



HS1 Freight Access Terms

**Network Statement & Related Arrangements
Consultation**

June 2009

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SECTION 1 – DEFINITIONS AND INTERPRETATION

1. INTERPRETATION

1.1 Definitions

In the Contract unless the context otherwise requires:

"Access and Management Regulations" means the Railway Infrastructure (Access and Management) Regulations 2005;

"Act" means the Railways Act 1993;

"Affected Party" has the meaning ascribed to it in paragraph 5.1 of Section 5;

"Affiliate" has the meaning ascribed to the term "affiliate" in Part C of the HS1 Network Code;

"Aggregate IRC/OMRC" means, in respect of any Relevant Year, the aggregate amount of the IRC and OMRC anticipated as being payable by the Train Operator during that Relevant Year calculated on the basis described in Section 7 and in respect of each day during that Relevant Year on the basis of the Train Slots identified in the Working Timetable published prior to the Principal Change Date immediately prior to the Relevant Year or, if such Principal Change Date is prior to the Effective Date, the Train Slots anticipated to be operated by the Train Operator during the Relevant Year;

"Ancillary Movements" means train movements which are not an express part of any Services but which are necessary or reasonably required for giving full effect to the train movements which are an express part of the Services;

"Applicable Rules of the Route" means the Rules of the Route in force in respect of the Routes on the Effective Date, as from time to time amended or replaced under Part D of the HS1 Network Code;

"Applicable Rules of the Plan" means the Rules of the Plan in force in respect of the Routes on the Effective Date, as from time to time amended or replaced under Part D of the HS1 Network Code;

"Applicable Timetable" means, in respect of a Day, that part of the Working Timetable in respect of that Day which is required to be drawn up in accordance with Condition D1.6.1 as at 2200 hours on the Day prior to that Day, and which is applicable to the Trains;

"Associate" has the meaning ascribed to the term "associate" in section 17 of the Act;

"Change in Circumstances" has the meaning ascribed to it in the Concession Agreement as at the Effective Date;

"Collateral Agreements" means the agreements and arrangements listed in Schedule 3 to the Contract;

"Commencement Date" has the meaning given to it in paragraph 4 of Schedule 1 to the Contract;

"Concession Agreement" means the agreement made or to be made between the Secretary of State and HS1 Co granting the concession for the operation and financing of the Network and the repair, maintenance and replacement of the Network;

"Confidential Information" means information relating to the affairs of one party to the Contract or any of its Affiliates which has been provided by any such person to the other party under or for the purposes of the Contract, or any matter or thing contemplated by the Contract or to which the Contract relates, the disclosure of which is likely materially to compromise or

otherwise prejudice the commercial interests of any such person;

"Contract" means any Framework Track Access Agreement or Track Access Agreement between HS1 Co and the Train Operator which incorporates the Terms, the HS1 Network Code and the HS1 Operational Codes;

"CTRL Claims Allocation and Handling Agreement" means the agreement of that name between or acceded to by the Parties (and others), providing for (inter alia) the allocation and handling of third party claims against railway industry participants operating on any part of the Network;

"Day" means any period of 24 hours beginning at 0200 hours and ending immediately before the next succeeding 0200 hours;

"Default Interest Rate" is two percent above the base lending rate of Barclays Bank PLC as varied from time to time;

"Diversionary Routes" means the routes specified as such in Schedule 2 to the Contract, which routes the Train Operator is permitted to use for:

- (a) providing the Services and making Ancillary Movements during the unavailability of some or all of the Main Routes as a result of the Operational Disruption on the Main Routes; and
- (b) making Ancillary Movements of the relevant Specified Equipment for crew training purposes;

"Effective Date" means the later of the Commencement Date and the date on which the conditions precedent specified in paragraph 1.2 of Section 2 have been satisfied in full;

"Emergency Access Code" means the HS1 Emergency Access Code;

"Environmental Condition" has the meaning ascribed to it in Part E of the HS1 Network Code;

"Environmental Damage" has the meaning ascribed to it in Part E of the HS1 Network Code;

"Eurotunnel Boundary" has the meaning ascribed to it in Part A of the HS1 Network Code;

"Event of Default" means a Train Operator Event of Default or a HS1 Event of Default;

"Expiry Date" has the meaning given to it in paragraph 5 of Schedule 1 to the Contract;

"Failure to Use Notice" has the meaning ascribed to it in Part J of the HS1 Network Code;

"First Working Timetable" has the meaning ascribed to it in Part D of the HS1 Network Code;

"Force Majeure Event" has the meaning ascribed to it in paragraph 5.1 of Section 5;

"Force Majeure Notice" has the meaning ascribed to it in paragraph 5.1 of Section 5;

"Force Majeure Report" has the meaning ascribed to it in paragraph 5.1 of Section 5;

"Games" means the London Olympic 2012;

"HS1 Event of Default" has the meaning ascribed to it in paragraph 1.3 of Section 6;

"HS1 Network Code" means the document entitled "HS1 Network Code" dated [June 2009], as may be amended from time to time;

"HS1 Operational Codes" means the Performance Data Accuracy Code, the Systems Code,

the Emergency Access Code and such other codes or agreements as may be adopted pursuant to Part C of the HS1 Network Code;

"Innocent Party" means, in relation to a breach of an obligation under the Contract, the party who is not in breach of that obligation;

"Insolvency Event", in relation to either of the parties, has occurred where:

- (a) any step which has a reasonable prospect of success is taken by any person with a view to its administration under Part II of the Insolvency Act 1986;
- (b) it stops or suspends or threatens to stop or suspend payment of all or a material part of its debts, or is unable to pay its debts, or is deemed unable to pay its debts under section 123(1) or (2) of the Insolvency Act 1986, except that in the interpretation of this paragraph:
 - (i) section 123(1)(a) of the Insolvency Act 1986 shall have effect as if for "£750" there were substituted "£50,000" or such higher figure as the parties may agree in writing from time to time; and
 - (ii) it shall not be deemed to be unable to pay its debts for the purposes of this paragraph if any such demand as is mentioned in section 123(1)(a) of the Insolvency Act 1986 is satisfied before the expiry of 21 days from such demand;
- (c) its directors make any proposal under section 1 of the Insolvency Act 1986, or it makes any agreement for the deferral, rescheduling or other readjustment (or makes a general assignment or an arrangement or composition with or for the benefit of the relevant creditors) of all or a material part of its debts, or a moratorium is agreed or declared in respect of or affecting all or a material part of its debts;
- (d) any step is taken to enforce security over or a distress, execution or other similar process is levied or sued out against the whole or a substantial part of its assets or undertaking, including the appointment of a receiver, administrator, administrative receiver, manager or similar person to enforce that security;
- (e) any step is taken by any person with a view to its winding up or any person presents a winding-up petition which is not dismissed within 14 days, or it ceases or threatens to cease to carry on all or a material part of its business, except for the purpose of and followed by a reconstruction, amalgamation, reorganisation, merger or consolidation on terms approved by the other party before that step is taken (which approval shall not be unreasonably withheld or delayed); or
- (f) any event occurs which, under the law of any relevant jurisdiction, has an analogous or equivalent effect to any of the events listed above,

unless:

- (i) in any case, a railway administration order (or application for such order) has been made or such order (or application) is made within 14 days after the occurrence of such step, event, proposal or action (as the case may be) in relation to the party in question under section 60, 61 or 62 of the Act (as modified by section 19 of the Channel Tunnel Rail Link Act 1996) and for so long as any such order (or application) remains in force or pending; or
- (ii) in the case of paragraphs (a), (d) and (e), the relevant petition, proceeding or other step is being actively contested in good faith by that party with timely

recourse to all appropriate measures and procedures;

"Legal Requirement" has the meaning given to it in Part A of the HS1 Network Code;

"Liability" means any liability, whether pursuant to a claim for contribution or under statute, tort (including but not limited to liability for negligence), contract or otherwise (save that any exclusions or limitations of liability shall not apply in respect of fraud), and "liable" shall be construed accordingly;

"Liability Cap" means, in respect of each Relevant Year, the greater of:

- (a) 1.0% of the Aggregate IRC/OMRC in respect of that Relevant Year; and
- (b) £500,000 (Indexed);

"Longstop Date" means the date falling one week after the date of the Contract;

"Main Routes" means the routes specified as such in Schedule 2 to the Contract and which are not the Diversionary Routes;

"Network" has the meaning ascribed to it in Part A of the HS1 Network Code;

"Network Statement" means the network statement published by HS1 Co in accordance with regulation 11 of the Access and Management Regulations;

"NR(CTRL)" means Network Rail (CTRL) Limited, a company incorporated under the laws of England and Wales (company number 04434562) and whose registered address is Kings Place, 90 York Way, London, N1 9AG;

"NRIL" means Network Rail Infrastructure Limited, a company incorporated under the laws of England and Wales (company number 02904587) and whose registered address is Kings Place, 90 York Way, London, N1 9AG;

"NR Network" has the meaning ascribed to it in Part A of the HS1 Network Code;

"Operational Disruption" has the meaning given to it in Part H of the HS1 Network Code;

"Operator" means an operator of the Network appointed by HS1 Co;

"ORR" or "Office of Rail Regulation" has the meaning ascribed to it under section 15 of the Railways and Transport Safety Act 2003;

"Performance Data Accuracy Code" means the HS1 Performance Data Accuracy Code;

"Period" means each consecutive period of 28 days during the term of the Contract commencing at 0000 hours on 1 April in each year, provided that the length of the first and last such Period in any year may be varied by up to 14 days on reasonable prior notice from HS1 Co to the Train Operator;

"Previous Access Agreements" means any access agreements referred to in paragraph 6 of Schedule 1 to the Contract;

"Principal Change Date" has the meaning given to it in Part D of the HS1 Network Code;

"Public Holiday" means any Day other than Saturday or Sunday on which the banks in the City of London are not open for business;

"Railway Code System" has the meaning ascribed to it in the HS1 Railway Systems Code;

"Recovery Time" means additional time incorporated in the First Working Timetable or (where the Train Operator requests that the allowance is not incorporated in the First Working Timetable and HS1 Co complies with that request) the Applicable Timetable to allow a Train to regain time lost during an earlier part of its journey;

"Relevant Force Majeure Event" has the meaning ascribed to it in paragraph 5.1 of Section

5;

"Relevant Losses" means, in relation to:

- (a) a breach of the Contract; or
- (b) in the case of paragraph 1 of Section 5, any of the matters specified in paragraph 1.1 or paragraph 1.2 of Section 5 (each a "breach" for the purpose of this definition),

all costs, losses, expenses, payments, damages, liabilities, interest and the amounts by which rights or entitlements to amounts have been reduced, in each case incurred or occasioned as a result of or by such breach excluding in each such case loss of profit, loss of revenue and consequential loss;

"Relevant Obligation" has the meaning ascribed to it in paragraph 5 of Section 5;

"Relevant Year" means a year commencing at 0000 hours on 1 April and ending at 2359 hours on the following 31 March or, in respect of the first Relevant Year, the period from the Effective Date until 2359 hours on the following 31 March and, in respect of the last Relevant Year, the period ending or on the expiry or termination of the Contract and beginning at 0000 hours on the immediately preceding 1 April;

"Routes" means the Main Routes and the Diversionary Routes;

"RPI" means the UK All Items Retail Prices Index as published by the United Kingdom Office for National Statistics (January 1987 = 100) contained in the Monthly Digest of Statistics (or contained in any official publication substituted therefor) or failing such publication, such other index which replicates RPI as closely as possible (with the intention of putting HS1 Co in no better nor worse position than it would have been had the index not ceased to be published);

"Rule Book" means the HS1 Rule Book dated 2008;

"Safety Authorisation" and **"Deemed Safety Authorisation"** have the meanings ascribed to them by regulation 2 of and Schedule 5 to the Railways and Other Guided Transport Systems (Safety) Regulations 2006;

"Safety Certificate" and **"Deemed Safety Certificate"** have the meanings ascribed to them by regulation 2 of and Schedule 5 to the Railways and Other Guided Transport Systems (Safety) Regulations 2006;

"Safety Obligations" means all applicable obligations concerning health and safety (including any duty of care arising at common law, and any obligation arising under statute, statutory instrument or mandatory code of practice) in Great Britain;

"Scheduled" means, in relation to the quantum, timing or any other characteristic of a Service, that quantum, timing or other characteristic as included in the Applicable Timetable;

"Secretary of State" means the Secretary of State for Transport;

"Services" means the Scheduled services for the carriage of goods by railway to be operated by the Train Operator on the Network pursuant to the permission to use the Routes granted under Section 3 and in accordance with the Firm Rights provided in Schedule 5 to the Contract;

"Sectional Appendix" means the HS1 Sectional Appendix dated 2008;

"Specified Equipment" means, in relation to each of the Routes, the railway vehicles which the Train Operator is entitled to use in the provision of Services on that Route as specified in Schedule 5 to the Contract;

"Stable" means the parking or laying up of the Specified Equipment or such other railway vehicles being necessary or reasonably required in connection with the provision of the Services and **"Stabling"** shall be construed accordingly;

"St. Pancras International" means London St Pancras International Station;

"Suspension Notice" means a notice in writing served by the relevant party on the other party under paragraph 2 of Section 6;

"Systems Code" means the HS1 Railway Systems Code;

"Temple Mills Boundary" means the boundary of the Temple Mills Depot;

"Temple Mills Depot" means the light maintenance depot located at Temple Mills, north of Stratford, London

"Termination Notice" means a notice in writing served by the relevant party on the other party under paragraph 3 of Section 6;

"Terms" means these High Speed 1 Freight Access Terms as may be amended from time to time;

"Timetable Period" has the meaning ascribed to in Part A of the HS1 Network Code;

"Track Charges" means the charges payable by or on behalf of the Train Operator to HS1 Co, as set out in or calculated under Part 2 of Section 7;

"Train" means each train, whether operated by the Train Operator or another train operator, operating a scheduled service for the carriage of passenger or goods by railway excluding any and all trains making an Ancillary Movement;

"Train Operator" means the relevant train operator who executes the Contract with HS1 Co;

"Train Operator Event of Default" has the meaning ascribed to it in paragraph 1.1 of Section 6;

"Train Slot" means a train movement or a series of train movements, identified by arrival and departure times at each of the start, intermediate (where appropriate) and end points of each train movement;

"Value Added Tax" means value added tax as provided for in the Value Added Tax Act 1994, and any tax similar or equivalent to value added tax or any turnover tax replacing or introduced in addition to them, and "VAT" shall be construed accordingly;

"Working Day" means each of Monday to Friday (inclusive) excluding the Public Holidays; and

"Working Timetable" has the meaning ascribed to in Part A of the HS1 Network Code.

1.2 Interpretation

In the Contract, unless the context otherwise requires:

- (a) the singular includes the plural and vice versa;
- (b) any one gender includes the other;
- (c) all headings are for convenience of reference only and shall not be used in the construction of the Contract;
- (d) reference to an item of primary or secondary legislation is to that item as amended or replaced from time to time;

- (e) reference to a contract, instrument or other document is to that contract, instrument or other document as amended, novated, supplemented or replaced from time to time;
- (f) reference to a party is to a party to the Contract, its successors and permitted assigns;
- (g) reference to a recital, Clause or Schedule is to a recital, clause or schedule of or to the Contract; reference to a Section is to a section of the Terms, reference in a Schedule or Section to a Part of or an Appendix to a Schedule or Section is to a part of or an appendix to the Schedule or Section in which the reference appears; reference in a Part of a Schedule or Section to a paragraph is to a paragraph of that part; reference to a Part of an appendix is to a part of the appendix in which the reference appears; and reference in a schedule to a Table is a reference to the table included in or annexed to that schedule;
- (h) where a word or expression is defined, cognate words and expressions shall be construed accordingly;
- (i) references to the word "person" or "persons" or to words importing persons include individuals, firms, corporations, government agencies, committees, departments, authorities and other bodies incorporated or unincorporated, whether having separate legal personality or not;
- (j) "otherwise" and words following "other" shall not be limited by any foregoing words where a wider construction is possible;
- (k) the words "including" and "in particular" shall be construed as being by way of illustration or emphasis and shall not limit or prejudice the generality of any foregoing words;
- (l) words and expressions defined in the Channel Tunnel Rail Link Act 1996, the Channel Tunnel Rail Link (Supplementary Provisions) Act 2008, the Railways Acts 1993 and 2005, the Railway Infrastructure (Access and Management) Regulations 2005, the Railway (Licensing of Railway Undertakings) Regulations 2005 and the Railways and Other Guided Transport Systems (Safety) Regulations 2006 shall, unless otherwise defined in the Contract, have the same meanings in the Contract;
- (m) any reference to the term "possession", either by itself or as part of any composite definition, shall be construed as a reference to a Restriction of Use as defined in Section 4;
- (n) words and expressions defined in the HS1 Network Code shall, unless that word or expression is defined in the Contract (excluding the HS1 Network Code), have the same meanings in the Contract;
- (o) save as otherwise expressly stated in the Contract, where at any time any sum is stated to be 'Indexed' then at such time, the said sum shall be multiplied by I where I equals:

$$RPI_t \div RPI_0$$

where RPI_t means the RPI published or determined with respect to February in Relevant Year t-1 and RPI_0 means the RPI published or determined with respect to February 2009 provided that where a value of RPI published or determined with respect to any February is lower than the value of RPI published or determined with respect to any previous February in or after 2009, RPI shall remain at the higher value;

- (p) all sums payable under the Contract are expressed in Pounds Sterling; and

(q) all sums payable under the Contract exclude VAT (unless otherwise stated).

1.3 **Indemnities**

Indemnities provided for in the Contract are continuing indemnities in respect of the Relevant Losses to which they apply, and hold the indemnified party harmless on an after tax basis.

SECTION 2 – DURATION

1. CONDITIONS PRECEDENT AND DURATION

1.1 Effective date

The provisions of the Contract, other than paragraph 1 of Section 3, shall take effect from the signature of the Contract.

