



CONTENTS

	<u>Page No.</u>
1. INTERPRETATION	1
<b>1.1 Definitions</b>	<b>1</b>
<b>1.2 Interpretation</b>	<b>4</b>
2. NETWORK CODE	6
<b>2.1 Incorporation</b>	<b>6</b>
<b>2.2 Compliance by other operators</b>	<b>6</b>
3. CONDITIONS PRECEDENT AND TERM	6
<b>3.1 Conditions precedent</b>	<b>6</b>
<b>3.2 Obligations to satisfy conditions precedent</b>	<b>6</b>
<b>3.3 Entry into effect</b>	<b>7</b>
3.3.1 Binding effect on signature	7
3.3.2 Binding effect on Commencement Date	7
<b>3.4 Consequences of non-fulfilment</b>	<b>7</b>
<b>3.5 Term</b>	<b>7</b>
4. COMMERCIAL PURPOSE AND STANDARD OF PERFORMANCE	7
<b>4.1 General</b>	<b>7</b>
4.1.1 Achievement of commercial purpose	7
4.1.2 Application of commercial purpose	8
<b>4.2 Commercial purpose</b>	<b>8</b>
<b>4.3 Standard of performance</b>	<b>8</b>
5. PERMISSION TO USE	9
<b>5.1 Permission to use the Routes</b>	<b>9</b>

5.2	<b>Meaning</b>	<b>9</b>
5.3	<b>Permission under Clauses 5.2(d) and 5.2(e)</b>	<b>9</b>
5.4	<b>Stabling</b>	<b>10</b>
5.5	<b>Access right warranty</b>	<b>10</b>
6.	<b>OPERATION AND MAINTENANCE OF TRAINS AND NETWORK</b>	<b>10</b>
6.1	<b>General</b>	<b>10</b>
6.2	<b>Trespass, vandalism and animals</b>	<b>11</b>
6.3	<b>Safety</b>	<b>11</b>
6.4	<b>Use of Railway Code Systems</b>	<b>11</b>
	6.4.1 General	11
	6.4.2 Provision of train consist data	11
	6.4.3 Consent to use	11
6.5	<i>Information</i>	<b>11</b>
	[Information provision to be inserted in light of the consultation of the new asset register licence condition.]	<b>12</b>
7.	<b>TRACK CHARGES</b>	<b>12</b>
8.	<b>LIABILITY FOR PERFORMANCE</b>	<b>12</b>
	<b>8.1 Performance</b>	<b>12</b>
	<b>8.2 Liability for late trains</b>	<b>12</b>
9.	<b>INDEMNITIES</b>	<b>12</b>
	<b>9.1 Train Operator indemnity</b>	<b>12</b>
	<b>9.2 Railtrack indemnity</b>	<b>12</b>
	<b>9.3 Restrictions on claims</b>	<b>13</b>
	9.3.1 Notification and mitigation	13
	9.3.2 Obligation first to seek performance order	13

<b>9.4</b>	<b>Limitation on liability</b>	<b>13</b>
<b>9.5</b>	<b>Claims Allocation and Handling Agreement</b>	<b>14</b>
10.	Governing Law and Dispute Resolution	<b>14</b>
<b>10.1</b>	<b>Governing law and jurisdiction</b>	<b>14</b>
<b>10.2</b>	<b>Dispute resolution</b>	<b>14</b>
11.	PERFORMANCE ORDER PROCEDURE	<b>14</b>
<b>11.1</b>	<b>Relevant failures</b>	<b>14</b>
<b>11.2</b>	<b>Discussion of remedial action</b>	<b>14</b>
11.2.1	Meeting at operational level	<b>14</b>
11.2.2	Elevation of question to director level	<b>14</b>
<b>11.3</b>	<b>Fast-track arbitration</b>	<b>15</b>
<b>11.4</b>	<b>Performance orders</b>	<b>15</b>
11.4.1	Application for performance order	<b>15</b>
11.4.2	Powers of arbitrator in relation to performance orders	<b>15</b>
11.4.3	Duties of the arbitrator in relation to performance orders	<b>15</b>
11.4.4	Conduct of arbitration	<b>16</b>
<b>11.5</b>	<b>Appointment of arbitrator</b>	<b>16</b>
11.5.1	Obligation to establish panel of arbitrators	<b>16</b>
11.5.2	Qualification of arbitrators	<b>16</b>
11.5.3	Relevant arbitrator where the parties have an established panel	<b>16</b>
11.5.4	Default position	<b>16</b>
11.5.5	Appointment by Regulator	<b>16</b>
12.	CONFIDENTIALITY	<b>17</b>
<b>12.1</b>	<b>Confidential information</b>	<b>17</b>

12.1.1	General obligation	17
12.1.2	Railtrack - affiliates	17
12.1.3	Train Operator - affiliates	17
<b>12.2</b>	<b>Entitlement to divulge</b>	<b>17</b>
<b>12.3</b>	<b>Return of Confidential Information</b>	<b>18</b>
<b>12.4</b>	<b>Ownership of Confidential Information</b>	<b>18</b>
<b>12.5</b>	<b>Part J Network Code</b>	<b>18</b>
13.	ASSIGNMENT AND NOVATION	18
<b>13.1</b>	<b>No assignment</b>	<b>18</b>
13.1.1	Consent	18
13.1.2	Charge to Bank	18
<b>13.2</b>	<b>Novation where requested</b>	<b>19</b>
<b>13.3</b>	<b>Regulatory approval</b>	<b>19</b>
14.	PAYMENTS, INTEREST AND VAT	19
<b>14.1</b>	<b>Payment</b>	<b>19</b>
14.1.1	No deduction	19
14.1.2	Disputed amounts	20
14.1.3	Dispatch of invoices	20
14.1.4	Payment and content of invoices	20
14.1.5	Method of payment	20
<b>14.2</b>	<b>Interest</b>	<b>20</b>
<b>14.3</b>	<b>VAT</b>	<b>20</b>
14.3.1	Payment of VAT	20
14.3.2	Reimbursement of VAT	21

14.3.3	VAT credit note to be issued on repayment	21
15.	<b>MISCELLANEOUS</b>	<b>21</b>
15.1	<b>Non waiver</b>	<b>21</b>
15.2	<b>Variations</b>	<b>21</b>
15.3	<b>Entire agreement</b>	<b>21</b>
15.4	<b>Notices</b>	<b>21</b>
15.4.1	Giving of notices	21
15.4.2	Right to amend communication details	22
15.4.3	Deemed receipt	22
15.4.4	Copyees	22
15.5	<b>Counterparts</b>	<b>22</b>
	Schedule 1 Contract Particulars	23
	Schedule 2 The Routes	25
	Schedule 3 Collateral Agreements	26
	Schedule 4 Rules of the Route, Rules of the Plan	27
	Schedule 5 The Services and the Specified Equipment	28
	Schedule 6 Events of Default, Suspension and Termination	29
1.1	<b>Events of Default</b>	<b>29</b>
1.1.1	Train Operator Events of Default	29
1.1.2	Notification	29
1.1.3	Railtrack Events of Default	30
1.1.4	Notification	30
1.2	<b>Suspension</b>	<b>30</b>
1.2.1	Right to suspend	30

