THE PROPOSED A122 (LOWER THAMES CROSSING) DEVELOPMENT CONSENT ORDER

Proposed Arbitration Rules on behalf of the Port of London Authority

PINS Reference Number	TR010032
Interested Party Reference Number	20035622
Document Ref.	PLA 21
Author	Winckworth Sherwood LLP
Date	5 December 2023

Arbor
255 Blackfriars Road
London
SE1 9AX

Winckworth Sherwood
Solicitors and
Parliamentary Agents

1. Introduction

1.1. This is a written submission made on behalf of the Port of London Authority (**PLA**) in respect of arbitration in relation to the PLA's protective provisions, in particular paragraph 99(6) of Schedule 14 Part 8 (Protective Provisions for the Port of London Authority). This matter was most recently raised during ISH14 on the draft Development Consent Order (**dDCO**).

1.2. The PLA's position and concern with paragraph 99(6) was discussed at ISH14.

1.3. Paragraph 99 deals with consulting the PLA in relation to the design of the tunnelling works. Paragraph 99(4) allows the PLA, in the event of a dispute, to refer certain matters to arbitration if agreement cannot be reached between the parties. Paragraph 99(5) provides that if a matter is referred to arbitration, tunnelling work should not begin until the dispute is settled. The PLA has no issue with these two sub-paragraphs.

1.4. However, sub-paragraph 99(6) significantly weakens both the process and protection set out in sub-paragraphs 99(4) and (5). This is because sub-paragraph 6 provides that if a matter proceeds to arbitration, the Applicant can unilaterally decide at any point to override the arbitration to refer the matter to the Secretary of State. An arbitrator must then make a decision that is consistent with that of the Secretary of State.

1.5. This effectively allows for jurisdiction shopping by the Applicant. This is not provided for anywhere else in this dDCO, nor to our knowledge is it in any other DCO. We can see no justification for this novel approach being applied to the PLA.

1.6. We acknowledge that the Secretary of State has a role to play in some arbitration provisions: under other parts of the dDCO, some disputes can be referred to the Secretary of State. However, the scenarios in which referrals to the Secretary of State take place are either where the parties fail to agree on arbitration as a route to resolution, or on appeal. In none of the examples under the dDCO where matters can be referred to an arbitrator is it deemed necessary for a central government department to be kept as a back-up option for the Applicant. The process proposed for the PLA under paragraph 99(6) where the Applicant can unilaterally intervene to override an arbitration process under this dDCO is unique, and provides the Applicant with an unwarranted degree of control over dispute resolution.

1.7. The Applicant has sought to justify this approach on the basis that it needs certainty over the timing of any arbitration.

1.8. In other DCOs, as the ExA noted at ISH14, concerns about the expediency of arbitration have been met by the inclusion of a schedule referred to as the Arbitration Rules. The wording of these varies very little between DCOs and is well-precedented, having been included in last two years in the following energy-related DCO's:

- Awel y Môr Offshore Wind Farm 2023;
- Hornsea Four Offshore Wind Farm Order 2023;
- The Longfield Solar Farm Order 2023;

- East Anglia ONE North Offshore Windfarm 2022;
- East Anglia TWO Offshore Windfarm 2022;
- Little Crow Solar Park Order 2022; and
- Norfolk Vanguard Offshore Wind Farm Order 2022.

1.9. **Attached** to this representation as Appendix 1 is a table that sets out the few instances where there are differences in the precedent DCOs and, where such differences exist, why particular wording has been adopted in the proposed Arbitration Rules.

2. Changes requested to the draft Development Consent Order

2.1. The PLA requests that:

2.1.1. paragraph 99(6) of the dDCO is deleted so as to remove the ability for the Applicant to unilaterally refer a dispute to the Secretary of State;

2.1.2. that a new Schedule be inserted which contains the Arbitration Rules, **attached** to this representation as Appendix 2. We would suggest that these Rules are included as a new Schedule to the dDCO.

