

For the avoidance of doubt, this Users Guide, the Leveraged Document and the Intercreditor Agreement are in a non-binding, recommended form. Their intention is to be used as a starting point for negotiation only. Individual parties are free to depart from their terms and should always satisfy themselves of the regulatory implications of their use.



USERS GUIDE
TO
FORM OF INTERCREDITOR AGREEMENT
FOR LEVERAGED ACQUISITION FINANCE TRANSACTIONS
(SENIOR/MEZZANINE)

JANUARY 2017

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1. IMPORTANT NOTICE

This Users Guide has been prepared for the Loan Market Association ("**LMA**") in connection with the form of intercreditor agreement for leveraged acquisition finance transactions (senior facilities and mezzanine facility structure) (the "**Intercreditor Agreement**") published by the LMA. Whilst every care has been taken in the preparation of this Users Guide and the Intercreditor Agreement, no representation or warranty is given by the LMA or Clifford Chance LLP:

- as to the suitability of the Intercreditor Agreement for any particular transaction
- that the Intercreditor Agreement will cover any particular eventuality
- as to the accuracy or completeness of the contents of this Users Guide.

This Users Guide provides limited guidance only on the terms of the Intercreditor Agreement. It is not intended to be a comprehensive analysis of the Intercreditor Agreement nor to explain exactly how each provision operates. In particular, users of the Intercreditor Agreement should satisfy themselves as to the taxation, regulatory and accounting implications of its use and that the Intercreditor Agreement is appropriate to the terms of the commercial transaction.

Neither the LMA nor Clifford Chance LLP is liable for any losses suffered by any person as a result of any contract made on the terms of the Intercreditor Agreement or which may arise from the presence of any errors or omissions in this Users Guide or the Intercreditor Agreement and no proceedings shall be taken by any person in relation to such losses.

For the avoidance of doubt, this Users Guide and the Intercreditor Agreement are in a non-binding, recommended form. Their intention is to be used as a starting point for negotiation only. Individual parties are free to depart from their terms and should always satisfy themselves of the regulatory implications of their use.

2. INTRODUCTION

The purpose of this Users Guide is to assist users of the Intercreditor Agreement. The Intercreditor Agreement seeks to govern the relationship between a range of creditors providing finance to the same borrower group in the context of a leveraged acquisition finance transaction. It does this by ranking the creditors' debt and their entitlements to the proceeds of any guarantees and security and by contractually restricting their behaviour: for example, by controlling when and by whom security might be enforced and when payments can be made by a borrower to a given class of creditor.

2.1 Evolution and Scope of the Intercreditor Agreement

The Intercreditor Agreement project was begun in response to demand from the leveraged finance market to provide a form of intercreditor agreement for use in conjunction with the LMA's recommended form of facility agreement for leveraged acquisition finance transactions (senior/mezzanine) (the "**Leveraged Document**").

As with the Leveraged Document itself, it was recognised that the nature of leveraged finance transactions was such that it would be very difficult to produce a document which was in any way "standard". In particular, it was accepted that any document which was produced would need to be adapted so as to be tailored to the particular transaction structure and the agreement reached between the creditor classes in each case. However, it was still felt that it would be helpful for market participants if a document was produced which was a good starting point for the draftsman; which provided a common framework and language for those involved in these transactions; and which was specifically designed to dovetail with the Leveraged Document.

It is important, therefore, to recognise that, as with the Leveraged Document itself, the Intercreditor Agreement is not a standard form to be followed slavishly for each deal but a document which will be used as a starting point by law firms drafting the credit documentation for leveraged acquisition finance transactions.

In order to be helpful, various provisions which may or may not be included in any particular transaction have been included in square brackets in order that a menu of clauses is available to the draftsman should those clauses be required. The non-inclusion of such square bracketed provisions should not be considered as a departure from the LMA form.

A Working Party consisting of representatives from banks (including in-house lawyers) and major City law firms was established to consider the drafting of the Intercreditor Agreement. A negotiation with representatives of the borrower community was not included as part of this process on the basis that such a negotiation is not adopted in the case of the Leveraged Document and that a number of the issues involved are matters between providers of external finance only. It should, of course, be recognised that a number of the provisions of the Intercreditor Agreement, such as those dealing with the rights and restrictions of the creditors of intra-group loans, are likely to be commercially important to the borrower group and that borrowers may seek to negotiate them.

In November 2009 the Intercreditor Agreement was amended (following comments from, and discussions with, a committee of Mezzanine investors) to take account of, and in some cases to highlight, key issues for Mezzanine Lenders. Once the Intercreditor Agreement had been in use for some time the LMA undertook a thorough review of the Intercreditor Agreement to take into account developments in law and practice and to give market practitioners an opportunity to give feedback and comment on the Intercreditor Agreement based on their experience of using it in the leveraged finance market. Revised versions of the Intercreditor Agreement were published in September 2012 and again in November 2016.

It is important to note that a large number of provisions will need to be tailored to a transaction on a case-by-case basis and that, in each case, the position adopted is a matter to be commercially agreed between the different creditor classes. In those cases, the Intercreditor Agreement provides a sensible starting point only and does not attempt to set out a definitive position suitable for all transactions.

2.2 **Format and Use of the Intercreditor Agreement**

(a) *Assumptions*

The Intercreditor Agreement has been produced on the basis of various assumptions set out below, made in order to avoid overcomplicating the document. However, if any assumption is not correct in the context of a particular transaction, the Intercreditor Agreement may still represent a useful starting point. The key assumptions are set out below.

- (i) The corresponding Senior Facilities Agreement is based on the Leveraged Document and the corresponding Mezzanine Facility Agreement is based on the approach outlined in the LMA Mezzanine Facility Agreement Drafting Guide for Leveraged Acquisition Finance Transactions (Senior/Mezzanine) (the "**Mezzanine Document**"). All the assumptions made in the separate Users Guide to the Leveraged Document and in the Mezzanine Document apply equally to the Intercreditor Agreement;
- (ii) The structure of the transaction is as described in the Users Guide to the Leveraged Document and in the Mezzanine Document. There are, of course, a number of different structures that could be used for leveraged acquisition finance transactions and if the structure applying to the transaction in question is different to that described in the Users Guide to the Leveraged Document and in the Mezzanine Document it is likely that changes will need to be made to the Intercreditor Agreement;
- (iii) The Intercreditor Agreement is governed by English law;
- (iv) The provisions of the Intercreditor Agreement which govern the Hedging Liabilities have been formulated on the basis of a number of assumptions. These include that:

