NAEGA Arbitration Education

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

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

Total Time (All Videos): 30 Minutes

Training Outline

Video #3 Lessons:

Lesson 5: Procedural Orders from the Panel

5.1 Orders from the Panel

Lesson 6: Dealing with Information Exchange (Discovery) Issues

6.1 Discovery Issues

- Knowledge Check #5

6.2. Key Takeaways

Lesson 7: Dealing with Requests for Additional Briefings

7.1 The Buyer's Request

7.2 The Panels' Consensus

- Knowledge Check #6

7.3 Key Takeaways

Lesson 8: Writing an Effective Award

8.1 An Effective Award

8.2 Key Takeaways

References:

1. ICDR's guidance concerning information exchange – and ICDR International Arbitration Rules 20 and 21
2. "Requirements for NAEGA Approved Arbitrators, Special Grain Arbitrators and Schedule of Fees" available at www.naega.org
3. ICDR Rules & "Standards and Responsibilities for Members of the AAA Roster of Arbitrators and Mediators" and "The Code of Ethics for Arbitrators in Commercial Disputes" and "International Centre for Dispute Resolution — Arbitration Rules" available at www.adr.org

The Arbitrationcontinues:

Lesson 5: Procedural Orders from the Panel: (0:15)

5.1 Orders from the Panel: (0:16)

After the preparatory conference, the chairperson will typically draft an order from the tribunal stating all of the points on which the parties agreed, including scheduling issues.

This order is delivered to the parties and to the ICDR case manager.

All agreements concerning the management of the arbitration should be memorialized in this order. Some orders – particularly after the preparatory conference – can be lengthy.

Orders can indicate that matters *are not yet decided* but have been taken under advisement by the tribunal. They may also indicate matters upon which the parties will confer on and attempt to agree prior to a certain date.

Make sure that all orders are made part of the record of the arbitration by sending a copy to the ICDR case manager. Normally, this is done by the chairperson.

Lesson 6: Dealing with Information Exchange (Discovery) Issues: (1:07)

One week after the preliminary conference, the two parties in our case report to the panel that they cannot agree on the seller's demand that the buyer produce

all of their internal email and phone records relating to vessel 1 – including communications with the river pilots and the vessel agents.

The seller also wants a copy of the signed charter party to see if the buyer had the contractual ability to tell the vessel where to anchor.

The buyer believes the seller's demands are *excessive* almost to the point where it feels like litigation. They also argue that the charter party is a *confidential* agreement.

The seller says she is concerned that the vessel waited *too long* to look for a spot in the anchorages designated in the elevator tariff. Furthermore, she suspects that the anchorage ultimately chose is *not* as close to the elevator as the vessel could have gotten.

The sellers wish to confirm all this by obtaining the requested communications within a reasonable date range, claiming that it would allow them to make a full defense.

As for communications between the buyer and third parties, the seller has told the buyer that if they do not agree, she will ask for the information *directly from the pilots and the vessel agents* – which may mean subpoenas and extra costs that she will, in turn, claim from the buyer in this arbitration.

The chairperson sets up a call for the tribunal to address these issues. The panel ultimately orders the buyer to produce the communications – assuming that the sellers, do in fact, set a reasonable date range.

However, the panel is *unconvinced* of the need for the sellers to see the charter party or what that would add to the case, so that request is denied. The chairperson goes back to the parties with the tribunal's order.

Knowledge Check #5: (2:42):

Question: *True or False* - Orders of the Arbitration Panel are merely documents to guide the Panel and Parties and should not be a part of the formal Record of the Arbitration?

Answer: False. Orders of the Panel are an integral part of the formal Record and should always be submitted to the ICDR Case Manager for inclusion into the Record.

Lesson 6: Key Takeaways: (2:46):

Discovery, if any, should be tailored to the case, and in most cases *moderate*. You want to give the parties an equal right and opportunity to be heard and present their case, but your goals are also efficiency and economy – as well as avoiding unnecessary delay and expense.

Broad U.S. litigation discovery should *not* apply – so depositions, requests for admissions, and interrogatories should not be allowed other than in exceptional circumstances.

Nonetheless, parties must exchange documents upon which they intend to rely *prior to* any hearing or the briefing (if there is to be no hearing).

Further, arbitrators may order a party to produce documents not otherwise available to the party seeking them if those documents are reasonably believed to exist, and reasonably believed to be relevant and material to the arbitration outcome.

Encourage the parties to try to agree on the *scope* of the information exchange, or other related disputes, before going to the panel for a decision.

Note that it is not uncommon for panels to agree to allow what would appear to be discovery into relevant information – and then giving that information the weight that the panel thinks it deserves (which may be very little). Should a

party challenge the award, this negates the argument that they did not get a fair chance to present their case.

Lastly, arbitration panels may issue subpoenas in order to obtain information from an outside source that one party cannot obtain from the opposing party. However, this is not a simple process. The panel should consider the applicable law on arbitrators issuing subpoenas and generally try to help the parties find other ways obtaining the information needed.

Lesson 7: Dealing with Requests for Additional Breifings: (4:38):

7.1 The Buyer's Request: (4:41):

At this point in the process, both parties have submitted their initial brief as well as their reply brief. However, the buyer now wishes to address certain points raised by the seller's reply brief – so he requests additional time to submit a third brief.

The seller objects, stating her belief that everything has been fully addressed in the existing briefs. She also points out that if the buyer is granted a third brief, she very well may need one too – which adds to the cost and time of this arbitration.

7.2 The Panel's Consensus (5:11):

Sarah again sets up a call with you and Gabe. You push hard to allow the buyers to put in another brief. You think the panel could benefit from seeing more and that the delay would not be significant. You are concerned that they seller's intention is to cut off the buyers from further presenting their case.