1.2.2	Contents of Suspension Notice	<b>30</b>
1.2.3	Effect of Suspension Notice served by Railtrack	<b>31</b>
1.2.4	Effect of a Suspension Notice served by the Train Operator	<b>31</b>
1.2.5	Suspension to be proportionate to breach	<b>32</b>
<b>1.3</b>	<b>Termination</b>	<b>33</b>
1.3.1	Railtrack's right to terminate	<b>33</b>
1.3.2	Train Operator's right to terminate	<b>33</b>
1.3.3	Contents of Termination Notice	<b>33</b>
1.3.4	Effect of Termination Notice	<b>34</b>
<b>1.4</b>	<b>Consequence of Termination</b>	<b>34</b>
1.4.1	Directions regarding location of Specified Equipment	<b>34</b>
1.4.2	Failure to comply with directions	<b>34</b>
1.4.3	Evidence of costs	<b>34</b>
1.4.4	Survival	<b>35</b>
<b>1.5</b>	<b>Exclusion of common law termination rights</b>	<b>35</b>
	Schedule 7 Track Charges	<b>36</b>
	Schedule 8 Performance Regime	<b>37</b>
	Schedule 9 Limitation on Liability	<b>38</b>
2.1	The maximum liability of Railtrack in respect of any relevant claim of the train operator shall not exceed the following:	<b>38</b>

THIS AGREEMENT is made the [ ] day of [ ]

BETWEEN:

- (1) Railtrack PLC, a company registered in England under number 2904587 having its registered office at [ ] (“Railtrack”); and
- (2) The party whose name and address and other particulars are specified in paragraph 1(b) of Schedule 1 (the “Train Operator”).

WHEREAS:

- (A) Railtrack is the owner of the Network; and
- (B) Railtrack has agreed to grant to the Train Operator permission to use certain track comprised in the Network on the terms and conditions of this Agreement.

IT IS HEREBY AGREED AS FOLLOWS:

## 1. INTERPRETATION

### 1.1 Definitions

In this Agreement unless the context otherwise requires:

“**Affiliate**” means, in relation to any company:

- (a) a company which is either a holding company or a subsidiary of such company; or
- (b) a company which is a subsidiary of a holding company of which such company is also a subsidiary;

and for these purposes “holding company” and “subsidiary” shall have the meanings given in section 736 of the Companies Act 1985;

“**Agreement**” means this agreement including all schedules and appendices to it and the Network Code;

“**Applicable Rules of the Route**” means the Rules of the Route described in Schedule 4 as amended in accordance with Part D of the Network Code;

“**Applicable Rules of the Plan**” means the Rules of the Plan described in Schedule 4 as amended in accordance with Part D of the Network Code;

“**associate**” has the meaning attributed to it in section 17 of the Railways Act 1993;

“**Claims Allocation and Handling Agreement**” means the agreement of that name approved by the Regulator;

**“Collateral Agreements”** means the agreements and arrangements listed in Schedule 3;

**“Commencement Date”** means the date set out in paragraph 3 of Schedule 1;

**“Confidential Information”** means information relating to the affairs of one party to this Agreement or any of its affiliates which has been provided by any such person to the other party under or for the purposes of this Agreement, or any matter or thing contemplated by this Agreement or to which this Agreement relates, the disclosure of which may be likely to compromise or otherwise prejudice the commercial interests of any such person;

**“Default Interest Rate”** means the interest rate set out in paragraph 2 of Schedule 1;

**“Event of Default”** means a Train Operator Event of Default or a Railtrack Event of Default as the context requires;

**“Expiry Date”** means the date set out in paragraph 4 of Schedule 1;

**“Franchise Agreement”** means any franchise agreement under which a franchisee undertakes to provide or procure the provision of all or any material part of the Services;

**“Franchisee”** means the person defined as such in any Franchise Agreement;

**“Insolvency Event”** in relation to either of the parties, shall have occurred where:

- (a) any step which has a reasonable prospect of success is taken by any person with a view to its administration under Part II of the Insolvency Act 1986;
- (b) it stops or suspends or threatens to stop or suspend payment of all or a material part of its debts, or is unable to pay its debts, or is deemed unable to pay its debts under section 123(1) or (2) of the Insolvency Act 1986 except that in the interpretation of this paragraph:
  - (i) section 123(1)(a) of the Insolvency Act 1986 shall have effect as if for “£750” there were substituted £100,000 or such higher figure as the parties may agree in writing from time to time;
  - (ii) it shall not be deemed to be unable to pay its debts for the purposes of this paragraph if any such demand as is mentioned in section 123(1)(a) of the Insolvency Act 1986 is satisfied before the expiry of 21 days from such demand;
- (c) its directors make any proposal under section 1 of the Insolvency Act 1986, or it makes any agreement for the deferral, rescheduling or other readjustment (or makes a general assignment or an arrangement or composition with or for the benefit of the relevant creditors) of all or a material part of its debts, or a moratorium is agreed or declared in respect of or affecting all or a material part of its debts;

- (d) any step is taken to enforce security over or a distress, execution or other similar process is levied or sued out against the whole or a substantial part of its assets or undertaking, including the appointment of a receiver, administrative receiver, manager or similar person to enforce that security;
- (e) any step is taken by any person with a view to its winding up or any person presents a winding-up petition which is not dismissed within 14 days, or it ceases or threatens to cease to carry on all or a material part of its business, except for the purpose of and followed by a reconstruction, amalgamation, reorganisation, merger or consolidation on terms approved by the other party before that step is taken (which approval shall not be unreasonably withheld or delayed);
- (f) any event occurs which, under the law of any relevant jurisdiction, has an analogous or equivalent effect to any of the events listed above;

unless, in any case, a railway administration order (or application therefor) has been made or such order (or application) is made within 14 days after the occurrence of such step, event, proposal or action (as the case may be) in relation to the party in question pursuant to section 60 of the Act and for so long as any such order (or application) remains in force or pending, or unless, in the case of paragraphs (a), (d) and (e), the relevant petition, proceeding or other step is being actively contested in good faith by that party with timely recourse to all appropriate measures and procedures;

**“Network Code”** means the document known as the Network Code;

**“Railtrack Event of Default”** has the meaning given to that term in paragraph 1.1.3 of Schedule 6;

**“Railway Code Systems”** means Necessary Systems within the meaning of the Systems Code;

**“Relevant Losses”** means all losses (including loss of profit, loss of revenue, loss of use, loss of contract, loss of goodwill, indirect and other economic losses), costs, expenses, payments, damages, liabilities, rentals and rental abatements, claims, proceedings, actions, penalties, fines, fees, rates, levies, charges, demands, royalties, interest, insurance premia, calls, judgments, orders or other sanctions or amounts payable, and the amounts by which rights or entitlements to amounts have been reduced, as a result of the matters in question;

**“Routes”** means that part of the Network described in

Schedule 2;

“**Safety Case**” has the meaning given to that term in the Railways (Safety Case) Regulations 1994;

“**Safety Obligations**” means all applicable obligations and laws concerning health and safety (including any duty of care arising at common law, and any arising under statute, statutory instrument, or mandatory codes of practice) in Great Britain;

“**Services**” means the railway passenger services described in Schedule 5;

“**Specified Equipment**” means, in relation to each of the Routes, the railway vehicles to be used in the provision of Services on that Route as specified in Schedule 5;

“**SRA**” means the body known as the Strategic Rail Authority established under the Transport Act 2000;

“**Stabling**” means the parking or laying up of the Specified Equipment or such other railway vehicles as the Train Operator is permitted by this Agreement to use on the Network, such parking or laying up being necessary or reasonably required for giving full effect to the movements of Specified Equipment required for the provision of the Services; and “**Stable**” and “**Stabled**” shall be construed accordingly;

“**Suspension Notice**” means a notice in writing served by the relevant party on the other party in accordance with paragraph 1.2 of Schedule 6;

“**Systems Code**” means the Code of Practice relating to the Management and Development of Railway Information Systems as from time to time approved by the Regulator in accordance with Railtrack’s network licence;

“**Termination Notice**” means a notice in writing served by the relevant party on the other party in accordance with paragraph 1.3 of Schedule 6;

“**Track Charges**” means the charges payable by or on behalf of the Train Operator in respect of the permission to use the Routes granted under this Agreement, as set out in or calculated in accordance with Part [ ] of Schedule 7;

“**Train Operator Event of Default**” has the meaning given to that term in paragraph 1.1.1 of Schedule 6; and

“**Value Added Tax**” means value added tax as provided for in the Value Added Tax Act 1994 and “**VAT**” shall be construed accordingly.

