Our ref: NTW\ICE02.00001
Direct line: +44(0)20 7859 1236
E-mail: nigel.ward@ashurst.com

Ashurst LLP
Broadwalk House
5 Appold Street
London EC2A 2HA

Tel +44 (0)20 7638 1111
Fax +44 (0)20 7638 1112
DX 639 London/City
www.ashurst.com

16 December 2009



The Budget Committee
Althingi
150 Reykjavik
Iceland

Dear Sirs

**Re: Icesave Loan Agreements**

1. **Introduction**: The purpose of this letter is to provide our opinion in relation to the questions identified in your letter of 11 December 2009. These questions relate to:

   (a) a £2,350,000,000 (maximum) loan agreement between (1) the Depositors' and Investors' Guarantee Fund of Iceland ("**TIF**"), (2) Iceland and (3) the Commissioners of Her Majesty's Treasury of the United Kingdom originally dated 5 June 2009 as amended by an acceptance and amendment agreement ("**AAA**") dated 19 October 2009;

   (b) a €1,329,242,850 loan agreement between (1) TIF, (2) Iceland and (3) the State of The Netherlands also originally dated 5 June 2009 and as amended by an acceptance and amendment agreement dated 19 October 2009 (together with the UK loan agreement the "**Icesave Loan Agreements**"); and

   (c) certain supplemental agreements entered into in connection with those loan agreements.

   We were not involved in the negotiation of the loan agreements as executed on 5 June 2009. However, we provided Althingi with a report dated 25 June 2009 on certain aspects of the original loan agreements. We subsequently assisted in the negotiation of the amendments to those loan agreements implemented by the AAAs from mid-September 2009 through to their signature on 19 October 2009.

2. **Question 1**: *An opinion on the wording and substance of the Icesave Loan Agreements, in particular in light of the interests of the various parties involved. In particular such opinion should extend to the content and terms of the Icesave Loan Agreements, whether they are considered customary in light of the terms of comparable agreements and whether the agreements reflect that the parties were on equal footing during the course of negotiation.*

   We have updated our June report on the Icesave Loan Agreements to reflect the modifications made by the AAAs. Our updated report (which summarises the essential terms of the modified loan agreements) is enclosed with this letter.

Notwithstanding the circumstances in which the Icesave Loans arose,[1] the main operative terms and structure of the Icesave Loan Agreements are customary and comparable to other international loan agreements. The requirements for conditions precedent, the interest and repayment provisions, the terms of the guarantee, the termination events and the "boilerplate" provisions dealing with payments, set-off, cross-indemnities, representations, notices, governing law and submission to jurisdiction are all consistent with what we would expect to see in an international loan agreement. The features which in our experience are not customary are those which are specific to the Icesave situation namely:

- the fact that Iceland's guarantee does not come into effect until 5 June 2016;
- in the UK loan, the right for FSCS to make drawdowns on behalf of TIF;[2]
- the cap on payments in each calendar year of 2% (Netherlands) and 4% (UK) of the cumulative growth in Icelandic GDP since 2008 (but with interest always being payable in full);
- the extension options whereby the repayment date for the loans may extend beyond 2024;
- the arrangements regarding the sharing of Landsbanki recoveries (either on a pari passu basis or, in certain circumstances, on a preferential basis);
- Iceland agreeing not to take any action which results in creditors of Landsbanki being treated in a manner contrary to generally accepted international or European principles of treatment of creditors in an international winding up;
- the obligation on the UK and Netherlands to meet with Iceland (on request) to consider how the Icesave Loan Agreements should be amended to reflect a change in circumstances if the IMF concludes there has been a significant deterioration in the sustainability of Iceland's debt relative to its assessment as at 19 November 2008.

Whilst these provisions are "non-customary" they reflect the agreements reached between Iceland, TIF, the UK and The Netherlands in relation to matters specific to the Icesave situation and are favourable to TIF and Iceland. We comment further on these aspects in our main paper.

Another "non-customary" provision appears at clause 2.1.3(b) of the Netherlands Icesave Loan Agreement. TIF and Iceland agree that they will not make any claim against the Netherlands or the Dutch Central Bank (DNB) in relation to DNB having paid compensation to an Amsterdam branch depositor or as a result of DNB refusing a claim of an Amsterdam branch depositor. The corresponding provision in the UK Icesave Loan Agreement records that neither the UK nor the FSCS will be responsible for any cost or liability suffered by TIF or Iceland in connection with the Icesave Loan Agreements "or otherwise in connection with the Landsbanki prior to the date of the [Icesave Loan Agreement]" . As a result TIF and Iceland both acknowledge that they may not bring claims against the UK, the Netherlands, FSCS or DNB as a result of actions taken in respect of the failure Landsbanki and the compensating of the London branch and Amsterdam branch depositors.

---

1 As a result of the Financial Services Compensation Scheme in the UK and the Dutch Central Bank in The Netherlands making compensation payments to London and Amsterdam branch depositors when TIF was unable to do so following the collapse of Landsbanki.

2 Reflecting the fact that FSCS will handle the logistics of any further compensation payments to London branch depositors with Landsbanki.

We are asked to comment on whether the Icesave Loan Agreements "*reflect that the parties were on equal footing during the course of the negotiation.*" All the contracting parties found themselves in unusual positions. The UK and The Netherlands were in an unusual position having already disbursed significant monies in compensating London and Amsterdam branch depositors on a "voluntary" basis on behaif of TIF. TIF and Iceland were in the unusual position of negotiating loans arising from such "voluntary" disbursement in order to fulfil their respective responsibilities in respect of directive 94/19/EC on deposit-guarantee schemes.[3] Given (i) that the monies had already been disbursed, (ii) the agreed Brussels guidelines announced on 17 November 2008[4] and (iii) the requirement for Iceland to conclude the Icesave Loan Agreements as a condition to the availability of loans and support from the IMF and others – it is difficult to say that the parties "*were on equal footing during the course of the negotiations.*" Having said that, both the UK and Netherlands governments had a significant incentive to conclude the Icesave Loan Agreements to regularise the basis upon which they will be compensated for making the disbursements to London and Amsterdam branch depositors. Moreover, the willingness of The Netherlands and the UK to accommodate the main requirements stipulated in the Aithingi Authorising Act of August 2009 is evidence that Iceland had sufficient bargaining power to modify the loan terms in its favour in the further round of negotiations in September and October leading to signature of the AAAs.

3. **Question 2**: *An opinion on the impact on the interests of the Icelandic State or Icelandic parties as a result of the position that any potential litigation in the future in the United Kingdom regarding a dispute under the Icesave Agreement is subject to English law and jurisdiction as opposed to Icelandic law and jurisdiction. In particular, such opinion should address whether contractual provisions, based on such grounds, would result in the legal position of the Icelandic State or Icelandic parties, such as Landsbanki Islands hf. and its subsidiaries, being weakened and whether the legal position of the British & Dutch State, or British & Dutch parties being strengthened.*

Both the UK Loan Agreement and The Netherlands Loan Agreement are governed by English law and the parties submit to the jurisdiction of the English courts.[5] As is well known, English law is one of the primary choices of law to govern international loan agreements. The English courts have a pre-eminent reputation for the quality of the judiciary and the pool of legal advisers available to parties when litigating international disputes. The choice of English law (and of the English courts to hear disputes) in relation to the Icesave Loan Agreements is therefore in no way unusual in our view. Moreover, it is common practice for the lender of money to be the party which stipulates the choice of law (and courts to adjudicate on disputes) which will govern the loan agreement recording the terms of the loan.

