

Published Version

## **PUBLIC SERVICE CONTRACT**

**between**

**The Scottish Ministers**

**and**

**Shetland Line 1984 Limited**

Grant for Northern Isles Lift-on Lift-off Freight Service

### **DUNDAS & WILSON CS LLP**

191 West George Street  
Glasgow G2 2LD

Tel 0141 222 2200  
Fax 0141 222 2201  
Legal Post: LP1 Glasgow 8

FAS: 1401  
Ref: SCO288.0013

## **PUBLIC SERVICE CONTRACT**

between

**THE SCOTTISH MINISTERS**, Victoria Quay, Edinburgh, EH6 6QQ (who and whose successors are referred to as the **Scottish Ministers**);

and

**SHETLAND LINE 1984 LIMITED** incorporated in Scotland (Registered No. SC088013) and having its registered office at Streamline Terminal, Blaikies Quay, Aberdeen AB1 2PU (who and whose permitted assignees are referred to as the **Operator**).

### WHEREAS

- (1) The Scottish Ministers may in terms of section 70 of the 2001 Act make grants for the purpose of securing or encouraging the carriage of goods by sea on such conditions as they determine;
- (2) The Scottish Ministers wish to support freight services to the Northern Isles for the purpose of providing a continuing, safe, stable and affordable regime for users;
- (3) The Scottish Ministers, for the purposes mentioned in Recital 2 have agreed to make advances by way of grant to the Operator for the purposes described in, of the amounts referred to in, and on the terms and conditions set out in this Agreement.

NOW THEREFORE the Scottish Ministers and the Operator agree as follows:

#### 1. **DEFINITIONS AND INTERPRETATION**

In this Agreement, words and expressions shall, except where the context otherwise requires, have the following meanings assigned to them:

**2001 Act** means the Transport (Scotland) Act 2001;

**Agreement** means this Agreement between the Scottish Ministers and the Operator, including the Schedule, and any agreement which replaces or supersedes any of the foregoing or any part of the foregoing, all as amended, supplemented or varied from time to time;

**Agreement Date** means the date of execution of this Agreement;

**Annual Tonnage Statement** shall be construed in accordance with Clause 4.4.1;

**Applicable Law** means regulation, Legislation, practice or concession or official directive, ruling, request, notice, guideline, statement of policy or practice by any relevant legislative authority, the European Union, governmental, local, international, national or other competent authority or agency (whether or not having the force of law in respect of which compliance by ship owners and operators is generally customary);

**Approved Services** means freight transport services to the Northern Isles from Aberdeen as specified in Part 3 of the Schedule;

**Associated Company** has the meaning attributed in Section 416 Income and Corporation Taxes Act 1988;

**Business Day** means any weekday during which the Scottish Clearing Banks (or a majority of them) are open for business;

**Change in Control** means a person or persons acting in concert (as that term is defined in The City Code on Take-overs and Mergers from time to time) having control of the relevant entity (not being a person having a shareholding in the relevant entity as at the date hereof) who did not have control of the relevant entity at the date hereof (and control is to be determined in accordance with Section 416 of the Income and Corporate Taxes Act 1988);

**Classification Society** means in respect of any Vessel the classification society with which that Vessel is registered;

**Commencement Date** means 31 May 2008;

**Consumer Prices Index** or **CPI** means the Consumer Prices Index as published from time to time by the Office of National Statistics or such index as shall replace the same provided always that if the CPI is rebased at any time in the period between the Commencement Date and the expiry or termination of this Agreement, it shall nonetheless be determined as if such rebasing had not occurred. In the event of the abolition or a fundamental variation in the basis of the said Index (other than rebasing), the manner in which any sums referred to in this Agreement which are to be varied by reference to CPI are to be varied shall be as agreed between the Scottish Ministers and the Operator. In the event that such agreement has not been

reached by the date on which the Grant next falls to be calculated (or re-calculated) using CPI the manner in which any sums referred to in this Agreement are to be varied shall be determined in accordance with Clause 21;

**Cure Notice** shall be construed in accordance with Clause 11.3.1;

**Cure Plan** shall be construed in accordance with Clause 11.3.1;

**Day** means a period beginning at 00:01 hours UK time on any day and ending at 00:00 hours UK time on the following day;

**Deduction Regime for Availability** means the system of deductions set out in Part 7 of the Schedule for failure by the Operator to meet the Performance Measure for Availability;

**Deduction Regime for Compliance** means the system of deductions set out in Part 7 of the Schedule for failure by the Operator to meet the Performance Measure for Compliance;

**Deduction Regime for Punctuality** means the system of deductions set out in Part 7 of the Schedule for failure by the Operator to meet the Performance Measure for Punctuality;

**Deduction Regime for Reliability** means the system of deductions set out in Part 7 of the Schedule for failure by the Operator to meet for the Performance Measure for Reliability;

**Emergency** means any threat to the safety of life or property at sea affecting any person or vessel but shall not include any threat to a Vessel arising from a failure by the Operator to perform its obligations under this Agreement;

**Event of Default** means the occurrence of any of the events set out in Clause 11.1;

**Evaluation** shall be construed in accordance with Clause 9.2;

**Excess Tonnage Rate** shall be the [£Tonnage Rate x 4];

**Extended Employment Liabilities** means costs, claims, liabilities and expenses (including legal expenses) relating to or arising out of the employment of the Transferring Employees or the termination thereof in the period from and including the Commencement Date including without prejudice to the forgoing generality, negligence claims by any such Transferring Employees or any third party, unfair

dismissal, redundancy, unlawful discrimination, breach of contract, claims in relation to pension entitlement, unlawful deduction of wages and equal pay (save in every case where any liability arises as a result of any failure by an Incoming Operator and/or any contractor of the Incoming Operator to comply with its or their obligations under Regulation 13(4) of TUPE or in respect of any substantial change proposed by the Incoming Operator or a contractor of the Incoming Operator to the working conditions of such employees to their material detriment);

**Expiry Date** means 30 May 2014;

**Financial Obligation** means any obligation for the payment or repayment of money, whether joint or several, actual or contingent, in respect of:

- (a) moneys borrowed or raised (including obligations under financial leases and hire purchase agreements and deposits) debit balances at bank accounts and interest and other charges thereon in respect thereof;
- (b) any liability under any debenture, bond, note, loan stock, commercial paper or other security or under acceptance or documentary credit, bill discounting or note purchase facilities;
- (c) any liability in respect of the deferred acquisition cost or property, assets or services to the extent payable after the time of acquisition or possession thereof by the party liable;
- (d) any guarantee or other assurance against financial loss in respect of any of the indebtedness specified in this definition;
- (e) any cost or liability under any interest rate or currency hedging agreement; and
- (f) any other transaction having the commercial effect of the borrowing or raising of money.

**Flat Rate Element** means that part of the Grant which is payable in respect of the first 40,000 Tonnes carried in a Service Year and which at the Commencement Date shall be £6.25 per tonne and which shall only be increased in accordance with Clause 4.7 hereof;

**Force Majeure Event** means:

- (a) war, civil war (whether declared or undeclared) or armed conflict;

- (b) nuclear explosion, radioactive, biological or chemical contamination, ionising radiation (but not arising from any act of terrorism); or
- (c) substantial damage arising from the effect of sonic booms,

in each case occurring after the Agreement Date;

**Freight Accommodation** means those parts of the Vessel which are designed to be utilized for the carriage of goods for the purposes of a sailing;

**Grant** shall be construed in accordance with Clause 4 and references to "Grant" include where the context so requires or admits references to Quarterly Instalments;

**Grant Period** means the period commencing on the Commencement Date and finishing on the Expiry Date or in the event of early termination the Termination Date;

**Harbour** means the harbour facilities at all or any of Kirkwall (Hatston), Aberdeen and Lerwick;

**Incoming Operator** means any person other than the Operator with whom the Scottish Ministers enter into a New Contract;

**Index Linked** to a date in respect of a sum means that the sum is multiplied by the following factor:

CPI Jc

CPI Jp

Where:

CPI Jc is the Consumer Price Index published in the Month of [April] in the Service Year in which Index Linking is being applied; and

CPI Jp is the Consumer Price Index published in the Month of [April] in the previous Service Year,

and cognate expressions shall be construed accordingly;

**Initial Timetable** means the timetable set out in Part 3 of the Schedule;

**Insurances** means all policies of insurance taken out from time to time in respect of any Vessel throughout the Grant Period, together with all variations, modifications, extensions, or other alterations thereof;

**Intellectual Property Rights** means the following types of property and/or rights as granted in any jurisdiction (where references to any Scottish legal term for such property/rights shall, in respect of any jurisdiction other than Scotland, be deemed to include what most nearly approximates in that jurisdiction to the right/property under English law) : i) patents; ii) petty patents and utility model rights; iii) registered trade marks; iv) registered design rights; v) applications for, and rights to apply for the property/rights listed in items i) to v) (inclusive) above; vi) copyrights; vii) database rights; (viii) unregistered design rights; (ix) rights in performances; (x) the moral rights set out in Chapter IV of Part I of the Copyright, Designs and Patents Act 1988 (as amended from time to time); (xi) any rights of action in relation to confidential information; and (xii) any rights of action in relation to trade names, trading styles, product packaging and/or domain names;

**Legislation** means any Act of Parliament, including any local, personal or private Act of Parliament, any subordinate legislation (as that expression is defined in section 21(1) of the Interpretation Act 1978), any exercise of the Royal Prerogative and any enforceable community right (as that expression is defined in section 2 of the European Communities Act 1972) and any bylaws, statutory instruments, orders, notices, directions, codes of practice, consents or permissions properly and lawfully made or given under any of the foregoing (including for the avoidance of doubt, any legislation enacted by any Scottish Parliament or assembly or similar body and any subordinate or delegated legislation made by the Scottish Ministers or other person deriving authority from such legislation);

**MCA** means the Maritime and Coastguard Agency and any successor body or bodies;

**Mobilisation Requirements** means the matters set out in Part 2 of the Schedule;

**Monitoring Procedures** shall mean the procedures set out in Part 6 of the Schedule;

**Month** shall mean each calendar month during the Grant Period, provided that where the Termination Date does not fall on the last day of a calendar month that Month shall be deemed for the purposes of this Agreement to end on the Termination Date;

**New Contract** means any arrangement or contract of whatsoever nature in relation to the provision by the Scottish Ministers of a subsidy in respect of freight services between Aberdeen, Lerwick and Kirkwall (Hatston) similar in scope to the Approved Services commencing subsequent to the expiry or termination of this Agreement;

**Nominated Consultant** means a consultant appointed by the Scottish Ministers;

**Northern Isles** means Shetland and Orkney;

**Operator Employment Liabilities** means costs, claims, liabilities and expenses (including legal expenses) relating to or arising out of claims by the Transferring Employees for unfair dismissal, redundancy and breach of contract which relate to the termination of their employment in the period from and including the Commencement Date (save in every case where any liability arises as a result of any failure by an Incoming Operator and/or any contractor of the Incoming Operator to comply with its or their obligations under Regulation 13(4) of TUPE or in respect of any substantial change proposed by the Incoming Operator or a contractor of the Incoming Operator to the working conditions of such employees to their material detriment);

**Party** means either of the parties to this Agreement;

**Performance Deduction** shall be construed in accordance with Clause 8.2.1;

**Performance Measures** means all or any of the Performance Measure for Availability, the Performance Measure for Reliability, Performance Measure for Punctuality and the Performance Measure for Compliance all as set out in Part 7 of the Schedule;

**Proposed Tariff** shall be construed in accordance with Clause 3.3.1;

**Published Tariff** shall be construed in accordance with Clause 3.3.1;

**Published Timetable** shall be construed in accordance with Clause 3.4.1;

**Quarter** means each period beginning on any Day in a calendar month and ending on the preceding Day in the third following calendar month or, if the third following calendar month has no numerically preceding Day, on the last Day of the appropriate calendar month, provided that the first Quarter shall commence on the Commencement Date and where the Termination Date does not fall on the last Day of a Quarter that Quarter shall be deemed for the purposes of this Agreement to have ended on the Termination Date;

