

Approved January 18, 2000

Minutes of the
October 21, 1999 Meeting of the
Securities Industry Conference on Arbitration
Hosted by NYSE
Palm Desert, 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
Nancy Nielsen, CBOE
Fredda Plessner, SIA *
Thomas J. Stipanowich, Public Member

Invitees Present

Cynthia Cain, NFA
Robert A. Love, SEC
Helene McGee, SEC*
Laura Pruitt, SEC*
Steve Sneeringer, SIA
George Sullivan, SIA

Public Members Emeritus Present

James E. Beckley
Constantine N. Katsoris

The Securities Industry Conference on Arbitration ("Conference" or "SICA") convened on October 21, 1999 at 8:50 a.m., Chair Beth Fruechtenicht presiding.

Minutes of the April 13, 1999 Meeting (Tab 1)

Ms. Fruechtenicht called for amendments to the draft of the minutes of the July 15, 1999 meeting. The Conference proposed typographical corrections. Upon motion duly made and seconded, the conference unanimously approved the minutes, as amended. (Attachment A)

* Via Conference Call

Appointment of SICA Chairperson and Secretary

The Conference expressed its appreciation for Ms. Fruechtenicht's commendable service as SICA Chair since 1998 and accepted her resignation from the position. Ms. Fruechtenicht thanked SICA and expressed her admiration for the Conference and its members.

The Conference discussed the neutral role of the chairperson, which essentially involves putting together the meeting agenda and chairing the meeting. The Conference nominated Professor Stipanowich for Chair for 2000 by acclamation. Noting that he is currently a member of the 120 person Board of the American Arbitration Association (AAA), Professor Stipanowich agreed that he would recuse himself in the event of a sensitive vote regarding the AAA. Upon motion duly made and seconded, the Conference elected Professor Stipanowich as Chair and Ms. Nielsen as Secretary for the upcoming year.

Non-SRO Pilot Program (Tab 3)

Professor Stipanowich discussed the presentation on the Non-SRO Pilot Program that the task force will give to PIABA in the afternoon. The presentation will include an outline of the program procedures and eligibility requirements by Professor Stipanowich, a discussion of JAMS' administrative procedures by Catherine Zinn, and a question and answer presentation about key issues the audience is like to raise by Mr. Beckley. The presentation will conclude with the distribution of a short questionnaire soliciting PIABA members' opinion of the pilot program.

Mr. Clemente distributed a revised press release and described the changes from the version in the agenda. The Conference adopted additional amendments. Mr. Clemente informed the Conference that the *Guidelines for the SICA Securities Arbitration Program*, contained in Tab 3 of the agenda, are unchanged.

Professor Katsoris discussed changes to the pilot program's *Arbitration Evaluation Form*, the confidentiality of the evaluation process, and the fact that the intent of the evaluation is to evaluate the arbitration process, not the arbitrators, per se. The Conference determined that SICA will request that the alternate fora provide quarterly reports regarding the number of cases pending under the pilot and that SICA will maintain a basic log of the number of pending cases.

The Conference revisited the issue of distributing a questionnaire to PIABA members. After consideration of the proposed questions, the Conference decided to solicit verbal input from PIABA members, rather than distribute a written questionnaire.

Arbitration and Mediation at the NFA

Mr. Eppenstein discussed his recent experience with arbitration before the National Futures Association (NFA) and the differences between NFA and securities SRO procedures. He suggested that an exchange of ideas and an open dialogue with the NFA could be beneficial. At Mr. Eppenstein's request, Ms. Cain, NFA's Director of Arbitration, addressed the Conference regarding NFA procedures and distributed NFA's educational materials for parties and arbitrators. Ms. Cain informed the Conference that the NFA administers approximately 200 cases per year and that the average claim is filed by a pro se customer and requests relief in the amount of \$10,000. Among other things, Ms. Cain noted the following with respect to NFA arbitrations:

- Customers do not sign pre-dispute arbitration agreements.
- The customer must consent to a counterclaim, if it is filed after the 45-day period to file an answer.
- Motions to dismiss for failing to state a claim may not be filed.
- A motion to dismiss on other grounds must be included in a timely answer or the motion will be rejected.
- Discovery is conducted according to a set timetable and is based upon a claim-specific document list.
- Late motions to compel are disallowed, except for good cause.
- A written certification attesting to the party's good faith attempt to resolve discovery problems must accompany a motion to compel.
- Staff appoints arbitrators and selects the hearing site.
- Only challenges for cause are allowed.
- NFA fully subsidizes mediation.
- Several in-house NFA attorneys serve as mediators, in addition to outside mediators.
- The parties must submit a hearing plan 30 days prior to the hearing.
- NFA educates arbitrators regarding both procedural and legal issues.

