Final

Minutes of the March 21, 2006 Meeting of the
Securities Industry Conference on Arbitration
Hollywood, Florida

Members Present

David Blass (SEC),*
Theodore G. Eppenstein
Linda D. Fienberg
George H. Friedman
Greg Hoogasian
Paula Jenson (SEC)
Professor Constantine S. Katsoris (chair)
George Kramer
Karen Kupersmith
Gena Lai (SEC)*
Helene McGee (SEC)*
Matthew Mennes
J. Pat Sadler
Elizabeth Sheridan (National Futures Association)
Tanya Solov (NASAA)*
Patricia D. Struck (NASAA).

Guests:
Michael Alford (Raymond James),
Linda Drucker (Schwab),
Andy Melnick (UBS),
Andrew Weinberg (Deutsche Bank).

* = phone participation

The Securities Industry Conference on Arbitration ("Conference" or "SICA") convened on March 21, 2006 at 1:05 pm, Professor Constantine Katsoris, Chair, presiding.

MEETING WITH SIA DELEGATION

The meeting opened with a working luncheon with a delegation from the SIA Arbitration Committee. The following main topics were discussed:

NASD's explained awards rule: Linda Fienberg described the rule's genesis, and planned amendments. She noted, among other things, that the explanation would not have precedential value, that arbitrators would not be required to address every claim in their written decision, and that it would have a sunset provision after three years. The SIA

representatives expressed concern that the rule is tilted toward the customer and will invite motions to vacate. Pat Sadler noted that, if the rule were reciprocal, so that any party could require an explained award, PIABA would not have supported it.

Result: no action required.

Industry perception that the playing field is tilted toward the customer: The SIA representatives cited the explained awards rule, the non-party subpoena rule, and the recent "cleaning up" of the public arbitrator definition as evidence of a trend toward a playing field tilted toward the customer. Ted Eppenstein countered that in the past, there have been some "investor-unfriendly" rule proposals, too, such as the punitive damages cap rule and the offer of award rule.

Result: no action required.

Industry arbitrator: The SIA representatives expressed concern that SICA and the SROs will do away with the mandatory industry arbitrator in customer cases. The representatives of the SROs who were present stated that they had no intention of doing so.

Result: no action required.

Discovery Arbitrators: Linda Fienberg and George Friedman explained how the pilot worked and how well it was going. Linda Fienberg encouraged members and the SIA representatives to use the pilot.

Result: no action required.

The SIA delegation departed at 2:10 p.m.

ACTION ITEMS

MINUTES OF JANUARY 12, 2006 [Tab 1]: George Friedman reviewed technical amendments that had been received. A few other technical amendments were offered. George Friedman also advised that his staff had just sent out the revised SICA minutes on a compact disk, which now includes the 2005 approved minutes.

Result: With changes approved unanimously, George Friedman will finalize and distribute.

INDEPENDENT RESEARCH ON FAIRNESS OF SRO ARBITRATIONS [Tab 2]: Pat Sadler presented the final draft. A few technical amendments were offered, including:

- in the introduction, change first sentence so it reads: "… made up of representatives of securities regulators, the Securities Industry Association, and investors…"

- add somewhere that SICA was "created with the encouragement of the SEC."

- Question 14a becomes: Did you know, prior to the filing of the arbitration, that one arbitrator would be connected in some way with the securities industry (an "industry arbitrator")?

Participants discussed whether to ask Pace to include questions seeking overall impressions about arbitration, in addition to, or in place of, questions about one's last case.

The participants also discussed the following:

- Whether to add at least one "general experience" question (since the survey now asks parties to respond re: their last case)

- Whether and how to disseminate the survey to industry registered representatives

  Possible concerns about Pace's insistence that it be allowed to use the confidential survey data for research and publication purposes.

Linda Fienberg called participants' attention to an open contractual issue, i.e., a lack of clarity as to who owns the data. Pace desires to publish an article based on the results of the survey. While this is not necessarily problematic, several Committee members expressed concerns about maintaining confidentiality of the data. Linda Fienberg agreed to provide copies of the contract to interested SICA members.

