

## **LMA/IUA User Guide to the Loan Market Association Model Credit Risk Insurance Policy Wording**

### **Introduction**

This User Guide has been prepared for the Lloyd's Market Association (LMA) and the International Underwriting Association (IUA) to provide an overview of the model insurance policy form drafted by the Loan Market Association with input from brokers and LMA and IUA insurers. Whilst every care has been taken in the preparation of this User Guide, no representation or warranty is given by A2Z Risk Services, the LMA or the IUA as to the accuracy or completeness of its contents, nor is it intended to provide legal advice.

It is intended to be read in conjunction with the annotated model policy form attached as an Appendix hereto, but neither this User Guide nor the footnotes to the policy document are intended to be a comprehensive analysis of each provision and how it operates.

Please note that, although the policy may be treated by bank users as a 'guarantee' for purposes of regulatory capital relief purposes, it is drafted as an insurance product and governed by English insurance law. Insurers using this policy document should already be familiar with their rights and obligations as well as the treatment of clauses such as warranties, exclusions and conditions under insurance law, but a brief overview of certain points are outlined below.

Insurers should regard the policy document as a starting point for negotiations only and should satisfy themselves as to any applicable regulatory implications as well as seek internal or external legal advice as required. Lloyd's syndicates are advised to check relevant Lloyd's Bulletins and any other guidance on exclusions, sanctions and other wording requirements.

Corrections have been identified in the text and language has been suggested in some clauses for clarification or completeness' sake. However, Insurers should feel free to adapt the text as necessary depending on the outcome of negotiations with the Insured, keeping in mind that the purpose of this document is to ensure consistency of approach and that the draft is intended to be fit for purpose with changes made only as required to reflect the outcome of negotiations on commercial points.

### **Insurance Law**

The model policy is governed by English insurance law. The key characteristics of a contract of insurance is that it indemnifies the Insured in the event of a fortuitous loss of something in which it has an insurable interest. It is a contract under the principle of utmost good faith.

The duty to make a fair presentation requires the Insured to proactively provide to the Insurer information regarding the material aspects of the risk the Insured is asking the Insurer to take. The test of materiality is any fact or circumstances that would influence the judgment of a prudent underwriter in deciding to write the risk and on what terms. The Insured must disclose to the Insurer all material circumstances which it knows, or ought to know. The Insured 'ought to know' information that should reasonably have been revealed by a reasonable search of information available to it, as well as information known to senior management and the people responsible for procuring the insurance policy. This duty arises pre-contract and then subsequently at the time that any changes are made to the policy.

The duty of fair presentation has been modified in the model policy to confine the discharge of the duty to the defined Deal Team on the basis of its Knowledge (as defined), rather than the Insured. The reasonable search requirement has been modified to be the defined Customary Due Diligence

conducted by the Deal Team. There are caveats regarding third-party information provided to the Insurer by the Deal Team. The issue of how the Insured can provide to the Insurer information obtained on a confidential basis is also addressed; helpfully, the text also provides for the Insured alerting the Insurer to the existence of information that the Insured is restricted from providing.

Under insurance law, the Insured must give a fair presentation of the risk by providing information on a clear and accessible basis rather than 'data dumping', e.g., by flooding the Insurer with all the information that the bank has received without providing the Insurer with a 'roadmap' to make sense of it. A fair presentation may mean that the Insured has provided sufficient 'signposts' so that the Insurer is put on notice that it should ask further questions in order to reveal a material matter. However, the intentional withholding of information is considered a breach of the duty of fair presentation, notwithstanding any 'signposts' provided.

The model policy restates insurance law regarding material statements of fact and opinion as well as what does not need to be disclosed to the Insurer under insurance law. In Clause 3.2 the model policy makes explicit that the Insurer's remedies for misrepresentation by the Insured are those under the Insurance Act 2015 rather than the Misrepresentation Act 1967.

The Insured's obligations that are critical to management of the risk and alignment of its interests with those of Insurers are listed as warranties under 8.1. However, as noted in the preamble to the model document, clauses expressed as one type of provision can be expressed as another so Insurers may decide whether they wish to negotiate for these to be conditions precedent or accept an Insured's negotiating position that these are to be conditions. Insurers may wish to consider their relationship and track record with the Insured as well as seek internal legal guidance as to the legal effect of breach of these different types of provisions: warranties, conditions precedent and conditions.

Upon payment of a claim, under the operation of insurance law the Insurer is automatically subrogated to the rights of the Insured against third parties as well as recoveries from anything that diminishes the loss. The model policy addresses the need for the Insured to consult and cooperate with the Insurer in investigating and determining a claim, as well as in respect of the rights to which the Insurer is subrogated. There is also provision for instances where the Insurer may request outright assignment of those rights.

Finally, Insurers are reminded to be aware of the impact of Section 11 and Section 17 of the Insurance Act 2015 and to ensure that these are appropriately addressed in any final policy language negotiated (note that Clause 8.3 already refers to Sections 11 and 17).

## **Model Policy Options in the Context of Market Practice**

Although Insurers are free to depart from market norms in respect of any of the clauses in the model policy, the footnotes to the model policy do note various instances of market practice (or at least A2Z Risk Services' understanding thereof) that Insurers may wish to keep in mind. Certain examples are set forth below.

The model policy defines a Waiting Period in the Risk Details as well as a defined Claims Settlement Date. Under standard market terms for 'protracted default' for straightforward trade credit, the standard waiting period is 180 days to give an opportunity for efforts to collect the debt from the still solvent debtor to bear fruit. Claims for structured credits and even plain vanilla loans in emerging markets can be complex. These are often complicated by the existence of 'verticalised' placements making difficult the coordination among Insurers covering the same risk but on different policies. Therefore, customarily, the claims determination/cure period known as the waiting period is 180 days, although this can be shortened depending on the nature of the exposure insured or the

relationship with the Insured or its regulatory requirements. In certain instances a longer period may be required to ensure sufficient time for the claim to be determined by that date certain. Regulators such as the Prudential Regulatory Authority have accepted the timeliness of payment required for credit risk mitigation does not require a set period of time provided the Insured has certainty over when payment will occur and considers any residual risks.

The definition of Deal Team includes options to include or exclude employees of the Insured in approval and restructuring functions. As the credit review and workout functions in a bank often play critical roles in managing the transaction and these may have access to additional information beyond that of the transactors, Insurers' starting point is usually to include these functions.

The model policy is drafted to cover a single loan exposure which may be secured or unsecured. Care should be taken where the loan is secured to ensure that security documents are picked up in the definition of Finance Documents where Insurers wish to ensure that enforceability, loss minimisation and recovery obligations encompass any security or collateral available, given its importance to recoveries.

Care should be taken that the final policy text addresses how premium is calculated, paid and adjusted; market practice is that this is spelled out in the body of the document but the model policy simply refers to Schedule 3. Suggested language has been provided in Clause 6.1 and Schedule 3, and care in any event should be taken that Schedule 3 is not left blank or only contains a spreadsheet. Note that Clause 6.1 suggests text to clarify that full premium is payable in the event of a claim as insurers tend to model technical adequacy/expected loss calculations on the basis of full premium for the expected duration of the policy.

The definition of Insured Payment has the option to include basis default interest, late payment charges and other fees and costs under the loan agreement; however, market practice is normally to exclude these and similar payments and cover only principal (and sometimes interest).

Minimum Retained Interest is defined as the percentage (Minimum Retained Percentage) of the outstanding amount borrowed under the loan agreement. The Insured warrants to retain this Minimum Retained Interest rather than a percentage of each and every defaulted Insured Payment.

The model policy defines what a rescheduling is; note that the defined term Rescheduling makes it optional whether a deferral/rescheduling of a payment is for the purpose of minimising the likelihood of a loss. While it has always been a market understanding that this is the purpose of a rescheduling, this will need to be specified under the model policy.

The model policy assumes the Insured will view the Rescheduling positively but is required to obtain the Insurer's consent. Clause 13.3 addresses where the Insurer has consented (by an agreement to agree an endorsement to the policy to reflect the Rescheduling); Clause 13.4 is optional and addresses a situation where either the Insurer has not agreed to the Rescheduling or the Insurer and Insured are unable to reach agreement on an endorsement. In this instance the Insured can claim according to the original due dates as if the Rescheduling had not occurred. Note that Clause 13.4 contemplates a deadline for such agreement which may not be realistic for an appropriate agreement to be reached and signed off by the Insured and Insurer. As historically Insurers and the Insured have been able to negotiate a mutually acceptable endorsement in the event of rescheduling, Insurers may not wish to include Clause 13.4 in its current form.

Although Clause 14 *Acceleration* follows market practice by making the choice to accelerate payment of a claim at the discretion of the Insurer, Insurers may wish to make more explicit that if the Insurer does not accelerate the policy, claim payment would be of originally due amounts on their original due dates.

The model policy includes provisions in Clause 17 regarding hedging and other risk management practices of banks which have been accommodated by insurers. Whilst in Clause 8.1(c) the Insured warrants that it will hold the Minimum Retained Amount uninsured, unhedged and for its own account, thereby preserving some 'skin in the game' that Insurers require to ensure an alignment of interests, this is subject to Clause 17.

Note that Clause 17.1(a) allows the Insured to sub-participate its rights under any Finance Document or enter into a hedging agreement provided it retains the Minimum Retained Interest. Clause 17.2 would allow the Insured greater latitude to assign, transfer, securitise or repackage its rights without the Insurer's consent. Clause 17.3 allows the Insured to conduct a wide range of risk management activities regarding the Insured's exposure under the Insured Agreement including the Minimum Retained Interest or part thereof, subject to certain provisos. If Clause 17.4 is included in an insurance policy, the Insured may fully transfer, assign or otherwise create security over all of its rights under the loan, either to a central bank or any other entity, the implications of which should be considered carefully by the Insurer.

Of course, market practice evolves and Insurers are in any event free to deviate from these practices according to their risk appetite, relationship with the Insured or other reasons.

### **Clauses/Concepts Added by the Model Policy**

The model policy defines the term Material Amendment and adds the concept of Permitted Amendments, which is a defined term and used in Clause 8.4 (c) which addresses changing the insured loan agreement to replace the reference rate (driven by the change from the cost of funds being LIBOR to other reference rates such as SOFR, SONIA or €STR). The Insurer could simply provide reassurance to an Insured that such a change would not be considered a Material Amendment and therefore would not fall under Clause 8.1(d), which requires Insurer approval for a Material Amendment. The alternative may be to agree a long list of things that are *not* material rather than just focusing on Material Amendments that do need to be approved.

Clause 8.4 also contemplates that other changes to the Finance Documents could be agreed to be Permitted Amendments, allowing the Insured to make these changes without Insurer consent. The model policy contains the usual protection for the Insured if changes are made (for example, by Majority Lender vote – see Clause 10 *Constraint on Insured's Actions*) outside of the Insured's control.

The model policy also has a place-marker for insurance premium tax, which is normally addressed in slips and therefore this clause should not be needed. If included, Insurers should check that the burden of insurance premium tax is borne by the appropriate entity. Insurers should also check regulatory guidance on the administration of IPT.

The model policy uses the terms Non-Payment Date (which may be the date of a Non-Payment Event or, as set out in Clause 13 *Rescheduling* and Clause 14 *Acceleration* a different date) rather than the usual Date of Loss. See comments above on those Clauses.

The model policy has included a definition for Recoveries which includes interest accruing on principal once Compensation has been paid; however, Clause 9.7 *Recoveries* contains an option to cap the amount the Insurer has the right to receive to the amount of Compensation paid.

The standard LMA Clause 5326 Change of Claims language has been added as an optional Clause 9.8.

Clause 25 *Sanctions* contains the standard LMA 3100 as an option (Clause 25.2) in the midst of LSW 1865 (the remainder of Clause 25).

The model policy provides the option for the parties to choose either English courts or arbitration as the dispute resolution mechanism under the policy. Clause 30 provides a handy reminder that certain jurisdictions require a service of suit clause; Insurers should check Crystal or internal guidance on this and other licensing or regulatory requirements.

Clause 32 leaves space for a 'bail-in' recognition clause which may be relevant for European banks; Insurers should satisfy themselves as to the effect of such clause on their rights and any licensing or regulatory requirements.

## **General Guidance on the Use of the Model Policy**

The model policy can be adapted (for example, if Insurers wish the insuring agreement to cover default of a guarantor following default of the borrower), in which case Insurers should ensure that any necessary changes are tracked through the document. The model policy can also be used as the basis for a template wording but again care should be taken to ensure that the model policy provisions that are drafted for a single loan are sufficiently adapted to a master wording with attaching declarations, for example.

The model policy is drafted on the basis that all tranches/loans under one loan agreement are insured, so the wording may need to be adapted to incorporate restrictions if only one portion of the underlying loan is insured.

Insurers should read each definition carefully in the context of the Clauses in which it is used (a word search will easily identify these) as the legal definition chosen may change the implications of a subsequent clause, while the options chosen in subsequent clauses may likewise change the effect of the definition (e.g., Recoveries).

As noted in the footnotes where blanks need to be completed as to the number of days required (for example, notifications, consultation response times, submission of claims and information requests, etc), careful thought should be given, in consultation particularly with claims personnel, as to realistic deadlines that still provide certainty to the Insured that they can meet external deadlines under the Insured Agreement and the Insured's internal expectations. For example, claims deadlines will need to strike a balance between a quick submission of a Proof of Loss and as complete a Proof of Loss as possible, keeping in mind that the preferred option usually is to allow the Insured time to resolve the potential default, whilst the Insurer has a duty to reinsurers and regulators to make a well-informed claims determination.

The attached policy document is annotated with a great many footnotes, but Insurers should take heed that not every optional text (shown in brackets in the text) has been footnoted.

In addition to making their own judgment regarding the desirability of including or excluding the bracketed options, Insurers should read the text as a whole with the aim of ensuring that the clauses work together, and that the chosen text results in a consistent interpretation throughout the document. To that end, a short list of key terms and their location in the document may be found below.

