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**DATED**

The [\_\_\_\_\_] Ports Authority

- and -

The Concessionaire [\_\_\_\_\_]

**CONCESSION AGREEMENT**

For [\_\_\_\_\_] a BOT Container Terminal the Port of [\_\_\_\_\_]

## CONCESSION AGREEMENT

FOR [ ] BOT CONTAINER TERMINAL dated the [ ] day of [ ]

BETWEEN:

- (1) The [ ] Ports Authority, a statutory corporation established in the Republic of [ ] by the [ ] Ports Authority Act No. [ ], as amended (the "Ports Authority"); and
- (2) The Company [ ], a limited liability company incorporated in the Republic of [ ] whose company registration number is [ ] ("The concessionaire")

**Comment [ID1]:** It would be usual for a defined term of this importance to have an upper case "C"

WHEREAS:

The Ports Authority has determined it to be appropriate, for the purpose of or in connection with, discharging its statutory functions, to enter into this Agreement, which describes the provisions for the implementation of the Project (as defined below).

FOR GOOD AND VALUABLE CONSIDERATION, THE SUFFICIENCY OF WHICH IS ACKNOWLEDGED, IT IS HEREBY AGREED:

### 1. Interpretation

This Agreement shall be interpreted according to schedule 1.

### 2. Scope of the project

#### *Concession grant*

- 2.1 Subject to the provisions of this Agreement, THE CONCESSIONAIRE shall have the exclusive right and obligation to finance, design, construct, equip, test, commission, operate and maintain the Phase 1 Facilities.

**Comment [ID2]:** The whole of the defined term is in upper case here and in clause 2.2. In drafting it is better to have consistency.

#### *Limited recourse*

- 2.2 Subject to the provisions of this Agreement, THE CONCESSIONAIRE shall perform its obligations under clause 2.1, regardless of whatever circumstances may be encountered and at its own cost and risk, without recourse to the Ports Authority except to the extent expressly described in this Agreement.

#### 2.3 General performance standards

- a) the provisions of this Agreement;
- b) all applicable Laws;
- c) all Identified Permits and other Consents;
- d) Good International Practice;

and in particular sub-clauses (a) to (d) inclusive above shall include an obligation to ensure at all times during the term of this Agreement that concessionaire takes reasonable measures to avoid death or personal injury, loss or damage to property or damage to the environment in the course of the concessionaire performance of this Agreement.

**Comment [ID3]:** As the only previous wording in this Clause has been sub paragraphs (a) to (d) this drafting is hard to follow as outside the "in particular" what else is there? It may be that "General performance standards is not the title to this clause-some clauses have titles and some do not-but then the expression would seem to be very wide if it forms part of the clause and not the title.

- 2.4 The concessionaire shall ensure, throughout the Concession Term, that the standards of performance of the Phase 1 Facilities and the fixtures, Plant and other assets which form part of the Phase 1 Facilities satisfy internationally accepted standards for a world class, modern port the main function of which is to be a central transshipment point in a container transport hub, taking into account local conditions in the Port.

**Comment [ID4]:** Should this read "concessionaire's performance"?

### **Phase 2 Facilities**

- 2.5 This provision describes the arrangements for offering the concessionaire the opportunity to build the four Outer Berths:

- (a) it is envisaged that the Government, acting through its instrumentalities, will commission a feasibility study to build the Breakwater in the Port of [ ] so as to develop the Phase 2 Facilities;
- (b) the Ports Authority has no obligation to do anything until and unless the Government decides to build the Breakwater,
- (c) the decision of the Government either to build or not to build the Breakwater shall be communicated on behalf of the Government by the Ports Authority to the concessionaire in writing;
- (d) if the Government decides to build the Breakwater, the concessionaire and the Ports Authority within three (3) months of communication of the decision of the Government to the concessionaire shall commence negotiations with one another to agree on technical, commercial and financial terms and conditions for the Phase 2 Facilities (the "Terms");
- (e) if the Terms are agreed in writing between the Ports Authority and the concessionaire, subject to the approval of the Lenders, either,
  - (i) the Terms shall be incorporated in a new concession agreement and related project documentation between the Ports Authority and the concessionaire or an affiliate of the concessionaire to be approved in advance by the Ports Authority, or
  - (ii) this Agreement shall be extended, supplemented or otherwise amended as deemed necessary to incorporate such Terms to provide for the terms of the Phase 2 Facilities as an integral part of the Phase 1 Facilities and in particular such writing shall provide that: (aa) all seven berths shall be operated as an integral

**Comment [ID5]:** This could be more of a challenge than initially thought. The Lenders will have security over the income stream and other assets and will not want to share their security with lenders to Phase 2. There is no certainty that the Phase 1 Lenders will want to lend on Phase 2 and the economy at the time may mean that the terms being offered by the market are not as favourable as those applying to the funding for Phase 1. On other projects the financing for subsequent stages has been raised at the same time as the funding for the first stage but having regard to the uncertainty of Phase 2 going forward the mechanism suggested is a sensible solution.

- unit; and (bb) capital dredging alongside the four (4) Outer Harbour berths to a width of fifty (50) meters from the quay wall to a dredged depth of seventeen (17) meters;
- (f) if the Terms are not agreed in writing between the Ports Authority and the concessionaire, either party shall have the right to request non-binding mediation;
- (g) The procedure for starting mediation under this clause 2.5 shall be as follows:
- (i) the party requesting a mediation shall send a notice to that effect to the other party;
  - (ii) within ten (10) Business Days of the giving of such notice, the parties shall agree and appoint a mediator,
  - (iii) if the parties fail to so appoint a mediator, either party may within a further ten (10) Business Days request the International Centre for Expertise of the International Chamber of Commerce (the "ICC Centre") within one (1) calendar month of the request to suggest to the parties the name of a person to act as mediator on the basis that, if it becomes apparent to the ICC Centre that the parties are unwilling or unlikely to agree to that person within that month, the ICC Centre shall prescribe that person as mediator,
  - (iv) for the purpose of this sub-clause (g), the mediator shall be:
    - (aa) a person trained in mediation with an established and reputable mediation organization;
    - (bb) a person with at least five (5) years experience of being a mediator,
    - (cc) a person who shall have mediated at least ten (10) disputes;
    - (dd) a fluent English speaker;
    - (ee) a person who is not necessarily a lawyer or an expert in the construction or any port/maritime industry;
  - (v) the parties shall bear the cost (including fees and expenses) of the mediator equally and shall enter into any agreement with the mediator which the mediator reasonably requires as a condition of his appointment, each party shall bear its own costs;
  - (vi) it is understood that the mediation shall be conducted on the basis that the mediator cannot and shall not seek to impose any

agreement on the parties and that neither party will be bound by the discussions that make up the mediation unless any agreement is reduced into writing and signed by the parties;

- (vii) the mediation shall terminate on the earlier of (aa) the period referred to in sub-clause (h) below; and (bb) the date on which the mediator notifies the parties in writing that the mediation is at an end (in circumstances where the mediator in his absolute discretion, at the request of one of the parties, considers that it is futile to continue the mediation process);
- (h) The mediation process shall last for no longer than six (6) months from the date of the appointment of the mediator, subject always to the parties' right to agree between themselves in writing an extension of time for the mediation process;
- (l) unless an extension of time for negotiations is agreed in writing between the parties, the period of negotiations shall not exceed a period of forty two (42) months from the commencement of negotiations; subject to the provisions of sub-clause (k), mediation under this clause shall not commence until after the expiry of such forty two (42) months' period (as the same maybe extended by agreement of the parties) and either party may call for mediation during the seven (7) Business Days which follow the expiry of such period;
- (j) If the parties are unable to agree on the Terms then the Ports Authority shall have the right to exercise a buy out of the Phase 1 Facilities (the "Buy Out Option") within a period of twelve (12) months from the earliest to occur of:
  - I. the date which is forty two (42) months and seven (7) Business Days after the commencement of negotiations provided that a mediation is not convened in accordance with sub-clause (g);
  - II. the date which is seven (7) Business Days following the date on which one (1) party serves a Notice of Irretrievable Breakdown of Negotiations on the other in accordance with sub-clause (k) and the other party elects not to call for mediation within that period of seven (7) Business Days;
  - III. subject always to the provisions of sub-clause (h), the date which is six (6) months following the date on which the mediator is appointed upon one party serving a Notice of Irretrievable Breakdown of Negotiations on the other in accordance with sub-clause (k) and the other party electing to call for mediation;
  - IV. the date on which the mediator notifies the parties that the mediation is at an end in accordance with sub-clause (g)(vii)(bb) above;

- (k) for the purposes of this clause 2.5, negotiations between the parties shall be taken to have irretrievably broken down if at any time one party serves on the other a Notice of Irretrievable Breakdown of Negotiations; upon service of such a notice by one party, the other party has a period of seven (7) Business Days from the date of service of such notice to determine whether or not it wishes to call for mediation. If the other party so wishes to call for mediation, it shall make a request for non-binding mediation pursuant to the procedure set out in sub-clause (g); neither party shall be entitled to serve a Notice of Irretrievable Breakdown of Negotiations after expiry of the period stipulated in sub-clause (g)(vii) unless the parties have agreed an extension of time for the period of negotiations, in which event a Notice of Irretrievable Breakdown of Negotiations may be served prior to expiry of such agreed extension;
- (l) the Ports Authority shall pay the price payable upon the exercise of the Buy Out Option (the "Buy Out Price") to the concessionaire in full no later than ninety (90) days from the communication of its decision to exercise the Buy Out Option to the concessionaire provided that the Ports Authority shall be entitled to deduct from the Buy Out Price any undisputed sums owed by the concessionaire to the Ports Authority under this Agreement; for purposes of this sub-clause (l) a payment obligation (or part thereof) is deemed undisputed if:
- (i) such obligation (or part thereof) is acknowledged by the concessionaire to be due and payable; or
  - (ii) a final award requiring payment to be made by the concessionaire in respect of such obligation (or part thereof) is rendered by an arbitral tribunal under clause 48; to avoid doubt, title to the Phase 1 Facilities shall not pass to the Ports Authority and this Agreement shall not terminate until the date on which the Buy Out Price, subject to the deductions contemplated in this sub-clause (l), is received in full by the concessionaire, provided that, if payment of the Buy Out Price is not made in full by the Ports Authority prior to the expiry of the ninety (90) days aforementioned, the Buy Out Option shall lapse and the Ports Authority shall forfeit any right to acquire the Phase 1 Facilities under this clause 2.5;
- (m) the Buy Out Price shall be a sum equivalent to one hundred & ten percent (110%) of the Termination Compensation Base Case and shall be payable, subject to the deductions contemplated by sub-clause (l) above, by the Ports Authority to the concessionaire in accordance with the instructions given by the concessionaire following the communication by the Ports Authority of its decision to exercise the Buy Out Option;

**Comment [ID6]:** Whilst this is probably a fair outcome there is a risk that if the Ports Authority believes it is entitled to a sum which is disputed then it will have to bring proceedings but there will be little interest for the Sponsors keeping the Concessionaire extant during the period of the proceedings as it will have no income.

- (n) on exercise of the Buy Out Option the provisions of clauses 35.1 to 35.8 and 35.13 shall apply mutatis mutandis save that in relation to the provisions of clause 35.8, the Ports Authority shall at its option either offer employment to all persons who are officers or employees of the concessionaire as at the date of exercise of the Buy Out Option or pay the costs of terminating the employment of such persons provided that in any event the concessionaire shall remain fully and solely responsible for any expatriate staff where the said Buy Out Option is exercised after seven (7) years of the Concession Term have elapsed;
- (o) if the Terms are not agreed between the Ports Authority and the concessionaire as contemplated above, the Ports Authority agrees that any contract it enters into with a third party for the development of the Outer Berths shall not be on terms (including, but not limited to, any lease rentals and/or per TEU royalty fees) which are in aggregate materially more favorable than those offered to the concessionaire and that all four (4) Outer Berths would be contracted to one (1) party in one line as a single package;
- (p) the concessionaire agrees to grant the Ports Authority the right to exercise the Buy Out Option in consideration of the representation made by the Ports Authority to the concessionaire that the Government will use its reasonable efforts to build the Breakwater within the time frame that the Ports Authority may have indicated to the concessionaire during the negotiations of the Terms and that if the Ports Authority exercises such Buy Out Option, the Government will in fact take all reasonable steps to honor the representation regarding the construction of the Breakwater that may have been made to the concessionaire by the Ports Authority during such negotiations; the Ports Authority acknowledges and recognizes that in negotiating the Terms the concessionaire will have relied on this representation on the basis that it will not be materially varied other than for good cause; and
- (q) if no decision is made or communicated to the Ports Authority by the Government regarding whether or not to build the Breakwater, all rights and obligations of the Ports Authority and the concessionaire under this clause 2.5 shall cease seventy five (75) months after the date of Handover.

2.6 Regardless of whether the Ports Authority enters into a contract with the concessionaire for the Outer Berths, the parties acknowledge that neither the concessionaire nor any of the Sponsors has any right to any further berths in the Outer Harbour. It is the current intention of the Ports Authority that THE CONCESSIONAIRE and the Sponsors shall be entitled to participate in any open tender competition for those further berths in the Outer Harbour, but it is recognized that, depending, amongst other things, upon Government policy and

market conditions from time to time, at some time it may be decided that the concessionaire and the Sponsors should not be awarded any further berths.

### **3. Duration**

#### ***Coming into force***

- 3.1 The provisions of this clause 3 and of clause 6 (warranties), clause 22 (force majeure) (only for the purpose of clause 3.3), clause 41 (confidentiality), clause 48 (applicable law and dispute resolution) and such other provisions of this Agreement as may be necessary to refer to in order to give meaning and effect to those clauses shall come into force on the date of this Agreement.

#### ***Phase I Conditions Precedent***

- 3.2 Except as described in clause 3.1, the rights and obligations of the parties under this Agreement are conditional upon and shall not come into force until, satisfaction or waiver of all of the Phase 1 Conditions Precedent.
- 3.3 The "Phase 1 Effective Date" shall be the date on which the last outstanding Phase 1 Condition Precedent has been satisfied or waived. If the Phase 1 Effective Date is not achieved within six (6) months (or such other period as the parties may agree in writing) after the date of this Agreement (provided that in either case such period shall be extended for an additional period not exceeding six (6) months due to Force Majeure), then unless the parties otherwise agree in writing, this Agreement shall lapse and cease to have any further force or effect and the parties shall be released from all obligations under this Agreement (except for any rights or liabilities which have accrued before that time).
- 3.4 The parties may in writing waive all or any of the Phase 1 Conditions Precedent. Subject to such waiver:
- (a) The concessionaire shall use all reasonable efforts to ensure that the Phase 1 Conditions Precedent contained in schedule 5; and
  - (b) the Ports Authority shall use all reasonable efforts to ensure that the Phase 1 Conditions Precedent contained in schedule 5; are fulfilled as soon as practicable and in any event by not later than six (6) months after the date of this Agreement (as such period may be extended as provided in clause 3.3).
- 3.5 the concessionaire shall keep the Ports Authority fully informed of and consult with the Ports Authority concerning the status of concessionaire's efforts to satisfy the Phase 1 Conditions Precedent and in particular.
- a) shall provide a written report summarizing all material matters relevant to understanding the then current status of its efforts as soon as reasonably practicable after receipt of a reasonable request from the Ports Authority;

- b) immediately notify the Ports Authority in writing of the occurrence of any event or circumstance which might reasonably be expected to prevent satisfaction or delay satisfaction until after the anticipated Phase 1 Effective Date, of any of the Phase 1 Conditions Precedent
- 3.6 The provisions of clause 3.5 shall apply mutatis mutandis to the Ports Authority as regards that Phase 1 Conditions Precedent requiring fulfillment by the Ports Authority.

**Duration**

- 3.7 This Agreement shall continue in force until:
- (a) it lapses according to this clause 3;
  - (b) it is terminated upon the Ports Authority paying in full the Buy Out Price as provided in clause 2.5 (I);
  - (c) the thirtieth (30<sup>th</sup>) anniversary of the date of Handover, unless the Government decides to build the Breakwater and the Ports Authority and THE CONCESSIONAIRE enter into an agreement by which the concession for the four (4) Outer Berths is awarded to the concessionaire, in which event such period shall be extended to:
    - (i) the thirty-fifth (35<sup>th</sup>) anniversary of the Commissioning Date for the third Inner Berth; or
    - (ii) the twenty-fifth (25<sup>th</sup>) anniversary of the Commissioning Date for the fourth Outer Berth; or
    - (iii) the thirty-first (31<sup>st</sup>) anniversary of the date of Handover of the Concession Area relating to the four (4) Outer Berths to the concessionaire by the Ports Authority, whichever occurs first (the above together comprising the "Operation Period") and expiry at the end of the Operation Period shall be automatic unless the Operation Period is extended in accordance with the terms of this Agreement; or
  - (d) It is terminated according to clauses 30 to 33 (termination); whichever occurs first and that period shall be referred to as the "Concession Term".

**4. Exclusivity**

- 4.1 Each of:
- (a) the concessionaire;
  - (b) any and all subsidiaries or subsidiary undertakings of the concessionaire;

- (c) the Sponsors;
- (d) any and all subsidiaries or subsidiary undertakings of the Sponsors;
- (e) the [\_\_\_\_\_] Company ("The company "); ' and
- (f) Any and all subsidiaries or subsidiary undertakings of The Company; shall not individually or in aggregate have a Significant Port Interest whilst the restrictions in clauses 4.3 and 4.4 apply.

4.2 A "Significant Port Interest" means for the purposes of clause 4.3:

- a) being a provider of management services in, about or relating to the running, operation or maintenance of a Rival Port or any part thereof (including any terminal(s) or berth(s) within such Rival Port); or
- b) being legal or beneficial owner or having Control of more than ten percent (10%) of the issued equity capital of any company which owns, operates, manages or provides services to a Rival Port or any part thereof (including any terminal(s) or berth(s) within such Rival Port) and for the purposes of clause 4.4:
- c) being legal or beneficial owner or having Control of more than ten percent (10%) of the issued equity capital of any company which owns, operates, manages or provides services to a Rival Port or any part thereof (including any terminal(s) or berth(s) within such Rival Port); and
- d) the aggregate capacity of the berths owned and/or operated and/or managed and/or serviced in any individual Rival Port is [US\_\_\_] or more; and
- e) At least forty per cent (40%) of e capacity of referred to in-(d) above is used for Transshipment cargo.

4.3 The restriction on taking a Significant Port Interest within the meaning of clause 4.2(a) to (b) shall apply:

- (a) during a period of two (2) years from Handover, and
- (b) within an area comprising [\_\_\_\_\_]

4.4 The restriction on taking a Significant Port Interest within the meaning of clause 4.2(c) to (e) shall apply:

- (a) during the Initial Period; and
- (b) within an area comprising [\_\_\_\_\_]

- 4.5 Nothing in clauses 4.2 to 4.4 shall prevent any of the parties listed in clause 4.1 retaining those Significant Port Interests held by such parties as at the date of this Agreement in respect of Rival Ports located in the areas described in clauses 4.3(b) and 4.4(b) provided the Significant Port Interests concerned have been fully, accurately and completely disclosed to the Ports Authority in writing prior to execution of this Agreement.
- 4.6 During a period of five (5) years from the date of Handover, the Ports Authority shall neither directly nor indirectly commence (nor grant a right to any third party to commence) the operation of new container terminals aggregating more than [US\_\_\_\_\_]per annum capacity in each of:
- (a) the Port;
  - (b) outside the Existing Superstructure; or
  - (c) In any other port in [\_\_\_\_\_].

To avoid doubt, the aggregate limit of [US\_\_\_\_\_] capacity shall apply separately and not cumulatively to each of sub-clauses (a) to (c) above.

- 4.7 Nothing in this clause 4 shall prevent either
- (a) any of the parties listed in clause 4.1; or
  - (b) the Ports Authority;
- from undertaking any technical, feasibility or other studies and/or instituting any tender competition or undertaking other preparatory work and/or negotiating and/or signing any agreement in relation to the operation of new container terminals or from construction of any such terminals.
- 4.8 The provisions of this clause 4 are subject to any direct agreement between the Ports Authority and the Lenders concerning, amongst other matters, the exercise of the Lenders' security rights and the appointment of a substitute operator of the Phase 1 Facilities.]

