

Approved October 11, 2000

Minutes of the
March 14, 2000 Meeting of the
Securities Industry Conference on Arbitration
Hosted by NYSE
Palm Desert, California

Members Present

Robert S. Clemente, NYSE
Paul Dubow, SIA
Theodore G. Eppenstein, Public Member
Linda D. Fienberg, NASDR
George H. Friedman, NASDR
Joanne Moffic-Silver, CBOE
Nancy Nielsen, CBOE
Wendy J. Phillippay, PCX*
Fredda L. Plessner, SIA
Thomas J. Stipanowich, Public Member

Invitees Present

Helen Dembrovich, SEC
Mary Ann Gadziala, SEC*
Toni Griffin, AAA
Robert A. Love, SEC
Helene McGee, SEC*
Catherine McGuire, SEC*
Stephen G. Sneeringer, SIA
Catherine M. Zinn, JAMS*

SIA Emeritus Present

Philip J. Hoblin, Jr.

The Securities Industry Conference on Arbitration ("Conference" or "SICA") convened on March 14, 2000 at 8:30 a.m., Professor Stipanowich presiding.

The Conference welcomed Mr. Hoblin, the first emeritus member of SICA.

Minutes of the January 18, 2000 Meeting (Tab 1a)

Professor Stipanowich called for amendments to the minutes of the January 18, 2000 meeting. Upon motion duly made and seconded, the Conference unanimously approved the minutes, as submitted. (Attachment A)

* Via Conference Call



Ms. Nielsen informed the Conference that a compiled minute book (April 11, 1996 through October 21, 1999) is available for SICA members and requested Conference guidance as to whether the compiled minutes should be made available to SICA invitees. It was the sense of the Conference that only SICA members and SEC staff should receive copies of the compiled minute books and draft minutes. With respect to draft minutes, an invitee will receive a redacted paragraph, if the paragraph quotes or paraphrases his/her comments.

Conduct of Meetings (Tab 2)

Professor Stipanowich introduced a proposal to adopt rules of conduct for SICA meetings to improve the efficiency and productivity of meeting and to facilitate participation by those present via teleconference. The Conference agreed to the following procedures:

- The agenda will allot a specific time to each discussion/action item. At the end of the budgeted time, the Conference would determine whether to continue discussion, table the discussion or take other action.
- Conference members will commit to review agenda materials prior to the meeting to help maintain the meeting timetable.
- Participants will not interrupt or speak over whoever has the floor.
- Participants will keep side conversations to a minimum.

Professor Stipanowich informed the Conference that Professor Katsoris was unable to attend the meeting. Professor Katsoris requested that Professor Stipanowich read a statement regarding his article, "Farewell to Comrades-In-Arms," to the Conference. SICA determined to hear the statement as the first item of business when the SIA Arbitration Committee joined the Conference.

Review of Revised NASD Proposal to Amend §11 (Tab 3)

Mr. Friedman presented a redraft of the NASD's proposal to amend §11 of the Uniform Code of Arbitration (UCA) to authorize the Director of Arbitration to remove an arbitrator after the commencement of the hearing. As agreed at the last SICA meeting, the proposed amendment limits the Director's authority after the hearings have commenced to removal based only on information not known to the parties when the arbitrator was selected. As also previously agreed, the proposed amendment provides that the Director may not delegate his/her authority to remove an arbitrator after the commencement of the hearing. Mr. Friedman reported that the NAMC approved the proposed amendment in anticipation of favorable action by SICA, with the addition that the President of NASD Dispute Resolution, in addition to the Director, may exercise the authority to remove an arbitrator after the hearings have commenced.

Stating that no arbitrator queries all relatives about potential conflicts, Mr. Dubow proposed an amendment to §11(a)(2) to clarify that arbitrators are required to disclose relationships that "they knew or reasonably should have known." Mr. Friedman commented that the current language is derived from the AAA/ABA Code of Ethics for Arbitrators (developed in 1977 following the 1968 Commonwealth Coatings decision) and that the terms "likely to affect impartiality" and "reasonably create an appearance of partiality" provide leeway for interpretation.