- (A) the Hedging Letter follows the format of the LMA recommended form of hedging letter for leveraged acquisition finance transactions (senior/mezzanine) and that in particular:
 - (AA) it may require hedging in respect of interest rate and/or exchange rate risks in relation to the Senior Term Facilities¹ (and any Refinancing Term Facilities) only and/or the Senior Term Facilities (and any Refinancing Term Facilities) and the Mezzanine Facility; and
 - (BB) it will record the required hedging requirements as a % of the amounts outstanding under the relevant Facilities from time to time;
- (B) the Debtors are permitted to hedge notional amounts beyond the requirements of the Hedging Letter provided that the total notional amounts hedged do not exceed the amounts outstanding under the relevant Facilities from time to time;
- (C) the Senior Term Facilities and the Mezzanine Facility are each single currency facilities and are each denominated in the same currency;
- (D) there may be multiple Hedge Counterparties;
- (E) there is no requirement for a Hedge Counterparty to also be a Senior Lender;
- (F) to the extent consistent with the requirements of the Hedging Letter, the hedging transactions which constitute the Hedging Liabilities may be represented by interest rate hedge transactions, exchange rate hedge transactions or a combined cross-currency interest rate swap transaction;
- (G) the Hedge Counterparties will obtain the benefit of the Guarantee and Indemnity contained in the Senior Facilities Agreement;
- (H) the Hedge Counterparties do not have the benefit of the restrictions on the Debtors contained in the Senior Facilities Agreement;
- (I) hedging in respect of risks required to be hedged by the Hedging Letter is not carried out by way of Ancillary Facility;
- (J) any Ancillary Facility which is made available by way of hedging facility is documented under a master agreement which is separate

¹ Users should also consider the extent to which the hedging strategy documented in the Hedging Letter should (or should not) require hedging of interest rate and / or exchange rate risks in relation to any Incremental Senior Facility. The LMA recommended form of hedging letter provides for both options.

from any hedging master agreement used to document hedging carried out in respect of risks required to be hedged by the Hedging Letter; and

- (K) the only hedging arrangements to be documented under any "Hedging Agreement" are those of the type contemplated in the Hedging Letter;
- (v) The Security Agent is (or is related to) a member of one of the lending syndicates and/or one of the facility agents. The Intercreditor Agreement is unlikely to be suitable for use with a professional/corporate trustee.

(b) ***Style***

As far as possible the Intercreditor Agreement adopts a "plain English" approach, with clauses broken down into shorter sub-paragraphs and exceptions listed in sub-paragraphs rather than as provisos.

The Intercreditor Agreement is divided into Sections and Clauses. Each Clause is divided into sub-clauses, and sub-clauses may be further divided into separate paragraphs. The sequence of numbering is as follows:

SECTION 1 HEADING

Clause 1 **HEADING**,

Clause 1.1 **Heading**,

paragraphs (a), (b), (c),

paragraphs (i), (ii), (iii),

paragraphs (A), (B), (C),

paragraphs (1), (2), (3).

Headings are given to each Section and Clause only. Cross references should refer to the Clause number and the heading of the Clause.

Where additional information is required a gap [] is left. Where optional language or more than one option have been included it is identified as [option] or [option 1]/[option 2].

(c) ***How to use the Intercreditor Agreement***

It is impossible to use the Intercreditor Agreement without amendment or additions (because of the inclusion of different options and the provisions that have been left blank). It will therefore be necessary to show clearly what amendments have been made, both during the course of negotiation and at the end of the transaction. The following approach can be adopted:

- when distributing the first draft to the syndicate of banks and the borrowers, the drafting law firm should provide copies of the draft marked to show changes from the Intercreditor Agreement including the deletion of the LMA logo and the copyright notice. Further comparisons should be provided as required by the Parties
- at the end of the transaction, the law firm responsible for the draft should provide the Parties with a conformed copy of the final document marked to show changes from the Intercreditor Agreement. This will help with administration of the facility and any secondary trading that may take place.

There is no recommendation for how this comparison will be produced or how additions or deletions should be indicated.

3. OUTLINE OF KEY PROVISIONS OF THE INTERCREDITOR AGREEMENT

Please note that this section of the Users Guide is intended to summarise the key provisions of the Intercreditor Agreement and to act as an overview of its structure. By its nature it does not attempt to cover every aspect of all the Intercreditor Agreement's provisions in full. Where appropriate the below summary contains cross-references (in italicised text) to the corresponding clauses of the Intercreditor Agreement. Areas in square brackets denote that the relevant provision is in square brackets in the Intercreditor Agreement.

3.1 **Types Of Debt and Creditors** (*Clause 1 (Definitions and Interpretation)*)

The layers of debt to be regulated are as set out below (together the "**Liabilities**" held by the "**Creditors**").

(a) **Primary Liabilities**

- (i) A, B and C single currency senior term facilities [and any incremental single currency senior term facility that may be established and made available (an "**Incremental Senior Facility**")] (the "**Senior Term Facilities**") and a working capital multicurrency revolving credit facility (together with the Senior Term Facilities, the "**Senior Facilities**") provided by "**Senior Lenders**" (together with the arranger of the Senior Facilities (the "**Senior Arranger**") and the agent under the Senior Facilities (the "**Senior Agent**"), the "**Senior Facility Creditors**") and documented in the "**Senior Facilities Agreement**". All amounts due under the Senior Facilities Agreement to the Senior Facility Creditors are referred to as "**Senior Facility Liabilities**".
- (ii) Facilities (the "**Refinancing Senior Facilities**") which:
 - (A) refinance the Senior Facility Liabilities in full;
 - (B) rank, in relation to the Hedging Liabilities and the Mezzanine Liabilities, in the same manner and to the same extent as the Senior Facility Liabilities;
 - (C) the terms of which are either agreed to by the [Majority] Mezzanine Lenders and the Mezzanine Agent or are such that:
 - (1) the facilities do not exceed the size of the Senior Facilities [(including any potential Incremental Senior Facility)] as at the original date of closing [or, if less, as at the date of refinancing] by more than the Senior Headroom;
 - (2) the margin [and fees] applicable to the facilities do not exceed those applicable to the Senior Facilities by more than the Senior Yield Headroom;

- (3) the facilities do not benefit from any security and/or guarantee/indemnity other than those permitted to be taken by the Senior Facility Creditors;
- (4) the facilities terminate no earlier than [] days before, and no more than [] days after, the Senior Facilities [(other than any Incremental Senior Facility)];
- (5) [the average life for the facilities is [equal to or greater]/[other] than the average life of the Senior Facilities;]
- (6) [the representations, undertakings and events of default are not materially more onerous than those applying to the Senior Facilities;]
- (7) [if the financial covenants are more onerous than those under the Senior Facilities Agreement, the Mezzanine Lenders are given the opportunity to amend the financial covenants under the Mezzanine Facility Agreement so that the level of any percentage differential is maintained],

will become Senior Facilities (and the liabilities under those facilities will become Senior Facility Liabilities) under the Intercreditor Agreement and the providers of, agent under and arranger of, those facilities will become Senior Facility Creditors under the Intercreditor Agreement if they accede to the Intercreditor Agreement in the appropriate capacity. The provision of such facilities is referred to as a "**Qualifying Senior Facilities Refinancing**".

This concept is designed to offer flexibility to the borrower group by allowing the Senior Facilities to be refinanced within the existing Intercreditor framework. It is designed to facilitate a refinancing by way of loan financing documented by a typical leveraged facilities agreement. Changes are likely to be required to similarly facilitate such a refinancing implemented by way of bond or other financing instruments. It will be important to ensure that the concept is adequately reflected in the terms of the other transaction documentation (particularly the mezzanine facility agreement² and the security documents). Users should also note that the concept is subject to the Senior Headroom limits and should take this into account when setting the level of Senior Headroom.

- (iii) Arrangements to hedge interest rate liabilities and/or exchange rate risks in relation to the Senior Term Facilities (or the term facilities under the

² The Mezzanine Document reflects the Qualifying Senior Facilities Refinancing concept.

