



NEW MANGALORE PORT TRUST

No.10/62/GNL/CE(C)/2016-17/TS

13.02.2017

Subject: Submission of Claims regarding 75% of the Arbitral
Award Amount -reg.

Dear Sirs,

This is regarding the payment of 75% of the Arbitral Amount in terms of the decision taken by the Cabinet Committee on Economic Affairs (CCEA). Please find enclosed Annex-A in which you are required to submit the information immediately to the NMPT along with the supporting documents of your claim. Please find attached the two documents in this behalf i.e. :

- (i) Activities & Timelines for Action on the subject;
 - (ii) **Format-A** in which the claim is to be submitted to the NMPT
2. Please appreciate that the process to validate the amount for which you have to obtain the Bank Guarantee can be completed by the NMPT only after we receive the information from you in the prescribed format.
3. I am also attaching copies of the following documents for ready reference.
- (i) SOP issued by the NITI Aayog for processing the claims;
 - (ii) SOP for the Arbitral Award Escrow Account Mechanism;
 - (iii) Template for the Bank Guarantee
4. The documents at (ii) and (iii) above have been vetted by the department of Financial Services in consultation with the Indian Banks Association.

Yours sincerely,

Sd/-

(P.C. PARIDA)

Chairman

Format for intimation to NMPT for payment of 75% of the Arbitral Award

Sr. No.	Subject	Particulars
1.	Name of the Project	
2.	Name of the concessionaire/contractor	
3.	Date & year of Award	
4.	Amount awarded by the Arbitral Tribunal	
5.	Rate of interest awarded by the Arbitral Tribunal	
6.	Claim towards interest amount up to <date>-----	
7.	Total amount of pay – out Claim (4+6)	
8.	75% of Arbitral award claim (pay-out amount to be released by NMPT)	
9.	Interest amount for which on Sr. No. 8 calculated at the same rate of interest as awarded by the Tribunal (for a period of one year)	
10	Total amount for which the Bank Guarantee is to be furnished (8+9)	
11	Completion of documentation: 1. Bank Guarantee of the amount as mentioned under Sr. No.10 <hr/> 2. Opening of the Arbitral Award Escrow Account <hr/> 3. Arbitral Award Escrow Account Agreement; and <hr/> 4. Unconditional acceptance of the SOP	

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Signature & Seal of the authorised representative with date

Note: Please enclose all supporting documents including copy of Arbitral Award also indicating the present status of case challenged in court

Measures to revive the Construction Sector:

Release of 75% of the Arbitral Award to Contractors /Concessionaires

ACTIVITIES & TIMELINES

Sr. No.	Activity	Timeline	Responsible Division (NMPT)
1.	Contractors/Concessionaires to inform NMPT about the pay-out claim on account of the Arbitral Award as per Format-A enclosed along with the supporting documents please send your communication addressed to the nodal officers (given below) of NMPT	T	Legal Division
2.	NMPT to verify and validate the claim amount and inform the contractors/Concessionaire (both by letter and email) about the amount of Bank Guarantee to be obtained/furnished by him as per Format-B enclosed	T+5 Working days	
3.	The Contractors/Concessionaire To give his acceptance of the pay-out amount as communicated by the Authority (Legal Division, NMPT) for release of 75% of the Total eligible pay-out amount +amount of interest on such amount, and Furnish (i) the Bank Guarantee valid for one year for the requisite amount (ii) Arbitral Award Escrow Account Agreement and (iii) unconditional acceptance of the SOP (Standard format uploaded on NMPT website)	T	
4.	NMPT to verify the Bank Guarantee Arbitral Award Escrow Account Agreement and (iii) unconditional acceptance of the SOP. The NMPT to deposit the amount in the Arbitral	T+5	

	Award Escrow Account opened by the Contractors /Concessionaire	Working days	
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Nodal Officers of NMPT		
1.	Secretary New Mangalore Port Trust Administration Offices, Panambur, Mangalore, Karnataka – 575 010	Email Id: secy@nmpt.in/ nmptsecretary@gmail.com
2.	FA&CAO New Mangalore Port Trust, Administration Offices, Panambur, Mangalore, Karnataka – 575 010	Email Id: facao@nmpt.gov.in / fa@nmpt.in

**Standard Operating Procedure (SOP) for release of payments to the Contractors
in terms of CCEA decisions – NITI O.M. dated 05.09.2016**

Background:

1. Pursuant to the decisions by the Cabinet Committee on Economic Affairs (CCEA) for revival of the Construction Sector, the NITI Aayog had issued O.M. No.14070/14/2016-PPPAU dated 5th September 2016 titled “**Measures to revive the Construction Sector – reg.**” containing the decisions for implementation by all the concerned Ministries / Departments / PSUs. As per the decision taken by the CCEA, cases where the Arbitration Tribunals have passed orders in favour of the Contractors / Concessionaires in arbitral proceedings and such awards/orders have been further challenged by the government agencies in courts of law, all the works executing agencies are required to pay an amount equal to 75% of the total pay-out (i.e. Arbitral Award amount including the interest payable as per such Award, if any) should be released to the Contractors/Concessionaires against a Bank Guarantee without prejudice to the rights and stand of the Agency and subject to the final order of the court in the matter under challenge. The OM further stipulates that in case the matter under legal challenge is decided in favour of the works executing agency (the Departments/PSUs are referred to as the ‘Agency’ throughout the SOP), it would be entitled to recover the said amount along with appropriate interest.
2. The process of implementation of the above decision of the CCEA needs to be laid down through a Standard Operating Procedure. While each of the Ministries / Departments / PSUs is free to evolve its own SOP for smooth implementation of the decision taken by the CCEA, a suggested framework of the SOP is given hereinafter, which may be used by the Ministries/Departments/PSUs with or without any amendments therein. The following paragraphs detail out the Standard Operating Procedure (SOP) to be followed by National Highways Authority of India (hereinafter referred to as “**the Authority**”).
3. **Applicability in case of projects of the Authority:**

Applicable to all projects of the Authority, where the Concessionaire / Contractor and the Authority have entered into a Concession Agreement

/Construction Contract /Engineering Procurement Commissioning Contract for a PPP/EPC project (hereinafter referred to as “**the Project**”), in which the

Arbitral Tribunal has passed the Arbitral Award in favour of the Concessionaire/Contractor and the Authority has challenged the Arbitral Award.

