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**CCOS ACCESS DISPUTE  
RESOLUTION RULES**

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## **EXPLANATORY NOTE**

*This Explanatory Note does not form part of the CCOS Network Code.*

*This explanatory note provides a brief overview of the purpose and structure of the CCOS Access Dispute Resolution Rules (CCOS ADRR).*

*The CCOS ADRR themselves are intended to be a readable single point of reference for parties involved in a dispute. However, further background, and the templates required for use in connection with the CCOS ADRR are available at the access disputes website: <http://www.accessdisputesrail.org>.*

### **Overview**

*The purpose of the CCOS ADRR is to provide a clear, coherent, and effective structure for dealing with those rail disputes arising under access agreements and access conditions/codes, that should be dealt with under access-specific processes.*

### **Structure**

***Chapter A** of the CCOS ADRR sets out principles which should be applied throughout the determination procedure by the parties, Chairs, arbitrators, experts and others involved. Those using these Rules are expected to respect the principles and have regard to them at all stages in the determination procedure. Failure to do so is intended to carry penalties, including potential adverse costs awards.*

***Chapter B** provides the mechanism by which a dispute will be initiated and allocated to the agreed or most appropriate forum.*

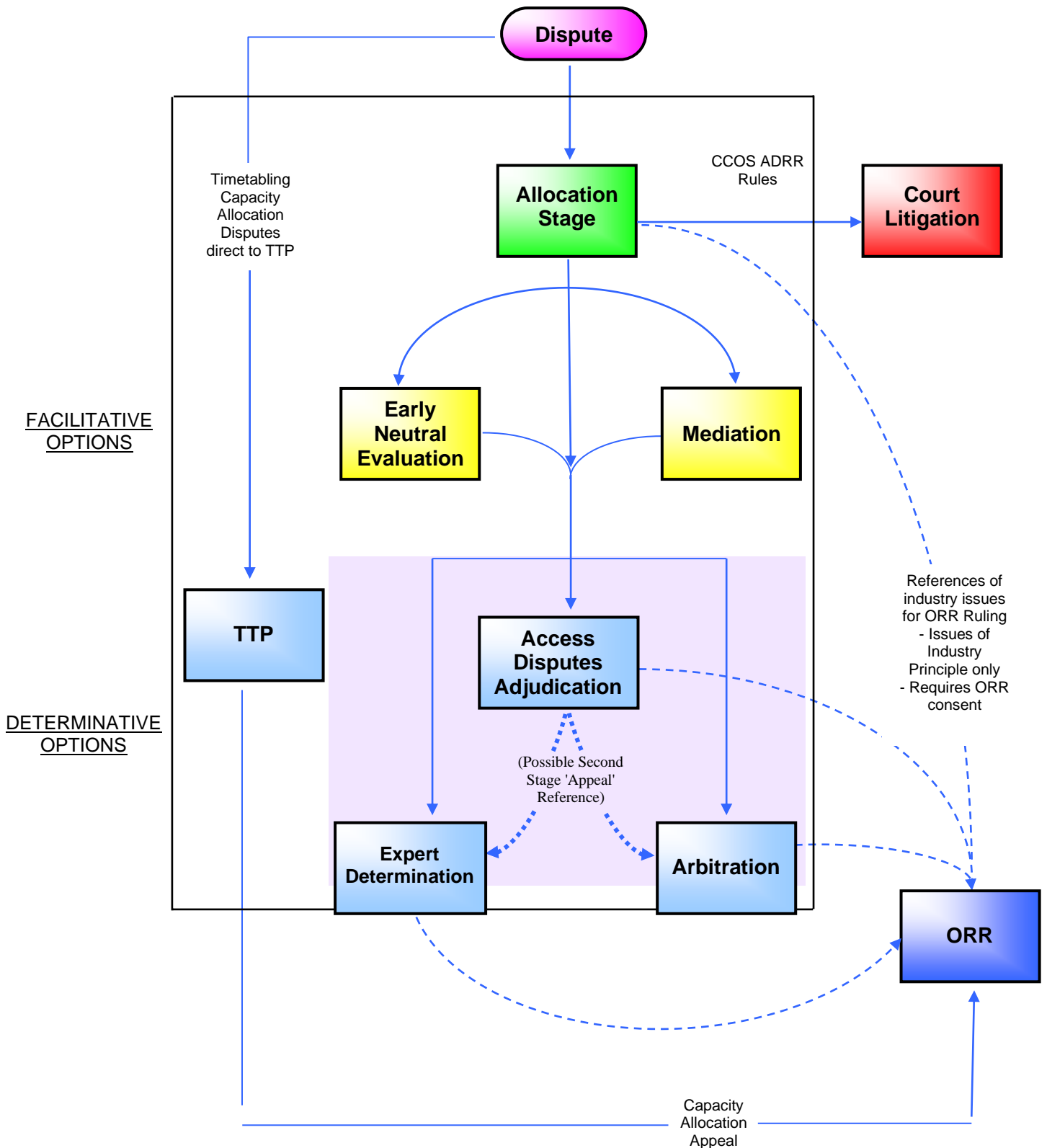
***Chapter C** describes the mechanism by which issues of wider industry concern and issues of a regulatory nature (including those which come within the scope of the Access Regulations can be referred to the ORR at any stage of the process.*

***Chapters D-I** set out the Rules applicable to each of the dispute resolution processes provided for in these Rules. These include facilitative and determinative processes which may be conducted in parallel (particularly in the case of mediation in parallel with a determinative process) or by way of offering a means of appeal from a first instance decision.*

***Chapter J** contains the constitutional, governance and administrative arrangements required to provide the services contained within the Rules.*

***Chapter L** makes provision for parties who are dissatisfied with the outcome of disputes arising in connection with Part D or Part J of the CCOS Network Code to refer the matter to the ORR and sets out general provisions regarding such appeals. If the ORR refuses to hear the appeal, and the Appellant wishes to pursue the appeal, they must, unless agreed otherwise by the parties, do so before the High Court.*

In addition it is envisaged that it will be possible in certain cases to refer cases outside these Rules to ORR under the Access Regulations or to court on particular issues for which a commercial jurisdiction is most beneficial. The following diagram illustrates how allocation can take place:



## **DEFINITIONS AND INTERPRETATION**

1 In these rules, unless the context otherwise requires, the following words and phrases where capitalised shall mean:

<b>Term</b>	<b>Definition</b>
"Access Beneficiary"	has the meaning ascribed to it in Part D of the CCOS Network Code;
"Access Conditions"	means, as the context so requires, the CCOS Network Code, the Station Access Conditions relating to the stations on the CCOS, the CCOS Emergency Access Code, the CCOS Performance Data Accuracy Code, the CCOS Railway Systems Code (or successor documents) or any other document carrying out a similar purpose;
"Access Contract"	means, in respect of a railway facility, an agreement which has RfL (I) as a party to it and which incorporates by reference the Access Conditions applicable to that railway facility;
"Access Regulations"	means The Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016 and/or such other legislation taking effect in Great Britain in respect of the same subject matter as those regulations;
"Act"	means the Railways Act 1993;
"ADA"	means Access Disputes Adjudication in accordance with Chapter G of these Rules;
"Agency Company"	means the limited liability company incorporated in England and Wales by the Committee, pursuant to the Companies Act 2006;
"Appellant"	means any Dispute Party seeking to challenge a determination made under these Rules by appeal to the ORR;
"Applicable Laws"	has the meaning ascribed to it in Part A of the CCOS Network Code;
"Arbitration Acts"	means those acts in force from time to time governing arbitration proceedings in England (including the Arbitration Act 1996);
"Case Summary"	has the meaning ascribed to it in Rule D7(a) in respect of a mediation and Rule E5(a) in respect of an ENE;

<b>Term</b>	<b>Definition</b>
<b>"CCOS ADRR"</b>	means the set of rules known as the "CCOS Access Dispute Resolution Rules" which apply to the resolution of disputes arising under, or in connection with, an Access Contract and which are appended to the CCOS Network Code;
<b>"CCOS Allocation Chair"</b>	means the individual appointed by the Committee or, where the context so allows, another individual appointed as a substitute by the CCOS Secretary, to discharge the role of the CCOS allocation chair in respect of a specific dispute relating to the matters contemplated by these Rules;
<b>"CCOS Hearing Chair"</b>	means an individual appointed by the CCOS Secretary to determine a dispute referred to TTP or ADA in accordance with these Rules;
<b>"CCOS Industry Advisor"</b>	means an individual appointed as such in accordance with Rule J11;
<b>"CCOS Network Code"</b>	means the document entitled "CCOS Network Code" maintained by RfL(I);
<b>"CCOS Secretary"</b>	means the individual appointed as such in accordance with Rule J16;
<b>"Committee"</b>	means the CCOS Access Disputes Committee constituted under Rule J2 of the NR ADRR;
<b>"Committee Chair"</b>	means a Committee Member appointed as Committee Chair by the Committee Members;
<b>"Committee Member"</b>	means a member of the Committee from time to time;
<b>"Conflict of Interest"</b>	shall include bias or an appearance of bias, a potential conflict of interest and any circumstances in which a reasonable third party may consider that there is a real risk of a conflict of interest existing or arising in the future;
<b>"Costs"</b>	means professional and other costs and expenses which would be recoverable following a judgment in court proceedings in England;
<b>"Dispute Party"</b>	means an Involved Party which is likely to be materially affected by the outcome of the dispute and is putting its position to the Forum and/or requesting a determination from a Forum;

<b>Term</b>	<b>Definition</b>
<b>"Document"</b>	means hard copy or electronic data of any kind and in any format including internal or external correspondence, emails or other communications, documents, spreadsheets and databases;
<b>"ENE"</b>	means early neutral evaluation in accordance with Chapter E;
<b>"Evaluation Documents"</b>	has the meaning ascribed to it in Rule E5(b);
<b>"Firm Right"</b>	has the meaning ascribed to it in Part D of the CCOS Network Code;
<b>"Forum"</b>	means each CCOS Hearing Chair of an ADA or Timetabling Panel, evaluator, mediator, arbitrator and determining expert appointed under these Rules;
<b>"Human Rights Act"</b>	means the Human Rights Act 1998 as amended from time to time and/or such other legislation taking effect in Great Britain in respect of the same subject matter as that act;
<b>"Infrastructure Manager"</b>	has the meaning ascribed to it in the Access Regulations;
<b>"Involved Party"</b>	in relation to a dispute, dispute procedure or dispute resolution process means a party directly involved in the dispute including the CCOS Secretary, all Dispute Parties, and the Forum;
<b>"Mediation Documents"</b>	has the meaning ascribed to it in Rule D7(b);
<b>"Network Rail"</b>	means Network Rail Infrastructure Limited, a company registered in England under number 029045877 having its registered office at 1 Eversholt Street, London NW1 2DN;
<b>"Notice of Dispute"</b>	means a notice issued by a Resolution Service Party wishing to refer a dispute to resolution in accordance with these Rules;
<b>"NR ADRR"</b>	means the set of rules known as the "Access Dispute Resolution Rules" which apply to the resolution of disputes on the NR Network;
<b>"NR Network"</b>	means the railway infrastructure and railway facilities of which Network Rail is the facility owner;

<b>Term</b>	<b>Definition</b>
<b>"Office of Rail and Road or ORR"</b>	has the meaning ascribed to it in section 15 of the Railways and Transport Safety Act 2003 or any successor body or regulator;
<b>"Panel Member"</b>	means in respect of a dispute to be resolved by TTP or ADA, each individual member of the panel appointed from time to time in respect of that dispute;
<b>"Principles"</b>	means the principles set out in Rules A5-A10;
<b>"Procedure Agreement"</b>	has the meaning ascribed to it in Rule B11;
<b>"Reference"</b>	has the meaning ascribed to it in Rule C6 in respect of a reference to ORR;
<b>"Referring Party"</b>	has the meaning ascribed to it in Rule C2;
<b>"Regulatory Issue"</b>	<p>means a principle, issue or process connected with the railway industry (and any interactions between such principles, issues and processes) which:</p> <ul style="list-style-type: none"> <li>(a) concerns the regulated structure of the railway industry as a whole or a material part of it, or</li> <li>(b) relates to or is closely aligned with a matter on which the ORR has regulatory oversight (from time to time); or</li> <li>(c) is connected with the ORR's relevant duties, functions or powers as a regulator including under section 4 of the Act and under the Access Regulations;</li> </ul>
<b>"Resolution Service Party"</b>	means a party entitled to use the dispute resolution service described in these Rules;
<b>"Respondent"</b>	means, in relation to any determination which is challenged under Chapter L, any other Dispute Party which is affected by such determination;
<b>"RfL(I)"</b>	means Rail for London (Infrastructure) Limited, a company registered in England under number 09366341 having its registered office at 5 Endeavour Square, London E20 1JN;
<b>"Secretariat"</b>	means individuals appointed as such in accordance with Rule J21;



<b>Term</b>	<b>Definition</b>
<b>"Statement of Case"</b>	means any of the initial submissions setting out a Dispute Party's case including a statement of claim, reference, statement of defence, reply, answers and response and such other documents as a CCOS Hearing Chair, arbitrator or determining expert shall identify as such;
<b>"TfL"</b>	means Transport for London, a body established under the Greater London Authority Act 1999 whose principal office is at 5 Endeavour Square, London E20 1JN;
<b>"Timetabling Dispute"</b>	means a dispute arising out of or concerning issues of timetabling, timetable change and/or changes in the allocation of capacity, for which the TTP is identified in the relevant Underlying Contract as the relevant dispute resolution process;
<b>"Timetabling Panel"</b>	means the panel including a CCOS Hearing Chair and one or more members of the Timetabling Pool appointed in respect of a dispute to be resolved by TTP;
<b>"Timetabling Pool"</b>	means the pool of potential members of Timetabling Panels;
<b>"Train Slot"</b>	has the meaning ascribed to it in Part D of the CCOS Network Code;
<b>"TTP"</b>	means the dispute resolution process for resolving Timetabling Disputes in accordance with Chapter H of these Rules;
<b>"Underlying Contract"</b>	means any contract (or to the extent applicable any other source of a reference to a dispute) under which disputes are or can be referred to resolution under these Rules, and this may include such interrelated contracts as govern access to infrastructure;
<b>"working day"</b>	has the meaning ascribed to it in Part A of the CCOS Network Code; and
<b>"Working Timetable"</b>	has the meaning ascribed to it in Part A of the CCOS Network Code.

## **Interpretation**

2 Unless the context otherwise requires:

- (a) terms and expressions defined in the Act or the Access Regulations shall, unless the contrary intention appears, have the same meaning when used in these Rules;
- (b) the use of male pronouns and other words connoting the male gender shall encompass the equivalent female pronoun and other words connoting the female gender;
- (c) use of the singular shall include the plural;.
- (d) references to statutory provisions shall be construed as references to those provisions as amended or re-enacted or as their application is modified by other statutory provisions from time to time and shall include references to any statutory provisions of which they are re-enactments (whether with or without modification);
- (e) any agreement, instrument, licence, standard, timetable, code or other document referred to in these Rules or entered into, approved, authorised, accepted or issued by a person pursuant to this code shall be construed, at the particular time, as a reference to that agreement, instrument, licence, standard, timetable, code or other document, as it may then have been amended, varied, supplemented or novated;
- (f) words and expressions defined in the Interpretation Act 1978 shall have the same meaning in these Rules and the rules of interpretation contained in that Act shall apply to the interpretation of these Rules;
- (g) where in these Rules any obligation of any party is required to be performed within a specified time limit that obligation shall continue after that time limit if the party fails to comply with that obligation within the time limit;
- (h) the words "including" "include" and "includes" are to be construed without limitation;
- (i) references to Rules and Chapters are to Rules and Chapters of these Rules;
- (j) references to the law shall be to English law and shall include all binding legislation (including regulations and statutory instruments) and directly effective European law; and
- (k) the headings in these Rules are used for convenience only and shall not affect the interpretation of the Rules.

## **CHAPTER A - THE PRINCIPLES AND OPERATION OF THE DETERMINATION PROCEDURE**

- 1 The Principles set out in this Chapter A are intended to be applied to the whole of the conduct and determination of disputes by all parties including the CCOS Allocation Chair, the CCOS Secretary and each Forum. The CCOS Allocation Chair and the CCOS Secretary may be the same persons as the Allocation Chair and the Secretary (as defined in and pursuant to the NR ADRR).
- 2 Except as otherwise provided in these Rules, any and all references in any contractual document to resolution or determination of a dispute, matter or issue under or in accordance with the whole or any part of, or any process subject to or governed by:
  - (a) the CCOS Access Dispute Resolution Rules (or CCOS ADRR) incorporated into (or annexed to) the CCOS Network Code; or
  - (b) the CCOS Network Code itself,shall be a reference to resolution in accordance with these Rules as a whole and (unless otherwise provided in these Rules) no such reference shall restrict or otherwise limit or determine the process or processes to be adopted under these Rules to resolve or determine any dispute or issue.

### **Purpose**

- 3 The determination procedure for disputes described in these Rules is intended to:
  - (a) include one or more dispute resolution processes appropriate to the dispute;
  - (b) include at least one available determinative stage which is objectively impartial and fair trial compliant;
  - (c) provide a relatively swift and easy to access disputes process for all cases where this is appropriate;
  - (d) be able to accommodate larger cases of significant value or wider importance including cases that reasonably require extensive documentation and/or witness evidence;
  - (e) provide a mechanism for the parties or any relevant Forum to obtain a determination on Regulatory Issues from ORR;
  - (f) allow parties to resolve disputes as efficiently and effectively as possible;
  - (g) allow the parties flexibility to identify and adopt the most appropriate dispute resolution process(es) for each dispute; and

- (h) avoid the use by any Resolution Service Party of any dispute resolution process to delay, frustrate or avoid determination or resolution of the dispute.
- 4 The CCOS Allocation Chair and each Forum under these Rules shall have regard to the Principles:
- (a) when making any procedural decisions; and
  - (b) at any stage when Costs are awarded.

## **PRINCIPLES**

### **Determinations and Remedies**

- 5 Each and every Forum shall reach its determination on the basis of the legal entitlements of the Dispute Parties and upon no other basis. Each and every Forum shall act in accordance with the law; and all its decisions, including its determinations and decisions on procedure, shall be in accordance with the law.
- 6 Each and every Forum shall:
- (a) where the Access Conditions or Underlying Contract require that a specific remedy be granted, grant that remedy accordingly; or
  - (b) where a specific remedy is provided for at law, grant that remedy accordingly; or
  - (c) where the choice of remedy is not a matter of entitlement but is a question properly falling within the discretion of the Forum, exercise that discretion in accordance with any requirements and criteria set out in the Access Conditions and Underlying Contract after due consideration of all remedies and orders that could properly be made.

### **Precedent**

- 7 In reaching its determination, each and every Forum shall:
- (a) take note of relevant published ADA or TTP determinations and of any other relevant tribunal regarding the CCOS excluding (to the extent referred to in (b) below) the ORR, as persuasive authority but need not be bound by them; and
  - (b) be bound by any relevant decision of the ORR on a Regulatory Issue applicable to the CCOS and any relevant decisions of the courts.

Any determination made in relation to railway infrastructure other than the CCOS shall not be treated as persuasive authority or any precedent in relation to any dispute to be determined in accordance with these Rules.

### **Impartiality**

- 8 Members of Forums may be appointed in part due to their particular industry expertise. Nonetheless, all members of Forums shall exercise their functions impartially and not on behalf of any specific organisation, company, business, trade or profession.

### **Duties of Dispute Parties**

- 9 Dispute Parties shall at all times:
- (a) co-operate with any reasonable request of the CCOS Allocation Chair, any Forum, the CCOS Secretary and each other;
  - (b) conduct themselves in good faith with the objective of resolving the dispute; and
  - (c) avoid antagonistic or unduly adversarial behaviour.
- 10 Dispute Parties shall provide voluntarily, or where reasonably requested, to each other, to the CCOS Allocation Chair, the CCOS Secretary and to any Forum, all material required for the effective consideration and determination of the dispute, mindful of the requirements of Rules F20, G25, H26, and I20 on documents.

## **OPERATION OF THE RULES**

### **Funding**

- 11 The delivery of the dispute resolution service provided for in these Rules will be funded by potential users of the service in accordance with the provisions of the Access Contracts.

