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## **THE PORTS AUTHORITY**

## **THE CONCESSIONAIRE**

## **PORT SERVICES AGREEMENT**

**THIS AGREEMENT** is made on the \_\_\_\_ day of \_\_\_\_\_,

**BETWEEN**

**THE PORTS AUTHORITY** a statutory body established by the Ports Authority Act No. \_\_\_\_\_ (hereinafter referred to as "the Ports Authority")

**AND**

**THE CONCESSIONAIRE** a company incorporated under the provisions of the Companies Act No. \_\_\_\_\_ and having its registered office at (hereinafter referred to as "the concessionaire").

**RECITALS**

- A The Ports Authority and the concessionaire have, on the date of this Agreement, entered into an agreement for the expansion of container terminal facilities in the Port (the "**Concession Agreement**").
- B Pursuant to the terms and as a condition of the Concession Agreement, the Ports Authority and the concessionaire have agreed to enter into this Agreement recording the rights and obligations of the parties in relation to the provision of port services to the concessionaire in the Port by or on behalf of the Ports Authority and matters incidental thereto.
- C This Agreement shall be construed and interpreted in consonance with the Concession Agreement.

**Comment [ID1]:** Might be better if this was an effective clause rather than a recital. Many of the defined terms used in this Agreement are in fact defined in the Concession Agreement.

**NOW THIS AGREEMENT WITNESSES:**

**1. DEFINITIONS AND INTERPRETATION**

- 1.1 In this Agreement, unless the context otherwise requires, the following terms shall have the following meanings:

**Comment [ID2]:** See comment 1.

"**[city] Port Tariff**" means the schedule published by the Ports Authority from time to time of navigation, cargo, ancillary and other charges levied by the Ports Authority on users of the Port or operators of terminals within the Port determined in accordance with the provisions of the country Authority Act; and

"**Port Services**" means the services typically provided to port users and includes the services set out in Clauses 5 to 15.

- 1.2 Unless the context otherwise requires, this Agreement shall be interpreted according to the following provisions:

- (a) the headings and sub-headings in this Agreement (and references to them) are included for convenience only and shall not be taken into account in interpreting this Agreement;
- (b) a reference to a person shall include reference to any natural person, corporation (wherever incorporated), partnership, unincorporated association, any form of governmental or supra governmental body, agency or authority (whether federal, national, provincial or otherwise) and any other entity or association of any nature (in each case whether or not having legal capacity);
- (c) in this Agreement, the interpretation rule known as the eiusdem generis rule shall not apply, nor shall any similar rule or approach to interpretation and accordingly where a general statement is followed by the word "including" or "in particular" or where in some other way specific examples are given of matters included in the general statement, the word "including" or "in particular" or the specific examples shall not limit the scope of the ordinary meaning of the general statement;
- (d) where any word or expression is given a defined meaning, any other grammatical form of that word or expression shall have a corresponding meaning, where the context requires;
- (e) where the context requires:
  - I. the singular includes the plural and vice versa; and
  - II. the masculine includes the feminine and the neuter and vice versa;  
wherever provision is made for the giving or issuing of any notice, endorsement, consent, approval, certificate or determination by any person, unless otherwise specified, such notice, endorsement, consent, approval, certificate or determination shall be in writing and the words "notify", "endorse", "approve", "certify" or "determine" shall be construed accordingly. Where any notice, consent or approval is to be given by the Ports Authority, the notice, consent or approval shall be given on its behalf only by either the Chairman or the Managing Director of the Ports Authority or such other person nominated by the Ports Authority from time to time;
- (f) any consent or approval to be given by the Ports Authority under this Agreement may be granted or withheld by the Ports Authority, acting reasonably, except where there is an express

provision to the contrary;

