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Subject:	Representations to Examining Authority - Norfolk Vanguard Offshore Wind Farm Project for Deadline 9
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Attachments:	Letter Norfolk.pdf Advice - Thanet DCO.PDF

Dear Sir / Madam

EN: 0010079

Identification No. 20011687

Representations to Examining Authority - Norfolk Vanguard Offshore Wind Farm Project for Deadline 9

Please see attached Trinity House's representations dated 6 June 2019 in respect of the Norfolk Vanguard Offshore Wind Farm Project and associated Counsel's Opinion that form part of these representations.

Kind Regards

Russell

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TRINITY HOUSE

6 June 2019

The Planning Inspectorate
Temple Quay House
Temple Quay
Bristol
BS1 6PN

Your Ref: EN010079

Identification No. 20011687

The Norfolk Vanguard Offshore Wind Farm
Written Submission to Examining Authority for Deadline 9
on the Draft Development Consent Order

Dear Sir / Madam

We refer to the above application for development consent.

Trinity House ("**TH**") make these submissions in relation to the Applicant's revised draft Development Consent Order ("**dDCO**") issued on 30 May 2019 (Version 6 issued at Deadline 8) which largely incorporates the Examining Authority's ("**ExA**") Schedule of suggested changes to the previous draft which the EA had issued on 9 May. TH made submissions on the ExA's suggested changes at Deadline 8.

Proposed new appeal procedures

TH reiterates strongly the concerns it raised in relation to the ExA's proposed changes which have now been incorporated in the latest draft (Version 6) of the dDCO.

TH noted previously that the ExA's suggested changes to article 2 (interpretation) and Part 5 of Schedules 9 to 12 of the dDCO. TH also noted the ExA's comments that their suggested changes were intended to provide for an appeal procedure for the discharge of Deemed Marine Licence ("**DML**") conditions which is broadly consistent with existing statutory processes and is consistent with similar DCOs.

TH reiterates that any process for the discharge of DML conditions under the dDCO is of relevance to it, as one of the Marine Management Organisation's ("**MMO**") statutory consultees in respect of applications for approval under those conditions. Our concerns on the revised draft of the dDCO are as follows-

- it is acknowledged that there is a settled, statutory process for appeals against licensing decisions set out in s. 73 of the Marine and Coastal Access Act 2009 ("**the 2009 Act**") and regulations made under that section;

- however, although the refusal of a marine licence, or grant subject to conditions, is the subject of a statutory appeal procedure, there is no statutory right of appeal in relation to decisions made by the MMO on the discharge of DML conditions. Any challenge would therefore be required to be brought by way of judicial review;

- the draft appeals process currently included in Part 5 of the DMLs is accordingly a process which departs from the established statutory regime. It has no current legislative (primary or secondary) basis, as far as TH is aware. It would **not** be (as the ExA evidently intends it should be) "an appeal procedure broadly consistent with existing statutory processes";

- as drafted, the Applicant for this particular Order would be placed in a different, and more advantageous position than an applicant for a marine licence pursuant to the 2009 Act. The Applicant would have an advantageous appeal process which is not available to other marine licence holders. This would lead to an un-level playing field between those who obtained a marine licence direct from the MMO under the 2009 Act and those who obtained a licence under the Planning Act procedure. This would create the potential for serious inconsistency in conflict with the existing statutory regime put in place by Parliament.

- We again draw the ExA's attention in respect of the recent Tilbury 2 – Proposed Termination at Former Tilbury Power Station DCO, to the fact that the Examining Authority accepted an argument by the MMO that, once a DML has been granted, there was nothing in the Planning Act 2008 that suggested that an applicant for a DCO should be treated any differently from any other marine licence holder, and that the MMO's ordinary powers should therefore be maintained (see pages 233 – 234 of the Examining Authority's Report and Recommendations to the Secretary of State);

- the appropriateness of the statutory appeal procedure in cases of refusal of a marine licence, or grant subject to conditions, has been subject to detailed Parliamentary scrutiny and enacted in the 2009 Act. As previously submitted, in TH's view, it is inadvisable to seek to rely (subject to modifications) upon a process which has been tailored to very different circumstances to those in which it is now sought to be deployed in the context of this Order;

