

FALCA TERMS AND NOTES

LMAA FALCA: Rules

(Fast and low cost arbitration)

The incorporation of the FALCA Rules in a contract means that the parties have agreed that all disputes arising under or in connection with it shall be determined in accordance with English Law by reference to arbitration in London in accordance with the following Rules:

1. A party wishing to refer a dispute or matter to arbitration (the claimants) shall send to the opposing party (the respondents) a notice in writing requiring them to agree within fourteen days to the appointment of a sole arbitrator.
2. Unless an agreed sole arbitrator has been appointed within the fourteen days period stipulated in Rule 1, the claimants shall send to the President of the London Maritime Arbitrators Association ("the LMAA"), and send to the respondents in copy, a written request for the appointment of a sole arbitrator, giving the names and addresses of the parties to the dispute and a short statement of the nature of the dispute and the claims made.
3. The sending of a notice in writing under Rule 1 or, in a case where a sole arbitrator has been agreed between the parties prior to the despatch of such a notice in writing, the appointment of that sole arbitrator, shall constitute the commencement of the arbitration proceedings.
4. Within fourteen days of the receipt of the written request for the appointment of an arbitrator, the President of the LMAA or his nominee shall appoint a sole arbitrator to determine all disputes between the parties arising under or in connection with the contract that may be referred to him and shall notify both parties in writing of such appointment.
5. The President of the LMAA or his nominee may appoint any appropriate person as arbitrator including but not limited to any full or supporting Member of the Association.
6. Any arbitrator appointed pursuant to these Rules whether by agreement or otherwise shall have jurisdiction to determine his own jurisdiction, including in particular any question as to the existence or validity of the contract.
7. Unless the arbitrator orders otherwise, the timetable set out in Rules 8-15 shall apply.
8. Within two weeks of receipt of the notice of appointment of arbitrator, the claimants shall send to the respondents, with copies to the arbitrator, their written claim submissions, together with copies of the documents upon which they principally rely.
9. Within four weeks of the service of the claim submissions, the respondents shall send to the claimants, with copies to the arbitrator, their written defence submissions and counterclaim submissions (if any) together with copies of the documents on which they principally rely.
10. The sending of the respondents to the claimants of their counterclaim submissions shall constitute the commencement of proceedings in respect of the counterclaim and in such event the claimants shall, within four weeks, send their defence to counterclaim submissions to the respondents, with copies to the arbitrator.
11. Within four weeks of defence submissions, or if there is a counterclaim within four weeks of defence to counterclaim submissions, there shall be mutual discovery between the parties by the exchange of copies of relevant documents.
12. Within two weeks of the exchange of discovery under Rule 11, either party may apply to the arbitrator for an order for discovery of a specific document or documents not included in the other party's original discovery. Such application shall specify the document(s) sought and their relevance to the dispute or matter before the arbitrator. The other party

shall within seven days of the application either disclose a copy or copies of the document(s) or provide the applicant and the arbitrator with his reasons for not doing so. The applicant shall reply to the arbitrator and the other party within three days of receipt of such objection. The arbitrator shall rule on the issue on receipt of (or failing any) such reply.

13. Within six weeks of the exchange of discovery under Rule 11, the parties shall exchange copies of statements of witnesses and experts' reports (if any) and send copies to the arbitrator.
14. Within four weeks thereafter, the parties shall exchange final submissions, together with witness statements or experts' reports in reply (if any) and send copies to the arbitrator.
15. Subject to Rule 7 and the Rules which follow, the arbitrator shall make his award within seven months of the notice of his appointment if there is no counterclaim, and otherwise within eight months.
16. The arbitrator may, in his absolute discretion, take into account any evidence whether strictly admissible or not, and require the production of any document or the statement of any witness (whether sworn or otherwise).
17. There shall be no oral hearing in the arbitration proceedings unless and to the extent that the arbitrator in his absolute discretion requires oral hearings and/or requires the oral examination of any witness or expert. In the event that the arbitrator requires an oral hearing he may, if he thinks fit, order the provision of security for costs at a figure in excess of the sum referred to in Rule 18 and also require the payment of a non-returnable booking fee for each day reserved for the hearing.
18. The arbitrator shall have the power to order any party to provide security for the legal or other costs of any other party, but subject to Rule 17, each party by agreeing to these Rules waives any right to call for security for costs in excess of a sum of £7,500 in total insofar as such waiver may validly be made.
19. The award of the arbitrator shall be final and binding on the parties and by agreeing to these Rules the parties waive any right to any appeal or recourse to any court or judicial authority, insofar as such waiver may validly be made. The arbitrator may make such award as to costs as he may in his absolute discretion consider proper and shall tax all costs of the reference and of the award.
20. If any party shall fail to take any step in the arbitration required under these Rules or to comply with any order made by the arbitrator within the times stipulated, the arbitrator may in his absolute discretion:
 - (i) reduce any right to costs to which that party might otherwise be entitled;
 - (ii) deny that party the recovery of costs altogether;
 - (iii) strike out any claim, counterclaim or defence;
 - (iv) proceed to an award on such documents and evidence as may be before him, at such time as he may consider appropriate;
 - (v) take any other measure he may think fit.
21. In the case of multi-party disputes in which the same arbitrator has been appointed, the arbitrator shall have the power to direct in appropriate cases that the references shall be heard concurrently and to give all such directions as to procedure as the interests of fairness, economy and expedition may require.
22. Should the amount, excluding interest, of the claimants' claim (by amendment or otherwise), or of the respondents' counterclaim, equal or exceed the figure referred to in the LMAA FALCA Clause, either party shall have the right to require:-
 - (i) that the tribunal be increased to a panel of three, one additional arbitrator being nominated by each of the parties and the additional arbitrators so nominated being