### **The Role of the CCOS Allocation Chair and CCOS Secretary**

- 12 The CCOS Allocation Chair:
- (a) has oversight (under the powers contained in Chapter B) of the effective overall case management of a dispute;
  - (b) will consider any disputes referred under Chapter B in accordance with these Rules and the Dispute Parties' proposals for the procedure for resolution of them including whether any issues should or could be referred to the ORR;
  - (c) may, at the request of any Resolution Service Party, give guidance on dispute procedure prior to the reference of any dispute for resolution under these Rules;

- (d) where the Dispute Parties are not in agreement will seek to facilitate an agreement between them concerning the most appropriate determination procedure; and
  - (e) has responsibility for any allocation hearing including directions for any submissions, the hearing itself and any decisions connected with allocation.
- 13 The CCOS Allocation Chair may, where reasonable to do so, delegate the performance of any of his functions in any dispute to the CCOS Secretary appointed under Rule J16 or any member of the Secretariat appointed under Rule J21 but such delegation shall not affect the obligations and responsibilities of the CCOS Allocation Chair set out in Rule A12.
- 14 The CCOS Secretary:
- (a) has responsibility for appointing CCOS Hearing Chairs and CCOS Industry Advisors from a register maintained by the CCOS Secretary and, where parties are unable to agree, arbitrators and determining experts;
  - (b) shall assist the CCOS Allocation Chair, as required, in the discharge of the functions in Rule A12;
  - (c) shall receive disputes referred under Chapter B, record them and allot a case number to them;
  - (d) is responsible for managing the delivery of the determination procedure allocated to the dispute;
  - (e) may at the request of any Resolution Service Party, give guidance on dispute procedure prior to the reference of any dispute for resolution under these Rules.

### **Timely Determination**

- 15 Subject to the other provisions of these Rules and any specific timescale provisions of the Access Conditions, Underlying Contract or any other legal requirements, a Forum shall reach its determination in a timely manner consistent with the nature and complexity of the dispute.

### **Consequences of procedural default**

- 16 If a Dispute Party is in procedural default, the CCOS Allocation Chair or Forum (as appropriate) may, whether or not upon the application of the other Dispute Party, make one or more of the following orders:
- (a) that the defaulting party comply with its obligation;
  - (b) that the defaulting party is prohibited from relying upon the information or other matter which it has failed to provide in accordance with these Rules or a valid direction;

- (c) that the dispute can proceed to determination without one or more steps being taken which have not been taken because of the procedural default; and/or
- (d) that the Costs arising from or connected with the procedural default be paid by the defaulting party on an interim or final basis.

In addition, and where appropriate to do so, adverse inferences may be drawn by any Forum in respect of the position for which the defaulting party contends.

17 For the purposes of Rule A16 procedural default shall include:

- (a) failure to take a step by the time required by these Rules;
- (b) failure to comply with any direction of the CCOS Allocation Chair, the CCOS Secretary or any Forum; and
- (c) failure to abide by the Principles.

### **Representation**

18 A Dispute Party is entitled to be represented by such person(s) (legally qualified or otherwise) as it chooses.

19 A Dispute Party shall not be prejudiced by its choice of one category of representative as against another. It shall, however, ensure that:

- (a) the competencies, skills and knowledge of any chosen representative are appropriate to the issues involved in the dispute (content, subject and value);
- (b) where a representative is also a witness, that representative is able to perform both duties in full;
- (c) where a representative is not a witness, any appropriate witnesses are present at the hearing to provide relevant information; and
- (d) its representatives shall respect and act at all times in accordance with the Principles.

### **Hierarchy**

20 In the event of conflict (when using these Rules) between the Access Regulations, the Act, the Access Conditions, an Underlying Contract, and these Rules the following order of precedence shall apply:

- (a) any Applicable Laws;
- (b) the Access Conditions;
- (c) these Rules; and

- (d) the Underlying Contract.

### **Service of Documents and Notice**

21 Documents may be served:

- (a) in person on any director of any party, in which case service shall be deemed to take place on the day on which the documents are given to the director in person;
- (b) by personal delivery to the registered address or principal business address within the UK of any party, or such other address (including that of a representative or adviser) as that party identifies in connection with the relevant dispute; in which case service shall be deemed to take place on the day of delivery or, if delivery is made after 5pm, the following working day;
- (c) by first class post, to the registered address or principal business address within the UK of any party, or such other address (including that of a representative or adviser) as that party identifies in connection with the relevant dispute; in which case service shall be deemed to take place two working days after posting;
- (d) by email, to any party which has previously identified in writing an electronic address for service of documents in connection with the relevant dispute (including the address of a representative or adviser) in which case service shall be deemed to take place on the day of receipt, or if receipt is after 5pm, the day following receipt. For the purposes of this Rule A21(d) the CCOS Secretary will accept documents sent to him at the email address published on the access disputes website from time to time;
- (e) where a party has no registered address or principal business address within the UK, service may be made in accordance with the above requirements to the CCOS Secretary on behalf of that party. The CCOS Secretary shall be considered to be the relevant party's agent for service and shall take all reasonable efforts to transmit the documents on to the party at such address as is specified outside the UK.

Provided that, in all cases in which documents are sent to any company or corporate entity, such documents are addressed "Urgent: for the attention of the Company Secretary" or addressed to a person representing the party who has previously confirmed in writing his willingness to receive such documents on behalf of the party.

22 In these Rules, whenever any notice is required to be given in writing, writing shall include email.

23 Any reference to pages is a reference to A4 pages containing reasonably legible typescript at 1.5 line spacing. All documents submitted shall be



made in a form compatible with software agreed with the CCOS Secretary from time to time and all attachments should, where reasonably possible, be in electronic format.

- 24 All documents, correspondence, communications and other material including spoken statements, submissions and communications shall be in the English language.
- 25 In the event that any date specified in these Rules for service of documents or any action by any party, Forum, CCOS Allocation Chair, CCOS Hearing Chair or CCOS Secretary or any other date specified would fall between 25 December and 31 December in any year, it shall be extended by seven days. Any such date falling on a public holiday in England shall be extended to the next working day.

## **CHAPTER B - INITIATING A DISPUTE AND ALLOCATION**

- 1 Disputes proceedings will be initiated and referred for allocation in accordance with the following Rules.

### **NOTIFICATION OF A DISPUTE**

- 2 A Resolution Service Party wishing to refer a dispute shall serve a written Notice of Dispute on the CCOS Secretary and shall serve a copy of the Notice of Dispute on every other party to the dispute.
- 3 The Notice of Dispute shall, unless otherwise advised by the CCOS Secretary, normally be in accordance with the template format for a Notice of Dispute (found on the access disputes website) and shall do all of the following:
  - (a) state the contract and relevant contractual clause under which the reference is made (or such other basis for the reference under these Rules);
  - (b) list the other parties concerned whether as a Dispute Party to the dispute or otherwise;
  - (c) summarise the basis of the claim including a brief list of issues;
  - (d) state whether the Dispute Parties have already agreed on a determination procedure, or, if not, specify the referring Dispute Party's initial preference for a determination procedure, including, if it believes it is a Timetabling Dispute, a statement to this effect; and
  - (e) state whether exceptional circumstances exist requiring an expedited hearing or process.
- 4 Valid service of a Notice of Dispute upon the CCOS Secretary in accordance with Rule B2 shall amount to the issuing of proceedings relating to the dispute for the purposes of all relevant limitation periods or provisions. Provided that the dispute has not subsequently been finally resolved or withdrawn in accordance with Rule B4A below (upon the occurrence of which all relevant limitation periods shall be calculated by excluding the period during which the claim was subject to these Rules), no party shall raise any argument, defence or exclusion in subsequent proceedings (whether under these Rules or otherwise) on the basis of the expiry, after the date of valid service of a Notice of Dispute in accordance with Rule B2, of any limitation period.
- 4A A party which has referred a dispute by service of a Notice of Dispute in accordance with Rule B2 may (without affecting any powers in these Rules to make consequential orders as to costs) discontinue the dispute by serving written notice of withdrawal of the Notice of Dispute on the Secretary and on every other party to the dispute. This Rule B4A does not

apply to any dispute which the parties of the dispute have agreed shall be submitted to arbitration in accordance with Chapter F of these Rules (in which case, the relevant arbitration rules shall apply).

4B Rule B4C applies where a party which has served a notice of withdrawal in accordance with Rule B4A seeks to serve a further Notice of Dispute in accordance with Rule B2 which:

- (a) one or more other parties to the dispute referred by the further Notice of Dispute was or were a party to the dispute which has been discontinued in accordance with Rule B4A; and
- (b) the dispute referred by the further Notice of Dispute arises out of facts which are, in most part, the same as those relating to the discontinued dispute.

4C In the circumstances described in Rule B4B, the dispute identified in the further Notice of Dispute will not be referred as a dispute under these Rules unless and until:

- (a) all parties to the dispute have indicated to the Secretary that they agree that the dispute should be referred under these Rules; or
- (b) upon reference to the Allocation Chair by the Secretary and having invited submissions by all affected parties and duly considered any submissions made, the Allocation Chair has given permission for the dispute to be referred under these Rules having regard to:
  - (i) the circumstances of the withdrawal and the further Notice of Dispute;
  - (ii) whether those circumstances amount to an abuse of the CCOS ADRR process;
  - (iii) whether the dispute party which is seeking permission has acted oppressively or unreasonably;
  - (iv) whether there is a reasonable argument that there has been any relevant retrospective change in the law;
  - (v) the terms of any undertaking offered by the dispute party which is seeking permission to be responsible for the costs

incurred by the other dispute parties in connection with the withdrawn dispute; and

- (vi) the terms of any cost order made upon the withdrawal.

## **ALLOCATION PROCESS**

- 5 All Timetabling Disputes shall be referred to a Timetabling Panel in accordance with Chapter H of these Rules. Following service of a Notice of Dispute relating to a Timetabling Dispute, the process under Chapter H shall commence and the CCOS Secretary shall appoint a Timetabling Panel in accordance with Rule H11. If either Dispute Party raises any objection then the CCOS Hearing Chair of the Timetabling Panel shall consider the best way to proceed.
- 6 All disputes referred to resolution in accordance with these Rules under Condition B2.4.4 of the CCOS Network Code shall be referred to an ADA in accordance with Chapter G of these Rules as a single stage dispute resolution process with no appeal. Following service of a Notice of Dispute relating to such a dispute an ADA shall commence and the CCOS Secretary shall appoint a CCOS Hearing Chair for the dispute in accordance with Rule G9 of these Rules. If either Dispute Party raises an objection then the CCOS Hearing Chair shall consider the best way to proceed.
- 7 Except as stipulated in Rule B8, all disputes referred for resolution in accordance with these Rules under Part J of the CCOS Network Code shall be referred to an ADA in accordance with Chapter G of these Rules with a right of appeal to the ORR for determination in accordance with Chapter L of these Rules. Following service of a Notice of Dispute relating to such a dispute an ADA shall be convened and the CCOS Secretary shall appoint a CCOS Hearing Chair for the dispute in accordance with Rule G9. If either Dispute Party raises any objections then the CCOS Hearing Chair shall consider the best way to proceed.
- 8 All disputes referred for resolution in accordance with these Rules under Condition J8.14 of the CCOS Network Code shall:
  - (a) if concerning Condition J8.14.1, be referred to an ADA in accordance with Chapter G of those Rules or referred for expert determination in accordance with Chapter I of these Rules; or
  - (b) if concerning Condition J8.14.2, be referred for expert determination in accordance with Chapter I of these Rules.
- 9 Unless otherwise ordered by the CCOS Allocation Chair, following service of a Notice of Dispute upon him, the CCOS Secretary:

- (a) shall allot a case number to the dispute and notify this case number to all Involved Parties including those identified in the Notice of Dispute according to Rule B3(b);
- (b) where he reasonably believes that another party or parties are likely to be directly affected by the outcome of the dispute and it is appropriate that they should be informed of the existence of the dispute, may seek clarification from the party initiating proceedings about why that party has not been identified in accordance with Rule B3(b) and inform the CCOS Allocation Chair or relevant CCOS Hearing Chair (as appropriate) accordingly;
- (c) (unless a Procedure Agreement has already been drawn up or served on him) shall set a date and time for an allocation hearing to take place within 28 days of the service of the Notice of Dispute upon him or such other time as the Dispute Parties may agree;
- (d) (unless a Procedure Agreement has already been drawn up or served on him) shall provide initial directions to the parties setting out the following initial timetable (or such variation of the timetable as the CCOS Allocation Chair shall approve):
  - (i) fixing a date and time of the allocation hearing, a provisional method by which such allocation hearing shall take place (in writing, in person at a specified location, or by telephone conference or otherwise) and an estimated duration for the allocation hearing;
  - (ii) encouraging the Dispute Parties to seek to agree a determination procedure between them and in the event of reaching such an agreement immediately to notify him accordingly;
  - (iii) requiring each Dispute Party to serve upon him and exchange with the other parties a statement, at least seven days before the hearing, containing that Dispute Party's:
    - (A) assessment of the basis of the claim and a brief list of issues. Alternatively agreement with the basis of the claim and list of issues provided with the Notice of Dispute; and
    - (B) preferences for the Forum and any facilitative stages together with short reasons in support of such process; and
    - (C) assessment of any issues which should be referred to the ORR together with the proposed form of words for the reference and short reasons in support of such a reference.

Such statements should each be less than three pages long unless the CCOS Allocation Chair directs otherwise.

- 10 The CCOS Secretary shall assist the Dispute Parties to reach an agreement regarding the most appropriate determination procedure and whether any issues can or should be referred to the ORR or to the courts. In doing so the CCOS Secretary shall act in a facilitative role impartially between the Dispute Parties and shall not seek to impose his own assessment or preference upon the Dispute Parties.
- 11 If the parties reach agreement upon a determination procedure, they shall confirm their agreement and the terms of that agreement to the CCOS Secretary by way of a written procedure agreement (the "**Procedure Agreement**") executed by or confirmed in writing on behalf of all Dispute Parties. The form of the executed Procedure Agreement received by the CCOS Secretary shall be definitive evidence of the agreement reached and shall specify at least:
  - (a) the dispute resolution process or processes agreed by the Dispute Parties and the order in which they will take place (or specify that facilitative processes are to take place in parallel to other dispute resolution processes);
  - (b) where appropriate, the basis on which any appeal or reference to a second (or later) stage may be made;
  - (c) (subject to the provisions of Chapter L) where in exceptional circumstances the ORR has identified that the matter is appropriate for it to determine (and the Dispute Parties have requested that it do so) and has therefore agreed to act as an appeal body, confirmation of the ORR's agreement. Dispute Parties should note that except as expressly provided in these Rules or in the Access Regulations, the ORR will not generally accept the role of appeal body unless exceptional circumstances can be shown justifying it taking on this role; and
  - (d) where any dispute is agreed to be referred to the courts at any stage, specify the timescale (which shall not be less than 2 months nor more than 9 months) by which any claim must be initiated following conclusion of any prior stages, otherwise the dispute will be deemed withdrawn.
- 12 The Procedure Agreement may specify dispute resolution processes provided for in these Rules (including court proceedings) or otherwise (provided that agreement from any tribunal/ determinative body not provided for in these Rules is obtained before a reference to it is agreed). The Procedure Agreement may not specify that a dispute be referred to a Timetabling Panel unless it is a Timetabling Dispute.

- 13 The Procedure Agreement may also specify any agreed timings for commencement of any dispute resolution process, the terms of any reference agreed to be made to the ORR by the Dispute Parties and any other agreement between the parties regarding the procedure to be adopted.
- 14 The CCOS Allocation Chair shall preside over any allocation hearing which takes place. At an allocation hearing he shall:
- (a) consider the Notice of Dispute, the written statements of the Dispute Parties and any oral representations from the Dispute Parties;
  - (b) ask questions to identify the most appropriate determination procedure and whether any issues exist which could be referred to the ORR;
  - (c) seek to facilitate an agreement between the Dispute Parties on the most appropriate determination procedure and whether any issues exist which should be referred to the ORR;
  - (d) having heard each Dispute Party's full submissions, if no agreement has been reached, state clearly any view he has of the most appropriate determination procedure;
  - (e) in the event that any Dispute Party claims the right to refer a matter or issue directly to the ORR under the Access Regulations (without the need to first refer the matter to a Timetabling Panel), determine whether it is arguable that such a right exists and if so direct the reference of the matter to the ORR;
  - (f) in the event that any Dispute Party claims the right to refer a matter or issue to a Timetabling Panel and subsequently to the ORR in accordance with the Access Regulations, determine whether it is arguable that such a right exists and if so refer the matter to a Timetabling Panel followed by appeal to the ORR. There is a presumption that disputes referred to resolution under Condition D5.1.1 of the CCOS Network Code shall, unless there are compelling reasons to the contrary relating to subject matter, be allocated to a Timetabling Panel. Consequently the CCOS Allocation Chair shall not allocate a dispute ostensibly falling within Condition D5.1.1 other than to a Timetabling Panel without first inviting written representations from the Dispute Parties on his intention to do so (to be provided by the parties within seven days of the request or such other time as he shall specify) and giving proper consideration to any representations made;
  - (g) in the event that the Dispute Parties agree that an issue would be best determined by the ORR but are unable to agree to the wording of the necessary reference, determine the wording of the reference

and write to the ORR (copying the Dispute Parties) identifying the issue and requesting that the issue be considered in accordance with Chapter C of these Rules;

- (h) in the event that agreement in principle on the resolution procedure has been reached, but the Dispute Parties are unable to agree on the timings of each stage (including adjustments to the default timings in these Rules), determine the timings to be applied following consideration of the Dispute Parties' submissions in that respect;
  - (i) in the event that agreement is reached between the Dispute Parties (including agreement following the exercise by the CCOS Allocation Chair of his powers under Rules B14 (g) and/or (h)), the CCOS Allocation Chair shall draw up, with the Dispute Parties' assistance, the Procedure Agreement and the Dispute Parties shall execute it or confirm it in writing;
  - (j) in the event that no agreement is reached between the Dispute Parties and neither Rules B14 (e) or (f) apply, determine that, unless the Dispute Parties reach a contrary agreement within seven days of the allocation hearing, the matter shall be referred to final determination by arbitration subject to Chapter F as a one stage determination procedure with appeal only in accordance with the Arbitration Acts and shall draw up the Procedure Agreement accordingly and shall sign it as CCOS Allocation Chair; and
  - (k) in the event that no agreement is reached between the Dispute Parties under Rule B9(a), shall determine that, unless the Dispute Parties reach an agreement within seven days of the allocation hearing, the matter shall be referred to final determination subject to Chapter I of those Rules and shall draw up the Procedure Agreement accordingly and shall sign it as CCOS Allocation Chair.
- 15 Following an allocation hearing in accordance with Rule B14 the CCOS Allocation Chair may at his discretion write formally to all Dispute Parties stating his view on the best allocation of the dispute and the approach taken by the Dispute Parties leading to the actual allocation of the dispute.
- 16 Following service upon him of a Procedure Agreement in accordance with Rule B11 or drawing up of a Procedure Agreement in accordance with Rule B5, 6, 7 or 14, the CCOS Secretary shall write to all the Involved Parties:
- (a) dispensing with any remaining stages of any previous directions;
  - (b) confirming receipt of the Procedure Agreement and recording the determination procedure to be adopted for the dispute;
  - (c) confirming the first dispute resolution process and the first dates required by these Rules in respect of that process; and



- (d) where the first dispute resolution process is ADA or TTP, identifying the CCOS Hearing Chair appointed for the dispute.
- 17 For the purposes of these Rules the first dispute resolution process specified in the Procedure Agreement shall commence upon the date on which the CCOS Secretary writes to the Involved Parties in accordance with Rule B16. Subsequent dispute resolution processes provided for in the Procedure Agreement shall commence upon receipt by the CCOS Secretary in accordance with these Rules of notice from any Dispute Party of that Dispute Party's decision to refer the dispute to such dispute resolution process in accordance with these Rules.
- 18 In discharging his roles in respect of allocation under this Chapter B, the CCOS Allocation Chair shall have regard to:
- (a) these Rules including the Principles;
  - (b) the allocation criteria (if any) published from time to time by the Committee on the access disputes website;
  - (c) the objective importance of the dispute to the Dispute Parties;
  - (d) the complexity of the issues;
  - (e) the significance (if any) to the railway industry of the issues involved;
  - (f) the scale of any financial claims involved; and
  - (g) the relevant laws including the Arbitration Acts, , the Act, the Railways Regulations and the right to a fair trial at common law and under the Human Rights Act.
- 19 The CCOS Allocation Chair (aided by the CCOS Secretary) shall continue to actively encourage and facilitate resolution of disputes throughout the life of the dispute. All Dispute Parties and all Forums shall have liberty to apply to the CCOS Allocation Chair at any stage in respect of a restructuring of the determination procedure including as appropriate the addition of any facilitative process in parallel with determinative processes or otherwise.
- 20 In exceptional circumstances requiring an expedited hearing or process or where alternative actions or directions are required, the CCOS Allocation Chair may at any stage on the application of any Dispute Party give directions varying the timescales provided for in these Rules and nothing in this Chapter B shall restrict such directions being given.
- 21 Upon the application of any Dispute Party or at his own instigation the CCOS Allocation Chair may order that any two or more disputes be joined or heard and resolved together where such disputes appear to him in his absolute discretion to concern the same or similar subject matter and where it is in the interests of efficient and fair resolution to do so. Where

appropriate, this may include disputes raised for resolution under these Rules and disputes raised for resolution under the NR ADRR.

