Where Arbitration Began: Maritime Arbitration in New York

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In March 1656, Andrew Kilvert brought suit against Jan Geraerdy in the Court of Burgemeesters of the colony of New Netherland, demanding the release of his vessel, which had been arrested to obtain payment for the sale price of Kilvert's ship. The Court ruled as follows: "… the case is found to be somewhat obscure… and, in order then not to be troubled with a long and weary lawsuit at the expense of a stranger, the Court orders… that the matter shall be disposed of by four arbitrators."

The practice of arbitration of maritime matters in New York, therefore, has its beginnings in Dutch law. Dutch rule in New Netherland (New Amsterdam) lasted less than fifty years. With the English takeover in 1664, most of the Dutch settlers elected to stay in what its new rulers named New York. In 1766, a statute concerning arbitration was enacted in the colony, and shortly after the founding of the New York Chamber of Commerce in 1768, the arbitral system became further embedded in New York. Given the long historical practice of arbitration in New York, it is understandable that the passage of the United States' Federal Arbitration Act of 1925 originated in New York. By 1920, the Chamber of Commerce and the New York State Bar Association drafted what would become the New York Arbitration Act of 1920. The federal law that followed in 1925 derived directly from the New York Arbitration Act.

As New York's importance as a shipping center grew, the need for a specialized body of rules, and reference of commercial disputes to specialized and knowledgeable maritime commercial "men" became commonplace. In the early years of New York, first as a colonial outpost, and later as a thriving mercantile center, maritime knowledge was rather broadly distributed among the general population. The records preserved in the archives of the State and City of New York document the paramount importance of shipping in the trade of the colony.

With the adoption of a pioneering arbitration act in New York in 1920, it was only a matter of time before the tradition firmly established nearly 300 years before during Dutch rule, gave rise to a modern regime of maritime arbitration.

The Society of Maritime Arbitrators, Inc. was formally constituted in 1963, and since its formation, the Society has published over 4,200 awards, and currently comprises 63 arbitrator members. The Society (SMA) has adopted a body of Rules, with links to its published awards, and to its newsletter, "The Arbitrator".

All of the arbitrator members of SMA have commercial shipping experience; many have legal experience as well.

Maritime arbitration in New York has a number of inherent strengths:

1. New York, taken with the adjacent states of New Jersey and Connecticut, is one of the world's major shipping centers. It is also one of the world's most diversified shipping regions, embracing skilled and seasoned commercial enterprises ranging from shipbuilding, shipbroking, chartering, design, vessel management and operation, insurance, engineers and lawyers, as well as a wide range of cargo specialists. It is also, of course, one of the world's great financial places of business. The intellectual resources available to the arbitration process are uniquely broad-based. It can be said that no other commercial center has so many different talents and skills at its disposal, when it comes to dispute resolution.

2. At a time of rising costs, another factor that favors New York maritime arbitration is the availability of the process at a reasonable expense to the parties. The fact that SMA arbitrations are well-known to be often less costly than those conducted in other jurisdictions is a significant attractive quality. For example, there is no appointment fee under SMA procedure.

3. SMA arbitrators may order pre-award security; they may also issue discovery subpoenas.

4. The process of arbitration is speedy, permitting not only prompt and economical resolution but encouraging the arrival at a result

within a reasonable and predictable period of time. Increasingly, an SMA panel will order scheduling and discovery within a fixed period of time. This is far more efficient than the prolonged and often unwieldy process of information-gathering prevalent in courts of law.

5. One of the distinguishing features of SMA arbitration is the publication of awards, from which the parties can opt out. This assists practitioners, and the parties, to be able to predict outcomes.

6. Awards made by an SMA panel of arbitrators are **final**, in virtually all cases. There is no right of appeal, so that while a right exists to petition the Court to have an award set aside, the grounds for doing so are very limited, in contrast to court cases, where there is always a right of appeal.

7. Proceedings are normally conducted by the SMA tribunal without any formal evidence rules; the panel has broad discretion as to whether it will accept evidence, and what weight and credibility shall be given to such evidence. Under U.S. law, arbitrators have the power to issue subpoenas to third parties, to produce documents, or to testify. The SMA panel therefore has, in addition, the power to order parties themselves, to produce documents or witnesses within their control. Needless to say, the arbitrators will also decide whether testimony, the declaration of witnesses, or documents are themselves credible. The arbitrators may consider evidence that a court of law would exclude, and they will usually decide how much or how little weight to give it. They may consider not only what evidence is submitted to them, but also what has not been submitted – and why. They may draw adverse inferences from what was and was not produced.

8. It is common for an SMA panel to be convened quite quickly, to conduct an emergency hearing. This is extremely useful where time is of the essence. Panels are promptly available for hearing at all times.

9. An SMA panel will award fees and expenses in nearly all cases. Nearly every SMA arbitration may entail the assessment of

attorneys' fees, costs and arbitrators' fees against the losing party. This contrasts with the well-known "American Rule" followed in most court proceedings, in which each side bears its own fees and costs. In maritime arbitrations in New York, the prevailing party will most likely recover the majority of fees and costs disbursed by it.

10. Awards are issued promptly in nearly all cases, and sealed offers of settlement, and written witness statements are also commonly used.

11. There is no right to pre-trial discovery, as there is in most court cases. The tribunal can order disclosure, of course, but the parties are encouraged to cooperate in an exchange of disclosures to avoid costs. One of the most attractive aspects of SMA arbitration, as I can personally confirm, is that costly and time-consuming adversarial jousting is discouraged. Emphasis is placed, as it was in New York more than 300 years ago, in finding a practical resolution, which helps the parties themselves to reach a fair and commercially reasonable result.

12. For those not familiar with SMA practice, perhaps the most helpful aspect of this form of dispute resolution is that proceedings are much more transparent to both sides. This encourages settlement, compromise, and fairness. Past awards of SMA can be accessed online through Lexis or Westlaw, many cases, to be sure, are resolved before an award is issued – a sign that the system really works.

The early, Dutch, adopters of arbitration had a vision for a system that was timely, definitive, smooth, transparent and efficient. That vision is alive and well today in New York.

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