Term	Where found in document
Claim Settlement Date	9.4 – Amount of Compensation 9.5 – Date of Payment of Compensation 13.4(e) & (g) – Rescheduling
Compensation	Insured Loss definition Policy Currency definition Recoveries definition 9.3(d) – Claim 9.4 – Amount of Compensation 9.5 – Date of Payment of Compensation 9.6 – Assignment and Subrogation of Rights 9.7 – Recoveries 11.1 – (cooperation) 11.2 – (loss minimisation) 11.4 – (loss minimisation) 12.1 – late payment of compensation 12.3 – late payment of compensation 12.4 – late payment of compensation 13.4 (f) – Rescheduling 18.4 – (costs)
Customary Due Diligence	Knowledge definition 7.4 – Fair Presentation 7.5 – Fair Presentation
Date of Binding	7.4 – Fair Presentation 7.7 – fair Presentation 7.8 – Fair Presentation 8.1(b) – Compliance with Laws
Deal Team	Deal Team Department definition Knowledge definition 7.1 – Fair Presentation 7.4 – Fair Presentation 7.5(d) – Fair Presentation 7.6 – Fair Presentation 7.7 – Fair Presentation 9.1 – Notification 9.3(a) – Claim 17.3 – Hedging
Due Date	Original Due Date definition 6.3 – Payment of Premium in the event of Rescheduling or Acceleration 14.2 – Acceleration Schedule 2 – Proof of Loss
Finance Documents	Majority Lenders Material Amendment Recoveries 5.1(b) – Exclusion 7.4 – Fair Presentation 8.1(a) – Warranty 8.1(b) – Warranty 8.2 – law precedence in warranty 8.4(c) – Permitted Amendment 9.4(a)(ii) – Amount of Compensation 9.6 – Assignment and Subrogation of Rights 9.7(b) – Recoveries 10.1 – Constraint on Insured's Actions 10.3 – Constraint on Insured's Actions 11.5 – Loss Minimisation (validity of documents) 17.1 – Hedging 17.2 – Hedging
Host Country	Host Government 8.1(b) – Compliance with Laws 8.2 – Compliance with Laws

Term	Where found in document
	17.1 - Hedging 17.3 – Hedging
Insured Agreement	Acceleration definition Insured Loan definition Insured Payment definition Lenders definition Majority Lenders definition Material Amendment definition Due Date definition Finance Documents definition 5.1(a) (Exclusion) 9.4(a)(iii) – Amount of Compensation 9.7(a)(ii) – Recoveries 13.4 (a) & (e)– Rescheduling 17.3 – Hedging 19.1(b) – Termination 20.6 – Confidentiality 25.1 – Sanctions
Insured Loan	Acceleration definition Customary Due Diligence definition Deal Team definition Insured Payment definition Minimum Retained Interest definition 7.5 – Insurer used own judgment in respect of Insured Loan 17.2 – Whether Insured may transfer/assignment of rights under a Finance Document 17.4 – Whether Insured may transfer/assign/pledge rights under the Insured Loan 19.1(b) – Termination of policy if Insured Loan prepaid 19.1(c) – Termination of policy if Insured has sold the Insured Loan
Insured Payment	Due Date definition Non-Payment Event definition Other Insurance definition Recoveries definition Rescheduling definition 6.3 – Payment of Premium in the Event of Rescheduling or Acceleration 9.4 – Amount of Compensation 9.6 (a) & (b) – Assignment and Subrogation of Rights 9.7 – Recoveries 11.2 (loss minimisation) 11.6 (no agreement regarding Insured Payment without Insurer consent) 13.4(e) – Rescheduling 14.2 – Acceleration 15.2 (e) – Other Insurance 18.2 – Costs and Expenses Schedule 2 – Proof of Loss
Insured Loss	Insuring Clause Preamble to Exclusions 9.1 - Notification 9.3(a) – Claim 9.6(a) and (d) – Assignment and Subrogation of Rights 11.2 (loss minimisation) 13.4(e) & (f) – Rescheduling Schedule 2 - Proof of Loss form
Material Amendment	8.1(d) – Warranty 8.4(b) – relating to warranty 8.4(c) – Permitted Amendment 10.3 – Constraint on Insured's Actions
Minimum Premium	Risk Details Definitions Earned Premium definition

Term	Where found in document
	Unearned Premium definition
Non-Payment Date	Non-Payment Event definition Waiting Period definition 6.3(a) – Payment of Premium in the Event of Acceleration or Rescheduling 9.2 – Waiting Period 9.3 – Claim 9.4 – Amount of Compensation 13.4 (d) & (f) – Rescheduling (endorsement) 14.2 – Acceleration of Loan 18.2 – Costs
Non-Payment Event	Claim definition Compensation definition Insured Loss definition Rescheduling definition 4.1 – Insuring Clause 5.1 – Exclusions 5.2 – Cyber Affirmation 9.1 – Notification 9.2 – Waiting Period 9.3 – Claim 11.2 – Cooperation & Loss Minimisation 13.4(c), (d) & (f) – Rescheduling 18.3 – Costs 18.4 – Costs 19.3 – Effect of Termination Schedule 2 – Proof of Loss form
Other Insurance	Other Insurer definition 9.4(a) – Amount of Compensation 13.4(e) – Rescheduling 15.2 – Other Insurance
Recoveries	9.7 – Recoveries 10.2 – Constraint on Insured's Actions 11.2 – (loss Minimisation) 13.4(g) – Rescheduling
Rescheduling	Material Amendment definition 6.3 – Payment of Premium in the Event of Acceleration or Rescheduling 13.4 – Rescheduling 10.3 – Constraint on Insured's Actions 11.7 – (Cooperation, Loss Minimisation) 13 – Rescheduling
Waiting Period	Risk Details 9.2 – Waiting Period 9.3(a) – Claim 9.3(c) – Claim 9.7(a) – Recoveries 18.2 – Costs 18.3 – Costs 18.4 – Costs
Clause 13.4	Insured Loss definition Non-Payment Date definition Non-Payment Event definition Original Due Date definition Reference Date definition

For the avoidance of doubt, this model form of Credit Risk Insurance Policy is in a non-binding, model form. Its intention is to be used as a starting point for negotiation only. Individual parties are free to depart from its terms and should always satisfy themselves of the regulatory implications of its use.



## CREDIT RISK INSURANCE POLICY

AUGUST 2022

IUA/LMA ANNOTATED VERSION DECEMBER 2022

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## IMPORTANT NOTICE

- This model form Credit Risk Insurance Policy ("**CRI Policy**") has been prepared for the Loan Market Association ("**LMA**") and has been prepared with the assistance of the Lloyd's Market Association ("**Lloyd's**") and the International Underwriting Association ("**IUA**"). Whilst every care has been taken in the preparation of the CRI Policy, no representation or warranty is given by the LMA, Lloyd's or IUA, Clifford Chance LLP, Clyde and Co LLP or any other person:
  - as to the suitability of the CRI Policy for any particular transaction; or
  - that the CRI Policy will cover any eventuality.
- This CRI Policy is drafted for the purposes of insuring a single borrower risk and the purposes of insuring credit risk arising from loan agreements.
- LMA member users should read this CRI Policy and look at its accompanying User Guide. However, the User Guide and notes herein provide limited guidance only and are not intended to be a comprehensive analysis of the CRI Policy or to explain how each provision of the document operates. In particular, users of the CRI Policy should satisfy themselves as to the taxation, regulatory and accounting implications of its use and that the CRI Policy is appropriate for the particular commercial transaction.
- This CRI Policy is a basic starting point for a policy of this type, subject to case-specific customisation and subsequent negotiation. It omits several features which are commonly negotiated between parties from time to time.
- This CRI Policy contains various square bracketed options, which may be deleted or included depending upon the parties' requirements, the facts and the negotiated position. The selection, deletion or specific form of one option may require a corresponding selection, deletion or form of another. In most cases where such correspondences are not immediately clear from the context, a footnote draws attention thereto. It should also be noted that the use of square bracketed options is not intended to direct users towards their inclusion or otherwise. Rather, they are intended to present a range of different options, the inclusion/non-inclusion of which will be transaction dependent.
- All footnotes should, generally, be deleted from agreed, final versions.
- This CRI Policy includes various provisions which might be expressed as any or all of representations, warranties or general conditions. The fact that any such provision is expressed as one type of provision (in this model form) does not mean that it should not be expressed as another or that to do so would necessarily be contrary to market practice. That said, the legal effect of a breach (and the resulting commercial and regulatory consequences thereof) may vary depending upon how such provision is expressed.
- Neither the LMA, Lloyd's, the IUA, Clifford Chance LLP, Clyde and Co LLP nor any other person are liable for any losses suffered by any person as a result of any contract made on the terms of the CRI Policy or which may arise from the presence of any errors or omissions in the CRI Policy and no proceedings shall be taken by any person in relation to such losses.

- For the avoidance of doubt, this CRI Policy is in a non-binding, non-prescribed model form. Its intention is to be used as a starting point for case-specific customisation and negotiation only. Individual parties are free to depart from its terms and should always satisfy themselves of the regulatory implications of its use and should seek expert advice, where appropriate, to ensure that it is tailored to suit their particular needs. In particular, this CRI Policy is not intended to be a substitute for, or to override, the terms already negotiated between, and agreed by, specific insured lenders and their insurers.
- Furthermore, market practice, insurance products and their terms are ever-changing, and the LMA expects that this model form will be adapted, improved and refined from time-to-time as the market and market practice develops.



**Maximum Limit of Liability:** [ ]<sup>6</sup>

**Minimum Retained Percentage:** [ ] per cent.

**Policy Period:** From: Commencement Date to: [*specify a date on or after the final Due Date*]<sup>78</sup>

**Commencement Date:** [ ]

**Date of Binding:** [ ]<sup>9</sup>

**Minimum Premium:** [ ]

**Policy Currency:** [ ]

**Waiting Period:** [ ] days.

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<sup>6</sup> The assumption is that this is a fixed hard currency amount that reflects the maximum amount of indemnity but note that the policy does not explicitly state that it reduces with repayment, prepayment or the transfer/assignment of part of the loan.

<sup>7</sup> For contract certainty/accurate exposure tracking, an exact date should be specified as policy expiry.

<sup>8</sup> The Policy Period should cover the term of the Insured Loan (including any final payment obligations covered within the scope of the term "**Insured Payment**").

<sup>9</sup> Note any difference between this date and the date of the stamp/PPL binding, as this term is used in Fair Presentation and also in Compliance with Laws.

## 2. DEFINITIONS AND INTERPRETATION

### 2.1 Definitions

"**Acceleration**" means the exercise of acceleration rights in respect of any or all of the Borrower's payment obligations under the Insured Loan pursuant to the terms of the Insured Agreement.

"**Affiliate**" means, in relation to any person, a Subsidiary of that person or a Holding Company of that person or any other Subsidiary of that Holding Company.

"**Borrower**" means the entity specified as such in Clause 1 (*Risk Details*).

[**Broker** means the entity specified as such in Clause 1 (*Risk Details*).]<sup>10</sup>

"**Business Day**" means a day (other than a Saturday or Sunday) on which banks are open for general business in [London]<sup>11</sup>.

[**Central Bank** has the meaning ascribed to it at Clause 17.4(a).]<sup>12</sup>

"**Claim**" means a claim for compensation in respect of a Non-Payment Event submitted by the Insured in accordance with Clause 9 (*Claim Procedure*).

[**Claims Agreement Parties** has the meaning ascribed to it at Clause 9.8 (*Ceasing to underwrite risks*).]<sup>13</sup>

"**Claims Determination Date**" has the meaning ascribed to it at Clause 9.3(c).

"**Claim Settlement Date**" means the date that is [●<sup>14</sup>] Business Days following the Insurer's determination of the Claim and acceptance thereof in accordance with Clause 9 (*Claim Procedure*).

"**Commencement Date**" means the date specified as such in Clause 1 (*Risk Details*).

"**Compensation**" means the amount payable or paid to the Insured as compensation in respect of a Non-Payment Event, calculated in accordance with Clause 9.4 (*Amount of Compensation*).

[**Computer System** means any computer, hardware, software, communications system, electronic device (including, but not limited to, smart phone, laptop, tablet, wearable device), server, cloud or microcontroller including any similar system or any configuration of the aforementioned and including any associated input, output, data

<sup>10</sup> Delete if no Broker involved; delete also in Clause 26.4.

<sup>11</sup> Locations where payment of premium and claims is made to be listed here (i.e., jurisdiction of Insured, Insurer(s)).

<sup>12</sup> This term is used in Clause 17.4(a) (i.e. the loan insured is not permitted to be assigned/pledged etc to a central bank) so Insurers may wish to delete if this optional clause is not agreed.

<sup>13</sup> Insurers may wish to delete if not applicable (see also Clause 9.8 – RITC).

<sup>14</sup> Market norm is 180 days for claims determination; subject to negotiation.

storage device, networking equipment or back-up facility, owned or operated by the Insured or any other party.]<sup>15</sup>

**"Customary Due Diligence"** means due diligence conducted in accordance with the Insured's usual practice and procedure for transactions that are unhedged and uninsured, but otherwise are similar to the Insured Loan<sup>16</sup>.

**"Cyber Act"** means an unauthorised, malicious or criminal act or series of related unauthorised, malicious or criminal acts, regardless of time and place, or the threat or hoax thereof involving access to, processing of, use of or operation of any Computer System.]<sup>17</sup>

**"Cyber Incident"** means: (a) any error or omission or series of related errors or omissions involving access to, processing of, use of or operation of any Computer System; or (b) any partial or total unavailability or failure or series of related partial or total unavailability or failures to access, process, use or operate any Computer System.]<sup>18</sup>

**"Date of Binding"** means the date specified as such in Clause 1 (*Risk Details*). Where the Date of Binding is later than the Commencement Date, this Policy shall be effective from the Commencement Date.

**"Deal Team"** means:

- (a) those employees of the Insured [or its Affiliates]<sup>19</sup> [(working within the [ ] department)<sup>20</sup>] who are directly involved in the [approval<sup>21</sup>,] origination, negotiation, structuring [, restructuring] or management of the Insured Loan<sup>22</sup>; and
- (b) those employees of the Insured [or its Affiliates] who are directly involved in the negotiation and management of this Policy.

<sup>15</sup> Delete if cyber affirmation clause is not included (found in Exclusions).

<sup>16</sup> Insurers should consider their usual position on this issue and/or discussing the CDD that the Insured would ordinarily undertake for this type of exposure.

<sup>17</sup> Delete if cyber affirmation clause is not included (found in Exclusions).

<sup>18</sup> Delete if cyber affirmation clause is not included (found in Exclusions).

<sup>19</sup> May be necessary to include Affiliates of the Insured here or in (b) depending on where the loan is booked.

<sup>20</sup> Understanding the Insured's structure and various functions should be part of an Insurer's due diligence on the insureds it works with. Ensure that the appropriate functions are all included in the department(s) listed or add 'or any other employees performing the function of' approval, origination, etc. May also wish to add 'and successors in that function'. <sup>21</sup> Note that excluding approval and restructuring will exclude personnel in credit review and workout functions in the Insured who often play a critical function in managing the risk of transactions in a bank may have knowledge.

<sup>21</sup> Note that excluding approval and restructuring will exclude personnel in credit review and workout functions in the Insured who often play a critical function in managing the risk of transactions in a bank may have knowledge.

<sup>22</sup> If including the text in first brackets, understand what those departments do/should add 'and successors in that function'; note that excluding approval and restructuring will exclude personnel in credit review and workout functions in the Insured who often play a critical function in managing the risk of transactions in a bank.

"**Deal Team Department**<sup>23</sup>" means the department, group or similar administrative team in or for which the members of the Deal Team work in connection with, and at the time of, the activities referred to in the definition of Deal Team.

"**Default Interest Rate**" means [       ] per cent.<sup>24</sup>

"**Dispute**" has the meaning ascribed to it at Clause 29.1.

"**Due Date**" means the date on which an Insured Payment is [expressed to be] due to be paid pursuant to the Insured Agreement.

"**Earned Premium**" means:

- (a) where<sup>25</sup> a Claim has been submitted and accepted by the Insurer, all Premium payments [which are expressed to be] due under this Policy; or
- (b) otherwise, [the Minimum Premium plus<sup>26</sup>] such proportion of the Premium in excess of the foregoing that relates pro rata to the actual time elapsed from the Commencement Date to and including the date of termination of this Policy, as assessed by reference to the timing, amount and frequency of Premium payment pursuant to Schedule 3 (*Premium Details*).<sup>27</sup>

"**Endorsement**" means any amendment to the Policy, agreed in the manner set out at Clause 21.2.

"**Endorsement Information**" means any information which is both (a) provided by the Insured to the Insurer in connection with an Endorsement and (b) agreed between the parties to be Endorsement Information.

["**FATCA**"] means:

- (a) sections 1471 to 1474 of the US Internal Revenue Code of 1986 or any associated regulations;
- (b) any treaty, law, regulation of any other jurisdiction, or relating to an intergovernmental agreement between the US and any other jurisdiction, which (in either case) facilitates the implementation of any law or regulation referred to in paragraph (a) above; or
- (c) any agreement pursuant to the implementation of any treaty, law or regulation referred to in paragraph (a) or (b) above with the US Internal Revenue Service,

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<sup>23</sup> Used in Clause 17.3 (*Hedging*).

<sup>24</sup> Or insert other default interest-setting mechanism (e.g., benchmark plus margin).

<sup>25</sup> Text deleted on the assumption that premium would become fully due at the time the claim is accepted, rather than at the end of the policy if terminated; see also text added in Clause 6.2.

<sup>26</sup> Delete brackets if Minimum Premium has been agreed.

<sup>27</sup> To revise depending on basis of assessment and payment of Premium, as set out in the completed Schedule 3 (*Premium Details*). Note that Schedule 3 is blank and addition of a spreadsheet of expected premium dates/amounts will not suffice, as the method of calculating premium has to be agreed and spelled out. Suggested text has been added to Schedule 3 but the actual premium arrangements are subject to commercial agreement with the Insured.

the US government or any governmental or taxation authority in any other jurisdiction.]

**"Finance Documents"** means:

- (a) [the Insured Agreement][.][;]; and]
- (b) [[ ]]; and][.]
- (c) [any other documentation between the Insured and the Borrower which i) relates to the Insured Agreement and ii) has been [provided by the Insured to the Insurer]/[included within the Underwriting Information].]<sup>28</sup>

**"Holding Company"** means, in relation to a person, any other person in respect of which it is a Subsidiary.

**"Host Country"** means the country or any of the countries specified as such in Clause 1 (*Risk Details*).<sup>29</sup>

**"Host Government"** means the governing authority [(or its authorised agents, courts and regulatory authorities)]<sup>30</sup> of the Host Country or of any political or territorial subdivision thereof (without regard to the method of its succession or to whether it is recognised by other governments and international bodies).

