IN THE MATTER OF THE ARBITRATION ACT 1996

AND

IN THE MATTER OF AN ARBITRATION COMMENCED BY NOTICE

DATED 15 DECEMBER 2006

BETWEEN:

FIRST CAPITAL CONNECT LIMITED

CLAIMANT

AND

NETWORK RAIL INFRASTRUCTURE LIMITED

RESPONDENT

AWARD AS TO JURISDICTION

Introduction

1. This is an Award as to Jurisdiction made, pursuant to sections 30(1) and 31(4)(a) of the Arbitration Act 1996 ("the Act"), in an arbitration between First Capital Connect Limited ("FCC") as Claimant, and Network Rail Infrastructure Limited ("NR") as Respondent. This arbitration was commenced by notice of arbitration contained in a document entitled "Appellant's Notice of Appeal", served by FCC on NR on 15 December 2006, in circumstances described below.

2. In October 2007, the undersigned, Richard Siberry QC, of Essex Court Chambers, 24, Lincoln's Inn Fields, London WC2A 3EG, was duly appointed sole arbitrator in both this arbitration, and a related arbitration commenced by FCC against NR.

3. NR has raised the objection that I lack substantive jurisdiction. As explained in more detail below, NR accepts that there is an arbitration agreement between the parties, albeit one the invocation of which is subject to certain conditions

precedent. It contends, however, that the matters the subject of this arbitration have not been submitted to arbitration in accordance with that arbitration agreement – in short, because those conditions precedent have not been satisfied. NR has accordingly invited me to rule on my own substantive jurisdiction under section 30(1)(c) of the Act – i.e. to rule as to "what matters [if any] have been submitted to arbitration in accordance with the arbitration agreement". It has invited me to do so now, rather than waiting until an award on the merits to deal with its objection to my substantive jurisdiction; to rule that no matters have been validly so submitted; and therefore to conclude that I have no jurisdiction to hear and determine the substantive disputes the subject of this arbitration.

4. FCC for its part has contended that I do have substantive jurisdiction to hear and determine all of those substantive disputes. It has contended that I should not rule on my jurisdiction at this stage, but rather should deal with NR's objection to jurisdiction, if persisted in, in my award on the merits – i.e. pursuant to section 31(4)(b) of the Act.

5. I have decided, in all the circumstances of the case, and having regard to the fact that the jurisdiction issue has been addressed by the parties in detail, in both written and oral submissions, that it would be appropriate for me to determine the jurisdiction issue raised by this objection now, in an Award as to Jurisdiction.

The background to these arbitration proceedings

6. NR is the owner of the railway Network (as defined in Part A of the document now known as the Network Code ("the Code", formerly known as the Railtrack Track Access Conditions 1995).

7. From May 2005 to August 2007, NR carried out extensive rewiring works ("the Works") on the East Coast Main Line ("the ECML").

8. FCC has, since 1 April 2006, operated passenger services (*inter alia*) on and over the ECML. FCC has operated such services pursuant to the Thameslink Great Northern Franchise, which was awarded to it in December 2005. It has done so

(1) From 1 April 2006 to 11 June 2006, upon the terms of a Track Access Agreement ("TAA") between NR and West Anglia Great Northern Railway Limited ("WAGN") dated 31 March 2004;

(2) From 11 June 2006 and for the remaining duration of the Works, upon the terms of a TAA between NR and Thameslink Rail Limited ("Thameslink) dated 9 February 2006.

These TAAs were transferred to FCC as Train Operator with effect from 1 April 2006. The transfers were effected by a statutory scheme in accordance with powers conferred on the Secretary of State for Transport by the Railways Act 2005. So far as relevant (and subject to para. 9 below), the TAAs were on the same terms, and I shall therefore refer to them collectively as "the TAA".

9. The TAA incorporated the Code (by clause 2.1 thereof). The version of Part D of the Code in force when NR was considering the implementation of the Works, up to the time when the Works commenced, was referred to as "the Pink Pages". These were replaced by a revised version, "the Yellow Pages", which came into effect in mid-2005. It is for present purposes unnecessary for me to decide which version (or versions) of Part D of the Code applied during relevant periods. That is because both the Pink Pages and the Yellow Pages contained provisions requiring NR to give notice, to any Train Operator potentially affected, of any proposal to implement a Major Project as defined in the Pink Pages (such definition being incorporated by reference in the Yellow Pages), to consult with each such Train Operator concerning the method of implementation of any such Major Project, and having done so, to notify each such Train Operator of its proposed method of implementation of any such Major Project. In the Pink Pages, such final notice of proposed method of implementation is referred to as a Major Project Notice ("MPN"). The equivalent notice under the Yellow Pages is referred to as a Possessions Strategy Notice, identifying itself as one that relates to a Major Project ("PSN-MP").

10. Issues arose, initially between WAGN and NR, and subsequently between FCC and NR, as to whether the Works were a Major Project. If works constitute a Major Project and NR serves a MPN or a PSN-MP in respect thereof, the works qualify as a Significant Restriction of Use ("SroU") within the meaning of Part 3

of Schedule 4 to the TAA, "Compensation for Restrictions of Use" (referred to herein simply as "Schedule 4"), and the Train Operator has the right, under para. 2.6 of Schedule 4, to bespoke compensation for the disruption caused to its services by such works.

11. Schedule 4 also provides for the delivery by NR to the Train Operator of so-called "Day 42 Statements", viz. statements issued within 14 days after the end of each consecutive 28 day Period (commencing on and from 1 April in each year during the term of a TAA), showing (among other things):

> "(i) all [NR] Restrictions of Use taken during that Period;
>
> .....
>
> (iii) any compensation payable in respect of the [NR] Restrictions of Use identified,
>
> in sufficient detail to enable the Train Operator to make an informed assessment thereof" (Schedule 4, para. 8.1).

