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TO: ALL MEMBERS

January, 2022

UPDATING OF PRACTICE RECOMMENDATIONS – RULES 2022/23

With effect from 20th February, 2022 Practice Recommendations 2 and 10 will be updated as set out on the following pages. The changes highlight some of the factors that the Association takes in to account when considering support for cases including proportionality as between the costs of a dispute and the claim amount.

Should Members have any questions then please do not hesitate to contact the Managers.

Yours faithfully
THOMAS MILLER DEFENCE LTD.
Managers

Practice Recommendation 2

Conduct of claims

Over a number of years the Association has experienced an escalation in the general level of legal costs and expenses in a number of major jurisdictions. Faced with this trend the Managers have, from time to time, issued circulars highlighting the need for Members, when confronted with matters which may involve the Association, to observe closely certain requirements aimed at both avoiding unnecessary legal expenditure and achieving the most cost-effective use of the Association's resources.

In summary, these requirements are as follows:

Notification of Claims

Rule 5(1) requires Members to give prompt notification to the Managers of any matter which may give rise to costs forming a claim on the Association. This obligation applies even if it is anticipated that a dispute may be settled amicably. Not only does prompt notice ensure compliance with the Rules, it also affords the Managers the opportunity to offer advice on any claim.

Appointment of Lawyers

Rule 5(2) requires that Members should obtain the Managers' written approval before a lawyer or surveyor or other professional advisor is instructed in any matter which may form a claim on the Association. The Managers recognise that on occasions this may not be possible and in these circumstances notification should be made to the Managers as soon as possible after any such appointment.

In many cases the Managers can offer their considerable experience in claims matters by providing advice and assistance in resolving claims, without the need for external advice. Where the involvement of lawyers is unavoidable, the Managers will, wherever possible, respect a Member's choice of lawyer, provided that the lawyer is suitably qualified for the matter in question.

Information and Consultation

Under Rule 5(3), Members should ensure that the Managers are kept closely involved in and informed of the progress of a matter, whether or not lawyers have been instructed. In particular, the Managers should receive, contemporaneously with developments in the case, copies of all documentation and correspondence which is relevant to the conduct of the matter. Where lawyers have been appointed, this is often best achieved by ensuring that the Managers are copied into all correspondence with those lawyers. The Managers should also always be consulted before any decisions are taken which are likely to impact on the future conduct, strategy or the costs of a case.

There may be occasions when a Member intends to seek retrospective support for the costs of a case. This may arise in circumstances where a decision has been taken to restrict or decline support. Notwithstanding this if a Member intends to revisit the decision subsequently it remains an obligation of the Member to keep the Managers closely apprised of developments in the case, and to follow the guidelines contained within this and other Practice Recommendations.

Settlement

Under Rule 5(4) Members should seek the prior consent of the Managers before settling or compromising any claim, dispute or Proceedings which might give rise to a claim on or which has been conducted with the support of the Association. In particular, Members should ensure that any requirement of the Managers to make provision in any settlement agreement for costs or expenses which have been incurred by the Association is complied with. In some cases, the terms of any settlement or compromise may include a specific provision for the recovery of costs. However, where a settlement is proposed which contemplates the payment of an “inclusive” sum, without specific reference to the recovery of costs, and a costs recovery might otherwise have been expected, then the Managers should be consulted over the proportion of the settlement which may properly be attributable to costs before the settlement is concluded.

Payment of Fees

In most cases, where the Association has given support to costs being incurred, fees will be met by the Association directly. However, where this is not the case, Members should seek the Managers’ approval before paying any fees which may subsequently form a claim on the Association.

Practice Recommendation 10

Effective management of claims, control of costs and factors impacting support.

The Managers are committed to ensuring that best practice is applied in the handling of cases by third party service providers and also to improve the cost effectiveness of the services provided.

As a legal costs insurer a proper and accurate assessment of the likely costs of a potential course of action is absolutely critical. If it becomes apparent that a service provider's estimate is likely to be exceeded then the service provider must bring that to the attention of the Managers at the earliest opportunity along with a detailed explanation as to the reasons for any overrun.

The Directors place great store in the proposed steps to be taken in any particular case and the costs to be incurred. Both are relevant factors, pursuant to Rule 3 of the Association's Rules, in determining support for any given case. The Directors have become increasingly concerned by the number of cases where estimates have proved inadequate or inappropriate. In the case of an inadequate or inappropriate estimate the service provider will be expected to honour the estimate previously given unless there are mitigating circumstances.

Under Rule 3(4) the factors to be taken into account in relation to decisions on support by the Managers and the Directors include the merits of the dispute, the reasonableness of the Member's conduct, the extent of compliance with obligations, cost effectiveness and the proportionality of costs to be incurred when considered in the context of the amount and issues in dispute, and generally.

Proportionality, costs versus claim amounts is something which is becoming increasingly prevalent and unless there are compelling mitigating circumstances costs will need to evidence proportionality to the claim amount otherwise this will undoubtedly have an impact on the extent of support that can be extended to the particular case in question.