**"Insolvency"** means formal insolvency proceedings or analogous proceedings under the laws of the jurisdiction in which the Insured is incorporated[ but excluding special resolution pursuant to the Banking Act 2009 or analogous regimes in other jurisdictions]<sup>31</sup>.

**"Insured"** means the entity specified as such in Clause 1 (*Risk Details*).

**"Insured Agreement"** means the agreement so specified in Clause 1 (*Risk Details*), including all exhibits and attachments thereto.

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<sup>28</sup> As this is widely used in the Policy, including Material Amendments, Recoveries and Warranties, etc, at a minimum, the Insured Agreement and any guarantee or security documentation that is key to the transaction/recoveries which the Insurer does not wish to see amended without Insurer consent should be included. For certainty as to which documents are important, key documents should in any event be listed in Information but note this is key if the chosen option is (c). See also Material Amendments definition and elsewhere in the document.

<sup>29</sup> Need to include this definition as it is used in Clause 17 and also in the definition of Host Government, which is not an optional term as it is used throughout the Policy (e.g., Exclusions, Warranties and other clauses).

<sup>30</sup> Note implication of the inclusion of regulatory and judicial authorities in Rescheduling, Exclusion and Material Amendment text where this definition is used.

<sup>31</sup> Insurers may wish to seek internal legal advice as to the implications of excluding special regime resolutions on the conduct of the Insured.

**"Insured Loan"** [has the meaning given to that term in Clause 1 (*Risk Details*)] [means the loan made by the Insured [or its predecessors in title] (as lender) to the Borrower (as borrower/obligor) pursuant to the Insured Agreement.]<sup>32</sup>

**"Insured Loan Pledge"** has the meaning ascribed to it at Clause 17.4.<sup>33</sup>

**"Insured Loss"** means[, subject to Clause 13.4<sup>34</sup>,] the Insured Percentage of the losses suffered by the Insured arising [directly]<sup>35</sup> from a Non-Payment Event, as assessed pursuant to Clause 9.4 (*Amount of Compensation*) (and Clause 9.4 (*Amount of Compensation*)) shall prevail over this defined term, in the case of any inconsistency between the two).

**"Insured Payment"** means any amount of principal [or interest]<sup>36</sup> [which is expressed to be] due and payable by the Borrower to the Insured<sup>37</sup> on each Due Date<sup>38</sup> pursuant to the Insured Agreement in respect of the Insured Loan during the Policy Period, [but excluding [default interest,][late payment charges,][fees,][costs and expenses] [and][ ] similar payments under the Insured Agreement.<sup>39</sup>

**"Insured Percentage"** means the Insured Percentage specified at Clause 1 (*Risk Details*).

**"Insurer"** means each entity specified as such in Schedule 1 (*Insurers' Details*).<sup>40</sup>

**"Knowledge"** means:

- (a) actual knowledge of matters by any individual within the Deal Team[;][; and]
- (b) matters which should reasonably have been revealed by the exercise of Customary Due Diligence by the Deal Team[.][; and]

<sup>32</sup> Select and amend depending on whether the Policy covers all borrowings under the Insured Agreement, or a specific loan/drawing thereunder. Reference can be made to the amount of the Insured's commitment here if desired but should be consistent with Risk Details if not referring to them.

<sup>33</sup> Delete if not permitting the loan to be pledged to a central bank or otherwise (see Clause 17.4).

<sup>34</sup> Clause 13.4 permits the Insured to claim as if a Rescheduling had not happened in the event that Insured/Insurers cannot agree on an Endorsement to reflect the rescheduling; in which case an Insured Loss is 'deemed to have occurred' hence the definition is subject to this clause – delete bracketed language if Clause 13.4 is deleted.

<sup>35</sup> 'Directly' is a more targeted definition.

<sup>36</sup> Delete "interest" where the Policy is only intended to cover principal payments.

<sup>37</sup> May wish to include 'on each Due Date' as the Policy normally covers each individual payment as/when due (however, see Clause 14.2 *Acceleration*).

<sup>38</sup> To ensure that the policy is covering each payment due on each due date (see comments to Clause 14.2 *Acceleration*).

<sup>39</sup> Market practice is not to accept covering these additional payments; however, if they are covered the Maximum Limit of Liability should be sufficient to cover these and Insurers should consider whether premium should be charged thereon.

<sup>40</sup> Consider whether to list Insurer(s) in the Risk Details, Schedule 1 (*Insurers' Details*) or both and amend definition accordingly – see comments in Risk Details.

- (c) matters which any individual within the Deal Team suspected and of which the individual would have had knowledge but for deliberately refraining from confirming or enquiring about them<sup>41</sup>].

"**LCIA**" has the meaning ascribed to it at Clause 29.1.

"**Lenders**" means the Insured and any other lenders to the Borrower pursuant to the Insured Agreement.

"**Majority Lenders**" [has the meaning given to that term in the Insured Agreement] / [means, in respect of a particular action pursuant to, or a provision of, the Finance Documents, a majority of Lenders (howsoever described and identified) whose approval or acquiescence is required for that action or provision.<sup>42</sup>

"**Material Amendment**" means any material and relevant amendment to, variation of, or waiver of rights arising from, the Insured Agreement or any Finance Document (other than a Rescheduling or a Permitted Amendment<sup>43</sup>).

"**Maximum Limit of Liability**" means the amount specified as such in Clause 1 (*Risk Details*).

"**Minimum Premium**" means the amount specified as such in Clause 1 (*Risk Details*).<sup>44</sup>

"**Minimum Rating**" means the long-term financial strength rating of the Insurer by Standard & Poors [or equivalent rating agency] of [A- or equivalent]<sup>45</sup>.

"**Minimum Retained Interest**" means the Minimum Retained Percentage of the outstanding amount borrowed by the Borrower pursuant to the Insured Loan<sup>46</sup>.

"**Minimum Retained Percentage**" means the percentage specified as such in Clause 1 (*Risk Details*).

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<sup>41</sup> If all three 'limbs' of knowledge per the Insurance Act 2015 are to be included, (b) and (c) should not be deleted.

<sup>42</sup> Which option to choose may depend on whether the policy is a master policy to which declarations attach, or for a single loan only, in which case the meaning in the Insured Agreement may be used. The second option is the most flexible.

<sup>43</sup> Permitted Amendment concept added to allow for changes in the interest rate reference to be made during the transition from this cost of funds reference; however, Insurers can simply agree with the Insured that this is not a Material Amendment. Inclusion of any additional changes as Permitted Amendments allows the bank to agree these without consulting Insurers on changes that otherwise may be considered material amendments.

<sup>44</sup> A Minimum Premium is normally required by Insurers but this will be subject to negotiation with the Insured.

<sup>45</sup> Sample text suggested but Insurers should be careful of how rating agencies are specified as not all Insurers have a rating from all rating agencies.

<sup>46</sup> Note this is of the whole outstanding loan not of each and every Insured Payment; Insurers should consider whether this is appropriate in all cases (e.g., facilities not expected to be (fully) drawn) as this requirement is to align Insurer's and Insured's interests by sharing the 'skin in the game'.

**"Non-Payment Date"** means the date on which the Non-Payment Event occurs, for whatever reason (except [where deemed otherwise pursuant to Clause 13.4, or<sup>47</sup>] to the extent treated otherwise by the Insurer, pursuant to Clause 14 (*Acceleration of Loan*)).

**"Non-Payment Event"** means [(except where deemed otherwise pursuant to Clause 13.4)]<sup>48</sup> any failure of the Borrower to pay an Insured Payment when [expressed to be<sup>49</sup>] due.

**"Original Due Date"** has the meaning ascribed to it at Clause 13.4(a).<sup>50</sup>

**"Other Insurance"** means the Insured's rights to compensation for Insured Payments pursuant to any credit risk insurance policy other than this Policy.

**"Other Insurer"** has the meaning ascribed to it at Clause 15.2(c) (*Other Insurance*).

**"Permitted Amendment"** has the meaning ascribed to it at Clause 8.4(c) (*Further provisions in relation to Clause 8.1(d)*).<sup>51</sup>

**"Policy"** means this Agreement [and the [Risk Details,] Schedules and Endorsements to this Agreement].<sup>52</sup>

**"Policy Currency"** means the currency of the Insured's Premium payments and the Compensation payable by the Insurer to the Insured, if any, as specified as such in Clause 1 (*Risk Details*).

**"Policy Period"** means the period specified as such in Clause 1 (*Risk Details*).

**"Premium"** means the amounts payable by the Insured to the Insurer as set forth in Clause 6 (*Premium*) and Schedule 3 (*Premium Details*), or as otherwise agreed.

**"Proof of Loss"** means a statement substantially in the form of Schedule 2 (*Proof of Loss Form*).

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<sup>47</sup> Clause 13.4 permits the Insured to claim as if a Rescheduling had not happened in the event that Insured/Insurers cannot agree on an Endorsement to reflect the rescheduling; in which case an Insured Loss is 'deemed to have occurred' hence the definition is subject to this clause – delete bracketed language if 13.4 is deleted.

<sup>48</sup> Clause 13.4 permits the Insured to claim as if a Rescheduling had not happened in the event that Insured/Insurers cannot agree on an Endorsement to reflect the rescheduling; in which case an Insured Loss is 'deemed to have occurred' hence the definition is subject to this clause – delete bracketed language if Clause 13.4 is deleted.

<sup>49</sup> It is not clear that the bracketed text adds any clarity; Insurers should seek legal advice as to the advisability of including it.

<sup>50</sup> Clause 13.4 permits the Insured to claim as if a Rescheduling had not happened in the event that Insured/Insurers cannot agree on an Endorsement to reflect the rescheduling; in which case an Insured Loss is 'deemed to have occurred' hence the definition is subject to this clause – delete bracketed language if Clause 13.4 is deleted.

<sup>51</sup> Can include Permitted Amendment to allow for changes in the interest rate reference to be made during the transition from this cost of funds reference; note that Clause 8.4(c) contemplates that other amendments may be Permitted Amendments, which will depending on how much control the Insurer wishes to cede to the Insured to change the underlying documentation without Insurer consent.

<sup>52</sup> Note that this term is used throughout the document. Users may expand this definition to refer to other documents that should be deemed/considered to form part of this Policy: for example a slip or, in the case of Lloyd's policies, the MRC: however, care should be taken to ensure such documents are properly identified and that their terms do not conflict with or undermine the intended construction and effect of this Policy.

**"Recoveries"** means recoveries made by the Insured and/or the Insurer under the Finance Documents which relate to Insured Payments to which Compensation pursuant to Clause 9.4 (*Amount of Compensation*) relates, but:

- (a) excluding recoveries already taken into account when assessing the amount of Compensation pursuant to Clause 9.4 (*Amount of Compensation*); and
- (b) subject to (a) above, including any interest on any Insured Payment (to the extent that Compensation relates to such Insured Payment), accruing on or after the payment of such Compensation to the Insured.

**["Reference Date"** has the meaning ascribed to it at Clause 13.4.<sup>53</sup>]

**["Reference Rate"** has the meaning ascribed to it in Clause 8.4(d)(ii) (*Further provisions in relation to Clause 8.1(d)*).]<sup>54</sup>

**["Replacement Reference Rate"** has the meaning ascribed to it at Clause 8.4(d)(i) (*Further provisions in relation to Clause 8.1(d)*).]<sup>55</sup>

**"Rescheduling"** means a deferral or rescheduling of any Insured Payment [for the purpose of minimising the likelihood of a Non-Payment Event]<sup>56</sup>.

**"Sanctions"** has the meaning ascribed to it at Clause 25.1.

**"Settlement and Release Agreement"** means an agreement substantially in the form of Schedule 5 (*Form of Settlement and Release Agreement*) (or such other form as may have been agreed between the Insurer and the Insured).

**"Subsidiary"** means a subsidiary undertaking within the meaning of section 1162 of the Companies Act 2006.

**"Underwriting Information"** means the information set out in, or in any documents specified in, Schedule 4 (*Underwriting Information*).

**"Unearned Premium"** means Premium that has not been earned in accordance with the definition of Earned Premium[, in excess of the Minimum Premium].<sup>57</sup>

**"Uninsured Percentage"** means 100 per cent. minus the Insured Percentage.

<sup>53</sup> Clause 13.4 permits the Insured to claim as if a Rescheduling had not happened in the event that Insured/Insurers cannot agree on an Endorsement to reflect the rescheduling; in which case an Insured Loss is 'deemed to have occurred' hence the definition is subject to this clause – delete bracketed language if Clause 13.4 is deleted.

<sup>54</sup> Used in Clause 8.4(d) – Insurers may wish to delete if Clause 8.4(c) (amendments in respect of transition in interest rate references) is not agreed.

<sup>55</sup> Used in Clause 8.4(d) – Insurers may wish to delete if Clause 8.4(c) (amendments in respect of transition in interest rate references) is not agreed.

<sup>56</sup> As market practice assumes that a rescheduling is in respect of a distressed situation where the rescheduling is deemed necessary for loss minimisation, the brackets should be deleted and/or more specific language negotiated; note also the effect of a 'deemed default' in Rescheduling clause.

<sup>57</sup> Delete words in square brackets where there is no (non-returnable) Minimum Premium.

**"Waiting Period"** means, subject to Clause 9.2(b) (*Waiting Period*), the period which starts on the Non-Payment Date and ends on the day falling the number of days specified in respect of the Waiting Period in Clause 1 (*Risk Details*) after the Non-Payment Date.

**"Written Line"** has the meaning ascribed to it in Clause 15.1 (*Insurer's Liability*).<sup>58</sup>

## 2.2 Construction

- (a) Unless a contrary indication appears, a reference in this Policy to:
- (i) any agreement or instrument is a reference to that agreement or instrument as amended, novated, supplemented, extended or restated;
  - (ii) a **"person"** includes a reference to a government, state, state agency, corporation, body corporate, association or partnership, and includes a reference to that person's legal personal representatives, successors and permitted assigns;
  - (iii) a **"regulation"** includes any regulation, rule, official directive, request or guideline (whether or not having the force of law) of any governmental, intergovernmental or supranational body, agency, department or of any regulatory, self-regulatory or other authority or organisation;
  - (iv) a provision of law is a reference to that provision as amended or re-enacted from time to time; and
  - (v) a time of day is a reference to [London] time.
- (b) If there is more than one Insurer, each reference to an **"Insurer"** shall be construed to refer to each such Insurer, except where the context otherwise requires.
- (c) Clause and Schedule headings are for ease of reference only.

## 3. PREAMBLE

- 3.1 No term of this Policy is intended to limit the statutory rights or obligations of the Insured or the Insurer under, or the effect of, Parts 2, 3, 4, 4A or 5 of the Insurance Act 2015, unless expressly stated in this Policy.
- 3.2 The parties' remedies arising out of, relating to, or in any way involving issues dealt with in the Insurance Act 2015 shall be limited to the remedies set out in the Insurance Act 2015 unless expressly stated in this Policy. Any remedies under the Misrepresentation Act 1967 shall not apply.

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<sup>58</sup> Note that Written Line is used as a defined term in Clause 19.

#### 4. INSURING CLAUSE

- 4.1 In consideration of the payment of the Premium and subject to this Policy, the Insurer shall indemnify the Insured for the Insured Loss ~~arising from any Non-Payment Event~~<sup>59</sup> occurring during the Policy Period, up to but not exceeding the Maximum Limit of Liability.<sup>60</sup>
- 4.2 No term of this Policy (whether express or implied) shall be construed as a condition precedent or a warranty unless it is expressly stated to be one in this Policy.

#### 5. EXCLUSIONS

- 5.1 This Policy does not cover and the Insurer shall have no liability to the Insured in respect of any Insured Losses ~~arising from a Non-Payment Event~~<sup>61</sup> to the extent that it is [directly]<sup>62</sup> caused by:
- (a) illegal, criminal or fraudulent acts of the Insured [except, in the case of an illegal or criminal act, where it results from targeted or discriminatory action taken by the Host Government in relation to the Insured or the performance of the Insured Agreement after the commencement of this Policy<sup>63</sup>];
  - (b) material breach by the Insured of its obligations under the Finance Documents [unless and to the extent that such breach is a result of matters outside the direct control of the Insured][; and]<sup>64</sup>
  - (c) the Insolvency of the Insured[.][; and]]
  - (d) [any of the following:
    - (i) ionising radiations from, or contamination by radioactivity from, any nuclear fuel or from any nuclear waste or from the combustion of nuclear fuel;
    - (ii) the radioactive, toxic, explosive or other hazardous or contaminating properties of any nuclear installation, reactor or other nuclear assembly or nuclear component thereof;

<sup>59</sup> Repeats definition of Insured Loss; particularly important to delete if the bracketed text is included in the definition of Insured Loss

<sup>60</sup> Note the implications of clause 19.1(b) as noted in the Risk Details comments.

