

DATED *6th March*

2019

**Department of Infrastructure**

and

**Isle of Man Steam Packet Company Limited**

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**HEADS OF TERMS  
FOR THE SEA SERVICES AGREEMENT**

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**Isle of Man  
Government**

*Reiltys Ellan Vannin*



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Douglas



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## HEADS OF TERMS FOR THE SEA SERVICES AGREEMENT

This Heads of Terms is made on the 6 day of March 2019

### BETWEEN

- (1) **Department of Infrastructure** (a Department of the Isle of Man Government) of Sea Terminal, Douglas, Isle of Man, IM1 2RF ("**DOI**")
- (2) **Isle of Man Steam Packet Company Limited** a company duly incorporated in the Isle of Man under Company Reference number 002092v and whose registered office is situate at Imperial Buildings, Douglas, Isle of Man ("**IOMSPC**")

(the DOI and the IOMSPC together referred to as the "**Parties**").

### SUBJECT TO CONTRACT

### BACKGROUND

- (A) The DOI and the IOMSPC are interested in entering into an agreement for the transfer in ownership of the Linkspan situate at Victoria Pier in Douglas harbour (the "**Victoria Pier Linkspan**") and for the use of the Victoria Pier Linkspan and the Linkspan at King Edward VIII Pier in Douglas harbour (the "**King Edward VIII Linkspan**") (the "**proposed Sea Services Agreement**").
- (B) This heads of terms sets out the principal terms and conditions upon which the parties agreement to enter into the proposed Sea Services Agreement.

### 1. STATUS OF THE HEADS OF TERMS

The terms of this heads of terms are not exhaustive and are expressly subject to contract until the final written Sea Services Agreement is entered into. The terms are not intended to be legally binding between the parties except where specifically stated.

#### 1.1. Timescale and Notice to Terminate

- 1.1.1. The Parties agree to negotiate in good faith with a view to sign the final written proposed Sea Services Agreement on or before 31<sup>st</sup> May 2019.
- 1.1.2. The signing of these Heads of Terms is subject to Tynwald approval. In the event that the approval of Tynwald to these Heads of Terms is not obtained within twelve (12) weeks of the date on which these Heads of Terms and signed by both parties (or the final party) they will be deemed void ab initio.
- 1.1.3. Either Party may at any time, by giving notice to the other, terminate negotiations for the proposed Sea Services Agreement, without having to give any reasons for doing so.

- 1.1.4. The Party giving notice will not incur any financial liability to any other Party, unless it has breached a legally binding obligation of this heads of terms as set out below.

## **2. ESSENTIAL PRE-CONDITIONS TO AN AGREEMENT**

The proposed Sea Services Agreement between the Parties is conditional upon:

- 2.1. the Parties negotiating, drafting and agreeing the satisfactory terms of the proposed Sea Services Agreement governed by the laws of the Isle of Man;
- 2.2. the approval of and consent to the proposed Sea Services Agreement being given by the Parties (including any necessary internal, shareholder, board of directors, Departmental Treasury, CoMin, Tynwald or Ministerial approval as required).

## **3. AGREED TERMS OF THE PROPOSED SEA SERVICES AGREEMENT**

### **3.1. Previous agreements**

Upon the Commencement Date the following agreements entered into between the Parties shall automatically terminate:

- 3.1.1 The Agreement between the Parties dated 19<sup>th</sup> September 1995 for use of the King Edward VIII Linkspan (as amended by the agreement between the Parties dated 26<sup>th</sup> January 1996; the agreement between the Parties dated 20<sup>th</sup> February 2002; and the agreement between the Parties dated 21<sup>st</sup> December 2004)
- 3.1.2 The agreement between the Parties dated 19<sup>th</sup> September 1995 for use of the Victoria Pier Linkspan (as amended by the agreement between the Parties dated 20<sup>th</sup> February 2002; and the agreement between the Parties dated 21<sup>st</sup> December 2004).

### **3.2. Victoria Pier Linkspan**

- 3.2.1. The IOMSPC warrant that they are the unencumbered owner of the Victoria Pier Linkspan.
- 3.2.2. The IOMSPC warrant that they have carried out such capital works as are necessary to ensure that the Victoria Pier Linkspan is structurally adequate for its intended use.
- 3.2.3. In consideration for the grant of the Sea Services Agreement the IOMSPC agree to convey the Victoria Linkspan to the DOI.

### **3.3. Licence to use**

- 3.3.1. The DOI will grant the IOMSPC the right to use the King Edward VIII Linkspan, the Victoria Pier Linkspan (to include any Linkspan that may be constructed to replace either the King Edward VIII Linkspan or the Victoria

Pier Linkspan) and the access area shown edged blue on the attached Plan (the "**Access Area**") for the purpose of meeting its obligations under the proposed Sea Services agreement subject to the conditions set out in this heads of terms to be reflected in the proposed Sea Services Agreement ("**Permitted Use**").

### 3.4. **Term of the proposed Sea Services Agreement and termination provisions**

- 3.4.1. The proposed Sea Services Agreement shall commence on the 1<sup>st</sup> January 2020 (the "**Commencement Date**") and shall continue for a Term of twenty five years (unless previously terminated in accordance with the terms of the proposed Sea Services Agreement) (the "**Term**").
- 3.4.2. The Department shall be entitled to extend the Term by a period of not more than twelve (12) months to provide additional time to complete any procurement exercise relating to any new agreement for the provision of sea services.
- 3.4.3. In the event that the TT is cancelled in any year of the Term the Term shall be increased by one (1) year if requested in writing by the IOMSPC Provided always that the Term shall not be increased by more than three years in total.
- 3.4.4. The proposed Sea Services Agreement may be terminated:
  - 3.4.4.1. at any time by mutual agreement in writing between the DOI and the IOMSPC;
  - 3.4.4.2. upon not less than one month's prior written notice if and whenever the IOMSPC shall fail after receipt of the appropriate invoice or demand to pay any monies due and payable by the IOMSPC to the DOI in accordance with the provisions of the proposed Sea Services Agreement within the period specified or if no period is specified then within twenty eight (28) days of the same becoming due and payable (whether demanded or not);
  - 3.4.4.3. upon not less than fourteen (14) days written notice in the event of a breach by the DOI or the IOMSPC of any of the provision of the proposed Sea Services Agreement which the breaching Party has failed to rectify upon receiving thirty days' notice from the non-breaching Party requiring the breach to be rectified;
  - 3.4.4.4. upon not less than six (6) months written notice in the event that either Party is in breach of the terms of the proposed Sea Services Agreement for a continuous or cumulative period of thirty (30) days or more;
  - 3.4.4.5. upon not less than three (3) months written notice if the DOI reasonably believe that the IOMSPC do not have adequate financial

resources and management expertise to meet its financial and other obligations under the proposed Sea Services Agreement.