4. Steps required to be taken regarding switching over to the amended Arbitration Act:

- 4.1 In cases where the Arbitration proceedings are still under process (unless the same are at final stages) under the provisions of the pre-amended Arbitration Act, the Authority would send a communication (under acknowledgement) to the Contractor / Concessionaire to give their consent within the period specified therein to switch over to the amended provisions of the Arbitration Act;
- 4.2 Where the Contractor/Concessionaire gives his consent to such a proposal, take up the matter with the Arbitration Tribunal for switching over to the conduct of proceedings under the amended Arbitration Act.
- 4.3 In matters where the Contractor/Concessionaire do not respond to such a communication within the specified period or decline to give their consent, a list of all such parties shall be maintained for reporting under the Action taken Report (ATR).

5 Steps required for release of 75% of the total eligible Payout amount:

Send a communication (under acknowledgement) to the eligible Contractor/Concessionaire informing him about the details of the total payout obligation in terms of the CCEA decision, and requiring him to open an Escrow account and furnish Bank Guarantee for the purpose within a period specified in such communication. Since completion of these formalities may take some time, the Contractors/Concessionaires may be initially given time of 30 days to do the needful, which may be considered for extension based on requests/merits of each case.

5.1 Arbitral Award Escrow Account:

- (i) A separate designated Escrow Account (hereinafter referred to as “**the Arbitral Award Escrow Account**”), shall be opened and established by the Concessionaire/Contractor in accordance with Arbitral Award Escrow Account Agreement

(ii) Arbitral Award Escrow Account Agreement shall include 4 (four) parties viz., (a) the Concessionaire /Contractor, (b) the Authority, (c) Arbitral Award Escrow Bank and (d) Lenders' Representative.

(iii) The Concessionaire / Contractor shall bear all expenses on establishment of the Arbitral Award Escrow Account with respect to opening and operation of the Arbitral Award.

5.2 Bank Guarantee:

(i) Arbitral Award amount is the amount for which the Award has been announced by the Arbitral Tribunal. In case the Tribunal has also awarded payment of interest on such amount till the date of payment, such interest amount together with the Award amount shall constitute the total eligible '**Payout Amount**'. The Authority is liable to pay 75% of such 'Payout Amount' against the Bank Guarantee of the equivalent amount.

(ii) The Authority shall require the Contractor/Concessionaire to furnish the Bank Guarantee for the 75% of the Payout Amount and appropriate interest amount on such amount for a period of one year. These Bank Guarantee shall roll over annually and renewed on annual basis.

(iii) The Authority shall release and credit an amount equivalent to 75% of the Payout Amount to the designated Arbitral Award Escrow Account opened by the Contractor/Concessionaire against the Bank Guarantee furnished by the Concessionaire/Contractor for the amount under (ii) above;

(iv) The process of renewal of the Bank Guarantee shall be initiated by the Authority 90 days prior to the expiry of validity and shall be done by the Contractor/Concessionaire 60 days prior to the expiry of validity of the Bank Guarantee. In case the settlement of the legal challenge to the Arbitral Award before the Court is not resolved within the validity period of the Bank Guarantee, such Guarantee shall be renewed for a further period of one year and so on and so forth. While renewing the Bank Guarantee for the Second Year, the amount of the Guarantee shall be calculated based on : (a) 75% of the Payout Amount plus the interest on such amount for one year, and (b) appropriate interest on (a) for the second year and so on and so forth. For preparation of the Bank Guarantee, the applicable interest rate in such cases shall be the rate of interest awarded under the Arbitral Award under challenge.

- (v) In cases where the appeal of the Authority is allowed by the court, the Authority would be entitled to recover such amount with appropriate interest (as specified in the OM dated 05.09.2016) on the amount paid to the Concessionaire / Contractor. For recovery of the interest amount, the applicable interest rate in such cases shall be the rate of interest awarded under the Arbitral Award under challenge. The interest rate shall be compounded annually from the date of deposit of monies in Arbitral Award Escrow Account by the Authority till the date of encashment. For the purposes of such compounding of interest rates, the rate of interest awarded under the Arbitral Award under challenge shall be considered. The Concessionaire/Contractor will have to confirm its unqualified acceptance of this condition obtained at the time of release of the amount. This would be in addition to any order of the Hon'ble Court in the appeal proceedings.
- (vi) Failure of the Concessionaire/Contractor to extend the validity of the Bank Guarantee 60 days prior to the expiry of the Guarantee may lead to encashment and appropriation of the Bank Guarantee.
- (vii) In case the Court allows the appeal of the Authority against the Arbitral Award, the Authority shall be entitled to encash the Bank Guarantee furnished by the Concessionaire /Contractor of the amount equivalent to 75% of the paid out amount along with appropriate interest till the date of such encashment.

5.3 Deposit and withdrawal of funds from Escrow Account:

- (i) After opening of the designated 'Arbitral Award Escrow Account and receipt of the Bank Guarantee, the Authority shall deposit 75% of the Payout Amount in the Arbitral Award Escrow Account within a period of no more than 7 working days.
- (ii) The Arbitral Award Escrow Bank shall withdraw and appropriate the amounts from the Arbitral Award Escrow Account strictly in accordance with the instructions issued by the Authority to the Concessionaire / Contractor, as mutually agreed/ decided by the Authority, Lenders' Representative and the Concessionaire/Contractor; provided that such amounts shall be appropriated in the following order :
 - a) Debt service payments;
 - b) All payments relating to construction/completion of the Project;

- c) All payments relating to construction of other projects of the Authority under execution by the Concessionaire / Contractor; and
- d) Balanced, if any, in accordance with the instructions of the Concessionaire/Contractor after receiving the prior written approval of the Lender's Representative and the Authority

5.4 Debt Service Payments

- (i) The Concessionaire /Contractor shall provide the Authority with the details of Lender/s and their dues specific to the Project
- (ii) After withdrawal and payment of Lenders' dues, the Concessionaire / Contractor shall provide the Authority with a copy to the Arbitral Award Escrow Bank, the acknowledgement receipts of payment of dues from all the applicable lenders.

