

Annex 5

Passenger Service Contract Guide

1 Introduction

Before drafting a Transport Services Contract, some form of gateway procedure should have been adopted that would include a thorough feasibility study, a review of options, and a continuing assessment of value for money at particular stages of the procurement process, including before the process commences and immediately prior to execution of the Transport Services Contract, as is indicated in the body of the Toolkit.

A key difference of approach between civil law and common law jurisdictions is the interpretation by the judiciary of Transport Services Contracts between what was written and what was intended. Under civil law, Transport Services Contracts need not set out what is already included under the civil code. These points were also highlighted in Annex 4, Introduction to the Guide for a Concession Transport Services Contract.

1.1 Purpose

The three main objectives of a Transport Services Contract are the following:

- Promote understanding of the main responsibilities and risks undertaken by parties to the Transport Services Contract;
- Specify service levels to be delivered by the private sector and the flow of payments from the Passenger Transport Authority (PTA) to the Contractor without extended negotiations;
- Establish consistent approach and pricing among bidders in any competitive tendering procedure following the introduction of the reforms.

1.2 Key Factors

This Guide was developed for application to passenger transport services and assumes that the contract will be let by a Passenger Transport Authority (PTA), which could be a government ministry or a separate national or regional entity. This may give rise to the need for a government guarantee if the PTA is not an arm of government and if the PTA payment flows in favor of the Contractor are likely to be substantial.

The simplest form of Transport Services Contract (TSC) would be based on the Contractor operating and carrying out light maintenance on public sector-provided assets. Contractual matters become more complex if some or all of the assets are supplied by other private sector entities (see Annex 4, Concession Guide) or

state or municipal-owned corporations or similar distinct legal entities. Mechanisms will be needed to address interfaces between the Contractor and those other entities because they are not party to the TSC. For example, the private sector might supply rolling stock on a ‘finance-and-maintain’ basis. Does this mean the Contractor will have access to maintenance depots to carry out cleaning services? If the private company supplying the rolling stock is contractually tied to the public sector and not to the Contractor, and carries out external cleaning under the supply contract, the Contractor could not be held responsible for key performance indicators in relation to the quality of external cleanliness because it is out of Contractor control. However, a contractual relationship between a rolling stock company and the Contractor could allow the Contractor not only to enforce its rights against a rolling stock company that fails to comply with cleanliness standards, but also recover penalties.

Punctuality is a primary passenger concern. However, if a separate legal entity supplies Below Rail Infrastructure Services to either or both the PTA and the Contractor, key performance indicators for punctuality must reflect that delay may be the result of actions unrelated to the Contractor. Issues will also arise in relation to passenger access to stations if the stations are operated by an entity other than either or both the PTA and the Contractor. In addition to punctuality, passengers are concerned about overcrowding, but to manage passenger density, the Contractor would need to have control over the assets required to address overcrowding. Also, there is a knock-on effect from overcrowding because it affects punctuality. Another consideration in relation to punctuality is passenger type; for example, if the service includes airline passengers, additional dwell time will be required—first, for handling luggage, and second, because many passengers will be unfamiliar with their surroundings.

Other issues that may need to be addressed include the following:

- Who is responsible for ticket sales? Do the tickets extend to other transport services besides those for which the Contractor is responsible?
- If the Contractor has some responsibility for revenue protection, which fare categories will be discounted? (e.g., children, military, seniors, students? Also, off-peak or weekend fares?)
- How will revenue be collected? Through stored-value cards or similar? Who is responsible for fare system administration?
- Will a specified proportion of the fare box be retained by the Contractor?
- Does the PTA specify all the services? Is the PTA purchasing a minimum service level freeing the Contractor to supply any additional services that are commercially viable?
- Who benefits from advertising revenue? Are approvals required for display advertisements?
- Will the Contractor require a train operator’s license? Is there a separate safety regime?
- How does the Contractor interact with the Regulator(s) under a separate safety regime?

- Who is responsible to timetable trains? Who issues timetables to the public?
- If the state of infrastructure and rolling stock affects fuel consumption, and the Contractor has responsibility for neither, how will fuel costs be addressed?
- How will requests for changes to scope or delivery of services be addressed?
- What is the responsibility of the Contractor regarding the following?
 - Resource use optimization: optimal scheduling for rolling stock;
 - Skill-based planning: scheduling drivers and crews with regard to their skills, certifications, and knowledge of route and traction;
 - Balance assignments: reducing the number of empty trains; ensuring crews end shifts at their home depots;
 - Employee preferences support: increasing employee satisfaction, retention, and efficiency;
 - Daily operational control: ability to handle real-time disturbances and schedule changes;
 - Safety: Contractor employees may require first aid training, including defibrillator use. Dealing with issues such as suicides may depend on who is in control of the infrastructure and whether station staff are engaged by the Contractor;
 - Security: third parties such as transport or railway police may affect this;
 - Universal access: improvements to infrastructure and equipment to enable access for all, regardless of physical ability, may be the responsibility of the PTA or other third parties; and
 - Reporting and data management: collating and disseminating accurate data to improve decision-making.

Responses to these issues will be reflected in any contract but a solution does not imply that one structure is inherently preferable. Instead, the best solution will be derived from analysis carried out as part of the reform process.

2 The Guide

2.1 *Parties*

In this Guide the public sector party granting concession rights is referred to as the 'PTA' and its counterpart as the 'Contractor'; overall services to be delivered are referred to as 'Services'. The agreement between the PTA and the Contractor is referred to as the 'Transport Services Contract' (TSC).

