

Approved January 19, 2001

Minutes of the  
October 11, 2000 Meeting of the  
Securities Industry Conference on Arbitration  
Hosted by New York Stock Exchange, Inc.  
San Antonio, Texas

Members Present

Amal Aly, SIA  
Robert S. Clemente, NYSE  
Paul Dubow, SIA\*  
Theodore G. Eppenstein, Public Member  
Angelo Evangelou, CBOE  
Linda D. Fienberg, NASD Dispute Resolution  
George H. Friedman, NASD Dispute Resolution  
Thomas R. Grady, Public Member  
Wendy J. Phillippay, PCX\*  
Thomas J. Stipanowich, Public Member

Invitees Present

Mary Ann Gadziala, SEC\*  
India Johnson, AAA  
Constantine Katsoris, Public Member Emeritus\*  
Robert A. Love, SEC  
Helene McGee, SEC\*  
Jane Patterson-Auld, SEC\*  
Stephen G. Sneeringer, SIA

The Securities Industry Conference on Arbitration ("Conference" or "SICA") convened on October 11, 2000 at 8:30 a.m., Professor Stipanowich presiding.

**Approval of Minutes (Tab 1)**

Upon a motion duly made and seconded, the Conference unanimously approved the revised March 14, 2000 and the August 1, 2000 meeting minutes. (Attachment A)

**Fitzpatrick/Beckley Workshop on the Betterment of Securities Arbitration (Tab 2)**

Professor Stipanowich reported that a second workshop session has been scheduled for November 17, 2000 at Fordham Law School and that "civility principles" would be a major discussion item. Professor Katsoris suggested that a civility provision be crafted and incorporated into the Uniform Code of Arbitration ("UCA") as well as adopted by SROs. The Conference discussed the appropriateness of including such a provision in the UCA and SRO rules. The Conference members agreed on the value of

the workshop in strengthening the lines of communication between the groups involved in securities arbitration and determined to establish a planning group consisting of Mr. Andrichik (NASD-DR), Mr. Clemente, Ms. Aly, and Professor Stipanowich to review what was discussed and accomplished at the previous Fitzpatrick/Beckley Workshop and to make preparations for the November 17, 2000 session.

### **SICA Publications (Tab 3)**

Mr. Clemente and Mr. Friedman informed the Conference about the status of the updates to the *Arbitrator's Manual* and the *Arbitration Procedures* pamphlets. The updates are meant to ensure that these documents are consistent with the latest changes to the UCA. The Conference determined to require that all comments on the proposed updates be submitted by November 10, 2000 and to schedule a conference call to finalize the updates on November 21, 2000. Mr. Love suggested that it would be helpful for the exchanges to add language to the documents identifying instances where an exchange's rules deviate from what is described in the document (e.g. the use of list selection). The Conference endorsed inserting such language.

### **Plain English Translation of the UCA (Tab 4)**

Mr. Clemente informed the Conference that the Plain English Drafting Committee's last meeting was very productive and that the Committee would meet later in the day to complete this effort.

### **SICA Pilot (Tab 5)**

The Conference discussed the use of the SICA Pilot at the various SROs, including participation statistics. It was determined that interest in the Pilot to date has been negligible. Mr. Friedman informed the Conference that an inquiry form has been drafted to solicit feedback from parties regarding their decision to reject the Pilot.

### **Expungement of CRD Records (Tab 6)**

Ms. Phillippay inquired how other SROs handle the issue of stipulated awards that contain expungement provisions. Ms. Fienberg mentioned a situation at NASD Dispute Resolution where a member lost an arbitration case but nevertheless obtained a settlement agreeing to an expungement, and that NASD Dispute Resolution subsequently requested that a court overturn confirmation of that settlement.

### **Uniform Submission Agreement (Tab 7)**

The Conference continued its discussion from its August 1, 2000 meeting regarding the use of the Uniform Submission Agreement ("USA") by SROs and its impact on arbitration cases including, among other things, whether it modifies the terms of a pre-dispute arbitration agreement and whether a claim is considered filed if submitted without the USA. Mr. Clemente informed the Conference that past SICA minutes were not insightful with respect to the issues raised at the August 1<sup>st</sup> meeting. Mr. Friedman summarized NASD Dispute Resolution's September 19, 2000 memorandum in opposition to proposals to eliminate the USA concluding that the USA has been more helpful than hurtful to investors and the arbitration process. The Conference determined to discuss this issue later in the meeting with the PIABA representatives.

### **Subpoena Service (Tab 8)**

The next Subpoena Service sub-Committee meeting was scheduled for December 14, 2000 at 10:00 a.m. at the NYSE. The sub-committee consists of Tom Grady, Paul Dubow, Robert Clemente and Rose Schindler (NASD Dispute Resolution).

### **Status - NASD Rule Amendments (Tab 9)**

The Conference was advised that the NASD's rule filing regarding a director's authority to remove arbitrators was published in the *Federal Register*.

### **NYSE Pilot Rules (Tab 10)**

The Conference was advised that the NYSE has adopted a voluntary arbitrator selection process which was previously informally used by the NYSE. Additionally, the NYSE has filed rule changes regarding its pilot programs for mediation and administrative conferences.

### **Arthur Levitt Lecture (Tab 11)**

Professor Katsoris provided an overview of the A.A. Sommer Lecture Series sponsored by Fordham University School of Law and noted that SEC Chairman Arthur Levitt would be the featured speaker at the November 3, 2000 lecture. SICA members were invited to attend.