12. Paras. 8.3 and 8.4 of Schedule 4 provide as follows:

> *"8.3 Disputes*
>
> a) Within 10 days of receipt of a statement from Network Rail under paragraphs 7.4, 8.1 or 8.2, the Train Operator shall notify Network Rail of any aspects of the statement which it disputes, giving reasons for any dispute. Save to the extent that disputes are so notified, the Train Operator shall be deemed to have agreed the contents of the statement.
>
> *b)* .....
>
> *8.4 Dispute Resolution*
>
> The procedure for resolving disputes notified under paragraph 8.3 shall be as follows:
>
> a) within 7 days of service of any notice under paragraph 8.3, the parties shall meet to discuss the disputed aspects for the statement with a view to resolving all disputes in good faith;
>
> b) if, within 7 days of that meeting (the "first meeting"), the parties are for any reason still unable to agree the disputed aspects of the statement, each party shall promptly (and in any event within 7 days) prepare a written summary of the disputed aspects of the statement and

the reasons for each such dispute and shall submit the summaries to the senior officer of each party;

c) within 28 days of the first meeting, the senior officers shall meet with a view to resolving all disputes;

d) if no resolution results within 14 days of that meeting, either party may require that the matter be resolved by the relevant ADRR Panel; and

e) if either party is dissatisfied with the decision of the relevant ADRR Panel or the ruling of the Disputes Chairman (as the case may be) such party shall be entitled to refer the matter for arbitration, pursuant to Part C of the Access Dispute Resolution Rules (except that rules C1.26 to C1.31 of the Access Dispute Resolution Rules shall not apply)."

13. Between January and August 2006, FCC and NR held discussions and engaged in correspondence concerning the Works, and whether they constituted a Major Project. FCC contended that they did, whilst NR eventually took the position that they did not.

14. In particular, in a letter dated 17 May 2006 from Mr Jim Morgan of FCC to Mr Michael Conn of NR ("the 17 May letter"), FCC stated, among other things, as follows:

> " ....The purpose of this letter is to address what is ... a very important aspect for First Capital Connect, ensuring that we are appropriately compensated for the extensive impact of the rewiring project on our operations. Making the railway available for the long-running sequence of weekend and bank holiday weekend possessions required by the project imposes very significant additional costs on our operations. These include special arrangements for handling the exceptional passenger loadings generated at other stations when Kings Cross is closed and extensive bus substitution costs. Although it is too early in our franchise to provide you with full details, we are also expecting this pattern of weekend disruption to be impacting significantly on our weekend revenues. As you will appreciate the regular Schedule 4 compensation which you are paying is not designed to cover these types of situations and leaves us with a significant shortfall.
>
> Our analysis is that the rewiring project comprises a Major Project and that FCC is therefore entitled to recover its costs associated with possessions for the Project. This is briefly explained as follows.
>
> A "Major Project" is defined in the Network Code as:
>
> "any engineering, maintenance or renewal project which requires a possession or series of possessions of one or more sections of track extending over:

(a) a period of more than one year; or

(b) a period which contains two or more Passenger Change Dates".

The Project clearly falls within the scope of "Major Project". It is a renewal project, requiring a series of possessions of one or more sections of track spanning more than one year. Your presentations on the Project have made clear that this is not part of routine maintenance and renewal: this in itself is also self-evident from the scale of works being undertaken and the distinctly non-routine, additional possessions which are being required.

.....

We are dismayed .... to find that no MPN has been issued and currently we are regarding this as a contravention of your obligations under the Network Code. The previous versions of the Code provided that "Network Rail shall, if it wishes to implement a Major Project, give notice of its intention to each Bidder ...."..... Note 5 of the current Network Code keeps ongoing the obligation to issue MPNs.

The Network Code is incorporated into the track access contract and each party indemnifies the other for Relevant Losses consequent upon its breach of the track access contract.

The significance of the failure to issue an MPN is, of course, that FCC has been unable to establish Significant Restriction of Use Treatment under Schedule 4 in respect of the possessions related to the Project. This treatment would have enabled FCC to recover the costs covered by the Significant Restriction of Use provisions which it is now incurring as a result of the Project. Recovery of those costs now therefore form part of the "Relevant Losses" which FCC are suffering as a result of Network Rail's breach of the Network Code in failing to issue an MPN.

Our preference is to reach a speedy settlement with you regarding compensation for the impacts of the Project from 1st April 2006 to the Project's conclusion. I would hope that we can meet very rapidly to progress such a settlement and conclude this matter before the next bank holiday weekend. However if we are unable to do so, we will have little choice but to progress the enforcement of our rights and I must confirm that at this point all our rights are reserved."

15. NR's "conclusive response" to the 17 May letter, in its letter to FCC of 29 June 2006, was to the effect that:

"...the current payment mechanism via the Schedule 4 Part 3 regular 'restriction of use' regime is applicable and fair as we do not believe the works constitute a 'Major Project'."

FCC and NR were accordingly unable to reach agreement on whether the Works were a Major Project, or regarding the level of compensation payable to FCC in respect of the Works and their effect upon FCC and the services it operated on the ECML.

The Joint Reference, and the Determination therein

16. Accordingly, and at the initiative of FCC, in October 2006 FCC and NR submitted a written joint reference ("the Joint Reference") to an Access Disputes Panel ("the ADP"), under the Access Dispute Resolution Rules ("the ADRR"), for determination of whether the Works were a Major Project, and of related issues. The Joint Reference, which was duly signed on behalf of both FCC and NR, recited (in para. 2.1) that:

> "This matter is referred to an Access Disputes Panel ("the Panel") for determination in accordance with:
>
> (a) Condition D.2.2.4 of [the Code]; and/or
>
> (b) Paragraph 8.4 of Schedule 4 to the Track Access Contract between NR and FCC ("TAA")."

17. In the Joint Reference, FCC submitted that the Works did constitute a Major Project, for which either a MPN or a PSN-MP should have been issued. FCC further contended, among other things, that if the Works were held to be a Major Project,

> "paragraphs 2.6 of Schedule 4 Part 3 to the TAA and paragraphs 8.3 to 8.5 of Schedule 4 Part 3 to the TAA permit a reference to the Panel with regard to the compensation arrangements."

NR for its part contended, among other things, that the Works were not a Major Project, and that if FCC had wished to dispute the contents of NR's Day 42 Statements, it should have followed the procedure set out in paras. 8.3 – 8.5 of Schedule 4, which it had not done.

