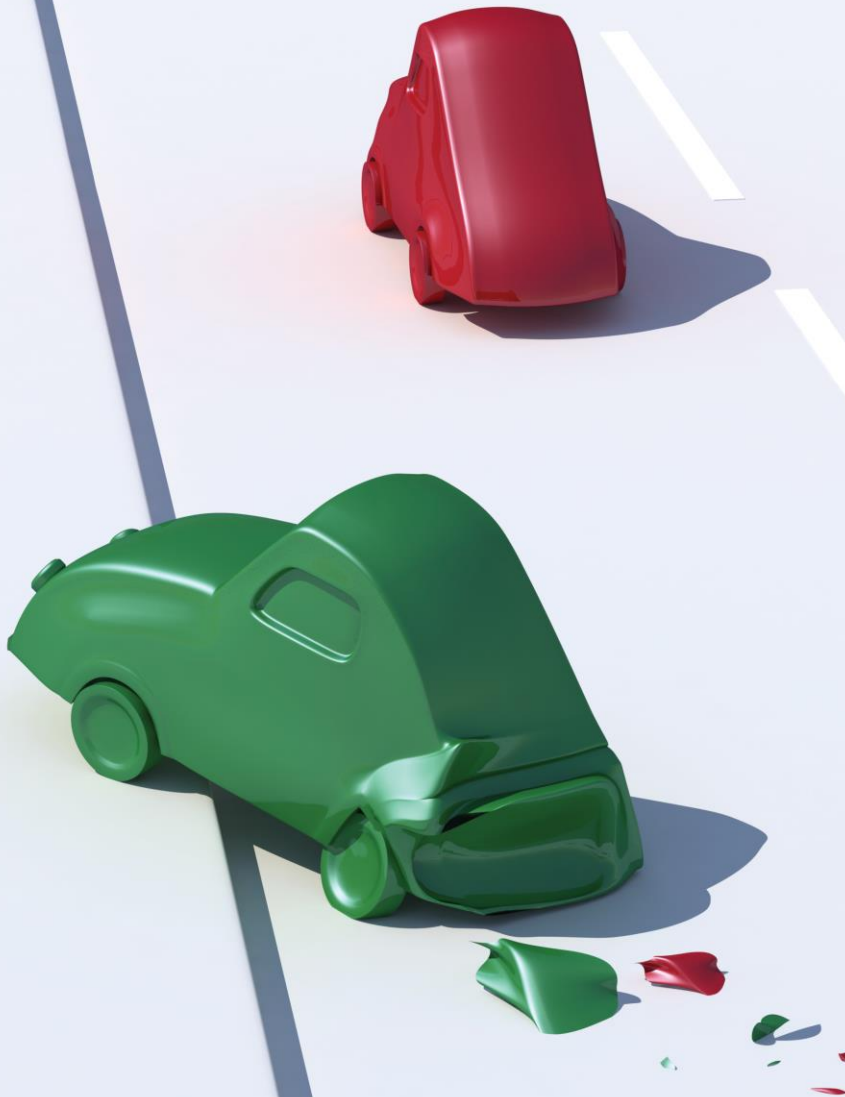


# Notes for guidance

MIB untraced agreement 2017



## Notes for guidance

### Untraced Drivers Agreement dated 28 February 2017

The following notes are for the guidance of anyone who submits a claim to the Motor Insurers Bureau ('MIB') under this Agreement ('the Agreement') and their legal advisers.

Enquiries, claim forms and general correspondence in connection with this Agreement should be addressed to:-

Motor Insurers' Bureau,  
Linford Wood House,  
6-12 Capital Drive,  
Milton Keynes  
MK14 6XT

**Tel:** 01908 830001

**Fax:** 01908 671681

**DX:** 142620 Milton Keynes

**Email:** [enquiries@mib.org.uk](mailto:enquiries@mib.org.uk)

## The purpose of this document

These Notes are intended to present a plain English explanation of the principal parts of the Agreement. They are not a substitute for

the Agreement itself and, if there is a conflict, the Agreement wording is determinative.

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## Introduction – MIB's role and application of the Agreement

The role of MIB under the Agreement is to provide a safety net for innocent victims of the actions of unidentified drivers/users of motor vehicles. MIB's funds for this purpose are obtained from levies charged upon insurers and so come from the premiums which are charged by those insurers to members of the public. Subject importantly to the claim falling within the scope of the Agreement and to the exceptions, general terms and conditions and procedural requirements set out, MIB operates as a safety net for the innocent victim who is unable to identify anyone liable for his injuries and/or property damage and who, therefore, cannot bring proceedings against any such person.

If the claimant or his legal representative is not satisfied with the way in which his claim is dealt with in accordance with the Agreement, he may register a complaint with MIB. MIB's formal complaints procedure is set out in detail within the Customer Charter which can be found on MIB's website at [www.mib.org.uk](http://www.mib.org.uk). Alternatively, full details of the procedure can be requested from MIB. MIB will aim to compensate innocent victims of negligent unidentified drivers fairly and promptly and will be open and honest in dealing with all claimants.

MIB has entered into a series of Agreements with the Secretary of State and his

predecessors in office. This Agreement applies to accidents which occur on or after 1st March 2017 – see clause 2. Accidents occurring before this date will be dealt with under previous Untraced Drivers Agreements in accordance with their period of application. For example, the Untraced Drivers' Agreement dated 7 February 2003 continues to apply in respect of accidents occurring between 14 February 2003 and 28 February 2017. Reference should be made to MIB's website for further details of the earlier Agreements to ascertain which one is relevant to any particular claim.

Under each Agreement, MIB is obliged to pay defined compensation in specific circumstances. There are two sets of Agreements, one relating to the victims of uninsured drivers (the "Uninsured Drivers Agreements") and the other concerned with the victims of hit and run or otherwise unidentified drivers (the "Untraced Drivers Agreements"). These Notes are addressed specifically to the procedures required to take advantage of the rights granted by the Untraced Drivers Agreements and, more specifically, by this Agreement.

## Layout of the Agreement

After the interpretation and definitions and the duration clauses (clauses 1 and 2), this Agreement is broken down into 5 parts for convenience, namely

- a) Part 1 (clauses 3 to 11 inclusive) – this Part contains general terms and conditions which define the scope of the Agreement (clause 3) and set out important exceptions to MIB's liability (clauses 4 to 9 inclusive). Part 1 also explains the obligations on the

It is not always clear from the outset whether a claim should be dealt with under the relevant Uninsured Drivers Agreement or Untraced Drivers Agreement. By way of brief guidance, the following should be borne in mind:-

- a) Where the driver/user of a vehicle has not been identified (either because it is shown, on a balance of probabilities, that the named person does not exist or false particulars for the individual have been provided), the claim will be dealt with under the relevant Untraced Drivers Agreement. This provides, subject to specified terms and conditions, for the payment of compensation for personal injury and/or damage to property.
- b) Where the available evidence establishes, on balance, that a particular person named was the driver/user of an identified vehicle, MIB will deal with the claim under the relevant Uninsured Drivers' Agreement, even if the current whereabouts of the named person is no longer known.

claimant (clause 10) and deals with the principles for the payment of compensation (clause 11).

- b) Part 2 (clauses 12 to 14 inclusive) – this Part sets out the procedures which MIB adopts in connection with investigating and, where appropriate, paying claims under the Agreement. It addresses (clause 14) the procedure for accepting an award made by MIB and for the approval of

an award by an arbitrator where the claimant is a child (under the age of 16 in Scotland or 18 in England or Wales) or lacks the mental capacity to make his own decision on whether to accept the award. Such claimants are in a vulnerable position and the requirement for approval by an arbitrator is there to provide added protection.