In some jurisdictions, the bidder may be a consortium and the Contractor created only just before or just after the TSC is signed. If the Contractor was created just after, the TSC should provide for itself to be assigned or novated to the new company before the contract becomes fully effective.

2.2 *Recitals/purpose*

The document format will reflect to a degree what is customary in the Host Country. These provisions will describe the PTA and its mandate, the proposed service arrangements, and may include a brief description of the bidding procedure and outcome, namely the appointment of the Contractor.

2.3 *Definitions*

Some jurisdictions set out the interpretation of contracts and other legal documents in legislation. To the extent that this is not provided for, the interpretation of expressions and the meaning of defined terms should be set out in the TSC.

2.4 *Conditions Precedent to the Effective Date*

Most TSC provisions will not come into effect until specified requirements have been met. This provision will specify these key requirements (conditions precedent).

Some key requirements may be regulatory, such as acquiring a train operator license and safety approvals.

Others key requirements may be more technical, for example that each party must obtain all necessary authorizations to be bound by the TSC and legal opinions that the authorizations have been properly obtained.

Issues relating to transfer of personnel to the Contractor may need to be addressed, as will procuring insurances for property, employer liability, and from the state perspective, the more important third-party liability cover.

If the Contractor is to procure the issuance of a performance bond or similar, the timing for bond issue should be dealt with under Conditions Precedent; and the provisions for obtaining bonds may be set out elsewhere (see Bonds post).

Where the Contractor will enter into agreement with others, e.g., track access, station access, rolling stock supply, and the like, these agreements should be completed.

The Contractor may be required to produce specific plans to which it will have to adhere for developing passenger services or improving services; the first set of these should have been submitted and agreed.

Provision will be required for a cut-off date by which time conditions must be either achieved or waived (where feasible); including specifying consequences of failure by either party. In case of Contractor failure, if the tender documents have so provided, it might be appropriate for the PTA to call the bid bond.

2.5 *Service Period*

The TSC must specify the length of the Service Period or its duration. The duration should reflect all relevant matters and examples are set out below.

The PTA will wish to specify a duration that is expected to result in the best value-for-money solution. Factors to be taken into account when deciding on the duration of the Transport Services Contract will include the following:

- The mechanism for dealing with cost inflation and the balance between the advantage of competitive tendering of the contracts for Transport Services in controlling costs, against the disruption and costs incurred in tendering for a replacement contractor;
- The possibility of further reforms that might significantly change the approach to the rail system, or the delivery of transport services;
- The affordability of Transport Services for users and for the PTA;
- If the PTA or others are executing major refurbishment or asset renewal programs, how efficiencies thereby created can best be reflected (if at all) in an adjustment to the cost and payment structure under the TSC.

2.6 *Transport Services*

The assets to be supplied by the PTA or by others nominated by the PTA should be identified, as should the basis on which they are to be supplied. As indicated in item 1.2 above, if these assets are to be made available by third parties and the Contractor is to enter into agreements with those third parties, then the basis of those agreements should be set out and the Contractor will agree to enter into those agreements. The Contractor should also agree not to amend those agreements without the consent of the PTA.

The Contractor should have a period of time to inspect the assets and if finding them damaged or otherwise materially impaired, should give notice to the PTA, or if assets are supplied by a third party, give notice to that third party. The TSC should address timing for carrying out remedial work or replacement, and the effect on contract terms while remedial work or replacement is carried out, or the consequences of delay or failure to do so.

The routes to be taken over by the Contractor should be identified, as should the service frequency, or minimum service frequency, and the timing of the first and last service on each route, if the service is not 24/7 operations.

The Passenger Services Contract should specify who is responsible for timetabling. Even if the PTA is responsible, it would be sensible to include a mechanism for Contractor inputs to the process. For example, if a proposed change would adversely impact upon load levels, other key performance indicators, or a class of passengers, proposed changes should be subject to counter-notice and resolution. If a change is imposed upon the Contractor, then any additional costs incurred should be recoverable as a Change in Service. (See item 2.19 post.) The minimum period between setting a timetable and implementing the timetable should also be stated.

The Transport Service levels and key performance indicators should be described. If improvements to assets or services supplied to the Contractor by the PTA, or other parties nominated by the PTA, are required, provision should be included for those improvements. If improvements are not carried out, the Contractor should be relieved from any requirements to meet increased service levels or key performance indicators to the extent that the failure to do so resulted from improvements not being carried out, as envisaged under the Transport Services Contract by the PTA or other third party.

Special service regimes for specific events such as sporting fixtures, national or regional festivals, and the like should be agreed. The definition of a Special Event will depend on the expected number of people per hour travelling to or from an event and the capacity of the system, and should take into consideration that spectator departure density is typically higher than arrival density. Issues that will need to be addressed include crowd surge control, security, and health and safety. It may be sensible to create a forum involving venue management, police or other law enforcement, the local authority, and other transport providers that may be affected by the mass movement of spectators. Provisions should include agreements to extend running times (if not 24 hours) if an event is scheduled to continue past normal hours of operation, and a strategy to deal with incidents and accidents.

The Contractor will need flexibility to deal with increasing ridership. However, flexibility is directly linked to the degree of control the Contractor is able to exercise over the infrastructure and equipment. Load control will be impacted by length of stations, which, together with the kinetic (clearance) envelope, will determine maximum train length, the number of available train paths at peak periods, and the capacity of seating/standing areas in any carriage. During peak periods, if the number of passengers trying to enter a carriage exceeds the permitted number, the Contractor will need to take steps to limit passenger influx, which will depend upon the configuration of stations and platforms. Nevertheless, responsibility for load control should be placed upon the Contractor, although the measures adopted will depend upon the available facilities.

