

Approved February 5, 1999

Minutes of the
October 22, 1998 Meeting of the
Securities Industry Conference on Arbitration
Hosted by the New York Stock Exchange
Orlando, Florida

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
Justin Klein, NASD Regulation
Nancy Nielsen, CBOE
Thomas Stipanowich, Public Member
Janice Stroughter-Giff, AMEX

Invitees Present

Robert Love, SEC
Helene McGee, SEC* *
Jeffrey R. Schwartz, SEC

Public Members Emeritus Present

James Beckley
Constantine Katsoris

The Securities Industry Conference on Arbitration convened on October 22 1998 at 9:25 a.m., Chair Beth Fruechtenicht presiding.

1. Minutes

a) May 1, 1998

On a motion duly made and seconded, the Conference unanimously approved the Minutes of the May 1, 1998 meeting, as submitted. (Attachment A)

* Via Conference Call

b) August 27, 1998

Ms. Fruechtenicht called for amendments to the draft of the minutes of the August 27, 1998 meeting. Messrs. Klein, Clemente, Love and Beckley and Ms. Fienberg proposed amendments. Upon a motion duly made and seconded, the conference unanimously approved the Minutes of the August 27, 1998 meeting, as amended. (Attachment B)

2. SICA Publications

Mr. Clemente proposed revising and updating *The Arbitration Procedures Manual* and *The Arbitrator's Manual* to capture rule changes since the 1996 editions. He proposed certain minor changes (Tab 2) and indicated that SEC staff has suggested converting the publications to plain English. After discussing the sufficiency, scope and availability of the manuals, the Conference determined to forego any major revisions until approval of the pending NASD rule changes, which would create a chasm between the rules of the various fora.

Mr. Clemente will take over the publication of the manuals. Ms. Fienberg will look into the NASD's current inventory of the publications. Mr. Clemente will incorporate the minor changes as proposed and circulate drafts prior to the next meeting, if possible. Mr. Clemente requested that any additional comments or changes be forwarded to him within the next few weeks.

3. Birbrower Legislation

Mr. Dubow updated the Conference on the terms of the Birbrower legislation, indicating that the law will become effective as of the first of the year. As enacted, the bill provides that an out-of-state attorney may appear at California arbitration, provided that *pro hac vice* requirements are fulfilled and the arbitrator(s) or the forum approve the appearance. An attorney licensed in another jurisdiction must file a certificate with the arbitrators, the California State Bar and the parties. Mr. Dubow also noted that the bill does not change any rights to employ a non-attorney representative that the parties possessed prior to the Birbrower decision. Mr. Dubow suggested that arbitrators should be trained with regard to their responsibilities under the legislation.

Mr. Clemente reminded the Conference that the non-attorney representation amendment to the uniform code was adopted to relieve the SROs from dealing with representation issues. Ms. Fienberg indicated that the NASD is considering raising the Birbrower requirements at the outset of the arbitration by requiring non-California attorneys to file a certificate with the NASD. Ms. Fienberg indicated that NASD general counsel's staff is looking at the issues. She will share information with the fora that hear cases in California. The Conference discussed the ramifications of a non-qualified lawyer representing a party. What is the responsibility of forum staff or the arbitrators absent a challenge? Would a non-qualified attorney create grounds for vacating an award?

4. Amendment to List Selection Rule

Mr. Eppenstein submitted a proposed amendment to Section 9 of the Uniform Code to toll the 20-day time period for returning the list of arbitrators when additional information is requested and to provide examples of the type of additional information a party may request. (Tab 4) Mr. Eppenstein stated that under list selection, the parties need as much information as possible to determine possible conflicts; experience to decide particular issues; product knowledge, etc. The examples provide guidance for the parties and the forum on appropriate information requests.

The Conference expressed concerns about the examples involving: i) the appropriateness of placing detailed

examples in the rule, as opposed to the *Arbitrator's Manual* or in a staff guideline, ii) arbitrator and party privacy rights, iii) the discretion provided to the forum to determine the appropriateness of the information requests, and iv) possible proceeding delays caused by automatic request for additional information. Mr. Grady suggested adopting the tolling proposal as submitted and considering an alternate proposal to increase the mandatory disclosure requirements for arbitrators.

