

Approved October 21, 1999

Minutes of the
July 15, 1999 Meeting of the
Securities Industry Conference on Arbitration
Hosted by NASD Regulation, Inc.
San Francisco, California

Members Present

Robert S. Clemente, NYSE
Paul Dubow, SIA
Theodore Eppenstein, Public Member
Angelo Evangelou, CHX
Linda D. Fienberg, NASDR
George H. Friedman, NASDR
Beth A. Fruechtenicht, PCX
Thomas R. Grady, Public Member
Judith Norris, NASDR
Nancy Nielsen, CBOE
Fredda Plessner, SIA
Thomas J. Stipanowich

Invitees Present

Robert A. Love, SEC
Helene McGee, SEC*
Catherine McGuire, SEC*
Laura Pruitt, SEC*
Jeffrey R. Schwartz, SEC*

Public Members Emeritus Present

James E. Beckley
Constantine N. Katsoris*

The Securities Industry Conference on Arbitration ("Conference" or "SICA") convened on July 15, 1999 at 9:15 a.m., Chair Beth Fruechtenicht presiding.

Minutes of the April 13, 1999 Meeting

Ms. Fruechtenicht called for amendments to the draft of the minutes of the April 13, 1999 meeting (Tab 1). The Conference proposed two minor corrections. Upon motion duly made and seconded, the conference unanimously approved the minutes, as amended (Attachment A).

Non-SRO Pilot Program

Professor Stipanowich reported on the status of the Non-SRO Pilot Program (Tab 2). He informed SICA that the American Arbitration Association ("AAA") had confirmed its willingness to participate in the pilot

* Via Conference Call

program and to administer cases under its Commercial Arbitration Rules, as supplemented for securities arbitration. Professor Stipanowich further reported that he received letters from six securities firms (Merrill Lynch, Morgan Stanley Dean Witter, PaineWebber Incorporated, Prudential Securities Incorporated, Raymond James & Associates, Inc., and Salomon Smith Barney, Inc.) committing to participate in the pilot program. He handed out five of the letters that were received after the meeting agenda was prepared (Attachment B).

The firms' elections for the pilot program (including A.G. Edwards' elections which were not available at the time of the meeting) are summarized below:

Firm	# Cases	AAA	JAMS	Rules
Raymond James	10	x		Comm. Arb Rules & Supplement
A.G. Edwards*	15	x		Comm. Arb Rules & Supplement for AAA
			x	Sec. Arb Rules (1993) + JAMS Supplement
PaineWebber	15		x	Sec. Arb Rules (1993) + JAMS Supplement
DeanWitter	15		x	Sec. Arb Rules (1993) + JAMS Supplement
Merrill Lynch	15		x	Sec. Arb Rules (1993) + JAMS Supplement
Smith Barney	15		x	Sec. Arb Rules (1993) + JAMS Supplement
Prudential	15		x	Sec. Arb Rules (1993) + JAMS Supplement

*Customer picks AAA or JAMS

Professor Stipanowich informed the Conference that five of the firms conditioned their participation in the pilot on SICA's changing the program guidelines in two respects (addressed below) and that five of the six firms exclusively and unexpectedly chose J•A•M•S/ENDISPUTE ("J•A•M•S") as the alternate provider.

Professor Stipanowich summarized his telephone conversation with Catherine Zinn, J•A•M•S' contact person for the program, and distributed Ms. Zinn's letter, dated July 14, 1999, which outlined J•A•M•S' proposal (Attachment C). Professor Stipanowich called attention to J•A•M•S' proposed Procedures for Securities Arbitrations, particularly the \$400 per hour arbitrator fees, and requested comments from the Conference.

The Conference agreed that additional information must be obtained from J•A•M•S before the pilot could go forward. Among other things, the Conference raised the following questions: 1) how do J•A•M•S' fees and costs compare to those of the AAA and the SROs, 2) are arbitrator rates negotiable, 3) what is the composition and geographical distribution of J•A•M•S' arbitrator roster, 4) how do J•A•M•S' proposed procedures compare to the AAA procedures, 5) how is "securities arbitrator" defined under the J•A•M•S procedures, 6) where are J•A•M•S' facilities located and what is the potential impact of hearing facility costs, including cancellation fees and arbitrator travel expenses, and 7) what is the proposed content and scheduling of arbitrator training?

