

Approved October 11, 2000

Minutes of the
August 1, 2000 Meeting of the
Securities Industry Conference on Arbitration
Hosted by Securities Industry Association
San Francisco, California

Members Present

Robert S. Clemente, NYSE
Paul Dubow, SIA
Theodore G. Eppenstein, Public Member
Linda D. Fienberg, NASD Dispute Resolution
George H. Friedman, NASD Dispute Resolution
Thomas R. Grady, Public Member
Nancy Nielsen, CBOE
Wendy J. Phillippay, PCX
Thomas J. Stipanowich, Public Member

Invitees Present

Mary Ann Gadziala, SEC*
India Johnson, AAA
Robert A. Love, SEC
Helene McGee, SEC*
Stephen G. Sneeringer, SIA

The Securities Industry Conference on Arbitration ("Conference" or "SICA") convened on August 1, 2000 at 9:00 a.m., Professor Stipanowich presiding.

Mr. Dubow informed the Conference that Fredda L. Plesser has resigned from the SIA and accepted a new job as executive assistant to the Chancellor of Education of the City of New York. The Conference commended Ms. Plesser for her contributions to SICA.

Approval of Minutes (Tab 1)

Professor Stipanowich called for amendments to the minutes of the March 14, 2000 meeting. Mr. Love called attention to a discrepancy between the minutes (page 3, first full paragraph) and Attachment B, Section 11(e) of the Uniform Code ("UCA"), regarding the adoption of an amendment suggested by Mr. Sneeringer. Conference members agreed to consult their notes from the March 14th meeting and to provide comments to Ms. Nielsen by August 8th regarding the adopted version of Section 11(e).

Mr. Grady proposed an amendment to the Committee on Class Actions section (page 4) of the January 18, 2000 minutes, approved on March 14, 2000. It was the sense of the Conference to rely on the minutes as approved and to seek input from PIABA at the October SICA meeting regarding any current problems

with the UCA class action rule. If PIABA or others identify issues with the class action rule, then the subcommittee will proceed. If no issues are presented, the subcommittee will be suspended.

Upon motion duly made and seconded, the Conference unanimously approved the March 14th meeting minutes, subject to clarification of the amendment to UCA Section 11(e). (Attachment A)

Mr. Clemente discussed the progress made on the Plain English translation of the UCA at the subcommittee meeting on July 31, 2000. SICA members agreed with the continuing need to schedule special meetings specifically devoted to completing the translation. Recognizing that some substantive changes may be appropriate, the Conference determined to keep the translation as close as possible to the current code. When a SICA member proposes a substantive change, a 1-page memo with suggested language and the reason for the proposal should be submitted as a SICA agenda item. Mr. Clemente will research the history of code provisions for which substantive changes are proposed.

Fitzpatrick/Beckley Workshop on the Betterment of Securities Arbitration (Tab 2)

Professor Stipanowich discussed the outcome of the Fitzpatrick/Beckley Workshop on May 24, 2000, and directed SICA to the written summary contained in Tab 2 of the Agenda. The Conference discussed the role of the workshop as a consensus building vehicle and noted that workshop priorities will likely focus initially on developing practice standards and a code of civility. Any product developed would be proposed to SICA for official review and adoption. Conference members confirmed the value of the workshop in strengthening the lines of communication between the groups involved in securities arbitration and agreed to schedule one or more future meetings with the same participants.

Update of SICA Pilot Program – Access to Non-SRO Forums

Ms. Johnson reported that the AAA has had no inquiries on the pilot. Professor Stipanowich informed the conference that one pilot program case has been filed at JAMS. Mr. Dubow reported that the firms have reported a number of cases eligible for the pilot and suggested that SICA make an effort to determine why the claimants chose not to participate. Mr. Friedman informed the Conference that of the 30 cases reported eligible to the NASD:

- 1 case went to an alternate forum,
- 24 claimants refused to participate in the pilot, and
- 5 cases await reply from the claimants.

Mr. Friedman noted that another 3 cases involved late firm responses.

Noting Joe Long's article that inaccurately stated that the pilot was created without PIABA input, the high cost of the alternate fora in comparison with SRO fora, and the fact that JAMS awards are not publicly available as possible reasons for non-participation, SICA members agreed on the importance of determining the reasons for declining to enter the pilot. Noting Congressmen Dingell and Markey's interest in the pilot, Mr. Love informed SICA that SEC Staff expects to report to Congress by December.

The Conference considered approaching the lawyers who represented claimants that did not elect the pilot to obtain the reasons for non-participation. After confirming whether it is appropriate to approach the

lawyers, the NASD and the NYSE will develop an inquiry form for distribution through the SROs. Professor Stipanowich will confirm Professor Katsoris's availability to receive and evaluate the responses to the questionnaire. Mr. Eppenstein will approach the alternate fora to see if they are willing to adjust their costs.

SICA Publication – Revisions to Arbitrator's Manual and Arbitration Procedures (Tab 4)

Mr. Friedman reported that the subcommittee has nearly completed its review of the SICA publications to conform the booklets to amendments to UCA and material differences between the SRO fora. The subcommittee will review the most recent draft, then circulate the revised drafts to conference members in September. The final drafts will be presented for adoption at the October meeting.

