investors in about 59% of arbitrations versus 60% of AAA-sponsored arbitrations, and prevailing investors received average awards of about 61% of the damages, as opposed to awards averaging 57% of amounts claimed in AAA proceedings.¹³⁷

In addition, Professor Perino in his report recommended that there be a new independent survey on the perception of fairness of the arbitration process. In response to that suggestion, SICA has commissioned an independent survey on the perceptions of fairness between SRO arbitration and litigation, and it is anticipated that this survey will be completed sometime in the year 2006.¹³⁸

133. See ELEVENTH REPORT OF THE SECURITIES INDUSTRY CONFERENCE ON ARBITRATION (June 2001) (on file with author) [hereinafter ELEVENTH REPORT].

134. See THIRTEENTH REPORT OF THE SECURITIES INDUSTRY CONFERENCE ON ARBITRATION 4 (Oct. 2005) (on file with author) [hereinafter THIRTEENTH REPORT].

135. See *Perino Report*, *supra* note 116.

136. *Id.* at 31 (citing SECURITIES ARBITRATION: HOW INVESTORS FARE, GAO/GGD-92-74 (May 2002)).

137. *Id.*

138. See THIRTEENTH REPORT, *supra* note 134, at 6.

J. COMMENCEMENT OF PROCEEDING1. Pleadings

Section 7 (section 13 of the Old Code) sets out the requirements for the commencement of an arbitration proceeding by listing the general pleading and service requirements regarding such items as: the Statement of Claim; Submission Agreement; Answer; Counterclaim and/or Cross-claims; and Claims-over.¹³⁹ 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 or relevant facts were not pleaded;¹⁴⁰ or, (iii) where a party fails to file a timely answer.¹⁴¹

After *McMahon*, and largely for purposes of paring escalating costs, SICA required the parties to serve upon each other all pleadings *after* the service of the Statement of Claim.¹⁴² The SROs, however, continue to be responsible for serving the Statement of Claim,¹⁴³ whereas the parties are now required to serve all other parties with the other pleadings, and file copies thereof with the Director of Arbitration.¹⁴⁴ To facilitate this new procedure, the Code specifically permits service by mail or other means of delivery.¹⁴⁵

The areas of dispute are framed by the pleadings, so the pleadings should be complete, precise and written in simple English.¹⁴⁶ They are the arbitrators' first exposure to the case, so they should not ramble.¹⁴⁷ The *Statement of Claim* should be expressed in plain language and seek

139. See Katsoris IV, *supra* note 24, at 502.

140. FOURTH REPORT, *supra* note 38, at C-5 to C-6; see also UNIF. CODE, *supra* note 50, § 7(b)(6)(a).

141. FIFTH REPORT, *supra* note 31, at 33-34; see also UNIF. CODE, *supra* note 50, § 7(b)(6)(b).

142. SIXTH REPORT, *supra* note 40, at 8-9; see also UNIF. CODE, *supra* note 50, § 8(d).

143. See UNIF. CODE, *supra* note 50, § 7(a).

144. *Id.* § 7(b).

145. *Id.* § 6.

146. See Katsoris V, *supra* note 92, at 311.

147. Robert S. Clemente & Karen Kupersmith, *The Nuts and Bolts of Working Within the System: A Guide to Arbitration at the New York Stock Exchange*, 1061 PLI/CORP. 93 (July – Aug. 1998).

specific relief.¹⁴⁸ 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.¹⁴⁹ The damages sought should be clear and, to the extent possible, well defined. *Relevant* documents may be attached to the Statement of Claim to assist the arbitrators in understanding the claims.¹⁵⁰

The *Answer* should be just that, an answer — not simply a vague or general denial.¹⁵¹ It should contain all available defenses.¹⁵² The answer is the respondent's opportunity to refute the claimant's allegations.¹⁵³ It should tell the respondent's version, supplying pertinent information that the claimant neglected to provide.¹⁵⁴ 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.¹⁵⁵

2. Joinder and Consolidation / Multiple Parties

Where multiple claimants have similar issues involving the same respondent or respondents, section 8 of the Code permits joinder and consolidation, the propriety of which is initially ruled upon by the Director of Arbitration.¹⁵⁶ Upon the request of a party, the Director's decision is subject to review by the arbitrators who make all final decisions regarding joining and consolidating multiple parties and claims.¹⁵⁷

3. Acknowledgement of Pleadings by Arbitrators

Section 25 of the Code requires that the arbitrators acknowledge

148. See *Katsoris V*, *supra* note 92, at 311.

149. *Id.*

150. See UNIF. CODE, *supra* note 50, § 7. Documents that are irrelevant to the proceedings, however, should not be attached to the pleadings, and can often prove counterproductive. See *Katsoris V*, *supra* note 92, at 311.

151. See *Katsoris V*, *supra* note 92, at 311.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. See UNIF. CODE, *supra* note 50, § 8.

157. *Id.* §§ 8(c)-(d).

that they have read the pleadings filed by the parties.¹⁵⁸

4. Amendment to Pleadings

The Old Code initially provided that amended pleadings would not be permitted after receipt of a responsive pleading without the consent of the arbitrators.¹⁵⁹ This was subsequently changed by now permitting amending pleadings after receipt of a responsive pleading, *but before the appointment of the arbitration panel*.¹⁶⁰ Moreover, after *McMahon*, the Code was further amended; and section 13 of the New Code now imposes upon the party making the changes the obligation to serve the new or different pleadings, whereas initially that burden fell upon the Director of Arbitration.¹⁶¹

K. REPRESENTATION BY AN ATTORNEY

Originally, the Code (section 15 of the Old Code) simply provided that all parties have the right to representation by counsel.¹⁶² This permitted parties to be assisted in their presentation at the hearing by anyone they chose, even if that person was not an attorney (usually a relative or accountant). In 1991, however, SICA began to receive complaints that many 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).¹⁶³

For a variety of reasons, SICA first viewed this as a subject which would best be handled at the state level, because attorneys general and bar associations have the principal responsibility for dealing with questions relating to business practices and the standards and qualifications to practice law, and would thus be better suited to handle

158. See UNIF. CODE, *supra* note 50, § 25(c).

159. See SECOND REPORT, *supra* note 129.

160. See UNIF. CODE, *supra* note 50, § 13.

161. *Id.*; see also *supra* notes 142-45 and accompanying text.

162. SECOND REPORT, *supra* note 129, at A-8.

163. Constantine N. Katsoris, *Foreword to 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 Nonlawyers*, A.B.A. J., Oct. 1995, at 103.

this multifaceted problem at the local level.¹⁶⁴ But the complaints persisted, and since they raised questions as to whether customers were being adequately represented in SRO arbitrations, SICA felt obligated to address this sensitive and thorny issue.¹⁶⁵

1. NARs Report

Because of the enormous stakes and widely divergent opinions on this issue of representation, 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 views of the public and affected parties.¹⁶⁶ 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.¹⁶⁷ SICA listened, and, in 1995, issued a report on Non-Attorney Representation in Arbitration (“NARs Report”).¹⁶⁸ The NARs Report concluded that certain activities of Non-Attorney Representatives (“NARs”) constituted the practice of law and might even constitute the unauthorized practice of law. SICA also determined that some NARs’ claims regarding successful recoveries were inaccurate and misleading,¹⁶⁹ and, as such, raised questions under various state and federal advertising statutes or other consumer regulations.¹⁷⁰ Accordingly, SICA sent the NARs Report to bar associations and to

164. *NARs Report*, *supra* note 163.

165. *Id.*

166. *Id.* An interesting development occurred in a California case, where a NAR consented to a permanent injunction barring the NAR from future arbitration proceedings against the brokerage firm and its employees. See *Sutro & Co. v. Richard L. Sacks*, No. 965943 (Sup. Ct. of Cal. San Francisco Co., Nov. 17, 1995).

167. See *NARs Report*, *supra* note 163, at 506; see also *SAC Report on Non-Attorney Representation*, SEC. ARB. COMMENTATOR, Jan. 1994, at 3-6.

168. See *NARs Report*, *supra* note 163, at 506.

169. See *id.* at 524; see also S. Estreicher and S. Bennett, *Is Arbitration the Unauthorized Practice of Law?*, N.Y. L.J., Jan. 6, 2005, at 3.

170. See *NARs Report*, *supra* note 163; see also Michael Scionolfi, *Imperfect Advocate*, WALL ST. J., Nov. 14, 1995, at A1 (“It’s 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 complain that the . . . investment recovery firm has instead found a variety of ways to take them to the cleaners.”).

attorney licensing bodies, as well as to 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 the Federal Trade Commission.

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.¹⁷¹ Moreover, in California, the Supreme Court held 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, and, to the extent it practiced law in California, was engaged in the unauthorized practice of law.¹⁷² The Court further noted that such prohibitions extended to arbitration.¹⁷³ Such restrictions on representation by out-of-state attorneys in SRO securities arbitration, however, further exacerbate the difficulty that investors with small claims experience in obtaining counsel. For some investors, it places them in the unenviable position of having to choose between abandoning their claim or representing themselves on a pro se basis.¹⁷⁴

171. The Florida Bar re: Advisory Opinion on Nonlawyer Representation in Securities Arbitration, 696 So.2d 1178 (Fla. July 3, 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. *See also Out-of-State Attorneys*, SEC. ARB. COMMENTATOR, Mar. 1999, at 14. *See also Florida Court and Bar Continue to Debate Rules of Arbitration Practice*, 16 WORLD ARB. & MEDIATION REP. 6, at 171 (June 2005).

172. *See Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 17 Cal. 4th 119 (Cal. 1998); *see Licensing Attorneys for Arbitration Practices*, SEC. ARB. COMMENTATOR, Jan. 1998, at 16; *see also 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.*

173. *See Birbrower*, 17 Cal. 4th 119; *see Licensing Attorneys for Arbitration Practices*, SEC. ARB. COMMENTATOR, Jan. 1998, at 16; *see also California Birbrower Bill Signed into Law; Anti-Arbitration Bill Vetoed*, SEC. ARB. COMMENTATOR, Oct. 1998, at 9.

174. Constantine N. Katsoris, *Securities Arbitration: A Clinical Experiment*, 25 FORDHAM URB. L.J. 193, 194 (1998) [hereinafter Katsoris VIII].

Finally, in recognition of the fact that SRO securities arbitration claims procedures are basically identical throughout the United States, SICA recently amended section 4(b) of the Code to emphasize that, *subject to local law*, all parties can be represented in an arbitration proceeding in a United States hearing location by an attorney admitted to practice in any state of the United States, the District of Columbia, or possession of the United States or foreign country.¹⁷⁵ Furthermore, regarding representation by non-attorneys, SICA added section 4(d) of the Code to further provide that, *subject to local law*, parties may be assisted by a person who is not an attorney (such as a business associate, friend, or relative), if that person is not receiving compensation for services rendered in representing the party.¹⁷⁶ Moreover, in the absence of a court order, the arbitration proceedings shall not be stayed or otherwise delayed pending resolution of such issues.¹⁷⁷

2. Clinical Representation

In a separate but related development, 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.¹⁷⁸ In a cooperative effort, the SEC met with representatives of SICA, several law schools in New York City, and the Association of the Bar of the City of New York (“Bar Association”).¹⁷⁹ 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.¹⁸⁰ Although about twelve such clinics

175. THIRTEENTH REPORT, *supra* note 134, at 4.

176. *See id.* *See also supra* notes 163-70 and accompanying text.