- further, the effect of the drafting changes in Part 5 of the DMLs is to place strict, potentially unrealistic, time limits on the process for appeals which relate to decisions made by the MMO on the discharge of conditions. Similarly, the revised drafting imposes strict, potentially unrealistic, time limits within which the Secretary of State must make a decision (see, for example, the amendments to regs 8 and 10 of the 2011 Regulations at subparagraph 2(d), (e) and (f)). In TH's view, such drafting is likely to be ill-suited to this and similar Orders, given the complex nature and range of issues which may arise on the discharge of DML conditions, engaging as they do important matters of public interest. As one of the MMO's statutory consultees on decisions relating to the discharge of DML conditions, TH is concerned that its expert view may not be capable of full and reasoned consideration within these restrictive timeframes and the quality of the licence in safety of navigation terms vitiated as a result.

For these reasons, TH considers that it would be inappropriate for this Order to confer a right of appeal in relation to the discharge of conditions under the DMLs. TH reiterates its view that the mechanism available to the Applicant to challenge a decision, or non-decision, is judicial review. Notably, that view also appears to accord with recent DCO precedent. We also note these concerns are repeated and amplified by the MMO's submission dated 30 May at Deadline 8 in particular paragraph 5.2.5ff.

Arbitration

For the avoidance of doubt, and for the reasons expressed in earlier submissions, TH also equally remains fundamentally opposed to the inclusion of any provision which would authorise decisions made by the MMO on the discharge of DML conditions to be referred to arbitration.

In this regard TH enclose with this submission an Opinion by Rebecca Clutten of Counsel which responds to the Counsel's Opinion obtained by Vattenfall Wind Power Limited (Vattenfall), the applicant for the Thanet Extension Offshore Windfarm currently under examination, in relation to arbitration. That Opinion had been sought by Vattenfall over concerns raised by TH and the MMO as to the operation of the arbitration provision proposed on similar terms to that in this dDCO. It was submitted by Vattenfall at Deadline 5 of the Thanet Extension OWF examination process. The Opinion of Rebecca Clutten, in response to the Vattenfall Counsel's Opinion, concurs with TH's concern about the appropriateness of the arbitration provision applying to TH and the MMO.

TH will be submitting Ms Clutten's Opinion to the Thanet OWF examination before it closes.

We trust that these comments are helpful and would ask that all correspondence regarding this matter is addressed to myself at russell.dunham@thls.org and to Mr Steve Vanstone at navigation.directorate@thls.org

Yours faithfully,

[redacted]
Russell Dunham ACII
Legal & Risk Advisor

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IN THE MATTER OF

THE THANET EXTENSION OFFSHORE WIND FARM DCO

ADVICE

INTRODUCTION

1. I am asked to advise The Corporation of Trinity House ('TH'), in respect of matters arising in relation to the draft Thanet Extension Offshore Wind Farm Development Consent Order ('the draft DCO').

2. TH is the General Lighthouse Authority for England and Wales, and has statutory functions, powers and duties (found mostly under Parts VIII and IX of the Merchant Shipping Act 1995 ('MSA 1995')), which include promoting the safety of navigation by vessels at sea.

3. TH seeks my advice in respect of the draft arbitration provision contained in article 36 of the draft DCO, which TH is concerned may have adverse implications for the exercise of its statutory functions, powers and duties, and article 39, which is a saving provision in TH's favour.

   *"**Arbitration***
   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

   […]

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

4. In particular, I am asked to consider whether there is any incompatibility between the arbitration provision and the interests of TH and other statutory bodies (in particular the Marine Management Organisation ('the MMO')).

5. I am asked to advise with reference to Counsel's Opinion dated 29 April 2019, which was submitted and is relied upon by Vattenfall Wind Power Limited ('VWPL') in support of its position that the inclusion of the arbitration provision is appropriate, and would be so even in

the absence of the saving provision ('the VWPL Opinion').

SUMMARY OF ADVICE

6. For the reasons more fully set out below, I consider that:

    a. The application of the arbitration provision proposed to TH and the MMO is inappropriate, having regard to the nature of the disputes that could be argued to fall within its scope; and

    b. The saving provision in respect of TH provides necessary, albeit potentially insufficient protection for its interests. The potential insufficiency relates to the absence of a similar saving provision in relation to the MMO: see further paras.59-60 below.

