

# **Annex**

## **Access Dispute Resolution Rules**

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## **EXPLANATORY NOTE**

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

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

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

### **Overview**

*The purpose of the 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 ADRR sets out principles which should be applied throughout the determination procedure by the parties, Chairs, arbitrators, experts and others involved. Those using the 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.*

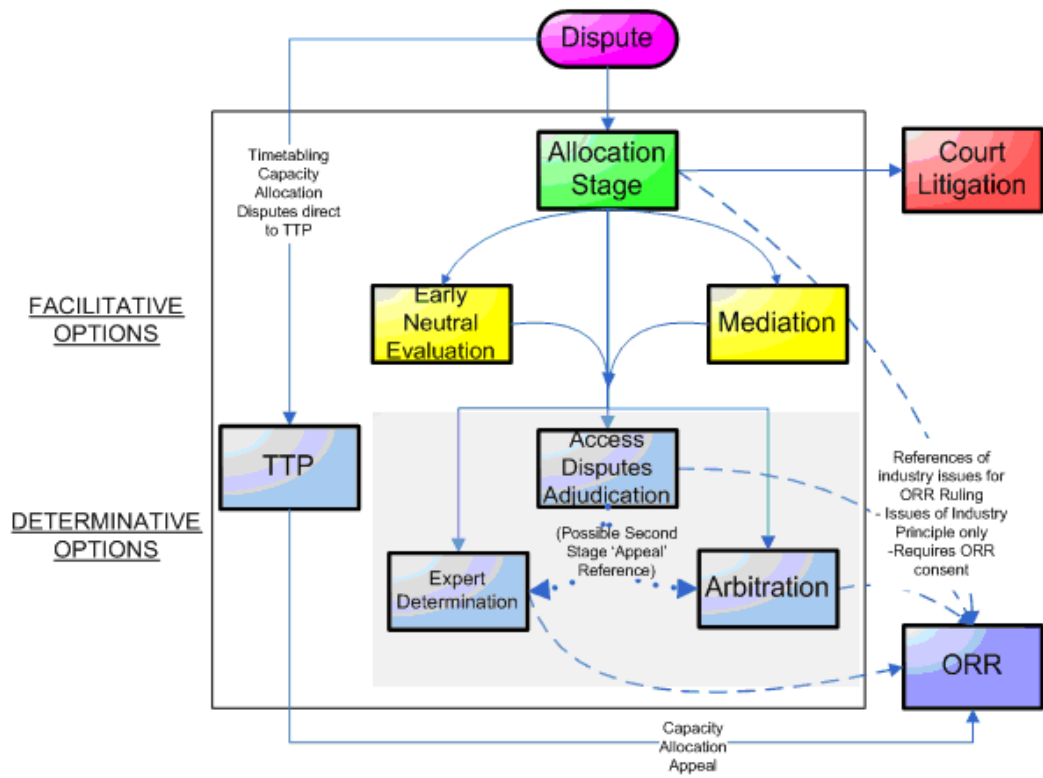
*Chapter B provides the mechanism by which a dispute will be initiated and allocated to the agreed or most appropriate forum.*

*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 Railways Infrastructure (Access and Management) Regulations 2005) can be referred to the industry Regulator at any stage of the process.*

*Chapters D-I set out the Rules applicable to each of the dispute resolution processes provided for in the 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.*

*In addition it is envisaged that it will be possible in certain cases to refer cases outside these Rules to ORR under the Access and Management 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 Conditions	In relation to an access contract, whichever of the Network Code, the National Station Access Conditions, the Independent Station Access Conditions or the Depot Access Conditions (or successor documents) or any other document carrying out a similar purpose is incorporated by reference in that access contract;
Act	The Railways Act 1993 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;
ADA	Access Disputes Adjudication in accordance with Chapter G;
Agency Company	The Agency Company constituted in accordance with Rule J42;
Allocation Chair	The individual appointed by the Committee pursuant to Rule J20, or, where the context so allows, another individual appointed as a substitute by the Secretary to discharge the role of the Allocation Chair in respect of a specific dispute;
Arbitration Acts	Means those acts in force from time to time governing arbitration proceedings in England, Wales and/or Scotland (including in England and Wales the Arbitration Act 1996 and in Scotland the Administration of Justice (Scotland) Act 1972);
Arbitrator	An arbitrator and includes, in Scotland, an arbiter;
Band; Class; Franchised Passenger Class; Non-Franchised Passenger Class; Non-Passenger Class; Representative Committee	Have the definitions in Part C of the Network Code;
CAHA	The Claims Allocation and Handling Agreement dated 1 April 2011 as amended from time to time;
CAHA Registrar	The Registrar appointed in accordance with CAHA;
Case Summary	Is as defined by Rule D6(a) in respect of a mediation and Rule E5(a) in respect of an ENE;
Committee	The Access Disputes Committee constituted under Rule

<b>Term</b>	<b>Definition</b>
	J2;
Committee Chair	A Committee Member appointed as Committee Chair pursuant to Rule J19;
Committee Member	A person appointed to the Committee pursuant to Rule J6;
Conflict of Interest	Includes 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;
Costs	Professional and other costs and expenses which would be recoverable following a judgment in Court proceedings in England;
Delay Attribution Board	The Delay Attribution Board constituted in accordance with Condition B6.2 of the Network Code;
Dispute Party	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;
Document	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;
ENE	Early Neutral Evaluation in accordance with Chapter E;
Evaluation Documents	Is as defined in Rule E5(b);
Existing Resolution Service Parties	Is as defined in Rule J61;
Forum	Each Hearing Chair of an ADA or Timetabling Panel, evaluator, mediator, arbitrator and determining expert appointed under these Rules;
Hearing Chair	An individual appointed by the Secretary to determine a dispute referred to TTP or ADA in accordance with these Rules;
Human Rights Act	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;
Industry Advisor	An individual appointed as such in accordance with Rule J29;
Involved Party	In relation to a dispute, dispute procedure or dispute resolution process means a party directly involved in the dispute including the Secretary, all Dispute Parties, and

<b>Term</b>	<b>Definition</b>
	the Forum;
Mediation Documents	Are those defined in Rule D6(b);
Network Code	The document entitled Network Code maintained by Network Rail as amended from time to time;
Notice of Dispute	A notice issued by a Resolution Service Party wishing to refer a dispute to resolution in accordance with these Rules;
ORR	The Office of Rail Regulation (and where relevant the former Rail Regulator) or any successor body or regulator;
Panel Member	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;
Principles	The principles set out in Rules A5-A10;
Procedure Agreement	Is as defined in Rule B9;
Railways Infrastructure (Access and Management) Regulations	The Railways Infrastructure (Access and Management) Regulations 2005 as amended from time to time and/or such other legislation taking effect in Great Britain in respect of the same subject matter as those Regulations;
Railway Safety Levy	Has the meaning ascribed to railway safety levy in Regulation 2 of the Railway Safety Levy Regulations 2006;
Reference	In respect of a reference to ORR, is as defined in Rule C6;
Referring Party	Is as defined in Rule C2;
Regulatory Issue	A principle, issue or process connected with the railway industry (and any interactions between such principles, issues and processes) which <ul style="list-style-type: none"> <li>(a) concerns the regulated structure of the 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 duties, functions or powers as a regulator including without limitation under the Railways Act 1993 s4;</li> </ul>
Related Dispute	A dispute which in the reasonable opinion of the Allocation Chair raises similar or connected factual or legal issues;
Resolution Service Party	A party entitled to use the dispute resolution service

<b>Term</b>	<b>Definition</b>
	described in these Rules, in accordance with regulated access contracts, agreements with the Committee or otherwise, having made payments to the Committee in accordance with Chapter J;
RIDR Rules	The Rail Industry Dispute Resolution Rules;
Secretariat	Individuals appointed as such in accordance with Rule J39;
Secretary	The individual appointed as such in accordance with Rule J34;
Statement of Case	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 Hearing Chair, arbitrator or determining expert shall identify as such;
Timetabling Dispute	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;
Timetabling Panel	The panel including a Hearing Chair and one or more members of the Timetabling Pool appointed in respect of a dispute to be resolved by TTP.
Timetabling Pool	The pool of potential members of Timetabling Panels established under Rule H2;
TTP	The dispute resolution process for resolving Timetabling Disputes in accordance with Chapter H of these Rules; and
Underlying Contract	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.

## Interpretation

2 Unless the context otherwise requires:

- (a) terms and expressions defined in the Railways Act 1993 shall, unless the contrary intention appears, have the same meaning in these Rules;
- (b) the use of male pronouns and other words connoting the male gender shall encompass the equivalent female word;



- (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 "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 the law of England except where otherwise provided to be the law of Scotland 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 Allocation Chair, the Secretary and each Forum.
- 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 Access Dispute Resolution Rules (or ADRR) incorporated into (or annexed to) the Network Code; or
  - (b) the 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 party of any dispute resolution process to delay, frustrate or avoid determination or resolution of the dispute.
- 4 The 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 those of any predecessor bodies) and of any other relevant tribunal excluding (to the extent referred to in (b) below) the ORR, as persuasive authority but need not be bound by them;
  - (b) be bound by any relevant decision of the ORR on a Regulatory Issue and any relevant decisions of the courts.

### **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 Allocation Chair, any Forum, the 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 Allocation Chair, the Secretary and to any Forum, all material required for the effective consideration and determination of the dispute, mindful of the requirements of Rules F19, G24, H26, and I19 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 Chapter J.