- c) Part 3 (clauses 15 to 20 inclusive) – this Part deals with the appeal process. An appeal can be made by the claimant against any award of MIB or in respect of any other decision or determination reached by MIB in connection with the claim. This Part sets out the process to be followed in respect of any such appeal including the appointment of and determination by an arbitrator and it also outlines the range of decisions which an arbitrator may make.
- d) Part 4 (clauses 21 and 22) – these clauses deal with the claimant’s entitlement to claim a contribution towards legal costs as well as his ability to seek costs in connection with any appeal to an arbitrator.
- e) Part 5 (clauses 23 to 26 inclusive) – these clauses deal with miscellaneous issues including (i) MIB’s liability under the Agreement where an identified person is liable or partly liable to the claimant but not in circumstances which would make MIB liable under the Uninsured Drivers Agreements (clause 23), (ii) how notices are to be provided under the Agreement (clause 24), (iii) the extent of the claimant’s entitlement

to benefit from the Agreement even though he is not a party to it (clause 25) and (iv) the claimant’s entitlement to enforce non-performance by MIB of its fundamental obligations under the Agreement through court action as a last resort (clause 26).

As an overview, MIB will investigate claims brought by the victims of allegedly negligent motorists who cannot be traced. As no one responsible can be identified, it is not possible for the claimant to bring court proceedings against any person. Instead, he can make an application to MIB under the Agreement.

MIB will investigate the claim to the degree necessary and will then reach a decision as to whether to make an award to the claimant. As part of its investigation, MIB will typically require the claimant to cooperate fully and to provide such information regarding the claim as MIB reasonably requires.

If MIB refuses to make an award or if the award is not considered by the claimant to be sufficient, he may appeal to an arbitrator whose decision will ultimately be final.

It is important to understand that, unlike a typical court action, the process under the Agreement is not an adversarial one. MIB carries out the necessary enquiries and makes a decision. The claimant is entitled to seek legal advice regarding his claim if he wishes, but the extent to which any legal costs which he incurs are recoverable (including in connection with any appeal to an arbitrator) is set out in clauses 21 and 22 (and, to a degree, in clause 14 when dealing with approvals of awards for claimants who are either children or who lack legal capacity

to make a decision). No other costs are recoverable.

The costs recoverable under the Agreement reflect the investigatory nature of the function of MIB. MIB, rather than the claimant or his legal representative, is responsible for the investigation of the claim and for reaching a decision.

For a fuller understanding of the rationale for the investigation and determination process involved in a claim under any of the Untraced Drivers Agreements, reference should be made to the decision of Hickinbottom J in *Carswell v Secretary of State for Transport and MIB* (2010) EWHC 3230.

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## Interpretation and Definitions

### Clause 1

This clause sets out some definitions in respect of words or phrases which appear at more than one place in the Agreement. It also deals with some general points of interpretation. The context for many of the definitions is largely considered in these Notes under the specific clauses where they arise.

### Clauses 1 (2) and (3)

This provides that MIB can deal with solicitors appointed by or on behalf of the claimant rather than having to deal with the claimant direct, although this does not alter the fact that the obligations set out in clause 10 must be fulfilled by the claimant or by a person legally authorised to represent his interests where he is a child or lacks mental capacity to make his own decisions.

MIB may perform all or part of its obligations through agents appointed on its behalf.



### Clause 1 (5)

**“1988 Act”** - It is an offence under Section 143 of the Road Traffic Act 1988 (‘the 1988 Act’) to use a motor vehicle on a road or other public place without insurance. Where there is insurance covering the vehicle, whether or not the user was covered by that insurance, the relevant insurer will usually deal with any claim. However, where either the offending vehicle is unidentified or no one can be identified who can be held at fault for the use of an identified vehicle, there will be nobody to bring court proceedings against and, hence, no judgment can be obtained. In such circumstances, MIB provides a safety net for the innocent victim of the unidentified responsible person.

In these circumstances, MIB will effectively take the place of an insurer, but operates outside any court process (as civil proceedings cannot be brought) and can only provide compensation strictly in accordance with the framework provided by the Agreement.

**“Claimant”** - The person making the claim is “the claimant” (even if his interests are, as a

child or a person lacking mental capacity, represented by someone else) and he will be the person who has suffered injury and/or loss. The only exception is where a person dies as a result of the accident, in which

event the claimant will be the person who is entitled in law to represent the estate of the deceased and/or to pursue a claim for financial dependency (see clause 8(4) of the Agreement).

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## Duration of Agreement

### Clause 2

The Agreement applies in respect of accidents on or after 1 March 2017. The previous Agreement, namely that dated 7 February 2003, continues to operate in respect of claims arising out of accidents occurring on or after 14 February 2003 and before 1 March 2017.



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## Part 1 – General terms and conditions

### Clause 3 – Scope of the Agreement

In order to trigger MIB's obligation to investigate a claim presented to it, the claim must fall within the scope of the Agreement. The scope requirements are set out in clause 3. If the claim is outside the scope of the Agreement, MIB is under no obligation to consider it further and will reject the claim accordingly. The claimant still has a right of appeal to an arbitrator if he does not accept the rejection.

Even where the claim is in scope, it does not mean the claim will be accepted. It merely means that it will be investigated and MIB will then reach a decision as to whether an award is appropriate.

There are important exceptions to MIB's liability (clauses 4 to 9), and obligations on the part of the claimant (clause 10) which need to be met. There also various procedural requirements and timeframes which must be followed as explained in these Notes.

### Clauses 3(1)(a) & (b)

The claim must be for death or personal injury and/or property damage (and losses flowing from such death or injury and/or property damage) which arises from the use of a motor vehicle on a road or other public place in Great Britain.

The definitions of “motor vehicle” and “road or other public place” are set out in Sections 185 and 192 of the 1988 Act (see clause 3(3)). The Agreement is designed to mirror the circumstances when Part VI of the 1988 Act requires the use of a motor vehicle to be covered by insurance, save that the use of a motor vehicle outside Great Britain is not within the scope of the Agreement. So, if it would have been necessary in law for the offending driver, had he been identified, to have insurance cover for his use of the vehicle at the time the accident occurred, MIB would potentially be liable under the Agreement.

MIB will also be liable to meet claims, where negligence is established, which arise out of the use of an uncoupled trailer on a road or other public place. However, for MIB to be potentially liable, the claim must arise from the use of the trailer as a trailer as such and not from uses unrelated to its primary function as a trailer. If the trailer becomes detached as a result of the motion of a motor vehicle pulling it (e.g. the coupling mechanism is faulty), then any resultant injury, damage and loss claims will typically be the responsibility of the insurer of the motor vehicle (or MIB if that motor vehicle is not insured) provided someone responsible can be identified. If, however, the claim arises from the use as a trailer (1) of a stationary, uncoupled trailer or (2) of a moving, uncoupled trailer (but where the motion is not brought about by a motor vehicle), MIB will consider this as in scope within the Agreement if nobody responsible can be identified.

The purpose behind excluding claims which do not arise from the primary use of an uncoupled trailer as a trailer is to deal with cases where the trailer is being used for other specific functions. For example, the

trailer may be used to sell food and/or drink or as a fairground attraction or is occupied as a caravan. If the claim arises from any such function, then it is not a claim which is required to be met by a motor insurer or MIB pursuant to the 1988 Act. Rather, it is a public liability or employer’s liability claim and would typically fall to be dealt with by specific insurance covering such risks. If however, a stationary, uncoupled trailer, not otherwise being used, starts to move down an incline on a road, because it has not been adequately secured, and a passer-by is injured in the process, this would have arisen from the use of a trailer as a trailer.

In short, if the trailer has another function, apart from acting as a trailer, and is performing that function at the time of the accident, then MIB will not be liable (see clause 3(2)).

### Clause 3(1)(c)

MIB will only potentially be liable under the Agreement if the person alleged to be responsible is unidentified. If more than one person is alleged to have been responsible, MIB will only have any potential liability under the Agreement if all the persons claimed to be responsible are unidentified.