SCOPE OF POWERS CAPABLE OF INCLUSION IN A DCO

7. It is useful to begin by considering briefly the applicable legal framework.

8. The scope of what may be included in and done pursuant to a development consent order ('DCO') is governed by the Planning Act 2008 ('the 2008 Act'), and in particular s.120 and Sch. 5 of the same.

9. The powers conferred by s.120 are wide ranging and provide that a DCO may, amongst other things:

    a. apply, modify or exclude a statutory provision which relates to any matter for which provision may be made in the order;
    b. make such amendments, repeals or revocations of statutory provisions of local application as appear to the Secretary of State ('SoS') to be necessary or expedient in consequence of a provision of the order or in connection with the order;
    c. include any provision that appears to the SoS to be necessary or expedient for giving full effect to any other provision of the order; and
    d. include incidental, consequential, supplementary, transitional or transitory provisions and savings.

10. Part 1 of Sch.5 provides that the matters for which provision may be made in a DCO include the submission of disputes to arbitration, amongst others.

11. As such, it is not contentious either that (a) a DCO may include an arbitration clause, and (b) that the 2008 Act itself does not preclude the application of such a clause to TH and similar statutory bodies as a matter of law.

12. Indeed, and as noted in the VWPL Opinion, this view is reflected in the fact that the now-repealed Infrastructure Planning (Model Provisions) (England and Wales) Order 2009 ('the Model Provisions') contained model clauses that made broad provision for arbitration and did not preclude their application to statutory bodies as a matter of principle.

13. Where I differ from the view expressed by Counsel in the VWPL Opinion is upon the extent to which inference may reasonably be drawn as to the SoS's views on the propriety of applying an arbitration clause to a body such as TH in the circumstances proposed in this draft DCO.[1] There are a number of reasons for this.

14. First, and as a matter of principle, I consider it inherently problematic to seek to draw any reliable conclusions about the SoS's intentions from the terms of a very broad brush Order which was never confirmed by Parliament (either positively or negatively) or tested by the courts, and which (importantly) has been repealed since 1 April 2012[2] and so is of no continuing legal effect, whatever the position at the time of its enactment.

15. Second, the broad terms of the arbitration provision(s) in the Model Provisions are merely a reflection of the fact it is a model provision. It would not have been practical or useful to attempt to exhaustively list all potential derogations and the circumstances in which they would apply. The draftsman would have been aware that an applicant would have to justify the inclusion of each article of its draft DCO as part of the statutory process of examination and so the propriety of each article would fall to be considered on a case by case basis.

16. Moreover, it is assumed in the VWPL Opinion that the arbitration provision in para. 42 of Sch.1 to the Model Provisions applied to disputes which could arise under the provisions in paras. 37 or 38 on the basis that they are included in the same schedule.[3] This misunderstands the Model Provisions, which offered an 'a la carte menu' of model provisions,[4] not a collective or coherent code to be incorporated wholesale.

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[1] And indeed as has been proposed in other draft Orders of which I am aware, notably the draft Norfolk Vanguard and Hornsea 3 Wind Farm Orders.

[2] By the Localism Act 2011 c. 20 Sch.25 (20) para.1

[3] See paras.7 & 7 (c) of the VWPL Opinion; the same point is also made in respect of Schedule 3 to the 2009 Order at paras.7 & 7 (d) of the VWPL Opinion

[4] See the *National Infrastructure Planning Handbook 2018*, Humphries QC and FTB at p.199.

17. The application of the model arbitration provision(s)[5] if incorporated into a DCO is to any of the other provisions of that DCO, not the rest of the model provisions in the same schedule. The SoS could in principle include model clauses in the same schedule which were mutually incompatible, on the basis that only one or other might be included by an applicant (and justified during the course of the application as mentioned above).

18. In any event, even if it were accepted (contrary to the above) that the Model Provisions demonstrate that the SoS did consider it appropriate for arbitration to apply to disputes under s.34 of the Coast Protection Act 1949 or Part 2 of the Food and Environment Protection Act 1985,[6] the fact that he or his successors did not also include any disputes with the MMO under the Marine and Coastal Access Act 2009 ('MCAA 2009')[7] or with TH under the MSA 1995[8] in a model clause undermines the claim that it can be taken that the SoS did not consider there to be incompatibility between the exercise of those powers and arbitration.

