

## 9. Spares and Special Tools

### Spares – general obligations

- 9.1 (a) The Maintainer shall at its own risk and expense be responsible for all necessary Relevant Approvals (including safety approvals) required under any Applicable Laws and Standards with respect to the storage, maintenance, use and disposal of Spares.
- (b) The Maintainer shall be responsible for procuring, replacing and managing the Initial Spares and the Standard Services Supplementary Spares in order to perform its obligations under this Agreement.
- (c) Without prejudice to clauses 9.1(a), 9.1(b) and 9.7 the Maintainer shall be responsible for:
- (i) making all payments to the supplier of such Spares;
  - (ii) the storage, safety, maintenance and insurance (in accordance with Schedule 11 (*Insurance*)) of the Spares;
  - (iii) ensuring the suitability and quality of the Spares for undertaking the Services and the availability and readiness of the Spares to be used straight away;
  - (iv) the transit of any Spares between any supplier and the Maintainer, and the transit of any Spares that are taken to a location to be overhauled and/or Repaired;
  - (v) managing any warranty claims arising in relation to the Spares; and
  - (vi) ensuring that the Spares and the Simulator are kept up to date and compatible in all respects (including Software) with the Units.

### Provision of Initial Spares

- 9.2 (a) Upon Acceptance by the Purchaser of an Initial Spare pursuant to the MSA, the Purchaser shall permit the Maintainer to make that Initial Spare available for use in the provision of the Services.
- (b) The Maintainer warrants to the Purchaser that the numbers of Standard Services Initial Spares will be sufficient to enable it to carry out the Standard Services.
- (c) Where, in performing the Services, the Maintainer installs an Initial Spare on a Unit to replace a Part, the Maintainer shall procure that the Part which has been replaced by such Initial Spare shall be overhauled in accordance with the Manuals, or, where such Part is life expired or damaged beyond economic repair, that such Part is replaced with a new Spare.
- (d) If an Initial Spare is not available and this prevents the Maintainer performing its obligations under this Agreement, including any of the Standard Services,

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the Maintainer shall not be entitled to any relief from any of its obligations and/or any claim, remedy or compensation under this Agreement.

### Supplementary Spares – Standard Services

- 9.3 (a) The Maintainer shall monitor the level of usage of the Standard Services Initial Spares in the provision of the Standard Services and shall be responsible for acquiring at its own cost any Standard Services Supplementary Spares which the Maintainer (acting reasonably) considers necessary to increase the stock of Standard Services Initial Spares to a level which enables the Maintainer to perform the Standard Services efficiently and economically. The Maintainer shall notify the Purchaser prior to making any such adjustment to the stock levels of Standard Services Initial Spares.
- (b) Title and risk in each Standard Services Supplementary Spare shall remain with the Maintainer until such Standard Services Supplementary Spare has been incorporated in the relevant Unit, in which case title and risk shall pass to the Purchaser or the Purchaser's nominee with full title guarantee free and clear of all Security Interests.
- (c) If a Standard Services Supplementary Spare is not available and this prevents the Maintainer performing its obligations under this Agreement, including any of the Standard Services, the Maintainer shall not be entitled to any relief from any of its obligations and/or any claim, remedy or compensation under this Agreement.
- (d) Upon the earlier of the expiry of this Agreement or the termination of this Agreement arising from a Maintainer Event of Default, the occurrence of a Force Majeure Event or an event specified in Clause 33 (*Corrupt Gifts Termination*), the Purchaser shall have the option to purchase some or all of the Standard Services Supplementary Spares from the Maintainer at a price equivalent to the fair book value of such Standard Services Supplementary Spares.
- (e) The Purchaser shall be entitled to exercise the option pursuant to clause 9.3(d) by giving written notice to the Maintainer at least fourteen Working Days prior to the expiry or termination of this Agreement as contemplated by clause 9.3(d) identifying the type and quantity of each Standard Services Supplementary Spare the Purchaser wishes to acquire. No later than five Working Days after receipt by the Maintainer of the notice served by the Purchaser the Parties shall meet and seek to agree the type, quantity and fair book value of each of the Standard Services Supplementary Spares to be acquired by the Purchaser. If the Parties are unable to reach agreement within five Working Days of first meeting, either Party may refer the matter or matters in dispute for resolution as an Expert Dispute.
- (f) Upon termination of this Agreement arising from a Purchaser Event of Default or pursuant to clauses 26.2 or 26.3, the Purchaser shall purchase from the Maintainer at a price determined on an Open Book Basis the stock of Standard Services Supplementary Spares which exists at the date of termination. No later than seven Working Days prior to termination of this

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Agreement in the circumstances contemplated by this clause 9.3(d) the Maintainer shall give written notice to the Purchaser identifying the type, quantity and value on an Open Book Basis of each Standard Services Supplementary Spare. No later than five Working Days after receipt by the Purchaser of the notice served by the Purchaser pursuant to this clause 9.3(f) the Parties shall meet and seek to agree the type, quantity and value on an Open Book Basis of each of the Standard Services Supplementary Spares to be acquired by the Purchaser. If the Parties are unable to reach agreement within five Working Days of first meeting, either Party may refer the matter or matters in dispute for resolution as an Expert Dispute.

#### **Supplementary Spares – Additional Services**

- 9.4 (a) The Maintainer shall monitor the level of usage of the Additional Services Initial Spares in the provision of any Additional Services required and shall be responsible for acquiring any supplementary Spares which the Maintainer (acting reasonably) considers necessary to increase the stock of Additional Services Initial Spares to a level which enables the Maintainer to perform the Additional Services efficiently and economically. The Maintainer shall notify the Purchaser prior to making any such adjustment to the stock levels of Additional Services Initial Spares.
- (b) Title and risk in the supplementary Spares referred to in clause 9.4(a) shall, from the earlier of the date of their delivery to the Maintenance Facilities or the Chingford Stabling Site or their incorporation in the relevant Unit, pass to the Purchaser or the Purchaser's nominee with full title guarantee free and clear of all Security Interests.

#### **Additional Services Initial Spares – general obligations**

- 9.5 (a) Subject to clause 9.5(b), the Maintainer hereby acknowledges and agrees that the Additional Services Initial Spares are to be used exclusively for the provision of Additional Services.
- (b) If the Maintainer wishes for any reason to use any Additional Services Initial Spares in the provision of any Standard Services it shall, prior to using such Additional Services Initial Spares, notify the Purchaser in writing of the quantity of such Additional Services Initial Spares it wishes to so use, and the reason why it wishes to use such Additional Services Initial Spares.
- (c) Subject to the Purchaser giving its written consent to the proposed use of the Additional Services Initial Spares, the Maintainer shall proceed to use such Additional Services Initial Spares in the provision of any Standard Services.
- (d) Where the Maintainer uses an Additional Services Initial Spare in performing the Standard Services in accordance with this clause 9.5, the Maintainer shall procure at its cost a brand new replacement for such Additional Services Initial Spare.

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### Spares reporting

- 9.6 (a) The Maintainer shall ensure that it reports at each Performance Review Meeting on the quantity and usage of each type of Spare in the four-week period prior to each Performance Review Meeting.
- (b) The Maintainer shall keep updated throughout the Duration an inventory of Spares (the *Spares Inventory*) reflecting any changes to the levels of Initial Spares and Standard Services Supplementary Spares in accordance with clauses 9.3(a) and 9.4(a) and shall provide a copy of the Spares Inventory to the Purchaser on request.

### Standard of Spares on Return

- 9.7 On the termination or expiry of this Agreement at any time following Provisional Acceptance of the Minimum Fleet, the Maintainer shall deliver to the Purchaser or its nominee possession of all of the Spares in the Spares Inventory to be received by the Purchaser in accordance with clause 34 (*Consequences of Early Termination*) and clauses 9.3(d) or 9.3(f), in each case in compliance with the Return Condition. To the extent that any Spares to be delivered to the Purchaser on termination do not satisfy the above requirements, the Maintainer shall promptly Repair or replace such Spares at its own cost to ensure that such Spares are put into the Return Condition.
- 9.8 Where, in accordance with clauses 9.3(d) and 9.3(f) the Purchaser is to acquire any Standard Services Supplementary Spares, on the termination or expiry of this Agreement, title and risk to such Standard Services Supplementary Spares shall pass to the Purchaser free of all Security Interests on delivery of the Standard Services Supplementary Spares to the Purchaser.

## 10. General Undertakings

### General Undertaking

- 10.1 The Maintainer undertakes that during the Maintenance Period it will carry out the Maintainer Obligations under this Agreement:
- (a) in accordance with the Services Delivery Strategy;
- (b) in a manner consistent with the Maintenance Technical Requirements or, following a TSSSA Change, in a manner consistent with Schedule 22 (*Technical Support and Spare Supply*);
- (c) in a manner consistent with the Operator's Safety Certificates and the Operator's Safety Management System;
- (d) in accordance with all Applicable Laws and Standards, Relevant Approvals and any consents obtained by the Manufacturer under the Manufacture and Supply Agreement including the giving of all notices and the paying of all fees thereunder;
- (e) in accordance with good industry practice from time to time relating to the activity concerned and with all due skill, care and diligence to be expected of

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appropriately qualified and experienced professional maintainers of trains with experience of carrying out work of a similar scope, type, nature and complexity to that required under this Agreement;

- (f) in accordance with the Performance Regime and to minimise the application of Adjustments under the Performance Regime by achieving a high level of performance of the Units;
- (g) so that the rights of the Purchaser under the MSA shall not be in any way prejudiced or adversely affected;
- (h) in a safe manner reducing any risk to the health and wellbeing of persons using, operating, maintaining or involved in the management of the Units to as minimal a level as reasonably practicable, and free, so far as is reasonably practicable (taking into account the Maintainer's obligations under this Agreement), from any risk of Environmental Damage;
- (i) using materials and goods which comply with all Applicable Laws and Standards and other requirements of this Agreement and which are of satisfactory quality such that the provision of the Services and the Spares used in connection with the Services provision will be of satisfactory quality;
- (j) in accordance with the requirements of any Change Confirmation Notice and in all other respects in accordance with this Agreement;
- (k) so that the Units, Vehicles, Spares, Special Tools and the Simulator are Fault Free, and are, at all times, in the Return Condition;
- (l) so that none of the Units, Spares, Special Tools or the Simulator are maintained in a discriminatory manner during the Maintenance Period so as to ensure that from the Full Deployment Date:
  - (i) no Dual Voltage Unit performs more than +/- ten per cent. of the average annual mileage of the Fleet Dual Voltage Units in aggregate; and
  - (ii) no AC Only Unit performs more than +/- ten per cent. of the average annual mileage of the AC Only Units in aggregate;
- (m) in accordance with any relevant Maintainer Safety Certificates;
- (n) in accordance with any relevant licence granted to the Maintainer or Depot Operator under Section 8 of the Act or under the 2005 Regulations or any other European licence authorising the Maintainer or Depot Operator to operate light maintenance depots;
- (o) in accordance with the rights and obligations in respect of access to the Willesden Depot, the Ilford A Maintenance Depot, the Ilford Depot and the Stabling Sites granted to and imposed upon the Maintainer in accordance with this Agreement;
- (p) in accordance with any reasonable instructions or directions properly issued by the Purchaser pursuant to this Agreement; and

- (q) otherwise in accordance with this Agreement;

and that it will provide all such co-operation and assistance as the Purchaser shall reasonably require to enable it to exercise its rights under this Agreement effectively, efficiently and without incurring unreasonable cost, expense or delay.

**Relevant Knowledge**

- 10.2 The Maintainer agrees with the Purchaser and undertakes that it shall, in the performance of the Maintainer Obligations, use all relevant knowledge obtained by it in maintaining the Units or Spares or other TSA Equipment.

**Relevant Approvals**

- 10.3 (a) The Maintainer shall obtain and maintain all such Relevant Approvals and give all notices and pay all fees required or necessary for the proper performance of the Maintainer's obligations under this Agreement including an obligation to obtain, and maintain at all times, any licence or any exemption from obtaining such licence which the Maintainer or the Depot Operator shall be required to hold under the Railways Act or the 2005 Regulations.
- (b) The Maintainer shall ensure that all Relevant Approvals are available for inspection by the Purchaser or its nominee throughout the Duration.
- 10.4 (a) The Maintainer shall be responsible for providing all documentation, information, advice and assistance that is necessary to enable the Purchaser or the Operator to obtain the Depot Safety Certificates and obtain all Relevant Approvals (including any required from Network Rail) which, according to Applicable Laws and Standards, must be obtained in the name of the Purchaser or the Operator and cannot, according to Applicable Law, be obtained by the Maintainer.
- (b) The Purchaser shall assist the Maintainer in carrying out its obligation under clause 10.4(a) to enable the Purchaser or the Operator to obtain all Relevant Approvals and obtain the Depot Safety Certificates on the reasonable request of the Maintainer by:
- (i) attending meetings with qualified personnel;
  - (ii) providing information; and
  - (iii) executing documents, provided that in each case:
    - (A) the extent of such assistance is, in the opinion of the Purchaser, reasonable in all the circumstances; and
    - (B) such attendance, provision of information or execution of documents could not otherwise have been carried out by the Maintainer itself.

### **Purchaser approvals**

- 10.5 Notwithstanding any other provision of this Agreement, no examination or lack of examination and/or the giving or issue of any approval, consent or certificate or any delay in respect of the foregoing by the Purchaser, the Operator or either of them or any employee of any of them under or in accordance with this Agreement shall relieve or absolve the Maintainer from any liability to the Purchaser arising out of, or connected with, the performance or non-performance of the Services under this Agreement.

### **Environmental Issues**

- 10.6 During the Maintenance Period, the Maintainer shall, in accordance with Schedule 15 (*Environment*), keep updated and comply with its certified environmental management system and associated working procedures for the Services so that the risk of Environmental Damage occurring at any of the Maintenance Facilities, the Ilford Depot and/or the Stabling Sites caused by the Maintainer or its Subcontractors (including as a result of discharge of Hazardous Substances or from the disposal of components removed from the Units) is as low as reasonably practicable.

### **Interference with the Public or Operations of Infrastructure Manager or Operator**

- 10.7 (a) All operations necessary for the execution of the Maintainer's duties and obligations under this Agreement shall be carried out in accordance with this Agreement so as not to interfere unnecessarily or improperly with traffic or the convenience of the public or the access to, use and occupation of, public or private roads or footpaths to or of properties whether in the possession of the Purchaser or of any other person.
- (b) The Maintainer shall not unreasonably or improperly obstruct, hinder or permit any obstruction, interruption or hindrance by its employees or Subcontractors or any of their respective servants or agents to the safe and/or efficient activity or operations of any Infrastructure Manager or Operator, their employees or Subcontractors or their respective servants or agents and/or, to the extent materially detrimental to the Purchaser's ability to perform its obligations, the efficient operation of any rail service or trains on the LO Infrastructure.
- (c) The Purchaser shall not and shall ensure that the Operator shall not unreasonably or improperly obstruct or hinder the safe performance of the operations of the Maintainer, its employees or Subcontractors or its servants or agents pursuant to this Agreement, other than as required by any Applicable Laws and Standards, Relevant Approvals or the Operator's Safety Certificate or as provided for in this Agreement.

### **Obstruction to use of the TSA Facilities**

- 10.8 The Maintainer shall not obstruct, interrupt or hinder, or permit any obstruction, interruption or hindrance by its employees or Subcontractors or any of their respective servants or agents to the use of a TSA Facility by the Purchaser, any Purchaser's Employee or any other person permitted to use that TSA Facility, and the

Purchaser undertakes to the Maintainer that it shall not grant access to any person to enter or remain on a TSA Facility other than persons who are aware of and agree to comply with all applicable site safety and security procedures and practices and which have been previously notified in writing to the Purchaser by the Maintainer in reasonable time to allow it to notify persons accessing the TSA Facility and obtain such agreement.

#### Noise

- 10.9 All operations necessary for the performance of the Maintainer's duties and obligations under this Agreement shall be carried on without unreasonable noise and disturbance as required by Applicable Laws and Standards.

#### Stacking of Materials

- 10.10 The Maintainer shall stack and place all materials, plant and appliances (including any TSA Equipment) in a manner so as to prevent them causing injury or damage to persons or property and at a safe distance from the LO Infrastructure tracks and platform edges. The Maintainer will also strictly observe any directions given by the Purchaser and/or the Operator as to the precautions to be taken and the distance from the said tracks and platform edges within which materials, plant and appliances may not be stacked or placed.

#### Return Condition

- 10.11 At the expiry of the applicable Maintenance Period and where later, at expiry or termination of this Agreement, the Maintainer shall comply with its obligations as set out in clause 34 (*Consequences of Early Termination*), Schedule 7 (*Return of Assets*) and Schedule 9 (*Maintenance Facilities – Willesden Depot*).

#### Business Rates

- 10.12 The Maintainer acknowledges that:
- (a) it is the Maintainer's responsibility to pay the business rates applicable to the Willesden Depot and all associated equipment as referred to in paragraph 1.3(f) of Schedule 9 (*Maintenance Facilities – Willesden Depot*); and
  - (b) it is the intention of the Parties that the Willesden Depot and all associated equipment forms part of Network Rail's Cumulo for the purposes of business rating, and agrees to take all action to ensure that this is the case. Without prejudice to the foregoing, the Maintainer agrees:
    - (i) that it will ensure that the Depot Operator has and will continue to have the status in rating terms of a train operating company for the purposes of the relevant rating regulations; and
    - (ii) to agree with Network Rail that the Depot Operator pays the Willesden Licence Fee directly to Network Rail, as provided for in paragraph 1.7 of Schedule 9 (*Maintenance Facilities – Willesden Depot*).

**Cost**

- 10.13 Save as otherwise provided in this Agreement, the Maintainer shall perform the services under this Agreement at its own cost and shall provide or procure, at its own cost, all labour, equipment, support services and other facilities necessary for the full performance by the Maintainer of the Services under this Agreement.

**Free Issue Materials**

- 10.14 (a) The Maintainer acknowledges that the Purchaser shall be entitled to fit Free Issue Materials on to the Units either (i) through the Maintainer or the Manufacturer (under the MSA); or (ii) using a third party.
- (b) Regardless of whether it is the Maintainer that fits the Free Issue Materials, any impact of the fitment of such Free Issue Materials on the obligations of the Maintainer under this Agreement, whether before or following the Operating Date, shall be dealt with under the Change Procedure.
- (c) Without prejudice to this clause 10.14(a), the Purchaser shall be entitled to invoke a Purchaser Change under the Change Procedure if it requires the installation in any Unit of any Free Issue Materials.
- (d) Without prejudice to the other paragraphs of this clause 10.14, the Maintainer shall co-operate with and provide access to the Willesden Depot, the Ilford A Maintenance Depot and the Units for all or any third parties contracted by the Purchaser to install, test and/or maintain any Free Issue Materials in or on the Units and/or the Simulator (including advertising services) at the request of the Purchaser (in accordance with the applicable Purchaser Change).
- (e) The Maintainer shall comply with any special maintenance requirements relating to any such Free Issue Materials in accordance with Part A (*Maintenance Services*) of Schedule 1 (*Maintenance Services*) and any relevant Change Confirmation Notice.
- (f) The Maintainer acknowledges that all advertising on the Units shall be the responsibility and domain of the Purchaser, and the Maintainer shall not have any right to place any advertising on to the Units other than at the specific request of the Purchaser (or the Purchaser's nominee). Any revenue from any advertising placed on the Units shall be for the benefit of the Purchaser.

**Purchaser obligations**

- 10.15 The Purchaser shall comply with its obligations with regard to the Services as set out in Schedule 1 (*Maintenance Services*).

**11. Diagrams and Services Procedures**

**Train Plan**

- 11.1 (a) The Purchaser shall consult with the Maintainer in the development of the Train Plan and the Purchaser shall (acting reasonably) produce a Train Plan which shall:

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- (i) allow flexibility, operational robustness and time for maintenance, in each case as would be reasonable for the Fleet assuming that the Maintainer complies with its obligations under the Agreement; and
- (ii) without prejudice to clause 11.3, not require more Diagrams than are indicated in the applicable part of Schedule 2 (*Diagrams*) corresponding to the time period of such Train Plan,

in each case in accordance with the Maintenance Plan and the Train Plan Parameters.

- (b) The Purchaser shall provide the Maintainer with a Train Plan no later than six months before the Contractual Provisional Acceptance Date of the first Unit to be Accepted.
- (c) Without prejudice to clause 11.3, it shall be possible for the Purchaser to amend the Train Plan from time to time (including in accordance with Network Rail timetabling parameters to accommodate timetable changes). The consequences of amendments to the Train Plan shall be dealt with as follows:
  - (i) consequences of mileage changes shall be determined in accordance with paragraphs 2.5 and 3 (*Annual Mileage Reconciliation*) of Schedule 6 (*Payment Mechanism*);
  - (ii) consequences of any change where the Train Plan will remain within the Train Plan Parameters shall not entitle the Maintainer to any change to or relief from its obligations under this Agreement including under the Performance Regime or to any compensation or to any additional payment other than as referred to in clause 11.1(c)(i); and
  - (iii) consequences of any change where the Train Plan does not remain within the Train Plan Parameters shall be as set out in clause 11.1(e).
- (d) Where there is a change to the Train Plan, the Purchaser shall submit to the Maintainer the revised Train Plan by no later than 22:00 on the day before the required implementation date of the revised Train Plan.
- (e) Where changes to the Train Plan mean that the Train Plan cannot remain within the Train Plan Parameters, the Purchaser shall nevertheless be entitled to issue the revised Train Plan by no later than 22:00 on the day before the required implementation date of the revised Train Plan. The Maintainer shall use best endeavours to co-operate and to comply with the revised Train Plan and, at the Purchaser's discretion, either:
  - (i) without prejudice to such best endeavours obligation, any Failure which the Purchaser agrees (acting reasonably) arises as a direct result of the Train Plan falling outside the Train Plan Parameters shall be an Allowable Failure pursuant to and on the terms of the Performance Regime and the Maintainer shall be entitled to claim its Direct Losses resulting from such Failure provided that the

Maintainer has provided the Purchaser with reasonable supporting information to evidence such Direct Losses; or

- (ii) the changes to the Train Plan shall be a Purchaser Change.