177. *See* UNIF. CODE, *supra* note 50, § 4(c).

178. *See* Katsoris VIII, *supra* note 174, at 202. *See also* Diana B. Henriques, *Aid for the Little Guy in Securities Arbitration*, N.Y. TIMES, Oct. 4, 1998, § 3, at 8.

179. *See* Katsoris VIII, *supra* note 174, at 202.

180. *Id.* *See also* Victoria Rivkin, *Help For Small Investors; Clinics Provide Guidance on Arbitration Claims*, N.Y. L.J., Oct. 22, 1998, at 5; *see also* Katsoris VIII, *supra* note 174, at 202; *Fordham Law Students Win Punitives for Investors*, SEC. ARB. COMMENTATOR, June 2003, at 12 (“[O]nce a case is accepted, the full panoply of ADR procedures should be available, as with private representation [I]f mediation is practical, it should also be available to the clinic. Similarly, if an award has to be confirmed or vacated, the clinic should be able to do so.”); Leonard Post, *Help for*

have been established, unfortunately most are located in the Northeast, still leaving an unmet need in many parts of the country; and, *to this end*, SICA is encouraging the establishment of additional clinics in order to achieve broader geographical coverage.¹⁸¹

L. DESIGNATION OF TIME AND PLACE OF HEARING

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;¹⁸² and, thereafter, the arbitrators would determine the time and place of subsequent hearings.¹⁸³

Subsequent to *McMahon*, SICA eliminated the reference “[u]nless the law directs otherwise” so as to nullify location of hearing provisions incorporated into brokerage contracts. Thus, section 10 of the Code now 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.

M. PRE-HEARING PROCEDURES / INFORMATION GATHERING

Section 23 of the present Code incorporates the subject matter originally found in the Old Code [sections 20 (Subpoena Process) and

‘churned and burned’: *Small Investors Seek Out Law School Securities-Arbitration Clinics*, NAT’L L.J., Feb. 10, 2003, at A6 (“The SEC, the National Association of Securities Dealers (NASD), the New York Stock Exchange (NYSE), and local bar associations refer prospective clients to the clinics. Besides having a compelling case, clients must also qualify under a school’s financial criteria.”).

181. See *Law School Clinics Meet at Fordham*, SEC. ARB. COMMENTATOR, Apr. 2005, at 14. Indeed, at a day-long roundtable attended by directors of clinics at ten law schools, attendees voted to form an informal association, tentatively called National Association of Securities Arbitration and Mediation Clinics (NASAMC). *Id.* at 15. See also THIRTEENTH REPORT, *supra* note 134, at 6. Indeed, on February 24, 2006, the Third Annual Roundtable of Clinics was held at Fordham Law School, which was attended by representatives of the SEC, N.Y. State Attorney General, NASD, NYSE, the author, and the following law schools: Albany; Brooklyn; Buffalo; Cardozo; Duquesne; Fordham; Hofstra; New York; Northwestern; St. Johns; and Syracuse. See *Securities Arbitration Clinic Roundtable*, SEC. ARB. ALERT, Mar. 9, 2006, at 1.

182. SECOND REPORT, *supra* note 129, at A-8.

183. *Id.*

21 (Power to Direct Appearances) of the Old Code].¹⁸⁴ Originally, the Old Code simply provided that the parties were expected to voluntarily exchange documents as would “serve to expedite the arbitration” without establishing any mechanism to ensure cooperation in production of documents and information.¹⁸⁵ 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.¹⁸⁶

1. Discovery Orders and Compliance

Admittedly, arbitrators always had the inherent authority to resolve discovery disputes in advance of the hearing.¹⁸⁷ 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.¹⁸⁸ 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.¹⁸⁹

After *McMahon*, SICA decided to codify the informal practice of some SROs to get the arbitrators involved in discovery disputes before the first hearing.¹⁹⁰ Accordingly, SICA added specific provisions relating to pre-hearing conferences and procedures for pre-hearing document and information production.¹⁹¹

Under the present Code, a request for documents or information may be served,¹⁹² and if a party objects or fails to honor a request, a pre-hearing conference may be requested to resolve the impasse.¹⁹³ 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

184. See ELEVENTH REPORT, *supra* note 133, at 41.

185. Katsoris IV, *supra* note 24, at 511 (quoting FIFTH REPORT).

186. *Id.* at 512.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. See UNIF. CODE, *supra* note 50, § 23.

193. *Id.*

produced.¹⁹⁴

2. Witness Lists

Section 23 of the Code further authorizes a sole arbitrator to act on behalf of the entire panel to set deadlines for compliance with discovery orders.¹⁹⁵ In addition, section 24 provides that 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.¹⁹⁶

3. Subpoenas

The Code always provided that all parties to a dispute are to receive copies of any subpoenas issued.¹⁹⁷ Unfortunately, such notice was not always timely; therefore, section 23 was amended to provide that service of a copy of such request or subpoena be made in a manner that is reasonably expected to be delivered to all parties on the same day.¹⁹⁸ This requirement was an attempt to promptly notify, and thus permit the opposing party a reasonable opportunity to seek to quash third party subpoenas indiscriminately or improperly issued before the materials are turned over by the recipient of such subpoenas.

194. 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*]; *Securities Arbitration Reform: Report Of The Arbitration Policy Task Force To The Board Of Governors National Association Of Securities Dealers, Inc.*, at 82 (Jan. 1996) (on file with author) [hereinafter *Ruder Report*]; *NASD Files Discovery Guide Proposal for Use in NASD Arbitrations*, SEC. ARB. COMMENTATOR, Apr. 1999, at 8; ARBITRATOR'S MANUAL, *supra* note 131, at 12-3. In October 1999, the NASD made available a Discovery Guide for use in customer cases, which includes Document Production Lists which 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. *Id.*

195. See Katsoris IV, *supra* note 24, at 512; see also UNIF. CODE, *supra* note 50, § 23(b).

196. See UNIF. CODE, *supra* note 50, § 24(a). Moreover, such lists must also be served on the Director of Arbitration. *Id.* § 24(c).

197. See UNIF. CODE, *supra* note 50, § 23(c).

198. *Id.* § 23(c)(1). See also Seth E. Lipner, *Phony As A \$3 Bill: Attorney-Issued Discovery Subpoenas in Arbitration*, 10 PIABA BAR J. No. 2 (Summer 2003), at 2.

In addition, in order to prevent premature compliance by non-parties to third party subpoenas (before the non-serving party has an opportunity to object), the Uniform Code was recently further amended to require ten days prior notice before the issuance of such subpoenas in order to afford the objecting party an opportunity to seek to limit or quash it.¹⁹⁹

4. Depositions

Although the Code omits any reference to *pre-hearing depositions*, the circumstances under which such depositions are usually ordered by the arbitrators are discussed in SICA's Arbitrator's Manual.²⁰⁰ Mindful of the excessive use of depositions in court litigation, and the resultant increase in cost and delay, depositions are more sparingly used in SRO arbitrations. Indeed, it is suggested that depositions should normally be "limited to preserving the testimony of ill or dying witnesses, or persons who are unable to travel long distances for a hearing and cannot otherwise be required to attend the hearing, as well as to expedite large or complex cases."²⁰¹ In any event, parties can agree to depose a witness without asking the permission of the arbitrators.²⁰²

5. Resolution Format

On the whole, the expanded pre-hearing procedures of the Uniform Code enhance the arbitration process. Admittedly, the new procedures may initially involve some additional expense and delay, but this is 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, and sets the tone for more orderly hearings.

In practice, some of the pre-hearing proceedings are conducted by telephone conference calls. Although such conference calls may be less

199. See UNIF. CODE, *supra* note 50, § 23(c)(2)-(4). The Uniform Code of Arbitration provides that arbitrators shall have the power to quash or limit the scope of any subpoenas. *Id.* § 23(c)(6).

200. ARBITRATOR'S MANUAL, *supra* note 131, at 9.

201. *Id.*

202. *Id.*

expensive and more convenient, they are not always the most effective method, particularly in a large or complex case involving several parties. In that case, it is often more productive if the arbitrator overseeing the discovery process orders a formal face-to-face hearing. Section 23 also permits a sole arbitrator (selected for these pre-hearing proceedings) to refer any issue to the full panel, and, in the appropriate case, the sole arbitrator should not hesitate to do so, for many of the same issues may again resurface, to be ruled upon by the entire panel during the hearings.²⁰³

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.²⁰⁴

N. EXPEDITED PROCEDURES / ELDERLY OR SERIOUSLY ILL

The Uniform Code has attempted to balance the competing goals of speed, fairness and economy, with the need for preserving procedural due process. Where one of the parties is elderly or seriously ill, however, special consideration must be given to accommodate their needs. Although arbitrators have generally been sensitive to expediting matters involving the elderly or seriously ill, it has been suggested that some form of formal recognition of such policy be established. Accordingly, SICA is presently studying how to improve the arbitration process “for disputes involving elderly or seriously ill parties, while maintaining procedural balance and fairness for all involved parties.”²⁰⁵

203. See UNIF. CODE, *supra* note 50, § 23(b).

204. See Emily Thornton, *The Brokers Strike Back*, BUS. WK., Aug. 16, 2004, at 70. “Since January, arbitration panels have fined six investors for abusing rules requiring them to hand over documents without delay. In the same period, they have cited 16 firms for the same reason.” *Id.* In addition, “on July 19, Merrill was one of three firms, with Morgan Stanley and Citigroup, each fined \$250,000 by the NASD for failing to produce documents in a total of 20 cases.” *Id.*

205. *NASD Expedites Elder Cases*, SEC. ARB. COMMENTATOR, July 2004, at 7; see also THIRTEENTH REPORT, *supra* note 134, at 3-4.

O. HEARINGS

1. Attendance at Hearings

Section 25 of the Uniform Code simply provides that except for parties and their attorneys, the arbitrators decide the attendance or presence of other persons at the hearings. 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.²⁰⁶

Greater guidance, however, is provided in the Arbitrator's Manual, which presently provides that a corporate party may designate a representative as it may choose, whether or not that representative is going to be a fact witness. In addition, absent persuasive reasons to the contrary, there is a presumption that expert witnesses, as opposed to fact witnesses, should be permitted to attend the entire proceedings. The Manual further provides

that absent persuasive reasons to the contrary, and *subject to the ultimate authority of the arbitrators*, the investor party should be permitted to designate one individual to attend the hearing, as there are many instances where an investor wishes to have a spouse, son or daughter, accountant or other fact witness attend to provide added support and valuable assistance to the investor party.²⁰⁷

Indeed, such presence can provide invaluable assistance to the investor party when hearing the testimony of fact witnesses; but these designations should be made before the hearings start.

It has also been suggested on occasion that, in the interest of transparency, SRO arbitrations be open to the press and the public at large. Whatever benefits such access would bring, it is respectfully suggested that, on balance, it would be counterproductive. SROs would be hard pressed to provide the additional space (at their numerous hearing sites scattered throughout the country) that would be required by such expanded attendance, as well as posing additional security concerns. Moreover, the presence of the press or public would

206. See UNIF. CODE, *supra* note 50, § 25; see also Constantine N. Katsoris, "I Won't Sit Without a Record", SEC. ARB. COMMENTATOR, Sept. 1990, at 1 [hereinafter Katsoris IX].