- (g) the language of this Agreement is English. All correspondence, drawings, Design Data, test reports, certificates, specifications and information between the parties shall be entirely in English;
- (h) references to any Law are to be construed as references to that Law as from time to time amended or to any Law from time to time replacing, extending, consolidating or amending the Law;
- (i) references to this Agreement and any agreement or document include (subject to all relevant consents) a reference to that agreement or document as varied, substituted, novated or assigned;
- (j) references to a public organization shall be deemed to include a reference to any successor to such public organization or any organization or entity which has taken over either or both of the relevant functions and responsibilities of the public organization;
- (k) each of the concessionaire and the Ports Authority's obligations, duties and responsibilities shall be construed as separate obligations, duties and responsibilities owed to the Ports Authority and the concessionaire respectively;
- (l) where this Agreement states that an obligation shall be performed "no later than" or "within" a prescribed number of days after a stipulated date or event (the "base date") or "by" a date which is a prescribed number of days after a base date, time shall be counted in calendar days and the latest time for performance shall be noon on the last day for performance of the obligations concerned;
- (m) where this Agreement states that an obligation shall be performed "no later than" or "by" a prescribed number of days before a base date or "by" a date which is a prescribed number of days before a base date, time shall be measured in calendar days and the latest time for performance shall be noon on the last day for performance of the obligations concerned;
- (n) where the last day for performance of an obligation under this Agreement falls on a day which is not a Business Day, the latest time for performance shall be extended to noon on the next

following Business Day;

- (o) any reference to a document in the agreed terms is to the form of the relevant document agreed between the parties and for the purpose of identification initialed by each of them or on their behalf (in each case with such amendments as may be agreed by or on behalf of the parties);
- (p) unless the context requires otherwise, in this Agreement all references to time are to time in the country; and
- (q) capitalized expressions shall have the same meanings as defined in the Concession Agreement unless otherwise defined in this Agreement.

## **2. PURPOSE OF THIS AGREEMENT**

The objective of the parties in entering into this Agreement is to record the various port services which the Ports Authority shall provide to the concessionaire for the purpose of enabling the concessionaire to operate a container terminal in the Concession Area in accordance with the terms of the Concession Agreement.

## **3. TERM OF THIS AGREEMENT**

This Agreement shall continue for the duration of the Concession Term and shall expire at the end of the Concession Term provided that neither party shall be released from any obligation to pay monies which has accrued before such expiry of this Agreement.

## **4. STATUTORY OBLIGATIONS**

- 4.1 The terms of this Agreement shall not derogate from the statutory obligations of the Ports Authority but shall only supplement such obligations and shall be performed by the Ports Authority so as not to be inconsistent with its statutory obligations.
- 4.2 The rights and obligations under this Agreement are recognized and performed only in conformity with the Law and no right under this Agreement becomes enforceable and no obligation requires performance if such right or obligation violates any Law.
- 4.3 The Ports Authority represents and warrants that the entering into or

the performance of this Agreement will not conflict with or result in a breach of any of the terms, conditions or provisions of or constitute a default or require any consent under, any instrument or arrangement to which the Ports Authority is a party or violate the country Ports Authority Act or any other Law or any writ, order, injunction or judgment by which the Ports Authority is bound and, notwithstanding Clause 4.1, as far as the Ports Authority is aware, no provision of this Agreement derogates from the statutory obligations of the Ports Authority.

## **5. PORT SERVICES, CHARGES AND PAYMENTS**

- 5.1 The Ports Authority shall provide Port Services to the extent and on the terms of its obligations provided herein and subject to Clause 28 either directly by itself or through its contractors, agents or nominees.
- 5.2 Unless otherwise provided for in this Agreement or the Concession Agreement or any other subsequent agreement, the Ports Authority shall levy charges for Port Services in accordance with the [city] Port Tariff and where any such service is not included in the [city] Port Tariff the Ports Authority shall determine the sums payable for the services rendered.
- 5.3 The Ports Authority shall in accordance with procedures and practices from time to time in place determine the terms and conditions relating to the payment of charges and dues for any Port Services rendered by the Ports Authority.
- 5.4 The Ports Authority shall provide the concessionaire with equal access to the following Port Services:
- (i) pilotage;
  - (ii) towage;
  - (iii) lighterage;
  - (iv) destuffing and delivery of LCL's;
  - (v) fire services; and
  - (vi) dredging.
- 5.5 For the purposes of Clause 5.4, "equal access" shall mean where equivalent circumstances exist:
- (i) the concessionaire shall be entitled to the same level, timing and priority of service as that provided by the Ports Authority to other

users or operators of terminals within the Port; and

- (ii) the Ports Authority shall not unfairly discriminate against the concessionaire by refusing to provide a service at all or on the same timely basis as such service is provided to other users or operators of terminals within the Port, provided however, the Ports Authority shall at all times in accordance with prevailing circumstances and having regard in particular to the provisions of any Law, and to matters relating to safety, security or national emergency (economic or otherwise) or to the prevention, containing or restriction of pollution, retain operational freedom to allocate priorities for services.

