NOTE OF ACCESS DISPUTE RESOLUTION RULES REVIEW SEMINAR 9 JANUARY 2009

1. Brian Kogan, in chairing the workshop, stated that its aim was to:

(a) provide an opportunity to set out the industry working group's findings and recommendation from its review of the current Access Dispute Resolution Rules (ADRR);

(b) facilitate development of a consensus on the way forward; and

(c) help inform responses to the proposals in the working groups consultation document[1] which are due by 30 January 2009.

2. Brian Kogan pointed out that a note of the seminar would be posted on the ORR, Network Rail and ADC websites to inform those industry parties who had been unable to attend. A list of the attendees at the workshop is attached to this note, along with copies of the speaker's slides.

ADRR background and current position – Gabrielle Ormandy (Network Rail)

3. This presentation summarised the history of the ADRR to date. It also explained the reasoning behind the review and the establishment of the working group under the auspices of the Industry Steering Group, and the positive and negative aspects of the current system in comparison with those attributes that the working group considered would constitute an effective dispute resolution system. In terms of the positive and negative attributes identified no other 'positives' were noted by attendees but Lindsay Durham did consider a further 'negative' of the current system to be the potential lack of impartiality of the panel hearing the dispute (i.e. where a panel member could be from the same company as one of the dispute parties).

4. Tom Winsor provided a helpful summary of the background to the development of the current rules and why the current arrangements focus on an industry based process which had, in his view, only been intended to be a short-term measure. He expressed the opinion that the current arrangements were unsatisfactory, particularly in respect of legal issues and high value or complex cases and made reference to a proposal at privatisation to establish a Railway Appeals Tribunal which was not accepted by the Secretary of State.

5. Brian Kogan suggested that, in commenting on the proposals, industry parties need to consider their experiences of the current system and how they want it to work going forward.

6. Tom Winsor, in considering the appeal role of ORR in the process, made it clear that questions on capacity have to be heard by ORR under its statutory powers. This review should now address where the other disputes, concerning points of legal interpretation, should be heard. Brian Kogan suggested that ideally ORR would prefer that the dispute process was sufficiently robust that no appeals were necessary.

Options considered – Chris Jackson (Burges Salmon)

7. Chris Jackson, standing in for Kai Hills (ATOC) who was unfortunately not able to attend, presented the various options that had been considered and conclusions drawn

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[1] Available on the ORR website at http://www.rail-reg.gov.uk/upload/pdf/ADRR-revcons_121208.pdf.

by the working group as alternatives to the current ADRR process. These, along with their perceived advantages and disadvantages, are set out in both the attached slides and the industry consultation document.

8. Brian Kogan raised two questions:

(a) during the last review of the ADRR (2004/05) the issue of the cost of a more rigorous, non-industry process was an important factor to the industry. Recognising that there were also cost implications associated with a poorly run system, the views of attendees were sought on whether this remained the case; and

(b) how does the ORR's approach to appeals – reviewing determinations rather than re-hearing the arguments – fit with the alternative options described and would parties want this 'review' approach to continue?

9. Lindsay Durham indicated that whilst costs are generally low enough not to raise concern this might change if they increased significantly. Also, a system where costs are paid only by the parties involved may focus attention and this might be a good thing. John Beer commented that the cost of preparing for an appeal is becoming more significant, and charging for every referral would favour larger parties.

10. Ian Yeowart suggested charging a flat fee for referrals to the Timetabling Panel (TTP) which would make parties think more fully about taking such action whereas at the moment there is perhaps complacency about the process. Tony Skilton pointed out that such referrals are driven by other processes (for example, Part D of the network code) and are often necessary simply to protect an operator's position whilst discussions with Network Rail are ongoing, and often act as a catalyst to focus attention on the issue. Tom Winsor expressed the view that part of this process should be about reforming behaviours – the rules might be adequate but if they are not followed correctly they might as well not exist.

11. The point was raised that in cases of significant value, if ORR remains as the second stage of appeal, parties will still take that route irrespective of the reliability of the original determination. Is there an argument, therefore, for ORR to be the first stage of the process? Brian Kogan confirmed that this had been considered (and rejected) under previous reviews of the rules and this was not a favoured approach. ORR would want to understand the circumstances under which such a direct referral might be made, and would also want the ability to refuse to accept such a reference.

