

**CITY OF LONDON LAW SOCIETY, LAND LAW COMMITTEE'S INSURANCE PROVISIONS
FOR A RACK RENT LEASE OF COMMERCIAL PROPERTY – MARCH 2014**

**Schedule 1
Insurance provisions¹**

1 INSURED RISKS AND OTHER DEFINITIONS

- 1.1 "**Insured Risks**" means the risks and other contingencies against which the Premises [and the Building] are required to be, or which may be, insured under this Lease, but subject to any exclusions, limitations and conditions in the policy of insurance and "**Insured Risk**" has a corresponding meaning.
- 1.2 Insured Risks include fire, lightning, explosion, storm, tempest, flood, bursting and overflowing of water tanks, apparatus or pipes, earthquake, aircraft (but not hostile aircraft) and devices dropped from aircraft, riot and civil commotion, malicious damage, acts of terrorism, subsidence, heave, landslip and such other risks as the Landlord may consider it prudent to insure.²
- 1.3 If a risk or contingency itemised, or otherwise included, as an Insured Risk, can no longer be insured in the London insurance market, [or in the Landlord's reasonable opinion can no longer be insured in the London insurance market at reasonable commercial rates or on reasonable commercial conditions] the risk or contingency is to cease to be treated as an Insured Risk from the time that cover is withdrawn until cover again becomes available in the London insurance market [, or in the Landlord's reasonable opinion at reasonable commercial rates and on reasonable commercial conditions in the London insurance market].
- 1.4 ["**Uninsured Risk**" has the meaning in paragraphs 8.1 and 8.2 and "**Uninsured Risks**" has a corresponding meaning.]
- 1.5 In this Schedule 1 (*Insurance provisions*):³
- (a) references to [the Building and] the Premises include alterations, additions and improvements only if made by or at the expense of the Landlord or which the Landlord and the Tenant expressly agree to treat as landlord's fixtures and fittings following notification by the Tenant in accordance with paragraph 3.5 [, but does not include tenant's fixtures and fittings];
 - (b) references to the act or default of the Tenant include the act or default of any person deriving title under or through the Tenant or its or their respective employees, agents and visitors [***exclude if covered by general interpretation provisions in lease***];
 - (c) references to "**vitiating by the Tenant**" include any event occurring by the act or default of the Tenant as a result of which the insurance monies otherwise payable under the policy of insurance of the Landlord become

¹ Ensure expressions used in these provisions are consistent with the lease in which they are used.

² The tenant should be aware that damage by risks not included in the "Insured Risks" definition may be the tenant's responsibility under the tenant's repair obligation.

³ It is assumed that "Building" and "Premises" will each have been defined elsewhere in the lease to include the whole or any part (unless the context otherwise requires).

wholly or partially irrecoverable, or as a result of which such policy is vitiated, and "**vitiate**" and "**vitiated**" have corresponding meanings;

- (d) references to damage to or destruction of the Premises [and the Building] include damage to or destruction of or prevention of the use of the essential means of access to and egress from the Premises in the ownership of the Landlord; [and
- (e) "**due proportion**" means such proportion of the relevant amount as may fairly [and reasonably] be attributed to the Premises by the Landlord or the Landlord's surveyor, and the apportionment may take into account:
 - (i) the net internal area (as defined in the Measuring Code [*insert definition if not defined in general definitions clause in lease*]) of the Premises relative to the aggregate net internal areas in the Building;
 - (ii) the different uses to which the various parts of the Building are put and the degree of special risk associated with those uses;
 - (iii) an increase in the insurance premiums or expense of renewal resulting from any act or default of the Tenant;
 - (iv) risks and contingencies that apply only to the Tenant;
 - (v) the cost of complying with the requirements of the insurer; and
 - (vi) such other matters as may properly affect the apportionment of the relevant amount between the various tenants and occupiers of the Building,

and the apportionment may attribute the whole of the relevant amount, or an increase in the relevant amount, to the Tenant, and the decision of the Landlord or the Landlord's surveyor in making apportionments (except in the case of manifest error) is to be conclusive.^{4]}

