

The sample documents

The following sample loan agreement is based on the terms of the sample term sheet for the DutchCo transaction which are described in detail in Chapter 3 (but for reasons of – relative – brevity and to avoid repetition no sample loan agreement corresponding to the Project Tennis term sheet is included). For the purposes of this chapter, the reader can assume that the commercial terms of the DutchCo term sheet have been accepted by the borrower and the guarantor. The reader can also assume that the sample agreement is a draft agreed between the arranging banks and their lawyers and is ready for delivery to the borrower. In other words, it is a draft at an early stage in the documentation process.

The sample agreement is based on the Recommended Form of LMA Primary Documents (with the optional swingline wording) but has been amended to take account of the requirements of the term sheet and the arrangers.

Annotations are made in the agreement to explain each of its important provisions.

The use of square brackets ([•]) is a convention to signify that information is to be inserted, clarified or agreed between the parties.

\$1,000,000,000

FACILITY AGREEMENT

DATED [•]

FOR

DUTCHCO SPV B.V.
AS BORROWER

WITH

PARENT COMPANY S.A.
AS GUARANTOR

ARRANGED BY

ARRANGER BANK LIMITED
TOP BANK PLC
AND
XYZ BANK LIMITED

WITH

XYZ BANK LIMITED
ACTING AS AGENT

MULTICURRENCY REVOLVING FACILITY
AGREEMENT INCORPORATING A DOLLAR
SWINGLINE FACILITY

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THIS AGREEMENT is dated *[date]* and made

The first part of a syndicated loan agreement lists all parties to the Agreement. Each party is defined by reference to its specified function, for example, guarantor, arranger, agent. The reason for this way of defining parties is to avoid confusion where, for example, the Agent changes identity pursuant to Clause 30 (*Role of the Agent and the Arranger*) or a transferee becomes a '**Lender**' pursuant to Clause 28 (*Changes to the Lenders*). In Clause 1.2 (*Construction*) each 'Party' is construed so as to include its successors in title, permitted assigns and permitted transferees. The borrower is referred to as the '**Borrower**' throughout this sample agreement. The lenders are split into different groups in accordance with the different facilities. The lenders are called '**Lenders**' under the Revolving Facility and '**Swingline Lenders**' under the Swingline Facility.

BETWEEN:

- (1) **DUTCHCO SPV B.V.** (the 'Borrower');

This party will issue the commercial paper which is intended to be sold in the US market. In this case, Parent Company S.A. has chosen to tap the US commercial paper market through a special purpose vehicle subsidiary incorporated in The Netherlands (which has a favourable tax regime for cross-border borrowing (amongst other things)). In some cases, foreign corporations may choose instead to use a US special purpose company, which has the advantage that some US buyers of commercial paper are restricted in the amount of non-US paper they are able to buy. Using a US special purpose company therefore enlarges the potential market of the issuer. However, this comes at the cost (in terms of time and expense) of having to set up the US special purpose company.

- (2) **PARENT COMPANY S.A.** (the 'Guarantor');
- (3) **ARRANGER BANK LIMITED, TOP BANK PLC and XYZ BANK LIMITED** as mandated lead arrangers (whether acting individually or together the 'Arranger');
- (4) **THE FINANCIAL INSTITUTIONS** listed in Part II (*The Original Lenders*) and Part III (*The Original Swingline Lenders*) of Schedule 1 (*The Original Parties*) as lenders (the 'Original Lenders'); and

The Swingline Lenders must be able to provide same day funds in dollars in accordance with the timetable set out in Schedule 10 (*Timetables*). Accordingly, they will be US banks or US branches of non-US banks. The syndicate of Swingline Lenders may differ from the syndicate in respect of the Revolving Facility as some banks may not be able to make domestic funds available other than through an affiliate. For example, sometimes two separate legal entities from within the same bank group will act as lender under the Revolving Facility and the Swingline Facility (for example, the London branch of an English bank and its US incorporated subsidiary).

(5) XYZ BANK LIMITED as agent of the other Finance Parties (the ‘Agent’).

Because of the late notice of borrowing permitted in a swingline facility (see Schedule 10 (*Timetables*)), a separate New York entity is often appointed to act as agent for the Swingline Lenders. In this case, the Agent delegates the swingline functions to its branch in New York (so that a separate swingline agent is not appointed).

IT IS AGREED as follows:

SECTION 1 INTERPRETATION

1. DEFINITIONS AND INTERPRETATION

The interpretation section defines those terms of an agreement which are constantly used throughout the agreement and which are of significance for its functions. Usually, all defined terms are written with a first capital letter, except those general terms as referred to in paragraph (a) of Clause 1.2 (*Construction*) of the sample agreement. Many of these defined terms appear in the Glossary, where further explanations can be found.

1.1 Definitions

In this Agreement:

‘Acceptable Bank’ means:

- (a) a Lender;
- (b) any bank or financial institution which has a rating for its long-term unsecured and non-credit-enhanced debt obligations of [A-] or higher by Standard & Poor’s Ratings Services or Fitch Ratings Ltd or [A3] or higher by Moody’s Investor Services Limited or a comparable rating from an internationally recognised credit rating agency; or
- (c) any other bank or financial institution approved by the Agent (acting reasonably).

‘Additional Cost Rate’ has the meaning given to it in Schedule 4 (*Mandatory Cost formulae*).

‘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.

‘Agent’s Spot Rate of Exchange’ means the Agent’s spot rate of exchange for the purchase of the relevant currency with the Base Currency in the London foreign exchange market at or about 11:00 a.m. on a particular day.

‘Assignment Agreement’ means an agreement substantially in the form set out in Schedule 6 (*Form of Assignment Agreement*) or any other form agreed between the relevant assignor and assignee.

‘Authorisation’ means an authorisation, consent, approval, resolution, licence, exemption, filing, notarisation or registration.

‘Availability Period’ means the period from and including the date of this Agreement to and including the Business Day:

- (a) falling one Month prior to the Termination Date in relation to the Revolving Facility; and
- (b) immediately preceding the Termination Date in relation to the Swingline Facility.

‘Available Commitment’ means (but without limiting Clause 8.4 (*Relationship with the Revolving Facility*)) a Lender’s Commitment minus (subject as set out below):

- (a) the Base Currency Amount of its participation in any outstanding Loans; and
- (b) in relation to any proposed Utilisation, the Base Currency Amount of its participation in any Loans that are due to be made on or before the proposed Utilisation Date.

For the purposes of calculating a Lender’s Available Commitment in relation to any proposed Utilisation, that Lender’s participation in any Loans that are due to be repaid or prepaid on or before the proposed Utilisation Date shall not be deducted from a Lender’s Commitment.

‘Available Facility’ means the aggregate for the time being of each Lender’s Available Commitment.

‘Available Swingline Commitment’ of a Swingline Lender means (but without limiting Clause 8.4 (*Relationship with the Revolving Facility*)) that Lender’s Swingline Commitment minus:

- (a) the amount of its participation in any outstanding Swingline Loans; and
- (b) in relation to any proposed Utilisation under the Swingline Facility, the amount of its participation in any Swingline Loans that are due to be made under the Swingline Facility on or before the proposed Utilisation Date.

For the purposes of calculating a Swingline Lender’s Available Swingline Commitment in relation to any proposed Utilisation under the Swingline Facility, that Lender’s participation in any Swingline Loans that are due to be repaid or prepaid on or before the proposed Utilisation Date shall not be deducted from a Swingline Lender’s Swingline Commitment.

‘Available Swingline Facility’ means the aggregate for the time being of each Swingline Lender’s Available Swingline Commitment.

‘Base Currency’ means dollars.

‘Base Currency Amount’ means, in relation to a Loan, the amount specified in the Utilisation Request for that Loan (or, if the amount requested is not denominated in the Base Currency, that amount converted into the Base Currency at the Agent’s Spot Rate of Exchange on the date which is three Business Days before the Utilisation Date or, if later, on the date the Agent receives the Utilisation Request) adjusted to reflect any repayment, prepayment, consolidation or division of the Loan.

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

- (a) the interest (excluding any Margin) which a Lender should have received for the period from the date of receipt of all or any part of its participation in 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 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 London, Amsterdam and New York and:

- (a) (in relation to any date for payment or purchase of a currency other than euro) the principal financial centre of the country of that currency; or
- (b) (in relation to any date for payment or purchase of euro) any TARGET Day.

‘Cash’ means, at any time, cash in hand or at bank denominated in dollars, euro or sterling and (in the case of cash at bank) credited to an account in the name of a member of the Group with an Acceptable Bank and to which a member of the Group is alone (or together with other members of the Group) beneficially entitled and for so long as:

- (a) that cash is repayable on demand;
- (b) repayment of that cash is not contingent on the prior discharge of any other indebtedness of any member of the Group or of any other person whatsoever or on the satisfaction of any other condition;
- (c) there is no Security over that cash except for any Security constituted by a netting or set-off arrangement entered into by any member of the Group in the ordinary course of its banking arrangements; and
- (d) the cash is freely and immediately available to be applied in repayment or prepayment of the Facility.

‘Cash Equivalent Investments’ means at any time:

- (a) certificates of deposit maturing within one year after the relevant date of calculation and issued by an Acceptable Bank;
- (b) any investment in marketable debt obligations issued or guaranteed by the government of the United States of America, the United Kingdom or any Participating

Member State which in each case has a credit rating of [AA] or higher by either Standard & Poor's Rating Services or Fitch Ratings Ltd or [Aa2] or higher by Moody's Investor Services Limited or by an instrumentality or agency of any of them having an equivalent credit rating, maturing within one year after the relevant date of calculation and not convertible or exchangeable to any other security;

- (c) commercial paper not convertible or exchangeable to any other security:
 - (i) for which a recognised trading market exists;
 - (ii) issued by an issuer incorporated in the United States of America, the United Kingdom or any Participating Member State;
 - (iii) which matures within one year after the relevant date of calculation; and
 - (iv) which has a credit rating of either A-1 or higher by Standard & Poor's Rating Services or F1 or higher by Fitch Ratings Ltd or P-1 or higher by Moody's Investor Services Limited, or, if no rating is available in respect of the commercial paper, the issuer of which has, in respect of its long-term unsecured and non-credit enhanced debt obligations, an equivalent rating;
- (d) any investment in money market funds which (i) have a credit rating of either [A-1] or higher by Standard & Poor's Rating Services or [F1] or higher by Fitch Ratings Ltd or [P-1] or higher by Moody's Investor Services Limited and (ii) which invest substantially all their assets in securities of the types described in paragraphs (a) to (c) above, provided that such investment can be turned into cash on not more than 30 days' notice; or
- (e) any other debt security approved in writing by the Majority Lenders,
- (f) in each case, denominated in dollars, euro or sterling and to which any member of the Group is alone (or together with other members of the Group) beneficially entitled at that time and which is not issued or guaranteed by any member of the Group or subject to any Security.

'Commitment' means:

- (a) in relation to an Original Lender, the amount in the Base Currency set opposite its name under the heading **'Commitment'** in Part II (*The Original Lenders*) of Schedule 1 (*The Original Parties*) and the amount of any other Commitment transferred to it under this Agreement or assumed by it in accordance with Clause 2.2 (*Increase*); and
- (b) in relation to any other Lender, the amount in the Base Currency of any Commitment transferred to it under this Agreement or assumed by it in accordance with Clause 2.2 (*Increase*),

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

'Compliance Certificate' means a certificate substantially in the form set out in Schedule 7 (*Form of Compliance Certificate*).

'Confidential Information' means all information relating to the Borrower, the Guarantor, the Group, the Finance Documents or the 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 the Facility from either:

- (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 40 (*Confidentiality*); 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 LMA as set out in Schedule 9 (*LMA Form of Confidentiality Undertaking*) 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 27 (*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.

‘Defaulting Lender’ means any Lender:

- (a) which has failed to make its participation in a Loan or a Swingline Loan available (or has notified the Agent or the Borrower (which has notified the Agent) that it will not make its participation in a Loan or a Swingline Loan available) by the Utilisation Date of that Loan in accordance with Clause 64 (*Lenders’ participation*) or Clause 8.3 (*Swingline Lenders’ participation*);
- (b) which has otherwise rescinded or repudiated a Finance Document;
- (c) with respect to which an Insolvency Event has occurred and is continuing; or
- (d) an Affiliate of which is a Defaulting Lender,
- (e) unless, in the case of paragraph (a) above:
 - (i) its failure to pay is caused by:
 - (A) administrative or technical error; or
 - (B) a Disruption Event; and
 - (ii) payment is made within three Business Days of its due date; or the Lender is disputing in good faith whether it is contractually obliged to make the payment in question.

‘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; or
- (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.

LMA loan documents include optional wording to address how to deal with Defaulting Lenders (as defined above). This wording was introduced in response to events in 2008 to 2009 when certain banks (including certain Lehman Brothers entities and some Icelandic banks) entered into insolvency processes and/or were unable to comply with their obligations under syndicated loan agreements. If a Lender becomes a Defaulting Lender, then:

- (a) the Borrower can cancel the Defaulting Lender’s undrawn Commitments;
- (b) the Defaulting Lender’s participations in drawn Revolving Facility Loans can be ‘termed’ out, so such participations are no longer required to be repaid at the end of the current Interest Period (recognising that if a Defaulting Lender receives such a repayment, it may not be capable of funding the ‘rollover’ of its participation in the relevant Loan); and
- (c) the Defaulting Lender will cease to have a vote to the extent of its undrawn Commitments and cease to be entitled to receive a commitment fee in respect of its undrawn Commitments.

‘Dutch FSA’ means the Dutch Financial Supervision Act (*Wet op het financieel toezicht*), including any regulations issued pursuant thereto.

Because the Borrower is a Dutch entity, the agreement contains a number of provisions aimed at ensuring compliance with Dutch law (including the Dutch FSA which provides for the regulation of financial institutions in The Netherlands).

‘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 permit, licence, consent, approval and other 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.

‘EURIBOR’ means in relation to any Loan in euro:

- (a) the applicable Screen Rate; or
- (b) (if no Screen Rate is available for the Interest Period of that Loan) the Reference Bank Rate;

as of the Specified Time on the Quotation Day for euro and for a period comparable to the Interest Period of that Loan and, if any such rate is below zero, EURIBOR will be deemed to be zero.

‘Event of Default’ means any event or circumstance specified as such in Clause 27 (*Events of Default*).

‘Facility’ means the Revolving Facility or the Swingline 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.

‘Federal Funds Rate’ means, in relation to any day, the rate per annum equal to:

- (a) the weighted average of the rates on overnight Federal funds transactions with members of the US Federal Reserve System arranged by Federal funds brokers, as published for that day (or, if that day is not a New York Business Day, for the immediately preceding New York Business Day) by the Federal Reserve Bank of New York; or
- (b) if a rate is not so published for any day which is a New York Business Day, the average of the quotations for that day on such transactions received by the Agent from three Federal funds brokers of recognised standing selected by the Agent.

‘Fee Letter’ means any letter or letters dated on or about the date of this Agreement between the Arranger and the Borrower (or the Agent and the Borrower) setting out any of the fees referred to in Clause 16 (*Fees*).

‘Finance Document’ means this Agreement, the Mandate Letter, any Fee Letter and any other document designated as a ‘Finance Document’ by the Agent and the Borrower.

‘Finance Lease’ means any lease which would, in accordance with GAAP as applied at the date of this Agreement, be treated as a finance or capital lease but shall exclude any operating lease entered into at any time which is treated as a finance or capital lease as a result of any change to the treatment of such leases under GAAP which is implemented after the date of this Agreement.

‘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;
- (d) the amount of any liability in respect of any Finance 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;
- (i) any amount raised by the issue of redeemable shares which are redeemable (other than at the option of the issuer) before the Termination Date;
- (j) any amount of any liability under an advance or deferred purchase agreement if one of the primary reasons behind the entry into the agreement is to raise finance; and
- (k) (without double counting) the amount of any liability in respect of any guarantee or indemnity for any of the items referred to in paragraphs (a) to (j) above.

‘GAAP’ means generally accepted accounting principles in The Netherlands (in the case of the Borrower) and in France (in the case of the Guarantor), in either case including IFRS.

‘Group’ means the Guarantor and its Subsidiaries for the time being.

‘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.

‘Impaired Agent’ means the Agent at any time when:

- (a) it has failed to make (or has notified a Party that it will not make) a payment required to be made by it under the Finance Documents by the due date for payment;
- (b) the Agent otherwise rescinds or repudiates a Finance Document;
- (c) (if the Agent or the Swingline Agent is also a Lender) it is a Defaulting Lender under paragraph (a) or (b) of the definition of ‘Defaulting Lender’; or
- (d) an Insolvency Event has occurred and is continuing with respect to the Agent or the Swingline Agent;
- (e) unless, in the case of paragraph (a) above:
 - (i) its failure to pay is caused by:
 - (A) administrative or technical error; or
 - (B) a Disruption Event; and
 - payment is made within three Business Days of its due date; or
 - (ii) the Agent is disputing in good faith whether it is contractually obliged to make the payment in question.

LMA loan documents include optional wording to address how to deal with a situation where an agent experiences an Insolvency Event (as defined below), informs the other Parties that it will not be able to make payments as required under the Finance Documents or otherwise becomes a Defaulting Lender. If an Agent becomes an Impaired Agent as a result of the occurrence of one of these events, then the Majority Lenders are entitled to replace the Agent and may use alternative means of making payments under the Finance Documents (in order to avoid the situation where payments are made by other Parties to an Impaired Agent which is unable to make the corresponding payments out to the relevant recipients as required under the Finance Documents).

‘Increase Confirmation’ means a confirmation substantially in the form set out in Schedule 11 (*Form of Increase Confirmation*).

‘Increase Lender’ has the meaning given to that term in Clause 2.2 (*Increase*).

‘Indebtedness for Borrowed Money’ means Financial Indebtedness save for any indebtedness for or in respect of paragraphs (g) and (h) of the definition of **‘Financial Indebtedness’**.

‘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 before the date of this Agreement.

‘Insolvency Event’ in relation to a Finance Party or the Swingline Agent means that the Finance Party or the Swingline Agent:

- (a) is dissolved (other than pursuant to a consolidation, amalgamation or merger);
- (b) becomes insolvent or is unable to pay its debts or fails or admits in writing its inability generally to pay its debts as they become due;
- (c) makes a general assignment, arrangement or composition with or for the benefit of its creditors;
- (d) institutes or has instituted against it, by a regulator, supervisor or any similar official with primary insolvency, rehabilitative or regulatory jurisdiction over it in the jurisdiction of its incorporation or organisation or the jurisdiction of its head or home office, a proceeding seeking a judgment of insolvency or bankruptcy or any other relief under any bankruptcy or insolvency law or other similar law affecting creditors' rights, or a petition is presented for its winding-up or liquidation by it or such regulator, supervisor or similar official;
- (e) has instituted against it a proceeding seeking a judgment of insolvency or bankruptcy or any other relief under any bankruptcy or insolvency law or other similar law affecting creditors' rights, or a petition is presented for its winding-up or liquidation, and, in the case of any such proceeding or petition instituted or presented against it, such proceeding or petition is instituted or presented by a person or entity not described in paragraph (d) above and:
 - (i) results in a judgment of insolvency or bankruptcy or the entry of an order for relief or the making of an order for its winding-up or liquidation; or
 - (ii) is not dismissed, discharged, stayed or restrained in each case within 30 days of the institution or presentation thereof;
- (f) has a resolution passed for its winding-up, official management or liquidation (other than pursuant to a consolidation, amalgamation or merger);
- (g) seeks or becomes subject to the appointment of an administrator, provisional liquidator, conservator, receiver, trustee, custodian or other similar official for it or for all or substantially all its assets (other than, for so long as it is required by law or regulation not to be publicly disclosed, any such appointment which is to be made, or is made, by a person or entity described in paragraph (d) above);
- (h) has a secured party take possession of all or substantially all its assets or has a distress, execution, attachment, sequestration or other legal process levied, enforced or sued on or against all or substantially all its assets and such secured party maintains possession, or any such process is not dismissed, discharged, stayed or restrained, in each case within 30 days thereafter;
- (i) causes or is subject to any event with respect to it which, under the applicable laws of any jurisdiction, has an analogous effect to any of the events specified in paragraphs (a) to (h) above; or
- (j) takes any action in furtherance of, or indicating its consent to, approval of, or acquiescence in, any of the foregoing acts.

'Interest Period' means, in relation to a Loan, each period determined in accordance with Clause 14 (*Interest Periods*) and, in relation to an Unpaid Sum, each period determined in accordance with Clause 13.3 (*Default interest*).

‘Legal Reservations’ means:

- (a) the principle that equitable remedies may be granted or refused at the discretion of a court and the limitation of enforcement by laws relating to insolvency, reorganisation and other laws generally affecting the rights of creditors;
- (b) the time barring of claims under the Limitation Acts, the possibility that an undertaking to assume liability for or indemnify a person against non-payment of UK stamp duty may be void and defences of set-off or counterclaim; and
- (c) similar principles, rights and defences under the laws of any Relevant Jurisdiction.

‘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 2.2 (*Increase*) or Clause 28 (*Changes to the Lenders*), 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:

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

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

Libor has been used for the calculation of interest in syndicated loans since the inception of the market in the 1970s, but has more recently been the subject of some controversy (see Chapter 1).

The definition of Libor (and the equivalent definition for Euribor) states that the rate will be fixed by reference to the **‘Screen Rate’**. Which particular commercial screen is noted in the definition of **‘Screen Rate’**. The most commonly used screen operator is Reuters. In relation to Libor, this sample agreement is referring to the average rate for the relevant currency (dollars or an Optional Currency) which is quoted by Reuters.

Term loans or multicurrency loans can often require quotes to be given for periods other than whole months or for currencies not quoted on the relevant screen. In addition, the definitions in agreements of Business Day and Months can cause problems if they do not coincide with those used by the relevant screen operator and problems could also arise if the screen operator ceases to exist and no suitable replacement is found. Accordingly, it is customary in all agreements to put a **‘fall-back’** position in the Libor and Euribor definitions to set out a way of providing a quote if any of these problems arise. In this agreement the fall-back position is to go to the Reference Bank Rate. However, following the publication in September 2012 of the Wheatley Report on

Continued

Libor, it is possible that market practice may change so that loan agreements specify that alternative benchmark rates (rather than the Reference Bank Rate) should be used where Libor is not available. In response to the recommendations included in the Wheatley Report on Libor, the British Bankers' Association announced in November 2012 that the publication of Libor rates for certain currencies (Australian dollars, Canadian dollars, Danish Kroner, New Zealand dollars and Swedish Kronor) and/or for maturities other than one, three, six and 12 months would be discontinued in 2013 (on account of the limited transaction data for interbank lending in such currencies and such maturities), meaning that alternative benchmark rates are likely to be required for these currencies and those maturities in future (although it was subsequently decided that the BBA would continue to publish overnight, one week and two month rates).

As mentioned in the term sheet, in 2011 there were a few instances where certain Libor rates (for example, one-month Swiss franc Libor) briefly turned negative, leading to concerns that negative Libor rates may reduce margins payable to lenders. The LMA documentation now provides that if the relevant Screen Rate shows that Libor or Euribor is negative, then for the purposes of the loan agreement, Libor or Euribor will be deemed to be zero in order to protect the lenders' return.

'Limitation Acts' means the Limitation Act 1980 and the Foreign Limitation Periods Act 1984.

'LMA' means the Loan Market Association.

'Loan' means a Revolving Facility Loan or a Swingline Loan.

'Majority Lenders' means a Lender or Lenders whose Commitments aggregate more than 66⅔% of the Total Commitments (or, if the Total Commitments have been reduced to zero, aggregated more than 66⅔% of the Total Commitments immediately prior to the reduction).

'Mandate Letter' means the letter dated [DATE] between the Arranger, the Borrower and others.

'Mandatory Cost' means the percentage rate per annum calculated by the Agent in accordance with Schedule 4 (*Mandatory Cost formulae*).

'Margin' means 0.30 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 an Obligor to perform its obligations under the Finance Documents; or
- (c) the validity or enforceability of the Finance Documents 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;
- (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 only apply to the last Month of any period.

‘New Lender’ has the meaning given to that term in Clause 28 (*Changes to the Lenders*).

‘New York Business Day’ means a day (other than a Saturday or Sunday) on which banks are open for general business in New York.

‘Obligors’ means the Borrower and the Guarantor.

‘Optional Currency’ means a currency (other than the Base Currency) which complies with the conditions set out in Clause 5.3 (*Conditions relating to Optional Currencies*).

‘Original Financial Statements’ means:

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

‘Original Swingline Lender’ means an Original Lender listed in Part III (*The Original Swingline Lenders*) of Schedule 1 (*The Original Parties*) as a Swingline Lender.

‘Original Termination Date’ means the date falling 12 Months after the date of this Agreement.

‘Overall Commitment’ of a Lender means:

- (a) its Commitment; or
- (b) in the case of a Swingline Lender which does not have a Commitment, the Commitment of a Lender which is its Affiliate.

‘Participating Member State’ means any member state of the European Union that has the euro as its lawful currency in accordance with legislation of the European Union relating to Economic and Monetary Union.

‘Party’ means a party to this Agreement.

‘Quotation Day’ means, in relation to any period for which an interest rate is to be determined:

- (a) (if the currency is sterling) the first day of that period;
- (b) (if the currency is euro) two TARGET Days before the first day of that period; or
- (c) (for any other currency) two Business Days before the first day of that period, unless market practice differs in the Relevant Interbank Market for a currency, in which case the Quotation Day for that currency 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).

‘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:

- (a) in relation to LIBOR, as the rate at which the relevant Reference Bank could borrow funds in the London interbank market; or
- (b) in relation to EURIBOR, as the rate at which the relevant Reference Bank could borrow funds in the European interbank market,

in the relevant currency 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 that currency and for that period.

‘Reference Banks’ means, in relation to LIBOR and Mandatory Costs the principal London offices of [•], [•] and [•] and, in relation to EURIBOR, 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 in relation to euro, the European interbank market and, in relation to any other currency, the London interbank market.

‘Relevant Jurisdiction’ means in relation to an Obligor:

- (a) its jurisdiction of incorporation; or
- (b) any jurisdiction where it conducts its business.

‘Repeating Representations’ means each of the representations set out in Clauses 23.2 (*Status*) to 23.7 (*Governing law and enforcement*), Clause 23.10 (*No default*), paragraph (d) of Clause 23.11 (*No misleading information*), Clause 23.13 (*Pari passu ranking*) and Clause 23.14 (*No proceedings pending or threatened*).

Certain representations are repeated on the date of any Utilisation Request, any Utilisation Date and the first day of each Interest Period. These are representations which are not duplicated elsewhere in the document by an ongoing undertaking.

‘Representative’ means any delegate, agent, manager, administrator, nominee, attorney, trustee or custodian.

‘Revolving Facility’ means the revolving loan facility made available under this Agreement as described in Clause 2 (*The Revolving Facility*) with an extension option made available to the Borrower by the Lenders pursuant to Clause 4 (*Extension option*).

