



NAEGA Arbitration Education

Anatomy of an Arbitration – Video #1 (of 3)

Designed & Created By: NAEGA Staff, Contracts Committee, & Senior Advisors

Total Time (All Videos): 30 Minutes

Training Outline

Video #1 Lessons:

Overview of:

1. Course Purpose
2. Course Method
3. Ethical Guidelines

Lesson 1: The Initial Call

- 1.1 Conversation
- 1.2 Initial Errors to Avoid & Key Takeaways
 - Knowledge Check #1
- 1.3 Confirming the Appointment

Lesson 2: Identifying & Appointing a Chairperson

- 2.1 Context & Setting the Scene
- 2.2 Conversation
 - Knowledge Check #2
- 2.3 Key Takeaways

Lesson 3: Initial Call with the Panel & Communication Within the Panel

- 3.1 Background – A Chair is Named
- 3.2 Initial Panel Conversation
 - Knowledge Check #3

3.3 Key Takeaways

References:

1. “Requirements for NAEGA Approved Arbitrators, Special Grain Arbitrators and Schedule of Fees”
2. ICDR Rules & “Standards and Responsibilities for Members of the AAA Roster of Arbitrators and Mediators

Overview 1: *Course Purpose (0:37)*

Learn the ‘Arbitrators Role’ and how to participate as an arbitrator in an effective and efficient arbitration process that operates within the international rules of the American Arbitration Association’s (AAA) International Centre for Dispute Resolution (ICDR).

Overview 2: *Course Method (1:07)*

A ‘Mock Arbitration’ that is based on an actual NAEGA Arbitration. This case:

- Involves Clause 8 of the NAEGA 2 contract... “Subject to the elevator tariff to the extent that it does not conflict with the terms of this contract.”
- The load elevator tariff states that in order to file at the elevator, the vessel must be at anchor in specific anchorages relatively near the load elevator.

Questions considered throughout the training:

- What happens if all those anchorages are full?
- Can the elevator tariff impose any restrictions it would like?
- Is this a fair requirement for filing?
- Is the elevator tariff requirement consistent with the other terms of the NAEGA 2 Contract?

Overview 3: Review of Ethical Guidelines (2:29)

NAEGA approved arbitrators are bound by strict ethics guidelines and are obligated to uphold the integrity and fairness of the arbitration process.

Arbitrators are obligated to disclose any factors that may give rise to conflicts, appearances of partiality or bias. The obligation to disclose applies to the “notice of appointment,” and throughout the course of the arbitration.

Lesson 1: The Initial Call (2:53)

A party to the arbitration reaches out to a prospective arbitrator and identifies themselves as the buyer and claimant in a dispute under the NAEGA 2 Contract.

1.1 Conversation (3:04)

Buyer: The buyer is interested in potentially selecting the prospective arbitrator as his party-appointed arbitrator and asks for some more details about the prospective arbitrator’s background and qualifications. The buyer then begins to describe what led to the dispute in question – including the vessel involved, the basics of the contract and what transpired when the vessel approached the load port and attempted to file with the load elevator. The buyer then asks what the prospective arbitrator think about the facts, and whether the prospective arbitrator think you can support his position against the seller.

Prospective arbitrator: Politely responds that it appears that the buyer has a claim and then ask what he is looking for in a potential arbitrator.

Buyer: The priority is finding an arbitrator who can advocate on his behalf – someone who is going to, “see it our way” – given the concern that the seller will appoint an arbitrator who would never decide in his favor.

Prospective arbitrator: While the buyer should not presuppose how a seller-appointed arbitrator might rule, the prospective arbitrator understands why he feels that way. The Prospective arbitrator tells the buyer that he or she needs to see all the facts and evidence of the case but based on what he or she has heard on the call, it sounds like they have a good case and he or she could see themselves taking his side.

