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Ms. Manzer's more than 35 year legal practice encompasses a broad range of experience in the financial services sector, with a focus on Canada-US cross border issues involving financial institution regulation, secured and unsecured debt finance, asset-based financing, securitization and structured finance, project finance and syndicated lending. Restructuring and lender rights and remedies within these areas is also part of her active practice.



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## NEW ISSUES EMERGING IN SYNDICATED LOAN TRANSACTIONS

### Syndicated Debt Transactions - London, European Union

*The following are selected clauses taken from a transaction document based upon the Loan Marketing Association's (a London based organization) recommendations for syndicate and agency language. The document was developed based upon the recommendations of the LMA, which are similar to, but far from identical to, the LSTA recommendations which are generally used in North America. The drafting style and approach of UK and European Union drafters is a much simpler, plain language approach, and that is reflected in the clauses that follow. These clauses have been selected to provide a counterpart, and supplement to the well-known LSTA provisions, indicating a difference approach in some circumstances, at least as to drafting. These clauses were taken from a multi-jurisdictional transaction, primarily involving home base in the UK, with extensive European involvement. These clauses are useful in a North American transaction, both where there is multi-jurisdictional involvement by jurisdictions outside of North America, but also to help to illustrate other approaches that might be useful in tailoring the North American document. With emerging global trends and norms it is important to recognize the approaches to the agency and syndication arrangements in jurisdictions other than the United States. The clauses were selected as being relevant to an agent in a transaction, with a specific focus on the agency provisions.*

***It is necessary in all syndicate transactions to contemplate the possibility of a lender defaulting on its obligations. Increasingly complex protocols are being included for lender default, largely as a consequence of lender failures during the credit crisis. Consideration will need to be given to the nature of the syndicate, the participation by individual members, the consequences of a syndicate member failure or default, and the willingness of other syndicate members to take up responsibilities in these circumstances. These will depend upon the nature of the syndicate participants, in many cases, and on the requirements of the issuer as to assurance of full syndicate participation.***

"Defaulting Lender" means any Lender:

- (a) which has failed to make its participation in a Loan available or has notified the Agent that it will not make its participation in a Loan available [\_\_\_\_\_] in accordance with this Agreement or has failed to provide cash collateral if such is provided for;
- (b) which has otherwise rescinded or repudiated a Credit Document; or
- (c) with respect to which an Insolvency Event has occurred and is continuing,

unless, in the case of paragraph (a) above:

- (i) its failure to pay is caused by:
  - (A) administrative or technical error; or
  - (B) [\_\_\_\_]; andpayment is made within [ ] Business Days of its due date; or
- (ii) the Lender is disputing in good faith whether it is contractually obliged to make the payment in question.

"Impaired Agent" means the Agent at any time when:

- (a) it has failed to make (or has notified a Party that it will not make) a payment required to be made by it under the Credit Documents by the due date for payment;
- (b) the Agent rescinds or repudiates a Credit Document;
- (c) if it is a Defaulting Lender, or
- (d) an Insolvency Event has occurred and is continuing with respect to the Agent;

unless, in the case of paragraph (a) above:

- (i) its failure to pay is caused by:
  - (A) administrative or technical error; or\
  - (B) [\_\_\_\_];and payment is made within [\_\_\_\_] Business Days of its due date; or
- (ii) the Agent is disputing in good faith whether it is contractually obliged to make the payment in question.

"Non-Acceptable L/C Lender" means a Lender under the Revolving Facility which:

- (a) is not an Acceptable Bank within the meaning of paragraph (a) of the definition of "Acceptable Bank" (other than a Lender which each Issuing Bank has agreed is acceptable to it notwithstanding that fact); or
- (b) is a Defaulting Lender; or

- (c) has failed to make (or has notified the Agent that it will not make) a payment to be made by it hereunder to or for the account of any other Finance Party in its capacity as Lender by the due date for payment.

#### Cash collateral by Non-Acceptable L/C Lender

- (a) If, at any time, a Lender under the Revolving Facility is a Non-Acceptable L/C Lender, the Issuing Bank may, by notice to that Lender, request that Lender to pay and that Lender shall pay, on or prior to the date falling [ ] Business Days after the request by the Issuing Bank, an amount equal to that Lender's L/C Proportion of the outstanding amount of a Letter of Credit and in the currency of that Letter of Credit to an interest-bearing account held in the name of that Lender with the Issuing Bank.
- (b) The Non-Acceptable L/C Lender to whom a request has been made in accordance with paragraph (a) above shall enter into a security document or other form of collateral arrangement over the account, in form and substance satisfactory to the Issuing Bank, as collateral for any amounts due and payable under the Finance Documents by that Lender to the Issuing Bank in respect of that Letter of Credit.
- (c) Until no amount is or may be outstanding under that Letter of Credit, withdrawals from the account may only be made to pay to the Issuing Bank amounts due and payable to the Issuing Bank by the Non-Acceptable L/C Lender under the Finance Documents in respect of that Letter of Credit.
- (d) If a Lender who has provided cash collateral in accordance with this Clause:
- (i) ceases to be a Non-Acceptable L/C Lender; and
  - (ii) no amount is due and payable by that Lender in respect of a Letter of Credit,

that Lender may, at any time it is not a Non-Acceptable L/C Lender, by notice to the Issuing Bank request that an amount equal to the amount of the cash provided by it as collateral in respect of that Letter of Credit (together with any accrued interest) standing to the credit of the relevant account held with the Issuing Bank be returned to it and the Issuing Bank shall pay that amount to the Lender within [ ] Business Days after the request from the Lender (and shall cooperate with the Lender in order to procure that the relevant security or collateral arrangement is released and discharged).

