



7 October 2016

“You’re not a loan”
UKRG Event and AGM

Dulwich Picture Gallery

Government Indemnity Scheme

Loan Agreements and the Condition Precedent

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Government Indemnity Scheme

GIS provides an alternative to
commercial insurance for
loans in to UK institutions

It exists for the UK public
benefit

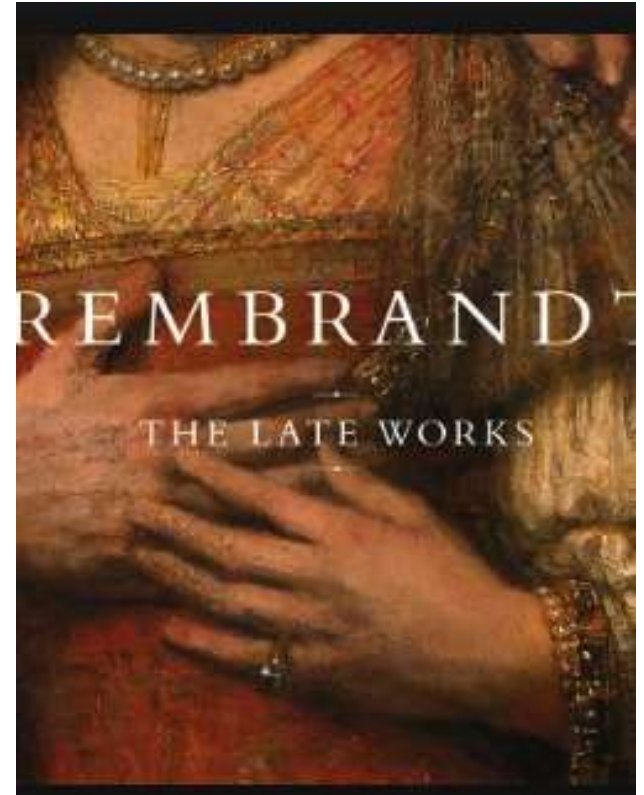
It aims to enhance and widen
access to objects of a
scientific, technological,
artistic or historic nature



Ostro topaz from Brazil,
Long term loan to Natural History Museum

Government Indemnity Scheme

We estimate the Scheme saves
the sector c.£15 million a year



National Heritage Act 1980

(as amended by the Museums and Galleries Act 1992)

Circumstances in which Government Indemnity may be granted

Section 16 indemnity

“16 (1) ... the Secretary of State, may in such cases and to such extent as he may determine, undertake to indemnify any institution, body or person for the loss of, or damage to, any object belonging to that institution, body or person while on loan to any other institution, body or person which falls within subsection (2)” – museums, art galleries, the National trust and any other approved body



GIS underwrites the Borrower's risk of loss or damage to the objects loaned for the public benefit

As a matter of law, indemnity is in favour of the Owner and is provided by the Secretary of State to the Owner. In practice issued via the applicant borrower who is responsible for sending the certificate to the owners.

It indemnifies the Owner lending to the Borrowing institution.

Condition Precedent

It is a requirement of the Act that, for indemnity to be given, a loan must be made in accordance with conditions approved by Government

Those **conditions** are set out in Section 2.21 Government Indemnity Guidelines and are known as the Condition Precedent.

Clause 2 of the standard GIS undertaking makes it compulsory that the Condition Precedent (i.e. the exclusions) be included in the loan agreement for the object covered by that indemnity.



Ritual ewer and cover, Compton Verney.

Condition Precedent

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;

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.

Option for a Side Letter / addendum

Ideally the terms specified in the condition precedent should be included in the loan agreement

A side letter/ addendum along the lines of the **example here** can to be entered in to.

Providing that the terms of the loan agreement itself do not conflict with the side letter e.g. refer to different insurance arrangements.

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 iv) 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;
 - 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 undertaken 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]

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

Guidance note

published July 2016

Updated – version 2
October 2016

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

We have published extra guidance – available on GIS website

<http://www.artscouncil.org.uk/protecting-cultural-objects/government-indemnity-scheme>

Q&A

i) 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.

ii) What if the Borrower cannot issue the side letter at the same time as the loan agreement? In many cases the side letter will have to be issued after the Lender issues their own loan agreement to the borrower.

It can be signed at a later date as long as it is clear that it forms part of the same agreement and makes reference to it and it is completed/signed before GIS is issued.

Q&A

iii) 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. There are agreed steps that have to be followed to obtain approval from DCMS before nationals can take out commercial cover.

iv) What if the Owner wants to impose additional terms?

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, 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.

Q&A

v) If we cannot afford to provide full time invigilation in line of sight and nearby to loaned objects will GI still cover the exhibition?

It is mandatory that invigilation is present and this is specified in the Annex D to the guidelines.

The National Security Adviser does have the authority to vary the conditions under certain mitigating circumstances which may include the use of display cases, beam alarms and other technology.

vi) Where do we get advice on transport and storage of objects being shipped or transported for exhibition?

If the borrower is a nationally funded venue then the in house security professional should be able to give the advice.

If a non-national then the conditions of Annex E should be met and if not contact made with the National Security Adviser on a case by case basis.

Q&A

vii) When a non national with a Designated Collection borrows from a national does the borrower need to opt in to the minimum liability of £25,000 within its financial year?

Part 4 of the GIS guidelines for non nationals (4.2) and Part 6 (6.4) refers

A national bears the majority of risk – it is the decision of the national institution.

A non-national will seek assurances from the national that it does not need to purchase commercial insurance to cover 100% of the loaned object's value.