## **5. Establishment of the concessionaire as the project company**

### ***Single purpose vehicle***

- 5.1 Subject to clause 2.5, during the Concession Term, the only business of the concessionaire shall be financing, designing, building, testing and commissioning the Phase 1 Facilities and the Passenger Berth and equipping, operating and maintaining the Phase 1 Facilities pursuant to this Agreement and matters incidental thereto (the "Project"). The provisions of this clause 5.1 shall not prevent the concessionaire from establishing a wholly owned subsidiary or subsidiaries to conduct all or part of its business subject to and to the extent consistent with the other provisions of this Agreement and provided always that

such subsidiary or subsidiaries shall be subject to and comply with all the terms and conditions of this Agreement applicable to the concessionaire.

### **Project Documents compliance**

5.2 The concessionaire shall fulfill all its obligations under all of the Project Documents and except to the extent expressly permitted by other provisions of this Agreement shall:

- (a) not itself terminate nor allow grounds (within its control) to exist which would entitle other parties to terminate any Project Document;
- (b) not make nor agree to any material variation of any Project Document (except that this provision shall apply to the Building Contract only to the extent of provisions enabling its assignment to the Ports Authority and the implementation of the Collateral Warranty from the Builder);
- (c) in so far as is within its control, use best efforts to prevent the failure of performance by any party to a Project Document (with the exception of the Ports Authority or any other Authority) which would have the effect of causing the concessionaire to breach its obligations under this Agreement;
- (d) not waive performance by any other party to a Project Document which (but for such waiver) would result in a material breach by that party of such Project Document, nor acquiesce in any material breach of or failure of any of that party's obligations under a Project Document
- (e) not enter into any agreement or document (or do; or fail to do, any act) which would materially adversely affect, the performance of the concessionaire under any Project Document; unless the relevant act, failure to act, agreement or document has been approved by the Ports Authority. If any such approval is given, the concessionaire shall deliver to the Ports Authority a conformed copy of each agreement or document (or, where any such matter is not made in writing, a true and complete written record of the matter), within ten (10) Business Days of the date of the act or agreement or the execution or creation of the agreement or document, in each case certified as a true copy by an officer of the concessionaire and such agreement or document, as approved, shall be deemed to be a Project Document for the purposes of this clause.

**Comment [ID7]:** This could give rise to double jeopardy. Not only will the Concessionaire be liable under the project Agreement to the counter-party to the agreement but it will also be liable under this Agreement. Usually the provision would be drafted on the basis that the Concessionaire will so perform its obligations under and will cause the counter-parties ( other than the Ports Authority and Government) to the Project Agreements to so perform their obligations under the Project Agreements so as to avoid a breach of this Agreement.

### **Project Financing**

5.3 The Ports Authority and the concessionaire acknowledge that the construction of the Phase 1 Facilities and the Passenger Berth will require financing by the Lenders. To facilitate compliance with the Phase 1 Conditions Precedent, the Ports Authority is willing to enter into the Lenders Direct Agreement with the

Lenders, provided that only one Lenders Direct Agreement shall be effective at any time. The Ports Authority agrees to negotiate in good faith during the period commencing on the date of this Agreement until the Phase 1 Effective Date regarding the terms of such Direct Agreement as may be reasonably required by the Lenders in connection with such financing, including terms to enable the Lenders to exercise their rights and remedies under the Financing Documents.

#### **Lenders security**

5.4 Without prejudice to generality of the provisions of clause 5.3, for the sole purpose of financing its implementation of the Project and the fulfillment of its obligations under the Project Documents, the concessionaire may assign, by way of security, the benefit of, or its interest in, this Agreement and any of the other Project Documents, according to the requirements of any of the Financing Documents and create other forms of security over any Plant, insurances, Collateral Warranty, or other property rights forming part of its interest in the Project in favor of any Lender, only, provided that:

- (a) the Lenders shall rank ahead of royalty and lease rental payments in case of Force Majeure under clauses 22.5(b) and (c); and
- (b) The Lenders and the Ports Authority shall rank **pari passu** in all other cases.

**Comment [ID8]:** This will mean that in order to rank pari passu the Port Authority will probably need to be a party to the Common Terms Agreement or other Inter- Creditor Agreement between the Lenders.

5.5 The concessionaire shall be entitled to create over its assets:

- (a) an encumbrance which (i) arises out of title retention provisions in a supplier's standard conditions of supply of goods which are acquired by the concessionaire in the ordinary course of its business and (ii) applies only to the goods so supplied;
- (b) rights of set off or liens arising solely by operation of law in the ordinary course of business; and
- (c) any Security Interest for the purpose of or in connection with the securing of working capital facilities provided to the concessionaire in the ordinary course of its business provided that the total extent of liability arising upon such security shall not exceed the lower of the Termination Compensation payable to the concessionaire or 40% of the net book value of the assets of the concessionaire. The concessionaire shall always procure the discharge of Security Interests upon termination of this Agreement.

The concessionaire agrees that where a Security Interest within the meaning of this sub-clause remains un-discharged within ninety (90) days of termination of this Agreement, then, in the absence of notice from the concessionaire that such Security Interest is contested by the concessionaire in good faith, the Ports Authority shall be entitled to

discharge such Security Interest on behalf of the concessionaire. At any time after all sums due and owing by the concessionaire to the Lenders under the Financing Documents shall have been paid in full, the Ports Authority shall be entitled to retain any sum required to discharge such Security Interest from the Termination Compensation, Buy Out Price and Transfer Price otherwise payable by it to the concessionaire; or at any time be entitled to recover any amount so disbursed from the concessionaire together with interest at the Applicable Interest Rate. The concessionaire shall pay such sums to the Ports Authority without set-off, deduction or counterclaim. As between the concessionaire and the Ports Authority, the sums paid by the Ports Authority shall be conclusive of the amount required to discharge the said Security Interest. The Ports Authority shall be under no duty to enquire as to any matters concerning the validity, enforceability or amount secured by such Security Interest.

- 5.6 Except as permitted by clauses 5.4 and 5.5 or as otherwise permitted in writing citing this clause by the Ports Authority upon the application of the concessionaire, the concessionaire shall not create or permit the creation of any Security Interest over the benefit of, or its interest in, this Agreement or over any property which forms part of the Phase 1 Facilities or over any rights or interests in any of the Project Documents.

**Comment [ID9]:** Might be worthwhile considering provision to allow for finance leasing for equipment and the concept of transfer of the lease is allowed for under the termination provisions.

## 6. Warranties

- 6.1 In consideration of each party agreeing to enter into this Agreement:
- (a) the concessionaire represents and warrants to the Ports Authority in the terms of the concessionaire Warranties; and
  - (b) The Ports Authority represents and warrants to the concessionaire in the terms of the Ports Authority Warranties.
- 6.2 Except where a Warranty provides otherwise, the Warranties are given on the date of this Agreement and are deemed to be repeated daily up to and including the Phase 1 Effective Date, with reference to the facts then existing.
- 6.3 The concessionaire acknowledges that the Ports Authority has relied on the concessionaire Warranties when entering into this Agreement. The Ports Authority acknowledges that the concessionaire has relied on the Ports Authority Warranties when entering into this Agreement.
- 6.4 Up to and including the Phase 1 Effective Date the concessionaire will immediately disclose in writing to the Ports Authority:
- (a) any fact or circumstance which may become known to it which is a breach of the concessionaire Warranties; and

- (b) Any fact or circumstance which can reasonably be expected to be likely (whether with the passing of time, giving of a notice, fulfillment of a condition or in some other way) to cause or constitute a breach of the concessionaire Warranties.

6.5 Up to and including the Phase 1 Effective Date, the Ports Authority will immediately disclose in writing to the concessionaire:

- (a) any fact or circumstance which may become known to it which is a breach of the Ports Authority Warranties; and
- (b) Any fact or circumstance which can reasonably be expected to be likely (whether with the passing of time, giving of a notice, fulfillment of a condition or in some other way) to-cause or constitute a breach of the Ports Authority Warranties.

## 7. Employment

The provisions of schedule 7 shall apply.

## 8. Asset Injections

8.1. On the Phase 1 Effective Date, the Ports Authority shall transfer and the concessionaire shall accept the transfer of the three (3) gantry cranes currently located on the [\_\_\_\_\_] (the "Cranes") on the following terms and conditions:

- (a) the transfer value of the Cranes will be their market value determined, in the absence of agreement by the parties, by an Expert, at least sixty (60) days prior to the anticipated Phase 1 Effective Date;
- (b) the Cranes shall be transferred to the concessionaire in their then current state and condition, without any express or implied terms, conditions or other assurances as to merchantability, fitness for purpose or compliance with description;
- (c) unencumbered title to the Cranes shall be transferred by the Ports Authority;
- (d) any and all manufacturers' or repairers' warranties and such maintenance contracts relating to the Cranes as may be required by the concessionaire, insofar as they are assignable, shall be transferred by the Ports Authority to the concessionaire;
- (e) the concessionaire shall apply the transfer value of the Cranes towards half of the total subscription price payable in respect of the Ports Authority's Shares and shall bear the stamp duty payable on the issue of the Ports Authority's Shares;

**Comment [ID10]:** It might be better to address this chronologically. The appointment and decision of the Expert might better appear in Clause 3.

- (f) if the transfer value of the Cranes is less than half of the total subscription price payable in respect of the Ports Authority's Shares, then the Ports Authority shall still be entitled to seven and one half per cent (7.5%) of the initial equity of the concessionaire at no extra cost to the Ports Authority; and
- (g) If the transfer value of the Cranes exceeds half of the total subscription price payable in respect of the Ports Authority's Shares, the concessionaire shall pay the excess to the Ports Authority within three (3) months of Handover.

## **9. Design and construction**

### ***Functional requirements***

- 9.1 The concessionaire shall design and construct the Phase 1 Facilities and the Passenger Berth to comply with the functional requirements of the Ports Authority set out in part 1 of schedule 8 (the "Functional Requirements")

### ***Design solution***

- 9.2 Without affecting the concessionaire's obligation under the preceding provision, the concessionaire shall comply with the design and construction methods described in part 2 of schedule 8 (the "Design Solution"). The concessionaire represents warrants and undertakes that:
- (a) the Design Solution as set out in part 2 of schedule 8 satisfies the Functional Requirements of the Phase 1 Facilities;
  - (b) if the concessionaire determines with the consent of the Ports Authority that it is necessary to amend the Design Solution to take into account latent ground and other site conditions, the Design Solution as so amended will satisfy the Functional Requirements ;
  - (c) each item of the Phase 1 Facilities (including fixtures, Plant and other assets) individually and the Phase 1 Facilities as a whole, will be fit for their respective purposes; and
  - (d) The Passenger Berth will be fit for its purposes. Without limiting the general nature of this provision, the concessionaire represents warrants and undertakes:
    - (i) notwithstanding the construction of the quay walls and other infrastructure comprising the Phase 1 Facilities and the Passenger Berth, access to and maneuverability of vessels within the Port harbour will remain adequate for Port users subject to the application of due care, skill and diligence by the persons responsible for the movement and maneuverability of such vessels within the Port harbour;

- (ii) the Phase 1 Facilities and the Works will be safe and stable for the duration of the Concession Term; and
- (iii) The Passenger Berth will be safe and stable for the duration of the Concession Term provided it is maintained by the Ports Authority according to Good International Practice as applied to the operation of a passenger berth.

#### ***Design development***

- 9.3 The concessionaire shall submit detailed Design Data to the Ports Authority prior to commencement of the corresponding elements of construction. The concessionaire shall consult with the Ports Authority concerning such Design Data and the Ports Authority shall within thirty (30) calendar days provide written confirmation that such Design Data satisfies the Functional Requirements and Design Solution. Such written confirmation shall not derogate from the obligations of the concessionaire under clause 9.2. Absence of any written confirmation or written objection from the Ports Authority within thirty (30) days of such submission of Design Data shall be taken as approval by the Ports Authority.
- 9.4 The Ports Authority shall be entitled to monitor the development of other aspects of the design for the Phase 1 Facilities and the Passenger Berth and the concessionaire shall provide the Ports Authority with all relevant Design Data promptly on written request and consult with the Ports Authority concerning such Design Data and answer all the Ports Authority's questions concerning the Design Data. The concessionaire shall not be obliged to obtain the Ports Authority's approval of any such Design Data, except as provided in clause 9.3 above, but the concessionaire shall give due consideration to any comments which the Ports Authority may make. Any comment or approval which the Ports Authority may give concerning the Design Data shall not affect the concessionaire's responsibility to comply with the provisions of this Agreement, including clauses 9.1 and 9.2.

#### ***Design flaws***

- 9.5 If the concessionaire becomes aware of any failure of the Design Solution or the Design Data to-comply in any material manner with the provisions of this clause 9, it shall:
- (a) immediately notify the Ports Authority of the fact and provide reasonable details of such failure;
  - (b) as soon as reasonably particle, provide the Ports Authority with a written statement:

- (i) giving a full explanation for the reasons for such failure and, if appropriate, for any delay in providing notification under sub-clause (a);
- (ii) describing in full the measures which the concessionaire proposes to adopt in order to rectify such failure and/or to prevent or mitigate the consequences of it (if any);
- (iii) assessing the effect of the failure on the Construction Program; and
- (iv) Where the concessionaire considers that it is impossible for it to comply with the provisions of clauses 9.1. and 9.2, a full statement of its proposed variation to those provisions, including detailed specifications, costing and effect on the Construction Program.

9.6 The Ports Authority shall have the right to decide whether to accept any application for a variation in the requirements of this Agreement pursuant to the provisions of clause 9.5(b)(iv), and any acceptance may be made conditionally or unconditionally, provided the Ports Authority in the exercise of its rights under this clause 9.6, shall act reasonably.

#### **Consents**

9.7 Except to the extent expressly provided herein, it is the sole responsibility of the concessionaire to identify, obtain and maintain all Consents at its expense. The Ports Authority shall nevertheless give the concessionaire all reasonable assistance in relation to the identification, obtaining and renewal of Consents. The concessionaire acknowledges that the Ports Authority has no power (statutory or otherwise) to ensure that Consents are issued or maintained, except in regard to such Consents as are required to be obtained from the Ports Authority, which Consents the Ports Authority hereby agrees to grant or cause to be granted, as soon as reasonably practicable upon application by the concessionaire in compliance with applicable Law and procedure. The concessionaire shall promptly indemnify the Ports Authority in relation to any direct expenditure incurred by the Ports Authority pursuant to this clause 9.7.

#### **Concession Area conditions**

9.8 The concessionaire shall be deemed to have inspected the Concession Area and its surroundings including the land over which access is provided to the Concession Area (and, where applicable, any existing structures or works on, over or under the Concession Area and its surroundings) and to have satisfied itself as to:

**Comment [ID11]:** Lenders will be nervous as to pre-existing environmental conditions and in a number of jurisdictions ports have been the site of use of munitions. This clause may need to be revisited depending upon location.

- (a) the adequacy of the rights of access and egress to and from the Concession Area and movement within the Concession Area and any accommodation it may require for the purpose of fulfill its obligations under this Agreement, including the need for any additional land or buildings outside the Concession Area; and
- (b) All precautions, times and methods of working necessary to prevent any nuisance or interference, whether public or private, being caused to any persons of whom the concessionaire is aware and whose interests may be affected by the performance of the concessionaire's obligations under this Agreement.

9.9 To avoid doubt, the concessionaire accepts sole and full responsibility for ensuring that the Phase 1 Facilities and the Passenger Berth shall be designed and constructed and the Operations of the Phase 1 Facilities, shall be carried out, with due regard to all conditions of and surrounding the Concession Area, including those described in the preceding provisions. The concessionaire shall not be entitled to make any claim against the Ports Authority, whether for any payment or contribution by the Ports Authority relating to such matters, or for extensions of time, or for damages or for any other recourse, except as expressly provided in this Agreement.

Provided that the concessionaire's responsibilities in respect of the Passenger Berth only arise and continue upon the Ports Authority granting the concessionaire unrestricted and uninterrupted access to and egress from the area on which the Passenger Berth is to be constructed and all assistance reasonably required by the concessionaire to facilitate the construction of the Passenger Berth.

#### ***Archaeological items/Geological items***

9.10 As between the Ports Authority and the concessionaire, all fossils, minerals, antiquities, structures or other remains or things either of particular geological or archaeological interest on or under the Concession Area shall be deemed to be the absolute property of the Ports Authority. The concessionaire shall take all reasonable precautions to prevent the Builder's workmen or any other persons from removing or damaging any such items. Immediately on discovery of the item, The concessionaire shall inform the Ports Authority of the discovery and comply with such instructions as the Ports Authority may reasonably give as to the removal of the items and the Ports Authority will promptly reimburse all reasonable out of pocket costs incurred by the concessionaire.

#### ***The Building Contract***

9.11 The concessionaire shall have the right to and responsibility for selecting the Builder and agreeing the provisions of the Building Contract, without the

approval of the Ports Authority, except that the Ports Authority's approval shall be required for,

- (a) the provisions of the Building Contract:
  - (i) enabling its assignment to the Ports Authority upon termination of this Agreement (subject to any prior assignment rights of the Lenders);
  - (ii) enabling the implement of the Collateral Warranty from the Builder, and
  - (iii) requiring all sums payable by the Builder pursuant to any Collateral Warranty to be paid into the Trust Account; (subject to any prior rights of the Lenders);
- (b) The provisions of the Collateral Warranty from the Builder.

**Comment [ID12]:** The warranty should be dependent upon termination of the concession before the Port Authority's rights accrue. If that is the case then it is difficult to see how monies would be payable under the Collateral Warranty.

### **Construction program**

9.12 Subject to clauses 9.16 to 9.19 (extension events), the concessionaire shall ensure that the Works are carried out:

- (a) according to the Construction Program; and
- (b) So that the Milestone Achievement Date for each Milestone shall occur by the relevant Milestone Sunset Date.

**Comment [ID13]:** If the Milestone Sunset Date is the key date it is difficult to understand why there is a separate obligation to comply with the Program which could give rise to a breach of contract and then the issue is what is the Ports Authority rights in respect of such a breach unless the rights under Clause 9.13 are the sole remedy.

The Construction Program may not be materially varied without the prior approval of the Ports Authority such approval not to be unreasonably withheld, provided always that the concessionaire shall provide the Ports Authority with evidence reasonably satisfactory to the Ports Authority that the Milestone Sunset Dates shall still be achieved and any such approval shall be without prejudice to the rights of the Ports Authority to terminate this Agreement for failure to achieve the Milestone Sunset Dates and further shall be without prejudice to the Ports Authority's other rights under this Agreement. Without limiting the general nature of the concessionaire's obligation, the concessionaire shall complete the design, construction and commissioning of the Passenger Berth and give possession of the Passenger Berth to the Ports Authority at the time and otherwise according to the Construction Program and the other provisions of this Agreement.

9.13 If the actual progress of the Works does not comply with the Construction Program, then the Ports Authority shall be entitled to require the concessionaire either:

- (a) to submit to the Ports Authority a report identifying the reasons for the delay; and/or
  - (b) to prepare and submit to the Ports Authority its proposals for a revised Construction Program, showing the manner in which the Works shall be carried out and the time necessary to ensure each Milestone Achievement Date s 11 be achieved by the relevant Milestone Sunset Date.
- 9.14 The Ports Authority shall give written notice to the concessionaire from time to time giving details of the person appointed from time to time by the Ports Authority to be the Construction Observer. The Construction Observer shall be a person or corporate entity specializing in the business of port civil engineering construction supervision and able to deploy suitably qualified and experienced personnel. In particular, he shall have appropriate civil engineering qualifications and specific experience in the design and supervision of construction of modern container terminal infrastructure. No act or omission by the Construction Observer shall derogate from the concessionaire's obligations under this Agreement and the Construction Observer shall have no authority (express or implied, actual or apparent) to amend, vary or curtail any such obligations save that the Ports Authority shall be responsible for any misconduct or negligent or willful damage or loss or hindrance caused to the concessionaire by such action by the Construction Observer, (subject always to the provisions of clause 39 (liabilities)) and for any delays resulting from such action by the Construction Observer.