207. See THIRTEENTH REPORT, *supra* note 134, at 5.

encourage many parties and their representatives to posture instead of trying their case, turning many arbitrations into theater instead of a search for the truth — particularly if inexperienced arbitrators are involved. In addition, sensitive issues of confidentiality or privilege of either party could be compromised. Accordingly, such efforts have not to date gained traction.

2. Record of Proceedings

Initially, there was no requirement that a record of arbitration proceedings be kept,²⁰⁸ but, after *McMahon*, the Code was amended and presently requires that a verbatim record of all proceedings be kept either by stenographic reporter or tape recording.²⁰⁹ This flexibility as to the method of recording takes into account the significant cost differential between a stenographic record and a tape recording. Nevertheless, in a multi-sessioned 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.²¹⁰

3. Oaths of Arbitrators and Witnesses

The Code 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.²¹¹

4. Adjournments

Initially, the Code merely authorized arbitrators to grant adjournments; however, as time went on, 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 postponed

208. See Katsoris IV, *supra* note 24, at 514.

209. See UNIF. CODE, *supra* note 50, § 25(d). At the NYSE the proceedings are recorded by stenographic reporter, whereas tape recording is routinely used at the NASD.

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

211. See UNIF. CODE, *supra* note 50, § 21(a). See also Katsoris IV, *supra* note 24, at 515.

after the panel had already been appointed.²¹² 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 nonetheless impact upon the arbitration process. Repeated adjournments often result in having to replace arbitrators (who have already cleared the selection process)²¹³ because of their unavailability on the new adjourned date or dates. This causes further 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.

These seemingly harmless adjournments undercut the two advantages of arbitration — speed and economy. The more adjournments granted, the longer resolution is delayed, and the more expensive it becomes for the parties, as well as to the forum hosting the arbitration.

Before *McMahon*, SICA addressed this problem by amending the Code 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 \$100.²¹⁴ As time went on, it became evident that this penalty was not a sufficient deterrent. Accordingly, after *McMahon*, SICA not only increased the adjournment fees, but also made them mandatory at the time of the request, unless waived by the Director of Arbitration.²¹⁵

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

213. See *supra* notes 101-12 and accompanying text.

214. Katsoris IV, *supra* note 24, at 510.

215. *Id.* The first request requires a deposit of a fee equal to the initial hearing session deposit, and the second request a fee equal to double that amount (but not to exceed \$1,000.00). See UNIF. CODE, *supra* note 50, § 10(c)(2). In any event, the arbitrators may also direct the refund of a postponement fee if a postponement is granted. *Id.* Moreover, if a third request is made that is consented to by all the parties, the arbitrators could dismiss the arbitration, subject to the claimant's refiling their claim as a new arbitration. *Id.* §10(c)(3).

5. Evidence

Section 21 of the Code provides that arbitrators determine the materiality and admissibility of evidence. As a result, arbitrators are not necessarily bound by the Federal Rules of Evidence or state evidentiary rules.²¹⁶ 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.²¹⁷ Accordingly, although arbitrators may not be 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 26 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.²¹⁸ Although the Code is silent on the grounds for such re-opening, they should include such circumstances as perjured or coerced testimony.²¹⁹

7. Confidentiality

The Code does not directly address the issue of the confidentiality of arbitration proceedings, and, until recently, the Arbitrator's Manual simply provided that arbitrators "must consider all aspects of an arbitration to be confidential" and that "[r]ecords of the arbitration hearing should not be provided by the arbitrators to non-parties."²²⁰ The aforementioned language was intended to encourage arbitrators to respect the privacy of the parties before whom they serve, being careful not to casually divulge information obtained during the course of the proceeding. Unfortunately, some arbitrators misinterpreted these

216. See Katsoris IV, *supra* note 24, at 514.

217. *Id.*

218. *Id.* at 515.

219. *Id.* at 515-16.

220. ARBITRATOR'S MANUAL, *supra* note 131, at 23. For a reproduction of the ARBITRATOR'S MANUAL, see ELEVENTH REPORT, *supra* note 133, at 67.

instructions and *routinely* ordered that *all matters* pertaining to the dispute be held confidential by everyone involved — including the parties.²²¹

To clarify this issue, SICA recently amended its Manual by modifying these instructions by adding thereto:

Nothing in this provision should be interpreted as either imposing a blanket of confidentiality on the parties to the arbitration or preventing the arbitrators from entering a confidentiality order as to certain documents and information exchanged between the parties in the course of the arbitration and in accordance with the provisions set forth in the ‘*Pre-hearing Conference*’ section of this manual.²²²

Moreover, the *Pre-hearing Conference* section of the Manual was also concurrently amended by the insertion of the following language:

Ideally, the parties will agree on the form and content of any confidentiality order. In some instances, however, the parties will not agree what is or is not confidential. When deliberating contested requests for confidentiality orders, the arbitrator(s) should bear in mind that the party asserting/requesting confidentiality has the burden of establishing that the documents or information in question are entitled to confidential treatment. Arbitrators should not automatically designate all discovery as confidential. When the party requesting confidentiality has met the burden of establishing the need for confidentiality of certain documents or information, the arbitrator(s) should strive to accomplish the confidentiality sought in the least restrictive manner possible.²²³

P. RULINGS OF ARBITRATORS AND AWARDS

1. Interpretation of Code and Enforcement of Arbitrators’ Rulings

The Code always provided that arbitrators have the final authority

221. See Neutral Roster Subcomm. of the Nat’l Arbitration & Mediation Comm. (NAMC), *Arbitrators and Orders of Confidentiality*, THE NEUTRAL CORNER, Apr. 2004, at 1.

222. See ARBITRATOR’S MANUAL, *supra* note 131, at 23 (emphasis added).

223. *Id.* at 9.

to interpret the provisions of the Code.²²⁴ After *McMahon*, however, the Code was amended to specifically empower the arbitrators to take appropriate action to obtain compliance with their rulings including, but not limited to, imposing sanctions.²²⁵

2. Determinations of Arbitrators

The Code provides that the rulings and determinations of the panel shall be made by a majority of the arbitrators.²²⁶

3. Awards

Section 27 basically provides that: (i) all awards must be in writing and signed by a majority of the arbitrators;²²⁷ (ii) all awards are deemed final and not subject to review or appeal, except as provided by law;²²⁸ (iii) arbitrators should endeavor to render the award within thirty business days from the date the record was closed;²²⁹ and (iv) prescribes the manner in which the Director of Arbitration is to serve the award on the parties.²³⁰ The section also requires that the award be made publicly available and include summary data, such as: the names of the parties and their counsel, if any; the names of the arbitrators; a description of the issues in controversy; and the amounts claimed and awarded.²³¹ This data is available to the public by various vendors, and in accordance with the policies of the sponsoring SRO.²³² While arbitration is not a system of precedents, the significance of publishing these awards is most important in maintaining the investing public's confidence in the

224. Katsoris IV, *supra* note 24, at 514. See UNIF. CODE, *supra* note 50, § 21(c).

225. See UNIF. CODE, *supra* note 50, § 22; Tom Wynn, *Handling Key Procedural Issues, The Chairperson's Role*, THE NEUTRAL CORNER, Aug. 1996, at 3. See also *supra* notes 187-89 and accompanying text.

226. See UNIF. CODE, *supra* note 50, § 21.

227. *Id.* § 27(b).

228. *Id.* § 27(c).

229. *Id.* § 27(e).

230. *Id.* § 27(d).

231. *Id.* § 27(f).

232. See Katsoris IV, *supra* note 24, at 516; see also SAC's Award Report, SEC. ARB. COMMENTATOR, June 1989; Award Reporter, SEC. ARB. COMMENTATOR, Oct. 1989, at 1-7. Indeed, some awards are often analyzed and commented upon. *Id.* at 8-10; see also NYSE Awards on WebSite, SEC. ARB. COMMENTATOR, Mar. 1999, at 14.

SRO process.²³³

The section, however, does not go so far as to require the arbitrators to issue written opinions — *although they are free to do so*.²³⁴ At first blush, this may appear to be a weakness or deficiency 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 for the award,²³⁵ and help the parties in formulating opinions about arbitrators with a view towards exercising their preferences or challenges in the future.²³⁶ Interestingly, a Federal Appellate Court — in overturning an arbitration award on the theory of manifest disregard of the *facts* by the arbitration panel — noted the absence of a written opinion to explain the arbitrators' ruling.²³⁷ 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.²³⁸

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.²³⁹ 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.²⁴⁰ Indeed, requiring such opinions might realistically result in fewer

233. See Katsoris IV, *supra* note 24, at 516.

234. *Id.*

235. *Id.*

236. See *supra* notes 101-12 and accompanying text.

237. See *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197 (2d Cir. 1998), *cert. denied*, 526 U.S. 1034 (1999). *But see* *Wallace v. Buttar*, 378 F.3d 182 (2d Cir. 2004) (rejecting reversal of an arbitration award for manifest disregard of the facts); see also Mark Hamblitt, *Only 'Manifest Disregard of Law' Can Upset Arbitration Award*, Panel Says, N.Y. L.J., Aug. 13, 2004, at 1.

238. See *Halligan*, 148 F.3d 197; see also Philip J. Hoblin, Jr., *Assessing Halligan Manifest Disregard of the Facts*, SEC. ARB. COMMENTATOR, Apr. 1999, at 6.

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

240. *Id.* at 517.

awards in favor of claimants based upon general equity grounds,²⁴¹ 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.²⁴²

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.²⁴³ Such appeals are both costly and time consuming and ultimately result in undue delay in the payment of any award.²⁴⁴

One area, however, where a written opinion may be advisable is in the case of punitive damages, because of its unusual nature.²⁴⁵ 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.²⁴⁶

The NASD has recently proposed a rule requiring arbitrators to give a written decision/award if requested by the claimant. Although such a requirement seems laudatory, it has hardly met with unanimous support.²⁴⁷

241. *Id.*

242. *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.

243. *See* Katsoris IV, *supra* note 24, at 517.

244. *Id.* *See also* Norman S. Poser, *Judicial Review of Arbitration Awards: Manifest Disregard of the Law*, 64 BROOK. L. REV. 471 (1998).

245. *See* Katsoris X, *supra* note 49, at 346.

246. *See* Katsoris IV, *supra* note 24, at 518. *See also* Constantine N. Katsoris, *Post-Sawtelle Tremors: Arbitration Faces New Questions about Sustainability of Punitive Awards*, 22 ALTERNATIVES 4, May 2004, at 61 [hereinafter Katsoris XI]. “When panels issue punitive awards the panel members should explain not only their reasons for the punishment, but also give some justification and blueprint as to their computation to defuse an appellate court’s concern as to guidelines.” *Id.* at 76. *See also* *Sawtelle Award Vacated – Again!*, SEC. ARB. COMMENTATOR, Nov. 2005, at 11.

247. Reflecting the wide divergence of opinion regarding awards, *see* Aegis J. Frumento, *Can’t Get No Satisfaction! How Explained Decisions Will Undermine the Arbitration Process*, SEC. ARB. COMMENTATOR, Apr. 2005, at 1; H. Thomas Fehn, *Arbitration Awards . . . Where the Sun Don’t Shine*, SEC. ARB. COMMENTATOR, Feb. 2005, at 1; Constantine N. Katsoris, *Beware of What You Ask For: You Might Just Get It*, SEC. ARB. COMMENTATOR, Feb. 2005, at 1 [hereinafter Katsoris XII]; Jake

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*, the Code 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.²⁴⁸ This payment requirement is a distinct advantage over court-litigated awards and those issued at non-SRO forums, which lack 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.²⁴⁹

5. Scope of Award

In 1992, SICA 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.*"²⁵⁰ Despite this clear mandate, several years later the Ruder Report²⁵¹ recommended the

Zamansky, *A 'Reasoned' Arbitration Decision? Be Careful What You Ask For*, WALL ST. LAW., Feb. 2005, at 1. See also Barbara Black, *Do We Expect Too Much From NASD Arbitrators*, SEC. ARB. COMMENTATOR, Oct. 2004, at 1.