Mr. Eppenstein expressed concerns that allowing staff to remove an arbitrator after the commencement of the hearing would open the floodgates to motions and delays. He proposed that the extended authority be limited to the time period from the pre-hearing to the hearing. Mr. Eppenstein noted that in New York a party may go to court after the hearing is underway to remove an arbitrator for outrageous conduct.

Mr. Sneeringer suggested an amendment to the Director's authority under proposed §11(e) that would limit the authority to remove an arbitrator after the commencement of the hearing "based only on information required to be disclosed pursuant to paragraph (a)." Professor Stipanowich commented that the proposed language under (e) is very broad and could be interpreted to cover active partiality. Ms. Fienberg indicated that the proposed amendment to §11 is intended to address narrow circumstances. Upon motion duly made and seconded, Mr. Sneeringer's proposed modification to the proposed amendment to §11(e) carried by a vote of 5 - 0.

Upon the expiration of the budgeted time for consideration of amendments to §11, the Conference determined to continue the discussion to consider Mr. Dubow's proposal to modify paragraph (a) by limiting an arbitrator's required disclosures to those "which the arbitrator knows or reasonably should have known." Mr. Dubow asserted the Director's interest in preserving the presumption of impartiality of the forum increases the likelihood that the Director will exercise his/her authority to remove an arbitrator under newly adopted paragraph (e).

Mr. Friedman informed the Conference that arbitrators are trained to use common sense with respect to determining conflicts and that the disclosure form should elicit necessary information. Professor Stipanowich commented that in light of case law and the administrative history of the language, the existing language of paragraph (a) does not appear to be overly onerous.

The motion to adopt Mr. Dubow's proposed modification to paragraph 11(a) failed for lack of a second.

Mr. Eppenstein moved to bifurcate paragraph 11(a) to separate the arbitrator's duty to disclose from the types of information to be disclosed. Mr. Eppenstein's motion failed for lack of a majority.

Upon motion duly made and seconded, the Conference adopted the proposed amendment to §11, as amended. Section 11, as amended, is attached as Attachment B.

Review of Revised Form U-4 Disclosure Questions (Tab 4)

Mr. Clemente discussed changes to the regulatory history questions of the Form U-4 since SICA adopted the questions for the arbitrator profile/application process after the 1994 GAO Report. He suggested that SICA review the Form U-4 to determine if changes to the profile/application questions are necessary and requested guidance from the SEC Staff regarding whether changes are appropriate. Ms. Fienberg stated that the NASDR checks the CRD for regulatory history upon receipt of an arbitrator application from an industry person and again when an industry arbitrator is considered for a panel. She further indicated that the NASDR has recently expended considerable resources to review and update its arbitrator pool and objected to changes to the disclosure form at this time.

Mr. Love suggested that SICA carefully review any proposed changes that would reduce the level of disclosure, that SEC Staff who worked with the changes to the Form U-4 would be a good resource, and that any changes to arbitrator disclosure should be coordinated with OCIE. Ms. McGuire indicated that the arbitrator profile/application does not have to match the Form U-4 and agreed that any additional, relevant disclosures would be picked up through CRD checks. SICA decided not to review profile disclosure questions at this time.

SICA Publication – Status Report (Tab 5)

Mr. Friedman updated the Conference on the status of revisions to the *Arbitrator's Manual* and the *Arbitration Procedures* booklet. He stated that a working draft is under review by the subcommittee (Messrs. Clemente, Dubow, Eppenstein and Friedman). The subcommittee intends to present the draft to SICA at its next meeting. Mr. Friedman stated that the effort is driven by changes to the UCA and differences between SRO rules and procedures, and that the subcommittee's rule of operation is to address important differences, not to change for sake of change.

