

DATED

18th June

2019

DIFFERENCES BETWEEN
HEADS OF TERMS FOR THE SEA SERVICES AGREEMENT
APPROVED BY TYNWALD ON 20TH MARCH 2019

AND

THE SEA SERVICES AGREEMENT



Isle of Man
Government

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HM Attorney General's Chambers Report Differences between Heads of Terms and Sea Services Agreement

Introduction

I have been asked to provide a report to the Department of Infrastructure with the intention of the Department in turn providing the report to Members of Tynwald. My intention in producing this report as required by the Department is to detail the differences between the Heads of Terms for the Sea Services Agreement approved by Tynwald on 20th March 2019 ("the HOTs") and the Sea Services Agreement which was signed by the Department of Infrastructure ("DOI") and the Isle of Man Steam Packet Company ("the Company") on the 31st May 2019 ("the SSA").

The HOTs set out the basic and essential terms of the agreement and transaction which the DOI and the Company had agreed to and was an essential first step heading up to a fully legally binding contract. As agreed by Tynwald the HOTs formed the basis of the drafting of the SSA but, as would be expected, the terms of the HOTs have been expanded upon in the SSA to include more detail as to how many of the HOTs will work operationally. Additionally, the SSA includes some general provisions that were not included in the HOTs many of which are included in the former User Agreement ("UA") and which relate to issues such as insurance requirements and the operational allocation of slot times etc. There have also been added to the SSA what I would describe as standard contract clauses, some of which are taken from the UA and others of which are new, often resulting from changes in legislation since the date of the UA (e.g. dealing with Bribery, Freedom of Information and Data Protection).

Differences between HOTs and the SSA

Although the precise terms of the HOTs (expanded as necessary) have been incorporated into the SSA some slight variations have also arisen as a result of drafting requirements or further negotiation between the DOI and the Company. I have detailed these changes in the table included as a Schedule to this report but I would summarise the primary variations as follows:

Incorporation of additional documents

The HOTs anticipated that the Company would be granted use of the Access Area leading to the Linkspans in order to provide the Services, situate within the existing Access Area which is an area the Company currently uses for the provision of check-in services for its customers. This area was previously and at the time of the HOTs leased to the Company by means of a separate document ("the Check-In Lease") but it was decided that the provisions of this lease should be incorporated into the SSA for ease and convenience and to better protect both the DOI and the Company.

In order to effect this change, reference to the termination of the Check-In Lease has been included in clause 2.3 of the SSA; the right to use the existing Check-In units has been included at clause 4.1.3; and the amount of the Fixed Charge due under the SSA has been increased from £514,620.88 (as provided in the HOTs) to £515,377.88 due in the SSA to reflect the rent that was paid under the Check-In Lease.

Reference was made in the HOTs to the incorporation of both the then existing agreements relating to the arrangement for payment of harbour dues and to the fuel surcharge in the SSA. The SSA provides that the previous Harbour Dues Agreement and Fuel Surcharge



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Agreement will come to an end upon commencement of the SSA and the arrangements relating to these matters now form part of the SSA. It should also be noted that the amount of the Minimum Sum in relation to the payment of harbour dues has been increased from £1,047,932 stated in the HOTs to £1,091,526 in the SSA to reflect the fact that a further MRPI increase has been added since the date of the HOTs.

Additional deliverables in favour of the DOI

The DOI and the Company agreed to include several other provisions in the SSA which were not mentioned in the HOTs which are designed to provide additional reassurance to the DOI in relation to the provision of sea services.

The HOTs and the SSA both provide that the Company will have the exclusive use of the Linkspans subject to those exceptions set out in clause 3.7.1 of the HOTs (and incorporated in clause 12 of the SSA). The SSA has extended the provisions set out in the HOTs by permitting the DOI to allow other operators visiting the Island from overseas (i.e. not from British Isles) and for cruise liners visiting the Island to use the Linkspans (clauses 12.3.5 and 12.3.6 of the SSA respectively).

Clause 12.2 of the SSA also extends the powers of the DOI should the Company fail to provide the required Sea Services either as a result of a breach of the terms of the SSA or because of force majeure or industrial action. Whereas the UA permitted the DOI to allow another operator to use the Linkspans in these circumstances (subject to certain restrictions), this has been included and extended in the SSA to allow the DOI to require a lease of the Company's then current vessels in these circumstances. This gives the DOI the ability to ensure that vessels are available which are capable of using the required ports to operate the Sea Services if required.