Refinancing Senior Facilities) [and the Mezzanine Facility] as required by the hedging strategy letter (the "**Hedging Letter**") (the "**Hedging Liabilities**") provided by "**Hedge Counterparties**" and documented by "**Hedging Agreements**". Such arrangements hedging a notional amount in excess of that required by the Hedging Letter will still constitute Hedging Liabilities for the purposes of the Intercreditor Agreement. (Hedge Counterparties are not required to also be Senior Lenders or Mezzanine Lenders and framework documentation other than ISDA documentation is allowed for in the Intercreditor Agreement.)

(The Senior Facility Creditors and the Hedge Counterparties are together referred to as the "**Senior Creditors**").

- (iv) Single currency mezzanine term facility (the "**Mezzanine Facility**") provided by "**Mezzanine Lenders**" (together with the arranger of the Mezzanine Facility (the "**Mezzanine Arranger**") and agent under the Mezzanine Facility (the "**Mezzanine Agent**"), the "**Mezzanine Creditors**") and documented in the "**Mezzanine Facility Agreement**". All amounts due under the Mezzanine Facility Agreement to the Mezzanine Creditors are referred to as "**Mezzanine Liabilities**".

(The Senior Creditors and the Mezzanine Creditors are together referred to as the "**Primary Creditors**").

(b) ***Junior Liabilities***

- (i) Intercompany debt (the "**Intra-Group Liabilities**") (not including Parent Liabilities) owed to "**Intra-Group Lenders**".

[(The Intercreditor Agreement envisages that certain Intra-Group Liabilities (given the label "**Structural Intra-Group Liabilities**") may need (for transaction/structure specific reasons) to be treated more restrictively than Intra-Group Liabilities generally).]

- (ii) Debt due from the Company to the Parent (the "**Parent Liabilities**").
- (iii) Vendor notes (the "**Vendor Liabilities**") owed to "**Vendor**".
- (iv) [Investor debt (the "**Investor Liabilities**") owed to "**Investors**"]³.

The Vendor Liabilities and the Investor Liabilities are together referred to as the "**Subordinated Liabilities**" and the Vendor and the Investors are together referred to as the "**Subordinated Lenders**".

³ A square bracketed option is used to include Investors as party to the Intercreditor Agreement in recognition that the commercial position reached may be that the Investors will not be party to an Intercreditor Agreement.

3.2 **Other Parties**

(a) ***The Debtors***

The Company and any other member of the Group which has any actual or contingent obligations in respect of any of the Liabilities are required to be party to the Intercreeitor Agreement. (Such members of the Group (together with the Parent and the Company) are referred to as the "**Debtors**".)

(b) ***The Security Agent***

The Transaction Security is held by a security agent the ("**Security Agent**") on trust for the Primary Creditors.

3.3 **Creditor voting groups** (*Clause 1 (Definitions and Interpretation)*)

(a) ***Majority Senior Creditors***: holders of []% of the aggregate of:

- (i) the Senior Facilities;
- (ii) following a permitted termination or close out of any Hedging Liability, the settlement amount of that Hedging Liability to the extent that that settlement amount is due to the Hedge Counterparty and has not been paid by the relevant Debtor; and
- (iii) (following discharge in full of the Senior Facility Liabilities only), the deemed settlement amount of the Hedging Liabilities (that have not been closed out or terminated) at any time.

Therefore, a Hedge Counterparty will have a vote:

- (iv) at any time after a permitted termination or close-out of the corresponding Hedging Liability to the extent that the resulting settlement amount is due to the Hedge Counterparty and has not been paid by the relevant Debtor; and
- (v) at any time following discharge in full of the Senior Facility Liabilities.

(b) ***Majority Senior Lenders***: holders of []% of the Senior Facilities, as specified in the Senior Facilities Agreement.

(c) ***Majority Mezzanine Lenders***: holders of []% of the Mezzanine Facility, as specified in the Mezzanine Facility Agreement.

(d) ***Instructing Group***:

- (i) at any time prior to discharge in full of the Senior Facility Liabilities and the Hedging Liabilities, the Majority Senior Creditors; and
- (ii) at any time after such discharge, the Majority Mezzanine Lenders.

3.4 **Ranking as to Payment** (*Clause 2 (Ranking and Priority)*)

- (a) *First: Senior Facility Liabilities and Hedging Liabilities pari passu.*
- (b) *Second: Mezzanine Liabilities.*
- (c) *Third: Intra-Group Liabilities, Parent Liabilities and Subordinated Liabilities.*

(The Intra-Group Liabilities, Parent Liabilities and Subordinated Liabilities are not ranked between themselves, and are merely postponed to the Primary Liabilities).

3.5 **Ranking as to Proceeds of Enforcement of Transaction Security** (*Clause 2 (Ranking and Priority)*)

- (a) *First: Senior Facility Liabilities and Hedging Liabilities pari passu.*
- (b) *Second: Mezzanine Liabilities.*

3.6 **Senior Facility Liabilities - Restrictions and Permissions**

- (a) ***Payments to Senior Facility Creditors*** (*Clause 3.1 (Payment of Senior Facility Liabilities)*)

No restrictions - any due payments allowed from time to time. (Users should note that this will allow any professional adviser fees incurred by the Senior Lenders and which are, under the Senior Facilities, to be paid by the borrower group, to be paid without restriction. Junior creditors may seek to restrict such fees to those which are "reasonable", to the extent that they follow the occurrence of an Event of Default. Whether or not such a qualification is included is a matter for commercial negotiation between the parties.)

- (b) ***Restrictions on waivers/amendments - Senior Facility Creditors*** (*Clause 3.2 (Amendments and Waivers: Senior Facility Creditors), Clause 3.3 (Restriction on amendments and waivers: Senior Facility Liabilities) and Clause 3.4 (Restriction on amendments and waivers: SFA guarantee)*)

- (i) *Restriction on size*

No increase in the size of the Senior Facilities [(including any potential Incremental Senior Facility)] as at the original date of closing [or, if less, as at the date of the waiver/amendment] which exceeds the Senior Headroom.

- (ii) *Restriction on margin*

No increase in margin unless:

- (A) contemplated by the Senior Facilities Agreement and associated documents or otherwise pursuant to market flex; or

- (B) the increase does not exceed the Senior Yield Headroom.
- (iii) *[Restriction on fees]*

No increase in fees unless:

 - (A) in consideration for amendments, waivers or granting of consents;
 - (B) in consideration for a role in connection with the refinancing or restructuring of the Senior Facilities;
 - (C) contemplated by the Senior Facilities Agreement and associated documents or otherwise pursuant to market flex;
 - (D) the relevant fee is payable to the Senior Agent; or
 - (E) the increase does not exceed the Senior Yield Headroom.]
- (iv) *Restrictions on payment waivers and deferrals*

No waiver of prepayment obligations or deferral of payment obligations due to a Senior Lender the amount of which exceed the Senior Headroom.
- (v) *Extra restriction on deferrals*

No deferral of payment obligations due to a Senior Lender to a date more than [] days after the final termination date for the Senior Facilities.
- (vi) *[Restriction on waiver of interest/fees]*

No waiver of interest/fees the amount of which exceed the Senior Headroom].
- (vii) *Restriction on increased payments*

No other amendment/waiver leading to increased or additional payments unless:

 - (A) contemplated in the Senior Facilities Agreement;
 - (B) [made pursuant to provisions in the Senior Facilities Agreement which facilitate the replacement of an interest rate benchmark which is unavailable];
 - (C) [of fees;] or
 - (D) permitted under this paragraph (b).
- (viii) *Restriction on guarantee release/amendments*

No change to or release of any guarantee without the consent of the Hedge Counterparties.