12. In terms of the alternative options, Tom Winsor also raised the following views:

(a) High Court judges are rarely experienced in railway matters. Railway experience is very important and can reduce the cost associated with disputes;

(b) high value or complex cases cannot be dealt with on paper – a hearing is essential to draw out the full facts of the case; and

(c) independence is a key factor. A tribunal with an independent, experienced chairman supported by expert advice on a case-by-case basis (both without railway affiliation) is, in his opinion, the best way forward. Greater value can be achieved through such a process as, although the initial costs might be higher, better quality and more reliable decisions will be taken at the first stage, reducing the number of expensive appeals.

13. Brian Kogan argued that many references seem to be dealt with currently at the first stage because they are not subsequently appealed. Tom Winsor considered that there is a lack of industry confidence in the current system, and that there may be a

number of reasons why parties choose not to appeal, cost being one of them. He reiterated his view that a body such as a Railway Appeals Tribunal should be created (through the network code) where all industry regulatory appeals (the majority of which involved questions of legal interpretation) would be heard. Timetabling appeals could still be heard by the TTP which in his view was best able to serve this function. ORR could still be involved (or even sit on the tribunal) on questions where regulatory guidance / decisions were required, and the tribunal should have to apply ORR's position on any statutory Section 4 duties in making a determination. If ORR considered that a regulatory aspect has subsequently been determined incorrectly, the process could allow ORR to question the outcome and demand a rehearing. He considered, however, that this would be unlikely, relieving ORR of its current appeal role.

Industry working group's proposals – Nigel Oatway (DB Schenker)

14. Nigel Oatway explained in detail the revisions to the current ADRR on which the working group was consulting the industry. He highlighted a key consideration of the working group that a party should use the most appropriate forum to hear and determine its dispute.

15. Lindsay Durham questioned how fair trial compliance (FTC) will be achieved in terms of timetabling disputes if the current arrangements for dealing with them remain unchanged. Brian Kogan pointed out that such appeals are covered by the (Access and Management) Regulations 2005 which allow issues to be appealed to the regulatory body (ORR). Chris Jackson suggested that any system needed to ensure that FTC was achieved over both stages of the dispute mechanisms. It was, however, important to avoid repeating a full hearing process at the appeal stage if a FTC hearing had already been undertaken earlier.

16. Simon Taylor questioned whether there was a role for some form of early mediation to try and resolve any technical or communication issues. It was confirmed that this would form part of the role of the proposed Dispute Resolution Service and it was therefore important to ensure the correct people from the dispute parties were involved at this stage. Eileen Carroll from the Centre for Effective Dispute Resolution suggested that this was a key element of any process used across a wide range of industries, but one that could prove difficult to administer.

Scenario Discussion – Nigel Oatway, Chris Jackson and Ian Tucker

17. Members of the working group then led attendees in a discussion of three scenarios to consider how issues would be dealt with currently and under the proposed new process. It was pointed out that the discussions should focus on the merits of the relevant processes rather than the fact of the hypothetical cases.

Scenario 1

18. This was a typical issue that involved many factors (timetabling dispute, network change and Rules of the Route amendment). Views expressed by attendees included:

(a) depending on the size of operator, the dispute value of £1m would mean that this would be an issue that would currently be appealed irrespective of the first determination. This in itself might indicate a lack of confidence in the current system. The likelihood of appeal through the current system might make a Railway Appeals Tribunal approach more attractive;

(b) despite the range of issues, the dispute as a whole would be dealt with by the Access Dispute Panel (ADP);

(c) any bilateral disputes might lead to other disputes arising involving other operators. Such a range of party involvement would lead to impartiality issues with the current panel arrangements;

(d) in this type of issue a large operator might be willing to pay a significant amount of costs to take the matter to a Railways Appeals Tribunal, whereas a freight or open access operator might not want to or be able to afford to; and

(e) in terms of appeals of a tribunal decision, points of law (perhaps in high value cases) could be taken to the High Court. Alternatively the tribunal determination could be seen as final.

