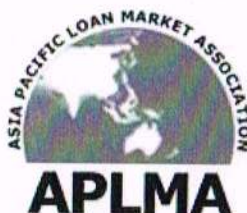


This document is a recommended form. It will require amendment in order to conform with a particular transaction and may require amendment in order to comply with particular regulatory requirements.

*SINGLE BORROWER, SINGLE GUARANTOR, SINGLE CURRENCY
TERM FACILITY AGREEMENT
(ENGLISH LAW)*



[currency and amount in numbers]
FACILITY AGREEMENT

dated []

for

[NAME OF BORROWER]

[NAME OF GUARANTOR]

acting as Guarantor

arranged by

[NAME OF ARRANGERS]

with

[NAME OF AGENT]

acting as Agent

[NAME OF LAW FIRM]

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THIS AGREEMENT is dated [] and made between:

- (1) [] (the "**Borrower**");
- (2) [] (the "**Guarantor**");
- (3) [] [and []] ([*whether acting individually or together*] the "**Arranger**");
- (4) **THE FINANCIAL INSTITUTIONS** listed in Schedule 1 (*The Original Lenders*) as lenders (the "**Original Lenders**"); and
- (5) [] as agent of the Finance Parties (other than itself) (the "**Agent**").

IT IS AGREED as follows:

SECTION 1 INTERPRETATION

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

In this Agreement:

"Administrative Party" means each of the Agent and the Arranger.

"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.

"APLMA" means the Asia Pacific Loan Market Association Limited.

"Assignment Agreement" means an agreement substantially in a recommended form of the APLMA or any other form agreed between the relevant assignor, assignee and the Agent.

"Authorisation" means:

- (a) an authorisation, consent, approval, resolution, licence, exemption, filing, notarisation, lodgement or registration; or
- (b) in relation to anything which will be fully or partly prohibited or restricted by law if a Governmental Agency intervenes or acts in any way within a specified period after lodgement, filing, registration or notification, the expiry of that period without intervention or action.

"Availability Period" means the period from and including the date of this Agreement to and including [].

"Available Commitment" means at any time a Lender's Commitment *minus*:

- (a) the aggregate amount of its participations in any outstanding Loans; and
- (b) in relation to any proposed Utilisation, the aggregate amount of its

participations in any Loans that are due to be made on or before the proposed Utilisation Date.

"Available Facility" means at any time the aggregate of the Lenders' Available Commitments.

"Break Costs" means the amount (if any) by which:

- (a) the interest which a Lender should have received pursuant to the terms of this Agreement for the period from the date of receipt of all or any part of the principal amount of a Loan or Unpaid Sum to the last day of the current Interest Period in respect of that Loan or Unpaid Sum, had the principal amount or Unpaid Sum received been paid on the last day of that Interest Period;

exceeds:

- (b) the amount of interest which that Lender would be able to obtain by placing an amount equal to the principal amount or Unpaid Sum received by it on deposit with a leading bank in the Relevant Interbank Market for a period starting on the Business Day following receipt or recovery and ending on the last day of the current Interest Period.

"Business Day" means a day (other than a Saturday or Sunday) on which banks are open for general business in London¹ [and Hong Kong]/[and].

"Commitment" means:

- (a) in relation to an Original Lender, the amount set opposite its name under the heading "Commitment" in Schedule 1 (*The Original Lenders*) and the amount of any other Commitment transferred to it under this Agreement; and
- (b) in relation to any other Lender, the amount of any Commitment transferred to it under this Agreement,

to the extent not cancelled, reduced or transferred by it under this Agreement.

"Compliance Certificate" means a certificate delivered pursuant to Clause 19.2 (*Compliance Certificate*) and signed by [two directors]/[two senior officers, one of whom shall be the chief finance officer or finance director] of the Borrower [substantially in the form set out in Schedule 5 (*Form of Compliance Certificate*)]/[in form and substance satisfactory to the Agent].

"Confidential Information" means all information relating to the Company, any Obligor, the Group, the Finance Documents or a Facility of which a Finance Party becomes aware in its capacity as, or for the purpose of becoming, a Finance Party or which is received by a Finance Party in relation to, or for the purpose of becoming a Finance Party under, the Finance Documents or a Facility from either:

¹ If the interest rate is set by reference to LIBOR, the first and last days of an Interest Period have to be London Business Days.

- (a) any member of the Group or any of its advisers; or
- (b) another Finance Party, if the information was obtained by that Finance Party directly or indirectly from any member of the Group or any of its advisers,

in whatever form, and includes information given orally and any document, electronic file or any other way of representing or recording information which contains or is derived or copied from such information but excludes information that:

- (i) is or becomes public information other than as a direct or indirect result of any breach by that Finance Party of Clause 24 (*Disclosure of information*); or
- (ii) is identified in writing at the time of delivery as non-confidential by any member of the Group or any of its advisers; or
- (iii) is known by that Finance Party before the date the information is disclosed to it in accordance with paragraphs (a) or (b) above or is lawfully obtained by that Finance Party after that date, from a source which is, as far as that Finance Party is aware, unconnected with the Group and which, in either case, as far as that Finance Party is aware, has not been obtained in breach of, and is not otherwise subject to, any obligation of confidentiality.

"Confidentiality Undertaking" means a confidentiality undertaking substantially in a recommended form of the APLMA or in any other form agreed between the Borrower and the Agent.

"Default" means an Event of Default or any event or circumstance specified in Clause 22 (*Events of Default*) which would (with the expiry of a grace period, the giving of notice, the making of any determination under the Finance Documents or any combination of any of the foregoing) be an Event of Default.

"Disruption Event" means either or both of:

- (a) a material disruption to those payment or communications systems or to those financial markets which are, in each case, required to operate in order for payments to be made in connection with the Facility (or otherwise in order for the transactions contemplated by the Finance Documents to be carried out) which disruption is not caused by, and is beyond the control of, any of the Parties; and
- (b) the occurrence of any other event which results in a disruption (of a technical or systems-related nature) to the treasury or payments operations of a Party preventing that, or any other Party:
 - (i) from performing its payment obligations under the Finance Documents; or
 - (ii) from communicating with other Parties in accordance with the terms of the Finance Documents,

and which (in either such case) is not caused by, and is beyond the control of, the Party whose operations are disrupted.

["**Environmental Claim**" means any claim, proceeding or investigation by any person in respect of any Environmental Law.

"**Environmental Law**" means any applicable law in any jurisdiction in which any member of the Group conducts business which relates to the pollution or protection of the environment or harm to or the protection of human health or the health of animals or plants.

"**Environmental Permits**" means any Authorisation and the filing of any notification, report or assessment required under any Environmental Law for the operation of the business of any member of the Group conducted on or from the properties owned or used by the relevant member of the Group.]²

"**Event of Default**" means any event or circumstance specified as such in Clause 22 (*Events of Default*).

"**Facility**" means the term loan facility made available under this Agreement as described in Clause 2 (*The Facility*).

"**Facility Office**" means the office or offices notified by a Lender to the Agent in writing on or before the date it becomes a Lender (or, following that date, by not less than five Business Days' written notice) as the office or offices through which it will perform its obligations under this Agreement.

"**Fee Letter**" means any letter or letters referring to this Agreement or the Facility between one or more Administrative Parties and the Borrower setting out any of the fees referred to in Clause 11 (*Fees*).

"**Final Repayment Date**" means []³.

"**Finance Document**" means this Agreement, any Fee Letter, any Utilisation Request and any other document designated as such by the Agent and the Borrower.

"**Finance Party**" means the Agent, the Arranger or a Lender.

"**Financial Indebtedness**" means any indebtedness for or in respect of:

- (a) moneys borrowed;
- (b) any amount raised by acceptance under any acceptance credit facility or dematerialised equivalent;
- (c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;

² Insert if environmental covenants are included.

³ Insert the final Repayment Date. Consider if the Business Day convention in clause 27.7(a) should be amended in respect of the Final Repayment Date from "the next Business Day" to "the preceding Business Day" to avoid technically extending the approved tenor of the Facility.

- (d) the amount of any liability in respect of any lease or hire purchase contract which would, in accordance with GAAP, be treated as a finance or capital lease;
- (e) receivables sold or discounted (other than any receivables to the extent they are sold on a non-recourse basis);
- (f) any amount raised under any other transaction (including any forward sale or purchase agreement) having the commercial effect of a borrowing;
- (g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price (and, when calculating the value of any derivative transaction, only the marked to market value shall be taken into account);
- (h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, standby or documentary letter of credit or any other instrument issued by a bank or financial institution; and
- (i) the amount of any liability in respect of any guarantee or indemnity for any of the items referred to in paragraphs (a) to (h) above.

"GAAP" means generally accepted accounting principles in [], including IFRS/[IFRS].⁴

"Governmental Agency" means any government or any governmental agency, semi-governmental or judicial entity or authority (including, without limitation, any stock exchange or any self-regulatory organisation established under statute).

"Group" means the [Borrower/Guarantor] and its Subsidiaries from time to time.

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

"IFRS" means international accounting standards within the meaning of the IAS Regulation 1606/2002 to the extent applicable to the relevant financial statements.]

"Indirect Tax" means any goods and services tax, consumption tax, value added tax or any tax of a similar nature.

["Information Memorandum" means the document in the form approved by the Borrower concerning the Group which, at the Borrower's request and on its behalf, was prepared in relation to this transaction and distributed by the Arranger to selected financial institutions [during []][before the date of this Agreement].]

"Interest Period" means, in relation to a Loan, each period determined in accordance with Clause 9 (*Interest Periods*) and, in relation to an Unpaid Sum, each period determined in accordance with Clause 8.3 (*Default interest*).

⁴ As a result of EU Regulations concerning IFRS all companies which are governed by the laws of an EU member state and which are listed in the EU (both requirements must be satisfied) must prepare their consolidated financial statements in accordance with adopted IFRS after 1 January 2005.

"Lender" means:

- (a) any Original Lender; and
- (b) any bank, financial institution, trust, fund or other entity which has become a Party in accordance with Clause 23 (*Changes to the Parties*),

which in each case has not ceased to be a Party in accordance with the terms of this Agreement.

["LIBOR" means, in relation to any Loan:⁵

- (a) the applicable Screen Rate; or
- (b) if no Screen Rate is available for [dollars]/[other] for the Interest Period of that Loan) the Reference Bank Rate,

as of the Specified Time on the Quotation Day for [dollars]/[other] and for a period comparable to the Interest Period of that Loan and, if any such rate is below zero, LIBOR will be deemed to be zero.]

"Loan" means, as the context requires, a loan made or to be made under the Facility or the principal amount outstanding at any time of that loan.

["London Business Day" means a day (other than a Saturday or Sunday) on which commercial banks are open for general business including dealings in interbank deposits in London.]

"Majority Lenders" means a Lender or Lenders whose Commitments aggregate more than $[66\frac{2}{3}]$ % of the Total Commitments (or, if the Total Commitments have been reduced to zero, aggregated more than $[66\frac{2}{3}]$ % of the Total Commitments immediately prior to the reduction).

"Margin" means [] per cent. per annum.

"Material Adverse Effect" means a material adverse effect on (a) the business, operations, property, condition (financial or otherwise) or prospects of the Group taken as a whole; (b) the ability of any of the Obligor to perform its obligations under the Finance Documents; or (c) the validity or enforceability of, or the rights or remedies of any Finance Party under, the Finance Documents.

"Month" means a period starting on one day in a calendar month and ending on the numerically corresponding day in the next calendar month, except that:

- (a) subject to paragraph (c) below, if the numerically corresponding day is not a Business Day, that period shall end on the next Business Day in that calendar month in which that period is to end if there is one, or if there is not, on the immediately preceding Business Day;

⁵ See the Loan Market's Association's note dated 13 September 2011 in relation to addressing situations where LIBOR rates are negative, available for download from the APLMA web site at http://www.aplma.com/Docs_Asian.asp.

- (b) if there is no numerically corresponding day in the calendar month in which that period is to end, that period shall end on the last Business Day in that calendar month; and
- (c) if an Interest Period begins on the last Business Day of a calendar month, that Interest Period shall end on the last Business Day in the calendar month in which that Interest Period is to end.

The above rules will apply only to the last Month of any period.

"**New Lender**" has the meaning given to that term in Clause 23 (*Changes to the Parties*).

"**Obligors**" means the Borrower and the Guarantor and "**Obligor**" means each one of them.

"**Original Financial Statements**" means:

- (a) in relation to the [Borrower/Guarantor], the audited consolidated financial statements of the Group for the financial year ended []; and
- [(b) in relation to the Borrower, its audited financial statements for its financial year ended [].]

"**Party**" means a party to this Agreement.

"**Quotation Day**" means:

- (a) in relation to any period for which an interest rate is to be determined, [the first day of that period]/[two London Business Days before the first day of that period] unless market practice differs in the Relevant Interbank Market in which case the Quotation Day will be determined by the Agent in accordance with market practice in the Relevant Interbank Market (and if quotations would normally be given by leading banks in the Relevant Interbank Market on more than one day, the Quotation Day will be the last of those days); and
- (b) in relation to any Interest Period the duration of which is selected by the Agent pursuant to Clause 8.3 (*Default interest*), such date as may be determined by the Agent (acting reasonably).

"**Reference Bank Rate**" means the arithmetic mean of the rates (rounded upwards to four decimal places) as supplied to the Agent at its request by the Reference Banks, as the rate at which the relevant Reference Bank could borrow funds in the [London] interbank market in [dollars]/[other] and for the relevant period, were it to do so by asking for and then accepting interbank offers for deposits in reasonable market size in [dollars]/[other] and for that period.

"**Reference Banks**" means, subject to Clause 25.15 (*Reference Banks*), [the principal London offices of [], [] and []]/[the principal office in [] of [], [] and []] or such other banks as may be appointed by the Agent in consultation with the Borrower.

["**Related Fund**" in relation to a fund (the "**first fund**"), means a fund which is managed or advised by the same investment manager or investment adviser as the first fund or, if it is managed by a different investment manager or investment adviser, a fund whose investment manager or investment adviser is an Affiliate of the investment manager or investment adviser of the first fund.]

"**Relevant Interbank Market**" means [the London interbank market].

"**Repayment Date**" means [].

"**Repayment Instalment**" means [].]

"**Repeating Representations**" means each of the representations set out in Clauses 18.[], 18.[] and 18.[].]

"**Representative**" means any delegate, agent, manager, administrator, nominee, attorney, trustee or custodian.

"**Screen Rate**" means [the British Bankers' Association LIBOR fixing for [dollars]/[other] for the relevant period] displayed on the appropriate page of the [Reuters]/[Bloomberg] screen. If the agreed page is replaced or service ceases to be available, the Agent may specify another page or service displaying the appropriate rate after consultation with the Borrower and the Lenders.

"**Security**" means a mortgage, charge, pledge, lien or other security interest securing any obligation of any person or any other agreement or arrangement having a similar effect.

"**Selection Notice**" means a notice substantially in the form set out in Part II of Schedule 3 (*Requests*) given in accordance with Clause 9 (*Interest Periods*).

"**Specified Time**" means a time determined in accordance with Schedule 7 (*Timetables*).

"**Subsidiary**" means [a subsidiary undertaking within the meaning of section 1162 of the Companies Act 2006]⁶/[a subsidiary within the meaning of section 1159 of the Companies Act 2006]⁷/[, in relation to any company or corporation, a company or corporation:

- (a) which is controlled, directly or indirectly, by the first mentioned company or corporation;
- (b) more than half the issued equity share capital of which is beneficially owned, directly or indirectly, by the first mentioned company or corporation; or
- (c) which is a Subsidiary of another Subsidiary of the first mentioned company or corporation,

⁶ This option is for English companies. The s1162 Companies Act 2006 definition of "subsidiary undertaking" is wider than the definition of "subsidiary" set out in section 1159 and is designed to cover entities to which another entity may not necessarily have a participating interest but simply the ability to exercise dominant influence over the first entity.

⁷ This option is for English companies. The s1159 definition of "subsidiary" is narrower than the definition of "subsidiary undertaking" under s1162.

and for this purpose, a company or corporation shall be treated as being controlled by another if that other company or corporation is able to direct its affairs and/or to control the composition of its board of directors or equivalent body/[]⁸.

"**Tax**" means any tax, levy, impost, duty or other charge or withholding of a similar nature (including any penalty or interest payable in connection with any failure to pay or any delay in paying any of the same).

"**Tax Deduction**" has the meaning given to such term in Clause 12.1 (*Tax definitions*).

"**Total Commitments**" means at any time the aggregate of the Commitments (being [] at the date of this Agreement).

"**Transfer Certificate**" means a certificate substantially in the form set out in Schedule 4 (*Form of Transfer Certificate*) or any other form agreed between the Agent and the Borrower.

"**Transfer Date**" means, in relation to an assignment or a transfer, the later of:

- (a) the proposed Transfer Date specified in the relevant Assignment Agreement or Transfer Certificate; and
- (b) the date on which the Agent executes the relevant Assignment Agreement or Transfer Certificate.

"**Unpaid Sum**" means any sum due and payable but unpaid by an Obligor under the Finance Documents.

"**Utilisation**" means a utilisation of the Facility.

"**Utilisation Date**" means the date of a Utilisation, being the date on which the relevant Loan is to be made.

"**Utilisation Request**" means a notice substantially in the form set out in Part I of Schedule 3 (*Requests*).