2 **TENANT'S LIABILITY FOR INSURANCE PREMIUMS**

- 2.1 The Tenant shall pay to the Landlord on demand [the due proportion of] the insurance premiums incurred by the Landlord.⁵
- 2.2 Insurance premiums are to include all monies expended, or required to be expended by the Landlord in effecting and maintaining cover against:
 - (a) Insured Risks;
 - (b) loss of the rent [service charge and insurance premiums] reserved by this Lease [(making due allowance for increases provided for in Schedule [] (*Rent reviews*))] for [five]⁶ years;

⁴ If "due proportion" is used elsewhere in the lease such as the service charge provisions, it will be sensible to use different expressions to describe the respective proportions so as to avoid any confusion.

⁵ Where a tenant is the sole tenant in a building, the lease may allow the tenant to request extra insurance cover at the tenant's cost.

⁶ A fixed period for loss of rent insurance is standard practice and gives certainty to the tenant as to the premium cost it has to pay and as to, when, and if, it may exercise a right to terminate the lease if reinstatement has not been completed at the expiration of the insured period. The landlord would be well-advised to consider insuring at its own cost an

- (c) such professional fees as may be incurred in connection with rebuilding or reinstatement of the [Premises] [Building];
- (d) the costs of demolition, shoring up, and site clearance works;
- (e) employers', third party and public liability risks;
- (f) value added tax liability on such items; and
- (g) insurance premium tax.

2.3 The insurance cover may take into account the Landlord's reasonable estimation of the effects of inflation and escalation of costs, fees and rental values.

2.4 The Tenant shall pay to the Landlord on demand [the due proportion of] the professional fees for insurance valuations, carried out at reasonable intervals, but not more frequently than once in every [three]⁷ years, of the full cost of reinstatement and rebuilding of the [Premises] [Building].

2.5 The Tenant shall pay to the Landlord on demand [the due proportion of] other costs reasonably incurred by the Landlord with respect to the insurance of the [Premises] [Building], where such costs are not otherwise provided for in this Schedule [, nor recoverable under the service charge provisions of this Lease].

2.6 The Landlord shall give credit for any discount on the insurance premiums.⁸

2.7 The Landlord may retain any commission offered to it by its insurer for its exclusive benefit [, but shall disclose the amount of such commission to the Tenant on request].⁹

3 **TENANT'S OBLIGATIONS IN RELATION TO INSURANCE COVER**

3.1 The Tenant shall ensure that the insurance effected by the Landlord is not vitiated by the Tenant and that insurance premiums are not increased by the act or default of the Tenant.

3.2 The Tenant shall adopt such precautions against Insured Risks as the Landlord (acting reasonably) or its insurers consider appropriate and comply with the requirements [and reasonable recommendations] of the Landlord's insurers in all other respects.

3.3 If the insurance of the Landlord is vitiated by the Tenant, the Tenant shall pay to the Landlord on demand a sum equal to the amount of the insurance monies which has in consequence become irrecoverable.

extended period, in the case of the possible exercise of tenant's termination rights in the meantime, until the premises may reasonably be expected again to become rent-producing. This period for loss of rent insurance may vary depending on the use; for example, a shorter period may be required for industrial premises.

⁷ The period may need to be more frequent in periods of high inflation.

⁸ Although some leases still enable the landlord to retain any discount on the insurance premiums, these provisions seek to achieve a more balanced position between the landlord and the tenant.

⁹ The landlord's retention of commission remains somewhat controversial, but paragraph 2.7 has been included as this is still often found and expected by landlords in leases of commercial property. The commission does not relate to the premium, but to the level of business between the landlord and the insurer. Some landlords may not wish to disclose to the tenant the amount of any commission.