Scenario 2

19. Views expressed by attendees included:

(a) this scenario (a potential mixture of ADP and arbitration resolution) was too complicated a mix of commercial and contractual issues for the current system to provide a suitable remedy and would probably result in appeal;

(b) mediation might have a role to play in resolving the issues. It was suggested that mediation was a process not used as much as it could or should be. This could be due to a lack of guidance or encouragement across the industry and some belief that the current rules not allowing such alternative routes to be followed. There was also feeling that issues can be resolved through local discussion if given sufficient time;

(c) industry panel members may not have time to deal with the complexities of this type of dispute;

(d) there is a need to remember that not all ADP determinations are appealed. There is therefore perhaps still a role for that type of forum and that choice should be available for those that want to use it; and

(e) as the majority of disputes are between operators and Network Rail it was suggested that a specific disputes group be established within Network Rail to provide guidance, and therefore consistency, on the way that matters are dealt with. Network Rail noted this suggestion.

Scenario 3

20. Ian Tucker (Burges Salmon standing in for Kai Hills) suggested that three specific issues be considered in relation to this scenario which considered the merits of dealing with issues under either the TTP or the ADP. These issues were:

(a) reliance on precedent;

(b) the nature of arbitration against adjudication; and

(c) ORR's role being used to carve out certain issues.

21. Views expressed by attendees included:

(a) whilst useful in understanding how an issue had been dealt with previously, precedents are only of any real benefit if they come from a higher tribunal because they do not have any binding force under the rules;

(b) better determinations under a more reliable dispute system would improve the value of precedents;

(c) precedents are more likely to be of value in an arbitration case than mediation, where discussions are generally private between the parties involved;

(d) it would be helpful if the ADC website were improved and an annual analysis produced of issues resolved;

(e) on matters of regulatory policy ORR cannot be excluded from the dispute process. Legal issues, however, should not be addressed by ORR. It may have no legal standing to discharge this role anyway; and

(f) could ORR be involved in the mediation process? Based on experience of previous appeals, and the complexity of issues discussed, ORR considered it unlikely that it would be able to offer suitable advice under such circumstances.

22. In summarising the discussions Brian Kogan identified three key issues for further consideration:

(a) costs involved in any new process;

(b) the need to achieve fair trial compliance, and at what stage this is necessary. This included the proposal for a specific appeals tribunal and whether this approach and the way it was designed could be a better way of dealing with disputes; and

(c) dispute management - will addressing issues earlier be a better way of dealing with or streamlining appeals.

23. Brian Kogan then went on to outline other areas that the consultation requested comment on:

(a) the role of the ORR going forward;

(b) governance of ADC – including status and funding;

(c) composition and structure of ADPs – as now or independent members?

(d) how any changes will be given effect;

(e) precedent and publication; and

(f) consideration of the RIDRC process and whether it should be considered as part of this review.

24. In closing the seminar, Brain Kogan reminded attendees that responses to the consultation document should be submitted to both Gabrielle Ormandy and Andrew Eyles (ORR) by 30 January 2009. He noted that ORR is reserving its position until such time as the industry has had the opportunity to agree how it wants to take things forward.

25. Tom Winsor expressed his opinion that the working group had produced a good consultation document and followed a very good process in achieving this.

Office of Rail Regulation
January 2009

Access Dispute Resolution Rules Seminar

9 January 2009

List of Attendees

Name	Organisation
Industry working group	
Gabrielle Ormandy	Network Rail
Richard Smith	Network Rail
Dan Kayne	Network Rail
Alice Connolly	Network Rail
Chris Jackson	Burges Salmon
Ian Tucker	Burges Salmon
Nigel Oatway	DB Schenker
Paul Gold	DB Schenker
Martin Shrubsole	Access Dispute Committee
Tony Skilton	Access Dispute Committee
ORR	
Brian Kogan (Chairman)	
Colin Greenslade	
Rebecca Staheli	
Andrew Eyles	
Michael Beswick	
Industry representatives	
John Beer	First Capital Connect
Mike Vila	c2c
Tom Winsor	White & Case
Ian Yeowart	Grand Central Railway
George Thompson	TransPennine Express