(ix) *Senior Headroom and Senior Yield Headroom*

- (A) Senior Headroom: a specified aggregate limit.
- (B) Senior Yield Headroom: a specified aggregate limit of []% per annum.

(c) ***Security and guarantees/indemnities - Senior Lenders*** (Clause 3.6 (Security: Senior Facility Creditors))

Senior Lenders may take security and/or any guarantee/indemnity in addition to:

- (i) that the benefit of which is given to each other Primary Creditor; and
- (ii) the guarantees/indemnities contained in the Senior Facilities Agreement, the Intercreditor Agreement or the relevant mandate letter,

provided that:

- (A) it is also offered to the Hedge Counterparties and the Mezzanine Lenders; [or
- (B) it is reasonably necessary to either:
 - (1) maintain the effectiveness of security and/or any guarantee/indemnity as a result of the establishment of an Incremental Senior Facility; or
 - (2) provide the Senior Lenders under an Incremental Senior Facility with security and/or guarantees/indemnities equivalent to those provided to the other Lenders under the other Senior Term Facilities].

(d) ***Acquisition of Senior Facilities by members of the Group***

No restrictions. It is assumed that the relevant Senior Facilities Agreement regulates such action. (The Leveraged Document contains such provisions.)

3.7 **Additional Restrictions and Permissions relating to Ancillary Lenders and Issuing Banks**

(a) ***Security and guarantees/indemnities - Ancillary Lenders and Issuing Banks*** (Clause 3.7 (Security: Ancillary Lenders and Issuing Banks))

Not permitted to take security and/or any guarantee/indemnity other than:

- (i) that the benefit of which is given to each other Primary Creditor;
- (ii) any guarantee/indemnity contained in the Senior Facilities Agreement or the Intercreditor Agreement;

- (iii) any guarantee/indemnity contained in an Ancillary Facility and no greater in extent than that referred to in paragraphs (i) and (ii) above;
 - (iv) cash collateral permitted under the Senior Facilities;
 - (v) where an Ancillary Facility is provided by way of hedging facility, indemnities contained in a hedging master agreement; and
 - (vi) that giving effect to or arising out of netting or set-off balances arising under the Ancillary Facilities.
- (b) ***Enforcement Action - Ancillary Lenders and Issuing Banks*** (Clauses 3.8 (Restriction on Enforcement: Ancillary Lenders and Issuing Banks) and 3.9 (Permitted Enforcement: Ancillary Lenders and Issuing Banks))

Whilst any of the Senior Facilities and Hedging Liabilities are outstanding, only permitted to take enforcement action:

- (i) if the Senior Facility Creditors have taken enforcement action in which case the Ancillary Lenders and the Issuing Banks may take the same enforcement action;
 - (ii) if contemplated by the Senior Facilities Agreement or paragraph (a) above;
 - (iii) if relating to permitted cash collateral;
 - (iv) if consented to by Majority Senior Creditors; or
 - (v) in respect of a member of the Group following insolvency of that member of the Group.
- (c) ***[Netting and set-off of multi-account overdraft facilities - Ancillary Lenders***

The Intercreditor Agreement allows the operation of netting or set-off of multi-account overdraft facilities provided by way of Ancillary Facility [from a gross limit down to a net limit (each of which are agreed between the Parent and the Ancillary Lender and notified to the Agent when the facility is established)][without limit]]⁴.

3.8 Facilitation of establishment of Incremental Senior Facilities (Clause 3.10 (Facilitation of establishment of Incremental Senior Facilities))

On the establishment of an Incremental Senior Facility each Primary Creditor shall do such things as are reasonably necessary to either:

⁴ These optional provisions are included to facilitate Ancillary Lenders reporting Ancillary Facilities comprising group overdraft facilities "net" to the UK regulator and are included as carve-outs to the relevant Clauses in the Intercreditor Agreement. The choice of whether these are subject to limits or are without limits is likely to affect the extent to which an Ancillary Lender is able to report such an overdraft on a net basis. The inclusion of the language and the choice of option is a matter for commercial agreement. It is assumed that users will obtain separate regulatory advice in relation to the ability to report such facilities net.

- (a) maintain the effectiveness of security and/or any guarantee/indemnity as a result of the establishment of a Senior Incremental Facility; or
- (b) to provide the Senior Lenders under an Incremental Senior Facility with security and/or guarantees/indemnities equivalent to those provided to the Senior Lenders under the other Senior Term Facilities,

provided that there is no obligation to release or amend the Transaction Security or any guarantee/indemnity [unless []].

3.9 **Restrictions and Permissions - Hedge Counterparties**

- (a) ***Payments to Hedge Counterparties*** (Clauses 4.2 (Restriction on Payment: Hedging Liabilities) and 4.3 (Permitted Payments: Hedging Liabilities))

Only the following payments are permitted:

- (i) scheduled payments under Hedging Agreements;
- (ii) payments arising from tax gross-up, default interest and indemnities under the relevant ISDA master agreement (or any equivalent);
- (iii) payments arising out of a Non-Credit Related Close-Out (as described in paragraph (e)(i) below);
- (iv) payments arising out of
 - (A) a Credit Related Close-Out (as described in paragraph (e)(i) below);
[or
 - (B) the operation of an automatic early termination, the provision of which in the Hedging Agreement is consistent with practice in the relevant derivatives market (taking into account the legal status and jurisdiction of incorporation of the relevant parties) and is as provided for under the relevant ISDA master agreement (or any equivalent),to the extent that no [Default]/[Event of Default] is continuing under the Senior Facilities Agreement;
- (v) payments arising as a result of a termination or close-out arising from:
 - (A) a bankruptcy event of default under the relevant ISDA master agreement (or any equivalent) relating to a Hedge Counterparty;
 - (B) an Illegality, Tax Event, Tax Event Upon Merger or a Force Majeure Event under the relevant ISDA master agreement (or any equivalent) relating to a Hedge Counterparty

to the extent that no [Default]/[Event of Default] is continuing under the Senior Facilities Agreement;

(vi) payments made with the consent of the Majority Senior Creditors;

if, in each case, there is no payment default by that Hedge Counterparty (unless the Majority Senior Creditors otherwise consent); and

(vii) payments in respect of the Hedging Liabilities of an insolvent member of the Group.

(b) ***Acquisition of Hedging Liabilities by members of the Group*** (Clause 4.5 (No acquisition of Hedging Liabilities))

Not permitted without consent of Majority Senior Creditors.

(c) ***Restrictions on waivers/amendments - Hedging Agreements*** (Clause 4.6 (Amendments and Waivers: Hedging Agreements))

Amendments and waivers permitted so long as it would not result in a breach of:

(i) the Intercreditor Agreement; or

(ii) the Hedging Letter.

