HS2

Alternative dispute resolution guidance

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High Speed Two (HS2) Limited has been tasked by the Department for Transport (DfT) with managing the delivery of a new national high speed rail network. It is a non-departmental public body wholly owned by the DfT.

High Speed Two (HS2) Limited
Two Snowhill
Snow Hill Queensway
Birmingham B4 6GA

Phone: 08081 434 434

General email enquiries: HS2enquiries@hs2.org.uk

Website: www.gov.uk/hs2

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Foreword

High Speed Two (HS2) Limited (HS2 Ltd), acting on behalf of the Secretary of State for Transport) has bought a significant amount of land and property to build, run and maintain the proposed HS2 railway.

If compensation for your land and property has not been agreed, then either we or you can refer the case to the Upper Tribunal (Lands Chamber). The Upper Tribunal will decide the amount of compensation that you will receive. It can be costly to refer a case to the Upper Tribunal, due to the amount of evidence required, and it can take a long time for a decision to be made. To help make quicker decisions and reduce costs, we may offer alternative dispute resolution (ADR) instead to try to settle claims.

This booklet sets out the types of ADR and the steps we will take when making offers or considering proposals. It also includes the criteria for assessing which form of ADR might be the most appropriate, based on the details of each case and the nature of the dispute.

Disclaimer

The information in this booklet is for guidance only and is not a substitute for professional advice. Using this information is voluntary and we do not accept any liability arising from any inaccuracy or error.

Our commitment

Our Residents' Charter sets out the standards that we aim to meet when communicating with property owners. You can find out more at www.hs2.org.uk/documents/hs2-residents-charter/.

1 Introduction

1.1.1 If you have received a compulsory purchase notice from us or we have accepted your blight notice (the formal application asking us to buy your property), the level of your compensation will need to be agreed (or decided by the Upper Tribunal).

1.1.2 We will employ a suitably qualified professional adviser to act on our behalf during compensation negotiations. We will do our best to reach an agreement on compensation by directly negotiating with you or your advisers.

1.1.3 This booklet aims to provide guidance on other ways of resolving disputes when you and we cannot reach agreement by direct negotiation. Referring a case to the Upper Tribunal can be costly and time-consuming for both you and us, and there can be significant delays in a case being considered.

1.1.4 It is in both our interests to try to settle disputes by alternative methods where possible.

1.1.5 This guidance applies to property compensation matters where you have a right to refer the dispute to the Upper Tribunal. This includes claims following the temporary possession and occupation of land (under Schedule 16 of the High Speed Rail (London - West Midlands) Act 2017, or Schedule 15 of the High Speed Rail (West Midlands - Crewe) Act 2021) and works authorised by Schedule 2 of both acts.

1.1.6 It does not apply to:

- our non-statutory property schemes (those we do not have to offer by law), including Voluntary Purchase, Need to Sell, Cash Offer, Homeowner Payment, Streamlined Residential Blight, Prolonged Disturbance Compensation Scheme, Shimmer Cash Offer Scheme and Shimmer Relocation Assistance Scheme;
- minor claims related to construction;
- disputes over whether we have used our powers properly;
- disputes to do with undertakings and assurances;
- assessing compensation that has been paid in advance; or
- any losses you may suffer while we occupy your land temporarily.

1.1.7 So far, all the land we need to build and run the railway has been in England. However, the Government introduced the High Speed Rail (Crewe – Manchester) Bill, which includes land in Scotland, into Parliament in January 2022. If this bill is made an Act of Parliament, we may need to update this booklet (to reflect the fact that Scotland has a separate legal system).

2 What is ADR?

2.1.1 Alternative dispute resolution (ADR) is any way of settling a dispute without going to a court or tribunal for a decision. We are encouraged by the courts and tribunals to use ADR to try to settle disputes involving compensation. There is widespread support for ADR from the government and the courts.