**Preparation, Presentation and Hand-back**

- 11.2 (a) The Maintainer shall hand over the Units to the Purchaser and the Purchaser shall hand back the Units to the Maintainer in accordance with the Train Plan and the Preparation, Presentation and Hand-Back Procedure.
- (b) The Maintainer shall provide to the Purchaser for Assurance Acceptance in accordance with the MSA no less than nine months before the Contractual Provisional Acceptance Date of the first Unit to be Accepted, a detailed procedure for timely Hand-Over and Hand-Back in accordance with the Train Plan Parameters and once such procedure has been Assurance Accepted, it shall be the *Preparation, Presentation and Hand-Back Procedure* for the purposes of this Agreement.
- (c) The Preparation, Presentation and Hand-Back Procedure shall set out in detail:
- (i) the respective responsibilities of the Maintainer and the Purchaser;
  - (ii) timings for the preparation and disposal of Units; and
  - (iii) the procedure for generation of a Hand-Over Certificate and a Hand-Back Certificate by the Maintainer and the Purchaser respectively.
- (d) The Hand-Over Certificate shall include, as a minimum, the following information:
- (i) the Entry Point;
  - (ii) the time of Hand-Over;
  - (iii) the Unit number;
  - (iv) the relevant Diagrams that the Unit will operate;
  - (v) the first Entry Time and Entry Point following Hand-Over;
  - (vi) the scheduled time of Hand-Back;
  - (vii) where appropriate, the agreed Services (including any Additional Services) that have been performed by the Maintainer in relation to that Unit;
  - (viii) all Faults (if any) on that Unit; and
  - (ix) a declaration that the Unit complies with paragraphs 2.1(a)(i), 2.1(a)(ii), 2.1(a)(iii) and 2.1(a)(v) of Part A (*Maintenance Services*) of Schedule 1 (*Maintenance Services*).

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- (e) The Hand-Back Certificate shall include, as a minimum, the following information:
  - (i) the Exit Point;
  - (ii) the time of Hand-Back;
  - (iii) the Unit number;
  - (iv) the Diagram the Unit operated immediately prior to Hand-Back; and
  - (v) to the extent the Operator or the Purchaser is aware, whether that Unit is being Handed-Back for the performance by the Maintainer of scheduled maintenance or Fault rectification.

#### **Ad hoc Marginal Unit Availability**

- 11.3 (a) The Purchaser may, by not less than two Working Days' written notice, request the Maintainer to make available Marginal Unit(s) on any day or days in excess of the maximum number of Units that the Train Plan contemplates being in service on that day. Any such notice shall provide relevant information in respect of the relevant Marginal Unit(s) required.
- (b) The Maintainer shall use reasonable endeavours to make Marginal Unit(s) available to satisfy any such Purchaser request, having regard to the Maintainer's resilience and maintenance requirements and subject to the Maintainer's ability to comply with its other obligations under this Agreement.
- (c) The Maintainer shall respond to any such request from Purchaser as soon as practicable stating whether it is able to make any Marginal Unit(s) available and, if it is able to do so, the Purchaser may require those Marginal Unit(s) to be available by including them in the Train Plan.
- (d) Where the Maintainer has notified the Purchaser that it is able to make any Marginal Unit(s) available under this clause 11.3, the Parties, acting reasonably, shall agree a price on the basis of the principles set out in paragraph 2.3 of Schedule 6 (*Payment Mechanism*) to be paid by the Purchaser for the provision of each such Marginal Unit that the Maintainer agrees to provide.

#### **In Service Support Procedure**

- 11.4 The Maintainer shall provide to the Purchaser for Assurance Acceptance (in accordance with the MSA) no later than six months before the Contractual Provisional Acceptance Date of the first Unit to be Accepted a detailed procedure for complying with its obligations in paragraphs 2.9 to 2.12 of Part A (*Maintenance Services*) of Schedule 1 (*Maintenance Services*), and once such procedure has been Assurance Accepted, it shall be the *In Service Support Procedure* for the purposes of this Agreement.

### **Fault Notification Procedure**

11.5 The Maintainer shall provide to the Purchaser for Assurance Acceptance (in accordance with the MSA) no later than six months before the Contractual Provisional Acceptance Date of the first Unit to be Accepted a detailed procedure for complying with its obligations in paragraphs 2.6 and 2.13 of Part A (*Maintenance Services*) of Schedule 1 (*Maintenance Services*), including a procedure for the Purchaser or the Operator to follow in order to report Faults of which it is aware and once such procedure has been Assurance Accepted, it shall be the Fault Notification Procedure for the purposes of this Agreement.

### **Fault Rectification during Maintenance Period**

11.6 (a) Without prejudice to the Purchaser's rights under the Performance Regime, and subject to the terms of Schedule 1 (*Maintenance Services*) in the case of Purchaser Faults (except where a Unit suffers an Event of Loss) the Maintainer shall, during the Maintenance Period:

- (i) remedy any Fault which occurs in any Unit, Vehicle or item of Equipment; or
- (ii) produce a draft fault rectification strategy setting out the steps that the Maintainer will take to remedy such Fault,

as soon as reasonably practicable and in any event within two Working Days after the Maintainer is notified of such Fault or otherwise becomes aware of such Fault.

(b) If the Maintainer produces a draft fault rectification strategy pursuant to clause 11.6(a)(ii) it shall forward such strategy to the Purchaser within the period referred to in clause 11.6(a), and the Parties shall then meet within seven Working Days (or such lesser or greater period as the Parties shall agree) in order to agree such fault rectification strategy.

(c) Without prejudice to Schedule 1 and the Performance Regime, if:

- (i) any Fault is not remedied under clause 11.6(a)(i); or
- (ii) the Maintainer has not produced the fault rectification strategy under clause 11.6(a)(ii) or the fault rectification strategy produced under clause 11.6(a)(ii) was not approved in writing by the Purchaser within seven Working Days following receipt of it under clause 11.6(b); or
- (iii) if, having produced the fault rectification strategy under clause 11.6(a)(ii), the Maintainer does not remedy the relevant Faults in accordance with such strategy,

then, pursuant to clause 14, the Purchaser may remedy, or procure that an appropriately qualified third party shall remedy, such Fault and the Maintainer shall (except to the extent that such Fault is a Purchaser Fault)

indemnify the Purchaser in respect of any costs incurred by the Purchaser in remedying such Fault.

- (d) If any Fault is a Purchaser Fault then notwithstanding the rest of this clause 11.6, the Maintainer shall rectify such Purchaser Fault pursuant to paragraph 3 (*The Additional Services*) of Part A (*Maintenance Services*) of Schedule 1 and shall be entitled to payment for such Additional Services in accordance with the terms of this Agreement including Schedule 6 (*Payment Mechanism*).

**Run-off warranty**

11.7 (a) The Maintainer shall either:

- (i) make good any Maintainer Fault which occurs in any Unit, Vehicle, Spare, Simulator or Special Tool during the Warranty Period and which arises as a result of the Maintainer or any Subcontractor carrying out, or not carrying out, any Services for the Duration in respect of that Unit, Vehicle, Spare, Simulator or Special Tool; or
- (ii) produce a remedial plan acceptable to the Purchaser (such acceptance not to be unreasonably withheld or delayed) setting out the steps that the Maintainer will take to remedy such Maintainer Fault,

within five Working Days after the Maintainer is notified of such Maintainer Fault or otherwise becomes aware of such Maintainer Fault. The Purchaser will be deemed to have accepted any remedial plan produced under clause 11.7(a)(ii) if it has not responded to the Maintainer on that remedial plan within five Working Days of receiving it.

(b) If:

- (i) any Maintainer Fault is not remedied under clause 11.7(a)(i); or
- (ii) the Maintainer has not produced a remedial plan under clause 11.7(a)(ii),

within five Working Days after the Maintainer is notified of such Maintainer Fault or otherwise becomes aware of such Maintainer Fault or the Maintainer does not comply with the remedial plan produced under clause 11.7(a)(ii) or the Parties are unable to agree the remedial plan within five Working Days of receiving the remedial plan from the Maintainer, the Purchaser may remedy, or procure that an appropriately qualified third party remedies, such Maintainer Fault and the Maintainer shall indemnify the Purchaser in respect of any costs incurred by the Purchaser in remedying such Maintainer Fault.

(c) The Maintainer will not be liable under clause 11.7(b) to the extent that it is unable to comply with its obligations under clause 11.7(b) after the end of the Maintenance Period due to the Purchaser not providing access to:

- (i) the Units, Vehicles, Spares, the Simulator or the Special Tools that are the subject of the relevant warranty work; and/or

- (ii) the Maintenance Facilities (excluding the Ilford A Maintenance Depot) or the Special Tools,

to the extent necessary to permit the Maintainers to comply with its obligations under clause 11.7(a)(i).

- (d) The provisions of this clause 11.7 shall survive expiry and termination of this Agreement.

### **Rescue of Units which fail on the LO Infrastructure**

11.8 Where any Unit which has commenced operation of a Diagram is not Fit to Remain in Service, the Maintainer shall provide the Services as set out in paragraph 2.9 of Part A (*Maintenance Services*) of Schedule 1 (*Maintenance Services*).

## **12. Maintenance Period Documentation**

### **Manuals**

- 12.1 (a) The Purchaser shall procure that all Manuals provided by the Manufacturer pursuant to the MSA are delivered to the Maintainer and the Maintainer acknowledges and agrees that it shall not be entitled to any additional payment or any relief or remedy in the event the Manuals provided pursuant to the MSA are not sufficient to enable the Maintainer to perform the Services.
- (b) The Purchaser makes no warranty or representation whatsoever as to the accuracy, sufficiency, completeness or otherwise of the Manuals delivered to the Maintainer.

### **Service Records**

12.2 During the Maintenance Period:

- (a) The Maintainer shall keep and maintain clear, complete and accurate electronic records and documentation of all Services performed on the Units, Vehicles, Spares and Special Tools at the relevant TSA Facility and shall provide the Purchaser with access at all times to such electronic records. These records, the Unit Log Books and the Configuration Database shall form the *Service Records* for the purposes of this Agreement.
- (b) The Service Records shall be completed and maintained in a manner which allows the Purchaser and Operator to satisfy themselves that the Services have been and are being carried out in accordance with this Agreement and the Maintenance Technical Requirements.
- (c) The Service Records shall detail:
  - (i) the performance of the Parts of the Units which are the subject of maintenance and repairs in a manner which allows the Purchaser to understand thoroughly the repair cycle, rate of deterioration and/or failure of such components;

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- (ii) the usage of each type of Part; and
  - (iii) any outstanding work which is required in respect of any Unit, Vehicle or Spare and is still to be performed on any Unit, Vehicle or Spare.
- (d) The Maintainer shall maintain all Service Records in English in accordance with all Applicable Laws and Standards and Relevant Approvals and otherwise in a form and substance satisfactory to the Purchaser. The Maintainer shall update the Service Records on a daily basis. The Maintainer shall submit the format proposed for the Service Records to the Purchaser for approval at least nine (9) months before maintenance of the Units is scheduled to commence. The Maintainer acknowledges and agrees that the Purchaser may pass to the Operator details of the format of Service Records in connection with the Operator's Safety Certificates.
- (e) The Maintainer shall make the Service Records available to the Purchaser for inspection at the relevant TSA Facility at which such Service Records are maintained on one (1) day's notice from the Purchaser, in hard copy or electronic format as requested by the Purchaser.
- (f) Both the Purchaser and the Operator will have access to the Service Records on any system on which the Maintainer chooses to maintain such Service Records and the Maintainer shall make available access to all relevant software and systems to enable the Operator and the Purchaser to do this and any related IPR shall be covered by the licence granted in clause 16 (*Intellectual Property Rights*).
- (g) The Maintainer shall keep back-up copies of all Service Records in a secure location which is separate from the Maintenance Facilities, the Chingford Stabling Site and the Ilford Depot.

#### **Retention of Service Records and Manuals**

12.3 The Maintainer shall retain all Service Records and Manuals at all times during the Maintenance Period and shall not dispose of any Service Records or Manuals during the Maintenance Period without the prior written consent of the Purchaser.

#### **Ownership of the Service Records and Manuals**

- 12.4 (a) The Service Records and Manuals shall be the property of the Purchaser and title to them shall vest in the Purchaser:
- (i) in the case of the Manuals, on their delivery pursuant to clause 15 (*Delivery and Acceptance of Units and Equipment*) of the Manufacture and Supply Agreement;
  - (ii) in the case of the Unit Log Books, on their delivery to the Purchaser pursuant to the Manufacture and Supply Agreement; and
  - (iii) in the case of the Service Records (other than the Unit Log Books), on their creation.

- (b) Without prejudice to the rest of this Agreement and to the terms of the Manufacture and Supply Agreement, this clause 12 shall not operate to transfer, assign or licence any Intellectual Property Rights in the Manuals, Unit Log Books or the Service Records.

#### **Responsibilities for Technical Documents**

12.5 Without prejudice to any other provision of this clause 12, the Maintainer shall be fully responsible for and bear the cost and risk of:

- (a) any mistake, inaccuracy, discrepancy or omission in the Technical Documents whether or not the same shall have been approved by the Purchaser, as applicable, and the Maintainer shall correct the same without delay;
- (b) any failure by the Maintainer properly to prepare any of the Technical Documents or submit them to the Purchaser, as applicable, in a timely manner; and
- (c) any failure by the Maintainer to draw to the attention of the Purchaser, as applicable, any mistake, discrepancy or omission in any documents, drawings or other written information produced by the Maintainer or by the Manufacturer under the MSA or provided by the Purchaser under this Agreement in connection with the Maintainer Obligations of which the Maintainer becomes aware.

#### **Technical Library**

- 12.6 (a) During the Maintenance Period and subject to clause 12.6(b) the Maintainer shall keep the Technical Library in a secure place at the relevant TSA Facility and shall maintain back-up copies of all documents and information contained in the Technical Library at a secure location which is separate from the TSA Facilities.
- (b) To the extent that any of the contents of the Technical Library are not generated by the Maintainer pursuant to its obligations under this Agreement the Purchaser shall supply such parts of the Technical Library at the Commencement Date or on such later date as they shall come into the possession of the Purchaser.
- (c) The Maintainer in consultation with the Manufacturer as the design authority for the Units shall maintain and update the Software and each document in the Technical Library throughout the Maintenance Period:
- (i) as and when required by Applicable Laws and Standards;
  - (ii) following any change or exercise of any Option under the MSA;
  - (iii) following any Modification or Mandatory Modification,
- and otherwise on a timely basis at frequent and regular intervals so that they are always in the Return Condition and consistent with, and reflect, the up-to-date position of and procedures relating to the Units, the TSA Equipment and

the Services. In the case of updates to the Software and/or the Technical Library resulting from Services or Variations carried out by a third party, the Maintainer's obligation under this clause 12.6(c) shall be limited to the extent that it receives the necessary information under clause 14.1.

- (d) The Technical Library shall be maintained in a clear format and in a form and manner which would allow an appropriately qualified independent auditor to verify and understand the contents of the Technical Library.
- (e) The Maintainer shall provide access to the Technical Library to the Purchaser on not less than two (2) Working Days prior written notice.
- (f) The Purchaser may not use, take copies of or adapt the Technical Library contrary to the provisions of clause 41 (*Confidentiality*).
- (g) On the termination or expiry of this Agreement or the implementation of a TSSSA Change the Maintainer shall deliver the Technical Library to the Purchaser at such location designated by the Purchaser.

#### Accident investigation

12.7 The Maintainer shall, promptly on request, make available to a Competent Authority (with a copy to the Purchaser) any specifications, drawings, programmes of work, computer standards, listings, programs, software, data, test scripts, test procedures, test plans and strategies, test certificates, quality plans and procedures, quality programmes, quality certification, operating manuals, maintenance manuals, information and know how, whether on paper or in magnetic or electronic format or in any other form which is prepared by or on behalf of the Maintainer in accordance with this Agreement, or as a result of performing the Maintainer Obligations, and which is required in accordance with a request from a Competent Authority, provided that the Purchaser acknowledges, agrees and undertakes that where, but for this clause 12.7, it would not otherwise be entitled to receive this information (the *Restricted Information*):

- (a) it will treat that Restricted Information as confidential and will only be entitled to use it in connection with the accident investigation (the *Purpose*) (including without limitation any internal investigation into matters of safety which arises from the accident or accident investigation) and for no other purpose whatsoever;
- (b) access to the Restricted Information shall be restricted to those employees of the Purchaser who need to see such information in connection with the Purpose only and further agrees not to disclose Restricted Information to any third party, save where required to do so by Applicable Laws and Standards;
- (c) it will make no additional copies of the Restricted Information and will return the Restricted Information to the Maintainer as soon as reasonably practicable following conclusion of the Purpose; and
- (d) without prejudice to the foregoing the Restricted Information may be commercially sensitive for the purposes of the FOI Legislation and it will take due account of the Maintainer's reasonable representations in advance of

making any disclosure of the Restricted Information under the FOI Legislation.

**13. Contract Management Requirements**

For the Duration the Parties shall comply with the requirements set out in Schedule 8 (*Contract Management*).

**14. Maintainer obligations and third parties**

**Entitlement to place performance of Maintainer Obligations with a third party**

14.1 The Purchaser shall be entitled itself or to contract with a third party (including the Operator) to undertake execution or re-execution of any of the work or any of the Services:

- (a) to avoid or mitigate against a serious and imminent risk that exists to health or safety of persons or property or to the environment; and/or
- (b) to discharge a statutory duty; and/or
- (c) where a Force Majeure Event prevents the Maintainer from performing any of the Services in accordance with this Agreement; and/or
- (d) where by reason of an accident, emergency, failure or other event occurring to or in connection with any of the Services, any remedial or other work shall in the opinion of the Purchaser be urgently necessary and the Maintainer is unable or unwilling promptly to respond or within such timescale as the Purchaser shall determine is required; and/or
- (e) to the extent that the Maintainer is in breach of its obligations under this Agreement to perform the Services (including the Refurbishments) and, after written notice of such breach or non-performance having been given by the Purchaser pursuant to this Agreement such breach or non-performance has not been remedied within such reasonable timescale as the circumstances require;
- (f) in accordance with the Purchaser's rights under clauses 20.2 and 20.6 of the MSA in order to remedy the relevant Fault; and
- (g) in the case of a Modification, provided that a Change has been concluded in respect of the effects of that Modification on the Maintainer Obligations.

14.2 Except in the case of emergency where time does not permit, if clause 14.1 applies and the Purchaser wishes to take action, the Purchaser shall notify the Maintainer in writing of the following:

- (a) the action it wishes to take;
- (b) the reason for such action;
- (c) the date it wishes to commence such action;
- (d) the time period it believes will be necessary for such action; and

- (e) to the extent practicable, the effect on the Maintainer and its obligation to provide the Services during the period such action is being taken.
- 14.3 Following service of such notice, the Purchaser shall take such action as notified under clause 14.2 and any consequential additional action as it reasonably believes is necessary (together, the *Required Action*) and the Maintainer shall give all reasonable assistance to the Purchaser while it is taking such Required Action. The Purchaser shall be entitled to contract with an appropriately qualified third party (including, where appropriate, the Operator) to undertake any Required Action and all references in this clause 14 to the Purchaser taking any Required Action shall be construed as including any such third party contracted by the Purchaser.
- 14.4 If the Required Action is taken in circumstances where the Maintainer is not in breach of its obligations under the Agreement and the Required Action does not arise out of, or is not in consequence of, a breach of an obligation of the Maintainer under the Agreement, then for so long as and to the extent that the Required Action is taken and the Maintainer does not provide part or all of the Services, provided that the Maintainer provides the Purchaser with reasonable assistance, the Purchaser shall pay the Service Payments to the Maintainer during the Required Action Period as if the Maintainer were providing the Services relating to the Required Action in full but without prejudice to the Purchaser's right to make Adjustments pursuant to the Performance Regime to the extent that the Maintainer is not providing the Services.
- 14.5 If the Required Action is taken as a result of a breach of the obligations of the Maintainer under the Agreement and, where applicable, the Maintainer has failed to take action to remedy such breach itself following notification by the Purchaser, then provided that the Maintainer provides the Purchaser with reasonable assistance, the Purchaser shall pay the Service Payments to the Maintainer during the Required Action Period as if the Maintainer were providing the Services relating to the Required Action in full, less an amount equal to all the Purchaser's costs properly incurred in taking the Required Action and without prejudice to the Purchaser's right to make Adjustments pursuant to the Performance Regime to the extent that the Maintainer is not providing the Services.
- 14.6 The Maintainer shall, free of charge, allow the Purchaser and/or any third party appointed by the Purchaser in connection with any Required Action to have access to the Units, the Special Tools, the Maintenance Facilities, the TSA Equipment and other property used by the Maintainer to perform its obligations under this Agreement and co-operate with the Purchaser and/or such third party to enable the Required Action to be carried out.
- 14.7 The Maintainer shall, upon request by the Purchaser, provide the Purchaser in a timely manner with details of all reasonable and appropriate safety and security arrangements operating at the relevant Maintenance Facilities or such other location where the Required Action is to be carried out and the Purchaser shall and shall procure that any third party contractor shall comply with such arrangements.
- 14.8 The Purchaser shall use reasonable endeavours to ensure that the Required Action is performed in accordance with Good Industry Practice and the Manuals (where applicable) and shall use reasonable endeavours to provide to the Maintainer all

information relating to the performance of any Required Action that is required by the Maintainer in order to carry out its obligations under this Agreement, including but not limited to its obligations relating to the maintenance and updating of the Technical Documents and the Service Records, and in its role as design authority of the Units.

- 14.9 The Purchaser may at any time during the Required Action Period notify the Maintainer that the Purchaser will cease the Required Action and the date on which the Required Action shall cease. Following such notification, the Parties shall cooperate in order for the Maintainer to resume full Services without any degradation in the Services. On the specified date, the Maintainer shall resume responsibility for all or any part of the Services in addition to its relevant obligations under this Agreement which were the subject of the Required Action.
- 14.10 In the event that the Required Action carried out by the Purchaser and/or a third party directly causes material damage to the Units, any TSA Equipment, any part of the Maintenance Facilities or other relevant location as a result of negligence by the Purchaser and/or such third party, then the Purchaser shall be liable to the Maintainer for the reasonable Direct Losses directly caused by such damage.
- 14.11 The Purchaser shall use its reasonable endeavours to assign to the Maintainer the benefit of any warranties relating to works carried out by the Purchaser or third party contractors in connection with the Required Action.
- 14.12 The exercise by the Purchaser of its rights under this clause 14 shall not in any way prejudice or affect any of the Purchaser's other rights or remedies under this Agreement (including pursuant to clause 37 (*Indemnities*)) nor shall it relieve the Maintainer from any of its obligations and liabilities under this Agreement other than to the extent specified under this clause 14.

## 15. Subcontracting

### Consent for subcontracting

- 15.1 The Maintainer may subcontract its obligations under this Agreement either in whole or in part to any Subcontractor provided that:
- (a) the written consent of the Purchaser (acting in its absolute discretion) is obtained by the Maintainer prior to the Maintainer entering into any Subcontract of the whole of its obligations under this Agreement;
  - (b) in subcontracting any part of its obligations under this Agreement the Maintainer agrees with the Purchaser that it shall:
    - (i) co-operate with the Purchaser in complying with ACOP/EC/01003 in respect of the supply of safety critical Spares; and
    - (ii) maintain an appropriate accreditation process for suppliers of non-safety critical Spares;

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- (c) the Maintainer shall procure that all guarantees or warranties given to it by a Subcontractor are also expressed to be for the benefit of, enforceable by and capable of being transferred to the Purchaser; and
- (d) the provisions of clauses 18.1 to 18.5 are complied with.