3.4.4.6. if the IOMSPC goes into liquidation either compulsory or voluntary or if a receiver or manager is appointed in respect of the whole or any part of the IOMSPC's assets or if the IOMSPC makes an assignment for the benefit of its creditors generally or threatens to do any of these things or if judgement and execution is entered against the IOMSPC (not being capable of appeal or subject to an appeal by the IOMSPC) and such judgement and execution remains unsatisfied for twenty one (21) days after the same shall be sought to be enforced;

3.4.4.7. with immediate effect upon written notice if the proposed lease between the Parties of the Liverpool terminal and Linkspan (the "**Proposed Lease**") shall be terminated for breach;

3.4.4.8. with immediate effect upon written notice if the IOMSPC breach the Permitted Use provisions in relation to freight as contained within the Proposed Lease (whether or not the Proposed Lease is terminated);

3.4.4.9. upon written notice of not more than twenty four (24) months if there is a Change of Control of the IOMSPC save than where the DOI has provided written approval for the Change of Control. For the purposes of this clause 3.4.4.9 "**Control**" (in relation to IOMSPC) means the power of a person to secure that the affairs of the body corporate are conducted in accordance with the wishes of that person:

3.4.4.9.1. means of the holding of shares, or the possession of voting power, in or in relation to that or any other body corporate; or

3.4.4.9.2. as a result of any powers conferred by the articles of association or any other document regulating that or any other body corporate;

and a "**Change of Control**" occurs if a person who controls the IOMSPC ceases to do so or if another person acquires Control of it.

3.4.5. In the event that the proposed Sea Services Agreement is terminated pursuant to clause 3.4.4 (unless termination is by the IOMSPC as a result of a breach of the terms of the proposed Sea Services Agreement by the DOI) and at the end of the Term the DoI shall be entitled to purchase all or any of the Vessels for market value at that time owned by the IOMSPC as follows:



- 3.4.5.1. the Department shall serve a notice stipulating the Vessel or Vessels that it wishes to purchase (the "**Vessel Notice**");
- 3.4.5.2. the Vessel Notice shall be served by the DoI simultaneously with the notice to terminate or receipt of a notice to terminate or within a period of not more than twelve (12) months from the date of the relevant notice of termination or the end of the Term as appropriate;
- 3.4.5.3. the DoI and the IOMSPC shall agree the market value for the Vessels stipulated in the Vessels Notice and both parties will complete such documentation as is required to ensure the transfer of the Vessels to the DoI within not more than six (6) months from the date on which the market value is agreed;
- 3.4.5.4. in the event that the DoI and IOMSPC are unable to agree to the market value for the Vessels the Parties may submit the dispute for determination to a panel of arbitrators comprising one (1) arbitrator nominated by the DoI, one (1) arbitrator nominated by the IOMSPC and one (1) arbitrator nominated by the President of the Isle of Man Law Society (with each Party bearing its own costs). The determination shall be held in the Isle of Man and the arbitrator shall act as an expert and not an arbitrator. Where the Parties do not agree to arbitration, the dispute shall be resolved in accordance with clause 7 (Governing Law) below.

### 3.5. **Charges**

In consideration of the rights granted to the IOMSPC by the DOI and the obligations on the part of the DOI, the IOMSPC agree to pay:

3.5.1. to the Department without any deduction of abatement whatsoever:

- 3.5.1.1. Subject to the provisions of clause 3.5.1.1 below, the sum of five hundred and fourteen thousand six hundred and twenty pounds and eighty eight pence (£514,620.88) per annum uplifted by MCPI for the period 1<sup>st</sup> January 2017 until the Commencement Date (the "**Licence Fee**") by equal quarterly payments in advance;
- 3.5.1.2. (Within seven (7) days of any written demand to do so) an amount equal to the relevant excess under any policy of insurance effected by the Department in respect of which the Department makes a claim due to the actions or omissions of the IOMSPC;
- 3.5.1.3. (Within seven days (7) of any written demand to do so) an amount equal to any amount that the DOI is required to pay to the Mersey Dock and Harbour Company Limited ("**MDHC**") pursuant to the Deed to be entered into between the DOI and the MDHC and which

relates to monies payable by the DOI in the event that the permitted use restrictions referred to in clause 3.4.4.8 of these Heads of Terms (insofar as they relate to freight) are breached;

- 3.5.1.4. Value Added Tax (or any tax of a similar nature that may be substituted for it or levied in addition to it) Chargeable in respect of any payment made by the Company under any of the terms of or in connection with the Proposed Sea Services Agreement.
- 3.5.2. The Licence Fee shall be increased annually by MCPI on each anniversary of the Commencement Date.
- 3.5.3. The IOMSPC shall also pay (and indemnify the DOI) in respect of the following:
  - 3.5.3.1. All rates taxes assessments duties charges impositions and outgoings whatsoever which are now or during the Term shall be charged assessed or imposed upon the King Edward Linkspan or the Victoria Pier Linkspan.
  - 3.5.3.2. all charges for electricity and other services consumed or used at or in relation to the King Edward Linkspan, the Victoria Pier Linkspan.