The Construction Observer shall give the concessionaire prior notice (in writing or by word of mouth) of his attendance in the Concession Area and shall report to the site office each day when he first enters and finally leaves the Concession Area. The concessionaire shall have the right to accompany the Construction Observer during his attendance in the Concession Area. The Construction Observer shall have no authority to delay or hinder any work taking place in the Concession Area.

### ***Progress reviews***

- 9.15 Throughout the period from the Phase 1 Effective Date until the Actual Commissioning Date for the last of the Inner Berths, the concessionaire shall keep the Ports Authority fully informed about the progress of the Works and in particular:
- (a) the concessionaire shall provide the Ports Authority with monthly progress reports, in such initial form and containing such information, as the concessionaire and the Ports Authority may agree and thereafter in such other form and containing such other information as the Ports Authority may reasonably require from time to time as agreed between the parties;

- (b) the concessionaire and the Ports Authority shall hold regular progress meetings to review performance of the Works and discuss any co-ordination issues;
- (c) the concessionaire shall fully cooperate with the Construction Observer, who shall be entitled to be present at any time during the performance of the Works and to have reasonable access to all parts of the Concession Area and to all records and materials of the concessionaire concerning the Works, including attendance at the concessionaire meetings to review progress of the Works; the Construction Observer shall be entitled to disclose all such information to the Ports Authority and its advisors who shall all be bound by a duty of confidentiality towards the concessionaire in accordance with clause 41 (confidentiality); the Ports Authority shall instruct the Construction Observer to comply with any reasonable requirements of the concessionaire concerning Concession Area safety and to use all reasonable efforts to minimize disruption to the orderly and cost effective performance of the Works, but the Ports Authority shall not be responsible for any delay, loss, cost or expense incurred by the concessionaire as a result of any act or failure to act of the Construction Observer except to the extent provided in clause 9.14; and
- (d) at the completion of each stage of major construction activity identified in part 1 schedule 9, Ports Authority shall provide written acceptance and confirmation within fifteen (15) days that the completed construction is in accordance with the confirmed Design Data as identified in clause 9.3. Absence of any written confirmation or written objection from the Ports Authority within fifteen (15) days of completion of each such stage of major construction activity shall be taken as acceptance by the Ports Authority.

**Comment [ID14]:** Unless the Ports Authority has a team of resident engineers on site it is difficult to see how the confirmation could be given that the construction is in accordance with the confirmed Design Data.

### **Extension Events**

9.16 As soon as possible and in any event within seven (7) Business Days after the concessionaire in good faith determines that any Extension Event has occurred, the concessionaire shall notify the Ports Authority of:

- (a) the occurrence of the Extension Event, giving a reasonable description of its nature and cause;
- (b) the concessionaire's assessment of the effect of the Extension Event on the performance of the Works and in particular the effect on the Construction Program, quantifying its assessment of the period of delay caused by the Extension Event, with supporting reasons for that assessment;

- (c) the concessionaire's proposed measures for mitigating the consequences of delay; and
- (d) the cost implications of the Extension Event and proposals as to how the concessionaire will fund them,

Provided that such proposals shall be made without admission of liability of the concessionaire or without prejudice to the concessionaire's rights at either Law or under this Agreement in respect of the recovery or reimbursement of such funding and/or damages from the Ports Authority or any other person. For this purpose, an "Extension Event" means:

- (i) a breach by the Ports Authority of its obligations under any Project Document to which the Ports Authority is a party which results in a material adverse impact on the Construction Program; or
- (ii) an event of Force Majeure outside the control of the concessionaire; or
- (iii) loss of time or delay resulting from compliance with instructions given by the Ports Authority to the concessionaire pursuant to clause 9.10; or
- (iv) a delay in obtaining any Consent required for carrying on the design, construction and commissioning of the Phase 1 Facilities for reasons beyond the control of the concessionaire; or
- (v) loss of time or delay resulting from delay in obtaining or interruptions in the supply of utilities such as electricity and water notwithstanding reasonable efforts by the concessionaire; or
- (vi) Loss of time or delay resulting from the sub-soil conditions of the Concession Area and its surroundings being materially different from the conditions the concessionaire could reasonably have foreseen; the occurrence of which, in any case, prevents or delays the concessionaire from complying with this Agreement.

To avoid doubt, Extension Events are restricted to the design and construction period of the Project.

- 9.17 The concessionaire shall provide such further information concerning the Extension Event as the Ports Authority may reasonably require from time to time.
- 9.18 The concessionaire shall use all reasonable efforts to prevent the delay and costs resulting from an Extension Event.
- 9.19 Subject to compliance with clauses 9.16 to 9.18 (inclusive), if the Ports Authority is satisfied that or it is determined by the Expert that an Extension Event has

occurred, the concessionaire shall be entitled to such extension of time as shall be reasonable (taking into account not only the Extension Event itself but the reasonably foreseeable consequences of the Extension Event agreed with the Ports Authority or determined by the Expert) by fixing new Milestone Sunset Date(s) which shall replace the existing Milestone Sunset Date(s), but on no account shall any extension of time be for a period greater than the period of delay caused by an Extension Event under clause 9.16, provided always that if the concessionaire is unable by reason of an Extension Event to commence or continue construction of the Phase 1 Facilities in accordance with the Construction Program, the Operation Period shall automatically be extended by the period represented by such extension of time and where the Extension Event occurs within three (3) years of Handover (or such longer period as may result from the occurrence of an Extension Event), the commencement of the concessionaire's obligations with respect to the payment of the minimum guaranteed royalty under schedule 6 shall be deferred for a like period.

#### **Sanctions for late completion**

9.20 If a Milestone Achievement Date does not occur by the Milestone Sunset Date, then subject to the provisions of clauses 9.16 to 9.19 (extension events), the Ports Authority shall be entitled to terminate this Agreement pursuant to clause 30 (termination by the Ports Authority).

#### **10. Commissioning**

- 10.1 An Actual Commissioning Date shall occur when a test certifier (the "Test Certifier") issues his certificate that the Commissioning Tests for the Berth in question have been successfully completed. The certificate issued by the Test Certifier shall state that the Phase 1 Facilities comply with the requirements of this Agreement. The Test Certifier shall be provided by the concessionaire with full Design Data as provided to the Ports ascertain fully the technical reasons why the relevant Berth failed the Commissioning Tests; submit proposals for rectification of the failure; and Authority and the Ports Authority's confirmation as specified in clause 9.3, that Design Data satisfies the Functional Requirements and Design Solution, and such records demonstrating compliance with design and construction requirements as are reasonably required and stipulated by the Test Certifier, and as agreed between the parties and confirmed by the Test Certifier, to enable him to issue a Commissioning Certificate.
- 10.2 The Commissioning Tests shall be conducted by the concessionaire in accordance with the test procedures and requirements set out in schedule 11 and in the presence of the Test Certifier.
- 10.3 The issue of a Commissioning Certificate shall not affect the concessionaire's responsibility to ensure the Phase 1 Facilities satisfy all the requirements of this Agreement

**Comment [ID15]:** On other projects the equivalent certifier have refused to issue a certificate in such terms. All the certifier can certify is that commissioning tests have or have not been successfully completed.

- 10.4 the concessionaire shall give the Ports Authority and the Test Certifier not less than sixty (60) days notice of the date on which it wishes to conduct the Commissioning Tests.
- 10.5 The Commissioning Tests shall be conducted on the dates specified in the notice given by the concessionaire pursuant to clause 10.4 or such other date as the concessionaire and the Ports Authority may subsequently agree in writing with the Test Certifier provided that the concessionaire shall not be liable if, due to a cause outside the control of the concessionaire, the Test Certifier fails to present himself at the appointed time and place.
- 10.6 The Ports Authority shall be entitled to have representatives attend and observe the Commissioning Tests. The concessionaire shall notify the Ports Authority and the Test Certifier of the precise time and precise place for carrying out the tests.
- 10.7 The Test Certifier shall be a person or corporate entity specializing in the business of port construction and equipment verification and able to deploy suitably qualified and experienced personnel. In particular, he shall have appropriate civil, mechanical and electrical engineering qualifications and specific experience in the commissioning of a container handling port installation. The Ports Authority and the concessionaire shall seek to agree the identity of the Test Certifier not later than nine (9) months before the first Commissioning Date. If the parties fail to agree on the appointment of the Test Certifier by no later than six (6) months before the first Commissioning Date, either party may apply to the President at that time of the Institution of the Mechanical and Electrical Engineers of the [ ] to appoint the Test Certifier. To avoid doubt, the same Test Certifier shall wherever practicable be appointed to carry out Commissioning Tests on all three (3) berths comprising the Phase 1 Facilities.
- 10.8 The costs of the Test Certifier shall be shared equally by the concessionaire and the Ports Authority.
- 10.9 The Test Certifier shall act as an Expert. Without affecting the general powers of the Test Certifier to obtain information pursuant to clause 48, the concessionaire shall and shall procure that the Builder and the Designer shall, provide all information concerning the design and construction of the Phase 1 Facilities as may be required by the Test Certifier for the purpose of the Commissioning Tests under clauses 10.1 and 10.2.
- 10.10 The concessionaire shall be responsible for the provision of all electricity, fuel, other utilities, labour, test equipment, instruments and other apparatus, facilities and materials as may be required in order that the Test Certifier may fully and properly examine a Berth during Commissioning Tests.

- 10.11 If the Test Certifier is not willing to issue a Commissioning Certificate following Commissioning Tests, he shall so notify the concessionaire and the Ports Authority giving his reasons. Following such notification, the concessionaire shall:
- (a) Carry out the work on the Berth at its own cost and expense as soon as possible in order to rectify the problems that led to the failure.
  - (b) Commissioning Tests shall then be repeated on a date set by the Test Certifier after consultation with the concessionaire and the Ports Authority.
- 10.12 Nothing in this clause 10 shall enable any of the Commissioning Tests to be repeated on or after the respective Milestone Sunset Date.
- 10.13 Any dispute, difference, controversy or claim of any kind arising between the parties as regards matters dealt with in this clause may be referred to an Expert in terms of clause 48 provided in all circumstances, unless the parties otherwise agree, the Expert shall be the Test Certifier referred to in this clause 10.

## **11. Ports Authority Port Services**

- 11.1 The provision of general port services, including pilotage, towage, navigational controls and aids (including channel marking, beacons and lighthouses), dredging, wharfage, general port security and general fire services, the supply of water and electricity to vessels, handling petroleum, petroleum products and lubricating oils to and from vessels and between bunkers and depots, protective services and port installations, (collectively, "Port Services") in the Port is currently undertaken by the Ports Authority.
- 11.2 The Ports Authority shall provide Port Services to the concessionaire and vessels entering the Phase 1 Facilities in accordance with the Port Services Agreement subject always to the making of separate contractual arrangements from time to time between the parties or their successors or between the concessionaire and other persons in relation to the provision of Port Services.

## **12. The concessionaire operational functions**

- 12.1 As between the Ports Authority and the concessionaire, the concessionaire shall have the sole right and responsibility for managing its business pursuant to the Project Documents and shall subject to applicable Law and the other Project Documents have the sole and exclusive right and obligation to perform the functions of an operator of the Phase 1 Facilities, including the following functions in relation to the Phase 1 Facilities:

- (a) subject to the identification of the Port as a priority service area for the supply of electricity and water for the duration of the Concession Term, procuring the supply of all utilities, including power telecommunications, water and sewerage provided that where the Ports Authority is able to do so without affecting its operations, the Ports Authority shall grant any reasonable request of the concessionaire to access or connect to such utilities belonging to or used by the Ports Authority and that all costs in this regard shall be borne by the concessionaire; the procurement and operation of all communication, control and administrative systems necessary for the efficient operation of the Phase 1 Facilities;
- (b) subject to clause 16 (tariffs), deciding the prices at which it provides its services to customers;
- (c) subject to clauses 12.4 and 12.5 (equal access rules/common user), deciding the terms and conditions on which it provides its services to customers;
- (d) the marketing of the Phase 1 Facilities to potential customers;
- (e) subject to clause 7 (employment), deciding staff recruitment, training, working practices and conditions, other employment policies and industrial relations generally;
- (f) the procurement and implementation of systems and services for the prevention, monitoring and detection of fire, including the appointment of a fully competent, trained fire officer and the provision of adequate fire alarm appliances provided always that nothing in this sub-clause shall derogate from the responsibilities undertaken by the parties under the Port Services Agreement;
- (g) the manner of establishing and maintaining a working environment which is reasonably safe and designed to avoid injury or illness to any persons present on the Concession Area or loss or damage to containers, vessels or other moveable or immoveable property (the working environment shall include the provision of adequate numbers of trained first aid personnel and adequate quantities of first aid supplies);
- (h) garbage and waste disposal;
- (i) carrying out temperature checks on reefer (temperature controlled) containers;
- (j) checking the condition of containers and, where appropriate, shipping lines' chassis;

- (k) ship and yard planning (including ship stowage planning);
- (l) preparing equipment interchange reports;
- (m) ship-to-shore transfer operations, including lifting of hatch covers and lashing of containers;
- (n) stacking and unstacking of containers;
- (o) transfers of containers within the Concession Area;
- (p) delivery and receipt for shipment of containers;
- (q) documentary controls (whether manual or computerized);
- (r) inventory control of all containers, chassis and other assets at the Phase 1 Facilities;
- (s) communication with and reporting to shipping lines, agents and other users;
- (t) implementation of and adherence to the IMDG code and regulations made under it;
- (u) transit storage of containers;
- (v) provision of MT - pool chassis pool;
- (w) weighing of containers;
- (x) cleaning, washing and disinfection of containers;
- (y) transfers of containers between terminals;
- (aa) allocation and sequencing of containers; and
- (bb) all other yard and matters internal to the Phase 1 Facilities.
- (cc) Passenger terminal vessel movements

12.2 The concessionaire shall provide assistance and access in relation to the berthing and unberthing of passenger vessels (defined as vessels carrying more than one hundred (100) passengers) at the Passenger Berth as follows:

- (a) the concessionaire and the Ports Authority shall cooperate together to minimize disruption at each others terminals; in this regard the Ports

Authority shall provide the concessionaire with reasonable notice of the scheduled arrival and departure times of passenger vessels;

- (b) based on receipt of the notice referred to in clause 12.2(a) the concessionaire shall do whatever is required (including moving vessels on QEQ) to facilitate prompt ingress and egress of passenger vessels to and from the Passenger Berth provided that it shall not be obligated to do any act under this sub-clause (b) which would cause it to breach any other obligation hereunder,
- (c) during construction work by the concessionaire at Inner Berth No 1, passenger vessels notified by the Ports Authority to the concessionaire in accordance with clause 12.2(a) shall be accommodated by the concessionaire, on a one vessel at a time basis, at an alternative Inner Berth without charge to the Ports Authority;
- (d) On the basis of receipt of notice from the Ports Authority in accordance with clause 12.2(a), the concessionaire shall make a single Berth on QEQ available for passenger vessels, which by reason of their size cannot be accommodated at the Passenger Berth. Such a vessel shall be accommodated as close as possible to the Passenger Berth facilities;
- (e) all berthing of passenger vessels on QEQ, described above, shall proceed on the basis that the maximum allowable stay per passenger vessel alongside QEQ shall be forty eight (48) hours in total;
- (f) it is anticipated that in the normal course of operations larger container vessels on QEQ will be accommodated by the concessionaire at the outer (seaward) end of such terminal and smaller vessels on the inner (landward) end;
- (g) all berthing and unberthing operations of passenger vessels shall be under the control of the Ports Authority, whether at the Passenger Berth or QEQ, provided that the concessionaire may provide complementary services at the Ports Authority's request (subject to sub-clause (h) below);
- (h) after the Passenger Berth is constructed and commissioned the concessionaire shall have the right to earn dockage and charges for provision of services at the request of the Ports Authority for passenger vessels berthed on QEQ;
- (i) The parties acknowledge that these arrangements assume continuity of the frequency and number of passenger vessel calls as at the date of Handover. If these change such that the frequency and number of such calls increases substantially, the parties shall review and, if required, vary the then current arrangements; and

- (j) when passenger vessels are accommodated by the concessionaire on QEQ, the concessionaire shall provide the Ports Authority and any passengers, crew and supernumeraries on such vessels with such access as shall reasonably be required to enable the Ports Authority to provide Services to such vessels and to enable passengers, crew, supernumeraries and providers of Services access to and/or egress from such vessels via the Passenger Berth subject to the provisions of the Terminal Access Agreement.

Comment [ID16]: Should this be BQ?

### **BO vessel movements**

12.3 The concessionaire shall provide reasonable assistance in relation to the berthing and unearthing of vessels at the Bandaranaike Quay ("BO" which term shall include berths BQ1 and BQ2) as follows:

- (a) as a general principle the concessionaire and the Ports Authority shall collaborate and work together to ensure that vessel movements cause minimal disruption to one another's activities;
- (b) in the event of vessel movement "clashes", the concessionaire and the Ports Authority will work together to find an appropriate solution to the problem;
- (c) when a vessel is berthed at the innermost the concessionaire berth and a vessel is berthed on BQ2, and a vessel is required to berth at or sail from BQ1, the concessionaire shall at the request of the Ports Authority either move vessels or "warp vessels" alongside northwards if a greater transverse clearance is required;
- (d) additionally, as and when required, particularly so as to free-up incremental clearance, the concessionaire will "warp" ships alongside at QEQ in a northerly direction away from the inner end thus freeing up the buffer zones of twenty (20) meters to thirty (30) meters between those ships;
- (e) Solutions referred to in sub-clauses (c) and (d) above are not exhaustive but are merely illustrative.

### **Equal access rules**

- 12.4 (a) the parties acknowledge that:
- (i) rules for allocation of individual berths within the Port may -be made by the Minister pursuant to the [\_\_\_\_\_]Ports Authority Act and to the Masters Attendant Legislation and to rules and regulations hereunder,
  - (ii) the Minister may also prescribe the time and manner in which vessels shall enter and leave the Port;

- (iii) in allocating priorities to vessels and dealing with all matters concerning allocation of berths, the timing and manner in which vessels enter/exit the Port, the Harbour Master is bound to give effect to rules made by the Minister;
  - (iv) the priorities for access to and egress from the Port and the allocation of berths presently operated by the Harbour Master are set out in sub-clauses (b) and (c) below respectively;
  - (v) 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
  - (vi) 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 Harbour 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; car carriers;
  - (vi) general cargo vessels using conventional cargo berths and bulk cement vessels;
  - (vii) oil and gas tankers; and
  - (viii) All other types of vessels.
    - a. In the case of vessels having the same degree of priority, preference is given to the vessel which gave the earliest time of arrival (the "ETA") at a reference position five (5) nautical miles radius from the pilot boarding point which is at present [here insert longitude and latitude] and in the case of vessels which report the same ETA, preference will be 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.

- b. The Harbour Master may disregard the above priorities if in his sole discretion he considers it necessary to ensure compliance with any applicable Law 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 egress from the Port or the allocation of priorities for such egress, the Harbour Master currently takes into account which vessel is first ready to leave the berth/port.
- (d) To the extent permitted by Law 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 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) 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 LCLs;
  - (v) fire services; and
  - (vi) Dredging, subject always to the provisions of the [\_\_\_\_\_]Ports Authority Act, as amended from time to time, to such rules and regulations as may be made from time to time by the Minister and to other applicable Laws.
- (f) For the purposes of sub-clauses (d) and (e) above, "equal access" shall mean that where equivalent circumstances exist:
  - (i) the concessionaire shall be entitled to the same level, timing and priority of service, access to its berths, or egress from its berths for vessels as that provided by the Ports Authority to other users of or operators of terminals within the Port;
  - (ii) the Ports Authority shall not unfairly discriminate against the concessionaire by refusing to provide a service, provide access to

the concessionaire berths or egress from the concessionaire berths to vessels at all or on the same timely basis as such service, access or egress is provided to other users or operators of terminals within the Port; and

- (iii) 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, access or egress Common user

**Comment [ID17]:** This provision should be reviewed as it does not appear to make sense in the final line.

12.5 the concessionaire and the Ports Authority shall manage, operate and maintain their respective facilities in the Port on a common user basis, open to any and all shipping lines, shippers, receivers and forwarders which may be suitably handled by the Port. The concessionaire and the Ports Authority shall refrain from unfair or discriminatory practices against users of the Port or against persons wishing to avail themselves of the services offered by the concessionaire and the Ports Authority, as the case may be, at the Port.

