

## **COMMENTARY ON THE LMAA INTERMEDIATE CLAIMS PROCEDURE (2009)**

### **1. INTRODUCTION**

The LMAA Intermediate Claims Procedure has been 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 is 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.

### **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 and, again, there is a time limit for applying for this as well as for serving/exchanging it. Again, there is no automatic right to serve supplementary expert evidence and there is a time limit for applying for permission to do so.

#### 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 allow the tribunal to decide whether or not there should be an appeal on the question of law by way of certification contained in its award. This is a novel provision and 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 law of general public importance 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.

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.