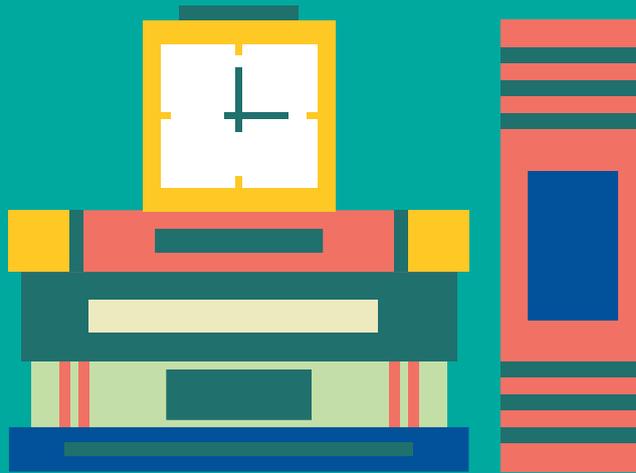




**European Bank**  
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# Introduction to direct agreements for public-private partnership projects

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## 1. Overview of direct agreements

1.1 A direct agreement is a contract between the lenders, the project company (private partner) and the procuring authority (public partner) in a public-private partnership (PPP) project. This type of agreement provides the lender with certain protections and remedies against the threat of the project company defaulting or the PPP agreement (PPPA) being terminated, which are not available or sufficiently detailed in either the credit agreement or security documents.

1.2 **Rationale.** The main purpose of a direct agreement in a PPP is to enhance lender security under limited-recourse finance structures, where debt repayment depends on the future revenues to be generated by the project. A direct agreement is designed to forestall a potential termination of the PPPA by the public partner. This is done to ensure the continuity of the project and its revenue generation. If the future revenue stream is lost as a result of the project's termination, at least a portion of the lenders' future debt could also be lost. To avoid this, compensation payments to the lenders will be required by the public partner upon termination. By taking action to prevent the termination of the project, direct agreements help avoid these potential losses and compensation payments. This safeguards the interests of the private partner, the public partner and even the wider public, as the project's completion will provide a public good.

1.3 **Mechanisms.** Where a threat of default or PPPA termination arises, direct agreements are accordingly used to:

- **Grant lenders step-in rights:** This allows them to take over the project company if the private partner defaults on its obligations. The lender can then attempt to fix any defaults (at least for a period of time) and so prevent the termination of the PPPA.
- **Grant lenders substitution rights (novation):** This allows them to replace the project company with a new entity (which will have to meet certain tests agreed with the public partner), to which the PPPA and other project contracts are then novated.
- **Outline consent requirements for collateral assignment:** Notice to, and the consent of the parties, is required to perfect the collateral assignment of contract rights, detailed in the credit agreement. This would grant the lender the right to assign the project agreement and other project contracts to itself or its nominees in the case of termination and/or for the enforcement of security.

- **Reinforce the lenders' rights to information and access:** Under the credit agreement the lenders will have extensive rights to information from the project company, including access to the company's records and project site. The direct agreement can provide the public partners consent to these rights, as well as agreement to provide the lenders with copies of any notices of default or intended termination that it may serve under the PPPA, which would then trigger the direct agreement "step-in" mechanism.

- **Waive or limit the procuring authority's rights of set-off, counterclaim or abatement against the project company:** This protects the project company from certain claims or damages that the procuring authority may have against it. This means the procuring authority cannot reduce or cancel payments to the project company, thus protecting the lenders' investments.

1.4 **Key benefits.** Signing a direct agreement is, therefore, usually one of the main conditions for the provision of limited recourse debt financing for PPP projects. It offers benefits for all parties involved, by:

- **Reducing the risks and costs of project failure:** The direct agreement gives lenders the opportunity to intervene in a distressed project, which means the project can be rescued, preventing project termination.
- **Enhancing the bankability and creditworthiness of the project:** The direct agreement provides lenders with contractual assurances and protections over the project assets and revenues, in addition to their security package.
- **Improving the efficiency and transparency of the project:** The direct agreement facilitates communication and cooperation among the lenders, the project company and the procuring authority.
- **Preserving the public interest and service delivery:** The direct agreement can thus help ensure that the project goes ahead and operates to the required standards.

## 2. Best practices and recommendations for direct agreements in PPP projects

2.1 The optimal design of a direct agreement depends on the specific features of each PPP project (such as the asset type, scope of services, payment mechanism and legal framework). Generally, however, direct agreements tend to resemble each other, conforming to certain standard terms. Common provisions that should be incorporated into the design of direct agreements include:

- **The definition and scope of the direct agreement:** To be effective, the parties need to be clearly identified and the direct agreement provisions need to be consistent with the key project documents. This includes the project agreement, the project contracts, the loan agreement and the security documents. This calls for careful structuring.
- **Step-in right procedures:** This refers to the conditions and procedures that lenders and the public partner must follow in relation to the exercise of step-in rights. Procedures include the events of default, the notice period, the cure period, the duration and the termination of the step-in right.
- **The terms and conditions for the assignment of the project agreement and other project contracts:** This includes the consent requirements, the novation formalities, the liability transfer and the fees.
- **Any waivers or limitations of the procuring authority's rights of set-off, counterclaim or abatement against the project company** (which need to be specified in the direct agreement).
- **Dispute resolution mechanisms.**

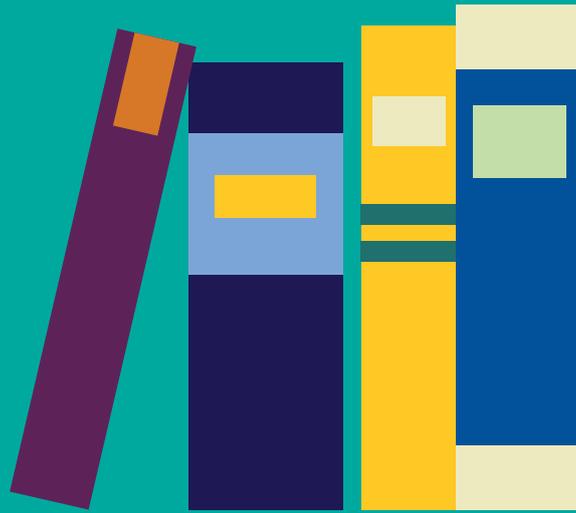
2.2 The negotiation of direct agreements should attempt to achieve balanced and fair outcomes for all parties, while ultimately promoting the viability, bankability and successful implementation of the PPP project. Factors facilitating the negotiation process include:

- **Timetables:** The development of a well-mapped project timetable that allows reasonable flexibility and contingencies in the case of unforeseen events.
- **Stakeholder engagement:** All the affected parties should be involved in the consultation and communication of the proposed PPP project and direct agreement.
- **Expert advice and assistance:** Including transaction advisers, legal counsels and technical consultants with relevant experience and knowledge of PPP projects and direct agreements.

2.3 Effective management of the credit agreement and project contracts can aid the successful implementation and performance of the PPP project, forestalling the need for direct agreement provisions to be evoked. Effective management practices include:

- **A contract management team:** Members should have clear roles and responsibilities and the required skills and resources to carry them out.
- **The monitoring and evaluation of the project progress and performance:** This can be done using key performance indicators, quality standards and reporting systems. This is also important for identifying the threat of project termination or credit default, activating the direct agreement.
- **Dealing with change and uncertainty:** This can be done through the application of agreed procedures and mechanisms for changes, force majeure and termination.
- **Clear dispute resolution mechanisms:** Aimed at seeking amicable solutions.

The following section will provide a model template (which should be tailored to a specific PPP project) of a direct agreement.



Chapter 11.  
Model direct agreement template

**THIS DIRECT AGREEMENT** (the “**Agreement**”) is dated [●] and made

**BETWEEN:**

(1) [●] (the “**Public Authority**”);

(2) [●], in its capacity as Agent for the Lenders under the Facilities Agreement (the “**Agent**”)<sup>1</sup>

(3) [●] (the “**Project Company**”)

the parties referred to in points (1)(3) above are together hereinafter referred to as the “parties”.