If opted for a minimum liability arrangement of £25,000 within its financial year, such a borrowing non-national must meet the cost of loss or damage up to a limit not exceeding £25,000 and inform the national that it has opted for this arrangement.

Minimum liability arrangements set out in paragraph 6.4 will apply if loss or damage occurs.

Waivers:

War risk and/ or negligence – set questions to be answered by those requesting such cover.

Where war cover is requested in transit, be prepared to give details of the route and method of transport.

Waiver of recourse – in effect negligence cover for owner and owner's agents. Particularly with French loans.

Comfort Letter

1. Claims are paid swiftly (within 4-7 working days of DCMS being satisfied with a claim);
 2. There has been one instance where it took longer because the loan agreement did not include the exclusions required by the Secretary of State and therefore there was not a legally binding contract under which to pay;
 3. The Government Indemnity Scheme (GIS) uses loss adjusters used by the industry who specialise in assessing art claims and we can discuss the experts it is proposed to appoint with the Lender/Owner but we cannot offer them any right to agree to or veto the experts who will advise GIS as their role is to advise the Borrower (i.e. the Museum) and the GIS on the damage and repair (in effect this is advice to UK government). If the Lender/Owner disagrees the ultimate remedy is arbitration or the courts – we have very good records and I can confirm that there has not been a case to date since GIS commenced in the early 1980s that has been referred to the courts or arbitration. Ultimately if it came to arbitration the two sides can agree on a jointly instructed expert. In that situation the expert is jointly instructed and responsible to both parties;
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Comfort Letter

4. Although it is not possible for the Lender/Owner to appoint an expert who will be responsible for advising GIS we have no objection to the Lender/Owner appointing their own expert (at the Lender's/or Borrower's expense to be agreed by them) to attend any assessment by the GIS expert, to represent the interests of the Lender/Owner and to advise the Lender/Owner and discuss questions of the damage and methods of repair with the GIS appointed expert. In a recent claim each side had an expert loss adjuster whose costs were borne by the Borrower and they agreed on the level of depreciation;
 5. Payment of the claim can be made direct to a restorer provided we are given written instructions to do so by the Lender/Owner;
 6. The Owner/Lender and their advisers if applicable are kept informed throughout either by the Borrower or us and all stages of repair etc. are agreed beforehand.
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Comfort Letter

The reputation of the English GIS rests very much on swift payment and as James Pender, Head of the Cultural Property Unit emphasises in the attached comfort Letter, if there have been any breaches by third parties or the Borrower then any subrogation is a matter for the secretary of state and would not delay payment of the claim to the Owner/Lender.

Inalienability

This is not a concept recognised in English law, but Arts Council can provide a letter stating:

"The indemnity offered by the UK Government does not affect either title to the object(s) or affect the inalienable right of the object(s) in question.

Loans from the [Lender] to the [Borrower] for the XXX exhibition will be listed on a schedule as being the property of the [Lender] and the [Lender] will retain title to the object(s) at all times unless otherwise agreed."

and the Borrower can also reinforce the position by providing a letter along similar lines and we can provide wording.

Additional loss payee

Who is the legal owner of the artwork?

We are aware that there are some finance deals where title is transferred to the grantor/finance company but there are others where title remains with the original owner. You'll need to confirm what the position is.

If Finance Company has title then it should be shown as owner on the indemnity schedule. If Mr X, however, has legal title then Mr X has to be shown as, if incorrect owner details are given, it can render the indemnity invalid – see para 2.14 of the Guidelines.

Additional loss payee cont'd

As a matter of law, indemnity is in favour of the owner and is issued to the owner (via the borrower). It indemnifies the owner lending to the borrower and payment can only be made to the owner (or an agent nominated by them in writing) named on the schedule. In a previous cases with loans to the NPG and Tate where this was an issue and the concern was that the owner should be involved directly with ACE re any claims, the lender accepted GIS on production of a letter from us confirming that the Arts Council (which manages the Government Indemnity Scheme on behalf of the Secretary of State for Culture, Media and Sport, is responsible for issuing indemnities under the Government Indemnity Scheme and for administering any claims made under an indemnity granted under section 16 of the National Heritage Act 1980) and the Board of Trustees of the X Gallery(the borrower) hereby confirm that in the event of indemnified loss or damage to the object resulting in a claim on the Government Indemnity Scheme the Arts Council of England will take forward any claim by dealing directly with the owner or their appointed agent, such agent to be appointed in writing by the owner, rather than through the borrower.

Contingency or Difference in Condition insurance

Usually required by Italian institutional lenders for what their brokers call DiC which is basically Contingency Insurance and purportedly covers everything not covered by GIS. Usually require payment of premium to own insurance company for this cover.

Touring exhibitions

2.50- 2.52 indemnity might be applied to cover risk for two leg of a touring exhibition where such an arrangement has been **planned and agreed in advance** of the commencement of the whole tour and where such arrangement is aimed at achieving a “package” approach to sharing the cost and risk between the participating venues. In such cases it must be absolutely demonstrable that UK public access to the objects would not have been facilitated but for the use of indemnity to cover the risk during transit to/from a foreign tour venue as an element in realizing the tour package.

We need information to demonstrate the above. In particular we ask that you calculate the cost of the transfer being covered by British Government Indemnity and by commercial insurance to show the savings to the Borrower if you were able to use British Government Indemnity for the transfer.

In addition where a UK institution is the lead partner (in assessing this we would look to see who was curating the exhibition and who had published the catalogue for it) in a two leg touring exhibition then we would normally agree to cover two legs.

