

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

4.1 **Effect**

Paragraph 4.2 and 4.3 shall have effect if a Previous Access Agreement is identified in paragraph 6 of Schedule 1 to the Contract.

4.2 Corresponding Rights

- (a) Any Access Proposal or Rolled Over Access Proposal made under any Previous Access Agreement in relation to a Train Slot in respect of which there is a Corresponding Right shall:
 - (i) cease to have effect under the Previous Access Agreement as from the Effective Date; and
 - (ii) be deemed to have effect under the Contract as from the Effective Date.
- (b) Any Train Slot which is the subject of an Access Proposal or a Rolled Over Access Proposal referred to in paragraph 4.2(a) shall for all purposes be treated as if it had been established in and under the Contract and not such Previous Access Agreement.
- (c) Any consultations undertaken, notices served, matters referred to dispute resolution, agreements reached or determinations made which:
 - (i) were made in accordance with and under the Previous Access Agreement in relation to the Engineering Access Statement or the Timetable Planning Rules, Vehicle Change, Network Change or train regulation; and
 - (ii) relate to a right under the Previous Access Agreement which is the subject of a Corresponding Right,shall:
 - (A) cease to have effect under the Previous Access Agreement as from the Effective Date; and
 - (B) be deemed to have effect under the Contract as from the Effective Date.

4.3 Definitions

In this paragraph 4:

"Corresponding Right" means any right of a party under a Previous Access Agreement which:

- (a) relates to the permission of the Train Operator to use the Routes; and
- (b) relates to a period after the Effective Date.

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 Ltd 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 Ltd 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 applicable to that Timetable Period 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 Timetable Period for that 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 applicable to that Timetable Period 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 applicable to the relevant Timetable Period or such other timetable as may be agreed between the parties or

otherwise determined in accordance with paragraph 6;

"Direct Costs"

means the aggregate demonstrable amount of:

- (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,

reasonably incurred by the Train Operator as a result of a Restriction of Use, adjusted by:

- (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;

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;

"HS1 Restriction of Use"

means any Restriction of Use other than an Operator Restriction of Use or a Competent Authority Restriction of Use;

"Operator Restriction of Use"

means a Restriction of Use of the type referred to in paragraph 2.3;

"Part G Restriction of Use"

means a HS1 Restriction of Use to implement a Network Change;

"Possessions Allowance"

means:

- (a) 12 x 8 hours Saturday to Sunday planned disruptive possessions in a Timetable Year on the route between St Pancras International and Temple Mills Boundary (provided that if there is a demand for paths on the North London Line this requirement will increase to 20 x 8 hours planned disruptive possessions in a Timetable Year on the route between St Pancras International and Temple Mills Boundary);
- (b) one overnight double line possession of 12 hours per Timetable Year; and
- (c) two double line possessions of up to 20 minutes per day on Saturdays and Sundays;

- "Recovery Allowance"** means an allowance for the Recovery Time;
- "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 Ltd and/or any train operator using HS1 (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 Timetable Planning Rules relevant to that Day notified to each Timetable Participant on or before D-22) 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 applicable to 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; and
- "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 Engineering Access Statement and the HS1 Network Code**

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

- (a) HS1 Ltd's right to take Restrictions of Use under or pursuant to the Applicable Engineering Access Statement;
- (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 Ltd.

2.3 **Operator Restriction of Use**

HS1 Ltd 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 HS1 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 Ltd demonstrates, is in excess of fair wear and tear arising from use of HS1 by the Train Operator; or
- (b) requested by the Train Operator (other than for the purposes of inspection, maintenance, renewal or repair of HS1);
- (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 Ltd payments**

Subject to paragraph 2.3, HS1 Ltd 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 Ltd 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 Ltd to the Train Operator under Part G in respect of that Part G Restriction of Use.

3. COMPENSATION FOR HS1 RESTRICTIONS OF USE

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

4. ASSET MAINTENANCE PLAN

4.1 HS1 Ltd shall provide a copy of the Asset Maintenance Plan to the Train Operator within 10 Working Days of the Effective Date and shall provide copies of any material changes proposed to the Asset Maintenance Plan to the Train Operator, identifying where these may result in requirements for Restrictions of Use outside the Possessions Allowance.

4.2 The Train Operator shall be entitled to review and comment on the Asset Maintenance Plan and on any proposed material changes to the Asset Maintenance Plan submitted by HS1 Ltd. HS1 Ltd shall give reasonable consideration to any such comments, in particular where they relate to possible requirements for a Restriction of Use outside the Possessions Allowance and shall notify the Train Operator of its response to such comments as soon as reasonably practicable.