**Comment [ID18]:** The use of upper case letters and full stops needs to be generally reviewed as there appears to be inconsistency.

**Comment [ID19]:** See note 16.

- (a) The concessionaire shall treat all information related to the users of the Phase 1 Facilities as confidential, except to the extent required by its reporting requirements to the Ports Authority.
- (b) the concessionaire may offer preferential treatment to users or potential users of the Phase 1 Facilities in the matter of berths or tariffs (to the extent permitted by this Agreement) on the basis of specified minimum guaranteed volume commitments, provided that similar preferential treatment shall be granted by the concessionaire to all users or potential users of the Phase 1 Facilities which are committed or prepared to commit to similar volumes and conditions.

### **Regulator**

12.6 The Ports Authority and the concessionaire have been advised by the Government that it is expected that no later than five (5) years from the date of Handover,

- (a) a legally binding regulatory framework for the pricing of services in the Ports of [\_\_\_\_\_], including the pricing of services provided by the Ports Authority to the concessionaire and other operators of container terminals is expected to be established.; and
- (b) The terms of reference of a Regulator to be appointed pursuant to such regulatory framework will include substantially the terms set forth in schedule 10; and the Ports Authority hereby agrees to facilitate and not obstruct or in any manner prevent the establishment of a regulatory framework relating to the above.

### **13. Operational performance standards**

- 13.1 The concessionaire shall carry out its terminal operations to a standard expected by international container shipping lines using equivalent container terminal facilities
- 13.2 The concessionaire's performance shall be to an international standard recognizing local conditions in the Port.
- 13.3 During construction of Phase 1 Facilities it is recognized that the concessionaire will not be expected to perform to standards as identified in clauses 13.1 and 13.2 above, but the concessionaire shall make reasonable endeavors to ensure that a satisfactory performance is achieved.

### **14. Maintenance**

- 14.1 The concessionaire shall carry out at its own cost all:
- (a) Life-Cycle Maintenance;
  - (b) Routine Maintenance; and
  - (c) Reactive Maintenance (subject to the provisions of clauses 24.7 and 36.5); which is necessary or desirable to maintain or restore the Phase 1 Facilities to the standards required by this Agreement, including compliance with the concessionaire maintenance policy in schedule 18 and, as an overriding requirement, Good International Practice and using materials and goods of sound quality which are fit for their respective purposes.
- 14.2 The concessionaire shall prepare an annual maintenance schedule, which describes:
- (a) arrangements for Life-Cycle Maintenance and Routine Maintenance (including the start and end dates for each material item of work and a summary of the work to be carried out);
  - (b) the expected effect of the Life-Cycle Maintenance and Routine Maintenance on the operation of the Phase 1 Facilities; the measures to be taken to continue to achieve the performance standards described in clause 13; and contingency arrangements made to enable it to undertake Reactive Maintenance for that year (and how the work shall be funded);

The concessionaire shall comply with that schedule or a replacement schedule containing equivalent information, compliance with which will enable the concessionaire to discharge its obligations under clause 14.1

and which enables the Ports Authority easily to identify the implications for capacity (and whole life costing) at the Phase 1 Facilities resulting from the changed schedule. A copy of such schedule for a particular year shall be delivered to the Ports Authority not later than 30 November in the preceding year. The concessionaire shall give the Ports Authority as much advance notice of proposed changes of a material nature to the schedule in respect of any year as is reasonable in the circumstances and deliver a copy of the changed schedule to the Ports Authority within seven (7) days of the change being made.

- 14.3 The concessionaire shall develop, before the start of Commissioning Tests, a full set of maintenance manuals for the Phase 1 Facilities and shall update these as required. The concessionaire shall also maintain a record of maintenance work, comparing the work done by reference to the maintenance schedule.
- 14.4 The concessionaire shall keep safely all manufacturers and repairers warranties and guarantees and shall use all reasonable efforts to ensure the benefit of these are assignable to the Ports Authority.

#### **15. Operational sub-contracting**

Subject to the terms of the Lenders Direct Agreement, concerning, among other matters, the exercise of the Lenders' security rights and the appointment of a substitute operator of the Phase 1 Facilities, the approval of the Ports Authority (as to the identity of the person and the scope of its powers and responsibilities) is required for:

- (a) any appointment of an Operator; or
- (b) Any appointment of a person (a "Management Services Provider") who is to provide to the concessionaire some or all of the services to be provided under the Management Contract or other forms of management services.

In either case the approval of the Ports Authority shall not be unreasonably withheld.

#### **16. Tariffs**

The provisions of schedule 12 shall apply.

#### **17. TEU royalties**

The provisions of schedule 6 shall apply to the payment of Royalties by the concessionaire to the Ports Authority.

## 18. Storage rent

All revenues relating to LCL cargo, including storage rent relating thereto, shall accrue and be paid to the Ports Authority. The concessionaire shall not handle LCL cargo.

- 18.1 As part of its operational activities, the concessionaire will store both loaded and empty containers and levy appropriate charges to consignees, shipping lines and other parties in accordance with the concessionaire's published tariff.
- 18.2 Where any loaded containers discharged at the Phase 1 Facilities are not collected from the Phase 1 Facilities within a period of twenty one (21) days from the time that the containers are discharged, at the expiry of such period and at the request of the concessionaire, the Ports Authority shall sell by public auction within fourteen (14) days the contents of such containers in terms of the powers entrusted to the Ports Authority under the [ ] Ports Authority Act, provided that;
- (a) in the case of goods for which a through bill of lading has been issued there shall be substituted a period of forty two (42) days for the period of twenty one (21) days referred to above;
  - (b) notwithstanding the above and if the goods are of a perishable, hazardous or offensive nature, the concessionaire may require their removal within such shorter period, as determined by the concessionaire, not less than twenty four (24) hours after discharge;
  - (c) if no bid is made at the sale, the Ports Authority may with the concurrence of the Principal Collector of Customs dispose of such goods in any manner whatsoever, and
  - (d) the proceeds of such sale, less the costs of the sale (including all monies due to the Ports Authority for storage and other direct costs, if any, in respect of the said container) and any monies payable to the Principle Collector of Customs, shall be paid to the concessionaire.
- 18.3 The Ports Authority at its cost will remove all import LCL to its destuffing facility and thereafter be responsible for all subsequent activity, costs and revenues there from (including storage) associated with such containers and cargo. Any LCL container or dangerous cargo (if any) not removed within the free period of three (3) Clear Days from receipt of notice will be deemed to be incurring storage rent in accordance with the concessionaire's published tariff. Such storage rents will be paid on demand by the Ports Authority to the concessionaire.

## **19. Information supply Reporting**

19.1 By no later than the tenth (10th) day of each month throughout the Concession Term, the concessionaire shall provide the Ports Authority with a written report (in such initial form and content as the concessionaire and the Ports Authority may agree and thereafter in such other form and content as the Ports Authority and the concessionaire shall agree) on its activities in the preceding month. The report shall include all information reasonably necessary to verify all payments due to the Ports Authority and achievement of performance standards.

### **Access to records**

19.2 At all reasonable times:

- (a) The Ports Authority shall be entitled to access all records of the concessionaire to the extent reasonably required by the Ports Authority to verify the concessionaire's compliance with its obligations under this Agreement and the other Project Documents, but not otherwise. The concessionaire shall provide reasonable co-operation to the Ports Authority in responding to all the Ports Authority's reasonable requests for information in this regard; and
- (b) The concessionaire shall be entitled to access records of the Ports Authority to the extent reasonably required by the concessionaire to verify the Ports Authority's compliance with its payment obligations to the concessionaire under the Project Documents, but not otherwise. The Ports Authority shall provide reasonable co-operation to the concessionaire in responding to concessionaire's reasonable requests for information in this regard.
- (c) Notwithstanding the provisions of clause 40, the Ports Authority confirms that the concessionaire may rely on the information contained in such records for the limited purpose of enabling the concessionaire to verify the Ports Authority's compliance with its payment obligations to the concessionaire under the Project Documents.

### **Accounts**

19.3 Throughout this Agreement, the concessionaire shall provide the Ports Authority with its annual audited accounts by no later than four (4) months after the period to which the accounts relate and with monthly management accounts by no later than thirty (30) days after the end of the month to which the report relates.

## 20. Legal compliance

- 20.1 The concessionaire and the Ports Authority shall, at all times during the term of the Concession, comply with all applicable Laws. Provided that there shall be no right of termination in the case of a failure of compliance unless such failure has a material adverse effect on the ability of either the terminating party or the other to perform its obligations under this Agreement.
- 20.2 The concessionaire shall not:
- (a) offer, agree to pay, pay or approve the payment by another person of, any money for the purpose of influencing, improperly or unlawfully, any act, decision or judgment of any person relating to the performance of this Agreement or any other Project Document or in any other way relating to this Agreement; or
  - (b) offer, agree to give, give or approve the gift by another person of anything of value, whether directly or indirectly, to any person (whether a public servant as defined by the [ ] Bribery and Corruption Legislation [ ] as amended, or a political party or candidate, or any other individual) which either results in such person committing the offence of corruption or in any other way is for the purpose of influencing, improperly or unlawfully, any act, decision or judgment of any such person relating to the performance of this Agreement or any other Project Document or in any other way relating to this Agreement (all such acts collectively described as "Corruption"); or
  - (c) Commit, offer, agree to or approve any act of bribery for the purpose of influencing, improperly or unlawfully, any act, decision or judgment of any person relating to the performance of this Agreement or any other Project Document or in any other way relating to this Agreement (all such acts collectively described as "Bribery").
- 20.3 If the concessionaire or a Sponsor, so long as that Sponsor holds at least ten per cent (10%) of the issued equity capital of the concessionaire or any of their respective group or associated companies, or any of their respective officers, employees or authorized agents commits any act of Bribery or Corruption, the Ports Authority shall be entitled:
- (a) to recover from the concessionaire the amount of any such payment or the value of any such gift; and/or
  - (b) to recover from the concessionaire any direct loss resulting from the breach of the provisions of sub-clause 20.2; and/or
  - (c) To request that the person committing the act of Bribery or Corruption is dismissed.

- 20.4 In exercising its rights and remedies under this clause 20, the Ports Authority shall:
- (a) act in a reasonable and proportionate manner, having regard to such matters as the nature of the breach; and/or
  - (b) in addition, in cases of Bribery or Corruption, have regard to the gravity of and the identity and status of the person performing, the act of Bribery or Corruption and whether the person committing the act of Bribery or Corruption has been found guilty of committing such an offence by a competent court of law; and/or
  - (c) Give consideration and where appropriate require the concessionaire to terminate the appointment of an authorized agent (where the authorized agent committed the act of Bribery or Corruption).
- 20.5 The concessionaire shall establish procedures designed to prevent and to identify the performance of acts of Bribery or Corruption. Those procedures will include a regular review by the board of directors of the concessionaire of the effectiveness of the measures.

## 21. Change in Law

21.1 The provisions of this clause 21 shall apply where there is a Change in Law, which;

- (a) relates to taxation; or
  - (b) imposes rationing; or
  - (c) relates to duties and other import/export levies; or
  - (d) relates to a change in the regulatory framework for Tariffs (as defined in Schedule 10); which in each case is beyond the control of the concessionaire and materially affects the operations of the concessionaire and produces, directly an adverse financial outcome for the concessionaire's operations as a whole as a direct consequence of which the internal rate of return as contemplated by the Financial Model is negatively affected by five per cent (5%) or more of that return (the "Change in Law Event"); provided that this clause shall apply only until all sums due and owing by the concessionaire to the Lenders under the Financing Documents have been paid in full.
- 21.2 The concessionaire shall take all reasonable steps to avoid or mitigate any adverse financial outcome resulting from the Change in Law Event.
- 21.3 The concessionaire shall as soon as reasonably practicable after the occurrence of a Change in Law Event:
- (a) advise the Ports Authority of the occurrence of such event and the steps taken by the concessionaire to avoid or mitigate any adverse financial

outcome resulting from such event and the concessionaire's assessment of the effect of such event on the internal rate of return as aforesaid; and

- (b) Provide to the Ports Authority all information and documents which the concessionaire reasonably determines to be necessary to enable the Ports Authority to assess the impact of such event on the business and financial performance of the concessionaire (the "Assessment Information").

21.4 As soon as practicable after the concessionaire has provided to the Ports Authority the Assessment Information, the Ports Authority and the concessionaire shall meet to determine:

- (a) whether any Change in Law Event has occurred;
- (b) the financial impact of any such event on the concessionaire's operations; and
- (c) the steps which the concessionaire is to take pursuant to clause 21.2.

If the concessionaire and the Ports Authority cannot agree on the occurrence and financial impact of a Change in Law Event within thirty (30) days after submission of the Assessment Information to the Ports Authority either party may refer such matter for determination by an Expert as provided in clauses 48.12 to 48.21.

21.5 No later than thirty (30) days after the earlier of:

- (a) an agreement between the concessionaire and the Ports Authority on the occurrence and financial impact of a Change in Law Event; or
- (b) the Expert making his determination; the Ports Authority shall inform the concessionaire which measures it is willing to take to compensate the concessionaire for the financial impact of the Change in Law Event, including, without limitation, a reduction in rent payable under the Site Lease, in Royalties or in charges levied by the Ports Authority and payable by the concessionaire and implement or give effect to such measures.

21.6 The concessionaire shall be entitled to terminate this Agreement if the Ports Authority does not propose, implement or give effect to any such measures within the thirty (30) day period described in clause 21.5.

21.7 The provisions of clause 21.5 shall be in addition to any other legal or contractual remedy which the concessionaire may have against the Ports Authority, any Authority or the Government.

## 22. Force Majeure

- 22.1 A party (the "Affected Party") shall be relieved from liability (except for accrued payment obligations and except for continued Royalty payments due in accordance with paragraph 4 of schedule 6 and except for rent payable under the Site Lease as stipulated therein which shall remain payable in all circumstances unless provided to the contrary in this clause 22) for any delay in the performance of or inability to perform an obligation under this Agreement which is directly caused by or results from Force Majeure for so long as the Force Majeure or the inability to perform continues.
- 22.2 The Affected Party shall use all 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 labour dispute under terms it considers being unfavorable to it.
- 22.3 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.
- 22.4 In this Agreement, "Force Majeure" means, subject to clause 22.6, any event or circumstance or combination of events or circumstances whenever occurring which, in each case:
- (a) is outside the control of the Affected Party; and
  - (b) could not be avoided, prevented, overcome or mitigated with reasonable foresight, prudence and diligence or otherwise by taking action according to Good International Practice; and
  - (c) Materially prevents performance of a party's obligations under this Agreement.
- 22.5 Without limiting the generality of clause 22.4 and subject to clause 22.6 Force Majeure includes the following categories of events or circumstances:

- (a) Events or circumstances of a natural or general nature, including without limitation:
- (i) Acts of God;
  - (ii) adverse weather conditions outside the design tolerance of the Phase 1 Facilities;
  - (iii) nuclear explosion, radioactive or chemical contamination or ionizing radiation (unless the source or cause of the explosion, contamination or radiation is brought onto or near the Phase 1 Facilities by the Affected Party or its suppliers, subcontractors or other persons for whom it is responsible);
  - (iv) pressure waves caused by aircraft or other aerial devices;
  - (v) meteorites; and
  - (vi) epidemic, plague or quarantine;
- (b) Political- events or circumstances in [\_\_\_\_\_], including, without limitation:
- (i) blockade or closure of the Port resulting from any of the matters referred to in paragraphs (iv) and (vi) below;
  - (ii) strikes or other industrial action in [\_\_\_\_\_] and of a political nature;
  - (iii) curfews in or restrictions on travel within [\_\_\_\_\_] resulting from any of the matters referred to in paragraphs (ii) above and (iv) and (vi) below;
  - (iv) war (whether declared or not), invasion embargo, revolution, military coup, armed conflict, in each case in [\_\_\_\_\_];
  - (v) sabotage or criminal damage to the Phase 1 Facilities resulting from any of the matters referred to in paragraph (iv) above;
  - (vi) riot, civil commotion, insurrection or terrorism, in each case in [\_\_\_\_\_]; and
  - (vii) sabotage or criminal damage to the Phase 1 Facilities resulting from any of the matters referred to in paragraph (vi) above;

- (c) Any of the following events or circumstances caused by acts and omissions of the Government, the Ports Authority or any other Authority:
  - (i) restrictions on imports imposed by the Government or an Authority;
  - (ii) confiscation (except for confiscation of goods or other assets resulting from the exercise of Law including customs and importation duties and laws concerning dangerous goods), expropriation or nationalization authorized by the Government;
  - (iii) commandeering or authorized by the Government (but excluding in either case any emergency Ports Authority intervention pursuant to clause 23 of this Agreement);
  - (iv) a Change in Law in [ ] which has the direct effect of preventing the concessionaire from performing its obligations under this Agreement or any of the Project Documents;
  - (v) failure to obtain or renew any Consents or the failure to obtain connections for utilities required by the concessionaire to perform its obligations under this Agreement, provided that such failure is not due to any fault of the concessionaire; and
  - (vi) Any other event or circumstance which is within the reasonable control of the Government, the Ports Authority or any other Authority.

22.6 In no circumstances shall Force Majeure include:

- (a) any inability or failure to pay (except where funds are available but payment is prevented as a result of an event or circumstance described in clause 22.4 as comprising Force Majeure);
- (b) any Change in Law other than described in clause 22.5(c) (iv); or
- (c) any delay in performing or failure to perform by any supplier, sub-contractor or other person for whom the concessionaire is responsible (except where such failure or delay is caused by Force Majeure affecting such supplier, sub contractor or other person).

22.7 Subject to complying with clauses 22.2 and 22.3, if:

- (a) physical damage to the Existing Superstructure is directly caused by an event of Force Majeure under clause 22.5 (a); and
- (b) no decision is made in respect of the restoration of such physical damage; or -
- (c) a decision is made not to restore such physical damage; or
- (d) a decision is made to restore such physical damage but the restoration is not completed, in each case, during the relevant time periods provided for in clause 36.4; then the concessionaire may terminate this Agreement forthwith upon notice to the Ports Authority upon expiry of the relevant time period provided that:
  - (i) in any event, for so long as the Force Majeure or the inability to substantially perform continues the rent payable under the Site Lease shall be adjusted as indicated in clause 22.13; and
  - (ii) The Operating Period under this Agreement shall be extended by a period equivalent to that during which such Force Majeure or the substantially perform continues.

22.8 Subject to complying with clauses 22.2 and 22.3, if:

- (a) an event of Force Majeure within the meaning of clause 22.5(a) occurs; and
- (b) as a direct consequence of such event of Force Majeure the concessionaire is materially prevented from performing its obligations under this Agreement for a period of not less than twelve (12) consecutive months; then neither party shall be entitled to terminate this Agreement by reason of such event (save as provided in clause 22.7 above and subject to clause 36.4), provided that:
  - (i) in any event, for so long as the Force Majeure or the inability to substantially perform continues, the rent payable under the Site Lease shall be adjusted as indicated in clause 22.13 after the first (1<sup>o</sup>) anniversary of the date of first (1<sup>o</sup>) occurrence of such event of Force Majeure; and
  - (ii) the Operating Period under this Agreement shall be extended by a period equivalent to that during which such Force Majeure or the inability to substantially perform continues after the first (1<sup>o</sup>) anniversary of the date of first (1<sup>o</sup>) occurrence of such Force Majeure.

