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By e-mail: NetZeroTeessideProject@planninginspectorate.gov.uk

27 July 2022

Dear Sirs

The Net Zero Teesside Project ("the Scheme")
Our Client: Exolum Seal Sands Ltd ("Exolum")
Protective Provisions Agreement between the Applicant and Exolum

We act for Exolum in this matter.

We have been engaging with the solicitors acting for Net Zero Teesside Power Limited and Net Zero North Sea Storage Limited ("the Promoter") to agree a protective provisions agreement ("PPA") in relation to the Scheme. The PPA is not yet agreed and we await to hear from the Promoter's solicitor following our latest comments.

The Promoter amended the provisions for the protection of Exolum at Schedule 12 Part 7 ("Part 7") in the Draft DCO submitted at Deadline 4.

We attended the Issue Specific Hearing on the draft DCO (ISH3) on 12 July 2022, virtually via Microsoft Teams. As mentioned at the hearing, we were not aware that Part 7 had been amended until the day of the hearing, so did not have the opportunity to review the changes prior to the hearing.

We have now considered the amended provisions in Part 7 and we confirm that these provisions do not provide sufficient protection to Exolum.

We enclose revised Part 7 protective provisions which are acceptable to Exolum, both a clean copy and a comparison with the current draft Part 7 showing the substantive differences.

Yours faithfully



Veale Wasbrough Vizards LLP

Cc Pinsent Masons



Lawyers & Parliamentary Agents

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PART 7 FOR THE PROTECTION OF EXOLUM SEAL SANDS LTD

74. For the protection of Exolum, the following provisions have effect, unless otherwise agreed in writing between the undertaker and Exolum.

75. In this Part of this Schedule—

“Exolum” means Exolum Seal Sands Ltd (Company number 00465548) and Exolum Riverside Ltd (Company number 03422427) and any successor in title or function to these entities;

“the Exolum operations” means the operations and assets within the Order limits or operations and assets which are operated by Exolum and/or have the benefit of rights (including access) over the Order limits vested in Exolum including the pipeline crossing the Order limits operated by Exolum used at all times and all ancillary apparatus including such works and apparatus properly appurtenant to the pipelines as are specified by section 65(2) (meaning of “pipe-line”) of the Pipe-Lines Act 1962;

“restricted works” means any works forming any part of the authorised development that are near to, or will or may affect the Exolum operations or access to them including:

- (a) all works within 15 metres of the Exolum operations;
- (b) the crossing of the Exolum operations by other utilities;
- (c) the use of explosives within 400 metres of the Exolum operations; and
- (d) piling, undertaking of a 3D seismic survey or the sinking boreholes within 30 metres of the Exolum operations, whether carried out by the undertaker or any third party in connection with the authorised development;

“works details” means—

- (a) plans and sections;
- (b) a method statement describing—
 - (i) the exact position of the works;
 - (ii) the level at which the works are proposed to be constructed or renewed;
 - (iii) the manner of the works’ construction or renewal including details of excavation, positioning of plant etc.;
 - (iv) the position of all apparatus;
 - (v) by way of detailed drawings, every alteration proposed to be made to or close to any such apparatus;
 - (vi) any intended maintenance regime;
 - (vii) details of the proposed method of working and timing of execution of works;
 - (viii) details of vehicle access routes for construction and operational traffic; and
 - (ix) any other information reasonably required by Exolum to assess the works; and
- (c) where the restricted works will or may be situated on, over, under or within 15 metres measured in any direction of the Exolum operations, or (wherever situated) impose any load directly upon the Exolum operations or involve embankment

works within 15 metres of the Exolum operations, the method statement must also include—

- (i) the position of the Exolum operations; and
 - (ii) by way of detailed drawings, every alteration proposed to be made to the Exolum operations; and
- (d) any further particulars provided in response to a request under paragraph [3].