As will be seen from the above, key performance indicators must reflect both the actual ability of the Contractor to control the quality of passenger services, and the PTA transport delivery objectives. Key indicators of passenger perception of service quality are delivery punctuality, crowding, and cleanliness. A bonus and penalty regime can be developed and linked with key performance indicators, but the Contractor should be exempt from any penalties if the reason for failing to meet a key performance indicator is outside of Contractor control.

If the TSC includes maintenance and cleanliness, these can be regulated either by establishing periods within which the service must be carried out, or by specifying desired outcomes. In relation to key performance indicators for cleanliness, an interesting subset is the presence of graffiti, since the Contractor's ability to remove graffiti, and the speed of removal, will depend upon the surfaces in question.

2.7 *Passengers*

Key performance indicators will be linked to customer or passenger satisfaction. The Contractor should either issue or subscribe to a charter that specifies passenger rights and obligations; the charter should be publicly available. This charter would supplement any regulations that are issued periodically to govern passenger behavior, which, when breached could result in criminal prosecution, for example, riding on the outside of a carriage. The charter scope and any amendments would be agreed with the PTA.

It is desirable to establish a regime to deal with passenger illness, including defibrillators if they are installed, and this could be included in the charter. The regime should specify the number of staff with first aid qualifications that should be available, their locations, and protocols for dealing with passenger illness, including liaising with the emergency services.

The passenger charter should deal with the issue of universal access—for luggage, pushchairs/strollers, guide dogs, and passengers with physical mobility limitations, depending upon the layout of stations, platforms, and carriages. The charter should specify circumstances under which passengers may claim compensation from the Contractor, or seek ticket refunds.

The charter should set out a regime to handle passenger complaints and any appeals procedures for passengers to pursue redress for unresolved grievances.

There should be simple procedures to deal with lost/found property, and related reports and inquiries, and a single contact point for passengers seeking to recover lost property.

Passenger surveys should be considered as a means to contribute to service delivery evaluations. Who should carry them out? What results are considered satisfactory/ unsatisfactory? Who is responsible for areas of satisfaction/ dissatisfaction?

2.8 *Disability and Discrimination*

The Contractor should prepare and implement an agreed plan for addressing disability and discrimination issues in relation to passengers and staff, in addition to issues dealt with in the charter. At a minimum, the plan should meet current legislated requirements, but may cover any criteria identified by the PTA during the bidding procedure. During the period of the Transport Services Contract, any upgrades to standards in relation to universal access should be addressed as a Change in Services; any capital costs incurred in the change of assets or equipment should be met by the PTA, or their nominees responsible for the supply of the asset or service.

In the event of an adverse departure from the plan, the Transport Services Contract should specify sanctions to be applied against the Contractor, in addition to any criminal liability that the Contractor may have, except if the adverse departure occurred under circumstances outside Contractor control.

2.9 *Disasters and Disaster Recovery*

If several entities are involved in delivering railway passenger services it is sensible to have a joint disaster recovery plan that establishes duties for each entity, including the Contractor, in the event of disaster or a real and immediate threat. The plan should be reviewed regularly and exercises carried out according to an established schedule. The TSC should impose on the Contractor, obligations in relation to a disaster that are commensurate with the services that the Contractor will supply, and the obligations it will undertake pursuant to the Transport Services Contract.

2.10 *Fares and Fare Box*

At a minimum, the Contractor should improve Revenue Protection to reduce the number of unauthorized, non fare-paying passengers. How the Contractor achieves this depends upon the revenue collection methodology.

If the Contractor is responsible to either or both collect or protect revenue, the TSC should specify discounts to be offered. If the Contractor benefits from collected revenue then any change to the scope of discounts that would reduce Contractor revenue should be dealt with as a Change in Services.

The TSC should define whether all fares are prescribed or whether the Contractor is entitled to set any fares. The Contract should also clarify whether the Contractor is to retain any collected revenue or if all revenue should be paid into a designated account and held for distribution to one or more entities—a system often referred to as a ‘locked box’ because fare revenue never appears in Contractor accounts.

The TSC should define the mechanism and procedure to adjust fares. If the Contractor benefits from fares and those fares are reduced, this should be dealt with as a Change in Services, except if reductions are agreed compensation for the Contractor’s default.

If a passenger commits an infringement of fare regulations, the PTA should cover the costs incurred by the Contractor for issuing summonses against fare defaulters for court appearances, plus costs related to appearing in court proceedings to recover the fares, unless the Contractor is entitled to retain a substantial part of the fare revenues.

2.11 *Stations and Property*

Where the Contractor is responsible for maintaining the Stations during the Service Period, the Contractor should keep clean not only the station premises but also the associated car parks and cycle storage areas, depending upon Station locations.

The scope of services in relation to stations should have been set out in the tender documents and the Contractor given an opportunity to price. Maintenance stand-

ards should then be incorporated in a schedule to the TSC; failure to maintain specified standards should be governed by the bonus and penalty regime. Further and by way of example, as a public safety issue, maximum allowable periods should be specified for restoring to service a malfunctioning light source in public areas. If standards are raised during the Service Period, changes should be dealt with as a Change in Services.

The TSC may specify the number of staff, job descriptions, and hours of availability that Station personnel must be present in any given location during the working day.

The Contractor may be required to set out a maintenance plan for stations and premises; periodically, agreement with the PTA on this plan should be renewed. The plan may be part of a wider systems maintenance plan to allow all required system renewal and maintenance plans to dovetail, including plans for Below Rail Infrastructure rolling stock, stations, and the like. Therefore, Contractor failure to meet obligations for systems maintenance plans may incur financial losses or increased costs for those responsible for other parts of the system; the bonus penalty regime should reflect the consequences of any failure. Delays to the Contractor caused by others could be dealt with under Changes in Service, or under the respective third-party contract.