Plain English Translation of the UCA (Tab 6)

Mr. Clemente discussed the status of the Plain English Translation of the UCA, including the changes proposed in Mr. Dubow's letter of January 11, 2000, some of which are substantive and should be considered by the full Conference. Ms. Nielsen presented a marked-up version of the Plain English Translation, which includes the incorporation of some of Mr. Dubow's changes, indicating where substantive amendments would be required, additional proposed revisions based upon comparison with the current code, and certain other proposed reorganizations/revisions for clarity.

The Conference determined to schedule special meetings, in conjunction with regular SICA meetings to focus on completing the translation. The first such meeting was scheduled for the afternoon of July 31, 2000 (the day before the next SICA meeting) at a place to be determined. A subcommittee, consisting of Messrs. Clemente, Dubow, Grady and Katsoris and Ms. Nielsen and Phillippy, will present a revised draft, indicating substantive versus "Plain English" changes, to the Conference at that meeting. Mr. Dubow will circulate comments on the marked-up version to subcommittee members.

Ms. McGuire reminded the Conference that the SEC supports the Plain English Translation of the UCA and the importance of specifying substantive changes to the code.

1999 SICA Statistics Update (Tab 7)

Mr. Clemente presented the compiled SRO arbitration statistics, including the recently drafted explanation of the categories reported. Mr. Clemente indicated that the statistics are publicly available, shared with the *Securities Arbitration Commentator*, and published every two years in the SICA Report. The Conference determined to continue to maintain statistics back to 1980 and to consider including NFA statistics in the compilation. Mr. Eppenstein will contact the NFA about including their statistics.

Mr. Love reminded the Conference that the NFA cases are administered under different rules and involve different products that are regulated by a different regulatory authority. He suggested that NFA figures should not be included in composite SRO figures.

The Conference considered the creation of a SICA website, including who would maintain the site and who would respond to emails. Professor Stipanowich will explore the possibility of the University of Kentucky hosting a SICA website.

The Conference reconfirmed its decision to include mediation statistics in the compilation, upon the development of standardized categories. Messrs. Friedman and Clemente agreed to develop these categories, and report on them at the next meeting.

Ms. Plesser suggested that the Conference consider revising its name to include a reference to mediation. Upon consideration, the Conference adopted the new name "Securities Industry Conference on Arbitration and Mediation " (SICAM). The NASDR will draft a press release about SICA's name change, and circulate it for editorial review.

SEC Approval of NASD Voluntary Single Arbitrator Pilot (Tab 8)

Mr. Friedman informed the Conference that on February 15, 2000, the SEC approved the NASDR proposed rule change creating a voluntary single arbitrator pilot program. The NASDR will issue a notice to members about the pilot on April 15, 2000 and the pilot will become effective on May 15, 2000.

SICA/SIA Arbitration Committee Joint (Tab 9)

SICA welcomed the following SIA Arbitration Committee members:

Kenneth E. Meister, Prudential Securities Inc. (Chairman)
Judith Belash, Goldman, Sachs & Co.
Martin S. Cohen, Merrill Lynch & Co., Inc.
Donald N. Cohen, Gruntal Financial, LLC
Donald S. Davidson, Paine Webber, Inc.
Linda P. Drucker, Charles Schwab & Co. Inc.
Charles W. Gerber, CIBC World Market Corp.
Robert Goldgerg, Merrill Lynch & Co., Inc.
Thomas E. Hommel, Lehman Brothers Inc.
Paul Matecki, Raymond James Financial Inc.
Edward Turan, Salomon Smith Barney Inc.
Pamela P. Warnament, Wachovia Securities Inc.