### 3.6. **Harbour Dues**

- 3.6.1. The DOI agrees to exercise its powers under regulation 6A of Schedule 2 to the Harbour (Dues and Charges) Regulations 2017 (the "**Regulations**") for the calculation and collection of that proportion of Harbour Dues which relates to passengers (including passenger carrying vehicles which they accompany) disembarking from or embarking on a Vessel operated by the IOMSPC ("**Passenger Dues**") as provided for in clause 3.6.7 of this heads of terms.
- 3.6.2. For the avoidance of doubt this clause 3.6 shall not apply to the calculation of any Dues payable pursuant to the Regulations save for Passenger Dues. All other Dues will remain payable in accordance with the Regulations.
- 3.6.3. The IOMSPC must retain the accurate records detailing the following:
  - 3.6.3.1. Gross foot passenger revenue (before deduction of commissions);
  - 3.6.3.2. Gross vehicle passenger revenue (before deduction of commissions);
  - 3.6.3.3. Gross private vehicle revenue (before deduction of commissions);
  - 3.6.3.4. Cabin revenues received on board;
  - 3.6.3.5. Revenue received from any executive or premium upgrades;
  - 3.6.3.6. Dog revenues;

- 3.6.3.7. The gross revenue allocated to the IOMSPC from sail and rail tickets or Land Bridge fares using third party ferry company;
  - 3.6.3.8. Provisions of passenger travel and breakdown insurance income;
  - 3.6.3.9. Specific charter sailings to or from the Isle of Man.
- 3.6.4. The revenues set out in clauses 3.6.3.1 to 3.6.3.9 (inclusive) are referred to as the "**Revenues**".
- 3.6.5. For the avoidance of doubt, the obligation set out in clause 3.6.3 does not require the IOMSPC to retain records of:
- 3.6.5.1. Freight vehicle revenue;
  - 3.6.5.2. Any non-ferry business in relation to the operations of inclusive holidays;
  - 3.6.5.3. Retail and entertainment services (including the sale of food and drink) on board a Vessel operated by the IOMSPC;
  - 3.6.5.4. Specific charter sailings not to or from the Isle of Man;
  - 3.6.5.5. Non Isle of Man sailings or services (e.g. Liverpool – Dublin service);
  - 3.6.5.6. Any other revenue unrelated to the use by the IOMSPC of harbours in the Isle of Man.
- 3.6.6. Throughout the Term, the IOMSPC must provide to the DOI on a monthly basis a report detailing the Revenues received in the previous month.
- 3.6.7. The amount payable by the IOMSPC to the DOI in respect of Passenger Dues shall be either:
- 3.6.7.1. Five point two eight percent (5.28%) of the Revenues received for the preceding year (the "**Fixed Percentage**"); or
  - 3.6.7.2. One million and forty seven thousand nine hundred and thirty two pounds (£1,047,932) (as adjusted annually by MCPI) (the "**Minimum Sum**");
- whichever shall be the greater.
- 3.6.8. If the Fixed Percentage is more than the Minimum Sum for any year of the Term then the Fixed Percentage shall be certified by the IOMSPC's auditors and a certificate stating the Revenue will be supplied to the DOI.

### 3.7. **Exclusivity**

3.7.1. The DOI agree that they will not grant permission for any third party to use the Victoria Pier Linkspan or the King Edward VIII Linkspan save than in the following circumstances:

3.7.1.1. in instances where the IOMSPC shall be in breach of any of its obligations referred to in clauses 3.8 or 3.9 of this heads of terms or during any period of suspension of the proposed Sea Services Agreement by reason of force majeure or illegality of its terms;

3.7.1.2. for use in connection with a service operated by any person between two ports outside the Isle of Man where such use of the Victoria Pier Linkspan or King Edward VIII Linkspan is en route but as part of a journey and subject to the use for this purpose not exceeding twenty four (24) times per year;

3.7.1.3. for use in connection with a service which originates or ends at a port not situate between Holyhead in Wales and the most northerly port in the North West of England;

3.7.1.4. for use in connection with a service between the Isle of Man and a port on the east coast of Ireland during the period the third weekend in September until the last weekend in March provided that such a service is designed to take passengers or passengers with vehicles where such vehicles are intended for private pleasure use only;

3.7.1.5. for use in connection with a service carrying passengers and/or freight to and from any off shore structure or platform;

3.7.1.6. (upon giving not less than twenty four (24) hours prior notice) for use in connection with specialist or one off arrivals or departures provided that such uses shall not exceed twelve (12) per year.

3.7.2. The DOI acknowledge that the proposed Sea Services Agreement will impose obligations upon the IOMSPC that the IOMSPC would not undertake were they to only consider the commercial benefits. In recognition of this, the DoI agree as follows:

3.7.2.1. that it will not install nor consent to the installation of any Linkspan within any harbour or port in the Isle of Man capable of use by conventional Vessels or fast craft similar to those for time being used by the IOMSPC other than in instances where the installation of a Linkspan is required to replace either the King Edward VIII Linkspan or the Victoria Pier Linkspan for whatever reason ; and

3.7.2.2. that they will pay due regard to the obligations referred to in clause 3.7.2 above when considering whether to permit other sea freight transport services to operate using Douglas Harbour.

### 3.8. **Vessels**

3.8.1. The IOMSPC shall at all times maintain adequate Vessels (the "**Vessels**") to enable them to meet their obligations under the proposed Sea Services Agreement.

3.8.2. notwithstanding the provisions of clause 3.8.1 but subject to clause 3.8.3.2 the IOMSPC shall ensure that at all times during the Term, they have not less than three (3) Vessels available for use in the provision of the services required under the proposed Sea Services Agreement (the "**Services**"). Save for instances where these specific Vessels are not available due to maintenance or in instances where the approval of the DOI has been obtained, these three (3) Vessels shall comprise:

3.8.2.1. for the period from the Commencement Date until the 31<sup>st</sup> December 2021 (or the date on which the replacement Vessel for the current Ropax Vessel commences provision of the Services provided that: (i) the IOMSPC shall use their best endeavours to ensure that the replacement Vessel for the current Ropax Vessel commences provision of the Services by no later than the 31<sup>st</sup> December 2021 (Provided always that in using their best endeavours the IOMSPC shall be entitled to take into account the capability and availability of appropriate shipyards); and (ii) the replacement Vessel for the current Ropax Vessel shall commence the provision of the Services by no later than the 31<sup>st</sup> December 2022 in any event):

3.8.2.1.1. The current Ropax Vessel;

3.8.2.1.2. The current fast craft Vessel;

3.8.2.1.3. The current chartered Vessel (which will act as a back-up Vessel).

3.8.2.2. for the period from the 31<sup>st</sup> December 2021 (or the date on which the replacement Vessel for the current Ropax Vessel commences provision of the Services) until the 31<sup>st</sup> December 2026 (or the date on which the replacement Vessel for the current fast craft Vessel commences provision of the Services if sooner):