**Quarterly Claim** shall be construed in accordance with Clause 4.2.1;

**Quarterly Instalment** shall be construed in accordance with Clause 4.2.2;



**Regional Transport Partnership** means any such partnership created by the Scottish Ministers pursuant to the Transport (Scotland) Act 2005;

**Relief Event** means:

- (a) the cancellation of any sailing or the late arrival of any sailing if the cause of the cancellation or lateness is attributable to adverse weather, tidal conditions or any other safety factor (but not the non-attendance of suitably qualified and experienced staff) outwith the Operator's reasonable control which would in the Master's opinion have made the sailing or arrival in accordance with the Timetable unsafe or impractical and where such cancellation or lateness (or the effects thereof) could not have been avoided or mitigated by the exercise of due diligence by the Operator;
- (b) the unscheduled Unavailability of any Vessel unless such Unavailability results from a failure of the Operator to comply with its obligations under this Agreement or could have been avoided or mitigated by the exercise of due diligence provided that the Operator has used all reasonable endeavours to obtain a substitute vessel;
- (c) non-availability of, or operational restrictions at, any of the Harbours for any reason outwith the Operator's reasonable control;
- (d) fuel shortages outwith the Operator's reasonable control;
- (e) terrorism, piracy or hijacking; and
- (f) the occurrence of an Emergency in which any Vessel is or becomes involved;

**Schedule** means the Schedule to this Agreement;

**Service Year** means each period of twelve Months of the Grant Period, the First Service Year commencing on the Commencement Date and each subsequent Service Year commencing on each anniversary of the Commencement Date and in the last Service Year terminating on the Expiry Date or the Termination Date as the case may be;

**Standard Portion** means the £62,500 per Quarter paid in respect of the first 10,000 Tonnes carried in each Quarter;

**Termination Date** means the date of termination of this Agreement prior to the Expiry Date and Termination shall be construed accordingly;

**Tonnage Rate** means £[ ] per tonne;

**Tonnage Report** shall be construed in accordance with Clause 4.2.1;

**Tonnes** means tonnes of freight carried on the Approved Services in any Service Year;

**Transfer Assistance Period** means the period commencing 18 Months prior to the Expiry Date or the Termination Date as the case may be;

**Transferring Employees** means those employees of the Operator and/or any contractor of the Operator who are assigned to the provision of the Approved Services which are to cease to be provided by the Operator;

**TUPE** means the Transfer of Undertakings (Protection of Employment) Regulations 2006;

**Unavailable** means in relation to a Vessel that the Vessel is for any reason unable to undertake or complete a voyage referred to in the Published Timetable and in relation to Freight Accommodation that such Freight Accommodation having regard to Applicable Law and the severity of impact of the relevant circumstances is not accessible, sound, operationally safe, clean and capable of use for its normal function and **Unavailability** shall be construed accordingly;

**Variation** shall be construed in accordance with Clause 9.1.3;

**Variation Notice** shall be construed in accordance with Clause 9.1.1; and

**Vessel** means the MV Daroja (details of which are set out in Section 2 of Part 1 of the Schedule) or such other lift-on lift-off vessel employed from time to time by the Operator for the provision of all or any part of the Approved Services as has been approved by the Scottish Ministers in accordance with Clause 3.5.

## 1.2 INTERPRETATION

In this Agreement, except where the context otherwise requires:

- 1.1.1 all references to Clauses and to a Part of the Schedule are references to Clauses of and Parts of the Schedule to this Agreement, all references to Annexes are references to Annexes to the relevant Part of the Schedule and all references to Parts, Sections, or paragraphs, are references to Parts, Sections, or paragraphs contained in the Schedule;

- 1.1.2 words importing the masculine include the feminine and words importing the neuter include the masculine and the feminine, and words importing the singular include the plural and vice versa;
- 1.1.3 any reference to any Act of Parliament or any Act of the Scottish Parliament or any enactment of the European Parliament, the European Council or the European Commission having the force of law shall be construed as a reference to the Act of Parliament or Act of the Scottish Parliament or the enactment as from time to time amended, extended or re-enacted and to include any bylaws, statutory instruments, rules, regulations, orders, notices, directions, directives, consents or permissions made or given thereunder. Similarly, any reference to that statutory instrument, regulation or order shall be construed as a reference to that statutory instrument, regulation or order as from time to time amended, extended or re-enacted;
- 1.1.4 all references to agreements, documents, or other instruments include a reference to that agreement, document or instrument as amended or supplemented from time to time or to any replacement or superseding agreement, document or instrument;
- 1.1.5 any undertaking by any of the Parties not to do any act or thing shall be deemed to include an undertaking not to allow, permit or suffer the doing of that thing;
- 1.1.6 any reference to "procure" shall mean to bring about or cause to happen;
- 1.1.7 the headings to the Clauses are inserted for convenience only and shall not affect the interpretation of this Agreement; and where any words or expressions are defined in the Schedule, or any Annex to any Part of the Schedule, the same shall have the same meaning where used in any other part of this Agreement;
- 1.1.8 any notice, instruction, notification, direction, request, consent or approval contemplated herein shall be made or given in writing;
- 1.1.9 expressions defined in the Companies Act 1985 shall have the same meaning in this Agreement; and
- 1.1.10 anything which may be done by the Scottish Ministers may be done by any person duly authorised by the Scottish Ministers for that purpose.

## 2. CONDITIONS PRECEDENT

2.1 The obligation of the Scottish Ministers to pay the Grant or any Quarterly Instalment is subject to the conditions that:

2.1.1 the Scottish Ministers have received all of the documents and other evidence listed in Section 1 of Part 1 of the Schedule all in form and substance satisfactory to the Scottish Ministers; and

2.1.2 the Operator shall have implemented in all respects to the satisfaction of the Scottish Ministers the Mobilisation Requirements.

2.2 The Scottish Ministers shall be entitled in their sole discretion to waive or deem to be satisfied in whole or in part the conditions set out in Clause 2.1.

2.3 The Operator shall use its best endeavours to procure that the conditions precedent set out in Clause 2.1 shall be satisfied as soon as practicable and in any event not later than the Commencement Date or such later date as the Scottish Ministers may agree in writing.

## 3. APPROVED SERVICES

3.1 Subject to Clause 3.4, the Operator shall employ the Vessel to provide the Approved Services in accordance with the Published Timetable throughout the Grant Period.

3.2 The Operator shall ensure that the Approved Services are provided throughout the Grant Period in accordance with Applicable Law including but not limited to all Applicable Law relating to sea-going vessels, their registration, operation and maintenance, and all vessel and crew safety requirements.

### 3.3 Tariffs

3.3.1 The Operator shall throughout the Grant Period publish the maximum tariff for the Approved Services which will apply for each Service Year (the **Published Tariff**). The Published Tariff for the first Service Year shall be the Tariff set out in Part 4 of the Schedule against the heading "Service Year 1". The proposed maximum tariff for each subsequent Service Year (the **Proposed Tariff**) shall be the relevant Tariff set out in Part 4 of the Schedule and, unless adjusted in accordance with this Clause 3.3, shall become the Published Tariff for the relevant Service Year.

- 3.3.2 The Operator may at any time make reductions to the Published Tariff or vary preferential tariffs or discounts to achieve the same effect without the consent of the Scottish Ministers.
- 3.3.3 If the Operator wishes to adjust the Proposed Tariff for any Service Year after the Initial Service Year the Operator shall seek the consent of the Scottish Ministers no later than 20 Business Days prior to the relevant Service Year and the Scottish Ministers will be deemed to have signified consent to any proposed increase or decrease in the Proposed Tariff unless they shall have refused their consent within 30 Business Days of the receipt by the Scottish Ministers of the application for consent.
- 3.3.4 If during any Service Year the Operator wishes to adjust the Published Tariff the Operator shall seek the consent of the Scottish Ministers and the Scottish Ministers will be deemed to have signified consent to any proposed increase or decrease in the Published Tariff unless they shall have refused their consent within 30 Business Days of the receipt by the Scottish Ministers of the application for consent.
- 3.3.5 On the occasion of any adjustment referred to in Clauses 3.3.3 and/or 3.3.4, a revised tariff shall be published and notice of publication shall be given to the Scottish Ministers.

#### **3.4 Timetable**

- 3.4.1 The Operator shall issue a Published Timetable for the Approved Services annually. The Operator's first Published Timetable shall be the Initial Timetable.
- 3.4.2 The Operator shall provide the Approved Services in accordance with the Published Timetable except in the event of a Relief Event.
- 3.4.3 The Operator shall be entitled to make changes to the departure and arrival times set out in the Initial Timetable or any later Published Timetable. The Operator shall give the Scottish Ministers not less than 20 Business Days notice of the coming in to effect of any proposed alterations to the Published Timetable. For the avoidance of doubt, any such proposal shall not have the effect of materially altering the Approved Services
- 3.4.4 On making changes in accordance with Clause 3.4.3, the Operator shall issue a new Published Timetable.

3.4.5 The obligation on the Operator in Clause 3.1 to provide the Approved Services does not preclude the Operator from using the Vessel for any other purposes provided that the obligation to provide the Approved Services has been and continues to be satisfied in accordance with this Agreement throughout the Grant Period.

### 3.5 Change of Vessel

3.5.1 The Operator shall be entitled to provide the Approved Services employing a vessel other than MV Daroja but no substitute or replacement vessel shall commence provision of the Approved Services or any part thereof until the Scottish Ministers have approved the use of such substitute or replacement vessel and the Operator has obtained and has provided to the Scottish Ministers in relation to that substitute vessel all of the following documents all in form and substance satisfactory to the Scottish Ministers:

- (a) a charterparty or other evidence of the Operator's entitlement to the employment of such vessel as contemplated;
- (b) evidence of insurance at least equivalent to that required for the specified Vessel;
- (c) all Certificates required by the MCA or other relevant regulatory body; and
- (d) such other information as the Scottish Ministers may reasonably require to satisfy themselves that the proposed vessel is capable of providing the Approved Services;

provided that in the event of emergency or the need to employ a substitute or replacement vessel on a day which is not a Business Day the Operator may supply such documents on the following Business Day.

3.5.2 Notwithstanding provision by the Operator of the documents referred to in Clause 3.5.1, the Scottish Ministers may before giving their approval inspect such vessel (or may arrange for another person to inspect such vessel on their behalf) and such vessel shall not commence provision of the Approved Services until the Scottish Ministers have advised the Operator that such vessel is approved.

#### 4. GRANT

4.1 The Scottish Ministers shall make advances by way of grant (the **Grant**) to the Operator towards provision of the Approved Services during the Grant Period calculated in accordance with this Clause and this Agreement. Notwithstanding any other provisions of this Agreement the Grant for any Service Year shall not exceed £750,000 other than as contemplated in Clause 4.7.

#### 4.2 Ascertaining the Quarterly Instalments

4.2.1 Within 10 Business Days of the end of each Quarter the Operator shall submit to the Scottish Ministers a report setting out the number of Tonnes carried in that Quarter (the **Tonnage Report**) and a claim setting out the Quarterly Instalment calculated in accordance with Clauses 4.2.2 – 4.2.5 (the **Quarterly Claim**) together with such supporting information and other documentation as the Scottish Ministers may reasonably require for the purpose of substantiating the Tonnage Report and the Quarterly Claim.

4.2.2 If in any Quarter the total number of Tonnes is less than 10,000 then the Quarterly Instalment for that Quarter shall be zero.

4.2.3 If in any Quarter the total number of Tonnes is greater than or equal to 10,000 and less than or equal to 35,000 then the Quarterly Instalment for that Quarter shall be:

$$£62,500 + (T - 10,000 \times TR)$$

where:

T = the total number of Tonnes for that Quarter; and

TR = the Tonnage Rate.

4.2.4 If in any Quarter the total number of Tonnes is greater than 35,000 but less than 41,250 then the Quarterly Instalment for that Quarter shall be:

$$£62,500 + ((T - 10,000 \times TR) - (ET \times ETR))$$

where :

T = the total number of Tonnes for that Quarter;

TR = the Tonnage Rate;

ET = the total number of Tonnes for that Quarter in excess of 35,000; and

ETR = the Excess Tonnage Rate.

