

**Minutes of the October 11, 2005 Meeting of the  
Securities Industry Conference on Arbitration  
Chicago Board Options Exchange, Inc.**

Members Present

Heather Cook, NFA  
Theodore Eppenstein, Public Member  
Jim Flynn, CBOE  
George Friedman, NASD  
Constantine Katsoris, Public Member and Chair  
George Kramer, SIA  
Karen Kupersmith, NYSE  
Matthew Mennes, Pacific Exchange  
Joanne Moffic-Silver, CBOE  
Pat Sadler, Public Member  
Steve Sneeringer, SIA  
James Yong, NSX

Members Participating by Phone

Linda Fienberg, NASD

Invitees Participating in Person or by Phone

David Blass, SEC  
Lourdes Gonzalez, SEC  
Mary Ann Gadziala, SEC  
Paula Jenson, SEC  
India Johnson, AAA  
Gena Lai, SEC  
Helene McGee, SEC  
Catherine McGuire, SEC

Guests:

Robert Banks, PIABA  
Richard Berry, NASD  
Barbara Brady, NASD  
Jean Feeny, NASD  
Kenneth Meister, Prudential Equity Group  
Lawrence Schultz, PIABA  
Tanya Solov, NASAA  
Patricia Struck, NASAA

The Securities Industry Conference on Arbitration ("Conference" or "SICA") convened on October 11, 2005 at 9:00 a.m., Professor Constantine Katsoris, Chair, presiding. These minutes cover items in the order in which they appeared in the agenda, even though some items were presented out of order.

## ACTION ITEMS

### Approval of Minutes of June 23, 2005 Meeting [Tab 1]

The minutes as submitted were unanimously approved by the Conference. Mr. Friedman will finalize and distribute them.

### Petition for Rulemaking [Tab 2]

Chairman Katsoris discussed two separate petitions forwarded from Catherine McGuire of the SEC, which generally pertain to (1) arbitrator training and evaluation, and the role of industry arbitrators, and (2) an appeal process for reviewing challenges of arbitrator appointments or classifications.

**Result:** The chair appointed a small task force, consisting of Ted Eppenstein (co-chair), George Friedman (co-chair), Jim Flynn, George Kramer, and Karen Kupersmith to meet, evaluate the proposals, and return to the January 12<sup>th</sup> meeting with a proposed plan of action. Rick Berry and Barbara Brady of NASD may serve as alternates for George Friedman.

### Report from Independent Survey Subgroup: Fairness Survey [Tab 3]

Pat Sadler distributed various proposed changes (from NASD, SIA, PIABA, Chairman Katsoris) to the draft survey prepared by the outside vendor (Professors Black and Gross of the Pace Law School Investor Rights Clinic). There was a prolonged discussion, with several suggested amendments.

- Linda Fienberg pointed out that the revised draft did not seem to reflect NASD's changes; Pat replied that he intended to accept NASD's proposed changes.

Some members suggested separate surveys geared toward individuals, firms, and attorneys, with different instructions (especially for those who participate often in SRO arbitrations). George Friedman pointed out that the vendor might view this change as significant, and outside the scope of the current contract (which called for a single survey).

- Linda Fienberg observed that some of PIABA's suggested questions (e.g., eliminating mandatory arbitration and getting rid of the industry arbitrator) were somewhat inflammatory, and beyond the scope of the original suggestions in the "Perino Report" that gave rise to the survey project. She reserved the right to reconsider NASD's participation if the final survey contained such questions.

Ted Eppenstein supported the PIABA suggestions and noted that this is a good opportunity to receive input from the public. Mr. Eppenstein also suggested that the Conference not attempt to adhere strictly to the original suggestions made in the Perino Report in developing the survey.

**Result:** 1) Pat Sadler will synthesize the various suggestions and prepare a single revised draft survey. He will distribute it to the membership within two weeks (by October 25<sup>th</sup>). 2) He

might schedule a separate SICA conference call to resolve this issue in advance of our January meeting, so work can begin on the survey.

## DISCUSSION ITEMS

### Update/ Statistics on NASD Pilot Procedures for Old/Infirm/Terminally Ill Parties [Tab 4]

Mr. Berry reported on the status of the national NASD pilot program to expedite arbitration proceedings for elderly, infirm, and terminally ill parties. Mr. Berry provided a handout to illustrate the results of the pilot program.