1. Key takeaways and objectives (4:12)

A. Key takeaways:

- A prospective arbitrator must avoid taking sides or speculating on the outcome or what position he or she might would take.
- It is not a prospective arbitrator's job to sell his or herself or make a quick read on the dispute and decide if he or she can support either party.
- Prospective arbitrators may end up being a party-appointed arbitrator, and if so, must be an impartial, independent arbitrator.

B. Key Objectives:

The purpose of the initial call is to help a prospective arbitrator understand the following:

- The position of the party (in other words, the buyer or the seller)
- The very basic facts as explained by the party participating in the initial call
- The identities of all key parties to the contract or involved in the dispute (in this case, the buyer, seller, the name of the vessel, and perhaps the load elevator)
- Information that allows the prospective arbitrator to do a quick conflict check
- Who might be a candidate for the panel chairperson – though potential arbitrators should consider waiting until formal appointment before engaging in the process of selecting a chairperson.
- Restrict communications directly and solely with either party to the dispute to the above 5 points.

Knowledge Check #1: (exact time – not finalized)

Question: Would it ever be appropriate for a potential arbitrator to state how he or she would decide on an arbitration during a first call with a party?

Answer: No. A grain arbitrator should never commit to prejudging a dispute. A member of the panel has the fundamental duty to act fairly and impartially, avoiding any act of bias.

1.3 Confirming the Appointment: (6:11)

Appointments must be confirmed in writing – email will suffice.

In turn, confirm acceptance of the role of a NAEGA Grain Arbitrator under the arbitration clause of the NAEGA 2 Contract – and subject to the international arbitration rules of the ICDR.

Once appointed, the ICDR requires a signed a “Notice of Appointment” form. The form reminds arbitrators of their obligations as an arbitrator and requires answering certain questions to confirm independence and impartiality. This form becomes part of the record in the arbitration and should be read carefully and answered fully.

Appointed NAEGA arbitrators, will be asked by ICDR to confirm compensation and are bound by the scale of fees provided under NAEGA’s “Requirements for NAEGA Approved Arbitrators, Special Grain Arbitrators and Schedule of Fees”

Congratulations! you have been appointed as a NAEGA arbitrator! Now the Arbitration begins:

Lesson 2: Identifying & Appointing a Chairperson (6:59)

2.1 Context & Setting the Scene: (7:10)

Setting: This dispute takes place on the lower Mississippi river in and around New Orleans, Louisiana.

Background: The dispute is about whether or not a vessel could make a valid filing if it anchors as close to the seller’s load elevator as possible but outside the range of anchorage dictated by the elevator tariff.

Your role: you have been appointed by one party, the buyer.

The other party: In this case, the seller – has appointed a different NAEGA Grain Arbitrator – we’ll call him Gabe – and the two of you connect to discuss appointing the panel chairperson.

2.2 Conversation: (7:32)

Gabe (seller-appointed arbitrator): has a candidate in mind for the chair whom you’re familiar with, but you worry that this person doesn’t understand the intricacies of loading at lower Mississippi elevators.

You: suggest a candidate who spent years in the grain export trade managing logistics. Gabe does not know her and is concerned that she will not understand the pressures and concerns of an export elevator operator.

The conversation ends without an agreement. You agree to think about it some more, look for additional names, and talk again in three days.

Knowledge Check #2: (8:03)

Question: If a grain arbitrator were involved in a transaction about two years ago with one of the parties, should he or she take the case?

Answer: It depends. It’s not uncommon for arbitrators to have contacts within the industry and this is an industry arbitration forum. You will need to first determine whether you can be impartial. You should also disclose this fact so the parties can determine the relevance of the potential conflict.

2.3 Key Takeaways: (8:06)

A. Recall:

- Selecting the Chairperson is important, so prepare for this call by having a few candidates in mind and reasons why you think each one would be a good fit.

- In our example here, it is ideal to have someone who understands the grain export trade and the carriages of goods by sea in bulk – or at least cross-border trade in goods.
- However, experience and knowledge of the trade may be less important than the chair’s commercial arbitration experience – that is, his or her ability to both manage the proceedings efficiently and develop a positive relationship with the party-appointed arbitrators.