1.2 Construction

- (a) Unless a contrary indication appears, any reference in this Agreement to:
 - (i) any "**Administrative Party**", the "**Agent**", the "**Arranger**", any "**Finance Party**", any "**Lender**", any "**Obligor**" or any "**Party**" shall be construed so as to include its successors in title, permitted assigns and permitted transferees;
 - (ii) "**assets**" includes present and future properties, revenues and rights of every description;
 - (iii) a "**Finance Document**" or any other agreement or instrument is a reference to that Finance Document or other agreement or instrument as amended, novated,

⁸ Where the Borrower/Obligor is not English it may object to using a definition in a statute with which it is unfamiliar. In that situation, this option should be used where the definition is set out in detail in the agreement so that it "stands alone" without reference to a U.K. statute.

supplemented, extended or restated;

- (iv) **"including"** shall be construed as "including without limitation" (and cognate expressions shall be construed similarly);
 - (v) **"indebtedness"** includes any obligation (whether incurred as principal or as surety) for the payment or repayment of money, whether present or future, actual or contingent;
 - (vi) a Lender's **"participation"** in a Loan or Unpaid Sum includes an amount (in the currency of such Loan or Unpaid Sum) representing the fraction or portion (attributable to such Lender by virtue of the provisions of this Agreement) of the total amount of such Loan or Unpaid Sum and the Lender's rights under this Agreement in respect thereof;
 - (vii) a **"person"** includes any individual, firm, company, corporation, government, state or agency of a state or any association, trust, joint venture, consortium or partnership (whether or not having separate legal personality);
 - (viii) 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 regulatory, self-regulatory or other authority or organisation;
 - (ix) a provision of law is a reference to that provision as amended or re-enacted; and
 - (x) a time of day is a reference to [Hong Kong] time.
- (b) Section, Clause and Schedule headings are for ease of reference only.
 - (c) Unless a contrary indication appears, a term used in any other Finance Document or in any notice given under or in connection with any Finance Document has the same meaning in that Finance Document or notice as in this Agreement.
 - (d) A Default (other than an Event of Default) is "continuing" if it has not been remedied or waived and an Event of Default is "continuing" if it has not been [remedied or waived]/[waived].
 - (e) Where this Agreement specifies an amount in a given currency (the "specified currency") "or its equivalent", the "equivalent" is a reference to the amount of any other currency which, when converted into the specified currency utilising the Agent's spot rate of exchange for the purchase of the specified currency with that other currency at or about 11 a.m. on the relevant date, is equal to the relevant amount in the specified currency.

1.3 **Third party rights**

[A person who is not a Party has no right under the Contracts (Rights of Third Parties) Act 1999 to enforce or to enjoy the benefit of any term of this Agreement.]

OR

- (a) Unless expressly provided to the contrary in a Finance Document a person who

is not a Party has no right under the Contracts (Rights of Third Parties) Act 1999 (the “**Third Parties Act**”) to enforce or to enjoy the benefit of any term of this Agreement.

- (b) Notwithstanding any term of any Finance Document, the consent of any third person who is not a Party is not required to rescind or vary this Agreement at any time].

SECTION 2 THE FACILITY

2. THE FACILITY

2.1 The Facility

Subject to the terms of this Agreement, the Lenders make available to the Borrower a [dollar]/[other] ⁹ term loan facility in an aggregate amount equal to the Total Commitments.

2.2 Finance Parties' rights and obligations

- (a) The obligations of the Finance Parties under the Finance Documents are several. Failure by a Finance Party to perform its obligations under the Finance Documents does not affect the obligations of any other Party under the Finance Documents. No Finance Party is responsible for the obligations of any other Finance Party under the Finance Documents.
- (b) The rights of the Finance Parties under or in connection with the Finance Documents are separate and independent rights and any debt arising under the Finance Documents to a Finance Party from an Obligor shall be a separate and independent debt.
- (c) A Finance Party may, except as otherwise stated in the Finance Documents, separately enforce its rights under the Finance Documents.

3. PURPOSE

3.1 Purpose

The Borrower shall apply all amounts borrowed by it under the Facility towards [].

3.2 Monitoring

No Finance Party is bound to monitor or verify the application of any amount borrowed pursuant to this Agreement.

4. CONDITIONS OF UTILISATION

4.1 Initial conditions precedent

The Borrower may not deliver a Utilisation Request [unless the Agent has received all of the documents and other evidence listed in Schedule 2 (*Conditions Precedent*) in form and substance satisfactory to the Agent] / [the Agent has received all of the documents listed in and appearing to comply with the requirements of Schedule 2 (*Conditions Precedent*)]. The Agent shall notify the Borrower and the Lenders promptly upon [being so satisfied] / [receiving such documents and other evidence].

⁹ If the Facility is denominated in euro or any other currency other than dollars then amendments will need to be made to this Agreement. Guidance as to the types of changes that will need to be made if the Facility is denominated in euro can be found by reviewing the APLMA form of multiple borrower, multiple guarantor, multicurrency term and revolving facilities agreement which contains certain provisions relating to euro in case euro is an Optional Currency under that Agreement.

4.2 Further conditions precedent

The Lenders will be obliged to comply with Clause 5.4 (*Lenders' participations*) only if on the date of the Utilisation Request and on the proposed Utilisation Date:

- (a) no Default is continuing or would result from the proposed Loan [and none of the circumstances described in Clause 7.2 (*Change of control*) has occurred]¹⁰; and
- (b) the Repeating Representations to be made by each Obligor are true in all material respects.

4.3 Maximum number of Loans

- (a) The Borrower may not deliver a Utilisation Request if as a result of the proposed Utilisation [] or more Loans would be outstanding.
- (b) The Borrower may not request that a Loan be divided if, as a result of the proposed division, [] or more Loans would be outstanding.

¹⁰ Lenders may consider including this wording where change of control is a mandatory prepayment event rather than an Event of Default.

SECTION 3 UTILISATION

5. UTILISATION

5.1 Delivery of a Utilisation Request

The Borrower may utilise the Facility by delivery to the Agent of a duly completed Utilisation Request not later than the Specified Time.

5.2 Completion of a Utilisation Request

(a) Each Utilisation Request is irrevocable and will not be regarded as having been duly completed unless:

- (i) the proposed Utilisation Date is a Business Day within the Availability Period;
- (ii) the currency and amount of the Utilisation comply with Clause 5.3 (*Currency and amount*); and
- (iii) the proposed first Interest Period complies with Clause 9 (*Interest Periods*).

(b) Only one Loan may be requested in each Utilisation Request.

5.3 Currency and amount

(a) The currency specified in a Utilisation Request must be [dollars]/[other].

(b) The amount of the proposed Loan must be an amount which is not more than the Available Facility and which is a minimum of [] or, if less, the Available Facility.

5.4 Lenders' participations

(a) If the conditions set out in Clause 4 (*Conditions of Utilisation*) and 5.1 (*Delivery of a Utilisation Request*) to 5.3 (*Currency and amount*) above have been met, each Lender shall make its participation in each Loan available by the Utilisation Date through its Facility Office.

(b) The amount of each Lender's participation in each Loan will be equal to the proportion borne by its Available Commitment to the Available Facility immediately prior to making the Loan.

(c) The Agent shall notify each Lender of the amount of each Loan and the amount of its participation in that Loan by the Specified Time.

5.5 Cancellation of Available Facility

The Commitments which, at that time, are unutilised shall be immediately cancelled at 5 p.m. on the last day of the Availability Period.¹¹

¹¹ A reference to a time of day is a reference to [Hong Kong] time. This is based on the assumption that the Agent is based in Hong Kong.

SECTION 4

REPAYMENT, PREPAYMENT AND CANCELLATION

6. REPAYMENT

6.1 Repayment of Loans

[].

6.2 Reborrowing

The Borrower may not reborrow any part of the Facility which is repaid.

7. PREPAYMENT AND CANCELLATION

7.1 Illegality

If, at any time, it is or will become unlawful in any applicable jurisdiction for a Lender to perform any of its obligations as contemplated by this Agreement or to fund or maintain its participation in any Loan [or it is or will become unlawful for any Affiliate of a Lender for that Lender to do so]:

- (a) that Lender shall promptly notify the Agent upon becoming aware of that event;
- (b) upon the Agent notifying the Borrower, the Commitment of that Lender will be immediately cancelled; and
- (c) the Borrower shall repay that Lender's participation in the Loans on the last day of the Interest Period for each Loan occurring after the Agent has notified the Borrower or, if earlier, the date specified by the Lender in the notice delivered to the Agent (being no earlier than the last day of any applicable grace period permitted by law).

7.2 [Change of control]¹²

- (a) If [[] ceases to control the Borrower]/[any person or group of persons acting in concert gains control of the Borrower]:
 - (i) the Borrower shall promptly notify the Agent upon becoming aware of that event; and
 - (ii) [a Lender shall not be obliged to fund a Utilisation;]
 - (iii) if [the Majority Lenders so require] / [a Lender so requires and notifies the Agent within [] days of the Borrower notifying the Agent of the event], the Agent shall, by not less than [] days notice to the Borrower, cancel the [Total Commitments / Commitment of that Lender] and declare [the participations of that Lender in] all outstanding Loans, together with accrued interest, and all other amounts accrued under the Finance Documents immediately due and payable, whereupon the [Total Commitments / Commitment of that Lender] will be cancelled and all such outstanding amounts will become immediately due and payable.

¹² This is an optional clause: it should not be used if Clause 22.14 (*Change of Control*) is used.

- (b) For the purpose of paragraph (a) above "**control**" means [].
- (c) [For the purpose of paragraph (a) above "**acting in concert**" means [].]¹³

7.3 **Voluntary cancellation**

The Borrower may, if it gives the Agent not less than [] Business Days' (or such shorter period as the Majority Lenders may agree) prior notice, reduce the Available Facility to zero or by such amount (being a minimum amount of []) as the Borrower may specify in such notice. Any such reduction under this Clause 7.2 shall reduce the Commitments of the Lenders rateably.

7.4 **Voluntary prepayment of Loans**

- (a) The Borrower may, if it gives the Agent not less than [] Business Days' (or such shorter period as the Majority Lenders may agree) prior notice, prepay [on the last day of the Interest Period applicable thereto] the whole or any part of any Loan (but, if in part, being an amount that reduces the amount of the Loan by a minimum amount of []).
- (b) A Loan may be prepaid only after the last day of the Availability Period (or, if earlier, the day on which the Available Facility is zero).
- (c) [Any prepayment under this Clause 7.4 shall satisfy the obligations under Clause 6.1 (*Repayment of Loans*) [in inverse chronological order]/[*pro rata*] and be applied rateably among the participations of all Lenders.]

7.5 **Right of prepayment and cancellation in relation to a single Lender**

- (a) If:
 - (i) any sum payable to any Lender by an Obligor is required to be increased under paragraph (a) of Clause 12.2 (*Tax gross-up*)¹⁴; or
 - (ii) any Lender claims indemnification from the Borrower under Clause 12.3 (*Tax indemnity*) or Clause 13.1 (*Increased costs*),

the Borrower may, whilst the circumstance giving rise to the requirement for that increase or indemnification continues, give the Agent notice of cancellation of the Commitment of that Lender and its intention to procure the prepayment of that Lender's participation in the Loans or give the Agent notice of its intention to replace that Lender in accordance with paragraph (d) below.

- (b) On receipt of a notice of cancellation referred to in paragraph (a) above, the Commitment of that Lender shall immediately be reduced to zero.
- (c) On the last day of each Interest Period which ends after the Borrower has given notice of cancellation under paragraph (a) above (or, if earlier, the date specified by the Borrower in that notice), the Borrower shall prepay that Lender's participation in the relevant Loan.
- (d) The Borrower may, in the circumstances set out in paragraph (a) above, on [] Business

¹³ Depending on the terms of the transaction.

¹⁴ If a withholding (and gross-up) on account of Tax is recognised by the parties as required to be made from inception of the transaction, this paragraph may require amendment.

Days' prior notice to the Agent and that Lender, replace that Lender by requiring that Lender to (and, to the extent permitted by law, that Lender shall) transfer pursuant to Clause 23 (*Changes to the Parties*) all (and not part only) of its rights and obligations under this Agreement to a Lender or other bank, financial institution, trust, fund or other entity selected by the Borrower which confirms its willingness to assume and does assume all the obligations of the transferring Lender in accordance with Clause 23 (*Changes to the Parties*) for a purchase price in cash or other cash payment payable at the time of the transfer equal to the outstanding principal amount of such Lender's participation in the outstanding Loans and all accrued interest [(to the extent that the Agent has not given a notification under Clause 23.12 (*Pro rata interest settlement*))], Break Costs and other amounts payable in relation thereto under the Finance Documents.

- (e) The replacement of a Lender pursuant to paragraph (d) above shall be subject to the following conditions:
 - (i) the Borrower shall have no right to replace the Agent;
 - (ii) neither the Agent nor any Lender shall have any obligation to find a replacement Lender;
 - (iii) in no event shall the Lender replaced under paragraph (d) above be required to pay or surrender any of the fees received by such Lender pursuant to the Finance Documents; and
 - (iv) no Lender shall be obliged to execute a Transfer Certificate unless it is satisfied that it has completed all "know your customer" and other similar procedures that it is required (or deems desirable) to conduct in relation to the transfer to such replacement Lender.
- (f) A Lender shall perform the procedures described in paragraph (e)(iv) above as soon as reasonably practicable following delivery of a notice referred to in paragraph (d) above and shall notify the Agent and the Borrower when it is satisfied that it has completed those checks.

7.6 Restrictions

- (a) Any notice of cancellation or prepayment given by any Party under this Clause 7 shall be irrevocable and, unless a contrary indication appears in this Agreement, shall specify the date or dates upon which the relevant cancellation or prepayment is to be made and the amount of that cancellation or prepayment.
- (b) Any prepayment under this Agreement shall be made together with accrued interest on the amount prepaid and, subject to any Break Costs, without premium or penalty.
- (c) The Borrower may not reborrow any part of the Facility which is prepaid.
- (d) The Borrower shall not repay or prepay all or any part of any Loan or reduce any Commitment except at the times and in the manner expressly provided for in this Agreement.
- (e) If any Commitment is reduced in accordance with this Agreement, the amount of such

reduction may not be subsequently reinstated.

- (f) If the Agent receives a notice under this Clause 7 it shall promptly forward a copy of that notice to either the Borrower or the affected Lender, as appropriate.
- (g) If all or part of a Loan is repaid or prepaid and is not available for redrawing (other than by operation of Clause 4.2 (*Further conditions precedent*)), an amount of the Commitments (equal to the amount of the Loan which is repaid or prepaid) will be deemed to be cancelled on the date of repayment or prepayment. Any cancellation under this paragraph (g) (save in connection with any repayment or, as the case may be, prepayment under paragraph (c) of Clause 7.1 (*Illegality*) or paragraph (c) of Clause 7.5 (*Right of prepayment and cancellation in relation to a single Lender*)) shall reduce the Commitments of the Lenders rateably.

7.7 [Mandatory Prepayment

[]]

SECTION 5

COSTS OF UTILISATION

8. INTEREST

8.1 Calculation of interest

The rate of interest on each Loan for each Interest Period is the percentage rate per annum which is the aggregate of the applicable:

- (a) Margin; and
- (b) [LIBOR].

8.2 Payment of interest

The Borrower shall pay accrued interest on each Loan on the last day of each Interest Period applicable to that Loan (and, if the Interest Period is longer than six Months, on the dates falling at six monthly intervals after the first day of the Interest Period).

8.3 Default interest

- (a) If an Obligor fails to pay any amount payable by it under a Finance Document on its due date, interest shall accrue on the Unpaid Sum from the due date to the date of actual payment (both before and after judgment) at a rate which is, subject to paragraph (b) below, [] per cent. higher than the rate which would have been payable if the Unpaid Sum had, during the period of non-payment, constituted a Loan in the currency of the Unpaid Sum for successive Interest Periods, each of a duration selected by the Agent (acting reasonably). Any interest accruing under this Clause 8.3 shall be immediately payable by the Obligor on demand by the Agent.
- (b) If any Unpaid Sum consists of all or part of a Loan which became due on a day which was not the last day of an Interest Period relating to that Loan:
 - (i) the first Interest Period for that Unpaid Sum shall have a duration equal to the unexpired portion of the current Interest Period relating to that Loan; and
 - (ii) the rate of interest applying to the Unpaid Sum during that first Interest Period shall be [] per cent. higher than the rate which would have applied if the Unpaid Sum had not become due.
- (c) Default interest (if unpaid) arising on an Unpaid Sum will be compounded with the Unpaid Sum at the end of each Interest Period applicable to that Unpaid Sum but will remain immediately due and payable.

8.4 Notification of rates of interest

The Agent shall promptly notify the Lenders and the Borrower of the determination of a rate of interest under this Agreement.

9. INTEREST PERIODS

9.1 Selection of Interest Periods

- (a) The Borrower may select an Interest Period for a Loan in the Utilisation Request for that Loan or (if the Loan has already been borrowed) in a Selection Notice.

- (b) Each Selection Notice for a Loan is irrevocable and must be delivered to the Agent by the Borrower not later than the Specified Time.
- (c) If the Borrower fails to deliver a Selection Notice to the Agent in accordance with paragraph (b) above, the relevant Interest Period will, subject to Clause 9.2 (*[Changes to Interest Periods]*), be [one] Month.
- (d) Subject to this Clause 9, the Borrower may select an Interest Period of [] or [] Months or any other period agreed between the Borrower and the Agent (acting on the instructions of all the Lenders). [In addition the Borrower may select an Interest Period of a period of less than [one] Month, if necessary to ensure that there are sufficient Loans (with an aggregate amount equal to or greater than the Repayment Instalment) which have an Interest Period ending on a Repayment Date for the Borrower to make the Repayment Instalment due on that date].
- (e) An Interest Period for a Loan shall not extend beyond the Final Repayment Date.
- (f) Each Interest Period for a Loan shall start on the Utilisation Date or (if a Loan has already been made) on the last day of the preceding Interest Period of such Loan.

