

GUIDANCE (Version 3)

GOVERNMENT INDEMNITY SCHEME, CONDITION PRECEDENT AND LOAN AGREEMENTS

This note is intended to provide extra guidance in relation to conditions that should be included in all loan agreements where GIS cover is agreed. It should be read in conjunction with the Government Indemnity Scheme Guidelines for Nationals and Non-Nationals ("the Guidance"), which can be found on the Arts Council website at the following link: <http://www.artscouncil.org.uk/protecting-cultural-objects/government-indemnity-scheme>. In the event of any conflict between this note and the Guidance, the Guidance shall take precedence.

The Government Indemnity Scheme (GIS) underwrites the Borrower's risk of loss or damage to objects loaned for the public benefit. However, as a matter of law, indemnity is in favour of the Owner, and is provided by the Secretary of State to the Owner, under the provisions of section 16 of the National Heritage Act 1980. It indemnifies the Owner lending to the Borrower. The Act stipulates that the Secretary of State shall not give an undertaking unless the loan of the object is made in accordance with conditions approved by her/him and the Treasury. Those conditions are set out in paragraph 2 of the GIS Undertaking and are referred to as the "Condition Precedent".

The GIS Undertaking, which is issued in all GIS cases, is the legal contract under which payments can be made in the event that an object on loan is damaged or lost. Clause 2 of the standard undertaking states:

Condition Precedent

2. This indemnity is conditional upon it being a term of the loan agreement that:

- 2.1 no restoration or conservation work is carried out on the object without the prior agreement of the owner;

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- 2.2 the borrower is under no liability for the loss of, or damage to, the object arising or flowing from:
 - 2.2.1 war, hostilities or war-like operations, but excluding acts of terrorism, riot, civil commotion, piracy and hijacking;
 - 2.2.2 the negligence or other wrongful act of the owner, his servants or agents;
 - 2.2.3 the condition (including inherent vice or a pre-existing flaw) of the object at the time of its loan;
 - 2.2.4 restoration or conservation work undertaken to the object by the borrower, his servants or agents with the agreement of the owner; or
 - 2.2.5 a third party claiming to be entitled to the object; and
- 2.3 any liability which the borrower may incur to the lender arising out of the loan of the object shall not exceed the specified value.

As the language suggests, **it is compulsory that these terms form part of the relevant loan agreement**. Without them, the statutory basis on which cover has been provided is null and void, so there is no legal basis for paying a claim.

The purpose of the condition precedent is to protect the Borrower, by ensuring there is no gap between their liability and what is covered by the GIS Undertaking. If the exclusions contained in the GIS Undertaking are not also included in the loan agreement, the Owner could potentially claim against the Borrower in the circumstances not covered by the GIS Undertaking. For example, if damage to an object was the result of negligence by the Owner's agents and this exclusion was not mirrored in the loan agreement the Owner could claim against the Borrower and there would be no legal basis under which GIS could agree to pay any such claim.

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If a claim on GIS is made as a result of damage or loss to a loaned object, the Borrower is required to submit the information specified in section 5.3 of the Guidance, which includes a copy of the loan agreement between the Borrower and the Owner. All of the information submitted is carefully considered to determine whether a claim is eligible. This will include examining the loan agreement to check that it is valid and in force during the term of the GIS cover, and that it includes the terms required under the condition precedent as cited above (or as modified where, by exception, cover for war and/or negligence has been granted) as a term of the loan. Ideally the terms specified in the condition precedent should be included in the loan agreement document.

However, it is acceptable for a side letter/addendum along the lines of the draft provided below to be entered in to, provided that the terms of the loan agreement itself do not obviously conflict with the side letter, e.g. refer to different insurance arrangements.

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EXAMPLE DRAFT SIDE LETTER TO THE LOAN AGREEMENT

FROM: [FULL NAME AND ADDRESS OF BORROWER] (“Borrower”)

TO: [FULL NAME AND ADDRESS OF OWNER/LENDER] (“Owner/Lender”)

[GUIDANCE NOTE: Terms such as Loan Agreement / Loan Contract / Lender / Owner / Borrower / Object) in square brackets SHOULD REFLECT THOSE IN THE LOAN AGREEMENT itself]

Dear Sirs

[Loan Agreement / Loan Contract] dated []

1. We refer to the [Loan Agreement / Loan Contract] [bearing the same date as this letter] or [dated xx] and made between you as [Lender/Owner] of the one part and us as [Borrower] of the other part (the “Agreement”).
2. The Agreement is hereby amended to incorporate the following additional terms:
 - (1) no restoration or conservation work will be carried out on the [Object] without the prior agreement of the [Lender/Owner];
 - (2) the [Borrower] is under no liability for the loss of, or damage to the [Object] arising or flowing from:
 - a. war, hostilities or war-like operations, but excluding acts of terrorism, riot, civil commotion, piracy and hijacking;