4.2.5 If in any Quarter the total number of Tonnes is greater than or equal to 41,250 then the Quarterly Instalment for that Quarter shall be £62,500.

4.2.6 The Scottish Ministers and the Operator shall agree the Tonnage Report and the Quarterly Claim within 10 Business Days of submission to the Scottish Ministers in accordance with Clause 4.2.1.

#### 4.3 **Payment of Grant**

4.3.1 Quarterly Instalments shall be payable in arrears within 15 Business Days of the Tonnage Report and the Quarterly Claim being agreed.

4.3.2 The Scottish Ministers shall have no obligation to pay any part of a Quarterly Instalment where, as at the due date for payment, an Event of Default (or event which with the giving of notice, lapse of time or other condition may constitute an Event of Default) has occurred. The Scottish Ministers may at their discretion pay any part of a Quarterly Instalment notwithstanding, and without waiving, any such Event of Default or event.

#### 4.4 **Annual Tonnage Statement**

4.4.1 As soon as possible after the end of each Service Year and in any event within 3 Months the Operator shall submit to the Scottish Ministers a statement setting out the total number of Tonnes carried in that Service Year (the **Annual Tonnage Statement**) together with such supporting information and other documentation as the Scottish Ministers may reasonably require for the purpose of substantiating the Annual Tonnage Statement.

4.4.2 The Scottish Ministers and the Operator shall agree the Annual Tonnage Statement within 10 Business Days of submission to the Scottish Ministers in accordance with Clause 4.4.1.

4.4.3 The Annual Tonnage Statement will be used to calculate the Grant for that Service Year and any adjustments required in accordance with the remainder of this Clause 4.



#### 4.5 Annual Reconciliation

4.5.1 If in any Service Year the total number of Tonnes carried is less than 40,000 then the Grant for that Service Year shall be zero.

4.5.2 If in any Service Year the total number of Tonnes carried is greater than or equal to 40,000 and less than or equal to 140,000 then the Grant for that Service Year shall be:

$$£250,000 + (T - 40,000 \times TR)$$

where:

T = the total number of Tonnes carried in that Service Year; and

TR = the Tonnage Rate.

4.5.3 If in any Service Year the total number of Tonnes carried is greater than 140,000 but less than 165,000 then the Grant for that Service Year shall be:

$$£250,000 + ((T - 40,000 \times TR) - (ET \times ETR))$$

where :

T = the total number of Tonnes carried in that Service Year;

TR = the Tonnage Rate;

ET = the total number of Tonnes carried in that Service Year in excess of 140,000; and

ETR = the Excess Tonnage Rate.

4.5.4 If in any Service Year the total number of Tonnes carried is greater than or equal to 165,000 then the Grant for that Service Year shall be £250,000.

4.5.5 If in any Service Year the Grant calculated pursuant to Clauses 4.5.2 or 4.5.3 above exceeds £750,000 then the Grant for that Service Year shall be deemed to be £750,000.

#### 4.6 Over or Under Payments

4.6.1 If for any Service Year the Grant calculated pursuant to Clause 4.5 is greater than the Provisional Grant for that Service Year by more than or equal to

£1,000 (the **Cap**) then the Scottish Ministers shall pay the resultant underpayment within 20 Business Days of the Annual Tonnage Statement being agreed or determined as the case may be.

4.6.2 If over any 2 consecutive Service Years the Grant calculated pursuant to Clause 4.5 is greater than the Provisional Grant for those Service Years by less than the Cap (the **Deficit**) then the amount (if any) by which the Deficit exceeds the Cap shall be paid by the Scottish Ministers in accordance with Clause 4.6.1 and that part of the Deficit which applies to the second of those Service Years shall be deemed to have been zero for the purposes of any subsequent Service Year.

4.6.3 If for any Service Year the Grant calculated pursuant to Clause 4.5 is less than the Provisional Grant for that Service Year by less than or equal to the Cap then the Operator shall repay the resultant overpayment within 20 Business Days of the Annual Tonnage Statement being agreed or determined as the case may be and if such overpayment is not repaid as aforesaid may be deducted by the Scottish Ministers from any subsequent Quarterly Instalment.

4.6.4 If over any 2 consecutive Service Years the Grant calculated pursuant to Clause 4.5 is less than the Provisional Grant for those Service Years by less than the Cap (the **Surplus**) then the amount (if any) by which the Surplus exceeds the Cap may be deducted by the Scottish Ministers in accordance with Clause 4.6.3 and that part of the Surplus which applies to the second of those Service Years shall be deemed to have been zero for the purposes of any subsequent Service Year.

4.6.5 The **Provisional Grant** is the aggregate of all Quarterly Instalments payable to the Operator in a Service Year and for the avoidance of doubt is calculated based on the gross Quarterly Instalments before deduction of Performance Deductions.

#### 4.7 **Review of Grant Payments**

4.7.1 The Grant shall not be revised except in accordance with this Clause 4.7.

4.7.2 The Grant shall not be revised by an amount more than would arise from Index Linking the Grant for the previous Service Year.

4.7.3 If the Operator wishes to increase the Grant by an amount equal to or less than that which would arise from Index Linking the Grant for the previous Service

Year the Operator may within 10 Business Days of the Annual Tonnage Statement being agreed or determined pursuant to Clause 4.4 submit to the Scottish Ministers a request for an increased Grant (the **Increased Grant Request**). Such request shall:

- (a) specify the revised Flat Rate Element and the revised Tonnage Rate;
- (b) provide an explanation for the increase in Grant requested;
- (c) suggest alternative solutions to the increase in Grant requested which would have the same effect as the increase in Grant which may include, but shall not be limited to, adjustments to the Published Tariff, the Published Timetable or the Approved Services;
- (d) contain such evidence as the Scottish Ministers may require to enable the Scottish Ministers to evaluate the request.

4.7.4 The Scottish Ministers shall notify the Operator within 1 Month of receipt of the Increased Grant Request in accordance with Clause 4.7.2 either:

- (a) that the increase in Grant requested by the Operator has been approved;
- (b) that a revised increase in Grant has been approved in which case the Scottish Ministers shall give details of such revised increase to the Operator; or
- (c) that no increase in Grant has been approved;

and the Scottish Minister's decision in this respect shall be final.

4.7.5 The Scottish Ministers may also require the Operator to implement any or all of the alternative solutions proposed by the Operator in the Increased Grant Request which may include, but shall not be limited to, adjustments to the Published Tariff, the Published Timetable or the Approved Services.

4.7.6 The Grant increased in accordance with this Clause shall not exceed £750,000 Index Linked.

4.7.7 If Index Linking the Grant would result in a reduction in Grant the Scottish Ministers may within 10 Business Days of the Annual Tonnage Statement being agreed or determined pursuant to Clause 4.4 notify the Operator that the

Grant shall be so reduced. Such notice shall set out the revised Flat Rate Element and the revised Tonnage Rate.

#### 4.8 **Miscellaneous**

4.8.1 The Grant shall be used solely to meet part of the costs and expenses of provision of the Approved Services in accordance with this Agreement and for no other purpose whatsoever.

4.8.2 For the avoidance of doubt it is specifically declared that the Grant is a subsidy only and not a payment for services provided or to be provided to the Scottish Ministers.

### 5. **PUBLIC SECTOR CONTRIBUTIONS**

5.1 If the Operator shall receive any contribution in connection with the Approved Services (except the Grant) either in cash or in kind from any public sector body (including any government body, institution or fund of the European Union, local authority, statutory undertaking or other body wholly or substantially funded by public money) the Scottish Ministers shall be entitled to reduce the Grant by the amount of such contribution (**Public Sector Contribution**) provided that the Scottish Ministers shall make no reduction nor take any action under Clause 5.3 if such Public Sector Contribution has been previously approved by the Scottish Ministers following a notification by the Operator to the Scottish Ministers referring to this Clause 5 and providing reasonable details of the Public Sector Contribution to be received by the Operator.

5.2 The Operator shall notify the Scottish Ministers immediately if:

5.2.1 the Operator shall make an application for any Public Sector Contribution in connection with the Approved Services;

5.2.2 the Operator receives notification that it will receive, or will receive an offer of, any Public Sector Contribution in connection with the Approved Services; or

5.2.3 the Operator shall receive any Public Sector Contribution in connection with the Approved Services.

Such notification shall give full details of the Public Sector Contribution applied for, offered or received as the case may be.

5.3 The Scottish Ministers may reclaim the Grant or any part of it or withhold payment if

required to do so by the Commission pursuant to Articles 87 and 88 of the EC Treaty and/or Applicable Law and Scottish Ministers shall use reasonable endeavours (subject to any objection of confidentiality imposed) to advise the Operator in the event that Scottish Ministers receive any notification which will or may lead to a request to reclaim the Grant and if so authorised by the Commission provide copies of any such notification and relevant communications. Any amount reclaimed as aforesaid shall be paid within twenty one days of notification by the Scottish Ministers to the Operator of any such decision by the Commission and if not so paid may be deducted by the Scottish Ministers from any subsequent Quarterly Instalment.

## 6. OPERATIONAL AND OTHER UNDERTAKINGS

6.1 The Operator undertakes to comply with the requirements of Part 5 of the Schedule at all times during the Grant Period provided that compliance with any requirement of Part 5 of the Schedule by a contractor of the Operator shall be accepted by the Scottish Ministers as compliance by the Operator.

6.2 The Operator undertakes at all times during the Grant Period:

6.2.1 to furnish the Scottish Ministers promptly with all such information as they may from time to time require regarding the business and affairs of the Operator and of any Associated Company of the Operator employed as a sub-contractor in the provision of the Approved Services, the provision of the Approved Services, and any other matters connected with or affecting the foregoing or the performance by the Operator of its obligations under this Agreement or the performance by the relevant parties of their obligations under the agreements set out in Section 1 of Part 1 of the Schedule;

6.2.2 to allow the Scottish Ministers and persons appointed by them (including without limitation, the Nominated Consultant) access to the premises, the Vessel and the employees of the Operator and all records and books of account of the Operator and shall procure that any Associated Company with which the Operator has contracted for purposes connected with this Agreement or the Approved Services shall allow similar access;

6.2.3 immediately to notify the Scottish Ministers of the commencement of any procedure for the winding up of the Operator or for the appointment of a liquidator, receiver, judicial factor, administrator or administrative receiver to the Operator or of analogous proceedings in any jurisdiction, and to provide the

Scottish Ministers with copies of all communications that are dispatched to the Operator's creditors pursuant to or in contemplation of any of the foregoing;

- 6.2.4 to send to the Scottish Ministers, at the same time as they are dispatched, copies of all communications that are dispatched to the Operator's shareholders; and
- 6.2.5 to provide to the Scottish Ministers details of any legal or administrative action involving the Operator or any Vessel as soon as such action is instituted unless such legal or administrative action is not material in the context of this Agreement and the Approved Services.

## **7. CONSULTATION WITH USERS**

- 7.1 The Parties, acting reasonably, shall consult with each other in good faith throughout the Grant Period in relation to all matters relevant to both the Approved Services and this Agreement, in order to facilitate the continued provision of the Approved Services.
- 7.2 The Operator shall take part in shipping services consultation meetings with representatives of the relevant Regional Transport Partnerships (HITRANS and Zetrans) from time to time throughout the Grant Period but not less than once per year and as required by the relevant Regional Transport Partnership.
- 7.3 As and when requested by the Scottish Ministers the Operator shall take part in consultation meetings throughout the Grant Period with representatives of users of the Approved Services and shall provide the Scottish Ministers with copies of minutes from such meetings. The Scottish Ministers shall be entitled to be represented at such meetings and their representatives shall be entitled to speak at such meetings.

## **8. APPROVED SERVICES OBLIGATIONS**

- 8.1 The Operator shall:
  - 8.1.1 operate the Approved Services in accordance with the Performance Measure for Availability;
  - 8.1.2 operate the Approved Services in accordance with the Performance Measure for Reliability;

- 8.1.3 ensure that the Approved Services meet the Performance Measure for Punctuality; and
- 8.1.4 ensure that the Approved Services meet the Performance Measures for Service Levels.