248. See UNIF. CODE, *supra* note 50, § 27(h). 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.* See also *Non-Payment of Awards*, SEC. ARB. ALERT, Aug. 25, 2004, at 24.

249. See UNIF. CODE, *supra* note 50, § 27(h). 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.* See also *Non-Payment of Awards*, SEC. ARB. ALERT, Aug. 25, 2004, at 24; *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 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 FED. NEWS 35, at 1192.

250. See UNIF. CODE, *supra* note 50, § 27(a) (emphasis added).

251. 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

imposition of an inflexible cap on punitive damages of two times compensatory damages, or \$750,000, *whichever is less* (rigid cap rule).²⁵² In spite of significant opposition, the NASD submitted the rigid cap rule in a 19(b) filing with the SEC.²⁵³ By way of comparison, no other SRO, nor the AAA, sought a similar cap on punitive damages.²⁵⁴

From the investor's point of view, a rigid ceiling 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."²⁵⁵ 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 underlying the broad embracement of arbitration by the Supreme Court in *McMahon* was an investor's ability to *obtain in arbitration whatever relief was available in court*.²⁵⁶ Not only does the Ruder Report's rigid cap rule violate that mandate,²⁵⁷ but

the arbitration process, including the contentious issue of punitive damages. In early 1996, The Ruder Committee issued its report which was over 150 pages in length and contained scores of recommendations, most of them quite constructive. See Constantine N. Katsoris, *Ruder Report Is a Delicate Compromise*, 14 ALTERNATIVES 29 (Mar. 1996) [hereinafter Katsoris XIII]; see also *supra* note 194.

252. Constantine N. Katsoris, *The Betrayal of McMahon*, 24 FORDHAM URB. L.J. 221, 225 (1997) [hereinafter Katsoris XIV]. See also Constantine N. Katsoris, *Punitive Damages In Securities Arbitration: The Tower of Babel Revisited*, 18 FORDHAM URB. L.J. 573 (1991) [hereinafter Katsoris XV].

253. 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).

254. Katsoris XIV, *supra* note 252, at 225.

255. *Ruder Report*, *supra* note 194, at 43.

256. Katsoris XIV, *supra* note 252, at 229.

257. Leslie Eaton, *Investing It; Arbitration Rules Would Give Some, Take Some*, N.Y. TIMES, Nov. 17, 1996, § 3, at 3 ("The new rules are 'supposed to make sure investors can get in arbitration what they can get in court.'") (quoting Linda Fienberg); see also NYSE Symposium, *supra* note 194, 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,

more importantly, by using the SRO rules as the vehicle for its enforcement, it undermines the public's confidence of the fairness of SRO arbitration by rekindling the perception that the SRO process was *stacked against the public investor*.²⁵⁸ More than two years after the NASD's filing of the rigid cap rule (with no SEC approval),²⁵⁹ the NASD (in the spring of 1999) issued a *new* 19(b) filing (permissive cap rule).²⁶⁰ Although the permissive cap rule did not directly *impose* a rigid cap, it nevertheless *permitted* NASD members to insert into agreements

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., Ruder Committee member); *see also* 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.*

258. *See* Shearson American Express, Inc. v. McMahon, 482 U.S. 220, 261 (1987) (Blackmun, J., dissenting) (“As even the most ardent supporter of arbitration would recognize, the arbitral process at best places the investor on an equal footing with the securities-industry personnel against whom the claims are brought.”). Furthermore, there remains the danger that, *at worst*, compelling an investor to arbitrate securities claims puts him in a forum controlled by the securities industry. This result directly contradicts the goal of both Securities Acts to free the investor from the control of the market professionals. The Uniform Code provides some safeguards but despite them, and indeed because of the background of the arbitrators, the investor has the impression, frequently justified, that his claims are being judged by a forum composed of individuals sympathetic to the securities industry and not drawn from the public. *Id.* at 260-61 (emphasis added). “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.” *Id.* at 261 (citing William Glaberson, *When the Investor Has a Gripe*, N.Y. TIMES, Mar. 29, 1987, at 8 (quoting 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.”)); *see also* Thomas J. Stipanowich, *Punitive Damages in Arbitration: Garrity v. Lyle Stuart, Inc. Reconsidered*, 66 B.U. L. REV. 953 (1986).

259. 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.*

260. Constantine N. Katsoris, *Riding The Trojan Horse Back To Wilko?*, SEC. ARB. COMMENTATOR, July 1999, at 1-3 [hereinafter Katsoris XVI].

punitive damage caps which were *not more restrictive* than the rigid cap rule. Thus, the NASD attempted to do indirectly through the permissive cap rule what it originally sought unsuccessfully to do through its moribund rigid cap rule. Unfortunately, the practical result to the public would be the same.²⁶¹

Q. SRO ARBITRATION FEES

Section 11 of the Code 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 generally increased over the years.²⁶² Most SROs have, to date, subsidized the arbitration process. As the forums' costs increased, however, whispers were heard that SRO arbitration should be put on a self-sustaining, pay-as-you-go basis.²⁶³ 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. Such escalation of costs would surely fuel renewed efforts that securities claimants no longer be subject to mandatory pre-dispute arbitration agreements, and that customers be free to pursue their claims in court.

R. LARGE AND COMPLEX CASES

Although the Uniform Code does not specifically deal with large and complex cases, SICA revised its Procedures Booklets 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

261. *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.*

262. 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, 47-50 (1999).

263. The NASD submitted a 19(b)(4) filing seeking SEC approval to spin off arbitration to a wholly-owned and self-supporting subsidiary. Exchange Act Release No. 34-41510 (June 10, 1999). Such a subsidiary company under the umbrella of the NASD became operational as a separate company on July 9, 2000. *NASD Dispute Resolution, Inc.*, THE NEUTRAL CORNER, Nov. 2000, at 1.

qualifications; and block-scheduling of hearing dates.²⁶⁴ Parties seeking such special or additional services should advise the sponsoring SRO at the earliest possible time.

S. TRACING UNIFORM CODE INTO SICA 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 returns to its respective organization for Board approval; and, if successful, such rule is usually then submitted to the SEC for approval in a Rule 19(b) filing.²⁶⁵ Accordingly, there is often a time lag time between SICA's approval and SRO action, with the result that the SRO codes do not always mirror the SICA Code.²⁶⁶ Indeed, some sections of the Code have never been adopted by the SROs. For example, *no* SRO code has adopted the SICA requirement that the predispute arbitration clause be separately initialed,²⁶⁷ nor has any SRO adopted SICA's rule that arbitrators may grant "any relief they deem just and equitable."²⁶⁸

Even more troublesome, however, is when SROs *affirmatively* bypass SICA and pursue significant rule changes on their own.²⁶⁹ This is particularly unfortunate since through its public members, together with the SEC's oversight role of the SROs, SICA appears to be the

264. See Katsoris IV, *supra* note 24, at 523; see also ELEVENTH REPORT, *supra* note 133, at 48-66.

265. Katsoris II, *supra* note 14, at 364. 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)(2) (1988 & Supp. IV 1992). 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.*

266. Katsoris II, *supra* note 14, at 364.

267. UNIF. CODE, *supra* note 50, § 3(b); see SEVENTH REPORT OF THE SECURITIES INDUSTRY CONFERENCE ON ARBITRATION 23 (July 1991) (on file with author) [hereinafter SEVENTH REPORT]; see also *supra* notes 55-57 and accompanying text.

268. See UNIF. CODE, *supra* note 50, § 27(a); see also NYSE Symposium, *supra* note 194, at 1573.

269. See *supra* notes 94-98, 234-45 and accompanying text.

mechanism with which most of the public seems comfortable. Unfortunately, over the last decade, the NASD has often adopted a go-it-alone policy,²⁷⁰ which not only undermines the credibility of the Uniform Code, but also makes it difficult to track its provisions into the various SRO codes.²⁷¹ Moreover, inconsistencies among SRO rules often lead to confusion and forum shopping and can constitute a trap for the unwary.²⁷²

Certainly, there are areas where administrative variations among the SRO codes and practices are understandable (such as whether a record of the hearing should be recorded or transcribed).²⁷³ On more basic issues, however, *lone ranger* actions by the SROs²⁷⁴ undermine the creditability of SICA, confuse the users of the various forums, rekindle suspicions about the process, and erode the confidence that is essential to the integrity of a procedure that is basically compulsory.²⁷⁵

T. CONDUCT OF PARTICIPANTS

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 thus becomes, who monitors the conduct of these various participants?

270. Constantine N. Katsoris, *SICA, Does The Bell Toll for Thee?*, SEC. ARB. COMMENTATOR, Jan. 1994, at 1 [hereinafter Katsoris XVII]. For a tracking of the SICA Code into the SRO codes as of 1996, see Katsoris IV, *supra* note 24, at 565-66.

271. See Katsoris XVII, *supra* note 270, at 1; see also Katsoris IV, *supra* note 24, at 565-66; Robert S. Clemente, *Road Map Comparing Arbitration at the NYSE, NASD, ABA DISP. RESOL. MAG.*, Winter 2000, at 24.

272. See Katsoris XVII, *supra* note 270.

273. See *supra* notes 208-10 and accompanying text.

274. See *supra* notes 250-61 and accompanying text.

275. See Katsoris VII, *supra* note 125. See also Mark Pullano, *An Analysis of NASD's Proposal to Reorganize its Code of Arbitration Procedure*, BLOOMBERG LAW REPORTS, Vol. 1, No. 4, Dec. 2005, at 1. "[The NASD] has gone about proposing revisions to its Code without the cooperation of SICA, and without soliciting input from other SROs. It further appears that NASD was not motivated to make these changes at the insistence of the staff at the SEC, or at least not by its public urging." *Id.*

SRO personnel are supervised by their superiors at the SRO; and, the SRO in turn is supervised by the SEC. Arbitrators' conduct is monitored by the courts through appellate review, by the list selection process, and through evaluation forms filled out and filed by the parties 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. The same is true for all of the others who participate in the process. It is not unreasonable that arbitrators and the host forum should expect a certain standard of conduct on the part of the parties, their attorneys and 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.²⁷⁶

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.²⁷⁷ Fortunately, unethical conduct is rare, but, when discovered, should be addressed and dealt with promptly. How that is handled depends upon the nature of the misconduct and the effect upon

276. See Adam Owen Glist, *Enforcing Courtesy: Default Judgments and the Civility Movement*, 69 *FORDHAM L. REV.* 757 (2000).

