

**Approved October 16, 1997**

Meeting of the  
Securities Industry Conference on Arbitration  
10 July 1997  
at the  
Chicago Board Options Exchange

**MEMBERS PRESENT:**

James E. Beckley, Public Member  
Robert S. Clemente, NYSE  
Phil Cottone, NASDR  
Elliott R. Curzon, NASDR  
Paul Dubow, SIA  
Angelo Evangelou, CHX  
Linda D. Feinberg, NASDR  
Bill Floyd-Jones, AMEX  
Thomas R. Grady, Public Member  
John Katovich, PCX  
Daniel J. Liberty, CHX  
Rosemary MacGuinness, PCX  
Deborah Masucci, NASDR  
Joanne Moffic-Silver, CBOE  
Stephanie C. Mullins, CBOE  
Nancy Nielsen, CBOE  
Fredda Plessner, SIA  
Thomas J. Stipanowich, Public Member

**INVITED GUESTS:**

Paul Andrews, SEC (By telephone)  
Constantine N. Katsoris, Emeritus Public Member  
Robert Love, SEC  
Helene McGee, SEC (By telephone)

Mr. Beckley called the meeting to order at 9:45 a.m.

**Approval of Minutes of April 15, 1997 (Tab 1)**

Upon motion duly made and seconded, the minutes of the April 15, 1997 meeting (Tab 1) were approved without discussion. (Attachment 1)

**Uniform Arbitration Act Drafting Committee (Tab 2)**

Mr. Stipanowich, who is Academic Advisor to the Drafting Committee of the National Conference of Commissioners on Uniform State Laws ("NCCUSL Drafting Committee"), reported on the potential revisions to the Uniform Arbitration Act ("UAA") and the process involved (Tab 2). Major issues under consideration include interlocutory review of arbitral pre-award orders, the standards for review/vacatur, and arbitral immunity. He stated that revising the UAA, which has been adopted in pertinent part by most states (exceptions include New York and California), is a precursor to revising the Federal Arbitration Act. Mr. Stipanowich advised that the NCCUSL Drafting Committee relies upon outside information for advisory purposes and is willing to have SICA represented at its meetings. He requested that SICA appoint representatives to attend future meetings of the Committee. Meetings are expected to extend over a two-year period.

A motion was made and seconded to appoint Messrs. Grady and Dubow as SICA representatives to the NCCUSL Drafting Committee. Ms. Masucci suggested that the team of SICA representatives include an SRO member. Upon further discussion, the motion was amended to include a rotating SRO member on the SICA team. The Conference unanimously passed the motion, as amended. SRO members agreed to pay Mr. Grady's expenses for attending NCCUSL Drafting Committee meetings.

### **Proposed List Selection Rules – UCA §8, 9, 10 and 12 (Tab 3)**

Mr. Clemente summarized the plain English version of the list selection proposal, which, in substance, is the proposal considered at the April SICA meeting. The Plain English version, included in Tab 3 of the Agenda, incorporates certain comments from the public members and from Mr. Dubow's letter of June 16, 1997 (Attachment 2). Mr. Clemente also discussed changes considered by the SRO representatives just prior to the commencement of the SICA meeting. As revised, the proposal amends Sections 8, 9, 10 and 12 of the Uniform Code to provide, among other things:

- the parties may agree to select arbitrators from outside of the SRO's pool,
- the parties may agree upon a panel Chairperson,
- list(s) of potential arbitrators will be provided to the parties within 30 days of receipt of the Answer to an initial claim or to a third-party claim,
- the parties will have 20 calendar days to return the list(s),
- the Director will appoint arbitrators after the list(s) is exhausted, and
- the parties may reserve strikes for use on appointed arbitrators.

(Section 11, Disclosures Required by Arbitrators, of the Uniform Code will be considered and redrafted in Plain English at another time.) As previously agreed by the Conference, the list selection proposal does not address the method of generating arbitrator lists or the number of names to be included on the lists. Each SRO, according to its needs and resources, will include objective selection criteria in its 19(b)(4) filing. Mr. Clemente indicated that the NYSE will utilize an electronic, random selection process.

A motion was made and seconded to adopt, in principle, the proposed amendments to Sections 8, 9, 10 and 12. Ms. MacGuinness noted that the SROs may have additional language refinements. Mr. Dubow questioned the use of the third person rather than second person. After discussion, it is agreed by all present to change the proposal to third person.

Mr. Love called attention to the inclusion of "registered investment advisor" under the definition of "securities industry arbitrators" (Section 8(c)(1)), noting that currently the SROs are not uniform on this issue. He also noted that Sections 8 (c)(3) and (4) change the balance between industry and public arbitrators by including "spent a *substantial* part of their career" in the industry as a criteria and by imposing a 20 percent criteria upon an arbitrator's firm, respectively. Mr. Grady spoke in favor of retaining the requirement that an individual be classified as an industry arbitrator if his/her firm devoted 20 percent or more of its time to industry clients. Ms. Masucci noted that a party could exercise a challenge for cause on the basis of the client composition of an arbitrator's firm. The Conference agreed to retain the provision regarding a substantial part of an arbitrator's business career and to eliminate the 20 percent firm business criteria. It was further agreed to limit the criterion in the definition of public arbitrators (Section 8(d)) to exclude individuals "employed in *securities activities* by a bank or other financial institution."

After additional discussion and clarifying amendments to the proposal, motions were made and seconded to approve, in principle, the proposed changes to Sections 8, 9, 10, and 12, as amended. SICA unanimously voted to approve. Mr. Clemente will circulate a redraft of the proposal after the SICA meeting.