## **6. SECURITY**

- 6.1 The Ports Authority shall be responsible for the provision and maintenance of all perimeter fencing around the Port and the general security within the Port excluding the Concession Area.
- 6.2 The concessionaire shall be responsible for the provision and maintenance of perimeter fencing around the Concession Area and for its own security arrangements within the Concession Area in order to maintain the proper and orderly conduct of its business and the general security of the Concession Area.
- 6.3 The Ports Authority shall be entitled to deploy its security services as it wishes throughout the Port including the Concession Area for reasons of national security, which includes the security of the Port, or to perform its statutory obligations or to protect the health or safety of persons or to safeguard the environment or to prevent damage to or loss of property in the exercise of its statutory obligations, the Ports Authority, acting reasonably, considers urgent actions are required to be taken, in which case, the Ports Authority shall bear its own costs in taking that action and the concessionaire shall not be entitled to any compensation for any disruption of its operations or loss or damage resulting from the Ports Authority's actions other than those resulting from its willful or grossly negligent acts or omissions.
- 6.4 The Ports Authority shall be entitled to inspect and search all vehicles and other modes of transportation including ships and vessels entering the Concession Area or departing therefrom and similarly to search or question any person entering the Concession Area or departing therefrom.

- 6.5 The Ports Authority shall not be under any obligation to provide any security or related services within the Concession Area, but the Ports Authority may at its complete discretion provide any such services if requested by the concessionaire on such charges and terms as may be determined by the Ports Authority. However, the Ports Authority shall not levy any charges on the concessionaire for the performance of its responsibilities under Clause 6.1 or the exercise of its rights under Clauses 6.3 and 6.4.
- 6.6 The parties acknowledge that security requirements within the Port may change from time to time and that representatives of the parties will meet periodically to review security procedures. The parties agree to establish, review and implement procedures as may be required from time to time.

**i. ACCESS TO LAND**

- 7.1 Access rights to the Concession Area over the Ports Authority controlled property shall be determined in accordance with the Concession Agreement and the Site Lease.
- 7.2 The Ports Authority shall grant to the concessionaire and its contractors, nominees and agents such reasonable access as the occasion demands and subject to such terms and conditions as the Ports Authority may reasonably determine over all land and sea areas under the control of the Ports Authority in relation to the Concession Area, for the purpose of carrying out demolition and construction works or for the purpose of site inspection and pre-construction works or for the purpose of carrying out environmental, hydrographic or other surveys or such other activities as may be required for the purpose of obtaining any statutory consents and permits or the securing of facilities and services for the Concession Area or for any other purpose necessary to enable the concessionaire to meet its obligations under the Concession Agreement.

**8. ACCESS TO PORTS SERVICES**

- 8.1 (a) The parties acknowledge that:
- a. rules for allocation of individual berths within the Port may be made by the Minister pursuant to [the country] Ports Authority Act and to the Masters Attendant Ordinance and to rules and regulations thereunder;
  - (i) the Minister may also prescribe the time and manner in which vessels shall enter and leave the Port;



- (ii) in allocating priorities to vessels and dealing with all matters concerning the allocation of berths, the timing and manner in which vessels enter/exit the Port, the Harbor Master is bound to give effect to rules made by the Minister;
  - (iii) the priorities for access to and egress from the Port and the allocation of berths presently operated by the Harbor Master are set out in sub-clauses (b) and (c) below respectively;
  - (iv) the priorities described in sub-clauses (b) and (c) below may be changed from time to time by the Minister, who may make rules affecting such priorities subject to Law; and
  - (v) a ship's master can choose not to enter the Port when a particular berth becomes free and his vessel has priority, instead waiting to obtain a subsequent slot at a different berth.
- (b) When determining the allocation of towage or pilotage services for the purposes of entering/exiting the Port or the allocation of berths the Harbor Master currently takes into account, in descending order of priority and subject to a berth being available, the following:
- i. vessels carrying dangerous cargo or high security cargo (including arms and ammunition);
  - ii. passenger vessels;
  - iii. main line container vessels;
  - iv. feeder vessels;
  - v. vessels using container facilities at conventional cargo - berths;
  - vi. car carriers;
  - vii. general cargo vessels using conventional cargo berths and bulk cement vessels;
  - viii. oil and gas tankers; and
  - ix. all other types of vessels.

