

Approved October 22, 1998

Minutes of the  
August 27, 1998 Meeting of the  
Securities Industry Conference on Arbitration  
Hosted by the Chicago Board Options Exchange, Incorporated  
Chicago, Illinois

Members Present

Robert Clemente, NYSE  
Paul Dubow, SIA  
Theodore Eppenstein, Public Member  
Angelo Evangelou, CHX  
Linda Fienberg, NASD Regulation  
Beth Fruechtenicht, PCX  
Thomas Grady, Public Member  
Joanne Moffic-Silver, CBOE  
Nancy Nielsen, CBOE  
Fredda Plessner, SIA\*  
Patrick Sexton, CBOE  
Thomas Stipanowich, Public Member  
Janice Stroughter-Giff, AMEX  
Nandita Yagnik, PHLX\*

Invitees Present

Robert Love, SEC  
Helene McGee, SEC\*  
Catherine McGuire, SEC\*  
Laura Pruitt, SEC

Public Members Emeritus Present

James Beckley  
Constantine Katsoris

\* Via Conference Call

The Securities Industry Conference on Arbitration convened on August 27, 1998 at 10:20 a.m., Chair Beth Fruechtenicht presiding.

**1. Minutes of May 1, 1998 Meeting**

Upon review of the amendments submitted by SICA members and invitees, the Conference determined to circulate a second draft of the minutes of the May 1, 1998 meeting.

## 2. Report of Subcommittee on Options to SRO Arbitration

Professor Stipanowich summarized the status of the subcommittee's continuing efforts to develop guidelines for the proposed pilot allowing customers, under certain circumstances, to arbitrate at a non-SRO sponsored forum. Professor Stipanowich recognized the efforts of Mr. Dubow in developing the terms of the pilot. Professor Stipanowich described a meeting between certain subcommittee members and PIABA representatives concerning the pilot guidelines. He also reported that the incoming PIABA President, Mark Maddox, acceded that the rule-making proposal does not reflect the vehement sentiments of all PIABA members.

Ms. Fienberg reported that PIABA representatives had four major concerns about the proposed pilot:

1) the costs of arbitration at the AAA (PIABA representatives questioned whether the firms would consider subsidizing the costs at an alternate forum, similar to the subsidization of SRO fora), 2) the potential for abuse of the provision that allows a registered representative party to refuse to participate in an alternate forum, 3) the restriction of remedies at alternate fora, and 4) whether the number of cases submitted to the pilot will be substantial enough to provide for a valid test of the proposal.

Professor Stipanowich stated that subcommittee members hope to make a presentation at the October PIABA meeting. He also stated that he will report on behalf of SICA to the SEC staff regarding the status of the proposed pilot. With respect to inquiries from the media, the conference agreed that at this time information would be limited to the fact that SICA is working on the terms of a pilot and that the draft proposal is nearing completion. The specific terms of the pilot will be held in reserve until finalized.

## 3. PIABA Rulemaking Petition

Mr. Clemente called attention to Bill Fitzpatrick's letter (Tab 3) discussing the PIABA rule-making petition and proposing, among other things, the elimination of arbitrator classifications, the creation of objective standards for qualifying as an arbitrator, and party control over the composition of panels. Mr. Clemente proposed that SICA establish a subcommittee to study the elimination of arbitrator classifications.

Ms. Fienberg raised the related issue of expanding the use of a single arbitrator, noting that requiring 3 arbitrators on a panel is a major impediment to cost reduction and administrative efficiency. Although conference members spoke in favor of the expanded use of a single arbitrator, several obstacles to eliminating arbitrator classification and increasing the use of single arbitrator panels were raised. Mr. Dubow stated that the securities industry would oppose increased use of single arbitrators as long as arbitrators who are affiliated with the securities industry are eliminated by rule from serving as the sole arbitrator. Professors Katsoris and Stipanowich noted the perception of bias created by a controversy resolved by a single arbitrator who is affiliated with the securities industry and the concomitant rationale in support of classification.

Observing that maintaining classifications creates an artificial perception that "industry" arbitrators can not be impartial, Mr. Clemente proposed linking non-classification of arbitrators with list selection. Mr. Beckley stated that until list selection has been implemented, it is premature to discuss the elimination of arbitrator classifications. (Mr. Clemente informed SICA that the NYSE is actively offering the parties several optional methods for selecting arbitrators.)

No action was taken on the proposal that SICA establish a subcommittee to study the elimination of

arbitrator classification.

Ms. McGuire stated that that it is consistent with PIABA's rulemaking petition to explore the options raised by SICA members, including the use of single arbitrators and list selection. She also noted concern about arbitration costs.

With regard to single arbitrator panels, Mr. Grady stated that SICA should consider linking it with certain procedures which benefit consumers, such as (1) claims would be heard within six months, (2) no motions would be allowed, and (3) discovery assistance.