**WHEREAS:**

(A)The project company and the public authority have entered into an agreement for the [financing, design and construction] and [the provision of certain services in connection with]<sup>2</sup> operation of [●] (the “project” and the “project agreement”, accordingly).

(B)The lenders have agreed to make debt facilities available, on the terms set out in the facilities agreements, for the purpose of providing finance for the project.

(C)It is a condition precedent to the debt facilities being made available by the lenders that this agreement is executed by the parties hereto.

(D)The parties agree to set up mutual rights and duties arising out of their relations with the project company based on the project agreement and facilities agreements as appropriate. For this purpose, they enter into this agreement under the following terms and conditions.

**IT IS AGREED AS FOLLOWS:**

## 1. Definitions and interpretation

### 1.1 Definitions

Except as explicitly defined in this agreement, capitalised terms defined in the project agreement shall have the same meanings when used in this agreement. In this agreement:

“**Affiliate**” has the meaning given to it in the project agreement.

“**Appointed Representative**” means a representative that has been notified to public authority pursuant to a step-in notice.

“**Arbitration Procedure**” has the meaning given to it in Clause 28.3.

“**Business Day**” has the meaning given to it in the Project Agreement.

“**Commencement Date**” means the Effective Date of the Project Agreement.

“**Discharge Date**” means the date on which all the obligations of the Project Company under the Facilities Agreements have been irrevocably and fully discharged.

“**Dispute**” has the meaning given to it in Clause 10.5.

“**Effective Date**” has the meaning given to it in the Project Agreement.

“**Enforcement of Pledge**” has the meaning given to it in Clause 4.1.2(A) or 4.1.3(A).

“**Enforcement Transfer**” has the meaning given to it in Clause 4.1.1(A).

“**Equity**” has the meaning given to it in the Project Agreement.

“**Holding Company**” means a controlling entity pursuant to [●]<sup>3</sup>, as amended.

“**Facilities Agreement**” has the meaning given to it in the Project Agreement.

[“**ICC**” means the International Chamber of Commerce.]

“**Insurance Proceeds Account**” has the meaning given to it in the Project Agreement.

“**Law**” has the meaning given to it in the Project Agreement.

“**Lenders**” has the meaning given in the Facilities Agreements.

“**Lender Notice**” has the meaning given to it in Clause 9.2.

“**Loan Default**” means any of the “Events of Default” (as defined under the Facilities Agreements).

<sup>1</sup> Where the financing structure of the Project warrants the difference between the lists of Secured Parties and Lenders Secured Parties will nominate a Security Agent under the Security Documents. The Security Agent will need to be a party to this Agreement. If the Agent is a bank and acts as a Security Agent a wording needs to be added that it acts for itself also. If there is only one lending institution under the Project, the figure of an Agent may be superfluous and can be replaced with this lender.

<sup>2</sup> Insert if other parties will be responsible for the operation mandate in addition to the Project Company and its retained contractors.

<sup>3</sup> Reference usually to the Facilities Agreement or the sponsor support agreement.

“**No Liquid Market Notice**” has the meaning given to it in Clause 8.1.

“**Nominee**” has the meaning given to it in Clause 4.1.1(A).

“**Notice Period**” means:

(a) the period commencing on the date that the Public Authority receives a Lender Notice in accordance with the provisions of Clause 9.2 and ending one hundred and twenty (120) days thereafter unless the Public Authority and the Agent have agreed to extend such period; or

(b) the period commencing on the date the Agent receives a Public Authority Notice in accordance with the provisions of Clause 7.1 and ending 120 days thereafter unless the Public Authority and the Agent have agreed to extend such period,

**provided that**, in each case:

(i) notwithstanding the above, the Notice Period shall in any event end on any Security Enforcement Date occurring before the end of such period;

(ii) if there is a Dispute which is referred to a dispute resolution procedure in accordance with Clause 28 and is so referred prior to the end of the Notice Period (disregarding this paragraph (B)), the period shall be extended until the date falling twenty (20) days after resolution of such Dispute;

(iii) the Notice Period shall end if and to the extent the Public Authority and the Agent agree on a Rectification Plan prior to the date on which the Notice Period will expire otherwise and the provisions of Clause 11 shall apply in respect of such Rectification Plan;

(iv) the Notice Period shall end on the later of the Agent and the Public Authority agreeing that the underlying circumstances which gave rise to the Notice Period are not capable of remedy or rectification through a Rectification Plan or within one hundred and twenty (120) days after receipt by the Public Authority of a Lender Notice or by the Agent of a Public Authority Notice (as applicable) unless the Public Authority and the Agent have agreed to extend such period;

(v) the Notice Period shall end if the Agent gives notice to the Public Authority, for and on behalf of the Lenders, that the Lenders cannot, or do not wish to, agree a Rectification Plan; and

(vi) the Notice Period shall end if the circumstances set out in Clause 12 apply.

“**Occupation Permit**” has the meaning given to it in the Project Agreement.

“**Occupation Permit Longstop Date**” has the meaning given to it in Project Agreement.

“**Performance Point**” has the meaning given to it in the Project Agreement.

“**Petition**” has the meaning given to it in Clause 10.1.2.

“**Physical Damage Policies**” has the meaning given to it in Project Agreement.

“**Project**” has the meaning given to it in the Project Agreement.

“**Project Agreement**” means the agreement dated [●] and entered into between the Public Authority and the Project Company as relating to the [financing, design and construction and [the provision of certain services in connection with] operation] of the Project, amended, supplemented, replaced or novated from time to time.

“**Project Company Default**” has the meaning given to it in the Project Agreement.

“**Project Document**” has the meaning given to it in the Project Agreement.

“**Project [●]**” has the meaning given to it in the Project Agreement.

“**Proposed Replacement**” has the meaning given to it in Clause 3.1.1

“**Public Authority Notice**” has the meaning given to it in Clause 7.1.

[“**Public Procurement Procedure**” means the procedures for the legal and valid award of a non-concession project on the same or substantially similar terms to the Project Agreement, by the Public Authority or another public authority in [specify country of origin of the Public Authority], set out in applicable Law as the same may have been, or may from time to time be, amended or reenacted.]

“**Rectification Period**” means the period commencing on the date a Rectification Plan has been agreed in accordance with Clause 10.2 or settled in accordance with Clause 28 and ending on the earlier of:

(c) the date on which the Rectification Plan is implemented in accordance with its terms; and

(d) the date on which there is a material failure by the Project Company to comply with the Rectification Plan as agreed, in accordance with Clause 10 or settled in accordance with Clause 28,

**provided that**, in each case:

(i) notwithstanding the above, the Rectification Period shall in any event end on any Security Enforcement Date occurring before the end of such period; and

(ii) the Rectification Period shall end if the Public Authority and the Agent (on the instruction of the [Lenders / Secured Parties]) agree that the Rectification Plan is not capable of being successfully implemented in accordance with its terms.

**“Rectification Plan”** has the meaning given to it in Clause 10.2.

**“Refinancing”** has the meaning given to it in the Project Agreement.

**“Representative”** means:

(e) the Agent, any Lender and / or any of their Affiliates;

(f) an administrative receiver, receiver or receiver and manager of Project Company appointed under the Security Documents;

(g) an administrator of Project Company;

(h) a person directly or indirectly owned or controlled by the Agent and/or any Lender; or

(i) any other person approved by the Public Authority (such approval not to be unreasonably withheld or delayed).

[**“Secured Parties”** has the meaning given to it in the Facilities Agreements.]<sup>4</sup>

**“Security Documents”** has the meaning given to it in the Facilities Agreements.

**“Security Enforcement Date”** means the date on which:

(j) any action is taken by the Agent to enforce any of the Security Documents in accordance with their terms (other than enforcement of the Security by the Shareholders in favour of the Agent (on behalf of the [Lenders / Secured Parties]) with regard to their shareholding in the Project Company in accordance with Clause 4);

(k) any instructions are given by the required proportion of [Lenders / Secured Parties] in accordance with the Facilities Agreements to enforce the Security Documents (including in part only) to the Agent (other than any instructions to enforce the Security by the Shareholders in favour of the Agent (on behalf of the [Lenders / Secured Parties]) with regard to their shareholding in the Project Company in

accordance with Clause 4); or

(l) without prejudice to Clause 3.4, any Petition is presented in respect of the Project Company.