appointed by the arbitrator appointed under Rules 1 or 4 who will act as third arbitrator and chairman of the tribunal; and/or

- (ii) that Rules 7 to 21 inclusive shall cease to apply to the arbitration and instead the provisions of the LMAA Terms in force at the relevant time shall apply.

Provided that

- (a) such right must be exercised not later than four weeks after the service of defence submissions under Rule 9, or if there is a counterclaim not later than four weeks after the service of defence to counterclaim submissions under Rule 11;
- (b) if either of the parties fails to nominate an additional arbitrator under (i) within two weeks of being called upon to do so by the arbitrator appointed under Rules 1 or 4, the latter may appoint whomsoever he thinks fit.

Commentary on the LMAA FALCA Rules

Introduction

The LMAA has adopted the FALCA Rules ("Fast and Low Cost Arbitration") in order to encourage quicker and cheaper resolution of the middle range of maritime disputes - those which involve neither very large nor very small amounts of money. The new LMAA FALCA Arbitration Clause for insertion in charterparties and other maritime contracts allows the parties to choose for themselves the size of the claim to which the FALCA Rules will apply, but if no figure is inserted the Rules will apply to claims under US\$250,000. Claims under US\$50,000 will be dealt with under the LMAA Small Claims Procedure.

What is "fast" about FALCA Rules is that the dispute is to be decided by a single arbitrator (appointed by the President of the LMAA if not agreed) in accordance with a strict timetable designed to produce an award no later than 8 months after appointment, with no right to appeal to the courts. What is "low cost" is a single arbitrator, rather than a tribunal; no oral hearings, save in very exceptional circumstances; a slimmed down procedure strictly controlled by the arbitrator and accordingly a saving in legal fees.

The individual arbitrators as appointed by the President of the LMAA will be chosen by reference to their qualities to determine the particular issues involved and their ability to proceed to an award within the time scale provided.

FALCA Rules reflect the provisions of the Arbitration Act 1996 which came into force on 31st January 1997. In the case of references commencing prior to 31st January 1997 the parties will, following appointment of the Arbitrator, be required to confirm in writing that they waive the right of appeal to the courts failing which either party shall have the right of appeal.

The LMAA FALCA Clause

The Clause which we recommend should be inserted in charterparties and other maritime contracts provides as follows:

"This contract is governed by English Law and all disputes arising under or in connection with it shall be referred to arbitration in London. The arbitration shall be conducted in accordance with one of the following LMAA procedures:

- (i) where the amount claimed by the claimants is less than US\$*....., [*Note: where no figure is inserted, the parties shall be deemed to have agreed a limit of US\$250,000, excluding interest,] excluding interest, the reference shall be to a sole arbitrator and the arbitration shall be conducted in accordance with the LMAA FALCA Rules;
- (ii) where the amount claimed by the claimants is less than US\$50,000, excluding interest, (or such other sum as the parties may agree) the reference shall be to a sole arbitrator and the arbitration shall be conducted in accordance with the LMAA Small Claims Procedure;

- (iii) in any case where the LMAA procedures referred to above do not apply the reference shall be to three arbitrators (one to be appointed by each of the parties and the third by the arbitrators so chosen) in accordance with the LMAA Terms in force at the relevant time."