277. *Id.* at 757 (“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. Afterward, you’d all go out for a drink.’ Can we ever again achieve this level of professionalism? I hope so.”) (quoting 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 XVIII]; *ELEVENTH REPORT*, *supra* note 133.

the outcome of the case. It can vary, from a slap on the wrist to reporting an attorney to the appropriate bar association, or might even involve the imposition of some sort of sanction.²⁷⁸

There is no room in arbitration for incivility. Incivility, if unchecked, often breeds more incivility, and 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.²⁷⁹ 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, 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, for example: not only against opposing parties and their attorneys, but also against witnesses, SRO arbitration staff, and occasionally even against the arbitrators themselves.²⁸⁰ 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 recurring? It depends upon the circumstances. For example, it can vary from calling numerous short recesses while counsel, witnesses and others regain their composure; or, in a most egregious case, even dismissing the proceedings without prejudice; or, imposing sanctions, depending upon the source, seriousness and/or malice of the misconduct.²⁸¹ Ironically, it is often the malfeasant —

278. See Constantine N. Katsoris, *Advocacy With Civility: A Prescription for Success*, THE NEUTRAL CORNER, Jan. 2000, at 1 [hereinafter Katsoris XIX]. See also Jisook Lee, *Disciplinary Referrals*, THE NEUTRAL CORNER, Oct. 2005, at 1.

279. See Katsoris XIX, *supra* note 278, at 1.

280. *Id.*

281. Indeed, the NASD has recently proposed in Rule 12211 that the sanction power of arbitrators not only be applied to parties, but to their representatives as well. See David E. Robbins, *What New Customer Arbitration Code Will Mean to Arbitrators*, THE NEUTRAL CORNER, June 2004, at 1.

whose conduct disrupts and delays the proceedings — who complains that the hearings are taking too long.²⁸²

An attorney or party who is a victim of such unethical or uncivil conduct by an adversary should not hesitate to bring it to the attention of the arbitrators. It is then up to the arbitrators to do their utmost to insure 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 insuring civility historically falls upon the Chairperson. On the other hand, 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, perhaps they should not be reappointed as Chairperson in the future.²⁸³

U. JOINT ADMINISTRATION

Section 23(e) of the Code now permits the parties to agree to jointly administer the arbitration proceedings without the further assistance of the SRO. This procedure is available only with the consent of the parties and the arbitrators, and sets out a list of procedural rules that must be followed. Although this option has some advantages, particularly in long and complicated cases, it is doubtful that it will become the procedure of choice in the vast majority of cases either because of reluctance on some of the participants to agree, or an underlying apprehension that by increasing the direct contact with the arbitrators the opportunity for mischief is increased. Accordingly, although the procedure has significant merit, it should be used only in the right type of case, preferably involving only seasoned and experienced arbitrators who are likely to seek increased compensation because of their undertaking of additional administrative duties.

IV. ALTERNATIVES TO SRO ARBITRATION

The *McMahon* decision transformed SRO arbitration from a

282. See Katsoris XIX, *supra* note 278.

283. *Id.*

basically voluntary procedure to a largely mandatory one.²⁸⁴ Since then, the debate has focused upon whether or not it is fair to compel the public to arbitrate their disputes before an SRO forum.²⁸⁵ As 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 non-SRO forum* to host these disputes; or (ii) alternative providers be permitted to compete with the SRO arbitration forums.²⁸⁶

A. SINGLE INDEPENDENT FORUM

As SRO arbitration filings exploded and the issues became more complex, the rules of combat became more litigious and complaints surfaced that securities arbitration had lost its way, becoming less economical and speedy, and more like the courthouse it was designed to avoid. In 1994, both the NYSE and the NASD announced plans to address the troublesome issues then facing SRO arbitrations. 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.²⁸⁷

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.²⁸⁸ The Task Force's

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

285. See Constantine N. Katsoris, *Should McMahon Be Revisited?*, 159 BROOK. L. REV. 1113 (1993) [hereinafter Katsoris XX]; Peter R. Cella, *Letters to the Editor*, SEC. ARB. COMMENTATOR, Sept. 1997, at 9 ("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?"); See also Kenneth R. Davis, *The Arbitration Claws: Unconscionability in the Securities Industry*, 78 B.U. L. REV. 255 (1998); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631 (2005).

286. See *infra* notes 302-06 and accompanying text.

287. See NYSE Symposium, *supra* note 194 and accompanying text.

288. See Michael Siconolfi, *Revised Rules Are Mapped For Securities Arbitration*, WALL ST. J., Nov. 14, 1995, at C1 ("Members of the task force represent a cross section of arbitration specialists, including Steve Hammerman, Vice Chairman at Merrill Lynch

mission was to study the 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.²⁸⁹ Basically, the topics 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,²⁹⁰ including several 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) that the arbitration function be administered as independently as is practicable.²⁹¹ Indeed, the Public Members of SICA had previously pressed for many of these goals both at SICA and also 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.²⁹²

The Ruder Report also recommended that consideration be given to the establishment of a single forum *within an existing SRO*.²⁹³ *In contrast*, SICA once considered the creation of a single *independent* forum to administer (with SEC oversight) all securities arbitrations

& 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 Edward D. Jones & Co."). *See also Ruder Report, supra* note 194.

289. 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.

290. *See also Ruder Report, supra* note 194.

291. *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.*

292. Katsoris IV, *supra* note 24, at 532-33.

293. *Id.* at 533.

involving the public.²⁹⁴ While SICA ultimately decided it would not pursue that course 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.²⁹⁵

Once the Uniform Code had been extensively updated after *McMahon*, some suggested that SICA's usefulness had diminished,²⁹⁶ and it be replaced by a system whereby all the SROs collapse their public arbitration programs into one, leaving the public securities arbitration function solely to one SRO, such as the NASD.²⁹⁷ That suggestion, however, does not solve the nagging perception of the SROs' close association to the securities industry, thus lacking the structural independence necessary to insure public confidence.²⁹⁸

To date, the SEC has opposed the idea of a single forum, preferring the competitive choices offered by the various SROs.²⁹⁹ Perhaps a truly independent single forum is a *Utopian* dream; but, 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 25 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

294. NYSE Symposium, *supra* note 194, at 1643; see also Philip J. Hoblin, *The Case for a Single Securities and Commodities Arbitration Forum*, COMMODITIES LETTER 3, 5 (Aug. 1989); Katsoris I, *supra* note 3, at 384-5 ("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.") (emphasis added).

295. See Hoblin, *supra* note 7, at 3, 5.

296. See Katsoris XX, *supra* note 285, at 1152; *Feedback*, SEC. ARB. COMMENTATOR, Feb. 1993, at 2, 6. This possibility was also raised by the *Ruder Report*. See *supra* note 194.

297. See Katsoris XX, *supra* note 285, at 1152. See also Roberta S. Karmel, *Should There Be a Single SRO?*, N.Y. L.J., Oct. 21, 1999, at 3.

298. See NYSE Symposium, *supra* note 194, at 1592. See also Katsoris XX, *supra* note 285, at 1152.

299. See NYSE Symposium, *supra* note 194, at 1649. It is noteworthy, however, that the number of SRO arbitration forums has dwindled. See *supra* note 32.

the securities arbitration process.³⁰⁰

Under the present system, SICA, *an independent body*, proposes rule changes. The respective SRO boards then review them and, if they approve, file them with the SEC. The SEC then approves or disapproves, usually after allowing interested parties the opportunity to comment thereon. 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.³⁰¹

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

300. See *supra* notes 94-98, 251-60 and accompanying text.

301. See Katsoris IV, *supra* note 24, at 536; see also Katsoris X, *supra* note 245, at 361. As for continuing the role of SICA, it is noteworthy that in the majority opinion in *McMahon*, Justice O'Connor reflected upon the previous *mistrust* of arbitration as follows: "[T]he mistrust of arbitration that formed the basis for the *Wilko* opinion in 1953 is difficult to square with the assessment of arbitration that has prevailed since that time. This is expressly so in light of the *intervening changes* in the regulatory structure of the securities laws." 482 U.S. 220, 223 (1987) (emphasis added). It is respectfully suggested that the single most important event bridging the Supreme Court's mistrust expressed in *Wilko* and its confidence evidenced in *McMahon* was the creation of SICA in 1977. Similarly, in a dissenting opinion in *McMahon*, Justice Blackmun observed: It is true that arbitration procedures in the securities industry have improved since *Wilko's* day. Of particular importance has been the development of a code of arbitration by the Commission with the assistance of representatives of the securities industry and the public

This code has been used to harmonize the arbitration procedure among SROs. Constantine N. Katsoris, *The Arbitration of a Public Securities Dispute*, 53 *FORDHAM L. REV.* 279, 283-84 (1984) (Katsoris). As the Commission explained: This [Code] marks a substantial improvement over the various arbitration procedures currently being utilized by the securities industry and represents an important step towards establishing a *uniform system* for resolving investor complaints through arbitration. SEC Exchange Act Rel. No. 16390 (Nov. 30, 1979). 44 *FED. REG.* 70616, 70617.

Id. at 258, 257 n.16 (emphasis added).

that any disputes regarding their account be resolved by arbitration at one of the SROs. In order to provide customers with a broader choice of arbitration forums other than SROs, several years ago SICA proposed a two-year pilot program where they may resolve disputes with their brokerage firm at non-SRO forums. SICA developed guidelines for the pilot program. The guidelines provided for the voluntary participation of brokerage firms who would designate one or more non-SRO forums where customers may file a claim. The choice of whether to go to a non-SRO forum was up to the customer. The guidelines also set forth minimum due process requirements that the non-SRO forums must meet to be eligible for the pilot program. Seven of the largest retail brokerage firms volunteered to participate in the pilot program involving two non-SRO forums.³⁰² Collectively the firms agreed to *arbitrate to award* a minimum of 100 cases at the non-SRO forums during the two-year pilot.³⁰³

Beginning September 1, 1999, a customer who had a dispute with one of the participating firms could choose to arbitrate at a non-SRO forum. Customers whose claims qualified under the pilot program could file directly with the non-SRO forum selected by the firm. Customers who filed a claim with an SRO against one of the seven participating firms would be advised, if the claim qualified, that they may arbitrate the dispute at the non-SRO forum. The customer could then choose whether to proceed at that non-SRO forum or remain at the SRO forum.

In order for a claim to have qualified for the pilot, the events giving rise to the dispute must have occurred less than four years before the date the Pilot Program commenced or six years before filing, whichever

302. 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, Salomon 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 *NASD To Enforce Settlement and Decisions From All Forums*, SEC. ARB. COMMENTATOR, May 1999, at 8.

303. Since most 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 was 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 ("Arbitration 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."). See also Sneeringer, *supra* note 302, at 1.

was shorter. Disputes involving limited partnerships and disputes naming registered representatives or non-participating firms were not eligible for the pilot program unless the registered representative or non-participating firm consented to arbitration at the non-SRO forum. Nor were claims involving *pro se* claimants eligible for the pilot program.³⁰⁴

Unfortunately, this SICA-sponsored pilot program, aimed at encouraging investors and their counsel to choose outside arbitration, produced little positive response.³⁰⁵ Indeed, it would appear that most eligible participants were more concerned with the cost of non-SRO arbitration and were more comfortable with their familiarity with SRO procedures.³⁰⁶

C. BACK TO COURT

Should access to the courts be made available to securities claimants similar to the manner allowed before *Shearson American Express, Inc. v. McMahon*?³⁰⁷ One of the principal attractions for such access (whether limited or not) would be to counter the argument that claimants should not be forced to arbitrate in forums controlled by SROs (even though they allegedly agreed to do so).³⁰⁸ Indeed, permitting such alternative access to the courts has considerable merit and appeal, and would help defuse the escalating tension regarding the selection and qualification of arbitrators. Unfortunately, however, there is no free lunch; and such re-entry to the courts would trigger a ripple effect.