***Concepts of the issuing bank, usually meaning the letter of credit issuer, but at times meaning a hedge fund provider as well, have been included merely to illustrate that agency, and agent in transactions, involve several roles. It is frequent that the agent, or a lead, takes responsibility for matters such as hedging, accounts, collateral control, letter of credit issuance and swing line issuance (the swing line will be either the temporary advances made on a daily or weekly basis by one lender for ease of administration that are then taken out by an all syndicate advance or other form of temporary advance for convenience that is to be replaced by a facility advance. These all need to be considered in the context of the transaction, the roles allocated, the consequences of advance or failure to advance all considered. These are matters which intimately effect the syndicate goals and responsibilities, and generally will be fully negotiated.***

"Issuing Bank" means each Lender which has agreed to be an Issuing Bank pursuant to the terms of this Agreement (and if more than one Lender has so agreed, such Lenders shall be referred to, whether acting individually or together, as the "**Issuing Bank**") agreeing to issue Letters of Credit.

*The majority lender definition included herein is for example only. Lender approvals are generally subdivided into four levels of approval, one for ordinary day to day, one for matters of some but not material significance, and one for matters of material significance but not considered to reach the level of the requirement for unanimous approval, and matters requiring unanimous approval. Day to day management and administration is frequently delegated to the agent, without lender approval. Minor changes, such as a waiver of a technical default, frequently require only approval by a majority, of principal amount held, perhaps coupled with a majority of lenders as well. More material changes, such as a change to a covenant, or a waiver of a payment default, will usually require a higher level of approval, frequently 66<sup>2/3</sup> or 75% of the principal amount, and at times the syndicate numbers. Matters which require unanimous approval are generally those which change the business dynamic such as a change in committed amounts, rates, payment profile and similar. Matters such as the right to require action be taken or waive defaults is frequently done at a 66<sup>2/3</sup> or 75% level. The smaller syndicate, club deal, may require unanimous approval for all steps and actions but this generally proves awkward to the operation of the syndicate. Each of the matters to be considered, and the voting rights in relation to those matters needs to be carefully considered and drafted.*

"Majority Lenders" means:

- (a) [(for the purposes of paragraph (a) of Clause [ ] (Required consents) in the context of a waiver in relation to a proposed Utilisation of the Revolving Facility (other than a Utilisation on the Closing Date) of the condition in Clause [ ] (Further conditions precedent)), a Lender or Lenders whose Revolving Facility Commitments aggregate more than 66<sup>2/3</sup> per cent. of the Total Revolving Facility Commitments; and
- (b) (in any other case), a Lender or Lenders whose Commitments aggregate more than 66<sup>2/3</sup> per cent. of the Total Commitments (or, if the Total Commitments have been reduced to zero, aggregated more than 66<sup>2/3</sup> per cent. of the Total Commitments immediately prior to that reduction).]

### "Know your customer" checks

***Lenders increasingly face regulatory requirements around "know your client", and similar. These will often involve insuring that the borrower group does not include prohibited entities, such as might be the case under Patriot Act or OFAC requirements in the United States. This requires that someone take the responsibility for obtaining the required information for regulatory compliance, have responsibility for its accuracy, and report on such to the syndicate. The determination will need to be made early on whether syndicate members will be directly responsible for obtaining such information and satisfying themselves with regard to the issuer and its affiliates, or whether the agent will take that role on for the syndicate. These responsibilities need to be clearly delineated in the agreements, and the appropriate notices, deliveries, and direction included in the protocol.***

- (a) To assist each Lender to comply with "know your customer" or similar identification procedures in circumstances where the necessary information is not already available to it, each Obligor shall promptly upon the request of the Agent or any Lender supply, or procure the supply of, such documentation and other evidence as is reasonably requested by the Agent (for itself or on behalf of any Lender) or any Lender in order for

the Agent, such Lender or to carry out and be satisfied it has complied with all necessary "know your customer" or other similar checks under all applicable laws and regulations pursuant to the transactions contemplated in the Credit Documents.

- (b) Each Lender shall promptly upon the request of the Agent supply, or procure the supply of, such documentation and other evidence as is reasonably requested by the Agent (for itself) in order for the Agent to carry out and be satisfied it has complied with all necessary "know your customer" or other similar checks under all applicable laws and regulations pursuant to the transactions contemplated in the Credit Documents.
- (c) The Parent shall, by not less than [ ] Business Days' prior written notice to the Agent, notify the Agent (which shall promptly notify the Lenders) of its intention to request that one of its Subsidiaries becomes an Additional Obligor.
- (d) Following the giving of any notice pursuant to paragraph (c) above, if the accession of such Additional Obligor obliges the Agent or any Lender to comply with "know your customer" or similar identification procedures in circumstances where the necessary information is not already available to it, the Parent shall promptly upon the request of the Agent or any Lender supply, or procure the supply of, such documentation and other evidence as is reasonably requested by the Agent (for itself or on behalf of any Lender) or any Lender (for itself or on behalf of any prospective new Lender) in order for the Agent or such Lender or any prospective new Lender to carry out and be satisfied it has complied with all necessary "know your customer" or other similar checks under all applicable laws and regulations pursuant to the accession of such Subsidiary to this Agreement as an Additional Obligor.

***The issuers will often want to have some say in the formation of the syndicate, particularly where this will be a private placement, smaller, syndicate where they may have direct, or close to direct, dealings with the syndicate participants. Also if the syndication is not on a bought or underwritten basis, the issuer will be concerned to ensure that they clearly understand the responsibilities and protocols for the syndication process.***

Syndication - The Borrower shall provide reasonable assistance to the Arranger in the preparation of the Information Memorandum and the primary syndication of the Facilities (including, without limitation, by making Senior Management available for the purpose of making presentations to, or meeting, potential lending institutions) and will comply with all reasonable requests for information from potential syndicate members prior to completion of syndication.

***It will be necessary to ensure that responsibility for the preparation, accuracy, and release, of issuer information is clearly outlined, delineating responsibility between the agent, and the remaining syndicate members in a clear and enforceable manner.***

Conditions of assignment or transfer - (a) An Existing Lender must consult with the Parent for no more than [ ] days before it may make an assignment or transfer in accordance with Clause 3.1 (*Assignments and transfers by the Lenders*) unless the assignment or transfer is:

- (i) to another Lender or an Affiliate of a Lender;
- (ii) if the Existing Lender is a fund, to a fund which is a Related Fund of the Existing Lender; or
- (iii) made at a time when an Event of Default is continuing.]