HOW SHOULD THE SOS APPROACH THE QUESTION OF WHETHER ARBITRATION PROVISIONS APPLYING TO TH AND OTHER STATUTORY BODIES SHOULD BE INCLUDED WITHIN A GIVEN DCO?

19. If there is no legal bar to including arbitration provisions affecting TH and other statutory bodies contained within the 2008 Act, it is necessary then to identify what (if any) other considerations the SoS should take into account when determining whether arbitration provisions applying to TH and other statutory bodies are appropriate for inclusion within any given DCO (and in particular, within the draft DCO which is the subject of the present advice).

20. In my view, it will be necessary for the SoS to consider the following:

    a. Whether there are any other statutory limitations upon the application of arbitration to TH or any other body;

    b. Whether there are any common law principles that suggest that the subject matter of the dispute that it is contemplated will be arbitrated is not suitable for arbitration ('not arbitrable'); and

[5] E.g. para. 42 of Schedule 1 to the 2009 Order which says it applies to *"Any difference under any provision of this Order…"*

[6] As claimed at para.8 of the VWPL Opinion.

[7] Part 4 of the MCAA 2009 was enacted on 12 November 2009 and in force from 6 April 2011

[8] Parts 8 and 9 of the MSA 1995 (which relate to TH and its powers, duties and functions) were enacted on 19 July 1995 and in force from 1 January 1996

c. Even if neither of the above apply, whether the provision is justified or appropriate in any event.

21. I am not aware of any limitations within those Acts conferring powers and duties etc. upon TH that disable it from being a party to an arbitration as a matter of law[9], but mention the point at (a) above for the sake of completeness.

22. I consider the questions raised by (b) and (c) in greater detail below.

Are there any common law principles that suggest that the contemplated subject matter of the dispute is not arbitrable?

23. As noted in paras.22-23 of the VWPL Opinion, whether or not a matter is arbitrable is to be determined by reference to the common law, with the correct approach being to consider (1) whether there is an express or implied statutory bar on referring the matter to arbitration, and (2) in the absence of such a bar, whether there is any matter of public policy that prohibits such a reference: Fulham Football Club (1987) Ltd v Richards [2011] EWCA Civ 855 at *inter alia* [24] and [94].

24. Having considered point (1) in the earlier part of this Advice, the below focusses on the question raised by point (2).

25. In answering point (2) it is however first necessary to understand what the 'subject matter of the dispute' would or may be, as this is potentially relevant to (or may even be determinative of) arbitrability.

The subject matter of the dispute

26. As presently drafted, the proposed arbitration clause only mandates arbitration in respect of "*any difference under any provision of this Order"* that is not *"otherwise provided for"*.

27. It is therefore right to note that the exercise by TH or other bodies of any powers, duties or functions not carried out under any provision of the DCO (when made) would not be subject to arbitration.

28. The difficulty arises in relation to instances where it may be open to interpretation as to whether (a) a 'difference' has arisen, and/or (b) whether that difference arises 'under any provision of the DCO' or otherwise. It is for this reason that I consider the saving provision

[9] As my Instructions are from TH, I have not considered whether there are any statutory limitations that would prevent other bodies being a party to an arbitration, but plainly this is a matter of which the SoS would need to be satisfied.

currently included at draft article 39 to be both necessary and appropriate, a point to which I return in paras.59-60 below.

29. The point is best illustrated by reference to the draft DCO. In relation to TH, it has powers in relation to the placing, alteration etc. of and the issuing of directions in respect of aids to navigation under Part VIII of the MSA 1995. Any decision made by TH pursuant to this power could be challenged only by way of judicial review. However, it is also empowered to give such directions in relation to these pursuant to (amongst other provisions[10]) draft article 16(4). In the absence of the saving provision, if a direction is given with which the beneficiary of the deemed marine licence ('DML') does not agree, there is a risk it will argue (and that an arbitrator might accept) that the direction gives rise to a 'difference' under a provision of the DCO and that the matter will be subject to arbitration in accordance with article 36, rather than that it is a matter that is the subject of TH's statutory rights and powers etc.

