



Confidential & Subject to Contract

ORR Reference: [REDACTED]

**AGREEMENT**

BETWEEN

**(1) [DB CARGO (UK) LIMITED]**

**OR**

**[DB CARGO INTERNATIONAL LIMITED]**

as facility owner

-AND-

**(2) [XX] LIMITED**

as access beneficiary

---

relating to the provision of facility access and associated services at [FACILITY].

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**THIS CONTRACT** is dated on the date of the last signature shown in the signature block below

**BETWEEN THE PARTIES:**

- (1) **[DB Cargo (UK) Limited (company number 2938988)] OR [DB Cargo International Limited (company number 3232475)]** whose registered office is at Lakeside Business Park, Carolina Way, Doncaster, South Yorkshire, DN4 5PN ("**DB Cargo**"); and
- (2) **[xx]** (the "**Access Beneficiary**"),

each "**a party**" and together "**the parties**".

**BACKGROUND**

- (A) DB Cargo is the facility owner and operator of the Service Facility.
- (B) DB Cargo has agreed to grant the Access Beneficiary permission to use the Service Facility on the terms and conditions of this Contract.
- (C) This Contract is entered into pursuant to a general approval issued by the ORR under to section 18(1)(c) of the Act.

**1. DEFINITIONS AND INTERPRETATION**

1.1 In this Contract, the following words shall have the following meanings:

"**Access and Facilities Request Form**" shall mean the form of that name available from time to time at <https://uk.dbcargo.com/rail-uk-en/services/locations-and-access>;

"**Access Beneficiary Event of Default**" means the occurrence of any of the following:

- (a) the Access Beneficiary ceases to be authorised to be the operator of trains for the provision of the Train Services by:
- (i) either (i) a Non-Passenger Train Operator's Licence; or (ii) a Passenger Train Operator's Licence, granted under section 8 of the Act (unless it is exempt from the requirement to be so authorised); or
  - (ii) a European licence and a valid Statement of National Regulatory Provisions (granted under the Railway (Licensing of Railway Undertakings) Regulations 2005);
- (b) an Insolvency Event in relation to the Access Beneficiary;

(c) any actual or anticipated breach by the Access Beneficiary of this Contract and/or its Safety Obligations including any such breach which, by itself or taken together with any other such breach, results, or is likely to result in either material financial loss to DB Cargo and/or material disruption to the operation of the Service Facility;

(d) any Facility Service Charges or other undisputed amounts due from the Access Beneficiary to DB Cargo under this Contract remain unpaid for more than five (5) Working Days after their due date; or

(e) the Access Beneficiary fails to perform its obligations under this Contract to any material extent for a continuous period of sixty five (65) Working Days as a result of an event of Force Majeure;

**"Access Beneficiary Request"** has the meaning attributed to it in **Clause 9.2.1**;

**"Access Dispute Resolution Rules"** means the set of rules entitled "Access Dispute Resolution Rules" annexed to the Network Code as amended from time to time;

**"Act"** means the Railways Act 1993, as amended;

**"Ad Hoc Use"** means short notice and/or ad hoc access granted to the Access Beneficiary by DB Cargo which is in respect of:

(a) access to the Service Facility where such access is not identified in the Specification;

(b) a service facility other than the Service Facility; and/or

(c) facility services other than the Facility Services;

**"Ad Hoc Use Request"** means a request made by the Access Beneficiary in accordance with the process set out in **Clause** Error! Reference source not found.;

**"Adjustment Factor"** means a percentage equivalent to the increase in the General Index of Consumer Prices all items (or "CPI") published by the Office for National Statistics (or calculated using such data) for the twelve (12) month period from January to December immediately preceding the Contract Year in respect of which a relevant adjustment is to take effect in accordance with **Clause 13.6.3** of this Contract;

**"Affiliate"** means any subsidiary, subsidiary undertaking or holding company of a body corporate and any subsidiary or subsidiary undertaking of any such holding company for the time being;

**"Ancillary Movements"** means train movements within the Service Facility (including where any such movements involve temporarily departing and re-entering the Service Facility) which are not an express part of the Train Services but which are necessary or reasonably required for giving full effect to the Train Services;

**"Applicable Law"** means any applicable law, legislation, by-law, directive, decision, regulation, rule, standard (including Railway Group Standards), order or notice having the force of law in England (or in Scotland insofar as applicable to Service Facility and/or Facility Services located and/or provided in Scotland) whether originating from any legislative, governmental, quasi-governmental, supranational, statutory or regulatory body, local authority or court which has an effect in relation to the Service Facility, the Facility Services and/or the activities of DB Cargo and/or the Access Beneficiary in relation to them;

**"associate"** has the meaning ascribed to it in section 17 of the Act;

**"BARS"** means DB Cargo's IT system of that name and which manages the ordering, acceptance, processing, invoicing and general administration of requests for Facility Services and/or Ad Hoc Use (and includes, for the avoidance of doubt, any updates, new versions and/or releases made or issued by DB Cargo from time to time);

**"Cancellation Fee"** means the fee charged or chargeable by DB Cargo to the Access Beneficiary in accordance with **Clause 12**.

**"Charging Period"** means a calendar [month or week] save that the first period and the last period may be of less than a calendar [month or week] if the Commencement Date does not coincide with the first Working Day of a calendar [month or week] or the Expiry Date does not coincide with the last Working Day of a calendar [month or week];

**"Commencement Date"** means the date on which the last of the conditions precedent contained in **Clause 2.2** has been satisfied;

**"Confidential Information"** means all information in respect of the business of each of the parties including, without prejudice to the generality of the foregoing, business methods; prices; business, financial, marketing, development or manpower plans that arise through the negotiation or performance of this Contract, relating to the affairs of one party to this Contract or any of its Affiliates or their customers or suppliers provided by the other party under and for the purposes of this Contract;

**"Contract"** means this document including all schedules and appendices to it, and other documents expressly incorporated into it by reference;

**“Contract Year”** means the twelve (12) months commencing at 00:01 hours on the Commencement Date and each subsequent twelve (12) month period save that the last such period shall end on the Expiry Date;

**“Dangerous Goods”** means any Goods incorporating dangerous substances listed in the Carriage of Dangerous Goods and Use of Transportable Pressure Equipment Regulations 2009 and any other substance of a similar nature or presenting a similar hazard;

**“Data Protection Addendum”** means the document of that name available at <https://uk.dbcargo.com> or otherwise on request from DB Cargo (as amended from time to time);

**“DB Cargo Codes”** means:

- (a) DB Cargo 'Business Principles';
- (b) DB Cargo 'Corporate Principles, Ethics: Code of Conduct'; and
- (c) the 'Data Protection Addendum',

each as amended from time to time and available at <https://uk.dbcargo.com/rail-uk-en/Our-Company/compliance> or otherwise on request;

**“DB Cargo Event of Default”** means any of the following:

- (a) DB Cargo ceases to be authorised to be the operator of the Service Facility by a network licence granted under section 8 of the Act, unless exempt from the requirement to be so authorised;
- (b) an Insolvency Event occurs in relation to DB Cargo;
- (c) any actual or anticipated breach by DB Cargo of this Contract and/or its Safety Obligations including any such breach which, by itself or taken together with any other such breach, results, or is likely to result, in material financial loss to the Access Beneficiary; and/or
- (d) DB Cargo fails, for a continuous period of sixty five (65) Working Days, to perform its obligations under this Contract to any material extent as a result of an event of Force Majeure;

**“Decision Criteria”** means the necessity or desirability of the following:

- (a) sharing the capacity, and securing the development, of the Service Facility in the most efficient and economical manner in the interests of all users having regard, in particular, to

safety, the environment, and the proper maintenance, improvement and usage of the Service Facility;

- (b) enabling users of the Service Facility to comply with any contracts to which they are party, in each case to the extent that DB Cargo has been informed of the relevant terms of such contracts;
- (c) enabling DB Cargo to comply with any contracts to which it is a party; and
- (d) maintaining, renewing and carrying out other necessary work on or in relation to the Service Facility,

each criterion having equal weight and significance save that safety and environmental considerations shall take precedence in the event of a conflict or inconsistency as the case may be;

**“Default Interest Rate”** is two (2) percent above the base lending rate of HSBC Bank PLC, as varied from time to time;

**“Dispute”** has the meaning attributed to it in **Clause 18.9.1**;

**“Disruptive Event”** means any event or circumstance which materially prevents or materially disrupts the operation of trains on any relevant part of the Service Facility, but which is not Force Majeure;

**“Environmental Damage”** means any injury or damage to persons, living organisms or property or any pollution or impairment of the environment resulting from the discharge, emission, escape or migration of any substance, energy, noise or vibration;

**“Event of Default”** means an Access Beneficiary Event of Default or a DB Cargo Event of Default as the context requires;

**“Expiry Date”** means [DATE] unless this Contract is terminated earlier in accordance with an express provision of **Clause 14**, in which case it shall be the relevant date of termination;

