

**Minutes of the
April 9, 2003 Meeting of the
Securities Industry Conference on Arbitration
Orlando, Florida**

Members Present

Amal Aly, SIA
Robert S. Clemente, NYSE
Ted Eppenstein, Public Member
Linda Fienberg, NASD
Jim Flynn, CBOE
George Friedman, NASD
Constantine Katsoris, Public Member and Chair
Steve Sneeringer, SIA

Invitees Present

Joseph Corcoran, SEC
India Johnson, AAA
Robert Love, SEC
Helene McGee, SEC

The Securities Industry Conference on Arbitration (“Conference” or “SICA”) convened on April 9, 2003 at 8:30 a.m., Constantine Katsoris, Chair, presiding.

1. Approval of Minutes of the January 13, 2003 Minutes

Several members noted that the draft minutes of the January 13, 2003 appeared to need additional work. Mr. Friedman volunteered to submit a revised draft for review and consideration at the June meeting.

Result: This matter was tabled.

2. Final Action on Arbitrator Classification

The Conference first addressed the remaining “old business” issue pertaining to arbitrator classification, i.e., proposed changes to Rule 16(c)(4) of the Uniform Code of Arbitration (“Uniform Code”). Mr. Sneeringer discussed his proposal to

amend this part of the Uniform Code so that it would effectively bar customers' attorneys from qualifying as public arbitrators. Mr. Sneeringer advised that this problem (a customers' attorney being appointed as a public arbitrator) was especially troublesome when the SRO directly appoints the arbitrator to fill a vacancy. Mr. Sneeringer moved his proposed amendment to the Uniform Code. This motion failed to get a second, and thus it did not carry.

Mr. Friedman introduced a proposal to amend Section 16 of the Uniform Code to provide that an arbitrator could not be classified as "public" if his or her firm derives 20% or more of its income from securities industry representation (even though the arbitrator does not devote his or her professional time to securities matters). Ms. Fienberg stated that NASD believes it is important that the definition of public arbitrator be clarified to avoid misperceptions in Congress as to the fairness of the SRO arbitration system. She advised that NASD intends to take a similar proposal to change its Code of Arbitration Procedure, to the National Arbitration and Mediation Committee and then the NASD Dispute Resolution Board of Governors. Mr. Sneeringer renewed his suggestion that the rules be parallel, so that an arbitrator could not be classified as industry if his or her firm derives more than 20% of its income from customer representation. Mr. Clemente suggested that SICA consider eliminating classification entirely.

Result: Mr. Friedman moved that SICA adopt the NASD proposal. The motion duly was seconded, and the vote on this proposal was: 3 in favor, 1 opposed and 2 abstentions. [Note: At the time of the vote, we concluded the motion did not carry, because a majority of those voting did not vote in favor of the proposal. That is, 3 of 6 voting voted "yes" -- a tie -- and thus the motion failed to carry. Mr. Friedman promised to consult *Robert's Rules of Order* to verify the Conference's assumption. Having consulted *Roberts Rules*, and having reviewed the Q&A section of the official Roberts Rules Web site (<http://www.robertsrules.com/default.html>) it turns out that abstentions do not count as "votes." Thus, this proposal had 4 votes, 3 in favor and 1 opposed. It therefore carried.]

The issue of eliminating classification entirely was tabled until the June meeting.

3. Subpoenas of Third Parties

Mr. Friedman gave a status report on the issue of third party subpoenas. NASD's NAMC has been reviewing this issue for some time, and appears close to a resolution that would require a notice period prior to service of third party

subpoenas. The matter will be called for a vote at the June 12, 2003 NAMC meeting. After a brief discussion, a consensus emerged that the Uniform Code be amended to provide for some notice period – perhaps ten days – and a requirement that the subpoena and notice be served in the same manner. A small group was asked to meet to iron out a proposal for review at the June 13, 2003 SICA meeting.

Result: A task group consisting of Ms. Aly, Mr. Clemente, Mr. Eppenstein, Mr. Friedman (chair), and Mr. Sneeringer will convene and develop a proposed change to the Uniform Code for consideration at the June SICA meeting.