It was identified that the UA previously and the HOTs did not include a provision to assist the DOI in any re-procurement of the Sea Services should the UA, or now the SSA, come to an end or be terminated. Similarly, the only remedy for a breach of the terms of the UA by the Company was termination which would not have been prudent in most instances in view of the lifeline nature of the Sea Services. The SSA therefore includes two new provisions which seek to address these commercial concerns. Clause 5.14 of the SSA requires the Company to engage in any re-procurement of the Sea Services by providing the DOI with such information and access as is reasonably required. Clause 14 of the SSA provides that the Company shall also be liable to suffer in terms of liquidated damages should they fail to meet the KPI Targets set by the SSA. This clause 14 should also be read in conjunction with Schedule 7 of the SSA from which it will be noted that in most instances, a failure to meet a KPI Target in any one year may result in the DOI electing to reduce the Term of the SSA by one year. The introduction of these KPI's better protects the DOI.

Following representations made by the Department for Enterprise ("DfE"), provision was also included at clause 5.12 of the SSA requiring the Company to provide space for Tourist Information at each of its facilities. Also, whereas the HOTs provided that consultation relating to the required Marketing Spend of the Company be made with the DOI (clause 3.14), this has been amended in Schedule 5 of the SSA to require that this consultation is to be made with the DfE.



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Other changes

The HOTs included provision whereby the Company transferred ownership of the Victoria Pier Linkspan to the DOI. It was always the intention that the Company would retain ownership of the Victoria Pier Gangway but the King Edward Gangway was not included in the HOTs. These gangways are moveable structures used to allow foot passengers to embark/disembark. In order to rationalise ownership and make clear the responsibilities for maintenance and replacement of the Gangways, it was agreed that the ownership of the King Edward Gangway would be transferred from the DOI to the Company. This is provided for in clauses 3.4 and 3.5 of the SSA.

In clause 3.5.3 of the HOTs it was agreed that the Company would pay all rates, taxes, assessments, duties, charges, impositions, outgoings and electricity costs in connection with the Linkspans (in addition to the required payment of the Fixed Charge). This has been amended under the SSA so as to provide that these payments are now included within the Fixed Charge (and they will therefore be made by the DOI).

The HOTs included at clause 3.8.3 a requirement that the Company make the back-up Vessel available for use in the provision of the Sea Services at any time on not more than 96 hours' notice if required to provide the Sea Services. For the period from the Commencement Date of the SSA until the date on which the New Vessel comes into service the Arrow will remain as the back-up Vessel and from the date that the New Vessel comes into service the Ben my Chree will then act as the back-up Vessel. Clause 5.2.4 of the SSA clarifies that the back-up Vessel will only be recalled in circumstances when the Ben my Chree or New Vessel is unavailable (i.e. it will not apply in instances where the Manannan or the replacement for the Manannan is unavailable).

The HOTs anticipated that the SSA would include a Strategic Reset provision (clause 3.11) which would allow the DOI to revisit the Sea Services provision and other requirements once in every five year period and enable the DOI to require changes to the Sea Service provision if necessary. This provision has been included and also extended in the SSA to now allow the Company to also request a review of certain requirements in the SSA should there be a change in legislation, the construction of infrastructure in the sea on a required route or a drop in passenger numbers which would materially impact upon the ability of the Company to provide the Sea Services as set out in the SSA (clause 13.8). The Company is only able to request these types of changes once in every three year period during the Term.

THE SCHEDULE

Differences between the HOTs and the SSA

Clause in HOTs	Clause in SSA	Comment
Not included	2.3	The provisions of the Licence for the Check-In Units has now been included in the SSA (the Check-In Area forms part of the Access Area)



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Clause in HOTS	Clause in SSA	Comment
Not included	2.4	This relates to the Fuel Surcharge Agreement. The detail of the Fuel Surcharge arrangements was included in the HOTS, this clause merely terminates the previous arrangements
Not included	2.5	This relates to the Harbour Dues Agreement. The detail of the Harbour Dues arrangements was included in the HOTS, this clause merely terminates the previous arrangements
Not included	3.4 & 3.5	Agreement subsequently reached for the transfer of ownership of the gangway used for the King Edward Pier from the DOI to the Company
Not included	4.1.3	The existing lease for the Check-In Units has been incorporated into the SSA (the Check-In Area forms part of the Access Area)
Not included	18.2	Provision taken from current UA. This applies in instances where the Company elects to sail to a Port which has not been approved by the DOI in accordance with the provisions of the SSA
3.5.1.1	5.1.1.1	The amount of the Fixed Charge has increased from £514,620.88 in the HOTS to £515,377.88 in the SSA. This is to incorporate the rent currently payable under the lease of the Check-In units
Not included	5.1.1.2	This relates to the payment of Harbour Dues. This was referred to in the HOTS (and is included in more detail in the SSA). This wording is from the current UA
3.5.3	Not included	The HOTS required the Company to pay rates, taxes, assessments, duties, charges, impositions, outgoings and electricity costs for the Linkspans in addition to the Fixed Charge. It is now agreed that these costs will be met by the DOI and included as part of the Fixed Charge (which remains the same amount as was included in the HOTS save for the increase to take into account the rent for the Check-In Units)
3.6	6	This relates to Harbour Dues. The only substantive difference is the amount of the "Minimum Sum" which was £1,047,932 in the HOTS and is £1,091,526 in the SSA. This is because there has been recent MCPI increase in this amount



