

SECTION 1 – DEFINITIONS AND INTERPRETATION

1. INTERPRETATION

1.1 Definitions

In the Contract unless the context otherwise requires:

"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 A of the HS1 Network Code;

"Aggregate Variable DI Costs" means, in respect of any Relevant Year, the aggregate amount of the variable DI Costs anticipated as being payable by the Train Operator during that Relevant Year calculated on the basis described in Section 7 and on the basis that all capacity which is reserved by the Train Operator in Schedule 5 to the Contract is timetabled in the Applicable Timetable;

"Ancillary Movement" has the meaning ascribed to it in Part D of the HS1 Network Code;

"Applicable Engineering Access Statement" has the meaning ascribed to it in Part A of the HS1 Network Code;

"Applicable Timetable Planning Rules" has the meaning ascribed to it in Part A 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 D2.1.1 of Part D of the HS1 Network Code at 2200 hours on the Day prior to that Day, and which is applicable to the Trains;

"Asset Maintenance Plan" means an asset maintenance plan issued by HS1 Ltd from time to time which describes the assets and equipment on HS1 and the means of renewal, maintenance and inspection of the same;

"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 on 14 August 2009 between the Secretary of State and HS1 Ltd granting the concession for the operation and financing of HS1 and the repair, maintenance and replacement of HS1;

"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 Ltd and the Train Operator which incorporates the Terms, the HS1 Network Code and the HS1 Operational Codes;

"CTRL Act" means the Channel Tunnel Rail Act 1996;

"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 HS1;

"D-22" has the meaning ascribed to it in Part D of the HS1 Network Code;

"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;

"First Working Timetable" has the meaning ascribed to it in Part A 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;

"**Forum**" has the meaning given to it in the HS1 Access Dispute Resolution Rules;

"**Framework Track Access Agreement**" means an agreement between HS1 Ltd and a Train Operator setting out the rights and obligations of the parties in relation to the infrastructure capacity to be allocated and the charges to be levied over a period in excess of one Timetable Period;

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

"**HS1 Access Dispute Resolution Rules**" has the meaning ascribed to it in Part A of the HS1 Network Code;

"**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 August 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 "£100,000" 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) the Aggregate Variable DI Costs in respect of that Relevant Year; and
- (b) £1,000,000 (Indexed);

and where there is insufficient information available to calculate the Aggregate Variable DI Costs on the day immediately preceding the first day of a Relevant Year, the Liability Cap shall be £1,000,000 (Indexed) in respect of such Relevant Year;

"Light Engine" means a locomotive operating under electrical traction power with no associated wagons;

"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 Statement**" means the network statement published by HS1 Ltd in accordance with regulation 11 of the Railways Regulations;

"**NR(~~CTRL~~HS)**" means Network Rail (~~CTRL~~High Speed) 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**" ~~has the meaning ascribed to it in Part A of the HS1 Network Code;~~means NR(HS) or such successor operator of HS1 appointed by HS1 Ltd from time to time;

"**ORR**" or "**Office of Rail Regulation**" has the meaning ascribed to it in Part A of the HS1 Network Code;

"**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 Ltd to the Train Operator;

"Periodic Review" means the periodic review that is to be carried out by the ORR in accordance with the Concession Agreement;

"**Permitted Transferee**" means:

- (a) if the Concession Agreement is terminated, any undertaking which replaces HS1 Ltd as the concessionaire of HS1;
- (b) any nominated undertaker of HS1 (other than HS1 Ltd) under section 34 of the CTRL Act;
- (c) any lender, security or other trustee, bank, trust, fund or other financial institution or entity with whom HS1 Ltd has at any time entered into any arrangement in connection with the provision of finance to HS1 Ltd; and
- (d) in relation to HS1 Ltd, any undertaking falling within the definition of "group undertaking" in section 1161 of the Companies Act 2006;

"**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;

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

"**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 Ltd 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 (including loss of profit and revenue), 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;