18. The dispute was summarized, in para. 5 of the Joint Reference, as one concerning whether the Works were a Major Project, which should have been the subject of a MPN or a PSN-MP, and which should (*inter alia*)

> "be subject to compensation as a SRoU under Schedule 4 of the TAA".

19. Para. 8 of the Joint Reference summarized the issues in respect of which the parties sought the determination of the ADP. These included:

> "(d) Are FCC and NR required under the TAA to treat Restrictions of Use relating to the [Works] as SRoUs, with compensation for FCC's Direct Costs required to be paid in respect of Restrictions of Use in respect of the [Works] taken after 1st April 2006? Or
>
> (e) If paragraph (d) does not apply, is NR required to compensate FCC for its failure to issue a [MPN or PSN-MP] in an amount equivalent to FCC's direct costs in respect of the [Works], reflecting the compensation not able to be claimed by FCC under paragraph 2.6 of Schedule 4 Part 3 as a result of NR's failure to establish those works as a Major Project as required by the [Code]."

NR did not take any exception to the above formulation of those two issues, though the Joint Reference made clear that NR disputed that FCC was entitled to any compensation over and above that stipulated in its Day 42 Statements; and (as indicated above) that NR's position was that the appropriate method of raising the issue of whether the Works were a Major Project would have been for FCC to have challenged the Day 42 Statements under paras. 8.3 – 8.5 of Schedule 4, which FCC had not done. NR added two further questions for determination by the ADP, the first of which, NR's question (a), was as follows:

> "As regards past ROUs, should FCC have challenged them under paragraph 8.1 and 8.3 to 8.5 of Part 3 of Schedule 4 to the TAA or should the SRoU compensation mechanism now apply retrospectively and if so how?"

20. FCC sought orders that the ADP declare the Works to be a Major Project, and that NR use its best endeavours to agree, with FCC, arrangements to compensate FCC in accordance with paras. 2.6 and 2.7 of Schedule 4 to the TAAs – i.e. on the basis that there had been a SRoU within the meaning thereof, or alternatively, that NR pay FCC compensation by way of the damages suffered by FCC as a result of NR's failure to issue a MPN.

21. The Chairman of the ADP, Sir Anthony Holland, wrote to the parties on 10 November 2006, among other things raising the question of whether the appropriate panel to determine the Joint Reference was the ADP, or a Timetabling Panel. He proposed that the Joint Reference be heard in full by the ADP. The parties agreed, and the Joint Reference proceeded accordingly before the ADP.

22. In the course of his letter to the parties, the Chairman wrote as follows:

> "...I shall be concerned to ensure that, whatever the determinations of substance made by the [ADP], the parties' rights, should they be dissatisfied with the outcome of the hearing, to take matters in relation to Part D on appeal to the Office of Rail Regulation ["the ORR"], and those in relation to schedule 4 to arbitration, are not impaired." [my underlining]

The passage I have underlined was clearly intended, and should have been understood by any reader familiar with the provisions of Schedule 4, to be a reference to the provisions of para. 8.4(e) thereof whereby any party dissatisfied with the decision of "the relevant ADRR Panel or the ruling of the Disputes Chairman" was entitled to "refer the matter to arbitration, pursuant to Part C of the [ADRR] ...". FCC did not comment on this passage in the Chairman's letter in its response to him dated 14 November 2006. In its response of the same date, however, NR wrote:

> "[NR] agrees that ADP should hear the dispute, and is content for the Panel to deal with all or part of it as it sees fit. NR agrees that any appeal from the Part D aspects (including in particular the definition of 'Major Project' should be to ORR."

23. Following an oral hearing of the Joint Reference on 16 November 2006, ADP published its Determination ADP 21 in respect of the Joint Reference on 8 December 2006. That Determination ("the ADP Determination") recorded that the ADP had been unable to reach a unanimous decision. In such circumstances, the Panel Chairman is empowered under the ADRR to make a determination of the dispute himself. Accordingly, Sir Anthony Holland made the dispositive Determination, in which he held (in common with the views of two of the other four Panel members) that

> "FCC has not made the case for my directing that [NR] should declare the [Works] a Major Project, and in consequence invoke the provisions of Schedule 4 Part 3 paragraph 2.6."

In the light of that Determination, the compensation issues raised by FCC, and its claims to relief in respect thereof, did not arise, and so were not the subject of any determination.

The Appeal Notice

24. FCC was not satisfied with the ADP Determination, and accordingly on 15 December 2006 it served an Appellant's Notice of Appeal ("the Appeal Notice"), by which it sought to challenge the ADP Determination by means of an appeal to the ORR, under Part M of the Code, and a reference to an arbitrator under para. 8.4(e) of Schedule 4 to the TAA. It was by this Appeal Notice that the present arbitration (which has been referred to by the parties, and to which I shall refer for convenience, as "the Appeal Notice Arbitration") was commenced. The Appeal Notice made clear that FCC was continuing to pursue alternative claims for compensation under Schedule 4 paragraph 2.6, and for damages for breach of the TAA.

25. It is convenient at this point to record my finding that a reference to arbitration under para. 8.4(e) of Schedule 4 is not properly to be characterized as an "appeal" from a determination of the relevant ADRR Panel. It is, as FCC submitted, a reference to arbitration under Part C of the ADRR, following an alternative dispute resolution process, namely a reference to the ADRR Panel, with the result of which either party is dissatisfied. NR did not seek to persuade me otherwise.

26. The Appeal Notice was served on NR under cover of a letter dated 15 December 2006 from Burges Salmon, FCC's solicitors, to NR, marked for the attention of Mr Nigel Dewick, a solicitor employed by NR who, I was told, had led for NR on Access Disputes for a number of years. This covering letter confirmed that a copy of the Appeal Notice had been served on the ORR. It continued:

"Please note that the Notice of Appeal will also be served on the Disputes Secretary under the Access Dispute Resolution Rules in respect of any matters which fall to be appealed to an arbitrator under the rules. We do however request that you agree a stay of that process until after the ORR's substantive ruling.

Please contact us if you have any questions or comments."