(d) ***Security and guarantees/indemnities - Hedge Counterparties*** (Clause 4.7 (Security: Hedge Counterparties))

Not permitted to take security and/or any guarantee/indemnity other than:

(i) that the benefit of which is given to each other Primary Creditor;

(ii) any guarantee/indemnity contained in the Senior Facilities Agreement or the Intercreditor Agreement;

(iii) any guarantee/indemnity contained in a Hedging Agreement and no greater in extent than that referred to in paragraphs (i) or (ii) above; and

(iv) the indemnities contained in an ISDA master agreement (or equivalent).

(e) ***Enforcement Action - Hedge Counterparties*** (Clauses 4.8 (Restriction on Enforcement: Hedge Counterparties) and 4.9 (Permitted Enforcement: Hedge Counterparties))

(i) Subject to paragraphs (ii), (iii) and (f) below, not permitted to take enforcement action but may terminate or close out the Hedging Liabilities prematurely:

Non-Credit Related Close-Outs

(A) if so doing would not result in a breach of the Hedging Letter;

- (B) following an Illegality or Tax Event, Tax Event upon Merger or a Force Majeure Event under those Hedging Liabilities;
- (C) to the extent required to comply with controls on amounts hedged described in paragraph (g) below;
- (D) [];

Credit Related Close-Outs

- (E) if the Senior Lenders or the Mezzanine Lenders have taken any action under any of the acceleration provisions of the relevant Facility Agreement;
 - (F) if any Transaction Security is enforced;
 - (G) on an insolvency event of default (in respect of a Debtor of those Hedging Liabilities) under the Senior Facilities Agreement;
 - (H) if the Majority Senior Creditors consent;
 - (I) on a refinancing in full of the Senior Facilities or on a Qualifying Senior Facilities Refinancing or [];
 - (J) [].
- (ii) Following:
- (A) a payment default under any Hedging Liabilities; and
 - (B) the expiry of [] days from notice of the payment default being given to the Security Agent,
- permitted to:
- (C) terminate or close out those Hedging Liabilities; and
 - (D) (until enforcement of the Transaction Security) take proceedings against the Debtors in respect of those Hedging Liabilities.
- (iii) Permitted to take enforcement action in respect of a member of the Group following insolvency of that member of the Group.

(f) **Required Enforcement** (Clause 4.10 (Required Enforcement: Hedge Counterparties))

An Instructing Group can require a Hedge Counterparty to close out Hedging Liabilities relating to that Hedge Counterparty if:

- (i) the Majority Senior Lenders have taken any action pursuant to the acceleration provisions of the Senior Facilities Agreement; and

- (ii) that Hedge Counterparty is entitled to, but has not, closed out under paragraph (e)(ii) above.
- (g) **Controls on amounts hedged** (Clause 4.13 (Total Interest Rate Hedging and Total Exchange Rate Hedging) and Clause 16.4 (Adjustment of Mandatory Prepayments))

- (i) Parent to ensure that the total amounts hedged by the Debtors against:
 - (A) interest rate risks; and
 - (B) exchange rate risks,

in relation to the Senior Term Facilities [and the Mezzanine Facility] are each no more than the outstanding amount of the Senior Term Facilities [and the Mezzanine Facility] from time to time. Any resulting reduction in notional amounts to be made on a *pro rata* basis across each Hedge Counterparty's relevant Hedging Liabilities.

- (ii) If a mandatory prepayment is to be made under the Senior Facilities or the Mezzanine Facility as a result of the receipt of the proceeds of a permitted disposal, an insurance claim, a claim under the acquisition agreement or excess cashflow (the "**Proceeds**") and would require a payment by a Debtor to a Hedge Counterparty as a result of paragraph (i) above, the amount of that mandatory prepayment will be adjusted so as to provide sufficient funds for the Debtor to make that payment out of the Proceeds.
- (h) **Netting**⁵

The Intercreditor Agreement allows, and does not interfere with, the operation of the netting of individual hedging transactions documented by Hedging Agreements under a single master agreement (to the extent envisaged by ISDA master agreements) or between separate master agreements which are both Hedging Agreements.

- (i) **Senior Facilities Agreement**

The Intercreditor Agreement will contain a mechanism under which a person that accedes to the Intercreditor Agreement as a Hedge Counterparty will automatically accede to the Senior Facilities Agreement. Each Hedge Counterparty will be party to the Senior Facilities Agreement for limited purposes and primarily for the purposes of receiving the benefit of the guarantee and indemnity.

3.10 Mezzanine Liabilities - Restrictions and Permissions

- (a) **Payments to Mezzanine Creditors** (Clauses 5.1 (Restriction on Payment: Mezzanine Liabilities)) to 5.3 (Issue of Mezzanine Payment Stop Notice))

⁵ The provisions are included as carve-outs to the relevant Clauses in the Intercreditor Agreement.

(i) Until the Senior Facility Liabilities and the Hedging Liabilities have been discharged in full, the only payments permitted without the consent of the Majority Senior Creditors are:

(A) due payments of:

- (1) any sum other than principal or capitalised interest;
- (2) principal pursuant to illegality prepayment provisions;
- (3) principal pursuant to cancellation and repayment provisions triggered by an increase in sums payable under tax gross-up and/or increased costs provisions; and
- (4) principal pursuant to mandatory prepayment provisions following permitted disposal, receipt of insurance or acquisition proceeds or excess cashflow except that payments of such amounts are permitted only after discharge in full of the Senior Facilities,

except that no such payments are allowed:

- (5) during a Mezzanine Stop Period; or
 - (6) when a payment default under the Senior Facility Creditor Liabilities or the Hedging Liabilities is outstanding. (In this scenario, payments are blocked automatically and without a Mezzanine Payment Stop Notice being issued);
- (B) payments in respect of amounts owing in respect of the Mezzanine Facility by an insolvent member of the Group; [and
- (C) after an event of default under the Mezzanine Facility Agreement, payments of professional advisers' fees in respect of restructuring advice or valuations relating to the Group [(other than any payable in connection with disputing any aspect of a Distressed Disposal or any provision of the Intercreditor Agreement)] up to a specified aggregate limit and **provided that** there is no payment default under the Senior Facilities Agreement.

Users should consider whether payments under the illegality provision of the Mezzanine Facility should be permitted during a Mezzanine Stop Period or when a payment default under the Senior Facilities or the Hedging Liabilities is outstanding.

(ii) Mezzanine Stop Period begins when Majority Senior Creditors issue a Mezzanine Payment Stop Notice.

