

# Arbitrating Maritime Disputes: The New LMAA Terms 2021

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**PRACTICES** Shipping, Europe, Middle East and Africa, Shipping Dispute Resolution, International Arbitration, Offshore Oil and Gas Dispute Resolution

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The past year has seen new arbitration rules from many of the leading arbitral institutions, namely the International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA) and the International Centre for Dispute Resolution (ICDR). Now the London Maritime Arbitrators Association (LMAA) has followed suit and published revised Terms and Procedures which came into effect on 1 May 2021. The LMAA Terms 2021 apply to maritime arbitrations commenced after that date where the parties agree or members of the tribunal accept their appointment subject to the LMAA Terms.

## Background

Most of our shipbuilding and offshore construction disputes are subject to LMAA arbitrations and it is the most popular arbitration forum for the resolution of maritime disputes generally. Unlike the arbitral institutions, the LMAA does not administer or supervise the conduct of its arbitrations or provide institutional help but exists to assist maritime arbitrations in various ways including publishing Terms and Procedures.

In 2020, 3,010 arbitrator appointments and 1,775 new arbitrations were registered with the LMAA and its members published 523 awards. While the figures for the previous year were similar, 2020 was markedly different as a result of the COVID-19 pandemic. To allow hearings to take place during the pandemic, many hearings were conducted virtually, (although a large number of awards were the result of document-only arbitrations). The experiences of its arbitrators were reflected in the LMAA Guidelines for Virtual and Semi-Virtual Hearings issued in July 2020. The updated Terms address this and other specific issues which have arisen in recent years but seek to retain the flexibility and light touch approach which is characteristic of LMAA arbitration.

## Appointment and replacement of arbitrators

The rules now reflect the simpler and speedier procedure that is commonly used by parties in LMAA arbitration clauses when the parties are to each appoint an arbitrator, but one fails to do so. Now, provided that the referring party stated in its original notice of arbitration that it will appoint its own arbitrator as sole arbitrator in such circumstances, paragraph 10 provides that their arbitrator can be so appointed without delay. The Terms no longer require the claimant to comply with section 17 of the Arbitration Act 1996 and send a further notice to the respondent requesting that the appointment is made within a further 14 days. Only if the respondent still failed to appoint an arbitrator, would the claimant's arbitrator be appointed sole arbitrator.

Where an arbitrator resigns, dies, becomes incapable of conducting the proceedings or attending the hearing, the appointment of a replacement arbitrator is dealt with in new paragraph 12. This allows a party to make an application to the LMAA President for the appointment of a substitute arbitrator, where one or more of the parties is unwilling or unable to appoint a substitute arbitrator

within a reasonable time or in time to allow the hearing to proceed. The President can make the substitute appointment where all parties and the tribunal have been notified, and where they consider it appropriate to do so. It is no longer necessary to provide for this eventuality in the arbitration agreement or for the parties to subsequently agree on a replacement arbitrator in order to avoid having to make an application to court for the appointment of a replacement arbitrator in accordance with the Arbitration Act 1996.

## **Witness statements**

Significant changes were recently made by the English courts to address concerns about the length of witness statements and the role of lawyers in their preparation. These changes are acknowledged in the new Terms, with the Checklist in the Fourth Schedule now providing at paragraph 2 that witness statements should ideally be:

- (i) expressed in the witness' own words
- (ii) confined to matters of fact which need to be proved by the evidence of the witness
- (iii) about matters which the witness has personal knowledge or recollection

It also states that a witness statement should never be used to argue a case.

The new Terms do not fully reflect the new court requirements as they do not require a list of the documents the witness has been referred to in preparation of their witness statement to be included nor certification of compliance with the rules from the witness and their legal representative. They also do not contain all of the sanctions that apply in court cases (such as refusing permission to rely upon some or all of the witness evidence; requiring the witness statement to be re-drafted or requiring a witness to give some or all of his evidence in chief orally), but they do state in the Second Schedule that a failure to comply with the Checklist set out in the Fourth Schedule can be taken into account when a tribunal assesses costs.

## **Virtual and Semi-Virtual Hearings**

Like the other arbitration rules that have been amended over the past year, the new LMAA Terms now expressly refer to virtual hearings by amending the definition of "hearing" and encouraging parties to follow the new Guidelines which are incorporated as the Sixth Schedule. The Guidelines, which were first produced nearly a year before the new Terms came into force, provide a procedure and etiquette to be adopted in virtual hearings and included in related directions as appropriate. Reflecting the time when they were issued, the Guidelines are predominantly aimed at wholly virtual hearings. However, the LMAA indicated that they would be used in the future as quasi-virtual and hybrid hearings (involving participation by some parties physically in a hearing room and some virtually) become an increasingly usual and viable option particularly where witnesses and experts are based abroad.

Parties are also encouraged in the Questionnaire, which is submitted by them after each party has served its submissions, to consider whether the hearing will take the form of a virtual or semi-virtual hearing and the arrangements contemplated for such a hearing.

## **Allowing for the electronic signature of Awards**

The members of a tribunal, when publishing their award, are not required to meet together to sign it, but an award typically includes handwritten signatures, unless otherwise agreed by the parties. While in the past parties may have been invited to accept electronic signatures, this has now been

addressed in the new Terms which provides that awards may be signed electronically, and in counterparts, and notified by electronic means to the parties. As the notes accompanying the new Terms acknowledge, while this gives greater flexibility in preparing and publishing awards, it is important to keep in mind that enforcement issues can arise in certain jurisdictions in relation to an electronically signed award. This is recognised by the Terms, which stipulate that parties must inform the tribunal, prior to issue of the award, if they would like the award to be signed with original handwritten signatures and tribunals are encouraged to continue to obtain handwritten signatures whenever possible so that this version can be made available if subsequently required.

In making these changes, the LMAA have said that they seek to ensure that LMAA arbitration “*remains as effective and cost-efficient as possible*”. The changes in the 2021 Terms generally reflect the current best practices of tribunals, the parties and their lawyers. While there will be further changes to these rules in the future as parties, their lawyers and tribunals adjust to a post-pandemic world, this latest revision provides a set of rules that will enable the LMAA to retain its popularity when it comes to resolving maritime disputes.