## 1.2 Interpretation

In this Agreement, unless the context otherwise requires:

- (a) references to “this Agreement” include the schedules attached hereto;

- (b) the singular includes the plural and vice versa;
- (c) any one gender includes the others;
- (d) clause, sub-clause and paragraph headings are for convenience of reference only and do not form part of, and shall neither affect nor be used in the construction of, this Agreement;
- (e) reference to a statute, bye-law, regulation, rule, delegated legislation or order is to that statute, bye-law, regulation, rule, delegated legislation or order as amended, modified or replaced from time to time and to any bye-law, regulation, rule, delegated legislation or order made thereunder;
- (f) reference to an agreement or instrument is to that agreement or instrument as amended, novated, modified, supplemented or replaced from time to time;
- (g) reference to a party is to a party to this Agreement, its successors and permitted assigns;
- (h) reference to a recital, clause or schedule is to a recital, clause or schedule of or to this Agreement; reference to a Part of a schedule is to a Part of the Schedule in which the reference appears and reference in a Schedule to a Table is a reference to the table annexed to that Schedule;
- (i) reference to any Condition is a reference to the relevant Part of the Network Code;
- (j) where a word or expression is defined, cognate words and expressions shall be construed accordingly;
- (k) references to the word “person” or “persons” or to words importing persons include individuals, firms, corporations, government agencies, committees, departments, authorities and other bodies incorporated or unincorporated, whether having separate legal personality or not;
- (l) the words “other” and “otherwise” shall not be limited by any foregoing words where a wider construction is possible;
- (m) the words “including” and “in particular” shall be construed as being by way of illustration or emphasis and shall not limit or prejudice the generality of any foregoing words;
- (n) terms and expressions defined in the Railways Act 1993, the Railway (Safety Case) Regulations 1994 or Railtrack’s network licence shall have the same meanings in this Agreement; and
- (o) unless the context otherwise requires, words and expressions defined in and rules of interpretation set out in the Network Code shall apply throughout this Agreement and references to the Network Code in such words, expressions and rules shall be construed as references to this Agreement.

## **2. NETWORK CODE**

### **2.1 Incorporation**

The Network Code is incorporated in and shall form part of this Agreement.

### **2.2 Compliance by other operators**

Except where the Regulator has directed otherwise in the exercise of his powers under the Act or the Network Code, Railtrack shall ensure that all operators of trains having permission to use any track comprised in the Network agree to comply with the Network Code.

## **3. CONDITIONS PRECEDENT AND TERM**

### **3.1 Conditions precedent**

Subject to Clause 3.3, the provisions of this Agreement shall not have effect until the following conditions precedent have been satisfied in full:

- (a) the Train Operator is authorised by a licence granted under section 8 of the Act to be the operator of trains for the provision of the Services or is exempt from the requirement to be so authorised under section 7 of the Act;
- (b) Railtrack is authorised by a licence granted under section 8 of the Act to be the operator of that part of the Network comprising the Routes or is exempt from the requirement to be so authorised under section 7 of the Act;
- (c) each of the Collateral Agreements is executed and delivered by all the respective parties thereto and is unconditional in all respects (save only for the fulfilment of any condition relating to this Agreement becoming unconditional); and
- (d) each Safety Case of each of the parties is accepted in accordance with the Railways (Safety Case) Regulations 1994.

### **3.2 Obligations to satisfy conditions precedent**

Each party shall use all reasonable endeavours to secure that the following conditions precedent are satisfied as soon as practicable, and in any event not later than the Commencement Date:

- (a) in the case of Railtrack, the conditions precedent contained in Clause 3.1(b) and, insofar as within its control, Clauses 3.1(c) and 3.1(d); and
- (b) in the case of the Train Operator, the conditions precedent contained in Clause 3.1(a) and, insofar as within its control, Clauses 3.1(c) and 3.1(d).

### **3.3 Entry into effect**

#### *3.3.1 Binding effect on signature*

Clauses 1, 3, 10 and 12 to 15 inclusive of this Agreement and Part A (Organisation of the Network Code and Definitions), Part C (Modifications to the Network Code), Part D (Timetable Change), Part F (Vehicle Change), Part G (Network Change) and Part I (Local Output Statements) of the Network Code take effect and are binding upon the parties immediately upon signature of this Agreement.

#### *3.3.2 Binding effect on Commencement Date*

All Clauses of this Agreement and Parts of the Network Code other than those listed in Clause 3.3.1 come into effect and shall be binding upon the parties on the Commencement Date, as long as each of the conditions precedent referred to in Clause 3.1 have by then have been satisfied in full.

### **3.4 Consequences of non-fulfilment**

If the conditions precedent set out in Clause 3.1 have not been satisfied in full on or before the Commencement Date:

- (a) this Agreement shall lapse save for the obligations of confidence contained in Clause 12 which shall continue in force; and
- (b) neither party shall have any liability to the other except in respect of any breach of its obligations under those Clauses of this Agreement and those Parts of the Network Code listed in Clause 3.3.1.

### **3.5 Term**

Subject to Clause 3.1, this Agreement shall come into effect on the Commencement Date and continue in force until the earlier of:

- (a) termination pursuant to Schedule 6; and
- (b) 23.59 hours on the Expiry Date.

## **4. COMMERCIAL PURPOSE AND STANDARD OF PERFORMANCE**

### **4.1 General**

#### *4.1.1 Achievement of commercial purpose*

Subject to Clause 4.1.2, Railtrack and the Train Operator shall each carry out their respective obligations under this Agreement, and take such other steps as shall be reasonably necessary or expedient, in order to achieve the commercial purpose.

#### 4.1.2 *Application of commercial purpose*

Clause 4.1.1 shall only apply:

- (a) in circumstances for which no specific provision has been made elsewhere in this Agreement; or
- (b) in order to resolve any ambiguity as to the interpretation of any provision of this Agreement.

#### 4.2 **Commercial purpose**

The commercial purpose is that:

- (a) the Train Operator shall operate the Services over the Routes using the Specified Equipment;
- (b) the parties shall maintain and operate:
  - (i) the Network (in the case of Railtrack); and
  - (ii) the Specified Equipment (in the case of the Train Operator)

to a standard which is appropriate for the operation of the Services including in terms of safety, reliability and comfort to passengers;
- (c) the Specified Equipment is:
  - (i) in reliable and lawful commercial service on the Routes; and
  - (ii) kept in a condition which ensures that the maintenance and other costs of or connected with the upkeep of the Network shall be as low as reasonably practicable;
- (d) the Network is kept in a condition which ensures that the maintenance and other costs of or connected with the operation of the Specified Equipment shall be as low as reasonably practicable;
- (e) Railtrack and the Train Operator shall explore commercial opportunities to enhance the capability, quality and performance of the Network over time.

#### 4.3 **Standard of performance**

In carrying out its obligations under this Agreement, each party shall act with due efficiency and economy and in a timely manner, including in all respects with that degree of skill, diligence, prudence and foresight which should be exercised by a skilled and experienced

- (a) network owner and operator (in the case of Railtrack); and

- (b) train operator (in the case of the Train Operator).

