NAEGA Arbitration Education

Anatomy of an Arbitration – Video #2 (of 3)

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Total Time (All Videos): 30 Minutes

Training Outline

Video #2 Lessons:

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On with the Abritration

Lesson 4: Preparatory Conference – The Initial Call with the Parties (0:14)

4.1 Preparations for the Initial Call (0:15)

Chairwoman Sarah sets up this initial call between the two parties. She tells them she's looking forward to working with the tribunal to render an award – but at the same time, encourages both parties to look for opportunities to settle. Sarah asks if the parties have tried or considered mediating their dispute.

Buyer: His side has not discussed mediation but would be open to it.

Seller: Expresses a preference for the NAEGA Arbitration process, calling it fair and fast.

Sarah: Tells the parties that she cannot force them to mediate but encourages them to think it over. She also reminds them that they are allowed legal counsel – although lawyers can add to the length and cost of the arbitration.

Neither side has lawyers on the call.

Buyer: States that he intends to secure counsel.

Sarah: Advises that he do so quickly – and tells the seller to consider doing the same. She states she is ready to hear the details of the dispute and gives each side up to ten minutes to present.

4.2 Initial Call with the Parties: (1:14)

Sarah: Thank you to both parties for joining this call. The buyers filed the notice of arbitration and are therefore recognized as the claimants. I have read the notice of arbitration, but I would like to hear each of you briefly describe the nature of your claim here.

4.2 A - The Buyer's Statement: (1:27)

Buyer: Thank you Ms. Chairperson. We think our claim is straight forward and not only supported by the contract, but also supported by the custom of the trade in river ports in and around New Orleans – and by fairness. The FOB contract with the seller here requires us to charter in a vessel that can load the goods, bring it to the load port – and in fact to the load berth where the seller has committed to load it. In this case, that load berth is the seller's load elevator at berth in Louisiana. We did that… we brought a vessel into the river and up to the load elevator, or at least as close to it as we could get. You see, when the vessel arrived in New Orleans, there are only certain places where the vessel can

anchor and all of the spots to anchor which are nearest to the elevator were full. The pilots therefore took the vessel to the anchorage which was nearest available to the elevator and anchored there.

Buyer: Does that make sense so far?

Sarah: More or less, but I do not want to keep asking for clarifications. The other arbitrators can help too. Any questions from my fellow arbitrators?

Gabe: No questions.

You: No.

Sarah: Please continue.

Buyer: Thank you. So, once the vessel is anchored there, it gets inspected to be sure that it is clean and suitable enough for the grain that the seller is going to load. When it passes these inspections, it files a berth application at the seller's load elevator and provides sellers with a "notice or readiness" or NOR. It is at that point we say that the vessel is "filed." This is important because we have to file within a set period under the contract – and also because the seller then has a certain period of time to load our vessel. If the seller does not load in time, they have to pay us money called demurrage.

Sarah: I am familiar with the concept. So there is a demurrage dispute?

Buyer: More or less. But the only reason we are here is that the seller's elevator tariff – the rules of the elevator for anyone loading there – say that in order to file at the elevator you have to be anchored in certain anchorages.

Sarah: And your vessel was not, I assume?

Buyer: That's right. But not because we just missed it. There simply was not any space there when the vessel arrived. We got as close to the load elevator as we could. We anchored there, in a recognized anchorage. Why should the elevator be able to deny us our right to file simply because it chose in its tariff to restrict the anchorages from which we could file? It is important to add that this

is not the custom or practice in the industry. Normally, the vessel is required to get as close to the elevator as it can, and when it gets there it can present its notice of readiness and file. That is all we want to happen here. We cannot be denied this ability to file due to some arbitrary requirements in the elevator tariff. Lastly, we had no ability to negotiate the elevator tariff. The seller's come up with that. We are just forced, if you believe them, to live with whatever they put in it, however unfair and unusual it may be.

Sarah: So you think that the vessel should have been able to file when it got to its anchorage, even though that was not close enough according to the seller's elevator tariff, right?

Buyer: In a nutshell, yes.

Sarah: Anything else we should know today?

Buyer: Well, there is more but I know this is not a call to go through *all* the facts and arguments. I hope you have a better idea of what we are claiming here and why.

Sarah: I do. Thank you. I would like now to give the seller a chance to tell us how they see this dispute. Please go ahead.

4.2 B. The Seller's Statement: (4:56):

Seller: Ms. Chairperson, I am the manager if the load elevator and we see this as a pretty simple matter. We have a contract with the buyers that is on the NAEGA 2 form of contract. That contract clearly says that delivery will be made "subject to the elevator tariff." Our tariff is publicly available and states very clearly, that in order to file at our elevator, the vessel needs to be anchored at one of the anchorages that are reasonably close to the elevator. We specify those by name, and they are recognized anchorages. It certainly is unusual for them to be full and this has generally not been a problem for us or vessels filing at our elevator. What is not unusual is the contract and our tariff, which the buyers had every opportunity to study. Now they are complaining that it is

unfair because, without fault by either of us, the named anchorages are full. It is not unfair; it is just the way the bargain was struck here.

