VATTENFALL

Norfolk Vanguard Offshore Wind Farm

Counsel's Written Opinion in relation to Arbitration

Applicant: Norfolk Vanguard Limited
Document Reference: ExA; AS; 10.D7.23

Deadline 7
Date: May 2019
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Photo: Kentish Flats Offshore Wind Farm

Vattenfall Wind Power Ltd

Thanet Extension Offshore Wind Farm

Annex B to Appendix 15 to Deadline 5 Submission: Counsel's written opinion, in relation to arbitration

Relevant Examination Deadline: 5

Submitted by Vattenfall Wind Power Ltd

Date: April 2019

Revision A

Drafted By:	Womble Bond Dickinson
Approved By:	Daniel Bates
Date of Approval:	April 2019
Revision:	A

Revision A	Original Document submitted to the Examining Authority

COVERING NOTE – WRITTEN OPINION ON ARBITRATION PROVISION

1.1 The Applicant has instructed Counsel (separately from Mr Scott Lyness) to provide a written opinion in relation to the drafting the arbitration provision within the draft Development Consent Order (**DCO**). This step was taken following the recommendation of the Examination Panel at the Issue Specific Hearing 9 into the draft DCO that the Applicant submit in writing their final position on the appropriateness of the provision. The written opinion is appended to this covering note.

1.2 The arbitration provision as drafted is intended to develop the model provision in order to make it more appropriate for use by either party subject to it, by providing effective timeframes. The proposed arbitration provision is the only mechanism to resolve disputes within the deemed marine licences and therefore it is an important inclusion in order to provide a fair, impartial and final award on substantive difference between parties.

1.3 Throughout the Examination proceedings, the Applicant has maintained dialogue with the relevant stakeholders including the MMO, Trinity House and Natural England. The MMO and Natural England raised concerns about the potential conflict between the arbitration provision and their ability to carry out their statutory duties. The Applicant is clear that the introduction of a more prescriptive and therefore practical arbitration provision does not fetter the discretion or powers of any statutory body, and Counsel's written opinion concludes that this is supported by case law and academic opinion.

1.4 Following the first issue specific hearing into the draft DCO, Trinity House requested clarification within the draft DCO that their saving provision (Article 39) would exclude them from being subject to arbitration provisions. The Applicant amended the draft DCO to reflect this and asked Counsel to consider whether this would be sufficient to ensure that Trinity House's role in ensuring safety at sea is protected. Trinity House previously explained that as a consultee to the MMO, they may still affected by the arbitration provision as provided. The Applicant can confirm that Counsel's written opinion has been able to clarify t there is no reason the arbitration provision should preclude the MMO from consulting Trinity House on any matters relating to safety at sea and that an arbitrator would be able to consider any consultation responses made by Trinity House when making an award.

1.5 The Applicant also asked Counsel to consider the interaction between the arbitration provision as drafted and judicial review. Counsel has concluded that arbitration is not incompatible with judicial review and, in fact, it is advantageous to have recourse to alternative methods of dispute resolution.

2. The Applicant's key points raised so far have been as follows:

(a) There is no recognised general preclusion from arbitration available to statutory bodies.

(b) Since the creation of the Planning Act 2008, an arbitration provision has been included in made DCOs, and indeed such a provision is included within the Model Articles (Article 42).

(c) The need for an Arbitration mechanism is well recognised as part of the regime established by the Planning Act 2008, in order to ensure that nationally significant infrastructure projects are not subject to delays due to an impasse between parties. Judicial review is a lengthy, time intensive and costly exercise for all parties.

(d) There is no intention that arbitration should be the first point of recourse following any issue with the discharge of a requirement or condition.

(e) An ongoing dialogue between statutory bodies and the Applicant is an imperative part of the discharge process and every effort would be made to resolve disagreements through this dialogue.

2.2 In asking for a more detailed Counsel opinion, the Applicant asked that the following points be considered:

2.2.1 the ability of statutory bodies that exercise a public function to be subject to arbitration;

2.2.2 views on the submissions made by Trinity House and the MMO;

2.2.3 the scope of the arbitration provision;

2.2.4 the application of the arbitration provision to Trinity House and/or the MMO given their statutory powers, in particular with reference to:

(a) the saving provision in article 39; and

(b) TH's role in ensuring safety at sea;

2.2.5 the arbitrability of disputes arising between the Applicant and either Trinity House and/or the MMO;

2.2.6 how arbitration may work in respect of disputes where Trinity House is a statutory consultee; and

2.2.7 how arbitration would operate in circumstances where a disputed decision may also be susceptible to judicial review.