## **5. PERMISSION TO USE**

### **5.1 Permission to use the Routes**

Railtrack hereby grants the Train Operator permission to use the Routes.

### **5.2 Meaning**

References in this Agreement to permission to use the Routes shall, except where the context otherwise requires, be construed to mean permission:

- (a) to use the track comprised in the Routes for the provision of the Services using the Specified Equipment;
- (b) to make Ancillary Movements;
- (c) to Stable, which shall be treated, for the purposes of Part D of the Network Code, as the use of a Train Slot;
- (d) for the Train Operator and its associates to enter upon that part of the Network comprising the Routes, with or without vehicles; and
- (e) for the Train Operator and its associates to bring things on to that part of the Network comprising the Routes and keep them there

and such permission is subject, in each case and in all respects to:

- (i) the Network Code;
- (ii) the Applicable Rules of the Route; and
- (iii) the Applicable Rules of the Plan.

### **5.3 Permission under Clauses 5.2(d) and 5.2(e)**

In relation to the permissions specified in Clauses 5.2(d) and 5.2(e):

- (a) the Train Operator shall, and shall procure that its associates shall, wherever reasonably practicable, first obtain the consent of Railtrack, which consent shall not be unreasonably withheld or delayed;
- (b) the Train Operator shall remove any vehicle or other thing so brought onto any part of the Network when reasonably directed to do so by Railtrack; and

- (c) whilst exercising any rights conferred by Clauses 5.2(d) and 5.2(e), the Train Operator shall, and shall procure that its associates shall, comply with such reasonable restrictions or instructions as Railtrack shall specify.

#### **5.4 Stabling**

Railtrack shall use all reasonable endeavours to provide such Stabling facilities as are necessary or expedient for the provision of the Services in accordance with the Working Timetable.

#### **5.5 Access right warranty**

By way of separate contract with the Train Operator, Railtrack:

- (a) represents and warrants to the Train Operator that it has not granted to any other person any access right which would prevent the Train Operator from exercising the access rights contained in Schedule 5; and
- (b) undertakes to procure that the representation and warranty contained in Clause 5.5(a) shall remain true and accurate in all respects throughout the term of this Agreement.

### **6. OPERATION AND MAINTENANCE OF TRAINS AND NETWORK**

#### **6.1 General**

Without prejudice to the other provisions of this Agreement:

- (a) the Train Operator shall ensure that:
  - (i) the Specified Equipment is in reliable and lawful commercial service on the Routes and is maintained and operated to a standard which will permit provision of the Services in accordance with the Working Timetable;
  - (ii) the Specified Equipment is kept in a condition which ensures that the maintenance and other costs of or connection with the upkeep of the Network shall be as low as reasonably practicable; and
  - (iii) that adequate and suitably qualified personnel are engaged in the provision of the Services; and
- (b) Railtrack shall ensure that:
  - (i) the Network is maintained and operated to a standard which shall permit the provision of the Services using the Specified Equipment in accordance with the Working Timetable and the making of Ancillary Movements;
  - (ii) the Network is kept in a condition which ensures that the maintenance and other costs of or connected with the operation of the Specified Equipment shall be as low as reasonably practicable; and

- (iii) that adequate and suitably qualified personnel are engaged in the operation and maintenance of that part of the Network comprising the Routes.

## **6.2 Trespass, vandalism and animals**

Without prejudice to the other provisions of this Agreement, each of the parties shall use all reasonable endeavours (including participating in such consultation and joint action as is reasonable in all the circumstances) to reduce:-

- (a) trespass;
- (b) vandalism; and
- (c) intrusions on to the Network by animals

in each case as may affect the provision of the Services.

## **6.3 Safety**

The Train Operator shall comply with any reasonable request by Railtrack in relation to any aspect of the Train Operator's operations which affects or is likely to affect the performance of Railtrack's Safety Obligations.

## **6.4 Use of Railway Code Systems**

### *6.4.1 General*

The parties shall use the Railway Code Systems in their dealings with each other in connection with matters provided for in this Agreement. Both parties shall observe and comply with the provisions of the Systems Code.

### *6.4.2 Provision of train consist data*

Without prejudice to the provisions of Clause 6.4.1, the Train Operator undertakes:

- (a) to provide to Railtrack such train consist data as shall be necessary to enable Railtrack to calculate the amount of Track Charges; and
- (b) to procure that such data is true and accurate in all respects.

### *6.4.3 Consent to use*

The Train Operator consents to the use by Railtrack of any data or information supplied by the Train Operator in the course of complying with its Safety Obligations for the purpose of monitoring the Train Operator's performance of its obligations under this Agreement and calculating the amount of Track Charges.

## **6.5 Information**

[Information provision to be inserted in light of the consultation of the new asset register licence condition.]

**7. TRACK CHARGES**

Each of the parties shall perform its obligations set out in Schedule 7.

**8. LIABILITY FOR PERFORMANCE**

**8.1 Performance**

Each of the parties shall perform its obligations set out in Schedule 8.

**8.2 Liability for late trains**

The rights and obligations of the parties set out in Schedule 8 represent the parties' sole entitlement as between themselves to any compensation in respect of any Relevant Losses arising from cancellations or delays to trains.

**9. INDEMNITIES**

**9.1 Train Operator indemnity**

The Train Operator shall indemnify Railtrack and keep it indemnified (on an after tax basis) against all Relevant Losses incurred or suffered by Railtrack as a result of:

- (a) a failure by the Train Operator to discharge any of its obligations under this Agreement (including a failure to comply with a performance order made against it under Clause 11);
- (b) a failure by the Train Operator to comply with its Safety Obligations;
- (c) any Environmental Damage arising directly from the acts or omissions of the Train Operator or the proper taking by Railtrack in accordance with Condition E2 of any steps to prevent, mitigate or remedy an Environmental Condition which exists as a direct result of the acts or omissions of the Train Operator; and
- (d) any damage to the Network arising directly from the Train Operator's negligence,

save to the extent that any such Relevant Losses result from Railtrack's wilful misconduct, negligence or its breach of this Agreement.

**9.2 Railtrack indemnity**

Railtrack shall indemnify the Train Operator and keep it indemnified (on an after tax basis) against all Relevant Losses incurred or suffered by the Train Operator as a result of:

- (a) a failure by Railtrack to discharge any of its obligations under this Agreement (including a failure to comply with a performance order made against it under Clause 11);
- (b) a failure by Railtrack to comply with its Safety Obligations;
- (c) any Environmental Damage to the Network arising directly from any acts or omissions of the British Railways Board prior to 1st April, 1994 or from the acts or omissions of Railtrack; and
- (d) any damage to the Specified Equipment or other vehicles or things brought onto the Network in accordance with the permission to use granted by this Agreement arising directly from Railtrack's negligence,

save to the extent that any such Relevant Losses result from the Train Operator's wilful misconduct, negligence or its breach of this Agreement.

### **9.3 Restrictions on claims**

#### *9.3.1 Notification and mitigation*

A party wishing to claim under any indemnity or warranty provided for in this Agreement shall:

- (a) notify the other party of the relevant facts giving rise to that claim as soon as reasonably practicable (and in any event within 90 days) of first becoming aware of those facts;
- (b) consult with the other party as to the ways in which the circumstances giving rise to that claim and any Relevant Losses connected with that claim may be prevented, mitigated or restricted; and
- (c) take all reasonable steps to prevent, mitigate and restrict any and all of them.

#### *9.3.2 Obligation first to seek performance order*

Where Clause 11.1 applies, neither party shall be entitled, whether under Clause 9.1, Clause 9.2 or otherwise, to claim from the other party damages for loss of revenue, loss of profit or other economic loss unless and until the first party has invoked the remedies provided for in Clause 11 to the fullest extent reasonably practicable in the circumstances.