It is fair to say that English law is regarded as a creditor-friendly legal system. However, this is primarily due to English law principles relating to English law security interests and the insolvency laws affecting the winding up of entities in the UK. Neither of these features is likeiy to be relevant in relation to the Icesave Loan Agreements as they do not involve the creation of security and the Icelandic parties (TIF and Iceland itself) are unlikely to be subject to any insolvency proceedings in the UK. Choosing English law as the governing law will therefore likely impact upon determination of any dispute as to such matters as (i) whether a termination event occurs and monies therefore become immediately due under the relevant Icesave Loan Agreement or (ii) the interpretation of other provisions of the Loan Agreements (for example whether UK and/or Netherlands has

---

3 Implemented in Iceland pursuant to the requirements of the EEA Agreement in the form of Icelandic Act No. 98/1999 on deposit guarantees and investor compensation scheme.

4 "*According to the agreed guideiines, the government of Iceland wiii cover deposits of insured depositors in the Icesave accounts in accordance with EEA law....All parties concluded that the Deposit Guarantee Directive has been incorporated in the EEA legislation in accordance with the EEA Agreement and is therefore applicable in Iceland in the same way as it is applicable in the EU Member States.*"

5 However, both the UK and The Netherlands are entitled to take proceedings in relation to a dispute in the courts of any other jurisdiction if they so wish.

discharged its obiigation to meet and discuss how the Loan Agreements should be amended if there is a change in circumstances triggered by an IMF review).[6]

One of the key features of the modified Loan Agreements is the potential for TIF to receive priority recoveries out of the Landsbanki estate (which it can apply in paying down the Icesave loans without first sharing the recoveries on a pari passu basis with The Netherlands and the UK). Even though the Icesave Loan Agreements are governed by English law the trigger for the entitlement to achieve such preferential treatment is either a determination of an Icelandic court (not in conflict with an advisory opinion obtained from the EFTA court) or a determination of the Landsbanki winding up board in Iceland (which is not challenged in an Icelandic court).[7] So, even though English law governs the terms of the loan and its repayment etc, the key elements of this important provision are driven by determinations made in Iceland.

The question whether the Icelandic parties are in a worse position as a result of the choice of English law (as opposed to Icelandic law) is difficult to answer. The Icelandic parties should only be in a weaker position if Icelandic law confers a defence in a legal dispute (relating to the Icesave Loan Agreements) which English law does not. To answer this question would require a comparative study of English law and Icelandic law (which we have not undertaken).[8] However, we would be surprised if Icelandic law would reach a materially different conclusion to English law in relation to the essential terms of a loan agreement (and an interpretation of those essential terms).[9]

It must also be borne in mind that even if The Netherlands and/or UK governments obtain a judgment of the English courts requiring TIF or Iceland to make immediate payments under the Loan Agreements such judgment wili need to be enforced against TIF or Iceland (as the case may be). We understand TIF itself is exempt from attachment of its assets or liquidation by virtue of article 17 Icelandic Act 98/1999. Iceland, on the other hand, has waived sovereign immunity rights in the Loan Agreement so in theory The Netherlands or the UK could seek to enforce against Iceland's assets. However:

(a) the AAAs specifically confirm that the waiver of sovereign immunity does not extend to any assets of Iceland which enjoy immunity under the Vienna Convention,[10] any assets of Iceland located in Iceland which are necessary for the proper functioning of Iceland as a sovereign power, or any assets of the Central Bank of Iceland;

---

6 See clause 15 of The Netherlands Loan Agreement and clause 16 of the UK Loan Agreement.

7 And the failure to challenge is not the result of a change of Icelandic law made after 5 June 2009 rendering such challenge more difficult or impossible.

8 Lex have advised us that "*under Icelandic law it is generally recognised that parties to a contract are bound by a 'principle of loyalty' in the making, execution and termination of a contract. The scope of the obligation is somewhat unclear but it generally means that a contracting party must, to a certain extent, show regard for the interests of his counterparty. This, inter alia, means that if there is doubt in regard to the interpretation of a contract, which sets out mutual obligations the interpretation choice of which leads to an unfair result for one party shall not be chosen but rather the interpretation choice which best conforms to the mutual trust between the parties.*" English law does not include such a concept. To this extent there may be some disadvantage to Iceland as a result of the contract being governed by English law rather than Icelandic law.

9 We could foresee a different interpretation in relation to the exercise of security rights or rights on insolvency. However, as indicated earlier in this letter, such matters are unlikely to arise in relation to the Icesave Loan Agreements. No security has been granted. Also we understand TIF is exempt from attachment of its assets or liquidation by virtue of article 17 Icelandic Act 98/1999.

10 The UK is a signatory to the Vienna Convention and certain of the provisions of the Vienna Convention have the force of law in the UK by virtue of the Diplomatic Privileges Act 1964. These provisions include article 22 of the Vienna Convention which records that the "*Premises of the mission [i.e. embassy], their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.*" The UK government has, however, pursuant to section 3 of the Diplomatic Privileges Act 1964 reserved the right to withdraw such privileges if the home state of the relevant embassy (here Iceland) does not afford the same privileges and immunities to the UK embassy.

(b) the parties have confirmed that nothing is intended to remove or shall have the effect of removing from Iceland its control of its natural resources and its right to decide on the utilisation and form of ownership thereof; and

(c) it would be extremely challenging for The Netherlands or the UK to seek to enforce against assets of Iceland within Iceland (because, in extremis, Althingi could pass new laws preventing such enforcement if necessary to protect Icelandic assets).

4. **Question 3**: *An opinion on the impact of any potential future revision and amendments of the European legislation on deposit guarantee schemes, as it was in October 2008, not least regarding the guarantee by a home State, on the content and validity of the Icesave Loan Agreements and the obligations of the Icelandic State or Icelandic parties under the Icesave Loan Agreements. In particular such opinion should refer to the existing legal obligations of the Icelandic State or Icelandic parties under the European legislation on deposit guarantee schemes, and their impact on the Icelandic State or Icelandic parties.*

Article 3 of Directive 94/19/EC on deposit guarantee schemes requires "*each Member State shall ensure that within its territory one or more deposit-guarantee schemes are introduced and officially recognised.*" By Article 4 "*deposit-guarantee schemes introduced and officially recognised in a Member State in accordance with Article 3(1) shall cover the Depositors at branches set up by credit institutions in other Member States.*" The minimum guarantee level is set at €20,000 (raised in March 2009 to €50,000).[11]

By Article 10 "*deposit-guarantee schemes shall be in a position to pay duly verified claims by Depositors in respect of unavailable deposits within three months of the date on which [the competent authorities determine the relevant credit institution is unable to repay the deposit and has no current prospect of being able to do so*]."

Iceland is party to the EEA Agreement which entered into force in 1994. As such Iceland agreed to be bound by directive 94/19/EC and established TIF pursuant to Icelandic law No 98 of 1999 for this purpose.

The EC deposit-guarantee directive does not specifically define what constitutes a deposit-guarantee scheme nor explicitly provide that each State stands behind or guarantees the obligation of the deposit-guarantee scheme in its jurisdiction. However, as mentioned above, Article 10 provides that deposit-guarantee schemes must be in a position to pay claims in respect of unavailable deposits within three months of the ruling that the failed institution will be unable to repay the deposits.

