

13 November 2020

RECOGNITION OF EU AND UK BAIL-IN CLAUSES FOR OTHER LIABILITIES

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RECOGNITION OF EU BAIL-IN CLAUSE FOR OTHER LIABILITIES

Set out below is a model clause for contractual recognition of bail-in powers for liabilities other than debt instruments or liabilities governed by industry standard master agreements (collectively, “other liabilities”) governed by a non-EEA law reflecting the requirements of Article 55 of the EU Bank Recovery and Resolution Directive (BRRD). This clause was originally developed by a group of leading law firms for AFME and ICMA. Its intended uses include contracts related to new issues of bonds, bond issuance programmes and ECP issuance programmes. For debt liabilities, one of the model clauses set out in [AFME’s model clauses for the contractual recognition of bail-in under Article 55 BRRD](#) may be relevant.

| Provision ¹ | Other Liabilities governed by a non-EEA law ² |
|-----------------------------|--|
| Contractual acknowledgement | Notwithstanding and to the exclusion of any other term of this [<i>Agreement</i>] or any other agreements, arrangements, or understanding between [[<i>BRRD Party</i>] and [<i>Creditor or Counterparty of BRRD Party</i>]] ^{3, 4} [<i>Creditor or Counterparty of BRRD Party</i>] ⁵ acknowledges and accepts that a |

¹ **Note to counsel preparing the transaction documentation:** Consider other relevant provisions for amendment / inclusion in the main agreement. For example, under English law, the benefit of a contract but not the burden can be assigned. Accordingly, in order to avoid the assignment of a contract to a person who has not consented to bail-in, if there is a consent to assignment clause, consider having a termination right where assignment takes place without consent. Where there is not a consent to assignment clause in the main agreement, we advise that this is added, and consent to assignment should only be given where the assignee consents contractually to bail-in.

² **Note to counsel preparing the transaction documentation:** Consideration should be given to obtaining advice in relation to the effectiveness of this clause in relation to the law of the non-EEA state governing the contract. Consideration may also be given to having the consent to bail-in governed by the law of an EEA state to avoid the need for a contractual recognition clause.

³ Include “[*BRRD Party*] and [*BRRD Party*] (each a “**BRRD Party**”)” where the liabilities of both parties under the Agreement may be subject to bail-in under the BRRD.

⁴ Reflecting Article 44(4) of Commission Delegated Regulation (EU) 2016/1075 (the “**Delegated Regulation**”)

⁵ Include “each BRRD Party” where the liabilities of both parties under the Agreement may be subject to bail-in under the BRRD.

| Provision ¹ | Other Liabilities governed by a non-EEA law ² |
|------------------------|---|
| | <p>BRRD Liability arising under this [Agreement] may be subject to the exercise of Bail-in Powers by the Relevant Resolution Authority⁶, and acknowledges, accepts, and agrees to be bound by:</p> <ul style="list-style-type: none"> a. the effect of the exercise of Bail-in Powers by the Relevant Resolution Authority in relation to any BRRD Liability of [[BRRD Party] to [Creditor or Counterparty of BRRD Party]]⁷ under this agreement, that (without limitation) may include and result in any of the following, or some combination thereof: <ul style="list-style-type: none"> i. the reduction of all, or a portion, of the BRRD Liability or outstanding amounts due thereon;⁸ ii. the conversion of all, or a portion, of the BRRD Liability into shares, other securities or other obligations of [BRRD Party]⁹ or another person, and the issue to or conferral on [Creditor or Counterparty of BRRD Party]¹⁰ of such shares, securities or obligations;¹¹ iii. the cancellation of the BRRD Liability;¹² iv. the amendment or alteration of any interest, if applicable, thereon, the maturity or the dates on which any payments are due, including by suspending payment for a temporary period;¹³ b. the variation of the terms of this [Agreement], as deemed necessary by the Relevant Resolution Authority, to give effect to the exercise of Bail-in Powers by the Relevant Resolution Authority.¹⁴ |
| Definitions | <p>“Bail-in Legislation” means in relation to a member state of the European Economic Area which has implemented, or which at any time implements, the BRRD, the relevant implementing law, regulation, rule or requirement as described in the EU Bail-in Legislation Schedule from time to time</p> <p>“Bail-in Powers” means any Write-down and Conversion Powers as defined in the EU Bail-in Legislation Schedule, in relation to the relevant Bail-in Legislation.</p> <p>“BRRD” means Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms.</p> <p>“EU Bail-in Legislation Schedule” means the document described as such, then in effect, and published by the Loan Market Association (or any successor person) from time to time at http://www.lma.eu.com/pages.aspx?p=499.</p> |

⁶ Reflecting Article 44(1) of the Delegated Regulation.

⁷ Include “a BRRD Party (“**Relevant BRRD Party**”) to the other BRRD Party” where the liabilities of both parties under the Agreement may be subject to bail-in under the BRRD.

⁸ Reflecting Article 63(1)(e) of the BRRD, as per the requirements in Articles 44(2) and 44(3)(a)(i) of the Delegated Regulation.

⁹ Include “the Relevant BRRD Party” where the liabilities of both parties under the Agreement may be subject to bail-in under the BRRD.

¹⁰ Include “the other BRRD Party” where the liabilities of both parties under the Agreement may be subject to bail-in under the BRRD.

¹¹ Reflecting Article 63(1)(f) of the BRRD as per the requirements in Articles 44(2), 44(3)(a)(ii) and 44(3)(c) of the Delegated Regulation.

¹² Reflecting Article 63(1)(g) of the BRRD as per the requirements in Article 44(2) of the Delegated Regulation.

