



Mumbai Port Trust



Volume- 2
Draft Concession Agreement (DCA)

For

**JNPT- Mumbai Port Barge/ Ship Operations to Reduce
City Congestion and Create Value for Trade**

January 2019

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TRIPARTITE CONCESSION AGREEMENT

AMONGST

MUMBAI PORT TRUST
(THE AUTHORITY)

AND

JAWAHARLAL NEHRU PORT TRUST
(THE CONFIRMING PARTY)

AND

(THE CONCESSIONAIRE)

FOR

JNPT- MbPT BARGE/ SHIP OPERATIONS TO REDUCE CITY CONGESTION AND
CREATE VALUE FOR TRADE

DATED

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CONCESSION AGREEMENT

THIS CONCESSION AGREEMENT is made at _____ on this the ____ day of ____

AMONGST

- 1. BOARD OF TRUSTEES OF PORT OF MUMBAI**, established under the Major Ports Trust Act, 1963 (“Act”) having its administrative office at “Port House”, Shoorji Vallabhdas Road, Ballard Estate, Mumbai – 400001 (hereinafter referred to as the “**CONCESSIONING AUTHORITY/ AUTHORITY/ MbPT**”, which expression shall unless repugnant to the context or meaning thereof, include its successors and permitted assigns);

AND

- 2. JAWAHARLAL NEHRU PORT TRUST (JNPT)**, established under the Major Ports Trust Act, 1963 (“Act”) having its administrative office at “Jawaharlal Nehru Port Trust”, 1107, Raheja Centre, FPJ Marg, Nariman Point, Mumbai- 400021 (hereinafter referred to as the “**CONFIRMING PARTY/ JNPT**” (which term(s) or expression(s) shall unless excluded by or repugnant to the subject and/or context mean and include its respective successors and permitted assigns).

AND

- 3. _____ LIMITED**, a company registered under the Companies Act, 1956, and having its registered office at _____ hereinafter referred to as the “**CONCESSIONAIRE**”(which expression shall, unless repugnant to the context or meaning thereof, include its successors and permitted assigns).

WHEREAS:

- The Authority is desirous of implementing a Project (as defined hereinafter) for facilitating movement of custom cleared containers from JN Port to MbPT on barges/ships to reduce city congestion and environmental pollution and to create value for trade wherein the Concessionaire shall undertake to operate and maintain barge/ship movement between JN Port to MbPT and may also construct warehouse for the storage of such containers and/or goods;
- On or about _____, the Authority, in order to carry out the Project, proposed the Confirming Party to act as the Project Facilitator vide Official Memo No. _____ dated _____ and subsequently the Confirming Party acknowledged the same and agreed to act as the Project Facilitator vide Official Memo No. _____ dated _____ and in accordance with the terms and conditions of this Concession Agreement.
- On or about _____, the Authority invited applications from the interested parties in accordance with the Request for Proposal (as defined hereinafter), to bid for the Project;

- D.** In response to the invitation, the Authority received bids from various parties including the Bid dated _____ submitted by the Concessionaire in accordance with the Request for Proposal;
- E.** The Authority, after evaluating all the Bids received by it from the shortlisted bidders, accepted the proposal submitted by the Concessionaire and communicated its acceptance to the Concessionaire vide Letter of Intent for Award of Concession dated _____.
- F.** Following the issue of the Letter of Intent for Award of Concession, the Authority, in confirmation with the Confirming Party has agreed to grant the Concession to the Concessionaire to implement the Project on the terms, conditions and covenants hereinafter set forth in this Concession.

NOW, THIS CONCESSION WITNESSETH AS FOLLOWS:

1. ARTICLE 1: DEFINITIONS AND INTERPRETATION

1.1 Definitions

In this Concession, unless the context otherwise requires the following terms shall have the following meanings assigned/ascribed thereto: -

“**Additional Auditor**” has the meaning ascribed to it in Article 9.5.

“**Additional Cost**” means the additional capital expenditure which the Concessionaire has or would be required to incur and which has arisen as a result of Change in Law.

“**Affiliate**” means, with respect to any Party and/or with respect to the Applicant and/or with respect to any member of Consortium, any other Person directly or indirectly controlling, controlled by or under common control with such Party, Applicant and/or member of Consortium. For the purposes of this definition, the term “control” (including with correlative meaning, the terms “controlled by” and “under common control with”) as applied to any Party or Applicant or a member of Consortium, means the possession, directly or indirectly, of the power to direct or cause the direction of the management of that Party or Applicant or a member of Consortium whether through ownership of 50 (fifty) % or more of the voting securities, by concession, or otherwise.

“**Agreement**” means this agreement as of date hereof, including Appendices 1 through 20 as may be amended, supplemented or modified in accordance with the provisions hereof.

“**Appendix**” means the schedules, supplements or documents, appended to this Concession.

“**Applicable Laws**” means all laws in force and effect as of the date hereof and which may be promulgated or brought into force and effect hereinafter in India, including statutes, rules, regulations, directions, bye-laws, notifications, ordinances and judgments having force of law, or any final interpretation by a Court of Law having jurisdiction over the matter in question as may be in force and effect during the subsistence of this Concession.

“**Applicable Permits**” means any and all permissions, clearances, licenses, authorizations, consents, no-objections, approvals and exemptions under or pursuant to any of the Applicable Laws or from any Government Authority required in connection with the Project and for undertaking, performing or discharging the obligations contemplated by this Concession or any other Transaction Document.

“**Applicable Tariff Guideline**” shall have the same meaning ascribed to it in Article 8.1.

“**Applicant**” means [*]._

“**Bid**” means the proposal and the entire set of documents submitted by the Applicant and/or the Consortium in response to the RFP.

“**Bid Security**” means the bank guarantee [●] dated [●] furnished by the Applicant/Consortium along with its Bid.

“**Board**” means the Board of Trustees for the Mumbai Port Trust for all intents and purposes unless the context suggests otherwise.

“**Book Value**” means the aggregate written down value as on the date of issue of the Termination Notice in the books of the Concessionaire of (i) the tangible assets (including capital works in progress) forming part of, fixed or attached to the ground, created, installed or provided by the Concessionaire and comprised in Project Facilities and Services, and (ii) the moveable assets including cargo handling equipment belonging to the Concessionaire, in accordance with Indian Accounting Standards using depreciation rates as set forth in the (Indian) Companies Act, 2013, as applicable from time to time.

“**Change in Law**” shall have the meaning set out under Article 13.1 of this Concession.

“**Change of Scope**” shall have the meaning assigned to it under Article 6.8(a).

“**Change of Scope Notice**” shall have the meaning assigned to it under Article 6.8(b).

“**Commercial Operation**” shall mean the commercial exploitation of the Project Site made available by the Concessions Authority and the Confirming Party, which shall include the operation and maintenance of the Commercial Operation Assets by way of barge/ship movement and warehousing.

“**Commercial Operation Area**” shall mean the area defined by Authority and the Confirming Party in Appendix – I of this agreement at the Project Site (i.e. at Mumbai port and JN port respectively).

“**Commercial Operation Assets**” shall mean all the immoveable and moveable assets constructed, developed, installed, located, created or provided by the Concessionaire at the Project Site including the common facilities and amenities appertaining thereto including structures and/or warehouses for the purpose of Commercial Operation at the Commercial Operation Area and shall also include the Port’s Assets.

“**Completion Certificate**” shall have the meaning assigned to it under Article 6.3.

“**Concession**” means the Concession granted by the Concessions Authority to the Concessionaire in accordance with the provisions of Article 2.1 of this Concession for implementing the Project and providing Project Facilities and Services.

“**Concessions Authority/Confirming Party Event of Default**” shall have the meaning as set out under Article 15.1 (b).

“**Concessionaire Event of Default**” shall have the meaning as set out under Article 15.1 (a).

“**Concession Period**” means the period of the Concession specified in Article 2.2 of this Concession.

“**Conditions Precedent**” shall mean the conditions prescribed in Article 3 of this Concession.

“**Consortium**” means the consortium consisting of (i) XXXX, (ii) YYYY, and (iii) ZZZZ formed, to implement the Project.

“**Construction Phase**” means the period commencing from the date of handing over of the additional plot of land at J-Plot to the date of issue of Completion Certificate.

“**Construction Works**” means all works, equipment and things necessary to complete the Project and provide the Project Facilities and Services in accordance with this Concession.

“**Construction Standards**” means the construction standards set out in the annexure to Appendix 4.

“**Consultation Notice**” has the meaning ascribed to it in Article 15.3.

“**Contractor**” means the person with whom the Concessionaire has entered into/may enter into a contract relating to the execution of any works and /or operation and maintenance of the Project Facilities and Services, including the Management Contractor.

“**Consortium**” means the consortium/Joint venture consisting of (i) XXXX, (ii) YYYY, and (iii) ZZZZ i.e. formed, to implement the Project.

“**Date of Commercial Operation or Commercial Operation Date (COD)**” means the date on which the Condition Precedent have been satisfied in accordance with Article 3 and shall be deemed to be the date of commencement of the Concession Period.

“**Day**” means the 24 (twenty four) hour period beginning and ending at 12:00 midnight Indian Standard Time.

“**Debt Due**” means the aggregate of the following sums representing the amounts advanced by the Senior Lenders towards Total Project Cost, expressed in Indian rupees as may be outstanding and payable to the Senior Lenders under the Financing Documents on the Transfer Date:

(a) the principal amount of the debt including any subordinated debt provided by the Senior Lenders under the Financing Documents for financing the Project (“**the Principal**”) but excluding (i) working capital loans; (ii) any part of the Principal that had fallen due for repayment six months prior to the Transfer Date, if the Transfer Date is related to expiry of the Concession Period or any part of the Principal that had fallen due before the Termination Notice, if the Transfer Date is related to termination prior to the expiry of the Concession Period; and (iii) any debt that has been rescheduled or refinanced, unless such repayment had been rescheduled or refinancing made with the prior consent of Concessioning Authority; and

(b) all accrued interest, financing fees and charges payable on or in respect of the debt referred to in sub-clause (a) above up-to the Transfer Date but excluding (i) any interest, fees or charges that had fallen due six months prior to the Transfer Date, and (ii) penal interest or charges, payable under the Financing Documents to any Senior Lender.

“Designs and Drawings” means the designs and drawings, and other technical information submitted by the Concessionaire from time to time and reviewed by the Independent Engineer in accordance with the provisions of this Concession.

“Encumbrance” means any encumbrance such as mortgage, charge, pledge, lien, hypothecation, security interest, assignment, privilege or priority of any kind having the effect of security or other such obligations and shall include without limitation any designation of loss payees or beneficiaries or any similar arrangement under any insurance policy pertaining to the Project, physical encumbrances and encroachments on the Project Site/Port’s Assets/Project Facilities and Services.

“EPC Contract” means the contract entered into by the Concessionaire with one or more Contractors inter-alia for the purpose of design, engineering, procurement of equipment and materials (including by import thereof) and construction of the Project in accordance with the provisions of this Agreement.

“Environmental Law” means any statute, rule, regulation, ordinance, code, guideline or policy having the force of law, in each case, applicable to the Project now or hereafter in effect and any applicable judicial or administrative interpretation, pronouncement, order, decree or judgment, relating to the environment, health and safety.

“Equity” means the paid up share capital of the Concessionaire representing the equity component of the Total Project Cost, as capitalized in the books of the Concessionaire and duly certified by the Statutory Auditors.

“Equity IRR” means the internal rate of return on equity investment of the project based on projected/actual cash flows during the Concession Period.

“Escrow Account” shall have the meaning assigned to it under Article 9.6.

“Escrow Agreement” means the agreement to be executed *inter alia* between the Concessionaire, the Concessioneing Authority and the Senior Lenders/Senior Lenders representative substantially in the format set out in Appendix 16 hereto.

“Estimated Project Cost” means the sum of Rs. 65,00,00,000/- (Rupees Sixty Five Crore only) being the cost of the Project as estimated by the Concessioneing Authority and disclosed in the Request for Proposal.

“Event of Default” shall have the meaning assigned to it under Article 15.1.

“Expert” means any person, body or organization of repute with recognized technical/ professional expertise in respect of any field, matter or subject relevant for the purpose of this Agreement.

“Financial Assistance” means all funded and non-funded credit assistance including but not limited to loans, advances, lease assistance and guarantees required for the Project.

“Financial Close” means the date on which the Financing Documents providing for Financial Assistance by the Senior Lenders, Equity Documents and the documents in respect of debt, if any, committed by the Applicant/Consortium have become effective and the Concessionaire has access to such Financial Assistance.

“Financial Year” means a period of twelve month period commencing from 1st April and ending on 31st March.

“Financing Documents” means, collectively, the documents executed in favour of or entered into with the Senior Lenders, by the Concessionaire in respect of the Financial Assistance relating to the financing (including any re-financing) of the Total Project Cost and includes any document providing security for the Financial Assistance.

“Financing Plan” means the base case financial model adopted by Concessionaire with the approval of the **Senior** Lenders and approved by the Concessions Authority in accordance with Article 3.1(a) (viii) , setting forth the capital and operating cost of the Project and revenues therefrom on the basis of which financial viability of the Project has been determined by the **Senior** lenders, and includes a detailed description of the assumptions and parameters used for making calculation and projections therein including inter alia the Estimated Project Cost, License Fee and Royalty payable to the Concessions Authority annual estimated revenue, equity contribution, cargo handling projections estimated by Concessionaire, discounted net present value of the cash flows, Equity IRR, debt equity ratio and debt service coverage ratio, as set out in Appendix 17.

“Force Majeure Event” shall have the meaning ascribed to it in Article 14.1 of this Agreement.

“GOI” means the Government of India.

“Good Industry Practice” means the exercise of that degree of skill, diligence and prudence and those practices, methods, specifications and standards of equipment, safety and performance, as may change from time to time and which would reasonably and ordinarily be expected to be used by a skilled and experienced concessionaire engaged in operation and maintenance of facilities, equipment or systems of the type and size similar to the Project Facilities and Services.

“Government Authority” means GOI, any state government or any governmental department, commission, board, body, bureau, agency, authority, instrumentality, administrative body, at central, state, or local level, having jurisdiction over the Concessionaire, the Port’s Assets, the Project Facilities and Services or any portion thereof, but shall not include the Authority and/or the Confirming Party.

“Independent Engineer” means a Person appointed in accordance with Article 5.1 for supervision and monitoring of compliance by the Concessionaire with the Scope of Work in relation to the construction of warehouse in the additional plot of land of ~10,000 sq.m., more particularly to undertake, perform, carry out the duties, responsibilities, services and activities set forth in Appendix 7.

“Indian Accounting Standards” means the Indian accounting standards issued by the Institute of Chartered Accountants of India.

“Indian Ports Association” means the Apex body of Major Ports of India registered under Societies Registration Act.

“Insurance Cover” shall have the meaning ascribed to it in Article 12.1(c).

“License Fee” shall have the meaning assigned to it under Article 9.1(a).

“License Rights” shall mean the License hold rights for Commercial Operation, granted by the Authority in confirmation with the Confirming Party to the Concessionaire for carrying out activities in accordance with the provisions of this Agreement.

“Management Control” means the possession, directly or indirectly of the power to direct or cause the direction of the management and policies of the Concessionaire, whether through the ownership of voting securities, by contract or otherwise or the power to elect or appoint more than 50% (fifty percent) of the directors, managers, partners or other individuals exercising similar authority with respect to the Concessionaire.

“Material Adverse Effect” means significant adverse effect of any act or event on the ability of either Party to perform any of its rights or perform/discharge any of their duties/obligations under and in accordance with the provisions of this Concession and which act or event causes a material financial burden or loss to either Party.

“Milestone Dates” means the dates for completion of specified Project activities as contained in the Project Schedule.

“Minimum Guaranteed Throughput” shall have the meaning ascribed to it in Article 7.1(A) (xiii).

“Month” means the calendar month as per the Gregorian calendar.

“MPT Act” means The Major Port Trusts Act, 1963 as amended, supplemented, re-enacted or replaced from time to time.

“Non-Political Event” means the Force Majeure Events set out in Article 14.2.

“Operations Phase” means the period from the Date of Commercial Operation to the expiry/termination of the Concession Period.

“Operations and Maintenance Standards” means the minimum standards of operations and maintenance with regards the Project Facilities and Services.

“Other Events” means the Force Majeure Events set out in Article 14.4.

“Party” means either the Authority or the Concessionaire or the Confirming Party as the context may require or admit and **“Parties”** means the Authority, the Confirming Party and the Concessionaire.

“Performance Guarantee” shall mean the bank guarantee(s) procured by the Concessionaire for the benefit of the Authority guaranteeing the performance of the obligations of the Concessionaire hereunder in the manner specified in Article 4.1.

“Performance Standards” means the minimum standards of performance set out in Appendix 15 with regards the Project Facilities and Services.

“Person” means any individual, company, corporation, partnership, joint venture, trust, unincorporated organization, government or governmental authority or agency or any other legal entity including Limited Liability Partnership Firm and HUF.

“Political Event” means the Force Majeure Events set out in Article 14.3.

“Port’s Assets” means the assets set out in Appendix 1, belonging to the Authority and the Confirming Party.

“Port Limits” means Territorial Jurisdiction of Mumbai Port Trust as well as Jawaharlal Nehru Port Trust.

“Project” means the JNPT- MbPT barge/ ship operations to reduce city congestion and create value for trade.

“Project Capacity” means the capacity of the Project Facilities and Services to handle ~55,000 TEUs per annum.

“Project Facilities and Services” means the facilities and services as set out under the Scope of Work, to be provided by the Concessionaire during the Concession Period, in accordance with this Agreement.

“Project Schedule” means the Appendix 5 hereto.

“Project Site” means assets comprised therein on which the Concessionaire is authorized to operate the Project Facilities and Services as set forth in this Agreement. This shall also include additional land, utilities and services allowed by Port in terms of Article 6 wherever applicable.

“Provisional Certificate” shall have the meaning assigned to it under Article 6.7(d) .

“Punch List” shall have the meaning assigned to it under Article 6.7 (d) .

“Quarter” means a period of 3 (three) Months.

“Remedial Period” has the meaning ascribed to it in Article 15.4.

“Request for Proposal” or “RFP” means the Request for Proposal dated [●] issued by the Authority to the applicants shortlisted pursuant to the Request for Qualification and includes any addendum / clarifications issued in respect thereof by the Authority.

“Requisition” has the meaning ascribed to it in Article 16.3.

“Royalty” means the revenue share payable by the Concessionaire to the Concessioneing Authority, pursuant to Article 9.2 hereof.

“Safety Standards” means the minimum standards of safety set out in the annexure to Appendix 4 with regards the Project/Project Facilities and Services.

“Scale of Rates” means the scale of rates along with the statement of conditions with respect thereto framed and notified by TAMP or such other competent authority under the provisions of MPT Act, as applicable.

“Scheduled Project Completion Date” means [●]¹.

“Scope of Work” means the minimum requirements as to the operation and maintenance of the Project and provision of Project Facilities and Services.

“Selectee” has the meaning ascribed to it in Article 15.4(b).

“Senior lenders” means the financial institutions, multilateral lending agencies, trusts, banks, funds and agents of trustees of debentures, including their successors and assignees, who have agreed to guarantee or provide finance to the concessionaire under any of the Financing Agreements for meeting all or any part of the Total Project Cost and who hold pari-passu charge on the assets, rights, title and interests of the Concessionaire.

¹ The date would be fixed depending on the Project and in case of phase wise project development be linked to expected completion of the first phase of development.

“Special Audit” shall have the meaning assigned to it under Article 9.5.

“Statutory Auditors” means a firm of chartered accountants appointed in terms of Section 224 of the Companies Act, 1956 and acting as the statutory auditors of the Concessionaire.

“Stressed Project” means the Project reaching a situation in which either Party is unable to perform/ discharge its obligations under this Agreement due to reasons beyond its control or due to certain unanticipated conditions.

“Sub-License” shall mean only the sub-licensing of any activity allotted by Concessionaire to a person for commercial operations made with the prior consent of the Authority and/or the Confirming Party.

“Substitution Agreement” means the agreement substantially in the form set out at Appendix 3, to be entered into between the Concessioneing Authority, the Concessionaire and the Senior Lenders.

“Supporting Project Infrastructure”² means:

- (a) maritime access channels;
- (b) port entrance;
- (c) protective works including breakwaters, shore protection;
- (d) deleted;
- (e) access to port for inland transport (including roads and bridges);
- (f) deleted;
- (g) inland waterways within port area;
- (h) wharf, berths and pre-stacking area;

And shall include such other facilities as may be specified by the Concessioneing Authority and/or the Confirming Party as supporting infrastructure provided/to be provided for the Project.

“Tariff” means the applicable rate(s) that may be charged by the Concessionaire for and in respect of providing the Project Facilities and Services.

“Ten Year G Sec” means the 10 Year G Sec rate published by Reserve Bank of India prevailing as on the date of a payment due from which the computation of interest is required to be made under the Agreement.

“Termination Notice” means the termination notice issued pursuant to Article 16 hereof.

“Termination Period” shall have the meaning as set out under Article 16 hereof.

“Tests” shall have the meaning assigned to it under Article 6.7 (a) hereof.

“The Port” means the Mumbai Port Trust and by extension the Jawaharlal Nehru Port Trust.

² This definition would need to be used/modified depending on the commitments made by the Concessioneing Authority at the time of bidding of the specific Project. This may either be a Conditions Precedent or ongoing obligation.

“Transfer” means to transfer, sell, assign, pledge, hypothecate, create a security interest in or other encumbrance on, place in trust (voting or otherwise), transfer by operation of law or in any other way dispose of, whether or not voluntarily, the legal or beneficial interest in the equity shares of the Concessionaire.

“Transfer Date” means the date of expiry or termination as the case may be, of the Concession Period in accordance with the terms of this Agreement.

“Transaction Documents” means collectively the Project Agreements and the Financing Documents.

1.2 Other References

In this Agreement:

“BIS” means Bureau of Indian Standards.

“BS” means British Standard.

“CISF” means Central Industrial Security Force.

“DIN” means German Industrial Standard.

“FEM” means Federation of Equipment Manufacturers.

“GST” means Goods and Services Tax.

“IS” means Indian Standard.

“ISO” means International Standards Organization.

“IEC” means International Electro Technical Commission.

“IMDG” means International Maritime Dangerous Goods.

“IMO” means International Maritime Organization.

“JNPT” means Jawaharlal Nehru Port Trust

“km” means Kilometre, the unit of length.

“kWh” means Kilowatt-hour, the unit of electrical energy.

“KVA” means Kilovolt-Ampere, the unit of power.

“m” means Metre, the unit of length.

“mm” means Millimetre, the unit of length.

“MbPT” means Mumbai Port Trust

“MT” means Metric Tonne, the unit of weight.

“MSIHC” means Manufacture Storage and Input of Hazardous Chemicals.

“MVA” means Mega Volt Ampere, the unit of power.

“OISD” means Oil Industry Safety Directorate.

1.3 Interpretations

This Concession constitutes the entire understanding between the Parties regarding the Project and supersedes all previous written and/or oral representations and/or arrangements regarding the Project. If there is any aspect of the Project not covered by any of the provisions of this Agreement, then and only in that event, reference may be made by the Parties to the bid documents, inter alia including the RFP documents, issued by the Authority and also including addendums, clarifications given in writing in the pre-bid meetings and the submissions of the

Concessionaire and the bid submitted by the Concessionaire but not otherwise. In case of any contradictions in the terms of this Agreement and any such other bid documents as referred to above, the terms of this Agreement shall prevail. In this Agreement unless the context otherwise requires:

- a. any reference to a statutory provision shall include such provision as is from time to time modified or re-enacted or consolidated so far as such modification or re-enactment or consolidation applies or is capable of applying to any transactions entered into hereunder;
- b. the words importing singular shall include plural and vice versa, and words denoting natural persons shall include partnerships, firms, companies, corporations, joint ventures, trusts, associations, organisations or other entities (whether or not having a separate legal entity);
- c. the table of contents and any headings in this Agreement are for ease of reference only and shall not affect the operation or interpretation of this Agreement;
- d. the words “include” and “including” are to be construed without limitation;
- e. references to “construction” include investigation, design, engineering, procurement, delivery, transportation, installation, processing, fabrication, testing, commissioning and other activities incidental to the construction;
- f. any reference to any period of time shall mean a reference to that according to Indian Standard Time;
- g. any reference to day shall mean a reference to a calendar day;
- h. any reference to month shall mean a reference to a calendar month;
- i. “Recital”, “Article” and “Appendix” shall refer, except where the context otherwise requires, to Articles of and any Appendix to this Agreement. The Appendices to this Agreement shall form an integral part and parcel of this Agreement and will be in full force and effect as though they were expressly set out in the body of this Agreement;
- j. any reference at any time to any Agreement, deed, instrument, license or document of any description shall be construed as reference to that Agreement, deed, instrument, license or other document as amended, varied, supplemented, modified or novated at the time of such reference;
- k. any Agreement, consent, approval, authorization, notice, communication, information or report required under or pursuant to this Agreement from or by any Party or the Independent Engineer and/or a Statutory Auditor shall be valid and effectual only if it is in writing under the hands of duly authorized representative of such Party or the Independent Engineer and/or Statutory Auditor, as the case may be, in this behalf and not otherwise;
- l. unless otherwise stated, any reference to any period commencing “from” a specified day or date and “till” or “until” a specified day or date shall include both such days or dates;
- m. unless otherwise specified, any interest to be calculated and payable under this Agreement shall accrue on a Monthly basis and from the respective due dates as provided for in this Agreement; and

- n. any word or expression used in this Agreement, unless defined or construed in this Agreement, shall be construed as per the definition given in General Clauses Act, 1897 failing which it shall bear the ordinary English meaning.

1.4 Measurements and Arithmetic Conventions

All measurements and calculations shall be in metric system and calculations done to 2 decimal places, with the third digit of 5 or above being rounded up and below 5 being rounded down.

1.5 Ambiguities and Discrepancies

In case of ambiguities or discrepancies within this Agreement, the following shall apply:

- a. between two Articles of this Agreement, the provisions of specific Articles relevant to the issue under consideration shall prevail over those in other Articles;
- b. between the dimension scaled from the Design and Drawings and its specific written dimension, the latter shall prevail;
- c. between any value written in numerals and that in words, the latter shall prevail; and
- d. between the provisions of this Agreement and any other documents forming part of this Agreement, the former shall prevail.

2 ARTICLE 2: CONCESSION AND PORT ASSETS

2.1 Concession

In consideration of the Concessionaire agreeing to pay to the Concessioneing Authority (a) the License Fee and (b) Royalty per TEU, and performing its obligations as set out in this Agreement, the Concessioneing Authority hereby grants to the Concessionaire, subject to the provisions of this Agreement, an exclusive license for designing, engineering, financing, constructing, equipping, operating, maintaining, replacing the Project Facilities and Services as per Scope of Work.

2.2 Concession Period

This Concession hereby granted is for a period of 20 years starting from Date of Commercial Operation during which the Concessionaire is authorized and obliged to implement the Project and to provide Project Facilities and Services as per Scope of work in accordance with the provisions hereof.

Provided that: -

- a) in the event of the Concession being extended by the Authority beyond the said period of 20 years in accordance with the provisions of this Agreement, the Concession Period shall include the period by which the Concession is so extended, and
- b) in the event of an early termination/ determination of this Concession by either Party in accordance with the provisions hereof, the Concession Period shall mean and be limited to the period commencing from the Date of Commercial Operation and ending with the date of termination/ determination of this Concession.

2.3 Acceptance of the Concession

The Concessionaire hereby accepts, agrees and undertakes to implement the Project and to provide Project Facilities and Services in accordance with the provisions of this Agreement. Subject to and in accordance with the provisions of this Agreement and Applicable Laws and Applicable Permits, the Concessionaire shall at its costs, charges, expenses and risk including but not limited to traffic risk, variation risk if any, conceptualize, equipment risk, mobilization, warehouse space, engineer, labor, finance, equip, operate and maintain and the Project/ Project Facilities and Services.

2.4 Port's Assets

- a) In consideration of the Concessionaire agreeing to perform and discharge its obligations as set forth in this Agreement, the Authority and the Confirming Party hereby grants to the Concessionaire, the exclusive right to enter upon, occupy and use the Project Site and Port's Assets for the purpose of implementing the Project and provision of Project Facilities and Services pursuant thereto in accordance with this Agreement.
- b) The Concessionaire shall at its costs, charges and expenses make such improvements in the Project Site and Port's Assets as may be necessary or appropriate for implementing the Project and providing Project Facilities and Services in accordance with the Agreement, Applicable Laws and Applicable Permits.

2.5 Use of Port's Assets

The Concessionaire shall not without the prior written consent or approval of the Authority and/or the Confirming Party use the Project Site and the Port's Assets for any purpose other than for the purposes of the Project/the Project Facilities and Services and purposes incidental thereto as permitted under this Agreement or as may otherwise be approved by the Authority and/or the Confirming party.

2.6 Information about Project Site and Port's Assets

The information about the Project Site and Port's Assets as set out in Appendix 1 and Appendix 2 respectively is provided by the Concessioneing Authority in good faith and with due regard to the matters for which such information is required by the Concessionaire. The Concessioneing Authority agrees to provide to the Concessionaire, upon a reasonable request, any further information relating to the Project Site and Port Assets, which the Concessioneing Authority may now possess or may hereafter come to possess, as may be relevant to the implementation of the Project. Subject to this, the Concessioneing Authority makes no representation and gives no warranty to the Concessionaire in respect of the condition of the Port Assets or the Project Site.

2.7 Acceptance of the Port Assets

The Concessionaire accepts to take possession of the Port's Assets and Project Site on 'as is where is' basis and confirms having:

- a) Inspected the Project Site/Port's Assets, including all structures thereat and its surroundings;
- b) Satisfied itself as to the nature of the climatic, hydrological and general physical conditions of the Project Site/Port's Assets, the nature of the ground and subsoil, the form and nature of the Project Site/Port's Assets, and the nature of the work and materials necessary for the performance of its obligations under this Agreement; and
- c) Obtained for itself all necessary information as to the risks, contingencies and all other circumstances which may influence or affect the Concessionaire and its rights and obligations under or pursuant to this Agreement.

2.8 Peaceful Occupation

The Authority and the Confirming Party warrants that the Concessionaire shall, subject to complying with the terms and conditions of this Agreement, remain in occupation of the Project Site and Port's Assets during the Concession Period. In the event the Concessionaire is obstructed by any Person claiming any right, title or interest in or over the Project Site and Port's Assets or any part thereof or in the event of any enforcement action including any attachment, distraint, appointment of receiver or liquidator being initiated by any Person claiming to have charge on the Project Site and Port's Assets or any part thereof pursuant to Section 78 of the MPT Act, the Authority and/or the Confirming Party shall, if called upon by the Concessionaire, defend such claims and proceedings.

2.9 Grant of License Rights for Commercial Operation

The Concessionaire shall be entitled to the License Rights on the Commercial operation only on fulfilment by it of all the Conditions Precedent in terms of Article 3.1 hereof. The Authority grants the Concessionaire for carrying out following activities, (subject to the compliance with the terms of this Agreement)

- a) Offloading of custom cleared containers (for barge/ ship movement to Mumbai Port) arriving from various terminals of JNPT through trailers and storing the containers in the designated yard at shallow water berth at JNPT.
- b) Feeding of containers to trailers from the yard at shallow Water Berth (SWB), transportation to SWB berth and loading on to barge/ ships.
- c) Barge/ship movement from JNPT to MbPT and unloading at Mumbai Port.
- d) Transportation of containers from MbPT berth/ pre-stack area to designated warehouse (New Sewree warehouse or Grain depot)
- e) Storage at designated warehouse of MbPT and handing over of cargo to consignee
- f) Handling of empty containers and coastal movement of empties from Mumbai port to appropriate port/ jetty to reach the designated CFS/ EY (Empty yards) of the shipping lines within 20 km radius of JN Port.
- g) Operations and maintenance at allocated warehouse and pre-stack yard at Mumbai port; payment of all authority charges; payment for utilities such as electricity, water, housekeeping, repairs, etc. and all other activities as needed for smooth operations at Mumbai port as part of this project.
- h) Apart from basic maintenance and illumination provided at yard at SWB at JNPT, all other activities required for smooth operations at JN Port as part of this project shall be the responsibility of the concessionaire.

2.10 Relocation of Operational Amenities

Where any port operational offices, amenities, etc. are required to be temporarily shifted in order to undertake works in relation to the Project, the same shall be undertaken at the cost and expense of the Concessionaire. It is agreed that any such temporary shifting shall be undertaken strictly in accordance with the approved works program for the Project approved by Authority and the Confirming Party. The Authority and the Confirming Party shall provide necessary support and assistance to the Concessionaire for the same.

2.11 Existing commercial operations

The Concessionaire acknowledges that the commercial establishments and operations are located on the Port, which shall be identified in greater detail in the joint inventory of the Authority and the Concessionaire. The Concessionaire agrees that it shall undertake the works on the Port in a manner that causes minimal interference to, or impedance to the normal operations of such commercial establishments and operations.

3 ARTICLE 3: CONDITIONS PRECEDENT

3.1 Conditions Precedent

The award of the Concession shall be subject to the satisfaction or waiver of the following conditions precedent (the “Conditions Precedent”):

- a) The following Conditions Precedent shall be satisfied by the Concessionaire:
 - i. Furnishing of the Performance Guarantee as stipulated in Article 4.1 hereof;
 - ii. Furnishing of copies (certified as true copies by a director of the Concessionaire) of the constituent documents of the Concessionaire;
 - iii. Furnishing of all resolutions adopted by the Board of Directors of the Concessionaire (certified as true copies by a director of the Concessionaire) authorizing the execution, delivery and performance by the Concessionaire of each of the Transaction Documents;
 - iv. Opening the Escrow Account and executing the Escrow Agreement;
 - v. Undertaking to furnish a copy of the Management Contract;
 - vi. Furnishing a certificate from its principal officer/director on the shareholding pattern of the Concessionaire;
 - vii. Submission to Concessioning Authority of its Financing Plan and Financing Documents for the Project and demonstrating Financial Close for verification that there is no inconsistency/contradiction with the terms & condition of the agreement. Authority, within 15 days shall notify concessionaire of inconsistency/contradictions, in any which shall be promptly addressed by the Concessionaire.
 - viii. Procuring and furnishing the following confirmations, in original, from the Applicant/members of Consortium:
 - a) it/they shall at all times comply with the provisions of Article 11.2 in respect of their shareholding in the Concessionaire;
 - b) it/they has/have the financial standing and resources to fund /raise finances for undertaking and implementing the Project in accordance with this Agreement;
 - c) the Applicant is/each of the member of the Consortium is duly organized and validly existing under the laws of the jurisdiction of its incorporation, and has requested the Concessioning Authority to enter into this Agreement with the Concessionaire and has agreed to and unconditionally accepted the terms and conditions set forth in this Agreement;
 - ix. Furnishing to the Concessioning Authority a legal opinion from the legal counsel of the Concessionaire with respect to the authority of the Concessionaire to enter into this Agreement and the enforceability hereof; and
 - x. [Obtaining Applicable Permits as may be required for commencement of Construction Works as set out in Appendix 8].

- xi. Provide inputs to the Authority for finalization of the list of cargo equipment along with specifications for the cargo handling equipment and furniture within a period of 1 (one) month from the signing of the Agreement ;
- b) The following Conditions Precedent shall be satisfied by the Authority and the Confirming Party:
 - i. procurement of the clearances required for the Project, as set out in Appendix-8;
 - ii. handing over physical possession of the Project Site and/or the Port's Assets, warehouse as prescribed in tender document for the purposes of the Project after receipt of performance guarantee / security from the Concessionaire
 - iii. provision of or putting in place arrangements for the provision of Supporting Project Infrastructure by the Authority and/or the Confirming Party.
 - iv. the Customs should clear all the custom confiscated cargo remaining in the New Sewree Warehouse.

3.2 The aforesaid Conditions Precedent shall be complied within 90 (Ninety) days of the date of signing of the Agreement and upon fulfillment of the Conditions Precedent, the Authority shall officially award this concession to the Concessionaire and the same shall be marked as the commencement of the Concession Period.

3.3 Any of the Conditions Precedent set forth in Articles 3.1(a) may be waived fully or partially by the Authority at any time in its sole discretion or the Authority may grant additional time for compliance with these conditions and the Concessionaire shall be bound to ensure compliance within such additional time as may be specified by the Authority. Any of the Conditions Precedent set forth in Articles 3.1 (b) may be waived fully or partially by the Concessionaire at any time in its sole discretion.

3.4 DELETED

3.5 If the Authority has fulfilled all the Conditions Precedent under Article 3.1(b) and has not waived or extended the time under Clause 3.3 above, and if the Concessionaire has failed to fulfil the Conditions Precedent to be fulfilled by it under Article 3.1(a) (and which are within the power of the Concessionaire), the Concessionaire shall be liable to pay liquidated damages in a sum calculated at the rate of 0.1% (zero point one percent) of the Performance Guarantee for each day's delay until fulfillment of the Conditions Precedent subject to a maximum of 5% (five percent) of the figure mentioned in the Performance Guarantee furnished by the Concessionaire. In such event, having regard to the quantum of damages, the time for the performance shall be deemed to have been extended by the number of days for which the liquidated damages is paid and if, after the extended period the Concessionaire is still not in a position to comply with the Conditions Precedent, then authority has the right to terminated as provided for in Clause 3.6 below;

- 3.6** In the event that the Conditions Precedents are not complied with within the time (including the extended time, if any) in terms of the aforesaid Articles 3.2 to 3.5, this Agreement may be liable to be terminated. If such termination is on account of failure of the Concessionaire to comply with the Conditions Precedent, the Bid Security/ Performance Guarantee shall stand forfeited. If such termination is on account of failure of the Authority, the Authority shall be obliged to return the Bid Security/Performance Guarantee. It is clarified that except for the payment as stipulated in the foregoing Article 3.5 and forfeiture in this Article 3.6, each party hereto shall have no claims against the other for costs, damages, compensation or otherwise.

4 ARTICLE 4: PERFORMANCE GUARANTEE

4.1 Performance Guarantee

The Concessionaire shall for due performance of its obligations during the Concession Period provide to Concessioneing Authority an unconditional and irrevocable bank guarantee, in favour of the Concessioneing Authority encashable and enforceable at Mumbai substantially in the form set forth in Appendix 9 (the “**Performance Guarantee**”). The Performance Guarantee shall be for a sum of Rs.3,25,00,000/- (Rupees Three Crore Twenty Five Lakh only). Till such time the Concessionaire provides to Concessioneing Authority the Performance Guarantee pursuant hereto, the Bid Security shall remain in full force and effect. The Performance Guarantee, if in the form of a bank guarantee shall be valid for an initial period of 1 (one) year and shall be renewed 30 (thirty) Days prior to expiry of each year, for an additional term of 1 (one) year. It is clarified that the Concessionaire shall be liable to restore the Performance Guarantee to the full amount in case of part encashment of the same by the Concessioneing Authority. This shall be done within 30 (thirty) Days of any such part encashment. The Performance Guarantee, if in the form of a Bank Guarantee shall be irrevocable and replenished from time to time such that an amount of Rs.3,25,00,000/- (Rupees Three Crore Twenty Five Lakh only) is available in immediate cash to the Concessioneing Authority for the entire period of the Concession. The Performance Guarantee furnished under this provision shall be valid until expiry of 6 (six) months from the Date of Commercial Operations. Failure of the Concessionaire to provide a valid Performance Guarantee and/or restore and maintain the Performance Guarantee in accordance with this Article shall entitle the Concessioneing Authority to forthwith terminate this Agreement and also if relevant, to forfeit the Bid Security.