We are asked for our opinion as to the impact of subsequent amendments to European legislation on deposit-guarantee schemes (in particular relating to State guarantees) on the content and validity of the Icesave Loan Agreements (and Iceland's obligations thereunder). In our view, TIF's obligations (and Iceland's guarantee obligations) would not be affected.[12] TIF and Iceland enter into the Icesave Loan Agreements to record their contractual obligations to repay the monies disbursed by the UK and The Netherlands. This contractual obligation is independent of (a) any separate obligation TIF and Iceland have as a matter of their respective obligations under Icelandic law No 98 of 1999 and the EEA Agreement to reimburse the UK and Netherlands for the compensation payments

---

11 See Directive 2009/14/EC – EU Member States were required to raise the limit to €50,000 by 30 June 2009.

12 We note, for example, that the EU increased the minimum compensation limit for deposit guarantee schemes in March 2009 from €20,000 to €50,000. There has been no suggestion (so far as we are aware) that such an amendment in any way retrospectively increases or otherwise affects TIF's obligations under the original Icelandic guarantee scheme which provides protection for up to €20,887 per claim.

made to Amsterdam and London branch depositors up to €20,887 or (b) any adjustment to the terms of the EC deposit – guarantee schemes which may be made in the future.[13]

If the Icesave Loan Agreements come into contractual effect (once the conditions precedent – including further Althingi approval – are satisfied) then in our view the contractual obligations in the Loan Agreements will be obligations in their own right. Whilst there are principles of English law which in exceptional circumstances allow a contracting party to be released from its contractual obligations[14] we do not consider it likely any of these legal principles would operate to exempt TIF and Iceland from its obligations under the Icesave Loan Agreements. We consider this to be the case even if (a) an EFTA court rules Iceland was under no obligation to provide a state guarantee (or similar) in respect of TIF's obligations or (b) there is a subsequent amendment to the European legislation on deposit guarantee schemes.

5. **Question 4**: *An opinion on the possible legal repercussions if the final acceptance of the draft bill for a State guarantee for Icesave loans from 19 October 2009, Amending Act No. 96/2009 (the Icesave bill) will be delayed and/or not adopted as Icelandic law by the Icelandic Parliament, Althingi. In particular, such opinion should evaluate, on grounds of such circumstances, the most appropriate way forward for all the relevant parties to bring the Icesave matter to a successful conclusion.*

The Icesave Loan Agreements entitle the UK and Netherlands to terminate those agreements if the various conditions precedent (including Althingi approval) have not been satisfied by 30 November 2009. As this date has already passed, in theory the UK and/or Netherlands could terminate the arrangement. However, there appears to be little advantage for them to do so when there is some prospect of approval being obtained.

If Althingi does not approve the bill and the Loan Agreements do not come into effect then we are back to the position which prevailed in the autumn of 2008. The Netherlands and the UK have disbursed monies to the London and Amsterdam branch depositors. They will say they have done so "on behalf of" TIF because TIF did not discharge its obligations under Icelandic law no 98 of 1999. In any event, the London and Amsterdam branch depositors have (we understand) assigned to FSCS in the UK and DNB in the Netherlands respectively all claims they have against Landsbanki and TIF – so FSCS and DNB will be entitled to make claims against TIF by stepping into the shoes of the individual depositors and claiming compensation from TIF via the assignments.

It is difficult to predict what would follow an Althingi rejection of the bill. There would no doubt be intense further diplomatic pressure upon Iceland from the international community to reconsider its position. It may be that the UK and Netherlands would seek a court ruling confirming TIF's and Iceland's obligations to repay the monies paid to the

---

13 Articie 2 of the Bill currently before Althingi to amend Act No. 96/2009 does, of course, direct the Icelandic Minister of Finance to initiate discussions with The Netherlands and the UK if a competent adjudicator concludes (in line with an advisory opinion obtained from the EFTA Court), that the Icelandic state was not under an obligation to guarantee the obligations of TIF. Such discussions would relate to the potential implications of such a decision on the Icesave Loan Agreements and the obligations of the Icelandic state under those documents. This was also recognised in the joint ministerial statement made in October 2009. However, there would be no binding legal obligation upon the UK or The Netherlands to modify the obligations of the Icelandic state or TIF under the Icesave Loan Agreements following such negotiations.

14 In very rare circumstances a party to an English law contract can escape its iiabilities under that contract if it can show it entered into the contract as a result of a mistake of law. In this case the argument would be that Iceland entered into the Loan Agreements and provided the guarantees on the "mistaken" assumption that it had a legal liability to ensure TIF made the compensation payments to the Landsbanki, Amsterdam and London branch depositors. Whilst we have not fully investigated the position, we consider that any such argument in Iceland's case is unlikely to succeed. A House of Lords decision in England in 2006 (Deutsche Morgan Grenfell Group v Inland Revenue Commissioners) concluded that if a claimant had some suspicion that it did not have a legal liability to pay – but nonetheless made a payment, the claimant could not then seek to recover the payment if it subsequently turned out it had no legal liability to pay. In the Icesave scenario Iceland will be providing the guarantee and committing to a contractual obligation under the guarantee even though there have been discussions as to whether or not there is an underlying legal obligation upon Iceland to support TIF's obligation to make a compensation payment.

Amsterdam and London Depositors on their behalf. The terms of any such judgment (if in favour of the UK and Netherlands) could conceivably require repayment on terms which are more onerous to Iceland than those enshrined in the Icesave Loan Agreements – by, for example, requiring immediate payment of the full amounts due.[15]

In addition there is, of course, the risk that the promised additional financial support from the IMF and others may be delayed or not provided.

Ultimately, if (a) TIF and Iceland are shown to be legally obligated to reimburse the UK and the Netherlands and (b) Iceland does not enter into arrangements with the UK and the Netherlands (satisfactory to those two countries) to reimburse the payments which have been made, Iceland will have defaulted on its payment obligations to two major creditors. This will bring with it all the ramifications of a sovereign payment default in relation to Iceland's standing in the international community, its ability to raise finance in the future and the potential for such failure to pay to cause cross-defaults in bonds and other instruments under which Iceland has borrowed money.[16]

---

15 We consider there are two potential actions which could be brought by the UK and The Netherlands. First, there would be a potential action by FSCS and DNB against TIF. (We understand FSCS and DNB have taken an assignment of the benefit of the depositors claims against both Landsbanki and TIF.) Second, there could be a separate action against the Icelandic state for damages (assuming TIF is unable to pay) for failure to properly implement the requirements of the deposit guarantee directive as stipulated by the terms of the EEA Agreement. Such a claim would be a so called "Francovich" claim. (Our initial view is that it is likely that any such actions would need to be brought in the Icelandic courts – but we would need to undertake considerably more research to confirm our view on this.)

In 1997, the EFTA Court decided in an Advisory Opinion (the equivalent of a judgment) in E-9/97 Erla María Sveinbjörnsdóttir, that the principle of State liability for failure to implement a directive (a Francovich claim) also exists in EEA law.

Although strictly speaking the District Court of Reykjavik is not bound by an Advisory Opinion of the EFTA Court, we anticipate the District Court would in any such action, be likely to follow the ruling in E-9/97 and find that the potential for State liability exists under EEA law for failure to correctly implement an EU directive.

