

COTTON ON: THE ICA GETS TOUGH ON DEFAULTERS



The International Cotton Association (ICA) has voted in new changes to the ICA Bylaws & Rules, to take effect from 1 June 2014.

As a result, ICA members can no longer trade with firms on the 'advisory notice list'. If they do, they risk being expelled from the Association.

Broadening of the "List of Unfulfilled Awards"

The Association previously maintained and circulated a "List of Unfulfilled Awards" and separately circulated an "Advisory Note". The Advisory Note identified any entity which appeared to be related to, or utilised by, a defaulter. Under the new regime, the list of defaulters has been re-branded as the "ICA List of Unfulfilled Awards: Part 1" and the Advisory

Note (with the reference to "or utilised by" having been deleted) has become the "ICA List of Unfulfilled Awards: Part 2". Together the "ICA List of Unfulfilled Awards".

Thanks to the widening and re-casting of the definition of "ICA List of Unfulfilled Awards", members are now also prohibited from trading with firms that previously featured on the Association's Advisory Notice List (i.e. entities related to the defaulters). This, together with the Association's development of the ICA Business Intelligence Team, aims to prevent circumvention of the List and to expose "firms involved in dishonourable trading". In support of this approach, the relationship between Related Companies registered with the Association and their Principal is no longer protected by confidentiality.



On appeal

A firm will be listed on Part 1 (at the request of a party to the Award), if it appeals to the High Court on a point of law. However, an “*appropriate footnote*” will be attached pending the outcome of the Court’s decision. What this “*appropriate footnote*” might consist of is still to be seen.

In any event, the outcome seems to be that members will not be able to trade with that entity, unless and until they are removed from the List.

The immediate question that arises is whether the Directors have any discretion as to whether or not the appealing firm should be listed (as they do on receiving advice in respect of non-payment of an award). The wording of the provision provides that “*Firms that have made an application to the High Court for leave to appeal an award on a question of law will, on the request of the Reporting Party, be listed on the ICA List of Unfulfilled Awards: Part 1*” [our emphasis].

However, the intention of the Association must have been that the decision to list a firm would be considered in the usual way. It is certainly arguable both ways.

It is also worth highlighting that this provision applies only on appeals on a point of law.

Of course, any attempt by the Association to preserve the sanctity of an arbitration award and crack down on firms trying to circumvent the List should be supported. However, we

would expect balance to be shown by the Directors when considering whether or not an appealing firm is listed (assuming there is discretion) – we would hope that a party with a bona fide concern on a point of law would be able to appeal without fear of being placed on the List. Time will tell.

A procedural spring clean

Amendments to the arbitration procedure include:

- The procedures to be used for arbitration or appeal will be those in force at the time of making the application.
- An express provision that parties cannot recover their legal fees.
- An express provision that an appeal will be dismissed if the appellant fails to (i) submit a Notice of Appeal within the time specified in the Award; (ii) submit the correct fee in time; and/or (iii) submit its case for appeal within 14 days of the Association receiving the Notice of Appeal.

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