The Contractor may be required to develop a quality assurance procedure in accordance with the proposals submitted by the Contractor at the time of tender. The TSC should set out the acceptance procedure to create control documents and the bonus penalty regime should specify consequences for failure to produce documentation, or failure to adhere to control documentation.

If the Contractor is to provide certain key equipment, the supplier or suppliers should be identified in the TSC, or a list of prospective suppliers could be agreed and set out in the that contract, allowing the Contractor to negotiate the best value with listed suppliers. The PTA should have the right to use key equipment upon expiry or earlier termination of the TSC, but whether the PTA should pay to acquire ownership would depend upon the nature of the equipment and whether the Contractor was fully reimbursed for its cost under the payment mechanism in the TSC.

2.12 System Contracts

The reform process should have considered whether the Contractor should be required to enter into contracts (System Contracts) with third parties who supply assets or services in connection with the Transport Services, such as rolling stock, Below Rail Infrastructure, and the like. A key issue is any potential losses that the Contractor may suffer if the terms of those agreements are breached, and whether it would represent value for money if the Contractor priced for the risk of those potential losses. Among issues to be considered is the level of financial security required by counterparties to those agreements, bearing in mind that the Contractor will have few assets, and whether it would be cost-effective for the Contractor to procure a performance bond to the requisite level.

System Contracts could be assigned or novated to the Contractor or entered into anew by the Contractor. In addition, contracts could range from an agreement to

cooperate, to a fully fledged agreement such as a track-access agreement for Below rail Infrastructure, which may require the Contractor to agree, under the TSC, not to substantially amend a Systems Contract, and not to amend if the amendment would remain in effect after the end of the Services Period, without the consent of the PTA. Further, when cost-effective to do so, the PTA may ask the Contractor for an indemnity in respect of all claims, expenses, and losses that might flow from any breach by the Contractor of obligations under the Systems Contracts.

2.13 Fees and Other Remuneration

The Contractor will require revenue commensurate with the scope of the services it supplies, and the scope of the obligations it undertakes pursuant to the Transport Services Contract and where relevant, under the System Contracts.

The TSC should define whether the Contractor keeps in its own right a substantial part of the fare box and other generated income such as from advertising (because the Contractor may have bid based on a PTA topping-up payment or subsidy) or whether PTA will supply a revenue stream sufficient to cover Contractor costs and profit (because the Contractor may have bid based on the amount of the Service Payment).

If the Contractor relies little on the fare box for revenue, it can become out of touch with passengers, so customer service standards should be securely linked to key performance indicators and bonus penalty arrangements should be elaborated in the TSC.

The Transport Services Agreement should include a provision for receivables to be adjusted in case of inflation, and should include incentives for the Contractor to seek efficiency increases in operations.

2.14 Bonds

As indicated in item 2.12 above, the Contractor will add the cost of any bond or bonds to total costs, which it will then seek to recover from the PTA or out of fares (if relevant). Using a bid bond in the context of a negotiated bid can be difficult. The bond supports only bidder commitment to enter into a contract based upon its bid. However, if there are negotiations, the original bid will be superseded by a new negotiated bid, which, arguably, renders the bond unenforceable. To avoid this, negotiations could be conducted with multiple bidders; they are asked to submit 'best and final offers' each supported by a bid bond. Another option is to hold discussions during the prequalification or pre-bid stage and ask for bids with bid bonds on the basis that the PTA will countersign the winning bid, which then becomes the Transport Services Contract. Either way, the bid bond should be extended to cover achievement of 'Conditions Precedent' to Transport Services Contract effectiveness.

Depending upon Service Period length, but assuming a relatively short time, and considering the lack of Contractor assets, it may be prudent for the performance bond to equal the life of the Service Period.

2.15 Standards

The Contractor should assume responsibility for training all staff and for meeting all accreditations that may be required, particularly among drivers and any other staff responsible for the interface with control and signaling procedures.

The Contractor should provide details of its program and procedures for staff recruitment and training, and the continuous training of existing staff, for acceptance by the PTA and any relevant Safety Regulator.

The Contractor should also meet all safety requirements. Provisions will depend upon the state of the host country's safety legislation. If the Contractor must gain approval for safety arrangements, e.g., safety case as a Track Access Holder or Track Access Applicant, this should be addressed in the relevant Systems Contract, or in the TSC to the extent that it is not covered by legislation.

2.16 Insurances

During the reform process, attention should be paid to insurance cover. Under the TSC, it may be sensible to require the Contractor to take out insurances common to any prudent business undertaking; some of these may be a legal requirement, such as workers' compensation. However, if insurance for Below Rail Infrastructure is being borne by an Infrastructure Provider, does it make sense for the Contractor to duplicate cover for the same asset? Advice should be obtained from a competent insurance broker.

Other insurances are more important from the perspective of the PTA, particularly if the PTA is paying for Contractor services. These include the following coverages:

- Contractor-occupied infrastructure ;
- Third-party liability;
- Business interruption cover is essential to a prudent Contractor to make up for a loss of revenue that may be caused upon the occurrence of an insured peril. However, if a third party insures an asset, business interruption cover, which is usually a parasitic cover, might be carefully reconsidered because the Contractor would need an insurable interest in the asset in question.

The period and amount of specific covers should be stated and the PTA should be a named insured.

The Contractor should be required to provide the PTA with an insurance broker's letter of confirmation that the broker will notify the PTA if, prior to renewal, there is any indication that cover will not be renewed, or that renewal will entail onerous conditions.