In summary the conditions for State liability are that:

(1) the Directive in question must be intended to confer rights on individuals, the content of which can be identified on the basis of the provisions of the Directive;

(2) the breach on the part of the State concerned must be sufficiently serious;

(3) there must be a causal link between the breach of the State's obligation and the loss and damage suffered by the injured parties.

Turning to the first condition, in this case the UK/Netherlands would need to establish that Directive 94/19/EC required implementation in Iceland in such a way that Iceland was unconditionally obliged to maintain a guarantee deposit scheme that provided the minimum guaranteed compensation of EUR 20,000.

The District Court might well make a request to the EFTA Court for an Advisory Opinion for clarification on this question. The District Court can make such a request under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

Second, the UK / Netherlands would need to show that the breach by Iceland was sufficiently serious to justify State liability. Again, this question might well be the subject of a request for an Advisory Opinion. There may be good arguments to indicate that the breach is sufficiently serious. However, a more detailed review of the case law would be required to express a more reasoned view on this point.

Third, as regards causality, we see little difficulty with satisfying this condition as it is clear that depositors were not compensated due to the failure of the scheme to operate properly.

16 Iceland would find itself in the position of Mexico in 1914 and in 1982, Argentina in 1956 and in 2002, Russia in 1998 and Turkey in 2001.

We hope that the advice given addresses the points raised by the questions. However, if you require any further clarification or you wish us to add to this opinion we will be happy to do so.

Yours faithfully

Ashurst LLP

ashurst

# TIF (Guarantee Fund)

## Review of UK & Dutch Loan Agreements

*(June 2009 as amended in October 2009)*

**TIF (GUARANTEE FUND) – REVIEW OF UK AND DUTCH LOAN AGREEMENTS**
*(June 2009 as amended in October 2009)*

## 1. INTRODUCTION

1.1 The Financial Services Compensation Scheme Limited ("**FSCS**") in the UK and the Dutch Central Bank ("**DNB**") compensated depositors with Landsbanki in London and Amsterdam respectively in respect of deposit monies owing to them by Landsbanki which Landsbanki was unable to repay. Those deposits were guaranteed by the Depositors' and Investors' Guarantee Fund of Iceland ("**TIF**") up to €20,887 per depositor.[1] The loans to be made available by The Commissioners of Her Majesty's Treasury ("**HMT**") under the UK loan and by the State of the Netherlands (the "**Netherlands**") under the Dutch loan will be used by TIF to reimburse those compensation payments made by FSCS and DNB respectively.

1.2 Both the UK loan and the Dutch loan are governed by English law.

1.3 Back in June 2009 we reviewed the agreements recording the loans as entered into on 5 June 2009 and produced the original version of this report. At that stage we had not been involved in the negotiation of the loan agreements. Althingi then passed its 28 August Act. This authorised Iceland's guarantee of the loans – but subject to important conditions which required amendments to be made to the original loan agreements. These amendments are recorded in amendment and acceptance agreements ("**AAAs**"). We assisted in the negotiation of the AAAs from mid September through to their signature on 19 October 2009.

1.4 In producing our original report we were asked to focus in particular on the following points (the "**Original Questions**"):

- English governing law and submission to jurisdiction;
- Waiver of sovereign immunity;
- General observations (highlighting any unusual features);
- Reimbursement provisions relating to the loans;
- Termination Events relating to the loans.

1.5 This is an updated version of our report which reflects the terms of the AAAs. Section 2 below provides an overview of the loan agreements (as amended by the AAAs). Section 3 records our summary responses to the Original Questions. We include diagrams in section 5 showing the basic structure of each loan arrangement. Sections 6 to 11 then cover each of the Original Questions in greater detail. The summaries should be read in conjunction with the more detailed analysis which follows.

1.6 **Our approach**:

(a) we present our observations and conclusions in summary form;

(b) as a result we do not go into the full technical detail which supports the conclusions and observations. This is particularly the case in relation to sections 6 (English Governing Law and Submission to Jurisdiction) and 7 (Waiver of Sovereign Immunity);

(c) we express views only as to English law.

---

[1] EEA Member States must fulfil the requirements of Directive 94/19/EC as incorporated into the agreement on the European Economic Area. Directive 94/19/EC sets out the obligation to ensure that depositors are repaid up to at least 20,000 EUR (in the case of Iceland, 20,887 EUR) for each depositor when deposits become unavailable, regardless of whether their deposits are held in a bank in an EEA state or at a branch of such a bank in another EEA state.

## 2. OVERVIEW OF LOAN AGREEMENTS

2.1 Amounts: The UK loan and the Dutch loan are made on substantially similar terms. The Dutch loan is for a fixed amount of €1,329,242,850. No further drawdowns may be made under the Dutch loan. The UK loan is for a maximum of £2,350,000,000. It contemplates an initial drawdown followed by further drawdowns after signing as mentioned at paragraph 2.8 below.

2.2 Iceland guarantee: Iceland guarantees outstandings under the loan agreement but the guarantee only comes into force as from 5 June 2016.

2.3 Interest: Both loans bear interest at 5.55% per annum. The interest compounds annually until 5 June 2016 and from then on is payable in cash quarterly.

2.4 Repayment: The loans must be repaid by 32 quarterly instalments which start on 5 June 2016 and end on 5 March 2024. However, to the extent that recoveries are made from Landsbanki's liquidation (and subject as mentioned in paragraph 2.11 below) they must be applied against the UK and Dutch loans pro rata. So recoveries will reduce the amount of the quarterly repayment instalments which apply after 5 June 2016. These repayment terms are subject to payment cap and extension provisions summarised in paragraphs 2.5 to 2.7 below.

2.5 Payments Cap: If the total of interest and principal repayments in any calendar year exceeds 2% (Netherlands) or 4% (UK)[2] of the cumulative growth in Icelandic GDP since 2008 (as determined from the IMF World Economic Outlook), then principal repayments are reduced[3] so that the cap is not exceeded. Interest is always payable in full.[4]

2.6 Extension option: Iceland has the option (at any time) to extend the repayment instalments by six years out to 2030. The repayment instalments are recalculated at the time of the extension so that they are equalised over the remaining years to 2030.

2.7 Automatic extension: If the extension option has not been exercised and the loan will not be repaid in full by 2024 (by virtue of operation of the Payments Cap) then there is an automatic extension to 2030. There are further five year automatic extensions from 2030 if the Payments Cap continues to prevent the loan being repaid in full by the relevant extended maturity date.

2.8 Further disbursements: The UK loan anticipates the UK may make further payments to London depositors in the period through to 30 March 2012. The FSCS[5] is authorised to make drawdowns on behalf of TIF to meet the future claims of London depositors in Icesave (up to £16,872.99 per depositor).

2.9 Assignment of depositor claims to TIF: Both DNB and FSCS will transfer (assign) the depositor claims against Landsbanki they hold (in respect of the €20,887 and £16,872.99 payments to depositors) to TIF upon the Loan Agreements entering into legal effect. Separate assignment instruments will implement those transfers.

2.10 Landsbanki standard distributions: As and when TIF receives a distribution from Landsbanki in respect of the depositor claims it acquires (or otherwise) it must apply those in paying down the UK Loan and the Netherlands Loan on a pro rata basis.