5 ARTICLE 5: INDEPENDENT ENGINEER

5.1 Independent Engineer

- (a) The Independent Engineer shall be selected out of the panel prepared for the purpose by the Mumbai Port Trust. The Concessions Authority shall in the procurement documents³ published by it, set out in reasonable detail the scope of work as indicated in Appendix 7 and shortlist bidders based on their technical capability. The Concessions Authority shall within 30 (thirty) Days of the date of notification by the Concessionaire of his intention of constructing a warehouse at the additional land provided forward to the Concessionaire a list consisting of the names accompanied by their respective profile in brief of Persons so shortlisted. If within 15 (fifteen) Days of forwarding the list, the Concessions Authority does not receive any objection from the Concessionaire with reasons therefor, the Concessions Authority shall call for a financial bid from the shortlisted Persons and select the Independent Engineer ordinarily based on the lowest fee quote. Any objection raised by the Concessionaire shall be considered by the Concessions Authority and Persons against whom such objections are raised will at the discretion of the Concessions Authority, which discretion shall be used with the highest degree of prudence and fairness, be disqualified prior to seeking a financial bid.
- (b) The Independent Engineer selected pursuant to the aforesaid process may be appointed for a period as mutually decided between the parties. The scope of work of the Independent Engineer shall be substantially as set out in Appendix 7. Work of certification of Performance Parameters as stipulated in this Agreement shall be done by Indian Ports Association during the remaining concession period (During the Concession period).
- (c) The costs and expenses of the Independent Engineer and Indian Ports Association for their services shall be borne by the Concessions Authority and Concessionaire, equally.
- (d) If the Concessions Authority either on its own or on a report of the Concessionaire has reason to believe that the Independent Engineer is not discharging its duties in a fair, appropriate and diligent manner, the Concessions Authority may after giving the Independent Engineer due opportunity of being heard, terminate the appointment of the Independent Engineer and appoint another firm in its place in accordance with the preceding clause (a) above.
- (e) If either Party disputes any advice, instruction or decision of the Independent Engineer, the dispute shall be resolved in accordance with the dispute resolution procedure set out in Article 19.

³ The Concessions Authority shall to the extent possible use standard bidding documents prescribed by the Ministry of Finance for appointment of consultants and make available the relevant documents to the Concessionaire.

6 ARTICLE 6: PROJECT IMPLEMENTATION

6.1 Preparation of Designs and Drawings

The Concessionaire shall at its cost, charges and expenses, prepare the Designs and Drawings in conformity with the Scope of Work.

6.2 Review of the Designs and Drawings

(a) The Concessionaire shall submit the Designs and Drawings as set out in Appendix 6 for the review of the Independent Engineer. Simultaneously, the Concessionaire shall also provide the Concessioneing Authority with a set of the Designs and Drawings.

(b) The Independent Engineer shall review the Designs and Drawings submitted by the Concessionaire and provide its comments/observations and suggestions on the same including the comments/observations of the Concessioneing Authority in respect thereof within 21 (twenty one) Days from the date of the receipt of such Designs and Drawings.

(c) In the event that the Independent Engineer/ Concessioneing Authority has observed that the Designs and Drawings are not in conformity with the Scope of Work , the Concessionaire shall promptly and without any undue delay revise and resubmit the Designs and Drawings or satisfy the Independent Engineer/ Concessioneing Authority with regards its compliance.

(d) If the Independent Engineer /Concessioneing Authority does not make any observation/comments with respect to the Designs and Drawings submitted to it by the Concessionaire within 21 (twenty one) Days of the submission, it shall be deemed that the Independent Engineer/ Concessioneing Authority has no suggestions to make with respect to the Designs and Drawings and the Concessionaire shall be titled to proceed with the Project accordingly.

(e) The Concessionaire shall not be entitled to any extension of time for completing construction or any other relief on account of delay caused due to providing any clarification or in resubmitting the Designs and Drawings. Provided however the Concessioneing Authority at its sole discretion may suitably extend the Construction Phase or provide other relief to compensate for any such delay not attributable to the Concessionaire.

(f) The Concessionaire shall not change any Designs and Drawings reviewed by the Independent Engineer /Concessioneing Authority under this Agreement, without submitting such revised Designs and Drawings for the review of the Independent Engineer/ Concessioneing Authority.

(g) Notwithstanding the review by the Independent Engineer, the Concessionaire and independent engineer shall be severely and jointly be responsible for any defect and/or deficiency in the Designs and Drawings relating to the Project or any part thereof and accordingly the Concessionaire shall at all times remain responsible for its obligations under this Agreement.

6.3 Construction Phase⁴

(a) The Concessionaire shall promptly commence and complete the construction works of the warehouse at the additional plot of land allotted by the Concessioneing Authority, including installation of equipment and other necessary and ancillary works in accordance with the Project Schedule and shall also obtain from the Independent Engineer a certificate as to completion of construction of Project Facilities and Services in accordance with the provisions of this Agreement (“Completion Certificate”)

⁴ This provision would need to be modified in case the Project is being developed phase wise or the Project is a brownfield project where existing facilities which have been handed over are required to be operated during the Construction Phase.

no later than 6 (six) Months from the date of commencement of the construction.

(b) Concessionaire shall be entitled to approach Concessioneing Authority, within 7(seven) years from the Date of Commercial Operation, for permission to use the additional land to be allotted on license basis by Concessioneing Authority, for construction of warehouse and handling cargo during the Operations Period, which shall be allowed as per terms and conditions given in Concession Agreement.

6.4 Obligations of the Concessionaire

Without prejudice to the generality of Article 6.3 and in addition to any of its other obligations under this Agreement, during the Concession Period, the Concessionaire shall:

- (a) Arrange for, in a timely manner all necessary financial and other resources required for construction and installation of the Project Facilities and Services.
- (b) Engage professionally competent Persons for project management and construction and ensure that all works are carried out in compliance with the Construction Standards;
- (c) Give written notice to the Concessioneing Authority within 7 (seven) Days of any material modification or change to any of the Financing Documents and/or any Equity Documents and shall simultaneously therewith also furnish copies of such modified/ amended documents to the Concessioneing Authority. Provided no such modification/amendment will be made if it in any manner whatsoever has the effect of imposing an additional financial obligation or increasing the financial obligation of the Concessioneing Authority in addition to that contemplated under the Financing Documents provided on Financial Close, without the prior written consent of the Concessioneing Authority. For avoidance of doubt any such modifications/amendments made without the prior written consent of the Concessioneing Authority will not be enforceable against the Concessioneing Authority;
- (d) Obtain Applicable Permits, comply with Applicable Laws and Applicable Permits and give priority to safety in its construction and planning activities in order to protect life, health, property and environment;
- (e) Provide to the representative(s) of the Concessioneing Authority, at reasonable times and upon prior intimation, access to the Project Site to review progress in construction and to ascertain compliance with any of the requirements of this Agreement. Provided that non- inspection by the Concessioneing Authority of any works shall not, in relation to such works,
 - (i) Amount to any consent or approval by the Concessioneing Authority nor shall the same be deemed to be waiver of any of the rights of the Concessioneing Authority under this Agreement; and
 - (ii) release or discharge the Concessionaire from its obligations or liabilities under this Agreement in respect of such work;
- (f) provide monthly reports on the progress of Construction Works or such other relevant information as may be required by the Independent Engineer;
- (g) promptly carry out at its cost such further works as may be necessary to remove any defects or deficiencies observed by the Independent Engineer and ensure timely completion of construction of the Project / the Project Facilities and Services in all respects in accordance with the provisions of this Agreement; and
- (h) to ensure safe and timely construction and completion of the Project/Project Facilities and Services, the Concessionaire may, at its cost, interrupt and divert/create barriers on the flow of water or on the road or port traffic, adjacent to the Project Site if such interruption and diversion is imperative for the efficient progress of Construction Works and conforms to Good Industry Practice; provided that such interruption and diversion shall be undertaken by the

Concessionaire only with the prior written approval of the Independent Engineer which approval shall not be unreasonably withheld. For the avoidance of doubt, it is agreed that the Concessionaire shall at all times be responsible for ensuring safe operation of Construction Works and shall remove the interruption or diversion within the period specified by the Independent Engineer.

- (i) Repair/ renovate/ retrofit/ modify/ alter the existing structure at New Sewree Warehouse and complete such works at the New Sewree Warehouse within reasonable time.

6.5 Obligations of the Concessions Authority

In addition to any of its other obligations under this Agreement, during the Concession Period, the Concessions Authority shall:

- (a) in matters falling within its authority, grant, the Applicable Permits, approvals and consents as may be required by the Concessionaire and on a best efforts basis assist the Concessionaire in obtaining all other Applicable Permits as may be required by the Concessionaire;
- (b) Make available all records of sub-soil investigations carried out on its behalf in the Port's Assets, if requested by the Concessionaire. It is clarified that the Concessionaire shall be solely responsible for determining the adequacy or otherwise of such investigations and will not in reliance of such records, be entitled to claim any relief under this Agreement;
- (c) upon satisfaction as to completion and receipt of Completion Certificate issued by the Independent Engineer promptly obtain approval of the Collector of Customs, publish requisite notifications in the Official Gazette and declare the Project Facilities and Services as ready for operation in accordance with the provisions of Section 37 of the MPT Act;
- (d) upon written request from the Concessionaire, assist the Concessionaire, on a best effort basis, in obtaining immigration clearances, employment permits and residential premises for any foreign personnel engaged or employed by the Concessionaire in connection with the implementation of the Project; and
- (e) Subject to the Concessionaire / Contractor complying with the requirements under the Applicable Laws including but not limited to payment of customs and any other duty, assist the Concessionaire or Contractor, on a best effort basis, to import into India all items of equipment and materials required for the Project.

6.6 Suspension of Works

- (a) Upon recommendation of the Independent Engineer to this effect, the Concessions Authority may by notice require the Concessionaire to suspend forthwith the whole or any part of the Construction Works if, in the reasonable opinion of the Concessions Authority, such work is not in accordance with the Construction Standards / Safety Standards.
- (b) The Concessionaire shall, pursuant to the notice under the foregoing provision suspend the Construction Works or any part thereof for such time and in such manner as may be specified by the Concessions Authority and thereupon represent to the Concessions Authority / Independent Engineer, the remedial measures to remedy the defects notified. The Concessionaire may by notice require the Independent Engineer to inspect such remedial measures forthwith and make a report to the Concessions Authority recommending whether or not the suspension hereunder may be revoked. Any dispute as regards the suspension of works or the remedial measures proposed, if cannot resolved within 30 (thirty) Days of the suspension or proposal of the remedial measures, shall be submitted for dispute resolution in accordance with Article 19 hereof.

6.7 Issue of Completion Certificate

- (a) At least 60 (sixty) Days prior to the likely completion of the completion of construction of the warehouse at the additional plot of land, the Concessionaire shall notify the Independent Engineer of the date when it intends to commence commercial operations. The Independent Engineer shall then proceed to inspect the Construction Works with the intention of issuing the Completion Certificate and determine and notify to the Concessionaire the schedule and manner of the tests as are specified in Appendix 7 that it shall carry out to ensure that the Project meets with the Construction Standards (**“the Tests”**). The date and time of each of the Tests shall be determined by the Independent Engineer in consultation with the Concessionaire, and notified to the Concessioneing Authority who may designate its representative to witness the Tests. The Concessionaire shall provide such assistance as the Independent Engineer may reasonably require for conducting the Tests. In the event of the Concessionaire and the Independent Engineer failing to mutually agree on the dates for conducting the Tests, the Concessionaire shall fix the dates by not less than 10 (ten) Days’ notice to the Independent Engineer;
- (b) Upon completion of each Test, the Independent Engineer shall provide to the Concessionaire and the Concessioneing Authority copies of all Test data including detailed Test results;
- (c) Upon completion of Construction Works and the Independent Engineer determining all the Tests to be successful, it shall forthwith issue to the Concessionaire and the Concessioneing Authority a Completion Certificate substantially in the form set forth in Appendix 10;
- (d) The Independent Engineer may, at the request of the Concessionaire, issue a provisional certificate of completion substantially in the form set forth in Appendix 10 (the **“Provisional Certificate”**) if the Tests are successful and the Project can be safely and reliably placed in commercial operation though certain works or things forming part thereof are outstanding and not yet complete. The Provisional Certificate shall have appended thereto a list of outstanding items signed jointly by the Independent Engineer and the Concessionaire (the **“Punch List”**) to be completed by the Concessionaire within a stipulated time. Provided, notwithstanding the foregoing, no such Provisional Certificate will be issued pending notifications in the Official Gazette by the Collector of Customs. All items in the Punch List shall be completed by the Concessionaire within 90 (ninety) Days of the date of issue of the Provisional Certificate or such other extended period that the Concessioneing Authority may in its sole discretion determine, failing which the Provisional Certificate shall lose its validity and the Concessioneing Authority shall be entitled to terminate this Agreement;
- (e) Without prejudice to the foregoing, if the Concessionaire shall have failed to complete any Construction Works on account of Force Majeure or for reasons solely attributable to the Concessioneing Authority, the Concessioneing Authority may, in its discretion, reduce the scope of Project and require the Concessionaire to pay 80% (eighty percent) of the sum saved due to such reduction of scope. Upon such payment to the Concessioneing Authority, the obligations of the Concessionaire in respect of such works shall be deemed to have been fulfilled.

6.8 Change of Scope

- (a) The Concessioneing Authority may, notwithstanding anything to the contrary contained in this Agreement, require the provision of additional works and services which are not included in the scope of the Project as contemplated by this Agreement (**“Change of Scope”**). Provided no such Change of Scope shall be made in the Construction Phase if it is in the reasonable judgment of the parties hereto likely to delay the completion of the Project such that the Project cannot be completed on the Scheduled Project Completion Date. Provided further, the cost of implementing a single Change of Scope shall

not exceed a sum corresponding to [5% (five percent)] of the Estimated Project Cost and during the Concession Period the cumulative cost of implementing orders pertaining to Change of Scope shall not exceed a sum corresponding to [20% (twenty percent)] of the Estimated Project Cost ;

(b) If the Concessioneing Authority determines that a Change of Scope is necessary, it shall issue to the Concessionaire a notice specifying in reasonable detail the works and services contemplated thereunder (the **“Change of Scope Notice”**);

(c) Upon receipt of a Change of Scope Notice, the Concessionaire shall, provide to the Concessioneing Authority, the following:

(i) the adverse impact, if any, which the Change of Scope is likely to have on the Project; and

(ii) the cost to be incurred by the Concessionaire for and in respect of such Change of Scope;

(d) Upon receipt of the foregoing information, the Concessioneing Authority shall, if it decides to proceed with the Change of Scope, convey its agreement or otherwise of the assessment of the Concessionaire. If the Concessionaire does not notify any adverse impact of a Change of Scope notified under the Change of Scope Notice within 30 (thirty) Days of the date thereof and/or the Concessioneing Authority does not disagree with the cost assessment of the Concessionaire, the Concessioneing Authority shall issue an order requiring the Concessionaire to proceed with the implementation of such Change of Scope. If an adverse impact is notified by the Concessionaire and/or the Concessioneing Authority disagrees with the cost assessment, the Parties shall in good faith modify the Change of Scope envisaged so as to remove the adverse impact/agree to the cost implication for carrying out the Change of Scope within a period of 30 (thirty) Days of notification of the adverse impact/cost. In the event that the Parties are unable to mutually agree to a Change of Scope and/or the cost of implementing the same, they may seek intervention of an Expert to resolve the differences and upon the final determination of the desired Change of Scope and its cost implication, the Concessioneing Authority may issue an order to implement the Change of Scope;

(e) The provisions of this Agreement, insofar as they relate to Construction Works and Tests, shall apply mutatis mutandis to the works undertaken by the Concessionaire in respect of a Change of Scope;

(f) Within 7 (seven) Days of an order for Change of Scope being issued, the Concessioneing Authority shall make an advance payment to the Concessionaire of a sum equal to 20% (twenty per cent) of the cost of Change of Scope as agreed hereunder. The Concessionaire shall, after commencement of work, present to the Concessioneing Authority bills for payment in respect of the works in progress or completed works, as the case may be, supported by such documentation as is reasonably sufficient for the Concessioneing Authority to determine the accuracy thereof. Within 30 (thirty) Days of receipt of such bills, the Concessioneing Authority shall disburse to the Concessionaire after deducting Pro- rata advance payment, such amounts as are certified by the Statutory Auditors as being expended by the Concessionaire for and in respect of implementing Construction Works or procuring equipment following an order for a Change of Scope;

(g) Notwithstanding anything to the contrary contained in this Article 6.8, the Concessioneing Authority may, after giving the Change of Scope Notice to the Concessionaire and considering its reply thereto, decide to seek competitive bids for carrying out the works envisaged in a Change of Scope; provided that the Concessionaire shall have the option of matching the first ranked bid in terms of the selection criteria, subject to payment of 2% (two per cent) of the bid amount to the Concessioneing Authority, and thereupon securing the award of such works or services. For the avoidance of doubt, it is agreed that the Concessionaire shall be entitled to exercise such option only if it has participated in the bidding process and its bid does not exceed the first ranked bid by more

than 10% (ten percent) thereof; and

(h) If during the pendency of the Agreement, the Concessionaire determines at any time that a Change of Scope is necessary for providing safer and improved Project Facilities and Services, it shall by notice in writing request the Concessioneing Authority to consider such Change of Scope. The Concessionaire may implement the Project and provide Project Facilities and Services in accordance with the Change of Scope as may be approved in writing by the Concessioneing Authority and all the provisions of this Article 6 for the Project Implementation shall mutatis mutandis apply. Provided, it is clarified that the provisions contained in Article 6.8.

(f) And (g) shall not apply to a Change of Scope required by the Concessionaire.

6.9 Liquidated Damages

Subject to any of the provisions of this Agreement providing for extension of time for performance or excuse from performance, as the case may be, of any of the obligations of the Concessionaire under this Agreement, the Concessionaire shall pay to the Concessioneing Authority liquidated damages at the rate of [0.1% (zero point one percent)] of the Performance Guarantee for every Day of delay in fulfilling the specified obligations on or before a Milestone Date including a delay in obtaining the Completion Certificate or the Provisional Certificate on or before the Scheduled Project Completion Date. Provided such liquidated damages shall not in aggregate exceed 5% (five percent) of the Estimated Project Cost and unless the delay is in obtaining of the Completion Certificate or the Provisional Certificate, shall not be payable for less than 15 (fifteen) Days of delay from a Milestone Date, in fulfilling a specified obligation. The Parties agree that the liquidated damages as provided are a genuine pre-estimate of the damages the Concessioneing Authority is likely to suffer and are not by way of a penalty. In case the aggregate delay exceeds 180 (one hundred and eighty) Days or the aggregate liquidated damages paid and/or payable under this provision exceeds the specified limit of 5% (five percent) of the Estimated Project Cost, the Concessioneing Authority shall be entitled to terminate this Agreement and the consequences of termination as laid down in Article 16.5 shall follow. The Concessioneing Authority may, at its discretion recover any amounts with respect to liquidated damages from the Performance Guarantee.

7 ARTICLE 7: OPERATIONS & MAINTENANCE

7.1 (A) Obligations of the Concessionaire

In addition to any of its other obligations under this Agreement, the Concessionaire shall manage, operate, maintain and repair the Project Facilities and Services, entirely at its cost, charges, expenses and risk in accordance with the provisions of this Agreement. The Concessionaire's obligations under this Article shall include but shall not be limited to the following:

i. Berth and Terminal Operations:

The Concessionaire shall:

- (a) promptly commence operations upon the Project Facilities and Services being declared by the Concessioneing Authority as ready for operations;
- (b) make efforts to maximise cargo handled so as to achieve optimal utilization of the Project Facilities and Services;
- (c) ensure compliance of the Project Facilities and Services at least as per the Scope of Work.;
- (d) be free to deploy higher capacity equipment/facilities/ technology, etc. and induct new technology and carry out value engineering for improved productivity and/or improved utilization and/or cost saving of Project assets during the concession period;
- (e) ensure that the Project Facilities and Services shall adhere to the Operations and Maintenance Standards and Safety Standards and there is safe, smooth and uninterrupted flow of traffic normal operating conditions;
- (f) minimise disruption to traffic in the event of accidents or other incidents affecting the safety and use of the Project Facilities and Services by providing a rapid and effective response and maintaining liaison with emergency services of the Concessioneing Authority or other agencies;
- (g) make available all necessary financial, technical, technological, managerial and other resources for operation, maintenance, repair and replacement of the Project Facilities and Services in a timely manner;
- (h) ensure maintenance of proper and accurate record/data/accounts relating to operations of the Project Facilities and Services and the revenue earned therefrom;
- (i) obtain, maintain and comply with Applicable Permits and comply with the Applicable Laws including those relating but not limited to dock side safety, health, environment and labour;
- (j) subject to the provisions of this Agreement, perform, undertake or provide, in connection with the Project, all services which the Concessioneing Authority is authorized to perform, undertake or provide under the provisions of the MPT Act; and
- (k) prevent, with the assistance of concerned law enforcement agencies, any encroachment or unauthorized use of the Project Facilities and Services.

ii. Container Operations:

The Concessionaire shall:

- a) promptly commence operations upon the Project Facilities and Services being declared by the Authority and the Confirming Party as ready for operations;
- b) make efforts to maximize containers handled so as to achieve optimal utilization of the Project Facilities and Services;
- c) ensure compliance of the Project Facilities and Services at least as per the Scope of Work.as per Appendix 2;

- d) be free to deploy higher capacity equipment/facilities/ technology, etc. and induct new technology and carry out value engineering for improved productivity and/or improved utilization and/or cost saving of Project assets during the Concession Period;
- e) The concessionaire is expected to arrange for all required equipment and assets such as cranes, reach stackers, barges/ ships, trailer etc. for smooth and efficient end-to-end operations. However, the concessionaire will also have an option to make use of old equipment available with the JN-Port (3 RMQCs and 6 RTGCs) based on their requirement on "as is where is" basis on outright sale basis for which separate quote not less than the price fixed by JN-Port based on valuation of these equipment is to be submitted by the bidder.
- f) ensure that the Project Facilities and Services shall adhere to the Operations and Maintenance Standards and Safety Standards and there is safe, smooth and uninterrupted flow of traffic normal operating conditions;
- g) Minimize disruption to traffic in the event of accidents or other incidents affecting the safety and use of the Project Facilities and Services by providing a rapid and effective response and maintaining liaison with emergency services of the Authority or other agencies;
- h) make available all necessary financial, technical, technological, managerial and other resources for operation, maintenance, repair and replacement of the Project Facilities and Services in a timely manner;
- i) ensure maintenance of proper and accurate record/data/accounts relating to operations of the Project Facilities and Services and the revenue earned therefrom;
- j) obtain, maintain and comply with Applicable Permits and comply with the Applicable Laws including those relating but not limited to dock side safety, health, environment and labour;
- k) subject to the provisions of this Agreement, perform, undertake or provide, in connection with the Project, all services which the Authority and/or the Confirming Party is authorized to perform, undertake or provide under the provisions of the MPT Act; and
- l) prevent, with the assistance of concerned law enforcement agencies, any encroachment or unauthorized use of the Project Facilities and Services;
- m) Ensure that all cargo handling equipment are installed, checked and functions according to manufacturer's instructions, current best practice guidelines and legislation;
- n) Implement CIMS from time to time (cargo information management system) as per the terms of this Agreement (directed by the Authority and/or the Confirming Party)
- o) Implement standard operating procedures for all departments of the JNPT and MbPT;
- p) protection and conservation of the environment
- q) maintaining a high standard of cleanliness and hygiene on the project site

iii. Repairs and Maintenance

The Concessionaire shall at its own cost:

- a) repair as necessary and maintain the Project Facilities and Services or any part thereof in accordance with the Scope of Work and for this purpose carry out routine preventive measures and maintenance of the Project Facilities and Services including resurveying of pavement, repairing of structures and repairing and refurbishing equipment's; and
- b) maintain the Project Facilities and Services in accordance with the provisions of this Agreement and Good Industry Practice with the objective of providing adequate service standards and ensuring that the Project Facilities.

It is pertinent to mention here that the basic maintenance and illumination purpose at yard provided at SWB (Shallow Water Berth) of JNPT shall be the responsibility of JNPT. All other expenses, other than the above mentioned basic maintenance and electricity charges shall have to be borne by the Concessionaire.

iv. Replacement of Equipment

The Concessionaire shall at its cost, plan for replacement of the equipment well ahead of the time when the utility thereof is reasonably expected to expire and replace the equipment in accordance with Good Industry Practice so as to ensure that the Project facilities and Services commensurate with the Scope of Work, at all times during the Concession Period.

v. Repairs, Replacement or Restoration

The Concessionaire shall at its own costs, promptly and diligently repair, replace or restore any of the Project Facilities and Services or part thereof which may be lost, damaged, or destroyed for any reason whatsoever.

vi. Removal / Replacement of Assets

Except as provided/authorized under this Agreement the Concessionaire shall not, without the prior written intimation to the Authority or the Confirming Party, remove or replace any assets comprised in the Project Facilities and Services. Such notice shall contain the exact details of the assets that the Concessionaire intends to remove and/or replace, its reasons for doing so and the likely period for replacement.

vii. Payments to the Authority and the Confirming Party

The Concessionaire shall make/ensure payments to the Authority and the Confirming Party as per Article 9.

viii. Access for Inspection

The Concessionaire shall be obliged to extend all co-operation to Experts appointed by the Authority and/or the Confirming Party for purposes of verifying that the Project/the Project Facilities and Services are operated and maintained in compliance with the Performance Standards and adhere to the Operations and Maintenance Standards and Safety Standards. Such verification may be made quarterly. Additionally, the Concessionaire shall upon prior intimation by the Authority and/or the Confirming Party provide the authorized representatives of the Authority and/or the Confirming Party access to the Port's Assets/the Project Facilities and Services for inspection and review of operations and also to ascertain compliance with any of the requirements under this Agreement. Without prejudice to the generality of this provision, it is agreed that the Concessionaire shall in particular extend all co-operation and information required by the Experts appointed by the Authority and/or the Confirming Party for conducting a safety audit and verifying that the Project/Project Facilities and Services are in strict compliance with the Safety Standards.

ix. Reports

The Concessionaire shall provide to the Authority, Monthly reports on cargo traffic, unit gross output/discharge rates at berth, daily output rated per vessel, in respect of Project Facilities and Services and effective working time to waiting within 15 (fifteen) Days following the end of each Month, and any other information relating to operations which the Authority may require from time to time. If so

desired by the Authority, the Concessionaire shall provide the reports in prescribed formats and in electronic form so as to provide online access to the Authority and its representatives.

x. Computer System and Network

The Concessionaire shall install, operate and maintain such computer system and network (such as Electronic Data Interchange and Port Community System) and follow such protocol as the Authority may specify from time to time.

xi. Security Arrangements

The Concessionaire may make his own arrangements for security for the warehouse facility at MbPT and with respect to the Project provided the Concessionaire shall abide by the security regulations/ procedures prescribed by the Authority or a Government Authority from time to time. Other than the warehouse facility, the Authority and JNPT shall provide security arrangements for the project site coming under the Port Area.

xii. Employment of Personnel

The Concessionaire shall employ qualified and skilled personnel required to operate the Project Facilities and Services. The terms of employment may be as deemed fit by the Concessionaire and the Concessionaire shall comply with all Applicable Laws and bear all costs in this regard. Without prejudice to the generality of this provision, all requisite approvals for employment of personnel of foreign origin or nationality shall be obtained by the Concessionaire prior to engaging such personnel. Failure to obtain approval will not amount to a Force Majeure Event. All employees shall always remain the Concessionaire's responsibility.

xiii. Minimum Guaranteed Throughput:

The Concessionaire hereby unconditionally guarantees the Authority annual throughput of the levels set out in **Appendix - 14 ("Minimum Guaranteed Throughput")** and agrees that except as provided in this Agreement, it shall not be entitled to any relaxation of its guarantee in this respect.

xiv. Indemnity Against Claims for Loss of Goods

Notwithstanding anything contained in the MPT Act or any other law for the time being in force, the Concessionaire shall be responsible for meeting any claim, action, suit or proceeding (the "Action") by any third party alleging the loss, destruction or deterioration of goods of which charge has been taken by the Concessionaire and indemnify, save and hold harmless the Authority and the Confirming Party, its officers, employees, agents and representatives (the "Indemnitees") against all claims which may be asserted against or suffered and legal fees and costs incurred and which relate to any such goods, provided that notice of the Action received by the Indemnatee(s) shall be forwarded to the Concessionaire expeditiously and in any case within [●] Days of the receipt thereof by any of the Indemnitees. Provided further that the Indemnitees shall have the right but not the obligation, to contest, defend and litigate any Action by any third party alleged or asserted against any of such Indemnitees in respect of, resulting from, related to or arising out of any matter for which it is to be indemnified hereunder, and reasonable costs and expenses thereof shall be indemnified by the Concessionaire. If the Concessionaire acknowledges in writing its obligation to indemnify the Indemnitees in respect of loss to the full extent, the Concessionaire shall be entitled, at its option, to

assume and control the defense of such Action at its expense and through the counsel of its choice; provided it gives prompt notice of its intention to do so to the Indemnitees and reimburses to them for the reasonable cost and expenses incurred by them prior to the assumption of such defense by the Concessionaire. In such case the Indemnitees shall not be entitled to settle or compromise any Action without the prior written consent of the Concessionaire, which consent shall not be unreasonably withheld or delayed. This indemnity shall survive termination of this Agreement.

xv. Information, Records and Customer Relationship Management

The Concessionaire shall be required to

- a) Maintain a CIMS comprising of cargo and customer records including name, type, destination, source, etc. of cargo and other details
- b) Provide the Authority and/or the Confirming Party and other monitoring agencies access to the CIMS;
- c) Structure and establish processes to safeguard cargo information. This will need to be supported by appropriate training of staff; and
- d) Keep and maintain all such books, records and reports as are required to be maintained by the Agreement and/or Applicable Law and shall submit to appropriate government authorities, monitoring agencies all information and reports as required under the Agreement or any other Applicable Law;

xvi. Maintenance of Complaint Portal

- a) The concessionaire shall maintain a “Complaint Portal” on its website which shall be available to all users of the Project Facilities and Services who shall be duly informed about availability of the provision for lodging of complaints. The Complaint Portal will also be linked to the Concessioning Authority website with an alert system for real time access to the complaints.
- b) Concessionaire shall take action for just and fair redressal of the grievance and submit a reply to the complainant within thirty days from the date of receipt with a copy to Authority and maintain a proof of reply.
- c) If concessionaire fails to address the grievance and the complaint makes a reference to Authority, it will issue directions which shall be complied by the concessionaire.

(B) Rights of Concessionaire

(i) Refinancing of Debts

The Concessionaire in accordance with the provisions of this Agreement and the provisions of the Draft Tripartite Agreement (Appendix-19) may issue bonds to refinance the debts raised and utilized by it from Senior Lenders for financing the project for which Concessioning Authority shall enter into Tripartite Agreement as per the Draft Tripartite Agreement annexed at Appendix-19.

(ii) Preferential and Priority Berthing

Normally, except for the priority and preferential berthing that may be authorized in terms of guidelines issued by the Government from time to time, the Concessionaire shall manage and operate the Project Facilities and Services on a first come - first serve, common-user basis, open to any and all shipping lines, importers, exporters, shippers, consignees and receivers, and refrain from indulging in any unfair or discriminatory practice against any user or potential user thereof. However, if there is a requirement to offer preferential or priority berthing to any one or more shipping lines or vessel

owners/operators to optimize the use of the Project Facilities and Services, it shall be done in accordance with the priority berthing norms agreed between Concessionaire and Authority.

(iii) Unclaimed cargo

The Concessionaire may at its cost:

- (a) after obtaining prior written approval of the Commissioner of Customs or other competent Government Authority and in accordance with the provisions of Applicable Law, destroy or dispose of by way of public auction and/or tender, any unclaimed cargo, the charge of which has been taken by Concessionaire under or pursuant to this Agreement, and always subject to provisions of MPT Act and other laws in this regard.
- (b) institute proceedings for recovery of unrealized charges, if any, in its name and/or defend any claim made in respect of such cargo by consignee/owners. The Concessioning Authority agrees to provide all reasonable assistance necessary in this regard to the Concessionaire.

- (iv)** The Concessionaire may also store any other containers, other than custom cleared containers, at the New Sewree Warehouse and the charges for transportation, berthing and storage of such containers shall be at prevailing SOR rates of the Authority.

(C) Obligations of the Authority and the Confirming Party:

In addition to any of its other obligations in this Agreement, the Authority and the Confirming Party shall arrange for and provide the following:

I. Marine and Port Services

- i. The Authority shall provide the following services:
 - a) scheduling the entry, berthing and sailing of the vessels, pilotage and towage on a non-discriminatory basis subject to priority berthing norms and the sailing schedule as determined by the Deputy Conservator of the Port depending on individual barge/ship characteristics and tidal conditions;
 - b) It is clarified that 1 (one) Indira Dock (or an equivalent area) shall be earmarked for the project operations;
 - c) The Authority shall ensure a minimum draft of 3.5m below Chart Datum at 1 Indira Dock;
 - d) waterside safety and safety of navigation;
 - e) carry out capital or maintenance dredging operations, if any that may be required to ensure the draft to be provided or maintained at the levels agreed under this Agreement, with minimum inconvenience to or dislocation of the Project Facilities and Services;
 - f) provide for/put in place arrangements for provision of Supporting Project Infrastructure other than those covered under the Agreement;
 - g) assist the Concessionaire in securing the assistance of CISF or the relevant Government Authority as may be necessary to prosecute any persons for any offence committed by them within the Project Site ; and
 - h) evolve mutually acceptable mechanism for sharing of common costs by existing and future terminal concessionaires.
- ii. The confirming party shall provide the following services:
 - a. scheduling the entry, berthing and sailing of the vessels, pilotage and towage on a non-discriminatory basis subject to priority berthing norms and the sailing schedule as

determined by the Deputy Conservator of the Port depending on individual ship characteristics and tidal conditions; It is clarified that Shallow Water Berth (SWB) has been earmarked for the project operations.

- b. waterside safety and safety of navigation;
- c. carry out capital or maintenance dredging operations, if any that may be required to ensure the draft to be provided or maintained at the levels agreed under this Agreement, with minimum inconvenience to or dislocation of the Project Facilities and Services;
- d. provide for/put in place arrangements for provision of Supporting Project Infrastructure other than those covered under the Agreement;
- e. assist the Concessionaire in securing the assistance of CISF or the relevant Government Authority as may be necessary to prosecute any persons for any offence committed by them within the Project Site ; and
- f. evolve mutually acceptable mechanism for sharing of common costs by existing and future terminal concessionaires.

II. Approvals

The Authority and/or the Confirming Party shall promptly grant approvals/ consents sought by the Concessionaire as required under this Agreement subject to the Concessionaire having complied with all Applicable Laws/requirements in this regard.

III. Additional Space, Utilities and facilities

In the event of requirement of additional space for storage, utilities and facilities are found to be insufficient by the Concessionaire for providing services as per the scope of work at any time during the Concession period, the Concessionaire may approach the Authority and/or the Confirming Party for providing additional space, utilities and facilities. The Authority and/or the Confirming Party on being approached by Concessionaire shall consider, subject to availability and provide additional space, utilities and facilities if considered necessary for providing project facilities as per scope of work and the same may be made available on chargeable basis as per prevalent rates. Even if authority is not in a position to provide additional space, utilities and services, the Concessionaire would not be entitled to any relaxation on the grounds that additional space, utilities and services are found to be insufficient for providing services as per Scope of Work.

(D) Rights to Authority

- a. If in the reasonable opinion of the Authority, the Concessionaire is in material breach of its obligations under this Agreement for handling of cargo at the berth, the Authority may, without prejudice to any of its rights under this Agreement including Termination thereof, by notice require the Concessionaire to take reasonable measures for the handling of container cargo.
- b. In the event that the Concessionaire, upon notice as per 6.2(a) above fails to handle Container cargo at the berth as per Agreement within a reasonable period, the Authority may take over the performance of any or all the obligations of the Concessionaire to

the extent deemed necessary by it for handling of container cargo at the berth; provided that such taking over by the Authority shall be of no greater scope and of no longer duration than is reasonably required.

- c. The space designated for transportation, berthing and storage of custom cleared containers shall be made available by the Authority and the Confirming Party on need basis.
- d. The area, at New Sewree Warehouse, remaining vacant even after utilization by the Concessionaire, shall be utilized by the Authority for storage its own containers/cargo. The Concessionaire shall make available unutilized space at the said warehouse to the Authority, readily and without disruption.
- e. The Authority and the Confirming Party shall have the right to collect all vessel related charges, as per prevalent rates, from the Concessionaire.

7.2 Utilities and Services

The Authority and the Confirming Party shall during the Concession Period provide access to the concessionaire to all infrastructure facilities and utilities including water, electricity and telecommunication facilities necessary for the implementation, operations and maintenance of the Project/ Project Facilities and Services in accordance with this Agreement, at rates and on terms no less favorable to the Concessionaire than those generally available to commercial customers availing substantially equivalent facilities and utilities. Provided unless otherwise agreed to by the Authority:

- (a) the power made available shall be as received by the Authority and the Confirming Party from [•] (*Name of Electricity Board or other source*) and [•] (*Name of Electricity Board or other source*) respectively. The take off point for electricity shall be from the substation at [•] and [•] respectively;
- (b) the water made available shall be as received by the Authority and the Confirming Party from [•] (*Name the Source*) and [•] (*Name the Source*) respectively. The take off point for water shall be the nearest available water line;
- (c) the Concessionaire shall, at its cost, and to the satisfaction of the Authority and the Confirming Party, install meters to measure the consumption of power and water. The Authority and/or the Confirming Party does not warranty the reliability, quality and quantity of water and power and shall not be liable in any manner for the shortage in or non-supply of these utilities;
- (d) The Concessionaire may, at its cost, make alternate arrangements for power including but not limited to installation of generators, subject to obtaining Applicable Permits, if any, therefore.

7.3 Liability for shortfall in performance

In the event the Concessioning Authority, whether from the review of reports submitted by the Concessionaire in accordance with the provisions of this Agreement or otherwise, observes that the Project/Project Facilities and Services do not comply with the Performance Standards

or fall short of the Performance Standards, the Concessioneing Authority shall calculate the amount of liquidated damages payable by the Concessionaire in accordance with Appendix 15 of this Agreement and demand the Concessionaire by a notice in writing to pay the same within 30 (thirty) Days and on failure of the Concessionaire to pay the same recover the amount from the Concessionaire. Provided that on receipt of the demand the Concessionaire may make a written representation to the Concessioneing Authority which shall be considered by the Concessioneing Authority on merits and the Concessioneing Authority may waive the liquidated damages in part or full, if it is satisfied that the Concessionaire has been carrying out its obligations diligently and efficiently and the shortfall to be waived was on account of reasons beyond the control of the Concessionaire.

It is clarified that this provision does not prejudice the rights of the Concessioneing Authority upon a Concessionaire Event of Default as set out in Article 15 including the Concessioneing Authority's right to terminate this Agreement which shall remain unaffected.

8 ARTICLE 8: TARIFF

8.1 Applicable Tariff Guidelines

Applicable Tariff Guidelines means the guidelines for determination of tariff for projects at Major Ports in vogue on the date the Agreement is signed. However, in the event the said tariff guidelines are either amended, revised or replaced or a new set of tariff guidelines is notified at any time during the Concession period, such amended, revised or new set of tariff guidelines, as the case may be, shall be the Applicable Tariff Guidelines., The charges as per tariff guidelines and SOR shall be applicable only for port dues, berth hire and pilotage and all vessel related charges.

8.2 Levy and Recovery of the Tariff

The Concessionaire shall be entitled to recover Tariff from the users of the Project Facilities and Services. The Concessionaire shall, subject to Article 8.3 hereunder, deposit all Tariff and other receipts in relation to the Project Facilities and Services in the Escrow Account and shall not make any such deposits to any other account either of the Concessionaire or of any other person.

8.3 Collection of Cesses and Charges

The Concessionaire shall collect all cesses and charges including infrastructure cess, if any levied on the users as may be requested by the Concessioneing Authority, on behalf of the Concessioneing Authority and remit the same to the Concessioneing Authority. Provided, the Concessionaire shall be duly authorized by the Concessioneing Authority or such other authority as may be competent in this regard, for the purpose of such collection.

9 ARTICLE 9: PAYMENTS TO THE AUTHORITY (MbPT and JNPT)

9.1 License Fee

(a) In the event, the Concessionaire exercises the prerogative of utilizing the additional plot of land of ~10,000 sq.m., the Concessionaire shall, as consideration for the use, in its capacity as a bare licensee of the said additional land to be allotted and the equipment comprised in the Port's Assets, pay to the Concessioneing Authority (the "License Fee") at the prevailing SOR of open land. Such amount shall be paid by the Concessionaire in lump sum annually with an escalation of 4% per annum.

(b) Any delay in payment of the amount in the preceding clause (a) shall entail payment of interest @ 10 Year GSec plus 6% (Six percent) per annum on the amount outstanding. Payments of Royalty

9.2 Payment of Royalty

(a) The Concessionaire shall pay to the Concessioneing Authority Royalty per Month equal to Rs.***** per TEUs handled during the month. ("the **Royalty**").

(b) Royalty per TEUs will be escalated by 4% annually.

(c) Royalty for each Month shall be paid on or before the seventh Day of the immediately succeeding Month.

