

Meeting of the
Securities Industry Conference on Arbitration
October 17, 1996
at the offices of
NASD Regulation, Inc. -- Ft. Lauderdale, Fla.

MEMBERS PRESENT:

James E. Beckley, Public Member
James E. Buck, NYSE
Robert S. Clemente, NYSE
Philip Cottone, NASD Regulation
Elliott R. Curzon, 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
Rosemary MacGuinness, PSE
Deborah Masucci, NASD Regulation
Joanne Moffic-Silver, CBOE
Nancy Nielsen, CBOE
Thomas J. Stipanowich, Public Member
Janice M. Stroughter-Giff, AMEX

INVITED GUESTS:

Robert Love, SEC
Catherine McGuire, SEC (By telephone)
Florence M. Petersen, AAA

Ms. Masucci called the meeting to order.

Minutes (Tab 1).

Minutes of **July 12, 1996** meeting were discussed, changes were suggested and the Minutes were approved, as amended. Copies of the amended Minutes will be included in the next agenda.

Preliminary Issues

Ms. Masucci advised Conference that NASD Regulation is not prepared to discuss punitive damages, eligibility, and requirements for predispute arbitration agreements. These topics will be the subject of discussions at a future meeting. Professor Katsoris expressed his opinion that there was no room for diversity amongst the SRO's for rules on eligibility and punitive damages. He also distributed the Mulder decision affirming a punitive damage award in New York.

Representation of parties in arbitration proceedings (Tab 2)

The Conference discussed the status of the amendment to section 15 adopted by the Conference last year as part of the Uniform Code. Several members noted that it is up to the SROs to take action to adopt the amendment or to propose further amendments.

The Conference also discussed recent developments in Florida, New York and California concerning whether representing parties in arbitration amounted to the practice of law. Recent decisions indicate that it is an issue of state law. Ms. Masucci noted that NASD Regulation is watching the activity in Florida closely.

The Conference also discussed whether arbitrators have the authority to disqualify attorneys in arbitration. Some members argued that arbitrators have the inherent right to control decorum in a hearing and, therefore, could exclude any person, including attorneys, who engage in obstreperous or disruptive behavior. Others argued that the exclusion of a representative of a party by the arbitrators could result in a finding on review that the arbitrators abused their discretion and denied the party its right to effectively present its case.

Increasing ceiling for use of a single arbitrator (Tab 3)

The Conference considered a memorandum from NASD Regulation concerning an adjustment to the ceilings for simplified arbitration and for arbitrations heard by a single arbitrator. Ms. Masucci noted that the NASD's Arbitration Policy Task Force had recommended increasing the ceiling for simplified arbitration to \$30,000 and the single arbitrator ceiling to \$50,000. At the April 11, 1996 meeting, the Conference agreed to the increased ceiling. Subsequently, the NYSE expressed their concern about raising the simplified arbitration threshold to \$30,000 and asked that it be raised to \$20,000 instead. Ms. Masucci noted that in ceiling discussions between the NYSE and NASD Regulation, a compromise had been reached calling for the threshold to be set at \$25,000. Ms. Masucci also noted that increasing the ceiling to \$25,000 would move seven percent of NASD Regulation's regular caseload into simplified arbitration.

Accordingly, Ms. Masucci asked the Conference to approve the compromise ceilings. Mr. Buck noted the NYSE's concurrence with the proposal. The Conference approved the change.

Eligibility Rule (Tab 4)

The Conference discussed the comments on the SICA eligibility rule proposal received by the Securities Arbitration Commentator in response to the publication of an article on the proposal by Messrs. Dubow and Grady. Mr. Curzon noted NASD Regulation's concerns about the proposal, including: (1) questions about the procedural device parties will use to obtain court review of the Director's decision and whether courts would accept such actions seeking interim review; (2) gamesmanship by respondents who, after a claim has been ordered to arbitration by a court, then seek to challenge eligibility before the Director; (3) attempts by parties to preempt the Director's decision; (4) clarification of service and notice issues both in the proposed rule and in the Code in general; (5) whether the limitations period should be tolled on just the claim where eligibility is challenged or on all claims that are part of the Statement of Claim.