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 Timetable 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 Forum'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 First Working Timetable notified to the Train Operator on or before D-22 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. ~~7.~~ **COMPETENT AUTHORITY RATE**

7.1 **Calculations**

The Competent Authority Rate shall be calculated as follows:

- (a) where any compensation paid to HS1 Ltd in relation to a Competent Authority Restriction of Use is sufficient to cover the Relevant Costs of all train operators using HS1 and of HS1 Ltd, 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 Ltd's Relevant Costs and the Relevant Costs of all train operators using HS1 in respect of that Competent Authority Restriction of Use.

7.2 **Negotiation of compensation with Competent Authority**

HS1 Ltd 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 Ltd 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 Ltd:
 - (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 Ltd, including final details of such Relevant Costs.

7.4 **Notification of HS1 Ltd's Relevant Costs**

- (a) Within 28 days of receipt of information under paragraph 7.3(a), HS1 Ltd 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 Ltd 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 Ltd shall serve a supplemental notice on the Train Operator, including final details of such Relevant Costs.

7.5 **Compensation received by HS1 Ltd**

HS1 Ltd 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 Ltd 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 Ltd 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,in sufficient detail to enable the Train Operator to make an informed assessment thereof.
- (b) Within 20 Working Days of the receipt of the Possessions Statement, the Train Operator shall notify HS1 Ltd of any compensation payable to the Train Operator by HS1 Ltd in respect of the HS1 Restrictions of Use identified in the Possessions Statement together with the details of the full amount of Direct Costs incurred by the Train Operator in respect of such Restrictions of Use.
- (c) The aggregate liabilities of HS1 Ltd 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 Ltd or the Train Operator, as the case may be, within 20 Working Days after the receipt by HS1 Ltd of the Train Operator's notice in accordance with paragraph 8.1(b).

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 Ltd, HS1 Ltd 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 calculated in accordance with paragraph 3.2 of Part 4 of Section 7; 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 Ltd 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 Ltd 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 Ltd 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 Ltd 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.

9. CAP ON COMPENSATION

The compensation payable by HS1 Ltd 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.

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 Ltd 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 Ltd 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 HS1 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 Ltd indemnity

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

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

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

- (a) shall exclude any Relevant Losses to the extent that they result from a cancellation of or a delay in commencement to a Restriction of Use save where such delay or cancellation is attributable to the Train Operator;
- (b) 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; and
- (c) shall:
 - (i) include Relevant Losses only to the extent that these constitute amounts which HS1 Ltd would not have incurred as network owner and operator but for the relevant breach; and
 - (ii) give credit for any savings to HS1 Ltd 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 Ltd for indemnity for Relevant Losses:
 - (i) shall exclude any Relevant Losses to the extent that they result from delays to or cancellations of trains; and
 - (ii) 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 Ltd 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 Ltd 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 paragraphs 3.3 to 3.9 apply in the circumstances set out in paragraph 3.1.

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

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

- (a) HS1 Ltd 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 Ltd 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 Ltd:

- (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, whether resulting from the negligence of a party or the negligence of any of its officers, employees or agents or from a failure by a party to comply with its Safety Obligations,

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 & Aggregate Variable DI Costs

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

4. ~~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 Ltd, the Train Operator shall provide suitable evidence to HS1 Ltd to demonstrate that such insurance policy or insurance policies are in full force and effect.

4.3 **HS1 Ltd Insurance**

HS1 Ltd 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 Ltd 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:
 - (i) the obligation of the Affected Party to perform a Relevant Obligation to the extent that it is prevented from doing so by reason of the Relevant Force Majeure Event; and
 - (ii) 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 (g) of the definition of Force Majeure Event, 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

- (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 Ltd 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 Ltd 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 Ltd promptly after such information first becomes available to the Train Operator.

3.5 Notification

HS1 Ltd shall promptly notify the Train Operator upon HS1 Ltd 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 Ltd and will use all reasonable endeavours to provide HS1 Ltd 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:
 - (i) the extent to which each party has taken reasonable steps to avoid and/or mitigate the effects of the incidents; and

- (ii) 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 Ltd shall identify:
 - (i) in respect of each incident recorded under paragraph 3.1(d)(i) as causing Minutes Delay, the extent to which that incident caused each of the Minutes Delay; and
 - (ii) 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 Ltd 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 Ltd, to the Train Operator or to another train operator in accordance with the following provisions of this paragraph 4.