### **9.4 Limitation on liability**

Schedule 9 shall have effect so as to limit the parties' liability to each other:

- (a) under the indemnities contained in Clauses 9.1 and 9.2; and
- (b) otherwise for breach of this Agreement.

## **9.5 Claims Allocation and Handling Agreement**

Clause 17 of the Claims Allocation and Handling Agreement shall not apply as between the parties to this Agreement if and to the extent that the giving of any right or remedy as provided for under this Agreement would be prevented or otherwise restricted by Clause 17.

## **10. GOVERNING LAW AND DISPUTE RESOLUTION**

### **10.1 Governing law and jurisdiction**

This Agreement shall be governed by and construed in accordance with the laws of [England] [Scotland] and subject to Clause 10.2 the parties irrevocably agree that the Courts of [England] [Scotland] are to have exclusive jurisdiction to settle any dispute which may arise out of or in connection with this Agreement.

### **10.2 Dispute resolution**

Save as otherwise provided in Parts D, F, G, H and I of the Network Code and in Clause 11 of this Agreement, any dispute or claim arising out of or in connection with this Agreement shall be referred to the Industry Committee for determination pursuant to the Access Dispute Resolution Rules. If either party is dissatisfied with any determination of the Industry Committee in relation to any matter referred to it under this Clause, the matter shall be resolved by arbitration pursuant to the Access Dispute Resolution Rules.

## **11. PERFORMANCE ORDER PROCEDURE**

### **11.1 Relevant failures**

If one party is failing to comply, or is likely to fail to comply, with any of its obligations under this Agreement, the procedure provided for in Clauses 11.2.1 and 11.2.2 shall apply and shall be in addition to the procedures provided for in Clause 10.

### **11.2 Discussion of remedial action**

#### *11.2.1 Meeting at operational level*

If one party gives notice to the other party that the circumstances referred to in Clause 11.1 have occurred or are occurring, the parties shall meet as soon as reasonably practicable (and in any event within 28 days of the notice) to discuss the matter and try to resolve it.

#### *11.2.2 Elevation of question to director level*

If the parties have failed to reach agreement on the matter referred to in Clause 11.2.1 above within 28 days of notice from one party to the other requesting agreement under that paragraph:

- (a) either party shall be entitled, by notice to the other, to require the matter to be referred to a meeting of members of the boards of directors of the parties or a duly constituted committee of any such board;

- (b) if either party exercises its rights under paragraph (a) above, each party shall procure that one or more members of its board of directors shall consider the matter and meet with one or more members of the board of directors of the other party to attempt to reach agreement on the matter; and
- (c) if the parties fail to reach agreement under paragraph (b) above within 28 days after the notice referred to in paragraph (a) above, either party may take the steps provided for in Clause 11.3 or Clause 11.4.

### **11.3 Fast-track arbitration**

If either party reasonably considers that the circumstances of a breach or anticipated breach of this contract are such as to require urgent resolution, that party:

- (a) may but shall not be required to follow the procedure in Clauses 11.2.1 and 11.2.2;
- (b) may proceed with an application under Clause 11.4.1; and
- (c) shall apply to the arbitrator for rules of procedure which will lead to urgent resolution of the matter

### **11.4 Performance orders**

#### *11.4.1 Application for performance order*

In the circumstances provided for in Clause 11.2.2(c), without prejudice to any other remedy available to a party (whether interim or final and including any right of appeal contained in the Network Code), the party in question shall be entitled to apply to a single arbitrator sitting in London (who shall be chosen in accordance with Clause 11.5) for a performance order ordering the other party to comply with its obligations.

#### *11.4.2 Powers of arbitrator in relation to performance orders*

The powers of the arbitrator shall include:

- (a) the powers specified in section 48(3) to (5) of the Arbitration Act 1996; and
- (b) power to order on a provisional basis any relief which he would have power to grant in a final award.

#### *11.4.3 Duties of the arbitrator in relation to performance orders*

Where a party has applied for a performance order:

- (a) the arbitrator shall decide whether the application is well-founded or not; and
- (b) if he decides that the application is well-founded, he shall be required to make a declaratory order to that effect; and

- (c) if he makes a declaratory order, he shall be required to grant a mandatory order in terms of the declaration.

#### 11.4.4 *Conduct of arbitration*

Except to the extent provided for in Clauses 11.4.1, 11.4.2 and 11.4.3, the arbitration shall be conducted in accordance with the rules contained in Part C of the Access Dispute Resolution Rules.

### 11.5 **Appointment of arbitrator**

#### 11.5.1 *Obligation to establish panel of arbitrators*

Within 60 days from the date of this Agreement, the parties shall establish a panel of five persons acceptable to the parties to act as arbitrator under the performance order procedure contained in Clause 11.4 and shall rank those persons in order of preference.

#### 11.5.2 *Qualification of arbitrators*

No person may be appointed by the parties to the panel of arbitrators under Clause 11.5.1 unless his qualifications to sit as arbitrator meet the criteria published by the Regulator for the purposes of this Clause 11.5.

#### 11.5.3 *Relevant arbitrator where the parties have an established panel*

Where the parties have established the panel of arbitrators referred to in Clause 11.5.1, the arbitrator to which any party shall apply under Clause 11.4.1 shall be the first arbitrator on the panel (following the order of preference established by the parties) who is available and willing to act.

#### 11.5.4 *Default position*

Where the parties have not established the panel of arbitrators referred to in Clause 11.5.1 or where none of the persons on that panel is available or willing to act, the arbitrator to which any party shall apply under Clause 11.4.1 shall be the first arbitrator (who is available and willing to act) on a panel of arbitrators established and published by the Regulator.

#### 11.5.5 *Appointment by Regulator*

Where:

- (a) the circumstances referred to in Clause 11.5.4 apply; and
- (b) none of the persons on the panel of arbitrators established by the Regulator and referred to in Clause 11.5.4 is available or willing to act,

any party wishing to make an application under Clause 11.4.1 shall notify the Regulator. The arbitrator to which that party shall thereafter apply under Clause 11.4.1 shall be such person as the Regulator shall direct by notice to both parties.

## **12. CONFIDENTIALITY**

### **12.1 Confidential information**

#### *12.1.1 General obligation*

Except as permitted by Clause 12.2, all Confidential Information shall be held confidential during the continuance of this Agreement and thereafter, and shall not be divulged in any way to any third party without the prior written approval of the other party.

#### *12.1.2 Railtrack - affiliates*

Except as permitted by Clause 12.2, Railtrack shall procure that its affiliates and its and their respective officers, employees and agents shall keep confidential and not disclose to any person any Confidential Information.

#### *12.1.3 Train Operator - affiliates*

Except as permitted by Clause 12.2, the Train Operator shall procure that its affiliates and its and their respective officers, employees and agents shall keep confidential and not disclose to any person any Confidential Information.

### **12.2 Entitlement to divulge**

Either party shall be entitled in good faith to divulge any Confidential Information without the approval of the other party in the following circumstances:-

- (a) to the Regulator;
- (b) to the SRA;
- (c) to the Health and Safety Executive;
- (d) to any affiliate of such party;
- (e) to any officer or servant of the party in question or any person engaged in the provision of goods or services to or for him if disclosure is necessary or reasonably required to enable the party in question to perform its obligations under this Agreement, upon obtaining an undertaking of strict confidentiality from such officer, servant or person;
- (f) to any professional advisers or consultants of such party engaged by or on behalf of such party and acting in that capacity, upon obtaining an undertaking of strict confidentiality from such advisers or consultants;

- (g) to any lender, security trustee, bank or other financial institution from whom such party is seeking or obtaining finance, or any advisers to any such entity, upon obtaining an undertaking of strict confidentiality from the entity or advisers in question;
- (h) to the extent required by the Act, any licence under section 8 of the Act held by the party in question, any other applicable law, the rules of any stock exchange or regulatory body or any written request of any taxation authority;
- (i) to the extent that it has become available to the public other than as a result of any breach of confidence; and
- (j) pursuant to the order of any court or tribunal of competent jurisdiction (including the Industry Committee or any sub-committee thereof).

