

THE LMAA INTERMEDIATE CLAIMS PROCEDURE 2009

(as developed in conjunction with The Baltic Exchange)

INTRODUCTION

1. These provisions shall be known as the LMAA Intermediate Claims Procedure 2009 (and hereinafter called “this Procedure”). They shall apply to any dispute which parties have agreed should be referred to arbitration under this Procedure. Any agreed monetary limit for disputes that may be so referred shall be deemed to exclude interest and costs unless the parties agree otherwise. In the absence of such agreed monetary limit, this Procedure shall apply where either:

(a) the total amount of the Claimant’s claims or the total amount of any counterclaims exceed any applicable agreed upper limit under the LMAA Small Claims Procedure or (b) US\$100,000

but where neither the total amount of the claimant’s claims nor the total amount of any counterclaims exceed US\$400,000, or such other sum as the parties may agree, (exclusive of interest and costs). Should either party at any time advance claims or counterclaims which in total exceed that amount, the tribunal shall decide, in its absolute discretion, whether it is appropriate to continue the reference under this Procedure or to apply the LMAA Terms current at the date of commencement of the arbitration proceedings.

APPOINTMENT OF TRIBUNAL

2. The parties are free to agree on the composition of the tribunal but, in the absence of agreement, the tribunal is to consist of three arbitrators as set out in paragraph 3 below.

3. If the tribunal is to consist of three arbitrators:

(a) each party shall appoint one arbitrator not later than 14 days after service of a request in writing by either party to do so;

(b) the two so appointed may at any time thereafter appoint a third arbitrator so long as they do so before any substantive hearing or forthwith if they cannot agree on any matter relating to the arbitration, and if the two said arbitrators do not appoint a third within 10 working

- days of one calling upon the other to do so, the President shall, on the application of either arbitrator or of a party, appoint the third arbitrator;
- (c) the third arbitrator shall be the chairman unless the parties shall agree otherwise;
 - (d) before the third arbitrator has been appointed or if the position has become vacant, the two original arbitrators, if agreed on any matter, shall have the power to make decisions, orders and awards in relation thereto;
 - (e) after the appointment of the third arbitrator decisions, orders or awards shall be made by all or a majority of the arbitrators;
 - (f) the view of the chairman shall prevail in relation to a decision, order or award in respect of which there is neither unanimity nor a majority under paragraph (e).

4. If the tribunal is to consist of two arbitrators and an umpire:

- (a) each party shall appoint one arbitrator not later than 14 days after service of a request in writing by either party to do so;
- (b) the two so appointed may appoint an umpire at any time after they themselves are appointed and shall do so before any substantive hearing or forthwith if they cannot agree on any matter relating to the arbitration, and if the two said arbitrators do not appoint an umpire within 10 working days of one calling upon the other to do so, the President shall, on the written application of either arbitrator or of a party, appoint the umpire;
- (c) the umpire shall attend any substantive hearing and shall following his appointment be supplied with the same documents and other materials as are supplied to the other arbitrators;
- (d) the umpire may take part in the hearing and deliberate with the original arbitrators;
- (e) decisions, orders and awards shall be made by the original arbitrators unless and until they cannot agree on a matter relating to the arbitration. In that event they shall forthwith give notice in writing to the parties and the umpire, whereupon the umpire shall replace them as

the tribunal with power to make decisions, orders and awards as if he were the sole arbitrator.

5. If the tribunal is to consist of a sole arbitrator and if within 14 days of one party calling for arbitration the parties have not agreed upon a sole arbitrator:
- (a) either party may apply in writing for the appointment of a sole arbitrator by the President;
 - (b) such application shall be copied to the other party and shall be accompanied by a remittance in favour of the LMAA for its fee for making the appointment (“the LMAA fee”);
 - (c) a party applying to the President shall provide a concise explanation of the issues which are likely to arise and an indication as to whether any particular expertise on the part of the arbitrator is required;
 - (d) the President (or if he is unable to act, a member of the LMAA Committee nominated by him) having considered the nature of the dispute, shall appoint a sole arbitrator and give notice of such appointment to the parties.