Sarah: I think I see. Anything else form the seller?

Seller: Just one thing. The reason our elevator names specific anchorages is so we can run our elevator efficiently. It is nearly 200 miles from the mouth of the Mississippi river to our elevator. There are many, many anchorages. But for us to operate, well, as best we can, we need vessels to be able to arrive at our elevator shortly after they are called to berth. So our tariff is not unfair. It is attempting to lay out the bounds of fairness to both the elevator and the vessel that wants to file. That is really it.

Sarah: Ok. Any questions from my fellow arbitrators?

Gabe: No.

You: No questions.

4.3 Following the Call: (6:37):

Now that she has heard the basic arguments of the case, Sarah asks the parties if there is a need for a physical hearing. Both sides agree that an in-person hearing would not be necessary and that they would be satisfied with discovery in the form of documents and witness statements.

Sarah gives the parties several weeks to discuss and come to an agreement on three key matters:

- What information needs to be exchanged
- A list of witnesses – either on the facts or related to the so-called "Custom of the Trade"
- And a briefing schedule

Lastly, she asked about a reasoned award and whether the parties want the panel to produce an award that not only decides on the buyer's claim, but also states why. Both sides agree they want a reasoned award.

Sarah concludes the call by saying she will draft a *first order* for this arbitration that lays out the agreed points and deadlines. She will share it with the panel members and then email it to the parties.

Knowledge Check #4: (7:35):

Question: Which of the following are important aspects of a successful Preparatory Conference with the Parties?

A. The arbitrators leave with a general understanding of the dispute and the anticipated claims and defenses.
B. There is agreement about whether an in-person hearing will be necessary.
C. There is an agreement on a final list of witnesses and experts.
D. The arbitrators know whether they will be issuing a "reasoned award."

Answer: A, B, D. The objective of the Preparatory Conference is to get a general understanding of the dispute and set the tone and direction for next steps. Arbitrators will want to know if the Parties intend to call witnesses or experts, but there is no expectation that this meeting will establish a "final" list.

4.4 Key Takeaways: (7:40)

4.4 A. Areas to Cover: (7:42)

This is an important meeting. It gives the tribunal a better understanding of the claim and defenses – and sets how the arbitration will be organized.

There are several key areas to cover. The ICDR case manager will normally provide the tribunal with its form of agenda for this preliminary conference. This can be quite useful as a checklist for this meeting, but the chair can use whatever agenda or checklist they like.

This meeting allows the tribunal to explore whether this case is ripe for mediation or some kind or expedited arbitration. If the parties are not aware of

these alternatives and they are potentially applicable, they should be pointed towards resources to help them determine whether something like mediation is a preferred path.

The chairperson can also make clear to the parties how they intend to manage they arbitration. The idea is that as the arbitration progresses, there are as few surprises to the panel or the parties as possible.

Let the parties raise any preliminary matters. It may be that the respondent wants to make a counterclaim arising from the same or similar facts or one of the parities may have concerns about the confidentiality of some of the documents or practices it feels it will need to disclose in the arbitration. All of these should be addressed at this state.

4.4. B Procedural Issues: (9:01)

Be sure to address all of the key procedural issues. These include:

- Whether the parties need a hearing, or just proceed on the use of documents alone.

- The amount of information exchanges each side anticipates.

- Whether the parties anticipate the use of witnesses – and if there is expected to be a hearing, would they appear?

- Whether the parties anticipate the use of expert witnesses, and if so how and when they will be identified, and their credentials examined by the other party and the panel.

- Timing of the briefing, information exchange, and hearing (if any). If there is to be a hearing, schedule it as early as possible so that they parties can clear their calendars for it, and so that can be used to set the timing of procedures that are requires prior to the hearing – things like:
  a. Information exchanges.
  b. Identifying witnesses (lay and expert) and pre-hearing briefings.

c. Try to start thinking about how long the full hearing might take.

- Do the parties want a reasoned award? ICDR rules state that it must be reasoned unless the parties agree otherwise.

- Do the parties need translators? And if a hearing occurs, do the parties want a court reporter? This is recommended though an extra expense.

Conclusion: (10:14)

This preparatory conference is the first and most critical opportunity for the tribunal and parties to outline procedures and discuss complexities of the particular case.
Additionally, it is a great time to organize how the case will proceed – ensuring a cost-effective and problem-free proceeding. Prepare and plan for it carefully.

More on the Arbitration in Video 3 !