- 22 Subject to the Arbitration Acts, any Dispute Party may at any stage issue or initiate proceedings before the High Court in England, for any interim remedies including injunctions, or specific performance and nothing in this Chapter B shall prevent them from so doing.

## CHAPTER C - REFERENCE TO THE ORR IN THE COURSE OF A DISPUTE RESOLUTION PROCESS

- 1 This section describes how issues connected to disputes may be referred to the ORR by the Dispute Parties, the CCOS Allocation Chair or any Forum at any stage of the determination procedure and the basis on which the ORR will determine such references.

### ISSUES TO BE REFERRED

- 2 Issues may only be referred to the ORR under these Rules by:
  - (a) the Dispute Parties together acting by agreement;
  - (b) the CCOS Allocation Chair in accordance with the provisions of Chapter B; or
  - (c) any Forum acting in accordance with these Rules,in each case a "**Referring Party**".
- 3 A Referring Party may at any stage or stages in a dispute refer to the ORR any discrete issue or matter which is connected to or forms part of a dispute and:
  - (a) concerns information to which the ORR has access and which is not readily available from another source; or
  - (b) is or concerns a Regulatory Issue; or
  - (c) is an issue or matter of wider railway industry relevance which would benefit from the ORR's industry specific experience and/or knowledge.
- 4 The purpose of a reference to the ORR is to obtain answers to issues of general application to the railway industry (or a significant part of it) in respect of which the ORR has relevant information or knowledge which may inform the resolution of the Dispute Parties' respective entitlements. Consequently (except where it is legally required to hear specific claims, whether pursuant to the Act, the Access Regulations or otherwise) the ORR may at its discretion decline references which relate solely to one or more Referring Parties' specific factual or financial position or refuse to determine any Referring Party's rights on the basis of the particular facts applicable to that Referring Party. The ORR may exercise its discretion not to consider the substantive commercial issues in dispute or give an opinion on the merits of the dispute or on the proposed Forum for resolution.
- 5 The provisions of this Chapter C are without prejudice to any statutory or Access Conditions provisions which provide a right for a party to refer an appeal to the ORR.

## PROCESS FOR REFERENCES

- 6 Where a Referring Party decides to refer an issue or matter to the ORR it shall send a Reference to the ORR (copied to all other Involved Parties) (the "**Reference**") containing the following:
- (a) the Referring Party's formulation of a specific question or questions for the ORR to answer with sufficient clarity to enable the ORR to understand the nature of the answer requested from it; and
  - (b) a brief explanation of how the issue or matter fulfils the requirements of Rule C3; and
  - (c) a statement of the steps which have already been taken to resolve the issue; and
  - (d) (at the discretion of that Referring Party) a statement from each Dispute Party of no more than three pages:
    - (i) stating that Dispute Party's position in respect of the Reference; and
    - (ii) explaining why the Reference should or should not be decided by the ORR; and
    - (iii) attaching any relevant Documents which the Dispute Party wishes to bring to the attention of the ORR in connection with the ORR's decision on whether the Reference should be decided by it.

Where applicable, the Referring Party should also state whether it believes that any Dispute Party has a right to refer the issue or matter to the ORR in accordance with the Access Regulations or the CCOS Network Code or otherwise.

- 7 For the purposes of this Chapter C, references to the ORR may be sent to the following email address: [adrr.references@orr.gsi.gov.uk](mailto:adrr.references@orr.gsi.gov.uk)
- 8 The ORR will aim to acknowledge receipt of a Reference within seven days to the Referring Party.
- 9 The ORR will consider the Reference including any statements served under Rule C6 and will respond in writing within 21 days or such other period as the ORR may specify to the Referring Party (copying to all other Involved Parties):
- (a) to advise it that the ORR declines to respond to the Reference and that the issue remains a matter for the relevant dispute Forum to determine and to provide reasons for this decision; or
  - (b) to provide a response on questions of fact and/or copies of relevant Documents or records in response to the Reference; or

- (c) where the ORR accepts the Reference, but requires additional time, information or submissions to consider its response, to set directions and a timetable for any further stages in responding to the Reference.
- 10 Following receipt of a response from the ORR in accordance with Rule C9, the relevant Forum, if appropriate, shall give directions concerning any procedural steps required in light of the response including whether a stay is required pending further consideration by the ORR.
  - 11 Following completion of its process, the ORR shall send its final written determination of the Reference to the Involved Parties. Following receipt of a final determination the CCOS Allocation Chair or the relevant Forum, as the case may be, shall give further directions concerning any procedural steps required in light of the determination.
  - 12 Subject to any order from the ORR for partial or complete redaction, all References, statements and submissions made under this Chapter C and all responses provided by the ORR may be published by the ORR and shall also be made accessible from the access disputes website.
  - 13 In accordance with Rule A4, the ORR's determinations will be applied (in accordance with Rule A7(b)) by relevant Forums to the resolution of the dispute on the basis of the Dispute Parties' respective entitlements. Consequently, subject to any specific legal obligations on the ORR in considering a reference received under this Chapter C, the ORR's determinations on the Regulatory Issues raised will be made in accordance with the Dispute Parties' respective entitlements. The ORR will not take account of any argument raised by any Dispute Party which is not based upon the Dispute Parties' respective entitlements or would have the effect of avoiding or rendering ineffective any Resolution Service Party's existing entitlements.

## CHAPTER D - FACILITATIVE PROCESS RULES - MEDIATION

- 1 Mediation under these Rules is a private facilitative dispute resolution process in which a neutral mediator tries to help the Dispute Parties to reach a negotiated settlement.

### **Disputes to be submitted to mediation**

- 2 Any dispute which the Dispute Parties have agreed shall be submitted to mediation under these Rules shall proceed according to the Rules of this Chapter D. Such agreement may be made when the dispute arises or previously or in the Procedure Agreement or while any other dispute resolution process is taking place and may be made orally or in writing. Any mediation agreed by the Dispute Parties which is not specified in the Procedure Agreement shall commence upon notification to the CCOS Secretary in writing by all Dispute Parties (or confirmation in writing of such a notification on behalf of all Dispute Parties) of their agreement to mediate.

- 3 **Not used.**

### **Beginning a mediation**

- 4 Upon commencement of a mediation (in accordance with the Procedure Agreement and Rule B17 or otherwise), the CCOS Secretary shall promptly approach all Dispute Parties and liaise with and assist the Dispute Parties in identifying, choosing and retaining a suitable mediator if not already done.
- 5 If no mediator can be agreed by the Dispute Parties within 21 days of the date of commencement of the mediation, the CCOS Secretary shall recommend an appropriate individual from lists maintained by him or otherwise. If any Dispute Party rejects the recommended individual then the mediation will be deemed to have failed and the CCOS Secretary shall write to the Involved Parties stating that that mediation stage has been terminated on the date of his letter.
- 6 Upon appointment of a mediator, the Dispute Parties and the mediator will agree a date for the mediation session within 60 days of appointment of the mediator (subject to contrary agreement on timescales between the Dispute Parties).

### **Exchange of Information**

- 7 Following appointment of a mediator, each Dispute Party shall prepare the following documents:
  - (a) a concise summary (the "**Case Summary**") of its case in the dispute ; and
  - (b) all documents to which the summary refers and any others to which it may wish to refer to in the mediation (the "**Mediation Documents**").

- 8 The Dispute Parties will exchange the Case Summary and Mediation Documents with each other at least seven days before the mediation session, or other such date as may be agreed between the Dispute Parties and the mediator. Copies shall be sent directly to the mediator on the same date.
- 9 Subject to contrary agreement between the Dispute Parties:
  - (a) each Case Summary shall be a maximum of ten pages long; and
  - (b) a joint set of documents will be provided to the mediator containing the Mediation Documents requested by each Dispute Party.

### **The Mediation**

- 10 The mediator, where appropriate, will:
  - (a) consult with the Dispute Parties before the mediation session;
  - (b) read before the mediation session each Case Summary and all the Mediation Documents sent to him;
  - (c) determine the procedure for the mediation including the mediation session;
  - (d) facilitate the drawing up of any settlement agreement;
  - (e) be bound by the terms for the appointment of a mediator agreed with the Dispute Parties; and
  - (f) abide by the terms of this Chapter D.
- 11 The mediation session will take place at the place and time stated by the mediator which is best suited to the location of the Dispute Parties.
- 12 No recording or transcripts of the mediation session will be made.
- 13 Each Dispute Party shall be represented at the mediation session by at least one individual who shall be a senior manager with full decision-making authority to settle the dispute. If there is any restriction on that authority this should be discussed with the mediator before the mediation session. Dispute Parties should inform the mediator prior to the date of the mediation session of the identity of its representation which may include professional or other advisers. No other persons may attend without the mediator's agreement.
- 14 The mediator may see each Dispute Party on his own if he sees fit. The mediator shall not be entitled to disclose matters told to him in confidence without the permission of the Dispute Party disclosing such matters.
- 15 Within seven days of the end of the mediation session, if the Dispute Parties have not resolved the dispute by agreement and only if all the

Dispute Parties request, the mediator may advise the Dispute Parties of his non-binding views as to the likely outcome of the dispute if it were to be referred back to the determination procedure and/or what he considers would be a fair settlement of the dispute.

### **Settlement Agreement**

- 16 Any settlement reached in the mediation will not be legally binding until it has been recorded in writing and signed by the Dispute Parties.

### **Confidentiality**

- 17 The mediation is and shall be kept confidential.
- 18 The Dispute Parties, their representatives and advisers, the mediator and the CCOS Secretary shall keep confidential all documents, submissions, statements and other information disclosed in the mediation, including any agreement for the settlement of the dispute, except when and insofar as disclosure is necessary:
- (a) to implement or enforce the agreement for settlement of the dispute; or
  - (b) to comply with an obligation to disclose owed to any financial associate of the Dispute Party making the disclosure or any obligations at law (including under the Freedom of Information Act 2000 and the Environmental Information Regulations 2004).

- 19 Its use in the mediation shall not affect the extent to which any Document, submission, statement or other information disclosed in the mediation is admissible or subject to disclosure or production in any subsequent arbitration, legal or other proceedings involving the Dispute Parties.
- 20 New Documents generated in the course and for the purposes of the mediation shall be treated as being on the same basis as without prejudice negotiations in an action in the courts.

### **Costs**

- 21 Unless the Dispute Parties otherwise agree, each Dispute Party shall bear its own costs of the mediation. The Dispute Parties shall share equally the mediator's fees and expenses, any costs of his appointment and all other administrative costs of the procedure.

### **Termination of the mediation**

- 22 The mediation shall terminate upon the earliest of:
- (a) the occurrence of the events in Rule D5;
  - (b) service by one Dispute Party to the mediation on the others and on the mediator of a notice of withdrawal from the mediation;



- (c) the provision to all Dispute Parties by the mediator of his views in accordance with Rule D15;
- (d) the expiry of 14 days from the end of the mediation session;
- (e) withdrawal of the mediator from the mediation; or
- (f) the conclusion of a written settlement agreement.

23 Upon termination any Dispute Party which wishes to refer the dispute to the next stage of the determination procedure (in accordance with the Procedure Agreement) shall notify the CCOS Secretary of the termination and its intention to refer. Any such notification shall be copied to all Dispute Parties. If no Dispute Party notifies the CCOS Secretary of its intention to refer the matter to another dispute resolution process (unless such other process has already been commenced) within 28 days of termination the claim shall be deemed to have been withdrawn.

**Exclusion of liability**

24 None of the CCOS Allocation Chair, the CCOS Secretary or any mediator shall be liable to any party for any act or omission (including negligence) in connection with any mediation under these Rules unless the act or omission is shown to have been in bad faith.

**Mediator barred from further proceedings**

25 The mediator shall not be entitled to act in any capacity in relation to the subject matter of the mediation in which he acted as mediator in any subsequent arbitration, legal or other similar proceedings.

## CHAPTER E - FACILITATIVE PROCESS RULES - EARLY NEUTRAL EVALUATION

- 1 Early Neutral Evaluation ("**ENE**") under these Rules is a private facilitative dispute resolution process in which a neutral evaluator provides a confidential assessment of the likely merits of the case and tries to help the Dispute Parties to reach a negotiated settlement.

### **Disputes to be submitted to ENE**

- 2 Any dispute which the Dispute Parties have agreed shall be submitted to ENE under these Rules shall proceed according to the Rules of this Chapter E. Such agreement may be made when the dispute arises or previously or in the Procedure Agreement or while any other dispute resolution process is taking place and may be made orally or in writing. Any ENE agreed by the Dispute Parties which is not specified in the Procedure Agreement shall commence upon notification of the CCOS Secretary in writing by all Dispute Parties (or confirmation in writing of such a notification on behalf of all Dispute Parties) of their agreement to an ENE.

### **Beginning an ENE**

- 3 Upon commencement of an ENE (in accordance with the Procedure Agreement and Rule B17 or otherwise), the CCOS Secretary shall promptly approach all Dispute Parties and liaise with and assist the Dispute Parties in identifying, choosing and retaining a suitable evaluator, if not already done.
- 4 In the event that no evaluator can be agreed by the Dispute Parties within 21 days of commencement of the ENE, the CCOS Secretary shall recommend an appropriate individual from lists maintained by him or otherwise. If any Dispute Party rejects the recommended individual then the ENE will be deemed to have failed and the CCOS Secretary shall write to all Involved Parties stating that that ENE stage has been terminated on the date of his letter.

### **Exchange of Information**

- 5 Following appointment of an evaluator, each Dispute Party will prepare the following documents:
  - (a) a concise summary (the "**Case Summary**") of its case in the dispute; and
  - (b) all documents to which the summary refers and any others to which it considers to be relevant to the evaluation (the "**Evaluation Documents**").

Unless the evaluator specifies otherwise, each Case Summary should be limited to 15 pages.

- 6 The evaluator will specify the date for exchange of submissions and the Dispute Parties will exchange the Case Summary and Evaluation Documents with each other on that date. Copies shall be sent directly to the evaluator on the same date.
- 7 Within seven days of the receipt by him of the Case Summaries and Evaluation Documents the evaluator shall notify the Dispute Parties of any further submissions he requires before making the evaluation including any questions he requires the parties to answer, the date for provision of such further submissions and if necessary the time for an oral hearing. The evaluator need not hold an oral hearing if he considers it unnecessary.

### **The Evaluation**

- 8 The evaluator where appropriate, will:
  - (a) read each Case Summary and all the Evaluation Documents sent to him;
  - (b) determine whether any further submissions are required by him and whether an oral presentation from the Dispute Parties would assist him;
  - (c) provide a written statement of his evaluation of the dispute;
  - (d) facilitate the drawing up of any settlement agreement;
  - (e) be bound by the terms for the appointment of an evaluator agreed with the Dispute Parties; and
  - (f) abide by the terms of this Chapter E.
- 9 Any oral hearing will take place at the place and time stated by the evaluator who will chair and determine the procedure for the hearing. No recording or transcripts of the hearing will be made. Unless the evaluator orders otherwise, each Dispute Party shall be limited to one submission of up to one hour. The evaluator may require the Dispute Parties to answer questions posed by him.
- 10 Within seven days of any hearing or confirmation from the evaluator that there will be no hearing, or such other date as the Dispute Parties and the evaluator shall agree, the evaluator shall provide a written statement of his evaluation to all Dispute Parties. The evaluation will state, on the basis of the information provided to him:
  - (a) the evaluator's assessment of the dispute, the background and each Dispute Party's arguments in respect of the facts;
  - (b) the evaluator's conclusions on, or his best estimate of, the likely outcome of the case and the merits of each Dispute Party's case;

- (c) the key issues or facts which the evaluator identifies as influencing the likely outcome of the case; and
- (d) at his discretion, any suggestions on a fair or appropriate settlement of the dispute as between the Dispute Parties.

11 No Dispute Party shall be bound to adopt the views expressed, or accept the advice provided, by the evaluator.

### **Settlement Agreement**

12 Any settlement reached in connection with the ENE will not be legally binding until it has been recorded in writing and signed by the Dispute Parties.

### **Confidentiality**

13 The evaluation is and shall be kept confidential.

14 The Dispute Parties, their representatives and advisers, the evaluator and the CCOS Secretary shall keep confidential all documents, submissions, statements and other information disclosed in the ENE, including any agreement for the settlement of the dispute, except when and insofar as disclosure is necessary:

- (a) to implement or enforce the agreement for settlement of the dispute; or
- (b) to comply with an obligation to disclose owed to any financial associate of the Dispute Party making the disclosure or any obligations at law (including under the Freedom of Information Act 2000 and the Environmental Information Regulations 2004).

15 Its use in the ENE shall not affect the extent to which any Document, submission, statement or other information disclosed in the ENE is admissible or subject to disclosure or production in any subsequent arbitration, legal or other proceedings involving the Dispute Parties.

16 The evaluator's evaluation shall be treated as being on the same basis as without prejudice negotiations in an action in the courts.

### **Costs**

17 Unless the Dispute Parties otherwise agree, each Dispute Party shall bear its own costs of the ENE. The Dispute Parties shall share equally the evaluator's fees and expenses, the costs of his appointment and all other administrative costs of the procedure.

### **Termination of the ENE**

18 The ENE shall terminate upon the earliest of:

- (a) the occurrence of the events in Rule E4;
  - (b) the service by one Dispute Party to the ENE on the others and on the evaluator of a notice of withdrawal from the ENE;
  - (c) withdrawal of the evaluator from the ENE; or
  - (d) provision of the evaluation to the Dispute Parties.
- 19 Upon termination any Dispute Party which wishes to refer the dispute to the next stage of the determination procedure (in accordance with the Procedure Agreement) shall notify the CCOS Secretary of the termination and its intention to refer. Any such notification shall be copied to all Dispute Parties. If no Dispute Party notifies the CCOS Secretary of its intention to refer the matter to another dispute resolution process (unless such other process has already been commenced) within 28 days of termination, the claim shall be deemed to have been withdrawn.

**Exclusion of liability**

- 20 None of the CCOS Allocation Chair, the CCOS Secretary or any evaluator shall be liable to any party for any act or omission (including negligence) in connection with any ENE under these Rules unless the act or omission is shown to have been in bad faith.

**Jurisdiction and governing law**

- 21 ENEs shall take place in such location as the Dispute Parties agree (or in default of agreement at such place as the evaluator specifies being appropriate for all parties and himself). Unless otherwise agreed by the Dispute Parties, evaluations (and any issues arising or connected with evaluations, whether contractual or non-contractual in nature) shall be subject to English law.

**Evaluator barred from further proceedings**

- 22 The evaluator shall not be entitled to act in any capacity in relation to the subject matter of the ENE in which he acted as evaluator in any subsequent arbitration, legal or other similar proceedings.

## CHAPTER F - DETERMINATIVE PROCESS RULES - ARBITRATION

- 1 Arbitration under these Rules is a private determinative dispute resolution process subject to the Arbitration Acts in which a neutral arbitrator determines the dispute on the basis of the parties' respective legal rights in accordance with the evidence and argument presented to him.