5.5 All payments relating to construction of the Project

- (i) The Concessionaire / Contractor shall provide the Authority with the following details:
 - (a) The amounts due for payment to the suppliers/sub-contractors in respect of the work already completed;
 - (b) The remaining works in the Project along with the estimated costs of the respective works and the schedule for completion of such remaining works
 - (c) The monthly/bi-annual /annual or any other periodic schedule of funds, (as agreed with the Authority's Technical Division), required to complete the remaining works.
- (ii) The Independent Engineer (IE) or equivalent authority for the project and the Authority shall verify the genuineness in respect of the above overdue payments/remaining works, the associated costs, the schedule and the (periodic) requirement of funds.
- (iii) On approval of the Authority and subject to availability of funds in the designated Arbitral Award Escrow Account, the total requirement of funds shall be earmarked for the completion of the remaining works of the Project.

- (iv) The Concessionaire / Contractor shall then be allowed to withdraw the funds required to meet his obligations in the order mentioned under (i) above for completion of the work.
- (v) Balance amounts in the Arbitral Award Escrow Account, if available, shall be earmarked and concurrently used for the completion of other projects of the Authority, as per conditions set forth in this SOP keeping the physical progress work in view.

5.6 All payments relating to construction of other projects of the Authority

- (i) Shall be applicable to other projects of the Authority being executed by the Concessionaire / Contractor
- (ii) For each of the other projects, provisions applicable to the main project shall be applicable

5.7 Post debt service payments, completion of the Project and completion of other projects of the Authority, and subject to availability of funds in the Arbitral Award Escrow Account, balance funds shall be appropriated in accordance with the instructions of the Concessionaire / Contractor in terms of the Agreement executed among the parties in terms of para 5.1 above.

6 Events of Arbitral Award Escrow Default

- 6.1 Following events shall constitute an 'event of default' by the Concessionaire / Contractor unless such event of default has occurred as a result of Force Majeure or any act or omission of the Authority or the Lenders' Representative:
- (i) The Concessionaire/ Contractor causes the Arbitral Award Escrow Bank to transfer funds to any account of the Concessionaire / Contractor in breach of the terms of Arbitral Award Escrow Account Agreement;
 - (ii) The Concessionaire/Contractor fails to make any refund due to the Authority in breach of the terms of Arbitral Award Escrow Account Agreement within 5 (five) business days of such refund becoming due;
 - (iii) The Concessionaire / Contractor commits or causes any other breach of the provisions of Arbitral Award Escrow Account Agreement and fails to cure the same within a Cure Period of 5 (five) business days; or

(iv) The Concessionaire / Contractor does not extend the validity of the Bank Guarantee submitted to the Authority as security for principal as well as for interest thereon, in cases where such extension is required.

6.2 Upon occurrence of an Arbitral Award Escrow Default, the Authority shall be entitled to encash and appropriate the relevant amounts from the Bank Guarantee as Damages for such Arbitral Award Escrow Default

7. Termination of Arbitral Award Escrow Account Agreement

(i) Arbitral Award Escrow Agreement shall remain in full force and effect so long as Court decides the Appeal and a certified copy of the decision of the Court has been submitted to the Arbitral Award Escrow Account Bank

(ii) In case the Court's decision is in favour of the Authority, the Authority shall suo motu encash the Bank Guarantee against refunds from the Concessionaire/Contractor of an amount equivalent to 75% of the Arbitral Award amount along with appropriate interest till the date of encashment.

8 Closure of Arbitral Award Escrow Account

The Arbitral Award Escrow Bank shall close the Arbitral Award Escrow Account at the request made by the Concessionaire /Contractor and the Authority after decision of the Appeal by the Court and pay any amount standing to the credit thereof to the Concessionaire / Contractor.

9. Monitoring Mechanism

(i) There will be a robust monitoring mechanism for all cases where funds have been disbursed by the Authority against Bank Guarantee. A consolidated list of all such cases will be tracked by the Legal Department of the Authority with requisite inputs from the concerned Technical Division, Finance Divisions, etc.

(ii) Disbursement of funds into Arbitral Award Escrow Accounts shall be tracked and consolidated

(iii) The finance wing of the authority will be provided requisite information for budgeting and release of funds

- (iv) The Authority will have the right to impose any further condition/monitoring mechanism to ensure the Authority interests are protected such as appointment of concurrent Auditor(s).
- (v) Since release of funds may be across various projects, hence, a Program Management Unit (PMU) under Member(P) (to be nominated) may be set up to coordinate release of funds for utilisation in accordance with the provisions under this SOP.
- (vi) Disbursement of funds from Arbitral Award Escrow Accounts will be tracked and monthly statements/MIS reports shall be prepared by the Technical Divisions at the HQ and Project Implementation Units (PIU) under RO at field level
- (vii) Validity and renewal of Bank Guarantee shall be meticulously tracked by the Technical Divisions /Project Implementation Units (PIU) and PMU in the Authority's HQ.

**Bank Guarantee as security for interest on advance towards payment of Arbitral
Award under litigation**

(On a stamp paper of appropriate amount)

Board of Trustees,
New Mangalore Port Trust
Acting through Chairman,
New Mangalore Port Trust,
Panambur, Mangalore – 575 010,
Karnataka.

WHEREAS:

- (A) The [.....("Concessionaire / Contractor")] and Board of Trustees of New Mangalore Port (herein after refer as Authority) have entered into a [Concession Agreement / Construction Contract / Engineering Procurement Commissioning Contract] dated (the "Agreement") whereby the Authority agreed to the [Concessionaire / Contractor] undertaking the project [as defined in the Concession Agreement] on [build, operate and transfer/design, build, finance, operate and transfer]¹ [**"DBFOT"**]² basis (the **"Project"**), subject to and in accordance with the provisions of the Agreement.
- (B) During the course of implementation of the Project, disputes/claims arose in respect of the Agreement. As the disputes could not be resolved amicably, the same were referred to Arbitration and accordingly a three member Arbitral Tribunal, as per the terms of the Agreement, was constituted to resolve the disputes between Authority and the ["Concessionaire/Contractor"] under the Agreement.