By freeing claimants from the yoke of mandatory contractual arbitration, the industry would surely counter — in the interest of maintaining a level playing field — that it too should then be similarly

304. Admittedly, the cost of arbitration at these alternate forums would be greater than at SRO forums and SICA did not feel *pro se* litigants would benefit from participating in the pilot program in its initial stages. See also Fried, *supra* note 303, at 5.

305. See SECURITIES INDUSTRY CONFERENCE ON ARBITRATION, FINAL REPORT, PILOT PROGRAM FOR NON-SRO SPONSORED ARBITRATION ALTERNATIVE (2002) (on file with author).

306. *Id.* See also Stephen G. Sneeringer, *A SICA Experiment*, SEC. ARB. COMMENTATOR, Nov. 2002, at 1-2.

307. See *supra* notes 8-14 and accompanying text.

308. See Katsoris IV, *supra* note 24, at 534. See also Jonathan C. Uretsky, *Securities Arbitration vis-à-vis Securities Litigation: To Be or Not to Be*, BLOOMBERG LAW REPORTS, Vol. 2, No. 2, at 1.

freed from the mandatory obligation to arbitrate, which is presently imposed by the SROs upon its members (whether there is an agreement to arbitrate or not).³⁰⁹

Moreover, flooding the courts with thousands of securities disputes would saddle the courts, claimants, and respondents with additional costs and delays. In addition, depending on the extent and manner in which access to the courts was allowed, the troublesome intertwining/bifurcation dilemma of having similar facts being simultaneously tried before different tribunals could resurface.³¹⁰

Furthermore, once the exclusivity of the arbitration remedy is breached, we will probably gradually drift towards a significantly weaker SRO arbitration system where interest and resources in maintaining a level playing field will wane over time; for, instead of being constantly vigilant to insure that the playing field does not tilt one way or the other, complacency will reappear and a “*let’s fix it*” attitude will be replaced by “*if you don’t like the rules, why don’t you go to court.*” In this regard, I might add that it was only after *McMahon* that most of the belt-tightening in SRO arbitration occurred.³¹¹

In any event, it is this author’s opinion that most claimants would still opt to stay within the SRO system because of its informality, finality, speed of resolution and collectability of awards, and familiarity with basically one set of nationwide rules. This would be particularly true regarding the law school clinics where continuity of same-student representation is short-lived through the attrition of graduation, making speed and simplicity all that more important.

V. MEDIATION

Mediation of securities disputes provides parties with a voluntary, non-adversarial, and informal process that can often result in the

309. SROs require by rule that their membership consent to arbitrate disputes with their customers. See Hoblin, *SECURITIES ARBITRATION: PROCEDURES, STRATEGIES*, Case 1-2 (1988), at 2-3 to 2-4. By belonging to the SRO, its members agree to be bound by the SRO’s rules. Consequently, customers of an SRO may compel a member of an SRO to arbitrate; however, absent a written contract, the member cannot compel the customer to arbitrate. *Id.*

310. See *supra* notes 15-24 and accompanying text.

311. See *supra* notes 21-26 and accompanying text.

resolution of a dispute with a minimal expenditure of time and money.³¹² 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.³¹³ Mediation is voluntary, and thus the parties are free to withdraw from mediation at any time.³¹⁴

Mediation differs from arbitration in several ways. Unlike arbitration, mediation usually is non-binding.³¹⁵ Thus, a mediator cannot force parties to settle their disputes.³¹⁶ If the parties cannot reach a resolution of their dispute through mediation, they may proceed either in arbitration or in court.³¹⁷ 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.³¹⁸ 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.³¹⁹ 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.³²⁰

312. J. Boyd Page et al., *The Role of Mediation and Early Evaluation in Facilitating Settlement Negotiations*, PLI/SEC. ARB., Vol. 2: Course Handbook Series No. B-899, at 60 (1995). See also Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. UNIV. L.Q. 47 (1996).

313. Nolan-Haley, *supra* note 312.

314. Roger M. Deitz, *Understanding Function, Use of Mediation*, 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.

315. *Id.*

316. *Id.*

317. J. Boyd Page et al., *supra* note 312, 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.

318. Davidson & Gardner, *supra* note 317, at 8; see also Thomas J. Stipanowich, *Beyond Arbitration: Improvement and Evolution in the United States Construction Industry*, 31 WAKE FOREST L. REV. 65, 94 (1996).

319. J. Boyd Page et al., *supra* note 312, at 61; see also Davidson & Gardner, *supra* note 317, at 8; John D. Feerick, *The Peace-Making Role of a Mediator*, 19 OHIO ST. J. DISP. RESOL. 229.

320. Davidson & Gardner, *supra* note 317, at 8. See also *Model Standards of*

With greater frequency, mediation is being sought at all stages of the dispute, even after hearings have begun; and that flexibility is to be encouraged. Indeed, both the NASD and the NYSE have successfully instituted and have been operating a growing mediation program in securities arbitrations for several years.³²¹

VI. CONCLUSION

At its inception in 1977, SICA consisted of ten SROs, three Public Members, and a representative of the SIA. At that time, trades were generally executed at *fixed commission rates*, pursuant to a *specialist system*, the DJIA *hovered at about 1,000* and the daily volume on the NYSE averaged *about 21 million shares*. Much has changed in the last three decades. Presently, only four of the original SICA SROs have active arbitration programs, the others have either discontinued their arbitration programs or receive few, if any, claims. Despite its shrinking SRO membership, however, the work of SICA is as important as ever, as indicated by the significant increase in claim filings over the years.

Mediation, as a prelude to or even during an arbitration or litigation, is an option to be encouraged. Fair settlements arrived at through mediation can avoid the delay, expense, collateral damage and trauma of courtroom litigation or SRO arbitration. Thus, every effort should be made to explore the use of mediation, where the results to date have been quite favorable.³²²

No one can predict what the averages of the various markets will be a decade from now, and one can only *surmise* what new technologies

Conduct for Mediators Endorsed by AAA, ABA, and SPIDR, 6 WORLD ARB. & MEDIATION REP., No. 10, at 215 (Oct. 1995); Jacqueline M. Nolan-Haley, *Lawyers, Clients, and Mediation*, 73 NOTRE DAME L. REV. 1369.

321. J. Boyd Page et al., *supra* note 312, at 62; *see also* Katsoris V, *supra* note 92, at 476 n.415; *Getting Serious about Mediation*, An Interview with Kenneth L. Andrighick, SEC. ARB. COMMENTATOR, Dec. 1995, at 9-10; *A Great Beginning for NASD Mediation Program*, THE NEUTRAL CORNER, Dec. 1995, at 1; *Mediation Celebrates Fourth Anniversary*, THE NEUTRAL CORNER, Nov. 1999, at 1; *NYSE Rules Package Places NYSE Arbitration Program on Competitive Par with NASD*, SEC. ARB. COMMENTATOR, Dec. 1998, at 9. *See also* SRO Mediation Statistics attached hereto as appendix C.

322. *See SRO Forum Statistics*, SEC. ARB. COMMENTATOR, Apr. 1999, at 9 (In 1997 and 1998, over 2,000 cases were closed by the NASD's Office of Dispute Resolution after utilizing the mediation process and approximately 80% of said cases ended in settlement.). *See also* SRO Mediation Statistics attached hereto as appendix C.

will drive future trading, or what new competitors and products will surface.³²³ One thing is certain, however, and that is that disputes will continue to arise between the securities industry and the public. In resolving such 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.³²⁴ Simply put, whatever relief is available in court should generally also be available in arbitration. That was the mandate of *McMahon*.³²⁵

323. See Dominic Bencivenga, *SEC Takes Solomon 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 currency markets.”); *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. 58, 60 (1994). See also *The Tremors from Two Trading Titans*, BUS. WK., May 9, 2005, at 82; *Taking Risk To Extremes*, BUS. WK., May 23, 2005.

324. See Katsoris IV, *supra* note 24, at 536.

325. See *supra* notes 250-56 and accompanying text; see also 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 XXI]. 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 footnote 34 (in over 20 lines and over 200 words) of my article, *The Betrayal of McMahon*, 24 FORDHAM URB. L.J. 221, 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.

On the other hand, indiscriminately throwing thousands of cases back to congested court calendars is certainly no panacea. In such a scenario, the parties would often be plagued by excessive litigation costs, which either directly or indirectly would be ultimately borne by the public as the industry's cost of doing business. Moreover, the public would often be denied justice because of the excessive costs and delays associated with courtroom litigation.³²⁶ Yet, the present mandatory process will work only so long as the playing field is not only perceived to be, but also in fact remains *level for all*.

To this end, SICA's independent stabilizing influence, together with the SEC's oversight role, continues to generate investor confidence in the SRO arbitration system. Indeed, SICA's very presence during these past three decades, like the cop on the beat, has been reassuring to the regulators, the courts, and the public.³²⁷ To continue to be effective in this role, however, we must be ever vigilant that SICA remains a beacon of *independent thought*, whose ultimate goal is to maintain a level playing field.

My principal concern going forward is that we do not backslide into a system of *Balkanization*, as existed before the creation of SICA, where practitioners had to contend with the diverse rules and procedures of the various state courts, federal courts, and SROs throughout the country — each of which often spoke in a different language, reminiscent of the biblical *Tower of Babel*.

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. To insure the stability of such markets, however, we *must* retain the public's confidence — confidence in the markets themselves and confidence that, should a dispute arise, it will be fairly resolved.³²⁸ “This confidence, however, can only be earned by maintaining a *de*

326. 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).

327. See Katsoris XX, *supra* note 285.

328. See THIRTEENTH REPORT, *supra* note 134, at 6. See also notes 135-38 and accompanying text; David S. Ruder, *Balancing Investor Protection with Capital Formation Needs After the SEC Chamber of Commerce Case*, 26 PACE L. REV. 39; Barbara Black & Jill Gross, *The Elusive Balance Between Investor Protection and Wealth Creation*, 26 PACE L. REV. 27.

facto as well as a *de jure* image of fairness.”³²⁹ 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.”³³⁰ This will be particularly true in the future as the landscape changes to reflect the trend towards: electronic trading; consolidation and mergers of markets, exchanges and SROs; and the transformation of SROs from being not-for-profit entities to those organized for profit.³³¹

329. Constantine N. Katsoris, Statement Before the Securities and Exchange Commission (Dec. 8, 1977); *see also* Katsoris XX, *supra* note 285, at 1154; 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). *See also* Susanne Craig & John Hechinger, *Wall Street's Dispute Process Is Under Fire*, WALL ST. J., July 20, 2004, at C1. *See also* SRO Mediation Statistics attached hereto as appendix C.

330. Henry Ward Beecher, LIFE THOUGHTS 129 (1858) (*emphasis added*).

331. *See A Big Exchange: NYSE Members Approve Deal*, WALL ST. J., Dec. 7, 2005, at C1. *See also One Regulator – One SRO Forum?*, SEC. ARB. ALERT, 2005-46, Nov. 30, 2005, at 2; *NYSE-Archipelago: What Becomes of PCX Arbitration?*, SEC. ARB. COMMENTATOR, Nov. 2005, at 5; *Exchanges, Good Times Rarely Last*, THE ECONOMIST, Dec. 3-9, 2005, at 69; Aaron Lucchetti, *Street Debates Oversight of the New NYSE*, WALL ST. J., Feb. 10, 2006, at C3.