Professor Stipanowich opened the joint meeting by reading a statement by Professor Katsoris. Professor Katsoris informed the Conference of reactions to his testimonial to Bill Fitzpatrick and Jim Beckley, "Farewell to Comrades-In-Arms," which appeared in the January issue of the *Securities Arbitration Commentator*. The underlying theme of the article was that advocacy and civility could co-exist within the legal profession. Professor Katsoris stated that he received many responses to the article, including personal notes from three members of the U.S. Supreme Court hailing the practice of advocacy with civility. Professor Katsoris requested that the article be made a part of SICA's minutes, to act as a permanent reminder and tribute to Bill and Jim for their friendship and dedicated service to SICA. (Attachment C)

Possible Refinements to List Selection

Mr. Meister informed the Conference that the SIA Arbitration Committee is concerned that the NASDR list selection rule is not as effective as had been hoped, that there were too many strikes, and that too often cases revert back to the NASDR for appointment of the arbitrators. Committee members also commented about the number of unknown arbitrators appearing on lists, and the amount of time necessary to research the arbitrators.

Ms. Fienberg and Mr. Friedman indicated that the NASDR is considering limiting the number of strikes, but that the response is generally negative to the suggestion of a shorter list of candidates. The NASDR is also considering a separate chair designated list containing only experienced arbitrators. However, the specific criteria for inclusion on the list have not yet been specified. Ms. Fienberg indicated that the NASDR will ultimately reduce its roster by eliminating those who are continually stricken.

Mr. Clemente described the NYSE voluntary list selection pilot, indicating there is a 16% acceptance rate for list selection. Although users have applauded the program, one problem raised is the limited time frame for agreeing to list selection. The NYSE will file a streamlined version of the pilot program with the SEC. However, the NYSE intends to retain the voluntary status of the program. Mr. Clemente further indicated that the NYSE is considering whether to change its arbitrator selection system from a random selection to a rotational selection. Considerations for the change include whether a rotational system will provide a deeper penetration of its arbitrator pool and reduce the repetition of names.

The NYSE has posted 1997-99 awards on its website and intends to add a search engine to search by criteria. The NASDR anticipates posting awards, prospectively, on its website by next year. Glasser Legal Works has launched its award database, which includes awards for all SROs and the AAA.

Pilot Program Update

Ms. Griffin indicated that despite news coverage, the AAA has not received any filings under the pilot program or calls to the AAA 800 number. She stated that the AAA will write about the pilot in the *Dispute Resolution Times*, and will continue to mention it in conversations with reporters.

Ms. Zinn indicated that JAMS has received about 40 inquiries, mostly California based customers and attorneys, and that although no cases have been filed, two cases are expected to be filed directly with JAMS (one from New York and one from Cleveland). She informed the meeting that JAMS is launching a new website, including a section dedicated to the pilot, and that a letter, emphasizing the single arbitrator and mediation options, will be sent to lawyers to generate interest in the pilot. Ms. Zinn stated that training has been conducted in San Francisco and is scheduled for Los Angeles (April 15, 2000) and New York (April 27, 2000). Trainers included an SIA and a PIABA representative and both have provided names and contact information for arbitrators.

Ms. Fienberg indicated that the firms have returned four eligible cases to the NASDR and that the time within which to select the pilot has expired in one of the cases. Mr. Sneeringer indicated that he has received only one case where only the firm was named, all others included the registered representatives

or branch managers. Mr. Meister indicated that the firms are actively reviewing cases and that it is too early to judge the outcome of the pilot.

A discussion ensued regarding the reasons for PIABA's lack of support for the pilot. Suggested reasons included the cost of the pilot and PIABA's disappointment that the alternate fora will continue to use industry arbitrators.

Professor Stipanowich thanked the SIA Arbitration Committee for its help in establishing the pilot program.

Ways to Improve the Time Efficiencies of the Arbitration Hearing

Mr. Meister stated that the SIA Arbitration Committee is developing a proposal regarding ways to improve the efficiency of the arbitration hearing. He suggested more rigorous training for chairs, including how to proactively take charge of the hearing process and how a judge would handle certain situations. Mr. Meister further suggested developing broad rules on the admissibility of evidence (e.g., limiting the admission of news articles that create the need for respondents to bring in additional witnesses). He also emphasized the importance of the pre-hearing process to setting the tone of the proceeding from the beginning.

