

**Approved March 14, 2000**

Minutes of the  
January 18, 2000 Meeting of the  
Securities Industry Conference on Arbitration  
Hosted by NASDR  
Boca Raton, Florida

Members Present

James E. Buck, NYSE  
Robert S. Clemente, NYSE  
Paul Dubow, SIA  
Theodore Eppenstein, Public Member  
Linda D. Fienberg, NASDR  
George H. Friedman, NASDR  
Thomas R. Grady, Public Member  
Nancy Nielsen, CBOE  
Wendy J. Phillippay, PCX  
Fredda Plessner, SIA \*  
Rose Schindler, NASDR  
Thomas J. Stipanowich, Public Member

Invitees Present

Mary Ann Gadziala, SEC\*  
India Johnson, AAA  
Robert A. Love, SEC  
Helene McGee, SEC\*  
Steve Sneeringer, SIA  
Beth Wiener, JAMS  
Catherine Zinn, JAMS

Public Members Emeritus Present

Constantine N. Katsoris\*

The Securities Industry Conference on Arbitration ("Conference" or "SICA") convened on January 18, 2000 at 9:00 a.m., Professor Thomas Stipanowich presiding.

**Introduction of New Members; Review of Updated Membership Roster**

Mr. Clemente asked Conference members and invitees to review the updated membership roster for accuracy and to submit any changes to him. (Tab 1)

\* Via Conference Call

The Conference welcomed Wendy Phillippy, the Director of Arbitration at the Pacific Exchange, and invitees India Johnson (AAA), Beth Wiener (JAMS) and Catherine Zinn (JAMS).

The Conference observed a moment of silence in honor of James Beckley, Public Member Emeritus, who died in December 1999. Professor Stipanowich spoke of Mr. Beckley's great intellect, devastating wit and sincere efforts on behalf of SICA. A memorial service will be held at 3:00 p.m. on February 26, 2000, at the Quigley Preparatory Seminary, 103 East Chestnut Street, Chicago, IL.

Mr. Clemente and Ms. Plesser spoke in honor of Bill Fitzpatrick, a founding member of SICA, who died in November 1999. They recalled Mr. Fitzpatrick's humor, integrity and strong support for the arbitration process. Mr. Clemente informed the Conference of an upcoming tribute to both former SICA members by Professor Katsoris that will appear in the *Securities Arbitration Commentator*.

### **Minutes of the October 21, 1999 Meeting (Tab 2)**

Professor Stipanowich distributed a revised draft of the minutes of the October 21, 1999 meeting and called for amendments. The Conference proposed corrections. Upon motion duly made and seconded, the conference unanimously approved the minutes, as amended. (Attachment A)

### **Non-SRO Pilot Program (Tab 3)**

Mr. Clemente distributed and described a draft fact sheet, which is designed to be the first document about the pilot received by customers. In the interest of uniformity, it was the sense of the Conference that the SROs, firms and alternate providers should distribute a single, straightforward fact sheet. Conference members proposed changes to the document, which Mr. Clemente will incorporate and redistribute.

Mr. Friedman informed the Conference that he received an email from Robin Ringo, on behalf of PIABA, indicating that PIABA should not be included in the pilot program press release and that PIABA would consider issuing a separate release. Professor Stipanowich described recent conversations with Ms. Ringo and Joe Long, incoming PIABA president, in which he asked PIABA to act as an avenue for information about the pilot. Mr. Long indicated that the PIABA Board would consider whether to disseminate information about the pilot and whether to include hyperlinks to the alternate providers on PIABA's website at its next meeting in early March.

Ms. Zinn informed SICA that JAMS is prepared to proceed with the pilot. Ms. Zinn indicated that the fact sheet developed by SICA is acceptable to JAMS and will replace the Media Fact Sheet contained in the Agenda. Ms. Zinn also informed the Conference that the "Frequently Asked Questions" (FAQ) document, also contained in the Agenda, will be revised to incorporate Conference comments, will be used internally by JAMS' staff, and will be re-circulated to SICA members. Ms. Zinn indicated that JAMS' roster currently includes a sufficient number of experienced arbitrators to facilitate the pilot program and that additional arbitrators would be trained by February 2000. Training content will include an overview of conflict management, an outline of securities disputes, and highlights of the pilot program guidelines. Ms. Zinn further indicated that JAMS has contacted PIABA and the SIA to participate in training.