The LMAA FALCA Rules

- Rule 1. The parties are encouraged to agree upon a sole arbitrator and may only apply to the President of the LMAA for the appointment by him of an arbitrator under Rule 2 if the claimants have first requested the other party to agree upon the appointment of an arbitrator. The procedure we suggest is that upon or shortly after giving notice under Rule 1 the claimants should put forward the names of 2 or 3 arbitrators for agreement.
- Rule 2. If the notice required by Rule 1 has not resulted in agreement on the appointment of a sole arbitrator the claimants can request the President of the LMAA to make an appointment. The request should be addressed to: The President of the LMAA, at the offices of the Association.
- Rule 3. It is to be noted that the commencement of an arbitration for the purposes of any time limit, or otherwise, is the sending of the written notice under Rule 1 by the claimants to the other party, or, in the event of a sole arbitrator already having been agreed prior to that, the time when the agreed arbitrator was appointed. For the time of commencement of any counterclaim see Rule 10.
- Rule 4. If the President of the LMAA is, at any time, unavailable to make appointments, he may nominate another person to do so. The nominee will usually be another officer of the LMAA.
- Rule 5. One of the main objects of the LMAA FALCA Rules is to ensure that the persons appointed are well suited to act as arbitrators, both as regards their qualifications to deal with the particular issues involved and as regards their availability, so that they are able to conclude the arbitration within the timetable laid down. The President of the LMAA will therefore select arbitrators on the basis of their suitability and availability, whether members of the LMAA or not.
- Rule 6. This Rule enables the arbitrators to decide such issues as, for example, whether a contract alleged by one party to have been entered into with the other party ever actually came into existence.
- Rule 7. Under this Rule an arbitrator may, for example, make an order that because of the special circumstances of the dispute, the strict timetable which is otherwise laid down should not apply in that particular case.
- Rules 8-10. Because of the strict timetable for the exchange of written submissions it is not intended that submissions should be in the form of pleadings or that technical points should be taken on what should or should not have been included in them, provided that, in the arbitrator's view, the respective submissions are fairly presented and do not result in prejudice to one party or the other.
- Rules 11-12. The process of discovery of documents has been found in the past to be a major cause of unnecessary delay and cost and it is intended that in this Rule the requirement of "relevance" should be narrowly defined. But those documents directly and clearly relevant to the issues should always be produced in the first instance. If they are not so produced the arbitrator may take this into account in considering questions as to costs. Rules 12 and 16 give the arbitrator the power to order further specific discovery if the initial discovery is not considered wide enough.
- Rules 13-14. Witness statements and experts' reports, if any, will be prepared on the basis of the

parties' own documents and the copy documents obtained initially from the other party. Rule 14 gives the parties the opportunity to obtain comments from witnesses and experts on any further specific discovery and on any statements and reports of the other parties' witnesses and experts. The arbitrator has power under Rule 16 to take account of any statements or reports in reply however informal. Rule 14 anticipates that at this stage the parties will also send copies of the documents they have exchanged to the arbitrator if they have not already done so. Although this is not a requirement of Rule 14 the parties are encouraged to provide the arbitrator with a joint set of documents if possible.

- Rule 16. Since the normal arbitration under these Rules will be on documents only, the arbitrator is given wide powers to decide what weight to give to any evidence and to call for documents, expert advice and witness statements of his own volition.
- Rule 17. It is recognised that in exceptional cases an arbitrator might consider it necessary to hear oral argument and/or to order the oral examination and cross examination of witnesses. An oral hearing will increase the costs of the arbitration and for this reason the arbitrator is given the power to relax the limit for security for costs under Rule 18, in the event of an oral hearing being ordered.
- Rule 18. Experience has shown that the size of a demand for security for costs in cases where the amount of the claim may not be very large has sometimes unfairly deterred a claimant from pursuing an apparently reasonable claim. In limiting demands for security for costs to £7,500 (except in cases where the arbitrator has made an order under Rule 17) this Rule is intended to emphasise that arbitrations under the LMAA FALCA Rules can and should be conducted without incurring heavy costs.
- Rule 19. In order to achieve the objective of the Rules of limiting delay and saving costs the parties under this Rule expressly waive the right to appeal to the courts.
- Rule 20. Owing to the lack of effective sanctions it has been common for cases to suffer delays in respect of timetables not being adhered to. The intention of this Rule is to emphasise to the parties and their advisors that save in exceptional circumstances there will be no divergence from the strict procedure laid down in the Rules and that non-adherence to the timetable laid down is likely to result in real prejudice to the defaulting party.
- Rule 21. This Rule is intended to prevent delay and save costs in multi-party or "chain" arbitrations.
- Rule 22. It is recognised that a claim appropriate to be dealt with on the basis of a sole arbitrator and a strict timetable may turn out to involve sums in excess of the figure in the LMAA FALCA Clause. A counterclaim may exceed that figure or a claim, initially stated below the figure, may be increased above it. In such circumstances either party is given an option to expand the panel to three arbitrators and/or to do away with the strict timetable and the related Rules, provided that the options are exercised within the stated time limits.