22.9 Subject to complying with clauses 22.2 and 22.3, if:

- (a) an event of Force Majeure within the meaning of clause 22.5 (b) (i) to (v) occurs, whether or not there is any physical damage to the Phase 1 Facilities; and
- (b) as a direct consequence of such event of Force Majeure either party is materially prevented from performing its obligations under this Agreement for a period of not less than six (6) consecutive months (provided that the concessionaire shall be deemed to be materially prevented from performing such obligations if as a result of the foregoing The concessionaire has lost at least twenty per cent (20%) of throughput (being the term AVT defined in clause 22.13) for such period of not less than six (6) consecutive months); then either Party may terminate this Agreement forthwith upon notice to the other Party upon expiry of such six (6) month period provided that:
  - (i) in any event, for so long as the Force Majeure or the inability to substantially perform continues, the rent payable under the Site Lease shall be adjusted as indicated in clause 22.13;
  - (ii) The Operating Period under this Agreement shall be extended by a period equivalent to that during which such Force Majeure or the inability to substantially perform continues.

22.10 Subject to complying with clauses 22.2 and 22.3:

- (a) If an event of Force Majeure within the meaning of clause 22.5 (b) (vi) to (vii) occurs; and
- (b) as a direct consequence of such event of Force Majeure either party is materially prevented from performing its obligations under this Agreement for a period of not less than six (6) consecutive months; then:
  - (i) for so long as such Force Majeure or the inability to substantially perform continues, the rent payable under the Site Lease shall be adjusted as indicated in clause 22.13: and
  - (ii) the Operating Period under this Agreement shall be extended by a period equivalent to that during which such Force Majeure or the inability to substantially perform continues; but neither party shall be entitled to terminate this Agreement by reason of such event except as follows:
    - (aa) if the event described in sub-clause (a) above resulted in physical damage to the Phase 1 Facilities and the

insurance loss adjusters estimate of the aggregate damage exceeds United States Dollars [\_\_\_\_\_] (US\$[\_\_\_\_\_] but is less than or equal to United States Dollars [\_\_\_\_\_] (US\$[\_\_\_\_\_]), then in that case the Ports Authority shall have an option to pay the shortfall between the United States Dollars [\_\_\_\_\_] (US\$[\_\_\_\_\_]) and the amount required to restore the Phase 1 Facilities, but the concessionaire shall have the right to terminate this Agreement at any time upon notice to the Ports Authority; or

- (bb) if the event described in sub-clause (a) above resulted in physical damage to the Phase 1 Facilities and the insurance loss adjusters estimate of the aggregate damage exceeds United States Dollars [\_\_\_\_\_] (US\$[\_\_\_\_\_]), then the Ports Authority shall have the option to pay the shortfall between United States Dollars [\_\_\_\_\_] (US\$[\_\_\_\_\_]) and the amount required to restore the Phase 1 Facilities, but either party shall have the right to terminate this Agreement forthwith upon notice to the other party; or
- (cc) if as a result of the Force Majeure described in sub-clause (a) above the concessionaire has lost at least twenty per cent (20%) of throughput (being the term AVT in clause 22.13) for a period of not less than six (6) consecutive months, then the concessionaire may terminate this Agreement forthwith upon notice to the Ports Authority following expiry of the said period of six (6) months.

22.11 Subject to complying with clauses 22.2 and 22.3:

- (a) if an event of Force Majeure within the meaning of clause 22.5 (c) occurs; and
- (b) as a direct consequence of such event of Force Majeure either party is materially prevented from performing its obligations under this Agreement for a period of not less than six (6) consecutive months; then the concessionaire may terminate this Agreement forthwith upon notice to the Ports Authority following expiry of the said period of six (6) months except that the concessionaire may terminate this Agreement with immediate effect upon notice to the Ports Authority if the Force Majeure described in sub-clause (a) above is of a nature that would permanently prevent the concessionaire from performing its obligations under this Agreement or the other Project Documents, provided that:

- (i) in any event for so long as such Force Majeure or the inability to substantially perform continues, the rent payable under the Site Lease shall be adjusted as indicated in clause 22.13; and
- (ii) The Operating Period under this Agreement shall be extended by a period equivalent to that during which such Force Majeure or the inability to substantially perform continues.

22.12 Subject to complying with clauses 22.2 and 22.3, if any event of Force Majeure outside the categories set forth in clause 22.5 occurs, then the Operating Period under this Agreement shall be extended by a period equivalent to that during which such event or the inability to substantially perform continues.

22.13 In clause 22.7 to 22.11 (inclusive) the adjusted rent payable under the Site Lease shall be calculated by the application of the following formula:

- (a) In the case of clause 22.8:

$$AR = ER \times \frac{ACT}{AVT}$$

Where:

AR means the adjusted rent to be paid in respect of a whole quarter or part of a quarter under the Site Lease as would be applicable for the period commencing on the date of the first (1<sup>st</sup>) anniversary of the date of the first (1<sup>o</sup>) occurrence of the relevant event of Force Majeure (the "Reference Date") and expiring when the relevant event of Force Majeure and any consequential inability to perform ceases (the "End Date");

ER means the rent which would have been payable by the concessionaire under the Site Lease in respect of the period commencing on the Reference Date and expiring on the End Date as if no such event of Force Majeure had occurred;

ACT means the actual throughput of the Phase 1 Facilities during the period commencing on the Reference Date and expiring on the End Date;

AVT means the average monthly throughput of the Phase 1 Facilities calculated by reference to the period of twelve (12) months immediately preceding the date of the first (1<sup>st</sup>) occurrence of the relevant event of Force Majeure and applied proportionately for each quarter from the Reference Date to the End Date.

- (b) In the case of clauses 22.7 and 22.9 to 22.11:

$$AR = ER \times \frac{ACT}{AVT}$$

Where:

AR means the adjusted rent to be paid in respect of a whole quarter or part of a quarter under the Site Lease as would be applicable for the period commencing on the date of the first (1<sup>9</sup>) occurrence of the relevant event of Force Majeure (the Reference Date") and expiring when the relevant event of Force Majeure and any consequential inability to perform ceases (the "End Date");

ER means the rent which would have been payable by the concessionaire under the Site Lease in respect of the period commencing on the Reference Date and expiring on the End Date as if no such event of Force Majeure had occurred;

ACT means the actual throughput of the Phase 1 Facilities during the period commencing on the Reference Date and expiring on the End Date;

AVT means the average monthly throughput of the Phase 1 Facilities calculated by reference to the period of twelve (12) months immediately preceding the Reference Date and applied proportionately for each quarter from the Reference Date to the End Date.

- 22.14 If either party becomes aware of any proposed or actual Law or administrative act which, in that party's reasonable opinion, is likely with the passing of time, giving of notice or in some other way, to constitute Force Majeure within the meaning of clause 22.5 (c) preventing or delaying the concessionaire's performance of this Agreement, such party shall promptly:
- (a) notify the other party giving full details of its concerns and consult the other party; and
  - (b) In the case of the concessionaire only, use its reasonable efforts to prevent it from suffering from such Force Majeure.

### **23. Emergency Ports Authority intervention**

- 23.1 The Ports Authority shall be entitled to access to the Phase 1 Facilities and to perform any of the functions, services or obligations of the concessionaire or to take other action (and may also take action elsewhere in the Port, including the access route to the Phase 1 Facilities), or to engage others to take action, if:
- (a) The concessionaire is in breach of this Agreement which prejudices or is in the reasonable opinion of the Ports Authority likely to prejudice, either security or the performance by the Ports Authority of its statutory functions in any material way, or the health or safety of persons at the Phase 1 Facilities or adjacent to them or the environment and, in the reasonable opinion of the Ports Authority, urgent action is required, in which case the concessionaire shall reimburse the Ports Authority for all reasonable costs incurred by it in taking action to protect the health or safety of persons or to safeguard the environment; or

- (b) The concessionaire is not in breach of this Agreement but 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 action is 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 and in relation to sub-clauses (a) and (b) above as the case may be the Ports Authority in its discretion considers that either there is no time to request the concessionaire to take remedial action or that the concessionaire is unable to undertake the remedial action in time.

## 24. Insurance

- 24.1 The concessionaire shall ensure that with effect from the Phase 1 Effective Date:
- (a) the insurances identified in and complying with part 1 of schedule 13 are taken out and maintained in force in respect of the period ending on the date of the Commissioning Certificate issued for the third (3<sup>rd</sup>) Inner Berth; and
  - (b) The insurances identified in and complying with part 2 of schedule 13 are taken out and maintained in force in respect of the Concession Term and that the level of insurance cover shall at all times be no less than the amounts stated in schedule 13.
- 24.2 Without affecting the other provisions of this clause 24, the concessionaire shall take out and maintain in force such other insurances as would be taken out and maintained in force from time to time by a reasonable and prudent person exercising the rights and performing the obligations of the concessionaire under this Agreement and having regard to all the circumstances who does not self-insure (except to the extent of minimum deductibles which are at a level consistent with prudent market practice).
- 24.3 Without prejudice to the preceding provisions, the concessionaire shall from time to time take out and maintain all other insurances which the concessionaire is required to effect by any Law.
- 24.4 The concessionaire shall:
- (a) inform the Ports Authority about any material variation of its insurance proposals as contained in schedule 13 in good time before taking out the

**Comment [ID20]:** The issue of non availability of insurance due to change in the market or market perception of host country remains unresolved. It might be useful to include a Brokers' letter provision if this does not appear in Schedule 13.

insurance; provided that where any of the insurances required by this Agreement cannot be obtained on reasonable commercial terms, the concessionaire shall seek the approval of the Ports Authority to waive or amend compliance with such requirements, which approval may not be unreasonably withheld;

- (b) pay or procure the payment of all prima payable for any insurance effected under this clause 24; and
  - (c) On request supply to the Ports Authority copies of the insurance policies and evidence that the policies are in force (including payment of prima).
- 24.5 If the concessionaire fails to take out or maintain in force any of the insurances required by this Agreement, the Ports Authority shall be entitled (without prejudice to its other rights and remedies for the breach) to take out and maintain such part or all of those policies as it considers (in its complete discretion) appropriate and to recover the cost of doing so (including payment of premiums, reasonable administration and other expenses and charges) from the concessionaire as a debt due on demand. Nothing in this clause shall entitle the Ports Authority to recover from the concessionaire any costs of taking out or maintaining in force insurances in excess of that required to be taken out and maintained under this Agreement by the concessionaire.
- 24.6 Subject to clauses 24.7, 24.10 and 36.5, the concessionaire shall apply the proceeds of the insurance policies required under this Agreement as follows:
- (a) In the case of third party legal liability or employers liability insurance, in satisfaction of the liability in respect of which the proceeds are payable;
  - (b) in the case of any other insurance, so as to ensure the performance of its functions and obligations under this Agreement, including, where relevant, the repair or replacement of the Phase 1 Facilities (including fixtures, Plant or other assets) in respect of which the proceeds are payable; and the concessionaire shall not grant, or permit the creation of, a Security Interest in or relating to any of those policies which is inconsistent with these provisions except as provided for in the Financing Documents and provided further that clauses 24.6 to 24.10 (inclusive) are subject to the Lenders Direct Agreement concerning, among other matters, the application of insurance proceeds until all sums due and owing by the concessionaire to the Lenders shall have been paid in full;
- 24.7 After all sums due and owing by the concessionaire to Lenders under the Financing Documents shall have been paid in full:
- (a) The following shall be paid directly into an account in the joint names of the Ports Authority and the concessionaire (the "Trust Account"):

- (i) the proceeds of all insurances required by this Agreement to be taken out or maintained by the concessionaire in respect of or for the purposes of repair, reinstatement or restoration of the Phase 1 Facilities or any part thereof (whether or not taken out or maintained by the concessionaire); and
  - (ii) all payments made by the Builder, the Designer or any other person pursuant to any Collateral Warranty; and the concessionaire shall ensure that all sums to be paid into the Trust Account pursuant to this sub-clause are paid directly by the paying party into the Trust Account unless otherwise agreed in writing by the Ports Authority and the concessionaire.
- 24.8 The Trust Account shall be opened and maintained by the Ports Authority and the concessionaire with a first class bank of international standing nominated jointly by the Ports Authority and the concessionaire (the "Bank"). All fees payable to the Bank in relation to the running of the Trust Account shall be paid by the concessionaire.
- 24.9 The Ports Authority and the concessionaire shall agree and sign a mandate for the Trust Account in the usual form required by the Bank provided that the mandate reflects that:
  - (a) the account shall be in the joint names of the Ports Authority and the concessionaire ;
  - (b) no payment out of or any other dealing with, the account shall be authorized without the joint signatures of one authorized signatory of each of the Ports Authority and the concessionaire;
  - (c) notwithstanding sub-clause (b) above, the Bank shall be entitled to make a payment out of or deal with the account pursuant to the terms of:
    - (i) an arbitration award made pursuant to an arbitration commenced in respect of monies paid into the Trust Account; or
    - (ii) an order of a court of competent jurisdiction, provided that the Bank shall make a payment out of, or deal with, the account pursuant to any such award or order regardless of whether or not the award or order is the subject of an appeal; provided further that the Bank shall not be obliged to make a payment out of, or deal with, the account if (and then only to the extent that) it is prevented from doing so by an injunction or similar order made by a court of competent jurisdiction;
  - (d) Credit balances held in the account shall earn interest and any interest earned shall be credited to the account; and the mandate shall be governed by [\_\_\_\_\_] law.

24.10 The sums held in the Trust Account shall:

- (a) in the case of proceeds paid in relation to third party legal liability or employers liability insurance and only to the extent that such proceeds were paid into the Trust Account, be used in satisfaction of the liability in respect of which such proceeds were paid; or
- (b) in the case of other insurance proceeds and only to the extent that such insurance proceeds were paid into the Trust Account, be used to ensure the performance of the concessionaire's functions and obligations under this Agreement, including, where relevant, the repair or replacement of the Phase 1 Facilities (including fixtures, Plant or other assets) in respect of which such proceeds were paid; or
- (c) in the case of payments made in relation to any Collateral Warranty and only to the extent that such payments were paid into the Trust Account, be used to make good the defects of the facilities for which such payments were paid .

24.11 Neither the Ports Authority nor the concessionaire shall create a Security Interest over the Trust Account or any credit balance(s) held in the Trust Account.

***No effect on other protection***

24.12 If following all payments made pursuant to clause 24.10 a credit balance remains in the Trust Account, such credit balance shall be paid to the concessionaire.

24.13 Neither compliance nor failure to comply with these insurance provisions shall affect the concessionaire's other obligations under this Agreement, including any indemnity provisions.

**25. Late capex**

25.1 The concessionaire shall obtain the prior approval of the Ports Authority for capital expenditure for the Phase 1 Facilities exceeding United States Dollars [\_\_\_\_\_] (US\$[\_\_\_\_\_] (escalated by the proportionate increase in US CPI calculated from the date of Handover during the final fifteen (15) years of the Concession Term.

25.2 During the final fifteen (15) years of the Concession Term, the concessionaire shall in any event replace quay gantry cranes only with prior approval of the Ports Authority.

- 25.3 Subject always to clause 25.2, if the Ports Authority withholds its approval to "the acquisition of any item of Plant, the concessionaire shall be allowed to acquire and install the Plant on the following terms:
- (a) the Ports Authority shall have no obligation to acquire the Plant on expiry of this Agreement but the Ports Authority shall have a right of first refusal to acquire the same on terms no less favorable (taking account of relocation \_charges) than those subsequently offered by the concessionaire to third parties; and
  - (b) The concessionaire may remove the Plant and reinstates the Phase 1 Facilities to the condition such Phase 1 Facilities were in immediately before the concessionaire's installation of that item of Plant, at the concessionaire's cost provided that nothing in this sub-clause shall require the concessionaire to restore the premises by reinstating any Plant which has been removed and replaced in accordance with the terms of this Agreement.

## **26. Handback**

### ***Overall Responsibility***

- 26.1 The concessionaire shall procure that on the date of expiry of the Concession Term each element of the Phase 1 Facilities shall comply with the Handback Requirements.
- 26.2 Six months prior to the expected date of expiry of the Concession Term the Handback Expert shall conduct an inspection of the Phase 1 Facilities (the "Initial Inspection"). Such inspection shall comply with the requirements set out in the Handback Requirements applicable to the respective elements of the Phase 1 Facilities.

### ***Assessing required renewal works***

- 26.3 Within fourteen (14) days after the completion of the Initial Inspection the Handback Expert shall provide the concessionaire and the Ports Authority with a notice (the "Handback Proposals") setting out:
- (a) a schedule of dilapidations on the condition of the Phase 1 Facilities;
  - (b) determination as to the maintenance works or other works of renewal, reconstruction, repair or reinstatement (the "Renewal Works") required to be carried out in respect of the Phase 1 Facilities in order to procure that, on expiry of the Concession Term, the Phase 1 Facilities shall comply with the Handback Requirements;

- (c) determination as to the program (the "Renewal Construction Program") for carrying out the Renewal Works over the remainder of the Concession Term; and
  - (d) Determination as to the cost of carrying out the Renewal Works (the "Renewal Amount").
- 26.4 The Handback Proposals shall be made, amongst other things, on the assumption that the Phase 1 Facilities shall be maintained in accordance with the concessionaire maintenance policy set forth in schedule 18 for the remainder of the Concession Term.
- 26.5 Upon receipt of the Handback Expert's determinations as to the Renewal Works, the Renewal Construction Program and the Renewal Amount;
- (a) The concessionaire shall, within fourteen (14) days of the receipt of such determinations, where the Renewal Amount is greater than the transfer price payable to the concessionaire under clause 35.9 ("Transfer Price"), provide a bond in an amount equal to the difference between the Renewal Amount and the Transfer Price from a bank or insurance company which is authorized to carry on business in [\_\_\_\_\_] ("Renewal Amount Bond") or provide such other security as the Ports Authority and the concessionaire may agree;
  - (b) The concessionaire shall ensure that the Renewal Works are carried out in accordance with the Renewal Construction Program; and
  - (c) The concessionaire's right to receive any payment under this Agreement or any other agreement between it and the Ports Authority shall be suspended (and no interest shall in any event be payable in respect of the suspension period) from the fifteenth (15th) day following the receipt of the Expert's determinations until the Renewal Amount Bond or other security required under sub-clause (a) is duly executed and delivered to the Ports Authority.
- 26.6 To avoid doubt, the concessionaire shall procure at its own cost that the Renewal Works are carried out even if the actual cost of the Renewal Works may be higher than the Renewal Amount.

#### **Handback Procedure**

- 26.7 On the day on which the Concession Term expires the Handback Expert shall conduct a further inspection of the Phase 1 Facilities. The inspection shall comply with the requirements set out in part 2 of schedule 14 applicable to the relevant element of the Phase 1 Facilities.

- 26.8 Within seven (7) days after the completion of the inspection referred to in the preceding sub-clause, the Handback Expert shall either:
- (a) issue a Handback Certificate to the concessionaire with a copy to the Ports Authority; or
  - (b) notify the concessionaire of its decision not to issue a Handback Certificate and state the reason for that decision (a "Handback Deficiency Notice")
- 26.9 The Handback Expert shall not issue the Handback Certificate if:
- (a) The concessionaire shall have failed to complete all of the Renewal Works; or
  - (b) The Phase 1 Facilities for any other reason do not comply with any material aspect of the Handback Requirements.
- 26.10 Any Handback Deficiency Notice shall describe each way in which the Renewal Works have not been completed or the Phase 1 Facilities do not comply with the Handback Requirements and shall state the cost of completing those Renewal Works and/or of procuring that the Phase 1 Facilities fully comply with the Handback Requirements. If the cost of completion of the Renewal Works exceeds the Renewal Amount the concessionaire shall, as the case may be, either increase the value of the Renewal Amount Bond by the excess or post a bond (or other security) ("Handback Deficiency Bond") whose face value equates such excess.
- 26.11 If the concessionaire has not completed the Renewal Works or the Phase 1 Facilities do not fully comply with the Handback Requirements, then without prejudice to any other right or remedy of the Ports Authority, the Ports Authority shall be entitled to draw down the Renewal Amount Bond (increased as above), Handback Deficiency Bond or deduct the Renewal Amount from the Transfer Price, whichever is applicable.
- 26.12 Despite the provisions of this clause 26, the Ports Authority may in its absolute discretion direct that all or any part of the Renewal Works shall not be carried out. If the Ports Authority gives that direction the value of the work which is not to be done shall be deducted from the amount (if any) secured by the Renewal Amount Bond or Handback Deficiency Bond and the concessionaire shall be entitled to the amount by which the Renewal Amount Bond or Handback Deficiency Bond is reduced.
- 26.13 If the Handback Expert issues a Handback Certificate under clause 26.8(a), the Ports Authority shall promptly return to THE CONCESSIONAIRE the value of the Renewal Amount Bond.