2.3 The opinion is clear that there is no legal reason why the Examining Authority cannot maintain the arbitration provision as currently drafted within the DCO.

IN THE MATTER OF:

THANET EXTENSION OFFSHORE WIND FARM

OPINION

Introduction

1. I am asked to advise Vattenfall Wind Power Limited ("**VWPL**") in respect of the drafting of its proposed development consent order ("**DCO**") for the Thanet Extension Offshore Wind Farm.

2. My advice is sought on the drafting of the arbitration provision. As currently drafted, the arbitration provision is found in articles 36 and 39 which provide:

   "36. Subject to Article 39 (Saving provisions for Trinity House), any difference under any provision of this Order, unless otherwise provided for, must be referred to and settled in arbitration in accordance with the rules at Schedule 9 of this Order, by a single arbitrator to be agreed upon by the parties, within 14 days of receipt of the notice of arbitration, or if the parties fail to agree within the time period stipulated, to be appointed on application of either party (after giving written notice to the other) by the Centre for Effective Dispute Resolution …

   39. Nothing in this Order prejudices or derogates from any of the rights, duties or privileges of Trinity House."

3. Schedule 9 as currently drafted sets out the arbitration rules.

4. I understand that concerns have been raised in respect of the operation of the arbitration provision by, among others, Trinity House ("**TH**") and the Marine Management Organisation ("**MMO**"). In light of those concerns my advice is sought on the following matters:

(a) the application of the arbitration provision to TH and/or MMO given their statutory powers, in particular with reference to

(i) the saving provision in article 39; and

(ii) TH's role in ensuring safety at sea.

(b) the arbitrability of disputes arising between VWPL and either TH and/or the MMO;

(c) how arbitration may work in respect of disputes where TH is a statutory consultee; and

(d) how arbitration would operate in circumstances where a disputed decision may also be susceptible to judicial review.

5. I am instructed that concerns have also been raised by Natural England, among other statutory bodies. I have dealt with some of the specific concerns raised by TH and the MMO below, but the general analysis would apply equally to Natural England and other statutory bodies.

Background

6. The arbitration provision must be viewed in context. Three aspects are particularly relevant.

7. First, arbitration is expressly considered to be appropriate in the context of a DCO by the Secretary of State: see the (now revoked) Infrastructure Planning (Model Provisions) (England and Wales) Order 2009 ("**the Model Provisions**"). It is noteworthy that the arbitration provision in the Model Provisions is widely drawn and does not contain any standard saving provisions for public bodies. Further, arbitration in the Model Provisions is expressly referenced in respect of the determination of technical disputes, for example regarding consents or licences, and/or disputes which involve the public interest. For example:

(a) para. 42 of Schedule 1, which concerns general model provisions, makes provision for an arbitration provision in similarly broad terms to that proposed by VWPL;

(b) para. 31 of Schedule 1 expressly refers to arbitration under para. 42 in the context of statutory undertakers (see sub-paragraph (4));

(c) para. 42 of Schedule 1, given the breadth of the drafting, applies to disputes which could arise under either para. 37 (Deemed consent under section 34 of the Coast Protection Act 1949) or para. 38 (Deemed licence under Part 2 of the Food and Environment Protection Act 1985);

(d) para. 57 of Schedule 3, which concerns model provisions for development consent orders concerning harbours, makes provision for arbitration in the same broad terms and would also apply to disputes under para. 44 (Deemed consent under section 34 of the Coast Protection Act 1949) or para. 45 (Deemed licence under Part 2 of the Food and Environment Protection Act 1985).

8. Notably, section 34 of the Coast Protection Act 1949 was repealed by the Marine and Coastal Access Act 2009 ("**MCAA 2009**") and Part 2 of the Food and Environment Protection Act 1985 was repealed in part and amended by the MCAA 2009. In light of this, as well as the fact that para. 53 of Schedule 3 to the Model Provisions makes specific reference to saving provisions for TH (in the same terms now proposed by VWPL), it is clear that the Secretary of State did not consider that there was any incompatibility between the arbitration provisions and the interests of TH or MMO.