(C) The Arbitral Tribunal on [date] passed the Award in favour of the [Concessionaire/Contractor] (hereinafter referred to as the Arbitral Award) allowing [claims]³ of the [Concessionaire/Contractor] to [‘.....’]⁴ as on [Date]⁵ [along with interest @% per annum till the date of Award]⁶ and the [total amount along with interest @% as on is ` Lakhs]⁷.

(D) Authority have preferred appeal against the Award under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the “Appeal”) before the [.....]⁸ (hereinafter referred to as the “court”), challenging the Arbitral Award.

1 Name of the project to be included

2 Type of the project development model to be included

3 details of the claims to be inserted

4 amount in figures and words

5 date of Arbitral Award to be inserted

6 to be inserted, in case applicable

7 Interest rate, date of calculation of amount and total amount to be inserted

8 Details of the court, where the appeal has been filed to be provided

(E) Pursuant to NITI Aayog’s OM No.14070/14/2016-PPPAU dated 5th September 2016, Ministry of Shipping vide its Office Order No.CD-11053/25/2016-Coord dated 13.09.2016, NITI Aayog has directed the Authority that, in case of claims where the Arbitration Tribunal has passed the Arbitral Award and the Authority has challenged the Arbitral Award, the Authority may pay an amount equal to 75% (seventy five percent) of the Arbitral Award as awarded in favour of the [Concessionaire/Contractor] to the [Concessionaire/Contractor] against Bank Guarantee without prejudice to the final order of the court in the matter under challenge, subjected to the terms as stated herein.

(F) The [Concessionaire/Contractor] has opened an account with the Arbitral Award Escrow Bank (the Arbitral Award Escrow Bank) and entered into an Arbitral Award Escrow Agreement with the Authority the Arbitral Award

Escrow Bank and the Lenders Respective on (the **Arbitral Award Escrow Agreement**).

- (G) The Arbitral Award Escrow Agreement requires the concessionaire to furnish a Bank Guarantee to the Authority in a sum of `..... (Rupees..... Only) (**the Guarantee Amount**) as security for the interest on amount to be deposited by the Authority in the Arbitral Award Escrow Account and for due and faithful performance of its obligations under and in accordance with Arbitral Award Escrow Agreement.
- (H) We, through our Branch at (the **“Bank”**) have agreed to furnish this Bank Guarantee (**“Guarantee”**).

NOW, THEREFORE, the Bank hereby, unconditionally and irrevocably, guarantees and affirms as follows :

1. The Bank hereby unconditionally and irrevocably guarantees the due and faithful performance of the and [Concessionaire's/Contactor's] obligations under and in accordance with the Arbitral Award Escrow Agreement, and agrees and undertakes to pay to the Authority, upon its mere first written demand, and without any demur, reservation, recourse, contest or protest, and without any reference to the [Concessionaire/Contractor], such sum up to an aggregate sum of the Guarantee Amount as the Authority shall claim, without the Authority being required to prove or to show grounds or reasons for its demand and/or to show grounds or reasons for its demand and/or for the sum specified therein.
2. A letter from the Authority, under the hand of an Officer not below the rank of HOD in the Authority, that the court has decided the appeal in favour of the authority and the [Concessionaire/Contractor] needs to repay the Guaranteed Amount or that there has been an Arbitral Award Escrow Default by the [Concessionaire/Contractor] as per the provisions of Arbitral Award Escrow Agreement, shall be conclusive final and binding on the Bank and the Bank shall immediately release the Guarantee Amount to the Authority. The Bank further agrees that the Authority's letter in this regard shall be final and binding on the Bank,

not withstanding any differences between the Authority and the [Concessionaire/Contractor].

3. In order to give effect to this Guarantee, the Authority shall be entitled to act as if the Bank is the principal debtor and any change in the constitution of the [Concessionaire/Contractor] and/or the Bank, whether by their absorption with any other body or corporation or otherwise, shall not in way or manner affect the liability or obligation of the Bank under the Guarantee.
4. It shall not be necessary and the Bank hereby waives any necessity, for the Authority to proceed against the [Concessionaire/Contractor] before presenting to the Bank its demand under this Guarantee.
5. The Authority shall have the liberty, without affecting in any manner the liability of the Bank under this Guarantee, to vary at any time, the terms and conditions of the Arbitral Award Escrow Agreement or to extend the time or period for the compliance with fulfillment and/or performance of all or any of the obligations of the [Concessionaire/Contractor] contained in Arbitral Award Escrow Agreement or to postpone for any time, and from time, any of the rights and power exercisable by the Authority against the [Concessionaire/Contractor], and either to enforce or forbear from enforcing any of the terms and conditions contained in Arbitral Award Escrow Agreement and/or the securities available to the Authority, and the Bank shall not be released from its liability and obligation under these presents by any exercise by the Authority of the liberty with reference to the matters aforesaid or by reason of time being given to the [Concessionaire/Contractor] or any other forbearance, indulgence, act or omission on the part of the authority or of any other matter or thing whatsoever which under any law relating to sureties and guarantors would but for this provision have the effect of releasing the Bank from its liability and obligation under this Guarantee and the Bank hereby waives all of its rights under any such law.
6. This Guarantee is in addition to and not in substitution of any other guarantee or security now or which may hereafter be held by the Authority in respect of or relating to the Arbitral Award Escrow Agreement or for the fulfillment, compliance and/or performance of all or any of the obligation of the [Concessionaire/Contractor] under the Arbitral Award Escrow Agreement.