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

- 12 The 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;
  - (e) has responsibility for any allocation hearing including directions for any submissions, the hearing itself and any decisions connected with allocation.
- 13 The Allocation Chair may, where reasonable to do so, delegate the performance of any of his functions in any dispute to the Secretary appointed under Rule J34 or any member of the Secretariat appointed under Rule J39 but such delegation shall not affect the obligations and responsibilities of the Allocation Chair set out in Rule A12.
- 14 The Secretary:
- (a) has responsibility for appointing Hearing Chairs and Industry Advisors from a register maintained by the Secretary and, where parties are unable to agree, arbitrators and determining experts.
  - (b) shall assist the 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 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 Allocation Chair, the Secretary or any Forum;
  - (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 Act, the Access Conditions, an Underlying Contract, and these Rules the following order of precedence shall apply:

- (a) the Act;
- (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 A20(d) the Secretary will accept documents sent to him at ***sec.adc@btconnect.com***;
- (e) by fax to the advertised fax number of any Party, in which case service shall be deemed to take place on the day of transmission or, if transmission is completed after 5pm, the following working day;
- (f) 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 Secretary on behalf of that party. The 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 Secretary from time to time and all attachments should be where reasonably possible, 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, Allocation Chair, Hearing Chair or 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 (or where the matter is being conducted subject to Scottish law, in Scotland) 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 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 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 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 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 (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.

### **ALLOCATION PROCESS**

- 5 All Timetabling Disputes shall be referred to a Timetabling Panel in accordance with Chapter H. Following service of a Notice of Dispute relating to such a dispute the process under Chapter H shall commence and the Secretary shall appoint a Timetabling Panel in accordance with Rule H11. If either party raises any objection then the 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 Network Code shall be referred to an ADA in accordance with Chapter G 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 Secretary shall appoint a Hearing Chair for the dispute in accordance with Rule G8. If either party raises any objection then the 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 Network Code shall be referred to an ADA in accordance with Chapter G with a right of appeal to the ORR for determination in accordance with Part M of the Network Code. Following service of a Notice of Dispute relating to such a dispute an ADA shall commence and the Secretary shall appoint a Hearing Chair for the dispute in accordance with Rule G8. If either party raises any objection then the Hearing Chair shall consider the best way to proceed.
- 8 All disputes referred for resolution in accordance with these Rules under Condition J10.14 of the Network Code shall:
- (a) if concerning Condition J10.14.1, be referred to an ADA in accordance with Chapter G or referred for expert determination in accordance with Chapter I.
  - (b) if concerning Condition J10.14.2, be referred for expert determination in accordance with Chapter I.
- 9 Unless otherwise ordered by the Allocation Chair, following service of a Notice of Dispute upon him, the 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 Allocation Chair or relevant 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 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 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 party to serve upon him and exchange with the other parties a statement, at least seven days before the hearing, containing that 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 Allocation Chair directs otherwise.

- 10 The Secretary shall assist the 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 Secretary shall act in a facilitative role impartially between the parties and shall not seek to impose his own assessment or preference upon the parties.
- 11 If the parties reach agreement upon a determination procedure, they shall confirm their agreement and the terms of that agreement to the 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 Procedure Agreement received by the Secretary shall be definitive evidence of the agreement reached and shall specify at least:
  - (a) the dispute resolution process or processes agreed by the 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 the Network Code Part M) where in exceptional circumstances the ORR has identified that the matter is appropriate for it to determine (and the parties have requested that it do so) and has therefore agreed to act as an appeal body, confirmation of ORR's agreement. Parties should note that, except as expressly provided in these Rules, 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 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 parties and any oral representations from the 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 parties on the most appropriate determination procedure and whether any issues exist which should be referred to the ORR;
- (d) having heard each 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 party claims the right to refer a matter or issue directly to the ORR under the Railways Infrastructure (Access and Management) 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 party claims the right to refer a matter or issue to a Timetabling Panel and subsequently to the ORR in accordance with the Railways Infrastructure (Access and Management) 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 Network Code shall, unless there are compelling reasons to the contrary relating to subject matter, be allocated to a Timetabling Panel. Consequently the 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 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 parties) identifying the issue and requesting that the issue be considered in accordance with Chapter C;
- (h) in the event that agreement in principle on the resolution procedure has been reached, but the 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 parties' submissions in that respect;
- (i) in the event that agreement is reached between the parties (including agreement following the exercise by the Allocation Chair of his powers under (g) and/or (h)), the Allocation Chair shall draw up, with the parties' assistance, the Procedure Agreement and the parties shall execute it or confirm it in writing;
- (j) in the event that no agreement is reached between the parties and neither (e) or (f) applies, determine that, unless the 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 Allocation Chair.

- (k) in the event that no agreement is reached between the parties under Rule B8(a), shall determine that, unless the parties reach a contrary agreement within seven days of the allocation hearing, the matter shall be referred to final determination by expert determination subject to Chapter I and shall draw up the Procedure Agreement accordingly and shall sign it as Allocation Chair.
- 15 Following an allocation hearing in accordance with Rule B14 the Allocation Chair may at his discretion write formally to all parties stating his view on the best allocation of the dispute and the approach taken by the 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 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 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 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 Secretary in accordance with these Rules of notice from any party of that 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 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 Railways Act, the Railways (Access and Management) Regulations and the right to a fair trial at common law and under the Human Rights Act.

- 19 The Allocation Chair (aided by the Secretary) shall continue to actively encourage and facilitate resolution of disputes throughout the life of the dispute. All parties and all Forums shall have liberty to apply to the 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 Allocation Chair may at any stage on the application of any 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 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.
- 22 Subject to the Arbitration Acts, any party may at any stage issue or initiate proceedings before the High Court in England, or the Court of Session in Scotland, for any interim remedies including injunctions, interdict or specific implement 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 parties, the Allocation Chair or any Forum at any stage of the determination procedure and the basis on which ORR will determine such references.

### **ISSUES TO BE REFERRED**

- 2 Issues may only be referred to the ORR under these Rules by:
- (a) the parties together acting by agreement;
  - (b) the 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 ORR any discrete issue or matter which is connected to or forms part of a dispute and:
- (a) concerns information to which 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 ORR's industry specific experience and/or knowledge.
- 4 The purpose of a reference to ORR is to obtain answers to issues of general application to the railway industry (or a significant part of it) in respect of which 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) ORR may at its discretion decline references which relate solely to one or more parties' specific factual or financial position or refuse to determine any party's rights on the basis of the particular facts applicable to that 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 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) ("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 Dispute 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 party wishes to bring to the attention of the ORR in connection with 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 party has a right to refer the issue or matter to ORR in accordance with the Railways Infrastructure (Access and Management) Regulations or the Network Code or otherwise.

- 7 For the purposes of this Chapter C, References to ORR may be sent to the following email address: [adrr.references@orr.gsi.gov.uk](mailto:adrr.references@orr.gsi.gov.uk)
- 8 ORR will aim to acknowledge receipt of a Reference within seven days to the Referring Party.
- 9 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 ORR shall 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 ORR.
- 11 Following completion of its process, ORR shall send its final written determination of the Reference to the Involved Parties. Following receipt of a final determination the 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 ORR for partial or complete redaction, all References, statements and submissions made under this Chapter C and all responses provided by ORR may be published by the ORR and shall also be made accessible from the access disputes website.

- 13 In accordance with Rule A4, 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 ORR in considering a reference received under this Chapter C, ORR's determinations on the 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 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 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 parties which is not specified in the Procedure Agreement shall commence upon notification to the Secretary in writing by all parties (or confirmation in writing of such a notification on behalf of all parties) of their agreement to mediate.

### **Beginning a mediation**

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

### **Exchange of Information**

- 6 Following appointment of a mediator, each 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").
- 7 The 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 parties and the mediator. Copies shall be sent directly to the mediator on the same date.
- 8 Subject to contrary agreement between the 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 party.

### **The Mediation**

- 9 The mediator, where appropriate, will:
- (a) consult with the 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 parties; and
  - (f) abide by the terms of this Chapter D.
- 10 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.
- 11 No recording or transcripts of the mediation session will be made.
- 12 Each 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. 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.
- 13 The mediator may see each 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 party disclosing such matters.
- 14 Within seven days of the end of the mediation session, if the parties have not resolved the dispute by agreement and only if all the parties request, the mediator may advise the 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**

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

### **Confidentiality**

- 16 The mediation is and shall be kept confidential.
- 17 The parties, their representatives and advisers, the mediator and the 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 party making the disclosure or any obligations at law.

- 18 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 (or, in Scotland, recoverable by commission and diligence under section 1 of the Administration of Justice (Scotland) Act 1972 or otherwise) in any subsequent arbitration, legal or other proceedings involving the parties.
- 19 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**

- 20 Unless the parties otherwise agree, each party shall bear its own costs of the mediation. The 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**

- 21 The mediation shall terminate upon the earliest of:
- (a) the occurrence of the events in Rule D4;
  - (b) service by one party to the mediation on the others and on the mediator of a notice of withdrawal from the mediation;
  - (c) the provision to all parties by the mediator of his views in accordance with Rule D14;
  - (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.
- 22 Upon termination any party which wishes to refer the dispute to the next stage of the determination procedure (in accordance with the Procedure Agreement) shall notify the Secretary of the termination and its intention to refer. Any such notification shall be copied to all Dispute Parties. If no party notifies the 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**

- 23 None of the Allocation Chair, the 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**

- 24 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 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 parties which is not specified in the Procedure Agreement shall commence upon notification of the Secretary in writing by all parties (or confirmation in writing of such a notification on behalf of all 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 Secretary shall promptly approach all parties to the dispute and liaise with and assist the 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 parties within 21 days of commencement of the ENE, the Secretary shall recommend an appropriate individual from lists maintained by him or otherwise. If any party rejects the recommended individual then the ENE will be deemed to have failed and the 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 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 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 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 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 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 party shall be limited to one submission of up to one hour. The evaluator may require the 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 parties and the evaluator shall agree, the evaluator shall provide a written statement of his evaluation to all 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 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 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 parties.
- 11 No 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 parties.