Upon a motion duly made and seconded, the Conference voted to approve the amendment to Section 9 of the Uniform Code, without the paragraph setting forth the examples. (Attachment C) Ms. Fienberg noted that, as adopted, tolling would apply until the forum replies, even if a request is abusive.

Mr. Grady requested that agenda for the next meeting include information regarding the information automatically provided to the parties by the fora.

SICA will review arbitrator selection, including SRO disclosures to the parties. Copies of the questionnaires to the arbitrators will be provided at the next meeting for discussion.

5. Update from Subcommittee on Options to SRO Arbitration

Professor Stipanowich updated the Conference on the status of the Pilot Program for Non-SRO Sponsored Arbitration Alternatives and discussed the presentation to PIABA membership following the SICA meeting. Messrs. Clemente and Stipanowich noted the sensitivity of the number of cases to be submitted to the pilot. Mr. Dubow clarified that the firms have committed to go to hearing on a minimum of 100 cases during the 2-year pilot. It was the sense of the Conference that the alternate providers should be provided with the names of the firms involved in the pilot.

6. Class Action Rule (Tab 6)

Mr. Love requested that members of the Conference share experiences with the class action rule in light of alleged abusive practices that had been reported to Commission staff. Members of the Conference suggested that there may be litigation issues in class action cases that are not addressed by the rule, and the Conference established a subcommittee to identify and address these issues. Messrs. Beckley, Dubow, Grady, Katsoris, and Stipanowich will serve on the subcommittee, and have agreed to invite Mr. Love to their meetings on this subject. Mr. Grady agreed to chair the subcommittee.

7. Arbitrator Training and Disciplinary Referrals

Tabled.

8. NASD Proposed Rule for Employment Disputes

Tabled.

9. Law School Clinics

Professor Katsoris reported that the Fordham Clinic has received five referrals of very small cases, two of which were rejected as not worthy of a claim. He further indicated that his journal article on establishing a clinic was sent to law school deans, the media, and the judiciary. The New York Times published a favorable article regarding the clinics. (Tab 9) Professor Katsoris encouraged Conference members to lecture at the clinics.

10. Uniform Code of Arbitration

Ms. Fruechtenicht submitted an updated version of the Uniform Code, amended as of August 1998.

11. NYSE Voluntary Arbitrator List Selection Program

Mr. Clemente discussed a program allowing parties to elect alternate arbitrator selection procedures, which the NYSE initiated last spring. Materials are provided to the parties ("Arbitrator Selection – Your Choices") upon receipt of the answer. The NYSE offers the parties a choice between three methods of arbitrator selection: i) SICA's list selection rule, ii) an enhanced procedure, in which arbitrators are pre-screened for conflicts and qualifications, and iii) the AAA securities list selection procedures. Ten customer claims have proceeded under alternate procedures, nine under the enhanced procedures and one under the SICA procedures. Mr. Clemente stated that under the alternate procedures, those arbitrators with little or no history are challenged. He further indicated that NYSE staff indicates that the parties prefer staff selection of arbitrators.

12. NYSE Rule Filing re: Employment Discrimination Claims

Mr. Clemente distributed a NYSE rule filing, SR-NYSE-98-28, regarding employment discrimination claims. The filing (Tab 12) provides that statutory employment discrimination claims, including sexual harassment claims, are eligible for submission to arbitration only where the parties have agreed to arbitrate the claim after it has arisen.

13. Scheduling of Future Meetings

The PSX will host the next SICA meeting in Los Angeles, California on February 5, 1999.

The NASD will host the following meeting on April 21, 1999 in Washington, D.C.

14. New Business

Ms. Fienberg provided Conference members with a copy of the NASD's proposed Discovery Guide. The guide has been discussed, but not filed, with the SEC.

Professor Stipanowich suggested that the Conference focus on the use of mediation for the resolution of securities disputes. He proposed examining the ways mediation is established and the styles and strategies employed by the mediators. Ms. Fienberg volunteered to have Ken Andrichik discuss the NASD program at the April meeting. Indicating that the NYSE has implemented a mediation program, Mr. Clemente stated he would report on the program at the April meeting.

There being no further new business, the meeting was adjourned at 1:45 p.m.

/s/ Nancy Nielsen _____
Acting Secretary