7. Notwithstanding anything contained hereinbefore, the liability of the Bank under this guarantee is restricted to the Guarantee Amount. This Bank Guarantee shall come in force from the date on which the Authority deposits an amount equal to 75% of the Arbitral Award awarded to the [Concessionaire/Contractor] and shall remain in force until, the earlier of the [1 (one) year] from the date of such deposits or two (2) months from the date of the Court deciding the Appeal in favour of the [Concessionaire/Contractor].
8. Upon request made by the [Concessionaire /Contractor] for release of this Guarantee along with the particulars required hereunder, the Authority shall release the Guarantee forthwith.
9. The bank undertakes not to revoke this Guarantee during its currency, except with the previous express consent of the authority in writing and declares and warrants that it has the power to issue this Guarantee and the undersigned has full powers to do so on behalf of the Bank.
10. Any notice by way of request, demand or otherwise hereunder may be sent by post addressed to the Bank at its above referred Branch which shall be in demand to have been duly authorized to receive such notice and to effect payment thereof forthwith, and if sent by the post it shall be deemed to have been given at the time when it ought to have been delivered in due course of post and in proving such notice, when given by post, it shall be sufficient to prove that the envelope containing the notice was posted and a certificate signed by an officer of the Authority that the envelope was so posted shall be conclusive.
11. Notwithstanding anything contained herein :
 - (a) our liability under this Bank Guarantee shall not exceed (in words
 - (b) this Bank Guarantee shall be valid upto and
 - (c) we are liable to pay the guaranteed amount or any part thereof

under this Bank Guarantee only and only if the Authority serve
upon us a written claim or demand on or before

Signed and sealed this day of 20. at

SIGNED, SEALED AND DELIVERED

For and on behalf of

The BANK by:

(Signature)

(Name)

(Designation)

(Code Number)

(Address)

NOTES:

- (i) The Guarantee should contain the name, designation and code number of the officer(s) signing the guarantee
- (ii) The address, telephone number and other details of the Head of Office of the Bank as well as of issuing Branch should be maintained on the covering letter of issuing Branch

ARBITRAL AWARD ESCROW ACCOUNT AGREEMENT

THIS ARBITRAL AWARD ESCROW ACCOUNT AGREEMENT is entered into on this the (.) day of (.) 20(.) **AMONGST**

1. [Name of the concessionaire/contractor to be inserted], a company incorporated under the provisions of the Companies Act, 1956/2013 and having its registered office at [.] (hereinafter referred to as the “**Concessionaire**” which expression shall, unless repugnant to the context or meaning thereof, include its successors, permitted assigns and substitutes.);
2. [.(name and particulars of Lenders’ Representative in case applicable) (in case where reference to Lenders’ Representative is not applicable, all references of Lenders’ Representatives to be deleted from the Agreement)] and having its registered office at [.] acting for and on behalf of the Lenders as their duly authorised agent with regard to matters arising out of or in relation to this Agreement (hereinafter referred to as the “**Lenders’ Representative**” which expression shall, unless repugnant to the context or meaning thereof, include its successors and substitutes);
3. [. (name and particulars of the Arbitral Award Escrow Bank)] and having its registered office at [.] (hereinafter referred to as the “**Arbitral Award Escrow Bank**” which expression shall, unless repugnant to the context or meaning thereof, include its successors and substitutes); and
4. BOARD OF TRUSTEES for NEW MANGALORE PORT TRUST, a autonomous body constituted under the provisions of the Major Port Trusts Act, 1963 and having its Administrative Office at Panambur, Mangalore, Karnataka – 575 010, hereinafter referred to as “**the Concessioning Authority**” (which expression shall, unless repugnant to the context or meaning thereof, include its successors and permitted assigns);

WHEREAS :

- (I) The [**“Concessionaire / Contractor”**] and the Authority have entered into a [Concession Agreement / Construction Contract / Engineering Procurement Commissioning Contract] dated (the **“Agreement”**) whereby the Authority agreed to the [Concessionaire/Contractor] undertaking the project [as defined in the Concession Agreement] on [build, operate and transfer/design, build, finance, operate and transfer] [**“DBFOT”**] [*Type of Project development model to be included*] basis (the **“Project”**), subject to and in accordance with the provisions of the Agreement.
- (J) During the course of implementation of the Project, disputes/claims arose in respect of the Agreement. As the disputes could not be resolved amicably, the same were referred to Arbitration and accordingly a Arbitral Tribunal, as per the terms of the Agreement, was constituted to resolve the disputes between Authority and the [Concessionaire/Contractor] under the Agreement;
- (K) The Arbitration Tribunal on [Date] passed the Award in favour of the [Concessionaire/Contractor] (hereinafter referred to as the **“Arbitral Award”**) allowing [claims]⁵ of the Concessionaire /Contractor] amounting to [‘.....’]⁶ as on [Date]⁷ [along with interest @ .% per annum till the date of Award]⁸ and the [total amount along with interest @% as on is `..... lakhs]⁹;
- (L) The Authority have preferred appeal against the Award under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the **“Appeal”**) before the [.....]¹⁰ (hereinafter referred to as the Court), challenging the Arbitral Award;
- (M) Pursuant to NITI Aayog’s OM No.14070/14/2016-PPPAU dated 5th September 2016, Ministry of Shipping, vide its Office Order No.CD-11053/25/2016-Coord dated 13.09.2016 (the **“Office Order”**) has directed the Authority that, in case of claims where the Arbitration Tribunal has passed the Arbitral Award and the Authority has challenged the Arbitral Award, the Authority may pay an amount equal to 75% (seventy five percent) of the Arbitral Amount as awarded in favour the [Concessionaire/Contractor] to the [Concessionaire / Contractor] against

Bank Guarantee, without prejudice to the final order of the Court in the matter under challenge;

- (N) The Office Order requires the payment to be made by the Authority into a designated Escrow Account to be opened for this purpose and the amount so released shall be used, inter alia, on the terms and conditions stated herein;

5	Details of the claims to be inserted
6	Amount in Figures and words to be inserted
7	State of Arbitral Award to be inserted
8	To be inserted, in case applicable
9	Insert rate, date of calculation of amount and total amount to be inserted
10	Details of the court, where the appeal has been filed to be provided

- (O) The Concessionaire has approached the Authority and vide letter no. _____ dated _____ has requested the Authority to release the amount equivalent to 75% of the Arbitral Award and has confirmed its acceptance to the terms and conditions as provided in the Office Order, including but

NOW IT IS HEREBY AGREED as follows:

1 DEFINITIONS AND INTERPRETATION

1.1 Definitions

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

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

“Arbitral Award” shall have the meaning ascribed thereto in Recital C;

“Arbitral Award Escrow Account” means an escrow account established in terms of and under this Agreement.