**“Security”** has the meaning given to it in the Facilities Agreements.

**“Shareholders”** has the meaning given to it in the Project Agreement.

**“Shareholder Agreements”** means any shareholders agreement, equity subscription agreement or other agreements entered into by the Shareholders in relation to the Project in connection with (i) the Equity; (ii) the Subordinated Debt; and/or (iii) their arrangements inter se in respect of the Project Company.

**“Statement”** has the meaning given to it in Clause 3.6.3.

**“Step-In Date”** means the date on which the Agent gives Public Authority a Step-In Notice.

**“Step-In Notice”** means the notice given by the Agent to Public Authority pursuant to Clause 13.1 stating that the Agent is exercising the step-in rights under this agreement and identifying the Appointed Representative.

**“Step-In Period”** means the period from the Step-In Date up to and including the earlier of:

(m) the Step-Out Date;

(n) the date of any transfer under Clause 16.1;

(o) the date of any termination for breach under Clause 14.1;

(p) the date of expiry of the Project Agreement.

**“Step-Out Date”** means the date falling 20 Business Days after the date of a Step-Out Notice.

**“Step-Out Notice”** means a notice from the Appointed Representative or the Agent to Public Authority pursuant to Clause 15.1.

**“Subordinated Debt”** has the meaning given to it in the Project Agreement.

**“Subsequent Transfer”** has the meaning given to it in Clause 4.1.1(B).

**“Sub-Contractor”** has the meaning given to it in the Project Agreement.

**“Suitable Substitute Contractor”** means a person or entity duly incorporated and existing under [applicable

<sup>4</sup> Hereinbelow refer to footnote 1 for explanation.

Law] / [the laws of [●]]<sup>5</sup> approved by the Public Authority as (such approval not to be unreasonably withheld or delayed):

(q) having the legal capacity, power and authority to become a party to the Shareholder Agreements and/or perform the obligations of a Shareholder under the Shareholder Agreements;

(r) having the appropriate qualifications, experience and technical competence and having the resources available to it (including committed financial and technical resources) which are sufficient to enable it:

(i) to perform the obligations of a Shareholder under the Shareholder Agreements; and

(ii) to perform or to procure the performance of the obligations of the Project Company under the Project Agreement; and

(s) not being subject to a sanction or embargo of the United States of America or the European Union or any member state of the European Union or whose shares are held in whole or in part, directly or indirectly by any entity that is subject to a sanction or embargo of the United States of America or the European Union or any member state of the European Union.

**“Termination”** means termination of the Project Agreement in accordance with clause [early termination and compensation on termination] of the Project Agreement.

**“Termination Date”** has the meaning given to it in the Project Agreement.

**“Termination Sum”** has the meaning given to it in the Project Agreement.

**“Tribunal”** has the meaning given to it in Clause 28.2.

**“Unrestricted Assets”** has the meaning given in Clause 17.2.

## 1.2 Interpretation

Save where the contrary is indicated, any reference in this Agreement to:

1.2.1 words importing the singular shall include the plural and vice versa;

1.2.2 any gender includes all other genders;

1.2.3 any person (including, without limitation, a [Lender / Secured Party]) shall be construed so as to include its and any subsequent successors,

transferees and assignees in accordance with their respective interests;

1.2.4 this Agreement or any other agreement or document shall be construed as a reference to this Agreement or, as the case may be, such other agreement or document as the same may have been, or may from time to time be, amended, varied, novated, replaced or supplemented;

1.2.5 the Law includes references to the respective Law as amended or superseded;

1.2.6 time of day shall be a reference to [applicable time] time

1.2.7 the words “herein”, “hereto” and “hereunder” refer to this agreement as a whole and not to the particular clause in which such word may be used

1.2.8 “party” means a party to this agreement and references to “parties” shall be construed accordingly

1.2.9 all monetary amounts are expressed in [applicable currency]

1.2.10 the word “includes” or “including” is to be construed without limitation

1.2.11 the obligations of any party under this agreement are to be performed at that party’s own cost and expense;

1.2.12 a “Clause” and a “Schedule” shall, respectively, be construed as a reference to a clause of or schedule to this Agreement;

1.2.13 the “winding up”, “dissolution”, “administration”, “insolvency” or “reorganisation” of a company or corporation and references to the “liquidator”, “assignee”, “administrator”, “receiver”, “administrative receiver”, “manager” or “trustee” of a company or corporation shall be construed so as to include any equivalent or analogous proceedings or, as the case may be, insolvency representatives or officers under the law of the jurisdiction in which such company or corporation is incorporated or constituted or any jurisdiction in which such company or corporation or, as the case may be, insolvency representative or officer carries on business including without limitation, the seeking of liquidation, winding up, reorganisation, dissolution, administration, arrangement, adjustment, protection or relief of debtors.

<sup>5</sup> A general approach would be not to restrict the law of incorporation of the Suitable Substitute Contractor, but in some instances, primarily revolving around the nature of the Project, the public side may be willing to impose a certain jurisdiction of incorporation.

### 1.3 Headings

Headings are for ease of reference only and shall not affect the construction or interpretation of this Agreement.

## 2. Effectiveness of the provisions of this agreement

2.1 Subject to Clause 2.2, this Agreement and the rights and obligations of the Parties thereunder shall come into effect on the date of this Agreement.

2.2 The Parties agree that the rights and obligations of each respective party set out in Clauses 3 to 12 (inclusive) and Clause 22 (No Set Off) shall take effect from (and not before) the Commencement Date.

## 3. Undertakings

3.1 The Parties agree that:

3.1.1 during a Notice Period the prior written approval of the Public Authority to any replacement Sub-Contractor or replacement Independent Engineer (a “**Proposed Replacement**”) to the extent required in accordance with the Project Agreement shall still be required;

3.1.2 in respect of any Proposed Replacement, the Agent will, or will cause the Project Company to, provide the Public Authority with:

- (A) certified copies of the Proposed Replacement’s most recent financial statements (and if available such financial statements for the three preceding financial years);
- (B) a certified copy of the Proposed Replacement’s constitutional documents;
- (C) details of the Proposed Replacement’s work history and services performed;
- (D) a copy of the proposed agreement with the Proposed Replacement prior to its execution.

3.1.3 all insurance proceeds received under the Physical Damage Policies established in connection with the Project shall:

- (A) be paid to the Insurance Proceeds Account;

(B) be applied to repair and reinstate the Project [●] in accordance with the Project Agreement;

3.1.4 this Agreement shall not affect any obligation of the Project Company under the Project Agreement to obtain future approval from the Public Authority regarding amendments to the existing Facilities Agreements or to any other agreement in relation to any future Refinancing.

3.2 The Public Authority shall, notwithstanding any terms of the Project Agreement:

3.2.1 following the receipt of written notice from the Agent stating that a Loan Default has occurred (such notice being conclusive evidence to the Public Authority only of the matters stated therein) and until further notice from the Agent, make any further payment of any monies due to the Project Company under the Project Agreement to the Agent to an account designated for such purposes by the Agent. Project Company acknowledges and consents to the obligations of Public Authority under this Clause;

3.2.2 following termination of the Project Agreement and prior to the Discharge Date, pay any Termination Sum or instalment of any Termination Sum payable by the Public Authority pursuant to the Project Agreement to the Agent to any account designated for such purposes by the Agent;

3.2.3 give notice (reasonably in advance of, or at the same time, as any notice or other communication is issued to the Project Company) to the Agent of any of the following events:

- (A) any notice or other communication issued to the Project Company in accordance with the Project Agreement;
- (B) any proposed step-in<sup>6</sup> [or other action<sup>7</sup> pursuant to clause [the Public Authority’s intervention right] of the Project Agreement], and the Public Authority shall provide to the Agent, together with such notice, (i) a detailed description of the reasons for the taking of such action and (ii) a detailed explanation for the rejection of any proposed remedial plan;
- (C) any proposed step-in into any agreements with the Sub-Contractors;
- (D) any proposed adjustment of the fixed rent under any of the Lease Agreements.

