

# SOUNDINGS

## The Intermediate Claims Procedure

BIMCO recently announced (16th January, 2016) that the Intermediate Claims Procedure has been removed from the standard BIMCO dispute resolution clause following a request that they received from the London Maritime Arbitrators Association (LMAA). The LMAA decided to take such action because they found that the procedure was not being used to the extent they had anticipated following its introduction in 2009. This article looks to highlight the key differences between the Intermediate Claims Procedure and the alternative dispute resolution procedures more commonly used.

### Purpose

The Intermediate Claims Procedure (the "ICP") was originally introduced in an attempt to "bridge the gap" between the Small Claims Procedure (the "SCP") and arbitration under the "full" procedure (the "FP"). Where a claim requires a more substantial procedure than that provided under the SCP regime but does not warrant the more extensive FP, the ICP was intended to provide a satisfactory solution.

The intention of the ICP was to enable parties to more accurately predict the costs of the proceedings from the outset. Fixed time limits and strict rules regarding time extensions were also introduced in order to enable parties to better estimate how long it would take to obtain an award.

### Key Features

#### (a) Applicability

Subject to any express amendment agreed upon between the parties to a contract, the ICP applies where the total amount of the claimant's claim or the total amount of any counterclaims exceed US\$100,000 but is not greater than US\$400,000. This range is exclusive of interest and costs.

The parties must have agreed to refer the dispute to arbitration under the ICP. In light of the recent announcement by BIMCO (referred to above) a party will no longer possess an automatic right to refer a dispute under the ICP if the contract only refers to the incorporation of the new BIMCO Dispute Resolution Clause 2015. In such circumstances the parties will need to

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agree upon the inclusion of the ICP, either expressly within the contract or by agreement thereafter.

**(b) Costs**

Under the SCP, the parties' recoverable costs are capped at £4,000 (£4,500 if there is a counterclaim), however, there is no such cost cap under the FP.

The ICP introduced a new proportionate approach to assessing a party's recoverable costs. Whilst costs are capped, the cap is calculated by reference to the sum of the claim or the counterclaim advanced as opposed to a fixed sum.

Neither party is entitled to recover more than 30% of the claimant's monetary claim. This percentage is increased to 50% if there is an oral hearing.

If there is a counterclaim that the tribunal consider to be distinct from the claimant's claim, the parties' costs are similarly capped to 30% of the monetary counterclaim advanced. Once again, this percentage is increased to 50% if there is an oral hearing.

By way of example, if the a claimant advances a US\$200,000 claim and the defendant advances a distinct counterclaim for the same value, each parties' recoverable costs under the ICP are capped at US\$120,000 representing 30% of the claim and counterclaim combined. This example assumes that an oral hearing is not necessary.

**(c) Tribunal's Costs**

The SCP appointment fee (presently £3,250), which is paid at the commencement of proceedings, covers the tribunal's costs up to and including the collection of an award. The tribunal's costs under the FP however are not capped, with the tribunal being entitled to recover any "reasonable fees and expenses" that they have incurred.

The ICP once again takes a proportionate approach in assessing the tribunal's costs. Subject to the composition of the tribunal (which the parties are free to agree upon), the tribunal's costs are proportionately capped by reference to the parties' cost cap (referred to above).

If the parties agree upon a sole arbitrator the tribunal's costs shall not exceed the sum equivalent to one third of the total at which the parties' costs are capped. If a two or three man tribunal is agreed upon then the aforementioned cap is increased to two thirds of the total at which the parties' costs are capped. Only in exceptional circumstances shall the tribunal be entitled to exceed such cost caps.

Once again, by way of an example, if the parties' recoverable costs are capped at US\$90,000 then the tribunal's costs will be capped at US\$30,000 (sole arbitrator) or US\$60,000 (two or three man tribunal) respectively.

**(d) Disclosure**

The SCP provides that there shall be "no disclosure", save that the tribunal does have the discretionary power to order the production of any relevant document(s). By contrast, the FP only limits disclosure to the extent that the parties will not generally be required to provide broader disclosure than is required by the Courts.

