

For the purpose of this Clause 7.3, "**Surplus Amount**" means the amount by which the aggregate of:

- (a) the aggregate amount of all proceeds received by FMEL in respect of a resolution of the dispute between FMEL and CMAL in relation to a contract price increase for the vessels known as 801 and 802 (less all independent third party fees, costs and/or expenses reasonably and properly incurred by FMEL in connection with such contract price increase); and
- (b) all Loans utilised by the Borrower under this Agreement which are outstanding as at that date, excluding, for the avoidance of doubt, any Loans which have been repaid or prepaid pursuant to this Clause 7 (*Repayment and Prepayment*),

exceeds the sum of £33,000,000 less the amount of all CBC Subscription paid by CBC to the Borrower.

- 7.4 If it becomes unlawful for the Scottish Ministers to perform any of its obligations as contemplated by this Agreement or to fund or maintain its participation in any Loan then upon the Scottish Ministers notifying the Borrower, the Available Facility will be immediately cancelled and the Borrower shall repay the Loans made to it on the last day of the calendar month occurring after the Scottish Ministers have so notified the Borrower or, if earlier, the date specified by the Scottish Ministers in a notice delivered to the Borrower (being no earlier than the last day of any applicable grace period permitted by law).
- 7.5 Any notice of cancellation or prepayment given by any Party under this Clause 7 shall be irrevocable and, unless a contrary indication appears in this Agreement, shall specify the date or dates upon which the relevant cancellation or prepayment is to be made and the amount of that cancellation or prepayment. Any prepayment under this Agreement shall be made together with accrued interest on the amount prepaid. The Borrower shall not repay or prepay all or any part of the Loans or cancel all or any part of the Available Facility except at the times and in the manner expressly provided for in this Agreement. No amount of the Available Facility cancelled under this Agreement may be subsequently reinstated. Amounts repaid or prepaid shall not be available for re-borrowing.
- 7.6 Notwithstanding any other provision of this Agreement, if an Exit occurs at any time prior to the exercise by the Scottish Ministers of all of their Subscription Rights and prior to the Relevant Exit Date, then:-
 - 7.6.1 the Borrower shall promptly notify the Scottish Ministers upon becoming aware of that event;
 - 7.6.2 the Scottish Ministers shall not be obliged to fund a Utilisation; and
 - 7.6.3 the Scottish Ministers, in their sole discretion, may by notice in writing to the Borrower cancel the Facility and the First Facility Agreement and declare all outstanding Loans, together with accrued interest, and all other amounts accrued under the Finance Documents immediately due and payable, whereupon the Facility and the First Facility Agreement shall be cancelled and all such outstanding amounts shall become automatically due and payable.

8. FEES AND EXPENSES

- 8.1 All costs charges and expenses incurred by a party to this Agreement in connection with the negotiation, preparation, execution and carrying into effect of the Finance Documents shall be borne by the party so incurring the same.
- 8.2 All reasonable costs, charges and expenses in each case properly incurred (including legal expenses on a full indemnity basis and VAT) of the Scottish Ministers incurred directly in connection with the enforcement or preservation of rights under the Finance Documents will be paid on demand by the Borrower.