9.2 **[Changes to Interest Periods]**

- (a) Prior to determining the interest rate for a Loan, the Agent may shorten an Interest Period for any Loan to ensure there are sufficient Loans (with an aggregate amount equal to or greater than the Repayment Instalment) which have an Interest Period ending on a Repayment Date for the Borrower to make the Repayment Instalment due on that date.
- (b) If the Agent makes any change to an Interest Period referred to in this Clause 9.2, it shall promptly notify the Borrower and the Lenders.]

9.3 **Non-Business Days**

If an Interest Period would otherwise end on a day which is not a Business Day, that Interest Period will instead end on the next Business Day in that calendar month (if there is one) or the preceding Business Day (if there is not).

9.4 **Consolidation and division of Loans**

- (a) Subject to paragraph (b) below, if the Interest Periods of two or more Loans end on the same date, those Loans will, unless the Borrower specifies to the contrary in the Selection Notice for the next Interest Period, be consolidated into, and treated as, a single Loan on the last day of the Interest Period.
- (b) Subject to Clause 4.3 (*Maximum number of Loans*) and Clause 5.3 (*Currency and amount*), if the Borrower requests in a Selection Notice that a Loan be divided into two or more Loans, that Loan will, on the last day of its Interest Period, be so divided into the amounts specified in that Selection Notice, being an aggregate amount equal to the amount of the Loan immediately before its division.

10. **CHANGES TO THE CALCULATION OF INTEREST**

10.1 **Absence of quotations**

Subject to Clause 10.2 (*Market disruption*), if [LIBOR] is to be determined by reference to the Reference Banks but a Reference Bank does not supply a quotation by noon on the

Quotation Day, the applicable [LIBOR] shall be determined on the basis of the quotations of the remaining Reference Banks.

10.2 **Market disruption**

- (a) Subject to any alternative basis agreed and consented to as contemplated by paragraphs (a) and (b) of Clause 10.3 (*Alternative basis of interest or funding*), if a Market Disruption Event occurs in relation to a Loan for any Interest Period, then the rate of interest on each Lender's participation in that Loan for that Interest Period shall be the percentage rate per annum which is the sum of:
- (i) the Margin; and
 - (ii) the percentage rate per annum notified to the Agent by that Lender, as soon as practicable and in any event not later than five Business Days before interest is due to be paid in respect of that Interest Period (or such later date as may be acceptable to the Agent), as the cost to that Lender of funding its participation in that Loan from whatever source(s) it may reasonably select.
- (b) In relation to a Market Disruption Event under paragraph (c)(ii) below, if the percentage rate per annum notified by a Lender pursuant to paragraph (a)(ii) above shall be less than [LIBOR] or if a Lender shall fail to notify the Agent of any such percentage rate per annum, the cost to that Lender of funding its participation in the relevant Loan for the relevant Interest Period shall be deemed, for the purposes of paragraph (a) above, to be [LIBOR].
- (c) In this Agreement "**Market Disruption Event**" means:
- (i) at or about noon on the Quotation Day for the relevant Interest Period the Screen Rate is not available and none or only one of the Reference Banks supplies a rate to the Agent to determine [LIBOR] for [dollars]/[other] for the relevant Interest Period;¹⁵ or
 - (ii) at 5 p.m. on the Business Day immediately following the Quotation Day for the relevant Interest Period, the Agent receives notifications from a Lender or Lenders (whose participations in the relevant Loan exceed [] per cent. of that Loan) that the cost to it of obtaining matching deposits in the Relevant Interbank Market would be in excess of [LIBOR].
- (d) If a Market Disruption Event shall occur, the Agent shall promptly notify the Lenders and the Borrower thereof.
- #### 10.3 **Alternative basis of interest or funding**
- (a) If a Market Disruption Event occurs and the Agent or the Borrower so requires, the Agent and the Borrower shall enter into negotiations (for a period of not more than thirty days) with a view to agreeing a substitute basis for determining the rate of interest.

¹⁵ The definition of LIBOR contains wording for a "LIBOR floor" if the Screen Rate or Reference Bank Rate is below zero. If banks require the market disruption provisions to apply if the Screen Rate or Reference Bank Rate is zero or negative then amendments will need to be made to the definition of Market Disruption Event and to certain other provisions of this Agreement.

- (b) Any alternative basis agreed pursuant to paragraph (a) above shall, with the prior consent of all the Lenders and the Borrower, be binding on all Parties.
- (c) For the avoidance of doubt, in the event that no substitute basis is agreed at the end of the thirty day period, the rate of interest shall continue to be determined in accordance with the terms of this Agreement.

10.4 **Break Costs**

- (a) The Borrower shall, within three Business Days of demand by a Finance Party, pay to that Finance Party its Break Costs attributable to all or any part of a Loan or Unpaid Sum being paid by the Borrower on a day other than the last day of an Interest Period for that Loan or Unpaid Sum.
- (b) Each Lender shall, as soon as reasonably practicable after a demand by the Agent, provide a certificate confirming the amount of its Break Costs for any Interest Period in which they accrue.

11. **FEES**

11.1 **Commitment fee**

- (a) The Borrower shall pay to the Agent for the account of each Lender a fee computed and accruing on a daily basis, at the rate of [] per cent. per annum on that Lender's Available Commitment at close of business (in the principal financial centre of the country of the relevant currency) on each day of the Availability Period (or, if any such day shall not be a Business Day, at such close of business on the immediately preceding Business Day).
- (b) The accrued commitment fee is payable:
 - (i) on the last day of each successive period of three Months which ends during the Availability Period;
 - (ii) on the last day of the Availability Period; and
 - (iii) if a Lender's Commitment is reduced to zero before the last day of the Availability Period, on the day on which such reduction to zero becomes effective.

11.2 **Arrangement fee**

The Borrower shall pay to the Arranger an arrangement fee in the amount and at the times agreed in a Fee Letter.

11.3 **Agency fee**

The Borrower shall pay to the Agent (for its own account) an agency fee in the amount and at the times agreed in a Fee Letter.

SECTION 6

ADDITIONAL PAYMENT OBLIGATIONS

12. TAX GROSS-UP AND INDEMNITIES

12.1 Tax definitions

(a) In this Clause 12:

"Tax Credit" means a credit against, relief or remission for, or repayment of any Tax.

"Tax Deduction" means a deduction or withholding for or on account of Tax from a payment under a Finance Document.

"Tax Payment" means an increased payment made by an Obligor to a Finance Party under Clause 12.2 (*Tax gross-up*) or a payment under Clause 12.3 (*Tax indemnity*).

- (b) Unless a contrary indication appears, in this Clause 12 a reference to **"determines"** or **"determined"** means a determination made in the absolute discretion of the person making the determination.

12.2 Tax gross-up¹⁶

- (a) All payments to be made by an Obligor to any Finance Party under the Finance Documents shall be made free and clear of and without any Tax Deduction unless such Obligor is required to make a Tax Deduction, in which case the sum payable by such Obligor (in respect of which such Tax Deduction is required to be made) shall be increased to the extent necessary to ensure that such Finance Party receives a sum net of any deduction or withholding equal to the sum which it would have received had no such Tax Deduction been made or required to be made.
- (b) The Borrower shall promptly upon becoming aware that an Obligor must make a Tax Deduction (or that there is any change in the rate or the basis of a Tax Deduction) notify the Agent accordingly. Similarly, a Lender shall notify the Agent on becoming so aware in respect of a payment payable to that Lender. If the Agent receives such notification from a Lender it shall notify the Borrower and that Obligor.
- (c) If an Obligor is required to make a Tax Deduction, that Obligor shall make that Tax Deduction and any payment required in connection with that Tax Deduction within the time allowed and in the minimum amount required by law.
- (d) Within thirty days of making either a Tax Deduction or any payment required in connection with that Tax Deduction, the Obligor making that Tax Deduction shall deliver to the Agent for the Finance Party entitled to the payment evidence reasonably satisfactory to that Finance Party that the Tax Deduction has been made or (as

¹⁶ Many financial institutions have expressed concern about the Foreign Account Tax Compliance Act ("FATCA") – US legislation which imposes US compliance and withholding taxes on banks and financial institutions worldwide, regardless of their connection with the US. For further information on the impact of FATCA, please see the briefing notes available on the APLMA web site from http://www.aplma.com/Docs_Asian.asp.

APLMA members should also note that the LMA has issued riders to its documentation in respect of FATCA. These riders are also available on the APLMA web site and are intended as a guide rather than a template – in particular, specific US tax advice should always be obtained on US tax matters.

applicable) any appropriate payment paid to the relevant taxing authority.

12.3 **Tax indemnity**

- (a) Without prejudice to Clause 12.2 (*Tax gross-up*), if any Finance Party is required to make any payment of or on account of Tax on or in relation to any sum received or receivable under the Finance Documents (including any sum deemed for purposes of Tax to be received or receivable by such Finance Party whether or not actually received or receivable) or if any liability in respect of any such payment is asserted, imposed, levied or assessed against any Finance Party, the Borrower shall, within three Business Days of demand of the Agent, promptly indemnify the Finance Party which suffers a loss or liability as a result against such payment or liability, together with any interest, penalties, costs and expenses payable or incurred in connection therewith, provided that this Clause 12.3 shall not apply to:
- (i) any Tax imposed on and calculated by reference to the net income actually received or receivable by such Finance Party (but, for the avoidance of doubt, not including any sum deemed for purposes of Tax to be received or receivable by such Finance Party but not actually receivable) by the jurisdiction in which such Finance Party is incorporated; or
 - (ii) any Tax imposed on and calculated by reference to the net income of the Facility Office of such Finance Party actually received or receivable by such Finance Party (but, for the avoidance of doubt, not including any sum deemed for purposes of Tax to be received or receivable by such Finance Party but not actually receivable) by the jurisdiction in which its Facility Office is located.
- (b) A Finance Party intending to make a claim under paragraph (a) shall notify the Agent of the event giving rise to the claim, whereupon the Agent shall notify the Borrower thereof.
- (c) A Finance Party shall, on receiving a payment from an Obligor under this Clause 12.3, notify the Agent.

12.4 **Tax credit**

If an Obligor makes a Tax Payment and the relevant Finance Party determines that:

- (a) a Tax Credit is attributable to an increased payment of which that Tax Payment forms part, to that Tax Payment or to a Tax Deduction in consequence of which that Tax Payment was required; and
- (b) that Finance Party has obtained and utilised that Tax Credit,

the Finance Party shall pay an amount to the Obligor which that Finance Party determines will leave it (after that payment) in the same after-Tax position as it would have been in had the Tax Payment not been required to be made by the Obligor.

12.5 **Stamp taxes**

The Borrower shall:

- (a) pay all stamp duty, registration and other similar Taxes payable in respect of

any Finance Document, and

- (b) within three Business Days of demand, indemnify each Finance Party against any cost, loss or liability that Finance Party incurs in relation to any stamp duty, registration or other similar Tax paid or payable in respect of any Finance Document.

12.6 Indirect tax

- (a) All amounts set out or expressed in a Finance Document to be payable by any Party to a Finance Party shall be deemed to be exclusive of any Indirect Tax. If any Indirect Tax is chargeable on any supply made by any Finance Party to any Party in connection with a Finance Document, that Party shall pay to the Finance Party (in addition to and at the same time as paying the consideration) an amount equal to the amount of the Indirect Tax.
- (b) Where a Finance Document requires any Party to reimburse a Finance Party for any costs or expenses, that Party shall also at the same time pay and indemnify the Finance Party against all Indirect Tax incurred by that Finance Party in respect of the costs or expenses to the extent the Finance Party reasonably determines that it is not entitled to credit or repayment in respect of the Indirect Tax.

13. INCREASED COSTS

13.1 Increased costs¹⁷

- (a) Subject to Clause 13.3 (*Exceptions*) the Borrower shall, within three Business Days of a demand by the Agent, pay for the account of a Finance Party the amount of any Increased Costs incurred by that Finance Party or any of its Affiliates as a result of (i) the introduction of or any change in (or in the interpretation, administration or application of) any law or regulation or (ii) compliance with any law or regulation made after the date of this Agreement. The terms "law" and "regulation" in this paragraph (a) shall include any law or regulation concerning capital adequacy, prudential limits, liquidity, reserve assets or Tax.
- (b) In this Agreement "**Increased Costs**" means:
 - (i) a reduction in the rate of return from the Facility or on a Finance Party's (or its Affiliate's) overall capital (including as a result of any reduction in the rate of return on capital brought about by more capital being required to be allocated

¹⁷ The publication by the Basel Committee on Banking Supervision of its proposed new standards for bank capital and liquidity requirements (labelled "**Basel III**") has brought the increased costs clause into sharp focus, especially in light of the supra-national nature of those proposals.

The form of increased costs clause in this Agreement is drafted in deliberately wide terms in an attempt to cover all circumstances which could increase a Lender's costs as a result of a change in law or regulation. The balance of views in the market is that costs arising from Basel III are likely to fall within the scope of the increased costs clause. However, if the commercial agreement is that Basel III costs are to fall within the scope of the increased costs clause, users should note that some market participants consider that it is helpful to supplement the clause to expressly specify this.

For further information on the impact of Basel III, please see the article titled "*Introduction to Basel III and impact on Asia-Pacific*" in Issue 42 (Autumn 2011) of the APLMA News (this is available at <http://www.aplma.com/Newsletters.asp>).

by such Finance Party);

- (ii) an additional or increased cost; or
- (iii) a reduction of any amount due and payable under any Finance Document,

which is incurred or suffered by a Finance Party or any of its Affiliates to the extent that it is attributable to the undertaking, funding or performance by such Finance Party of any of its obligations under any Finance Document or any participation of such Finance Party in any Loan or Unpaid Sum.

13.2 Increased cost claims

- (a) A Finance Party intending to make a claim pursuant to Clause 13.1 (*Increased costs*) shall notify the Agent of the event giving rise to the claim, following which the Agent shall promptly notify the Borrower.
- (b) Each Finance Party shall, as soon as practicable after a demand by the Agent, provide a certificate confirming the amount of its Increased Costs.

13.3 Exceptions¹⁸

- (a) Clause 13.1 (*Increased costs*) does not apply to the extent any Increased Cost is:
 - (i) attributable to a Tax Deduction required by law to be made by an Obligor;

¹⁸ Basel II was finalised in 2004 and implemented in Europe during 2007 and so it may not be necessary to include a Basel II carve out from the increased costs clause where the syndicate consists of European Lenders. If it is agreed by the parties to exclude Basel II from the increased costs clause, and for example this may be relevant where there are US Lenders in the syndicate as Basel II has not been fully implemented in the US, then users should note that elements of the Basel III papers amend the Basel II paper and so care needs to be taken with the drafting of the carve out. The following provision may be inserted at the end of this paragraph (a) of Clause 13.3 (*Exceptions*) to address this point:

- "(d) attributable to the implementation or application of or compliance with the "International Convergence of Capital Measurement and Capital Standards, a Revised Framework" published by the Basel Committee on Banking Supervision in June 2004 in the form existing on the date of this Agreement (but excluding any amendment arising out of Basel III) ("**Basel II**") or any other law or regulation which implements Basel II (whether such implementation, application or compliance is by a government, regulator, Finance Party or any of its Affiliates)."

The following definition should be added to paragraph (b) of Clause 13.1 (*Increased costs*):

""**Basel III**" means:

- (a) the agreements on capital requirements, a leverage ratio and liquidity standards contained in "Basel III: A global regulatory framework for more resilient banks and banking systems", "Basel III: International framework for liquidity risk measurement, standards and monitoring" and "Guidance for national authorities operating the countercyclical capital buffer" published by the Basel Committee on Banking Supervision in December 2010, each as amended, supplemented or restated;
- (b) the rules for global systemically important banks contained in "Global systemically important banks: assessment methodology and the additional loss absorbency requirement – Rules text" published by the Basel Committee on Banking Supervision in November 2011, as amended, supplemented or restated; and
- (c) any further guidance or standards published by the Basel Committee on Banking Supervision relating to "Basel III".

Users should note that this definition of Basel III is deliberately wide and includes future Basel III publications. It is, therefore, unlikely to be suitable to describe Basel III in the context of **excluding** Basel III costs from the scope of the increased costs clause generally.

- (ii) compensated for by Clause 12.3 (*Tax indemnity*) (or would have been compensated for under Clause 12.3 (*Tax indemnity*) but was not so compensated solely because the exclusion in paragraph (a) of Clause 12.3 (*Tax indemnity*) applied); or
 - (iii) attributable to the wilful breach by the relevant Finance Party or its Affiliates of any law or regulation.
- (b) In this Clause 13.3, a reference to a "**Tax Deduction**" has the same meaning given to the term in Clause 12.1 (*Tax definitions*).

14. MITIGATION BY THE LENDERS

14.1 Mitigation

- (a) Each Finance Party shall, in consultation with the Borrower, take all reasonable steps to mitigate any circumstances which arise and which would result in any amount becoming payable under or pursuant to, or cancelled pursuant to, any of Clause 7.1 (*Illegality*), Clause 12 (*Tax gross-up and indemnities*) or Clause 13 (*Increased costs*), including:
- (i) [providing such information as the Borrower may reasonably request in order to permit the Borrower to determine its entitlement to claim any exemption or other relief (whether pursuant to a double taxation treaty or otherwise) from any obligation to make a Tax Deduction; and]
 - (ii) in relation to any circumstances which arise following the date of this Agreement, transferring its rights and obligations under the Finance Documents to another Affiliate or Facility Office.
- (b) Paragraph (a) above does not in any way limit the obligations of any Obligor under the Finance Documents.