**“facility owner”** has the meaning ascribed to it under section 17(6) of the Act;

**“Facility Service Charge(s)”** means the amount(s) identified as such in **Schedule 3**;

**“Facility Services”** are those services to be provided by DB Cargo to the Access Beneficiary set out in **Schedule 2**;

**"First Level Representative"** means the individual assigned to such role on behalf of a party and identified in **Schedule 1**;

**"Force Majeure"** means any circumstance beyond the reasonable control of either party including: strikes and any other industrial action or dispute; acts of God; war; riot; terrorism; crime; civil commotion; compliance with any law or governmental order, rule, regulation or direction or any overriding emergency procedures; pandemic; accident; fire; flood; adverse weather conditions; any IT Disruption; failure of, material reduction in utility of or inability to use a third party's infrastructure or refusal due to a physical or operational impediment of any such third party to allow such use;

**"FSC Period"** means (save in respect of the first FSC Period and the final FSC Period) the twelve (12) month period from and including 1 April to 31 March. The first FSC Period shall be the period from and including the Commencement Date to the 31 March, and the final FSC Period shall be the period from and including the 1 April to the Expiry Date;

**"FSC Proposal"** has the meaning attributed to it in **Clause 11.5** (and shall include a revised FSC Proposal notified to the Access Beneficiary by DB Cargo pursuant to **Clause 11.7**);

**"Goods"** means cargo of any description whatsoever, together with any package, case, pallet, container or other thing which contains, protects or supports cargo or is designed or made to do so;

**"Insolvency Event"** means that a party:

- (a) has a receiver, administrator, monitor, provisional liquidator or similar officer appointed; or
- (b) is subject to a notice of intention to appoint an administrator; or
- (c) passes a resolution for its winding-up (save for the purpose of a solvent restructuring previously approved in writing by the other party); or
- (d) has a winding up order made by a court in respect of it; or
- (e) proposes or enters into any scheme, restructuring plan, reconstruction and arrangement, composition or other arrangement with creditors (other than relating to a solvent restructuring previously approved in writing by the other party); or
- (f) is unable to pay its debts, or admits that it is unable to do so; or
- (g) ceases to carry on business; or
- (h) has any steps or actions taken in connection with any of these procedures; or



- (i) is the subject of anything analogous to the foregoing under the laws of any applicable jurisdiction; or
- (j) is the subject of any proceeding in any Member State of the European Union which is capable of recognition under the EC Regulation on Insolvency Proceedings (EC 1346/2000) or the EU Regulation on Insolvency Proceedings (Recast) (EU 2015/848); or
- (k) is the subject of an application for the recognition of a foreign insolvency proceeding under the Cross-Border Insolvency Regulations 2006 (SI 2006/1030);

**“Intellectual Property Rights”** means patents, rights to inventions, copyright and related rights, trademarks, trade names, domain names, rights in get-up, rights in goodwill or to sue for passing off, unfair competition rights, rights in designs, rights in computer software, database rights, topography rights, moral rights, rights in confidential information (including know-how and trade secrets) and any other intellectual property rights, in each case whether registered or unregistered, and including all applications for, and renewals or extensions of, such rights, and all similar or equivalent rights or forms of protection in any part of the world whether existing now or in the future.

**“IT Disruption”** means any interference, disruption, damage and/or outage of any nature to IT systems and communication networks owned and/or used by DB Cargo and/or its subcontractors and/or assignees including but not limited to: a cyber-attack or other malicious act; destruction, corruption or theft of electronic or other information assets and/or data; failure of or denial of access to a computer system or network used by DB Cargo and/ or its subcontractors and/or assignees;

**“Liability Cap”** means the sum calculated in accordance with **Clause 13.6**;

**“Long-stop Date”** means the date falling sixty five (65) Working Days after the date on which the parties sign this Contract;

**“Network”** means the network in respect of which Network Rail (or any relevant replacement or successor body) is the facility owner and which is situated in England, Wales and Scotland;

**“Network Code”** means the document by that name published by Network Rail;

**“Network Rail”** means Network Rail Infrastructure Limited, incorporated in England and Wales under registered number 2904587;

**“Office of Rail and Road”** has the meaning ascribed to it under section 15 of the Railways and Transport Safety Act 2003, and **“ORR”** shall be construed accordingly;

“**Plan**” means the plan of the Service Facility available at <https://uk.dbcargo.com/rail-uk-en/services/locations-and-access>;

“**Railway Group Standards**” means, as the context requires, the applicable published rules and regulations including codes of practice and conduct in force from time to time relating to any equipment or activity or service to be provided under or used in connection with this Contract including:

(a) technical standards with which railway assets or equipment used on or as part of railway assets must conform; and

(b) operating procedures with which the operators of railway assets must comply,

in each case as authorised and maintained by the Railway Safety and Standards Board and any other competent statutory authorities;

“**Safe System of Work**” means an agreed statement of the procedures to be followed by DB Cargo and the Access Beneficiary in respect of the safe operation of the Service Facility;

“**Safety Certificate**” has the meanings given to “safety certificate” in the Railways and Other Guided Transport Systems (Safety) Regulations 2006;

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

“**Second Level Representative**” means the individual assigned to such role on behalf of a party and identified in **Schedule 1**;

“**Service Facility**” means the railway network of which DB Cargo is the facility owner, and which is more particularly described in **Schedule 2** and depicted on the Plan;

“**Service Facility Operating Constraints**” means the physical and operational constraints of the Service Facility to accommodate the operation of Train Services or provision of Facility Services as the case may be including those specified from time to time at or otherwise on request from DB Cargo as amended from time to time pursuant to the Service Facility Operating Constraints Change Procedure;

“**Service Facility Operating Constraints Change**” means a change to the Service Facility Operating Constraints made in accordance with the Service Facility Operating Constraints Change Procedure;

**"Service Facility Operating Constraints Change Procedure"** means the procedure by which DB Cargo may make amendments to the Service Facility Operating Constraints as set out at <https://uk.dbcargo.com/rail-uk-en/services/locations-and-access>;

**"Specification"** means the information set out in **Schedule 2** and/or information provided to DB Cargo by the Access Beneficiary regarding the Train Services in accordance with **Clause 6.1.2** and in the form appended to **Schedule 2** as amended from time to time in accordance with **Clause 9.2**;

**"Specified Equipment"** means railway vehicles registered for operation on the Network, and which the Access Beneficiary is therefore permitted to use on the track comprised in the Service Facility, as more particularly described in **Schedule 2**;

**"Stabling"** has the meaning ascribed to it in the Stabling Policy;

**"Stabling Policy"** means the policy governing Stabling at DBC UK Service Facilities as set out at <https://uk.dbcargo.com/rail-uk-en/services/locations-and-access> as may be amended from time to time in accordance with its terms;

**"Suspension Notice"** means a notice served by one party on the other pursuant to **Clause 14.2.1**;

**"Termination Notice"** means a notice served by one party on the other pursuant to **Clause 14**;

**"Train Services"** means the services identified in the Specification and which will enter a Service Facility; and

**"Working Day"** means each of Monday to Friday (inclusive) excluding common law and statutory public or bank holidays in England and Wales and, insofar as this Contract relates to Service Facilities and/or Facility Services located or provided in Scotland, Scotland.

1.2 References to a "Clause" or "Schedule" are to a clause of, or a schedule to, this Contract; references to this Contract include its schedules; and references in a Schedule to a "paragraph" are to a paragraph of that relevant Schedule; the Schedule forms part of this Contract and shall have effect as if set out in full in the body of this Contract and any reference to this Contract includes the schedules.

1.3 The singular includes the plural and vice versa (including where reference is made to a Service Facility or Service Facilities); references to any gender include every gender; and references to persons include corporations, partnerships, other unincorporated associations or bodies of persons, any individual, firm and company.

- 1.4 The headings in this Contract are for convenience only, have no legal effect and shall not affect its construction.
- 1.5 The expression "person" includes any individual, firm, company, unincorporated association and partnership and vice versa.
- 1.6 The words "include", "including" or "includes" are to be construed as if they were immediately followed by the words "without limitation" and so shall not limit the meaning of the words preceding them.
- 1.7 Reference to the parties include their respective successors in title, and/or respective permitted assigns. This Contract shall be binding on, and ensure to the benefit of, the parties to this Contract and their respective personal representatives, successors and permitted assigns.
- 1.8 A reference to a statute or statutory provision shall be construed as a reference to the same as amended, consolidated, modified, extended, re-enacted or replaced from time to time.
- 1.9 Any obligation on a party not to do something includes an obligation not to allow that thing to be done.
- 1.10 The Service Facility Operating Constraints Change Procedure is incorporated in and shall form part of this Contract.
- 1.11 In the event of a conflict or inconsistency between applicable terms within this Contract, the following order of precedence will apply to the conflicting or inconsistent terms (with the first mentioned terms having the highest precedence):
- 1.11.1 **Clause 5.1.3** and the Specification;
  - 1.11.2 **Schedule 1** and **Schedule 3** of this Contract;
  - 1.11.3 **Clauses 1 to 18** (excluding **Clause 5.1.3**); and
  - 1.11.4 the Service Facility Operating Constraints Change Procedure.