If anyone responsible (or partly responsible) can be identified, the claimant must pursue his claim against any such person and MIB would not be liable under the Agreement. In that situation, MIB may still be liable under the applicable Uninsured Drivers Agreement where the identified responsible person happens to be an uninsured user of the vehicle. Alternatively, if the identified person is liable in circumstances where he was not required to have motor insurance in place and he does not meet a judgment obtained by the claimant, the claimant may claim



against MIB to the extent of the liability of the unidentified person – see below in relation to clause 23.



### Clause 3(1)(d)

Clause 3(1)(d) provides that a claim is not in scope if it is brought outside the limitation period for the bringing of claims which would have applied had court proceedings been brought against the responsible person in accordance with the Limitation Act 1980 (in England and Wales) or the Prescription and Limitation (Scotland) Act 1973 (in Scotland).

In general, this means that a claim for personal injury (even if it includes a claim for property damage) must be brought within 3 years of the accident unless there are good reasons to justify it being brought outside that period. If the claim is for property damage only, the limitation period is 6 years but with no ability to put forward good reasons to justify it being brought later than this.

### Clauses 4 to 9 inclusive – Exceptions to the Agreement

These clauses set out exceptions to MIB's liability. Where only part of the claim is excluded under these provisions, the remainder will be considered by MIB



### Clause 4 – Crown vehicles

Crown vehicles are not required to be insured. The Crown will be expected to meet any claim arising unless the vehicle has actually been insured or some person or body, other than the Crown, can be shown to have taken responsibility for maintaining insurance in respect of the vehicle. This will be very rare in the context of untraced driver claims.

### Clause 5 – Other vehicles exempt from the insurance obligation

Local authorities, the National Health Service, the police and the Ministry of Defence are examples of public bodies who will meet claims arising from the use of vehicles in their ownership or possession and who do not need to have insurance cover (Section 144 of the 1988 Act). As such, MIB is not liable under the Agreement in these circumstances.

However, if the vehicle was insured or it was not being used in the custody or control of the owner at the time of the accident, MIB



will potentially have an involvement under the Agreement if no one can be identified against whom proceedings can be brought.

## Clause 6 – Other sources of recovery

This clause seeks to reflect MIB's status as the guarantee body which operates as a safety net for victims who have suffered loss or damage which cannot be recovered elsewhere. It is effectively a final port of call save that, where the Criminal Injuries Compensation Authority or its successor (the "CICA") would pay compensation to the victim of a criminal act in circumstances which would fall within the scope of the Agreement, MIB would be liable in priority to the CICA.

In summary, the clause is intended to —

- prevent insurers, who have met some or all of the claimant's losses, from recovering their outlays from MIB;
- divert those parts of the claimant's losses to the insurers who have taken a premium for the risk;
- avoid a claimant electing to claim from MIB when there is an insurer who could deal with some or all of the claim

MIB does not pay subrogated claims from insurers (in short, claims brought in the name of the claimant by another person, typically an insurer, to recover that person's losses) who have already paid the claimant for the loss. In the vast majority of cases, these claims for recovery will be from the same motor insurers who pay levies to fund MIB, levies which are ultimately paid for by premium paying motorists. An insurer who has received a premium for the risk should bear the claim rather than MIB. The burden

should fall on that insurer rather than on all premium paying motorists.

If the claimant has been paid for the repairs to or write off value of his damaged vehicle by his insurer under a comprehensive motor policy, that insurer may not seek to recover its outlay from MIB in the claimant's name. The same applies, for example, to the claimant's private medical insurer where it seeks to recover its outlay.

The intention of this clause is not that the claimant should be out of pocket. Insurers will, in general, not prejudice a non-fault customer in terms of his No Claim Discount (NCD) just because the insurer is unable to recover its outlay from MIB. However, should that not be the case, MIB will consider a claim for loss of NCD as part of the losses sought.

For cases where there is an insurer to cover the loss in place of MIB, then that insurer should deal with the claim leaving MIB to pick up any uninsured losses. For example, if the claimant has a comprehensive motor policy, he cannot elect to ignore that policy by having his repairs carried out on a credit basis or otherwise by a repairer and then seek to claim for such repairs from MIB. If the claimant has such repairs carried out without notifying his insurer and then later claims from his insurer, he cannot claim the repair costs from MIB where the insurer refuses an indemnity because of late notification or because it was not, in accordance with the policy provisions, given the chance to have the repairs carried out by its own nominated repairer.

Moreover if, for example, the claimant obtains a hire vehicle on credit, MIB will only be liable for any credit hire charges reasonably incurred if he did not have the

benefit of a separate credit protection policy covering him for such charges. The same applies to credit repair costs where, regardless of whether the claimant's motor insurance policy was a comprehensive one or covered only third party risks; he did have a separate credit protection policy available which meant he would not suffer a loss in respect of such costs. Again, the claimant cannot claim from MIB where he does not claim from the protection policy or claims either too late or in circumstances where he fails to comply with the policy provisions.

So this clause applies to motor insurers, private medical insurers, insurers who back a claimant's employers (in respect of payments made for a period or periods off work), indeed any other insurance backed part of the claim or where some other person pays the claimant and seeks to recover in the claimant's name. This includes where a service is provided to the claimant which is insured.

However, clause 6(2) provides that MIB will remain liable in respect of claims for:-

- 1) the reimbursement of employers' payments to cover a claimant's absence from work unless the employer is insured for that loss, and
- 2) any legal costs under clauses 21 and 22 even where the claimant is backed by legal expenses insurance or similar cover with which to bring a claim under the Agreement.

It is important to note that the operation of this clause is not intended to reduce the total compensation received by the claimant. It merely ensures that the part of the loss covered by a policy (for which an insurer has received a premium) is paid by that insurer

leaving MIB to deal with uninsured losses such as a policy excess or hire charges not otherwise insured. It also prevents MIB from reimbursing insurers who have already paid part of the claimant's losses.

This clause is not intended to be used to enable MIB to deduct proceeds received or receivable from a personal accident or life policy taken out by the claimant prior to the accident to provide benefits in the event of injury or death occurring. That type of policy was designed to provide the claimant with an additional benefit, one which should not be reduced by MIB being permitted to take it into account when paying compensation following an accident. Such a benefit would not typically be deductible by a motor insurer who deals with a third party claim and MIB should be in no different position.

## Clause 7 – Property damage

MIB is not liable to meet a claim for property damage where the responsible vehicle is unidentified unless 'significant personal injury' has been sustained by somebody (not necessarily by the claimant) as a result of the accident in question.

Clause 7(2) provides a definition of 'significant personal injury'. Somebody must have died as a result of injuries sustained in the accident or have suffered injuries of a severity requiring either a stay of 2 or more nights of in-patient treatment in hospital or 3 or more attendances at hospital for outpatient treatment. The rationale for this provision is to prevent fraud. It only applies to bar a property damage claim, not a claim for personal injury.

Even if significant personal injury has occurred, MIB is entitled to deduct an

excess, set at £400, from any claim for property damage such that if, for example, the claim did not exceed £400, MIB would not make any payment (see the definition of 'specified excess' in clause 1(5)).

This provision must be contrasted with the situation where the vehicle can be identified but no one responsible for the use of the vehicle at the time of the accident can be identified. In that case, MIB would potentially be liable for a property damage claim without the need to show that someone has suffered significant personal injury and MIB would not be entitled to apply the £400 excess against any such claim.

### Clause 8 – Passenger claims

This clause deals with the position where the claimant (subject to clause 8(4)) is a passenger in an unidentified vehicle (or in an identified vehicle where no person responsible for using the vehicle can be identified) and he claims that the unidentified driver was responsible for his claim.

Clause 8 excludes a claim where such a passenger knew or had reason to believe that the vehicle had been stolen or unlawfully taken or that there was no or no effective insurance permitting the particular use at the time of the accident.