30. A further example arises in relation to the MMO (in respect of whom there is no saving provision), which is empowered to impose (and subsequently discharge) conditions pursuant to the marine licences issued pursuant to Part 4 of the MCAA 2009. Although the refusal of such a licence, or its grant subject to conditions, is the subject of a statutory appeal procedure pursuant to s.73 MCAA 2009 and the Marine Licensing (Licence Application Appeals) Regulations 2011, there is no statutory right of appeal in relation to decisions made by the MMO in relation to the discharge of conditions. Any challenge would be required to be brought by way of judicial review.

31. It may however be open to argument (and indeed I understand it to be VWPL's position) that a failure or refusal to discharge a condition pursuant to the DML would give rise to a 'difference under [a] provision of the DCO', because the deemed marine licence is included within one of the Schedules to it, such that it would be subject to arbitration.

32. Whilst I tend to the view that this argument is incorrect (on balance preferring the view that the effect of the deeming provision contained in draft art.30 is to create a DML which is to be treated as if it has arisen pursuant to Part 4 of the MCAA 2009 and not pursuant to the Order), it is plainly one about which there are differences of professional opinion and in relation to which a risk of the arbitration provision being effective arises.

33. It is therefore clear that there are instances where there is at least a risk that, absent any saving provision, the draft arbitration clause would be engaged, and it is in my view necessary

[10] Similar provision is also made in certain of the conditions attaching to the DMLs.

for the SoS to engage with the question of whether the identified potential disputes are ones that are indeed capable of being made subject to arbitration pursuant to the common law.

34. In particular, I disagree with the view expressed at para.20 of the VWPL Opinion that ss.30-32 of the AA 1996 (as amended in respect of statutory arbitrations by s.96 of the AA 1996), which empower arbitrators to deal with questions of jurisdiction, provide an adequate or practical safeguard in answer to the objections raised by TH and others in this context.

35. In my view it is wrong in principle (for reasons set out below in relation to arbitrability) and unsatisfactory in practice for a single, private arbitrator, who rightly would be selected on the basis of their (technical) expertise in the subject of the difference (e.g. safety of navigation at sea), to be ruling under s.31 of the AA 1996 on jurisdictional questions where that question would be likely to involve detailed and technical submissions on the law and on where the balance of public interest lies[11].

36. Nor do I think disputes under ss.30-32 of the AA 1996, which could arise in every arbitration under this DCO (and any other DCO which might follow in kind), are in the interests of the purpose of the DCO regime which is for the prompt, cost effective delivery of nationally significant infrastructure projects.

37. Although I note that s.32 of the AA 1996 does provide for any jurisdictional question to be determined by the High Court, this only arises in limited prescribed circumstances, which are outside the control of TH and other affected public bodies. There must be either agreement of VWPL or the permission of the court which may only be granted according to strict criteria, one limb of which does not relate to the legal merits or public importance of the case: the court must be satisfied under s.32 (2) (b) (i) of the AA 1996 that determination of the jurisdictional question is *"likely to produce substantial savings in costs"*.

38. In my view, a decision about whether statutory bodies can or should be made subject to the arbitration clause within the draft DCO properly sits with the SoS, who is charged by statute with determining the DCO's proper scope and content, which includes being satisfied as to the lawfulness and/or appropriateness of each article in the circumstances.

<u>Are the disputes that are likely to arise in relation to TH and the MMO arbitrable?</u>

39. In my opinion the SoS can and should therefore reach a conclusion on arbitrability at this

[11] The public interest would be involved because such a jurisdictional dispute could not only involve whether the difference falls within the scope of the DCO, but also its arbitrability (e.g. under s.30 (1) of the AA 1996 as amended by s.96 (2) or s.30 (3) of the AA 1996).

stage.

40. My view is that public policy prohibits the reference of matters which are ordinarily subject to the exclusive jurisdiction of TH and/or the MMO to arbitration, as per the Fulham Football Club decision, above.

41. That view is based on the fact that *"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"* (Fulham per Patten LJ at para.40).

42. In my view, Parliament's intention is that the expert, public, open, transparent regulatory and advisory bodies it created and to whom it gave functions, duties and powers in the fields of their expertise (i.e. safety of navigation at sea in the case of TH and protection of the marine environment in the case of the MMO) should be the bodies which ultimately make decisions in the carrying out of those functions and should be publicly accountable for doing so (including being seen by the general public to be open, transparent and accountable).