9. PAYMENTS AND TAX

- 9.1 All payments by the Borrower hereunder shall be made without set-off or counterclaim in same day funds to such account of the Scottish Ministers in such place as the Scottish Ministers shall notify to the Borrower from time to time.
- 9.2 All payments due to be made by the Borrower hereunder, whether of principal, interest or otherwise, shall be made free and clear of and without deduction for any present or future taxes (including, without limitation, VAT, stamp duty land tax, corporation tax, income tax, capital gains tax and any penalty or interest payable in connection with any failure to pay or any delay in paying the same), levy, duties or other charges or withholdings ("Tax"). If the Borrower is compelled by law to deduct or withhold any Tax it will ensure that such deduction or withholding does not exceed the minimum liability therefor and will promptly pay to the Scottish Ministers such additional amount as is necessary to ensure that the net amount received by the Scottish Ministers is equal to the amount payable by the Borrower had there been no deduction or withholding.
- 9.3 The Borrower shall within 10 Business Days of demand pay to the Scottish Ministers an amount equal to the loss, liability or cost which the Scottish Ministers determine will be or has been (directly or indirectly) suffered for or on account of Tax by the Scottish Ministers in respect of a Finance Document.
- 9.4 All amounts expressed to be payable under a Finance Document to the Scottish Ministers which (in whole or in part) constitute the consideration for any supply for VAT purposes are deemed to be exclusive of any VAT which is chargeable on that supply, and accordingly if VAT is or becomes chargeable on any supply made by the Scottish Ministers to the Borrower under a Finance Document and the Scottish Ministers are required to account to the relevant tax authority for the VAT, the Borrower shall pay to the Scottish Ministers (in addition to and at the same time as paying any other consideration for such supply) an amount equal to the amount of that VAT (and the Scottish Ministers must promptly provide an appropriate VAT invoice to the Borrower).

10. REPRESENTATIONS AND WARRANTIES

- 10.1 The Borrower and/or FMEL (as the context so requires) makes each of the representations and warranties set out in this Clause 10 (for itself and each other Obligor);
- 10.2 The rights and remedies of the Scottish Ministers in respect of any misrepresentation or breach of warranty on the part of the Borrower shall not be prejudiced or affected by any investigation of the Borrower or any other person by or on behalf of the Scottish Ministers or (without limitation) any other matter which but for this provision would or might prejudice or affect any such rights or remedies.
- 10.3 The representations and warranties set out in this Clause 10 are deemed to be made by reference to the facts and circumstances then existing on each day the representations and warranties are given.
- 10.4 It is a limited liability body, duly incorporated and validly existing under the laws of Scotland and has the power to own its assets and carry on its business as it is being conducted.
- 10.5 It has the power (and all necessary corporate authorisations have been obtained) to enter into the Finance Documents to which it is a party and to perform its obligations under the Finance Documents and has complied, or will comply, with all material statutory and other legal requirements relative to its business.
- 10.6 No limit on the powers of the Borrower will be exceeded as a result of the borrowing contemplated by the Finance Documents.

- 10.7 On execution each of the Finance Documents:
- 10.7.1 will constitute legal, valid and binding obligations of the Obligors enforceable in accordance with its terms;
 - 10.7.2 does not and will not breach any law or regulation applicable to the Obligors;
 - 10.7.3 does not and will not breach the constitution of the Obligors; and
 - 10.7.4 does not and will not breach any agreement or instrument by which an Obligor is bound, or constitute a default or termination event (however described) under any such agreement or instrument or breach any judgment, decree, judicial order or determination of any court or applicable national or supranational judicial or governmental authority.
- 10.8 All Authorisations required or desirable to enable the each Obligor lawfully to enter into, exercise its rights and comply with its obligations under each Finance Document and to make each Finance Document admissible in evidence in Scotland have been obtained or effected and are in full force and effect.
- 10.9 All Authorisations necessary for the conduct of the business of each Obligor have been obtained or effected and are in full force and effect.
- 10.10 The choice of Scots law or the laws of England as the governing law of each of the Finance Documents will be recognised and enforced by the Scottish courts.
- 10.11 It is not required to make any deduction for or on account of Tax from any payment it may make under any Finance Document.
- 10.12 other than the Security Documents, it is not necessary that any of the Finance Documents be registered, filed, recorded or enrolled with any court or other authority or that any stamp, registration or similar tax be paid on or in relation to any of the Finance Documents.
- 10.13 In each case:
- (1) in respect of any matters occurring on or before the date of this agreement or save as disclosed to the Scottish Ministers or their advisers or matters of which the Scottish Ministers or any of their wholly owned companies are aware; and
 - (2) in respect of any matters occurring after the date of this agreement, save as disclosed to the Scottish Ministers or their advisers:
 - (a) no litigation, arbitration or administrative proceedings is/are pending nor, to the Borrower's knowledge after due enquiry, threatened against an Obligor or any of its assets which could or might have a Material Adverse Effect;
 - (b) no Obligor (nor would, with the giving of notice or passing of time or both, be) in default in respect of any Financial Indebtedness and the borrowing and repayment by the Borrower of the Loans will not contravene any existing applicable law or regulation or any contractual or other restriction or limitation binding on it;
 - (c) no Event of Default is continuing or might reasonably be expected to result from the drawing of any part of the Loans or the entry into, or the performance of, the Finance Documents or any transaction contemplated by the Finance Documents;
 - (d) no other event or circumstance is outstanding which constitutes, or (with the expiry of a grace period, the giving of notice, the making of any determination or any combination of any of the above) would constitute, a default or a termination event (however described) under any other agreement or instrument which is binding on the Obligor or to which any of their assets are subject which could or might have a material adverse effect on its financial condition;
 - (e) the financial projections contained in the Financial Information represent a fair and reasonable assessment of the anticipated future performance of the Group based on the assumptions (if any) stated in the Financial Information;