The other members responded to the concerns of NASD Regulation. First, there was no problem about the procedural device. A party aggrieved by the Director's decision would simply file a lawsuit in a court having jurisdiction over the matter. Mr. Curzon's concern, however, was that NASD Regulation might be a defendant in such a suit. The Conference agreed that there should be some provision in the rule that the suit should be filed against the adverse party or parties, not NASD Regulation. With respect to Mr. Curzon's fear that there could be no viable cause of action if NASD Regulation were not a party, some members expressed the view that the suit could be couched as a declaratory suit to compel arbitration. In any event, the matter will probably be resolved with experience. Second, Mr. Grady believed that there was no prospect of gamesmanship by respondents since the rule provided that if a claimant is ordered to arbitration by a court following a motion to compel arbitration filed by a respondent then the respondent can not ask the Director to declare the claim to be ineligible. Third, it is also his opinion that there is little risk to preemption of the Director's decision by a party because the rule virtually eliminated the ability of a party to gain ancillary relief since it provided that all claims are eligible unless declared ineligible by the Director. Fourth, Mr. Grady also noted that service and notice issues are clear under the Code and hence there was no need for clarification. Finally, there was no need to toll all claims that are part of the Statement of Claim. Once the eligible claim was filed the limitations period ends. The statute of limitations is not affected by a decision by the parties to defer trying the case until there is a resolution of the issue of eligibility on the claim rejected by the Director. There is only a need to toll the purportedly ineligible claim so that the claimant has the opportunity to file the claim in court once the eligibility issue is resolved.

At the suggestion of Ms. Masucci, the Conference also agreed that any rule filing submitted to the SEC would make it clear that the claimant could proceed in court on a claim that was ruled to be ineligible for arbitration immediately following the Director's decision. In addition, notwithstanding the concern by NASD Regulation that the SICA rule encourages the bifurcation of claims, there was general agreement that the claimant can opt to proceed with the arbitration of all eligible claims even while the eligibility of other claims is being reviewed in court.

List selection

The NASD Regulation's proposed List Selection Rule classifies spouses and immediate family of a registered person as 'nonpublic' arbitrators. Mr. Dubow noted that spouses and family members of registered persons do not necessarily have the securities industry expertise that is important for a nonpublic arbitrator. Accordingly, the Conference voted to retain the current rule, which excludes these individuals from the roster of arbitrators by preventing them from being classified as public. These individuals would be classified as nonpublic only if they independently could be qualified as such. For example, a spouse could also be employed in the securities industry thereby independently qualifying as a nonpublic arbitrator.

Mr. Dubow also noted that some formerly registered persons who leave or retire from the securities industry also do not keep current on securities industry issues and therefore should not be classified as nonpublic arbitrators. He also noted that some of these people work as claimant's expert witnesses and are, thus, tainted from acting as unbiased nonpublic arbitrators. Ms. Fienberg and Mr. Grady noted that such persons could be challenged for cause because of a demonstrated bias. Mr. Dubow agreed, but noted that it would be difficult to challenge a retired person for not being current. In response to these concerns, the Conference agreed that retired persons should not be appointed to fill open nonpublic seats on a panel, but should remain on the nonpublic roster for selection by the parties.

Mr. Dubow also urged that challenges to arbitrators for a three member panel should be decided by the remaining members of the panel and that the Director of Arbitration should decide a challenge to an arbitrator in a one person panel. Messrs. Grady and Stipanowich expressed concern about the ability of arbitrators to act in such matters when to do so would mean removing one of their colleagues. The Conference agreed with Mr. Dubow but determined that if more than one arbitrator on the panel were challenged, the challenges would be decided by the Director.

At the suggestion of Ms. McGuire, the Conference agreed that the definition of nonpublic arbitrator should also include employees of banks who have taken a securities industry examination as part of their employment if they are involved in the retail sale of securities or investment products.

Finally, Mr. Clemente and others noted their continuing concern that NASD Regulation's proposed list selection rule is too complicated and not user friendly, and that many of its provisions do not need to be included in the rule language itself. Mr. Katsoris concurred arguing that *pro se* claimants will have a difficult time navigating the rule. The Conference recommended that the proposed list selection rule developed by Mr. Clemente and other members should be consolidated with the NASD Regulation proposal in an attempt to produce a simpler rule.

Discovery Rule(Tab 6)

The Conference reviewed a proposed Discovery Rule. Several members of the Conference thought that it was too burdensome to require parties to produce the full array of required documents recommended by the Rule when the documents would not necessarily always be relevant in particular cases. Mr. Curzon asked whether providing for a process where a party could object to the production of required documents based on relevance would resolve the problem. Mr. Grady expressed the belief that such a provision would generate the kind of gamesmanship that the rule was intended to avoid. He also felt that the list of documents should appear in the Manual, not the Code. The Conference thereupon recommended that the Discovery Rule appear in the Manual in the form of a guide to arbitrators with respect to discovery for specific types of claims.

