COMMITTEE ON MARITIME ARBITRATION: *GUIDELINES REGARDING DISCOVERY IN ARBITRATION*

It is generally recognized that effective discovery of relevant evidence is necessary to assure both that arbitral proceedings are conducted in a manner which is fundamentally fair to the participants, and that matters are decided on the basis of all relevant evidence being made available by the parties for presentation to the arbitrators. Accordingly, in order to encourage both uniformity of approach to and flexibility in use of discovery, the following guidelines are set forth regarding the timing of discovery, possible limitations on discovery, and possible sanctions for failure of a party to respond to a discovery order.

1. Discovery should be utilized during the course of arbitration proceedings to enable the parties to identify and obtain relevant and material evidence. To initiate such discovery the parties should exchange written requests for production of documents and information at an early stage of the arbitration proceedings so that documents and information may be exchanged prior to the scheduling of arbitration hearings. Other written requests for production of documents, information or witnesses for testimony before the arbitrators may be made as the arbitration progresses.

2. In the event of any dispute between the parties concerning the scope of discovery or compliance with discovery requests the arbitrators upon written notice of such dispute by the parties shall hear the parties concerning the dispute and make such order or orders as are appropriate under the circumstances, with the arbitrators considering the amounts at stake, the likelihood that the discovery request will lead to the production of relevant and material evidence and the expense and time which may be required in complying with such request. If the parties and the arbitrators agree the Chairman of the panel may be empowered to make all rulings on discovery in order to expedite the proceeding.

3. In appropriate circumstances discovery may take place outside the arbitration hearings, with or without the attendance of the arbitrators, by the taking of depositions of witnesses or the inspection, in the presence of the parties or their representatives, of property involved in the parties' dispute or by other steps necessary to preserve or present relevant and material evidence. Arbitrators are also empowered (in appropriate cases) to require written pre-hearing disclosure by the parties identifying proposed fact or expert witnesses and a brief statement as to the substance of the proposed testimony of such witnesses.

4. As arbitration is a private dispute resolving procedure, it may be appropriate for the arbitrators to protect proprietary or confidential information or documents from disclosure to parties not involved in the arbitration proceedings. On written application by any party, and for good cause shown, the arbitrators may condition the availability of discovery of such proprietary or confidential material on the observance of reasonable safeguards to prevent its disclosure or use outside of the arbitration.

5. In the event of a party's failure to comply, or delay in complying, with an order of the arbitrators concerning discovery, the arbitrators may impose appropriate sanctions against that party including, without limitation, (1) the awarding against that party of expenses necessarily incurred by any other party in obtaining discovery through other means, (2) the awarding against that party of a portion of the arbitrators' fees relating to any prolongation of the arbitration proceedings resulting from the failure or delay in complying, (3) the awarding of procedural relief, including the recalling of witnesses of that party to permit full cross-examination by other parties and, most important, (4) the drawing of inferences adverse to the position of that party.

6. The above Guidelines are without prejudice to the right of the parties to agree in each case upon appropriate discovery devices to simplify and expedite the arbitration process and the parties are encouraged to discuss and agree on appropriate discovery devices.

Commentary

A. *Power of the Arbitrators to Order Discovery*

The arbitrators have broad discretion to control their own proceedings. *Scherk v. Alberto-Culver*, 417 U.S. 506 (1974); *John Wiley & Sons v. Livingston*, 376 U.S. 543, 557 (1964). This discretion is limited only by the proviso that each party have notice of hearings and the opportunity to be heard, *Grovner v. Georgia-Pacific Corp.*, 625 F.2d 1289 (5th Cir. 1980), and that the arbitrators receive all "relevant evidence." The courts will review the arbitrators' actions in refusing to hear evidence deemed "relevant". *Nelson Bunker Hunt v. Mobil Oil Corp.*, 654 F. Supp. 1487, 1513 (S.D.N.Y. 1987); *Petroleum Transport. Ltd. v. Yacimientos Petroliferos Fiscales*, 419 F. Supp. 1233 (S.D.N.Y. 1976); *Harbor Island Spa Inc. v. Norwegian American Lines*, 314 F. Supp. 471 (S.D.N.Y. 1970).