76. Consent of restricted works under this Part

- 1) Unless a shorter period is otherwise agreed in writing between the undertaker and Exolum, not less than thirty five (35) days before commencing the execution of any restricted works, the undertaker must submit to Exolum the works details for the proposed restricted works and such further particulars as Exolum may, within 28 days from the day on which the works details are submitted under this paragraph, reasonably require.
- 2) No restricted works are to be commenced until the works details in respect of those works submitted under sub-paragraph (1) have been approved by Exolum.
- 3) Any approval of Exolum required under this paragraph must not be unreasonably withheld or delayed but may be given subject to such reasonable requirements as Exolum may require to be made for—
 - (a) the continuing safety and operational viability of the Exolum operations; and
 - (b) the requirement for Exolum to have reasonable access with or without vehicles to inspect, repair, replace and maintain and ensure the continuing safety and operation or viability of the Exolum operations.
- 4) Any approval of Exolum required under this paragraph 76 including any reasonable requirements required by Exolum under sub-paragraph (3), must be made in writing within a period of 21 days (unless a shorter period is otherwise agreed in writing between the undertaker and Exolum) beginning with the date on which the works details were submitted to Exolum under subparagraph (1) or the date on which any further particulars requested by Exolum under sub-paragraph (1) were submitted to Exolum (whichever is the later).
- 5) The authorised development must be executed only in accordance with the works details approved under sub-paragraph (1) and any requirements imposed on the approval under sub-paragraph (3) by Exolum under this paragraph 76 including any reasonable requirements notified to the undertaker in accordance with sub-paragraph (3) and Exolum shall be entitled to watch and inspect the execution of those works.
- 6) If Exolum in accordance with sub-paragraph (3) and in consequence of the restricted works proposed by the undertaker, reasonably requires the removal of any of the Exolum operations and gives written notice to the undertaker of that requirement, this Order applies as if the removal of the apparatus had been required by the undertaker under sub-paragraph (1).
- 7) Nothing in this paragraph precludes the undertaker from submitting at any time or from time to time, but (unless otherwise agreed in writing between the undertaker and Exolum) in no case less than 28 days before commencing the execution of any restricted works, new works details, instead of the works details previously submitted, and having done so the provisions of this paragraph 76 apply to and in respect of the new works details.

77. Prohibition of acquisition and interference

- 1) Regardless of any provision in this Order or anything shown on the land plans or if the Order applies to any interest in any land in which the Exolum operations are placed or over which access to the Exolum operations is enjoyed:

- (a) the undertaker must not, otherwise than by agreement with Exolum, acquire the Exolum operations, Exolum's rights in respect of the Exolum operations or any of Exolum's interests in land;
 - (b) (notwithstanding anything to the contrary in the Order, the undertaker must not acquire or create new rights in the Order Land subject to any existing rights or interests of Exolum unless the Parties agree otherwise, such agreement not to be unreasonably withheld, delayed or subject to unreasonable conditions;
 - (c) the undertaker must not, otherwise than in accordance with terms of this Order including any approval given under this Part—
 - i. obstruct or render less convenient the access to the Exolum operations;
 - ii. interfere with or affect the Exolum operations or Exolum's ability to carry out its functions including operating its pipeline and its terminal by way of the creation of restrictive covenants or otherwise;
 - iii. require that the Exolum operations are relocated or diverted; or
 - iv. remove or require to be removed any Exolum operations; and
 - (d) any right of Exolum to access the Exolum operations shall not be extinguished until any necessary alternative access has been provided to the reasonable satisfaction of Exolum.
- 2) Prior to the carrying out of any restricted works (in accordance with any approval given under this Part) or any works authorised by this Order that will affect the existing rights of Exolum or the Exolum operations, the parties shall use their reasonable endeavours to negotiate and enter into such deeds of consent (crossing consent) and (if necessary) variations to the existing rights upon such terms and conditions as may be agreed between Exolum and the undertaker acting reasonably and which must be no less favourable on the whole to Exolum than the provisions of this Order, and it will be the responsibility of the undertaker to procure and / or secure the consent and entering into of such deeds and variations by all other third parties with an interest in the land at that time who are affected by such works.
- 3) Where the undertaker takes temporary possession of any land or carries out survey works on land in respect of which Exolum has an easement, right, operations, assets or other interests (together "Exolum's rights"):
- (a) where reasonably necessary Exolum may exercise its rights to access such land:
 - (i) in an emergency without notice; and
 - (ii) in non-emergency circumstances having first given the undertaker prior written notice in order to allow the parties to liaise over timing of their respective works during the period of temporary possession; and
 - (b) subject to sub-paragraph (3)(a), the undertaker shall not remove, restrict or in any way alter Exolum's rights, unless in accordance with the provisions of this Part.