## 8.2 Deductions

### 8.2.1 Performance Deductions

Without prejudice to and in addition to the rights of the Scottish Ministers under any other provisions of this Agreement, where the Operator has failed to meet any of the Performance Measures, the Scottish Ministers may make deductions (**Performance Deductions**) in accordance with the Deduction Regime for Availability and/or Deduction Regime for Reliability and/or the Deduction Regime for Punctuality and/or Deduction Regime for Compliance as the case may be. The Scottish Ministers shall notify the Operator of its liability to Performance Deductions, but any delay or failure to notify shall not impair the right of the Scottish Ministers to make Performance Deductions.

### 8.2.2 Payment of Performance Deductions

The Scottish Ministers shall be entitled to recover Performance Deductions by way of deduction from the Quarterly Instalment payable in the Quarter immediately after the Quarter in respect of which the Performance Deductions arose or at the option of the Scottish Ministers in a later Quarter. Any Performance Deductions which remain unrecovered at the end of the last Quarter shall be a debt due and owing to the Scottish Ministers.

8.2.3 No Performance Deductions under Clause 8.2.1 may be made where the failure to meet any Performance Measure is directly attributable to a Relief Event.

8.2.4 If the Scottish Ministers make a Performance Deduction in accordance with the Deduction Regime for Reliability they shall not make a Performance Deduction in accordance with the Deduction Regime for Punctuality in respect of the same failure and vice versa.

8.3 The Scottish Ministers may require the Operator to explain any default or failure (including any default or failure attributable to a Relief Event) in the provision of the Approved Services and such explanation shall be given in any manner and within

any reasonable timescale specified by the Scottish Ministers.

- 8.4 The Scottish Ministers may require the Operator to present for their approval a programme to remedy any failure to provide the Approved Services in accordance with this Agreement and in particular, but without limitation, in accordance with the Performance Measures.
- 8.5 The Scottish Ministers may at any time investigate any circumstances or appoint the Nominated Consultant to investigate the circumstances in any case where, in their opinion, the Operator has failed to provide the Approved Services in accordance with this Agreement. The Scottish Ministers shall instruct the Nominated Consultant to have regard to the obligations of the Operator to provide the Approved Services when making his investigations.
- 8.6 The Scottish Ministers may at any time contact all or any of the harbour authorities at the Harbours to obtain information about or relating to the Approved Services and the Operator shall sign such documents and carry out such acts as required to facilitate the provision of such information by the relevant harbour authority and will use its reasonable endeavours to procure that any relevant harbour authority complies with such a request.
- 8.7 The Operator shall comply with the Monitoring Procedures set out in Part 6 of the Schedule.
- 8.8 If a Relief Event shall occur the Operator shall use all reasonable endeavours to minimise the disruption to the Approved Services and to users of the Approved Services.

## 9. VARIATIONS TO THE SERVICES

### 9.1 Variation

- 9.1.1 The Scottish Ministers may by notice (a **Variation Notice**) to the Operator from time to time during the Grant Period require a change to the Approved Services by such date as the Scottish Ministers may reasonably specify, having regard to the scope of the matters specified in the Variation Notice.
- 9.1.2 A Variation Notice may only be issued if the Scottish Ministers, acting reasonably, have concluded that the Approved Services are, or are about to become, inadequate or inappropriate or for any reason. For the avoidance of doubt, this may include where a Harbour is non-available or is suffering



operational restrictions in which event the Scottish Ministers may require the Operator to provide services comparable with the Approved Services to an alternative harbour for the period of non-availability or operational restriction of such Harbour.

- 9.1.3 A Variation Notice shall specify the additional, reduced or altered freight service by sea (and, for the avoidance of doubt, may refer to any aspect of such freight service) that the Scottish Ministers, acting reasonably, consider to be necessary to restore or maintain an adequate or appropriate freight service to the Northern Isles (the **Variation**).

## 9.2 Evaluation

As soon as practicable and in any event within 40 Business Days after having received a Variation Notice the Operator shall deliver to the Scottish Ministers a written evaluation (the **Evaluation**) of the Variation dealing with the matters specified in Clause 9.3 (to the extent that such matters can reasonably be addressed within such 40 Business Day period). The Operator shall not be obliged to engage external advisers in connection with the preparation of the Evaluation.

- 9.3 The Evaluation shall include the following information:

- 9.3.1 the proposed programme for the commencement of the Variation, including any proposed amendment (and reason therefor) to the date set out in the Variation Notice;
- 9.3.2 all authorisations, approvals, consents, licences, registrations, and other matters, official or otherwise, which the Operator reasonably requires to be obtained or otherwise addressed before it implements the Variation;
- 9.3.3 the specification of the vessels proposed to be employed by the Operator and confirmation of their availability and the proposed timetable of all departures and arrivals;
- 9.3.4 details of the effect on the Tonnage Rate resulting from implementing the Variation (or reasonable estimates thereof or where it is impractical to specify fixed sums); and
- 9.3.5 any changes to the provisions of this Agreement reasonably required as a consequence.

- 9.4 If the Scottish Ministers shall approve the Evaluation and the revised Tonnage Rate

the Operator shall commence the Variation and the Variation shall on the date stipulated by the Scottish Ministers, acting reasonably, deem to be appropriate in the circumstances become part of the Approved Services and the relevant revised Tonnage Rate shall on the date of its approval come into effect.

## 10. EXPENDITURE AND ACCOUNTABILITY

- 10.1 The Operator shall ensure and procure that adequate internal expenditure controls are in place and that all resources are used economically, effectively and efficiently so as to comply with the terms of this Agreement.
- 10.2 The Operator shall ensure that there is no cross-subsidisation between the Approved Services and any other service run by or activities of the Operator or between the Operator and any other Associated Company and that all transactions with any Associated Company are conducted on an arms length basis and are so identified in all records and books of accounts.
- 10.3 The Operator shall have clear, separate and transparent accounting systems for the financing and operating of the Approved Services and for receipt and use of the Grant and shall deal with the Scottish Ministers on an open book basis.
- 10.4 The Operator shall keep and maintain throughout the Grant Period and thereafter until 5 years after the final payment by the Scottish Ministers to the Operator pursuant to this Agreement adequate and proper records of and books of accounts recording the financial affairs of the Operator, the provision of the Approved Services and all receipts and expenditures of monies advanced to the Operator by the Scottish Ministers by way of the Grant and on the first request of the Scottish Ministers provide complete copies of such records and books of account provided that the Operator may discharge its obligation to keep and maintain such records and books by delivering to the Scottish Ministers at any time after the payment of the final instalment of the Grant all such records and books of accounts, and if such records and books of account are kept otherwise than in a legible form the Operator shall deliver the relevant electronically stored data, computer files, magnetic media files or micro files in commonly readable format.
- 10.5 The Operator shall throughout the Grant Period and thereafter until 5 years after the final payment by the Scottish Ministers to the Operator pursuant to this Agreement present to the Scottish Ministers:
- 10.5.1 not later than six months after the end of every accounting reference period of

the Operator, a copy of the audited financial statements of the Operator and the audited consolidated financial statements of any Group of which the Operator forms part for that accounting reference period; and

- 10.5.2 as soon as reasonably practicable after the end of any period notified by the Scottish Ministers (but not more than once in any Service Year) a confirmation by the auditors of the Operator (or a firm of chartered accountants selected by the Scottish Ministers) in such form as may be agreed between the Scottish Ministers, the Operator and the auditors or firm of chartered accountants containing information to confirm that the Grant and paid to the Operator has been applied by the Operator in accordance with Clause 4.
- 10.6 The Operator shall provide to the Scottish Ministers (or any other person appointed by the Scottish Ministers) such information as they may reasonably require from time to time, including access to and/or copies of all records maintained by the Operator, concerning any of the Approved Services (but not so as to involve the Operator in expenditure or managerial or administrative time which is unreasonable having regard to the nature of the information required).
- 10.7 The Operator shall throughout the duration of the Grant Period and for a period of 5 years after the final payment has been made to the Operator by the Scottish Ministers pursuant to this Agreement provide the Auditor General for Scotland access at all reasonable times and on reasonable notice to its books and records for the purposes of carrying out any audit or examination which he is empowered to carry out pursuant to the Public Finance and Accountability (Scotland) Act 2000 or any other Legislation. For the avoidance of doubt, this Clause does not apply to those books and records which have previously been delivered to and retained by the Scottish Ministers in accordance with Clause 10.4.
- 10.8 The Operator acknowledges and agrees that the number of Tonnes shall be subject to audit. The Operator shall cooperate fully with the Scottish Ministers and the auditor (or any other person appointed by the Scottish Ministers) to enable such audit to be completed. The Operator further acknowledges and agrees that the Scottish Ministers may make arrangements with the relevant harbour authorities to obtain access to all information held by said harbour authorities from time to time in respect of or associated with the Approved Services.

## **11. DEFAULT, CURE AND TERMINATION**

- 11.1 The occurrence of any of the following circumstances or event shall constitute an

Event of Default:

- 11.1.1 the Operator knowingly and deliberately giving any fraudulent written information to the Scottish Ministers or giving any other written information to the Scottish Ministers which read as a whole is incorrect or misleading, in substance or the manner of presentation, in a material respect whether such information is provided prior to or after the payment of any Grant is made;
- 11.1.2 the Operator being unable or admitting inability to pay its debts as they fall due, suspending making payments on any of its debts or, by reason of actual or anticipated financial difficulties, commencing negotiations with one or more of its creditors with a view to rescheduling any of its indebtedness;
- 11.1.3 the passing of a resolution that the Operator be wound up, or a court making an order that the Operator be wound up or that a liquidator (whether provisional, interim or otherwise) be appointed or any equivalent or analogous step is taken in any jurisdiction and such order not being recalled or discharged within 28 days, in any case otherwise than for the purposes of a solvent reconstruction or amalgamation previously sanctioned by the Scottish Ministers;
- 11.1.4 a receiver, manager, judicial factor, administrator or administrative receiver being appointed to the Operator or over all or any substantial part of the property which may from time to time be comprised in the property and undertaking of the Operator or any equivalent or analogous appointment is made in any jurisdiction and such appointment not being discharged within 28 days;
- 11.1.5 the Operator ceasing or threatening to cease to carry on business or to provide the Approved Services or any of them;
- 11.1.6 the occurrence of any event which allows or which with the lapse of time would allow any party to any of the agreements set out in Section 1 of Part 1 of the Schedule to terminate the relevant agreement before its natural expiry date or to exercise any other remedy thereunder or in the case of a Financial Obligation would allow the creditor to declare that Financial Obligation to be due and payable prior to its specified maturity;
- 11.1.7 the arrest or detention of any Vessel unless the Vessel or Vessels in question shall be free from arrest or detention within 7 days;

- 11.1.8 the Operator committing a material breach of any provision of this Agreement which if capable of remedy has not been remedied within 7 days;
- 11.1.9 any authorisation, approval, consent, licence, exemption, filing, registration or notarisation or other requirement necessary to enable the Operator to comply with any of its obligations hereunder which are material (as determined by the Scottish Ministers) being modified, revoked or withheld or ceasing to remain in full force and effect and not being reinstated in full force and effect or replaced by an equivalent, unless lack of the same does not affect the provision of the Approved Services and said reinstatement or replacement is achieved with 7 Business Days; or
- 11.1.10 there is any Change in Control of the Operator after the date of this Agreement except in circumstances where its holding company is listed on the London Stock Exchange and the Change in Control occurs as a result of a public offer (unless the Scottish Ministers shall have given their prior consent which, shall not be unreasonably withheld or delayed if there is no Event of Default then subsisting).
- 11.1.11 if, the Scottish Ministers having issued a Cure Notice, the terms of the Cure Plan have not been agreed within the period stated in the Cure Notice or if the actions specified in the Cure Plan to be taken by the Operator shall not have been taken and the matters referred to in the Cure Notice have not been otherwise resolved to the satisfaction of the Scottish Ministers within the period specified in the Cure Plan; or
- 11.1.12 if, the Scottish Ministers having issued a Cure Notice, the actions specified in the Cure Plan to be taken by the parties other than the Operator shall not have been taken and the matters referred to in the Cure Notice have not been otherwise resolved to the satisfaction of the Scottish Ministers within the period specified in the Cure Plan.