The words "had reason to believe" replace "ought to have known" from the previous agreements. Since the judgment of the House of Lords in *White v White* [2001] 2 ALL ER 43, this clause has been interpreted in a restrictive way.

Passengers who "ought to know" that the driver is uninsured will not fall within the exception if they have been careless or

negligent in not establishing the facts about the lack of insurance. On the other hand, those who had some information pointing to a lack of insurance but deliberately did not ask further questions for fear of confirming the point will be excluded along with those who had actual direct knowledge of the situation.

The new words "had reason to believe" better reflect this position and will be interpreted according to the judgment in *White v White*.

If the claimant passenger was forced into a vehicle against his will and had no reasonable opportunity to alight prior to the accident, then MIB will not reject the claim on the basis of either of the limbs of knowledge set out in clause 8(1).

MIB will typically bear the burden of having to prove the knowledge referred to in clause 8(1), but the responsibility will rest with the claimant to disprove he had the requisite knowledge of the lack of insurance or effective insurance under clause 8(1)(b) if MIB can prove any of the circumstances set out in clause 8(3).

Clause 8(4) provides that, if the passenger dies and his dependants claim in their own right and/or on behalf of his estate, the fact that they had no knowledge that the vehicle had been stolen or unlawfully taken or used without insurance as set out in clause 8(1) is irrelevant. What is relevant is the knowledge of the deceased.

Clause 8(5)(b) makes it clear that the claimant cannot say that his lack of knowledge was due to the self-induced effects of drink or drugs. So, if it can be established that he would have known of the

theft and/or of the lack of insurance had he been sober, his claim will fail.

### Clause 9 – Recovery charges by appropriate authority

This clause provides that MB will not be liable for recovery, storage and disposal charges incurred by the appropriate authorities who have removed a vehicle which has been abandoned on a road or other public place.

### Clause 10 – Obligations upon the claimant

The claimant must comply with the requirements of clause 10. If he does not do so, it is open to MIB to reject the claim (or the relevant part of the claim where appropriate – see clause 10(5)).

Clause 10(2) requires the claimant to notify the MIB by completion and submission of MIB's claim form.

The completed claim form acts for MIB as the formal notification of the claim so as to trigger MIB's obligations to investigate the claim as appropriate. The claim form can be completed online at [www.mib.org.uk](http://www.mib.org.uk), downloaded from the same website or requested direct from MIB.

If the claim form is submitted online, the terms and conditions flagged during the online process must be accepted.

The claim form should be submitted at the earliest practicable stage in the claim, once it appears that either the offending vehicle cannot be identified or no one responsible

can be identified in respect of an identified vehicle.

Claimants and their representatives should ensure the claim form is fully completed and correctly signed. This can include a signature by the claimant's parents or his guardian for a claimant under 18 years of age (or 16 years of age in Scotland) or by the claimant's deputy where the claimant lacks capacity.

The claim form is important. MIB is not an insurer and has no policyholders to provide it with notice of any accident and possible claim in advance. MIB will regard the claim form as having been 'fully' completed if it is completed to the best of the claimant's knowledge and ability and provided all the requisite information known or reasonably available to him is included. If the claimant says that the claim form has been 'fully' completed but MIB does not agree, this is one example of an issue which can be resolved if necessary by appeal to an arbitrator pursuant to clauses 15 and 16, but the claimant must appreciate that, if the arbitrator upholds MIB's position, this will be an end to the claim. It would not be possible to have another bite of the cherry by means of the late completion of the claim form in accordance with the decision of the arbitrator.

In essence, the onus on the claimant is to cooperate in response to MIB's requests so as that MIB can investigate the claim effectively. Part, but only part, of this cooperation is the submission of a completed claim form. In addition, the claimant must, for example, respond to MIB's reasonable requests for information and documentation to support the claim put forward and provide a statement by means of an interview with MIB or its agent if this is

required – see clauses 10(3) and 10(4). Again, any dispute regarding the reasonableness of MIB’s requirements can be dealt with by way of an appeal to an arbitrator.

A further limb of the need to cooperate appears in clause 10(4)(b). This provides that, if MIB reasonably requires it, the claimant must report the accident to the police as soon as reasonably practicable if he has not done so previously. This will then enable the police to look into the allegations as appropriate and the claimant is required to cooperate with any police enquiries. The need to report to the police is also aimed at trying to prevent fraud as is the requirement under clause 10(5) for the claimant to provide documentary evidence to support any part of the claim relating to property damage. This sub-clause is self explanatory and the supportive proof specifically listed is the minimum required.

Clause 10(6) is an important obligation upon the claimant. If MIB requires the claimant to pursue an identified person (or body) who it reasonably believes may be liable to the claimant, it can request that the claimant takes all the steps necessary to obtain compensation from that person or, more likely, his insurer. If necessary, a judgment must be sought against him.

Whenever MIB asks the claimant to pursue another person, the claimant must follow MIB’s reasonable instructions and MIB will have control of the precise steps to be taken in any particular case.

If the claimant can recover in full from any other person, who either has insurance cover or whose insurer, whilst not indemnifying him, nevertheless remains liable to meet the claimant’s claim in full, MIB will have no

liability as it is intended to act as a safety net for cases where the claimant cannot make a full recovery elsewhere for the same losses. MIB will pay for the claimant’s reasonable costs incurred in pursuing another party as MIB had requested.

If the claimant obtains a judgment against a person, but that judgment is not met by that person or his insurer for whatever reason, then MIB may be liable to meet the judgment under the applicable Uninsured Drivers Agreement. If so, MIB would require the benefit of the judgment to be assigned to it under the Uninsured Drivers Agreement so as to enable MIB to seek recovery of its outlay from the person liable.

Similarly, Clause 10(7) of the Agreement requires an assignment to MIB of a judgment against a person in circumstances where MIB would not be liable under the applicable Uninsured Drivers Agreement. This is the situation catered for by clause 23 (see below). It involves an unidentified person being partly liable as well as an identified person, but the identified person is not liable in a situation where he was required to have compulsory motor insurance cover in place (e.g. he is liable as an adjacent landowner for the emergence of water onto the road surface)

Where the claimant’s judgment against the identified person is not satisfied in full, MIB would potentially be liable under the Agreement to the extent that it decides that the unidentified person was liable. Here, MIB would only be liable up to the amount outstanding on the judgment – see clause 23. MIB, therefore, would seek an assignment of the benefit of the judgment to enable it to seek recovery of its outlay from the identified person.

If the claimant has previously commenced proceedings against another party without having first been requested to do so by MIB, clause 10(8) requires the claimant to notify MIB of the proceedings as soon as reasonably practicable, at which point MIB will decide whether to require the proceedings to be continued (with the consequent indemnification by MIB of any reasonable costs incurred) or whether it does not feel that continuation of the proceedings is necessary or appropriate, in which event it will not be liable for the costs of the proceedings. If MIB requires the proceedings to be continued, it will, from that point onwards, be able to control the steps taken in those proceedings in the same way as under clause 10(6).

As with the other requirements of clause 10, if the claimant does not believe that the steps which MIB is requesting him to take to pursue another person to judgment are reasonable, this dispute can be appealed to an arbitrator. If the arbitrator supports MIB's decision, the claim will fail.

## Clause 11 – Compensation and interest

MIB's will only pay compensation and interest where it decides, in the same way as a court would decide, that the unidentified person was liable to the claimant (clause 11(1)).

If MIB concludes that the unidentified person would have been liable, it will determine the extent to which the claimant should be allowed to recover having regard to his own blameworthiness (his contributory negligence). Again, it must approach this assessment in the same way as a court would.

Moreover, MIB will then assess the amount of compensation and interest thereon which it considers to be justified, again approaching matters in the same way as a court would (clauses 11(3) and 11(4)). However, with interest, there is a difference in connection with interest on the injury compensation. With a court assessment, interest on the injury compensation (for pain, suffering and loss of amenity, known as general damages in England and Wales, or solatium in Scotland), interest would run from the date of service of court proceedings upon the defendant.