Catherine Rowe	National Express East Coast
Chris Deal	Transport for London
John Czyrko	London Midland
Sarka Oldham	Direct Rail Services Limited
Lindsay Durham	Freightliner Group Limited
Bill Davidson	Network Rail
Rob Hodgkinson	Virgin Trains
Alan Winn	Heathrow Express
Jim Sheils	RIDR
Simon Taylor	East Midlands Trains
Other interested parties	
Eileen Carroll	Centre for Effective Dispute Resolution
Ranse Howell	Centre for Effective Dispute Resolution

ADRR Review Seminar

9 January 2009

Introduction

Brian Kogan

ADRR background and current position

Gabrielle Ormandy

- ADRR devised at privatisation
- Heavily revised for 1995
- Unchanged until April 2005

Until 2005

- Access Disputes Resolution Committee (ADRC)
- 3 sub-committees
  - Timetabling
  - Network & Vehicle Change
  - Technical (never activated)
- Each sub-committee had 8 members (2 from Railtrack, and 6 from Train Operators)

Review & Change

- June 2004 – ORR issued consultation document
- Cross-industry Working Group formed
- Updated rules – April 2005
- 2 dispute hearing committees
  - ADP (Access Dispute Panel)
  - TTP (Timetabling Panel)
  - Admin and governance functions separated (ADC)

At that time, the Regulator indicated that ORR would

“monitor the determinations which are produced by the dispute panels...to see whether the new rules are producing the anticipated quality improvement in determinations in practice”

Analysis of current process

- Current rules in force now for 4 years
- Since 2005 ADP has had 33 references of which:
  - 1 still pending
  - 15 ADP determinations
    - 6 appealed to ORR of which
      - 2 appeals rejected (in one of these, ORR upheld the ADP determination but for partially different reasons)
      - 4 either fully or partially upheld
  - 15 settled or withdrawn

- TTP has received 259 references of which:
  - 20 resulted in 13 TTP hearings making determinations,
    - 5 of which appealed to ORR - 2 cases upheld, 3 cases are pending
  - 223 have been settled or withdrawn

Working Group

- Under the Industry Steering Group a Working Group was established
- membership:
  - Network Rail (Chair)
  - ATOC
  - RFOA
  - ADC and
  - ORR (primarily as observers and providing secretariat support)

Working Group Remit

"To review the current Access Dispute Resolution Rules (ADRR), (including the structure of the relevant committees and secretariat) and Part M of the Network Code so that they are fit for purpose, and allow disputes/appeals raised by parties to access contracts to be considered and resolved in an appropriate, robust and fair manner"

Identified positives of the current system

- Provides industry resolution of industry disputes in an adjudication style
- Reduces learning curve
- TTP generally works well
- There is a robust set of rules
- Free at point of delivery as funded by levy
- Body of case law has been built up

Identified negatives of the current process

- Panel member availability
- Some perception that the current structure not wholly “fair trial compliant”
- Practical constraints on ability to hear large/complex disputes
- Current system lacks flexibility (route is pre-determined)

negatives cont'd

- Lack of consistency in route a dispute currently follows – can lead to duplication
- Concerns about ORR's ability to handle evidence heavy and unduly burdensome second stage hearings in all cases
- Perception in some instances that case management powers available to the ADP have not been used to the extent available or contemplated at last review

Proposed requirements for an effective ADRR

- Have a fair determinative stage available
- Provide a relatively swift and easy to access dispute process for all cases where this is appropriate
- Be able to accommodate larger cases of significant value or wider importance
- Preserve facility of industry involvement and expertise
- Deploy that expertise at a streamlined and well managed stage

Proposed requirements for an effective ADRR cont.

- Be sufficiently clear for parties to understand relationship of different routes
- Maintain option to have ORR involvement at second or full hearing stage
- Distinguish with clarity between exercise of contractual jurisdiction and economic regulatory jurisdiction
- Continue to capture, make accessible and make best use of industry precedent/case law.

Options Considered

Chris Jackson

Do Nothing

- Pros
  - Known Process
  - Industry Engagement
- Cons
  - Perceived as inflexible
  - Not good for large & complex disputes
  - Issues around fair trial compliance

Straight to High Court

- Pros
  - Clear process
  - Good for high value disputes
  - Fair trial compliant
- Cons
  - Inflexible
  - Not always appropriate/efficient
  - Where does the ORR fit in?