Gabe, on the other hand, is not entirely clear about exactly what the buyer feels he needs to address in a third brief. That said, you are inclined to let them add to the record – but with some reasonable boundaries on the issues addressed and the length of the brief.

Sarah agrees with Gabe if the buyer is allowed another brief, the seller should get one too, albeit one with similar restrictions. Sarah therefore goes out with another order.

The order states that the *buyer* is allowed an additional brief due within 10 days and running no more than 5 pages long. It may only address issues in the seller's reply brief which the buyer *did not address* in his *original* brief.

Upon receiving the buyer's additional brief, the seller is allowed a *responsive brief* within 10 days – also no more than 5 pages long and addressing *only* the issues raised in the buyer's third brief.

Knowledge Check #6: (6:19):

Question: *True or False* - Broad US litigation discovery rules do not apply to arbitrations for disputes related to the NAEGA No. 2 contract?

Answer: True. Arbitration is an alternate dispute resolution forum and not a formal court of law. Article 21 of the ICDR Rules provides general guidance related to the exchange of information for arbitration panels.

7.3 Lesson 7 Takeaways: (6:23):

Much like dealing with information exchange, the goal here when it comes to requests for additional briefings is to provide both parties the opportunity to present their case, and to treat them fairly – all while avoiding unnecessary or irrelevant arguments that only serve to add time and cost.

Neither party should be allowed to drown the other party with arguments.

It is not unusual for a party to ask for another opportunity to present their case or defense. But at some point, the arguments need to end. The panel's job is to weigh the utility of further argument against cost and delay.

If additional briefings are allowed, the panel should favor setting clear boundaries on the issues to be addressed, and the length of the additional submissions – and those stipulations should be put out in another order, or the modification of an existing order.

Lesson 8: Writing an Effective Award: (7:15):

8.1 An Effective Award: (7:17):

If you recall from Lesson 4, both parties agreed with the chairperson's suggestion to proceed with presentation of documents only. After responses to her last order allowing for final briefs are submitted, the chairperson will ask the parties If they decline or if satisfied that the record is complete, she declares the arbitral hearing closed.

That said, the tribunal – whether by its own discretion or upon request from one of the parties – may reopen the hearing at any time during deliberations and before any award is made.

We have covered a great deal of procedures leading up to the deliberation by the tribunal as they consider the merits of the case and arrive at an award.

We will save this part of the process for another, more comprehensive lesson – one that will include the actual facts of the case and how the tribunal dealt with the various issues presented by both parties.

However, as you think about how you might handle this process, the following takeaways will provide good insight on how this award should be written.

8.2 Lesson 8 Key Takeaways: (8:21):

Most reasoned awards adhere to a format that accomplishes the following:

- First, it identifies the parties and their contract, including the arbitration clause and the party that initiated the arbitration.

- Next, it lays out the key facts, claims and defenses in a clear and concise manner.

- This is not to say that it merely recites those details as laid out by both sides in their submissions – because not all facts in those submissions are necessarily important to the case. Where important facts are *not* clear and that ambiguity *had an impact* on the award, that should also be noted.

- And in the award, do not forget to include that the contract at the root of the dispute included an arbitration clause. You should include a full copy of that clause and note that this arbitration was conducted under that arbitration clause.

- It is the panel's job to identify the key facts and the arguments and lay out how the panel addressed all of these issues and, ultimately, the rationale behind its decision.

- And then there is the panel's *award of relief*, if any. This usually takes the form of an order for one party to pay a sum of money to the other, but the relief can take other forms as well, such as the return of property.

- Remember that the award will be published by NAEGA – though the identities of the parties will be redacted. The ICDR may also publish the award with these redactions. The panel therefore needs to think about how the award will be understood by those using the NAEGA 2 contract, and how it could affect their behavior.

- All members of the tribunal should sign the award, but the signatures of only two are sufficient for the award to be valid and enforceable. An arbitrator may certainly dissent and can do so by simply writing "in dissent" next to their signature, by refusing to sign, or by writing a separate dissenting view.

- The dissenting view has no impact on the enforceability of the award – but could give the non-prevailing party the ammunition or courage to try to appeal the award, so be careful when dissenting.

- The award must be sent to the ICDR for review before it is released to the parties. The arbitrators should take this into account when considering the timing of the award and may want to consult with the ICDR to determine how long this review will likely take.

References:

1. **See the ICDR's guidance concerning information exchange – and ICDR International Arbitration Rules 20 and 21.**
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Training Conclusion and Thank you! (11:00)

We hope this training has given you a better idea of what to expect and how to act as a NAEGA Arbitrator.

First, please read and make sure you understand the NAEGA guidelines for approved arbitrators available on our website. As well as the AAA's code of ethics for arbitrators in commercial disputes, its standards and responsibilities for arbitrators and mediators, and the rules – all of which are available on the AAA website.

Second, serving as an arbitrator is a privilege. You are taking on a significant commitment – not only to the parties and your fellow arbitrators, but to the process, the grain export industry, all its participants, and ultimately the wider public.

Before you accept an appointment, you should be certain that you have sufficient time and capability to serve – and that you can do so impartially and independently.

It is expected that NAEGA arbitrators will make every reasonable effort to issue an award that does justice to the contract, facts, custom of the trade and the law applicable to the dispute. An arbitration that accomplishes this – but does so at the expense of fairness and integrity – undermines not only that award, but also the foundation of the arbitration process.

That process depends in large part upon the trust that parties using it put into arbitrators that will rule on the dispute. Any doubts about your ability to act impartially and independently can normally be addressed by a full disclosure of the potential conflict or appearance of conflict. If any doubt, disclose.

Thank you, again, for your interest in serving as an arbitrator for approved by the North American Export Grain Association.

End of Arbitration 101- Stay Tuned for 102 !