## 11.2 **Cure**

The Scottish Ministers may at any time issue a Cure Notice if:

- 11.2.1 the Operator shall fail to meet the Performance Measures or any of them so that the Scottish Ministers become entitled to reduce the Tonnage Rate by more than 20% on two or more occasions in any consecutive two Quarters; or
- 11.2.2 the Operator shall fail to meet the Performance Measures or any of them so

that the Scottish Ministers become entitled to reduce the Tonnage Rate by more than 10% on six or more occasions in any consecutive four Quarters; or

11.2.3 the Operator shall fail to comply with any of its obligations under this Agreement;

11.2.4 there shall occur an Event of Default; or

11.2.5 one or more Relief Events shall prevent the provision by the Operator of the Approved Services for a continuous period of 10 Business Days or for a cumulative period of 24 Business Days in any twelve consecutive months.

### 11.3 Cure Notice and Cure Plan

11.3.1 In this Agreement a Cure Notice means a notice by the Scottish Ministers to the Operator requiring the Operator, in consultation with the Scottish Ministers and, if appropriate, the Nominated Consultant, to submit within 14 days (or such longer period, to be specified in the Cure Notice, as the Scottish Ministers may reasonably require having regard to the matters referred to in the Cure Notice) a programme of action which will, if performed, cure or remedy the matters referred to in the Grievance Notice to the satisfaction of the Scottish Ministers within a period acceptable to the Scottish Ministers (the **Cure Plan**). The Scottish Ministers will be entitled to give a Cure Notice notwithstanding that they have served notice pursuant to Clause 11.4.2 and/or 11.4.3 before or at the same time as the Cure Notice.

11.3.2 When the Cure Plan (as presented or amended to meet the requirements of the Scottish Ministers) has been approved by the Scottish Ministers the Operator will implement the Cure Plan accordingly to its terms and all the satisfaction of the Scottish Ministers.

11.3.3 If at any time the Scottish Ministers are not satisfied with the progress being achieved by the Operator in relation to the Cure Plan, then the Scottish Ministers may by notice to the Operator declare that the payment of the Grant shall be suspended whereupon the liability of the Scottish Ministers in respect of the Grant shall be suspended forthwith. The liability of the Scottish Ministers in respect of the Grant, if suspended, shall be reinstated upon the implementation of the Cure Plan to the satisfaction of the Scottish Ministers or otherwise as the Scottish Ministers may decide. During any period of suspension the Scottish Ministers may, at their sole discretion, make advances to the Operator in respect of the Grant without conferring any rights on the

Operator or waiving any right of the Scottish Ministers.

11.3.4 The obligations of the Operator to implement the Cure Plan shall not be affected by any remedy exercised by the Scottish Ministers.

#### 11.4 Remedies

If the Scottish Ministers become aware of the occurrence of an Event of Default, the Scottish Ministers may at any time exercise all or any of the following remedies:

11.4.1 by notice to the Operator terminate this Agreement with immediate effect;

11.4.2 by notice to the Operator terminate this Agreement on such date as the Scottish Ministers in their sole discretion shall stipulate in the notice;

11.4.3 by notice to the Operator declare that all sums previously paid by way of Grant shall be immediately due and payable to the Scottish Ministers;

11.4.4 take any action available to them under common law and/or Legislation; and

11.4.5 issue a Cure Notice.

11.5 This Agreement may be terminated at any time by agreement between the Scottish Ministers and the Operator.

11.6 In the event of this Agreement being terminated:

11.6.1 the Scottish Ministers may enter into a New Contract with an Incoming Operator; and

11.6.2 where termination occurs as a consequence of an Event of Default, the Operator shall pay to the Scottish Ministers the amount of any costs and expenses properly and reasonably incurred by the Scottish Ministers in connection with the Scottish Ministers entering into a grant agreement with another operator for carrying out the Approved Services to a similar standard for the remainder of the Grant Period.

11.7 In the event of a failure by the Scottish Ministers to implement any of their obligations under this Agreement the sole remedy of the Operator shall be able to rescind and to recover from the Scottish Ministers any financial losses suffered by the Operator as a direct consequence of such failure.

11.8 Notwithstanding the provisions of this Clause 11, Clauses 1, 2, 3, 4, 5, 8, 10, 12, 14,

15, 16, 18, 20 and 21 shall survive termination of this Agreement along with any other Clauses or Parts of the Schedule necessary to give effect to those provisions.

#### **11.9 Exclusive Remedies**

Performance Deductions under Clause 8.2 of this Agreement and/or exercising rights under Clause 11.2 and 11.4 shall be the only remedies available to the Scottish Ministers in respect of failures by the Operator in respect of which Performance Deductions apply.

### **12. OPERATOR'S WARRANTIES**

12.1 The Operator warrants and undertakes to the Scottish Ministers that as at the date hereof and the Commencement Date:

12.1.1 it is a limited liability company, duly incorporated and validly existing and not in liquidation or apparently insolvent under the laws of Scotland;

12.1.2 it has full power and authority to enter into, and to fulfil its obligations under, this Agreement and the agreements set out in Section 1 of Part 1 of the Schedule;

12.1.3 the entry into and performance by it of this Agreement do not and will not:

(a) conflict with its constitutional documents; or

(b) conflict with any document which is binding upon it or affects any of its assets to the extent that such conflict would be reasonably likely to have a material adverse effect on the ability of the Operator to perform its obligations under this Agreement;

12.1.4 each of the agreements set out in Section 1 of Part 1 of the Schedule is (subject only to its being conditional upon the Commencement Date occurring) to the best of its knowledge and belief in full force and effect and constitutes valid, binding and enforceable obligations of the parties to the same, the copies which the Operator has delivered to the Scottish Ministers are true and complete copies of such agreements and of the other documents set out in Section 1 of Part 1 of the Schedule and there are not in existence any other agreements or documents or understandings replacing or relating thereto which would materially affect the interpretation or performance of any of the same;



- 12.1.5 all authorisations, approvals, consents, licences, registrations and other matters, official or otherwise, required or advisable in connection with the entry into, performance, validity and enforceability of this Agreement and in connection with the operation of the Approved Services have been obtained or effected and are in full force and effect and there are no circumstances which indicate that any of the same are likely to be revoked in whole or in part in the ordinary course of events; and
- 12.1.6 all information, representations and other matters of fact communicated in writing to the Scottish Ministers or to their agents (a) in connection with the Operator's response dated 30 May 2007 (and amended at 12 September 2007) to the Invitation To Tender dated 28 March 2007 in respect of the Approved Services or (b) in the course of the subsequent negotiations in respect of the provisions of this Agreement are, to the best of the Operator's knowledge and belief, true, complete and accurate in all material respects.
- 12.2 The Operator warrants and undertakes to the Scottish Ministers that as at their respective dates of coming into effect each Annual Tonnage Statement will be based on a reasonable interpretation of the books of account and records of the Operator and on reasonable assumptions and will, so far as the Operator is reasonably able to ensure, not contain any material error or inconsistency and none of the information incorporated in a Annual Tonnage Statement will be incorrect in such a way as to have a material affect on the computations.

### **13. FORCE MAJEURE**

- 13.1 Notwithstanding any other provision of this Agreement, neither party shall be deemed to be in breach of this Agreement or otherwise be liable to the other for any delay in the performance or the non-performance of any of its obligations under this Agreement to the extent that the delay or non-performance is due to any Force Majeure Event. If either party is affected by a Force Majeure Event, it shall forthwith notify the other party of the nature and extent of the circumstances in question.
- 13.2 If at any time the Operator claims a Force Majeure Event in respect of any of its obligations under this Agreement, the Scottish Ministers shall be entitled at their own cost to procure one or more third parties to provide freight transport services by sea to the Northern Isles in so far as the Operator is unable to provide the Approved Services or part of them for so long as the Force Majeure Event or its effect continues to prevent the Operator from performing all or any of its obligations under this Agreement.

- 13.3 If the Force Majeure Event in question prevails for a continuous period in excess of 7 days, the Scottish Ministers and the Operator shall without prejudice to the rights of the Scottish Ministers under Clause 13.2 enter into bona fide discussions with a view to alleviating the effects of the Force Majeure Event or to agreeing such alternative arrangements as may be fair and reasonable.
- 13.4 If no such terms are agreed within 6 Months of the commencement of the Force Majeure Event, and at that time such Force Majeure Event is continuing or its consequence remains such that the Operator is unable to comply with its obligations to any material extent, either party may terminate this Agreement by giving 30 Business Days' notice to the other party.
- 13.5 If the Operator gives notice of termination to the Scottish Ministers pursuant to Clause 13.4 then the Scottish Ministers shall have the option either to accept such notice or to notify the Operator within 10 Business Days of receipt of such notice that they require this Agreement to continue. If the Scottish Ministers give the Operator notice requiring the Agreement to continue then (without prejudice to their rights under Clause 13.6):
- 13.5.1 the Scottish Ministers shall pay the Grant to the Operator as if the Approved Services were being fully provided; and
- 13.5.2 this Agreement will not terminate, provided that the Scottish Ministers shall at any time thereafter be entitled to terminate this Agreement on not less than 30 Business Days' notice.
- 13.6 Notwithstanding the provisions of Clause 13.5, if a Force Majeure Event prevents the Operator from providing some but not all of the Approved Services for a continuous period of 6 Months the Scottish Ministers may exercise the rights conferred on them by Clause 9 to reduce the Approved Services.
- 13.7 The Parties shall at all times following the occurrence of a Force Majeure Event use all reasonable endeavours to prevent and mitigate the effects of such Force Majeure Event on the Approved Services and the Operator shall at all times during which a Force Majeure Event is subsisting take all steps to overcome or minimise the consequences of the Force Majeure Event.
- 13.8 The party affected by a Force Majeure Event shall notify the other party as soon as practicable after the Force Majeure Event ceases or no longer causes such party to be unable to comply with its obligations under this Agreement. Following such notification this Agreement shall unless the Scottish Ministers have exercised their

rights under Clause 9 continue to be performed on the terms existing immediately prior to the occurrence of the Force Majeure Event.

## **14. TRANSITION OBLIGATIONS**

### **14.1 Pre-Expiry**

The Operator shall upon the request of the Scottish Ministers made at any time during the last 18 Months of the Grant Period (or if the Scottish Ministers shall have given notice under Clause 11.4.2 at any time after the date of such notice) supply the Scottish Ministers with all such information regarding the Vessel and its operation, its employees, volumes of freight and other matters (including the like information as regards key sub-contractors) which the Scottish Ministers may require (of which the Scottish Ministers shall be the sole judges) for all purposes connected with the inviting of tenders from persons interested in becoming the Incoming Operator and for the purposes of evaluating any such tender.

### **14.2 Handover**

If the Scottish Ministers shall have appointed an Incoming Operator, the Operator shall cooperate with the Scottish Ministers and the Incoming Operator to ensure smooth handover and uninterrupted provision of the Approved Services and shall procure the assignation or novation to the Incoming Operator of all Intellectual Property Rights which are, in the reasonable opinion of the Scottish Ministers, essential to the uninterrupted provision of the Approved Services.

### **14.3 Termination**

The provisions of this Clause shall apply mutatis mutandis in the event of termination of this Agreement in accordance with its terms.

### **14.4 Continuing Appointment**

In the event that the Operator shall be appointed as the Incoming Operator Clause 14.2 (insofar as not already performed) shall not apply.

## **15. TRANSFER OF STAFF**

15.1 In the event that there is a New Contract with an Incoming Operator remuneration of any kind due to Transferring Employees in respect of the period up to the Expiry Date or the Termination Date (as the case may be) shall be paid or settled in full by the Operator.