1.2 Conditions precedent to paragraph 1 of Section 3

Paragraph 1 of Section 3 shall take effect on the later of the Commencement Date and the date on which the following conditions precedent have been satisfied in full:

- (a) the Train Operator is authorised to be the operator of trains for the provision of the Services by either (i) a European licence and a statement of national regulatory provisions granted by the ORR under the Railway (Licensing of Railway Undertakings) Regulations 2005 or (ii) a licence granted under section 8 of the Act unless it is exempt from the requirement to be so authorised under section 7 of the Act;
- (b) each of the Collateral Agreements is executed and delivered by all the parties to each such agreement and is unconditional in all respects (save only for the fulfilment of any condition relating to the Contract becoming unconditional);
- (c) the Train Operator is issued a Safety Certificate or a Deemed Safety Certificate and HS1 Co is issued a Safety Authorisation or a Deemed Safety Authorisation under the Railways and Other Guided Transport Systems (Safety) Regulations 2006; and
- (d) the provisions of the Contract, other than paragraph 1 of Section 3, have taken effect in accordance with paragraph 1.1.

1.3 Obligations to satisfy conditions precedent

Each party shall use all reasonable endeavours to ensure that the following conditions precedent are satisfied as soon as practicable and in any event not later than the Longstop Date:

- (a) in the case of HS1 Co, in so far as within its controls, the conditions precedent contained in paragraphs 1.2(b) and 1.2(c); and
- (b) in the case of the Train Operator, the condition precedent contained in paragraph 1.2(a) and, in so far as within its control, the conditions precedent contained in paragraphs 1.2(b) and 1.2(c).

1.4 Consequences of non-fulfilment of conditions precedent to paragraph 1 of Section 3

If the conditions precedent set out in paragraph 1.2 have not been satisfied in full on or before the Longstop Date:

- (a) the Contract shall lapse save for the obligations of confidence contained in paragraph 1 of Section 9 which shall continue in force; and
- (b) neither party shall have any liability to the other except in respect of any breach of its obligations under the Contract.

1.5 Expiry

This Contract shall continue in force until the earliest of:

- (a) lapse under paragraph 1.4;
- (b) the date specified in any Failure to Use Notice terminating all of the Services;
- (c) termination under Section 6; and
- (d) 0159 hours on the Expiry Date.

1.6 **Previous Access Agreements**

- (a) Paragraph 1.6(b) shall have effect if any Previous Access Agreement is identified in paragraph 6 of Schedule 1 to the Contract.
- (b) On the Effective Date, the Previous Access Agreements shall terminate with immediate effect. Such termination shall be without prejudice to accrued rights and obligations under the Previous Access Agreements.

SECTION 3 – OPERATIONAL PROVISIONS

1. PERMISSION TO USE

1.1 Permission to use the Routes

- (a) The parties have agreed the capacity reservation as set out in Schedule 5 to the Contract, subject to application for, allocation of (in accordance with the provisions of the HS1 Network Code) and payment for the right to use the Routes within that capacity in each Timetable Period during the term of the Contract, in accordance with the terms of the Contract.
- (b) Subject as aforesaid, HS1 Co grants the Train Operator permission to use the Routes allocated to it in accordance with the provisions of Part D of the HS1 Network Code.

1.2 Meaning

References in the Contract to permission to use the Routes shall, except where the context otherwise requires, be construed to mean permission:

- (a) to use the track comprised in the Routes for the provision of the Services using the Specified Equipment;
- (b) to use the track comprised in the Network in order to implement any plan established under Part H of the HS1 Network Code;
- (c) to make Ancillary Movements;
- (d) where agreed between the parties pursuant to paragraph 1.4, to Stable, which shall be treated, for the purposes of Part D of the HS1 Network Code, as the use of a Train Slot;
- (e) for the Train Operator and its Associates to enter upon that part of the Network comprising the Routes, with or without vehicles; and
- (f) for the Train Operator and its Associates to bring things onto that part of the Network comprising the Routes and keep them there;

and such permission is subject, in each case and in all respects to:

- (i) the HS1 Network Code;
- (ii) the Applicable Rules of the Route;
- (iii) the Applicable Rules of the Plan;
- (iv) the Rule Book, including, the Sectional Appendix; and
- (v) the HS1 Standards.

1.3 Permission under paragraphs 1.2(e) and 1.2(f)

In relation to the permissions specified in paragraphs 1.2(e) and 1.2(f):

- (a) the Train Operator shall, and shall procure that its Associates shall, wherever reasonably practicable, first obtain the consent of HS1 Co, which consent shall not be unreasonably withheld or delayed;

- (b) the Train Operator shall remove any vehicle or other thing so brought onto any part of the Network when reasonably directed to do so by HS1 Co; and
- (c) whilst exercising any rights conferred by paragraphs 1.2(e) and 1.2(f), the Train Operator shall, and shall procure that its Associates shall, comply with such reasonable restrictions or instructions as HS1 Co shall specify.

1.4 **Stabling**

The Train Operator shall be entitled to such Stabling rights at such location on the Network as may be agreed with HS1 Co from time to time provided that in agreeing what Stabling rights shall be made available to the Train Operator and any other train operators, HS1 Co shall endeavour to distribute such Stabling rights in a manner which is non-discriminatory and in a manner which makes best available use of the Stabling capacity at such location on the Network having regard to the operational requirements of the Train Operator and any other train operators.

1.5 **Changes to Applicable Rules of the Route and Applicable Rules of the Plan**

Changes to the Applicable Rules of the Route and the Applicable Rules of the Plan are subject to complying with the procedural requirements in Part D of the HS1 Network Code.

1.6 **Changes to Rule Book, Sectional Appendix or HS1 Standards**

If any change made to the Rule Book, the Sectional Appendix or the HS1 Standards fall within the definition of Network Change, such change shall be subject to Part G of the HS1 Network Code.

2. **STANDARD OF PERFORMANCE**

2.1 **General standard**

Without prejudice to all other obligations of the parties under the Contract, each party shall, in its dealings with the other for the purpose of, and in the course of performance of its obligations under the Contract, act with due efficiency and economy and in a timely manner with that degree of skill, diligence, prudence and foresight which should be exercised by a skilled and experienced:

- (a) network owner and operator (in the case of HS1 Co); and
- (b) train operator (in the case of the Train Operator).

2.2 **Good faith**

The parties to the Contract shall, in exercising their respective rights and complying with their respective obligations under the Contract (including when conducting any discussions or negotiations arising out of the application of any provisions of the Contract or exercising any discretion under them), at all times act in good faith.

3. **OPERATION AND MAINTENANCE OF TRAINS AND NETWORK**

3.1 **General**

Without prejudice to the other provisions of the Contract:

- (a) the Train Operator shall maintain and operate the Specified Equipment used on the Network in accordance with paragraph 2.1 with a view to permitting the provision of the Services on the Routes in accordance with the Working Timetable and the making

of Ancillary Movements;

- (b) HS1 Co shall maintain and operate the Network in accordance with paragraph 2.1 with a view to permitting the provision of the Services on the Routes using the Specified Equipment in accordance with the Working Timetable and the making of Ancillary Movements; and
- (c) the parties shall comply with the Systems Code and, where appropriate, shall use the Railway Code Systems in their dealings with each other in connection with matters provided in the Contract.

3.2 **Trespass, vandalism and animals**

Without prejudice to the other provisions of the Contract, each of the parties shall use all reasonable endeavours (including participating in such consultation and joint action as is reasonable in all the circumstances) to reduce:

- (a) trespass;
- (b) vandalism; and
- (c) intrusions on to the Network by animals,

in each case as may affect either the provision of the Services or the Routes.

3.3 **Safety**

In relation to Safety Obligations:

- (a) the Train Operator shall comply with any reasonable request by HS1 Co in relation to any aspect of the Train Operator's operations which affects or is likely to affect the performance of HS1 Co's Safety Obligations; and
- (b) HS1 Co shall comply with any reasonable request by the Train Operator in relation to any aspect of HS1 Co's operations which affects or is likely to affect the performance of the Train Operator's Safety Obligations.

3.4 **Provision of Information**

- (a) Without prejudice to paragraph 1 of Section 9 (Confidentiality) each of HS1 Co and the Train Operator (the "**Provider**") shall provide the other (the "**Recipient**") with such information as the Recipient may reasonably request, to the extent that:
 - (i) such information is in the possession or control of the Provider; and
 - (ii) the Recipient requires such information to exercise its rights or perform its obligations under the Contract or for the safe and efficient operation of the Network (in case of HS1 Co) or for the safe and efficient provision of Services (in case of the Train Operator).
- (b) The Recipient shall bear the Provider's reasonable costs in complying with this paragraph 3.4 save that information provided in connection with Section 4, Section 7 and Section 8 should be provided at no cost to the Recipient.

4. **CO-ORDINATION**



HS1 Co and the Train Operator shall co-operate with each other in co-ordinating the timetabling and operation of passenger and freight services on the Network (taking into account that timetabling on the Network will be carried out subject to the HS1 Network Code) with a view to the passenger and freight services being scheduled to operate and operating over the Network and the other networks, running in a co-ordinated and robust manner:

- (a) with any of the Train Operator's services passing through the Channel Tunnel; and
- (b) with any of the Train Operator's services on the NR Network.

5. OLYMPIC GAMES

- 5.1 The parties acknowledge that the Games will take place during 2012 and acknowledges that during the period of the Games train operations which relates to the Games will take priority over train operations which does not relate to the Games.

SECTION 4 – COMPENSATION FOR RESTRICTIONS OF USE

1. DEFINITIONS

1.1 Defined terms

In this Section 4, unless the context otherwise requires, the following expressions shall have the following meanings:

"Competent Authority Restriction of Use" means a Restriction of Use (other than one which constitutes an Extended Disruption under and for the purposes of Condition H7 of Part H of the HS1 Network Code):

- (a) as a result of any Change of Law or any Direction of any Competent Authority other than ORR; or
- (b) pursuant to an agreement between HS1 Co and any Competent Authority, to the extent only that the Restriction of Use could otherwise have been required pursuant to a Direction of that Competent Authority;

"Competent Authority Rate" means the amount payable by HS1 Co to the Train Operator in respect of a Competent Authority Restriction of Use as calculated in accordance with paragraph 7;

"Corresponding Day" means, in respect of any Day (the "First Day"):

- (a) a Day which is contained in the same Timetable Period as the First Day and on which the Services scheduled in the First Working Timetable are the same as would have been scheduled on the First Day but for Restrictions of Use reflected in the First Working Timetable for the First Day; or
- (b) if no Day is found under paragraph (a), then a Day during the equivalent time of year in the year immediately preceding the Timetable Period which includes the First Day and on which the Services scheduled in the First Working Timetable are the same as would have been scheduled on the First Day but for Restrictions of Use reflected in the First Working Timetable for the First Day; or
- (c) if no Day is found under paragraph (a) or (b) above, such other Day as the parties may agree or as may be determined in accordance with paragraph 6;

"Corresponding Day Timetable" means, in relation to a Corresponding Day, the First Working Timetable or such other timetable as may be agreed between the parties or otherwise determined in accordance with paragraph 6;

"Direct Costs"	<p>means the aggregate demonstrable amount of:</p> <ul style="list-style-type: none"> (a) bus and taxi hire costs; (b) publicity costs; (c) train planning and diagramming costs; and (d) other costs directly related to the organisation and management of the Train Operator's response to a Restriction of Use, <p>reasonably incurred by the Train Operator as a result of a Restriction of Use, adjusted by:</p> <ul style="list-style-type: none"> (i) adding any increase in costs which results from increases in train mileage; and (ii) deducting any decrease in costs which results from decreases in train mileage; <p>but only to the extent that the Train Operator has used reasonable endeavours to mitigate such costs and excluding any loss of profit, loss of revenue and consequential losses;</p>
"HS1 Restriction of Use"	<p>means any Restriction of Use other than an Operator Restriction of Use or a Competent Authority Restriction of Use;</p>
"Operator Restriction of Use"	<p>means a Restriction of Use of the type referred to in paragraph 2.3;</p>
"Part G Restriction of Use"	<p>means a HS1 Restriction of Use to implement a Network Change;</p>
"Possessions Allowance"	<p>means:</p> <ul style="list-style-type: none"> (a) 12 x 8 hours Saturday to Sunday planned disruptive possessions in a Timetable Period on the route between St Pancras International and Temple Mills Boundary (provided that if there is a demand for paths by the North London Line this requirement will increase to 20 x 8 hours planned disruptive possessions in a Timetable Period on the route between St Pancras International and Temple Mills Boundary); (b) one overnight double line possession of 12 hour per Timetable Period; and (c) two double line possessions of up to 20 minutes per day on Saturdays and Sundays;
"Recovery Allowance"	<p>means an allowance for the Recovery Time;</p>

- "Relevant Costs"** means, in respect of any Competent Authority Restriction of Use, all costs, expenses and losses (including loss of profit, loss of revenue and consequential losses) incurred by HS1 Co and/or any train operator using the Network (including the Train Operator) as a consequence of the taking of that Competent Authority Restriction of Use (but without double counting);
- "Restriction of Use"** means, in respect of any Day, any restriction of use of all or any part of the Routes (other than one caused by a Recovery Allowance which was contained in the Applicable Rules of the Plan relevant to that Day notified to each Bidder on or before the end of the Drafting Period under Part D of the HS1 Network Code) which results in:
- (a) a difference between the Applicable Timetable on that Day as compared with the First Working Timetable in respect of that Day; and/or
 - (b) a difference between the First Working Timetable on that Day as compared with the Corresponding Day Timetable in respect of the Corresponding Day;
- "Restriction of Use Day"** means a Day on which a HS1 Restriction of Use is taken or deemed to be taken;
- "Week"** means a period commencing at 00:00:00 hours on any Saturday and ending at 23:59:59 hours on the next following Friday.

1.2 Interpretation

A Restriction of Use shall be deemed to be taken if and to the extent it results in any difference between timetables of the type referred to in the definition of "Restriction of Use". For these purposes, a difference between timetables shall be deemed to be due to a Restriction of Use where the difference was initially the direct result of the Restriction of Use being notified, whether or not the Restriction of Use was subsequently cancelled in whole or in part.

1.3 Suspension Notices

Wherever a Suspension Notice is in force, the effects of that Suspension Notice shall be the subject of Section 6 and not of this Section 4. A Restriction of Use shall only be treated as a Restriction of Use to the extent that it involves a Restriction of Use of all or any part of the Routes which is not covered by the restriction under that Suspension Notice.

2. APPLICATION OF THIS PART

2.1 Entry into effect

This Section 4 shall apply in respect of Restrictions of Use.

2.2 Applicable Rules of the Route and the HS1 Network Code

The provisions of this Section 4 shall be without prejudice to:

- (a) HS1 Co's right to take Restrictions of Use under or pursuant to the Applicable Rules of the Route;
- (b) the establishment of any amended Working Timetable under Part H of the HS1

Network Code; and

- (c) any rights pursuant to the HS1 Network Code that the Train Operator may have to challenge any decision of HS1 Co.

2.3 Operator Restriction of Use

HS1 Co shall not be obliged to make any payments to the Train Operator for any one or more Restrictions of Use to the extent:

- (a) required as a result of any damage to the HS1 Network or Environmental Damage which in each case:
 - (i) arises wholly or mainly from the operations of the Train Operator or its failure to comply with its obligations under the Contract; and
 - (ii) HS1 Co demonstrates, is in excess of fair wear and tear arising from use of the HS1 Network by the Train Operator; or
- (b) requested by the Train Operator (other than for the purposes of inspection, maintenance, renewal or repair of the HS1 Network);
- (c) required in connection with a Network Change proposed by the Train Operator under Condition G3; or
- (d) that the Restriction of Use is within the Possessions Allowance.

2.4 HS1 Co payments

Subject to paragraph 2.3, HS1 Co shall make payments to the Train Operator (in accordance with the procedure in paragraph 8) in respect of Restrictions of Use calculated on the following basis:

- (a) for each HS1 Restriction of Use, in accordance with paragraph 3; and
- (b) for each Competent Authority Restriction of Use, in accordance with paragraph 7.

2.5 Part G Restriction of Use

A Part G Restriction of Use shall be subject to compensation in accordance with both this Section 4 and Part G of the HS1 Network Code. The application of this Section 4 shall be without prejudice to the application of Part G, save that in calculating the compensation to be paid to the Train Operator under Part G for the implementation of the relevant Network Change, any payment made or to be made by HS1 Co to the Train Operator under this Section 4 in respect of the Part G Restriction of Use shall be taken into account for the purposes of Condition G2.3 as a benefit to be obtained by the Train Operator as a result of the relevant Network Change and accordingly be deducted from (and thereby reduce) the amount of compensation otherwise payable by HS1 Co to the Train Operator under Part G in respect of that Part G Restriction of Use.

3. COMPENSATION FOR HS1 RESTRICTIONS OF USE

- 3.1 Subject to paragraph 9, HS1 Co shall, in respect of each HS1 Restriction of Use, pay to the Train Operator the Direct Costs actually incurred by the Train Operator as a consequence of such HS1 Restriction of Use.

- 3.2 Where reasonably requested by HS1 Co within 3 months of the relevant HS1 Restriction of

Use, is taken, the Train Operator shall provide HS1 Co with details of the full amount of Direct Costs actually incurred by the Train Operator in respect of such Restriction of Use.

4. CAP ON COMPENSATION

The compensation payable by HS1 Co to the Train Operator in respect of any Restriction of Use (excluding any Competent Authority Restriction of Use or any Part G Restriction of Use) in any Relevant Year shall not exceed 1.0 % of the Aggregate IRC/OMRC in respect of that Relevant Year.

5. SECTION 8 APPLICATION

If and to the extent that a HS1 Restriction of Use is not reflected in the Applicable Timetable for the Restriction of Use Day, the amount of compensation (if any) shall be calculated in accordance with Section 8 (to the exclusion of any compensation under Section 4).