78. Cathodic protection testing

- 1) Where in the reasonable opinion of Exolum or the undertaker—
- (a) the authorised development might interfere with the cathodic protection forming part of the Exolum operations; or
 - (b) the Exolum operations might interfere with the proposed or existing cathodic protection forming part of the authorised development,

Exolum and the undertaker must co-operate in undertaking the tests which they consider reasonably necessary for ascertaining the nature and extent of such interference and implement measures for providing or preserving cathodic protection.

79. **Expenses**

- 1) Subject to the following provisions of this paragraph 79, the undertaker must pay to Exolum the reasonable and properly incurred costs and expenses (including reasonable staffing costs if work is carried out in-house) incurred by Exolum in, or in connection with—
 - (a) undertaking its obligations under this Order including—
 - (i) the execution of any works under this Order including for the protection of the Exolum operations; and
 - (b) the review and assessment of works details in accordance with paragraph 76;
 - (b) the watching of and inspecting the execution of the restricted works and any works undertaken by third parties within 15 metres of the Exolum operations and undertaken as a result of or in connection with the authorised development; and
 - (c) imposing reasonable requirements in accordance with paragraph 76(3).
- 2) There will be no deduction from any sum payable under sub-paragraph (1) or otherwise, as a result of any cost-sharing provisions under the Highways Act 1980 or New Roads and Street Works Act 1991.
- 3) Upon the submission of proper and reasonable estimates of costs and expenses to be incurred by Exolum, the undertaker shall pay Exolum sufficiently in advance to enable Exolum to undertake its obligations under this Order in a manner that is neutral to its cash flow provided that in the event that the costs incurred by Exolum are less than the amount paid by the undertaker pursuant to this sub-paragraph (3) then Exolum shall promptly repay any overpayment to the undertaker.
- 4) Where agreed by both parties, acting reasonably and having regard to the nature of the restricted works, their complexity, timescales, phasing or costs, the parties shall with due diligence and good faith negotiate a works agreement.
- 5) Where there has been a reference to an arbitrator in accordance with paragraph 86 and the arbitrator gives approval for the works details, the authorised development must be carried out in accordance with the approval and conditions contained in the decision of the arbitrator under paragraph 81.

80. **Indemnity**

- 1) Subject to sub-paragraphs (2) and (3), if by reason or in consequence of the construction of any of the works referred to in paragraph 76 or otherwise associated with the authorised development and / or temporary and permanent reinstatement of excavations in the vicinity of the Exolum operations, any damage is caused to the Exolum operations, or there is any interruption in any service provided, or in the supply of any goods, by or to Exolum or via the Exolum operations, the undertaker must—
 - (a) bear and pay the cost reasonably incurred by Exolum in making good such damage or restoring the supply;
 - (b) make reasonable compensation to Exolum for any other expenses, loss, damages, penalty or costs incurred by Exolum, by reason or in consequence of any such damage or interruption; and
 - (c) indemnify and keep indemnified Exolum against all claims by third parties arising by reason or in consequence of any such damage or interruption.

- 2) Nothing in sub-paragraph (1) imposes any liability on the undertaker with respect to— any damage or interruption to the extent that it is attributable to the wrongful act, neglect or default of Exolum, its officers, employees, servants, contractors or agents, in circumstances where any act done by Exolum has been done on behalf of the undertaker or in accordance with works details approved by Exolum or in accordance with any requirement or under its supervision, subject to paragraph 80(4).
- 3) Exolum must give the undertaker reasonable notice of any such claim or demand.
- 4) Exolum must use its reasonable endeavours to mitigate in whole or in part and to minimise any costs, expenses, loss, demands, and penalties to which the indemnity under this paragraph 80 applies. If requested to do so by the undertaker, Exolum must provide an explanation of how the claim has been minimised or details to substantiate any cost or compensation claimed pursuant to sub-paragraph (1). The undertaker shall only be liable under this paragraph 80 for claims reasonably incurred by Exolum.
- 5) The undertaker warrants that the information it or any of its employees agents or contractors provide to Exolum about the works details or the authorised development and on which Exolum relies in the design of and carrying out of any works is accurate and the undertaker or any of its employees agents or contractors have exercised all the reasonable skill, care and diligence to be expected of a qualified and experienced member of their respective profession.
- 6) The undertaker shall indemnify Exolum against any claim made against, or loss suffered by, Exolum as a result of any act or omission committed by undertaker's officers, employees or agents whilst on Exolum's premises or in the vicinity of Exolum's operations.
- 7) The undertaker shall indemnify Exolum against all costs, expenses, legal liability, losses (including loss of profit), claims or proceedings whatsoever arising under any law in respect of or as a result of:
 - (a) the undertaker's works or the execution of any works by Exolum under this Order;
 - (b) personal injury to or death of any person whomsoever;
 - (c) the use or occupation of the land over or in the vicinity of the pipeline for the purpose of carrying out the authorised development;
 - (d) any injury or damage whatsoever to any property, real or personal, including the property of Exolum and the Exolum operations; and / or
 - (e) matters arising out of or in connection with this Order.