- 3.4 The Tenant shall not insure the Premises for any of the Insured Risks in such a manner as would permit the insurer of the Landlord to average the proceeds of insurance or cancel insurance cover.
- 3.5 The Tenant shall notify the Landlord of the full reinstatement cost of any fixtures and fittings installed at the Premises at the cost of the Tenant which become landlord's fixtures and fittings.
- 3.6 The Tenant shall notify the Landlord as soon as possible of the occurrence of damage to or destruction of the Premises by any of the Insured Risks.
- 3.7 If the [Building] [Premises] [is] [are] damaged or destroyed by Insured Risks, the Tenant shall pay to the Landlord on demand [the due proportion of] the amount of any uninsured excess to which the insurance cover of the Landlord is subject.
- 3.8 The obligations of the Tenant to repair and to decorate, and to yield up in repair and decorated, the Premises do not apply to damage or destruction caused by Insured Risks, unless and to the extent that the insurance effected by the Landlord is vitiated by the Tenant.¹⁰

4 **LANDLORD'S OBLIGATION TO INSURE AND REINSTATE**

- 4.1 The Landlord shall keep insured with a substantial insurer of good repute against Insured Risks the [Premises] [Building] for the full cost of reinstatement and other items referred to in paragraph 2.2, subject to such uninsured excess as the insurer may apply that is customary or usual in the London insurance market having regard to the nature and use of the [Premises] [Building].¹¹
- 4.2 Following damage to or destruction of the [Building] [Premises] by an Insured Risk, the Landlord shall diligently apply, or procure the application of, the proceeds of the insurance covering reinstatement and rebuilding costs for those purposes, and shall make good any deficiency in the proceeds of the insurance out of its own resources.
- 4.3 The obligations of the Landlord in paragraph 4.2 do not apply:
- (a) if the Landlord is unable, after using its reasonable endeavours to do so, to obtain any requisite planning permission or other consents for the reinstatement or rebuilding of the [Building] [Premises] or of a building of similar size, character and amenity;
 - (b) if the Landlord's insurance is vitiated by the Tenant unless and until the Tenant has paid all sums due from it under paragraph 3.3;
 - (c) if this Lease is, or is to be, determined under paragraph 7.1; or
 - (d) unless the Tenant has complied with paragraph 3.7.
- 4.4 Where the [Premises] [Building] [are] [is] substantially damaged or destroyed, the Tenant may not object to the reinstatement or rebuilding of the [Premises] [Building] in a form which is not identical to the [Premises] [Building] immediately before the damage or destruction occurred, if the [Premises] [Building] as reinstated or rebuilt [are] [is] of at least an equivalent standard and area, and afford[s] amenities which

¹⁰ Paragraph 3.8 may be (and is often) dealt with in the tenant's repair/decoration/yield up obligation, so 3.8 may not need to be included.

¹¹ If the landlord wishes to agree a higher uninsured excess than is usual, the drafting will need amendment.

are at least equivalent to those enjoyed by the Tenant before the damage or destruction.

4.5 The Landlord shall use reasonable endeavours to:

(a) ensure that any reinstatement and rebuilding works are carried out in a good and workmanlike manner, with good quality materials and in accordance with current good building practice [, having due regard to the reasonable requirements of the Tenant]¹²; [and

[(b) procure from the building contractor and the professional team engaged in the design, reinstatement or rebuilding, collateral warranties or equivalent protection under the Contracts (Rights of Third Parties) Act 1999 in a form which reflects current market practice in favour of the Tenant in relation to the design, reinstatement or rebuilding works they have undertaken [and which warranties or equivalent protection are to be approved by the Tenant (such approval not to be unreasonably withheld or delayed)].]

5 **LANDLORD'S OBLIGATIONS IN RELATION TO INSURANCE**

5.1 The Landlord shall use its reasonable endeavours to procure that its insurers waive entitlement to rights of subrogation against the Tenant, its sub-tenants and persons lawfully occupying the Premises through or under the Tenant [or its sub-tenants] and their respective employees ("**its lawful occupiers**") on such terms as the insurers may stipulate.¹³

5.2 The Landlord shall notify its insurers of the interest of the Tenant in the Premises and have it noted on the policies of insurance or by a general noting under the conditions of the policies.¹⁴

5.3 The Landlord shall on request (but not more than once each year) and, in any event on renewal and/or change of insurer, provide the Tenant with a copy of its insurance policies (or other evidence of the conditions of insurance) on the [Building] [Premises], and (at the request of the Tenant) with a receipt for the payment of the last premium or other evidence of renewal and up-to-date details of the amount of cover.

