

D R A F T

**Meeting of the
Securities Industry Conference on Arbitration
July 12, 1996
at the
Chicago Board Options Exchange**

MEMBERS PRESENT:

**James E. Beckley, Public Member
James E. Buck, NYSE
Robert S. Clemente, NYSE
Philip Cottone, NASD Regulation
Paul Dubow, SIA
Linda D. Fienberg, NASD Regulation
William J. Fitzpatrick, SIA
Thomas R. Grady, Public Member
John C. Katovich, PSE
Constantine N. Katsoris, Public Member
Daniel J. Liberti, CHX
Rosemary MacGuinness, PSE
Deborah Masucci, NASD Regulation
Joanne Moffic-Silver, CBOE
Nancy Nielsen, CBOE
John Ramsey, NASD Regulation (By telephone)
Suzanne Rothwell, NASD Regulation (By telephone)
Andrew C. Small, CBOE
Thomas J. Stipanowich, Public Member
Janice M. Stroughter-Giff, AMEX**

INVITED GUESTS:

**Peter R. Cella
Robert Love, SEC
Helene K. McGee, SEC (By telephone)
Catherine McGuire, SEC (By telephone)
Florence M. Petersen, AAA**

Ms. Nielsen called the meeting to order. As the first order of business, Mr. Dubow read a letter from former SICA member Phil Hoblin honoring Mr. Cella for his long and dedicated service in the field of arbitration. (Attachment 1)

Eligibility (Tab 3). Upon request, Ms. Nielsen turned the meeting over to Mr. Beckley to address the proposed amendment to the eligibility rule. Mr. Dubow summarized recent changes to the proposed eligibility rule, which was initially drafted by Messrs. Dubow and Grady and amended pursuant to a telephone conference between SICA members on July 9, 1996. (Attachment

2) Mr. Beckley called for a motion to approve the eligibility rule, as summarized by Mr. Dubow. Mr. Clemente so moved to approve; Mr. Katsoris seconded.

Prior to the vote, Ms. MacGuinness questioned the rationale for the language "or any amendment" in the parenthetical in subsection (c)(i) and expressed concern that any amendment to the pleadings, however minor, could trigger challenges to eligibility. The Conference agreed to delete the reference to amendments, provided that the SROs clarify in their 19b-4 filings that an eligibility determination could be triggered upon the filing of a new cause of action.

Ms. Masucci raised concern with the word "extend" in paragraph (a) because the word is more applicable to statute of limitation issues. After a short discussion, the Conference agreed to replace the phrase "extend the time within which to file" with the phrase "render an otherwise ineligible claim eligible".

A short recess was taken in order to prepare and distribute a revised version of the eligibility rule.

Upon reconvening, Mr. Grady questioned whether it was necessary to have the Director "endeavor to" decide eligibility issues in 30 days as provided in subsection (c)(i) and proposed eliminating that language. Ms. Masucci indicated that for administrative reasons the language was required to avoid complaints against an SRO if eligibility decisions were not made and issued within a strict timetable. Although most eligibility decisions should be issued in the stated time period, it may not occur during times of peak volume. The Conference agreed to amend subsection (c)(i) to state "The Director shall decide the issue of eligibility and shall endeavor to notify the parties of its decision within thirty (30) days of the request."

Ms. Fienberg questioned the meaning of "final decision" in the last sentence of subsection (c)(i). In order to further clarify the meaning of "final decision", Ms. McGuire suggested that the first sentence of (c)(ii) be amended to read: "Any party may dispute the Director's decision by filing an action in a court of competent jurisdiction challenging the Director's decision in subsection (c)(i) above." Mr. Stipanowich recommended that the word eligibility be inserted between Director's and decision. Ms. Fienberg thought that this sentence should clearly state that the parties to an arbitration can only sue each other and not a Director of Arbitration or SRO. Mr. Clemente proposed inserting against the opposing party after the word "action". The Conference agreed to the language proposed by Ms. McGuire, with the modifications proposed by Messrs. Stipanowich and Clemente.

Mr. Grady noted that the proposed eligibility rule had implications for Section 22, "Interpretation of Code and Enforcement of Arbitrator Rulings", since the proposed rule removes the eligibility decision from the arbitrators' jurisdiction. Mr. Grady proposed an amendment to Section 22 by adding the phrase with the exception of the eligibility determination required to made pursuant to Section 4. The Conference discussed defining "eligibility" as a question of procedural arbitrability in the 19b-4 filings.