#### **Subcontracting to Depot Operator**

15.2 The Purchaser in executing this Agreement hereby provides its prior written consent to subcontracting by the Maintainer to the Depot Operator in respect of the operation and maintenance of the Willesden Depot pursuant to the Depot Operator Contract.

#### **Spare Supply Arrangements**

15.3 The Maintainer shall use reasonable endeavours to include within the Subcontracts between the Maintainer and a Subcontractor:

- (a) the right for the Purchaser to become a party to such Subcontracts to the extent that the Purchaser shall be able to order Spares and be obliged to pay for Spares in accordance with the terms of the Subcontracts; and/or
- (b) a right for the Purchaser to require a novation of the Subcontract from the Maintainer to the Purchaser,

operative from a termination of this Agreement or the implementation of a TSSSA Change (*Assumption Date*) and to the extent that neither the relevant Subcontractor nor the Purchaser shall have any liability for any accrued liabilities or obligations of the Maintainer or any other party to the Subcontracts which arise under this Agreement or under the relevant Subcontract prior to the Assumption Date, and each party agrees to execute agreements, notices or other documents which may be necessary to give effect to this clause 15.3 at the reasonable cost and expense of the Maintainer.

#### **Continuing liability of Maintainer**

15.4 The appointment or authorisation by the Maintainer of any Subcontractor shall not relieve the Maintainer of its liability to perform its obligations under this Agreement. The Maintainer shall be responsible and liable to the Purchaser for the acts and omissions of its Subcontractors and all references to the act, breach, omission, negligence or default of the Maintainer shall be construed to include any such act, breach, omission, negligence or default of a Subcontractor.

#### **Exclusion of Purchaser's Liabilities**

15.5 To the extent that any action is approved by the Purchaser under clause 15.1, the Purchaser shall not be liable for any Loss suffered by the Purchaser or any other person, as a result thereof.

## 16. Intellectual Property Rights

### Ownership of Intellectual Property Rights

- 16.1 Nothing in this Agreement shall operate to transfer any IPR of either Party (or of either Party's Affiliates or subcontractors) to any other person save to the extent set out in this Agreement.
- 16.2 All IPR developed or created by a Party, or on behalf of that Party, in the course of performing that Party's obligations under this Agreement, or any other Project Document, shall belong to that Party or its subcontractors, as appropriate.

### Subcontractors

- 16.3 The Maintainer agrees that it will use reasonable endeavours to procure that all Subcontracts that are entered into by the Maintainer which include a licence or rights which have equivalent effect in favour of the Maintainer in respect of Third Party IPR shall permit the Maintainer to assign or novate such licence to the Purchaser without the consent of the relevant Subcontractor.

### Licence granted by the Maintainer

- 16.4 The Maintainer hereby grants to the Purchaser an irrevocable, perpetual, cost-free, assignable (provided that such assignment is permitted only to any person to whom the Purchaser's rights and/or obligations under this Agreement are assigned in accordance with clause 45 (*Assignment and Novation or granting of Security by the Purchaser*)) and non-exclusive licence (or sub-licence, as applicable), with the right to grant sub-licences to any number of tiers, of the Maintainer IPR and the Third Party IPR, in each case for the purposes of:
- (a) the maintenance, use and operation, modification, refurbishment and any related activity of the Units and the TSA Equipment and any related equipment, and permitting the Purchaser and the Operator to operate the Units and use the TSA Equipment for the purposes of providing passenger carrying services and any activity related to that provision of services, including interfaces between the Units and the Railway Infrastructure and associated systems;
  - (b) modifying and converting, refurbishing, repairing, maintaining and overhauling the Units, and/or any item of TSA Equipment or any related activity (including Fault rectification or other works pursuant to clause 11 (*Diagrams and Service Procedures*) or clause 14 (*Maintainer Obligations and Third Parties*)), to the extent the Purchaser is entitled to carry out such activities or procure a third party to do so in accordance with this Agreement;
  - (c) carrying out the Services;
  - (d) complying with all Applicable Laws and Standards and all Relevant Approvals and with any requests of a Competent Authority;

- (e) using and copying the Technical Documents to the extent necessary to perform any of the purposes specified in this clause 16 including accessing any software used for using or accessing such documents;
- (f) training the Purchaser's employees to carry out any of the activities described in clause 16.4(a) to 16.4(c) (inclusive);
- (g) allowing the Operator to perform, manage and operate the LO Concession and all related activities;
- (h) inviting tenders for any of the activities described in clause 16.4(a) to 16.4(g) (inclusive); or
- (i) the Purchaser and/or the Operator pursuant to clause 5 (*Relationship with the Operator and Representatives*) performing the Purchaser's obligations or exercising the Purchaser's rights under this Agreement.

**Licence granted by the Maintainer with effect from termination or expiry**

16.5 With effect from the termination or expiry of this Agreement or on a TSSSA Change, the Maintainer hereby grants to the Purchaser an irrevocable, perpetual, cost-free, assignable (provided that such assignment is permitted only to any person to whom the Purchaser's rights and/or obligations under this Agreement are assigned in accordance with clause 45 (*Assignment and Novation or granting of Security by the Purchaser*)) and non-exclusive licence (or sub-licence, as applicable), with the right to grant sub-licences to any number of tiers, of the Maintainer IPR and the Third Party IPR, in each case for the purposes of procuring the performance of what were the Maintainer's obligations under this Agreement while it was in force, including:

- (a) the provision of any of the Services and/or any TSA Equipment for use in connection with the Units;
- (b) the carrying out of any Modification;
- (c) accessing the Maintainer's web-based applications for the Manuals,

in each case, (i) whether by the Purchaser itself or by any person appointed by the Purchaser to carry out those obligations, and (ii) except to the extent that nothing in this clause 16.5 shall place the Maintainer under any higher obligation than to use reasonable endeavours to procure rights in any Third Party IPR for the purposes of the manufacture of Spares.

**Documentation**

16.6 Upon request from the Purchaser, the Maintainer shall, at no cost to the Purchaser, execute such further documents, provide copies of any documents or records and do such other things, as the Purchaser may reasonably request, in order to obtain for the Purchaser the full benefit of this clause 16.

**Warranties**

16.7 The Maintainer represents and warrants to the Purchaser that (excluding any Manufacturer IPR or Software as such terms are defined in the MSA):

- (a) in doing any of the things referred to in clause 16.4 and clause 16.5, neither the Purchaser nor any of its sub-licensees, of whatever tier; and
- (b) in performing its obligations under this Agreement, neither the Maintainer nor any Subcontractor,

will infringe or make unauthorised use of any IPR of any person.

#### **Maintainer Indemnity**

16.8 Without prejudice to:

- (a) clause 16.7; or
- (b) the ability of the Purchaser to claim damages, on any basis available to it, in the event that any of the representations or warranties in clause 16.7 proves to be untrue or misleading or is breached (as the case may be),

and subject to clause 16.11, the Maintainer shall indemnify and pay the Indemnified Parties, on demand, the amount necessary to put all such Indemnified Parties and each of their sub-licensees into the position which would have existed if the said representations and warranties had been true and not misleading or not broken (as the case may be), together with all Losses incurred by them as a result of such breach.

#### **Notification and Handling of Claims**

16.9 Without prejudice to clauses 16.7 and 16.8, if either Party (which in the case of the Purchaser, includes the Indemnified Parties) becomes aware of a matter which might give rise to a claim for infringement of any rights in or to intellectual property against the Purchaser arising out of the use or exploitation by the Purchaser of any TSA Equipment, Maintainer IPR, Third Party IPR and/or Maintainer Software (*IPR Claim*):

- (a) that Party shall, to the extent known to it, notify the other Party promptly of the scope and nature of the proposed IPR Claim and the grounds on which it is based;
- (b) if the IPR Claim is against the Purchaser, the Purchaser shall, at the Maintainer's cost:
  - (i) take such action as the Maintainer may reasonably request to:
    - (A) dispute, resist, appeal, compromise, defend, remedy or mitigate the IPR Claim; or
    - (B) enforce the Purchaser's rights in relation to the IPR Claim; and
  - (ii) in connection with proceedings related to the IPR Claim, if the Maintainer so requests, allow the Maintainer exclusive conduct of those proceedings,

in each case subject to the Maintainer indemnifying the Purchaser against any Loss incurred by the Purchaser as a result of any matter arising under this

clause 16.9(e), and the provisions of clause 37 (*Indemnities*) shall apply to such indemnity;

- (c) the Purchaser shall not admit liability in respect of or settle any IPR Claim without first obtaining the Maintainer's prior written consent, such consent not to be unreasonably withheld; and
- (d) where the Maintainer exercises its right pursuant to clause 16.9(b)(ii) to exclusive conduct of any proceedings, the Maintainer shall keep the Purchaser informed of the progress of the IPR Claim, and the Purchaser shall be entitled to be consulted by the Maintainer and given a reasonable opportunity to express its opinions prior to the Maintainer taking any decision material to the conduct of the IPR Claim, including any admission of liability by the Maintainer or the settlement or compromise by the Maintainer of the IPR Claim;
- (e) where the Maintainer does not exercise its right pursuant to clause 16.9(b)(ii) to exclusive conduct of any proceedings within 30 days of the date of the notification referred to in clause 16.9(a), the Maintainer shall, at its own cost, provide any assistance required by the Purchaser to dispute, resist, appeal, compromise, defend, remedy or mitigate that claim; and
- (f) the Maintainer agrees not to take any action pursuant to this clause 16.9(f) which may have an adverse impact on the business dealings, public authority duties or position of the Purchaser or any member of the TfL Group.

#### **Remedy for Infringement**

16.10 Without prejudice to clause 16.7, if in the reasonable opinion of the Purchaser the carrying out of any of the activities in clause 16.4 and 16.5 is or might constitute an infringement of the Intellectual Property Rights of a third party (*Infringement*), the Maintainer shall, at its expense, either:

- (a) procure for the Purchaser (and its sub-licensees) a licence to continue to use such IPR as may be applicable in order to remove the risk of such Infringement arising; or
- (b) at the Maintainer's election, either:
  - (i) modify the applicable TSA Equipment as may be applicable to remove the risk of such Infringement arising; or
  - (ii) replace the TSA Equipment with non-infringing TSA Equipment,provided however that the modified or replacement item of TSA Equipment shall at all times comply with all the requirements of this Agreement.

#### **Exclusion**

16.11 The provisions of clauses 16.7 and 16.8 shall not apply to the extent that any infringement, or claim for any infringement, of IPR is caused by:

- (a) the use by the Purchaser (or any of its sub-licensees) of any Unit, item of TSA Equipment or Technical Document otherwise than in accordance with the licences granted to them pursuant to this clause 16.11(b), or any other breach by the Purchaser (or its sub-licensees) of, or non-compliance by the Purchaser (or its sub-licensees) with, those licences; or
- (b) any modification or adaptation of any Unit, item of TSA Equipment or Technical Document other than by the Maintainer or any of its Affiliates, subcontractors or licensees other than: (i) as authorised by the Change Procedure; or (ii) pursuant to any right in this Agreement for the Purchaser to carry out work or services or engage a third party to do so; or (iii) following termination of this Agreement.

#### Software

- 16.12 (a) The Maintainer shall ensure in respect of all Maintainer Software that:
- (i) there is orderly documented progress from the functional requirements to the final code and provision for regular verification and testing at each stage of the design process;
  - (ii) the documentation for the Maintainer Software is such as to enable an appropriately qualified person (who was not involved in the original design) to relate the Maintainer Software to the performance of the relevant equipment under normal and fault conditions, and to verify its compliance with the functional requirements of that equipment; and
  - (iii) it is designed and documented following a nationally or internationally recognised standard using recognised quality control methods.
- (b) The Maintainer shall at all times during the Duration:
- (i) retain updated "as made" copies, in machine readable form, of the final structure of the Maintainer Software, and of the intermediate stages leading to it (including Source Code and object codes);
  - (ii) retain updated usable copies of any ancillary computer programmes used to generate such codes (including compilers);
  - (iii) keep copies of the materials referred to in this clause 16.12 in a secure manner and place such that they will not deteriorate;
  - (iv) retain the Maintainer Software designed by the Maintainer; and
  - (v) allow the Purchaser reasonable access to the Software (excluding Source Code) and all relevant documentation to the extent necessary to enable the Purchaser to exercise its rights pursuant to clause 16.4.

### **Cessation of Software Support**

16.13 If the Maintainer or any Subcontractor (including any tier of subcontractor to a Subcontractor relating to the matters concerning the Maintainer's obligations under this Agreement supplying any of the Maintainer Software) stops trading or withdraws (or makes known its intention to withdraw) support for that Maintainer Software, the Maintainer shall, without additional charge, use reasonable endeavours to procure the transfer to the Purchaser of all rights in and to the Maintainer Software in question or enter into reasonable alternative arrangements to ensure continued supply and support of such Maintainer Software for the purposes of this Agreement.

### **Branding and advertising**

16.14 The Maintainer shall not, and shall procure that other third parties (except the Operator and any other third party approved in writing by the Purchaser) shall not:

- (a) use:
  - (i) any of their trade marks, service marks, symbols, logos, company names, trade names, domain names, designs, get-up, livery, taglines, advertising or other indicators of origin; or
  - (ii) any marketing, promotional and/or advertising material, in any media (whether now known or hereafter developed, including any printed media, display screen, transmission and/or telecommunications system),

on or in any part (including any interior or external surface) of any Unit that is visible to passengers during normal operation; or

- (b) authorise, permit, procure, assist or enable any third party to do any of the acts referred to in clause 16.14(a),

other than as agreed in writing by the Purchaser.

### **Language**

16.15 Except to the extent required by local patent registries, all documents which contain or show evidence of IPR licensed under this Agreement by the Maintainer shall be in English. Where a document containing or showing evidence of IPR is in a language other than English, the Maintainer shall provide a translation into English.

### **Survival**

16.16 This clause 16.16 and/or any liability howsoever arising in connection under it, shall survive the termination of this Agreement.

## **17. Audit Rights**

### **Access to Facilities for Purpose of Audits**

17.1 To the extent necessary for the purpose of exercising any of the rights granted under clause 17.3 the Purchaser shall at its own cost be granted access during normal business hours and on reasonable prior notice to any premises used by the Maintainer

or the Depot Operator in performing the Maintainer Obligations pursuant to this Agreement and, to the extent that the Maintainer using all reasonable endeavours can procure such access, to those premises used by any Service Subcontractors.

- 17.2 The Maintainer shall use reasonable endeavours to ensure that each Subcontract between the Maintainer and a Service Subcontractor shall contain a similar provision to clause 17.1 of this Agreement.

#### **Right of Audit**

- 17.3 (a) The Maintainer shall, and shall use reasonable endeavours to procure that its Service Subcontractors shall:

- (i) maintain a complete and correct set of records pertaining to all activities relating to the performance of the Maintainer Obligations under this Agreement and all transactions and Subcontracts entered into by the Maintainer for the purposes of performing its obligations under this Agreement (in respect of the Maintainer) and the performance by each Service Subcontractor of its obligations under its Subcontract (in respect of the Service Subcontractor) (the *Maintainer's Records*); and
- (ii) retain all the Maintainer's Records for a period of not less than 6 years (or such longer period as may be required by law) following termination of this Agreement (the *Retention Period*).

- (b) Notwithstanding any other right of audit that the Purchaser is entitled to under this Agreement or under any Applicable Laws and Standards, in order to verify the Maintainer's performance of and compliance with the Agreement, the Purchaser (and/or its nominees) shall be entitled on reasonable written notice, to:

- (i) audit, inspect or witness any aspects of the performance of any Maintainer Obligations;
- (ii) inspect and be provided with copies (electronic and hard copy), to the extent necessary to verify the Maintainer's compliance with this Agreement any and all of the Maintainer's Records during the Retention Period but not including any part of the Maintainer's Records containing commercially confidential information which the Purchaser is not otherwise entitled to pursuant to this Agreement);
- (iii) audit the management systems of the Maintainer and those of any Service Subcontractor; and/or
- (iv) inspect and/or audit compliance by the Maintainer and its Service Subcontractors with the Maintainer Obligations under this Agreement,

provided that each of the audits and inspections described in paragraphs (i) to (iv) shall not unreasonably disrupt the commercial and industrial operation of the Maintainer or its Service Subcontractors.

- (c) The Maintainer acknowledges and agrees that the Purchaser may nominate the C&AG to exercise any or all of the rights granted to the Purchaser under this clause 17, and the Maintainer shall produce oral and/or written responses (as requested) to any of his questions.

#### **Co-operation with Audit Procedure**

- 17.4 To the extent necessary for the purpose of exercising any of the rights granted under clause 17.3(b) the Maintainer shall provide, and shall procure that its Service Subcontractors shall provide, all reasonable co-operation to the Purchaser and/or its nominee including:
- (a) ensuring that appropriate safety and security systems are in place to prevent unauthorised access to, extraction of and/or alteration to any of the Maintainer's Records;
  - (b) subject to clause 17.3(b)(ii), making all of the Maintainer's Records available for inspection and within a reasonable time (or within such reasonable time specified by the Purchaser if such a time is specified) if requested; and
  - (c) making the Maintainer's employees and/or any Service Subcontractor's employees available for discussion with the Purchaser or its nominee.

#### **No Claim for Relief**

- 17.5 Any audit, inspection and/or testing by the Purchaser or the Purchaser's nominee pursuant to this clause 17 shall not relieve the Maintainer (or any of its Service Subcontractors) from any of its obligations under this Agreement or prejudice any right, power and/or remedy of the Purchaser against the Maintainer.

#### **Corrective Actions Arising**

- 17.6 (a) If and to the extent that any audit carried out by the Purchaser or the Purchaser's nominee when exercising their rights under this clause 17 discovers any breach or non-compliance with the Maintainer's obligations under this Agreement then the Maintainer shall carry out any actions found to be reasonably necessary to remedy such breach or non-compliance (each, a *Corrective Action*) as soon as reasonably practicable in accordance with the following provisions of this clause 17.6.
- (b) The Maintainer shall acknowledge formally within two Working Days receipt of any request for a Corrective Action raised by the Purchaser and/or its nominee, together with the Maintainer's confirmation of the timescale allocated by the Purchaser and/or its nominee for the Maintainer to close out the Corrective Action. The Maintainer shall advise the Purchaser and/or its nominee upon its close-out of the Corrective Action, together with details of the Corrective Action applied. The Purchaser shall be entitled to undertake a close out audit of any Corrective Actions on the same basis as set out in clauses 17.3 to 17.5.
- (c) If the Maintainer (acting reasonably) disputes any Corrective Action it shall notify the Purchaser whereupon the Maintainer and the Purchaser shall

consult with each other and seek to resolve such dispute and in default of such resolution either the Purchaser or the Maintainer may refer the dispute as a Dispute under the Dispute Resolution Procedure.

## 18. Employment Arrangements

### Transfer of employees

18.1 The Parties agree that if:

- (a) the termination of any of the Services (including, without limitation, pursuant to a TSSSA Change); or
- (b) the termination of this Agreement,

amounts to a relevant transfer under TUPE, then the contracts of employment of the Transferring Employees shall (subject to any valid objection by any of the Transferring Employees under regulation 4(7) of TUPE) have effect from the date of such relevant transfer (the *Exit Transfer Date*) as if originally made between those Transferring Employees and the Purchaser, or as the case may be, a Future Maintainer, and only in such circumstances shall the following clauses 18.2 to 18.6 apply.

### Employee information

18.2 (a) The Maintainer shall (and shall procure that any Subcontractor shall):

- (i) within the period of 12 months immediately preceding the Expiry Date; or
- (ii) immediately following the service of any notice to terminate this Agreement prior to the Expiry Date or following the commencement, for whatever reason of any procedure under this Agreement which would, or would be likely to amount to a relevant transfer; or
- (iii) following the Purchaser notifying the Maintainer of its intention to retender this Agreement:
  - (A) on receiving a request from the Purchaser, provide in respect of any Assigned Employees full and accurate details regarding the identity, number, age, sex, length of service, job title, grade and terms and conditions of employment of and other matters affecting each of those Assigned Employees who it is expected, if they remain in the employment of the Maintainer (or of any Subcontractor) until immediately before the Termination Date would be Transferring Employees (the *Retendering Information*);
  - (B) provide the Retendering Information promptly and at no cost to the Purchaser and permit the Purchaser to copy the Retendering Information to any person who has been asked

to participate in the retendering of this Agreement and to any Future Service Provider;

- (C) notify the Purchaser forthwith in writing of any material changes to the Retendering Information promptly as and when such changes arise;
  - (D) be precluded from making any material increase or decrease in the numbers of Assigned Employees other than in the ordinary course of business and with the Purchaser's prior written consent (such consent not to be unreasonably withheld or delayed);
  - (E) be precluded from making any increase in the remuneration or other change in the terms and conditions of the Assigned Employees other than in the ordinary course of business and with the Purchaser's prior written consent (such consent not to be unreasonably withheld or delayed); and
  - (F) be precluded from transferring any of the Assigned Employees to another part of its or their business or moving other employees from elsewhere in its or their business who have not previously been employed or engaged in performing the obligations under the Project Documents, to perform such obligations, save with the Purchaser's prior written consent (such consent not to be unreasonably withheld or delayed).
- (b) Without prejudice to clause 18.2(a), the Maintainer shall provide and shall procure that any relevant Subcontractor shall:
- (i) provide to the Purchaser or any Future Service Provider ten Working Days before the Exit Transfer Date, the Employee Liability Information and a final list of Transferring Employees; and
  - (ii) warrant at the time of providing the Employee Liability Information that it will be updated to take account of any changes to it as are required by TUPE.

### Consultation

- 18.3 (a) In good time prior to the Exit Transfer Date, the Maintainer and the Purchaser agree to discuss the respective communications programmes that will be delivered to their respective employees (including any employees of any Subcontractor) and they will also discuss the process by which the transfer will take place (including the consultation process). The Maintainer will also discuss its employee communications programme with any Future Service Provider.
- (b) The Maintainer will (and will procure that any Subcontractor will) comply with its or their obligations to elect appropriate representatives and inform and consult with the appropriate employees and any recognised trade unions or other employee representatives in accordance with regulation 13 of TUPE.

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- (c) The Purchaser will comply and will use reasonable endeavours to procure that any Future Service Provider will comply with its/their obligations to inform and consult, and to provide the Maintainer (or any Subcontractor) with such information as is required to enable it to consult, in accordance with regulation 13 of TUPE.

