

Sample Lenders Clause CAR/EAR

This document contains the 2018

version of the Sample Lenders Clause CAR/EAR. This sample clause has been drafted by the Lenders Clause Working Group of the Dutch Association of Insurers.

The working group wishes to point out that the contents of the Sample Lenders Clause CAR/EAR are not binding and the use of it isn't recommended in any way. Insurers are free to decide whether to use this or a different clause, or to offer their clients other conditions.

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SAMPLE LENDERS CLAUSE CAR/EAR

This clause applies with regard to *[Project description]*. In case of any contradiction between the text of this clause and the other insurance conditions, supplementary conditions and clauses that have been declared applicable, this clause takes precedence. Unless this clause explicitly states otherwise, the financier(s), the security agent, the facility agent, the SPC and any other parties named in this clause will not be granted any rights other than the rights that the policyholder and the insured parties have under the other terms and conditions. "It is expressly stated that this clause does not additionally includes insuring the risk of repayment of the loan (credit risk)."

1. Definitions

[To be completed in accordance with definitions as included in the finance agreement]

1.1 **Financier**

Financier is taken to mean *[Definition of financier]*.

1.2 **Security agent**

Security agent is taken to mean *[Definition of security agent]*.

1.3 **Facility agent**

Facility agent is taken to mean *[Definition of facility agent]*.

1.4 **SPC**

SPC is taken to mean *[Definition of SPC]*.

1.5 **Client**

Client is taken to mean *[Definition of client]*.

1.6 **Broker**

Broker is taken to mean *[Definition of broker]*.

1.7 **Joint account**

Joint account is taken to mean *[Definition of joint account]*.

1.8 **Contract**

Contract is taken to mean the contract between the SPC and its client *[Add contract data]*.

1.9 *(optional) [Free text]*

2. Mutual relationships

2.1 **Other insured parties**

Other insured parties, aside from the insured parties identified in the policy, are:

2.1.1 *(optional)* the financier(s), in their capacity as such;

2.1.2 *(optional)* the security agent, in its capacity as such;

2.1.3 *(optional)* the facility agent, in its capacity as such;

2.1.4 *(optional)*, *[free text]*

2.1.5 *(optional)* the executive directors, partners and supervisory directors of the insured parties identified under paragraph(s) *[to be entered]*

2.1.6 *(optional)* the subordinates of the insured parties identified under paragraph(s) *[to be entered]* insofar as they have performed work on behalf of those insured parties (in their capacity as such).

2.2 **Payment of premiums**

The obligation to pay the premiums and costs of insurance does not lie with the financier(s), the security agent and the facility agent, nor with their executive directors, partners and supervisory directors or subordinates, unless this lenders clause explicitly states otherwise.

2.3 **Duty of disclosure**

The duty of disclosure on conclusion of an insurance policy under Section 7:928 of the Civil Code, as well as other duties of disclosure under the policy, do not lie with the financier(s), the security agent and the facility agent, nor with their executive directors, partners and

supervisory directors or subordinates. However, at the written request of the insurers, the financier(s) will allow inspection by insurers within a reasonable period of all relevant due diligence reports that have been prepared on behalf of the financier(s). The insurers will treat such reports confidentially.

2.4 Non-vitiation

If an insured party has failed to comply with its obligations under this insurance policy, thereby relieving the insurers wholly or partly of their obligation to compensate such insured party for the loss, the insurers will not attribute this to the other insured parties. However, this does not relieve the other insured parties of their own obligations. The first sentence of this Article 2.4 does not apply to the obligation to pay the premium (*optional*), nor to obligations under any specific supplementary conditions and clauses with regard to risk-mitigating measures that are included in the policy.

2.5 Waiver of recourse

By way of derogation from the provisions of Section 7:962 of the Civil Code, insurers do not have a right of recourse against the financier(s), the security agent, the facility agent and the client, nor against their executive directors, partners and supervisory directors or subordinates, unless they have wilfully caused the loss within the meaning of the insurance conditions.