### **Disputes to be decided by arbitration**

- 2 Any dispute which the parties to the dispute have agreed shall be submitted to arbitration under these Rules or which has otherwise been allocated to arbitration as a first, second or appeal stage dispute resolution process in accordance with these Rules, shall proceed according to the Rules of this Chapter F.
- 3 Any arbitration under these Rules shall proceed before a sole arbitrator.
- 4 **Not used.**

### **Beginning an arbitration and appointing the arbitrator**

- 5 Upon commencement of an arbitration (in accordance with the Procedure Agreement and Rule B17 or otherwise), the CCOS Secretary shall promptly approach all Dispute Parties and liaise with and assist the parties in identifying, choosing and retaining a suitable arbitrator, if not already done.
- 6 In the event that no arbitrator can be agreed by the Dispute Parties within 21 days of the commencement of the arbitration, the CCOS Secretary shall propose an appropriate individual, from lists maintained by him and published on the access disputes website, or otherwise. That individual shall be appointed by the Dispute Parties as arbitrator unless any Dispute Party notifies the CCOS Secretary of a challenge to the appointment on the ground of (real or apparent or potential) bias, Conflict of Interest or a lack of competence within 5 days of notification of the CCOS Secretary's choice. If any challenge is made on the ground of bias, Conflict of Interest or lack of competence, the CCOS Allocation Chair shall consider the challenge and determine either to:
  - (a) uphold the proposed appointment; or
  - (b) remit the choice to the CCOS Secretary with directions concerning how a further choice should be made.

Nothing in this Rule F6 shall affect the power of an arbitrator to determine his own jurisdiction or appointment.

### *Notice of arbitration*

- 7 Upon the appointment of an arbitrator, the CCOS Secretary shall send to all the Dispute Parties a notice of the appointment of the arbitrator. The CCOS Secretary shall also send to the arbitrator a copy of:

- (a) this Chapter F and Chapters A, B and C;
- (b) any template terms for appointment of an arbitrator issued by the Committee;
- (c) the Notice of Dispute;
- (d) any statements from the Dispute Parties made under Rule B9(d)(iii); and
- (e) any correspondence from the CCOS Allocation Chair made under Rule B15

The Notice of Dispute shall stand as a notice of arbitration and no further notice of arbitration shall be required or served.

#### *Change of arbitrator*

- 8 If any arbitrator acting or appointed to act under these Rules resigns, withdraws, dies or refuses to act, the CCOS Secretary shall, upon application by the arbitrator or any Dispute Party, on proof satisfactory to the CCOS Secretary, declare the position of arbitrator vacant.
- 9 If the arbitrator or any Dispute Party considers that the arbitrator is unable by reason of mental or physical infirmity to perform the duties of his position as arbitrator or is disqualified for any reason from performing those duties, or has delayed unreasonably in the conduct of the arbitration or in the making of any award, the CCOS Secretary may, at the request of the arbitrator or any Dispute Party, having heard the arbitrator and the Dispute Parties if they or any of them wish to be heard, declare the position of arbitrator vacant.
- 10 Where the position of arbitrator shall have been declared to be vacant pursuant to Rule F8 or F9, then Rule F5 shall apply to the appointment of a replacement arbitrator.

### **Procedure**

#### *General*

- 11 The arbitrator shall act fairly and impartially as between the Dispute Parties, giving each a reasonable opportunity of putting his case and dealing with facts raised by his opponent.
- 12 The arbitrator shall adopt procedures suitable to the circumstances of the case, avoiding unnecessary delay or expense to provide a fair means for the resolution of the matters falling to be determined in accordance with each Dispute Party's rights at law to a fair trial. The arbitrator may give appropriate directions as to any or all aspects of the procedures to be followed and shall have the power at any time to make or amend the procedure (and the directions) to be followed by the Dispute Parties in the arbitration. The directions shall be in accordance with the Principles.

- 13 Subject to Rule F14, an arbitration shall include an oral hearing which is appropriate in length and content for the just and expeditious determination of the dispute.
- 14 The Dispute Parties may agree that an arbitration shall be conducted on the basis of written representations only. In such a case, nothing in this Rule shall prevent the arbitrator from requiring one or more oral hearings if he considers it appropriate for the just and expeditious determination of the proceedings.
- 15 Unless the arbitrator rules otherwise (either on his own motion or upon the application of any Dispute Party), the following timetable and procedure shall apply:
  - (a) within 21 days of the notice of appointment of the arbitrator, the claimant(s) shall serve upon the arbitrator and each other Dispute Party a written statement of its claim. The statement of claim shall specify all relevant facts and matters and contentions of law (if any, and naming the principal authorities) on which the claimant relies (or admits or denies) and the relief and remedies sought;
  - (b) within 21 days of service by the claimant of the statement of its claim, the other Dispute Party(s) shall serve upon the arbitrator and the claimant(s) a written statement of its defence. The statement of defence shall specify the defence and all relevant facts and matters and contentions of law (if any, naming the principal authorities) on which the respondent relies (or admits or denies). The statement of defence may set out any counterclaim which the respondent wishes to make;
  - (c) the statements of case served pursuant to sub-paragraphs (a) and (b) above shall be accompanied by copies of any Documents referred to in them or upon which the Dispute Party serving the statement wishes to rely. That Dispute Party shall, if so requested, make the originals of such Documents available for inspection by the arbitrator or the other Dispute Party;
  - (d) after service by the respondent of its statement of defence, the arbitrator may:
    - (i) allow the Dispute Parties an adjustment period within which to adjust the written statements of case so that each material averment of the Dispute Parties shall be answered (whether by admission, denial, explanation or otherwise). On the expiry of the adjustment period, the statements of case shall be finalised and within seven days thereafter the claimant(s) shall reproduce the statements of case, as adjusted, into a single document and send 2 copies to each of the arbitrator and the other Dispute Parties to the arbitration; or, alternatively; and/or



- (ii) within seven days of the service by the respondent of its statement of defence, allow a reply from the claimant(s) limited to responding to new matters and contentions of law raised in the statement of defence including any counterclaim raised;
  - (e) within seven days after the statements of case have been finalised, the arbitrator shall (in consultation with the Dispute Parties) set a hearing date and the estimated length of the hearing;
  - (f) within 21 days after the statements of case have been finalised, each Dispute Party shall serve upon the arbitrator and the other Dispute Party signed statements of any factual witnesses upon whose evidence it wishes to rely, together with any copies of documents referred to in them not already in the possession of the other Dispute Party. That Dispute Party shall, if requested to do so, make the originals of such Documents available for inspection by the arbitrator or the other Dispute Party; and
  - (g) at least seven days before the hearing, each Dispute Party shall serve on the other and on the arbitrator its written submissions.
- 16 Unless ordered otherwise by the arbitrator, at the hearing:
- (a) there shall be no oral opening submissions, but the arbitrator may ask the Dispute Parties questions arising out of their written submissions or statements of case;
  - (b) subject to sub-paragraph (iii) below, the testimony of a witness may be presented in written form, either as a signed statement or as an affidavit duly sworn, provided Rule F15(f) has been complied with. Any Dispute Party may apply to the arbitrator for an order that any witness whose written statement or affidavit is to be relied upon by a Dispute Party should attend for oral examination at a hearing and the arbitrator shall make such order unless, having heard the Dispute Parties, he is satisfied that such oral examination is not likely to assist him in making his award. If a witness is ordered to attend and fails to do so, the arbitrator may:
    - (i) place such weight on the written statement or affidavit as he thinks fit;
    - (ii) exclude it altogether; or
    - (iii) apply to the court for an order for the citation or attendance of witnesses.

In addition, in making his determination on Costs the arbitrator may take any failure to attend into account;

- (c) factual or expert witnesses who give oral evidence will not be required to provide their evidence in full orally. The Dispute Parties may cross-examine witnesses on oath or affirmation to the extent permitted by the arbitrator;
- (d) the Dispute Parties may make oral closing submissions;
- (e) the Dispute Parties may be legally represented;
- (f) the arbitrator shall be entitled to receive such evidence as he shall consider relevant, whether or not such evidence would have been admissible in a court of law; and
- (g) the arbitrator shall deliver to the Dispute Parties a reasoned award within 21 days of the end of the hearing.

*Proposed amendments*

- 17 Immediately after his appointment, the arbitrator shall require each Dispute Party to propose directions to him or to inform him of any amendments to the procedure or the time limits set out in Rule F15 which it considers appropriate (whether because more than two Dispute Parties will be involved or otherwise). Each Dispute Party shall send promptly any proposed directions or amendments to the arbitrator and each other Dispute Party. Before responding or ordering any amendments to the procedure, the arbitrator may require the Dispute Parties to meet him.

*References to the ORR*

- 18 The arbitrator may, on the application of either Dispute Party or on his own motion, elect to refer any issue or issues to which Rule C3 applies, to the ORR in accordance with Chapter C. Before making any such reference the arbitrator shall:
- (a) seek submissions from all Dispute Parties on whether a reference should be made and if so the wording of such a reference; and
  - (b) determine the wording of any reference to be made with due regard to such submissions.

*Supplemental*

- 19 If he considers it appropriate for the just and expeditious determination of the proceedings, the arbitrator shall be entitled to appoint one or more advisers, assessors or experts on any matter (including matters of law) to report to him on any specific issue. The costs of any such person shall be subject to the provisions of Rule F30. The arbitrator shall provide to the Dispute Parties the terms of reference, qualifications and experience of any adviser or assessor appointed. Where the arbitrator receives a report from any such person, he shall disclose the report to the Dispute Parties and afford them an opportunity to comment on it.

20 In relation to the production of Documents:

- (a) the arbitrator may, on the application of a Dispute Party, require the production of such specific identified Documents or class of Documents as are within the possession, custody or control of another Involved Party or any third party which the arbitrator considers relevant. The Dispute Parties shall be given the opportunity to inspect and to comment upon any Document so produced;
- (b) if any Document is not supplied to the arbitrator and the other Dispute Party within such time as the arbitrator shall prescribe, the arbitrator may:
  - (i) proceed with the arbitration on the basis of the Documents already before him;
  - (ii) apply to the Court for an order to produce the Documents; or
  - (iii) strike out the part of the claim or defence to which the Document relates,

and in making his award the arbitrator shall be entitled to draw inferences as he may think fit from the failure to supply the Document. In addition, in making his determination on Costs the arbitrator may take any failure to supply a Document at any stage in the proceedings into account;

- (c) no Involved Party shall be obliged to produce any document which would be privileged from production in any proceedings in an action in the courts; and
- (d) unless otherwise ordered by the arbitrator, an application by a Dispute Party to the arbitrator pursuant to sub-paragraph (a) above shall be made not later than 21 days before the date fixed for the hearing; a Dispute Party in receipt of a request from the arbitrator to produce a document shall comply with such a request within 14 days.

21 Without prejudice to the powers in Rule A16 and in addition to them, the arbitrator shall have power to strike out part or all of any claim or defence made in the proceedings on any one or more of the following grounds:

- (a) wilful breach of these Rules;
- (b) deliberate non-compliance by a Dispute Party with any order of the arbitrator; or
- (c) inordinate or inexcusable delay on the part of any Dispute Party, where such act or omission has, in the opinion of the arbitrator, given rise to a substantial risk that a fair determination of the

dispute will not be possible, or which is such as to cause or to have caused serious prejudice to the other Dispute Party.

- 22 Without prejudice to the powers in Rule A16 and in addition to them, the arbitrator shall have power to strike out part or all of any claim or defence made in the proceedings if he is satisfied that the claim or defence or any part of it is scandalous, frivolous or vexatious.
- 23 Without prejudice to the powers in Rule A16 and in addition to them, if any Dispute Party fails to serve a Statement of Case within the period allowed under these Rules or by order of the arbitrator, and fails to remedy his default within 14 days after despatch to him by the arbitrator or any other Dispute Party of notice of that default, the arbitrator shall be entitled to rule that he shall be treated as having abandoned his claim or defence (as the case may be) and, having made such a ruling, the arbitrator shall be entitled to proceed with the reference on a without notice basis.
- 24 Any Dispute Party who becomes aware that any provision or requirement of these Rules has not been complied with and who fails to state an objection to that failure within a reasonable time shall be deemed to have waived the right to object.

### **Awards**

#### *Final and binding*

- 25 Awards shall be final and binding on the Dispute Parties subject to:
- (a) the provisions (including rights of appeal) of the Arbitration Acts and any other relevant law; and
  - (b) the provisions of any agreement between the Dispute Parties, the relevant Access Conditions, and any further right of appeal or reference to another dispute resolution process provided for in the Procedure Agreement.
- 26 If any further dispute resolution process is provided for in the Procedure Agreement then any Dispute Party which wishes to refer the dispute to the next stage of the determination procedure (in accordance with the Procedure Agreement) shall notify the CCOS Secretary of its intention to refer. Any such notification shall be copied to all Dispute Parties. If no Dispute Party notifies the CCOS Secretary of its intention to refer the matter to such further dispute resolution process within 28 days of the final award, the final award shall be deemed to have been accepted by all Dispute Parties.

#### *Power to make orders*

- 27 Subject to any other provision of the Access Conditions and Underlying Contract, the arbitrator may make such orders in his award as he considers necessary to resolve the dispute, including, without limitation, that:

- (a) one Dispute Party shall pay an amount of money (including damages) to another Dispute Party, whether that amount is specified in the determination or calculated in accordance with such procedure as the arbitrator shall specify;
- (b) one Dispute Party should take or not take specified action;
- (c) the meaning of an agreement or a Dispute Party's obligations under that agreement are as stated in the determination; or
- (d) any principal sum the arbitrator may order one Dispute Party to pay to another shall carry interest at such rate and over such period as he shall determine.

*Issue of arbitration award*

- 28 The arbitrator shall send a copy of his award to the Dispute Parties, the CCOS Allocation Chair and the CCOS Secretary.

**Costs**

*Discretion to order payment of Costs*

- 29 Whether or not the arbitration reaches the stage of a final award, the arbitrator may order any Dispute Party to pay some or a specified proportion of any Dispute Party's Costs incurred in the arbitration, assessed in such manner as the arbitrator shall determine. The arbitrator may make such an order without limitation following any interim or final award.

*Joint and several liability of parties to arbitrators for fees and expenses*

- 30 The Dispute Parties are jointly and severally liable to pay the arbitrator's reasonable fees and expenses.

**Confidentiality**

- 31 Subject to the provisions of Rule C and Rules F32, F33 and G69, all Documents produced or disclosed in the course of an arbitration including all awards shall be treated as confidential by the arbitrator, the CCOS Allocation Chair, the CCOS Secretary and all Dispute Parties and shall not be published.
- 32 Unless otherwise agreed by all Dispute Parties, all Documents produced or disclosed in the course of an arbitration including all awards shall only be used:
- (a) for the purposes of the arbitration, including any appeal against the arbitration award, or for judicial review, in respect of the award or any subsequent stages of the determination procedure;
  - (b) for enforcing the arbitration award; or

- (c) in support of a plea of estoppel in any subsequent proceedings.
- 33 The confidentiality obligations under Rule F31 shall not apply to Documents which are:
- (a) agreed in writing by all the Dispute Parties to be disclosed (including in any Underlying Contract between them);
  - (b) made available to the advisers or financial associates of the Dispute Party in question, upon obtaining an undertaking of strict confidentiality from such persons;
  - (c) disclosed on a confidential basis to the ORR or TfL or such other relevant franchising or concessioning authority in the normal course of business; or
  - (d) required to be disclosed pursuant to the order of a court of competent jurisdiction or by any obligations at law (including under the Freedom of Information Act 2000 and the Environmental Information Regulations 2004).

#### **Communications**

- 34 Communications for the purposes of the arbitration may be by telephone or email (or such other means as is appropriate) and where by telephone shall be confirmed in writing wherever possible.

#### **Exclusion of liability**

- 35 None of the CCOS Allocation Chair, the CCOS Secretary or any arbitrator shall be liable to any party for any act or omission (including negligence) in connection with any arbitration under these Rules unless the act or omission is shown to have been in bad faith.

#### **Jurisdiction and governing law**

- 36 Arbitrations (and any issues arising or connected with arbitrations, whether contractual or non-contractual in nature) shall take place in England and be subject to English law.

#### **Interim relief granted by the Court**

- 37 In an appropriate case, a Dispute Party to a dispute which has been or may be submitted to arbitration may apply to the court for interim relief (whether negative or positive), notwithstanding that the relief sought may overlap with the interim relief which is, or may be, claimed in the arbitration.

## **CHAPTER G - DETERMINATIVE PROCESS RULES - ACCESS DISPUTE ADJUDICATION**

- 1 An Access Dispute Adjudication (ADA) under these Rules is a determinative dispute resolution process in which, with the benefit of advice from independent railway CCOS Industry Advisors, a CCOS Hearing Chair determines the dispute in a timely and efficient manner on the basis of the parties' respective legal rights in accordance with the evidence and argument presented to him.

### **Disputes to be decided by ADA**

- 2 Any dispute which is to be submitted to an ADA under these Rules shall proceed according to the Rules of this Chapter G.
- 3 Any ADA under these Rules shall proceed before a CCOS Hearing Chair and a number of CCOS Industry Advisors to be determined by the CCOS Hearing Chair in light of the issues in the dispute and/or its value or complexity. Unless otherwise ordered by the CCOS Hearing Chair the normal number of CCOS Industry Advisors shall be two.
- 4 An ADA shall:
  - (a) provide determinations as an adjudication body with relevant railway expertise;
  - (b) endeavour to reach fair, rapid and inexpensive determinations of disputes drawing on that expertise;
  - (c) where appropriate, take the initiative in ascertaining the facts and law relating to the dispute; and
  - (d) balance the formality required to achieve a fair and efficient process with the accessibility required so that the process is quick and easy to use.
- 5 It is an overriding objective of these Rules that disputes referred to an ADA shall be administered in a way which is proportionate to:
  - (a) the objective importance of the dispute to the Dispute Parties;
  - (b) the complexity of the issues;
  - (c) the significance (if any) of the issues involved to the railway industry; and
  - (d) the scale of any financial claims involved.

Accordingly having regard to Rule G16, the CCOS Hearing Chair shall (where appropriate) adapt the procedures adopted in respect of each dispute to reflect its specific requirements in terms of subject matter, timescales and value.

6 The ADA shall, in the case of unavoidable absence on the day of one CCOS Industry Advisor, be quorate to hear a dispute with all other selected CCOS Industry Advisors and the CCOS Hearing Chair present.

7 **Not used.**

### **Beginning an ADA**

8 An ADA shall commence upon the date identified in Rule B17.

9 The CCOS Secretary shall, on any occasion where the next dispute resolution process provided for in the Procedure Agreement is an ADA stage, appoint a CCOS Hearing Chair appropriate to the dispute.

10 The CCOS Hearing Chair:

- (a) has oversight of the effective case management of a dispute which has been referred to an ADA in light of the Principles;
- (b) has responsibility to ensure that all procedures of the ADA (at and before ADA hearings) are being implemented fairly and effectively in respect of each dispute;
- (c) will review each dispute following submission of statements of case to identify and to itemise in written form for consideration by the ADA all relevant issues of law raised by the dispute a copy which shall be provided promptly to the Dispute Parties;
- (d) will make a final determination of the dispute referred to the ADA and prepare a written determination which is legally sound, appropriate in form, and otherwise compliant with this Chapter G;
- (e) shall ensure that the final determination of the dispute is circulated promptly and (where applicable) in accordance with any mandatory time requirement; and
- (f) may, where reasonable to do so, delegate the performance of any of his functions (with the exception of making the determination of the dispute) in any dispute to the CCOS Secretary: however, such delegation shall not affect the obligations and responsibilities of the CCOS Hearing Chair set out in this Rule.

11 Upon appointment, the CCOS Hearing Chair shall adopt procedures suitable to the circumstances of the case, avoiding unnecessary delay or expense to provide a fair means for the resolution of the matters falling to be determined. The CCOS Hearing Chair may give appropriate directions as to any or all aspects of the procedures to be followed and shall have the power at any time to make or amend the procedure (and the directions) to be followed by the Dispute Parties in the ADA. The directions shall be in accordance with the Principles.