Professor Katsoris informed the Conference that two Fordham Law School students and a former law review student (who is now an associate at Skadden) are working on redrafting the entire Code in Plain English. Professor Katsoris will present the redraft to SICA upon completion.

### **Proposed Discovery Rules**

Upon motion duly made and seconded, SICA voted to table consideration of discovery issues.

Ms. Masucci distributed the NASDR proposal (included in the April SICA Agenda) and advised the conference that the NASDR is revising its proposal and considering revisions to the *Arbitration Procedures Manual*. She requested that the Drafting Committee meet via telephone conference prior to the next SICA meeting to discuss discovery. Ms. Masucci and Messrs. Dubow, Clemente and Grady, among others, will participate in a conference call on Monday July 14, 1997 at 4:00 EST (3:00 CST) to discuss the NASDR proposal.

### **NASDR Rule Filings (Tab 5)**

Ms. Feinberg informed the Conference on the status of certain NASDR rule filings, as follows:

- Eligibility and punitive damages proposals have been filed, but have not been published in the *Federal Register*. The NASDR is considering amplification of the pre-dispute arbitration agreement rule prior to the SEC's approval of these rule filings.
- The member surcharge increase was filed and became effective July 1, 1997.
- The proposal to increase forum fees was filed, but has not been published.
- The NASDR filed for a 5-year sunset provision for its large and complex case rules. The proposal makes the administrative conference voluntary.
- A notice to members is to be published on the injunctive relief rule soliciting members' comments. The NASD is seeking permanency by the end of the year.

- The NASDR is considering proposals to amend Form U-4 to carve out statutory employment discrimination claims from the requirement to arbitrate.

Mr. Hoyd-Jones raised concerns about the consequences for the other SROs if NASDR forum fees are increased. He questioned whether other SROs can expect accelerated effectiveness of fee increases if the NASDR filings is approved. Mr. Katovich stated that the other SROs will need to raise fees to avoid a huge caseload increase which could adversely affect the administration of public customers cases. Ms. Masucci commented that the punitive damages filing, if approved, also could affect the caseload at other SROs. Mr. Love commented that fees should be reasonably related to expenses. He stated that the SEC will think carefully before approving the NASDR proposal. Mr. Love agreed to participate in a conference call with the other SROs to discuss the SEC's expectations and requirements for approving fee increases at other SROs.

Ms. Feinberg informed SICA that the NASDR has agreed to administer MSRB arbitration cases.

### **California Senate Bill 19 – Vacation of an Arbitration Award (Tab 6)**

Mr. Dubow reported that California Senate Bill 19 would provide for the vacatur of an arbitration award at the behest of a "consumer" if the award is the result of a legal error by the arbitrator that has resulted in a miscarriage of justice. It was Mr. Dubow's opinion that Governor Wilson will probably veto the bill.

### **Default Judgment Proposal**

Ms. Nielsen assumed the chair. Mr. Beckley moved that SICA adopt an amendment to Section 13 of the Uniform Code (Attachment 3) to allow a claimant to move for default before the panel of arbitrators if a respondent fails to file a timely answer. Mr. Beckley stated that the proposal provides discretion to the panel, but gives claimants an opportunity to obtain a default judgment. Mr. Dubow commented that a plaintiff's attorney may file a motion for the arbitrator to preclude an answer under the current rules. Ms. Masucci commented that currently a panel will require the claimant to put on its prima facie case prior to deciding such motion. Ms. Masucci further noted that unlike in court, there is no vehicle for setting aside a default judgment in arbitration. The motion to amend Section 13 failed for lack of a second.

### **Non-lawyer Representation (Tab 7)**

Ms. Masucci discussed the Florida Supreme Court Advisory Opinion, issued July 3, 1997, which enjoins non-lawyers from representing investors in securities arbitration proceedings for compensation. The NASDR is seeking ethics counsel to determine the obligation, if any, of NASD staff attorneys to report non-lawyer representatives pursuant to the injunction. Ms. Masucci stated that the NASDR currently accepts every claim, regardless of whether there is a non-lawyer representative, with the caveat that non-lawyer representation may not be acceptable. Mr. Clemente stated that the NYSE requires the parties to sign a power of attorney and the NYSE has had no problems.

### **New Business**

Mr. Curzon distributed a memorandum proposing to amended Section 28 of the Uniform Code (NASD Rule 10330(c)) regarding the service of awards. (Attachment 4) The amendment would provide for service by a method "that is reasonably expected to cause the award to be delivered to all parties on the same day." Ms Masucci brought a motion for SICA to adopt the amendment to Section 28. In order to allow SICA members to consider the proposal, the motion was withdrawn and will be presented at the next SICA meeting.

Ms. MacGuinness presented a California Supreme Court case, Nida Engalla et al. v. Kaiser Permanente Medical Group, Inc. et al., 97 C.D.O.S. 5206, involving a motion to compel arbitration by an HMO medical group that administers its own arbitration forum. (Attachment 5) The issues concern the control of the group over the arbitration process. The case was remanded to trial court to determine whether the group fraudulently induced entrance into the arbitration agreement by misrepresenting the speed of its program and whether the group, by delay or other acts or omissions, waived its right to compel arbitration.

The next meeting will be hosted by Mr. Beckley on October 16, 1997 at 8:00 a.m. at the Hyatt Regency Gainey Ranch, Scottsdale, Arizona. The following meeting will be hosted by the Pacific Exchange in San Francisco on February 6, 1997.

F:/arb/sica/Minutes 970710