Straight to Arbitration

- Pros
  - Clear & expert process
  - Fair trial compliant
- Cons
  - Inflexible
  - Not always appropriate
  - Inefficient it terms of time & cost
  - Availability of expert arbitrators

More legally qualified/independent Panel

- Pros
  - Applies the existing rules
  - More thorough
  - Independent members would ensure fair trial compliance
- Cons
  - Inflexible
  - Loss of industry peer group
  - Slow for straightforward disputes
  - Availability of suitable independents

INDUSTRY WORKING GROUP'S PROPOSAL

Nigel Oatway

KEY CONSIDERATIONS

- Menu of Dispute Resolution Options backed by an Industry-provided Dispute Resolution Service
- Parties to agree which Options best meet the needs of their dispute
- In the absence of agreement, Options to be independently decided based on transparent Allocation Criteria
- Whether Options are agreed or decided upon the resolution process must provide opportunity for full ‘fair trial’ compliance at least at one stage of the process

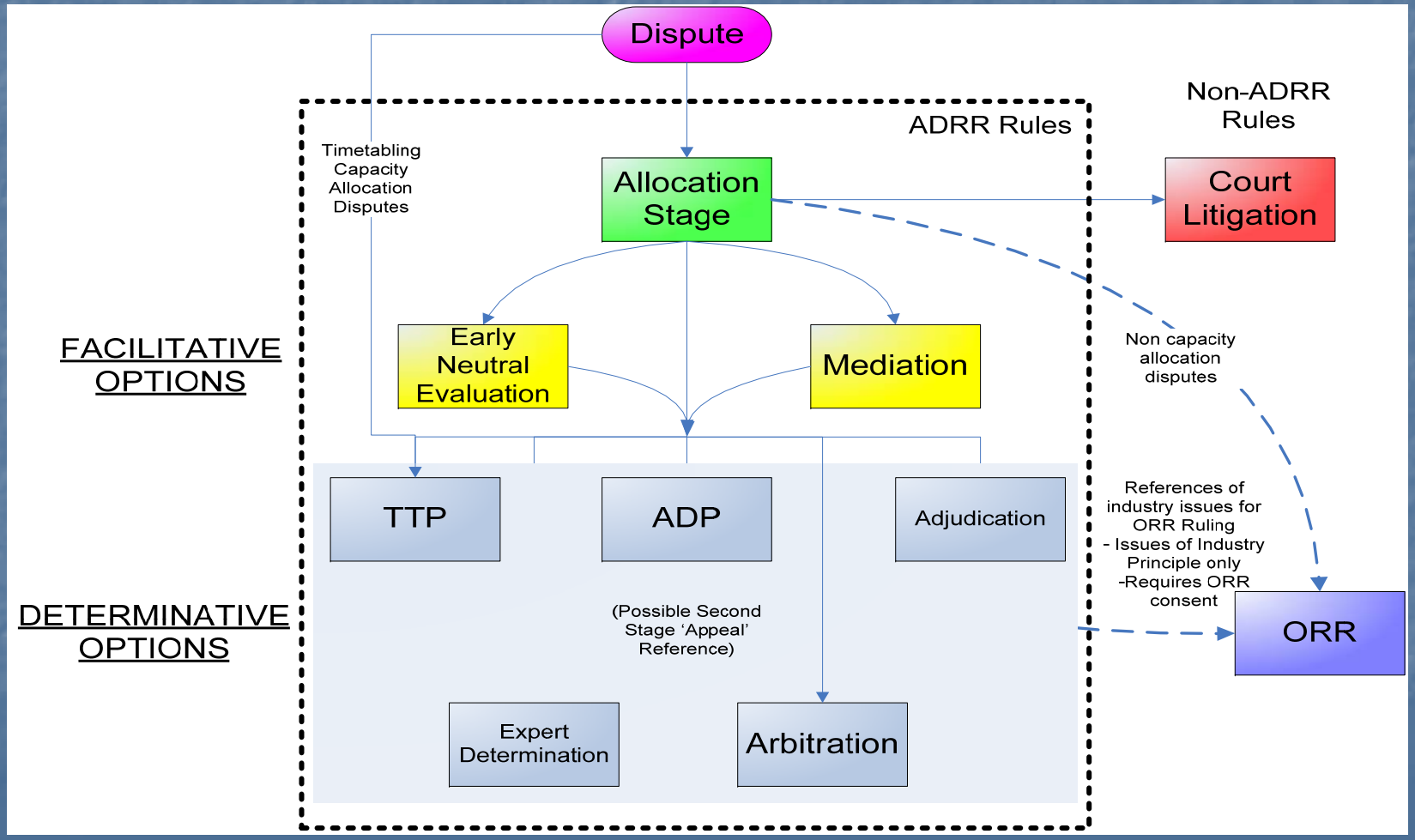
MENU OF OPTIONS

- Facilitative processes designed to assist or encourage a negotiated settlement (e.g. Mediation, Early Neutral Evaluation)
- First Stage Determinative processes (e.g. ADP, Adjudication, Arbitration, Expert Determination)
- Second Stage (Appeal) Determinative processes (e.g. Arbitration, High Court, ORR)

DISPUTE RESOLUTION SERVICE

- Provided by ADP Secretariat & guided by a legally qualified Chairman
- Designed to:
  - offer parties a comprehensive ‘cradle to grave’ service over the life of each dispute:
  - actively encourage and facilitate the resolution of disputes:
  - gives parties freedom to agree a choice:
  - enable the disputes to be allocated Options in cases of disagreement.

PROPOSED DISPUTE RESOLUTION PROCESS



DEFAULT OPTIONS

Should Default Options be retained?

Advantages

- Reduce unnecessary time at deciding which Options to allocate for standard cases
- Requires parties to give a full rationale for wanting an alternative
- Similarity with Model Clause Track Access Dispute Resolution process

Disadvantages

- Similar to current system
- May require parties unnecessary time and effort to overturn presumed default Option

Scenarios

- Example 1 – Nigel Oatway
- Example 2 – Chris Jackson
- Example 3 – Ian Tucker

Questions for discussion in relation to each scenario

A. Is the existing process adequate/appropriate to deal with all the issues in arising the above facts?

B. How should the proposed process be applied to the above facts?