2.1.2 The following are some of the key features of ADR:

- Both parties (you and we) have to agree to refer their dispute to some form of ADR. Courts and tribunals can impose penalties on parties who unreasonably refuse to consider ADR.
- It allows you and us to find solutions which are not available through legal action. It also supports your and our commercial needs and interests and can protect or even improve our future relationship. Many forms of ADR are carried out in private and 'without prejudice' (which means any documents, notes of meetings, evidence provided and arguments recorded cannot be referred to in any Upper Tribunal or other formal proceedings). The result is only binding once we reach an agreement that can be enforced. The terms of this agreement can be confidential if necessary.
- It is flexible. The timing and method of ADR can be tailored to suit your and our needs. ADR may take place before a case has been referred to the Upper Tribunal (or while it is being referred). It may help resolve the whole matter or just parts of it to reduce time and expense at a tribunal.
- It is quick, and compared with legal action it is not expensive, particularly if it resolves the dispute at an early stage.

3 When is ADR appropriate?

3.1.1 Each case needs to be considered on its circumstances, but in general we should consider ADR in all cases where, through negotiation, it has become clear that the matter (or parts of it) cannot be resolved without outside support.

3.1.2 When producing this booklet, we used guidance from the Compulsory Purchase Association (CPA) on how to deal with compensation claims. The Land Compensation Claims Protocol 2018 produced by the CPA covers what is expected of parties before a case goes to the Upper Tribunal. It says that, before ADR, you and we should have:

1. exchanged enough information to understand each other's case;
2. discussed each other's viewpoint thoroughly and constructively; and
3. tried to reduce the number of issues the Upper Tribunal would have to decide on if the case were referred to them.

3.1.3 We and you should follow 1 to 3 above before referring a case to ADR. For number 3, we would expect Scott Schedules (schedules that set out your and our position and explain what the main differences are) or a formal statement of agreed facts to have been prepared (by either surveyors or solicitors we and you have appointed), so that we both know the matters that are still being disputed and that your and our agents have tried to reduce the number of matters that are still being disputed.

3.1.4 When you have served a blight notice or received a compulsory purchase notice, either you or your agent must serve a Form of Claim on us, to start your claim. If you do not have an adviser, we strongly recommend that you get professional advice from a suitably qualified surveyor. The Royal Institution of Chartered Surveyors (RICS) has recently published a Consumer Guide, which you can find at: https://www.ricsfirms.com/media/1279/cpo-consumer-guide.pdf.

3.1.5 Once we have received your Form of Claim, we will appoint our own agent to consider the amount that you have claimed. Negotiations will then take place to try to reach an agreement, which may include arranging an 'agents and principals' meeting. This is a meeting between you and us, and your and our advisers. It may also be useful to have a chairperson to make sure the meeting is orderly and that both of us have an equal opportunity to review, debate and present our case. A face-to-face discussion can help us both understand and clarify the points being disputed. We will usually ask for this meeting before ADR, to make sure we have tried all forms of direct negotiation.

3.1.6 If we cannot reach agreement at the meeting or through other negotiation then, as long as we have both met the criteria in paragraph 3.1.2 above, we should consider ADR. If either of us think ADR is not appropriate, we should explain why.

4 Different forms of ADR

4.1.1 The following forms of ADR are usually appropriate for the types of claims covered by this guidance booklet, depending on your case and the issues that are still being disputed.

- Faster evaluation of small-value disturbance disputes;
- Independent expert determination;
- Mediation; and
- Early neutral evaluation (ENE).

4.1.2 The list above is not a full list. We can consider other forms of ADR, including a peer review (an evaluation of your and our positions by a suitably qualified person), a third valuation of your property (an additional valuation to inform negotiations), or arbitration (the appointment of a third party to consider the dispute based on the evidence that is presented to them, which can be used either as an alternative to the Upper Tribunal or as an additional form of ADR to reduce the number of areas being disputed before an Upper Tribunal hearing, depending on the case).