(d) The payment of Royalty shall commence from the Month of start of commercial operations.

(e) Royalty amounts remaining unpaid on respective due dates would carry interest @ 10 year GSec plus 6% (Six percent) per annum from the due date till the date of payment or realization thereof.

9.3 Charges for RFID

RFID charges of Rs. 145 per container shall be payable by the Concessionaire for the containers used for this project. Such charges shall be collected by the Confirming Party on behalf of Logistic Data Bank.

9.4 Additional Utilities or Services

The Concessionaire shall also pay rent or other charges for any additional land (other than the Project Site/Project Assets) or additional utilities or services, made available by the Concessioneing Authority to the Concessionaire in accordance with Article 7.1(iii) as per the terms, conditions and covenants including on payment of rates specified by the Concessioneing Authority. Such rates shall be equal to 1.20 times the Scale of Rates. The charges in case of additional land will be 1.20 times of scale of rates as applicable at the time of giving additional land, where the fees is paid on half year/ yearly basis, it may also contain an escalation clause as in Bidding Documents but periodic review of SOR, if any will not be applicable. The present rates applicable in respect of land, utilities and services are set out in Appendix 13.

9.5 Certified Accounts

During the subsistence of this Agreement, the Concessionaire shall maintain all documents and supporting evidences for its financial statements including agreements and documents with respect to all capital and debt raised by the Concessionaire, capital and revenue expenses towards the Project, ship/vessel/user wise information, and, as relevant, the details of cargo handled by category, tariffs charged and the amount of rates received. The Concessionaire shall submit to the Concessioneing Authority a financial statement including quantity (MT) of cargo/ TEUs handled for every 6 (six) monthly period ending 30th September and 31st March every year, duly certified by its Statutory Auditors. The certificate must be furnished within 30 (thirty) Days of the end of each such period.

The Concessioneing Authority shall, at its own cost, have the option to appoint another firm of chartered accountants duly licensed to practice in India (the “Additional Auditor”) to conduct a special audit of the quantity (MT) of cargo/ TEUs handled and the financial statements, documents and supporting evidences thereto as may be mandated by the Concessioneing Authority and report to the Concessioneing Authority such information as may be desired by the Concessioneing Authority for any period and the quantity (MT) of cargo/TEUs handled (“Special Audit”).

In the event that the quantity (MT) of cargo/ TEUs handled reported by the Additional Auditor is higher than that reported by the Statutory Auditor, the auditors shall meet to resolve such differences and if they are unable to resolve the same the Concessionaire shall pay Royalty on the quantity (MT) of cargo/ TEUs handled reported by the Additional Auditor. The Concessionaire shall also pay interest @ 10 year GSec plus 6% - (Six percent) on the difference between the Royalty paid by the Concessionaire based on the quantity (MT) of cargo/TEUs handled reported by the Statutory Auditor and that payable by the Concessionaire based on the quantity (MT) of cargo/TEUs handled reported by the Additional Auditor for the intervening period between the payment of the Royalties as above. Further the Concessionaire shall reimburse all costs, charges and expenses related to the Special Audit. Without prejudice to the aforesaid, if the difference between the quantity (MT) of cargo/ TEUs handled reported by the Additional Auditor and that reported by the Statutory Auditor is higher than [5]% (five percent), the Concessioneing Authority shall at its sole discretion have the right to require a Special Audit for the entire outstanding tenure of the Concession.

9.6 ESCROW Account

- (a) Withdrawals and appropriations during the Concession Period, at any relevant time, from the Escrow Account shall be in the following order of priority⁵:
 - (i) for all taxes due and payable by the Concessionaire;
 - (ii) towards payment of Royalty/TEU and License Fee;

⁵ This provision would be discussed at the pre-bid stage and any reasonable requests of the Concessionaires and the Senior lenders would be taken into account with respect to the priority

- (iii) all construction/implementation expenses relating to the Project/Project Facilities and Services, subject to limits if any set out under the Financing Documents;
- (iv) all expenses relating to operations and management of the Project/Project Facilities and Services, subject to limits if any set out under the Financing Documents;
- (v) towards its debt service obligations under the Financing documents
- (vi) towards other sums payable to the Concessioneing Authority and liquidated damages, if any;
- (vii) towards any reserve requirements in accordance with the Financing Documents;

and the Concessionaire shall be at liberty to withdraw any sums outstanding in the Escrow Account after all the aforesaid payments due in any Quarter have been made and/or adequate reserves have been created in respect thereof for that Quarter. Provided, upon issuance of Termination Notice and/or suspension of the Concessionaire in accordance with the provisions of this Agreement, withdrawal from the Escrow Account shall be made only in accordance with the written instructions of the Concessioneing Authority and the Senior Lenders.

- (b) All amounts standing to the credit of the Escrow Account at the end of the Concession Period including amounts credited to the Escrow Account towards compensation payable in accordance with Article 17 shall be appropriated in the following order of priority:

- (i) towards taxes and statutory dues payable by the Concessionaire;
- (ii) compensation to Senior Lenders in terms of the Financing Documents towards discharge of the Concessionaire's liability under such Financing Documents;
- (iii) all amounts due to the Concessioneing Authority and amounts payable towards transfer of the Project Facilities and Services by the Concessionaire in accordance with this Agreement;

and the Concessionaire shall be at liberty to withdraw any sums outstanding in the Escrow Account after all the aforesaid payments due have been made and/or adequate reserves have been created in respect thereof to the satisfaction of the Senior Lenders and the Concessioneing Authority.

10 ARTICLE 10: OWNERSHIP AND PERMITTED CHARGE

10.1 Ownership of Assets

a) Land

The ownership of the Project Site and Port's Assets shall always remain vested with the Concessioneing Authority. The rights of the Concessionaire in the Project Site and Port's Assets shall only be that of a bare licensee of such assets and the Concessionaire shall neither assign, transfer, sublet, create any charge or Encumbrance, nor shall the Concessionaire create or permit creation of any third party rights whatsoever, on whole or any part of the Port's Assets or Project Site. Further, any such rights of the Concessionaire shall always be subject to existing rights of way. It is expressly agreed that the Concessionaire's rights in the Project Site and/or the Port's Assets shall cease without the need for any action to be taken by the Concessioneing Authority upon the termination of this Agreement for any reason whatsoever.

b) Assets created or provided by the Concessionaire

The ownership of all infrastructure assets, buildings, structures, berths, wharfs, equipment and other immovable and movable assets constructed, installed, located, created or provided by the Concessionaire at the Project Site and/or in the Port's Assets pursuant to this Agreement shall, until expiry of this Agreement or transfer to the Concessioneing Authority on Termination in accordance with this Agreement, be with the Concessionaire. However, such ownership of buildings etc. erected by the Concessionaire at the Project Site shall not be construed as and shall not confer any rights in the Project Site or other Port's Assets upon the Concessionaire, save as that of a bare licensee as provided for in this Agreement.

10.2 Permitted Charge on Assets

The Concessionaire shall be entitled to create a charge on its rights, title and interest in the assets referred to in Article 10.1 (b) in favour of Senior Lenders for securing the Financial Assistance provided or agreed to be provided by them under the Financing Documents. Provided, any such charge shall not be effective before Financial Close and shall not continue for a period exceeding the Concession Period.

Provided further, that such charge shall not be for the Project Site nor encumber the Project Site and/or the Port's Assets.

Provided further, in the event of termination of this Agreement, the said charge shall stand extinguished upon payment of compensation by the Concessioneing Authority to the Senior Lenders, to the extent they are entitled to receive the same in accordance with the provisions of this Agreement.

11 ARTICLE 11: SHAREHOLDING

11.1 Ownership Structure

The Applicant/Consortium has caused the Concessionaire to be incorporated as a special purpose company to implement, operate and maintain the Project/Project Facilities and Services in accordance with this Agreement. The shareholding pattern of Concessionaire/each member of the Consortium in the Concessionaire is [●].

11.2 Shareholding

The Concessionaire shall ensure that the Applicant/ members of the Consortium maintain Management Control at least until expiry of the two (2) years after COD as also maintain their equity holding in the Concessionaire such that⁶:

(a) Selected Concessionaire/Consortium Members together with its/their Associates hold not less than 51% (Fifty One Percent) of its issued and paid up equity and that no member of Consortium whose technical and financial capacity was evaluated for the purposes of Pre-qualifications in response to Request for Qualification shall hold less than 26% (Twenty Six Percent) of such equity until expiry of two (2) years after COD. At any time, after expiry of the aforesaid share holding period, lead member can approach Authority for approval proposing a new entity/ consortium. Authority may at its sole discretion consider and approve it subject to the entity/consortium meeting the eligibility criteria as prescribed in Bid Document for the Project; and

(b) M/s [●] (“**Lead Member**”) of the Consortium (original or new as the case may be) legally and beneficially holds at any time not less than 50% (fifty percent) of the Consortium’s holding in the paid up equity capital of the Concessionaire.

Any Transfer of shareholding in the Concessionaire and/or direct or indirect change in the Management Control of the Concessionaire, including by way of a restructuring or amalgamation, shall only be with the prior written approval of the Concessioneing Authority which consent shall not be withheld except (i) for reasons of national security; or (ii) [if the Person proposed for assuming such Management Control would by virtue of the restrictions imposed under the Applicable Law or the conditions of bidding (including restrictions to avoid anti-competitive and monopolistic practice) and/or public policy be disqualified from undertaking the Project.]

Provided, nothing contained in this Article shall preclude or prevent pledge of shares in the Concessionaire in favour of Senior Lenders as security for the Financial Assistance subject to the enforcement and consequent Transfer thereof only with the prior written consent of the Concessioneing Authority as stated hereinbefore and in accordance with the Financing Documents.

11.3 Constituent Documents

The Concessionaire shall ensure that its articles of association adequately reflect the aforesaid and the relevant commitments, obligations and responsibilities of the Applicant/Consortium.

In particular, the Articles of Association and the Memorandum of Association of the Concessionaire shall be amended within 3 (three) months of the Date of Commercial Operation to include the terms and conditions regarding the composition of share-holding and management stipulated in this Agreement; and terms and conditions related to changes in the share-holding pattern stipulated in this

⁶ This provision would be edited depending on whether the Concessionaire is a single applicant or a Consortium. Sub Article (b) will be omitted in case the Concessionaire is a single Applicant.

Agreement. The Concessionaire shall submit the amended Articles of Association and the Memorandum of Association to the Concessioneing Authority as soon as may be reasonably possible. Any subsequent change in the articles of association or the memorandum of association which alter the provisions required by this Article shall require the prior approval of the Concessioneing Authority and the articles of association and memorandum of association of the Concessionaire shall include a specific provision to this effect.

12 ARTICLE 12: GENERAL RIGHTS, DUTIES AND OBLIGATIONS

12.1 Of the Concessionaire

a) Applicable Permits

The Concessionaire shall at all times during the Concession Period maintain and comply with the Applicable Permits.

b) Taxes & duties

The Concessionaire shall during the Concession Period pay in a timely manner all taxes, duties, levies, GST, cess and charges including but not limited to income tax, customs duty that may be levied, claimed or demanded from time to time by any Government Authority including any increase therein effected from time to time from any Government Authority, in respect of the Project/ the Project Facilities and Services.

c) Insurance

i. Insurance Requirement

The Concessionaire shall, at its cost and expense, purchase and maintain insurances as are prudent, including but not limited to the following:

- a. loss, damage or destruction of the equipment's/ machinery installed by the concessionaire at Project Site, at replacement value;
- b. Transit Insurance for container movement
- c. workmen's compensation insurance;
- d. Deleted
- e. any other insurance that may be necessary to protect the Concessionaire, its employees and its assets and the Authority and/or the Confirming Party, its employees and agents engaged in or connected to the Project and the Project Site and Port Assets (against loss, damage or destruction at replacement value) including all Force Majeure Events that are insurable and not otherwise covered in items (a) to (e).

The concessionaire shall defend, indemnify and hold harmless the Authority and the Confirming Party, towards its property, its officers, officials, employees and volunteers from any and all claims including any or all kind of Third Party liabilities, injuries, damages, losses or suits including attorney fees, arising out of or in connection with the performance of this Concession.

ii. Insurance Cover & Insurance Companies

The Concessionaire shall insure all insurable assets deployed or created by the concessionaire comprised in the Port's Assets and/or the Project Facilities and Services and all insurable risks associated with the Project to the extent advisable in accordance with Good Industry Practice ("Insurance Cover").

iii. Evidence of Insurance Cover

The Concessionaire shall, from time to time, provide to the Authority and the Confirming Party copies of all insurance policies (or appropriate endorsements, certifications or other satisfactory evidence of insurance) obtained by the Concessionaire in accordance with this Agreement.

iv. Application of Insurance Proceeds

Subject to the provisions of the Financing Documents, all moneys received under insurance policies shall be promptly applied by the Concessionaire towards repair or renovation or restoration or substitution of the Ports' Assets and the Project Facilities and Services or any part thereof which may have been damaged or destroyed and in respect of which the claim is lodged. The Concessionaire may designate the Senior Lenders as the loss payees under the insurance policies/assign the insurance policies in their favour as security for the Financial Assistance. The Concessionaire shall carry out such repair or renovation or restoration or substitution to the extent possible in such manner that the Project Facilities and Services or any part thereof, shall, after such repair or renovation or restoration or substitution be as far as possible in the same condition as they were before such damage or destruction, normal wear and tear excepted.

v. Validity of the Insurance Cover

The Concessionaire shall pay the premium payable on such insurance policy (ies) so as to keep the policy(ies) in force and valid throughout the Concession Period and furnish copies of the same to the Authority and the Confirming Party. Each insurance policy shall provide that the same shall not be cancelled or terminated unless 10 (ten) Days' clear notice of cancellation is provided to Authority and the Confirming Party in writing. If at any time the Concessionaire fails to purchase and maintain in full force and effect any and all of the insurances required under this Agreement, the Concessioning Authority may at its option purchase and maintain such insurance and all sums incurred by the Concessioning Authority therefor shall be reimbursed with interest @ 10 year GSec plus 6% - (six percent) per annum by the Concessionaire forthwith on demand, failing which the same shall be recovered by the Concessioning Authority by exercising right of set off or otherwise.

vi. Waiver of Subrogation

All insurance policies procured in terms of the provisions hereof shall include a waiver of any right of subrogation of the insurers there under against, inter alia, the Authority and the Confirming Party and its assigns and successors and their respective subsidiaries, affiliates, employees and of any right of the insurers of any set-off or counterclaim or any other deduction, whether by attachment or otherwise, in respect of any liability of any such person insured under any such policy or in any way connected with any loss, liability or obligation covered by such policies of insurance.

d) Indemnification

The Concessionaire shall during the pendency of this Concession and thereafter until all claims and demands in respect to the acts and omissions during the period of the Agreement as described hereunder are duly settled, indemnify and keep indemnified and otherwise save harmless, the Authority and/or the Confirming Party, its agents and employees, from and against all claims, demands made against and/or loss caused and/or damages suffered and/or cost, charges/expenses

incurred to and/or penalty levied and/or any claim due to injury to or death of any person and/or loss or damage caused or suffered to property owned or belonging to the Authority and/or the Confirming Party, its agents and employees or third party as a result of any acts, deeds or thing done or omitted to be done by the Concessionaire or as a result of failure on the part of the Concessionaire to perform any of its obligations under this Agreement or on the Concessionaire committing breach of any of the terms and conditions of this Agreement or on the failure of the Concessionaire to perform any of its duties and/or obligations including statutory duties or as a consequence of any notice, action, suit or proceedings, given, initiated, filed or commenced by consignee or owner of goods or vessel owner/agent or its employees or any third party or Government Authority or as a result of any failure or negligence or default of the Concessionaire or its Contractor(s), sub-contractor(s), , or employees, servants, agents of such Contractor(s) and/or sub-contractor(s), and/or invitees as the case may be, in connection with or arising out of this Agreement and/or arising out of or, in connection with the Concessionaire's use and occupation of the Project Site or Port's Assets and/or operation and maintenance of the Project Facilities and Services.

e) Assignability

Except as otherwise provided in this Agreement, the Concessionaire shall not assign its rights, title or interest in this Agreement in favour of any Persons without prior written consent of the Authority.

Provided the Concessionaire may assign its rights, interests and benefits under this Agreement to the Senior Lenders as security for the Financial Assistance. Provided further nothing contained in this Article shall:

- i. absolve the Concessionaire from its responsibilities to perform/discharge any of its obligations under and in accordance with the provisions of this Agreement; and
- ii. authorize or be deemed to authorize the Senior Lenders to operate the Project Facilities and Services themselves and any such assignment to operate shall be in terms of the Substitution Agreement.

f) Engagement of Contractors

The Concessionaire shall engage the Management Contractor and execute the Management Contract, thereby entrusting the Management Contractor with the responsibilities of operating and managing the Project Facilities and Services in the manner envisaged under the Request for Proposal.⁷ A copy of the Management Contract shall be provided to the Concessioneing Authority and the same shall not be amended, substituted or revoked without prior written consent of the Concessioneing Authority.

The Concessionaire may engage any Person possessing the requisite skill, expertise and capability of designing, engineering, procurement and construction of civil/ mechanical/electrical engineering structures/equipment, and /or operation and maintenance of the Project Facilities and Services.

Provided:

- (i) the Concessionaire shall at all times be solely responsible for all its obligations under this Agreement notwithstanding any such engagement and anything contained in any Project Contracts or

⁷ This may be added in cases where the project has been awarded on the strength of the management contractor.

any other agreement, and no default under any Project Contract or agreement shall excuse the Concessionaire from its obligations or liability hereunder and the Concessionaire shall at all times be solely responsible for non-performance or for any defect, deficiency or delay in the construction and erection and/or installation of the structures/equipment or any part thereof and for the operation and maintenance of the Project/the Project Facilities and Services in accordance with the provisions of this Agreement;

- (ii) the Concessionaire should have obtained, if required, security clearance for the Contractor the Concessionaire intends to engage;
- (iii) the Concessionaire shall ensure that the Project Contracts contain provisions that entitle the Concessioneing Authority to step into such contract in its sole discretion in substitution of the Concessionaire in the event of termination or suspension of this Agreement; and
- (iv) any contract that it enters with an Affiliate in respect of the Project shall be on an arms length basis.

g) Condition Survey

- (i) The Concessionaire agrees that at least 6 (six)⁸ Months prior to the expiry by efflux of time of the Concession Period, it shall, cause to be conducted at its cost by an Expert appointed by the Parties by mutual consent, a condition survey and an inventory of the entire Project Facilities and Services. If, as a result of such survey, the Expert shall observe/notice that the Port's Assets and/or the Project Facilities and Services or any part thereof have/has not been operated and maintained in accordance with the requirements therefor under this Agreement (normal wear and tear excepted) the Concessionaire shall, at its cost and expenses, take all necessary steps to put the same in good working condition well before the Transfer Date. In the event the Concessionaire fails to comply with this provision, the Concessioneing Authority may itself cause the condition survey and inventory of the Port's Assets and Project Facilities and Services to be conducted and remove any defect or deficiency. The Concessioneing Authority shall be promptly reimbursed by the Concessionaire for the costs incurred in conducting such survey and preparation of inventory as also in putting the Project Facilities and Services in a good working condition.
- (ii) The Concessionaire shall as security for performance of its obligation in the preceding sub-article (i) , provide/submit to the Concessioneing Authority a guarantee issued by a scheduled bank in India for a sum of Rs.3,25,00,000/- (Rupees Three Crore Twenty Five Lakh only) 2 (two) years prior to the expiry of the Concession Period. In the event of Concessionaire's failure to provide such guarantee, the same shall be deemed to be a Concessionaire Event of Default and the Concessioneing Authority shall accordingly be entitled to terminate this Agreement in accordance with Article 15

12.2 Of the Concessioneing Authority and/or the Confirming Party:

a) Assistance in obtaining Approvals, Permits and Licenses

The Concessioneing Authority and/or the Confirming Party shall, at the written request of the Concessionaire, but without guarantees and/or without assuming any responsibility in that behalf, issue recommendatory letters and make best efforts to assist the Concessionaire in obtaining all the

⁸ This period could vary depending on the Project/Concession so as to ensure adequate time for both the survey and restoration of assets.

Applicable Permits including renewals thereof. Provided that, nothing contained in this Article shall relieve the Concessionaire of its obligations under this Agreement to obtain the Applicable Permits and to keep them in force and effect throughout the Concession Period.

b) Taxes and Duties

Any levy or levies including increase therein of taxes, duties, cess and the hike, on account of/in respect of Port's Assets payable to the State Government or any statutory authority shall be met and paid by the Concessioneing Authority and/or the Confirming Party. In case of nonpayment, Concessionaire may pay the amount after giving 30 days' notice to Concessioneing Authority and seek reimbursement from the Concessioneing Authority in due course.

c) Competing Facilities

The Concessionaire shall not operationalise any additional facility within Port Limits for handling cargos either on its own or through any other Person. The Concessioneing Authority will have right to call for a separate tender for same/similar operations if the annual average traffic of containers handled in any financial year during the Concession Period exceed 55,000 TEUs. Nonetheless, the appointed Concessionaire will be permitted to participate in the new tender as per the terms and conditions as specified then. The Concessioneing Authority may during the pendency of the Concession itself or by appointment of Experts verify the performance of obligations of the Concessionaire as set out in this Agreement.

d) General rights of inspection and verification

The Concessioneing Authority and/or the Confirming Party may during the pendency of the Agreement itself or by appointment of Experts verify the performance of obligations of the Concessionaire as set out in this Agreement.

12.3 Of the Authority, the Confirming Party and the Concessionaire

a) Monitoring Arrangement

The parties shall furnish to each other periodical status reports relating to key milestones and obligations as per Appendix 18 "Monitoring Arrangement"

b) Compliance with Laws and Regulations

The Parties shall perform their respective obligations under this Agreement in accordance with the Applicable Laws and Applicable Permits.

c) Rights to Documents

i. Concessioneing Authority's and Confirming Party's Documents

Documents and computer programs or copies thereof, if any, provided by the Authority and/or the Confirming Party to the Concessionaire, shall always remain the property of the Authority and/or the Confirming Party. Such documents, computer programs and/or copies shall not be used by the Concessionaire for the purposes other than for the Project. Such documents, computer programs and/or copies thereof shall, unless otherwise agreed upon by the Authority and/or the Confirming Party, be returned by the Concessionaire to the Authority and/or the Confirming Party on the Transfer Date.

ii. Concessionaire's Documents

Necessary Documents provided by the Concessionaire, or which are developed (and owned by the Concessionaire) for operation and/or maintenance of the Project /the Project Facilities and Services shall be handed over by the Concessionaire to the Authority as well as the Confirming Party free of cost on the Transfer Date.

iii. Confidentiality

All confidential information and documents (whether financial, technical or otherwise) provided by either Party to the other shall not, unless compelled by law or the process of a Government Authority, be disclosed to any Person without the consent of the other Party with the exception of providing such information to legal advisors/auditors of the concerned party on a need-to-know basis. This covenant shall survive the Concession Period.

iv. Obligation to Cooperate

The Parties shall mutually cooperate with each other in order to achieve the objectives of this Concession.

v. Substitution Agreement

The Substitution Agreement envisaged by Appendix 3 hereunder, will/may be executed within 30 (thirty) Days' of notice by the Concessionaire to the Concessioneing Authority of the Senior Lenders' readiness to execute the same.

13 ARTICLE 13: CHANGE IN LAW

13.1 Change in Law

“**Change in Law**” means any of the following events which has a Material Adverse Effect:

- (a) adoption, promulgation, modification, reinterpretation or repeal after the date of this Agreement by any Government Authority of any statute, rule, ordinance, regulation or order, treaty, convention, directive, guideline, policy having force of law; or
- (b) the imposition by any Government Authority of any material condition (other than a condition which has been imposed as a consequence of a violation by the Concessionaire of any Applicable Permit) in connection with the issuance, renewal or modification of any Applicable Permits after the date of this Agreement which renders the performance by the Concessionaire of any of the terms of this Agreement impossible or unviable; or
- (c) Any Applicable Permit previously granted, ceasing to remain in full force and effect for reasons other than breach/violation by or the negligence of the Concessionaire or if granted for a limited period, being renewed on terms different from those previously stipulated.
- (d) Any imposition of new Taxes except a new Direct Tax (both State and Central), duties, cess and the like and/or the increase in Taxes except in Direct Taxes (both State and Central), duties, cess and the like effected from time to time by any Government Authority, and/or imposition of standards and conditions of operations, maintenance and safety arising out of a new or revised Environmental Law; and/or imposition of standards and terms of employment and working conditions of Labourers and Workmen; and/or any rules or regulations stipulated by TAMP or other regulatory authority having jurisdiction over the Project in respect of standards of service. A change in the interpretation or application of any Indian Law by the judgement of a court of record which has become final and binding in place of such interpretation or application of law by a court of record prior to the bid due date

13.2 The Concessionaire's Remedy

- (a) In the event of Change in Law the Concessionaire may propose to the Concessions Authority modifications to the relevant terms of this Agreement which are reasonable and intended to mitigate the effect of the Change in Law. Thereupon, the Parties shall, in good faith, negotiate and agree upon suitable changes in the terms of this Agreement including extension of the Concession Period, so as to place the Concessionaire in substantially the same legal and financial position as it were prior to such Change in Law. i.e Protecting Project IRR as per Financing Plan. Provided however, that if the resultant Material Adverse Effect is such that this Agreement is frustrated or is rendered illegal or impossible of performance, the Change in Law shall be deemed to be a Political Event, whereupon the provisions with respect thereto shall apply.
- (b) In the alternative to the aforesaid, subject to the Concessionaire taking necessary measures to mitigate the impact or the likely impact of Change in Law on the Project, if as a direct consequence of a Change in Law, the Concessionaire is obliged to incur Additional Cost in any accounting year, any such Additional Cost above a sum of Rs.3,25,00,000/- (Rupees Three Crore Twenty Five Lakh only) may at the option of the Concessions Authority be borne by the Concessions Authority. It

- is clarified that Additional Cost upto Rs.3,25,00,000/- (Rupees Three Crore Twenty Five Lakh only) in any accounting year shall be borne by the Concessionaire;
- (c) Upon occurrence of a Change in Law, the Concessionaire shall notify the Concessioning Authority, of the following:
 - (d) the particulars, nature and the impact of Change in Law on the Project;
 - (e) in sufficient detail, the estimate of the Additional Cost likely to be incurred by the Concessionaire on account of the Change in Law; and
 - (f) the measures, which the Concessionaire has taken or proposes to take to mitigate the impact of Change in Law, including in particular, minimising the Additional Cost.
 - (g) Upon receipt of the notice of Change in Law issued by the Concessionaire pursuant to the preceding sub-article(c) , the Concessioning Authority and the Concessionaire shall hold discussions and take all such steps as may be necessary including determination/certification by an Expert, appointed by the Parties by mutual consent, of the Additional Cost and to determine the quantum of the Additional Cost to be incurred.
 - (h) If it is determined that the only material impact of a Change in Law is Additional Cost and the Concessioning Authority opts to compensate the same in accordance with the preceding sub-article (b) , the Concessionaire shall not be entitled to any other remedy nor shall seek any alterations to the Agreement and the Concessioning Authority shall, within 30 (thirty) Days from the date of determination of quantum of Additional Cost to be borne by the Concessioning Authority in accordance with sub-article (b) above, compensate the Concessionaire in either of the following ways:
 - (i) by lump-sum reimbursement of such Additional Cost to the Concessionaire;
 - (j) reimbursement of the such Additional Cost to the Concessionaire, in not exceeding four half yearly installments, subject to payment of interest at 10 Year GSEC + 6% - (Six percent) on the amount the payment of which is deferred.

Notwithstanding the aforesaid, if in terms of Good Industry Practice, the event constituting a Change in Law could be insured, the Concessionaire shall not be entitled to any remedy under this Article 13.2;

If as a result of Change in Law, the Concessionaire incurs a reduction in costs or other financial gain or benefit in connection with its development or operation of the Project, the aggregate financial effect of which exceeds Rs.3,25,00,000/- (Rupees Three Crore Twenty Five Lakh only) in any Financial Year, the Concessionaire shall notify the Concessioning Authority and pay to the Concessioning Authority an amount that would put the Concessionaire in the same financial position it would have occupied had there been no such Change in Law resulting in such cost reduction, increase in return or other financial gain or benefit as aforesaid. Without prejudice to the aforesaid, the Concessioning Authority may, by notice in writing require the Concessionaire to pay an amount that would put the Concessionaire in the same financial position it would have occupied had there been no such Change in Law resulting in such cost reduction, increase in return or other gain or benefit.

The Concessionaire shall make payment of such compensation within sixty (60) Days of the said financial benefit. If the Concessionaire shall dispute the quantum of such compensation claim of the Concessioning Authority, the same shall be finally settled in accordance with the dispute resolution mechanism contained in Article 19 herein.

14 ARTICLE 14: FORCE MAJEURE

14.1 Force Majeure Event

As used in this Agreement, Force Majeure Event means the occurrence of any of the Non-Political Events, the Political Events or the Other Events in India, set out in Articles 14.2 , 14.3 and 14.4 respectively including the impact/consequence thereof which :

- a) is beyond the control of the Party claiming to be affected thereby (the “Affected Party”);
- b) prevents the Affected Party from performing or discharging its obligations under this Agreement; and
- c) the Affected Party has been unable to overcome or prevent despite exercise of due care and diligence.

14.2 Non-Political Events

Any of the following events which prevent the Affected Party from performing any of its obligations for a continuous period of not less than 7 (seven) Days from the date of its occurrence, shall constitute a Non-Political Event:

- a) act of God, epidemic, extremely adverse weather conditions, lightning, earthquake, cyclone, tsunami, flood, volcanic eruption, chemical or radioactive contamination or ionizing radiation, fire or explosion (to the extent of contamination or radiation or fire or explosion originating from a source external to the Project Site and by reasons not attributable to the Concessionaire or the Concessionaire or any of the employees or agents of the Concessionaire or the Concessionaire);
- b) strikes or boycotts (other than those involving the Concessionaire, Concessionaires or their respective employees/representatives, or attributable to any act or omission of any of them), and not being an Other Event set forth in Article 14.4 labour disruptions or any other industrial disturbances not arising on account of the acts or omissions of the Concessionaire or the Concessionaire;
- c) any failure or delay of a Concessionaire caused by any of the Non-Political Events, for which no offsetting compensation is payable to the Concessionaire or on behalf of the Concessionaire;
- d) the discovery of geological conditions, toxic contamination or archeological remains on the Project Site that could not reasonably have been expected to be discovered through a site inspection; or
- e) any event or circumstance of a nature analogous to any of the foregoing situations or events.

14.3 Political Events

Any of the following events shall constitute Political Event:

- a) Change in Law for which no relief is provided under the provisions of Article 13, resulting in Material Adverse Effect;

- b) action of a Government Authority having Material Adverse Effect including but not limited to (i) acts of expropriation, compulsory acquisition or takeover by any Government Authority of the Project/Project Facilities and Services or any part thereof or of the Concessionaire's or the Concessionaire's rights under any of the Project Contracts, and (ii) any unlawful, unauthorized or without jurisdiction refusal to issue or to renew or the revocation of any Applicable Permits, in each case, for reasons other than the Concessionaire's or the Concessionaire's breach or failure in complying with the Scope of Work, Applicable Laws, Applicable Permits, any judgment or order of a Governmental Agency of any contract by which the Concessionaire or the Concessionaire as the case may be is bound;
- c) early determination of this Concession by the Authority for reasons of national emergency, national security or the public interest;
- d) any failure or delay of a Concessionaire caused by any of the aforementioned Political Events, for which no offsetting compensation is payable to the Concessionaire by or on behalf of the Concessionaire; or
- e) any event or circumstance of a nature analogous to any of the foregoing situations or events.

14.4 Other Events

Any of the following events which prevents the Affected Party from performing any of its obligations under this Agreement for a continuous period of not less than 7 (seven) Days from the date of its occurrence, shall constitute the Other Event:

- a) an act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, riot, insurrection, terrorist or military action, civil commotion or politically motivated sabotage;
- b) industry wide or State wide strikes or industrial action;
- c) any civil commotion, boycott or political agitation which prevents collection of Fee by the Concessionaire;
- d) any judgment or order of a court of competent jurisdiction or statutory authority in India made against the Concessionaire or the Concessionaire in any proceedings which is non-collusive and duly prosecuted by the Concessionaire; and any judgment or order of a court of competent jurisdiction or statutory authority in India made against the Concessionaire or the Concessionaire in any proceedings which is non-collusive and duly prosecuted by the Concessionaire other than relating to proceedings (i) pursuant to failure of the Concessionaire to comply with any Applicable Law or Applicable Permit, or (ii) on account of breach of any Applicable Law or Applicable Permit or of any contract, or (iii) enforcement of this Agreement or (iv) with respect to exercise of any of its rights under this Agreement by the Authority; or
- e) any event or circumstance of a nature analogous to any of the foregoing situations and events.

14.5 Notice of Force Majeure Event

- a) The Affected Party shall give written notice to the other Party in writing of the occurrence of any of the Force Majeure Event (the “**Notice**”) as soon as the same arises or as soon as

reasonably practicable and in any event within 7 (seven) Days after the Affected Party knew, or ought reasonably to have known, of its occurrence and the adverse effect it has or is likely to have on the performance of its obligations under this Agreement.

- b) The Notice shall inter-alia include full particulars of:
 - i. the nature, time of occurrence and extent of the Force Majeure Event with evidence in respect thereof;
 - ii. the duration or estimated duration and the effect or probable effect which such Force Majeure Event has or will have on the Affected Party's ability to perform its obligations or any of them under this Agreement;
 - iii. the measures which the Affected Party has taken or proposes to take, to alleviate the impact of the Force Majeure Event or to mitigate the damage; and
 - iv. any other relevant information.
- c) So long as the Affected Party continues to claim to be affected by a Force Majeure Event, it shall provide the other Party with periodic (fortnightly/monthly) written reports containing the information called for by Article 14.5 and such other information as the other Party may reasonably request.

14.6 Period of Force Majeure

Period of Force Majeure shall mean the period from the time of occurrence specified in the Notice given by the Affected Party in respect of the Force Majeure Event till the earlier of:

- a. the expiry of the period during which the Affected Party is excused from performance of its obligations in accordance with Article 14.7 or
- b. the termination of this Agreement pursuant to Article 14.10 hereof; whichever is earlier.

14.7 Resumption of Performance

During the period of Force Majeure, the Affected Party shall in consultation with the other Party, make all reasonable efforts to limit or mitigate the effects of the Force Majeure Event on the performance of its obligations under this Agreement. The Affected Party shall also make efforts to resume performance of its obligations under this Agreement as soon as possible and upon resumption shall notify the other Party of the same in writing. The other Party shall afford all reasonable assistance to the Affected Party in this regard.

14.8 Performance Excused

The Affected Party, to the extent rendered unable to perform its obligations or part thereof under this Agreement as a consequence of the Force Majeure Event shall be excused from performance of the obligations. Provided that, the excuse from performance shall be of no greater scope and of no longer duration than is reasonably warranted by the Force Majeure Event. Provided further, nothing contained herein shall absolve the Affected Party from any payment obligations accrued prior to the occurrence of the underlying Force Majeure Event.

14.9 Costs, Revised Timetable

a) Costs

Each Party shall bear its costs, if any, incurred as a consequence of the Force Majeure Event.

b) Extension of time/period

The Affected Party shall be granted by the other Party, extension of time specified in this Agreement for the performance of any obligation by such period not exceeding the period during which the relative performance was affected by the Force Majeure Event. Such extension may include extension of the Concession period by the Authority in appropriate cases if permissible under Applicable Law.

14.10 Termination Due to Force Majeure Event

If the period of Force Majeure continues or is in the reasonable judgment of the Parties likely to continue beyond a period of 120 (one hundred and twenty) Days, the Parties may mutually decide to terminate this Agreement or continue this Agreement on mutually agreed revised terms. If the Parties are unable to reach an agreement in this regard, the Affected Party shall after the expiry of the said period of 120 (one hundred and twenty) Days be entitled to terminate the Agreement in which event, the provisions of Articles 16 and 17 shall, to the extent expressly made applicable, apply.

15 ARTICLE 15: EVENTS OF DEFAULT

15.1 Events of Default

Event of Default means the Concessionaire's Event of Default or the Authority's/Confirming Party's Event of Default or both as the context may admit or require.

a) The Concessionaire's Event of Default

The Concessionaire's Event of Default means any of the following events unless such an event has occurred as a consequence of the Authority's Event of Default or a Force Majeure Event:

- i. the Concessionaire's failure to perform or discharge any of its obligations in accordance with the provisions of this Agreement;
- ii. operations at the Project Site is abandoned for a more than 90 (ninety) Days during the Construction Phase;
- iii. Delay in payment of Licence Fee for 2 (two) consecutive Months or more than (7) (seven) times in the aggregate during the Concession Period;
- iv. Delay in payment of royalty for 4 (four) consecutive Months or more than (7) (seven) times in the aggregate during the Concession Period;
- v. a delay of more than 180 (one hundred and eighty) Days from any Milestone Date in achieving any of the performance obligations set forth for the relevant Milestone Date or the Date of Commercial Operations is delayed for more than 60 (sixty) Days from the Scheduled Project Completion Date;
- vi. the construction of warehouse at the additional plot of land allotted by the Concessioning Authority is delayed beyond 8 (eight) months from the date of handing over of the said land by the Authority;
- vii. the Concessionaire's failure to perform or discharge any of its obligations under any other Project Contracts, which has or is likely to affect the Project/the Project Facilities and Services, materially;
- viii. Failure to enter into Operation and Maintenance (O&M) contract before date of commercial operation and a default under the Management Contract, which has or is likely to affect the Project/the Project Facilities and Services, materially;
- ix. minimum traffic to be handled through barge/ ship movement from JNPT to Mumbai port each year is not fulfilled in accordance with requirements under this Agreement. The Concessionaire should ensure that a total traffic of 3,000 TEUs per annum for the second year of operations, 6,000 TEUs per annum for the third year of operations, 12,000 TEUs per annum for the fourth year of operations and subsequent increase of 25% of base figure of MGT for the subsequent years of operations is handled as part of this project. If the container traffic recorded as part of this project for any four consecutive months, is lower than 75% of the minimum traffic as stipulated in this Agreement, then apart from forfeiting the Performance Guarantee of the Concessionaire, the Authority may also terminate the Agreement.
- x. any representation made or warranties given by the Concessionaire under this Agreement is found to be false or misleading;
- xi. the Concessionaire passing a resolution for voluntary winding up;

- xii. appointment of a provisional liquidator, administrator, trustee or receiver of the whole or substantially whole of the undertaking of the Concessionaire by a court of competent jurisdiction in proceedings for winding up or any other legal proceedings;
- xiii. occurrence of default under the Financing Documents pursuant to which the Senior Lenders exercise their rights to substitute the Concessionaire in accordance with the provisions of the Substitution Agreement;
- xiv. levy of an execution or restraint on the Concessionaire's assets which has or is likely to have Material Adverse Effect and/or affect the Project/Project Facilities and Services, materially and such execution or restraint remaining in force for a period exceeding 90 (ninety) Days.
- xv. the Performance Guarantee is not maintained in terms of the provisions hereof;
- xvi. the Concessionaire abandons or expresses its intention to revoke/terminate this Agreement without being entitled to do so as is expressly provided in the Agreement;
- xvii. a change in shareholding such that the beneficial interest of the Applicant/Consortium in the Concessionaire reduces below the limits set in Article 11.2 and/or Management Control of the Concessionaire has occurred in contravention of the provisions of Article 11 hereof;
- xviii. amalgamation of the Concessionaire with any other company or reconstruction or transfer of the whole or part of the Concessionaire's undertaking [other than transfer of assets in the ordinary course of business] in contravention with the provisions of Article 11 hereof; and
- xix. the Concessionaire engaging or knowingly allowing any of its employees, agents, Concessionaire or representative to engage in any activity prohibited under this Agreement and/or by law or which constitutes a breach of the Agreement or breach of or an offence under any law, in the course of any activity undertaken pursuant to this Agreement.

b) The Authority's/ Confirming Party's Event of Default

- i. the Authority's/Confirming Party's failure to perform or discharge its obligations in accordance with the provisions of this Agreement unless such failure has occurred as a consequence of any Concessionaire Event of Default or a Force Majeure Event.
- ii. any representation made or warranties given by the Authority and/or the Confirming Party under this Agreement is found to be false or misleading.
- iii. appointment of a provisional liquidator, administrator or receiver of the whole or part of the Port's Assets in any legal proceedings initiated against the Authority and/or the Confirming Party (unless such proceedings are initiated as a consequence of any Concessionaire Event of Default).
- iv. levy of an execution or restraint on the Port's Assets in any proceedings against the Authority and/or the Confirming Party (unless such proceedings are initiated as a consequence of any Concessionaire Event of Default) which has or is likely to have Material Adverse Effect and such execution or restraint remaining in force for a period exceeding 90 (ninety) Days.