- (f) so far as the Borrower is aware having made due enquiry, the Financial Information did not omit any information which, if disclosed, might reasonably be expected to adversely affect the decision of a person considering whether to provide financial assistance to the Borrower.
- 10.14 It has not taken any corporate action, nor have any steps been taken, or legal proceedings started or threatened against it for its winding up or dissolution, or for the appointment of a trustee in sequestration or similar officer of it or all or any part of its assets or revenues.
- 10.15 It holds all types of insurances, and for insured sums, which a prudent operator of the business would hold.
- 10.16 Any financial projections contained in the Financial Information have been prepared as at their date, on the basis of recent historical information and on the basis of reasonable assumptions.
- 10.17 For the purposes of the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) (the "Regulation"), its centre of main interest is situated in Scotland and it has no "establishment" in any other jurisdiction.
- 10.18 It owns, or, as appropriate, any of its Subsidiaries, will have rights to use under licence, all of its or their assets, including the intellectual property rights, necessary for the operation of its business and is not in breach of any law, rule or order.
- 10.19 Nothing has occurred since the date of any information referred to in this Clause 10 which, if disclosed, would make that information untrue or misleading in any material respect.
- 10.20 The information contained in the officers certificate to be delivered to the Scottish Ministers under this Agreement is true, complete and accurate in all respects.
- 10.21 The Repeating Representations are deemed to be made by the Borrower by reference to the facts and circumstances then existing on the date of each Utilisation Request.

11. UNDERTAKINGS BY THE BORROWER

The Borrower and/or FMEL (as the context so requires) undertake (for themselves and each other Obligor) to the Scottish Ministers that throughout the Loan Period it shall:

- 11.1 deliver to the Scottish Ministers such information as the Scottish Ministers may reasonably require including the following:
- 11.1.1 any changes in key personnel or office bearers of FMEL, with FMEL undertaking to maintain adequate senior management commensurate with the senior management in place as at the date of this Agreement at all times;
- 11.1.2 monthly financial reports including a profit and loss, balance sheet and actual cashflow against budget (to be submitted within one month of the end of the relevant month and in a format acceptable to the Scottish Ministers), such monthly financial reports to include details of the Permitted Fees and all details in relation thereto;
- 11.1.3 annual audited accounts to be received no later than nine months after the end of the relevant financial year other than for the year ended 31 December 2016;
- 11.1.4 within 30 days after the beginning of each financial year, an updated Business Plan and an updated Financial Model satisfactory to the Scottish Ministers (acting reasonably);