‘Revolving Facility Loan’ means a loan made or to be made under the Revolving Facility or the principal amount outstanding for the time being of that loan.

‘Rollover Loan’ means one or more Revolving Facility Loans:

- (a) made or to be made on the same day that a maturing Revolving Facility Loan is due to be repaid;
- (b) the aggregate amount of which is equal to or less than the amount of the maturing Revolving Facility Loan;
- (c) in the same currency as the maturing Revolving Facility Loan (unless it arose as a result of the operation of Clause 10.2 (*Unavailability of a currency*)); and
- (d) made or to be made for the purpose of refinancing a maturing Revolving Facility Loan.

‘Screen Rate’ means:

- (a) in relation to LIBOR, the London inter-bank offered rate for the relevant currency and period; and
 - (b) in relation to EURIBOR, the percentage rate per annum determined by the Banking Federation of the European Union for the relevant period,
- displayed on the appropriate page of the information service which publishes that rate (being currently Reuters screen page LIBOR01 or LIBOR02 for currencies other than euro and Reuters screen page EURIBOR01 for euro). If that page is replaced or service ceases to be available, the Agent may specify another page or service displaying the relevant rate after consultation with the Borrower.

LMA loan agreements have referred specifically in the definition of 'Screen Rate' to the British Bankers' Association Interest Settlement Rate in respect of Libor. However, the Wheatley Report on Libor published in September 2012 announced that a new independent organisation would replace the British Bankers' Association as the body responsible for the administration of Libor and this definition has been adjusted accordingly.

'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.

'Separate Loan' has the meaning given to that term in Clause 11 (*Repayment*).

'Specified Time' means a time determined in accordance with Schedule 10 (*Timetables*).

'Subsidiary' means any person (referred to as the 'first person') in respect of which another person (referred to as the 'second person'):

- (a) holds a majority of the voting rights in that first person or has the right under the constitution of the first person to direct the overall policy of the first person or alter the terms of its constitution; or
 - (b) is a member of that first person and has the right to appoint or remove a majority of its board of directors or equivalent administration, management or supervisory body; or
 - (c) has the right to exercise a dominant influence (which must include the right to give directions with respect to operating and financial policies of the first person which its directors are obliged to comply with whether or not for its benefit) over the first person by virtue of provisions contained in the articles (or equivalent) of the first person or by virtue of a control contract which is in writing and is authorised by the articles (or equivalent) of the first person and is permitted by the law under which such first person is established; or
 - (d) is a member of that first person and controls alone, pursuant to an agreement with other shareholders or members, a majority of the voting rights in the first person or the rights under its constitution to direct the overall policy of the first person or alter the terms of its constitution; or
 - (e) has the power to exercise, or actually exercises dominant influence or control over the first person; or
 - (f) together with the first person are managed on a unified basis,
- and for the purposes of this definition, a person shall be treated as a member of another person if any of that person's Subsidiaries is a member of that other person or, if any shares in that other person are held by a person acting on behalf of it or any of its Subsidiaries. A subsidiary undertaking shall include any person the shares or ownership interests in which are subject to Security and where the legal title to the shares or ownership interests so secured are registered in the name of the secured party or its nominee pursuant to such Security.

‘Swingline Agent’ means any branch or Affiliate of the Agent through which the Agent performs its duties in respect of the Swingline Facility pursuant to Clause 9.6 (*Swingline Agent*).

‘Swingline Commitment’ means:

- (a) in relation to an Original Swingline Lender, the amount in dollars set opposite its name under the heading ‘Swingline Commitment’ in Part III (*The Original Swingline Lenders*) of Schedule 1 (*The Original Parties*) and the amount of any other Swingline Commitment transferred to it under this Agreement or assumed by it in accordance with Clause 2.2 (*Increase*); and
- (b) in relation to any other Swingline Lender, the amount of any Swingline Commitment transferred to it under this Agreement or assumed by it in accordance with Clause 2.2 (*Increase*),

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

‘Swingline Facility’ means the dollar swingline loan facility made available under this Agreement as described in Clause 7 (*Swingline Facility*).

‘Swingline Lender’ means:

- (a) an Original Swingline Lender; or
- (b) any other person that becomes a Swingline Lender after the date of this Agreement in accordance with Clause 2.2 (*Increase*) or Clause 28 (*Changes to the Lenders*), which in each case has not ceased to be a Party in accordance with the terms of this Agreement.

‘Swingline Loan’ means a loan made or to be made under the Swingline Facility or the principal amount outstanding for the time being of that loan.

‘Syndication Date’ means the day specified by the Arranger as the day on which primary syndication of the Facility is completed.

‘TARGET2’ means the Trans-European Automated Real-time Gross Settlement Express Transfer payment system which utilises a single shared platform and which was launched on 19 November 2007.

‘TARGET Day’ means any day on which TARGET2 is open for the settlement of payments in euro.

‘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 Authority’ means any government, state municipality or any local, state federal or other fiscal, revenue, customs or excise authority, body or official anywhere in the world.

‘Termination Date’ means the date falling 12 Months after the date of this Agreement or any subsequent date to which the Original Termination Date is extended pursuant to Clause 4.6 (*Extension Date*).

‘Total Commitments’ means the aggregate of the Commitments, being \$1,000,000,000 at the date of this Agreement.

‘Total Swingline Commitments’ means the aggregate of the Swingline Commitments, being \$500,000,000 at the date of this Agreement.

‘Transfer Certificate’ means a certificate substantially in the form set out in Schedule 5 (*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) in the case of a Utilisation of the Revolving Facility, a notice substantially in the form set out in Part I of Schedule 3 (*Requests*); and
- (b) in the case of a Utilisation of the Swingline Facility, a notice substantially in the form set out in Part II of Schedule 3 (*Requests*).

‘VAT’ means:

- (a) any tax imposed in compliance with the Council Directive of 28 November 2006 on the common system of value added tax (EC Directive 2006/112); and
- (b) any other tax of a similar nature, whether imposed in a member state of the European Union in substitution for, or levied in addition to, such tax referred to in paragraph (a) above, or imposed elsewhere.

1.2 Construction

- (a) Unless a contrary indication appears any reference in this Agreement to:
 - (i) 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, supplemented, extended, replaced or restated;
 - (iv) ‘**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;
 - (v) an ‘**Interest Period**’ includes each period determined under this Agreement by reference to which interest on a Swingline Loan is calculated;
 - (vi) a ‘**Lender**’ includes a Swingline Lender unless the context otherwise requires;
 - (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 of any 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 London 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 waived.

1.3 Currency Symbols and Definitions

‘\$’ and ‘dollars’ denote the lawful currency of the United States of America, ‘€’ and ‘EUR’ and ‘euro’ denote the single currency of the Participating Member States and ‘£’ and ‘sterling’ denote the lawful currency of the United Kingdom.

1.4 Dutch Terms

In this Agreement, where it relates to a Dutch entity, a reference to:

- (a) a necessary action to authorise, where applicable, includes without limitation:
 - (i) any action required to comply with the Dutch Works Council Act (*Wet op de ondernemingsraden*); and
 - (ii) obtaining unconditional positive advice (*advies*) from each competent works council;
- (b) a security interest includes any mortgage (*hypotheek*), pledge (*pandrecht*), retention of title arrangement (*eigendomsvoorbehoud*), privilege (*voorrecht*), right of retention (*recht van retentie*), right to reclaim goods (*recht van reclame*), and, in

general, any right *in rem* (*beperkte recht*), created for the purpose of granting security (*goederenrechtelijk zekerheidsrecht*);

- (c) a winding-up, administration or dissolution includes a Dutch entity being:
 - (i) declared bankrupt (*failliet verklaard*);
 - (ii) dissolved (*ontbonden*);
- (d) a moratorium includes *surseance van betaling* and granted a moratorium includes *surseance verleend*;
- (e) a trustee in bankruptcy includes a curator;
- (f) an administrator includes a *bewindvoerder*;
- (g) a receiver or an administrative receiver does not include a *curator* or *bewindvoerder*; and
- (h) an attachment includes a *beslag*.

1.5 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.

This provision has been included in light of the UK Contracts (Rights of Third Parties) Act 1999 which enables persons who are not parties to a contract to enforce rights under the contract. It is assumed that lenders will not wish third parties to obtain rights under syndicated loan agreements in this case.

SECTION 2 THE FACILITY

2. THE FACILITY

2.1 The Revolving Facility

The committed Revolving Facility which is made available under Clause 2.1 (*The Revolving Facility*) is limited to a maximum available amount of \$1 billion. The Swingline Facility operates as a sub-limit of \$500 million within the Revolving Facility (see definition of Total Swingline Commitments in Clause 1.1 (*Definitions*)). Utilisations of the Swingline Facility operate to reduce the Commitments available under the Revolving Facility. The drawdown procedure of each Facility is set out in Sections 2 and 3 of the sample agreement.

Many agreements which offer both a revolving facility and a swingline facility will restrict the amount of the swingline facility to a proportion of the revolving amount (depending on the size of the commercial paper programme and the purposes for which the revolving credit is to be put). Whether the amount of the swingline facility should be restricted will also be determined by the fee structure i.e. whether the borrower will be paying additional fees for a facility amount which it will never utilise or if the lenders have a commitment for which they are not being adequately compensated.

The Swingline Facility is dealt with in Clauses 7 to 9.

For further commentary see Chapter 3.

- (a) Subject to the terms of this Agreement, the Lenders make available to the Borrower a multicurrency revolving loan facility with an extension option in an aggregate amount equal to the Total Commitments.
- (b) The aggregate amount of all Loans outstanding under this Agreement shall not exceed the Total Commitments.

2.2 Increase

This wording deals with the consequences of a situation where the Borrower has chosen to cancel the Available Commitments of one or more Lenders because they are Defaulting Lenders or (for example) have exercised their rights to charge Increased Costs or request that interest payments are 'grossed up' to take account of a Tax Deduction. In this scenario, the Borrower may choose to reinstate those Commitments, provided that the Borrower is able to find another Lender or Lenders which is (or are) willing to assume the rights and obligations of the Lenders whose Available Commitments were cancelled in the capacity of an Increase Lender.

- (a) The Borrower may by giving prior notice to the Agent after the effective date of a cancellation of:

- (i) the Available Commitments and/or Available Swingline Commitments of a Defaulting Lender in accordance with paragraph (g) of Clause 12.5 (*Right of replacement or repayment and cancellation in relation to a single Lender*); or
 - (ii) the Commitments and/or Swingline Commitments of a Lender in accordance with:
 - (A) Clause 12.1 (*Illegality*); or
 - (B) paragraph (a) of Clause 12.5 (*Right of replacement or repayment and cancellation in relation to a single Lender*),
 - (iii) request that the Commitments and/or Swingline Commitments relating to the relevant Facility be increased (and the Commitments and/or Swingline Commitments relating to the relevant Facility shall be so increased) in an aggregate amount in the Base Currency (or in the case of a Swingline Commitment, in dollars) of up to the amount of the Available Commitments or Available Swingline Commitments or Commitments or Swingline Commitments (in each case, as applicable) relating to the relevant Facility so cancelled as follows:
 - (iv) the increased Commitments and/or Swingline Commitments will be assumed by one or more Lenders or other banks, financial institutions, trusts, funds or other entities (each an ‘**Increase Lender**’) selected by the Borrower (each of which shall not be a member of the Group) and each of which confirms in writing (whether in the relevant Increase Confirmation or otherwise) its willingness to assume and does assume all the obligations of a Lender corresponding to that part of the increased Commitments and/or Swingline Commitments which it is to assume, as if it had been an Original Lender;
 - (v) each of the Obligors and any Increase Lender shall assume obligations towards one another and/or acquire rights against one another as the Obligors and the Increase Lender would have assumed and/or acquired had the Increase Lender been an Original Lender;
 - (vi) each Increase Lender shall become a Party as a ‘Lender’ and any Increase Lender and each of the other Finance Parties shall assume obligations towards one another and acquire rights against one another as that Increase Lender and those Finance Parties would have assumed and/or acquired had the Increase Lender been an Original Lender;
 - (vii) the Commitments and Swingline Commitments of the other Lenders shall continue in full force and effect; and
 - (viii) any increase in the Commitments and/or Swingline Commitments shall take effect on the date specified by the Borrower in the notice referred to above or any later date on which the conditions set out in paragraph (b) below are satisfied.
- (b) An increase in the Commitments and/or Swingline Commitments will only be effective on:
- (i) the execution by the Agent of an Increase Confirmation from the relevant Increase Lender; and

- (ii) in relation to an Increase Lender which is not a Lender immediately prior to the relevant increase, the Agent being satisfied that it has complied with all necessary 'know your customer' or other similar checks under all applicable laws and regulations in relation to the assumption of the increased Commitments and/or Swingline Commitments by that Increase Lender. The Agent shall promptly notify the Borrower and the Increase Lender upon being so satisfied,
- (c) Each Increase Lender, by executing the Increase Confirmation, confirms (for the avoidance of doubt) that the Agent has authority to execute on its behalf any amendment or waiver that has been approved by or on behalf of the requisite Lender or Lenders in accordance with this Agreement on or prior to the date on which the increase becomes effective.
- (d) The Borrower shall promptly on demand pay the Agent the amount of all costs and expenses (including legal fees) reasonably incurred by it in connection with any increase in Commitments and/or Swingline Commitments under this Clause 2.2.
- (e) The Increase Lender shall, on the date upon which the increase takes effect, pay to the Agent (for its own account) a fee in an amount equal to the fee which would be payable under Clause 28.3 (*Assignment or transfer fee*) if the increase was a transfer pursuant to Clause 28.5 (*Procedure for transfer*) and if the Increase Lender was a New Lender.
- (f) The Borrower may pay to the Increase Lender a fee in the amount and at the times agreed between the Borrower and the Increase Lender in a Fee Letter.
- (g) The Borrower may not request an increase under this Clause 2.2 to the extent that such increase would result in a Lender (or its Affiliate) failing to meet the requirement set out in paragraph (i) of Clause 28.2 (*Conditions of assignment or transfer*).
- (h) Clause 28.4 (*Limitation of responsibility of Existing Lenders*) shall apply *mutatis mutandis* in this Clause 2.2 in relation to an Increase Lender as if references in that Clause to:
 - (i) an 'Existing Lender' were references to all the Lenders immediately prior to the relevant increase;
 - (ii) the 'New Lender' were references to that 'Increase Lender'; and
 - (iii) a 're-transfer' and 're-assignment' were references to respectively a 'transfer' and 'assignment'.

2.3 Finance Parties' rights and obligations

- (a) The obligations of each Finance Party 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.

A syndicate of lenders does not constitute a partnership under English law. It is an administrative arrangement whereby a group of lenders co-operate in the extension of credit and the handling of receipts in relation to that credit and ancillary technical matters.

It should be noted that the Lenders' Commitments and rights are several, not joint. (See '**several liability**' in the Glossary.)

- (b) The rights of each Finance Party 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

Depending on the jurisdiction where a borrower is incorporated or located, difficult legal questions may occur where the purpose is *ultra vires* the company or where the purpose fails or becomes impossible. For further commentary see Chapter 3.

3.1 Purpose

The Borrower shall apply all amounts borrowed by it under the Revolving Facility towards its general corporate and working capital purposes and the refinancing of Swingline Loans.

Some Lenders may stipulate that a Revolving Facility may not be used to refinance maturing commercial paper programmes in order to try to distinguish it from the Swingline Facility and to ensure that the Revolving Facility is not liable to be treated as a 'liquidity facility' for the purpose of the Liquidity Coverage Ratio under Basel III.

3.2 Monitoring

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

4. EXTENSION OPTION

As mentioned in the term sheet for this loan agreement, under Basel I, banks were able to take advantage of a favourable regulatory capital treatment for loans with a tenor of less than a year. This favourable treatment would also apply in respect of an extended

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loan if a firm offer to extend the commitment was only given in the final thirty days (or sixty days if syndicated as in the case of the sample agreement) of the initial commitment period, following a full credit assessment of the customer. This often led to banks offering their customers a facility with a 364 day tenor, which could be extended for a further 364 days at the option of the lenders.

Although this favourable capital treatment no longer applies, it remains common for banks to offer financings on the basis of an initial maturity (12 months in this case), together with an option for the borrower to request that the lenders extend the maturity for a further period of 12 months, with such extension being at the discretion of each lender.

4.1 Extension request

The Borrower shall be entitled to request an extension of the Facility, for an additional period of 12 Months by giving notice to the Agent (the '**Extension Request**') not earlier than 60 days nor later than 30 days before the Original Termination Date. The Extension Request shall be made in writing and shall be binding on the Borrower except as set out in Clause 4.5 (*Revocation of Extension*).

4.2 Notification of Extension Request

The Agent shall forward a copy of the Extension Request to the Lenders as soon as practicable after receipt of it.

4.3 Lenders' Response to Extension Request

If a Lender, in its individual and sole discretion, agrees to the extension requested by the Borrower, it shall give notice to the Agent (a '**Notice of Extension**') (revocable only in the case mentioned in Clause 4.5 (*Revocation of Extension*) below) no later than the day falling twenty days prior to the Original Termination Date (the '**Response Deadline**'). If a Lender does not give a Notice of Extension on or prior to Response Deadline it shall be deemed to have refused the Borrower's Extension Request.

4.4 Lender's Discretion

Nothing shall oblige a Lender to agree to an Extension Request.

4.5 Revocation of Extension

If Lenders accounting for fifty per cent or more of the Commitments of the Lenders have not given Notices of Extension by the Response Deadline then the Extension Request will be deemed to have been refused and the Agent shall notify the Borrower and the Lender or Lenders which have given Notices of Extension, that the Extension Request has not been granted.

4.6 Extension Date

- (a) The Original Termination Date shall be extended if and when one or more Lenders so agree by giving a Notice of Extension (except where the Extension Request is

deemed to be refused under Clause 4.3 (*Lenders' Response to Extension Request*) or Clause 4.5 (*Revocation of Extension*) above) and, subject to the provisions of this Clause 4 (*Extension Option*), the Termination Date shall be extended to the day which falls 12 Months from (but including) the Original Termination Date.

- (b) If less than all the Lenders give a Notice of Extension (and the Extension Request is not deemed to be refused pursuant to Clause 4.3 (*Lenders' Response to Extension Request*) or Clause 4.5 (*Revocation of Extension*) above), then the Commitments of the Lenders (and Swingline Lenders which share Commitments with those Lenders not so extending) shall be reduced to zero on the Original Termination Date and the amount of the Revolving Facility and Swingline Facility shall be reduced accordingly.

4.7 Notification of Extension

The Agent shall promptly inform the Borrower and the Lenders and Swingline Lenders which will continue to have Commitments or Swingline Commitments under this Agreement after the Original Termination Date of the size of the Revolving Facility and Swingline Facility if it will be reduced following the Original Termination Date pursuant to Clause 4.6 (*Extension Date*).

5. CONDITIONS OF UTILISATION

The lenders' obligation to lend is contingent upon satisfaction of conditions precedent, including delivery of documents evidencing the existence and powers of the Borrower and the Guarantor and the taking by the Borrower and the Guarantor of the corporate action required to authorise execution of the agreement.

A list of the documents which might be required, including opinions of counsel, is set out in Schedule 2 (*Conditions Precedent*). For present purposes it suffices to mention that the advice of the lenders' counsel in the jurisdiction of incorporation of a borrower and a guarantor should be sought in order to establish a definitive list of the documents to be required of a company incorporated and/or carrying on business in a given jurisdiction.

5.1 Initial conditions precedent

- (a) 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 shall notify the Borrower and the Lenders promptly upon being so satisfied.
- (b) Other than to the extent that the Majority Lenders notify the Agent in writing to the contrary before the Agent gives the notification described in paragraph (a) above, the Lenders authorise (but do not require) the Agent to give that notification. The Agent shall not be liable for any damages, costs or losses whatsoever as a result of giving any such notification.

5.2 Further conditions precedent

Subject to Clause 5.1 (*Initial conditions precedent*), the Lenders will only be obliged to comply with Clause 6.4 (*Lenders' participation*) if on the date of the Utilisation Request and on the proposed Utilisation Date:

- (a) in the case of a Rollover Loan, no Event of Default is continuing or would result from the proposed Rollover Loan and, in the case of any other Loan, no Default is continuing or would result from the proposed Loan; and
- (b) the Repeating Representations to be made by each Obligor are true in all material respects.

5.3 Conditions relating to Optional Currencies

- (a) A currency will constitute an Optional Currency in relation to a Loan if it is euro or if:
 - (i) it is readily available in the amount required and freely convertible into the Base Currency in the Relevant Interbank Market on the Quotation Day and the Utilisation Date for that Loan; and
 - (ii) it has been approved by the Agent (acting on the instructions of all the Lenders) on or prior to receipt by the Agent of the relevant Utilisation Request for that Loan.
- (b) If the Agent has received a written request from the Borrower for a currency to be approved under paragraph (a)(ii) above, the Agent will confirm to the Borrower by the Specified Time:
 - (i) whether or not the Lenders have granted their approval; and
 - (ii) if approval has been granted, the minimum amount for any subsequent Utilisation in that currency.

5.4 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) Any Loan made by a single Lender under Clause 10.2 (*Unavailability of a currency*) shall not be taken into account in this Clause 5.4.
- (c) Any Separate Loan shall not be taken into account in this Clause 5.4.

SECTION 3 UTILISATION

6. UTILISATION – REVOLVING FACILITY LOANS

6.1 Delivery of a Utilisation Request

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

6.2 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 6.3 (*Currency and amount*); and
 - (iii) the proposed Interest Period complies with Clause 14 (*Interest Periods*).
- (b) Only one Revolving Facility Loan may be requested in each Utilisation Request.

6.3 Currency and amount

- (a) The currency specified in a Utilisation Request must be the Base Currency or an Optional Currency.
- (b) The amount of the proposed Revolving Facility Loan must be:
 - (i) if the currency selected is the Base Currency, a minimum of \$50,000,000 or if less, the Available Facility; or
 - (ii) if the currency selected is euro, a minimum of EUR50,000,000 or if less, the Available Facility; or
 - (iii) if the currency selected is an Optional Currency other than euro, the minimum amount specified by the Agent pursuant to paragraph (b) (ii) of Clause 5.3 (*Conditions relating to Optional Currencies*) or, if less, the Available Facility; and
 - (iv) in any event such that its Base Currency Amount is less than or equal to the Available Facility.

6.4 Lenders' participation

- (a) If the conditions set out in this Agreement have been met, and subject to Clause 11 (*Repayment*), each Lender shall make its participation in each Revolving Facility Loan available by the Utilisation Date through its Facility Office.
- (b) The amount of each Lender's participation in each Revolving Facility Loan will be equal to the proportion borne by its Available Commitment to the Available Facility immediately prior to making the Revolving Facility Loan.
- (c) The Agent shall determine the Base Currency Amount of each Revolving Facility Loan which is to be made in an Optional Currency and shall notify each Lender of the amount, currency and the Base Currency Amount of each Revolving Facility Loan, the amount of its participation in that Revolving Facility Loan and if

different, the amount of that participation to be made available in accordance with Clause 33.1 (*Payments to the Agent*), in each case by the Specified Time.

6.5 Cancellation of Commitment

The Commitments which, at that time, are unutilised (taking into account a utilisation of the Revolving Facility by way of Swingline Loan) shall be immediately cancelled at the end of the Availability Period.

7. SWINGLINE FACILITY

7.1 General

- (a) Clause 5.2 (*Further conditions precedent*) and 5.3 (*Conditions relating to Optional Currencies*);
 - (b) Clause 6 (*Utilisation – Revolving Facility Loans*);
 - (c) Clause 10 (*Optional Currencies*);
 - (d) Clause 13 (*Interest*) as it applies to the calculation of interest on a Loan but not default interest on an overdue amount;
 - (e) Clause 14 (*Interest Periods*); and
 - (f) Clause 15 (*Changes to the calculation of interest*),
- do not apply to Swingline Loans.

7.2 Swingline Facility

Subject to the terms of this Agreement, the Swingline Lenders make available to the Borrower a dollar swingline loan facility in an aggregate amount equal to the Total Swingline Commitments.

7.3 Purpose

The Borrower shall apply all amounts borrowed by it under the Swingline Facility towards refinancing any note or other instrument maturing under a dollar commercial paper programme of the Borrower. A Swingline Loan may not be applied in repayment or prepayment of another Swingline Loan.

8. UTILISATION – SWINGLINE LOANS

The Swingline Facility is required solely in relation to the commercial paper programme of the issuer. Such programmes are routinely rated by a recognised rating agency. In order to obtain an appropriate rating the issuer will normally need to show that it has access to same day funds in the US to meet any obligations which arise on the maturity of the paper (and, therefore, the rating agency will wish to see evidence of the existence of the Swingline Facility).

8.1 Delivery of a Utilisation Request for Swingline Loans

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

- (b) Each Utilisation Request for a Swingline Loan must be sent to the Agent to the address, fax number or, if relevant, electronic mail address or other such information in New York City notified by the Agent to the Borrower for this purpose, with a copy to its address, fax number or, if relevant, electronic mail address or other such information referred to in Clause 35 (*Notices*).

8.2 Completion of a Utilisation Request for Swingline Loans

- (a) Each Utilisation Request for a Swingline Loan is irrevocable and will not be regarded as having been duly completed unless:
 - (i) it specifies that it is for a Swingline Loan;
 - (ii) the proposed Utilisation Date is a New York Business Day within the Availability Period;
 - (iii) the Swingline Loan is denominated in dollars;
 - (iv) the amount of the proposed Swingline Loan is not more than the Available Swingline Facility and is a minimum of \$50,000,000 or, if less, the Available Swingline Facility; and
 - (v) the proposed Interest Period:
 - (A) does not extend beyond the Termination Date;
 - (B) is a period of not more than five New York Business Days; and
 - (C) ends on a New York Business Day.
- (b) Only one Swingline Loan may be requested in each Utilisation Request.

8.3 Swingline Lenders' participation

- (a) If the conditions set out in this Agreement have been met, each Swingline Lender shall make its participation in each Swingline Loan available through its Facility Office in New York City.
- (b) The Swingline Lenders will only be obliged to comply with paragraph (a) above if on the date of the Utilisation Request and on the proposed Utilisation Date:
 - (i) no Default is continuing or would result from the proposed Utilisation; and
 - (ii) the Repeating Representations to be made by each Obligor are true in all material respects.
- (c) The amount of each Swingline Lender's participation in each Swingline Loan will be equal to the proportion borne by its Available Swingline Commitment to the Available Swingline Facility immediately prior to making the Swingline Loan, adjusted to take account of any limit applying under Clause 8.4 (*Relationship with the Revolving Facility*).
- (d) The Agent shall determine the Base Currency Amount of each Swingline Loan and notify each Swingline Lender of the amount of each Swingline Loan and its participation in that Swingline Loan in each case by the Specified Time.

8.4 Relationship with the Revolving Facility

- (a) This Clause 8.4 applies when a Swingline Loan is outstanding or is to be borrowed.
- (b) The Revolving Facility may be used by way of Swingline Loans. The Swingline Facility is not independent of the Revolving Facility.