Burges Salmon also sent NR a copy of their letter of the same date to the Access Disputes Committee Disputes Secretary. That letter explained that:

"ADP21 was a reference to the Panel under:

(a) Condition D 2.2.4 of Part D of the Network Code: and

(b) paragraph 8.4 of Schedule 4 to the Track Access Contract between the Appellant and Respondent (the "TAA").

The reference therefore has two separate appeal processes that are mandated:

(a) under Condition D5.2 of the Network Code (yellow pages) for determination in accordance with Part M of the Network Code by the ORR;

(b) under paragraph 8.4(e) of Schedule 4 of the TAA, in place, for determination by an arbitrator in accordance with Part C of the Access Dispute Resolution Rules annexed to the Network Code (the "ADRR").

Given the two processes the dispute may contain elements which the ORR consider more appropriately dealt with by an arbitrator under the ADRR. We have therefore taken the precautionary step of serving the notice on both the ORR and you as Disputes Secretary under Part C of the ADRR."

27. Following service of the Appeal Notice, on 19 December 2006 ORR wrote to the parties, among other things noting FCC's explanation of the "two separate appeal processes", and that FCC was seeking to agree with NR a "stay" of the "appeal" to an arbitrator until the ORR's substantive ruling.

28. On 21 December 2006 Mr Chris Jackson of Burges Salmon wrote to Mr Dewick, asking, among other things,

"Can you please confirm also that [NR] is happy for the parties mutually to agree to defer the appointment of an arbitrator in relation to the Schedule 4 aspects until after ORR has ruled on the Major Project aspects."

In response, on 22 December 2006 Ms Kate Andrew, a Legal Adviser at NR, wrote as follows:

> "We do not see that there is any need for such an agreement as there are no Schedule 4 issues to be considered at present. This issue will depend on the substantive point to be decided by ORR".

29. Mr Jackson replied on 3 January 2007, agreeing that logically the Schedule 4 aspects would follow on from any appeal ruling (i.e. by the ORR) that the Works were a Major Project. He continued,

> "We do though need to decide how to approach the arbitration issue given the trigger in Paragraph 8.4(e) of Part 3 of Schedule 4 because of the split contractual appeal route",

pointing out that the appeal route mandated by Para. 8.4(e) of Schedule 4 is to arbitration, and pressing for NR's agreement to deferral of appointment of an arbitrator. On 19 February 2007, Mr Jackson wrote to Mr Vasey of Beachcrofts, who had been instructed on behalf of NR shortly before Christmas 2006, pressing for a response to Burges Salmon's suggestion of an agreed deferral of the appointment of an arbitrator in the Appeal Notice Arbitration. Mr Jackson wrote again to Mr Vasey on 26 February 2007, pointing out that FCC had not had a response to FCC's request for what he described as "a stay of the Schedule 4 arbitration", pending the ORR Determination – despite his earlier "chasers".

30. NR served a Response to the Appeal Notice on 31 January 2007. NR maintained its arguments that the appropriate method of challenging its failure to issue a MPN would have been under para. 8 of Schedule 4, and that FCC had lost the opportunity to do so because it had not notified a dispute under para. 8.3. However, NR did not, in its Response, respond to the reference to arbitration in the Appeal Notice, whether by suggesting that such reference was ineffective on the grounds that para. 8.4(e) of Schedule 4 had not been validly invoked, or, indeed, at all.

31. In the meantime, in its response of 6 February 2007 to NR's Day 42 Statement dated 18 January 2007 in respect of Period 10, from 10 December 2006 to 6 January 2007, FCC stated:

> "We note, for the avoidance of doubt, that any possessions which relate to [the Works] are not accepted as suitable for standard ROU compensation. Possessions connected to [the Works] continue to be part of the dispute regarding their treatment, as was notified [by the 17 May letter] and discussed previously with [NR]. We maintain that SRoU treatment is applicable".

Similar statements were apparently included in almost all FCC responses to subsequent Day 42 Statements covering the period of the Works.

32. Mr Vasey responded on behalf of NR to Mr Jackson's 26 February 2007 email on 2 March 2007. His letter reiterated NR's then position that the appropriate procedure for determining the issue of whether a MPN or a PSN-MP should have been issued was under para. 8 of Schedule 4. The letter asserted that:

> "4. By virtue of paragraph 8.3 FCC is deemed to have accepted the level of compensation payable because it failed to challenge compensation payments [sc. NR's Day 42 Statements]. It is therefore not open to FCC to pursue the further dispute resolution procedure at paragraph 8.4. This includes an ultimate reference to an arbitrator.
> 5. Even if FCC had dispute the compensation payments in accordance with paragraph 8.3 it has failed to comply with the dispute resolution procedures at paragraph 8.4(a)-(c). These procedures ... are a pre-condition of entitlement to take the dispute to an arbitrator. FCC is out of time to comply with the procedures at paragraphs 8.4(a)-(c)."

He stated that NR would agree to a limited deferral of the arbitration proceedings, pending the ORR Determination, but added,

> "For the avoidance of doubt such waiver does not preclude [NR] from disputing FCC's entitlement to bring arbitration proceedings, as set out above."

This was the first indication – albeit a clear and unequivocal one – that NR challenged the validity of the Appeal Notice insofar as it purported to be a reference to arbitration under para. 8.4(e) of Schedule 4.

33. In answers to various questions put by FCC to NR through the ORR, NR responded by stating, among other things, that it did not suggest that a separate dispute process should have been entered into in relation to every Day 42 Statement, and that if invited to do so, it would in all probability have agreed to one challenge being adequate to deal with the same issue (viz. as to whether a MPN/PSN-MP should have been issued in respect of the Works) on subsequent Day 42 Statements. NR also reiterated its position, as first stated in Mr Vasey's letter of 2 March 2007 referred to above, that as FCC had not complied with the paragraph 8 dispute procedure, it was not entitled to take the matter to arbitration. Without prejudice to that, NR agreed to a "stay" of the arbitration proceedings pending the ORR Determination.

34. FCC served a Reply to the Appeal Notice, and the parties further participated in the preparation of a Report for the hearing before ORR, made written submissions on the issues raised in the Report, and attended an oral hearing before the ORR on 11 June 2007.