In the case of vessels having the same degree of priority, preference is given to the vessel which gave the earliest ETA at a reference position five nautical miles radius from the pilot board point which is at present 6°58.65' N and 79°49.15'E and in the case of vessels which report the same ETA's, preference is given to the vessel which first arrives at the reference position. The time to declare the ETA shall be determined by the Ports Authority from time to time.

The Harbor Master may disregard the above priorities if in his sole discretion he considers it necessary to ensure compliance with any applicable law or regulation or for reasons of safety, security or national emergency (economic or otherwise) or to prevent, contain or restrict pollution.

- (c) When determining the allocation of towage or pilotage services for the purposes of access into or egress from the Port or the allocation of priorities for such access or egress, the Harbor Master currently takes into account which vessel is first ready to arrive at or leave the berth/Port.
- (d) To the extent permitted by the laws and legal procedures established in [the country] and subject always to such rules and regulations as may be made by the Minister, the Ports Authority hereby covenants with the concessionaire that it shall ensure that the current priorities as described in sub-clauses (b) and (c) above are extended to all vessels calling at the Port and that it shall provide equal access and egress and shall not discriminate in the provision of such priorities as between the terminal operated by the concessionaire and any other terminal operated by the Ports Authority or any other person or body.
- (e) For the purposes of sub-clause (d) above equal access shall mean where equivalent circumstances exist:
  - (i) The concessionaire shall be entitled to the same level, timing and priority of access to the Phase 1 Facilities or egress from the Phase 1 Facilities for vessels as that provided by the Ports Authority to other users of or operators of terminals within the Port; and
  - (ii) the Ports Authority shall not unfairly discriminate against the concessionaire by refusing either to provide access to the Phase 1 Facilities or egress from the Phase 1

Facilities to vessels at all, or on the same timely basis as such access or egress is provided to other users or operators of terminals within the Port,

Provide however, the Ports Authority shall at all times in accordance with prevailing circumstances and having regard in particular to the provisions of any Law and to matters relating to safety, security or national emergency (economic or otherwise) or to the prevention, containing or restriction of pollution, retain operational freedom to allocate priorities for access or egress.

## **9. PILOTAGE AND TOWAGE**

9.1 The Ports Authority shall provide pilotage and towage services for all vessels calling at the Phase 1 Facilities, to support, subject to weather conditions and other exigencies, ship movements into and out of the Port and the Outer Harbor. The Ports Authority shall levy charges upon ship operators for such services in accordance with the [city] Port Tariff and the Concession Agreement.

9.2 In accordance with its statutory obligations, the Ports Authority shall provide and maintain navigational aids, including but without limitation, lighthouses, beacons and channel markers as are necessary to enable the uninterrupted, safe and timely movement of ships into and out of the Port and its access routes. The Ports Authority shall not levy any charges from the concessionaire for establishing and maintaining these navigational aids.

## **10. LIGHTERAGE**

If requested by the concessionaire or the operator of any vessel, the Ports Authority shall provide lighterage services to vessels calling at the Phase 1 Facilities. The Ports Authority shall be entitled to levy and recover charges for such services from the requesting party.

## **11. DREDGING**

11.1 The concessionaire shall be responsible for Capital Dredging for the purpose of developing the Concession Area in accordance with the Concession Agreement. If requested by the concessionaire, the Ports Authority may at its sole discretion provide such Capital Dredging services on such charges and terms as may be determined by the Ports Authority. "**Capital Dredging**" means the initial dredging to the depth of

fourteen (14) meters to a distance of fifty (50) meters from the quay line of the Phase 1 Facilities at ninety (90) degrees to the quay line.