- (iii) Majority Senior Creditors may issue a Mezzanine Stop Notice following the occurrence of [a [material] event of default [(the materiality to be in the discretion of the Majority Senior Creditors)] under] / [an event of default under specified clauses of] the Senior Facilities Agreement. (Users should note that the choice of trigger event and the applicability of any materiality concepts is a matter for commercial negotiation between the parties).
 - (iv) Mezzanine Stop Period lasts [] days subject to early termination on the first to occur of: (A) relevant event of default no longer continuing; (B) Majority Senior Creditors cancelling Mezzanine Payment Stop Notice; (C) Senior Facilities and Hedging Liabilities discharged in full; and (D) the end of a subsequent Mezzanine Standstill Period (as defined in paragraph (e) below).
 - (v) Mezzanine Stop Period does not restrict capitalisation of interest on the Mezzanine Facility.
- (b) ***Acquisition of Mezzanine Facility by members of the Group*** (Clause 5.7 (Mezzanine Debt Purchase Transactions))

Not permitted unless:

- (i) either:
 - (A) the Senior Facility Liabilities and the Hedging Liabilities have been discharged in full; or
 - (B) with the consent of the Majority Senior Creditors and in accordance with the Senior Facilities Agreement; and
 - (ii) in accordance with the Mezzanine Facility Agreement.
- (c) ***Restrictions on waivers/amendments - Mezzanine Creditors*** (Clause 5.8 (Amendments and Waivers: Mezzanine Creditors))

Before the Senior Facility Liabilities and the Hedging Liabilities have been discharged in full, the following restrictions apply:

- (i) no change to principal amount of Mezzanine Facility;
- (ii) no change to terms of repayment or prepayment other than one:
 - (A) which is contemplated by the Mezzanine Facility Agreement and associated documents; or
 - (B) the effect of which is solely to defer any scheduled repayment of the Mezzanine Facility;

(iii) no change to basis on which interest, fees or commission accrue other than one:

(A) which is contemplated by the Mezzanine Facility Agreement and associated documents;

(B) [which is otherwise pursuant to market flex provisions;]

(C) [the effect of which is solely to convert cash pay interest to capitalised interest;

(D) the effect of which is solely to increase the PIK margin under the Mezzanine Facility by up to []% per annum to the extent it relates to interest converted under paragraph (C) above; or]

(E) which is:

(1) a minor or administrative change; or

(2) a correction of a manifest error,

not prejudicial to the Senior Creditors;

(iv) no change which:

(A) would result in a Debtor being subject to more onerous obligations under representations, undertakings, financial covenants or events of default; and

(B) has not been made to the Senior Facilities,

without the consent of the Majority Senior Creditors.

(d) ***Security and guarantees/indemnities - Mezzanine Creditors*** (Clause 5.10 (Security: Mezzanine Creditors))

Not permitted to take security and/or any guarantee/indemnity other than:

(i) that the benefit of which is given to each other Primary Creditor; or

(ii) the guarantees/indemnities contained in the Mezzanine Facility Agreement, the Intercreditor Agreement or the relevant mandate letter,

without the consent of the Majority Senior Creditors.

(e) ***Enforcement Action - Mezzanine Creditors*** (Clauses 5.11 (Restriction on Enforcement: Mezzanine Creditors) to 5.13 (Restriction on Enforcement against Debtors: Mezzanine Creditors))

(i) Not permitted to take enforcement action whilst any of the Senior Facility Liabilities and Hedging Liabilities are outstanding unless:

- (A) the Senior Facility Creditors have taken action under any of the acceleration provisions of the Senior Facilities Agreement, in which case the Mezzanine Creditors may take the same action under the acceleration provisions of the Mezzanine Facility Agreement;
- (B) expiry of a period (a "**Mezzanine Standstill Period**") of:
 - (1) [] days in the event of a non-payment of any principal, interest or fees under the Mezzanine Facility;
 - (2) [] days in the event of any other non-payment (in a minimum amount of []) under the Mezzanine Facility;
 - (3) [] days in the event of a breach of any financial covenant under the Mezzanine Facility; and
 - (4) [] days in the case of any other event of default under the Mezzanine Facility;

(If the Senior Creditors' ability to serve a Mezzanine Payment Stop Notice is restricted to the occurrence of specified events of default (or to material events of default) under the Senior Facilities Agreement, users should consider whether the Mezzanine Lenders' ability to take enforcement action under paragraph (4) above should be similarly confined to specified events of default (or to material events of default) under the Mezzanine Facility Agreement. The extent to which such restrictions are applied is a matter for commercial negotiation between the parties.)

- (C) in respect of a member of the Group following insolvency of that member of the Group; or
 - (D) the Majority Senior Creditors give consent.
- (ii) Not permitted to take enforcement action (other than under paragraph (i)(C) above) against a Debtor (or its holding company) where (A) the shares of that member of the Group are part of the Transaction Security and (B) that part of the Transaction Security is being enforced, until the earlier of: (1) [] days after the end of the Mezzanine Standstill Period; and (2) notification that that part of the Transaction Security is no longer being enforced.

(f) **Mezzanine Lenders' Call Options** (Clauses 5.14 (Option to purchase: Mezzanine Lenders) and 5.15 (Hedge Transfer: Mezzanine Lenders))

- (i) *Senior Facilities [and Hedging Liabilities]*

The Mezzanine Lenders have a call option to purchase the Senior Facilities [(together with the Hedging Liabilities (in full and, if not closed

out, on a deemed Early Termination Date basis or, if closed out, on a settlement amount basis))] in full and at par (plus costs and expenses and any amount that would have been due if that purchase was a repayment or prepayment of the Senior Facilities by a Debtor) at any time [during [a Mezzanine Standstill Period]/[a Mezzanine Stop Period]]/[after [any acceleration action under any Facility Agreement or any enforcement of the Transaction Security]/[the final termination date for the Senior Facilities]].

(ii) *Hedging Liabilities*

The Mezzanine Lenders have an additional call option to purchase the Hedging Liabilities (in full and, if not closed out, on a deemed Early Termination Date basis or, if closed out, on a settlement amount basis) which is exercisable at any time after discharge in full of the Senior Facilities.

3.11 Intra-Group Liabilities - Restrictions and Permissions

(a) ***Payments to Intra-Group Lenders*** (Clauses 6.1 (Restriction on payment: Intra-Group Liabilities) to 6.2 (Permitted Payments: Intra-Group Liabilities))

- (i) Any due payments allowed unless (subject to paragraph (ii) below) [an event of default is continuing]/[any action under the acceleration provisions has been taken] under the Senior Facilities Agreement or the Mezzanine Facility Agreement.
- (ii) Due payments allowed despite the restrictions in paragraph (i) above if either:
 - (A) payment is approved by: (i) Majority Senior Creditors (or Majority Mezzanine Lenders if, at that time, they are entitled to give instructions as to the manner of enforcement of Transaction Security); or (ii) (only after discharge in full of the Senior Facility Liabilities and the Hedging Liabilities) Majority Mezzanine Lenders; or
 - (B) payment is made to facilitate repayment of the Senior Facility Liabilities and the Hedging Liabilities or the making of any permitted payment of the Mezzanine Facility.
- (iii) [Paragraphs (i) and (ii) above do not apply to Structural Intra-Group Liabilities. Payments in respect of Structural Intra-Group Liabilities permitted only to the extent permitted under the Senior Facilities Agreement and the Mezzanine Facility Agreement.]
- (iv) Payments in respect of the Intra-Group Liabilities of an insolvent member of the Group are permitted.