6. RESTRICTION OF USE DAY AND CORRESPONDING DAY

- (a) If, for the purpose of identifying a Corresponding Day, no Day is found under paragraph (a) or (b) of the definition "Corresponding Day" and the parties have failed to reach agreement on the Corresponding Day by the date falling 8 Weeks before the relevant Passenger Change Date then either party may require that the identification of the Corresponding Day be resolved by submission to the Disputes Resolution Procedure.
- (b) The relevant Dispute Resolutions Panel's remit shall be that it shall:
 - (i) reach a decision which is fair and reasonable; and
 - (ii) identify the Day in either any version of the Working Timetable or any Draft Timetable notified to the Train Operator on or before the end of the Drafting Period in either case which has been produced in accordance with the HS1 Network Code as at the Restriction of Use Day and which most closely reflects the Services which would have been scheduled on the First Day (as that term is used in the definition of Corresponding Day) but for Restrictions of Use reflected in the First Working Timetable for the First Day.

7. COMPETENT AUTHORITY RATE

7.1 Calculations

The Competent Authority Rate shall be calculated as follows:

- (a) where any compensation paid to HS1 Co in relation to a Competent Authority Restriction of Use is sufficient to cover the Relevant Costs of all train operators using the Network and of HS1 Co, the Relevant Costs of the Train Operator in relation to the Competent Authority Restriction of Use; and
- (b) where such compensation is not so sufficient, such proportion of that compensation as the Train Operator's Relevant Costs bears to the sum of HS1 Co's Relevant Costs and the Relevant Costs of all train operators using the Network in respect of that Competent Authority Restriction of Use.

7.2 Negotiation of compensation with Competent Authority

HS1 Co shall use all reasonable endeavours to negotiate with the relevant Competent

Authority a level of compensation in respect of the Competent Authority Restriction of Use which is sufficient to ensure that the Train Operator receives compensation for all of its Relevant Costs. HS1 Co shall from time to time consult with the Train Operator and keep the Train Operator informed in reasonable detail of the progress of such negotiations.

7.3 Notification of Train Operator's Relevant Costs

- (a) Within 28 days of the end of each Period in which a Competent Authority Restriction of Use is taken, the Train Operator shall supply to HS1 Co:
 - (i) details of its Relevant Costs; and
 - (ii) reasonable details of any of its Relevant Costs which are not fully determined.
- (b) Save to the extent that the Train Operator supplies details of its Relevant Costs under paragraph 7.3(a), such costs shall not be regarded as Relevant Costs.
- (c) Within 10 days of determination of any Relevant Costs which are supplied under paragraph 7.3(a)(ii) as not fully determined, the Train Operator shall serve a supplemental notice on HS1 Co, including final details of such Relevant Costs.

7.4 Notification of HS1 Co's Relevant Costs

- (a) Within 28 days of receipt of information under paragraph 7.3(a), HS1 Co shall supply to the Train Operator:
 - (i) details of its Relevant Costs; and
 - (ii) reasonable details of any of its Relevant Costs which are not fully determined.
- (b) Save to the extent that HS1 Co supplies details of its Relevant Costs under paragraph 7.4(a), such costs shall not be regarded as Relevant Costs.
- (c) Within 10 days of determination of any Relevant Costs details of which are supplied under paragraph 7.4(a)(ii) as not fully determined, HS1 Co shall serve a supplemental notice on the Train Operator, including final details of such Relevant Costs.

7.5 Compensation received by HS1 Co

HS1 Co shall inform the Train Operator of compensation received in respect of each Competent Authority Restriction of Use within 7 days of receipt of the compensation. HS1 Co shall pay the compensation into a segregated account and retain it in such an account until distributed in accordance with paragraph 8.

8. PAYMENT PROCEDURES

8.1 HS1 Restrictions of Use

- (a) Within 10 Working Days after the end of each Period, HS1 Co shall provide to the Train Operator a statement ("Possessions Statement") showing:
 - (i) all HS1 Restrictions of Use taken during that Period; and
 - (ii) all Competent Authority Restrictions of Use taken during that Period.
- (b) Within 10 Working Days of the receipt of the Possessions Statement, the Train Operator

shall notify HS1 Co of any compensation payable to the Train Operator by HS1 Co in respect of the HS1 Restrictions of Use identified in the Possessions Statement.

- (c) The aggregate liabilities of HS1 Co and the Train Operator, in respect of any and all compensation for which either is liable to the other under this Section 4 in respect of each Period shall, to the extent that such compensation is not under dispute, be set off against each other and the balance (if any) shall be payable by HS1 Co or the Train Operator, as the case may be, within 20 Working Days after the end of that Period.

8.2 **Competent Authority Restrictions of Use**

- (a) Where all Relevant Costs have been finally determined under paragraph 7 in respect of a Competent Authority Restriction of Use for which compensation has been received by HS1 Co, HS1 Co shall:

- (i) forward to the Train Operator a calculation of such sums as are due to the Train Operator in respect of that Restriction of Use; and

- (ii) pay to the Train Operator any compensation due in accordance with paragraph 7 in respect of that Restriction of Use:

- (A) plus any interest accrued; and

- (B) less any interim payments already made in respect of that Restriction of Use under paragraph 8.2(c),

within 20 Working Days after receipt of such compensation or 20 Working Days after final determination of all Relevant Costs, whichever is the later.

- (b) Where HS1 Co has received compensation in respect of a Competent Authority Restriction of Use for which the Relevant Costs have not been fully determined within 20 Working Days of receipt of the compensation, HS1 Co shall within 20 Working Days of receipt of the compensation forward to the Train Operator a statement of:

- (i) all Relevant Costs which have been fully determined;

- (ii) all Relevant Costs of which HS1 Co is aware and which have not been fully determined;

- (iii) interim payments already made under paragraph 8.2(c) in respect of that Competent Authority Restriction of Use; and

- (iv) its proposals for making an interim payment in respect of that compensation.

- (c) Within 20 Working Days after serving the statement under paragraph 8.2(b), HS1 Co shall make an interim payment to the Train Operator in accordance with its proposals.

8.3 **Disputes**

Within 10 Working Days of receipt of a statement under paragraphs 7.3, 7.4, 8.1 or 8.2, the relevant party shall notify the other party of any aspects of the statement which it disputes, giving reasons for any dispute. Save to the extent that disputes are so notified, the relevant party shall be deemed to have agreed the contents of the statement.

8.4 **Dispute resolution**

The procedure for resolving disputes notified under paragraph 8.3 shall be as follows:

- (a) within 5 Working Days of service of any notice under paragraph 8.3, the parties shall meet to discuss the disputed aspects of the statement with a view to resolving all disputes in good faith;
- (b) if, within 5 Working Days of that meeting (the "first meeting"), the parties are for any reason still unable to agree the disputed aspects of the statement, each party shall promptly (and in any event within 5 Working Days) prepare a written summary of the disputed aspects of the statement and the reasons for each such dispute and shall submit the summaries to the senior officer of each party;
- (c) within 20 Working Days of the first meeting, the senior officers shall meet with a view to resolving all disputes; and
- (d) if no resolution results within 10 Working Days of that meeting, either party may require that the matter be resolved by the submission to the Dispute Resolutions Procedure.

8.5 **Payments in the event of a dispute**

Where any amount under paragraphs 8.1 or 8.2 is in dispute:

- (a) the undisputed amount shall be paid in accordance with paragraphs 8.1 or 8.2 as the case may be;
- (b) the disputed amount shall be paid within 20 Working Days after the dispute is resolved or determined to the extent that the amount in dispute is adjudged or resolved to be payable; and
- (c) the disputed amount shall carry interest (incurred daily and compounded monthly) at the Default Interest Rate from the date on which such amount would but for such dispute have been due to be paid until the date of payment.

SECTION 5 – LIABILITY

1. LIABILITY

1.1 Train Operator indemnity

Subject to paragraph 2 and the other provisions of the Contract, the Train Operator shall indemnify HS1 Co against all Relevant Losses resulting from:

- (a) a failure by the Train Operator to comply with its Safety Obligations;
- (b) any Environmental Damage arising directly from the acts or omissions of the Train Operator or the proper taking by HS1 Co under Part E of the HS1 Network Code of any steps to prevent, mitigate or remedy an Environmental Condition which exists as a direct result of the acts or omissions of the Train Operator;
- (c) any damage to the Network arising directly from the Train Operator's wilful default, negligence or failure to comply with its obligations under the Contract; and
- (d) a breach by the Train Operator of the Contract.

1.2 HS1 Co indemnity

Subject to paragraph 2 and the other provisions of the Contract, HS1 Co shall indemnify the Train Operator against all Relevant Losses resulting from:

- (a) a failure by HS1 Co to comply with its Safety Obligations;
- (b) any Environmental Damage to the Network arising directly from any acts or omissions of HS1 Co;
- (c) any damage to the Specified Equipment or other vehicles or things brought onto the Network in accordance with the permission to use granted by the Contract arising directly from HS1 Co's wilful default, negligence or failure to comply with its obligations under the Contract; and
- (d) a breach by HS1 Co of the Contract.

2. RESTRICTIONS ON CLAIMS

2.1 Notification and mitigation

A party wishing to claim under any indemnity provided for in the Contract:

- (a) shall notify the other party of the relevant circumstances giving rise to that claim as soon as reasonably practicable after first becoming aware of those circumstances (and in any event within 365 days of first becoming so aware); and
- (b) where practicable given the circumstances, consult with the other party as to the ways in which the circumstances giving rise to that claim and any damage, losses, claims, proceedings, demands, liabilities, costs, damages, orders or out of pocket expenses connected with that claim may be prevented, defended, mitigated or restricted and shall take all reasonable steps to prevent, mitigate, defend and restrict any and all of the same and any Relevant Losses connected with that claim; but
- (c) shall not be required to exercise any specific remedy available to it under the Contract.

2.2 Restrictions on claims by HS1 Co

Any claim by HS1 Co against the Train Operator for indemnity for Relevant Losses:

- (a) shall exclude payments to any person (other than the Train Operator) under or in accordance with the provisions of any access agreement with such person other than any such payments which are for obligations to compensate for damage to property, and so that any claim for indemnity under the Contract for such payments for damage to property, in relation to any incident, shall be limited to the maximum amount for which the Train Operator would be liable for such damage in accordance with the CTRL Claims Allocation and Handling Agreement;
- (b) shall exclude loss of profit, loss of revenue and consequential losses in respect of permission to use any part of the Network under or in accordance with any access agreement with any person; and
- (c) shall:
 - (i) include Relevant Losses only to the extent that these constitute amounts which HS1 Co would not have incurred as network owner and operator but for the relevant breach; and
 - (ii) give credit for any savings to HS1 Co which result or are likely to result from the incurring of such amounts.

2.3 Restrictions on claims by the Train Operator

- (a) Any claim by the Train Operator against HS1 Co for indemnity for Relevant Losses:
 - (i) shall exclude any Relevant Losses to the extent that they result from delays to or cancellations of trains;
 - (ii) shall exclude any loss of profit, loss of revenue and consequential losses (including fare revenue, subsidy, access charges, Track Charges and incentive payments) or other consequential loss in connection with the subject matter of the Contract caused to the Train Operator by HS1 Co, save to the extent otherwise provided in the Contract or any other agreement between them; and
 - (iii) shall:
 - (A) include Relevant Losses only to the extent that these constitute amounts which the Train Operator would not have incurred as train operator but for the relevant breach; and
 - (B) give credit for any savings to the Train Operator which result or are likely to result from the incurring of such amounts.
- (b) The rights set out in Sections 4 and 8 and Part G of the HS1 Network Code represent the Train Operator's sole entitlement to any compensation in respect of any damage, losses, claims, proceedings, demands, liabilities, costs, damages, orders and out-of-pocket expenses arising from or caused by any restriction of use of all or any part of the Routes or any delay, or cancellations to trains (together "Losses"). The Train Operator undertakes to HS1 Co not to seek to recover any Losses by making any claim or commencing any action or proceedings whatsoever against or otherwise seeking payment in respect of any Losses from the Operator or HS1 Co otherwise than pursuant to Sections 4 and 8 or Part G of the HS1 Network Code.

2.4 **Restriction on claims by both parties**

Any claim for indemnity for Relevant Losses shall exclude Relevant Losses which:

- (a) do not arise naturally from the breach; and
- (b) were not, or may not reasonably be supposed to have been, within the contemplation of the parties:
 - (i) at the time of the making of the Contract; or
 - (ii) where the breach relates to a modification or amendment to the Contract, at the time of the making of such modification or amendment, as the probable result of the breach.

2.5 **CTRL Claims Allocation and Handling Agreement**

- (a) Clauses 15 and 16 of the CTRL Claims Allocation and Handling Agreement provide that claims between parties to it are limited to specified amounts unless the parties expressly contract otherwise.
- (b) Except as otherwise expressly provided in the Contract, Clauses 15 and 16 of the CTRL Claims Allocation and Handling Agreement shall not apply as between the parties to the Contract if and to the extent that the giving of any right or remedy as provided for under the Contract would be prevented or restricted by Clauses 15 and 16 of the CTRL Claims Allocation and Handling Agreement.
- (c) Nothing in the Contract shall affect the application as between the parties of the provisions of the CTRL Claims Allocation and Handling Agreement which relate to liability for small claims equal to or below the Threshold (as defined in that agreement).

3. **LIMITATION ON LIABILITY**

3.1 This paragraph 3 shall have effect so as to limit the liability of the parties to one another, but:

- (a) does not limit any liability arising under Sections 4, 7 or 8;
- (b) shall not apply to the extent that a Party is insured in respect of the Relevant Loss and such Relevant Loss is recoverable from such insurance;
- (c) in relation to a failure to perform an obligation under the HS1 Network Code, only to the extent (including as to time and conditions) that the HS1 Network Code so provides; and
- (d) subject to paragraph 5.3(c) of Section 9.

3.2 **Application**

The limitations on liability contained in this Section apply in the circumstances set out in paragraph 3.1.

3.3 **Limitation on HS1 Co's liability**

In relation to any claim in respect of any Liability made by the Train Operator:

- (a) HS1 Co shall not be liable to make payments in relation to such claims which are admitted in writing or finally determined in any Relevant Year to the extent that its liability for such claims exceeds the Liability Cap for such Relevant Year; and
- (b) to the extent that its liability for such claims exceeds the Liability Cap for such Relevant Year, any claim for payment of a sum which exceeds such Liability Cap shall be extinguished and HS1 Co shall have no further liability for it.

3.4 **Limitation on Train Operator's liability**

In relation to any claim in respect of any Liability made by HS1 Co:

- (a) the Train Operator shall not be liable to make payments in relation to such claims which are admitted in writing or finally determined in any Relevant Year to the extent that its liability for such claims exceeds the Liability Cap for such Relevant Year; and
- (b) to the extent its liability for such claims exceeds the Liability Cap for such Relevant Year, any claim for payment of a sum which exceeds such Liability Cap shall be extinguished and the Train Operator shall have no further liability for it.

3.5 **Disapplication of limitation**

To the extent that any Relevant Losses:

- (a) result from a conscious and intentional breach by a party; or
- (b) are in respect of obligations to compensate any person for liability for death or personal injury,

such Relevant Losses:

- (i) shall not be subject to the limitation of liability in this Section 5; and
- (ii) shall not be taken into account when calculating the amount of Relevant Losses in respect of claims admitted or finally determined in a Relevant Year for the purposes of the limitations of liability in this Section 5.

3.6 **Exclusion of legal and other costs**

The limits on the parties' liabilities provided for in paragraph 3 shall not apply to costs incurred in recovering any amount under a relevant claim, including legal, arbitral and other professional fees and expenses.

3.7 **Exclusion of certain Relevant Losses**

A party shall have no claim for Relevant Losses to the extent that such Relevant Losses result from its own negligence or breach of the Contract.

3.8 **Continuing breaches**

Nothing in this Section 5 shall prevent a party making a new claim in respect of a continuing breach of contract which:

- (a) is a continuing breach of contract which continues for more than 12 months; or
- (b) is a continuing breach of contract which continues beyond a period within which it might reasonably be expected to have been remedied,

but any such new claim shall not include any sum which was the subject matter of a previous claim and was extinguished by virtue of paragraph 3.3(b) or 3.4(b).

3.9 **Final determination of claims**

For the purpose of this Section 5, a determination of a claim for Relevant Losses by a Court or other tribunal shall be treated as final when there is no further right of appeal or review from such determination or in respect of which any right of appeal or review has been lost, whether by expiry of time or otherwise.

3.10 **Notification of Aggregate IRC/OMRC**

As soon as reasonably practicable in advance of each Relevant Year, HS1 Co shall notify the Train Operator of the Aggregate IRC/OMRC for that Relevant Year.

4. **INSURANCE**

4.1 **Insurance Cover**

(a) The Train Operator shall, at its own cost, take out and maintain in force, or procure the taking out and maintenance in force of the following insurance:

(i) if the Train Operator is authorised to be the operator of trains for the provision of the Services by either (i) a European licence and a statement of national regulatory provisions granted by the ORR under the Railway (Licensing of Railway Undertakings) Regulations 2005, or (ii) a licence granted under section 8 of the Act, such insurances as are required by the terms and conditions of such licence;

(ii) if, under section 7 of the Act, the Train Operator is exempt from the requirement to be authorised by a licence to be the operator of trains for the provision of the Services, such insurances as are required by the terms and conditions of a licence granted under section 8 of the Act, as if the Train Operator is required to be so authorised by a licence granted under section 8 of the Act to be the operator of trains for the provision of the Services.

4.2 If requested by HS1 Co, the Train Operator shall provide suitable evidence to HS1 Co to demonstrate that such insurance policy or insurance policies are in full force and effect.

4.3 **HS1 Co Insurance**

HS1 Co shall effect and maintain such insurances as it is required to take out and maintain under the terms and conditions of the Concession Agreement. If requested by the Train Operator, HS1 Co shall provide suitable evidence to the Train Operator to demonstrate that such insurance policy or insurance policies are in full force and effect.