#### Wrong pocket arrangements

- 18.4 (a) If the contract of employment of any of the Transferring Employees is found or alleged not to have effect after the Exit Transfer Date as if originally made with the Purchaser or any Future Service Provider (save in circumstances where TUPE does not apply or where that Transferring Employee has objected under regulation 4(7) of TUPE), the Purchaser or the Future Service Provider, in consultation with the Maintainer, may within five Working Days of being informed of such finding or allegation make to such Transferring Employees an offer in writing to employ him/her under a new contract of employment to take effect on the termination referred to in clause 18.4(b) below.
- (b) Upon the offer referred to in clause 18.4(a) above being accepted by the employee, the Maintainer will (or will procure that the relevant Subcontractor will) allow the employee to terminate his or her contract of employment with the Maintainer or the relevant Subcontractor with immediate effect, and will waive any right it may otherwise have against the employee to enforce his or her contractual notice period. The Maintainer shall indemnify the Indemnified Parties and any Future Service Provider against all Employment Losses arising out of or as a result of any act or omission by the Maintainer or any Subcontractor in relation to such employee occurring prior to the termination of their employment.
- (c) If the contract of employment of any person(s) who is not a Transferring Employee (an *Unexpected Employee*) is found or alleged to have effect after the Exit Transfer Date as if originally made with the Purchaser or a Future Service Provider, then the Purchaser or such Future Service Provider may terminate the employment of the Unexpected Employee and the Maintainer shall indemnify the Indemnified Parties and any Future Service Provider against all Employment Losses of any of the Indemnified Parties and any Future Service Provider arising directly or indirectly in relation to the Unexpected Employee.

#### Payment obligations

- 18.5 (a) In connection with any transfer under clause 18.1, the Maintainer will (and will procure that the Subcontractor will) perform and discharge all of its or their payment obligations in respect of the Transferring Employees which are due and payable before the Exit Transfer Date and will use reasonable endeavours to procure that any relevant Subcontractor will perform and discharge all of their payment obligations due and payable before the Exit Transfer Date in respect of any persons employed or engaged by any such

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Subcontractor in respect of the performance of its or their obligations under the Project Documents.

- (b) In connection with any transfer under clause 18.1, the Purchaser will (or will use reasonable endeavours to procure that any Future Service Provider will) perform and discharge all of its (or their) payment obligations arising after the Exit Transfer Date in respect of those Transferring Employees whose details have been provided to the Purchaser pursuant to clause 18.2(b).
- (c) For the purpose of this clause 18.5, references to *payment obligations* shall include all remuneration, benefits, entitlements, outgoings, wages and salary, holiday pay, bonuses, commissions and incentives, and any income tax withholding or payment obligations, national insurance or other social security obligations and pension contributions.

#### Indemnities for Employment Losses

- 18.6 (a) The Maintainer will indemnify on an ongoing basis the Indemnified Parties or any Future Service Provider against all Employment Losses arising out of or as a result of:
- (i) failure by the Maintainer or any Subcontractor to perform and discharge any of the payment obligations under clause 18.5(a);
  - (ii) any breach of regulation 11 of TUPE;
  - (iii) any act or omission by the Maintainer or any Subcontractor in relation to any Transferring Employees occurring on or before the Exit Transfer Date;
  - (iv) any unlawful misrepresentation or misstatement, whether negligent or otherwise, made by the Maintainer or any Subcontractor to any of the Transferring Employees or any trade union, works council, staff association or other employee representative representing such Transferring Employees; and
  - (v) any failure by the Maintainer or any Subcontractor to comply with any requirement of regulation 13 of TUPE, except to the extent that such failure arises out of a failure by the Purchaser or a Future Service Provider to comply with regulation 13(4) of TUPE.
- (b) If:
- (i) any collective agreement has not been disclosed in writing to the Purchaser at least ten Working Days before an Exit Transfer Date; and
  - (ii) as a result of the provisions of TUPE such collective agreement has effect as if originally made between the Purchaser or any Future Service Provider and any trade union,

then the Maintainer will indemnify the Indemnified Parties on an ongoing basis against all Losses arising from, or related to, the continuation of and compliance with such agreement.

- (c) The Purchaser will indemnify on an ongoing basis the Maintainer against all Employment Losses arising out of or as a result of:
- (i) the Purchaser's (or any Future Service Provider's) failure to perform and discharge any of its obligations under clause 18.5(b);
  - (ii) any act or omission by the Purchaser or any Future Service Provider in relation to the Transferring Employees occurring after the Exit Transfer Date; and
  - (iii) any failure by the Purchaser or any Future Service Provider to comply with regulation 13(4) of TUPE in respect of the transfer of the Transferring Employees.

#### **Termination of the Duration**

18.7 In this clause 18, references to the termination of the Duration shall be deemed to include termination of this Agreement for whatever reason, including the expiry of the Duration.

#### **Key Posts**

18.8 The Maintainer shall appoint and maintain in post persons holding the Key Posts in accordance with paragraph 4 (*Organisational Arrangements*) of Schedule 8 (*Contract Management*).

### **19. Payments**

#### **Accrual of Service Payments**

- 19.1 (a) The Service Payments payable in relation to each Unit shall accrue with effect from the Operating Date and shall be calculated in accordance with the provisions of Schedule 6 (*Payment Mechanism*).
- (b) The Purchaser shall pay each Service Payment in accordance with Schedule 6 and this clause 19.
- (c) The EF Service Payments payable in relation to the EF Services shall accrue with effect from the Existing Fleet Commencement Date until the Existing Fleet Replacement Date and shall be calculated and paid in accordance with the provisions of Schedule 23 (*Existing Fleet*).

#### **Service Payment Report**

19.2 The due date for the payments set out below to be made by the Purchaser to the Maintainer shall be the day of the start of each Railway Period. Within five (5) Working Days following the start of each Railway Period after the occurrence of the Operating Date, the Purchaser shall deliver to the Maintainer a report (the *Service Payment Report*) setting out:

- (a) the Base Period Charge due in respect of the Reference Railway Period calculated in accordance with Schedule 6 (*Payment Mechanism*);
- (b) each of:
  - (i) the Performance Regime Adjustment (including each of its individual elements set out in paragraph 2.2(a) of Schedule 6 and which shall reflect the information in the Maintainer Performance Monitoring Report issued by the Maintainer to the Purchaser pursuant to paragraph 10.11 of Schedule 5 (*Performance Regime*));
  - (ii) the Costs Payable by the Purchaser Adjustment for Additional Services;
  - (iii) the Marginal Unit Payment Adjustment; and
  - (iv) any Annual Mileage Reconciliation,in each case relating to the immediately preceding Railway Period and in each case calculated in accordance with Schedule 6;
- (c) adjustments to reflect any amounts that were previously in dispute but which were settled during the immediately preceding Railway Period and any previous overpayments and/or underpayments, if any, (each adjustment stated separately) relating to any Railway Period prior to the Reference Railway Period and agreed in the immediately preceding Railway Period);
- (d) any amount the Purchaser will require to withhold in accordance with clause 25 (*Insurance and Risk*), clause 55 (*Set-Off*) or any other provision of this Agreement;
- (e) any VAT payable in respect of the above amounts; and
- (f) the net amount owing by the Purchaser to the Maintainer or by the Maintainer to the Purchaser, calculated by the Purchaser and reflected in the Service Payment Report.

#### **Response to Service Payment Report**

- 19.3
- (a) Within five days of receipt of the Service Payment Report the Maintainer shall give notice to the Purchaser (the *Maintainer Report Response*) indicating whether it agrees with the amounts set out in the Service Payment Report relating to the Base Period Charge, the Performance Regime Adjustment, the Costs Payable by the Purchaser Adjustment for Additional Services, any Marginal Unit Payment Adjustment and any Annual Mileage Reconciliation.
  - (b) The Maintainer shall indicate in the Maintainer Report Response any disputed amount and/or further adjustment or amount which in its opinion is payable in respect of the Base Period Charge, any Performance Regime Adjustment, any Costs Payable by the Purchaser Adjustment for Additional Services, any Marginal Unit Payment Adjustment and any Annual Mileage Reconciliation, each as set out in the Service Payment Report (the *Disputed*

*Amount*) together with an explanation of why any such amount is disputed or why such further adjustment or payment should be made.

- (c) The Maintainer shall indicate in the Maintainer Report Response the undisputed amount of the Base Period Charge, any Performance Regime Adjustment, any Costs Payable by the Purchaser Adjustment for Additional Services, any Marginal Unit Payment Adjustment and any Annual Mileage Reconciliation, each as set out in the Service Payment Report (the *Undisputed Amount*).
- (d) If the Purchaser fails to submit a Service Payment Report within 5 Working Days from the due date, then the Maintainer may submit to the Purchaser a notice that specifies: (i) the sum that the Maintainer considers to be or to have been due at the payment due date in respect of the payment; and (ii) the basis on which that sum is calculated.

#### **Invoice and payment**

- 19.4 (a) (If the Undisputed Amount is a net amount owing by the Purchaser to the Maintainer), the Maintainer shall issue a valid invoice from the Maintainer to the Purchaser in respect of the Undisputed Amount with the issue of the Maintainer Report Response. If the Undisputed Amount is a net amount owing by the Maintainer to the Purchaser, the Purchaser shall issue an invoice to the Maintainer in respect of such Undisputed Amount on receipt of the Maintainer Report Response from the Maintainer. Payment shall be made by the Maintainer or the Purchaser (as applicable) within ten Working Days of receipt of the relevant invoice or the last Working Day of the Railway Period in which the invoice is issued, if later (and such date shall be known as the final date for payment).
- (b) Any Disputed Amounts shall be referred to the Performance Review Meeting pursuant to paragraph 8 (*Performance Review Meetings*) of Schedule 8 (*Contract Management*) and paragraph 10 (*Performance Monitoring*) of Schedule 5 (*Performance Regime*) in the first instance, and then to the Dispute Resolution Procedure and shall be included in the Service Payment Report following settlement of the relevant Dispute as contemplated by clause 19.2(c).
  - (c) In the event of any disputed invoice, the undisputed part of such invoice shall be paid in accordance with clause 19.4(a).
  - (d) The obligation of the Purchaser to pay invoices is subject to the Purchaser's right to make retentions and withhold payments in accordance with clause 25 (*Insurance and Risk*), clause 55 (*Set-Off*) or any other provision of this Agreement that expressly provides for such a right.
  - (e) Not later than two days before the final date for payment, the Purchaser may give a notice to the Maintainer which shall specify any amount proposed to be withheld or deducted from the amount due, the ground or grounds for such withholding or deduction and the amount of withholding or deduction attributable to each ground.

### First and last payments

- 19.5 (a) The first Service Payment (other than in respect of the EF Services) due will relate to the Railway Period immediately following the Railway Period in which the Operating Date falls (the *Second Railway Period*) and shall include the PPA (as defined in paragraph 2.1 of Schedule 6 (*Payment Mechanism*)) relating to any Units that were Accepted during the period between the Operating Date and the start of the Second Railway Period together with any Performance Regime Adjustment, Costs Payable by the Purchaser Adjustment for Additional Services and/or Marginal Unit Payment Adjustment referable to the period between the Operating Date and the start of the Second Railway Period.
- (b) In the Railway Period in which the first to occur of the Termination Date and the Expiry Date falls (the *Last Railway Period*), the Base Period Charge relating to that Railway Period will be adjusted by way of adjustment of each Unit's periodic service charge in that Railway Period *pro rata* to the number of days in that Railway Period that fall before (and excluding) the Termination Date or Expiry Date, as the case may be, together with the Undisputed Amount of the adjustments and amounts referred to in clause 19.3(c) after the immediately preceding Railway Period.
- (c) Payment of the amounts referred to in clause 19.3(b) relating to the Last Railway Period and clause 19.2(c) relating to the Last Railway Period or any preceding Railway Period, shall be paid in the Railway Period following the Last Railway Period.

### Method of Payments

- 19.6 (a) Service Payments and all other payments required to be made under this Agreement will be made for value prior to the final date for payment in cleared funds to such account at a bank in the United Kingdom as the payee shall have notified to the payer by not less than three Working Days' notice, free and clear of any deduction, withholding, set-off or counterclaim whatsoever, except to the extent any deduction is required by any Applicable Laws and Standards, or is in accordance with the express provisions of this Agreement.
- (b) If the final due date for any payment falls on a day which is not a Working Day, payment shall be made on the next Working Day thereafter.

### VAT

- 19.7 (a) All amounts due under this Agreement are exclusive of VAT.
- (b) If any supply made or referred to in this Agreement is or becomes chargeable to VAT then the person receiving the supply (the *Recipient*) shall in addition pay the person making the supply (the *Supplier*) the amount of that VAT against receipt by the Recipient from the Supplier of a proper VAT invoice in respect of that supply.

- (c) Where under this Agreement any amount is calculated by reference to any sum which has or may be incurred by any person on costs related to this Agreement, the amount shall include any VAT in respect of that amount only to the extent that such VAT is not recoverable as input tax by that person (or a member of the same VAT group), whether by set-off or repayment and where the Parties so agree in accordance with this Agreement.
- (d) The Maintainer shall provide the Purchaser with any information reasonably requested by the Purchaser in relation to the amount of VAT chargeable in accordance with this Agreement and payable by the Purchaser to the Maintainer (and vice versa).

#### Default Interest

- 19.8 If any Party fails to pay any amount payable under this Agreement on or before the final date for payment, interest will accrue (both before and after judgment) on such unpaid amount from day to day (compounding on a monthly basis) during the period commencing on the final date for payment and ending on the date of payment in full, at the Default Rate. All such interest will be calculated on the basis of the actual number of days elapsed and a 365-day year and will be payable on demand of the non-defaulting Party.

#### Payments free and clear

- 19.9 (a) If any Party is required by law to make any deduction or withholding from any payment hereunder (such Party referred to herein as the *Payer*), it shall do so and the sum due from the Payer in respect of such payment shall be increased to the extent necessary to ensure that, after the making of such deduction or withholding, the Party to whom such payment is due (such Party referred to herein as the *Payee*) receives and retains (free of any liability in respect of any such deduction or withholding) a net sum equal to the sum it would have received and retained had no deduction or withholding been required to be made.
- (b) If following the making of any deduction or withholding in respect of sums payable hereunder and the payment by the Payer of any increased amount in accordance with the provisions of clause 19.9(a), the Payee receives or is granted a credit against, remission for or repayment of any Tax payable by it, which credit, remission or repayment the Payee is able to realise, utilise and retain and is referable to that increased amount so paid by the Payer, the Payee shall, to the extent that it is satisfied that it can do so without prejudice to the retention of such credit, remission or repayment, reimburse the Payer with such amount as the Payee shall certify to be the proportion of such credit, remission or repayment as will leave the Payee (after such reimbursement and taking into account the time any Taxation was payable and any such credit, remission or repayment was received by the Payee) in no worse or no better position (after Taxation) than it would have been in had there been no such deduction or withholding from the said sums payable by the Payer hereunder. Such reimbursement shall be made as soon as possible

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upon such credit or remission or repayment having, in the reasonable opinion of the Payee, been received or granted.

- (c) Save as expressly provided otherwise in this Agreement, the Service Payments payable by the Purchaser are inclusive of all costs, expenses and disbursements incurred by the Maintainer in connection with this Agreement.
- (d) The Service Payments are denominated in, and shall (together with all other payments payable by any Party under this Agreement) be made in, Sterling.

## 20. Performance Regime

### Obligations under the Performance Regime

20.1 The Maintainer and the Purchaser shall comply with the provisions of the Performance Regime.

### Deductions

- 20.2 (a) Any Deductions shall be deducted from the Service Payments in accordance with the Performance Regime and the provisions of Schedule 6 (*Payment Mechanism*).
- (b) Subject to the Purchaser's other express rights under this Agreement, the making of any Deductions in accordance with the Performance Regime and the provisions of Schedule 6 shall, in each case, be the Purchaser's sole remedy for the failure to provide Services as a result of the event giving rise to the calculation of those Deductions.
- (c) Nothing in this clause 20.2 shall prevent or restrict the right of the Purchaser to seek injunctive relief or a decree of specific performance or other discretionary remedies of Court.

## 21. Change Procedure

### Purchaser Changes

21.1 The provisions of Part A (*General*) and Part B (*Purchaser Changes*) of Schedule 10 (*Change Procedure*) shall apply in respect of Purchaser Changes, including a Major Depot Change or an Option Unit Change.

### Maintainer Changes

21.2 The provisions of Part A (*General*) and Part C (*Maintainer Changes*) of Schedule 10 (*Change Procedure*) shall apply in respect of Maintainer Changes.

## 22. Exonerating Events

### Relief and Reimbursement of Costs

22.1 If and to the extent that an Exonerating Event:

- (a) prevents the Maintainer from complying with, or has an adverse effect on the ability of the Maintainer to perform any of its obligations under, this Agreement; and/or
- (b) results in the Maintainer incurring any additional costs,

then the Maintainer shall be entitled to apply for relief from its obligations and to claim Direct Losses under this Agreement.

#### **Claim for relief and/or compensation**

22.2 To obtain relief and/or claim its Direct Losses, the Maintainer shall comply with the provisions of Part D (*Compensation Changes*) of Schedule 10 (*Change Procedure*).

#### **Insured Losses**

22.3 In relation to any payments to the Maintainer which would not have been due but for clause 22.1, such payment shall be calculated on the basis that the Maintainer shall be in no better or worse position than it would have been had the Exonerating Event not occurred, and any assessment of whether the Maintainer is in a better or worse position shall take account of any amount which the Maintainer will recover or has recovered under any Required Insurance.

#### **General**

- 22.4 (a) Any relief and/or costs given by the Purchaser under this clause 22.4 shall not of itself entitle the Maintainer to any other relief and/or costs under this Agreement and where an Exonerating Event gives rise to an Allowable Failure the Maintainer shall only be entitled to the relief permitted under Schedule 5 (*Performance Regime*) in respect of that Allowable Failure but without prejudice to any entitlement to costs or (in the case of consequences of the Exonerating Event other than an Allowable Failure) other relief pursuant to this clause 22.4.
- (b) The Maintainer must make a separate claim under this clause 22.4 for relief and/or costs each time an Exonerating Event occurs or the Maintainer believes an Exonerating Event will occur.
- (c) Any relief and/or costs granted by the Purchaser to the Maintainer shall be in full compensation and satisfaction for any loss sustained or sustainable by the Maintainer in respect of any matter or thing in connection with which that relief and/or costs are granted.

### **23. Change in Law**

#### **Change in Law**

23.1 If a Change in Law occurs before the termination or expiry of this Agreement, the Maintainer shall comply with that Change in Law, such compliance to be at its own risk and cost, except where this Agreement expressly provides for the Purchaser to bear some or all of the costs of complying with the Change in Law.

### Necessary Steps

23.2 The Maintainer shall take all steps necessary to ensure that the Services are performed in accordance with the terms of this Agreement following any Change in Law.

### Consequences of a Qualifying Change in Law

23.3 The Maintainer shall only be entitled to compensation and/or to any relief from its obligations for a Change in Law to the extent:

- (a) it is a Qualifying Change in Law; and
- (b) that the Maintainer has complied with the provisions of Part D (*Compensation Changes*) of Schedule 10 (*Change Procedure*) which, subject to clause 23.4, shall apply in respect of any compensation and/or relief for the Maintainer arising from a Qualifying Change in Law.

### Risk Allocation in respect of a Qualifying Change in Law

23.4 (a) For the purposes of Part D (*Compensation Changes*) of Schedule 10 (*Change Procedure*), where a Qualifying Change in Law arises, the Parties shall, subject to clause 23.4(b), adjust the Service Payments by [REDACTED] which arises directly from the relevant Qualifying Change in Law.

(b) Where an adjustment pursuant to clause 23.4(a), either alone or when aggregated with any other adjustment made pursuant to this clause 23 in respect of any prior Qualifying Change in Law in the same Contract Year:

- (i) is less than the Qualifying Change in Law Cap, no adjustment shall be made to the Service Payments; and
- (ii) exceeds the Qualifying Change in Law Cap the adjustment pursuant to clause 23.4(a) shall include the amount in excess of the Qualifying Change in Law Cap.

(c) The Maintainer shall not be entitled to any other remedy, claim, payment, compensation and/or, save as expressly provided otherwise in this Agreement, relief in respect of such Qualifying Change in Law or associated Change (or the consequence of either) and the provisions of this Agreement shall be construed accordingly.

### Requirement for Maintainer Change

23.5 Where a Change in Law which is not a Qualifying Change in Law will require a Change, the Maintainer shall request a Maintainer Change in accordance with clause 21 (*Change Procedure*) and Part C (*Maintainer Changes*) of Schedule 10 (*Change Procedure*).

### Payment of Irrecoverable VAT

23.6 The Purchaser shall pay to the Maintainer from time to time as the same is incurred by the Maintainer sums equal to any Irrecoverable VAT but only to the extent that it arises as a result of a Change in Law. Any such payment shall be made within 28 days of the delivery by the Maintainer to the Purchaser of written details of the amount involved accompanied by details as to the grounds for and computation of the amount claimed. For the purposes of this clause 23.6, *Irrecoverable VAT* means input VAT incurred by the Maintainer on any supply which is made to it which is used or to be used exclusively in performing the Services (together with input VAT incurred as part of its overhead in relation to such activities) to the extent that the Maintainer is not entitled to repayment or credit from HM Revenue & Customs in respect of such input VAT.

### Mitigation

23.7 Without prejudice to paragraph 2.4 of Part D (*Compensation Changes*) of Schedule 10 (*Change Procedure*), the Maintainer shall:

- (a) assist the Purchaser or its nominee in making any proposal to change, abolish or derogate from any Applicable Laws and Standards and shall suggest the making of any proposal for such change, abolition or derogation where to do so would assist the provider of the Services; and
- (b) in the event of any proposed Change in Law, explore with any relevant Competent Authority steps to mitigate the effects of such Change in Law.

## 24. Financial Adjustments

### General

24.1 Whenever a Relevant Event occurs, the financial consequence shall (save where otherwise provided in this Agreement or where the Parties mutually agree otherwise) be determined in accordance with this clause 24.

### Updating the Base Case Maintenance Model

24.2 Where for the purposes of this clause 24 the Base Case Maintenance Model is to be adjusted by reference to a Relevant Event, this shall be carried out by the Maintainer, in consultation with the Purchaser, on the version of the Base Case Maintenance Model applicable immediately prior to the relevant adjustment and to reflect the impact of the Relevant Event in respect of which such adjustment is being undertaken. In calculating the Change in Costs and in assessing other adjustments to be made to the Base Case Maintenance Model arising from the Relevant Event, the Maintainer shall be entitled to take into account, inter alia:

- (a) reasonable economic assumptions prevailing at the time in respect of that Relevant Event only; and
- (b) changes in the prospective technical performance of the Project arising as a result of the Relevant Event,

provided that the Purchaser shall not be required (and the Maintainer shall not be entitled) to take into account the financial impact up to the date of the Relevant Event of those risks which the Maintainer bears under the terms of this Agreement.

