

Amended and Approved May 1, 1998

**Minutes of the
February 6, 1998 Meeting of the
Securities Industry Conference on Arbitration
at
The Pacific Exchange
San Francisco, CA**

Members Present:

James E. Beckley, **Public Member**
Robert S. Clemente, NYSE
Philip S. Cottone, NASD Regulation
Paul J. Dubow, SIA
Linda D. Fienberg, NASD Regulation
Beth A. Fruechtenicht, PCX
Lydia Gavalis, PHLX
Thomas R. Grady, **Public Member**
Deborah Masucci, NASD Regulation
Nancy Nielson, CBOE
Judith Hale Norris, NASD Regulation
Thomas J. Stipanowich, **Public Member**
Janice Stroughter-Giff, AMEX

Invitees Present:

Paul Andrews, **SEC**
Robert Love, **SEC**
Helena McGee, **SEC** (by conference call)
Florence Peterson, AAA
Laura Pruitt, **SEC** (by conference call)

Public Members *Emeritus* Present:

Peter R. Cella
Constantine N. Katsoris

Ms. Fruechtenicht called the meeting to order at 9:35 a.m.

1. Public Member Reimbursement Policy

The public member expense reimbursement policy was discussed. It was determined that the NASD

will distribute its travel expense guidelines to public members as a guide to reasonable expenses. It was also determined that it was in the best interest of the Conference that the background information of any new public member candidate be disclosed to all members for review as soon as possible prior to the meeting where there would be a vacant seat.

2. Approval of the October 16, 1997 Minutes

Approval of the minutes of the SICA meeting from October 16, 1997, meeting was tabled. Ms. Fruechtenicht will take proposed changes from SICA members and the SEC and will submit the revised minutes for approval at the May 1, 1998 meeting.

3. List Selection Rule

Mr. Clemente presented the final version of the List Selection Rule for the Conference's approval.

The Conference determined to amend UCA Section 2(f) to refer to new UCA Section 9 for the method of selecting arbitrators, rather than to add more language to the Code. One Member also proposed amending the introductory remarks to UCA Section 8 to indicate that Section 8 does not apply to simplified claims.

The Conference also determined to amend UCA Section 2(d), deleting the reference to a five person panel for simplified claims.

Mr. Clemente moved to adopt the List Selection Rule, as amended, along with the amendments to UCA Sections 2(d) and 2(f).

There being no objections, the List Selection Rule (UCA Sections 8, 9, 10 and 12), and amendments to UCA Sections 2(d) and 2(f) were unanimously approved by the Conference.

A copy of the new List Selection Rule and amended UCA Sections 2(d) and (f), are attached to these minutes as Exhibit 1 and Exhibit 2, respectively.

4. Discovery Guide

The NASD reported that the Discovery Guide had been approved by the NASD Board.

The NASD represented that the Guide method provides uniformity, and added that the NASD's concern in drafting the Guide was to avoid discovery disputes. It gives discretion to the arbitrators, but also sends a message to the parties to produce the documents.

One Member expressed the opinion that the Guide seemed harsh in some areas and that it would send a negative message. It was suggested that the NASD step back for now and see how other changes recently implemented resolve the current problems, such as the early appointment of arbitrators and

scheduling of pre-hearing conferences. Finally, certain inaccuracies in the Guide were pointed out, such as the NASD's statements that there are "no interrogatories."

One Member raised the question how the NASD Discovery Guide would affect the other SROs who may not adopt such a guide, due to the fact that arbitrators at the various forums overlap. In addition, one Member stated that from the materials presented, it appeared that the NASD intended to amend the *Arbitrator's Manual* to include the Guide, and that there is a problem with this because the *Arbitrator's Manual* is a SICA publication. The NASD responded that this was not their intent, and that a separate NASD Discovery Guide would be prepared.

Several Members voiced concern regarding the production of specific documents in all cases, such as tax returns, and as to all documents being presumptively discoverable, with the suggestion that the NASD consider changing it to a rebuttable presumption. Another Member suggested that the Guide was too complicated for the pro se claimant, and queried whether it unnecessarily complicates the proceedings.

The NASD noted that the Guide is a work in progress and SICA's comments would be considered.

5. NASDR Punitive Damage Cap

The Conference next turned to the status of the NASD's rule filing to cap punitive damage awards. The NASD noted that it is in the process of reviewing approximately 20 comment letters, reviewed to date, which were largely negative. The NASD is now reviewing the comments.

