

Minutes of the June 13, 2006 Meeting of the  
Securities Industry Conference on Arbitration  
New York Stock Exchange, New York City

Members Present

Dan Beyda, NYSE  
Theodore Eppenstein, Public Member  
Linda Fienberg, NASD  
George Friedman, NASD  
Greg Hoogasian, CBOE  
Constantine Katsoris, Public Member and Chair  
Karen Kupersmith, NYSE  
Kenneth Meister, Prudential Equity Group  
Matt Mennes, NYSE-Arca  
Pat Sadler, Public Member

Invitees Participating in Person or by Phone

Lourdes Gonzalez, SEC  
Karen Jalkut, AAA  
Bryan Lantagne, NASAA  
Gena Lai, SEC  
Helene McGee, SEC  
Tanya Solov, NASAA

*Mary Ann Gadzala*

Guests:

Richard Berry, NASD  
Barbara Black, Pace Law School  
Barbara Brady, NASD  
Jean Feeney, NASD  
Romaine Gardner, Fordham Law School  
Rose Seeman, NASD  
Rex Staples, NASAA

The Securities Industry Conference on Arbitration ("Conference" or "SICA") convened on June 13, 2006 at 8:30 a.m., Professor Constantine Katsoris, Chair, presiding.

**ACTION ITEMS**

Approval of Minutes of March 21, 2006 Meeting [Tab 1]

With the addition of some minor amendments submitted by Mr. Eppenstein, and Mr. Sadler, the minutes were approved unanimously by the Conference. George Kramer to finalize and distribute.

Dates for 2007 SICA Meetings [Tab 2]

After a brief discussion, the group agreed on the following 2007 SICA meeting schedule. The host's name is in parenthesis:

- January 17 in New York at NASD (George Friedman)

## D R A F T: September 18, 2006

- March 27 in Phoenix at SIA's Legal & Compliance Division Annual Meeting (George Kramer)  
*1 p.m. start time*
- June 14 in New York at NYSE (Karen Kupersmith)
- October 17 in Amelia Island (Florida) at PIABA's Annual Meeting (Pat Sadler)

### Electronic Discovery [Tab 3]

Mr. Eppenstein reported on the work of the Subcommittee. He said that they were looking at revising the Arbitrators *Training Manual* to address the following: preservation of documents; electronic discovery; spoliation of evidence; and remedies for non-compliance with production orders.

Mr. Eppenstein directed the Conference's attention to the New York State Supreme Court decision in *Zubulake*, in which the court ruled that an Answer be stricken due to the destruction of evidence contained in a computer hard-drive.

Result: The Subcommittee will meet to finalize a proposal, which they will present as an Action Item at the October meeting.

## DISCUSSION ITEMS

### Revisions to Arbitrator Disqualification Criteria [Tab 4]

Ms. Feeney reported that the Securities and Exchange Commission (SEC) requested that NASD file its Temporary and Permanent Arbitrator Disqualification Criteria in a rule filing for their approval the next time it files a rule pertaining to arbitrator qualifications. In reviewing the criteria, which are based on SICA's criteria, NASD staff observed several technical inconsistencies both within the criteria themselves and between NASD's and SICA's versions of this document. Ms. Feeney suggested that these differences be resolved.

The Conference agreed that a Subcommittee should be formed to review the criteria and remedy any inconsistencies contained therein.

Result: Chairman Katsoris appointed a subcommittee to be chaired by Ms. Feeney and consisting of Ms. Brady, Mr. Eppenstein, Mr. Meister, and Ms. Kupersmith. They will report back at the October or January meetings.

### Report on Law School Clinics [Tab 5]

Romaine Gardner of the Fordham Law School Securities Arbitration Clinic joined the Conference to report on the progress of law school securities arbitration clinics, which were developed in the late 1990s to provide representation to *pro se* clients in securities arbitration.

Mr. Gardner reported that there are 11 law schools currently offering such programs. He said that over 140 students are involved nationwide. Ms. Lai stated that she had participated in a securities arbitration clinic when she was in law school and found it to be a very enriching experience.

Conference members enthusiastically agreed with Mr. Romaine that the programs have been a great success and that it's important that they continue to work on promoting their expansion.