(b) ***Acquisition of Intra-Group Liabilities by members of the Group*** (Clause 6.4 (Acquisition of Intra-Group Liabilities))

- (i) Permitted unless (subject to paragraph (ii) below):
 - (A) it would result in a breach of the Senior Facilities Agreement or the Mezzanine Facility Agreement; or
 - (B) [an event of default is continuing]/[any action under the acceleration provisions has been taken] under the Senior Facilities Agreement or the Mezzanine Facility Agreement.
- (ii) Permitted despite the restriction in paragraph (i) above if either:
 - (A) acquisition is approved by: (1) Majority Senior Creditors (or Majority Mezzanine Lenders if, at that time, they are entitled to give instructions as to the manner of enforcement of Transaction Security); or (2) (only after discharge in full of the Senior Facilities and the Hedging Liabilities) Majority Mezzanine Lenders; or
 - (B) acquisition is made to facilitate repayment of the Senior Facility Liabilities and the Hedging Liabilities or the making of any permitted payment of the Mezzanine Liabilities.
- (iii) [Paragraphs (i) and (ii) above do not apply to Structural Intra-Group Liabilities. Acquisition by members of the Group of Structural Intra-Group Liabilities permitted only to the extent permitted under the Senior Facilities Agreement and the Mezzanine Facility Agreement.]

(c) ***Security and guarantees/indemnities - Intra-Group Lenders*** (Clause 6.5 (Security: Intra-Group Lenders))

Not permitted prior to discharge in full of the Senior Facility Liabilities, Hedging Liabilities and Mezzanine Liabilities unless:

- (i) permitted under the Senior Facilities Agreement and the Mezzanine Facility Agreement; or
- (ii) consented to by Majority Senior Creditors and Majority Mezzanine Lenders.

(d) ***Enforcement Action - Intra-Group Lenders*** (Clauses 6.6 (Restriction on enforcement: Intra-Group Lenders) and 6.7 (Permitted Enforcement: Intra-Group Lenders))

Not permitted until:

- (i) Senior Facility Liabilities, Hedging Liabilities and Mezzanine Liabilities discharged in full; or

- (ii) insolvency of a member of the Group, when enforcement action may be taken in respect of that member of the Group.

3.12 **Parent Liabilities - Restrictions and Permissions**

- (a) ***Payments to Parent*** (Clauses 7.1 (Restriction on Payment: Parent Liabilities) and 7.2 (Permitted Payments: Parent Liabilities))

- (i) No payment (other than payments permitted by the Senior Facilities Agreement and the Mezzanine Facility Agreement) allowed until the Senior Facility Liabilities, the Hedging Liabilities and the Mezzanine Liabilities have been discharged in full unless the Majority Senior Creditors and the Majority Mezzanine Lenders consent.
- (ii) Payments in respect of the Parent Liabilities of an insolvent member of the Group are permitted.

- (b) ***Acquisition of Parent Liabilities by Debtors*** (Clause 7.4 (No acquisition of Parent Liabilities))

Not permitted prior to discharge in full of the Senior Facility Liabilities, Hedging Liabilities and Mezzanine Liabilities unless Majority Senior Creditors and Majority Mezzanine Lenders consent.

- (c) ***Restrictions on Waivers/Amendments - Parent Liabilities*** (Clause 7.5 (Amendments and Waivers: Parent Liabilities))

Not permitted prior to discharge in full of the Senior Facility Liabilities, Hedging Liabilities and Mezzanine Liabilities unless:

- (i) of a minor and administrative nature and not prejudicial to the Primary Creditors; or
- (ii) Majority Senior Creditors and Majority Mezzanine Lenders consent.

- (d) ***Security and guarantees/indemnities - Parent*** (Clause 7.6 (Security: Parent Liabilities))

Not permitted prior to discharge in full of the Senior Facility Liabilities, Hedging Liabilities and Mezzanine Liabilities unless permitted by the Senior Facilities Agreement and the Mezzanine Facility Agreement.

- (e) ***Enforcement Action - Parent*** (Clauses 7.7 (Restriction on Enforcement: Parent) and 7.8 (Permitted Enforcement: Parent))

Not permitted until:

- (i) discharge in full of Senior Facility Liabilities, Hedging Liabilities and Mezzanine Liabilities; or

- (ii) insolvency of a member of the Group, when enforcement action may be taken in respect of that member of the Group.

3.13 Subordinated Liabilities - Restrictions and Permissions

- (a) ***Payments to Subordinated Lenders*** (Clauses 8.1 (Restriction on Payment: Subordinated Liabilities) and 8.2 (Permitted Payments: Subordinated Liabilities))

- (i) No payment (other than payments permitted by the Senior Facilities Agreement and the Mezzanine Facility Agreement) allowed until the Senior Facility Liabilities, the Hedging Liabilities and the Mezzanine Liabilities have been discharged in full unless the Majority Senior Creditors and the Majority Mezzanine Lenders consent.

- (ii) Payments in respect of the Subordinated Liabilities of an insolvent member of the Group are permitted.

- (b) ***Acquisition of Subordinated Liabilities by Debtors*** (Clause 8.4 (No acquisition of Subordinated Liabilities))

Not permitted prior to discharge in full of the Senior Facility Liabilities, Hedging Liabilities and Mezzanine Liabilities unless Majority Senior Creditors and Majority Mezzanine Lenders consent.

- (c) ***Waivers/Amendments to Subordinated Liabilities*** (Clause 8.5 (Amendments and Waivers: Subordinated Creditor[s]))

Not permitted prior to discharge in full of the Senior Facility Liabilities, Hedging Liabilities and Mezzanine Liabilities unless:

- (i) of a minor and administrative nature and not prejudicial to the Primary Creditors; or

- (ii) Majority Senior Creditors and Majority Mezzanine Lenders consent.

- (d) ***Security and guarantees/indemnities - Subordinated Lenders*** (Clause 8.6 (Security: Subordinated Creditor[s]))

Not permitted prior to discharge in full of the Senior Facility Liabilities, Hedging Liabilities and Mezzanine Liabilities unless Majority Senior Creditors and Majority Mezzanine Lenders consent.

- (e) ***Enforcement Action - Subordinated Lenders*** (Clauses 8.7 (Restriction on Enforcement: Subordinated Creditor[s]) and 8.8 (Permitted Enforcement: Subordinated Creditor[s]))

Not permitted until:

- (i) discharge in full of Senior Facility Liabilities, Hedging Liabilities and Mezzanine Liabilities; or

- (ii) insolvency of a member of the Group, when enforcement action may be taken in respect of that member of the Group.

3.14 **Turnover** (*Clause 10 (Turnover of Receipts)*)

Any receipt or recovery by a Creditor in respect of the Liabilities which is:

- (a) not permitted by the Intercreditor Agreement;
- (b) made after any action has been taken under the acceleration provisions of the Senior Facilities Agreement or the Mezzanine Facility Agreement or after any enforcement of any Transaction Security;
- (c) the result of litigation against a member of the Group; or
- (d) made in respect of Liabilities of a member of the Group as a result of, or after, the insolvency of that member of the Group,

to be turned over to the Security Agent for application in accordance with the waterfall described in clause 3.19 (*Payment waterfall*) of this Users Guide.

3.15 **Enforcement of Transaction Security**

Instructions to enforce the Transaction Security and subsequent instructions regarding the manner of that enforcement are treated separately.