43. This is subject to any appeal mechanism provided for by Parliament or, absent that, judicial review. As noted previously, in respect of approval decisions under conditions attached to marine licences and deemed marine licences under s.71(3) (a) of the MCAA 2009 and decisions taken by TH under the MSA 1995 it is judicial review[12].

44. This is particularly important in cases such as this given the scale of the project and its potential impacts upon safety at sea and the marine environment, and also having regard to the particular form that the arbitration takes in this draft DCO (private and confidential etc.).

45. In my view, this intention should not be circumvented by arbitration where the statutorily-empowered expert bodies could be bound by the findings or judgment of a single arbitrator inconsistent or wholly at odds with their own. The fact that the arbitrator would have to take into account the views expressed by the expert body in reaching his decision (as relied upon at para.36(b) of the VWPL Opinion) is nothing to the point: if Parliament had intended third parties to be able to make decisions in such cases, it would have provided for appeals against those decisions, but it did not.[13] It entrusted them wholly to the appointed statutory bodies.

[12] Approval decisions under s.71(3)(a) are not included in the two appeal mechanisms available against other decisions by the MMO under Part 4 of the MCAA 2009, see s.73 and the regulations made thereunder

[13] Save, in the case of marine licences, in the limited circumstances set out in the provisions referred

46. I note that the VWPL Opinion suggests at para.27 that the fact that the comments of Patten LJ in Fulham Football Club (as set out at para.41 above) were made in the context of an arbitration arising under rules agreed between two private parties means that *"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…"*. I disagree.

47. Although the arbitration being proposed would involve a public body, it is to all intents and purposes a private contractual process of the type spoken of by the court in Fulham. This is because it is wholly or largely private and confidential to the two parties involved, and there is no consultation or interveners etc. Indeed both types of arbitration would be treated almost identically for the purposes of the AA 1996: see s.95.

48. In this regard, although I note the limited concession made in the VWPL Advice, to the effect that the arbitrator's award could be made public, this does nothing to overcome the private nature of the process contemplated overall, and the absence of public accountability.

49. Further, I consider paras.32-33 of the VWFL Opinion to overplay the extent to which the public interest is safeguarded by the DCO process. Although it is claimed that *"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"*, this appears to be little more than assertion. It is simply not possible to know precisely what those factors are and the extent to which they have been considered without knowledge of the particular nature of any dispute arising.

50. In relation to the discharge of DML conditions, the majority of the post-consent plans and documentation which are required to be submitted for the approval of the MMO under the DMLs are new documents, which will not have been subject to public scrutiny as part of the DCO process. This would be true of the aids to navigation management plan, and a number of other plans, many of which need only accord with an outline plan submitted for scrutiny with the DCO application.

51. In any event, I consider that the VWPL Opinion misunderstands, at least in part, the relevant public interest consideration(s) which primarily influence my view that the disputes that may arise in relation to TH and the MMO are non-arbitrable. Those considerations are not just 'the safety of navigation' or 'protection of the environment', as paras.31-32 appear to assume, but principally the fact that Parliament has seen fit to entrust those decisions to one expert body

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to in the preceding footnote.

and that body alone. No amount of skill on the part of an arbitrator in weighing various considerations is capable of overcoming that issue.

52. It is for this reason that the repeated comparisons drawn with s.78 appeals in the Town and Country Planning context are wholly inappropriate. In that case, Parliament has specifically entrusted a third party decision maker (the Planning Inspectorate) with the power to make such decisions through the statutory appeal procedure, which also contains extensive safeguards in relation to matters such as public participation, accountability and transparency: for example, it is funded by the public; operates in public save in very limited instances engaging issues of national security; it publicises its proceedings and decisions and consults the public before making a decision; it can and does accept representations from interested interveners (i.e. Rule 6 parties); it is publicly accountable for its decisions.[14] Moreover, the Secretary of State retains the ability to recover cases for his own personal determination where the delegation to PINS is considered inappropriate.

53. The earlier comparisons drawn in the VWPL Opinion suffer from similar defects: none of the instances identified[15] in which statutory arbitration arises are ones in which the matter that is permitted or required to be arbitrated relate to matters in respect of which the party affected would ordinarily have exclusive jurisdiction. For example, the Agricultural Holdings Act arbitrations relate to disputes about the terms of tenancies e.g. rent.

Is the provision justified or appropriate in any event?