- 12 The directions given under Rule G11 shall expressly require the Dispute Parties to reconsider whether any third parties not already identified and notified to the CCOS Secretary, in accordance with Rule B3(b) or otherwise, may be directly affected by the outcome of the dispute and require the Dispute Parties to notify the CCOS Secretary of the identity of any such parties.
- 13 Provided that such extension has no adverse effect upon the date fixed for an oral hearing, the Dispute Parties may agree an extension of any timescales of up to seven days in respect of any stage. For any period beyond that extension a Dispute Party may seek an order from the CCOS Hearing Chair to provide an extension of time for any of the stages specified in the directions. The CCOS Hearing Chair shall make his decisions on any request for an extension of time based upon the Principles.
- 14 Subject to Rule G15, an ADA shall include an oral hearing which is appropriate in length and content for the just and expeditious determination of the dispute. In relation to disputes referred to under Part J of the CCOS Network Code, the oral hearing shall be fixed by the CCOS Hearing Chair as soon as practicable after his appointment and shall take place, unless exceptional circumstances apply, within 14 days of the completion of service of the Statements of Case referred to in Rule G17(a) to (c) below.
- 15 The Dispute Parties may agree that an ADA shall be conducted on the basis of written representations only. In such a case, nothing in this Rule shall prevent the CCOS Hearing Chair from requiring one or more oral hearings if he considers it appropriate for the just and expeditious determination of the proceedings.
- 16 The ADA process is flexible and may be adapted by the CCOS Hearing Chair to accommodate disputes of differing complexity and size and requiring different levels of evidence. The CCOS Hearing Chair shall therefore actively consider whether variations on the standard directions (which are for a straightforward matter) set out in Rule G17 are appropriate or justified and will have regard to the submissions of the Dispute Parties in this respect.
- 17 Subject to Rule G16, unless the CCOS Hearing Chair directs otherwise (and subject to any Dispute Party's right to apply for alternative or revised directions at all stages), the following timetable and procedure shall apply:
  - (a) within 14 days of the appointment of the CCOS Hearing Chair, the claimant(s) shall serve upon the CCOS Secretary and each other Involved Party, a written statement of its claim in accordance with the template format for a statement of claim (found on the access disputes website) as may be adapted by the CCOS Hearing Chair in respect of a particular dispute. The statement of claim shall include the following:

- (i) names, registered address and any relevant correspondence address (including email address) of the Dispute Parties;
  - (ii) the subject matter of the dispute;
  - (iii) identification of the provision(s) of the Underlying Contract under which the reference is made;
  - (iv) identification of any other provision(s) of the Underlying Contract or other contract(s) which the claimant believes are also relevant to the dispute;
  - (v) a summary of the nature and circumstances of the dispute in sufficient detail for the other Dispute Party to identify the issues raised;
  - (vi) the decision sought from the ADA;
  - (vii) the remedy claimed;
  - (viii) an authorised signature of the referring party; and
  - (ix) copies of the following Documents which shall be annexed and cross referenced to the statement:
    - (A) the relevant extracts of contractual Documents containing the provision(s) under which the referral to the ADA arises and/or provision(s) associated with the substance of the dispute; and
    - (B) any other Documents referred to in the reference;
- (b) subject to Rule 17(h), within 14 days of service by the claimant of the statement of its claim, the other Dispute Party(s) shall serve upon each other Involved Party a written statement of its defence. The statement of defence shall be in accordance with the template format for a statement of defence (found on the access disputes website) as may be adapted by the CCOS Hearing Chair in respect of a particular dispute and shall include the following:
- (i) a schedule identifying those parts of the statement of claim that it agrees with and those that it disagrees with;
  - (ii) the reasons for any disagreement including any further references to provisions of the Underlying Contract or other contract(s) not dealt with in the reference;
  - (iii) details of any other related claim;
  - (iv) the decision (and, if relevant) any remedy sought from the ADA;

- (v) an authorised signature of the responding party; and
- (vi) copies of the following Documents which shall be annexed and cross referenced to the response if not dealt with in the statement of claim:
  - (A) the relevant extracts of contractual Documents containing the provision(s) under which the referral to the ADA arises and/or provision(s) associated with the substance of the dispute; and
  - (B) any other Documents referred to in the defence;
- (c) the claimant(s) may within seven days of the service by the respondent of its statement of defence, serve upon each Involved Party a reply limited to responding to new matters and contentions of law raised in the statement of defence and any counterclaim or related claim raised;
- (d) following service of the reply, the CCOS Secretary shall write to all Dispute Parties to inform them that a hearing date will be set in accordance with (e) below and to inquire whether any Dispute Party intends to make an application for alternative or varied directions and/or a directions hearing at this stage;
- (e) except in relation to a dispute arising under Part J of the CCOS Network Code (which shall be addressed in accordance with paragraph (h) below), before the date 14 days after the statements of case referred to in paragraphs (a)-(c) have been finalised, the CCOS Secretary shall agree with the CCOS Hearing Chair and the Dispute Parties a hearing date and the estimated length of the hearing. If a date cannot be agreed with one or more Dispute Parties the CCOS Hearing Chair shall determine the hearing date. Unless the Dispute Parties agree otherwise, or the CCOS Hearing Chair determines otherwise having due regard to Rule G16, the hearing date shall be within 35 days of the date on which it is agreed or determined in accordance with this Rule. Upon agreement or determination of a hearing date, the CCOS Secretary shall write to all Involved Parties to confirm the date to them;
- (f) the CCOS Hearing Chair may raise any questions relating to the dispute he wishes in advance of the hearing. In particular the CCOS Hearing Chair shall consider whether any additional third party should be or should have been notified of the dispute subsequent to Rule B3(b) or otherwise and may ask the Dispute Parties to justify their decision not to notify any such party. If any CCOS Industry Advisor or assessor raises a question, the CCOS Hearing Chair may in his absolute discretion refer such question to the Dispute Parties;

- (g) at least seven days before the hearing, each Dispute Party shall serve on all other Involved Parties its written submissions for the hearing and any additional information or responses to questions requested by the CCOS Hearing Chair; and
  - (h) for disputes referred under Part J of the CCOS Network Code the timeframes set out in Rules G17(a) and G17(b) shall be reduced by 7 days.
- 18 At any stage prior to the date on which the CCOS Secretary writes to inform the Involved Parties of the date of the hearing, in accordance with Rule G17(e) or otherwise, any third party made aware of the dispute subsequent to Rule B3(b) or otherwise can by notification to the CCOS Secretary request to become a claimant, defendant or an Involved Party in the dispute. Any person who would be an Involved Party but who has not requested to become a claimant, defendant or an Involved Party in the dispute by this point shall cease to be an Involved Party.
- 19 Any third party which has not been made aware of the dispute subsequent to Rule B3(b) or otherwise can by notification to the CCOS Secretary request to become a claimant, defendant or an Involved Party in the dispute at any stage prior to the final hearing. Unless the request seems to him vexatious or frivolous (in which case he shall request that the CCOS Hearing Chair determine appropriate directions) upon receiving such a request, the CCOS Secretary shall send copies of the Notice of Dispute and all statements of case to the third party making the request subject to a requirement that that party keep such documents confidential.
- 20 Any request to become a claimant, defendant or third party in accordance with Rule G18 or G19 shall be considered and determined by the CCOS Hearing Chair having considered such submissions and evidence as he shall request. In making his decision the CCOS Hearing Chair shall take into account the Principles, the wider interests of the industry, the balance of interests between all relevant parties and such other matters as appear to him to be relevant.

*References to the ORR*

- 21 The CCOS Hearing Chair may, on the application of any Dispute Party or on his own motion, elect to refer any issue or issues to which Rule C3 applies, to the ORR in accordance with Chapter C of these Rules. Before making any such reference the CCOS Hearing Chair shall:
- (a) seek submissions from all Dispute Parties on whether a reference should be made and if so the wording of such a reference; and
  - (b) determine the wording of any reference to be made with due regard to such submissions.

### **Length of References, Responses and Joint References and method of service**

- 22 The length of every Statement of Case shall be in proportion to the nature and complexity of the dispute. Unless otherwise agreed by the CCOS Hearing Chair the maximum length of submissions shall be as follows:
- (a) a statement of claim or defence shall be no longer than 20 pages; and
  - (b) a reply shall be no longer than 10 pages.
- 23 The normal method of service shall be electronic to the CCOS Secretary and other Involved Parties.

### **Directions Hearing**

- 24 The CCOS Hearing Chair, if necessary, may at any time (on his own motion or that of any Dispute Party) require the Dispute Parties to participate in a directions hearing to decide, after hearing representations from the Dispute Parties, any issues relating to the procedures adopted for the dispute including:
- (a) whether further or additional third parties should be notified of the dispute;
  - (b) the procedures most appropriate to the dispute;
  - (c) the nature of the issues in dispute;
  - (d) whether any matters are to be referred to the ORR under Rule G21 or otherwise;
  - (e) an outline timetable;
  - (f) the process and details of the preparation, submission and amendments of Statements of Case;
  - (g) whether any Document disclosure procedures shall take place;
  - (h) whether the Dispute Parties shall be permitted to bring expert evidence and, if so, the details of such expert evidence;
  - (i) the basis and timings for which witness evidence (if any) is to be prepared and exchanged; and/or
  - (j) the appointment by the ADA of assessors.

### **Documents**

- 25 Although Documents reasonably requested should be provided in compliance with the directions specified at Rule G17, disclosure will not ordinarily be ordered. However the CCOS Hearing Chair, whether or not on

the application of any Dispute Party and having due regard to Rule G16, has the power to:

- (a) order any Dispute Party to provide by way of formal disclosure and inspection, documents which it controls and which are relevant to the dispute; and
- (b) specify the formalities, detail and timings involved.

The CCOS Hearing Chair shall exercise this power in accordance with the Principles.

- 26 No Dispute Party shall be obliged to produce any document which would be privileged from production in any proceedings in an action in the courts.
- 27 Requests and applications to the CCOS Hearing Chair for disclosure may be made at any stage of the dispute but (whenever practicable) should be made at the time of or shortly following submission of the relevant Statement of Case giving rise to the request. The timing of any request (by reference to the date when it could first reasonably have been made) may be taken into account by the CCOS Hearing Chair when considering a request.
- 28 Without prejudice to any other action open to the CCOS Hearing Chair, the CCOS Hearing Chair shall be entitled to draw any inference he wishes from any failure to provide adequate or full disclosure by any Dispute Party or disclosure in accordance with the terms of directions given by him.
- 29 When considering a request for disclosure, the CCOS Hearing Chair will consider the commercial sensitivity of the information requested and may exercise his discretion not to grant full disclosure.

#### **Witness evidence**

- 30 Subject to any alternative direction from the CCOS Hearing Chair, a Dispute Party may rely on any witness evidence it believes to be relevant in its Statements of Case and at any ADA hearing provided that either a witness summary or a witness statement has been served on all other Involved Parties at least seven days before the hearing.
- 31 A witness summary shall identify in overview the issues on which the witness will give evidence and a summary of the evidence he will give in respect of each such issue. Witness summaries shall be signed by the witness.
- 32 Written witness statements will not normally be required. However if the CCOS Hearing Chair permits or requires witness statements to be submitted he shall specify the formalities, detail and timings involved.

## **Experts**

- 33 A Dispute Party can rely, as of right, upon expert evidence completed prior to the date of the reference. Where a Dispute Party wishes to exercise this right it shall attach such evidence to its first Statement of Case and the other Dispute Parties shall be entitled to a direction that they may commission expert reports responding to the particular issues covered by such evidence.
- 34 When considering whether and to what extent to permit the Dispute Parties to commission further expert reports, the CCOS Hearing Chair shall consider what evidence is reasonably required to determine the dispute, the Principles and Rule G16.
- 35 The reports of experts shall state:
- (a) the full remit against which the report has been prepared;
  - (b) the identity, qualifications and experience of the person(s) preparing the report;
  - (c) the extent (if any) to which the expert has previously been involved in the subject matter of the dispute and current or recent professional connections with any of the Dispute Parties.
- 36 At any hearing the CCOS Hearing Chair, CCOS Industry Advisors, or any assessor appointed, may address questions directly to any experts.
- 37 The CCOS Hearing Chair shall determine in accordance with the specific requirements of the dispute whether the expert evidence is dealt with either by consideration of reports only or by the attendance and examination of one or more of the experts to answer questions upon their reports, by telephone, conferencing facilities or by any other means.

## **Assessors**

- 38 The CCOS Hearing Chair may appoint one or more assessors to facilitate the determination of a dispute. Any such assessor may be (without limitation):
- (a) a technical assessor with a specific area of expertise relevant to one or more issues in the dispute; and/or
  - (b) a legal assessor.
- 39 Assessors may help undertake the procedural management of the dispute and prepare such report(s) and guidance on such issues as the CCOS Hearing Chair may direct.
- 40 The CCOS Hearing Chair shall provide to the Dispute Parties the terms of reference, qualifications and experience of any assessor appointed and a summary of his advice.

- 41 The CCOS Hearing Chair shall not be bound by the views of an assessor but shall be required to explain his reasons for disagreeing with those views.

### **Hearing Conduct**

- 42 The hearing will be chaired by the CCOS Hearing Chair.
- 43 Subject to any contrary direction of the CCOS Hearing Chair with due regard to Rule G16, the following procedure will be adopted at hearings:
- (a) the CCOS Hearing Chair, CCOS Industry Advisors and any assessor will meet in the absence of the Dispute Parties to discuss issues arising from the papers submitted by the Dispute Parties;
  - (b) the CCOS Hearing Chair, CCOS Industry Advisors and any assessor will confirm to the Dispute Parties the extent to which they have read the papers submitted by the Dispute Parties;
  - (c) the claimant's representative will make an opening submission of its case of not longer than 10 minutes, referring if necessary to witness or expert evidence which the claimant wishes the CCOS Hearing Chair and CCOS Industry Advisors to consider;
  - (d) the respondent's representative will also make any opening submission of its response and/or counterclaim of not longer than 10 minutes, referring if necessary to additional witness or expert evidence which the respondent wishes the ADA to consider;
  - (e) if a written witness statement has been provided, the witness will not be required to read out his statement unless the CCOS Hearing Chair decides otherwise. If any witness summary has been provided the CCOS Hearing Chair shall direct how the evidence shall be admitted and may require the witness to provide his evidence in full orally before cross examination;
  - (f) if expert evidence is used, the expert will not be required to read out his report unless the CCOS Hearing Chair decides otherwise;
  - (g) the CCOS Hearing Chair and CCOS Industry Advisors and any assessor may put any relevant questions to the representatives, witness(es) and expert(s);
  - (h) Dispute Parties may put questions to any witness(es) or expert(s) in their capacity as witnesses or experts, and when any representative is acting as a witness he shall make that clear; and
  - (i) at the conclusion of questions, representatives may make closing submissions of not more than 10 minutes.
- 44 The hearing shall be conducted with the Dispute Parties present. Following conclusion of the submissions, the Dispute Parties will withdraw to allow the



CCOS Hearing Chair and CCOS Industry Advisors to consider the evidence and arguments with any assessor. The Dispute Parties shall remain available to allow the CCOS Hearing Chair, CCOS Industry Advisors and any assessor to put any additional questions.

- 45 The CCOS Secretary will unless otherwise directed by the CCOS Hearing Chair make a full note of the evidence given to the ADA. The CCOS Hearing Chair may in his discretion direct in advance that a full transcript is taken.
- 46 The CCOS Hearing Chair may, subject to any specified requirements of the Access Conditions or Underlying Contract and legal requirement, reserve his determination until a later date.

### **Determinations**

- 47 Having considered the submissions of the parties and the advice of the CCOS Industry Advisors and any assessor the CCOS Hearing Chair shall make a determination of the dispute in accordance with Rule G48.
- 48 Subject to any other provision of the Access Conditions and Underlying Contract, the CCOS Hearing Chair may make such orders in his determination as he considers necessary to resolve the dispute including, without limitation, that:
  - (a) one Dispute Party shall pay an amount of money (including damages) to another Dispute Party, whether that amount is specified in the determination or calculated in accordance with such procedure as the CCOS Hearing Chair shall specify;
  - (b) one Dispute Party should take or not take specified action;
  - (c) the meaning of an agreement or a Dispute Party's obligations under that agreement are as stated in the determination; or
  - (d) any principal sum the CCOS Hearing Chair may order one Dispute Party to pay to another shall carry interest at such rate and over such period as he shall determine.
- 49 The CCOS Hearing Chair's determination of a dispute shall be in writing and comprise:
  - (a) the date of the hearing;
  - (b) the names of the CCOS Hearing Chair and CCOS Industry Advisors and any assessors present;
  - (c) details of all Dispute Parties (including interested parties);
  - (d) details of the attendance and status of all witnesses and interested parties;

- (e) a brief summary of the dispute;
- (f) an identification of the issues of fact and law considered by the CCOS Hearing Chair;
- (g) a summary of the evidence presented;
- (h) the findings of fact made by the CCOS Hearing Chair;
- (i) identification of any applicable precedents considered relating to the CCOS;
- (j) the decisions and conclusions reached, distinguishing clearly between:
  - (i) decisions upon legal entitlement;
  - (ii) decisions upon remedy;
  - (iii) guidance to the Dispute Parties or other observations not forming part of a decision upon either legal entitlement or upon remedy;
- (k) the reasons for those decisions and conclusions (including any relevant legal principles or rules of law applied); and
- (l) the signed and dated confirmation of the CCOS Hearing Chair that the determination is legally sound and appropriate in form.

50 The CCOS Hearing Chair shall provide a copy of his written reasoned determination to all the Dispute Parties. Where a dispute has arisen in connection with Condition J8.14.1 of the CCOS Network Code, the CCOS Hearing Chair shall deliver his reasoned written determination within ten working days of final submission to the ADA of all relevant information.

51 Except as otherwise provided in the Underlying Contract and without prejudice to Rule G68, the Dispute Parties shall comply with the terms of the determination within such period as shall be specified in the determination.

52 If a Dispute Party fails to comply with the terms of the determination, that failure will be dealt with by way of a new dispute through the appropriate mechanism.

**Costs**

53 Any fees and expenses, including costs of any assessors and transcription services relating to the period up to and including the first day of any ADA, shall not be charged to the Dispute Parties. The Dispute Parties at the time of the ADA are jointly and severally liable to pay the reasonable fees and expenses connected with the ADA relating to the period after the first day of

the hearing. Subject to Rule G54, the Dispute Parties shall pay such fees in equal proportions.

- 54 The CCOS Hearing Chair shall have power to order one or more Dispute Party to meet part or all of the Costs or expenses of the ADA and of any other Dispute Party, assessed by such means as the CCOS Hearing Chair shall determine. Any such order shall be made with due regard to the Principles and to the provisions of these Rules including in particular Rule A16(d).
- 55 An order for costs shall only be made where the CCOS Hearing Chair is satisfied that either:
- (a) the case of the relevant Dispute Party shall have been so lacking in merit that the reference should not have been made (or defended); or
  - (b) the conduct of the relevant Dispute Party before or during the references was such as to justify an award of costs being made against it (or them).
- 56 The CCOS Hearing Chair may make such an order at any stage including following any interim or final award.

### **Confidentiality**

- 57 Subject to Rules G58, G60 and G61, and unless otherwise agreed by all Dispute Parties, all Documents produced or disclosed in the course of an ADA including the determination shall be treated as confidential by the CCOS Hearing Chair, Panel Members, the CCOS Allocation Chair, the CCOS Secretary and all Involved Parties and shall only be used:
- (a) for the purposes of the ADA, including any appeal or further stage in the determination procedure;
  - (b) for enforcing the ADA determination; or
  - (c) in support of a plea of estoppel in any subsequent proceedings.
- 58 The confidentiality obligations under Rule G57 shall not apply to Documents which are:
- (a) agreed in writing by all Dispute Parties to be disclosed (including in any Underlying Contract between them);
  - (b) made available to the advisers or financial associates of the Dispute Party in question, upon obtaining an undertaking of strict confidentiality from such persons;
  - (c) disclosed on a confidential basis to the ORR or TfL or such other relevant franchising or concessioning authority in the normal course of business;

- (d) disclosed pursuant to Rule G60 or G61; or
  - (e) required to be disclosed pursuant to the order of a court of competent jurisdiction or by any obligations at law (including under the Freedom of Information Act 2000 and the Environmental Information Regulations 2004).
- 59 Within seven days of its receipt of the determination (or such longer period as the CCOS Hearing Chair shall allow), any Dispute Party may give notice to the CCOS Hearing Chair and the other Dispute Party:
- (a) that it objects to the publishing of all or some of the Documents specified in Rule G60;
  - (b) whether it considers that the CCOS Hearing Chair should exercise his discretion to exclude from publication any part of the determination which relates to its affairs; and
  - (c) if confidentiality is sought, its justification for considering that the grounds referred to in Rule G62 do not exist.
- 60 If no notice under Rule G59 is given within the time specified in that Rule, the CCOS Secretary shall publish the following Documents on the access disputes website:
- (a) each finalised Statement of Case (including all exhibits and attachments to such Statements of Case);
  - (b) each request from the CCOS Hearing Chair for further information and all responses to such requests;
  - (c) all written submissions from all Dispute Parties; and
  - (d) all awards and/or determinations from the CCOS Hearing Chair.
- 61 If any Dispute Party serves a notice in accordance with Rule G59, the CCOS Hearing Chair shall be entitled to hear the Dispute Parties on the question of confidentiality and determine which Documents shall be published and/or whether any aspects of such Documents should be made illegible or excluded prior to publishing. If any such representations shall have been made to him, unless the Dispute Parties otherwise agree the CCOS Hearing Chair shall provide the Dispute Parties with his reasons for making his determination on confidentiality. Such reasons shall be given in writing but shall not be published on the access disputes website.
- 62 There is a presumption that the documents identified in Rule G58 shall be published provided that:
- (a) publication will not, in the CCOS Hearing Chair's reasonable opinion, result in any material adverse effect on the Dispute Party or Dispute Parties objecting to publication; and

- (b) the determination contains a finding or findings of wider railway industry significance; and
- (c) it is just in all the circumstances to decline the objection from the objecting Dispute Party.