OPENING SUBMISSIONS

6. (a) The submissions referred to hereunder shall comprise the opening submissions and shall be copied to the tribunal as and when served.
- (b) Claim submissions accompanied by all relevant documents (as defined in paragraph 7(b)) shall be served by the claimant within 14 days of the appointment of the second member of the tribunal or the appointment of a sole arbitrator, as appropriate;
- (c) Defence submissions, together with any counterclaim, accompanied in each case by copies of all relevant documents shall be served by the respondent on the claimant within 28 days from receipt of the claim submissions.
- (d) Reply submissions, together with any defence to counterclaim, shall be served by the claimant on the respondent within a further 21 days.
- (e) The respondent shall, if it so wishes, serve on the claimant reply to defence to counterclaim submissions within a further 21 days.

- (f) Following service of the reply submissions, or, where there is a counterclaim, following service of the reply to defence to counterclaim submissions, or following expiry of the time for service of the same, the opening submissions shall be deemed completed and no further opening submissions may be served by either party, except with the prior permission of the tribunal.

DISCLOSURE OF DOCUMENTS

- 7. (a) There will be no formal stage of disclosure, each party being obliged to produce all relevant documents with its opening submissions. Following service of claim submissions, the parties shall include in their opening submissions any specific request for disclosure of any relevant documents. If such documents are not disclosed by the other party within 14 days of completion of the opening submissions the tribunal may draw adverse inferences in its award, should it consider that other party to be in default of its disclosure obligations.
- (b) The expression “relevant documents” includes all documents relevant to the dispute, whether or not favourable to the party having power, possession or control of them, but does not include documents which are privileged and not therefore legally disclosable.

STATEMENTS OF WITNESSES OF FACT

- 8. Any party wishing to adduce in evidence statements of witnesses of fact (“witness statements”) must give notice of such intention within 14 days after completion of opening submissions (see: paragraph 6 above). Any such witness statements are to be served/exchanged within 28 days after the completion of opening submissions. Neither party may serve any supplementary witness statement unless the express permission of the tribunal has first been obtained and any terms imposed by the tribunal complied with. Any request for such permission must be made by the party wishing to adduce such evidence within fourteen days of service/exchange of witness statements, failing which no supplementary witness statement shall be adduced in evidence by that party.

EXPERT EVIDENCE

9. (a) Unless served with opening submissions, no expert evidence may be adduced by either party unless the express permission of the tribunal has first been obtained. Any request for such permission must be made within fourteen days after completion of opening submissions or exchange of witness statements (whichever is the later) and must indicate the precise nature of the issues to which the expert evidence is directed and identify the precise field of expertise of the expert witness(es), who will, if permitted, give such evidence.
- (b) Any expert evidence is to be served/exchanged within twenty-one days after the date on which the tribunal gives permission for such evidence to be adduced.
- (c) Neither party may serve any supplementary expert evidence unless the express permission of the tribunal has first been obtained and any terms imposed by the tribunal complied with. Any request for such permission must be made by the party wishing to adduce such evidence within fourteen days of service/exchange of experts' reports, failing which no supplementary witness statement shall be adduced in evidence by that party.

ORAL HEARING

10. (a) There is no automatic right to an oral hearing and only exceptionally will one be held.
- (b) Either party may apply to the tribunal for an oral hearing within, but no later than, 21 days after (i) completion of opening submissions, or (ii) 14 days after (aa) service/exchange of witness statements or (bb) the determination of the tribunal of any application to adduce expert evidence or (cc) the time permitted for service/exchange of expert evidence, whichever is the later.
- (c) If an oral hearing is permitted:
 - (i) each party shall serve a skeleton argument, together with a statement of agreed facts, in advance of the hearing;
 - (ii) except with the permission of the tribunal (sought and obtained no less than 14 days prior to the commencement of the

hearing), the oral hearing shall be limited to a maximum of five hours;

- (iii) each party shall be allocated a maximum of two hours in which to present its case either in the form of evidence or argument or both, as that party may see fit, and the remaining hour shall be allocated by the tribunal in such a way as it considers fair and appropriate in the circumstances of the particular case. Time for cross-examination of the other party's witnesses is included in each party's two-hour allocation.
- (iv) following the conclusion of the oral hearing, each party shall have the right (but not the obligation) to serve one set only of closing submissions. Such submissions shall be served sequentially with the respondent first serving its submissions within seven days of the end of the oral hearing and the claimant serving its closing submissions within seven days thereafter.