15.2 Parties Rights

- a) Upon the occurrence of the Concessionaire's Event of Default, the Authority shall without prejudice to any other rights and remedies available to it under this Agreement be entitled to terminate this Agreement.
- b) Upon the occurrence of the Authority's Event of Default, the Concessionaire shall without prejudice to any other rights and remedies available to it under this Agreement be entitled to terminate this Agreement.

Provided that before proceeding to terminate this Agreement, the Party entitled to do so shall give due consideration and shall have due regard to the nature of the underlying Event of Default, its implication on the performance of the respective obligations of Parties under this Agreement and the circumstances in which the same has occurred.

15.3 Consultation Notice

Either Party exercising its right under Article 15.2, shall issue to the other Party a notice in writing specifying in reasonable detail the underlying Event of Default(s) and proposing consultation amongst the Parties and the Senior Lenders to consider possible measures of curing or otherwise dealing with the underlying Event of Default ("**Consultation Notice**").

15.4 Remedial Process

Following the issue of Consultation Notice by either Party, within a period not exceeding 90 (ninety) Days or such extended period as the Parties may agree ("**Remedial Period**") the Parties shall, in consultation with the Senior Lenders, endeavour to arrive at an agreement as to the manner of rectifying or remedying the underlying Event of Default. Without prejudice to this, if the underlying event is a Concessionaire Event of Default, the Concessioning Authority shall in consultation with the Senior Lenders endeavour to arrive at an agreement as to one or more of the following measures and/or such other measures as may be considered appropriate by them in the attendant circumstances:

- (a) the change of management or control/ownership of the Concessionaire;
- (b) the replacement of the Concessionaire by a new operator ("**Selectee**") proposed by the Senior Lenders (in terms of the Substitution Agreement), and the specific terms and conditions of such replacement which shall include :
 - (i) the criteria for selection of the Selectee;
 - (ii) the transfer of rights and obligations of the Concessionaire surviving under this Agreement to the Selectee;
 - (iii) handing over/ transfer of the Project Site, the Port's Assets and the Project Facilities and Services to the Selectee;
 - (iv) acceptance by the Selectee of the outstanding obligations of the Concessionaire under the Financing Documents and preserving Senior Lenders' charge on the Concessionaire's assets;
 - (v) acceptance by the Selectee of any amounts due to the Concessioning Authority from the Concessionaire under this Agreement; and
 - (vi) payment of consideration for the Concessionaire's assets comprised in the Project Facilities and Services and the manner of appropriation thereof.

15.5 Obligations during Remedial Period

During the Remedial Period, the Parties shall continue to perform their respective obligations under this Agreement which can be performed, failing which the Party in breach shall compensate the other Party for any loss or damage occasioned or suffered on account of the underlying failure/breach.

15.6 Revocation of Consultation Notice

If during the Remedial Period the underlying Event of Default is cured or waived or the Parties and the Senior Lenders agree upon any of the measures set out in Article 15.4, the Consultation Notice shall be withdrawn in writing by the Party who has issued the same.

15.7 Termination due to Events of Defaults

If before the expiry of the Remedial Period, the underlying Event of Default is neither cured nor waived nor the Parties and the Senior Lenders have agreed upon any of the measures in accordance with Article 15.4, the Party who has issued the Consultation Notice shall have the right to terminate this Agreement, in which event, the provisions of Article 16 and 17 shall, to the extent expressly made applicable, apply.

15.8 Authority's Rights of Step-in

Upon a Termination Notice being issued due to Concessionaire's Event of Default, the Authority may, at its discretion:

- a) re-enter upon and take possession and control of its Project Site/Project Facilities and Services forthwith;
- b) prohibit the Concessionaire and any Person claiming through or under the Concessionaire from entering upon/dealing with the Project Facilities and Services;
- c) step in and succeed upon election by Authority without the necessity of any further action by the Concessionaire, to the interests of the Concessionaire under such of the Project Contracts as the Authority may in its discretion deem appropriate with effect from the date of communication of such election to the counter party to the relative Project Contracts.

Provided, that in such circumstances, the Concessioneing Authority shall assume the obligations of the Concessionaire with respect to the Senior Lenders during such Remedial Period out of the current revenues. Provided further, the Concessionaire acknowledges that any payments made by the Concessioneing Authority during the Remedial Period shall be adjusted against compensation payable by the Concessioneing Authority to the Concessionaire in terms of the provisions of this Agreement.

16 ARTICLE 16: TERMINATION OF THE CONCESSION/AGREEMENT

16.1 Termination Procedure

The Party entitled to terminate this Agreement either on account of a Force Majeure Event or on account of an Event of Default having Material Adverse Effect shall do so by issue of a notice in writing (“**Termination Notice**”) to the other Party and simultaneously deliver a copy thereof to the Senior Lenders. The Termination Notice shall be of not less than 90 (ninety) Days and not ordinarily be more than 180 (one hundred and eighty) Days, (“**Termination Period**”) and at the expiry of the Termination Period, this Agreement shall stand terminated without any further notice.

16.2 Obligations during Termination Period

During Termination Period, the Parties shall, subject where applicable to the provisions of this Article 15, continue to perform such of their respective obligations under this Agreement which are capable of being performed with the object, as far as possible, of ensuring continued availability of the Project Facilities and Services to the users, failing which the Party in breach shall compensate the other Party for any loss or damage occasioned or suffered on account of the underlying failure/breach.

16.3 Requisition

Except where the Termination Notice is issued prior to Financial Close being achieved by the Concessionaire, when the Agreement has not come into effect the Concessionaire has no right hereunder and no compensation is payable by the Concessioneing Authority, upon issue or receipt as the case may be of Termination Notice, either as a consequence of a Force Majeure Event or as a consequence of an Event of Default, or otherwise 6 (six) months prior to the expiry of the Concession Period, the Concessioneing Authority shall by a notice in writing (“**Requisition**”) call upon the Concessionaire to furnish the following information to enable the Concessioneing Authority to estimate the likely compensation payable by the Concessioneing Authority to the Concessionaire and/or to finalise the items of Concessionaire’s assets comprised in the Project Facilities and Services to be handed over to/taken over by the Concessioneing Authority.

- (a) except in cases where no Financial Close has been achieved, the particulars of Debt Due supported by Senior Lenders’ certificate;
- (b) data or records [to be specified by Concessioneing Authority] regarding the operation and maintenance of the Project Facilities and Services;
- (c) specifications regarding the Concessionaire’s assets comprised in the Project Facilities and Services; and
- (d) any other information or records [to be specified by Concessioneing Authority at its discretion] regarding Concessionaire, its business, the Project/Project Facilities and Services, assets and liabilities. The Concessionaire shall within a period of 30 (thirty) Days of receipt of Requisition furnish the particulars called for by the Concessioneing Authority.

16.4 Condition Survey

- a) The Concessionaire agrees that on the service of a Termination Notice or at least 6 (six) months prior to the expiry of the Concession period, as the case may be, it shall conduct or cause to be conducted under the Authority's supervision, a condition survey of the Project Facilities and Services including the Project Site and/or the Port's Assets to ascertain the condition thereof, verifying compliance with the Concessionaire's obligations under this Agreement and to prepare an inventory of the assets comprised in the Project Facilities and Services. During this period, the designated key personnel of the Authority shall be associated with the operations of the Project Facilities and Services (except when the same is impossible due to a Force Majeure Event) in order to facilitate smooth takeover of the same by the Authority and the Confirming Party on the Transfer Date.
- b) If, as a result of the condition survey, the Authority and/or the Confirming Party observes/notices that the Project Site and/or the Port's Assets and/or the Project Facilities (warehouse, wharfs, berths, etc.) and Services or any part thereof have/has not been operated and maintained in accordance with the requirements therefor under this Agreement (normal wear and tear excepted) the Concessionaire shall, at its cost and expenses, take all necessary steps to put the same in good working conditions well before the Transfer Date.
- c) In the event the Concessionaire fails to comply with the provisions of this Agreement, the Authority and/or the Confirming Party may itself cause the condition survey and inventory of Port's Assets and the Project Facilities and Services to be conducted. The Authority and/or the Confirming Party shall be compensated by the Concessionaire for any costs incurred in conducting such survey and preparation of inventory as also in putting the Project Facilities and Services in good working condition.

16.5 Consequences of Termination

Without prejudice to any other consequences or requirements under this Agreement or under any law:

- (a) the Concessionaire shall transfer all the assets and rights upon expiry of the Concession Period by efflux of time or termination of the Agreement due to a Force Majeure Event or on account of an Event of Default in accordance with Article 18;
- (b) the Concessioning Authority shall be entitled to encash any subsisting bank guarantee(s) provided by the Concessionaire against any amounts owing to the Concessioning Authority by the Concessionaire.

Notwithstanding anything contained in this Agreement, except for ensuring the deposit of the compensation payable to the Concessionaire in accordance with Article 17 in the Escrow Account, the Concessioning Authority shall not, as a consequence of termination or otherwise, have any obligation whatsoever to any third party including but not limited to obligations as to compensation for loss of employment, continuance or regularization of employment, absorption or re-employment on any ground, in relation to any person in the employment of or engaged by the Concessionaire in connection with the Project, and the handback of the Project Site/Port Assets/Project Facilities & Services by the Concessionaire to the Concessioning Authority shall be free from any such obligation.

17 ARTICLE 17: COMPENSATION

17.1 Compensation

(a) Termination due to Force Majeure Event

- (i) If the termination is due to a Non Political Event, compensation payable to the Concessionaire shall be the lower of the Book Value or the Debt Due LESS any amount due to the Concessioneing Authority by the Concessionaire under this Agreement LESS all insurance claims received or admitted.
- (ii) If the termination is due to Other Event, compensation payable to the Concessionaire shall be the higher of the Book Value or the Debt Due LESS any amount due to the Concessioneing Authority by the Concessionaire under this Agreement LESS all insurance claims received or admitted. Provided, the Book Value or the Debt Due, as the case may be shall not exceed the Total Project Cost.
- (iii) If termination is due to a Political Event, compensation payable to the Concessionaire shall be the same as that stipulated for termination due to a Concessioneing Authority Event of Default under Article 17.1 (c) .

Provided, no compensation shall be payable to the Concessionaire if the Concessionaire fails to maintain Insurance Cover as contemplated under Article 12 of this Agreement.

(b) Termination due to Concessionaire Event of Default

If the termination is after the Date of Commercial Operation, due to a Concessionaire Event of Default, the compensation payable by the Concessioneing Authority to the Concessionaire shall be the lowest of:

- (i) the Book Value;
- (ii) 90% (ninety percent) of Debt Due;
- (iii) the Total Project Cost;

Provided, no compensation shall be payable to the Concessionaire if the Concessionaire fails to maintain Insurance Cover as contemplated under Article 12 of this Agreement.

(c) Termination due to Concessioneing Authority Event of Default

If the termination is due to a Concessioneing Authority Event of Default, the compensation payable by the Concessioneing Authority shall be equal to the aggregate of (i) Debt Due plus (ii) 150% (one hundred and fifty percent) Equity.

17.2 No Compensation on Expiry of Concession Period

In the event of expiry of Concession by efflux of time (the Concession having run its full course), the Concessionaire shall hand over/ transfer peaceful possession of the Project Site, Port's Assets and the Project Facilities and Services free of cost and Encumbrance.

17.3 Transfer Fee and Charges

Transfer costs, stamp duties, notary fees and taxes, if applicable, for the transfer of the Project Facilities and Services consequent to the expiry or termination of this Agreement shall be borne by:

- (a) the Concessionaire in the event of expiry of Concession Period or termination due to a Concessionaire Event of Default;
- (b) the Concessioneing Authority in the event of termination due to an Concessioneing Authority Event of Default or Political Event; and
- (c) by both parties equally in case of termination due to Change in Law or Non Political Event or Other Event.

17.4 Payment of Compensation to Senior Lenders

The Concessionaire hereby irrevocably authorises the Concessioneing Authority to pay to the Senior Lenders or at their instruction to any designated bank account in India the compensation payable to the Concessionaire. The Concessionaire confirms that upon such payment being made, the Concessioneing Authority shall stand duly discharged of its obligations regarding payment of compensation under this Agreement and the charge created by the Concessionaire in favour of the Senior Lenders on any of its assets taken over by the Concessioneing Authority shall stand satisfied and all such assets shall on and from the Transfer Date be free from such charge. The Concessionaire further confirms that payment of compensation by Concessioneing Authority in accordance with this Article 17.4 shall be a valid discharge to the Concessioneing Authority in respect of Concessioneing Authority's obligation regarding payment of compensation to the Concessionaire under this Agreement.

Provided notwithstanding anything inconsistent contained in this Agreement, the Concessionaire/the Senior Lenders as the case may be shall be entitled to remove at its/ their cost all such movables which are not taken over by the Concessioneing Authority and to deal with the same in accordance with their respective rights under law.

Provided further, if there are no amounts outstanding under the Financing Documents and a certificate to that effect issued by the Senior Lenders is furnished by the Concessionaire to the Concessioneing Authority, the compensation shall be paid by the Concessioneing Authority to the Concessionaire directly.

17.5 Delayed Payment of Compensation

If for any reasons, other than those attributable to the Concessionaire, the Concessioneing Authority fails to pay the compensation on the Transfer Date, the Concessioneing Authority shall be liable to pay interest@ 10 year GSEC plus 6%(six percent) per annum thereon from the Transfer Date till payment thereof. Provided, nothing contained in this Article shall be deemed to authorise any delay in payment of compensation in accordance with this Agreement.

17.6 Delayed Transfer of Assets

If for any reasons other than those attributable to the Concessioneing Authority the Concessionaire fails to transfer assets, rights and contracts on the Transfer Date in accordance with Article 16.5 read with Article 18, there shall be no suspension of the operation and maintenance of the Project Facilities and Services and the Concessionaire shall, as a trustee of the Concessioneing Authority, (a) continue to operate and maintain the Project Facilities and Services or such of them, as directed by Concessioneing Authority until completion of the relative transfer formalities and (b) account for and pay to the Concessioneing Authority the Project Revenue minus operating costs and statutory dues, from such operations. In the event of failure to do so, the Concessionaire shall be liable to pay to the Concessioneing Authority, for every Day of delay, liquidated damages computed at the rate of the average daily profits earned during the 3 (three) years immediately preceding the Transfer Date. Parties confirm that this is a true and correct estimate of damages and not in the nature of a penalty. Provided nothing contained in this Article 17.6 shall be deemed or construed to authorise delay in completion of formalities of transfer of assets, rights and contracts by the Concessionaire to the Concessioneing Authority in accordance with the requirements thereof under this Agreement.

In case the transfer of assets by the Concessionaire to the Concessioneing Authority is delayed for reasons attributable to the Concessioneing Authority, the Concessionaire shall nonetheless continue to

operate the Project Facilities and Services but as agent of the Concessioneing Authority. Provided however, the Concessionaire shall be liable to pay Royalty in accordance with Article 9.2.

17.7 Remedies Cumulative

The exercise of right by either Party to terminate this Agreement, as provided herein, shall not preclude, such Party from availing any other rights or remedies that may be available to it under law. All remedies available to the Parties shall be cumulative and the exercise or failure thereof of one or more remedies by any Party shall not limit or preclude the exercise of or constitute a waiver of any other remedies by such Party.

18 ARTICLE 18: TRANSFER ON EXPIRY OF THE CONCESSION PERIOD

18.1 General Scope of Transfer/Payment

The Parties shall perform/discharge their respective obligations to be performed or discharged under the provisions of this Agreement on the Transfer Date in entirety. Without prejudice to the generality of this provision and the provisions of Article 16, the transactions to be consummated and the formalities to be completed by the Parties on the Transfer Date shall be as set out in Articles 18.2 and 18.3.

18.2 Concessionaire's Obligations

The Concessionaire shall;

- (a) hand over peaceful possession of the Project Site, Port's Assets, the Project and the Project Facilities and Services free of Encumbrance;
- (b) transfer all its rights, titles and interests in the assets comprised in the Project Facilities and Services which are required to be transferred to the Concessioneing Authority and the Confirming Party in accordance with this Agreement and execute such deeds and documents as may be necessary for the purpose and complete all legal or other formalities required in this regard;
- (c) hand over to the Concessioneing Authority and the Confirming Party all documents including as built drawings, manuals and records relating to operation and maintenance of the Project Facilities and Services;
- (d) transfer technology and up-to-date know-how relating to operation and maintenance of the Port's Assets and/or the Project Facilities and Services;
- (e) transfer or cause to be transferred to the Concessioneing Authority and the Confirming Party any Project Contracts which are (i) valid and subsisting; (ii) capable of being transferred to the Concessioneing Authority; and (iii) those the Concessioneing Authority has chosen to take over, and cancel or cause to be cancelled such Project Contracts not transferred to the Concessioneing Authority. For this purpose, the Concessionaire shall ensure that all Project Contracts are assignable in favor of the Concessioneing Authority without any further action on part of the respective counterparties. The Concessionaire shall entirely at its cost, terminate all such Project Contracts which are not transferred/assigned and/or are not required to be transferred/assigned to the Concessioneing Authority;
- (f) at its cost, transfer to the Concessioneing Authority all such Applicable Permits which the Concessioneing Authority may require and which can be legally transferred. Provided if the termination is on account of Concessioneing Authority Event of Default the cost of such transfer shall be borne/ reimbursed by the Concessioneing Authority;
- (g) at its cost, remove within 90 (ninety) days from expiry of the Concession Period, from the Project Site/Port's Assets, any moveable assets that are not taken over by or not to be transferred to the Concessioneing Authority in terms of the provisions of this Agreement;
- (h) Transfer to the Authority the structure (newly constructed warehouse) on the additional plot of land at J-plot, at a depreciated cost. The cost of such structure shall be as valued by an independent third party valuer and the said depreciated cost shall be paid by the Authority to the Concessioanire;

- (i) However, the said additional plot of land at J-Plot shall be transferred back to Authority free of cost.
- (j) With regard to the equipment (old/new) (leased/purchased) (i.e. moveable assets) brought by the Concessionaire shall be taken back by the Concessionaire at the expiry or termination of the Concession Period.

18.3 Concessioning Authority's Obligations

Except in the event of expiry of the Concession by efflux of time, the Concessioning Authority shall pay compensation payable to the Concessionaire in accordance with Article 17.1 of this Agreement, to the Senior Lenders, or deposit the same in the Escrow Account or on the written instructions of the Senior Lenders to any designated bank account in India, or to the Concessionaire, as the case may be. The Concessionaire confirms that upon such payment being made, the Concessioning Authority shall stand duly discharged of its obligations regarding payment of compensation under this Agreement and the charge created by the Concessionaire in favour of the Senior Lenders on any of the assets shall stand satisfied and all such assets shall on and from the Transfer Date be free from such charge.

The Concessionaire further confirms that payment of compensation by Concessioning Authority in accordance with this Article 18.3 shall be a valid discharge to the Concessioning Authority in respect of Concessioning Authority's obligation regarding payment of compensation to the Concessionaire under this Agreement.

18.4 Risk

Until transfer in accordance with this Article 18, the Port's Assets and the Project Facilities and Services shall remain at the sole risk of the Concessionaire except for any loss or damage caused to or suffered by the Concessionaire due to any act or omission or negligence on the part of the Concessioning Authority under this Agreement.

19 ARTICLE 19: DISPUTE RESOLUTION

19.1 Amicable Settlement

If any dispute or difference or claims of any kind arises between the Concessioneing Authority and the Concessionaire in connection with construction, interpretation or application of any terms and conditions or any matter or thing in any way connected with or in connection with or arising out of this Agreement, whether before or after the termination of this Agreement, then the Parties shall meet together promptly, at the request of any Party, in an effort to resolve such dispute, difference or claim by discussion between them.

19.2 Assistance of Expert

The parties, may, in appropriate cases agree to refer the matter to an Expert appointed by them with mutual consent. The cost of obtaining the service of the Expert shall be shared equally.

19.3 Arbitration

- (a) Any Dispute which is not resolved amicably as provided in Clause 19.1 and 19.2, shall be finally settled by arbitration as set forth below:-
 - i. The Dispute shall be referred to the Society for Affordable Redressal of Disputes - Ports (hereinafter called as SAROD - Ports). The dispute shall be dealt with in terms of Rules of SAROD - Ports. The detailed procedure for conducting Arbitration shall be governed by the Rules of SAROD - Ports and provisions of Arbitration & Conciliation Act, 1996, as amended from time to time. The Dispute shall be governed by Substantive Law of India.
 - ii. The constitution of Arbitral Tribunal, code of conduct for Arbitrators and fees and expenses of SAROD - Ports and Arbitral Tribunal shall also be governed by the Rules of SAROD - Ports as amended from time to time. The rules of SAROD – Ports are placed at Appendix-20.
 - iii. The seat of Arbitration shall be New Delhi or a place selected by the Governing Body of SAROD - Ports and the language for all documents and communications between the parties shall be English.
 - iv. The expenses incurred by each party in connection with the preparation, presentation, etc., of arbitral proceedings shall be borne by each party itself.
- (b) Any Award made in any arbitration held pursuant to the Article 19 shall be final and binding on the Parties as from the date it is made, and the Concessionaire and the Authority agree and undertake to carry out such Award without delay.
- (c) The Concessionaire and the Concessioneing Authority agree that an Award may be enforced against the Concessionaire or the Authority, as the case may be, and their respective assets wherever situated.
- (d) In the event that the Party against whom the Award has been granted, challenges the Award for any reason in a Court of law, the other Party, subject to the order of the Court, shall be entitled to seek an interim payment for an amount equal to 75% (seventy five per cent) of the Award, pending final settlement of the dispute. The aforesaid amount shall be paid forthwith upon furnishing an irrevocable Bank Guarantee for a sum equal to 120 % (one hundred and twenty per cent) of the aforesaid amount. The Bank Guarantee shall be kept alive for the entire period till the dispute is finally resolved. Upon final settlement of the dispute, the aforesaid interim payment shall be

adjusted and any balance amount due to be paid or returned, as the case may be, shall be paid or returned with interest calculated at 10 year G Sec + 6% per annum from the date of interim payment to the date of final settlement of such balance. The Parties acknowledge and agree that the Arbitration proceedings shall be video recorded and one copy each of the video recording shall be provided to both the parties.

19.4 Adjudication by Adjudicatory Board

In the event of constitution of a statutory Adjudicatory Board or such other forum with powers to receive and adjudicate upon disputes between the Concessionaire and the Concessioning Authority, all disputes not settled under Clause 19.2 through conciliation, can alternatively be referred to the Adjudicatory Board or such other forum with mutual consent of the parties in accordance with the applicable laws. For avoidance of doubt, parties hereto agree that notwithstanding anything contained herein above, after adjudication by the statutory Adjudicatory Board or such other forum, the parties cannot refer the dispute, difference or controversy of whatsoever nature again under Clause 19.3 and the adjudication hereunder shall be final and binding.

20 ARTICLE 20: REPRESENTATIONS AND WARRANTIES

20.1 Representations and Warranties of the Concessionaire

The Concessionaire represents and warrants to the Authority and the Confirming Party that:

- a) it is duly organised, validly existing and in good standing under the laws of India and hereby expressly and irrevocably waives any immunity in any jurisdiction in respect of this Agreement or matters arising thereunder including any obligation, liability or responsibility hereunder;
- b) it has full power and authority to execute, deliver and perform its obligations under this Agreement;
- c) it has taken all necessary action to authorise the execution, delivery and performance of this Agreement;
- d) this Agreement constitutes the legal, valid and binding obligation of the Concessionaire, enforceable against it in accordance with the terms hereof;
- e) there are no actions, suits or proceedings pending or to its best knowledge, threatened against or affecting it before any court, administrative body or arbitral tribunal which might materially and adversely affect its ability to meet or perform any of its obligations under this Agreement;
- f) it has the financial standing and capacity to undertake the Project in accordance with the terms of this Agreement;
- g) the execution, delivery and performance of this Agreement will not conflict with, result in the breach of, constitute a default under, or accelerate performance required by any of the terms of its memorandum of association and articles of association or any Applicable Laws or any covenant, agreement, contracts, arrangement, understanding, decree or order to which it is a party or by which it or any of its properties or assets is bound or affected;
- h) it has no knowledge of any violation or default with respect to any order, writ, injunction or decree of any court or any legally binding order of any Government Authority which may result in any Material Adverse Effect on its ability to perform its obligations under this Agreement and no fact or circumstance exists which may give rise to such proceedings that would adversely affect the performance of its obligations under this Agreement;
- i) it has complied with Applicable Laws in all material respects and has not been subject to any fines, penalties, injunctive relief or any other civil or criminal liabilities which in the aggregate have or may have a Material Adverse Effect on its ability to perform its obligations under this Agreement;
- j) all its rights and interests in the Project/Project Facilities and Services shall pass to and vest in the Authority and/or the Confirming Party, as applicable on the Transfer Date free and clear of all liens, claims and Encumbrances, without any further act or deed on its part or that of the Authority and/or the Confirming Party, as applicable, and that none of the Project Assets shall be acquired by the Concessionaire, subject to any contract under which a security interest or other lien or Encumbrance is retained by any person, save and except as expressly provided in this Agreement;
- k) no representation or warranty by the Concessionaire contained herein or in any other document furnished by the Concessionaire to the Authority including the Bid or to any Government Authority in relation to Applicable Permits contains or will contain any untrue or misleading statement of material fact or omits or will omit to state a material fact necessary to make such representation or warranty not misleading;

- l) no sums, in cash or kind, have been paid or will be paid, by the Concessionaire or on its behalf, to any person by way of fees, commission or otherwise for securing the Concession or entering into this Agreement or for influencing or attempting to influence any officer or employee of the Authority and/or the Confirming Party in connection therewith;
- m) agrees that the execution, delivery and performance by the Concessionaire of this Agreement and all other agreements, contracts, documents and writings relating to this Agreement constitute private and commercial acts and not public or governmental acts; and
- n) consents generally in respect of the enforcement of any judgement against the Concessionaire in any proceedings in any jurisdiction to the giving of any relief or the issue of any process in connection with such proceedings.

20.2 Representations and Warranties of the Authority and the Confirming Party:

The Authority and the Confirming Party represent and warrant to the Concessionaire that:

- A. it is duly organised, validly existing and in good standing under the laws of India;
- B. it has full power and authority to execute, deliver and perform its obligations under this Agreement;
- C. it has taken all necessary action to authorise the execution, delivery and performance of this Agreement;
- D. this Agreement constitutes the legal, valid and binding obligation of the Authority, enforceable against it in accordance with the terms hereof; and
- E. there are no actions, suits or proceedings pending or to its best knowledge, threatened against or affecting it before any court, administrative body or arbitral tribunal which might materially and adversely affect its ability to meet or perform any of its obligations under this Agreement.

20.3 Disclosure

In the event that any occurrence or circumstance comes to the attention of either Party that renders any of its aforesaid representations or warranties untrue or incorrect, such Party shall immediately notify the other Party of the same. Such notification shall not have the effect of remedying any breach of the representation or warranty that has been found to be untrue or incorrect nor shall it adversely affect or waive any obligation of either Party under this Agreement.

21 ARTICLE 21: MISCELLANEOUS PROVISIONS

21.1 Datum

The datum to which all levels shall be referred for the purpose of the Project is the Chart Datum (0.000) which is _____m below mean sea level.

21.2 Survival of Obligations

Any cause of action which may have occurred in favour of either Party or any right which is vested in either Party under any of the provisions of this Agreement during the Concession Period as the case may be as a result of any act, omission, deed, matter or thing done or omitted to be done by either Party before the expiry of the Concession Period by efflux of time or otherwise in accordance with the provisions of this Agreement shall survive the expiry of the Concession Period/ termination of this Agreement.

21.3 Articles to survive Termination

The provisions of Articles 16 to 21 shall, to the fullest extent necessary to give effect thereto, survive the Concession Period/the termination of this Agreement and the obligations of Parties to be performed/discharged following the termination/early determination of this Agreement shall accordingly be performed/discharged by the Parties.

21.4 Joint Responsibility

In the event that any damage is caused partly due to the negligence or default or omission on the part of the Authority, partly due to the negligence or default or omission on the part of the Confirming Party and partly due to the negligence or default or omission on the part of the Concessionaire, each Party shall be liable to the other Party only in the proportion to its respective degree of negligence or default or omission, as the case may be.

21.5 Several Obligations

Nothing contained in this Agreement shall be construed to create an association, trust, partnership, agency or joint venture among the Parties and Parties shall be liable to perform their respective duties and discharge their respective liabilities or obligations in accordance with the provisions of this Agreement.

21.6 Severability

If for any reason whatsoever any provision or any part(s) of this Agreement is held or shall be declared to be void or illegal or invalid under present or future laws or regulations effective and applicable during the Concession period, by any competent arbitral tribunal or court, and if such provisions shall be fully separable and this Agreement shall be constructed as if such provision or such part(s) of this Agreement never comprised part of this Agreement and the remaining provisions of this Agreement shall remain in full force and effect and shall not be affected by such void or illegal or invalid provision or by its severance from this Agreement.

21.7 Notices

Unless otherwise stated, notices to be given under this Agreement including but not limited to a notice of waiver of any term or related or breach of any term of this Agreement shall be in writing and shall be given by hand delivery, recognized international courier, mail, telex or facsimile transmission and delivered or transmitted to the Parties at their respective addresses set forth below:

The Authority:

THE TRAFFIC MANAGER

MUMBAI PORT TRUST

PORT HOUSE, SHOORJI VALLABHDAS ROAD, BALLARD ESTATE, MUMBAI - 400001

Fax No: _____

Email: _____

The Confirming Party: THE TRAFFIC MANAGER

JAWAHARLAL NEHRU PORT TRUST

1107, RAHEJA CENTRE, FPJ MARG, NARIMAN POINT, MUMBAI- 400021

Fax No: _____

Email: _____

The Concessionaire:

The MANAGING DIRECTOR

_____Ltd

Fax No. _____

Email: _____

or such other address, telex number, or facsimile number as may be duly notified by the respective Parties from time to time, and shall be deemed to have been made or delivered (i) in the case of any communication made by letter, when delivered by hand, by recognized international courier or by mail (registered, return receipt requested) at that address and (ii) in the case of any communication made by telex or facsimile, when transmitted properly addressed to such telex number or facsimile number.

21.8 Waiver

No waiver of any term or condition or of the breach thereof by any Party shall be valid unless expressed in writing and signed by such Party and communicated by such Party to the other Party. A waiver by any Party of any term or condition or breach thereof in a given case shall not be deemed or construed as a general waiver of such term or condition or the breach in the future or waiver of any other terms or conditions or breach of this Agreement.

21.9 Amendments, Modifications or Alterations

No amendments, modifications or alterations of or any additions to the terms and conditions of this Agreement shall be valid unless the same be in writing and agreed to by the Parties.

21.10 Governing Law

This Agreement shall be governed by and construed in accordance with the laws of the Republic of India and courts having territorial jurisdiction over the Project shall have jurisdiction over all matters relating to or arising out of this Agreement.

21.11 Entire Concession Agreement

This Agreement and the Appendices together constitute a complete and exclusive statement of the terms of the Agreement between the Parties. All prior written or oral understandings, offers or other communications of every kind pertaining to this Agreement unless specifically retained in this Agreement and the Appendices, by reference or otherwise, are abrogated and withdrawn.

IN WITNESS WHEREOF, the Parties, intending to be legally bound, have caused this Agreement on the dates indicated next to their signatures below:

Common Seal of the Authority is affixed pursuant to its resolution dated _____

of the Board in the presence of Mr. _____ who has signed this Agreement in token thereof.

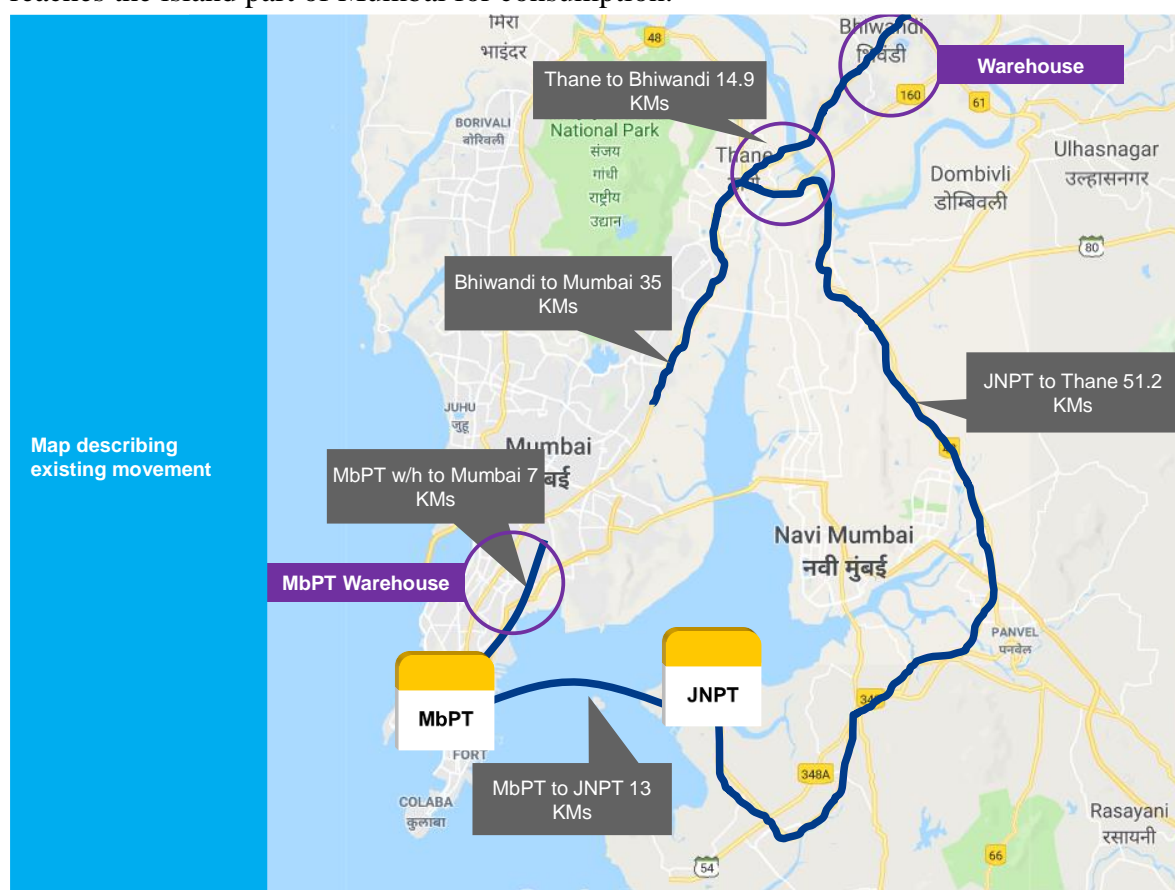
Common Seal of the Confirming Party is affixed pursuant to its resolution dated _____ of the Board in the presence of Mr. _____ who has signed this Agreement in token thereof.

Signed and Delivered by the Concessionaire by the hand of its authorized representative Mr. _____ pursuant to Resolution dated _____ of its Board of Directors.

APPENDIX 1: PROJECT SITE

The purpose of this project, which is to transport Mumbai-city headed containers through JNPT-Mumbai Port barge/ship operations, is to reduce city congestion and create value for trade. The imported container cargo received at JNPT headed for Mumbai city would have to be diverted via sea route to Mumbai port and from there to nearby warehouse. The sea route-based cargo will be cleared through Direct Port Delivery mechanism at JNPT by customs.

Many containers which land at JNPT usually contain cargo headed for the south Mumbai region. This cargo is first transported to warehouses in Bhiwandi (around 65 kms from JNPT) through trucks and then from Bhiwandi to Mumbai city for consumption. The cargo travels more than 100 km before it reaches the island part of Mumbai for consumption.



The goal is to eliminate around 600 trucks from Mumbai roads, by moving nearly 3 lakhs to 4 lakhs TEUs annually by barge to Mumbai Port. To make it an attractive value proposition for trade, it is important that barges/ships complete an adequate number of trips in a day. These trips typically depend on the turnaround time of the barges (from JNPT to Mumbai Port and back to a suitable location for the empties). It is also dependent on the number of active barges/ships and the productivity of cranes employed for loading and unloading of barges/ships.

JNPT will provide Shallow Water Berth and a container yard for all cargo bound for Mumbai port. The Operators will take the containers from the shallow berth at JNPT to the 1 ID (Indira Dock) or equivalent area at Mumbai Port and the container will be shifted to the pre-stack area behind 1 Indira Dock or equivalent area and transported via trucks to New Sewree Warehouse, located about 8 kms away. Here, the cargo will be unloaded from containers and stored, till the time it is not transported to the city. In addition to the New Sewree Warehouse, the Operator will also be provided an additional

land of 1 (one) hectare (~10,000 m²) for construction of a new warehouse at J-Plot wherein the Operator may construct a new warehouse to accommodate more TEUs and the same land shall be provided at prevailing SOR for open land and according to the terms and conditions as set out in the Concession Agreement.

APPENDIX 2: PORT'S ASSETS

For handling container operations, wharf at JNPT and MbPT will be provided by the port. The details of infrastructure facility available for this project are mentioned below:

Assets at JNPT

EXHIBIT 1

Current vs future flow at JNPT



A. Wharf: Shallow water berth (SWB) at JNPT will be used for barge/ship operations (see Exhibit 2), the details of which are as follows:

- Total quay length of SWB is 445 m.
- Total length of Shallow water berth is 445 m. The draft is 10 m for 370 m of the berth length and for the rest 75 m of the berth the draft is 8 m. JNPT shall decide to provide key face of a maximum of 160m for two barges or 180m for a vessel or as deemed adequate by JNPT, at anywhere along the SWB. Berthing preference will be given for coastal container cargo at this berth.
- The strength of the wharf is 5T per square meter.
- This wharf can easily be used to fit in at least three 100m barges (LOA 100m, beam 20m, draft 3.5m, capacity 120 TEUs), with a gap of 10 m between, still leaving some part for other operations (see Exhibit 2).

EXHIBIT 2

Wharf length in meters

Gap	Barge 1	Gap	Barge 2	Gap	Barge 3	Gap	Total
10	100	10	100	10	100	10	340

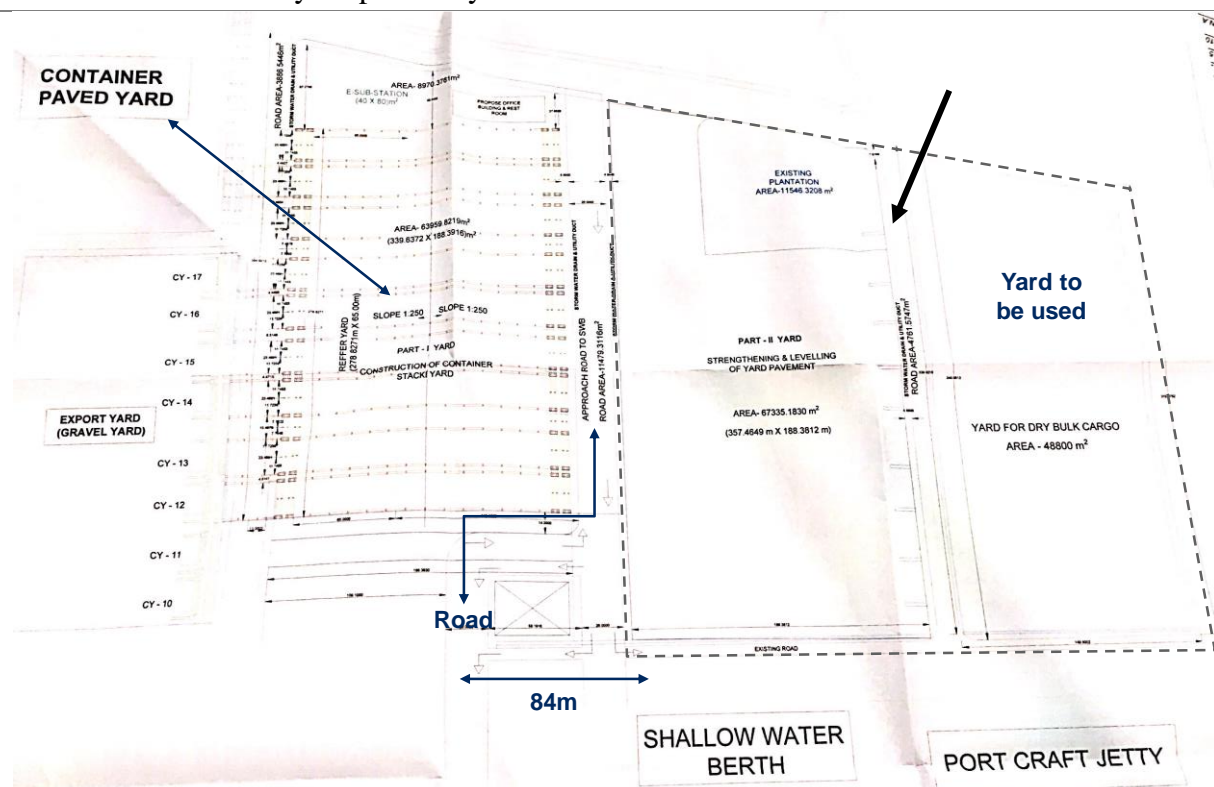


It must be noted that SWB is currently being used for cement and liquid handling and any other cargo may be handled at SWB berth in the future as well. However, preference for berthing will be given to coastal container cargo.