Mr. Eppenstein stated that the Conference should go further and reduce the time frames in the Uniform Code. The SRO's should encourage arbitrators to facilitate resolution of the dispute and to have a lower tolerance for delays. Mr. Berry noted that such information is reflected in the report.

Result: No action was taken. NASD will provide an update on this program at the January SICA meeting.

### NASD's Direct Communication Rule [Tab 5]

Mr. Berry reported on the status of the direct communication rule. Mr. Berry reminded SICA that NASD intended to do a survey after about a year of experience.

Mr. Mennes reported that the PCX recently enacted a direct communication rule.

Mr. Eppenstein added that he believed that the NASD's direct communication rule was working well.

Result: No action was taken. NASD will report again at the January SICA meeting.

### Publication of NASD's Administrative Manual [Tab 6]

Mr. Eppenstein reiterated his proposal that NASD (and NYSE) publish its internal staff administrative manual. Mr. Friedman reiterated NASD's view that this is proprietary information, and contained constantly changing technical material that would not be of use to constituents. Larry Schultz asked if PIABA reps could look at this material "in camera," but NASD declined.

Result: Mr. Eppenstein and Larry Schultz will write up a proposal outlining areas of confusion to users, and submit the proposal to the SROs on behalf of PIABA.

### Arbitration of Employment Disputes [Tab 7]

In view of the late hour, and at the request of the chair, Mr. Eppenstein agreed to table this matter until the January meeting.

Result: The matter was tabled until SICA's January meeting.

Report from the Arbitrator Removal Criteria Subgroup [Tab 8]

Ms. Brady discussed the findings of the SICA subcommittee created to consider the issue of whether to revise SICA's current criteria used in determining the permanent and temporary removal of arbitrators. Ms. Brady advised that, after reviewing the current criteria and the several discussions and subcommittee meetings previously held on this topic, absent any showing that the current criteria are insufficient, there is no reason to recommend an amendment.

Mr. Eppenstein proposed that the subcommittee continue to consider this issue and revisit this matter and Mr. Flynn noted that the report indicates that the subcommittee would be willing to reconsider its resolution should specific data or evidence be presented that would give reason to show that the current criteria is insufficient.

Result: Mr. Eppenstein agreed to write up specific proposed changes for review and consideration at the January SICA meeting.

Meeting with PIABA Representatives [Tab 9]

Incoming PIABA president Robert Banks and Larry Schultz appeared to present their agenda of discussion items for consideration by the Conference.

PIABA requested that the Conference consider requiring that a customer party to an arbitration must consent before an industry arbitrator is appointed to a case because, according to Mr. Banks, industry arbitrators on a panel create an appearance of bias, creates actual bias, and there is no legitimate need for an industry arbitrator on a panel. PIABA noted that customers polled by PIABA agree that there is a feeling of bias to overcome in every case. PIABA notes that in some cases, there is actual bias with which to contend; such as in variable annuity product cases where an arbitrator works for a firm who sells them or in geographic locales in which firms are deeply connected to the local community. PIABA feels that there is better training of arbitrators and there is no longer a need for industry arbitrators' collective expertise.

Members of the Conference posited that eliminating highly trained industry arbitrators would strain the gross arbitrator pool. The Conference determined to consider creating a subcommittee to consider whether it would be better to reclassify arbitrators and eliminate the industry/public nomenclatures.

PIABA's second issue involved a request to require that public arbitrators have no affiliation whatsoever with the industry, presuming that the current arbitration classifications are maintained. PIABA suggested amending Rule 16(b)(2) of the SICA Uniform Code to at least adopt NASD's "10%" rule on public arbitrators and believe 20% is too high. PIABA provided a list of the top law firms' annual billing revenues to illustrate the difference between 10% and 20%. Regardless of the percentage, PIABA suggested that it is virtually

impossible to quantify the percentages and such criteria is not workable as a standard. PIABA noted that it would be presenting the Conference with a written position on this in the near future.

PIABA's third issue involved raising the single-arbitrator hearing criterion, pertaining to claim amount, to a maximum amount of \$300,000. Ms. Fienberg suggested that the NASD would consider alternatives involving a claim cap ranging from \$100,000 to \$200,000 or \$100,000 to \$200,000 where punitive damages are not requested. Ms. McGuire requested the Conference to consider the highest cut-off possible to maximize the savings to customers. PIABA committed to consider the proposals and respond accordingly.