Removal of Arbitrator After Commencement of Hearing (Tab 4)

Mr. Friedman presented the NASDR's proposal to amend Section 11 of the UCA (NASDR Rules 10308(d)(2) and 10312(f)) to:

- Permit the Director of Arbitration to entertain for-cause challenges at any time in the arbitration process (as opposed to the current limitation on the Director's authority which extends only until the first pre-hearing or hearing);
- Require that the challenge be based on information not known to the parties when the arbitrator was selected;
- Require that the disclosed information raise "substantial doubt" about the arbitrator's ability to remain impartial; and
- Permit the Director to entertain challenges based on information received from the arbitrator or another source.

Mr. Beckley commented that the proposal would allow a party to use a threat of removal to influence the arbitration and could encourage abuse of the process. Mr. Dubow noted that the Director's action could be subject to appeal. Mr. Clemente commented that the SICA rule is vague and does not specifically state that the Director has no authority to remove an arbitrator after the commencement of the hearing. He also stated that the NYSE has been successful in persuading arbitrators to recuse themselves in appropriate cases. Professor Katsoris noted that arbitrators can grant a motion to recuse and questioned whether the proposal would limit the arbitrators' authority. Ms. Fienberg noted that the NASDR's proposal was not intended to cover hearing conduct.

Mr. Eppenstein commented that the courts will not overturn an award based on arbitrator comments and suggested that the proposal exclude comments as a basis for challenge. He further questioned the application of a higher standard after the hearing has commenced. Mr. Love indicated that SEC staff suggested that SICA consider the standard difference due to concerns about disrupting a hearing. Mr. Dubow noted that jurisdictions apply the "substantial doubt" standard differently (e.g., reasonable expectation of bias) and that arbitrator comments could meet the bias standard. Mr. Grady commented that challenging an arbitrator requires recusal because the challenge itself creates bias. Noting that the law on bias is difficult and cumbersome to administer, Mr. Grady remarked that the proposal could delay the arbitration process. Professor Stipanowich suggested that the Conference review the scope of administrator authority and the basis for removal, considering such things as passive v. active partiality, relationships, and conduct. Ms. Fienberg stated that the NASDR would further develop the proposal, including rule language, and resubmit the proposal to SICA at the next meeting.

PIABA Director, Seth Lipner

Service of Claims

At 11:30 a.m., Seth Lipner, a PIABA Director, joined the conference. Mr. Lipner presented the issue of serving "run-away Respondents", which is set forth in Mr. Beckley's letter of October 11, 1999. (Attachment B) Mr. Lipner noted that serving the claim to the last known address is not good service under New York law, unless the Respondent specifically designates the SRO as agent for service of process. Messrs. Lipner and Beckley suggested amending the UCA to allow for service by publication. Mr. Friedman stated that the NASDR is considering allowing the parties to serve the claim. Messrs. Clemente, Friedman and Lipner will develop a proposal for SICA's consideration.

Arbitration Fees

Mr. Lipner stated that increasing forum fees are chilling access to dispute resolution. He questioned the assessment of fees, such as adjournment fees, against the investor and suggested that the SROs 1) raise the threshold for simplified arbitration, and 2) grant investors with modest claims a single arbitrator option. Mr. Lipner also proposed that if a single arbitrator resolves the dispute, the arbitrator's authority to award damages could be limited (e.g., no authority to award punitive damages and a cap on compensatory damages).

The Conference agreed to consider modifying the small claim threshold, providing an option for the voluntary election of a single arbitrator, and assessing fees in adjournment. Ms. Fienberg suggested that the Conference consider having the arbitrators allocate certain fees, such as adjournment fees, at the time

the event occurs. She also noted that a NASDR proposal for a single arbitrator pilot is pending at the SEC.