Ms. Fienberg directed the Conference's attention to NASD Regulation's June 30, 1998 response (Tab 3) to the SEC staff's request for comments on PIABA's rulemaking petition.

#### **4. AAA Due Process Protocol**

Mr. Grady noted for the Conference that the AAA recently enacted the Due Process Protocol for mediation and arbitration of consumer disputes (Tab 4). It was noted that the protocol and a lengthy commentary are available at the AAA website (<http://www.adr.org>).

#### **5. Predispute Arbitration Agreements**

Ms. Fienberg informed the Conference of proposed amendments to NASD Rule 3110(f) governing the use of predispute arbitration agreements in connection with customer accounts (Tab 5). Ms. Fienberg stated that SEC staff has asked for additional disclosure requirements in connection with its consideration of the proposed punitive damages and eligibility rules. The NASD anticipates filing the proposed amendments with the SEC by the end of September 1998. Following discussion of the proposed amendments, Ms. Fienberg advised the Conference that the NASD will review the proposal in light of comments regarding potential motions to vacate in connection with section 4(B) of the rule.

#### **6. Proposed Amendments to SICA List Selection Rules**

Mr. Eppenstein requested that the Conference consider two proposed changes to SICA's List Selection Rule (Tab 6): (1) changes to Sections 9(b)(5) and 9(c)(1) that would toll the 20 day period of time during which the parties must evaluate and return lists when additional information is requested, and (2) changes to Sections 10(a)(1) and 10(a)(2) that would provide for a limited second round of arbitrator selection in the event the forum is unable to compose a panel from the first round of list selection. Mr. Eppenstein stated that the AAA adopted this second round of list selection in 1992/1993.

Commenting that a second round in list selection would add time and cost, Ms. Fienberg stated that the NASD's proposed list selection rule gives discretion to staff to determine whether to toll the period to return the list of arbitrators. Ms. Fienberg also stated that the NASD will consider appropriate changes to improve the system once list selection is implemented. Mr. Clemente commented that tolling provides opportunities for abuse and delay of the proceeding.

Following discussion of the proposals, on a motion duly made and seconded, the proposed changes to Sections 10(a)(1) and 10(a)(2) that provide for a second round in list selection were approved as proposed. A copy of the amended UCA Section 10 (Objecting to Potential Arbitrators) is attached hereto as Exhibit "A".

The proposed changes to Sections 9(b)(5) and 9(c)(1) were tabled so that the Conference could further address concerns regarding the potential for abuse of tolling. Mr. Eppenstein agreed to submit revised language for review at the next meeting.

#### **7. Comments Regarding NASD List Selection Rule**

Mr. Beckley submitted for information purposes Scott Bernstein's August 11, 1998 letter discussing NASD's proposed list selection rule (Tab 7). The NASD advised that it would consider Mr. Bernstein's comments as well as any other comments.

#### **8. Arbitrator Training and Testing**

Mr. Grady requested that the Conference discuss arbitrator training and whether SICA should be involved in this area. Mr. Grady noted his concerns with regard to NASD's arbitrator training programs and, in particular, that the training is not balanced. Upon discussion of concerns regarding training in substantive areas of the law, the Conference determined to address arbitrator training at its January/February 1999 meeting. NASD Regulation will invite Ken Andrichik or Gary Tidwell to address SICA.

#### **9. SROs Interpretation of Rules Regarding Peremptory Challenges of Arbitrators**

Mr. Grady requested that the NASD and the NYSE advise the Conference of its policies with respect to tolling the exercise of peremptory challenges whenever additional information is requested. Mr. Grady stated that the forums appear to have the same rule, but different policies as to application, or that the policy within the forum is not followed on a consistent basis. Ms. Fienberg and Mr. Clemente both stated that the NASD and NYSE have policies of administratively tolling the exercise of peremptory challenges when additional information is requested. In addition, they will review the application of the rule to ensure that it is applied consistently.

#### **10. Letter from Congressman Dingell to GAO Regarding Arbitration**

As an information item, Mr. Clemente submitted Congressman's Dingell's July 30, 1998 letter to the GAO regarding unpaid arbitration awards (Tab 10).

Ms. Fienberg stated that the NASD is very sensitive to this issue and that in general, claimants would not be any more successful obtaining payment had they sued in court. Moreover, if a claimant advises the NASD that they have not been paid an arbitration award, NASD Regulation will send a letter to the non-paying parties advising that unless the award is paid within 15 days, they will be suspended, unless the firm has filed for bankruptcy or moved to vacate. The respondent may request summary proceedings.

#### **11. Dismissal of Claims Against Broker as a Condition of Settlement**

Mr. Eppenstein requested that the Conference discuss the practice of respondent broker-dealers requiring dismissal of all claims against the respondent broker as a condition of settlement. Mr. Eppenstein noted that a public customer's concern is receiving the settlement, not whether the broker's record is blemished. Mr. Grady compared the filing of an amended Form U4 with the NASD (which does not disclose any settlement with the firm) and the filing of a Form RE-3 with the NYSE (which requires disclosure of a settlement in any complaint in excess of \$15,000). Ms.