The ORR Determination

35. The ORR published its Determination in July 2006. By that Determination ("the ORR Determination"), the ORR:

(1) allowed the appeal in respect of the central question of whether the Works were a Major Project., and set aside the ADP Determination in that respect;
(2) declared that the Works constituted a Major Project for the purposes of Part D of the Code;
(3) held that NR's duties under the Code in respect of giving notice of the Works fell to be assessed by reference to the Pink Pages;
(4) held that NR should have served a MPN on WAGN, and that in failing to do so, NR had breached its obligations in Conditions D.2.2.1 to D.2.2.3 of the Code (as incorporated into the TAA), because it had commenced the Works without following the MPN process;

(5) held that once the Works had commenced, the remedy in respect of any failure to comply with Conditions D.2.2.1 to D.2.2.3 of the Code was a claim for damages for breach of the TAA;

(6) held that the determination of FCC's rights to compensation, if any, for such breach, and the quantum of any such compensation, should be referred to arbitration pursuant to clause 13 of the TAA;

(7) declined to decide whether para. 8 of Schedule 4 provided a mechanism to challenge the non-issue of a MPN, or the issues related to FCC's alleged non-compliance with the procedural requirements of the TAA, and, in particular, of para 8.3 of Schedule 4.

Commencement of the Indemnity Notice Arbitration; seat of the Arbitrations

36. By Notice dated 24 August 2007, FCC commenced a second arbitration against NR, under clause 13 of the TAA, in respect of a claim to an Indemnity under clause 8.2 of the TAA, for breach of contract in respect of NR's failure to issue a MPN. This second arbitration has been referred to, for convenience, as "the Indemnity Notice Arbitration", and I shall refer to it thus herein.

37. In October 2007, I was duly appointed sole arbitrator in the Indemnity Notice Arbitration, as well as in the Appeal Notice Arbitration.

38. The seat of this, the Appeal Notice, Arbitration (and of the Indemnity Notice Arbitration) is London, England.

Proceedings in the arbitrations

39. By my Procedural Order No. 1 dated 21 November 2007, and by consent, I gave various directions for the determination of the issues raised in the Appeal Notice Arbitration, expressed to be "without prejudice to any application by the Respondent, [NR] to strike out the Notice of Arbitration herein, or all or any of the proceedings herein, or otherwise to contend that these proceedings are not effective or should not be pursued."

40. On the same date, I gave parallel directions for the determination of the issues raised in the Indemnity Notice Arbitration.

41. The directions in each Arbitration allowed for the service of a single set of pleadings to stand as the pleadings in each arbitration, provided that such pleadings distinguished clearly between the two arbitrations and the relief respectively claimed in each.

42. Such consolidated pleadings have been duly served by the parties; Points of Claim were served on 7 December 2007, Points of Defence were served on 11 January 2008, and a Reply to the Points of Defence was served on 1 February 2008.

43. In its Points of Claim, FCC states that the two arbitrations represented alternative routes to determining FCC's rights. FCC claims (*inter alia*):

    (1) In the Indemnity Notice Arbitration, damages for Relevant Losses resulting from NR's failure, allegedly in breach of the TAA, to issue a MPN and/or to seek to agree bespoke compensation in accordance with clause 2.6 of Schedule 4, by way of arbitration under clause 13 of the TAA; and further or alternatively

    (2) In the Appeal Notice Arbitration, by way of appeal (*sic*) from the ADP Determination, damages incurred as a result of NR's failure to treat the Possessions in connection with the Works as SRoUs under Schedule 4 and in relation to its failure to issue a MPN which would have given rise to such treatment.

44. In its Points of Defence, NR asserts (*inter alia*) that under condition D.2.2 of the Code, there was no right of appeal to arbitration from the decision of the ADP, and "Consequently the arbitrator has no jurisdiction to deal with the dispute under the Appeal Notice". It also asserts that, there having been no "appeal" before the start of the Works to require NR to issue a MPN, the right to such "appeal" had been lost; and that the SRoU procedure in Schedule 4 of the TAA was never

operated because no MPN had been issued. NR contends that it was not open to FCC to use the disputes procedure under paras. 8.3 and 8.4 of Schedule 4 to obtain compensation in respect of losses incurred before 6 February 2007, because the procedure under para. 8.4 is expressed to be for resolving disputes notified under para. 8.3, and no such disputes had been notified prior to that date. NR also pleads various alleged defences to the claims the subject of the Indemnity Notice Arbitration, which are not material to the jurisdiction issue the subject of this Award.

45. In its Reply to the Points of Defence, FCC contends (*inter alia*) that jurisdiction in respect of the Appeal Notice Arbitration arises under Schedule 4 para. 8.4(e), and therefore NR's references to Part D of the Code (sc. NR's reference to Condition D.2.2) are not relevant. FCC reiterates its contention that the Tribunal has jurisdiction in respect of the Appeal Notice Arbitration.

46. Following a procedural hearing in both arbitrations on 27 February 2008, on 28 February 2008 I issued a (separate) Procedural Order No. 2 in each arbitration. In Procedural Order No. 2 in the Appeal Notice Arbitration, I directed, among other things, that:

> "1. By 14 March 2008, FCC is to serve written submissions on jurisdiction, setting out, in detail, the grounds on which it contends that the Tribunal has jurisdiction in respect of this reference to arbitration, such submissions to refer to all relevant facts relied on as founding jurisdiction, and to summarise any principles of law relied on (with case references to as appropriate).
> 2. By 28 March 2008, Network Rail is to serve written submissions in response to FCC's submissions on jurisdiction.
> 3. If, in the light of the exchange of submissions on the jurisdiction issue provided for above, either party wishes to apply for the jurisdiction issue to be determined as a Preliminary Issue in this arbitration, it must make such application by 4 April 2008."

47. Thereafter, the parties served written submissions on the jurisdiction issue in compliance with my directions, and further responded in writing to various questions raised by me arising out of their written submissions or otherwise.

48. An oral hearing of the jurisdiction issue took place on 15 April 2008. FCC was represented by Mr Jackson of Burges Salmon. NR was represented by Mr Vasey of Beachcrofts. NR presented its oral submissions first, FCC responded, and NR then replied.