2.2. This would require the following consequential amendments to the dDCO:

2.2.1. Article 64(1) (arbitration) of the dDCO: this should be amended so that it includes reference to the proposed Arbitration Rules schedule, as follows. The words underlined are those that differ from the drafting of article 64 in the version 9.0 of the dDCO, submitted by Applicant at Deadline 7 (REP7-090):

"64.—(1) Except where otherwise expressly provided for in this Order and unless otherwise agreed in writing between the parties, any difference under any provision of this Order (other than a difference which falls to be determined by the tribunal) must be referred to and settled <u>in arbitration in accordance with the rules at Schedule [17] (arbitration rules) to this Order</u> by a single arbitrator to be agreed between the parties, <u>within 14 days of receipt of the notice of arbitration, or if the parties fail to agree within the time period stipulated,</u> to be appointed on the application of either party (after giving notice in writing to the other) by the President of the Institution of Civil Engineers."

2.2.2. Paragraph 99(4) of Schedule 14 (protective provisions): this sub-paragraph deals with how matters are referred to arbitration. Because paragraph 1 of the proposed Schedule 17 (arbitration rules) duplicates elements of sub-paragraph (4), this sub-paragraph should be amended to substitute the words "it may" for the existing words "*the senior representatives from the PLA and the undertaker must seek to resolve the dispute through a meeting between the parties promptly and in any event within 10 business days*, *and if the PLA is not reasonably satisfied following that meeting it may within 20 business days of the specified day*, *notify the undertaker that the PLA is in dispute with the undertaker and accordingly*". Sub-paragraph (4) would therefore read as follows:

"99. (*4) Where the PLA are not reasonably satisfied in relation to the written account provided in relation to the matters under paragraph (2)(a)(ii), it may refer the matter to arbitration under paragraph 116 to review the measures to be implemented having regard to protecting the existing and future use of the river Thames."*

2.2.3. Paragraph 99(5) of Schedule 14 (protective provisions): because sub-paragraph 99(6) would be deleted, sub-paragraph 99(5) should be amended to remove the words "Unless sub-paragraph (6) applies" and "(and where sub-paragraph (6) applies, the arbitrator must ensure its decision does not conflict with the Secretary of State's decision under that sub-paragraph)".

Appendix 1

Comparison of proposed Arbitration Rules and Arbitration Rules in precedent DCOs

Appendix 1

Table recording where there is inconsistency in the provisions amongst the previous DCO's reviewed, and why the language adopted in the draft has been used

1. In drafting Schedule 17 (arbitration rules), we reviewed all recent (decided between 1 January 2021 and 4 December 2023) energy-related DCO's that include arbitration rules as a Schedule, being:

    a. Awel y Môr Offshore Wind Farm Order 2023 ("**AMO"**);
    b. Hornsea Four Offshore Wind Farm Order 2023 ("**HFO"**);
    c. The Longfield Solar Farm Order 2023 ("**LSF"**);
    d. East Anglia ONE North Offshore Windfarm Order 2022 ("**EA One**");
    e. East Anglia TWO Offshore Windfarm Order 2022 ("**EA Two"**);
    f. Little Crow Solar Park Order 2022 ("**LCSP"**); and
    g. Norfolk Vanguard Offshore Wind Farm Order 2022 ("**NVO"**).

2. The wording used in these arbitration rules varies very little. The table below records where there are differences, and in such cases, why particular wording has been used in the proposed Schedule 17. This table therefore does not comment on every provision in proposed Schedule 17.

Provision in Schedule 17 (arbitration rules)	**Explanation**
1. Primary Objective	
1(2) use of the term "Parties"	EA One and EA Two use the term "Parties", however we have replaced throughout the Schedule with the small 'p' parties, as the term is not a defined term anywhere in the dDCO.
1(2) The parties will first use their reasonable endeavours to settle a dispute amicably through negotiations undertaken in good faith by the senior management of the parties. Any dispute which is not resolved amicably by the senior management of the parties within twenty business days of the dispute arising, or such longer period as agreed in writing by the parties, shall be subject to arbitration in accordance with the terms of this Schedule.	This provision duplicates paragraph 99(4) of Schedule 14 (protective provisions), hence why in the covering representation we have suggested amendments to 99(4), if the Arbitration Rules are included in the dDCO. Paragraph 99(4) stated "*the senior representatives from the PLA and the undertaker must seek to resolve the dispute through a meeting between the parties promptly and in any event within **10 business days"**,* and this 10 business day requirement is not carried through to paragraph 1(2) of the Arbitration Rules. This is considered appropriate, given that most of the previous DCO's reviewed (except LSF and LCSP) use the wording (and timeframes) in paragraph 1(2).