B. Storage space: The details of the container yard are as follows:

- a. The container yard at the shallow water berth has an area of 12 hectares. The area allotted out of the above will have to be divided into two sections by the concessionaire – One for handling RMS facilitated cargo and the other for non-RMS cargo (For the RMS facilitated DPD containers, Customs Out of Charge is given without any examination. For Non RMS cargo that require examination or clearance from PGA, the containers will have to be first examined or samples drawn and Customs Out of Charge (hereinafter OOC) granted by the Department of Customs. Only then shall the non RMS containers be loaded from the Shallow Water Berth). Further, the concessionaire should ensure First-in first-out module of container management in the storage space for both RMS facilitated and non-RMS cargo.
- b. Considering the lesser requirement of space at the start of the project, initially, the concessionaire will be allotted only area of 3000 sq mtr at yard at SWB. If the concessionaire requires additional space, then additional area in multiple of 500 sq mtr. shall be provided subject to the feasibility. For this, concessionaire should provide a written application to the JNPT for additional space at least 30 days prior to the date of requirement.
- c. The containers may be stored with a maximum stack height of 3 high in the yard.
- d. A road has been constructed at the SWB and it occupies around 86m of length at the SWB.

EXHIBIT 3: Below layout plan for yard at shallow water berth



C. Equipment for loading/unloading and trucks:

The Concessionaire has to deploy required equipment such as reach stackers etc. in the yard at SWB for offloading/ storing containers (for barge movement) arriving from various terminals

of JNPT and to feed the containers for barge loading. In addition, the Concessionaire may have to deploy trailers to transport containers from the allotted storage yard at JNPT to the Shallow water berth for loading into barges/ ships.

Assets at Mumbai Port

EXHIBIT 4: BELOW LAYOUT PLAN FOR YARD AT SHALLOW WATER BERTH

Future flow at MbPT (multiple berthing options for barge)



A. Wharf: 1 Indira Dock (1ID) with a minimum draft of 7 to 8 m below CD has been earmarked for this project.

B. Storage space: Discharged containers need to be shifted to pre-stack area at Indira docks, where they could be stored at no cost for 2 days before being transported to the warehouse. Post 2 days, the rates for storage at pre-stack area would be as per SOR.

To accommodate the JNPT container traffic, Mumbai Port Trust will provide warehouses, at:

- **New Sewree Warehouse (NSW)** – It is around 33,000 sq m and can be used with immediate effect. It also has an open area of around 22,000 sq.m around it.
- **Additional land** of about 1 (one) Hectare (around 10,000 sq m) will be made available to the Concessionaire. This land shall be provided with a lock in period of 7 (seven) years within which construction of warehouse must be initiated, failing which the land shall revert back to the Authority. The said land shall be made available on meeting the following conditions:

- i. the Concessionaire is paying the Authority the charges for the entire area as per prevalent SOR of open land applicable as on the date on hand over.
 - ii. the Concessionaire provides a written application to the Mumbai Port Trust giving the Authority at least 3 months to make the required additional plot of land available.
- Although the Authority shall strive to provide warehouses at the above locations, the Authority has the right to change the location of allotment of warehouse at any point during the Concession period.

Note: All figures/ numbers provided for areas at JN Port and Mumbai port are approximates, and the area that shall be handed over to the operator shall be duly measured and accordingly the charges shall be calculated on actual basis and the same shall be payable to MbPT.

APPENDIX 3: SUBSTITUTION AGREEMENT

THIS SUBSTITUTION AGREEMENT is entered into on this the ----- day of ----- (Month) ---
- (Year) at -----.

AMONGST,
THE__TRUST, a body corporate constituted under the provisions of the Major Port Trusts Act, 1963
and having its Administrative Office at

_____ (hereinafter referred to as **“the Concessioneing Authority”**) which expression shall, unless
repugnant to the context or meaning thereof include its administrators, successors or assigns.

AND

THE__TRUST, a body corporate constituted under the provisions of the Major Port Trusts Act, 1963
and having its Administrative Office at

_____ (hereinafter referred to as **“the Confirming Authority”**) which expression shall, unless
repugnant to the context or meaning thereof include its administrators, successors or assigns.

AND

M/s. XXXX Limited, a company incorporated under the provisions of the Companies Act, 1956 and
having its Registered Office at ----- hereinafter referred to as **“the Concessionaire”**
(which expression shall unless repugnant to the context or meaning thereof include its successors and
assigns),

AND

YYYY (Financial Institution/ Bank) having its Registered Office/Head Office at -----
----- hereinafter referred to as **“the Senior Lender”**. OR

ZZZZ (Financial Institution/Bank) having its Registered Office/Head Office at-----
----- acting for and on behalf of the Senior Lenders listed in Schedule A hereto
(hereinafter referred as **“the Senior Lender’s Representative”**).

WHEREAS,

a) The Concessioneing Authority for implementing a Project envisaging
_____ by private sector participation (hereinafter referred to as **“the Project”**), has by the Concession
Agreement dated ----- entered into between the Concessioneing Authority and the Concessionaire
(hereinafter referred to as **“the Concession Agreement”**) has granted to the Concessionaire the
Concession to implement the Project in terms of the provisions set out thereunder;

b) With a view to facilitate financing of the Project by the Concessionaire, the Concessioneing
Authority and the Concessionaire have agreed to enter into Substitution Agreement being these
presents with the Senior Lender/s/Senior Lenders’ Representative.

NOW, THEREFORE, THIS AGREEMENT WITNESSETH AS FOLLOWS:

ARTICLE 1

DEFINITIONS AND INTERPRETATION

1.1 Definitions

In this Agreement the following words and expressions shall, unless repugnant to the context or meaning thereof, have the meaning hereafter respectively assigned to them.

“Agreement” means this agreement and includes any amendment or modification made to this agreement in accordance with the provisions hereof.

“Financial Assistance” means the financial assistance set forth in **Schedule A** hereto, agreed to be provided by the Senior Lender(s) to the Concessionaire for financing the Project.

“Financial Default” means occurrence of a material breach of the terms and conditions of the Financing Documents or a continuous default in servicing debt there under by the Concessionaire for a minimum period of 3 (three) months.

“Senior Lender(s)” means the financial institutions/banks whose name(s) and addresses are set out in Schedule A hereto and shall include the financial institutions/banks who may replace the same by way of a refinance/subrogation, as may be notified by the Senior Lenders’ Representative to the Concessionaire, from time to time.

“Residual Concession Period” means the period which shall be the remainder of the Concession Period computed from the date of issuance of Termination Notice in terms of Article 16.1 of the Concession Agreement.

“Selectee” means a Person proposed by the Senior Lender/Senior Lender’s Representative pursuant to this Agreement and approved by the Concessioneing Authority for substituting the Concessionaire for the residual Concession Period, in accordance with the provisions of this Agreement.

“Suspension Period” means the Termination Period as defined in Article 16 of the Concession Agreement at the end of which all formalities connected with substitution of the Concessionaire by the Selectee including handing over of Project Site/Project Facilities and Services, in accordance with this Agreement are completed and the substitution has become effective.

1.2 Capitalized terms used in this Agreement but not defined shall have the meaning assigned to them respectively in the Concession Agreement.

ARTICLE 2

ASSIGNMENT

2.1 Assignment of rights and title

The Concessionaire hereby agrees to assign its rights, title and interest in the Agreement to, and in favour of, the Senior Lenders pursuant to and in accordance with the provisions of this Agreement and the Concession Agreement by way of security in respect of financing by the Senior Lenders under the Financing Documents.

ARTICLE 3

SUBSTITUTION OF THE CONCESSIONAIRE

3.1 Rights of substitution

3.1.1 Pursuant to the rights, title and interest assigned under Clause 2.1, the Senior Lenders shall be entitled to substitute the Concessionaire by a Selectee under and in accordance with the provisions of this Agreement and the Concession Agreement.

3.1.2 The Concessioneing Authority hereby agrees to substitute the Concessionaire by endorsement

on the Concession Agreement in favour of the Selectee selected by the Senior Lenders in accordance with this Agreement (For the avoidance of doubt, the Senior Lenders shall not be entitled to operate and maintain the Project/Project Facilities and Services).

3.2 Substitution upon occurrence of Financial Default

3.2.1 Upon occurrence of a Financial Default, the Senior Lenders/Senior Lenders' Representative may issue a notice to the Concessionaire (the "**Notice of Financial Default**") along with particulars thereof, and send a copy to the Concessioneing Authority for its information and record. A Notice of Financial Default under this Clause 3 shall be conclusive evidence of such Financial Default and it shall be final and binding upon the Concessionaire for the purposes of this Agreement.

3.2.2 Upon issue of a Notice of Financial Default hereunder, the Senior Lenders/Senior Lenders' Representative may, without prejudice to any of its rights or remedies under this Agreement or the Financing Documents, substitute the Concessionaire by a Selectee in accordance with the provisions of this Agreement.

3.2.3 At any time after the Senior Lenders/Senior Lenders' Representative has issued a Notice of Financial Default, it may by notice require the Concessioneing Authority to suspend all the rights of the Concessionaire and undertake the operation and maintenance of the Project/Project Facilities and Services, and upon receipt of such notice, the Concessioneing Authority shall suspend the rights of the Concessionaire. Provided, such suspension shall be revoked upon substitution of the Concessionaire by a Selectee, and in the event such substitution is not completed within 180 (one hundred and eighty) Days from the date of such suspension, the Concessioneing Authority may terminate the Concession Agreement forthwith by issuing a Termination Notice in accordance with the provisions of the Concession Agreement; provided that upon written request from the Senior Lenders/Senior Lenders' Representative and the Concessionaire, the Concessioneing Authority may extend the aforesaid period of 180 (one hundred and eighty) Days by a period not exceeding 90 (ninety) Days.

3.3 Substitution upon occurrence of Concessionaire Default

3.3.1 Upon occurrence of a Concessionaire Default, the Concessioneing Authority shall by a notice inform the Senior Lenders/Senior Lenders' Representative of its intention to issue a Termination Notice and grant 15 (fifteen) Days time to the Senior Lenders/Senior Lenders' Representative to make a representation, stating the intention to substitute the Concessionaire by a Selectee.

3.3.2 In the event that the Senior Lenders/ Senior Lenders' Representative makes a representation to the Concessioneing Authority within the period of 15 (fifteen) Days specified in Clause 3.3.1, stating that it intends to substitute the Concessionaire by a Selectee, the Senior Lenders/ Senior Lenders' Representative shall be entitled to undertake and complete the substitution of the Concessionaire by a Selectee in accordance with the provisions of this Agreement within a period of 180 (one hundred and eighty) Days from the date of such representation, and the Concessioneing Authority shall either withhold termination and/or suspend the rights of the Concessionaire for the aforesaid period of 180 (one hundred and eighty) Days; provided that upon written request from the Senior Lenders/ Senior Lenders' Representative and the Concessionaire, the Concessioneing Authority shall extend the aforesaid period of 180 (one hundred and eighty) Days by a period not exceeding 90 (ninety) Days.

3.4 Procedure for substitution

3.4.1 The Concessioneing Authority and the Concessionaire hereby agree that on or after the date of Notice of Financial Default or the date of representation to the Concessioneing Authority under Clause 3.3.2, as the case may be, the Senior Lenders/Senior Lenders' Representative may, without prejudice to any of the other rights or remedies of the Senior Lenders, invite, negotiate and procure offers, either

by private negotiations or public auction or tenders from potential Selectees for substituting the Concessionaire and taking on the rights and obligations under the Concession Agreement. 3.4.2 To be eligible for substitution in place of the Concessionaire, the Selectee shall be required to fulfil the eligibility criteria that were laid down by the Concessioneing Authority for shortlisting the Concessionaires for award of the Concession; provided that the Senior Lenders/ Senior Lenders' Representative may represent to the Concessioneing Authority that all or any of such criteria may be waived in the interest of the Project, and if the Concessioneing Authority determines that such waiver shall not have any material adverse effect on the Project, it may waive all or any of such eligibility criteria.

3.4.2 Upon selection of a Selectee, the Senior Lenders/Senior Lenders' Representative shall request the Concessioneing Authority to:

- (a) accede to transfer to the Selectee the rights and obligations of the Concessionaire under the Concession Agreement; and
- (b) novate the Concession Agreement to the Selectee such that the Selectee replaces the Concessionaire and becomes entitled/obligated to all the rights and obligations of the Concessionaire, for the residual Concession Period.

3.4.3 If the Concessioneing Authority has any objection to the transfer of Concession in favour of the Selectee in accordance with this Agreement, it shall within 7 (seven) Days from the date of proposal made by the Senior Lenders/Senior Lenders' Representative, give a reasoned order after hearing the Senior Lenders/Senior Lenders' Representative. If no such objection is raised by the Concessioneing Authority, the Selectee shall be deemed to have been accepted. The Concessioneing Authority thereupon shall novate the Concession Agreement within 7 (seven) Days of its acceptance/deemed acceptance of the Selectee; provided that in the event of such objection by the Concessioneing Authority, the Senior Lenders' Representative may propose another Selectee whereupon the procedure set forth in this Clause 3.4 shall be followed for substitution of such Selectee in place of the Concessionaire.

3.5 Selection to be binding

The decision of the Senior Lenders/Senior Lenders' Representative and the Concessioneing Authority in selection of the Nominated Company shall be final and binding on the Concessionaire. The Concessionaire irrevocably agrees and waives any right to challenge the actions of the Senior Lenders' Representative or the Senior Lenders or the Concessioneing Authority taken pursuant to this Agreement including the transfer/novation of the Concession Agreement in favour of the Selectee. The Concessionaire agrees and confirms that it shall not have any right to seek revaluation of assets comprised in the Project or the Concessionaire's shares. It is hereby acknowledged by the Parties that the rights of the Senior Lenders/Senior Lenders' Representative are irrevocable and shall not be contested in any proceedings before any court or Concessioneing Authority and the Concessionaire shall have no right or remedy to prevent, obstruct or restrain the Concessioneing Authority or the Senior Lenders/Senior Lenders' Representative from effecting or causing the transfer by substitution and endorsement of the Concession as requested by the Senior Lenders/Senior Lenders' Representative.

ARTICLE 4

TRANSACTION DOCUMENTS

4.1 Substitution of Selectee in Transaction Documents

The Concessionaire shall ensure and procure that each Transaction Documents contains provisions that entitle the Selectee to step into such Transaction Documents, in its discretion, in place and substitution of the Concessionaire in the event of such Selectee assumption of the liabilities and obligations of the Concessionaire under the Concession Agreement.

ARTICLE 5

TERMINATION OF CONCESSION AGREEMENT

5.1 Termination upon occurrence of Financial Default

At any time after issue of a Notice of Financial Default, the Senior Lenders/Senior Lenders' Representative may by a notice in writing require the Concessioneing Authority to terminate the Concession Agreement forthwith, and upon receipt of such notice, the Concessioneing Authority shall terminate the Concession in accordance with the Concession Agreement.

5.2 Termination when no Selectee is selected

In the event that no Selectee acceptable to the Concessioneing Authority is selected and recommended by the Senior Lenders/Senior Lenders' Representative within the period of 180 (one hundred and eighty) Days or any extension thereof as set forth in Clause 3.3.2, the Concessioneing Authority may terminate the Concession Agreement forthwith in accordance with the provisions thereof.

5.3 Realisation of Debt Due

The Concessioneing Authority and the Concessionaire hereby acknowledge and agree that, without prejudice to their any other right or remedy, the Senior Lenders are entitled to receive from the Concessionaire, without any further reference to or consent of the Concessionaire, the Debt Due upon termination of the Concession Agreement.

ARTICLE 6 INDEMNITY

7.1 General indemnity

7.1.1 The Concessionaire will indemnify, defend and hold the Concessioneing Authority and the Senior Lenders/Senior Lenders' Representative harmless against any and all proceedings, actions and third party claims for any loss, damage, cost and expense of whatever kind and nature arising out of any breach by the Concessionaire of any of its obligations under this Agreement or on account of failure of the Concessionaire to comply with Applicable Laws and Applicable Permits.

7.1.2 The Concessioneing Authority will indemnify, defend and hold the Concessionaire harmless against any and all proceedings, actions and third party claims for any loss, damage, cost and expense arising out of failure of the Concessioneing Authority to fulfil any of its obligations under this Agreement, materially and adversely affecting the performance of the Concessionaire's obligations under the Concession Agreement or this Agreement, other than any loss, damage, cost and expense, arising out of acts done in discharge of its lawful functions by the Concessioneing Authority.

7.1.3 The Senior Lenders/Senior Lenders' Representative will indemnify, defend and hold the Concessionaire harmless against any and all proceedings, actions and third party claims for any loss, damage, cost and expense arising out of failure of the Senior Lenders/Senior Lenders' Representative to fulfil its obligations under this Agreement, materially and adversely affecting the performance of the Concessionaire's obligations under the Concession Agreement, other than any loss, damage, cost and expense, arising out of acts done in discharge of their lawful functions by the Senior

Lenders/Senior Lenders' Representative.

7.2 Notice and contest of claims

In the event that any Party hereto receives a claim from a third party in respect of which it is entitled to the benefit of an indemnity under Clause 7.1 or in respect of which it is entitled to reimbursement (the “**Indemnified Party**”), it shall notify the other Party responsible for indemnifying such claim hereunder (the “**Indemnifying Party**”) within 15 (fifteen) Days of receipt of the claim and shall not settle or pay the claim without the prior approval of the Indemnifying Party, such approval not to be unreasonably withheld or delayed. In the event that the Indemnifying Party wishes to contest or dispute the claim, it may conduct the proceedings in the name of the Indemnified Party and shall bear all costs involved in contesting the same. The Indemnified Party shall provide all cooperation and assistance in contesting any claim and shall sign all such writings and documents as the Indemnifying Party may reasonably require.

ARTICLE 8

GENERAL

8.1 General

- (i) The Parties hereto expressly represent and warrant that they are duly empowered to sign and execute this Agreement.
- (ii) Notices under this Agreement shall be sent to the Addresses first hereinabove mentioned. Any change in the address of any Party shall be duly notified by registered post acknowledgement due and delivered to the other parties.
- (iii) The expressions “Concessioning Authority”, the “Concessionaire”, the “Senior Lender” and the “Senior Lenders' Representative”, “Selectee” herein used shall unless there be anything repugnant to the subject or context include the respective successors and assigns.
- (iv) This Agreement shall not be affected by reorganisation of any Senior Lender, the Concessionaire or Concessioning Authority, “Selectee” and the successor in interest of the Senior Lender or Concessioning Authority shall have the benefit of this Agreement.
- (v) Failing amicable settlement and/or settlement with the assistance of Expert, the dispute or differences or claims as the case may be, shall be finally settled by binding arbitration under the Arbitration and Conciliation Act, 1996. The arbitration shall be by a panel of three Arbitrators, one each to be appointed by the Concessioning Authority and the Senior Lenders/Senior Lender's Representative and the third to be appointed by the two arbitrators. If any Party entitled to do so, fails to appoint a second Arbitrator within 30 (thirty) Days of from the receipt of the request for such appointment, then the single Arbitrator appointed in accordance with this provision shall adjudicate the disputes as Sole Arbitrator.
- (vi) This Agreement and rights and obligations of the Parties hereunder shall remain in full force and effect pending the Award in any arbitration proceeding hereunder. The courts having territorial jurisdiction over the Project alone shall have jurisdiction over all matters arising out of or relating to the arbitration agreement contained herein or proceedings arising out of or relating to the arbitration proceedings thereunder.
- (vii) The consultation, recommendation or approval of the Senior Lenders' Representative under this Agreement shall always be deemed as consultation, recommendation or approval of every concerned Senior Lender and each such Senior Lender shall be bound by the same.
- (viii) This Agreement shall be in addition to and shall not be in derogation of the terms of the

Financing Documents.

(ix) The Concessionaire agrees and acknowledges that it shall not be necessary for the Senior Lender(s) or the Senior Lenders' Representative to enforce or exhaust any other remedy available to them before invoking the provisions of this Agreement.

(x) No amendment, variation or modification to this Agreement shall be valid and effectual unless made in writing and executed by the duly authorized representatives of all the Parties hereto.

(xi) All stamp duties or other imposts and charges as are applicable on this Agreement or on amendment of the Concession Agreement or execution of fresh Concession Agreement for the purpose of substitution as aforesaid, irrespective of the Senior Lenders making such payment for the time being, shall be borne by and be to the account of the Concessionaire.

(xii) The Parties hereby expressly agree that for the purpose of giving full and proper effect to this Agreement, the Concession Agreement and this Agreement shall be read together and construed harmoniously. The terms of this Agreement shall prevail in the event of any inconsistency with the Concession Agreement.

SCHEDULE A

PARTICULARS OF FINANCIAL ASSISTANCE.

Name and Address of the Lender	Nature and Amount of Financing Assistance

IN WITNESS WHEREOF THE PARTIES HERETO HAVE SET THEIR HANDS HEREUNTO ON THE DAY, MONTH AND YEAR HEREINABOVE MENTIONED.

SIGNED AND DELIVERED ON BEHALF OF

-----LIMITED BY : ____

Name : Title :

SIGNED AND DELIVERED ON BEHALF OF GOVERNMENT OF INDIA

BY : __

Name : Title :

SIGNED AND DELIVERED ON BEHALF OF

----- ON BEHALF OF THE SENIOR LENDERS SETFORTH IN SCHEDULE I

BY : __

Name :

APPENDIX 4: SCOPE OF WORK

Project Facilities and Services:

A brief description of Project Facilities and Services shall be provided. Also certain key project facilities shall be set out:

- ✓ Offloading containers (for barge/ ship movement to Mumbai Port) arriving from various terminals of JNPT through trailers and storing the containers in the designated yard at shallow water berth at JNPT.
- ✓ Feeding of containers to trailers from the yard at Shallow Water Berth (SWB), transportation to SWB berth and loading on to barge/ ships.
- ✓ Barge/ship movement from JNPT to MbPT and unloading at Mumbai Port
- ✓ Transportation of containers from MbPT berth/ pre-stack area to designated warehouse
- ✓ Storage at designated warehouse of MbPT and handing over of cargo to consignee
- ✓ Handling of empty containers and coastal movement of empties from Mumbai port to appropriate port/ jetty to reach the preferred CFS/ EY (Empty yards) of the shipping lines within 20 km radius of JN Port.
- ✓ Operations and maintenance at allocated warehouse at Mumbai port; payment of all authority charges; payment for utilities such as electricity, water, housekeeping, repairs, etc. and all other activities as needed for smooth operations at Mumbai port as part of this project.
- ✓ Construction of Warehouse at additional open land within the lock in period.
- ✓ Apart from basic maintenance of yard and payment of illumination at SWB at JNPT, all other activities required for smooth operations at JN Port as part of this project shall be the responsibility of the operator.

Requirements

- ✓ Install and/or operate
 - mobile cranes (new/ old) (leased/ rented/ purchased/ owned) at JNPT, MbPT and private jetty (if needed)
 - Barge/ ship (new/ old) (leased/ rented/ purchased/ owned) operations
- ✓ Develop market for the ports – minimum traffic guarantees
- ✓ Procure and implement operational software and integrated management systems at own cost. IT systems for coordinated operations to be of latest technologies or as per requirement of the authority if needed (optional requirement)
- ✓ Operate and maintain allocated warehouse/ storage area/ pre-stack yard and pay utilities such as electricity, water, housekeeping, repairs, and upkeep etc. for warehouse/ pre-stack area provided by MbPT. Basic maintenance and illumination at yard at SWB to be the responsibility of JNPT. All other expenses to be borne by the private operator.
- ✓ Construction of Warehouse at additional open land within the lock in period. In case of any discrepancy, the decision of the authority will be final and binding.

Annexure

CONSTRUCTION STANDARDS, OPERATIONS AND MAINTENANCE STANDARDS AND SAFETY STANDARDS

[Indicative and minimum standards and norms for various kinds of projects are prescribed herein. Concessioning Authority may modify these and customize them to suit the Scope of Work.]

A. General

The Concessionaire shall execute the project by completing civil works as per the Scope of Work and provide appropriate equipment for cargo handling and other support facilities for proper and efficient functioning.

The Concessionaire shall carry out Construction Works, etc duly complying with the provisions of all relevant latest Indian Standards and in case certain item of works not covered by the Indian Standards, provisions of ISO/IEC/OISD standards, etc shall be complied.

The construction of civil works, facilities, erection & commissioning of lifting appliances, equipment and machinery and their layout shall ensure that during cargo operations these facilities meet the required provisions of the Dock Workers Safety Health & Welfare Act, 1986 and the relevant Regulations 1990.

The Concessionaire shall meet the requirements of Management Quality System (IS/ISO – 9001: 2000) and shall also obtain accreditation for operations at the terminal. In addition, the Concessionaire shall comply with all relevant statutory regulations, codes, practices and guidelines.

It is not intended to specify herein all the relevant standards required to complete the Project. Such of those standards considered more pertinent are listed in this Annexure.

B. Civil Construction Work

B. 1. Dry Bulk, Break Bulk & Container Terminals

The civil construction work may comprise variety of works such as dredging, reclamation, construction of breakwaters, berths, development of back-up area for storage of cargo/containers, approach roads, railways sidings, operational buildings/offices, maintenance workshop, drainage, water supply, environmental protection works and other amenities. The Concessionaire is required to undertake all tests required as per IS/ ISO/IEC standards to ensure that the construction work carried out by him meets not only the functional requirements of the project but also conforms to the required quality as per the standards. In addition, the Concessionaire shall also comply with the provisions of specifications published by the Indian Road Congress, RDSO of Ministry of Railways and provisions of Shore Protection Manual (CERC) of US Army Corps of Engineers, as may be pertinent to the Project. In respect of implementing the Project, the Concessionaire shall refer to and as relevant comply with the design and construction standards specified in the following paragraphs.

Indian Standards for Construction of Ports and Harbours

IS 4651 – Part – 1 – 1974 Code of practice for planning and design of ports and harbours: Part 1 Site investigation

IS 4651–Part 2–1989 Code of practice for planning and design of ports and harbours Part 2 Earth pressure

IS 4651-Part III-1974 Code of practice for planning and design of ports and harbours: Part III: Loading

IS 4651- Part 4 -1989 Code of practice for planning and design of ports and harbours: Part 4: General Design consideration.

IS 4651-Part 5-1980:

IS7314: 1974

IS 9527: Part 1: 1981

IS 9527: Part 3:: 1983

IS 9527: Part 4: 1980

IS 9527: Part 6: 1989

IS 10020: Part 4: 1981

IS 9556: 1980

Code of practice for planning and design of ports and harbours Part:5 Layout and functional requirements

Glossary of terms relating to port and harbour engineering

Code of practice for design and construction of port and harbour structures: Part 1 Concrete monoliths

Code of practice for design and construction of port and harbour structure: Part 3 Sheet pile walls

Code of practice for design and construction of port and harbour structure: Part 4 Cellular Sheet pile structures

Code of practice for design and construction of port and harbour structures: Part 6 Block work

Recommendations for design and construction of port and harbour components Part 4 Slipways. Code of Practice for design and construction of diaphragm walls

Indian Standards for Foundation Work

IS 2911: Part 1:Sec 1:1979 Code of practice for design and construction of pile foundations Part 1 Concrete piles, Section 1, Driven cast in-situ concrete piles

IS 2911: Part 1: Sec 2:1979 Code of practice for design and construction of pile foundations: Part 1 Concrete piles, Section 2 Bored cast in-situ piles

IS 2911: Part 1:Sec 3:1979 Code of practice for design and construction of pile foundations: Part 1 Concrete piles, Section 3 Driven pre-cast concrete piles

IS 2911: Part1: Sec 4:1984 Code of practice for design and construction of pile foundations. Part 1 Concrete piles, Section 4 Bored pre-cast concrete piles

IS 2911: Part 2: 1980 Code of practice for design and construction of pile foundations: Part 2 Timber piles

IS 2911: Part 3: 1980 Code of practice for design and construction of pile foundations: Part 3 Under reamed piles.

IS 2911: Part 4: 1985 Code of practice for design and construction of pile foundations: Part 4 Load test on piles

IS 2950: Part 1: 1981 Code of practice for design and construction of raft foundations – Part I: Design

IS 2974: Part 1: 1982 Code of practice for design and construction of Machine Foundations- Part 1: Foundation for

Reciprocating Type Machines.

IS 2974: Part 2: 1980 Code of practice for design and construction of machine foundations. Para 2 Foundations for impact type machine (hammer foundations)

IS 2974: Para 3: 1992 Code of practice for design and construction of machine foundations for rotary type machines (medium and high frequency)

IS 2974:: 1979: Code of practice for design and construction of machine foundations: Part 4 Foundations for rotary type machines of low frequency.

IS 2974: Part 5: 1987 Code of practice for design and construction of machine foundations Part 5 Foundations for impact machines other than hammers (forging and stamping press, pig breaker drop crusher and jolter)

IS 1080: 1985 Code of Practice for design and construction of shallow foundations on soils (other than raft, ring and shell).

IS 13094: 1992 Guidelines for Selection of ground improvement techniques for foundation in weak soils.

Indian Standards for Structural Design

IS 875(Part I to V): 1987 Code of Practice for design loads (other than earth quake) for buildings – dead loads, imposed loads, wind loads, snow loads, special loads and load combinations.

IS 456: 2000 Code of Practice for plain and reinforced concrete.

IS: 800: 1984 Code of practice for general construction in steel

IS: 801: 1975 Code of practice for use of cold formed light gauge steel structural members in general building construction.

IS: 803: 1976 Code of practice for Design fabrication and Erection of vertical mild steel cylindrical welded oil storage tanks.

IS 1893: Part 1: 2002 Criteria for Earthquake Resistant Design of Structures

Part I – General Provision and Buildings

IS 1893: Part 4: 2005 Criteria for earth quake resistant design of structures

–Part 4- Industrial Structures including Stack-like Structures.

IS 4326: 1993 Code of Practice for Earth Quake Resistant design and construction of buildings.

B-2 Bulk Liquid Terminals and Tank Farms

In addition to complying to the requirement of relevant specifications mentioned above, in respect of port terminals meant for handling bulk liquids such as crude, POL, hazardous chemicals, LPG, LNG, etc., the concessionaire shall also comply with the requirements of IMO Standards, MSIHC Rules 1989, IMDG Codes, OISD Standards & Guidelines, Petroleum Rules and Act, Explosives Act and statutory requirements.

C. Cargo Handling Equipment C-1 General

The concessionaire in accordance with relevant standards shall provide the type and capacity of equipment required for handling the specified cargo/containers. The equipment shall generally conform to the following standards and code of practices.

C-2 Electric Cranes - Wharf and Gantry Cranes

The crane and its mechanisms shall be designed and constructed in compliance with the latest editions and amendments of the following standards and codes of practice. Standards equivalent or higher in BS, JIS, FEM, DIN, ISO, IEC are also acceptable.

Structures and Mechanism

IS 807: 2006

- Code of practice for fatigue IS 4137 - 1985

Design, erection and testing (Structural Portion) of Cranes and Hoists – Code of Practice.

BS 5400 – Part 10 Steel concrete and composite bridges

Specification for heavy duty electric overhead traveling and special cranes for use in steel works

Material

800: 1984 Code of Practice for general construction in steel

2062: 2006 Hot rolled low medium and high tensile Structural

Steel

2644: 1994 High tensile steel castings

2266: 2002 Steel Wire Ropes for General Engineering
Purposes-specification

IS 3177: 1999 Code of Practice for Electric Overhead Traveling
Cranes and Gantry Cranes other than Steel Work
Cranes

Electricals IEC standards

IEE – regulations for the electrical equipment of buildings BS 4999 / FEM 3rd edition Booklet 4 -
Motors

BS 171, BS 3941, BS 3938 - Transformers BS 99 - Fuses

Welding

IS 7307: Part 1: 1974 Approval test for welding procedures Part 1 Fusion welding of steel.

IS 7310: Part 1: 1974 Approval test for Welders working to approved welding procedures – Part 1:
Fusion welding of Steel.

Painting

BS 5493 Code of practice for protective coating of iron and steel structures against corrosion

Swedish Standard Sa 2,5 or SIS ST3, SIS 055900 surface preparation

General

IS 13367:Part 1: 1992 Safe use of Cranes - Code of Practice Part 1 General

Classification of Crane

Structures

Class of utilization: U8 (4 Million loading cycles)

State of loading: Q3

Group classification: A8

Impact factor: 1.4

Duty factor: 0.9

Nominal load spectrum: 0.8 of rated capacity factor

Mechanism

Class of Utilization State of Loading Group Classification

Hoist

Traverse

Travel

Boom hoist

The wharf cranes shall be designed for Stability as per BS 2573 Part I & II.

C-3 Mobile Equipment

IS 4357: 2004 Methods for Stability Testing of Fork Lift Trucks

IS 4573: 1982 Specification for Power Driven Mobile Cranes IS 13473: Part 2:1992/ Cranes - Vocabulary Part 2 Mobile cranes ISO 4306-1985

IS 13558: Part 2:1995/ Cranes - Controls - Layout and Characteristics – Part ISO 7752 –2- 1986 Mobile Cranes

IS 13834 : Part 2: 1993/ Cranes - Classification: Part 2 Mobile cranes ISO 4301 – 2 :1985

IS 13870: Part 2: 1993/ Cranes and Lifting Appliances - Selection of Wire

ISO 4308 : 1988 Ropes - Part 2: Mobile Cranes - Coefficient of utilization

IS 14469: 1997/ Mobile Cranes - Determination of Stability ISO 4305 - 1991

IS 14474: Part 1: 1997/ Mobile Cranes - Experimental Determination of Crane ISO 11662-1 :1995 Performance – Part 1 : Tipping Loads and Radii

IS 3173: 1965 Specification for High pressure connections for fuel injection equipment for diesel engines

C-4 Conveyors for Bulk Handling

Conveyors

IS 4776: Part I: 1977 Specification for Troughed Belt Conveyors- Part I Troughed Belt Conveyors for Surface Installation

IS 8597 – 1977

IS 11592 – 2000

IS 7465 – 1974

IS 7155:Part 1: 1986

IS 7155:Part 2: 1986

IS 7155:Part 3: 1986

IS 7155:Part 4: 1990

IS 7155:Part 5: 1990

IS 7155:Part 6: 1990

IS 7155:Part 7: 1990

IS 7155:Part 8: 1994

Idlers and Pulleys

IS 8598 – 1987

IS 8531 – 1986

IS 11507 – 1985

Flat Belt Conveyors

Code of practice for selection and design of Belt Conveyors Portable and Mobile troughed Belt Conveyor

Code of recommended practice for conveyor safety: Part 1 General Information Code of recommended practice for conveyor safety: Part 2 General Safety requirement

Code of recommended practice for conveyor safety: Part 3 Belt Conveyors and feeders

Code of recommended practice for conveyor safety: Part 4 Vibrating Conveyor/feeder

Code of recommended practice for conveyor safety: Part 5 Apron Conveyor/Apron Feeder

Code of recommended practice for conveyor safety: Part 6 Selection, Training and Supervision of Operators

Code of recommended practice for conveyor safety

Part 7 Inspection and Maintenance

Code of recommended practice for conveyor safety: Part 8 Flight Conveyors (scraper conveyors)

Idlers and Idlers Sets Pulleys for Conveyors Synchronous Drive Pulleys

Conveyor Belts

1891(Part I & II)-1978

Rubber Conveyor Belting

IS 1891 – 1988

Amendment to above conveyor

IS 22131 Part I 1980

Steel Cord Conveyor Belting

Electrical

IS 325: 1996

Three-phase induction motors

IS 900: 1992

Code of practice for installation and maintenance of induction motors

IS 1231: 1974

Dimensions of Three-phase Foot-mounted Induction Motors

IS 2223: 1983

Dimensions of flange mounted ac induction motors

IS 3682: 1966

Flame-proof ac motors for use in mines

IS 3842: Part 2 : 1966

Application guide for electrical relays for ac systems: -Part 2 Over current relays for generators and motors

IS 4029: 1967

Guide for testing three-phase induction motors

IS 8151: 1976

Single-speed three-phase induction motors for driving lifts

IS 8789: 1996

Values of performance characteristics for three-phase induction motors

IS 9628: 1980

Three-phase induction motors with type of protection 'n'

IS 10242: Part 3 : Sec 1:1983 Electrical installations in ships: Part 3 Equipment,
Sec 1 Generators and motors

IS 12615: 2004

Energy Efficient Induction Motors - Three Phase Squirrel Cage

IS 13529: 1992

Guide on Effects of Unbalanced Voltages on the Performance of Three-Phase Cage Induction Motors

IS 13555: 1993 Guide for Selection and Application of 3-Phase A.

C. Induction Motors for Different Types of Driven

Equipment

IS 14122: 1994 Built in thermal protection for electric motors rated
up to 660 V ac

IS 14377: 1996 Specification for Three-phase Induction Motors for
Fans Used in Air-conditioning and Ventilation

IS 15429: 2004 Storage, Installation and Maintenance of DC Motors
- Code of Practice

IS 3043: 1987 Code of practice for earthing

IS 3151: 1982 Earthing transformers
Reactor Parts – Earthing of Transformers

IS 5553(Part 6) 1991

IS 9921: Part 1: 1981 Specification for Alternating Current
Disconnections (Isolators) and Earthing Switches
for Voltages above 1 000 V - Part I: General and
Definitions

IS 9921: Part 2: 1982 Alternating current disconnections (isolators) and
earthing switches for voltages above 1000 V: Part 2

Rating

IS 9921: Part III : 1982 Specification for Alternating Current
Disconnections (Isolators) and Earthing Switches
for Voltages above 1000 V - Part III: Design and
Construction
Specification

IS 9921: Part 4: 1985 for Alternating Current
Disconnections (isolators) and Earthing Switches
for Voltages Above 1000 V - Part 4: Type Tests and
Routine Tests

IS 9921: Part 5: 1985 Specification for Alternating Current
Disconnections (Isolators) and Earthing Switches
for Voltages Above 1000 v - Part 5: Information to
be given with Tenders, Enquiries and Orders

IS 12776: 2002 Galvanized Strand for Earthing – Specification

IS 14981: 2001 Live Working - Earthing or Earthing and Short- Circuiting Equipment Using Lances as a Short-

Circuiting Device-Lance Earthing

IS 13947: Part 2 : 1993 Specification for Low-voltage Switchgear and Control gear - Part 2 : Circuit Breakers

IS 14658: 1999 High Voltage Alternating Current Circuit Breakers -

Guide for Short-circuit and Switching Test Procedures for Metal-enclosed and Dead Tank Circuit Breakers

IS 8828: 1996 Electrical Accessories - Circuit Breakers for Over Current Protection for Household and Similar Installations

IS 2309: 1989 Code of Practice for Protection of allied structure against lightning

IS 732 IS 732: 1989 Code of Practice for Electric wiring installation

IS 694: 1990 PVC insulated Cables for working voltages upto and including 1100V

IS 1554 (Part 1):1988 PVC insulated (Heavy Duty) electric cables : Part 1 for working voltages upto and including 1100 V

IS 1554 (Part 2) : 1988 PVC insulated (Heavy Duty) electric cables : Part 2 for working volages from 3.3 kV upto and including 11 kV

IS 7098 (Part 1) : 1988 Cross linked Polyethelene insulated PVC sheathed cables Part 1 for working voltages upto and including 1100 V

IS 7098 (Part 2) : 1985 Cross linked Polyethelene insulated PVC sheathed cables Part 2 for working voltages from 3.3 kV upto and including 33 kV

IS 7098 (Part 3) : 1988 Cross linked Polyethelene insulated PVC sheathed cables Part 3 for working voltages from 66 kV upto and including 220 kV

IS 10118 (Part 1) : 1982 Code of Practice for selection, installation & maintenance of switchgears and Control gears : Part 1 General

IS 10118 (Part 2) : 1982 Code of Practice for selection, installation & maintenance of switchgears and Control gears: Part 2 Selection

IS 10118 (Part 3) : 1982 Code of Practice for selection, installation & maintenance of switchgears and Control gears: Part 3 Installation

IS 10118 (Part 4) : 1982 Code of Practice for selection, installation & maintenance of switchgears and Control gears: Part 4 Maintenance

For all other equipment not covered in the above standards, equivalent or higher standards in BS, JIS, FEM, DIN, ISO, IEC, are acceptable.