3. Principal cover

This insurance offers a principal cover. Section 7:961 of the Civil Code and any concurrence rule included in the insurance conditions are therefore not applicable. However, this does not apply in case of concurrence with insurance policies that have been taken out specifically for the project.

4. Notification of changes and circumstances between broker, financier(s) and facility agent

4.1 Notification by broker

The broker will inform the financier(s) or facility agent as soon as possible, but no later than 14 days after receipt of notification from the policyholder or from the insurer(s), of:

- premature termination of his activities on behalf of the policyholder;
- premature termination of the insurance;
- change in the sum insured, insured parties, period of insurance, exclusions and excesses, insofar as these are to the detriment of the policyholder and/or the insured party;
- changes in other policy provisions insofar as these are to the detriment of the policyholder and/or the insured party;
- cancellation of the insurance by the insurer and/or the policyholder.

The termination or change will not take effect earlier than 45 days after receipt by financier(s) or facility agent of the broker's notification.

4.2 Arrears in payment of premiums

The broker will inform the financier(s) or facility agent as soon as possible of any arrears in the payment of premiums. In case of arrears in the payment of premiums, the insurance will not be terminated until the broker has informed the financier(s) or the facility agent about the arrears in payment and has given them 45 days to still pay the premium owed.

4.3 Notification of claim

The financier(s) and the facility agent or their executive directors, partners and supervisory directors or subordinates are not obliged but have the right to claim a loss under this insurance. A claim is considered to have been submitted on behalf of all insured parties. If the loss pertaining to a claim appears to exceed € [Amount], the broker will notify the financier(s) or facility agent of this as soon as is reasonably possible after the notification of claim.

4.4 Address details

The following addresses of the financier(s) and the facility agent are used to allow the obligations under this clause to be fulfilled:

Address and email address of financier(s):
[Address(es) of financier(s)]

Address and email address of facility agent:
[Address of facility agent]

4.5 Insurance documents

On request, the broker will provide the financier(s) or the facility agent with copies of all insurance documents.

(optional) The broker will store all insurance documents during a period of [Number] years on behalf of the financier(s) and the facility agent.

5. Specification of payment address

The policyholder has pledged, assigned or otherwise transferred his right of action under the insurance to the financier(s), subject to the payment system rule in the policy conditions. The insurer and the broker have been notified of this.

Payment in discharge of amounts owed by the insurers to one or more insured parties will only be made via the broker to the joint account. The maximum amount to be paid via the broker to the person entitled to benefit in discharge of an obligation is € [Amount].

Excepted from this rule are the situations in which direct payment must be made to a third party under relevant laws or regulations.

A change of payment address can only be effected by the financier(s) or the security agent by sending the broker a letter recorded delivery.

Subject to the payment system rule in the policy conditions, any restrictions in the other conditions regarding the possibility of transfer of rights under the insurance are hereby set aside.

6. Disputes

Resolution of disputes arising from this clause is subject to Dutch law and the customs applicable in the Dutch insurance practice. All disputes regarding this clause are subject to the decision by the court that is designated in this policy as the competent court.

Explanatory notes to Sample Lenders Clause CAR/EAR

General

Insurance contracts for the insurance of projects that are financed on the basis of project finance or non-recourse finance constructions often include what are referred to as lenders clauses. In practice, the interpretation of such clauses often leads to discussion. For that reason the Dutch Association of Insurers established the Lenders Clause Working Group, with the aim of developing a sample lenders clause for the purpose of CAR/EAR. This is meant as a non-binding, strictly indicative model. Parties are free to deviate from this model.

The background to the inclusion of lenders clauses in project insurance policies is as follows.