4. Independent Research on Fairness of SRO Arbitrations

Mr. Clemente and Mr. Friedman reported on the SROs' efforts to follow-through on the *Perino Report's* recommendation that there be independent research conducted on user perceptions of the fairness of SRO arbitration programs. Mr. Friedman reported that NASD has one proposal from an outside vendor that has done previous work for NASD. The cost was over \$100,000. NASD has also asked Lew Maltby (President of the Workplace Rights Project), who appeared at our January 2003 meeting, to submit a bid for conducting the survey. Mr. Maltby is in the process of preparing his bid, which is due April 30th. After a brief discussion, the Conference coalesced around some key issues: 1) the survey should be conducted under SICA's auspices; 2) the survey should be paid for by NASD and NYSE; 3) to ensure that the results are perceived to be truly independent, editorial control over the final questions should repose in SICA. Ms. Fienberg also suggested that we approach Professor Perino to help develop the questions.

Result: The SROs will narrow down the field of vendors. Chairman Katsoris will reach out to Professor Perino, and will also evaluate the questions. A progress report will be made at the June meeting.

5. Eligibility Rule

Chairman Katsoris proposed that Section 12 of the Uniform Code be amended to conform to the United States Supreme Court's decision in *Howsam v. DeanWitter*. Ms. Fienberg stated that the NAMC just approved a similar amendment to the NASD Code of Arbitration, and this proposed rule change would be presented to the NASD Dispute Resolution Board of Governors in late April (with a rule filing with the SEC to follow). Ms. Fienberg agreed to share NASD's proposed rule with SICA once the Board approves it.

Result: This issue will be taken up at the June SICA meeting. NASD will share its draft when it becomes available.

6. Florida Bar Unauthorized Practice of Law Ruling

Mr. Clemente reported on developments relating to the *Rappaport* decision, a Florida Supreme Court case that bars out of state attorneys from appearing in arbitrations in Florida. In the wake of the decision, the Florida Bar met on April 4th and will be proposing a rule that would permit out of state attorneys to appear in Florida arbitrations if: 1) they are in good standing in another state and agree to submit to the jurisdiction of the Florida Bar; 2) they pay \$250 per appearance; and 3) they appear in no more than three matters in a rolling 365 day period. The rule will be posted for public comments in the Fall.

Result: The Conference will monitor developments and review this matter at the June meeting.

7. SAC Letter on Content of Awards

The Conference reviewed a December 16, 2002 letter from Rick Ryder, President of the Securities Arbitration Commentator. In his letter, Mr. Ryder urged greater detail in awards and also stressed the importance of including all arbitrator decisions – including dispositive motions – in the awards made available to the public. On the latter, Mr. Friedman stated that NASD awards provide information on the case history, including issues resolved by the arbitrators prior to the award. Mr. Clemente noted that where a party “settles out” before the case in chief is resolved, more likely than not a separate stipulated award will not be issued. The consensus of the conference was that this issue was worth exploring. There was no consensus to adopt the other proposals, including the proposal for more detailed awards.

Result: Chairman Katsoris will contact Mr. Ryder and advise him of the discussions reflected above. NASD and NYSE will report back at the next meeting on what can be done to more precisely track each arbitral determination connected with a case.

8. Bonding Requirement for Awards

Ted Eppenstein presented HIS January 13, 2003 and March 17, 2003 proposals to

provide a bonding requirement for arbitration awards. Mr. Friedman advised the Conference that the GAO's report on unpaid arbitration awards was due to be released in mid-April, and will likely urge the SEC to convene key "players" in the process (regulators, government officials, legislators, investor representatives and industry representatives) to discuss what can be done to improve the award payment. A bonding requirement is one item likely to be considered. Mr. Katsoris stated that he thought this proposal needed more work, and perhaps was best addressed after the release of the GAO report.

Result: After a motion duly made and seconded, the vote on this proposal was: 1 in favor, 3 opposed and 3 abstentions. The motion failed to carry. Mr. Katsoris asked that the GAO report on unpaid awards be placed on the agenda as a discussion item for the June meeting.

9. Updating NASD Arbitrator Biographical Information

At the January meeting, Mr. Eppenstein proposed that NASD's arbitrator biographical information be made clearer as when various updates were entered. NASD promised to investigate and report back at the April SICA meeting.

Mr. Friedman reported that NASD completed a change to its system to more clearly reflect update information. NASD implemented the change in mid-March.