- (b) The consent of the Issuing Bank is required for any assignment or transfer by an Existing Lender of any of its rights and/or obligations under the Revolving Facility.

***The following is a relatively common limitation of responsibility for existing lenders when they sell assignments or participations. Assignment of participation language is included in essentially all private placement syndicated transactions. These clauses restrict the rights, require consent, or specifically allow, assignments and participations by existing lenders. In addition to outlining those rights and protocols, the agreements frequently pre-set the terms on which the assignment or participation is undertaken. That is, there will be provisions dealing with whether the existing lender continues to have duties and responsibilities or liabilities, whether they are fully released, whether the newly arriving lender gets additional representations, warranties, covenants or support from the existing lender or from the agent. These will be crafted for specific transactions but the following is a reasonably standard set of protocols.***

Limitation of responsibility of Existing Lenders - (a) Unless expressly agreed to the contrary, an Existing Lender makes no representation or warranty and assumes no responsibility to a New Lender for:

- (i) the legality, validity, effectiveness, adequacy or enforceability of the Transaction Documents, the Transaction Security or any other documents;
- (ii) the financial condition of any Obligor;
- (iii) the performance and observance by any Obligor of its obligations under the Transaction Documents or any other documents; or
- (iv) the accuracy of any statements (whether written or oral) made in or in connection with any Transaction Document or any other document,

and any representations or warranties implied by law are excluded.

- (b) Each New Lender confirms to the Existing Lender, the other Finance Parties and the Secured Parties that it:
- (i) has made (and shall continue to make) its own independent investigation and assessment of the financial condition and affairs of each Obligor and its related entities in connection with its participation in this Agreement and has not relied exclusively on any information provided to it by the Existing Lender or any other Finance Party in connection with any Transaction Document or the Transaction Security; and
  - (ii) will continue to make its own independent appraisal of the creditworthiness of each Obligor and its related entities whilst any amount is or may be outstanding under the Finance Documents or any Commitment is in force.

***The following clause is a very simple appointment, giving the agent very broad authority. This will generally not be suitable, and more clear agency language around the delegated rights and powers to the agent will normally be merited. This will need careful consideration as to a responsible balancing of the rights and entitlements of the syndicate participants, as to the matters over which they should have control, and the need for a simple, efficient, protocol for execution and delivery of documentation, and undertaking of the steps of notice, approvals, and similar.***

Appointment of the Agent - (a) Each of the Arranger, the Lenders and the Issuing Bank appoints the Agent to act as its agent under and in connection with the Credit Documents.

(b) Each of the Arranger, the Lenders and the Issuing Bank authorises the Agent to exercise the rights, powers, authorities and discretions specifically given to the Agent under or in connection with the Credit Documents together with any other incidental rights, powers, authorities and discretions.

***Duties of an agent will generally be explicitly set out in agreements in order to establish the responsibility and liability of the agent and to establish the expectations that the syndicate members should have as to the matters that the agent will be undertaking on their behalf. This list should be carefully considered and the following would be a bare minimum. More extensive lists will generally be suitable but need to be considered specific to the transaction, the nature and number of the members of the syndicate, the nature of the transaction and the approval rights negotiated by the syndicate members. The taking on of duties and responsibilities will naturally have inherent in it the taking of liability and responsibility and will frequently be a heavily negotiated part of the agreement. Reference should be made to the LSTA terms for some assistance in reviewing the standard protocol for agent responsibilities.***

Duties of the Agent - (a) Subject to paragraph (b) below, the Agent shall promptly forward to a Party the original or a copy of any document which is delivered to the Agent for that Party by any other Party.

(b) Paragraph (a) above shall not apply to any Transfer Certificate, any Assignment Agreement or any Increase Confirmation.

(c) Except where a Finance Document specifically provides otherwise, the Agent is not obliged to review or check the adequacy, accuracy or completeness of any document it forwards to another Party.

(d) If the Agent receives notice from a Party referring to this Agreement, describing a Default and stating that the circumstance described is a Default, it shall promptly notify the other Finance Parties.

(e) If the Agent is aware of the non-payment of any principal, interest, commitment fee or other fee payable to a Finance Party (other than the Agent, the Arranger or the Security Agent) under this Agreement it shall promptly notify the other Finance Parties.

***The following clause is somewhat unusual, and would be limited to use in a large syndicate, where there is frequent trading or changes in syndicate composition. In a smaller syndicate, with relatively fixed commitments and notice and consent requirements for assignment such a clause would not be necessary.***

(f) The Agent shall provide to the Borrower[, within [ ] Business Days of the last Business Day of each calendar month]/[within [ ] Business Days of a request by the Borrower (but no more frequently than once per calendar month)], a list (which may be in electronic form) setting out the names of the Lenders [as at that Business Day]/[as at the date of that request], their respective Commitments, the address and fax number (and the department or officer, if any, for whose attention any communication is to be made) of each Lender for any communication to be made or document to be delivered under or in connection with the Finance Documents, the electronic mail address and/or any other information required to enable the sending and receipt of information by electronic mail or other electronic means to and by each Lender to whom any communication under or in connection with the Finance Documents may be made by that means and the account

details of each Lender for any payment to be distributed by the Agent to that Lender under the Finance Documents.

- (g) The Agent's duties under the Finance Documents are solely mechanical and administrative in nature.

*We have included the note as to the role of a party known as an "arranger", several other roles are frequently considered in these documents such as administrative agent, document agent, and collateral agent among others. Each of these roles should be considered, and the relationship of the party, in that role, to the remaining members of the syndicate and the issuer needs to be considered and documented appropriately. A balancing of a need to reasonably rely upon performance of those duties, and protection for the party performing those duties, needs to be achieved as a balanced and reasonable clause is negotiated.*

Role of the Arranger. Except as specifically provided in the Finance Documents, the Arranger has no obligations of any kind to any other Party under or in connection with any Finance Document.