9. This is unsurprising because arbitration in the context of the DCO is not one of the recognised exceptions at common law: see, by comparison, the imposition of a criminal sanction.[1]

10. Second, arbitration clauses are not the exclusive preserve of bilateral contracts, rather arbitration is also found in the statutory context. Indeed, statutory arbitration is not novel: see, for example, the Agricultural Holdings Act 1986, the Trade and Union and Labour

[1] See further the discussion and examples in ***Russell on Arbitration*** at 2-080 to 2-094.

Relations (Consolidation) Act 1992 and the Industry Act 1975. Further, there are specific examples of statutory arbitration operating in respect of disputes with public bodies. For example, the Coal Mining Subsidence (Arbitration Schemes) Regulations 1994 (made under the Coal Industry Act 1994) provide for disputes with the Coal Authority to be referred to an arbitrator.

11. In this regard, I do not consider that the characterisation by TH of the arbitration provisions proposed by VWPL as being a "*commercial arbitration measure*" (see ISH9 representations) is either accurate or helpful. Instead, the arbitration provisions should be considered to be a form of statutory arbitration.

12. Third, the provisions of the Arbitration Act 1996 ("**AA 1996**") would apply to an arbitration under the DCO by virtue of section 94(2)[2]. Further, pursuant to section 95 the provisions of the AA 1996 apply to a statutory arbitration "*as if the arbitration were pursuant to an arbitration agreement and as if the enactment were that agreement*". Accordingly, I note the following pertinent features of Part 1 of the AA 1996:

    (a) Section 1(b) AA 1996 recognises the principle of party autonomy which underpins the AA 1996: "*the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest*".

    (b) Section 81(1) AA 1996 expressly preserves "*the operation of any rule of law consistent with the provisions of this Part, in particular, any rule of law as to - … matters which are not capable of settlement by arbitration*".

    (c) The AA 1996 expressly applies to the Crown: see section 106 AA 1996.

[2] Section 94(2) AA 1996 provides that "*the provisions of Part 1 apply to every arbitration under an enactment … subject to the adaptations and exclusions specified in sections 95 to 98 [AA 1996]*" and here "*enactment*" includes orders (and other forms of subordinate legislation) by virtue of section 94(3)(a) AA 1996 and the Interpretation Act 1978.

Issue (a) - the application of the arbitration provision to TH and/or MMO given their statutory powers, in particular with reference to: (i) the saving provision in article 39; and (ii) TH's role in ensuring safety at sea.

Issue (b) - the arbitrability of disputes arising between VWPL and either TH and/or the MMO.

13. These issues are conveniently considered together.

(1) Capacity of TH and the MMO

14. The starting point is to recognise that there is no reason in principle why either TH or the MMO may not be a party to an arbitration. Public bodies (which would include the MMO, but may not include TH – see TH's view that it is not a public body for the purposes of the Freedom of Information Act 2000) may be parties to an arbitration: see section 106 AA 1996 and Chapter 3 of *Russell on Arbitration* for examples. (If TH is not a public body, there can be no dispute that it could be a party to the arbitration as a corporation: see *Russell on Arbitration* at 3-012 to 3-015 for examples.)

15. I do not understand that either TH or the MMO are suggesting that they are not capable of being a party to an arbitration. They are right not to do so for the reasons in the preceding paragraph. Rather it appears that TH and the MMO are contending that arbitration, in the manner proposed in the arbitration provision, is not appropriate.

(2) Submissions on behalf of TH and the MMO

16. I am instructed that, in broad terms, TH and MMO found their arguments as to the appropriateness of arbitration on the fact that both organisations exercise public functions (broadly termed). This is consistent with the written submissions I have reviewed from both organisations and the oral submissions advanced at ISH9. I note the following matters from these submissions:

    (a) the MMO are particularly concerned about the fact that in discharging conditions under the deemed marine licences ("**DMLs**") it is exercising public functions which could – in its view – be susceptible to judicial review (see in particular the MMO's Deadline 4 Response);

(b) the MMO also comment that arbitration is – in its view – a "*private process*" which is inimical to the public and open nature which it considers that its decisions should be made in, and similarly it views arbitration as an "*usurpation*" of those public functions (see in particular the MMO's Deadline 3 Response);

(c) similarly, TH are particularly concerned about its responsibilities for safety at sea in respect of which it acts in the public interest and/or undertakes public functions (see in particular ISH9 submissions).