4.2 **HS1 Ltd responsibility incidents**

Responsibility for Minutes Delay and Cancelled Trains on a Day caused by incidents for which HS1 Ltd is allocated responsibility pursuant to this paragraph 4.2 shall be allocated to HS1 Ltd. Unless and to the extent otherwise agreed, HS1 Ltd 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 Ltd of any of its obligations under the Contract; or
- (b) (whether or not HS1 Ltd is at fault) by circumstances within the control of HS1 Ltd in its capacity as the infrastructure manager of HS1; or
- (c) (whether or not HS1 Ltd is at fault) by any act, omission or circumstance originating from or affecting HS1 (including its operation), but excluding any incident caused wholly or mainly by rolling stock on HS1 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 Ltd at that station or physical works undertaken by HS1 Ltd at that station), any light maintenance depot or any network other than HS1.

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 Ltd.
- (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 Ltd.

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:
 - (i) is an act, omission or circumstance which affects HS1, or its operation, and prevents a Train entering or passing through a station at the time it is scheduled to do so; and
 - (ii) prevents the access of passengers through the station to or from the Train;
- (b) any identified incident in respect of which HS1 Ltd and the Train Operator are equally responsible and for which neither HS1 Ltd nor the Train Operator is allocated responsibility under paragraph 4;
- (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)); or
- (d) any delays or cancellations which are experienced by a Train which is being tested.

5. ~~5.~~ **STATEMENT OF ALLOCATED RESPONSIBILITY**

5.1 **Initial statement**

- (a) For each Day, HS1 Ltd 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 Ltd under paragraph 4; and
- (b) a summary showing:
 - (i) the aggregate Minutes Delay and Cancelled Trains recorded under each category set out in paragraph 3.2; and
 - (ii) a list of the Minutes Delay and Cancelled Trains (in each case broken down by incident) recorded as the responsibility of:
 - (1) HS1 Ltd;
 - (2) the Train Operator;
 - (3) any other train operator (with each individual train operator separately identified); or
 - (4) none of the above.

5.2 **Further statements**

If HS1 Ltd has reasonable grounds to believe that any further incident was the responsibility of the Train Operator, HS1 Ltd or any other train operator but was not shown as such in the information made available in accordance with paragraph 5.1, then HS1 Ltd 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 Ltd 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, subject to paragraph 7.2, an adjusting payment shall be payable within 28 days of HS1 Ltd'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 Ltd 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:

- (i) within the next two clear Working Days after notification of any dispute, nominated representatives of the parties shall attempt to resolve that dispute; and
 - (ii) 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.
- (d) Where the Train Operator disputes any attribution which relates to TOC on TOC Minutes Delay or TOC on TOC Cancellation Minutes, HS1 Ltd shall use reasonable endeavours to procure that such other affected train operator cooperates in the resolution of such dispute. Where a train operator disputes any attribution which is relevant for the purpose of this Contract, the Train Operator shall cooperate with HS1 Ltd and that train operator in the resolution of that dispute.

6. ~~6.~~ NOTIFICATION OF PERFORMANCE SUMS

6.1 Notification

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

- (a) any Performance Sums for which HS1 Ltd or the Train Operator is liable, together with such supporting information 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 Ltd 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 Ltd for any Performance Sums shall be set off against each other, and subject to paragraph 7.2, the balance shall be payable by HS1 Ltd 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. **NOT USED**

9. **~~INITIAL~~ BENCHMARKING AND REVIEW**

- 9.1 ~~Following 1st July 2011 but no later than 30th November 2011, HS1 Ltd shall recalibrate the Benchmarked Values in accordance with this paragraph 9 by serving a Proposal for Change pursuant to Part C of HS1 Network Code. The parties agree that the purpose of such recalibration is to determine what changes, if any, should be made to Schedule 6 to the Contract which would better incentivise the parties to keep delays and cancellations to a minimum, having regard to the fact that the caps on liability shall not be subject to change without the consent of each of the Access Parties which may be affected by any such change. Such review shall be undertaken by reference to performance on HS1 during the year ending on the Period which ended most recently prior to 1st July 2011. Schedule 6 of the Contract contains the Benchmarked Values. The Benchmarked Values may be recalibrated in accordance with the terms of this paragraph 9.~~

- 9.2 Following 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 Proposal for Change pursuant to Part C of HS1 Network Code, the purpose of which is to determine what changes, if any, should be made to Schedule 6 to the Contract as a consequence of such Material Change having regard to the fact that the caps on liability are not subject to review.