10. Arbitration Responsiveness to Questions from Parties

Mr. Eppenstein raised several questions about how NASD handles disclosure questions posed to potential arbitrators on cases (i.e., clarifying questions asked by parties about arbitrators whose names appear on a list of proposed arbitrators sent by NASD). The first question: does NASD toll the list due date when parties pose disclosure questions after they receive the list? Ms. Fienberg replied that the NASD Code of Arbitration Procedure does not provide for tolling. The second question: will NASD remove an arbitrator from the roster if the arbitrator does not answer disclosure questions posed by a party? Ms. Fienberg replied that NASD encourages parties to answer such questions, and that a party is free to strike an arbitrator who doesn't answer these questions. On the former, Mr. Eppenstein suggested that there be some tolling for a reasonable period of time, perhaps seven days. Ms. Fienberg stated that NASD staff did not have strong views on tolling, and might be willing to explore the subject

11. Status Report on Fitzpatrick/Beckley Workshops and Training Tape

Mr. Clemente reported that the arbitrator training tape is essentially completed. He is now reviewing the “master” tape for final edits and changes. He reported that the tape should be completed within a couple of months. NYSE and NASD will likely issue a joint press release when the tape is completed.

12. California Arbitration Ethics Standards

Ms. Fienberg reported that a decision in *DeanWitter v. Mayo* is expected before the end of April. NASD’s pilot waiver rule was extended another six months, until September 30, 2003. NASD plans to simplify its waiver form, in line with that used by NYSE.

13. NASD and NYSE Rule Filings Update

Mr. Friedman and Mr. Clemente reported on various rule filing initiatives at their respective organizations. Of note: both organizations are pressing ahead with implementing the proposals in the *Perino Report*.

14. Articles and Cases of Interest

The Conference reviewed various articles and cases of interest contained in the meeting materials binder.

15. Future Meetings

The next meeting will take place on Friday, June 13, 2003 at NASD Dispute Resolution (One Liberty Plaza, New York City). The following meeting will take place Wednesday, October 22, 2003, in conjunction with the PIABA Annual Meeting. Mr. Eppenstein commented that the October meeting is mid-week, and was thus inconvenient for many of the members. He suggested that in the future we aim toward Monday or Friday meetings. There was a general consensus that this was a good idea.

Joint Discussion with SIA Members

At 1:00 p.m. a number of SIA representatives joined the SICA meeting to discuss matters of common interest. Participating SIA Members included: Linda Drucker, Daniel Greenstone, Paul Matecki, and Ken Meister.

Out of State Counsel

The SIA attendees expressed concern about the *Rappaport* decision in Florida, barring out of state counsel from appearing in Florida arbitrations. Ms. Fienberg provided an update (as recorded in item 5, above).

New York Disclosure Bill

The SIA attendees alerted SICA to the bill introduced in the New York legislature that was in many respects similar to the California ethics standards law. Mr. Friedman commented that the disclosure provisions in the law were not objectionable per se, but he was concerned because the bill also vested in the attorney general broad authority to create additional disclosure standards. Mr. Clemente reported that NYSE's lobbyists did not think the bill would pass. Ms. Fienberg stated the anti-arbitration trend suggested by this bill and other recent developments (the California ethics standards and the *Rappaport* case) was not welcome.

Arbitrator Classification (continued)

The SIA members expressed concerns about the recently-approved changes to SICA's arbitrator classification rule. Mr. Sneeringer suggested that the rule should also bar customer's attorneys as industry arbitrators. He pointed out that some individuals who are now classified as industry arbitrators spend significant time representing customers, and that if the intent is to ensure that we weed out as public arbitrators anyone with any industry connection, the same concept should apply to the industry roster as well. Chairman Katsoris said SICA would take this under advisement in considering future rule changes.

Dispositive Motions

The SIA members asked NASD to summarize its proposed rule on dispositive motions. Ms. Fienberg provided an update, noting that NASD DR was codifying the existing practice of motion practice and a separate rule for dispositive motions, carving out motions regarding the eligibility rule. While codifying the practice the rule will be worded to discourage it.

This SIA voiced concern that while getting dispositive motions heard and decided the NASD rule may make it more difficult to do so.

Pleadings Amendment

The SIA inquired as to whether the NYSE had adopted the amendment regarding answers to statements of claim. They were advised that the proposal was not approved by SICA and was not adopted by the NYSE.

The meeting adjourned at 1:28 p.m.