APPENDIX A

UNIFORM CODE OF ARBITRATION

Approved 01/19/2001; as amended 06/23/2005

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Section 1: Arbitration

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) 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) 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 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 took place is identifiable; and
- the Claimant agrees to the referral.

(d) Class Action Claims.

(1) Class action claims will not be arbitrated under this Code.

(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.

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) 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;
 - 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 person waives any rights under this Code or under any agreement except as stated in this paragraph.

Section 2. Agreement to Arbitrate

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 3. Requirements When Using Pre-Dispute Arbitration Agreements With Customers

- (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 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) 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) 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) 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.”

- (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 4. Representation in Arbitration

- (a) Representation by a Party.

Parties may represent themselves in an arbitration held in a United States hearing location.

- (b) Representation by an Attorney.

At any stage of the arbitration proceeding held in a United States hearing location, all parties shall have the right to be represented by an attorney admitted to practice law in any state of the United States, the District of Columbia, any commonwealth, territory, or possession of the United States, or foreign country. A member of a partnership may represent the partnership; and a bona fide officer of a corporation, trust, or association may represent the corporation, trust, or association.

- (c) Qualifications of Representative.

Issues regarding the qualifications of a person to represent a party in arbitration are governed by applicable law or bar regulations 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.

(d) Assistance by a Non-Attorney.

Parties may be assisted by a person who is not an attorney (such as a business associate, friend, or relative), if that person is not receiving compensation for services rendered in representing the party, and the representation does not violate the laws of the state in which the arbitration is scheduled to be held.

Sections 4(a) and (b) amended, and sections 4(c) and (d) added June 23, 2005

Section 5. Tolling time limitations for filing a claim in court or arbitration

- (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) 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 6. Filing and Service Requirements

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 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

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 B 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:

- 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 may extend any of the above time periods.

Section 8. Joining and Consolidating Claims for Multiple Parties

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 that Respondent. Each Respondent may have an award issued against them based on their individual liability.

(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.

(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.

Section 9. Simplified Arbitration

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) 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.

Upon receipt, the Director will promptly send each Respondent a copy of the Submission 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
 - 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-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.

(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.

(i) General Arbitration Rules.

The general arbitration rules of the [SRO] apply to Simplified Arbitration, unless otherwise specified.

Section 10. The Arbitration Hearing

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.

- (1) The Director decides when and where to 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.

- (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.

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 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.
- (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.

Section 11. Schedule of Fees

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.
- (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) Hearing Session Defined.

A hearing session is any meeting between the parties and 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.

(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.

- (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.
- (4) Other costs. The arbitrators may also 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.

(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.

(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.

(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.

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

Schedule of Fees

For the purposes of the schedule of fees the term “claim” includes claims, counterclaims, cross claims, and third party claims. Any such “claim” made by a customer is a customer claim. Any such “claim” made by a member or associated person of a member is an industry claim.

SCHEDULE OF FEES**CUSTOMER CLAIMANT**

Amount in Dispute	Filing Fee	Paper	Hearing Session Deposit	
			1 Arbitrator	3 Arbitrators
\$.01-\$1,000	\$ 15	\$15	\$ 15	N/A
\$1,000.01-\$2,500	\$ 25	\$25	\$ 25	N/A
\$2,500.01-\$5,000	\$ 50	\$75	\$100	N/A
\$5,000.01-\$10,000	\$ 75	\$75	\$200	N/A
\$10,000.01-\$25,000	\$100	\$100	\$300	\$400
\$25,000.01-\$50,000	\$120	N/A	\$300	\$400
\$50,000.01-\$100,000	\$150	N/A	\$300	\$500
\$100,000.01-\$500,000	\$200	N/A	\$300	\$750
\$500,000.01-\$5,000,000	\$250	N/A	\$300	\$1,000
Over \$5,000,000	\$300	N/A	\$300	\$1,500

INDUSTRY CLAIMANT

Amount in Dispute	Filing Fee	Paper	Hearing Session Deposit	
			1 Arbitrator	3 Arbitrators
\$.01-\$1,000	\$500	\$75	\$300	N/A
\$1,000.01-\$2,500	\$500	\$75	\$300	N/A
\$2,500.01-\$5,000	\$500	\$75	\$300	N/A
\$5,000.01-\$10,000	\$500	\$75	\$300	N/A
\$10,000.01-\$25,000	\$500	\$100	\$300	\$600
\$25,000.01-\$50,000	\$500	N/A	\$300	\$600
\$50,000.01-\$100,000	\$500	N/A	\$300	\$600
\$100,000.01-\$500,000	\$500	N/A	\$300	\$750
\$500,000.01-\$5,000,000	\$500	N/A	\$300	\$1,000
Over \$5,000,000	\$500	N/A	\$300	\$1,500

Section 12. Determining time limits on eligibility of a claim and how to challenge a claim's eligibility for arbitration

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:
 - 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) 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) 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) 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).
 - (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.
 - (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

- (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.

- (b) Parties serving new or different pleadings or responses under this section must follow Section 6 (Service and Filing Requirements).
- (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

Parties to an arbitration may agree to settle their dispute at any time.

Section 15. Exchange of Documents and Information

This section covers the documents and information that the parties must provide to each other before the hearing.

(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.

(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.
- (2) The party requesting information must serve copies of the request upon all parties.

(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.

- (4) Within 10 days of receipt of the objection, a party may serve a response to the objection on all parties.
- (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). Copies of the request, objections to the request and response to the objection, if any, must accompany the request to the Director of Arbitration.

Sections 15(c) (3)&(4) amended October 2, 2003

Section 16. Determining the Number and Type of Arbitrators

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).

- (a) For claims of \$25,001 to \$100,000.

If any party is a customer or a non-member and the total amount claimed in the case is from \$25,001 to \$100,000 (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 \$100,000 or where no dollar amount is claimed or disclosed.

Three arbitrators will hear and decide claims above \$100,000 (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 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 five 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 of his or her time to any person or entities enumerated in (c)(1).

(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.
 - The person has been associated with the industry as defined in paragraph (c)(1) of this section
 - The person is an investment advisor
 - The person is an attorney, accountant or other professional whose firm derives 20 percent or more of its annual income from securities industry representation.

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
 - 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 16(c)(1), (c)(2), (c)(3) & (d)(2) amended June 7, 2002

Sections 16(c)(4) & (d)(2) amended April 9, 2003

Sections 16(a) & (b) amended March 22, 2004

Section 17. Selecting Arbitrators

(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).
- (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.
- (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.

In the event the Director's appointment becomes necessary, then each side will be given one peremptory strike per case.

Section 17 amended March 15, 2005 (added last paragraph)

Section 18. Challenging Potential Arbitrators

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 preemptory 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 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 preemptory strikes and all the people responding to the claim will share one set of preemptory strikes. If a claim is made against two or more third parties, the third parties will share one set of preemptory strikes.
- (4) Section 17 (Selecting Arbitrators) provides the deadlines for exercising preemptory strikes.
- (5) The Director may allow additional preemptory strikes if the Director determines that justice would be served by doing so.

(b) Challenges for Cause.

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.

A challenge for cause to a particular arbitrator will be granted where it is reasonable to infer an absence of impartiality, the presence of bias, or the existence of some interest on the part of the arbitrator in the outcome of the arbitration as it affects one of the parties. The interest or bias must be direct, definite, and capable of reasonable demonstration, rather than remote or speculative.

Section 18(b) amended January 13, 2003

Section 19. Arbitrator's Required Disclosures

(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 between:
 - themselves, their immediate families or household members, their employers and their professional or business associates, and
 - the parties, their attorneys, and witnesses;
- (3) any relationship that might reasonably create the appearance of partiality or bias; and
- (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.

(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. The Director will remove or will disqualify from appointment any arbitrator who the director concludes intentionally has failed to disclose material information as to his or her background, experience or potential or existing conflicts of interest or bias.
- (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 subsection (a), not known to the parties when the arbitrator was selected. The Director's authority under this subsection may not be delegated.

Sections 19(a)(2) and 19(c) amended: March 14, 2000

Section 19(d)(3) added March 14, 2000

Section 19(d)((1) amended June 23, 2005

Section 20. Filling Vacancies of Arbitrators

(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.
- (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.
- (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).
- (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 21. Arbitrator Rulings

(a) Oaths of the Arbitrators.

Arbitrators will take an oath or affirmation before the first pre-hearing or hearing session begins or before issuing any ruling.

(b) Majority Agreement Requirement.

The arbitrators will make any ruling or determination by a majority vote, except as provided under Section 23 (Pre-Hearing Procedures).

(c) Interpretation and Enforcement of Arbitrator Rulings.

The arbitrators may interpret and enforce all 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.

Section 22. When Proceedings May be Dismissed

- (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.
- (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.
- (c) The arbitrators will dismiss the proceedings when requested to do so by all parties.

Section 23. Pre-Hearing Proceedings

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.

- (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.

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

reasonably expected to cause the request or subpoena to be delivered to all parties and the entity receiving the subpoena on the same day. The parties will produce witnesses and present proof at the hearing whenever possible without using subpoenas.

- (2) No subpoenas seeking discovery shall be issued to or served upon non-parties to an arbitration unless, at least 10 days prior to the issuance or service of the subpoena, the party seeking to issue or serve the subpoena sends notice of intention to serve the subpoena, together with a copy of the subpoena, to all parties to the arbitration.
- (3) In the event a party receiving such a notice objects to the scope or propriety of the subpoena, that party shall, within the 10 days prior to the issuance or service of the subpoena, file with the Director, with copies to all other parties, written objections. The party seeking to issue or serve the subpoena may respond thereto. The arbitrator appointed pursuant to this Code shall rule promptly on the issuance and scope of the subpoena.
- (4) In the event an objection to a subpoena is filed under paragraph (c)(3), the subpoena may only be issued or served prior to the arbitrator's ruling if the party seeking to issue or serve the subpoena advises the subpoenaed party of the existence of the objection at the time the subpoena is served, and instructs the subpoenaed party that it should preserve the subpoenaed documents, but not deliver them until a ruling is made by the arbitrator.
- (5) Rule 23(c)(2) and (3) do not apply to subpoenas addressed to parties or non-parties to appear at a hearing before the arbitrators.
- (6) The arbitrator(s) shall have the power to quash or limit the scope of any subpoena.

(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.

(e) Joint Administration.

- (1) At the request of any of the parties to an arbitration or of any member of the panel, the arbitrators may consider whether they should jointly administer all subsequent proceedings in the arbitration.
- (2) If the arbitrators and all parties agree, then the arbitrators may, without the assistance of the SRO, schedule all pre-hearing and hearing dates, the timing of the service and filing of appropriate papers, all discovery matters and all other matters relevant to the expeditious handling of the case.
- (3) This Rule shall only apply to those matters where all parties are represented by counsel. If, during the proceeding a party chooses to appear pro se, this Rule shall no longer apply.
- (4) Transmittal of Documents and Procedure for Oral Communications
 - (a) Parties may send written materials directly to the arbitrators, provided that copies of all such materials are sent simultaneously and in the same manner to all parties and the Director. The parties shall send the Director, arbitrators, and all parties proof of service of such written materials, indicating the time, date, and manner of service upon the arbitrators and all parties. Service by mail is completed upon mailing. If the arbitrators and all parties

agree, written materials may be served electronically.