## **2. COMMENCEMENT AND TERM**

- 2.1 **Clauses 1, 2, 4.4, 13, 14.5-14.8, 15, 16, 17 and 18** and **Schedules 1 to 3** shall come into effect and be binding upon the parties immediately upon this Contract being signed and dated by the parties. All other clauses shall come into effect and be binding on the parties on the Commencement Date.

- 2.2 The conditions precedent which must be satisfied in full are:
- 2.2.1 DB Cargo providing a signed copy of this Contract to the ORR within 14 days of this Contract being entered into by the parties;
  - 2.2.2 DB Cargo is authorised to be the operator of the Service Facility by a licence granted under section 8 of the Act or is exempt from the requirement to be so authorised under section 7 of the Act;
  - 2.2.3 the Access Beneficiary is authorised to be the operator of trains for the provision of the Train Services by:
    - 2.2.3.1 either: (i) a Non-Passenger Train Operator's Licence; or (ii) a Passenger Train Operator's Licence, granted under section 8 of the Act (unless it is exempt from the requirement to be so authorised); or
    - 2.2.3.2 a European Licence and a valid Statement of National Regulatory Provisions granted under the Railway (Licensing of Railway Undertakings) Regulations 2005;
  - 2.2.4 the Access Beneficiary holds a Safety Certificate in relation to its operation of trains; and
  - 2.2.5 an Insolvency Event not having occurred in relation to either of the parties, and the parties shall:
    - (a) use reasonable endeavours to secure that they are so satisfied; and
    - (b) provide reasonable evidence of the satisfaction of applicable conditions precedent upon request by the other party.
- 2.3 If any of the conditions precedent in **Clause 2.2** shall not have been satisfied in full on or before the Long-stop Date, this Contract shall lapse and neither party shall have any liability to the other under or in respect of it, save in respect of a pre-existing breach of any of the Clauses referred to in **Clause 2.1**.
- 2.4 The Contract shall expire on the Expiry Date unless terminated earlier in accordance with an express provision of **Clause 14**.
- 3. PERMISSION TO USE THE FACILITY AND AD HOC USE**
- 3.1 DB Cargo grants the Access Beneficiary permission to use the Service Facility and the Facility Services and/or Ad Hoc Use (if and to the extent granted following an Ad Hoc Use Request) in

accordance with the terms of this Contract. Requests for Facility Services and/or Ad Hoc Use shall be submitted by the Access Beneficiary to DB Cargo using the BARS unless and to the extent that the circumstances in **Clauses** Error! Reference source not found. or **3.5** apply.

- 3.2 For requests made either on the day any relevant Ad Hoc Use is required or at or after 0800 on the Working Day before the day on which the Ad Hoc Use is required: complete the Access and Facilities Request Form and e-mail it to [DBCUK.Accessrequest@deutschebahn.com](mailto:DBCUK.Accessrequest@deutschebahn.com) and contact DB Cargo's Duty Manager by telephone on 01302 575047 or such alternative number as advised by DB Cargo or included on the Access and Facilities Request Form, to request such access from DB Cargo (an **Ad Hoc Use Request**).
- 3.3 DB Cargo must give reasonable consideration to the Access Beneficiary's Ad Hoc Use Request and must notify the Access Beneficiary in writing of its decision.
- 3.4 The Access Beneficiary acknowledges that if DB Cargo grants Ad Hoc Use to the Access Beneficiary it shall be on the terms set out in this Contract, including as to Facility Service Charges as set out in **Schedule 3** and any Cancellation Fee in accordance with Clause 12.
- 3.5 The Access Beneficiary may also submit requests for Facility Services and/or Ad Hoc Use using the methods and associated contact details contained in **Clause** Error! Reference source not found. if and to the extent that the BARS is unavailable for use (including as a result of any downtime or maintenance activities).

#### **4. STANDARD OF PERFORMANCE**

##### **4.1 General standard**

Without prejudice to all other obligations of the parties under this Contract, each party shall, in its dealings with the other for the purpose of, and in the course of performance of its obligations under, this Contract, act in a timely manner with that degree of skill, diligence, prudence and foresight which should be exercised by an appropriately qualified and experienced:

- 4.1.1 facility owner and operator (in the case of DB Cargo) in respect of the relevant Service Facility; and
- 4.1.2 train operator (in the case of the Access Beneficiary).

##### **4.2 Good faith**

The parties to this Contract shall, in exercising their respective rights and complying with their respective obligations under this Contract (including when conducting any discussions or

negotiations arising out of the application of any provisions of this Contract or exercising any discretion under them), at all times act in good faith.

#### **4.3 Movement of Specified Equipment**

Where Specified Equipment under the control of the Access Beneficiary will move onto and off a Service Facility, the parties shall ensure that they facilitate (to the extent they are able) the prompt presentation of such Specified Equipment onto and off the Service Facility.

#### **4.4 Compliance with laws, standards and directions**

4.4.1 The parties to this Contract shall at all times comply with all relevant Applicable Laws and Safety Obligations in the course of performing their respective obligations.

4.4.2 The Access Beneficiary shall comply with any reasonable direction by DB Cargo in relation to any aspect of the Access Beneficiary's operations which affects or is likely to affect the performance of DB Cargo's Safety Obligations.

4.4.3 DB Cargo shall comply with any reasonable request by the Access Beneficiary in relation to any aspect of DB Cargo's operations which affects or is likely to affect the performance of the Access Beneficiary's Safety Obligations.

#### **4.5 Acknowledgment**

It is acknowledged that, insofar as **Clauses 4.1 and 4.4** relate to the subject matter of the DB Cargo Codes, compliance with the DB Cargo Codes is a relevant consideration with regard to the Access Beneficiary's compliance with those Clauses insofar as they relate to the subject matter of the DB Cargo Codes, but is not conclusive proof of such compliance.

### **5. DB CARGO'S OBLIGATIONS**

5.1 DB Cargo shall:

5.1.1 save in circumstances (in respect of which see **Clause 5.1.2** below) in which the Service Facility is not ordinarily connected to the Network as at the Commencement Date, use its reasonable endeavours to ensure that the Service Facility remains connected to the Network;

5.1.2 in circumstances in which the Service Facility is not ordinarily connected to the Network, use reasonable endeavours to ensure that the Service Facility remains connected to a network which provides access to the Network;

- 5.1.3 permit the Access Beneficiary and its associates to use the Service Facility at such times and for such Train Services as, in each case, is stated in the Specification, except where and to the extent that DB Cargo reasonably determines, having regard to the Service Facility Operating Constraints, the Decision Criteria and its Safety Obligations, or as a result of a Disruptive Event, it is unable to do so;
- 5.1.4 as soon as reasonably practicable, permit the Access Beneficiary to use the Service Facility for any Train Services not running in accordance with the Specification, except where, and to the extent that DB Cargo reasonably determines, having regard to the Service Facility Operating Constraints, the Decision Criteria and its Safety Obligations, or as a result of a Disruptive Event, it is unable to do so;
- 5.1.5 give reasonable consideration to any Ad Hoc Use Request made by the Access Beneficiary in accordance with **Clause 3**;
- 5.1.6 provide the Facility Services in accordance with the Specification. If DB Cargo is unable to provide the Facility Services in accordance with the Specification, DB Cargo shall use its reasonable endeavours to provide them at a time which is reasonably convenient for the Access Beneficiary, except where, and to the extent that, DB Cargo shall, having due regard to the Decision Criteria, determine that the Facility Services cannot be provided;
- 5.1.7 inform the Access Beneficiary if any Specified Equipment in respect of which access is to be or is granted is, in DB Cargo's reasonable opinion, in an unsafe condition. DB Cargo shall be under no obligation to provide access, or Facility Services in respect of such Specified Equipment;
- 5.1.8 give the Access Beneficiary:
  - 5.1.8.1 at least twenty (20) Working Days' notice of planned restriction of use on the Service Facility; or
  - 5.1.8.2 as soon as reasonably practicable, notice of emergency possessions or any Disruptive Event affecting the Train Services on the Service Facility.
- 5.1.9 use reasonable endeavours to maintain availability of the BARS and provide any relevant specifications to enable the Access Beneficiary to access it and appropriate user login details and support to enable the Access Beneficiary to submit requests and otherwise administer its requirements for Facility Services and/or Ad Hoc Use in accordance with this Contract.