<sup>6</sup> Reference is to the government step-in event under the Project Agreement.

<sup>7</sup> Such actions may include the right of the Public Authority to step in to reduce the impact of an emergency which the Project Company is unable to handle, or in case the Project Company stops the operation of the object and does not cooperate to resume the operation, if the relevant regulation is provided by the Project Agreement.

3.3 The Project Company agrees that any payment made in accordance with Clause 3.2 shall constitute a complete discharge of the Public Authority's payment obligations to the Project Company to the extent of the amount actually credited to the account designated by the Agent in accordance with Clause 3.2.

3.4 The Public Authority shall not prior to the Discharge Date (or if earlier, the date on which the Agent has given its written consent to such exercise following a request by the Public Authority or otherwise) present a Petition.

3.5 The Public Authority agrees that in case of the insolvency of the Project Company or in the case of dissolution of the Project Company by liquidation or any analogous procedure the receivables and rights of the Public Authority against the Project Company (in part or in whole) in relation to the Project shall be satisfied (by way of enforcement of claims under the Project Agreement or otherwise) only after satisfaction of the receivables and rights of the Agent (including receivables and rights arising from its position as joint and several creditor with the [Lenders / Secured Parties]). Any amounts received by the Public Authority in violation of this Clause shall be immediately remitted to the account designed by the Agent.

3.6 The Public Authority shall:

3.6.1 following receipt of a written notice from the Agent, terminate the Project Agreement in accordance with the procedures set out in clause [early termination and compensation on termination] of the Project Agreement if:

(A) any of the Project Company Events of Default set out in clause [Project Company default] of the Project Agreement occurs;

(B) the Agent has served notice on the Project Company under the Facilities Agreement requiring repayment of all or part of the debt under the Facilities Agreement following a Loan Default or it has not been able to do so because the law did not permit service of such notice

3.6.2 and such Project Company Event of Default or Loan Default is, or the consequences of such Project Company Event of Default or Loan Default are, continuing for a period of not less than ninety (90) days from the date of the occurrence of such Project Company Event of Default or Loan Default, as applicable;

3.6.3 and within 10 days of:

(A) the receipt of a Step-in Notice served in accordance with this Agreement;

(B) the transfer referred to in clause 16.1 becoming effective; or

(C) the receipt of a request from the Agent,

provide the Agent with a statement of all amounts due and payable by the Project Company to the Public Authority under the Project Agreement and each relevant Project Document as of the date of such statement and a description (in reasonable detail) of the nature of all outstanding or unperformed non-monetary obligations (if any) of the Project Company under the Project Agreement and each relevant Project Document (each, a **"Statement"**).

## 4. Transfer of shares during enforcement

4.1 Without prejudice to any other rights or remedies of the [Lenders / Secured Parties] under the Security Documents:

4.1.1 if the Security Documents establish a security transfer of the shares in the Project Company:

(A) subject to the terms of the Security Documents, following a Loan Default and the issue of a Lender Notice, the [Lenders / Secured Parties] may (where permissible in accordance with the Law and the Security Documents) enforce security by transferring shares in the Project Company from the Shareholders to the Agent appointed under the Facilities Agreements or a nominee company (a **"Nominee"**) wholly owned and controlled by the [Lenders / Secured Parties] which satisfies the definition of a Suitable Substitute Contractor (an **"Enforcement Transfer"**);

(B) subject to the terms of the Security Documents, following a Loan Default and the issue of a Lender Notice and transfer under Clause 4.1.1(A) above, the Agent or the Nominee may (where permissible in accordance with the Law and the Security Documents) only transfer shares in the Project Company acquired by it pursuant to Clause 4.1.1(A) (a **"Subsequent Transfer"**) to a person satisfying the definition of a Suitable Substitute Contractor;

4.1.2 if the Security Documents establish a pledge over the shares or any other legal instrument with a similar effect in the Project Company:

(A) subject to the terms of the Security Documents, following a Loan Default and the issue of a Lender Notice, the [Lenders / Secured Parties] may (where permissible in accordance with the Law and the Security Documents) enforce security by transferring shares in the Project Company from the Shareholders to a person satisfying the definition of a Suitable Substitute Contractor (**"Enforcement of Pledge"**);

(B) the [Lenders / Secured Parties] and the Project Company shall ensure that this condition (to the extent permissible in accordance with the Law) permitting transfer will be contained in the relevant Security Document provided always that nothing contained in the relevant Security Document shall permit transfer of the shares in the Project Company to a person who is not a Suitable Substitute Contractor.

4.1.3 if the Security Documents establish a pledge over the enterprise of the Project Company or a significant part of such enterprise:

(A) subject to the terms of the Security Documents, following a Loan Default and the issue of a Lender Notice, the [Lenders / Secured Parties] may (where permissible in accordance with the Law and the Security Documents) enforce security by transferring such enterprise or significant part of it to a person satisfying the definition of a Suitable Substitute Contractor (“Enforcement of Pledge”);

(B) the [Lenders / Secured Parties] and the Project Company shall ensure that this condition (to the extent permissible in accordance with the Law) permitting transfer will be contained in the relevant Security Document provided always that nothing contained in the relevant Security Document shall permit transfer of such enterprise or significant part of it to a person who is not a Suitable Substitute Contractor.

4.2 In respect of any proposed Enforcement Transfer where this is to a Nominee other than the Agent, or any proposed Subsequent Transfer or Enforcement of Pledge, the Agent will provide the Public Authority with such information as may be reasonably necessary to decide whether the proposed transferee is a Suitable Substitute Contractor including:

4.2.1 certified copies of the proposed transferee’s most recent financial statements (and, if available, its financial statements for the three preceding financial years) or in the case of a special purpose company its opening balance sheet and the most recent financial statements of its Holding Company (and, if available, its Holding Company’s financial statements for the three preceding financial years);

4.2.2 a certified copy of the proposed transferee’s constitutional documents;

4.2.3 documents, in form and substance satisfactory to the Public Authority, evidencing that the proposed transferee would:

(A) meet the legal, financial, economic and technical criteria; and

(B) not be precluded from participating in the Public Procurement Procedure for any reason,

if the Project were to be re tendered in accordance with the Public Procurement Procedure;

4.2.4 details of the proposed transferee’s work history and services performed or, in the case of a special purpose company, details of what financial resources and technical expertise are available to it with details of the work history and services performed by the organisation and/or individuals providing such technical expertise.

4.3 If, within twenty (20) Business Days after the later of: (i) the date of service of notice of a proposed Enforcement Transfer, Subsequent Transfer or Enforcement of Pledge pursuant to Clause 4.1 (as the case may be), or (ii) the date of receipt of the information required pursuant to Clause 4.2, the Public Authority fails to respond to such notice, the approval of the Public Authority shall be deemed to have been given.

## 5. Consent to security

5.1 The Public Authority acknowledges notice of, and consents to the Security granted over the Project Company’s rights under this Agreement, the Project Agreement [and the Independent Engineer Agreement]<sup>8</sup> in favour of the [Lenders / Secured Parties] and/or the Agent. The Public Authority confirms that, to the best of its knowledge and as at the date of this Agreement, it has not received any notice of any other Security granted over the Project Company’s rights under this Agreement, the Project Agreement [or the Independent Engineer Agreement].

5.2 The Project Company and the Public Authority shall promptly cooperate in case their cooperation will be necessary for the repeated creation, in case the then existing Security might be considered invalid, ineffective or non-existent, of the Security in the scope approved by the Public Authority pursuant to Clause 5.1 or otherwise subsequently approved by the Public Authority, in favour of the [Lenders / Secured Parties] and/or the Agent.