- (b) If the arbitrators agree, the parties may initiate conference calls with the arbitrators, provided that all parties are on the line before the arbitrators join the call. Such conference calls may be tape-recorded or stenographically recorded.
- (c) The arbitrators may initiate conference calls with the parties, provided all parties are on the line before the conference begins. Such conference calls may be tape recorded or stenographically recorded.
- (d) Parties may not communicate orally with the arbitrators unless all parties are present.

The arbitrators are empowered to terminate or modify any order they issue regarding the joint administration of the arbitration.

Section 23(e) added October 2, 2002

Section 23(c) amended June 12, 2003

Section 23(c) amended April 29, 2004

Section 23(c) amended October 20, 2004

Section 24. Pre-Hearing Exchange of Documents and Witness Lists

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
 - 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

This section covers the procedures that will be followed at a hearing.

(a) Who May Attend Hearings.

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.

All witnesses will testify under oath or affirmation.

(c) Acknowledgment of Pleadings.

Arbitrators will acknowledge at the hearing that they have read the pleadings.

(d) Recording the Proceedings.

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.

(e) Evidence.

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.

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

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:
 - 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;
 - 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 B: SRO COMPOSITE ARBITRATION STATISTICS

COMPOSITE ARBITRATION FIGURES						
			Total Cases		Public	
	Total	Small	Concluded	Small	Customer	Awards in
	Cases	Claims	Including	Claims	Cases	Favor of
Year	Received	Received	Settlements	Concluded	Decided	Public
1980	830	332	686	269	410	205
1981	1034	302	978	356	526	263
1982	1319	305	1017	282	544	285
1983	1737	421	1260	319	620	328
1984	2464	561	1777	493	739	367
1985	2788	664	2204	523	988	525
1986	2837	660	2453	618	1013	508
1987	4357	836	2964	649	1158	638
1988	6097	1474	3742	936	1559	742
1989	5404	1730	5900	1308	2844	1504
1990	5332	1033	5837	1204	2187	1169
1991	5869	1063	5857	971	1994	1033
1992	5451	925	5778	891	1965	1002
1993	6562	1088	5363	922	1617	853
1994	6531	1116	5580	882	1367	643
1995	7271	1163	6787	1382	1818	919
1996	6510	938	7405	1272	2014	1048
1997	6665	842	6869	840	1652	943
1998	5575	583	6111	684	1704	999
1999	6274	1027	5324	642	1264	750
2000	6156	866	6137	1054	1531	800
2001	7742	687	6070	849	1487	770
2002	9099	667	6701	789	1731	917
2003	10,212	929	8,187	655	1866	990
2004	9,225	1002	10,334	971	2357	1229
2005	6,555	458	10,202	767	1,916	947

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

**** AMEX Merged with the NASD

BOSTON STOCK EXCHANGE, INC.						
			Total Cases		Public	
	Total	Small	Concluded	Small	Customer	Awards in
	Cases	Claims	Including	Claims	Cases	Favor of
Year	Received	Received	Settlements	Concluded	Decided	Public
1980	2	2	2	2	2	0
1981	2	2	2	2	0	0
1982	1	1	1	1	1	1
1983	2	2	2	2	2	1
1984	0	0	0	0	0	0
1985	0	0	0	0	0	0
1986	2	2	2	2	2	0
1987	0	0	0	0	0	0
1988	0	0	0	0	0	0
1989	0	0	0	0	0	0
1990	0	0	0	0	0	0
1991	1	0	0	0	0	0
1992	1	0	1	0	0	0
1993	0	0	1	0	0	0
1994	0	0	0	0	0	0
1995	1	0	0	0	0	0
1996	0	0	1	0	0	0
1997	0	0	0	0	0	0
1998	0	0	0	0	0	0
1999	0	0	0	0	0	0
2000	0	0	0	0	0	0
2001	0	0	0	0	0	0
2002	0	0	0	0	0	0
2003	0	0	0	0	0	0
2004	0	0	0	0	0	0
2005	0	0	0	0	0	0

CHICAGO BOARD OPTIONS EXCHANGE, INC.						
			Total Cases		Public	
	Total	Small	Concluded	Small	Customer	Awards in
	Cases	Claims	Including	Claims	Cases	Favor of
Year	Received	Received	Settlements	Concluded	Decided	Public
1980	44	11	31	11	18	6
1981	41	10	32	8	12	3
1982	50	6	38	6	14	3
1983	75	5	45	4	13	6
1984	91	24	56	16	4	3
1985	64	10	38	5	0	0
1986	72	16	44	9	12	9
1987	130	29	93	33	22	9
1988	149	22	89	27	48	12
1989	71	17	105	20	43	14
1990	67	16	85	18	32	16
1991	46	5	62	12	13	9
1992	28	7	28	5	11	5
1993	15	3	18	4	6	2
1994	23	1	24	3	4	1
1995	15	6	26	6	5	0
1996	19	6	10	4	1	0
1997	12	2	18	4	5	2
1998	20	3	18	3	5	3
1999	22	8	22	7	6	2
2000	14	4	17	4	1	0
2001	13	9	4	4	3	0
2002	14	11	2	3	3	2
2003	10	1	15	1	5	0
2004	6	0	9	0	0	0
2005	5	0	7	0	0	0

CHICAGO STOCK EXCHANGE, INC.						
			Total Cases		Public	
	Total	Small	Concluded	Small	Customer	Awards in
	Cases	Claims	Including	Claims	Cases	Favor of
Year	Received	Received	Settlements	Concluded	Decided	Public
1980	2	1	2	0	1	1
1981	2	0	2	0	0	0
1982	1	0	0	0	0	0
1983	2	0	2	0	0	0
1984	1	0	0	0	0	0
1985	1	0	0	0	0	0
1986	4	1	0	0	0	0
1987	5	1	3	1	1	1
1988	1	0	7	0	0	0
1989	5	0	6	0	0	0
1990	4	0	3	0	1	1
1991	5	0	2	0	0	0
1992	1	0	2	0	0	0
1993	1	0	0	0	0	0
1994	1	0	1	0	0	0
1995	1	0	0	0	0	0
1996	1	0	1	0	0	0
1997	0	0	0	0	0	0
1998	1	0	1	0	0	0
1999	1	0	0	0	0	0
2000	2	0	2	0	0	0
2001	1	0	2	0	0	0
2002	1	0	0	0	0	0
**2003						
**2004						
**2005						

** No Data Received

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

**** The NASD now administers MSRB arbitrations

NASD DISPUTE RESOLUTION, INC.						
			Total Cases		Public	
	Total	Small	Concluded	Small	Customer	Awards in
	Cases	Claims	Including	Claims	Cases	Favor of
Year	Received	Received	Settlements	Concluded	Decided	Public*
1980	318	134	234	113	122	56
1981	422	142	422	177	242	118
1982	606	157	435	139	276	140
1983	768	216	549	147	272	161
1984	1,108	298	747	244	381	196
1985	1,400	377	962	250	434	232
1986	1,587	390	1,199	327	476	248
1987	2,886	458	1,625	325	642	364
1988	3,990	1,084	2,169	539	934	432
1989	3,651	1,417	4,050	967	2,097	1,130
1990	3,617	703	4,019	900	1,530	826
1991	4,150	787	4,037	665	1,419	775
1992	4,379	793	4,375	717	1,552	821
1993	5,419	852	4,327	801	1,329	730
1994	5,570	992	4,561	725	1,111	532
1995	6,055	994	5,680	1,159	1,523	788
1996	5,631	849	6,331	1,155	1,815	977
1997	5,997	778	5,880	750	1,497	875
1998	4,938	540	5,484	628	1,573	937
1999	5,608	983	4,767	594	1,148	697
2000	5,558	828	5,473	1,009	1,396	734
2001	6,915	649	5,582	803	1,365	725
2002	7,704	631	5,957	733	1,483	820
2003	8,945	845	7,278	583	1,658	893
2004	8,201	864	9,209	828	2,019	1,113
2005	6,074	370	9,043	655	1,671	851

* "Awards in Favor of Public" column: Relief can include compensatory damages, punitive damages, interest, all or part of attorneys' fees, all or part of the filing fees or other costs, and non-monetary awards such as specific performance or declaratory relief.

NEW YORK STOCK EXCHANGE, INC.						
			Total Cases		Public	
	Total	Small	Concluded	Small	Customer	Awards in
	Cases	Claims	Including	Claims	Cases	Favor of
Year	Received	Received	Settlements	Concluded	Decided	Public
1980	367	131	327	110	221	119
1981	477	117	433	134	214	111
1982	558	109	473	113	214	118
1983	713	136	532	122	276	137
1984	1,008	176	796	183	259	113
1985	1,095	198	962	190	424	221
1986	965	181	1,004	205	432	210
1987	1,050	225	1,000	204	378	200
1988	1,623	263	1,196	235	440	228
1989	1,407	201	1,458	229	527	267
1990	1,378	222	1,466	199	499	256
1991	1,403	187	1,496	199	451	185
1992	873	83	1,166	119	317	137
1993	810	72	837	62	205	92
1994	711	62	795	74	186	80
1995	810	53	784	61	175	74
1996	648	21	783	42	146	49
1997	546	26	695	34	110	48
1998	544	26	528	24	105	47
1999	602	28	507	35	102	45
2000	553	29	604	37	116	55
2001	780	25	462	38	113	42
2002	1,315	25	717	52	239	92
2003	1,241	83	872	71	201	95
2004	1,001	135	1,095	142	335	116
2005	463	86	1,111	106	228	89

PACIFIC EXCHANGE, INC.						
			Total Cases		Public	
	Total	Small	Concluded	Small	Customer	Awards in
	Cases	Claims	Including	Claims	Cases	Favor of
Year	Received	Received	Settlements	Concluded	Decided	Public
1980	24	12	28	11	4	3
1981	24	17	20	17	9	5
1982	31	15	21	11	10	7
1983	35	17	29	17	23	10
1984	45	21	26	11	10	7
1985	50	12	40	18	20	12
1986	41	9	37	13	18	8
1987	64	27	58	11	23	13
1988	99	30	77	40	45	20
1989	61	19	93	27	86	37
1990	93	25	68	25	45	26
1991	86	21	82	17	33	21
1992	58	16	65	13	27	16
1993	199	130	54	22	23	12
1994	102	37	93	57	38	18
1995	76	15	166	118	79	39
1996	106	10	100	16	36	17
1997	34	13	121	12	21	9
1998	33	7	31	9	11	5
1999	41	8	28	6	8	6
2000	29	5	41	4	18	11
2001	33	4	20	4	6	3
2002	65	0	25	1	6	3
2003	16	0	22	0	2	2
2004	17	3	21	1	3	0
2005	13	2	41	6	17	7

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

**** Cases administered by the NASD

APPENDIX C: SRO MEDIATION STATISTICS

SRO Mediation Statistics	
NASD Dispute Resolution, Inc.	
Year	Mediations Held
1998	506
1999	461
2000	477
2001	418
2002	523
2003	742
2004	810
2005	668
New York Stock Exchange, Inc.	
Year	Mediations Held
1998	11
1999	51
2000	54
2001	76
2002	157
2003	42
2004	3
2005	6
Composite Mediation Statistics	
Year	Mediations Held
1998	517
1999	512
2000	531
2001	494
2002	680
2003	784
2004	813
2005	674

Notes & Observations