<sup>61</sup> Repeats definition of Insured Loss; particularly important to given the option to have directly included here and/or in the definition of Insured Loss

<sup>62</sup> Insurers are advised to seek their internal legal position, particularly where internal guidelines require the full text of CL 270 (NCBR exclusion or equivalent clause).

<sup>63</sup> The Insurer may wish to add language such as “[and the Insured’s act does not violate any law of the jurisdiction in which the Insured is incorporated and, if different, established] to ensure the Insurer is not exposed to reputational risk or to unnecessary risk of sanctions or local corruption.

<sup>64</sup> Insurers should consider whether this is appropriate given the terms of the loan agreement and what matters outside the control of the Insured could apply.

- (iii) any weapon or device employing atomic or nuclear fission and/or fusion or other like reaction or radioactive force or matter;
- (iv) the radioactive, toxic, explosive or other hazardous or contaminating properties of any radioactive matter; or
- (v) any chemical, biological, bio-chemical, or electromagnetic weapon<sup>65</sup> [.][]; and]

(e) [ ].

5.2 [This Policy does not contain a specific Cyber Act or Cyber Incident exclusion. Therefore, the indemnity otherwise recoverable hereunder in respect of a Non-Payment Event shall not be prejudiced if it results from a Cyber Act or a Cyber Incident and will be payable, subject to the terms, conditions, warranties and exclusions of this Policy.<sup>66</sup>]

## 6. PREMIUM

### 6.1 Payment of Premium

The Insured shall pay the Premium in accordance with the terms of this Policy and on the basis set out in Schedule 3 (*Premium Details*), in the Policy Currency.

### 6.2 Payment of Premium in the Event of a Claim

It is understood and agreed that in the event of a Claim submitted and accepted by the Insurer, all Earned Premium shall be payable on the basis set out in Schedule 3 (*Premium Details*) or if agreed by the Insurer after consultation with the Insured deducted from the Compensation otherwise due pursuant to Clause 9.4.<sup>67</sup>

### 6.3 Payment or Repayment of Premium on Termination

- (a) On termination pursuant to Clause 19 (*Termination*), the Insured shall pay to the Insurer any Earned Premium not already paid by it to the Insurer.
- (b) On termination pursuant to Clause 19 (*Termination*), the Insurer shall repay to the Insured any Unearned Premium paid by the Insured to the Insurer.
- (c) On termination pursuant to Clause 16 (*Fraudulent Claims*), the Insurer shall not be required to repay any Premium already received by it (whether Unearned Premium or otherwise) from the Insured<sup>68</sup>.

### 6.4 Payment of Premium in the event of an Acceleration or Rescheduling

<sup>65</sup> The Insurer should ensure it has the necessary approval, appetite and capacity to remove this exclusion.

<sup>66</sup> Delete if not applicable or, if multiple Insurers, an Insurer to whom this does not apply may wish to note that it does not apply to its line. Note that affirmation or exclusion of cyber coverage is mandatory for Lloyd's.

<sup>67</sup> Text suggested to clarify as this is usual market practice; Insurers are of course free to accept a different commercial position.

<sup>68</sup> This is the position under the Insurance Act 2015; see also Clause 19 *Termination*.

- (a) Where Acceleration has occurred, then, except as agreed otherwise by the parties:
- (i) where the Insurer agrees to treat the date of Acceleration (or the date on which the Due Date in respect of the Insured Payment falls, as a result of such Acceleration) as the Non-Payment Date, in accordance with Clause 14.2(a), then [all unpaid amounts of the Premium that would, but for such Acceleration, have been payable by the Insured at some point during the Policy Period, pursuant to Clause 6.1 (*Payment of Premium*) shall be accelerated and shall be payable by the Insured within [●] Business Days of the date of [such Non-Payment Date].]<sup>69</sup>
  - (ii) otherwise, the Premium will remain payable when provided by Clause 6.1 (*Payment of Premium*).
- (b) Where a Rescheduling has occurred, the Insured's Premium payment obligations will be amended or continue pursuant to Clause 13 (*Rescheduling*).

#### 6.5 **[Interest on late payment of Premium**

If, and to the extent that, the Insured fails to pay an amount of Premium when [expressed to be] due, such unpaid amount of Premium shall bear interest for each day after such due date at a rate per annum equal to the Default Interest Rate.]

#### 6.6 **[Insurance Premium Tax**

[ ]]<sup>70</sup>

### 7. **DUTY OF FAIR PRESENTATION**

- 7.1 The duty of fair presentation owed by the Insured in accordance with Part 2 of the Insurance Act 2015 in respect of this Policy is amended as set out in this Clause 7, and shall be discharged exclusively by the Deal Team on the basis of its Knowledge.
- 7.2 [To the extent that such sections would require disclosure of material circumstances which the Insured ought to know (but not otherwise), Sections 3(3)(a) and 3(4)(a) of the Insurance Act 2015 shall not apply.<sup>71</sup>]
- 7.3 Section 4 of the Insurance Act 2015 shall not apply.

<sup>69</sup> Inclusion of the text in brackets is market standard practice; if deleted, Insurers should otherwise seek to clarify when this premium would be paid and how it would be calculated.

<sup>70</sup> IPT is normally addressed in the slip therefore this clause should not be needed if a slip accompanies the wording. If included, Insurers should check that the burden of insurance premium tax is borne by the appropriate entity. Insurers should also check regulatory guidance on the administration of IPT.

<sup>71</sup> Compare the requirements of the Insurance Act that fair presentation of the risk be disclosure of what the Insured knows and ought to know with Clause 7.1 and the definition of Knowledge and the Insured's representations as to what has actually been disclosed to the Insurer; note that Clause 7.1 replaces the duty of the Insurer to disclose with disclosure by the Deal Team.

7.4 As at the [[Date of Binding][or][Commencement Date] [(whichever is the later)]]<sup>72</sup> and subject to and on the basis of the Deal Team's Knowledge and Clause 7.5(d), the Insured represents that:

- (a) it conducted Customary Due Diligence in deciding whether to enter into the Finance Documents;
- (b) there is no material circumstance which has not been disclosed to the Insurer;
- (c) every material representation in the Underwriting Information:
  - (i) as to a matter of fact is substantially correct; and
  - (ii) as to a matter of expectation or belief is made in good faith;
- (d) the Insured has not [(knowingly or otherwise)]<sup>73</sup> withheld from the Insurer any material circumstances or information; and
- (e) any documents provided by the Deal Team to the Insurer comprising of the Underwriting Information are correct and complete copies of the originals (or the originals themselves) [unless and to the extent:
  - (i) noted in writing at the time of provision of the relevant document;
  - (ii) noted on the face of the documents themselves; or
  - (iii) noted in Schedule 4 (*Underwriting Information*).]<sup>74</sup>

7.5 The Insurer acknowledges that:

- (a) it has received the Underwriting Information;
- (b) it has agreed to enter into this Policy on the basis of its own independent judgment as to the Borrower and the Insured Loan, using the Underwriting Information;
- (c) except and to the extent that the Insured's representations at Clause 7.4(d) or 7.6(b) are incorrect, material information shall be limited to the Underwriting Information or Endorsement Information (as applicable) and the Insurer shall not rely on statements or representations of any description to the extent that such statement or representation is not contained within the Underwriting Information, this Policy or Endorsement Information; and

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<sup>72</sup> Insurance law normally requires that the duty of fair presentation applies before a contract of insurance is entered into (see comment to Date of Binding vs stamp/binding date) as well as before any variation to that contract.

<sup>73</sup> The inclusion of 'otherwise' here is relevant to the question of whether an Insurer only has a remedy for a deliberate or fraudulent on-disclosure and to the extent that the bracketed language is included consideration should be given to any deviations/changes which the Insurer may wish to discuss with in-house counsel.

<sup>74</sup> The Insured may wish to control its operational risk by including the bracketed text; the Insurer should ensure they are aware of and comfortable with any omissions or inaccuracies noted in information provided if this text is accepted.

- (d) the Underwriting Information and Endorsement Information may include documents derived from third-party sources, the accuracy and completeness of which the Deal Team may not be able to verify. Provided that the Deal Team has disclosed to the Insurer any material inaccuracy or omission of which it has Knowledge [and the extent to which it has not been able to verify the accuracy and completeness of the content of the documents (after undertaking Customary Due Diligence)]<sup>75</sup>, the Insured's rights under this Policy (so far as they relate to the Insured's duty of fair presentation or any remedies Insurers may have in respect of such duty) will not be prejudiced if those documents are inaccurate or incomplete.

7.6 As at the date of an Endorsement to this Policy and subject to the Deal Team's Knowledge and Clause 7.5(d), the Insured represents that:

- (a) every material representation in the Endorsement Information:
- (i) as to a matter of fact is substantially correct; and
  - (ii) as to a matter of expectation or belief is made in good faith;
- (b) the Insured has not [(knowingly or otherwise)]<sup>76</sup> withheld from the Insurer any material circumstances or information relevant to such Endorsement; and
- (c) any documents provided by the Deal Team to the Insurer comprising of the Endorsement Information are correct and complete copies of the originals (or the originals themselves) [unless and to the extent:
- (i) noted in writing at the time of provision of the relevant document; or
  - (ii) noted on the face of the documents themselves]<sup>77</sup>.

7.7 Nothing in this Clause 7 shall require the Insured to disclose to the Insurer [(in, or translated into, the English language)]<sup>78</sup>:

- (a) matters of general public knowledge of which the Insurer is, or reasonably should be, aware in the ordinary course of business; or
- (b) any information that a member of the Deal Team has access to and is legally prohibited from sharing with the Insurer because of any law, regulation, court order or prohibition by any regulatory authority with jurisdiction over the Insured,

<sup>75</sup> Inclusion of the bracketed text requires the Insured to alert the Insurer to information on which they (and the Insurer) are blind as to whether the information is accurate, not just of the 'known' inaccuracies.

<sup>76</sup> See footnote to Clause 7.4(d).

<sup>77</sup> The Insured may wish to control its operational risk by including the bracketed text; the Insurer should ensure they are aware of and comfortable with any commissions or inaccuracies noted in information provided if this text is accepted.

<sup>78</sup> Negotiation of this text may depend on the Insurer's comfort that there may be publicly available information that it should know but that is in a language it may not comprehend but note that Clause 7.7(a) is basically the position under the Insurance Act 2015.

provided that, in relation to a prohibition envisaged under Clause 7.7(b), the Insured: (i) uses all reasonable endeavours to take any steps, measures or actions that would permit and/or allow disclosure to the Insurer of the relevant information; and (ii) to the extent it is legally permissible to do so, notifies the Insurer of the existence of the applicable information and prohibition, in advance of the Date of Binding or the date of an Endorsement (as applicable).

- 7.8 Nothing in this Clause 7 shall require the Insured to breach (or to procure or cause the breach by any other person of) any duty of confidentiality it owes to a third party, whether such duty arises pursuant to a specific confidentiality agreement or by a confidentiality law to which the Insured is directly subject to, provided that the Insured: (i) uses all reasonable endeavours to take any steps, measures or actions that would permit and/or allow disclosure to the Insurer of the relevant information, including (without limitation) requesting that the Insurer enters into a confidentiality and/or non-disclosure agreement on commercially reasonable terms; and (ii) to the extent it is legally permissible to do so, notifies the Insurer of the existence of the applicable information and the prohibition, in advance of the Date of Binding or the date of an Endorsement (as applicable).
- 7.9 For the avoidance of doubt, Clause 11.3 of this Policy shall not apply to this Clause 7 and the duty of fair presentation owed by the Insured to the Insurer.
- 7.10 In the event that any representation set out at Clause 7.4 or 7.6 is incorrect, or in the event of any other breach by the Insured of the obligations set out in this Clause 7, the Insurer's remedies are limited to those set out in Section 8 of the Insurance Act 2015 and Schedule 1 of the Insurance Act 2015.
- 7.11 Materiality for the purposes of this Clause 7 is to be construed in accordance with Section 7(3) of the Insurance Act 2015.

## 8. INSURED'S WARRANTIES

8.1 The Insured warrants that:

- (a) the obligations expressed to be assumed by the Borrower under the Finance Documents are legal, valid, binding and enforceable, [in all material respects]<sup>79</sup> [, subject to: [(i)] [applicable insolvency, bankruptcy, reorganisation, moratoria or similar laws affecting creditors' rights generally;] [and (ii)] [the assumptions, qualifications and reservations expressed in the legal opinions included in the Underwriting Information<sup>80</sup>]];
- (b) it shall comply with [applicable law][[the laws of the jurisdiction in which the Insured is incorporated and, if different, established, the laws of the Host

<sup>79</sup> Insurers may wish to delete this text if they wish the legal/valid/enforceable requirement to be absolute.

<sup>80</sup> Note that assumptions are generally of fact whereas qualifications are in respect of points of law. Insurers should seek legal advice as to whether to include (i) or (ii), as the legal opinion may specify (in the assumptions or otherwise) actions that the Insured/Borrower should take such as paying stamp tax or registering the debt in order for it to be valid/enforceable under applicable law in the applicable jurisdiction. This may be particularly important if the bank seeks to negotiate that this warranty is valid only as of Policy Inception. Note that Clause 11.5 does contain as a condition a duty for the Insured to maintain the enforceability of its rights against the Borrower throughout the Policy Period.

Country, and the laws of the jurisdiction governing the Finance Documents] at the Date of Binding, in so far as such laws relate to the Finance Documents]<sup>81</sup> [unless the Insured is prevented from doing so due to events outside its direct control][;]<sup>82</sup>[; and]

- (c) subject to Clause 17.3 [and Clause 17.4]<sup>83</sup>, it shall remain uninsured for and unhedged in respect of, and will at all times bear the Minimum Retained Interest on its own account[.][; and]
- (d) it shall not agree any Material Amendment without the prior written consent of the Insurer [(such consent not to be unreasonably withheld or delayed)]<sup>84</sup>.

8.2 If, and to the extent that the laws referred to at Clause 8.1(b) conflict, then the Insured shall be deemed to comply with the warranty at Clause 8.1(b) where it complies with whichever law takes precedence. For these purposes, unless the Insured and Insurer agree otherwise, the laws shall take precedence in the following order: first, the laws of the jurisdiction in which the Insured is incorporated, then the laws of the jurisdiction in which the Insured is established (if different), then the laws of the jurisdiction governing the Finance Documents, then the laws of the Host Country.

8.3 [Section 11 of the Insurance Act 2015 shall not apply to Clause 8.1.]<sup>85</sup> If the Insured breaches Clause 8.1, the Insurer may rely upon that breach to exclude, limit or discharge its liability, even if such breach could not have increased the risk of the loss which actually occurred in the circumstances in which it occurred. To the extent that this Clause 8 is a "disadvantageous term" the Insured acknowledges that it has been brought to its attention and is clear and unambiguous as to its effect. The Insurer and the Insured confirm that in respect of this Clause 8, the requirements of Section 17 of the Insurance Act 2015 have been met. For the avoidance of doubt, the above is without prejudice to Section 10 of the Insurance Act 2015, which will continue to apply.

#### 8.4 Further provisions in relation to Clause 8.1(d)

- (a) The Insurer shall notify the Insured of its decision whether to grant or withhold such consent within [●] Business Days of the date of the Insured's written request to the Insurer. [Where the Insurer fails to notify the Insured within such period, the Insurer shall be deemed to have granted its consent.<sup>86</sup>]

<sup>81</sup> Applicable law is the broadest, as this should apply to the Insured across all of the sub-categories in the subsequent options.

<sup>82</sup> Insurers should consider whether the Insured could be prevented from complying with laws in its own jurisdiction and if so whether Insurers wish to take that reputational risk by allowing the Insured this 'out'.

<sup>83</sup> Delete if Clause 17.4 has not been accepted.

<sup>84</sup> As Insurers have underwritten the transaction as presented by the Insured before policy binding, consider (in the context of the definition of Material Amendment) whether this caveat is acceptable.