- (a) ***Enforcement of Transaction Security*** (*Clause 12.2 (Enforcement Instructions)*)

Instructions to commence enforcement given:

- (i) by Majority Senior Creditors unless:
 - (A) the Senior Facility Liabilities and the Hedging Liabilities have been discharged in full; or
 - (B) no enforcement or instructions to enforce by Majority Senior Creditors and the Majority Senior Creditors have not required the Group to dispose of any assets,
- (ii) in which case, by Majority Mezzanine Lenders to the extent that the Mezzanine Lenders are otherwise permitted to take enforcement action.

- (b) ***Manner of Enforcement*** (*Clause 12.3 (Manner of enforcement)*)

Instructions as to manner of enforcement given:

- (i) by Majority Senior Creditors unless:
 - (A) the Senior Facility Liabilities and the Hedging Liabilities have been discharged in full; or

- (B) if the Majority Mezzanine Lenders gave instructions to enforce the Transaction Security under paragraph (a) above and the Majority Senior Creditors have not given instructions as to the manner of enforcement,
 - (ii) in which case, by Majority Mezzanine Lenders,
- (in either case, the "**Enforcing Group**").

3.16 **Distressed Disposals** (*Clause 14 (Distressed Disposals)*)

- (a) Security Agent authorised to release Transaction Security when disposals made in distressed circumstances ("**Distressed Disposals**") and, where that disposal is a disposal of shares of a member of the Group, to have the power to release, dispose of or transfer obligations in respect of certain Liabilities and other liabilities.
- (b) The powers described in paragraph (b) above are controlled by requiring the Security Agent [to take reasonable care] to obtain a fair market [price]/[value] in the prevailing market conditions when making a Distressed Disposal.
- (c) [The Security Agent may seek to meet this requirement in any manner but the requirement is automatically satisfied if:
 - (i) the Distressed Disposal is made pursuant to a court supervised/approved process;
 - (ii) the Distressed Disposal is made at the direction of, or under the control of, an insolvency officer;
 - (iii) the Distressed Disposal is made pursuant to:
 - (A) an auction or other competitive sales process [conducted with the advice of an independent [internationally recognised] investment bank, accountancy firm or other professional services firm with the requisite experience (a "**Financial Adviser**")] [(with procedures which do not expressly exclude the Mezzanine Creditors from participating as prospective buyers[, other than where the Financial Adviser advises that such participation could prejudice that process])]; or
 - (B) any enforcement of the Transaction Security carried out by way of auction or other competitive sales process pursuant to applicable law; or
 - (iv) a Financial Adviser has delivered an opinion to the Security Agent that the proceeds received in connection with the Distressed Disposal are fair from a financial point of view taking into account all relevant circumstances [including, without limitation, the method of enforcement or disposal].]

Users should note that these controls are intended as a starting point only and it is expected that they will be considered and negotiated in the context of the transaction in question.

More restrictive controls include requiring one or more of the above valuation techniques to be followed and/or making the release of any Transaction Security or liabilities subject to any specified valuation technique being followed.

- (d) Distressed Disposals may be made for non-cash consideration unless:
 - (i) the Instructing Group does not consent; or
 - (ii) the Security Agent has reasonable grounds for believing that its receiving, managing or distributing the non-cash consideration would have an adverse effect on it.
- (e) Instructions on Distressed Disposals (including the appointment of a Financial Adviser) are given:
 - (i) by the Enforcing Group if effected by way of enforcement of the Transaction Security; or
 - (ii) otherwise by the Instructing Group.

3.17 Non-cash consideration (*Clause 15 (Non-Cash Recoveries)*)

- (a) If non-cash consideration is received by the Security Agent instructions in relation to the managing, realisation for cash and/or any distribution of that non-cash consideration are given by the Instructing Group.
- (b) The cash value of non-cash consideration (and discharge of Liabilities upon a distribution of non-cash consideration to the Creditors) is determined by reference to a valuation provided by a Financial Adviser appointed on the instructions of the Instructing Group.
- (c) [If it is unlawful, or would conflict with a Creditor's constitutional documents, for any Creditor to receive non-cash consideration, any non-cash consideration held for that Creditor shall not be distributed to it but shall be held, managed and realised for cash by the Security Agent, acting on the instructions of that Creditor.]
- (d) Notwithstanding any instruction to the contrary, the Security Agent may immediately realise any non-cash consideration for cash if it has reasonable grounds for believing that its managing or distributing any non-cash consideration would have an adverse effect on it.

3.18 Claims against Report Providers (*Clause 16.3 (Recoveries from Report Providers)*)

- (a) Recoveries from actions against report providers to be either:

- (i) (if no action under the acceleration provisions of the Senior Facilities Agreement or the Mezzanine Facility Agreement or enforcement of the Transaction Security has been taken), paid to the Parent for application in accordance with the Senior Facilities Agreement; or
- (ii) (if action under the acceleration provisions of the Senior Facilities Agreement or the Mezzanine Facility Agreement or enforcement of the Transaction Security has been taken), paid to the Security Agent for application in accordance with the waterfall described in clause 3.19 (*Payment waterfall*) of this Users Guide.

3.19 **Payment waterfall** (*Clause 18 (Application of Proceeds)*)

Amounts received by Security Agent (from enforcement of Transaction Security or otherwise) to be applied towards:

- (a) *first*: sums owing to Security Agent;
- (b) *second*: enforcement costs and expenses incurred by any Senior Facility Creditor, Hedge Counterparty or Mezzanine Creditor in connection with the Senior Facilities, the Hedging Liabilities or the Mezzanine Facility;
- (c) *third*: (i) Senior Facility Liabilities and (ii) Hedging Liabilities, *pro rata* as between (i) and (ii);
- (d) *fourth*: Mezzanine Liabilities;
- (e) *fifth*: to any person to whom payment is required to be made by law; and
- (f) *sixth*: Debtors.

3.20 **[Equalisation** (*Clause 19 (Equalisation)*)

If Senior Lenders and Hedge Counterparties experience uneven recourse against Debtors or in respect of the Transaction Security, payments are required to be made between the Senior Lenders and the Hedge Counterparties to correct this and are calculated by reference to the outstandings owing to each Senior Lender and Hedge Counterparty in respect of the relevant Liabilities when enforcement proceedings are commenced.]

3.21 **Facilitation of Qualifying Senior Facilities Refinancing** (*Clause 20 (Facilitation of Qualifying Senior Facilities Refinancing)*)

- (a) [If the Transaction Security would not be available to the creditors under a Qualifying Senior Facilities Refinancing to the same extent as it was available to the Senior Facility Creditors, the Transaction Security may be released and retaken.]
- (b) Each Primary Creditor shall do such things as are reasonably necessary to give the providers of a Qualifying Senior Facilities Refinancing the rights given to the Senior Facility Creditors and otherwise to implement successfully a Qualifying Senior Facilities Refinancing,

provided that, in each case, there is no obligation to release or amend the Transaction Security or any guarantee/indemnity [if so doing would have [an]/[a] [material] adverse effect on the Primary Creditors. The release of security or guarantee/indemnity and restarting of any hardening period shall not in itself constitute such an effect.]

Users should note that this further assurance provision for the facilitation of a Qualifying Senior Facilities Refinancing is an example only and should be considered in the context of the transaction. In particular, the extent to which any release or amendment of security and/or guarantees/indemnities should be included within its scope should be considered on a transaction specific basis, together with the extent of any qualifications.