## **Confidentiality**

- 13 The evaluation is and shall be kept confidential.
- 14 The parties, their representatives and advisers, the evaluator and the 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 party making the disclosure or any obligations at law.

- 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 (or, in Scotland, recoverable by commission and diligence under section 1 of the Administration of Justice (Scotland) Act 1972 or otherwise) in any subsequent arbitration, legal or other proceedings involving the 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 parties otherwise agree, each party shall bear its own costs of the ENE. The 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 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 parties.
- 19 Upon termination any party which wishes to refer the dispute to the next stage of the determination procedure (in accordance with the Procedure Agreement) shall notify the Secretary of the termination and its intention to refer. Any such notification shall be copied to all Dispute Parties. If no party notifies the 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 Allocation Chair, the 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 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 parties, evaluations shall be subject to English law, except where the Underlying Contract has arisen confers permission to use railway assets situated entirely in Scotland or the Underlying Contract in question is governed by Scottish law, in which case the ENE shall be subject to Scottish law. For the purposes of this Rule E21, where a single Underlying Contract confers permission to use track in both Scotland and England, the railway

assets in question shall be treated as being situated partly in Scotland and partly in England.

**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.

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

- 4 Upon commencement of an arbitration (in accordance with the Procedure Agreement and Rule B17 or otherwise), the 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.

- 5 In the event that no arbitrator can be agreed by the parties within 21 days of the commencement of the arbitration, the 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 parties as arbitrator unless any party notifies the 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 Secretary's choice. If any challenge is made on the ground of bias, Conflict of Interest or lack of competence, the Allocation Chair shall consider the challenge and determine either to:

- (a) uphold the proposed appointment; or
- (b) remit the choice to the Secretary with directions concerning how a further choice should be made.

Nothing in this Rule F5 shall affect the power of an arbitrator to determine his own jurisdiction or appointment.

### *Notice of arbitration*

- 6 Upon the appointment of an arbitrator, the Secretary shall send to all the parties to the dispute a notice of the appointment of the arbitrator. The 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 parties made under Rule B7(d)9(d)(iii); and
- (e) any correspondence from the 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*

- 7 If any arbitrator acting or appointed to act under these Rules resigns, withdraws, dies or refuses to act, the Secretary shall, upon application by the arbitrator or any Dispute Party, on proof satisfactory to the Secretary, declare the position of arbitrator vacant.
- 8 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 Secretary may, at the request of the arbitrator or any Dispute Party, having heard the arbitrator and the parties if they or any of them wish to be heard, declare the position of arbitrator vacant.
- 9 Where the position of arbitrator shall have been declared to be vacant pursuant to Rule F7 or F8, then Rule F4 shall apply to the appointment of a replacement arbitrator.

### **Procedure**

#### *General*

- 10 The arbitrator shall act fairly and impartially as between the parties, giving each a reasonable opportunity of putting his case and dealing with facts raised by his opponent.
- 11 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 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 parties in the arbitration. The directions shall be in accordance with the Principles.
- 12 Subject to Rule F13, an arbitration shall include an oral hearing which is appropriate in length and content for the just and expeditious determination of the dispute.
- 13 The 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.
- 14 Unless the arbitrator rules otherwise (either on his own motion or upon the application of any 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 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 party(s) shall serve upon the arbitrator and the claimant(s) a written statement of its defence (in Scotland, answers). 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 party serving the statement wishes to rely. That party shall, if so requested, make the originals of such Documents available for inspection by the arbitrator or the other party;
- (d) after service by the respondent of its statement of defence (in Scotland, answers), the arbitrator may:
  - (i) allow the parties an adjustment period within which to adjust the written statements of case so that each material averment of the 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 (in Scotland, the closed record) and send 2 copies to each of the arbitrator and the other parties to the arbitration; or, alternatively; and/or
  - (ii) within seven days of the service by the respondent of its statement of defence (in Scotland, answers), allow a reply from the claimant(s) limited to responding to new matters and contentions of law raised in the statement of defence (in Scotland, answers) including any counterclaim raised;
- (e) within seven days after the statements of case have been finalised, the arbitrator shall (in consultation with the 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 party shall serve upon the arbitrator and the other 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 party. That party shall, if requested to do so, make the originals of such Documents available for inspection by the arbitrator or the other party;
- (g) at least seven days before the hearing, each party shall serve on the other and on the arbitrator its written submissions;

15 Unless ordered otherwise by the arbitrator, at the hearing:

- (a) there shall be no oral opening submissions, but the arbitrator may ask the 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 14(f) has been complied with. Any party may apply to the arbitrator for an order that any witness whose written statement or affidavit is to be relied upon by a party should attend for oral examination at a hearing and the arbitrator shall make such order unless, having heard the 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 parties may cross-examine witnesses on oath or affirmation to the extent permitted by the arbitrator;
- (d) the parties may make oral closing submissions;
- (e) the parties may be legally represented; and
- (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 parties a reasoned award within 21 days of the end of the hearing.

*Proposed amendments*

- 16 Immediately after his appointment, the arbitrator shall require each party to propose directions to him or to inform him of any amendments to the procedure or the time limits set out in Rule F14 which it considers appropriate (whether because more than two parties will be involved or otherwise). Each party shall send promptly any proposed directions or amendments to the arbitrator and each other party. Before responding or ordering any amendments to the procedure, the arbitrator may require the parties to meet him.

*References to the ORR*

- 17 The arbitrator may, on the application of either 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*

- 18 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 F29. The arbitrator shall provide to the 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 parties and afford them an opportunity to comment on it.

- 19 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 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 (in Scotland, dismiss) 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 party shall be obliged to produce any Document which would be privileged from production in any proceedings in an action in the courts;
- (d) unless otherwise ordered by the arbitrator, an application by a 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 party in receipt of a request from the arbitrator to produce a Document shall comply with such a request within 14 days;

20 Without prejudice to the powers in Rule A16 and in addition to them, the arbitrator shall have power to strike out (in Scotland, dismiss) 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 party with any order of the arbitrator; or
- (c) inordinate or inexcusable delay on the part of any 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 party.

21 Without prejudice to the powers in Rule A16 and in addition to them, the arbitrator shall have power to strike out (in Scotland, dismiss) 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.

22 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 party to the dispute 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.

- 23 Any 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*

- 24 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 parties to the dispute, the relevant Access Conditions, and any further right of appeal or reference to another dispute resolution process provided for in the Procedure Agreement.
- 25 If any further dispute resolution process is provided for in the Procedure Agreement then any party which wishes to refer the dispute to the next stage of the determination procedure (in accordance with the Procedure Agreement) shall notify the Secretary of its intention to refer. Any such notification shall be copied to all Dispute Parties. If no party notifies the 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 parties.

#### *Power to make orders*

- 26 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 party shall pay an amount of money (including damages) to another 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 party's obligations under that agreement are as stated in the determination; or
  - (d) any principal sum the arbitrator may order one party to pay to another shall carry interest at such rate and over such period as he shall determine.

#### *Issue of arbitration award*

- 27 The arbitrator shall send a copy of his award to the parties, the Allocation Chair and the Secretary.

### **Costs**

#### *Discretion to order payment of Costs*

- 28 Whether or not the arbitration reaches the stage of a final award, the arbitrator may order any party to pay some or a specified proportion of any 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*

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

**Confidentiality**

- 30 Subject to the provisions of Rule C and Rules F31, F32 and G68, all Documents produced or disclosed in the course of an arbitration including all awards shall be treated as confidential by the arbitrator, the Allocation Chair, the Secretary and all parties and shall not be published.

- 31 Unless otherwise agreed by all 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, in Scotland, any application under Section 3 of the Administration of Justice (Scotland) Act 1972), 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 (or, for arbitrations taking place in Scotland, of res judicata) in any subsequent proceedings.

- 32 The confidentiality obligations under Rule F30 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 party in question, upon obtaining an undertaking of strict confidentiality from such persons;
- (c) disclosed on a confidential basis to the ORR or the appropriate franchising authority in the normal course of business; or
- (d) required to be disclosed pursuant to the order of a court of competent jurisdiction.

**Communications**

- 33 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**

- 34 None of the Allocation Chair, the 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**

- 35 Arbitrations shall take place in England or Wales and be subject to English law, except where the Underlying Contract in respect of which the dispute has arisen confers permission to use railway assets situated entirely in Scotland or the Underlying Contract in question is governed by Scottish law, in which case the

arbitration shall take place in Scotland and be subject to Scottish law. In either case the arbitrator may order otherwise. For the purposes of this Rule F35, where a single access agreement confers permission to use track in both Scotland and England, the railway assets in question shall be treated as being situated partly in Scotland and partly in England.