5.4 The Landlord shall promptly notify the Tenant of any material changes in its insurance cover or the terms on which cover has been effected.

6 **SUSPENSION OF RENT**

6.1 Paragraph 6.2 applies if the [Building] [Premises] [is] [are] at any time during the Term so damaged or destroyed by an Insured Risk as to render the Premises unfit for occupation, use or enjoyment or to prevent use of the essential means of access to and egress from the Premises so far as in the Landlord's ownership, except in the circumstances and to the extent that insurance cover is vitiated by the Tenant.

¹² The Landlord should consider including provision for it to be released from the obligations in this paragraph on provision of warranties/third party rights to the tenant (if applicable) and following the issue of the certificate of completion of making good defects or equivalent document for the works.

¹³ It should be borne in mind that the noting of the tenant's interest on insurance policies does not protect the tenant against the insurer exercising its subrogation rights against the tenant. In fact, while traditionally requested, it is a general misconception that such noting serves much of a useful purpose.

¹⁴ This is included as it is perceived by some tenants to provide a comfort that the insurer knows the tenant is there. However, there is no established authority to prove the benefit of such noting. The alternative is composite insured, although this is rarely encountered in rack rent leases, except perhaps in lettings of whole or with anchor tenants.

- 6.2 The rent [and service charge and insurance premiums] reserved by this Lease or a fair proportion of [it] [them] according to the nature and extent of the damage or destruction sustained, [is] [are] to be suspended and cease to be payable until the damage or destruction has been made good so as to render the Premises fit for occupation, use or enjoyment, or, if earlier, until the date immediately following the expiry of the period of loss of rent insurance to be effected by the Landlord under paragraph 2.2(b).
- 6.3 A dispute as to the amount of the suspension of the rent or the duration of the period of suspension is to be submitted to a single arbitrator, by whose decision the parties are to be bound, who is to be appointed by the parties jointly or, if they do not agree on the appointment, by the president for the time being of the Royal Institution of Chartered Surveyors (at the request of either party) and the arbitration is to be conducted under the Arbitration Act 1996.
- 6.4 The Premises are not to be treated as unfit for occupation, use or enjoyment by reason only that tenant's fixtures and fittings have not been reinstated and replaced.¹⁵
- 6.5 [If the Building suffers damage or destruction by the occurrence of an Insured Risk during a period in which the Tenant is entitled to a rent-free concession (the "**rent-free period**") such that a period of abatement of rent under paragraph 6.2 (the "**abatement period**") would otherwise have operated, the following provisions of this paragraph 6.5 are to apply:
- (a) if the damage or destruction is such as would otherwise have required a full abatement of rent under paragraph 6.2, the Tenant is to be entitled to a credit against the rent becoming payable at or after the end of the abatement period to the extent of the period of overlap of the abatement period with the rent-free period;
 - (b) if the damage or destruction is such as would otherwise have required a partial abatement of rent under paragraph 6.2:
 - (i) the abatement period is to be adjusted to reduce it to a period of days to reflect the proportion of the use and enjoyment of the Premises which has been available during that time; and
 - (ii) the Tenant is to be entitled to a credit against the rent becoming payable at or after the end of the abatement period to the extent of the period of overlap of the abatement period (as so adjusted) with the rent-free period; and
 - (c) the amount of the credit against the rent becoming payable is to be calculated for the number of days in the period of overlap at the daily rate of rent applicable during which the Tenant would otherwise be required to pay it.]¹⁶

¹⁵ A tenant will be concerned that it may be required to start paying the rent again, because the premises have been reinstated, even though it is unable to occupy beneficially the premises, because the tenant's fixtures have not been reinstated. A tenant should, therefore, ensure that its business interruption insurance (or it takes out special insurance that) covers rent and other payments (including rates) that it may have to pay for the period when it is fitting out the premises.