14.2 Limitation of liability

- (a) The Borrower shall promptly indemnify each Finance Party for all costs and expenses reasonably incurred by that Finance Party as a result of steps taken by it under Clause 14.1 (*Mitigation*).
- (b) A Finance Party is not obliged to take any steps under Clause 14.1 (*Mitigation*) if, in the opinion of that Finance Party (acting reasonably), to do so might be prejudicial to it.

14.3 Conduct of business by the Finance Parties

No provision of this Agreement will:

- (a) interfere with the right of any Finance Party to arrange its affairs (tax or otherwise) in whatever manner it thinks fit;
- (b) oblige any Finance Party to investigate or claim any credit, relief, remission or repayment available to it or the extent, order and manner of any claim; or
- (c) oblige any Finance Party to disclose any information relating to its affairs (tax or otherwise) or any computations in respect of Tax.

15. OTHER INDEMNITIES

15.1 Currency indemnity

- (a) If any sum due from an Obligor under the Finance Documents (a "**Sum**"), or any order, judgment or award given or made in relation to a Sum, has to be converted from the currency (the "**First Currency**") in which that Sum is payable into another currency (the "**Second Currency**") for the purpose of:

- (i) making or filing a claim or proof against that Obligor; or
- (ii) obtaining or enforcing an order, judgment or award in relation to any litigation or arbitration proceedings,

that Obligor shall as an independent obligation, within three Business Days of demand, indemnify each Finance Party to whom that Sum is due against any cost, loss or liability arising out of or as a result of the conversion including any discrepancy between (A) the rate of exchange used to convert that Sum from the First Currency into the Second Currency and (B) the rate or rates of exchange available to that person at the time of its receipt of that Sum.

- (b) Each Obligor waives any right it may have in any jurisdiction to pay any amount under the Finance Documents in a currency or currency unit other than that in which it is expressed to be payable.

15.2 Other indemnities

The Borrower shall, within three Business Days of demand, indemnify each Finance Party against any cost, loss or liability incurred by that Finance Party as a result of:

- (a) the occurrence of any Event of Default;
- (b) the [Information Memorandum or any other] information produced or approved by any Obligor being or being alleged to be misleading and/or deceptive in any respect;
- (c) any enquiry, investigation, subpoena (or similar order) or litigation with respect to any Obligor or with respect to the transactions contemplated or financed under this Agreement;
- (d) a failure by an Obligor to pay any amount due under a Finance Document on its due date or in the relevant currency, including without limitation, any cost, loss or liability arising as a result of Clause 26 (*Sharing among the Finance Parties*);
- (e) funding, or making arrangements to fund, its participation in a Loan requested by the Borrower in a Utilisation Request but not made by reason of the operation of any one or more of the provisions of this Agreement (other than by reason of default or negligence by that Finance Party alone); or
- (f) a Loan (or part of a Loan) not being prepaid in accordance with a notice of prepayment given by the Borrower.

15.3 Indemnity to the Agent

The Borrower 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.

16. COSTS AND EXPENSES

16.1 Transaction expenses

The Borrower shall, within three Business Days of demand, pay the Administrative Parties the amount of all costs and expenses (including legal fees) reasonably incurred by any of them in connection with the negotiation, preparation, printing, execution and syndication of:

- (a) this Agreement and any other documents referred to in this Agreement; and
- (b) any other Finance Documents executed after the date of this Agreement.

16.2 Amendment costs

If [(a)] an Obligor requests an amendment, waiver or consent [or (b) an amendment is required pursuant to Clause 27.9 (*Change of currency*)], the Borrower shall, within three Business Days of demand, reimburse the Agent for the amount of all costs and expenses (including legal fees) reasonably incurred by the Agent in responding to, evaluating, negotiating or complying with that request or requirement.

16.3 Enforcement costs

The Borrower shall, within three Business Days of demand, pay to each Finance Party the amount of all costs and expenses (including legal fees) incurred by that Finance Party in connection with the enforcement of, or the preservation of any rights under, any Finance Document.

SECTION 7 GUARANTEE

17. GUARANTEE AND INDEMNITY

17.1 Guarantee and indemnity

The Guarantor irrevocably and unconditionally:

- (a) guarantees to each Finance Party punctual performance by the Borrower of all the Borrower's obligations under the Finance Documents;
- (b) undertakes with each Finance Party that whenever the Borrower does not pay any amount when due under or in connection with any Finance Document, that Guarantor shall immediately on demand pay that amount as if it was the principal obligor; and
- (c) agrees with each Finance Party that if any obligation guaranteed by it is or becomes unenforceable, invalid or illegal, it will, as an independent and primary obligation, indemnify that Finance Party immediately on demand against any cost, loss or liability it incurs as a result of a Borrower not paying any amount which would, but for such unenforceability, invalidity or illegality, have been payable by it under any Finance Document on the date when it would have been due. The amount payable by a Guarantor under this indemnity will not exceed the amount it would have had to pay under this Clause 17 if the amount claimed had been recoverable on the basis of a guarantee.

17.2 Continuing guarantee

This guarantee is a continuing guarantee and will extend to the ultimate balance of sums payable by the Borrower under the Finance Documents, regardless of any intermediate payment or discharge in whole or in part.

17.3 Reinstatement

If any discharge, release or arrangement (whether in respect of the obligations of any Obligor or any security for those obligations or otherwise) is made by a Finance Party in whole or in part on the basis of any payment, security or other disposition which is avoided or must be restored in insolvency, liquidation, administration or otherwise, without limitation, then the liability of each Guarantor under this Clause 17 will continue or be reinstated as if the discharge, release or arrangement had not occurred.

17.4 Waiver of defences

The obligations of the Guarantor under this Clause 17 will not be affected by an act, omission, matter or thing which, but for this Clause 17, would reduce, release or prejudice any of its obligations under this Clause 17 (without limitation and whether or not known to it or any Finance Party) including:

- (a) any time, waiver or consent granted to, or composition with, any Obligor or other person;
- (b) the release of the Borrower or any other person under the terms of any composition or arrangement with any creditor of any member of the Group;

- (c) the taking, variation, compromise, exchange, renewal or release of, or refusal or neglect to perfect, execute, take up or enforce, any rights against, or security over assets of, the Borrower or other person or any non-presentation or non-observance of any formality or other requirement in respect of any instrument or any failure to realise the full value of any security;
- (d) any incapacity or lack of power, authority or legal personality of or dissolution or change in the members or status of the Borrower or any other person;
- (e) any amendment, novation, supplement, extension, restatement (however fundamental and whether or not more onerous) or replacement of any Finance Document or any other document or security including without limitation any change in the purpose of, any extension of or any increase in any facility or the addition of any new facility under any Finance Document or other document or security;
- (f) any unenforceability, illegality or invalidity of any obligation of any person under any Finance Document or any other document or security;
- (g) any insolvency or similar proceedings; or
- (h) this Agreement or any other Finance Document not being executed by or binding upon any other party.

17.5 Immediate recourse

The Guarantor waives any right it may have of first requiring any Finance Party (or any trustee or agent on its behalf) to proceed against or enforce any other rights or security or claim payment from any person before claiming from the Guarantor under this Clause 17. This waiver applies irrespective of any law or any provision of a Finance Document to the contrary.

17.6 Appropriations

Until all amounts which may be or become payable by the Borrower under or in connection with the Finance Documents have been irrevocably paid in full, each Finance Party (or any trustee or agent on its behalf) may:

- (a) refrain from applying or enforcing any other moneys, security or rights held or received by that Finance Party (or any trustee or agent on its behalf) in respect of those amounts, or apply and enforce the same in such manner and order as it sees fit (whether against those amounts or otherwise) and the Guarantor shall not be entitled to the benefit of the same; and
- (b) hold in an interest-bearing suspense account any moneys received from the Guarantor or on account of the Guarantor's liability under this Clause 17.

17.7 Deferral of Guarantor's rights

Until all amounts which may be or become payable by the Borrower under or in connection with the Finance Documents have been irrevocably paid in full and unless the Agent otherwise directs, the Guarantor will not exercise or otherwise enjoy the benefit of

any right which it may have by reason of performance by it of its obligations under the Finance Documents or by reason of any amount being payable, or liability arising, under this Clause 17:

- (a) to be indemnified by the Borrower;
- (b) to claim any contribution from any other guarantor of or provider of security for the Borrower's obligations under the Finance Documents;
- (c) to take the benefit (in whole or in part and whether by way of subrogation or otherwise) of any rights of the Finance Parties under the Finance Documents or of any other guarantee or security taken pursuant to, or in connection with, the Finance Documents by any Finance Party;
- (d) to bring legal or other proceedings for an order requiring any Obligor to make any payment, or perform any obligation, in respect of which the Guarantor has given a guarantee, undertaking or indemnity under Clause 17.1 (*Guarantee and Indemnity*);
- (e) to exercise any right of set-off against any Obligor; and/or
- (f) to claim or prove as a creditor of any Obligor in competition with any Finance Party.

If the Guarantor shall receive any benefit, payment or distribution in relation to any such right it shall hold that benefit, payment or distribution (or so much of it as may be necessary to enable all amounts which may be or become payable to the Finance Parties by the Obligors under or in connection with the Finance Documents to be paid in full) on trust for the Finance Parties, and shall promptly pay or transfer the same to the Agent or as the Agent may direct for application in accordance with Clause 27 (*Payment mechanics*).

17.8 **Additional security**

This guarantee is in addition to and is not in any way prejudiced by any other guarantee or security now or subsequently held by any Finance Party.

SECTION 8

REPRESENTATIONS, UNDERTAKINGS AND EVENTS OF DEFAULT

18. REPRESENTATIONS

Each Obligor makes the representations and warranties set out in this Clause 18 to each Finance Party on the date of this Agreement.

18.1 Status

- (a) It is a corporation, duly incorporated and validly existing under the laws, in the case of the Borrower, of [*insert jurisdiction of incorporation*] and, in the case of the Guarantor, of [*insert jurisdiction of incorporation*].
- (b) It and each of its Subsidiaries has the power to own its assets and carry on its business as it is being conducted.

18.2 Binding obligations

The obligations expressed to be assumed by it in each Finance Document are, subject to any general principles of law limiting its obligations which are specifically referred to in any legal opinion delivered in accordance with Clause 4 (*Conditions of Utilisation*), legal, valid, binding and enforceable obligations.

18.3 Non-conflict with other obligations

The entry into and performance by it of, and the transactions contemplated by, the Finance Documents do not and will not conflict with:

- (a) any law or regulation applicable to it;
- (b) its [and each of its Subsidiaries'] constitutional documents; or
- (c) any agreement or instrument binding upon it [or any of its Subsidiaries] or any of its [or any of its Subsidiaries'] assets.

18.4 Power and authority

It has the power to enter into, perform and deliver, and has taken all necessary action to authorise its entry into, performance and delivery of, the Finance Documents to which it is a party and the transactions contemplated by those Finance Documents.

18.5 Validity and admissibility in evidence

All Authorisations required or desirable:

- (a) to enable it lawfully to enter into, exercise its rights and comply with its obligations in the Finance Documents to which it is a party;
- (b) to make the Finance Documents to which it is a party admissible in evidence in its jurisdiction of incorporation; and
- (c) for it [and its Subsidiaries] to carry on [their]/[its] business, and which are material,

have been obtained or effected and are in full force and effect.

18.6 Governing law and enforcement

- (a) The choice of English law as the governing law of the Finance Documents will be recognised and enforced in its jurisdiction of incorporation.
- (b) Any judgment obtained in England in relation to a Finance Document will be recognised and enforced in its jurisdiction of incorporation.

18.7 Deduction of Tax

It is not required under the law applicable where it is incorporated or resident or at the address specified in this Agreement to make any deduction for or on account of Tax from any payment it may make under any Finance Document.

18.8 No filing or stamp taxes

Under the law of its jurisdiction of incorporation it is not necessary that the Finance Documents be filed, recorded or enrolled with any court or other authority in that jurisdiction or that any stamp, registration or similar tax be paid on or in relation to the Finance Documents or the transactions contemplated by the Finance Documents.

18.9 No default

- (a) No Event of Default is continuing or might reasonably be expected to result from the making of any Utilisation.
- (b) No other event or circumstance is outstanding which constitutes a default under any other agreement or instrument which is binding on it [or any of its Subsidiaries] or to which its [(or any of its Subsidiaries')] assets are subject which might have a Material Adverse Effect.

18.10 No misleading information

- (a) [Any factual information contained in or provided by any member of the Group for the purposes of [the Information Memorandum][*specify other relevant material*] was true and accurate in all material respects as at the date it was provided or as at the date (if any) at which it is stated.
- (b) Any financial projections contained in [the Information Memorandum][*specify other relevant material*] have been prepared on the basis of recent historical information and on the basis of reasonable assumptions.
- (c) Nothing has occurred or been omitted from [the Information Memorandum][*specify other relevant material*] and no information has been given or withheld that results in the information contained in [the Information Memorandum][*specify other relevant material*] being untrue or misleading in any material respect.¹⁹
- (d) All information [(other than [the Information Memorandum][*specify other relevant material*])]²⁰ supplied by any member of the Group was true, complete and accurate in all material respects as at the date it was given and was not misleading in any respect.

¹⁹ Delete if there is no Information Memorandum or other relevant material.

²⁰ Delete if there is no Information Memorandum or other relevant material.

18.11 Financial statements

- (a) Its financial statements most recently supplied to the Agent (which, at the date of this Agreement, are the Original Financial Statements) were prepared in accordance with GAAP consistently applied save to the extent expressly disclosed in such financial statements.
- (b) Its financial statements most recently supplied to the Agent (which, at the date of this Agreement, are the Original Financial Statements) give a true and fair view and represent its financial condition and operations (consolidated in the case of the [Borrower/Guarantor]) during the relevant financial year save to the extent expressly disclosed in such financial statements.
- (c) There has been no material adverse change in its business or financial condition (or the business or consolidated financial condition of the Group, in the case of the [Borrower/Guarantor]) since [].

18.12 Pari passu ranking

Its payment obligations under the Finance Documents rank at least *pari passu* with the claims of all of its other unsecured and unsubordinated creditors, except for obligations mandatorily preferred by law applying to companies generally.

18.13 No proceedings pending or threatened

No litigation, arbitration or administrative proceedings of or before any court, arbitral body or agency which, if adversely determined, might reasonably be expected to have a Material Adverse Effect have (to the best of its knowledge and belief) been started or threatened against it [or any of its Subsidiaries].

18.14 Authorised Signatures

Any person specified as its authorised signatory under Schedule 2 (*Conditions Precedent*) or paragraph (e) of Clause 19.4 (*Information: miscellaneous*) is authorised to sign Utilisation Requests (in the case of the Borrower only) and other notices on its behalf.

18.15 Repetition

The Repeating Representations are deemed to be made by each Obligor by reference to the facts and circumstances then existing on the date of each Utilisation Request and the first day of each Interest Period.

19. INFORMATION UNDERTAKINGS

The undertakings in this Clause 19 remain in force from the date of this Agreement for so long as any amount is outstanding under the Finance Documents or any Commitment is in force.

19.1 Financial statements

The Borrower shall supply to the Agent in sufficient copies for all the Lenders:

- (a) as soon as the same become available, but in any event within [] days after the end of each of its financial years:
 - (i) its audited [consolidated] financial statements for that financial year; and

- (ii) the audited [consolidated] financial statements of the Guarantor for that financial year; and
- (b) as soon as the same become available, but in any event within [] days after the end of [each] / [the first] half of each of its financial years:
 - (i) its [consolidated] financial statements for that financial half year]; and
 - (ii) the [consolidated] financial statements of the Guarantor for that financial half year].

19.2 Compliance Certificate

- (a) The Borrower shall supply to the Agent, with each set of financial statements delivered pursuant to paragraph (a)(i) or (b)(i) of Clause 19.1 (*Financial statements*), a Compliance Certificate setting out (in reasonable detail) computations as to compliance with Clause 20 (*Financial covenants*) as at the date as at which those financial statements were drawn up.
- (b) [Each Compliance Certificate delivered pursuant to paragraph (a) above shall be [signed by the Borrower's auditors]/[reported on by the Borrower's auditors in the form agreed by the Borrower and all the Lenders before the date of this Agreement].]

19.3 Requirements as to financial statements

- (a) Each set of financial statements delivered by the Borrower pursuant to Clause 19.1 (*Financial statements*) shall be certified by a director of the Borrower as fairly representing its financial condition as at the date as at which those financial statements were drawn up.
- (b) [The Borrower shall procure that each set of financial statements delivered pursuant to Clause 19.1 (*Financial statements*) is prepared using GAAP.]
- (c) [The Borrower shall procure that each set of financial statements of an Obligor delivered pursuant to Clause 19.1 (*Financial statements*) is prepared using GAAP, accounting practices and financial reference periods consistent with those applied in the preparation of the Original Financial Statements for that Obligor unless, in relation to any set of financial statements, it notifies the Agent that there has been a change in GAAP, the accounting practices or reference periods and its auditors (or, if appropriate, the auditors of the Obligor) deliver to the Agent:
 - (i) a description of any change necessary for those financial statements to reflect the GAAP, accounting practices and reference periods upon which that Obligor's Original Financial Statements were prepared; and
 - (ii) sufficient information, in form and substance as may be reasonably required by the Agent, to enable the Lenders to determine whether Clause 20 (*Financial covenants*) has been complied with and make an accurate comparison between the financial position indicated in those financial statements and that Obligor's Original Financial Statements.

Any reference in this Agreement to those financial statements shall be construed as a

reference to those financial statements as adjusted to reflect the basis upon which the Original Financial Statements were prepared.]

