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BRIEFING

LMAA PUBLISHES NEW LMAA 2017 TERMS AIMED AT IMPROVING EFFICIENCY AND COST-EFFECTIVENESS

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- NEW LMAA TERMS OF ARBITRATION ARE AN UPGRADE RATHER THAN A SUBSTANTIAL AMENDMENT
- MORE FOCUS ON PROMOTING COST-EFFECTIVENESS AND EFFICIENCY
- ADJUSTMENTS TO SMALL AND INTERMEDIATE CLAIMS PROCEDURES

The London Maritime Arbitrators Association (LMAA) has long been regarded as a preferred forum for resolving international maritime disputes and, indeed, each year some 2,000 new arbitrations are commenced under LMAA Terms. Five years on from when the LMAA last amended its Terms, it has produced a new set which will apply to arbitrations commenced on or after 1 May 2017.

"THE LMAA CANNOT… AFFORD TO BE COMPLACENT."

Scope of review

The LMAA adopted three guiding principles when revising the Terms:

1. Maintaining a 'light-touch' approach so that parties and tribunals continue to have considerable freedom within the scope of the Terms to adopt procedures to suit particular cases;
2. 'If it isn't broke, don't fix it': the LMAA was of the view that the 2012 Terms were working well and therefore substantial changes were not required; and
3. That the LMAA cannot, however, afford to be complacent and that some adjustments could usefully be made to improve the efficiency and cost-effectiveness of LMAA proceedings.

Given the tone of these guiding principles, the 2017 Terms can best be described as an update or upgrade to the 2012 Terms, rather than a substantial amendment, with the majority of changes focusing on promoting greater efficiency and cost-effectiveness in proceedings while maintaining the flexibility afforded to parties.

Overview of changes

The purpose of this short note is not to discuss each amendment in detail. To that end the LMAA has produced a helpful guidance note which can be found here. However, some of the more notable changes include:

"CHANGES INCLUDE … AN EXPRESS OBLIGATION ON THE PARTIES AND TRIBUNAL TO CONSIDER WAYS TO MAKE THE ARBITRATION PROCESS AS COST-EFFECTIVE AND EFFICIENT AS POSSIBLE."

- The addition of an express obligation on the parties and Tribunal to consider ways to make the arbitration process as cost-effective and efficient as possible (paragraph 13 in the Second Schedule). To that end a checklist has been incorporated in the Fourth Schedule to assist the parties in managing the costs of an arbitration. While the practical matters covered there will be familiar tools to most practitioners seeking to achieve an efficient and cost-effective process:
  - They do at least provide clear guidance as to what the LMAA will consider to be a minimum requirement going forward; and
  - Paragraph 19(b) of the Second Schedule makes clear that failure to comply with the checklist may be penalised in costs.

- Greater clarity on how to resolve situations where (in the absence of some agreement otherwise by the parties) one or other party's actions or inaction prevent or delay the Tribunal from being constituted:
  - Where a sole arbitrator is to be appointed but the parties fail to agree on his/her identity within 14 days of one party calling for arbitration, paragraph 11 of the Terms provides that either party can apply to the President of the LMAA to make such appointment.
  - Where a three-person Tribunal is to be constituted and one party refuses or fails to appoint an arbitrator, paragraph 10 of the Terms expressly provides that section 17 of the Arbitration Act 1996 will apply. Under section 17, the non-defaulting party may give notice that his appointed arbitrator is to act as a sole arbitrator.

- Greater guidance as to the importance of the Questionnaire and the detail expected to be provided in it, including as to the breakdown of estimated costs (the Third Schedule).

- A suggested time limit of 21 days from exchange of Questionnaires for the parties to agree a procedural timetable or make submissions on the same, failing which the Tribunal will make such directions or take such action as it considers appropriate regarding the future conduct of the proceedings (paragraph 11(b) of the Second Schedule).

- Greater clarity that permission must be sought and granted before parties are entitled to serve further submissions (e.g. rejoinders) after a reply to defence and counterclaim (paragraph 5 of the Second Schedule).

- In circumstances where proceedings are being heard concurrently, an express power for the Tribunal to abbreviate or modify time limits so as to save costs, minimise delay or otherwise enhance efficiency (paragraph 16(b)(i) of the Terms).

- An indication that the late instruction of legal or other representatives (or a change in representation) will not be considered as a valid ground for adjourning a hearing or delaying the progress of an arbitration save in exceptional circumstances (paragraph 20 of the Second Schedule).

- More clarity as to when the Tribunal can demand security for its costs (the answer being: "whenever it considers it appropriate to do so"), when such costs must be paid and the repercussions of failing to do so (Part (E) of the First Schedule).

"IN THE INCREASINGLY COMPETITIVE MARKET FOR INTERNATIONAL DISPUTE RESOLUTION, THE LMAA IS AWARE OF CHALLENGES POSED BY OTHER ARBITRAL INSTITUTES BOTH IN LONDON… AND INTERNATIONALLY."

The 2017 amendments also introduce adjustments to the Small Claims Procedure (SCP) and Intermediate Claims Procedure (ICP), including:

- Increasing the recommended monetary limit for the application of the SCP to US$100,000 (in circumstances where the parties have not agreed a limit between themselves). That limit applies separately for claims and counterclaims.
- Minor changes only to the ICP, aimed at simplifying and clarifying the procedure to bring it in line with other the amendments to the main LMAA Terms.

Conclusion

The drive for cost-effectiveness is not limited to the LMAA. Practitioners and parties that have engaged in English High Court proceedings over the last few years will be well aware of the strong drive towards limiting costs in litigation. Similarly, in the increasingly competitive market for international dispute resolution, the LMAA is aware of challenges posed by other arbitral institutes both in London (e.g. the LCIA) and internationally (e.g. ICC, SIAC and HKIAC) and rightly acknowledges that it cannot afford to be complacent. Seen in this context, the new 2017 Terms can be viewed both as a natural progression and an effort to 'keep up with the Joneses'.

FOR MORE INFORMATION

Should you like to discuss any of the matters raised in this Briefing, please speak with a member of our team below or your regular contact at Watson Farley & Williams.

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