The Conference considered the content of the Submission Agreement, including whether to include the hearing location and number of arbitrators in the agreement. It was the sense of the Conference that Submission Agreement should be simple, with as few issues as possible. The Conference agreed to add "Pilot Program" to the agreement header, to delete the designation for the number of arbitrators, and not to include the choice of hearing site in the agreement.

Ms. Johnson indicated that since the AAA currently administers securities cases, the AAA has not contemplated a separate fact sheet or FAQ and will use the Submission Agreement as amended by the conference. The AAA will communicate with its securities arbitrator roster and distribute the guidelines to the arbitrators.

Messrs. Dubow and Eppenstein discussed the value of the 1993 AAA securities arbitrator training, in which they both participated as trainers. The training included vignettes on topics and issues that could arise during an arbitration, with discussion by both claimants' and respondents' representatives. Ms. Johnson will see if materials from the training are available.

Mr. Clemente distributed a revised Fact Sheet and requested final comments by Friday, January 21, 2000.

The pilot will launch on Monday, January 24, 2000. SICA, JAMS and AAA will coordinate press releases. The AAA will fax its press release to SICA participants prior to release. JAMS will circulate a revised press release. The NASD, NYSE, AAA and JAMS will place the Guidelines and SICA Fact Sheet on their web pages. The SROs will include the Fact Sheet and the Pilot Guidelines in the arbitration materials provided in response to inquiries about arbitration.

#### **Committee on Compensated Non-Attorney Representatives (Tab 4)**

Mr. Friedman presented the Committee on Compensated Non-Attorney Representatives' (Compensated NARs) proposal to amend Section 15 of the UCA to bar Compensated NARS from appearing on behalf of parties, except under certain circumstances (e.g., an officer of a corporation). (Tab 4) The proposed amendment would leave issues regarding qualifications to the court or other appropriate regulatory body and does not contemplate requiring the SROs to police compliance.

Mr. Dubow suggested that the proposed bar should not apply to simplified arbitrations to accommodate firms that employ paralegals, who are not officers, to represent the firm in small claims. In the alternative, Mr. Dubow proposed that the exception for an "officer" in paragraph (a)(2) be changed to "employee." Mr. Grady objected to the exception for small claims and the exception for officers based on Florida law under which both exceptions would be deemed the unauthorized practice of law. Upon further consideration, the Conference failed to adopt the motion to amend the specified exceptions to the bar against representation by a Compensated NARs.

Mr. Dubow also proposed to amend paragraph (c) to allow the arbitrators to adjourn the hearing if the parties state an intention to seek an injunction. Mr. Grady proposed adding the language "unless otherwise directed by the arbitrators" to the last sentence of paragraph (c) to give the arbitrators the discretion to stay the proceeding. The Conference agreed to the amendment to paragraph (c) as proposed.

Questioning the meaning of "bona fide" preceding "officer" in paragraph (a)(2), Mr. Sneeringer introduced an amendment to strike "bona fide." Upon consideration, the Conference failed to adopt Mr. Sneeringer's proposed amendment.

Messrs. Buck and Katsoris objected to SICA's adopting the proposed amendments to Section 15, stating that adopting the prohibition against Compensated NARs is not worth the risk of reviving previous problems. Both supported continuing to leave legislating against the unauthorized practice of law to the states. Mr. Friedman encouraged SICA to adopt the proposal and to enlist the support of previous opponents, such as AARP.

