

Minutes of the
January 16, 2002 Meeting of the
Securities Industry Conference on Arbitration
New York, NY

Members Present

Amal Aly, SIA
Joan Clark, PCX*
James E. Buck, NYSE
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
Stephen G. Sneeringer, SIA
Thomas J. Stipanowich

Invitees Present

Peter Cella, Public Member Emeritus
Mary Ann Gadziala, SEC
Florence Harmon, SEC
India Johnson, AAA*
Constantine Katsoris, Public Member Emeritus
Robert Love, SEC*
Helene McGee, SEC*
Deborah Masucci, JAMS
Michael McAllister, City Bar
Catherine Zinn, JAMS*
Lisa Angelson, NASD Dispute Resolution
Rick Berry, NASD Dispute Resolution

The Securities Industry Conference on Arbitration ("Conference" or "SICA") convened on January 16, 2002 at 8:30 a.m., Professor Stipanowich presiding.

Approval of Minutes (Tab 1)

Upon a motion duly made and seconded, the Conference unanimously approved the October 17, 2001 meeting minutes, as amended. (Attachment A) Mr. Friedman informed the Conference that the NASD will take responsibility for updating the SICA Minutes CD to include 2001 minutes, as well as older minutes missing from the CD issued last year. He expects to issue the CD before the March SICA meeting.

With regret, the Conference acknowledged Mr. Dubow's departure from SICA and recognized him for his constructive and integral contribution to SICA during the past 11 years. The Conference also recognized Mr. Buck's retirement from the NYSE and his contribution to the creation of SICA and his instrumental role in alternate dispute resolution in the securities industry. A round of applause ensued.

* Via Teleconference

SICA Non-SRO Pilot (Tab 2)

SICA reviewed the statistics regarding the Non-SRO pilot, which expires on January 24, 2002, including:

- ?? 196 eligible cases were filed at the NASD (as of January 15th)
- ?? 5 cases from the NASD are in the pilot
- ?? 2 cases from the NYSE are in the pilot
- ?? 3 cases are active at JAMS
- ?? 0 cases were filed at the AAA
- ?? 0 hearings have been held to-date

The Conference agreed to accept cases into the pilot that are transmitted through January 24, 2002, and to process them to conclusion. Mr. Clemente will draft language regarding the conclusion of the pilot to post on the NASD Dispute Resolution, NYSE and other relevant Web sites.

After discussing experience with the current pilot and prior non-SRO securities arbitration initiatives (AMEX window, NYSE pilots, SICA's single forum study, and the Ruder Report's recommendation to create an independent forum), the Conference referred to a subcommittee consisting of Professor Katsoris (Chair), Messrs. Clemente, Friedman and Stipanowich, and Ms. Aly the task of drafting a report on the pilot. Mses. Johnson and Zinn will provide input from the non-SRO fora. It was the consensus of the Conference that the report will include:

- ?? the history leading up to pilot, including the documents developed for use during the pilot;
- ?? cases statistics (i.e., cases eligible, number and claim size of cases filed at non-SRO fora, etc.); and
- ?? statistics on user survey responses.

City Bar Proposals on Use of Single Arbitrators and Non-Administered SRO Arbitration (Tab 4)

Ms. Masucci and Mr. McAllister presented the City Bar proposal that SICA consider adopting rules with respect to the joint administration of a case by the parties and the arbitrator(s) and the use of a single arbitrator. (Tab 4) The "joint administration rule" would permit the parties and the arbitrators to jointly administer a case upon the agreement of the parties and the arbitrator(s). Under the rule:

- ?? the parties may send documents directly to the arbitrators, provided that materials are sent simultaneously and in the same manner to all parties and the SRO;
- ?? the parties and the arbitrators may initiate conference calls with the arbitrators, provided that all parties are on the line before the arbitrators join the call or the conference begins; and
- ?? the arbitrators may terminate or modify joint administration.

The Conference discussed the maintenance of case records under joint administration, compensation for arbitrators for performing administrative tasks, problems with respect to the arbitrator(s) being "on call" for parties who are contentious, encroachment on ex parte communications, and changes to the forum fee structure under joint administration. SICA also discussed including the possibility of joint administration in the *Arbitrators Manual*, as opposed to adopting a rule.

SICA referred the joint administration proposal to a subcommittee composed of Messrs. Eppenstein (Chair), Berry, Grady, and Sneeringer. The subcommittee will obtain feedback from their respective constituent groups, evaluate the proposal, and report back at the next meeting.

The "single arbitrator rule" would:

- ?? increase the ceiling for cases decided by a single arbitrator to \$250,000, including interest, costs, and attorneys' fees upon agreement of the parties;
- ?? allow requests for punitive damages only upon agreement of the parties;
- ?? require the parties to be represented by counsel;
- ?? allow joint administration of the case by the parties and the arbitrator; and
- ?? define qualification criteria for individuals to serve as single arbitrators in large cases.

Recognizing the advantages with respect to efficiency, SICA discussed issues and constituent concerns about fairness and due process when a single arbitrator decides larger cases, including the concern about "runaway awards" with a single arbitrator, and the perception that a three-member panel is more likely to be unbiased. The Conference also discussed the NASD's experience with respect to cases with claims between \$25,000 and \$50,000, in which a majority of the parties chose a three-member panel, rather than a single arbitrator.

Upon a motion duly made and seconded, the Conference decided not to amend the single-arbitrator threshold. For the next meeting, the NASD will provide statistical data on overall customer win percentages in single arbitrator cases (versus three-arbitrator cases).

Upon completion of this topic, Ms. Masucci and Mr. McAllister were thanked for their contributions, and then left the meeting.

Arbitrator Classification (Tab 3)

Mr. Clemente presented PIABA's proposal to amend UCA Section 16 (Tab 3) regarding the definition of "industry arbitrator." PIABA proposes to change the "spent a substantial part of a career" criteria to the more objective "20 or more years" with the industry criteria under Section 16(c)(3) and to change "has been associated with the industry within the last three years" to "five years" under Section 16 (c)(2). Upon motion duly made and seconded, the Conference adopted the following amendment to UCA Section 16(c)(2):

- (2) has been associated with any of the above within the last [~~three~~] five years; or

The Conference considered objections to the amendment to Section 16(c)(3) and a counter-proposal to retain the "spent a substantial part of a career" in the industry under Section 16(c)(3) and amend Section 16(d)(2) to incorporate the "20 or more years" standard under the criteria that define when a person will not be classified as a public arbitrator. After discussion, Mr. Grady moved that SICA amend Section 16(d)(2) to read as follows:

- (2) A person will not be classified as a public arbitrator if: (a) a spouse or member of the household could be classified as a securities industry arbitrator under paragraph (c)(1) of the section, or (b) the arbitrator has been associated with the industry as defined in paragraph (c)(1) above for at least twenty years.

Mr. Grady's motion failed to carry. Upon motion, the Conference tabled until its next meeting the proposal to incorporate the 20-year standard under Section 16(d)(2). Mr. Clemente will circulate the amended proposal prior to the next meeting.

Selection of Next SICA Chair

Mr. Eppenstein announced the unanimously nomination of Professor Stipanowich to continue as SICA Chair for another year and paid tribute to his fine job in that position. Professor Stipanowich accepted the nomination and the Conference elected him by acclamation.

Nomination of Ted Eppenstein to Another Term

Professor Stipanowich on behalf of the public members nominated Mr. Eppenstein to a second term as a public member of SICA. Upon a motion made by Mr. Sneeringer and seconded by Mr. Clemente, the Conference, by acclamation, elected Mr. Eppenstein to a second term as a public member of SICA.

Subpoena Issues (Tab 6)

Mr. Grady presented an issue regarding a recent NYSE refusal to honor a subpoena issued in a NASD sponsored Florida arbitration proceeding. (Tab 6) Mr. Grady objected that such refusal is contrary to the spirit of the UCA and proposed amending the UCA to require that SICA exchange members honor process served by other SICA exchange members. Mr. Eppenstein described "mobile arbitrations" and his experience with the NFA, wherein the arbitrators move hearings (to different states or a foreign country) to obtain jurisdiction over witnesses. Mr. Clemente will arrange a meeting between Messrs. Grady, Eppenstein, and Stipanowich and NYSE legal staff to discuss the issues with respect to obtaining jurisdiction over third parties.

* * * * *

Messrs. Clemente and Grady informed the Conference about special arrangements with the NYSE under which a number of cases will be administered under the simplified arbitration procedures and assessed the same filing fees.

Future Meeting Schedule

- ?? March 11, 2002 (10 a.m.) at the Marriott Desert Springs, Palm Desert, CA in conjunction with the SIA Conference.
- ?? June 4, 2002 at the NASD facilities in Los Angeles, CA (tentative).
- ?? October 2, 2002 in Colorado Springs in conjunction with the PIABA Annual Meeting.

Law School Clinical Representation (Tab 7)

Professor Katsoris reported on the history of the Law School Clinical Programs and the Fordham law students' recent success in opposing a motion to vacate a \$5,000 award in the New York State Supreme Court. He reported that in 2001, the students conducted 50 in-person interviews and 120 telephonic interviews, of which more than half of the interviewees were from outside of New York (predominately Florida, California and Illinois). Professor Katsoris reported that there are a number of cases that the clinic cannot serve. Because the programs are concentrated in the New York area, Professor Katsoris



suggested that SICA encourage other law schools outside the New York area to develop clinical programs for securities arbitration. Professor Katsoris thanked the NASD and the NYSE for their cooperation with the clinic. Professor Stipanowich mentioned that the CPR Institute for Dispute Resolution is involved in a number of initiatives with law schools and agreed to assist Professor Katsoris in contacting administrators at schools with ADR programs.

Sneeringer Package (Tab 5)

Content of Answer

Mr. Sneeringer moved to adopt an SIA Arbitration Committee proposal to amend UCA Sections 7(b)(2) and (6) with respect to the content requirements for an Answer. (Handout) After further discussion, the Conference adopted the following amendment to UCA Section 7(b)(2), Content of Answer:

The Answer must include all of the available defenses and facts ~~[to be relied upon at the hearing]~~ that are responsive to the Statement of Claim submitted....

The motion to amend UCA Section 7(b)(6) failed to get a second. This proposed amendment would have modified the current language providing that the arbitrators may bar a respondent "from presenting defenses or other facts at the hearing if . . . available defenses or relevant facts are not specified in the answer" to limit required defenses to those "responsive to the Statement of Claim that states specific facts and contentions."

Bonding Requirement

Mr. Sneeringer's motion to amend UCA Section 27(h)(3) was tabled until the next meeting. (Handout) This proposed amendment would allow a party who is appealing a motion to vacate an award that has been denied, to post a bond equivalent to the award in lieu of paying the award.

Retired Judges

Mr. Sneeringer reiterated a proposal to involve retired judges in arbitrator training and indicated that the SIA and public members will present to SICA lists of potential judges who are willing to do arbitrator training.

Status Report on SICA Arbitrator Training Tape

Mr. Clemente reported that the script for the arbitrator training tape is complete and that arrangements have been made with PLI for use of its taping facilities at a discounted rate. SICA hopes to present both the training tape and the advocacy program at the SIA and PIABA next year. Mr. Clemente will contact PIABA and SIA to reserve space on their programs.

There being no further business, the Conference adjourned at 1:47 p.m.

/s/ Nancy Nielsen
Secretary

Attachment: A. Approved Minutes of the October 17, 2001 SICA Meeting