- 9.3 It is acknowledged that any recalibration of the Benchmarked Values in relation to one track access contract may affect other train operators under other track access contracts and that those affects and the consequent changes required in relation to those other contracts may all require to be taken into account as part of any such process. 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 the Benchmarked Values being revised in accordance with Part C:

- (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 or (if applicable) from such other date as may be~~ established in accordance with the Part C process for the change to take effect;
- (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 with effect from the first Period to commence on or after the date on which the changes to the Contract take effect, HS1 shall notify the Train Operator within 35 days after the end of the Period in which Schedule 6 is amended of the amount of any payment required from either party to the other to take account of the repeated calculations and the provisions of paragraphs 6, 7 and 11 shall apply mutatis mutandis in relation to the payment and /or dispute of those amounts.

9.5 Without prejudice to the other provisions of this paragraph 9, following the entering into of a track access agreement between HS1 Ltd and a train operator, which is deemed to be a Material Change for the purposes of paragraph (e) of the definition of Material Change in paragraph 1.1 of Part 1 of this Section 8, either party shall be entitled to require that the Benchmarked Values are recalibrated in accordance with this paragraph 9 by serving a Proposal for Change pursuant to Part C of HS1 Network Code at any time following the end of the period of 12 months from the commencement of train services by the relevant train operator.

10. ~~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(a), the parties are still unable to agree any disputed aspects, each party shall 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 officers 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 Disputes Resolution Procedure.

PART 2: CALCULATION OF THE PERFORMANCE SUMS

1. HS1 LTD PERFORMANCE SUMS

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

$$HSPS = HSP1 \times PR \times T$$

where:

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

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

where:

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

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

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

T is the aggregate number of Trains operated or due to be operated by the Train Operator in that Period calculated in accordance with the following formula:

$$T = T_{OP} + T_{SB}$$

where:

T_{OP} is the aggregate number of Trains to be operated by the Train Operator in that Period as Scheduled in the Applicable Timetable; and

T_{SB} is the aggregate number of Trains operated by the Train Operator in that Period by virtue of Train Operator Variations and which do not appear in the Applicable Timetable.

- 1.2 Where HSP1 is negative it shall be deemed to be zero.

- 1.3 The HS1 Ltd Performance Sum shall not exceed the lower of:
- (a) in respect of any Relevant Year, the Performance Cap in respect of that Relevant Year;
 - (b) in respect of the first Advance Period in any Relevant Year, 25% of the Performance Cap in respect of that Relevant Year;
 - (c) 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 Ltd Performance Sum already paid by HS1 Ltd to the Train Operator in respect of the Relevant Year; and
 - (d) 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 Ltd Performance Sum already paid by HS1 Ltd to the Train Operator in respect of the Relevant Year.

2. HS1 LTD PERFORMANCE BONUS

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

$$HSPB = HSP2 \times BPR \times T$$

where:

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

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

where:

HSGPT is the HS1 Ltd 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 Ltd 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 Ltd 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 Ltd 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 Ltd Excluded Incidents;

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; and

T has the meaning given to it in paragraph 1.1.

- 2.2 Where HSPB is negative it shall be deemed to be zero.
- 2.3 The HS1 Ltd Performance Bonus shall not exceed the lower of:
- (a) in respect of any Relevant Year, 10% of the Performance Cap in respect of that Relevant Year;
 - (b) in respect of the first Advance Period in any Relevant Year, 2.5% of the Performance Cap in respect of the Relevant Year;
 - (c) in respect of the second Advance Period in any Relevant Year, 5% of the Performance Cap in respect of that Relevant Year less the aggregate of any HS1 Ltd Performance Bonus already paid by the Train Operator to HS1 Ltd in respect of the Relevant Year; and
 - (d) in respect of the third Advance Period in any Relevant Year 7.5% of the Performance Cap in respect of that Relevant Year less the aggregate of any HS1 Ltd Performance Bonus already paid by the Train Operator to HS1 Ltd in respect of the Relevant Year.
- 2.4 No HS1 Ltd Performance Bonus shall be payable in respect of any Period where the HS1 Ltd 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 Ltd and shall be calculated according to the following formula:

$$TOPS = \sum(TOP \times TOPR)$$

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:

$$TOP = TOMD + TOCM$$

where:

TOMD is the aggregate for all Recording Points of the Minutes Delay in respect of the Period experienced by the relevant affected train operator and 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 experienced by the relevant affected train operator and 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

Σ means the summation across all affected train operators; and

TOPR means, in respect of each affected train operator, the payment rate per Delay Minute or Cancellation Minute applicable to the traffic type for that train operator and set out in Schedule 6 of that affected train operator's track access contract.