NR's submissions

49. NR's case, in summary, was as follows. NR contended that the dispute resolution provisions of para 8.4 of Schedule 4 only came into effect if and when a Train Operator, such as FCC, had notified NR in accordance with the provisions of para 8.3 of any aspects of a Day 42 Statement which it disputed. FCC had not, prior to 6 February 2007, given notification under para. 8.3 of any dispute with respect to any of NR's Day 42 Statements. The 17 May letter was not a dispute notification under para 8.3 – on the contrary, far from asserting an entitlement to bespoke compensation under Schedule 4, FCC had complained in that letter that, because NR had failed to issue a MPN, FCC had been unable to establish SRoU treatment under Schedule 4, and had thereby suffered "Relevant Losses" under the TAA as a result of NR's breach of contract in failing to issue a MPN – this being the subject of FCC's claim in the Indemnity Notice Arbitration. Even if, contrary to the foregoing, FCC had notified a dispute under para. 8.3, it had failed to implement any of the dispute escalation requirements of paras. 8.4(a) – (c), which were conditions precedent to the operation of para. 8.4(d) and thereby to arbitration under para 8.4(e). NR referred me to paras. 2-021 and 2-036 of Russell on Arbitration, 23rd edition (2007), dealing with multi-tier arbitration clauses and the circumstances in which the specified pre-arbitration steps might be conditions precedent to the commencement of arbitration; and to a number of cases on the topic, including *Itex Shipping Pte. Ltd. V. China Ocean Shipping Co. [1989] 2 Lloyds Rep. 522* and *Paul Smith Ltd. V. H & S International Holding Inc. [1991] 2 Lloyds Rep. 127*, two decisions of Steyn J., in which it was respectively held, and conceded, that provisions, respectively, that, "any dispute ... will be settled amicably", and that "the parties shall strive to settle the same amicably", were not conditions precedent to arbitration, having regard to the well-known principle that an agreement to negotiate is not legally-binding – see e.g. *Courtney & Fairbairn Ltd. V. Tolaini Bros. (Hotels) Ltd. [1975] 1 WLR 297*. NR submitted, however,

that these cases were distinguishable, and that compliance with the carefully-structured and timetabled escalation provisions in paras. 8.4(a) – (c) was indeed a condition precedent to a party's right to invoke paras. 8.4(d) and (e).

50. NR's participation in the Joint Reference did not, so NR submitted, alter that position. NR pointed out that under Part A, para. 1.30, of the ADRR, it was provided that parties were expected to submit a joint reference, and that the fact that the Joint Reference was indeed such a reference should be read in that light. Furthermore, NR had made clear, in the Joint Reference, its position that the para. 8.3 – 8.4 procedures could have been, but had not been, invoked by FCC. NR did, however, concede that it had been content to allow the ADP to decide the issue of whether FCC had an entitlement to bring the claims it advanced in the Joint Reference, including those under Schedule 4, and thereby to decide on its own jurisdiction in respect of such claims. But NR submitted that that did not amount to an agreement that FCC could, if dissatisfied with the Determination of the ADP, refer the matter to arbitration under para. 8.4(e). Nor did NR's response to the Chairman's letter of 10 November 2006, in which NR agreed only that FCC could appeal any Part D aspects to the ORR. There had, so NR contended, been no *ad hoc* agreement by NR to arbitration under para. 8.4(e) (NR submitted that any such agreement would have been a variation of the TAA which would have required an amendment in writing pursuant to clause 18.2.1 thereof), and NR was not estopped or otherwise precluded from disputing jurisdiction in the Appeal Notice Arbitration, in respect of which it had duly registered its objection to jurisdiction from an early date. NR further relied on the "no waiver" provisions of clause 18.1 of the TAA.

51. NR contended that there was in any event nothing for FCC to appeal to arbitration in respect of the ADP Determination, the only material finding in which – that FCC had not made out its case that a MPN should have been issued – had been reversed by the ORR, in favour of FCC.

52. NR informed me that it was content for me, in considering my jurisdiction in relation to claims for compensation as from 6 February 2007, to ignore the fact that FCC did not comply with the provisions of Schedule 4 paras. 8(a) – (c) in

relation to such claims, and also the fact that there was no separate reference to an ADRR Panel following FCC's responses to Day 42 Statements on and after 6 February 2007.

FCC's submissions

53. FCC's primary case was that the 17 May letter (sent the day before FCC received the first Day 42 Statement, and being a continuation of prior discussions about the treatment of Possessions in respect of the Works) was indeed sufficient notification, under Schedule 4 para. 8.3, of disputes in respect of all Day 42 Statements, because it made clear FCC's position that a MPN should have been issued and that FCC was entitled to be compensated on the basis that the Possessions taken in respect of the Works should be given SRoU treatment. The escalation provisions in paras. 8.4(a) – (c) had been followed in substance in the parties' discussions, or alternatively had been waived when the parties proceeded to the Joint Reference under para. 8.4(d). The escalation provisions in paras. 8.4(a) – (c) were in any event unenforceable and/or not conditions precedent to the ADRR Panel stage (which FCC rightly accepted was a condition precedent to arbitration). As FCC was dissatisfied with the Determination of the Chairman on the Joint Reference, it was entitled to refer the matter to arbitration in accordance with the arbitration agreement contained in para. 8.4(e).

54. Alternatively, if NR was correct that the paras. 8.3 and 8.4(a) – (d) procedure had not been observed, and that observance of that procedure, or any part thereof, was a condition precedent to operation of the arbitration agreement in para. 8.4(e), FCC contended that there had, by virtue of the Joint Reference, and the parties' conduct in relation thereto, been an *ad hoc* agreement to the effect that the matter would be submitted to the ADP on the basis of para. 8.4(d), and that, if either party was dissatisfied with the ADP Determination, it could refer the matter to arbitration in accordance with para. 8.4(e) – such *ad hoc* arbitration agreement being an arbitration agreement in writing within the meaning of section 5(5) of the Act.