- 11.2 In accordance with its statutory obligations and as provided by Law, it shall be the responsibility of the Ports Authority to dredge the harbor basin outside the Concession Area and to maintain clear channels for the safe passage of vessels to and from the Port.
- 11.3 The Ports Authority shall provide free of charge maintenance dredging services alongside the Phase 1 Facilities within the Concession Area in accordance with the provisions of Clauses 11.4 to 11.10 (inclusive) below. For the purpose of this Clause and Clauses 1.4 to 11.10 (inclusive) below "alongside" shall mean clear berths to a distance of fifty (50) meters from the quay line at ninety (90) degrees to the quay line.
- 11.4 The concessionaire acknowledges that maintenance dredging services and routine maintenance dredging services within the Concession Area are provided by the Ports Authority to the concessionaire free of charge and that the Ports Authority is not liable to the concessionaire or to any third party for any loss or damage arising from the depth alongside the Phase 1 Facilities becoming shallower by more than thirty (30) centimeters from a fourteen (14) meter depth, except in the circumstances set out in Clause 11.7.2(i).
- 11.5 The obligations of the Ports Authority to the concessionaire in respect of dredging shall extend only to the extent set out in Clauses 11.6 to 11.10 (inclusive) below.
- 11.6 Subject always to Clause 11.8 below, the Ports Authority shall:
  - a) carry out regular hydrographic surveys of water depths surrounding the harbor basin and the channel and alongside the Phase 1 Facilities once every six (6) months; and
  - b) within a reasonable time of being requested to do so by the concessionaire, commission any additional hydrographic surveys of water depths alongside the Phase 1 Facilities it being agreed that the costs of such additional hydrographic surveys shall be paid by the concessionaire; and
  - c) provide the concessionaire promptly with the results of the hydrographic surveys referred to in sub-clauses (a) and (b) above.

All hydrographic surveys alongside the Phase 1 Facilities will be carried out subject to the availability of berths free of ships and other equipment and personnel and in appropriate weather conditions. Timetables for hydrographic surveys shall be mutually agreed between the Ports Authority and the concessionaire.

11.7.1 Subject always to Clause 11.8 below, the Ports Authority shall provide:

- a) maintenance dredging services alongside the Phase 1 Facilities, within a reasonable time of such services being requested by the concessionaire. The concessionaire shall be entitled to make such request when any area alongside the Phase 1 Facilities within the Concession Area becomes shallower by more than thirty (30) centimeters from a fourteen (14) meter depth; and
- b) routine maintenance dredging in accordance with the maintenance dredging program agreed from time to time between the Ports Authority and the concessionaire, on condition that the relevant berths of the Phase 1 Facilities are available and free of vessels at the appointed time for carrying out such dredging services in each case to a dredged depth of fourteen (14) meters.

11.7.2 Subject always to Clause 11.8 below:

- (a) the Ports Authority shall provide routine maintenance dredging in accordance with the maintenance dredging program and maintenance dredging within seven (7) days of a reasonable request being made by the concessionaire for maintenance dredging;
- (b) if the Ports Authority fails to provide routine maintenance dredging or maintenance dredging as aforesaid in Clause 11.7.2 (a), the concessionaire shall give notice to the Ports Authority of its failure to perform either routine maintenance dredging or maintenance dredging as the case may be;
- (c) The Ports Authority shall within seven (7) days of the receipt of the notice respond to such notice and cause soundings to be taken to determine the water depth alongside the Phase 1 Facilities. The Ports Authority shall complete the sounding tests within seven (7) days of commencing the said tests;

- (d) if after the soundings are taken it is found that the depth of the water alongside the Phase 1 Facilities is not shallower by more than thirty (30) centimeters from the fourteen (14) meter depth, then the Ports Authority shall not be required to provide any maintenance dredging or routine dredging as the case may be alongside the Phase 1 Facilities, and in the case of routine maintenance dredging, the parties shall agree on a revised maintenance dredging program;
- (e) if, however, it is found after the soundings are taken that the depth alongside the Phase 1 Facilities is shallower by more than thirty (30) centimeters from a fourteen (14) meter depth, the Ports Authority shall within seven (7) days either:
  - (i) commence maintenance dredging or routine maintenance dredging as the case may be; or
  - (ii) if it is unable to commence such dredging within the said period of seven (7) days, give notice to the concessionaire of its inability to provide the dredging services and convene a meeting between the Ports Authority and the concessionaire within the said period of seven (7) days to determine the provision of such dredging services;
- (f) (f) at the meeting of the two parties convened as aforesaid in sub-clause (e) (ii) above, the Ports Authority may either:
  - (i) inform the concessionaire that it will obtain the services of a third party to provide the dredging services; or
  - (ii) request the concessionaire to obtain the services of a third party to provide such dredging services;
- (g) if the Ports Authority undertakes to obtain the services of a third party to provide the dredging services, then the Ports Authority shall ensure that the dredging commences and is completed within a period of sixty (60) days from the date on which the Ports Authority informs the concessionaire that the Ports Authority shall obtain the services of a third party to perform the dredging services;
- (h) if the Ports Authority does not provide the dredging services within