### ***Identity of the Handback Expert***

- 26.14 For the purposes of this clause 26, "Handback Expert" means an Expert appointed in accordance with clause 48.15, having the qualifications contemplated by clause 48.14 and exercising powers on the basis contemplated by clause 48.17.
- 26.15 On the completion of the Renewal Works, or on the concessionaire making payment to the Ports Authority in respect of any additional work required by this clause, the Ports Authority shall return to the concessionaire the bonds provided under this clause 26.

### **27. Performance monitoring**

- 27.1 If at any time either the Ports Authority or the concessionaire reasonably considers that the other party has failed to perform any of its obligations under this Agreement and that failure is capable of remedy, then the Ports Authority or the concessionaire as the case may be, may serve a notice on the other party (a "Corrective Action Notice") requiring such other party (at its own cost) to remedy that failure (and any damage resulting from that failure) within a reasonable period (the "Remedial Period").
- 27.2 If the party on whom a Corrective Action Notice is served fails to remedy the failure within the Remedial Period following service of a Corrective Action Notice, then the party serving the Corrective Action Notice may (without prejudice to any right or remedy available to it) itself take such steps as are reasonably necessary to remedy that failure, or engage others to take those steps and the party on whom a Corrective Action Notice is served shall indemnify the party serving the Corrective Action Notice from all losses, costs, liabilities or expenses incurred by or claimed against the party serving the Corrective Action Notice in taking that action.

### **28. Corporate changes in equity during Initial Period**

- 28.1 The Ports Authority shall be entitled to terminate this Agreement if before expiry of the Initial Period the Sponsors create a Security Interest over, sell or in any other way dispose of, any share or other security or an interest in any share or other security of the concessionaire without obtaining the prior written approval of the Ports Authority, except pursuant to the Financing Documents, the concessionaire shall be entitled to terminate this Agreement if, before the expiry of the Initial Period, the Ports Authority creates a Security Interest over, sells or in any other way disposes of, any share or other security or an interest in any share or other security of the concessionaire without obtaining the prior written approval of the concessionaire.

### **Listings**

- 28.2 The Ports Authority shall be entitled to terminate this Agreement if, before expiry of the Initial Period, any of the shares or other securities of the concessionaire, or of any subsidiary of the concessionaire, are listed on the [\_\_\_\_\_] Stock Exchange.
- 28.3 The approval of the Ports Authority is required before any of the shares or other securities of the concessionaire or of any subsidiary of the concessionaire are listed on a stock exchange other than in [\_\_\_\_\_].

### **Sponsor equity**

- 28.4 The Ports Authority shall be entitled to terminate this Agreement if, at any time prior to expiry of the Initial Period the Sponsors cease to hold, as registered holder and beneficial owner, in aggregate not less than fifty one per cent (51%) of the issued equity capital of the concessionaire held equally between [\_\_\_\_\_].
- 28.5 The Ports Authority shall be entitled to terminate this Agreement if at any time between expiry of the Initial Period and Listing the Sponsors cease to hold, at registered holder and beneficial owner, in aggregate not less than thirty per cent (30%) of the issued equity capital of the concessionaire held equally between [\_\_\_\_\_].
- 28.6 The Ports Authority shall be entitled to terminate this Agreement if, subject to the preceding sub-clause, at any time until the tenth (10<sup>th</sup>) anniversary of the said Listing of shares or other securities of the concessionaire or any subsidiary of on the [\_\_\_\_\_] Stock Exchange, the Sponsors cease to hold, as registered holder and beneficial owner, in aggregate not less than twenty per cent (20%) of the issued equity capital of the concessionaire held equally between [\_\_\_\_\_].
- 28.7 Not less than thirty (30) Business Days prior to disposal of (i) the aggregate twenty per cent (20%) of the issued equity capital of the concessionaire referred to in clause 28.6 or (ii) the first disposal of such part thereof as comprises at least three per cent (3%) of the issued equity capital of the concessionaire, the Sponsor(s) disposing of such shares shall insofar as permitted by the rules of the [\_\_\_\_\_] Stock Exchange inform the Ports Authority of:
- (a) the proposed date of disposal and any change in such date;
  - (b) the number of shares being disposed of;
  - (c) the price at which it is proposed to dispose of such as; and
  - (d) All such other details relating to the disposal of such shares which the Ports Authority may reasonably request.

The Ports Authority shall keep such information confidential to itself and its legal and financial advisors and accountants save to the extent such information is or enters the public domain.

### **Restricted Shareholders**

- 28.8 Except to the extent set out in any direct agreement between the Lenders and the Ports Authority, at no time prior to listing may a share or other security of the concessionaire or any subsidiary of the concessionaire, or an interest in a share or other security of the concessionaire or any subsidiary of the concessionaire be owned by a restricted shareholder category, which for this purpose means:
- (a) organizations incorporated in, Controlled by or whose majority legal or beneficial owners are nationals of, or incorporated or domiciled in countries which are at war with [ ] or are subject to any embargo applied by the Government; and/or
  - (b) owners, operators of, or other persons having a Significant Port Interest in, facilities falling within the provisions of clause 4.2 (exclusivity); and/or
  - (c) any proscribed or terrorist organization; provided that nothing in this clause 28.8 shall deem any of the shareholders listed in schedule 20 to be members of any restricted shareholder category.

### **Asset disposals**

- 28.9 The Ports Authority shall be entitled to terminate this Agreement if, except for the purpose of granting security pursuant to clauses 5.4 and 5.5, the concessionaire sells, transfers, supplies, leases or in any other way disposes of the whole or any part (which in the reasonable opinion of the Ports Authority is material in the context of the performance of the concessionaire's obligations and functions under this Agreement or the other Project Documents) of its undertaking, rights or other assets, whether by a single transaction or a number of transactions (whether related or not and whether at the same time or over a period of time).

## **29. Refinancing**

- 29.1 Until expiry of the Initial Period, the concessionaire shall not without the prior written consent of the Ports Authority;
- (a) Vary terminate or cause the termination of any of the Financing Documents in a manner adversely affecting the ability of the concessionaire to perform its obligations under this Agreement; or
  - (b) incur any Debt (other than incurred under the Credit Agreements) save that THE CONCESSIONAIRE shall be entitled to incur trading and credit liabilities in the ordinary course of business, provided that any Security Interest thereby created in favor of any third party shall not rank in priority to any right or Security.

**Comment [ID21]:** As it is likely that on a Refinancing the new lenders will require direct agreements the question as to whether the public sector should share in the refinancing gains still remains unresolved.

### ***Interest of the Ports Authority under the Project Documents***

29.2 The Ports Authority's consent under the preceding sub-clause shall not be withheld where it is satisfied (acting reasonably) that:

- (a) The concessionaire shall continue to have sufficient financial resources to fulfill its obligations under this Agreement and the Project Documents;
- (b) it shall be able to comply with the terms and conditions of the new Debt; and
- (c) No security prohibited by this Agreement would be obtained by providers of the new Debt.

29.3 In no circumstances shall the Ports Authority's approval of new Debt increase its liability (if any) to pay sums on termination of this Agreement or the expiry of the Concession Term.

### **30. Termination by the Ports Authority**

30.1 The Ports Authority shall be entitled to terminate this Agreement (in the manner described in clause 34 (termination procedure)) in the following circumstances:

- (i) the occurrence of any act of insolvency relating to the concessionaire, the Builder, a Management Services Provider or any Sponsor which holds at least ten per cent (10%) of the issued equity capital of the concessionaire, including:
- (ii) any meeting of creditors of the person in question being held with a view to a general re-adjustment of all or any class of its indebtedness or any arrangement or composition with or for the benefit of creditors (including any voluntary arrangement as defined in Sections 323 to 330 of the Companies Act) being entered into by or in relation to the person in question;
- (iii) a receiver, administrator, administrative receiver or other encumbrance, taking possession of or being appointed over, or any distress, execution or other process being levied or enforced upon the whole or any part of, the assets of the person in question; the person in question ceasing or threatening to cease to carry on business, or being or becoming unable to pay its debts within the meaning of [ ] law;
- (iv) a petition being presented (and not being discharged within ninety (90) Business Days) or a meeting being convened for the purposes of considering a resolution, or such a resolution being circulated as a written resolution for the purposes of the Companies Act or otherwise pursuant to the Articles of Association (or other relevant constitutional document) of the person in question, for the making of an administration order or the

- winding-up, bankruptcy or dissolution of the person in question; or if the person in question shall suffer any event analogous to any of the foregoing in any jurisdiction in which it is incorporated or resident;
- (v) provided that if any act of insolvency relates to the Builder, a Management Services Provider or a Sponsor, there shall only be a termination right if in the reasonable opinion of the Ports Authority the occurrence shall be likely to have a material adverse effect on the ability of the concessionaire to perform its obligations under this Agreement and the concessionaire shall have twenty one (21) days in which to make written representation to the Ports Authority concerning its ability to perform its obligations despite the act of insolvency; and (but without prejudice to other termination rights) provided further that no right of termination under this provision shall be exercised by the Ports Authority if the insolvency relates to a Builder or Management Services Provider until six (6) months after the occurrence of the act of insolvency in order to allow the concessionaire to engage a replacement Builder or Management Services Provider (such replacement to be always in accordance with and subject to the terms of this Agreement) within six (6) months of the occurrence of any act of insolvency relating to a Builder or Management Services Provider as the case may be; if at the end of such six (6) month period the concessionaire has failed to engage a replacement, the Ports Authority will be entitled to terminate this Agreement forthwith; and (but without prejudice to other termination rights, whether pursuant to clause 28 (corporate changes) or otherwise) provided further that no right of termination shall be exercised by the Ports Authority in the event of an act of insolvency relating to a Sponsor (the "Insolvent Sponsor") if the Sponsor in respect of which no act of insolvency had occurred:
- (aa) holds, as at the date of the act of insolvency, the minimum shareholding required to be held in the aggregate by the Sponsors; or
- (bb) acquires the minimum shareholding required to be held in the aggregate by the Sponsors within ninety (90) days of the occurrence of the act of insolvency of the insolvent sponsor,
- (a) if a Milestone Achievement Date does not occur before a Milestone Sunset Date;
- (b) in the circumstances described in clause 28 (corporate changes);
- (c) for breach of clause 29 (refinancing);
- (d) for breach of clause 15 (operational sub-contracting);

- (e) failure to pay Royalties in accordance with schedule 6, other sums payable under this Agreement, the Inter-Terminal Operations Agreement, the Site Lease or the Port Services Agreement of a single sum of United States Dollars [\_\_\_\_\_] (US\$ \_\_\_\_\_) or sums of United States Dollars [\_\_\_\_\_] (US\$ \_\_\_\_\_) or more in aggregate, for a period of thirty (30) days or more (the figures to be adjusted by the proportionate increase in USCPI annually from the date of Handover) provided that the party owing such sums shall be entitled to retain from the sums otherwise payable any sums in respect of which there is a bona fide dispute, such retention in any event to be no greater than United States Dollars [\_\_\_\_\_] (US\$ [\_\_\_\_\_]);
- (f) failure to provide within thirty (30) days of being requested to do so by the Ports Authority the access and information required to enable the Ports Authority's accountants to review and check the accountants' certificate referred to in schedule 6 in relation to Royalties, or an adverse discrepancy of five per cent (5%) or more between the calculation of Royalties in a particular Contract Year made by the concessionaire and the determination of those Royalties by such accountant, other than arising from an unintentional bona-fide mistake;
- (g) failure to provide the secured funding for remedial work under clause 26.5 (a);
- (h) on the occurrence of any other material breach of this Agreement which is not expressly provided for in this clause 30 which materially affects the ability of the concessionaire to perform its obligations under this Agreement;
- (i) at any time after all sums due and owing by the concessionaire to the Lenders shall have been paid in full THE CONCESSIONAIRE fails to meet the financial ratio tests set by the Lenders in the Financing Documents;
- (j) subject to the concessionaire's applicable cure rights under the relevant agreement in the event of any of the Project Documents:
- (i) ceasing to be in full force and effect or no longer constituting a valid, binding or enforceable

- obligation of the parties to any such agreement (except in accordance with its provisions); or
- (ii) being materially varied or departed from other than where permitted by the Ports Authority);
  - (iii) provided that no right of termination under this provision shall be exercised by the Ports Authority if any of the events described in this sub-clause (k) was caused by an act or omission of the Ports Authority, the Government or any other 1r Authority without any fault on the part of the concessionaire; and
  - (iv) provided further that there shall only be an Event of Default if in the reasonable opinion of the Ports Authority the occurrence of an event described in this sub-clause (k) shall materially adversely affect the ability of the concessionaire to perform its obligations under this Agreement or materially adversely affect any right of the Ports Authority under this Agreement or its ability to enforce any such right or to perform its obligations under this Agreement or to perform any statutory duty.

### 31. Termination by the concessionaire

The concessionaire shall be entitled to terminate this Agreement in the following circumstances:

- (a) on the failure by the Ports Authority to Handover the Concession Area to the concessionaire within sixty (60) days of the Phase 1 Effective Date;
- (b) on the occurrence of a material breach of this Agreement or any other Project Documents to which the Ports Authority is a party by the Ports Authority which has a material adverse effect on the ability of the concessionaire to perform its obligations under this Agreement for a period of not less than ninety (90) days;
- (c) on the occurrence of breach of any material obligation under the Implementation Agreement by the Government which entitles the concessionaire to terminate the Implementation Agreement;
- (d) on the failure of the Ports Authority to comply with its obligations under clause 21; and
- (e) On the occurrence of any breach by the Ports Authority of its obligations under clause 28.1.

### 32. Force majeure termination

Either the Ports Authority or the concessionaire as the case may be shall be entitled to terminate this Agreement pursuant to the relevant provisions of clause 22.

### 33. Termination in the national interest

On the direction of the Minister, the Ports Authority shall be entitled to terminate this Agreement at any time if the Minister states, in his direction to the Ports Authority, that it is in the national interest to do so. For this purpose the national interest means any circumstance which the Minister states that the Government considers shall affect, directly or indirectly, the sovereignty, integrity or security of [\_\_\_\_\_]. The Ports Authority shall provide the concessionaire with a letter from the Minister or other appropriate written evidence of the direction given by the Minister but shall in no event be required to provide evidence or an explanation of the Ministers reasons for his direction.

### 34. Termination procedure

- 34.1 Each party shall notify the other immediately upon becoming aware of the occurrence of any event or circumstance which is, or would, with the passing of time or by the giving of notice, constitute or give rise to a right of termination under this Agreement. Such notice shall summarize the nature of the matter and give all reasonably available information concerning how it was caused, shall give an assessment of its likely effect, and the measures which the party giving the notice plans to take to avoid its occurrence or mitigate its effect.
- 34.2 Subject to any direct agreement between the Ports Authority and the Lenders, the Ports Authority shall be entitled to terminate this Agreement by notice with immediate effect in the circumstances described in:
- (a) clause 30.1(b) (Milestone Sunset Dates);
  - (b) clause 30.1(c) (corporate changes) provided that where the shortfall in the minimum shareholdings required pursuant to clauses 28.4, 28.5 and 28.6 does not in each case exceed half a percent (0.5%) in aggregate, THE CONCESSIONAIRE shall be entitled to a cure period of three (3) months within which to bring the shareholdings to the minimum required levels);
  - (c) clause 30.1(d) (refinancing);
  - (d) clause 30.1 (f) (payment obligations);
  - (e) clause 30.1 (g) (royalty certification);
  - (f) Clause 30.1 (h) (handback bond).

The Ports Authority shall copy to the Lenders any notice given by it to the concessionaire in respect of any default relating to the matters listed in clauses 34.2 (a) to (f).

- 34.3 Subject to any direct agreement between the Ports Authority and the Lenders, the Ports Authority shall be entitled to terminate this Agreement with immediate effect, by notice, in the circumstances described in clause 33 (national interest). The Ports Authority shall copy to the Lender any such notice.
- 34.4 Before a party (the "innocent party") exercises any termination right under the provisions of this Agreement other than those described in clauses 34.2 and 34.3, it shall (if the breach is capable of remedy) serve a notice on the other (the "party in default"), identifying the breach and requiring the party in default at the election of that party to either:
- (a) remedy the breach within sixty (60) days, or such longer period as may be determined in writing by the innocent party at its discretion; or
  - (b) Within sixty (60) days propose in writing a reasonable program (a "Remedial Program") for remedying the breach; that program shall specify in reasonable detail the manner and time in which the breach is to be remedied.
- 34.5 If the party in default has not proposed a Remedial Program by the time required by the preceding sub-clause, then the innocent party may terminate this Agreement by notice with immediate effect if the notified breach has not been remedied before the expiry of sixty (60) days of the notice served on the party in default pursuant to clause 34.4.
- 34.6 Where the party in default puts forward a Remedial Program, the innocent party shall have sixty (60) days within which to notify the party in default that it does not accept the program as being reasonable, failing which the innocent party shall be deemed to have accepted the Remedial Program. Where the innocent party notifies the party in default that it does not accept the Remedial Program as being reasonable, the parties shall endeavor within the following thirty (30) days to agree any necessary changes to the Remedial Program put forward. In the absence of agreement within thirty (30) days, the question of whether the Remedial Program (as may have been amended by agreement) is reasonable may be referred by either party to an Expert.
- 34.7 The innocent party may terminate this Agreement by notice with immediate effect if the party in default either:
- (a) puts forward a Remedial Program which has been accepted by the innocent party or determined by the Expert as being reasonable and the

party in default then fails to comply with the program in a material respect; or

- (b) Fails to remedy the breach within the period specified in a notice given pursuant to clause 34.4(a).

34.8 Subject to the provisions of this Agreement, the rights of the innocent party under this clause are in addition and without prejudice to any other right which the innocent party may have to claim the amount of any loss or damage suffered by the innocent party concerning the acts or failures to act of the party in default.

34.9 The Ports Authority shall subject to the provisions of the Lenders Direct Agreement give notice to the Lenders of its intention to exercise any right of termination pursuant to clause 34.5 or 34.7 prior to exercising such right and permit the Lenders to exercise their rights under such Lenders Direct Agreement.

### **35. Other effects on termination or expiry**

#### ***Rights cease***

35.1 On termination or expiry of this Agreement, all future rights and obligations of the Ports Authority and the concessionaire under this Agreement shall cease and the Site Lease shall also terminate automatically, without prejudice to accrued rights and liabilities or to the provisions of clause 36 (termination compensation). The Inter-Terminal Operations Agreement, Terminal Access Agreement and any Port Services Agreement shall terminate automatically without prejudice to accrued rights and liabilities.

#### ***Asset transfers***

35.2 On termination:

- (a) all physical assets (other than Excluded Assets); and
- (b) All records, including those necessary for the proper operation of the Phase 1 Facilities (other than the corporate records of the concessionaire itself); shall be transferred to the Ports Authority free from all third party rights; to avoid doubt, title to the Phase 1 Facilities shall not pass to the Ports Authority, notwithstanding such transfer until the date on which the Termination Compensation, subject to the deductions expressly contemplated in this Agreement, is received in full by the concessionaire provided that the concessionaire shall make all such arrangements by way of assignment, lease or otherwise that maybe necessary to enable the Ports Authority to carry on the operation of the Phase 1 Facilities for a period of one hundred and eighty (180) days, provided further that all costs and expenses incurred during this period with regard to such

interim arrangements would be at the cost of the Ports Authority. For the purpose of this clause 35.2, "Excluded Assets" shall mean capital expenditure items which were not approved by the Ports Authority under clause 25 (late capex). All records shall be complete, accurate and up to date.