Provision in Schedule 17 (arbitration rules)	Explanation
2. Time periods	
2(1) "*Unless otherwise specified*"	The phrase "*unless otherwise specified*" is not used in this clause in any of the previous DCO's reviewed, but it is preferable to include this wording to demonstrate that the reference to business days in paragraph 4(3), which is precedented in EA One, EA Two, and AMO DCO's, is not an error.
2(1) [Definition of time period]	The way that "time periods" are defined in sub-paragraph (1) varies between the examples reviewed, and the variation is, at a high level, due to whether time periods are to be considered "calendar days" or "business days" (or in some cases, days including weekends, but not bank holidays). The definition of time period has flow-on effects for the timetable specified in the subsequent paragraphs. However it is noted that the DCO's that adopt the concept of calendar days use similar timetables, as do those that use business days. We have adopted the wording for 2(1) from the EA One and EA Two examples, adjusted slightly (as explained in the row above).
3. Timetable	
As noted in the row above, the way that time periods are defined in paragraph 2(1) has an impact on the prescribed timetable. The timetable in Schedule 17 follows the timetable set out in the EA One, EA Two, LSF, LCSP and NVO examples, because those DCO's use a similar definition of "time period". Therefore, while on their face the timetable set out in the AMO and HFO DCO's appear to be different, because of their use of "business days" or "working days" in the definition of time period at paragraph 2(1), in reality the time allowed will be similar.	
3(2) "Within 14 days…"	EA One, EA Two, LSF, LCSP and NVO also allow for 14 days. AMO and HFO specify 15 days – as explained above, this is because of the different definition of time period used.

Provision in Schedule 17 (arbitration rules)	Explanation
3(3) "Within 14 days…"	EA One, EA Two, LSF, LCSP and NVO also allow for 14 days. AMO and HFO specify 15 days – as explained above, this is because of the different definition of time period used.
3(4) "Within 7 days…"	EA One, EA Two, LSF, LCSP and NVO also allow for 7 days. AMO and HFO specify 5 days– as explained above, this is because of the different definition of time period used.
4. Procedure	
Additional provision used in some DCO's	LSF, LCSP, and NVO include the following provision at 4(1): *4.—(1) The parties' pleadings, witness statements and expert reports (if any) must be concise. A single pleading must not exceed 30 single-sided A4 pages using 10pt Arial font.* It is not considered that such a provision is necessary in the dDCO and therefore we have not included it in Schedule 17.
4(1) The seat, or place, of the arbitration shall be London, England, the governing law shall be the laws of England and Wales and the language of the arbitration proceedings shall be English. The proceedings shall be conducted in accordance with the Arbitration Act 1996(1), save where modified by these Rules	This provision is used in the EA One and EA Two examples, and we consider it is useful to include here.
4(3) "Either party may, within 2 business days…"	The term "*2 business* days" is specified here (as opposed to 2 calendar days), because days are otherwise defined as calendar days (see paragraph 2(1)), and this provision, being a short timeline, needs to deal with the scenario where the request falls on or just before a weekend.
4(4) "Within 7 days…"	EA One, EA Two, LSF, LCSP, and NVO also provide for 7 days.

Provision in Schedule 17 (arbitration rules)	Explanation
	AMO and HFO provide for five days– as explained above, this is because of the different definition of time period used.
4(7)(a) "…at least 28 days"	EA One, EA Two, LSF, LCSP, and NVO also provide for 28 days. AMO and HFO provide for 20 days– as explained above, this is because of the different definition of time period used.
4(7)(c) "…at least 7 days"	EA One, EA Two, LSF, LCSP, and NVO also provide for 7 days. AMO and HFO provide for 5 days– as explained above, this is because of the different definition of time period used.
4(8) "Within 14 days of a Hearing…"	EA One, EA Two, LSF, LCSP, and NVO also provide for 14 days. AMO and HFO provide for 10 days– as explained above, this is because of the different definition of time period used.
4(9) Where a party requests an expedited procedure, accompanied by an evidenced reason for expedition, the Arbitrator may vary the timescales in sub paragraphs (3), (4), (5) and (7), but where a party does so, the Arbitrator must provide an opportunity for parties objecting to the effects of an expedited procedure to provide written submissions on that point and may decide to revert to standard timescales in response to such submissions. Where an expedited procedure is sustained, the Arbitrator must set out their reasons for acceding to an expedited timetable in writing, to be given alongside their award	This provision appears in the EA One and EA Two examples (but not the others reviewed). In our view, the provision should be retained, because it is useful to enable the arbitrator to vary the process and make it quicker, where doing so would be appropriate.
5. Arbitrator's powers	
5(2) *"There will be no discovery or disclosure…"*	The term "will be" is used in the most recent DCO's (AMO, HFO, and LCSP), and so that has been used here. The older examples (EA One, EA Two, and NVO) use the phrase "*there must be no…"*