Mr. Friedman will obtain an estimate of the costs to administer a benchmark case from J•A•M•S, the AAA and the NASD. Mr. Dubow and Ms. Plesser will talk to the SIA Arbitration Committee to determine the willingness of the firms to also include the AAA as an alternate forum. Professor Stipanowich and Mr. Clemente will set up a meeting with J•A•M•S to address the issues raised by the Conference and to learn more about the J•A•M•S proposal. Professor Stipanowich will send a letter to J•A•M•S in advance of the meeting outlining SICA's concerns.

Proposed Pilot Guidelines Amendments.

The firms proposed that:

- Section 3 of the guidelines clearly state that the program does not apply to commodity futures disputes, and
- Section 8(b) be amended to allow the firms 25 days, rather than 15 days, to advise the SRO if a claim qualifies for the pilot program.

The Conference agreed to specifically exclude commodity futures disputes under Section 3. With respect to the proposal to amend Section 8(b), Mr. Clemente informed the Conference that the firms mistakenly believed the time to answer the Statement of Claim did not begin to run until the claimant decided whether to proceed at the SRO or to move the case to a non-SRO forum. The Conference agreed that it was never SICA's intent to toll a firm's time to answer during the period when the firm is considering a case's eligibility under the pilot program. The Conference determined to adhere to its original intent, to retain the 15-day time frame for determining eligibility under the pilot, and to specifically state that there would be no tolling of respondent's time to answer during the period when the firm must determine if a claim qualifies for the pilot.

Finally, the Conference considered an amendment to Section 3 regarding cases that involve both a pilot participant respondent and a non-participant respondent (or cases that do not otherwise qualify under the pilot) where the parties may nevertheless agree to proceed at an alternate forum. The Conference agreed with Mr. Dubow's suggested amendment to Section 3 that would provide that if the parties agree to arbitrate an otherwise ineligible claim at an alternate forum, then the claim would count toward the participant firm's minimum case requirement.

Ms. Plesser volunteered to draft language to address the proposed amendments. The Conference tabled further discussion of the pilot program guidelines. **Class Action Rule**

After a brief break, Mr. Clemente presented a request from the National Employment Lawyers Association ("NELA") that the NASD and the NYSE clarify the applicability of the class action exclusion to representative actions brought under the FLSA (Tab 3). Mr. Friedman agreed to share with SICA a copy of its response to NELA. Mr. Clemente proposed an amendment to Uniform Code of Arbitration ("UCA") Section 1(d) to include representative actions under the class action exclusion. The Conference referred the proposal to the Class Action Subcommittee for review.

SICA as Advocate of Mediation

Mr. Eppenstein requested that the Conference address the SIA Arbitration Committee's suggestion that SICA actively endorse mediation and requested discussion about SICA's potential role in advocating mediation. He suggested that the SROs contact the parties by telephone shortly after the case is filed to promote mediation. Mr. Dubow spoke in favor of encouraging mediation early in the dispute, before an arbitration claim is filed. Professor Katsoris also supported SICA becoming involved in promoting mediation, suggesting that SICA consider reduced forum fees if mediation is attempted prior to filing a claim and that information on mediation be provided with the arbitration packet and prominently advocated on SRO web sites. Ms. Fienberg informed the conference that the NASDR is suggesting telephone mediation and conducting focus groups on mediation for attorneys. Mr. Clemente suggested that mediation be included in any revision of the *Arbitration Procedures Manual* and reported that the NYSE's mediation program, which is compulsory for members, has concluded 6 cases through mediation and achieved 6 settlements.

The Conference established a task force to consider SICA's involvement in advocating mediation. Messrs. Clemente, Dubow, Eppenstein, Katsoris, Stipanowich and Ken Andrichik, NASDR Director of Mediation and Neutral Management, will participate on the task force. Professor Stipanowich suggested that the task force interview mediators with good success rates to obtain information about successful mediation techniques. Mr. Eppenstein suggested that the task force consider the issues of tolling, mediation agreements, voluntary discovery, and confidentiality.