- 3.2 For the purpose of paragraph 3.1, any Delay Minutes or Cancellation Minutes attributed to the Train Operator which relate to delays or cancellations experienced by an affected train operator shall be ignored in respect of any Period if the performance experienced by that train operator in that Period calculated in accordance with the following formula ("TOCPP") is better (that is a smaller number than) than the TOC on TOC Receipt Benchmark of the affected train operator:

$$TOCPP = \frac{HSTMD + HSTCM}{TA}$$

where:

HSTMD in respect of that affected train operator under its track access contract, is the aggregate for all Recording Points of the Minutes Delay in respect of the Period allocated to HS1 Ltd 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 Ltd Excluded Incidents;

HSTCM in respect of that affected train operator under its track access contract, is the aggregate of the Cancellation Minutes arising from each Cancelled Train as specified in column F of Schedule 6 to that contract in respect of the Period allocated to HS1 Ltd 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 Ltd Excluded Incidents; and

TA is the aggregate number of Trains operated or due to be operated by the affected train operator in that Period calculated in accordance with the following formula:

$$TA = TA_{OP} + TA_{SB}$$

where:

TA_{OP} is the aggregate number of Trains to be operated by the affected train operator in that Period as Scheduled in the Applicable Timetable; and

TA_{SB} is the aggregate number of Trains operated by the affected train operator in that Period by virtue of Train Operator Variations and which do not appear in the Applicable Timetable.

- 3.3 The Train Operator Performance Sum shall not exceed the lower of:

- (a) in respect of any Relevant Year, the Performance Cap in respect of that Relevant Year;
- (b) in respect of the first Advance Period in any Relevant Year, 25% of the Performance Cap in respect of that Relevant Year;

- (c) 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 Ltd in respect of the Relevant Year; and
- (d) 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 Ltd in respect of the Relevant Year.

3.4 HS1 Ltd shall provide the Train Operator with evidence to support the calculations carried out in accordance with this paragraph 3.

4. TRAIN OPERATOR PERFORMANCE RECEIPT

4.1 In respect of each Period, HS1 Ltd shall, as soon as reasonably practicable, account to the Train Operator for the Train Operator Performance Sums which it receives pursuant to the equivalent paragraph 3 of the track access contracts of the train operators (other than the Train Operator) operating on HS1 on the following basis:

- (a) where all 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 any relevant train operator (other than the Train Operator) were experienced by the Train Operator, HS1 Ltd shall account to the Train Operator for the Train Operator Performance Sum paid by that relevant train operator; and
- (b) 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 any relevant train operator (other than the Train Operator) were experienced by the Train Operator and one or more other train operators, HS1 Ltd shall account to the Train Operator for a sum equal to:

$$\frac{\sum (TOPS \times A)}{B}$$

where:

\sum is the summation in respect of all relevant train operators;

TOPS is the aggregate Train Operator Performance Sum received by HS1 Ltd in respect of the Period from the relevant train operator (other than the Train Operator);

A is calculated as follows:

$$A = TDMCM \times OPR$$

where:

TDMCM is the sum of the Delay Minutes and Cancellation Minutes (excluding those which arise from Train

Operator Excluded Incidents) which are attributed to the relevant train operator (other than the Train Operator) under its track access contract which were experienced by the Train Operator in such Period; and

OPR is the payment rate (Indexed) specified in column C of the table at Schedule 6 to the Contract for the relevant traffic type; and

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

provided that in calculating the values of A and B, Delay Minutes and Cancellation Minutes shall be ignored where they were not taken into account in the calculation of TOPS by virtue of the equivalent of paragraph 3.2 of the relevant track access contract and the operation of any Performance Cap shall be ignored; and

provided further that the aggregate amount which HS1 Ltd shall be liable to account to all train operators under this paragraph 4 and its equivalents in other track access contracts in respect of any Period shall not exceed the Train Operator Performance Sum received by HS1 Ltd in respect of that Period under all those contracts.