C. Would the proposed process be adequate/appropriate to deal with all the issues? Would it be better suited to deal with these issues than the existing process?

Other Issues to Consider

- Consultation document also covers:
  - Role of ORR going forward
  - Governance of ADC – including status and funding
  - Composition and structure of ADPs – as now or independent members?
  - How changes will be given effect
  - Precedent and publication

Finally

- Consultation closes on 30 January 2009
- Responses to Gabrielle Ormandy (Chairman of working group) and copied to Andrew Eyles (ORR)

Scenarios for Discussion at the Seminar on 9 January 2009

Please read and consider the following scenarios prior to the Seminar. A discussion of procedural issues relating to them will be held as part of the seminar.

Questions for Discussion in relation to each Scenario:

a) Is the existing process adequate/appropriate to deal with all the issues in arising the above facts?

b) How should the proposed process be applied to the above facts?

c) Would the proposed process be adequate/appropriate to deal with all the issues? Would it be better suited to deal with these issues than the existing process?

Discussion example 1

Access Dispute Resolution Rules amendments: Seminar 9 January 2008.

The following scenario is intended to allow discussion of the process of dispute resolution rather than the merits of the case. Please focus on the available processes rather than the apparent strength or weakness of any party's position.

A programme of hardwood replanting in the Duchy of Cornwall has resulted in ten 10 miles of the most severely graded sections of the Great Western Main Line being susceptible to heavy disruption from leaf-fall.

After major disruption during the previous leaf-fall season, Network Rail proposes that, for the next leaf-fall season and all future leaf fall seasons, there should be radical adjustments to the Timetable to allow extended running times during periods of low adhesion. In particular, the number of passenger paths in the standard hour should be reduced by two in each direction. As the number of available paths outside the leaf-fall season is, in some hours, used to the full, this would require some services to be withdrawn indefinitely from the Timetable each year.

In a complementary move Network Rail have also advised that during the same period, the permitted timing loads for all freight locomotives will be reduced by 30%, but that it will be acceptable for Freight Train Operators to introduce double-heading to maintain known contractual commitments.