NASD and NYSE Arbitrator List Selection Method

Mr. Eppenstein requested that the NASDR and the NYSE report on their experience with list selection (Tab 5). Mr. Friedman stated that the NASDR is conducting informal focus groups with clients regarding their satisfaction with list selection, and that NASDR was planning to conduct a user survey on its Neutral List Selection System (NLSS) during the fourth quarter of 1999. Mr. Friedman stated that he would provide more meaningful data at the next meeting. Mr. Friedman stated that the NASDR is considering providing fewer names on the list, providing a chair qualified list and limiting strikes. He also stated that the NASDR is emphasizing the return of evaluations, has eliminated a number of arbitrators based upon evaluations and intends to review every arbitrator each year. Mr. Clemente stated that NYSE list selection is voluntary, that it has been offered in 390 cases and that 19% of parties respond affirmatively when offered list selection. Of those participating in list selection, 38% chose the SICA method, 52% chose the enhanced selection method, and 10% chose the AAA method. Mr. Clemente stated that the NYSE has received about a dozen evaluations of the procedures, which indicate that the SICA rule is cumbersome, too time consuming and too expensive.

NASD Amendment to Punitive Damages Rule Filing

Mr. Eppenstein requested that the Conference discuss the latest NASDR proposal regarding its pending punitive damages rule (Tab 6). Ms. Fienberg reported that the amendment is a clarification based upon discussions with the SEC concerning NASDR's proposals regarding pre-dispute arbitration agreements, eligibility and punitive damages. The punitive damages amendment will provide that a punitive damages cap is a matter of contract between a firm and its customers and that a firm may have a different cap, which may not be lower than that provided in the NASDR rule.

Arbitrator Classification

Professor Katsoris called attention to the fact that under the UCA an outside director of a local bank would qualify as a public arbitrator, even if the bank indirectly offered securities related services (such as securities transactions and custodial services) to its customers (Tab 7). **Plain English Translation of the UCA**

Mr. Clemente distributed the latest version of the Plain English Translation of the UCA and requested that the SROs review specific sections to identify ambiguities and clarifications (Tab 8). Substantive changes and proposals for reorganization will be considered after the translation has been reviewed for conformity with the intent of the original code. Mr. Clemente requested that comments and changes be submitted to him no later than October 1, 1999.

Verification of the Current Version of the UCA

Professor Katsoris requested that the Conference review the latest UCA to insure that all amendments since the Tenth Report are included. Ms. Fruechtenicht will verify the changes. **Unlicensed Practice of Law**

Mr. Friedman informed the Conference that the Florida Bar's Standing Committee on the Unlicensed Practice of Law referred to committee the issues involving an out-of-state attorney representing a party in arbitration (Tab 10). Mr. Friedman further informed the Conference that the NASDR is exploring adopting a practice rule that would require that compensated representatives of parties be attorneys admitted to practice in the United States or its territories.

California Legislation

Mr. Dubow updated SICA on the status of the pending California legislation concerning employment arbitration contracts (Tab 11). He stated that the bill prohibiting waivers of constitutional, statutory or common law rights in commercial contracts passed the Assembly on June 6th and is currently in committee at the Senate. A proposed amendment provides that the bill not apply to employees who are earning \$150,000 or more. **Update on Birbrower Legislation**

Mr. Clemente informed the Conference that the California Supreme Court adopted a rule giving the California Bar Association the power to discipline out-of-state attorneys for misconduct in California proceedings (Tab 12). **Scheduling of Future Meetings**

The next meeting will be held on October 21, 1999 in conjunction with the PIABA annual meeting at Marriott's Desert Springs Resort, Palm Desert, California.

The NASD will host the following meeting on January 18, 2000 at its Boca Raton office.

The following meeting will be held in conjunction with the SIA annual meeting on March 12 - 15, 2000, in Palm Desert, California.

New Business

Mr. Grady informed the Conference about an Eleventh Circuit case, Randolph v. Green Tree Financial Corp. et al. (1999 U.S. App. Lexis 13697), that found pre-dispute arbitration agreements in consumer contracts are unenforceable if the agreement does not allocate costs (Attachment D).

Non-SRO Pilot Program The Conference revisited the proposed amendments to the pilot program guidelines and agreed that Ms. Plesser's draft captures the sense of the Conference. Ms. Plesser and Mr. Dubow will discuss the guidelines with the SIA Arbitration Committee. The Conference passed a motion by Mr. Grady to refer the guidelines back to the subcommittee for further review. The subcommittee scheduled a conference call for the following week.

There being no further business, the Conference adjourned at 1:45 p.m.

/s/ Nancy Nielsen _____
Secretary