5. **FORCE MAJEURE EVENTS**

5.1 **Meaning of Force Majeure Event**

In this paragraph 5:

"Affected Party" means, in relation to a Force Majeure Event, the party claiming relief under this paragraph 5 by virtue of that Force Majeure Event, and **"Non-affected Party"** shall be construed accordingly;

"Force Majeure Event" means any of the following events (and any circumstance arising as a direct consequence of any of the following events):

(a) an act of the public enemy or terrorists or war (declared or undeclared), threat of war,

revolution, riot, insurrection, civil commotion, demonstration or sabotage;

- (b) acts of vandalism or accidental damage or destruction of machinery, equipment, track or other infrastructure;
- (c) natural disasters or phenomena, including extreme weather or environmental conditions (such as lightning, earthquake, hurricane, storm, fire, flood, drought or accumulation of snow or ice);
- (d) nuclear, chemical or biological contamination;
- (e) pressure waves caused by devices travelling at supersonic speeds;
- (f) discovery of fossils, antiquities or unexploded bombs; and
- (g) strike or other industrial action which is a single circumstance and which also is a strike or industrial action in sectors of the economy other than the railway industry;

"Force Majeure Notice" means a notice given or to be given by the Affected Party to the other party stating that a Force Majeure Event has occurred;

"Force Majeure Report" means a report given or to be given by the Affected Party to the other party following the giving of a Force Majeure Notice;

"Relevant Force Majeure Event" means a Force Majeure Event in relation to which an Affected Party is claiming relief under this paragraph 5; and

"Relevant Obligation" means an obligation under the Contract in respect of which a Force Majeure Event has occurred and the Affected Party has claimed relief under this paragraph 5.

5.2 Nature and extent of relief for Force Majeure

Force Majeure relief under this paragraph 5:

- (a) extinguishes the obligation of the Affected Party to indemnify the other party under paragraph 1.1(d) or 1.2(d), as appropriate, in respect of Relevant Losses sustained as a result of the failure of the Affected Party to perform a Relevant Obligation; but
- (b) is not available in respect of:
 - (i) any obligation to pay money under Sections 4, 7 and 8; or
 - (ii) any other obligation to do or refrain from doing any other thing provided for in the Contract; and
- (c) is only available in relation to a failure to perform an obligation under the HS1 Network Code to the extent (including as to time and conditions) that the HS1 Network Code so provides.

5.3 Entitlement to Force Majeure relief

An Affected Party is entitled to Force Majeure relief if and to the extent that:

- (a) performance of the Relevant Obligation has been prevented or materially impeded by

reason of a Force Majeure Event;

- (b) it has taken all reasonable steps, taking account of all relevant circumstances (including as to whether the event in question could reasonably have been anticipated):
 - (i) to avoid the occurrence of the Force Majeure Event; and
 - (ii) to minimise, and where practicable avoid, the effects of the Force Majeure Event on its ability to perform the Relevant Obligation; and
- (c) except in the case of paragraph 5.1(f), none of the Affected Party, its officers, employees or agents caused the Force Majeure Event.

5.4 **Procedure for claiming relief**

Without prejudice to paragraph 5.3, an Affected Party is only entitled to claim Force Majeure relief under this paragraph 5 if it complies with the obligations to give Force Majeure Notices, Force Majeure Reports and provide other information under paragraph 5.5 and to perform its obligations under paragraph 5.6.

5.5 **Force Majeure Notices and Reports**

(a) *Force Majeure Notice*

In relation to any Relevant Force Majeure Event:

- (i) as soon as reasonably practicable after the Affected Party becomes aware, or ought reasonably to have become aware, that such Force Majeure Event qualifies for relief under this paragraph 5 (and, in any event, within 72 hours of becoming aware of such circumstances), the Affected Party shall give a Force Majeure Notice; and
- (ii) the Force Majeure Notice shall include detailed particulars (to the extent available) of the Relevant Force Majeure Event and its consequences, its effects on the Affected Party, the Relevant Obligations, the likely duration of such consequences and effects and the remedial measures proposed by the Affected Party to avoid or remove the Relevant Force Majeure Event or to mitigate its consequences and effects.

(b) *Force Majeure Report*

Following the giving of a Force Majeure Notice:

- (i) the Affected Party shall give a Force Majeure Report as soon as practicable, and in any event within 7 days of service of the Force Majeure Notice; and
- (ii) the Force Majeure Report shall constitute a full report on the Relevant Force Majeure Event, amplifying the information provided in the Force Majeure Notice and containing such information as may reasonably be required by the Non-affected Party, including the effect which the Relevant Force Majeure Event is estimated to have on the Affected Party's performance of the Relevant Obligations.

(c) *Other information*

The Affected Party shall promptly give the Non-affected Party all other information concerning the Relevant Force Majeure Event and the steps which could reasonably be taken, and which the Affected Party proposes to take, to avoid or remove the

Relevant Force Majeure Event or to mitigate its consequences and effects as may reasonably be requested by the Non-affected Party from time to time.

5.6 Mitigation

The Affected Party shall, promptly upon becoming aware of the occurrence of a Force Majeure Event in respect of which it intends to claim relief, use all reasonable endeavours to:

- (a) minimise the effects of such Force Majeure Event on the performance of the Relevant Obligations; and
- (b) minimise the duration of such Force Majeure Event,

and shall keep the Non-affected Party fully informed of the actions which it has taken or proposes to take under this paragraph 5.6.

5.7 Duration of relief for force majeure

The right of an Affected Party to relief under paragraph 5.2 shall cease on the earlier of:

- (a) the date on which its performance of the Relevant Obligations is no longer prevented or materially impeded by the Relevant Force Majeure Event; and
- (b) the date on which such performance would no longer have been prevented or materially impeded if the Affected Party had complied with its obligations under paragraph 5.6.

SECTION 6 – EVENTS OF DEFAULT, SUSPENSION AND TERMINATION

1. EVENTS OF DEFAULT

1.1 Train Operator Events of Default

The following are Train Operator Events of Default:

- (a) the Train Operator ceases to be authorised to be the operator of trains for the provision of the Services by either (i) a European licence and a statement of national regulatory provisions granted by the ORR under the Railway (Licensing of Railway Undertakings) Regulations 2005, or (ii) a licence granted under section 8 of the Act unless it is exempt from the requirement to be so authorised under section 7 of the Act;
- (b) an Insolvency Event occurs in relation to the Train Operator;
- (c)
 - (i) any breach by the Train Operator of the Contract, its Safety Obligations or any of the Collateral Agreements; or
 - (ii) any event or circumstance which is reasonably likely to result in any such breach,
which, by itself or taken together with any other such breach, event or circumstance, HS1 Co reasonably considers constitutes a threat to the safe operation of any part of the Network;
- (d) any amount due from the Train Operator remains unpaid for more than 28 Working Days after its due date except where liability to pay any such sum is being contested by the Train Operator in good faith and with timely recourse to appropriate means of redress;
- (e) any breach of the Contract or any material breach of any of the Collateral Agreements by the Train Operator which, by itself or taken together with any other such breach, results, or is likely to result, in material financial loss to HS1 Co; and
- (f) any breach of the Contract or any material breach of any of the Collateral Agreements by the Train Operator which, by itself or taken together with any other such breach, results, or is likely to result, in material disruption to train operations of other train operators.

1.2 Notification

The Train Operator shall notify HS1 Co promptly on becoming aware of the occurrence of a Train Operator Event of Default.

1.3 HS1 Co Events of Default

The following are HS1 Co Events of Default:

- (a) the Concession Agreement is terminated;
- (b) HS1 Co ceases to be authorised (if any such authorisation is required) to be the operator of the Network;
- (c) an Insolvency Event occurs in relation to HS1 Co;

- (d)
 - (i) any breach by HS1 Co of the Contract, its Safety Obligations or any of the Collateral Agreements; or
 - (ii) any event or circumstance which is reasonably likely to result in any such breach,
which, by itself or taken together with any other such breach, event or circumstance the Train Operator reasonably considers constitutes a threat to the safe operation of the Services or any Ancillary Movements;
- (e) any amount due from HS1 Co to the Train Operator remains unpaid for more than 28 Working Days after its due date except where liability to pay any such sum shall be contested by HS1 Co in good faith and with timely recourse to appropriate means of redress; and
- (f) any breach of the Contract or any material breach of any of the Collateral Agreements by HS1 Co which, by itself or taken together with any other such breach, results, or is likely to result, in material financial loss to the Train Operator.

1.4 **Notification**

HS1 Co shall notify the Train Operator promptly on becoming aware of the occurrence of a HS1 Co Event of Default.

2. **SUSPENSION**

2.1 **Right to suspend**

- (a) HS1 Co may serve a Suspension Notice where a Train Operator Event of Default has occurred and is continuing.
- (b) The Train Operator may serve a Suspension Notice where a HS1 Co Event of Default has occurred and is continuing.

2.2 **Contents of Suspension Notice**

A Suspension Notice shall specify:

- (a) the nature of the relevant Event of Default;
- (b) the date and time at which suspension is to take effect;
- (c) in the case of a Suspension Notice served on the Train Operator, reasonable restrictions imposed while the Suspension Notice is in force on the permission to use the Routes or any parts of them or any other part of the Network;
- (d) in the case of a Suspension Notice served on HS1 Co, details of any necessary suspension of the Services; and
- (e) whether the party serving the Suspension Notice reasonably considers that the Event of Default is capable of remedy, and where the Event of Default is capable of remedy:
 - (i) the steps reasonably required to remedy the Event of Default; and
 - (ii) a reasonable grace period for the defaulting party to remedy it (where the Event

of Default which has occurred is a failure to pay Track Charges or other amount due, 7 days shall be a reasonable grace period).

2.3 **Effect of Suspension Notice served by HS1 Co**

Where HS1 Co has served a Suspension Notice on the Train Operator:

- (a) the Train Operator shall comply with any reasonable restrictions imposed on it by the Suspension Notice;
- (b) the Suspension Notice shall remain in full force and effect in accordance with its terms until it has been revoked either in whole or in part by notice from HS1 Co to the Train Operator under paragraph 2.5(d);
- (c) service of the Suspension Notice shall not affect the Train Operator's continuing obligation to pay the Track Charges; and
- (d) service of the Suspension Notice shall not affect the Train Operator's Firm Rights (as defined in Schedule 5 to the Contract) for the purpose of making a Bid as defined in Part D of the HS1 Network Code.

2.4 **Effect of a Suspension Notice served by the Train Operator**

Where the Train Operator has served a Suspension Notice on HS1 Co:

- (a) it shall have the effect of suspending the Train Operator's permission to use the Routes to provide the Services to the extent specified in the Suspension Notice;
- (b) the Suspension Notice shall remain in full force and effect in accordance with its terms until it has been revoked either in whole or in part by notice from the Train Operator to HS1 Co under paragraph 2.5(d); and
- (c) the service of the Suspension Notice shall not affect the Train Operator's Firm Rights (as defined in Schedule 5 to the Contract) for the purpose of making a Bid, as defined in Part D of the HS1 Network Code.

2.5 **Suspension to be proportionate to breach**

- (a) A Suspension Notice served under paragraph 2.1(a) in respect of any of the Train Operator Events of Default shall be proportionate to the breach and, so far as reasonably practicable, apply only to the:
 - (i) railway vehicles;
 - (ii) Services (and the Ancillary Services);
 - (iii) Routes (including the Diversionary Routes, if any); and
 - (iv) categories of train movements or railway vehicles,(or (as the case may be) part or parts of them) to which the relevant Train Operator Event of Default relates.
- (b) A Suspension Notice served under paragraph 2.1(b) in respect of any of the HS1 Co Events of Default shall be proportionate to the breach and, so far as reasonably practicable, apply only to the:
 - (i) railway vehicles;
 - (ii) Services (and the Ancillary Services);
 - (iii) Routes (including the Diversionary Routes, if any); and

- (iv) categories of train movements or railway vehicles,
(or (as the case may be) part or parts of them) to which the relevant HS1 Co Event of Default relates.
- (c) The party served with a Suspension Notice which specifies an Event of Default which is capable of remedy shall:
 - (i) with all reasonable diligence, take such steps as are specified in the Suspension Notice to remedy the Event of Default; and
 - (ii) keep the party serving the Suspension Notice fully informed of the progress which is being made in remedying the Event of Default.
- (d) Where a party served with a Suspension Notice has complied with its obligations under paragraph 2.5(c) (whether in whole or in part) and it is reasonable for the suspension effected by the Suspension Notice to be revoked (whether in whole or in part), the party which served the Suspension Notice shall revoke the suspension to that extent. Such revocation shall be effected as soon as practicable after the remedy in question by notice to the other party specifying the extent of the revocation and the date on which it is to have effect.

3. TERMINATION

3.1 HS1 Co's right to terminate

HS1 Co may serve a Termination Notice on the Train Operator:

- (a) where the Train Operator fails to comply with any material restriction in a Suspension Notice;
- (b) where the Train Operator fails to comply with its obligations under paragraph 2.5(c);
- (c) where the Train Operator Event of Default specified in paragraph 1.1(a) has occurred and is continuing;
- (d) where the Train Operator Event of Default specified in a Suspension Notice served by HS1 Co is not capable of being remedied and three months have elapsed from the service of that Suspension Notice; or
- (e) where the Concession Agreement has been terminated by the Secretary of State (and the Secretary of State has not entered into another concession agreement with HS1 Co), the Train Operator has not terminated the Contract and the Secretary of State has not served the notice referred to in paragraph 5.2(b).

3.2 Train Operator's right to terminate

Subject to paragraph 5, the Train Operator may serve a Termination Notice on HS1 Co:

- (a) where HS1 Co fails to comply with its obligations under paragraph 2.5(c); or
- (b) where the HS1 Co Event of Default specified in a Suspension Notice served by the Train Operator is not capable of being remedied and three months have elapsed from the service of that Suspension Notice.

3.3 Contents of Termination Notice

A Termination Notice shall specify:

- (a) the nature of the relevant Event of Default;
- (b) a date and time, which shall be reasonable in the circumstances, at which termination is to take effect; and
- (c) whether the party serving the Termination Notice reasonably considers that the Event of Default is capable of remedy, and where the relevant Event of Default is capable of remedy:
 - (i) the steps which the party serving the Termination Notice believes are reasonably required to remedy the Event of Default; and
 - (ii) a reasonable grace period within which such steps may be taken (where the Event of Default is a failure of the Train Operator to pay Track Charges or other amounts due, 7 days is a reasonable grace period).

3.4 Effect of Termination Notice

Where HS1 Co or the Train Operator has served a Termination Notice on the other:

- (a) the service of the Termination Notice shall not affect the parties' continuing obligations under the Contract up to the date of termination, which date shall be determined in accordance with paragraph 3.4(c);
- (b) the party which has served the Termination Notice shall withdraw it by notice to the other party, upon being reasonably satisfied that the relevant Event of Default has been remedied; and
- (c) subject to paragraph 5, the Contract shall terminate on the date and time specified in the Termination Notice for the Contract to terminate (or such later date and time as the party which served the Termination Notice notifies to the other before the date and time so specified).

4. CONSEQUENCE OF TERMINATION

4.1 Directions regarding location of Specified Equipment

Immediately before, upon or following termination or expiry of the Contract, the Train Operator shall comply or procure compliance with all reasonable directions given by HS1 Co concerning the location of the Specified Equipment.

4.2 Failure to comply with directions

If the Train Operator fails to comply with any directions given under paragraph 4.1, HS1 Co shall be entitled to remove from the Network any Specified Equipment Stabled or left on the Network or to instruct a third party to do so and any reasonable costs incurred by HS1 Co in taking such steps shall be paid promptly by the Train Operator.

4.3 Evidence of costs

HS1 Co shall provide such evidence of such costs as are referred to in paragraph 4.2 as the Train Operator shall reasonably request.

5. NOVATION OF THE CONTRACT ON TERMINATION OF THE CONCESSION AGREEMENT

- 5.1 If the Train Operator proposes the termination of the Contract as a consequence of the

termination of the Concession Agreement, it shall in advance of doing so, serve a notice to that effect on the Secretary of State at the address set out in paragraph 3 of Schedule 1 to the Contract.

- 5.2 Within 10 Working Days of the receipt of the notice referred to in paragraph 5.1, the Secretary of State shall be entitled to serve a notice on the Train Operator and HS1 Co either:
- (a) requiring that the Contract should continue with HS1 Co, on the basis that a new concession agreement has been entered into with HS1 Co in respect of the Network; or
 - (b) requesting HS1 Co to novate all its rights and obligations under the Contract to the Secretary of State or to a person nominated by the Secretary of State as a substitute operator of the Network.
- 5.3 If the Secretary of State serves the notice referred to in paragraph 5.2(a), the Contract shall continue with HS1 Co on and from the date of such notice, and any termination notice served by the Train Operator shall be revoked.
- 5.4 If the Secretary of State serves the notice referred to in paragraph 5.2(b), the parties agree to execute such documentation as the Secretary of State may request in order to novate HS1 Co's rights and obligations under the Contract to the Secretary of State, or to the nominated substitute operator of the Network, within 10 Working Days of the Secretary of State's notice under paragraph 5.2 and on any such novation any termination notice served by the Train Operator shall be revoked.
- 5.5 If the Secretary of State fails to serve the notice referred to in paragraph 5.3 or 5.4 (as the case may be) or if the Secretary of State serves a notice under paragraph 5.2(b) but the novation does not take effect, the Contract shall terminate in accordance with its terms
- 5.6 In respect of a novation pursuant to paragraph 5.4,
- (a) the party whose rights and obligations are being novated shall not be released from any accrued but unperformed obligation, the consequences of any breach of the Contract which is the subject of arbitration or litigation between the parties or any liability in respect of any act or omission under or in relation to the Contract prior to, or as at the date of, any such novation (except to the extent that the Secretary of State or his nominee agrees to assume and be responsible for such unperformed obligation, such liability or the consequences of such breach in connection with the relevant novation); and
 - (b) neither the Secretary of State nor his nominee shall be obliged, in connection with the novation, to agree to assume and be responsible for any unperformed obligation, liability or consequences of a breach referred to in paragraph 5.6(a).