- (c) Notwithstanding any other term of this Agreement a Lender is only obliged to participate in a Loan to the extent that it would not result in the Base Currency Amount of its participation (and that of a Lender which is its Affiliate) in the Loans exceeding its Overall Commitment.
- (d) Where, but for the operation of paragraph (c) above, the Base Currency Amount of a Lender's participation (and that of a Lender which is its Affiliate) in the Loans would have exceeded its Overall Commitment, the excess will be apportioned among the other Lenders required under this Agreement to make available a participation in the relevant Loan pro rata according to their Commitment or, as the case may be, Swingline Commitment. This calculation will be applied as often as necessary until participations in the Loan are apportioned among the relevant Lenders in a manner consistent with paragraph (c) above.

8.5 Cancellation of Swingline Commitment

The Swingline Commitments which, at that time, are unutilised shall be immediately cancelled at the end of the Availability Period.

9. SWINGLINE LOANS

9.1 Repayment of Swingline Loans

The Borrower shall repay each Swingline Loan on the last day of its Interest Period.

9.2 Loss sharing

Clause 9.2 (*Loss sharing*) has been included to ensure that the credit risk in respect of a Swingline Loan is spread between the Lenders proportionately to their share of the Total Commitments (even if they do not participate in the Swingline Facility). The effect of this is that where the Borrower fails to pay an amount in respect of a Swingline Loan when due, each of the other Lenders will make a payment (via the Agent) to the relevant Swingline Lenders of an amount equal to that Lender's proportion of the Total Commitments multiplied by the overdue amount. Inclusion of the loss sharing provision in facilities agreements which incorporate a swingline facility is not invariable. Some lenders take the view that, if they do not share in the economics of a swingline facility, they should not be required to share in any losses associated with it.

- (a) If a Loan (including a Swingline Loan) or interest on a Loan (including a Swingline Loan) is not paid in full on its due date, the Agent (if requested to do so in writing by any affected Lender) shall calculate the amount (if any) which needs to be paid or received by each Lender with a Commitment to place that Lender in the position it would have been in had each Lender (or its Affiliate) with a Commitment participated in that Loan in the proportion borne by its Commitment to the Total Commitments and, if the Total Commitments are then zero, the

proportion borne by its Commitment to the Total Commitments immediately prior to their reduction to zero.

- (b) The calculation of the Agent is designed solely to allocate the unpaid amount proportionally between the Lenders with a Commitment according to their Commitments and will not take into account any commitment fee or other amount payable under the Finance Documents.
- (c) The Agent will set a date (the '**Loss Sharing Date**') on which payments must be made under this Clause 9.2. The Agent shall give at least three Business Days' notice to each affected Lender of this date and the amount of the payment (if any) to be paid or received by it on this date.
- (d) On the Loss Sharing Date:
 - (i) each affected Lender who has to make a payment shall pay to the Agent the relevant amount set out in the notice referred to in paragraph (c) above; and
 - (ii) out of the amounts the Agent receives, the Agent shall pay to each affected Lender who is entitled to receive a payment the amount set out in that notice.
- (e) If the amount actually received by the Agent from the Lenders under paragraph (d) above is insufficient to pay the full amount required to be paid under that paragraph, the Agent shall distribute the amount it actually receives among the affected Lenders *pro rata* to the amounts they are entitled to receive under that paragraph.
- (f) If a Lender makes a payment to the Agent under this Clause 9.2 then, to the extent that that payment is distributed by the Agent under paragraphs (d) or (e) above, as between the relevant Obligor and that Lender an amount equal to the amount of that distributed payment will be treated as not having been paid by the relevant Obligor.

Any payment under this Clause 9.2 will not reduce the obligations in aggregate of any Obligor.

9.3 Voluntary Prepayment of Swingline Loans

- (a) The Borrower may prepay at any time the whole of any Swingline Loan.
- (b) Unless a contrary indication appears in this Agreement, any part of the Swingline Facility which is prepaid or repaid may be re-borrowed in accordance with the terms of this Agreement.

9.4 Interest

Interest is charged on each Swingline Loan at the higher of the prime commercial rate for dollars announced by the Agent and the rate on that date determined by the Agent to be the Federal Funds Rate plus a margin of 0.25%.

- (a) The rate of interest on each Swingline Loan for any day during its Interest Period is the higher of:
 - (i) the prime commercial lending rate in dollars announced by the Agent at the Specified Time and in force on that day; and

- (ii) 0.25 per cent per annum over the rate per annum determined by the Agent to be the Federal Funds Rate (as published by the Federal Reserve Bank of New York) for that day.
- (b) The Agent shall promptly notify the Swingline Lenders and the Borrower of the determination of the rate of interest under paragraph (a) above.
- (c) If any day during an Interest Period is not a New York Business Day, the rate of interest on a Swingline Loan on that day will be the rate applicable to the immediately preceding New York Business Day.
- (d) The Borrower shall pay accrued interest on each Swingline Loan on the last day of its Interest Period.

9.5 Interest Period

- (a) Each Swingline Loan has one Interest Period only.
- (b) The Interest Period for a Swingline Loan must be selected in the relevant Utilisation Request.

9.6 Swingline Agent

- (a) The Agent may perform its duties in respect of the Swingline Facility through an Affiliate acting as its agent.
- (b) Notwithstanding any other term of this Agreement and without limiting the liability of any Obligor under the Finance Documents, each Lender shall (in proportion to its share of the Total Commitments or, if the Total Commitments are then zero, to its share of the Total Commitments immediately prior to their reduction to zero) pay to or indemnify the Agent, within three Business Days of demand, for or against any cost, loss or liability (including, without limitation, for negligence or for any other category of loss whatsoever) incurred by the Agent or its Affiliate (other than by reason of the Agent's or the Affiliate's gross negligence or wilful misconduct or, in the case of any cost, loss or liability pursuant to Clause 33.11 (*Disruption to Payment Systems etc.*) notwithstanding the Agent's or the Affiliate's negligence, gross negligence or any other category of liability whatsoever but not including any claim based on the fraud of the Agent or the Affiliate in acting as Agent for the Swingline Facility under the Finance Documents) unless the Agent or its Affiliate has been reimbursed by an Obligor pursuant to a Finance Document.

9.7 Partial payments (Swingline Loans)

- (a) If the Agent receives a payment in respect of the Swingline Facility that is insufficient to discharge all the amounts then due and payable by an Obligor under the Finance Documents in respect of the Swingline Facility, the Agent shall apply that payment towards the obligations of that Obligor under the Finance Documents in respect of the Swingline Facility in the following order:
 - (i) **first**, in or towards payment *pro rata* of any unpaid fees, costs and expenses of the Agent or its Affiliate under the Finance Documents incurred in respect of the Swingline Facility;

- (ii) **secondly**, in or towards payment *pro rata* of any accrued interest on a Swingline Loan due but unpaid under this Agreement;
 - (iii) **thirdly**, in or towards payment *pro rata* of the principal of any Swingline Loan 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 in respect of the Swingline Facility.
- (b) The Agent shall, if so directed by all the Swingline 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 and Clause 33.6 (*Partial payments*) does not apply to the Swingline Facility.

10. OPTIONAL CURRENCIES

10.1 Selection of currency

The Borrower shall select the currency of a Loan in a Utilisation Request.

10.2 Unavailability of a currency

If before the Specified Time on any Quotation Day:

- (a) a Lender notifies the Agent that the Optional Currency requested is not readily available to it in the amount required; or
- (b) a Lender notifies the Agent that compliance with its obligation to participate in a Loan in the proposed Optional Currency would contravene a law or regulation applicable to it,

the Agent will give notice to the Borrower to that effect by the Specified Time on that day. In this event, any Lender that gives notice pursuant to this Clause 10.2 will be required to participate in the Loan in the Base Currency (in an amount equal to that Lender's proportion of the Base Currency Amount or, in respect of a Rollover Loan, an amount equal to that Lender's proportion of the Base Currency Amount of the Rollover Loan that is due to be made) and its participation will be treated as a separate Loan denominated in the Base Currency during that Interest Period.

10.3 Participation in a Loan

Each Lender's participation in a Loan will be determined in accordance with paragraph (b) of Clause 6.4 (*Lenders' participation*).

SECTION 4 REPAYMENT, PREPAYMENT AND CANCELLATION

11. REPAYMENT

Each Revolving Loan must be repaid by the Borrower at the end of its Interest Period. The Borrower can choose the period for which it wishes to make drawings under each of the facilities. The chosen period has to be specified in each request for a Loan and this period is defined as an '**Interest Period**'. The Interest Period for drawings under the Revolving Facility may be one, three or six months.

More flexibility could be negotiated by the Borrower. However, periods which are not whole numbers of months are not traded in large volume and so the rates at which they trade may be on the high side. In addition, no such quotes are available via Reuters.

All sums repaid under the facilities may be re-borrowed in accordance with the provisions of the sample agreement.

Paragraph (b) of this Clause 11 allows the Agent to carry out 'cashless rollovers' – this is to say, if a Revolving Facility Loan is being made available to the Borrower on the same day that a maturing Revolving Facility Loan is due to be repaid, then to the extent that the amounts and currencies of such Revolving Facility Loans are the same, then there is no need for the Borrower and the Lenders (via the Agent) to make actual cash payments.

This provision reflects normal operating procedure of many banks when acting as Agent. If rollovers are conducted by way of actual cash payments, from the Borrower's perspective, there remains a risk that the Borrower will repay the maturing Revolving Facility Loan but a member of the syndicate will be a Defaulting Lender and fail to fund its participation in the new Revolving Facility Loan which has been requested on the same day.

- (a) Subject to paragraph (c) below, the Borrower shall repay each Revolving Facility Loan on the last day of its Interest Period.
- (b) Without prejudice to the Borrower's obligation under paragraph (a) above, if:
 - (i) one or more Revolving Facility Loans are to be made available to the Borrower:
 - (A) on the same day that a maturing Revolving Facility Loan is due to be repaid by the Borrower;
 - (B) in the same currency as the maturing Revolving Facility Loan (unless it arose as a result of the operation of Clause 10.2 (*Unavailability of a currency*)); and
 - (C) in whole or in part for the purpose of refinancing the maturing Revolving Facility Loan; and
 - (ii) the proportion borne by each Lender's participation in the maturing Revolving Facility Loan to the amount of that maturing Revolving Facility Loan is the same as the proportion borne by that Lender's participation in the new

Revolving Facility Loans to the aggregate amount of those new Revolving Facility Loans,

the aggregate amount of the new Revolving Facility Loans shall, unless the Borrower notifies the Agent to the contrary in the relevant Utilisation Request, be treated as if applied in or towards repayment of the maturing Revolving Facility Loan so that:

- (A) if the amount of the maturing Revolving Facility Loan exceeds the aggregate amount of the new Revolving Facility Loans:
 - (1) the Borrower will only be required to make a payment under Clause 33.1 (*Payments to the Agent*) in an amount in the relevant currency equal to that excess; and
 - (2) each Lender's participation in the new Revolving Facility Loans shall be treated as having been made available and applied by the Borrower in or towards repayment of that Lender's participation in the maturing Revolving Facility Loan and that Lender will not be required to make a payment under Clause 33.1 (*Payments to the Agent*) in respect of its participation in the new Revolving Facility Loans; and
- (B) if the amount of the maturing Revolving Facility Loan is equal to or less than the aggregate amount of the new Revolving Facility Loans:
 - (1) the Borrower will not be required to make a payment under Clause 33.1 (*Payments to the Agent*); and
 - (2) each Lender will be required to make a payment under Clause 33.1 (*Payments to the Agent*) in respect of its participation in the new Revolving Facility Loans only to the extent that its participation in the new Revolving Facility Loans exceeds that Lender's participation in the maturing Revolving Facility Loan and the remainder of that Lender's participation in the new Revolving Facility Loans shall be treated as having been made available and applied by the Borrower in or towards repayment of that Lender's participation in the maturing Revolving Facility Loan.
- (c) At any time when a Lender becomes a Defaulting Lender, the maturity date of each of the participations of that Lender in the Revolving Facility Loans then outstanding will be automatically extended to the Termination Date applicable to the Revolving Facility and will be treated as separate Revolving Facility Loans (the '**Separate Loans**') denominated in the currency in which the relevant participations are outstanding.
- (d) If the Borrower makes a prepayment of a Revolving Facility Loan pursuant to Clause 12.4 (*Voluntary prepayment of Revolving Facility Loans*), the Borrower may prepay any outstanding Separate Loan by giving not less than five Business Days' prior notice to the Agent. The Agent will forward a copy of a prepayment notice received in accordance with this paragraph (d) to the Defaulting Lender concerned as soon as practicable on receipt.

- (e) Interest in respect of a Separate Loan will accrue for successive Interest Periods selected by the Borrower by the time and date specified by the Agent (acting reasonably) and will be payable by the Borrower to the Agent (for the account of that Defaulting Lender) on the last day of each Interest Period of that Loan.
- (f) The terms of this Agreement relating to Revolving Facility Loans generally shall continue to apply to Separate Loans other than to the extent inconsistent with paragraphs (c) to (e) above, in which case those paragraphs shall prevail in respect of any Separate Loan.

12. PREPAYMENT AND CANCELLATION

12.1 Illegality

This clause allows a Lender to cancel its Commitment if it becomes illegal for that Lender to lend to the Borrower after it has entered into the agreement. The possible types of illegality that most concern lenders are (a) situations where diplomatic relations deteriorate between the government of the country of a lender and that of a borrower and (b) situations where newly imposed foreign currency exchange controls make it impossible for a lender to make or maintain its loan.

If it becomes unlawful, in any applicable jurisdiction, for any Lender to perform any of its obligations as contemplated by this Agreement or to fund or maintain its participation in any Loan or at any time it becomes 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 and/or Swingline Commitment of that Lender and of any Affiliate of that Lender which is a Swingline Lender will be immediately cancelled; and
- (c) the Borrower shall repay that Lender's (and any such Affiliate's) participation in the Loans made to the Borrower 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.

12.2 Change of control

- (a) If any person or group of persons acting in concert gains control of the Guarantor:
 - (i) the Company shall promptly notify the Agent upon becoming aware of that event;
 - (ii) a Lender shall not be obliged to fund a Utilisation (except for a Rollover Loan);
 - (iii) any Lender may, by not less than ten days notice to the Company, cancel its Commitment and Swingline Commitment and declare its portion of all outstanding Loans, together with accrued interest, and all other amounts

- accrued to it under the Finance Documents immediately due and payable, whereupon its Commitment and Swingline Commitment will be cancelled and all such outstanding amounts will become immediately due and payable.
- (b) For the purposes of paragraph (a) above:
- (i) ‘**acting in concert**’ means a group of persons who, pursuant to an agreement or understanding (whether formal or informal) actively co-operate (through the acquisition by any of them, either directly or indirectly, of shares in the Guarantor, or otherwise) to obtain or consolidate control of the Guarantor.
 - (ii) ‘**control**’ means:
 - (A) the power (whether by way of ownership of shares, proxy, contract, agency or otherwise) to:
 - (1) cast, or control the casting of, more than one-half of the maximum number of votes that might be cast at a general meeting of the Guarantor; or
 - (2) appoint or remove all, or the majority, of the directors or other equivalent officers of the Guarantor; or
 - (3) give directions with respect to the operating and financial policies of the Guarantor which the directors or other equivalent officers of the Guarantor are obliged to comply with; or
 - (B) the holding of more than one-half of the issued share capital of the Guarantor (excluding any part of that issued share capital that carries no right to participate beyond a specified amount in a distribution of either profits or capital).

12.3 Voluntary cancellation

Besides the right to prepay certain amounts under each Facility, the Borrower may cancel Commitments under the Available Facility. The Borrower’s benefit from such cancellation is normally a reduction of the fees it has to pay under a committed loan agreement, (in this case the commitment fees under Clause 16.1 (*Commitment Fee*)). On the other hand, a cancellation leads to a deterioration of the Borrower’s liquidity since a cancelled Commitment may not be reinstated afterwards (see paragraph (e) of Clause 12.6 (*Restrictions*)). This is in contrast to any prepayment which entitles the Borrower to re-borrow those amounts (see paragraph (c) of Clause 12.6 (*Restrictions*)). Usually, a cancellation reduces the Commitments of the Lenders rateably except in the case of cancellations in accordance with Clause 12.5 (*Right of repayment and cancellation in relation to a single Lender*) in relation to a single Lender which provides for cancellations of Commitments of individual Lenders for withholding tax or increased costs problems.

- (a) Subject to paragraph (b) below, the Borrower may, if it gives the Agent not less than 15 Business Days’ (or such shorter period as the Majority Lenders may agree) prior notice, cancel the whole or any part (being a minimum amount of \$100,000,000) of the Available Facility or the Available Swingline Facility. Any

cancellation under this Clause 12.3 shall reduce the Commitments of the Lenders rateably under the Facility.

- (b) The Borrower may not make a cancellation pursuant to paragraph (a) above to the extent that that cancellation would result in a Lender (or its Affiliate) failing to meet the requirement set out in paragraph (i) of Clause 28.2 (*Conditions of assignment or transfer*).

12.4 Voluntary Prepayment of Revolving Facility Loans

English law does not give a borrower a general right to prepay a loan. Therefore, if a borrower requires such a right it must be negotiated, agreed and recorded in the loan documentation. Prepayments can cause a problem for lenders which match fund an advance for its full term. If a borrower prepays there is the risk that the lenders will be unable to obtain a sufficient return on the sum prepaid in order to meet their liabilities to their sources of funds. Lenders will, therefore, require to be indemnified by the borrower for any losses they may incur as the result of a prepayment. This indemnity is given in Clause 15.4 (*Break Costs*) of the sample agreement. The indemnity for losses as a result of prepayment will not be relevant for Swingline Loans as they are funded on an overnight basis and the Swingline Lenders will not normally suffer any funding losses from early prepayment.

The Borrower may, if it gives the Agent not less than five Business Days' (or such shorter period as the Majority Lenders may agree) prior notice, prepay the whole or any part of a Revolving Facility Loan (but if in part, being an amount that reduces the Base Currency Amount of the Revolving Facility Loan by a minimum amount of \$50,000,000).

12.5 Right of replacement or repayment 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 (c) of Clause 17.2 (*Tax gross-up*);
 - (ii) any Lender claims indemnification from the Borrower under Clause 17.3 (*Tax indemnity*) or Clause 18.1 (*Increased costs*); or
 - (iii) the Agent makes a determination of the Additional Cost Rate under paragraph 3 of Schedule 4 (*Mandatory Cost formulae*),the Borrower may, whilst (in the case of paragraphs (i) and (ii) above) the circumstance giving rise to the requirement for that increase or indemnification continues or (in the case of paragraph (iii) above) that Additional Cost Rate of any Lender is greater than zero, give the Agent notice of cancellation of the Commitment and/or Swingline Commitment of that Lender and of any Affiliate of that Lender which is a Swingline Lender and its intention to procure the repayment of that Lender's and any such Affiliate's participation in the Loans or give the Agent

- notice of its intention to replace that Lender (together with any Affiliate of that Lender) in accordance with paragraph (d) below.
- (b) On receipt of a notice of cancellation referred to in paragraph (a) above, the Commitment and/or Swingline Commitment (as the case may be) of that Lender and any such Affiliate 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 repay that Lender's participation in that Loan.
 - (d) The Borrower may, in the circumstances set out in paragraph (a) above, on five Business Days' prior notice to the Agent and that Lender, replace that Lender (together with any Affiliate of that Lender) by requiring that Lender and that Affiliate to (and to the extent permitted by law, that Lender and that Affiliate shall) transfer pursuant to Clause 28 (*Changes to the Lenders*) 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 and transferring Affiliate in accordance with Clause 28 (*Changes to the Lenders*) 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 and such Affiliate's participation in the outstanding Loans and all accrued interest (to the extent that the Agent has not given a notification under Clause 28.9 (*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;
 - (iv) the Lender shall only be obliged to transfer its rights and obligations pursuant to paragraph (d) above once it is satisfied that it has complied with all necessary 'know your customer' or other similar checks under all applicable laws and regulations in relation to that transfer; and
 - (v) a Lender shall not be obliged to transfer its rights and obligations pursuant to paragraph (d) above to the extent that the transfer would result in the Lender (or its Affiliate) failing to meet the requirement set out in paragraph (i) of Clause 28.2 (*Conditions of assignment or transfer*).
 - (f) A Lender shall perform the checks 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 complied with those checks.

- (g) (i) If any Lender becomes a Defaulting Lender, the Borrower may, at any time whilst the Lender continues to be a Defaulting Lender, give the Agent five Business Days' notice of cancellation of each Available Commitment and/or Available Swingline Commitment (as the case may be) of that Lender.
- (ii) On the notice referred to in paragraph (i) above becoming effective, each Available Commitment and/or Available Swingline Commitment (as the case may be) of the Defaulting Lender shall, other than as set out in paragraph (iv) below, immediately be reduced to zero.
- (iii) The Agent shall as soon as practicable after receipt of a notice referred to in paragraph (i) above, notify all the Lenders.
- (iv) That Lender's Overall Commitment shall immediately be reduced to the lowest amount possible which does not result in that Lender (or its Affiliate) failing to meet the requirement set out in paragraph (i) of Clause 28.2 (*Conditions of assignment or transfer*).

12.6 Restrictions

- (a) Any notice of cancellation or prepayment given by any Party under this Clause 12 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 in relation to the prepayment of Revolving Facility Loans, without premium or penalty.
- (c) Unless a contrary indication appears in this Agreement, any part of the Facility which is prepaid or repaid may be reborrowed in accordance with the terms of this Agreement.
- (d) The Borrower shall not repay or prepay all or any part of the Loans or cancel all or any part of the Commitments or the Swingline Commitments except at the times and in the manner expressly provided for in this Agreement.
- (e) Subject to Clause 2.2 (*Increase*), no amount of the Total Commitments cancelled under this Agreement may be subsequently reinstated.
- (f) If the Agent receives a notice under this Clause 12 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 5.2 (*Further conditions precedent*)), an amount of the Commitments and/or Swingline Commitments (equal to the Base Currency Amount of 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) shall reduce the Commitments of the Lenders proportionately to their participations in that Loan.

SECTION 5 COSTS OF UTILISATION

13. INTEREST

The interest rate payable on each Revolving Loan will be determined in accordance with this Section 5 in connection with the definition of '**Libor**' or '**Euribor**'. Each Libor or Euribor determination will be determined on the Quotation Date which refers to the day on which quotations would ordinarily be given by leading banks in the Relevant Interbank Market being, in this case, the London interbank market (or the European interbank market in relation to Euribor). Quotations are ordinarily given two Business Days before the disbursement of the funds (or on the same day as disbursement in the case of sterling loans).

In the case of Revolving Loans, the Lenders' profits will be the Margin (on the assumption that they can fund themselves at the applicable Libor or Euribor rate). During the period from 2010 onwards a number of European banks found it difficult to fund themselves in certain currencies at the applicable Libor rate. As a result, in some transactions a premium was added to the rate for borrowing in those currencies. This was sometimes expressed as an additional margin and sometimes was calculated by reference to a benchmark rate (such as, for dollar loans, the dollar/euro basis swap rate). A premium is not included in the sample agreement.

Clause 36.3 (*Day count convention*) states that each determination of interest will be calculated on the basis of the actual number of days elapsed and a year of 360 days.

13.1 Calculation of interest

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

- (a) Margin;
- (b) LIBOR or, in relation to any Revolving Facility Loan in euro, EURIBOR; and
- (c) Mandatory Cost, if any.

13.2 Payment of interest

On the last day of each Interest Period the Borrower shall pay accrued interest on the Revolving Facility Loan to which that Interest Period relates (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).

13.3 Default interest

The rate at which default interest is charged will usually be 1% or (sometimes) 2% per annum above the normal rate charged on the loan. This is justified by the lenders on the basis that they suffer additional costs in time and money when there is a default and it is appropriate to charge more for the increased risk of lending, or continuing to lend, to a deteriorated credit. To the extent that the construction of the default interest clause and the circumstances at the date of the loan agreement show that the interest charged under this clause is a genuine pre-estimate of the loss likely to be suffered by the lenders on a default, the clause will stand. However, if the clause requires 'a payment of money stipulated as *in terrorem* of the offending party' so that he is discouraged from breaching the contract, the clause will be void as being a penalty. The case of *Lordsvale Finance Plc v Bank of Zambia* TLR (1996) decided that an additional rate of 1% was too modest to be construed as a penalty.

- (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 overdue amount from the due date up to the date of actual payment (both before and after judgment) at a rate which, subject to paragraph (b) below, is one per cent higher than the rate which would have been payable if the overdue amount had, during the period of non-payment, constituted a Loan in the currency of the overdue amount for successive Interest Periods, each of a duration selected by the Agent (acting reasonably). Any interest accruing under this Clause 13.3 shall be immediately payable by the Obligor on demand by the Agent.
- (b) If any overdue amount 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 overdue amount 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 overdue amount during that first Interest Period shall be one per cent higher than the rate which would have applied if the overdue amount had not become due.
- (c) Default interest (if unpaid) arising on an overdue amount will be compounded with the overdue amount at the end of each Interest Period applicable to that overdue amount but will remain immediately due and payable.

13.4 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.

14. INTEREST PERIODS

14.1 Selection of Interest Periods

- (a) The Borrower may select an Interest Period for a Loan in the Utilisation Request for that Loan.
- (b) Subject to this Clause 14, the Borrower may select an Interest Period of one, three or six Months or any other period agreed between the Borrower and the Agent (acting on the instructions of all the Lenders in relation to the relevant Loan).
- (c) An Interest Period for a Loan shall not extend beyond the Termination Date.
- (d) Each Interest Period for a Loan shall start on the Utilisation Date.
- (e) A Loan has one Interest Period only.
- (f) Prior to the Syndication Date, Interest Periods shall be one Month or such other period as the Agent and the Borrower may agree and any Interest Period which would otherwise end during the Month preceding or extend beyond the Syndication Date shall end on the Syndication Date.

14.2 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).

15. CHANGES TO THE CALCULATION OF INTEREST

15.1 Absence of quotations

Subject to Clause 15.2 (*Market disruption*), if LIBOR or, if applicable, EURIBOR is to be determined by reference to the Reference Banks but a Reference Bank does not supply a quotation by the Specified Time on the Quotation Day, the applicable LIBOR or EURIBOR shall be determined on the basis of the quotations of the remaining Reference Banks.

15.2 Market disruption

This sample provision sets forth the mechanics for determining the interest rate on the loan if, in the case of Libor or Euribor-based loans, there is a disruption in the London or European interbank market for deposits in the loan currency. The sample clause defines a '**Market Disruption Event**' by reference to two scenarios: first, the situation where it is not possible to determine Libor or Euribor and, second, where Libor or Euribor does not adequately reflect the lenders' cost of funding. Although there have certainly been periods when the second scenario was the case (for example, when European and Middle Eastern banks experienced difficulties obtaining dollar funding in 2008 to 2009), it is thought to have been fairly rare for lenders to use this provision.