5.3 The creation or maintenance of the security created in favour of the [Lenders / Secured Parties] and/or the Agent over the assets of the Project Company under the Security Documents shall not impose any additional obligations on the Public Authority not otherwise set out in the Project Agreement or this Agreement.

<sup>8</sup> Remove if not applicable.

## 6. Project company default

6.1 The Public Authority shall notify the Agent in writing as soon as reasonably practicable after becoming aware of the occurrence of a Project Company Default.

## 7. Public authority notice

7.1 If at any time the Public Authority intends to exercise any rights to:

7.1.1 terminate in accordance with clause [Project Company default] of the Project Agreement; or

7.1.2 without prejudice to Clause 3.4, present a Petition,

it shall give prior written notice of its intention to do so to the Agent (a “**Public Authority Notice**”).

7.2 The Public Authority shall specify in the Public Authority Notice:

7.2.1 the proposed date of Termination;

7.2.2 the nature and circumstances of the Project Company Default, in reasonable detail, with reference to the relevant provisions and clauses of the Project Agreement,

and not later than the date which falls 20 Business Days after the delivery of the Public Authority Notice, the Public Authority shall also provide details of:

7.2.3 all amounts due and payable to the Public Authority by the Project Company under the Project Agreement, and any other liabilities or obligations of the Project Company, in each case of which the Public Authority is aware (having made reasonable enquiry) on or before the date of issue of such Public Authority Notice and which remain unpaid at such date;

7.2.4 to the extent the Public Authority is aware (having made reasonable enquiry), the nature and the amount of any monetary claim, asserted by the Public Authority against the Project Company under the Project Agreement which arises from or in connection with the Project Company Default in respect of which such Public Authority Notice was served; and

7.2.5 to the extent the Public Authority is aware (having made reasonable enquiry), the amount of any payment obligation of the Project Company to the Public Authority the Public Authority reasonably

foresees will fall due during the applicable Notice Period (including any Rectification Period).

7.3 At the request of the Agent the Public Authority shall, and at its own discretion the Public Authority may, update or amend the information provided under Clauses 7.2.3, 7.2.4 and 7.2.5.

7.4 If the Public Authority Notice does not contain the information required by Clauses 7.2.3, 7.2.4 and 7.2.5 the applicable Notice Period shall be extended by the number of days equal to the period between the date of the Public Authority Notice and the date on which all such required information is provided to the Agent.

## 8. <sup>9</sup>No liquid market

8.1 At any time during the Notice Period the Agent may issue a written notice (the “**No Liquid Market Notice**”) to the Public Authority setting out the reasons why the [Lenders / Secured Parties] do not believe that a Liquid Market exists.

8.2 On or before the date falling fourteen (14) days after the date on which a No Liquid Market Notice is received by the Public Authority, the Public Authority shall notify the Agent of its opinion as to whether or not a Liquid Market exists. Where the Public Authority believes that a Liquid Market does exist, such notice shall set out the reasons for the Public Authority’s belief. If the parties do not agree whether or not a Liquid Market exists, then either party may refer the dispute to be determined in accordance with Clause 28.

8.3 If the parties agree or it is determined in accordance with Clause 28 that no Liquid Market exists, then there shall be deemed to be no Liquid Market for the purpose of the Project Agreement and the provisions of clause [procedure for determining the estimated market value of the Project Agreement]<sup>10</sup> of the Project Agreement shall apply.

8.4 [If any dispute relating to this Clause 8 has been submitted for determination in accordance with Clause 28:

8.4.1 the Public Authority shall not be entitled to retender the provision of the Project as long as it has not been determined in accordance with Clause 28 that the Liquid Market exists; and

8.4.2 the period of set out in clause [period within which the Public Authority shall notify the Project

<sup>9</sup> Remove this section if under the Project Agreement the termination payment does not factor the open market value of the Project into the calculation.

<sup>10</sup> This applies in case the Public Authority is not entitled to or elects not to retender the Project following the Project Agreement terminating through the Project Company’s default (if retendering is envisaged in the Project Agreement).

Company of its intention to retender the Project after the termination] of the Project Agreement shall be extended until the date falling [20 business days] after the determination under Clause 28.]

## 9. Lender undertaking and lender notice

9.1 [The Agent shall notify the Public Authority in writing as soon as reasonably practicable after becoming aware of the occurrence of a Project Company Default or a Loan Default (the “**Lender Notice**”).]<sup>11</sup>

9.2 [The Agent may give a written notice to the Public Authority at any time after a Lender becomes entitled after a Loan Default has occurred to exercise its remedies under a Facilities Agreement (whether or not a Public Authority Notice has been served).]<sup>12</sup>

9.3 The Agent shall specify in its Lender Notice reasonable details of the circumstances and nature of any Loan Default.

9.4 The Agent shall give a written notice to the Public Authority of the occurrence of any Security Enforcement Date contemporaneously with the action, instruction or Petition giving rise to such Security Enforcement Date and of any event arising or action taken pursuant to Clause 4.

9.5 Where the Agent serves a Lender Notice, the Public Authority shall provide to the Agent the same information as set out in Clauses 7.2.3 to 7.2.5 above.

## 10. Notice period

10.1 The Public Authority undertakes not to:

10.1.1 terminate the Project Agreement, pursuant to clause [the Project Company’s default] of the Project Agreement; or

10.1.2 present any petition for the administration, dissolution, any insolvency proceedings, restructuring or winding up or any analogous procedure of the Project Company (a “Petition”),

prior to the expiry of the Notice Period, provided that such undertaking shall not prevent the Public Authority from taking actions which are permitted under Clause 12 of this Agreement.

10.2 During any Notice Period the Public Authority and the Agent shall cooperate to establish jointly an

acceptable rectification plan setting out the proposed methodology to remedy the circumstances giving rise to, and described in, the Public Authority Notice or Lender Notice (as the case may be) (the “**Rectification Plan**”). The Agent shall submit a draft rectification plan to the Public Authority within sixty (60) Business Days of commencement of a Notice Period. Such draft Rectification Plan shall set out in detail the proposed timetable to implement the plan and must include:

10.2.1 all necessary actions, measures and provisions that must be taken to secure the ongoing and continuous construction and/or reconstruction works and the future continuation of the Project or the ongoing and continuous current or future operation and maintenance thereof, as the case may be, at all times in accordance with the provisions of the Project Agreement;

10.2.2 an obligation to make payment, no later than the Business Day falling on or immediately following the last day of the Notice Period, of all amounts:

(A) specified in the Public Authority Notice referred to in Clause 7.2 as may be updated in accordance with Clause 7.3;

(B) falling due to be paid during the Notice Period (including any Rectification Period);

10.2.3 any actions that must be implemented to remove the causes or to limit the consequences of the event that led to the Public Authority Notice or Lender Notice (as the case may be), along with an estimate of technical aspects of the work to be undertaken;

10.2.4 a summary of the estimated financing required to implement the Rectification Plan (and the manner in which this shall be provided) and to comply with the current obligations on the basis of the Project Agreement;

10.2.5 details of all claimable amounts the Public Authority owes the Project Company and all other unfulfilled obligations on the part of the Public Authority on the basis of the Project Agreement;

10.2.6 all other matters that the Public Authority and the Agent shall reasonably agree to be included in the Rectification Plan; and

10.2.7 the duration of the Rectification Period.

10.3 In the event that a Loan Default or a Project Company Default occurs prior to issue of the Occupation Permit, the Occupation Permit Longstop

<sup>11</sup> These undertakings are more commonplace in authority direct agreements entered into in relation to projects in developing countries where termination payments often cover not only 100 per cent of gross senior debt but may also include equity. In these scenarios authorities feel the need for a greater level of control over the Project Company performance.

<sup>12</sup> Remove if the Agent is required to serve such notice pursuant to the previous paragraph.

