

**Minutes of the
June 13, 2003 Meeting of the
Securities Industry Conference on Arbitration
New York City (NASD Dispute Resolution, Inc.)**

Present:

Members Present

Amal Aly – SIA
Robert S. Clemente – NYSE
Theodore G.Eppenstein – Public Member
Jim Flynn – CBOE (by phone)
George H. Friedman – NASD
Constantine N. Katsoris – Public Member
Stephen G. Sneeringer – SIA
Thomas J. Stipanowitch – Public Member (by phone)

Invitees Present

Richard Berry – NASD
Barbara Brady – NASD
Heather Cook – NFA
Linda D. Fienberg – NASD (by phone)
India Johnson – AAA
Robert A. Love – SEC
Helene McGee – SEC (by phone)
Rose Seeman – NASD (Recording Secretary)

Approval of Minutes of January 13, 2003 Meeting (Tab 1)

Mr. Eppenstein proposed that the minutes be amended to reflect the names of members and how they voted. He also proposed that we vote on whether to follow Robert's Rules of Order. Both matters were tabled until the October SICA meeting. **Mr. Love suggested several technical edits to the minutes.**

Result: As amended, the minutes were approved, 6 yes, 1 no.

Approval of Minutes of the April 9, 2003 Meeting (Tab 2)

Mr. Love suggested several technical edits.

Result: As amended, the minutes were approved, 6 yes, 1 no.

Subpoena of Third Parties (Tab 3)

Mr. Eppenstein reported that on May 27, 2003, a task force consisting of Ms. Aly, Mr. Clemente, Mr. Eppenstein, Mr. Friedman and Mr. Sneeringer met to develop language for the Uniform Code of Arbitration to address issues pertaining to third-party subpoenas.

The Task Force reviewed Mr. Sneeringer's proposal (Exhibit A) and Mr. Eppenstein's proposal (Exhibit B) and reached a consensus (Exhibit C).

After some discussion a consensus emerged on the following language:

Section 23. Pre-Hearing Proceedings

...

(c) **Subpoenas.** Arbitrators and any counsel of record may issue subpoenas if allowed by law. The party who requests or issues a subpoena must send a copy of the request or subpoena to all parties in a matter that is reasonably expected to cause the request or subpoena to be delivered to all parties on the same day when it is issued. The parties will produce witnesses and present proof at the hearing whenever possible without using subpoenas.

Result: As amended, the language above was approved unanimously. Mr. Clemente will make the changes to the SICA *Uniform Code of Arbitration*.

Arbitrator Classification (Tab 4)

Ms. Aly and Mr. Sneeringer expressed continued concerns about NASD's "Ten Percent Rule" that provides that an arbitrator cannot be classified as public if his or her firm derives more than ten percent of their revenues from industry activity, even if the individual arbitrator does no securities-related work whatsoever. This rule generally impacts attorneys and accounts that work in law firms or accounting firms. Ms. Fienberg stated that NASD's proposed rule change, which was approved by the NASD's National Arbitration and Mediation Committee and the NASD's Board of Governors, would be filed with the SEC as part of a broad package of changes tightening up arbitrator definitions. The *Perino Report* issued last year at the request of the SEC drove many of the changes, and others were driven by changes approved by SICA. The current SICA and NASD rule would allow an arbitrator to be classified as public if he or she performed no industry-related work, even though his or her partners did substantial industry-related work

and the firm derived substantial revenues from same. This situation was not tenable in NASD's view, especially given the heightened media and Congressional scrutiny of the SRO arbitration process.

Mr. Sneeringer stated that SIA still had concerns about the rule, and asked that SICA discuss this topic at the October meeting. He also suggested that SICA and the SROs take a look at the current industry arbitrator definition, which allows an attorney, accountant, or other professional to be classified as an industry arbitrator if he or she devotes twenty percent or more of his or her professional work to industry-related matters. He noted that an attorney could spend 80 percent of his or her time representing customers and still be considered an industry arbitrator.

Result: Both matters will be discussed at the October SICA meeting.

Expedited Service for Elderly/Infirm Parties (Tab 5)

Mr. Eppenstein discussed his proposal to provide for expedited hearings for claimants over 70 years old who are infirm, or parties of any age who are terminally ill.

Mr. Eppenstein asked the Conference to take a vote in favor of a Rule filing, which would make expedited hearings for the elderly and infirm mandatory. The Conference decided that more study of whether our current Rules were already sufficient was necessary before the Conference would be ready to take a vote. Mr. Friedman pointed out that NASD is currently modifying its Initial Prehearing Conference Script to address these issues, and recently published an article in *The Neutral Corner* (an NASD publication sent to arbitrators) designed to heighten awareness of the need to put arbitration for elderly and infirm claimants on the fast-track. Mr. Katsoris cited guidelines in the Arbitrator Manual that speak to this topic. Ms. Brady advised that NASD has developed a form letter it will use in a related pilot project in Florida.

