COMMENTARY ON THE LMAA SMALL CLAIMS PROCEDURE 2012

1. Introduction

(Note: Attention is particularly drawn to the passages in bold type below. These indicate substantial changes to the Commentary made at the time of the 2012 Revision of the Procedure.)

The Small Claims Procedure has been introduced to provide a simplified, quick and inexpensive procedure for the resolution of small claims.

It is suggested that it should be used where neither the claim nor any counterclaim exceeds the sum of US$50,000 (excluding interest and costs**)**. It is not suitable for use where there are complex issues or where there is likely to be examination of witnesses. On the other hand, the Procedure may be suitable for handling larger claims where there is a single issue at stake.

Since the 2006 revision the tendency has regrettably continued for the Procedure to be applied regardless of the complexity of the issues involved in a particular dispute (and occasionally, regardless of the amounts involved or where the amounts involved are considerably higher than the suggested limit). It has previously been pointed out that this is likely to lead to dissatisfaction with and criticism of the Procedure since the constraints on the arbitrator and the parties imposed by the limited financial remuneration for their services (which is an essential part of the Procedure) may mean that a particular dispute is not dealt with as the parties envisage. Parties proposing to use the Procedure are therefore encouraged to consider at the outset whether it is appropriate to vary the terms of the Procedure (for example, by mutually agreeing to increase the maximum amount of recoverable costs). The position of the arbitrator is dealt with further in the context of discretion at paragraph 9 below. **Paragraph 1 of the procedure has been amended to give to the parties the right to challenge the use of the Procedure in cases where the limits are exceeded and to give to the arbitrator a discretion whether to proceed with the determination of the claims and any counterclaim using the Procedure or applying the Intermediate Claims Procedure or the main Terms. It is hoped that parties will give serious consideration to the use of the Intermediate Claims Procedure in cases where the amounts involved are between US$ 100,000 and US$400,000.**

Attention is drawn to the following features:

2. Reference to a Sole Arbitrator

Since its introduction the Small Claims Procedure the arrangement for the appointment of a sole arbitrator has provided a saving both in time and expense. It is expected and hoped that in most cases the parties will be able to agree on the sole arbitrator. Where they cannot agree, application may be made to the LMAA and the President will then make the appointment. There will be a charge to cover the administrative expenses (please see our page on fees). The attention of the parties is drawn to the fact that payment of the fixed fee in full (including the additional element when the appointment is made by the President) is a condition precedent to the commencement of proceedings. In requesting the President to make an appointment under the Procedure, the appointing party should provide as full an explanation as is practicable of the issues which he expects to arise. He should also draw the attention of the President to the

fact that particular expertise on the part of the arbitrator may be desirable (for example, engineering expertise in the case of a performance dispute). Parties should also be aware that it is the practice of the President not to consider for appointment in a particular case any arbitrator whose name he knows has been put forward by either party. The objective of this practice is to avoid any perception on the part of the other party that a party has secured an advantage by having the President appoint as arbitrator one of the individuals whom he has proposed. A party asking the President to make an appointment should therefore disclose the names of the arbitrators proposed by either party.

It is now provided that the payment of the Small Claims fee shall be a condition precedent to *the pursuit* of proceedings under the Small Claims Procedure, rather tan to *the valid commencement* of proceedings so as to avoid the possibility that a claim might become time barred by virtue of a failure to pay the fee, sometimes before the time for agreeing on a sole arbitrator had expired.

The arrangements for the service of the letter of claim are now dealt with in paragraph 5 which deals with procedure generally.

3. Arbitrator to Receive a Fixed Fee

So that the parties know where they stand at an early stage, it is provided that the arbitrator will receive a fixed fee. In the case of a counterclaim which exceeds the amount of the claim there is an additional fixed fee. This additional fee is charged because a counterclaim that exceeds the claim will normally involve different issues. No additional charge is made in respect of counterclaims which do not in total exceed the amount of the claim. Members of the LMAA have agreed to deal with disputes under the LMAA Small Claims Procedure as a service to the industry, though it will be appreciated that, having regard to current rates of remuneration, it may in many cases involve some financial sacrifice. Any expenses must be paid in addition.

The amounts of these fees are determined from time to time by the LMAA Committee and will be found in the LMAA Newsletter and on the fees page of the LMAA website.

Challenges to jurisdiction can involve a great deal of work additional to that required to resolve the merits of a dispute. Accordingly it seems appropriate that such work should be paid for on a quantum meruit basis before the arbitrator resolves the challenge, and that such fees should be borne – in the first instance only – by the claimant.

