

COMMENTARY ON THE LMAA/BALTIC EXCHANGE MEDIATION TERMS (2009)

1. INTRODUCTION

The LMAA/Baltic Exchange Mediation Terms have been introduced in co-operation with the Baltic Exchange to provide a flexible mediation service where parties in a contractual or other legal relationship seek an amicable settlement of their disputes. Mediation may take place whether or not the parties are already involved in arbitration or judicial proceedings and may involve two or more parties. Where, for example, a dispute involves several parties who may not all have a direct relationship with each other, mediation enables all of those parties to be involved in a single procedure to resolve the dispute. Mediation also offers the possibility of resolving disputes on commercial terms that may not necessarily be limited to a monetary payment by one party to the other, for example, by an agreement to conclude new, or extend existing, business between the parties.

The possibility of resolving disputes by mediation is recognised in the BIMCO/LMAA Arbitration Clause but no specific mediation clause is required to refer a dispute to mediation under the LMAA/Baltic Exchange Mediation Terms.

2. COMMENCING THE MEDIATION PROCEDURE

No particular formality is involved in commencing a mediation. A party simply writes to the other party or parties setting out the matters in dispute and inviting them to mediate under the LMAA/Baltic Exchange Terms. The mediation is deemed to commence when the other party or parties accept in writing the invitation to mediate. If there are more than two parties and one accepts but the other or others do not the mediation may continue between the two parties who agree to mediation if they so agree.

3. THE APPOINTMENT OF A MEDIATOR

The panel of qualified mediators for the LMAA/Baltic Exchange Mediation Terms is drawn from a wide range of different backgrounds, including full members of the LMAA, lawyers and senior broker members of the Baltic Exchange.

Unless the parties agree otherwise, there will usually be one mediator who is to be appointed within 14 days from the commencement of the mediation. The parties may agree on the appointment of a mediator from the panel. If, however, they are unable to agree, the parties may apply to the President of the LMAA, or a person nominated by the President for the purpose, to make the appointment. Where both or all of the parties are members of the Baltic Exchange the application should be made to the Chairman of the Baltic Exchange Member and Membership Services Committee to make the appointment. Any application should be accompanied by a brief summary of the matters in dispute, a copy of which should also be sent to the other parties to the mediation. Any application to the President of the LMAA should be accompanied by payment of an administration fee as fixed from time to time by the committee of the LMAA.

4. EXCHANGE OF INFORMATION

Within 14 days of the appointment of the mediator each party must send to the mediator and the other party or parties a concise summary of its case and any documents referred to in the summary or which the party wishes to refer to in the mediation. The parties are encouraged to try to agree a joint summary and set of documents or, at least, a limit on the number of pages for each summary and set of documents.

5. THE MEDIATION PROCEDURE

The mediator may conduct the mediation in the manner that he, or she, considers appropriate, taking into account the circumstances, the amount in dispute and any express wishes of the parties. A new feature of these terms is the power given to the mediator to conduct the mediation in writing only or by phone and fax or e-mail. This provision has been included with the smaller cases in mind where it may be less cost effective for decision makers of the parties to travel to the mediation. Mediation hearings may take place in London or anywhere convenient to the parties (although the agreement of the mediator to this should ideally be sought at the time of appointment).

The mediator will only disclose information received from a party to the dispute during the course of the mediation with that party's agreement .

Although unlikely to occur in most cases, the mediator may call any witness who it is felt will be able to assist in the mediation.

6. SETTLEMENT

Where there appear to be the elements of a settlement acceptable to the parties, the mediator may, if he or she considers it appropriate, formulate the terms of a settlement agreement for their consideration and re-formulate it in light of their observations. If the parties reach an agreement they should then draw up and sign a settlement agreement to bring the dispute to an end. The settlement may, if the parties so wish, take the form of an arbitration award.

7. CONFIDENTIALITY

The mediator and the parties must keep confidential all matters relating to the mediation proceedings.

8. RELATIONSHIP WITH ARBITRATION AND JUDICIAL PROCEEDINGS

Where the disputes referred to arbitration are already the subject of arbitration or judicial proceedings either party may advise the arbitration tribunal or court that they have agreed to mediation. The arbitration or judicial proceedings will however continue in the meantime. The mediation procedure does not however interrupt time limits and either party may initiate proceedings during the course of the mediation to prevent their rights from becoming time barred.

9. COSTS

An appointment fee of, presently, £250 is payable to the mediator by each party to the mediation procedure. At the end of the mediation the mediator will fix the cost of the mediation. In most cases the cost will be shared equally between the parties. Liability for these costs is however joint and several.

Each party will normally bear their own costs of the mediation, although provision is made to enable the mediator to make an award of costs against a party that he or she considers has not tried genuinely to co-operate in the mediation or has been obstructive.

10. ADMISSIBILITY OF EVIDENCE IN OTHER PROCEEDINGS

As the mediation procedure takes place on a without prejudice basis, unless all parties to the mediation otherwise agree, the parties undertake not to reveal or rely on any evidence disclosed in the mediation that might otherwise be privileged or on any views expressed or proposals made by any party with a view to settlement or to any admissions made by any party or views expressed by the mediator.