CLOSING SUBMISSIONS IF NO ORAL HEARING

11. If an oral hearing is not permitted (see paragraph 10 above) and there has been no further disclosure beyond that accompanying the opening submissions, and no witness or expert evidence has been adduced in accordance with the preceding paragraphs, neither party shall be entitled to serve any further submissions beyond those provided for in paragraph 6, above. In a case where there is no oral hearing but there has been disclosure and/or witness and /or expert evidence, each party shall be entitled to serve one set of closing submissions. Any such closing submissions shall be served sequentially with the respondent first serving its closing submissions within 14 days after the last of the said steps in the procedural timetable for the reference has been performed (see paragraphs 7, 8 and 9 hereof) and the claimant serving its closing submissions within 7 days thereafter. The closing submissions must not adduce new evidence.

EXTENSION OF TIME

12. Any extension of the time limits set forth in this Procedure shall be applied for before expiry of the existing time limit. If a party fails to comply with the relevant

step in the proceedings within the time limit set for the performance thereof, the tribunal, on the application of the other party or of its own motion, shall notify the defaulting party that unless it complies within a fixed period (maximum 21 days) it will proceed to its award on the basis of the submissions and documents before it to the exclusion of all others. (In the case of a failure to serve claim submissions, the tribunal has the power to make and shall make an award dismissing the claim unless the tribunal is satisfied that it would not be just to require service of claim submissions at that time, in which event the tribunal will extend time as it deems appropriate). Any submissions, documents, witness statements, or expert evidence submitted by the defaulting party subsequent to expiry of the time limit set by the tribunal's notice shall not be admissible.

THE AWARD

13. (a) The tribunal will make every effort to publish its award within six weeks of service of the last submissions served by the parties.
- (b) In addition to the powers set out in section 57 of the Arbitration Act 1996 ("the Act"), the tribunal shall have the following powers to correct an award or to make an additional award;
 - (i) The tribunal may on its own initiative or on the application of a party correct any accidental mistake or omission or error of calculation in its award;
 - (ii) The tribunal may on the application of a party give an interpretation of a specific point or part of the award;
- (c) An application for the exercise of the powers set out above and in section 57 of the Act must be made within 28 days of the award unless the tribunal shall think fit to extend time;
- (d) Such powers shall not be exercised without the tribunal first affording the other party (or, where it is acting on its own initiative, the parties) a reasonable opportunity to make representations to the tribunal;
- (e) Any correction or interpretation of an award may be effected in writing on the original award or in a separate memorandum or supplementary award which shall become part of the award. It shall be effected within 56 days of the date of the original award unless all parties shall agree a longer period.

RIGHT OF APPEAL

14. The parties are deemed to have agreed that there will be a right of appeal to the Courts but only where the tribunal certifies in its award that the dispute between the parties involves a question of law of general interest or importance to the trade or industry in question. Any right of appeal is otherwise excluded. For the avoidance of doubt this provision does not apply to any ruling by a tribunal in relation to its own jurisdiction.

PARTIES' COSTS

15. (a) Costs will be awarded on a summary and commercial basis and in such manner and amount as the tribunal shall in its absolute discretion consider fair, reasonable and proportional to the matters in dispute.
- (b) The parties' recoverable costs are capped so that neither party shall be entitled to recover more than a sum equivalent to 30% of the claimants' monetary claim as advanced plus, should there be a counterclaim and should the tribunal consider it to be distinct from the claimants' claim, a sum equivalent to 30% of such monetary counterclaim as advanced. These percentages shall be increased from 30% to 50% if there is an oral hearing, and in that event expenses such as hiring a venue for the hearing and/or associated catering costs shall be recoverable in addition to, and shall not be included in, the said 50%. These percentages are maximum figures and the tribunal may at any time, and in its absolute discretion, cap the parties' future costs so that the total cap amounts to some lesser percentage than is here stated.
- (c) If declaratory or other non-monetary relief is sought the tribunal will, following completion of opening submissions and in its sole discretion, decide what overall cap on future costs to apply.
- (d) To enable the tribunal to assess costs, each party will provide a breakdown of those costs as soon as the tribunal is in a position to proceed to its award.