SECTION 7 – TRACK CHARGES

PART 1: INTERPRETATION

1. DEFINITIONS

In this Section 7, the following expressions shall have the following meanings:

"Additional Permitted Charges"	means the charges specified in paragraph 2 of Part 4 of this Section 7;
"Advance Period"	means any of the following periods: <ul style="list-style-type: none"> (a) the first three Periods in a Relevant Year; (b) the three Periods comprising the fourth, fifth and sixth Periods in any Relevant Year; (c) the three Periods comprising the seventh, eighth and ninth Periods in any Relevant Year; and (d) the final four Periods in any Relevant Year;
"Capacity Reservation Charge"	means the charges to be paid by the Train Operator to HS1 Co with regard to the Reserved Capacity Train Slots as calculated in accordance with paragraph 6.1 of Part 2 of this Section 7;
"Capacity Reservation Rebate"	means, in respect of any Period, the aggregate of the Individual Capacity Rebate in that Period as calculated in accordance with paragraph 6.2 of Part 2 of this Section 7;
"DI Costs"	those elements of the OMRC which are directly incurred as a result of operating train services on the Network (other than such costs which comprise the Other Services Charge or Pass Through Costs);
"Firm Train Slot"	has the meaning given to it in Schedule 5 to the Contract;
"Gross Tonne Kilometre"	in relation to a train, means a kilometre travelled on the Network in providing the Services, by each tonne of the aggregate weight of the train in question;
"Individual Capacity Rebate"	has the meaning given to it in paragraph 6.2 of Part 2 of this Section 7;
"IRC"	means the investment recovery charge imposed by HS1 Co under the Contract;
"List of Consumption Rates"	means the list of consumption rates for Traction Electricity published by HS1 Co from time to time;

"LTOP Costs"	those elements of the OMRC which relate to the long term operational phase of the High Speed 1 project which are recoverable pursuant to paragraph 3 of Schedule 3 to the Railway Regulations (other than such costs which comprise Pass Through Costs);
"Night"	mean the period at night when no passenger trains are scheduled to operate;
"OMRC"	means the charges imposed by HS1 Co under the Contract with regard to the operations, maintenance and renewals costs comprising the DI Costs, the LTOP Costs and the Pass Through Costs;
"Other Services Charge"	means the charge calculated pursuant to paragraph 8;
"Pass Through Costs"	means those elements of OMRC which the ORR determines from time to time are not suitable for efficiency frontier treatment and which at the Effective Date include rates, insurance, non-traction energy costs and OMR costs of the EDF electrical distribution assets;
"Relevant Distance"	means, in respect of any Timetabled Freight Train or Spot Service, the distance travelled or scheduled to be travelled by that Train on the Network;
"Relevant Year"	means a year commencing at 0000 hours on 1 April and ending at 2359 hours on the following 31 March;
"Reserved Capacity Train Slot"	means, in respect of the Train Operator, any Firm Train Slot which is not a Scheduled Firm Train Slot, including any such Firm Train Slots which are surrendered by the Train Operator, other than any Firm Train Slot which could not be operated due to a Restriction of Use;
"Review Date"	means the date on which a review of the OMRC is completed by HS1 Co in accordance with Part 3 of this Section 7;

"Review Event"	means a Principal Change Date where: (a) any anticipated timetabled train movements on the Network in respect of the Timetable Period beginning on such Principal Change Date is at least 4% more or less than the actual number of timetabled train movements on the Network during the 12 months commencing on the immediately preceding Review Date (or, in respect of the first Review Event, the Commencement Date), excluding any change as a consequence of the Games; or (b) any train operator's anticipated timetabled trains movements on the Network in respect of the Timetable Period beginning on such Principal Change Date is at least 4% more or less than such train operator's actual timetabled train movements on the Network during the 12 months commencing on the immediately preceding Review Date (or, in respect of the first Review Event, the Commencement Date), excluding any change as a consequence of the Games, provided that where the period in question is less than 12 months, the number of train movements shall be expressed on an annualised basis;
"Scheduled"	has the meaning given to it in Schedule 5 to the Contract;
"Scheduled Firm Train Slot"	means a Firm Train Slot which has been Scheduled;
"Service Group"	means a collection of Services contained within the Service Group specified in column A of Part 2 of Schedule 4 to the Contract;
"Spot Services"	means each freight railway service scheduled to be operated by the Train Operator pursuant to a Spot Bid and which are not Timetabled Freight Trains save for any which cannot be operated by virtue of a Restriction of Use;
"Timetabled Freight Train"	means each Service Scheduled to be operated by the Train Operator as specified in the First Working Timetable of the relevant Timetable Period save for any which cannot be operated by virtue of a Restriction of Use;
"Traction Electricity"	means the electricity to be consumed by the Train Operator in providing the Services (including the Ancillary Movements);
"Traction Electricity Charge"	means the charges to be paid by the Train Operator for the Traction Electricity in accordance with paragraph 4.1 of Part 2 of this Section 7;



"Traction Electricity Charge Adjustment"

means the adjustment to the Traction Electricity Charge as calculated in accordance with paragraph 4.2 of Part 2 of this Section 7;

"Train Kilometre"

in relation to a train, means a kilometre travelled by that train on the Network in providing the Services; and

"Vehicle Category"

means each different type of vehicle used to provide the Services as specified in column B of Part 2 of Schedule 4 to the Contract.

PART 2: TRACK CHARGES

1. PRINCIPAL FORMULA

The Train Operator shall pay to HS1 Co Track Charges in respect of each Period p in accordance with the following formula:

$$T_p = IRC_p + OMRC_p + E_p + EA_p + CRC_p - CRR_p + CT_p + OSC_p + WU_p$$

where:

T_p	means the Track Charges in respect of Period p ;
IRC_p	means the IRC in respect of Period p , calculated in accordance with the provisions of paragraph 2.1 and charged in advance of the commencement of each Advance Period;
$OMRC_p$	means the OMRC in respect of Period p , calculated in accordance with the provisions of paragraph 3 and charged in advance of the commencement of each Advance Period;
E_p	means the Traction Electricity Charge in respect of Period p , calculated in accordance with paragraph 4.1 and charged in arrears following the end of a Period;
EA_p	means the Traction Electricity Charge Adjustment in respect of Period p , calculated in accordance with paragraph 4.2 and charged in arrears following the end of a Period;
CRC_p	means the Capacity Reservation Charge in respect of Period p , calculated in accordance with paragraph 6.1 and charged in advance of the commencement of each Advance Period;
CRR_p	means the Capacity Reservation Rebate in respect of Period p , calculated in accordance with paragraph 6.2 and charged in arrears following the end of a Period;
CT_p	means the Congestion Tariff in respect of Period p , calculated in accordance with paragraph 7 and charged in arrears following the end of a Period;
OSC_p	means the Other Services Charge in respect of Period p , calculated in accordance with the provisions of paragraph 8.1 and charged in arrears following the end of a Period; and
WU_p	means the Wash Up Amount in respect of Period p , calculated in accordance with paragraph 9 and charged in arrears following the end of a Period.

2. INVESTMENT RECOVERY CHARGE

2.1 Calculation of the IRC

Subject to paragraph 2.3, the IRC in Period p shall be derived from the following formula:

$$IRC_p = \sum AIRCPT_{TP}$$

where:

- IRC_p means the IRC in Period p;
- \sum means the summation across all Timetabled Freight Trains and Spot Services in Period p; and
- $AIRCPT_{TP}$ means the Adjusted IRC Per Train in Period p as calculated below:

$$AIRCPT_T = IRCPT_{SG} \times D_{SG} \times I_m \times RD_T$$

where:

- $IRCPT_{SG}$ means the IRC Per Train Per kilometre, being the figure specified as such in column C of Part 2 of Schedule 4 to the Contract;
- D_{SG} means, in respect of each Service Group, the Discount Factor in respect of each Freight Train in that Service Group as specified as such in column D of Part 2 of Schedule 4 to the Contract;
- I_m means the indexation factor for IRC as determined in accordance with paragraph 2.2; and
- RD_T means in respect of each Timetabled Freight Train and Spot Service, the Relevant Distance.

2.2 Indexation Factor for IRC

The indexation value for IRC shall be derived on each Indexation Review Date from the following formula:

$$I_m = (I_{m-1} \times b/a)$$

where:

“ I_{m-1} ” means the value of I_m applicable immediately before the relevant Indexation Review Date, the first such value of I_m being 1; and

“a” means the value of RPI for the Index Observation Month that is 6 months prior to that used in the calculation of “b” (save in the case of the first Indexation Review Date when it shall be the value of RPI for the Index Observation Month immediately preceding the month in which the Concession Agreement is entered into);

“b” means the value of RPI for the Index Observation Month immediately preceding the relevant Indexation Review Date;

“**Index Observation Months**” shall be February and August each year; and

“**Indexation Review Date**” shall be the date six months (6) immediately following the month in which the Concession Agreement is entered into, and every six months (6) thereafter.

2.3 Access Charges and Network Change

HS1 Co shall levy and the Train Operator shall pay such further investment recovery charges and/or any increase in the OMRC, as may be agreed or determined pursuant to a Network Change proposed by HS1 Co under Condition G1 of the HS1 Network Code.

3. OMRC

3.1 Calculation of the OMRC

The OMRC in Period p , (being the basic charge for the minimum access package as provided in Schedule 2 of the Access and Management Regulations) shall be derived from the following formula:

$$OMRC_p = \sum AOMRCPT_{SGV} \times RD_T$$

where:

$$AOMRCPT_{SGVP} = DO_{SGV} \times ((OMRCA_{SGV} + OMRCB_{SGV}) \times OI_p + OMRCC_{SGV})$$

and:

$AOMRCPT_{SGVP}$ means, in respect of each Service Group and Vehicle Category, the Adjusted OMRC Per Train in that Service Group and in respect of that Vehicle Category in Period p ;

DO_{SGVP} means, in respect of each Service Group, the OMRC Discount Factor in respect of each Freight Train in that Service Group as specified as such in column E of Part 2 of Schedule 4 to the Contract;

$OMRCA_{SGV}$ means, in respect of each Service Group and Vehicle Category, the DI Costs expressed as a figure per train per kilometre in that Service Group and in respect of that Vehicle Category, being the figure specified as such in column F of Part 2 of Schedule 4 to the Contract as the same may be varied pursuant to Part 3;

$OMRCB_{SGV}$ means, in respect of each Service Group, the LTOP Costs expressed as figure per train per kilometre in that Service Group and in respect of that Vehicle Category, being the figure specified as such in column G of Part 2 of Schedule 4 to the Contract as the same may be varied pursuant to Part 3;

$OMRCC_{SGV}$ means, in respect of each Service Group, the Pass Through Costs expressed as a figure per train per kilometre in that Service Group

and in respect of that Vehicle Category, being the figure specified as such in column H of Part 2 of Schedule 4 to the Contract as the same may be varied pursuant to Part 3;

OI _p	means the indexation factor for OMRC in respect of each Period p as determined in accordance with paragraph 3.3;
RD _T	means in respect of each Timetabled Freight Train and Spot Service, the Relevant Distance; and
Σ	means the summation across each Timetabled Freight Train and Spot Service.

3.2 Indexation Factor for OMRC

- (a) The indexation factor for OMRC in respect of each Period p shall be derived from the following formula:

$$OI_p = (0.011 + (RPI_t \div RPI_{t-1})) \times OI_t$$

Where:

OI _p	means the indexation factor for OMRC in respect of Period p;
RPI _t	means, in respect of Relevant Year t, the RPI published or determined with respect to February in Relevant Year t;
RPI _{t-1}	means, in respect of Relevant Year t, the RPI published or determined with respect to February in Relevant Year t-1; and
OI _t	means, in respect of the first Relevant Year, 1, and in respect of each subsequent Relevant Year, the value of OI _p determined during the first Period of that Relevant Year.

- (b) If any value of RPI determined pursuant to this paragraph 3.2 (the "First Value") is lower than any such value previously determined (the "Second Value"), the First Value shall be deemed to be equal to the Second Value until the First Value exceeds the Second Value.

4. TRACTION ELECTRICITY CHARGE

- 4.1 Subject to paragraph 5, for the purposes of paragraph 1, the term E_p means an amount in respect of the Traction Electricity Charge in Period p which is derived from the following formula:

$$E_p = \sum C_i \times EF_{jp} \times UE_{ijp}$$

where:

C _i	means the calibrated modelled consumption rate (in kWh <i>per</i> Train Kilometre in relation to electric multiple units and kWh <i>per</i> Gross Tonne Kilometre in relation to locomotive-hauled units) for train category i, shown in the List of Consumption Rates;
EF _{jp}	means an amount for traction current (in pence <i>per</i> kWh) consumed by railway vehicles

operated by or on behalf of the Train Operator in Period p during the relevant tariff band j defined in the List of Consumption Rates;

UE_{ijp} means the actual volume of usage (in electrified Train Kilometres in relation to electric multiple units or Gross Tonne Kilometres in relation to locomotive hauled units) of trains operated by or on behalf of the Train Operator in train category i and tariff band j in Period p, pursuant to the Contract; and

Σ means the summation across all relevant train categories i and tariff bands j;

"kWh" means kilowatt hours; and

"train category" means train type i used on the relevant route in question.

- 4.2 Within 90 days after the end of each Relevant Year t, HS1 Co shall calculate the Traction Electricity Charge Adjustment which, for the Period commencing after the expiry of such 90 day period, shall be derived from the formula set out below. In respect of all other Periods, EA_p shall be zero.

$$EA_p = E_t \times \frac{(TAC_t - TRC_t)}{TRC_t}$$

where:

E_t is the sum of the values of E_p during Relevant Year t;

TAC_t means the total actual cost of electricity to HS1 Co in respect of Relevant Year t other than electricity charges covered in OMRC;

TRC_t means the total cost of electricity recovered by HS1 Co in respect of Relevant Year t other than electricity charges covered in OMRC.

5. PROCUREMENT OF TRACTION ELECTRICITY BY THE TRAIN OPERATOR

- 5.1 HS1 Co acknowledges and agrees that the Train Operator shall be entitled to procure Traction Electricity itself with the prior written approval of HS1 Co. If another train operator proposes to procure traction electricity itself, the Train Operator shall not unreasonably withhold its consent to such proposal.
- 5.2 The Train Operator acknowledges and agrees that HS1 Co's approval pursuant to paragraph 5.1 would be conditional on the Train Operator bearing all expenses, payments, liabilities, costs and losses (including transmission losses) associated with the procurement of Traction Electricity by the Train Operator.

6. CAPACITY RESERVATION CHARGE

6.1 Calculation of the Capacity Reservation Charge

- (a) Subject to paragraphs 6.1(b) and 6.3 and Part J of the HS1 Network Code, the Capacity Reservation Charge in Period p shall be derived from the following formula:

$$CRC_p = \sum 0.25 \times CIRCPT_{RP}$$

where:

- CRC_p means the Capacity Reservation Charge in Period p;
 \sum means the summation across all Reserved Capacity Train Slots; and
 $CIRCPT_{RP}$ means, in respect of each Reserved Capacity Train Slot which is entirely during the Night, the Capacity IRC Per Train in Period p as calculated below:

$$CIRCPT_{RP} = IRCPT_{SG} \times I_m \times RD_T \times SF_R$$

and, in respect of each Reserved Capacity Train Slot which is not entirely during the Night (including one which does not coincide with the Night), the Capacity IRC Per Train in Period p as calculated below:

$$CIRCPT_{RP} = CC \times I_m \times SF_R$$

where:

- $IRCPT_{SG}$ has the meaning given to it in paragraph 2.1;
 I_m has the meaning given to it in paragraph 2.2;
 RD_T has the meaning given to it in paragraph 2.1;
 SF_R means the Surrender Figure applicable the Reserved Capacity Train Slot as determined in accordance with paragraph 6.3; and
 CC means, the Capacity Charge as specified in column I of Part 2 of Schedule 4 to the Contract.¹
- (c) HS1 Co shall not charge the Capacity Reservation Charge for the duration of any HS1 Restriction of Use or any Competent Authority Restriction of Use, to the extent that the Train Operator could not utilise any capacity as a consequence of such Restriction of Use. #

6.2 Calculation of the Capacity Reservation Rebate

Where a Reserved Capacity Train Slot is utilised by another train operator in Period p, the Train Operator shall be entitled to a rebate (the "Individual Capacity Rebate") of 75% of the lower of:

- (a) $0.25 \times CIRCPT_{RP}$ in respect of that Reserved Capacity Train Slot; and

¹ This will be a sum representing the product of the passenger IRC and the assumed journey time.

- (b) where the other operator is a passenger operator, the amount of the IRC paid by that operator and, where the second operator is a freight operator, 75% of the OMRC paid by that operator.

A Reserved Capacity Train Slot shall only be utilised by another train operator for the purpose of this paragraph 6.2 where the utilised capacity matches the characteristics of the Reserved Capacity Train Slot in all material respects and there is no other unreserved capacity which could have been utilised by that train operator which has the appropriate characteristics. Where a Reserved Capacity Train Slot of the Train Operator and another train operator could satisfy these criteria, the rebate shall be split on a fair and equitable basis. The Capacity Reservation Rebate in Period p (being CRR_p) shall be the aggregate of the Individual Capacity Rebates during Period p.

6.3 Rebate in respect of surrendered capacity

When the Train Operator decides to surrender some or all of the Firm Train Slots, it shall serve a notice to this effect to HS1 Co. Any such notice shall specify the number of the Firm Train Slots surrendered. The Surrender Figure shall be calculated in accordance with the following table:

Period between surrender of capacity and commencement of Timetable Period in respect of which capacity relates	Surrender Figure
Up to 1 Timetable Period	0
Between 1 and 2 Timetable Periods	25%
Between 2 and 3 Timetable Periods	50%
Between 3 and 4 Timetable Periods	75%
More than 4 Timetable Periods	100%

7. CONGESTION TARIFF

The Congestion Tariff in Period p shall be the sum, if any, determined to be payable by the Train Operator in accordance with paragraphs 1(8) and 1(9) of Schedule 3 of the Access and Management Regulations.

8. OTHER SERVICES CHARGE

The Other Services Charge in respect of Period p shall be calculated in accordance with Part 1 of Schedule 4 to the Contract.

9. WASH UP AMOUNT

9.1 The Wash Up Amount in respect of each Relevant Year shall be calculated by HS1 Co pursuant to paragraph 9.2 promptly following the end of each Relevant Year and shall be paid promptly following the agreement or determination of any such amount.