19.4 **Information: miscellaneous**

The Borrower shall supply to the Agent (in sufficient copies for all the Finance Parties, if the Agent so requests):

- (a) all documents dispatched by the Borrower to its shareholders (or any class of them) or its creditors generally at the same time as they are despatched;
- (b) promptly, any announcement, notice or other document relating specifically to the Borrower posted onto any electronic website maintained by any stock exchange on which shares in or other securities of the Borrower are listed or any electronic website required by any such stock exchange to be maintained by or on behalf of the Borrower;
- (c) promptly upon becoming aware of them, the details of any litigation, arbitration or administrative proceedings which are current, threatened or pending against any member of the Group, and which might, if adversely determined, have a Material Adverse Effect;
- (d) promptly, such further information regarding the financial condition, business and operations of any member of the Group as any Finance Party (through the Agent) may reasonably request; and
- (e) promptly, notice of any change in authorised signatories of any Obligor signed by a director or company secretary of such Obligor accompanied by specimen signatures of any new authorised signatories.

19.5 **Notification of default**

- (a) Each Obligor shall notify the Agent of any Default (and the steps, if any, being taken to remedy it) promptly upon becoming aware of its occurrence (unless that Obligor is aware that a notification has already been provided by another Obligor).
- (b) Promptly upon a request by the Agent, the Borrower shall supply to the Agent a certificate signed by two of its directors or senior officers on its behalf certifying that no Default is continuing (or if a Default is continuing, specifying the Default and the steps, if any, being taken to remedy it).

19.6 **Use of websites**

- (a) The Borrower may satisfy its obligation under this Agreement to deliver any information in relation to those Lenders (the "**Website Lenders**") who accept this method of communication by posting the 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 (a **"Paper Form Lender"**) does not agree to the delivery of information electronically then the Agent shall notify the Borrower accordingly and the Borrower shall supply the information to the Agent (in sufficient copies for each Paper Form Lender) in paper form. In any event the Borrower shall 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 Website 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 [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 Website 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 comply with any such request within ten Business Days.

19.7 **"Know your customer" checks**

- (a) Each Obligor 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 or on behalf of any Lender (including for any Lender on behalf of any prospective new Lender)) in order for the Agent, such Lender or any prospective new Lender to conduct any "know your customer" or other similar procedures under applicable laws and regulations.
- (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 conduct any "know your customer" or other similar procedures under applicable laws and regulations.

20. FINANCIAL COVENANTS

[]²¹

21. GENERAL UNDERTAKINGS

The undertakings in this Clause 21 remain in force from the date of this Agreement for so long as any amount is outstanding under the Finance Documents or any Commitment is in force.

21.1 Authorisations

Each Obligor shall promptly:

- (a) obtain, comply with and do all that is necessary to maintain in full force and effect; and
- (b) supply certified copies to the Agent of,

any Authorisation required to enable it to perform its obligations under the Finance Documents and to ensure the legality, validity, enforceability or admissibility in evidence in its jurisdiction of incorporation of any Finance Document.

21.2 Compliance with laws

Each Obligor shall comply in all respects with all laws to which it may be subject, if failure so to comply would materially impair its ability to perform its obligations under the Finance Documents.

21.3 *Pari passu* ranking

Each Obligor shall ensure that its payment obligations under the Finance Documents rank and continue to rank at least *pari passu* with the claims of all of its other unsecured and unsubordinated creditors, except for obligations mandatorily preferred by law applying to companies generally.

21.4 Negative pledge

In this Clause 21.4, "**Quasi-Security**" means an arrangement or transaction described in paragraph (b) below.

- (a) No Obligor shall (and the [Guarantor/Borrower] shall ensure that no other member of the Group will) create or permit to subsist any Security over any of its assets.
- (b) No Obligor shall (and the [Guarantor/Borrower] shall ensure that no other member of the Group will):
 - (i) sell, transfer or otherwise dispose of any of its assets on terms whereby they are or may be leased to or re-acquired by an Obligor [or any other member of the Group];
 - (ii) sell, transfer or otherwise dispose of any of its receivables on recourse terms;
 - (iii) enter into or permit to subsist any title retention arrangement;

²¹ For sample financial covenants, see APLMA financial covenants published separately.

- (iv) enter into or permit to subsist any arrangement under which money or the benefit of a bank or other account may be applied, set-off or made subject to a combination of accounts; or
- (v) enter into or permit to subsist any other preferential arrangement having a similar effect,

in circumstances where the arrangement or transaction is entered into primarily as a method of raising Financial Indebtedness or of financing the acquisition of an asset.

(c) Paragraphs (a) and (b) above do not apply to:

- (i) any Security or Quasi-Security listed in [Schedule 6 (*Existing Security*)] except to the extent the principal amount secured by that Security or Quasi-Security exceeds the amount stated in that Schedule;
- (ii) any netting or set-off arrangement entered into by any member of the Group in the ordinary course of its banking arrangements for the purpose of netting debit and credit balances;
- (iii) any payment or close out netting or set-off arrangement pursuant to any hedging transaction entered into by a member of the Group for the purpose of:
 - (A) hedging any risk to which any member of the Group is exposed in its ordinary course of trading; or
 - (B) its interest rate or currency management operations which are carried out in the ordinary course of business and for non-speculative purposes only,
 excluding, in each case, any Security or Quasi-Security under a credit support arrangement in relation to a hedging transaction;
- (iv) any lien arising by operation of law and in the ordinary course of trading **provided that** the debt which is secured thereby is paid when due or contested in good faith by appropriate proceedings and properly provisioned;
- (v) any Security or Quasi-Security over or affecting any asset acquired by a member of the Group after the date of this Agreement if:
 - (A) the Security or Quasi-Security was not created in contemplation of the acquisition of that asset by a member of the Group;
 - (B) the principal amount secured has not been increased in contemplation of, or since the acquisition of that asset by a member of the Group; and
 - (C) the Security or Quasi-Security is removed or discharged within [] months of the date of acquisition of such asset;

- (vi) any Security or Quasi-Security over or affecting any asset of any person which becomes a member of the Group after the date of this Agreement, where the Security or Quasi-Security is created prior to the date on which that person becomes a member of the Group, if:
 - (A) the Security or Quasi-Security was not created in contemplation of the acquisition of that person;
 - (B) the principal amount secured has not increased in contemplation of or since the acquisition of that person; and
 - (C) the Security or Quasi-Security is removed or discharged within [] months of that person becoming a member of the Group;
- (vii) any Security or Quasi-Security created pursuant to any Finance Document;
- (viii) any Security or Quasi-Security arising under any retention of title, hire purchase or conditional sale arrangement or arrangements having similar effect in respect of goods supplied to a member of the Group in the ordinary course of trading and on the supplier's standard or usual terms and not arising as a result of any default or omission by any member of the Group;
- (ix) []; or
- (x) any Security or Quasi-Security securing indebtedness the principal amount of which (when aggregated with the principal amount of any other indebtedness which has the benefit of Security or Quasi-Security given by any member of the Group other than any permitted under paragraphs (i) to (ix) above) does not exceed [] (or its equivalent in another currency or currencies).

21.5 Disposals

- (a) No Obligor shall [(and the [Guarantor/Borrower] shall ensure that no other member of the Group will)], enter into a single transaction or a series of transactions (whether related or not) and whether voluntary or involuntary to sell, lease, transfer or otherwise dispose of any asset.
- (b) Paragraph (a) above does not apply to any sale, lease, transfer or other disposal:
 - (i) made in the ordinary course of trading of the disposing entity;
 - (ii) of assets in exchange for other assets comparable or superior as to type, value and quality and for a similar purpose;
 - (iii) []; or
 - (iv) where the higher of the market value or consideration receivable (when aggregated with the higher of the market value or consideration receivable for any other sale, lease, transfer or other disposal by members of the Group, other than any permitted under paragraphs (i) to [(iii)] above) does not exceed [] (or its equivalent in another currency or currencies) in any financial year.

21.6 **Merger**

No Obligor shall (and the [Guarantor/Borrower] shall ensure that no other member of the Group will) enter into any amalgamation, demerger, merger or corporate reconstruction.

21.7 **Change of business**

The [Guarantor/Borrower] shall procure that no substantial change is made to the general nature of the business of the Obligors or the Group from that carried on at the date of this Agreement.

21.8 **[Environmental compliance]**

Each Obligor shall (and the [Borrower/Guarantor] shall ensure that each member of the Group will) comply in all material respects with all Environmental Law, obtain and maintain any Environmental Permits and take all reasonable steps in anticipation of known or expected future changes to or obligations under Environmental Law or any Environmental Permits.

21.9 **Environmental Claims**

Each Obligor shall inform the Agent in writing as soon as reasonably practicable upon becoming aware of:

- (a) any Environmental Claim which has been commenced or (to the best of such Obligor's knowledge and belief) is threatened against any member of the Group, or
- (b) any facts or circumstances which will or might reasonably be expected to result in any Environmental Claim being commenced or threatened against any member of the Group,

in each case where such Environmental Claim might reasonably be expected, if determined against that member of the Group, to have a Material Adverse Effect.]²²

21.10 **[Acquisitions]**

- (a) No Obligor shall [(and the [Guarantor/Borrower] shall ensure that no other member of the Group will)] acquire any company, business, assets or undertaking or make any investment.²³

- (b) Paragraph (a) above does not apply to an acquisition or investment:

- (i) [which is in respect of assets or businesses in the same nature and of the same scope as the [Guarantor/Borrower/Group]'s business as conducted on the date of this Agreement; and]
- (ii) the value of which acquisition or investment (when aggregated with the value of all other acquisitions and investments permitted under this Clause and made in the same financial year) does not exceed [],

provided that such acquisition or investment does not result in a breach of any

²² Consider if this undertaking is relevant/suitable in the context of the particular transaction.

²³ Where the restriction on acquisition of assets is included, consideration should be given to the borrower's day to day operational/trading requirements.

Authorisation or of any other provision of this Agreement.²⁴

21.11 **[Loans and guarantees]²⁵**

- (a) No Obligor shall (and the [Borrower/Guarantor] shall ensure that no member of the Group will) make or allow to subsist any loans, grant any credit (save in the ordinary course of business) or give or allow to remain outstanding any guarantee or indemnity (except as required under any of the Finance Documents) to or for the benefit of any person or otherwise voluntarily assume any liability, whether actual or contingent, in respect of any obligation of any person.
- (b) [Paragraph (a) above does not apply to: [•].]]²⁶

21.12 **[Financial Indebtedness]**

- (a) No Obligor shall (and the [Guarantor/Borrower] shall ensure that no other member of the Group will) incur or permit to remain outstanding any Financial Indebtedness.
- (b) Paragraph (a) above does not apply to:
 - (i) any Financial Indebtedness incurred pursuant to any Finance Documents;
 - (ii) []; and
 - (iii) any Financial Indebtedness the principal amount of which (when aggregated with the principal amount of any other Financial Indebtedness incurred by any member of the Group except any permitted under paragraph (i) or (ii) above) does not exceed [] (or its equivalent in another currency or currencies).]²⁷

22. **EVENTS OF DEFAULT**

Each of the events or circumstances set out in the following sub-clauses of this Clause 22 (other than Clause 22.16 (*Acceleration*)) is an Event of Default.

22.1 **Non-payment**

An Obligor does not pay on the due date any amount payable pursuant to a Finance Document at the place at and in the currency in which it is expressed to be payable unless:

- (a) its failure to pay is caused by:
 - (i) administrative or technical error; or
 - (ii) a Disruption Event; and
- (b) [payment is made within:

²⁴ Consider if this undertaking is relevant/suitable in the context of the particular transaction.

²⁵ Consider if this undertaking should carve-out any indemnity given in connection with the Obligor's/the member of the Group's own obligations in relation to any transactions which are not prohibited by the Facility Agreement.

²⁶ Consider if this undertaking is relevant/suitable in the context of the particular transaction.

²⁷ Consider if this undertaking is relevant/suitable in the context of the particular transaction.

- (i) (in the case of paragraph (a)(i) above) [] Business Days of its due date; or
- (ii) (in the case of paragraph (a)(ii) above) [] Business Days of its due date.] /

OR

[payment is made within [] Business Days of its due date.]

22.2 Financial covenants

Any requirement of Clause 20 (*Financial covenants*) is not satisfied.

22.3 Other obligations

- (a) An Obligor does not comply with any provision of the Finance Documents (other than those referred to in Clause 22.1 (*Non-payment*) [and Clause 22.2 (*Financial covenants*)]).
- (b) No Event of Default under paragraph (a) above in relation to Clause [] will occur if the failure to comply is capable of remedy and is remedied within:
 - (i) (in relation to []) [] Business Days; or
 - (ii) (in relation to []) [] Business Days,

of the earlier of (A) the Agent giving notice to the Borrower and (B) the Borrower becoming aware of the failure to comply.

22.4 Misrepresentation

Any representation or statement made or deemed to be made by an Obligor in the Finance Documents or any other document delivered by or on behalf of any Obligor under or in connection with any Finance Document is or proves to have been incorrect or misleading in any material respect when made or deemed to be made.

22.5 Cross default

- (a) Any Financial Indebtedness of any member of the Group is not paid when due nor within any originally applicable grace period.
- (b) Any Financial Indebtedness of any member of the Group is declared to be or otherwise becomes due and payable prior to its specified maturity as a result of an event of default (however described).
- (c) Any commitment for any Financial Indebtedness of any member of the Group is cancelled or suspended by a creditor of any member of the Group as a result of an event of default (however described).
- (d) Any creditor of any member of the Group becomes entitled to declare any Financial Indebtedness of any member of the Group due and payable prior to its specified maturity as a result of an event of default (however described).
- (e) No Event of Default will occur under this Clause 22.5 if the aggregate amount of Financial Indebtedness or commitment for Financial Indebtedness falling within

paragraphs (a) to (d) above is less than [] (or its equivalent in any other currency or currencies).

22.6 Insolvency

- (a) A member of the Group is or is presumed or deemed to be unable or admits inability to pay its debts as they fall due, suspends making payments on any of its debts or, by reason of actual or anticipated financial difficulties, commences negotiations with one or more of its creditors with a view to rescheduling any of its indebtedness.
- (b) The value of the assets of any member of the Group is less than its liabilities (taking into account contingent and prospective liabilities).
- (c) A moratorium is declared in respect of any indebtedness of any member of the Group.

22.7 Insolvency proceedings

Any corporate action, legal proceedings or other procedure or step is taken in relation to:

- (a) the suspension of payments, a moratorium of any indebtedness, winding-up, dissolution, administration, provisional supervision or reorganisation (by way of voluntary arrangement, scheme of arrangement or otherwise) of any member of the Group other than a solvent liquidation or reorganisation of any member of the Group which is not an Obligor;
- (b) a composition or arrangement with any creditor of any member of the Group, or an assignment for the benefit of creditors generally of any member of the Group or a class of such creditors;
- (c) the appointment of a liquidator (other than in respect of a solvent liquidation of a member of the Group which is not an Obligor), receiver, administrator, administrative receiver, compulsory manager, provisional supervisor or other similar officer in respect of any member of the Group or any of its assets; or
- (d) enforcement of any Security over any assets of any member of the Group,

or any analogous procedure or step is taken in any jurisdiction.

Clause 22.7(a) shall not apply to any winding-up petition which is frivolous or vexatious and is discharged, stayed or dismissed within [] days of commencement.

22.8 Creditors' process

Any expropriation, attachment, sequestration, distress or execution affects any asset or assets of a member of the Group [having an aggregate value of []] [and is not discharged within [] days].

22.9 Ownership of the Obligors

The [Borrower/Guarantor] is not or ceases to be a Subsidiary of the [].

22.10 Unlawfulness

It is or becomes unlawful for an Obligor to perform any of its obligations under the Finance Documents.

22.11 Repudiation

An Obligor repudiates a Finance Document or evidences an intention to repudiate a Finance Document.

22.12 [Moratorium on External Indebtedness]

The government of [insert name of country], central bank of [insert name of country] or any Governmental Agency of [insert name of country] declares a moratorium, standstill or similar suspension of payments in respect of its [External Indebtedness]²⁸ or the External Indebtedness of any person incorporated, domiciled, resident or situated in [insert name of country].]

22.13 [Cessation of business]

The [Borrower/Guarantor] suspends or ceases to carry on all or a material part of its business or of the business of the Group taken as a whole.]

22.14 [Change of control]²⁹

- (a) If [[] ceases to control the Borrower]/[any person or group of persons acting in concert gains control of the Borrower].
- (b) For the purpose of paragraph (a) above, "control" means [] [and "acting in concert" means []].]

22.15 Material adverse change

[].

22.16 Acceleration

On and at any time after the occurrence of an Event of Default which is continuing the Agent may, and shall if so directed by the Majority Lenders, by notice to the Borrower:

- (a) without prejudice to the participations of any Lenders in any Loans then outstanding:
 - (i) cancel the Commitments (and reduce them to zero), whereupon they shall immediately be cancelled (and reduced to zero); or
 - (ii) cancel any part of any Commitment (and reduce such Commitment accordingly), whereupon the relevant part shall immediately be cancelled (and the relevant Commitment shall be immediately reduced accordingly); and/or
- (b) declare that all or part of the Loans, together with accrued interest, and all other amounts accrued or outstanding under the Finance Documents be immediately due and payable, whereupon they shall become immediately due and payable; and/or
- (c) declare that all or part of the Loans be payable on demand, whereupon they

²⁸ Insert the following definition in Clause 1.1: "External Indebtedness" means any Financial Indebtedness which is denominated or payable by its terms, or at the option of the creditor in respect of such Financial Indebtedness, in a currency other than [currency of jurisdiction of Borrower/Guarantor].