5.2 Except as expressly required to give effect to **Clauses 5.1.1, 5.1.3 and 5.1.6**, the Access Beneficiary acknowledges that, DB Cargo shall have no obligation to provide and/or procure any fixed, minimum and/or guaranteed volume of access or Facility Services pursuant to this Contract and nothing within this Contract or implied by custom, practice or otherwise shall be construed as giving rise to any such commitment.

5.3 DB Cargo shall not be deemed to be in breach of this Contract or otherwise liable to the Access Beneficiary for any failure or delay in performing its obligations under this Contract due to a Service Facility Operating Constraints Change or its implementation.

## 6. ACCESS BENEFICIARY'S OBLIGATIONS

6.1 The Access Beneficiary shall (and, as the context requires, procure that any associates shall):

6.1.1 maintain and operate the Specified Equipment used on the Service Facility with a view to permitting the operation of the Train Services on the Service Facility in accordance with the permission to use under this Contract;

6.1.2 notify DB Cargo promptly of any proposed changes to a Specification in accordance with **Clause 9.2** and to the extent that it is aware of such considerations, ensure that any such changes conform to the Service Facility Operating Constraints;

6.1.3 notify DB Cargo promptly if it no longer requires any access and/or Facility Services allocated to it pursuant to this Contract or it could reasonably be said that there is no longer any such requirement and assist DB Cargo in updating the Specification in accordance with such change;

6.1.4 notify DB Cargo of the names and contact details of any of the Access Beneficiary's associates who access the Service Facility pursuant to **Clause 5.1.3**;

6.1.5 inform DB Cargo in advance of any Dangerous Goods which will or might be carried in any of the Specified Equipment comprised in the Train Services and of any known or suspected defects in any of the Specified Equipment or any unusual specification or characteristic of any Goods carried in any of the Specified Equipment which might materially affect the Train Services or the Service Facility or the operation thereof;

6.1.6 inform DB Cargo as soon as reasonably practicable of any Train Service not running in accordance with the Specification to allow DB Cargo to attempt to accommodate such Train Service in accordance with **Clause 5.1.4**;

- 6.1.7 operate the Train Services and manage any activity it carries out in connection with the Train Services at all times in such a way as to:
  - (a) minimise, by taking all reasonable steps, any nuisance to or disturbance of DB Cargo or any other person on the Service Facility or the owners or occupiers of other land whether within or outside the Service Facility; and
  - (b) prevent the escape of any Goods or other items or substances within the possession or control of the Access Beneficiary from the Specified Equipment;
- 6.1.8 remove any Specified Equipment or other thing so brought onto any part of the Service Facility when reasonably directed to do so by DB Cargo;
- 6.1.9 comply with any reasonable instructions provided by DB Cargo concerning the proper use, integrity and security of the BARS, and:
  - 6.1.9.1 ensure that its network and systems comply with the relevant specifications provided by DB Cargo from time to time; and
  - 6.1.9.2 not introduce, or permit the introduction of, any virus, harmful or malicious code, or other vulnerability into the BARS or DB Cargo's related network and information systems.
- 6.2 If the Access Beneficiary (or its associates) fails to comply with any directions given under **Clause 6.1.8**, DB Cargo shall be entitled to remove from the Service Facility, any Specified Equipment or other thing or to instruct a third party to do so and any reasonable costs incurred by DB Cargo in taking such steps shall be paid promptly by the Access Beneficiary.
- 6.3 DB Cargo shall provide such evidence of such costs as are referred to in **Clause 6.2** as the Access Beneficiary shall reasonably request.
- 6.4 All Intellectual Property Rights and all other rights in the BARS are and shall continue to be owned by DB Cargo and/or its licensors. DB Cargo grants to the Access Beneficiary on a royalty free, non-exclusive, non-transferable basis (without any right to sub-licence) a licence to use the BARS to such extent as is necessary to enable the Access Beneficiary to request, cancel and/or make reasonable use of, the Facility Services and/or any Ad Hoc Use as envisaged by the parties under this Contract. For the avoidance of doubt, termination of this Contract shall result in automatic termination of the licence described in this **Clause 6.4**.



## **7. GOODS**

### **7.1 Risk**

Risk in the Goods (including, without limitation, all risk of theft, loss or damage to the Goods) shall at all times remain with the Access Beneficiary and DB Cargo shall not be under any obligation to insure the Goods or any part thereof and shall have no liability in respect of the same unless and to the extent it is caused directly by DB Cargo's negligence and/or breach of its obligations under this Contract.

### **7.2 Dangerous Goods**

7.2.1 Dangerous Goods shall not be brought onto the Service Facility unless and until a declaration by the Access Beneficiary in writing shall have been given to DB Cargo of their nature and quantity, including details of special handling requirements in the event of an emergency, and DB Cargo's consent shall have been first obtained, and then only upon such terms and conditions as DB Cargo acting reasonably may require, or as may be prescribed under Applicable Law.

7.2.2 DB Cargo is hereby permitted by the Access Beneficiary to give any particulars furnished under **Clause 7.2.1** to whomsoever DB Cargo reasonably believes necessary in order to comply with Applicable Law and/or its Safety Obligations.

### **7.3 Ability to reject Dangerous Goods**

DB Cargo reserves the right to refuse to accept Dangerous Goods onto the Service Facility where it reasonably believes that they may cause damage to the Service Facility, the environment, harm to human health or otherwise pose a health and safety risk.

## **8. AGREEMENT OF THE SPECIFICATION**

8.1 If and to the extent that a Specification has not been agreed as part of this Contract as effective from the Commencement Date, the Access Beneficiary shall notify DB Cargo of its proposed specification (including details and copies of specifications relevant for any examinations required) as soon as reasonably practicable after it becomes aware that it desires the provision of access and/or Facility Services.



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8.2 DB Cargo shall promptly (and in any event within ten (10) Working Days) notify the Access Beneficiary:

8.2.1 that it accepts the Access Beneficiary's proposed specification as the Specification (and in such circumstances the Access Beneficiary's proposed specification shall take effect as the Specification from the date of DB Cargo's notice); or

8.2.2 that it proposes an alternative specification, having made amendments to the Access Beneficiary's proposal:

8.2.2.1 to ensure that it conforms to the Service Facility Operating Constraints;

8.2.2.2 to ensure that it includes details and copies of specifications relevant for any locomotive examinations required; and/or

8.2.2.3 to the extent permitted by Applicable Law, because it does not propose to provide some or all of the access requested in the Access Beneficiary's proposed specification because a viable alternative exists,

and such alternative specification shall take effect as the Specification from the date of DB Cargo's notice.

8.3 Where any Facility Services within a Specification and/or in any request for Ad Hoc Use include a requirement for Stabling, the further terms of the Stabling Policy shall apply.

## 9. CHANGES

### 9.1 Changes to the Facility Services

9.1.1 The Service Facility Operating Constraints Change Procedure shall apply in accordance with its terms.

9.1.2 If DB Cargo is entitled to make material amendments to this Contract pursuant to **paragraph 5.2** of the Service Facility Operating Constraints Change Procedure, then the Access Beneficiary shall have the right within twenty two (22) Working Days of receipt of notice from DB Cargo pursuant to **paragraph 4.1** of the Service Facility Operating Constraints Change Procedure to terminate its requirement for Facility Services at a relevant Service Facility on twenty two (22) Working Days' prior written notice to DB Cargo.

## 9.2 Changes to the Specification

- 9.2.1 If the Access Beneficiary wishes to request a change in the Specification (an “**Access Beneficiary Request**”), it shall promptly notify DB Cargo in writing, setting out its requirements in a level of detail which reasonably allows DB Cargo to assess the impact on the Service Facility Operating Constraints and any other relevant matters affecting the provision of Facility Services at the relevant Service Facility.
- 9.2.2 On receipt of the Access Beneficiary Request pursuant to **Clause 9.2.1**, DB Cargo shall use reasonable endeavours to accommodate the relevant Access Beneficiary Request. No later than ten (10) Working Days following receipt of the Access Beneficiary’s Request, DB Cargo shall confirm if it is able to accommodate the relevant Access Beneficiary Request, in which case the parties shall take all necessary steps to amend the relevant terms of this Contract in accordance with **Clause 18.2**; or that it is unable to accommodate the relevant Access Beneficiary Request, in which case the Access Beneficiary shall have the right to refer the matter to the procedures contained in **Clause 18.9**.