¹³ Reflecting Article 63(1)(j) of the BRRD, and the requirements in Articles 44(2) and 44(3)(a)(i) of the Delegated Regulation.

¹⁴ Reflecting Article 44(3)(b) of the Delegated Regulation.

| Provision ¹ | Other Liabilities governed by a non-EEA law ² |
|------------------------|---|
| | <p>“BRRD Liability” means a liability in respect of which the relevant Write Down and Conversion Powers in the applicable Bail-in Legislation may be exercised.</p> <p>“Relevant Resolution Authority” means the resolution authority with the ability to exercise any Bail-in Powers in relation to [BRRD Party]¹⁵.</p> |

RECOGNITION OF UK BAIL-IN CLAUSE FOR OTHER LIABILITIES

Set out below is a model clause for contractual recognition of bail-in powers for liabilities other than debt instruments or liabilities governed by industry standard master agreements (collectively, “other liabilities”) governed by a non-English law reflecting the requirements of the UK bail-in regime. This clause was originally developed by a group of leading law firms for AFME and ICMA. Its intended uses include contracts related to new issues of bonds, bond issuance programmes and ECP issuance programmes. For debt liabilities, one of the model clauses set out in [AFME’s model clauses for the contractual recognition of bail-in under Article 55 BRRD](#) may be relevant.

| Provision | Other Liabilities governed by a non-English law ¹⁶ |
|-----------------------------|---|
| Contractual acknowledgement | <p>Notwithstanding and to the exclusion of any other term of this [Agreement] or any other agreements, arrangements, or understanding between [[UK bail-in party] and [creditor or counterparty of UK bail-in party]]¹⁷, [creditor or counterparty of UK bail-in party]¹⁸ acknowledges and accepts that a UK Bail-in Liability arising under this [Agreement] may be subject to the exercise of UK Bail-in Powers by the relevant UK resolution authority¹⁹, and acknowledges, accepts, and agrees to be bound by:</p> <p>a. the effect of the exercise of UK Bail-in Powers by the relevant UK resolution authority in relation to any UK Bail-in Liability of [[UK bail-in party] to [creditor or counterparty of UK bail-in party]]²⁰ under this agreement, that (without limitation) may include and result in any of the following, or some combination thereof:</p> |

¹⁵ Include “the Relevant BRRD Party” where the liabilities of both parties under the Agreement may be subject to bail-in under the BRRD.

¹⁶ **Note to counsel preparing the transaction documentation:** Consideration should be given to obtaining advice in relation to the effectiveness of this clause in relation to the (non-English) law governing the contract.

¹⁷ Include “[UK bail-in party] and [UK bail-in party] (each a “UK Bail-in Party”)” where the liabilities of both parties under the Agreement may be subject to bail-in under the UK Bail-in Legislation.

¹⁸ Include “each UK Bail-in Party” where the liabilities of both parties under the Agreement may be subject to bail-in under the UK Bail-in Legislation.

¹⁹ This is the terminology used in the AFME model clause for *debt* liabilities of entities organised in the UK, available in the [AFME model clauses and user guide document](#).

²⁰ Include “a UK Bail-in Party (“**Relevant UK Bail-in Party**”) to the other UK Bail-in Party” where the liabilities of both parties under the Agreement may be subject to bail-in under the UK Bail-in Legislation.

| Provision | Other Liabilities governed by a non-English law ¹⁶ |
|-------------|---|
| | <ul style="list-style-type: none"> i. the reduction of all, or a portion, of the UK Bail-in Liability or outstanding amounts due thereon; ii. the conversion of all, or a portion, of the UK Bail-in Liability into shares, other securities or other obligations of [<i>UK bail-in party</i>]²¹ or another person, and the issue to or conferral on [<i>creditor or counterparty of UK Bail-in Party</i>]²² of such shares, securities or obligations; iii. the cancellation of the UK Bail-in Liability; iv. the amendment or alteration of any interest, if applicable, thereon, the maturity or the dates on which any payments are due, including by suspending payment for a temporary period; <p>b. the variation of the terms of this [Agreement], as deemed necessary by the relevant UK resolution authority, to give effect to the exercise of UK Bail-in Powers by the relevant UK resolution authority.</p> |
| Definitions | <p>“UK Bail-in Legislation” means Part I of the UK Banking Act 2009 and any other law or regulation applicable in the UK relating to the resolution of unsound or failing banks, investment firms or other financial institutions or their affiliates (otherwise than through liquidation, administration or other insolvency proceedings).</p> <p>“UK Bail-in Liability” means a liability in respect of which the UK Bail-in Powers may be exercised.</p> <p>“UK Bail-in Powers” means the powers under the UK Bail-In Legislation to cancel, transfer or dilute shares issued by a person that is a bank or investment firm or affiliate of a bank or investment firm, to cancel, reduce, modify or change the form of a liability of such a person or any contract or instrument under which that liability arises, to convert all or part of that liability into shares, securities or obligations of that person or any other person, to provide that any such contract or instrument is to have effect as if a right had been exercised under it or to suspend any obligation in respect of that liability.</p> |

CONTACTS

AFME: Oliver.Moullin@afme.eu

ICMA: RegulatoryHelpdesk@icmagroup.org

²¹ Include “the Relevant UK Bail-in Party” where the liabilities of both parties under the Agreement may be subject to bail-in under the UK Bail-in Legislation.

²² Include “the other UK Bail-in Party” where the liabilities of both parties under the Agreement may be subject to bail-in under the UK Bail-in Legislation.