- 24.3 Where, pursuant to this Agreement, either Party is entitled to payment of any sum the assessment of which properly requires reference to the Base Case Maintenance Model, the adjustment to the Service Payment due shall be that required to ensure that, by reference to the Base Case Maintenance Model adjusted under this clause 24, the Maintainer is left in a no better and no worse position than under the version of the Base Case Maintenance Model applicable immediately prior to the relevant adjustment, and shall be ascertained by determining the adjustment to the Service Payment required to maintain the margin of the Maintainer which it would have received under the version of the Base Case Maintenance Model applicable immediately prior to the relevant adjustment.

**No better and no worse**

- 24.4 Any reference in this Agreement to “no better and no worse” or to leaving the Maintainer in a “no better and no worse position” shall be construed by reference to the Maintainer’s:

- (a) rights, duties and liabilities under or arising pursuant to performance of this Agreement; and
- (b) ability to perform its obligations and exercise its rights under this Agreement,

so as to ensure that:

- (i) the Maintainer is left in a position which is no better and no worse in relation to its margin by reference to the version of the Base Case Maintenance Model applicable immediately prior to the Relevant Event than had the Relevant Event not occurred; and
- (ii) the ability of the Maintainer to comply with this Agreement is not adversely affected or improved as a consequence of the Relevant Event.

**Replacement of Base Case Maintenance Model**

- 24.5 Any Base Case Maintenance Model produced following adjustments in accordance with this clause 24 shall, when it is approved by the Purchaser (such approval not to be unreasonably withheld), become the Base Case Maintenance Model for the purposes of this Agreement until any further amendment in accordance with this Agreement.

**Disclosure of Base Case Maintenance Model**

- 24.6 Following any change to the Base Case Maintenance Model under the provisions of this clause 24, the Maintainer shall promptly deliver a copy of the revised Base Case Maintenance Model to the Purchaser in the same form as is established at the date of this Agreement or in such other form as may be agreed between the Parties.

**25. Insurance and Risk**

**Insurance**

- 25.1 The Parties shall comply with the requirements of the insurance regime set out in Schedule 11 (*Insurance*).
- 25.2 Upon the occurrence of an Event of Loss in relation to a Vehicle, the Maintainer's obligations under this Agreement in relation to the Unit of which that Vehicle forms part will immediately terminate and, except as expressly stated in this Agreement, no Party will have any further obligation or liability under this Agreement in relation to that Unit.

**26. Voluntary Termination by the Purchaser and Major Depot Change**

**Purchaser right of voluntary termination**

- 26.1 The Purchaser shall be entitled to terminate this Agreement at any time by serving written notice stating that the Purchaser is exercising its right under this clause 26.1 to terminate the Agreement and that the termination will be effective on the date which is twelve (12) months following the date of the notice, provided that such termination does not take effect before the date which is the tenth anniversary of the Scheduled Commencement Date.
- 26.2 Where the Purchaser has served notice on the Maintainer in accordance with clause 26.1, this Agreement shall terminate with effect from the date specified in such notice (the *Voluntary Termination Date*).

**Thwarted Major Depot Change**

- 26.3 If it is entitled to do so pursuant to paragraph 3.1 or 5.4 or 6.4 of Part B (*Purchaser Changes*) of Schedule 10 (*Change Procedure*), then the Purchaser may serve a notice of termination on the Maintainer, in which case this Agreement shall terminate on the date falling 28 days after the date of receipt by the Maintainer of such termination notice.

**Voluntary termination of MSA and Variation**

- 26.4 In the event that the MSA is terminated pursuant to clause 32.12 of the MSA, and:
- (a) the Operating Date and/or the Existing Fleet Commencement Date has not occurred, this Agreement shall automatically terminate on the date on which the MSA terminates; or
  - (b) the Operating Date and/or Existing Fleet Commencement Date has occurred:
    - (i) the Parties shall agree any required variations to the level of Services in respect of those Units which have already been Accepted and in respect of the remaining Units that are scheduled to be Accepted prior to or following the date of termination of the MSA pursuant to clause 21 (*Change Procedure*) and the Change Procedure; and

- (ii) the Purchaser may terminate this Agreement in part in respect of the Services in relation to those Units that are no longer to be Accepted after the date of termination of the MSA.

### Consequences of Termination

26.5 Where the Purchaser serves notice on the Maintainer pursuant to clause 26.1, 26.3, or where the TSA terminates in whole or in part pursuant to clause 26.4(a) or clause 26.4(b)(ii), the relevant provisions of clause 34 (*Consequences of Early Termination*) shall apply.

### 27. Technical Support and Spare Supply

#### Purchaser Right

27.1 The Purchaser shall be entitled to instruct the Maintainer to cease complying with the requirements set out in Schedule 1 (*Maintenance Services*) and to comply instead with the provisions of Schedule 22 (*Technical Support and Spare Supply*) at any time by serving a written notice (a *TSSSA Change Notice*) stating that the Purchaser is exercising its right under this clause 27.1, and that such TSSSA Change will be effective on a date which is no less than twelve (12) months following the date of the notice, provided that such TSSSA Change does not take effect before the date which is the tenth anniversary of the Scheduled Commencement Date.

27.2 Where the Purchaser has served a TSSSA Change Notice on the Maintainer in accordance with clause 27.1, then, with effect from the date specified in such notice (the *TSSSA Commencement Date*):

- (a) the Maintainer shall cease complying with the requirements set out in Schedule 1 (*Maintenance Services*) and comply instead with the provisions of Part A (*TSSSA Services*) of Schedule 22 (*Technical Support and Spare Supply*);
- (b) the Service Payments payable to the Purchaser shall cease to be calculated and accrue in accordance with Schedule 6 (*Payment Mechanism*) and shall be calculated and accrue in accordance with the provisions of Part B (*TSSSA Payment Mechanism*) of Schedule 22 (*Technical Support and Spare Supply*); and
- (c) the provisions of Part C (*TSSSA Performance Regime*) of Schedule 22 (*Technical Support and Spare Supply*) shall apply as the Performance Regime in place of Schedule 5 (*Performance Regime*).

#### Consequences of TSSSA Change

27.3 Where the Purchaser has served a TSSSA Change Notice on the Maintainer in accordance with clause 27.1:

- (a) the relevant provisions of clause 35 (*General Obligations on Termination, TSSSA Change or Expiry*) shall apply;

- (b) the provisions of paragraphs 2(c)(i) to (iii) (inclusive) of Schedule 19 (*Termination Payments*) shall apply as if references therein to "Termination Date" were references to the "TSSSA Commencement Date " and references to "termination of this Agreement" were references to "the TSSSA Change"; and
- (c) the payments by the Purchaser pursuant to the operation of clause 27.3(b) shall be the sole compensation for any Losses incurred by the Maintainer as a result of the service and effect of the TSSSA Change Notice.

27.4 The Parties agree that Schedule 10 (*Change Procedure*) shall not apply in relation to any TSSSA Change, unless the Purchaser proposes making an amendment to the provisions of any part of Schedule 22 (*Technical Support and Spare Supply*) as part of such TSSSA Change.

## **28. Suspension**

### **Right to Suspend Maintenance**

28.1 The Purchaser may at any time instruct the Maintainer to suspend the provision of the Services.

### **Protection of Work in Progress**

28.2 The Maintainer shall during any such suspension protect and secure the affected Units and any affected TSA Equipment in its possession or control and/or the possession or control of a Subcontractor at the relevant TSA Facility (or other location agreed with the Purchaser) against any deterioration, loss or damage.

### **Entitlement to Costs**

- 28.3 The additional reasonably and properly incurred costs of the Maintainer in protecting and securing the affected Units and any affected TSA Equipment shall be reimbursed by the Purchaser save that the Maintainer shall not be entitled to be paid any additional costs:
- (a) where the suspension was necessary by reason of any neglect or default on the part of the Maintainer or any of its Subcontractors; or
  - (b) arising from remedying any deterioration, defect or loss caused by faulty workmanship or materials or by the Maintainer's failure to comply with this clause 28.
- 28.4 If the Purchaser gives an instruction to suspend the provision of the Services pursuant to this clause 28 as a consequence of, or to address the consequences of a Force Majeure Event the existence of which has been notified by the FM Affected Party, the provisions of clause 29 (*Force Majeure*) shall apply in relation to that suspension.
- 28.5 If the Purchaser gives an instruction to suspend the provision of the Services pursuant to this clause 28 for any other reason:

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- (a) the Maintainers shall, for the duration of the suspension, be relieved of any liability for any Adjustment pursuant to the Performance Regime that would otherwise apply in relation to the suspended Services; and
- (b) for the purposes of determining the Service Payments due to the Maintainer during such suspension, the suspension shall constitute a Purchaser Change and the relevant provisions of clause 21.1 and the Change Procedure shall apply in relation to that Suspension.

## 29. Force Majeure

### Relief from obligations

29.1 Neither Party shall be entitled to bring a claim for a breach of an obligation (other than a payment obligation) under this Agreement by the other Party or incur any liability to the other Party for any losses or damages incurred by that other Party to the extent that a Force Majeure Event occurs and it is prevented from performing that obligation in whole or in part by that Force Majeure Event or its consequences.

### Notification of Force Majeure

29.2 If either Party becomes aware of a Force Majeure Event which has affected or is likely to affect its ability to perform its obligations under this Agreement (the *FM Affected Party*) it shall, as soon as reasonably practicable and in any event no more than five (5) Working Days after the start of the claimed Force Majeure Event, serve notice in writing on the other Party:

- (a) specifying the act, event or circumstance relied on as a Force Majeure Event;
- (b) detailing why the Force Majeure Event will prevent it performing its obligations; and
- (c) setting out its proposals to mitigate the consequences of the Force Majeure Event in accordance with clause 29.5.

29.3 As soon as practicable and no later than three (3) Working Days following a notification under clause 29.2, the Parties shall consult with each other in good faith and use all reasonable endeavours to agree appropriate terms to mitigate the consequences of any Force Majeure Event and to facilitate the continued performance of this Agreement.

29.4 The FM Affected Party shall provide periodic written updates (on at least a weekly basis or such other period as the Parties may agree acting reasonably) to the other Party of the effects of, and any proposals to mitigate the effect of the claimed Force Majeure Event, including any reasonable alternative means for performance of the affected obligations and provide any information relating to the claimed Force Majeure Event and its effects that the other Party may reasonable request.

### Mitigation

29.5 The FM Affected Party shall at all times following the occurrence of a Force Majeure Event use all reasonable endeavours to prevent and mitigate the effects of the claimed

Force Majeure Event (including, in the case of the Maintainer, taking all steps in accordance with good industry practice to overcome or minimise the effects of the Force Majeure Event, complying with the requests of the Purchaser and, in relation to any TSA Facility using all reasonable endeavours to find alternative facilities at which to carry out its obligations), to continue to perform its obligations under this Agreement and to resume performance as soon as possible.

- 29.6 The FM Affected Party shall not be relieved from liability under this Agreement to the extent that it is not able to perform its obligations under this Agreement due to its failure to comply with its obligations under clause 29.5.

#### **Termination for Force Majeure**

- 29.7 The Purchaser shall be entitled to terminate this Agreement (in whole or in part) by notice in writing to the Maintainer (an *FM Termination Notice*) if any of the Services have been delayed for more than a total of one hundred and eighty (180) days as the sole and exclusive result of a Force Majeure Event.

#### **Effect on payments**

- 29.8 If a Force Majeure Event results in the Maintainer being unable to carry out its obligations, the Purchaser shall cease to be liable to make any payment which would otherwise have been due on fulfilment of that obligation until, and to the extent that, the Maintainer performs the obligations.

#### **Cessation of Force Majeure**

- 29.9 As soon as practicable after a Force Majeure Event ceases or no longer causes the FM Affected Party to be unable to comply with its obligations under this Agreement, the FM Affected Party shall notify the other Party in writing of such occurrence and shall resume performance of its obligations under this Agreement in so far as the Agreement has not been terminated or varied in accordance with clause 29.7 or 29.10.

#### **Variation and Termination**

- 29.10 In the event this Agreement is terminated pursuant to clause 29.7 in respect of some of the Services, this Agreement shall be deemed to be varied in accordance with clause 21 (*Change Procedure*) and the Change Procedure, to the extent of the Services terminated, forthwith upon receipt by the Maintainer of the FM Termination Notice.

#### **Consequences of Termination for Force Majeure**

- 29.11 Where the Purchaser serves notice on the Maintainer pursuant to clause 29.7, the relevant provisions of clause 34 (*Consequences of Early Termination*) shall apply.

#### **Continuing Obligations**

- 29.12 Subject to Clause 29.1, the Parties shall not be released from any of their obligations under this Agreement as a result of a Force Majeure Event, and this Agreement shall, subject to clause 29.7 remain in effect for the duration of a Force Majeure Event.

### 30. Maintainer Default

#### Maintainer Events of Default

- 30.1 The occurrence of one or more of the following shall constitute a Maintainer Event of Default:
- (a) the Maintainer commits a material breach of its obligations under this Agreement, other than breaches of the nature set out in the other clauses of this clause 30.1;
  - (b) an Insolvency Event occurs in relation to the Maintainer or the Guarantor;
  - (c) the Maintainer fails to make payment of any sum(s) which are not in dispute and which either singly or in aggregate exceeds £100,000 (Indexed by RPI) when due and payable to the Purchaser in accordance with this Agreement, and which remains unpaid twenty Working Days after a written demand for payment by the Purchaser;
  - (d) the occurrence of a Persistent Breach;
  - (e) the Maintainer is not liable to suffer Deductions in accordance with the Performance Regime because the Annual Deductions Cap has been reached in any Contract Year;
  - (f) there are 24 or more occurrences of an Unavailable Unit (other than any Unavailable Unit resulting from an Allowable Failure) in any rolling period of three Railway Periods;
  - (g) the Railway Period Deductions Cap is reached three times in any rolling period of six Railway Periods;
  - (h) the Guarantor or the TSA Performance Bond Provider fails to comply with any payment or performance obligations expressed to be assumed by it in the Guarantee or the Performance Bond (as the case may be);
  - (i) a Change of Control occurs in relation to the Maintainer without the written approval of the Purchaser being required and given under clause 47 (save where the Purchaser's consent to the Change of Control is deemed under clause 47.2(d));
  - (j) there is a breach by the Maintainer of its obligations under clause 44 (*Assignment or Transfer by the Maintainer*) or clause 45 (*Assignment and Novation or Granting of Security by the Purchaser*);
  - (k) the Maintainer fails to take out and/or maintain the Required Insurances as specified in Schedule 11 (*Insurance*);
  - (l) a Guarantee Event occurs and the Maintainer fails to procure a replacement valid and enforceable guarantee on terms reasonably satisfactory to the Purchaser (acting in its absolute discretion) together with any supporting legal opinions reasonably requested by the Purchaser within five Working Days of such Guarantee Event;

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- (m) the Guarantor or a TSA Performance Bond Provider fails to comply with any payment or performance obligations expressed to be assumed by it in the Guarantee or the TSA Performance Bond unless, in the case of the TSA Performance Bond in any of the circumstances described in paragraph 2 (*Defect in the TSA Performance Bond*) of Schedule 20 (*TSA performance Bond*), the Maintainer has taken action to extend or replace the TSA Performance Bond or provide alternative security in accordance with the requirements of this Agreement;
- (n) a TSA Performance Bond Event occurs or any other event that causes the Maintainer to extend or replace any Performance Bond or provide alternative security in each case as required by the relevant provisions of Schedule 20 (*TSA Performance Bond*) and the Maintainer fails to extend or replace the relevant Performance Bond or provide alternative security in accordance with the requirements of this Agreement; or
- (o) a Manufacturer Event of Default occurs under the Manufacture and Supply Agreement resulting in the termination of the Manufacture and Supply Agreement.

#### **Persistent Breach**

- 30.2 (a) If the Maintainer breaches any of its obligations (where those obligations are of the same type or nature) under this Agreement more than twice in any twelve (12) month period, then the Purchaser may serve a notice on the Maintainer:
- (i) specifying that it is a formal warning notice;
  - (ii) giving reasonable details of such breach;
  - (iii) requiring the production of a remedial plan (*Remedial Plan*) acceptable to the Purchaser within 14 days of such notice, such Remedial Plan to include as a minimum:
    - (A) criteria for the success of the Remedial Plan;
    - (B) time period for achievement of success; and
    - (C) resources to be allocated to the Remedial Plan; and
  - (iv) stating that such breach is a breach which, if it continues unremedied or recurs within six (6) months of the date of service of the notice, or if the Maintainer is in breach of the Remedial Plan, may result in a termination of this Agreement in accordance with this clause 30.
- (b) If, following service of such a warning notice pursuant to clause 30.2(a) the breach specified has continued unremedied or has recurred more than twice (which shall include breaches of the Remedial Plan) within the four (4) month period following the date of service of such notice, then the Purchaser may serve another notice on the Maintainer:
- (i) specifying that it is a final warning notice;

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- (ii) stating that the breach specified has been the subject of the relevant warning notice served under clause 30.2(a) within the four (4) month period prior to the date of the final warning notice;
  - (iii) requiring a further Remedial Plan containing the information required by clause 30.2(a)(iii) (updated as appropriate); and
  - (iv) stating that if such failure continues unremedied or recurs (which shall include breaches of the Remedial Plan) more than twice within the six (6) month period commencing two months after the date of service of the final warning notice, this Agreement may be terminated.
- (c) A warning notice may not be served in respect of any breach in respect of which a separate warning notice has already been served until a period of three months has elapsed since the date of the previous warning notice.

30.3 The continuance of any failure to remedy specified in the final warning notice or any further breach of the same type or nature within the six (6) month period referred to in clause 30.2(b)(iv) shall constitute a *Persistent Breach* for the purposes of clause 30.1(d).

#### Notification of a Maintainer Event of Default

30.4 The Maintainer shall notify the Purchaser promptly on the Maintainer becoming aware of the occurrence of a Maintainer Event of Default.

#### Termination Notice for a Maintainer Event of Default

30.5 If a Maintainer Event of Default occurs and is continuing, the Purchaser may, if it wishes to terminate the provisions of the Services under this Agreement, deliver a notice in writing to the Maintainer, signed on behalf of the Purchaser (*Purchaser Termination Notice*). The Purchaser Termination Notice shall specify the Maintainer Event of Default in question, giving reasonable details, and either:

- (a) in respect of a Maintainer Event of Default other than one to which clause 30.5(b) applies, that this Agreement is to terminate with effect from the date specified in the Purchaser Termination Notice (being not less than seven (7) days after the date of the Purchaser Termination Notice or, in the case of Insolvency, forthwith); or
- (b) in the case of a Maintainer Event of Default under clause 30.1(a) which is capable of remedy, that this Agreement will terminate with effect from the date falling 60 days after the date of the Purchaser Termination Notice, unless:
  - (i) the Maintainer puts forward a plan (a *Rectification Plan*) acceptable to the Purchaser in its absolute discretion within 28 days of the date of the Purchaser Termination Notice to rectify the breaches referred to in the Purchaser Termination Notice, which shall be in writing and shall specify the proposed actions in reasonable detail and the latest date by which it is proposed that those actions will be completed; and

- (ii) the Maintainer rectifies, in accordance with the Rectification Plan, the relevant Maintainer Event of Default with 60 days of the date of service of the Purchaser Termination Notice or any other period agreed in accordance with clause 30.5(b) (such periods to run concurrently with the 28-day period in clause 30.5(b)(i)).

#### **Rectification Plan**

30.6 Where the Purchaser serves a Purchaser Termination Notice in accordance with clause 30.5(b) and the Maintainer either:

- (a) rectifies the Maintainer Event of Default within the 60-day period specified in the Purchaser Termination Notice; or
- (b) implements the Rectification Plan agreed by the Purchaser in accordance with its terms,

the Purchaser Termination Notice will be deemed to be revoked and this Agreement will continue.

30.7 Where the Purchaser serves a Purchaser termination Notice in accordance with clause 30.5(b) and the Maintainer fails either to:

- (a) rectify the Maintainer Event of Default within the 60-day period specified in the Purchaser Termination Notice; or
- (b) implement the Rectification Plan agreed by the Purchaser in accordance with its terms,

this Agreement will terminate on the date falling 60 days after the date of service of the Purchaser Termination Notice unless the Purchaser notifies otherwise.

#### **Termination where Rectification not permitted**

30.8 Where the Purchaser serves a Purchaser Termination Notice in accordance with clause 30.5(a), this Agreement will terminate on the date set out in that Purchaser Termination Notice.

#### **Consequences of Termination or Expiry**

30.9 Where the Purchaser has served a Purchaser Termination Notice in accordance with clause 30.5 (and, where relevant, the Maintainer Event of Default has not been or is not being remedied pursuant to clause 30.5(b) or is not the subject of an extant Rectification Plan), the relevant provisions of clause 34 (*Consequences of Early Termination*) shall apply.

### **31. Purchaser Default**

#### **Purchaser Event of Default**

31.1 A Purchaser Event of Default shall occur when:

- (a) the Purchaser fails to make payment of any sum which is due and payable to the Maintainer in accordance with this Agreement and not in dispute and such

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amount is not paid within thirty (30) days following a subsequent written demand for payment;

- (b) an Insolvency Event occurs in relation to the Purchaser;
- (c) the cap on the Purchaser's maximum liability under this Agreement (as specified in clause 38.4) has been reached and the Purchaser has not elected to increase the maximum liability cap specified in clause 38.4;
- (d) the Purchaser exercises any rights accruing to the Purchaser pursuant to clause 16 (*Intellectual Property Rights*) relating to the Maintainer IPR, the Third Party IPR, Software and/or Source Code in breach of the provisions of clause 16;
- (e) the Purchaser discloses any Confidential Information in breach of the provisions of clause 41 (*Confidentiality*) and/or 12.7; or
- (f) the circumstances in clause 46.1(g) occur.

#### **Notification of a Purchaser Event of Default**

- 31.2 The Maintainer and the Purchaser agree to notify each other of the occurrence of any Purchaser Event of Default as soon as they become aware of such occurrence.