“Arbitral Award Escrow Default” shall have the meaning ascribed thereto in Clause 7.1;

“Bank Guarantee(S)” shall have the meaning ascribed thereto in Clause 4.1;

“[Concession Agreement / Construction Contract / Engineering Procurement Commissioning Contract]” means the [Concession Agreement / Construction Contract / Engineering Procurement Commissioning Contract] referred to in Recital (A) above and annexed hereto as Annex-A, and shall include all of its Recitals and Schedules and amendments made thereto in accordance with the provisions contained in this behalf therein;

“Cure Period” means the period specified in this Agreement for curing any breach or default of any provision of this Agreement by the [Concessionaire/Contractor], and shall commence from the date on which a notice is delivered by the Authority [or the Lenders’ Representative], as the case may be, to the [Concessionaire / Contractor] asking the latter to cure the breach or default specified in such notice;

“Lenders’ Representative” means the person referred to as the Lenders’ Representative in the foregoing Title Clause;]

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

“Permitted Investments” shall mean:

The investments (including encashment, re-investment and charge in investment) in:

- (i) Treasury bills or debt instruments or other securities issued by the Government of India or backed by full Government of India guarantee;
- (ii) Deposits with or certificates of deposits issued by scheduled commercial banks;

1.2 Interpretation

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

1.2.2 The words and expressions beginning with capital letters and defined in this Agreement shall have the meaning ascribed thereto herein, and the words and expressions used in this Agreement and not defined herein but defined in the [Concession Agreement/ Construction Contract / Engineering procurement Commissioning Contract] shall, unless repugnant to the context, have the meaning ascribed thereto in the [Concession Agreement / Construction Contract / Engineering procurement Commissioning Contract]

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

1.2.4 ¹¹[The rules of interpretation stated in Articles 1.2, 1.3, and 1.4 of the Concession Agreement shall apply, mutandis, to this Agreement.]

2 ESCROW ACCOUNT

2.1 Escrow Bank to act as trustee

- 2.1.1 The words and expressions beginning with capital letters and defined in this Agreement shall have the meaning ascribed thereto herein, and the words and expressions used in this Agreement and not defined herein but defined in the [Concession Agreement / Construction Contract / Engineering Procurement Commissioning Contract] shall, unless repugnant to the context, have the meaning ascribed thereto in the [Concession Agreement / Construction Contract / Engineering Procurement Commissioning Contract].

¹¹To be updated with respect to the Concession Agreement / Contract

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

2.2 Acceptance of Arbitral Award Escrow Bank

The Arbitral Award Escrow Bank hereby agrees to act as such and to accept all payments and other amounts to be delivered to and held by the Arbitral Award Escrow Bank pursuant to the provisions to this Agreement. The Arbitral Award Escrow Bank shall hold and safeguard the Arbitral Award Escrow Account during the term of this Agreement and shall treat the amount in the Arbitral Award Escrow Account as monies deposited by the Authority with the Arbitral Award Escrow Bank or any interest thereon. In performing its function and duties under this Agreement, the Arbitral Award Escrow Bank shall act in trust for the benefit of, and as agent for, the Authority, [the Lenders' Representative] and the [Concessionaire / Contractor]. For the avoidance of doubt, in case there is a conflict between the interests of Authority, [the Lenders' Representative] and the [Concessionaire / Contractor] or their nominees, successors or assigns, the Arbitral Award Escrow Bank shall keep the interest of the Authority as paramount.

2.3 Establishment and Operation of Arbitral Award Escrow Account

- 2.3.1 Within 30 (thirty) days from the date of this Agreement, the [Concessionaire / Contractor] shall open and establish the Arbitral Award Escrow Account with the (name of Branch) Branch of the Arbitral Award Escrow Bank. The Arbitral Award Escrow Account shall be denominated in Indian Rupees.

- 2.3.2 The Arbitral Award Escrow Bank shall maintain the Arbitral Award Escrow Account in accordance with the terms of this Agreement and its usual practices and applicable regulations, and pay the maximum rate of interest payable to similar customers on the balance in the said account from time to time.
- 2.3.3 The Arbitral Award Escrow Bank and the [Concessionaire / Contractor] shall, [after consultation with the Lenders' Representative,] agree on the detailed mandates, terms and conditions, and operating procedures for the Arbitral Award Escrow Account, but in the event of any conflict or inconsistency between this Agreement and such mandates, terms and conditions, or procedures, this Agreement shall prevail.

2.4 Arbitral Award Escrow Bank's fee

The Arbitral Award Escrow Bank shall be entitled to receive its fee and expenses in an amount, and at such times, as may be agreed between the Arbitral Award Escrow Bank and the [Concessionaire / Contractor]. For the avoidance of doubt, such fee and expenses shall be paid by the [Concessionaire / Contractor] directly to the Arbitral Award Escrow Bank and shall not seek any reimbursement for the same from the Authority.

2.5 Rights of the Parties

The rights of the Authority, [the Lenders' Representative] and the [Concessionaire / Contractor] in the monies held in the Arbitral Award Escrow Account are set forth in their entirety in this Agreement and the Authority, [the Lenders' Representative] and the [Concessionaire / Contractor] shall have no other rights against or to the monies in the Arbitral Award Escrow Account.

2.6 Substitution of the Concessionaire

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

3 DEPOSITS INTO ARBITRAL AWARD ESCROW ACCOUNT

3.1 Deposits by the Authority

The Authority agrees and undertakes that it shall deposit into and/or credit the Arbitral Award Escrow Account with an amount equivalent to 75% of the amount equivalent to the Arbitral Award. A detailed statement of account on the amount to be deposited and breakup thereof is attached hereto as [Annex-B]

3.2 Interest on deposits

The Arbitral Award Escrow Bank agrees and undertakes that all interest accruing on the balances of the Arbitral Award Escrow Account from the Permitted Investments shall be credited to the Arbitral Award Escrow Account.