¹⁶ Paragraph 6.5 is a tenant's amendment and should not be included in a first draft.

7 **OPTIONS TO DETERMINE - INSURED RISKS¹⁷**

- 7.1 If [the Building or a substantial part of it (whether or not directly affecting the Premises)] [the Premises or a substantial part of them] [is] [are] damaged or destroyed by an Insured Risk so as to make continued use of the Premises impracticable in the Landlord's reasonable opinion, the Landlord may terminate this Lease by giving to the Tenant notice to that effect, at any time within [12] months after the damage or destruction has occurred, to expire immediately.
- 7.2 If for any reason beyond the control of the Landlord it proves impracticable to commence rebuilding or reinstatement of the [Building] [Premises] within [two years] of the damage or destruction by an Insured Risk, the Landlord may terminate this Lease by giving to the Tenant notice to that effect to expire immediately.
- 7.3 If the rebuilding or reinstatement of the [Building] [Premises] has not been commenced [three] years after the occurrence of the damage or destruction by an Insured Risk, the Tenant may give not less than six months' notice to the Landlord to terminate this Lease, and if the rebuilding or reinstatement work has not commenced within six months of the giving of the notice, this Lease is to terminate at the expiry of the notice.
- 7.4 If, following damage or destruction by an Insured Risk, the Landlord has not practically completed the works of rebuilding or reinstating the [Building] [Premises] (as evidenced by the issue of the certificate or statement of practical completion under the building contract for the works) by the date immediately following the expiration of the period of loss of rent insurance to be effected by the Landlord under paragraph 2.2(b), then either the Landlord or the Tenant may at any time thereafter (but not after the Landlord has practically completed the works of rebuilding or reinstating the [Building] [Premises]) terminate this Lease by giving notice to the other to that effect to expire immediately.
- 7.5 On the expiry of a notice of termination given under this paragraph 7 (*Options to determine - Insured Risks*), this Lease will terminate unless expressly provided otherwise in this Schedule, but without affecting any liability arising from a breach of covenant or condition which has occurred before then.

8 **[UNINSURED RISKS¹⁸**

- 8.1 In this paragraph 8 (*Uninsured Risks*), an "**Uninsured Risk**" means any risk, or some aspect of any risk, which would be covered by the risks itemised in the definition of "Insured Risks" but which:
- (a) is excluded from being so by reason of withdrawal of cover by the insurer and which is not otherwise available to be insured in the London insurance market; or
 - (b) is withdrawn from cover by the Landlord on the grounds that in the Landlord's reasonable opinion cover cannot be placed in the London insurance market at reasonable commercial rates or on reasonable commercial conditions.

¹⁷ This clause lists some possible approaches, all or some of which may be appropriate for the particular lease.

¹⁸ Leases commonly include uninsured risks provisions, but approaches vary. The treatment in this document is not the only way of dealing with uninsured risks. There is little experience of the operation of uninsured risks provisions in practice. The drafting should be determined by the particular circumstances including the financial strength of the parties, the location of the property and the parties' respective negotiating strength.

