DISCOVERY AND DISCLOSURE IN UNITED STATES MARITIME ARBITRATIONS

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DISCOVERY GUIDELINES

Federal Court Discovery

Modern Arbitration

Old-time Arbitration

SOCIETY OF MARITIME ARBITRATORS DISCOVERY GUIDELINES

- Emphasis on Fairness and Relevance
  - Section 23 of SMA Rules – Evidence
  - Guidelines Contemplate:
    - Written requests
    - Depositions in appropriate cases
    - Possible expert disclosure
    - Protection of proprietary information
    - E-discovery not specifically covered
  - Panel has power to sanction non-compliance

Resolution of Discovery Disputes

- Amount at stake
- Likelihood discovery will lead to the submission of relevant & material evidence
- Cost of Compliance
- E-discovery – No SMA guideline, but certain rules of thumb apply
  - Production only from sources used in ordinary course of business
  - Generally available technology (no metadata)
  - Costs
  - Protect efficiency and economy

WHAT THE CASES TELL US

Expectations:

- Candor from outset about what evidence parties believe the panel should hear
- Arbitrators will not reward party who fails to request discovery of relevant and necessary evidence
- Arbitrators will not reward a party whose discovery requests prolong proceedings yet turn out to reveal little
- Arbitrators will tailor discovery to meet the needs of the case – a balancing act

NO FISHING!

- Tension between "fair disclosure" and the "fishing expedition"

DISCLOSURE FROM THIRD PARTIES

Arbitral Subpoenas to non-parties pursuant to Federal Arbitration Act §7:

- Federal Rule 45 – Service of Subpoena
- History of Arbitral Subpoenas and Federal Court Discovery Closely Linked
- The Inherent Constraints in §7:

  *Documents only Subpoena?

  *Witness/Documents Outside Judicial District Where Panel Sits?

- The Jurisdictional Problem:

- Subpoena must be for testimony before the Panel (so may not be enforceable outside that judicial district)

- Arbitrators may be constrained by contract to subpoena only witnesses in the jurisdiction where the Panel sits

- Subpoena can only be enforced by District Court (so Federal jurisdiction must exist)

A PARTIAL SOLUTION:

- SMA Rules §7 – "Site of the Arbitration"
  - Recently amended rule gives arbitrators authority to convene at alternate location and to require production of documents there without testimony
  - Not yet tested before the courts, but appears to sidestep the limitations placed on third party discovery in arbitration by FAA §7 and certain courts

JUDICIAL INTERVENTION

GENERALLY

Courts shy away from direct involvement in arbitral discovery with limited exceptions

- Exigent Circumstances – Ship is sailing or witness leaving jurisdiction
- Misconduct – Right to be heard and disregard of evidence to deprive party of a full and fair hearing

- Note: Exceptions are rare and appeals often unsuccessful

Discovery in Aid of Foreign Arbitration – A Deep Divide Among the Circuits

- Judiciary Act, 28 USC §1782, provides for broad and liberal discovery, as under the Federal Rules in aid of proceedings before foreign and international tribunals, but the heart of the controversy is whether private international arbitration qualifies as a "tribunal"
  - 1999 – Second and Fifth Circuits say private arbitration does not qualify as a tribunal because it is a creature of contract not to be disrupted by either party's "tactical use of discovery devices." Courts also dragged out the old public policy argument that such discovery would "undermine" the efficient and cost effective benefits of arbitration

- 2004: Supreme Court dictum in the Intel case suggests the term "tribunal" includes "arbitral tribunals"
  - Not legal precedent, so not binding as law
- After Intel: Courts more likely to consider foreign/international arbitration panels as "tribunals" qualifying for liberal discovery benefits under §1782
- Irony Alert!: The application of §1782 discovery provides parties to foreign arbitrations with broader discovery benefits than are available to those seeking discovery under FAA §7 in U.S. domestic arbitrations, maritime or otherwise