- 11.1.5 as soon as reasonably practicable after the same become available (but in any event within 30 days of the month end to which the management accounts relate) management accounts, such management accounts to be accompanied by commentary in reasonable detail on the financial performance of the Group, a build update report on the build out of vessels 801 and 802 plus cost overruns and other issues, details of cost estimations in connection therewith and any such other information as relevant to the delivery of the vessels and to the running of the business;
 - 11.1.6 an annual operating budget consistent with the Financial Model within 30 days after the beginning of each financial year; and
 - 11.1.7 notification as soon as practicable of any and all material changes in the financial condition or business of the Group.
 - 11.2 on reasonable request, following the expiry of a reasonable period of notice and no more than:
 - 11.2.1 once in any rolling period of 20 Business Days during the period from the date of this Agreement until the date that the Available Facility has been fully drawn by the Borrower; or
 - 11.2.2 once in any quarter of each financial year of the Borrower at any time during the period from the date that the Available Facility has been fully drawn by the Borrower until the Final Repayment Date,
- FMEL shall (a) allow an independent operational expert nominated by the Scottish Ministers to meet with the Chief Executive Officer of the Group (whether by telephone conference or otherwise) and (b) provide such independent expert with information as may be reasonably requested by him, provided that (i) such meeting/call or information is in connection with the vessel build progress for the vessels known as 801 and 802, and (ii) such meeting/call is for no longer than one working day in duration.
- 11.3 maintain its existence and carry on its activities in accordance with its constitutional documents substantially in the form carried on as at the date of this Agreement and obtain and maintain in force all licences, consents, permits and insurances necessary for its business and assets;
 - 11.4 not amend its constitutional documents without the prior written consent of the Scottish Ministers, which consent shall not be unreasonably withheld
 - 11.5 take all steps and actions for the purpose of perfecting and giving effect to the terms hereof;
 - 11.6 not acquire any company or any shares in any company or create any Subsidiary nor enter into any partnership or joint venture with any party without the consent of the Scottish Ministers (such consent not to be unreasonably withheld or delayed);
 - 11.7 supply to the Scottish Ministers promptly upon becoming aware of them, details of any litigation, arbitration or administrative proceedings which are current, threatened or pending, and which might, if adversely determined, have a material adverse effect on the financial condition of the Group or on the ability of an Obligor to perform its obligations under this Agreement;
 - 11.8 immediately upon becoming aware of it, inform the Scottish Ministers of the occurrence of an Event of Default or Potential Event of Default (and the steps, if any, being taken to remedy it);
 - 11.9 not incur any Financial Indebtedness other than Permitted Financial Indebtedness;
 - 11.10 operate each Account and any other bank account held by it in accordance with the Financial Transparency (EC) Regulations 2009;

- 11.11 save in each case for Permitted Fees, not to pay, make or declare any dividend, other distribution, management fees or equivalent or pay any interest on unpaid dividends, distributions management fees or equivalents or any other sums intended to act as distributions or payment of fees to any of its shareholders;
- 11.12 not to create or attempt to create or allow to be created or to exist any security, charge (whether fixed or floating) or lien of any kind without the prior written consent of the Scottish Ministers, other than a Permitted Security Right;
- 11.13 not to make any loans or advance or enter into any guarantee or indemnity other than in the ordinary course of business unless with the prior consent of the Scottish Ministers;
- 11.14 not to change the nature of the business undertaken by it from that undertaken as at the date of this Agreement;
- 11.15 promptly upon a request by the Scottish Ministers, supply to the Scottish Ministers a certificate signed by two of its directors or senior officers on its behalf certifying that no Event of Default is continuing (or if an Event of Default is continuing, specifying the Event of Default and the steps, if any, being taken to remedy it);
- 11.16 notify the Scottish Ministers in writing of any actual or threatened claim against it in respect of an alleged breach of Environmental Law or remedial obligation or liability under such law which could, if well-founded, (1) have a Material Adverse Effect or (2) constitute a material liability of the Group (which shall be judged solely by the Scottish Ministers acting reasonably);
- 11.17 indemnify the Scottish Ministers against all costs and expenses suffered or properly incurred by them which arise as a result of (1) any actual or threatened breach of Environmental Law, (2) any actual or threatened release of or exposure to a Dangerous Substance on, at or from the premises or operations of FMEL or (3) any actual or threatened claim referred to in paragraph 11.15 above whether such claim has a Material Adverse Effect or not;
- 11.18 not make any Disposal, or agree to do so, other than in the ordinary course of its business whether absolutely or in security;
- 11.19 maintain all of its assets in a good state or repair and maintenance and in good working order;
- 11.20 comply in all respects with all laws to which it may be subject, if failure so to comply would materially impair its ability to perform its obligations under the Finance Documents;
- 11.21 not to repay, pre-pay, redeem, purchase or otherwise satisfy in any way or make any payment of or in respect of any shareholder or directors loans (excluding any repayment or prepayment made by FMEL to the Borrower pursuant to Clause 3.2 of the Intra-Group Loan); and
- 11.22 not enter into any transaction or series of transactions to sell, transfer or otherwise dispose of its interest in the share capital of MacKellar without the consent of the Scottish Ministers (such consent not to be unreasonably withheld or delayed).