- (a) If a Market Disruption Event occurs in relation to a Loan for any Interest Period, then the rate of interest on each Lender's share of that Loan for the Interest Period shall be the percentage rate per annum which is the sum of:

- (i) the Margin;
 - (ii) the rate notified to the Agent by that Lender as soon as practicable and in any event before interest is due to be paid in respect of that Interest Period, to be that which expresses as a percentage rate per annum the cost to that Lender of funding its participation in that Loan from whatever source it may reasonably select; and
 - (iii) the Mandatory Cost, if any, applicable to that Lender's participation in the Loan.
- (b) 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 or, if applicable, EURIBOR for the relevant currency and the relevant Interest Period; or
 - (ii) before close of business in London on the Quotation Day for the relevant Interest Period, the Agent receives notifications from a Lender or Lenders (whose participations in a Loan exceed 35 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 or, if applicable, EURIBOR.

15.3 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.
- (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.

15.4 Break Costs

Clause 15.4 (*Break Costs*) is based on the assumption that for each Interest Period for which a principal amount is outstanding under the agreement, each Finance Party will fund itself in the London interbank market with a matching deposit. Accordingly, it is provided that if all or any part of a Revolving Loan or Unpaid Sum (which is unpaid default interest) is received otherwise than at the end of its current Interest Period the Borrower will pay to each relevant Finance Party a specified sum, this sum being sufficient to indemnify each such Finance Party against any loss it would suffer by reason of a fall in interest rates which has occurred since the beginning of that Interest Period.

The assumption which underlies this Clause may not always be true. In the case of the Swingline Facility it clearly is untrue and, therefore, this facility is excluded from the ambit of the Clause. So far as the Revolving Facility is concerned, although many Lenders will not fund themselves with matching deposits, the methodology appears to be generally accepted as a simple way of estimating a Lender's likely loss.

- (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.

16. FEES

16.1 Commitment fee

- (a) The Borrower shall pay to the Agent (for the account of each Lender) a fee in the Base Currency computed at the rate of 35 per cent of the Margin on that Lender's Available Commitment for the Availability Period.
- (b) The accrued commitment fee is payable on the last day of each successive period of three Months which ends during the Availability Period, on the last day of the Availability Period and, if cancelled in full, on the cancelled amount of the relevant Lender's Overall Commitment at the time the cancellation is effective.
- (c) No commitment fee is payable to the Agent (for the account of a Lender) on any Available Commitment of that Lender for any day on which that Lender is a Defaulting Lender.

16.2 Utilisation fee

- (a) The Borrower shall pay to the Agent (for the account of each Lender) a utilisation fee computed at the rate of:
 - (i) 0.15 per cent per annum for each day on which there are any Loans outstanding but the aggregate amount of Loans outstanding is less than or equal to $33\frac{1}{3}$ per cent of the Total Commitments as at the date of this Agreement;
 - (ii) 0.30 per cent per annum for each day on which the aggregate amount of Loans outstanding exceeds an amount equal to $33\frac{1}{3}$ per cent (but is less than or equal to $66\frac{2}{3}$ per cent) of the Total Commitments as at the date of this Agreement; and
 - (iii) 0.50 per cent per annum for each day on which the aggregate amount of Loans outstanding exceeds an amount equal to $66\frac{2}{3}$ per cent of the Total Commitments as at the date of this Agreement.

The utilisation fee is payable on the aggregate amount of Loans outstanding on the relevant date for the account of each Lender in an amount equal to the proportion borne by such Lender's participation in the Loans outstanding on that date to such aggregate amount.

- (b) The accrued utilisation fee is payable quarterly in arrear and is also payable to the Agent for the account of any Lender on the date that such Lender's Overall Commitment is cancelled and/or its share in the Loans prepaid or repaid in full.

16.3 Arrangement fee

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

16.4 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.

The benefit of listing the fees in a separate letter rather than in the agreement is that the agent and arranger may keep confidential certain fees they are obtaining from a borrower. See the example fee letter at the end of this agreement.

SECTION 6 ADDITIONAL PAYMENT OBLIGATIONS

17. TAX GROSS UP AND INDEMNITIES

17.1 Definitions

The purpose of Section 6 is to preserve the profit margin of each lender. The justification for this is that since lenders charge on a cost plus margin basis they have the right to be indemnified against all costs, no matter how incurred, other than overheads and overall net income taxes. However, in order not to impose an excessive charge on a borrower for the length of a deal, the borrower is customarily given the right to repay an individual lender if that lender makes certain claims under these provisions. Clause 12.5 (*Right of repayment and cancellation in relation to a single Lender*) of the sample agreement gives the Borrower this right in relation to paragraph (c) of Clause 17.2 (*Tax gross-up*), Clause 17.3 (*Tax indemnity*) and Clause 18.1 (*Increased costs*).

Paragraph (c) of Clause 17.2 (*Tax gross-up*) covers the imposition of a withholding tax on the Obligors, that is, a tax levied by deduction at source. It is dealt with by requiring that, unless one of the circumstances set out in paragraph (d) applies, the payment from which the tax is deducted is to be grossed up so that after the appropriate deduction the lender receives a net sum equal to the sum which it would have received had no such deduction been required. It should be noted that the application of paragraph (c) of Clause 17.2 (*Tax gross-up*) is not restricted to changes which occur after the date of the agreement. In a deal involving many jurisdictions it is often not possible to be certain even at the date of the agreement that there are no withholding tax problems in any of these jurisdictions and the lenders insist that this small risk is borne by borrowers. Concerned borrowers can reduce this risk by incorporating a definition of '**Qualifying Lender**' which imposes restrictions as to which Lenders may claim the benefit of the gross-up provisions (essentially by requiring that each Lender should organise its participation in the Facility in such a way as to meet any requirement of the relevant taxation laws (as at the date of the agreement) in order for the Borrower to be able to make payments without withholding tax. In the sample agreement the 'Qualifying Lender' concept has not been included because at the time of writing The Netherlands does not impose a withholding tax on interest payments (which is one of the reasons a Dutch SPV has been chosen as the borrowing vehicle).

Clause 17.3 (*Tax indemnity*) covers a tax (other than normal corporation tax) imposed on or in relation to sums received by any party or by the Agent on its behalf under the agreement.

As mentioned in the term sheet (see Chapter 3), from 2013 the US government is expected to start to implement the Foreign Account Tax Compliance Act ('FATCA'). This may necessitate the introduction of revised tax provisions in LMA loan agreements once more information is available as to how FATCA will operate in practice.

- (a) In this Agreement:
 - ‘**Protected Party**’ means a Finance Party which is or will be subject to any liability, or required to make any payment, for or on account of Tax in relation to a sum received or receivable (or any sum deemed for the purposes of Tax to be received or receivable) under a Finance Document.
 - ‘**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 either the increase in a payment made by an Obligor to a Finance Party under Clause 17.2 (*Tax gross-up*) or a payment under Clause 17.3 (*Tax indemnity*).
- (b) Unless a contrary indication appears, in this Clause 17 a reference to ‘determines’ or ‘determined’ means a determination made in the absolute discretion of the person making the determination.

17.2 Tax gross-up

- (a) Each Obligor shall make all payments to be made by it without any Tax Deduction, unless a Tax Deduction is required by law.
- (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 each Obligor.
- (c) If a Tax Deduction is required by law to be made by an Obligor, the amount of the payment due from that Obligor shall be increased to an amount which (after making any Tax Deduction) leaves an amount equal to the payment which would have been due if no Tax Deduction had been required.
- (d) 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.
- (e) 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 applicable) any appropriate payment paid to the relevant Tax Authority.

17.3 Tax indemnity

- (a) The Borrower shall (within three Business Days of demand by the Agent) pay to a Protected Party an amount equal to the loss, liability or cost which that Protected Party determines will be or has been (directly or indirectly) suffered for or on account of Tax by that Protected Party in respect of a Finance Document.
- (b) Paragraph (a) above shall not apply:
 - (i) with respect to any Tax assessed on a Finance Party:

- (A) under the law of the jurisdiction in which that Finance Party is incorporated or, if different, the jurisdiction (or jurisdictions) in which that Finance Party is treated as resident for tax purposes; or
- (B) under the law of the jurisdiction in which that Finance Party's Facility Office is located in respect of amounts received or receivable in that jurisdiction,
if that Tax is imposed on or calculated by reference to the net income received or receivable (but not any sum deemed to be received or receivable) by that Finance Party; or
- (ii) to the extent a loss, liability or cost is compensated for by an increased payment under Clause 17.2 (*Tax gross-up*).
- (c) A Protected Party making, or intending to make a claim under paragraph (a) above shall promptly notify the Agent of the event which will give, or has given, rise to the claim, following which the Agent shall notify the Borrower.
- (d) A Protected Party shall, on receiving a payment from an Obligor under this Clause 17.3, notify the Agent.

17.4 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 that 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 that Obligor.

17.5 Stamp taxes

The Borrower shall pay and, within three Business Days of demand, indemnify each Finance Party against any cost, loss or liability that Finance Party incurs in relation to all stamp duty, registration and other similar Taxes payable in respect of any Finance Document.

17.6 VAT

- (a) All amounts expressed to be payable under a Finance Document by any Party to a Finance Party which (in whole or in part) constitute the consideration for any supply for VAT purposes are deemed to be exclusive of any VAT which is chargeable on that supply, and accordingly, subject to paragraph (b) below, if VAT is or becomes chargeable on any supply made by any Finance Party to any Party under a Finance Document and such Finance Party is required to account to the relevant tax authority for the VAT, that Party must pay to such Finance Party (in addition to and at the same time as paying any other consideration for such supply) an amount equal to the amount of the VAT (and such Finance Party must promptly provide an appropriate VAT invoice to that Party).

- (b) If VAT is or becomes chargeable on any supply made by any Finance Party (the ‘**Supplier**’) to any other Finance Party (the ‘**Recipient**’) under a Finance Document, and any Party other than the Recipient (the ‘**Relevant Party**’) is required by the terms of any Finance Document to pay an amount equal to the consideration for that supply to the Supplier (rather than being required to reimburse or indemnify the Recipient in respect of that consideration):
 - (i) (where the Supplier is the person required to account to the relevant tax authority for the VAT) the Relevant Party must also pay to the Supplier (at the same time as paying that amount) an additional amount equal to the amount of the VAT. The Recipient must (where this paragraph (i) applies) promptly pay to the Relevant Party an amount equal to any credit or repayment the Recipient receives from the relevant tax authority which the Recipient reasonably determines relates to the VAT chargeable on that supply; and
 - (ii) (where the Recipient is the person required to account to the relevant tax authority for the VAT) the Relevant Party must promptly, following demand from the Recipient, pay to the Recipient an amount equal to the VAT chargeable on that supply but only to the extent that the Recipient reasonably determines that it is not entitled to credit or repayment from the relevant tax authority in respect of that VAT.
- (c) Where a Finance Document requires any Party to reimburse or indemnify a Finance Party for any cost or expense, that Party shall reimburse or indemnify (as the case may be) such Finance Party for the full amount of such cost or expense, including such part thereof as represents VAT, save to the extent that such Finance Party reasonably determines that it is entitled to credit or repayment in respect of such VAT from the relevant tax authority.
- (d) Any reference in this Clause 17.6 to any Party shall, at any time when such Party is treated as a member of a group for VAT purposes, include (where appropriate and unless the context otherwise requires) a reference to the representative member of such group at such time (the term ‘representative member’ to have the same meaning as in the Value Added Tax Act 1994).
- (e) In relation to any supply made by a Finance Party to any Party under a Finance Document, if reasonably requested by such Finance Party, that Party must promptly provide such Finance Party with details of that Party’s VAT registration and such other information as is reasonably requested in connection with such Finance Party’s VAT reporting requirements in relation to such supply.

18. INCREASED COSTS

This Clause sets out the indemnity given by the Borrower in respect of an 'Increased Cost' as described in paragraph (b)(i) of Clause 18.1 (*Increased Costs*). In order for Lenders to be able to make a claim there must be either a change in law (or its interpretation or application) or there must be some compliance with a law or regulation made after the date of the Agreement. As discussed in the notes above, the Basel II Accord (which made substantial changes to the capital weighting of loans). It is, therefore, expected that banks will structure the pricing of loans to take account of the costs resulting from Basel II (and Clause 18.3 (*Exceptions*) specifically states that Lenders cannot claim costs relating to Basel II under the increased costs indemnity), on the basis that the Basel II has been in force for some time and therefore Lenders should be able accurately to estimate any costs arising under it in connection with their participation in syndicated loan facilities and incorporate such costs as part of the Margin payable in respect of Loans drawn under the relevant facilities agreements.

By contrast, at the time of writing, Lenders generally insist that costs relating to Basel III should be included in the increased costs indemnity until such time as Basel III has been fully implemented and, therefore, Lenders are able to estimate the likely regulatory capital costs under Basel III associated with their participation in a loan facility. The same also often applies in relation to the US 'Dodd-Frank' regulations which were enacted in 2010 (and are in the process of being implemented). The Dodd-Frank regulations will result in a range of changes specific to the US regulatory framework – including provisions for monitoring and reducing systemic risk, reallocating authority among the federal regulators, creating a consumer protection regime for retail financial products and services. As a result, some Lenders consider that it is not yet possible accurately to estimate the costs which they will incur under such regulations in connection with their participation in syndicated loan facilities.

Sometimes, the reserve asset costs which some Lenders may incur under Regulation D of the Board of Governors of the US Federal Reserve System are payable under the increased costs clause or under a separate indemnity or under a reserve adjusted definition of LIBOR. Such a provision has not been included on this occasion.

18.1 Increased costs

- (a) Subject to Clause 18.3 (*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 after the date of this Agreement;
 - (ii) compliance with any law or regulation made after the date of this Agreement;
 - (iii) the implementation or application of, or compliance with, Basel III or any law or regulation that implements or applies Basel III; or

- (iv) compliance with the Dodd-Frank Wall Street Reform and Consumer Protection Act or any law or regulation made under, or connected with, that Act.
- (b) In this Agreement:
 - (i) **'Increased Costs'** means:
 - (A) a reduction in the rate of return from the Facility or on a Finance Party's (or its Affiliate's) overall capital;
 - (B) an additional or increased cost; or
 - (C) 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 that Finance Party having entered into its Commitment or Swingline Commitment or funding or performing its obligations under any Finance Document; and
 - (ii) **'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'.

18.2 Increased cost claims

- (a) A Finance Party intending to make a claim pursuant to Clause 18.1 (*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.

18.3 Exceptions

- (a) Clause 18.1 (*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;
 - (ii) compensated for by Clause 17.3 (*Tax indemnity*) (or would have been compensated for under Clause 17.3 (*Tax indemnity*) but was not so compensated solely because any of the exclusions in paragraph (b) of Clause 17.3 (*Tax indemnity*) applied);

- (iii) compensated for by the payment of the Mandatory Cost;
- (iv) attributable to the wilful breach by the relevant Finance Party or its Affiliates of any law or regulation;
- (v) attributable to the implementation 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); or
- (vi) attributable to the United Kingdom bank levy as set out in the Finance Act 2011 or the Dutch bank levy (*Wet bankenbelasting*) or any levy or Tax of a similar nature in force as at the date of this Agreement and imposed in any jurisdiction by reference to the assets or liabilities of a financial institution or other entity carrying out financial transactions.

The above reference to excluding costs relating to certain bank levy costs from the increased costs indemnity is sometimes agreed by lenders at the request of borrowers. If accepted, this exclusion would normally refer only to any bank levy which is in force as at the date of the relevant loan agreement (rather than to any proposed bank levy which has not yet been enacted).

- (b) In this Clause 18.3, a reference to a '**Tax Deduction**' has the same meaning given to the term in Clause 17.1 (*Definitions*).

19. OTHER INDEMNITIES

It is now well-established practice that English courts will, if requested, give judgments in foreign currencies. However, English courts retain a discretion to substitute a judgment in sterling. In addition, foreign courts (either in enforcing an English judgment or in making their own judgment) may take a different approach. Therefore, provision is made in Clause 19.1 (*Currency indemnity*) for the company to indemnify the other parties against any loss suffered by reason of any discrepancy in the rates of exchange used for the purposes mentioned in the Clause.

It should be noted that English courts might regard a final judgment on an agreement as discharging entirely the obligations created by the agreement including, in the case of the sample agreement, the indemnity on the part of the Borrower contained in Clause 30.3 (*Duties of the agent*).

19.1 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;
 - (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.

19.2 Other indemnities

A borrower will be required to give lenders a general indemnity against any losses or expenses which they suffer as a result of the borrower's default. This, like default interest, is clearly applicable regardless of whether an Event of Default is formally declared by the lenders.

Each Obligor 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) a failure by an Obligor to pay any amount due under a Finance Document on its due date, including without limitation, any cost, loss or liability arising as a result of Clause 32 (*Sharing among the Finance Parties*);
- (c) 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
- (d) a Loan (or part of a Loan) not being prepaid in accordance with a notice of prepayment given by the Borrower.

19.3 Indemnity to the Agent

The Borrower shall promptly indemnify the Agent against:

- (a) any cost, loss or liability incurred by the Agent (acting reasonably) as a result of:
 - (i) investigating any event which it reasonably believes is a Default;

- (ii) acting or relying on any notice, request or instruction which it reasonably believes to be genuine, correct and appropriately authorised; or
- (iii) instructing lawyers, accountants, tax advisers, surveyors or other professional advisers or experts as permitted under this Agreement; and
- (b) any cost, loss or liability (including, without limitation, for negligence or any other category of liability whatsoever) incurred by the Agent (otherwise than by reason of the Agent's gross negligence or wilful misconduct) (or, in the case of any cost, loss or liability pursuant to Clause 33.11 (*Disruption to Payment Systems etc.*) notwithstanding the Agent's negligence, gross negligence or any other category of liability whatsoever but not including any claim based on the fraud of the Agent in acting as Agent under the Finance Documents.

20. MITIGATION BY THE LENDERS

20.1 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 12.1 (*Illegality*), Clause 17 (*Tax gross-up and indemnities*), Clause 18 (*Increased costs*) or paragraph 3 of Schedule 4 (*Mandatory Cost formulae*) including (but not limited to) 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.

20.2 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 20.1 (*Mitigation*).
- (b) A Finance Party is not obliged to take any steps under Clause 20.1 (*Mitigation*) if, in the opinion of that Finance Party (acting reasonably), to do so might be prejudicial to it.

21. COSTS AND EXPENSES

21.1 Transaction expenses

The Borrower shall promptly on demand pay the Agent and the Arranger 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.

21.2 Amendment costs

If (a) an Obligor requests an amendment, waiver or consent or (b) an amendment is required pursuant to Clause 33.10 (*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.

21.3 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 it in connection with the enforcement of, or the preservation of any rights under, any Finance Document.

SECTION 7 GUARANTEE

22. GUARANTEE AND INDEMNITY

In addition to the principal purpose of ensuring that, if a borrower does not meet its obligations under an agreement then the guarantor will, a guarantee also serves two other purposes: it ensures that the guarantor exercises a supervisory function over a borrower and, in certain circumstances, secures non-interference from the guarantor. The latter purpose would arise, for example, where a central bank is guaranteeing a borrower's obligation and the lenders wish to ensure that it will not impose exchange controls etc. to the detriment of the borrower's ability to repay.

The guarantee in Clause 22 has two principal obligations: the first is a true guarantee (that is, secondary undertaking) of the Borrower's observance and performance of its obligations under the agreement and the second is an indemnity (that is, a primary undertaking to cover the situation where if the Borrower does not have the necessary capacity to enter into the agreement or for some other reason is held by law not to have to meet its obligations under the agreement then the Guarantor will do so). The indemnity is required in the second situation because without it a guarantor cannot be liable where the underlying debtor is not liable. As a matter of law it is a question of construction whether an agreement which is purported to be made between a number of parties is binding on any of the parties if one party proves not to have had the capacity to enter into the agreement. Paragraph (c) of Clause 22.1 (*Guarantee and indemnity*) is drafted to make it clear that the Guarantor will be under an obligation to the other parties to the agreement should the Borrower be found not to have validly entered the agreement.

The remaining provisions of Clause 22 (*Guarantee and indemnity*) are generally referred to as the preservation of rights provisions. These are needed to preserve the rights of beneficiaries against guarantors because the general law gives guarantors certain rights to deny liability under guarantees if, for example, the underlying agreement has been amended without their consent or obligations of the borrower or other sureties have been waived.

22.1 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, the 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 the 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 the Guarantor under this indemnity will not exceed the amount it would have had to pay under this Clause 22 if the amount claimed had been recoverable on the basis of a guarantee.

22.2 Continuing guarantee

The statement that the guarantee is '**continuing**' conveys the parties' agreement that the guarantee will cover a borrower's obligations in respect of loans made from time to time in the future.

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.

22.3 Reinstatement

Insolvency and similar laws in some jurisdictions provide for return to a troubled company, or to a trustee or similar official appointed with respect to the company or its property, of certain kinds of payments made by the company, often within specified periods before the filing or commencement of insolvency or similar proceedings. Clause 22.3 (*Reinstatement*) provides for the guarantee to continue in effect, or to be reinstated, if all or part of any payment by the Borrower to the Agent or any of the lenders has to be returned or is rescinded under such circumstances or otherwise.

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 the Guarantor under this Clause 22 will continue or be reinstated as if the discharge, release or arrangement had not occurred.

22.4 Waiver of defences

The obligations of the Guarantor under this Clause 22 will not be affected by any act, omission, matter or thing which, but for this Clause, would reduce, release or prejudice any of its obligations under this Clause 22 (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, the Borrower 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, 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 or restatement (however fundamental and whether or not more onerous) or replacement of a 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;
- (f) any unenforceability, illegality or invalidity of any obligation of any person under any Finance Document or any other document or security; or
- (g) any insolvency or similar proceedings.

22.5 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 22. This waiver applies irrespective of any law or any provision of a Finance Document to the contrary.

22.6 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 22.

22.7 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 any rights 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 22:

- (a) to be indemnified by the Borrower;
- (b) to claim any contribution from any other guarantor of 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 the Borrower to make any payment, or perform any obligation, in respect of which the Guarantor has given a guarantee, undertaking or indemnity under Clause 22.1 (*Guarantee and Indemnity*);
- (e) to exercise any right of set-off against the Borrower; and/or
- (f) to claim or prove as a creditor of the Borrower in competition with any Finance Party.

If the Guarantor receives any benefit, payment or distribution in relation to such rights it shall hold that benefit, payment or distribution to the extent necessary to enable all amounts which may be or become payable to the Finance Parties by the Borrower under or in connection with the Finance Documents to be repaid 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 33 (*Payment mechanics*).

Guarantees customarily include limitations on the guarantor's rights of subrogation i.e. the right of the guarantor who has discharged the debt he has guaranteed to step into the shoes of the creditor and take over by subrogation the creditor's rights against the debtor in respect of the debt and all the securities held by the creditor for payment of the debt. This clause effectively constitutes a waiver of such rights until final satisfaction of all sums owing by the borrower to the lenders.

22.8 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

23. REPRESENTATIONS

The functions fulfilled by the representations are: (a) to provide for certain contractual '**internal**' remedies within the framework of the loan agreement; (b) (to a lesser extent) to give the lenders the benefit of certain remedies available under the general law; and (c) to provide the lenders with full information in the course of their negotiations.

(a) **The internal remedies**

- (i) **Suspension:** One of the conditions precedent to a borrower's right to draw down any part of the facility is the correctness of all the representations. Accordingly, on the discovery of the incorrectness of a representation, lenders may suspend the making of further loans (although typically the Lenders would not have the right to prevent Rollover Loans unless an actual Event of Default has occurred and is continuing (paragraph (a) of Clause 5.2 (*Further conditions precedent*)) under an agreement until such time as either the circumstances have changed so that the representation concerned is correct or the lenders agree to waive this condition precedent.
- (ii) **Cancellation:** The second remedy provided within the loan agreement is also available only to the extent that the full amount of the facility has not been drawn down. As stated above, it is an Event of Default if any representation made by a borrower proves to have been incorrect or misleading when made (Clause 27.4 (*Misrepresentation*)). In such circumstances one of the remedies available to the lenders will be the cancellation of the undrawn portion of the loan. The decision to cancel will usually, as in this sample agreement, require a positive decision by a significant grouping of lenders – the '**Majority Lenders**'.
- (iii) **Acceleration:** The other remedy arising from the Event of Default discussed above, again exercisable on the instructions of the Majority Lenders, is the right to declare the loan immediately due and repayable. In other words, the liability of a borrower is rendered immediately current and the borrower is obliged to pay the balance of the loan and accrued interest to the lenders at once. In practice, it is recognised that a borrower may be unlikely to be able to satisfy this obligation and the danger to the borrower is that it may cause its other creditors to accelerate their indebtedness by virtue of cross-default clauses. However, the power to render the repayment obligation current is needed by the lenders in order that they may speedily take any necessary action against a borrower or any of the borrower's assets so as to protect their position.

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(b) Remedies under general law

The protection given to lenders in respect of the representations under the general law are less significant than those expressly provided in the loan agreement. In certain circumstances a person who has been induced to enter into a contract by a misleading representation has rights to rescind the contract, treating it as having become void, and/or to claim damages. This area of the law is rather complicated, the remedies being different in the cases of fraudulent, negligent and innocent misrepresentations and being, to some extent, discretionary. In cases such as syndicated loan agreements, where representations have been incorporated as terms of the contract, the relationship between the remedies for misrepresentation and those for breach of warranty is unclear. However, such remedies will not usually give lenders any rights against borrowers which they would not otherwise have under a properly drawn loan agreement, and such remedies are unlikely, because of their uncertainty, to be enforced without litigation.

(c) Investigative function

One purpose of inserting representations in the draft agreement is to give borrowers and their lawyers and lenders' local lawyers every opportunity to say that the representation is untrue and must be qualified or amended. Once the loan agreement is signed and the money advanced, it is too late to make discoveries of this sort: they must be made as early as possible.

Each Obligor makes the representations and warranties set out in this Clause 23 to each Finance Party on the date of this Agreement.

23.2 Status

- (a) It is a corporation, duly incorporated and validly existing under the law of its 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.

23.3 Binding obligations

The obligations expressed to be assumed by it in each Finance Document are, subject to the Legal Reservations, legal, valid, binding and enforceable obligations.

23.4 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 or any 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.

23.5 Power and authority

This representation is concerned with the capacity of the Borrower and the Guarantor to enter the agreement. Since it may not be possible to correct a breach of this representation subsequently, its effectiveness is primarily as something giving rise to an Event of Default to enable the Lenders to get out of their commitment to lend. In deciding whether either party has power to enter the agreement, the two relevant matters to consider are the constitutional documents of the relevant party and the law of the country of its incorporation. English law, as the proper law of the contract, is only secondary. It is therefore vital to obtain the Borrower's and the Guarantor's counsel's opinion on the question of 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.