No fiduciary duties - (a) Nothing in this Agreement constitutes the Agent, the Arranger and/or the Issuing Bank as a trustee or fiduciary of any other person.

- (b) None of the Agent, the Security Agent, the Arranger, the Issuing Bank or any Ancillary Lender shall be bound to account to any Lender for any sum or the profit element of any sum received by it for its own account.

*Allowing or restricting business between a member of a syndicate, and the borrowing group, requires careful consideration and a fulsome protocol included in the agreement outlining these issues. If members of the syndicate, including the agent, or specific members of the syndicate group, are freely allowed to do business, other than that comprised in the credit documentation under consideration, with the borrower group then this should be stated and carved out from any duties or responsibilities established under the credit agreement. Syndicate members should consider whether these permissions or restrictions should be provided to the agent or other members of the syndicate, as the undertaking of other business is often a lucrative arrangement for the financial institutions allowed to undertake it, and the right to provide other banking services, other credit services, or hedging products is often avidly sought. The credit agreement will need in those circumstances to contemplate the credit consequences of those other arrangements, and particularly in a secured transaction, the priority of entitlement and payment. Matters such as set off if one of the banking services able to be provided is the operating accounts need to be considered and the rights allocated among the syndicate members must be seen as suitable. The clause below encloses language that is somewhat unusual in North America in that it gives broad permission to the agents and arrangers, but is frequently found in non-North American documentation. North American documentation will generally be more restrictive of rights to undertake business, other than the credit arrangements, with members of the borrowing group, or will provide for a sharing of the benefits of such arrangements.*

Business with the Group. The Agent, the Security Agent, the Arranger, the Issuing Bank and each Ancillary Lender may accept deposits from, lend money to and generally engage in any kind of banking or other business with any member of the Group.

## **Rights and discretions**

*It is usual to provide in a syndicated debt agreement an outline of an agent's rights with regard to matters such as reliance, the engagement of service providers, sub-agents, and similar. The list should be specifically reviewed and tailored to the transaction, recognizing the nature of the credit arrangements, the potential needs for such reliance or support, and the composition of the syndicate. The syndicate will need to be aware that where the agent can rely, the syndicate is, in effect, accepting the levels of performance, the representations, or the reports which are received by the agent, without responsibility or liability on the part of the agent to have done independent review, or to assess the standards of delivery. There may need to be negotiation around such ability to rely where matters are of importance to the syndicate.*

- (a) The Agent [and the Issuing Bank] may rely on:
  - (i) any representation, notice or document believed by it to be genuine, correct and appropriately authorised; and
  - (ii) any statement made by a director, authorised signatory or employee of any person regarding any matters which may reasonably be assumed to be within his knowledge or within his power to verify.
- (b) The Agent may assume (unless it has received notice to the contrary in its capacity as agent for the Lenders) that:
  - (i) no Default has occurred (unless it has actual knowledge of a Default);
  - (ii) any right, power, authority or discretion vested in any Party or the Majority Lenders has not been exercised;
  - (iii) any notice or request made by the Borrower (other than a Utilisation Request or Selection Notice) is made on behalf of and with the consent and knowledge of all the Obligors.
- (c) The Agent may engage, pay for and rely on the advice or services of any lawyers, accountants, surveyors or other experts.
- (d) The Agent may act in relation to the Credit Documents through its personnel and agents.
- (e) The Agent may disclose to any other Party any information it reasonably believes it has received as agent under this Agreement.
- (f) Without prejudice to the generality of paragraph (e) above, the Agent may disclose the identity of a Defaulting Lender to the other Finance Parties and the Borrower and shall disclose the same upon the written request of the Borrower or the Majority Lenders.
- (g) Notwithstanding any other provision of any Credit Document to the contrary, the Agent is not obliged to do or omit to do anything if it would or might in its reasonable opinion constitute a breach of any law or regulation or a breach of a fiduciary duty or duty of confidentiality.

### **Majority Lenders' Instructions**

***An agent will be required, as to specified matters in the credit arrangements, be required to seek the instruction or consent of a stated percentage of the syndicate participants, by dollar amount or by number, and to act in accordance with those instructions. It is also usual to provide for matters where the syndicate participants can initiate a direction or instruction to the agent and require compliance with those instructions. The agent will generally require indemnity from the syndicate participants, and payment of costs and expenses, at times in advance, in connection with undertaking matters which the syndicate participants have directed. These provisions should tie into the voting levels, and matters, which have been determined to be applicable to the transaction and the specific syndicate composition.***

- (a) The Agent shall (i) exercise any right, power, authority or discretion vested in it as Agent in accordance with any instructions given to it by the Majority Lenders (or, if so instructed by the Majority Lenders, refrain from exercising any right, power, authority or discretion vested in it as Agent) and (ii) not be liable for any act (or omission) if it acts (or refrains from taking any action) in

accordance with an instruction of the Majority Lenders.

- (b) Any instructions given by the Majority Lenders will be binding on all the Finance Parties other than the Security Agent.
- (c) The Agent may refrain from acting in accordance with the instructions of the Majority Lenders (or, if appropriate, the Lenders) until it has received such security as it may require for any cost, loss or liability (together with any associated VAT) which it may incur in complying with the instructions.
- (d) In the absence of instructions from the Majority Lenders, (or, if appropriate, the Lenders) the Agent may act (or refrain from taking action) as it considers to be in the best interest of the Lenders.
- (e) The Agent is not authorised to act on behalf of a Lender (without first obtaining that Lender's consent) in any legal or arbitration proceedings relating to any Finance Document. This paragraph (e) shall not apply to any legal or arbitration proceeding relating to the perfection, preservation or protection of rights under the Transaction Security Documents or enforcement of the Transaction Security or Transaction Security Documents.