Two franchise operators have services that follow a regular hourly pattern, one freight operator runs long distance services and one Open Access Operator runs three trains per day in each direction. Each Operator is minded to challenge Network Rail's proposal as an over-reaction, imposing undue restrictions, and to propose that this change should be deemed to be a Network Change, and progressed under Part G Network Code.

Each Train Operator has its own view on the expert evidence to be presented in relation to adhesion and running speeds (which may be significant), and their estimates of the impact of the proposals upon costs and revenues add up to more than £1m per year, for which they would variously claim compensation.

Whether Network Rail's proposal is modified or implemented unchanged, each Train Operator will wish to argue separately that any eventual reductions in Train Slots should not affect their services.

Currently: The question of whether these proposed arrangements should be dealt with under Part G would be referred to ADP (appeal to ORR, subject to ORR acceptance). Subsequently the practical application of the Decision Criteria to determine which paths should be curtailed, could be progressed at a TTP (appeal to ORR, subject to ORR acceptance). Considerations of timescale to implementation mean that it is likely that the Disputes Chairman would allocate this (nominally Part D issue) to an ADP, which would address both Part G and Part D matters in one hearing..

Discussion example 2

Access Dispute Resolution Rules amendments: Seminar 9 January 2008.

The following scenario is intended to allow discussion of the process of dispute resolution rather than the merits of the case. Please focus on the available processes rather than the apparent strength or weakness of any party's position.

The Scenario

Two Franchised Train Operators (Xenorail and Yoretrip Express) have traditionally operated certain services which connect end-on at Borchester City using shared rolling stock (owned by Yoretrip), and complementary Track Access Rights (i.e. rights which link up at this point). These services are seen by customers and designated in the National Rail Timetable as through services.

A third operator (Zorro Trains) has sought a service acceleration which would result in Xenorail's train slots and times of presentation at Borchester no longer being available. Network Rail has proposed alternative Train Slots for Xenorail within the limits of flex allowed by its Track Access Contract but other factors (including line capacity and the limited number of through platforms at Borchester) would not allow Yoretrip's services to be flexed to preserve the through services. Yoretrip and Xenorail would both expect to lose passengers (and revenue over £1M over the rest of their franchises) if the through service was lost.

Under its Franchise Commitments, Xenorail is obliged to introduce additional alternative rolling stock. The only stock available for the commencement of the new timetable, are "Silver Steeds" which were operated on Yoretrip's services out of Borchester but do not have Sectional Appendix route clearance over some of Xenorail's route from Borchester.

Network Rail is requiring Xenorail to initiate Vehicle Change and to meet any costs associated with evaluating the impact of using Silver Steeds on its services, and any other related works. Xenorail argues that it should not need to fund costs of such evaluation as the costs have been caused by Network Rail's decision and anyway Network Rail is aware of the impact of Silver Steeds.

Xenorail indicates that unless an agreement can be reached, the dispute will involve issues of vehicle change and separately violation of its track access rights. Yoretrip and Zorro would need to become involved and a potentially extensive claim would be brought on the grounds of significant technical evidence (some of which Xenorail expects to obtain from Yoretrip and possibly Zorro) and witness statements from the individuals involved which could easily occupy several weeks of argument.

Currently: The Vehicle Change issues would be dealt with under Part F by reference to an ADP (appeal to ORR, subject to ORR acceptance). Potentially issues of breach of the Track Access Agreement would be brought under the TAA to arbitration. Different actions involving different parties would probably be required to deal with the different aspects.

Discussion example 3

Access Dispute Resolution Rules amendments: Seminar 9 January 2008.

The following scenario is intended to allow discussion of the process of dispute resolution rather than the merits of the case. Please focus on the available processes rather than the apparent strength or weakness of any party's position.

The Scenario

As part of the Rules of the Route consultation Network Rail has agreed with the Train Operators concerned ("Dragon Trains" for Franchised passenger services, and "Glendowerpower" for freight and charter passenger services) a programme of regular weekend possessions for undertaking resignalling works over a large section of rural Welsh lines. The first such possession reveals that the rate of degradation of existing wiring will require an accelerated programme of works that cannot be accommodated in the agreed Rules of the Route. Therefore Network Rail proposes to amend the Rules of the Route, making use of the provisions of part 3 of the National Rules of the Plan, to extend all Restrictions of Use in the current Timetable, and, in addition, to impose 54 hour Restrictions of Use at all Bank Holidays. In the immediate term Network Rail sets out to reschedule the work content of all agreed possessions.