"**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;

"**Ripple Lane**" means the exchange sidings between HS1 and the NR Network at Ripple Lane in the London Borough of Barking and Dagenham;

"**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 Ltd 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**" [has the meaning ascribed to it by regulation 2 of the Railways and Other Guided Transport Systems \(Safety\) Regulations 2006;](#)

"**Safety Certificate**" [has the meaning ascribed to it by regulation 2 of the Railways and Other Guided Transport Systems \(Safety\) Regulations 2006;](#)

~~"Safety Certificate" has the meaning ascribed to it by regulation 2 of 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**" has the meaning ascribed to it in Part A of the HS1 Network Code;

"**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 HS1 pursuant to the permission to use the Routes granted under Section 3 and in accordance with the 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 Change Date**" has the meaning ascribed to it in Part D of the HS1 Network Code;

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

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

"Track Access Agreement" means an agreement between HS1 Ltd and a Train Operator setting out the rights and obligations of the parties in relation to the infrastructure capacity to be allocated and the charges to be levied over a period of up to one Timetable Period;

"Track Charges" means the charges payable by or on behalf of the Train Operator to HS1 Ltd, 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 passengers 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 Ltd;

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

"Train Operator Variation" has the meaning ascribed to it in Part D of the HS1 Network Code;

"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;

"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;

"Working Day" has the meaning ascribed to it in Part A of the HS1 Network Code; 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 Concession Agreement is still in force and effect and HS1 Ltd is the nominated undertaker of HS1 under section 34 of the CTRL Act;
- (b) 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;
- (c) 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);
- (d) the Train Operator is issued a Safety Certificate and the Operator is issued a Safety Authorisation under the Railways and Other Guided Transport Systems (Safety) Regulations 2006; and
- (e) 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 Ltd, in so far as within its controls, the conditions precedent contained in paragraphs 1.2(c) and 1.2(d); 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(c) and 1.2(d).

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

The Contract shall continue in force until the earliest of:

- (a) lapse under paragraph 1.4;
- (b) termination under Section 6; and
- (c) 0159 hours on the Expiry Date.

SECTION 3 – OPERATIONAL PROVISIONS

1. PERMISSION TO USE

1.1 Permission to use the Routes

HS1 Ltd grants the Train Operator permission to use the Routes.

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 HS1 in order to implement any plan established under Part H of the HS1 Network Code;
- (c) to make Ancillary Movements;
- (d) 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) ~~(e)~~ for the Train Operator and its Associates to enter upon that part of HS1 comprising the Routes, with or without vehicles;
- (f) for the Train Operator and its Associates to bring things onto that part of HS1 comprising the Routes and keep them there; and
- (g) for the Train Operator and its Associates to use the track to stop at any station on HS1 for which the Train Operator either has a station access agreement or is the station facility owner;

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

- (i) the HS1 Network Code;
- (ii) the Applicable Engineering Access Statement;
- (iii) the Applicable Timetable Planning Rules;
- (iv) the Rule Book, including, the Sectional Appendix; and
- (v) the HS1 Standards
- (vi) any relevant Network Rail Infrastructure Limited standards, where a Service operates to and/or from Ripple Lane.

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 Ltd, 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 HS1 when reasonably directed to do so by HS1 Ltd; 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 Ltd shall specify.

1.4 **Stabling**

Without prejudice to HS1 Ltd's obligations, if any, under Schedule 5 to provide Stabling, HS1 Ltd shall use all reasonable endeavours to provide such Stabling facilities as are necessary or expedient for or in connection with the provision of the Services in accordance with the Working Timetable.

2. ~~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 Ltd); 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 HS1 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 Ltd shall maintain and operate HS1 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;

- (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;
- (d) subject to paragraph 3.1(e), the Train Operator shall be responsible for putting in place all arrangements to enable the Specified Equipment to move on and off HS1 on to an adjacent network; and
- (e) HS1 Ltd shall be responsible for putting in place all arrangements required to connect HS1 to an adjacent network.