Uniform Submission Agreements (Tab 5)

Mr. Grady requested that the Conference review the use of the Uniform Submission Agreement ("USA") as a condition of filing a claim in arbitration. Arguing that courts have held that the USA acts as a novation and becomes the operating arbitration agreement between the parties, Mr. Grady proposed that serving a demand is a more simple and preferable procedure. Mr. Clemente will review the historical minutes regarding the genesis of the USA and the notarization requirement. Noting that the USA was adopted before the use of predispute arbitration agreements and that the courts consistently find that the USA amends the arbitration agreement, Mr. Dubow spoke in favor of the proposal. Mr. Friedman distributed a memorandum, dated July 28, 2000, from the NASD outlining its opposition to eliminating use of the USA. (Attachment B)

The Conference discussed:

- modifying the USA to indicate that the USA does not change the terms of a predispute arbitration agreement,
- the fact that the USA puts all parties on a level playing field,
- the problems associated with failure to sign and notarize a USA,
- the fact that by signing the USA the party agrees to abide by all of the rules of the forum, and
- the use of a demand that would bind customers to SRO rules.

The NASD and NYSE will review the issues involved in eliminating the USA in favor a demand and report back to the Conference.

Subpoena Service & Objections (Tab 6)

Mr. Grady requested that SICA review the procedures and code provisions with respect to the issuance of subpoenas. He described problems arising from attorney issued subpoenas, particularly when the subpoena is served prior to the selection of arbitrators. Mr. Grady questioned the appropriateness of forcing a party to court to quash a subpoena, and objected to instances of untimely notice of claimants of the issuance of a subpoena, which can nullify any attempt to quash. Among other things, the Conference discussed:

- the inability of SRO staff to rule on a motion to quash.
- amending the code to suspend subpoena issuance or effectiveness until arbitrators are appointed.
- amending the code to require service of all documents at the same time and in the same manner on all parties and any third party.
- the authority of the arbitrators to quash a validly issued subpoena.
- the reasonableness of requiring parties to go to court to enforce or quash a subpoena.
- the lack of panel and SRO jurisdiction over non-member third parties.

The Conference appointed a subcommittee, consisting of Messrs. Grady (Chair), Dubow, and Clemente and a NASD representative, to consider the problems associated with the subpoena process.

Status of NASD Rule on Challenges to Arbitrators after Appointment (Tab 7)

Mr. Friedman reported that the NASD filed on July 27, 2000, a rule change with the SEC that proposes to adopt the amendment to UCA providing authority for the Director of Arbitration to remove arbitrators for cause after the commencement of the hearing. The rule filing has not yet been published in the Federal Register.

GAO Report (Tab 8)

Ms. Fienberg discussed the GAO Report, "Securities Arbitration: Actions Needed to Address Problems of Unpaid Awards." She informed the Conference of the NASD's work with GAO auditors and the NASD's current efforts to follow-up on the findings. Ms. Fienberg stated that the GAO staff was cooperative and made significant changes to the report; however, the GAO's data is incomplete. The NASD has found that a number of the awards have been paid, or that the parties have reached an agreement on payment, or that the awards are subject to a motion to vacate. In addition, a number of the awards cited for non-payment involve terminated firms or firms in bankruptcy. Ms. Fienberg reported that the NASD will submit rule changes to address the nonpayment of arbitration awards.

Mediation Statistics (Tab 9)

Mr. Clemente reported that the NASD and NYSE have agreed upon a uniform system of reporting mediation statistics. The statistics will include the number of mediations held, the number of cases settled pursuant to mediation, and the number of cases where no settlement was reached.

Name Change for SICA (Tab 10)

Professor Stipanowich reported on Jim Buck's concerns about the Conference's vote to change the name of the organization. (Tab 10) Upon motion duly made and seconded, the Conference determined to rescind its previous resolution to change the Conference's name and to retain "SICA."

Birbrower – Update (Tab 11)

Mr. Dubow reported on the status of the bill to extend the legislation allowing out of state attorneys to try arbitrations in California, the "anti-Birbrower" bill. Mr. Dubow noted the state bar's support for the extension and that the bill is expected to pass the assembly.

NFA Arbitration (Tab 12)

Mr. Eppenstein presented the NFA's arbitration statistics and referred the Conference to Cindy Cain's letter, dated May 17, 200, which discusses inconsistencies in the statistics. (Tab 12) The Conference determined not to include NFA numbers in SICA's statistics.

ABA Consumer Arbitration Task Force

Mr. Clemente presented information from Carroll Neesemann on the ABA Section of Dispute Resolution's Task Force on Consumer Arbitration concerning proposals on pre-dispute arbitration agreements. (Tab 13) Mr. Eppenstein requested that SICA look at the appropriateness of mandatory arbitration in securities disputes. He will bring the issue to the next meeting.

New Business

The Conference will consider digitizing all past minutes at the next meeting.

Future Meetings Schedule

A special meeting to focus on the Plain English Translation of the UCA will be held on September 14th at the NASD's New York offices.

The next regular meeting will be held on October 11, 2000 in conjunction with the PIABA annual meeting in San Antonio Texas and will be hosted by the NYSE. PIABA representatives will be invited to join the meeting in the late morning.

The winter meeting will be held on January 19, 2001 and will be hosted by the NASD at its office in Boca Raton.

The spring meeting will be held in conjunction with the SIA Conference in Orlando, Florida on March 19, 2001. The SIA Arbitration Committee will be invited to join SICA for part of the meeting.

There being no further business, the Conference adjourned at 12:30 p.m.

/s/ Nancy Nielsen _____

Secretary

- Attachments:
- A. Approved Minutes of the March 14, 2000 meeting
 - B. NASD Memorandum, dated July 28, 2000, re: Use of Uniform Submission Agreement by SROs