²⁹ This is an optional clause: it should not be used if Clause 7.2 (*Change of Control*) is used.

shall immediately become payable on demand by the Agent on the instructions of the Majority Lenders.

SECTION 9 CHANGES TO PARTIES

23. CHANGES TO THE PARTIES

23.1 Assignments and transfers by the Lenders

Subject to this Clause 23, a Lender (the "**Existing Lender**") may:

- (a) assign any of its rights; or
- (b) transfer by novation any of its rights and obligations,

under the Finance Documents to another bank or financial institution or to a trust, fund or other entity which is regularly engaged in or established for the purpose of making, purchasing or investing in loans, securities or other financial assets (the "**New Lender**").

23.2 Conditions of assignment or transfer

- (a) The consent of the Borrower is required for:

- (i) a transfer by a Lender of any of its obligations owed to the Borrower under the Finance Documents in respect of the Lender's Available Commitment; and
- (ii) any release of a Lender from any of its obligations owed to the Borrower under the Finance Documents in respect of such Lender's Available Commitment pursuant to Clause 23.6 (*Procedure for assignment*),

in each case unless the relevant transfer or assignment is:

- (A) to another Lender or an Affiliate of a Lender[; or
 - (B) made at a time when an Event of Default is continuing].
- (b) The consent of the Borrower to a transfer, assignment or, as the case may be, release referred to at paragraph (a) above must not be unreasonably withheld or delayed. The Borrower will be deemed to have given its consent five Business Days after the Existing Lender has requested it unless consent is expressly refused by the Borrower within that time.
 - (c) A transfer will be effective only if the procedure set out in Clause 23.5 (*Procedure for transfer*) is complied with.
 - (d) An assignment will be effective only if the procedure and conditions set out in Clause 23.6 (*Procedure for assignment*) are complied with.

23.3 Assignment or transfer fee

The New Lender shall, on the date upon which an assignment or transfer takes effect, pay to the Agent (for its own account) a fee of [].

23.4 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 Finance

- Documents or any other documents;
 - (ii) the financial condition of any Obligor;
 - (iii) the performance and observance by any Obligor of its obligations under the Finance Documents or any other documents; or
 - (iv) the accuracy of any statements (whether written or oral) made in or in connection with any Finance Document or any other document,
- and any representations or warranties implied by law are excluded.
- (b) Each New Lender confirms to the Existing Lender and the other Finance 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 in connection with any Finance Document; 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.
 - (c) Nothing in any Finance Document obliges an Existing Lender to:
 - (i) accept a re-transfer or re-assignment from a New Lender of any of the rights and obligations assigned or transferred under this Clause 23; or
 - (ii) support any losses directly or indirectly incurred by the New Lender by reason of the non-performance by any Obligor of its obligations under the Finance Documents or otherwise.

23.5 Procedure for transfer

- (a) Subject to the conditions set out in Clause 23.2 (*Conditions of assignment or transfer*) a transfer is effected in accordance with paragraph (c) below when the Agent executes an otherwise duly completed Transfer Certificate delivered to it by the Existing Lender and the New Lender. The Agent shall, subject to paragraph (b) below, as soon as reasonably practicable after receipt by it of a duly completed Transfer Certificate appearing on its face to comply with the terms of this Agreement and delivered in accordance with the terms of this Agreement, execute that Transfer Certificate.
- (b) The Agent shall not be obliged to execute a Transfer Certificate delivered to it by the Existing Lender and the New Lender unless it is satisfied that it has completed all "know your customer" and other similar procedures that it is required (or deems desirable) to conduct in relation to the transfer to such New Lender.
- (c) [Subject to Clause 23.12 (*Pro rata interest settlement*),] on the Transfer Date:
 - (i) to the extent that in the Transfer Certificate the Existing Lender seeks to transfer by novation its rights and obligations under the Finance Documents each of the

Obligors and the Existing Lender shall be released from further obligations towards one another under the Finance Documents and their respective rights against one another shall be cancelled (being the "**Discharged Rights and Obligations**");

- (ii) each of the Obligors and the New Lender shall assume obligations towards one another and/or acquire rights against one another which differ from the Discharged Rights and Obligations only insofar as that Obligor and the New Lender have assumed and/or acquired the same in place of that Obligor and the Existing Lender;
 - (iii) the Agent, the Arranger, the New Lender and other Lenders shall acquire the same rights and assume the same obligations between themselves as they would have acquired and assumed had the New Lender been an Original Lender with the rights and/or obligations acquired or assumed by it as a result of the transfer and to that extent the Agent, the Arranger and the Existing Lender shall each be released from further obligations to each other under this Agreement; and
 - (iv) the New Lender shall become a Party as a "Lender".
- (d) The procedure set out in this Clause 23.5 shall not apply to any right or obligation under any Finance Document (other than this Agreement) if and to the extent its terms, or any laws or regulations applicable thereto, provide for or require a different means of transfer of such right or obligation or prohibit or restrict any transfer of such right or obligation, unless such prohibition or restriction shall not be applicable to the relevant transfer or each condition of any applicable restriction shall have been satisfied.³⁰

23.6 **Procedure for assignment**

- (a) Subject to the conditions set out in paragraph (d) below and in Clause 23.2 (*Conditions of assignment or transfer*), an assignment may be effected in accordance with paragraph (b) below when the Agent executes an otherwise duly completed Assignment Agreement delivered to it by the Existing Lender and the New Lender. The Agent shall, subject to paragraph (d)(ii) below, as soon as reasonably practicable after receipt by it of a duly completed Assignment Agreement appearing on its face to comply with the terms of this Agreement and delivered in accordance with the terms of this Agreement, execute that Assignment Agreement.
- (b) [Subject to Clause 23.12 (*Pro rata interest settlement*),] on the Transfer Date:
- (i) the Existing Lender will assign absolutely to the New Lender the rights under the Finance Documents expressed to be the subject of the assignment in the Assignment Agreement;
 - (ii) the Existing Lender will be released by each Obligor and the other Finance Parties from the obligations owed by it (the "**Relevant Obligations**") and expressed to be the subject of the release in the Assignment Agreement; and

³⁰ Consider whether express reference should be made to any specific requirement, having regard to relevant jurisdictions, governing laws of Finance Documents and any Finance Document to which any non-Obligor is a party.

- (iii) the New Lender shall become a Party as a "Lender" and will be bound by obligations equivalent to the Relevant Obligations.³¹
- (c) Lenders may utilise procedures other than those set out in this Clause 23.6 to assign their rights under the Finance Documents (but not, without the consent of the relevant Obligor or unless in accordance with Clause 23.5 (*Procedure for transfer*), to obtain a release by that Obligor from the obligations owed to that Obligor by the Lenders nor the assumption of equivalent obligations by a New Lender) **provided that** they comply with the conditions set out in paragraph (d) below.
- (d) An assignment (whether pursuant to an Assignment Agreement or paragraph (c) above) will only be effective on:
 - (i) receipt by the Agent (whether in an Assignment Agreement or otherwise) of written confirmation from the New Lender (in form and substance satisfactory to the Agent) that the New Lender will assume the same obligations to the other Finance Parties as it would have been under if it was an Original Lender; and
 - (ii) performance by the Agent of all necessary "know your customer" or other similar checks under all applicable laws and regulations in relation to such assignment to a New Lender, the completion of which the Agent shall promptly notify to the Existing Lender and the New Lender. The Agent shall not be obliged to execute an Assignment Agreement delivered to it by an Existing Lender and the New Lender or any document delivered to it pursuant to paragraph (c) above unless it is satisfied that it has completed all "know your customer" and other similar procedures that it is required (or deems desirable) to conduct in relation to the assignment to such New Lender.
- (e) The procedure set out in this Clause 23.6 shall not apply to any right or obligation under any Finance Document (other than this Agreement) if and to the extent its terms, or any laws or regulations applicable thereto, provide for or require a different means of assignment of such right or release or assumption of such obligation or prohibit or restrict any assignment of such right or release or assumption of such obligation, unless such prohibition or restriction shall not be applicable to the relevant assignment, release or assumption or each condition of any applicable restriction shall have been satisfied.³²

23.7 **Copy of Transfer Certificate or Assignment Agreement to Borrower**

The Agent shall, as soon as reasonably practicable after it has executed a Transfer Certificate or an Assignment Agreement, send to the Borrower a copy of that Transfer Certificate or Assignment Agreement.

³¹ If the Assignment Agreement is used in place of a Transfer Certificate in order to avoid a novation of rights/obligations for reasons relevant to a civil jurisdiction, local law advice should be sought to check the suitability of the Assignment Agreement due to the assumption of obligations referred to in paragraph (b)(iii) of Clause 23.6 (*Procedure for assignment*).

³² Consider whether express reference should be made to any specific requirement, having regard to relevant jurisdictions, governing laws of Finance Documents and any Finance Document to which any non-Obligor is a party.

23.8 Existing consents and waivers

A New Lender shall be bound by any consent, waiver, election or decision given or made by the relevant Existing Lender under or pursuant to any Finance Document prior to the coming into effect of the relevant assignment or transfer to such New Lender.

23.9 Exclusion of Agent's liability

In relation to any assignment or transfer pursuant to this Clause 23, each Party acknowledges and agrees that the Agent shall not be obliged to enquire as to the accuracy of any representation or warranty made by a New Lender in respect of its eligibility as a Lender.

23.10 [Assignments and transfers to Obligor group]

A Lender may not assign or transfer to any Obligor or any Affiliate of any Obligor any of such Lender's rights or obligations under any Finance Document, except with the prior written consent of all the Lenders.]³³

23.11 [Security over Lenders' rights]

In addition to the other rights provided to Lenders under this Clause 23, each Lender may without consulting with or obtaining consent from any Obligor, at any time charge, assign or otherwise create Security in or over (whether by way of collateral or otherwise) all or any of its rights under any Finance Document to secure obligations of that Lender including, without limitation:

- (a) any charge, assignment or other Security to secure obligations to a federal reserve or central bank; and
- (b) in the case of any Lender which is a fund, any charge, assignment or other Security granted to any holders (or trustee or representatives of holders) of obligations owed, or securities issued, by that Lender as security for those obligations or securities,

except that no such charge, assignment or Security shall:

- (i) release a Lender from any of its obligations under the Finance Documents or substitute the beneficiary of the relevant charge, assignment or Security for the Lender as a party to any of the Finance Documents; or
- (ii) require any payments to be made by an Obligor other than or in excess of, or grant to any person any more extensive rights than, those required to be made or granted to the relevant Lender under the Finance Documents.]

23.12 [Pro rata interest settlement]

If the Agent has notified the Lenders that it is able to distribute interest payments on a "pro rata basis" to Existing Lenders and New Lenders then (in respect of any transfer pursuant to Clause 23.5 (*Procedure for transfer*) or any assignment pursuant to Clause 23.6 (*Procedure for assignment*) the Transfer Date of which, in each case, is after the date of such notification and is not on the last day of an Interest Period):

³³ Consider whether this is a matter of concern in the context of the particular transaction.

- (a) any interest or fees in respect of the relevant participation which are expressed to accrue by reference to the lapse of time shall continue to accrue in favour of the Existing Lender up to but excluding the Transfer Date ("**Accrued Amounts**") and shall become due and payable to the Existing Lender (without further interest accruing on them) on the last day of the current Interest Period (or, if the Interest Period is longer than six Months, on the next of the dates which falls at six Monthly intervals after the first day of that Interest Period); and
- (b) the rights assigned or transferred by the Existing Lender will not include the right to the Accrued Amounts, so that, for the avoidance of doubt:
 - (i) when the Accrued Amounts become payable, those Accrued Amounts will be payable to the Existing Lender; and
 - (ii) the amount payable to the New Lender on that date will be the amount which would, but for the application of this Clause 23.12, have been payable to it on that date, but after deduction of the Accrued Amounts.]

23.13 **Assignments and transfers by Obligor**

An Obligor may not assign or transfer any of its rights or obligations under any Finance Document, except with the prior written consent of all the Lenders.

24. **DISCLOSURE OF INFORMATION**³⁴

Any Finance Party may disclose:

- (a) to any of its Affiliates [and Related Funds] and any of its or their officers, directors, employees, professional advisers, auditors, partners and Representatives such Confidential Information as that Finance Party shall consider appropriate if any person to whom the Confidential Information is to be given pursuant to this paragraph (a) is made aware in writing of its confidential nature and that some or all of such Confidential Information may be price-sensitive information except that there shall be no such requirement to so inform if the recipient is subject to professional obligations to maintain the confidentiality of the information or is otherwise bound by requirements of confidentiality in relation to the Confidential Information;
- (b) to any person:
 - (i) to (or through) whom it assigns or transfers (or may potentially assign or transfer) all or any of its rights and/or obligations under one or more Finance Documents and to any of that person's Affiliates, [Related Funds,] Representatives and professional advisers;
 - (ii) with (or through) whom it enters into (or may potentially enter into), whether directly or indirectly, any sub-participation in relation to, or any

³⁴ Consider if this Clause should be extended to include persons who invest in or finance any assignment, transfer or participation under paragraph (i), beneficiaries pursuant to a securitisation, service providers for administration or settlement services and/or rating agencies.

other transaction under which payments are to be made or may be made by reference to, one or more Finance Documents and/or one or more Obligor and to any of that person's Affiliates, [Related Funds,] Representatives and professional advisers;

- (iii) appointed by any Finance Party or by a person to whom paragraph (b)(i) or (ii) above applies to receive communications, notices, information or documents delivered pursuant to the Finance Documents on its behalf (including, without limitation, any person appointed under paragraph (b) of Clause 25.13 (*Relationship with the Lenders*));
- (iv) who invests in or otherwise finances (or may potentially invest in or otherwise finance), directly or indirectly, any transaction referred to in paragraph (b)(i) or (b)(ii) above;
- (v) to whom information is required or requested to be disclosed by any court of competent jurisdiction or any governmental, banking, taxation or other regulatory authority or similar body, the rules of any relevant stock exchange or pursuant to any applicable law or regulation;
- (vi) to whom information is required to be disclosed in connection with, and for the purposes of, any litigation, arbitration, administrative or other investigations, proceedings or disputes;
- (vii) [to whom or for whose benefit that Finance Party charges, assigns or otherwise creates Security (or may do so) pursuant to Clause 23.11 (*Security over Lenders' rights*)]³⁵;
- (viii) who is a Party; or
- (ix) with the consent of the Company;

in each case, such Confidential Information as that Finance Party shall consider appropriate if:

- (A) in relation to paragraphs (b)(i), (b)(ii) and b(iii) above, the person to whom the Confidential Information is to be given has entered into a Confidentiality Undertaking except that there shall be no requirement for a Confidentiality Undertaking if the recipient is a professional adviser and is subject to professional obligations to maintain the confidentiality of the Confidential Information;
- (B) in relation to paragraph (b)(iv) above, the person to whom the Confidential Information is to be given has entered into a Confidentiality Undertaking or is otherwise bound by requirements of confidentiality in relation to the Confidential Information they receive and is informed that some or all of such Confidential Information may be price-sensitive information;

³⁵ Include if optional Clause 23.11 (*Security over Lenders' rights*) is included.

- (C) in relation to paragraphs (b)(v), (b)(vi) [and (b)(vii)]³⁶ above, the person to whom the Confidential Information is to be given is informed of its confidential nature and that some or all of such Confidential Information may be price-sensitive information except that there shall be no requirement to so inform if, in the opinion of that Finance Party, it is not practicable so to do in the circumstances;
- (c) to any person appointed by that Finance Party or by a person to whom paragraph (b)(i) or (b)(ii) above applies to provide administration or settlement services in respect of one or more of the Finance Documents including without limitation, in relation to the trading of participations in respect of the Finance Documents, such Confidential Information as may be required to be disclosed to enable such service provider to provide any of the services referred to in this paragraph (c) if the service provider to whom the Confidential Information is to be given has entered into a confidentiality agreement substantially in the form of the LMA Master Confidentiality Undertaking for Use With Administration/Settlement Service Providers or such other form of confidentiality undertaking agreed between the Company and the relevant Finance Party;
- (d) [to any rating agency (including its professional advisers) such Confidential Information as may be required to be disclosed to enable such rating agency to carry out its normal rating activities in relation to the Finance Documents and/or the Obligors [if the rating agency to whom the Confidential Information is to be given is informed of its confidential nature and that some or all of such Confidential Information may be price-sensitive information].]

³⁶ Include this reference if the optional paragraph (b)(vii) of Clause 24 (*Disclosure of Information*) is included.

SECTION 10

THE FINANCE PARTIES

25. ROLE OF THE ADMINISTRATIVE PARTIES

25.1 Appointment of the Agent

- (a) Each of the other Finance Parties appoints the Agent to act as its agent under and in connection with the Finance Documents.
- (b) Each of the other Finance Parties authorises the Agent to exercise the rights, powers, authorities and discretions specifically given to the Agent under or in connection with the Finance Documents together with any other incidental rights, powers, authorities and discretions.

25.2 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) Without prejudice to Clause 23.7 (*Copy of Transfer Certificate or Assignment Agreement to Borrower*), paragraph (a) above shall not apply to any Transfer Certificate or to any Assignment Agreement.
- (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 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 to any Administrative Party) under this Agreement it shall promptly notify the other Finance Parties.
- (f) The Agent's duties under the Finance Documents are solely mechanical and administrative in nature.

25.3 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.

25.4 No fiduciary duties

- (a) Nothing in this Agreement constitutes any Administrative Party as a trustee or fiduciary of any other person.
- (b) No Administrative Party 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.

25.5 Business with the Group

Any Administrative Party may accept deposits from, lend money to and generally engage in any kind of banking or other business with any member of the Group.

