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Introductory Remarks

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PROF. KATSORIS: Thank you, Mr. Chairman. Securities arbitration involving the public is not a new phenomenon. You can trace it back to the New York Stock Exchange ("NYSE"), to the year 1872.[5] I wasn't around for that first arbitration, but I've been an arbitrator for the National Association of Securities Dealers ("NASD") and the New York Stock Exchange for over twenty-five years.

I briefly want to talk about securities arbitration as it was in the 1960s and 1970s. It was much different than it is today. There was little, if any, exchange of documents before the first hearing date. Hearings were often completed in one afternoon. The various SROs had differing rules—some were written, but most were unwritten common law and custom.

As the Chairman indicated, SICA was created to bring greater uniformity and clarity to this area. Jim Buck, Secretary of the New York Stock Exchange, who is here today, was at that first organizational meeting of SICA back in 1977.[6] He has been one of its staunchest supporters ever since. We welcome that support because SICA has been an important non-judicial buffer between the public and the industry.

In 1980, the first full year in which the Uniform Code was adopted, there were a total of 830 securities arbitrations filed at all of the SROs.[7] That figure grew gradually and reached a total of 2837 in 1986.[8] At that point, some thought we had completed our work, and there was no longer any need for SICA. They were wrong.

In 1987 two things happened: The Supreme Court's decision in *Shearson v. McMahon*[9] and Black Monday, when the Dow Industrials plunged over five hundred points in one day.[10] Prior to *McMahon*, arbitrations were largely voluntary on the part of the public, because the conventional wisdom at that time was that under *Wilko v. Swan*,[11] if you included a federal securities claim in your complaint, you couldn't be forced into arbitration despite the presence of an arbitration agreement. The *McMahon* case changed that, and overnight, securities arbitration was basically transformed from a voluntary procedure to a mandatory obligation.

5. Phillip J. Hoblin, Jr., Securities Arbitration: Procedures, Strategies, Cases § 1-2 (2d ed. 1992).

6. Securities Industry Conference on Arbitration, Report No. 8, at 1 (1994) [hereinafter Eighth Report].

7. *Id.* at 29.

8. *Id.*

9. Shearson/American Express Inc. v. McMahon, 482 U.S. 220 (1987).

10. *See* Constantine N. Katsoris, *The Level Playing Field*, 17 Fordham Urb. L.J. 419 (1990).

11. 346 U.S. 427 (1953).

Between the closing of the *Wilko* escape route and the influx of Black Monday cases, SRO arbitrations more than doubled to 6097 cases in the year after *McMahon*, from those filed the year before *McMahon*.[12] Not only did the number of cases increase dramatically, but the more complex cases, which were previously going to court through the *Wilko* exception, were now finding their way into arbitration.

Because of this major switch from basically voluntary to mandatory arbitration, many of the issues involved in arbitration took on added significance. SICA, with the cooperation and the assistance of the SEC, examined many of these issues with greater intensity, such as the independence of arbitrators, the composition and selection of panels, discovery, arbitrator training, and class actions, just to name a few.

Incidentally, SICA has issued eight reports to the SEC outlining its progress over the years, and the latest, the Eighth Report, was issued last summer and distributed here today. Despite much progress at SICA, some of the problems we thought were solved have lingered or have shifted direction. Some new problems have arisen. These are real issues and they must be resolved. If the public and the industry cannot resolve them consensually, then sooner or later the regulators, the courts, or Congress will.

We're here today to discuss many of these issues. We have assembled gladiators with differing perspectives. We hope that as a result of these frank discussions, we can each get a better understanding of the problems so that meaningful and practical solutions can be achieved.

Everybody here today will hear something they don't like, but that's the purpose of this Symposium. The purpose is to inform and, with better understanding, to build a consensus, so that in the end we can truly say that the playing field is level for all. If we don't achieve that goal, pressures will build to revert to a basically voluntarily system once again, as was the case before *McMahon*.

I commend the New York Stock Exchange for initiating this dialogue here today. This Symposium consists of a two-day program. We have seven topics, with one—punitive damages—being covered on both days. We have eight speakers today, and I would briefly like to introduce the panelists for today's discussion.

Our first panel deals with pre-dispute arbitration agreements. We have Theodore Krebsbach, who was the former head of litigation at Shearson. He successfully argued both the *McMahon* and the *Rodriguez*[13] cases before the United States Supreme Court. Ted was a student of mine, but, Ted, feel free to attack your old professor if you wish.

12. Eighth Report, *supra* note 6, at 29.

13. Rodriquez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989).

We also have Theodore Eppenstein, who argued on behalf of the McMahons before the Supreme Court in *Shearson v. McMahon.* He is a very successful and active litigator in arbitrating securities cases on behalf of customers.

The second panel will deal with eligibility, or the so-called "six-year rule."[14] For that panel we have Ken Meister, Senior Vice President/ Senior Counsel of Prudential, who is also active on the Securities Industry Association's ("SIA") arbitration committee.

The other speaker on the second panel is Seth Lipner, who represents customers in securities arbitrations. He is a professor of law at Bernard M. Baruch College and has been very active on behalf of customers in this area of the six-year rule. He is also the present president of the Public Investors Arbitration Bar Association.

The third panel deals with discovery. For that panel we have Michael Stone, who is an active litigator on behalf of Dean Witter, a member of the SIA Litigation Committee, and has also been very active in discovery related rules and issues.

The second speaker on the discovery panel is David Robbins, who is a practicing attorney on behalf of customers in arbitration. He has written extensively on the subject for many years. He has chaired securities arbitration seminars at both the Practicing Law Institute and the American Arbitration Association ("AAA"), and he was formerly Director of Arbitration at the American Stock Exchange.

For the last panel, dealing with punitive damages, we have John Peloso and myself. John is outside counsel for many firms, formerly chief trial counsel for the SEC, has written extensively in the area of securities law, and recently chaired an American Bar Association subcommittee on securities arbitration.

In addition, we'll have two wildcard speakers: James Steffenburg, the manager at Coopers & Lybrand who conducted a single forum study for SICA in 1990, will briefly describe the results of that study,[15] and John Cooney, Senior Counsel at Bank of America, will briefly tell us about the banking industry's experience with arbitration.

At this time, I would briefly like to describe the format. We have eight panelists today. Each panelist will speak for about ten to fifteen minutes. Then we'll throw the discussion open for comments. Once comments are exhausted, we then will move on to a question and answer period.

14. *See* 2 New York Stock Exchange, Inc., New York Stock Exchange Guide, Rule 603, ¶ 2603 (1992) [hereinafter NYSE Rules]; Securities Industry Conference on Arbitration, Uniform Code of Arbitration § 4(a), *in* Eighth Report, *supra* note 6, at 9 [hereinafter Uniform Code].

15. James Steffenburg participated on both days of the Symposium. His presentation and the participants' comments have been consolidated and appear at pages 1643-50.

For the first panel, we'll have the industry go first, followed by the public. For the second panel, we'll flip flop, the public going first, with the industry going second. For the third panel, the industry will go first, followed by the public, and so on down the line.