4. Exclusion of Appeal

Under the Arbitration Act 1996 there is no restriction on the parties to exclude the right of appeal. An agreement to arbitrate under the LMAA Small Claims Procedure will automatically be treated as an agreement to exclude the right of appeal. In view of this, while a Reasoned Award will be given, it will be expected that reasons will be relatively brief. This exclusion does not, by virtue of the Arbitration Act 1996, apply to challenges to jurisdiction.

5. Informal Procedure

There will be no formal pleadings and no disclosure as such. Each party will be informed of the case against him by a simple exchange of letters accompanied by copies of all relevant documents, including witness statements. **Paragraph 5(a) imports the provision formerly in paragraph 2(b) dealing with the service of the letter of claim and adding a limit to the length of the letter of claim. Under paragraphs 5(b) and5(c) the length of any defence and counterclaim and any replies and defence to counterclaim will also be limited.** A strict but reasonable timetable is imposed, and, if a party fails to comply with a final time limit set by the arbitrator, the arbitrator will proceed to his award on the basis of the documents already received. There is substituted for disclosure (a procedure frequently used to gain time) an obligation on the parties to disclose all relevant documents with their letters of claim or defence. Should a party fail in this obligation, the arbitrator is given power to order production of any missing documents and to give warning to that party that, if he fails to produce them without adequate explanation, the arbitrator may proceed on the basis that those documents do not favour that party's case. Claimants should note that any attempt to secure a tactical advantage by withholding production of evidence which should properly accompany the claim submissions until the stage of a reply may be met with a refusal on the part of the arbitrator to admit such further evidence.

6. Legal Representation

The use of lawyers is not excluded, though it is thought that in many cases they will not be necessary. But it should be borne in mind that advice from a lawyer can often indicate to a party the strength or weakness of his case and can assist in reaching an amicable settlement; also, if settlement cannot be reached, the case may be presented by a lawyer in a more orderly and concise manner.

7. The Award

The arbitrator will normally make his Award within one month from the date on which he has received all the papers.

8. Costs

The power of an arbitrator to award costs has been retained as an important feature of London arbitration. It operates to deter spurious claims or defences and may assist in promoting an amicable settlement. The arbitrator is given power to tax or assess legal costs, but on a commercial basis. The amount recoverable will be assessed at a sum in the arbitrator's discretion not to exceed such sum as may be fixed by the Committee of the LMAA. Where there is a counterclaim that attracts an additional fee for the arbitrator under paragraph 3(c), again this fee is fixed by the Committee from time to time. Although the arbitrator has discretion to vary or depart from the provisions of the Procedure in exceptional cases (see paragraph 9 below) this discretion does not extend to varying the amount of legal costs recoverable under this Procedure. It is regarded as being of fundamental importance so far as the Procedure is concerned that a party agreeing to arbitrate disputes according to the Procedure can be certain at the outset of his maximum liability in terms of costs.

Unless otherwise agreed or requested by the arbitrator, parties are not required to present schedules of the costs claimed: the amount is to be left to the arbitrator's discretion. **Where breakdowns of costs are to be provided they are to be limited to 500 words.**

9. Discretion

It is expected that in the great majority of cases the strict timetable and provisions of the Procedure will be observed and enforced, but in exceptional cases there is discretion for the arbitrator to vary or depart from them. The success of the Procedure in promoting cost effective arbitration in London has led to a regrettable number of cases in which disputes have been referred to arbitration according to the Procedure which are not appropriate for determination in accordance with the spirit, if not the letter, of that Procedure. Such situations can arise simply as the result of the fact that parties to a contract agreed in that contract to apply the Procedure to all disputes involving less than a certain sum of money, regardless of the nature of such disputes. In such cases the parties should be aware that the arbitrator may at the outset or at any time thereafter inform them that in his opinion the dispute referred to him cannot be dealt with satisfactorily according to the Procedure. He will then be entitled to invite the parties either to agree to an appropriate variation of the Procedure or, alternatively, to agree to his continuing to act on the basis of the LMAA Terms in force for the time being. In the event of a refusal by the parties so to agree the arbitrator shall be entitled to resign from the reference whilst retaining out of the Small Claims fee a sum sufficient to remunerate him for services thus far rendered. An amendment to paragraph 9 makes it clear that where the Small Claims Procedure is deemed inappropriate, it shall cease to apply in all respects.

10. General

Certain provisions have been imported into the Procedure from the main Terms for clarification purposes.