

Introduction of the LMAA 2017 Terms

Earlier this year, the LMAA published updated terms and procedures which it announced would come into effect for appointments made on or after 1 May 2017 ("the 2017 Terms"). The update to the 2012 Terms is aimed at achieving efficiency and cost effectiveness in arbitration proceedings. They take on board suggested revisions received from the two Supporting Members' Liaison Committees as well as from users of LMAA arbitration.

In considering revisions, the committee responsible was guided by the following overriding principles:

- a) The LMAA Terms provide for a "light touch" approach, which should be maintained.
- b) "If it isn't broke, don't fix it". The committee took a cautious approach to changing rules which have generally operated satisfactorily in practice.
- c) However, the LMAA said it could not be complacent about its procedures in seeking to achieve efficiency and cost effectiveness.

Accordingly, the revisions clarify a number of existing rules and make incremental improvements to others, rather than being substantial or wholesale amendments.

Now that the 2017 Terms are in force, this note sets out some of the key revisions. It does not seek to address all changes. For that, please see the LMAA's Explanatory Note and other links at the following address:

<http://www.lmaa.london/terms2012.aspx>

Main Terms

THE ARBITRAL TRIBUNAL

The 2017 Terms now contain a procedure for when a party defaults on the appointment of an arbitrator.

- Paragraph 10 provides expressly that where each of the parties is to appoint an arbitrator, and one defaults, section 17 of the Arbitration Act 1996 ("the Act") applies. This enables the other party to appoint their arbitrator as sole arbitrator, by giving notice. The default position under the Act applied under the 2012 Terms in the absence of agreement to a different procedure, but this has now been clarified.
- Paragraph 11 of the 2017 Terms provides a new procedure in circumstances where the parties are to agree a sole arbitrator, and no agreement is reached within 14 days. Either party can request the President of the LMAA to make the appointment. It is at the President's discretion as to who is appointed, and the requesting party should not suggest any particular arbitrator, although they can advise whether any particular expertise is required.

POWERS OF THE TRIBUNAL

The 2012 Terms enabled arbitrators to order that arbitrations which appear to raise common issues of fact or law, be heard concurrently. The committee considered but rejected a mechanism for consolidation of arbitration proceedings in such cases. Instead the 2017 Terms provide at paragraph 16(b)(i) that, in concurrent hearings, the Tribunal may direct that time limits for service of submissions may be abbreviated/modified, in the interests of saving costs or minimising delay, or otherwise enhancing efficiency. This express reference clarifies the 2012 Terms which already provided a catch-all provision, enabling tribunals to give such directions in concurrent proceedings as the interests of fairness, economy and expedition may require.

1st SCHEDULE – TRIBUNAL'S FEES

The 2012 Terms provided that a tribunal is entitled to reasonable security for its estimated costs. The 2017 Terms clarify certain aspects of the procedure surrounding the request for, and provision of, the tribunal's security for costs, as follows:

- A tribunal is entitled to request security whenever it considers it appropriate to do so, and may stipulate when such security is to be provided.
- The "long stop" date for provision of security (no later than 21 days before the start of an oral hearing) is maintained, but it is clarified that the tribunal can stipulate an earlier date for the provision of security.
- The tribunal shall advise the parties of its total estimated costs no later than 28 days before the security is due to be in place.
- The default position is that the claimant or party requesting an oral hearing provides security but the tribunal now has a discretion to order that security should be provided in whole or in part by another party.
- A tribunal is entitled to suspend work pending provision of security.
- Failure to provide security as ordered/directed, enables the tribunal to make a peremptory order which if not complied with, empowers the tribunal to dismiss the claim.

2nd SCHEDULE – ARBITRATION PROCEEDINGS

Parties are encouraged to "avoid an unnecessary proliferation of submissions" at paragraph 5, which provides that rejoinder submissions can now only be served with the tribunal's permission. A party will need to apply to the Tribunal, explaining why such further submissions are necessary. Under paragraph 11(b), parties will usually have 21 days following exchange of LMAA Questionnaires to agree future procedural directions, or to make submissions regarding such directions, after which the tribunal will step in.

Paragraph 13 sets out an obligation for the parties and the tribunal to actively consider ways to make the arbitration proceedings as cost effective and efficient as possible.

In considering costs, a tribunal can take into account unreasonable or inefficient conduct, including failure to comply with the Checklist (paragraph 19(b)). A tribunal can also take into account Without Prejudice offers and the cost estimates provided in LMAA Questionnaires. It is also expressly stated that the CPR Part 36 regime does not apply to LMAA proceedings. This was always the case, but not always fully appreciated by users.

3rd SCHEDULE – LMAA QUESTIONNAIRE

The substance of the Questionnaire remains the same, but greater detail is required, with the focus on cost effectiveness and efficiency. For example, the estimated costs must be broken down in far greater detail than in the 2012 Terms, where it was common merely to provide a global costs estimate figure.

4th SCHEDULE – CHECKLIST

The Checklist contains important guidance on the efficient conduct of arbitrations, including in respect of matters such as the preparation of hearing bundles and witness statements. This has not, until now, formed part of the LMAA Terms at all. It is now incorporated because the guidance is often not followed. As mentioned above, compliance with it will now be a factor in assessing costs.

Small Claims Procedure (SCP)

The SCP applies to claims by agreement only. Under the 2012 Terms, if the parties' agreement referred to a monetary limit, it was clear that this was the principal sum. Under the 2017 Terms,

if no monetary limit is referred to in the agreement, the default position is that it shall refer to claims which do not exceed USD 100,000 (applicable separately to claims and counterclaims).

Intermediate Claims Procedure (ICP)

The ICP applies to claims by agreement only, usually for claims in the region of USD 100,000 to USD 400,000. Minor amendments have been made, with a focus of bringing the ICP in line with the 2017 Terms, or alternatively with the SCP.

Comment

The revisions to the 2017 Terms, SCP and ICP should have the desired result in terms of bringing about improvements to efficiency and cost effectiveness. There is an emphasis on compliance with procedure, preventing delays and focusing on costs from the outset. This is underlined by the tribunal's new power to take into account unreasonable or inefficient conduct, when considering costs.



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