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Schedule 8.3 - ESMCP Mobile Services Agreement

Dispute Resolution Procedure

Version 1.0

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CHANGE HISTORY

Version No.	Effective Date of agreement / CAN	Version / Details of Changes included in Update	Author(s)
1.0	01/12/2024	Execution Version	ESMCP

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1 Introduction

1.1 If a Dispute arises then:

- (a) the Parties shall act in good faith to attempt to resolve such Dispute by commercial negotiation; and
- (b) if such attempts are not successful within a reasonable period, such period not being less than [REDACTED] either Party may issue to the other a Dispute Notice and following service of such Dispute Notice the Parties shall follow the procedure set out in the following paragraphs of this Schedule.

1.2 The Dispute Notice

- (a) shall include:
 - (i) the material particulars of the Dispute;
 - (ii) the reasons why the Party serving the Dispute Notice believes that the Dispute has arisen; and
 - (iii) if the Party serving the Dispute Notice believes that the Dispute should be dealt with under the Expedited Dispute Timetable, the justification for such belief ; and
- (b) may specify in accordance with Paragraphs 8.2 and 8.3 below that the Party issuing the Dispute Notice has determined (in the case of the Authority) or considers (in the case of the Supplier) that the Dispute is a Multi-Party Dispute, in which case Paragraph 1.3 shall apply.

1.3 If a Dispute Notice specifies that the Dispute has been determined or is considered to be a Multi-Party Dispute pursuant to Paragraph 1.2(b), then:

- (a) if it is served by the Authority it shall be treated as a Multi-Party Procedure Initiation Notice; and
- (b) if it is served by the Supplier it shall be treated as a Supplier Request,

and in each case the provisions of Paragraph 8 below shall apply.

1.4 Subject to Paragraph 1.5 and 2.2, and so long as the Authority has not served a Multi-Party Procedure Initiation Notice in respect of the relevant Dispute, following the issue of a Dispute Notice, the Parties shall seek to resolve Disputes:

- (a) first by commercial negotiation (in accordance with Paragraph 3 below);
- (b) then, if either Party serves a Mediation Notice, by mediation (in accordance with Paragraph 4 below); and

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- (c) lastly, by recourse to arbitration (in accordance with Paragraph 6 below) or litigation (in accordance with Clause 45 of this Agreement (Governing Law and Jurisdiction)).
- 1.5 Specific issues shall be referred to Expert Determination (in accordance with Paragraph 5 below) where specified under the provisions of this Agreement and may also be referred to Expert Determination where otherwise appropriate as specified in Paragraph 5.1.
- 1.6 Unless agreed otherwise in writing, the Parties shall continue to comply with their respective obligations under this Agreement regardless of the nature of the Dispute and notwithstanding any issue of a Dispute Notice or a Multi-Party Procedure Initiation Notice.
- 1.7 Subject to Paragraph 2, the following timescales shall apply:
 - (a) [REDACTED] for the Authority's Commercial Manager and the Supplier's Commercial Manager to resolve the Dispute following service of the Dispute Notice (Paragraph 3.1);
 - (b) [REDACTED] for the Authority's Commercial Director and Supplier's Commercial Director to resolve the Dispute following escalation from the Authority's Commercial Manager and the Supplier's Commercial Manager (Paragraph 3.2);
 - (c) [REDACTED] from the service of the Mediation Notice for the Parties to agree the joint appointment of an independent mediator (Paragraph 4.2);
 - (d) [REDACTED] from a request that the Dispute be referred to an Expert for determination for the Parties to agree which Expert shall be appointed (Paragraph 5.2); and
 - (e) [REDACTED] from receipt by the Authority of a notice that the Supplier intends to commence court proceedings for the Authority to issue a Counter Notice (Paragraph 6.2).

2 Expedited Dispute Timetable

- 2.1 In exceptional circumstances where the use of the timescales set out in this Schedule would be unreasonable (e.g.: where a Party would be materially disadvantaged by a delay in resolving the Dispute), the Parties may agree to use the Expedited Dispute Timetable. If the Parties are unable to reach agreement as to whether to use the Expedited Dispute Timetable within five (5) Working Days of the issue of the Dispute Notice, the use of the Expedited Dispute Timetable shall be at the sole discretion of the Authority.
- 2.2 If the use of the Expedited Dispute Timetable is to be used pursuant to the provisions of Paragraph 2.1 or is otherwise specified under the provisions of this Agreement, then the following timescales shall replace those specified in the relevant Paragraphs:
 - (a) in Paragraph 3.2, [REDACTED]
 - (b) in Paragraph 3.3(c), [REDACTED]
 - (c) in Paragraph 4.2, [REDACTED]

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(d) in Paragraph 5.2, [REDACTED] and

(e) in Paragraph 6.2, [REDACTED]

- 2.3 If at any point it becomes clear that an applicable deadline cannot be met or has passed, the Parties may (but shall be under no obligation to) agree in writing to extend the deadline. Any agreed extension shall have the effect of delaying the start of the subsequent stages by the period agreed in the extension.