E. Operations & Maintenance Standards: Repairs, Maintenance and Replacement

The Concessionaire at it's own cost promptly and diligently maintain, replace or restore any of the project facilities or part thereof which may be lost, damaged, destroyed or worn out.

The Concessionaire shall abide by the operations and maintenance plan as outlined in the approved DPR.

While carrying out the repairing, maintaining and replacing the project facilities, the Concessionaire acknowledges and accepts that it is holding and maintaining the concession or assets, project facilities in trust for eventual transfer to the Concessioning Authority on termination of the agreement and therefore, will not do any act as a result of which the value of Port Assets and Project Facilities and Services is diminished.

The Concessionaire shall, at all times during the Concession Period, at its own risk, cost, charges and expenses, performance and pay for maintenance repairs, renewals and replacement of various type of assets and equipment in the concessionaire premises and /or the project or any parts thereof, whether due to use and operations or due to deterioration of materials and /or parts, so that on the expiry or termination of Concession, the same shall except normal wear and tear be in good working condition as it were at the time of commencement of the Concession.

While carrying out the repair, maintenance and replacement of the project facilities, the Concessionaire shall carry out the work in accordance with the manufacturer's recommendations and the relevant latest Indian Standards or in its absence ISO/OISD Standards. In the event that the concessionaire, by necessity or otherwise need to follow any other country standard and it shall be equal or superior to the standard specified above.

The repairs and maintenance shall generally conform to the following specifications.

E.1 Maintenance Standards

ISO 4308-1-2003	Maintenance of lifting appliances
ISO 4309-2004	Cranes wire rope care, maintenance and discard
IS 13367: Part 1 : 1992	Safe use of cranes – Code of Practice Part 1
	General
BS 7121-2-2003	Code of Practice for safe use of cranes, inspection, testing & examination
BS 7121-4-1997	Code of Practice for safe use of cranes (Lorry Loaders)
BS 7121-5-2006	Code of Practice for safe use of cranes

(Tower Cranes)

E.2 Painting

IS 144 : 1950	Ready mixed paint, brushing, petrol resisting, air-drying, for interior painting of tanks and container, red oxide (colour unspecified)
IS 145 : 1950	Ready mixed paint, slushing, petrol resisting, air-drying for interior painting of tanks and containers, red oxide (colour unspecified)
IS 146 : 1950	Specification for ready mixed paint, brushing, petrol resisting, stoving, for interior painting of tanks and containers, red oxide (colour unspecified)
IS 147 : 1950	Specification for ready mixed paint, slushing, petrol resisting, stoving, for interior painting of tanks and containers, red oxide (colour unspecified)
IS 164 : 1981	Specification for Ready mixed paint for road marking (first revision)
IS 1419 : 1989	Antifouling paint, brushing for ship's bottom and hulls-Specification (second revision)
IS 6714 : 1989	Ready mixed paint, finishing, non-slip, deck – Specification (first revision)
IS 6948 : 1973	Specification for Ready mixed paint, undercoat, synthetic for ships
IS 6951 : 1973	Specification for Ready mixed paint, finishing, exterior for ships
IS 1477 : Part I : 1971	Code of Practice for Painting of Ferrous Metals in Buildings - Part I : Pretreatment
IS 1477 : Part 2 : 1971	Code of practice for painting of ferrous metals in buildings: Part2 Painting
IS 9954 : 1981	Pictorial Surface Preparation Standards for Painting of Steel Surfaces

F. Safety Standards

The Concessionaire shall ensure compliance with the safety standards set out under Applicable Law/international conventions, as relevant, from time to time including those required under the following:

1. Dock Workers (Safety, Health and Welfare) Act, 1986 & Regulations framed thereunder of 1990.
2. The Manufacture, Storage and Import of Hazardous Chemicals Rules, 1989.
3. The Petroleum Act, 1934 along with the Petroleum Rules, 2002.
4. OISD – Guidelines – 156 (Oil Industry Safety Directorate): Fire Protection Facilities for Port Oil Terminals.
5. The Explosives Act, 1884 alongwith The Explosive Substance Act, 1983 & The Explosive Rules, 1983
6. Guidelines by Fire Advisor, CCE & DG FASLI, Government of India
7. National Fire Codes (National Fire Protection Association – USA)
8. Drill Manual for the Fire Services of India.
9. International Safety Guide for Oil Tankers & Terminals.
10. ISPS (International Ship & Port Facility Security) Code (2003 Edition)
11. MARPOL CONVENTION
12. International Maritime Dangerous Goods Code

[Besides the above, the Concessioning Authority may prescribe standards specific to the port/project]

APPENDIX 5: PROJECT SCHEDULE

Milestone date	Activity/level of completion of project
60 Days from Date of handing over of the additional plot of land.	25% of Construction Works should have been completed
120 Days from Date of handing over of the additional plot of land.	50% of Construction Works should have been completed
180 Days from Date of handing over of the additional plot of land.	100% of Construction Works should have been completed

APPENDIX 6: DESIGNS AND DRAWINGS

(Concessioning Authority to stipulate the Designs and Drawings that the Concessionaire will be expected to submit for review by the Independent Engineer as per the Scope of Work)

APPENDIX 7: TERMS OF REFERENCE FOR INDEPENDENT ENGINEER

[This Appendix shall stipulate the terms of reference for the Independent Engineer which shall include the scope of work (review of design and drawings, notification of objection thereto, inspection of Construction Works and Tests to be carried out, notification of shortfalls if any, issue of completion certificate, seeking of approval from collector of customs for the purpose of operationalising the facilities and services) which shall include the manner and timeliness of the reports of the Independent Engineer to be submitted while performing the services within the scope of work. Following is an indicative scope of work of the Independent Engineer. The scope would be revised to include such other functions as are required to be undertaken pursuant to specific provisions of the Agreement.]

1. Role and functions of the Independent Engineer

The Independent Engineer is expected to play a positive and independent role in discharging its functions, thereby facilitating the smooth implementation of the Project. The role and functions of the Independent Engineer shall include the following:

- (i) review of the Designs and Drawings;
- (ii) review, inspection and monitoring of Construction Works;
- (iii) conducting Tests on completion of construction and issuing Completion/ Provisional Certificate;
- (iv) determining, as required under the Agreement, the costs of any works or services and/or their reasonableness;
- (v) determining, as required under the Agreement, the period or any extension thereof, for performing any duty or obligation;
- (vi) assisting the Parties in resolution of disputes as regards the Designs & drawings; and
- (vii) undertaking all other duties and functions as envisaged under the Agreement.

2. Review or Designs and Drawings

(i) The Independent Engineer shall undertake a detailed review of the Designs & Drawings to be furnished by the Concessionaire along with supporting data, including, if relevant the geo-technical and hydrological investigations, characteristics of materials from borrow areas and quarry sites, topographical surveys and traffic surveys. The Independent Engineer shall complete such review and send its comments in accordance with the Agreement. In particular, such comments shall specify the conformity or otherwise of such

Designs & Drawings with the Scope of Work, Construction Standards and Safety Standards.

(ii) The Independent Engineer shall review the detailed design, construction methodology, quality assurance procedures and the procurement, engineering and construction time schedule sent to it by the Concessionaire and furnish its comments. The Independent Engineer shall take into account comments and suggestions of the Concessioning Authority, if any while furnishing the comments.

(iii) The Independent Engineer shall review the monthly progress reports as regards the Construction Works.

(iv) The Independent Engineer shall inspect the Construction Works once every month, preferably after receipt of the monthly progress report from the Concessionaire, but before the 20th (twentieth) day of each month in any case, and make out a report of such inspection (the “**Inspection Report**”) setting forth an overview of the status, progress, quality and safety of construction, including the work methodology adopted, the materials used and their sources, and conformity of Construction Works with the Construction Standards and Safety Standards. In a separate section of the Inspection Report, the Independent Engineer shall describe in reasonable detail the lapses, defects or deficiencies

observed by it in the Construction Works.

(v) The Independent Engineer may inspect the Construction Works more than once in a month if any lapses, defects or deficiencies require such inspections.

(vi) For determining that the Construction Works conform to Construction Standards, the Independent Engineer shall require the Concessionaire to carry out, or cause to be carried out, tests on a sample basis, to be specified by the Independent Engineer in accordance with Good Industry Practice for quality assurance. The Independent Engineer shall issue necessary directions to the Concessionaire for ensuring that the tests are conducted in a fair and efficient manner, and shall monitor and review the results thereof.

(vii) The tests shall be undertaken on a random sample basis and shall be in addition to, and independent of, the tests that may be carried out by the Concessionaire for its own quality assurance in accordance with Good Industry Practice.

(viii) In the event that the Concessionaire carries out any remedial works for removal or rectification of any defects or deficiencies, the Independent Engineer shall require the Concessionaire to carry out, or cause to be carried out, tests to determine that such remedial works have brought the Construction Works into conformity with the Construction Standards.

(ix) In the event that the Concessionaire fails to adhere to the Project Schedule and complete the Construction Works on the specified Milestone Dates, the Independent Engineer shall undertake a review of the progress of construction and identify potential delays, if any. If the Independent Engineer shall determine that completion of the Project is not feasible within the time specified in the Agreement, it shall require the Concessionaire to indicate within 15 (fifteen) Days the steps proposed to be taken to expedite progress, and the period within which the Project shall be completed. Upon receipt of a report from the Concessionaire, the Independent Engineer shall review the same and send its comments to the Concessioneing Authority and the Concessionaire forthwith.

(x) If at any time during the Construction Period, the Independent Engineer determines that it is not safe to carry on Construction Works for any reason whatsoever including if the Concessionaire has not made adequate arrangements for the safety of workers or other third parties or that any work is being carried out in a manner that threatens such safety, it shall make a recommendation to the Concessioneing Authority forthwith, identifying the whole or part of the Construction Works that should be suspended for ensuring safety in respect thereof.

(xi) Upon remedial measures being taken by the Concessionaire for securing the safety of suspended works, the Independent Engineer shall inspect the safety measures for adequacy and recommend whether or not such suspension may be revoked by the Concessioneing Authority.

(xii) If suspension of Construction Works is for reasons not attributable to the Concessionaire, the Independent Engineer shall determine the extension of time for completion, to which the Concessionaire is reasonably entitled, and shall notify the Concessioneing Authority and the Concessionaire of the same.

(xiii) The Independent Engineer shall carry out, or cause to be carried out, all the Tests specified in the Appendix hereto and issue a Completion Certificate or Provisional Certificate, as the case may be, in accordance with the provisions of the Agreement.

Annexure Tests

[Depending on the parameters of the Project/Construction Requirements, the Tests shall be as per Good Industry Practice shall be stipulated on a project specific basis and listed in this Annexure.]

APPENDIX 8: PERMITS AND CLEARANCES PROCURED BY THE CONCESSIONAIRE/ AUTHORITY

- i. Applicable Permits to be obtained by the Concessionaire before commencement of Operation Works.
- ii. Such permits and clearances under Environmental Law/other Applicable Laws as will be procured by the Concessioning Authority as well as the Confirming Party before the commencement of the Project.
- iii. It is also pertinent to mention here that a dedicated task force comprising the following members shall be formed to facilitate the Concessionaire in the process of obtaining applicable permits and/or clearances:
 - a. A representative from the Traffic Department of the Concessioning Authority;
 - b. A representative from the Traffic Department of the Confirming Party;
 - c. A representative of the Concessionaire;
 - d. A representative from the Special Planning Authority of the Concessioning Authority/relevant Civic Bodies.

**APPENDIX 9: PERFORMANCE GUARANTEE
(PROFORMA OF BANK GUARANTEE)**

THIS DEED OF GUARANTEE executed on this the ---- day of ---- at ----- by -----
----- (Name of the Bank) having its Head/Registered office at -----
----- hereinafter referred to as “the Guarantor” which expression shall unless it
be repugnant to the subject or context thereof include its successors and assigns;

In favour of

THE BOARD OF TRUSTEES, MUMBAI PORT TRUST, established under the Major Ports Trust Act, 1963 (“Act”) having its administrative office at Port House, Ballard Estate, Soorji Vallabhdas Road, Mumbai 400 001 (hereinafter referred to as the “Authority”, which expression shall unless repugnant to the context or meaning thereof, include its successors and permitted assigns).

WHEREAS

- a) The Board, vide its Request for Proposal dated [●] (“the RFP”) invited duly short listed Concessionaires to implement a project envisaging _____
(more particularly described in Appendix 1 and hereinafter referred to as “the Project”);
- b) After evaluation of the bids received in response to the RFP, the Board accepted the bid of the consortium comprising of _____, _____ and _____ (“the Consortium”) OR the Board accepted the bid of _____ Ltd. (“the Applicant”) and issued the Letter of Intent No _____ dated _____ (“LOI”) to the Consortium/Applicant requiring, inter alia, the execution of the Concession, (“the Concession”) the draft whereof was provided in the RFP;
- c) Pursuant to the LOI the Applicant/Consortium has promoted and incorporated a special purpose company _____ (“the Concessionaire”), to enter into the Concession for undertaking, inter alia, the work with respect to the Project referred to in Recital (a) above and to perform and discharge all its obligations thereunder.
- d) In terms of the LOI and the Concession, the Concessionaire is required to furnish to the Board, a Performance Guarantee being an unconditional and irrevocable Bank Guarantee from a Scheduled Bank for a sum of Rs. [●] (Rupees [●] only) as security for due and punctual performance/discharge of its obligations under the Concession during the Operation Phase,
- e) At the request of the Concessionaire, and for valid consideration the Guarantor has agreed to provide guarantee, being these presents guaranteeing the due and punctual performance/discharge by the Concessionaire of its obligations under the Concession during the Operation Phase.

NOW THEREFORE THIS DEED WITNESSETH AS FOLLOWS:

1. Capitalized terms used herein but not defined shall have the meaning assigned to them respectively in the Concession.
2. The Guarantor hereby irrevocably and unconditionally guarantees the due execution and punctual performance by M/s._____ (“the Concessionaire”) of all its obligations under the Concession during the Operation Phase.
3. The Guarantor shall, without demur or protest, pay to the Board sums not exceeding in aggregate Rs.[●] (Rupees [●] only) within five (5) calendar Days of receipt of a written demand therefor from the Board stating that the Concessionaire has failed to meet its performance obligations under the Concession during the Operation Phase. The Guarantor shall not go into the veracity of any breach or failure on the part of the Concessionaire or validity of demand so made by the Board and shall pay the amount specified in the demand notwithstanding any direction to the contrary given or any dispute whatsoever raised by the Concessionaire or any other Person before any court, tribunal, expert, arbitrator or similar proceedings. The Guarantor’s obligations hereunder shall subsist until all such demands of the Board are duly met and discharged in accordance with the provisions hereof. Any such demand made on the Guarantor by the Board shall be conclusive, absolute and unequivocal as regards the amount due and payable by the Guarantor under this Concession. The Authority shall at all times at its sole discretion have the absolute and unconditional right to call upon the Guarantor to pay the amount under the Guarantee.
4. In order to give effect to this Guarantee, the Board shall be entitled to treat the Guarantor as the principal debtor. The obligations of the Guarantor shall not be affected by any variations in the terms and conditions of the Concession or other documents or by the extension of time for performance granted by the Board or postponement/non exercise/ delayed exercise of any of its rights by the Board or any indulgence shown by the Board to the Concessionaire and the Guarantor shall not be relieved from its obligations under this Guarantee on account of any such variation, extension, postponement, non-exercise or delayed exercise by the Board of any of the Board’s rights or any indulgence shown by the Board; provided nothing contained herein shall enlarge the Guarantor’s obligation hereunder.
5. This Guarantee shall be unconditional and irrevocable and shall remain in full force and effect until six months of the expiry of the Concession thereafter unless discharged/released earlier by the Board in accordance with the provisions of the Concession. The Guarantor’s liability in aggregate shall be limited to a sum of Rs. [●] (Rupees [●] only).
6. This Guarantee shall not be affected by any change in the constitution or winding up, insolvency, bankruptcy, dissolution or liquidation of the Concessionaire/ the Guarantor or any absorption, merger or amalgamation of the Concessionaire/the Guarantor with any other Person.

7. Any payment made hereunder shall be made free and clear of, and without deduction for or on account of taxes, levies, imposts, duties, charges, fees, deductions, or withholding of any nature whatsoever.
8. The Guarantor hereby irrevocably and unconditionally undertakes, agrees and acknowledges that its obligations as a Guarantor hereunder:
 - a. shall not be affected by the existence of or release or variation of any other guarantee or security for any of the obligations of the Concessionaire under the Concession;
 - b. shall not be affected by any failure by the Authority to perform any of its obligations under the Concession;
 - c. shall not be affected by any failure or delay in payment of any fee or other amount payable to the Guarantor in respect hereof;
 - d. shall not be affected by any exercise or non-exercise of any right, remedy, power or privilege of any person under or in respect of any payment obligations of the Concessionaire under the Concession;
 - e. shall not be affected by any failure, omission or delay on the Authority's part to enforce, assert or to exercise any right, power or remedy conferred on the Authority in this Guarantee;
 - f. shall not be affected by any act, omission, matter or thing which, but for this clause would reduce, release or prejudice the Guarantor from any of the obligations under this Guarantee or prejudice or diminish the obligations in whole or in part.
9. The obligations, covenants, concessions and duties herein shall not be subject to any counterclaims, cross claims, set offs, deductions, withholdings, diminutions, abatements, recoupments, suspensions, deferments, reductions or defense for any reason whatsoever and the Guarantor, shall have no right to terminate this Guarantee or to be released, relieved or discharged from any of its obligations, covenants, concessions and duties hereunder for any reason whatsoever.
10. The Guarantor has power to issue this guarantee and discharge the obligations contemplated herein, and the undersigned is duly authorized to execute this Guarantee pursuant to the power granted under _____.
11. This Guarantee shall be governed by and construed in accordance with the laws of India. The Guarantor hereby irrevocably submits to the exclusive jurisdiction of the Court of _____ for the purposes of any suit, action, or other proceeding arising out of this Guarantee, or the subject matter hereof, brought by the Authority or its successors or assigns. To the extent permitted by Applicable Law, the Guarantor or its successors or assigns hereby waive, and shall not assert,

by way of motion, as defense, or otherwise, in any such suit, action, or proceeding any claim that such suit, action, or proceedings is brought in an inconvenient forum, or that the value of such suit, action, or proceeding is improper, or that the subject matter hereof may not be enforced in or by such court.

IN WITNESS WHERE OF THE GUARANTOR HAS SET ITS HANDS HERE UNTO ON THE DAY, MONTH AND YEAR FIRST HERE IN ABOVE WRITTEN.

SIGNED AND DELIVERED by

_____ Bank by the
hand of Shri _____ its
_____ and authorized official.

APPENDIX 10: CERTIFICATES

COMPLETION CERTIFICATE

1. I, [●] (Name of the Independent Engineer), acting as Independent Engineer, under and in accordance with the Agreement dated [●], for the [●] Project on build, operate and transfer (BOT) basis, through [(Name of Concessionaire)], hereby certify that the Tests specified in Article [●] and Schedule-[●] of the Agreement have been successfully undertaken to determine compliance of the Project with the provisions of the Agreement, and I am satisfied that the Project can be safely and reliably placed in commercial service of the users thereof.

2. It is certified that, in terms of the aforesaid Agreement, all works forming part of the Project have been completed, and the Project is hereby declared fit for entry into commercial operation on this the [●] day of [●] 20[●].

SIGNED, SEALED AND DELIVERED For and on behalf of the INDEPENDENT ENGINEER by:
(Signature) (Name) (Designation) (Address)

PROVISIONAL CERTIFICATE

1. I, [[●] (Name of the Independent Engineer)], acting as Independent Engineer, under and in accordance with the Agreement dated [●], for the Project on build, operate and transfer (BOT) basis through [● (Name of Concessionaire)], hereby certify that the Tests specified in Article [●] and Schedule-[●] of the Agreement have been undertaken to determine compliance of the Project with the provisions of the Agreement.

2. Construction Works that were found to be incomplete and/or deficient have been specified in the Punch List appended to the Provisional Certificate, and the Concessionaire has agreed and accepted that it shall complete and/or rectify all such works in the time and manner set forth in the Agreement. [Some of the incomplete works have been delayed as a result of reasons attributable to the Concessioning Authority or due to Force Majeure and the Provisional Certificate cannot be withheld on this account. Though the remaining incomplete works have been delayed as a result of reasons attributable to the Concessionaire,] I am satisfied that having regard to the nature and extent of such incomplete works, it would not be prudent to withhold commercial operation of the Project, pending completion thereof.

3. In view of the foregoing, I am satisfied that the Project can be safely and reliably placed in commercial service of the users thereof, and in terms of the Agreement, the Project is hereby provisionally declared fit for entry into commercial operation on this the [●] day of [●] 20[●].

ACCEPTED, SIGNED, SEALED AND
DELIVERED For and on behalf of
CONCESSIONAIRE by:

(Signature)

(Name and Designation)

(Address)

SIGNED, SEALED AND DELIVERED
For and on behalf of INDEPENDENT
ENGINEER by:

(Signature)

(Name and Designation)

(Address)

APPENDIX 11: PERSONNEL AND LABOUR REQUIREMENTS

DELETED

APPENDIX 12: TARIFFS

DELETED

APPENDIX 13: RATES APPLICABLE IN RESPECT OF LAND, UTILITIES AND SERVICES

(As per SOR)

APPENDIX 14: MINIMUM GUARANTEED THROUGHPUT

The Concessionaire is required to provide a guarantee for a minimum traffic to be handled through barge/ ship movement from JNPT to Mumbai port. The Concessionaire shall ensure that a total traffic of 3,000 TEUs per annum (i.e. average monthly traffic of 250 TEUs) for the 2nd (second) year of commercial operations, 6,000 TEUs per annum (i.e. average monthly traffic of 500 TEUs) for the 3rd (third) year of commercial operations, 12,000 TEUs per annum (i.e. average monthly traffic of 1000 TEUs) for the 4th (fourth) year of commercial operations and thereafter 25% increase over base MGT for the subsequent years of commercial operations is handled as part of this project. If the concessionaire fails to meet the minimum traffic requirement as per Appendix 5 (a), a penalty will be imposed at the rate of 33% of royalty quoted per TEU for every shortfall in annual MGT (computed annually).

APPENDIX 15: PERFORMANCE STANDARDS

The selected concessionaire is required to provide a guarantee for a minimum traffic to be handled through barge/ ship movement from JNPT to Mumbai port. The selected concessionaire should ensure that a total traffic of 3,000 TEUs per annum (i.e. average monthly traffic of 250 TEUs) for the 2nd (second) year of commercial operations, 6,000 TEUs per annum (i.e. average monthly traffic of 500 TEUs) for the 3rd (third) year of commercial operations, 12,000 TEUs per annum (i.e. average monthly traffic of 1000 TEUs) for the 4th (fourth) year of commercial operations, and subsequent increase of 25% of base figure of MGT for the subsequent years of commercial operations is handled as part of this project. It should be noted that for the purpose of this project, the date of start of commercial operations by the concessionaire shall be deemed to be the commencement of the Concession Period. If the concessionaire fails to meet the minimum traffic requirement, a penalty will be imposed as follows:

- 33% of royalty per TEU for every shortfall in the MGT
- After the first year of commercial operations, if the minimum guaranteed throughput recorded as part of this project for any four consecutive months, is lower than 75% of the minimum traffic provided annual MGT is not met as stipulated above herein, then apart from forfeiting the Performance Guarantee of the Concessionaire, the Authority may also terminate the Agreement.

APPENDIX 16: ESCROW ACCOUNT

THIS ESCROW AGREEMENT is entered into on this the [●] day of [●] 20[●].

AMONGST

1. [● LIMITED], a company incorporated under the provisions of the Companies Act, 1956 and having its registered office at [●] (hereinafter referred to as the **Concessionaire** which expression shall, unless repugnant to the context or meaning thereof, include its successors, permitted assigns and substitutes);
2. [● (name and particulars of Senior Lenders' Representative)] and having its registered office at [●] acting for and on behalf of the Senior Lenders as their duly authorised agent with regard to matters arising out of or in relation to this Agreement (hereinafter referred to as the **“Senior Lenders' Representative”** which expression shall, unless repugnant to the context or meaning thereof, include its successors and substitutes);
3. [● (name and particulars of the Escrow Bank)] and having its registered office at [●] (hereinafter referred to as the **“Escrow Bank”** which expression shall, unless repugnant to the context or meaning thereof, include its successors and substitutes); and
4. BOARD OF TRUSTEES for PORT, a body corporate constituted under the provisions of the Major Port Trusts Act, 1963 and having its Administrative Office at _____, hereinafter referred to as **“the Concessioneing Authority”** (which expression shall, unless repugnant to the context or meaning thereof, include its successors and permitted assigns);

WHEREAS:

(A) The Concessioneing Authority has entered into a Concession Agreement dated [●] with the Concessionaire (the **“Concession Agreement”**) for undertaking the Project (as defined in the Concession Agreement) on build, operate and transfer (BOT) basis. The Senior Lenders have agreed to finance the Project in accordance with the terms and conditions set forth in the Financing Documents.

(B) The Concession Agreement requires the Concessionaire to establish an Escrow Account, *inter alia*, on the terms and conditions stated therein.

NOW IT IS HEREBY AGREED as follows:

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

In this Agreement, the following words and expressions shall, unless repugnant to the context or meaning thereof, have the meaning hereinafter respectively assigned to them:

“Agreement” means this Escrow Agreement and any amendment thereto made in accordance with the provisions contained herein;

“Budget” means the budget for construction/implementation expenses relating to the Project/Project Facilities and Services and O&M Expenses submitted by the Concessionaire in accordance with the provisions contained herein;

“Concession Agreement” means the Concession Agreement referred to in Recital (A) above and shall include any amendments made thereto in accordance with the provisions contained in this behalf therein;

“Escrow Account” means an escrow account established in terms of and under this Agreement, and shall include any sub accounts thereof;

“Escrow Default” shall have the meaning ascribed thereto in Clause 6.1;

“Senior Lenders' Representative” means the person referred to as the Senior Lenders' Representative in the foregoing Recitals;

“Parties” means the parties to this Agreement collectively and **“Party”** shall mean any of the Parties to this Agreement individually;

“Payment Date” means, in relation to any payment specified in Clause 4.1, the date(s) specified for such payment; and

“Quarter” means, any three month period from 1st April to 30th June, 1st July to 30th September, 1st October to 31st December or 1st January to 31st March.

1.2 Interpretation

1.2.1 References to Senior Lenders' Representative shall, unless repugnant to the context or meaning thereof, mean references to the Senior Lenders' Representative, acting for and on behalf of Senior Lenders.

1.2.2 The words and expressions beginning with capital letters and defined in this Agreement shall have the meaning ascribed thereto herein, and the words and expressions used in this Agreement and not defined herein but defined in the Concession Agreement shall, unless repugnant to the context, have the meaning ascribed thereto in the Concession Agreement.

1.2.3 References to Articles are, unless stated otherwise, references to Articles of this Agreement.

1.2.4 The rules of interpretation stated in Articles 1.3, 1.4 and 1.5 of the Concession Agreement shall apply, *mutatis mutandis*, to this Agreement.

2. ESCROW ACCOUNT

2.1 Escrow Bank to act as trustee

2.1.1 The Concessionaire hereby settles in trust with the Escrow Bank a sum of Rs.

100 (Rupees Hundred Only) appoints the Escrow Bank to act as trustee for the Concessioning Authority, the Senior Lenders, the Senior Lenders' Representative and the Concessionaire in connection herewith and authorises the Escrow Bank to exercise such rights, powers, authorities and discretion as are specifically delegated to the Escrow Bank by the terms hereof together with all such rights, powers, authorities and discretion as are reasonably incidental hereto, and the Escrow Bank accepts such appointment pursuant to the terms hereof.

2.1.2 The Concessionaire hereby declares that all rights, title and interest in and to the Escrow Account shall be vested in the Escrow Bank and held in trust for the Concessioning Authority, the Senior Lenders, the Senior Lenders' Representative and the Concessionaire, and applied in accordance with the terms of this Agreement. No person other than the Concessioning Authority, the Senior Lenders/Senior Lenders' Representative and the Concessionaire shall have any rights hereunder as the beneficiaries of, or as third party beneficiaries under this Agreement.

2.2 Acceptance of Escrow Bank

The Escrow Bank hereby agrees to act as such and to accept all payments and other amounts to be delivered to and held by the Escrow Bank pursuant to the provisions of this Agreement. The Escrow Bank shall hold and safeguard the Escrow Account during the term of this Agreement and shall treat the amount in the Escrow Account as monies deposited by the Concessionaire, Senior Lenders or the Concessioning Authority with the Escrow Bank. In performing its functions and duties under this Agreement, the Escrow Bank shall act in trust for the benefit of, and as agent for, the Concessioning Authority, the Senior Lenders' Representative and the Concessionaire or their nominees, successors or assigns, in accordance with the provisions of this Agreement.

2.3 Establishment and operation of Escrow Account

2.3.1 Within 30 (thirty) Days from the date of this Agreement, and in any case prior to the Date of Commercial Operation, the Concessionaire shall open and establish the Escrow Account with the [(name of Branch)] Branch of the Escrow Bank. The Escrow Account shall be denominated in Rupees.

2.3.2 The Escrow Bank shall maintain the Escrow Account in accordance with the terms of this Agreement and its usual practices and applicable regulations, and pay the maximum rate of interest payable to similar customers on the balance in the said account from time to time.

2.3.3 The Concessionaire shall submit to the Escrow Bank a Budget within 7 (seven) Days of the commencement of each Financial Year. Till the pendency of the financing Documents, such Budget shall be approved by the Senior Lenders/Senior Lenders Representative and thereafter by the Concessioneing Authority.

2.3.4 The Escrow Bank and the Concessionaire shall, after consultation with the Senior Lenders' Representative, agree on the detailed mandates, terms and conditions, and operating procedures for the Escrow Account, but in the event of any conflict or inconsistency between this Agreement and such mandates, terms and conditions, or procedures, this Agreement shall prevail.

2.4 Escrow Bank's fee

The Escrow Bank shall be entitled to receive its fee and expenses in an amount, and at such times, as may be agreed between the Escrow Bank and the Concessionaire. For the avoidance of doubt, such fee and expenses shall form part of the operating and maintaining expenses and shall be appropriated from the Escrow Account in accordance with Article 4.1.1 (c) .

2.5 Rights of the parties

The rights of the Concessioneing Authority, the Senior Lenders (through the Senior Lenders' Representative) and the Concessionaire in the monies held in the Escrow Account are set forth in their entirety in this Agreement and the Concessioneing Authority, the Senior Lenders' and the Concessionaire shall have no other rights against or to the monies in the Escrow Account.

2.6 Substitution of the Concessionaire

The Parties hereto acknowledge and agree that upon substitution of the Concessionaire with the Selectee, pursuant to the Substitution Agreement, it shall be deemed for the purposes of this Agreement that the Selectee is a Party hereto and the Selectee shall accordingly be deemed to have succeeded to the rights and obligations of the Concessionaire under this Agreement on and with effect from the date of substitution of the Concessionaire with the Selectee.

3. DEPOSITS INTO ESCROW ACCOUNT

3.1 Deposits by the Concessionaire

The Concessionaire agrees and undertakes that it shall deposit into and/or credit the Escrow Account with:

- (a) all monies received in relation to the Project from any source, including the Senior Lenders;
- (b) all funds received by the Concessionaire from its share-holders, in any manner or form;
- (c) all Fee levied and collected by the Concessionaire;
- (d) any other revenues from or in respect of the Project/Project Facilities and Services accruing to the Concessionaire including termination payments; and
- (e) all proceeds received pursuant to any insurance claims.

For avoidance of doubt, all amounts received by the Concessionaire in respect of the Project/Project Facilities and Services excepting any amounts in respect of cesses and duties collected by it from the users on behalf of the Concessioneing Authority or such other authority in accordance with the

Concession Agreement or pursuant to any other instructions in respect thereof shall be deposited in the Escrow Account.

4. WITHDRAWALS FROM ESCROW ACCOUNT

4.1 Withdrawals during Concession Period

4.1.1 At the beginning of every month, or at such shorter intervals as the Senior Lenders' Representative and the Concessionaire may by written instructions determine, the Escrow Bank shall withdraw amounts from the Escrow Account and appropriate them in the following order by depositing such amounts in the relevant Sub-Accounts for making due payments in a month :

- (a) all taxes due and payable by the Concessionaire;
 - (b) towards License Fee;
 - (c) all construction/implementation expenses relating to the Project/Project Facilities and Services, in accordance with the Budget and subject to limits if any set out under the Financing Documents;
 - (d) all expenses relating to operations and management of the Project/Project Facilities and Services, in accordance with the Budget and subject to limits if any set out under the Financing Documents;
 - (e) towards its debt service obligations under the Financing Documents;
 - (f) towards Royalty and other sums payable to the Concessioneing Authority and liquidated damages, if any;
 - (g) towards any reserve requirements in accordance with the Financing Documents;
- and the Concessionaire shall be at liberty to withdraw any sums outstanding in the escrow account after all the aforesaid payments due in any Quarter have been made and/or adequate reserves have been created in respect thereof for that Quarter.

4.1.2 Not later than 60 (sixty) Days prior to the commencement of each Accounting Year, the Concessionaire shall provide to the Escrow Bank, with prior written approval of the Senior Lenders' Representative, details of the amounts likely to be required for each of the payment obligations set forth in this Article 4.1; provided that such amounts may be subsequently modified, with prior written approval of the Senior Lenders' Representative, if fresh information received during the course of the year makes such modification necessary.

4.2 Withdrawals upon end of Concession Period

All amounts standing to the credit of the Escrow Account at the end of the Concession Period including amounts credited to the Escrow Account towards compensation payable in accordance with Article 17 of the Concession Agreement shall be appropriated in the following order of priority:

- (i) towards taxes and statutory dues payable by the Concessionaire;
 - (ii) compensation to Senior Lenders in terms of the Financing Documents towards discharge of the Concessionaire's liability under such Financing Documents;
 - (iii) all amounts due to the Concessioneing Authority and amounts payable towards transfer of the Project Facilities and Services by the Concessionaire in accordance with this Agreement;
- and the Concessionaire shall be at liberty to withdraw any sums outstanding in the Escrow Account after all the aforesaid payments due have been made and/or adequate reserves have been created in respect thereof to the satisfaction of the Senior Lenders and the Concessioneing Authority and the Escrow Agent has received a confirmation of final settlement by the Senior Lenders and/or Concessioneing Authority.

4.3 Application of insurance proceeds

Notwithstanding anything in this Agreement, the proceeds from all insurance claims, except life and injury, shall be deposited into and/or credited to the Escrow Account and utilised for any necessary

repair, reconstruction, reinstatement, replacement, improvement, delivery or installation of the Project/Project facilities and Services, and the balance remaining, if any, shall be applied in accordance with the provisions contained in this behalf in the Financing Documents.

4.4 Withdrawals during Suspension

Notwithstanding anything to the contrary contained in this Agreement, in case the Escrow Bank receives a notice in writing from the Concession Authority that the rights of the Concessionaire are suspended in accordance with the Concession Agreement or a Termination Notice is issued, the Escrow Bank shall until such notice is withdrawn, act only on the instructions of the Concessioneing Authority.

5. OBLIGATIONS OF THE ESCROW BANK

5.1 Segregation of funds

Monies and other property received by the Escrow Bank under this Agreement shall, until used or applied in accordance with this Agreement, be held by the Escrow Bank in trust for the purposes for which they were received, and shall be segregated from other funds and property of the Escrow Bank.

5.2 Notification of balances

7 (seven) business Days prior to each Payment Date (and for this purpose the Escrow Bank shall be entitled to rely on an affirmation by the Concessionaire and/or the Senior Lenders' Representative as to the relevant Payment Dates), the Escrow Bank shall notify the Senior Lenders' Representative of the balances in the Escrow Account as at the close of business on the immediately preceding business day.

5.3 Communications and notices

In discharge of its duties and obligations hereunder, the Escrow Bank:

- (a) may, in the absence of bad faith or gross negligence on its part, rely as to any matters of fact which might reasonably be expected to be within the knowledge of the Concessionaire upon a certificate signed by or on behalf of the Concessionaire;
- (b) may, in the absence of bad faith or gross negligence on its part, rely upon the authenticity of any communication or document believed by it to be authentic;
- (c) shall, within 5 (five) business Days after receipt, deliver a copy to the Senior Lenders' Representative of any notice or document received by it in its capacity as the Escrow Bank from the Concessionaire or any other person hereunder or in connection herewith; and
- (d) shall, within 5 (five) business Days after receipt, deliver a copy to the Concessionaire of any notice or document received by it from the Senior Senior Lenders' Representative in connection herewith.

5.4 No set off

The Escrow Bank agrees not to claim or exercise any right of set off, banker's lien or other right or remedy with respect to amounts standing to the credit of the Escrow Account. For the avoidance of doubt, it is hereby acknowledged and agreed by the Escrow Bank that the monies and properties held by the Escrow Bank in the Escrow Account shall not be considered as part of the assets of the Escrow Bank and being trust property, shall in the case of bankruptcy or liquidation of the Escrow Bank, be wholly excluded from the assets of the Escrow Bank in such bankruptcy or liquidation.

5.5 Regulatory approvals

The Escrow Bank shall use its best efforts to procure, and thereafter maintain and comply with, all regulatory approvals required for it to establish and operate the Escrow Account. The Escrow Bank

represents and warrants that it is not aware of any reason why such regulatory approvals will not ordinarily be granted to the Escrow Bank.

6 ESCROW DEFAULT

6.1 Escrow Default

6.1.1 Following events shall constitute an event of default by the Concessionaire (an “**Escrow Default**”) unless such event of default has occurred as a result of Force Majeure or any act or omission of the Concessioneing Authority or the Senior Lenders' Representative:

- (a) the Concessionaire commits breach of this Agreement by failing to deposit /cause the deposit of any receipts into the Escrow Account;
- (b) the Concessionaire causes the Escrow Bank to transfer funds to any account of the Concessionaire in breach of the terms of this Agreement; or
- (c) the Concessionaire commits or causes any other breach of the provisions of this Agreement.

6.1.2 Upon occurrence of an Escrow Default, the consequences thereof shall be dealt with under and in accordance with the provisions of the Concession Agreement.

7. TERMINATION OF ESCROW AGREEMENT

7.1 Duration of the Escrow Agreement

This Agreement shall remain in full force and effect so long as any sum remains to be advanced or is outstanding from the Concessionaire in respect of the debt, guarantee or financial assistance received by it from the Senior Lenders, or any of its obligations to the Concessioneing Authority remain to be discharged, unless terminated earlier by consent of all the Parties or otherwise in accordance with the provisions of this Agreement.

7.2 Substitution of Escrow Bank

The Concessionaire may, by not less than 45 (forty five) Days prior notice to the Escrow Bank, the Concessioneing Authority and the Senior Lenders' Representative, terminate this Agreement and appoint a new Escrow Bank, provided that the new Escrow Bank is acceptable to the Senior Lenders' Representative and arrangements are made satisfactory to the Senior Lenders' Representative for transfer of amounts deposited in the Escrow Account to a new Escrow Account established with the successor Escrow Bank. The termination of this Agreement shall take effect only upon coming into force of an Escrow Agreement with the substitute Escrow Bank.

7.3 Closure of Escrow Account

The Escrow Bank shall, at the request of the Concessionaire and the Senior Lenders' Representative made on or after the payment by the Concessionaire of all outstanding amounts under the Concession Agreement and the Financing Documents including the payments specified in Article 4.2, and upon confirmation' of receipt of such payments, close the Escrow Account and pay any amount standing to the credit thereof to the Concessionaire. Upon closure of the Escrow Account hereunder, the Escrow Agreement shall be deemed to be terminated.