Since there can be no court proceedings under the Agreement because no one responsible can be identified, a different approach to the payment of interest is required. Clause 11(4) provides that interest on the injury compensation runs from the date 3 years after the accident or from the date of MIB's award, whichever is sooner.

Under clause 11(2), there are a number of possible decisions which MIB can reach in relation to a claim. It can decide whether the claim:-

- a) falls within the scope of the Agreement (under clause 3);
- b) fails because the unidentified person would not, if traced, have been held liable in court proceedings;
- c) succeeds in full (i.e. the claimant is entitled to a 100% liability award);
- d) succeeds, but the claimant is to some degree to blame such that he is entitled to less than a 100% liability award as a result of his own contributory negligence;
- e) has a full value of £x and, if so, whether it is all to be paid in one lump sum payment or part of it is to comprise annual instalment



payments, called periodical payments, in future years (and/or whether the claimant is entitled to return at some later date to seek further compensation, called provisional compensation, if a specified serious deterioration in his condition as a result of the accident subsequently occurs, e.g. epilepsy); and/or

- f) justifies an interim payment of £x in circumstances where it is not possible, at that stage, to calculate the full amount of the award.

MIB may, at any one time, make a decision which encompasses more than one of the above options (e.g. it could decide that the claim is within scope, that the claimant is entitled to succeed to the extent of say 75% on liability and that, whilst the final value of the claim cannot yet be determined, the claimant should be entitled to an interim payment of £x on account of the eventual award. Any of these decisions the claimant is entitled to appeal against to an arbitrator (in accordance with clauses 15 and 16) if he is not satisfied by the decision.

Under clause 11(5), MIB's maximum liability in respect of all claims for property damage

(and any losses flowing from such damage) arising from any one accident is limited to £1 million (or whatever figure is laid down by the Secretary of State in agreement with MIB from time to time). Where more than one claim for property damage arises from one event, such claims will be dealt with on a first come, first served basis, time running from the date of submission of MIB's claim form. Once the maximum limit is accounted for, MIB will have no liability to meet further, later notified claims arising from the same accident.

Where the property damage claims arise from the use of an unidentified vehicle, then they will only be met if there has been 'significant personal injury' to a person (who need not be the claimant in respect of the property damage claim) - see above under clause 7. Moreover, as with clause 7, there will be an excess of £400 applicable. For the purposes of calculating when the maximum £1million limit is met, each claim will first have the £400 excess deducted (see clause 1(5))





## Part 2 – Procedure

### Clause 12 – MIB’s obligation to investigate claims and reach a determination

Clause 12(1) contains MIB’s primary obligation, namely to carry out all reasonable enquiries in order to investigate each claim to the extent which it deems appropriate in order to make a decision on whether to make an award and, if so, the form of that award.

If MIB quickly concludes that a claim is, for example, not within the scope of the Agreement under clause 3, it can decide to reject the claim without investigating further (clause 12(2)). The claimant then has the right to appeal the rejection decision.

The remainder of clause 12 sets out the possible decisions open to MIB which reflect the range of options outlined in clause 11. So, it could decide;

- a) to reject the claim on the grounds that the liability of the untraced driver is not proven on a balance of probabilities;
- b) to make an award of a particular percentage of the claim to reflect its view as to the claimant’s contributory negligence;
- c) that the claimant is entitled to a 100% award;
- d) the proportion to which the claimant is entitled to succeed on liability (as per (b) or (c)), and announce the amount of the award together with the form of the award (i.e. whether it is to be a lump sum only award or it involves periodical payments and/or provisional compensation (see clause 13 below));

- e) to proceed as per (d) but that it is not possible, at that stage, to assess the ultimate amount of the award, such that no sum would be payable then or an interim payment on account is payable and, if so, how much.

Whatever decision MIB reaches under clause 12, it must notify the claimant of that decision in writing, giving its reasons for the decision and setting out all the evidence obtained during its investigation. MIB must give full disclosure of all the relevant evidence which it has obtained during the course of its investigation.

It is the notification in writing which will then trigger the claimant’s entitlement to appeal if he is not satisfied with the decision reached.

### Clause 13 – Acceptance of decision and payment of award

The claimant may accept MIB’s decision to make an award or interim payment by unconditionally confirming his acceptance usually (but not necessarily) in writing. Where this happens, MIB must pay the award or interim payment to the claimant no later than 14 days after it received notice of the claimant’s acceptance (clause 13(1)(a)).

If the claimant does not indicate his acceptance unconditionally, but also does not appeal the award within the 6 week time period permitted under clause 16(1), MIB must again pay the award or interim payment within 14 days after the expiry of the 6 week appeal period (clause 13(1)(b)).

Payment of an award will usually be in the form of a lump sum payment and will always be so in the case of an interim payment. Payment of a lump sum award will discharge MIB from all liability under the Agreement (clause 13(2)(a)) and, in the case of an interim payment, payment will operate as a partial discharge only to the extent intended (clause 13(2)(b)).

However, in some cases where future recurring losses occur, MIB may decide to make the award by way of both a lump sum element and thereafter by means of annual periodical payments to meet the claimant's anticipated future ongoing needs. Periodical payments are defined by reference to the Damages Act 1996 – see the definition of 'periodical payments' under clause 1(5). They may be awarded in cases which would have proceeded in England or Wales (if court proceedings could have been commenced) but can currently only be awarded, if the case would have been brought in Scotland, where the claimant consents such that, in the absence of consent, MIB can only make lump sum awards in Scottish cases.

Where the award includes an element of periodical payments, MIB will pay the lump

sum element within the relevant 14 day periods specified in clause 13(1) and will thereafter be fully discharged from further liability save as regards the ongoing requirement to make the identified annual payments (clause 13(3))

MIB may also make a lump sum award combined with a right to 'provisional compensation' as defined in clause 1(5). The relevant legislation which permits a court to award provisional damages applies to Scotland as well as to England and Wales.

In short, provisional compensation envisages that the claimant has a risk at some future point in time of developing a specified, serious deterioration in his condition, in which event he has the right to return to MIB to seek further compensation if he can show that there has been measurable increase in his needs as a result. The particular deterioration anticipated must be specified at the time of the award.

Again, where there is a provisional compensation element to the award, MIB will be fully discharged from all further liability save to the extent that provisional compensation may later become payable.

## Clause 14 – Claims from minors and protected parties

Where the claimant is a minor (a child under the age of 18 in England and Wales or 16 in Scotland) or he is a protected party (meaning, in brief, that he lacks mental capacity to make decisions in relation to the claim or manage his own affairs), it is considered that he is a vulnerable individual who requires additional protection.

If court proceedings could be brought against an identified person, any settlement of the claim would be subject to the approval of the

court even where there has been agreement, in principle, between MIB and the claimant or his legal representatives.

In a similar vein, the intention of clause 14 is to provide a suitable level of protection for minors and protected parties who bring claims under the Agreement.

Where such a claimant wishes to accept an award (but not an interim payment) pursuant to clause 13(1), MIB will not be

required to pay the award until it is approved by an arbitrator (clause 14(1)). The arbitrator will have to approve the award and decide how it is best to be administered.

If the claimant indicates his unconditional acceptance of the award or the 6 week period for an appeal has run out (see clause 13(1) above), MIB must, before paying the award, seek the approval of an arbitrator. For this purpose, MIB will apply to the Secretary of State for the appointment of an arbitrator and here the provisions of clause 18 shall apply.

The principal function of the arbitrator here is to decide if the proposed award represents a fair settlement for the claimant (clause 14(2)).