55. In response to NR's submission that there was in any event nothing for FCC to appeal to arbitration in respect of the ADP Determination because the only decision therein had been reversed by the ORR, FCC pointed out that the question of what if any Schedule 4 compensation should be awarded if the ADP concluded that the Works were a Major Project was one of the matters which, by agreement, was before the ADP on the Joint Reference; and that, in the light of the Appeal Notice and the ORR's Determination, it was one of the matters properly before the Tribunal in the Appeal Notice Arbitration. In answer to a question from the Tribunal as to what the position would have been if the ADP had determined that the Works were a Major Project for which FCC was entitled to compensation under Schedule 4 (as opposed to the Condition 2.2 route to compensation for which FCC primarily contended), and if the ORR had then upheld the Major Project determination but declined (as it did) to deal with any compensation issues, FCC submitted that NR's only option, had it wished to challenge the ADP's decision on compensation, would (subject to having complied with applicable time limits) have been to pursue a reference to arbitration under para. 8.4(e). (NR was unable, in a post-hearing submission, to suggest any alternative appeal or recourse option on this hypothesis.)

56. FCC submitted that NR's challenges to jurisdiction were properly to be characterized as matters of defence, rather than as going to jurisdiction. The "no waiver" provisions of clause 18.1 of the TAA did not help NR. If anything, they assisted FCC.

Discussion and conclusions

57. I accept NR's submission that the 17 May letter did not constitute notification of a dispute in respect of any Day 42 Statements under or for the purposes of para. 8.3 of Schedule 4. It is true that it made clear FCC's position that the Works were a Major Project, in respect of which a MPN should have been issued: NR can have been left in no doubt, both from that letter and from prior and subsequent discussions and other contacts, that that was FCC's position. However, it is also clear, from the penultimate paragraph of that letter, that the line that FCC was then taking was that, because NR had failed to issue a MPN,

> "….. FCC has been unable to establish Significant Restriction of Use treatment under Schedule 4 in respect of the possessions related to the Project. This treatment would have enabled FCC to recover the costs covered by the Significant Restriction of Use provisions which it is now incurring as a result of the Project. Recovery of those costs now therefore form part of the "Relevant Losses" which FCC are suffering as a result of Network Rail's breach of the Network Code in failing to issue an MPN." (My underlining)

Thus the case FCC was making was not that the content of any Day 42 Statements was disputed – indeed, as was pointed out by NR, there is no mention of Day 42 Statements in the 17 May letter. It was that, because of NR's breach of contract in failing to issue a MPN which would have established SRoU treatment under Schedule 4, FCC had suffered "Relevant Losses" within the meaning of the TAA, in respect of which it would be entitled to an Indemnity under the TAA. The dispute as to whether the Works were a Major Project, in respect of which a MPN (or a PSN-MP) should have been issued, was not a "dispute notified under paragraph 8.3" within the meaning of the introductory words of para. 8.4 . Accordingly, and subject to any *ad hoc* agreement, the further provisions of para. 8.4 were not applicable to that dispute. It follows that I reject FCC's primary case on jurisdiction.

58. For completeness, however, I should add that, if I had accepted that the dispute was, or was to be treated as, a "dispute notified under paragraph 8.3", I should have held that the parties had, by their conduct in agreeing and proceeding to the Joint Reference, waived or otherwise agreed to dispense with compliance with the escalation provisions of paras. 8.4(a) – (c). I would have seen nothing in the "non-waiver" provisions of clause 18.1 of the TAA to prevent such conclusion: on the contrary, they expressly contemplate that parties may waive performance of an obligation (see clause 18.1.1) Accordingly, it would not have been necessary for me to reach a conclusion as to whether compliance with those provisions (or any of them) was (subject to waiver) a condition precedent to a reference to the relevant ADRR Panel under para. 8.4(d), and thence to arbitration.

59. However, the Joint Reference, duly signed on behalf of both parties, was clearly expressed to be a reference to the ADP

" ...for determination in accordance with [*inter alia*]

...

(b) Paragraph 8.4 of Schedule 4 to the Track Access Contract between NR and FCC ("TAA")."

60. I note the provisions of Part A, para. 1.30, of the ADRR. However, paras 1.29 ff. also contemplate that a reference may be a "separate reference", and I see nothing in the ADRR which would have precluded NR from declining to join in a joint reference, e.g on the grounds that conditions precedent to a reference had not been satisfied, or from making it clear than its participation in a reference, joint or separate, was under protest and without prejudice to its position that para. 8.4(d) was inapplicable. NR did neither of these thinks. Instead, it willingly participated in the Joint Reference.

61. The fact that NR made clear therein its then position that FCC, had it wished to challenge NR's failure to serve a MPN or a PSN-MP, should have followed the para. 8.3 – 8.4 procedures, does not detract from the fact that the parties agreed to treat the Joint Reference as being one under (*inter alia*) para. 8.4. It was also one in which the parties agreed that the questions for determination by the ADP should include, as question (d), a question as to whether compensation was payable on the basis that Restrictions of Use relating to the Works should be treated as SRoUs (under Schedule 4), and in which NR added a question, NR's question (a), the latter part of which asked whether the SRoU mechanism should be applied retrospectively, and if so, how. In the light of this, NR was right to concede, as it did, that it had been content to allow the ADP to decide the issue of whether FCC had an entitlement to bring the claims it advanced in the Joint Reference, including those under Schedule 4, and thereby to decide on its own jurisdiction in respect of such claims.

62. The parties' agreement that the Joint Reference was one under (*inter alia*) para. 8.4 of Schedule 4 in my judgment necessarily involved their acceptance of the applicability of para. 8.4(e) to that Reference, and to any Determination thereunder: a right of a dissatisfied party to refer a matter to arbitration following an ADRR Panel/Disputes Chairman's determination is a necessary adjunct of a

reference to an ADRR Panel "in accordance with .... paragraph 8.4 ...", as the Chairman recognized in his letter of 10 November 2006. It is true that the possibility of arbitration was not mentioned in the Joint Reference itself (nor would one have expected it to be), and that NR did not specifically acknowledge a right of reference to arbitration in its response to the Chairman's letter, mentioning only the right of appeal to the ORR "from the Part D aspects". But NR's silence on the point in its response cannot detract from its implicit agreement to arbitration as a necessary consequence of its agreement to a Joint Reference under para. 8.4.