Result: A subcommittee consisting of Mr. Eppenstein, Mr. Sneeringer, Mr. Clemente and Ms. Brady will meet this summer to develop proposed changes to the SICA *Arbitrator's Manual* and, if necessary, the SICA *Uniform Code of Arbitration*. This topic will be on the agenda for the October SICA meeting.

Mandatory CRD Exposure (Tab 6)

Mr. Eppenstein discussed his proposal to provide all prospective customers of broker-dealers a current CRD report for the broker to whom the customer's funds

would be entrusted. He suggested that this would better protect the investing public from potentially unscrupulous brokers.

Several members cited that the Public Disclosure system is already available to the public, and accomplishes the same objective. It was determined that this is a regulatory issue and not a matter for SICA to decide.

Result: Tabled.

Eligibility (Tab 7)

Mr. Friedman reported that on April 24, 2003 the NASD Board of Governors approved new language for Rule 10304 of the Code of Arbitration Procedure pertaining to eligibility, in line with the United States Supreme Court's decision in *Howsam*. The rule will be filed with the SEC before July 1, 2003. Mr. Friedman agreed to provide to SICA copies of the proposed rule.

Result: Action has been tabled until the October SICA meeting so that the Conference can assess NASD's approach. Professor Katsoris also proposed discussing eliminating the eligibility rule at the October SICA meeting.

GAO Report on Arbitration (Tab 8)

Ms. Fienberg and Mr. Friedman discussed the GAO's April 11, 2003 report entitled *Follow-up Report on Matters Relating to Securities Arbitration*. The report focused primarily on the issue of unpaid arbitration awards.

Mr. Friedman stated that the GAO acknowledged that unpaid awards are down from 62% in 1998 to 32% in 2002. NASD intends to update its Web site to make the investing public aware that it is very difficult if not impossible to collect awards from terminated or bankrupt member firms and individuals. Mr. Love stated that the SEC is evaluating the GAO's recommendation that it consider other options to enhance award payment.

Independent Research on User Perceptions of the Fairness of SRO Arbitration Programs (Tab 9)

Mr. Friedman and Mr. Clemente reported that NASD and NYSE are evaluating their options. They will provide an update at the October SICA meeting.

Update on Florida Out of State Attorney Ruling (Tab 10)

Mr. Friedman reported on activities to date in the wake of the *Rappaport* decision, in which the Florida Supreme Court held that only attorneys admitted to practice law in Florida could represent parties in arbitrations that take place in Florida.

The Florida State Bar is developing a proposed rule that will allow an out-of-state attorney to appear in Florida arbitrations if: 1) they certify they are in good standing in the state(s) in which they are admitted; 2) agree to pay a fee of \$250 per appearance; 3) appear in no more than three cases in a rolling 365-day period; and 4) submit to the jurisdiction of the Florida Bar. The Florida State Bar will be taking public comments on this topic until the fall. There was a general consensus that SIA and PIABA should consider filing a joint comment with the Florida Bar. Mr. Friedman and Mr. Clemente will deliver a status report at the October SICA meeting.

Contents of Awards (Tab 11)

Rick Berry reported that NASD's current computer system is not currently able to issue separate awards where a party is dismissed, and the remaining case later settles before an award is issued. Thus, these matters do not appear on the SAC Award Database, because no arbitration award has been issued. He said that NASD is going to work this type of tracking capability into its new MATRICS computer system, now under construction.

Fitzpatrick-Beckley Workshop (Tab 12)

Mr. Clemente reported that the Fitzpatrick-Beckley Workshop tape on civility in arbitration has been completed. It is now being used in the NYSE's arbitrator training program.

California Ethics Standards (Tab 13)

Mr. Clemente and Mr. Friedman gave a status report on the legislative remedies that are being explored in California in the wake of the SRO's victory in the *Mayo* case. Mr. Friedman reported that the waiver programs for NASD and NYSE would continue while they seek a legislative solution. They will provide another status report at the October SICA meeting.

NASD and NYSE Rule Filings Update (Tab 14)

Mr. Friedman and Mr. Clemente reported on various rule filing initiatives at their respective organizations.

Articles and Cases of Interest (Tab 15)

Approved October 22, 2003

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

Future Meetings (Tab 16)

The meeting schedule is as follows:

- ?? October 22, 2003 in LaQuinta, CA (PIABA Annual Meeting), 8:30 a.m.
- ?? January 16, 2004 in Washington, DC (NASD Office), 10:00 a.m.
- ?? March 22, 2004 in Palm Desert, CA (SIA Annual Legal & Compliance Meeting), 12:00 noon.

There being no other business, the meeting adjourned at 11:59 a.m.

Respectfully submitted,

/s/ George H. Friedman, Acting Secretary