9.2 The Wash Up Amount in respect of a Relevant Year shall be the amount which puts the parties in the position as if the Track Charges had been calculated on the following basis:

- 9.2.1 in respect of the Pass Through Costs, such sum as ensures that HS1 Co recovers from all train operators the exact amount of the Pass Through Costs for the Relevant Year (taking account of sums already paid by the train operators in respect of Pass Through Costs in respect of such Relevant Year). Any such adjustment in respect of the Pass Through Costs shall be split between the train operators in the proportion to which such costs were payable by the train operators during the Relevant Year prior to the operation of this paragraph 9.2.1;
 - 9.2.2 in respect of the IRC and the Capacity Reservation Charge, appropriate adjustment to take account of Restrictions of Use, Spot Bids, the effect of a Suspension Notice served by the Train Operator and the exercise by HS1 Co of its rights pursuant to Part J of the HS1 Network Code during such Relevant Year which, in each case, have not already been taken into account;
 - 9.2.3 in respect of the OMRC comprising DI Costs, appropriate adjustment to take account of Restrictions of Use, Spot Bids, the effect of a Suspension Notice served by the Train Operator and the exercise by HS1 Co of its rights pursuant to Part J of the HS1 Network Code during such Relevant Year which, in each case, have not already been taken into account provided that the Train Operator shall not be entitled to any rebate pursuant to this paragraph 9.2.3 to the extent that it is entitled to a discount on the OMRC; and
 - 9.2.4 in respect of the IRC, the OMRC and Capacity Reservation Charge, such sum as puts the parties in the position they would have been in had such sums been invoiced in arrears on a Period by Period basis (with indexation being applied accordingly) rather than in advance of each Advance Period.
- 9.3 Notwithstanding paragraph 9.1, HS1 shall be entitled to calculate the Wash Up Amount on an interim basis during a Relevant Year and the parties shall make appropriate payments to reflect any such calculation. Any payment following the end of the Relevant Year shall take account of any such payments made.

PART 3: REVIEW

1. PERIODIC REVIEW, INTERIM REVIEW AND REVIEW EVENT

1.1 Periodic Review and Interim Review

1.1.1 Promptly following the occurrence of a Periodic Review or an Interim Review which revises the amount of the $OMRCA_{SGV}$, HS1 Co shall serve a notice on the Train Operator specifying such revised amount and the date on which the Periodic Review or Interim Review (as appropriate) is scheduled to take effect under the terms of the Concession Agreement. From such date, the Contract shall be deemed to be amended by replacing the existing value of $OMRCA_{SGV}$ set out in Column F in Schedule 4 to the Contract with such revised value.

1.1.2 Promptly following the occurrence of a Periodic Review or an Interim Review which revises the amount of the LTOP Costs, HS1 Co shall serve a notice on the Train Operator specifying the revised amount of the LTOP Costs and the value of $OMRCB_{SGV}$ (which shall be determined in accordance with paragraph 1.3) and the date on which the Periodic Review or Interim Review (as appropriate) is scheduled to take effect under the terms of the Concession Agreement. From such date, the Contract shall be deemed to be amended by replacing the existing value of $OMRCB_{SGV}$ set out in Column G in Schedule 4 to the Contract with such revised value.

1.2 Review Event

Promptly following the occurrence of a Review Event, HS1 Co shall serve a notice on the Train Operator specifying the value of $OMRCB_{SGV}$ (which shall be determined in accordance with paragraph 1.3). From the date of the Review Event, the Contract shall be deemed to be amended by replacing the existing value of $OMRCB_{SGV}$ set out in Column G in Schedule 4 to the Contract with such revised value.

1.3 Reapportionment of LTOP Costs

Where required pursuant to paragraph 1.1.2 or 1.2, the value of $OMRCB_{SGV}$ shall be determined by apportioning:

- (a) the LTOP Costs which comprise overhead costs between international and domestic passenger train operators on the basis of expected train minutes spent on the Network (ignoring stopping time at stations); and
- (b) the LTOP Costs which do not comprise overhead costs between international and domestic passenger train operators on the basis of expected train minutes spent on that part of the Network which is utilised by both domestic and international trains (ignoring stopping time at stations),

in a manner which ensures that HS1 Co recovers the LTOP Costs from all train operators and assessed by reference to the Timetable in respect of the next Timetable Period.

PART 4: PAYMENTS

1. PAYMENT OF ACCESS CHARGES

1.1 Contents of invoice – periodic payments

HS1 Co shall issue an invoice to the Train Operator within 20 Working Days of the end of each Period in respect of:

- (a) the Traction Electricity Charge in respect of such Period;
- (b) the Traction Electricity Charge Adjustment (if any) in respect of such Period;
- (c) the Capacity Reservation Rebate (if any) in respect of such Period;
- (d) the Congestion Tariff (if any) in respect of such Period;
- (e) the Other Services Charge in respect of such Period; and
- (f) the Wash Up Amount in respect of such Period,

together with a detailed statement describing the derivation of each such sum and separate itemisation of the charges and information referred to in such invoice.

1.2 Contents of invoice – advance payments

HS1 Co shall issue an invoice to the Train Operator 20 Working Days in advance of the commencement of each Advance Period in respect of:

- (a) the IRC payable in respect of such Advance Period;
- (b) the OMRC payable in respect of such Advance Period; and
- (c) the Capacity Reservation Charge payable in respect of such Advance Period,

together with a detailed statement describing the derivation of each such sum and separate itemisation of the charges and information referred to in such invoice.

1.3 Payment of access charges

The Train Operator shall pay or procure the payment to HS1 Co of all sums invoiced pursuant to paragraphs 1.1 and 1.2 within 15 Working Days of the invoice date.

1.4 Disputed amounts repayment and interest rate

- (a) Where a party wishes to contest any invoice issued to it under this Section 7 (including any invoice in respect of Track Charges) it shall, within 14 days of receipt of the invoice, notify the other party in writing of the amount which is in dispute but shall pay the full amount of the invoice, including the disputed amount, in accordance with the terms of the invoice.
- (b) Where a party has given notice under paragraph 1.4(a) that it disputes part of any invoiced amount:
 - (i) payment of such sum shall be without prejudice to the determination of whether such sum is properly due or not; and

- (ii) if it is subsequently determined that the disputed sum, or part of it, was not properly due the payee shall repay the disputed sum, or relevant part, to the payer together with interest (to accrue daily and be compounded monthly) at the Default Interest Rate from the date of payment until the actual date of repayment.

2. ADDITIONAL PERMITTED CHARGES

Either party shall be required to pay to the other (in accordance with the Contract) any Additional Permitted Charges comprising:

- (c) amounts payable to or by HS1 Co as are specified in, or calculated in accordance with, Section 4;
- (d) such amounts payable to or by HS1 Co as are specified in, or calculated in accordance with, Section 8; and
- (e) such amounts payable to or by HS1 Co pursuant to any provision of the HS1 Network Code.

3. PAYMENTS, INTEREST AND VAT

3.1 Payment

- 3.1.1 All sums due or payable by either party under the Contract shall be paid free and clear of any deduction, withholding or set off except only as may be required by law or as expressly provided in the Contract or in the HS1 Network Code.
- 3.1.2 All invoices issued under this Section 7, or statements of amounts payable under Sections 4 or 8 or the HS1 Network Code, shall be delivered by hand at, or sent by prepaid first class post or by email (with confirmation copy by prepaid first class post) to, the address for service for the recipient specified in Schedule 1 to the Contract and shall be deemed to have been received by the addressee in accordance with paragraph 5.4(c) of Section 9.
- 3.1.3 Each invoice and statement of amounts payable shall contain such detail as to the constituent elements of the amounts stated to be payable as shall be necessary or expedient so as to enable the person to whom it is given to understand and check it and the party making the supply will issue a VAT invoice for that amount to the payer.
- 3.1.4 All payments shall be made by direct debit mandate or standing order mandate, CHAPS transfer, BACS transfer or other electronic or telegraphic transfer to a London clearing bank or such other financial institution as may be approved by the party entitled to the payment, such approval not to be unreasonably withheld or delayed.

3.2 Interest

Without prejudice to any other rights or remedies which one party may have in respect of the failure of the other party to pay any amount on the due date, amounts payable under the Contract and not paid by the due date shall carry interest (to accrue daily and to be compounded monthly) at the Default Interest Rate from the due date until the date of actual payment (as well after judgment as before), except to the extent that late payment arises from any failure by the invoicing party to comply with paragraph 3.1.2 or paragraph 3.1.3.

3.3 VAT



- 3.3.1 Where any taxable supply for VAT purposes is made under or in connection with the Contract by one party to the other the payer shall, in addition to any payment required for that supply, pay such VAT as is chargeable in respect of it.
- 3.3.2 Where under the Contract one party is to reimburse or indemnify the other in respect of any payment made or cost incurred by the other, the first party shall also reimburse any VAT paid by the other which forms part of its payment made or cost incurred to the extent such VAT is not available for credit for the other party (or for any person with whom the indemnified party is treated as a member of a group for VAT purposes) under sections 25 and 26 of the Value Added Tax Act 1994.
- 3.3.3 Where under the Contract any rebate or repayment of any amount is payable by one party to the other, and the first party is entitled as a matter of law or of HM Revenue and Customs practice to issue a valid VAT credit note, such rebate or repayment shall be paid together with an amount representing the VAT paid on that part of the consideration in respect of which the rebate or repayment is made, and the first party shall issue an appropriate VAT credit note to the other party.

SECTION 8 – PERFORMANCE REGIME

1. INTERPRETATION

1.1 Definitions

In this Section 8 and its Appendices, unless the context otherwise requires:

- "Benchmarked Values "** means the figures set out in Columns B to H (inclusive) of Schedule 6 to the Contract;
- "Cancelled Train"** means:
- (a) in relation to a Train scheduled in the Applicable Timetable, failure of the Train to set down or pick up passengers at a station in accordance with the Applicable Timetable; or
 - (b) in relation to a Train scheduled in the Applicable Timetable to leave the Network, failure of the Train to cross the Channel Tunnel Boundary or the NR Boundary as specified in the Applicable Timetable;
- "Cancellation Minutes"** means, in relation to a Cancelled Train, the number of Cancellation Minutes specified in column F of the table at Schedule 6 to the Contract for Trains of its Traffic Type;
- "Channel Tunnel Boundary"** means the point on the Network at which trains:
- (a) travelling from France begin to be monitored by HS1 Co for the purposes of collecting performance data; or
 - (b) travelling towards France cease to be so monitored;
- "HS1 Co Excluded Incident"** means third party incidents occurring off the Network including fires and gas leaks originating off the Network;
- "Material Change"** *means:*
- (a) a significant physical modification to the Network resulting in a material change in the performance and reliability of the Network unless, in the case of a review notice served by HS1 Co, the same was caused by a failure of HS1 Co to maintain the Network in accordance with the Contract; or

- (b) a physical modification to the Network due to an inherent defect in the construction of the Network unless, in the case of a review notice served by HS1 Co, the same was caused by a failure of HS1 Co to maintain it in accordance with the Contract; or
 - (c) an increase or decrease of not less than 4% in the number of timetabled train movements on the Network in any Timetable Period other than where such increase or decrease is due to the Games; or
 - (d) a significant change in the performance and reliability of the Train Operator's rolling stock unless, in the case of a review notice served by the Train Operator, the same was caused by the Train Operator's failure to maintain the same; or
 - (e) a change or anticipated change in the performance regime applicable to any other train operator operating on the Network.
- "Minutes Delay"** means, in relation to a Train and a Recording Point, the delay at that Recording Point, calculated in accordance with paragraph 3;
- "NR Boundary"** means the point on the Network at which trains:
- (a) travelling from NR Network begin to be monitored by HS1 Co for the purposes of collecting performance data; or
 - (b) travelling towards NR Network cease to be so monitored;
- "Performance Cap"** means 1.5% of the Aggregate IRC/OMRC in respect of that Relevant Year, subject to a minimum of £500,000 (Indexed);
- "Performance Improvement Plan"** has the meaning given to it in the HS1 Network Code;
- "Performance Monitoring System"** means the system operated by HS1 Co for monitoring train performance as described in Condition B1 of the HS1 Network Code;
- "Performance Sum"** means any payment to be made by either party to the other pursuant to Part 2;
- "Planned Incident"** means an incident to the extent that:
- (a) it was a Restriction of Use notified in accordance with the Applicable Rules of the Route by HS1 Co to the Train Operator; or
 - (b) there is Recovery Time in respect of that incident;
- "Recalibration Period"** means the final 13 Periods of the period of 18 consecutive Periods commencing with the first Period to start on or after the Effective Date;
- "Recording Point"** means a point at which HS1 Co records Trains using the Performance Monitoring System;

has the meaning ascribed to it in Section 4;

"Restriction of Use"

"TOC Excluded Incidents" means:

- (a) any one or more incidents resulting in late presentation of a Train onto the Network from either the Channel Tunnel Boundary or the NR Boundary and recorded as Minutes Delay at the first Recording Point triggered by that Train after it crosses onto the Network from the Channel Tunnel Boundary or the NR Boundary; and
- (b) third party incidents occurring off the Network including fires and gas leaks originating off the Network;

"TOC on TOC Cancellation Minutes" means the Cancellation Minutes allocated to a train operator pursuant to paragraph 4.4(a);

"TOC on TOC Minutes Delay" means the Minutes Delay allocated to a train operator pursuant to paragraph 4.4(a); and

"Traffic Type" means in relation to a Train, the traffic type specified in column A of Schedule 6 to the Contract.

1.2 Interpretation

For the purposes of this Section 8:

- (a) events in respect of a Train shall be treated as occurring on the Day on which the Train is scheduled in the Applicable Timetable to depart from the first point at which it is to pick up passengers;
- (b) save as otherwise provided, each final calculation of minutes shall be accurate to three decimal places; and
- (c) reference to Schedule 6 to the Contract is, at the date of the Contract, reference to Schedule 6 to the Contract and, thereafter, to Schedule 6 to the Contract as the same may be amended pursuant to paragraph 9.

1.3 Suspension Notices

Wherever a Suspension Notice is in force, the effects of that Suspension Notice shall be the subject of paragraph 1.6 of Section 2 and not of this Section 8. Accordingly, for the purposes of this Section 8:

- (a) neither HS1 Co nor the Train Operator shall be allocated any responsibility for those effects; and
- (b) those effects shall not be regarded as causing any Minutes Delay or Cancelled Trains.

2. CALCULATION OF MINUTES DELAY AND CANCELLATION MINUTES

2.1 Minutes Delay

The Minutes Delay in respect of a Train when it triggers a Recording Point shall be equal to:

- (a) in respect of the first Recording Point triggered by that Train on any Day (and, where the Train has subsequently left the Network, in respect of the first Recording Point which it triggers each time it crosses back onto the Network on that Day), the number of minutes (rounded down to the nearest whole minute) by which the time at which that Train triggers the Recording Point is later than the time at which that Train is scheduled in the Applicable Timetable to do so; and
- (b) in respect of any other Recording Point, the lesser of:
 - (A) the number of Minutes Delay in respect of that Recording Point calculated in accordance with paragraph 2.1(a) (as if that Recording Point were the first Recording Point triggered by that Train); and
 - (B) the greater of $((A_1 - A_2) + B)$ and zero

where:

- A_1 is the number of minutes between the time at which the Train triggers the Recording Point (rounded down to the nearest whole minute) and the time the Train last triggered a Recording Point (rounded down to the nearest whole minute);
- A_2 is the relevant time lapse scheduled in the Applicable Timetable between those same two Recording Points; and
- B is any Recovery Time between those Recording Points incorporated in the Applicable Timetable;

provided that any Minutes Delay which arise from a single incident or a series of related incidents and which are less than three minutes in aggregate shall be deemed to be zero.

2.2 Cancellation Minutes

In relation to a Train which is a Cancelled Train, the number of Cancellation Minutes applicable to trains of its Traffic Type shall apply.

2.3 Cancellation Minutes and Minutes Delay

Notwithstanding paragraph 2.1, where a Train is a Cancelled Train, the Minutes Delay for each Recording Point on the leg of its journey which is the subject of that cancellation shall be deemed to be zero.

3. RECORDING OF PERFORMANCE INFORMATION

3.1 Recording of Minutes Delay and Cancelled Trains

Without prejudice to its obligations under Part B of the HS1 Network Code, HS1 Co shall use the Performance Monitoring System to record for each Day in respect of each Train scheduled in the Applicable Timetable:

- (a) each Cancelled Train and the incident(s) causing such Cancelled Train where the incident can be identified;
- (b) the time at which the Train triggers each Recording Point;

- (c) the Minutes Delay for that Train at each Recording Point; and
- (d) where the Minutes Delay which that Train has accrued since the last Recording Point are greater than or equal to three minutes:
 - (A) the incident(s) causing each minute of any delay included in Minutes Delay; and
 - (B) those Minutes Delay for which HS1 Co is unable to identify a cause.

The provisions of this Section 8 which concern the recording of train performance information or which refer to information regarding train performance, and the rights and remedies of the parties in respect of the recording of that information, shall be subject to and interpreted in accordance with the provisions of the Performance Data Accuracy Code.

3.2 **Recording of allocated responsibility for Minutes Delay and Cancelled Trains**

HS1 Co shall for each Day and for each Train scheduled in the Applicable Timetable record separately in the Performance Monitoring System those Minutes Delay and Cancelled Trains caused by incidents:

- (a) for which HS1 Co is allocated responsibility in accordance with paragraph 4.2;
- (b) for which the Train Operator is allocated responsibility in accordance with paragraphs 4.3 and 4.4(b);
- (c) for which another train operator is allocated responsibility in accordance with paragraph 4.4(a);
- (d) for which neither party is allocated responsibility, in accordance with paragraph 4.5;
- (e) for which no cause can be identified; and
- (f) which are Planned Incidents.