#### **Procedures in relation to Termination for a Purchaser Event of Default**

- 31.3 On the occurrence of a Purchaser Event of Default, if the Maintainer wishes to terminate this Agreement, the Maintainer must deliver to the Purchaser a notice (a *Maintainer Termination Notice*) specifying and giving reasonable details of the Purchaser Event of Default which has occurred within 60 days of becoming aware of such Purchaser Event of Default.
- 31.4 This Agreement will terminate on the day falling 30 days after the date the Purchaser receives the Maintainer Termination Notice, unless the relevant Purchaser Event of Default is remedied within 28 days of the Purchaser's receipt of the Maintainer Termination Notice, in which case the applicable Maintainer Termination Notice will be deemed to have been withdrawn and will no longer be outstanding.

#### **Consequences of Termination for Purchaser Event of Default**

- 31.5 Where the Maintainer has served a Maintainer Termination Notice on the Purchaser, the relevant provisions of clause 34 (*Consequences of Early Termination*) shall apply.

#### **32. Declaration of Ineffectiveness**

- 32.1 In the event that a third party starts proceedings seeking a Declaration of Ineffectiveness and, as a result of such proceedings, a relevant court declares that this Agreement is Ineffective, then this Agreement will terminate with immediate effect, and the relevant provisions of clause 34 (*Consequences of Termination*) shall apply.
- 32.2 Where the Purchaser is served with any third party proceedings in relation to the subject matter of this clause 32, the Purchaser undertakes to serve a notice on the Maintainer forthwith to keep the Maintainer informed of the progress of said

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proceedings, including in relation to any determination or order of the nature described in clause 32.1.

### **33. Corrupt Gifts Termination**

#### **Prohibited Act**

- 33.1 If the Maintainer or any Subcontractor (or anyone employed by or acting on behalf of or associated with any of them or any of its or their agents or shareholders) commits any Prohibited Act, then the Purchaser shall be entitled to act in accordance with clauses 33.3 to 33.7.
- 33.2 For the purposes of this clause 33, whether a person is associated with the Maintainer or any of its Subcontractors shall be determined in accordance with section 8 of the Bribery Act 2010.

#### **Party committing the Prohibited Act**

- 33.3 Notwithstanding clauses 33.1 and 33.2, if a Prohibited Act is committed by the Maintainer (including any of its officers) or by an employee not acting independently of the Maintainer, then the Purchaser may terminate this Agreement by giving notice to the Maintainer, provided that, if the Prohibited Act is an offence under section 7(1) of the Bribery Act 2010, the Purchaser may not terminate this Agreement unless, acting reasonably, it considers termination of the Agreement to be in the best interests of the Project.
- 33.4 If the Prohibited Act is committed by an employee of the Maintainer acting independently of the Maintainer, then the Purchaser may give notice to the Maintainer of termination and this Agreement will terminate, unless within 28 days of receipt of such notice the Maintainer terminates the employee's employment and (if necessary) procures performance of the relevant activities by another person.
- 33.5 If the Prohibited Act is committed by a Subcontractor (including any of its officers) or by an employee of that Subcontractor not acting independently of that Subcontractor, then the Purchaser may give notice to the Maintainer of termination and this Agreement will terminate, unless within 28 days of receipt of such notice the Maintainer terminates the relevant Subcontract and procures the performance of such part of the Project by another person provided that, if the Prohibited Act is an offence under section 7(1) of the Bribery Act 2010, the Purchaser may not terminate this Agreement unless, acting reasonably, it considers termination of the Agreement to be in the best interests of the Project.
- 33.6 If the Prohibited Act is committed by an employee of a Subcontractor acting independently of that Subcontractor, then the Purchaser may give notice to the Maintainer of termination and this Agreement will terminate, unless within 28 days of receipt of such notice the Subcontractor terminates the employee's employment and (if necessary) procures performance of the relevant activities by another person.
- 33.7 If the Prohibited Act is committed by another person not specified in clauses 33.3 to 33.6 including by subcontractors of any tier, then the Purchaser may give notice to the Maintainer of termination and the Agreement will terminate unless within 28 days of

receipt of such notice, the Maintainer procures the termination of such person's involvement (and of the involvement of his or her employee) and (if necessary) procures performance of the relevant activities by another person provided that, if the Prohibited Act is an offence under section 7(2) of the Bribery Act 2010, the Purchaser may not terminate the Agreement unless, acting reasonably, it considers termination of the Agreement to be in the best interests of the Project.

- 33.8 The Maintainer undertakes to the Purchaser that it will throughout the duration of this Agreement have in place adequate procedures (as referred to in section 7(2) of the Bribery Act 2010) designed to prevent persons associated with the Maintainer from bribing any person with the intention of obtaining or retaining business for the Maintainer or with the intention of obtaining or retaining an advantage in the conduct of business for the Maintainer.

#### Termination notice

- 33.9 Any notice of termination under this clause 33 shall specify:
- (a) the nature of the Prohibited Act;
  - (b) the identity of the party whom the Purchaser believes has committed the Prohibited Act; and
  - (c) the date on which the Agreement will terminate, in accordance with the applicable provision of this clause.
- 33.10 Where the Purchaser has served a notice of termination under this clause 33, the relevant provisions of clause 34 (*Consequences of Early Termination*) shall apply.

#### 34. Consequences of Early Termination

##### Payment

- 34.1 If this Agreement is terminated:
- (a) as a result of a Maintainer Event of Default in accordance with clause 30 (*Maintainer Default*), paragraph 1.1 of Schedule 18 (*Termination Payments*) shall apply;
  - (b) as a result of a Purchaser Event of Default in accordance with clause 31 (*Purchaser Default*), paragraph 2 (*Voluntary Termination or Termination for Purchaser Default or Force Majeure or Major Depot Change*) of Schedule 18 shall apply;
  - (c) voluntarily by the Purchaser pursuant to clause 26.1 or by the Purchaser pursuant to clause 26.3, paragraph 2 of Schedule 18 shall apply;
  - (d) as a result of termination of the MSA, in accordance with clause 26.4(a) or clause 26.4(b)(ii), paragraph 2 of Schedule 18 shall apply;
  - (e) as a result of a Force Majeure Event pursuant to clause 29.7, paragraph 2 of Schedule 18 shall apply;

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- (f) as a result of a Prohibited Act pursuant to clause 33 (*Corrupt Gifts Termination*), paragraph 1.1 of Schedule 18 shall apply;
- (g) as a result of Ineffectiveness under clause 32 (*Declaration of Ineffectiveness*), paragraph 3 (*Ineffectiveness*) of Schedule 18 shall apply,

and for each of paragraphs (a) to (g) paragraphs 4 (*Insurance Proceeds*) to 6 (*General*) (inclusive) of Schedule 18 shall (to the extent applicable) apply, in each case to determine the amounts payable by one Party to the other in relation to such termination of this Agreement.

### **Return Condition**

- 34.2 Without prejudice to the requirements of clause 35 (*General Obligations on Termination, TSSSA Change or Expiry*), upon delivery of a notice of termination of the Agreement for any reason occurring prior to the Expiry Date except as a result of a Purchaser voluntary termination pursuant to clause 26.1, the Maintainer shall cooperate with the Purchaser to establish and implement, as far as reasonably practicable, the Return procedures described in Part B (*Return Procedures*) of Schedule 7 (*Return of Assets*) and the training programme described in clause 35.7.
- 34.3 The Purchaser shall (acting reasonably) determine and advise the Maintainer of the reduced timescales for carrying out those Return procedures agreed pursuant to clause 34.2 which are appropriate in the circumstances to ensure an efficient Return with minimum disruption to the operation of the LO Services and the Maintainer shall comply with such timescales.
- 34.4 The Purchaser shall be entitled to deduct any amounts determined to be required for putting the Return Assets in the Return Condition from any termination payments due to the Maintainer in the event of early termination, as determined in accordance with the relevant provisions of Schedule 18 (*Termination Payments*).

### **35. General Obligations on Termination, TSSSA Change or Expiry**

#### **Return of Units, Equipment and Depot Moveable Assets**

- 35.1 Prior to the termination or expiry of this Agreement or the implementation of a TSSSA Change:
  - (a) the Purchaser shall nominate a Return Date on which the Maintainer is required to deliver the Return Assets to the Purchaser or to its nominee in accordance with paragraph 1 (*Return*) of Part A (*Return Condition*) of Schedule 7 (*Return of Assets*), and in the event of a failure to deliver any Return Assets on the Return Date the Purchaser shall be entitled to enter the premises of the Maintainer and take possession of those Return Assets; and
  - (b) the Willesden Licence Period will come to an end and title in the Willesden Depot, the Fixed Assets and the Depot Moveable Assets shall remain with the Purchaser (or such person as it shall nominate) free from any Security Interest (other than any Purchaser arranged Security Interest).

#### Assignment of warranties and guarantees

- 35.2 The Maintainer shall procure that all warranties and guarantees in respect of any maintenance work carried out on the Willesden Depot, the Units or Equipment that remain in force at the Return Date are capable of assignment and shall, upon any termination or expiry of this Agreement or the implementation of a TSSSA Change, upon the written request of the Purchaser, assign to the Purchaser the benefit free from any Security Interest of any or all such warranties and guarantees in relation to any Units or Equipment to which the Purchaser retains or will acquire title upon or following such termination in accordance with the terms of this Agreement or the MSA.
- 35.3 Upon termination or expiry of this Agreement or the implementation of a TSSSA Change, clause 16.5 shall apply and each of the items specified in clauses 35.3(a) and (b) shall, if so requested by the Purchaser, vest in the Purchaser (or such other person as the Purchaser shall nominate), free from any Security Interest and without charge and otherwise on the basis set out in the relevant clause:
- (a) the benefit of the rights, obligations, undertakings, guarantees, warranties or other commitments given by the Subcontractors and, insofar as it is legally able to do so, by any subcontractors and suppliers of any tier in relation to the Return Assets; and
  - (b) the benefit of the agreements, licences and other instruments in respect of the Return Assets.
- 35.3A Upon termination of this Agreement or the implementation of a TSSSA Change, the Maintainer shall not frustrate and shall assist the Purchaser in gaining access to the Subcontractors who supply Spares provided that nothing in this clause shall restrict the Maintainer's interest to protect its commercial interests.

#### Handover of documentation

- 35.4 The Maintainer shall ensure that:
- (a) all Technical Documents relating to any Units or Equipment to which the Purchaser retains or will acquire title upon or following the relevant termination of this Agreement; and
  - (b) the rights to use and copy such documentation,
- in each case required to enable the carrying out of heavy and light maintenance and to maintain safety standards for operating such Units or Equipment in Unrestricted Passenger Revenue-Earning Service in accordance with Good Industry Practice shall be up to date and, to the extent the same have not otherwise been provided in accordance with this Agreement or the MSA and if the Purchaser so requires, delivered to the Purchaser upon termination or expiry of this Agreement or the implementation of a TSSSA Change, in accordance with Part A (*Return Condition*) of Schedule 7 (*Return of Assets*).

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#### **Continuation of maintenance activities**

35.5 The Maintainer shall continue to perform the Services under this Agreement as normal up to the date of termination or expiry or the TSSSA Commencement Date as though it were responsible for continuing such activities thereafter, unless other phased termination procedures are agreed between the Parties prior to the date of termination or expiry or the TSSSA Commencement Date (as applicable).

#### **Co-operation**

35.6 The Maintainer shall give full co-operation to the Purchaser (or to any nominee of the Purchaser) to ensure a smooth and trouble-free transition with no degradation in the standard of the Services, including making relevant Maintainer employees available to attend such meetings with the Purchaser, the Purchaser's nominee and/or any replacement contractor appointed by the Purchaser as the Purchaser may, acting reasonably, require.

#### **Training and technical support**

35.7 Commencing:

- (a) 12 months prior to the Expiry Date; or
- (b) in circumstances where the Purchaser has given notice under clause 26.1, six months prior to the Voluntary Termination Date; or
- (c) in circumstances where the Purchaser has given a TSSSA Change Notice under clause 27.1, six months prior to the TSSSA Commencement Date; or
- (d) in any other circumstances of early termination, as soon as reasonably practicable after notice of the relevant termination has been delivered,

the Maintainer, at the Purchaser's cost, shall conduct an effective training programme for various categories of Purchaser staff and third party staff nominated by the Purchaser who will be responsible for maintenance of the Maintenance Facilities, the Chingford Stabling Site or the Units following the Return Date to ensure the successful continuation of the Services.

35.8 The content and style of and programme for the training referred to in clause 35.7 shall be submitted to the Purchaser by the Maintainer for review 18 months prior to the Expiry Date or seven months prior to the Voluntary Termination Date or the TSSSA Commencement Date (as applicable), and the Maintainer shall comply with the Purchaser's reasonable requirements in relation thereto.

35.9 The training referred to in clause 35.7 shall be supported by appropriate documentation and training manuals and shall include practical fieldwork or "on-the-job" training in addition to classroom sessions.

#### **Continuing technical support**

35.10 For a period of two years following the last day of the Duration, the Maintainer shall provide to the Purchaser, at the Purchaser's cost, such access as the Purchaser may reasonably require to persons having the appropriate knowledge and experience of the

history of the Maintenance Facilities, the Chingford Stabling Site, Units, Equipment and associated technical matters for the following purposes:

- (a) general technical advice on subjects for which the Maintainer was responsible during the Duration; and
- (b) interpretation of maintenance history data, drawing modifications, regulations and the like.

Without prejudice to the provisions of Schedule 22 (*Technical Support and Spare Supply*), the Maintainer shall not be obliged to provide any additional support under this clause 35.10 following the implementation of a TSSSA Change.

### **36. Survival of clauses**

#### **Effect of Expiry or TSSSA Commencement Termination**

36.1 Subject to clauses 36.2 to 36.7 (inclusive), the rights and obligations of the Parties under this Agreement shall cease:

- (a) upon expiry or termination of this Agreement for any reason; or
- (b) with effect on and from the TSSSA Commencement Date insofar as they relate to the requirements of Schedule 1 (*Maintenance Services*) and to the extent that they relate solely to the obligations in and provisions of Schedule 1 any other connected, related or derivative rights and obligations set out elsewhere in this Agreement, whether or not those other provisions refer specifically to the requirements of Schedule 1.

#### **Saving Provisions**

- 36.2 Any termination of this Agreement (or implementation of a TSSSA Change) shall be without prejudice to any right or remedy of either Party against the other accruing or accrued prior to such termination including any right to claim damages for any antecedent breach of this Agreement or accruing after termination in respect of those clauses referred to in clause 36.7 and any right to claim damages or other relief in relation thereto but subject, in the case of the Maintainer, to clause 34.1.
- 36.3 Subject to clause 36.5, the rights of the Purchaser in respect of termination are in addition and without prejudice to any right which the Purchaser may have to obtain redress or relief available at Law (whether by way of damages, specific performance or otherwise) in respect of a Maintainer Event of Default provided that the Purchaser shall not be entitled to recover twice in respect of the same loss.
- 36.4 Save as set out in clause 34.1 and in Schedule 18 (*Termination Payments*) or as otherwise expressly stated in this Agreement, the Maintainer shall not be entitled to any payment or any other remedy as a consequence of termination of this Agreement.
- 36.5 Termination of this Agreement shall not affect any continuing rights and obligations of the Parties under any clause which is expressed to survive termination or which give effect to such termination or the consequences of such termination or which otherwise apply (expressly or impliedly) on or after such termination and, without

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prejudice to the foregoing, clause 36.7 shall apply. The operation of clause 36.1(b) shall not affect any rights and obligations which give effect to clause 27 (*Technical Support and Spare Supply*) or to the consequences of the TSSSA Change or which otherwise apply (expressly or impliedly in on or after the TSSSA Commencement Date).

- 36.6 Neither Party shall be entitled to terminate this Agreement except as expressly set out in this Agreement.

#### **Survival of clauses**

- 36.7 The provisions of clauses 1 (*Definitions and Interpretation*), 6 (*Priority of Documents and information*), 11.7, 15.1(c), 15.4, 16 (*Intellectual Property Rights*), 17 (*Audit Rights*), 18.6, 34 (*Consequences of Early Termination*), 35 (*General Obligations on Termination, TSSSA Change or Expiry*), this clause 36, 37 (*Indemnities*), 38 (*Limitations on Liability*), 40 (*Performance Bond*), 41 (*Confidentiality*), 42 (*Freedom of Information*), 43 (*Dispute Resolution*), 44 (*Assignment or Transfer by the Maintainer*), 45 (*Assignment and Novation or Granting or Security by the Purchaser*), 48 (*Notices*), 49 (*Entire Agreement*), 52 (*Form of Documents*), 53 (*Sole remedy and Disclaimer*), 54 (*Further Assurance*), 55 (*Set-Off*), 56 (*No Waiver*), 57 (*Illegality and Severability*), 59 (*Language*), 60 (*Currency and Exchange Rate*), 61 (*Third Party Rights*), 63 (*Governing Law and Jurisdiction*) and the provisions of Schedule 9 (*Maintenance Facilities – Willesden Depot*), paragraph 3.3 of Schedule 12 (*Responsible Procurement*), Schedule 14 (*Health and Safety*) and Schedule 15 (*Environment*) shall remain in full force and effect following the termination or expiry of this Agreement.

#### **37. Indemnities**

##### **Application of clause 37**

- 37.1 The provisions of this clause 37 shall apply notwithstanding any other provision of this Agreement.

##### **Discharge of Liability**

- 37.2 The Maintainer covenants for the benefit of the Purchaser that, if the Maintainer's (or any other person on the Maintainer's behalf) performance or non performance of, and under, this Agreement or any act, omission, breach or neglect on the part of the Maintainer, or any member of its Group, or the Guarantor (or any of their respective employees, agents or representatives) causes loss or damage to any third party or any person other than the Purchaser or any Operator (in their respective capacities under this Agreement but not otherwise) or any property or rights of any such third party or person or causes any liability to or penalty becoming due to any Competent Authority or breaches any Applicable Laws and Standards or Relevant Approval the Maintainer shall promptly and fully discharge all such losses, damages and liabilities for which the Maintainer is legally liable.

### General Indemnity

37.3 The Maintainer shall, subject to clause 37.5, be responsible for, and shall release and indemnify the Indemnified Parties on demand on an after-Tax basis from and against all expenses, liabilities, losses (and in the case of Losses arising from Maintainer Contamination under paragraph 37.3(e)), damages, claims, costs, demands, proceedings and Taxes whatsoever suffered or incurred by the Indemnified Parties in respect of or arising from:

- (a) death or personal injury to any person;
- (b) loss or damage to any property or assets;
- (c) breach of statutory duty;
- (d) third party actions, claims, demands, costs, charges and expenses (including legal expenses on an indemnity basis) brought against any Indemnified Party;
- (e) all Environmental Liabilities that arise directly or indirectly as a result of Maintainer Contamination,

which may arise out of, or in consequence of:

- (i) the operation and use of the Units or the Equipment in accordance with the Manuals;
- (ii) the performance or non-performance by the Maintainer, a Subcontractor of the Maintainer or its or their respective servants, employees or agents, of the Maintainer's obligations under this Agreement; or
- (iii) the presence on the Relevant Property of the Maintainer, a Subcontractor of the Maintainer or its or their respective servants, employees or agents, in each case in connection with this Agreement.

37.4 The Maintainer shall, subject to clause 37.5, be responsible for and shall release and indemnify the Indemnified Parties on demand on an after-Tax basis from and against all Losses whatsoever suffered or incurred by the Indemnified Parties as a result of:

- (a) the negligence or wilful misconduct of; or
- (b) breach of this Agreement by,

the Maintainer, a Subcontractor of the Maintainer or its or their respective servants, their employees or agents.

### Qualifications

37.5 The Maintainer shall not be responsible or be obliged to indemnify the Indemnified Parties:

- (a) pursuant to clause 37.3 or clause 37.4 for any of the matters referred to in clauses 37.3(a) to (e) inclusive or clause 37.4 which arises as a direct result of the Maintainer acting in accordance with an instruction in writing given by

the Purchaser as part of a Change, provided that the Maintainer objected in writing to the giving of the instruction prior to its implementation and such objection was considered by the Purchaser to be reasonable or (in the case of disagreement) the objection is determined, pursuant to the Dispute Resolution Procedure, to be reasonable;

- (b) pursuant to clause 37.3 or clause 37.4 for any injury or Losses to the extent that the relevant liability or Loss is of such nature as is intended to be compensated by the payment of liquidated damages pursuant to this Agreement;
- (c) pursuant to clause 37.3 or clause 37.4 for any injury or Losses caused by the negligence or wilful misconduct of any of the Indemnified Parties or by the breach by the Purchaser of its obligations under this Agreement;
- (d) except in respect of any liability suffered or incurred under an Operator Document, pursuant to clause 37.3(d) for any Uninsured Losses incurred in excess of £30 million (Indexed by RPI) in aggregate;
- (e) in respect of any claims made pursuant to clause 37.3(b) or 37.3(e) that relate to Relevant Property against which the Maintainer is required by this Agreement to insure, where the amount of any such claim is in excess of the level of cover required by this Agreement (provided that the indemnity shall always extend to liability for any excess or deductible under any policy of insurance); and
- (f) save in respect of any IPR Claims pursuant to clause 16.8, for any loss of revenue suffered by any of the Indemnified Parties,

except to the extent that such Losses are recoverable (or should be recoverable assuming the Required Insurances have been taken out and maintained in force in accordance with this Agreement) under the Required Insurances to be taken out by the Maintainer in accordance with clause 25 (*Insurance and Risk*).

#### **No Double Recovery**

37.6 An indemnity by either Party under any provision of this Agreement shall be without limitation to any indemnity by that Party under any other provision of this Agreement provided that nothing in this Agreement shall give either Party the right to any double recovery. In addition and for the avoidance of doubt, liability under any indemnity in this Agreement other than this clause 37 shall be disregarded in determining any limitation on liability under this clause 37.

#### **Mitigation**

37.7 Each Indemnified Party shall at all times take all reasonable steps to minimise and mitigate any injury or Loss for which it is entitled to bring a claim against the Indemnifying Party pursuant to this Agreement.