4.1.3 This guidance only discusses the methods of ADR we think are the most suitable for resolving these types of claims. If you think the ADR options above are not appropriate and that we should consider others, please write to us (through your Case Officer), saying why you think an alternative method of ADR might be appropriate. We will always try to make sure that the method of ADR we use is appropriate for the amount of compensation being disputed.

4.1.4 Table 1 below sets out summary guidance on each of the types of ADR. Further details about these are in appendices A to D at the end of this booklet. In suitable cases, most forms of ADR can be arranged to be carried out alongside each other.

4.1.5 The RICS Dispute Resolution Service has recently introduced its own ADR Service for Compulsory Purchase Disputes. You can find more details on the RICS website (www.rics.org/uk/products/dispute-resolution-service/adr-for-compulsory-purchase-disputes/). RICS is an independent and impartial professional body whose ADR schemes include independent expert and mediation.

4.1.6 The RICS ADR Service has a panel of surveyors who specialise in compulsory purchase and have a strong working knowledge of statutory compensation.

4.1.7 We will recommend using the RICS ADR Service when using a specialist compensation surveyor is appropriate. We are unlikely to use this service if legal points are still being disputed or if we need advice from other professionals, such as

an accountant or a valuer with specific knowledge of a particular geographical area or type of property. We would use the RICS ADR Service to support the ADR we offer if it is the best way of settling the dispute based on the facts of the case.

Table 1: Summary guidance for the different forms of ADR

Form of ADR	Outcome	Usually appropriate for	Main features	Who pays
Faster evaluation of small-value disturbance disputes	Not binding	• Small disturbance claims (less than £10,000).	• Our Residents' Commissioner will consider the items that are being disputed and make a recommendation based on the facts of each case. • It can be quicker than other forms of ADR. • The cost is low, compared with other options.	We each cover the costs of our own professional advisers.
Independent expert determination	Binding	• Disputes about the value of residential, business or agricultural properties. • Small-value disturbance claims.	• The expert will be independent and appointed by you and us or an independent third party. • The expert can use their own experience and knowledge to help decide the dispute. • The process is flexible and can be adapted to the situation. • There is no right of appeal, except in limited circumstances. • The outcome can be confidential. • it is not generally suitable in cases where there are factual or legal disputes.	The independent expert will decide if you and we should share the costs or if one of us should pay more, based on the outcome or our conduct.
Mediation	Not binding	• Can be considered in cases which cannot be resolved through direct negotiation. It is particularly suitable where the costs of legal action would be out of proportion to the claim. • There are no complex legal issues that need to be dealt with in order to settle the dispute.	• It is flexible and can help find solutions that would not be possible through the Upper Tribunal. • The mediator does not make a decision on the dispute – their task is to help us work out our own solution. • The mediator can give guidance on possible solutions which are fair to both sides. • It is without prejudice (see page 3) and confidential. • It could result in us agreeing on some parts of the dispute, even if the whole dispute is not resolved. This would reduce the number of issues to be sorted out by other methods. • It may have to take place over a long period if this is considered the most appropriate way of making progress with the claim.	The costs of mediation will be shared between us. And we each cover the costs of our own professional advisers.

Form of ADR	Outcome	Usually appropriate for	Main features	Who pays
Early neutral evaluation (ENE)	Not binding	• Matters where strong legal or expert opinions on both sides have led to stalemate. • Complex issues or more than one issue.	• It can be quicker than mediation or using an independent expert. • It gives us both a better understanding of the likely outcome of referring the case to an Upper Tribunal and the risks of taking legal action, which can help with a settlement. • It can reduce the number of issues being disputed. • It can reduce the costs of further negotiations. • It is confidential.	The costs will be shared between us. both We each have to pay the costs of our own professional advisers.

5 Processes and timescales

5.1.1 We will suggest ADR in appropriate cases when we have both exchanged enough information to understand each other's case, discussed our positions thoroughly and constructively, and tried to reach a solution or narrow down the issues through direct negotiation. We would usually expect an agents and principals meeting to also have taken place.