3.8.2.2.1. The Vessel which replaces the current Ropax Vessel (the "**New Vessel**");

3.8.2.2.2. The current fast craft Vessel;

- 3.8.2.2.3. The current Ropax Vessel (which will act as a back-up Vessel).
    - 3.8.2.3. for the period from the 31st December 2026 (or the date on which the replacement Vessel for the current fast craft Vessel commences provision of the Services if sooner) for the remainder of the Term:
      - 3.8.2.3.1. The New Vessel;
      - 3.8.2.3.2. The Vessel which replaces the current fast craft Vessel (the "**fast craft Replacement**");
      - 3.8.2.3.3. The current Ropax Vessel (which will act as a back-up Vessel).
- 3.8.3. The IOMSPC shall ensure that the back-up Vessel is available for use in the provision of the Services:
  - 3.8.3.1. during the TT period, the MGP period, holiday periods and any New Ropax overhauls;
  - 3.8.3.2. at all other times on not less than ninety six (96) hours' notice save that the IOMSPC shall be entitled to enter into an agreement with another provider which results in the back-up Vessel not being available within the required ninety (96) hour period provided that such an agreement: (i) allows the IOMSPC to comply with its requirements under clause 3.8.3.1; and (ii) does not last for more than twelve weeks in any consecutive two years of the Term.
- 3.8.4. The IOMSPC shall ensure that the current Ropax Vessel, the current fast craft Vessel, the New Vessel and the fast craft Replacement are registered in the Isle of Man as passenger Vessels.
- 3.8.5. Unless otherwise agreed by the DOI, the IOMSPC shall retain the New Vessel in the provision of the Services. In the event that the New Vessel is unable (because of mechanical or other defect) to provide the Services (other than on a temporary basis) the IOMSPC shall replace the New Vessel with a vessel which is in all material aspects the same as the New Vessel.
- 3.8.6. Unless otherwise agreed by the DOI, the fast craft Replacement (and any Vessel which replaces the fast craft Replacement) (save for Vessels which are used on a temporary basis) have a maximum age limit of ten (10) years on the date that they are acquired by the IOMSPC.
- 3.8.7. The IOMSPC shall ensure that all Vessels:
  - 3.8.7.1. shall be of a high standard of quality safety and reliability;
  - 3.8.7.2. shall be so manned and fitted and in such condition to enable the IOMSPC to discharge its obligations under the proposed Sea

Services Agreement and so as to provide reasonable standards of services and facilities to passengers on board the Vessel and during the Vessels loading and unloading and so as to comply with any appropriate certificate of insurance;

3.8.7.3. shall provide WiFi to its customers to the extent that such a service is commercially available from shore based cellular providers. The IOMSPC shall use its best endeavours to extend the range of the WiFi coverage during the Term;

3.8.7.4. shall conform to all appropriate national and international agreements conventions regulations directives codes of practice and other appropriate matters for the time being in force.

3.8.8. The IOMSPC shall ensure that the current fast craft Vessel undergoes a refurbishment of its facilities by no later than the 31<sup>st</sup> March 2021. The IOMSPC shall invest no less than two hundred and fifty thousand pounds (£250,000) in completing the refurbishment. This refurbishment will include such works as are necessary to refurbish the facilities of the current fast craft Vessel to the quality comparable with that provided by leading Irish Sea and English Channel fast craft operators.

3.8.9. The IOMSPC shall commission the construction of the New Vessel and in deciding the specification of this New Vessel, the IOMSPC shall (unless otherwise agreed with the DOI):

3.8.9.1. ensure that the New Vessel has the capability of operating using either marine fuel oil or liquified natural gas;

3.8.9.2. ensure that the New Vessel is capable of making sailings in all seasons;

3.8.9.3. ensure that the New Vessel has a capacity for not less than eight hundred (800) passengers;

3.8.9.4. ensure that it includes one thousand two hundred and fifty (1,250) lane metres of which the proportion which exceeds four point eight metres (4.8m) in height shall not be less than one hundred and ten percent (110%) of the current provision for four point eight (4.8) lane metres provided by the current Ropax Vessel. Should the practicalities of the design of the Vessel mean that it is not practicable to provide one hundred and ten percent (110%) of the current provision for four point eight (4.8) lane metres height, the DOI will agree to the variation of this provision to allow for less provision provided always that the resulting provision is at least equal to that provided by the current Ropax Vessel;

- 3.8.9.5. take into account the outcome of the survey conducted by the DOI between 24<sup>th</sup> September 2018 and 7<sup>th</sup> October 2018 ;
- 3.8.9.6. pay due regard to the DOI policy to reduce emissions;
- 3.8.9.7. comply with the 2020 International Maritime Organisation Regulation;
- 3.8.9.8. include passenger facilities to a quality comparable with that provided by leading Irish Sea and English Channel ferry operators, including the quality and variety of food and beverages, furnishing and decoration, customer service offered by staff and cleaning and maintenance of all areas.
- 3.8.10. When acquiring the fast craft Replacement Vessel, the IOMSPC shall consult with the Department and carry out reasonable public consultation as to the specification of the fast craft Replacement Vessel.
- 3.8.11. The IOMSPC shall invest not less than seventy million pounds (£70,000,000) aggregate in the acquisition of the New Vessel (as referred to in clause 3.8.9) and in the acquisition of the fast craft Replacement (as referred to in clause 3.8.10).
- 3.8.12. The IOMSPC shall ensure that its Vessels provide the following capacity:
  - 3.8.12.1. minimum freight capacity:
    - 3.8.12.1.1. ten thousand (10,000) lane metres in each direction per week; or
    - 3.8.12.1.2. for each month to a port other than Liverpool or Ireland other than for those which take place during the TT period, twelve and a half percent (12.5%) more lane metres than land metres sold by the IOMSPC in the year immediately preceding.
  - 3.8.12.2. minimum passenger and passenger and vehicle capacity:
    - 3.8.12.2.1. adequate capacity during TT, MGP and summer;
    - 3.8.12.2.2. for monthly conventional ferry sailings save for those months which include the TT period, one hundred and fifty percent (150%) of the total number of passenger/Accompanied Vehicles seats sold in the same month of the year immediately preceding;
    - 3.8.12.2.3. for the fast craft service, save for those which take place during the TT period, one hundred and fifteen percent (115%) of the total number of



passenger/Accompanied Vehicle seats sold in the same month of the year immediately preceding.