Before it seeks approval from the appointed arbitrator, MIB must seek from the claimant the relevant information referred to in clause 14(3). In short, this will include, in the case of a protected party, details of any person who is legally representing the interests of the claimant (such as a Deputy appointed by the Court of Protection) and, in the case of a minor, details of any person who has parental responsibility for the claimant and whether the claimant has a junior ISA or similar savings account in his own name, into which it might be considered appropriate to pay the award if it was approved.

Within 21 days of notifying the claimant of the appointment of the arbitrator under clause 18 or within 14 days of receiving the information requested under clause 14(2) whichever is the later date (clause 14(4)), MIB must seek approval of the award from the arbitrator. In this context, it must send to the arbitrator (and copy in the claimant) not only the information obtained under clause 14(3), but also all the documentation,

information and evidence referred to in clause 14(5) so that the arbitrator is in possession of all the available material to enable him to decide whether or not the award is to be approved. If MIB does not comply with these requirements in time (including copying in the claimant), the claimant may himself instruct the arbitrator and send him the available material (14(6)).

The claimant must send to the arbitrator (but not to MIB unless he wishes to do so) a copy of any advice obtained by counsel in support of the approval of the award. The arbitrator will take this into account but will not disclose it to MIB (clause 14(7)).

The arbitrator, as well as approving the award, must decide how it is to be administered. This will typically involve the arbitrator being satisfied that there is an appropriate representative for the claimant who can receive and administer the award. This may, for example, be the parent or guardian of a minor or the Deputy for a protected party (see clauses 14(8) and 14(9)).

For a minor, the arbitrator may decide that the money is best paid into a junior ISA or similar savings account in the claimant's name (clause 14(9)).

If the arbitrator decides that there is no suitable, identified appropriate representative, he may order that MIB pay the reasonable costs involved in setting up a trust or otherwise to bring suitable proceedings to secure the appointment of an appropriate representative (clause 14(10)).

If the arbitrator is unable to approve the amount and/or the form of the award proposed by MIB, he will reject the award and give directions to MIB as to how the

matter should be taken forward. He may decide that he can only approve the award once he has seen the claimant and anyone else necessary (e.g. family members) in person (clause 14(11)).

If the arbitrator continues is unable to approve the award and/or the form of the award (even after taking the steps outlined in clause 14(11)), he will reject it and MIB must then decide whether to maintain its award or to alter it.

If it alters the award and obtains the claimant's approval to the altered award in principle, MIB must then, once again, seek approval from the same arbitrator (clause 14(12)(a)).

If, however, MIB decides to maintain its award, it will be submitted to a different arbitrator as an appeal, the alternative arbitrator being appointed under clause 18 and the appeal following the procedure under clause 19 save that there will be have

been no notice of appeal from the claimant (clause 14(12)(b)).

The arbitrator's decision on approval shall be in writing and shall be final (save to the extent catered for by clause 14(12)) with no right of appeal (clause 14(13)).

Save as provided for by clauses 14(14 and 14(15), the claimant has no right to any additional legal costs (over and above the contribution allowed under clause 21) by reason of the matter proceeding to an approval alone. So, where the award is approved, his legal representative will be entitled to a contribution towards costs as set out in clause 21, but nothing further accrues in this respect by reason of the approval of the award itself save that MIB will be liable for the arbitrator's fee for the approval and for counsel's reasonable fees for advising the claimant whether or not to accept MIB's award. Counsel's fees will be deemed reasonably incurred and, for lower value claims (see clause 21), counsel's fees will not exceed £250 plus VAT (clause 14(15)).

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## Part 3 – Appeals and Dispute Resolution

### Clause 15 – Right of appeal and right to refer disputes to arbitration

This clause explains that the claimant can appeal any decision by MIB under clause 12 or any other determination or requirement of MIB under the Agreement. The claimant has the right to appeal to an independent arbitrator in accordance with the provisions of clauses 16 to 19.

This is a wide-ranging right to appeal. It is an essential element of the untraced claims process.

### Clause 16 – Notice of appeal under clause 15

MIB is obliged to send its notification of award or other decision letter by fax or recorded delivery post (see clause 24(3)).

If the claimant wishes to appeal any award or decision or requirement made by MIB under clause 15, he has to send a notice of appeal to MIB in writing. This notice must be received by MIB within 6 weeks of the award or decision which is being challenged. The 6 week period starts on the 2nd day after the date on which MIB's fax or recorded delivery notification letter was sent to the claimant (clause 16(1)).

If the claimant can show that wholly exceptional circumstances existed which meant that he could not have served his appeal notice within the 6 week period, then either MIB can agree to accept a longer period for the appeal or, failing that, the arbitrator appointed for the appeal may allow a longer period (clause 16(1)). However, it is envisaged by the use of the words 'wholly exceptional' that the occasions when an extended period will be allowed will be very rare indeed.

The requirements for a notice of appeal are set out in clause 16(2). In essence, the claimant must set out in writing his reasons for appealing MIB's decision and must include all evidence and documentation which he feels is necessary to support the appeal. He must, at the same time, give an undertaking that he will abide by whatever final decision the arbitrator reaches, save that he may challenge the arbitrator's decision in accordance with sections 67 and 68 of the Arbitration Act 1996 (for an arbitration conducted in England or Wales) or in accordance with the equivalent provisions of the Arbitration (Scotland) Act 2010 (for an arbitration conducted in Scotland). These statutory provisions enable a claimant to challenge the arbitrator's decision if he can show a lack of jurisdiction in relation to the appointed arbitrator or a serious irregularity affecting the arbitration proceedings. Again, it

is envisaged that any such further challenges will necessarily be rare.

If the claimant provides notice of his intention to appeal within the 6 week period, gives his undertaking to abide by the arbitrator's decision and requests an extension of time within which to provide his full grounds for appeal and any documentation in support (i.e. an extension of time for complying with clauses 16(2) (a) and (b)), MIB shall allow any further time extension which it feels is reasonable within which to complete the appeal submission and, if this is not considered sufficient by the claimant, he may ask the arbitrator to determine what constitutes a reasonable extension of time in the circumstances (clause 16(3)).

MIB agrees to abide by the final decision of the arbitrator just as the claimant has to (clause 16(4)), again subject to the right to challenge jurisdiction or claim that there has been a serious irregularity.

## Clause 17 – Procedure following notice of appeal or notice of dispute

Not later than 14 days after receiving all of the material required to constitute a notice of appeal under clause 16 (including the further information and submissions made by the claimant where an extension of time was given by MIB in accordance with clause 16(3)), MIB must apply to the Secretary of State for the appointment of an arbitrator or, if the claimant has submitted with his notice of appeal further evidence not previously made available to MIB during its investigation, MIB may choose to investigate this further evidence first and notify the claimant that it is doing so (clause 17(1)).

If MIB does neither of these things within the 14 day period, then the claimant may himself

apply to the Secretary of State for the appointment of an arbitrator (clause 17(4)).

Where MIB chooses to investigate further in the light of fresh evidence provided by the claimant to support the appeal, it will, on completion of its further investigation, notify the claimant of any change in its original decision or determination and the claimant will then have a further 6 week period (calculated as previously when the notice of appeal was first served pursuant to clause 16(1)) within which to indicate acceptance or rejection of MIB's decision (clause 17(2)).

Where the claimant either rejects MIB's decision or fails to indicate his view within the 6 week period, then MIB must apply for the appointment of an arbitrator within 14 days of the rejection or the expiry of the 6 week period (as the case may be) (clause 17(3)).

### Clause 18 – Appointment of arbitrator

The Secretary of State shall appoint an arbitrator within 7 days of receiving an application for the appointment of an arbitrator under clause 17(1) and notify MIB accordingly. MIB shall then notify the claimant of the appointment within 7 days of it having received the notification from the Secretary of State.