2.11 Preferential Landsbanki recoveries: If TIF receives preferential recoveries as a creditor of Landsbanki (i.e. if it has priority over other creditors in Landsbanki) it must make payments to the UK and Netherlands to equalise the position in respect of the other claims Netherlands and UK retain against Landsbanki.[6] However, TIF is not obliged to equalise where the preferential recoveries result from (a) an Icelandic court deciding TIF has priority and such decision is not in conflict with an opinion obtained from the EFTA court or (b) the Winding-up Board of Landsbanki decides TIF has priority and such decision is not challenged by any depositor or creditor in an Icelandic court (provided the failure

---

2 1% for Netherlands and 2% for the UK in 2016 ( as there are only two instalment dates in 2016).

3 Potentially to zero but not negative.

4 Even if this results in the Payments Cap being exceeded because the total interest exceeds the Payments Cap.

5 Financial Services Compensation Scheme.

6 I.e. the elements of the claims which Netherlands and UK have paid out above €20,887 and £16,872.99.

to challenge is not the result of a change in Icelandic law after 5 June 2009 which makes such a challenge more difficult or impossible).

2.12 Voluntary prepayments: TIF may make voluntary prepayments of the Netherlands and UK Loans (on a pro rata basis) subject to a minimum prepayment amount of £1m (UK) or €1m (Netherlands).

2.13 Treatment of Landsbanki creditors: Iceland agrees not to take any action which results in creditors of Landsbanki being treated in a manner contrary to generally accepted international or European principles of treatment of the creditors in an international winding up.

## 3. SUMMARY RESPONSES TO JUNE QUESTIONS

3.1 Governing law and jurisdiction: Both loans are governed by English law and the English courts are given jurisdiction to hear any disputes. This is common for international loan agreements and it is common for lenders to be able to insist on their chosen law and courts of jurisdiction. We would expect the choice of law and jurisdiction to be upheld by the English courts.

3.2 Sovereign immunity: Iceland waives its rights to sovereign immunity. As a result the UK and Dutch lenders will be entitled to obtain court judgments against Iceland if it fails to pay on its guarantee and also obtain court orders against its assets. The UK and Dutch lenders will not be entitled to obtain judgment against the assets of the Icelandic Central Bank (Sedlabanki) unless Sedlabanki independently waives its rights to immunity in respect of those assets. In addition, we have reviewed an email sent by Gary Roberts, Head of Financial Services Statutory at the UK Treasury, (and now reflected by the terms of the modified loan agreements themselves) confirming (on behalf of both Dutch and UK governments) that the waiver of sovereign immunity recorded in the loan agreements is not intended to "*extend to a waiver of the various forms of diplomatic immunity provided by the Vienna Convention of 1961. Also that [HM Treasury] will not seek to issue process or levy execution in circumstances where that would infringe upon the immunities granted to Iceland by the Vienna Convention.*"[7]

3.3 Loan agreement terms: The terms of the loan agreements are fairly typical of those we would expect to see in an international loan agreement – although tailored for the rather unusual circumstances in which the loans are being made available to TIF. We summarise some points of particular interest in section 8. The main items relate to:

- the springing nature of the guarantee and the delay in operation of the guarantee;
- the requirement to treat creditors of Landsbanki in a way which accords with accepted international or European principles of treatment of creditors in an international winding up;[8]
- the requirement for Iceland or TIF to give the UK and Dutch lenders at least equivalent treatment to any other lender which finances claims of depositors of an Icelandic bank;[9]
- the requirement to make further payments to depositors if payments above €20,887 are made to any Landsbanki depositor by way of compensation (see further paragraph 3.6 below);[10]

---

7 The email further records that this is also the Dutch position. The UK is a signatory to the Vienna Convention and certain of the provisions of the Vienna Convention have the force of law in the UK by virtue of the Diplomatic Privileges Act 1964. These provisions include article 22 of the Vienna Convention which records that the "*Premises of the mission [i.e. embassy], their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.*" The UK government has, however, pursuant to section 3 of the Diplomatic Privileges Act 1964 reserved the right to withdraw such privileges if the home state of the relevant embassy (here Iceland) does not afford the same privileges and immunities to the UK embassy.

8 There is some vagueness in this requirement because it is not easy to say with certainty what constitutes "*accepted international or European principles of treatment of creditors in an International winding up.*" However, as we understand Iceland intends to act in conformity with international standards to ensure fair treatment of creditors we do not anticipate that this provision (though unusual) is likely to cause particular difficulties.

9 These types of "*equal treatment*" provisions, whilst relatively unusual in standard loan agreements, are more common in loan agreements entered into by borrowers who find themselves in difficult financial circumstances. In fact these provisions can favour a borrower by helping it resist demands from future lenders for better terms than those negotiated by the original lenders.

- whilst the Netherlands waive any further claims against Iceland and TIF in respect of the making of compensation payments relating to Landsbanki, DNB (which actually made the compensation payments) does not. However, we understand that the DNB will provide such a waiver in a separate assignment agreement the signature of which is a condition precedent to the Dutch loan agreement coming into force.

3.4 Reimbursement provisions: The loans are repayable in instalments as summarised in paragraphs 2.3 to 2.7.

3.5 Termination Events: Whilst most of the Termination Events are fairly typical for an international loan there are a few which warrant closer attention (see section 11). The loan is potentially immediately repayable if any of these events occur and they include:

- any payment by TIF or Iceland under the loan agreements[11] being set aside invalidated or reduced;
- TIF or Iceland failing to comply with the requirements of Directive 94/19/EC in respect of any Landsbanki depositor in any way;
- TIF being unable to pay its debts as they fall due;
- if TIF is dissolved or ceases to be the sole deposit guarantee scheme in respect of Landsbanki depositors officially recognised in Iceland.

3.6 Further payments to depositors: The loan agreements record that if TIF makes an "Excess Payment" to any Landsbanki depositor which is not a London or Amsterdam depositor then TIF must also pay a corresponding Excess Payment to each London and Amsterdam Landsbanki depositor. For this purpose an Excess Payment is a payment in excess of €20,887. The intent of these provisions in the loan agreements is to ensure fair treatment amongst the depositors with Landsbanki such that if additional payments beyond the minimum legal compensation payments are made to non-London/Amsterdam depositors then a corresponding top up payment is made to London/Amsterdam depositors.[12]

4. **AAA**

4.1 The AAAs record modifications to the original June 2009 loan agreements. The modifications reflect certain conditions to the giving of Iceland's guarantee as specified in the 28 August authorising act passed by Althingi.

4.2 The main modifications are as follows:

(a) Payments cap: The inclusion of the payments cap summarised at paragraph 2.4 above;

(b) Extensions: The extension options by which the repayment instalments may be extended beyond 2024 as summarised in paragraphs 2.5 and 2.6 above;

(c) Preferential Recoveries: The right of TIF to receive preferential recoveries in the winding up of Landsbanki in certain circumstances – as summarised in paragraph 2.11 above;

(d) Confirmations: the inclusion of certain confirmations namely:

- the negotiations of the AAAs being undertaken in accordance with the agreed guidelines of 14 November 2008 (the so-called Brussels Guidelines);
- confirmation that the waiving of sovereign immunity under the loan agreements does not apply to assets entitled to immunity under the Vienna Convention, assets in

---

10 We understand this is a further provision intended to ensure equal treatment across all creditor groups, a principle that we understand is fully endorsed by the Icelandic government.