3 Commercial Negotiation

- 3.1 Following the service of a Dispute Notice, then, so long as the Authority has not served a Multi-Party Procedure Initiation Notice in respect of the relevant Dispute, the Authority and the Supplier shall use reasonable endeavours to resolve the Dispute in good faith as soon as possible, by commercial negotiation between the Authority's Commercial Manager and the Supplier's Commercial Manager.

- 3.2 Notwithstanding Paragraph 2 (Expedited Dispute Timetable), if the Parties have not settled the Dispute in accordance with Paragraph 3.1 [REDACTED] of service of the Dispute Notice then the Dispute will be referred to the Authority's Commercial Director and the Supplier's Commercial Director who shall use reasonable endeavours to resolve the Dispute in good faith as soon as possible by commercial negotiation.

- 3.3 Following referral in accordance with Paragraph 3.2, if:

- (a) either Party is of the reasonable opinion that the resolution of a Dispute by commercial negotiation, or the continuance of commercial negotiation, will not result in an appropriate solution;
- (b) the Parties have already held discussions of a nature and intent (or otherwise were conducted in the spirit) that would equate to the conduct of commercial negotiation in accordance with this Paragraph 3; or
- (c) notwithstanding Paragraph 2 (Expedited Dispute Timetable), the Parties have not settled the Dispute in accordance with Paragraph 3.2 [REDACTED] of the Dispute being escalated; then

either Party may serve a written notice to proceed to mediation in accordance with Paragraph 4 (a "Mediation Notice").

4 Mediation

- 4.1 If a Mediation Notice is served, the Parties shall attempt to resolve the Dispute acting reasonably and in good faith in accordance with CEDR's Model Mediation Agreement (which shall be deemed to be incorporated by reference into this Agreement).
- 4.2 Notwithstanding Paragraph 2 (Expedited Dispute Timetable), if the Parties are unable to agree on the joint appointment of an independent person to mediate the Dispute within [REDACTED]

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[REDACTED] (and including) the service of the Mediation Notice then either Party may apply to CEDR to nominate such a person.

- 4.3 If the Parties are unable to reach a settlement in the negotiations at the mediation, and only if both Parties so request and the Mediator agrees, the Mediator shall produce for the Parties a recommendation on terms of settlement. This shall not attempt to anticipate what a court might order but shall set out what the Mediator suggests are appropriate settlement terms.
- 4.4 Any settlement reached in the mediation shall not be legally binding until it has been reduced to writing and signed by, or on behalf of, the Parties (in accordance with the Change Control Procedure where appropriate). The Mediator shall assist the Parties in recording the outcome of the mediation.

5 Expert Determination

- 5.1 If a Dispute relates to:

- 5.1.1 any aspect of the technology underlying the provision of the Services, or otherwise relates to a matter of an IT technical, financial technical or other aspect of a technical nature (as the Parties may agree) or a disagreement as to whether an Escalation Pack demonstrates that a Block exists, and the Dispute has not been resolved by:

- (a) commercial negotiation in accordance with Paragraph 3; or
- (b) if applicable mediation in accordance with Paragraph 4,

then either Party may by written notice to the other, request that the Dispute be referred to an Expert for determination (agreement to such request shall not be unreasonably withheld or delayed).

- 5.1.2 whether the implementation of a proposed Contract Change Request made by the Authority would amount to a substantial modification within the meaning of Regulation 72(8) of the PCR as provided for under Paragraph 10.1.2 of Schedule 8.2 (Change Control Procedure), then the Authority may, after the issue of a Dispute Notice, refer such Dispute straight to an Expert for determination pursuant to Paragraph 10.1A of Schedule 8.2 (Change Control Procedure), in which case the Parties agree that the commercial negotiation requirements and mediation under Paragraphs 3 and 4 of this Schedule shall not apply.

