

UKRG Questions

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

No - paras. 6.5 and 6.6 of the Guidelines clearly state what is required in the loan agreement when nationals lend to non-nationals namely:

6.5 When lending objects to non-nationals, the lending national institution should ensure that the following issues are addressed by the terms of the loan agreement with the borrowing non-national institution:

- public benefit (refer to 2.3 to 2.9)
- security and transport (refer to Annexes D to F)
- environmental monitoring and control (refer to Annex D)
- minimum liability (refer to 6.4(a) and 6.4(b))
- arrangements for condition reporting (refer to 2.23 to 2.32)

[Refer to 6.3]

6.6 On some occasions, the national institution will agree to lend an object for an exhibition in which there will also be objects loaned by non-national institutions or private lenders in respect of which indemnity will be sought. In those circumstances, the national institution should apply the following terms in the relevant loan agreement (in addition to the matters specified at 6.5 above):

- the borrower will comply with any additional security conditions recommended by the National Security Adviser
- the loan is conditional upon indemnity cover not being refused for the other objects loaned for the exhibition on the grounds that the arrangements for the exhibition are unsatisfactory in respect of any of the following: public access; security; transport; environmental monitoring and control; and arrangements for condition reporting.

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

No, as the Government does not provide section 16 indemnity for loans from the Royal Collection Trust– the Guidelines clearly state at para. 4.7 that if the Undertaking to Her Majesty applies then the borrower should include the following wording in the relevant paperwork (for example, in the loan agreement or in a side letter):

‘ For reasons of constitutional principle it is not possible for the Government to provide formal indemnity cover under the National Heritage Act 1980 for loans from the Royal Collection Trust. The Government has therefore given an Undertaking to Her Majesty that, in the event of loss of, or damage to, objects on loan from the Royal Collection Trust, it would be prepared to seek Parliamentary authority for compensation comparable to that available to private lenders.’

The relevant paperwork should clearly state the object(s) being covered by the Undertaking to Her Majesty (in much the same way as objects are detailed on indemnity schedule sheets) so that it is clear which object is being covered.

(iii) For long loans in to collections where an agreement has expired and is being re-negotiated but the work is covered by GIS, is indemnity cover still valid? It is extremely rare that a renewal agreement would be issued, signed and returned to the registrar before the previous one had expired.

Where loan agreements have expired and have not been renewed formally, we are content to take the view that it was the intention of the parties that the loan agreement continues on the same terms, unless there is evidence to the contrary.

(iv) What if during the renewal of a loan the previous expired loan agreement did not incorporate the conditions precedent and there was no side agreement?

Borrowers need either to re-negotiate the loan if lenders have not already clearly accepted the GIS terms and conditions or, if lenders have accepted them, the original loan agreement document does not need to be amended; instead lenders can sign a side letter/addendum that confirms that they accept GIS cover on all its terms, including the conditions precedent in clause 2 of the GIS Undertaking. If lenders have already been issued a copy of this, it should not be viewed as something new that is being imposed.

(v) If a lender loan agreement explicitly says that they agree to GIS and the lender has received a copy of the T&C, is that valid?

We will accept the validity of ones already in force so long as the borrower's liability is limited to the specified value and there is reference to the UK Government indemnity, implying that the loan will be made on those terms. For any future loans, however, the practice should be improved with something more explicit included in either a side agreement or letter making it clear that the conditions precedent form part of the loan agreement.

(vi) Would an addendum to a loan agreement be valid? Does this have to be written in English?

Yes and yes.

(vii) Would a formal confirmation of acceptance of GIS, which lists the conditions precedent, be valid?

Yes, this would be ideal so long as it forms part of the loan agreement.

(viii) 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?

Section 2.66 of the GIS Guidance 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 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.

(ix) Lender loan agreements are often in the language of the lending country. Will DCMS/ACE supply official translations of the wording for use in lender contracts?

We would expect borrowers to provide translated versions of these. But we have said that this can be done by way of a side agreement.] As stated above, GIS users should be aware 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.

(x) Given the difficulty of changing loan agreements or even getting lenders to agree to accept addenda, is it possible to:

(a) retain the current practice whereby borrowers send T&C to lenders and get written confirmation of acceptance of GIS (and make sure that all borrowers are aware they need to do this)

OR

(b) create a formal letter of acceptance of GIS which contains the relevant wording and which borrowers sign? As a separate document, not part of the loan agreement, this would be much easier to get lenders to sign.

