

Second Directions – 3 May 2023

The contractual relationship of the Parties is primarily set out in a written Heathrow Express Track Access Agreement (“HEX TAA”) dated 16 August 1993 between Network Rail Infrastructure Limited and Heathrow Airport Limited (“HAL”). I understand that it is common ground that this agreement has been varied on a number of occasions. A reference below to HEOC is to the Heathrow Express Operating Company. I understand that as a result of various transfer schemes and agreements the rights of HAL under the HEX TAA have been assigned, and the obligations of HAL under the HEX TAA have been subcontracted to HEOC. In other words, HEOC now stands in the shoes of HAL and operates on what I refer to as the HEOC Track Access Contract (“HEOC TAC”). A reference to the HEX TAA means the HEOC TAC unless the context indicates otherwise.

On 18 April 2023 I requested that by the close of that day the Parties should disclose a copy of a supplemental agreement which, I understood, varied the provisions of the HEOC TAC so far as it related to works in connection with HS2 (to which I refer in these Directions as the “HS2 Supplemental Agreement”).

I am grateful to the Parties for their compliance with that direction. I return to the HS2 Supplemental Agreement further below.

Having seen the HS2 Supplementary Agreement (dated 21 December 2017) I varied the Directions which I gave on 18 April 2023, to request the Parties to confirm whether in their view it is the effect of the HS2 Supplemental Agreement that Network Code Part D provisions and the ADRR apply to the contract for the purposes of this dispute (i.e. because the dispute has been raised against a timetable offer that arises in connection with a Restriction of Use for the HS2 project), and therefore that the question of whether the Panel has jurisdiction to determine the Dispute can be resolved by referring to provisions in the HS2 Supplemental Agreement.

In the event that either Party did not believe this to be the case, I asked them to provide reasons for their argument, with reference to relevant provisions in the HEOC TAC and the HS2 Supplemental Agreement.

Network Rail’s response was:

“Network Rail can confirm their understanding that the HS2 Supplemental Agreement means that Network Code Part D provisions and the ADRR apply to the contract for the purposes of this dispute.”

HEOC’s response was:

“HEOC can confirm their understanding that the HS2 Supplemental Agreement means that Network Code Part D provisions and the ADRR apply to the contract for the purposes of this dispute.”

These Directions are intended to help the Parties prepare for the hearing by setting out the process which the Panel might adopt in dealing with this question. These Directions are not intended to provide an exhaustive survey of the matters which the Panel may wish to explore.

Unless specified otherwise any expression which is capitalised is intended to be a reference to the relevant term as defined by Part D of the Network Code.

Preliminary matter – for all Parties

1. I set out below my approach to a preliminary matter which arises from the above, namely whether the HS2 Supplementary Agreement and its provisions apply to this Dispute.

Application of Network Code

2. In summary, subject to any further submissions my provisional view is set out below, and is consistent with the submissions of the Parties.

3. The terms of the HS2 Supplemental Agreement stipulate that the Parties acknowledge and agree that the agreement applies to the construction of the HS2 Works and the carrying out of related operations which: (a) are carried out on the Infrastructure; and/or (b) have an impact upon, or will or may have an impact upon, the Infrastructure. I understand that it is common ground that the works which are the subject of the Dispute are “HS2 Works” as defined in that agreement.

4. By way of mutual undertakings in clause 2.1, the parties to the HS2 Supplementary Agreement agree that certain specified provisions are incorporated by reference for a number of purposes including any Restriction of Use, and agree to comply with and to have the benefit of any rights contained in the specified parts of the Network Code (but only those parts) during the Relevant Period. I understand that it is common ground that the works which are the subject of the Dispute relate to a timetable offer that arises in connection with a Restriction of Use for the HS2 project, and that we are within the Relevant Period.

5. The parts of the Network Code which are so incorporated include amongst others Part D (timetable change), and Part M (appeals), and Part A to the extent required to interpret the other parts of the Network Code which are incorporated. The HEX TAA is deemed to be an “Access Agreement” and HEOC is deemed to be a “Train Operator”.

6. By way of clause 2.3, HAL and HEOC (as the context may require) undertake to Network Rail to be bound by the provisions of Part D of the Network Code as a Timetable Participant and Network Rail accepts that HAL and HEOC shall each be deemed to be a Timetable Participant.

7. By way of clause 2.4 the Parties agree (amongst other things) that the agreement or determination of any Restriction of Use; or the occurrence and consequences of any Disruptive Event, shall be binding on them notwithstanding any provision of the HEX TAA.

8. I understand that it is common ground that the Dispute falls within the provisions of the Network Code which the HS2 Supplemental Agreement applies.

9. The HS2 Supplemental Agreement addresses the question of which contractual provisions should take priority in the event of conflict or inconsistency, and its provisions provide for the following hierarchy (so far as is material):

- (1) Clause 1.9
- (2) Clauses 1.2 and 2
- (3) The parts of the Network Code listed in clause 2
- (4) The HS2 Supplemental Agreement (save for clauses 1.2 and 2)
- (5) The HEX TAA

10. The HS2 Supplemental Agreement makes provision at clause 7 for dispute resolution, by way of a commercially standard escalation provision by which the Parties may seek to resolve a relevant dispute informally before making a reference under the Access Disputes Resolution Rules. It is my understanding that neither Party has sought to make use of the provisions of clause 7.

11. Subject to any further submissions of the Parties, it is my provisional view that Part D of the Network Code applies for the purpose of this Dispute, for the following outline reasons (which are not necessarily exhaustive):

(1) As a matter of construction, the HS2 Supplemental Agreement incorporates Part D and other provisions of the Network Code by reference for the purposes of the HS2 Works;

(2) Were there to be any inconsistency between the HS2 Supplemental Agreement and the HEOC TAC, the relevant provisions of the HS2 Supplemental Agreement and the Network Code take precedence;

(3) I remind myself that the ORR made clear in its appeal decision in connection with the determinations in TTP1331 and TPP1376 that the provisions of Part D set out a mandatory process for the development of timetables which is intended to provide “stability and certainty” for the industry (paragraph 137). Although this Dispute does not concern the New Working Timetable, the same approach should apply to this Dispute for reasons of consistency;

(4) The language of clause 7 of the HS2 Agreement does not require compulsory informal dispute resolution before a reference is made under the ADRR. The language is permissive – either party “may” serve a notice. Neither has done so;

(5) Even if I am wrong in that, the provisions of the Network Code have priority over the terms of the HS2 Supplemental Agreement, and I repeat point (3). It follows that the provisions of Part D must apply to this Dispute.

12. If the Parties do not accept that the position is as I have set out, it would assist the Panel if any Party which does not agree would provide the Panel with succinct written submissions on this point by no later than **1700 on Thursday 4 May**.

[Signed on the original]

Paul Stevenson
Hearing Chair TTP2207