- 35.3 If any equipment is leased by the concessionaire then at the Ports Authority's request, the concessionaire shall arrange for the lease agreements relating to such equipment to include an option permitting (but not obliging) the Ports Authority to take over use and possession of the equipment on expiry of the lease and/or its termination for a period of up to two (2) years and on terms substantially no less favorable to the Ports Authority than those available.
- 35.4 On termination of this Agreement, all manufacturers and repairers warranties and guarantees as are then in force and available (and THE CONCESSIONAIRE shall use all reasonable efforts to ensure they are available) shall be assigned to the Ports Authority.
- 35.5 The concessionaire shall at the request of the Ports Authority provide full co-operation and assistance for a period of six (6) months commencing three (3) months before expiry of the Concession Term (or, in the event of termination pursuant to clauses 30 to 33, a period of three (3) months commencing from the date of termination) to enable the Ports Authority to take over and carry on the orderly and efficient operation of the Phase 1 Facilities with minimum disruption. For the purposes of this clause 35.5, the co-operation and assistance to be provided by the concessionaire shall include but not be limited to:
- (a) explaining and familiarizing the Ports Authority's personnel with the operation and maintenance of all Plant and equipment forming part of the concessionaire's operations, including all computer hardware and software;
  - (b) explaining and familiarizing the Ports Authority's personnel with all the concessionaire's routines and procedures and any manuals relating thereto;
  - (c) providing full information and supporting documentation to the Ports Authority's personnel in relation to the foregoing;
  - (d) training the Ports Authority's personnel in the use of any of the items referred to in sub-clauses (a) and (b) above;
  - (e) assisting the Ports Authority in identifying, assessing and (if desired by the Ports Authority) recruiting the concessionaire's employees, former employees or any of them;

- (f) Supplying to the Ports Authority such, documents and information as it may reasonably require preparing an information memorandum and related documentation for the purposes of any tender competition relating to the Phase 1 Facilities or any part thereof, subject always to the provisions of clause 35.13.

Each of the concessionaire and the Ports Authority shall indemnify and hold the other harmless from and against all costs, claims, demands, fees, imposts, taxes, charges and liabilities of whatsoever nature and howsoever arising incurred as a result of any acts or omissions of their respective personnel on or about the Concession Area during the said period.

#### **1P license**

- 35.6 (a) On termination of this Agreement at any time for whatever reason, the concessionaire shall, in respect of intellectual property used for this Project and which the concessionaire either owns or has the capacity to assign or transfer or in respect of which the concessionaire may permit the use of such property, transfer such property or assign such rights to or in respect of such property to the Ports Authority;
- (b) On termination of this Agreement prior to the tenth (10th) anniversary of the Phase 1 Effective Date for whatever reason the concessionaire shall, in respect of intellectual property rights in any container terminal management system customized or modified for the Project and not owned by the concessionaire, grant an option to the Ports Authority to acquire or obtain those intellectual property rights on the following terms and conditions:
- (i) the option, if exercised, will entitle the Ports Authority to take an assignment of the license or those intellectual property rights then held by the concessionaire and on the same terms and conditions, such license or rights to endure for a further twelve (12) months;
  - (ii) the Ports Authority shall contract with the proprietor of the container terminal management system for the latter to provide maintenance and any other related services to the Ports Authority during such period of twelve (12) months;
  - (iii) the Ports Authority shall be entitled, on a single instance basis only, to sub-license such intellectual property rights to a replacement terminal operator for the unexpired portion of such period of twelve (12) months provided that such sub-licensee accedes to the obligations of the Ports Authority in subparagraphs (i) and (ii) above;

- (c) On expiry or termination of this Agreement at any time for whatever reason, the concessionaire shall, in respect of intellectual property rights in any systems other than those referred to in clause (a) or clause (b) use its reasonable commercial endeavors to ensure a continuity of use of such rights by the Ports Authority or its nominee for a reasonable period and on the same terms and conditions as those applying to the concessionaire at the time of such expiry or termination.

#### **No sham/liability acquisition**

**Comment [ID22]:** Does sham mean share?

- 35.7 For clarity, it is agreed that the Ports Authority is under no obligation to acquire any shares in the concessionaire or any of its financial or other liabilities and the concessionaire shall remain solely responsible for all debts and liabilities of its business and shall indemnify the Ports Authority against any loss, cost, liability or expense suffered by the Ports Authority concerning such matters. This clause is without prejudice to the provisions of clause 36 (termination compensation).

#### **Employees**

- 35.8 The concessionaire shall ensure that all its employees are paid in full all sums due to them (including statutory dues) and shall indemnify the Ports Authority against all debts and liabilities of any nature relating to the employment of all employees or ex-employees of the concessionaire in relation to their period of employment by the concessionaire and as determined by an authority competent in law to do so. Nothing in this Agreement shall oblige the Ports Authority to off employment or to make any redundancy payments to any of the officers or employees of the concessionaire except if the termination occurs in the circumstances set out in clause 2.5, clause 31, and clause 33 or due to the occurrence of a Force Majeure event described in sub-clause 22.5(c).

#### **Transfer Price on Expiry**

- 35.9 The price payable for the physical assets (other than the records which in aggregate shall be purchased for United States Dollars one (US\$1) shall be their net book value. For this purpose, the concessionaire shall apply the following depreciation policies:
- (a) civil works (including the quay walls) – thirty five (35) years;
  - (b) panamax gantry cranes - fifteen (15) years;
  - (c) post-panamax gantry cranes – twenty (20) years (but only if designed by the manufacturer to make a minimum of two million (2,000,000) moves, if not, fifteen (15) years);

- (d) RTGs – fifteen (15) years (but only if designed by the manufacturer to make a minimum of one million (1,000,000) moves, if not twelve (12) years); and
- (e) Other assets shall be valued according to the standard periods under [ ] accounting practices on a historic cost basis.

Subject to clause 26.11 the Transfer Price shall be payable only upon expiry of the Concession Period. The concessionaire shall at the request of the Ports Authority provide to the Ports Authority evidence from the relevant manufacturer as to the number of moves which each post-panamax gantry crane and RTG is designed to make.

- 35.10 In all cases there shall be no revaluation resulting in an increase in book value.
- 35.11 The Transfer Price shall be based on the net book value of the assets in Rupees, as recorded at the prevailing rate of exchange on the date of acquisition, converted into United States dollars at the prevailing rate of exchange on the date of expiry of this Agreement.
- 35.12 the concessionaire shall remove as soon as practical and in any event within three (3) months after the date of expiry of this Agreement by effluxion of time or within six (6) months of termination pursuant to clauses 30 to 33, from the Concession Area, all property provided pursuant to clause 25 which is not required by the Ports Authority, at the concessionaire's cost.
- 35.13 If the Ports Authority wishes to conduct a tender competition before the expiry of this Agreement with the intention of granting a right to another person to operate and/or redevelop the Phase 1 Facilities, the concessionaire shall, at its reasonable cost and upon receipt of reasonable notice by the Ports Authority, co-operate with the Ports Authority fully in that competition process by:
  - (a) providing any information which the Ports Authority reasonably considers necessary to conduct the competition;
  - (b) providing reasonable access to the Concession Area; and
  - (c) Spending management time.

The foregoing shall not oblige the concessionaire to incur substantial cost expenditure or to make outlays to third parties save that the concessionaire shall in any event and to the extent necessary to comply with its obligations under this clause 35.13 procure full co-operation and provision of information by such Sponsors as hold at least ten percent (10%) of the issued equity capital of the concessionaire. It is the current intention of the Ports Authority that the concessionaire and the Sponsors shall be entitled to participate in any open tender competition for the re-letting of this Agreement on its expiry by effluxion of time.

### 36. Termination compensation

- 36.1 The right of the concessionaire to receive a termination payment shall be contingent upon the concessionaire performing its obligations to deliver assets under clause 35.
- 36.2 In the event of termination in the circumstances contemplated by clause 22.5 (b) and 22.5 (c) prior to the commissioning of the third Inner Berth, the Termination Compensation shall be assessed as follows:
- (a) the basic principle is that the basis for assessing the Termination Compensation shall be the fair value of the assets included in the Project (being such additions and/or improvements as have been made by the concessionaire together with the Cranes but not including anything else in existence as at the date of Handover), such fair value to be subject to addition or deduction in accordance with sub-clauses (h), (i) and (j) below, subject to a maximum amount equal to one hundred and ten percent (110%) of the highest amount payable under the Termination Compensation Base Case for the fully completed Phase 1 Facilities;
  - (b) the fair value shall be determined (in the absence of agreement by the parties within thirty (30) days following the date of the related termination notice) by an appraiser; the appraiser will be a chartered accountant independent of the parties who in the absence of agreement by the parties shall be, nominated by the [\_\_\_\_\_];
  - (c) the appraiser will act as an expert not as an arbitrator; he will have powers to obtain relevant information from the parties;
  - (d) the appraiser will determine the fair value on the basis of the projected cost of the construction of the Phase 1 Facilities as determined by the Financial Model adjusted for the degree of completion and to reflect the state and condition of the assets of the Project;
  - (e) despite any provisions, in no circumstances shall the appraiser:
    - (i) apply any earnings based valuation methodology; or
    - (ii) take into account any goodwill in the business in which the assets are to be employed or any commercial requirement of the Ports Authority to use the assets included in the Project;
  - (f) The fair value will be determined as at the date of termination;
  - (g) in the event of termination in the circumstances contemplated by paragraphs (i) to (v) of clause 22.5 (b) the Termination Compensation shall be one hundred per cent (100%) of the fair value as determined in accordance with sub-clause (d) above ;
  - (h) in the event of termination in the circumstances contemplated by paragraphs (vi) and (vii) of clause 22.5 (b), the Termination Compensation shall be:

- (i) one hundred percent (100%) of the fair value as determined in accordance with sub-clause (d) above; minus
  - (ii) any proceeds actually received from insurances taken out by the concessionaire in accordance with this Agreement to cover physical damage caused by events identified in such paragraphs (vi) and (vii), subject to any adjustments to be made as provided in clause 36.6 (a);
- (i) In the event of termination in the circumstances contemplated by clauses 22.5(c), 31 and 33, the Termination Compensation shall be:
- (i) one hundred and ten percent (110%) of the fair value as determined in accordance with sub-clause (d) above; plus
  - (ii) any redundancy costs payable to employees of the concessionaire as a consequence of such termination, provided that in the case of expatriate employees a payment in respect of such costs would be made only in the next seven (7) years after Handover, and
- (j) In the event of termination in the circumstances contemplated by clause 30, the Termination Compensation shall be ninety percent (90%) of the fair value as determined in accordance with paragraph (i) of sub-clause (d) above.
- 36.3 Termination Compensation in respect of any termination which takes place after the commissioning of the third (3<sup>m</sup>) Inner Berth shall be assessed on the following bases provided that in any event one hundred per cent (100%) of the Termination Compensation Base Case at any time shall not be less than the Transfer Price as calculated at that time:
- (a) in the circumstances contemplated by paragraphs (i) to (v) of clause 22.5 (b) shall be one hundred per cent (100%) of the Termination Compensation Base Case;
  - (b) in the circumstances contemplated by paragraphs (vi) and (vii) of clause 22.5 (b) shall be:
    - (i) one hundred per cent (100%) of the Termination compensation Base Case; minus
    - (ii) any proceeds actually received from insurances taken out by the concessionaire in accordance with this Agreement to cover physical damage caused by events identified in such paragraphs (vi) and (vii), subject to any adjustments to be made as provided in clause 36.6 (a);

- (c) In the circumstances contemplated by clauses 22.5 (c) 31 and 33 shall be:
    - (i) one hundred and ten per cent (110%) of the Termination Compensation Base Case ; plus
    - (ii) any redundancy costs payable to employees of THE CONCESSIONAIRE in consequence of such termination, provided that in the case of expatriate employees a payment in respect of such costs would be made only in the first seven (7) years after Handover; and
  - (d) In the circumstances contemplated by clause 30, shall be, ninety per cent (90%) of the Termination Compensation Base Case.
- 36.4 In the event of damage occurring to the Existing Superstructure as a direct result of any event of Force Majeure:
- (a) The concessionaire shall, when notifying the Ports Authority in accordance with clause 22.3, also notify the Ports Authority that damage has occurred to the Existing Superstructure and (where such damage is to the breakwater adjacent to the Concession Area) provide to the Ports Authority details of such damage and the causes thereof;
  - (b) where such damage is to the breakwater adjacent to the Concession Area the concessionaire and the Ports Authority shall consult with each other as to the nature, extent and cause of the damage, the extent of any repairs required, the time likely to be required to effect such repairs and any other steps to be taken by either Party;
  - (c) notwithstanding the provisions of sub-clause (b) above, the decision as to whether, on what basis and within what time scale to rebuild and/or to effect repairs to the Existing Superstructure shall be taken by the Government acting in its absolute discretion within six (6) months of the notification given by the concessionaire pursuant to sub-clause (a) above and such decision shall be final, binding and unappealable;
  - (d) the Ports Authority shall communicate any decision by the Government to the concessionaire within ten (10) Business Days of such decision being taken;
  - (e) If the Government decides to rebuild and/or effect repairs, such rebuilding and/or repairs shall be effected within such period as may be agreed between the parties or as determined by an Expert which period shall not exceed two (2) years from the date of occurrence of the event.

- (f) if rebuilding and/or repairs are not effected within the period as provided in sub-clause (e) above, then the concessionaire shall be entitled to terminate this Agreement forthwith upon notice to the Ports Authority;
- (g) upon such termination the concessionaire shall be entitled at its election:
  - (i) to retain the proceeds (if any) of all insurances taken out by the concessionaire in respect of such event, in which case no further sums shall be payable by the Ports Authority to the concessionaire in respect of such termination; or
  - (ii) when such event is one under clause 22.5 (a) or (b) (inclusive) to be paid by the Ports Authority compensation calculated on the basis stipulated in clause 36.2(i) in which case THE CONCESSIONAIRE shall account to the Ports Authority for the proceeds (if any) of insurances taken out by the concessionaire as required by this Agreement in respect of such event; in either case subject to any adjustments to be made as provided in clause 36.6 (a).

The provisions of this clause 36.4 shall apply in precedence to any other provisions of this clause 36 and do not derogate from the rights of the concessionaire under the provisions of clause 22.

36.5 In the circumstances contemplated by clause 22.5(a), but only if they occur during the period that any balance remains outstanding from the concessionaire to the Lenders under the financing documents:

- (a) if the damage to the Phase 1 Facilities is determined by the parties or absent such determination, by an Expert, to be:
  - (i) in the case of damage strictly to Plant replacement value of Plant to an amount not exceeding United States Dollars [\_\_\_\_\_] (US\$[\_\_\_\_\_]); or
  - (ii) in the case of damage to the civil works and quay walls of the Phase 1 Facilities, an amount not exceeding forty per cent (40%) of the total replacement value of such civil works/quay walls,

then the concessionaire shall apply the proceeds received from insurances required to be taken out by this Agreement to repair and replace the Plant or restore the civil works/quay walls of Phase 1 Facilities as applicable; but for the avoidance of doubt, if such circumstances occur after all balance outstanding to the Lenders under the financing documents have been repaid, then all such proceeds shall be applied for repair or restoration as applicable;

- (b) If the Ports Authority and the concessionaire determine that the Phase 1 Facilities be restored; then:
- (i) if the proceeds of the concessionaire's insurances are sufficient to restore the Phase 1 Facilities, such proceeds shall be applied for such purpose;
  - (ii) if the proceeds of the concessionaire's insurances are not sufficient to restore the Phase 1 Facilities and the concessionaire notifies the Ports Authority that it is not willing to restore the Phase 1 Facilities, the Ports Authority shall have the option, prior to the concessionaire exercising any right to terminate this Agreement pursuant to clause 22.7 to pay to the concessionaire the shortfall between the insurance proceeds and the amount required to restore the Phase 1 Facilities, in which event the Phase 1 Facilities shall be restored and no right of termination -pursuant to clause 22.7 shall be exercised by the concessionaire; and
  - (iii) if the Ports Authority does not exercise -its option under sub-clause (b)(ii) within six (6) months after the notice from the concessionaire referred to in such sub-clause, the concessionaire shall have the right to terminate the Agreement forthwith upon notice to the Ports Authority and shall be entitled to retain all insurances received but shall not be entitled to any further compensation from the Ports Authority; and
- (c) notwithstanding anything in this clause 36.5, to the contrary, if at the time of the determinations referred to in sub-clauses (a) and (b) above, there also exists damage to the Existing Superstructure, such damage affects the safety of the operations of the Phase 1 Facilities and the provisions of clause 22.7 and 36.4 apply, then the concessionaire shall not be obligated:
- (i) to restore or use any portion of the insurance proceeds for the restoration of the Phase 1 Facilities unless and until the Ports Authority has notified the concessionaire that the portion of the Existing Superstructure necessary for the adequate operation of the Phase 1 Facilities will be restored and the Ports Authority has in fact commenced such restoration; and
  - (ii) To complete the restoration of the Phase 1 Facilities before the later of the scheduled or actual date of completion of the restoration of such portion of the Existing Superstructure.

36.6 The compensation payable pursuant to clauses 36.2 and 36.3 shall be reduced by:

- (a) any insurance proceeds actually recovered by or on behalf of the concessionaire on insurances taken by the concessionaire in accordance with schedule 13, to cover against physical damage to the Phase 1 Facilities, save to the extent that:
    - (i) the insurers determine that all or part of such proceeds are not payable by reason of any act or omission of the concessionaire, in which event the compensation payable shall be reduced by the amount of the insurance cover (including political risk insurance in respect of the matters referred to in paragraphs (vi) and (vii) of clause 22.5 (b)) required to be obtained pursuant to this Agreement; and
    - (ii) if any portion of such insurance proceeds actually recovered has been applied by the concessionaire prior to such termination in connection with the evaluation, stabilization or restoration of any such physical damage, such portion shall not be deducted from the compensation payable to the concessionaire; and
  - (b) the amount of all sums owing to the Ports Authority under or for breach of this Agreement or any other contract between the parties (including the Site Lease), including damages for failure to maintain the Phase 1 Facilities according to the requirements of this Agreement where the concessionaire has acknowledged its liability for the sums owing to the Ports Authority or such sums have been held to be due and owing to the Ports Authority by the concessionaire by an Expert, arbitral tribunal or court of competent jurisdiction in terms of this Agreement.
- 36.7 Termination Compensation shall be paid in United States Dollars in two (2) tranches no later than one hundred and eighty (180) days and three hundred and sixty (360) days respectively following the date of termination, together with interest at US\$ LIBOR plus two per cent per annum (2% p.a.) calculated on the outstanding balances owing by the Ports Authority to THE CONCESSIONAIRE from the date of termination until the dates of actual payment.

## **37. Transfer**

### **Scope**

- 37.1 When this Agreement expires or if this Agreement is terminated according to clauses 30 to 33 (termination) then, on the Transfer Date the Phase 1 Facilities shall be transferred to the Ports Authority (or to such other person as may be designated by the Ports Authority) according to the arrangements set out in schedule 15 and otherwise as determined by the Transfer Committee.
- 37.2 A transfer committee (the "Transfer Committee") shall be established to prepare for and supervise the transfer of the Phase 1 Facilities. The Transfer Committee

shall have no power to vary the provisions of this Agreement. The Transfer Committee shall comprise equal numbers of representatives, each with equal voting rights, of the Ports Authority and the concessionaire (the total number of committee members being determined by the Ports Authority and the concessionaire).

- 37.3 The Transfer Committee shall agree upon a program for identifying the items to be transferred and how such transfers are to be effected in order to achieve the objectives set out in this Agreement.

### **38. The concessionaire and Ports Authority responsibilities**

- 38.1 As between the Ports Authority and the concessionaire, the concessionaire is solely responsible for the performance of its functions and services and for all the acts, or failures to act of itself and of its contractors, suppliers (and any tier of subcontractor or sub-supplier) and agents and of its and their officers, employees and independent contractors, (collectively "the concessionaire Associates") concerning the Project (the "Project Acts and Omissions") including:

- (a) the performance or failure to perform any of the Works or the Operations;
- (b) any infringement of the Intellectual Property Rights of any person in the course, of, or in connection with, the Project; or
- (c) any penalty, fine, compensation or other liability of any kind resulting from any breach by the concessionaire of any Law or any breach by the Ports Authority of any Law which is caused by or results from a Project Act or Omission; regardless of any control or influence which the Ports Authority may have or any instruction which the Ports Authority may give (save where there is an obligation on the concessionaire pursuant to this Agreement to comply with such instruction) concerning either the selection or removal of any the concessionaire Associates or the manner in which any of them performs his work.