***The agency arrangements in the syndicated debt transaction will include fairly extensive outlines of the matters for which the agent is not responsible, and the following is a fairly typical list of the matters where the agent effectively divests itself of liability. Dependent upon the nature of the syndicate, the ability of the syndicate to assess the matters relevant to the transaction, and the information provided, these will need adjusting specific to the transaction and the composition of the syndicate. A more active syndicate may well have extensive opt outs for agent responsibility, a more passive syndicate, particularly a larger syndicate, will likely require the ability to rely on the agent's work in many categories and this will need to be tailored to the transaction. It is suggested that the clauses following, although considered usual for UK and European based agreements is a very broad and far reaching claim of responsibility or liability and should be viewed as such.***

Responsibility for documentation - The Agent:

- (a) is not responsible for the adequacy, accuracy and/or completeness of any information (whether oral or written) supplied by the Agent, the Arranger, the Issuing Bank, an Obligor or any other person given in or in connection with any Credit Document or any information memorandum or reports or the transactions contemplated in the Credit Documents; or
- (b) is responsible for the legality, validity, effectiveness, adequacy or enforceability of any Credit Document or the security or any other agreement, arrangement or document entered into, made or executed in anticipation of or in connection with any Credit Document or the security.

Exclusion of liability - (a) The Agent will not be liable [(including, without limitation, for negligence or any other category of liability whatsoever)] for any action taken by it under or in connection with any Credit Document or the security, unless directly caused by its gross negligence or wilful misconduct.

- (b) No Party may take any proceedings against any officer, employee or agent of the Agent, in respect of any claim it might have against the Agent or in respect of any act or omission of any kind by that officer, employee or agent in relation to any Credit Document and any officer, employee or agent of the Agent may rely on this clause.

- (c) The Agent will not be liable for any delay (or any related consequences) in crediting an account with an amount paid or required under the Credit Documents to be paid by the Agent if the Agent has taken all necessary steps as soon as reasonably practicable to comply with the regulations or operating procedures of any recognised clearing or settlement system used by the Agent for that purpose.

*The following clause has been included as it is considered fairly routine to include in a UK or European Union based agreement. This is not the standard for North America, and in general there will be agent involvement in the know your customer requirements to satisfy applicable regulatory law, the information will be gathered and distributed by the agent, with perhaps with some limitations as to responsibility. Other materials included for this program indicate the usual standard for agency involvement in the know your customer requirements under law such as anti-money laundering, anti-terrorist financing, Patriot Act, OFAC and similar. Care should be taken in crafting the requirements under the agreements as to each of agent and lender responsibility for these reviews and investigations. While agents are reluctant to take on duties and responsibilities, the borrowers are equally unlikely to agree to allow a separate review and investigation, with separate information requests, from each of the lenders particularly in a larger syndicate.*

- (d) Nothing in this Agreement shall oblige the Agent or the Arranger to carry out any "know your customer" or other checks in relation to any person on behalf of any Lender and each Lender confirms to the Agent and the Arranger that it is solely responsible for any such checks it is required to carry out and that it may not rely on any statement in relation to such checks made by the Agent or the Arranger.

#### **Lenders' Indemnity to the Agent**

***The following clause has been included as it is considered reasonably standard for inclusion in United Kingdom and European Union based agreements. We would suggest that this is not standard generally seen in North American documents. The LSTA agreements should be reviewed for North American standards. Lenders will be required to indemnify an agent in a North American style syndicated debt transaction, but the agent will remain liable for at least gross negligence, fraud, malfeasance and similar, and potentially for negligence.***

Each Lender shall (in proportion to its share of the Total Commitments indemnify the Agent, within three Business Days of demand, against any cost, loss or liability [(including, without limitation, for negligence or any other category of liability whatsoever)] incurred by the Agent (otherwise than by reason of the Agent's gross negligence or wilful misconduct) notwithstanding the Agent's negligence, gross negligence or any other category of liability whatsoever but not including any claim based on the fraud of the Agent in acting as Agent under the Credit Documents (unless the Agent has been reimbursed by an Obligor pursuant to a Credit Document).

*In the private placement debt transaction, involving the smaller syndicate (smaller than the widely issued public deal) indemnities will be provided by the issuer to the agent, or agents where there is more than one, and also by the syndicate participants to the agent or agents. Indemnities provided by the issuer to the agent are generally broad, and will ensure that the agent, as to the borrower, will suffer limited, or no, liability for the steps and actions it takes on behalf of the lenders. The issuer will of course need to carefully consider these indemnities, and the extension of these indemnities to other syndicate members, such that the agent and its lenders effectively acquire no liability and responsibility needs to be carefully considered. From the syndicate member it will be necessary to consider whether the issuer indemnities should be extended also to all of the lenders or syndicate members, frequently they are extended only to the agents and this may not be suitable depending upon the role of the additional syndicate members.*

Indemnity to the Agent - The Borrowers shall promptly indemnify the Agent against any cost, loss or

liability incurred by the Agent (acting reasonably) as a result of:

- a) investigating any event which it reasonably believes is a Default; or
- (b) acting or relying on any notice, request or instruction which it reasonably believes to be genuine, correct and appropriately authorised.

Indemnity to the Security Agent - (a) Each Obligor shall promptly indemnify the Security Agent and every agent thereof against any cost, loss or liability incurred by any of them as a result of:

- (i) the taking, holding, protection or enforcement of the Security,
  - (ii) the exercise of any of the rights, powers, discretions and remedies vested in the Security Agent and each agent thereof by the Credit Documents or by law; or
  - (iii) any default by any obligor in the performance of any of the obligations expressed to be assumed by it in the Credit Documents.
- (b) The Security Agent may, in priority to any payment to the [\_\_\_\_], indemnify itself out of the Collateral in respect of, and pay and retain, all sums necessary to give effect to the indemnity in this Clause and shall have a lien on the Collateral and the proceeds of the enforcement of the Collateral for all monies payable to it.