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Independent Survey on the Fairness of SRO Arbitration [Tab 6]

Professor Barbara Black joined the Conference to discuss the progress of the survey she and Professor Jill Gross of Pace Law School have been commissioned by SICA to design on the perception of fairness in SRO arbitration.

Conference members focused on the issue of the survey's structure, particularly Pace's suggestion that follow-up interviews be conducted with some of the participants. Many Conference members were concerned that these interviews would lack consistency, rendering of doubtful use the information thus obtained. There were also concerns voiced over whether or not the survey was too geared toward gauging the response of the forum user's last experience, as opposed to overall experiences in the forum.

Ms. Fienberg moved that there be no follow-up interviews or general comments; that SICA agree to release the results irrespective of the outcome; that question 38 be added, with clarification that it is asking for views based on overall, general experiences in the SRO arbitration forum; and that question 39 pertaining to the subject's willingness to participate in a follow-up interview be removed (as to the latter, the motion was conditional on Cornell's agreement that question 39 be deleted).

Result: The motion carried, 6 Yes, 1 No (Mr. Eppenstein), and 1 Abstention. Mr. Eppenstein requested that his opposing vote be noted in the Minutes. The survey is on track to be mailed out by the fall. The Conference will discuss again at its October meeting.

Arbitrator Qualifications and Classification Subgroup [Tab 7]: Mr. Eppenstein suggested that this issue be folded into the review of the temporary and permanent removal criteria. The Conference agreed.

Arbitration of Employment Disputes [Tab 7(a)]

This item was inadvertently omitted from the meeting materials; it was designated item 7(a). Mr. Eppenstein asked the SROs for a progress report on his proposal that they take action in response to recent court decisions (most notably *CIBC v. Pitofsky*, a 2005 decision of the New York State Court of Appeals) that appear to allow a firm to preclude an employee from exercising his or her right to arbitrate at an SRO forum despite SRO rules to the contrary.

At the January meeting, SICA adopted a resolution urging the SROs to issue a Notice to Members precluding this practice (similar to NASD Rule 3110 for customer disputes), and that SROs adopt rules similar to SICA Uniform Code of Arbitration Rule 1, allowing an employee to require arbitration at an SRO irrespective of whether there is an arbitration agreement (i.e., a rule similar to NASD Rule 10301 for customers).

NASD reported it was awaiting a final decision from NASD Regulatory Policy and Oversight regarding their request to issue a "Member Alert" on this topic. Ms. Fienberg reported that NASD was open to the rule change proposal, and would review it with the National Arbitration and Mediation Committee (NAMC) this fall. Ms. Kupersmith reported that she would bring this matter to the attention of appropriate individuals at NYSE.

Result: Mr. Eppenstein will draft a proposal, which he will present to the Conference at its October meeting.

Petition for SEC Rulemaking [Tab 8]

Mr. Friedman reported on behalf of the Subcommittee. He discussed his review of the Subcommittee's findings and recommendations concerning the two petitions for rulemaking received by the SEC from Les Greenberg and Avery Goodman. During the summer of 2005, SEC received these two petitions for SEC rulemaking. On August 19, 2005, Caite McGuire of SEC wrote to Chairman Katsoris, asking that SICA consider and comment on the proposal. At the October 11, 2005 SICA meeting in Chicago, Chairman Katsoris appointed a subcommittee consisting of Mr. Eppenstein and Mr. Friedman (co-chairs), Mr. Flynn (since replaced by Mr. Hoogasian), Mr. Kramer, and Ms. Kupersmith, to review the petitions, and to recommend a response from SICA. The Subcommittee has met several times in the ensuing months.

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With respect to the Goodman proposal that parties be able to appeal Directors' decisions on whether to remove or reclassify arbitrators, the Subcommittee determined that this would run counter to the goal of expedient administration of claims and recommend that the SICA *Arbitrator's Manual and Guide to Arbitration* be revised to state that, while most arbitrator challenges to SROs are resolved by review of correspondence, a party can request a conference call be convened with all counsel and the Director.