### **Informational Items (Tab 12)**

The Conference was referred to certain informational items in Tab 12.

### **New Business**

Mr. Friedman suggested that SICA undertake maintaining meeting minutes in an accessible computerized format. It was suggested that Mr. Friedman and SICA Secretary Nancy Nielsen work towards "digitizing" the minutes.

### **Future Meeting Schedule**

The next regular meeting will be held on January 19, 2001 and will be hosted by NASD Dispute Resolution at its office in Boca Raton, Florida.

The spring meeting will be held in conjunction with the SIA Conference in Orlando, Florida on March 19, 2001. The SIA Arbitration Committee will be invited to join SICA for part of the meeting.

The summer meeting is tentatively scheduled for June 19, 2001 in hot and muggy Washington, D.C.

## **Joint Meeting between SICA and PIABA Representatives**

SICA welcomed the following PIABA representatives:

Mark Maddox  
Phil Adekoff  
Tracy Stoneman  
Rosemary Shockman  
Alan Fedor  
Scott Bernstein  
Pat Sadler

### Uniform Submission Agreement

The Conference resumed its previous discussion on the USA and solicited opinions from the PIABA representatives. Feedback on the use of the USA included:

- Concerns that respondents have used refusal to sign USAs as basis for refusal to arbitrate.
- Absent a pre-dispute arbitration agreement, judges don't always realize SRO members are compelled to arbitrate.
- A suggestion that SROs seek rule changes providing that if a respondent does not execute the USA within a certain time period, the claimant can proceed in court.
- Cases are sometimes delayed because the USA is not timely filed.
- Concern over the statement in the USA that says the customer has read the rules of the SRO.

The PIABA representatives indicated PIABA would formulate an opinion on the use of the USA and provide it to SICA before the end of November.

### Arbitrator Classification

Ms. Shockman informed the Conference that PIABA is in the process of assembling data on the issue of arbitrator classifications. PIABA is calling on its members to provide examples of concerns with arbitrator classifications. Ms. Shockman indicated that investment advisers being classified as public arbitrators was an example of PIABA's concerns in this area. Mr. Maddox further indicated that industry persons who leave the industry are considered non-industry arbitrators after a certain period of time, and that PIABA found that problematic. PIABA will provide its feedback to SICA before the end of November.

### Containing Arbitration Costs

PIABA representatives expressed concern over the costs associated with arbitration cases. Ms. Fienberg mentioned that NASD Dispute Resolution raised fees for customers only once in last five years and that there were no plans to increase fees in near future. PIABA's concerns with respect to arbitration costs include:

- Costs of mandatory (NASD Dispute Resolution) pre-hearing conferences.
- In cases that settle early in the process, refunds are nominal because of the pre-hearing conference.

- Arbitration panels are increasingly splitting costs, even in situations where there are discovery disputes that were the result of respondent intransigence.

### Arbitrator Training

Mr. Fedor noted that arbitrator training materials are better now than in the past, but expressed concern that there is no “watchdog” over the training material preparation process. Ms. Fienberg informed the Conference that PIABA and SIA members review NASD Dispute Resolution materials, and that if PIABA has specific instances where it believes a trainer acted inappropriately, NASD Dispute Resolution should be informed. Ms. Fienberg also encouraged PIABA members to state any complaints they have regarding an arbitrator in evaluation forms that are provided to parties.

Mr. Friedman informed the Conference that in response to questions by Seth Lipner, NASD Dispute Resolution is attempting to determine if there is a pattern of arbitrators swapping out arbitration dates for mediation, which involves higher rates.

Mr. Friedman asked the PIABA leadership to encourage members to complete the survey forms submitted to participants of the SRO fora. This is a valuable tool for evaluating and training arbitrators.

### Mediation

Some PIABA members raised concerns about the statute of limitations running when a dispute goes directly to mediation (as opposed to moving to a mediation phase after being filed as an arbitration). It was suggested that consideration be given to amending the Uniform Code to provide that the statute of limitations is tolled if a dispute that has not been filed as an arbitration is submitted directly to mediation.

### Use of Dispositive Motions

Mr. Maddox informed the Conference that the use of dispositive motions, particularly by member firms, is increasing sharply, and that oftentimes these motions are based on issues that go to the merits of a case. PIABA members noted that there is no provision in the UCA for dispositive motion practice. Mr. Maddox indicated that SROs should propose rule changes that would establish limited grounds for considering motions to dismiss. Mr. Sneeringer noted that dispositive motions might reduce costs. The PIABA representatives indicated PIABA would formulate a proposal to SICA regarding the use of dispositive motions, before the end of November.

### SICA Pilot

Mr. Friedman and Mr. Clemente updated the PIABA representatives on the SICA Pilot’s statistics to date. Mr. Fedor and Mr. Maddox indicated that **the Pilot is cost prohibitive**. PIABA members also noted that the SRO arbitration fora are much fairer today, and that many claimants’ attorneys are less inclined to seek an alternative arbitration forum today than in previous years.

### Online Trading Issues

Ms. Fienberg advised the Conference that the NASD has put out a number of advisories for investors and firms regarding online trading issues.

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

/s/ Angelo Evangelou  
Acting Secretary

Attachments: A. Approved Minutes of the August 1, 2000 meeting