Upon a motion duly made and seconded, SICA failed to approve the proposed amendment to Section 15, as modified. (4 in favor, 4 opposed)

### **Committee on Class Actions**

Mr. Grady distributed a memorandum outlining issues that may be appropriate for rulemaking consideration by the Subcommittee on Class Actions and asked Conference members to review and supplement the identified topics prior to the next meeting. (Attachment B) He suggested that SICA consider whether or not it wants to tackle class action issues. Professor Katsoris recommended that the Subcommittee consider the interplay between the eligibility and class action rules. Noting recent experience with class action defenses, Mr. Eppenstein supported reviewing the class action rule. Messrs. Dubow and Sneeringer indicated that the defense bar has no problems with the current class action rule and suggested that few cases actually involve spurious class action defenses. After further consideration, it was the sense of the Conference that the Committee should continue to collect information on class action issues, particularly from practitioners, and report on its findings at the next meeting.

### **Proposed Amendment to Uniform Code – Disclosures Required by Arbitrators (Tab 6)**

Mr. Friedman presented a proposed amendment to Section 11 of the UCA to permit the Director of Arbitration to remove an arbitrator at any time during the arbitration process. (Tab 6) Messrs. Dubow and Eppenstein raised concerns about delays and misuse of authority. With respect to the arbitrators' required disclosures, Mr. Dubow raised concerns about family and associate relationships, and suggested that such disclosures should be limited to known relationships. Mr. Love reminded the Conference that the Director's authority to remove an arbitrator was originally limited due to concerns about perception and the industry's affiliation with the fora. Ms. Fienberg indicated that it was important for the Director to have the authority to intervene when the parties disagree about whether an arbitrator should step down. Ms. Johnson stated that the arbitrators keeping arms length from the case was key to the integrity of the process and that the fora needed to have the authority to make gray area decisions. Commenting that it was better to have the authority and not need it, Mr. Friedman indicated that he recalls removing an arbitrator who did not step down perhaps 10 times during his 6 ½-year tenure as Vice President for Case Administration at the AAA. Professor Stipanowich reminded the Conference of issues raised at the previous meeting about the standard for removal, such as passive v. active partiality. Mr. Friedman indicated that criteria for "substantial doubt" are difficult to administer and to draft. Mr. Dubow questioned whether the Director would be permitted to delegate the authority to remove an arbitrator.

The Conference agree to adopt the proposal in concept, but deferred adopting a formal amendment until the details (i.e., "delegability" of authority and known or should have known disclosures) are addressed. Mses. Plesser and Fienberg and Mr. Friedman will circulate a revised draft of the amendment to Section 11 before the next SICA meeting.

### **Plain English Translation of Uniform Code (Tab 7)**

Mr. Clemente discussed the reorganization of the Plain English Translation of the Uniform Code to conform to the order of the arbitration proceeding and distributed a revised version of the 3-column translation. (Tab 7) Mr. Dubow distributed a memorandum setting forth suggested amendments. (Attachment C) The Conference thanked Mses. Fruechtenicht and Nielsen for their efforts to reorganize the code. Mr. Clemente requested comments on the reorganization and on Mr. Dubow's suggestions. Mr. Buck encouraged the Conference to complete and adopt the Plain English Translation.

### **SICA Publications (Tab 8)**

Mr. Friedman presented a status report on revisions to the *Arbitrators Manual* and the *Arbitration Procedures* booklet, noting that the proposed amendments are intended to highlight areas where SROs rules and procedures differ from the UCA and each other. Messrs. Friedman and Clemente will continue working on the revisions. Messrs. Eppenstein and Dubow will review the booklets and suggest revisions from the perspective of the industry and plaintiff's bar, respectively. It was agreed that the publications would be based on the UCA and highlight sections where the rules of the SROs may differ. The SROs will review the booklets to identify forum differences.

### **SICA Report 2000**

It was the sense of the Conference that SICA should defer issuing a report until 2001.