11 Or, in the case of the UK loan, under the Settlement Agreement.

12 The obligation to make Excess Payments also applies if any deposit guarantee fund (other than TIF) which is officially recognised in Iceland makes such an Excess Payment or if any such fund (or TIF) has sufficient funds available to it to make any such Excess Payment.

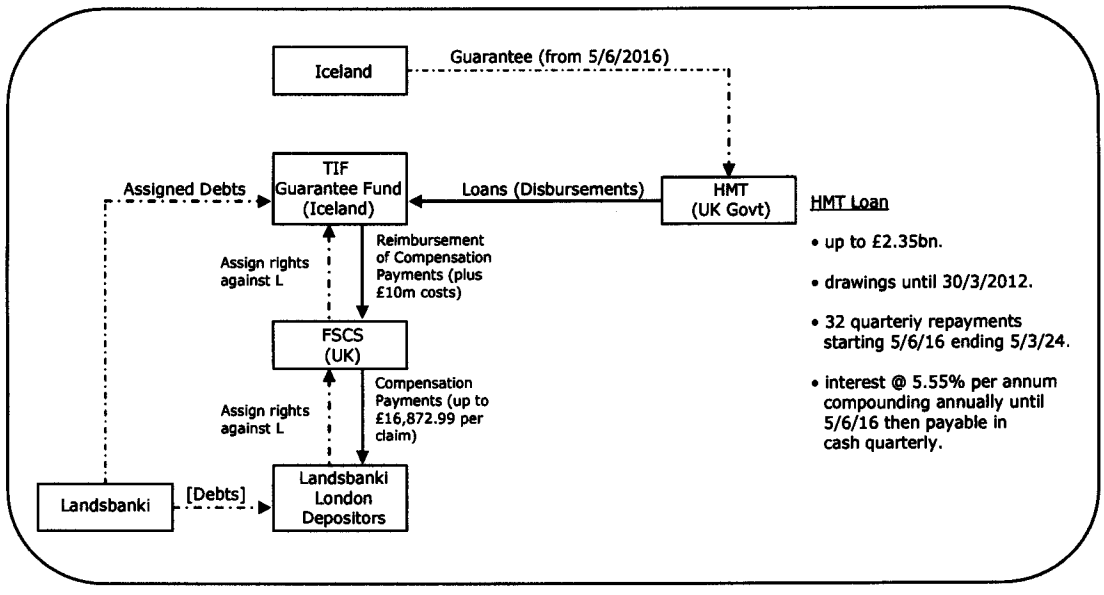
Iceland that are necessary for the proper functioning of Iceland as a sovereign power nor to assets of the Central Bank of Iceland;

- confirmation that nothing in the loan agreements is intended to or has the effect of causing Iceland to lose control of its natural resources or its rights to decide on their utilisation and form of ownership.

## 5. SCHEMATIC OVERVIEWS

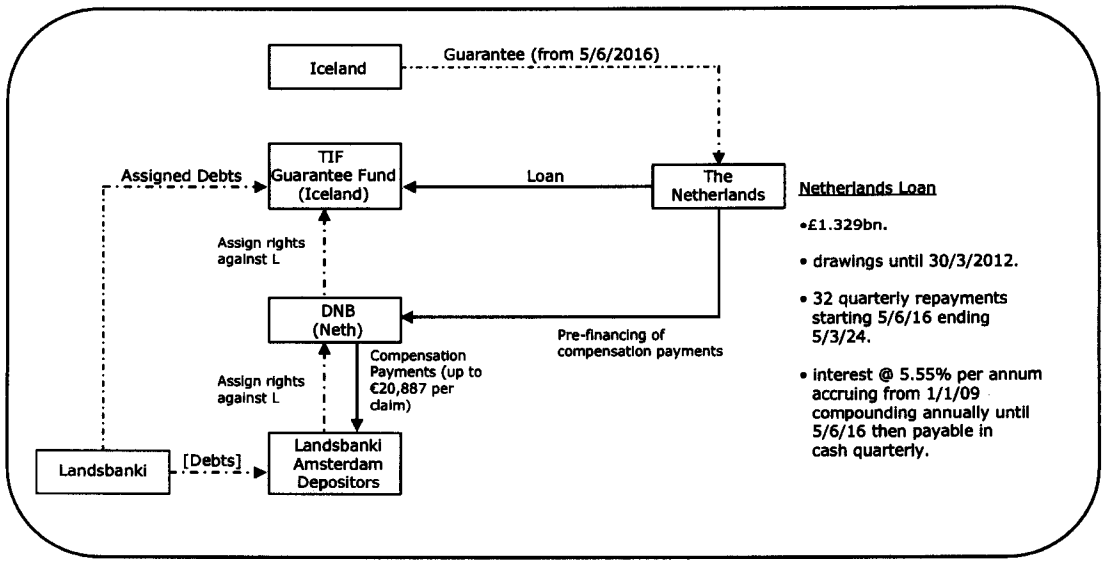
5.1 Set out in box 1 below is a diagrammatic overview of the UK loan arrangements.

Box 1




5.2 Set out in box 2 below is a diagrammatic overview of the Dutch ioan arrangements.

Box 2




## 6. ENGLISH GOVERNING LAW AND SUBMISSION TO JURISDICTION

6.1 The UK and the Dutch ioan agreements both record (a) that they are governed by English law and (b) that the parties submit to the jurisdiction of the English courts for the purpose of resolving any claim

or dispute arising out of the loan agreements.[13] Each lender nonetheless reserves the right to take legal proceedings relating to any dispute in any other courts which have jurisdiction.

6.2 The text of the governing law jurisdiction clause in the UK loan[14] is as follows:

*"This Agreement and any matter, claim or dispute arising out of or in connection with it, whether contractual or non-contractual, shall be governed by, and construed in accordance with, the laws of England.*

*Any matter, claim or dispute arising out of or in connection with this Agreement, whether contractual or non-contractual, including a matter, claim or dispute regarding the existence, vaiidity or termination of this Agreement (a "**Dispute**"), shall be subject to the exclusive jurisdiction of the English courts.*

*The Parties agree that the courts of England are the most appropriate and convenient courts to settle Disputes and accordingly no Party will argue to the contrary.*

*This paragraph ..... is for the benefit of the Lender oniy. As a result, the Lender shall not be prevented from taking proceedings relating to a Dispute in any other courts with jurisdiction. To the extent allowed by law, the Lender may take concurrent proceedings in any number of jurisdictions."*

6.3 It is common for international loan agreements to adopt English law (and include submission to the jurisdiction of English courts) even if the parties to the loan agreement are not themselves English. In our experience it is standard practice for the lender to select the law which will govern the loan agreement and the jurisdiction of the courts who will determine any disputes relating to the loan agreement.

6.4 We would expect the English courts to give effect to the choice of English law and to the submission to the jurisdiction of the English courts.[15] This means that the legal rights and remedies of the parties will be determined in accordance with English law[16] and that any disputes relating to the loans or the loan agreements will be iitigated before the English courts.[17]

---

13 See clause 17 of the UK loan and clause 16 of the Dutch loan.

14 The text of the corresponding clause in the Dutch ioan is different but has essentially the same effect.

15 In theory, the English courts could refuse to recognise the choice of English law as the governing law of the Netherlands loan if they conclude it is contrary to public policy for the Netherlands ioan to be governed by English law (see article 16 of the Rome Convention). However, we consider it unlikely that an English court would find anything in the arrangements relating to the Netherlands loan to suggest that such a public policy reason for rejecting the choice of law would be upheld. Also under article 3.3 of the Rome Convention "*the fact that the parties have chosen a foreign law...shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of the rules of the law of that country which cannot be derogated from by contract.*" This means that if the choice of law was being selected to avoid certain mandatory rules of (say) Netherlands law limiting the rate of interest which could be charged on this type of loan then again the choice of English law may not be upheld.