**Interim relief granted by the Court**

- 36 In an appropriate case, a 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 Industry Advisors, a 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 Hearing Chair and a number of Industry Advisors to be determined by the Hearing Chair in light of the issues in the dispute and/or its value or complexity. Unless otherwise ordered by the Hearing Chair the normal number of 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 G15, the 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 Industry Advisor, be quorate to hear a dispute with all other selected Industry Advisors and the Hearing Chair present.

### **Beginning an ADA**

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

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



9 The 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 Secretary, however, such delegation shall not affect the obligations and responsibilities of the Hearing Chair set out in this Rule.

10 Upon appointment, the 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 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 parties in the ADA. The directions shall be in accordance with the Principles.

11 The directions given under Rule G10 shall expressly require the parties to reconsider whether any third parties not already identified and notified to the Secretary, in accordance with Rule B3(b) or otherwise, may be directly affected by the outcome of the dispute and require the parties to notify the Secretary of the identity of any such parties.

12 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 party may seek an order from the Hearing Chair to provide an extension of time for any of the stages specified in the directions. The Hearing Chair shall make his decisions on any request for an extension of time based upon the Principles.

13 Subject to Rule G14, 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 under Part J of the Network Code, the oral hearing shall be fixed by the Hearing Chair as soon as practicable after his/her appointment and shall take place, unless exceptional circumstances apply, within 14 days of completion of service of the statements of case referred to in Rules G16(a)-(c) below.

- 14 The 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 Hearing Chair from requiring one or more oral hearings if he considers it appropriate for the just and expeditious determination of the proceedings.
- 15 The ADA process is flexible and may be adapted by the Hearing Chair to accommodate disputes of differing complexity and size and requiring different levels of evidence. The Hearing Chair shall therefore actively consider whether variations on the standard directions (which are for a straightforward matter) set out in Rule G16 are appropriate or justified and will have regard to the submissions of the parties in this respect.
- 16 Subject to Rule G15, unless the Hearing Chair directs otherwise (and subject to any party's right to apply for alternative or revised directions at all stages), the following timetable and procedure shall apply:
- (a) subject to Rule 16(h), within 14 days of the appointment of the Hearing Chair, the claimant(s) shall serve upon the 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 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 16(h), within 14 days of service by the claimant of the statement of its claim, the other party(s) shall serve upon each other Involved Party a written statement of its defence (in Scotland, answers). 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 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 (in Scotland, answers), serve upon each Involved Party a reply limited to responding to new matters and contentions of law raised in the statement of defence (in Scotland, answers) and any counterclaim or related claim raised;
- (d) following service of the reply, the Secretary shall write to all parties to inform them that a hearing date will be set in accordance with (e) below and to inquire whether any 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 Network Code, before the date 14 days after the statements of case referred to in paragraphs (a)-(c) have been finalised, the Secretary shall agree with the Hearing Chair and the parties a hearing date and the estimated length of the hearing. If a date cannot be agreed with one or more parties the Hearing Chair shall determine the hearing date. Unless the parties agree otherwise, or the Hearing Chair determines otherwise having due regard to Rule G15, 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 Secretary shall write to all Involved Parties to confirm the date to them;
- (f) the Hearing Chair may raise any questions relating to the dispute he wishes in advance of the hearing. In particular the 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 parties to justify their decision not to notify any such party. If any Industry Advisor or assessor raises a question, the Hearing Chair may in his absolute discretion refer such question to the 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 Hearing Chair.
  - (h) for disputes referred under Part J of the Network Code the timeframes set out in Rules G16(a) and G16(b) shall be reduced to 7 days.
- 17 At any stage prior to the date on which the Secretary writes to inform the Involved Parties of the date of the hearing, in accordance with Rule G16(e) or otherwise, any third party made aware of the dispute subsequent to Rule B3(b) or otherwise can by notification to the Secretary request to become a claimant, defendant or interested party in the dispute. Any Involved Party which has not requested to become a claimant, defendant or interested party in the dispute by this point shall cease to be an Involved Party.
- 18 Any third party which has not been made aware of the dispute subsequent to Rule B3(b) or otherwise can by notification to the Secretary request to become a claimant, defendant or interested 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 Hearing Chair determine appropriate directions) upon receiving such a request, the 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.
- 19 Any request to become a claimant, defendant or third party in accordance with Rule G17 or 18 shall be considered and determined by the Hearing Chair having considered such submissions and evidence as he shall request. In making his decision the 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*

- 20 The Hearing Chair may, on the application of any 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 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**

- 21 The length of every Statement of Case shall be in proportion to the nature and complexity of the dispute. Unless otherwise agreed by the 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.
- 22 The normal method of service shall be electronic to the Secretary and other Involved Parties.

### **Directions Hearing**

- 23 The Hearing Chair, if necessary, may at any time (on his own motion or that of any 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 G20 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 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**

- 24 Although Documents reasonably requested should be provided in compliance with the directions specified at Rule G16, disclosure will not ordinarily be ordered. However the Hearing Chair, whether or not on the application of any party and having due regard to Rule G15, 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 Hearing Chair shall exercise this power in accordance with the Principles.

- 25 No party shall be obliged to produce any Document which would be privileged from production in any proceedings in an action in the courts.
- 26 Requests and applications to the 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 Hearing Chair when considering a request.
- 27 Without prejudice to any other action open to the Hearing Chair, the Hearing Chair shall be entitled to draw any inference he wishes from any failure to provide adequate or full disclosure by any party or disclosure in accordance with the terms of directions given by him.

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

### **Witness evidence**

- 29 Subject to any alternative direction from the 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.
- 30 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.
- 31 Written witness statements will not normally be required. However if the Hearing Chair permits or requires witness statements to be submitted he shall specify the formalities, detail and timings involved.

### **Experts**

- 32 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.
- 33 When considering whether and to what extent to permit the Dispute Parties to commission further expert reports, the Hearing Chair shall consider what evidence is reasonably required to determine the dispute, the Principles and Rule G15.
- 34 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.

- 35 At any hearing the Hearing Chair, Industry Advisors, or any assessor appointed, may address questions directly to any experts.

- 36 The 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**

- 37 The 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.

38 Assessors may help undertake the procedural management of the dispute and prepare such report(s) and guidance on such issues as the Hearing Chair may direct.

39 The 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.

40 The 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**

41 The hearing will be chaired by the Hearing Chair.

42 Subject to any contrary direction of the Hearing Chair with due regard to Rule G15, the following procedure will be adopted at hearings:

(a) the Hearing Chair, 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 Hearing Chair, Industry Advisors and any assessor will confirm to the Dispute Parties the extent to which they have read the papers submitted by them;

(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 Hearing Chair and 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 Hearing Chair decides otherwise. If any witness summary has been provided the 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 Hearing Chair decides otherwise;

(g) the Hearing Chair and 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.

43 The hearing shall be conducted with the Dispute Parties present. Following conclusion of the submissions, the Dispute Parties will withdraw to allow the

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

- 44 The Secretary will unless otherwise directed by the Hearing Chair make a full note of the evidence given to the ADA. The Hearing Chair may in his discretion direct in advance that a full transcript is taken.
- 45 The 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**

- 46 Having considered the submissions of the parties and the advice of the Industry Advisors and any assessor the Hearing Chair shall make a determination of the dispute in accordance with Rule G47.
- 47 Subject to any other provision of the Access Conditions and Underlying Contract, the 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 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 Hearing Chair may order one party to pay to another shall carry interest at such rate and over such period as he shall determine.
- 48 The Hearing Chair's determination of a dispute shall be in writing and comprise:
- (a) the date of the hearing;
  - (b) the names of the Hearing Chair and 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 Hearing Chair;
  - (g) a summary of the evidence presented;
  - (h) the findings of fact made by the Hearing Chair;
  - (i) identification of any precedents considered;
  - (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 Hearing Chair that the determination is legally sound and appropriate in form.

49 The 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 J10.14.1 of the Network Code, the Hearing Chair shall deliver his reasoned written determination within ten working days of final submission to the ADA of all relevant information.

50 Except as otherwise provided in the Underlying Contract and without prejudice to Rule G67, the Dispute Parties shall comply with the terms of the determination within such period as shall be specified in the determination.

51 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**

52 The Committee's 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 Hearing shall not be charged to the parties. The parties at the time of the ADA hearing are jointly and severally liable to pay the Committee's reasonable fees and expenses connected with the ADA relating to the period after the first day of the hearing. Subject to Rule G53, the parties shall pay such fees in equal proportions.

53 The 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 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).

54 An order for costs shall only be made where the 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).

55 The Hearing Chair may make such an order at any stage including following any interim or final award.

#### **Confidentiality**

56 Subject to Rules G57, G59 and G60, and unless otherwise agreed by all parties, all Documents produced or disclosed in the course of an ADA including the

- determination shall be treated as confidential by the Hearing Chair, Panel Members, the Allocation Chair, the Secretary and all 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 (or, for ADAs taking place in Scotland, of *res judicata*) in any subsequent proceedings.
- 57 The confidentiality obligations under Rule G56 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 party in question, upon obtaining an undertaking of strict confidentiality from such persons;
  - (c) disclosed on a confidential basis to the ORR or the appropriate franchising authority in the normal course of business;
  - (d) disclosed pursuant to Rule G59 or 60; or
  - (e) required to be disclosed pursuant to the order of a court of competent jurisdiction.
- 58 Within seven days of its receipt of the determination (or such longer period as the Hearing Chair shall allow), any party to the dispute may give notice to the Hearing Chair and the other parties to the dispute:
- (a) that it objects to the publishing of all or some of the Documents specified in Rule G59;
  - (b) whether it considers that the 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 G61 do not exist.
- 59 If no notice under Rule G58 is given within the time specified in that Rule, the 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 Hearing Chair for further information and all responses to such requests;
  - (c) all written submissions from all parties; and
  - (d) all awards and/or determinations from the Hearing Chair.
- 60 If any Dispute Party serves a notice in accordance with Rule G58, the Hearing Chair shall be entitled to hear the 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 parties to the dispute otherwise agree the Hearing Chair shall provide the parties to the dispute 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.