- 15.2 The Operator hereby undertakes to indemnify and keep indemnified on demand the Scottish Ministers and/or, on demand by the Scottish Ministers, any Incoming Operator from and against any Operator Employment Liabilities which relate to or arise out of any act or omission by the Operator or a contractor of the Operator or any other event or occurrence in the period up to and including the Expiry Date or the Termination Date (as the case may be) for which the Scottish Ministers and/or any Incoming Operator is or becomes liable by reason of TUPE.
- 15.3 In the Transfer Assistance Period the Operator shall within 15 Business Days of its receipt of a request by the Scottish Ministers supply in writing to the Scottish Ministers or to its nominee:
- 15.3.1 full, complete and accurate information as to the terms and conditions of employment of all employees assigned to the provision of the Approved Services (**Assigned Employees**) at the time of a request for the same, whether contractual or otherwise (including without limitation remuneration, benefits and other perquisites), collective agreements which relate to the employment of such employees and any legally enforceable obligations on the Operator or its contractor to increase or otherwise vary such remuneration, benefits and other perquisites;
  - 15.3.2 the job title, role, length of service and age of all Assigned Employees at the time of a request for the same; and
  - 15.3.3 details of any outstanding disputes between the Operator and any of the Assigned Employees or their representatives.
- 15.4 In the event that the Operator shall fail to comply with Clause 15.3 the Operator hereby undertakes to indemnify and keep indemnified on demand the Scottish Ministers and/or, on demand by the Scottish Ministers, any Incoming Operator from and against any Extended Employment Liabilities which relate to or arise out of any act or omission by the Operator or a contractor of the Operator or any other event or occurrence in the period up to and including the Expiry Date or the Termination Date (as the case may be) for which the Scottish Ministers and/or any Incoming Operator is or becomes liable by reason of TUPE.
- 15.5 In the event that the Operator shall fail to comply with Clause 15.3 the Operator hereby undertakes to indemnify and keep indemnified on demand the Scottish Ministers and/or, on demand by the Scottish Ministers, any Incoming Operator from and against any costs, claims, liabilities and expenses (including legal expenses)

suffered or incurred by the Scottish Ministers, any Incoming Operator and/or its contractors as a result of any failure by the Operator and/or its contractors to comply with its or their obligations under Regulation 13 of TUPE.

- 15.6 The Operator acknowledges that the indemnities granted to the Scottish Ministers in this Clause 15 shall, in the event that the Scottish Ministers shall grant any indemnities to any Incoming Operator to the same extent, extend to any loss, payment or liability incurred by the Scottish Ministers in relation to such indemnities.

## **16. ASSIGNATION AND SUBCONTRACTING**

- 16.1 The Operator shall not assign this Agreement without the prior consent of the Scottish Ministers except for assignments in security.

- 16.2 No subcontracting or subletting of any duty, function, liability, obligation or responsibility (or any part thereof) incumbent upon the Operator in terms of this Agreement to any third party shall have the effect of relieving the Operator of any such duty, function, liability, obligation or responsibility (or any part thereof) owed to the Scottish Ministers in terms of this Agreement and notwithstanding the proviso to Clause 6.1 the Operator shall at all times be bound to fully implement this Agreement.

- 16.3 The Operator shall provide the Scottish Ministers with a copy of the deed or document formally recording any assignment of this Agreement.

- 16.4 Where the Operator enters into any assignment, subcontracting, subletting or other transfer of any duty, function, liability, obligation or responsibility (or any part thereof) incumbent upon the Operator in terms of this Agreement, it shall cause terms to be included in such assignment, subcontract, sublet or other transfer which requires payment to be made to the assignee, subcontractor, sublessee or transferee by the subcontract, sublet or other transfer within a specified period not exceeding 30 days from receipt by the Operator of a valid invoice in respect thereof from the assignee, subcontractor, sublessee or transferee.

## **17. INTEREST ON LATE PAYMENTS AND SET OFF**

- 17.1 If either party fails to pay any sum due to the other within 15 Business Days of the due date for payment interest will accrue for the period of non-payment at the Statutory Rate (as that expression is defined in the Late Payment of Commercial Debts (Interest) 1998 applying during the period of non-payment.

- 17.2 Either Party may retain or set off any amount owed to it by the other Party under this Agreement which has fallen due and payable against any amount due to the other Party under this Agreement.
- 17.3 If the payment or deduction of any amount referred to in Clause 17.2 above is disputed then any undisputed element of that amount shall be paid and the disputed element shall be dealt with in accordance with Clause 21.

## 18. **CONFIDENTIALITY AND FREEDOM OF INFORMATION**

- 18.1 The Scottish Ministers may publish or disclose this Agreement or any part of it, any information concerning the Agreement or matters arising out of or in connection with it, the performance of the Operator under the Agreement and any other information as it may deem appropriate from time to time. The Scottish Ministers shall use their best endeavours to notify the Operator prior to publishing or disclosing any such information directly relating to the Operator, and shall take account of any representations which the Operator may make in connection therewith.
- 18.2 The Operator shall do all things necessary to facilitate the Scottish Ministers' compliance with the Scottish Executive Publication Scheme (as required by section 23 of the Freedom of Information (Scotland) Act 2002) in force from time to time.
- 18.3 The Operator shall and shall procure that its sub-contractors shall treat as confidential and shall not disclose to any third party except with the prior consent of the Scottish Ministers (which may be granted subject to such conditions as the Scottish Ministers may see fit) any information obtained by it from the Scottish Ministers under or in connection with the Agreement.
- 18.4 The Operator shall not, and shall ensure and procure that its agents, employees, representatives and sub-contractors do not, communicate with representatives of the press, television, radio or other communications media on any matter concerning the Agreement without the prior approval of the Scottish Ministers.
- 18.5 Notwithstanding any of the foregoing provisions of this Clause 18, or any other provision of this Agreement, either party may disclose any information:
- 18.5.1 as required by law or any recognised Securities Exchange;
  - 18.5.2 for judicial purposes;
  - 18.5.3 which is or becomes public knowledge (other than by breach of this Clause 18);

- 18.5.4 which is in the possession of the party disclosing it without restriction as to its disclosure before receiving it from the disclosing party; or
- 18.5.5 which is received from a third party who lawfully acquired it and who is under no obligation restricting its disclosure.
- 18.6 Notwithstanding any of the foregoing provisions of this Clause 18, the Operator shall, unless otherwise directed by the Scottish Ministers, acknowledge in all promotional and publicity material relating to the Approved Services, the financial support given to the provision of the Approved Services through the Grant. The Operator shall not issue any such promotional or publicity material until the form of such acknowledgement has been approved by the Scottish Ministers, and following such approval shall include the acknowledgement (or such amended form of acknowledgement as may be approved by the Scottish Ministers from time to time) in all such promotional or publicity material unless the Scottish Ministers direct otherwise.
- 18.7 The provisions of this Clause 18 shall not apply to any Confidential Information which may reasonably be required to be disclosed to any party by the Scottish Ministers for the purposes of seeking an Incoming Operator.
- 18.8 The obligations imposed by this Clause 18 shall continue to apply after the expiry or termination of this Agreement.

## **19. ENTIRE AGREEMENT**

- 19.1 Except where expressly provided in this Agreement, this Agreement supersedes all understandings, agreements and documents between or by the Parties prior to the Agreement Date regarding any matters dealt with in this Agreement.
- 19.2 The Operator acknowledges that it has entered into this Agreement on the basis of its terms only and has not relied upon any statement or representation or warranty or other 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 repeated or referred to in this Agreement.

## **20. AMENDMENTS TO AGREEMENT**

Amendments to this Agreement or variations of its terms shall only be effective where constituted in writing and signed by or on behalf of each of the Parties.

## 21. DISPUTES

- 21.1 All disputes, differences or questions between the Parties with regard to any matter or thing arising out of or in connection with this Agreement shall be referred for decision to a single arbiter, mutually chosen by the parties for that purpose. If the Parties are unable to agree as to the appointment of an individual as an arbiter within 15 Business Days of the date of either Party intimating that it wishes the dispute to be resolved by the arbiter, such arbiter shall be chosen by the President of the Law Society of Scotland for the time being at the request of either party.
- 21.2 Where a dispute relates to the amount of any payment the Party disputing payment shall pay any undisputed amount when due under this Agreement.

## 22. NOTICES

- 22.1 Any document, notice, notification, statement, application for consent or other thing required to be given or served in terms of this Agreement may be given or served personally, or by sending the same by first class recorded delivery post at or to:

22.1.1 in the case of the Scottish Ministers, to The Scottish Government, Head of Transport Directorate, Victoria Quay, Edinburgh, EH6 6QQ;

22.1.2 in the case of the Operator to Streamline Terminal, Blaikies Quay, Aberdeen AB1 2PU;

or, in each case, at or to such other address as shall have been notified to the other Party for that purpose.

- 22.2 Any document, notice, statement or other thing given or served by post in accordance with the foregoing paragraph shall be deemed to have been duly given or served on the second Business Day after the letter containing the same was posted, and in proving that any document, notice, statement or other thing was so given or served, it shall be necessary only to prove that the same was properly addressed and posted in accordance with the provisions of the foregoing paragraph.

## 23. WAIVER

- 23.1 No failure by either Party to exercise or enforce, and no delay in exercising or enforcing, any right, remedy or provision of this Agreement shall operate as a waiver of such right, remedy or provision nor shall any single or partial exercise or enforcement of any right, remedy or provision preclude any other or further exercise



or enforcement or any other right, remedy or provision. No waiver shall be effective unless it is in writing.

24. **SEVERABILITY**

If any term, condition or provision contained in this Agreement shall be held to be invalid, unlawful or unenforceable to any extent such term, condition or provision shall not affect the validity, legality or enforceability of the remaining parts of this Agreement.

25. **JUS QUAESITUM TERTIO**

It is expressly declared that no rights shall be conferred under or arising out of this Agreement upon any person other than the Scottish Ministers and the Operator (and their permitted successors and assignees) and, without prejudice to the foregoing, there shall not in any circumstances be created by this Agreement a jus quaesitum tertio in favour of any other person whatsoever.

26. **EURO COMPLIANCE**

In the event that any currency in which any of the obligations under this Agreement are denominated from time to time is changed or replaced at any time after the date of this Agreement (whether as a result of the introduction of, changeover to or operation of a single or unified European currency or otherwise) this Agreement will be amended to the extent that the Scottish Ministers (acting reasonably) consider to be required in order to reflect those circumstances.

27. **LAW OF CONTRACT AND JURISDICTION**

This Agreement shall be governed by and construed in accordance with the laws of Scotland, and subject to Clause 21.1 the Parties submit to the irrevocable jurisdiction of the Court of Session in Edinburgh:

IN WITNESS WHEREOF these presents consisting of this and the preceding 40 pages together with the Schedule in 8 Parts attached as relative hereto are executed as follows:

**SIGNED** for and on behalf of

**SCOTTISH MINISTERS**

.....Signed.....

by

at on 30 May 2008

in the presence of this witness:

.....

..... Name

..... Address

**SIGNED** for and on behalf of

**SHETLAND LINE 1984 LIMITED**

by

.....Signed.....

Director

and

.....Signed.....

Director

at on 30 May 2008

**This is the Schedule in 8 Parts referred to in the foregoing Agreement between the  
Scottish Ministers and Shetland Line 1984 Limited**

**SCHEDULE PART 1**

**SECTION 1  
CONDITIONS PRECEDENT**

**(CLAUSE 2.1.1)**

- 1 Insurance Agreements
- 2 All Certificates required by MCA or other relevant regulatory body
- 3 Valid Certificate of Registry in respect of each Vessel
- 4 Copy of executed charterparty, or other evidence of entitlement to operate, in respect of each Vessel
- 5 An executed Parent Company Guarantee in favour of the Scottish Ministers in the form set out in Schedule Part 8.