Discussion ensued concerning:

- training chairs to establish a time line for the proceeding, with each side receiving equal time to present their case;
- encouraging parties to set ground rules and stipulate to facts,
- ensuring case administrators are attuned to facilitating the process;
- having forum staff at hearings;
- training arbitrators on their authority to decide substantive motions;
- eliminating the "let in for whatever its worth" standard for admitting evidence;
- ensuring there is a lawyer on the panel, if not chair; and
- professionalizing the chair roster.



Ms. Fienberg informed the meeting that the NASDR is rolling out its revised chair training, which focuses on the mechanics of controlling the process. Arbitrators may receive CLE credits for the training.

Professor Stipanowich recommended a book that addresses pre-hearing issues, among other topics, which will be coming out this spring – Commercial Arbitration at its Best: Successful Strategies for Business Users by the CPR Institute for Dispute Resolution Commission on the Future of Arbitration.

The Conference discussed how to coordinate SICA, SIA and PIABA involvement in the project to improve the efficiency of the arbitration process. Messrs. Eppenstein and Stipanowich will consider how to involve PIABA.

New Business

Messrs. Clemente, Friedman and Andrichik, and Mses. Griffin and Plessner will prepare a press release announcing SICA's name change and expanded focus on mediation, as well as arbitration. Mr. Love reminded the Conference that SICA's key function is the uniform code, and that any press release should be clear about SICAM's function with respect to mediation.

Future Meetings

The next meeting will be hosted by the SIA on August 1, 2000, beginning at 9 a.m., in San Francisco. A special meeting to focus on the Plain English Translation of the UCA will be held on the afternoon of July 31, 2000 at a place to be determined.

The following meeting will be held on October 11, 2000 in conjunction with the PIABA Annual Meeting in at the Hyatt Regency in San Antonio, Texas (October 12-15). Professor Stipanowich will contact Joe Long to invite PIABA representatives to meet with SICA.

The Conference also tentatively scheduled a meeting for January 19, 2001, at the NASD's Boca Raton Office.

There being no further business, the Conference adjourned at 12:15 p.m.

/s/ Nancy Nielsen _____
Secretary

- Attachments:
- A. Approved Minutes of the January 18, 2000 meeting
 - B. UCA §11, as amended
 - C. "Farewell to Comrades-In-Arms"

SECTION 11.

Disclosures Required by Arbitrators

- (a) Each arbitrator shall be required to disclose to the Director of Arbitration any circumstances that might preclude such arbitrator from rendering an objective and impartial determination. Each arbitrator shall disclose:
 - (1) Any direct or indirect financial or personal interest in the outcome of the arbitration.
 - (2) Any existing or past financial, business, professional, family, social, or other relationships that are likely to affect impartiality or that might reasonably create an appearance of partiality or bias. Persons requested to serve as arbitrators should disclose any such relationships that they have with any party or its counsel, or with any individual whom they have been told will be a witness. They should also disclose any such relationship involving members of their families, or their current employers, or their current employers' partners or business associates.
- (b) Persons who are requested to accept appointment as arbitrators should make a reasonable effort to inform themselves of any interests or relationships described in paragraph (a) above.
- (c) The obligation to disclose interests, relationships, or circumstances that might preclude an arbitrator from rendering an objective and impartial determination described in subsection (a) hereof is a continuing duty that requires a person who accepts appointment as an arbitrator to disclose, at any stage of the arbitration, any such interests, relationships, or circumstances that arise, or that are recalled or discovered.
- (d) The Director of Arbitration may remove an arbitrator based on information disclosed pursuant to this Section. The Director of Arbitration shall also inform the parties of any information disclosed pursuant to this Section if the arbitrator who disclosed the information is not removed.
- (e) Once the hearings have commenced, the Director may remove an arbitrator based only on information required to be disclosed under subsection (a), not known to the parties when the arbitrator was selected. The Director's authority under this subsection (e) may not be delegated.

Sections 11(a)(2) and 11(d) amended: March 14, 2000. Section 11(e) added March 14, 2000.

See Email that follows. SEC claims that it is entitled to all drafts and final versions of Minutes.

Training in substantive law?