3.8.12.3. For the purposes of this clause 3.8 and clause 3.9, the following clauses shall have the following meanings:

3.8.12.3.1. TT period shall mean the period commencing three (3) days before the scheduled commencement of the official practices for the Tourist Trophy Races and expiring at midnight on the second day after the day of the last scheduled Tourist Trophy Race in each year;

3.8.12.3.2. MGP period shall mean the period commencing three (3) days before the scheduled commencement of the official practices for the Festival of Motorcycling and expiring at midnight on the second day after the day of the last scheduled Festival of Motorcycling race in each year;

3.8.12.3.3. Summer period shall mean the period (excluding the TT Period) between the last weekend in May and the first Monday in September (such weekend and Monday being inclusive) in each year;

3.8.12.3.4. Holiday period shall mean the period from 22<sup>nd</sup> December to the following 4<sup>th</sup> January (both dates inclusive).

### 3.9. **Routes and frequency**

3.9.1. The DOI is to construct a terminal at West Waterloo Dock, Liverpool Waters (the "**Liverpool Terminal**"). Upon completion of the construction, the IOMSPC will enter into a lease or similar agreement with the DOI for the use of the Liverpool Terminal for the provision of the Services.

3.9.2. The IOMSPC shall provide the following minimum (unless minor changes agreed in writing by DOI) Services:

3.9.2.1. to Liverpool (which shall mean to the Liverpool Terminal after completion of its construction and to the current facility at Princes Dock or to such other port as is agreed between the DOI and IOMSPC in the event that the IOMSPC (i) is not able to secure the continued use of the facility at Princes Dock; or (ii) in instances where the charges imposed by the Mersey Dock and Harbour Company Limited for use of the Princes Dock or the Liverpool Terminal are increased by more than the MCPI (year on year using the charges imposed in the year 2019 as a base) and the Department

agrees (in its absolute discretion) that the continued use of the Princes Dock or Liverpool Terminal is uneconomic for the IOMSPC until completion of the construction):

3.9.2.1.1. during the summer period – not less than one (1) return sailing per day (Sunday to Friday) and two (2) return sailings per day on a Saturday with a minimum total of not less than eight (8) return sailings per week (provided always that should the total number of passengers travelling to Liverpool in the summer fall by an amount which is equal to or more than ten percent (10%) when compared to the passenger figures for the summer period 2018 the total weekly requirement under this clause 3.9.2.1.1 shall be reduced to one (1) sailing per day totalling seven (7) return sailings per week);

3.9.2.1.2. during the winter period (which shall be the period which is not during the summer period) – two (2) return sailings per week to take place on a Saturday and Sunday in each week.

3.9.2.2. to a port in the North West of England agreed between the IOMSPC and the DOI (both acting reasonably) – nine hundred and forty seven (947) return sailings per annum which will incorporate daily freight services on each day of each week and twice daily freight services for five (5) days of each week throughout the year with the exception of holiday periods and overhaul periods (or other exceptional dates with prior written agreement of DOI) such number to include those sailings detailed in clauses 3.9.2.1 and 3.9.2.1.2 to this Heads of Terms.

3.9.3. To a port (or ports) on the East coast of Ireland approved by the DOI (acting reasonably Provided always that it shall be reasonable for the DOI to consider the facilities offered by the port when deciding whether to give its approval) – not less than two sailings per week during such period (or periods) of the year as is agreed by the DOI provided always that the total annual number of sailings shall equal or exceed fifty two (52) return sailings per annum with scheduled to maximise overall visitor traffic from all routes and at times which offer convenience to its passengers when making travel arrangements.

3.9.4. When scheduling their Services to comply with the provisions of clause 3.9.2 the IOMSPC shall ensure that:

3.9.4.1. adequate overnight crossings are provided;

3.9.4.2. adequate Services are provided to meet the reasonable needs of the competitors and spectators attending the Manx Tourist Trophy Races and/or the Festival of Motorcycling.

3.9.5. The IOMSPC shall undertake works of refurbishment to the interior of its terminal building situate in Heysham which are sufficient to ensure that the terminal building includes passenger facilities to a quality comparable with that provided by other terminal facilities in the United Kingdom including the quality of furnishing and decoration and the provision of WiFi facilities. These refurbishment works shall be at the cost of the IOMSPC and shall be completed prior to the Commencement Date.

### 3.10. Fares

3.10.1. The Standard Passenger Fares for passengers (excluding freight passengers) for the purposes of this clause 3.10 shall be those standard fares (excluding discounted fares) for passengers, cars and motorbikes which are set out in the spreadsheet titled "Schedule 6 of the User Agreement – 2018 Fare Calculations" columns D and E ("the Fare Schedule"):

3.10.2. Subject to the provisions of clause 3.10.8.6, the Standard Passenger Fares are the maximum fares that the IOMSPC may use for services offered to passengers and passengers with vehicles (excluding freight passengers). Standard Passenger Fares shall be increased in accordance with clause 3.10.3.

3.10.3. The IOMSPC shall not increase the special offer fares offered to foot passengers beyond the level at which they were offered in the year immediately preceding the Commencement Date until the date on which the New Vessel commences the provision of Services pursuant to the proposed Sea Services Agreement (the "**New Vessel Commencement Date**"). Standard Passenger Fares for foot passengers will be increased in accordance with clause 3.10.4.

3.10.4. Subject to the provisions of clause 3.10.3, the IOMSPC shall not increase the Standard Passenger Fares by more than MCPI (calculated on a weighted basis) per annum. The weighted basis of calculation shall be as follows:

$$(A \times B) + (C \times D) + (E \times F) + (G \times H) + (I \times J) = \text{percentage increase}$$

Where:

A = increase in Band A fare as a percentage of the previous fare;

B = the percentage of passengers travelling on a Band A fare;

C = increase in Band B fare as a percentage of the previous fare;

D = the percentage of passengers travelling on a Band B fare;

E = increase in Band C fare as a percentage of the previous fare;

F = the percentage of passengers travelling on a Band C fare;

G = increase in Band D fare as a percentage of the previous fare;

H = the percentage of passengers travelling on a Band D fare;

I = increase in Band E fare as a percentage of the previous fare;

J = the percentage of passengers travelling on a Band E fare.