61 There is a presumption that the Documents identified in Rule G57 shall be published provided that:

- (a) publication will not, in the Hearing Chair's reasonable opinion, result in any material adverse effect on the party or 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 party.

62 Documents including the determination produced or disclosed in the course of an ADA in connection with Condition J10.14.1 of the Network Code shall be kept confidential and such Documents shall not be published on the access disputes website.

#### **Communications**

63 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**

64 None of the Allocation Chair, the Secretary, the Hearing Chair or any 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**

65 ADAs shall take place in England or Wales and be subject to English law, except where the Underlying Contract in respect of which the dispute has arisen confers permission to use railway assets situated entirely in Scotland or the Underlying Contract in question is governed by Scottish law, in which case the ADA shall take place in Scotland and be subject to Scottish law. In either case the Hearing Chair may order otherwise. For the purposes of this Rule G65, where a single access agreement confers permission to use track in both Scotland and England, the railway assets in question shall be treated as being situated partly in Scotland and partly in England.

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

66 In an appropriate case, a 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**

67 Following a determination of a dispute by the 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 party shall have a right of appeal to arbitration in accordance with these Rules.

- 68 Any further dispute resolution process to which an appeal is made in accordance with Rule G 67, shall be subject to the confidentiality provisions set out in Rules G56 - G61 as if all Documents disclosed and prepared in relation to that further dispute resolution process had been prepared in respect of an ADA.
- 69 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 G67 then any party which wishes to refer the dispute to the next stage of the determination procedure (in accordance with the Procedure Agreement) shall notify the Secretary of its intention to refer. Any such notification shall be copied to all Dispute Parties. If no party notifies the Secretary of its intention to refer the matter to such further dispute resolution process within 28 days of the determination of the Hearing Chair, that determination shall be deemed to have been accepted by all 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 agreement which incorporates Part D of the Network Code which arise out of or in connection with issues of timetabling, timetable change and the allocation of capacity including restrictions of use and train slots, in:
  - (a) such an access agreement; or
  - (b) the Access Conditions incorporated by reference in the access agreement in question;

### **The Timetabling Pool**

- 2 The Committee shall establish (and have administered by the 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 Hearing Chairs upon Timetabling Disputes.
- 3 Individual members of the Timetabling Pool shall be appointed by the following Bands and Classes:
  - (a) two members by each of the three Bands of the Franchised Passenger Class;
  - (b) two members by each of the two Bands of the Non-Passenger Class;
  - (c) two members by the Non-Franchised Passenger Class; and
  - (d) four members by Network Rail.

The members referred to in (a), (b) and (c) shall be appointed by the method used to elect members of the Class Representative Committee under Part C of the Network Code.

- 4 If the numbers of individuals nominated for appointment under Rule H3 (a), (b) and (c) exceeds the numbers specified then one or more election(s) shall be held as required, in each case in accordance with the relevant provisions of Part C of the Network Code.
- 5 Individual members of the Timetabling Pool shall commit to:
  - (a) sit on any Timetabling Panel when requested to do so by the Secretary subject only to diary commitments;
  - (b) hear disputes impartially in accordance with the Principles.

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

- 6 Subject to Rule H7 and 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 Secretary of the Notice of Dispute in relation to a Timetabling Dispute in accordance with Rule B2, any Involved Party may apply to the 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 Secretary.

- 8 Upon an application being made in accordance with Rule H7 the 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 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 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) Network Rail may only make adjustments to a timetable which affects train slots allocated to a train operator who is not a party to a dispute, 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 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 Secretary shall appoint a Timetabling Panel in accordance with Rule H12 and send to all the parties to the dispute, 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 Secretary shall also give the parties notice of the Hearing Chair who has been appointed.
- 12 A Timetabling Panel shall:
- (a) be appointed by the Secretary;

- (b) consist of a Hearing Chair and four members selected from the Timetabling Pool; and
- (c) in each case include one of the members of the Timetabling Pool appointed by Network Rail, one member of the Timetabling Pool from one of the three Bands of the Franchised Passenger Class, one member of the Timetabling Pool from one of the two Bands of the Non-Passenger Class and one member of the Timetabling Pool from the Non-Franchised Passenger Class. In the event that a member of the Timetabling Pool from the Non-Franchised Passenger Class is not available an additional member of the Timetabling Pool from the three Bands of the Franchised Passenger Class shall be appointed in substitution.

13 The Secretary shall appoint each Timetabling Panel in a manner that:

- (a) is in accordance with the Principles as set out in Rule A 5 - A10 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 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, Band or Class.

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 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 Hearing Chair), be quorate to hear a dispute with any three of the four selected members of the Timetabling Pool present.
- 18 The 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;
  - (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 Hearing Chair at any hearing) in any dispute to the Secretary, however, such delegation shall not affect the obligations and responsibilities of the Hearing Chair set out in this Chapter H.
- 19 Any Resolution Service Party can by notification to the Secretary at any stage become a Dispute Party if it fulfils the definition of a Dispute Party, provided that the prior consent of the 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 Hearing Chair may give directions as to any or all aspects of the procedures to be followed. The 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 Hearing Chair directs otherwise (and subject to each party's right to apply for alternative or revised directions at all stages), the following timetable and procedure shall apply:
- (a) if the parties agree to submit a joint reference they shall, within 14 days of notification of the appointment of the 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 Hearing Chair in respect of a particular dispute;
  - (b) if the parties do not agree to submit a joint reference in accordance with (a) above,
    - (i) each claimant shall within seven days of notification of the appointment of the 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 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 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 Hearing Chair in respect of a particular dispute.

- (c) the Dispute Parties shall send any additional information requested by the Hearing Chair, unless directed otherwise, to the Secretary not later than seven days prior to the hearing;
- (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 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 party may seek an order from the Hearing Chair for an extension of time for any of the stages specified in the directions. The 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 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 Secretary and other Dispute Parties.

**Directions Hearing**

25 The Hearing Chair, may at any time (on his own motion or that of any 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 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 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 Hearing Chair shall exercise this power in accordance with the Principles and this Chapter H.
- 28 No 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 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 Hearing Chair when considering a request.
- 30 Without prejudice to any other action open to the Hearing Chair, the Hearing Chair shall be entitled to draw any inference he wishes from any failure to provide adequate or full disclosure by any party or disclosure in accordance with the terms of directions given by him.
- 31 When considering a request for disclosure, the 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 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.
- 34 Written witness statements will not normally be required. However if the Hearing Chair permits or requires witness statements to be submitted he shall specify the formalities, detail and timings involved.

### **Assessors**

- 35 The 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.

36 Assessors may help undertake the procedural management of the dispute and prepare such report(s) and guidance on such issues as the Hearing Chair may direct.

37 The 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 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 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 Hearing Chair, other Panel Members, and/or any assessor appointed, may address questions directly to any experts.

43 The 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 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 party and the degree to which weight should be given to such additional evidence.

45 Subject to any contrary direction of the 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 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 Hearing Chair decides otherwise. If any witness summary has been provided the 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 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 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 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 Hearing Chair, other Panel Members and any assessor to put any additional questions.
- 47 The Secretary will, unless otherwise directed by the Hearing Chair, make a full note of the evidence given to the hearing. The Hearing Chair may in his discretion direct in advance that a full transcript is taken.
- 48 The 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 parties and the advice of the other Panel Members and any assessor, the 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 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 agreement or a Dispute Party's obligations under that agreement are as stated in the determination.
- 51 The Hearing Chair's determination of a dispute shall be in writing and comprise:
- (a) the date of the determination;
  - (b) the names of the Hearing Chair, other Panel Members and any assessors present;
  - (c) details of all parties to the dispute;
  - (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 Hearing Chair;
  - (i) identification of any precedents considered;
  - (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 Hearing Chair that the determination is legally sound and appropriate in form.
- 52 The Hearing Chair shall provide a copy of his written reasoned determination to all Dispute Parties and the Secretary. The 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, unless otherwise agreed by all 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 Allocation Chair, the Secretary and all 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 Hearing Chair's determination in the TTP; or
  - (c) in support of a plea of estoppel (or, for determinations taking place in Scotland, of res judicata) in any subsequent proceedings.
- 56 Immediately upon receipt by the 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 Hearing Chair and all responses to such requests;
  - (c) all written submissions from all parties; and
  - (d) all awards and/or determinations from the 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 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 (including, as applicable, Part M of the Network Code).

### **Costs**

- 59 The 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 Hearing Chair shall determine.
- 60 An order for Costs shall only be made where the 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 Allocation Chair, the Secretary, the 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 parties have agreed should be referred to expert determination under these Rules shall be determined by a sole expert agreed between the parties or appointed by the Secretary in accordance with this Chapter I.