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- b. the negligence or other wrongful act of the [Lender/Owner,] his servants or agents;
 - c. the condition (including inherent vice or pre-existing flaw) of the [Object] at the time of the loan;
 - d. restoration or conservation work undertaking to the [Object] by the [Borrower], his servants or agents with the agreement of the [Lender/owner]; or
 - e. a third party claiming to be entitled to the [object]; and
- (3) any liability which the [Borrower] may incur to the [Lender/Owner] arising out of the loan of the object shall not exceed the value specified in the loan agreement [[GUIDANCE NOTE: this value must be the same as that which is specified in the GIS Undertaking, when it is provided].
3. Terms used in this letter shall where the context permits have the meanings respectively ascribed to them in the Agreement.
4. In the event of any conflict between the terms of this letter and the terms of the Agreement, the terms of this letter shall prevail.

Please sign and return to us one copy of this letter to indicate your agreement.

.....

Signed by the [Borrower] on [date]

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.....

Signed by the [Lender/Owner] on [date]

Frequently Asked Questions

(i) Does this affect loans from nationals to non-nationals?

No, paragraphs 6.5 and 6.6 of the Guidance clearly state what is required in the loan agreement when nationals lend to non-nationals.

(ii) Does the wording have to be inserted into loan agreements for loans from the Royal Collection Trust, which has a special arrangement for GIS?

No, as the Government does not provide section 16 indemnity for loans from the Royal Collection Trust– paragraph. 4.7 of the Guidance applies.

(iii) Would a formal confirmation of acceptance of GIS, either in a letter or an e-mail which lists the condition precedent terms, be valid?

Yes, this would be sufficient, as long as it is clear that this acceptance forms part of the relevant loan agreement. If such acceptance takes place after the loan agreement has already been signed, it should be clear that this acceptance is an agreed variation to the earlier agreement.

(iv) Lender loan agreements are usually subject to the law of the lending country. GIS is subject to UK law. Does the insertion of the wording create a conflict?

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Paragraph 2.66 of the Guidance (Nationals) and 2.59 (Non-national) makes it clear that in no case will the Secretary of State consider indemnity being governed by any law other than English law or consider a case taking place in a foreign court of law according to English law, or consider a case taking place in a court in England or Wales according to foreign law. The same applies to indemnities issued by the Secretary of State for Scotland or by Department of Education for Northern Ireland (DENI) (so for 'English law' read 'Scottish law' or 'Northern Irish law' and for 'English and Welsh courts' read 'Scottish courts' or 'Northern Irish courts'). It is the responsibility of GIS users to ensure that the terms of loan agreements do not conflict with the terms of the GIS undertakings.

(v) What if Owners refuse to amend the loan agreement, or to sign a side letter?

Owners and Lenders must agree to all the relevant terms, including the condition precedent, if they want their objects to be covered by GIS. If they do not agree, GIS cover cannot be provided, and an alternative solution, such as commercial insurance cover, will have to be agreed. Paragraphs 2.38 and 2.39 of the Guidance (Nationals) provide some further information regarding commercial insurance.

(vi) What if the Owner wants to impose additional terms?

The terms and conditions of section 16 undertakings and the Guidance do not affect the owner's right to impose other reasonable conditions on a loan, provided they do not conflict with the GIS requirements. Nor do they affect the owner's rights to claim compensation from the borrower where conditions imposed by the owner have been breached. The cost of any such claim will be borne by the borrower and not by the Secretary of State under the section 16 indemnity.

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(vii) Where lenders request variations to the loan agreement which are incompatible with GIS, will Arts Council or DCMS offer advice on how these may be incorporated to achieve a valid variation which satisfies the conditions of GIS?

The rules on GIS are clear. Lenders must agree to all the relevant terms, including the condition precedent, if they want their objects to be covered by GIS. Whilst it is possible (although not ideal) for emails to vary a loan agreement to include the conditions precedent or otherwise, it is the responsibility of borrowing institutions to be satisfied that the requirements of GIS are met and they should seek their own legal advice on this if they feel reassurance is needed.

(viii) Can a rolling contract clause be included in long-term loan agreements so that where an existing loan agreement has expired and has not been renewed, despite intentions to do so, it may be considered to have been extended for the purposes of Government indemnity?

Where there are concerns, museums should seek their own legal advice on long-term loan agreements. From a GIS perspective, every effort should be made to ensure that long-term loan agreements are renewed on or before they expire. Where claims arise for items on long-term loan, each case would need to be assessed on its facts, specific to that case and we would need to be satisfied that there was a valid loan agreement in place at the time of loss or damage and that the conditions contained in the loan agreement remain enforceable while the object remains on loan.

Manager, Government Indemnity Scheme

Arts Council England

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Updated February 2023 to include FAQ (vii)

Updated April 2023 to include FAQ (viii)