**Resistance of claims**

- 37.8 (a) If one Party (the *Recipient*) becomes aware of any third party claim against the Recipient which may result in a claim by the Recipient against the other Party under any of the indemnities contained in this Agreement, the Recipient shall give notice to the Indemnifying Party as soon as is reasonably practicable thereafter. The Indemnifying Party shall be entitled at its discretion (but after consultation with the Recipient) to resist at the Indemnifying Party's own expense such claim on behalf of the Recipient provided that:
- (i) the Recipient shall be kept fully informed of all matters pertaining to the claim;
  - (ii) the Indemnifying Party shall, in resisting any such claim, comply with the terms of any relevant policies of insurance issued pursuant to clause 25 (*Insurance and Risk*) or otherwise;
  - (iii) the Indemnifying Party shall not be entitled to resist any such claim before any court unless it has been advised by leading counsel, after disclosure of all relevant information and documents, that it is reasonable to resist such claim in the manner proposed by the Indemnifying Party; and
  - (iv) the Recipient is indemnified and secured to its reasonable satisfaction by the Indemnifying Party against all Losses which may thereby be incurred.
- (b) The Recipient shall give the Indemnifying Party and the insurer, if any, under an applicable policy of insurance issued pursuant to clause 25 or otherwise all reasonable co-operation, access and assistance, technical or otherwise for the purpose of resisting such a claim, subject as provided in clause 37.8(a)(iv).
- (c) If the Indemnifying Party does not request the Recipient to take any appropriate action or shall fail to indemnify and secure the Recipient to its reasonable satisfaction within 15 Working Days of the said notice to the Indemnifying Party, the Recipient shall be free to pay or settle the claim on such terms as it may in its absolute discretion think fit. The Recipient shall make no admission prejudicial to the resistance of such claim prior to the expiry of the notice period and then only if the Indemnifying Party has either:
- (i) not requested the Recipient to take any appropriate action; or
  - (ii) not indemnified and secured the Recipient to its reasonable satisfaction or within 15 Working Days of the said notice to the Indemnifying Party.

**CAHA**

- 37.9 (a) The Maintainer shall become a party to CAHA within two months of the Commencement Date.

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- (b) Clause 16 of CAHA (or any reiteration of the principles of such provision) shall not apply as between the Maintainer on the one hand and the Indemnified Parties on the other in respect of matters relating to the subject matter of this Agreement.
- (c) Clause 17 of CAHA (or any reiteration of the principles of such provision) shall apply between the Maintainer and the Indemnified Parties in respect of matters relating to the subject matter of this Agreement but only to the extent that the recovery of the relevant loss would not otherwise be recoverable under this Agreement.

### 38. Limitations on Liability

#### Consequential Breach and Loss

- 38.1 (a) Neither the Maintainer nor the Purchaser shall be treated as being in breach of this Agreement if such breach arises as a direct, necessary and inevitable consequence of the occurrence of a breach thereof on the part of the other Party.
- (b) In no event shall any Party be liable to any Indemnified Party for any matter howsoever arising out of or in connection with this Agreement in respect of any Consequential Loss suffered by such Indemnified Party. Each Party respectively undertakes not to sue any an Indemnified Party in respect of such Consequential Loss.

#### Limitation on Maintainer's Liability

- 38.2 (a) Subject to clause 38.3, the Maintainer's liability to the Indemnified Parties under this Agreement (whether arising in contract, tort (including negligence), breach of statutory duty or otherwise), shall not exceed in any Contract Year \$ [REDACTED] (Indexed by RPI) (the *Maximum Liability*).
- (b) To the extent that the Maximum Liability applies in any Contract Year to limit the liability of the Maintainer, the Purchaser shall not be entitled to apply such liability against the Maximum Liability in any following Contract Year.

38.3 The Maximum Liability shall not apply to:

- (a) any liability of the Maintainer to the Indemnified Parties arising as a result of or in connection with:
  - (i) death or personal injury;
  - (ii) fraud, fraudulent misrepresentation or corruption by the Maintainer or any Maintainer Party;
  - (iii) wilful default or abandonment; or
  - (iv) termination of this Agreement,

- (b) any costs or expenses which the Maintainer is obliged or does expend during the term of the Agreement in carrying out its obligations;
- (c) Losses suffered or incurred, to the extent such Loss is or is required to be insured by the Maintainer in accordance with the provisions of clause 25 (*Insurance and Risk*);
- (d) the Maintainer's liability in respect of its express obligations in relation to warranty claims and/or for defect rectification pursuant to each of the Maintainer's obligations under clauses 11.6 and 11.7, including any related liquidated damages payments;
- (e) Adjustments under the Performance Regime;
- (f) any claim pursuant to the Maintainer's transfer obligations in clause 18 (*Employment Arrangements*);
- (g) the Maintainer's liability for any IPR Claims pursuant to clause 16.8;
- (h) the Maintainer's liability to refund or reimburse as expressly provided in this Agreement but for the avoidance of doubt excluding the Maintainer's liability to indemnify;
- (i) the Maintainer's liability to pay any Taxes as expressly provided by this Agreement or as required by Applicable Laws and Standards; or
- (j) any interest payable under this Agreement.

#### **Limitation of the Purchaser's Liability**

38.4 Save for its express obligations to make payment to the Maintainer under this Agreement in accordance with Schedule 5 (*Performance Regime*), Schedule 6 (*Payment Mechanism*), Schedule 10 (*Change Procedure*), Schedule 18 (*Termination Payments*), Part B (*TSSSA Payment Mechanism*) and Part C (*TSSSA Performance Regime*) of Schedule 22 (*Technical Support and Spare Supply*), Part C (*Existing Fleet Payment Mechanism*) and Part D (*Existing Fleet Performance Regime*) of Schedule 23 (*Existing Fleet*), any payment under clauses 14.4, 14.5, 19 (*Payments*), 22 (*Exonerating Events*) or 23 (*Change in Law*) and subject to clause 38.1(b), the Purchaser's liability to the Maintainer under this Agreement whether arising in contract, tort (including negligence), breach of statutory duty or otherwise save for liability in relation to death and personal injury shall not exceed £ [REDACTED]. The Purchaser shall at any time and from time to time be entitled to increase its maximum liability under this Agreement by an amount not less than [REDACTED] by giving written notice to the Maintainer of the amount of such increase.

#### **Reduction of Purchaser's Liability**

38.5 The Maintainer agrees that a claim by it in respect of an amount shall reduce (by the amount paid in respect of such claim) the remainder of the Purchaser's total liability to the Maintainer under this Agreement that would otherwise be available in respect of subsequent claims by the Maintainer save for where the amount claimed by the Maintainer arises in connection with or as a result of the repudiation and/or

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abandonment of this Agreement or the wilful default by the Purchaser of any obligation.

#### **No Compensation**

38.6 Notwithstanding any other provision of this Agreement neither Party shall be entitled to recover compensation or make a claim under this Agreement for any loss incurred to the extent it has already been compensated in respect of that loss or failure pursuant to this Agreement or otherwise.

#### **39. Guarantee**

The performance of the Maintainer Obligations under this Agreement shall be guaranteed by the Guarantor pursuant to the Guarantee.

#### **40. Performance Bond**

The Purchaser and the Maintainer shall comply with the provisions of Schedule 20 (*TSA Performance Bond*).

#### **41. Confidentiality**

##### **Maintainer's Obligations of Confidentiality**

41.1 Subject to clause 41.4 and except as otherwise provided in the Project Documents, the Maintainer shall keep confidential all matters relating to this Agreement and the Project Documents and shall use all reasonable endeavours to prevent its employees, agents and Subcontractors from making any disclosure to any person of any matter relating to this Agreement.

##### **Purchaser's Obligations of Confidentiality**

41.2 Subject to clause 41.4, the Purchaser shall have the same obligations as those imposed on the Maintainer under clause 41.1 in respect of those items of confidential and commercially sensitive information set out in Schedule 16 (*Maintainer Confidential Information*) until such time as is indicated in column 2 of the same table. Without prejudice to the foregoing and clause 41.4, the Purchaser shall be entitled to:

- (a) disclose Maintainer Confidential Information where the Purchaser considers that it is obliged to do so under any Applicable Laws and Standards;
- (b) use Maintainer Confidential Information to the extent necessary to obtain the benefit of the Maintainer's performance under this Agreement;
- (c) disclose such Maintainer Confidential Information as may be required to be published in the Official Journal of the European Union;
- (d) disclose such Maintainer Confidential Information as may be required pursuant to a valid FOI Information Request; and
- (e) publish any Contract Information to the general public pursuant to the requirements of the Transparency Commitment.

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41.3 For the purposes of clause 41.2(e), the Purchaser may in its absolute discretion prior to publication:

- (a) redact all or part of the Contract Information to take account of the exemptions that would be available in relation to information requested under the FOI Legislation; and
- (b) consult with the Maintainer regarding any redactions to the Contract Information to be published,

provided that in all cases the Purchaser shall make the final decision regarding publication and/or redaction of the Contract Information.

#### Permitted Disclosures

41.4 Clauses 41.1 and 41.2 shall not apply to:

- (a) any disclosure of information that is reasonably required by persons engaged in the performance of obligations set out in the Agreement;
- (b) any matter which a Party can demonstrate is already generally available and in the public domain otherwise than as a result of a breach of this clause;
- (c) for the purposes of exercising its obligations under the Manufacture and Supply Agreement or to the Maintainer (or its successors and/or assigns);
- (d) any disclosure to enable a determination to be made under Schedule 17 (*Dispute Resolution Procedure*);
- (e) any disclosure which is required by any Law (including any order of a court of competent jurisdiction), any Parliamentary obligation or the rules of any stock exchange or governmental or regulatory authority having the force of Law;
- (f) any disclosure of information which is already lawfully in the possession of the receiving party, prior to its disclosure by the disclosing party;
- (g) any provision of information where it is proposed that a person should or may provide funds (whether directly or indirectly and whether by loan, equity participation or otherwise) to the Purchaser to enable it to carry out its obligations under this Agreement, to that person but only to the extent reasonably necessary to enable a decision to be taken on the proposal;
- (h) any disclosure of information relating to the design, construction, operation and maintenance of the Units (including to the Operator) and such other information (except pricing information) as may be reasonably required for the purpose of conducting a due diligence exercise to any proposed new contractor and its advisers, should the Purchaser decide to retender this Agreement and/or the MSA;
- (i) any registration or recording of any consents and property registration required;

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- (j) any disclosure of information by the Purchaser in accordance with clause 41.7;
  - (k) any disclosure by the Purchaser of any document related to this Agreement to which it is a party and which the Maintainer (acting reasonably) has agreed with the Purchaser contains no commercially sensitive information;
  - (l) any disclosure for the purpose of:
    - (i) the examination and certification of the Purchaser's or the Maintainer's accounts; or
    - (ii) any examination pursuant to section 6(1) of the National Audit Act 1983; and
  - (m) any disclosure in relation to the Insurances.
- 41.5 Where disclosure is permitted under clause 41.4, other than clauses 41.4(e), (i), (j) and (k), the discloser of such information shall procure that the recipient of the information shall be subject to the same obligations of confidentiality as those contained in this Agreement.
- 41.6 For the purposes of the National Audit Act 1983, the C&AG may examine such documents as he may reasonably require which are owned, held or otherwise within the control of the Maintainer and any Subcontractor and may require the Maintainer and any Subcontractor to produce such oral or written explanations as he considers necessary. For the avoidance of doubt it is hereby declared that the carrying out of an examination under section 6(3)(d) of the National Audit Act 1983 in relation to the Maintainer is not a function exercisable under this Agreement.
- 41.7 Nothing in this Agreement shall prevent the disclosure by the Purchaser of any Confidential Information to the SoS, TfL or any other subsidiaries of TfL, the Mayor, the Purchaser's Subcontractors, all respective advisers or any other person or body that the Purchaser from time to time is required to consult with or provide information to. The Parties acknowledge that the National Audit Office has the right to publish details of this Agreement (including commercially sensitive information) in its relevant report to Parliament.
- 41.8 The Maintainer shall not make use of this Agreement or any information issued or provided by or on behalf of the Maintainer in connection with this Agreement otherwise than for the purpose of this Agreement, except with the written consent of the Purchaser.
- 41.9 Where the Maintainer, in carrying out its obligations under this Agreement, is provided with information relating to users of the Purchased Equipment, the Maintainer shall not disclose or make use of any such information otherwise than for the purpose for which it was provided, unless the Maintainer has sought the prior written consent of the user and has obtained the prior written consent of the Purchaser.

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#### **LO Concession Bidding Procedure**

- 41.10 The Maintainer shall, if and to the extent so reasonably requested by the Purchaser, TfL or an Affiliate of TfL, at the Maintainer's own cost provide such person and its representatives and advisers with information extracted from the Project Documents to which the Maintainer is party and other information which the Maintainer is required to provide under the Project Documents and which those representatives and advisers reasonably believe that a potential successor Operator would require in order to tender for the right and obligation to provide or operate all or any LO Services under the then applicable LO Concession, for the purpose of such representatives and advisers preparing any reports or other documents in connection with any invitation to potential successor Operators to tender for such right and obligation. The Maintainer will permit such information to be included in documents relating to the invitation to tender for the relevant concession or franchise agreement, including any pre-qualifying document and any associated information memorandum (whether preliminary or final).
- 41.11 Any information provided to the Purchaser, TfL or an Affiliate of TfL and its representatives and advisers pursuant to clause 1.2 may be disclosed by the Purchaser, TfL or Affiliate of TfL (as applicable) to persons who have expressed an interest in becoming the relevant franchisee, provided that such persons have provided an undertaking regarding the confidentiality and use of such information for the benefit of the Purchaser, TfL or Affiliate of TfL (as applicable) and the party who provided such information to the Purchaser, TfL or Affiliate of TfL (as applicable), in substantially the same form as this clause 41. Such disclosure of any such information by the Purchaser, TfL or Affiliate of TfL (as applicable) will be limited to the extent the Purchaser, TfL or Affiliate of TfL (as applicable) considers reasonably necessary for the relevant stage of the tender process and full disclosure of the terms of any Project Document, including detailed financial information, will, subject to any legal requirement to which the Purchaser, TfL or Affiliate of TfL (as applicable) is or may become subject, only be made available to the successful successor Operator.

#### **Restrictions on publicity and public relations**

- 41.12 The Maintainer shall not by itself, its employees or agents and shall procure that its Subcontractors shall not, communicate with representatives of the press, television, radio or other communications media on any matter concerning this Agreement or the Services without the prior written approval of the Purchaser.
- 41.13 No facilities to photograph or film in or upon any property used in relation to the performance of the Services under this Agreement shall be given or permitted by the Maintainer unless the Purchaser has given its prior written approval.
- 41.14 Notwithstanding any other provision of this Agreement, including, without limitation, clauses 25 (*Insurance and Risk*), 37 (*Indemnities*) and 38 (*Limitations on Liability*), the Maintainer agrees that the Purchaser shall have the right to control and supervise all dealings with the media in respect of any incident, event, claim or action in relation to any part of the Maintenance Facilities, the Ilford Depot, the Chingford Stabling Site, the Units and/or the Services.

41.15 The Maintainer shall co-operate with the Purchaser in relation to the Purchaser's publicity of any part of the Maintenance Facilities, the Chingford Stabling Site, the Ilford Depot, the Units and/or the Services.

#### Data protection

- 41.16 (a) In relation to all Personal Data, the Maintainer shall at all times comply (to the extent that the same is applicable) with the DPA as a data controller if necessary, including maintaining a valid and up-to-date registration or notification under the DPA covering the data processing to be performed in connection with this Agreement.
- (b) The Maintainer shall, and shall procure that all of its Subcontractors shall, only undertake fair and lawful processing of Personal Data reasonably required in connection with this Agreement and shall not transfer any Personal Data to any country or territory outside the European Economic Area.
- (c) The Maintainer shall not disclose Personal Data to any third parties other than:
- (i) to employees and Subcontractors to whom such disclosure is reasonably necessary in order for the Maintainer to carry out its obligations under this Agreement; or
  - (ii) to the extent required under a court order,
- provided that disclosure under clause 41.16(c)(i) is made subject to written terms substantially the same as, and no less stringent than, the terms contained in this clause and that the Maintainer shall give notice in writing to the Purchaser of any disclosure of Personal Data it or a Subcontractor is required to make under clause 41.16(c)(ii) immediately it is aware of such a requirement.
- (d) The Maintainer shall bring into effect and maintain all technical and organisational measures to prevent unauthorised or unlawful processing of or access to Personal Data and accidental loss or destruction of, or damage to, Personal Data including but not limited to taking reasonable steps to ensure the reliability of staff having access to the Personal Data.
- (e) The Purchaser may, at reasonable intervals, request a written description of the technical and organisational methods employed by the Maintainer and the Subcontractors. Within 30 days of such a request, the Maintainer shall supply written particulars of all such measures detailed to a reasonable level such that the Purchaser can determine whether or not, in connection with the Personal Data, it is compliant with the DPA.
- (f) The Maintainer shall indemnify and keep indemnified the Indemnified Parties against all Losses incurred by any of the Indemnified Parties in respect of any breach of this clause by the Maintainer and/or any Subcontractor.

### **Return of Confidential Information**

41.17 Save to the extent that the same may reasonably be required in respect of any current or anticipated litigation, on termination of the Agreement howsoever occurring, the Maintainer shall return to the Purchaser or permanently delete and destroy any Confidential Information (including all copies thereof) supplied to it at any time (including at a time before the date of this Agreement) by the Purchaser or any other person with the knowledge and consent of the Purchaser, except where retention of any such Confidential Information is required by any Applicable Law or pursuant to any applicable stock exchange listing requirements (in which case the provisions of clause 41.1 shall continue to apply to such information).

### **Continuing obligation following termination of Agreement**

41.18 The obligations of the Parties under clause 41 shall continue in full force and effect notwithstanding termination of the Agreement.

### **42. Freedom of Information**

42.1 For the purposes of this Agreement, *Information* means information recorded in any form held by the Purchaser or held by the Maintainer on behalf of the Purchaser.

42.2 The Maintainer acknowledges that the Purchaser is subject to the FOI Legislation and agrees to assist and co-operate with the Purchaser to enable the Purchaser to comply with their obligations under the FOI Legislation. The foregoing shall not preclude the Maintainer from objecting to a disclosure of Information.

42.3 Without prejudice to the generality of clause 42.2, the Maintainer shall and shall procure that its Subcontractors shall:

- (a) transfer to the company secretary of the Purchaser (or such other person as may be notified by the Purchaser to the Maintainer) all FOI Information Requests that they receive as soon as practicable and in any event within two Working Days of receiving an FOI Information Request; and
- (b) in relation to Information held by the Maintainer on behalf of the Purchaser, provide the Purchaser with details about and/or a copy of all such Information that the Purchaser requests, and such Information shall be provided within five Working Days of receipt of a copy of the FOI Information Request from the Purchaser (or such other period as the Purchaser may reasonably specify), and in such form as the Purchaser may reasonably specify.

42.4 Where the Purchaser receives an FOI Information Request relating to the Services the Purchaser shall as soon as practicable, and in any event within five Working Days, send a copy of such FOI Information Request to the Maintainer and shall consult the Maintainer on how disclosure under the FOI Legislation would affect the Maintainer's commercial interests.

42.5 The Purchaser shall be responsible for determining whether Information is exempt information under the FOI Legislation and for determining what Information will be disclosed in response to an FOI Information Request in accordance with the FOI Legislation. The Maintainer shall not itself respond to any person making an FOI

Information Request, save to acknowledge receipt, unless expressly authorised to do so by the Purchaser.

- 42.6 The Maintainer acknowledges that the Purchaser may be obliged under the FOI Legislation to disclose Information without consulting or obtaining consent from the Maintainer.

#### 43. Dispute Resolution

- 43.1 Except where expressly designated as an Expert Dispute, any Dispute shall be resolved in accordance with the procedures for Disputes set out in Schedule 17 (*Dispute Resolution Procedure*).
- 43.2 Nothing in this Agreement shall prevent either Party from seeking injunctive relief, specific performance or other equitable relief.

#### 44. Assignment or Transfer by the Maintainer

44.1 Without prejudice to clause 15 (*Subcontracting*), the Maintainer shall not:

- (a) assign (whether absolutely or by way of security and whether in whole or in part), transfer, mortgage, charge, declare itself a trustee for a third party of, or otherwise dispose of (in any manner whatsoever) this Agreement or any of its rights and/or obligations arising or under this Agreement or any benefit or interest therein:
- (i) to any member of the Maintainer's Group except by way of assignment, transfer or novation of all of the Maintainer's rights, title and obligations under this Agreement:
- (A) where the Guarantor has to the reasonable satisfaction of the Purchaser provided a guarantee in the form of the Guarantee in respect of the assignee's rights and obligation; and
- (B) with the prior written consent of the Purchaser (not to be unreasonably withheld or delayed); nor
- (ii) to any other person without the prior written consent of the Purchaser (acting in its absolute discretion); or
- (b) create or agree to create or permit to subsist any Security Interest on or over the Units or any of the TSA Equipment without the prior written consent of the Purchaser (acting in its absolute discretion),

and any purported dealing in contravention of this clause 44.1 shall be ineffective.

#### Indemnity

- 44.2 The Maintainer shall indemnify the Purchaser on an after tax basis against any costs, expenses and liabilities it would not have incurred but for an assignment, charge or other dealing in accordance with (and to the extent permitted under) clause 44.1.

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**45. Assignment and Novation or granting of Security by the Purchaser**

**Purchaser Refinancing**

45.1 The Purchaser shall be entitled to assign (whether absolutely or by way of security and whether in whole or in part), transfer, novate, mortgage, charge, or otherwise dispose of any or all of its rights and/or obligations under this Agreement (including its payment obligations):

- (a) without the consent of the Maintainer:
  - (i) to any member of the TfL Group;
  - (ii) to a third party provided that such third party is a Suitable Lessor; or
  - (iii) to a third party which is neither a Suitable Lessor nor a Competitor where the manner of the assignment, novation, mortgage, charge or other disposal of the rights and/or obligations under this Agreement is such that where the assignee, novatee or other beneficiary of the transferred rights and/or obligations does not fully perform the transferred obligations then the responsibility for the discharge of such unperformed obligations shall revert to the Purchaser; or
- (b) subject to the prior written consent of the Maintainer (such consent not to be unreasonably withheld) to a third party.

**Implementation of Transfers**

45.2 If the Purchaser wishes to deal with its rights and/or obligations in this Agreement (either in whole or in part) pursuant and subject to clause 45.1, the Maintainer shall execute such documents and do such other things as the Purchaser may reasonably request in order to facilitate and perfect such dealing.

**Novation**

- 45.3 (a) Without prejudice to clauses 45.1 and 45.2, the Purchaser may at any time elect to novate its rights and obligations under this Agreement to:
- (i) a Minister of the Crown; or
  - (ii) a member of the TfL Group,
- each, a *Permitted Party*.
- (b) If the Purchaser wishes to exercise its right of novation under this clause 45.3, it shall give due notice to the Maintainer no later than 28 days prior to such novation.
- (c) The Maintainer shall, within 14 days of a notice from the Purchaser pursuant to clause 45.3(b):
- (i) enter into a deed of novation in the form or substantially in the form of the deed of novation in Part B (*Deed of Novation*) of Schedule 19

(*Pro Forma Certificates*) with the Purchaser and the relevant Permitted Party; and

- (ii) enter into any other documents reasonably requested by the Purchaser in relation to such novation.

#### Indemnity

45.4 The Purchaser shall indemnify the Maintainer on an after tax basis against any costs, expenses and liabilities it would not have incurred but for an assignment charge or other dealing in accordance with clauses 45.1, 45.2 or 45.3.