Current Insurance Certificates should be produced to the PTA; if the Contractor fails to take out key insurances, the PTA should be able to take out the insurance and recover the premia from the Contractor.

During the reform process, the question of non availability of insurance requires consideration. If insurance cover is unavailable in the market, or available only at commercial premia, except through any act or neglect of the Contractor, the PTA has several options.

- Should the PTA be able to allow the Transport Services Contract to continue at the time of the non availability, to assume the risk itself for as long as cover is unavailable? Or should the PTA terminate the TSC, treating the non availability as a Force Majeure Event?
- The PTA must focus on what is at risk by allowing there to be no cover. There is a straight forward risk of claims by third parties if there is third-party liability, because the PTA will be seen to have deeper pockets than the Contractor. There is a risk to the economy if there is major property damage and the Contractor has no funds to put it right, thereby delaying passenger movement.
- There is also the reality that the Contractor has few assets and would have difficulty meeting any substantial non insured loss or damage.

There should be a requirement that the insurance policy shall include a cross liability clause such that the insurance shall apply to the PTA and the Contractor as separate insured and waivers of rights of subrogation.

The Contractor should be required to apply or procure the application of the proceeds of any claims in a specified manner, which avoids the possibility that the Contractor might take the money and ignore the Transport Services Contract, although the existence of a performance bond should be a deterrent.

2.17 Liability and Indemnities

The Contractor should assume all liability as regards the PTA in relation to the operations under the Transport Services Contract (other than and to the extent that the PTA or those for which it is responsible caused the loss or damage).

If there is damage to third parties, which would include passengers or their property, the Contractor should indemnify the PTA against claims by third parties, other than and to the extent that the PTA or those for which it is responsible caused the loss or damage. The Transport Services Contract should also specify how to handle legal and other processes arising from such claims.

2.18 Environmental and Other Conditions

The PTA should remain liable for any pre-existing hazardous waste and, where there is a requirement under the law to remove it, then the PTA should bear the cost of remediation. All subsequent environmental pollution arising from any Contractor act, neglect, or default should be at the risk of the Contractor.

The law of the host country should preclude claims by third parties arising from the usual noise and vibration emanating from the railway as a result of its usage in accordance with Good Industry Practice. Whether the Contractor should be liable for excessive noise and vibration, i.e., if Good Industry Practice was not applied and the cause of the problem is that either or both the Below Rail Infrastructure

and equipment has not been properly maintained depends upon the scope of the Transport Services. If the Contractor is not responsible for either infrastructure or rolling stock, it should have no liability and should be entitled to an indemnity.

2.19 *Intervening Events*

Intervening Events are events that impact upon the ability of one party to the Transport Services Contract to perform its obligations or to receive the benefits under the Transport Services Contract. There are many ways to identify and specify the consequences of these Intervening Events. This Guide uses Changes in Service and Force Majeure Events.

Changes in Service are designed to cater for events that arise and are at PTA risk, that result in Contractor loss of income or increased costs, or both. Such events are more appropriately dealt with through compensation than by being declared a PTA Default because termination of the Transport Services Contract should be a last resort in all circumstances. Although, if an event renders the parties' contractual relationship untenable, the PTA may choose to exercise its voluntary termination rights. Increased costs or income loss can arise through the following circumstances:

- Timetable changes
- PTA breach of obligation, which includes a breach or delay occasioned by third parties for which the PTA is responsible
- PTA request for Changes in Services
- Discriminatory or specific changes in law
- Railway sector or other specific events, e.g., a Special Event or occurrence of a Disaster
- Changes in safety regime
- Changes in fares or discounts, if the Contractor receives reimbursement through the fare box
- Changes in staff training standards
- Changes in disability access
- Contractor request for a Change in Service that enhances service delivery that exceeds the level contemplated at tender, and to which the PTA agrees.

If the TSC includes provisions for bonuses and penalties, the Contractor's liability also should be relieved for the period of delay or disruption if and to the extent that it arises from the Change in Service. As to whether the PTA should be entitled to a foregone bonus is more problematical since it is difficult to demonstrate that a bonus would have been awarded had it not been for the Intervening Event. It may be possible for the Contractor to show examples that indicate that the PTA timed the Change in Service to save itself money.

The Contractor should be obliged to use reasonable efforts to mitigate its losses and costs, for example, by rescheduling its own maintenance timetable or by redeploying staff.

Force majeure events

These are events that prevent the Contractor from performing its obligations at any time, for which the Contractor bears the financial risk of increased costs and reduced revenue, but for which it is given relief from TSC termination for failure to meet its contractual obligations to the extent that the Force Majeure Event caused that failure. However, it should be borne in mind that since the Contractor is likely to earn revenue only from Transport Services; any prolonged uninsured loss is likely to result in Contractor insolvency. The circumstances listed below may be outside of Contractor control, but whether the Contractor can recoup lost income will depend upon all circumstances surrounding the railway system, revenue, and capacity, and the extent to which the full burden should fall on the Contractor. Force Majeure Events may include the following:

- Fire, explosion, lightning, storm, tempest, flood, bursting or overflowing of water tanks, apparatus or pipes, ionizing radiation (to the extent it does not constitute a Force Majeure Event), earthquakes, riots and civil unrest;
- Any failure or shortage of power, fuel, or transport;
- Any blockade or embargo;
- Any of the following labor disruptions:
 - official or unofficial strike;
 - lockout;
 - work slowdown;
 - other dispute.