the period of sixty (60) days as aforesaid in sub-clause (g) above, the concessionaire shall be entitled without any further notice to obtain the services of a third party to provide the dredging services to a depth of fourteen (14) meters alongside the Phase 1 Facilities; services of a third party and completes the dredging, whichever comes first, the Ports Authority shall be liable for any direct damages caused to the concessionaire and users of the Phase 1 Facilities as a result of the area alongside the Phase 1 Facilities becoming or remaining shallower by more than thirty (30) centimeters from the fourteen (14) meter depth. This liability shall end on the sixtieth (60th) day and shall pass to the concessionaire whether or not the concessionaire has been able to obtain the services of a third party to provide the dredging services alongside the Phase 1 Facilities. Provided that such passing of liability shall be without prejudice to any accrued liabilities of the Ports Authority during the period mentioned in this sub-clause 11.7.2(i); and

- (i) Where the concessionaire becomes entitled to obtain the services of a third party to provide the dredging services as aforesaid in sub-clause (h) above, the Ports Authority shall bear the cost of such dredging services, properly incurred, provided to the concessionaire by the third party.

11.8 The concessionaire shall provide the Ports Authority with sufficient access and all other assistance as is necessary, including berths free of encumbrances and obstacles, to carry out surveys as provided in Clause 11.6 above and the dredging services provided in Clause 11.7 above. If the concessionaire fails to provide such access, assistance or unencumbered berths, the Ports Authority shall be discharged from performing the hydrographic surveys as provided for in Clause 11.6 and dredging services as provided for in Clause 11.7.

11.9 The services referred to in Clause 11.6(a) (hydrographic surveys) and Clause 11.7.1 (maintenance dredging and routine maintenance dredging services) shall be provided by the Ports Authority free of any charge or cost to the concessionaire.

## 12. FIRE SERVICES

12.1 In accordance with the provisions of the [country] Ports Authority Act, the Ports Authority shall be responsible for maintaining a fire service within the Port. Subject to any other provisions in this Agreement, the service

shall be maintained by the Ports Authority within the areas controlled by the Ports Authority and not in the Concession Area.

- 12.2 The concessionaire shall maintain a satisfactory fire service and maintain fire fighting equipment within the Concession Area at least to the minimum levels required by law and legal procedures established.
- 12.3 If requested by the concessionaire the Ports Authority may provide the following services to the concessionaire:
- (a) Advisory services in respect of fire prevention;
  - (b) training of the concessionaire employees in first aid and fire fighting; and
  - (c) Provision of ambulance and first aid services.

These services above-mentioned shall be provided by the Ports Authority on such charges and terms as may be determined by the Ports Authority in its sole discretion. The concessionaire shall make payment to the Ports Authority of all such charges for any of the aforesaid services rendered at the request of the concessionaire.

- 12.4 In the following circumstances and as the occasion demands the Ports Authority may in its sole discretion intervene anywhere within the Port, including the Concession Area at any time of day or night and if the circumstances so demand, without any request being made by, or notice given to, the concessionaire for the purpose of the:
- (a) provision of equipment and personnel for extinguishing major fires anywhere within the Port;
  - (b) provision of equipment and personnel for control and containment of shipboard fires; and
  - (c) provision of emergency services to assist in any fire-related accident.

If these services above mentioned are provided by the Ports Authority within the Concession Area or alongside the Phase 1 Facilities up to fifty (50) meters from the quay line (other than a ship board fire) or in respect of a fire originating from such areas or arising as a result of any action or omission of the concessionaire or any officer, employee, contractor or agent of the concessionaire, the Ports Authority shall be entitled to levy and recover charges from the concessionaire for the provision of such



services except in circumstances where the fire originated in the Concession Area owing to any act or default or negligence of the Ports Authority or its employees or agents.

- 12.5 In the case of ship board fire occurring in a ship berthed alongside the Phase 1 Facilities the Ports Authority shall be entitled to provide fire services as aforesaid in sub-clause 12.4 above, but in that event, unless the Ports Authority provides the services at the request of the concessionaire, the Ports Authority shall levy and recover charges directly from the owners of the ship or its agents and not from the concessionaire.
- 12.6 For the purpose of providing fire services for fires on board a ship alongside the Phase 1 Facilities, the Ports Authority shall be entitled to maintain a permanent presence in the Concession Area along with such fire fighting equipment and personnel as it may reasonably determine. The concessionaire shall provide such premises and such assistance as the Ports Authority may reasonably require for the purpose and shall also provide unhindered access to the Ports Authority to inspect the fire fighting readiness, equipment and personnel and preventive measures taken by the concessionaire.