63 Documents including the determination produced or disclosed in the course of an ADA in connection with Part J of the CCOS Network Code shall, subject to any obligations at law (including under the Freedom of Information Act 2000 and the Environmental Information Regulations 2004) be kept confidential and such Documents shall not be published on the access disputes website.

### **Communications**

64 Communications for the purposes of the ADA may be by telephone or email (or such other means as are appropriate) and where by telephone shall be confirmed in writing wherever possible.

### **Exclusion of liability**

65 None of the CCOS Allocation Chair, the CCOS Secretary, the CCOS Hearing Chair or any CCOS Industry Advisor shall be liable to any party for any act or omission (including negligence) in connection with any ADA under these Rules unless the act or omission is shown to have been in bad faith.

### **Jurisdiction and governing law**

66 ADAs (and any issues arising or connected with ADAs, whether contractual or non-contractual in nature) shall take place in England and be subject to English law.

### **Interlocutory relief granted by the Court**

67 In an appropriate case, a Dispute Party to a dispute which has been or may be submitted to ADA may apply to the court for interlocutory relief (whether negative or positive), notwithstanding that the relief sought may overlap with the relief which is, or may be, claimed in the ADA.

### **Appeal**

68 Following a determination of a dispute by the CCOS Hearing Chair, any Dispute Party is entitled to appeal in accordance with any relevant provisions in the Procedure Agreement. If the Procedure Agreement is silent in respect of a right of appeal then each Dispute Party shall have a right of appeal to arbitration in accordance with these Rules.

69 Any further dispute resolution process to which an appeal is made in accordance with Rule G68, shall be subject to the confidentiality provisions set out in Rules G57 - G62 as if all Documents disclosed and prepared in

relation to that further dispute resolution process had been prepared in respect of an ADA.

- 70 If any further dispute resolution process is provided for in the Procedure Agreement or if a right to appeal to arbitration exists in accordance with Rule G68 then any Dispute Party which wishes to refer the dispute to the next stage of the determination procedure (in accordance with the Procedure Agreement) shall notify the CCOS Secretary of its intention to refer. Any such notification shall be copied to all Dispute Parties. If no Dispute Party notifies the CCOS Secretary of its intention to refer the matter to such further dispute resolution process within 28 days of the determination of the CCOS Hearing Chair, that determination shall be deemed to have been accepted by all Dispute Parties.

## **CHAPTER H - DETERMINATIVE PROCESS RULES - TIMETABLING PANEL**

### **Purpose**

- 1 The purpose of a Timetabling Panel is to determine disputes referred to it by parties to an Access Contract which incorporates Part D of the CCOS Network Code which arise out of or in connection with issues of timetabling, timetable change and the allocation of capacity including Restrictions of Use (as defined in Part A of the CCOS Network Code) and Train Slots, in:
  - (a) such an Access Contract; or
  - (b) the Access Conditions incorporated by reference in the Access Contract in question.

### **The Timetabling Pool**

- 2 The Committee shall establish (and have administered by the CCOS Secretary) a pool of panel members for the TTP called the Timetabling Pool. The Timetabling Pool shall be primarily made up of individuals with expertise and experience in train services planning and the timetabling development process including the allocation of capacity which will allow them to understand and advise CCOS Hearing Chairs upon Timetabling Disputes.
- 3 Individual members of the Timetabling Pool shall be appointed as follows:
  - (a) two members appointed on behalf of all Access Beneficiaries on the CCOS from time to time; and
  - (b) two members appointed by RfL(I).
- 4 If the number of individuals nominated for appointment under Rule H3(a) exceeds the number specified then an election shall be held. Each Access Beneficiary shall have a number of votes equivalent to the number of Firm Rights to Train Slots on the CCOS which it holds on an average week and the two individuals receiving the highest number of votes shall be appointed to the Timetabling Pool.
- 5 Individual members of the Timetabling Pool shall commit to:
  - (a) sit on any Timetabling Panel when requested to do so by the CCOS Secretary subject only to diary commitments; and
  - (b) hear disputes impartially in accordance with the Principles.

## **Disputes to be decided by a Timetabling Panel**

- 6 Subject to Rules H7 and H 8, any dispute which is to be submitted to a Timetabling Panel under these Rules shall proceed according to this Chapter H.
- 7 Following service upon the CCOS Secretary of the Notice of Dispute in relation to a Timetabling Dispute in accordance with Rule B2, any Involved Party may apply to the CCOS Hearing Chair for a ruling that:
  - (a) the dispute is not a Timetabling Dispute and should be referred to allocation in accordance with Rule B9; and/or
  - (b) some aspects of the dispute or issues raised by the dispute are not matters of timetabling, timetable change and/or capacity allocation and are not properly resolved by a Timetabling Panel and consequently should be reserved for determination by another dispute resolution process.

Any such application shall give the reasons relied upon by the applicant in support of the application and be made as soon as possible after the applicant has become aware that a Timetabling Dispute has been notified to the CCOS Secretary.

- 8 Upon an application being made in accordance with Rule H7 the CCOS Hearing Chair may give such directions as he determines are appropriate to resolve the application and, where appropriate, to remit the dispute or aspects of the dispute to allocation in accordance with Chapter B. Such directions may include, as appropriate, a direction on whether aspects of the dispute which are not referred to a Timetabling Panel should be resolved concurrently or sequentially with any TTP process.
- 9 In taking his decision in accordance with Rule H8 the CCOS Hearing Chair shall have regard to the following:
  - (a) there is a presumption that disputes for which a Timetabling Panel is identified in the relevant provisions of the Underlying Contract as the body to determine disputes are Timetabling Disputes and should be resolved in accordance with this Chapter H. Consequently the CCOS Hearing Chair shall not allocate a dispute ostensibly falling within such a provision other than to a Timetabling Panel without first inviting written representations from the Involved Parties on his intention to do so and giving proper consideration to any representations made;
  - (b) any determination which may affect the production of the railway operational timetable must be made within the necessary timescales to allow that timetable to be published; and
  - (c) RfL(I) may only make adjustments to a timetable which affects train slots allocated to a train operator who is not a Dispute Party, with



the assent of all affected parties, or to give effect to a decision of a Timetabling Panel or the ORR.

### **TTP Process**

- 10 The TTP process in respect of a dispute shall commence upon the receipt by the CCOS Secretary of the Notice of Dispute in relation to a Timetabling Dispute in accordance with Rule B2.
- 11 Upon commencement of the TTP process in respect of any dispute, the CCOS Secretary shall appoint a Timetabling Panel in accordance with Rule H12 and send to all the Dispute Parties, and publish upon the access disputes website, a notice of the appointment of a Timetabling Panel. This notice shall contain sufficient information regarding the matter under dispute that any other Resolution Service Party will be able to determine whether or not it should seek to be recognised as a Dispute Party. The CCOS Secretary shall also give the Dispute Parties notice of the CCOS Hearing Chair who has been appointed.
- 12 A Timetabling Panel shall:
  - (a) be appointed by the CCOS Secretary;
  - (b) consist of a CCOS Hearing Chair and include at least:
    - (i) one member of the Timetabling Pool representative of the infrastructure manager of the CCOS; and
    - (ii) one member of the Timetabling Pool representative of Access Beneficiaries on the CCOS.
- 13 The CCOS Secretary shall appoint each Timetabling Panel in a manner that:
  - (a) is in accordance with the Principles as set out in Rules A5 - A10 of those Rules and this Chapter H;
  - (b) over time rotates (as evenly as is reasonably achievable given inevitably differing levels of other commitments of individuals) the individuals from the Timetabling Pool hearing disputes subject to any preferences as to the utilisation of their own employees expressed by any organisation which employs two or more such individuals; and
  - (c) is in accordance with any further guidance issued to the CCOS Secretary by the Committee.
- 14 A Timetabling Panel shall:
  - (a) provide determinations on the basis of the expertise of a knowledgeable peer group with relevant railway expertise;

- (b) endeavour to reach fair, rapid and inexpensive determinations of disputes drawing on that expertise; and
  - (c) where appropriate, take the initiative in ascertaining the facts and law relating to the dispute.
- 15 Members of the Timetabling Pool are chosen because of their particular railway expertise as described at Rule H2. They shall exercise their functions impartially and not on behalf of any specific organisation or type of railway operations.
- 16 It is an overriding objective of these Rules that disputes referred to a Timetabling Panel shall be administered in a way which is proportionate to:
- (a) the objective importance of the dispute to the Dispute Parties;
  - (b) the complexity of the issues;
  - (c) the significance (if any) of the issues involved to the railway industry; and
  - (d) the need to ensure that the production processes for the railway operational timetable are not disrupted to the potential detriment of third parties.

Accordingly, the CCOS Hearing Chair shall (where appropriate) adapt the procedures adopted in respect of each dispute to reflect its specific requirements in terms of subject matter, timescales and significance. All procedures adopted must reflect the Principles and this Chapter H.

- 17 The Timetabling Panel shall, in the case of absence on the day of one member (unless it is the CCOS Hearing Chair), be quorate to hear a dispute with any ~~one~~<sup>two</sup> of the ~~two~~<sup>three</sup> selected members of the Timetabling Pool present.
- 18 The CCOS Hearing Chair:
- (a) has oversight of the effective case management of a dispute which has been referred to a Timetabling Panel;
  - (b) has responsibility to ensure that all procedures of the Timetabling Panel (at, before and after TTP hearings) are being implemented fairly and effectively in respect of each dispute;
  - (c) will review each dispute following submission of Statements of Case to identify and to itemise in written form for consideration by the other Panel Members all relevant issues of law raised by the dispute, a copy which shall be provided promptly to the Dispute Parties;
  - (d) will make a final determination of the dispute referred to a Timetabling Panel and prepare a written determination which is

legally sound, appropriate in form, and otherwise compliant with this Chapter H; and

- (e) may, where reasonable to do so, delegate the performance of any of his functions (with the exception of making the determination of the dispute and acting as CCOS Hearing Chair at any hearing) in any dispute to the CCOS Secretary: however, such delegation shall not affect the obligations and responsibilities of the CCOS Hearing Chair set out in this Chapter H.
- 19 Any Resolution Service Party can by notification to the CCOS Secretary at any stage become a Dispute Party if it fulfils the definition of a Dispute Party, provided that the prior consent of the CCOS Hearing Chair is obtained in order for such a Resolution Service Party to become a Dispute Party if such notification is made after any directions hearing pursuant to Rule H25.
- 20 Upon appointment the CCOS Hearing Chair may give directions as to any or all aspects of the procedures to be followed. The CCOS Hearing Chair shall have the power at any time to make or amend the procedure to be followed by the parties in the TTP. The directions shall be in accordance with the Principles and this Chapter H and with any mandatory time requirements.
- 21 Unless the CCOS Hearing Chair directs otherwise (and subject to each Dispute Party's right to apply for alternative or revised directions at all stages), the following timetable and procedure shall apply:
- (a) if the Dispute Parties agree to submit a joint reference they shall, within 14 days of notification of the appointment of the CCOS Hearing Chair, submit a joint reference in accordance with the template format for a joint reference (found on the access disputes website) as may be adapted by the CCOS Hearing Chair in respect of a particular dispute;
  - (b) if the Dispute Parties do not agree to submit a joint reference in accordance with sub-paragraph (a) above:
    - (i) each claimant shall within seven days of notification of the appointment of the CCOS Hearing Chair produce and serve upon all Involved Parties a sole reference which shall include:
      - (A) names, registered address and any relevant correspondence address (including email address) of the Dispute Parties;
      - (B) the subject matter of the dispute;
      - (C) identification of the provision(s) of the Access Conditions or any Underlying Contract under which the reference is made;

- (D) identification of any other provision(s) of the Access Conditions or any Underlying Contract which the claimant believes are also relevant to the dispute;
- (E) a summary of the nature and circumstances of the dispute in sufficient detail for the other Dispute Party or Resolution Service Parties to identify the issues and whether they are likely to be materially affected;
- (F) the decision sought;
- (G) the remedy claimed;
- (H) an authorised signature of the referring party; and
- (I) copies of the following Documents which shall be annexed and cross referenced to the reference:
  - 1) the relevant extracts of contractual Documents containing the provision(s) under which the referral to the Timetabling Panel arises and/or provision(s) associated with the substance of the dispute; and
  - 2) any other Documents referred to in the reference,

and which shall be in accordance with the template format for a sole reference (found on the access disputes website) as may be adapted by the CCOS Hearing Chair in respect of a particular dispute;

- (ii) each defendant shall, within seven days of service on it of such sole reference, produce and serve upon all Involved Parties a response which shall include:
  - (A) a schedule identifying those parts of the reference that it agrees with and those that it disagrees with;
  - (B) the reasons for any disagreement including any further references to provisions of the Access Conditions and Underlying Contracts not dealt with in the reference;
  - (C) details of any other related claim;
  - (D) the decision and, (if relevant) any remedy sought from the CCOS Hearing Chair;
  - (E) an authorised signature of the responding party; and

(F) copies of the following Documents which shall be annexed and cross referenced to the response if not dealt with in the reference:

- 1) the relevant extracts of contractual Documents containing the provision(s) under which the referral to Timetabling Panel arises and/or provision(s) associated with the substance of the dispute; and
- 2) any other Documents referred to in the response,

and which shall be in accordance with the template format for a response (found on the access disputes website) as may be adapted by the CCOS Hearing Chair in respect of a particular dispute.

(c) the Dispute Parties shall send any additional information requested by the CCOS Hearing Chair, unless directed otherwise, to the CCOS Secretary not later than seven days prior to the hearing; and

(d) an oral hearing lasting no more than one day shall be conducted.

22 Provided that such extension has no adverse effect upon the date fixed for an oral hearing, the Dispute Parties may agree an extension of any timescales of up to seven days in respect of any stage. For any period beyond that extension, a Dispute Party may seek an order from the CCOS Hearing Chair for an extension of time for any of the stages specified in the directions. The CCOS Hearing Chair shall make his decisions on any request for an extension of time based upon the Principles and this Chapter H.

#### **Length of References, Responses and Joint References and method of service**

23 The length of every reference and response shall be in proportion to the nature and complexity of the dispute. Unless otherwise agreed by the CCOS Hearing Chair, the maximum length of submissions shall be as follows:

- (a) a joint reference shall be no longer than 20 pages; and
- (b) a sole reference or response shall be no longer than 10 pages.

24 The normal method of service shall be electronic to the CCOS Secretary and other Dispute Parties.

#### **Directions Hearing**

25 The CCOS Hearing Chair, may at any time (on his own motion or that of any Dispute Party) require the Dispute Parties to participate in a directions

hearing to decide, after hearing representations from the Dispute Parties, any issues relating to the procedures adopted for the dispute including:

- (a) the procedures most appropriate to the dispute, subject to compliance with the Principles and this Chapter H;
- (b) the nature of the issues in dispute;
- (c) an outline timetable;
- (d) the process and details of the preparation, submission and amendments of Statements of Case;
- (e) whether any Document disclosure procedures shall be required to take place;
- (f) the basis and timing in which witness evidence, if any, is to be prepared and exchanged; and/or
- (g) the appointment by the CCOS Hearing Chair of assessors.

### **Documents**

- 26 Although Documents reasonably requested should be provided in compliance with the directions specified at Rule H21, disclosure will not ordinarily be ordered. However, the CCOS Hearing Chair, whether or not on the application of any Dispute Party, has the power to:
- (a) order any Dispute Party to provide by way of formal disclosure and inspection, Documents which it controls and which are relevant to the dispute; and
  - (b) specify the formalities, detail and timings involved.
- 27 The CCOS Hearing Chair shall exercise this power in accordance with the Principles and this Chapter H.
- 28 No Dispute Party shall be obliged to produce any Document which would be privileged from production in any proceedings in an action in the courts.
- 29 Requests and applications to the CCOS Hearing Chair for disclosure may be made at any stage of the dispute but (whenever practicable) should be made at the time of or shortly following submission of the relevant joint reference or sole reference or response giving rise to the request. The timing of any request (by reference to the date when it could first reasonably have been made) may be taken into account by the CCOS Hearing Chair when considering a request.
- 30 Without prejudice to any other action open to the CCOS Hearing Chair, the CCOS Hearing Chair shall be entitled to draw any inference he wishes from any failure to provide adequate or full disclosure by any Dispute Party or disclosure in accordance with the terms of directions given by him.

- 31 When considering a request for disclosure, the CCOS Hearing Chair will consider the commercial sensitivity of the information requested and may exercise his discretion not to grant full disclosure.

### **Witness evidence**

- 32 Subject to any alternative direction from the CCOS Hearing Chair, a Dispute Party may rely on any witness evidence it believes to be relevant in its Statements of Case and at any TTP hearing provided that either a witness summary or a witness statement has been served on all other Involved Parties at least seven days before the hearing.
- 33 A witness summary shall identify in overview the issues on which the witness will give evidence and a summary of the evidence he will give in respect of each such issue. Witness summaries shall be signed by the witness.
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- (a) a technical assessor with a specific area of expertise relevant to one or more issues in the dispute; and/or
  - (b) a legal assessor.
- 36 Assessors may help undertake the procedural management of the dispute and prepare such report(s) and guidance on such issues as the CCOS Hearing Chair may direct.
- 37 The CCOS Hearing Chair shall provide to the Dispute Parties the terms of reference, qualifications and experience of any assessor appointed and a summary of his advice.
- 38 The CCOS Hearing Chair shall not be bound by the views of an assessor but shall be required to explain his reasons for disagreeing with those views.

### **Experts**

- 39 A Dispute Party can rely, as of right, upon expert evidence completed prior to the date of the reference. Where a Dispute Party wishes to exercise this right it shall attach such evidence to its first Statement of Case and the other Dispute Parties shall be entitled to a direction that they may commission expert reports responding to the particular issues covered by such evidence.

- 40 When considering whether and to what extent to permit the Dispute Parties to commission further expert reports, the CCOS Hearing Chair shall consider what evidence is reasonably required to determine the dispute, the Principles and this Chapter H.
- 41 The reports of experts shall state:
- (a) the full remit against which the report has been prepared;
  - (b) the identity, qualifications and experience of the person(s) preparing the report;
  - (c) the extent (if any) to which the expert has previously been involved in the subject matter of the dispute and current or recent professional connections with any of the Dispute Parties.
- 42 At any hearing the CCOS Hearing Chair, other Panel Members, and/or any assessor appointed, may address questions directly to any experts.
- 43 The CCOS Hearing Chair shall determine in accordance with the specific requirements of the dispute whether the expert evidence is dealt with either by consideration of reports only or by the attendance and examination of one or more of the experts to answer questions upon their reports, by telephone, conferencing facilities or by any other means.