6. Employment Discrimination Claims

The Conference next turned to the issue of employment discrimination claims. The NASD indicated that it is presently looking at a due process protocol for processing statutory (Title VII) claims. In addition, the NASD is also discussing how to resolve the issue of the federal punitive damage cap for Title VII claims and the NASD's proposed customer punitive damage cap.

7. Report from SICA Subcommittee on Options to SRO Arbitration

Subcommittee Chairman Professor Stipanowich reported that the Subcommittee has formulated the following options to review in more detail: 1) revive the AAA Option (pilot); 2) develop a due process protocol approach to establish standards for non-SRO forums; 3) revisit the possibility of a Unified Forum; and 4) have an opt-out provision into the court system. The Subcommittee will submit a report soon.

In regard to the opt-out option, one Member suggested that another option might be the choice of going to court in cases over a certain dollar amount, and whether larger cases are better handled in court than in arbitration. One Member noted that claimants probably wouldn't raise the amount of claims just to be eligible for the opt-out since court litigation is generally more expensive.

Mr. Clemente moved for SICA to adopt a non-SRO option to the Uniform Code of Arbitration, suggesting that by adopting the option SICA would solve the perception problem of the public being forced to file their claims with an industry sponsored forum. Mr. Clemente suggested that SICA consider adopting a rule requiring in all pre-dispute agreements a non-SRO option be offered as an alternative, and that the firms be permitted to name any non-SRO ADR provider that would adhere to SRO due process standards.

One Member suggested that Mr. Clemente's motion be tabled, and the Conference concurred. It was determined that the Subcommittee would later hear from Ms. Peterson and the practice of the AAA in order to obtain additional information and enhance the discussion of forum alternatives. All those attending the meeting were invited to remain for the presentation by Ms. Peterson.

8. Arbitrator Training at the NASD

The Conference next turned to the issue of Arbitrator Training at the NASD.

The NASD reported that as a result of complaints from PIABA and others, changes to NASD arbitrator training manuals regarding damage calculations, including punitive damages and mitigation of damages, were being discussed by the NAMC. The NASD noted that it had agreed to provide the appropriate PIABA representatives with the revisions before the final training materials are prepared.

9. Proposed Rule Changes - Scheduling of Hearing Dates and Arbitrator Disclosures

The Conference next considered Mr. Grady's proposed rule changes regarding the timing and scheduling of hearing dates, and enhanced disclosures by industry arbitrators.

First, Mr. Grady moved to amend the UCA to require that hearing dates be scheduled in close proximity and not to exceed 14 days between adjournments, unless all parties agree.

It was the general consensus of the Conference that a rule amendment was not necessary on this issue. The SROs generally agreed that scheduling "back-up" days (2 to 3 extra days within a 2 week period after the initial hearing dates) was a good idea. The NASD noted that scheduling is primarily in the hands of the parties and arbitrators in their offices, so dates (and any concerns about additional days) can be discussed at that time. The NASD can build the issue of back-up dates into their pre-hearing conference script.

Secondly, Mr. Grady moved to amend the UCA to require enhanced disclosure by industry arbitrators regarding any discussions they may have had with their employer, or any lawyer or law firm with respect to any arbitration pending before that industry arbitrator.

It was the general consent of the Conference that the Code of Ethics for Arbitrators requires all such disclosures to be made by arbitrators. It was noted that the Code of Ethics was incorporated into the

Arbitrator's Manual and the Uniform Code in 1989. In addition, training materials extensively cover disclosure and ethical considerations, and arbitrators are aware of their duty to keep the proceedings confidential. Further, the parties can ask the arbitrators, on the record, whether they have discussed the case with anyone.

One Member suggested reviewing training materials with respect to disclosures. The NASD agreed to distribute its additional training materials to Conference members.

Mr. Dubow moved to table the discussion of arbitrator training materials with respect to disclosures. The motion was seconded, and the Conference agreed.

10. Public Member Issues

The Conference next turned to other issues raised by Mr. Grady. It was noted that the other Public Members did not jointly raise the issues submitted by Mr. Grady.

Mr. Grady first raised the matter of increasing the number of public members from three to four. The Conference recalled that there had originally been three public members, which was increased to four when Justin Klein was added. The number of public members was returned to three after Professor Katsoris' term expired in order for the public and industry representation to be more in balance.

It was the general consent of the Conference that the number of public members remain at three.

Mr. Grady's second item of reimbursement of expenses was addressed at a separate SRO Meeting.