23.6 Validity and admissibility in evidence

If extensive governmental authorisations are required, it is useful to list them in an exhibit to the loan agreement. If there are formalities that can only be accomplished after the loan agreement is signed, such as registration of the agreement itself with the exchange control authorities in the Obligor's jurisdiction, those formalities should be referred to as exceptions in the representations and the legal opinions, and an undertaking from the Borrower to accomplish them promptly after signature of the loan agreement should be included.

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; and
 - (b) to make the Finance Documents to which it is a party admissible in evidence in its jurisdiction of incorporation,
- have been obtained or effected and are in full force and effect.

23.7 Governing law and enforcement

- (a) The choice of English law as the governing law of the Finance Documents will, subject to the Legal Reservations, be recognised and enforced in its Relevant Jurisdiction.
- (b) Any judgment obtained in England in relation to a Finance Document will be recognised and enforced in its Relevant Jurisdiction.

23.8 Deduction of Tax

It is not required to make any deduction for or on account of Tax from any payment it may make under any Finance Document to a Finance Party.

23.9 No filing or stamp taxes

This representation assumes that no stamp duty is payable under the execution of the agreement. This is currently the case, in relation to UK stamp duty, but it is still necessary to cover the (a) possible future imposition of stamp duty or (b) foreign stamp duty and this is achieved by the indemnity in Clause 17.5 (*Stamp taxes*).

Under the law of its Relevant Jurisdiction 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.

23.10 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.

23.11 No misleading information

- (a) Any factual information provided by any member of the Group for the purposes of the Information Memorandum 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) The financial projections contained in the Information Memorandum 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 and no information has been given or withheld that results in the information contained in the Information Memorandum being untrue or misleading in any material respect.
- (d) All written information (other than the Information Memorandum) supplied by any member of the Group is true, complete and accurate in all material respects as at the date it was given and is not misleading in any respect.

23.12 Financial statements

If accounting principles change frequently or if there is no recognised body of generally accepted principles of good accounting practice in the borrower's jurisdiction, it may be appropriate to include a more precise description of the financial reporting that is to be provided.

- (a) Its Original Financial Statements were prepared in accordance with GAAP consistently applied unless expressly disclosed to the Agent in writing to the contrary before the date of this Agreement.

- (b) Its Original Financial Statements fairly represent its financial condition and operations (consolidated in the case of the Guarantor) during the relevant financial year unless expressly disclosed to the Agent in writing to the contrary before the date of this Agreement.

If the obligors are required to deliver quarterly financial statements, some drafters provide that the representation as to the absence of any material adverse change (sometimes called a 'MAC' clause) should run from the date of the quarterly statements. The more usual practice, however, is to have it run from the date of the most recent audited statements, which are not subject to year-end adjustments. If there has in fact been a material adverse change in the financial condition of the Guarantor or of the Group between the two dates, the relevant circumstances should of course be reviewed in detail between the parties, and the representation should be adapted to reflect those circumstances, assuming the change is not so drastic that the lenders will call off the transaction.

- (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 Guarantor) since the date as at which its Original Financial Statements are stated to have been prepared.

23.13 *Pari passu* ranking

This provision is an example of the '*pari passu* clause'. The clause in effect states that there are no legal provisions which would cause the loans to be subordinated to other indebtedness of the Borrower. The reference to obligations 'mandatorily preferred by law' takes account of those classes of creditors which are (in many countries, including England) preferred above all creditors in the liquidation of a company. These preferred creditors are, typically, employees and tax and social security authorities. Until now the accepted interpretation of the *pari passu* clause has been that, upon the liquidation (or equivalent) of a company, all unsecured indebtedness will rank equally (subject to the usual statutory preferences referred to above). However, in the last few years several judicial decisions in Europe and the United States have (in the context of sovereign borrowers) suggested a possible wider interpretation, being that equally ranking debts must be paid equally at all times and not solely on the onset of insolvency. This means if there are insufficient funds to pay equally ranking creditors in full, then each creditor must receive a rateable share. Whilst this wider interpretation has been strongly criticised by academics and is not binding on English courts there remains some uncertainty over the interpretation of the clause.

This representation, of course, has no effect against a third party with no knowledge of the provision. In practice it may serve to ensure that the obligors disclose all liabilities that may amount to a breach of it if undisclosed.

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

23.14 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 any member of the Group (or against the directors of any member of the Group).

23.15 Environmental compliance

Each member of the Group has performed and observed in all material respects all Environmental Law, Environmental Permits and all other material covenants, conditions, restrictions or agreements directly or indirectly concerned with any contamination, pollution or waste or the release or discharge of any toxic or hazardous substance in connection with any real property which is or was at any time owned, leased or occupied by any member of the Group or on which any member of the Group has conducted any activity where failure to do so might reasonably be expected to have a Material Adverse Effect.

23.16 Environmental Claims

No Environmental Claim has been commenced or (to the best of its knowledge and belief) is threatened against any member of the Group where that claim would be reasonably likely, if determined against that member of the Group, to have a Material Adverse Effect.

23.17 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.

24. INFORMATION UNDERTAKINGS

The undertakings in this Clause 24 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.

24.1 Financial statements

It is normal to provide that a borrower's annual financial statements be audited in a particular manner. It is especially important that the auditing and accountancy principles are applied consistently from year to year, or the task of making meaningful comparisons will be made more

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difficult. Moreover, certain financial tests may lose some of their value if these principles are changed.

The lenders, having received the financial information from a borrower, have sophisticated financial and asset tests which they can apply to that information in order to assess objectively the condition and performance of a borrower's (or, as in the sample agreement, the Group's) business, and therefore its ability to repay the loan. The tests which are employed from time to time are many and this is not the place for their detailed discussion, but it should be noted that, in some cases, their significance goes beyond the monitoring function.

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 120 days after the end of each of its financial years:
 - (i) its audited 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 90 days after the end of each half of each of its financial years:
 - (i) its financial statements for that financial half year; and
 - (ii) the consolidated financial statements of the Guarantor for that financial half year.

24.2 Compliance Certificate

- (a) The Borrower shall supply to the Agent, with each set of financial statements delivered pursuant to paragraph (a)(ii) or (b)(ii) of Clause 24.1 (*Financial statements*), a Compliance Certificate setting out (in reasonable detail) computations as to compliance with Clause 25 (*Financial covenants*) as at the date at which those financial statements were drawn up.
- (b) Each Compliance Certificate shall be signed by two directors of the Borrower and, if required to be delivered with the financial statements delivered pursuant to paragraph (a)(ii) of Clause 24.1 (*Financial statements*), shall be reported on by the Guarantor's auditors in the form agreed by the Guarantor's auditors (and approved by the Majority Lenders) before the date of this Agreement.

24.3 Requirements as to financial statements

- (a) Each set of financial statements delivered by the Borrower pursuant to Clause 24.1 (*Financial statements*) shall be certified by a director of the relevant company as fairly representing its financial condition as at the date at which those financial statements were drawn up.

- (b) (i) The Borrower shall procure that each set of financial statements of an Obligor delivered pursuant to Clause 24.1 (*Financial statements*) is prepared using GAAP and 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 or the accounting practices or reference periods, and its auditors (or, if appropriate, the auditors of the Guarantor) deliver to the Agent:
 - (A) 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
 - (B) sufficient information, in form and substance as may be reasonably required by the Agent, to enable the Lenders to determine whether Clause 25 (*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.
- (ii) If the Borrower notifies the Agent of a change in accordance with paragraph (i) above then the Borrower and Agent shall enter into negotiations in good faith with a view to agreeing:
 - (A) whether or not the change might result in any material alteration in the commercial effect of any of the terms of this Agreement; and
 - (B) if so, any amendments to this Agreement which may be necessary to ensure that the change does not result in any material alteration in the commercial effect of those terms,and if any amendments are agreed they shall take effect and be binding on each of the Parties in accordance with their terms.

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.

24.4 Information: miscellaneous

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

- (a) all documents despatched by the Guarantor to its shareholders (or any class of them) or by any Obligor to its creditors generally at the same time as they are dispatched;
- (b) 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 (or against the directors of any member of the Group), and which might, if adversely determined, have a Material Adverse Effect; and
- (c) 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.

24.5 Notification of default

The principal purpose of this clause is to place an obligation on a borrower to give notice to the lenders of the occurrence of events of default that are likely to be known to the borrower before they would otherwise be known to the lenders, such as defaults on other debt instruments. The Agent can also request delivery by the Borrower of a certificate to the effect that no Event of Default (or event that could develop into one) exists, and if it does exist, stating what it is and what, if anything is being done to remedy it.

- (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).

24.6 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 this information onto an electronic website designated by the Borrower and the Agent (the ‘**Designated Website**’) if:
 - (i) the Agent expressly agrees (after consultation with each of the Lenders) that it will accept communication of the information by this method;
 - (ii) both the Borrower and the Agent are aware of the address of and any relevant password specifications for the Designated Website; and
 - (iii) the information is in a format previously agreed between the Borrower and the Agent.

If any Lender (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.

24.7 'Know your customer' checks

This Clause, together with Clause 26.2 (*Compliance with laws*), paragraph (b) of Clause 28.5 (*Procedure for transfer*) and paragraph (b) of Clause 28.6 (*Procedure for assignment*) has been included to take account of any 'know your customer' ('**KYC**') checks to be carried out by a Finance Party in relation to the identity of its 'customers'. In the UK these checks are required, pursuant to the Money Laundering Regulations 2007 (the '**Regulations**'), to be carried out where a person, in the course of 'relevant financial business' forms a 'business relationship' (as such terms are defined in the Regulations). As such, KYC issues arise between: (i) the Finance Parties and both Obligor; (ii) the Agent and the Lenders; and (iii) the Original Lenders and any New Lenders.

- (a) If:
 - (i) the introduction of or any change in (or in the interpretation, administration or application of) any law or regulation made after the date of this Agreement;
 - (ii) any change in the status of an Obligor or the composition of the shareholders of an Obligor after the date of this Agreement; or
 - (iii) a proposed assignment or transfer by a Lender of any of its rights and obligations under this Agreement to a party that is not a Lender prior to such assignment or transfer,obliges the Agent or any Lender (or, in the case of paragraph (iii) above, any prospective new Lender) to comply with 'know your customer' or similar identification procedures in circumstances where the necessary information is not already available to it, each Obligor shall promptly upon the request of the Agent or any Lender supply, or procure the supply of, such documentation and

other evidence as is reasonably requested by the Agent (for itself or on behalf of any Lender) or any Lender (for itself or, in the case of the event described in paragraph (iii) above, on behalf of any prospective new Lender) in order for the Agent, such Lender or, in the case of the event described in paragraph (iii) above, any prospective new Lender to carry out and be satisfied it has complied with all necessary 'know your customer' or other similar checks under all applicable laws and regulations pursuant to the transactions contemplated in the Finance Documents.

- (b) Each Lender shall promptly upon the request of the Agent supply, or procure the supply of, such documentation and other evidence as is reasonably requested by the Agent (for itself) in order for the Agent to carry out and be satisfied it has complied with all necessary 'know your customer' or other similar checks under all applicable laws and regulations pursuant to the transactions contemplated in the Finance Documents.

25. FINANCIAL COVENANTS

Financial covenants should be objective and, preferably, capable of determination from information available in the regular statements to be supplied by the obligors. For this reason, properly considered and drafted financial covenants may be more attractive to all parties than the protection afforded by an Event of Default occurring on a material adverse change in the financial condition of a borrower (or, as in the sample agreement's case, the Group). Compliance with such financial covenants should mean that a borrower's business is being directed in a prudent and safe manner, while a breach may be an indication of difficulties to follow. A breach will also, through the occurrence of an Event of Default, entitle the lenders to demand to be repaid early while there is still some prospect of a borrower being able to do so. Alternatively, lenders can use the threat of demanding repayment in order to require the borrower to renegotiate the terms of the agreement including increasing the margin or providing security. Financial covenants do, however, have their shortcomings, the chief of which, aside from the difficulty of setting realistic parameters in the first place, is the inevitable delay in discovering any breach. Annual financial statements will commonly take up to six months in preparation, and so it may be 12 or 18 months after the event that a particular adverse change is discovered in this way. While usually it will be open to the lenders to request financial information of a borrower at any time, normally the lenders will not do this unless they already have reason to suspect that a borrower is in difficulties. Accounting principles and standards vary from time to time and from country to country. This can be partially overcome by the choice of reputable auditors and definition of accounting terms and principles in the loan agreement, but the lenders must accept that the protection given by the financial covenants is only as good as the raw information supplied by a borrower in the first place.

25.1 Financial definitions

The following definitions are not generally applicable since they are too dependent on the circumstances of the particular deal.

It is important that the values to be ascribed to the defined financial terms can be readily ascertained from the financial statements, that is, the conditions and the terms in which they are written reflect the layout of the financial statement.

In this Clause 25:

‘Consolidated EBIT’ means, in respect of any Relevant Period, the consolidated operating profit of the Group before taxation (excluding the results from discontinued operations):

- (a) before deducting any interest, commission, fees, discounts, prepayment fees, premiums or charges and other finance payments whether paid, payable or capitalised by any member of the Group (calculated on a consolidated basis) in respect of that Relevant Period;
- (b) not including any accrued interest owing to any member of the Group;
- (c) before taking into account any Exceptional Items;
- (d) after deducting the amount of any profit (or adding back the amount of any loss) of any member of the Group which is attributable to minority interests;
- (e) after deducting the amount of any profit of any Non-Group Entity to the extent that the amount of the profit included in the financial statements of the Group exceeds the amount actually received in cash by members of the Group through distributions by the Non-Group Entity; and
- (f) before taking into account any unrealised gains or losses on any derivative instrument (other than any derivative instrument which is accounted for on a hedge accounting basis),

in each case, to the extent added, deducted or taken into account, as the case may be, for the purposes of determining the operating profit of the Group before taxation.

‘Consolidated EBITDA’ means, in respect of any Relevant Period, Consolidated EBIT for that Relevant Period after adding back any amount attributable to the amortisation, depreciation or impairment of assets of members of the Group (and taking no account of the reversal of any previous impairment charge made in that Relevant Period).

‘Consolidated Net Finance Charges’ means, in respect of any Relevant Period, the aggregate amount of the accrued interest, commission, fees, discounts, prepayment penalties or premiums and other finance payments in respect of Indebtedness for Borrowed Money whether paid, payable or capitalised by any member of the Group in respect of that Relevant Period:

- (a) excluding any such obligations owed to any other member of the Group;
- (b) including the interest element of payments in respect of any Finance Lease;

- (c) including any accrued commission, fees, discounts and other finance payments payable by any member of the Group under any interest rate hedging arrangement;
- (d) deducting any accrued commission, fees, discounts and other finance payments owing to any member of the Group under any interest rate hedging instrument; and
- (e) deducting any interest payable in that Relevant Period to any member of the Group (other than by another member of the Group) on any Cash or Cash Equivalent Investment.

‘Consolidated Tangible Net Worth’ means at any time the aggregate of the amounts paid up or credited as paid up on the issued ordinary share capital of the Guarantor and the aggregate amount of the reserves of the Group,

including:

- (a) any amount credited to the share premium account;
- (b) any capital redemption reserve fund; and
- (c) any balance standing to the credit of the consolidated income statement of the Group,

but deducting:

- (d) any debit balance on the consolidated income statement of the Group;
- (e) (to the extent included) any amount shown in respect of goodwill (including goodwill arising only on consolidation) or other intangible assets of the Group;
- (f) any amount which is attributable to minority interests;
- (g) (to the extent included) any amount set aside for taxation, deferred taxation or bad debts;
- (h) (to the extent included) any amounts arising from an upward revaluation of assets made at any time after [●]; and
- (i) any amount in respect of any dividend or distribution declared, recommended or made by any member of the Group to the extent payable to a person who is not a member of the Group and to the extent such distribution is not provided for in the most recent financial statements,

and so that no amount shall be included or excluded more than once.

‘Consolidated Total Net Debt’ means at any time the aggregate outstanding principal, capital or nominal amount of all obligations of the Group for or in respect of Indebtedness for Borrowed Money but:

- (a) excluding any such obligations to any other member of the Group;
- (b) including, in the case of any Finance Lease, its capitalised value; and
- (c) deducting the aggregate amount of freely available Cash and Cash Equivalent Investments held by any member of the Group at that time,

and so that no amount shall be included or excluded more than once.

‘Exceptional Items’ means any material items of an unusual or non-recurring nature which represent gains or losses including those arising on:

- (a) the restructuring of the activities of an entity and reversals of any provisions for the cost of restructuring;
- (b) disposals, revaluations or impairment of non-current assets; or
- (c) disposals of assets associated with discontinued operations.

‘Financial Year’ means the annual accounting period of the Guarantor ending on or about [31 December] in each year.

‘Interest Cover’ means, in respect of any Relevant Period, the ratio of Consolidated EBITDA for that Relevant Period to Consolidated Net Finance Charges for that Relevant Period.

‘Non-Group Entity’ means any investment or entity (which is not itself a member of the Group (including associates and joint ventures)) in which any member of the Group has an ownership interest.

‘Relevant Period’ means each period of twelve months ending on the last day of the Financial Year and each period of twelve months ending on the last day of the first half of the Financial Year.

25.2 Financial condition

The elements in each of the financial requirements require definition in a loan agreement (see Clause 25.1 (*Financial definitions*)) so that it is clear what is to be comprised in the financial tests applicable to a borrower. It will be for the lenders’ staff to decide what tests and definitions are appropriate in a particular case. It will also be necessary to decide whether the tests and other covenants are to be applied to a borrower alone or whether there are entities, such as subsidiaries, which should also be covered.

The Guarantor shall ensure that:

- (a) Consolidated Tangible Net Worth shall not at any time be less than [•].
- (b) The ratio of Consolidated Total Net Debt to Consolidated Tangible Net Worth shall not at any time exceed [•]:1.
- (c) Interest Cover for each Relevant Period shall not be less than [•]:1.
- (d) The ratio of Consolidated Total Net Debt to Consolidated EBITDA for any Relevant Period shall not at any time exceed [•]:1.

25.3 Financial testing

The financial covenants set out in Clause 25.2 (*Financial condition*) shall be tested by reference to each of the financial statements and/or each Compliance Certificate delivered pursuant to Clause 24.2 (*Compliance Certificate*).

26. GENERAL UNDERTAKINGS

The fact that the loan is unsecured and committed puts lenders in a vulnerable position. Lenders seek to use undertakings (together with financial covenants and events of default) to reduce this vulnerability. Their scope will naturally depend upon the circumstances and will be a matter of detailed negotiation between the borrower and the lenders. This situation may be affected by the degree of scrutiny of their customers' affairs which the borrower's main bankers normally adopt. This is likely to reflect the borrower's jurisdiction of incorporation (for example, traditionally German domestic banks generally scrutinise the affairs of their borrowers more than their British counterparts).

Lenders may sometimes (for example, in the case of less creditworthy borrowers, special purpose vehicles or limited recourse loans) insist that the undertakings impose severe limits on the management options of the borrower (which is, for example, the case with the LMA's Recommended Form of Facilities Agreement for Leveraged Acquisition Finance Transactions). More often, however, with stronger corporate borrowers they will be willing to leave the borrower's managerial powers largely unfettered provided that they get an Event of Default to cover a deterioration in the borrower's financial position. This will give lenders the right to demand repayment or, often more importantly in practice, the opportunity to renegotiate the terms of the loan (including imposing more severe undertakings).

Since undertakings are seen as a protection to lenders against the possibility of a deteriorating credit of a borrower, a borrower is only likely to be able to negotiate a substantial lessening of the scope of the undertakings at the cost of an increased rate of interest or the granting of security.

The undertakings in this Clause 26 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.

26.1 Authorisations

This area is primarily the responsibility of local counsel and will be covered by their legal opinion. A principal concern is compliance with any exchange controls, since the sanctions for failure to comply with them can be quite severe and may even render the loan agreement unenforceable. In this case, exchange controls are not relevant as they do not apply in the Netherlands where the Borrower is incorporated.

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 under any law or regulation of its jurisdiction of incorporation 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.

26.2 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.

26.3 Negative pledge

The negative pledge clause is a companion to the *pari passu* representation (Clause 23.13 (*Pari passu ranking*)). While the repetition of the *pari passu* representation throughout the life of the loan obliges the borrower to maintain parity between its unsecured obligations, the negative pledge clause seeks to control the borrower's ability to create or maintain secured indebtedness.

Lenders, being unsecured creditors of a borrower, will be determined to prevent other creditors being preferred to them, but they also will assert that it is when the borrower is in difficulties that it is most likely that it will be required to give security for its loans, and this is exactly the situation in which the lenders will not be prepared to see particular assets of the borrower pledged to other creditors and taken out of the fund to which the unsecured creditors, including the lenders, may look.

The negative pledge clause is only of limited value because it is effective only as long as it is followed. Once it is breached the lenders will have the right to accelerate the loan and to demand immediate repayment through the events of default, but they will be unable to dislodge any encumbrance already created unless, on the liquidation of a corporate borrower, they are able to point to some fraudulent preference which avoids the offending encumbrance. They may, however, obtain some claim against the secured lenders for inducing a breach of contract if those lenders were aware of the terms of the original lenders' negative pledge.

In this Clause 26.3, 'Quasi-Security' means an arrangement or transaction described in paragraph (b) below.

- (a) No Obligor shall (and the Guarantor 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 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 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
 - (iv) enter into 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 any Security or (as the case may be) Quasi-Security, listed below:
 - (i) any Security or Quasi-Security listed in Schedule 8 (*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;
 - (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 three months of the date of acquisition of such asset;
 - (vi) any Security or Quasi-Security over or affecting any asset of any company 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 company becomes a member of the Group, if:
 - (A) the Security or Quasi-Security was not created in contemplation of the acquisition of that company;
 - (B) the principal amount secured has not increased in contemplation of or since the acquisition of that company; and
 - (C) the Security or Quasi-Security is removed or discharged within three months of that company becoming a member of the Group;

- (vii) any Security or Quasi-Security entered into 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; or
- (ix) 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 (viii) above) does not exceed \$[•] (or its equivalent in another currency or currencies).

26.4 Disposals

This covenant attempts to preserve a borrower's assets which would be available for any future distribution, and it applies either to a single transaction or a series of transactions which exceed a particular amount of the book value. It is linked to the undertaking in Clause 26.7 (*Insurance*) to make sure that the preserved assets are adequately insured.

- (a) No Obligor shall (and the Guarantor 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; or
 - (iii) where the book value of the assets (when aggregated with the book value of the assets for any other sale, lease, transfer or other disposal by the Group, other than any permitted under paragraphs (i) to (ii) above) does not exceed \$[•] (or its equivalent in another currency or currencies) in any financial year.

26.5 Merger

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

26.6 Change of business

The Guarantor shall ensure 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.

26.7 Insurance

Each Obligor shall (and the Guarantor shall ensure that each member of the Group will) maintain insurances on and in relation to its business and assets with reputable underwriters or insurance companies against those risks and to the extent as is usual for companies carrying on the same or substantially similar business.

26.8 Environmental Compliance

Each Obligor shall (and the Guarantor shall ensure that each member of the Group will) comply in all material respects with all Environmental Law and obtain and maintain any Environmental Permits and take all reasonable steps in anticipation of known or expected future changes to or obligations under the same where failure to do so might reasonably be expected to have a Material Adverse Effect.

26.9 Environmental Claims

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

- (a) any Environmental Claim that has been commenced or (to the best of its knowledge and belief) is threatened against any member of the Group; or
- (b) any facts or circumstances which will or are reasonably likely to result in any Environmental Claim being commenced or threatened against any member of the Group,

where the claim would be reasonably likely, if determined against that member of the Group, to have a Material Adverse Effect.

27. EVENTS OF DEFAULT

Since the events of default can lead to the lenders being relieved of their obligation to lend and being entitled to exercise remedies that include acceleration, a borrower will be concerned to limit the actions or circumstances that will constitute events of default and to have included provisions: (a) that give the borrower time to cure events of default and (b) that require notice to a borrower before those cure periods start to run. The lenders, however, will be determined to protect their ability to act quickly to demand repayment of the loan, with accrued interest, if serious problems arise. This often means that only the 'minor' events of default will be compromised (see Clause 27.3 (*Other obligations*)).

The first three events of default cover the whole spectrum of actual breaches of the terms of the loan agreement. However, there are many possible events, the occurrence of any of which would be a warning that a borrower may soon be in breach of a term of the loan agreement. The early warning events of default are very important since by the time an actual default occurs it may be too late for the lenders to protect their position; other creditors may already have protected themselves and left nothing for the lenders.

Each of the events or circumstances set out in this Clause 27 is an Event of Default (save for Clause 27.14 (*Acceleration*)).

27.1 Non-payment

The fundamental concept of a loan is the repayment of principal and the payment of interest on the outstanding principal. The first Event of Default is therefore usually non-payment. The payment obligation is fundamental, and its breach may be said to be the last Event of Default as well as the first in the sense that the other events of default are included only because they are indications of a future non-payment. The lenders are therefore unlikely to agree to any significant qualifications of this event.

However, in some cases a grace period is allowed (as in the sample agreement). Any conceded grace period will usually be short and will often only be for delays occurring for purely technical difficulties in effecting 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:
 - (i) (in the case of paragraph (a)(i) above) three Business Days of its due date; or
 - (ii) (in the case of paragraph (a)(ii) above) five Business Days of its due date.

27.2 Financial covenants

Any requirement of Clause 25 (*Financial covenants*) is not satisfied or an Obligor does not comply with Clause 23.12 (*Financial Statements*).

27.3 Other obligations

During negotiations some borrowers may seek to limit this Clause by inserting a materiality limitation or by providing that there will be grace periods during which certain breaches may be remedied before they become events of default. Lenders will normally resist such changes.

- (a) An Obligor does not comply with any provision of the Finance Documents (other than those referred to in Clause 27.1 (*Non-payment*) and Clause 27.2 (*Financial covenants*)).

- (b) No Event of Default under paragraph (a) above will occur if the failure to comply is capable of remedy and is remedied within 15 Business Days of the earlier of (i) the Agent giving notice to the Borrower and (ii) the Borrower becoming aware of the failure to comply.

27.4 Misrepresentation

During negotiations some borrowers will wish to dilute the impact of this Clause by inserting a materiality limitation or by restricting it to those representations and statements which cover key commercial areas. This will usually be resisted by lenders.

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.

27.5 Cross default

The first of the early warning events of default is the cross-default clause, as a default by a borrower under one loan or of its obligations to one creditor is likely to be followed by defaults on all of its obligations to all of its creditors. Accordingly, and on the principle that all creditors of the same class should be treated alike, lenders attach great importance to cross-default.

The definition of '**Financial Indebtedness**' is deliberately very wide in its scope and includes all financial obligations, whether as principal or as surety, owed to any person. A borrower will often request that this be restricted to, say, indebtedness in respect of borrowed moneys. This would take a borrower's hedging debts out of the ambit of the cross-default. However, hedging debts can be as crippling as any other, so an alternative approach to the problem is to insert, as in this sample agreement, a financial limit, (which will be dictated by the balance sheet of a borrower) so that defaults which do not exceed a specified aggregate sum will not trigger the cross-default.