- 5.2 Notwithstanding Paragraph 2 (Expedited Dispute Timetable), the Expert shall be appointed by agreement in writing between the Parties, but in the event of a failure to agree [REDACTED] of the relevant request made pursuant to Paragraph 5.1.1 or Paragraph 5.1.2, or if the person appointed is unable or unwilling to act, the Expert shall be appointed:

- (a) if the Dispute relates to any aspect of the technology underlying the provision of the Services or a matter of an IT technical nature, on the instructions of the President of the British Computer Society (or any other association that has replaced the British Computer Society);

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- (b) if the Dispute relates to a matter of a financial technical nature, on the instructions of the President of the Institute of Chartered Accountants of England and Wales; or
- (c) if the Dispute relates to a matter of a technical nature not falling within Paragraphs 5.2(a) or (b), or to the existence of a Block, on the instructions of the President (or equivalent) of:
 - (i) an appropriate body agreed between the Parties; or
 - (ii) if the Parties do not receive instructions from an appropriate body within [REDACTED] of the relevant request made pursuant to Paragraph 5.1, such body as may be specified by the President of the Law Society on application by either Party.
- (d) if the Dispute relates to the circumstances set out at Paragraph 5.1.2, on the instructions of the Chair of the Bar Council of England and Wales. The Expert shall be a barrister with specialised expertise in procurement law with no less than ten (10) years' call.

5.3 The Expert shall act on the following basis:

- (a) they shall act as an Expert and not as an arbitrator and shall act fairly and impartially;
- (b) the Expert's determination shall (in the absence of a material failure to follow the procedures) be final and binding on the Parties;
- (c) the Expert shall decide the procedure to be followed in the determination and they shall be requested to make their determination within [REDACTED] of their appointment or as soon as reasonably practicable thereafter and the Parties shall assist and provide the documentation that the Expert requires for the purpose of the determination;
- (d) any amount payable by one Party to another as a result of the Expert's determination shall be due and payable [REDACTED] of the Expert's determination being notified to the Parties;
- (e) the process shall be conducted in private and shall be confidential; and
- (f) the Expert shall determine how and by whom the costs of the determination, including the Expert's fees and expenses, are to be paid.

6 Arbitration

- 6.1 Subject to compliance with its obligations under Paragraph 3.1 and to the provisions of Paragraph 5, the Authority may at any time before court proceedings are commenced refer the Dispute to arbitration in accordance with the provisions of Paragraph 6.5.
- 6.2 Notwithstanding Paragraph 2 (Expedited Dispute Timetable), before the Supplier commences court proceedings or arbitration, it shall serve written notice on the Authority of its intentions and the Authority shall [REDACTED] following receipt of such notice to

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serve a reply (a “**Counter Notice**”) on the Supplier requiring the Dispute to be referred to and resolved by arbitration in accordance with Paragraph 6.5 or be subject to the exclusive jurisdiction of the courts of England and Wales. The Supplier shall not commence any court proceedings or arbitration until the expiry [REDACTED]

6.3 If the Authority serves a Counter Notice, then:

- (a) if the Counter Notice requires the Dispute to be referred to arbitration, the provisions of Paragraph 6.5 shall apply; and
- (b) if the Counter Notice requires the Dispute to be subject to the exclusive jurisdiction of the courts of England and Wales, the Dispute shall be so referred to those courts and the Supplier shall not commence arbitration proceedings.

6.4 If the Authority does not serve a Counter Notice [REDACTED] period referred to in Paragraph 6.2, the Supplier may either commence arbitration proceedings in accordance with Paragraph 6.5 or commence court proceedings in the Courts of England and Wales which shall (in those circumstances) have exclusive jurisdiction.

6.5 The Parties hereby confirm that if any arbitration proceedings are commenced pursuant to Paragraphs 6.1 to 6.4:

- (a) the Dispute shall be referred to and finally resolved by arbitration under the Rules of the London Court of International Arbitration (“**LCIA**”) (subject to Paragraphs 6.5(e), (f) and (g));
- (b) the arbitration shall be administered by the LCIA;
- (c) the LCIA procedural rules in force at the date that the Dispute was referred to arbitration shall be applied and are deemed to be incorporated by reference into this Agreement and the decision of the arbitrator shall be binding on the Parties in the absence of any material failure to comply with such rules;
- (d) if the Parties fail to agree the appointment of the arbitrator [REDACTED] [REDACTED] from the date on which arbitration proceedings are commenced or if the person appointed is unable or unwilling to act, the arbitrator shall be appointed by the LCIA;
- (e) the chair of the Arbitral Tribunal shall be a British citizen;
- (f) the arbitration proceedings shall take place in London and in the English language; and
- (g) the seat of the arbitration shall be London.

7 Urgent Relief

Either Party may at any time take proceedings or seek remedies before any court or tribunal of competent jurisdiction:

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- (a) for interim or interlocutory remedies in relation to this Agreement or infringement by the other Party of that Party's Intellectual Property Rights; and/or
- (b) where compliance with Paragraph 2.1 and/or referring the Dispute to mediation may leave insufficient time for that Party to commence proceedings before the expiry of the limitation period.

