

COMMENTARY ON THE LMAA INTERMEDIATE CLAIMS PROCEDURE 2012

1. INTRODUCTION

(Note: Attention is particularly drawn to the passages in bold type below. These indicate substantial changes to the Commentary made at the time of the publication of the Intermediate Claims Procedure in 2009)

The LMAA Intermediate Claims Procedure was introduced to fulfil an apparent need for a procedure to deal with medium-sized claims, i.e. those deserving of a fuller procedure than provided by the Small Claims Procedure while not, on grounds of proportionality, justifying the full procedure offered by the LMAA Terms

In addition, the intention behind this procedure was that it should largely provide its own momentum and should also ensure that the extent of costs liability will be largely predictable at the outset.

It is suggested that it should be used for claims which exceed the top monetary limit of any relevant Small Claims Procedure but are less than US\$400,000. However, it will only apply if specifically agreed by the parties to be incorporated into their contract and, when they do agree that it should apply, they may of course set the applicable lower and upper limits. The BIMCO / LMAA Arbitration Clause may be used to incorporate the LMAA Small Claims Procedure, the LMAA ICP, and the LMAA Terms and the parties can adapt the financial limits set out in that clause.

Provision has been included to deal with the situation where a claim within the agreed limit is met by a counterclaim which exceeds it. In such a case the tribunal may, on request by a party, order that the reference shall proceed and be dealt with under the LMAA Terms 2012. If no order to this effect is made, the reference will proceed under the ICP.

2. APPOINTMENT OF TRIBUNAL

Paragraphs 1 - 5 deal with the question of appointment of the tribunal in the variety of circumstances which can arise and are self-explanatory. There is provision for application to the President of the LMAA where the parties have agreed to the appointment of a sole arbitrator but cannot agree his or her identity.

3. OPENING SUBMISSIONS

The form and procedural timetable for these submissions follow a well established format. In some cases the exchange of these submissions will be sufficient to enable the tribunal to proceed to its award once they had been completed.

4. DISCLOSURE OF DOCUMENTS

This procedure dispenses with any formal disclosure stage in the procedural timetable, given that the opening submissions must be accompanied by all relevant documents as defined in paragraph 7(b). However, any specific requests are to be included in the parties' opening submissions and adverse inferences may be drawn by the tribunal in the event of non-disclosure.

5. STATEMENTS OF WITNESSES OF FACT

If a party wishes to adduce in evidence statements of witnesses of fact it must give notice of such intention after completion of the opening submissions and it should be noted that there is no automatic right to serve supplementary witness statements.

6. EXPERT EVIDENCE

Should a party wish to serve expert evidence, that party must obtain the express prior permission of the tribunal. **No exception will be allowed for expert evidence served with opening submissions as under the 2009 Procedure.** There are a time limits for applying for permission as well as for serving/exchanging the expert evidence. Again, there is no automatic right to serve supplementary expert evidence and there is a time limit for applying for permission to do so. **The length of an expert's report will be limited to 3,500 words in the case of the first report and 1,000 words in the case of a supplementary report**

7. ORAL HEARING

An oral hearing will tend to be the exception rather than the rule and it should be noted that, again, there is a time limit for applying for this. It will normally be limited to a maximum of 5 hours and is primarily intended to allow for cross-examination of witnesses, so as to assist the tribunal should there be significant conflicts as to relevant facts. There is provision for closing written submissions thereafter.

8. CLOSING SUBMISSIONS IF NO ORAL HEARING

These provisions are to allow for sequential service of closing submissions where, following completion of opening submissions, there has been further disclosure and/or witness evidence and/or expert evidence.

9. EXTENSION OF TIME

In order to achieve the purpose of an inherent momentum to the proceedings, strict rules as to the extensions of time are incorporated.

10. THE AWARD

The intention is to produce an award within 6 weeks of service of the last submissions (whether the last of the opening submissions or the closing submissions). There is also additional power given to the tribunal to correct an existing award or make an additional award.

11. RIGHT OF APPEAL

Rather than exclude any right of appeal, as under the Small Claims Procedure, or leave the matter on the basis of the Act, this provision constitutes an advance agreement by the parties to confine appeals to cases (a) where the appeal is alleged to involve a point of law of general interest or (b) where the tribunal certifies that the appeal involves a point of importance to the trade or industry in question.. This is intended to achieve two purposes, namely to avoid a dichotomy of views between the tribunal and the Courts as to whether the award contains a question of interest to the trade or industry in question and,

secondly, to avoid the costs of applying for leave and establishing before the Court for a second time that which would have already been demonstrated to the tribunal. There is thus no “right” of appeal and further a “certified appeal” is limited to cases of importance to the relevant trade or industry, leaving it to the court on the application for leave to determine whether the issue is one of general interest or importance.

12. PARTIES' COSTS

These provisions have put an upper limit or cap on the parties' costs, calculated by reference to the monetary value of the parties' claims and allow for, in effect, summary assessment of the same. As a consequence, the parties should be able to predict, in advance, their maximum liability (should they be unsuccessful) for the other parties' costs. They should also avoid incurring what can frequently amount to substantial costs in the assessment of costs.

13. SECURITY FOR COSTS

The terms allow for security for costs to be ordered in the usual way.

14. TRIBUNAL'S COSTS

These costs are capped by reference to the cap on the parties' costs save in respect of a challenge to the jurisdiction of the tribunal, where the tribunal is entitled to charge a reasonable fee.

15. CONCURRENCY

The terms allow for two or more arbitrations to be conducted and heard concurrently on a similar basis to that permitted by the LMAA Terms.

16. GENERAL

This part of the terms includes provisions allowing the tribunal to depart from or vary the terms in exceptional circumstances; however, this does not allow variation of the cap on the parties' costs. Further, since the claims made by the parties will frequently be in US Dollars while their costs will usually be incurred in Pounds Sterling, the terms allow for the cap to be set by taking the exchange rate at the commencement of the arbitration. The other miscellaneous provisions are self-explanatory.