However the Transport Services Contract should specify that the expression ‘Force Majeure’ should not extend to events that arise directly or indirectly as a result of any willful default or willful act of the Contractor, or any of its contractors or their sub-contractors.

Whether Force Majeure Events should extend to war, civil war, armed conflict or terrorism; nuclear, chemical, or biological contamination (except if the contamination source or cause is the result of the Contractor’s actions), pressure waves caused by devices travelling at supersonic speeds, or whether it should be dealt with under Changes in Services, or give rise to termination depends upon the scope of the Transport Services and the expected result at the time of preparing the reform.

Consequences

Where a careful analysis shows that the financial effects of delays and disruption caused by Force Majeure Events should be borne by the Contractor, then no compensation should be paid by the PTA on the occurrence of such delay or disruption.

The TSC should provide that when a Force Majeure Event has occurred and the PTA has been informed, the parties should consult to discuss relevant issues, such as the likely duration of the Force Majeure Event and the action to be taken to mitigate its effects.

In some jurisdictions, the courts have the power to intervene and change contractual provisions to adjust the economic equilibrium, or because the Contractor is meeting a public service obligation, to adjust the Contractor position back to what it ought to have been had the event never occurred. Thus, in those jurisdictions, where the TSC allocates risks in relation to a Force Majeure Event, the courts might, nevertheless, overturn the TSC provisions.

2.20 Preservation of Railway Assets

The following are some commonly expected provisions.

The PTA will have high interest in assets maintenance throughout the Services Period. The Contractor's maintenance requirements for managing physical assets should be detailed in the TSC.

If the PTA reasonably believes that the Contractor is in breach of maintenance obligations under the TSC then the PTA should be permitted to carry out (or procure) a survey of the relevant assets to evaluate asset condition and establish whether the Contractor is maintaining the assets in accordance with contractual renewal and maintenance obligations. Exercising the right to survey the assets may be restricted to no more than once during a specified number of months.

The PTA should provide the Contractor with notification an agreed minimum number of days in advance of the date on which the PTA wishes to carry out the survey. The PTA should consider any reasonable Contractor request to reschedule the survey. When carrying out any survey, the PTA should use or procure the use of reasonable efforts to minimize any disruption to Contractor activities. The PTA should bear any costs associated with the survey, unless survey results reveal a Contractor failure, in which case, the Contractor should bear survey costs, or in the case of surveys on Hand Back be borne jointly. The Contractor should be required provide the PTA, without charge, any reasonable assistance required during the survey.

If the survey shows that the Contractor has failed to comply with maintenance obligations the following consequences could result:

- The regime for penalty points under the Transport Services Contract may come into play.
- The PTA should be authorized to notify the Contractor of required standards for assets condition to comply with TSC obligations.
- The PTA should specify a reasonable period within which the Contractor complete rectification and/or maintenance work.

The Contractor should be required to carry out rectification and/or maintenance work within the specified period and at its own expense.

If the survey is in relation to Hand Back, survey costs should be borne jointly or as otherwise set out in the Transport Services Contract. If the Contractor so requires, the survey should be carried out by an independent expert agreed between the parties. If parties are unable to agree, the Transport Services Contract should include the name of a nominating body to appoint the expert. If the survey finds that additional maintenance work is required to comply with assets standards stipulated under the Transport Services Contract, the PTA should deposit a portion of the TSC periodic payments in an escrow account until the work is completed. The Contractor may be permitted to issue a bond rather than having deductions, but the bond should be callable on demand.

2.21 *Temporary Operation*

If the Contractor fails to deliver a Transport Service, the PTA may temporarily require the right to procure operation of all or part of those services. The provision should deal with the service of a notice of intent to take over operation, the responsibility for costs incurred in relation to operation, and the allocation of risk, particularly in relation to damage during operation, and the withdrawal of the PTA or its nominee at the end of the emergency.

2.22 *Bonus and Penalties*

There are many mechanisms for bonus and penalty arrangements. One option may be to allocate points for each key performance indicator and to vary the number of points as a way to indicate the margin by which targets are met or missed, or in the case of failure, the degree of failure.

Financial bonuses or penalties would be allocated against the points according to a scale set out in a schedule.

Thresholds should be set for penalty points, either by points awarded during a specified time period, or aggregated over a series of periods, when the thresholds are reached, PTA should be entitled to increase the frequency of Contractor performance monitoring of the until the number of penalty points awarded in any period drops to a minimum.

2.23 *Confidential Information*

It is better to start with the concept of transparency and require the Concessionaire to divulge any information necessary to keep the public informed of the status of service improvements. The scope of such disclosure can be dealt with under item 2.25 [Reporting and records] The TSC should define 'Confidential Information'. Confidential information should extend from System Contracts to matters arising under those contracts and under and in connection with matters arising under the Transport Services Contract. The Transport Services Contract should specify circumstances under which confidential information should be released, and to whom.

The parties should agree to keep information confidential except in respect of Permitted Release referred to below. The Contractor may be required to enter into confidentiality undertakings with counterparties to the Systems Contracts.

Permitted Release should include the following disclosure and/or uses.

- Disclosure is required or compelled by any law;
- Disclosure is necessary to conduct legal proceedings, including any dispute resolution process under the Transport Services Contract or a Systems Contract;
- Disclosure is required under any stock exchange listing requirement or rule;
- Disclosure is required in relation to Rail Safety;
- Disclosure is required for the recipient's lawyers or accountants under a duty of confidentiality;
- Disclosure is required for the recipient's banker or other financial institution, for the purpose of raising funds or maintaining compliance with credit arrangements, if such banker or financial institution has executed a legally enforceable confidentiality deed in favor of the owner of the Confidential Information;
- Disclosure is required for facilitating train control directions where the disclosure of information is by the Contractor in the usual course of undertaking train control;
- Disclosure is required by any person involved in clearing an incident or emergency that is preventing the operation of Train Services on the Rail Infrastructure.