- 38.2 Without restricting the rights and remedies of the Ports Authority on any basis available to it and despite clause 39 (liabilities), the concessionaire shall, on demand by the Ports Authority, indemnify and hold the Ports Authority and its officers, employees and agents harmless at all times from all losses, costs, expenses, fines, penalties, compensation and other liabilities of any nature which may be incurred by the Ports Authority or any of its officers, employees or agents as a result of or in connection with the Project Acts and Omissions. The Ports Authority may enforce this provision for itself and for the benefit of its officers, employees and agents.

- 38.3 The Ports Authority agrees to allow the concessionaire, to the extent it is reasonable to do so, if the concessionaire so wishes, to be joined in any

proceedings brought by any person which gives rise to any liability of the concessionaire under the preceding sub-clause and to consult with the concessionaire as to any material action which the Ports Authority proposes to take concerning those proceedings. Nothing in this clause shall oblige the Ports Authority to incur any costs or expenses or to breach any confidentiality duty or other obligation to another person.

38.4 Clauses 38.2 and 38.3 shall apply mutatis mutandis to the Ports Authority.

### **39. Liabilities**

39.1 Subject to the provisions of clause 39.2:

- (a) neither the Ports Authority nor the concessionaire shall be liable on any basis whatever to the other for any loss, cost, liability or expense ("loss") arising from any breach of this Agreement other than for actual loss directly resulting from the breach and which at the time of occurrence as reasonably foreseeable as likely to occur in the ordinary course of events from the breach 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 the Ports Authority nor THE CONCESSIONAIRE 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 39.1(a)(ii), loss resulting from the liability of the other to any other person.

39.2 Nothing in this clause shall affect the concessionaire's liability to pay:

- (a) Royalties (including minimum Royalties) pursuant to this Agreement; or
- (b) Other sums expressly provided for in other provisions of this Agreement.

39.3 Nothing in this clause 39 shall affect the Ports Authority's liability to pay sums expressly provided for in other provisions of this Agreement.

39.4 Where the Ports Authority's liability to the concessionaire to pay the sums

provided for in terms of this Agreement and other Project Documents to which it is a party, except in the case of Termination Compensation, the Buy Out Price and Transfer Price, in the aggregate, equals or exceeds United States Dollars [\_\_\_\_\_] (US\$ \_\_\_\_\_), the Ports Authority shall provide the concessionaire security for the sum outstanding in the form of (i) a standby letter of credit from a first class bank acceptable to the concessionaire, or (ii) an interest bearing blocked deposit, or (iii) such other form of security as both parties may mutually agree.

#### 40. Disclosed Data

- 40.1 In this Agreement, "Disclosed Data" means any information concerning the Port or the Concession Area or its surroundings or the business or assets of the Ports Authority or any other information of any nature whatsoever which has been made available in connection with the Project at any time in any form to the concessionaire or its officers, employees, agents or advisors or the Sponsors or their officers, employees, agents or advisors or on behalf of the Ports Authority or the Government, whether before or after the date of this Agreement.
- 40.2 The concessionaire acknowledges to and agrees with the Ports Authority (for the benefit of the Ports Authority itself and on behalf of the Government and all the officers, employees, agents and advisors of the Ports Authority and the Government) (collectively described in this clause 40 as "Protected Persons") that none of the Protected Persons:
- (a) Has any liability or responsibility for the accuracy or completeness of any of the Disclosed Data (including whether it is up to date); or
  - (b) Gives any representation, warranty, undertaking or assurance of any nature, express or implied, (collectively described in this clause 40 as "assurance") relating to the Disclosed Data;
  - (c) shall be liable to the concessionaire for any loss, cost, liability or expense which may arise (whether in contract or in any other way) from the use of any of the Disclosed Data by or on behalf of the concessionaire or any person for whom the concessionaire is responsible, in the financing, design, construction, equipping, testing, commissioning, operation, maintenance or repairing of the Phase 1 Facilities (and the concessionaire shall not seek to recover from any Protected Person any such loss, cost, liability or expense); and the concessionaire acknowledges and agrees (for itself and each of the Sponsors) that it (and each of the Sponsors) has made its own independent assessment of the Disclosed Data and the Project, having taken such independent professional advice as each considers appropriate.
- 40.3 Without limiting the general nature of this clause 40 and clause 9.7, the concessionaire acknowledges that no assurance is given by any of the

Protected Persons that the Identified Permits are a comprehensive list of all applicable Consents with which the concessionaire must comply now or at any future time and the listing in schedule 4 of the Identified Permits does not affect the concessionaire's obligation to identify and comply with all applicable Consents.

#### **41. Confidentiality**

- 41.1 During the Concession Term and for a period of two (2) years from the date of expiry of the Concession Term or earlier termination of this Agreement, the parties shall, subject to the following sub-clauses, treat all information of a confidential nature disclosed by the other party (whether in writing, orally or by any other means and whether directly or indirectly) as confidential, except as may be reasonably necessary for a party to carry out its obligations or enforce its rights under this Agreement or as may be required to be disclosed by law, an Authority or for tax or accounting purposes or with the written approval of the other party.
- 41.2 Nothing in this Agreement shall prevent the disclosure of information:
- a) as required by law to any government or any authority or any other government or regulatory agency having jurisdiction;
  - b) as required by lawful process;
  - c) to the extent required by the applicable rules or regulations of any recognized stock exchange or securities regulatory body;
  - d) where reasonably necessary to effect the purposes of this Agreement;
  - e) to a party's professional advisors, prospective or actual Lenders and prospective or actual purchasers of the Project or its assets in connection with any sale thereof by the Lenders pursuant to the exercise by the Lenders of their rights and remedies under the Financing Documents.

#### **42. Assignment**

- 42.1 Subject to the following provisions of this clause, neither of the parties shall assign, transfer nor otherwise dispose of their respective interests or obligations in this Agreement during the Concession Term without the approval of the other party and any Approval Authorities.
- 42.2 The concessionaire may assign all or any part of its interest in this Agreement or any of the other Project Documents by way of security pursuant to the Financing Documents and clause 5.4 (lenders security).

42.3 Any or all of the rights and obligations of the Ports Authority may be assigned or otherwise assumed by any one or more statutory corporations or any other public or private organizations which succeed the Ports Authority in performing any of its functions relevant to this Agreement.

**Comment [ID23]:** Depending upon the terms of the agreement with Government (in this case the Implementation Agreement) some assurance as to the ability of the replacement entity to meet its obligations may be required.

#### 41 Entire agreement

43.1 Each of the parties acknowledges that:

(a) it does not enter into this Agreement on the basis of and does not rely and has not relied upon any statement or representation (whether negligent or innocent) or warranty or other assurance or provision (in any case whether oral, written, express or implied) made or agreed to by any person (whether a party to this Agreement or not) except those expressly repeated or referred to in this Agreement or in any of the other Project Documents and subject to and without prejudice to either party's rights concerning the Warranties given by the other, the only remedy or remedies available in respect of any misrepresentation or untrue statement made to a party shall be a claim for breach of this Agreement under this Agreement;

(b) this clause shall not apply to any statement, representation or warranty made fraudulently, or to any provision of this Agreement which was induced by fraud, for which the remedies available shall be all those available under the law governing this Agreement

#### 44. Variations etc

44.1 No variation of this Agreement shall be valid unless it is in writing and signed by or on behalf of each of the parties and if required by the laws of [\_\_\_\_\_] approved by the Approval Authorities.

44.2 No relaxation, forbearance, indulgence or delay (together "forbearance") of either party in exercising any right under this Agreement shall constitute the waiver of that right nor shall it affect the ability of that party subsequently to exercise the right or to pursue any remedy, nor shall that forbearance constitute a waiver of any other right.

44.3 The Construction Observer shall not have any authority to vary any provision of this Agreement or to exercise any right of the Ports Authority to give any consent or approval under this Agreement or do any other act or execute any document on behalf of the Ports Authority. The concessionaire shall not rely on any act or failure to act of the Construction Observer so as to give rise to any forbearance concerning any obligation of the concessionaire under this Agreement, and in particular (but without limitation) no examination or review of any matter or

document by the Construction Observer shall relieve the concessionaire of any liability or obligation or modify any such liability or obligation.

#### 45. Severability

- 45.1 If any provision of this Agreement, not being of a fundamental nature, is held to be illegal or unenforceable it shall not affect the validity or enforceability of the remainder of this Agreement.

#### 46. Notices

- 46.1 Without affecting service by any other method permitted by law, notices shall be given in writing or by facsimile. A notice shall be sent to the address below or facsimile number, marked for the attention of the relevant person given or to such other address or facsimile number or reference as may be notified from time to time for the purpose of receiving notices under this Agreement.

- 46.2 The [ ] Ports Authority:

Address:  
Fax:  
Attention:

The concessionaire:

Address:  
Fax:  
Attention:

- 46.3 A notice shall be deemed to have been served:

- (a) if in writing, when delivered;
- (b) if by facsimile, when transmission is completed; provided that where delivery or transmission occurs after 1700 hours or on a non-Business Day, in the place of receipt, service shall be deemed to occur on the next following Business Day in that place;

- 46.4 Service by facsimile may be proved by showing receipt of automatic confirmation of transmission to the correct number provided that a notice shall not be properly served if it is not legible upon receipt in all material respects and the communication shall be deemed to have been so legible if a request for re-transmission is not made before the end of the next Business Day following transmission.

**Comment [ID24]:** The timing is inelegant as the notice will have been deemed to have been served on the previous day.

#### 47. Relationship of parties

- 47.1 The parties are independent principals, and neither is the partner or agent of the other. Neither party has any fiduciary duty to the other.

47.2 Except to the extent expressly permitted by this Agreement (if any), neither party shall contract with any other person in the name or on behalf of the other and neither shall incur or purport to incur any liabilities in any other way on behalf of the other.

**48. Applicable law and dispute resolution Applicable law**

48.1 The validity, interpretation and implementation of this Agreement or any matter arising out of it shall be governed by the laws of [\_\_\_\_\_] Conciliation.

48.2 Before referring a dispute or difference to arbitration under clause 48.3 the parties shall establish a conciliation team to attempt in good faith to resolve the dispute or difference promptly according to the following arrangements:

- (a) the conciliation team shall consist of two (2) senior representatives nominated by the Ports Authority and two (2) senior representatives nominated by the concessionaire; those nominations shall be made within seven (7) days of either party notifying the other that it wishes to establish the conciliation team;
- (b) the purpose of the conciliation team is to try to agree between the representatives how best to resolve the dispute or difference and then to make recommendations to the parties; recommendations of the conciliation team must have the unanimous support of all the representatives;
- (c) the dispute or difference shall be resolved if the parties accept the recommendations made by the conciliation team and enter into a written agreement describing the arrangements for resolution of the dispute or difference; the written agreement shall be binding on the parties;
- (d) to avoid doubt, the conciliation team by itself shall not have the power to vary this Agreement;
- (e) the conciliation team shall have joint chairmen, consisting of one representative of the Ports Authority and one of the concessionaire; the joint chairmen may adopt such procedures for the conduct of the activities of the conciliation team as they consider appropriate, from time to time; and
- (f) if representatives have not been nominated by the required time or if the conciliation team is unable to agree its recommendations to resolve the dispute or if the parties do not agree in writing to resolve the dispute, within sixty (60) days of any party notifying the others that it wishes to form the conciliation team, the dispute shall be referred to arbitration under the following provisions of this clause.

## 48. Arbitration

- 48.1 Any difference, dispute, controversy or claim arising from, out of or in connection with this Agreement, on the interpretation thereof or the rights, duties, obligations, or liabilities of any party or the operation, breach, termination or invalidity thereof which arises or occurs between the parties to this Agreement, other than to those which clause 48.2 applies, shall be referred by either party to arbitration for final settlement in accordance with clauses 48.4 to 48.10.
- 48.2 Each of the parties submits to arbitration in [\_\_\_\_\_] (or such other place as the parties may agree in writing at the start of any arbitration proceedings) before a panel of three (3) arbitrators under the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL") as then in force, as modified by clauses 48.5 to 48.10. The proceedings shall be conducted and the award shall be rendered in the English Language.
- 48.3 Each Party shall appoint one (1) arbitrator and the two (2) arbitrators so appointed shall appoint a third (r) arbitrator. The (r) third arbitrator shall be the chairman of the arbitral tribunal. If either party fails to appoint an arbitrator or if the two (2) party-appointed arbitrators fail to agree upon a third arbitrator, then such arbitrator shall, at either party's written request, be appointed by the Chairman of the International Court of Arbitration of the International Chamber of Commerce acting in accordance with the rules adopted by the International Chamber of Commerce for selecting an arbitrator but without giving effect to the provisions of paragraph 6 of Article 9 of these rules.
- 48.4 Any award rendered by the arbitral tribunal shall be final and binding and judgment thereon may be entered in any court of competent jurisdiction. Any monetary award shall be made in reasonable time and payable in US\$ free of any tax, deduction or offset and the arbitral tribunal shall be authorized in its discretion to grant pre-award and post-award interest at commercial rates. Any costs, fees or taxes incidental to enforcing the award shall, to the maximum extent permitted by law, be charged against the party resisting such enforcement.
- 48.5 The parties hereby waive and agree to exclude any rights of application or appeal to the fullest extent permitted by law in connection with any question of fact or law arising in the course of the arbitration or with respect to any award made except for actions to enforce an arbitral award.
- 48.6 Except as expressly provided in this Agreement, pending the award in any arbitration proceedings hereunder, (i) this Agreement and the rights and obligations of the parties shall remain in full force and effect and (ii) each of the parties shall continue to perform their respective obligations under this Agreement. The termination of this Agreement shall not result in the termination of any arbitration proceedings pending at the time of such termination nor

**Comment [ID25]:** There should always be due diligence of the law in relation to this. Further the due diligence should extend to the position of and ability of an expert to make final and binding decisions.

otherwise affect the rights and obligations of the parties under or with respect to such pending arbitration.

- 48.7 Any award rendered by the Arbitral Tribunal shall determine the extent to which the costs of the arbitration are to be borne by each of the parties.
- 48.8 The reference to the arbitration, all proceedings in the arbitration and all documents and copies of documents or records produced on discovery or created for the purposes of the arbitration shall be confidential to the parties and the arbitrators and shall not be disclosed to any other person (other than the Lenders) without the express prior written consent of both parties, except as may be necessary to enforce the terms of any award made by the arbitrators or to challenge the conduct of the arbitrators or the validity of any award in a court of competent jurisdiction (subject however to clause 48.7).

The powers of the arbitrators shall include the power to conduct proceedings in part in any place other than [\_\_\_\_\_] where the arbitrators in their sole discretion determine that it is necessary for the more effective and efficient determination of the matters before them.

- 48.9 The parties hereby waive any objection to or claim of immunity in respect of the enforcement of any arbitral award made by the arbitral tribunal; and each party represents warrants and affirms that it is not entitled to claim immunity in connection with any proceedings relating to an arbitration or arbitral award under this Agreement.

**Expert determination**

- 48.10 Any dispute, difference, controversy or claim of any kind which arises or occurs between the parties as to any thing or matter arising under, out of or in connection with this Agreement or otherwise in connection with the implementation of the Project shall be determined by an expert (the "Expert") if:
- (a) this Agreement expressly so provides; or
  - (b) The parties so agree in writing.
- 48.11 Either party may initiate the reference of a dispute described in clause 48.12 to an Expert by proposing to the other party the appointment of an Expert. Clauses 48.2 or 48.3 shall not apply to matters to be determined by an Expert and in particular there shall be no arbitration challenging the Expert's decision.
- 48.12 The Expert shall be a port engineer, a container/inter-modal operations manager, a transport economist (specializing in container terminal operations for operating issues) or other person experienced in the construction or operation of container terminal facilities (as appropriate), except for disputes principally concerning the

manner in which an amount, sum or quantity is to be calculated, where the Expert shall be a chartered accountant or financial advisor. In any case, the Expert shall be an individual who holds an internationally recognized qualification in the relevant field.

- 48.13 The Expert shall be appointed by agreement between the parties or, if the parties have not agreed within fourteen (14) days of the date of the request, on the application of either party, the President of the Institute of Engineers of [\_\_\_\_\_] in the case of technical or non financial matters or the President of the Institute of Chartered Accountants in [\_\_\_\_\_] in respect of financial matters as appropriate shall appoint an Expert.
- 48.14 The Expert shall act as an expert and not as an arbitrator. The decision of the Expert shall be final and binding on the parties and may include orders that one or both of the parties are to pay his reasonable costs, stating the proportion and that one party is to pay the costs (or a proportion of the costs) of the other party and/or compensation for increased costs incurred by a party as a result of the reference to the Expert. If either party does not pay its proportion of the Expert's costs, the other party may make such payment and that party shall be entitled to an immediate reimbursement of such amount from the party in default plus interest at the Applicable Interest Rate.
- 48.15 The Expert shall have the power to order (and each party agrees to adhere to such an order) each party to pay from time to time and in equal amounts, sums to settle his reasonable costs to date. This power shall also extend to the reasonable costs of any advisor or other person referred to in clause 48.19 The Expert shall take account of any such sums paid by the parties when, on making his final decision, the Expert considers what order as to costs he should make pursuant to clause 48.16 which may result in one party being ordered to reimburse the other party amounts so paid by the other party together with default interest at the Applicable Interest Rate.
- 48.16 The parties shall each have the right to make written representations to the Expert with notice and a copy to the other party. There shall be no formal hearing. The Expert shall regulate procedure as he sees fit (except that he must give each party a reasonable opportunity to make representations), including, if the Expert chooses, requiring written submissions and/or hearing witnesses in person. The Expert's powers shall include the power to open up, review and revise any notice and determine all matters in dispute. He shall be instructed to make his determination as soon as possible.
- 48.17 The Expert may take such advice and assistance from independent professional advisors or other persons as he considers appropriate to enable him to reach a determination of the dispute.

48.18 Each of the parties shall upon and in accordance with a request by the Expert supply to the Expert free of charge such information and documents as he shall require for the purposes of the reference to him. That information and those documents shall be kept confidential by him and by the parties.

48.19 If any dispute referred to an Expert raises issues which, in the reasonable opinion of either party, are substantially the same as or are connected with issues raised in a related dispute between any of the following persons (or their successors in title and permitted assignees):

- (a) the Builder,
- (b) the Operator; or
- (c) other sub-contractors of the concessionaire;

the parties agree that the related dispute shall be referred to the Expert appointed to determine the dispute under this Agreement and the concessionaire shall procure that it has the power in its contracts with the persons described above to procure the related dispute is dealt with in that manner.

#### ***Continued performance***

48.20 The parties agree that their obligations under this Agreement (including, without limitation, payment obligations) shall continue to be performed during negotiations of their senior representatives pursuant to the preceding conciliation provisions to resolve the dispute or the arbitration or Expert determination of the dispute, unless the parties agree to suspend performance or if performance is impossible as a result of the nature of the dispute.

#### ***Interim relief***

48.21 Subject to clause 48.24, nothing in this clause shall prevent a party from seeking interim or interlocutory relief in a court.

48.22 Neither party shall apply to any court or arbitral body for interim or interlocutory relief by way of an injunction, order for specific performance or equivalent order the effect of which is or may be to prevent, hinder or delay exercise of a right of termination pursuant to clauses 30 to 33. In particular, even where the existence of such a right of termination is disputed, no such application shall be made to maintain the status quo pending determination by an arbitral body as to whether such a right exists and can be validly exercised.

Interim relief shall not be applied for except in connection with properly commenced arbitral proceedings (other than with respect to breach of any express confidentiality undertaking or in a clear emergency).

**Comment [ID26]:** This may be seen to be an unwarranted interference with the contractual relationship between the Concessionaire and the counter-party to these agreements.

#### 49. Counterparts

This Agreement may be executed in any number of counterparts, all of which, taken together, shall constitute one and the same agreement and any party may enter into this Agreement by executing any counterpart.

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

The Common Seal of the

[\_\_\_\_\_]Ports Authority is affixed hereto in the presence of:

(Name) ) (Sign

Director

Witnessed by:

(Sign)

The Concessionaire is affixed hereto in the presence of:

(Name) ) (Sign

Director

Witnessed by:

(Sign)