### **13. ENVIRONMENTAL HAZARDS AND MARINE POLLUTION**

- 13.1 The concessionaire shall comply with the Law relating to the protection of the environment and the prevention of marine pollution and shall take all reasonable measures for the purpose of preventing any environmental hazards or marine pollution.
- 13.2 At the request of the concessionaire the Ports Authority may provide environment protection or marine pollution related services to the concessionaire on such charges and terms as may be determined by the Ports Authority. The concessionaire shall make payment of all such charges to the Ports Authority for any of these services rendered at the request of the concessionaire.

### **14. MAINTENANCE OF BREAKWATER**

The Ports Authority shall be solely responsible for all maintenance (including routine maintenance) of the Existing Superstructure (being the breakwaters of the Port in existence as at the date of signature of this Agreement), in accordance with Good International Practice and shall not levy any charges from the concessionaire for such maintenance.

## 15. OTHER SERVICES

- 15.1 At the request of the concessionaire, the Ports Authority may at its sole discretion undertake to provide any other services not specifically mentioned herein to the concessionaire, on such charges and terms as may be determined by the Ports Authority.
- 15.2 The concessionaire acknowledges that the Ports Authority has no obligation whatsoever to provide any services to the concessionaire other than those specifically determined as an obligation or responsibility of the Ports Authority under Law or under this Agreement and all other services will be provided by the Ports Authority only if requested by the concessionaire and on such charges and such terms and conditions as may be determined by the Ports Authority. The concessionaire shall make payment of all such charges to the Ports Authority for services rendered at the request of the concessionaire.

## 16. LIABILITY OF THE PARTIES

16.1 Subject to the provisions of Clauses 16.2, 16.3 and 20:

- a) neither party shall be liable on any basis whatsoever to the other for any loss, cost, liability or expense (loss") arising from any breach of this Agreement other than for loss directly resulting from the breach and which was reasonably foreseeable as likely to occur in the ordinary course of events and only in respect of:
- (I) physical damage to the other's property; or
  - (ii) the liability in law of the other to any other person for loss in respect of physical damage to the property of such person; and
- b) neither party shall in any circumstances be liable in respect of any breach of this Agreement to the other for:
- (i) any loss of profit, loss of revenue, loss of contract, loss of goodwill or increased cost of working; or
  - (ii) any indirect or consequential loss; or
  - (iii) except as provided in Clause 16.1(a)(ii), loss resulting from the liability of the other to any other person.

16.2 The amount or amounts for which each party may be liable to the other pursuant to Clause 16.1(a) in respect of one event or circumstance constituting or resulting in a breach by that party of this Agreement shall not exceed United States dollars [\_\_\_\_\_]

16.3 Nothing in this Clause shall affect either party's liability under the Concession Agreement or either party's liability to pay charges or compensation expressly provided for in the Concession Agreement.

#### **16. APPLICABLE LAW**

This Agreement is governed by and shall be construed in accordance with the laws of [the country].

#### **17. DISPUTE RESOLUTION**

In the event of any dispute arising between the parties concerning the interpretation of this Agreement or any matter arising out of the operation of this Agreement or the provision of Port Services under this Agreement and matters related thereto and if such dispute relating to the provision of such services or matters related thereto cannot be resolved in a manner satisfactory to the concessionaire by the authorized officer of the Ports Authority carrying overall responsibility for the provision of such Port Services, the parties agree that they shall take steps in accordance with the terms of the Concession Agreement as a means of resolving such disputes.

#### **19. FORCE MAJEURE**

19.1 A party (the "**Affected Party**") shall be relieved from liability (except for accrued payment obligations referred to in and in accordance with clause 22 of the Concession Agreement which shall remain payable in all circumstances) for any delay or failure in the performance of an obligation under this Agreement which is caused by or results from Force Majeure for so long as the Force Majeure or the inability to perform continues.

19.2 The Affected Party shall use its reasonable efforts to mitigate and overcome the effects of the occurrence of Force Majeure in order to maintain or resume performance provided that no party shall be required under this provision to settle any strike or other labor dispute under terms it considers to be unfavorable to it.