Provision in Schedule 17 (arbitration rules)	Explanation
6. Costs	
6.—(1) The costs of the Arbitration must include the fees and expenses of the Arbitrator, the reasonable fees and expenses of any experts and the reasonable legal and other costs incurred by the parties for the Arbitration. *(2) Subject to sub-paragraph (3), the Arbitrator will award recoverable costs on the general principle that each party should bear its own costs.* *(3) The Arbitrator may depart from the general principle in sub-paragraph (2) and make such other costs award as it considers reasonable where a party has behaved unreasonably as defined within the National Planning Practice Guidance or such other guidance as may replace it.*	These three provisions appear in the EA One, EA Two, AMO and HMO examples. The LSF, LCSP, and NVO costs clauses vary slightly, however we consider that this drafting is appropriate and addresses all relevant matters.
7. Confidentiality	
7(2) Where the Arbitration relates to a dispute or difference under the provisions of Schedule 14 (protective provisions), the hearings must take place in private unless otherwise agreed between the parties and any matters, materials, documents, awards, expert reports and the like are confidential and must not be disclosed to any third party without prior written consent of the other party.	An equivalent provision is included in the EA One, EA Two and NVO examples (but not the others reviewed). We consider that it is appropriate that where a dispute relates to a dispute under the protective provisions, the hearing will take place in private – unless otherwise agreed between the parties. The confidentiality clauses in the LSF and LCSP examples provide that any hearings as part of the arbitration will take place in private.
8. Conservatory and Interim Measures	
8.—(1) Unless the parties have otherwise agreed, after the arbitration has commenced, the Arbitrator may, at the request of either party, order any conservatory or interim measure it deems appropriate. Any conservatory or interim measure shall be in the form of an order, giving reasons, or of an award, as the Arbitrator considers appropriate. (2) Unless the parties have otherwise agreed, either	This paragraph is used in the EA One and EA Two examples (but not the others reviewed). We consider that it is appropriate to enable the Arbitrator to put in place interim measures after the arbitration has commenced, such as an injunction on works.

Provision in Schedule 17 (arbitration rules)	Explanation
party may apply to the courts of England and Wales for conservatory or interim measures. (3) Such application by a party shall not be deemed to be an infringement or a waiver of the arbitration agreement, and shall not affect the relevant powers reserved to the Arbitrator	

Appendix 2

Arbitration Rules proposed to be included as Schedule 17 to the dDCO

SCHEDULE 17

Article 64

Arbitration Rules

Primary objective

1.—(1) The primary objective of these Arbitration Rules is to achieve a fair, impartial, final and binding award on the substantive difference between the parties (save as to costs) within four months from the date the Arbitrator is appointed pursuant to article 64 (arbitration) of the Order.

(2) The parties will first use their reasonable endeavours to settle a dispute amicably through negotiations undertaken in good faith by the senior management of the parties. Any dispute which is not resolved amicably by the senior management of the parties within twenty business days of the dispute arising, or such longer period as agreed in writing by the parties, shall be subject to arbitration in accordance with the terms of this Schedule.

(3) The Arbitration shall be deemed to have commenced when a party ("the Claimant") serves a written notice of arbitration on the other party ("the Respondent").

Time periods

2.—(1) Unless otherwise specified, all time periods in these Arbitration Rules are measured in days and this will include weekends but not bank holidays in England and Wales as defined in the Banking and Financial Dealings Act 1971(**a**).