11. Report on the Pilot Clinical Program & Writing of UCA in Plain English

Professor Katsoris presented a status report regarding the Pilot Clinical Program and the translation of the UCA to "Plain English."

Professor Katsoris noted that the Clinical Program concept has caught on at other law schools in Florida and Indiana, and it was noted that the program at Pace Law School has taken in three cases and has had many inquiries. The PHLX indicated that it will establish a clinical program with the Pennsylvania Bar Association and Temple University.

With respect to the writing of the UCA in plain English, Professor Katsoris advised that a presentation would be made at the May 1998 meeting by David Carey of the NYSE, explaining how the UCA was translated. Professor Katsoris noted that the most troublesome areas were the class action rule, the eligibility rule, and the fee schedule.

12. California Consumer Arbitration Bill and Recent Case Law re: Unauthorized Practice of Law

The Conference next turned to informational items regarding the California Consumer Arbitration Bill currently under consideration by the State Senate, and a recent California Supreme Court decision regarding the unauthorized practice of law. Birbrower, et al. v. Supreme Court, 98 Daily Journal D.A.R. 107.

The NASD reported that it is currently looking to retain ethics counsel to review the Court's decision in Birbrower and to determine the NASD's obligations, if any. It was noted that the court had declined to read an exception for arbitration proceedings into the statute, and that the ruling was applicable to NAR's and attorneys not licensed to practice law in California.

13. 10th Report on Arbitration

The Conference next turned to SICA's 10th Report on Arbitration. The issue was raised whether it was necessary to write the report due to the fact that SICA's SRO members are not acting uniformly in terms of rule adoptions, and **since the Report was historically written for the SEC**, whether the SEC wants such a Report.

It was noted that the SICA Report has been widely distributed in the past and used as a vehicle to disseminate the current Uniform Code of Arbitration and SRO arbitration statistics.

The Conference generally consented to table the issue of writing SICA's 10th Report on Arbitration to the May 1998 meeting.

14. SICA Publications

By general consent, this item was tabled for the May 1998 meeting.

15. Judicial Review of Arbitration

The Conference took notice of a recent decision from the 9th U.S. Circuit Court of Appeals which allowed the parties to create their own mechanism to appeal the results of an arbitration decision. LaPine Technology Corp. v. Kyocera Corp., 97 Daily Journal D.A.R. 14835.

16. MSRB Withdrawal from SICA

The Conference next turned to the MSRB's withdrawal from membership in SICA. The Conference took notice of the withdrawal, and the NASD announced that it had agreed to absorb all MSRB claims.

17. SICA Statistics

Mr. Clemente requested that the SROs submit their 1997 statistics to him as soon as possible.

18. Uniform Code of Arbitration

The Conference took notice of the revised version of the UCA, with an updated list of amendments attached.

19. Departure of Debbie Masucci

The Conference took notice of Ms. Masucci's departure from the NASD and as a member of SICA. Ms. Masucci's valuable contribution to SICA over the years was recognized by the Conference.

20. New Business

One Member raised the issue of the SEC's suggestion that the regional SROs limit jurisdiction in response to the NASD's proposal to increase fees. The SEC responded that it was only giving the regional SROs options in light of their expressed concern about the possible impact the NASD's fee increase could have on the regional SROs. The Staff's suggestion should not have been interpreted as a recommendation.

Mr. Cottone noted that this would be his last SICA meeting because his term as Chairman of the NAMC has ended. He noted that he will be succeeded by Justin Klein, a former Public Member of SICA. Mr. Cottone thanked the SICA members for their courtesy to him in the last three years, and he wished them well in the future.

Mr. Cottone also urged the group to elect a permanent Chairperson, at least on an annual basis, so one individual will have responsibility for running meetings, preparing minutes, following up with subcommittees and generally for taking responsibility for SICA affairs between meetings. He noted that the current practice of rotating the chairmanship at each meeting was disruptive and inhibited SICA's ability to move forward. The recommendation was favorably received by the Conference.

It was confirmed that the next SICA meeting will be held on May 1, 1998 at the NASD in New York.

The Conference then agreed that the summer meeting will be held on August 27, 1998 at the CBOE in Chicago.

There being no other new business or other matters for discussion, the Meeting was adjourned at 3:35 p.m.

/S/
Beth A. Fruechtenicht
Chairperson and Secretary

Minutes Approved: 5/1/98
(Date)

Exhibits to Minutes: 1) List Selection Rule - UCA Sections 8, 9, 10 & 12
2) Simplified Arbitration - UCA Sections 2(d) & 2(f)