The cross-default will always focus on a borrower, but if the lenders are looking at other entities, such as a guarantor or subsidiaries, as part of the credit for a loan, they too will be covered by the cross-default. Thus, in the sample agreement, a default by the guarantor or one of its subsidiaries under some unrelated transaction would lead to an Event of Default under the loan agreement, even though the borrower was not yet in difficulties itself. Some transactions have a cross-acceleration clause rather than a cross-default clause. This is weaker for the lenders and is achieved by deleting (d) from the sample clause.

- (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 27.5 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).

27.6 Insolvency

- (a) A member of the Group is unable or admits inability to pay its debts as they fall due, or is deemed to or declared to be unable to pay its debts under any applicable law, suspends or threatens to suspend 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.

This provision works in conjunction with the cross-default clause but may bite at an earlier stage. For example, the expression '**unable to pay its debts**' is a term of art and can happen before a debt is not paid. By comparison, the expression used in the cross-default clause ('is not paid') may not mean that a borrower/obligor is unable to pay its debts only that it is not willing to pay a particular debt.

- (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.
- (d) Any member of the Group which conducts business in France is in a state of *cessation des paiements* within the meaning of articles L.631-1 *et seq.* of the French *Code de Commerce*, or any Material Company becomes insolvent for the purpose of any applicable insolvency law.

27.7 Insolvency proceedings

Although it is possible that the laws of a number of countries may automatically treat bankruptcy or liquidation of a borrower as an event which would result in an acceleration of the loan, regardless of what is stated in the loan agreement, such an eventuality should still be covered within the events of default, since the relevant legal procedure in the country of a borrower's domicile may be disadvantageous to the lenders or at least not as advantageous as the lenders would wish. Also, the event should be triggered by the start of such proceedings and not by the subsequent making of an order under such 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 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, compromise, assignment or arrangement with any creditor of any member of the Group;
- (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, administrative receiver, administrator, compulsory manager or other similar officer in respect of any member of the Group or any of its assets;
- (d) enforcement of any Security over any assets of any member of the Group;
- (e) any member of the Group which conducts business in France commences proceedings for *conciliation* in accordance with articles L.611-4 to L.6111-5 of the French *Code de Commerce*; or
- (f) a judgement for *sauvegarde*, *redressement judiciaire*, *cession totale de l'entreprise* or *liquidation judiciaire* is entered in relation to any member of the Group which conducts business in France under articles L.620-1 to L.670-8 of the French *Code de Commerce*,

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

This Clause 27.7 shall not apply to any winding-up petition which is frivolous or vexatious and is discharged, stayed or dismissed within [14] days of commencement.

27.8 Creditors' process

Any expropriation, attachment, sequestration, distress or execution or any analogous process in any jurisdiction affects any asset or assets of a member of the Group and is not discharged within [14] days.

27.9 Tax Status

A notice under Article 36 Dutch Tax Collection Act (*Invorderingswet 1990*) has been given by any member of the Group.

27.10 Unlawfulness

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

27.11 Repudiation

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

27.12 Ownership of the Borrower

The Borrower ceases to be a wholly-owned subsidiary of the Guarantor.

27.13 Material adverse change

This is a safety-net provision. The events of default generally are intended to deal with unexpected occurrences, and it is the nature of such occurrences that they do not fall neatly into previously contemplated categories. It is therefore prudent to have such a comprehensive and general event of default in order to pick up adverse events in the light of which the lenders want to review their positions, but which are not expressly contemplated in the loan agreement. However, in order to cover all possibilities, the language will probably be so vague and loose as to make it very difficult for the lenders ever to be sure that the circumstances entitle them to rely on this Event of Default. This event is not likely to be relied on in marginal cases but has been used in practice where the position is a clear one and where convincing evidence is available of material adverse change. Where the commercial paper programme of the borrower is being rated the rating agency may be concerned about the inclusion of a 'MAC' clause as it may mean that the facility is not available to be used when the borrower's credit condition deteriorates.

Any event or circumstance occurs which might reasonably be expected to have a Material Adverse Effect.

27.14 Acceleration

- (a) On and at any time after the occurrence of an Event of Default which is continuing the Agent may, without *mise en demeure* or any other judicial or extra judicial step, and shall if so directed by the Majority Lenders, by notice to the Borrower but subject to the mandatory provisions of articles L.620-1 to L.670-8 of the French *Code de Commerce*:

A syndicate of lenders is a democracy: it is not necessary for all the lenders to agree in order to call a default. The decision in Clause 27.14 (*Acceleration*), among others

Continued

provided for elsewhere in the sample agreement, is taken by the '**Majority Lenders**'. Thus, lenders who have a greater amount at stake have a greater vote in the matter. The actual percentage to be applied will vary from loan to loan, but 66⅔% is quite normal. It is, of course, important that the percentage is at least 50% since otherwise there would be the possibility of getting two groups of lenders requiring the agent to take contradictory action.

The references above to certain provisions of French law are required given the Guarantor's jurisdiction of incorporation.

- (i) cancel the Total Commitments, at which time they shall immediately be cancelled;
- (ii) 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, at which time they shall become immediately due and payable; and/or
- (iii) declare that all or part of the Loans be payable on demand, at which time they shall immediately become payable on demand by the Agent on the instructions of the Majority Lenders.

SECTION 9 CHANGES TO PARTIES

28. CHANGES TO THE LENDERS

28.1 Assignments and transfers by the Lenders

For a general commentary on assignments and transfers of loans, see Chapter 6 'Secondary market transfer mechanism'.

Subject to this Clause 28, a Lender (the 'Existing Lender') may:

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

LMA loan agreements allow for transfers to a wide range of participants in the loan markets. In practice, revolving credit facilities with swingline options are not likely to be attractive to 'non-bank' lenders such as funds or collateralised loan obligations because they are likely to remain undrawn at most times (and therefore do not offer sufficient yield in terms of interest income) and also require Lenders to be capable of funding their participations in Loans at short notice. 'Non-bank' lenders invest primarily in drawn term loan facilities which have been underwritten (and funded) by bank lenders.

28.2 Conditions of assignment or transfer

- (a) The consent of the Borrower is required for an assignment or transfer by an Existing Lender, unless the assignment or transfer is:
 - (i) to another Lender or an Affiliate of a Lender; or
 - (ii) made at a time when an Event of Default is continuing.
- (b) The consent of the Borrower to an assignment or transfer 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) The consent of the Borrower to an assignment or transfer must not be withheld solely because the assignment or transfer may result in an increase to the Mandatory Cost.
- (d) Any assignment or transfer of part only of a Lender's Overall Commitment must be in a minimum amount of \$10,000,000.
- (e) An assignment will only be effective on:
 - (i) receipt by the Agent (whether in the 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.
- (f) A transfer will only be effective if the procedure set out in Clause 28.5 (*Procedure for transfer*) is complied with.
- (g) If:
 - (i) a Lender assigns or transfers any of its rights or obligations under the Finance Documents or changes its Facility Office; and
 - (ii) as a result of circumstances existing at the date the assignment, transfer or change occurs, an Obligor would be obliged to make a payment to the New Lender or Lender acting through its new Facility Office under Clause 18 (*Increased costs*),
 then the New Lender or Lender acting through its new Facility Office is only entitled to receive payment under that Clause to the same extent as the Existing Lender or Lender acting through its previous Facility Office would have been if the assignment, transfer or change had not occurred. This paragraph (g) shall not apply in respect of an assignment or transfer made in the ordinary course of the primary syndication of the Facility.
- (h) Each New Lender, by executing the relevant Transfer Certificate or Assignment Agreement, confirms, for the avoidance of doubt, that the Agent has authority to execute on its behalf any amendment or waiver that has been approved by or on behalf of the requisite Lender or Lenders in accordance with this Agreement on or prior to the date on which the transfer or assignment becomes effective in accordance with this Agreement and that it is bound by that decision to the same extent as the Existing Lender would have been had it remained a Lender.
- (i) Notwithstanding any other term of this Agreement, each Lender shall ensure that at all times its Overall Commitment is not less than:
 - (i) its Swingline Commitment; or
 - (ii) if it does not have a Swingline Commitment, the Swingline Commitment of a Lender which is its Affiliate.
- (j) Subject to the terms of this Agreement, the obligations of each Obligor under this Agreement will continue in full force and effect following any novation under this Clause 28. A novation under this Clause 28 is a novation (*novation*) within the meaning of Articles 1271 *et seq.* of the French *Code Civil*.

28.3 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 \$[•].

28.4 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 28; 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.

28.5 Procedure for transfer

- (a) Subject to the conditions set out in Clause 28.2 (*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 only be obliged to execute a Transfer Certificate delivered to it by the Existing Lender and the New Lender once it is satisfied it has complied with all necessary 'know your customer' or other similar checks under all applicable laws and regulations in relation to the transfer to such New Lender.
- (c) Subject to Clause 28.9 (*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 under the Finance Documents shall be cancelled (being the ‘**Discharged Rights and Obligations**’);
- (ii) each of the Obligor 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 the 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 the Finance Documents; and
 - (iv) the New Lender shall become a Party as a ‘Lender’.

28.6 Procedure for assignment

- (a) Subject to the conditions set out in Clause 28.2 (*Conditions of assignment or transfer*) an assignment may be effected in accordance with paragraph (c) 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 (b) 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) The Agent shall only be obliged to execute an Assignment Agreement delivered to it by the Existing Lender and the New Lender once it is satisfied it has complied with all necessary ‘know your customer’ or other similar checks under all applicable laws and regulations in relation to the assignment to such New Lender.
- (c) Subject to Clause 28.9 (*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
 - (iii) the New Lender shall become a Party as a ‘Lender’ and will be bound by obligations equivalent to the Relevant Obligations.
- (d) Lenders may utilise procedures other than those set out in this Clause 28.6 to assign their rights under the Finance Documents (but not, without the consent of the relevant Obligor or unless in accordance with Clause 28.5 (*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 Clause 28.2 (*Conditions of assignment or transfer*).

28.7 Copy of Transfer Certificate, Assignment Agreement or Increase Confirmation to Borrower

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

28.8 Security over Lenders' rights

In addition to the other rights provided to Lenders under this Clause 28.8, 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 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.

28.9 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 28.5 (*Procedure for transfer*) or any assignment pursuant to Clause 28.6 (*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):

- (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 28.9, have been payable to it on that date, but after deduction of the Accrued Amounts.

29. CHANGES TO THE OBLIGORS

No Obligor may assign any of its rights or transfer any of its rights or obligations under the Finance Documents.

SECTION 10 THE FINANCE PARTIES

30. ROLE OF THE AGENT AND THE ARRANGER

The agreement must contain provisions governing the relationship of the lenders between themselves and between them and the agent (and arranger). In view of difficulties experienced by agents over the years broad exculpatory statements are written into the agency clause, relieving the agent from responsibility for losses incurred by the lenders as a result of their participations. The agent should generally only be required to perform, in a reasonable manner, those duties specifically delegated to it within the loan agreement, and should not be responsible to any syndicate member unless it fails to perform such functions as a result of gross negligence or misconduct.

Similarly, there should be a confirmation from the lenders to the agent (and arranger) that each lender has made its own independent investigation of the financial condition of a borrower and has not relied upon information supplied by the agent (and arranger). In essence, the agent performs exclusively mechanical and operational functions, with the limits of its authority defined by the lending syndicate.

30.1 Appointment of the Agent

- (a) Each of the Arrangers and the Lenders appoints the Agent to act as its agent under and in connection with the Finance Documents.
- (b) Each of the Arrangers and the Lenders authorises the Agent to perform the duties, obligations and responsibilities and 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.

30.2 Instructions

- (a) The Agent shall:
 - (i) unless a contrary indication appears in a Finance Document, exercise or refrain from exercising any right, power, authority or discretion vested in it as Agent in accordance with any instructions given to it by:
 - (A) all Lenders if the relevant Finance Document stipulates the matter is an all Lender decision;
 - (B) in all other cases, the Majority Lenders; and
 - (ii) not be liable for any act (or omission) if it acts (or refrains from acting) in accordance with paragraph (i) above.
- (b) The Agent shall be entitled to request instructions, or clarification of any instruction, from the Majority Lenders (or, if the relevant Finance Document stipulates the matter is a decision for any other Lender or group of Lenders, from that Lender or group of Lenders) as to whether, and in what manner, it should exercise or refrain

from exercising any right, power, authority or discretion and the Agent may refrain from acting unless and until it receives those instructions or that clarification.

- (c) Save in the case of decisions stipulated to be a matter for any other Lender or group of Lenders under the relevant Finance Document and unless a contrary indication appears in a Finance Document, any instructions given to the Agent by the Majority Lenders shall override any conflicting instructions given by any other Parties and will be binding on all Finance Parties.
- (d) The Agent may refrain from acting in accordance with any instructions of any Lender or group of Lenders until it has received any indemnification and/or security that it may in its discretion require (which may be greater in extent than that contained in the Finance Documents and which may include payment in advance) for any cost, loss or liability which it may incur in complying with those instructions.
- (e) In the absence of instructions, the Agent may act (or refrain from acting) as it considers to be in the best interest of the Lenders.
- (f) 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.

30.3 Duties of the Agent

- (a) The Agent's duties under the Finance Documents are solely mechanical and administrative in nature.
- (b) Subject to paragraph (c) 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.
- (c) Without prejudice to Clause 28.7 (*Copy of Transfer Certificate, Assignment Agreement or Increase Confirmation to Borrower*), paragraph (b) above shall not apply to any Transfer Certificate, any Assignment Agreement or any Increase Confirmation.
- (d) 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.
- (e) If the Agent receives notice from a Party referring to this Agreement, describing a Default and stating that the circumstance described is a Default, it shall promptly notify the other Finance Parties.
- (f) If the Agent is aware of the non-payment of any principal, interest, commitment fee or other fee payable to a Finance Party (other than the Agent or the Arranger) under this Agreement it shall promptly notify the other Finance Parties.
- (g) The Agent shall provide to the Borrower, within five Business Days of a request by the Borrower (but no more frequently than once per calendar month), a list (which may be in electronic form) setting out the names of the Lenders as at the date of that request, their respective Commitments and/or Swingline Commitments, the address and fax number (and the department or officer, if any, for whose attention any communication is to be made) of each Lender for any communication

to be made or document to be delivered under or in connection with the Finance Documents, the electronic mail address and/or any other information required to enable the sending and receipt of information by electronic mail or other electronic means to and by each Lender to whom any communication under or in connection with the Finance Documents may be made by that means and the account details of each Lender for any payment to be distributed by the Agent to that Lender under the Finance Documents.

- (h) The Agent shall have only those duties, obligations and responsibilities expressly specified in the Finance Documents to which it is expressed to be a party (and no others shall be implied).

30.4 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.

30.5 No fiduciary duties

- (a) Nothing in any Finance Document constitutes the Agent or the Arranger as a trustee or fiduciary of any other person.
- (b) Neither the Agent nor the Arranger 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.

30.6 Business with the Group

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

30.7 Rights and discretions of the Agent

The Agent may:

- (a) rely on:
 - (i) any representation, communication, notice or document believed by it to be genuine, correct and appropriately authorised;
 - (ii) assume that:
 - (A) any instructions received by it from the Majority Lenders, any Lenders or any group of Lenders are duly given in accordance with the terms of the Finance Documents; and
 - (B) unless it has received notice of revocation, that those instructions have not been revoked; and
 - (iii) rely on a certificate from any person:
 - (A) as to any matter of fact or circumstance which might reasonably be expected to be within the knowledge of that person; or
 - (B) to the effect that such person approves of any particular dealing, transaction, step, action or thing,
- as sufficient evidence that that is the case and, in the case of paragraph (A) above, may assume the truth and accuracy of that certificate.

- (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 27.1 (*Non-payment*));
 - (ii) any right, power, authority or discretion vested in any Party or any group of Lenders has not been exercised;
 - (iii) any notice or request made by the Borrower (other than a Utilisation Request) is made on behalf of and with the consent and knowledge of the Guarantor
- (c) The Agent may engage and pay for the advice or services of any lawyers, accountants, tax advisers, surveyors or other professional advisers or experts.
- (d) Without prejudice to the generality of paragraph (c) above or paragraph (e) below, the Agent may at any time engage and pay for the services of any lawyers to act as independent counsel to the Agent (and so separate from any lawyers instructed by the Lenders) if the Agent in its reasonable opinion deems this to be desirable.
- (e) The Agent may rely on the advice or services of any lawyers, accountants, tax advisers, surveyors or other professional advisers or experts (whether obtained by the Agent or by any other Party) and shall not be liable for any damages, costs or losses to any person, any diminution in value or any liability whatsoever arising as a result of its so relying.
- (f) The Agent may act in relation to the Finance Documents through its officers, employees and agents and the Agent shall not:
 - (i) be liable for any error of judgment made by any such person; or
 - (ii) be bound to supervise, or be in any way responsible for any loss incurred by reason of misconduct, omission or default on the part, of any such person, unless such error or such loss was directly caused by the Agent's gross negligence or wilful misconduct.
- (g) Unless a Finance Document expressly provides otherwise the Agent may disclose to any other Party any information it reasonably believes it has received as agent under this Agreement.
- (h) Without prejudice to the generality of paragraph (g) above, the Agent:
 - (i) may disclose; and
 - (j) on the written request of the Borrower or the Majority Lenders shall, as soon as reasonably practicable, disclose, the identity of a Defaulting Lender to the Borrower and to the other Finance Parties.
- (k) Notwithstanding any other provision of any Finance Document to the contrary, neither the Agent nor the Arranger 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.
- (l) The Agent is not obliged to disclose to any Finance Party any details of the rate notified to the Agent by any Lender or the identity of any such Lender for the purpose of paragraph (a)(ii) of Clause 15.2 (*Market Disruption*).
- (m) Notwithstanding any provision of any Finance Document to the contrary, the Agent is not obliged to expend or risk its own funds or otherwise incur any financial liability in the performance of its duties, obligations or responsibilities

or the exercise of any right, power, authority or discretion if it has grounds for believing the repayment of such funds or adequate indemnity against, or security for, such risk or liability is not reasonably assured to it.

30.8 Responsibility for documentation

Neither the Agent nor the Arranger is responsible or liable for:

- (a) the adequacy, accuracy or completeness of any information (whether oral or written) supplied by the Agent, the Arranger, an Obligor or any other person in or in connection with any Finance Document or the Information Memorandum or the transactions contemplated in 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;
- (b) 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, under or in connection with any Finance Document; or
- (c) 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.

30.9 No duty to monitor

The Agent shall not be bound to enquire:

- (a) whether or not any Default has occurred;
- (b) as to the performance, default or any breach by any Party of its obligations under any Finance Document; or
- (c) whether any other event specified in any Finance Document has occurred.

30.10 Exclusion of liability

- (a) Without limiting paragraph (b) below (and without prejudice to any other provision of any Finance Document excluding or limiting the liability of the Agent, the Agent will not be liable (including, without limitation, for negligence or any other category of liability whatsoever) for:
 - (i) any damages, costs or losses to any person, any diminution in value, or any liability whatsoever arising as a result of taking or not taking any action under or in connection with any Finance Document, unless directly caused by its gross negligence or wilful misconduct;
 - (ii) exercising, or not exercising, any right, power, authority or discretion given to it by, or in connection with, any Finance Document or any other agreement, arrangement or document entered into, made or executed in anticipation of, under or in connection with, any Finance Document; or
 - (iii) without prejudice to the generality of paragraphs (i) and (ii) above, any damages, costs or losses to any person, any diminution in value or any liability whatsoever arising as a result of:
 - (A) any act, event or circumstance not reasonably within its control; or

- (B) the general risks of investment in, or the holding of assets in, any jurisdiction, including (in each case and without limitation) such damages, costs, losses, diminution in value or liability arising as a result of: nationalisation, expropriation or other governmental actions; any regulation, currency restriction, devaluation or fluctuation; market conditions affecting the execution or settlement of transactions or the value of assets (including any Disruption Event); breakdown, failure or malfunction of any third party transport, telecommunications, computer services or systems; natural disasters or acts of God; war, terrorism, insurrection or revolution; or strikes or industrial action.
- (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 1.5 (*Third party rights*).
- (c) The Agent will not be liable for any delay (or any related consequences) in crediting an account with an amount required under the Finance Documents to be paid by the Agent if the Agent has taken all necessary steps as soon as reasonably practicable to comply with the regulations or operating procedures of any recognised clearing or settlement system used by the Agent for that purpose.
- (d) Nothing in this Agreement shall oblige the Agent or the Arranger to carry out:
 - (i) any ‘know your customer’ or other checks in relation to any person; or
 - (ii) any check on the extent to which any transaction contemplated by this Agreement might be unlawful for any Lender,
 on behalf of any Lender and each Lender confirms to the Agent and the Arranger that it is solely responsible for any such checks it is required to carry out and that it may not rely on any statement in relation to such checks made by the Agent or the Arranger.
- (e) Without prejudice to any provision of any Finance Document excluding or limiting the Agent’s liability, any liability of the Agent arising under or in connection with any Finance Document shall be limited to the amount of actual loss which has been finally judicially determined to have been suffered (as determined by reference to the date of default of the Agent or, if later, the date on which the loss arises as a result of such default) but without reference to any special conditions or circumstances known to the Agent at any time which increase the amount of that loss. In no event shall the Agent be liable for any loss of profits, goodwill, reputation, business opportunity or anticipated saving, or for special, punitive, indirect or consequential damages, whether or not the Agent has been advised of the possibility of such loss or damages.

30.11 Lenders’ indemnity to the Agent

- (a) Each Lender shall (in proportion to its share of the Total Commitments or, if the Total Commitments are then zero, to its share of the Total Commitments immediately prior to their reduction to zero) indemnify the Agent, within three

Business Days of demand, against any cost, loss or liability (including, without limitation, for negligence or any other category of liability whatsoever) incurred by the Agent (otherwise than by reason of the Agent's gross negligence or wilful misconduct) (or, in the case of any cost, loss or liability pursuant to Clause 33.11 (*Disruption to Payment Systems etc.*) notwithstanding the Agent's negligence, gross negligence or any other category of liability whatsoever but not including any claim based on the fraud of the Agent) in acting as Agent under the Finance Documents (unless the Agent has been reimbursed by an Obligor pursuant to a Finance Document).

- (b) Subject to paragraph (c) below, the Borrower shall immediately on demand reimburse any Lender for any payment that Lender makes to the Agent pursuant to paragraph (a) above.
- (c) Paragraph (b) above shall not apply to the extent that the indemnity payment in respect of which the Lender claims reimbursement relates to a liability of the Agent to the Borrower.

30.12 Resignation of the Agent

- (a) The Agent may resign and appoint one of its Affiliates acting through an office in the United Kingdom as successor by giving notice to the Lenders and the Borrower.
- (b) Alternatively the Agent may resign by giving 30 days' notice to the Lenders and the Borrower, in which case the Majority Lenders (after consultation with the Borrower) may appoint a successor Agent.
- (c) If the Majority Lenders have not appointed a successor Agent in accordance with paragraph (b) above within 20 days after notice of resignation was given, the retiring Agent (after consultation with the Borrower) may appoint a successor Agent (acting through an office in the United Kingdom).
- (d) If the Agent wishes to resign because (acting reasonably) it has concluded that it is no longer appropriate for it to remain as agent and the Agent is entitled to appoint a successor Agent under paragraph (c) above, the Agent may (if it concludes (acting reasonably) that it is necessary to do so in order to persuade the proposed successor Agent to become a party to this Agreement as Agent) agree with the proposed successor Agent amendments to this Clause 30 and any other term of this Agreement dealing with the rights or obligations of the Agent consistent with then current market practice for the appointment and protection of corporate trustees together with any reasonable amendments to the agency fee payable under this Agreement which are consistent with the successor Agent's normal fee rates and those amendments will bind the Parties.
- (e) The retiring Agent shall, at its own cost, make available to the successor Agent such documents and records and provide such assistance as the successor Agent may reasonably request for the purposes of performing its functions as Agent under the Finance Documents. The Borrower shall, within three Business Days of demand, reimburse the retiring Agent for the amount of all costs and expenses (including legal fees) properly incurred by it in making available such documents and records and providing such assistance.

- (f) The Agent's resignation notice shall only take effect upon the appointment of a successor.
- (g) Upon the appointment of a successor, the retiring Agent shall be discharged from any further obligation in respect of the Finance Documents (other than its obligations under paragraph (e) above) but shall remain entitled to the benefit of Clause 19.3 (*Indemnity to the Agent*) and this Clause 30 (and any agency fees for the account of the retiring Agent shall cease to accrue from (and shall be payable on) that date). Any successor and each of the other Parties shall have the same rights and obligations amongst themselves as they would have had if such successor had been an original Party.

30.13 Replacement of the Agent

- (a) After consultation with the Borrower, the Majority Lenders may, by giving 30 days' notice to the Agent (or, at any time the Agent is an Impaired Agent, by giving any shorter notice determined by the Majority Lenders) replace the Agent by appointing a successor Agent (acting through an office in the United Kingdom).
- (b) The retiring Agent shall (at its own cost if it is an Impaired Agent and otherwise at the expense of the Lenders) make available to the successor Agent such documents and records and provide such assistance as the successor Agent may reasonably request for the purposes of performing its functions as Agent under the Finance Documents.
- (c) The appointment of the successor Agent shall take effect on the date specified in the notice from the Majority Lenders to the retiring Agent. As from this date, the retiring Agent shall be discharged from any further obligation in respect of the Finance Documents (other than its obligations under paragraph (b) above) but shall remain entitled to the benefit of Clause 19.3 (*Indemnity to the Agent*) and this Clause 30 (and any agency fees for the account of the retiring Agent shall cease to accrue from (and shall be payable on) that date).
- (d) Any successor Agent and each of the other Parties shall have the same rights and obligations amongst themselves as they would have had if such successor had been an original Party.

30.14 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 entity from any other of its divisions or departments.
- (b) If information is received by another division or department of the Agent, it may be treated as confidential to that division or department and the Agent shall not be deemed to have notice of it.
- (c) Notwithstanding any other provision of any Finance Document to the contrary, neither the Agent nor the Arranger is obliged to disclose to any other person (i) any confidential information or (ii) any other information if the disclosure would, or might in its reasonable opinion, constitute a breach of any law or regulation or a breach of a fiduciary duty.

30.15 Relationship with the Lenders

- (a) Subject to Clause 28.9 (*Pro rata interest settlement*), the Agent may treat the person shown in its records as Lender at the opening of business (in the place of the Agent's principal office as notified to the Finance Parties from time to time) as the Lender acting through its Facility Office:
 - (i) entitled to or liable for any payment due under any Finance Document on that day; and
 - (ii) entitled to receive and act upon any notice, request, document or communication or make any decision or determination under any Finance Document made or delivered on that day,unless it has received not less than five Business Days' prior notice from that Lender to the contrary in accordance with the terms of this Agreement.
- (b) Each Lender shall supply the Agent with any information required by the Agent in order to calculate the Mandatory Cost in accordance with Schedule 4 (*Mandatory Cost formula*).
- (c) Any Lender may by notice to the Agent appoint a person to receive on its behalf all notices, communications, information and documents to be made or 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 35.6 (*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 35.2 (*Addresses*) and paragraph (a)(ii) of Clause 35.6 (*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.