The ICP is similar to the SCP in that there is no formal stage of disclosure although each party is obliged under the ICP to produce all relevant documents in its respective "opening submissions". The "opening submissions" under the ICP comprise the claim, defence (and counterclaim) and reply submissions.

In contrast to the SCP, the parties are afforded the opportunity under the ICP to specifically request disclosure of any relevant document following service of the claim submissions. If a party fails to disclose a relevant document within 14 days of completion of the "opening submissions" then the tribunal may draw adverse inferences.

The term "opening submissions" is contained within the ICP and comprises the following submissions (a) Claim, (b) Defence (and Counterclaim), (c) Reply (and Defence to Counterclaim), and (d) Reply to Defence to Counterclaim. Following service of the Reply submissions, or where there is a counterclaim, following service of the Reply to Defence to Counterclaim, the "opening submissions" shall be deemed completed.

#### (e) Witness Statements and/or Expert Evidence

Under the SCP experts' reports, limited to 2,500 words, are admissible subject to the strict discretion of the tribunal. There is no such provision to allow the admission of witness statements. Understandably the FP does not, subject to the discretion of the tribunal, impose such strict limitations on expert and/or witness evidence.

Once more, the ICP seeks to strike a balance between the other two regimes. Each party is entitled to adduce witness statements and/or expert evidence however this right is subject to a time limit.

If a party wishes to adduce witness statements it must give notice of its intention to do so within 14 days of the completion of "opening submissions" and it must serve or exchange witness statements within 28 days of the completion of "opening submissions". Unless express permission is obtained from the tribunal within 14 days of service or exchange of witness statements, there is no right to serve supplementary statements.

Similar provisions apply where expert evidence is to be adduced save that the parties have 21 days from the date at which the tribunal's permission is received in which to serve or exchange expert evidence. As with the SCP, expert evidence is subject to a word limit, although the limit has been extended from 2,500 words to 3,500 words under the ICP.

#### (f) Hearings and Closing Submissions

Only in exceptional circumstances will an oral hearing be allowed under the SCP. If an oral hearing is permitted it shall be limited to one working day of 5 hours. Following the conclusion of an oral hearing the parties are not permitted to serve closing submissions.

The parties are free to agree upon whether they consider it necessary to have an oral hearing under the FP. If the parties fail to reach an agreement then the tribunal may (in its discretion) order that an oral hearing must take place. The appropriate duration of such a hearing is assessed depending upon the complexity of the case.

The ICP is similar to the SCP in that there is no automatic right to an oral hearing and should the tribunal deem it necessary then such a hearing is limited to one working day of 5 hours.

However, in contrast to the SCP, both parties are afforded the opportunity to serve one set (only) of closing submissions after the hearing has taken place.

Where no oral hearing takes place, each party is still permitted to serve closing submissions but only where disclosure and/or expert evidence and/or witness statements have been served or exchanged following the "opening submissions".

#### (g) Appeals

The right of appeal is expressly excluded under the SCP.

Under the FP the parties are entitled to appeal to the court providing that such an appeal is founded upon the basis of (a) a serious irregularity, and/or (b) a point of law, and/or (c) challenging the tribunal's jurisdiction.

The parties maintain the right of appeal under the ICP provided that the tribunal certifies in its award that the dispute involves (a) a question of law of general interest and/or (b) is of importance to the trade or industry in question.

#### (h) Proceedings – Concurrency

Under both the ICP and FP, if two or more arbitrations raise common issues of fact or law, the tribunal may direct that those arbitrations be conducted (including any subsequent hearing) concurrently. In such a case, the tribunal has the power to order that documents and evidence disclosed in one arbitration shall be made available in the other arbitration.

There is no such provision of concurrency under the SCP.

#### Conclusion

**Having assessed the key features of the ICP and compared them with the equivalent provisions contained within the alternative procedures, it is perhaps surprising that the ICP has not been utilised by parties to the extent anticipated by the LMAA when they were first introduced. The cost and time limit provisions combined with the relatively restrictive disclosure limitations contained within the ICP certainly appear to favourably afford themselves to disputes that are cost sensitive yet still require a degree of in-depth analysis.**



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