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Clause in HOTS	Clause in SSA	Comment
Not included	12.1	This clause permits the Company to make a reasonable charge in the event that the DOI allows other users to use the Linkspan. This acknowledges that the Company pays the Fixed Charge for the use of the Linkspan and will need to supply staff to manage the service
3.7.1.1	12.2	More detail added to include the ability for the DOI to opt to use the Vessels to provide the Services during any period that the Company is in breach of subject to Force Majeure or Industrial Action (clause 12.2.2)
Not included	12.3.5	Additional ability for the DOI to allow the Linkspans to be used in connection with Vessels visiting the Island from overseas (i.e. not British Isles). This is in the current UA
Not included	12.3.6	Additional ability for the DOI to allow the Linkspans to be used in connection with cruise liners visiting the Island. This is included in the current UA (as amended)
Not included	12.5	Additional provisions as to how the third party use will be dealt with operationally. These provisions are from the current UA (amended as necessary)
Not included	12.6	Additional provisions as to how the third party use will be dealt with operationally. These provisions are from the current UA (amended as necessary)
3.8.3	5.2.4	The SSA clarifies that the backup Vessel is only contractually required to provide back-up Services for the New Vessel (and not for the Fast Craft or Fast Craft Replacement)
3.8.11	5.2.9	Clarification included that the Fast Craft Replacement may be leased as opposed to purchased
3.9.5	5.10	The HOTS require that the works of refurbishment are completed by the Commencement Date. In the SSA this has changed to a "best endeavours" requirement as the Company are concerned that although they will commence the work immediately after the Festival of Motorcycling, there may be a small amount of work outstanding at the Commencement Date if there are any delays
3.10.8.6	9	This relates to the Fuel Surcharge/Rebate. The periods for calculation have been unified at three months (in the HOTS it referred to three months and six months). This ensures greater accuracy in the figures used



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Clause in HOTS	Clause in SSA	Comment
3.11	13	See clause 13.8 – the Company now has the right to seek variations to the SSA in defined circumstances (change in legislation, construction of windfarms or similar and a material fall in customer numbers). The Company is only able to request such variations not more than once in every three years of the Term
3.14	Schedule 5	This relates to marketing expenditure. The HOTS referred to the Company consulting with the DOI whereas the SSA refers to the Company consulting with the DfE
3.15.2	5.11	This relates to website functionality. The prescriptive requirements in the HOTS apply to the first two years of the Term but flexibility is allowed after this period to reflect the rapid changes that occur in relation to IT provision
Not included	5.13.4	This allows the DOI to ask for information which relates to crossing times and punctuality
Not included	5.13.5	This allows the DOI to ask for information to assist them in answering parliamentary questions
3.17.3	10.4.1	This relates the approval of sailing schedules. Six weeks has been changed to one month
Not included	5.16.3	New provisions requiring the Company to spend not less than 4% of its wages bill (excluding employer pension contributions) on training, to provide training on-Island if possible and to offer at least one apprenticeship throughout the Term has been included
3.20.3	11.3	This has changed slightly. The depth requirement for Berth 1 is now 5 metres (with an obligation to increase the depth to 6.5 metres if required) and for Berth 5 it is 6.5 metres
3.20.4	4.2.1	There is no positive obligation on the DOI to maintain the Access Area but this will in practice remain a responsibility of the DOI as it retains ownership and only grants a right for the Company to use the same
Additional provisions	5.8	Slot times – this is taken from the UA (appropriately amended to reflect existing schedule)
Additional provisions	5.9	Insurance – this is taken from the UA (appropriately amended)



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Clause in HOTs	Clause in SSA	Comment
Additional provisions	5.12	This is a new provision requiring the Company to provide space for tourist information at its facilities
Additional provisions	5.14	This is a new provision requiring the Company to engage in any re-procurement of the Service upon termination/expiry of the SSA
Additional provisions	5.15	Indemnity – this is taken from the UA (appropriately amended)
Additional provisions	5.18	Branding – this is taken from the UA (appropriately amended)
Additional provisions	14	This is a new provision requiring the Company to be subject to LADs for defined breaches (see Schedule 7)
Additional provisions	15	Suspension of charges for force majeure etc. – this is taken from the UA (appropriately amended)
Additional provisions	16	Reinstatement and termination if prevented – this is taken from the UA (appropriately amended)
Additional provisions	17	Further suspension of prescribed charges – this is taken from the UA (appropriately amended)
Additional provisions	20 - 31	Standard contract clauses

Please note that this table only includes details of those clauses of the HOTs which are amended by the SSA (and not those where merely more detail has been added to clarify the operation of the relevant term in the HOTs)

Signed:


HM Attorney General.

Dated:

18th June 2019