Results: 1) approved unanimously, as amended. 2) Pat Sadler was authorized to negotiate for a "general experience" question, with the understanding that he can yield if Pace insists on excluding such a question; 3) the Subcommittee [Kastoris, Kupersmith, Eppenstein and Sadler] was given delegated authority to give final approval on the survey's content (Pat Sadler will circulate the language to SICA by email, as an "FYI"); 4) Pat Sadler will consult with Ken Andrichik, and then work out the confidentiality/use of data issue with Jill Gross (including consultation with NYSE and NASD contract counsel).

SICA LOGO [Tab 3]: Gus Katsoris reviewed with the group several proposed SICA logos (for use with the planned survey, but also for letterhead and the like). George Friedman suggested that SICA delegate final selection to the chair.

Result: SICA voted unanimously to delegate this authority to the chair.

***** DISCUSSION ITEMS*****

ARBITRATOR CLASSIFICATION AND QUALIFICATIONS [Tab 4]: Ted Eppenstein reported on the discussion of the Subcommittee regarding his proposals and PIABA's letter of December 28, 2005. Since this subject was discussed at prior meetings it was treated as an action item.

After discussion, the proposal was modified as follows:

- arbitrators would not be classified;
- parties would get one list of 15 names, drawn at random;
- arbitrators would make full disclosure of any relationships and biographical information;
- parties would be given unlimited strikes;
- administrative appointments could made;
- the SRO would appoint only "pure public" arbitrators (those with no significant industry ties);

Parties would get one peremptory, per side, as the SICA rule now allows; and

- In single arbitrator cases, the same restrictions apply as with administrative appointments above.

Industry members stated that they believed the proposal would in effect eliminate the industry representative. Ted Eppenstein disagreed and although he was in favor of removing the industry arbitrator for appointments, he noted that his proposal would give the parties more say in the selection process and would increase the pool by bringing back into the pool arbitrators who are currently excluded from serving (such as investment advisers).

Result: By a vote of 2 in favor, 3 opposed, and 3 abstentions, the motion failed to carry. Chairman Katsoris wanted the minutes to reflect that he is opposed to the motion due to its reliance on unlimited strikes.

There was then a discussion of the three-arbitrator threshold. Although not designated as an action item, the members agreed to treat it as such.

There was a motion to amend SICA Uniform Code of Arbitration Rule 16(a) to raise the three-arbitrator threshold from $100,000 to $200,000 (with any party having the right to request three arbitrators).

Result: Approved unanimously (one abstention).

Linda Fienberg then proposed that SICA further amend the Code to mirror NASD's planned approach to this issue:

- claims up to $100K: single arbitrator, with no party option for three;
- claims between $100K and $200K: presumption of a single arbitrator, with any party having the right to demand three arbitrators.

Result: SICA approved this motion by a vote of 3 in favor, 1 opposed, and 4 abstentions. Pat Sadler wanted his objection noted in the minutes. Karen Kupersmith will revise the Uniform Code document.

Participants also discussed Ted Eppenstein's proposal that public arbitrators have no ties to the securities industry. Linda Fienberg noted that the NASD is considering putting a cap on how much a law firm can receive from the industry and have one of its partners still considered a public arbitrator. Since these items were discussed previously, no additional action was taken by SICA.

PETITIONS FOR SEC RULEMAKING [Tab 5]: Due to time constraints, this was tabled until the June 13th meeting.

SINGLE SECURITIES ARBITRATION FORUM [Tab 6]: Matt Mennes presented this item. There was a brief discussion about the pros and cons.

Result: SICA determined that no further action was warranted at this time.