The courts have granted discovery in advance of or outside of arbitration only in extraordinary circumstances, particularly where material evidence

which is controlled by an adverse party should be preserved. *Koch Fuel Int'l. Inc. v. M/V SOUTH STAR*, 118 F.R.D. 318, 320 (E.D.N.Y. 1987); *Bergen Shipping Co., Ltd. v. Japan Marine Services Ltd.*, 386 F. Supp. 430, 435 n.8 (S.D.N.Y. 1974); *Bigge Crane & Rigging Co. v. Docutel Corp.*, 371 F. Supp. 240 (E.D.N.Y. 1973). Further the courts have encouraged arbitrators to exercise their broad powers under Section 7 of the United States Arbitration Act in order to facilitate the obtaining of evidence relevant and material to the issues before the arbitrators. *Complaint of Koala Shipping & Trading Inc.*, 587 F. Supp. 140, 142 (S.D.N.Y. 1984).

Arbitration rules routinely provide that the parties may offer such evidence as they desire and "shall produce such additional evidence as the arbitrator may deem necessary to an understanding and determination of the dispute". *See, e.g.*, Rule 31, Commercial Arbitration Rules, American Arbitration Association; Section 22, Maritime Arbitration Rules, Society of Maritime Arbitrators, Inc . ("SMA"). Indeed Section 22 of the SMA Rules provides that the arbitrators shall have the power to direct the taking of depositions of witnesses who cannot conveniently attend before the panel in the event that all of the parties cannot agree to such depositions. *See also* Rule 10, Rules for Non-Administered Arbitration of Business Disputes, Center for Public Resources, which provides that the Tribunal shall permit and facilitate such discovery as it shall determine is appropriate in the circumstances, taking into account the needs of the parties and the desirability of making discovery expeditious and cost-effective.

Decisions such as *Commercial Solvents Corp. v. Louisiana Liquid Fertilizer Co.*, 20 F.R.D. 359 (S.D.N.Y. 1957) and *Foremost Yarn Mills, Inc. v. Rose Mills, Inc.*, 25 F.R.D. 9 (E.D. Pa. 1960), which held that discovery procedures provided in the Federal Rules of Civil Procedure are not available in an arbitration proceeding, do not limit the power of the arbitrators to require discovery in arbitration. Further, the decisions such as in *Concoran v. Shearson/American Express*, 596 F. Supp. 1113 (N.D. Ga. 1984), *Recognition Equipment Inc. v. NCR Corp.*, 532 F. Supp. 271 (N.D. Tex. 1981) and *Mississippi Power Co. v. Peabody Coal Co.*, 69 F.R.D. 558 (S.D. Miss. 1976), refusing to permit the continuation of discovery procedures in court actions which had been stayed pending arbitration, on the grounds that discovery was permitted in arbitrations under Section 7 and that "dual discovery" in *both* the arbitration and the court actions would be unduly time consuming and expensive, clearly proceeded on the assumption that adequate discovery could be obtained in the arbitrations. *Compare Int'l Ass'n of Heat and Frost Insulators and Asbestos Workers, Local 66 v. Leona Lee Corp.*, 434 F.2d 192, 194 (5th Cir. 1970), in which the Fifth Circuit Court of Appeals approved the availability of federal

discovery procedures in a case stayed pending arbitration as being consistent with the district court's retention of jurisdiction and effectuating the policy favoring arbitration.

B. ***Power of the Arbitrators to Enforce Discovery Orders***

Sanctions may be imposed at the conclusion of hearings after all evidence is heard, and these sanctions may include adverse inferences for failure to come forward with evidence which is demanded. *See THE ARHON*, SMA No. 1844 (Arb. at N.Y. 1983).

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