## 10. FACILITY SERVICE CHARGES AND PAYMENT TERMS

- 10.1 In respect of each Charging Period, the Access Beneficiary shall pay the Facility Service Charges and any Cancellation Fee(s) incurred. DB Cargo shall invoice the Access Beneficiary for the Facility Service Charges and Cancellation Fee(s) weekly in arrears. The Access Beneficiary shall notify DB Cargo in advance of any purchase order or other reference number it wishes to be stated on a relevant invoice and DB Cargo shall use reasonable endeavours to comply with any such request (however DB Cargo’s failure to state any such number correctly or at all shall not in any way prejudice, invalidate or otherwise restrict its right to recover the relevant the Facility Service Charges and/or Cancellation Fee(s)).
- 10.2 Unless otherwise agreed in writing by DB Cargo, the Facility Service Charges shall be paid by the Access Beneficiary to DB Cargo in the currency of the invoice in cleared funds no later than twenty (20) Working Days from the date of the invoice. All remittances should include a reference to the relevant invoice (including its number). Payment should be made as follows (the details of which may be varied from time to time by written notice from DB Cargo):
- 10.2.1 payment by CHAPS or BACS should be made to the bank account expressly nominated on the relevant invoice; and
- 10.2.2 all CHAPS or BACS remittance advices to be posted to DB Cargo (UK) Credit Control, Lakeside Business Park, Carolina Way, Doncaster, DN4 5PN.

- 10.3 All Facility Service Charges and/or payments payable pursuant to this Contract are exclusive of value added tax and any other tax, duty or fee imposed from time to time by any government or other authority and are subject to the addition of value added tax and any other tax, duty or fee at the appropriate rate.
- 10.4 Without prejudice to any other rights or remedies which one party may have in respect of the failure of the other party to pay any amount on the due date, amounts payable under this Contract and not paid by the due date shall carry interest (to accrue daily and to be compounded monthly) at the Default Interest Rate from the due date until the date of actual payment (after judgment as well as before), except to the extent that late payment arises from any failure by the invoicing party to comply with **Clause 10.1**.
- 10.5 Except as otherwise provided in this Contract, within fifteen (15) Working Days of receipt of an invoice or statement of amounts payable issued under any provision of this Contract, the recipient shall notify the issuer of any aspects of the invoice or statement which it disputes, giving reasons for any dispute, and shall pay the undisputed amount in accordance with the terms of the invoice. Except to the extent that disputes are so notified, the recipient shall be deemed to have agreed the contents of the invoice or statement.
- 10.6 All payments to be made by a party under this Contract shall be made in full without any set-off, restriction or condition and without any deduction for or on account of any counterclaim unless such deduction has been agreed following notification of a dispute in accordance with **Clause 10.5** or otherwise in advance in writing by the other party.

## **11. FACILITY SERVICE CHARGES REVIEW**

- 11.1 Facility Service Charges under this Contract are set at a level which reflects but does not exceed the cost of providing the Facility Services plus a reasonable profit.
- 11.2 Provided that DB Cargo shall ensure that Facility Service Charges remain consistent with the principle set out in **Clause 11.1**, DB Cargo shall be permitted to adjust the Facility Service Charges in accordance with the process set out in this **Clause 11**.
- 11.3 The Facility Service Charges for each forthcoming FSC Period may be reviewed by DB Cargo to reflect changes in (amongst other matters) the cost to DB Cargo of providing the Facility Services and the total number of Train Services permitted to use the Service Facility or relevant parts of the Service Facility.
- 11.4 On or before 31 December in each FSC Period (or on the date of entry into this Contract if this Contract is entered into in the period between 31 December and 1 April), DB Cargo shall give notice that either it wishes to review the Facility Service Charges for the following FSC Period,

or that no such review is required. For the avoidance of doubt, a revision under this **Clause 11.4** may not be made more than once in any FSC Period.

11.5 If DB Cargo wishes to review the Facility Service Charges, the notice given in accordance with **Clause 11.4** above, shall include a proposal (the "**FSC Proposal**") setting out the proposed adjustments to the figures and/or structure comprising the Facility Service Charges for the next FSC Period.

11.6 The Access Beneficiary shall promptly (and in any event, on or before 28 January immediately following the date of the relevant FSC Proposal) notify DB Cargo in writing either:

11.6.1 it accepts the FSC Proposal (and in such circumstances the revised Facility Service Charges shall take effect in accordance with **Clause 11.10**); or

11.6.2 of any questions and/or matters in relation to which it disagrees (with supporting information reasonably sufficient for DB Cargo to consider the notification).

If the Access Beneficiary does not respond to DB Cargo within the time period given in this **Clause 11.6** then it shall be deemed to have accepted the FSC Proposal and the relevant adjustments to the Facility Service Charge shall take effect in accordance with **Clause 11.10**.

11.7 On receipt of a notification pursuant to **Clause 11.6**, if the Access Beneficiary raised questions or indicated that it did not agree with matters, DB Cargo shall on or before 21 February provide the Access Beneficiary with a response in writing addressing any questions and confirming whether the matters disagreed with by the Access Beneficiary (if any) will be addressed in a revised FSC Proposal and provide such revised FSC Proposal to the Access Beneficiary.

11.8 If having considered the response provided pursuant to **Clause 11.7**, the Access Beneficiary still disagrees with DB Cargo's FSC Proposal, it shall on or before 1 March either confirm its acceptance of the FSC Proposal (whether revised or not) or escalate the matter for resolution in accordance with **Clause 11.11**. For the avoidance of doubt, in such circumstances, the disputed parts of the FSC Proposal shall not come into effect on commencement of the next relevant FSC Period in accordance with **Clause 11.10**, pending resolution in accordance with **Clause 11.11**, and if necessary there shall be a retrospective adjustment to reflect any determination or agreement reached following referral to dispute resolution in accordance with **Clause 11.11**.

11.9 If DB Cargo has not received any response from the Access Beneficiary to a revised FSC Proposal issued pursuant to **Clause 11.7**, before 5 p.m. on 1 March in the relevant current FSC Period, the Access Beneficiary shall be deemed to have accepted the FSC Proposal and the relevant adjustments to the Facility Service Charges shall take effect in accordance with **Clause 11.10**.

11.10 The revised Facility Service Charges settled pursuant to **Clauses 11.3 to 11.9**, shall replace those set out in **Schedule 3** on and from the start of the next relevant FSC Period (which, for the avoidance of doubt, shall not be before 1 April of the FSC Period).

11.11 If the parties fail to settle the revised Facility Service Charges for the relevant FSC Period (whether with regard to amount and/or structure), either party shall be entitled to refer the determination of the Facility Service Charges to adjudication in accordance with the Access Dispute Resolution Rules. DB Cargo shall notify ORR of the revised Facility Service Charges within twenty (20) Working Days of them being agreed or determined.

## 12. CANCELLATION CHARGES

12.1 If the Access Beneficiary decides that it no longer requires Facility Services and/or Ad Hoc Services, the Access Beneficiary must notify DB Cargo via the BARS or (if this is not possible) e-mail to [DBCUK.Accessrequest@deutschebahn.com](mailto:DBCUK.Accessrequest@deutschebahn.com) or to the Duty Manager using the contact details set out in **Schedule 1**, and the remaining provisions of this **Clause 12** shall apply.

12.2 If DB Cargo receives the notice referred to in **Clause 12.1**:

12.2.1 ten (10) days or more before the date of the relevant Facility Services and/or Ad Hoc Use, then it shall cancel such Facility Services and/or Ad Hoc Use and the Access Beneficiary shall, subject to Clause 12.4, be liable to pay a Cancellation Fee which reflects (without limitation) the committed costs associated with DB Cargo having processed the relevant request; or

12.2.2 fewer than ten (10) days before the date of the relevant Facility Services and/or Ad Hoc Use, then it shall cancel such Facility Services and/or Ad Hoc Use and the Access Beneficiary shall, subject to Clause 12.4, be liable to pay a Cancellation Fee which reflects (without limitation) the costs committed in anticipation of fulfilling the relevant request including management time in organising the relevant Facility Services and/or Ad Hoc Use, reservation and deployment of any relevant personnel and equipment at the relevant Service Facility, purchase of materials and DB Cargo's allowance for a reasonable profit.

12.3 If the Access Beneficiary does not provide notice to DB Cargo as referred to in **Clause 12.1** and does not make use of the Facility Services and/or Ad Hoc Use granted by DB Cargo then the Access Beneficiary shall be liable for the full Facility Service Charge.

12.4 For the avoidance of doubt, a Cancellation Fee shall not be more than the relevant Facility Service Charge that would otherwise have been payable for the relevant Facility Services and/or Ad Hoc Use.





### **13. INDEMNITIES AND LIMITATION OF LIABILITY**

#### **13.1 DB Cargo indemnity**

DB Cargo shall (on an after tax basis) indemnify the Access Beneficiary, and keep it indemnified, against all damage, losses, claims, proceedings, demands, liabilities, costs, damages, orders and out of pocket expenses (including costs reasonably incurred in investigating or defending any claim, proceedings, demand or order and any expenses reasonably incurred in preventing, avoiding or mitigating loss, liability or damage) incurred or suffered by it as a result of any breach by DB Cargo of any of its obligations under this Contract.

#### **13.2 The Access Beneficiary indemnity**

The Access Beneficiary shall (on an after tax basis) indemnify DB Cargo, and keep it indemnified, against all damage, losses, claims, proceedings, demands, liabilities, costs, damages, orders and out of pocket expenses (including costs reasonably incurred in investigating or defending any claim, proceedings, demand or order and any expenses reasonably incurred in preventing, avoiding or mitigating loss, liability or damage) incurred or suffered by it as a result of any breach by the Access Beneficiary of any of its obligations under this Contract.