8. SUPPLEMENTARY ESCROW AGREEMENT

8.1 Supplementary escrow agreement

The Senior Lenders' Representative and the Concessionaire shall be entitled to enter into a supplementary escrow agreement with the Escrow Bank providing, inter alia, for detailed procedures and documentation for withdrawals from Escrow Account, creation of sub-accounts pursuant to Clause 4.1.1 and for matters not covered under this Agreement such as the rights and obligations of Senior Lenders, investment of surplus funds, restrictions on withdrawals by the Concessionaire in the event of breach of Financing Documents, procedures relating to operation of the Escrow Account and

withdrawal therefrom, reporting requirements and any matters incidental thereto; provided that such supplementary escrow agreement shall not contain any provision which is inconsistent with this Agreement and in the event of any conflict or inconsistency between provisions of this Agreement and such supplementary escrow agreement, the provisions of this Agreement shall prevail.

9. INDEMNITY

9.1 General indemnity

9.1.1 The Concessionaire will indemnify, defend and hold the Concessioneing Authority, Escrow Bank and the Senior Lenders, acting through the Senior Lenders' Representative, harmless against any and all proceedings, actions and third party claims for any loss, damage, cost and expense arising out of any breach by the Concessionaire of any of its obligations under this Agreement or on account of failure of the Concessionaire to comply with Applicable Laws and Applicable Permits.

9.1.2 The Concessioneing Authority will indemnify, defend and hold the, Concessionaire harmless against any and all proceedings, actions and third party claims for any loss, damage, cost and expense arising out of failure of the Concessioneing Authority to fulfill any of its obligations under this Agreement materially and adversely affecting the performance of the Concessionaire's obligations under the Concession Agreement or this Agreement other than any loss, damage, cost and expense arising out of acts done in discharge of their lawful functions by the Concessioneing Authority, its officers, servants and agents.

9.1.3 The Escrow Bank will indemnify, defend and hold the Concessionaire harmless against any and all proceedings, actions and third party claims for any loss, damage, cost and expense arising out of failure of the Escrow Bank to fulfill its obligations under this Agreement materially and adversely affecting the performance of the Concessionaire's obligations under the Concession Agreement other than any loss, damage, cost and expense, arising out of acts done in discharge of their lawful functions by the Escrow Bank, its officers, servants and agents.

9.2 Notice and contest of claims

In the event that any Party hereto receives a claim from a third party in respect of which it is entitled to the benefit of an indemnity under Clause 9.1 or in respect of which it is entitled to reimbursement (the “**Indemnified Party**”), it shall notify the other Party responsible for indemnifying such claim hereunder (the “**Indemnifying Party**”) within 15 (fifteen) Days of receipt of the claim and shall not settle or pay the claim without the prior approval of the Indemnifying Party, which approval shall not be unreasonably withheld or delayed. In the event that the Indemnifying Party wishes to contest or dispute the claim, it may conduct the proceedings in the name of the Indemnified Party and shall bear all costs involved in contesting the same. The Indemnified Party shall provide all cooperation and assistance in contesting any claim and shall sign all such writings and documents as the Indemnifying Party may reasonably require.

10. MISCELLANEOUS PROVISIONS

10.1 Governing law and jurisdiction

This Agreement shall be construed and interpreted in accordance with and governed by the laws of India, and the Courts at Mumbai shall have jurisdiction over all matters arising out of or relating to this Agreement.

10.2 Waiver of sovereign immunity

The Concessioneing Authority unconditionally and irrevocably:

- (a) agrees that the execution, delivery and performance by it of this Agreement constitute commercial acts done and performed for commercial purpose;
- (b) agrees that, should any proceedings be brought against it or its assets, property or revenues in any jurisdiction in relation to this Agreement or any transaction contemplated by this Agreement, no immunity (whether by reason of sovereignty or otherwise) from such proceedings shall be claimed by or on behalf of the Concessioneering Authority with respect to its assets;
- (c) waives any right of immunity which it or its assets, property or revenues now has, may acquire in the future or which may be attributed to it in any jurisdiction; and
- (d) consents generally in respect of the enforcement of any judgement or award against it in any such proceedings to the giving of any relief or the issue of any process in any jurisdiction in connection with such proceedings (including the making, enforcement or execution against it or in respect of any assets, property or revenues whatsoever irrespective of their use or intended use of any order or judgement that may be made or given in connection therewith).

10.3 Priority of agreements

In the event of any conflict between the Concession Agreement and this Agreement, the provisions contained in the Concession Agreement shall prevail over this Agreement.

10.4 Alteration of terms

All additions, amendments, modifications and variations to this Agreement shall be effectual and binding only if in writing and signed by the duly authorised representatives of the Parties.

10.5 Waiver

10.5.1 Waiver by any Party of a default by another Party in the observance and performance of any provision of or obligations under this Agreement:

- (a) shall not operate or be construed as a waiver of any other or subsequent default hereof or of other provisions of or obligations under this Agreement shall not be effective unless it is in writing and executed by a duly authorised representative of the Party; and
- (b) shall not affect the validity or enforceability of this Agreement in any manner.

10.5.2 Neither the failure by any Party to insist on any occasion upon the performance of the terms, conditions and provisions of this Agreement or any obligation thereunder nor time or other indulgence granted by any Party to another Party shall be treated or deemed as waiver of such breach or acceptance of any variation or the relinquishment of any such right hereunder.

10.6 No third party beneficiaries

This Agreement is solely for the benefit of the Parties and no other person or entity shall have any rights hereunder.

10.7 Survival

10.7.1 Termination of this Agreement:

- (a) shall not relieve the Parties of any obligations hereunder which expressly or by implication survive termination hereof; and
- (b) except as otherwise provided in any provision of this Agreement expressly limiting the liability of either Party, shall not relieve either Party of any obligations or liabilities for loss or damage to the other Party arising out of, or caused by, acts or omissions of such Party prior to the effectiveness of such termination or arising out of such termination.

10.7.2 All obligations surviving the cancellation, expiration or termination of this Agreement shall only survive for a period of 3 (three) years following the date of such termination or expiry of this Agreement.

10.8 Severability

If for any reason whatever any provision of this Agreement is or becomes invalid, illegal or unenforceable or is declared by any court of competent jurisdiction or any other instrumentality to be invalid, illegal or unenforceable, the validity, legality or enforceability of the remaining provisions shall not be affected in any manner, and the Parties will negotiate in good faith with a view to agreeing to one or more provisions which may be substituted for such invalid, unenforceable or illegal provisions, as nearly as is practicable to such invalid, illegal or unenforceable provision. Failure to agree upon any such provisions shall not be subject to dispute resolution under Clause 10.1 of this Agreement or otherwise.

10.9 Successors and assigns

This Agreement shall be binding on and shall inure to the benefit of the Parties and their respective successors and permitted assigns.

10.10 Notices

Unless otherwise stated, notices to be given under this Agreement including but not limited to a notice of waiver of any term or related or breach of any term of this Agreement shall be in writing and shall be given by hand delivery, recognized international courier, mail, telex or facsimile transmission and delivered or transmitted to the Parties at their respective addresses set forth below:

The Concessioneing Authority:

CHAIRMAN

_____PORT

Fax No: _____

Email: _____

The Concessionaire:

The MANAGING DIRECTOR

_____Ltd

Fax No. _____ Email: _____

The Senior Lenders/Senior Lenders representative:

_____Ltd

Fax No. _____ Email: _____

The Escrow Bank:

_____Ltd

Fax No. _____ Email: _____

or such other address, telex number, or facsimile number as may be duly notified by the respective Parties from time to time, and shall be deemed to have been made or delivered (i) in the case of any communication made by letter, when delivered by hand, by recognized international courier or by mail (registered, return receipt requested) at that address and (ii) in the case of any communication made by telex or facsimile, when transmitted properly addressed to such telex number or facsimile number.

10.11 Language

All notices, certificates, correspondence and proceedings under or in connection with this Agreement shall be in English.

10.12 Authorised representatives

Each of the Parties shall, by notice in writing, designate their respective authorised representatives through whom only all communications shall be made. A Party hereto shall be entitled to remove and/or substitute or make fresh appointment of such authorised representative by similar notice.

10.13 Original Document

This Agreement may be executed in four counterparts, each of which when executed and delivered shall constitute an original of this Agreement.

IN WITNESS WHEREOF THE PARTIES HAVE EXECUTED AND DELIVERED THIS AGREEMENT AS OF THE DATE FIRST ABOVE WRITTEN.

SIGNED, SEALED AND DELIVERED

For and on behalf of CONCESSIONAIRE by:

(Signature) (Name) (Designation) (Address) (Fax No.)

SIGNED, SEALED AND DELIVERED

For and on behalf of SENIOR LENDERS by the Senior Lenders' Representative: (Signature)

(Name)

(Designation)

(Address) (Fax No.)

SIGNED, SEALED AND DELIVERED For and on behalf of ESCROW BANK by: (Signature)

(Name)

(Designation)

(Address) (Fax No.)

SIGNED, SEALED AND DELIVERED

For and on behalf of Concessioning Authority by: (Signature) (Name)

(Designation) (Address) (Fax No.) In the presence of:

- 1.
- 2.

APPENDIX 17: BASE CASE FINANCIAL MODEL

[Note: The model BCFM would be developed with the appropriate inputs from the financial and technical consultants. However such Financing Plan would need to be customized based on each project and its requirements. Such model Financing Plan would essentially include;

- (i) Estimated Project Cost,
- (ii) License Fee and Royalty payable to the Concessioneing Authority,
- (iii) annual estimated Project revenue,
- (iv) equity contribution,
- (v) cargo handling projections estimated by Concessionaire,
- (vi) discounted net present value of the cash flows,
- (vii) Equity IRR,
- (viii) debt equity ratio, and
- (ix) debt service ratio.

Such Financing Plan would be submitted by the concessionaire **and got approved by the Concessioneing Authority** at the time of Financial Close.]

Note: Such format of the Financing Plan shall also identify the respective threshold limit of the above parameters and the basis of further projections and the detailed requirements that would need to be stratified with respect to each line item.

APPENDIX 18: MONITORING AGREEMENT**(Name of the Port)****Construction Stage Monitoring Report of (Name of the Project) for the month ended.....****Compliance of Obligations of the Concessioneering Authority**

S.No.	Obligations of the Port (Related MCA Clause)	Whether any action required (Yes/ No)	If yes, give details of action taken *
1(a) 1(b)	<u>Meeting the Conditions Precedent (Clause 3.1)</u> <ul style="list-style-type: none"> • Procurement of clearance including Environment clearances. • Handing over physical possession of Project Site/ Port Assets for the project (Stage wise, if so envisaged) • Putting in place arrangement for provision of Supporting Project Infrastructure Informing the Concessionaire about the fulfillment of Conditions Precedent (Clause 3.1) 		
2	In case conditions precedent are not complied within the specified time, details of extension of time availed (Clause 3.4)		
3	Recovery of liquidated damages for failure to fulfill Conditions Precedent (Clause 3.5)		
4	Appointment of Independent Engineer – 5.1		
5	Furnishing of comments/ observations on the Designs & Drawings to Independent Engineer – 6.2 (b)		
6	Grant applicable permits, approval and consents or render assistance as may be required by concessionaire under concession agreement – 6.5 (a)		
7	Make available records of sub soil investigation, if requested – 6.5 (b)		
8	Assist the concessionaire in obtaining immigration clearance, employment permits and residential premises for any foreign		
	personnel engaged or employed by concessionaire. – 6.5 (d)		
9	Assist concessionaire or contractor to import into India all items of equipment and material required for the project. – 6.5 (e)		
10	If required on advice of Independent Engineer, suspend the construction works (Clause 6.6(a))		
11	On advise of IE, revoke the suspension after the		

	rectifications (Appendix 7)		
12	If required as advised by Independent Engineer, concession authority may extend the construction phase, if the delay is not attributable by concessionaire – 6.2(e)		
13	To witness the tests along with Independent Engineer to ensure project meets with construction standards. – 6.7 (a)		
14	To verify the performance security is maintained as per clause 4.1, or otherwise termination of agreement for non-maintenance of performance security as per clause 15.1 (a) (xii)		
15	Recovery of liquidated damages if any from performance guarantee for failure to achieve milestones (Clause 6.9)		
16	In case of Change of Scope, whether procedures laid down in Article 6.8 is followed		
17	Ensuring issue of Completion Certificate by Independent Engineer (Clause 6.7)		
18	In case aggregate delay exceeds 180 days or LD exceeds 5% of project cost, terminate the agreement (Clause 6.9)		
19	Is any action required on monthly Inspection report from IE (Appendix 7)		
20	In case concessionaire fails to complete the works on account of Force Majeure or due to reasons attributable to authority, reduce the scope of work and recover the 80% of sum saved from work not completed (Clause 6.7(e))		
21	In event of non-compliance of conditions precedent within the time including the extended time if any termination of the agreement (Clause 3.6)		
22	Ensuring Operation of Escrow account in an orderly manner (Clause 9.5)		
23	Issue of Notice for a Force Majeure Event (Clause 14.5)		
24	In case of Force Majeure Event, whether extension of time has been granted (Clause 14.9 (b))		
25	In the event of termination due to Force Majeure Event, whether compensation has been paid as per clause 17.1(a)		
26	Issue of Notice on occurrence of an event of default (Clause 16.1)		
27	Informing Senior Lenders of Intent to Terminate (Clause 16.1)		
28	Termination Payment for termination due to Port Event of Default as per clause 17.1(c))		
29	Exercising Rights and meeting obligations upon termination (Clause 16 and 17)		
30	Assessment of change in law and treatment of costs out of		

	change in law (Clause 13.2(b))		
31	Amicably resolving disputes (Clause 19.1 & 19.2)		
32	Declaration of Project Facilities & Services as ready for operation in accordance with Section 37 of MPT Act (Clause 6.5 (c))		
33	Execution of Substitution Agreement within 30 days of notice from the concessionaire as per clause 12.3 (b) v		
34	Any other project specific provision, observation, complaint or suggestion		

(Name of the Port)

Construction Stage Monitoring Report of (Name of the Project) for the month ended.....

Compliance of Obligations of the Concessionaire

S.No.	Obligations of the Concessionaire (Related MCA Clause)	Whether any action required (Yes/ No)	If yes, give details of action taken *
1	Providing and maintaining the Performance Guarantee (Clause 4.1)		
2 (a) 2(b)	<u>Compliance of Conditions Precedent (Clause 3.1(a))</u> <ul style="list-style-type: none"> • Execution of Escrow Agreement and opening of Escrow Account • Procuring all Applicable Permits as per Appendix 8 • Submission of Financial Package, Financing Documents Financial Model and other Financial Close documents to Port • Submission of Confirmation of Representation & Warranties by Consortium Members • Submission of legal opinion with respect to the authority of concessionaire • Furnishing a copy of Management Contract, if applicable Informing Concessioning Authority about fulfillment of Conditions Precedent (Clause 3.2)		
3	In case Conditions Precedents are not complied within the specified time, details of extension of time availed (Clause 3.5)		

4	Submission of Designs and Drawings to the Independent Engineer & Concessioneering Authority (Clause 6.2 and Appendix 6)		
5	Arrangement of financial and other resources as per Financing Plan as evidenced by Escrow Account (Clause 6.4(a))		
6	Carry out works in compliance with the Construction Standards (clause - 6.4 (b)		
7	Obtain Applicable Permits and comply with Applicable Laws. - 6.4 (d)		
8	Providing access to Port representatives for inspections for ascertaining compliance of requirements (Clause 6.4(e))		
9	Submission of Monthly Progress Reports to Independent Engineer (Clause 6.4(f))		
10	Removal of Defects/ deficiencies as observed by Independent Engineer (Clause 6.4(f))		
11	Ensure safe and timely construction and completion of the Project/ - 6.4 (h)		
12	At least 60 days prior to the likely completion of the Project, notify the Independent Engineer of the date when it intends to commence commercial operations - 6.7 (a)		
13	Providing assistance to Independent Engineer for conducting all requisite Tests on structures/ equipments etc., - 6.7 (a)		
14	To obtain Provisional Certificate of Completion as per clause 6.7(d)		
15	To complete all outstanding items listed in Punch List within 90 days or extended period by Concessioneering Authority. – 6.7 (d)		
16	Procurement of Security Clearance for Management Contractor. – 12.1 (f) (ii)		
17	Pay Concession fee annually and Royalty monthly – 9.1 (a) and 9.2		
18	Pay Liquidated Damages to Concessioneering Authority, if applicable. – 6.9		
19	Maintenance of Insurance as per clause 12.1(c)		

20	In case of Execution of substitution agreement, whether notice has been issued by the concessionaire to the port as per clause 12.3 (b) v		
21	Whether equity Holding requirements are met by lead member/ members of the applicant consortium as per clause 11.2		

(Name of the Port)

Operation Stage Monitoring Report of (Name of the Project) for the month ended.....

Compliance of Obligations of the Concessionaire

Sl. No.	Obligations of the Concessionaire (Related MCA Clause)	Whether any action required (Yes/ No)	If yes, give details of action taken *
1	Prompt commencement of operations after “Ready for Operation” declaration (Clause 7.1(a) (i) (a))		
2	Operation of Project Facilities as per “Project Requirement” (Clause 7.1(a) (i) (c))		
3	Achieving Performance Standards (Clause 7.1(a) (i) (d))		
4	Compliance of O&M and Safety Standards (Clause 7.1(a) (i) (e))		
5	Rapid & Effective response in the event of accident/ emergency (Clause 7.1(a) (i) (f))		
6	Replacement and repair of project facilities in a timely manner (Clause 7.1(a) (i) (g))		
7	Manage & Operate Project Facilities on “First Come First Served “ basis except for Priority & Preferential berthing as per GOI guidelines (Clause 7.1(a) (i) (h))		
8	Maintenance of Proper Records relating to Revenue and operation of Project Facilities (Clause 7.1(a) (i) and 9.4)		
9	Obtaining, Maintenance of Applicable Permits and Compliance of Applicable laws (Clause 7.1(a) (i) (j))		

10	Prevention of encroachment / unauthorized use of Project Facilities (Clause 7.1(a) (i) (l))		
11	Repair & Maintain all Project Facilities as per Agreement provisions & Good Industry Practice at all times during the Concession Agreement. 7.1(a) (ii)		
12	Repair, Replace or Restore the damaged Project Facilities at its own costs. 7.1(a) (iv)		
13	Obtaining prior written permission of concessioning authority for removal of assets clause 7.1(a) (v)		
14	Replacement of equipments/ assets as per Good Industry Practice (Clause 7.1(a) (iii))		
15	Compliance with Monthly Reporting Requirements (Clause 7.1(a) (viii))		
16	Cooperation to experts appointed by concession authority in access for inspection for safety audit once in a year (Clause 7.1(a) (vii))		
17	Cooperation to port representatives for inspection and review of operations also to compliance with requirements of Agreement (Clause 7.1(a) (vii))		
18	Installation & Operation of specified computer system and Network as specified by Concession Authority (Clause 7.1(a) (ix))		
19	Ensuring the prescribed Security Arrangements conforming to ISPS code (Clause 7.1(a) (x))		
20	Employment of personnel of foreign origin only after requisite approvals from Government of India (Clause 7.1(a) (xi))		
21	Employ qualified and skilled personnel. 7.1(a) (xi)		
22	Meeting Minimum Guaranteed Cargo requirements (Clause 7.1(a) (xii))		
23	To recover tariff from users of the project facilities as per Tariff Order Notification and deposit all Tariff in Escrow Account (Clause 8.1)		
24	If requested by CA, collect the cess and charges from the users on behalf of Concessioning Authority 8.2		

25	Make timely payments to Concessioning Authority viz. Royalty & License fees (Clause 9.1(a) & 9.2 (b))		
26	To operate Escrow Account as per priority of payments as per clause 9.5(a)		
27	Meeting any claim/ action/ suit etc. alleging loss/ destruction of goods (Clause 7.1(a) (xiii))		
28	Inform Concessioning Authority if any Direct or indirect change of management of concessionaire as per clause 11.2		
29	Payment of all taxes/ duties/ levies etc., to the Government Authorities (Clause 12.1(b))		
30	Purchasing and Maintaining of Insurance requirements in accordance with the Agreement and Good Industry Practice (Clause 12.1(c))		
31	Providing copies of insurance policies to the Port (Clause 12.1(c) (iii))		
32	Utilisation of money received under insurance policies as per terms of Agreement (Clause 12. 1(c) (iv))		
33	Engagement of Management Contractor as envisaged in RFP(Clause 12.1(f))		
34	Ensuring conduct of Conditional Survey by an expert appointed by mutual consent and compliance of remedies thereof before expiry of concession period. (Clause 12.1(g))		
35	Submit bank guarantee two years prior to expiry of concession period for repairs if any for condition survey [Clause 12.1 (g) ii]		
36	Issue of consultation notice and compliance of remedial process in case of Event of Default on the part of Port (Clause 15)		

(Name of the Port)

Operation Stage Monitoring Report of (Name of the Project) for the month ended.....

Compliance of Obligations of the Concessioning Authority

S.No.	Obligations of the Port (Related MCA Clause)	Whether any action required (Yes/ No)	If yes, give details of action taken *
1	To get from the concessionaire copies of “as built” design and drawings maintenance schedule of equipments etc. as reviewed by Independent Engineer as per (Appendix 6) & clause 18.2 ©		
2	Release of Performance Security after 6 months from the date of commercial operation(Clause 4.1)		
3	Scheduling entry, berthing and sailing of the vessels, pilotage and towage on a non- discriminatory basis subject to priority berthing norms.- Clause 7.1 © (i) (a)		
4	Maintenance of entrance channel draft Clause 7.1(c) (i) (b) Maintenance of required draft alongside berth (Clause 7.1(c) (i) (d))		
5	Provide waterside safety and safety of navigation; - Clause 7.1 (c) (i) (c)		
6	Provision and maintenance of all general port infrastructure other than covered under the concession – Clause 7.1 (c) (i) (f)		
7	Grant approvals/ consents sought by the Concessionaire as required under the agreement Clause 7.1 (c) (ii)		
8	Evolve mutually acceptable mechanism for sharing the common costs by existing and future terminal operators Clause 7.1 (c) (i) i		
9	Provide access to all applicable infrastructure facilities and utilities including water, electricity etc. Clause 7.2		
10	Review performance standards from the monthly report submitted by concessionaire and take remedial action including recovery of liquidated damages as per Clause 7.3		
11	To operate escrow account as per priority of payments as per clause 9.5(a)		

12	Whether equity Holding requirements are met by lead member/ members of the applicant consortium as per clause 11.2		
13	Assistance to concessionaire by giving recommendation letter for getting applicable permits Clause 12.2 (a)		
14	Pay levy (or) levies including increase in taxes, duties etc., on account of port assets payable to State Govt. Clause 12.2 (b)		
15	Shall not operationalise competing facility as per Clause 12.2 (c)		
16	Issue notice of Force Majeure In the event of occurrence of any Force Majeure event (Clause 14.5)		
17	Extension of time for performing obligations due to occurrence of Force majeure(Clause 14.9 (b))		
18	Compliance of provisions of Clause 14.10 in the event of force majeure continuing beyond 120 days		
19	Payment of compensation in the event of termination due to force majeure event as per clause 17.1(a) Payment of compensation in the event of termination due to concessionaire event of default as per clause 17.1(b) Payment of compensation in the event of termination due to concessioning authority event of default as per clause 17.1(c)		
20	Authorize the concessionaire to collect cesses and charges including infrastructure cess if required and remit the same to concessioning authority if required (Clause 8.2 and 8.5)		
21	Initiate action for amicably resolution of disputes (Clause 19.1 and 19.2)		
22	Any other observation, complaint or suggestion		
23	Payment of Compensation to Senior Lenders (Clause 17.4)		
24	Issue of Consultation Notice and Compliance of remedial process in case of Event of Default on the part of Concessionaire (Clause 15.3 & 15.4)		

25	Informing Senior lenders of intent of termination by issuing a copy of Termination Notice to them on occurrence of force Majeure/ Event of Default (Clause 15.7 and 16)		
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Key Performance Indicators (KPI)/Performance Standards

(Based on MCA of Major Ports)

S.No.	<i>Maintenance/ Performance Standards</i>	<i>Indicative norms</i>	<i>Actual during the month</i>	<i>Shortfall, if any</i>	<i>Action taken to remedy shortfall</i>
1	Gross Berth Output Appendix-15				
2	Transit Storage Dwell time Appendix 15				
3	Turn-around time for receipt/ delivery operation Appendix 15				
	Availability of Cranes				

(Name of the Port)

Construction/ Operation Stage Monitoring Report of (Name of the Project) for the month ended.....(Prepared by Port to the Ministry)**I. Basic Data of the project**

Sl. No.	<i>Project Parameters</i>	Details
1.	Name of the concessionaire	
2.	Percentage of equity holding in case of consortium	
3.	Payment of Royalty	
4.	Date of Issue of Letter of acceptance by the port to concessionaire	
5.	Date of signing of Concession Agreement	
6.	Time duration for fulfilling the condition precedent as per concession agreement (a) By Concessionaire (b) By Concessioning Authority	
7.	Actual Date of Commercial Operation after	

	fulfilling condition precedent	
8.	Date of starting of commercial operation	
9.	Estimated cost	
10.	Actual Cost	
11.	Capacity	
12.	Project details like length of berth, design vessel size can be handled, equipments installed, backup area etc.,	
13	Present tariff rate	
14.	MGT if any as per concession agreement	
15.	Cargo handled during this month	
16.	Cumulative cargo handled during the financial year	
17	Any other remarks	

APPENDIX 19: MODEL TRIPARTITE AGREEMENT (FOR PORT PROJECTS)

BETWEEN PROJECT AUTHORITY, CONCESSIONAIRE AND INFRASTRUCTURE DEBT FUND

This Tripartite Agreement⁹ is made at [New Delhi] on the *****¹⁰ day of *****, 20** by and between

(i) [BOARD OF TRUSTEES for [*] PORT¹¹, a body corporate constituted under the provisions of the Major Port Trusts Act, 1963], and having its principal administrative office at [*] (hereinafter referred to as the “**Concessioning Authority**” which expression shall, unless repugnant to the context or meaning thereof, include its administrators, successors and assigns);

(ii) The [***** Infrastructure Debt Fund], a company registered under the Companies Act, 1956, acting through *****, and having its registered office at ***** (hereinafter referred to as the “**Debt Fund**” which expression shall, unless repugnant to the context or meaning thereof, include its administrators, successors and assigns);

And

[***** Limited], a company registered under the Companies Act, 1956, acting through *****, duly authorised by the resolution passed at the meeting of its Board of Directors held on *****, and having its registered office at ***** (hereinafter referred to as the Concessionaire which expression shall, unless repugnant to the context or meaning thereof, include its administrators, successors and assigns)

WHEREAS:

(A) The Concessioning Authority and the Concessionaire had entered into a Concession Agreement (as defined hereinafter), a true copy of which is annexed hereto and marked as Annex-I, for development of ***** (the “**Project**”);

(B) The Project entered into commercial operation or any substitute thereof on ***** (the “**Date of Commercial Operation**”) in accordance with the provisions of the Concession Agreement;

(C) Following the occurrence of the Date of Commercial Operation, the Concessionaire has been operating the Project in accordance with the terms and conditions of the Concession Agreement;

(D) The Concessionaire had raised debt from the Senior Lenders for financing the Project and had utilised the same for the purposes of the Project under the Concession Agreement;

(E) The Concessionaire has been discharging its debt service obligations, including the repayment of principal and interest, in accordance with the provisions of the Financing Documents;

(F) The debt service obligations have not been rescheduled, waived or postponed in any manner during the past one year from the date hereof, and the Concessionaire is not in default of its debt service obligations under the Financing Documents; and

(G) The Concessionaire has decided to refinance all or part of its outstanding debt and has requested the Debt Fund to invest in its bonds, the proceeds of which shall be paid to the Senior Lenders as

⁹ This Tripartite Agreement is based on the Model Concession Agreements for PRIVATE SECTOR PROJECTS in MAJOR PORTS. Provisions referring to specific clauses of these MCAs may be suitably modified to reflect the provisions of the respective concession agreements, but without altering the allocation of risks.

¹⁰ Words enclosed in square parenthesis and all asterisks may be substituted as per Project-specific requirements.

¹¹ For Ennore Port: The Ennore Port Limited, a company registered under the Companies Act, 1956, acting through *****, and having its registered office at ***** (hereinafter referred to as the “the Concessioning Authority” which expression shall, unless repugnant to the context or meaning thereof, include its administrators, successors and assigns);

specified in Schedule-I.

Now, therefore, the Parties hereby agree and this agreement witnessed - as follows:

1. DEFINITIONS AND INTERPRETATIONS

1.1 For the purposes of this Agreement, the following terms shall have the meaning hereinafter respectively assigned to them:

“**Agreement**” means this Tripartite Agreement, and amendments if any thereto;

“**Bonds**” means the securities issued by the Concessionaire in consideration of the amounts paid for the investment thereof;

“**Concession Agreement**” means the executed Concession Agreement dated [date on which the Concession Agreement has been signed] for the Project, entered into between the Concessioneing Authority and the Concessionaire,

and shall include all Schedules thereof and any amendments thereto made in accordance with the provisions contained in this behalf therein;

“**Financing Documents**” means financing documents under the Concession Agreement and documents executed on the date [...date of signing of the financing documents] for the Project and shall include all Schedules thereof and any amendments thereto made in accordance with the provisions contained in this behalf therein.

“**Senior Lenders**” means any Persons based in India or abroad providing Financial Assistance under the Financing Documents and includes a trustee for the holders of debentures/ or other debt instruments issued by the Concessionaire to finance the Project.

“**Senior Lenders’ Representative**” shall have the same meaning as ascribed to it in the Financing Document, provided that, this would include the Trustees for any bonds issued by the Concessionaire. In absence of one such person/ entity having the authority to sign, Senior Lenders Representative shall mean all the Senior Lenders, and/or the Trustees for any bonds issued by the Concessionaire.

“**Major Ports**” means a port notified by the Central Government in the Official Gazette or a port that is declared as a Major Port through the Major Ports Act, 1963¹²

“**Parties**” means the parties to this Agreement collectively and “**Party**” shall mean any of the parties to this Agreement individually;

1.2 The words and expressions beginning with or in capital letters used in this Agreement and not defined herein but defined in the Concession Agreement shall have, unless repugnant to the context, the meaning respectively assigned to them in the Concession Agreement.

1.3 Interpretation

1.3.1 In this Agreement, unless the context otherwise requires,

(a) references to any legislation or any provision thereof, or any rules, regulations, bylaws or notifications thereunder, shall include amendment or re-enactment or consolidation of such legislation or any provision thereof so far as such amendment or re-enactment or consolidation applies or is capable of applying to any transaction entered into hereunder;

(b) references to “**development**” include, unless the context otherwise requires, construction, renovation, refurbishing, augmentation, upgradation and other activities incidental thereto, and “**develop**” shall be construed accordingly;

¹² All Major Ports except Ennore Port, are regulated by their respective Port Trusts. The major port trusts' are autonomous bodies managed by a board of trustees under the overall control of the Central Government through the Ministry of Shipping. All major ports are covered under the Major Port Trust Act (MPTA), 1963 except Ennore Port, which it is a limited company and registered under the Companies Act, 1956.

- (c) “**lakh**” means a hundred thousand (100,000) and “**crore**” means ten million (10,000,000);
- (d) save and except as otherwise provided in this Agreement, any reference, at any time, to any agreement, deed, instrument, license or document of any description shall be construed as reference to that agreement, deed, instrument, license or other document as amended, varied, supplemented, modified or suspended at the time of such reference; provided that this Sub-clause shall not operate so as to increase liabilities or obligations of the Debt Fund hereunder or pursuant hereto in any manner whatsoever;
- (e) any agreement, consent, approval, authorisation, notice, communication, information or report required under or pursuant to this Agreement from or by any Party shall be valid and effective only if it is in writing under the hand of a duly authorised representative of such Party in this behalf and not otherwise;
- (f) the Recitals and Annexes to this Agreement form an integral part of this Agreement and will be in full force and effect as though they were expressly set out in the body of this Agreement; and
- (g) time shall be of the essence in the performance of the Parties’ respective obligations. If any time period specified herein is extended, such extended time shall also be of the essence.

132 Any word or expression used in this Agreement shall, be construed as per the definition given in the General Clauses Act, 1897 failing which it shall bear the ordinary English meaning.

2 ISSUE OF BONDS

21 The Parties agree that the Concessionaire may, in accordance with the provisions of this Agreement, issue Bonds for the amounts subscribed by the Debt Fund; provided that the total value of such Bonds shall not exceed 94% (ninety four percent) of compensation payment from the Concessioneing Authority on day of signing this Tripartite Agreement(**as specified in Schedule II**); [provided further that the Concessionaire may, with prior written approval of the Concessioneing Authority, which approval the Concessioneing Authority may in its sole discretion deny, issue additional Bonds for a total value not exceeding the balance of the said compensation payable]¹³

22 Upon investment in Bonds pursuant to Paragraph 2.1, the Debt Fund shall be deemed to be a Senior Lender and shall thereupon be entitled to all the rights and privileges of a Senior Lender under the Concession Agreement.

23 The tenor of the Bonds, in accordance with the provisions of this Agreement shall be such that at least 50% (fifty per cent) and 75% (seventy five per cent) of the total nominal value thereof shall be fully redeemed by the Concessionaire no later than the expiry of 75% (seventy five per cent) and 85% (eighty five per cent) of the Concession Period respectively and the balance, if any, shall be redeemed no later than 2 (two) years prior to the expiry of the Concession Period.

24 Subject to the clause 2.3 of this Agreement, the tenure, rate of interest and other commercial terms of the Bonds shall be determined by mutual agreement between the Debt Fund and the Concessionaire.

25 The Bonds shall be in such denomination as the Debt Fund and the Concessionaire may determine, but not less than Rs [10,000 (Rupees ten thousand)] in any case.

26 Subject to the provisions of Paragraph 4.1, the Debt Fund and the Concessionaire may, with prior written approval of the Concessioneing Authority, which approval the Concessioneing Authority may in its sole discretion deny, allocate and bear the foreign exchange risks for and in respect of any

¹³ All portions enclosed in square parenthesis in paragraph 2.1,3.5 and 4.1 of this Agreement may be omitted by the Concessioneing Authority if it does not wish to extend the cover hereunder beyond limits specified in line with the Model Concession Agreement for Ports Sector.

foreign-exchange denominated Bonds, in such manner as they may mutually agree.[For the avoidance of doubt, the Parties expressly agree that if the foreign exchange risk for any or all Bonds is borne by the Concessionaire. The compensation to be made by the Concessioneing Authority for and in respect of such Bonds shall be adjusted to cover the variation between the nominal value of Bonds and the actual amount payable to the Debt Fund, such that the liability of the Concessionaire for redemption of the Bonds hereunder is fully discharged by the Concessioneing Authority.]

27 The Parties expressly agree and confirm that repayment of the principal and interest in respect of the Bonds shall have a prior charge over the Senior Lenders on appropriation of compensation under Article [9, 16 and 17] of the Concession Agreement, and only the balance remaining shall be paid to the other Senior Lenders.

28 Any delay in the repayment of the principal or interest for and in respect of the Bonds shall attract interest at a rate of 3% (three per cent) above the rate of interest applicable for the Bonds.

29 The Parties agree and confirm that upon execution of this Agreement, the Debt Fund shall, acting through the Senior Lenders' Representatives, be deemed to be a party to the Escrow Agreement and the Substitution Agreement for the Project, and all rights, privileges and obligations of the Senior Lenders shall also vest in the Debt Fund. The Parties further agree and confirm that the provisions of the Concession Agreement and all other agreements, including the Escrow Agreement, Substitution Agreement and Financing Documents, shall be read and construed so as to give effect to the provisions of this Agreement, but without increasing any financial obligations and/ or liabilities of the Concessioneing Authority under the Concession Agreement.

210 By counter-signing the Tripartite Agreement, the Senior Lenders' Representative, acting on behalf of the Senior Lenders agrees, confirms and undertakes that the *paripassu* rights, title or interest of the Lenders in compensation, to the extent such rights, title or interest are provided in the Concession Agreement, Substitution Agreement, Escrow Agreement, Financing Documents or any other agreement, shall be subordinate to the rights, title or interest created by the Bonds in favour of the Debt Fund, and accordingly, the compensation shall be applied first for the redemption of Bonds and only the balance remaining,¹⁴ if any, shall be paid into the Escrow Account for meeting other obligations , including the balance Debt Due. For the avoidance of doubt, the Parties expressly agree that the Debt Fund may, in its discretion, exercise all the rights and privileges of the Senior Lenders' Representative under the Concession Agreement, Substitution Agreement, Escrow Agreement and this Agreement. The Parties further agree that save and except the application of compensation for redemption of Bonds in pursuance of this Agreement and subject to the provisions of Paragraph 2.7, the Senior Lenders shall have *paripassu* charge on the revenues of the Concessionaire in accordance with the provisions of the Concession Agreement.

211 The Debt Fund may, by notice to the Parties, transfer all or any Bonds to any other person, and upon such transfer, the rights and obligations of the Debt Fund shall vest in such person. Provided that no such notice shall be required for transfer of Bonds if they have been listed in any recognized Stock Exchange and such transfer is in accordance with the regulations of the Stock Exchange.

212 Notwithstanding anything to the contrary contained in this Agreement, the Debt Fund may have the option to extend a term loan to the Concessionaire for an amount not exceeding 50% (fifty per cent) of its total exposure to the Concessionaire and the provisions of this Agreement shall apply *mutatis mutandis* to such term loan as if it were a Bond.

¹⁴ It is hereby clarified that statutory dues shall have priority over the rights of all Senior lenders including the Debt Fund

3 REDEMPTION OF BONDS

3.1 The Concessionaire agrees and undertakes that upon completion of the tenor of the Bonds, it shall redeem the same by making full and complete payment of the outstanding principle and the interest thereon.

3.2 Notwithstanding anything to the contrary in this Agreement, the Debt Fund may by notice require the Concessionaire to redeem upto 10% (ten per cent) of the value of the Bonds in any financial year and upon notice in this behalf, the Concessionaire shall redeem such Bonds no later than 120 (one hundred and twenty) days from the date of receipt of such notice.

3.3 The Parties expressly agree that the Debt Fund and the Concessionaire may at any time by mutual agreement undertake early redemption of the Bonds and upon full redemption thereof, this Agreement shall cease to be in force.

3.4 The Parties expressly agree and confirm that in terms of Article [15, 16 and 17] of the Concession Agreement, the Concessioneing Authority has covenanted that in the event of termination of the Concession Agreement, the Concessioneing Authority shall pay compensation in accordance with the provisions of the Concession Agreement, which shall be applied for redemption of the Bonds in accordance with the provisions of this Agreement. The Parties further agree and confirm that upon termination on account of a Concessionaire Event of Default or Concessioneing Authority Event of Default, the Concessioneing Authority shall pay compensation in accordance with the provisions of the Concession Agreement.

3.5 The Parties agree and confirm that in the event of default in Debt Service by the Concessionaire, the Senior Lenders shall have the right to enforce termination of the Concession Agreement in terms of Clause [15.1(a) (xi)] and [17] of the Concession Agreement, which *inter alia* requires the Concessioneing Authority to pay compensation in accordance with the provisions of the Concession Agreement. [The Parties further agree that in the event the Concessioneing Authority approves the issuance of additional Bonds under the provisions of Paragraph 2.1 of this Agreement, the liability of the Concessioneing Authority shall, notwithstanding the provisions of the Concession Agreement, extend to an amount equal to 100% of the compensation in Concessionaire Event of Default.]

3.6 The Concessioneing Authority agrees and undertakes that upon receipt of a notice under and in accordance with the provisions of Clause [3.2] of the Substitution Agreement, it shall, no later than 15 (fifteen) days from the date of receipt of such notice, issue a notice to the Concessionaire requiring it to cure the Financial Default and in the event the default is not cured before the expiry of the Remedial Period specified in Clause [15.4] of the Concession Agreement, a Concessionaire Default shall have occurred and the Concessioneing Authority shall issue the Termination Notice forthwith, but no later than 15 (fifteen) days from the date of occurrence of Concessionaire Default, and shall make compensation no later than 15(fifteen) days from the date of Termination Notice. The Parties expressly agree that the timelines specified in the Paragraph 3.6 of this Agreement are not in modification of the Concession Agreement but only in elaboration thereof.