16 This is because the parties have expressly agreed this in the loan agreements and because the UK has implemented the Rome Convention (through the Contracts (Applicable Law) Act 1990) which in turn confirms that if parties contractually agree their choice of law the courts will give effect to this choice.

17 Iceland, the UK and the Netherlands are all parties to the Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters. Article 17 of the Lugano Convention says that if the parties to a contract (one or more of whom being domiciled in a contracting state – as here) have agreed that a court in a contracting state (here England) is to have jurisdiction to settle any disputes then the chosen court has exclusive jurisdiction. Article 17 also says that if the agreement conferring jurisdiction is concluded for the benefit of one of the parties (here the lender) then that party (the lender) retains the right to bring proceedings in any other court which has jurisdiction by virtue of the Lugano Convention.

6.5 Each lender reserves the right to iitigate any dispute in a jurisdiction other than England if it so chooses. We consider that the lenders will be entitled to do this (as a matter of English law) but will have to demonstrate that the alternative court in the alternative jurisdiction is an appropriate forum to litigate the relevant dispute and that the court in that country has jurisdiction.[18]

6.6 Each lender also reserves the right to bring concurrent proceedings in more than one court - to the extent permitted by law. It is rare for courts to entertain concurrent proceedings so we consider this provision is unlikely to apply in most circumstances.

## 7. WAIVER OF SOVEREIGN IMMUNITY

7.1 The general rule under English law is that a State (such as Iceland) is not subject to the jurisdiction of the English courts[19] and no proceedings to enforce any judgment may be brought against the assets of the relevant State.[20]

7.2 This immunity extends to include:

- the sovereign or other head of State in his or her public capacity;
- the government of the State;
- any department of that government; and
- any separate legal entity connected with the State but only if the proceedings relate to an act done by the legal entity in the exercise of sovereign authority and the State itself would be immune.

7.3 A State (or legal entity enjoying State immunity) can, however, contractually agree to waive the above immunity it would otherwise have.[21]

7.4 Each loan agreement includes a contractual waiver of immunity in the following terms (emphasis added by us):

*"Each of the Guarantee Fund and Iceland consents generally to the issue of any process in connection with any Dispute and to the giving of any type of relief or remedy against it, including the making, enforcement or execution against any of its property or assets (regardless of its or their use or intended use) of any order or judgment. If either the Guarantee Fund or Iceland or any of their respective property or assets is or are entitled in any jurisdiction to any immunity from service of process or of other documents relating to any Dispute, or to any immunity from jurisdiction, suit, judgment, execution, attachment (whether before judgment, in aid of execution or otherwise) or other legal process, this is irrevocably waived to the fullest extent permitted by the law of that jurisdiction. Each of the Guarantee Fund and Iceland also irrevocably agree not to claim any such immunity for themselves or their respective property or assets."*

7.5 Both Iceland and TIF therefore contractually waive any immunity they may have. This means that if HMT or DNB obtain a judgment against Iceland or TIF under either loan agreement they will be entitled to enforce that judgment against Iceland and/or TIF (as the case may be) and (subject to obtaining an appropriate court order) seek to enforce that judgment against the property or assets of Iceland and/or TIF (as the case may be). An important point to note is that just because HMT or DNB obtain a monetary judgment against Iceland or TIF they cannot simply take any assets of Iceland or TIF to satisfy that monetary judgment.[22] Instead they would have to take the additional

---

18 To bring proceedings in an alternative jurisdiction the lenders would need to otherwise establish that the relevant courts in the relevant country have jurisdiction in accordance with the rules laid down by the Jurisdiction Regulation or the Lugano Convention (as the case may be). In contractual matters this is the place of performance of the contractual obligation in question (so it is likely to be Iceland or the Netherlands in the case of the Dutch loan agreement or Iceland or the UK in the case of the UK loan agreement).

19 See section 1 State Immunity Act 1978.

20 See section 13(2) State Immunity Act 1978.

21 See section 2(1) and 13(3) State Immunity Act 1978.

22 Other than by exercising rights to set off debts they owe Iceland or TIF against the money Iceland or TIF (as the case may be ) owes to them under the loans.

step of obtaining a court judgment requiring that assets be sold or that the assets be attached in their favour and the proceeds applied in paying the judgment debt.

7.6 We understand that Sedlabanki is constituted as a separate legal entity. The UK's State Immunity Act has a special regime for a State's central bank and specifically provides that the assets of such a central bank " *shall not be subject to any process for the enforcement of a judgment ..... or an action in rem for its arrest, detention or sale*".[23] As such property and assets of Sedlabanki will benefit from state immunity from enforcement proceedings, detention or sale unless Sedlabanki itself agrees to waive its rights to State immunity.[24]

7.7 The guarantee given by Iceland of payments due under the UK and Dutch loan agreements does not come into force until 5 June 2016. See clause 6.1 in each of the UK loan agreement and the Dutch loan agreement. Iceland cannot, therefore, be liable for monies owing under the loan agreements until that date. The lenders could not, therefore, obtain any judgment against Iceland for failure to pay and it is therefore difficult to see how either lender could take any action against any assets of Iceland prior to that date.

## 8. GENERAL OBSERVATIONS ON THE UK LOAN AGREEMENT

8.1 The general form of the loan agreement is fairly typical of a loan agreement governed by English law and contains protections for lenders typically seen in international loan agreements. The exceptions to this are those matters which flow from the unusual circumstances which give rise to the loan and include:

- Drawdowns: The provisions relating to how the loans are drawn down (with FSCS being the sole person authorised to request and receive drawdowns under the loan agreement) (TIF itself cannot control making the drawdowns – it has delegated this right to FSCS)). We understand this provision has been included for practical reasons given that FSCS has significantly greater administration resources than TIF and can therefore handle the compensation and drawdown procedures on behalf of TIF.[25]

- Pro rata prepayments: The requirement that (a) recoveries received by TIF in respect of depositor claims from the insolvency of Landsbanki and (b) voluntary prepayments be applied pro rata to amounts outstanding under the UK loan and to amounts outstanding under the Dutch loan agreement;[26]

- Springing guarantee: The fact that the Iceland guarantee of outstandings under the loan agreement does not come into force until 5 June 2016;[27]

- Landsbanki creditors: The requirement that Iceland will not take action which will result in creditors of Landsbanki being treated in a manner "*contrary to generally accepted international or European principles of treatment of the creditors in an international winding up*;"[28]

- Favoured financier treatment: The requirement in clause 7.1 that if Iceland or TIF enters into a similar agreement with another financier (relating to financing claims of depositors of an

---

23 See section 14(4) State Immunity Act 1978.

24 This position was confirmed in AIC Limited v The Federal Government of Nigeria (2003) EWHC 1357.

25 See clause 2.3.2 of the UK loan agreement.

26 See clauses 4.2 and 4.4 of the UK loan agreement. This is consistent with the philosophy that there will be equal treatment in respect of recoveries and repayments as between HMT (as UK lender) and the Netherlands (as Dutch lender). It is also consistent with the repayment instalments (and the guarantees) commencing after seven years thereby allowing any reimbursements received out of the Landsbanki liquidation proceedings prior to June 2016 to be applied in reducing the loans (pro rata) and thereby reducing the repayment instalments.

