New LMAA Terms 2017 Announced

The London Maritime Arbitrators Association (LMAA) recently released the LMAA Terms 2017. These terms will apply to proceedings commenced after 1 May 2017.

Revisions have also been made to the LMAA Small Claims Procedure (SCP) with a noteworthy change being an increase to the recommended SCP limit to US$100,000. The LMAA Intermediate Claims Procedure (SCP) has also been refreshed.

The LMAA terms are generally revisited every 5 years or so and, when doing so, there is a balancing act to be had between the need to address ongoing concerns over costs and efficiency without wishing to risk any adverse effects on what is demonstrably a popular forum of dispute resolution. As the LMAA notes discuss, when reviewing the terms there was a need to maintain flexibility and autonomy for the parties within the existing procedures to suit a particular case and a recognition of an element of “if it ain’t broke, don’t fix it.” Whilst that could be characterised as a cautious approach, there a number of key revisions which will be of interest to parties and practitioners alike.

Full details, including notes of the 2017 terms, and a tracked changes comparison with the 2012 terms can be found at http://www.lmaa.london-news-article.aspx

Main Terms

For the constitution of an arbitral tribunal, paragraphs 10 and 11 provide for an arbitrator appointed by a party to become sole arbitrator where the other party fails to appoint, or for the appointment by the President of the LMAA where the parties have failed to comply with an arbitration agreement for the appointment of a sole arbitrator. Under the 2012 Terms unless otherwise agreed, an application to court for the appointment of an arbitrator would have been necessary in such circumstances.

Disputes involving a number of arbitrations, such as are commonly found with charterparty chains, can bring their own difficulties and parties will still have to rely on the powers of the tribunal in relation to chain arbitrations, unless the parties are able to agree on a suitable mechanism for consolidation. When arbitration proceedings are run concurrently to avoid inconsistent conclusions, and to deal with the inherent delays where submissions are being passed up and down the line with minimal amendments, paragraph 16(b) (i) now gives an express power to the tribunal to shorten or otherwise modify the usual time limits. The tribunal also retains its powers of discretion and the parties may be able to reach agreement on a suitable mechanism to minimise, or eliminate the involvement of intermediate parties.

For matters proceeding to a hearing, there is enhanced discretion for the tribunal to order security for its own costs, together with a requirement for the tribunal to provide advance notice and transparency of its own fees and also the possibility for interim billing to be adopted to encourage an ongoing focus on costs.

To attempt to avoid excessive rounds of pleadings, the Second Schedule of the LMAA Terms 2017 expressly provides that where parties wish to serve submissions beyond the stage of reply (or reply to counterclaim if applicable) they must obtain the tribunal’s permission.

Paragraph 11 of the Second Schedule mirrors previous guidance and enables the tribunal to give directions following the exchange of questionnaires if the parties have not been able to reach an agreement between themselves within 21 days. Paragraph 13 underlines best practice in relation to the need for parties and tribunals to consider how to make arbitration as cost-effective as possible, with particular reference the LMAA Checklist as found in the Fourth Schedule.

Paragraph 19(b) sets out clearly that in dealing with costs, a tribunal may take account of unreasonable conduct, including failure to comply with the LMAA Checklist. This appears to be a measure aimed at tackling escalating costs and addressing criticism of how parties and their representatives conduct proceedings. The paragraph also expressly confirms that the Part 36 regime, in the sense of the entire machinery for protective costs offers as set out in the Civil Procedure Rules, does not apply to arbitration under LMAA Rules and that the tribunal’s discretion is not to be fettered by the factors set out within paragraph 19(b).

Interlocutory directions and applications play an important part in the progress of an arbitration, but at times they can become fertile ground for aggressive correspondence, additional time being spent by the tribunal in considering the issues with the result that unnecessary costs may be incurred by the parties. It remains incumbent on the parties to attempt to agree directions between themselves and paragraph 21 clarifies that where the parties do so agree and wish the directions to be deemed to take effect as if by an order of the tribunal, the tribunal must then be notified for it to have the desired effect as per section 41 of the Arbitration Act.

The Third Schedule of the LMAA terms 2017 sets out the regime for the LMAA Questionnaire and previous guidance is now incorporated to underline as far as possible the importance of the LMAA Questionnaire in terms of case management and focusing the attention of parties and their advisors on how the arbitration is to progress.

For example, the reference to estimated costs and breakdown of those costs may provide an appropriate pause to reflect in detail on any potential disparity in costs between the parties. There is also a greater emphasis upon identifying the issues to be dealt with through expert and witness evidence.

The LMAA Checklist, containing guidelines on the efficient conduct of arbitration, is now to be found incorporated in a Fourth Schedule. This serves to draw attention to its contents and highlights its importance, in terms of good practice, such as how to treat strings of e-mails within bundles, and also to the potential costs consequences of failing to comply.

Small Claims Procedure

The financial limit for the SCP 2017 has been raised to US$100,000, unless the parties have otherwise agreed. Even before the introduction of the 2017 terms, it was not uncommon to see an arbitration agreement with limits set above that figure and whilst complexity and claim value are not inextricably linked, the level of complexity and number of issues in dispute can test the appropriateness of the SCP framework. There is a provision to deal with such claims outside the SCP 2017 as SCP 2013 where that would be more appropriate and
mechanism to deal with such complex matters instead under either the LMAA Terms 2017 or ICP 2017 where that would be more appropriate and if the parties agree, the original tribunal would retain its jurisdiction over the dispute.

In an apparent effort to prevent either bland demands for payment at one extreme, or extensive pleadings supported by voluminous documentation at the other, the procedure for submissions - whether served in support of the parties claim or defence or reply submissions - has been clarified. Parties unable to comply may be requested to re-submit letters of submission in a more appropriate form.

**Intermediate Claims Procedure**

The ICP is often rather forgotten, or perhaps even unknown by parties considering an arbitration clause or agreement, or the commencement of proceedings. The level of appointments for ICP has certainly been consistently and significantly lower than under either the LMAA Terms or SCP terms.

The 2017 revision is an opportunity for parties to revisit the suitability of ICP terms for medium size claims that require a more detailed procedure than the SCP, but where the full LMAA terms may not necessarily be proportionate. The parties are free to agree the financial limits to apply to this procedure, although the suggested upper limit of US$400,000 remains.

Under the ICP, there is a mechanism for appeal from an award if it is alleged that the award gives rise to an issue of general interest or is of importance to the trade or industry in question and in the latter case, the tribunal must first certify that the issue is of importance to the relevant trade or industry.

ICP does not have a formal disclosure stage as documents should accompany the opening submissions. Specific requests for disclosure are also to be made with the opening submissions and the Tribunal may draw adverse inferences in the event of non-disclosure. The provisions for admission of expert evidence and witness statements are also limited in comparison with the main terms notice to be given prior to adducing witness statements and with the permission of the tribunal required for expert evidence or supplementary witness statements and expert supplementary reports. There are also default word limits for any such expert's initial and supplementary reports.

Parties' costs under the ICP are capped with reference to the monetary value of the claim with a procedure for summarily assessing costs which should assist in achieving a cost-effective arbitration.

Concurrence of arbitrations is also catered for under the mechanism in Paragraph 18.

For parties who wish to take advantage of the ICP, it should be noted that this had been removed from the BIMCO London arbitration clause and so amendment to the standard clause would be necessary.

**Conclusion**

Whilst the majority of these amendments are unlikely to result in substantial change in how LMAA arbitrations work in practice, it is to be hoped the greater guidance on cost control will result in enhanced efficiency and cost-effectiveness whether or not a matter settles, or has to proceed to an award.

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