### **12.3 Return of Confidential Information**

If this Agreement is terminated, Railtrack shall return to the Train Operator and the Train Operator shall return to Railtrack all of the Confidential Information within the possession or control of Railtrack or, as the case may be, the Train Operator as supplied to Railtrack by the Train Operator or, as the case may be, as supplied to the Train Operator by Railtrack.

### **12.4 Ownership of Confidential Information**

All Confidential Information shall be and shall remain the property of the party which supplied it to the other party.

### **12.5 Part J Network Code**

Railtrack shall be entitled to disclose information to which this Clause 12 applies if and to the extent permitted in accordance with Part J of the Network Code.

## **13. ASSIGNMENT AND NOVATION**

### **13.1 No assignment**

#### *13.1.1 Consent*

This Agreement is personal to the parties and, save as provided in Clause 13.1.2, neither party may assign or otherwise transfer its rights and obligations hereunder without the prior written consent of the other party, which consent shall not be unreasonably withheld or delayed.

#### *13.1.2 Charge to Bank*

It is acknowledged by the parties that either of them (the “chargor”) may wish to charge or assign by way of security the whole of its rights hereunder to a bank or other financial institution providing financial assistance to the chargor. Accordingly, the chargor may create a charge over or assign (by way of security) the whole (but not part) of its rights under this Agreement in favour of one bank or other financial institution (the “Bank”) provided that:-

- (a) unless and until the Bank enforces the charge or security the party other than the chargor shall be required to deal only with the chargor and not with the Bank; and
- (b) where the chargor is the Train Operator, prior to the creation of the charge or entry into of the assignment, the Bank has entered into a direct agreement with Railtrack, on terms reasonably acceptable to Railtrack, to the intent that following enforcement of the charge or security Railtrack is to be satisfied on a number of prescribed issues, including that any new operator proposed by the Bank in substitution for the Train Operator is able fully to perform and comply with this Agreement.

### **13.2 Novation where requested**

Railtrack shall agree to the novation of the rights and obligations of the Train Operator under this Agreement in favour of another person (including the SRA or a person nominated by it) in any circumstances where the SRA requests Railtrack to participate in such a novation in the course of exercising its powers under section 30 of the Act (as substituted by the Transport Act 2000) or section 51 of the Act, and provided that such novation shall be on terms that:-

- (a) the Train Operator shall not be released from any accrued but unperformed obligation, the consequences of any breach of this Agreement which is the subject of arbitration or litigation between the parties or any liability in respect of duties performed under this Agreement prior to, or as at the date of, any such novation (except to the extent that such other person agrees to assume and be responsible for such unperformed obligation, such liability or the consequences of such breach in connection with the relevant novation); and
- (b) such other person shall not be required, as a term of or a condition to the novation, to agree to assume and be responsible for any unperformed obligation, liability or consequence of a breach referred to in Clause 13.2(a).

### **13.3 Regulatory approval**

The assignment, transfer or novation of this Agreement shall have no effect unless approved by the Regulator and effected in accordance with the conditions (if any) of his consent.

## **14. PAYMENTS, INTEREST AND VAT**

### **14.1 Payment**

#### *14.1.1 No deduction*

Subject to Clause 14.1.2, all sums due or payable by either party under this Agreement shall be paid free and clear of any deduction or withholding, save only as may be required by law or where any sum shall be contested in on good faith by the party from whom payment is due and payable with timely recourse to appropriate means of redress.

14.1.2 *Disputed amounts*

Where either party wishes to contest any amount payable under an invoice issued to it by the other party, the first mentioned party shall, within 14 days of receipt of the invoice, notify the other party in writing of the amount which is in dispute and shall pay the undisputed amount in accordance with the terms of the invoice.

14.1.3 *Dispatch of invoices*

All invoices shall be sent by electronic or facsimile transmission (with confirmation copy by prepaid first class post) to the address for service for the recipient referred to in Schedule 1 with a copy to the bank or other financial institution providing the payment facility referred to in Clause 18.5 below.

14.1.4 *Payment and content of invoices*

All invoices, shall unless otherwise specified in Schedule 7 or 8:

- (a) be paid within 28 days of the date of their receipt, and
- (b) contain such detail as to the constituent elements of the amount stated to be payable as shall be reasonable.

14.1.5 *Method of payment*

All payments shall unless otherwise specified in Schedule 7 or 8 be made by direct debit mandate or standing order mandate to a London clearing bank or such other financial institution approved by the party entitled to the payment, such approval not to be unreasonably withheld or delayed.

**14.2 Interest**

Without prejudice to any other rights or remedies which one party may have in respect of the failure of the other party to pay or credit any amount on the date on which it should have been paid or credited, such amount shall carry interest (incurred daily and compounded monthly) at the Default Interest Rate from the said date until the date of actual payment or crediting (as well after judgement as before).

**14.3 VAT**

14.3.1 *Payment of VAT*

Where any taxable supply for VAT purposes is made under or in connection with this Agreement by one party to the other the payer shall, in addition to any payment required for that supply, pay such VAT as is chargeable in respect of it.

#### 14.3.2 *Reimbursement of VAT*

Where under this Agreement one party has agreed to reimburse or indemnify the other in respect of any payment made or cost incurred by the other then the first party shall also reimburse any VAT paid by the other which forms part of its payment made or cost incurred to the extent such VAT is not available for credit for the other, or for any person with whom the indemnified party is treated as a member of a group for VAT purposes, under sections 25 and 26 of the Value Added Tax Act 1994.

#### 14.3.3 *VAT credit note to be issued on repayment*

Where under this Agreement any rebate or repayment of any amount is payable by one party to the other, and the first party is entitled as a matter of law or of Customs & Excise practice to issue a valid VAT credit note, such rebate or repayment shall be paid together with an amount representing the VAT paid on that part of the consideration in respect of which the rebate or repayment is made and the first party shall issue an appropriate VAT credit note to the other party.

### 15. MISCELLANEOUS

#### 15.1 **Non waiver**

No waiver by either party of any default by the other in the performance of any obligation under this Agreement shall operate or be construed as a waiver of any other or further default whether of a like or different character. The failure to exercise or delay in exercising a right of remedy under this Agreement shall not constitute a waiver of the right or remedy or a waiver of any other rights or remedies and no single or partial exercise of any right or remedy under this Agreement shall prevent any further exercise of the right or remedy or the exercise of any other right or remedy.

#### 15.2 **Variations**

No variation of this Agreement (other than expressly contemplated in this Agreement) shall be effective unless in writing and signed by the parties

#### 15.3 **Entire agreement**

This Agreement contains the entire agreement between the parties in relation to the subject matters of this Agreement and supersedes all prior agreements and arrangements. This Clause 15.3 shall not have the effect of excluding any term implied by law.

#### 15.4 **Notices**

##### 15.4.1 *Giving of notices*

Any notice to be given under this Agreement shall be in writing and shall be duly given if signed by or on behalf of a person duly authorised to do so by the party giving the notice and delivered by hand at, or by sending it by first class post or by facsimile transmission to, the relevant

address or facsimile number set out in Schedule 1. For the purposes of this Clause 15.4, delivery by hand shall include delivery by a reputable firm of couriers.