#### **13.3 Mitigation**

A party wishing to claim under any indemnity provided for in this Contract shall take all reasonable steps to prevent, mitigate and restrict the circumstances giving rise to that claim and any losses connected with that claim.

#### **13.4 Limitations and exclusions on liability**

13.4.1 Subject to **Clauses 13.3** and **13.5 to 13.8** (inclusive) and except as expressly provided in **Clauses 7.1, 13.1** and **13.2**:

- (a) neither party shall have any liability (including liability arising as a result of any negligence, breach of contract or breach of statutory obligation) to the other in connection with the subject matter of this Contract; and
- (b) the remedies provided for in this Contract shall be the sole remedies available to the parties in respect of any matters for which such remedies are available.

13.5 Nothing in this Contract shall exclude or limit, or purport to exclude or limit:

13.5.1 any liability which either party would otherwise have to the other party, or any right which either party may have to rescind this Contract, in respect of any statement made fraudulently by the other party before the execution of this Contract;

13.5.2 any right which either party may have in respect of fraudulent concealment by the other party;

13.5.3 any right which either party may have in respect of a statement of the kind referred to in section 146 of the Act, whether or not proceedings have been instituted in that respect;

13.5.4 any liability which either party may have towards the other party for death or personal injury resulting from its negligence or the negligence of any party for whom it is vicariously liable; or

13.5.5 any other matter for which it is not permitted by law to exclude or limit or to attempt to exclude or limit its liability.

### 13.6 Liability Cap

13.6.1 A Liability Cap is applicable for each Contract Year and shall be an aggregate liability cap for all claims arising in that Contract Year.

13.6.2 The Liability Cap for the first Contract Year shall mean the sum of one (1) million pounds (£1,000,000).

13.6.3 On each anniversary of the Commencement Date, the aggregate Liability Cap shall be automatically increased in accordance with the relevant Adjustment Factor, and for the avoidance of doubt:

(a) no adjustment shall take place if the Adjustment Factor is a negative percentage and, if applied, would result in a reduction to the Liability Cap;

(b) the aggregate Liability Cap for each Contract Year shall always be equal to or greater than the sum specified in **Clause 13.6.2**; and

(c) to the extent that any part of a Liability Cap has not been allocated to claims arising in a Contract Year, that part of the Liability Cap shall not be available in any subsequent Contract Year.

13.6.4 For the purposes of determining the Liability Cap under **Clause 13.6.1**, the applicable Contract Year shall be the Contract Year in which the relevant incident, event or circumstance begins to occur.

**13.7 Exclusion of Environmental Damage**

The Liability Cap shall not limit the liabilities of the parties to one another in respect of Environmental Damage arising directly from their acts or omissions.

**13.8 Restriction on claims**

Save as otherwise expressly provided in this Contract, neither party may recover or seek to recover from the other party any amount in respect of any loss of revenue, loss of profits, goodwill, reputation or other consequential, indirect or special damages in connection with the subject matter of this Contract, which is or is alleged to be caused to it by the other party, save in respect of death or injury to persons or physical damage to property.

**14. SUSPENSION AND TERMINATION**

**14.1 Notification**

Each party shall promptly notify the other on becoming aware of the occurrence of an Event of Default.

**14.2 Suspension**

**14.2.1 Right to suspend**

Either party may serve a Suspension Notice on the other if an Event of Default has occurred and is continuing, provided the relevant Event of Default is reasonably capable of remedy.

**14.2.2 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 Access Beneficiary, reasonable restrictions imposed on the permission to use the Service Facility or any parts of it while the Suspension Notice is in force;

- (d) in the case of a Suspension Notice served on DB Cargo, details of any necessary suspension of the Train Services while the Suspension Notice is in force;
- (e) the steps reasonably required to remedy the Event of Default; and
- (f) a reasonable grace period for the defaulting party to remedy it (where the Event of Default is a failure by Access Beneficiary to pay any part of the Facility Service Charges or other amounts due under this Contract, five (5) Working Days shall be deemed the reasonable grace period).

#### 14.2.3 **Effect of a Suspension Notice served by DB Cargo**

Where DB Cargo has served a Suspension Notice on the Access Beneficiary:

- (a) the Access Beneficiary shall comply with any reasonable restrictions imposed on it by the Suspension Notice;
- (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 DB Cargo to the Access Beneficiary in accordance with **Clause 14.4**; and
- (c) service of the Suspension Notice shall not affect Access Beneficiary's continuing obligation to pay the Facility Service Charges.

#### 14.2.4 **Effect of a Suspension Notice served by the Access Beneficiary**

Where the Access Beneficiary has served a Suspension Notice on DB Cargo:

- (a) it shall have the effect of suspending the Access Beneficiary's permission to use the Service Facility to operate the Train Services to the extent specified in the Suspension Notice; and
- (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 the Access Beneficiary to DB Cargo in accordance with **Clause 14.4**.

14.3 The party served with a Suspension Notice shall, with all reasonable diligence, take such reasonable and necessary steps to remedy the Event of Default and keep the party which served the Suspension Notice fully informed of its progress.

14.4 Where a party served with a Suspension Notice has complied with its obligations under **Clause 14.3**, 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 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 written notice to the other party specifying the extent of the revocation and the date on which it is to have effect.

## 14.5 Termination

### 14.5.1 DB Cargo's right to terminate

- (a) DB Cargo may serve a Termination Notice on the Access Beneficiary:
  - (i) where, except during the period of a Suspension Notice relating to it, an Access Beneficiary Event of Default has occurred and is continuing;
  - (ii) where the Access Beneficiary fails to comply with any material restriction in a Suspension Notice provided that the relevant Access Beneficiary Event of Default is continuing; or
  - (iii) where DB Cargo is serving no less than three (3) months' prior notice of its intention to terminate this Contract.
- (b) Any Termination Notice served by DB Cargo under **Clause 14.5.1(a)** shall not take effect if the Access Beneficiary has, after the date of service of any Termination Notice and before the date of that notice taking effect, applied to the ORR under section 17 of the Act for directions to be given to DB Cargo to enter into an access contract which provides for the continued access by the Access Beneficiary to the Service Facility and for so long as that application shall not have been refused.

### 14.5.2 The Access Beneficiary's right to terminate

The Access Beneficiary may serve a Termination Notice on DB Cargo:

- (a) where, except during the period of a Suspension Notice relating to it, a DB Cargo Event of Default has occurred and is continuing;
- (b) where DB Cargo fails to comply with its obligations under **Clause 14.3**, provided that the relevant DB Cargo Event of Default is continuing; or
- (c) where the Access Beneficiary is serving no less than three (3) months' prior notice of its intention to terminate.

#### **14.6 Contents of Termination Notice**

A Termination Notice shall specify:

- 14.6.1 the nature of the relevant Event of Default or other matter entitling termination under **Clauses 14.5.1** or **14.5.2** as the case may be;
- 14.6.2 a date and time, which shall be reasonable in the circumstances, at which termination is to take effect; and
- 14.6.3 where the Event of Default is capable of remedy:
  - (a) the steps reasonably required to remedy the Event of Default; and
  - (b) a reasonable grace period within which such steps may be taken (and where the Event of Default is a failure by the Access Beneficiary to pay any part of the Facility Service Charges or other amounts due under this Contract, five (5) Working Days shall be a reasonable grace period).

#### **14.7 Effect of Termination Notice**

Where DB Cargo or the Access Beneficiary have served a Termination Notice on the other:

- 14.7.1 the service of the Termination Notice shall not affect the parties' continuing obligations under this Contract up to the date of termination;
- 14.7.2 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; and
- 14.7.3 this Contract shall terminate on the later of:
  - (a) the date and time specified in the Termination Notice for this Contract to terminate (or such later date and time as the party which served the Termination Notice notifies to the other before the date and time so specified); and
  - (b) the date on which a copy of the Termination Notice is given to ORR.

#### **14.8 Consequence of termination**

- 14.8.1 Immediately before, upon or following termination or expiry of this Contract, the Access Beneficiary shall comply or procure compliance with all reasonable directions

given by DB Cargo concerning the location and/or removal of the Specified Equipment and other things left on the Service Facility.

14.8.2 If the Access Beneficiary fails to comply with any directions given under **Clause 14.8.1**, DB Cargo shall be entitled to remove from the Service Facility any Specified Equipment and other things left on the Service Facility or to instruct a third party to do so and any reasonable costs incurred by DB Cargo in taking such steps shall be paid promptly by the Access Beneficiary.

14.8.3 DB Cargo shall provide such evidence of such costs as are referred to in **Clause 14.8.2** as the Access Beneficiary shall reasonably request.