<sup>85</sup> The warranties in Clause 8.1 are generally considered by the market to be critical to recoveries and not necessarily to the risk of a specific cause of the non-payment; therefore, it is market practice for Section 11 not to apply to these types of protections. Insurers can include the first or second sentences (or both to emphasize the point) if they wish to clarify that Section 11 does not apply.

<sup>86</sup> Insurers should consider whether the # of Business Days is sufficient for a considered response to be provided to the Insured and whether they are comfortable with the Insured will take its interests/manage the risk if the Insured does not have time to respond by the deadline. Note however that the Insured may not wish to be held hostage to the Insurer if it has 'you snooze you lose' provisions in the voting arrangements under the Insured Agreement.

(b) The Insurer acknowledges that the Insured may not be able to prevent a Material Amendment. Where a Material Amendment occurs for reasons outside the direct control of the Insured including, without limitation, due to:

- (i) an act or series of acts taken by the Majority Lenders (other than the Insured); or
- (ii) an act or series of acts taken by the Host Government,

then the Insured's rights under this Policy shall not be prejudiced and the Insurer will accept the result of such Material Amendment.

(c) [A "**Permitted Amendment**" means:

(i) [any amendment which relates to:

(A) providing for the use of a Replacement Reference Rate in place of a Reference Rate in respect of any Finance Document; and;

(B)

(1) aligning any provision of any Finance Document to the use of that Replacement Reference Rate;

(2) enabling that Replacement Reference Rate to be used for the calculation of interest under any Finance Document (including, without limitation, any consequential changes required to enable that Replacement Reference Rate to be used for the purposes of any Finance Document);

(3) implementing market conventions applicable to that Replacement Reference Rate;

(4) providing for appropriate fallback (and market disruption) provisions for that Replacement Reference Rate; or

(5) adjusting the pricing to reduce or eliminate, to the extent reasonably practicable, any transfer of economic value from one party to another as a result of the application of that Replacement Reference Rate][; and]<sup>87</sup>

(ii) [ .]

For the avoidance of doubt, the identification of an item as a Permitted Amendment should not be construed as implying that it would be a Material Amendment but for this paragraph (c).

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<sup>87</sup> (i) is designed to allow changes in the interest rate reference under the Finance Documents to be agreed by the Insured without seeking Insurer permission; Insurers can also simply agree with the Insured that changes to the Reference Rate would not constitute a Material Amendment and omit this language in the policy.

- (d) [For the purposes of Clause 8.4(c):
- (i) ["**Replacement Reference Rate**"] means a reference rate which:
- (A) is formally designated, nominated or recommended as the replacement for a Reference Rate by:
- (1) the administrator of that Reference Rate; or
- (2) any applicable central bank, regulator or other supervisory authority or a group of them, or any working group or committee sponsored or chaired by, or constituted at the request of, any of them or the Financial Stability Board;
- (B) in the opinion of the Insured, is generally accepted in the international or any relevant domestic syndicated loan markets as the appropriate successor to a Reference Rate; or
- (C) in the opinion of the Insured, is an appropriate successor to a Reference Rate;] [and]
- (ii) ["**Reference Rate**"] means any interest rate reference rate which is used for the calculation of interest under any Finance Document]]]; and]
- (iii) [ [ ]].<sup>88</sup>

## 9. CLAIM PROCEDURE

### 9.1 Notification

- (a) The Insured shall notify the Insurer in writing upon the occurrence of a Non-Payment Event or any event that the Insured reasonably believes is likely to give rise to a Non-Payment Event. Such notice shall include details of such Non-Payment Event (or details of the circumstances likely to give rise to such Non-Payment Event, as the case may be) and the estimated Insured Loss arising therefrom and shall be delivered as soon as reasonably practicable following, and in any event no more than [●] Business Days after,<sup>89</sup> the time at which the [Insured][Deal Team] becomes aware of such Non-Payment Event.
- (b) Breach of paragraph (a) above shall not invalidate this Policy or any Claim hereunder.

<sup>88</sup> Users should include any definitions specific to the Permitted Amendments agreed and included at Clause 8.4(c) here. (i) and (ii) are designed to allow changes from LIBOR to be agreed by the Insured without Insurer permission; Insurers should consider carefully if there are any other amendments that they would be comfortable not being consulted on (see prior footnote on this).

<sup>89</sup> Market practice is usually at least within 30 days or in any event within a reasonable deadline to allow the Insurer's underwriting and/or claims team to get prepared.

- (c) [The Insurer shall acknowledge receipt of a notification by the Insured pursuant to paragraph (a) above Clause 9.1(a) within [●] Business Days of receipt.]<sup>90</sup>

## 9.2 Waiting Period

- (a) The Waiting Period in respect of a Claim shall commence on the applicable Non-Payment Date.
- (b) The Waiting Period in respect of consecutive, subsequent Claims arising from the same Non-Payment Event shall be [●] Business Days<sup>91</sup> from the date of receipt by the Insurer of such Claim, provided that the first Waiting Period has expired.

## 9.3 Claim

- (a) Following the occurrence of a Non-Payment Event, the Insured shall submit a Proof of Loss together with any information reasonably available to the Insured that in its reasonable and good faith judgment<sup>92</sup> is necessary to substantiate the Claim to the Insurer.

The Insured shall submit the Proof of Loss:

- (i) [as soon as possible]/[at any time] after the Non-Payment Date[, but no later than [●] [Business Days]<sup>93</sup> following the later of: (1) the expiry of the Waiting Period; or (2) the date on which the Deal Team<sup>94</sup> became aware of the Non-Payment Event]; or
- (ii) within such other period, or by such other time, as may be agreed between the Insured and the Insurer.

[Without prejudice to the foregoing, if the Insured does not submit a Proof of Loss within [twelve months<sup>95</sup>] of the Date of Loss, ~~the submission of the Proof of Loss~~, the Insurer shall automatically be released from any liability in respect

<sup>90</sup> Insurers should ensure they have the procedures in place to meet this requirement, which is not a standard clause in most insurance policies to date.

<sup>91</sup> This should be sufficient time for a revised Proof of Loss confirming the claim's validity and amount as well as for the Insurer to fund the Compensation to ensure payment within the required deadline.

<sup>92</sup> Note that this may limit what the Insured thinks it has to disclose to substantiate its claim; however this should be mitigated by Clause 9.3(b) and Clause 11.1 – but Insurers should consult with claims personnel, who may decide that it is better to have more information up front than to ask for it given tight claims deadlines.

<sup>93</sup> A balance should be struck between a quick submission of Proof of Loss and as complete a Proof of Loss as possible; however, the longer the Insured has to submit the Proof of Loss, the less time the Insurer has prior to Claim Determination Date to compile all the necessary information, including from a Loss Adjuster, and make a well-deliberated claims determination as required by regulation and reinsurers.

<sup>94</sup> Should be consistent with the choice in Clause 9.1(a) and the paragraph below.

<sup>95</sup> Noting that many Insurers and Insureds prefer to allow the Insured to manage the risk by negotiating a restructuring or otherwise minimising the loss rather than submitting a claim, a sufficient time period should be given for this to take place.

of the Insured Loss occurring as a result of such Non-Payment Event, unless otherwise agreed by the Insurer.]<sup>96</sup>

- (b) The Insurer may request such additional information as is reasonably necessary to substantiate a Claim promptly upon receipt of the Proof of Loss [but in any event not later than [●] Business Days following receipt of such Proof of Loss] <sup>97</sup>. [The Insured shall only be required to provide such additional information as is available to it (or would be available to it using reasonable endeavours) and capable of being made available by the Insured to the Insurer without breaching applicable law.<sup>98</sup>]
- (c) Provided that the Waiting Period has elapsed and any additional information required pursuant to paragraph (b) above has been provided, the Insurer shall make a determination regarding the Insured's Claim promptly, but in any event no later than the Claims Determination Date. For the purposes of this Clause 9.3, the "**Claims Determination Date**" means, subject to Clause 9.4(c), the later of:
  - (i) the expiry of the Waiting Period;
  - (ii) [●] Business Days following the date upon which the Insured submitted the Proof of Loss pursuant to paragraph (a) above; or
  - (iii) if additional information is required pursuant to paragraph (b) above, [●] Business Days following the date of provision of such information.
- (d) If the Insurer has determined that the Claim is not valid or that the Insured is not entitled to receive Compensation, the Insurer's determination shall include a detailed written explanation why the Claim is being denied. The Insured may resubmit the Proof of Loss in amended form following any such denial, following and subject to the procedure set out at this Clause 9.

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<sup>96</sup> If this is not included, statutory deadlines will apply; Insurers may wish to consider the benefits of a shorter time to file a Proof of Loss versus allowing sufficient time for the Insured to resolve any issues without the pressure of a claim filing deadline. This should not be from the date of notification but from the date of submission of the Proof of Loss as notification can take place before the default actually occurs.

<sup>97</sup> A similar balance needs to be struck between a quick vs comprehensive request for additional information, keeping in mind that there may need to be coordination with others on the slip and engagement of a Loss Adjuster. In any event, Insurers may wish to remind the Insured that Insurers require sufficient information to make a claims determination.

<sup>98</sup> Insurers may wish to add an additional proactive requirement including signing an NDA with the Insurer to enable release of the information. If this text is included, Insurers should consider the laws governing disclosure by the Insured (such as bank secrecy laws) which may depend on the domicile of the Insured.

## 9.4 Amount of Compensation

- (a) Subject to paragraph (b) below, the Compensation payable to the Insured by the Insurer in respect of any Claim shall be equivalent to the sum value of the Insured Payments to which the Claim relates, less<sup>99</sup>:
- (i) such amount of the Insured Payments as was received by the Insured [(unconditionally and for the Insured's own account)<sup>100</sup>] from the Borrower before the Claim Settlement Date (whether before, on or after the relevant Non-Payment Date)[; and]
  - (ii) any other amount received or recovered by the Insured [(unconditionally and for the Insured's own account)<sup>101</sup>] in relation to the Insured Payments from the Borrower pursuant to the Finance Documents or from any other source at any point in time before the relevant Claim Settlement Date, other than any amounts received pursuant to Other Insurance(s)[; and]
  - (iii) any amount which the Borrower had credited to its own account by way of set-off or counter claim against the Insured in respect of the Insured Payment pursuant to the terms of the Insured Agreement [(but not otherwise, including without limitation by way of statutory set-off)] at any point in time before the Claim Settlement Date<sup>102</sup>,

multiplied by the Insured Percentage.

- (b) The aggregate amount of Compensation paid by the Insurer under this Policy shall not exceed the Maximum Limit of Liability.
- (c) [In the event that the Insured fails to comply with its obligations pursuant to Clause 9.3(b), the Claims Determination Date shall be set back by such number of days as the Insured so fails to comply (it being understood that failure to comply with Clause 9.3(b) does not invalidate any Claim).<sup>103</sup>]

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<sup>99</sup> As the list below does not address unallocated payments received by the Insured from the Borrower or may inadvertently allow insured loans to be subordinated by the Insured vis-à-vis uninsured loans, Insurers may wish to add language addressing the order of insured vs uninsured payments from the Borrower.

<sup>100</sup> If this text is included, the Insurer may end up having to pay and claw back any double indemnity if the Insured is allowed to keep that conditional payment, note this is not necessarily addressed in the recoveries clauses.

<sup>101</sup> If this text is included, the Insurer may end up having to pay and claw back any double indemnity if the Insured is allowed to keep that conditional payment, note this is not necessarily addressed in the recoveries clauses.

<sup>102</sup> Note that the text choices should correspond to the choices agreed in Clause 13.4(e) if Clause 13.4 is included.

<sup>103</sup> This mechanism may allow the date of payment of Compensation to be 'within the control of the Insured'.<sup>104</sup> 'or before' may be deleted to avoid confusion as to the timing of the start of payment of late interest. See also Clause 12.1 which also addresses late payment of a claim.

## 9.5 Date of payment of Compensation and interest on late settlement

- (a) Subject to paragraph (b) below, the Insurer shall pay the Compensation in the Policy Currency to the Insured on [or before]<sup>104</sup> the Claim Settlement Date.
- (b) The Insurer may withhold payment of the Compensation until the Insured has executed and delivered to the Insurer a Settlement and Release Agreement, executed by the Insured and in substantially the form provided at Schedule 5 (*Form of Settlement and Release Agreement*) (or such other form as may have been agreed between the Insurer and Insured), properly completed with the relevant particulars by the Insured.
- (c) If, and to the extent that, the Insurer fails to pay Compensation at [or before]<sup>105</sup> the time required pursuant to paragraphs (a) and (b) above, then (unless and to the extent that such delay is due to reasons within the control of the Insured) the Compensation shall bear interest for each day thereafter that such amount remains outstanding at a rate per annum equal to the Default Interest Rate. Any such interest shall be payable in addition to the Compensation, and without regard to the Maximum Limit of Liability.

## 9.6 Subrogation and assignment of rights

- (a) Upon payment by the Insurer of the Compensation, the Insurer shall be subrogated (as a matter of law[, and to the extent legally possible]<sup>106</sup>) to:
  - (i) all of the Insured's rights of recovery against any person in respect of the Insured Loss for which the Compensation has been paid;
  - (ii) all of the Insured's rights, title and interest in such part of the Insured Payments as are the subject of the Insured Loss for which the Compensation has been paid; and
  - (iii) all of the Insured's rights under the Finance Documents, including any promissory notes and other security agreements, in respect of the Insured Loss for which the Compensation has been paid.
- (b) The Insured shall not release the Borrower from its obligations to make Insured Payments that are the subject of a Claim without the prior consent of the Insurer [(such consent not to be unreasonably withheld or delayed)<sup>107</sup>].

<sup>104</sup> 'or before' may be deleted to avoid confusion as to the timing of the start of payment of late interest. See also Clause 12.1 which also addresses late payment of a claim.

<sup>105</sup> As (b) above permits the Insurers to withhold payment until the Settlement and Release Agreement is executed, 'or before' may be deleted to avoid confusion as to the timing of the start of payment of late interest.

<sup>106</sup> Subrogation arises automatically as a matter of insurance law; the Insurer may wish to ascertain under what circumstances there might be legal restrictions on subrogation. If this language is retained, Insurers should check for any restrictions (in the loan agreement or otherwise) that might address subrogation.

<sup>107</sup> Insurers should consider whether the requirement for their consent should be caveated given the importance of recoveries.

- (c) The Insured shall, if requested by the Insurer and to the fullest extent legally possible<sup>108</sup>, take such steps as are reasonably practicable to assign to the Insurer those rights described in paragraph (a) above free and clear of all claims, defences, counterclaims, rights of set-off and other encumbrances, to the extent legally possible. Nothing in this Clause 9.6 shall require the Insured to breach, or cause the breach by any other person of, the terms of a Finance Document.
- (d) [Where an assignment described in paragraph (c) above does not take place, the Insured shall take all reasonable<sup>109</sup> steps requested by the Insurer to assist it in *recovering any Compensation for an Insured Loss paid under this Policy.*]<sup>110</sup>
- (e) [Nothing in this Clause 9.6 shall require the Insured to issue or continue any proceedings in its own name or to join or lend its name to proceedings initiated by the Insurer or any other person if, acting reasonably and in good faith, the Insured determines that the issuance, continuation or joining of any such proceeding would materially prejudice the Insured.<sup>111</sup>]

## 9.7 Recoveries

- (a) After payment of Compensation by the Insurer, all Recoveries shall be applied in the following order:
  - (i) **first**, to reimburse the Insurer and the Insured for all expenses and costs incurred by each of them pursuant to this Clause 9, such amounts to be applied, pro rata to the respective proportions of such expenses and costs actually incurred by each party;
  - (ii) **second**, to be shared as between the Insured and the Insurer pro rata to their respective proportions (being, in respect of the Insured, the Uninsured Percentage, and in respect of the Insurer, the Insured Percentage) of such Insured Payments as are not received by the Insured from the Borrower when [expressed to be] due under the Insured Agreement and which remain outstanding at the expiry of the Waiting Period, [save that the Insurer shall not be entitled to any recoveries pursuant to this paragraph (ii) to the extent they exceed the amount of Compensation paid by it to the Insured<sup>112</sup>][.]; and

<sup>108</sup> There may be restrictions in the Insured Agreement on assignment, such as 'de minimis' transfer amounts or otherwise.