81. **Arbitration**

- 1) Any difference or dispute arising between the undertaker and Exolum under this Part of this Schedule must, unless otherwise agreed in writing between the undertaker and Exolum, be referred to and settled by arbitration in accordance with article 47 (arbitration).
- 2) Where there has been a reference to an arbitrator in accordance with sub-paragraph (1) and the arbitrator gives approval for the works details, the authorised development must be carried out in accordance with the approval and conditions contained in the decision of the arbitrator under sub-paragraph (1).

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“restricted works” means any works forming any part of the authorised development that are near to, or will or may affect the Exolum operations or access to them including:

- (a) all works within 15 metres of the Exolum operations;
- (b) the crossing of the Exolum operations by other utilities;
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- (a) plans and sections;
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 - (iv) the position of all apparatus;
 - (v) by way of detailed drawings, every alteration proposed to be made to or close to any such apparatus;
 - (vi) any intended maintenance regime;
 - (vii) details of the proposed method of working and timing of execution of works;
 - (viii) details of vehicle access routes for construction and operational traffic; and
 - (ix) any other information reasonably required by Exolum to assess the works; and
- (c) where the restricted works will or may be situated on, over, under or within 15 metres measured in any direction of the Exolum operations, or (wherever situated) impose any load directly upon the Exolum operations or involve embankment

works within 15 metres of the Exolum operations, the method statement must also include—

- (i) the position of the Exolum operations; and
- (ii) by way of detailed drawings, every alteration proposed to be made to the Exolum operations; and

(d) any further particulars provided in response to a request under paragraph [3].

76. Consent of restricted works under this Part

- 1) Unless a shorter period is otherwise agreed in writing between the undertaker and Exolum, not less than thirty five (35) days before commencing the execution of any restricted works, the undertaker must submit to Exolum the works details for the proposed restricted works and such further particulars as Exolum may, within 28 days from the day on which the works details are submitted under this paragraph, reasonably require.
- 2) No restricted works are to be commenced until the works details in respect of those works submitted under sub-paragraph (1) have been approved by Exolum.
- 3) Any approval of Exolum required under this paragraph must not be unreasonably withheld or delayed but may be given subject to such reasonable requirements as Exolum may require to be made for—
 - (a) the continuing safety and operational viability of the Exolum operations; and
 - (b) the requirement for Exolum to have reasonable access with or without vehicles to inspect, repair, replace and maintain and ensure the continuing safety and operation or viability of the Exolum operations.
- 4) Any approval of Exolum required under this paragraph 76 including any reasonable requirements required by Exolum under sub-paragraph (3), must be made in writing within a period of 21 days (unless a shorter period is otherwise agreed in writing between the undertaker and Exolum) beginning with the date on which the works details were submitted to Exolum under subparagraph (1) or the date on which any further particulars requested by Exolum under sub-paragraph (1) were submitted to Exolum (whichever is the later).
- 5) The authorised development must be executed only in accordance with the works details approved under sub-paragraph (1) and any requirements imposed on the approval under sub-paragraph (3) by Exolum under this paragraph 76 including any reasonable requirements notified to the undertaker in accordance with sub-paragraph (3) and Exolum shall be entitled to watch and inspect the execution of those works.
- 6) If Exolum in accordance with sub-paragraph (3) and in consequence of the restricted works proposed by the undertaker, reasonably requires the removal of any of the Exolum operations and gives written notice to the undertaker of that requirement, this Order applies as if the removal of the apparatus had been required by the undertaker under sub-paragraph (1).
- 7) Nothing in this paragraph precludes the undertaker from submitting at any time or from time to time, but (unless otherwise agreed in writing between the undertaker and Exolum) in no case less than 28 days before commencing the execution of any restricted works, new works details, instead of the works details previously submitted, and having done so the provisions of this paragraph 76 apply to and in respect of the new works details.