3.10.5. The IOMSPC shall not introduce any new fare Bands without the approval of the DOI.

3.10.6. The IOMSPC will offer a minimum number of special offer fares to passengers (excluding freight passengers) as follows:

3.10.6.1. special offer fares are intended to generate extra traffic and increase the overall passenger market;

3.10.6.2. not less than four hundred and fifty thousand (450,000) seats ("**Special Offer Seats**") will be offered on special offer fares. One hundred thousand (100,000) of the Special Offer Seats will be offered at a discount of not less than fifty percent (50%) of the Standard Passenger Fare and the remaining three hundred and fifty thousand (350,000) Special Offer Seats will be offered at a discount of not less than twenty five percent (25%) of the Standard Passenger Fare;

3.10.6.3. special offer fares for all children under the age of sixteen (16) years at a rate of not more than fifty percent (50%) of the equivalent adult Standard Fare;

3.10.6.4. special offer foot passenger fares for all students in full time education at a rate of not more than fifty percent of the equivalent adult Standard Fare;

3.10.6.5. Weekend supplements will not be applied to passenger fares during the period between 1<sup>st</sup> October and 31<sup>st</sup> March in each year;

3.10.6.6. general provisions concerning special offer fares:

3.10.6.6.1. special offer fares set out in clauses 3.10.6.2, 3.10.6.3, and 3.10.6.4 above shall exclude weekend supplements and fuel surcharge and fuel rebates if applicable;

3.10.6.6.2. the number referred to in clause 3.10.6.2 above shall be reduced pro rata if the total annual passenger

numbers in the previous calendar year fall below five hundred and fifty thousand UNLESS such falling passenger numbers is due (in the reasonable opinion of the Department) to exceptional circumstances.

3.10.7. Notwithstanding the provisions of clause 3.11 (Strategic Reset) the DOI shall be entitled to require that the IOMSPC provide additional special offer fares ("**Additional Special Offers**") at any time during the Term PROVIDED:

3.10.7.1. The DOI give the IOMSPC not less than one (1) month's notice in writing (the "**Notice**") setting out the details of the Additional Special Offer to be made (including, inter alia, the eligible passengers, the amount of the discount, the duration of the special offer and the financial cap on the Additional Special Offer (if any));

3.10.7.2. The DOI (and where relevant the Department for Enterprise ("**DFE**")) consult with the IOMSPC as to the manner in which the Additional Special Offer fares are to be set up and allocated (e.g. by means of a "special offer code" to be entered by eligible passengers);

3.10.7.3. The DOI agree to reimburse to the IOMSPC the total cost of the discounts awarded as part of the Additional Special Offer upon the IOMSPC providing to the DOI such documentary evidence as the DOI shall reasonably require.

3.10.7.4. For the avoidance of doubt Additional Special Offers shall not count towards the Special Offer Seats referred to in clause 3.10.6.2 above.

### 3.10.8. Freight Fares

3.10.8.1. The Standard Freight Fares for standard height trailers for the purposes of this clause 3.10.7.1 shall be those standard fares for freight as set out in the Fares Schedule:

3.10.8.2. Subject to the provisions of clause 3.10.8.6, the Standard Freight Fares are the maximum fares that the IOMSPC may use for services offered to freight metrage. Standard Freight Fares shall be increased in accordance with clause 3.10.8.3.

3.10.8.3. If the IOMSPC shall not increase the Standard Freight Fares by more than MCPI (calculated on a weighted basis) per annum. The weighted basis of calculation shall be as follows:

$$(A \times B) + (C \times D) + (E \times F) = \text{percentage increase}$$

Where:

A = increase in Band A fare as a percentage of the previous fare;

B = the percentage of metrage travelling on a Band A fare;

C = increase in Band B fare as a percentage of the previous fare;

D = the percentage of metrage travelling on a Band B fare;

E = increase in Band C fare as a percentage of the previous fare;

F = the percentage of metrage travelling on a Band C fare.

3.10.8.4. The IOMSPC shall not introduce any new fare Bands without the approval of the DOI.

3.10.8.5. The IOMSPC shall offer the following discounts to its freight customers:

3.10.8.5.1. The IOMSPC shall offer not less than three hundred thousand (300,000) HGV lane metres per annum at a discount related to volume shipped in the preceding year by any relevant customer and contractual terms existing between the IOMSPC and the relevant customer at the time being in force (provided always that the contractual terms referred to comply with the provisions of clause 3.10.8.5.3 below);

3.10.8.5.2. Discounts at the same level as was offered by the IOMSPC in the year 2018 (uplifted by MCPI) and including a requirement that the IOMSPC shall provide such evidence as the Department shall require in order to demonstrate their compliance with this clause 3.10.8.5.2;

3.10.8.5.3. discounts provided for in clauses 3.10.8.5.1 and 3.10.8.5.2 above must not be primarily designed to adversely impact the continuing operation of any business on the Isle of Man whose main business is the transportation of third party freight by sea;

3.10.8.5.4. the metrage referred to in clause 3.10.8.5.1 above shall be reduced pro rata if the total annual HGV lane metrage sold in the previous calendar year fall below four hundred and ten thousand (410,000) HGV lane metres UNLESS such falling lane metrage is

due (in the reasonable opinion of the Department) to exceptional circumstances.

3.10.8.6. The IOMSPC shall be entitled to levy a fuel surcharge on its customers in addition to the Standard Passenger Fares (for domestic passengers) and the Standard Freight Fares (for freight traffic and passengers) as follows:

3.10.8.6.1. The fuel surcharge will be calculated quarterly and will be based upon a baseline cost of fuel ("**Fuel Cost**") calculated as follows:

fifty percent (50%) x the weighted average cost incurred by the IOMSPC over the immediately preceding six (6) month period + fifty percent (50%) x the weighted cost estimated to be incurred by the IOMSPC over the six (6) month period immediately following the date of calculation.

3.10.8.6.2. The IOMSPC shall be required to absorb the sum of three million four hundred thousand pounds (£3,400,000.00) (adjusted annually by MCPI + ¼%) (the "**IOMSPC share**") of the Fuel Cost per annum and shall be entitled to levy any amount of the Fuel Cost which is in excess of the IOMSPC share by way of a fuel surcharge.