2.24 Staffing

If real reform of the railways is to be achieved then this is likely to require a comprehensive change to the terms and conditions for railway employees, and the manner in which they carry out their duties, including the removal of restrictive labor practices. It would be reasonable to include a provision in the Transport Services Contract promoting the use of local staff and to require the Contractor, in the selection of local staff, to give preference to existing rail employees that are suitable, qualified, and available. If the Contractor can demonstrate that existing rail employees are unsuitable or insufficiently qualified for specific positions, then the Contractor should be free to recruit staff from another source.

Each transferring employee should enter into an employment contract with the Contractor. Issues such as accrued pension rights and other employee benefits will need to be addressed. However, maintaining conditions that are at least equal to the terms and conditions enjoyed under the former rail employer prior to the commencement of the service period will depend upon what those terms were and the extent to which it would be economically sensible or feasible to adopt them.

2.25 Reporting and Records

The PTA should set out its rights to information in the TSC. Prior to the commencement of the Service Period, the PTA and the Contractor should agree on the format and scope for monthly and quarterly reports, and these should be set out in the TSC. The reports should cover progress in the development and implementation of measures to be taken by the Contractor to enhance performance and other key metrics data; the quarterly reports might extend to Contractor quarterly management reports.

The Contractor should carry on its business and affairs with due diligence and efficiency and in accordance with sound international financial and commercial standards and practices and fully account for all aspects of its business as follows:

- The Contractor should prepare and submit to the PTA within three months of the end of each fiscal year, a copy of the Contractor's audited financial statements that have been submitted to the state tax authorities and drawn up by an internationally recognized accounting/auditor firm registered in the host country in accordance with international accounting standards and host country laws. The financial statements shall include the balance sheet, a profit and loss account, a statement of cash flow, and any explanatory notes, including any variations from international accounting standards that were undertaken to comply with host country's laws.
- In addition to financial statements, the annual reporting to the PTA might include the following information and metrics.
 - Passengers and passenger-km carried by service or activity;
 - Revenue and costs by service or activity;
 - Actual vs. planned maintenance and details of asset breakdowns that have affected services;
 - Summary of events and causes of cancellations and late running, together with complaints received and actions taken and summaries of user satisfaction surveys;
 - Summary of accidents and incidents, causation and consequences (serious accidents should have been reported to the relevant Ministry as soon as they occurred and would be an issue for the Safety Board);
 - Details of human resources programs including personnel employed and training provided; and
 - Rolling stock utilization statistics.

The PTA, at its own expense, may appoint an independent auditor registered in the Host Country to verify Contractor-provided statements and information. The Contractor shall provide all reasonable assistance to such auditor.

The TSC should specify any other reports that may be required and which records should be retained. Of particular concern will be information flows to the Minister in the event of a serious incident or accident or near miss.

Retention periods for records categories should be stated as what should and what will be required at the time of termination or expiry of the TSC.

2.26 Termination

Termination by PTA for contractor default

The TSC should list the events of default by the Contractor which, if they remain unremedied or they cannot be remedied, would give rise to Termination. Of course, there are Intervening Events creating circumstances under which the Contractor is relieved of liability, so termination for default would not arise nor would it if the default was caused by the act or neglect of the PTA. Examples of events of default may include the following:

- Abandonment by the Contractor of the performance of obligations;
- Failure to comply with agreed levels of service under the Transport Services Contract, resulting in an excessive number of Penalty Points;
- Failure to pay sums to the PTA as they fall due;
- Insolvency and other similar events;
- Acts of corruption. The Contractor should be given the opportunity to dismiss personnel or contractors involved in corrupt practices if the Contractor's management was unaware of the acts;
- Except as permitted by the TSC, the assignment or transfer of any of the Contractor's rights or obligations in relation to the TSC;
- Any other material breach by the Contractor of any obligations under the TSC;

Termination by contractor for default of PTA

The TSC should also list the events that would constitute a PTA default, on a similar basis to those relating to the Contractor. The list may include:

- Removal of consent required for the Contractor to perform under the Transport Services Contract; and
- Any material breach by the PTA of any of its obligations under the TSC, after notice from the Contractor, including reasonable details of the breach and demanding remedies thereof.

Termination for non default

The TSC should provide for Termination in the event of prolonged Force Majeure or where the PTA wishes to terminate early for reasons in the public interest.

Termination procedure

The party seeking to terminate should serve a notice of Intention to Terminate and set out the grounds, for example, an event of default, on which it is seeking to rely. If the event of default can be remedied then the defaulting party should be given an opportunity to do so, or to submit a program to remedy the default. If the failure created penalty points, the regime for penalty points should apply.

Following the delivery of a notice of Intention to Terminate, the party that served the notice should be permitted to serve a Termination Notice unless the Intention

to Terminate was served as a result of an event of default and the default was subsequently remedied.

Effectiveness of a termination notice

The Transport Services Contract should state the minimum required time between serving the notice of Intention to Terminate and the Date of Termination.

Other remedies

If a party exercises the right to terminate under the TSC, that party should not be precluded from the right to exercise other remedies provided for under the Contract. However the TSC often includes an ‘exclusive remedies’ clause that limits the rights of either party to remedies provided under the TSC, rather than generally at law, and some consequential losses may be excluded.

Rights and obligations upon termination

The TSC needs to state that certain provisions remain in effect, such as Confidentiality, Dispute Resolution, and provisions relating to post-Termination financial adjustment, such as payments due.