3.7 The Parties expressly agree and confirm that the rights of the Debt Fund and the Senior Lenders' Representative to enforce termination of the Concession Agreement in accordance with Paragraph 3.6 may be exercised individually or jointly, as the case may be, by the Debt Fund and/or the Senior Lenders' Representative.

3.8 The Parties expressly agree that the Concessioneing Authority shall, instead of depositing the compensation in the Escrow Account of the Project, redeem the Bonds by making payments due and

payable to the Debt Fund, and the balance, if any, shall be paid into the Escrow Account. The Parties further agree that the provisions hereof shall in no way be construed to increase the financial liability of the Concessioneing Authority for and in respect of the compensation [save and except as provided in Paragraph 3.5 for and in respect of the additional bonds specified therein].

39 The Parties agree and confirm that the amounts, if any, paid by the Concessioneing Authority for redemption of Bonds and the balance compensation, if any, paid as per the Concession Agreement into the Escrow Account shall be deemed to be a valid discharge of its obligations to make compensation under and in accordance with the Concession Agreement.

4 FEES

4.1 The Debt Fund shall pay to the Concessioneing Authority, 0.05%¹⁵ (zero point zero five per cent) per annum of the outstanding debt financed by the IDF, by way of a guarantee fee in consideration of the obligations of the Concessioneing Authority hereunder; [provided that the guarantee fee shall be 1% (one per cent) in respect of Bonds for which the foreign exchange risk is to be borne by the Concessionaire] [provided further that the guarantee fee for and in respect of the additional Bonds specified in Paragraph 2.1 shall be 3% (three per cent) per annum of the nominal value thereof].

4.2 The guarantee fee specified in Paragraph 4.1 shall be due and payable annually before commencement of the financial year to which it relates. In the event of delay in payment of the guarantee fee, the Debt Fund shall pay interest at the rate of 14% (fourteen per cent) per annum, to be computed on a daily basis and compounded every month for the period of delay; provided, however, that if such delay exceeds the period of 180 (one hundred and eighty) days this Agreement shall cease to be in force, and upon termination of the Concession Agreement at any time thereafter, the Concessioneing Authority's obligation to pay the compensation to the Debt Fund shall be deemed to be reduced by 20% (twenty per cent) thereof.

5 REPRESENTATIONS AND WARRANTIES

5.1 Each of the Parties represent, warrant and confirm the following:

- (a) This Agreement constitutes its legal, valid and binding obligation, enforceable against it in accordance with the terms hereof, and its obligations under this Agreement will be legally valid, binding and obligations enforceable against it in accordance with its terms;
- (b) the execution, delivery and performance of this Agreement will not conflict with or result in a breach or constitute default under or accelerate performance required by any of the terms of Memorandum and Articles of Association of any Party or any applicable law or any covenant, contract, arrangement or understanding, or any decree or order of any court to which it is a party or by which it or any of its properties or assets is bound or affected;
- (c) all information provided by the Party is true and accurate in all material respect;
- (d) there are no actions, suits, proceedings or investigations pending or to its knowledge threatened against it at law or in equity before any court or any other judicial, quasi-judicial or other authority or body, the outcome of which may result in a material breach of this Agreement;
- (e) the Party has complied with all Applicable Laws and Applicable Permits in all material respects;
- (f) the Concessionaire is not in a material breach of the Concession Agreement or of any Project Contracts or Financing Documents; and

¹⁵ This fee percentage shall be reviewed after three years or earlier, if required, by the IMG under Secretary (EA) as approved by the Cabinet.

(g) no representation or warranty contained herein or in the Concession Agreement or any other document furnished by the Party contains or will contain any untrue or misleading statement of material facts or omits or will omit to state a material fact necessary to make such representation or warranty not misleading.

52 In the event of any occurrence or circumstance coming to the knowledge of the Party making any representation hereunder which renders any of its aforesaid representations or warranties untrue or incorrect at any time during the subsistence of this Agreement, such Party shall immediately notify the other Parties hereto about the same. Such notification shall not have the effect of remedying any such representation or warranty that has been found to be incorrect or untrue.

6 ARBITRATION

6.1 Any Dispute which is not resolved amicably by conciliation shall be finally decided by reference to arbitration by a Board of Arbitrators appointed in accordance with Paragraph 6.2 of this Agreement. Such arbitration shall be held in accordance with the Rules of Arbitration of the International Centre for Alternative Dispute Resolution, New Delhi (the “**Rules**”), or such other rules as may be mutually agreed by the Parties, and shall be subject to the provisions of the Arbitration Act. The venue of such arbitration shall be Delhi, and the language of arbitration proceedings shall be English.

6.2 In the event of a dispute between two Parties, there shall be a Board of three arbitrators, of whom each Party shall select one, and the third arbitrator shall be appointed by the two arbitrators so selected, and in the event of disagreement between the two arbitrators, the appointment shall be made in accordance with the Rules. In the event of a dispute involving all the Parties, a single arbitrator shall be appointed in accordance with the Rules.

6.3 The arbitrators shall make a reasoned award (the “**Award**”). Any Award made in any arbitration held pursuant to this Paragraph 6 shall be final and binding on the Parties as from the date it is made, and the Parties agree and undertake to carry out such Award without delay.

6.4 The Parties agree that an Award may be enforced against the Concessionaire, the Concessioneing Authority and/or the Debt Fund, as the case may be, and their respective assets wherever situated.

6.5 This Agreement and the rights and obligations of the Parties shall remain in full force and effect, pending the Award in any arbitration proceedings hereunder.

7. COMING INTO FORCE AND DURATION OF THE AGREEMENT

This Agreement shall come into force and effect on the date hereof and shall remain in force until the redemption of all Bonds.

IN WITNESS WHEREOF, this Agreement has been executed on the day and year first above written.

For and on behalf of the Concessioneing **Authority**

Signature : Name : Designation :

For and on behalf of the **Debt Fund**

Signature : Name : Designation :

For and on behalf of the **Concessionaire**

Signature : Name :

Designation :

Agreed, Accepted, Countersigned and Witnessed by the Senior Lenders’
Representatives for and on behalf of **Senior Lenders** by

Signature : Name : Designation :

SCHEDULE-I

(Refer Recital G)

No.	Name of SeniorLenders/Bond holders' Trustee with Address	Amount to be refinanced IDF by way of Bonds/Loan (Rs. in crore)	Remarks, if any
1.			
2.			
3.			
4.			
5.			
6.			
7.			
8.			
9.			
10.			

SCHEDULE-II

(Quantum of compensation)

As per the definition in the Concession Agreement, the quantum of (i) Book Value, (ii) 90% of Debt Due and (iii) Total Project Cost as on the date of execution of this Agreement, and at the end of each financial year until the end of the concession period is mentioned in the table below:

(Rs. In Crores)

Date	Book Value	90% of Debt Due	total Project Cost	Amount of Compensation¹⁶

¹⁶ On Termination due to Concessionaire Event of Default after the Date of Commercial Operation, the compensation payable by the Concessions Authority (as per 17.1 (b) of the Model Concession Agreement for Private Sector Projects in Major Ports), shall be the lowest of (i) [Book Value (ii) 90% of Debt Due and (iii) the Total Project Cost)

ANNEX-1

(Refer Recital A)

[Attach True Copy of the Concession Agreement]

APPENDIX 20

**Arbitration Rules of the Society for Affordable Redressal of Disputes - Ports (SAROD-Ports)
Rule**

ARBITRATION RULES OF SAROD-PORTS INDEX

1. Scope of Application
2. Definitions
3. Notice, Calculation of Periods of Time
4. Commencement of Arbitration
5. Response by Respondent
6. Filing of Case Statements
7. Contents of Case Statements
8. Default in Filing and Serving Case Statements
9. Further Written Statements
10. SAROD-PORTS- Ports to Provide Assistance
11. Appointment of Tribunal
12. Multi-party Appointment of the Tribunal
13. Appointment of Substitute Arbitrator
14. Independence and Impartiality of the Tribunal
15. Code of Ethics for Arbitrators
16. Challenge of Arbitrators 1 7. Decision on Challenge
18. Removal of the Tribunal
19. Re-hearing in the Event of Replacement of the Tribunal
20. Jurisdiction of the Tribunal
21. Fees of SAROD-PORTS - Ports and Arbitral Tribunal
22. Transmission of File of the Tribunal
23. Juridical Seat of Arbitration
24. Language of Arbitration
25. Conduct of the Proceeding
26. Communications between Parties and the Tribunal
27. Party Representatives
28. Hearings
29. Documents - only Arbitration
30. Witnesses
31. Experts Appointed by the Tribunal
32. Rules applicable to substance of dispute
33. Closure of Hearings ·
34. Additional Powers of the Tribunal
35. Deposits to Costs and Expenses
36. Decision Making by the Tribunal
37. The Award
38. Additional Award
39. Correction of Awards
40. Settlement
41. Interest
42. Costs
43. Waiver
44. Exclusion of Liability

- 45. General Provisions
- 46. Amendment to Rules

PREAMBLE

In order to seek speedy, affordable, just and reasonable Redressal of Dispute/Differences between Major Port Trusts and Concessionaire/Contractor arising out of and during the course of execution of various contracts, a Society for Affordable Resolution of Disputes - Ports (SAROD-PORTS - Ports) has been formed as a society under Societies Registration Act, 1860 with registration _____. It has been formed by Indian Ports Association and Indian Private Ports and Terminals Association with founding members as mentioned in the Memorandum of Association of SAROD-PORTS

RULES

SAROD-PORTS ARBITRATION

Rule 1- Scope of Application

1.1 Where any agreement, submission or reference provides for arbitration at the Society for Affordable Resolution of Disputes - Ports ("SAROD-PORTS"), or under the Arbitration Rules of the SAROD-PORTS and where the case is a domestic arbitration, the same shall be conducted in accordance with the following Rules, or such Rules as amended by the SAROD-PORTS where the amendments take effect before the commencement of the Arbitration.

1.2 These rules shall come into effect from the day of approval by Governing Body of SAROD-PORTS.

Rule 2 - Definitions

2.1 These Rules shall be referred to as "the SAROD-PORTS Arbitration Rules".

2.2 In these Rules:

"Act" means the 'Arbitration and Conciliation Act 1996' of India and any statutory modifications or re-enactments thereof

"DOMESTIC ARBITRATION" means arbitration to be conducted under these rules.

"SAROD-PORTS" means the Society for Affordable Redressal of Disputes- Ports.

"SAROD-PORTS Arbitrator Panel" means the list of persons admitted to serve as arbitrators under these Rules.

IPA means Indian Ports Association

"IPPTA" means Indian Private Ports and Terminals Association

"GOVERNING BODY" means Governing Body of SAROD-PORTS as defined in Article 9 of Memorandum of Association.

"PRESIDENT" means President of Governing Body of SAROD-PORTS as defined in Rules & Regulation of SAROD-PORTS.

"SECRETARY" means Secretary of SAROD-PORTS as defined in Rules & Regulation of SAROD-PORTS.

"TRIBUNAL" means either a Sole Arbitrator or all arbitrators when more than one is appointed.

"PARTY" means a party to an arbitration agreement,

"E-Arbitration" means submission of pleadings, defense statement etc by E-mail and holding of proceedings via video conferencing.

Rule 3 - Notice, Calculation of periods of Time

31 For the purposes of these Rules, any notice, including a notification, communication or proposal, is deemed to have been received if it is physically delivered to the addressee or if it is delivered at his habitual residence, place of business or mailing address, or, if none of these can be found after making reasonable inquiry, then at the addressee's last-known residence or place of business. Notice shall be deemed to have been received on the day it is so delivered.

32 For the purposes of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice, notification, communication or proposal is received. If the last day of such period is an official holiday or a non-business day at the residence or place of business of the addressee, the period is extended until the first business day which follows. Gazetted public holidays or non-business days occurring during the running of the period of time are included in calculating the period.

33 Without prejudice to the effectiveness of any other form of written communication, written communication may be made by fax, email or any other means of electronic transmission effected to a number, address or site of a party.

34 The transmission is deemed to have been received on the day of transmission.

Rule 4- Commencement of Arbitration

4.1 Any party wishing to commence an arbitration under these Rules ("the Claimant") shall file with the Secretary and serve on the other party {"the Respondent"}, a written Notice of Arbitration ("the Notice of Arbitration") which shall include the following:

- a. a request that the dispute be referred to arbitration;
- b. the names, addresses, telephone numbers, fax numbers and email addresses of the parties to the dispute;
- c. a reference to the arbitration clause or any separate arbitration agreement that is invoked and provide a copy of the arbitration clause or arbitration agreement;
- d. a reference to the contract out of which the dispute arises and provide a copy of the contract where possible;
- e. a brief statement describing the nature, **facts** and circumstances **leading to** the dispute;
- f. the relief or remedy sought, including the amount of claim if quantifiable at the time the Notice or Arbitration is filed;
- g. a proposal as to the number of arbitrators (i.e. one or three), if the parties have not previously agreed on the number; and
- h. the name of the Claimant's nominated arbitrator.

4.2 A filing fee of Rs. 10,000/- (Ten thousand) or any amount decided by Governing Body from time to time is payable at the time of filing the Notice of arbitration.

4.3 The date of filing of the Notice of Arbitration with the Secretary is the date of commencement of the arbitration for the purpose of these Rules.

Rule 5 - Response by Respondent

5.1 Within **14 (fourteen)** days of receipt of the Notice of Arbitration, the Respondent shall file with the Secretary and serve upon on the Claimant, a Response including

- a. A confirmation or denial of all or part of the claims;
- b. Brief statement of the nature and circumstances of any envisaged counterclaims
- c. A comment in response to any proposals contained in the Notice of Arbitration; and
- d. The name of the respondent's nominated arbitrator.

5.2 A filing fee of Rs. 10,000/- or any amount decided by Governing Body from time to time is payable at the time of filing the Response.

5.3 In case parties have objection to the jurisdiction of Arbitral Tribunal, such objection shall be raised not later than 15 days of the commencement of Arbitration proceedings failing which it will be deemed that parties have waived their right to objection.

Rule 6- Filing of Case Statements

6.1 Within 30 days after the filing of the Notice of Arbitration, the claimant must file with the Secretary and serve on the Respondent, a Statement of Claimant's Case alongwith all documents to be relied upon by the Claimant.

6.2 Within 30 days after the service of the statement of Claimant's Case, the Respondent must file with the Secretary and serve on the Claimant, a statement of respondent's defense and counterclaim (if any) alongwith all documents to be relied upon by the Respondent.

6.3 Within 30 days after the service of the statement of Respondent's defense, if the Claimant intends to challenge anything in the statement of Respondent's defense and/or counterclaim, the Claimant must then file with the Secretary and serve on the Respondent, a statement of claimant's reply and if necessary, defense to counterclaim.

6.4 No further case statements may be filed without the leave of the Tribunal or if a Tribunal has not been appointed, the Secretary.

6.5 The Tribunal or if a Tribunal has not been appointed, the Secretary, may upon the written application of a party, extend the time limits provided under this Rule,

6.6 Thy party required to file a case statement must at the same time deposit with the Secretary for eventual transmission to the Tribunal an additional copy or additional copies of the case statement, according to the number of arbitrators constituting or who will constitute the Tribunal.

Rule 7 - Contents of Case Statements

7.1 The case statements must contain the detailed particulars of the party's claim, defense or counterclaim and must thus contain a comprehensive statement of the facts and contentions of law supporting the party's position.

7.2 It must:

- a. Set out all items of relief or other remedies sought together with the amount of all quantifiable claims and detailed calculations.
- b. State fully its reasons for denying any allegation or statement of the other party.
- c. State fully its own version of events if a party intends to put forward a version of events different from that given by the other party.

7.3 A case statement must be signed by or on behalf of the party making it.

Rule 8 - Default in Filing and Serving Case Statements

8.1 If the Claimant fails within the time specified under these Rules or as may be fixed by the Tribunal or by the Secretary, to submit its Statement of Case, the Tribunal or if a Tribunal has not been appointed, the Governing Body may issue an order for the termination of the arbitral proceedings or make such other directions as may be appropriate in the circumstances.

8.2 If the Respondent fails to submit a Statement of Respondent's defense, the Tribunal may nevertheless proceed with the arbitration and make the award.

Rule 9 - Further Written Statements

9.1 The Tribunal will decide which further written statements, in addition to the case statement(s) already filed, are required from the parties and shall fix the periods of time for giving, filing and serving such statements.

9.2 All such further statements must be given to the Tribunal, filed with the Secretary and served on the Claimant or Respondent, whichever is applicable.

Rule 10 - SAROD-PORTS to Provide Assistance

10.1 At the request of the Tribunal or either party, the Secretary will render such assistance as is required for the conduct of the arbitration, including arranging for facilities, suitable accommodation for sittings of the Tribunal, secretarial assistance or interpretation of these rules.

10.2 Any additional expenses incurred or to be incurred for any such arrangements shall be borne by the parties.

Rule 11- Appointment of Tribunal

11.1 The disputes shall be decided by a Sole Arbitrator when the total claim of dispute is Rs. 3 Crores or less.

11.2 In all cases of disputes claimed for more than Rs. 3 Crores, the tribunal shall consist of odd number of Arbitrators to be nominated by the parties. The Presiding Arbitrator shall be appointed by the Arbitrators nominated by the parties from amongst the panel maintained by SAROD-PORTS. For deciding the Presiding Arbitrator, a draw of lots can be carried out from amongst the names suggested by the Arbitrators nominated by the Parties, The eligibility criteria for empanelment of Arbitrators will be decided by the Governing Body.

11.3 If a Sole Arbitrator is to be appointed, the Governing Body will appoint the Arbitrator within 21 days from the date the Respondent's Statement of Defense and Counterclaim (if any) is filed or falls due, whichever is earlier. The Governing Body will appoint the Arbitrator from the panel of Arbitrators by draw of lots,

11.4 An Arbitrator/Presiding Arbitrator to be appointed under these Rules shall be a person on the SAROD-PORTS Arbitration Panel as at the date of the appointment,

11.5 In the event of any party failing to appoint Arbitrator within 30 days of receipt of the notice of Arbitration, the Governing Body shall appoint the Arbitrator or Presiding Arbitrator as the case may be by a draw of lots.

Rule 12- Multiparty appointment of the Tribunal

12.1 If there are more than 2 parties in the arbitration, the parties shall agree on the procedure for appointing the Tribunal within 21 days of the receipt of the Notice of Arbitration.

12.2 If the parties are unable to do so, upon the lapse of the 21 day time period mentioned herein, the Tribunal shall be appointed by the Governing Body as soon as practicable.

Rule 13-Appointment of Substitute Arbitrator

In the event of the death or resignation of any of the arbitrators, a substitute arbitrator must be appointed by the same procedure as in Rule 11 by which the arbitrator concerned was appointed, failing which, the Governing Body will make the appointment.

Rule 14 - Independence and Impartiality of the Tribunal

14.1 The Tribunal conducting arbitration under these Rules shall be and remain at all times independent and impartial, and shall not act as advocate for any party.

14.2 A prospective arbitrator shall disclose to those who approach him in connection with his possible appointment, any circumstances likely to give rise to justifiable doubts as to his impartiality or independence.

14.3 An arbitrator, once nominated or appointed, shall disclose any such circumstance referred to in Rule 14.2 to the Secretary and/ or to all parties.

Rule 15 - Code of Ethics for Arbitrators

An Arbitrator is a fountain of justice and emblem of equity, fairness and good conscience. Therefore he/she is expected to exhibit a noble conduct. The code of conduct prescribed by the Governing Body has to be adopted.

Appointment

15.1 A prospective arbitrator shall accept an appointment only if he is fully satisfied that he is able to discharge his duties without bias, he has an adequate knowledge of the language of the arbitration, and he is able to give to the arbitration the time and attention which the parties are reasonably entitled to expect, In this code, the masculine includes the feminine.

Disclosure

15.2A prospective arbitrator shall disclose all facts or circumstances that may give rise to justifiable doubts as to **his** impartiality or independence, such duty to continue thorough out the arbitral proceedings with regard to new facts and circumstances, **in terms of the arbitration and conciliation Act 1996 as amended from time to time.**

15.3 A prospective arbitrator shall disclose to the Secretary and any party who approaches him for a possible appointment:

(a) Any past or present close personal relationship or business relationship, whether direct or indirect, with any party to the dispute, or any representative of a party, or any person known to be a potentially important witness in the arbitration;

(b) The extent of any prior knowledge he may have of the dispute.

Bias

15.4 The criteria for assessing questions relating to bias are impartiality and independence. Partiality arises when an arbitrator favours one of the parties or where he is prejudiced in relation to the subject matter of the dispute. Dependence arises from relationships between an arbitrator and one of the parties, or with someone closely connected with one of the parties.

15.5 Any close personal relationship or current direct or indirect business relationship between an arbitrator and a party, or any representative of a party, or with a person who is known to be a potentially important witness, will normally give rise to justifiable doubts as to a prospective arbitrator's impartiality or independence. Past business relationships will only give rise to justifiable doubts if they are of such magnitude or nature as to be likely to affect a prospective arbitrator's judgment. He should decline to accept an appointment in such circumstances unless the parties agree in writing that he may proceed.

Communications

15.6 Before accepting an appointment, an arbitrator may only enquire as to the general nature of the dispute, the names of the parties and the expected time period required for the arbitration.

15.7 No arbitrator shall **Communicate** with any of the parties or their Counsel until after the Secretary gives notice of the formation of the Tribunal to the parties.

15.8 Throughout the arbitral proceedings, an arbitrator shall avoid any unilateral communications regarding the case with any party, or its representatives.

Fees

15.9 In accepting an appointment, an arbitrator agrees to the remuneration as prescribed in the rules of SAROD-PORTS, and he shall make no unilateral arrangements with any of the parties or their Counsel for any additional fees or expenses without the agreement of all the parties and the consent of the Secretary of SAROD-PORTS.

Conduct

15.10 Once the arbitration proceedings commence, the arbitrator shall acquaint **himself** with all the facts and arguments presented and all discussions relative to the proceedings so that he may properly understand the dispute.

Confidentiality

15.11 The arbitration proceedings shall remain confidential. An arbitrator is in a relationship of trust to the parties and should not, at any time, use confidential information acquired during the course of the proceedings to gain personal advantage or advantage for others, or to affect adversely the interest of another.

15.12 This Code is not intended to provide grounds for the setting aside of any award.

Rule 16- Challenge of Arbitrators

16.1 An arbitrator may be challenged if there are circumstances that give rise to justifiable doubts as to his impartiality or independence and also if he or she has committed any misconduct

16.2 An arbitrator may also be challenged if he does not possess the qualifications required by the agreement of the parties,

16.3 A party may challenge an arbitrator appointed on its nomination or with its agreement only for reasons of which it becomes aware after the appointment has been made.

16.4 A party who intends to challenge an arbitrator shall file with the Secretary and serve on the other party or all other parties, whichever is applicable, a Notice of Challenge.

16.5 The Notice of challenge must be filed and served within 14 days from the appointment of the arbitrator or within 14 days after the circumstances mentioned in Rule 15.1 became known to that party.

16.6 The Notice of Challenge must state the reasons for the challenge.

16.7 The arbitration shall be suspended until the challenge is resolved or decided upon.

16.8 When an arbitrator has been challenged by one party, the other party may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his office. However, it is not implied in either case that there has been an acceptance of the validity of the grounds for the challenge. In both cases, the procedure provided in Rule 11 read with Rule 13, shall be used for the appointment of a substitute arbitrator.

Rule 17 - Decision on Challenge

17.1 If the other party does not agree to the challenge and the arbitrator does not withdraw, the decision on the challenge will be made by the Governing Body.

17.2 If the Governing Body sustains the challenge, a substitute arbitrator shall be appointed or chosen pursuant to the procedure applicable to the appointment of an arbitrator as provided in Rule 11 read with Rule 13. If the Governing Body dismisses the challenge, the arbitrator shall continue with the arbitration.

Rule 18 - Removal of the Tribunal

18.1 The Governing Body may on the application of a party remove an arbitrator:

a. Who is physically or mentally incapable of conducting the proceedings or where there are justifiable doubts as to his ability to do so; or

b. Who has refused or failed to use all reasonable dispatch in conducting the arbitration or making an award.

c. Who has continuously absented from attending the proceedings for more than 3 sitting without prior permission of Presiding Arbitrator/Governing Body of SAROD- PORTS.

18.2 The arbitrator(s) concerned is entitled to appear and be heard at the hearing of the application to remove him.

18.3 Upon the removal of the arbitrator, a substitute arbitrator shall be appointed in accordance with Rule 11 read with Rule 13.

18.4 The Governing Body's decision on the application is final and is not subject to appeal or review.

Rule 19 - Re-hearing in the Event of Replacement of the Tribunal

If the sole or presiding Arbitrator is replaced, there shall be a re-hearing. If any other arbitrator is replaced, such re-hearing may take place at the discretion of the Tribunal.

Rule 20 - Jurisdiction of the Tribunal

20.1 The Tribunal shall have the power to rule on its own jurisdiction, including any objection with respect to the existence, termination or validity of the arbitration agreement. For that purpose, an arbitration agreement which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the Tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration agreement.

20.2 The plea that the Tribunal does not have jurisdiction shall be raised not later than in the Statement of Defense. A plea that the Tribunal is exceeding the scope of its authority shall be raised promptly after the Tribunal has indicated its intention to decide on the matter alleged to be beyond the scope of its authority. [neither case the Tribunal may nevertheless admit a late plea under this Rule if it considers the delay justified. A party is not precluded from raising such a plea by the fact that he has nominated, or participated in the appointment of an arbitrator.

20.3 The Tribunal must rule on an objection that it lacks jurisdiction as a preliminary question upon the objection being raised. It may rule on an objection that it exceeds the scope of its authority either as a preliminary question or in an award on the merits, as it deems just and convenient.

20.4 In addition to the jurisdiction to exercise the powers defined elsewhere in these Rules, the Tribunal shall have jurisdiction to determine any question of law arising in the arbitration; proceed with the arbitration **notwithstanding** the failure or refusal of any party to comply with these Rules or with the Tribunal's orders or directions, or to attend any meeting or hearing, but only after giving that party written notice that it intends to do so; and to receive and take into account such written or oral evidence as it shall determine to be relevant, whether or not strictly admissible in law.

Rule 21 - Fees of SAROD-PORTS and Arbitral Tribunal Fee Schedule

Registration Fee (Non - Refundable): Rs.10,000/- or any amount fixed by Governing Body from time to time. The Schedule of Fees and allied expenditure shall be decided by Governing Body.

Rule 22- Transmission of File to the Tribunal

22.1 The Secretary shall, as soon as practicable transmit to the Tribunal, a file containing the Notice of Arbitration, the Response and all case statements.

22.2 The Tribunal shall as soon as practicable, after consultation with the parties, issue such orders and/or directions as are necessary for the conduct of the arbitration to conclusion, including a timetable for steps to be taken in the arbitration and for the hearing of the arbitration.

Rule 23- Judicial Seat of Arbitration

23.1 Unless otherwise agreed by the parties, the judicial seat of arbitration shall be New Delhi.

23.2 Notwithstanding Rule 22.1 and 22.2, the Tribunal may, unless otherwise agreed by the parties, hold hearings and meetings anywhere convenient, subject to the provisions of Rule 28.2.

Rule 24 - Language of Arbitration

The language of arbitrators shall be English. In case of material existing are in any other language, other than English the same has to be translated to English language.

Rule 25 - Conduct of the Proceedings

The Tribunal shall have the widest discretion allowed by the Act to ensure the just, expeditious, economical and final determination of the dispute. The proceedings shall be conducted from 1 O.AM to 5PM with a recess of one hour.

Rule 26 - Communication between Parties and the Tribunal

26.1 Where the Tribunal sends any written communication to one party, it shall send a copy to the other party or parties as the case may be.

26.2 Where a party sends any written communication (including Statements, expert reports or evidentiary documents) to the Tribunal, the same shall be copied to the other party or all other parties, whichever is applicable, and show to the Tribunal that the same has been so copied.

26.3 The address of the parties for the purpose of all communications during the proceedings shall be those set out in the Notice of Arbitration, or as either party may at any time notify the Tribunal and the other party or parties, whichever is applicable.

26.4 A copy of correspondence between the parties and the Tribunal shall be sent to the Secretary.

Rule 27 – Party Representatives

Any party may be represented by legal practitioners or any other representatives, subject to such proof of authority as the Tribunal may require. The names and addresses of such representatives must be notified to the other party or parties. In case one party is represented by non-legal person, another party will also be represented by non-legal person so as to maintain natural justice.

Rule 28 - Hearings

28.1 Unless the parties have agreed on documents- only arbitration the tribunal shall hold a hearing for the presentation of evidence by witnesses, including expert witnesses, or for oral submissions.

28.2 The Tribunal shall fix the date, time and place of any meetings and hearings in the arbitrations on the first hearing, and complete time table pertaining to all the activities of the Arbitration e.g submission of statement of claim, reply, counter claim, reply therein, admission and denial of documents, visit/inspection of site if any. The tribunal shall stick to the time table with **or** without any deviations unless there are unavoidable circumstances warranting such deviation which will be with the prior permission of the tribunal.

28.3 Prior to the hearing, the Tribunal may provide the Parties with matters or questions to which it wishes them to give special consideration.

28.4 In the event that a party to the proceedings without sufficient cause, fails to appear at a hearing of which the notice has been given, the Tribunal may proceed with the arbitration and may make the Award after the party present has submitted evidence to prove its case.

28.5 All meetings and hearing shall be in private unless the parties agree otherwise.

Rule 29 - Documents Only Arbitration

29.1 The Disputes may be decided without an oral hearing if it is so agreed by the parties.

29.2.1 Where the parties agree to dispense with oral hearing, the Tribunal must be promptly informed by either of the parties, as soon as is practicable. The Tribunal must also be promptly informed it, at a later stage, the parties or either of them intends to apply for an oral hearing.

29.2.2 Parties may seek discovery of documents if they are not satisfied with existence of documents annexed with statement of claim, reply and counter claim by giving self contained request to the Tribunal justifying the necessity for such documents. Decision of tribunal shall be final and binding upon the parties.

Rule 30 - Witnesses

30.1 The Tribunal may require each party to give notice of the names and designations of the witnesses it intends to call and reasons for legal necessity of such witness.

30.2 No party shall call any expert witness without the leave of the Tribunal.

30.3 Any witness who gives evidence may be questioned by each party or its representative subject to any rulings made by the Tribunal,

30.4 A Witness may be required by the Tribunal to testify under oath or affirmation

30.5 Subject to such order or direction which the Tribunal may make, the testimony of witness may be presented in written form, either as signed statements or by duly sworn or affirmed affidavits,

30.6 Any party may require a witness to attend an oral examination at a hearing. If the witness fails to attend, the Tribunal may place such weight on the written testimony as it thinks fit, or may exclude it altogether,

30.7 The Tribunal shall determine the admissibility, relevance, materiality and weight of the evidence given by any witness.

Rule 31- Experts Appointed by the Tribunal

31.1 Unless otherwise agreed by the parties, the Tribunal may:

- a. appoint one or more experts to report to the Tribunal on specific issues;
- b. require a party to give any such expert any relevant information or to produce, or to provide access to, any relevant documents, goods or property for inspection by the expert.

31.2 Unless otherwise agreed by the parties, if a party so requests or if the Tribunal deem it fit, the expert shall, after delivery of his written or oral report, participate in an oral hearing, at which the parties may question him and present expert witnesses in order to testify on the points at issue.

31.3 Rule 30.2 shall not apply to an assessor appointed by agreement of the parties, or to an expert appointed by the Tribunal to advise solely in relation to procedural matters.

Rule 32 – Rules applicable to substance of dispute - (1) Where the place of arbitration is situated in India

In an arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;

Rule 33 - Closure of Hearing

33.1 The Tribunal may inquire of the parties if they have any further proof to offer or witnesses to be heard or submission to make and, if there are none, declare the hearing closed.

33.2 The Tribunal may also, in view of exceptional circumstance, reopen the hearings at any time before the award is made.

Rule 34 - Additional Powers of the Tribunal

34.1 In addition to the powers conferred by the Act, the Tribunal shall also have the power to:-

- a. Allow any party, upon such terms of as to costs and otherwise) as it shall determine, to amend claims or counterclaims;
- b. Extend or abbreviate any time limits provided by these Rules;
- c. Conduct such enquires as may appear to the Tribunal to be necessary or expedient;
- d. Order the parties to make any property or thing available for inspection
- e. Order any parties to produce to the tribunal, and to other parties for inspection, and to supply copies of any documents, or classes of documents in their possession, custody, or power which the Tribunal determines to relevant.
- f. Make orders or give directions to any party for interrogatories;
- g. Make orders or give directions to any party for an interim injunction or any other interim measure;

h. Make such orders or give such directions as it deems fit in so far as they are not inconsistent with the Act or any statutory re-enactment thereof or such law which is applicable or these Rules.

34.2 If the parties so agree, the Tribunal shall also have the power to add other parties (with their consent) to be joined in the arbitration and make a single Final Award determining all disputes between them.

Rule 35- Deposits to Costs and Expenses

35.1 The Tribunal's fees and SAROD-PORTS administration fees shall be ascertained in accordance with the Schedule of Fees in Force at the time of commencement of the arbitration.

35.2 The Claimant shall deposit with the SAROD-PORTS half of the fees payable at the time of filing of the Statement of Case. The Respondent shall deposit with the SAROD-PORTS one-half of the fees payable at the time of filing the Statement of Respondent's defense and Counterclaim (if any). The balance of fees payable shall be paid 60 days before the date of the final hearing or on such other date that the Secretary may direct.

35.3 Where the amount of the claim or the counterclaim is not quantifiable at the time payment is due, the Secretary will make a provisional estimate. The fees will be adjusted in the light of such information as may subsequently become available. If the arbitration is settled or disposed of without a hearing, the amount of the Tribunal's fees and SAROD-PORTS administration fees shall be finally determined by the Secretary who will have regard to all the circumstances of the case, including the stage of proceedings at which the arbitration is settled or otherwise disposed of

35.4 The Secretary may from time to time direct parties to make one or more deposit(s) towards any further expenses incurred or to be incurred on behalf of or for the benefit of the parties.

35.5 All deposit(s) shall be made to and held by the SAROD-PORTS. Any interest which may accrue on such deposit(s) shall be retained by the SAROD-PORTS.

35.6 If a party fails to make the payments or deposits required or directed, the Tribunal may refuse to hear the claims or counterclaims, whichever is applicable, by the non-complying party, although it may proceed to determine claims or counterclaims by any party who has complied with orders

35.7 The parties shall remain jointly and severally liable to the SAROD-PORTS for payment of all such fees and expenses until they have been paid in full even if the arbitration is abandoned, suspended or concluded, by agreement or otherwise, before the final Award is made.

Rule 36 - Decision Making by the Tribunal

36.1 Where a Tribunal has been appointed, any direction, order, decision or award of the Tribunal must be made by the whole Tribunal or a majority. If an arbitrator refuses or fails to sign the Award, the signatures of the majority shall be sufficient, provided that the reason for the omitted signature is stated.

36.2 If there is no unanimity, the same shall be made by the majority arbitrators as well as by the dissenting arbitrator alone as if acting as a sole arbitrator.

36.3 However, in case of a three-member Tribunal the presiding arbitrators may after consulting the other arbitrators, make procedural rulings alone.

Rule 37 - The Award

37.1 It will be mandatory for the parties to submit written synopsis of their arguments respectively which will form part of the arbitral proceedings.

37.2 The Tribunal shall assemble at the assigned place in SAROD-PORTS and shall exercise utmost secrecy and confidentiality in writing the award,

37.3 Unless the Secretary extends the time or the parties agree otherwise, the Tribunal shall make

its Award in writing within 30 days from the date on which the hearings are closed and shall state the reasons upon which its award is based. The award shall contain the date and shall be signed by the arbitrator or arbitrators.

37.4 The Tribunal may make interim awards or separate awards on different issues at different times.

37.5 All Awards must be submitted by the Tribunal to the Secretary and they shall be issued through the Secretary.

37.6 The Tribunal must deliver to the Secretary number of originals of the award sufficient for the parties and for filing with the Secretary.

37.7 The Secretary shall release the award to the parties only upon receipt of sufficient deposits to cover the fees and expenses due to the Tribunal and to the SAROD- PORTS.

37.8 By agreeing to have arbitration under these Rules, the parties undertake to carry out the award without delay.

37.9 Stamp duty on award shall be payable by the party in whose favor the award has been pronounced.

Rule 38- Additional Award

38.1 Within 30 days after the receipt of the award, either party, with notice to the Secretary and the other party may request the Tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award.

38.2 If the Tribunal considers the request for an additional award to be justified and considers that the omission can be rectified without any further hearings or evidence, it shall notify all the parties within 7 days of the receipt of the request, that it will make an additional award, and complete the additional award within 30 days after the receipt of the request.

Rule 39 - Correction of Awards

39.1 Within 30 days of receiving an Award, unless another period of time has been agreed upon by the parties, a party may by notice to the Secretary and the other party request the Tribunal to correct in the Award, any errors in computation, any clerical or typographical errors or any errors of similar nature.

39.2 If the Tribunal considers the request to be justified, it shall make the corrections) within 30 days of receiving the request. Any correction shall be notified in writing to the parties and shall become part of the Award.

39.3 The Tribunal may correct any error of the type referred to in Rule 37.1 on its own initiative within 30 days of the date of the Award.

Rule 40- Settlement

40.1 If, the parties arrived at amicable settlement of the dispute during the currency proceedings, the parties shall file memo of settlement before the tribunal who shall either issue an order for the termination of the arbitral proceedings or, if requested by both parties and accepted by the Tribunal, record the settlement in the form of an arbitral award on agreed terms. The Tribunal is not obliged to give reasons for such an award,

40.2 The Parties shall:

a. Notify the **Tribunal** and the Secretary immediately if the arbitration is settled or otherwise terminated:

b. Make provision in any settlement for payment of all the costs of the arbitration and fees and expenses due to the SAROD-PORTS and the Tribunal.

40.3 If the continuation of the arbitral proceedings becomes unnecessary or impossible for any reason not mentioned in Rule 38.1, before the award is made, the Tribunal shall inform the parties of its intention to issue an order for the termination of the proceedings. The Tribunal shall have the power to issue such an order unless party raises justifiable grounds for objection.

40.4 Copies of the order for termination of the arbitral proceedings or of the arbitral award on agreed terms, signed by the Tribunal, shall be communicated by the Tribunal to the parties through the Secretary.

Rule 41- Interest

The Tribunal may award interest on any sum awarded at such rate as applicable in fixed deposits of Sate Bank of India in respect of such periods ending not later than the date of the award as the Tribunal considers just.

Rule 42- Costs

42.1 The Tribunal shall specify in the final award, the costs of the arbitrations and decide which party shall bear them and in what proportion they shall be borne.

42.2 In this Rule, "costs of the arbitration" shall include: '

- a. The fees and expenses of the Tribunal and the administration fees of the SAROD- PORTS as determined by the Secretary in accordance with the Schedule of Fees;
- b. The costs of tribunal appointed experts or of other assistance rendered: and
- c. All expenses which are reasonably incurred by the SAROD-PORTS in connection with the arbitration.

42.3 The Tribunal has power to order in its Award, that all or part of the legal or other costs (such as legal fees and expenses, costs incurred in respect of party appointed experts etc) of one party shall be paid by the other party.

Rule 43 - Waiver

A party which is aware of non-compliance with these Rules and yet proceeds with the arbitration without promptly stating its objection in writing such non-compliance shall be deemed to have waived its right to object.

Rule 44 - Exclusion of Liability

44.1 The Tribunal, the President, the SAROD-PORTS and any of its officers, employees or agents shall not be liable to any party for any act or omission in connection with any arbitration conducted under these Rules,

44.2 After the Award as been made and the possibilities of corrections and additional Awards have lapsed or been exhausted, neither the Tribunal nor the President shall be under any obligation to make any statement to any person about any matter concerning the arbitration, and no party shall seek to make any arbitrator or the President or the SAROD-PORTS and any of its officers a witness in any legal proceedings arising out of the arbitration.

Rule 45- General Provisions

45.1 In all matters not expressly provided for in these Rules, the President, the Secretary and the Tribunal shall act in the spirit of these Rules and shall make every reasonable effort to ensure the just, expeditious and economical conclusion of the arbitration.

45.2 The Secretary may from time to time issue Practice Notes on the implementation of these Rules.

Rule 46- Amendment to Rules

These Rules may from time to time be amended by the Governing Body of SAROD-PORTS.