Date may be postponed and revised in accordance with and pursuant to the dates set out in the agreed Rectification Plan, provided that the revised dates shall not in any circumstances be more than twelve (12) months later than the previously applicable dates.

10.4 In the event that a Loan Default or a Project Company Default occurs on or after the date of issue of the Occupation Permit, the Rectification Period shall not be longer than six (6) months unless the Agent can demonstrate that a period of six (6) months is unreasonably short for the completion of the Rectification Plan.

10.5 If the Public Authority and the Agent are unable to agree an acceptable Rectification Plan, either party may refer any dispute arising in connection with establishing a Rectification Plan (a “Dispute”) to a dispute resolution procedure in accordance with Clause 28.

10.6 For the purposes of Clause 10.2 the Public Authority agrees that it shall not withhold its consent to any replacement Sub-Contractor proposed in a draft Rectification Plan [unless the proposed replacement Sub-Contractor or the proposed replacement Sub-Contract do not satisfy the requirements of the Project Agreement]<sup>13</sup>.

10.7 Within ten (10) Business Days of receiving the draft referred to in Clause 10.3, the Public Authority shall enter into consultations with the Agent on:

10.7.1 the draft Rectification Plan;

10.7.2 all other matters which the Public Authority or the Agent believe still have to be included in the Rectification Plan;

10.7.3 where relevant, the appointment of experts to assist them in preparing the Rectification Plan.

These consultations must be completed within twenty-five (25) Business Days.

10.8 The Project Company shall, when requested, cooperate fully in preparing and completing the Rectification Plan.

10.9 The Agent shall submit the proposed final Rectification Plan for approval to the Public Authority within twenty (20) Business Days after the conclusion of the consultations referred to in Clause 10.7.

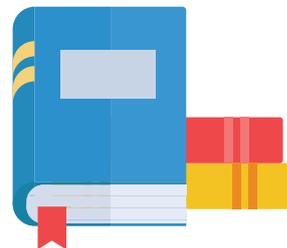
10.10 The Public Authority shall inform the Agent whether it has approved the Rectification Plan within twenty (20) Business Days of receipt of the Rectification Plan. The Public Authority may only withhold approval if the Rectification Plan is factually inaccurate or the Public Authority has reasonable grounds to believe the requirements of Clause 10.6 above have not been satisfied so as to enable the works referred to in Clause 10.2.3 to be completed and to otherwise fulfil the Project Company’s obligations pursuant to the Project Agreement. The Rectification Plan is, once approved, deemed to have been adopted on such approval date.

10.11 If the Public Authority does not inform the Agent whether it has approved the Rectification Plan within the period stipulated in Clause 10.10 above then the Public Authority is deemed to have approved the Rectification Plan.

10.12 Approval by the Public Authority of the Rectification Plan:

10.12.1 does not constitute an acceptance of any additional liability or obligation on the part of the Public Authority in respect of the Project;

10.12.2 does not affect the obligations of the Project Company on the basis of the Project Agreement and/or this Agreement, unless the Rectification Plan expressly deviates from the Project Agreement.



<sup>13</sup> Remove text in square brackets if the Project Agreement does not establish these requirements.

## 11. Rectification period and suspension of performance points

11.1 On and from the date on which a Rectification Plan is agreed pursuant to Clause 10.10, deemed to be approved pursuant to Clause 10.11 or settled pursuant to Clause 28 and throughout the Rectification Period, the Project Company shall continue with the performance of its obligations under the Project Agreement and shall comply with the Rectification Plan.

11.2 The Public Authority undertakes not to:

11.2.1 terminate the Project Agreement pursuant to clause [the Project Company's default] of the Project Agreement; or

11.2.2 present any Petition,

prior to the expiry of the Rectification Period, provided that such undertaking shall not prevent the Public Authority from taking actions which are permitted under Clause 12.

11.3 During the period after the Rectification Plan has been agreed or determined and during which a Rectification Plan is being complied with and following successful implementation of a Rectification Plan, Performance Points arising pursuant to schedules [●] (Public Authority's Services Requirements and Payment Mechanism) to the Project Agreement prior to the commencement of the Notice Period or Rectification Period shall not be taken into account during the Notice Period or Rectification Period but shall be taken into account after the end of the Notice Period or Rectification Period.

## 12. Preservation and revival of remedies

12.1 The Public Authority may terminate the Project Agreement if, in respect of the Project Company Default was the reason for the issuance of a Public Authority Notice, (i) on the termination date specified in the Public Authority Notice the grounds for that notice are continuing and have not been remedied or waived, and (ii) no Rectification Plan has been agreed between the Public Authority and the Agent pursuant to Clause 10.10, deemed to be approved pursuant to Clause 10.11 or settled pursuant to Clause 28.

12.2 The Public Authority may terminate, exercise its rights under the Project Agreement and/or present a Petition, at any time:

12.2.1 on the basis of any Project Company Default arising during a Notice Period or Rectification Period that

(A) is not the reason for initiating the Notice Period or Rectification Period (as the case may be), or

(B) is not set out in the Rectification Plan or violates the Rectification Plan (as the case may be),

in accordance with the terms of the Project Agreement;

12.2.2 after the end of the Rectification Period, if at that time the Rectification Plan has not been implemented in accordance with its terms.

12.3 Notwithstanding Clauses 10.1 and 11.2 (but without prejudice to Clause 3.4), the Public Authority may terminate, or exercise any of its rights under clause [early termination] of the Project Agreement and/or present a Petition, at any time if:

12.3.1 any amount referred to in Clause 7.2 or 7.3 above has not been paid to the Public Authority on or before the Business Day falling on or immediately following the last day of the Notice Period or any Rectification Period (as applicable); or

12.3.2 any amount referred to in Clause 7.2.5 has not been paid on or before the Business Day falling on or immediately following the last day of the Notice Period or any Rectification Period (as applicable);

12.3.3 amounts of which the Public Authority was not aware (having made reasonable enquiry) at the time of the Public Authority Notice or which were not known at the time of submission of the Rectification Plan, subsequently become payable and are not discharged on or before the later of:

(A) the date falling 20 Business Days after the date on which the liability for these amounts is notified to the Agent;

(B) the date falling 20 Business Days after the date on which the liability for these amounts falls due;

(C) the last day of the Notice Period; or

12.3.4 grounds arise during the Notice Period or Rectification Period in accordance with the Project Agreement unless such grounds are a direct and reasonably unavoidable effect of the Project Company Default serving the reason for the issuance of a Public Authority Notice or are waived pursuant to the Rectification Plan.

12.4 The Public Authority shall not terminate the Project Agreement during the Notice Period or any Rectification Period on grounds:

12.4.1 that the Agent has served a Lender Notice or enforced any Security Document, including any action taken under Clause 4; or

12.4.2 that arose prior to the commencement of the Notice Period of which the Public Authority was aware (having made reasonable enquiry) and whether or not continuing, unless:

(A) the grounds arose prior to the date of issue of the Occupation Permit, and such issue does not occur on or before the Occupation Permit Longstop Date, as the same may be revised in accordance with Clause 10.4;

(B) the grounds arose after the date of issue of the Occupation Permit, and neither the Agent nor the Project Company is using all reasonable endeavours (including implementation of any Rectification Plan) to remedy any breach of the Project Agreement that:

(i) arose prior to the Notice Period;

(ii) which is continuing (and capable of remedy);

(iii) which would have entitled the Public Authority to terminate the Project Agreement; or

(C) the grounds (whenever they first arose) did not give rise to any right to terminate until after the commencement of the Notice Period; or

12.4.3 arising solely in relation to the Project Company.

### 13. Representative

13.1 Subject to Clause 13.2 and without prejudice to the Agent's rights under the Security Documents, the Agent may give the Public Authority a Step-In Notice at any time:

13.1.1 during which a Project Company Event of Default is subsisting (whether or not a Termination Notice has been served); or

13.1.2 during the Notice Period.

13.2 The Agent shall give Public Authority not less than five business days' prior notice of:

13.2.1 its intention to issue a Step-In Notice;

13.2.2 the identity of the proposed Appointed Representative.