The arbitrator will be chosen from a rota of a list of Queen's Counsel (i.e. senior barristers) appointed to the list (from time to time) by the Lord Chancellor (in England and Wales) or the Lord President of the Court of Session (in Scotland) (clause 18). These senior barristers will be appointed because they are considered to have the necessary experience and expertise to adjudicate upon the range of issues which might possibly arise under the Agreement.

### Clause 19 – Arbitration procedure

Not later than 21 days after notifying the claimant of the identity of the appointed arbitrator, MIB must send a letter with the notice of appeal to the arbitrator (clause 19(1)). MIB will set out in its letter the issue(s) which the arbitrator is asked to adjudicate upon. This letter must be copied at the same time to the claimant.

The letter must be accompanied not only by the notice of appeal, but also by all the documents and evidence referred to in clause 19(2) including any observations which MIB wishes to make on the appeal. So, all comments, evidence and documentation provided by the claimant in support of the notice of appeal must be included in MIB's letter and MIB will also include all the evidence originally provided to the claimant in support of its decision. It may also choose to make its own observations on the notice of appeal (clause 19(2)).

To the extent that any documents which accompany the letter to the arbitrator have not previously been seen by the claimant (which should be a rarity), these documents are also to be copied to the claimant at the same time and the claimant must, in addition, be sent a copy of any observations on the appeal which MIB chooses to make..

If MIB does not instruct the arbitrator within the 21 day period provided for under clause 19(1), the claimant may do so, sending the arbitrator the same documentation and evidence as MIB was obliged to send relevant to the notice of appeal, save for observations from MIB (clause 19(3)).

On receipt of the papers, the arbitrator may ask MIB to investigate further any issue which he considers to be relevant to assist him in resolving the appeal. MIB will then have to



investigate appropriately and report its findings to the arbitrator and to the claimant. The claimant will then have 4 weeks within which to make any written observations on MIB's findings if he wishes to (clause 19(4)).

On receipt of the initial papers (or of receipt of MIB's further findings and any observations from the claimant pursuant to clause 19(4)), the arbitrator will provide a preliminary decision in writing setting out the decision he proposes to make and his reasons for doing so (clause 19(5)).

Within 28 days (or a longer period if the claimant and MIB agree between themselves), the claimant and MIB may (by written notification to the other and to the arbitrator):-

- a) accept the decision,
- b) challenge the decision by way of written observations, or
- c) challenge the decision by requesting an oral hearing before the arbitrator (clause 19(6)).

Where the claimant and/or MIB fails, within the 28 day period, to take one of steps (a), (b) or (c) above (including failing to notify the other party), the claimant and/or MIB (as applicable) will be taken to have accepted the decision (clause 19(7)).

Where the claimant submits further evidence with any written observations challenging the decision under (b) above, MIB may, within the 28 day period (or any longer period allowed by the arbitrator) investigate this further evidence, submit its own observations on this evidence and/or request an oral hearing where it has not previously done so (clause 19(8)).

Unless MIB has requested an oral hearing, the arbitrator will decide whether and, if so, to what extent to admit the further evidence which the claimant has submitted late in the process (clause 19(9)).

Where both the claimant and MIB accept the preliminary decision of the arbitrator (or are deemed to have accepted it due to taking none of the steps listed at (a) to (c) above), the preliminary decision of the arbitrator will stand as his final decision binding both the claimant and MIB (clause 19(10)).

If, however, either the claimant or MIB (or both of them) has challenged the decision by making written observations under (b) above, then the arbitrator will take these into account and send his final written decision within 28 days of receiving the observations (clause 19(11)).

Where the claimant or MIB (or both of them) requests an oral hearing, the appeal or dispute shall proceed to a hearing before the arbitrator in private. The arbitrator will decide on the most convenient location and will give directions leading up to the hearing dealing with issues such as the timetable for the hearing, the witnesses who may be called to give evidence (if any) and the documents which may be referred to at the hearing. MIB will then be obliged to arrange the hearing in accordance with the arbitrator's requirements and will be responsible for the cost of the location. Both the claimant and MIB may be represented by lawyers at the hearing (clause 19(12)).

Following the hearing, the arbitrator will provide his final decision in writing and will include at that stage (or at some later point once he has the relevant details), his order on the question of the costs of the arbitration proceedings (clause 19(13)).



The procedure under clause 19 does not apply where the arbitrator is appointed to approve an award under clause 14 (clause 19(14)).

### Clause 20 – Arbitrator’s decision

This clause sets out the range of decisions open to an arbitrator depending upon the subject matter of the arbitration proceedings. The arbitrator must only decide the issue or issues upon which he has been asked to adjudicate and on which the outcome of the appeal depends.

Clause 20(1) should be sufficiently clear as to the range of decisions open to the arbitrator and does not require further repetition in these notes.

Clause 20(2) provides that MIB will pay to the claimant within 14 days of the final decision of the arbitrator (whether by way of acceptance/deemed acceptance of the preliminary written decision or receipt of the final written decision either after receiving observations or following an oral hearing pursuant to clause 19) any amount immediately falling due as specified by the arbitrator in his decision (including, where specified, an amount in respect of the reasonable legal costs in connection with the arbitration proceedings).

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## Part 4 – Costs

### Clause 21 – Contribution towards legal costs

This clause sets out the obligation on MIB to make a contribution towards any legal costs incurred by the claimant prior to the commencement date of any arbitration proceedings (where applicable). The commencement date of such proceedings is defined by clause 22(1) as the date of receipt of the notice of appeal by MIB under clause 16(1) or the date of receipt of the notice of intention to appeal under clause 16(3).

Clause 21 deals with the claimant’s entitlement to costs incurred prior to the date of commencement of the arbitration proceedings. It is separate to costs incurred from the date of the commencement of any arbitration proceedings (clause 21(6)).

The primary obligation is on MIB, not the claimant, to investigate the claim and reach a decision on it. That said, it is recognised that the claimant may benefit from legal advice regarding the making of his claim, the correctness of any requirement imposed by MIB or the adequacy of any award or decision made by MIB.

MIB will only make a contribution payment where it pays a final award (clause 21(1)) whether that results from an appeal to an arbitrator or not.

MIB must be satisfied that some legal advice has been received by the claimant in relation to the claim (clause 21(4)).

The contribution will involve a single payment once the claim is finally determined. If the claimant has received advice from more than one solicitor, only one contribution will be paid and it will be for the claimant to resolve any split of the contribution which might be necessary (clause 21(5)).

The contribution shall comprise the fixed fee set out in the table at clause 21(8) together with VAT on that fee and any reasonable disbursements incurred (clause 21(7)).

'Reasonable disbursements' means any reasonable expenditure which the claimant has incurred (other than his solicitor's charges) which have been agreed by MIB in advance (such consent not being unreasonably withheld) and where the evidence resulting from the expenditure has been disclosed to MIB prior to it making its award (clause 21(11)(a)). Also, reasonable disbursements includes counsel's reasonable fees (which need not be disclosed in advance to MIB) where it was reasonable to seek counsel's advice (clause 21(11)(b)). If MIB did not accept these fees as having been reasonably incurred, then this would be one example of where the claimant could appeal to an arbitrator to allow the fees in full if he wanted to.

The table setting out the fixed fee applicable (clause 21(8)) involves a fee which varies with the size of the claim.

As an example, take an award of £35,000. This will attract a fixed fee of £700 plus 10% of the amount by which the award exceeds £25,000, namely £1,000 (being 10% of £10,000), making a total fee of £1,700.

The maximum contribution is capped at £250,000.

The aim is to strike a balance which reflects the inquisitorial (rather than adversarial) nature of the process of investigation and decision making involved under the Agreement with the onus being upon MIB to make enquiries and assess the claim. At the same time, it is understood that claimants may well justify support from a lawyer in terms of the initial presentation of the claim, explaining the process involved and in considering and advising on the adequacy/correctness of any award or other decision made by MIB.