Resignation of the Agent - (a) The Agent may resign and appoint one of its Affiliates acting through an office [\_\_\_\_] as successor by giving notice to the Lenders and the Borrower.

- (b) Alternatively the Agent may resign by giving 30 days notice to the Lenders and the Borrower, in which case the Majority Lenders (after consultation with the Parent) may appoint a successor Agent.
- (c) If the Majority Lenders have not appointed a successor Agent in accordance with paragraph (b) above within 20 days after notice of resignation was given, the retiring Agent (after consultation with the Borrower) may appoint a successor Agent.
- (d) The retiring Agent shall, at its own cost, make available to the successor Agent such documents and records and provide such assistance as the successor Agent may reasonably request for the purposes of performing its functions as Agent under the Finance Documents.
- (e) The Agent's resignation notice shall only take effect upon the appointment of a successor.
- (f) Upon the appointment of a successor, the retiring Agent shall be discharged from any further obligation in respect of the Credit Documents but shall remain entitled to the benefit of this Clause. Any successor and each of the other Parties shall have the same rights and obligations amongst themselves as they would have had if such successor had been an original Party.

Replacement of the Agent - (a) After consultation with the Borrower, the Majority Lenders may, by giving 30 days' notice to the Agent (or, at any time the Agent is an Impaired Agent, by giving any shorter notice determined by the Majority Lenders) replace the Agent by appointing a successor Agent.

- (b) The retiring Agent shall (at its own cost if it is an Impaired Agent and otherwise at the expense of the Lenders) make available to the successor Agent such documents and records and provide such assistance as the successor Agent may reasonably request for the purposes of performing its functions as Agent under the Credit Documents.
- (c) The appointment of the successor Agent shall take effect on the date specified in the notice from

the Majority Lenders to the retiring Agent. As from this date, the retiring Agent shall be discharged from any further obligation in respect of the Finance Documents but shall remain entitled to the benefit of this Clause (and any agency fees for the account of the retiring Agent shall cease to accrue from (and shall be payable on) that date).

- (d) Any successor Agent and each of the other Parties shall have the same rights and obligations amongst themselves as they would have had if such successor had been an original Party.

### **Relationship with the Lenders**

***While not always seen in a North American style agreement, an outline of the relationship between the agent and the lenders is a desirable clause to consider. This eases the administrative requirements for the agent and makes clear the basis upon which the lender is dealing with the agent, particularly with regard to the receipt of instructions and the requirement for and completion of funding arrangements.***

- (a) The Agent may treat the person shown in its records as Lender at the opening of business (in the place of the Agent's office as notified to the Finance Parties from time to time) as the Lender acting through its designated location:
- (i) entitled to or liable for any payment due under any Credit Document on that day; and
  - (ii) entitled to receive and act upon any notice, request, document or communication or make any decision or determination under any Credit Document made or delivered on that day,

unless it has received not less than five Business Days' prior notice from that Lender to the contrary in accordance with the terms of this Agreement.

- (b) Each Lender shall supply the Agent with any information that the Security Agent may reasonably specify (through the Agent) as being necessary or desirable to enable the Security Agent to perform its functions as Security Agent. Each Lender shall deal with the Security Agent exclusively through the Agent and shall not deal directly with the Security Agent.
- (c) Any Lender may by notice to the Agent appoint a person to receive on its behalf all notices, communications, information and documents to be made or dispatched to that Lender under the Finance Documents. Such notice shall contain the address, fax number and (where communication by electronic mail or other electronic means being permitted electronic mail address and/or any other information required to enable the sending and receipt of information by that means and the Agent shall be entitled to treat such person as the person entitled to receive all such notices, communications, information and documents as though that person were that Lender.

Credit appraisal by the Lenders, Issuing Bank and Lenders. Without affecting the responsibility of any Obligor for information supplied by it or on its behalf in connection with any Credit Document, each Lender, Issuing Bank and Lender confirms to the Agent, the Arranger, the Issuing Bank and each other Lender that it has been, and will continue to be, solely responsible for making its own independent appraisal and investigation of all risks arising under or in connection with any Credit Document including but not limited to:

- (a) the financial condition, status and nature of [ ];
- (b) the legality, validity, effectiveness, adequacy or enforceability of any Credit Document and the security and any other agreement, arrangement or document entered into, made or executed in anticipation of, under or in connection with any Credit Document or the security;
- (c) the adequacy, accuracy and/or completeness of any Information Memorandum, reports and any other information provided by the Agent, any Party or by any other person under or in connection with any Credit Document, the transactions contemplated by the Credit Documents or any other agreement, arrangement or document entered into, made or executed in anticipation of, under or in connection with any Credit Document; and
- (d) the right or title of any person in or to, or the value or sufficiency of any part of the Collateral, the priority of any of the security or the existence of any security affecting the Collateral.

#### **Agent's Management Time**

*While not considered market usual, there may be circumstances in which an agent should be reimbursed for management time spent on a transaction. In North American agreements this occasionally is added as additional compensation in circumstances of managing a defaulted credit, and particularly where the agent is responsible for managing collateral and realization. The following general clause would generally be tailored to the business deal agreed among the parties.*

- (a) Any amount payable to the Agent as indemnity or to reimburse costs and expenses shall include the cost of utilising the Agent's management time or other resources and will be calculated on the basis of such reasonable daily or hourly rates as the Agent may notify to the Borrower and the Lenders, and is in addition to any fee otherwise payable to the Agent.

Deduction from amounts payable by the Agent. If any Party owes an amount to the Agent under the Credit Documents the Agent may, after giving notice to that Party, deduct an amount not exceeding that amount from any payment to that Party which the Agent would otherwise be obliged to make under the Credit Documents and apply the amount deducted in or towards satisfaction of the amount owed. For the purposes of the Credit Documents that Party shall be regarded as having received any amount so deducted.