## **15. FORCE MAJEURE**

15.1 Neither party shall be deemed to be in breach of this Contract or otherwise liable to the other for any failure or delay in performing its obligations under this Contract due to Force Majeure. If a party's performance of its obligations under this Contract is affected by Force Majeure:

15.1.1 it shall give notice to the other party, specifying the nature and extent of the Force Majeure, as soon as reasonably possible upon becoming aware of the Force Majeure and will at all times use reasonable endeavours to mitigate the severity of the Force Majeure;

15.1.2 the date for performance of such obligation shall be deemed suspended for a period equal to the delay caused by such Force Majeure and (if necessary) for a reasonable period after the event of Force Majeure has ceased; and

15.1.3 it shall not be entitled to payment from the other party in respect of extra costs and expenses incurred by virtue of the Force Majeure.

15.2 Failure or inability to pay any sum due under this Contract shall not be excused by any event of Force Majeure.

## **16. CONFIDENTIALITY AND PRIVACY**

16.1 Each party shall keep confidential the terms of this Contract and any and all Confidential Information that it may acquire in relation to the other party. Neither party shall use the other party's Confidential Information for any purpose other than to perform its obligations under this Contract. Each party shall ensure that its agents and employees comply with the provisions of this **Clause 16**.

- 16.2 The obligations on a party set out in **Clause 16.1** shall not apply to any Confidential Information which:
- 16.2.1 is publicly available or becomes publicly available through no act or omission of that party; or
  - 16.2.2 a party is required to disclose by law or by competent legal or regulatory authority (including for the avoidance of doubt pursuant to a court order, or where the disclosure is requested under lawful powers exercised by the ORR and/or Department for Transport);
  - 16.2.3 a party is to disclose to any officer or employee 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 Contract, upon obtaining an undertaking of strict confidentiality from such officer, employee or person;
  - 16.2.4 a party is to disclose to any insurer or insurance broker from whom such party is seeking insurance or in connection with the making of any claim under any policy of insurance, upon obtaining an undertaking of strict confidentiality from the insurer or insurance broker;
  - 16.2.5 a party is to disclose to any lender, security trustee, bank or other institution from whom such party is seeking or obtaining finance or credit support for such finance, or any advisers to any such entity, or any rating agency from whom such party is seeking a rating in connection with such finance or credit support, upon obtaining an undertaking of strict confidentiality from the entity, advisers or rating agency in question;
  - 16.2.6 to the extent strictly required by the Act, is contained in any licence under section 8 of the Act or regulation 6 of the Railway (Licensing of Railway Undertakings) Regulations 2005 held by the party in question, any other Applicable Law, the rules of any recognised stock exchange or regulatory body.
- 16.3 For the avoidance of doubt, in the event of any disclosure made under this **Clause 16**, the disclosing party shall, in advance, always notify the other party of such disclosure, as soon as reasonably practicable.



## **17. ASSIGNMENT AND SUB-CONTRACTING**

### **17.1 Assignment**

Neither party may assign, charge, transfer, novate or create any encumbrance or other security interest over the whole or any part of its rights and obligations under this Contract except to the extent approved by the ORR following consultation with the other party, and subject to the conditions (if any) of the ORR's approval.

### **17.2 Sub-contracting**

Either party may sub-contract the performance of any of its obligations under this Contract with the prior written agreement of the other party (such agreement not to be unreasonably withheld or delayed) without thereby relieving it of any such obligations to the other party.

## **18. GENERAL**

### **18.1 No waiver**

18.1.1 No waiver by either party of any breach or failure by the other to perform any obligation under this Contract shall be deemed a waiver of any other or subsequent breach or default, whether of a like or different character, and shall in no way affect the other terms of this Contract.

18.1.2 The failure to exercise or delay in exercising a right or remedy under this Contract 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 Contract shall prevent any further exercise of the right or remedy or the exercise of any other right or remedy.

### **18.2 Amendments**

#### **18.2.1 Process for amendment**

If either party proposes an amendment to this Contract (other than in respect of the matters dealt with by **Clause 8**, the Service Facility Operating Constraints Change Procedure or **Clause 11**), it shall notify the other party of the details of the proposed amendment and the Second Level Representatives of the parties shall meet within eight (8) Working Days of such notification to discuss the proposed amendment with a view to reaching agreement regarding it.



**18.2.2 Amendments to be in writing and to be approved**

No amendment of any provision of this Contract shall be effective unless:

- (a) such is expressly agreed by DB Cargo and such amendment is in writing and signed by, or on behalf of, the parties; and
- (b) if it is an amendment which:
  - (i) requires ORR approval under section 22 of the Act; or
  - (ii) is made under section 22A or 22C of the Act or schedule 4A to the Act,and the amendment has been so approved or directed by the ORR as applicable.

**18.2.3 Exception to Clause 18.2.2**

**Clause 18.2.2** does not apply to the following amendments:

- (a) an amendment made by virtue of a general approval issued by the ORR under section 22 of the Act; and
- (b) an amendment made by virtue of the Service Facility Operating Constraints Change Procedure.

**18.2.4 Conformed copy of this Contract**

DB Cargo shall produce and send to the Access Beneficiary and to the ORR a conformed copy of this Contract within twenty (20) Working Days of the making of any amendment to it.

**18.3 Entire Agreement**

This Contract (including the Service Facility Operating Constraints Change Procedure) contains the entire agreement between the parties in relation to the subject matter of this Contract and each party warrants that it has not been induced to enter into this Contract in reliance upon, nor has it been given, any warranty, representation, misrepresentation (if established), statement, agreement or undertaking of any nature whatsoever other than as expressly set out in this Contract and, to the extent that this is not the case, the relevant party unconditionally and irrevocably waives any claims, rights or remedies which it might otherwise have had in relation to any such matter. Nothing in this **Clause 18.3** shall exclude or restrict any liability which a party would otherwise have to the other in respect of any statements, promises or representations made fraudulently by that party.

## 18.4 Notices

### 18.4.1 Giving of notices

Any notice to be given under this Contract 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 prepaid first class post or e-mail to, the relevant address or e-mail address set out in **Schedule 1**.

### 18.4.2 Right to modify contact details

A party shall be entitled to modify in any respect the details which relate to it and which are set out in **Schedule 1** by giving notice of such modification: (i) to the other party as soon as reasonably practicable; and (ii) to ORR within ten (10) Working Days of such modification.

### 18.4.3 Deemed receipt

A notice shall be deemed to have been given and received:

- (a) if delivered by hand or by recorded delivery, at the time the notice is left at the address;
- (b) if sent by prepaid first-class post or other next working day delivery service, 09:00am on the third Working Day after posting unless otherwise proven; or
- (c) if sent by e-mail (subject to confirmation of opening the e-mail by return of a read receipt), at the time of transmission.

### 18.4.4 Further recipients

If **Schedule 1** specifies any person to whom copies of notices shall also be sent, the party giving a notice in the manner required by this **Clause 18.4** shall send a copy of the notice to such person at the address for sending 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 under this **Clause 18.4**, and such copy notice shall be sent immediately after the original notice.

## 18.5 Counterparts

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

## 18.6 Survival

Those provisions of this Contract which by their nature or implication are required to survive expiry or termination of this Contract (including the provisions of **Clauses 10 (Facility Service Charges And Payment Terms)**, **13 (Indemnities and Limitation of Liability)**, **14.8 (Consequence of termination)**, **15 (Force Majeure)**, **16 (Confidentiality And Privacy)** and **18.10 (Governing Law)** shall so survive and continue in full force and effect, together with any other provisions of this Contract necessary to give effect to such provisions.

## 18.7 Contracts (Rights of Third Parties) Act 1999

### 18.7.1 Application to third parties

Save as provided in this **Clause 18.7**, or as expressly provided elsewhere in this Contract, no person who is not a party to this Contract shall have any right under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Contract.

### 18.7.2 Application to ORR

The ORR shall have the right under the Contracts (Rights of Third Parties) Act 1999 to enforce directly such rights as have been granted to it under this Contract.

## 18.8 Severance

18.8.1 If at any time any clause or part of this Contract is found by any court, tribunal or administrative body of competent jurisdiction to be wholly or partly illegal, invalid or unenforceable in any respect, that shall not affect or impair the legality, validity or enforceability of any other provision of this Contract.

18.8.2 If any illegal, invalid or unenforceable provision of this Contract or any part of this Contract would be legal, valid and enforceable if some part of it was deleted or amended, the parties shall negotiate in good faith in order to agree the terms of a mutually satisfactory provision, achieving as nearly as possible the same commercial effect, to be substituted for the clause or part of this Contract, which is found to be illegal, invalid or unenforceable.

## 18.9 Dispute Resolution

18.9.1 All disputes or matters in difference between the parties of whatever nature arising out of or in connection with this Contract ("**Disputes**") shall, except when otherwise expressly provided in this Contract, be resolved in accordance with the terms of this **Clause 18.9**.