PIABA's fourth issue involved a request to the Conference to consider incorporating the NASD discovery guidelines into the Code to provide consistency in rulings on what is discoverable and to create mandatory standards throughout the regions. Ms. Fienberg noted that NASD has received recent requests in pending arbitrations to assign a "magistrate" type of panelist to handle complex discovery issues.

Mr. Eppenstein supported PIABA's proposals. Mr. Eppenstein noted that there is no arbitrator representing the public's view and there shouldn't be an arbitrator representing the industry's view. He also noted that the SROs do not match the expertise of the industry arbitrator to the issues in the case. Mr. Eppenstein noted that the appearance problem where there is an industry arbitrator should be an issue easily dealt with by removing the industry arbitrator from the Panel. There are many complaints lodged about the industry arbitrator and these complaints are serious ones.

Result: PIABA noted that it would provide written a written proposal of their recommendations for consideration by the Conference.

## INFORMATION ITEMS

### Update on 13th SICA Report [Tab 13]

Chairman Katsoris advised that the update on the 13<sup>th</sup> SICA Report will be available on both the NYSE and NASD websites along with all comments received.

### California Ethics Rule Update [Tab 14]

Mr. Friedman reported on developments. The SROs won the *Grunwald* case in the 9<sup>th</sup> Circuit, and the *Jevne* case in the California Supreme Court, on 1934 Act preemption issues. NASD filed, and SEC approved, a rule withdrawing the waiver program. NYSE reported that it had opted to keep its waiver program in place, at least until the time for *certiorari* expired (August 9, 2005). Karen Kupesmith stated that NYSE had terminated its waiver program.

Mr. Mennes reported that the PCX filed to rescind its pertinent rule and the SEC approved the rule change.

Approved January 12, 2006

Cases and Articles of Interest [Tab 16]

With respect to the item "NASD Letter Responding to *Registered Representative Magazine*," Mr. Friedman noted that NASD's response will be published in the November 2005 issue.

No further discussion on the other items, other than a note of their inclusion in the agenda packet.

Schedule of Upcoming Meetings [Tab 17]

Mr. Friedman reminded the conference that the 2006 meeting schedule is as follows:

- January 12, 2006 at NASD (New York) [Friedman hosting]
- March 21, 2006 at SIA Compliance & Legal Annual Meeting (Hollywood, FL) [Kramer hosting]
- June 13, 2006 at NYSE (New York) [Kupersmith hosting]
- October 25, 2006 at PIABA (Tucson, AZ) [Pat Sadler hosting]

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

Respectfully submitted by:  
Jim Flynn

**Flynn, Jim**

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**From:** J. Pat Sadler [jps@sandhlaw.com]  
**Sent:** Monday, October 10, 2005 9:13 AM  
**To:** Evangelou, Angelo; Caite McGuire (E-mail); Constantine Katsoris; Dan Beyda (E-mail); David P. Van Wagner (E-mail); Eppenstein Ted (E-mail); Fienberg, Linda; George Kramer (E-mail); George Mann, Jr.; Heather Cook; Helene McGee (E-mail); Jenson Paula (E-mail); Flynn, Jim; Moffic-Silver, Joanne; Johnson India (E-mail); Karen Kupersmith (E-mail); Ken Meister (E-mail); Marc Beauchamp; Mary Ann Gadziala Esq. (E-mail); Matthew Mennes (E-mail); Patricia Struck (E-mail); Patrick DeMoon (E-mail); peter cella; 'S. Sneeringer' (E-mail); Sadler, Pat (E-mail)  
**Subject:** Comments on Fairness Survey Raised by Gus Katsoris and Pat Sadler

Dear SICA Members:

We will be discussing the draft of the SICA Fairness Survey at the meeting on Tuesday. For those who will be participating by phone, I have pasted below comments on the draft which are raised by Gus and me.

Pat Sadler

COMMENTS ON DRAFT SURVEY  
 by Gus Katsoris and Pat Sadler

Opening Paragraph **This is a SICA survey and should not be billed as a joint survey with Pace Law School**

Question 2 Add a choice "F. I was represented by a law school legal clinic."

Questions 6 & 7 These questions are deemed irrelevant given the prevalence of mandatory arbitration clauses

Question 13 "Empaneled" would be a more appropriate word than "appointed"

Question 14A Add "prior to the filing of the arbitration" after "did you know"

Preface to Questions 16-34 Add a choice "DK = Don't Know"

Question 33 <sup>2</sup> Add "even if it were not mandatory" at end

Question 35a Why ask this only of parties who have had a court case?  
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10/10/2005