Plain English Translation of UCA

Mr. Clemente reported that the plain English translation of the Uniform Code of Arbitration (UCA) is ready to proceed to the next stage, restructuring the UCA to more accurately follow the order of an arbitration proceeding. Mr. Clemente and Mses. Fruechtenicht and Nielsen will reorganize the translation and report back to SICA at the January meeting.

Proposed Revisions to the AAA/ABA Code of Ethics for Arbitrators (Tab 6)

Mr. Friedman presented the NASDR's letter commenting on the proposed revision to the *AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes*. He reported that the revision was approved in concept by the ABA and is now in committee.

Eligibility of FLSA Class Actions (Tab 7)

Mr. Friedman submitted the NASDR's interpretive letter in response to the National Employment Lawyers Association's inquiry regarding the eligibility of FLSA class actions for arbitration under SRO rules. The NASDR interpretive letter indicates that although the class action rule was designed to address investor class actions, the rationale for the rule would cover other types of class actions. Therefore, opt-in class actions under the FLSA would be considered ineligible for arbitration under NASDR Rule 10301(d). Mr. Grady will convene a meeting of the class action subcommittee to review the class action rule to determine if there are any open issues and if changes to the UCA are appropriate.

Operation of NASD Rule 10314(b)(5) -- Time to File Answers (Tab 8)

Mr. Grady requested information regarding the administration of NASDR's Rule 10314(b)(5), which extended the time to answer from 30 to 45 days, coupled with the intent to eliminate extensions except under extraordinary circumstances. Ms. Fienberg stated that fewer extensions were granted in the last year and that the NASDR is receiving fewer extension requests. The NASDR will review the number of extension in its arbitration database and report at the next meeting.

SRO Rules Regarding Exchange of Documents and Witness Lists (Tab 9)

Mr. Eppenstein requested that the Conference consider the rules governing discovery and the pre-hearing exchange of documents and witness lists. He indicates that respondents abuse the "cross examination or rebuttal" exception and indiscriminately assert the work product or privilege exception. Mr. Eppenstein proposes that the Conference eliminate the requirement that the parties exchange documents before the hearing and consider arbitrator training regarding use of the privilege.

Mr. Love noted that the attorney-client privilege is discussed in the NASDR discovery guide, but that the criteria for asserting the privilege are not defined. Professor Stipanowich suggested that SICA focus during the next year on guidelines on the application of privilege for training purposes and on discovery

issues. Mr. Eppenstein will redraft the issues regarding pre-hearing exchange and discovery and submit a proposal to SICA at a future meeting.

Compensated Non-Attorney Representatives (Tab 10)

Ms. Fienberg presented the NASDR's proposal to amend its rules to bar compensated non-attorney representatives from appearing on behalf of parties in securities arbitration and mediation proceedings. She requested that SICA consider a similar amendment to Section 15 of the UCA. Ms. Fienberg indicated that the NASDR would require a party represented by a non-attorney to sign a power of attorney, but that it does not plan to institute a verification process or inquire as to whether a non-attorney representative is compensated.

Mr. Sneeringer questioned whether the rule would create a basis for vacating an award and suggested that the proposal would require the industry to police compliance. Messrs. Grady and Stipanowich spoke in favor of amending the UCA, and agreed to work with Mr. Friedman to draft an amendment to Section 15.

Enforceability of Arbitration Agreements (Tab 11)

Mr. Grady informed the Conference about a recent Florida appellate court decision (*Powertel, Inc. v. Bexley*, 24 Fla. L. Weekly D2045 (1999)) that found an arbitration agreement unconscionable and unenforceable. The decision was based on findings that the agreement removed punitive damages as a remedy and insulated a corporation from liability under state consumer laws, among other things.

Scheduling of Future Meetings

The NASDR will host the next meeting on January 18, 2000 at its offices in Boca Raton, Florida.

The following meeting will be held in conjunction with the SIA Compliance and Legal Division's annual meeting on March 14, 2000 at the Marriott's Desert Springs Resort, Palm Desert, California.

New Business

Ms. Fienberg suggested that the agenda for future meetings be divided between action and information items.

There being no further business, the Conference adjourned at 1:30 p.m.

/s/ Nancy Nielsen _____
Secretary

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Attachments: Minutes of the April 13, 1999 Meeting, as approved
Mr. Beckley's letter of October 11, 1999