15.4.2 *Right to amend communication details*

Either party shall be entitled to amend in any respect the communication particulars which relate to it and which are set out in Schedule 1. Any such amendment shall be made only by notice given to the other party in accordance with this Clause 15.4.

15.4.3 *Deemed receipt*

A notice shall be deemed to have been given or received:-

- (a) if sent by hand or recorded delivery, at the time of delivery;
- (b) if sent by prepaid first class post, from and to any place within the United Kingdom, three days after posting unless otherwise proven; and
- (c) if sent by facsimile (subject to confirmation of uninterrupted transmission by a transmission report) before 17:00 hours on a business day, on the day of transmission and, in any other case, at 09:00 hours on the next following business day (“business day” for these purposes being a day which is not a Saturday, Sunday or a public holiday in the place where the transmission is to be received).

15.4.4 *Copyees*

If there shall be specified in Schedule 1 any person to whom copies of notices shall also be sent, the party serving a notice in the manner required by this Clause 15.4 shall send a copy of the notice in question to such person at the address for serving copies as specified in Schedule 1, or to such other person or address as may, from time to time, have been notified by the party to be notified to the notifying party in accordance with this Clause 15.4. Such copy notice shall be sent immediately after the original notice.

**15.5 Counterparts**

This Agreement may be executed in two counterparts which taken together, shall constitute one and the same document. Either party may enter into this Agreement by signing either of such counterparts.

IN WITNESS whereof the duly authorised representatives of the Train Operator and Railtrack gave respectively entered into this Agreement on the date first above written.

**Schedule 1**  
**Contract Particulars**

1. (a) Railtrack's address for service of notices is:

Railtrack PLC

[

]

Tel: [ ]

Fax: [ ]

All written notices to be marked  
"URGENT: ATTENTION [ ]"

[and copied to:

]

Tel: [ ]

Fax: [ ]

(b) Name, address and company registration number of the Train Operator:

[ ]

Company No: [ ]

The Train Operator's address for the service of notices is:-

[ ]

[ ]

Tel: [ ]

Fax: [ ]

All written notices to be marked:

"URGENT: ATTENTION [ ]" and copied to:



**Schedule 2**  
**The Routes**

**Schedule 3**

**Collateral Agreements**

1. An access agreement dated [ ] between (1) the Train Operator and (2) Railtrack granting the Train Operator permission to use the following stations [list relevant ISO's].
2. An agreement dated [ ] under which the Train Operator agrees to become a party to the Claims Allocation and Handling Agreement.
3. The Franchise Agreement.

**Schedule 4**  
**Rules of the Route, Rules of the Plan**

**Schedule 5**  
**The Services and the Specified Equipment**

## **Schedule 6**

### **Events of Default, Suspension and Termination**

#### **1.1 Events of Default**

##### *1.1.1 Train Operator Events of Default*

The following shall be Train Operator Events of Default:

- (a) the Train Operator ceases to be authorised to be the operator of trains for the provision of the Services by a licence granted under section 8 of the Act unless it is otherwise exempt from the requirement to be so authorised under section 7 of the Act;
- (b) an Insolvency Event occurs in relation to the Train Operator or the Franchisee;
- (c)
  - (i) any breach by the Train Operator of this Agreement or its Safety Obligations;
  - (ii) any material breach by the Train Operator of any of the Collateral Agreements;  
or
  - (iii) any event or circumstance which is reasonably likely to result in any such breach

which, by itself or taken together with any other such breach, event or circumstance, Railtrack reasonably considers constitutes a threat to the safe operation of any part of the Network;

- (d) any Track Charges or other amount due by the Train Operator to Railtrack pursuant to this Agreement remains unpaid for more than 7 days after their due date except where liability to pay any such sum shall be contested by the Train Operator in good faith and with timely recourse to appropriate means of redress;
- (e) any other breach of this Agreement or any material breach of any of the Collateral Agreements by the Train Operator which, by itself or taken together with any other such breach, results, or is likely to result, in material financial loss to Railtrack; and
- (f) any breach of this Agreement or any material breach of any of the Collateral Agreements by the Train Operator which, by itself or taken together with any other such breach, results, or is likely to result, in material disruption to train operations of other train operators; and
- (g) without prejudice to the provisions of paragraphs 1.1.1(c), (e) and (f), the Franchise Agreement being terminated.

##### *1.1.2 Notification*

The Train Operator shall notify Railtrack promptly on becoming aware of the occurrence of a Train Operator Event of Default.

1.1.3 *Railtrack Events of Default*

The following shall be Railtrack Events of Default:

- (a) Railtrack ceases to be authorised to be the operator of that part of the Network comprised in the Routes by a licence granted under section 8 of the Act unless otherwise exempt from the requirement to be so authorised under section 7 of the Act;
- (b) an Insolvency Event occurs in relation to Railtrack;
- (c)
  - (i) any breach by Railtrack of this Agreement or its Safety Obligations;
  - (ii) any material breach by Railtrack of any of the Collateral Agreements; or
  - (iii) any event or circumstance which is reasonably likely to result in any such breach

which, by itself or taken together with any other such breach, event or circumstance the Train Operator reasonably considers constitutes a threat to the safe operation of the Services; and

- (d) any other breach of this Agreement or any material breach of any of any of the Collateral Agreements by Railtrack which, by itself or taken together with any other such breach, results, or is likely to result, in material financial loss to the Train Operator.

1.1.4 *Notification*

Railtrack shall notify the Train Operator promptly on becoming aware of the occurrence of a Railtrack Event of Default.

**1.2 Suspension**

1.2.1 *Right to suspend*

- (a) Railtrack may serve a Suspension Notice where a Train Operator Event of Default has occurred and is continuing.
- (b) The Train Operator may serve a Suspension Notice where a Railtrack Event of Default has occurred and is continuing.

1.2.2 *Contents of Suspension Notice*

A Suspension Notice shall specify:

- (a) the nature of the relevant Event of Default;
- (b) the date and time at which suspension is to take effect;

- (c) in the case of a Suspension Notice served on the Train Operator: reasonable restrictions imposed while the Suspension Notice is in force on the permission to use the Routes or any parts thereof or any other part of the Network;
- (d) in the case of a Suspension Notice served on Railtrack: details of any necessary suspension of the Services; and
- (e) where the Event of Default is capable of remedy:
  - (i) the steps reasonably required to remedy the Event of Default; or
  - (ii) a reasonable grace period for the defaulting party to remedy it (where the Event of Default which has occurred is a failure to pay Track Charges, 7 days shall be a reasonable grace period).

#### 1.2.3 *Effect of Suspension Notice served by Railtrack*

Where Railtrack has served a Suspension Notice on the Train Operator:

- (a) the Train Operator shall comply with any reasonable restrictions thereby imposed on it;
- (b) the Suspension Notice shall remain in full force and effect in accordance with its terms until it has been revoked either in whole or in part by notice from Railtrack to the Train Operator pursuant to paragraph 1.2.5(d);
- (c) service of Suspension Notice shall not affect the Train Operator's continuing obligation to pay the Track Charges; and
- (d) the service of the Suspension Notice shall not affect the Train Operator's Firm Contractual Rights as defined in Part D of the Network Code and Schedule 5 of this Agreement.