30.16 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 the Agent and the Arranger 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 or completeness of the Information Memorandum, the Reports 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 any Finance Document or any other agreement, arrangement or document entered into, made or executed in anticipation of, under or in connection with any Finance Document.

30.17 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 to replace that Reference Bank.

30.18 Agent's Management Time

Any amount payable to the Agent under Clause 19.3 (*Indemnity to the Agent*), Clause 21 (*Costs and expenses*) and Clause 30.11 (*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 16 (*Fees*).

30.19 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.

31. 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.

32. SHARING AMONG THE FINANCE PARTIES

This provision, known as a '**sharing**', '**redistribution**' or '**pro rata**' clause, operates together with Clause 34 (*Set-off*), which permits the lenders to set-off against deposits of a borrower and a guarantor. The sharing clause acquired its current form in light of

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experience with its use following the freeze of Iranian assets imposed by the United States and following the Falklands/Malvinas crisis, when Argentine borrowers made debt repayments only to non-British lenders. The sharing clause requires a lender that has exercised set-off rights (or otherwise received more than its 'share' of a due payment) to acquire the other lenders' rights to receive payments from a borrower in amounts sufficient effectively to redistribute the amount so obtained by set-off among all the lenders.

The clause is sometimes written without the provision in paragraph (b) of Clause 32.5 (*Exceptions*). The sharing provision could then be restricted to only cover sums net of the costs of any legal proceedings brought to realise such sums.

32.1 Payments to Finance Parties

If a Finance Party (a '**Recovering Finance Party**') receives or recovers any amount from an Obligor other than in accordance with Clause 33 (*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 33 (*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 33.6 (*Partial payments*).

32.2 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 33.6 (*Partial payments*) towards the obligations of that Obligor to the Sharing Finance Parties.

32.3 Recovering Finance Party's rights

On a distribution by the Agent under Clause 32.2 (*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.

32.4 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.

32.5 Exceptions

- (a) This Clause 32 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

33. PAYMENT MECHANICS

33.1 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 and with such bank as the Agent, in each case, specifies.

33.2 Distributions by the Agent

Each payment received by the Agent under the Finance Documents for another Party shall, subject to Clause 33.3 (*Distributions to an Obligor*), Clause 33.4 (*Clawback*) and Clause 30.19 (*Deduction from amounts payable by the Agent*) 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 specified by that Party in the principal financial centre of the country of that currency.

33.3 Distributions to an Obligor

The Agent may (with the consent of the Obligor or in accordance with Clause 34 (*Set-off*)) apply any amount received by it for that Obligor in or towards payment (on the date and in the currency and funds of receipt) of any amount due from that Obligor under the Finance Documents or in or towards purchase of any amount of any currency to be so applied.

33.4 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.

33.5 Impaired Agent

- (a) If, at any time, the Agent becomes an Impaired Agent, an Obligor or a Lender which is required to make a payment under the Finance Documents to the Agent in accordance with Clause 33.1 (*Payments to the Agent*) may instead either:
 - (i) pay that amount direct to the required recipient(s); or
 - (ii) if in its absolute discretion it considers that it is not reasonably practicable to pay that amount direct to the required recipient(s), pay that amount or the relevant part of that amount to an interest-bearing account held with an Acceptable Bank within the meaning of paragraph (b) of the definition of 'Acceptable Bank' and in relation to which no Insolvency Event has occurred and is continuing, in the name of the Obligor or the Lender making the payment (the '**Paying Party**') and designated as a trust account for the benefit of the Party or Parties beneficially entitled to that payment under the Finance Documents (the '**Recipient Party**' or '**Recipient Parties**').

In each case such payments must be made on the due date for payment under the Finance Documents.

- (b) All interest accrued on the amount standing to the credit of the trust account shall be for the benefit of the Recipient Party or the Recipient Parties *pro rata* to their respective entitlements.
- (c) A Party which has made a payment in accordance with this Clause 33.5 shall be discharged of the relevant payment obligation under the Finance Documents and shall not take any credit risk with respect to the amounts standing to the credit of the trust account.
- (d) Promptly upon the appointment of a successor Agent in accordance with Clause 30.13 (*Replacement of the Agent*), each Paying Party shall (other than to the extent that that Party has given an instruction pursuant to paragraph (e) below) give all requisite instructions to the bank with whom the trust account is held to transfer the amount (together with any accrued interest) to the successor Agent for distribution to the relevant Recipient Party or Recipient Parties in accordance with Clause 33.2 (*Distributions by the Agent*).
- (e) A Paying Party shall, promptly upon request by a Recipient Party and to the extent:
 - (i) that it has not given an instruction pursuant to paragraph (d) above; and
 - (ii) that it has been provided with the necessary information by that Recipient Party,
 give all requisite instructions to the bank with whom the trust account is held to transfer the relevant amount (together with any accrued interest) to that Recipient Party.

33.6 Partial payments

- (a) Subject to Clause 9.7 (*Partial Payments* (Swingline Loans)), 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 the Agent and the Arranger under the Finance Documents;
 - (ii) **secondly**, in or towards payment pro rata of any accrued interest, fee 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.

33.7 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.

33.8 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 this Agreement interest is payable on the principal or Unpaid Sum at the rate payable on the original due date.

33.9 Currency of account

- (a) Subject to paragraphs (b) to (e) below, the Base Currency is the currency of account and payment for any sum due from an Obligor under any Finance Document.
- (b) A repayment of a Loan or Unpaid Sum or a part of a Loan or Unpaid Sum shall be made in the currency in which that Loan or Unpaid Sum is denominated on its due date.
- (c) Each payment of interest shall be made in the currency in which the sum in respect of which the interest is payable was denominated when that interest accrued.
- (d) Each payment in respect of costs, expenses or Taxes shall be made in the currency in which the costs, expenses or Taxes are incurred.
- (e) Any amount expressed to be payable in a currency other than the Base Currency shall be paid in that other currency.

33.10 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 reasonably 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.

33.11 Disruption to Payment Systems etc.

If either the Agent determines (in its discretion) that a Disruption Event has occurred or the Agent is notified by the Borrower that a Disruption Event has occurred:

- (a) the Agent may, and shall if requested to do so by the Borrower, consult with the Borrower with a view to agreeing with the Borrower such changes to the operation or administration of the Facility as the Agent may deem necessary in the circumstances;
- (b) the Agent shall not be obliged to consult with the Borrower in relation to any changes mentioned in paragraph (a) if, in its opinion, it is not practicable to do so in the circumstances and, in any event, shall have no obligation to agree to such changes;
- (c) the Agent may consult with the Finance Parties in relation to any changes mentioned in paragraph (a) but shall not be obliged to do so if, in its opinion, it is not practicable to do so in the circumstances;
- (d) any such changes agreed upon by the Agent and the Borrower shall (whether or not it is finally determined that a Disruption Event has occurred) be binding upon the Parties as an amendment to (or, as the case may be, waiver of) the terms of the Finance Documents notwithstanding the provisions of Clause 39 (*Amendments and Waivers*);
- (e) the Agent shall not be liable for any damages, costs or losses whatsoever (including, without limitation for negligence, gross negligence or any other category of liability whatsoever but not including any claim based on the fraud of the Agent) arising as a result of its taking, or failing to take, any actions pursuant to or in connection with this Clause 33.11; and
- (f) the Agent shall notify the Finance Parties of all changes agreed pursuant to paragraph (d) above.

34. SET-OFF

Clause 34 (*Set-off*) contains a provision under which the Borrower authorises each Finance Party to apply credit balances (in whatever currency) in satisfaction of sums due but unpaid under the sample agreement. As such, Clause 34 (*Set-off*) constitutes a contractual mandate from the Borrower to the Finance Parties and therefore gives rise to contractual rights and obligations entirely distinct from any rights of set-off which might exist in relation to accounts of the Borrower with the Finance Parties under the laws applicable in the jurisdiction or jurisdictions in which such accounts are maintained.

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.

35. NOTICES

35.1 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.

35.2 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 or 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.

35.3 Delivery

- (a) Any communication or document made or delivered by one person to another under or in connection with the Finance Documents will only be effective:
 - (i) if by way of fax, when received in legible form; or
 - (ii) if by way of letter, 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 35.2 (*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.

35.4 Notification of address and fax number

Promptly upon receipt of notification of an address and fax number or change of address or fax number pursuant to Clause 35.2 (*Addresses*) or changing its own address or fax number, the Agent shall notify the other Parties.

35.5 Communication when Agent is Impaired Agent

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

35.6 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.

35.7 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.

36. CALCULATIONS AND CERTIFICATES

36.1 Accounts

Under English law an extract from the accounts of a lender certified under the hand of a duly authorised officer of that lender constitutes *prima facie* evidence of the existence and amounts of the obligations of the debtor which are recorded in that account.

It is not, therefore, necessary (unless local law otherwise requires) that the obligations of a borrower to repay the principal of and to pay interest on the amounts from time to time outstanding under the agreement be evidenced by the issue of promissory notes. However, in certain jurisdictions there may be particular benefits to be obtained from the use of promissory notes and in such circumstances it would be proper, on the basis of appropriate legal advice, to issue promissory notes. It should be mentioned that if such promissory notes incorporate the provisions of an agreement relating to the principal amount outstanding and also the provisions for early repayment, it is unlikely that those promissory notes will be true 'promissory notes'.

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.

36.2 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.

36.3 Day count convention

The use of a 360-day year is market practice for Libor and Euribor-based loans (other than sterling Libor loans) and it has been adopted from the point of view of convenience although it does produce a higher 'true' rate of interest.

Continued

In the case of swingline loans, the reference rate is increasingly calculated on a 360-day basis (although a 365 day basis was formerly more prevalent for this rate). Whether a 360 or 365 day basis is agreed may depend on the credit rating of the borrower and the margin which has been agreed in addition to the Federal Funds Rate.

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 days or, in any case where the practice in the Relevant Interbank Market differs, in accordance with that market practice.

37. 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.

38. 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.

39. AMENDMENTS AND WAIVERS

39.1 Required consents

- (a) Subject to Clause 39.2 (*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.

39.2 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 or an extension of any Commitment or the Total Commitments or any requirement that a cancellation of Commitments reduces the Commitments of the Lenders rateably under the Facility;
 - (v) a change to the Borrower or Guarantor;
 - (vi) any provision which expressly requires the consent of all the Lenders;
 - (vii) Clause 2.3 (*Finance Parties' rights and obligations*), Clause 2.8 (*Changes to the Lenders*), this Clause 39, Clause 42 (*Governing law*) or Clause 43.1 (*Jurisdiction*);
 - (viii) the nature or scope of the guarantee and indemnity granted under Clause 22 (*Guarantee and indemnity*); or
 - (ix) (other than as expressly permitted by the provisions of any Finance Document) the release of any such guarantee and indemnity granted under Clause 22 (*Guarantee and Indemnity*) unless permitted by this Agreement, shall not be made without the prior consent of all the Lenders.
- (b) If:
- (i) any Defaulting Lender fails to respond to a request for a consent, waiver, amendment of or in relation to any term of any Finance Document or any other vote of the Lenders under the terms of this Agreement within [15] Business Days of that request being made; or
 - (ii) any Lender which is not a Defaulting Lender fails to respond to such a request (other than an amendment, waiver or consent referred to in paragraphs (a)(ii), (iii), (iv) or (v) above) or other vote of the Lenders under the terms of this Agreement within [15] Business Days of that request being made,
- (unless, in either case, the Borrower and the Agent agree to a longer time period in relation to any request):
- (A) its Commitment(s) shall not be included for the purpose of calculating the Total Commitments under the Facility when ascertaining whether any relevant percentage (including, for the avoidance of doubt, unanimity) of Total Commitments has been obtained to approve that request; and
 - (B) its status as a Lender shall be disregarded for the purpose of ascertaining whether the agreement of any specified group of Lenders has been obtained to approve that request.
- (c) An amendment or waiver which relates to the rights or obligations of the Agent or the Arranger (each in their capacity as such) may not be effected without the consent of the Agent or the Arranger as the case may be.

39.3 Disenfranchisement of Defaulting Lenders

- (a) For so long as a Defaulting Lender has any Available Commitment, in ascertaining:
 - (i) the Majority Lenders; or
 - (ii) whether:

- (A) any given percentage (including, for the avoidance of doubt, unanimity) of the Total Commitments or Total Revolving Facility Commitments under the Facility; or
 - (B) the agreement of any specified group of Lenders, has been obtained to approve any request for a consent, waiver, amendment or other vote of Lenders under the Finance Documents,
- that Defaulting Lender's Commitments under the Facility will be reduced by the amount of its Available Commitments under the Facility and:
- (1) to the extent that that reduction results in that Defaulting Lender's Total Commitments being zero, that Defaulting Lender shall be deemed not to be a Lender for the purposes of paragraphs (i) and (ii) above; and
 - (2) to the extent that that reduction results in that Defaulting Lender's Swingline Commitment being zero, that Defaulting Lender shall be deemed not to be a Swingline Lender for the purposes of paragraphs (i) and (ii)(B) above
- (b) For the purposes of this Clause 39.3, the Agent may assume that the following Lenders are Defaulting Lenders:
- (i) any Lender which has notified the Agent that it has become a Defaulting Lender;
 - (ii) any Lender in relation to which it is aware that any of the events or circumstances referred to in paragraphs (a), (b) or (d) of the definition of 'Defaulting Lender' has occurred,
- unless it has received notice to the contrary from the Lender concerned (together with any supporting evidence reasonably requested by the Agent) or the Agent is otherwise aware that the Lender has ceased to be a Defaulting Lender.

39.4 Replacement of Lender

- (a) If at any time:
 - (i) any Lender becomes a Non-Consenting Lender (as defined in paragraph (d) below); or
 - (ii) any Obligor becomes obliged to repay any amount in accordance with Clause 12.1 (*Illegality*),

then the Borrower may, on five Business Days' prior written notice to the Agent and such Lender, replace such Lender by requiring such Lender to (and such Lender shall) transfer pursuant to Clause 28 (*Changes to the Lenders*) 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 (a '**Replacement Lender**') selected by the Borrower, and which is acceptable to the Agent (acting reasonably), which confirms its willingness to assume and does assume all the obligations of the transferring Lender (including the assumption of the transferring Lender's participations on the same basis as the transferring Lender) for a purchase price in cash payable at the time of transfer equal to the outstanding principal amount of such Lender's participation in the outstanding Utilisations and

- all accrued interest, Break Costs and other amounts payable in relation thereto under the Finance Documents.
- (b) The replacement of a Lender pursuant to this Clause 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 the Borrower to find a Replacement Lender;
 - (iii) in the event of the replacement of a Non-Consenting Lender, such replacement must take place no later than [90] days after the date the Non-Consenting Lender notifies the Borrower and the Agent of its failure or refusal to give a consent in relation to, or agree to any waiver or amendment to the Finance Documents requested by the Borrower;
 - (iv) in no event shall the Lender replaced under this paragraph (b) be required to pay or surrender to such Replacement Lender any of the fees received by such Lender pursuant to the Finance Documents;
 - (v) the Lender shall only be obliged to transfer its rights and obligations pursuant to paragraph (a) above once it is satisfied that it has complied with all necessary 'know your customer' or other similar checks under all applicable laws and regulations in relation to that transfer; and
 - (vi) a Lender shall not be obliged to transfer its rights and obligations pursuant to paragraph (a) above to the extent that the transfer would result in the Lender (or its Affiliate) failing to meet the requirement set out in paragraph (i) of Clause 28.2 (*Conditions of assignment or transfer*).
- (c) A Lender shall perform the checks described in paragraph (b)(v) above as soon as reasonably practicable following delivery of a notice referred to in paragraph (a) above and shall notify the Agent and the Borrower when it is satisfied that it has complied with those checks.
- (d) In the event that:
- (i) the Borrower or the Agent (at the request of the Borrower) has requested the Lenders to give a consent in relation to, or to agree to a waiver or amendment of, any provisions of the Finance Documents;
 - (ii) the consent, waiver or amendment in question requires the approval of all the Lenders; and
 - (iii) Lenders whose Commitments aggregate more than [90] per cent of the Total Commitments (or, if the Total Commitments have been reduced to zero, aggregated more than [90] per cent of the Total Commitments prior to that reduction) have consented or agreed to such waiver or amendment,
- then any Lender who does not and continues not to consent or agree to such waiver or amendment shall be deemed a '**Non-Consenting Lender**'.

Clause 39.4 is known colloquially as the 'yank the bank' clause. It enables the Borrower to replace (at par value) a Non-Consenting Lender which refuses to agree to an amendment or waiver which requires all lender consent, **provided that** a defined majority of the Lenders (in this case [90]%) have provided their consent already. This allows the Borrower to remove a Non-Consenting Lender, assuming that the Borrower is able to find another Lender which is prepared to replace such Non-Consenting Lender.

39.5 Replacement of a Defaulting Lender

- (a) The Borrower may, at any time a Lender has become and continues to be a Defaulting Lender, by giving five Business Days' prior written notice to the Agent and such Lender:
 - (i) replace such Lender by requiring such Lender to (and, to the extent permitted by law, such Lender shall) transfer pursuant to Clause 28 (*Changes to the Lenders*) all (and not part only) of its rights and obligations under this Agreement;
 - (ii) require such Lender to (and, to the extent permitted by law, such Lender shall) transfer pursuant to Clause 28 (*Changes to the Lenders*) all (and not part only) of:
 - (A) the undrawn Revolving Facility Commitment of the Lender; and
 - (B) the undrawn Swingline Commitment of the Lender; or
 - (iii) require such Lender to (and, to the extent permitted by law, such Lender shall) transfer pursuant to Clause 28 (*Changes to the Lenders*) all (and not part only) of its rights and obligations in respect of the Revolving Facility and the Swingline Facility,

to a Lender or other bank, financial institution, trust, fund or other entity (a '**Substitute Lender**') selected by the Borrower, and which confirms its willingness to assume and does assume all the obligations, or all the relevant obligations, of the transferring Lender in accordance with Clause 28 (*Changes to the Lenders*) for a purchase price in cash payable at the time of transfer which is either:

 - (A) in an amount 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 28.9 (*Pro rata interest settlement*)), Break Costs and other amounts payable in relation thereto under the Finance Documents; or
 - (B) in an amount agreed between that Defaulting Lender, the Substitute Lender and the Borrower and which does not exceed the amount described in sub-paragraph (iii)(A) above.
- (b) Any transfer of rights and obligations of a Defaulting Lender pursuant to this Clause 39.5 shall be subject to the following conditions:
 - (i) the Borrower shall have no right to replace the Agent;
 - (ii) neither the Agent nor the Defaulting Lender shall have any obligation to the Borrower to find a Substitute Lender;

- (iii) the transfer must take place no later than [90] days after the notice referred to in paragraph (a) above;
 - (iv) in no event shall the Defaulting Lender be required to pay or surrender to the Substitute Lender any of the fees received by the Defaulting Lender pursuant to the Finance Documents;
 - (v) the Defaulting Lender shall only be obliged to transfer its rights and obligations pursuant to paragraph (a) above once it is satisfied that it has complied with all necessary 'know your customer' or other similar checks under all applicable laws and regulations in relation to that transfer to the Substitute Lender; and
 - (vi) the Defaulting Lender shall not be obliged to transfer its rights and obligations pursuant to paragraph (a) above to the extent that the transfer would result in that Lender (or its Affiliate) failing to meet the requirement set out in paragraph (i) of Clause 28.2 (*Conditions of assignment or transfer*).
- (c) The Defaulting Lender shall perform the checks described in paragraph (b)(v) above as soon as reasonably practicable following delivery of a notice referred to in paragraph (a) above and shall notify the Agent and the Borrower when it is satisfied that it has complied with those checks.

40. CONFIDENTIALITY

Clause 40 (*Confidentiality*) is included in order to ensure that all Lenders (including both banks and other types of financial institutions) are bound by an express duty of confidentiality in relation to information relating to the Obligors. This confidentiality requirement is subject to the exceptions set out in Clause 40.2 (*Disclosure of Confidential Information*), which allow Lenders to disclose Confidential Information in certain circumstances. For example, a Lender may disclose Confidential Information to a potential Lender to which it may potentially transfer or assign its rights and/or obligations under the Finance Documents, provided such potential Lender signs a Confidentiality Undertaking.

40.1 Confidential Information

Each Finance Party agrees to keep all Confidential Information confidential and not to disclose it to anyone, save to the extent permitted by Clause 40.2 (*Disclosure of Confidential Information*) and Clause 40.3 (*Disclosure to numbering service providers*), and to ensure that all Confidential Information is protected with security measures and a degree of care that would apply to its own confidential information.

40.2 Disclosure of Confidential Information

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 informed 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 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 Obligors 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 sub 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 (c) of Clause 30.15 (*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 (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 28.8 (*Security over Lenders' rights*);
 - (viii) who is a Party; or
 - (ix) with the consent of the Borrower,
- 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;
 - (C) in relation to paragraphs (b)(v), (b)(vi) and (b)(vii) 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 Borrower 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.

40.3 Disclosure to numbering service providers

Numbering service providers assign loan identification numbers to individual facilities agreements (and different facilities within such facilities agreements) for the purpose of allowing automation of the servicing and administration of syndicated facilities. Where such loan identification numbers are used, parties such as facility agents and lenders are able to use an online platform to reconcile their respective records as to lenders' participations in a given facilities agreement.

- (a) Any Finance Party may disclose to any national or international numbering service provider appointed by that Finance Party to provide identification numbering services in respect of this Agreement, the Facility and/or one or more Obligors the following information:

- (i) names of Obligors;
 - (ii) country of domicile of Obligors;
 - (iii) place of incorporation of Obligors;
 - (iv) date of this Agreement;
 - (v) the names of the Agent and the Arranger;
 - (vi) date of each amendment and restatement of this Agreement;
 - (vii) amount of Total Commitments;
 - (viii) currencies of the Facility;
 - (ix) type of Facility;
 - (x) ranking of Facility;
 - (xi) Termination Date for Facility;
 - (xii) changes to any of the information previously supplied pursuant to paragraphs (i) to (xi) above; and
 - (xiii) such other information agreed between such Finance Party and the Borrower, to enable such numbering service provider to provide its usual syndicated loan numbering identification services.
- (b) The Parties acknowledge and agree that each identification number assigned to this Agreement, the Facility and/or one or more Obligors by a numbering service provider and the information associated with each such number may be disclosed to users of its services in accordance with the standard terms and conditions of that numbering service provider.
- (c) The Agent shall notify the Borrower and the other Finance Parties of:
- (i) the name of any numbering service provider appointed by the Agent in respect of this Agreement, the Facility and/or one or more Obligors; and
 - (ii) the number or, as the case may be, numbers assigned to this Agreement, the Facility and/or one or more Obligors by such numbering service provider.

40.4 Entire agreement

This Clause 40 (*Confidentiality*) constitutes the entire agreement between the Parties in relation to the obligations of the Finance Parties under the Finance Documents regarding Confidential Information and supersedes any previous agreement, whether express or implied, regarding Confidential Information.

40.5 Inside information

Each of the Finance Parties acknowledges that some or all of the Confidential Information is or may be price-sensitive information and that the use of such information may be regulated or prohibited by applicable legislation including securities law relating to insider dealing and market abuse and each of the Finance Parties undertakes not to use any Confidential Information for any unlawful purpose.

40.6 Notification of disclosure

Each of the Finance Parties agrees (to the extent permitted by law and regulation) to inform the Borrower:

- (a) of the circumstances of any disclosure of Confidential Information made pursuant to paragraph (b)(v) of Clause 40.2 (*Disclosure of Confidential Information*) except where such disclosure is made to any of the persons referred to in that paragraph during the ordinary course of its supervisory or regulatory function; and
- (b) upon becoming aware that Confidential Information has been disclosed in breach of this Clause 40 (*Confidentiality*).

40.7 Continuing obligations

The obligations in this Clause 40 (*Confidentiality*) are continuing and, in particular, shall survive and remain binding on each Finance Party for a period of twelve months from the earlier of:

- (a) the date on which all amounts payable by the Obligors under or in connection with this Agreement have been paid in full and all Commitments have been cancelled or otherwise cease to be available; and
- (b) the date on which such Finance Party otherwise ceases to be a Finance Party.

41. 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

42. GOVERNING LAW

It is essential for a particular system of law to be chosen to govern the interpretation of the contract. In an agreement with parties of several different nationalities, it is difficult to ascertain which law should ultimately prevail if a governing law is not specified at the outset. Normally, the choice of law for syndicated loan agreements is either that of England or New York because the two legal systems are considered to be well developed in areas of commercial and financial matters but other legal systems may be selected in appropriate circumstances.

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

43. ENFORCEMENT

Notwithstanding the choice of law, lenders may elect to have disputes heard by courts in various countries. Generally, loan agreements will attempt to enable the lenders to bring disputes before English courts and the courts of the country where a borrower or any guarantor is resident. English courts are chosen not only because the law of the agreement is English but also because the courts are internationally considered to be impartial and competent and experienced in cross-border commercial disputes. This sample agreement does not need to cover submission to the courts of the Netherlands or France (that is, the jurisdictions of incorporation of the Borrower and the Guarantor) since that is dealt with by a treaty to which England, France and the Netherlands are parties but note the next paragraph in relation to an alternative approach.

Many agreements also submit to the jurisdiction of New York courts. This is not always required but is sometimes sought depending on the nationalities of the parties, whether the obligors have any assets in the United States and whether any payments will be routed through New York. The fact that English law might have been chosen to govern the agreement will not prevent a New York court from hearing any dispute, and from then applying English law and most jurisdictions will do the same.

Another factor which may affect the choice of jurisdiction is the ability of the lenders to ensure that the judgment received is capable of being speedily executed.

43.1 Jurisdiction

- (a) The courts of England have jurisdiction to settle any dispute arising out of or in connection with this Agreement (including a dispute relating to the existence, validity or termination of this Agreement or the consequences of its nullity or any

- non-contractual obligations arising out of or in connection with 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 43.1 (*Jurisdiction*) 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.

It is established market practice for the exclusive jurisdiction clauses included in facilities agreements to be stated to be for the benefit of the Finance Parties only so that the parties agree that the English courts will have jurisdiction over disputes but that the Finance Parties may choose to commence legal proceedings in another appropriate jurisdiction. However, in September 2012, the French Supreme Court (*Cour de cassation*) held that a one-sided jurisdiction clause (that is, where one party submits to the exclusive jurisdiction of a particular court while another party retains the right to bring proceedings in any court) was invalid on the basis that it was contrary to the Brussels Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. This French decision is not binding on other European courts, but may possibly lead to similar decisions in future and a change in market practice in relation to exclusive jurisdiction clauses relating to courts in the European Union and the European Economic Area.