17. As a preliminary point, these comments are all high level and do not engage with specific examples of when an arbitration provision would be inappropriate. The exception is the MMO's concern about the discharge of DMLs, but even that is expressed as a blanket concern. For the reasons which follow, I do not consider that such high level or generalized arguments are sustainable, particularly where it (appears to be) accepted that both the MMO and TH could be parties to an arbitration in principle.

(3) Scope of the arbitration provision

18. It is important to recognise that the arbitration provision will only apply to disputes which fall within its scope. This is a fact specific question which turns on the nature of the dispute and the construction of the arbitration provision. Whilst the arbitration provision is widely drawn, it will only apply to "*any difference under any provision of this Order*" and as such, neither the MMO or TH's general functions or duties would be caught, save insofar as they are engaged by one of the provisions in the Order.

19. Accordingly, I do not consider that generalised concerns are sustainable: for a concern to warrant consideration by the Examining Authority, in my view it should be tied to a provision in the Order, such that the Examining Authority are satisfied that *prima facie* it would be a dispute to which the arbitration provision might apply.

20. Further, it is important to note that the arbitrator would be able to rule on any dispute as to their jurisdiction in the first instance under the principle of competence-competence (as enshrined in section 31(4) AA 1996). Moreover, any dispute as to jurisdiction could be dealt with as a preliminary issue (section 31(4)(a) AA 1996) and would be reviewable by

the courts in some circumstances (including on a unilateral basis) pursuant to section 32 AA 1996. This is an important safeguard and it would be improper to characterise the inclusion of the arbitration provision in the DCO as binding either the MMO or TH without more in all disputes with the undertaker; rather, in any arbitration this safeguard would allow any party to dispute the applicability of arbitration.

(4) Arbitrability

21. This is typically the preliminary question to that of scope, but is dealt with here second on the basis that many of the concerns can be dismissed on a proper understanding of scope.

22. As set out above, section 81 AA 1996 materially provides: that "*[n]othing in this Part shall be construed as excluding the operation of any rule of law consistent with the provisions of this Part, in particular, any rule of law as to … matters which are not capable of settlement by arbitration*". Accordingly, the question of whether a matter is capable of settlement by arbitration – that is, whether it is arbitrable – is to be determined by applying the common law.

23. The correct approach in respect of whether a particular matter is arbitrable is to consider (1) whether there is an express or implied statutory bar on referring the matter to arbitration; and (2) if there is no statutory prohibition, whether public policy of the law of England and Wales prohibits such a reference: see ***Fulham Football Club (1987) Ltd v Richards*** [2011] EWCA Civ 855, [2012] Ch 333 *per* Longmore LJ at [94] and ***Assaubayeve v Michael Wilson & Partners Ltd*** [2014] EWCA Civ 1491, [2014] 6 Costs LR 1058 *per* Christopher Clarke LJ at [67]. See also the reasoning of Patten LJ in ***Fulham*** at [27], considering the test for a stay in section 86 AA 1996: "*one has to be looking for a statutory provision or a rule of public policy which has the effect of rendering the arbitration agreement either void or unenforceable in so far as it purports to bind the parties to an arbitral determination of the … issu*es".

24. The concerns in the present circumstances relate to objective arbitrability, not subjective arbitrability; that is, whether the subject matter of a dispute is arbitrable, not whether a particular party, for example a public body, is able to refer a matter to arbitration.

25. As to the first consideration, I do not consider that there is any express or implied general statutory bar on referring a dispute with TH or the MMO to the arbitration. In particular, there is no such general bar in the Planning Act 2008 or the MCAA 2009. I am not aware that either TH or the MMO have alleged that there is such a bar.

26. In respect of the second consideration, to the extent that public policy has a part to play it is only as "*a safeguard … necessary in the public interest*": ***Fulham*** *per* Patten LJ at [98 - 99] considering section 1(b) AA 1996. Further, this is a "*demanding test*" (ibid).

