

## **Advice of Clause 20 Task Force April 14, 2009**

With respect to all clause 20 certifications issued by NAEGA, a certificate issued under that clause is final. The NAEGA 2 model contract clearly states this in paragraph (a) of the Clause. It is not open to any review or discussion nor is the certification subject to any appeal.

An understanding that the NAEGA 2 Contract provides for terms that are different from INCOTERMS definitions and other models for FOB contracts combined with an examination of the procedure for the issuance of a Clause 20 certificate provides sound reasoning for retaining the current NAEGA 2 contract language and process.

Upon receipt of a request for a certificate, the President of NAEGA solicits the participation of members of the “Strikes” Committee in order to convene a panel (hereafter the “Panel”) of three persons to consider the request. That committee is named annually by the NAEGA Board of Directors. In the event that an insufficient number of persons from the committee can participate on the Panel, the Board of Directors has also named several alternates to the committee. The volunteers on the Panel, ultimately named from either the committee or the list of alternates to the committee, must indicate their willingness to serve as well as act in a timely fashion. In addition participation is subject to guidelines designed to prevent conflict of interest and provide for relevancy to the port area affected.

Much of this is outlined in the “Procedure for Obtaining NAEGA Strike Certificates”. This document is available to all at <http://www.naega.org/contracts/index.shtml>.

You will note the procedure mandates that all documentation to be considered by the panel is to be furnished by the applicant. And such documentation should include, but is not limited to, copies of communications which establish the parties involved in the Clause 20 declaration as well as documentation from neutral third parties (e.g. port authorities) clearly establishing the beginning (and end, when available) of the “Cause”.

Each Panel member is instructed to keep all information received and the proceedings strictly confidential. Their consideration begins with an examination of documentation to determine relevance to NAEGA Clause 20 conditions. If the Panel deems necessary, it will request additional information. The Panel’s decision is based upon the opinion of the majority. A unanimous decision is not required.

The panel, in an effort to determine the nature, validity and term of the cause, looks very closely into the terms of the contract and related execution documents to fully understand the relationship between the cause and contract provisions.

If the Panel determines that a valid cause, in accordance with Clause 20 conditions did not exist, the Panel will deny the request for a certificate.

If the Panel determines the cause is valid they proceed to determine the time the cause begins and ends so that a complete certificate might be issued.

Prerequisites for issuance of a certificate:

1. The contract already requires the sellers to send notice to the buyer.
2. The Panel reviews the declarations as part of the assessment procedure.
3. The Panel has full discretion over the information it considers and most often relies heavily on factual information from neutral third and official parties as provided for in the guidance.
4. Neither the Seller nor the Buyer are part of the decision making process which is exclusively the task of the Panel.

NAEGA is committed to commercial solutions, fostering sound practice and ongoing review of all of its services. We are very pleased that the procedure for dealing with requests for a "Strike" certificate is well established and has worked well for many years. Perhaps most importantly we benefit from volunteer Panel members who are seasoned and well experienced members of the Grain Export Industry, who exhibit the highest of standards and are bound to deal fairly with each request.

June 30, 2008

### **Board Guidance to Clarify when a Committee Member Should Disqualify Themselves**

"Committee appointees acting under the NAEGA Committee on Strikes, Riots, Lockouts and Embargoes shall be impartial and independent. Disqualification is only required in a situation where the committee member, or his or her firm, has a direct interest in the decision specific to the certificate under consideration, and not in the more general situation in which the member or company may also be doing related business or business in the same location but will not be affected by the specific certificate.

Prior to accepting appointment, a prospective appointee shall disclose to the Chairman of the committee, or the President of NAEGA, any circumstance likely to give rise to justifiable doubts as to the appointee's impartiality or independence. If, at any stage during the deliberations, new circumstances arise that give rise to such doubts, an appointee shall promptly disclose such circumstances to the parties and to the Chairman. In either case, upon receipt of such information from an appointee, or a party, the Chairman shall communicate it to the other parties and to the committee. The appointee may be asked to withdraw from the committee if it's determined that justifiable doubts exist regarding the appointee's impartiality or independence. If an appointee withdraws, or the Chairman determines that there are sufficient reasons to accept the resignation of an appointee, a substitute appointee shall be named by the Chairman of the committee, or the President of NAEGA."