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

- 4 Upon commencement of an expert determination (in accordance with the Procedure Agreement and Rule B17 or otherwise), the Secretary shall promptly approach all parties to the dispute and liaise with and assist the parties in identifying, choosing and retaining a suitable determining expert, if not already done.
- 5 In the event that no determining expert can be agreed by the parties within 21 days of commencement of the expert determination, the 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 parties as determining expert unless either or both parties notify the 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 Secretary's choice. If any challenge is made on the ground of bias, Conflict of Interest or lack of competence, the Allocation Chair shall consider the challenge and determine either to:
  - (a) uphold the proposed appointment; or
  - (b) remit the choice to the 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*

- 6 Upon the appointment of a determining expert, the Secretary shall send to all the parties to the dispute a notice of the appointment of the determining expert. The Secretary shall also send to the determining expert a copy of:
  - (a) this Chapter I and Chapter A, B and C;
  - (b) any template terms for appointment of a determining expert issued by the Committee;

- (c) the Notice of Dispute;
- (d) any statements from the Parties made under Rule B9(d)(iii); and
- (e) any correspondence from the 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*

- 7 If any determining expert acting or appointed to act under these Rules resigns, withdraws, dies or refuses to act, the Secretary shall, upon application by the determining expert or any party to the expert determination, on proof satisfactory to the Secretary, declare the office of determining expert vacant.
- 8 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 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.
- 9 Where the position of determining expert shall have been declared to be vacant pursuant to Rule 17 or 18, then Rule 14 shall apply to the appointment of a replacement determining expert.

#### **Procedure**

##### *General*

- 10 The determining expert shall act fairly and impartially as between the parties, giving each a reasonable opportunity of putting his case and dealing with facts raised by his opponent.
- 11 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 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 parties in the expert determination. The directions shall be in accordance with the Principles.
- 12 Subject to Rule 113, an expert determination shall include an oral hearing which is appropriate in length and content for the just and expeditious determination of the dispute.
- 13 The 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.
- 14 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 party or parties and reasonably accessible to them. The determining expert

may further request one or more 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 party or parties.

- 15 Unless the determining expert rules otherwise (either on his own motion or upon the application of any 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 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 party(s) shall serve upon the determining expert and the claimant(s) a written statement of its defence (in Scotland, answers). 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 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 party upon which the party wishes to rely. That party shall, if so requested, make the originals of such Documents available for inspection by the determining expert or the other party(s) and shall as appropriate make available active electronic copies of such Documents for analysis by the determining expert or the other party(s);
  - (d) 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.
  - (e) at least seven days before any hearing, each party shall serve on the other and on the determining expert its written submissions;
  - (f) 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 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 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 party should attend for oral examination at a hearing and the determining expert shall make such order unless, having heard the 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 parties may cross-examine witnesses on oath or affirmation to the extent permitted by the determining expert;
  - (iv) the parties may make oral closing submissions;
  - (v) the 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
- (g) the determining expert shall deliver to the parties a reasoned award within 21 days of the end of the hearing.

*Proposed amendments*

- 16 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 115 which it considers appropriate (whether because more than two parties will be involved or otherwise). Each party shall send promptly any proposed directions or amendments to the determining expert and each other party. Before responding and ordering any amendments, the determining expert may require the parties to meet him.

*References to the ORR*

- 17 The determining expert may, on the application of any 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*

- 18 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 128. The determining expert shall provide to the 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 parties and afford them an opportunity to comment on it.

19 In relation to the production of Documents:

- (a) the determining expert may, on the application of a 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 party or any third party which the determining expert considers relevant. The parties to the proceedings 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 (in Scotland, dismiss) 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 party shall be obliged to produce any Document which would be privileged from production in any proceedings in an action in the courts;
- (d) Unless otherwise ordered by the determining expert, an application by a party to the determining expert pursuant to sub-paragraph (a) above shall be made not later than 35 days after the appointment of the determining expert; a party in receipt of a request from the determining expert to produce a Document shall comply with such a request within 14 days;

20 Without prejudice to the powers in Rule A16 and in addition to them, the determining expert shall have power to strike out (in Scotland, dismiss) 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 party with any order of the determining expert; or
- (c) inordinate or inexcusable delay on the part of any 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 the other party.

- 21 Without prejudice to the powers in Rule A16 and in addition to them, the determining expert shall have power to strike out (in Scotland, dismiss) 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.
- 22 Without prejudice to the powers in Rule A16 and in addition to them, if any 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 to the dispute 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.
- 23 Any 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*

- 24 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.
- 25 If any further dispute resolution process is provided for in the Procedure Agreement then any party which wishes to refer the dispute to the next stage of the determination procedure (in accordance with the Procedure Agreement) shall notify the Secretary of its intention to refer. Any such notification shall be copied to all Dispute Parties. If no party notifies the 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 parties.

#### *Power to make orders*

- 26 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 party to pay to another shall carry interest at such rate and over such period as he shall determine.

*Issue of expert determination*

- 27 The determining expert shall send a copy of his determination to the parties, the Allocation Chair and the Secretary.

**Costs**

*Discretion to order payment of Costs*

- 28 Whether or not the expert determination reaches the stage of a final determination, the determining expert may order any party to pay some or a specified proportion of any 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 award.

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

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

**Confidentiality**

- 30 Subject to Rule C and Rules I31, I32 and G68, 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 Allocation Chair, the Secretary and all parties and shall not be published.

- 31 Unless otherwise agreed by all 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, in Scotland, any application under Section 3 of the Administration of Justice (Scotland) Act 1972), 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 (or, for determinations taking place in Scotland, of res judicata) in any subsequent proceedings.

- 32 The confidentiality obligations under Rule I30 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 party in question, upon obtaining an undertaking of strict confidentiality from such persons;
- (c) disclosed on a confidential basis to the ORR or the appropriate franchising authority in the normal course of business; or

- (d) required to be disclosed pursuant to the order of a court of competent jurisdiction.

### **Communications**

- 33 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**

- 34 None of the Allocation Chair, the 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**

- 35 Expert determinations shall take place in England or Wales and be subject to English law, except where the Underlying Contract in respect of which the dispute has arisen confers permission to use railway assets situated entirely in Scotland or the Underlying Contract in question is governed by Scottish law, in which case the expert determination shall take place in Scotland and be subject to Scottish law. In either case the determining expert may order otherwise. For the purposes of this Rule, where a single access agreement confers permission to use track in both Scotland and England, the railway assets in question shall be treated as being situated partly in Scotland and partly in England.

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

- 36 In an appropriate case, a party 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 – CONSTITUTION, GOVERNANCE AND FUNDING

- 1 This section establishes the Committee to oversee the operation of the disputes processes set out in these Rules, handle funding and procure delivery of the disputes service and deal with appointment and termination of consultants. It sets out the Committee's constitution and role as well as the roles of other consultants required by these Rules. It also deals with the funding arrangements for the Committee.
- 2 The Committee is established by this Rule J2.
- 3 The purpose of the Committee is to exercise management and administrative oversight of the disputes processes set out in these Rules. In particular it shall:
  - (a) appoint and remove the Allocation Chair;
  - (b) appoint and remove the Secretary and any staff of the Secretariat;
  - (c) appoint and remove any Hearing Chairs and Industry Advisors;
  - (d) produce and oversee any guideline standard terms for retaining arbitrators, evaluators, determining experts and mediators;
  - (e) determine and collect levies, costs or charges from each Resolution Service Party in accordance with Rules G52 and J51;
  - (f) supervise and allocate funding for the work of the Committee (including ADA and TTP processes);
  - (g) monitor and report at least annually to the Resolution Service Parties upon the work of the Committee;
  - (h) satisfy itself that the Principles are being observed in the way in which disputes are being managed and determined and (if they are not) require the Allocation Chair to take all necessary action to correct that position;
  - (i) fulfil the functions and obligations it is required to undertake as specified in CAHA, including but not limited to the appointment and supervision of the CAHA Registrar; the consideration and approval of the CAHA Registrar's annual estimate of costs and expenses; and
  - (j) take any other step reasonably required in connection with its management and oversight role.
- 4 The Committee shall not:
  - (a) determine any dispute; or
  - (b) involve itself in the merits or conduct of any dispute prior to the determination of that dispute by the appropriate Forum; or
  - (c) interpret or advise upon the legal effect of these Rules.
- 5 The Committee shall consist of the Committee Members from whom it shall elect one to be the Committee Chair.
- 6 The Committee Members (each of whom shall be employed by a relevant Resolution Service Party) shall be appointed by the following Bands and Classes:

- (a) one member by each of the three Bands of the Franchised Passenger Class;
- (b) one member by each of the two Bands of the Non-Passenger Class; and
- (c) one member by the Non-Franchised Passenger Class,

by the method used to appoint members of the Class Representative Committee under Part C of the Network Code

together with

- (d) two members appointed by Network Rail.