<sup>109</sup> Note that what is reasonable to the Insurer may not be the viewpoint of the Insured, so this may end up giving the Insured the right to veto steps that Insurers would consider reasonable for recoveries but would in the Insured's eyes damage its overall interests.

<sup>110</sup> This obligation for the Insured to take Insurers' interests into account in obtaining recoveries is fundamental to the underwriting strategy for this class of insurance. Insurers should consider this clause with reference to the Insured's loss minimisation and cooperation obligations in Clause 11. Note that the definition of Recoveries includes interest on Insured Payments for which Compensation is paid. However, note caveat in previous footnote.

<sup>111</sup> Insurers should consider whether to accept this ability of the Insured to 'override' this obligation to the potential detriment of recoveries, which may depend on the track record of the Insurer with this Insured; one possibility would be tie this clause to the obligations under Clause 11.1(c) which requires the Insured to mitigate loss.

<sup>112</sup> Deletion of this bracketed text caps recoveries by the Insurer solely to the amount paid out and the Insurer would forego any interest or other amounts otherwise due to it under the definition of Recoveries.

- (iii) **third**, and after the entitlements of the Insurer and the Insured described in paragraph (ii) above are satisfied, to the Insured [(or to the Insurer if, and to the extent, such recoveries relate directly to the rights to receive Insured Payments which have been assigned by the Insured to the Insurer)<sup>113</sup>].
- (b) The following shall not be considered to be recoveries for the purposes of this Clause and shall therefore not be applied pursuant to paragraph (a) above:
  - (i) any trading gains made by the Insured pursuant to any of the activities described in Clause 17.3; and
  - (ii) any amount received by the Insured, which the Insured is required (whether pursuant to the terms of the Finance Documents or otherwise by law) to hold on trust for or on the account of, or to pay to, another lender or other third party.

## 9.8 [Ceasing to underwrite risks

In the event that one of the "**Claims Agreement Parties**", being any Insurer which is the leading Lloyd's syndicate and/or the second Lloyd's syndicate, ceases underwriting risks of the type insured under this policy and/or enters into a reinsurance to close arrangement with a third-party RITC syndicate that includes risks of the type insured under this policy and that there are more than two underwriters on the slip, then it is hereby noted and agreed that the Insured shall have the right to require the affected syndicate and/or its reinsurer to relinquish its position as a Claims Agreement Party in favour of the next syndicate on the slip, or other syndicate on the slip as may be agreed between the Insured and the remaining underwriters on the slip.<sup>114</sup>

## 10. CONSTRAINT ON INSURED'S ACTIONS

- 10.1 The Insurer acknowledges that the Insured's ability to act may be constrained by the terms of the Finance Documents. [In the event of a [direct] conflict between the terms of the Finance Documents and this Policy, the Finance Documents will prevail, and t<sup>115</sup>]The Insured will not be deemed to have breached the terms of this Policy as a result of actions taken or not taken in compliance with the Finance Documents.
- 10.2 The Insurer acknowledges that decisions taken by the Majority Lenders may prevent the Insured from complying with obligations in this Policy. The Insurer also acknowledges that where any step under Clause 9.7 (*Recoveries*) (whether required by the Insurer or otherwise) is not taken, as a result of a decision taken by the Majority

<sup>113</sup> This language should be considered alongside the decision whether to accept deletion of the bracketed text in the preceding paragraph; the Insurer as owner of the assigned debt would automatically be due all monies owed by the Borrower in respect of such debt.

<sup>114</sup> This language should be included/omitted depending on internal guidance with respect to whether constraints on RITC arrangements are permitted.

<sup>115</sup> Inclusion of this language should be considered carefully, as the Insured is already protected by the other language in this section from being penalised for complying with the Finance Documentation and this language may have adverse consequences on the interpretation of the Policy, given that the Policy is between the Insured and Insurer and the Finance Documents are between the Insured and the Borrower.

Lenders where the Insured has otherwise complied with its obligations under this Policy, the Insured's rights under this Policy will not be prejudiced.

10.3 Whenever the Insured determines whether and how to exercise any voting rights or to take other actions in its capacity as lender under the Finance Documents (save, in each case, when determining whether or on what terms to agree to, approve, propose or effect any Material Amendment, Acceleration or Rescheduling, such determinations being instead subject to Clauses [8 (*Insured's Warranties*)]<sup>116</sup>, 13 (*Rescheduling*) or 14 (*Acceleration of Loan*), respectively), the Insured shall act in accordance with its obligations under Clause 11.2<sup>117</sup> and take into consideration any directions of the Insurer.

## 11. CO-OPERATION WITH INSURER, MINIMISATION OF LOSS

11.1 Subject to Clause 11.3:

- (a) the Insured shall permit the Insurer and its agents and representatives reasonable access to examine or take copies of all and any documentation relevant to any Claim in the possession or control of the Insured;
- (b) [to the extent practicable]<sup>118</sup>, the Insured will co-operate with the Insurer and its agents and representatives in the investigation or resolution of any Claim; and
- (c) the Insured shall take all reasonable steps requested by the Insurer to assist it in recovering *any Compensation paid under this Policy*.

11.2 The Insured shall at all times, whether before or after the occurrence of a Non-Payment Event, act diligently and shall do all things reasonably practicable to avoid a Non-Payment Event or minimise any Insured Loss, and to secure compensation (whether for its own account or for the Insurer's) for any Insured Loss[, including without limitation:

- (a) if requested by the Insurer, after consultation with the Insured, all reasonable legal, [diplomatic,] administrative and judicial or informal measures which may be available for the minimisation or recovery of any Insured Loss or the enforcement of any security in relation thereto; and
- (b) taking steps, as a comparable organisation to the Insured would reasonably undertake in the course of its business, and in consultation with the Insurer, to effect *recovery of any defaulted Insured Payment* from the Borrower, or from any other party or source from whom such recoveries may be made pursuant to the Finance Documents.]

11.3 Nothing in this Clause 11 shall require the Insured to breach (or to procure or cause the breach by any other person of) any duty of confidentiality owed to a third party, whether such duty arises pursuant to a specific confidentiality agreement, by law, or otherwise. [If the Insured is prohibited from providing to the Insurer any documentation by any

<sup>116</sup> Should not be deleted unless changes were accepted to Clause 8 with respect to Material Amendments.

<sup>117</sup> Consider adding also a reference to the obligations of cooperation in Clause 11.1.

<sup>118</sup> Insurers may wish to discuss inclusion of this text with the Insured and flag Insurers' obligations to ensure that claims paid are valid, which requires full cooperation from the Insured.

such duty, the Insured shall inform the Insurer (except where prohibited by such duty) of the existence of such documentation and the reason for its non-disclosure and the Insured and Insurer shall use reasonable endeavours to facilitate the disclosure of such information and the requested documentation to the Insurer. However, the Insurer acknowledges that there may be circumstances where it may not be possible for the Insured to obtain such consent.<sup>119]</sup>

- 11.4 Neither the taking of the steps required by this Clause 11 nor the commencement by the Insured of legal, administrative, judicial, attachment, or enforcement proceedings against the Borrower, or any other person are pre-conditions to the making of a Claim or payment of Compensation hereunder.
- 11.5 The Insured shall use all reasonable endeavours to ensure that the obligations expressed to be assumed by the Borrower or any other party<sup>120</sup> under the Finance Documents are legal, valid, binding and enforceable [, in all material respects,<sup>121]</sup> and remain so until the sooner of: (i) the end of the Policy Period; or (ii) their discharge.
- 11.6 [The Insured shall not (except as provided by Clause 11.7) enter into any material agreement directly relating to an Insured Payment without the prior consent of the Insurer, such consent not to be unreasonably withheld or delayed.
- 11.7 Clause 11.6 shall not require the Insured to obtain the Insurer's prior consent for anything in so far as it:
- (a) is or relates to a Rescheduling for which the Insured's consent is not required or has been given or deemed given pursuant to Clause 13 (*Rescheduling*);
  - (b) is or relates to an Acceleration for which the Insured's consent is not required or has been given or deemed given pursuant to Clause 14 (*Acceleration of Loan*);
  - (c) is permitted by Clause 17 (*Hedging and other Actions*);
  - (d) is permitted by Clause 22 (*Assignment and Transfer*); or
  - (e) it constitutes a Permitted Amendment and is not otherwise in breach of Clause 8.1(d).<sup>122]</sup>

## 12. [LATE PAYMENT OF COMPENSATION]<sup>123</sup>

- 12.1 [The Insurer's liability to pay damages to the Insured for late payment of Compensation under this Policy is limited to [interest on the amount which should have been paid, at

<sup>119</sup> Omission of this text means the Insurer would have to accept there was potentially material information that it was not aware of due to the Insured's duty of confidentiality elsewhere.

<sup>120</sup> To ensure that obligations of a guarantor or provider of other security are also enforceable.

<sup>121</sup> Inclusion of the bracketed text reduces this from an absolute obligation to only material matters.

<sup>122</sup> It is market practice to include the text in Clause 11.6 as these arrangements are likely to affect the Insurer's recoveries; Clause 11.7 allows the Insured agree without the Insurer's consent in the context of these clauses; this should only be accepted if these clauses and their implications are acceptable to the Insurer.

<sup>123</sup> Addresses Section 13(a) of the Insurance Act 2015. Market practice has been for damages to be limited to contractual interest.

a rate of [●] per cent. above [*select benchmark rate*]. The interest shall be payable from the date when payment should reasonably have been made until the date of actual payment.<sup>124]</sup>

- 12.2 If the Insurer has underwritten a proportion of this Policy, its liability for any late payment shall be no greater than that proportion of any damages suffered by the Insured, subject always to Clause 12.1 above.
- 12.3 [Clause 12.1 above does not apply if the Insurer fails deliberately or recklessly to pay Compensation within a reasonable time.]<sup>125</sup>
- 12.4 This Clause 12 relates to the Insurer's liability to pay damages to in the Insured for late payment of Compensation. Nothing in this Clause 12 shall limit the Insurer's liability to pay Compensation.]

### 13. RESCHEDULING

- 13.1 Subject to Clause 13.2, the Insured shall seek the Insurer's prior written consent to any [Rescheduling][action taken by the Insured in response to a proposed Rescheduling, including<sup>126]</sup> prior to agreeing, consenting to or otherwise effecting such Rescheduling. The Insurer shall not unreasonably withhold or delay its consent and shall notify the Insured of its decision whether to grant or withhold such consent within [●] Business Days of the date of the Insured's written request to the Insurer. [Where the Insurer fails to notify the Insured within such period, the Insurer shall be deemed to have granted its consent.<sup>127]</sup><sup>128</sup>
- 13.2 The Insurer acknowledges that the Insured may not be able to prevent a Rescheduling. Where a Rescheduling occurs for reasons outside the direct control of the Insured including, without limitation, due to:
- (a) an act or series of acts taken by the Majority Lenders (other than the Insured);  
or
  - (b) an act or series of acts taken by the Host Government,
- then the Insurer will be deemed to consent to such Rescheduling.

<sup>124</sup> This contracting out of Section 13A Insurance Act damages for late payment of a claim should be considered in conjunction with Clause 9.5(c), which already provides for payment of interest on late claim payments. Other options are to cap this amount for example to premium paid or the Maximum Limit of Liability. Also, Insurers should specify if this amount is subject to or in addition to the Maximum Limit of Liability.

<sup>125</sup> Insurers may wish to consider inclusion of this clause on an individual transaction basis as it may affect the impact of any cap such as limiting damages to premium paid or contractual interest – commercial negotiation point.

<sup>126</sup> Additional option if the Insurer wishes to be consulted on the prospect of a Rescheduling, not just on a vote by the Insured to accept it.

<sup>127</sup> Text in brackets as a reminder if the Insurer does not accept deemed consent pursuant to Clause 13.1.

<sup>128</sup> Insurers should consider whether their consent should be caveated given the importance of recoveries or whether the Insured is to be allowed discretion in this 'you snooze you lose' clause.

- 13.3 Where the Insurer consents, or is deemed to consent (pursuant to Clause [13.1 or] 13.2 as applicable) to such Rescheduling, the Insurer and Insured shall<sup>129</sup> enter into an Endorsement to this Policy, in good faith and on terms to each party's satisfaction<sup>130</sup>, to reflect the effect of such Rescheduling.
- 13.4 [<sup>131</sup>If, following the Insurer's consent or deemed consent to a Rescheduling, the Insurer and Insured do not enter into the Endorsement referred to at Clause 13.3 within [●]<sup>132</sup> Business Days of the date on which the Rescheduling took effect (the "**Reference Date**"), then this Policy shall continue to apply [from the Reference Date]<sup>133</sup> as if the Rescheduling had not occurred, with the effect that:
- (a) Due Dates falling on or after the Rescheduling shall be deemed to occur on such date as they would have occurred pursuant to the Insured Agreement but for the Rescheduling (each, an "**Original Due Date**");
  - (b) the Insured shall continue to pay the Premium as set forth in Schedule 3 (*Premium Details*);
  - (c) a Non-Payment Event shall be deemed to arise on an Original Due Date in respect of such amount as would have fallen due for payment but for the Rescheduling;
  - (d) the Non-Payment Date in respect of such deemed Non-Payment Event shall be deemed to be the later of the Original Due Date and the Reference Date;
  - (e) the Insured Loss shall mean the sum value of the Insured Payments that the Borrower would have been required to pay to the Insured on the Original Due Date, but for the Rescheduling, less:
    - (i) such amount of the Insured Payments as was received by the Insured [(unconditionally and for the Insured's own account)]<sup>134</sup> from the Borrower before the relevant Claim Settlement Date (whether before, on, or after the relevant Original Due Date)[; and]
    - (ii) any other amount received or recovered by the Insured [(unconditionally and for the Insured's own account)] in relation to the Insured Payments from the Borrower pursuant to the Finance Documents or from any other

<sup>129</sup> Although this is still an agreement to agree, 'shall' has a bit more proactive voice and imposes a duty of good faith on both parties to seek to agree the endorsement.

<sup>130</sup> Consider inclusion of this language in context of Clause 13.4.

<sup>131</sup> Please refer to the User Guide before selecting and including Clause 13.4. Insurers may wish to delete this clause until a track record with the Insured has been established. Other options include: (a) payment of original amounts on original due dates; (b) requiring rescheduling of the policy in the first event of a rescheduling but payment in the event of subsequent reschedulings; or (c) as contemplated by Clause 13.3 rescheduling the policy in all instances given that this is likely to be what a prudent Insured would do to protect its right to repayment if it did not benefit from insurance.

<sup>132</sup> Sufficient time should be allowed after the Rescheduling for an appropriate endorsement to be drafted and negotiated, noting that legal sign-off may be required on the Insured's side.

<sup>133</sup> May clarify the situation with regard to prior defaults/claim payments prior to Rescheduling.

<sup>134</sup> This contemplates where the Insured has received a 'preferred payment' that is clawed back by an administrator in the event of liquidation of the Borrower – see footnotes to Clause 9.4; note this bracketed text is also in the following paragraph.

source at any point in time before the relevant Claim Settlement Date, other than any amounts received pursuant to Other Insurance(s)]; and

- (iii) any amount which the Borrower had credited to its own account by way of set-off or counterclaim against the Insured in respect of the Insured Payment pursuant to the terms of the Insured Agreement as amended or deemed amended by the Rescheduling [(but not otherwise, including without limitation by way of statutory set-off)] at any point in time before the relevant Claim Settlement Date],<sup>135</sup>

multiplied by the Insured Percentage.

- (f) the Insured may file a Proof of Loss and make a Claim, pursuant to the procedure set out at Clause 9 (*Claim Procedure*) on the basis of such Non-Payment Events and Non-Payment Dates, and the Insurer shall pay Compensation for such Insured Loss; and
- (g) any payments of such rescheduled amounts, received from the Borrower on or following the Claim Settlement Date, shall be treated as recoveries and shall be applied in accordance with Clause 9.7 (*Recoveries*).]

#### 14. ACCELERATION OF LOAN

14.1 The Insured shall consult with the Insurer in good faith and shall take into consideration the Insurer's directions prior to agreeing to or effecting an Acceleration, but (subject to any other agreement to the contrary between the Insurer and the Insured and the Insured's obligations pursuant to Clause 11.2) shall not be required to act in accordance with the Insurer's directions in relation thereto.