#### 46. Change of Control of the Purchaser

##### Restriction on Change of Control

- 46.1 (a) For the purposes of this clause 46.1, a *Change of Control of the Purchaser* means the Purchaser (which, for the purposes of this clause 46.1 includes reference to any other person in whom all or any of the rights and obligations in the Project Documents expressed to be rights and obligations of the Purchaser are vested for the time being) ceasing to be owned and controlled directly or indirectly by or on behalf of one or more of the following:
- (i) a Minister of the Crown; or
  - (ii) the Mayor or the Greater London Authority or any statutory successor thereto; or
  - (iii) TfL or any statutory successor thereto; or
  - (iv) any public or statutory corporation or limited liability company which is owned and controlled directly or indirectly by any of the persons referred to in clause 45.1(a)(i) or (ii).
- (b) For the purposes of this clause 46.1, the expression *owned and controlled* shall mean possessing:
- (i) in relation to a body corporate having a share capital, 90 per cent. or more of the issued equity share capital of that body having voting power exercisable at general meetings of that body; and
  - (ii) in relation to any other body (whether or not corporate), the power to appoint or remove all or substantially all of the members of the *Board* of that body and the term *Board* shall mean the persons who have the management and control of the relevant entity and similar powers and responsibilities to those of directors of a body corporate.
- (c) For the purposes of this clause 46.1, a *statutory successor* means, in relation to a person, the person in whom the statutory functions of such first mentioned person relating to the development, operation and funding of road and rail transport in Greater London are vested from time to time.

- (d) For the purposes of this clause 46.1, the *Relevant Date* means the date on which a Change of Control of the Purchaser takes place.
- (e) The Purchaser shall give to the Manufacturer at least 90 days' notice prior to the date on which the Purchaser reasonably believes the Relevant Date is likely to occur.
- (f) If the Purchaser gives notice to the Maintainer under clause 46.1(e), then:
  - (i) the Purchaser may propose alternative arrangements to the Maintainer; and
  - (ii) the Maintainer shall consider on a reasonable basis such proposed alternative arrangements,such that the Agreement may be continued on its then existing terms without the Maintainer seeking to exercise its right to terminate this Agreement in accordance with clause 31 (*Purchaser Default*).
- (g) If the Maintainer and Purchaser are not able to agree as to alternative arrangements set out in clause 46.1(f), a Purchaser Event of Default shall be deemed to have occurred as of the Relevant Date in accordance with clause 31 (*Purchaser Default*).
- (h) The Parties acknowledge that the provisions of this clause 46.1 are intended to ensure that the Maintainer is placed in a no less favourable and a no more favourable position, as a result of a Change of Control of the Purchaser, than if the Relevant Date had not occurred, and the Maintainer and the Purchaser undertake to exercise their respective rights under this clause 46.1 in a reasonable manner so as to give effect to the intention of the Parties as set out in this clause 46.1(h).

#### 47. Change of Control of the Maintainer

##### Restriction on Change of Control

- 47.1 (a) Subject to clause 47.1(b) and (c) the Maintainer shall procure that no Change of Control occurs in respect of the Maintainer without the prior consent to such Change of Control being given by the Purchaser in writing.
- (b) The provisions of clause 47.1(a) shall not apply to any Change of Control that arises as a consequence of any change in legal or beneficial ownership of any equity securities or securities convertible into equity securities that are listed on a Recognised Investment Exchange.
- (c) The provisions of clause 47.1(a) shall not apply to any Change of Control:
  - (i) that arises as a consequence of any change in legal or beneficial ownership of any equity securities or securities convertible into equity securities where the transferee is an Affiliate of the transferor; or

- (ii) following which the Maintainer's ultimate parent company as it was prior to the Change of Control directly or indirectly controls the Maintainer.

#### **Procedure for Approving Change of Control**

- 47.2 (a) In the event that a Change of Control that requires the Purchaser's consent under clause 47.1(a) is proposed in respect of the Maintainer the Maintainer shall (unless prevented from doing so by any law or securities regulation applicable to the Maintainer or any member of the Maintainer's Group) give the Purchaser not less than sixty (60) days' written notice of the proposed Change of Control together with all such information about the proposed Change of Control as may be reasonable for the Purchaser to determine whether it ought to consent to such Change of Control.
- (b) Except in circumstances where there is a deemed consent under clause 47.2(d), if the Purchaser does not consent to the proposed Change of Control the Maintainer shall procure that such Change of Control is not implemented by any person.
- (c) Where the Maintainer is not permitted by law or securities regulation to give the Purchaser at least sixty (60) days prior notice of a proposed Change of Control, the Maintainer shall give the Purchaser written notice of the Change of Control as soon as it is permitted to do so in accordance with such law or securities regulation.
- (d) The Purchaser shall, within 20 Working Days of receipt of the written notice of the proposed Change of Control as described in clause 47.2(a) or clause 47.2(c), give the Maintainer written notice of its determination of whether or not to consent to the Change in Control in accordance with clause 47.3, and in the event that the Purchaser fails to give the Maintainer any such written notice of the Purchaser's determination within 20 Working Days of receipt of the written notice of the proposed Change of Control as described in clause 47.2(a) or clause 47.2(c), then it shall be deemed that the Purchaser has consented to the proposed Change in Control and the Purchaser shall have no rights to object to the proposed Change in Control.

#### **Grounds of Objection**

- 47.3 It shall be reasonable for the Purchaser to withhold its consent to a proposed Change of Control (and the Purchaser acknowledges its rights to withhold its consent to a Change of Control are limited to those described in this clause 47.3) where:
- (a) the person (or persons acting in concert) obtaining directly or indirectly control of the Maintainer is an Undesirable Transferee;
  - (b) the Change of Control would result in a breach of the terms of any Relevant Approval;
  - (c) as a result of the proposed Change of Control the Maintainer would:

- (i) be unable to perform, or would be materially prejudiced in its ability to perform, its obligations under this Agreement;
- (ii) cease to be able to satisfy the relevant Competent Authority as to its ability to continue to satisfy the requirements of the Railway and Other Guided Transport Systems (Safety) Regulations 2006;
- (iii) cease to have the appropriate management skills, resources, technical competence and financial standing (or the technical and financial resources available) to enable it to perform its obligations under this Agreement;
- (iv) cease to have the requisite capacity, power, and authority (including any necessary authorisations and consents) to perform its obligations under this Agreement;
- (v) cease to be able to provide the requisite stability of service delivery to enable it to perform its obligations under this Agreement; and/or
- (vi) seek to replace any TSA Performance Bond or Guarantee then in force, and any of the replacement TSA Performance Bond or Guarantee, or the proposed provider of such replacement TSA Performance Bond or Guarantee would not satisfy the requirements of this Agreement,

provided that the Purchaser shall not withhold its consent to a proposed Change of Control on the basis of this paragraph (c), if, following the Change of Control, the Maintainer continues to be part of the Bombardier Transportation Rolling Stock Group.

#### **Unapproved Change of Control**

- 47.4 Save where the Purchaser's consent to the Change of Control is deemed under clause 47.2(d), if a Change of Control occurs without the written approval of the Purchaser being required and given under this clause 47, a Maintainer Event of Default shall be deemed to have occurred in accordance with clause 30.1(i) of this Agreement.
- 47.5 The Purchaser agrees that in case of a breach of this Agreement or an anticipated breach of this Agreement by the Maintainer which entitles the Purchaser to terminate the Agreement whether at common law or in accordance with clause 30.1(i) as described at clause 47.4, the Purchaser shall not seek the application before any competent court of an order the effect of which is to restrain any Change in Control of the Maintainer including without limitation an interlocutory or final injunction. This provision shall be without prejudice to (i) the Purchaser's right to terminate this Agreement in accordance with the terms hereof, in particular clauses 30.1, 30.5 and 47.4 of this Agreement, (ii) any additional remedies granted to the Purchaser according to clauses 35.2 and 35.3 of this Agreement and (iii) any rights of the Purchaser under Schedule 18 of the TSA or otherwise to seek compensation of damages and/or payment of indemnities.

**48. Notices**

**Requirement for notice in writing**

- 48.1 Any notice, consent, approval, certificate or determination to be given or issued by any person under this Agreement shall be deemed a "notice" and shall be in writing unless otherwise specified and the words "notify", "consent", "approve", "certify" and "determined" shall be construed accordingly.
- 48.2 The Parties shall comply with the requirements of paragraph 6 (*Communications and Document Control*) of Schedule 8 (*Contract Management*) in respect of the form of communications to be served under this Agreement.

**Service of notices**

- 48.3 Subject to clause 48.4, any notice made under or in connection with the matters contemplated by this Agreement shall be deemed duly given if delivered personally or sent by email or by prepaid first-class post or by airmail (if posted to or from a place outside the United Kingdom) in accordance with the requirements of this clause 48.
- 48.4 The service of any certificate, Change Confirmation Notice in accordance with Schedule 10 (*Change Procedure*) or notice of termination pursuant to this Agreement shall be effected by any means specified in clause 48.3 (including as a scan of the original signed document attached to an email) except in the body of an email.
- 48.5 The relevant details of each Party at the date of this Agreement are:

**Purchaser**

Address: Rail for London Limited  
Overground House  
125 Finchley Road  
Swiss Cottage  
London, NW3 6HY

Email: [REDACTED]

Attention: Rolling Stock Project Manager (currently [REDACTED] at the date of this Agreement)

**Maintainer**

Address: Bombardier Transportation UK Limited  
Litchurch Lane  
Derby DE29 8AD

Email: [REDACTED]

Attention: Company Secretary

**Time of service**

- 48.6 A notice shall be deemed to have been received:

- (a) if delivered by hand, at the time when the notice is left at the address of the Party to be served;
- (b) if sent by first-class post, on the Working Day next following the day of posting or, if the day of posting was not a Working Day, the Working Day next following the first Working Day after the day of posting;
- (c) if sent by airmail, five Working Days after the day of posting; and
- (d) if sent by email, upon receipt by the sender of a "delivered" confirmation (provided that the sender shall not be required to produce a "read" confirmation),

provided that if, in accordance with the above provision, any such notice would otherwise be deemed to be given or made after 5.00 p.m. such notice shall be deemed to be given or made at 9.00 a.m. on the next Working Day. For the purposes of this clause, all times are to be read as local time in the place of deemed receipt.

#### **Change of details**

- 48.7 A Party may notify the other Parties to this Agreement of a change to its name, relevant addressee, postal address or email address to update the information in clause 48.5 provided that such notification shall only be effective:
- (a) on the date specified in the notification as the date on which the change is to take place; or
  - (b) if no date is specified or the date specified is less than five Working Days after the date on which notice is given, the date falling five Working Days after notice of any such change has been given.

#### **49. Entire Agreement**

This Agreement together with the other Project Documents constitute the entire agreement between the Parties hereto in connection with the subject matter of this Agreement. No party has relied upon any representation save for any representation expressly set out in the Project Documents.

#### **50. No Partnership or Agency**

Nothing in this Agreement and no action taken by the Parties pursuant to this Agreement shall constitute, or be deemed to constitute, a partnership, unincorporated association or other co-operative agency. The Maintainer shall not be or be deemed to be the agent of the Purchaser and the Maintainer shall not hold itself out as having authority or power to bind the Purchaser in any way.

#### **51. Statutory Notices**

- 51.1 If any statutory notice relating to the subject matter of this Agreement or naming the Purchaser or a member of the TfL Group as a party is served on the Maintainer or any of its Subcontractors or suppliers, the Maintainer shall immediately (or in the case of a statutory notice served on a Subcontractor or supplier, immediately such statutory

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notice comes into the Maintainer's possession provided that the Maintainer imposes a requirement in its Subcontracts or supply contracts that the Subcontractors or suppliers forward any such statutory notices to the Maintainer) inform the Purchaser and provide the Purchaser with a copy of such statutory notice.

- 51.2 Where the Maintainer receives any "letters of claim", writs and/or summons naming the Purchaser or a member of the TfL Group as a party or which may affect the Maintainer's ability to perform this Agreement, it shall provide the same or a copy immediately to the Purchaser.
- 51.3 Where the Maintainer receives any letters, faxes, emails or other communication from any person holding the Purchaser, any member of the TfL Group and/or any of their respective employees, agents or contractors responsible for any incident, the Maintainer shall consult immediately with the Purchaser and obtain the Purchaser's approval prior to giving any response to such letters, faxes or other communication.

**52. Form of Documents**

The Maintainer shall supply documents and drawings to the Purchaser in the manner and format specified in paragraph 6 (*Communications and Document Controls*) of Schedule 8 (*Contract Management*).

**53. Sole Remedy and Disclaimer**

53.1 Without prejudice to any entitlement of the Maintainer:

- (a) to specific performance of any obligation under this Agreement;
- (b) to injunctive relief; or
- (c) to see redress from the Purchaser for any liability relating to death or personal injury caused by the Purchaser,

the Maintainer's sole remedy in relation to matters for which an express right or remedy is stated in this Agreement shall be that right or remedy and the Maintainer shall have no additional right or remedy arising by common law, in equity, by statute or otherwise.

**Disclaimer**

53.2 Without prejudice to clause 53.1 and except in the case of fraud, wilful default or gross negligence on the part of the Purchaser or any of its officers, employees and agents, the Purchaser shall not be liable to the Maintainer (whether in contract, tort or otherwise howsoever caused) in respect of any inaccuracy, error, omission, unfitness for purpose, defect or inadequacy of any kind whatsoever in the Disclosed Data. For the purpose of this Agreement *Disclosed Data* means the materials, documents and data made available by the Purchaser or on behalf of the Purchaser to the Maintainer prior to the date hereof in relation to the obligations undertaken by the Maintainer under this Agreement. The Disclosed Data includes, without limitation, all such materials, documents and data which were provided to the Maintainer, the Subcontractors or their respective officers, employees, agents, contractors and advisers in connection with the Invitation to Negotiate.

- 53.3 Without prejudice to any entitlement of the Purchaser and/or the Indemnified Parties:
- (a) to specific performance of any obligation under this Agreement;
  - (b) to injunctive relief;
  - (c) to terminate this Agreement pursuant to the terms of this Agreement and to recover any monies owed pursuant to Schedule 18 (*Termination Payments*);
  - (d) to recover monies properly owing to it as a debt under this Agreement;
  - (e) to be indemnified by the Maintainer in respect of the matters referred to in clauses 37.3(a) to (c);
  - (f) to be indemnified by the Maintainer under clause 37.3(d) in respect of any liability arising from a breach by the Maintainer of paragraph 1.3(d) of Schedule 9 (*Maintenance Facilities – Willesden Depot*);
  - (g) to recover from the Manufacturer liquidated and ascertained damages pursuant to clause 20.3 of the MSA;
  - (h) to recover from the Maintainer Losses pursuant to clause 11.7(b);
  - (i) to undertake Required Action pursuant to clause 14 (*Maintainer obligations and third parties*) or paragraph 3.11(d)(ii) or 3.12 of Schedule 9; or
  - (j) to claim, on or after termination of this Agreement, the amount of any Losses suffered or incurred by the Purchaser and/or the Indemnified Parties as a result of rectifying or mitigating the effects of any breach of this Agreement by the Maintainer, save to the extent that the same has already been recovered by the Purchaser and/or the Indemnified Parties pursuant to this Agreement or has been taken into account to calculate any compensation payable pursuant to Schedule 18,

the sole remedy of the Purchaser and/or the Indemnified Parties in respect of the Maintainer's failure to provide the Services (excluding the Refurbishments and the refurbishment obligations in paragraph 2.8 of Part A (*Maintenance Services*) of Schedule 1 (*Maintenance Services*)) in accordance with the requirements of Schedule 1 shall be the operation of the Payment Mechanism and the Performance Regime.

**No liability for review and approval by the Purchaser**

- 53.4 The Maintainer acknowledges that it shall rely entirely on its own skill and judgment in the performance of its duties and obligations under this Agreement. Accordingly:
- (a) the duties, obligations and liabilities of the Maintainer shall not be released, diminished or in any other way affected by any instruction, direction, admission, consent, approval, confirmation, comment, sanction, acknowledgment or advice made or given by or on behalf of the Purchaser or by any independent entity into any relevant matter which may be made or carried out by or on behalf of the Purchaser nor by any act or omission of any person carrying out such enquiry, whether or not such act or omission might give rise to an independent liability of such person to the Purchaser; and

REDACTED

- (b) the Maintainer shall not be entitled to make any claim against the Purchaser or to seek any relief or remedy of any nature by reason of any such action by or on behalf of the Purchaser.

**54. Further Assurance**

Each Party agrees that it shall now or at any time during the subsistence of this Agreement, do or procure the doing of all such acts and/or execute or procure the execution of all such documents in a form satisfactory to the other Parties, as the other Parties may reasonably require for giving full effect to and obtaining the full benefit of the rights, powers and remedies conferred upon such other Party or Parties by this Agreement.

**55. Set-Off**

- 55.1 The Maintainer shall not be entitled to retain or set off from any amount due to the Purchaser by it, but the Purchaser may retain or set off any amount owed to it by the Maintainer under this Agreement which has fallen due and payable against any amount due to the Maintainer under this Agreement.
- 55.2 If the payment or deduction of any amount referred to in this Agreement is disputed then any undisputed element of that amount shall be paid and any disputed element shall be dealt with in accordance with Schedule 17 (*Dispute Resolution Procedure*).
- 55.3 Where the Purchaser is entitled to net off or set off any amount due to the Maintainer under this Agreement in respect of supplies made by the Maintainer under this Agreement, the Maintainer shall ensure that the full value of the supplies is recognised for the purpose of accounting for any VAT due (i.e. the value before any related payments are offset under this clause 55).

**56. No Waiver**

- 56.1 No term or provision of this Agreement shall be considered as waived by any Party to this Agreement unless a waiver is given in writing by such Party.
- 56.2 No waiver under clause 56.1 shall be a waiver of a past or future default or breach, nor shall it amend, delete or add to the terms, conditions or provisions of this Agreement unless (and then only to the extent) expressly stated in that waiver.
- 56.3 No variation to this Agreement shall be effective unless recorded in a written instrument in accordance with Schedule 10 (*Change Procedure*).

**57. Illegality and Severability**

If at any time any provision of this Agreement (or part thereof) is or becomes illegal or invalid or unenforceable in any respect under the law of any relevant jurisdiction, such illegality, invalidity or unenforceability shall not affect or impair the legality, validity or enforceability in that jurisdiction of any other part of that provision or any other provision of this Agreement or, in any other jurisdiction, of that provision or part thereof or any other provision of this Agreement.

REDACTED

**58. Costs**

Except as otherwise expressly provided in this Agreement, each Party shall be responsible for their own costs (including legal costs) in relation to the negotiation and execution of this Agreement.

**59. Language**

The language of this Agreement is the English language.

**60. Currency and Exchange Rate**

All payments under this Agreement shall be made in pounds sterling. All risks associated with movements in foreign currency exchange rates and/or the costs of activities performed outside of the United Kingdom shall be borne by the Maintainer.

**61. Third Party Rights**

61.1 Without prejudice to paragraph 1 (*Common to each policy in this Part B*) of Part B (*Policies to be taken out by the Maintainer from the Operating Date and maintained for the Duration*) of Schedule 11 (*Insurance*), a person who is not a Party or an Indemnified Party has no right under the Contracts (Rights of Third Parties) Act 1999 to enforce a right expressly or impliedly conferred by this Agreement. This does not affect any right or remedy of a third party which exists or is available apart from under the Contracts (Rights of Third Parties) Act 1999.

61.2 Any amendment, variation or termination of this Agreement may be effected by the Parties to this Agreement in accordance with its terms and without the consent of any Indemnified Party (other than the Purchaser), notwithstanding the rights of that Indemnified Party under the Contracts (Rights of Third Parties) Act 1999.

**62. Counterparts**

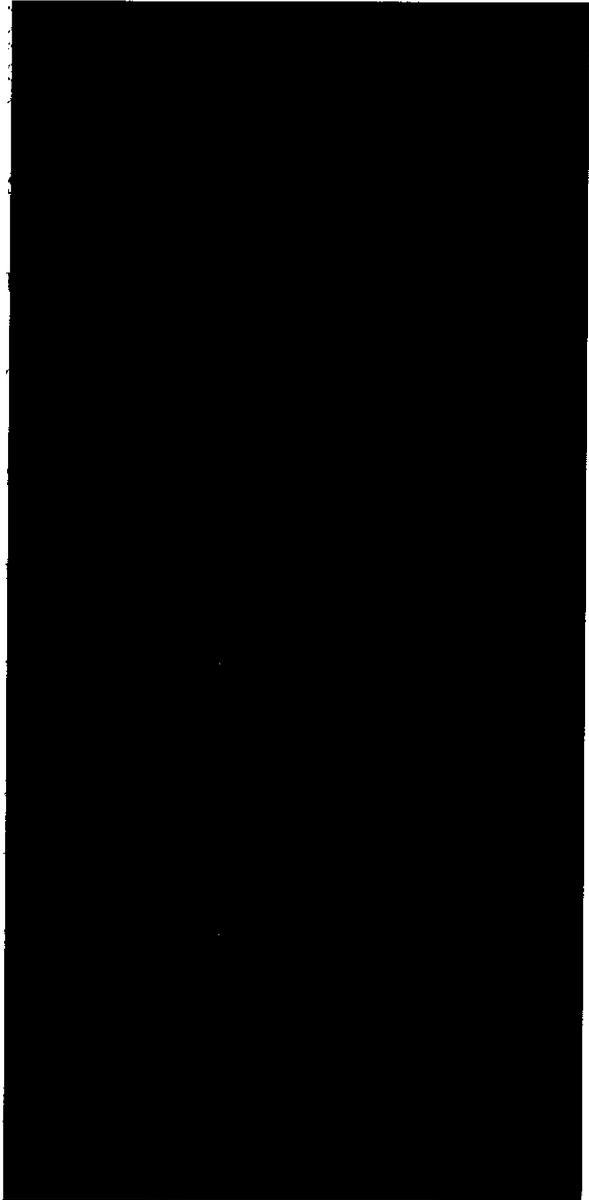
This Agreement may be executed in any number of counterparts and by the several Parties to it on separate counterparts, each of which when so executed and delivered shall be an original, but all the counterparts shall together constitute one and the same instrument.

**63. Governing Law and Jurisdiction**

This Agreement and any non-contractual relations arising out of or in connection with it shall be governed by and construed in accordance with English law and, subject to the provisions of clause 43 (*Dispute Resolution*), shall be subject to the exclusive jurisdiction of the English Courts.

REDACTED

**EXECUTED** for and on behalf of  
**BOMBARDIER TRANSPORTATION  
UK LIMITED**



**EXECUTED** for and on behalf of  
**RAIL FOR LONDON LIMITED**