25.6 Rights and discretions of the Agent

- (a) The Agent may rely on:
- (i) any representation, notice or document believed by it to be genuine, correct and appropriately authorised and shall have no duty to verify any signature on any document; and
 - (ii) any statement purportedly 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 arising under Clause 22.1 (*Non-payment*));
 - (ii) any right, power, authority or discretion vested in any Party or the Majority Lenders has not been exercised; and
 - (iii) any notice or request made by the Borrower 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 Finance 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) Notwithstanding any other provision of any Finance Document to the contrary, no Administrative Party is 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.

25.7 Majority Lenders' instructions

- (a) Unless a contrary indication appears in a Finance Document, 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) Unless a contrary indication appears in a Finance Document, any instructions given by the Majority Lenders will be binding on all the Finance Parties.

- (c) The Agent may refrain from acting in accordance with the instructions of the Majority Lenders (or, if appropriate, the Lenders) or under paragraph (d) below until it has received such security as it may require for any cost, loss or liability (together with any associated Indirect Tax) 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.

25.8 **Responsibility for documentation**

No Administrative Party:

- (a) is responsible for the adequacy, accuracy and/or completeness of any information (whether oral or written) supplied by any Administrative Party, an Obligor or any other person given in or in connection with any Finance Document or [the Information Memorandum][*specify other relevant material*]; [or]
- (b) is responsible for the legality, validity, effectiveness, adequacy or enforceability of any Finance Document or any other agreement, arrangement or document entered into, made or executed in anticipation of or in connection with any Finance Document; [or]
- (c) is responsible for any determination as to whether any information provided or to be provided to any Finance Party is non-public information the use of which may be regulated or prohibited by applicable law or regulation relating to insider dealing or otherwise.]

25.9 **Exclusion of liability**

- (a) Without limiting paragraph (b) below, the Agent shall not be liable for any cost, loss or liability incurred by any Party as a consequence of:
 - (i) the Agent having taken or having omitted to take any action under or in connection with any Finance Document, unless directly caused by the Agent's gross negligence or wilful misconduct; or
 - (ii) any delay in the crediting to any account of an amount required under the Finance Documents to be paid by the Agent, if the Agent shall have 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 the purpose of such payment.
- (b) No Party (other than the Agent) 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 Finance Document and any officer, employee or agent of the Agent may rely on this

Clause [subject to Clause 1.3 (*Third party rights*) and the provisions of the Third Parties Act]³⁷.

- (c) Nothing in this Agreement shall oblige any Administrative Party to conduct any "know your customer" or other procedures in relation to any person on behalf of any Lender and each Lender confirms to each Administrative Party that it is solely responsible for any such procedures it is required to conduct and that it shall not rely on any statement in relation to such procedures made by any Administrative Party.

25.10 Lenders' indemnity to the Agent

- (a) Each Lender shall, in accordance with paragraph (b) below, indemnify the Agent, within three Business Days of demand, against any cost, loss or liability incurred by the Agent (otherwise than by reason of the Agent's gross negligence or wilful misconduct) in acting as Agent under the Finance Documents (unless the Agent has been reimbursed by an Obligor pursuant to a Finance Document).
- (b) The proportion of such cost, loss or liability to be borne by each Lender shall be:
 - (i) if there is any Loan then outstanding, the proportion borne by (A) the sum of its participation(s) in the Loan(s) then outstanding to (B) the aggregate amount of such Loan(s), or
 - (ii) if there is no Loan then outstanding and the Available Facility is then greater than zero, the proportion borne by (A) its Available Commitment to (B) the Available Facility, or
 - (iii) if there is no Loan then outstanding and the Available Facility is then zero;
 - (A) if the Available Facility became zero after a Loan ceased to be outstanding, the proportion borne by (A) its Available Commitment to (B) the Available Facility immediately before the Available Facility became zero, or
 - (B) if a Loan ceased to be outstanding after the Available Facility became zero, the proportion borne by (A) the sum of its participation(s) in the Loan(s) outstanding immediately before any Loan ceased to be outstanding to (B) the aggregate amount of such Loan(s).

25.11 Resignation of the Agent

- (a) The Agent may resign and appoint one of its Affiliates acting through an office in [*insert name of country*] as successor by giving notice to the other Finance Parties and the Borrower.
- (b) Alternatively the Agent may resign by giving notice to the other Finance Parties and the Borrower, in which case the Majority Lenders (after consultation with the Borrower) may appoint a successor Agent.
- (c) If the Majority Lenders have not appointed a successor Agent in accordance with paragraph (b) above within 30 days after notice of resignation was given, the Agent

³⁷ Only include the words in brackets if second option in Clause 1.3 has been used.

(after consultation with the Borrower) may appoint a successor Agent [(acting through an office in [])].

- (d) The retiring Agent shall 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 take effect only 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 Finance Documents but shall remain entitled to the benefit of this Clause 25. Its 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.
- (g) After consultation with the Borrower, the Majority Lenders may, by notice to the Agent, require it to resign in accordance with paragraph (b) above. In this event, the Agent shall resign in accordance with paragraph (b) above.

25.12 Confidentiality

- (a) In acting as agent for the Finance Parties, the Agent shall be regarded as acting through its agency division which shall be treated as a separate legal person from any other of its branches, divisions or departments.
- (b) If information is received by another branch, division or department of the legal person which is the Agent, it may be treated as confidential to that branch, division or department and the Agent shall not be deemed to have notice of it.
- (c) The Agent shall not be obliged to disclose to any Finance Party any information supplied to it by the Borrower or any Affiliates of the Borrower on a confidential basis and for the purpose of evaluating whether any waiver or amendment is or may be required or desirable in relation to any Finance Document.

25.13 Relationship with the Lenders

- (a) Subject to [Clause 23.12 (*Pro rata interest settlement*) and] Clause 27.2 (*Distributions by the Agent*), the Agent may treat each Lender as a Lender, entitled to payments under this Agreement and acting through its Facility Office 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) 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 despatched 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 is permitted under Clause 29.4 (*Electronic communication*)) electronic mail address and/or any other information required to enable the sending and receipt of information by that means (and, in each case, the department or officer, if any, for whose attention communication is to be made) and be treated as a notification of a substitute address, fax number, electronic mail address, department and officer by that Lender for the purposes of Clause 29.2

(Addresses) and paragraph (a)(ii) of Clause 29.4 (*Electronic communication*) 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.

25.14 Credit appraisal by the Lenders

Without affecting the responsibility of any Obligor for information supplied by it or on its behalf in connection with any Finance Document, each Lender confirms to each Administrative Party 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 Finance Document including but not limited to:

- (a) the financial condition, status and nature of each member of the Group;
- (b) the legality, validity, effectiveness, adequacy or enforceability of any Finance Document and any other agreement, arrangement or document entered into, made or executed in anticipation of, under or in connection with any Finance Document;
- (c) whether that Lender has recourse, and the nature and extent of that recourse, against any Party or any of its respective assets under or in connection with any Finance Document, the transactions contemplated by the Finance Documents or any other agreement, arrangement or document entered into, made or executed in anticipation of, under or in connection with any Finance Document; and
- (d) the adequacy, accuracy and/or completeness of the [Information Memorandum and any other] information provided by the Agent, any Party or by any other person under or in connection with any Finance Document, the transactions contemplated by the Finance Documents or any other agreement, arrangement or document entered into, made or executed in anticipation of, under or in connection with any Finance Document.

25.15 Reference Banks

If a Reference Bank (or, if a Reference Bank is not a Lender, the Lender of which it is an Affiliate) ceases to be a Lender, the Agent shall (in consultation with the Borrower) appoint another Lender or an Affiliate of a Lender or any bank approved by the Majority Lenders to replace that Reference Bank.

25.16 Deduction from amounts payable by the Agent

If any Party owes an amount to the Agent under the Finance 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 Finance Documents and apply the amount deducted in or towards satisfaction of the amount owed. For the purposes of the Finance Documents that Party shall be regarded as having received any amount so deducted.

25.17 [Agent's management time]

Any amount payable to the Agent under Clause 15.3 (*Indemnity to the Agent*), Clause 16 (*Costs and expenses*) and Clause 25.10 (*Lenders' indemnity to the Agent*) 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 paid or payable to the Agent under Clause 11 (*Fees*).]

26. SHARING AMONG THE FINANCE PARTIES

26.1 Payments to Finance Parties

If a Finance Party (a "**Recovering Finance Party**") receives or recovers (whether by set-off or otherwise) any amount from an Obligor other than in accordance with Clause 27 (*Payment mechanics*) (a "**Recovered Amount**") and applies that amount to a payment due under the Finance Documents then:

- (a) the Recovering Finance Party shall, within three Business Days, notify details of the receipt or recovery, to the Agent;
- (b) the Agent shall determine whether the receipt or recovery is in excess of the amount the Recovering Finance Party would have been paid had the receipt or recovery been received or made by the Agent and distributed in accordance with Clause 27 (*Payment mechanics*), without taking account of any Tax which would be imposed on the Agent in relation to the receipt, recovery or distribution; and
- (c) the Recovering Finance Party shall, within three Business Days of demand by the Agent, pay to the Agent an amount (the "**Sharing Payment**") equal to such receipt or recovery less any amount which the Agent determines may be retained by the Recovering Finance Party as its share of any payment to be made, in accordance with Clause 27.5 (*Partial payments*).

26.2 Redistribution of payments

The Agent shall treat the Sharing Payment as if it had been paid by the relevant Obligor and distribute it between the Finance Parties (other than the Recovering Finance Party) (the "**Sharing Finance Parties**") in accordance with Clause 27.5 (*Partial payments*) towards the obligations of that Obligor to the Sharing Finance Parties.

26.3 Recovering Finance Party's rights

- (a) On a distribution by the Agent under Clause 26.2 (*Redistribution of payments*) of a payment received by a Recovering Finance Party from an Obligor, as between the relevant Obligor and the Recovering Finance Party, an amount of the Recovered Amount equal to the Sharing Payment will be treated as not having been paid by that Obligor.
- (b) If and to the extent that the Recovering Finance Party is not able to rely on its rights under paragraph (a) above, the relevant Obligor shall be liable to the Recovering Finance Party for a debt equal to the Sharing Payment which is immediately due and payable.

26.4 Reversal of redistribution

If any part of the Sharing Payment received or recovered by a Recovering Finance Party becomes repayable and is repaid by that Recovering Finance Party, then:

- (a) each Sharing Finance Party shall, upon request of the Agent, pay to the Agent

for the account of that Recovering Finance Party an amount equal to the appropriate part of its share of the Sharing Payment (together with an amount as is necessary to reimburse that Recovering Finance Party for its proportion of any interest on the Sharing Payment which that Recovering Finance Party is required to pay) (the "**Redistributed Amount**"); and

- (b) as between the relevant Obligor and each relevant Sharing Finance Party, an amount equal to the relevant Redistributed Amount will be treated as not having been paid by that Obligor.

26.5 **Exceptions**

- (a) This Clause 26 shall not apply to the extent that the Recovering Finance Party would not, after making any payment pursuant to this Clause, have a valid and enforceable claim against the relevant Obligor.
- (b) A Recovering Finance Party is not obliged to share with any other Finance Party any amount which the Recovering Finance Party has received or recovered as a result of taking legal or arbitration proceedings, if:
 - (i) it notified that other Finance Party of the legal or arbitration proceedings; and
 - (ii) that other Finance Party had an opportunity to participate in those legal or arbitration proceedings but did not do so as soon as reasonably practicable having received notice and did not take separate legal or arbitration proceedings.

SECTION 11 ADMINISTRATION

27. PAYMENT MECHANICS

27.1 Payments to the Agent

- (a) On each date on which an Obligor or a Lender is required to make a payment under a Finance Document, that Obligor or Lender shall make the same available to the Agent (unless a contrary indication appears in a Finance Document) 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.

27.2 Distributions by the Agent

- (a) Each payment received by the Agent under the Finance Documents for another Party shall, subject to Clause 27.3 (*Distributions to an Obligor*) and Clause 27.4 (*Clawback*) be made available by the Agent as soon as practicable after receipt to the Party entitled to receive payment in accordance with this Agreement (in the case of a Lender, for the account of its Facility Office), 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.
- (b) The Agent shall distribute payments received by it in relation to all or any part of a Loan to the Lender indicated in the records of the Agent as being so entitled on that date. Provided that the Agent is authorised to distribute payments to be made on the date on which any transfer becomes effective pursuant to Clause 23 (*Changes to the Parties*) to the Lender so entitled immediately before such transfer took place regardless of the period to which such sums relate.

27.3 Distributions to an Obligor

The Agent may (with the consent of the Obligor or in accordance with Clause 28 (*Set-off*)) apply any amount received by it for that Obligor in or towards payment (in the currency and funds of receipt) of any amount due from that Obligor under the Finance Documents or in or towards purchase of any currency to be so applied.

27.4 Clawback

- (a) Where a sum is to be paid to the Agent under the Finance Documents for another Party, the Agent is not obliged to pay that sum to that other Party (or to enter into or perform any related exchange contract) 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 actually received that amount, then the Party to whom that amount (or the proceeds of any related exchange contract) 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.

27.5 **Partial payments**

- (a) If the Agent receives a payment that is insufficient to discharge all the amounts then due and payable by an Obligor under the Finance Documents, the Agent shall apply that payment towards the obligations of that Obligor under the Finance Documents in the following order:
- (i) **first**, in or towards payment pro rata of any unpaid fees, costs and expenses of any Administrative Party under the Finance Documents;
 - (ii) **secondly**, in or towards payment pro rata of any accrued interest, fee (other than as provided in (i) above) or commission due but unpaid under this Agreement;
 - (iii) **thirdly**, in or towards payment pro rata of any principal due but unpaid under this Agreement; and
 - (iv) **fourthly**, in or towards payment pro rata of any other sum due but unpaid under the Finance Documents.
- (b) The Agent shall, if so directed by the Majority Lenders, vary the order set out in paragraphs (a)(ii) to (iv) above.
- (c) Paragraphs (a) and (b) above will override any appropriation made by an Obligor.

27.6 **No set-off by Obligors**

All payments to be made by an Obligor under the Finance Documents shall be calculated and be made without (and free and clear of any deduction for) set-off or counterclaim.

27.7 **Business Days**

- (a) Any payment which is due to be made on a day that is not a Business Day shall be made on the next Business Day in the same calendar month (if there is one) or the preceding Business Day (if there is not).
- (b) During any extension of the due date for payment of any principal or Unpaid Sum under paragraph (a) above, interest is payable on the principal or Unpaid Sum at the rate payable on the original due date.

27.8 **Currency of account**

- (a) Subject to paragraphs (b) and (c) below, [*insert currency of Loan*] is the currency of account and payment for any sum due from an Obligor under any Finance Document.
- (b) Each payment in respect of costs, expenses or Taxes shall be made in the currency in which the costs, expenses or Taxes are incurred.
- (c) Any amount expressed to be payable in a currency other than [*insert currency of Loan*] shall be paid in that other currency.

27.9 **[Change of currency]**

- (a) Unless otherwise prohibited by law, if more than one currency or currency unit are at the same time recognised by the central bank of any country as the lawful currency of that country, then:

- (i) any reference in the Finance Documents to, and any obligations arising under the Finance Documents in, the currency of that country shall be translated into, or paid in, the currency or currency unit of that country designated by the Agent (after consultation with the Borrower); and
 - (ii) any translation from one currency or currency unit to another shall be at the official rate of exchange recognised by the central bank for the conversion of that currency or currency unit into the other, rounded up or down by the Agent (acting reasonably).
- (b) If a change in any currency of a country occurs, this Agreement will, to the extent the Agent (acting reasonably³⁸ and after consultation with the Borrower) specifies to be necessary, be amended to comply with any generally accepted conventions and market practice in the Relevant Interbank Market and otherwise to reflect the change in currency.]

28. SET-OFF

A Finance Party may set off any matured obligation due from an Obligor under the Finance Documents (to the extent beneficially owned by that Finance Party) against any matured obligation owed by that Finance Party to that Obligor, regardless of the place of payment, booking branch or currency of either obligation. If the obligations are in different currencies, the Finance Party may convert either obligation at a market rate of exchange in its usual course of business for the purpose of the set-off.

29. NOTICES

29.1 Communications in writing

Any communication to be made under or in connection with the Finance Documents shall be made in writing and, unless otherwise stated, may be made by fax or letter.

29.2 Addresses

The address and fax number (and the department or officer, if any, for whose attention the communication is to be made) of each Party for any communication or document to be made or delivered under or in connection with the Finance Documents is:

- (a) in the case of the Borrower, that identified with its name below;
- (b) in the case of each Lender or any other Obligor, that notified in writing to the Agent on or prior to the date on which it becomes a Party; and
- (c) in the case of the Agent, that identified with its name below,

or any substitute address, fax number or department or officer as the Party may notify to the Agent (or the Agent may notify to the other Parties, if a change is made by the Agent) by not less than five Business Days' notice.

29.3 Delivery

- (a) Any communication or document made or delivered by one person to another under or in

³⁸ Consider if the Agent should only act on the instructions of the Majority Lenders or all the Lenders.

connection with the Finance Documents will be effective:

- (i) if by way of fax, only when received in legible form; or
- (ii) if by way of letter, only when it has been left at the relevant address or [five] 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 29.2 (*Addresses*), if addressed to that department or officer.