### 3.11. **Strategic Reset provisions**

In every fifth (5th) year of the Term, the DOI shall be entitled to vary any of the provisions set out in clauses 3.8, 3.9, 3.10, 3.13, 3.14, 3.15 and 3.20 of this heads of terms (the "**Variations**") PROVIDED:

3.11.1. the DOI give the IOMSPC not less than six (6) months' notice in writing of the proposed Variations (the "**Notice**");

3.11.2. the DOI consult with the IOMSPC as to the proposed Variations prior to the issue of the Notice;

3.11.3. the overall package of Variations can be achieved at the same overall cost (taking into account net revenues and costs including any capital costs) ("**Neutral Cost Envelope**") unless the DOI agree to meet any additional costs that would be incurred by the IOMSPC as a result of the Variations which is not met within the Neutral Cost Envelope;

3.11.4. the proposed Variations are operationally practical for the IOMSPC (taking into account the provisions of clause 3.11.3);

3.11.5. Should any dispute, disagreement or claim arise between the Parties (hereinafter referred to as the "**dispute**") concerning the cost of the required Variations (as referred to in clause 3.11.3) or operational practicality of the Variations (as referred to in clause 3.11.4), the Parties shall attempt to resolve the dispute by negotiation. Should the Parties fail to reach agreement or should for any reason the dispute remain unresolved after the period of thirty (30) days after the initial request by the DOI, the Parties may agree to submit the dispute for determination to a panel of arbitrators comprising one (1) arbitrator nominated by the DOI, one (1) arbitrator nominated by the IOMSPC and one (1) arbitrator nominated by the President of the Isle of Man Law Society (with each Party bearing its own costs). The determination shall be held in the Isle of Man and the arbitrator shall act as an expert and not an arbitrator. Where the Parties do not agree to arbitration, the dispute shall be resolved in accordance with clause 7 (Governing Law) below.

### 3.12. **Ireland Reset**

3.12.1. Upon giving not less than six (6) months' notice to expire on any date which is:

3.12.1.1. within 12 months from the date on which the UK formally leaves the European Union; or

3.12.1.2. before the first anniversary of the date on which the New Vessel commences the provision of Services pursuant to the proposed Sea Services Agreement

the DOI shall be entitled to vary clause 3.9 (Routes and Frequency) so as to amend the sailing requirements to Ireland and to amend such other requirements contained within clause 3.9 (Routes and Frequency) so as to enable the sailings to Ireland to be amended (the "**Ireland Variations**")  
Provided:

3.12.1.2.1. the DOI having due regard to the social and economic needs of the Isle of Man shall consult with the IOMSPC as to the proposed Ireland Variations prior to the issue of the Notice;

3.12.1.2.2. the Ireland Variations can be achieved within the same Neutral Cost Envelope (unless the DOI agree to meet any additional costs that would be incurred by the IOMSPC as a result of the Ireland Variations which is not met within the Neutral Cost Envelope);

3.12.1.2.3. the proposed Ireland Variations are operationally practical for the IOMSPC (taking into account the provisions of clause 3.12.1.2.2).



3.12.2. In the event that the Ireland Variations include the removal or suspension of Ireland sailings the DOI shall be entitled to make appropriate amendments to clause 3.7.1.4.

3.12.3. Should any dispute, disagreement or claim arise between the Parties concerning the cost of the required Ireland Variations (as referred to in clause 3.12.1.2.2) or whether the Ireland Variations are operationally practicable (as referred to in clause 3.12.1.2.3) the provisions of clause 3.11.5 to this heads of terms shall apply.

### 3.13. **Access Area Staffing**

3.13.1. The licence granted by the DOI to the IOMSPC in clause 3.3 of this heads of terms for the use of the Access Area shall not be exclusive and is granted for the Permitted Use only.

3.13.2. The IOMSPC shall ensure that the Access Area and the King Edward VIII Linkspan and the Victoria Pier Linkspan is adequately staffed so as to provide security, technical and customer care services to its customers.

3.13.3. In carrying out its obligations as set out in clause 3.13.2 the IOMSPC shall comply with all security requirements of the Port Security Plan for Douglas Harbour.

### 3.14. **Marketing Spend**

3.14.1. The IOMSPC will expend either by itself and/or through one or more wholly owned subsidiaries of the IOMSPC a sum equivalent to not less than seven hundred and fifty thousand pounds (£750,000) (adjusted annually by Manx Consumer Price Index) ("**Marketing Expenditure**") on off Island marketing to promote travel by passengers with and without accompanied vehicles by sea to the island.

3.14.2. The IOMSPC will consult with the DOI prior to its allocation of its Marketing Expenditure.

3.14.3. The IOMSPC will provide evidence to demonstrate its compliance with clause 3.14.1 of this heads of terms.

### 3.15. **Publication and Information Technology Requirements**

3.15.1. The IOMSPC shall publish a schedule of its sailings ("**Sailing Schedule**") by no later than 31<sup>st</sup> October in the year immediately preceding.:

3.15.2. The IOMSPC will maintain a website that is accessible to its customers (both domestic and freight) (the "**Website**"). As a minimum standard, the Website must:

3.15.2.1. be mobile responsive;

- 3.15.2.2. meet web content accessibility standards (WCAG 2.1 or higher or where replaced, equivalent standards);
- 3.15.2.3. function with assistive technology at minimum AA+ level with aim of AAA+;
- 3.15.2.4. be HTML compliant (as per <https://validator.w3.org> or equivalent if this is replaced);
- 3.15.2.5. adhere to best website security practices particular in regards to data protection and payments processing (following PCI Security Standards – DSS as may be replaced);
- 3.15.2.6. include provisions for website platform upgrades maintaining ninety nine point nine percent (99.9%) website availability during the hours of 6.00am to 12.00 midnight each day.

### 3.16. **Information**

The IOMSPC will provide to the DOI:

- 3.16.1. access to their management accounts (or equivalent information as may be agreed by the DOI acting reasonably) at any time for the purposes of inspection thereof by the DoI ;
- 3.16.2. an annual compliance report in a format and to include such key performance indicators as may be agreed between the DOI and the IOMSPC together with such evidence as the DOI shall reasonably require.
- 3.16.3. Such information as the DOI shall reasonably require in order for the DoI to provide information to the DfE and the Cabinet Office to assist the DfE and Cabinet Office in understanding the performance of the Island’s visitor economy.
- 3.16.4. The DOI agree that it shall treat all information received by it pursuant to clauses 3.16.1 and 3.16.2 as confidential (subject to its obligations pursuant to the Freedom of Information Act 2015).