### **SICA Statistics (SRO Case Numbers)**

Mr. Clemente reminded the SROs to submit case statistics to him. He informed the Conference that he circulates the compiled statistics upon request. The Conference expressed agreement with Ms. Fienberg's suggestion that mediation statistics be added to the data, upon the development of standardized categories. Mr. Buck noted that the categories for arbitration statistics were developed as a result of a compromise with the SEC. Mr. Love will inform the Conference whether the SEC is interested in changing the data or adding categories. Mr. Clemente will revise "Arbitration Cases Handled by Self-Regulatory Organizations" to include an explanation to the categories. (Tab 10)

### **Proposal for Symposium on Internet Trading (Tab 11)**

Mr. Clemente presented a proposal that SICA sponsor a symposium to explore issues that may arise regarding on-line trading and to explore what steps need to be taken to insure that the securities arbitration and mediation programs are prepared to administer disputes arising from on-line trading. (Tab 11) Similar to the 1994 NYSE Symposium on Arbitration, the program could be recorded, transcribed and potentially published. The Conference considered the proposed symposium agenda and raised concerns regarding the overlap with regulatory issues, among other things. Conference members indicated a need to consult

with their constituencies prior to supporting SICA's sponsorship of the symposium. The Conference supported the concept in general, provided that the symposium focused on arbitrator training, and agreed to reconsider the proposal at a later meeting. Mr. Clemente requested that SICA members forward any suggestions regarding the proposal to him.

### **Exclusion of Expert Witnesses from Hearings (Tab 12)**

Based upon the NASDR's response to his request, Professor Katsoris withdrew his request that SICA consider arbitrator training regarding the exclusion of expert witnesses from hearings. (Tab 12)

### **Public Comments by SICA Members**

Ms. Plesser asked about SICA's policy and guidelines about communicating with the press. It was the sense of the Conference that:

- Deliberations should not be discussed.
- If a matter is voted on and approved, then SICA members may confirm the vote.
- Pending issues should not be discussed.
- If speaking on an approved matter, members should make clear that they are not speaking on behalf of SICA.

Ms. Nielsen will review SICA minutes for any previous press policy.

### **Status Items from Prior Meetings**

#### Service on Respondents

Mr. Friedman reported that the NASDR is currently considering service options.

#### Extensions of Time to Answer

Mr. Friedman distributed the following information regarding extensions granted in non-paper cases during 1999. This information was provided in response to a point raised by Mr. Grady at the last meeting.

Consensual Extensions	1,369
Non-Consensual Extensions Granted	4
Non-Consensual Extensions Denied	2

Based upon the NASDR's response to his request, Mr. Grady withdrew his request that SICA undertake a review of NASDR's issuance of non-consensual extensions.

### **PIABA President's Committee on the Future of Arbitration**

Professor Stipanowich informed the Conference about the PIABA President's Committee on the Future of Arbitration. This committee includes non-PIABA members and is actively considering reform issues. He recommended the group as a good contact for SICA.

The Conference considered what to communicate to the PIABA Board regarding the pilot program and agreed to forward the pilot documents, together with a renewed request that PIABA publicize the pilot and place hyperlinks to the alternate providers on its website. SICA further determined to renew its request that PIABA withdraw its SEC Rule 19(c) rulemaking petition, and that, if PIABA does not actively support the pilot, to request that the Board agree not to make negative remarks about the program.

### **New Business**

No new business was introduced.

### **Information Items**

Ms. Fienberg informed the Conference that the SEC extended the comment period for SR-NASD-98-74, which amends the rule governing the use of pre-dispute arbitration agreements in relation to the eligibility rule amendments.

### **Future Meetings**

The next meeting will be held on March 14, 2000 in conjunction with the SIA Compliance and Legal Division's annual meeting at the Marriott's Desert Springs Resort, Palm Desert, California. The SICA meeting will start after SEC Chairman Levitt's address to the SIA. SIA representatives will join the Conference at approximately 10 a.m.

The SIA will host the summer meeting in San Francisco on August 1, 2000.  
There being no further business, the Conference adjourned at 3:15 p.m.

/s/ Nancy Nielsen \_\_\_\_\_  
Secretary

- Attachments:
- A. Approved Minutes of the October 21, 1999 meeting
  - B. Mr. Grady's memo re: Subcommittee on Class Actions
  - C. Mr. Dubow's memo re plain English translation