14.2 Where an Acceleration has occurred, or is proposed, then following a default by the Borrower on an accelerated obligation to make an Insured Payment, the Insurer shall decide in its sole discretion whether to:

- (a) treat the date of Acceleration (or, if later, the date on which the Due Date in respect of the Insured Payment fell, as a result of such Acceleration) as the Non-Payment Date; or
- (b) treat each original Due Date(s) in respect of the original amount of Insured Payment(s) due on that date(s) as the applicable<sup>136</sup> Non-Payment Date(s) and Insured Payment(s),

in either case, the Insurer shall notify the Insured of its decision as soon as practicable.

<sup>135</sup> Ensure that the selected options correspond to those selected at Clause 9.4 (*Amount of Compensation*).

<sup>136</sup> To ensure it is clear that the payment on each original due date is the amount originally expressed to be due on that date, as in the event of an acceleration of the loan, the full amount of the outstanding loan is what would be due under the terms of the Insured Agreement (see definition of Insured Payment).

## 15. MULTIPLE INSURERS

### 15.1 Insurers' Liability

Where there is more than one Insurer:

- (a) each Insurer's liability under this Policy is several and not joint;
- (b) each Insurer is liable only for the proportion of liability that it has underwritten (its "**Written Line**");
- (c) the Written Line of each Insurer [(or, in the case of a Lloyd's Syndicate, the total of the proportions underwritten by all the members of the Syndicate taken together)<sup>137</sup>] is stated in Schedule 1 (*Insurers' Details*) at *Written Line / Proportion of Liability (per cent.)* in respect of that Insurer. Such Written Lines together make up the Maximum Limit of Liability[;][; and]
- (d) the Insured's right to terminate this Policy pursuant to Clause 19.1(a), pertains only to the Written Line of an Insurer or Insurers to whom the conditions (financial strength or cessation of underwriting) referred to in such Clause relate[.][; and]
- (e) [if the Insured does not terminate the Written Line of an Insurer, in the event of any of the circumstances set out at Clause 19.1(a), the Insured may require such Insurer to relinquish its position as a claims agreement party (where it holds such position) to another Insurer on the Policy by agreement between the Insured and the other Insurers.<sup>138</sup>]

### 15.2 Other Insurance

- (a) The Insured shall not permit the creation of any Other Insurance without the Insurer's prior consent, such consent not to be unreasonably withheld<sup>139</sup>.
- (b) This Policy shall rank *pari passu* to any such Other Insurance.
- (c) The Insurer recognises and acknowledges that the Insured's ability to act or refrain from acting under this Policy might be subject to the directions it may receive from an insurer under any Other Insurance ("**Other Insurer**").
- (d) In the event that the Insured:
  - (i) has obtained Other Insurance from one or more Other Insurers; and
  - (ii) is obliged to consult or obtain consent or otherwise follow the directions or recommendations under the terms of the Other Insurance in relation to any matter for which the Insured is required under this Policy to

<sup>137</sup> Delete if not applicable; Insurers may wish to include this in a Master Wording in which syndicates may participate.

<sup>138</sup> Delete or include depending on Insurer's stance on RITC language (see Clause 19.1).

<sup>139</sup> Insurers may wish consent to be contingent on an agreement that information may be shared with Other Insurers/Insurers may cooperate with such Other Insurers in managing the claims & recovery process to facilitate effective claim payment and recovery where the insurance is 'verticalised'.

consult or obtain consent or otherwise follow the directions or recommendation of the Insurer, then,

if the Insured does not obtain unanimous consent, recommendation or direction, or receives conflicting recommendations or directions, the Insured shall inform each Insurer as to the recommendations, directions or other feedback of the other Insurers and any Other Insurer (to the extent it is not prohibited from so doing due to its duty of confidentiality owed to an Other Insurer or other third party<sup>140</sup>); and act in accordance with the decision, direction or recommendation of the Majority.

In the absence of such Majority position, the Insured shall be entitled to make the final decision and provided it does so prudently and as if uninsured and complies with Clause 11.2<sup>141</sup>, the Insured will not have breached any term, condition, or warranty of this Policy.

- (e) For the purposes of this Clause 15.2, "**Majority**" means those Insurers and Other Insurers who in the aggregate bear the risk of at least 66.66<sup>142</sup> per cent. of the total Insured Payments outstanding at the relevant time.

## 16. FRAUDULENT CLAIMS<sup>143</sup>

16.1 If the Insured makes any fraudulent Claim under this Policy, the Insurer:

- (a) is not liable to pay the Claim;
- (b) may recover from the Insured any sums paid by it to the Insured in respect of the Claim<sup>144</sup>; and
- (c) may, by notice to the Insured, treat the Policy as having been terminated, with effect from the time at which such fraudulent Claim is made, in which case the Insurer may refuse all liability to the Insured under the Policy in respect of a relevant event occurring after the time of the fraudulent act. Such termination will not affect the rights and obligations of the Insured under this Policy with respect to a relevant event occurring before such time.

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<sup>140</sup> Insurers may wish to include a proactive duty to alert Insurers to circumstances in which this applies and/or require the Insured to obtain such Other Insurer's consent to make this disclosure to Insurers; note that the Insured has the right to disclose the presence of this Policy to other insurers pursuant to Clause 20.1; Insurers may also wish to consider a similar disclosure obligation to Insurers of the presence of Other Insurers.

<sup>141</sup> Consider also Clause 11.1 and Clause 9.6(b).

<sup>142</sup> Insurers should consider this threshold in light of the number of Insurers involved in any particular transaction, their proportionate lines, and which Insurers have been designated Claims Agreements Parties on the slip.

<sup>143</sup> Note that the full language pursuant to the Insurance Act 2015 is split between this clause and Clause 6, *Premium*. Note that for Lloyd's syndicates, inclusion of at least the remedies for fraud set out in the Insurance Act are a minimum regulatory requirement.

<sup>144</sup> As the expenses of disputing a fraudulent claim can be considerable, Insurers should consider including expenses relating to establishing that the claim was fraudulent.

16.2 For the purposes of this Clause 16, "**relevant event**" means whatever gives rise to the Insurer's liability under the Policy (and may include, for example and without limitation, the occurrence of a loss, the making of a claim, or the notification of a potential claim).

## 17. HEDGING AND OTHER ACTIONS

17.1 Subject to the Insured's obligation to remain uninsured for and unhedged in respect of, and to bear the Minimum Retained Interest for its own account, the Insured may:

- (a) enter into any sub-participation in relation to a Finance Document;
- (b) enter into any other transaction under which payments are to be made by reference to one or more Finance Documents, or the Borrower[, or the Host Country].

17.2 [The Insured may not assign, transfer, securitise or repackage any of its rights and/or obligations under a Finance Document without the prior consent of the Insurer (save to the extent that such rights and/or obligations neither constitute the Insured Loan nor secure the Insured's rights as lender under the Insured Loan).<sup>145</sup>]

17.3 Neither Clause 8.1(c)<sup>146</sup>, nor anything in this Clause 17 shall prevent the Insured from mitigating its exposure to [the Borrower or to] risks relating to the Host Country or sector with which the Borrower is associated by whatever means, including without limitation by hedging, trading or otherwise risk managing as part of a general portfolio risk management programme or customary trading activities, provided that:

- (a) the contracts entered into by the Insured to effect such activities do not specifically reference the Insured Agreement; [and]
- (b) the Deal Team is not [directly] involved in the pursuit of such activities [and such activities are conducted outside the Knowledge of the Deal Team]; and
- (c) any profit or loss attributable to such activities does not accrue to the Deal Team Department's internal profit and loss accounts (save that any such profit or loss may accrue to the Insured's statutory accounts at a legal entity and group level).

17.4 [The Insured may at any time, assign, transfer, charge, pledge or otherwise create security in or over (whether by way of collateral or otherwise) all or any of its rights under the Insured Loan (an "**Insured Loan Pledge**") to:

- (a) a federal reserve or central bank (including without limitation the Bank of England, the European Central Bank or a US Federal Reserve bank) (a "**Central Bank**"); or
- (b) any fund, company, trust or other entity (or any compartment thereof) as part of any securitisation, asset-backed financing or refinancing transaction including, without limitation, any assignment or transfer of its rights to any fund, company,

<sup>145</sup> Insurers should consider carefully the exclusion of all or part of this text which may allow the loan that is insured to be included in a securitisation or other financial instrument without the Insurer's consent; consideration should be given as to the effect on the Policy, which is normally considered a personal contract by Insurers; see also comments to Clause 17.4.

<sup>146</sup> This cross reference is to the warranty that the Insured shall retain the Minimum Retained Interest.

trust or other entity where an assignment, transfer, charge, pledge or other security over the securities issued by such fund, company, trust or other entity is to be made or created by the Insured in favour of a Central Bank [or the Insured's lenders or repo counterparties,

it being agreed that an Insured Loan Pledge will not cause the Insured Loan or any part thereof to cease to be covered under this Policy, [nor shall the Insured be considered to be in breach of its warranty at Clause 8.1(c)], as long as the Insured continues to bear, directly or through the securities referred to in paragraph (b) above or by the effect of the terms and arrangements discussed in this Clause 17.4, the credit risk relating to such amount of the Insured Loan as is subject to the Insured Loan Pledge.]<sup>147</sup>

## 18. COSTS AND EXPENSES

18.1 Following settlement of the Claim to which such costs relate and subject to Clause 18.2, any external, out of pocket, costs and expenses incurred by the Insured<sup>148</sup> in respect of action(s) taken under Clause 11.1(c) and 11.2<sup>149</sup> (*Co-operation with Insurer, Minimisation of Loss*) will be shared between the Insurer and the Insured in accordance with the relative proportions of the Insured Percentage and the Uninsured Percentage, including:

- (a) Costs incurred where the Insurer requires the Insured to take actions during a Waiting Period following a Non-Payment Event that are outside of the Insured's normal procedures.
- (b) All costs incurred by the Insured after the end of the Waiting Period to effect recoveries in respect of a Non-Payment Event for which Compensation has been paid<sup>150</sup>

18.2 Costs and expenses that the Insured would have incurred in the normal course of events following a payment default in respect of the Insured Payment between the Non-Payment Date and the expiry of the Waiting Period shall be for the account of the Insured.

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<sup>147</sup> Insurers should consider their internal position on allowing the Insured to use loans they insure as collateral or for the benefit of third parties before accepting this language; as the text allows the Insured to assign and transfer the loan, as well as create a pledge or charge over it, legal advice should be sought as to the implications of this language on recoveries, regulatory and other issues.

<sup>148</sup> As these expenses can be considerable, Insurers should consider adding that these costs should be pre-agreed (or pre-agreed above a certain level) by Insurers in order to be shared, particularly as Insurers often bear 90% of these costs.

<sup>149</sup> Insurers should remove Clauses 11.1(a) and 11.1(b) from this unless they are willing to share in the external costs to the Insured of filing a claim, such as legal fees.

<sup>150</sup> Note that this modifies the original LMA drafting by reordering the paragraphs for clarity and removing duplicative language.

## 19. TERMINATION

### 19.1 Termination by the Insured

(a) ***Credit Downgrade of Insurer, Cessation of Underwriting etc.***

Subject to Clauses 15.1(d) and 15.1(e) (*Insurers' Liabilities*), the Insured may terminate the Written Line of an Insurer by providing no less than [●] Business Days' prior notice to that Insurer if:

- (i) an Insurer's financial strength rating has fallen below the Minimum Rating; or
- (ii) the Insurer has ceased underwriting the type of insurance provided under this Policy.

(b) ***Loan Prepayment***

The Insured may terminate this Policy by providing no less than [●] Business Days' prior notice to the Insurer if the Insured Loan is prepaid or refinanced in full by the Borrower. [In the event that the Insured's participation under the Insured Loan is reduced, in whole or in part, in accordance with the Insured Agreement (whether undrawn facilities are cancelled, or the Insured assigns or otherwise transfers its rights as lender) the Insured and the Insurer shall enter into an Endorsement to this Policy:

- (i) evidencing the reduction of the Maximum Limit of Liability in proportion to the reduction in the Insured's participation; and
- (ii) revising the Premium calculation set forth in Schedule 3 (*Premium Details*)]<sup>151</sup>.

(c) ***No Insurable Interest***

The Insured may terminate this Policy by providing no less than [●] Business Days' prior notice to the Insurer if the Insured has sold or transferred all of its interest in the Insured Loan such that it no longer has an insurable interest.

### 19.2 Termination by the Insurer

If any amount of the Premium has not been paid to the Insurer when due, the Insurer may terminate this Policy by providing no less than [●] Business Days' prior written notice to the Insured. If the amount of the Premium due is paid in full to the Insurer before such notice period expires, such notice of termination shall automatically be

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<sup>151</sup> Insurers and the Insured may wish to do this in the ordinary course of premium adjustment Endorsements to the policy to save on unnecessary administration/operational issues; note that the maximum Insurers should be required to indemnify the Insured for should automatically reduce proportionally if the Insured's exposure reduces through repayment or otherwise under the Insured Agreement unless the Insurer and the Insured agree otherwise, as the Insured Loss should be reduced automatically. Finally, Insurers should consider moving this to another clause and modifying the language, as it covers also repayments/amortisations, cancellations, and sales, which are different from prepayment; it also doesn't necessarily link to termination but reduction of the Maximum Limit of Liability.

revoked, otherwise the Policy shall automatically terminate at the end of such notice period.

### 19.3 Effect of termination

Upon the effective date of termination pursuant to this Clause 19, the Insurer shall be released from its liability to indemnify the Insured in respect of the Non-Payment Events which arise after the date of termination but, for the avoidance of doubt, both the Insurer and the Insured shall continue to be subject to and benefit from the other provisions of this Policy in respect of any rights and liabilities which arose or attached prior to termination, are attributable to such period or are necessary to enjoy or enforce such rights and obligations including, without limitation, the provisions of Clause 4 (*Insuring Clause*).

## 20. CONFIDENTIALITY

20.1 The Insured may not disclose this Policy or its existence to any person without the prior written consent of the Insurer, provided that the Insured may disclose the existence of this Policy without the prior written consent of the Insurer to:

- (a) any of its Affiliates; [and]
- (b) its or any of its Affiliates' directors, officers, employees, [agents,] [contractors,] professional advisers, auditors, [insurers,<sup>152</sup>] brokers[, other service providers] and regulatory authorities; [and]
- (c) [the Borrower]<sup>153</sup>.

20.2 [In the event the Insured discloses the Policy or its existence to a person referenced in Clause 20.1, the Insured must inform that person in writing of the confidential nature of the disclosure.]<sup>154</sup>

20.3 [Prior to payment of Compensation,<sup>155</sup>] the Insurer may not disclose this Policy or its existence to any person without the prior written consent of the Insured, provided that it may disclose the existence of this Policy without the prior written consent of the Insured to:

- (a) any of its Affiliates; [and]
- (b) its or any of its Affiliates' directors, officers and employees, [agents,] [contractors,] professional [and legal]<sup>156</sup> advisers, brokers, loss adjusters,

<sup>152</sup> Note that these are likely to be Other Insurers; see comments to Clause 15 (*Multiple Insurers*).

<sup>153</sup> Consider any moral hazard or other issue of the Borrower's behaviour being influenced by the presence of insurance.

<sup>154</sup> See comment with regard to issues raised by the disclosure of the presence of insurance.

<sup>155</sup> Insurers may wish to consider including language to permit disclosure of the Policy post-notification pursuant to Clause 9.1 to allow a more efficient claims process under verticalized placements. At a minimum, Insurers may wish to include the bracketed language to clarify that post-payment Insurers have the right to discuss recoveries with Other Insurers in respect of such Compensation; particularly if Clause 20.3(c) is included (note that Clause 20.6 already permits discussion with potential purchasers of the debt).

<sup>156</sup> Option to clarify that lawyers are specially included as advisers.

actuaries, [experts,] reinsurers, retrocessionaires[, other service providers<sup>157</sup>] and regulatory authorities; [and]

(c) [the Borrower]<sup>158</sup>.

20.4 In the event the Insurer discloses the Policy or its existence to a person referenced in Clause 20.3, the Insurer must inform that person in writing of the confidential nature of the disclosure.

20.5 This Clause 20 does not apply to information which the Insured (or its Affiliates) or Insurer (or its Affiliates), as the case may be, is required to disclose pursuant to any applicable law or regulation, order of any court or order of any governmental agency or supervisory authority having jurisdiction over the Insured or Insurer or their respective Affiliates.