13.3 On the issue of the Step-In Notice, the Appointed Representative shall assume jointly with Project Company the rights of Project Company under the Project Agreement and thereafter, until the end of the Step-In Period Public Authority shall deal with the Appointed Representative and not Project Company.

13.4 The Public Authority shall grant to any Appointed Representative or Suitable Substitute Contractor as the case may be (and, as applicable, the grant of) rights equivalent to those granted to Project Company

under clause [the Lease of Project assets] of the Project Agreement.

### 14. Step-in period

14.1 Notwithstanding Clause 7, the Public Authority may terminate the Project Agreement if:

14.1.1 any amount referred to in Clause 7.2.3 above has not been paid to Public Authority on or before the Step-In Date; or

14.1.2 any amount referred to in Clause 7.2.5 has not been paid on or before the last day of the Notice Period;

14.1.3 amounts of which Public Authority was not aware (having made proper enquiry) at the time of the Public Authority Notice, subsequently become payable to the Public Authority and are not discharged on or before the date falling 20 Business Days after the date on which the liability of Project Company for these amounts is notified to the Agent or if later the Step-In Date; or

14.1.4 grounds arise after the Step-In Date in accordance with the terms of the Project Agreement provided that Performance Points that arose pursuant to schedules [●] (Public Authority's Services Requirements and Payment Mechanism) to the Project Agreement prior to the Step-In Date shall not be taken into account during the Step-In Period but such Performance Points (to the extent applicable under the terms of the Project Agreement) shall be taken into account after the Step-Out Date.

14.2 The Public Authority shall not terminate the Project Agreement during the Step-In Period on grounds:

14.2.1 that the Agent has served a Step-In Notice or enforced any Security Document; or

14.2.2 arising prior to the Step-In Date of which Public Authority was aware (having made proper enquiry) and whether or not continuing at the Step-In Date unless:

(A) the grounds arose prior to the [Project Operation Date], and the [Project Operation Date] does not occur on or before the date 180 Days after the date on which Public Authority would have been entitled to terminate the Project Agreement for non-completion of the Works under clause [Project Company default] of the Project Agreement; or

(B) the grounds arose after the [Project Operation Date], and neither the Appointed Representative nor Project Company is using all reasonable endeavours (including implementation of any remedial programme) to remedy any breach of the Project

Agreement that:

- (1) arose prior to the Step-In Date;
  - (2) which is continuing (and capable of remedy);
  - (3) which would have entitled Public Authority to terminate the Project Agreement; or
  - (C) the grounds (whenever they first arose) did not give rise to any right to terminate until after the Step-In Notice; or
- 14.2.3 arising solely in relation to the Project Company.

## 15. Step-out

15.1 The Agent or the Appointed Representative may at any time during the Step-In Period deliver to Public Authority a Step-Out Notice which shall specify the Step-Out Date.

15.2 On expiry of the Step-In Period:

15.2.1 the Appointed Representative will be released from all of its obligations and liabilities to Public Authority under the Project Agreement arising prior to the end of the Step-In Period and rights of the Appointed Representative against Public Authority will be cancelled; and

15.2.2 the Public Authority shall no longer deal with the Appointed Representative and shall deal with Project Company in connection with the Project Agreement.

15.3 The Project Company shall continue to be bound by the terms of the Project Agreement, notwithstanding the occurrence of a Step-In Notice, a Step-In Period, a Step-Out Notice, Step-Out Date, any action by the Agent or Appointed Representative or the Lenders and/or any provision of this Agreement.

## 16. Novation

16.1 Subject to Clause 16.2, at any time:

16.1.1 after a Project Company Event of Default has occurred; or

16.1.2 during the Step-In Period,

the Agent may, subject to Clause 16.2, on not less than 20 Business Days' prior notice to Public Authority and any Appointed Representative, procure the transfer of Project Company's rights and liabilities under the Project Agreement to a Suitable Substitute Contractor in accordance with the provisions of Clause

16.2 Public Authority shall notify the Agent as to whether any person to whom the Agent proposes to transfer Project Company's rights and liabilities under the Project Agreement is a Suitable Substitute Contractor, on or before the date falling 20 Business Days after the date of receipt from the Agent of all information reasonably required by Public Authority to decide whether the proposed transferee is a Suitable Substitute Contractor.

16.3 Public Authority shall not unreasonably withhold or delay its decision on whether the proposed transferee is a Suitable Substitute Contractor. In the absence of a notification from the Public Authority within the period of time specified in Clause 16.2 a person to whom the Agent proposes to transfer Project Company's rights and liabilities under the Project Agreement shall be deemed a Suitable Substitute Contractor.

16.4 Upon the transfer referred to in Clause 16.1 becoming effective:

16.4.1 Project Company and Public Authority will be released from their obligations under the Project Agreement to each other (the discharged obligations);

16.4.2 the Suitable Substitute Contractor and Public Authority will assume obligations towards each other which differ from the discharged obligations only in so far as they are owed to or assumed by the Suitable Substitute Contractor instead of Project Company;

16.4.3 the rights of Project Company against Public Authority under the Project Agreement and vice versa (the discharged rights) will be cancelled;

16.4.4 the Suitable Substitute Contractor and Public Authority will acquire rights against each other which differ from the discharged rights only in so far as they are exercisable by or against the Suitable Substitute Contractor instead of Project Company;

16.4.5 any then subsisting ground for termination of the Project Agreement by Public Authority shall be deemed to have no effect and any subsisting Public Authority Notice shall be automatically revoked;

16.4.6 the Public Authority shall enter into a direct agreement with the Suitable Substitute Contractor and a representative of Lenders lending to the Suitable Substitute Contractor on substantially the same terms as this agreement;

16.4.7 any Performance Points that arose pursuant to schedules [●] (Public Authority's Services Requirements and Payment Mechanism) to the Project Agreement prior to that time shall not be taken into account in determining whether a Project Company Event of Default has occurred.

16.5 Public Authority shall act reasonably in relation to consenting to any request by the Agent to effect a share transfer rather than a novation under this Clause 16, and in such circumstances, the provisions and process set out in this Agreement shall be complied with to the extent possible.

## 17. Miscellaneous

17.1 Subject to the effectiveness provisions set out in Clause 2, this Agreement shall commence on the date hereof and shall continue in full force and effect until the Discharge Date.

17.2 On the Termination Date, the Agent acting on behalf of the [Lenders / Secured Parties] agrees that, notwithstanding the terms of the Project Agreement and Security Documents, the Public Authority may exercise its rights to have transferred to it or its nominee (or to have any security assigned to it or its nominee in respect of) any assets in the possession of the Project Company (or other parties specified in the Project Agreement) that may be required by the Public Authority, its nominee, or a replacement successor Project Company for the delivery of the Project after termination of the Project Agreement (the “**Unrestricted Assets**”). [On or following the Termination Date, the Agent will not exercise or seek to exercise any enforcement rights, and shall, on or before the date any Unrestricted Assets are transferred to the Public Authority or its nominee, as the case may be, release its security over them.]

17.3 [On the Expiry Date, the Agent, acting on behalf of the [Lenders / Secured Parties] shall release or assign to the Public Authority or its nominee any security granted in its favour over any Unrestricted Assets which have not previously been released, assigned or transferred to the Public Authority or its nominee, as the case may be.]<sup>14</sup>

17.4 The Project Company is a party to this Agreement and acknowledges and consents to the arrangements set out herein and agrees to observe the provisions of this Agreement at all times and not do or omit to do anything that may prevent any other party from, or prejudice any other party in, enforcing its rights under this Agreement. The Project Company acknowledges that, for the avoidance of doubt, the conclusion of this Agreement shall not affect its obligations of due and proper performance of the Project Agreement.

17.5 All costs and expenses arising in connection with the preparation, preservation or enforcement of this Agreement shall be borne by the Project Company.