**SCHEDULE PART 1**

**SECTION 2  
THE VESSEL**

<b>Item</b>	<b>Details</b>
Name and previous names	MV Daroja (current) / Muntediep / Lengai (previous)
Port of registry	Limassol, Cyprus
Crew Nationality	Various – e.g. Russian, Polish, Philippino, Ukrainian, etc
IMO Number	9148221
Built (when and where)	May 1997, Groningen, Holland
Manning Scale	9 crew
GA Drawing	Provided
LOA	90.95 metres
Beam	15.40 metres
Load Draft	5.65metres
Horse Power	3520KW/4720HP
Service Speed	14 knots
Average daily consumption in service	14 tonne heavy fuel oil (“HFO”) per day
Average daily consumption in port	0.7 tonnes gas oil (“GO”) per day
Carrying capacity (TEU/tonnage)	290 TEU / 3850 tonnes
Bunker capacity / fuel type	Capacity is 190 cube either of: HFO – 190 cbm at 90 percent / GO – 180 cbm at 90 percent
Propulsion configuration	Single screw LIPS CPP
Thruster power	400KW non-g geared
Class	LR+100A1.+LMC,UMS

**SCHEDULE PART 2**  
**MOBILISATION REQUIREMENTS**

1. The Operator shall within one Month of the date of this Agreement present to the Scottish Ministers a draft mobilisation plan complying with paragraph 3 (**Mobilisation Plan**).
2. The Scottish Ministers shall be entitled to request the Operator to modify or amplify the draft Mobilisation Plan and when the draft Mobilisation Plan, amplified and/or modified as the case may be, has been approved by the Scottish Ministers it shall become the Mobilisation Plan.
3. The Mobilisation Plan shall:
  - (a) set out the Operator's programme for obtaining any necessary MCA authorisations;
  - (b) set out the Operator's programme for staff (onshore and seagoing) familiarisation and training including, without limitation, disability and awareness training;
  - (c) provide for obtaining written confirmation from the MCA confirming that any Vessel which is currently under a non EEA Flag will be acceptable in terms of the requirements of the EEA Flag;
  - (d) set out a programme for satisfying the Conditions Precedent;
  - (e) set out a reasonable programme for achievement of relevant safety certifications for all relevant aspects of the Approved Services;
  - (f) set out arrangements providing for consultation with user groups and local authorities;
  - (g) set out arrangements to rectify the situation where mobilisation falls behind the requirements set out in the Mobilisation Plan;
  - (h) set out the arrangements for complying with the Data Protection Act 1998 and for registering an agreed brand or service name for use in connection with the Approved Services; and
  - (i) set out the Operator's project management process for delivery of the Mobilisation Plan.

**SCHEDULE PART 3  
APPROVED SERVICES**

- 1 The Approved Services are the lift-on lift-off freight transport services by sea (including but not limited to the transport of freight and dangerous goods) to be provided by the Operator between the Harbours as specified in accordance with the Published Timetable. The Approved Services will consist of 2 round trips from Aberdeen to the Northern Isles per week.

**Initial Timetable**

Dep	Arr	Sat	Sun	Mon	Tue	Wed	Thu	Fri
Aberdeen		1600 (1000)						
	Lerwick		0800					
Lerwick			2200 (1200)					
	Kirkwall			0800				
Kirkwall				2000 (1500)				
	Aberdeen				0800			
Aberdeen					2400 (1500)			
	Kirkwall					1200		
Kirkwall						2200 (1500)		
	Lerwick						0800	
Lerwick							2000 (1500)	
	Aberdeen							1200

Note: cut off time for receiving cargo is shown in brackets.

- 2 The Approved Services include: (a) the manning of terminals and harbour facilities for the purposes of loading and discharging of freight and dangerous goods; (b) facilities for accepting reservations, issuing relevant documentation and marketing the operation of a common timetable and fares database for all routes permitting reservation, sales and credit card payments by telephone and internet as well as at the Operator's office; and (c) the safe and efficient management and operation and maintenance of the Vessel so as to comply with Applicable Law including the provision of all necessary administration facilities.
  
- 3 The Vessel shall have a minimum capacity of 176 TEU where TEU or "Twenty-foot Equivalent Unit" is a volume equivalent to that occupied by one ISO twenty-foot container.

### SCHEDULE PART 4

#### TARIFFS (in GB Pounds)

Destination	Tariff rate per TEU, £	Tariff rate per TEU, £	Tariff rate per TEU, £	Tariff rate per TEU, £	Tariff rate per TEU, £	Tariff rate per TEU, £
	Service Year 1 Published Tariff	Service Year 2 Proposed Tariff	Service Year 3 Proposed Tariff	Service Year 4 Proposed Tariff	Service Year 5 Proposed Tariff	Service Year 6 Proposed Tariff
<b>Shetland</b>	250	250: Index Linked	Service Year 2 Published Tariff: Index Linked	Service Year 3 Published Tariff: Index Linked	Service Year 4 Published Tariff: Index Linked	Service Year 5 Published Tariff: Index Linked
<b>Orkney</b>	180	180: Index Linked	Service Year 2 Published Tariff: Index Linked	Service Year 3 Published Tariff: Index Linked	Service Year 4 Published Tariff: Index Linked	Service Year 5 Published Tariff: Index Linked
<b>Aberdeen</b>	50	50: Index Linked	Service Year 2 Published Tariff: Index Linked	Service Year 3 Published Tariff: Index Linked	Service Year 4 Published Tariff: Index Linked	Service Year 5 Published Tariff: Index Linked



**SCHEDULE PART 5**  
**OPERATIONAL UNDERTAKINGS**

References herein to “the Vessel” apply to the Vessels and any substitute, as appropriate.

**1. Information and Compliance Undertakings**

The Operator shall throughout the Grant Period:

- 1.1 ensure that at all relevant times all licences, approvals, consents and permits required under Applicable Law which are required for the use and operation of the Vessel are, in each case, obtained and maintained in full force and effect; and
- 1.2 furnish the Scottish Ministers promptly with all such information as they may from time to time reasonably require regarding the Vessel, her insurance, condition, and maintenance.

**2. Maintenance and Operation**

The Operator shall throughout the Grant Period:

- 2.1 at its sole cost and expense maintain the Vessel and keep it in a good and efficient state of repair and safe operating condition, seaworthy in all respects and in accordance with good maintenance practice (fair wear and tear excepted and having regard to the age and type of the Vessel) and in accordance with good industry practice for United Kingdom lift-on lift-off freight service operators and the Operator shall ensure that at all times:
  - a. the Vessel maintains the Classification of the Vessel with the Classification Society;
  - b. the Vessel complies with all other regulations and requirements (statutory or otherwise) from time to time applicable to vessels registered in the relevant flag state or otherwise applicable to the Vessel, her Master, officers and crew (including in relation to the number of crew to safely operate the Northern Isles lo-lo service); and
  - c. the Operator complies at all times with any terms of the Insurances relating to the condition or inspection of the Vessel;
- 2.2 notify the Scottish Ministers forthwith upon becoming aware of the same by facsimile transmission or email thereafter confirmed by letter and in reasonable detail of:

- a. the hijacking, confiscation, seizure, impounding, arrest, taking in execution, forfeiture or detention of the Vessel or any requisition for hire of the Vessel;
- b. any requirement or recommendation made by the Classification Society or by any insurer or any competent authority which is not, or cannot be, complied with in accordance with its terms;
- c. any death or serious or potentially serious injury to a third party or substantial damage to property, caused by, or in connection with, the Vessel;
- d. any single casualty or other accident or damage to the Vessel which may be or become an actual or constructive total loss or which may involve repairs or maintenance costing more than £100,000;
- e. any other event which occurs in connection with the Vessel which affects or may reasonably be expected to affect the rights of the Scottish Ministers;
- f. the occurrence of any litigation involving, or criminal proceedings against, the Operator; and/or
- g. any notices, requirements or recommendations made by or on behalf of a governmental or statutory body or agency. This includes, but is not limited to, notices, requirements or recommendations made by or on behalf of:
  - the Health and Safety Executive (**HSE**) or any other agency of the Health and Safety Commission;
  - the Scottish Environment Protection Agency (**SEPA**);
  - the MCA.

In the event of a casualty or maintenance referred to in (d) above, the Operator will notify the Scottish Ministers orally within 48 hours of discovery and in writing within 72 hours after the discovery of the event. Such notification will also describe the plan and time frame for rectification;

- 2.3 maintain all such records, logs, manuals, technical data and other materials and documents which are required to be maintained in respect of the Vessel to comply with any Applicable Laws or the requirement of the Classification Society;
- 2.4 procure that the Scottish Ministers are not at any time represented as carrying freight or providing any other service on or from the Vessel, or as being in any way

connected or associated with any operation or carriage or other service which may be undertaken by the Operator, or as having any operational interest in, or responsibility for, the Vessel;

- 2.5 do or cause to be done all things necessary to comply with all national, international and state conventions and laws (and any rules and regulations thereunder) applicable to the Operator and/or the Vessel including, without limitation, the Merchant Shipping Act 1995, the International Convention for the Safety of Life at Sea (SOLAS) 1974 as amended from time to time, the IMO document International Convention for the Prevention of Pollution from Ships (MARPOL) and international conventions, laws, rules and regulations relating to environmental matters, including those relating to discharges of oil, petroleum, petroleum products and distillates, chemicals, pollutants and other substances and the Terrorism Act 2000;
- 2.6 maintain an emergency response plan and undertake the appropriate exercises for training purposes; and
- 2.7 operate a procedure, available for inspection by the Scottish Ministers, pursuant to which customers or other parties having an interest can make complaints, such complaints and any related rectification action or response to be recorded.

### **3. Insurance Undertakings**

- 3.1 The Operator hereby covenants and undertakes that throughout the Grant Period it will insure and keep the Vessel insured at its own cost and expense in respect of all matters of whatsoever nature and howsoever arising in respect of which insurance would be maintained by a prudent owner of the Vessel having regard to the situation, nature and method of operation of that Vessel.
- 3.2 The Operator hereby covenants that it will not do, consent to or permit any act or omission which might invalidate or render unenforceable the whole or any part of the Insurances and not (without first obtaining the consent of the insurers to such employment and complying with such requirements as to extra premium or otherwise as the insurers may prescribe) employ the Vessel or suffer the Vessel to be employed otherwise than in conformity with the terms of the Insurances (including any warranties express or implied therein).
- 3.3 Apply all sums receivable under the Insurances which are paid to the Operator in repairing all damage and/or in discharging the liability in respect of which such sums shall have been received.

3.4 In the event of the Vessel becoming a wreck or obstruction to navigation during the Grant Period the Operator shall indemnify and hold harmless the Scottish Ministers against all costs, expenses, payments, charges, losses, demands, any liabilities, claims, actions, proceedings (whether civil or criminal) penalties, fines, damages, judgements, orders or other sanctions which may be made or asserted against the Scottish Ministers by reason that the Vessel shall have become a wreck or obstruction to navigation including, (without limitation), in respect of the removal or destruction of the wreck or obstruction under statutory powers but only to the extent that such has not been recovered from the Vessel's insurers.

## **SCHEDULE PART 6 MONITORING PROCEDURES**

The Operator shall supply reports to the Scottish Ministers as follows:

### **1 PERFORMANCE OF THE APPROVED SERVICES**

- 1.1 Quarterly Reports on Performance Measures for Availability summarised on the basis of Annex A;
- 1.2 Quarterly Reports on Performance Measures for Punctuality summarised on the basis of Annex A;
- 1.3 Quarterly Reports on Performance Measures for Reliability summarised on the basis of Annex A;
- 1.4 Quarterly Reports on Performance Measures for Compliance summarised on the basis of Annex A;
- 1.5 Quarterly Reports (in a form to be agreed) on the Relief Events and, of appropriate, the steps being taken to alleviate the consequences of Relief Events;
- 1.6 a summary (in a form to be agreed) of the position in relation to Clause 8 on Performance Measures before Relief Events are taken into account, and Performance Measures after Relief Events are taken into account;
- 1.7 a summary of the monitoring regime should be made available for publication, in the Operator's annual report and for use by the Scottish Ministers as necessary. The same information should also be made available to the members of the consultation meetings with users as required under Clause 7; and
- 1.8 an annual safety report including detailed information about any reportable accidents, including any major injuries and serious injuries, and any hazardous events.

The Operator will submit the Quarterly Reports to the Scottish Ministers within 6 weeks after the end of the relevant Quarter. The format of the information can be adjusted by mutual agreement between the Scottish Ministers and the Operator;

The Operator shall attend quarterly meetings with representatives of the Scottish Ministers in order to assist with the monitoring and management of this Agreement. The Scottish Ministers may, at their own expense, carry out such monitoring and/or audit of the Approved Services as they determine may be required in order to measure the performance of the Operator against the Performance Measures, provided that such monitoring and/or audit does not have an adverse effect on the provision by the Operator of the Approved Services or its ability to meet the Performance Measures.