ARBITRATION OF EMPLOYMENT DISPUTES [Tab 7]: Ted Eppenstein reported on the meetings which the Subcommittee held (Ted Eppenstein, Chair, George Friedman, Karen Kupersmith and George Kramer) and the action taken by SICA at the January 12, 2006 meeting. Ted Eppenstein asked the SROs for a progress report on his proposal that the SROs take some action to counteract recent court decisions (most notably *CIBC v. Pitofsky*, a 2005 decision of the New York State Court of Appeals) that appear to allow a firm to preclude an employee from exercising his or her right to arbitrate at an SRO forum. At the January meeting, SICA adopted a resolution urging the SROs to issue a Notice to Members precluding this practice (similar to NASD Rule 3110 for customer disputes), and that SROs adopt rules similar to SICA Uniform Code of Arbitration Rule 1, allowing an employee to require arbitration at an SRO irrespective of whether there is an arbitration agreement (i.e., a rule similar to NASD Rule 10301 for customers). It was noted that this would not apply to statutory discrimination claims, which are subject to arbitration only if agreed to outside the U-4.

NASD reported that it had reached out to NASD Regulatory Policy and Oversight, and was working with RPO on a "Member Alert" on this topic. Linda Fienberg reported that NASD was open to the rule change proposal, and would review it with the NAMC this fall. NYSE reported that it would bring SICA Rule 1(a)(2) to the attention of appropriate individuals. The SROs will report the progress they have made at the October SICA meeting.

Result: no action required.

ELECTRONIC DISCOVERY [Tab 8]: This item was originally scheduled for the October 2005 and January 2006 meetings, but was deferred due to time considerations. Ted reported that the Subcommittee (Barbara Brady, Ted Eppenstein, Chair, Karen Kupersmith and Ken Meister) discussed a number of topics including: the preservation of electronic documents, the production of electronic documents, spoliation issues and remedies for non-compliance such as shifting the burden of proof, adverse inferences, sanctions and enforcement procedures. Ted also briefly reviewed the *Coleman v. Morgan Stanley Dean Witter* case and the SEC's subsequent fine to Morgan Stanley Dean Witter. The Subcommittee sees a need to bring the arbitrators up to speed on the electronic discovery issues being litigated today. Ted Eppenstein reviewed the *Zubulake* case (in the meeting materials), as well as ongoing work by the American Bar Association e-discovery task force and proposed amendments to the Federal Rules of Civil Procedure on electronic discovery, and suggested that it is time for SICA to issue guidance on electronic discovery issues. George Friedman mentioned that the NASD is in the last phases of a two-year project to amend the discovery guide lists, and any SICA action on this one would be welcome. Ted Eppenstein also suggested the *SICA Arbitrators Manual* and arbitrator training materials be changed to cover this topic.

Result: The chair appointed a subgroup consisting of Brady, Kupersmith, Meister and Eppenstein (chair) to propose action for the next meeting.

***** INFORMATION ITEMS *****

UPDATE/STATISTICS ON NASD PILOT PROCEDURES FOR OLD/INFIRM-TERMINALLY ILL PARTIES [Tab 9]: George Friedman reported. By and large, the pilot seems to be working well. No action taken. NASD will report again at the June 13th meeting.

UPDATE/STATISTICS ON NASD DIRECT COMMUNCIATION RULE [Tab 10]: George Friedman reported. So far Rule 10334 appears to be operating well, but it is very early. He reminded SICA that NASD intended to do a survey after about a year of experience. No action taken. NASD will report again at the June 13th meeting.

SRO REPORT ON ACTIVITIES AND RULE FILINGS [Tab 11]: Linda Fienberg reported that the NASD's new discovery code is expected to be filed in the next 3 weeks. She noted that it will be accompanied by new internet-based arbitrator training. This

training will also be available to practitioners and parties for a fee. The new code will have a 3-month implementation period.

CASES AND ARTICLES OF INTEREST [Tab 12]: Skipped in the interest of time.

SCHEDULE FOR UPCOMING MEETINGS [Tab 13]:

- June 13, 2006 at NYSE (New York) [Karen Kupersmith hosting]
- October 25, 2006 at PIABA (Tucson, AZ) [Pat Sadler hosting]

Meetings start at 8:30 a.m., with breakfast available at 8 a.m.

NEW BUSINESS: no new business.

ADJOURNMENT: meeting adjourned at 6:10 p.m.

Respectfully submitted,

George Kramer