27 See clause 6.1 of the UK loan agreement.

28 See clause 6.9 of the UK loan agreement. There is some vagueness in this requirement because it is not easy to say with certainty what constitute "*accepted international or European principles of treatment of creditors in an international winding up.*" However, as we understand Iceland intends to act in conformity with international standards to ensure fair treatment of creditors we do not anticipate this provision (though unusual) is likely to cause particular difficulties.

Icelandic bank) and that financier enjoys a more favourable treatment (or benefits from security) then a similar favourable treatment (or security) will be given to HMT;

- Excess compensation payments: The requirement that if any compensation fund (whether TIF or any other deposit guarantee scheme recognised by Iceland) makes payments in excess of €20,887 to any Landsbanki depositor then an amount equal to that excess must also be paid to Landsbanki London depositors (or if excess payments have been made by FSCS TIF must pay the equivalent excess to FSCS);[29]

- Partial payments: Partial payments are applied first against principal and then against unpaid interest. The convention is that partial payments are paid first to interest and then to principal (though this formulation in the UK loan agreement is beneficial to TIF/Iceland);

- Change in circumstances: If the IMF concludes that there has been a significant deterioration in the sustainability of Iceland's debt relative to its assessment as at 19 November 2008 then the lender acknowledges it will on request meet with Iceland to consider how the loan agreement should be amended to reflect the change in circumstances.[30]

## 9. GENERAL OBSERVATIONS ON THE DUTCH LOAN AGREEMENT

9.1 The Dutch loan agreement is in substantially the same terms as the UK loan agreement. Accordingly, the comments made in 8.1 above apply equally to the Dutch loan agreement.

9.2 The main differences in respect of the Dutch loan appear to be as follows:

- Fixed amount: The loan is fixed at €1,329,242,850. As such it is a final settlement amount of the sums owing by TIF to the Netherlands and DNB in respect of the compensation payments made to Amsterdam depositors with Landsbanki;[31]

- Interest accrual: Interest on the loan accrues from 1 January 2009 (as opposed from the date of disbursement in the UK loan);

- No agency drawdowns: Because there are no further drawdowns there is no mechanism for DNB to make drawdowns on behalf of TIF (as applies in relation to FSCS under the UK loan).

## 10. REIMBURSEMENT PROVISIONS

10.1 The UK loan is available for drawing until 30 March 2012.[32] The maximum amount which can be drawn is £2.35 billion. The Dutch loan is deemed outstanding in the sum of €1,329,242,850 and no further drawings can be made.

10.2 Interest is payable at 5.5% per annum (fixed) and compounds annually until 5 June 2016. The total principal amount of the loan then outstanding then pays interest (again at 5.5% per annum) on a cash pay basis with interest to be paid in cash quarterly.

10.3 Each loan outstanding as at 5 June 2016 is repayable in 32 equal quarterly instalments – starting on 5 June 2016 and ending on 5 March 2024.

10.4 The repayment instalments are subject to the payment cap summarised at section 2.4 above and may be adjusted and extended in accordance with the extension options summarised at sections 2.5 and 2.6 above.

10.5 Iceland's guarantee of each loan does not commence until 5 June 2016. Icelandic cannot, therefore, be called upon to repay the loan (or any amount in respect of the loan) by virtue of its guarantee

---

29 See clause 7.2 (Equal Treatment) of the UK loan agreement. These types of "*equal treatment*" provisions, whilst relatively unusual in standard loan agreements, are more common in loan agreements entered into by borrowers who find themselves in difficult financial circumstances. In fact these provisions can favour a borrower by helping it resist demands from future lenders for better terms than those negotiated by the original lenders.

30 See clause 16 (Change in Circumstances) of the UK loan agreement.

31 See clause 2.1 of the Dutch loan agreement.

32 Unless terminated earlier because of a termination event.

before 5 June 2016. Such 'springing guarantees' are unusual but are occasionally encountered on international transactions. Usually the guarantee comes into force after a much shorter period than the seven years which apply in relation to the guarantees given by Iceland here. However, we cannot think of any reason under English law why such long dated "springing guarantees" should not be valid.

## 11. TERMINATION EVENTS

11.1 Termination Events: If a Termination Event occurs then HMT or the Netherlands (as the case may be) can;

(a) cancel the facility (so that no further drawings can be made); and/or

(b) declare all or part of the loan and all other amounts due owing under the loan agreement are immediately due and payable.

11.2 The Termination Events are fairly typical of the types of events which would trigger cancellation and/or repayment of an international loan. However, there are a few Termination Events on which we would comment in particular.

11.3 Avoidance of payments: Clause 12.1.3 stipulates a Termination Event if "*any payment previously made by the Guarantee Fund or Iceland in respect of amounts due under the Finance Documents is avoided, set aside, invalidated or reduced.*" So if for any reason an amount paid to the relevant lender when due is for some reason set aside or reduced or similar then the entirety of the loan could become repayable.

11.4 Compliance with laws: A Termination Event occurs if TIF or Iceland "*fails to comply with the requirements of the Directive 94/19/EC in respect of any Landsbanki Depositor in any material way.*" In respect of the UK loan, as it is FSCS alone which has the right to drawdown monies under the loan agreement, TIF is dependent upon FSCS making those drawdowns to ensure TIF complies with the requirements of the Directive.

11.5 Inability to pay debts: It is a Termination Event if "*the Guarantee Fund is unable (taking into account any support available to it) or admits its inability to pay any of its debts as they fall due....*"

11.6 Compensation fund: It is also a Termination Event if TIF "*is dissolved or ceases to be...the sole deposit-guarantee scheme in respect of the Landsbanki Depositors officially recognised in Iceland for the purposes of Directive 94/19/EC*".[33]

## 12. DOCUMENTS EXAMINED

12.1 In preparing the original version of this paper in June 2009 we examined PDF copies of the following documents:

- The UK loan dated 5 June 2009;
- The Dutch loan dated 5 June 2009;
- A settlement agreement dated 5 June 2009 relating to the UK loan.

12.2 In preparing the updated version of this paper in December 2009 we examined PDF copies of the following documents:

- The UK AAA dated 19 October 2009;
- The Dutch AAA dated 19 October 2009; and

---

[33] We note that clause 7.2 (Equal Treatment) of each loan agreement contemplates the possibility of another deposit guarantee fund being introduced in Iceland for the purpose of Directive 94/19/EC and that if such guarantee fund makes additional payments to Landsbanki depositors in excess of €20,887 per claim then additional corresponding payments are made under the UK loan and the Netherlands loan. We would also note that clause 7.2 on the one hand says additional payments must be made whilst the Termination Event gives the UK and Dutch lenders the opportunity to terminate the loans and demand repayment in the circumstances which give rise to an additional payment under clause 7.2.

- The UK Settlement Amendment Agreement dated 19 October 2009.

12.3 We have not examined any other documents for the purpose of preparing this paper.

**Ashurst LLP**
**25 June 2009**
**Updated: December 2009**