- (b) Any communication or document to be made or delivered to the Agent will be effective only when actually received by the Agent and then only if it is expressly marked for the attention of the department or officer identified with the Agent's signature below (or any substitute department or officer as the Agent shall specify for this purpose).
- (c) All notices from or to an Obligor shall be sent through the Agent.
- (d) Any communication or document made or delivered to the Borrower in accordance with this Clause will be deemed to have been made or delivered to the Guarantor.
- (e) Any communication or document which becomes effective, in accordance with paragraphs (a) to (d) above, after 5.00 p.m. in the place of receipt shall be deemed only to become effective on the following day.

29.4 **Electronic communication**

- (a) Any communication to be made between any two Parties under or in connection with the Finance Documents may be made by electronic mail or other electronic means to the extent that those two Parties agree that, unless and until notified to the contrary, this is to be an accepted form of communication and if those two Parties:
 - (i) notify each other in writing of their electronic mail address and/or any other information required to enable the sending and receipt 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 five Business Days' notice.
- (b) Any electronic communication made between those two Parties will be effective only when actually received in readable form and in the case of any electronic communication made by a Party to the Agent only if it is addressed in such a manner as the Agent shall specify for this purpose.
- (c) Any electronic communication which becomes effective, in accordance with paragraph (b) above, after 5.00 p.m. in the place of receipt shall be deemed only to become effective on the following day.

29.5 **English language**

- (a) Any notice given under or in connection with any Finance Document must be in English.
- (b) All other documents provided under or in connection with any Finance Document must

be:

- (i) in English; or
- (ii) if not in English, and if so required by the Agent, accompanied by a certified English translation and, in this case, the English translation will prevail unless the document is a constitutional, statutory or other official document.

30. CALCULATIONS AND CERTIFICATES

30.1 Accounts

In any litigation or arbitration proceedings arising out of or in connection with a Finance Document, the entries made in the accounts maintained by a Finance Party are *prima facie* evidence of the matters to which they relate.

30.2 Certificates and determinations

Any certification or determination by a Finance Party of a rate or amount under any Finance Document is, in the absence of manifest error, conclusive evidence of the matters to which it relates.

30.3 Day count convention

Any interest, commission or fee accruing under a Finance Document will accrue from day to day and is calculated on the basis of the actual number of days elapsed and a year of [360/365] days or, in any case where the practice in the Relevant Interbank Market differs, in accordance with that market practice.

31. PARTIAL INVALIDITY

If, at any time, any provision of the Finance Documents 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.

32. REMEDIES AND WAIVERS

No failure to exercise, nor any delay in exercising, on the part of any Finance Party, any right or remedy under the Finance Documents shall operate as a waiver of any such right or remedy or constitute an election to affirm any of the Finance Documents. No election to affirm any of the Finance Documents on the part of any Finance Party shall be effective unless it is in writing. No single or partial exercise of any right or remedy shall prevent any further or other exercise or the exercise of any other right or remedy. The rights and remedies provided in this Agreement are cumulative and not exclusive of any rights or remedies provided by law.

33. AMENDMENTS AND WAIVERS

33.1 Required consents

- (a) Subject to Clause 33.2 (*Exceptions*) any term of the Finance Documents may be amended or waived only with the consent of the Majority Lenders and the Obligors 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 33.

33.2 **Exceptions**

- (a) An amendment or waiver that has the effect of changing or which relates to:
- (i) the definition of "Majority Lenders" in Clause 1.1 (*Definitions*);
 - (ii) an extension to the date of payment of any amount under the Finance Documents;
 - (iii) a reduction in the Margin or a reduction in the amount of any payment of principal, interest, fees or commission payable;
 - (iv) an increase in the amount of any Commitment or an extension of the period of availability for utilisation of any Commitment or any requirement that a cancellation of Commitments reduces the Commitments of the Lenders rateably under the Facility;
 - (v) any provision which expressly requires the consent of all the Lenders;
 - (vi) Clause 2.2 (*Finance Parties' rights and obligations*), Clause 23 (*Changes to the Parties*) or this Clause 33;
 - (vii) the nature or scope of the guarantee and indemnity granted under Clause 17 (*Guarantee and indemnity*); or
 - (viii) [],

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 any Administrative Party may not be effected without the consent of such Administrative Party.

34. **COUNTERPARTS**

Each Finance Document may be executed in any number of counterparts, and this has the same effect as if the signatures on the counterparts were on a single copy of the Finance Document.

SECTION 12
GOVERNING LAW AND ENFORCEMENT

35. GOVERNING LAW

This Agreement, [and all non-contractual obligations arising from or in connection with this Agreement]³⁹, [is/are] governed by English law.

36. ENFORCEMENT

36.1 Jurisdiction of English courts

- (a) The courts of England have exclusive jurisdiction to settle any dispute arising out of or in connection with this Agreement (including any dispute relating to any non-contractual obligation arising from or in connection with this Agreement and any dispute regarding the existence, validity or termination of this Agreement) (a "**Dispute**").
- (b) The Parties agree that the courts of England are the most appropriate and convenient courts to settle Disputes and accordingly no Party will argue to the contrary.
- (c) This Clause 36.1 is for the benefit of the Finance Parties only. As a result, no Finance Party shall be prevented from taking proceedings relating to a Dispute in any other courts with jurisdiction. To the extent allowed by law, the Finance Parties may take concurrent proceedings in any number of jurisdictions.

36.2 [Service of process]⁴⁰

Without prejudice to any other mode of service allowed under any relevant law, each Obligor (other than an Obligor incorporated in England and Wales):

- (a) irrevocably appoints [] as its agent for service of process in relation to any proceedings before the English courts in connection with any Finance Document; and
- (b) agrees that failure by a process agent to notify the relevant Obligor of the process will not invalidate the proceedings concerned.

Each Obligor expressly agrees and consents to the provisions of this Clause 36.2.]

³⁹ This wording is intended to make non-contractual obligations arising out of or in connection with the agreement subject to English law. However, if the document is used in a cross-border transaction where different transaction documents are governed by different governing laws, consider whether it is appropriate, in the context of that transaction, for English law to apply to non-contractual obligations arising out of or in connection with the transaction documents which are not governed by English law.

⁴⁰ To be included where an Obligor is not incorporated in England and Wales.

36.3 **[Waiver of immunities⁴¹**

Each Obligor irrevocably waives, to the extent permitted by applicable law, with respect to itself and its revenues and assets (irrespective of their use or intended use), all immunity on the grounds of sovereignty or other similar grounds from:

- (a) suit;
- (b) jurisdiction of any court;
- (c) relief by way of injunction or order for specific performance or recovery of property;
- (d) attachment of its assets (whether before or after judgment); and
- (e) execution or enforcement of any judgment to which it or its revenues or assets might otherwise be entitled in any proceedings in the courts of any jurisdiction (and irrevocably agrees, to the extent permitted by applicable law, that it will not claim any immunity in any such proceedings).]

This Agreement has been entered into on the date stated at the beginning of this Agreement.

⁴¹ Include if any Obligor may be entitled to assert sovereign or crown immunity.

Recent decisions by the Hong Kong Court of Final Appeal (in the Congo case) and the Hong Kong High Court (in the Hua Tian Long case) regarding sovereign and crown immunity create some important issues which should be considered when dealing with foreign states, the PRC Government and those which may claim to be acting at the direction of a state, including State Owned Entities and Sovereign Wealth Funds.

If the facility agreement is governed by English law and the English courts have exclusive jurisdiction, the issue of sovereign and/or crown immunity may still be relevant if the Finance Parties seek to enforce an English judgment in Hong Kong (for example if the borrower/obligor has substantial assets in Hong Kong).

For further information on sovereign and crown immunity issues in Hong Kong, please see the briefing notes available on the APLMA web site at http://www.aplma.com/Docs_Asian.asp.

SCHEDULE 1
THE ORIGINAL LENDERS

Name of Original Lender

Commitment

SCHEDULE 2
CONDITIONS PRECEDENT

1. Obligators

- (a) A copy of the constitutional documents of each Obligor.
- (b) A copy of a resolution of the board of directors of each Obligor:
 - (i) approving the terms of, and the transactions contemplated by, the Finance Documents to which it is a party and resolving that it execute the Finance Documents to which it is a party;
 - (ii) authorising a specified person or persons to execute the Finance Documents to which it is a party on its behalf[; and] / [;]
 - (iii) authorising a specified person or persons, on its behalf, to sign and/or despatch all documents and notices (including, if relevant, any Utilisation Request and Selection Notice) to be signed and/or despatched by it under or in connection with the Finance Documents to which it is a party[.] / [and]
 - (iv) [in the case of the Guarantor, resolving that it is in the best interests of the Guarantor to enter into the transactions contemplated by the Finance Documents to which it is a party, giving reasons.]⁴²
- (c) A specimen of the signature of each person authorised by the resolution referred to in paragraph (b) above.
- [(d) A copy of a resolution signed by all the holders of the issued shares in the Guarantor, approving the terms of, and the transactions contemplated by, the Finance Documents to which the Guarantor is a party.]⁴³
- (e) A certificate from each Obligor (signed by a director) confirming that borrowing or guaranteeing, as appropriate, the Total Commitments would not cause any borrowing, guaranteeing or similar limit binding on it to be exceeded.
- (f) A certificate of an authorised signatory of the relevant Obligor certifying that each copy document relating to it specified in this Schedule 2 is correct, complete and in full force and effect as at a date no earlier than the date of this Agreement.

2. Legal opinions

- (a) A legal opinion in relation to English law from [*insert name of law firm*] addressed to the Arranger, the Agent and the [Original Lenders]⁴⁴[, substantially in the form distributed to the Original Lenders prior to the signing of this Agreement].

⁴² Seek local counsel advice if this should be included.

⁴³ Seek local counsel advice if this should be included.

⁴⁴ Consider whether the legal opinion should extend to lenders acceding to this facility agreement as part of a primary syndication which follows signing of the facility agreement.

- (b) A legal opinion as to [*insert law of jurisdiction of incorporation of Obligor, if other than England and Wales*] from [*insert name of law firm*] addressed to the Arranger, the Agent and the [Original Lenders]⁴⁵, substantially in the form distributed to the Original Lenders prior to signing this Agreement].⁴⁶

3. **Other documents and evidence**

- (a) [Evidence that any process agent referred to in Clause 36.2 (*Service of process*), has accepted its appointment.]
- (b) A copy of any other Authorisation or other document, opinion or assurance which the Agent considers to be necessary or desirable (if it has notified the Borrower accordingly) in connection with the entry into and performance of the transactions contemplated by any Finance Document or for the validity and enforceability of any Finance Document.
- (c) The Original Financial Statements of each Obligor.
- (d) [Evidence that the fees, costs and expenses then due from the Borrower pursuant to Clause 11 (*Fees*) and Clause 16 (*Costs and expenses*) have been paid or will be paid by the first Utilisation Date.]

⁴⁵ Consider whether the legal opinion should extend to lenders acceding to this facility agreement as part of a primary syndication which follows signing of the facility agreement.

⁴⁶ Duplicate paragraph (b) for each jurisdiction where an Obligor is incorporated.

SCHEDULE 3

REQUESTS

Part I

Utilisation Request

From: [Borrower]

To: [Agent]

Dated:

Dear Sirs

[Borrower] – [] Facility Agreement

dated [] (the "Facility Agreement")

1. We refer to the Facility Agreement. This is a Utilisation Request. Terms defined in the Facility Agreement shall have the same meaning in this Utilisation Request.
2. We wish to borrow a Loan on the following terms:

Proposed Utilisation Date:	[] (or, if that is not a Business Day, the next Business Day)
Amount:	[] or, if less, the Available Facility
First Interest Period:	[]
3. We confirm that each condition specified in Clause 4.2 (*Further conditions precedent*) is satisfied on the date of this Utilisation Request.
4. The proceeds of this Loan should be credited to [account].
5. This Utilisation Request is irrevocable.

Yours faithfully

.....
authorised signatory for
[name of Borrower]

Part II
Selection Notice

From: [Borrower]

To: [Agent]

Dated:

Dear Sirs

[Borrower] - [] Facility Agreement
dated [] (the "Facility Agreement")

1. We refer to the Facility Agreement. This is a Selection Notice. Terms defined in the Facility Agreement shall have the same meaning in this Selection Notice.
 2. We refer to the following Loan[s] with an Interest Period ending on []*.
 3. [We request that the above Loan[s] be divided into [] Loans with the following amounts and Interest Periods:]**
- or*
- [We request that the next Interest Period for the above Loan[s] is []].***
4. This Selection Notice is irrevocable.

Yours faithfully

.....
authorised signatory for
[name of Borrower]

* Insert details of all Loans which have an Interest Period ending on the same date.

** Use this option if division of Loans is requested.

*** Use this option if sub-division is not required.

SCHEDULE 4
FORM OF TRANSFER CERTIFICATE

To: [] as Agent

From: [*the Existing Lender*] (the "Existing Lender") and [*the New Lender*] (the "New Lender")

Dated:

[*the Borrower*] – [] Facility Agreement
dated [] (the "Facility Agreement")

1. We refer to Clause 23.5 (*Procedure for transfer*)⁴⁷ of the Facility Agreement. This is a Transfer Certificate. Terms used in the Facility Agreement shall have the same meaning in this Transfer Certificate.
2. The Existing Lender and the New Lender agree to the Existing Lender transferring to the New Lender by novation, and in accordance with Clause 23.5 (*Procedure for transfer*), all of the Existing Lender's rights and obligations under the Facility Agreement and the other Finance Documents which relate to that portion of the Existing Lender's Commitment and participations in Loans under the Facility Agreement as specified in the Schedule.
3. The proposed Transfer Date is [].
4. The Facility Office and address, fax number and attention particulars for notices of the New Lender for the purposes of Clause 29.2 (*Addresses*) are set out in the Schedule.
5. The New Lender expressly acknowledges:
 - (a) the limitations on the Existing Lender's obligations set out in paragraphs (a) and (c) of Clause 23.4 (*Limitation of responsibility of Existing Lenders*); and
 - (b) that it is the responsibility of the New Lender to ascertain whether any document is required or any formality or other condition requires to be satisfied to effect or perfect the transfer contemplated by this Transfer Certificate or otherwise to enable the New Lender to enjoy the full benefit of each Finance Document.
6. The New Lender confirms that it is a "New Lender" within the meaning of Clause 23.1 (*Assignments and transfers by the Lenders*).
7. The Existing Lender and the New Lender confirm that the New Lender is not an Obligor or an Affiliate of an Obligor.
8. This Transfer Certificate may be executed in any number of counterparts and this has the same effect as if the signatures on the counterparts were on a single copy of this Transfer

⁴⁷ Consider whether procedures for the assignment/transfer of rights/obligations under other Finance Documents should be specifically addressed.

Certificate.

9. This Transfer Certificate [and all non-contractual obligations arising from or in connection with this Transfer Certificate]⁴⁸ [is/are] governed by English law.
10. This Transfer Certificate has been entered into on the date stated at the beginning of this Transfer Certificate.

⁴⁸ This wording is intended to make non-contractual obligations arising out of or in connection with the agreement subject to English law. However, if the document is used in a cross-border transaction where different transaction documents are governed by different governing laws, consider whether it is appropriate, in the context of that transaction, for English law to apply to non-contractual obligations arising out of or in connection with the transaction documents which are not governed by English law.

THE SCHEDULE

Commitment/rights and obligations to be transferred, and other particulars

Commitment/participation(s) transferred

Drawn Loan(s) participation(s) amount(s):[]

Available Commitment amount: []

Administration particulars:

New Lender's receiving account: []

Address: []

Telephone: []

Facsimile: []

Attn/Ref: []

[the Existing Lender]

[the New Lender]

By:

By:

This Transfer Certificate is executed by the Agent and the Transfer Date is confirmed as [].

[the Agent]

By:

Note: It is the New Lender's responsibility to ascertain whether any other document is required, or any formality or other condition is required to be satisfied, to effect or perfect the transfer contemplated in this Transfer Certificate or to give the New Lender full enjoyment of all the Finance Documents.

SCHEDULE 5
FORM OF COMPLIANCE CERTIFICATE

To: [] as Agent

From: *[Borrower]*

Dated:

Dear Sirs

[Borrower] – [] Facility Agreement
dated [] (the "Facility Agreement")

1. We refer to the Facility Agreement. This is a Compliance Certificate. Terms used in the Facility Agreement shall have the same meaning in this Compliance Certificate.
2. We confirm that: *[Insert details of covenants to be certified including calculations]*
3. *[We confirm that no Default is continuing.] **

Signed:
Director
of
[Borrower]

.....
Director
of
[Borrower]

*[insert applicable certification language]***

.....
for and on behalf of
*[name of auditors of the Borrower]****

* If this statement cannot be made, the certificate should identify any Default that is continuing and the steps, if any, being taken to remedy it.

** To be agreed with the Borrower's auditors and the Lenders prior to signing the Agreement.

*** Only applicable if the Compliance Certificate accompanies the audited financial statements and is to be signed by the auditors. To be agreed with the Borrower's auditors prior to signing the Agreement.

SCHEDULE 6
EXISTING SECURITY

Name of Obligor	Security	Total Principal Amount of Indebtedness Secured
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TIMETABLES⁴⁹

<i>Function</i>	<i>Day/Time</i>
Delivery of a duly completed Utilisation Request (Clause 5.1 (<i>Delivery of a Utilisation Request</i>)) or a Selection Notice (Clause 9.1 (<i>Selection of Interest Periods</i>))	[]
Agent notifies the Lenders of the Loan in accordance with Clause 5.4 (<i>Lenders' participations</i>)	[]
[LIBOR] is fixed	[Quotation Day as of 11:00 a.m. London time] ⁵⁰

⁴⁹ Choose the timetable applicable for the currency of the Loan.

⁵⁰ Insert if the interest rate for the Loan is determined by reference to LIBOR.

SIGNATURE PAGE

[Do not show addresses or contact details of Lenders]