Mr. Stipanowich suggested changing "final decision" in the last line of subsection (c)(i) to "arbitration award". Mr. Dubow indicated that it is not an "award" that may be challenged on the

basis of bias, etc., but a decision of the Director that may be challenged in a manner set forth in the new rule. Ms. Fienberg was concerned that different states may reach different decisions after review of eligibility decisions rendered by a Director. [Mr. Love stated that on issues of eligibility the courts are likely to look to see whether the Director had authority to make the decision.]

Ms. Fienberg voiced concerns with respect to bifurcation, particularly when claims involve fraudulent concealment allegations. In these cases, customers would be in two forums simultaneously. Mr. Dubow suggested publishing the proposed eligibility rule in the *Securities Arbitration Commentator* ("SAC ") and inviting public comment, particularly regarding the bifurcation issue. Ms. Fienberg advised that NASD Regulation required further information on the issue of bifurcation before voting on the rule. Mr. Katsoris stated that bifurcation is a given under the eligibility rule. Mr. Fitzpatrick noted that the bifurcation issue has been around since 1968. Additionally, Mr. Fitzpatrick stated that approving a rule conditioned upon or subject to further review by a SICA member would undermine the purpose of SICA. Ms. McGuire noted that a SICA supported rule change is only a recommendation subject to an internal review process by the SROs, and subsequent review and approval by the SEC. Ms. Fienberg asked whether the SEC was comfortable with SICA's proposed rule with respect to the bifurcation issue. Ms. McGuire indicated that [she thought the way the bifurcation issue was handled was well reasoned, noting that] decisions are always subject to further thought and revision.

Mr. Katsoris moved to approve the proposed eligibility rule, as amended. (Attachment 3) Mr. Buck seconded the motion. All voted in favor, none opposed. NASD Regulation's vote was provisional, subject to further input on bifurcation, fraudulent concealment, and court jurisdiction to review a Director's decision. NASD Regulation will attempt to obtain further comments on bifurcation. Messrs. Grady and Dubow will draft a letter to SAC inviting comments on the eligibility rule proposal.

Additionally, a motion was made, and seconded, to approve the proposed changes to Section 22. (Attachment 4) All voted in favor, none opposed.

Mr. Buck thanked Messrs. Dubow and Grady for their work on drafting the eligibility rule.

Minutes (Tab 2). Minutes for the meetings from May 4, 1995 through April 11, 1996 were discussed, changes were suggested and the Minutes were approved, as amended. Copies of the amended Minutes will be included in next agenda.

List Selection of Arbitrators (Tab 6). Ms. Masucci summarized the NASD Regulation's proposal to change the arbitrator selection rules. Mr. Buck suggested that a system comparable to the list selection procedures used by the AAA would be less confusing to users of the SRO forums. Ms. Petersen explained AAA procedures and offered to provide copies of the AAA Rules for distribution to SICA members (Attachments 5 & 6) It was the consensus of the Conference, without a vote, that SICA should consider adopting the AAA procedure.

Next Meeting. The Conference scheduled its next meeting for October 17, 1996, at the NASD Regulation Ft. Lauderdale Office. The following meeting will be held on January 17, 1997 at a location to be determined.

Mandatory Discovery Rules (Tabs 5 and 6). Ms. Masucci summarized NASD Regulation's draft discovery rules. The general consensus was that the discovery rules were extremely difficult to read and understand. Mr. Love questioned the lack of discovery in simplified cases without a showing of good cause. Mr. Grady indicated that broad categories of information would be preferable to the extremely specific categories set forth in the proposed rule. Mr. Katsoris and Mr. Dubow expressed concern that the proposed rules would encourage the construction of complaints designed to trigger maximum discovery. Ms. Masucci requested written comments to assist NASD Regulation in drafting a discovery rule.

Reform of Uniform Arbitration Act (UAA) and Federal Arbitration Act (FAA) (Tab 8). Mr. Stipanowich informed SICA that the Conference of Commissioners on Uniform State Laws is establishing a drafting committee to consider changes to the Uniform Arbitration Act and, possibly, the Federal Arbitration Act. He thought that it was important for SICA to be involved in any proposed revisions to either of these Acts. The Conference voted to have Stipanowich chair a task force to represent SICA before the UAA Drafting Committee and any other body working on revising the FAA. Mr. DuBow volunteered to participate on the task force.

Meeting adjourned.

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FACSIMILE TRANSMITTAL

To: Deborah Masucci

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To: Nancy Nielson

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FROM: Robert A. Love

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Total Number of Pages, including this page: 2

Message:

Following this message are two requested changes to page three of the minutes from the July 12, 1996 SICA meeting. Thanks.

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