### **Hearing Conduct**

- 44 The hearing will be chaired by the CCOS Hearing Chair who may, in his absolute discretion, make any order in respect of procedure at the hearing which he considers appropriate including whether to admit additional evidence (including oral evidence) from any Dispute Party and the degree to which weight should be given to such additional evidence.
- 45 Subject to any contrary direction of the CCOS Hearing Chair, the following procedure shall be adopted at hearings:
- (a) the Timetabling Panel will meet in the absence of the Dispute Parties to discuss issues arising from the papers submitted by the Dispute Parties;
  - (b) the Timetabling Panel will confirm to the Dispute Parties the extent to which it has read the papers submitted by the Dispute Parties;
  - (c) the CCOS Hearing Chair, the other Panel Members and any assessors shall declare any relevant interests;
  - (d) the claimant's representative will make an opening submission of its case of not longer than 10 minutes, referring if necessary to witness or expert evidence which the claimant wishes the Timetabling Panel to consider;



- (e) the respondent's representative will also make a brief opening submission of its response and/or counterclaim of not longer than 10 minutes, referring if necessary to additional witness or expert evidence which the respondent wishes the Timetabling Panel to consider;
  - (f) if a written witness statement has been provided, the witness will not be required to read out his statement unless the CCOS Hearing Chair decides otherwise. If any witness summary has been provided the CCOS Hearing Chair shall direct how the evidence shall be admitted and may require the witness to provide his evidence in full orally before cross examination. The CCOS Hearing Chair shall direct whether any further witness evidence shall be allowed;
  - (g) if expert evidence is used, the expert will not be required to read out his report unless the CCOS Hearing Chair decides otherwise. Whenever expert evidence is being given by any individual that individual shall state that he is giving expert evidence and the basis upon which he claims expertise in the relevant matter;
  - (h) the CCOS Hearing Chair, other Panel Members and any assessor may put any relevant questions to the representatives, witness(es) and expert(s);
  - (i) Dispute Parties may put questions to any witness(es) or expert(s) in their capacity as witnesses or experts, and when any representative is acting as a witness he shall make that clear; and
  - (j) at the conclusion of questions, representatives may make closing submissions of not more than 10 minutes.
- 46 The hearing shall be conducted with the Dispute Parties present. Following conclusion of the submissions, the Dispute Parties will withdraw to allow the Timetabling Panel to consider the evidence and arguments (with any assessor). The Dispute Parties shall remain available to allow the CCOS Hearing Chair, other Panel Members and any assessor to put any additional questions.
- 47 The CCOS Secretary will, unless otherwise directed by the CCOS Hearing Chair, make a full note of the evidence given to the hearing. The CCOS Hearing Chair may in his discretion direct in advance that a full transcript is taken.
- 48 The CCOS Hearing Chair may, subject to any specified requirements of any Access Condition and legal requirement, reserve his determination from the hearing until a later date.

## **Determinations**

- 49 Having considered the submissions of the Dispute Parties and the advice of the other Panel Members and any assessor, the CCOS Hearing Chair shall make a determination of the dispute in accordance with Rule H51.
- 50 Subject to any other provision of the Access Conditions and Underlying Contract, the CCOS Hearing Chair may make such orders in his determination as he considers necessary to resolve the dispute including without limitation that:
- (a) one Dispute Party should take or not take specified action; or
  - (b) the meaning of an Access Contract, an agreement or a Dispute Party's obligations under that Access Contract or agreement are as stated in the determination.
- 51 The CCOS Hearing Chair's determination of a dispute shall be in writing and comprise:
- (a) the date of the determination;
  - (b) the names of the CCOS Hearing Chair, other Panel Members and any assessors present;
  - (c) details of all Dispute Parties;
  - (d) details of the attendance and status of all experts, witnesses and interested parties;
  - (e) a brief summary of the dispute;
  - (f) an identification of the issues of fact and law considered by the Timetabling Panel;
  - (g) a summary of the evidence presented;
  - (h) the findings of fact made by the CCOS Hearing Chair;
  - (i) identification of any applicable precedents considered relating to the CCOS;
  - (j) the decisions and conclusions reached, distinguishing clearly between:
    - (i) decisions upon legal entitlement;
    - (ii) decisions upon remedy;
    - (iii) guidance to the Dispute Parties or other observations not forming part of a decision upon either legal entitlement or upon remedy;

- (k) the reasons for those decisions and conclusions (including any relevant legal principles or rules of law applied); and
  - (l) signed and dated confirmation of the CCOS Hearing Chair that the determination is legally sound and appropriate in form.
- 52 The CCOS Hearing Chair shall provide a copy of his written reasoned determination to all Dispute Parties and the CCOS Secretary. The CCOS Secretary shall send the determination to each Resolution Service Party and shall arrange for the determination to be immediately published on the access disputes website.
- 53 Subject to appeal in accordance with Rule H58, the Dispute Parties shall comply with the terms of the determination within such period as shall be specified in the determination.
- 54 If a Dispute Party fails to comply with the terms of the determination, that failure will be dealt with by way of a new dispute through the appropriate mechanism.

### **Confidentiality**

- 55 Except for anything published pursuant to Rule H56 or required to be disclosed by any obligations at law (including under the Freedom of Information Act 2000 and the Environmental Information Regulations 2004), unless otherwise agreed by all Dispute Parties, all documents produced or disclosed in the course of a TTP shall be treated as confidential by the Panel Members, assessors or others present, the CCOS Allocation Chair, the CCOS Secretary and all Dispute Parties and shall only be used:
- (a) for the purposes of the TTP, including any appeal or further stage in the determination procedure;
  - (b) for enforcing the CCOS Hearing Chair's determination in the TTP;  
or
  - (c) in support of a plea of estoppel in any subsequent proceedings.
- 56 Immediately upon receipt by the CCOS Secretary the following documents shall be published on the access disputes website:
- (a) each finalised Statement of Case;
  - (b) each request for further information from the CCOS Hearing Chair and all responses to such requests;
  - (c) all written submissions from all Dispute Parties; and
  - (d) all awards and/or determinations from the CCOS Hearing Chair.

## **Communications**

- 57 Communications for the purposes of the TTP may be by telephone or email (or such other means as is appropriate) and where by telephone shall be confirmed in writing wherever possible.

## **Appeal**

- 58 Following a determination of a Timetabling Dispute by the CCOS Hearing Chair of a TTP any Dispute Party is entitled to appeal in accordance with the relevant part of the Access Conditions or Underlying Contract.

## **Costs**

- 59 The CCOS Hearing Chair shall have power to order one or more Dispute Parties to meet part or all of the Costs of the Timetabling Panel and of any other Dispute Party assessed by such means as the CCOS Hearing Chair shall determine.
- 60 An order for Costs shall only be made where the CCOS Hearing Chair is satisfied that either:
- (a) the case of the relevant Dispute Party shall have been so lacking in merit that the reference should not have been made (or defended); or
  - (b) the conduct of the relevant Dispute Party before or during the reference was such as to justify an award of Costs being made against it (or them).

Any such order shall be made with due regard to the Principles and this Chapter H.

## **Exclusion of liability**

- 61 None of the CCOS Allocation Chair, the CCOS Secretary, the CCOS Hearing Chair or any other Panel Member shall be liable to any party for any act or omission (including negligence) in connection with any TTP under these Rules unless the act or omission is shown to have been in bad faith.

## **CHAPTER I - DETERMINATIVE PROCESS RULES - EXPERT DETERMINATION**

- 1 Expert determination under these Rules is a private determinative dispute resolution process in which a neutral expert (the determining expert) determines the dispute on the basis of the parties' respective legal rights, the information available to him and his own expertise.

### **Disputes to be decided by expert determination**

- 2 Any dispute which the Dispute Parties have agreed shall be submitted to expert determination under these Rules or which has otherwise been allocated to expert determination as a first or second stage or appeal stage dispute resolution process in accordance with these Rules, shall proceed according to the Rules of this Chapter I.
- 3 Any dispute which the Dispute Parties have agreed should be referred to expert determination under these Rules shall be determined by a sole expert agreed between the Dispute Parties or appointed by the CCOS Secretary in accordance with this Chapter I.

- 4 **Not used.**

### **Beginning an expert determination and appointing the Determining Expert**

- 5 Upon commencement of an expert determination (in accordance with the Procedure Agreement and Rule B17 or otherwise), the CCOS Secretary shall promptly approach all Dispute Parties and liaise with and assist the Dispute Parties in identifying, choosing and retaining a suitable determining expert, if not already done.
- 6 In the event that no determining expert can be agreed by the Dispute Parties within 21 days of commencement of the expert determination, the CCOS Secretary shall propose an appropriate individual from lists maintained by him and published on the access disputes website, or otherwise. That individual shall be appointed by the Dispute Parties as determining expert unless either or both Dispute Parties notify the CCOS Secretary of a challenge to the appointment on the ground of (real or apparent or potential) bias, Conflict of Interest or a lack of competence within 3 days of notification of the CCOS Secretary's choice. If any challenge is made on the ground of (real or apparent or potential) bias, Conflict of Interest or lack of competence, the CCOS Allocation Chair shall consider the challenge and determine either to:
  - (a) uphold the proposed appointment; or
  - (b) remit the choice to the CCOS Secretary with directions concerning how a further choice should be made.

Nothing in this clause shall affect the power of a determining expert to determine his own jurisdiction or appointment.

*Notice of expert determination*

- 7 Upon the appointment of a determining expert, the CCOS Secretary shall send to all the parties to the dispute a notice of the appointment of the determining expert. The CCOS Secretary shall also send to the determining expert a copy of:
- (a) this Chapter I and Chapters A, B and C of these Rules;
  - (b) any template terms for appointment of a determining expert issued by the Committee;
  - (c) the Notice of Dispute;
  - (d) any statements from the Dispute Parties made under Rule B9(d)(iii); and
  - (e) any correspondence from the CCOS Allocation Chair made under Rule B15.

The Notice of Dispute shall stand as a notice of expert determination and no further notice of expert determination shall be required or served.

*Change of Determining Expert*

- 8 If any determining expert acting or appointed to act under these Rules resigns, withdraws, dies or refuses to act, the CCOS Secretary shall, upon application by the determining expert or any Dispute Party, on proof satisfactory to the CCOS Secretary, declare the office of determining expert vacant.
- 9 If the determining expert or any Dispute Party considers that the determining expert is unable by reason of mental or physical infirmity to perform the duties of his position or is disqualified for any reason from performing the duties of his position, or has delayed unreasonably in the conduct of the expert determination or in the making of any award, the CCOS Secretary may, at the request of the determining expert or any Dispute Party, having heard the determining expert and the parties if they or any of them wish to be heard, declare the position of determining expert vacant.
- 10 Where the position of determining expert shall have been declared to be vacant pursuant to Rule I8 or I9, then Rule I5 shall apply to the appointment of a replacement determining expert.

## Procedure

### *General*

- 11 The determining expert shall act fairly and impartially as between the Dispute Parties, giving each a reasonable opportunity of putting his case and dealing with facts raised by his opponent.
- 12 The determining expert shall adopt procedures suitable to the circumstances of the case, avoiding unnecessary delay or expense to provide a fair means for the resolution of the matters falling to be determined in accordance with each Dispute Party's rights at law to a fair trial. The determining expert may give appropriate directions as to any or all aspects of the procedures to be followed and shall have the power at any time to make or amend the procedure (and the directions) to be followed by the Dispute Parties in the expert determination. The directions shall be in accordance with the Principles.
- 13 Subject to Rule 114, an expert determination shall include an oral hearing which is appropriate in length and content for the just and expeditious determination of the dispute.
- 14 The Dispute Parties may agree that an expert determination shall be conducted on the basis of written representations only. In such a case, nothing in this Rule shall prevent the determining expert from requiring one or more oral hearings if he considers it appropriate for the just and expeditious determination of the proceedings.
- 15 The determining expert may at any stage require one or more Dispute Parties to provide him with any information, data or computations which are within the control of that Dispute Party or Dispute Parties and reasonably accessible to them. The determining expert may further request one or more Dispute Parties to produce further computations or analysis of data or information where such computations or analysis are reasonably necessary for the purposes of the fair resolution of the dispute and the necessary data, information and competence to prepare such computations or analysis is reasonably available to the relevant Dispute Party or Dispute Parties.
- 16 Unless the determining expert rules otherwise (either on his own motion or upon the application of any Dispute Party), the following timetable and procedure shall apply:
  - (a) within 21 days of the notice of appointment of the determining expert, the claimant(s) shall serve upon the determining expert and each other Dispute Party a written statement of its claim. The statement of claim shall specify all relevant facts and matters and contentions of law (if any, and naming the principal authorities) on which the claimant relies (or admits or denies) and the relief and remedies sought;

- (b) within 21 days of service by the claimant of the statement of its claim, the other Dispute Party(s) shall serve upon the determining expert and the claimant(s) a written statement of its defence. The statement of defence shall specify the defence and all relevant facts and matters and contentions of law (if any, naming the principal authorities) on which the respondent relies (or admits or denies). The statement of defence may set out any counterclaim which the respondent wishes to make;
- (c) the claimant(s) may within seven days of the service by the respondent of its statement of defence, serve upon the determining expert and each other Dispute Party a written reply limited to responding to new matters and contentions of law raised in the statement of defence and any counterclaim or related claim raised;
- (d) the Statements of Case served pursuant to sub-paragraphs (a), (b) and (c) above shall be accompanied by copies of any Documents referred to in them or upon which the Dispute Party serving the statement wishes to rely. In addition they shall be accompanied by (or, as appropriate refer to and identify) any computations, models, analysis or data prepared by or for that Dispute Party upon which the Dispute Party wishes to rely. That Dispute Party shall, if so requested, make the originals of such Documents available for inspection by the determining expert or the other Dispute Party(s) and shall as appropriate make available active electronic copies of such documents for analysis by the determining expert or the other Dispute Party(s);
- (e) the determining expert may raise such questions as he considers necessary or appropriate and require responses from the parties within such time as he specifies;
- (f) at least seven days before any hearing, each Dispute Party shall serve on the other and on the determining expert its written submissions;
- (g) unless ordered otherwise by the determining expert, at the hearing:
  - (i) there shall be no oral opening submissions, but the determining expert may ask the Dispute Parties questions arising out of their written submissions or Statements of Case;
  - (ii) subject to sub-paragraph (iii) below, the testimony of a witness may be presented in written form, either as a signed statement or as an affidavit duly sworn. Any Dispute Party may apply to the determining expert for an order that any witness whose written statement or affidavit is to be relied upon by a Dispute Party should attend for oral examination at a hearing and the determining expert shall make such order



unless, having heard the Dispute Parties, he is satisfied that such oral examination is not likely to assist him in making his award. If a witness is ordered to attend and fails to do so, the determining expert may:

- (A) place such weight on the written statement or affidavit as he thinks fit;
- (B) exclude it altogether; or
- (C) apply to the court for an order for the citation or attendance of witnesses.

In addition, in making his determination on Costs the determining expert may take any failure to attend into account;

- (iii) factual or expert witnesses who give oral evidence will not be required to provide their evidence in full orally. The Dispute Parties may cross-examine witnesses on oath or affirmation to the extent permitted by the determining expert;
  - (iv) the Dispute Parties may make oral closing submissions;
  - (v) the Dispute Parties may be legally represented; and
  - (vi) the determining expert shall be entitled to receive such evidence as he shall consider relevant, whether or not such evidence would have been admissible in a court; and
- (h) the determining expert shall deliver to the Dispute Parties a reasoned award within 21 days of the end of the hearing.

#### *Proposed amendments*

- 17 Immediately after his appointment, the determining expert shall require each Dispute Party to propose directions to him or to inform him of any amendments to the procedure or the time limits set out in Rule I16 which it considers appropriate (whether because more than two parties will be involved or otherwise). Each Dispute Party shall send promptly any proposed directions or amendments to the determining expert and each other Dispute Party. Before responding and ordering any amendments, the determining expert may require the Dispute Parties to meet him.

#### *References to the ORR*

- 18 The determining expert may, on the application of any Dispute Party or on his own motion, elect to refer any issue or issues to which Rule C3 applies, to the ORR in accordance with Chapter C. Before making any such reference the determining expert shall:

- (a) seek submissions from all Dispute Parties on whether a reference should be made and if so the wording of such a reference; and
- (b) determine the wording of any reference to be made with due regard to such submissions.

*Supplemental*

- 19 If he considers it appropriate for the just and expeditious determination of the proceedings, the determining expert shall be entitled to appoint one or more advisers or assessors on any matter (including matters of law) to report to him on any specific issue. The costs of any such person shall be subject to the provisions of Rule 129. The determining expert shall provide to the Dispute Parties the terms of reference, qualifications and experience of any adviser or assessor appointed. Where the determining expert receives a report from any such person, he shall disclose the report to the Dispute Parties and afford them an opportunity to comment on it.
- 20 In relation to the production of Documents:
- (a) the determining expert may, on the application of a Dispute Party, require the production of such specific identified Documents or class of documents or data or information as are within the possession, custody or control of any other Dispute Party or any third party which the determining expert considers relevant. The Dispute Parties shall be given the opportunity to inspect and to comment upon any Document so produced;
  - (b) if any Document is not supplied to the determining expert and all other Dispute Parties within such time as the determining expert shall prescribe, the determining expert may:
    - (i) proceed with the expert determination on the basis of the Documents already before him;
    - (ii) apply to the court for an order to produce the Documents; or
    - (iii) strike out the part of the claim or defence to which the Document relates,and in making his award the determining expert shall be entitled to draw such inferences as he may think fit for the failure to supply the Document. In addition, in making his determination on Costs the determining expert may take any failure to supply a document at any stage in the proceedings into account;
  - (c) no Dispute Party shall be obliged to produce any Document which would be privileged from production in any proceedings in an action in the courts; and

- (d) unless otherwise ordered by the determining expert, an application by a Dispute Party to the determining expert pursuant to subparagraph (a) above shall be made not later than 35 days after the appointment of the determining expert; a Dispute Party in receipt of a request from the determining expert to produce a Document shall comply with such a request within 14 days.
- 21 Without prejudice to the powers in Rule A16 and in addition to them, the determining expert shall have power to strike out part or all of any claim or defence made in the proceedings on any one or more of the following grounds:
- (a) wilful breach of these Rules;
  - (b) deliberate non-compliance by a Dispute Party with any order of the determining expert; or
  - (c) inordinate or inexcusable delay on the part of any Dispute Party, where such act or omission has, in the opinion of the determining expert, given rise to a substantial risk that a fair determination of the dispute will not be possible, or which is such as to cause or to have caused serious prejudice to another Dispute Party.
- 22 Without prejudice to the powers in Rule A16 and in addition to them, the determining expert shall have power to strike out part or all of any claim or defence made in the proceedings if he is satisfied that the claim or defence or any part of it is scandalous, frivolous or vexatious.
- 23 Without prejudice to the powers in Rule A16 and in addition to them, if any Dispute Party fails to serve a Statement of Case within the period allowed under these Rules or by order of the determining expert, and fails to remedy his default within 14 days after despatch to him by the determining expert or any other Dispute Party of notice of that default, the determining expert shall be entitled to rule that he shall be treated as having abandoned his claim or defence (as the case may be) and, having made such a ruling, the determining expert shall be entitled to proceed with the reference on a without notice basis.
- 24 Any Dispute Party who becomes aware that any provision or requirement of these Rules has not been complied with and who fails to state an objection to that failure within a reasonable time shall be deemed to have waived the right to object.

### **Determination**

#### *Final and binding*

- 25 The determining expert's determination shall be final and binding save:
- (a) where it is so clearly erroneous on its face that it would be unconscionable for it to stand; or

- (b) to the extent that a further right of appeal or reference to another dispute resolution process is provided for in the Underlying Contract, Access Conditions or Procedure Agreement.

26 If any further dispute resolution process is provided for in the Procedure Agreement, then any Dispute Party which wishes to refer the dispute to the next stage of the determination procedure (in accordance with the Procedure Agreement) shall notify the CCOS Secretary of its intention to refer. Any such notification shall be copied to all Dispute Parties. If no Dispute Party notifies the CCOS Secretary of its intention to refer the matter to such further dispute resolution process within 28 days of the determining expert's determination, the determination shall be deemed to have been accepted by all Dispute Parties.

*Power to make orders*

27 Subject to any other provision of the Access Conditions and Underlying Contract, the determining expert may make such orders in his determination as he considers necessary to resolve the dispute, including, without limitation, that:

- (a) one Dispute Party shall pay an amount of money (including damages) to another Dispute Party, whether that amount is specified in the determination or calculated in accordance with such procedure as the determining expert shall specify;
- (b) one Dispute Party should take or not take specified action;
- (c) the meaning of an agreement or a Dispute Party's obligations under that agreement are as stated in the determination;
- (d) any Document, certificate, invoice, report or record be amended or reissued in a manner specified in the determination; or
- (e) any principal sum the determining expert may order one Dispute Party to pay to another shall carry interest at such rate and over such period as he shall determine.