(2) Time periods are calculated from the day after the Arbitrator is appointed which is either—

(a) the date the Arbitrator notifies the parties in writing of his/her acceptance of an appointment by agreement of the parties; or

(b) the date the Arbitrator is appointed by the Secretary of State.

Timetable

3.—(1) The timetable for the Arbitration is set out in sub–paragraphs (2) to (4) below unless amended in accordance with paragraph 5(3).

(2) Within 14 days of the Arbitrator being appointed, the Claimant must provide both the Respondent and the Arbitrator with—

(a) a written Statement of Claim which describes the nature of the difference between the parties, the legal and factual issues, the Claimant's contentions as to those issues, the amount of its claim and/or the remedy it is seeking; and

(b) all statements of evidence and copies of all documents on which it relies, including contractual documentation, correspondence (including electronic documents), legal precedents and expert witness reports.

(3) Within 14 days of receipt of the Claimant's statements under sub–paragraph (2) by the Arbitrator and Respondent, the Respondent must provide the Claimant and the Arbitrator with—

(a) a written Statement of Defence responding to the Claimant's Statement of Claim, its statement in respect of the nature of the difference, the legal and factual issues in the Claimant's claim, its acceptance of any element(s) of the Claimant's claim, its contentions as to those elements of the Claimant's claim it does not accept;

(b) all statements of evidence and copies of all documents on which it relies, including contractual documentation, correspondence (including electronic documents), legal precedents and expert witness reports;

(**a**) 1971 c.80.

(c) any objections it wishes to make to the Claimant's statements, comments on the Claimant's expert report(s) (if submitted by the Claimant) and explanations for the objections.

(4) Within 7 days of the Respondent serving its statements under sub–paragraph (3), the Claimant may make a Statement of Reply by providing both the Respondent and the Arbitrator with—

(a) a written statement responding to the Respondent's submissions, including its reply in respect of the nature of the difference, the issues (both factual and legal) and its contentions in relation to the issues;

(b) all statements of evidence and copies of documents in response to the Respondent's submissions;

(c) any expert report in response to the Respondent's submissions;

(d) any objections to the statements of evidence, expert reports or other documents submitted by the Respondent;

(e) its written submissions in response to the legal and factual issues involved.

Procedure

4.—(1) The seat, or place, of the arbitration shall be London, England, the governing law shall be the laws of England and Wales and the language of the arbitration proceedings shall be English. The proceedings shall be conducted in accordance with the Arbitration Act 1996(**b**) save where modified by these Rules.

(2) The Arbitrator must make an award on the substantive difference(s) based solely on the written material submitted by the parties unless the Arbitrator decides that a hearing is necessary to explain or resolve any matters.

(3) Either party may, within 2 business days of delivery of the last submission, request a hearing giving specific reasons why it considers a hearing is required.

(4) Within 7 days of receiving the last submission, the Arbitrator must notify the parties whether a hearing is to be held and the length of that hearing.

(5) Within 10 days of the Arbitrator advising the parties that he is to hold a hearing, the date and venue for the hearing must be fixed by agreement with the parties, save that if there is no agreement the Arbitrator must direct a date and venue which he considers is fair and reasonable in all the circumstances. The date for the hearing must not be less than 35 days from the date of the Arbitrator's direction confirming the date and venue of the hearing.

(6) A decision must be made by the Arbitrator on whether there is any need for expert evidence to be submitted orally at the hearing. If oral expert evidence is required by the Arbitrator, then any expert(s) attending the hearing may be asked questions by the Arbitrator.

(7) There is no process of examination and cross-examination of experts, but the Arbitrator shall invite the parties to ask questions of the experts by way of clarification of any answers given by the expert(s) in response to the Arbitrator's questions. Prior to the hearing the procedure for the expert(s) is—

(a) at least 28 days before a hearing, the Arbitrator must provide a list of issues to be addressed by the expert(s);

(b) if more than one expert is called, they are to jointly confer and produce a joint report or reports within 14 days of the issues being provided; and

(c) the form and content of a joint report must be as directed by the Arbitrator and must be provided at least 7 days before the hearing.

(8) Within 14 days of a Hearing or a decision by the Arbitrator that no hearing is to be held the parties may by way of exchange provide the Arbitrator with a final submission in connection with

(**b**) 1996 c.23.

the matters in dispute and any submissions on costs. The Arbitrator must take these submissions into account in the award.