20.6 In the event that the Insurer has paid Compensation and is subrogated to the Insured's rights in accordance with Clause 9.6 (*Subrogation and assignment of rights*), the Insurer may disclose the existence of this Policy to potential investors or financial entities for the purpose of selling their position but at all times subject to any confidentiality provisions prescribed under the Insured Agreement (in which case the Insured and Insurer shall use reasonable endeavours to ensure that such confidentiality provisions are waived and such disclosure is permitted).

## 21. ENTIRE AGREEMENT, AMENDMENTS AND WAIVERS

21.1 This Policy constitutes the entire agreement between the Insurer and the Insured.

21.2 No provision of this Policy may be amended or supplemented except by way of an Endorsement entered into by the Insurer and Insured, acting through their respective authorised representatives.

21.3 Neither party shall be deemed to have waived any of its rights under this Policy, unless expressly so stated in a written notice by the party waiving such right to the other party.

## 22. ASSIGNMENT AND TRANSFER

22.1 The Insured may not assign or transfer this Policy to a third party without the prior written approval of the Insurer, evidenced by an Endorsement [(such approval not to be unreasonably withheld or delayed)<sup>159</sup>].

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<sup>157</sup> Of particular importance that these be included if premiums are processed through Xchanging or other third-party; consider any outsourcing of processing by the Insurer.

<sup>158</sup> See footnote to Clause 20.1(c).

<sup>159</sup> Insurers should consider the implications of this, e.g., on their ability to refuse assignment to an Insured with whom they are not licensed or do not wish to do business with but are not formally prohibited from doing so.

22.2 The Insured may require any payments under this Policy to be made to a named loss payee, with the Insurer's prior written approval, evidenced by an Endorsement [(such approval not to be unreasonably withheld or delayed)<sup>160</sup>].

22.3 The Insurer may not assign or transfer this Policy to a third party without the prior written approval of the Insured, evidenced by an Endorsement [(such approval not to be unreasonably delayed or withheld)<sup>161</sup>].

23. **PARTIAL INVALIDITY**

If, at any time, any provision of the Policy is or becomes illegal, invalid or unenforceable in any respect under any law of any jurisdiction, neither the legality, validity or enforceability of the remaining provisions nor the legality, validity or enforceability of such provision under the law of any other jurisdiction will in any way be affected or impaired.

24. **[FATCA INFORMATION]**

[Each party shall, upon a reasonable request by the other, supply to it such forms, documentation and other information as such other party reasonably requests for the purposes of its compliance with FATCA or with any other law, regulation, or exchange of information regime.]

25. **SANCTIONS**

25.1 The Insurer and the Insured shall each comply with all trade or economic sanctions laws, regulations and resolutions administered, enforced or imposed by the [United Nations, Japan, the European Union, the United Kingdom or the United States of America] (including extraterritorial sanctions) to which they are subject and that are applicable to the Insured Agreement ("**Sanctions**").

25.2 [No (re)insurer shall be deemed to provide cover and no (re)insurer shall be liable to pay any claim or provide any benefit hereunder to the extent that the provision of such cover, payment of such claim or provision of such benefit would expose that (re)insurer to any sanctions, prohibition or restriction under United Nations resolutions or the trade or economic sanctions, laws or regulations of the European Union, the United Kingdom or the United States of America.

For the avoidance of doubt, references to (re)insurer in this Clause 25.2 includes (without limitation) the Insurer as defined herein. The following Clause 25.3 is subject to this Clause 25.2]<sup>162</sup>

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<sup>160</sup> Insurers should include here or in the Endorsement the standard language restricting the loss payee's rights and the maintenance of the Insured's obligations under the Policy notwithstanding payment of Compensation to a third party.

<sup>161</sup> Insurers should consider whether this restricts Part 7 or other transfers and the Insurer's internal position on such matters.

<sup>162</sup> This clause is the LMA (Lloyd's Market Association)3100 (save for the final sentence, which aligns the clause with the defined term Insurer used elsewhere in this model form). LSW1865 was negotiated specifically for bank policies as an alternative to LMA3100. Its terms are incorporated into the text of Clauses 25.1, 25.3 and 25.4. Where the parties agree to use LSW1865, instead of LMA3100, this Clause 25.2 (which is stated to prevail over the following Clause) should be deleted. Insurers should seek advice on the protections offered by LMA3100 vs LSW1865.

- 25.3 No action taken by the Insured in compliance with Sanctions shall prejudice the Insured's rights under this Policy. The Insured and Insurer agree that they shall cooperate in good faith in the event that Sanctions affect the ability of the Insurer or Insured to perform its obligations under this Policy. The affected party will use its best endeavours to apply for the necessary governmental and regulatory permissions, approvals, licences or authorisations to allow the Insurer or the Insured, as the case may be, to perform its obligations hereunder and the parties shall perform their obligations under this Policy as soon as, if and to the extent, legally possible. Under no circumstances shall the Insurer or the Insured be obliged to carry out any action or comply with any obligation that arises under the terms of this Policy or at law if to do so would cause the Insurer or the Insured to breach any laws to which it is subject (including but not limited to any Sanctions) when carrying out its obligations hereunder.
- 25.4 Nothing in this Clause 25 gives the Insurer any right to rescind, terminate or cancel this Policy or any liability under it unless specifically required under any Sanctions.

## 26. NOTICES

### 26.1 Communications in writing

Any communication to be made under or in connection with this Policy shall be made in writing and, unless otherwise stated, may be made by letter or (in accordance with Clause 26.4 (*Electronic communication*)) by electronic mail or other electronic means.

### 26.2 Addresses

The address (and the department or officer, if any, for whose attention the communication is to be made) of the Insurer and the Insured for any communication or document to be made or delivered under or in connection with this Policy is that identified by the Insurer and the Insured at Clause 1 (*Risk Details*) or Schedule 1 (*Insurers' Details*) or any substitute address or department or officer as the Insurer or the Insured may notify to the other by not less than [●] Business Days' notice.

### 26.3 Delivery

- (a) Any communication or document made or delivered by one person to another by way of letter under or in connection with this Policy will only be effective when it has been left at the relevant address or [five] [(5)] Business Days after being deposited in the post postage prepaid in an envelope addressed to it at that address and, if a particular department or officer is specified as part of its address details provided under Clause 26.2 (*Addresses*), if addressed to that department or officer.
- (b) Any communication or document which becomes effective, in accordance with paragraph (a) above, after 5.00 p.m. in the place of receipt shall be deemed only to become effective on the following day.

## 26.4 Electronic communication

- (a) Any communication or document to be made or delivered by one party to another [or to the Broker<sup>163</sup>] under or in connection with this Policy may be made or delivered by electronic mail or other electronic means (including, without limitation, by way of posting to a secure website), if the Insurer and the Insured:
  - (i) notify each other in writing of their electronic mail address and/or any other information required to enable the transmission of information by that means; and
  - (ii) notify each other of any change to their address or any other such information supplied by them by not less than [●] Business Days' notice.
- (b) Any such electronic communication or delivery, as specified in paragraph (a) above, to be made between the Insurer and the Insured may only be made in that way to the extent that the parties agree that, unless and until notified to the contrary, this is to be an accepted form of communication or delivery.
- (c) Any such electronic communication or delivery, as specified in paragraph (a) above, made or delivered by one party to another will be effective only when actually received (or made available) in readable form.
- (d) Any electronic communication or document which becomes effective, in accordance with paragraph (c) above, after 5.00 p.m. in the place in which the party to whom the relevant communication or document is sent or made available has its address for the purpose of this Policy shall be deemed only to become effective on the following day.
- (e) Any reference in this Policy to a communication being sent or received or a document being delivered shall be construed to include that communication or document is being made available in accordance with this Clause 26.4.

## 27. THIRD PARTY RIGHTS

Subject to any provision(s) of this Policy under which rights are granted to third parties by express reference to the Contracts (Rights of Third Parties) Act 1999, a person who is not a party has no right under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Policy but this does not affect any right or remedy of a person which exists or is available apart from that Act.

## 28. GOVERNING LAW

This Policy and any non-contractual obligations arising out of or in connection with it is governed by English law.

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<sup>163</sup> Delete where a broker was not involved in the placement of the Policy.

[EITHER]<sup>164</sup>

29. **[JURISDICTION]**

- 29.1 [The courts of England have exclusive jurisdiction to settle any dispute arising from or connected with this Policy (a "**Dispute**") (including a dispute regarding the existence, validity or termination of this Policy or relating to any non-contractual or other obligation arising out of or in connection with this Policy) or the consequences of its nullity.
- 29.2 The parties agree that the courts of England are the most appropriate and convenient courts to settle any Dispute and, accordingly, that they will not argue to the contrary.]

[OR]

29. **[ARBITRATION]**

- 29.1 [Any dispute arising out of or in connection with this Policy, including any question regarding its existence, validity or termination, or any non-contractual obligation arising out of or in connection with this Policy] (a "**Dispute**") shall be referred to and finally resolved by arbitration under the Arbitration Rules of the London Court of International Arbitration ("**LCIA**"), which are deemed to be incorporated by reference into this Clause.
- 29.2 The tribunal shall consist of [a sole arbitrator] [three arbitrators]. The claimant[(s)] and the respondent[(s)] shall nominate an arbitrator respectively. The third arbitrator, who shall be the presiding arbitrator of the tribunal, shall be nominated by the two party-nominated arbitrators within thirty (30) days of the last of their appointments]. [The arbitrator[s] shall be [a lawyer/lawyers] of at least ten (10) years' standing]. The parties agree that a person shall not be disqualified from acting as [sole] [presiding] arbitrator for the reason of his or her nationality and that Article 6 of the LCIA shall not apply.
- 29.3 The seat of the arbitration shall be London, England.
- 29.4 The language of the arbitration shall be English.
- 29.5 [Any award of the tribunal shall be binding from the day it is made, and the parties hereby waive any right to refer any question of law and any right of appeal on the law and/or merits to any court. Judgment on the award rendered by the tribunal may be entered in any court having jurisdiction thereof.]
- 29.6 Nothing in this Clause 29 shall be construed as preventing either party from seeking conservatory or similar interim relief in any court of competent jurisdiction.
- 29.7 The parties agree to keep confidential all matters relating to the arbitration, including related court proceedings, to the greatest extent practicable.

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<sup>164</sup> Insurers should seek legal advice with respect to the choice of arbitration and jurisdiction. If arbitration is the chosen dispute resolution mechanism, legal advice should be sought regarding the options contained in Clause 29.

### 30. ENFORCEMENT

The purpose of this Clause 30 is to permit the enforcement in [*insert Insurer's home jurisdiction*] of an award made pursuant to the Clause 29 (*[Jurisdiction][Arbitration]*) of this Policy. The Insurer agrees that all summonses, notices or processes requiring to be served upon it for the purpose of instituting any legal proceedings against it in connection with this Policy shall be properly served if addressed to them and delivered to them care of:

*[Insert name, address and details of general representative/process agent][in respect of [Insurer's name]],<sup>165</sup>*

[who][each of whom] in this instance, has authority to accept service on [the Insurer's behalf][behalf of relevant Insurer].

[The][Each] Insurer, by giving the above authority does not renounce its right to any special delays or periods of time to which they may be entitled for the service of any such summonses, notices or processes by reason of their residence or domicile in England. [The foregoing is not intended to conflict with or override the obligation of the parties hereto to arbitrate their disputes as provided for in Clause 29 (*Arbitration*) of this Policy.]

### 31. [NO PUNITIVE DAMAGES]

Nothing contained herein shall be construed to allow [the arbitrators][any court] or any other forum to award punitive, exemplary or any other similar damages. The parties expressly waive any claim for punitive, exemplary or any similar damages.]

### 32. [BAIL-IN]<sup>166</sup>

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<sup>165</sup> Amend and complete. Where different Insurers hereunder have appointed different general representatives/process agents, the details will need to be completed in respect of each such representative/agent. Where a single general representative/process agent is appointed, it may not be necessary to specify the Insurer's name. The remainder of this Clause 30 should be amended to reflect the completed/selected details.

<sup>166</sup> A bail-in clause requires the relevant contract counterparty to agree to the contractual recognition of bail-in, thereby acknowledging that any liabilities owed by the financial institution to it may be written down or converted into equity. Insurers should familiarise themselves with the implications of this clause should its inclusion be sought by the insured bank.

**[SIGNATURES]<sup>167</sup>**

[[                    ]]

As **Insured**

By: [                    ]]

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<sup>167</sup> In practice, policies are rarely executed underhand. The execution blocks may be deleted or amended to reflect the appropriate means of acceptance/execution.

## SCHEDULE 1 INSURERS' DETAILS

### Insurer [●]

Name:

[Insert]

Written Line / Proportion of Liability (per cent.)

[Insert]

Notice Details:

[Insert]

[Stamp/Execution:

[Insert]]<sup>168</sup>

### [Insurer [●]

Name:

[Insert]

Written Line / Proportion of Liability (per cent.)

[Insert]

Notice Details:

[Insert]

[Stamp/Execution:

[Insert]]]

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<sup>168</sup> See previous footnote on execution.

## SCHEDULE 2 PROOF OF LOSS FORM

Policy Reference No.: [ ] (the "Policy")

From: Insured: [ ]

To: Insurer[s]: [ ]

1. We refer to the Policy. This is a Proof of Loss. Terms defined in the Policy have the same meaning in this Proof of Loss unless given a different meaning in this Proof of Loss.
2. We notify you of the occurrence of a Non-Payment Event with the following details:
  - Amount of Insured Payment due and unpaid: [.....]
  - Due Date of Insured Payment: [.....]
  - Amount of Insured Payment already recovered or set-off: [.....]
  - Amount of claimed Insured Loss: [.....]
  - [Additional information: [.....]]
3. In support of the above, we attach copies of:
  - (a) reasonable evidence of the Non-Payment Event and the Insured Loss arising therefrom; and
  - (b) relevant correspondence with the Borrower and other third parties with reference to the Non-Payment Event and recovery steps taken so far.

We claim from you the sum of [.....], representing [.....] of the amount due to us from the Borrower.

The Insured has complied with the terms and conditions of the Policy[, and no exclusion thereunder prevents this Claim].

Please make payment in accordance with the above referenced Policy to the following account:

[ACCOUNT DETAILS OF THE INSURED]

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for and on behalf of  
the Insured

Date:

[ATTACHMENTS]

### SCHEDULE 3 PREMIUM DETAILS

[ ]<sup>169</sup>

Premium Payment Dates: [Policy Inception, XX, XX, Policy Expiry][the date(s) identified as such in the table set forth below ]

Deposit Premium: [each amount identified as such in the table set forth below]

Premium Rate:

Premium due shall be calculated as of each Premium Payment Date set forth above as the Insured Percentage multiplied by the Insured Loan outstanding from time to time from the previous Premium Payment Date multiplied by the Premium Rate set forth above.

Any Premium due shall be offset by the Deposit Premium paid as of the immediately preceding Premium Payment Date (or as of Policy Inception) and (i) if the Deposit Premium is greater than the Premium due, the difference in Premium shall be credited against the Deposit Premium due on such Premium Payment date; and (ii) if the Deposit Premium is less than the Premium due, the difference in Premium shall be added to the Premium due.

*NOTE: simply including a spreadsheet of anticipated amortisation, exposure and premium amounts is not sufficient as does not show how calculations are to be made. See sample text above and footnote below.*

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<sup>169</sup> Set out the terms of the Premium (amount, basis of calculation, frequency and terms of payment). Users will need to ensure that this Schedule, together with Clause 6 (*Premium*), works as a functioning operative provision: a simple schedule of payments may not be sufficient on its own.

## **SCHEDULE 4 UNDERWRITING INFORMATION**

**SCHEDULE 5**  
**FORM OF SETTLEMENT AND RELEASE AGREEMENT**

To: [Insurer]

Re: Policy No: [ ] (the "**Policy**")

In accordance with the terms of the Policy, the Insured agrees to accept the sum of [ ] in full and final settlement of our Claim made pursuant to our Proof of Loss form submitted by the Insured dated [ ], pursuant to the Policy. Such payment shall constitute a full discharge and irrevocable release of the Insurer's liability in respect of that Claim.

The Insured understands that this payment is subject to the Insured continuing to comply with its obligations under the Policy, particularly pursuant to Clause 11 (*Co-operation with Insurer, Minimisation of Loss*) thereof.

Capitalised terms herein have the meanings given to them by the Policy.

.....

.....

Authorised Signatory

Date

for and on behalf of [Insured]