In low value claims, it was felt that, where the equivalent claim would not attract costs if it was the subject of possible court action, no contribution should likewise be made under the Agreement. Accordingly, reference is made to claims which would fall within the small claims track limit if brought before a court, this limit being a reference to the limit imposed for such claims from time to time under the Civil Procedure Rules 1998.

The reference to the small claims track also applies to claims in Scotland even though the Scottish civil procedure rules do not recognise this terminology as such. The intention is to apply consistency for all claims.

In higher value claims, it was considered that there should be an increasing contribution claimable as the value of the claim increased albeit with a cap at a maximum contribution of £250,000.

The contribution payable ignores any interim payments made. Such payments should not be treated as reducing the amount of the final award for the purposes of assessing the contribution. Also ignored are any state benefits received which can be offset against the claim as well as any NHS charges

incurred as a result of the accident. These are not relevant to assessing the contribution. Further, the relevant excess of £400 (see clauses 1(5), 7(1) and 11(5)), i.e. it is not deducted for the purposes of the award in order to calculate the contribution.

Where MIB includes periodical payments in its award, the award, for the purposes of assessing the fixed fee contribution, shall be taken to include the annual figures to be paid by MIB multiplied by the appropriate multiplier allowed by MIB as set out in MIB's award (clause 21(9)). If the claimant is entitled to provisional compensation in the event of the happening of a specified serious deterioration in his condition (which increases his needs), such right will not be reflected in the assessment of the award so as to calculate the fixed fee contribution (clause 21(10)).

The claimant may ask MIB to pay a higher fee than the amount calculated by reference to the formula set out in the table under clause 21(8) if he can demonstrate that the claim was exceptionally complex so as to warrant the higher fee (clauses 21(12) & (13)). The fact that the claim is of high value will not of itself typically mean it is exceptionally complex since the fixed fee payable under the table in higher value claims already escalates as the award increases, subject to the £250,000 cap.

If MIB refuses to pay a higher amount following the claimant's request, the claimant may appeal to an arbitrator in the usual way (clause 21(14)).

## Clause 22 – Costs of arbitration proceedings

The arbitrator may only award the costs of any arbitration proceedings which were

incurred after the date of commencement of the proceedings as defined by clause 22(1), save for the reasonable costs of preparing the notice of appeal (clauses 22(4) and (8)). No arbitration costs are recoverable where only an approval of an award is involved under clause 14 (clause 22(1)).

Once MIB is notified of the arbitrator's final decision, it will pay him a fee approved by the Lord Chancellor (in England and Wales) or the Lord President of the Court of Session (in Scotland). The level of this fee will be agreed between MIB and the Secretary of State from time to time (clause 22(2)). If the arbitrator feels that the appeal had no merit, he may, in his discretion, order the claimant, or a solicitor acting on his behalf, to reimburse MIB the whole or part of the arbitrator's fee (clause 22(3)).

Where the claimant has been successful in his appeal, the arbitrator may, in his discretion, order MIB to pay the claimant's reasonable costs of the arbitration proceedings (clause 22(4)). These costs are, however, fixed in relation to lower value claims which would have been decided under the fast track limit (from time to time) as defined by the Civil Procedure Rules if court proceedings could have been brought. The current limit for the fast track is £25,000. The reference to the fast track also applies to claims in Scotland even though the Scottish civil procedure rules do not recognise this terminology as such. The intention is to apply consistency for all claims.

The applicable fixed fees are set out in clause 22(5).

The arbitrator may only order the claimant (or any solicitor or other person acting on behalf of the claimant) to pay MIB's reasonable costs of the arbitration

proceedings if he considers that the appeal or dispute was 'frivolous, vexatious or otherwise entirely unmeritorious or involved fraud or fundamental dishonesty' (clause 22(6)). Where MIB is to be paid its reasonable costs for this reason, the arbitrator is not bound to restrict those costs

in fast track cases to the fixed fees set out in clause 22(5) (clause 22(6)).

Where MIB is awarded any costs or the reimbursement of the arbitrator's fee, it may deduct these costs from any award which is due to the claimant (clause 22(7)).

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## Part 5 – Miscellaneous

### Clause 23 – Joint and several liability – MIB's liability where wrongdoer is identified

Where MIB is liable to the claimant under the applicable Uninsured Drivers Agreement, it shall not be liable to the claimant under this Agreement because it must necessarily be the case that not all persons responsible are unidentified and hence the claim would not be within scope under clause 3(1)(c). The claimant can pursue his recovery from the identified, uninsured person and, even if an unidentified person is partly liable, MIB has no liability under this Agreement because it will compensate the claimant as an uninsured claim.

Clause 23 deals with the situation where, as well as an unidentified person being partly liable, there is an identified person who is liable (or partly liable) to the claimant but not in circumstances where that liability was one which had to be covered by motor insurance, i.e. so that MIB would not be liable under the applicable Uninsured Drivers Agreement.

In this situation, the claimant may be left out of pocket and so clause 23 provides that MIB

will be liable under the Agreement but only to the extent that a judgment obtained against the identified person has not been satisfied after a period of 3 months from when it first fell due and then only to the extent of the unidentified person's share of responsibility for the accident.

For example, if an unidentified motorist was viewed by MIB as being say 50% to blame, but a company, who caused an obstruction on a road was also partly to blame (but not such that the liability was one which required compulsory motor insurance to be in place – rather it would be a public liability), a claimant could, in principle, pursue full 100% recovery from the company. MIB could require him to pursue the company to judgment (pursuant to clause 10(6) and to the extent that he obtained a judgment and was paid on that judgment within 3 months, MIB would not be liable under the Agreement. As regards any balance not paid under the judgment, MIB could be liable to meet this if it was assessed that the untraced motorist's 50% blame amounted to at least this amount. MIB would not be liable to pay more than the balance due under the judgment.

Where the claimant pursues the identified person and the claim is settled for less than the full amount claimed, this settlement (assuming the agreed sum is paid in full) would be viewed as being in full and final discharge of the claimant's claim such that no further sum can be sought from MIB (clause 23(7)).

### Clause 24 – Service of notices or documents

Where the claimant notifies MIB of his intention to appeal, any such notice and any documentation sent with such notification has to be sent to MIB by fax or by recorded delivery post to ensure that the time limits under the Agreement are met (clause 24(1)).

Where, however, the notice is provided by a different means, MIB will accept it as valid provided MIB either accepts that it has received such notice or its receipt can be proven (clause 24(2)).

Any notification of MIB's award or decision under clause 12 or any notification in connection with the appeal process under Part 3 of the Agreement must be served by MIB on the claimant (or his solicitor) by fax or by recorded delivery post (clause 24(3)), although it may use other means if the claimant accepts that he has received such notice or its receipt can be proven (clause 24(4)).

If MIB is not able to make contact with the claimant as regards documents to be sent by the means outlined in clause 24(3), it may seek a direction from the arbitrator as to

what would constitute appropriate service (clause 24(5)).

### Clauses 25 – Contracts (Rights of Third Parties) Act 1999

Clause 25 explains that the claimant is entitled to the benefits he was meant to derive from the Agreement even though he was not a contracting party to it. Accordingly, if MIB does not pay an award or carry out its fundamental obligation to investigate the claim, the claimant may claim a breach of contract.

On the other hand, clause 25(3) gives MIB the right to set off against a claim under the Agreement any liability which the claimant may have to MIB where he was, for example, a Defendant in a separate claim under the Uninsured Drivers Agreements. MIB would have been entitled to recover its outlay in that claim from the claimant and, hence, can off set that outlay from the claimant's claim under this Agreement.

Clause 25(5) makes it clear that these provisions also apply to cases proceeding in Scotland.

### Clause 26 – Enforcement against MIB

If MIB does not perform its fundamental obligation to investigate a claim or it does not, for example, pay an award it agreed to pay or was ordered to pay by an arbitrator, the claimant can enforce any such breach by an action in contract against MIB in the courts.



1 March 2017

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