Project finance or non-recourse finance structures are project funding constructions where the equity capital and borrowed capital are recouped and paid from the revenue generated by the project. The precondition for return and repayment of equity capital and borrowed capital is thus the successful execution and commercial operation of the project. This method of financing is especially suited for projects involving the development of sustainable products that generate operating income for long periods, generally twenty to thirty years. Examples include infrastructure works, buildings with a public function and industrial properties. DBFM(O) contracts are often concluded for this purpose between government agencies and project BVs that are specifically established for the project. In these contracts the arrangements regarding the aspects assigned to the project BV are set out comprehensively – the *design* of the object involved, its *building*, its *financing*, and its *maintenance* after completion. And in residential projects, also a piece of facilities management (*operation*) is included.

In principle, financiers of projects financed on a non-recourse basis strictly depend on the project and the related income for repayment of the loans they have provided, so without recourse or collateral on the assets of the underlying parties. For that reason they use the project assets, rights and interests as secondary security and/or collateral. Following on from this, project insurance policies also fall under the assets that serve as collateral.

Because of the dependence of financiers on the security provided by project insurance policies, with regard to projects that are financed on the basis of project finance or non-recourse finance constructions financiers generally stipulate for the project BV that supplementary conditions constitute part of insurance contracts that the project BV concludes for insurance of the project involved. These supplementary conditions are included in what is referred to as a lenders clause. Such a clause is intended to offer the financiers of these projects the possibility to derive certain rights from the insurance policies concluded on behalf of the project, without dependence on the cooperation of the insured parties. The clause regulates obligations regarding the policy and the policy management. The clause is also intended to prevent a specific insured party from jeopardising the cover for other insured parties and/or to guarantee continuation of a project after a claim as much as possible.

The reason why discussion often arises regarding the interpretation of the lenders clause is that such a clause considerably limits the rights of the project insurers. Project insurers cannot, however, simply refuse to include a lenders clause in the policy, because the project to be insured depends on the funding. Without funding, there is no object to be insured. This means that the parties will have to negotiate a clause that, on the one hand, safeguards the interests of the financiers but, on the other hand, does not limit the rights of the insurers to an unreasonable extent. To facilitate this negotiation process, the Dutch Association of Insurers decided that it would be wise to develop this sample clause.

Explanatory notes by individual article

Explanatory notes to the sample clause are presented below by article.

The relevant sections from Part 7.17 of the Dutch Civil Code are identified in the blocks next to the headings.

The footnotes refer to customary terms in English-language lenders clauses or endorsements.

Opening sentences

The opening sentences state that, in case of contradictions between the text of the lenders clause and the other insurance terms and conditions that have been declared applicable, this clause takes precedence.¹ It also states that, unless this clause explicitly states otherwise, the parties named in the clause will not be granted any rights other than those that the policyholder and the insured parties identified elsewhere in the policy have under the other terms and conditions. It is expressly stated that this clause does not additionally includes insuring the risk of repayment of the loan (credit risk).

1. Definitions

The terms used in the lenders clause are defined in Article 1. The sample clause includes no term definitions but leaves it up to the parties to flesh out this article in line with the definitions included in the finance agreement.

The various terms are described below. It is quite possible, however, that these terms are reflected and/or interpreted differently in specific contracts.

1.1 Financier

The financier or lender is the party that provides the long-term loan for the project.

1.2 Security agent

In case of more than one financier, the security agent serves as the point of contact. He is the representative or agent of the financiers and manages the security rights related to the project. He administers and handles the execution of these rights where applicable.

1.3 Facility agent

The facility agent is the representative or agent of the financiers that provide the long-term loan. The facility agent is charged with such matters as the administration of the loan. The long-term funding is often provided by a syndicate of financiers. One of these can then act as facility agent.

1.4 SPC²

SPC stands for Special Project Company. It is a separate legal entity – the project BV – that is established for carrying out the project. All financial flows and contracts of the project are linked to this entity.

1.5 Client

The client is the government agency that commissions the project.

1.6 Broker

The broker is the insurance intermediary who is called in by the SPC to arrange the insurance cover that is required for the project.