27. It may be relevant in considering public policy as a safeguard in the public interest to have regard to whether "*the matters in dispute … engage third party rights or represent an attempt to delegate to the arbitrators what is a matter of public interest which cannot be determined within the limitations of a private contractual process*": see ***Fulham*** *per* Patten LJ at [40]. But I note that these latter comments were made in the context of an arbitration arising under rules agreed between two private parties. Accordingly, they should be applied with suitable flexibility to arbitration under a DCO which arises in a statutory context and which is the product of a process that has considered the public interest in detail in the making of the DCO.

28. Neither the MMO nor TH have presented arguments which engage with these principles. Nevertheless, it is fair to infer from the submissions made to date that they both organisations would rely on the public interest in safety at sea and environmental protection (see, for example, section 69 MCAA2009) to argue that a dispute is not arbitrable.

29. In my view, the Examining Authority cannot reach a blanket conclusion on such matters for the following reasons.

30. First, the mere fact that the public interest is engaged in a dispute – in that the dispute may include consideration of a public interest factor – in my view is insufficient without more to render the dispute not arbitrable. Rather, it would be necessary to show why arbitration would be incompatible, as a matter of public policy, with safeguarding the public interest. This is a demanding test (see above).

31. Further, the fact that the arbitrator may have to consider a public interest factor in making an award is not novel or a reason to consider that the public interest would not be safeguarded: see, by analogy, the determination of appeals pursuant to section 78 of the Town and Country Planning Act 1990 ("**TCPA 1990**") where the public interest (and factors which engage the public interest) is routinely considered, for example in the balancing of heritage harm with public benefits.

32. In addition, it is necessary to consider how the public interest is safeguarded by the DCO process as a whole: the arbitration provision should not be viewed in isolation. In this respect, I note that there has been extensive consultation with the public, statutory consultees and other stakeholders, followed by a six month examination process, with the benefit of extensive written and oral submissions, all of which will inform the final form of the DCO. It is very unlikely that the public interest factors which may arise in a dispute will be novel, such that they have not been considered in the DCO process. It follows that in considering whether the necessity to safeguard the public interest renders a dispute not arbitrable, it would be erroneous to ignore the other inbuilt safeguards in the DCO process. The DCO provides the framework parameters for the project, taking into account these public interest factors, and thus any dispute arising in respect of a provision of the DCO would arise in the context of provisions which have already been found to be compatible with the same public interest factors.

33. Second, with specific reference to the discharge of conditions under the DMLs, it is important to recognise that the public interest has been safeguarded by the imposition of the conditions and through the terms of those conditions, in the DCO. This is particularly the case where the conditions are the product of the detailed application process and have been formulated out of that process: for example, in light of the detailed analysis of environmental effects and alternatives in the Environmental Statement. The public interest is not solely safeguarded in the discharge of the condition. Indeed, where the discharge involves considering whether the technical solution proposed by the undertaker meets the terms of the condition, the public interest safeguard is in the formulation of the condition, not in the consideration of whether the solution proposed is

acceptable against the pre-determined criteria. It is through the setting of the criteria that the public interest has been protected.

34. Both of the reasons above are supported by the context noted further above: there is a recognition by the Secretary of State in the Model Provisions that arbitration is generally appropriate in the context of the DCO and that it is compatible in general with the public interest as it arises in the context of the DCO, including in respect of the discharge of conditions on deemed consents/licenses and in respect of disputes which involve public interest factors. This context further underlines why the general invocation of the public interest is insufficient to meet the demanding test discussed in ***Fulham***.

35. Third, as to the concern about the private nature of the process, I do not consider that this is a factor which suggests that the public interest would not be safeguarded in any arbitration because the basis for the award would be unaffected. In any event, there is no reason why this aspect of the arbitration provision could not be amended, for example by way of a requirement that any award arising from a dispute involving the MMO or TH should be publicised.

36. Finally, the MMO and the TH's concerns about the public interest have also been reformulated as concerns about fettering of their powers. I do not consider these arguments to be sustainable at a general level:

    (a) The arbitration provision does not restrict the MMO or TH's powers in the first instance, rather the arbitration provision is only engaged in the event of a dispute arising.