Yes to (a) and (b), but it does have to be "part of the loan agreement", because that is the requirement laid down by the statute. It would be problematic if the loan agreement had a "whole agreement" clause as this would potentially void any supplementary agreements.

(xi) While we usually send the T and C of GIS to lenders in advance, we have many regular lenders who are familiar with its terms and who would therefore not be sent these every time we make a request to borrow from them. For some others, who have received the terms with our requests and have accepted GIS, we do not necessarily receive an explicit written communication accepting the conditions precedent.

We assume that you are referring to cases where it is not possible to include the conditions precedent in the loan agreement and where these are dealt with separately. If you can supply proof that the owner/lender agreed those terms and

that a copy of the undertaking containing them was sent to them before the loan came into effect (e.g. before control passes to the borrower) then that would be acceptable for existing loans but for any future loans please see response to (v) above.

(xii) However where we sign the lender's loan agreement the clause is not included by the lender, and our lawyers have advised us never to sign two loan agreements for a loan.

GIS Conditions Precedent can be covered by a side agreement but they must form part of the agreement.

(xiii) We also have the situations where we do not have a current loan agreement because the lender has not returned the signed copy of a renewal loan. Some of these are potentially very political, for example a loan from the National Gallery of Zimbabwe.

Where loan agreements have expired and have not been renewed formally, we would be content to take the view that it was the intention of the parties that the loan agreement continues on the same terms, unless there was evidence to the contrary.

(xiv) It would often be very difficult to get lenders to amend their standard loan agreements to include the clause or even refer to it. Sometimes they will only lend on their standard terms, or changes have to go to a full meeting of their board of governors after legal advice. (This does not mean that they haven't agreed separately to Government Indemnity applying to the loan).

GIS Conditions Precedent can be covered by a side agreement but they must form part of the agreement.

(xv) Who should issue amendments to the agreements in order to satisfy the terms of GIS? The assumption is that the amendment should be issued by whoever issued the loan agreement but clarification would be welcome.

The borrower but they must be agreed by all parties.

(xvi) Lending institutions provide their own loan agreements and we have had considerable difficulty in the past getting some lenders to alter or add to those agreements. Many of these agreements have been subject to significant work by the legal profession and museum staff may not have the authority or expertise to change them. For example, a frequent, UK lender [to our museum] is unable to change their loan agreement easily due to the number of people it would have to go to for approval. However, they are fine with signing an acceptance of GIS letter. As a further example, in negotiating a recent loan from a Bavarian museum it was not possible for them to remove a clause because the loan agreement was a state wide agreement for all Bavarian state run museums.

GIS Conditions Precedent can be covered by a side agreement but they must still form part of the main agreement. The terms and conditions of section 16 undertakings and these guidelines do not affect the owner's right to impose other reasonable conditions on a loan. Nor do they affect the owner's rights to claim compensation from the borrower where conditions imposed by the owner have been breached. Any such compensation will be borne by the borrower and not by section 16 indemnity.

(xvii) Where amendments have been requested and the lending institution has been unable or unwilling to change the agreement, a separate agreement has been made to accompany the legal agreement document citing the additional requirements/arrangements. Is this acceptable?

Yes but the statute requires that it must be part of the agreement not form a separate agreement. As already mentioned above, it will be problematic if the lender's loan agreement contains an "entire agreement" clause.

(xviii) Please can you explain the legal reason that the wording has to be in loan agreements? Why do the loan and indemnity contracts need to be merged in this way? Is it purely to protect the borrower by limiting our liability – and also to limit the liability of DCMS in the event of a claim? What if the claim is for a risk covered under GIS – why do the exclusions of indemnity need to be formally agreed?

It is a requirement of the statute that the Secretary of State shall not give an undertaking unless the loan of the object in question is made in accordance with conditions approved by him and the Treasury. The conditions precedent in clause 2 of the undertaking mirror the exclusions contained in clause 4. If the exclusions contained in the indemnity were not also reflected in the loan agreement between the borrower and the lender, the lender would potentially be able to claim against a borrower in the circumstances not covered by the indemnity. For example, if we were unable to pay a claim because the damage to an object was the result of war or negligence by the owner's agents, the lender would still be able to claim against the borrower unless the same exclusions were included in the loan agreement. That would defeat the object of GIS which is to underwrite the borrowers' risk.