5.1.2 It is difficult to provide strict timescales for ADR as it depends on the flow of information between us and how we both conduct ourselves. You may want to choose ADR to speed up a decision on your case. We will deal with any requests for ADR as quickly as possible.

5.1.3 To request ADR, please fill out the form available on the HS2 website and send it to LPClaims@hs2.org.uk. We would also expect a copy to be sent to your case officer and our appointed agents. We will try to respond to you within two weeks, when we will either agree to your suggestion, explain why we consider other forms of ADR to be more appropriate, or say why we believe your case is not suitable for ADR.

5.1.4 How quickly ADR can go ahead will depend on several things, including:

- how complex your claim is;
- how long it takes to agree which method of ADR to use;
- the choice of expert, mediator or evaluator;
- your and our availability (and that of our advisers); and
- whether additional evidence, witness statements or other material is needed. If the case is referred to the Residents' Commissioner through faster evaluation of small-value disturbance disputes, ADR is likely to start sooner as the expert has already been chosen.

5.1.5 The process is set out below:

1. Once we have agreed an appropriate form of ADR, we will ask you to confirm, in writing, whether you have found a suitable expert, mediator or evaluator for us to consider. Before sending your proposals, please check that the expert, mediator or evaluator is likely to be available and that they do not have a conflict of interest. Please also include details of their proposed fee and a copy of their CV.
2. We will confirm whether we agree with your choice. This will be based on our assessment of the expert's, mediator's or evaluator's experience and whether their fee is reasonable (as a publicly funded body, we have a duty to provide best value for the taxpayer). We will compare all quotes we receive against market

rates to make sure we are getting value for money. We will not agree to anyone who has a conflict of interest. If we do not agree with your proposals, we will set out our reasons, in writing, within two weeks.

3. If you do not suggest anyone or we disagree with your choice, we will suggest alternatives for you to consider. If you and we still can't agree, we will ask you if we can refer the matter to a third party, for example:
   - Royal Institution of Chartered Surveyors (RICS);
   - Central Association for Agricultural Valuers (CAAV);
   - Centre for Alternative Dispute Resolution (CEDR); or
   - IPOS Mediation (formerly In Place of Strife - IPOS).

   These are independent organisations who would be impartial when choosing a suitably qualified expert or mediator. This is not a full list, and we will consider other ADR providers in appropriate cases.

5.1.6 Once an expert, mediator or evaluator has been appointed, we would usually expect ADR to be completed within three months. This will depend on the availability of the expert, mediator or evaluator and their timescales and requirements.

5.1.7 In Table 2 below we have set out a summary of the process and the timescales we would work to once a method of ADR has been suggested.

Table 2: Summary of the ADR process

Stage	Description	Timescale
1. Requesting ADR	Either you or we can ask for ADR. Before considering ADR, we should have exchanged enough information to understand each other's cases and discussed each other's positions thoroughly and constructively. We should also have had an agents and principals meeting. The party that proposes ADR should set out (with reasons) the method of ADR they would prefer, and fill out the request form that is included on our website.	
2. Confirmation	You or we should confirm whether we agree to the form of ADR that the other has suggested, within two weeks of receiving the letter proposing the ADR. If we think it is too early for you to request ADR or the case is unsuitable for ADR, or we disagree with the method you propose, we will explain this to you in writing. We may suggest other forms of ADR that we consider more appropriate.	2 weeks
3. Appointment	If we agree to faster evaluation of small-value disturbance, the expert will be the Residents' Commissioner). If you suggest an expert, mediator or evaluator, we will consider their experience, expertise, value for money (how reasonable their fees are) and whether there is a conflict of interest.	4 weeks

Stage	Description	Timescale
	If you do not suggest an expert, mediator or evaluator, or if we disagree with those you have put forward, we will suggest alternatives for you to consider. If we still can't agree, we will suggest that we agree to use a third party (such as RICS, CAAV, IPOS, CEDR or another professional body if appropriate) to make the appointment.	