4 BANK GUARANTEE(S)

- 4.1 The [Concessionaire / Contractor] in consideration of the Authority depositing the amount as stated in Clause 3, has provided the following bank guarantee(s)

¹² Add details of all the Bank Guarantee(s) to be submitted

Sl.No	Bank Guarantee issued by	Bank Guarantee Number	Amount (in figures)	Amount (in words)
1	*****	*****	*****	*****
2	*****	*****	*****	*****
3	*****	*****	*****	*****
.....

drawn in favour of the Authority, as security against 75% of the Arbitral Award and appropriate interest on such amount, for a total sum of Rs _____ (Rupees *****) (the Bank Guarantee(s)). A certified copy of the Bank Guarantee(s) is annexed hereto as [Annex-C]

5 WITHDRAWALS FROM ARBITRAL AWARD ESCROW ACCOUNT

5.1 Withdrawals during the Agreement

The Arbitral Award Escrow Bank shall withdraw and appropriate the amounts from the Arbitral Award Escrow Account strictly in accordance with the instructions issued by the Authority to the [Concessionaire / Contractor], as mutually agreed / decided by the Authority, [Lenders' Representative] and the [Concessionaire / Contractor]; provided that such amounts shall be appropriated in the following order:

- Debt service payments
- All payments relating to construction/completion of the project:
- All payments relating to construction /completion of other projects of the Authority under execution by the [Concessionaire/ Contractor] ; and
- Balance, if any, in accordance with the instructions of the [Concessionaire/ Contractor] after receiving the prior written approval of [the Lenders' Representative and] the Authority.

5.2 Application of insufficient funds:

Funds in the Arbitral Award Escrow Account shall be applied in the serial order of priority set forth in Clause 5.1. If the funds available are not sufficient to meet all the requirements, the Arbitral Award Escrow Bank shall apply such funds in the serial order of priority until exhaustion thereof.

5.3 Withdrawals during Suspension

Notwithstanding anything to the contrary contained in this Agreement, the Authority may exercise all or any of the rights of the Concessionaire during the period of Suspension under Article 30¹³ of the Concession Agreement. Any instructions given by the Authority to the Arbitral Award Escrow Bank during such period shall be complied with as if such instructions were given by the Concessionaire under this Agreement and all actions of the Authority hereunder shall be deemed to have been taken for and on behalf of the Concessionaire.

6 OBLIGATIONS OF THE ARBITRAL AWARD ESCROW BANK

6.1 Segregation of funds

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

6.2 Communications and Notices

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

- (a) may, in the absence of bad faith or gross negligence on its part, rely as to any matters of fact which might reasonably be expected to be within the knowledge of the { Concessionaire/ Contractor} upon a certificate signed by or on behalf of the { Concessionaire/ Contractor} ;
 - (b) may, in the absence of bad faith or gross negligence on its part, rely upon the authenticity of any communication or document believed by it to be authentic;
 - (c) shall, within 5(five) business days after receipt, deliver a copy to the Lenders' Representative¹⁴ of any notice or document received by it in its capacity as the Arbitral Award Escrow Bank from the { Concessionaire / Contractor} or any other person hereunder or in connection herewith;
And
 - (e) Shall, within 5 (five) business days after receipt, deliver a copy to the { Concessionaire/ Contractor} of any notice or document received by it from the Lenders' Representative¹⁵ in connection herewith.
-

¹³ To be updated with respect to the Concession Agreement/ Contract

¹⁴ To be replaced by “the Authority”, in cases where reference to Lenders’ Representative is not applicable

¹⁵ To be replaced by “ the Authority” , in cases where reference to Lenders’ Representative is not applicable

6.3 No set off

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

6.4 Regulatory approvals

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

7 ARBITRAL AWARD ESCROW DEFAULT

7.1 Arbitral Award Escrow Default

7.1.1 Following events shall constitute an event of default by the [Concessionaire / Contractor] (an “Arbitral Award Escrow Default”) unless such event of default has occurred as a result of Force Majeure or any act or omission of the Authority [or the Lenders’ Representative]:

- (a) the [Concessionaire / Contractor] causes the Arbitral Award Escrow Bank to transfer funds to any account of the [Concessionaire / Contractor] in breach of the terms of this agreement;
- (b) the [Concessionaire / Contractor] fails to make any refund due to the Authority in breach of the terms of this Agreement within 5 (five) business days from the date such refund becomes due; or
- (c) the [Concessionaire / Contractor] commits or causes any other breach of the provisions of this Agreement and fails to cure the same within a Cure Period of 5 (five) business days.
- (d) the [Concessionaire / Contractor] fails to extend the validity of Bank Guarantee(s), referred to in Clause 4.1 of this Agreement, submitted to

the Authority as security for principal as well as for interest thereon, in cases where such extension is required.

- 7.1.2 Upon occurrence of an Arbitral Award Escrow Default, the Authority shall be entitled to encash and appropriate the relevant amounts from the Bank Guarantee(s) provided under Clause 4.1 as Damages for such Arbitral Award Escrow Default.

8 TERMINATION OF ARBITRAL AWARD ESCROW AGREEMENT

8.1 Duration of the Arbitral Award Escrow Agreement and Arbitral Award Escrow Account

The Arbitral Award Escrow Bank shall, at the request of the [Concessionaire / Contractor] and the Authority, made after decision on the Appeal by the Hon'ble Court, pay any amount standing to the credit thereof to the [Concessionaire / Contractor] and close the Arbitral Award Escrow Account. Upon closure of the Arbitral Award Escrow Account hereunder, this Arbitral Award Escrow Agreement shall be deemed to be terminated.

8.2 Substitution of Arbitral Award Escrow Bank

The [Concessionaire / Contractor] may, by not less than 45 (forty five) days prior notice to the Arbitral Award Escrow Bank, the Authority [and the Lenders' Representative], terminate this Agreement and appoint a new Arbitral Award Escrow Bank, provided that the new Arbitral Award Escrow Bank is acceptable to [the Lenders' Representative]¹⁶ and arrangements are made satisfactory to [the Lenders' Representative]¹⁷ for transfer of amounts deposited in the Arbitral Award Escrow Account to a new Arbitral Award Escrow Account established with the successor Arbitral Award Escrow Bank pursuant to another Arbitral Award Escrow Agreement entered between such successor Arbitral Award Escrow Bank, the Authority, the [Concessionaire / Contractor] [and the Lenders Representative] in the same form as this Agreement.

The termination of this Agreement shall take effect only upon coming into force of an Arbitral Award Escrow Agreement with the substitute Arbitral Award Escrow Bank.

9 SUPPLEMENTARY ARBITRAL AWARD ESCROW AGREEMENT

9.1 Supplementary arbitral award escrow agreement

There shall be no supplementary Arbitral Award Escrow Agreement.

10 INDEMNITIES

10.1 General indemnity

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

¹⁶ To be replaced by "the Authority" in cases where reference to Lenders' Representative is not applicable.