## **2 FINANCE AND EFFICIENCY INFORMATION**

2.1 The Operator shall submit either as part of the audited financial statements submitted pursuant to Clause 10.5 or separately:

- (a) efficiency and financial information at the end of each Service Year;
- (b) detailed statements of both revenue and operating costs where appropriate differentiating between ship and operating costs, shore and terminal costs, administration costs, marketing costs and other costs; and
- (c) separate financing statements for Grant supported services, which clearly demonstrates that there is no cross subsidisation with any other of the Operator's activities or the activities of any Associated Company.

**SCHEDULE PART 6  
MONITORING PROCEDURES**

**ANNEX A – SAMPLE REPORTS**

**Punctuality:**

Vessel	Number of times in the relevant Quarter that the Vessel:		
	Met the Performance Measure	Did not meet the Performance Measure	Applicable Relief Event (if any)

**Reliability:**

Vessel	In the relevant Quarter:			
	No. of scheduled sailings	No. of sailings completed	Sailings completed (%)	Applicable Relief Event (if any)

**Availability:**

Sailing	In respect of each sailing from Aberdeen to the Northern Isles in the relevant Quarter:		
	Capacity for freight (in tonnes)	Tonnes of freight carried	Applicable Relief Event (if any)

**Service Levels (Notices):**

Quarter	Number of notices issued by HSE, SEPA or other governmental or statutory body or agency and of criminal fines or convictions	Further details of notices / fines / convictions

**SCHEDULE PART 7  
PERFORMANCE AND MONITORING REGIME**

**DEFINITIONS**

In the event that part of a Quarter has to be measured for the purposes of this Part of the Schedule, performance measures and deductions will be pro rated relative to the number of scheduled sailings in that Quarter and relevant part of a Quarter.

For the purposes of this Part of the Schedule a sailing means each sailing on the Published Timetable between two Harbours whether or not the destination Harbour is the final destination Harbour.

**SECTION A**

**PERFORMANCE MEASURE FOR AVAILABILITY:**

<b>Performance Measure for Availability</b>	<p>A Vessel providing an Approved Service meets the Performance Measure for Availability if on any sailing departing from Aberdeen it has the capacity to carry 1,154 tonnes of freight.</p> <p>A Vessel which does not have the required available capacity as a direct consequence of a Relief Event shall be deemed to have the required available capacity for the purpose of the Performance Measure for Availability.</p>
<b>Periods to be measured</b>	The Quarter commencing on the Commencement Date and each successive Quarter thereafter
<b>Classification of availability over period:</b>	<b>Deduction to apply to classification:</b>
<b>1</b> 0 – 2 sailings fail to meet the Performance Measure for Availability	No deduction (compliance)
<b>2</b> 3 – 5 sailings fail to meet the Performance Measure for Availability	Reduce the Tonnage Rate by 10% for that Quarter



<b>3</b>	6 – 10 sailings fail to meet the Performance Measure for Availability	Reduce the Tonnage Rate by 20% for that Quarter
<b>4</b>	11 – 16 sailings fail to meet the Performance Measure for Availability	Reduce the Tonnage Rate by 30% for that Quarter
<b>5</b>	more than 16 sailings fail to meet the Performance Measure for Availability	Reduce the Tonnage Rate by 40% for that Quarter

## SECTION B

### PERFORMANCE MEASURE FOR RELIABILITY:

<b>Performance Measure for Reliability</b>	<p>The Performance Measure for Reliability is the completion by the relevant Vessel of each sailing identified as part of the Approved Services in the Published Timetable.</p> <p>A sailing which either does not commence or does not complete in accordance with the Published Timetable as a direct consequence of a Relief Event shall be deemed to have been completed for the purpose of the Performance Measure for Reliability.</p>	
<b>Periods to be measured</b>	The Quarter commencing on the Commencement Date and each successive Quarter thereafter	
<b>Classification of reliability over period:</b>	<b>Deduction to apply to classification:</b>	
<b>1</b>	0 – 8 sailings do not commence or do not complete in accordance with the Published Timetable	No deduction (compliance)
<b>2</b>	8 – 16 sailings do not commence or do not complete in accordance with the Published Timetable	Reduce the Tonnage Rate by 10% for that Quarter.
<b>3</b>	16 – 32 sailings do not commence or do not complete in accordance with	Reduce the Tonnage Rate by 20% for that Quarter.

	the Published Timetable	
<b>4</b>	32 – 48 sailings do not commence or do not complete in accordance with the Published Timetable	Reduce the Tonnage Rate by 30% for that Quarter.
<b>5</b>	more than 48 sailings do not commence or do not complete in accordance with the Published Timetable	Reduce the Tonnage Rate by 40% for that Quarter.

## SECTION C

### PERFORMANCE MEASURE FOR PUNCTUALITY:

<b>Performance Measure for Punctuality</b>	<p>A Vessel providing an Approved Service meets the Performance Measure for Punctuality if the Vessel arrives at the final destination Harbour or any midway Harbour at which it is due to call in accordance with the Published Timetable within 3 hours of the Published Timetable.</p> <p>A Vessel which does not meet the Performance Measure for Punctuality for a sailing either because it is late, or fails to run, as a direct consequence (in either case) of a Relief Event shall be deemed to have met the Performance Measure for Punctuality in respect of the relevant sailing.</p>	
<b>Periods to be measured</b>	The Quarter commencing on the Commencement Date and each successive Quarter thereafter.	
<b>Classification of punctuality over period:</b>	<b>Deduction to apply to classification:</b>	
<b>1</b>	0 – 8 sailings do not meet the Performance Measure for Punctuality	No deduction (compliance)
<b>2</b>	8 – 16 sailings do not meet the Performance Measure for	Reduce the Tonnage Rate by 10% for that Quarter.

	Punctuality	
3	16 – 32 sailings do not meet the Performance Measure for Punctuality	Reduce the Tonnage Rate by 20% for that Quarter.
4	32 – 48 sailings do not meet the Performance Measure for Punctuality	Reduce the Tonnage Rate by 30% for that Quarter.
5	more than 48 sailings do not meet the Performance Measure for Punctuality	Reduce the Tonnage Rate by 40% for that Quarter.

## SECTION D

### PERFORMANCE MEASURES FOR COMPLIANCE:

<b>Performance Measure for Services – Compliance</b>		<p>The Performance Measure for Service is compliance with all Applicable Law.</p> <p>This Performance Measure shall not apply to notices issued on the Operator or any sub-contractor thereof in respect of actions or incidences of non-compliance by a third party (not being an Associated Company).</p>
<b>Periods to be measured</b>		The Quarter commencing on the Commencement Date and each successive Quarter thereafter
<b>Classification of service levels over period:</b>		<b>Deduction to apply to classification:</b>
1	No notices as a result of non-compliance issued on the Operator or any sub-contractor thereof by or on behalf of HSE, SEPA or any other governmental or statutory body or	No deduction (compliance)

	agency and no criminal convictions / fines	
<b>2</b>	1 – 2 notices as a result of non-compliance issued on the Operator or any sub-contractor thereof by or on behalf of HSE, SEPA or any other governmental or statutory body or agency or a conviction for a summary offence resulting in a Level 1 or 2 fine	Reduce the Tonnage Rate by 5% for that Quarter.
<b>3</b>	3 – 5 notices as a result of non-compliance issued on the Operator or any sub-contractor thereof by or on behalf of HSE, SEPA or any other governmental or statutory body or agency or a conviction for a summary offence resulting in a Level 3, 4 or 5 fine	Reduce the Tonnage Rate by 10% for that Quarter.
<b>4</b>	6 or more notices as a result of non-compliance issued on the Operator or any sub-contractor thereof by or on behalf of HSE, SEPA or any other governmental or statutory body or agency or a conviction for an indictable offence	Reduce the Tonnage Rate by 20% for that Quarter.

**SCHEDULE PART 8**  
**PARENT COMPANY GUARANTEE**

**GUARANTEE**

**BY:**

- (1) **STREAMLINE SHIPPING GROUP LIMITED** a company incorporated in Scotland (Registered Number SC131956) whose registered office is at Streamline Terminal, Blaikies Quay, Aberdeen AB1 2PU (the **Guarantor** which expression shall include its permitted successors or assignees);

**in favour of**

- (2) **THE SCOTTISH MINISTERS**, Victoria Quay, Edinburgh, EH6 6QQ (who and whose successors are referred to as the **Scottish Ministers**).

**WHEREAS:**

- A. The Scottish Ministers have entered into an agreement (the **Public Service Contract**) with Shetland Line 1984 Limited (the **Operator**), a company incorporated in Scotland (Registered No. SC088013) and having its registered office at Streamline Terminal, Blaikies Quay, Aberdeen AB1 2PU whereby the Contractor has agreed to perform the Services. The Public Service Contract shall include any variation of the terms thereof agreed between the Scottish Ministers and the Operator.
- B. The Operator is a wholly-owned subsidiary (as defined in Part XXXVI of the Companies Act 1985) of the Guarantor and the Guarantor has agreed to enter into this guarantee (this **Guarantee**) to guarantee to the Scottish Ministers the respective liabilities and obligations of the Operator arising under the Public Service Contract.
- C. Words and expressions in this Guarantee shall, unless the context otherwise admits, have the same meaning as in the Public Service Contract.

**NOW THIS GUARANTEE WITNESSES as follows:**

1. The Guarantor guarantees to the Scottish Ministers the full due and punctual performance and observance by the Operator of all the Operator's obligations under and pursuant to the terms of the Public Service Contract and any other agreements or documents entered into or to be entered into by the Operator pursuant to the Public Service Contract provided that the Guarantor's liability under this guarantee will not exceed £[ ]
2. The guarantee given by the Guarantor under this Guarantee shall be a primary obligation of the Guarantor and is a continuing guarantee.
3. The Guarantor agrees that it shall not in any way be released from liability under this Guarantee by any act, omission, matter or other things whereby (in the absence of

this provision) the Guarantor would or might be released in whole or in part from liability under this Guarantee.

4. If the Operator in any respect fails fully and properly to perform observe and execute the Public Service Contract or shall commit any breach of its obligations or fail to fulfil any of the contractual terms thereunder then the Guarantor will following written demand make good or procure the making good of such breach(es) as soon as is reasonably practicable and shall be liable to the Scottish Ministers for all losses, damages, expenses, liabilities, claims, costs or proceedings which the Scottish Ministers may suffer or incur by reason of the said failure or breach.
5. The rights of the Scottish Ministers under this Guarantee may be waived only in writing and any delay in exercising or non-exercise of any right is not a waiver of that right.
6. The Guarantor may rely upon the same defences and limitations of liability as the Operator has under or in connection with the Public Service Contract and shall in no circumstances have any greater liability than the Operator has under or arising out of the Public Service Contract.
7. Any notice or demand to be served under this Guarantee must be in writing and must be served by hand or by special delivery or recorded delivery or by facsimile. Service shall take effect, if given by hand, on the date of delivery. If given by post, it shall take effect two Business Days after posting. If given by facsimile it shall take effect at the expiration of two hours after the time of dispatch, if dispatched before 3.00pm on any Business Day and in any other case at 10.00am on the next Business Day. For the purposes of this clause, Business Day means a day (other than a Saturday or Sunday) on which banks are generally open in London, Glasgow and Edinburgh for normal business.

8. This Guarantee shall be governed by and construed in accordance with the laws of Scotland and the Parties submit to the irrevocable jurisdiction of the Scottish Courts:

IN WITNESS WHEREOF these presents consisting of this and the preceding [ ] pages are executed as follows:

**SIGNED** for and on behalf of

**SCOTTISH MINISTERS**

.....Signed.....

by

at on 30 May 2008

in the presence of this witness:

.....

..... Name

..... Address

**SIGNED** for and on behalf of

**SHETLAND LINE 1984 LIMITED**

by

..... Signed.....

Director

and

.....Signed.....

Director

at on 30 May 2008