- 7 If the numbers of individuals nominated for election under Rule J6 exceeds the numbers specified then one or more election(s) shall be held as required, in each case in accordance with the relevant provisions of Part C of the Network Code.
- 8 The quorum for meetings of the Committee shall be 5 Committee Members. Any Committee Member may participate in a meeting of the Committee by means of conference telephone or similar communications equipment whereby all persons participating in the meeting can hear each other. Any Committee Member participating in a meeting in this manner shall be deemed to be present in person at such meeting.
- 9 Any Committee Member who has or may have a Conflict of Interest in respect of any matter, decision or issue shall declare such Conflict of Interest to the Committee and shall take no part in any discussions, decisions, negotiation or votes relating to such matter, decision or issue. Where any Committee Member or Members who are present at a meeting have declared a Conflict of Interest such Committee Members shall be counted in the quorum required for such matter, decision or issue.
- 10 If the Committee Chair is unable to be present at a meeting or is present and has declared a Conflict of Interest, the Committee Members present shall elect one of their number to chair that meeting or part of the meeting as appropriate.
- 11 If the Committee cannot reach agreement on any issue then that issue may be decided by vote. Subject to any express requirement in these Rules governing the size of the required majority or of unanimity, the vote shall be decided by simple majority. The Committee Chair may vote but will not additionally have a casting vote.
- 12 The Committee may decide an issue by correspondence. Such correspondence must be sent to all members of the Committee. If agreement to any proposal in such correspondence is endorsed by the signature of at least five Committee Members then it shall be treated as if it was a decision of the Committee made at a Committee meeting.
- 13 The secretary to the Committee shall, as soon as reasonably practicable following the appointment of a new member, notify all other Committee Members of that appointment.
- 14 Subject to Rules J15 and 16, unless he shall have been re-elected, a Committee Member shall be treated as having ceased to hold office on the 1 April which is nearest to the date which is two years after the date of his appointment.
- 15 A Committee Member appointed in accordance with Rules J6(a) to J6(c):

- (a) may be removed from office and a replacement member appointed in his place by a majority in number of members of the relevant Class or Band (as the case may be) present (whether in person or by proxy) and voting at the relevant meeting called for the purpose of such removal and substitute appointment; and
- (b) shall be treated as having resigned from office if he dies or becomes of unsound mind, or suffers any physical or mental incapacity which prevents him from discharging his duties for a period of three months or longer;
- (c) shall be treated as having resigned from office if he becomes bankrupt or compounds with his creditors; and
- (d) shall be treated as having resigned from office if he ceases to be employed by a company within the Band to which he is appointed.

If appointed by Network Rail, a Committee Member:

- (e) may be removed from office and a replacement member appointed in his place through Network Rail informing the secretary in writing; and
- (f) shall be treated as having resigned from office if he dies or becomes of unsound mind, or suffers any physical or mental incapacity which prevents him from discharging his duties for a period of three months or longer;
- (g) shall be treated as having resigned from office if he becomes bankrupt or compounds with his creditors; and
- (h) shall be treated as having resigned from office if he ceases to be employed by Network Rail.

16 Notwithstanding Rule J15, Committee Members appointed in accordance with Rules J6(a) to J6(c) shall retire in rotation on 1 April in each year in the following order:

- (a) on 1 April in odd numbered years:
  - (i) the member appointed by the Band of the Franchised Passenger Class which is highest by value of relevant annual Track Charges payable by the Bands of that Class at the relevant time;
  - (ii) the member appointed by the Band of the Non-Passenger Class which is the higher of the two by value of relevant annual Track Charges payable by them at the relevant time; and
  - (iii) the member appointed by the Band of the Non-Franchised Passenger Class.
- (b) on 1 April in even numbered years, the Committee Members appointed in accordance with Rules J6(a) to J6(c) who shall not have retired pursuant to Rule J16(a).

17 The Committee may, where reasonable to do so, delegate the performance of any of its functions to the Committee Chair or to the secretary to the Committee but such delegation shall not affect the obligations and responsibilities of the Committee set out in this Chapter J.

### **Committee Chair**

- 18 The role of the Committee Chair is to ensure that the business of the Committee is dealt with effectively and that the purpose of the Committee is discharged.
- 19 At the first meeting after 1 April in every year the Committee Members shall elect from amongst their number a Committee Chair who shall remain as Committee Chair for the ensuing year unless he retires in accordance with Rules J15 and 16, or is otherwise unable to perform the role of Committee Chair in which case the Committee Members may elect one of their number as a replacement Committee Chair either temporarily for the circumstances described in Rule J10 or permanently until the meeting following the next 1 April.

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

- 20 The Committee shall appoint the 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 party entitled to use these Rules or receive any benefit from any such party in return for services provided to it, in either case in a way which may compromise his impartiality;
  - (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; and
  - (d) in addition to his role as set out in these Rules, determine any disputes arising in relation to relevant decisions of the CAHA Registrar.
- 21 The appointment and any re-appointment of the Allocation Chair shall be made by unanimous resolution.
- 22 The Allocation Chair shall upon appointment, declare to the Secretary any relevant connection which he has or has had with the railway industry, and, subject to Rule J20(b), shall during his term of office promptly disclose any new connection of that kind. The Secretary shall provide a copy of any disclosure made under this Rule to each Committee Member and to any Resolution Service Party which requests it.
- 23 In the event that the Allocation Chair has or may have any Conflict of Interest in respect of any dispute he shall identify such Conflict of Interest to the Secretary who shall nominate a Hearing Chair from the pool referred to in Rule J29 to act as Allocation Chair for that dispute.
- 24 The 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.
- 25 The terms on which the 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.

- 26 The 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 Allocation Chair.
- 27 A resolution to terminate the appointment of the 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.
- 28 If, within 60 days of the termination (for whatever reason) of the appointment of the Allocation Chair, the Committee shall have failed to appoint a new Allocation Chair pursuant to Rules J20 and 21, the Committee shall:
- (a) by unanimous resolution, determine a list of three candidates for the role of 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 Allocation Chair the candidate then selected by the ORR.

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

- 29 The Committee shall (in addition to the appointment of the Allocation Chair) appoint (as consultants) a pool of Hearing Chairs to sit on Timetabling Panels and ADAs and a pool of Industry Advisors to sit on ADAs as appropriate.
- 30 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 party entitled to use these Rules or receive any benefit from any such 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 (where Hearing Chairs are not legally qualified the Rules provide for assessors to be appointed as required);
  - (d) be appointed and be liable to termination of appointment in the same way as the 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 Allocation Chair or Secretary or under any Procedure Agreement under Chapter B.

- 31 In the event that any 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 Secretary who shall nominate an alternative Hearing Chair from the pool to act as Hearing Chair for that dispute.
- 32 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 party entitled to use these Rules or receive any benefit from any such 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 Allocation Chair;
  - (d) participate in ADA hearings or discharge any other function otherwise falling within these Rules as directed by the Allocation Chair.
- 33 In the event that any 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 Secretary who shall nominate an alternative Industry Advisor from the pool to take part in that dispute.

#### **The Secretary**

- 34 The Committee shall appoint the Secretary (as a consultant) to discharge the following separate and distinct roles:
- (a) secretary to the Committee;
  - (b) the Secretary for the purposes of these Rules;
  - (c) secretary to an ADA;
  - (d) secretary to a Timetabling Panel; and
  - (e) secretary for the administration of the RIDR Rules.
- 35 Subject to Rule J34 the Committee shall specify the 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) facilitating the work of the Committee and ensuring the efficient administration of its business;
  - (b) running the Secretariat efficiently and cost effectively;
  - (c) 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;
  - (d) implementing efficiently any instruction given to the Secretary by the Allocation Chair or any Hearing Chair;

- (e) liaising with the secretary of the Class Representative Committee as necessary and appropriate;
- (f) appointing an appropriate ADA and Timetabling Panel in each relevant dispute;
- (g) ensuring that the access disputes website is up to date, accurate and accessible;
- (h) 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;
- (i) sourcing external legal advice as requested or directed by the Committee, the Committee Chair, the Allocation Chair or a Hearing Chair;
- (j) administering the Committee's finances and bank account on behalf of the Committee;
- (k) determine and collect levies from each Resolution Service Party in accordance with Rule J51; and
- (l) liaising with the CAHA Registrar.

36 The 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 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;
- (c) be removed from office by the Committee in the same manner as the Allocation Chair.

37 The Secretary shall not be a Member of the Committee, the Allocation Chair, a Hearing Chair, an Industry Advisor, arbitrator, mediator, determining expert or evaluator or a member of any Timetabling Panel.

38 The Secretary shall be appointed upon such terms as the Committee shall determine. Where the terms on which the 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**

39 The Committee may appoint additional consultants to assist the Secretary to discharge his duties (together, from time to time, the "Secretariat").

40 The Secretariat shall be appointed upon such terms as the Committee shall determine.

41 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.

## **The Agency Company**

42 Without prejudice to the generality of Rule J3(i), the Committee shall have power:

- (a) to promote and register in England a company limited by guarantee and not having a share capital (the "Agency Company") to act as its agent and/or nominee;
- (b) to decide, subject to the provisions of Rules J44 to J47, the terms of the constitution of the Agency Company from time to time; and
- (c) to make agreements and arrangements pursuant to which the Agency Company acts as the agent and/or nominee of the Committee for the discharge of administrative functions and the provision of administrative services (including, without limitation, the provision of goods and services and the holding of property) on such terms as it may in its discretion determine.

43 For the avoidance of doubt:

- (a) the agreements and arrangements referred to in Rule J42(c) may include contracts under which officers and staff of the Secretariat (including the Secretary) are engaged by the Agency Company as agent of the Committee;
- (b) the Committee or the Committee Members may, under agreements and arrangements referred to in Rule J42(c), appoint the Agency Company as agent to make any appointment or otherwise exercise the powers under this Chapter J and references in Rules J59, J61 and J62 to the Committee or Committee Members acting on behalf of Resolution Service Parties or entering into a contract of appointment or contract of employment on behalf of Resolution Service Parties shall be construed accordingly; and
- (c) Committee Members will be liable under contracts made by, and for acts and omissions of, the Agency Company acting within the scope of its authority as agent under agreements and arrangements referred to in Rule J42(c).