### 3.17. **Sailing Schedules**

- 3.17.1. The IOMSPC shall ensure that its published Sailing Schedule does not breach any of the obligations on the part of the IOMSPC under the proposed Sea Services Agreements and that they are sufficient to meet the reasonable requirements of its customers (taking account of public transport links).
- 3.17.2. The IOMSPC will carry out annual consultation with the DOI as to their needs and requirements in terms of Sailing Schedule and shall ensure that their reasonable requirements are included within its next published Sailing Schedule.

- 3.17.3. Not less than six (6) weeks before the finalisation by the IOMSPC of its proposed Sailing Schedule the IOMSPC shall submit to the DOI and the Department For Enterprise its proposed Sailing Schedule and invite the DOI and the Department for Enterprise to make suggestions for the IOMSPC's scheduled sailings for the coming year. The IOMSPC shall endeavour subject to practicability and viability to incorporate such suggestions into the IOMSPC's Sailing Schedule.
- 3.17.4. The IOMSPC will undertake a consultation with hauliers, freight users and the general public in relation to its Sailing Schedules in each year in which the DOI is able to undertake a Strategic Reset pursuant to clauses 3.11 and 3.12 of this heads of terms. The IOMSPC shall ensure that the results of this public consultation is made available to the DOI by no later than the earliest date on which the DOI could serve a Notice to trigger a Strategic Reset.
- 3.17.5. The IOMSPC shall ensure that it shall exercise good faith in setting its Sailing Schedule and in particular without prejudice to the generality of the foregoing shall not attempt to frustrate the use of the King Edward VIII Linkspan or the Victoria Pier Linkspan by any other user or proposed user permitted by the DOI in accordance with clause 3.7.

### **3.18. Manx Resident Employment**

3.18.1. The IOMSPC shall ensure that:

- 3.18.1.1. not less than one half ( $\frac{1}{2}$ ) of the Executive Directors and not less than one half ( $\frac{1}{2}$ ) of the non-executive Directors of the Company from time to time shall be resident in the Isle of Man and the majority of the executive Directors shall work at the Company's offices in the Isle of Man ensuring local contribution input and consultation with the DOI, other Government Departments, Isle of Man businesses and residents;
- 3.18.1.2. the majority of all of its employees are resident for tax purposes in the Isle of Man (this requirement excludes employees who permanently work in ports outside of the Isle of Man);
- 3.18.1.3. the date on which the replacement Vessel for the current Ropax Vessel commences provision of the Services, all crew members serving on the back-up Vessel shall be engaged upon terms and conditions which provide (as a minimum) that the crew members shall be paid at a rate which is equivalent to (pro rata for hours worked) to the minimum wage applicable in the Isle of Man for the time being in force Provided that this provision shall only apply to any period that the crew member is working on a Vessel whilst it is providing services pursuant to the proposed Sea Services Agreement. All crew members serving on Vessels other than the back-up Vessel will be engaged on terms as agreed in the collective

bargaining agreements entered into between the IOMSPC, Unite Union, RMT Union and Nautilus Union.

3.18.2. Where practicable, the IOMSPC shall actively seek to recruit its employees on the Isle of Man.

### **3.19. Manx Community Assistance**

The IOMSPC will continue to provide discount or prize voucher assistance to organisations whose aims are to: (i) improve the quality of life of Manx residents; or (ii) assist Manx based or international charitable organisations or good causes.

### **3.20. DOI obligations**

The DOI agrees to:

3.20.1. maintain (fair wear and tear excepted) the structure of the King Edward VIII Linkspan and the Victoria Pier Linkspan;

3.20.2. maintain the navigational approach channel to the King Edward VIII Linkspan and the navigational approach channel to the Victoria Pier Linkspan each with associated manoeuvring area and each of six (6) metres depth below Douglas Harbour, and use its best endeavours to ensure the approach channel is clear of fishing gear obstructions;

3.20.3. maintain a berth of six and a half (6.5) metres depth in front of the King Edward VIII Linkspan and a berth of six and a half (6.5) metres depth in front of the Victoria Pier Linkspan;

3.20.4. maintain the Access Area (fair wear and tear excepted);

3.20.5. insure both the King Edward VIII Linkspan and the Victoria Pier Linkspan and use any insurance monies in their reconstruction.

3.20.6. To undertake a programme of refurbishment to the baggage area of the Sea Terminal Building in Douglas ("the Sea Terminal") and to those parts of the Sea Terminal which are used by IOMSPC customers.

## **4. COSTS**

4.1. This paragraph is legally binding.

4.2. Each Party is responsible for its own costs in connection with the proposed Sea Services Agreement, whether or not it proceeds (including, without limitation the preparation and negotiation of this heads of terms, the negotiation and drafting of the proposed Sea Services Agreement and any documents contemplated by it).

## **5. OTHER AGREEMENTS**

5.1. This paragraph is legally binding.

5.2. Where they exist, any agreements between the Parties will continue to apply to this heads of terms and shall remain in full force and effect and are not affected by anything in this heads of terms.

**6. RIGHTS AND REMEDIES**

6.1. This paragraph is legally binding.

6.2. This heads of terms is for the benefit of the parties to it and is not intended to benefit, or be enforceable by anyone else.

**7. GOVERNING LAW AND JURISDICTION**

7.1. This paragraph is legally binding.

7.2. The agreement constituted by this heads of terms shall be governed by the laws of Isle of Man and the Manx courts shall have exclusive jurisdiction for all matters arising under it.


**8. COMMENCEMENT AND SIGNATURE**

The agreement in this heads of terms will come into effect on the date above and will remain in effect until superseded by the proposed Sea Services Agreement, notice to terminate negotiations or other equivalent termination of the agreement in this heads of terms.

EXECUTED and DELIVERED by the DOI under the hand of the Minister for Infrastructure in the presence of:- :

Witnessed :  
C. Wilson :  
:  
:  
:

Signed

  
MINISTER OF INFRASTRUCTURE

EXECUTED and DELIVERED by the IOMSPC in the presence of:- :

  
J. WATT :  
:

Signed

  
Chief Executive