77. Prohibition of acquisition and interference

- 1) Regardless of any provision in this Order or anything shown on the land plans or if the Order applies to any interest in any land in which the Exolum operations are placed or over which access to the Exolum operations is enjoyed:

- (a) the undertaker must not, otherwise than by agreement with Exolum, acquire the Exolum operations, Exolum's rights in respect of the Exolum operations or any of Exolum's interests in land;
 - (b) (notwithstanding anything to the contrary in the Order, the undertaker must not acquire or create new rights in the Order Land subject to any existing rights or interests of Exolum unless the Parties agree otherwise, such agreement not to be unreasonably withheld, delayed or subject to unreasonable conditions;
 - (c) the undertaker must not, otherwise than in accordance with terms of this Order including any approval given under this Part—
 - i. obstruct or render less convenient the access to the Exolum operations;
 - ii. interfere with or affect the Exolum operations or Exolum's ability to carry out its functions including operating its pipeline and its terminal by way of the creation of restrictive covenants or otherwise;
 - iii. require that the Exolum operations are relocated or diverted; or
 - iv. remove or require to be removed any Exolum operations; and
 - (d) any right of Exolum to access the Exolum operations shall not be extinguished until any necessary alternative access has been provided to the reasonable satisfaction of Exolum.
- 2) Prior to the carrying out of any restricted works (in accordance with any approval given under this Part) or any works authorised by this Order that will affect the existing rights of Exolum or the Exolum operations, the parties shall use their reasonable endeavours to negotiate and enter into such deeds of consent (crossing consent) and (if necessary) variations to the existing rights upon such terms and conditions as may be agreed between Exolum and the undertaker acting reasonably and which must be no less favourable on the whole to Exolum than the provisions of this Order, and it will be the responsibility of the undertaker to procure and / or secure the consent and entering into of such deeds and variations by all other third parties with an interest in the land at that time who are affected by such works.
- 3) Where the undertaker takes temporary possession of any land or carries out survey works on land in respect of which Exolum has an easement, right, operations, assets or other interests (together "Exolum's rights"):
- (a) where reasonably necessary Exolum may exercise its rights to access such land:
 - (i) in an emergency without notice; and
 - (ii) in non-emergency circumstances having first given the undertaker prior written notice in order to allow the parties to liaise over timing of their respective works during the period of temporary possession; and
 - (b) subject to sub-paragraph (3)(a), the undertaker shall not remove, restrict or in any way alter Exolum's rights, unless in accordance with the provisions of this Part.

78. Cathodic protection testing

- 1) Where in the reasonable opinion of Exolum or the undertaker—
- (a) the authorised development might interfere with the cathodic protection forming part of the Exolum operations; or
 - (b) the Exolum operations might interfere with the proposed or existing cathodic protection forming part of the authorised development,

Exolum and the undertaker must co-operate in undertaking the tests which they consider reasonably necessary for ascertaining the nature and extent of such interference and implement measures for providing or preserving cathodic protection.