44 Each of the Committee Members is required to be a member of the Agency Company. With a view to giving effect to that requirement, each Committee Member shall, on his appointment as such, make application to be admitted as a member of the Agency Company in accordance with the terms of its constitution from time to time and agree to be bound by the provisions of agreements and arrangements made under Rule J42(c) prior to the date of his admission and of all contracts entered into by the Agency Company prior to the date of his admission pursuant to those agreements and arrangements. Without prejudice to the provisions of Rules J15 and J16, a Committee Member shall be treated as having resigned from office if he fails to comply with the provisions of this Rule J44 within 60 days after his appointment.

45 No person other than a Committee Member may be a member of the Agency Company.

46 The Secretary shall be a director of the Agency Company *ex officio*. The Committee may appoint all or any Committee Members to be directors of the



Agency Company and no person other than a Committee Member may be an alternate director of the Agency Company.

- 47 No person other than a Committee Member or the Secretary may be a director of the Agency Company.

### **Funding**

- 48 The Committee's financial year shall commence on 1 April.
- 49 The work of the Committee shall be funded by payments from the Resolution Service Parties. In respect of its funding and financial position the Committee shall be run as a going concern.
- 50 The required payments from the Resolution Service Parties shall be calculated in respect of each financial year and (subject to Rules G52 and J49) shall reflect the estimated costs and expenses of the Committee (including ADA and TTP) together with appropriate allowance for contingencies and for meeting cashflow requirements into the ensuing year. In abnormal circumstances additional payments may be required during a financial year to meet unplanned or unexpected costs.
- 51 The Resolution Service Parties shall make payments as follows:
- (a) any Resolution Service Party which does not pay the Railway Safety Levy shall make a payment in an amount to be assessed by the Committee which shall be fair and reasonable taking into account such factors as the Committee in its discretion believes to be appropriate which may include the turnover of the Resolution Service Party in relation to the mainline railway in Great Britain and the need to allow potential access parties and others reasonable access to the dispute resolution service;
  - (b) where incorporation of these Access Dispute Resolution Rules or RIDR Rules into a contractual arrangement is a matter of commercial choice and not a requirement of a regulated contract, and the parties are not already Resolution Service Parties, the parties to that contractual arrangement shall become Resolution Service Parties upon agreement with the Committee of the payment to be made by them in each financial year which shall be fair and reasonable to all Resolution Service Parties;
  - (c) the remaining funding in addition to those sums paid under (a) and (b) above which is required by the Committee in accordance with J49 and 50 shall be paid by those Resolution Service Parties which pay the Railway Safety Levy. Each such Resolution Service Party shall pay a proportion of the remaining funding equal to the proportion which the amount of Railway Safety Levy most recently determined as payable by it (subject to such rebate as the Committee chooses to apply in its absolute discretion to take account of a Resolution Service Party's business and operations which do not relate to matters subject to these Rules) bears to the aggregate Railway Safety Levy payable by all Resolution Service Parties (as adjusted to take account of the Resolution Service Parties' business and operations which do not relate to matters subject to these Rules);
  - (d) in each financial year the Committee shall, for that financial year, assess the payments to be made by any party which does not fall within the above provisions and which, in that financial year, becomes or remains in a dispute registered with the Secretary and such party shall make such payments upon

request from the Secretary; the amount of which (in any one financial year) shall not be less than £1,000.

- 52 The Committee may from time to time publish and/or amend a statement of the additional charges it will require Dispute Parties to pay in relation to the services provided in connection with disputes which have been referred for resolution under these Rules and may require Dispute Parties to pay such charges (including as a precondition to releasing determinations).
- 53 The Secretary shall receive and hold amounts paid pursuant to these Rules on behalf of the Committee and shall be entitled to exercise all relevant legal rights in respect of entitlement to, ownership of, or control of those amounts including to make demands and bring actions in his own name or that of the Committee in relation to them.
- 54 Any request for payment from the Secretary shall be settled within 30 days.
- 55 Without prejudice to any other rights available to the Secretary and/or the Committee under this Chapter J including the right to enforce such payments as a debt, in the event that any party fails to pay to the Secretary the required amount pursuant to Rule J51 within 30 days of being requested to do so by the Secretary, that party shall pay interest (incurred daily and compounded monthly) on the required amount from the due date to the date of actual payment at the rate 8% above the base lending rate of Barclays Bank plc as varied from time to time during the period in which the required amount remains unpaid. Any such interest due may be invoiced as an addition to the amount payable by the relevant party in the following year.
- 56 The Committee shall manage its finances such that funds are held to meet all reasonably foreseeable liabilities including building up funds for payments of property charges including dilapidations and in accordance with Rule J49. To the extent that the actual costs and expenses of the Committee shall have been underestimated by the Committee in respect of any period, the amount of the difference may be carried over to the following year and added to the amounts payable by the Resolution Service Parties in that following year. To the extent that the actual costs and expenses shall have been significantly overestimated in respect of any period, the amount of the difference shall be carried over to the following year and shall be deducted from the amounts payable by the Resolution Service Parties in that following year.
- 57 Any Resolution Service Party shall be entitled to require the Secretary to provide him with a certificate from a firm of chartered accountants in relation to the costs and expenses of the Committee in respect of any financial year. The Secretary shall promptly comply with any such request.
- 58 The Committee shall review and approve its accounts annually. The Committee may at any stage commission such additional audit examination as may be considered appropriate.

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

- 59 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.

60 None of the Allocation Chair, any Hearing Chair, any Industry Advisor, the Secretary or any member of the Secretariat shall by virtue of his office be an employee of the Committee or any person.

61 A Resolution Service Party, on becoming such, shall indemnify those who are already Resolution Service Parties (“the Existing Resolution Service Parties”) against its share of any liability which arises:

- (a) while it is a Resolution Service Party; and
- (b) under any contract of appointment and or other contract that is entered into by the Committee Members on behalf of the Existing Resolution Service Parties (or some of them, and whether or not with others) before it became a Resolution Service Party.

A Resolution Service Party’s share shall be the appropriate proportion of the liability calculated in accordance with Rule J51(d), applied to the Resolution Service Parties at the time the liability arises.

62 A Resolution Service Party that ceases to be such shall be indemnified by the Resolution Service Parties which remain against any liability which arises:

- (a) after it ceases to be a Resolution Service Party; and
- (b) under a contract of appointment and or other contract entered into by the Committee on behalf of it (with other Resolution Service Parties) while it was a Resolution Service Party,

such that the Resolution Service Parties as at the date the liability arises shall bear it in the proportion applied to them as set out in Rule J51.

#### **Publication of Information**

63 The Committee shall require the 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 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**

64 Subject to Rule J65 none of the Committee Members, the Committee, Panel Members (TTP or ADA), Committee Chair, the Allocation Chair, any Hearing Chair, Industry Advisors and the Secretary or any member of the Secretariat shall be liable

in contract or tort or otherwise to any party for any act or omission (including negligence) in connection with any Committee proceedings or dispute determined by a Timetabling Panel or by a Hearing Chair under these Rules except in respect of any act or omission shown to constitute bad faith and/or dishonest conduct.

- 65 The exclusion of liability in Rule J64 does not extend to the obligations of the Committee Chair, the Allocation Chair, any Hearing Chair, Industry Advisors and the Secretary, or member of the Secretariat contained in any contract of appointment.
- 66 The Resolution Service Parties shall (subject to Rule J67) jointly and severally indemnify, and keep indemnified, the Committee Members, Committee Chair, the Allocation Chair, any Hearing Chair, Panel Members (TTP or ADA), Industry Advisors, the Secretary and any member of the Secretariat against any liability incurred (or alleged to have been incurred) by them to any Dispute Party or any third party in connection with any of their duties under these Rules except in respect of any act or omission which is shown to constitute bad faith and/or dishonest conduct or which would be a breach of any obligation contained in any contract of appointment.
- 67 The indemnity obligation of a specific Resolution Service Party under Rule J66 shall exclude any individual who is an appointed officer of that Resolution Service Party or of any affiliate if (and only to the extent that) such indemnity would be precluded under the Companies Acts. For the avoidance of doubt such exclusion shall not however affect:
- (a) the joint and several obligation of that Resolution Service Party under Rule J66 to indemnify other relevant individuals;
  - (b) the joint and several obligation of all other Resolution Service Parties to indemnify any individual not entitled to an indemnity from any Resolution Service Party by virtue of a directorship; and
  - (c) any lawful right of contribution by indemnifying Resolution Service Parties against a Resolution Service Party not required to indemnify by reason of this Rule J67.

#### **Other Administrative Issues**

- 68 These Rules may be amended in accordance with the provisions of Part C of the Network Code.
- 69 No amendment of these Rules shall have effect unless approved by the ORR.
- 70 Any dispute arising out of the operation or interpretation of these Rules including this Chapter J 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 J70 does not relate to the operation or interpretation of these Rules, it shall decline to hear the reference.
- 71 These Rules are subject to English law except as otherwise provided as being subject to Scottish law.
- 72 These Rules form part of the Network Code.