B. Logistics:

- You will be asked by the ICDR Case Manager to select the chair from NAEGA’s list of Special Grain Arbitrators. These are arbitrators approved by NAEGA to sit as the Chairperson.
- If a special grain arbitrator is not available or mutually agreeable, contact the ICDR case manager. The case manager will prepare a list of potential candidates and provide it to the parties and party-appointed arbitrators. You may discuss the qualifications and suitability of the candidates with the party that appointed you.
- You should also consider a chair’s geographic proximity to the party-appointed arbitrators. Significant time zone differences can make scheduling calls, conferences or hearings more difficult.

Lesson 3: Initial Call with the Panel & Communication within the Panel (9:23)

3.1 Background – A Chair is Named: (9:31)

The party-appointed arbitrators finally agree on a chair. Sarah is an experienced arbitrator and chair but has not previously chaired a NAEGA tribunal. She has some background in the export trade, but not specifically with agricultural commodities or grain.

3.2 Initial Panel Conversation: (9:45)

Sarah contacts the party-appointed arbitrators shortly after the tribunal is formed and sets up a time for them to talk.

Sarah: Introduces herself and gives a brief background of her arbitration and dispute resolution experience. She admits she does not have any experience with the NAEGA 2 Contract or the export of grain from North America that said, she has been involved in several arbitrations including the sale of goods across borders, including those that are shipped by vessel.

She makes it clear that she will be relying on you and Gabe to educate her about the sale and loading of grain under NAEGA 2. She then asks you and Gabe to elaborate on your background.

You: Talk about your experience and note that you are new to acting as an arbitrator.

Gabe: Highlights the arbitrations he has participated in as a party, but then he starts to talk about how he sees this particular case. He states that he has thought it over and the position of the buyer's is simply unfair and that it would be tragic if this panel allowed them to get away with it. He starts to talk about why buyers are typically taking advantage when buying on FOB terms when...

Sarah: Interjects and cuts Gabe off. She does want or need to get into the facts of the matter or potential arguments right now. She simply wants to get to know you and Gabe better and understand the strengths that each of you bring to the tribunal. She also notes that while she will preside over the hearing, she wants you and Gabe to jump in when and wherever you deem it necessary or appropriate; in other words, you are not expected to be silent.

Knowledge Check #3: (11:20)

Question: When selecting a Chairperson, is a grain arbitrator allowed to seek guidance from the party that appointed him/her?

Answer: There is neither an absolute prohibition nor obligation for a grain arbitrator to consult with the party who appointed the arbitrator to the panel. However, some parties may expect to be consulted and may wish to suggest a candidate.

3.3 Key Takeaways: (11:23)

A. The Purpose of the call:

- The purpose of the initial call is normally to get to know each other
- Take this is an opportunity to start developing trust within the tribunal. You should be honest about your strengths and experience as well as areas where you are treading on new ground.
- This trust will pay dividends when the tribunal eventually starts its deliberation on the award
- Opportunity to understand how the chairperson intends to manage the arbitration, for example:
 - a. Whether they wish to strongly suggest that the parties attempt mediation
 - b. Or whether they tend to minimize the exchange of information or just the opposite – letting the conversation run so long as to lead to the disclosure of relevant information
- How the chairperson intends to work with the panel, for example:
 - a. Whether they will manage all aspects of calls with the parties or if they expect the other tribunal members to assume some responsibility for that

B. It is NOT:

- To begin to talk through the case. The chair may, however, ask some questions about the claim – and counterclaims if any – so to better understand the nature of the anticipated dispute.

References:

1. “Requirements for NAEGA Approved Arbitrators, Special Grain Arbitrators and Schedule of Fees” available at www.naega.org

2. ICDR Rules & “Standards and Responsibilities for Members of the AAA Roster of Arbitrators and Mediators” available at www.adr.org

Next up More on the Arbitration in Videos 2 and 3

DRAFT