54. As identified further above, even if it is decided that the matters in issue are not strictly 'non-arbitrable' as a matter of law, that does not mean that the inclusion of the arbitration provision (without adequate carve out for TH and the MMO) should be accepted without more. It is incumbent upon the SoS to determine whether it is justified and appropriate in any event.

55. In my view, and in the absence of any robust justification by VWPL for its application to TH and indeed the MMO, I consider that it would nonetheless be inappropriate to include the arbitration provision without the carve outs for the same reasons previously given. It would

[14] Compare s.69 of the AA 1996 for the limited circumstances in which an award may be appealed compared with, for example, a challenge under s.288 or an appeal under s.289 of the Town and Country Planning Act 1990. What limited accountability there is can also only be enforced by the losing party in an arbitration, not from a wider category of people e.g. from 'persons aggrieved' under s.288 of the Town and Country Planning Act 1990 or indeed by way of judicial review.

[15] In para.10 of the VWPL Opinion.

also be impractical to do so having regard to the purpose of the DCO regime referred to above.

56. I note that the Examining Authority in respect of the Tilbury 2 - Proposed Port Terminal at Former Tilbury Power Station DCO recently recommended the exclusion of an arbitration clause proposed to be included in relation to a DML by the applicant in that case, a recommendation that was subsequently accepted by the SoS. In particular, the Examining Authority accepted an argument by the MMO that, once a DML had been granted, there was nothing in the 2008 Act that suggested that an applicant for a DCO should be treated any differently from any other marine licence holder, and that the MMO's ordinary powers should therefore be maintained.[16]

57. This was notwithstanding the fact that there was, as in this draft DCO in respect of TH, a saving provision which stated that the arbitration was not to be taken, or to operate, so as to fetter or prejudice the statutory rights, powers, discretions or responsibilities of the MMO.

58. I note that no reference is made to this decision in the VWPL Opinion.

OTHER MATTERS

The necessity of the saving provision for TH

59. It follows from the above that I disagree with the conclusion of the VWPL Opinion that the inclusion of the saving provision in favour of the TH is not strictly necessary. In my view, this serves to provide an important measure of protection to TH against decisions which are properly to be regarded as exercises of its statutory rights and privileges (which I consider to encompass the exercise of its powers pursuant to its functions under the MSA 1995) but which might otherwise be at risk of being argued to give rise to 'differences' under the provisions of the DCO, if made.

60. However, I do note that:

    a. The absence of a similar saving provision in respect of the MMO indirectly affects TH, which often 'leads' on certain issues (such as approval of aid to navigation management plans) in exercise of its statutory functions and duties that are formally the subject of a decision by the MMO, if the MMO's decisions under the DML conditions are made subject to the arbitration provision, which operates to reduce

[16] Pages 233-234 of the Report to the SoS refer.

the effectiveness of the existing saving in favour of TH in practice; and

b. As mentioned above, the SoS in the Tilbury 2 case considered the deletion of the arbitration clause to be necessary, notwithstanding the saving in the MMO's favour.

Other measures available to secure TH's interests

61. Finally, I am asked to advise as to what, if any, further measures I consider would assist with securing TH's interests.

62. In my view, protection for TH's interests would be adequately secured if it was made clear on the face of the Order that the arbitration clause did not apply to either the exercise by TH of its functions etc (as per the existing saving) *and* decisions taken by the MMO in relation to the approval (or otherwise) of matters arising from the DML. I am aware that TH has proposed wording to this effect on other DCOs, such as the following, which I consider would represent an appropriate caveat to the arbitration clause:

> *"(X) The powers of the arbitrator appointed under this article do not extend to considering the appropriateness of a decision or determination made by a body exercising regulatory functions on behalf of the Secretary of State under or pursuant to an enactment".*

63. Finally, TH's position would no doubt be further assisted by a positive and well-reasoned decision of the SoS (or his Examining Authority), explaining the basis for any decision to reject the application of the arbitration provision to TH (and the MMO). This matter is, of course, out of TH's hands, but it may help TH in dealing with similar arguments advanced in the future, or (more beneficially) reduce the instances where this point is re-argued and TH has to incur expense in responding to it.

64. I hope this advice is clear. Those instructing should not hesitate to contact me in chambers if they wish to discuss any aspect of it, or any matter arising.

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30 May 2019