63. It is also true that, following the ADP Determination and service of the Appeal Notice (which of course stated that the "appeal" was brought *inter alia* under para. 8.4(e) of Schedule 4, and requested that an arbitrator be appointed to determine matters under Schedule 4), the parties came to focus primarily on the appeal to the ORR. However, the correspondence accompanying the Appeal Notice clearly explained the two parallel processes that such Notice invoked, and it is significant that, when Mr Jackson wrote to Mr Dewick on 21 December 2006, asking for confirmation that NR was happy to defer the appointment of an arbitrator in relation to the Schedule 4 aspects until after the ORR ruling, the response from NR's legal department, on 22 December 2006, was not to deny the efficacy of FCC's Notice of arbitration under para.8.4(e), but rather to state that "there are no Schedule 4 issues to be considered at present". And in its Response to the Appeal Notice, whilst NR reiterated its position that FCC, having failed to comply with the para. 8 procedure for responding to Day 42 Statements, had lost the opportunity to challenge NR on whether a MPN should have been issued, NR did not contend that the para. 8.4(e) jurisdiction had not been validly invoked. Indeed, as mentioned above, it was not until 2 March 2007 that NR took the jurisdiction point. Whilst that may not, in view of the provisions of section 31(1) of the Act, have been too late for NR to raise in this arbitration the objection that the Tribunal lacks substantive jurisdiction, it tends to confirm the view that the parties were, until then, proceeding on the basis that there was indeed a right of reference to arbitration in respect of the Joint Reference under para. 8.4.

64. If, contrary to the foregoing, the parties' agreement to the Joint Reference did not necessarily involve an acceptance of the applicability of para. 8.4(e), NR would have been left without any appeal option, or other recourse, in respect of the Schedule 4 aspects if the ADP had determined that the Works were a Major Project for which a MPN or a PSN-MP should have been given, and that FCC was entitled to retrospective compensation under Schedule 4 on the basis that the Possessions were SRoUs, and if the ORR had then upheld the ADP's determination on the Major Project issue but declined to deal with any compensation issues. That cannot have been the parties' intention in agreeing the Joint Reference and in agreeing (with one irrelevant exception) or, in the case of NR's questions, proposing, the relevant questions set out therein for determination by the ADP. It must surely have been contemplated that NR would have had the benefit of the para. 8.4(e) procedure if it was dissatisfied with a Determination in respect of Schedule 4 aspects.

65. I have therefore concluded that there was, by virtue of the Joint Reference, an *ad hoc* agreement that, if either party was dissatisfied with the determination of the ADP or the Disputes Chairman on that Joint Reference, the matter referred to the ADP could be referred to arbitration in accordance with para. 8.4(e). That is exactly what FCC purported to do by the Appeal Notice, as explained therein and in the accompanying and later correspondence from Burges Salmon. That agreement, implicit in the written terms of the Joint Reference, which itself referred to the written terms of para. 8.4 of Schedule 4 to the TAA, was in my judgment an "arbitration agreement … in writing" for the purposes of section 5 of the Act, to which the provisions of Part I thereof, including those of sections 30 and 31, apply – although it seems to me to have been an agreement falling within the terms of section 5(2), rather than section 5(5) as contended by FCC.

66. Again, in reaching this decision it has not been necessary for me to consider the question of whether the para. 8.4(a) – (c) escalation procedures were conditions precedent to a para. 8.4(d) reference to an ADRR Panel, and thereby to arbitration under para. 8.4(e). In agreeing to the Joint Reference to the ADP, the parties clearly agreed that it was not necessary for FCC to have gone through the hoops of paras. 8.4(a) – (c).

67. I also reject NR's argument that there was nothing for FCC to appeal to arbitration in respect of the ADP Determination because the only decision therein had been reversed by the ORR. As FCC pointed out, the question of what, if any, Schedule 4 compensation should be awarded if the ADP concluded that the Works were a Major Project was one of the matters which, by agreement, was before the ADP on the Joint Reference; and, in the light of the Appeal Notice and the ORR's Determination, it is one of the matters properly before the Tribunal in the Appeal Notice Arbitration.

68. In relation to claims for bespoke compensation in respect of the periods covered by Day 42 Statements the subject of notifications on and after 6 February 2007, NR was, as mentioned above, content for me to ignore the fact that FCC had not gone through the para. 8.4 (a) – (c) procedures in relation to such Statements, and also that there was no separate reference to an ADRR Panel following FCC's responses to Day 42 Statements on and after 6 February 2007. That was a very proper and sensible acknowledgment of the commercial realities of the situation: if, as I have found, there was an *ad hoc* agreement to the effect that the matters referred to the ADP could be referred to arbitration if either party was dissatisfied with the result of the Joint Reference, it would have made no commercial sense if FCC was required to go through all or any of the para. 8.4 (a) – (d) procedures in respect of such claims, rather than including them within the scope of the existing Appeal Notice Arbitration.

69. Accordingly, I have concluded that I do have substantive jurisdiction in respect of the matters submitted to arbitration in the Appeal Notice Arbitration.

70. The parties requested that I reserve all questions of costs arising in connection with NR's challenge to jurisdiction, and I shall therefore do so.

71. I should make clear that nothing in this Award as to Jurisdiction has any bearing on the merits of any of the substantive issues in either the Appeal Notice Arbitration or the Indemnity Notice Arbitration. I have not yet considered the merits of any of those issues (including any issues as to whether the parties are

bound by any findings of the ORR). They will be the subject of a hearing currently scheduled to be fixed for three days commencing not before 13 October 2008, with an estimated length of 3 days.

Award

72. I THEREFORE DECLARE, RULE AND AWARD AS FOLLOWS:

(1) THAT I DO HAVE SUBSTANTIVE JURISDICTION IN RESPECT OF THE MATTERS SUBMITTED TO ARBITRATION IN THE APPEAL NOTICE ARBITRATION, COMMENCED BY NOTICE DATED 15 DECEMBER 2006;

(2) THAT ALL QUESTIONS OF COSTS ARISING IN CONNECTION WITH NETWORK RAIL INFRASTRUCTURE LIMITED'S CHALLENGE TO JURISDICTION ARE HEREBY RESERVED.

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RICHARD SIBERRY QC

22 APRIL 2008.