- 18.9.2 Any Dispute shall be notified by either party to the other promptly and then, in the first instance, be the subject of a meeting between the parties. This meeting shall be held as soon as practicable after notification of a Dispute (and, in any event, within five (5) Working Days of such notification being received). Each party agrees to procure that the First Level Representatives shall attend a meeting called in accordance with this **Clause 18.9.2**, and those representatives of the parties attending the meeting shall, acting in good faith, use all reasonable endeavours to resolve the Dispute.
- 18.9.3 If the Dispute cannot be resolved at the meeting, it shall be referred by the parties to the Second Level Representatives who shall co-operate in good faith to resolve the Dispute as amicably as possible within five (5) Working Days of its referral (or such longer period as the parties may agree).
- 18.9.4 Any Disputes not resolved under **Clause 18.9.3** may be referred by either party in accordance with the Access Dispute Resolution Rules.
- 18.9.5 Each party shall bear its own costs in relation to the proceedings described in **Clause 18.9.4**.

#### **18.10 Governing Law**

This Contract and any non-contractual obligations arising under or in connection with it shall be governed by English law.

**IN WITNESS** whereof this Contract has been duly executed.



Signed for and on behalf of

**[DB CARGO (UK) LIMITED]**

**OR**

**[DB CARGO INTERNATIONAL LIMITED]**

Signed for and on behalf of

the **ACCESS BENEFICIARY**

Name:

Position:

Date:

Name:

Position:

Date:



SCHEDULE 1

CONTRACT PARTICULARS and CONTACT DETAILS

1. Contract Particulars

a. Facility owner:

Registered company name: [DB Cargo (UK) Limited] OR [DB Cargo International Limited].

Registered office and address for service of notices by post in accordance with **Clause 18.4**:  
Lakeside Business Park, Carolina Way, Doncaster, South Yorkshire, DN4 5PN.

Registered number: [2938988] OR [3232475].

b. Beneficiary:

Registered company name: [COMPANY].

Registered office and address for service of Notices by post in accordance with **Clause 18.4**:  
[ADDRESS].

Registered number: [NUMBER].

c. Service Facility:

The Service Facility as listed below.

[List Service Facility by name and [Property reference].]

2. Contact Details (General)

	DB Cargo:	Access Beneficiary:
<b>Notices</b>	Marked for the attention of the <b>Company Secretary</b> . And copied to the attention of the <b>Head of Product Management</b> . At DB Cargo's registered office (see above).	Marked for the attention of [NAME] [Address] [Contact Details]
<b>Operational or safety-related matters</b>	Marked for the attention of the Duty Control Manager. Telephone/Mobile: 01302 575047. e-mail: DutyProductionManager@Deutschebahn.com And copied to the attention of: [relevant local SDM/SAM/RSM or multiples thereof, listed by site].	[XX]



	e-mail: [xx]. Mobile: [xx].	
<b>Matters of a financial nature:</b>	Marked for the attention of the <b>National Accounts Receivable</b> . Telephone: 01302 575729. e-mail: [XX].	[XX]
<b>Matters of a general commercial or contractual nature:</b>	Marked for the attention of: <b>Product Manager: Facilities Access</b> Telephone: 01302 575760. e-mail: .	[XX]

**3. Contact Details for Disputes:**

	<b>DB Cargo:</b>	<b>Access Beneficiary:</b>
<b>First Level Representative:</b>	Product Manager (Facility Access).	[Position]
<b>Second Level Representative:</b>	Regulatory Specialist.	[Position]



**SCHEDULE 2**  
**SPECIFICATION**

**1. Contracted use**

- 1.1. Service Facility: [insert name and reference of Service Facility] – See Appendix 1 to this Schedule 2
- 1.2. [Service Facility: [insert name and reference of Service Facility] – See Appendix 2 to this Schedule 2
- 1.3. Service Facility: [insert name and reference of Service Facility] – See Appendix 3 to this Schedule 2
- 1.4. etc.]

**2. Service Facility Capability and Characteristics:**

**2.1. Service Facility Operating Constraints**

The Service Facility capabilities are available on request/ on the company website at: <https://uk.dbcargo.com/rail-uk-en/services/locations-and-access>.

Further details of the Service Facility Operating Constraints are specified in the relevant DB Cargo Safe System of Work and any relevant instructions, as amended from time to time, or otherwise provided to the Access Beneficiary by DB Cargo periodically.

**2.2. Exchange Point for the Specified Equipment**

The relevant boundary between the Network or other superior network and the Service Facility, as depicted on the Plan(s).

**3 Miscellaneous**

DB Cargo shall:

- (a) maintain records of all Facility Services provided and make such records available to the Access Beneficiary upon reasonable request;
- (b) having carried out any Facility Service, present Specified Equipment for further relevant Facility Service(s) in compliance with the Specification;
- (c) be under no obligation to carry out any Facility Service in respect of any Specified Equipment if:
  - (i) the Access Beneficiary has failed to comply with the standard of performance under **Clause 4** and/or its obligations under **Clause 6** in respect of such Specified Equipment; or
  - (ii) in the reasonable opinion of DB Cargo the mechanical condition of the Specified Equipment would render it unsafe to do so.





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## APPENDIX 1 TO SCHEDULE 2

**SERVICE FACILITY** [insert name and reference of Service Facility]

**Train Service(s):** [Insert here head code, origin and departure time, days run, destination, times at Service Facility, Loco class, maximum train length (in metres) and Route Availability, wagon type(s)]

**Dangerous Goods Category and/or Commodity:** [Insert for each Train Service as appropriate or state N/A]

**Facility Service(s):** [Insert details/state N/A applicable or delete options entirely if not required.]

- 1.1. Access: Yes      Number of events per [day/week/4-weekly period]
- 1.2. Ground staff: Yes/No      Purpose: [PIC/Shunting/Train Exam/Other] Ground staff: Yes/No      Purpose: [PIC/Shunting/Train Exam/Other]
- 1.3. Coverage: [Times & Days/Hours/shifts/N/A]
- 1.4. Specified Equipment: [Describe class/nature of relevant vehicles.]
- 1.5. Stabling: Requirement [Rolling Stock type/length, times & days]
- 1.6. Total Operations Processing System reporting: Yes/No
- 1.7. PNB Facilities: Yes/No
- 1.8. Road vehicle parking:
  - (a) Operational (light vans or cars)      Yes/No



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(b) Terminal (HGVs) Yes/No (for collection or delivery of goods only)

1.9. Train loading/unloading:

(a) Terminal staffing Yes/No Activity: [insert details]

(b) Commodity [Insert details including whether Dangerous Goods]

(c) Storage of goods: Yes/No [Number/size (m<sup>3</sup>)/other requirements]

1.10. Other Facility Services: [Specify]



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**APPENDIX 2 TO SCHEDULE 2**

**SERVICE FACILITY: [insert name and reference of Service Facility]**

**[To complete as for Appendix 1 and add further appendices as required]**

### SCHEDULE 3

#### FACILITY SERVICE CHARGES

#### 1. Facility Service Charges

1.1 The Facility Service Charge(s) is/are the sum of:

- (a) the charges for the Facility Service(s) identified in Schedule 2 as set out in **paragraphs 2 and 3** below; and
- (b) charges for any Ad Hoc Use levied in accordance with **paragraph 4** below; and
- (c) any contribution to the cost of a Service Facility Operating Constraints Change notified to the Access Beneficiary by DB Cargo pursuant to paragraph 4.1 of the Service Facility Operating Constraints Change Procedure

1.2 DB Cargo will not levy a Facility Service Charge in respect of Ancillary Movements.

1.3 Facility Service Charges for Facility Services identified in **Schedule 2** are set out in paragraphs 2 and 3 below.

#### 2. Access only (per Service Facility)

- 2.1. [Name of Service Facility] : £[xxx.xx]
- 2.2. [Name of Service Facility] : £[xxx.xx]
- 2.3. [Name of Service Facility] : £[xxx.xx]

#### 3. Facility Services

- 3.1. Ground staff (per hour) : £[xxx.xx]
- 3.2. Stabling (per "metre"/hour) : £[xxx.xx]
- 3.3. TOPS Reporting (per event) : £[xxx.xx]
- 3.4. PNB Facilities [unit to be determined] : £[xxx.xx]
- 3.5. Staff car parking (per standard space / day) : £[xxx.xx]
- 3.6. Train loading / unloading : £[xxx.xx]

#### 4. Ad Hoc Use

- 4.1. DB Cargo will apply the rates from time to time advertised at <https://uk.dbcargo.com/rail-uk-en/services/locations-and-access> to any Ad Hoc Use



granted under this Contract. Applicable rates at the time of signature of the Contract are appended to the Contract.

- 4.2. Rates for Ad Hoc Use are subject to change in accordance with the principle set out in **Clause 11.1** above and any such changes will be advised on the website referred to in **paragraph 4.1** above.