    (b) The subsequent consideration by an arbitrator will be able to have regard to the full gamut of considerations, including the MMO and TH's statutory responsibilities (so far as relevant) and any consideration of the public interest in respect of those responsibilities.

    (c) This process is not novel and is comparable to appeals in the Town and Country Planning context where the Inspector is analogous with an expert arbitrator. For example, appeals pursuant to section 78 TCPA 1990 (which includes appeals

against the refusal of approval required by a condition) and validation disputes under the Town and Country Planning (Development Management Procedure) (England) Order 2015. In these circumstances, it is not said that determination by an Inspector is a fetter on the local planning authority's powers and Inspectors frequently have to grapple with the public interest. Accordingly, there is no principled reason why this could not also be achieved by an expert arbitrator.

(5) Saving provision

37. In light of the above, I consider it strongly arguable that the saving provision in article 39 is not necessary to moderate the operation of article 36 (albeit may be necessary in respect of other provisions within the DCO). This is because the breadth of article 39 ignores the relatively narrow scope of the arbitration provision in comparison to the breadth of TH's role generally. This is particularly the case in respect of the reference to "*rights*" and "*privileges*" as it is difficult to see how either of those would even be engaged in an arbitration falling within the scope of article 36. Further, in respect of the reference to "*duties*", I do not consider that such a saving is necessary for the reasons above, namely that an arbitration would be compatible with TH's duties and in the event that it was not (because there was either a statutory bar or the public interest was not safeguarded as a matter of public policy), it would be open to TH to apply to the arbitrator to determine that the dispute was not arbitrable on that basis.

38. Notwithstanding this, I see no reason why the saving provision could not be retained as it appears to provide comfort to TH and it may be relevant to other provisions in the DCO.

Issue (c) - how arbitration may work in respect of disputes where TH is a statutory consultee.

39. TH's concern appears to be that there may be circumstances in which a dispute with the MMO is referred to arbitration where they have been consulted by the MMO in the making of the disputed decision.

40. In my view such circumstances would not be a good reason for finding that the arbitration process was inappropriate because the arbitration process would not impinge on TH's role as a consultee. In particular: the MMO would still be able to consult TH prior to making the decision; there would be no barrier for the MMO bringing that consultation response to the attention of the arbitrator; and there would be no barrier from the arbitrator considering the consultation response in making their award. This is very similar to an appeal pursuant to section 78 TCPA 1990 where an Inspector may have regard to consultation responses (for example from Historic England or the Environment Agency).

Issue (d) - how arbitration would operate in circumstances where a disputed decision may also be susceptible to judicial review.

41. This concern has not been developed in any detail in the material which I have seen. It is not a matter which is readily susceptible to abstract analysis, but it is important to view the concern in the context of the reality of litigation.

42. The starting point is that the availability of arbitration is not incompatible with judicial review (see the Pre-Action Protocol) and there are considerable benefits in this context (for example expeditious determination by an expert tribunal which considers the merits) which were clearly in the mind of the Secretary of State in making the Model Provisions.

43. As to the operation of the arbitration provision where a dispute which is within the scope of the arbitration provision may also be a decision which is susceptible to judicial review, it is difficult to see the circumstances in which the arbitration provision would be prohibitive:

    (a) in those circumstances, a party could bring a claim for judicial review but the public body could apply to the court for a stay on the claim pursuant to section 9 AA 1996 to allow arbitration;

(b) however, in the event that the public body did not make such an application (which I infer would be the likely position of TH and the MMO), the claimant would be entitled to forgo his right to arbitration and pursue the judicial review.

44. It is relevant to note in respect of this issue that the inability of an arbitrator to grant the same relief which would be available to the High Court is not determinative of whether a matter is arbitrable – see ***Fulham*** at [40], [49 – 50] and [103].

Conclusion

45. For the reasons above, it is my view that there is no principled reason why the arbitration provision would be inappropriate in respect of disputes which may arise with the MMO, TH or other statutory bodies. This is particularly the case where the position of the MMO and TH has been advanced as a series of general arguments. Further, in the event that there is a dispute as to the scope of the arbitration provision or the arbitrability of a particular dispute, this could be readily raised in the arbitration. It appears that this safeguard has also been overlooked by the MMO and TH.

MATTHEW HENDERSON

29th April 2019

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