Reliance and engagement letters. Each Finance Party confirms that the Agent has authority to accept on its behalf the terms of any reliance letter or engagement letters relating to reports or letters provided by any third party, including accountants in connection with the Credit Documents or the transactions contemplated in the Credit Documents and to bind it in respect of those reports, or letters and to sign such letters on its behalf and further confirms that it accepts the terms and qualifications set out in such letters.

Payments to the Agent - (a) On each date on which an Obligor or a Lender is required to make a payment under a Credit Document that Obligor or Lender shall make the same available to the Agent for value on the due date at the time and in such funds specified by the Agent as being customary at the time for settlement of transactions in the relevant currency in the place of payment.

- (b) Payment shall be made to such account in the principal financial centre of the country of that currency with such bank as the Agent specifies.

Distributions by the Agent. Each payment received by the Agent under the Credit Documents for another Party shall be made available by the Agent as soon as practicable after receipt to the Party entitled to

receive payment in accordance with this Agreement to such account as that Party may notify to the Agent by not less than five Business Days' notice with a bank in the principal financial centre of the country of that currency.

Distributions to an Obligor. The Agent may apply any amount received by it for that Obligor in or towards payment (on the date and in the currency and funds of receipt) of any amount due from that Obligor under the Credit Documents or in or towards purchase of any amount of any currency to be so applied.

Clawback - (a) Where a sum is to be paid to the Agent under the Credit Documents for another Party, the Agent is not obliged to pay that sum to that other Party until it has been able to establish to its satisfaction that it has actually received that sum.

- (b) If the Agent pays an amount to another Party and it proves to be the case that the Agent had not received that amount, then the Party to whom that amount was paid by the Agent shall on demand refund the same to the Agent together with interest on that amount from the date of payment to the date of receipt by the Agent, calculated by the Agent to reflect its cost of funds.

### **Impaired Agent**

***It is becoming more common practice to include clauses dealing with an agent which has become impaired, in some manner, including by default or change in financial or regulatory circumstances. The terms of the agreement will generally deal with changes in the rights, benefits and powers and authorities of the agent when such circumstances occur. The provisions would generally include the ability to use alternate payment methods to ensure that funds are not paid into a bank which may be undergoing adverse process.***

- (a) If, at any time, the Agent becomes an Impaired Agent, an Obligor or a Lender which is required to make a payment under the Credit Documents to the Agent may instead either pay that amount direct to the required recipient or pay that amount to an interest-bearing account held with an Acceptable Bank and in relation to which no Insolvency Event has occurred and is continuing, in the name of the Obligor or the Lender making the payment and designated as a trust account for the benefit of the Party or Parties beneficially entitled to that payment under the Credit Documents.
- (b) All interest accrued on the amount standing to the credit of the trust account shall be for the benefit of the beneficiaries of that trust account *pro rata* to their respective entitlements.
- (c) A Party which has made a payment in accordance with this Clause is discharged of the relevant payment obligation under the Credit Documents and does not take any credit risk with respect to the amounts standing to the credit of the trust account.

Communication when Agent is Impaired Agent. If the Agent is an Impaired Agent the Parties may, instead of communicating with each other through the Agent, communicate with each other directly and (while the Agent is an Impaired Agent) all the provisions of the Credit Documents which require communications to be made or notices to be given to or by the Agent shall be varied so that communications may be made and notices given to or by the relevant Parties directly. This provision shall not operate after a replacement Agent has been appointed.

### **Use of websites**

*It has becoming increasingly prevalent in syndicated transactions, particularly those with a larger syndicate group, to use website and portal systems for communication. It is desirable in the agency provisions of the credit arrangements to provide for the use of such methods of delivery. Fairly robust protocol around this concept follows, but will need to be revised dependent upon the available delivery systems and the technical capabilities of the syndicate members.*

- (a) A Party may satisfy its obligations under this Agreement to deliver any information to Lenders who accept this method of communication by posting this information onto an electronic website designated by the Borrower and the Agent (the "**Designated Website**") if:
  - (i) the Agent expressly agrees (after consultation with each of the Lenders) that it will accept communication of the information by this method;
  - (ii) both the Borrower and the Agent are aware of the address of and any relevant password specifications for the Designated Website; and
  - (iii) the information is in a format previously agreed between the Borrower and the Agent.

If any Lender does not agree to the delivery of information electronically then the Agent shall notify the Borrower accordingly and the Borrower shall at its own cost supply the information to the Agent in paper form. In any event the Borrower shall at its own cost supply the Agent with at least one copy in paper form of any information required to be provided by it.

- (b) The Agent shall supply each Lender with the address of and any relevant password specifications for the Designated Website following designation of that website by the Borrower and the Agent.
- (c) The Borrower shall promptly upon becoming aware of its occurrence notify the Agent if:
  - (i) the Designated Website cannot be accessed due to technical failure;
  - (ii) the password specifications for the Designated Website change;
  - (iii) any new information which is required to be provided under this Agreement is posted onto the Designated Website;
  - (iv) any existing information which has been provided under this Agreement and posted onto the Designated Website is amended; or
  - (v) the Borrower becomes aware that the Designated Website or any information posted onto the Designated Website is or has been infected by any electronic virus or similar software.

If the Borrower notifies the Agent under paragraph (c)(i) or paragraph (c)(v) above, all information to be provided by the Borrower under this Agreement after the date of that notice shall be supplied in paper form or by other agreed electronic communication unless and until the Agent and each Website Lender is satisfied that the circumstances giving rise to the notification are no longer continuing.

- (d) Any Lender may request, through the Agent, one paper copy of any information required to be provided under this Agreement which is posted onto the Designated Website. The

Borrower shall at its own cost comply with any such request within ten Business Days.