79. **Expenses**

- 1) Subject to the following provisions of this paragraph 79, the undertaker must pay to Exolum the reasonable and properly incurred costs and expenses (including reasonable staffing costs if work is carried out in-house) incurred by Exolum in, or in connection with—
 - (a) undertaking its obligations under this Order including—
 - (i) the execution of any works under this Order including for the protection of the Exolum operations; and
 - (b) the review and assessment of works details in accordance with paragraph 76;
 - (b) the watching of and inspecting the execution of the restricted works and any works undertaken by third parties within 15 metres of the Exolum operations and undertaken as a result of or in connection with the authorised development; and
 - (c) imposing reasonable requirements in accordance with paragraph 76(3).
- 2) There will be no deduction from any sum payable under sub-paragraph (1) or otherwise, as a result of any cost-sharing provisions under the Highways Act 1980 or New Roads and Street Works Act 1991.
- 3) Upon the submission of proper and reasonable estimates of costs and expenses to be incurred by Exolum, the undertaker shall pay Exolum sufficiently in advance to enable Exolum to undertake its obligations under this Order in a manner that is neutral to its cash flow provided that in the event that the costs incurred by Exolum are less than the amount paid by the undertaker pursuant to this sub-paragraph (3) then Exolum shall promptly repay any overpayment to the undertaker.
- 4) Where agreed by both parties, acting reasonably and having regard to the nature of the restricted works, their complexity, timescales, phasing or costs, the parties shall with due diligence and good faith negotiate a works agreement.
- 5) Where there has been a reference to an arbitrator in accordance with paragraph 86 and the arbitrator gives approval for the works details, the authorised development must be carried out in accordance with the approval and conditions contained in the decision of the arbitrator under paragraph 81.

80. **Indemnity**

- 1) Subject to sub-paragraphs (2) and (3), if by reason or in consequence of the construction of any of the works referred to in paragraph 76 or otherwise associated with the authorised development and / or temporary and permanent reinstatement of excavations in the vicinity of the Exolum operations, any damage is caused to the Exolum operations, or there is any interruption in any service provided, or in the supply of any goods, by or to Exolum or via the Exolum operations, the undertaker must—
 - (a) bear and pay the cost reasonably incurred by Exolum in making good such damage or restoring the supply;
 - (b) make reasonable compensation to Exolum for any other expenses, loss, damages, penalty or costs incurred by Exolum, by reason or in consequence of any such damage or interruption; and
 - (c) indemnify and keep indemnified Exolum against all claims by third parties arising by reason or in consequence of any such damage or interruption.

- 2) Nothing in sub-paragraph (1) imposes any liability on the undertaker with respect to— any damage or interruption to the extent that it is attributable to the wrongful act, neglect or default of Exolum, its officers, employees, servants, contractors or agents, in circumstances where any act done by Exolum has been done on behalf of the undertaker or in accordance with works details approved by Exolum or in accordance with any requirement or under its supervision, subject to paragraph 80(4).
- 3) Exolum must give the undertaker reasonable notice of any such claim or demand.
- 4) Exolum must use its reasonable endeavours to mitigate in whole or in part and to minimise any costs, expenses, loss, demands, and penalties to which the indemnity under this paragraph 80 applies. If requested to do so by the undertaker, Exolum must provide an explanation of how the claim has been minimised or details to substantiate any cost or compensation claimed pursuant to sub-paragraph (1). The undertaker shall only be liable under this paragraph 80 for claims reasonably incurred by Exolum.
- 5) The undertaker warrants that the information it or any of its employees agents or contractors provide to Exolum about the works details or the authorised development and on which Exolum relies in the design of and carrying out of any works is accurate and the undertaker or any of its employees agents or contractors have exercised all the reasonable skill, care and diligence to be expected of a qualified and experienced member of their respective profession.
- 6) The undertaker shall indemnify Exolum against any claim made against, or loss suffered by, Exolum as a result of any act or omission committed by undertaker's officers, employees or agents whilst on Exolum's premises or in the vicinity of Exolum's operations.
- 7) The undertaker shall indemnify Exolum against all costs, expenses, legal liability, losses (including loss of profit), claims or proceedings whatsoever arising under any law in respect of or as a result of:
 - (a) the undertaker's works or the execution of any works by Exolum under this Order;
 - (b) personal injury to or death of any person whomsoever;
 - (c) the use or occupation of the land over or in the vicinity of the pipeline for the purpose of carrying out the authorised development;
 - (d) any injury or damage whatsoever to any property, real or personal, including the property of Exolum and the Exolum operations; and / or
 - (e) matters arising out of or in connection with this Order.

81. **Arbitration**

- 1) Any difference or dispute arising between the undertaker and Exolum under this Part of this Schedule must, unless otherwise agreed in writing between the undertaker and Exolum, be referred to and settled by arbitration in accordance with article 47 (arbitration).
- 2) Where there has been a reference to an arbitrator in accordance with sub-paragraph (1) and the arbitrator gives approval for the works details, the authorised development must be carried out in accordance with the approval and conditions contained in the decision of the arbitrator under sub-paragraph (1).