- 8.2 An Insured Risk does not become an Uninsured Risk for the purposes of paragraph 8.1 by reason only of:
- (a) being excluded, or partially excluded, from cover due to standard exclusion provisions on the policy;
 - (b) rejection by the insurer of liability, or some part of it, due to vitiation by the Tenant; or
 - (c) infringement by the Landlord of policy conditions for the maintenance of cover.
- 8.3 The obligations of the Tenant to repair and to decorate, and to yield up in repair and decorated, the Premises do not apply to damage or destruction caused by an Uninsured Risk.¹⁹
- 8.4 The provisions of this paragraph 8 (*[Uninsured Risks]*) apply if the [Premises] [Building (whether or not directly affecting the Premises)] [are] [is] damaged or destroyed by an Uninsured Risk so as to make the Premises unfit for occupation, use or enjoyment.
- 8.5 If the damage or destruction referred to in paragraph 8.4 occurs, the Landlord may within [12] months after the date of the damage or destruction elect to rebuild or reinstate the [Building] [Premises] by giving notice to the Tenant to that effect and if the Landlord so elects:
- (a) the Landlord shall as soon as may reasonably be practicable use its reasonable endeavours to rebuild or reinstate the [Building] [Premises] providing the cost of doing so out of its own resources;
 - (b) paragraphs 4.4 and 4.5 are to apply; [and]
 - (c) [the provisions of paragraph 6.2, paragraph 6.3 and paragraph 6.4 are to apply with effect from the date of the damage or destruction;] [and]
 - (d) [on practical completion of the works of rebuilding or reinstating the [Building] [Premises] (as evidenced by the issue of the certificate or statement of practical completion under the building contract for the works), the Tenant shall pay to the Landlord a sum equal to [six] months' rent at the rate then reserved by [Clause *insert relevant clause number*] or, if it be less, a sum equal to the cost of rebuilding or reinstatement.]
- 8.6 The Landlord may at any time before it has made an election under paragraph 8.5 decide not to rebuild or reinstate the [Building] [Premises] and may instead terminate this Lease by giving notice to the Tenant to that effect to expire immediately.²⁰
- 8.7 If the Landlord has not made an election under paragraph 8.5 within [12] months after the date of damage or destruction of the [Building] [Premises], the Tenant may terminate this Lease by giving to the Landlord notice to that effect at any time thereafter to expire immediately unless the Landlord has made such an election in the meantime.

¹⁹ Exclude if dealt with in the repair/decoration/yield up clauses.

²⁰ Bear in mind that statutory notices may also need to be served if the lease falls within sections 24-28 of the Landlord and Tenant Act 1954. As an alternative, the drafting could allow for a de minimis level of damage in respect of which the landlord is obliged to reinstate and cannot terminate the lease. The level of de minimis could be tested either by the amount of time required to reinstate or by the likely cost of reinstatement.

- 8.8 [During the period before the Landlord makes an election under paragraph 8.5 or terminates this Lease under paragraph 8.6, the rent [and service charge and insurance premiums] reserved by this Lease, or a fair proportion of [it] [them] according to the nature and extent of the damage or destruction sustained, [is] [are] to be suspended and cease to be payable and paragraph 6.3 is to apply in case of dispute.]
- 8.9 [If the Landlord has not commenced rebuilding or reinstating the [Building] [Premises] within [six] months after making the election under paragraph 8.5, the Tenant may terminate this Lease by giving to the Landlord notice to that effect at any time thereafter to expire immediately, unless the Landlord has commenced rebuilding or reinstating the [Building] [Premises] before the expiry of the notice.]
- 8.10 If the Landlord has not practically completed the works of rebuilding or reinstating the [Building] [Premises] (as evidenced by the issue of the certificate or statement of practical completion under the building contract for the works) within the period of [three] years after making the election under paragraph 8.5, then either the Landlord or the Tenant may terminate this Lease by giving to the other not less than six months²¹ notice to that effect to expire at the end of that period, unless practical completion has taken place before the expiry of the notice.
- 8.11 On the expiry of any notice of termination given under this paragraph 8 (*[Uninsured Risks]*), this Lease will terminate unless provided otherwise, but without affecting any liability arising from a breach of covenant or condition which has occurred before then.]

9 **RETENTION OF INSURANCE PROCEEDS**

On the termination of this Lease under paragraph 7 (*Options to determine - Insured Risks*) [or paragraph 8 (*[Uninsured Risks]*)], or if this Lease is terminated by the operation of the doctrine of frustration or otherwise, the Landlord is to be entitled to retain all of the proceeds of insurance for its exclusive benefit.²²

²¹ Tenants may want to be able to terminate the lease by giving notice to expire immediately.

²² If the insurance extends to tenant's fixtures and fittings, the tenant may wish to amend this paragraph so that it will receive a fair proportion of the proceeds, reflecting its interest in the fixtures and fittings and their value, with perhaps a dispute resolution provision similar to paragraph 6.3.