Dragon Trains responds listing a range of alternatives to bank holiday working which it would prefer. Both Train Operators acknowledge, on the basis of engineering information supplied by Network Rail, that the works must be done over a period of two years, and invite Network Rail to issue a Possession Strategy Notice to cover the full programme of works under D2.2.3. Network Rail states that it is not obliged to issue a PSN, and wishes to retain the scope to amend the Rules of the Route further in the next Timetable.

Two months of discussions pass and Dragon Trains decides to challenge Network Rail's actions in relation to the operation of D2.2, and National Rules of the Plan Part 3, under the provisions of Condition 5.1.1(d).

Network Rail challenge Dragon Rail's right to refer to ADR on the grounds that the prescribed periods for appeal have been timed out. Network Rail state that Dragon Trains' only other option is to claim compensation (if it can prove any loss has been caused) through Schedule 4 of the TAA. Dragon Rail argues that the relevant periods are counted from the giving of a relevant decision or the issuing of a relevant document, and that these periods have not started. It also identifies loss from consistent bank holiday working which it claims would not otherwise be suffered and which it claims under TAA Schedule 4. Dragon Trains decides to dispute the proposed timetable for the works and in the alternative claim for compensation if the possessions cannot be rearranged (compensation issues are likely to involve significant analysis of records and data and potentially witness evidence). Network Rail indicates that in principle it might be prepared to negotiate some compensation but not a variation to the possessions.

Currently: Under the current part D the dispute regarding merits of the proposed programme of work etc would be referred to a TTP (appeal to ORR, subject to ORR acceptance). However, given the opposed views of the parties as to whether a dispute can be lodged, the Disputes Chairman would most likely allocate both the procedural and the merits argument to an ADP, but explicitly reserving the right of the parties to appeal to ORR on either ground. An alternative compensation claim might be brought under Schedule 4 Clause 8.3 by escalation to the ADP and then to arbitration.

Additional Discussion example

Access Dispute Resolution Rules amendments: Seminar 9 January 2008.

The following scenario is intended to allow discussion of the process of dispute resolution rather than the merits of the case. Please focus on the available processes rather than the apparent strength or weakness of any party's position.

The Scenario

Two Franchised Train Operators (Koala Westcountry and Lightning Trains) both operate services that terminate in Much Binding. Koala is the station facility owner, and, because Koala's services are primarily commuter services, and Driver Only Operated, it is keen to introduce automatic ticket gates, with the operating costs chargeable to qualifying expenditure. Lightning's services are essentially rural, serving several un-staffed stations, and Lightning relies on on-train staff for ticket sales and revenue protection. Lightning does not support the introduction of gates at Much Binding, and does not wish to contribute to either their capital or operating costs.

Additionally Much Binding station includes two otherwise unused platform faces where manual cleaning of carriages can be undertaken. The facilities are limited to rudimentary lighting, a share of a locker room, and a series of water-points. Koala no longer carries out any regular carriage cleaning at Much Binding, but Lightning funds staff to clean two sets that are stabled overnight.

Koala pays Network Rail for services, including maintenance and water, and recovers appropriately from Lightning. Lightning considers that an extraordinarily large water-bill (over £20,000) passed on from Koala arises only because Koala has failed to monitor consumption, and therefore neither noticed, nor advised Network Rail, of the likelihood of a significant water leak. Koala and Lightning both indicate that they would like to resolve these issues quickly and amicably without undue expense due to the comparatively limited costs of the water when compared to the costs of litigation.

They both recognise that there are a number of issues between them which would in theory require resolution separately but would like to explore first of all whether any can be quickly disposed of by agreement or any other means of resolution.

Currently: The station access conditions would refer a dispute between Koala and Lightning regarding the bills to the relevant access disputes panel (likely to be ADP) followed by such other ADRR process as the panel identifies. Disputes regarding the introduction of gates would relate to the station change procedure and would also be referred (separately) to the relevant panel.