3.3 **Failed Recording Points**

Without prejudice to its obligations under Part B of the HS1 Network Code, HS1 Co shall use all reasonable endeavours:

- (a) to restore as soon as reasonably practicable any failed Recording Point; and
- (b) pending such restoration, to compile such information from manual records and other sources, including the Train Operator, and otherwise to substitute such information as is appropriate to reflect as accurately as is reasonably practicable the actual performance of the relevant Trains for the purposes of this Section 8.

3.4 **Provision of information by Train Operator**

The Train Operator shall record and shall continue to record such information as HS1 Co may reasonably require and which it is reasonable to expect the Train Operator to have or procure in connection with any Minutes Delay and Cancellation Minutes that may arise and shall provide such information to HS1 Co promptly after such information first becomes available to the Train Operator.

3.5 **Notification**

HS1 Co shall promptly notify the Train Operator upon HS1 Co becoming aware of any failure or any likely failure to record accurately the information which it is required to record under

paragraphs 3.1 and 3.2. Any such notification shall be in sufficient detail to enable the Train Operator to institute the recording of such information in connection with the Trains for which the recording of information is subject to such failure or likely failure as the Train Operator may reasonably achieve. The Train Operator shall institute such recording as soon as it is reasonably able following receipt of the notification from HS1 Co and will provide HS1 Co with the resulting information no later than 1700 hours two Working Days following the Day on which it was recorded.

4. ALLOCATION OF RESPONSIBILITY FOR MINUTES DELAY AND CANCELLED TRAINS

4.1 Assessment of incidents causing Minutes Delay and Cancelled Trains

- (a) In assessing the cause of any Minutes Delay or Cancelled Train, there shall be taken into account all incidents contributing thereto including:
 - (A) the extent to which each party has taken reasonable steps to avoid and/or mitigate the effects of the incidents; and
 - (B) where a Restriction of Use overruns due to the start of such Restriction of Use being delayed by a late running Train, the incident(s) giving rise to that late running.
- (b) The parties shall take reasonable steps to avoid and mitigate the effects of any incidents upon the Trains and any failure to take such steps shall be regarded as a separate incident.
- (c) HS1 Co shall identify:
 - (A) in respect of each incident recorded under paragraph 3.1(d)(A) as causing Minutes Delay, the extent to which that incident caused each of the Minutes Delay; and
 - (B) in respect of each incident recorded under paragraph 3.1(a), the extent to which that incident caused the Cancelled Train.
- (d) So far as HS1 Co is reasonably able to do so, it shall identify whether responsibility for incidents causing Minutes Delay or Cancelled Trains is to be allocated to HS1 Co, to the Train Operator or to another train operator in accordance with the following provisions of this paragraph 4.

4.2 HS1 Co responsibility incidents

Responsibility for Minutes Delay and Cancelled Trains on a Day caused by incidents for which HS1 Co is allocated responsibility pursuant to this paragraph 4.2 shall be allocated to HS1 Co. Unless and to the extent otherwise agreed, HS1 Co shall be allocated responsibility for an incident which causes a Train operated by the Train Operator to be subject to Minutes Delay or a Cancelled Train (other than a Planned Incident) if that incident is caused wholly or mainly:

- (a) by breach by HS1 Co of any of its obligations under the Contract; or
- (b) (whether or not HS1 Co is at fault) by circumstances within the control of HS1 Co in its capacity as the infrastructure manager of the Network; or
- (c) (whether or not HS1 Co is at fault) by any act, omission or circumstance originating

from or affecting the Network (including its operation), but excluding any incident caused wholly or mainly by rolling stock on the Network for which any train operator (including the Train Operator) would be allocated responsibility if it were the Train Operator operating that rolling stock under this Contract.

4.3 **Train Operator responsibility incidents**

Responsibility for Minutes Delay and Cancelled Trains on a Day caused by incidents for which the Train Operator is allocated responsibility pursuant to this paragraph 4.3 shall be allocated to the Train Operator. Unless and to the extent otherwise agreed, the Train Operator shall be allocated responsibility for an incident which causes a Train operated by a train operator other than the Train Operator to be subject to Minutes Delay or a Cancelled Train (other than a Planned Incident) if that incident is caused wholly or mainly:

- (a) by breach by the Train Operator of any of its obligations under the Contract; or
- (b) (whether or not the Train Operator is at fault) by circumstances within the control of the Train Operator in its capacity as an operator of Trains; or
- (c) (whether or not the Train Operator is at fault) by any act, omission or circumstance originating from or affecting rolling stock operated by or on behalf of the Train Operator (including its operation), including any such act, omission or circumstance originating in connection with or at any station (other than in connection with signalling under the control of HS1 Co at that station or physical works undertaken by HS1 Co at that station), any light maintenance depot or any network other than the Network; or

4.4 **TOC on TOC Minutes Delay and TOC on TOC Cancellations**

- (a) Where a Train operated by the Train Operator is subject to Minutes Delay or is a Cancelled Train on a Day for which another train operator would be allocated responsibility if it were the Train Operator operating that rolling stock under this Contract, then responsibility for those Minutes Delay and the Cancellation Minutes in respect of that Cancelled Train shall be allocated to that train operator and not HS1 Co.
- (b) Where a train operated by another train operator is subject to Minutes Delay or is a Cancelled Train on a Day for which the Train Operator is allocated responsibility under this Contract, then responsibility for those Minutes Delay and the Cancellation Minutes in respect of that Cancelled Train shall be allocated to the Train Operator and not HS1 Co.

4.5 **Other incidents**

Neither party shall be allocated responsibility for:

- (a) any incident caused by an act, omission or circumstance originating in connection with or at a station which:
 - (A) is an act, omission or circumstance which affects the Network, or its operation, and prevents a Train entering or passing through a station at the time it is scheduled to do so; and
 - (B) prevents the access of passengers through the station to or from the Train;
- (b) any identified incident in respect of which HS1 Co and the Train Operator are

equally responsible and for which neither HS1 Co nor the Train Operator is allocated responsibility under paragraph 4; or

- (c) Minutes Delay or Cancelled Trains on any Day caused by incidents for which no cause can be identified (as recorded under paragraph 3.2(d)).

5. STATEMENT OF ALLOCATED RESPONSIBILITY

5.1 Initial statement

- (a) For each Day, HS1 Co shall provide to the Train Operator as soon as reasonably practicable and in any event no later than the following Working Day the allocation of responsibility for incidents made by HS1 Co under paragraph 4; and
- (b) a summary showing:
 - (A) the aggregate Minutes Delay and Cancelled Trains recorded under each category set out in paragraph 3.2; and
 - (B) a list of the Minutes Delay and Cancelled Trains (in each case broken down by incident) recorded as the responsibility of HS1 Co, as the responsibility of the Train Operator and as the responsibility of any other train operator (with each individual train operator separately identified).

5.2 Further statements

If HS1 Co's nominated representative has reasonable grounds to believe that any further incident was the responsibility of the Train Operator, HS1 Co or any other train operator but was not shown as such in the information made available in accordance with paragraph 5.1, then HS1 Co may, within 7 days after the last Minutes Delay or Cancelled Train caused by that incident, issue a notice in accordance with paragraph 10 revising the information and/or allocations of responsibility made available under paragraph 5.1.

5.3 Adjustment statements

If Condition B3.3 (adjustment to prior results) applies in respect of all or part of a Period, then HS1 Co shall promptly issue to the Train Operator a statement showing the necessary adjustments (if any) to statements already issued and Performance Sums already paid in respect of the Period, and any such adjusting statement shall be treated as if it were a statement under paragraph 8.1 and, subject to paragraph 7.2, an adjusting payment shall be payable within 28 days of HS1 Co's statement.

5.4 Disputes about statements of allocated responsibility

- (a) Except to the extent that it has, within two Working Days of receipt, notified HS1 Co in accordance with paragraph 10 that it disputes the contents of a statement under paragraphs 5.1, 5.2 or 5.3, the Train Operator shall be deemed to have agreed the contents of that statement. Any notification of a dispute shall specify the reasons for that dispute.
- (b) The parties shall attempt to resolve disputes notified in accordance with paragraph 5.4(a) as follows:
 - (A) within the next two clear Working Days after notification of any dispute, nominated representatives of the parties shall attempt to resolve that dispute; and

- (B) if agreement has not been reached after two clear Working Days, representatives authorised by a more senior level of management of the parties shall use all reasonable endeavours to negotiate a resolution of the dispute.
- (c) Negotiations under paragraph 5.4(b)(ii) shall continue, if necessary, until a date no earlier than five clear Working Days after the end of the Period in which the event giving rise to the dispute referred to in paragraph 5.4(a) occurred.

6. NOTIFICATION OF PERFORMANCE SUMS

6.1 Notification

Within 14 days after the end of each Period, HS1 Co shall provide the Train Operator with a statement for that Period showing:

- (a) any Performance Sums for which HS1 Co or the Train Operator is liable, together with such supporting information (other than information in respect of incidents recorded as the responsibility of HS1 Co) as the Train Operator may reasonably require; and
- (b) any matter referred to in paragraph 5.1 which the Train Operator has disputed in accordance with paragraph 5.4(a) and which is still in dispute.

6.2 Disputes

Within 14 days after receipt by the Train Operator of a statement required under paragraph 6.1, the Train Operator shall notify HS1 Co of any aspects of such statement which it disputes, giving reasons for each such dispute. The Train Operator shall not dispute any matter which it has agreed or deemed to have agreed under paragraph 5. Such disputes shall be resolved in accordance with the procedure in paragraph 11. Save to the extent that disputes are so notified, the Train Operator shall be deemed to have agreed the contents of each statement.

7. PAYMENT PROCEDURES

7.1 Payments and set-off

- (a) In respect of each Period, the liabilities of the Train Operator and of HS1 Co for any Performance Sums shall be set off against each other, and subject to paragraph 7.2, the balance shall be payable by HS1 Co or the Train Operator, as the case may be, within 35 days after the end of the Period to which the payment relates.
- (b) Subject to paragraph 7.2, and save as otherwise provided, all other sums payable under Section 8 shall be paid within 35 days after the end of the Period to which such payment relates.

7.2 Payments in the event of dispute

Where any sum which is payable under this paragraph 7 is in dispute:

- (a) the undisputed amount shall be paid or set off (as the case may be) in accordance with paragraph 7.1;
- (b) the disputed balance (or such part of it as has been agreed or determined to be

payable) shall be paid or set off (as the case may be) within 35 days after the end of the Period in which the dispute is resolved or determined; and

- (c) from the date at which such balance would but for the dispute have been due to be paid or set off, the disputed balance shall carry interest (incurred daily and compounded monthly) at the Default Interest Rate.

8. AMENDMENTS TO THE TABLE AT SCHEDULE 6 TO THE CONTRACT

8.1 Adjustments to the Performance Monitoring System

HS1 Co shall make appropriate amendments to the Performance Monitoring System to reflect the amendments to Schedule 6 to the Contract by the date when such amendments are to take effect, or as soon as reasonably practicable thereafter. Where any such amendment to Schedule 6 to the Contract or any consequential amendment to the Performance Monitoring System is not made until after that date, HS1 Co shall, promptly following such amendments being made, issue to the Train Operator a statement showing the necessary adjustments to the statements already issued and the payments already made in respect of Performance Sums up to and including the Period commencing on the date when such amendments to Schedule 6 to the Contract are to take effect. Any such adjusting statement shall be treated as if it were a statement under paragraph 6.1 and, subject to paragraph 7.2, an adjusting payment shall be payable within 35 days of that adjusting statement.

8.2 Costs of implementing amendment

HS1 Co shall be entitled to recover its costs incurred by or on behalf of HS1 Co in assessing and implementing any amendments to Schedule 6 to the Contract and the Performance Monitoring System where required as a result of changes instituted by the Train Operator, provided that those costs shall be the minimum reasonably necessary for HS1 Co to assess and implement that amendment.

8.3 Relationship with remainder of Section 8

References in this paragraph to amendments to the table at Schedule 6 to the Contract shall include any amendments to any other relevant parts of Section 8 which are agreed or determined to be reasonably required in connection with those amendments to the table at Schedule 6 to the Contract.

9. INITIAL BENCHMARKING AND REVIEW

- 9.1 Following the Recalibration Period or a Material Change, either party shall be entitled to require that the Benchmarked Values are recalibrated in accordance with this paragraph 9 by serving a notice on the other party.

- 9.2 Any notice under paragraph 9.1 shall specify as far as possible that party's proposed amendments to the table at Schedule 6 to the Contract. Promptly following the service of any such notice the parties shall endeavour to agree whether the table at Schedule 6 to the Contract should be amended in accordance with this paragraph 9 and if so what amendments should be made to the table at Schedule 6 to the Contract.

- 9.3 If the parties fail to reach agreement within 90 days after service of the notice referred to in

paragraph 9.1, or if prior to that date both parties agree that agreement is unlikely to be reached prior to that date, either party shall be entitled to serve a Proposal for Change pursuant to Part C of the HS1 Network Code, the purpose of which is to determine what changes, if any, should be made to Schedule 6 to the Contract. The parties agree that if a Proposal for Change is served under another track access contract which incorporates these Terms (or substantially similar terms) that they will comply with Part C in respect of such Proposal for Change and to any amendment to Schedule 6 as a consequence of such Proposal for Change.

9.4 Following agreement or determination of the revised Benchmarked Values:

- (a) Schedule 6 to the Contract shall be deemed to have been amended to reflect such revised values from the date of the notice referred to in paragraph 9.1;
- (b) the calculations of the Performance Payments previously undertaken pursuant to this Section 8 shall be repeated using the revised Benchmarked Values in substitution for the original Benchmarked Values.

10. NOTICES

All notices under this Section 8 shall be given in accordance with paragraph 5.4 of Section 9.

11. DISPUTES

If any dispute is notified under paragraph 6.2 it shall be resolved according to the following procedure:

- (a) within seven days of service of the relevant notice, the parties shall meet to discuss the disputed aspects with a view to resolving all disputes in good faith;
- (b) if, for any reason, within seven days of the meeting referred to in paragraph 11.1(a), the parties are still unable to agree any disputed aspects, each party shall promptly and in any event within seven days prepare a written summary of the disputed aspects and the reasons for each such dispute and submit such summaries to the senior officer of each party;
- (c) within 28 days of the first meeting of the parties, the senior officers of the parties shall meet with a view to resolving all disputes; and
- (d) if no resolution results before the expiry of 14 days following that meeting, then either party may require that the matter be resolved in accordance with the Dispute Resolution Procedure.

PART 2: CALCULATION OF THE PERFORMANCE SUMS

1. HS1 CO PERFORMANCE SUMS

- 1.1 Subject to paragraphs 1.2 and 1.3, the HS1 Co Performance Sum (HSPS) for each Period shall be payable by HS1 Co to the Train Operator and shall be calculated according to the following formula:

$$\text{HSPS} = \text{HSP1} \times \text{PR}$$

where:

HSP1 is HS1 Co's performance in respect of the Period calculated in accordance with the following formula:

$$\text{HSP1} = \frac{(\text{HSMD} + \text{HSCM})}{\text{T}} - \text{HSPPT}$$

where:

HSPPT is the HS1 Co Poor Performance Threshold specified in column B of the table at Schedule 6 to the Contract;

HSMD is the aggregate for all Recording Points of the Minutes Delay in respect of the Period allocated to HS1 Co in accordance with paragraph 4 of Part 1, excluding those Minutes Delay which arise from HS1 Co Excluded Incidents;

HSCM is the aggregate of the Cancellation Minutes arising from each Cancelled Train as specified in column F of Schedule 6 to the Contract in respect of the Period allocated to HS1 Co in accordance with paragraph 4 of Part 1, excluding those Cancellation Minutes which arise from HS1 Co Excluded Incidents;

T is the aggregate number of Trains to be operated by the Train Operator in that Period as scheduled in the Applicable Timetable; and

PR is the payment rate specified in column C of the table at Schedule 6 to the Contract (Indexed) for the relevant Traffic Type.

- 1.2 Where HSP1 is negative it shall be deemed to be zero.
- 1.3 The HS1 Co Performance Sum shall not exceed the lower of:
- 1.3.1 in respect of any Relevant Year, the Performance Cap in respect of that Relevant Year;
 - 1.3.2 in respect of the first Advance Period in any Relevant Year, 25% of the Performance Cap in respect of that Relevant Year;

- 1.3.3 in respect of the second Advance Period in any Relevant Year, 50% of the Performance Cap in respect of that Relevant Year less the aggregate of any HS1 Co Performance Sum already paid by HS1 Co to the Train Operator in respect of the Relevant Year; and
- 1.3.4 in respect of the third Advance Period in any Relevant Year, 75% of the Performance Cap in respect of that Relevant Year less the aggregate of any HS1 Co Performance Sum already paid by HS1 Co to the Train Operator in respect of the Relevant Year.

2. HS1 CO PERFORMANCE BONUS

- 2.1 Subject to paragraphs 2.2 and 2.3, the HS1 Co Performance Bonus (HSPB) for each Period shall be payable by the Train Operator to HS1 Co and shall be calculated according to the following formula:

$$\text{HSPB} = \text{HSP2} \times \text{BPR}$$

where:

HSP2 is HS1 Co's performance in respect of the Period calculated in accordance with the following formula:

$$\text{HSP2} = \text{HSGPT} - \frac{(\text{HSTMD} + \text{HSTCM})}{\text{T}}$$

where:

HSGPT is the HS1 Co Good Performance Threshold specified in column D of the table at Schedule 6 to the Contract;

HSTMD is the aggregate for all Recording Points of the Minutes Delay in respect of the Period allocated to HS1 Co in accordance with paragraph 4 of Part 1 together with any TOC on TOC Minutes Delay, excluding in either case those Minutes Delay which arise from HS1 Co Excluded Incidents;

HSTCM is the aggregate of the Cancellation Minutes arising from each Cancelled Train as specified in column F of Schedule 6 to the Contract in respect of the Period allocated to HS1 Co in accordance with paragraph 4 of Part 1 together with any TOC on TOC Cancellation Minutes, excluding in either case those Cancellation Minutes which arise from HS1 Co Excluded Incidents; and

T has the meaning given to it in paragraph 1; and

BPR is the bonus payment rate specified in column E of the table at Schedule 6 to the Contract (Indexed) for the relevant Traffic Type.