## Required Consents

***As noted elsewhere the requirement for consents, and the level of approvals by the syndicate participants, needs to be carefully considered. The composition of the syndicate will most often be the factor which will dictate the nature of the consents and approvals, and the level of voting rights. The list matters which requires consideration as to voting levels is relatively consistent, and the following is an industry normal outline. The LSTA agreements might be reviewed for the purpose of determining any differences, under North American practice, as to these matters.***

- (a) Subject to Clause [ ] (*Exceptions*) any term of the Credit Documents may be amended or waived only with the consent of the Majority Lenders and the Borrower and any such amendment or waiver will be binding on all Parties.
- (b) The Agent may effect, on behalf of any Finance Party, any amendment or waiver permitted by this Clause.
- (c) Each Obligor agrees to any such amendment or waiver permitted by this Clause which is agreed to by the Borrower. This includes any amendment or waiver which would, but for this paragraph (c), require the consent of all of the Guarantors.

Exceptions - (a) An amendment or waiver that has the effect of changing or which relates to:

- (i) the definition of "Majority Lenders";
- (ii) an extension to the date of payment of any amount under the Credit Documents;
- (iii) a reduction in the Margin or a reduction in the amount of any payment of principal, interest, fees or commission payable;
- (iv) a change in currency of payment of any amount under the Credit Documents;
- (v) an increase in or an extension of any Commitment or the Total Commitments;
- (vi) a change to the Borrowers or Guarantors other than in accordance with Clause [ ];
- (vii) any provision which expressly requires the consent of all the Lenders;
- (viii) the nature or scope of:
  - (A) the guarantee and indemnity granted;
  - (B) the Collateral; or
  - (C) the manner in which the proceeds of enforcement are distributed
- (ix) the release of any guarantee and indemnity granted or of any security unless permitted under this Agreement or any other Credit Document or relating to a sale or disposal of an asset which is the subject of the security where such sale

or disposal is expressly permitted under this Agreement or any other Credit Document;

- (x) [any amendment to the order of priority or subordination under the Intercreditor Agreement]; or
- (xi) [ ]

shall not be made without the prior consent of all the Lenders.

- (b) An amendment or waiver which relates to the rights or obligations of the Agent may not be effected without the consent of the Agent.
- (c) [If any Lender fails to respond to a request for a consent, waiver, amendment of or in relation to any of the terms of any Credit Document or other vote of Lenders under the terms of this Agreement within [ ] Business Days of that request being made, its Commitment and/or participation shall not be included for the purpose of calculating the Total Commitments or participations under the relevant Facility/ies when ascertaining whether any relevant percentage (including, for the avoidance of doubt, unanimity) of Total Commitments and/or participations has been obtained to approve that request].

#### **Disenfranchisement of Defaulting Lenders**

***The syndicated transaction documents will usually include provisions relating to lenders who default on their obligations under the agreement. These terms will generally result in the defaulting lender losing its rights to vote on matters put before the lenders, having payments which would otherwise be made to it be applied to advances to the borrower or to repayment of other lenders that have advanced on their behalf. Protocols also generally consider whether other lenders will step up to cover the default or failure by a syndicate member, and whether that lender can be forced to withdraw from the syndicate and if so whether at par or at discount, among other provisions. The price of the payment for the take out of the defaulting lender needs to be carefully considered; industry norm is generally a take out at par, but there are circumstances where it is suitable to consider a discount, and breakage costs and similar should generally also be considered and at times are not suitably the subject matter of take out payment.***

- (a) For so long as a Defaulting Lender has any Available Commitment, in ascertaining the Majority Lenders or whether any given percentage (including, for the avoidance of doubt, unanimity) of the Total Commitments or Total Revolving Commitments has been obtained to approve any request for a consent, waiver, amendment or other vote under the Finance Documents, that Defaulting Lender's Commitments will be reduced by the amount of its Available Commitments.
- (b) For the purposes of this Clause, the Agent may assume that the following Lenders are Defaulting Lenders:
  - (i) any Lender which has notified the Agent that it has become a Defaulting Lender;
  - (ii) any Lender in relation to which it is aware that any of the events or circumstances referred to in paragraphs (a), (b) or (c) of the definition of

**"Defaulting Lender"** has occurred,

unless it has received notice to the contrary from the Lender concerned (together with any supporting evidence reasonably requested by the Agent) or the Agent is otherwise aware that the Lender has ceased to be a Defaulting Lender.

Replacement of a Defaulting Lender - (a) The Borrower may, at any time a Lender has become and continues to be a Defaulting Lender, by giving [ ] Business Days' prior written notice to the Agent and such Lender:

- (i) replace such Lender by requiring such Lender to (and such Lender shall) transfer all (and not part only) of its rights and obligations under this Agreement;
- (ii) require such Lender to (and such Lender shall) transfer of the undrawn Revolving Commitment of the Lender; or
- (iii) require such Lender to (and such Lender shall) transfer all (and not part only) of its rights and obligations in respect of the Revolving Facility,

to a Lender or other bank, financial institution, trust, fund or other entity (a **"Replacement Lender"**) selected by the Borrower, and which (unless the Agent is an Impaired Agent) is acceptable to the Agent (acting reasonably) and (in the case of any transfer of a Revolving Facility Commitment) to the Issuing Bank, which confirms its willingness to assume and does assume all the obligations or all the relevant obligations of the transferring Lender (including the assumption of the transferring Lender's participations or unfunded participations (as the case may be) on the same basis as the transferring Lender) [for a purchase price in cash payable at the time of transfer equal to the outstanding principal amount of such Lender's participation in the outstanding Utilisations and all accrued interest and/or Letter of Credit fees, Break Costs and other amounts payable in relation thereto under the Credit Documents].

(b) Any transfer of rights and obligations of a Defaulting Lender pursuant to this Clause shall be subject to the following conditions:

- (i) the Borrower shall have no right to replace the Agent or Security Agent;
- (ii) neither the Agent nor the Defaulting Lender shall have any obligation to the Borrower to find a Replacement Lender;
- (iii) the transfer must take place no later than [ ] days after the notice referred to in paragraph (a) above; and
- (iv) in no event shall the Defaulting Lender be required to pay or surrender to the Replacement Lender any of the fees received by the Defaulting Lender pursuant to the Credit Documents.

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