Fienberg stated that she would investigate why the NASD does not have a RE-3 equivalent form, and report back to the Conference.

#### **12. Affirmation of Arbitration Awards**

Mr. Clemente advised the Conference that the NYSE was recently asked to “affirm” an arbitration award as required by New York law. To satisfy this requirement, the NYSE added language to its award stating that the arbitrators “affirm” the award.

#### **13. NASD Disclosure of Arbitrator Concurrence**

Mr. Beckley requested that SICA review the issue of NASD disclosures of concurrence in "closed cases" vis-a-vis cases terminated by motion. The NASD advised that it has resolved the problem relating to the disclosure of arbitrator concurrence.

#### **14. NASD Claim Deficiency Letter**

Mr. Beckley submitted a letter from an NASD Regulation legal assistant, which states that the case “will be closed without prejudice” if certain “deficiencies” are not corrected. Mr. Beckley stated that nothing in the NASD Arbitration Code allows paralegals to close cases. Ms. Fienberg stated that the NASD is reviewing the deficiency process..

#### **15. Approval of Updated Version of Uniform Code of Arbitration**

Mr. Clemente submitted an updated version of the Uniform Code that corrects minor inaccuracies noted during the conversion of the Uniform Code to Plain English. On a motion duly made and seconded, the Conference approved the updated Code.

#### **16. Update on Birbrower Legislation**

Mr. Dubow updated the Conference on the Birbrower legislation. Mr. Dubow stated that the California trial lawyers were opposed to the Bill unless it contained a *pro hac vice* requirement. The Bill subsequently died in the California Senate Judiciary Committee due to concerns of Consumers Union. The Bill could be brought back to the California Senate for one last try on or before Monday, August 31, 1998.

#### **17. Update of Translation into Plain English**

Professor Katsoris updated the Conference on the status of the translation of the Uniform Code into Plain English. He indicated that after the working group attends a Plain English writing program sponsored by the ABA, the group will resume working on revising the Code. He also informed the Conference that the clinical program at Fordham is ready to go, with six students and a new director. At this time, however, no cases have been received.

#### **18. NYSE Rule Filings**

Mr. Clemente advised the Conference that the NYSE submitted a rule filing eliminating interlocutory appeals of decisions of the Director of Arbitration by members to the Board of Directors. He also advised that the NYSE has submitted a rule filing to implement mediation and administrative conference pilot programs for larger cases, along with other rule amendments previously made to the

Uniform Code.

**19. NASD Corporate Travel and Reimbursement Policy**

NASD's Corporate Travel and Reimbursement Policy (Tab 19) was submitted for information purposes.

**20. Scheduling of Future Meetings**

The next SICA meeting will be held on October 22, 1998 in Orlando prior to the start of the annual PIABA meeting.

The following meeting will be held on February 5, 1999, hosted by the PCX in Los Angeles.

**21. New Business**

There being no new business or matters for discussion, the meeting was adjourned at 1:45 p.m.

/s/ Nancy Nielsen

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Acting Secretary

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## UCA Section 10.

### Objecting to Potential Arbitrators

August 27, 1998, amendments to language in Sections 10(a)(1) and (a)(2) in **BOLD** type, with additions underlined and deletions [~~bracketed~~].

#### Section 10.

#### Objecting to Potential Arbitrators.

You may use a limited number of strikes to remove arbitrators from a list. Arbitrators may also be removed from the list if they are successfully challenged for cause.

#### (a) Automatic Strikes

- (1) If one arbitrator hears a case, you may strike [~~three~~] **any or all of the names from your list without providing an explanation. In the event the (Name of SRO) cannot select the arbitrator from the names not stricken, then a second list will be submitted to the parties. The second list will contain three names. Each side shall be given one strike from the list without providing an explanation.**
- (2) If three arbitrators hear a case, you may strike [~~a total of five~~] **any or all of the names from your lists without providing an explanation. In the event the (Name of SRO) cannot select the panel from the names not stricken, then a second list will be submitted to the parties. The second list will contain three names for each vacancy to fill out the panel. Each side shall be given one strike per vacancy from the list without providing an explanation.**

~~[(c) Automatic Strikes Not Used.~~

~~If you have automatic strikes left, you may use them against an arbitrator proposed by the Director. You must use your strikes within 10 days from the date you received notice of the appointment. If the hearing will take place in less than 10 days, you have until the hearing starts to use your automatic strikes.]~~

~~[(d) (b) Challenges for Cause.~~

You have an unlimited number of challenges for cause. The Director will determine whether to remove an arbitrator because of a challenge for cause.