¹ Override

² Special/single purpose vehicle/company

1.7 Joint account³

The joint account is a bank account, specially opened for the project, to which insurance money needs to be credited in case of a pay-out under the DBFM(O) contract.

1.8 Contract

Contract refers to the contract between the SPC and its client with regard to the project, for example a DBFM(O) contract.

Article 2. Mutual relationships 7:928, 941, 945, 946, 947, 948, 957 CC

This article regulates the mutual relationship between the various parties involved, as described in the definitions.

2.1 Other insured parties⁴

Article 2.1 stipulates that the financier(s) and security agent (in their respective capacities), as well as their executive directors, partners and supervisory directors, and the subordinates of the financier(s) and the security agent (insofar as they have performed activities for them in these capacities), are regarded as co-insured under the policy. The co-insured parties can also directly submit claims to the insurer and demand payment of claims. Optional 2.1.4 may include parties such as the client (in that capacity) and/or 'step-in company'. For the step-in company it is important to consult the underlying arrangements in the contract. If these parties are included as co-insured, they can also be mentioned in Articles 2.2, 2.3, 2.5 and/or 4.3.

These co-insured obviously have a right of action under the policy – within the limits of the lenders clause – if they have an insured interest regarding a loss covered under the project policy.

2.2 Payment of premiums⁵ 7:934 to 939 CC

This article gives the financiers, the security agent and the facility agent, or their executive directors, partners and supervisory directors or subordinates, the possibility to take responsibility for the payment of premiums in case of any arrears in payment in order to prevent expiration of the cover.

2.3 Duty of disclosure⁶ 7:928 CC

This article stipulates that the duties of disclosure on taking out project insurance and with regard to changes during the period of insurance do not lie with the financier(s), the security agent and the facility agent, or with their executive directors, partners and supervisory directors or subordinates. However, the financing parties may be expected to provide the insurers with access to relevant due diligence reports that have been prepared on behalf of the financier(s). The insurers are obviously expected to handle these reports confidentially.

2.4 Non-vitiation 7:929, 930, 952 CC

Article 2.4 contains what is referred to as the non-vitiation provision.

If the insurer has the right under the policy to refuse payment with respect to an insured party because that insured party has not met its obligations under the policy, then this non-vitiation provision, which is included on behalf of the other insured parties, regulates that the insurer cannot invoke such non-compliance with obligations by the insured party involved against the other insured parties who have a covered insurable interest. Such other insured parties may include contractors and subcontractors, as the progress of the project would be impeded if a contractor or subcontractor 'topples over' after a

³ Insurance account

⁴ Co-insured / Interest of the parties insured

⁵ No obligation for premium payment

⁶ Duty of disclosure

claim that is not covered due to non-compliance with obligations by another insured party. Non-compliance can, however, be invoked against the other insured parties if they themselves fail to comply with the obligation that they are subject to under the policy.

The non-vitiating provision does not pertain to exclusions of cover but only to obligations, except for obligations related to risk-mitigating measures. This is intended to prevent a situation in which the insurer does not have the possibility to refuse cover if the risk-mitigating measures that it has prescribed are not met. After all, the possibility to prescribe risk-mitigating measures (for example sprinklers or fire extinguishers) is an important means for the insurer to be able to control and assess its risks.

The parties may also choose not to have this provision apply to the obligation of payment of premiums that is included in the policy.

2.5 Waiver of recourse⁷ 7:962 CC

Section 7:962 of the Civil Code gives the insurer who indemnifies an insured party for a loss under a policy a right to subrogation with respect to third parties against whom the insured party has a claim for damages other than under an insurance policy. Article 2.5 stipulates that insurers will waive recourse against the financier(s), the security agent, the facility agent and the client, or their executive directors, partners and supervisory directors or subordinates, unless they have wilfully caused the loss within the meaning of the insurance conditions. The same rule follows from Section 7:962(3) of the Civil Code, but since not all third parties mentioned are always co-insured under the project policy, this is explicitly included in the lenders clause.