SECURITY FOR COSTS

16. Applications for security for costs will not be considered until after service of defence submissions. Any application must be accompanied by a justification for it and a breakdown of the costs which it is reasonably anticipated will be incurred up to the stage of the reference for which security is sought. In no circumstances will security for costs be granted in a sum above the amount at which the parties' respective costs have been capped.

TRIBUNAL'S COSTS

17. (a) Every arbitrator appointed under this Procedure shall be entitled to charge an appointment fee.
- (b) Save in exceptional circumstances, the tribunal's costs (for payment of which the parties are jointly and severally liable) shall not exceed a sum equivalent to one-third of the total at which a party's costs are capped under paragraph 15 above, excluding the appointment fee, in respect of a sole arbitrator or two-thirds thereof in respect of a two or three-man tribunal.
- (c) The tribunal's said costs do not include expenses such as hiring a venue for the hearing and/or associated catering costs which shall, in the first instance, be paid by the party requesting an oral hearing on demand.
- (d) Should there be a challenge to the jurisdiction of the tribunal which, or which it is suggested, falls to the tribunal to resolve, the tribunal shall be entitled to charge a reasonable fee for such work, its additional fee being payable in the first instance by the claimant before the tribunal makes any award, ultimate liability for such additional fee being for the tribunal to determine.
- (e) An arbitrator may in his discretion require payment of his outstanding fees, and any expenses incurred, at appropriate intervals. Any such demand for payment shall be addressed to the arbitrator's appointing party and shall be copied to any other member of the tribunal and other parties. A sole arbitrator, third arbitrator or umpire shall require payment from the parties in equal shares. Any such demand for payment is without prejudice to (i) ultimate liability for the fees in

question and (ii) the parties' joint and several liability therefor. The cost of any award shall be paid upon collection of it.

- (f) If any amount due under (a) or (e) above remains unpaid for more than 14 days after payment has been demanded, the arbitrator may give written notice to the appointor and to the other parties and arbitrators that he will resign his appointment if such amount still remains unpaid 7 days after such notification. Without prejudice to ultimate liability for the fees in question, any other party may prevent such resignation by paying the amount demanded within the said 7 days. Upon any resignation under this paragraph the resigning arbitrator will be entitled to immediate payment of his fees to date, and shall be under no liability to any party for any consequences of his resignation.

CONCURRENCY

18. Where two or more arbitrations conducted under this Procedure appear to raise common issues of fact or law, the tribunals may direct that those arbitrations shall be conducted and any hearing take place concurrently. Where such an order is made, the tribunals may give such directions as the interests of fairness, economy and expedition require including:

- (a) that the documents disclosed by the parties in one arbitration shall be made available to the parties to the other arbitration upon such conditions as the tribunals may determine;
- (b) that the evidence given in one arbitration shall be received and admitted in the other arbitration, subject to all parties being given a reasonable opportunity to comment upon it and subject to such other conditions as the tribunals may determine.

GENERAL

- 19. (a) The tribunal may in any case which, in its discretion, it considers exceptional depart from or vary the above provisions as it considers appropriate, save that it shall not be entitled to vary the maximum figure which can be awarded to the parties in respect of their legal costs, unless the parties agree otherwise.

- (b) The appointment fee and the LMAA fee shall be such amounts as the Committee of the LMAA shall from time to time decide.
- (c) All references to costs herein are exclusive of VAT and VAT is to be added thereto where applicable.
- (d) In calculating costs for the purposes of paragraphs 15, 16 and 17 hereof, where claimed in a currency other than US Dollars, the tribunal will adopt the mid buying and selling exchange rate between the two currencies prevailing on the date of commencement of the arbitration proceedings.
- (e) For all purposes, including time limits, arbitration proceedings shall be deemed to be commenced under this Procedure upon one of the parties appointing an arbitrator or upon one of the parties calling upon the other party to agree on the appointment of a sole arbitrator.
- (f) In the absence of any agreement to the contrary, the parties to all arbitral proceedings to which this Procedure applies agree:
 - (i) that the law applicable to their arbitration agreement is English law; and
 - (ii) that the seat of the arbitration is in London, England.