¹⁷ To be replaced by "the Authority" in cases where reference to Lenders' Representative is not applicable.

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

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

10.2 Notice and contest of claims

In the event that any Party hereto receives a claim from a third party in respect of which it is entitled to the benefit of an indemnity under Clause 10.1 or in respect of which it is entitled to reimbursement (the "Indemnified Party"), it shall notify the other Party responsible for

indemnifying such claim hereunder (the "Indemnifying Party") within 15 (fifteen) days of receipt of the claim and shall not settle or pay the

claim without the prior approval of the Indemnifying Party, which approval shall not be unreasonably withheld or delayed. In the event that the Indemnifying Party wishes to contest or dispute the claim, it may conduct the proceedings in the name of the Indemnified Party and shall bear all costs involved in contesting the same. The Indemnified Party shall provide all cooperation and assistance in contesting any claim and shall sign all such writings and documents as the Indemnifying Party may reasonably require.

11 DISPUTE RESOLUTION

11.1 Dispute resolution

11.11 Any dispute, difference or claim arising out of or in connection with this Agreement, which is not resolved amicably, shall be decided finally by reference to Arbitral Tribunal comprising Sole Arbitrator appointed with mutual consent of all parties to dispute failing which appointed by Chairman, NMPT, and shall be subject to the provisions of the Arbitration and Conciliation Act, 1996 and any amendment thereto.

11.12 The Arbitral Tribunal shall issue a reasoned award and such award shall be final and binding on the parties. The place of arbitration shall be Mangalore and the language of the arbitration proceedings shall be English.

12. MISCELLANEOUS PROVISIONS

12.1 Governing law and jurisdiction

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

12.2 Waiver of sovereign immunity

The Authority unconditionally and irrevocably:

- (a) Agrees that the execution, delivery and performance by it of this Agreement constitute commercial acts done and performed for commercial purpose;
- (b) Agrees that, should any proceedings be brought against it or its assets, property or revenues in any jurisdiction in relation to this Agreement or any transaction contemplated by this Agreement, no immunity (whether by reason of sovereignty or otherwise) from such proceedings shall be claimed by or on behalf of the Authority with respect to its assets;

- (c) Waives any right of immunity which it or its assets, property or revenues now has, may acquire in the future or which may be attributed to it in any jurisdiction; and
- (d) Consents generally in respect of the enforcement of any judgment or award against it in any such proceedings to the giving of any relief or the issue of any process in any jurisdiction in connection with such proceedings (including the making, enforcement or execution against it or in respect of any assets, property or revenues whatsoever irrespective of their use or intended use of any order or judgment that may be made or given in connection therewith)

12.3 Alternation of terms

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

12.4 Waiver

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

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

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

12.5 No third party beneficiaries

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

12.6 Survival

12.6.1 Termination of this Agreement:

- (a) shall not relieve the Parties of any obligations hereunder which expressly or by implication survive termination hereof; and
 - (b) except as otherwise provided in any provision of this Agreement expressly limiting the liability of either Party, shall not relieve either Party of any obligations or liabilities for loss or damage to other Party arising out of, or caused by, acts or omissions of such Party prior to the effectiveness of such termination or arising out of such termination.
- 12.6.2 All obligations surviving the cancellation, expiration or termination of this Agreement shall only survive for a period of 3(three) years following the date of such termination or expiry of this Agreement.

12.7 Severability

If for any reason whatever any provision of this Agreement is or becomes invalid, illegal or unenforceable or is declared by any court of competent jurisdiction or any other instrumentality to be invalid, illegal or unenforceable, the validity, the legality or unenforceability of the remaining provisions shall not be affected in any manner, and the Parties will negotiate in good faith with a view to agreeing to one or more provisions which may be substituted for such invalid, unenforceable or illegal provisions, as nearly as is practicable to such invalid, illegal or unenforceable provision. Failure to agree upon any such provisions shall not be subject to dispute resolution under Clause 11.1 of this Agreement or otherwise.

12.8 Successors and assigns

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

12.9 Notices

All notices or other communications to be given or made under this Agreement shall be in writing and shall either be delivered personally or sent by courier or registered post with an additional copy to be sent by facsimile or e-mail. The address for service of each Party, its facsimile number or e-mail are set out under its name on the signing pages hereto. A notice shall be effective upon actual receipt thereof, save that where it is received after 5.30 (five thirty) p.m on a business day, or on the first business day following the date of actual receipt. Without prejudice to the foregoing, a Party giving or making a notice or communication by facsimile or e-mail shall promptly deliver a copy thereof personally, or send it by courier or registered post to the addressee of such notice or communication. It

is hereby agreed and acknowledged that any Party may by notice change the address to which such notices and communications to it are to be delivered or mailed. Such change shall be effective when all the Parties have noticed of it.

12.10 Language

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

12.11 Authorized representatives

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

12.12 Original Document

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

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

THE COMMON SEAL OF
[CONCESSIONAIRE / CONTRACT]
has been affixed pursuant to the
resolution passed by the Board of
the Directors of the [Concessionaire/
Contractor] at its meeting held on
the day of 20 hereunto, in the
presence of, Director,
who has signed these presents in
token thereof and Company
Secretary/Authorized Officer who
has countersigned the same in
token thereof

[AND DELIVERED
For and on behalf of
SENIOR LENDERS by
the Lender' Representative:]

For and on behalf of [Concessionaire/
Contractor] pursuant to the resolution
Passed by the Board of Directors of the
[Concessionaire / Contractor]

(Signature)

(Name)

(Designation)

(Address)

(Fax No)

(E-mail address)

SIGNED SEALED AND

DELIVERED

For and on behalf of

(Signature)

(Name)

(Designation)

(Address)

(Fax No)

(E-mail address)

SIGNED, SEALED AND

DELIVERED

For and on behalf of

To be affixed in accordance with the articles of association of the Concessionaire / Contractor and the resolution passed by its Board of Directors.

THE ARBITRAL AWRAD ESCROW BANK by

(Signature)

(Name)

(Designation)

(Address)

(Fax No)

(E-mail address)

Signed, Sealed

In the presence of

THE AUTHORITY by:

(Signature)

(Name)

(Designation)

(Address)

(Fax No)

(E-mail address)