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There were differing opinions on the issue of whether or not arbitrators should be allowed to conduct independent legal research. SROs were generally opposed to this proposal in part because it would be difficult for SROs to monitor if the arbitrators were disclosing such research. Some Conference members thought that prohibiting such research could be perceived as a hindrance of arbitrators' resources. There was agreement that arbitrators should not conduct independent factual research. After a prolonged discussion, it became evident that more Subcommittee work was needed. The Conference asked the Subcommittee to re-convene to gain consensus on the proposed changes to the SICA *Arbitrators Manual and Guide to Arbitration*.

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The Conference discussed at length the remaining proposals. The Subcommittee agreed that the SICA Guide to Arbitration be updated to add that a party may request a conference call with the Director of Arbitration to review arbitrator challenges. The Subcommittee determined that it would not be appropriate or feasible to train arbitrators in substantive law of 50 states, as it would likely be difficult to achieve a consensus on content. There were differing opinions on the issue of whether or not arbitrators should be allowed to conduct independent legal research. SROs were generally opposed to this proposal in part because it would be difficult for SROs to monitor if the arbitrators were disclosing such research. Some Conference members thought that prohibiting such research could be perceived as a hindrance of arbitrators' resources. ¶

The Conference discussed at length the remaining proposals. The Subcommittee determined that it would not be appropriate or feasible to train arbitrators in substantive law of 50 states, as it would likely be difficult to achieve a consensus on content. Mr. Friedman stated that the Subcommittee recommended that the issue of elimination of the industry arbitrator would be best left to the work of the Classification Subcommittee. The Subcommittee also didn't deem it necessary to discuss the proposal to require mandatory peer and party evaluations as such evaluations were already in place and there was a consensus that parties and arbitrators should continue to be encouraged to make use of them, but it should not be made mandatory. There was a discussion of ways to improve the response rate, such as by moving surveys online.

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Result: The Subcommittee will draft an Action Item to present to the Conference at its October meeting. Thereafter it will present a response letter to Catherine McGuire of the SEC.

INFORMATION ITEMS

# DRAFT: September 18, 2006

## Update/Statistics on NASD Pilot Procedures for Elderly or Infirm Parties [Tab 9]

Mr. Berry updated the Conference on the progress of the Pilot. He said that it has been very effective in expediting the hearings of elderly or infirm parties, with the average processing time for pilot cases being 10.6 months as compared to 14.3 months for all hearing-based decisions closed since May 2006. He will report again at the October meeting.

## Update/Statistics on Direct Communication Rule [Tab 10]

Mr. Berry reported on the Direct Communication Rule. He said that anecdotal reports were positive but at this time there was no hard data to submit to the Conference. He reminded SICA that NASD intended to do a survey after about a year of experience and he will report again at the October SICA meeting.

## SRO Reports on Activities and Rule Filings [Tab 11]

NASD and the NYSE reviewed their recent rule filings. Ms. Fienberg announced that due to declining case filings, NASD Dispute Resolution would be closing its Mid-Atlantic Regional office in Washington, D.C. by December 31, 2006. She assured the Conference that there would be a smooth transference of their caseload to the Northeast, Southeast, and Midwest Regional offices for administration.

## Cases and Articles of Interest [Tab 12]

Mr. Sadler pointed to a proposed NFA rule that requires a party moving to vacate an arbitration award to post a bond. Chairman Katsoris recalled that SICA had looked at this issue in the past, but agreed to appoint a Subcommittee to examine this issue consisting of Mr. Sadler, Mr. Meister (co-chairs), and Kenneth Andrichik.

## Schedule of Future Meetings [Tab 13]

The remaining 2006 SICA meeting will be held on October 25, 2006 in Tucson, Arizona, in connection with PIABA's annual meeting.

## New Business [Tab 14]

Chairman Katsoris noted that Public Member Ted Eppenstein's second term is expiring at the end of this year, and that it would be a good time to look at SICA governance issues. Toward that end, he asked Mr. Friedman to chair an informal task group to look at the issues of public member term limits and voting rights for SROs, to be discussed at the October SICA meeting. The other members of the group are: Mr. Hoogasian, Ms. Kupersmith, Mr. Mennes, Mr. Meister, Mr. Sadler, and Ms. Gonzalez (or another representative from SEC).

Mr. Beyda reported that NYSE and Arca would be merging their arbitration programs.

There being no other business, the meeting adjourned at 2:00 p.m.

Respectfully submitted by:

**DRAFT: September 18, 2006**

Rose E. Seeman