17.6 Notwithstanding clause [the prevalence of the Project Agreement over other project documents, if applicable] of the Project Agreement, if there is any conflict or inconsistency between the provisions of this Agreement and the provisions of the Project Agreement, the provisions of this Agreement shall prevail.

17.7 The Public Authority hereby acknowledges that it has received copies of the Facilities Agreements and Security Documents and is aware of their terms, as well as (i) the structure of the Project accounts and (ii) the insurance coverage, in each case of (i) and (ii) required pursuant to clauses [clauses relating to Accounts and Insurance] of the Facilities Agreement. The Project Company shall provide the Public Authority with copies of any additional agreements to the Facilities Agreements entered into between the Project Company and the Lenders.



## 18. Representations and warranties

18.1 The Public Authority represents and warrants to the Project Company and the Agent (for the benefit of the [Lenders / Secured Parties]) that:

18.1.1 it has the power to enter into and perform, and has taken all action necessary to authorise the entry into, performance and delivery of this Agreement, the Project Agreement and any relevant Project Document;

18.1.2 each of this Agreement, the Project Agreement and any relevant Project Document is its legal and binding obligation (subject to applicable bankruptcy laws), and does not conflict with any law or agreement to which it is a party and that it has obtained all consents and authorisations required to be obtained by it in connection with the execution and delivery of this Agreement, the Project Agreement and each relevant Project Document and the performance by it of its obligations thereunder and such consents and authorisations are in full force and effect, are final and not subject to appeal and/or renewal and are held in its name;

<sup>14</sup> In most cases Lenders prefer to keep the security until the termination payment. At balance, the parties may agree to have security released and termination payment procured on the same date.

18.1.3 the Project Agreement constitutes sufficient legal basis for the Public Authority to make the budgetary funds allocations in each respective [annual] budget law in connection with the performance of its obligations under the Project Agreement and this Agreement;

18.1.4 in any proceedings (or measures taken in connection with the enforcement of rights) taken in [specify country of origin of the Public Authority] in relation to this Agreement, it shall not be entitled to claim for itself or any of its assets immunity from suit, execution, attachment or other legal process (other than that set out by the Law);

18.1.5 its execution of this Agreement constitutes, and its exercise of its rights and performance of its obligations hereunder will constitute, private and commercial acts done and performed for private and commercial purposes.

18.2 The Agent represents and warrants to the Public Authority and the Project Company that:

18.2.1 it has the power to enter into and perform, and has taken all action necessary to authorise the entry into, performance and delivery of this Agreement and any relevant Project Document; and

18.2.2 each of this Agreement and any relevant Project Document is its legal and binding obligation (subject to applicable bankruptcy laws), and does not conflict with any law or agreement to which it is a party and that it has obtained all consents and authorisations required to be obtained by it in connection with the execution and delivery of this Agreement and each relevant Project Document and the performance by it of its obligations thereunder and such consents and authorisations are in full force and effect, are final and not subject to appeal and/or renewal and are held in its name.

18.3 The Project Company represents and warrants to the Public Authority and the Agent (for the benefit of the [Lenders / Secured Parties]) that:

18.3.1 it has the power to enter into and perform, and has taken all action necessary to authorise the entry into, performance and delivery of this Agreement, the Project Agreement and any relevant Project Document;

18.3.2 each of this Agreement, the Project Agreement and any relevant Project Document is its legal and binding obligation (subject to applicable bankruptcy laws), and does not conflict with any law or agreement to which it is a party and that it has obtained all consents and authorisations required to be obtained by it in connection with the execution and delivery of this Agreement, the Project Agreement and each relevant Project Document and the performance by it

of its obligations thereunder and such consents and authorisations are in full force and effect, are final and not subject to appeal and/or renewal and are held in its name.

## 19. No assignment

19.1 Except as expressly provided herein, no party to this Agreement shall assign or transfer any part of its respective rights or obligations under this Agreement.

19.2 The Agent may assign or transfer its rights and obligations under this Agreement to a successor Agent appointed in accordance with the relevant Facilities Agreements without the consent of the other Parties to this Agreement.

## 20. No waiver

20.1 No failure or delay by either Party in exercising any right under this Agreement shall operate as a waiver thereof or prejudice any other or further exercise by such Party of any of its rights or remedies under this Agreement. The rights and remedies under this Agreement may be exercised as often as necessary and are cumulative and not exclusive of any rights or remedies provided by law.

## 21. Counterparts

21.1 This Agreement may be executed in any number of counterparts, all of which when taken together shall constitute one and the same instrument.

## 22. No set off

22.1 All amounts payable under this Agreement shall be paid without set off or deduction.

## 23. Notices

23.1 Except as otherwise expressly provided in this Agreement, all notices or other communications which are required or permitted hereunder shall be in writing and sufficient if delivered personally or sent by registered or certified mail or fax addressed as follows:

23.1.1 if to the Public Authority:

Address: [●]  
Attention: [●]

Email: [●]  
Fax No.: [●]

23.1.2 if to the Project Company:

Address: [●]  
Attention: [●]  
E-mail: [●]  
Fax No.: [●]

23.1.3. if to the Agent:

Address: [●]  
Attention: [●]  
E-mail: [●]  
Fax No.: [●]

23.2 Each notice shall be in the [English] language and shall be deemed delivered upon receipt.

23.3 Any party may by notice of at least 15 days to the other party change the address and/or other contact details set out above to which such notice and communications addressed to it are to be delivered or mailed.

## 24. Partial invalidity

24.1 If, at any time, any provision of this Agreement is or becomes illegal, invalid or unenforceable in any respect under any law of any jurisdiction, neither the legality, validity or enforceability of the remaining provisions nor the legality, validity or enforceability of such provision under the law of any other jurisdiction will in any way be affected or impaired.

## 25. Amendment

25.1 Changes and amendments to this Agreement shall be made in writing.

## 26. Effect of breach

26.1 Without prejudice to any rights a Party may otherwise have, a breach of this Agreement shall not by itself give rise to a right to terminate the Project Agreement.

## 27. Third party rights

27.1 It is agreed for the purposes of the [Contracts (Rights of Third Parties) Act (Cap 53B)] that this agreement is not intended to, and does not, give to any person who is not a party to this agreement any rights to enforce any provisions contained herein except for any person to whom the benefit of this agreement is assigned or transferred in accordance with this Agreement.

## 28. Governing law and arbitration

### Governing law

28.1 This Agreement has been executed in the English language. The Agreement, including the arbitration agreement at Clause 28.2 and any non-contractual obligations is governed by the Law of [●].

### Arbitration

28.2 [All disputes shall be resolved in accordance with terms equivalent (mutatis mutandis) to the Dispute Resolution Procedure as set out in the Project Agreement. The parties shall co-operate to facilitate the proper, just, economical and expeditious resolution of any and all such disputes which arise under this agreement.]

OR

28.3 [Any Party may submit the dispute to arbitration under the [ICC Rules of Arbitration]. Any arbitration procedure initiated in accordance with this Clause 28.3 (the “**Arbitration Procedure**”) shall be conducted with the participation of an arbitration tribunal consisting of three arbitrators (the “**Tribunal**”), one being nominated by the Public Authority, one by the Agent. The third arbitrator shall be appointed by the other two arbitrators and shall act as Chairperson. The decision of the Tribunal shall be final and binding and not appealable.

28.4 The place of arbitration shall be [●] and the language of the arbitration shall be [English].

28.5 The Tribunal shall apply the terms of this Agreement.

28.6 The Tribunal is entitled, within the scope of a pending legal dispute, to make decisions for interim measures.]

**IN WITNESS** whereof this Agreement has been entered into as a Deed the day and year first above written.

## Signatories

**PUBLIC AUTHORITY**  
**SIGNED as a DEED by**  
**[●] as the Public Authority**

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**Name:**  
**Title:**

**SECURITY AGENT**  
**SIGNED as a DEED by**  
**[●] as the Agent**

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**Name:**  
**Title:**

**PROJECT COMPANY**  
**SIGNED as a DEED by**  
**[●] as the Project Company**

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**Name:**  
**Title:**