The Conference agreed to continue consideration of alternatives.

Arbitrator's authority to award relief not requested by the parties (Tab 7)

This matter was tabled at the request of Mrs. Stroughter-Giff.

Reasoned opinions by arbitrators and the SRO's role in drafting arbitration awards (Tab 7)

This matter was tabled at the request of Mrs. Stroughter-Giff.

Report by NASD Regulation.

Ms. Masucci provided the Conference with a brief report describing pilot programs or initiatives undertaken by NASD Regulation in arbitration and mediation. She advised that she will continue to provide feedback to the Conference on these areas especially if the experience leads to the development of additional rules for consideration by SICA.

Next Meeting.

It was confirmed that the next SICA meeting was January 17, hosted by the PSE in Los Angeles. Another meeting was scheduled for April 15, 1997.

TIME LIMIT OF ELIGIBILITY FOR ARBITRATION

(a) Eligibility; No Tolling for Fraudulent Concealment

The Director of Arbitration, upon the request of a party pursuant to subsection (c) below, shall find a dispute, claim or controversy to be ineligible for arbitration under this Code when, at the time of filing, six (6) years have elapsed from the occurrence or event giving rise to the dispute claim or controversy. An allegation of fraudulent concealment does not render an otherwise ineligible claim eligible, but may be considered in connection with any other time bar defense (e.g., statute of limitations). Any damages suffered by the Claimant prior to the period described in this section shall not be part of any award that might be rendered by the arbitrators but may be pursued in a court proceeding described in subsection (d) below.

(b) Occurrence or Event Defined

"Occurrence or event" means the trade date for the security upon which the claim is based. If the claim does not arise from a trade, then the occurrence or event refers to the date that the Respondent engaged (or omitted or refrained from engaging) in the activity that is the subject of a Claim.

(c) Challenge to Eligibility

(i) If any responding party has a good faith basis to allege that a claim is ineligible then such party, within twenty (20) business days after service of the claim upon it, shall request that the Director of Arbitration decide whether the claim is ineligible or eligible. The opposing party may submit a response to the Director of Arbitration no later than ten (10) days after service upon the party of the request. the period within which to file a responsive pleading to a Statement of

Claim

[an eligible claim] shall be tolled from the date a request is filed under this subsection until twenty (20) business days after service upon it of the Director's decision. 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. The Director's decision shall be deemed a final decision for purposes of court jurisdiction.

(ii) Any party may dispute the Director's decision by filing an action against the opposing party in a court of competent jurisdiction challenging the Director's eligibility decision under subsection (c)(i) above. Such court action must be filed within twenty (20) business days after service of the Director's decision. The filing of an action challenging the Director's decision that a claim is eligible shall constitute a stipulation by the filing party that the claims are ineligible for arbitration and the opposing party may immediately proceed with the claim in court as allowed in Subsection 4(d).

(iii) If no action is filed within the aforementioned period, then the Director's decision shall be final and may not be subsequently challenged in any forum. If an action is filed challenging the Director's decision, then the filing date of any responsive pleading in the arbitration shall continue to be tolled until twenty (20) business days after the date that the action is finally resolved.

(iv) No party shall submit the issue of eligibility to a court prior to submission of the issue to the Director or once submitted prior to the Director's decision as provided for in paragraph (c) of this Rule.

(d) Ineligible Claims

Any claim determined to be ineligible for arbitration may be filed in a court of competent jurisdiction by any Claimant, notwithstanding that a submission agreement had been filed and as if no arbitration agreement had been entered into by the parties; provided, however, the parties may agree to consolidate any or all claims related to a dispute in a single forum. All applicable time bars (including statutes of limitations and repose) are tolled in accordance with all applicable law and/or Section 7 draft the pendency of any arbitration claim filed pursuant to the rules of this forum, and for twenty (20) business days after service of the Director's decision.

(e) Statute of Limitations

This section shall not extend or limit applicable statutes of limitations, nor shall it apply too any claim which is directed to arbitration by a court of competent jurisdiction upon the motion of an opposing party.

SECTION 22

INTERPRETATION OF AND ENFORCEMENT OF ARBITRATOR RULINGS

The arbitrators are empowered to interpret and determine the applicability of all provisions under this Code with the exception of the eligibility determination required to be made pursuant to Section 4. The arbitrators are empowered to take appropriate action to obtain compliance with any ruling by the arbitrators, including but not limited to imposing sanctions pursuant to Section 5. Such interpretations and action to obtain compliance shall be final and binding upon the parties.

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