# Preparation For An Arbitration Hearing[1]

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## Introduction

ARBITRATION is an alternative to the court system for the resolution of disputes. It is strongly endorsed by the Chief Justice of the Supreme Court Warren E. Burger, who states: "We need to consider moving some cases from the adversary system to administrative processes, and especially arbitration. Against this background I focus on arbitration, not as the answer or cure-all for the mushrooming case loads of the courts, but as one example of 'a better way to do it.'"

The advantages are quite clear: Disputes are resolved by one's peers, who are knowledgeable about contracts, quality and market conditions; justice and equity are achieved in a matter of weeks, not months or years; and costs are minimal because the services of lawyers are not required. AFI arbitrators serve without pay, disputes are settled without further recourse to the courts[3], and the losing party pays the modest arbitration fee.

The AFI Arbitration Service began in 1906. From the start, it has been a businessman's service. It deals primarily with disputes concerning non-performance of contracts and the quality of merchandise delivered against contracts. Arbitrators are selected by an Arbitration Board for their expertise in the product or commodity in dispute. They are independent businessmen who also commit themselves in their contracts to submit disputes to arbitration by their peers. Parties to the arbitration may challenge the appointment of selected arbitrators. They have one challenge without cause and unlimited challenges with cause.

## Preparation

In order for an arbitration hearing to proceed in an orderly manner, each party to the arbitration should carefully prepare his case.

Preparation begins long before the arbitration hearing. It begins by having an agreement to arbitrate, not simply having an arbitration clause in a contract, but having the other party's signature on that contract or other proofs to show that an agreement to arbitrate exists.

The Arbitration Clause must state, at least, the following:

*ARBITRATION: Any controversy or claim arising out of this contract shall be settled in binding arbitration by the Association of Food Industries, Inc., of New York in accordance with its rules then obtaining.*

A great deal of business is done today without contracts. One must recognize that if this is the way he wishes to conduct his business, he is not going to have recourse to arbitration.[4] Also, he will not have recourse to the courts in many situations because of the prohibitive cost. Thus, one often hears the phrase: "Sue me."

In entering a new business relationship, one may request the Association of Food Industries, Inc., to write a letter to the other party, advising him of all the services of AFI, encouraging him to become a member and surveying his attitude toward arbitration.

## Building Your Case

1. Examine your contracts carefully to determine if there is a time bar for the submission of a claim or for the initiation of an arbitration. Even if there is a practice in the trade that is at variance with a contract term, do not rely on that practice. Submit your claim in a timely fashion.
2. When a claim is made that merchandise delivered does not meet the contract specification, have the seller or his agent make a site inspection of the merchandise with you. Prepare a memo of that meeting to be signed by both parties as to the condition of the merchandise.
3. In a dispute on quality, it is the obligation of the one in possession of the merchandise to limit the losses of the other party. As soon as the claim is established it is the obligation of both parties to arrange for a joint sampling of the merchandise or to mutually engage a third party to take the sample, seal it, identify it and preserve it in such a manner that there can be no dispute as to its validity. The size of the sample can be determined by mutual agreement of the parties.

   Furthermore, it is the obligation of the buyer to retain at least 10% of the lot from which arbitration samples may be drawn, once 60 days has passed from the time that the goods were received.

   The interpretation of contract descriptions can vary slightly from year to year depending upon the quality and grade of crops.
4. In cases of default, establish the precise time of default, that is, when you are reasonably sure that the other party would not perform. In a volatile market this is a crucial factor.

   When necessary to establish a market price at the time of default or whenever prices or allowances are a factor in a dispute, obtain, if possible, written statements as to market prices by parties active in the

trade. If both parties to the arbitration agree on market levels, this aspect can be presented as one of the undisputed facts.

5. Gather all documents related to the dispute: bills of lading; FDA or other government agency releases; sampling releases; all correspondence, letters, faxes, and telexes; records of telephone calls; truckers' receipts; warehouse receipts.
6. Prepare a brief summary statement setting out all undisputed facts relative to the case. If there is agreement as to what the undisputed facts are, one can avoid unnecessary discussion at the hearing. Nevertheless, at the hearing, one should have whatever documents substantiate the facts he presents.
7. Clearly state what facts are in dispute, and offer whatever proofs you have to substantiate your interpretation of the facts.
8. Anticipate what points can be asserted that will seriously weaken your case. One can be caught completely by surprise at an arbitration hearing, because facts or interpretations are submitted which never surfaced in discussion that took place between the parties prior to the hearing.

**At the Hearing**

1. Each party should bring four sets of his statement and supporting documents, properly referenced, e.g. Attachment 1, Attachment 2, etc. These sets are for each of the arbitrators and for the opposing party.
2. Originals of all documents should be submitted for proper verification, and should be marked for return to the parties after the conclusion of the proceedings.
3. Testimony submitted without documentary support may be contested by the other party. A request can be made to the arbitrators to completely ignore testimony for which proofs are not submitted.
4. One must be alert to anything said that may have an influence on the decision of the arbitrators. For example, one party may state that he had endured losses on resales because merchandise delivered was inferior. The other party can request that this point be disregarded unless his opponent substantiates the statement. There are also obligations of a buyer to determine the quality of merchandise bought before a resale is delivered, and one may point this out to the arbitrators.

   If a party claims that the same merchandise was delivered to many buyers, and none of the others had a claim, the opposing party has a right to demand proof of the assertion, as well as to state that the facts of this case stand on their own, regardless of other deliveries.
5. If one feels during the hearing that a real injustice may occur because some unexpected data is presented at the hearing, which he believes can be refuted, it would not be inappropriate to clearly state his concern to the arbitrators and request an adjournment of the hearing with the understanding that he will pay the fee for the resumption of the hearing.
6. Never say anything at a hearing that will indicate a willingness to accept a position which has not been considered adequately and which can affect the decision of the arbitrators.
7. Unsubstantiated charges at the hearing may also be contested by the opposing party. If one fails to do so, the arbitrators have the right to request substantiation.
8. Each party has the right to present his entire case without interruption by the other party. Notes should be taken on any points that need to be rebutted. Should an arbitrator ask a question that will be answered in subsequent testimony, one may so advise him and request his indulgence to continue one's statement.
9. The arbitration hearing is informal. If lawyers are present, they are requested to comply with this informality. Testimony is not to be elicited from a series of witnesses using the question and answer format of the courtroom. The presentation is to be made in a monologue. The role of the attorney is to assist his client in making a thorough presentation of the facts, and to assist him in refuting the opposition. There are no pre-hearing depositions. There is no need for coaching sessions with supporting witnesses. The ordinary role of witnesses other than the principal witness is as a resource in case the principal witness is not aware of all the facts and communications that have occurred between the parties during the course of the contract and the dispute.

N.B. It is recommended that parties to an arbitration at least 5 days prior to the hearing submit a letter to the Association with a copy for the opposing party stating what they consider to be the date of default, and market price as of that date, and a listing of the documents they will bring to the arbitration and the documents they expect the other side to produce.

Parties to an arbitration should address the question of damages and specify what they consider the damages to be without prejudice to their case.

While a party may not want to give any indication that damages are a possibility, he should nevertheless seek to minimize the damages claimed while affirming he does not expect any damages to be awarded.

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1. Reprinted from "Association of Food Industries '84".
2. This article was prepared with the help and advice of the AFI Arbitration Board and the AFI Board of Directors.
3. Very limited grounds exist for challenging an arbitration in court.
4. When an arbitration agreement does not exist, parties in dispute can mutually agree to submit to arbitration; however, usually the party against whom a claim is made is unwilling to submit.