4.2 HS1 shall include details of the calculations and amounts payable under this paragraph 4 in the notifications made under paragraph 6 of Part 1 and shall act responsibly with a view to securing payment to it by each train operator of the Train Operator Performance Sums which it owes.

5. PERFORMANCE IMPROVEMENT PLANS

5.1 If:

- (a) in 3 out of any 13 consecutive Periods the HS1 Ltd 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
- (b) in 8 out of any 13 consecutive Periods the value of HSP1 referred to in paragraph 1 is between the HS1 Ltd Poor Performance Threshold and the HS1 Ltd Performance Benchmark referred to in column H of Schedule 6 to the Contract,

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

5.2 If:

- (a) 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
- (b) 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 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 Ltd 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 Ltd - Affiliates*

Except as permitted by paragraph 1.2, HS1 Ltd 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;
- (m) in the case of HS1 Ltd, to any other infrastructure manager with regard to any access related issue affecting both such infrastructure manager and HS1 Ltd;
- (n) in the case of HS1 Ltd, any prospective buyer of HS1 Ltd (or its business), or any equity investor in HS1 Ltd and any of their respective lenders and advisers;
- (o) in the case of HS1 Ltd, any potential transferee or assignee of the Concession Agreement and/or a potential nominated undertaker of HS1 (other than HS1 Ltd) under section 34 of the CTRL Act and any of their respective lenders and advisers;
- (p) in the case of HS1 Ltd, to any potential Operator and any of its respective lenders and advisers; or
- (q) in the case of HS1 Ltd, on the website of HS1 Ltd subject to the redaction of any commercially sensitive information or in connection with any consultation process.

1.3 **Return of Confidential Information**

Each of HS1 Ltd 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 Ltd 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 Ltd 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

2.1 Subject to paragraphs 2.2 and 2.3, neither party may assign, transfer, novate, mortgage, charge, declare itself a trustee for a third party, dispose of any of its rights and/or obligations or create any encumbrance or other security interest over the whole or any part of its rights and/or obligations under the Contract without the prior written consent of the other party.

2.2 ~~2.2~~ HS1 Ltd may at any time and from time to time without obtaining the consent of the Train Operator assign, mortgage, charge, declare itself a trustee for a third party, dispose of any of its rights and/or obligations or create any encumbrance or other security interest over the whole or any part of its rights and benefits under the Contract to a Permitted Transferee.

2.3 Subject to the approval of the ORR to any new framework agreement, the Train Operator (and any assignee of all or part of the Train Operator's rights under the Contract):

- (a) consents to the transfer or novation of the rights and obligations of HS1 Ltd under the Contract to a Permitted Transferee in any circumstances where HS1 Ltd requests the Train Operator to participate in such a novation; and
- (b) shall execute such contracts and do such things as HS1 Ltd may reasonably request to give effect to the transfer or novation.

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 Forum 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 3.3(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 disputes resolution procedure 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 Railways Regulations but only to the extent that such party could not act in a manner which would not breach the Contract or the Railways 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 paragraph 5.2(b), no amendment of any provision of the Contract shall be effective unless such amendment is in writing and signed by or on behalf of the parties and the amendment has been approved by the ORR.
- (b) Paragraph 5.2(a) shall not apply to the following types of amendment:
 - (i) an amendment made in accordance with paragraph 5.4(b);
 - (ii) an amendment effected in accordance with any of the Schedules to the Contract;
 - (iii) an amendment effected in accordance with the HS1 Network Code; and
 - (iv) an amendment to the Terms in accordance with paragraph 5.2(c).
- (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 such amendments to the Terms *mutatis mutandis*.
- (d) The circumstances referred to in paragraph 5.2(c) are:
 - (i) such amendment is required pursuant to the terms of Regulation 18(5) of the Railways 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 Ltd 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.
- (e) HS1 Ltd shall produce and send to the Train Operator and to the ORR a conformed copy of the Contract within 28 days of the making of any amendment or modification to it.

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:
- (i) to the other party as soon as reasonably practicable; and
 - (ii) to ORR within 14 days of such modification.
- (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
 - (ii) 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 Office of Rail Regulation*

ORR shall have the right under the Contracts (Rights of Third Parties) Act 1999 to enforce directly such rights as have been granted to it under the Contract.

(c) *Application to the Secretary of State*

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

(d) *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 and any non-contractual obligation connected with it shall be governed by and construed in accordance with the laws of England and Wales.