- 2.2 Where HSPB is negative it shall be deemed to be zero.
- 2.3 The HS1 Co Performance Bonus shall not exceed the lower of:
 - 2.3.1 in respect of any Relevant Year, 25% of the Performance Cap in respect of that Relevant Year;
 - 2.3.2 in respect of the first Advance Period in any Relevant Year, 6% of the Performance

Cap in respect of that Relevant Year;

- 2.3.3 in respect of the second Advance Period in any Relevant Year, 12% of the Performance Cap in respect of that Relevant Year less the aggregate of any HS1 Co Performance Bonus already paid by the Train Operator to HS1 Co in respect of the Relevant Year; and
- 2.3.4 in respect of the third Advance Period in any Relevant Year, 18% of the Performance Cap in respect of that Relevant Year less the aggregate of any HS1 Co Performance Bonus already paid by the Train Operator to HS1 Co in respect of the Relevant Year.

No HS1 Co Performance Bonus shall be payable in respect of any Period where the HS1 Co Performance Sum either does or would but for the operation of paragraph 1.3, exceed one thirteenth of the Performance Cap in respect of the Relevant Year.

3. TRAIN OPERATOR PERFORMANCE SUMS

- 3.1 Subject to paragraphs 3.2 and 3.3 and paragraph 4, the Train Operator Performance Sum (TOPS) for each Period shall be payable by the Train Operator to HS1 Co and shall be calculated according to the following formula:

$$\text{TOPS} = \Sigma \text{TOP} \times \text{TOPR}$$

where:

TOP is in respect of each affected train operator, the Train Operator's performance in respect of the Period calculated in accordance with the following formula:

$$\text{TOP} = \frac{(\text{TOMD} + \text{TOCM})}{\text{T}}$$

where:

TOMD is the aggregate for all Recording Points of the Minutes Delay in respect of the Period allocated to the Train Operator in accordance with paragraph 4 of Part 1 excluding those Minutes Delay which arise from Train Operator Excluded Incidents;

TOCM is the aggregate of the Cancellation Minutes arising from each Cancelled Train as specified in column F of Schedule 6 to the Contract in respect of the Period allocated to the Train Operator in accordance with paragraph 4 of Part 1 excluding those Cancellation Minutes which arise from Train Operator Excluded Incidents; and

T has the meaning given to it in paragraph 1;

Σ means the summation across all affected train operators; and

TOPR means, in respect of each affected train operator, the payment rate applicable to the Traffic Type for that train operator.

- 3.2 Where in respect of any Period, any train operator (other than the Train Operator) is entitled

to a payment pursuant to its equivalent of paragraph 2, any Delay Minutes or Cancellation Minutes attributed to the Train Operator which relate to delays or cancellations caused to that train operator shall be ignored.

- 3.3 The Train Operator Performance Sum shall not exceed the lower of:
- 3.3.1 in respect of any Relevant Year, the Performance Cap in respect of that Relevant Year;
 - 3.3.2 in respect of the first Advance Period in any Relevant Year, 25% of the Performance Cap in respect of that Relevant Year;
 - 3.3.3 in respect of the second Advance Period in any Relevant Year, 50% of the Performance Cap in respect of that Relevant Year less the aggregate of any Train Operator Performance Sum already paid by the Train Operator to HS1 Co in respect of the Relevant Year; and
 - 3.3.4 in respect of the third Advance Period in any Relevant Year, 75% of the Performance Cap in respect of that Relevant Year less the aggregate of any Train Operator Performance Sum already paid by the Train Operator to HS1 Co in respect of the Relevant Year.

4. TRAIN OPERATOR PERFORMANCE RECEIPT

- 4.1 In respect of each Period, HS1 Co shall account to each train operator (other than the Train Operator) for the Train Operator Performance Sum which it receives pursuant to paragraph 3 on the following basis:
- 4.1.1 where all the delays and cancellations which gave rise to the Delay Minutes and Cancellation Minutes (excluding those which arise from Train Operator Excluded Incidents) which are attributed to the Train Operator were experienced by one train operator, HS1 Co shall account to that train operator for the Train Operator Performance Sum; and
 - 4.1.2 where the delays and cancellations which gave rise to the Delay Minutes and Cancellation Minutes (excluding those which arise from Train Operator Excluded Incidents) which are attributed to the Train Operator were experienced by more than one train operator, HS1 Co shall account to each such train operator for a sum equal to:
$$(TOPS \times A)/B$$

where:

TOPS is the Train Operator Performance Sum received by HS1 Co in respect of the Period;

A is the sum of the Delay Minutes and Cancellation Minutes (excluding those which arise from Train Operator Excluded Incidents) which are attributed to the Train Operator which were experienced by such train operator in such Period multiplied by the Payment Rate which is applicable to the Traffic Type for that train operator; and

B is, in respect of all train operators (other than the Train Operator), the sum of the values of A for all such train operators,

provided that the aggregate amount which HS1 Co shall be liable to account to all train operators under this paragraph 4 in respect of any Period shall not exceed the Train Operator Performance sum received by HS1 Co in respect of that Period.

5. PERFORMANCE IMPROVEMENT PLANS

5.1 If:

5.1.1 in 3 out of any 13 consecutive Periods the HS1 Co Performance Sum either does or would, but for the operation of paragraph 1.3, exceed one thirteenth of the Performance Cap in respect of the Relevant Year; or

5.1.2 in 8 out of any 13 consecutive Periods the value of HSP1 referred to in paragraph 1 is between the HS1 Co Poor Performance Threshold and the HS1 Co Performance Benchmark referred to in column H of Schedule 6 to the Contract,

the remedial provisions of Part L of the HS1 Network Code shall apply in respect of HS1 Co's performance.

5.2 If:

5.2.1 in 3 out of any 13 consecutive Periods the Train Operator Performance Sum either does or would, but for the operation of paragraph 3.3, exceed one thirteenth of the Performance Cap in respect of the Relevant Year, or

5.2.2 in 8 out of any 13 consecutive Periods the total delay caused to other train operators by the Train Operator exceeds the Train Operator Performance Benchmark referred to in column G of Schedule 6 to the Contract; or

the remedial provisions of Part L of the HS1 Network Code shall apply in respect of the Train Operator's performance.

SECTION 9 – MISCELLANEOUS

1. CONFIDENTIALITY

1.1 Confidential Information

(a) *General obligation*

Except as permitted by paragraph 1.2, HS1 Co and the Train Operator shall hold all Confidential Information confidential during and after the continuance of the Contract and shall not divulge any Confidential Information in any way to any third party without the prior written approval of the other party.

(b) *HS1 Co - Affiliates*

Except as permitted by paragraph 1.2, HS1 Co shall procure that its Affiliates and its and their respective officers, employees and agents shall keep confidential and not disclose to any person any Confidential Information.

(c) *Train Operator - Affiliates*

Except as permitted by paragraph 1.2, the Train Operator shall procure that its Affiliates and its and their respective officers, employees and agents shall keep confidential and not disclose to any person any Confidential Information.

1.2 Entitlement to divulge

Either party, and its Affiliates, and its and their respective officers, employees and agents, shall be entitled in good faith to divulge any Confidential Information without the approval of the other party in the following circumstances:

- (a) to the Secretary of State;
- (b) to the ORR;
- (c) to the Operator;
- (d) to any Affiliate of either party;
- (e) any officer or employee of the party in question or any person engaged in the provision of goods or services to or for him if disclosure is necessary or reasonably required to enable the party in question to perform its obligations under the Contract, upon obtaining an undertaking of strict confidentiality from such officer, employee or person;
- (f) to any professional advisers or consultants of such party engaged by or on behalf of such party and acting in that capacity, upon obtaining an undertaking of strict confidentiality from such advisers or consultants;
- (g) to any insurer or insurance broker from whom such party is seeking insurance or in connection with the making of any claim under any policy of insurances upon obtaining an undertaking of strict confidentiality from the insurer or insurance broker;
- (h) to any lender, security trustee, bank or other institution from whom such party is seeking or obtaining finance or credit support for such finance, or any advisers to any such entity, or any rating agency from whom such party is seeking a rating in connection with such finance or credit support, upon obtaining an undertaking of strict confidentiality from the entity, advisers or rating agency in question;

- (i) to the extent required by the Act, any licence held by the party in question, any other applicable law, the rules of any recognised stock exchange or regulatory body or any written request of any taxation authority;
- (j) to the extent that it has become available to the public other than as a result of a breach of confidence;
- (k) under the order of any court or tribunal of competent jurisdiction;
- (l) in the case of the Train Operator, to any manager or potential manager of its business, upon obtaining an undertaking of strict confidentiality from such manager or potential manager; and
- (m) in the case of HS1 Co, to any other infrastructure manager with regard to any access related issue affecting both such infrastructure manager and HS1 Co.

1.3 Return of Confidential Information

Each of HS1 Co and the Train Operator shall promptly return to the other party any Confidential Information requested by the other party if such request:

- (a) is made on or within two months after the Expiry Date or, if the Contract lapses or is terminated earlier, is made within two months after the date on which the Contract lapses or is terminated;
- (b) is reasonable; and
- (c) contains a sufficient description of the relevant Confidential Information to enable such information to be readily identified and located.

1.4 Retention or destruction of Confidential Information

If HS1 Co or the Train Operator, as the case may be, has not received a request to return any Confidential Information to the other party under and within the time limits specified in paragraph 1.3, it may destroy or retain such Confidential Information.

1.5 Ownership of Confidential Information

All Confidential Information shall be and shall remain the property of the party which supplied it to the other party.

1.6 HS1 Network Code and Section 8

Nothing in this paragraph 1 restricts the right of HS1 Co to disclose information to which this paragraph 1 applies to the extent that it is permitted or required so to do under the HS1 Network Code or Section 8.

2. ASSIGNMENT AND NOVATION

Save as otherwise provided elsewhere in the Contract, neither party may assign, transfer, novate or create any encumbrance or other security interest over the whole or any part of its rights and obligations under the Contract without the written approved of the other party.

3. DISPUTE RESOLUTION

3.1 Resolution in accordance with Conditions

Subject to paragraph 3.2 and save as otherwise provided in the Contract, any dispute or claim arising out of or in connection with the Contract shall be resolved in accordance with Part I of the HS1 Network Code.

3.2 **Disputes Resolution Agreement**

Without prejudice to the provisions of clause 7.1(B) of the Disputes Resolution Agreement ("DRA") but subject to paragraph 3.1, the parties shall not be required to enquire pursuant to the DRA as to whether the Secretary of State has an interest in the matter in dispute and the matter in dispute shall be referred directly to the appropriate Panel without the said enquiry.

3.3 **Unpaid sums**

If either party fails to pay:

- (a) any invoice issued to it under the Contract in respect of Track Charges in accordance with the provisions of Section 7; or
- (b) any sum which has fallen due in accordance with the provisions of Sections 4, 5 or 8 or the HS1 Network Code,
then:
 - (i) the amount invoiced or sum due, as referred to in paragraph 3.3(a) or (b), shall immediately constitute a debt due and owing from the party who has failed to pay the invoice or sum due to the other party (and to any assignee of a party's right to payment in respect of any Track Charges or other sum due);
 - (ii) such debt shall be recoverable by any means available under the laws of England and Wales; and
 - (iii) the dispute resolution procedures in paragraph 3.1 and 3.2 shall not apply to proceedings commenced under this paragraph 3.3.

4. **RAILWAYS REGULATIONS**

4.1 The parties agree:

- (a) to comply with law; and
- (b) to waive any breach of the Contract by the other which arises from it acting in a manner contemplated by the Access and Management Regulations but only to the extent that such party could not act in a manner which would not breach the Contract or the Access and Management Regulations.

5. **MISCELLANEOUS**

5.1 **Non waiver**

- (a) *No waiver*
No waiver by either party of any failure by the other to perform any obligation under the Contract shall operate or be construed as a waiver of any other or further default, whether of a like or different character.
- (b) *Failure or delay in exercising a right or remedy*
The failure to exercise or delay in exercising a right or remedy under the Contract

shall not constitute a waiver of the right or remedy or a waiver of any other rights or remedies, and no single or partial exercise of any right or remedy under the Contract shall prevent any further exercise of the right or remedy or the exercise of any other right or remedy.

5.2 Amendment

- (a) Subject to paragraphs 5.2(b) and 5.2(c), no amendment of any provision of the Contract shall be effective unless:
 - (i) such amendment is in writing and signed by, or on behalf of, the parties; and
 - (ii) the amendment has been approved by ORR.
- (b) Paragraph 5.2(a) shall not apply to modifications effected by virtue of any provision of the Contract (including the HS1 Network Code).
- (c) These Terms may be amended in the circumstances described in paragraph 5.2(d) in the same manner as the HS1 Network Code, and Part C of the HS1 Network Code shall apply to amendments to the Terms *mutatis mutandis*.
- (d) The circumstances referred to in paragraph 5.2 (d) are:
 - (i) such amendment is required pursuant to the terms of Regulation 18(5) of the Access and Management Regulations, provided that no such amendment is contrary to any Legal Requirement or impacts negatively on the interests of the Secretary of State or on his rights and obligations under the Contract or the Concession Agreement;
 - (ii) any provision of the Contract has been declared unlawful by the ORR or any provision of the Contract needs to be amended to render such provision or the Contract lawful;
 - (iii) if as a consequence of a Change in Circumstances the Concession Agreement is amended and HS1 Co determines (acting reasonably) that in order to comply with the Concession Agreement (as amended) it is necessary to amend the Contract; and/or
 - (iv) to reflect any change in law, the Network Statement or the HS1 Network Code since the Effective Date.

5.3 Entire contract and exclusive remedies

- (a) *Entire contract*
Subject to paragraph 5.3(c):
 - (i) the Contract contains the entire agreement between the parties in relation to the subject matter of the Contract;
 - (ii) each party acknowledges that it has not been induced to enter into the Contract in reliance upon, nor has it been given, any warranty, representation, statement, agreement or undertaking of any nature whatsoever other than as expressly set out in the Contract and, to the extent that this is not the case, the relevant party unconditionally and irrevocably waives any claims, rights or

remedies which it might otherwise have had in relation to any such matter;
and

- (iii) neither party shall have any right to rescind or terminate the Contract either for breach of contract or for misrepresentation or otherwise, except as expressly provided for in the Contract.

(b) *Exclusive remedies*

Subject to paragraph 5.3(c) and except as expressly provided in the Contract:

- (i) neither party shall have any liability (including liability arising as a result of any negligence, breach of contract or breach of statutory obligation) to the other in connection with the subject matter of the Contract; and
- (ii) the remedies provided for in the Contract shall be the sole remedies available to the parties in respect of any matters for which such remedies are available.

(c) *Fraud, death and personal injury*

Nothing in the Contract shall exclude, restrict or limit, or purport to exclude, restrict or limit:

- (i) any liability which either party would otherwise have to the other party, or any right which either party may have to rescind the Contract, in respect of any statement made fraudulently by the other party before the execution of the Contract;
- (ii) any right which either party may have in respect of fraudulent concealment by the other party;
- (iii) any right which either party may have in respect of a statement of the kind referred to in section 146 of the Act, whether or not proceedings have been instituted in that respect; or
- (iv) any liability which either party may have towards the other party for death or personal injury resulting from its negligence or the negligence of any of its officers, employees or agents.

5.4 Notices

(a) *Giving of notices*

Any notice to be given under the Contract:

- (i) shall be in writing; and
- (ii) shall be duly given if signed by or on behalf of a person duly authorised to do so by the party giving the notice and delivered by hand at, or by sending it by prepaid first class post or recorded delivery to, the relevant postal address set out in Schedule 1 to the Contract.

(b) *Right to modify communication details*

A party shall be entitled to modify in any respect the communication particulars which relate to it and which are set out in Schedule 1 to the Contract by giving notice of such modification to the other party.

(c) *Deemed receipt*

A notice shall be deemed to have been given and received:

- (i) if sent by hand or recorded delivery, at the time of delivery; and
- (ii) if sent by prepaid first class post from and to any place within the United Kingdom, three Working Days after posting unless otherwise proven.

(d) *Copies*

If Schedule 1 to the Contract specifies any person to whom copies of notices shall also be sent:

- (i) the party giving a notice in the manner required by this paragraph 5.4 shall send a copy of the notice to such person at the address for sending copies as specified in Schedule 1 to the Contract, or to such other person or address as may, from time to time, have been notified by the party to be notified to the notifying party under this paragraph 5.4; and
- (i) such copy notice shall be sent immediately after the original notice.

5.5 Counterparts

The Contract may be executed in two counterparts which, taken together, shall constitute one and the same document. Either party may enter into the Contract by signing either of such counterparts.

5.6 Survival

Those provisions of the Contract which by their nature or implication are required to survive expiry or termination of the Contract (including the provisions of Section 5 (Liability), paragraph 4 of Section 6 (Consequence of Termination), paragraph 3 of Part 4 of Section 7 (Payments, Interest and VAT) and this Section 9 (Miscellaneous)), shall so survive and continue in full force and effect, together with any other provisions of the Contract necessary to give effect to such provisions.

5.7 Contracts (Rights of Third Parties) Act 1999

(a) *Application to third parties*

Save as provided in this paragraph 5.7 or as expressly provided elsewhere in the Contract, no person who is not a party to the Contract shall have any right under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of the Contract.

(b) *Application to the Secretary of State*

The Secretary of State shall have the right under the Contracts (Rights of Third Parties) Act 1999 directly to enforce paragraph 5 of Section 6.

(c) *Application to other train operators*

Other train operators shall have the right under the Contracts (Rights of Third Parties) Act 1999 directly to enforce Section 8.

5.8 Invalidity

If any provision of the Contract shall be held to be void, illegal, invalid or unenforceable, in whole or in part, under any rule of law, such provision or part shall to that extent be deemed not to form part of the Contract but the legality, validity and enforceability of the remainder of

the Contract shall not be affected.

6. GOVERNING LAW

The Contract shall be governed by and construed in accordance with the laws of England and Wales.

HS1 Limited 73 Collier Street London N19BE