8 Multi-Party Disputes

- 8.1 All Multi-Party Disputes shall be resolved in accordance with the procedure set out in this Paragraph 8 (the "**Multi-Party Dispute Resolution Procedure**").
- 8.2 If at any time following the issue of a Dispute Notice, the Authority reasonably considers that the matters giving rise to the Dispute involve one or more Related Third Parties, then the Authority shall be entitled to determine that the Dispute is a Multi-Party Dispute and to serve a notice on the Supplier which sets out the Authority's determination that the Dispute is a Multi-Party Dispute and specifies the Related Third Parties which are to be involved in the Multi-Party Dispute Resolution Procedure, such notice a "**Multi-Party Procedure Initiation Notice**".
- 8.3 If following the issue of a Dispute Notice but before the Dispute has been referred to Expert Determination in accordance with Paragraph 5 or to arbitration in accordance with Paragraph 6, the Supplier has reasonable grounds to believe that the matters giving rise to the Dispute have been contributed to by one or more Related Third Parties, the Supplier may serve a Supplier Request on the Authority.
- 8.4 The Authority shall (acting reasonably and in good faith) consider each Supplier Request and shall determine [REDACTED] whether the Dispute is:
- (a) a Multi-Party Dispute, in which case the Authority shall serve a Multi-Party Procedure Initiation Notice on the Supplier; or
 - (b) not a Multi-Party Dispute, in which case the Authority shall serve written notice of such determination upon the Supplier and the Dispute shall be treated in accordance with Paragraphs 3 to 7 above.
- 8.5 If the Authority has determined, following a Supplier Request, that a Dispute is not a Multi-Party Dispute, the Supplier may not serve another Supplier Request with reference to the same Dispute.
- 8.6 Following service of a Multi-Party Procedure Initiation Notice a Multi-Party Dispute shall be dealt with by a Board (in relation to such Multi-Party Dispute, the "**Multi-Party Dispute Resolution Board**") comprising representatives from the following parties to the Multi-Party Dispute, each of whom shall be of a suitable level of seniority to finalise any agreement with the other parties to settle the Multi-Party Dispute:
- (a) the Authority;
 - (b) the Supplier;

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- (c) each Related Third Party involved in the Multi-Party Dispute; and
- (d) any other representatives of any of the Parties and/or any Related Third Parties whom the Authority considers necessary,

(together “**Multi-Party Dispute Representatives**”).

8.7 The Parties agree that the Multi-Party Dispute Resolution Board shall seek to resolve the relevant Multi-Party Dispute in accordance with the following principles and procedures:

- (a) the Parties shall procure that their Multi-Party Dispute Representatives attend, and in the case of the Authority, shall endeavour to procure that the Multi-Party Dispute Representatives of each Related Third Party attend, all meetings of the Multi-Party Dispute Resolution Board in respect of the Multi-Party Dispute;
- (b) the Multi-Party Dispute Resolution Board shall first meet within [REDACTED] of service of the relevant Multi-Party Procedure Initiation Notice at such time and place as the Parties may agree or, if the Parties do not reach agreement on the time and place [REDACTED] of service of the relevant Multi-Party Procedure Initiation Notice, at the time and place specified by the Authority, provided such place is at a neutral location within England and that the meeting is to take place between 9.00am and 5.00pm on a Working Day; and
- (c) in seeking to resolve or settle any Multi-Party Dispute, the members of the Multi-Party Dispute Resolution Board shall have regard to the principle that a Multi-Party Dispute should be determined based on the contractual rights and obligations between the Parties and the Related Third Parties and that any apportionment of costs should reflect the separate components of the Multi-Party Dispute.

8.8 If a Multi-Party Dispute is not resolved between the Parties and all Related Third Parties [REDACTED] of the issue of the Multi-Party Procedure Initiation Notice (or such longer period as the Parties may agree in writing), then:

- (a) either Party may serve a Mediation Notice in respect of the Multi-Party Dispute in which case Paragraph 4 shall apply;
- (b) either Party may request that the Multi-Party Dispute is referred to an Expert in which case Paragraph 5 shall apply; and/or
- (c) subject to Paragraph 8.9, Paragraph 6 shall apply to the Multi-Party Dispute,

and in each case references to the “Supplier” or the “Parties” in such provisions shall include a reference to all Related Third Parties.

8.9 If a Multi-Party Dispute is referred to arbitration in accordance with Paragraph 6 or a Dispute becomes a Multi-Party Dispute during the course of arbitration proceedings and either Party is unable to compel a Related Third Party to submit to such arbitration proceedings, the Authority or the Supplier may discontinue such arbitration proceedings and instead initiate court proceedings. [REDACTED]

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