19.3 If Force Majeure occurs, the Affected Party shall notify the other as soon as reasonably practicable and in any event within seven (7)

Business Days after the Affected Party has reasonably determined that the occurrence of the Force Majeure might affect its performance in a material way of:

- a) the occurrence and nature of the Force Majeure;
- b) its expected duration (so far as can be reasonably assessed);
- c) the obligations which cannot be fully performed as a result; and
- d) the proposed mitigating action.

The Affected Party shall keep the other fully informed of developments, including performance of its mitigation steps.

- 19.4 In this Agreement, "**Force Majeure**" means any event or circumstance or combination of events or circumstances whenever occurring and referred to in clauses 22.4 and 22.5 (but subject to clause 22.6) of the Concession Agreement.

## 20. TERMINATION

- 20.1 This Agreement shall be terminated either by mutual agreement between the Ports Authority and the concessionaire or upon the termination of the Concession Agreement.
- 20.2 The termination of this Agreement as aforesaid in Clause 20.1 above shall not prejudice the rights or liabilities of the parties already accrued or monies that have become payable prior to the termination of this Agreement.

## 21. INDEMNITIES

- 21.1 Subject to Clause 16, the concessionaire shall on demand hold harmless and indemnify the Ports Authority and keep the Ports Authority so indemnified against each and every liability which the Ports Authority may incur to any person whatsoever and against any claims, demands, proceedings, damages, costs, losses, obligations and liabilities and/or expenses sustained, incurred or payable by the Ports Authority to the extent in each case that the same arises by reason of any negligence or default of the concessionaire or of its officers, employees, servants, agents or subcontractors in the performance of any of the concessionaire's obligations under this Agreement except to the extent that the same results from the negligence or default of the Ports Authority.

21.2 Subject to Clause 16, the Ports Authority on demand shall hold harmless and indemnify the concessionaire and keep the concessionaire so indemnified against each and every liability which concessionaire may incur to any person whatsoever and against any claims, demands, proceedings, damages, costs, losses, obligations and liabilities and/or expenses sustained, incurred or payable by the concessionaire to the extent in each case that the same arises by reason of any negligence or default of the Ports Authority or of its officers, employees, servants, agents or sub contractors in the performance of any of the Ports Authority's obligations, under this Agreement except to the extent that the same results from the negligence or default of the concessionaire.

## **22. LANGUAGE**

This Agreement is expressed in English and any variations, waivers, notices or other written matters arising from the operation of this Agreement shall be expressed in English.

## **23. WAIVER AND VARIATION**

A provision of or a right created under this Agreement may not be waived except in writing signed by the party granting the waiver, or varied except in writing signed by the parties.

## **24. COUNTERPARTS**

This Agreement may be signed in any number of counterparts with the same effect as if the separate signatures were on the same agreement.

## **25. SEVERABILITY**

If any provision of this Agreement shall be or be determined to be illegal, invalid, void or voidable the legality or validity of the remainder of this Agreement shall not be affected and the remainder of this Agreement shall continue in full force and effect.

## **26. STRICT COMPLIANCE**

In the absence of express provision to the contrary, failure or omission by a party to this Agreement at any time to enforce or require strict or timely compliance with any provision of this Agreement or any related document shall not impair the ability of that party to exercise the rights and remedies it otherwise has in respect of a breach of any such provision.

## 27. LEGAL RELATIONSHIP

Nothing contained in this Agreement shall be construed so as to constitute any party to this Agreement the partner, agent or representative of the other or to create any trust or partnership with any other person or company or commercial entity for any purpose whatsoever.

## 28. ASSIGNMENT OF RIGHTS AND OBLIGATIONS

No party may assign or transfer its rights and obligations under this Agreement other than with the prior written consent of the other party or otherwise, in accordance with the terms of the Concession Agreement.

## 29. NOTICES

The notice provisions set out at clause 46 of the Concession Agreement shall apply to this Indenture.

IN WITNESS WHEREOF the parties have executed this Agreement on the day and year first above written.

The Common Seal of [the country] Ports Authority is affixed hereto in the presence of: \_\_\_\_\_

And \_\_\_\_\_

Witnessed by:  
(Signature) (Name)

The Common Seal of the concessionaire is affixed hereto in the presence of:

And \_\_\_\_\_

Witnessed by:  
(Signature) (Name)

Initialed by:

On this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.