Article 3. Principal cover⁸ 7:961 CC

This article stipulates that the project insurance, contrary to any other provisions in the project policy, provides principal cover. An exception applies to concurrence with covers that are specifically taken out for the project elsewhere; in that case Section 7:961 of the Civil Code or the concurrence rule included in the project policy will apply.

Article 4. Notification of changes and circumstances between broker, financier(s) and facility agent.

4.1 Notification by broker⁹ 7:940 CC, 4.2 Arrears in payment of premiums 7:934 CC and 4.5 Insurance documents

For the financier it is essential to be informed of changes in the policy cover, termination or cancellation of the insurance, and arrears in premium payment that might put the cover at risk, as well as to obtain copies of all insurance documents. The lenders clause must clearly specify which party is responsible for this obligation to inform. It has been decided to impose this information obligation on the broker since he is usually the intermediary for information to and from the parties associated with the insurance agreement. Since Articles 4.1 and 4.2 stipulate that a change or termination cannot take place until 45 days after the financier or facility agent has received the notification from the broker, considerable responsibility and thus also a liability risk will lie with the broker. The broker must therefore ensure that this information provision is properly implemented in his technical process.

At the end of Article 4.5, the parties can themselves decide how long the broker must keep the insurance documents in storage on behalf of the financier(s) and the facility agent.

4.3 Notification of claim¹⁰ 7:941 CC

⁷ Waiver of subrogation

⁸ Non-contribution

⁹ Cancellation or suspension

¹⁰ Notice of claims

The financier(s) and the facility agent, or their executive directors, partners and supervisory directors or subordinates, have the right to report a loss under the project insurance also on behalf of all insured parties, but they are not required to do so. Conversely, the financier or facility agent must be informed by the broker of every loss above a specified amount as soon as possible.

4.4 Address details¹¹ 7:933 CC, Electronic Notification Decree

In connection with the obligations set out in Articles 4.1 to 4.3 regarding notifications to the financier(s) and the facility agent, their address details are specified in Article 4.4.

Article 5. Specification of payment address¹² 7:934 to 939, 947, 954, 3:227, 236, 287, 6:32 CC

Finance agreements often stipulate that the SPC must ensure that payments above a certain amount are credited by the insurer under the project insurance policies to the joint account, a special account intended for that purpose that the SPC must open with the security agent. The SPC may only use the balance on this account for recovery work (or in case of a liability claim, the payment of the third party that is entitled to the claim). This is necessary in order to prevent a situation in which it may be more attractive for the SPC to stop the project rather than to proceed with recovery.

The finance agreement also stipulates by default that the SPC must establish a right of pledge¹³ on both the rights under the insurance policies and the rights of the SPC towards the security agent to payment of the balance on the joint account on behalf of the financier(s), or it must assign or otherwise transfer those rights to the financier(s).

All this serves as security for compliance with the obligations of the SPC towards the financier or the client, and to prevent the amounts that have been paid under the insurance from accruing, in case of a bankruptcy of the SPC, to the estate of the insolvent party.

Article 5 designates the joint account as the payment address to which the insurer can pay the insurance money with release of liability. An exception is included, which entails that in principle a certain amount will be paid to the party entitled to the payment with release of liability; this exception must obviously match the arrangements set out in the finance agreement. In addition, Article 5 contains an exception for payments to third parties that must be made directly under the law (see, for example, Section 7:954 of the Civil Code). Such claim payments may be made to a third party, with full release of liability.

The text of Article 5 assumes a pledge/assignment/transfer to the financier and, furthermore, that the joint account is specified in the deed of pledge. If one of these assumptions is incorrect, then the text of Article 5 must be revised.

The rights that the broker holds under the payment system rule are respected by this rule.

Article 6. Disputes

In this article, Dutch law is declared applicable. The competent court identified in the policy is declared the competent court.Ö

¹¹ Notification

¹² Loss payee

¹³ Notice of pledge