43.2 Service of process

The purpose of the appointment of a process agent is, so far as proceedings in England are concerned, to make it unnecessary to apply to the courts for leave to serve process, which leave would otherwise be required where process is to be served on a foreign corporation. Independent process agents are commonly used but a substantial subsidiary of a borrower, or its lawyers, resident in the relevant jurisdiction may suffice.

Without prejudice to any other mode of service allowed under any relevant law, each Obligor:

- (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 an agent for service of process to notify the relevant Obligor of the process will not invalidate the proceedings concerned.

If any person appointed as an agent for the service of process is unable for any reason to act as agent for service of process, each Obligor must immediately (and in any event within [●] days of such event taking place) appoint another agent on terms acceptable to the Agent. Failing this, the Agent may appoint another agent for this purpose.

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

SCHEDULE 1
THE ORIGINAL PARTIES

PART I
THE OBLIGORS

Name of Borrower	Registration number (or equivalent, if any)
DutchCo SPV B.V.	[•]
Name of Guarantor	Registration number (or equivalent, if any)
Parent Company S.A.	[•]

PART II
THE ORIGINAL LENDERS

Name of Original Lender

Commitment

[To be inserted]

PART III
THE ORIGINAL SWINGLINE LENDERS

Name of Original Lender

Swingline Commitment

[To be inserted]

SCHEDULE 2

CONDITIONS PRECEDENT TO INITIAL UTILISATION

1. Obligors

- (a) A copy of the constitutional documents of each Obligor, including:
 - (i) in the case of the Borrower, a copy of the articles of association (*statuten*) and deed of incorporation (*oprichtingsakte*), as well as an up-to-date extract (*uittreksel*) from the Dutch Commercial Register (*Handelsregister*) relating to it; and
 - (ii) in the case of the Guarantor, a copy of its certificate of incorporation (*Extrait K-bis*), a non-bankruptcy certificate (*recherche négative de procédure collective*) and an encumbrance certificate (*état des privilèges et nantissemements*) relating to it, in each case dated no more than 15 days prior to the date of this Agreement.
- (b) A copy of a resolution of the board of directors (or managing 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) to be signed and/or despatched by it under or in connection with the Finance Documents to which it is a party.
- (c) A specimen of the signature of each person authorised by the resolution referred to in paragraph (b) above.
- (d) A copy of the resolution of the shareholder(s) of the Borrower approving the resolutions of the board of managing directors referred to under (b) above and, if applicable, appointing an authorised person to represent the Borrower in case of a conflict of interest.
- (e) If applicable, a copy of the resolution of the board of supervisory directors of the Borrower approving the resolutions of the board of managing directors referred to under paragraph (b) above and, if applicable, appointing an authorised person to represent the Borrower in case of a conflict of interest.
- (f) If applicable, a copy of (i) the request for advice from each works council, or central or European works council with jurisdiction over the transactions contemplated by this Agreement and (ii) the positive advice from such works council which contains no condition, which if complied with, could result in a breach of any of any of the Finance Documents.
- (g) A certificate of each Obligor (signed by a director of each Obligor) confirming that borrowing or guaranteeing, as appropriate, the Total Commitments would not cause any borrowing, guaranteeing or similar limit binding on any Obligor to be exceeded.

- (h) 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 of [English law firm] legal advisers to the Arranger and the Agent in England, substantially in the form distributed to the Original Lenders prior to signing this Agreement.
- (b) A legal opinion of the legal advisers to the Arranger and the Agent in The Netherlands, substantially in the form distributed to the Original Lenders prior to signing this Agreement.
- (c) A legal opinion of the legal advisers to the Arranger and the Agent in France, substantially in the form distributed to the Original Lenders prior to signing this Agreement.

3. Other documents and evidence

- (a) Evidence that any agent for service of process referred to in Clause 43.2 (*Service of process*), if not an Obligor, 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 16 (*Fees*) and Clause 21 (*Costs and expenses*) have been paid or will be paid by the first Utilisation Date.

SCHEDULE 3
REQUESTS

PART I
UTILISATION REQUEST – REVOLVING FACILITY LOANS

From: DutchCo SPV B.V.

To: [Agent]

Dated:

Dear Sirs

DutchCo SPV B.V. – [•] Facility Agreement
dated [•] (the ‘Agreement’)

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

Proposed Utilisation Date:	[•] (or, if that is not a Business Day, the next Business Day)
Currency of Revolving Facility Loan:	[•]
Amount:	[•] or, if less, the Available Facility
Interest Period:	[•]
3. We confirm that each condition specified in Clause 5.2 (*Further conditions precedent*) is satisfied on the date of this Utilisation Request.
4. [This Loan is to be made in [whole]/[part] for the purpose of refinancing [*identify maturing Loan*]. [The proceeds of this Revolving Facility Loan should be credited to [*account*].]] OR

[The proceeds of this Revolving Facility Loan should be credited to [*account*].]
5. This Utilisation Request is irrevocable.

Yours faithfully

.....
authorised signatory for and on behalf of
DutchCo SPV B.V.

PART II
UTILISATION REQUEST – SWINGLINE LOANS

From: DutchCo SPV B.V.

To: [Agent]

Dated:

Dear Sirs

DutchCo SPV B.V. – [•] Facility Agreement
dated [•] (the ‘Agreement’)

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

Proposed Utilisation Date:	[•] (or, if that is not a New York Business Day, the next New York Business Day)
Facility to be utilised:	Swingline Facility
Amount:	[\$•] or, if less, the Available Swingline Facility
Interest Period:	[•]
3. We confirm that each condition specified in paragraph (b) of Clause 8.3 (*Swingline Lenders’ participation*) is satisfied on the date of this Utilisation Request.
4. The proceeds of this Swingline Loan should be credited to [account].
5. This Utilisation Request is irrevocable.

Yours faithfully

.....
authorised signatory for and on behalf of
DutchCo SPV B.V.

WARNING NOTE:

PLEASE ENSURE THAT THE SHARE OF EACH LENDER IN ANY UTILISATION IS AT LEAST EUR 100,000 (or its equivalent in another currency). OTHERWISE, ANY LENDER WHO LENDS A LESSER AMOUNT SHOULD CONFIRM THAT IT IS A PROFESSIONAL MARKET PARTY WITHIN THE MEANING OF THE DUTCH FSA.

SCHEDULE 4 MANDATORY COST FORMULAE

The Mandatory Costs are the costs which may be incurred by Lenders:

- (a) in respect of all currencies funded from London, imposed by the Bank of England and the Financial Services Authority,
- (b) in respect of all currencies funded out of the Eurozone, imposed by the European Central Bank.

The formula, which applies to currencies funded from London, is based on a weighted average of the costs suffered by the Lenders based on information provided to the Agent by each Lender.

1. The Mandatory Cost is an addition to the interest rate to compensate Lenders for the cost of compliance with (a) the requirements of the Bank of England and/or the Financial Conduct Authority (the 'FCA') and the Prudential Regulation Authority (the 'PRA') (or, in either case, any other authority which replaces all or any of its functions) or (b) the requirements of the European Central Bank.
2. On the first day of each Interest Period (or as soon as possible thereafter) the Agent shall calculate, as a percentage rate, a rate (the '**Additional Cost Rate**') in accordance with the paragraphs set out below. The Mandatory Cost will be calculated by the Agent by reference to the Agent's Additional Cost Rate and will be expressed as a percentage rate per annum.
3. The Additional Cost Rate for any Lender lending from a Facility Office in a Participating Member State will be the percentage determined by the Agent as the cost of complying with the minimum reserve requirements of the European Central Bank.
4. The Additional Cost Rate for any Lender lending from a Facility Office in the United Kingdom will be calculated by the Agent as follows:
 - (a) in relation to a sterling Loan:

$$\frac{AB + C(B - D) + E \times 0.01}{100 - (A + C)} \text{ per cent per annum}$$

- (b) in relation to a Loan in any currency other than sterling:

$$\frac{E \times 0.01}{300} \text{ per cent per annum}$$

Where:

- A is the percentage of Eligible Liabilities (assuming these to be in excess of any stated minimum) which the Agent is from time to time required to maintain as an interest free cash ratio deposit with the Bank of England to comply with cash ratio requirements.

- B is the percentage rate of interest (excluding the Margin and the Mandatory Cost) payable for the relevant Interest Period on the Loan.
 - C is the percentage (if any) of Eligible Liabilities which the Agent is required from time to time to maintain as interest bearing Special Deposits with the Bank of England.
 - D is the percentage rate per annum payable by the Bank of England to the Agent on interest bearing Special Deposits.
 - E is:
 - (a) at any time before the FCA/PRA Fee Date, the rate of charge that was payable by the Agent to the Financial Services Authority pursuant to the Financial Services Authority Fees Manual as in effect for the financial year 2012/2013 of the Financial Services Authority (calculated for this purpose by the Agent as being the average of the Fee Rates that were applicable to the Agent for that financial year) and expressed in pounds per £1,000,000 of the Tariff Base of the Agent; and
 - (b) thereafter, the rate of charge payable by the Agent to the FCA, or as the case may be, the PRA, pursuant to the Fees Rules (calculated for this purpose by the Agent as being the sum of (i) the average of the Fee Tariffs specified in the FCA Fees Manual and (ii) the average of the Fee Tariffs specified in the PRA Fees Manual applicable to the Agent) and expressed in pounds per £1,000,000 of the Tariff Base of the Agent.
5. For the purposes of this Schedule:
- (a) ‘**Eligible Liabilities**’ and ‘**Special Deposits**’ have the meanings given to them from time to time under or pursuant to the Bank of England Act 1998 or (as may be appropriate) by the Bank of England;
 - (b) ‘**Fees Rules**’ means:
 - (i) for the period from 1 April 2013 to the FCA/PRA Fee Date, the rules on periodic fees contained in the Financial Services Authority Fees Manual as in effect for the financial year 2012/2013 of the Financial Services Authority; and
 - (ii) thereafter the rules on periodic fees contained in the FCA Fees Manual and the PRA Fees Manual or such other law or regulation as may be in force from time to time in respect of the payment of fees for the acceptance of deposits;
 - (c) ‘**Fee Rates**’ means the fee rates specified in the Fees Rules under the activity group A.I Deposit acceptors (ignoring any minimum fee or zero rated fee required pursuant to the Fees Rules but taking into account any applicable discount rate);
 - (d) ‘**FCA/PRA Fee Date**’ means the date of publication of the fee rates for the periodic fees applicable to A.I Deposit acceptors in the FCA Fees Manual and the PRA Fees Manual for their financial years 2013/2014; and
 - (e) ‘**Tariff Base**’ has the meaning given to it in, and will be calculated in accordance with, the Fees Rules.

6. In application of the above formulae, A, B, C and D will be included in the formulae as percentages (that is, 5 per cent will be included in the formula as 5 and not as 0.05). A negative result obtained by subtracting D from B shall be taken as zero. The resulting figures shall be rounded to four decimal places.¹
7. The Agent shall have no liability to any person if such determination results in an Additional Cost Rate which over or under compensates any Lender.
8. Any determination by the Agent pursuant to this Schedule in relation to a formula, the Mandatory Cost, an Additional Cost Rate or any amount payable to a Lender shall, in the absence of manifest error, be conclusive and binding on all Parties.
9. The Agent may from time to time, after consultation with the Borrower and the Lenders, determine and notify to all Parties any amendments which are required to be made to this Schedule in order to comply with any change in law, regulation or any requirements from time to time imposed by the Bank of England, the FCA, the PRA or the European Central Bank (or, in any case, any other authority which replaces all or any of its functions) and any such determination shall, in the absence of manifest error, be conclusive and binding on all Parties.

¹ Include if the Loan is domestic sterling.

SCHEDULE 5
FORM OF TRANSFER CERTIFICATE

See Chapter 5 on 'Secondary transfer mechanisms' for techniques of and reasons for loan transfers.

To: [•] as Agent

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

Dated:

DutchCo SPV B.V. – [•] Facility Agreement
dated [•] (the 'Agreement')

1. We refer to the Agreement. This is a Transfer Certificate. Terms defined in the Agreement have the same meaning in this Transfer Certificate unless given a different meaning in this Transfer Certificate.
2. We refer to Clause 28.5 (*Procedure for transfer*):
 - (a) The Existing Lender and the New Lender agree to the Existing Lender transferring to the New Lender by novation, and in accordance with Clause 28.5 (*Procedure for transfer*), all of the Existing Lender's rights and obligations under the Agreement and other Finance Documents which relate to that portion of the Existing Lender's Commitment(s) and participations in Loans under the Agreement as specified in the Schedule.
 - (b) The proposed Transfer Date is [•].
 - (c) The Facility Office and address, fax number and attention details for notices of the New Lender for the purposes of Clause 35.2 (*Addresses*) are set out in the Schedule.
3. The New Lender expressly acknowledges the limitations on the Existing Lender's obligations set out in paragraph (c) of Clause 28.4 (*Limitation of responsibility of Existing Lenders*).
4. 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 Certificate.
5. This Transfer Certificate and any non-contractual obligations arising out of or in connection with it are governed by English law.
6. This Transfer Certificate has been entered into on the date stated at the beginning of this Transfer Certificate.

NOTE: The New Lender may, in the case of a transfer of rights by the Existing Lender under this Transfer Certificate, if it considers it necessary to make the transfer effective against third parties, arrange for it to be notified by way of *signification* to the Obligors incorporated in France in accordance with Article 1690 of the French *Code Civil*.

WARNING NOTE:

PLEASE ENSURE THAT THE AMOUNT TRANSFERRED BY ONE LENDER TO ANOTHER LENDER IN RELATION TO A LOAN/COMMITMENT TO ANY DUTCH BORROWER IS AT LEAST EUR 100,000 (OR ITS EQUIVALENT IN ANOTHER CURRENCY) OR SUCH HIGHER AMOUNT SPECIFIED FOR THIS PURPOSE UNDER OR FOR THE PURPOSES OF THE DUTCH FSA. OTHERWISE, INSERT A CONFIRMATION BY THE NEW LENDER WHO LENDS TO THE RELEVANT DUTCH BORROWER THAT THE NEW LENDER IS A PROFESSIONAL MARKET PARTY WITHIN THE MEANING OF THE DUTCH FSA.

THE SCHEDULE
Commitment/rights and obligations to be transferred
[insert relevant details]
[Facility Office address, fax number and attention details for notices
and account details for payments]

For and on behalf of
[Existing Lender]

For and on behalf of
[New Lender]

By:

By:

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

For and on behalf of
[Agent]

By:

NOTES:

- * Delete as applicable – each New Lender is required to confirm which of these three categories it falls within.

SCHEDULE 6
FORM OF ASSIGNMENT AGREEMENT

To: [•] as Agent and [•] as Borrower

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

Dated:

DutchCo SPV B.V. – [•] Facility Agreement
dated [•] (the ‘Agreement’)

1. We refer to the Agreement. This is an Assignment Agreement. Terms defined in the Agreement have the same meaning in this Assignment Agreement unless given a different meaning in this Assignment Agreement.
2. We refer to Clause 28.6 (*Procedure for assignment*):
 - (a) The Existing Lender assigns absolutely to the New Lender all the rights of the Existing Lender under the Agreement and the other Finance Documents which relate to that portion of the Existing Lender’s Commitment(s) and participations in Loans under the Agreement as specified in the Schedule.
 - (b) The Existing Lender is released from all the obligations of the Existing Lender which correspond to that portion of the Existing Lender’s Commitment(s) and participations in Loans under the Agreement specified in the Schedule.
 - (c) The New Lender becomes a Party as a Lender and is bound by obligations equivalent to those from which the Existing Lender is released under paragraph (b) above.
3. The proposed Transfer Date is [•].
4. On the Transfer Date the New Lender becomes Party to the Finance Documents as a Lender.
5. The Facility Office and address, fax number and attention details for notices of the New Lender for the purposes of Clause 35.2 (*Addresses*) are set out in the Schedule.
6. The New Lender expressly acknowledges the limitations on the Existing Lender’s obligations set out in paragraph (c) of Clause 28.4 (*Limitation of responsibility of Existing Lenders*).
7. This Assignment Agreement acts as notice to the Agent (on behalf of each Finance Party) and, upon delivery in accordance with Clause 28.7 (*Copy of Transfer Certificate, Assignment Agreement or Increase Confirmation to Borrower*), to the Borrower (on behalf of each Obligor) of the assignment referred to in this Assignment Agreement.

8. This Assignment Agreement 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 Assignment Agreement.
9. This Assignment Agreement and any non-contractual obligations arising out of or in connection with it are governed by English law.
10. This Assignment Agreement has been entered into on the date stated at the beginning of this Assignment Agreement.

WARNING NOTE:

PLEASE ENSURE THAT THE AMOUNT TRANSFERRED BY ONE LENDER TO ANOTHER LENDER IN RELATION TO A LOAN/COMMITMENT TO ANY DUTCH BORROWER IS AT LEAST EUR 100,000 (OR ITS EQUIVALENT IN ANOTHER CURRENCY) OR SUCH HIGHER AMOUNT SPECIFIED FOR THIS PURPOSE UNDER OR FOR THE PURPOSES OF THE DUTCH FSA. OTHERWISE, INSERT A CONFIRMATION BY THE NEW LENDER WHO LENDS TO THE RELEVANT DUTCH BORROWER THAT THE NEW LENDER IS A PROFESSIONAL MARKET PARTY WITHIN THE MEANING OF THE DUTCH FSA.

**THE SCHEDULE
RIGHTS TO BE ASSIGNED AND OBLIGATIONS TO BE
RELEASED AND UNDERTAKEN**

[insert relevant details]

*[Facility office address, fax number and attention details for notices and
account details for payments]*

For and on behalf of
[Existing Lender]

For and on behalf of
[New Lender]

By:

By:

This Assignment Agreement is accepted by the Agent and the Transfer Date is confirmed as [•].

Signature of this Assignment Agreement by the Agent constitutes confirmation by the Agent of receipt of notice of the assignment referred to herein, which notice the Agent receives on behalf of each Finance Party.

For and on behalf of

[Agent]

By:

NOTES:

- * Delete as applicable – each New Lender is required to confirm which of these three categories it falls within.

SCHEDULE 7
FORM OF COMPLIANCE CERTIFICATE

To: [•] as Agent

From: *Borrower/Guarantor*

Dated:

Dear Sirs

DutchCo SPV B.V. – [•] Facility Agreement
dated [•] (the ‘Agreement’)

1. We refer to the Agreement. This is a Compliance Certificate. Terms defined in the Agreement have the same meaning when used in this Compliance Certificate unless given a different meaning in this Compliance Certificate.
2. We confirm that:
 - (a) [Consolidated Tangible Net Worth on the last day of the Relevant Period ending on [•] was [•]. Therefore Consolidated Tangible Net Worth [was/was not] equal to or in excess of [•] and the covenant contained in paragraph (a) of Clause 27.2 (*Financial condition*) [has/has not] been complied with; and
 - (b) in respect of the Relevant Period ending on [•] Consolidated Total Net Debt was [•] and Consolidated Tangible Net Worth was [•]. Therefore the ratio of Consolidated Total Net Debt to Consolidated Tangible Net Worth was [•]:1 and the covenant contained in paragraph (b) of Clause 27.2 (*Financial condition*) [has/has not] been complied with;
 - (c) on the last day of the Relevant Period ending on [•] Consolidated EBITDA were [•] and Consolidated Net Finance Charges for such Relevant Period were [•]. Therefore Interest Cover for such Relevant Period was [•]:1 and the covenant contained in paragraph (c) of Clause 27.2 (*Financial condition*) [has/has not] been complied with; and
 - (d) on the last day of the Relevant Period ending on [•] Consolidated Total Net Debt was [•] and Consolidated EBITDA for such Relevant Period was [•]. Therefore the ratio of Consolidated Total Net Debt to Consolidated EBITDA was [•]:1 and the covenant contained in paragraph (d) of Clause 27.2 (*Financial condition*) [has/has not] been complied with].
3. [We confirm that no Default is continuing.]*

Signed:
Director
of
Borrower

Signed:
Director
of
Borrower

[insert applicable certification language]

.....
for and on behalf of
[name of auditors of the Guarantor]

NOTES:

- * 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.

**SCHEDULE 8
EXISTING SECURITY**

Name of Obligor	Security	Total Principal Amount of Indebtedness Secured
Parent Company S.A.	Hypothèque conventionnelle over building at 9, place Vendôme, Paris	EUR5,000,000

SCHEDULE 9
LMA FORM OF CONFIDENTIALITY UNDERTAKING

SCHEDULE 10 TIMETABLES

	<i>Loans in dollars</i>	<i>Loans in euro</i>	<i>Loans in other currencies</i>
Agent confirms to Borrower if a currency is approved as an Optional Currency in accordance with Clause 5.3(b) (<i>Conditions relating to Optional Currencies</i>)	–	–	U-4
Delivery of a duly completed Utilisation Request (Clause 6.1) (<i>Delivery of a Utilisation Request</i>)	U-3 9.30 a.m.	U-3 9.30 a.m.	U-3 9.30 a.m.
Agent determines (in relation to a Utilisation) the Base Currency Amount of the Loan, if required under Clause 6.4 (<i>Lenders' participation</i>)	U-3 noon	U-3 noon	U-3 noon
Agent notifies the Lenders of the Loan in accordance with Clause 6.4 (<i>Lenders' participation</i>)	U-3 3.00 p.m.	U-3 3.00 p.m.	U-3 3.00 p.m.
Agent receives a notification from a Lender under Clause 10.2 (<i>Unavailability of a currency</i>)	–	Quotation Day 10.00 a.m.	Quotation Day 10.00 a.m.
Agent gives notice in accordance with Clause 10.2 (<i>Unavailability of a currency</i>)	–	Quotation Day 10.30 a.m.	Quotation Day 10.30 a.m.
LIBOR or EURIBOR is fixed	Quotation Day as of 11:00 a.m. London time	Quotation Day as of 11.00 a.m. Brussels time	Quotation Day as of 11:00 a.m. London time

SWINGLINE LOANS

	<i>Dollar Swingline Loans</i>
Delivery of a duly completed Utilisation Request (Clause 8.1 (<i>Delivery of a Utilisation Request for Swingline Loans</i>))	U 11.00 a.m. (Eastern Standard Time)
Agent announces prime commercial lending rate in dollars under Clause 9.4 (<i>Interest</i>)	U 11.00 a.m. (Eastern Standard Time)
Agent determines (in relation to a Utilisation) the Base Currency Amount of the Swingline Loan, if required under Clause 8.3 (<i>Swingline Lenders' participation</i>) and notifies each Swingline Lender of the amount of its participation in the Swingline Loan under Clause 8.3 (<i>Swingline Lenders' participation</i>)	U 11.00 a.m. (Eastern Standard Time)

'U' = date of utilisation.

'U - X' = X Business Days prior to date of utilisation.

SCHEDULE 11
FORM OF INCREASE CONFIRMATION

To: [•] as Agent and [•] as the Borrower

From: [the *Increase Lender*] (the '**Increase Lender**')

Dated:

DutchCo SPV B.V. – [•] Facility Agreement
dated [•] (the '**Facility Agreement**')

1. We refer to the Facility Agreement. This agreement (the '**Agreement**') shall take effect as an Increase Confirmation for the purpose of the Facility Agreement. Terms defined in the Facility Agreement have the same meaning in this Agreement unless given a different meaning in this Agreement.
2. We refer to clause 2.2 (*Increase*) of the Facility Agreement.
3. The Increase Lender agrees to assume and will assume all of the obligations corresponding to the Commitment and/or Swingline Commitment specified in the Schedule (the '**Relevant Commitment**') as if it was an Original Lender under the Facility Agreement.
4. The proposed date on which the increase in relation to the Increase Lender and the Relevant Commitment is to take effect (the '**Increase Date**') is [•].
5. On the Increase Date, the Increase Lender becomes party to the relevant Finance Documents as a Lender; and
6. The Facility Office and address, fax number and attention details for notices to the Increase Lender for the purposes of Clause 35.2 (*Addresses*) are set out in the Schedule.
7. The Increase Lender expressly acknowledges the limitations on the Lenders' obligations referred to in paragraph (g) of Clause 2.2 (*Increase*).
8. This Agreement 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 Agreement.
9. This Agreement and any non-contractual obligations arising out of or in connection with it are governed by English law.
10. This Agreement has been entered into on the date stated at the beginning of this Agreement.

**THE SCHEDULE
RELEVANT COMMITMENT/RIGHTS AND OBLIGATIONS TO BE ASSUMED
BY THE INCREASE LENDER**

[insert relevant details]

*[Facility office address, fax number and attention details for notices and
account details for payments]*

[Increase Lender]

By:

This Agreement is accepted as an Increase Confirmation for the purposes of the Facility Agreement by the Agent and the Increase Date is confirmed as [•].

Agent

By:

SIGNATURES

THE BORROWER

For and on behalf of
DUTCHCO SPV B.V.

By:
Address:
Fax:

THE GUARANTOR

For and on behalf of
PARENT COMPANY S.A.

By:
Address:
Fax:

THE ARRANGER

For and on behalf of
ARRANGER BANK LIMITED

By:
Address:
Fax:

For and on behalf of
TOP BANK PLC

By:
Address:
Fax:

For and on behalf of
XYZ BANK LIMITED

By:
Address:
Fax:

THE AGENT

For and on behalf of
XYZ BANK LIMITED

By:
Address:
Fax:
Attention:

THE ORIGINAL LENDERS

For and on behalf of
[•]

By:

For and on behalf of
[•]
By:

SAMPLE FEES LETTER

To: DutchCo SPV B.V.
[Address]

Date: [•]

Dear Sirs,

\$1 BILLION REVOLVING AND SWINGLINE CREDIT FACILITY AGREEMENT DATED [•] (the 'Facility Agreement')

We refer to the Facility Agreement between DutchCo SPV B.V. as Borrower, Parent Company S.A. as Guarantor, Arranger Bank Limited as Arranger, the Lenders mentioned therein and XYZ Bank Limited as Agent. Terms defined in the Facility Agreement shall have the same meanings when used in this letter.

This letter constitutes the Fee Letter referred to in Clause 16.3 (*Arrangement Fee*) and Clause 16.4 (*Agency Fee*) of the Facility Agreement. By countersigning and returning the attached copy of this letter the Borrower agrees to pay the following fees:

1. Agency Fee

The Borrower shall pay to the Agent an agency fee of \$1,500 per syndicate bank member per annum. Such fee shall be payable no later than 30 days after the signing of the Facility Agreement.

2. Arrangement

The Borrower shall pay to the Agent for the account of the Arrangers and the Lenders an arrangement fee of \$1,000,000 being 0.10 per cent flat on the Total Commitments.

Such fee shall be payable on signing of the Facility Agreement.

All fees set out in this letter shall be payable in full without set-off, counterclaim or deduction, and the provisions of Clause 17 (*Tax gross-up and indemnities*) of the Facility Agreement apply to any payment of fees.

Yours faithfully

.....

For and on behalf of
XYZ Bank Limited
(on behalf of itself and as Agent and the Arrangers)

To: XYZ Bank Limited

We agree to pay the fees set out in the letter of which the above is a true copy.

.....

Signed for and on behalf of DutchCo SPV B.V.

.....

Date: