

Minutes of the
March 11, 2002 Meeting of the
Securities Industry Conference on Arbitration
Palm Desert, CA

Members Present

Joan Clark, PCX*
Robert S. Clemente, NYSE
Theodore G. Eppenstein, Public Member
Linda D. Fienberg, NASD Dispute Resolution
Thomas R. Grady, Public Member
Joanne Moffic-Silver, CBOE
Nancy Nielsen, CBOE
Stephen G. Sneeringer, SIA
Thomas J. Stipanowich

Invitees Present

Heather Cook, NFA
Constantine Katsoris, Public Member Emeritus*
Robert Love, SEC*
Helene McGee, SEC*

The Securities Industry Conference on Arbitration ("Conference" or "SICA") convened on March 11, 2002 at 10:00 a.m., Professor Stipanowich presiding.

Approval of Minutes (Tab 1)

Professor Stipanowich called for amendments to the draft minutes of the January 16, 2002 SICA meeting. Mr. Grady proposed an amendment to the Arbitrator Classification section (draft minutes, page 3) to reflect SICA's consideration of a motion to amend UCA Section 16(d)(2). Mr. Eppenstein proposed an amendment to indicate that Mr. Sneeringer made (and Mr. Clemente seconded) the motion to elect him to a second term as a public member of SICA (draft minutes, p. 4). Upon a motion duly made and seconded, the Conference approved the January 16, 2002 meeting minutes, as amended. (Attachment A)

SICA Non-SRO Pilot: Report (Tab 2)

Professor Katsoris presented a draft of SICA's report to the SEC on the Non-SRO Pilot Program. He deferred the drafting of conclusions about the outcome of the program to the Conference. After discussing various possible conclusions, it was the consensus of SICA not to include specific conclusions in the report. The Conference decided to include Professor Katsoris' memo to SICA members (without the "Confidential" designation) that summarizes responses to the pilot survey as an attachment to the report (Tab 2). The Conference discussed distributing the report to the SEC, PIABA, the SIA Arbitration Committee, and the firms that participated in the pilot program.

Public Member – Replacement for Thomas Grady

Professor Stipanowich informed the Conference that Mr. Grady's second term will end this year. The Conference discussed the process for nominating public members, noting that it is the responsibility of the current public members to nominate successors. The public members will determine how to publicize the upcoming vacancy and recruit interested person, and will devise a plan for interviewing applicants.

* Via Teleconference

Bonding Requirement (UCA Section 27(h)(3)) (Tab 4)

Mr. Sneeringer presented SIA's proposal to adopt proposed paragraph (3) to UCA Section 27(h) to permit a party to post a bond rather than pay an award if the party elects to appeal a trial court decision to deny a motion to vacate the award. The Conference discussed the issues raised by this proposal, including:

- ?? motions to vacate are rarely granted.
- ?? the difference between SIA's proposal and PIABA's proposal which would require payment of an award within 30 days or the posting of a supersedeas bond at the district court level.
- ?? the difficulty of posting a bond and filing a motion within 30 days.
- ?? amending Section 27(h) may appear to encourage appeals.
- ?? the 30-day payment requirement was adopted due to concerns that investors be paid swiftly.

Upon motion duly made and seconded, SICA determined not to amend UCA Section 27(h) to permit the posting of a bond in lieu of payment of an award.

Arbitrator Classification (Tab 5)

SICA revisited the following proposals to amend the arbitrator classification criteria set forth under UCA Section 16:

- ?? PIABA's proposal to delete the criteria under Section 16(c)(3) that provides that an arbitrator is classified as being from the securities industry if that arbitrator "has retired from [or spent a substantial part of a career with]" designated segments of the financial industry and replace it with the more objective "has spent 20 or more years with" the industry.
- ?? An alternate proposal (considered and tabled at the March meeting) to retain "has retired from [or spent a substantial part of a career with]" criteria under Section 16(c)(3) and amend Section 16(d)(2) to provide that "a person will not be classified as a public arbitrator if the arbitrator has been associated with the industry for at least 20 years." (Tab 5)
- ?? A counter proposal by the SIA, introduced by Mr. Sneeringer, to amend and clarify the classification language. The SIA proposal would amend Section 16(c) to (1) replace "associated with" with "employed by" in the criteria defining those affiliations that would require classification as a securities industry arbitrator (2) deleted registered investment advisors from the list of those who will be classified as being from the securities industry, (3) replace "has retired from [or spent a substantial part of a career with]" with "has spent 20 or more years employed by", and (4) amend the provision regarding other professionals who will be classified as being from the securities industry to replace "devoted 20 percent or time to securities industry clients..." with "derived 20 percent or more of his or her revenues from professional employment from..." the industry.(Tab 5)

Hearing no motion on the proposals, the Conference moved to the next agenda item.

California Proposal: Arbitrator Ethics (Tab 6)

Ms. Clark updated the Conference on the status of legislative activity in California on arbitrator ethics and disclosure obligations, as well as other pending California legislation regarding arbitration (e.g., a bill to eliminate arbitral immunity). (Tab 6) NASD Dispute Resolution, NYSE and PCX filed comment letters

seeking a waiver of the disclosure obligations for arbitrators serving on behalf of SROs who have no equity interest in the fora.

Single Arbitrator Statistics – NASD Dispute Resolution Tab 8)

Ms. Fienberg reported that, through January 2002, 8 out of 588 eligible cases are in NASD Dispute Resolution's two-year single-arbitrator pilot, which is scheduled to conclude on May 15, 2002. (Tab 8) With respect to outcome statistics for single-arbitrators versus multiple-arbitrator cases, Ms. Fienberg reported that the following data includes small claims cases. For cases decided by arbitrators in 2001, the customer was awarded damages in 44% of the cases heard by a single arbitrator and in 57% of the cases heard by more than one arbitrator.

CitiBar Direct Communication Proposal (Tab 7)

Tabled.

Status Report: Fitzpatrick/Beckley Workshops (9)

Professor Stipanowich reported on the status of the Arbitrator Training Scenarios video and the Advocate Training Program. Mr. Clemente informed the Conference of pending issues with respect to the production of the training video, including whether to utilizing an editing facility (as was done for the previous training video) or to produce less formally from a training session. SICA decided to revisit this item when the SIA Arbitration Committee joins the meeting.

Status Report – Update SICA Minutes CD

The SICA Minutes CD was updated to include minutes from 2001 and missing minutes from 1995-96. The CDs were sent to SICA members the week of February 4, 2002.

Arbitration Administration Issues and Remedies

Mr. Eppenstein reported that he has four issues to raise with SICA concerning the administration of cases, including the failure of SRO staff to return telephone calls and a requirement that staff have both sides on the line prior to substantive conversations. Mr. Eppenstein will raise the issues with the arbitration fora and will bring these concerns to the next meeting.

CitiBar Request: Support Passage of UMA (Tab 12)

Mr. Clemente presented Carroll E. Neesemann's request that SICA support the passage of the Uniform Mediation Act (UMA), as modified, in New York. Professor Stipanowich informed the Conference that the CPR Institute for Dispute Resolution wrote a letter in support of the UMA prior to the inclusion of the provision limiting mediator privilege (Section 7408(d), page 8 of the legislation) and that CPR takes issue with the proposed preclusion from privilege.

SICA/SRO Statistics 2001

Mr. Clemente presented the 2001 SRO arbitration statistics.

Future Meetings (Tab 16)

- ?? June 7, 2002 at the NASD facilities in New York City.
- ?? October 2, 2002 in Colorado Springs in conjunction with the PIABA Annual Meeting.
- ?? Week of January 13, 2003 in New York.

SICA was in favor of Mr. Clemente's proposal that the Conference invite SIA and PIABA representatives to meet with SICA at one meeting, rather than scheduling separate meetings with each during their annual meetings. The Conference then discussed whether it was necessary for SICA to hold quarterly meetings. It was the consensus of the Conference that SICA should hold four meetings per year and that, if appropriate, a meeting can be cancelled.

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Meeting with SIA Arbitration Committee (Tab 17)

After a short break at 12:30 p.m., Professor Stipanowich welcomed the following members of the SIA Arbitration Committee:

Martin Cohen – Merrill Lynch
Donald Davidson – UBS PaineWebber
Linda Drucker – Charles Schwab
Paul Matecki – Raymond James Financial Inc.
J. Kevin McCarthy – Credit Suisse First Boston Corp.
Kenneth Meister – Prudential Securities
Steven Sneeringer – A.G. Edwards & Sons (present throughout SICA meeting)
George Sullivan, Morgan Stanley
Edward Turan – Salomon Smith Barney

The Conference also welcomed Phil Hoblin, SICA member emeritus.

Arbitrator Classification (Investment Advisors)

Mr. Meister presented SIA's concerns with respect to the classification of investment advisors as industry arbitrators, which can create a situation where no arbitrator on the panel has industry knowledge. The Conference questioned how often a problem arose and how many industry arbitrators have no other association with the securities industry than registration as an investment advisor. Ms. Fienberg indicated she would check an NAMC study for statistics on the number of investment adviser arbitrators. Mr. Clemente suggested that if concerns arise about classification of an arbitrator, Committee members should contact the SRO to have classification reevaluated.

Arbitrator Expertise

The Conference considered the SIA proposal to involve retired judges in arbitrator training. SIA members suggested that judges, particularly those with arbitration experience, could teach hearing management skills, and self confidence, as well as how to deal with frivolous arguments. SIA offered to provide a list of potential judges. Ms. Fienberg indicated that it is not cost effective to use judges for arbitrator training, and that training is not helpful if there are no criteria addressing who may serve as a panel chair.

Mr. Clemente stated that the NYSE is upgrading its chair training. Ms. Fienberg stated that NASD Dispute Resolution is preparing to provide on-line chair training in order to reach more arbitrators.

Fitzpatrick-Beckley Civility Workshops

Mr. Turan requested a status of the projects from the Fitzpatrick-Beckley Civility Workshops and questioned what can be done to execute the project. Mr. Clemente provided a status report, including SICA's proposal to present the advocacy program at the SIA and PIABA meetings next year and the production and funding issues related to creating the civility training video. It was suggested that the firms may be able to assist with production of the video, e.g., Prudential Securities has in-house staff to produce regulatory continuing education materials. Mr. Clemente stated that he and Ken Andrichik (NASD Dispute Resolution) would investigate the options for producing the video.

Dispositive Motions

SIA members raised the issue that disposition motions should be allowed in arbitration, pursuant to the premise that arbitrators may award the same relief that is available in court. The following issues were discussed:

- ?? Nothing in the UCA prohibits dispositive motions.
- ?? Any party may bring a dispositive motion.
- ?? Whether the motion will be heard is subject to the panel's decision.
- ?? Pursuant to the UCA, the arbitrators interpret the code and may make any determination that will expedite the proceeding.

Expungement of CRD Information

Ms. Fienberg stated that PIABA and NASAA have filed comments to the NASD's Notice regarding the proposal with respect to the procedures and guidelines for the expungement of CRD information.

Eligibility Rule

On February 25, 2002, the U. S. Supreme Court granted certiorari in *Howsam v. Dean Witter Reynolds, Inc.* (No. 01-800), to decide whether a court or the arbitrator should determine whether a claim seeking arbitration is time-barred under the NASD's 6-year eligibility rule.

The meeting adjourned at approximately 2 p.m.

Nancy Nielsen
Secretary