12. SECURITY

The parties agree that the Facility shall be secured by the Security Documents and any other security documents granted in favour of the Scottish Ministers from time to time. All Security granted in favour of the Scottish Ministers will be discharged (i) on repayment in full of all sums due under this Agreement and the First Facility Agreement, or (ii) on the exercise by the Scottish Ministers of their Subscription Rights in respect of all Warrants capable of being issued pursuant to Clause 6 (*Issue of Warrants*) of this Agreement and repayment in full of all sums owing to the Scottish Ministers under the First Facility Agreement. For the avoidance of doubt, Warrants will no longer be capable of being issued where Warrants have been issued in respect of Loans drawn in an amount equal to the Available Facility or where Warrants have been issued in respect of all Loans drawn prior to the end of the Availability Period.

13. EVENTS OF DEFAULT

13.1 If any of the following events shall occur:

13.1.1 any sum owing under any Finance Document is not paid on the date it falls due save where such default was due to administrative error and is remedied within 3 Business Days; or

13.1.2 the Facility is used for a purpose other than that specified in Clause 2.2, without the prior written consent of the Scottish Ministers; or

13.1.3 an Obligor defaults under any other provision of this Agreement or any other Finance Document and, if capable of remedy, the default is not remedied within 15 Business Days after notice to the Borrower requesting action to remedy the same; or

13.1.4 any representation or warranty of the Borrower made in or deemed made pursuant to any provision of this Agreement proves to have been incorrect in a material respect;

13.1.5 the holder of any Security takes possession or a trustee in sequestration or similar officer is appointed of the whole or any part of the undertaking, property, assets or revenues of an Obligor; or

13.1.6 an Obligor enters into any composition or arrangement with its creditors or proceedings are commenced in relation to an Obligor under any law, regulation or procedure relating to reconstruction or re-adjustment of debts; or

13.1.7 an Obligor is adjudicated or found bankrupt or insolvent or any order is made by any competent court or any petition is presented for the winding-up or dissolution of, or for the appointment of a trustee in sequestration or similar officer of, an Obligor or of a substantial part of its assets save for the purposes of amalgamation or reorganisation (not involving insolvency) the terms of which shall have been previously approved in writing by the Scottish Ministers; or

13.1.8 in relation to borrowings (including any grant, loan or subsidy received or receivable by an Obligor) of an Obligor raised other than under this Loan Agreement ("**Other Borrowings**") any Other Borrowings become prematurely due and payable or capable of being declared due and payable, or any Other Borrowings or any sums payable in respect thereof are not paid when due or within any applicable grace period, or any Security securing any such borrowing becomes enforceable or a demand is made upon any guarantee given by the an Obligor which is not paid when due (taking into account any applicable grace periods); or

13.1.9 an Obligor ceases or threatens to cease to carry on business or a substantial part of the business, properties or assets of the Group is seized or appropriated;