*Issue of expert determination*

28 The determining expert shall send a copy of his determination to the Dispute Parties, the CCOS Allocation Chair and the CCOS Secretary.

**Costs**

*Discretion to order payment of Costs*

29 Whether or not the expert determination reaches the stage of a final determination, the determining expert may order any Dispute Party to pay some or a specified proportion of any Dispute Party's Costs incurred in the expert determination, assessed in such manner as the determining expert

shall determine. The determining expert may make such an order without limitation following any interim or final determination.

*Joint and several liability of parties to Determining Experts for fees and expenses*

- 30 The Dispute Parties are jointly and severally liable to pay the determining expert's reasonable fees and expenses.

**Confidentiality**

- 31 Subject to Rule C and Rules I32, I33 and G69, all Documents produced or disclosed in the course of an expert determination including all awards shall be treated as confidential by the determining expert, the CCOS Allocation Chair, the CCOS Secretary and all Dispute Parties and shall not be published.
- 32 Unless otherwise agreed by all Dispute Parties, all Documents produced or disclosed in the course of an expert determination including all awards shall only be used:
- (a) for the purposes of the expert determination, including any appeal against the determination, or for judicial review, in respect of the award or any subsequent stages of the determination procedure;
  - (b) for enforcing the determination; or
  - (c) in support of a plea of estoppel in any subsequent proceedings.
- 33 The confidentiality obligations under Rule I31 shall not apply to Documents which are:
- (a) agreed in writing by all the Dispute Parties to be disclosed (including in any Underlying Contract between them);
  - (b) made available to the advisers or financial associates of the Dispute Party in question, upon obtaining an undertaking of strict confidentiality from such persons;
  - (c) disclosed on a confidential basis to the ORR or TfL or such other relevant franchising or concessionary authority in the normal course of business; or
  - (d) required to be disclosed pursuant to the order of a court of competent jurisdiction or by any obligations at law (including under the Freedom of Information Act 2000 and the Environmental Information Regulations 2004).

### **Communications**

- 34 Communications for the purposes of the expert determination may be by telephone or email (or such other means as is appropriate) and where by telephone shall be confirmed in writing wherever possible.

### **Exclusion of liability**

- 35 None of the CCOS Allocation Chair, the CCOS Secretary or any determining expert shall be liable to any party for any act or omission (including negligence) in connection with any expert determination under these Rules unless the act or omission is shown to have been in bad faith.

### **Jurisdiction and governing law**

- 36 Expert determinations (and any issues arising or connected with expert determinations, whether contractual or non-contractual in nature) shall take place in England and be subject to English law.

### **Interim relief granted by the Court**

- 37 In an appropriate case, a Dispute Party in relation to a dispute which has been or may be submitted to expert determination may apply to the Court for interim relief (whether negative or positive), notwithstanding that the relief sought may overlap with the interim relief which is, or may be, claimed in the expert determination.

## CHAPTER J - PROCUREMENT

- 1 This section establishes the basis on which RfL(I) procures the appointment of consultants to perform the administrative and determinative functions set out in these Rules. It sets out the roles of the consultants required by these Rules. The consultants appointed under these Rules may be the same persons appointed to undertake the equivalent roles under the NR ADRR.

### **Appointment of the CCOS Allocation Chair**

- 2 The Committee shall appoint a CCOS Allocation Chair who shall:
  - (a) preferably have suitable experience of the railway industry;
  - (b) not, during his term of office, be employed by or be otherwise connected with any Resolution Service Party entitled to use these Rules or receive any benefit from any such Resolution Service Party in return for services provided to it, in either case in a way which may compromise his impartiality; and
  - (c) preferably have qualified as a lawyer and mediator (or have experience as a mediator) and shall have extensive professional and practical experience (at a senior level) of significant commercial disputes and commercial disputes processes but shall not be required to hold a current practising certificate.
- 3 The appointment and any re-appointment of the CCOS Allocation Chair shall be made by unanimous resolution of the Committee.
- 4 The CCOS Allocation Chair shall upon appointment, declare to the CCOS Secretary any relevant connection which he has or has had with the railway industry, and, subject to Rule J2(b), shall during his term of office promptly disclose any new connection of that kind. The CCOS Secretary shall provide a copy of any disclosure made under this Rule to RfL(I) and to any Resolution Service Party which requests it.
- 5 In the event that the CCOS Allocation Chair has or may have any Conflict of Interest in respect of any dispute he shall identify such Conflict of Interest to the CCOS Secretary who shall nominate a CCOS Hearing Chair from the pool referred to in Rule J11 to act as CCOS Allocation Chair for that dispute.
- 6 The CCOS Allocation Chair shall hold office on such terms as the Committee shall determine. Where the terms on which he holds office include provision for the payment to him of any allowances or expenses, the rate at which those allowances and expenses are paid shall be determined by the Committee.
- 7 The terms on which the CCOS Allocation Chair holds office may, in addition to providing for his remuneration, include provision for the payment of such pensions, allowances or gratuities to or in respect of him, or such

contributions or payments towards provision for such pensions, allowances or gratuities, as may be determined by the Committee.

- 8 The CCOS Allocation Chair shall be appointed (as a consultant) for a term of two years, and may be reappointed. The Committee may terminate the appointment on the motion of any Committee Member, provided that at least two weeks' written notice of the intention to table such a motion has been given to all members of the Committee and to the CCOS Allocation Chair.
- 9 A CCOS resolution to terminate the appointment of the CCOS Allocation Chair shall be passed on the positive resolution of at least five Committee Members acting at their discretion and without the need to provide reasons for their decision
- 10 If, within 60 days of the termination (for whatever reason) of the appointment of the CCOS Allocation Chair, the Committee shall have failed to appoint a new CCOS Allocation Chair pursuant to Rules J2 and J3, the Committee shall:
  - (a) by unanimous resolution, determine a list of three candidates for the role of CCOS Allocation Chair;
  - (b) send the list to the ORR and provide such information in relation to the candidates and the preferences of the Committee Members as the ORR may request; and
  - (c) be deemed to have appointed as CCOS Allocation Chair the candidate then selected by the ORR.

### **CCOS Hearing Chairs and CCOS Industry Advisors**

- 11 The Committee shall (in addition to the appointment of the CCOS Allocation Chair) appoint (as consultants) a pool of CCOS Hearing Chairs to sit on Timetabling Panels and ADAs and a pool of CCOS Industry Advisors to sit on ADAs as appropriate. CCOS Hearing Chairs and CCOS Industry Advisors shall be entitled to be hearing chairs or industry advisors (as the case may be) under the NR ADRR.
- 12 CCOS Hearing Chairs shall:
  - (a) preferably have suitable experience of the railway industry;
  - (b) not, during their terms of office, be employed by or be otherwise connected with any Resolution Service Party entitled to use these Rules or receive any benefit from any such Resolution Service Party in return for services provided to it, in either case in a way which may compromise impartiality;
  - (c) preferably have qualified as a lawyer or hold a similar professional background and shall have professional and practical experience



(at a senior level) of significant commercial disputes and commercial disputes processes but shall not be required to hold a current practising certificate;

- (d) be appointed and be liable to termination of appointment in the same way as the CCOS Allocation Chair;
  - (e) have such skills and experience as are deemed necessary by the Committee to discharge effectively the role for which the appointment is intended; and
  - (f) chair TTP or ADA hearings or discharge any other function otherwise falling within these Rules as directed by the CCOS Allocation Chair or CCOS Secretary or under any Procedure Agreement under Chapter B.
- 13 In the event that any CCOS Hearing Chair is appointed in respect of any dispute and has or may have any Conflict of Interest in respect of that dispute he shall identify such Conflict of Interest to the CCOS Secretary who shall nominate an alternative CCOS Hearing Chair from the pool to act as CCOS Hearing Chair for that dispute.
- 14 CCOS Industry Advisors shall:
- (a) have such skills, experience and qualifications as are deemed necessary by the Committee to discharge effectively the role for which the appointment is intended;
  - (b) not, during their terms of appointment, be employed by or be otherwise connected with any Resolution Service Party entitled to use these Rules or receive any benefit from any such Resolution Service Party in return for services provided to it, in either case in a way which may compromise impartiality;
  - (c) be appointed and be liable to termination of appointment in the same way as the CCOS Allocation Chair;
  - (d) participate in ADA hearings or discharge any other function otherwise falling within these Rules as directed by the CCOS Allocation Chair.
- 15 In the event that any CCOS Industry Advisor is appointed in respect of any dispute and has or may have any Conflict of Interest in respect of that dispute he shall identify such Conflict of Interest to the CCOS Secretary who shall nominate an alternative CCOS Industry Advisor from the pool to take part in that dispute.

### **The CCOS Secretary**

- 16 The Committee shall appoint the CCOS Secretary (as a consultant) to discharge the following separate and distinct roles:

- (a) the CCOS Secretary for the purposes of these Rules;
  - (b) secretary to an ADA;
  - (c) secretary to a Timetabling Panel.
- 17 Subject to Rule J11, the Committee shall specify the CCOS Secretary's remit and terms of appointment in such terms as it shall (from time to time) think fit but such remit shall include the following tasks:
- (a) running the Secretariat efficiently and cost effectively;
  - (b) communicating with Dispute Parties conducting a dispute under these Rules and effecting the appointment of suitable and appropriately qualified mediators, evaluators, arbitrators or determining experts as required;
  - (c) implementing efficiently any instruction given to the CCOS Secretary by the CCOS Allocation Chair or any CCOS Hearing Chair;
  - (d) appointing an appropriate ADA and Timetabling Panel in each relevant dispute;
  - (e) ensuring that the access disputes website is up to date, accurate and accessible;
  - (f) maintaining a register of persons who are suitably qualified, willing and able to act as mediators, arbitrators, experts, evaluators, assessors and of organisations which are qualified to suggest such persons; and
  - (g) sourcing external legal advice as requested or directed by the Committee, the Committee Chair, the CCOS Allocation Chair or a CCOS Hearing Chair.
- 18 The CCOS Secretary may:
- (a) delegate the performance of any of his functions to any member of the Secretariat but such delegation shall not affect his responsibilities to ensure that all matters falling within his remit are properly discharged;
  - (b) in the discharge of his tasks, duties and obligations under these Rules, seek guidance from the Committee Chair or the CCOS Allocation Chair (as appropriate) at any time and in relation to any matter, issue or question, as he sees fit, prior to taking (or not taking) any relevant action; and
  - (c) be removed from office by the Committee in the same manner as the CCOS Allocation Chair.

- 19 The CCOS Secretary shall not be a Member of the Committee, the CCOS Allocation Chair, a CCOS Hearing Chair, a CCOS Industry Advisor, arbitrator, mediator, determining expert or evaluator or a member of any Timetabling Panel or be a member of the committee, allocation chair, hearing chair, industry advisor, arbitrator, mediator, determining expert or a member of a timetabling panel under the NR ADRR.
- 20 The CCOS Secretary shall be appointed upon such terms as the Committee shall determine. Where the terms on which the CCOS Secretary is appointed include provision for the payment of any allowances or expenses, the rate at which those allowances and expenses are paid shall be determined by the Committee.

### **The Secretariat**

- 21 The Committee may appoint additional consultants to assist the CCOS Secretary to discharge his duties (together, from time to time, the "**Secretariat**").
- 22 The Secretariat shall be appointed upon such terms as the Committee shall determine.
- 23 The terms upon which the Secretariat are retained may, in addition to providing for remuneration, include provision for the payment of such pensions, allowances or gratuities or such contributions or payments towards provision for such pensions, allowances or gratuities, as may be determined by the Committee.

### **Capacity of Committee to enter into Contracts**

- 24 In making any appointment or otherwise exercising the powers under this Chapter J, the Committee Members are authorised to act on behalf of the Resolution Service Parties.
- 25 None of the CCOS Allocation Chair, any CCOS Hearing Chair, any CCOS Industry Advisor, the CCOS Secretary or any member of the Secretariat shall by virtue of his office be an employee of the Committee, RfL(I), or any other Resolution Service Party.

### **Publication of Information**

- 26 The Committee shall require the CCOS Secretary to ensure that the access disputes website shall be maintained. It shall be up to date at all times so as to contain, by means of conspicuous and easily accessible links:
- (a) the identity and telephone contact number for the CCOS Secretary, all Committee Members and members of the Timetabling Pool;
  - (b) copies of the approved minutes of every meeting of the Committee;

- (c) copies of the annual report and any other reports of the Committee, and of all other general communications to Resolution Service Parties in relation to its affairs;
- (d) subject to determinations of commercial confidentiality, copies of every reference to the ORR under these Rules and all responses from the ORR; and
- (e) all other documents including determinations and awards as specified for publication on the access disputes website in these Rules.

### **Liability of Committee Members, Panel Members and officers**

- 27 Subject to Rule J28, none of the Agency Company, Committee Members, the Panel Members (TTP or ADA), Committee Chair, the CCOS Allocation Chair, any CCOS Hearing Chair, any CCOS Industry Advisor and the CCOS Secretary, any member of the Secretariat or (where applicable) any employee of any of the preceding listed parties shall be liable in contract or tort or otherwise to any party for any act or omission (including negligence and, where applicable, vicarious liability for negligence of employees) in connection with any Committee proceedings or dispute determined by a Timetabling Panel or by a CCOS Hearing Chair under these Rules except in respect of any act or omission shown to constitute bad faith and/or dishonest conduct.
- 28 The exclusion of liability in Rule J27 does not extend to the express obligations of the Committee Chair, the CCOS Allocation Chair, any CCOS Hearing Chair, any CCOS Industry Advisors and the CCOS Secretary, any member of the Secretariat, or (where applicable) any employee of any of the preceding listed parties contained in any contract of appointment or employment.

### **Other Administrative Issues**

- 39 These Rules may be amended in accordance with the provisions of Part C of the CCOS Network Code.
- 30 No amendment of these Rules shall have effect unless approved by the ORR.
- 31 Any dispute arising out of the operation or interpretation of these Rules including this Chapter J (and including any non-contractual rights or obligations) shall be referred to the ORR for determination in accordance with such process as the ORR shall specify. In the event that the ORR determines that a reference made to it under this Rule J31 does not relate to the operation or interpretation of these Rules, it shall decline to hear the reference.
- 32 These Rules (and any non-contractual obligations arising out of or in connection with these Rules) are subject to English law.

33 These Rules form part of the CCOS Network Code.

**CHAPTER K – NOT USED**

## CHAPTER L - APPEALS

- 1 This section establishes the basis on which a Dispute Party who is dissatisfied with a determination made under these Rules in connection with a dispute arising under Part D or Part J of the CCOS Network Code may refer the matter to the ORR. It also sets out the general requirements governing such appeals.

### **Application of Chapter L**

- 2 The rules in this Chapter L apply to any appeal to the ORR under Part D or Part J of the CCOS Network Code.

### **Time Limit for Appeals**

- 3 Any appeal made under this Chapter L must be made by written notice served in accordance with Rule L4:
  - (a) in the case of an appeal under Condition D7 of the CCOS Network Code, within five working days of receipt of the determination to be challenged. If Christmas Day occurs within this period then an appeal should be submitted within 10 working days of receipt of the determination to be challenged; and
  - (b) in the case of an appeal under Condition J9.2 of the CCOS Network Code within 10 working days of receipt of the determination to be challenged,

or such longer period as the ORR may allow.

### **Notice of Appeal**

#### *Contents*

- 4 In a notice of appeal the Appellant must:
  - (a) identify the determination which the Appellant wishes to challenge;
  - (b) detail why the Appellant believes that the determination is:
    - (i) wrong; or
    - (ii) unjust because of a serious procedural or other irregularity; and
  - (c) insofar as reasonably practicable, attach any evidence on which the Appellant wishes to rely in support of the appeal.

### *Service*

- 5 The Appellant must serve the notice of appeal on the ORR and the Respondent(s).

### **Right of the ORR to refuse to hear appeal**

#### *Grounds of decision*

- 6 Within 15 working days of service of a notice of appeal pursuant to Rule L3, the ORR may decide that the appeal should not proceed to it, including on the grounds that:
- (a) the matter in question is not of sufficient importance to the industry;
  - (b) the reference is frivolous or vexatious;
  - (c) the conduct of the party making the reference ought properly to preclude its being proceeded with; or
  - (d) it is appropriate or convenient for the matter instead to be disposed of by the High Court.

#### *Consequences of decision*

- 7 If the ORR decides that the reference to appeal should not proceed, it shall immediately notify the Appellant and each Respondent of its decision, and:
- (a) in the case of decision on any of the grounds specified in Rule L6(a), (b) or (c), the decision of the relevant Forum shall stand; and
  - (b) in the case of a decision on the ground specified in Rule L6(d), either party to the appeal shall be entitled to apply to the High Court for any appropriate relief.

### **Respondent's Notice**

- 8 Within 30 working days of service of a notice of appeal a Respondent may serve on the Appellant, any other Respondent and the ORR a notice:
- (a) stating that he opposes the appeal; and
  - (b) insofar as reasonably practicable, attaching any evidence on which the Respondent wishes to rely in opposing the appeal.
- 9 In the event that:
- (a) a Respondent seeks more time to serve such a notice; or
  - (b) the Appellant seeks the appeal to be dealt with more expeditiously than the timescales in Rule L8 would allow,



the ORR may, upon the relevant party providing the ORR with evidence which satisfies it that an extension or expedition of the timeframe for service of the notice is appropriate, grant such shorter or longer period for service of the notice as it considers necessary.

### **Matters to be considered on appeal**

#### *Scope*

- 10 Every appeal will be limited to a review of the decision of the lower tribunal unless the ORR considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.

#### *Grounds*

- 11 At any hearing of the appeal, a party may not rely on a matter not contained in the appeal notice or Respondent's notice unless the ORR gives permission.

### **Powers of the ORR**

- 12 The ORR shall, in determining the matter in question, have the power:
- (a) to give directions as to the procedure to be followed in the appeal, including in relation to the time limits within which anything must be done, the making of any written and oral submissions, and the extent to which any evidence or other submissions made by one party to the appeal shall be disclosed to any other;
  - (b) to appoint any person to act as a legal or technical assessor who it considers has suitable knowledge and experience to assist the ORR;
  - (c) to make any interim order as to the conduct or the positions of the parties pending final determination of the matter by the ORR; and
  - (d) to make such orders as it shall think fit in relation to the proportions of the costs of the proceedings in question (assessed in such manner as the ORR shall determine) which shall be borne by each party.

### **Immunity of the ORR**

- 13 The ORR shall not be liable in damages or otherwise for any act or omission to act on its part (including negligence) in relation to the conduct of any reference to appeal.

### **Obligation to comply with determination of appeal**

- 14 All Appellants and Respondents shall:

- (a) subject to and pending the final determination of any reference to the ORR, comply with:
  - (i) any determination of the relevant Forum in relation to any dispute referred to it; and/or
  - (ii) any interim order of the ORR; and
- (b) comply with any final determination of the ORR.

**Effective date of ORR's decision**

- 15 If, in relation to any particular dispute, any interim order or final determination of the ORR is made during any period of operation of the Working Timetable to which the dispute relates, the ORR may, if it is of the opinion that in the circumstances of the case the balance of material convenience to all affected persons (taking into account any material prejudice that may thereby result) favours such a course, stipulate that such order or determination shall take effect at a specified time during such period of operation.

## VERSION CONTROL

	<b>Date</b>	<b>Summary of amendment(s)</b>
1	October 2017	Final CCOS Access Dispute Resolution Rules published
2	April 2018	Updated to reflect change of registered office of TfL entities to 55 Broadway
3	February 2021	Updated to reflect change of registered office of TfL entities to 5 Endeavour Square Updated to remove "mixed dispute" provisions following feedback from the Access Disputes Committee
4	November 2022	Following consultation, updated in line with PfCs 114 to 116 of the Network Rail Network Code, insofar as such changes are directly relevant to the CCOS ADRR, plus certain further amendments to tailor it to this document.
<u>5</u>	<u>May 2023</u>	<u>Amendment further to change above omitted in error</u>