The Contractor should release control of the Railway Assets in accordance with a Hand Back procedure. By and large, there should be no compensation for releasing control if the Contractor has not funded the acquisition of those assets.

If Termination is due to Contractor Default, then the PTA should be able to recover those losses permitted under the TSC and to call the Performance Bond.

On Force Majeure, each Party should bear its own losses.

On PTA default or voluntary termination, the Contractor should be entitled to receive demobilization costs and some compensation for revenue foregone.

On expiry of the Service Period, the Contractor should release control of the Railway Assets to the PTA, and at the option of the PTA, sell to the PTA other Contractor assets.

2.27 Hand Back

Within a stated period of the inspection carried out under item 2.20, or another agreed time period, the parties should meet and agree on processes based on the Hand Back procedure schedule to the TSC, which shall comprise the following items:

- Works to be carried out to ensure that railway assets comply with the requirements on the Hand Back date;
- Whether any subsisting contracts are to be cancelled or assigned to the PTA;
- Inventory of items to be included in the scope of Railway Assets;
- All of the Contractor’s assets and details of whether they are to be removed or transferred to the PTA;
- Employment, transfer, or redundancy of employees; and

- Other details and procedures in respect of the scope of Hand Back procedure.

On the Hand Back date, in accordance with the Hand Back procedure, the Contractor should release or transfer to the PTA the following:

- All Contractor rights, title and interest in Railway Assets, free and clear of any claims or encumbrances of whatever kind or nature;
- All rights to use, own, or have access to Railway Assets;
- All operation and maintenance manuals and other information as may reasonably be necessary, or as may be reasonably requested by the PTA to enable it or its designee to continue operation of Railway Assets;
- Individual and collective employment agreements, medical and pension schemes, and other labor relation obligations.

If, within a stated period of days of the Hand Back date, the Contractor fails to comply with or complete any item of the Hand Back procedure then the following will apply:

- Within a further stated period of days of the Hand Back date, the PTA should be entitled to give notice detailing the Hand Back failure and require the Contractor to remedy the same within a reasonable specified time and the Contractor should at its own cost, remedy the Hand Back failures; and
- if the Contractor refuses or otherwise fails to remedy the Hand Back failure within the time period specified then the PTA should be entitled to remedy the Hand Back failure itself and to recover the costs and expenses from the Contractor, whether under the Performance Bond or otherwise.

2.28 Assignment

Restrictions on the contractor

The TSC should not allow the Contractor to assign, novate, or transfer its rights under the Transport Services Contract nor to subcontract substantial parts of its obligations to a single subcontractor.

Restrictions on the PTA

The TSC should not allow the PTA to assign or transfer its rights or obligations under the TSC without Contractor consent except if the transfer takes place under legislation, or is required to facilitate public sector reorganization. However, the creditworthiness of the public sector party must not be adversely affected as a consequence.

2.29 Intellectual Property Rights

The PTA should grant or procure the grant to the Contractor of all necessary Intellectual Property Rights required by the Contractor to operate and maintain the Railway Assets. Those rights should terminate with expiry or earlier termination of the TSC.

If the Contractor has developed or acquired software in connection with delivery of Transport Services, the PTA may require licenses to use processes in respect of those operational systems. If this is proprietary software, then following expiry or earlier termination of the TSC, those processes may be required until a new contractor is appointed and has had an opportunity to introduce its own systems.

2.30 Payments

Provision should be made for payments and timing of payments such as when they would otherwise be due on a public or banking holiday.

A failure to make payment by the due date should result in compensation. The Contractor will be borrowing working capital; any interest payable should represent the Contractor's costs for late payments. However, the rate of compensation should not be such that it would provide an incentive for the Contractor to delay paying the PTA because it is a cheaper alternative than borrowing, e.g., at overdraft rates. Thus interest rates for late payments should be linked to the fluctuating cost of funds.

2.31 Proper Law and Language

In most Host Countries it is accepted that the law controlling the Agreement will be the law of the host country.

As to the language, the costs of international bidders and their Funders will be substantially reduced if translations are not required; therefore English, French or Spanish have advantages; typically, English is the most universal. However there may be political or cultural reasons that this is unacceptable.

2.32 Dispute Resolution

In effect, there are three main methods of resolving disputes, expert determination, arbitration, and litigation; their use depends upon the law of the host country. In some jurisdictions, no mechanism exists to recognize an expert determination as final, binding, and enforceable. In other jurisdictions, courts will intervene in arbitration, or when an award for enforcement is to be registered, courts will accept a rehearing of issues.

Reasons to avoid using the courts to settle disputes include the caliber of the judiciary, corruption within the court system, delays in processes and hearings, and the risk of multiple appeals.

International bidders' views on dispute resolution will depend on whether the host country is a signatory to the New York Convention on the Enforcement of Foreign Arbitral Awards, or other regional conventions.

As a condition precedent to launching proceedings, it may be helpful to require that the PTA's senior administrator and the Contractor's chief executive officer meet and be allowed a short time to attempt to resolve the issue. This requirement ensures that senior management understands the issues and the point of view of their counterparts before embarking on an expensive dispute. The corollary is that during the pre-reform process, PTA training should help administrators recognize

that they must take decisions, not hide behind the pretext that decisions were forced upon the PTA by a Disputes Resolution Procedure finding.

2.33 Boilerplate

The TSC will require several standard Service Periods addressing issues such as the service of notices, whether the TSC represents the entire agreement between the parties, or if there are a series of contracts, and a provision to preserve the TSC if any provision is found to be illegal, and so forth.