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.

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 any costs, direct losses and expenses reasonably incurred by the Train Operator as a result of a Restriction of Use including but not limited to:

- (a) additional train crew and ground staff costs;
- (b) additional fuel costs;
- (c) additional taxi costs;
- (d) additional track access costs;
- (e) train planning and diagramming costs;
- (f) additional resource (locomotives and wagons) costs; and
- (g) other costs directly related to the organisation and management of the Train Operator's response to a Restriction of Use,

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. ~~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. ~~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. ~~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.

- "TOC on TOC Minutes Delay"** means the Minutes Delay allocated to a train operator pursuant to paragraph 4.4(a);
- "TOC on TOC Receipt Benchmark"** means, in relation to a train operator, the average delay per train expressed in minutes specified in column I of the table at Schedule 6 to the track access contract of that train operator; 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 triggers the first Recording Point on HS1 on that Day;
- (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 2 of Section 6 and not of this Section 8. Accordingly, for the purposes of this Section 8:

- (a) neither HS1 Ltd 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. ~~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 HS1 (save where it is routed via Ashford International), in respect of the first Recording Point which it triggers each time it crosses back onto HS1 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:

- (i) 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
- (ii) 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 Ltd 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:
 - (i) the incident(s) causing each minute of any delay included in Minutes Delay; and

- (ii) those Minutes Delay for which HS1 Ltd 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 Ltd 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 Ltd 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 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. ~~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;
- (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;
- (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 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 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;
- (b) 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
- (c) any delays or cancellations which are experienced by a Train which is being tested.

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, if applicable, 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. ~~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 accordance with the Contract in that Period (excluding any and all Trains making an Ancillary Movement) calculated in accordance with the following formula:

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

where:

T_{OP} is the aggregate number of Trains operated by the Train Operator in accordance with the Contract in that Period (excluding any and all Trains making an Ancillary Movement) as Scheduled in the Applicable Timetable; and

T_{SB} is the aggregate number of Trains operated by the Train Operator in accordance with the Contract in that Period by virtue of Train Operator Variations (excluding any and all Trains making an Ancillary Movement) 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 HSPS 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 HSPS 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 HSPS already paid by HS1 Ltd to the Train Operator in respect of the Relevant Year.

2. ~~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:

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

where:

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

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

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 HSPB 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 HSPB 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 HSPB already paid by the Train Operator to HS1 Ltd in respect of the Relevant Year.

2.4 No HSPB shall be payable in respect of any Period where the HSPB 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:

$$\text{TOPS} = \sum (\text{TOP} \times \text{TOPR})$$

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:

$$\text{TOP} = \text{TOMD} + \text{TOCM}$$

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:

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

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 accordance with the Contract in that Period (excluding any and all Trains making an Ancillary Movement) calculated in accordance with the following formula:

$$\text{TA} = \text{TA}_{\text{OP}} + \text{TA}_{\text{SB}}$$

where:

TA_{OP} is the aggregate number of Trains to be operated by the affected train operator in accordance with the Contract in that Period (excluding any and all Trains making an Ancillary Movement) as Scheduled in the Applicable Timetable; and

TA_{SB} is the aggregate number of Trains operated by the affected train operator in accordance with the Contract in that Period (excluding any and all Trains making an Ancillary Movement) 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:

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

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:

$$A = \text{TDMCM} \times \text{OPR}$$

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 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 Ltd 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. ~~5.~~ **PERFORMANCE IMPROVEMENT PLANS**

5.1 If:

- (a) in 3 out of any 13 consecutive Periods the HSPS 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, to any prospective buyer of HS1 Ltd (or its business), or to any equity investor in HS1 Ltd and any of its respective lenders and advisers;
- (o) in the case of HS1 Ltd, to 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. ~~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. ~~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.