(9) Where a party requests an expedited procedure, accompanied by an evidenced reason for expedition, the Arbitrator may vary the timescales in sub paragraphs (3), (4), (5) and (7), but where a party does so, the Arbitrator must provide an opportunity for parties objecting to the effects of an expedited procedure to provide written submissions on that point and may decide to revert to standard timescales in response to such submissions. Where an expedited procedure is sustained, the Arbitrator must set out their reasons for acceding to an expedited timetable in writing, to be given alongside their award.

(10) The Arbitrator may make other directions or rulings as considered appropriate in order to ensure that the parties comply with the timetable and procedures to achieve an award on the substantive difference within four months of the date on which they are appointed, unless both parties otherwise agree to an extension to the date for the award.

(11) If a party fails to comply with the timetable, procedure or any other direction then the Arbitrator may continue in the absence of a party or submission or document, and may make a decision on the information before them attaching the appropriate weight to any evidence submitted beyond any timetable or in breach of any procedure and/or direction.

(12) The Arbitrator's award must include reasons. The parties must accept that the extent to which reasons are given shall be proportionate to the issues in dispute and the time available to the Arbitrator to deliver the award.

Arbitrator's powers

5.—(1) The Arbitrator has all the powers of the Arbitration Act 1996, including the non-mandatory sections, save where modified by these Rules.

(2) There will be no discovery or disclosure, except that the Arbitrator has the power to order the parties to produce such documents as are reasonably requested by another party no later than the Statement of Reply, or by the Arbitrator, where the documents are manifestly relevant, specifically identified and the burden of production is not excessive. Any application and orders are to be made by way of a Redfern Schedule without any hearing.

(3) Any time limits fixed in accordance with this procedure or by the Arbitrator may be varied by agreement between the parties, subject to any such variation being acceptable to and approved by the Arbitrator. In the absence of agreement, the Arbitrator may vary the timescales and/or procedure—

(a) if the Arbitrator is satisfied that a variation of any fixed time limit is reasonably necessary to avoid a breach of the rules of natural justice and then;

(b) only for such a period that is necessary to achieve fairness between the parties

(4) On the date the award is made, the Arbitrator must notify the parties that the award is completed, signed and dated, and that it is to be issued to the parties on receipt of cleared funds for the Arbitrator's fees and expenses.

Costs

6.—(1) The costs of the Arbitration must include the fees and expenses of the Arbitrator, the reasonable fees and expenses of any experts and the reasonable legal and other costs incurred by the parties for the Arbitration.

(2) Subject to sub-paragraph (3), the Arbitrator will award recoverable costs on the general principle that each party should bear its own costs.

(3) The Arbitrator may depart from the general principle in sub-paragraph (2) and make such other costs award as it considers reasonable where a party has behaved unreasonably as defined within the National Planning Practice Guidance or such other guidance as may replace it.

Confidentiality

7.—(1) Subject to sub-paragraphs (2), (3) and (4), any arbitration hearing and documentation shall be open to and accessible by the public.

(2) Where the Arbitration relates to a dispute or difference under the provisions of Schedule 14 (protective provisions), the hearings must take place in private unless otherwise agreed between the parties and any matters, materials, documents, awards, expert reports and the like are confidential and must not be disclosed to any third party without prior written consent of the other party.

(3) The Arbitrator may direct that the whole or part of a hearing is to be private and/or any documentation to be confidential where it is necessary in order to protect commercially sensitive information.

(4) Nothing in this paragraph shall prevent any disclosure of a document by a party pursuant to an order of a court in England and Wales or where disclosure is required under any enactment.

Conservatory and Interim Measures

8.—(1) Unless the parties have otherwise agreed, after the arbitration has commenced, the Arbitrator may, at the request of either party, order any conservatory or interim measure it deems appropriate. Any conservatory or interim measure shall be in the form of an order, giving reasons, or of an award, as the Arbitrator considers appropriate.

(2) Unless the parties have otherwise agreed, either party may apply to the courts of England and Wales for conservatory or interim measures.

(3) Such application by a party shall not be deemed to be an infringement or a waiver of the arbitration agreement, and shall not affect the relevant powers reserved to the Arbitrator.