#### 1.2.4 *Effect of a Suspension Notice served by the Train Operator*

Where the Train Operator has served a Suspension Notice on Railtrack:

- (a) it shall have the effect of suspending the Train Operator's permission to use the Routes to provide the Services to the extent specified in such Suspension Notice;
- (b) the amount of the Track Charges payable shall be abated in accordance with paragraph [●] of Schedule 7;
- (c) the Suspension Notice shall remain in full force and effect in accordance with its terms until it has been revoked either in whole or in part by notice from the Train Operator to Railtrack pursuant to paragraph 1.2.5(d); and

- (d) the service of the Suspension Notice shall not affect the Train Operator's Firm Contractual Rights as defined in Part D of the Network Code and Schedule 5 of this Agreement.

1.2.5 *Suspension to be proportionate to breach*

- (a) A Suspension Notice served pursuant to paragraph 1.2.3 in respect of any of the Train Operator Events of Default specified in paragraphs (a) and (c) to (f) (inclusive) of paragraph 1.1.1 shall, so far as reasonably practicable, apply only to the:

- (i) railway vehicles;
- (ii) Services;
- (iii) Routes; or
- (iv) categories of train movements or railway vehicles

(or (as the case may be) parts or part thereof) to which the relevant Train Operator Event of Default relates and the remainder of the rights and obligations of the parties shall remain in full force and effect.

- (b) A Suspension Notice served pursuant to paragraph 1.2.4 in respect of any of the Railtrack Events of Default specified in paragraphs 1.1.3(a), (c) and (d) shall, so far as reasonably practicable, apply only to the:

- (i) railway vehicles;
- (ii) Services;
- (iii) Routes; or
- (iv) categories of train movements or railway vehicles

(or (as the case may be) parts or part thereof) to which the relevant Railtrack Event of Default relates and the remainder of the rights and obligations of the parties shall remain in full force and effect.

- (c) The party served with a Suspension Notice which specifies an Event of Default which is capable of remedy shall, with all reasonable diligence, take such steps as shall be specified in the Suspension Notice to remedy the Event of Default and shall keep the party serving the Suspension Notice fully informed of the progress which is being made in remedying the Event of Default.

- (d) Where a party served with a Suspension Notice has complied with its obligations under paragraph 1.2.5(c) (whether in whole or in part) and it is reasonable for the suspension effected by the Suspension Notice to be revoked (whether in whole or in part), the party which shall have served the Suspension Notice shall revoke the suspension to that

extent. Such revocation shall be effected as soon as practicable after the remedy in question by notice to the other party specifying the extent of the revocation and the date on which it shall have effect.

### **1.3 Termination**

#### *1.3.1 Railtrack's right to terminate*

Railtrack may serve a Termination Notice on the Train Operator:

- (a) where the Train Operator fails to comply with any material restriction in a Suspension Notice;
- (b) where the Train Operator fails to comply with its obligations under paragraph 1.2.5(c);
- (c) where the Train Operator Event of Default described in paragraph 1.1.1(a) has occurred and is continuing; or
- (d) where the Train Operator Event of Default specified in a Suspension Notice served by Railtrack is not capable of being remedied and three months have elapsed from the service of the said Suspension Notice.

#### *1.3.2 Train Operator's right to terminate*

The Train Operator may serve a Termination Notice on Railtrack:

- (a) where Railtrack fails to comply with its obligations under paragraph 1.2.5(c);
- (b) where the Event of Default described in paragraph 1.1.3(a) has occurred and is continuing;
- (c) where the Railtrack Event of Default specified in a Suspension Notice served by the Train Operator is not capable of being remedied and three months have elapsed from the service of the said Suspension Notice.

#### *1.3.3 Contents of Termination Notice*

A Termination Notice shall specify:

- (a) the nature of the relevant Event of Default;
- (b) a date and time, which shall be reasonable in the circumstances, at which termination is to take effect;
- (c) where the relevant Event of Default is capable of remedy:
  - (i) the steps reasonably required to remedy the Event of Default; and

- (ii) a reasonable period within which such steps may be taken (where the Event of Default is a failure of the train Operator to pay Track Charges, 7 days shall be a reasonable grace period).

#### 1.3.4 *Effect of Termination Notice*

Where Railtrack or the Train Operator has served a Termination Notice on the other:

- (a) the service of such Termination Notice shall not affect the parties' continuing obligations under this Agreement up to the date of termination as specified in the Termination Notice or such later date as the party which has served the Termination Notice may notify to the other following the service of the Termination Notice but prior to the date upon which it shall have been specified to have effect;
- (b) the party which has served the Termination Notice shall withdraw it by notice to the other party, upon being reasonably satisfied that the relevant Event of Default has been remedied;
- (c) this Agreement shall terminate on the later of:
  - (i) the date and time specified in the Termination Notice or such later date and time as the party which has served the Termination Notice may notify to the other prior to the date and time upon which it shall have been specified to have effect; and
  - (ii) the date upon which notice of such termination shall have been given to the Regulator.

### 1.4 **Consequence of Termination**

#### 1.4.1 *Directions regarding location of Specified Equipment*

Immediately prior to, upon or following termination or expiry of this Agreement, the Train Operator shall comply or procure compliance with all reasonable directions given by Railtrack regarding the positioning and location of the Specified Equipment.

#### 1.4.2 *Failure to comply with directions*

If the Train Operator fails to comply with any such directions as are referred to in paragraph 1.4.1 Railtrack shall be entitled to remove from the Network or Stable any Specified Equipment left on the Network or to instruct a third party to do so and any reasonable costs incurred by Railtrack in taking such steps shall be paid promptly by the Train Operator.

#### 1.4.3 *Evidence of costs*

Railtrack shall provide such evidence of such costs as are referred to in paragraph 1.4.2 as the Train Operator shall reasonably request.

1.4.4 *Survival*

This paragraph 1.4 shall survive termination of this Agreement irrespective of the reason for termination.

**1.5 Exclusion of common law termination rights**

The suspension and termination rights set out in this paragraph 1 shall be the parties' only rights to suspend or terminate this Agreement whether pursuant to its terms or at law.

**Schedule 7**  
**Track Charges**

**Schedule 8**  
**Performance Regime**

## **Schedule 9**

### **Limitation on Liability**

#### **1. Application**

The limitations on liability contained in this Schedule shall apply in the circumstances set out in Clause 9.4.

#### **2. Limitation on Railtrack's liability**

**2.1** The maximum liability of Railtrack in respect of any relevant claim of the train operator shall not exceed the following:

- (a) in the case of an intentional disregard by Railtrack of any provision of this Agreement, £●; and
- (b) in any other case, in respect of a failure to comply with a provision of this Agreement specified in column 1 of Table 1 to this Schedule 9, the amount set opposite that provision in column 2 of that table.

**2.2** The maximum amount which shall be recoverable from Railtrack shall not exceed £● in respect of all relevant claims.

#### **3. Limitation on Train Operator's liability**

**3.1** The maximum liability of the Train Operator in respect of any relevant claim of Railtrack shall not exceed the following:

- (a) in the case of an intention disregard by the Train Operator of any provision of this Agreement, £●; and
- (b) in any other case, in respect of a failure to comply with a provision of this Agreement specified in column 1 of Table 2 to this Schedule 9, the amount set opposite that provision in column 2 of that table.

**3.2** The maximum amount which shall be recoverable from the Train Operator shall not exceed £● in respect of all relevant claims.

#### **4. Meaning of "relevant claim"**

In this Schedule, "relevant claim" means a claim under the indemnities contained in Clauses 9.1 and 9.2, or otherwise for breach of this Agreement.

#### **5. Restriction on small claims**

Neither party shall be entitled to damages or other amount in respect of any relevant claim unless and until the amount of that claim exceeds £●.



Table 2 - Limits on liability of Train Operator to Railtrack

Provision	Limit per incident (£)	Limit per period (specify period) (£)	Aggregate life of contract maximum (if any) (£)