6 How can I decide if ADR is right for me?

6.1.1 If you or your advisers want to know more about ADR before making a decision, we can help by:

- discussing the process with you and your advisers; or
- putting you in touch with organisations such as RICS, CAAV, CEDR and IPOS, or other professionals experienced in ADR who can give you more detailed, independent information.

6.1.2 Legal advisers and surveyors are usually able to provide advice on ADR. Various charities and not-for-profit organisations, such as Citizens Advice, may be able to give you free guidance.

Appendix A – Faster evaluation of small-value disturbance disputes

You can refer your case to the Residents' Commissioner:

- if we are buying your land or property as part of one of our statutory schemes (those we have to offer by law), or our Express Purchase scheme; and
- the amount of disturbance compensation being disputed is no more than £10,000.

How does it work?

Once you have given your permission for your case to be referred for ADR, we or the Department for Transport (DfT) (or both) will send the Residents' Commissioner a summary of the dispute and our discussions so far. Based on this evidence, the Residents' Commissioner will decide if it is appropriate to consider your case.

If the Residents' Commissioner agrees to accept your case, they will write to you confirming this and giving an idea of how long it will take to reach a decision, based on the evidence provided. If they decide not to accept your case, they will write to confirm this and give the reason why.

To help the Residents' Commissioner assess your case, you and we will need to provide some background evidence. The Residents' Commissioner may suggest the type of evidence that would help them reach a decision. You are expected to pay your own costs associated with providing evidence. However, if you run up extra costs while gathering evidence, the Residents' Commissioner may consider whether we should contribute to these costs.

What happens next?

We and the DfT will accept the Residents' Commissioner's evaluation of the compensation and their recommendation for what you should be paid. You do not have to accept their decision and you have the right to go to ADR or refer your case to the Upper Tribunal.

You usually have six years from the date we buy your land or property to refer your case to the Upper Tribunal, but you should get professional advice if this timescale becomes an issue.

The outcome of the evaluation will be confidential but not binding (you do not have to accept it). However, if you do not accept the Residents' Commissioner's evaluation and recommendation, you will not be able to use the evidence, evaluation and recommendation for other procedures, such as ADR or the Upper Tribunal.

Notes

The Residents' Commissioner is independent of us and the DfT.

They will handle all confidential information you provide to us sensitively and securely and in line with all relevant legislation, and they will only keep it for the length of time needed to deal with your case.

Frequently asked questions

Who decides which cases go to the Residents' Commissioner?

We or the DfT may refer a case to the Residents' Commissioner, or you can ask your Case Officer to refer your case.

Is the Residents' Commissioner's evaluation binding?

We are both expected to agree to keep to the Residents' Commissioner's evaluation. But you still have the right to go to ADR or refer your case to the Upper Tribunal.

Under what circumstances could the Residents' Commissioner refuse to accept my case?

There are some specific circumstances in which the Residents' Commissioner may not accept a case or may suggest another way of resolving it. These circumstances are as follows:

- if the amounts being disputed are (or are likely to be) over £10,000;
- if the amounts relate to:
  - the market value of the land we have bought;
  - severance (where we only need to buy part of your property and the value of the land you keep reduces);
  - injurious affection (where the value of the land you keep reduces as a result of the proposed construction or use of the railway); or
  - claims for items other than disturbance compensation.
- if the decision on the case is unusual, controversial or repercussive (in other words, may affect other cases, whether relating to HS2 or to other projects), or does not come under the Compensation Code (the law that governs compensation matters);
- if the case does not relate to HS2;

- if the case relates to a dispute involving our small claims scheme (the Construction Commissioner has responsibility for this); and/or
- if the case relates directly to the construction of the railway (the Construction Commissioner has responsibility for this).

Will you or the DfT pay my costs of preparing evidence for the Residents' Commissioner?

Not usually. But if the Residents' Commissioner needs more evidence than they have been given, and this leads to further costs, the Commissioner can recommend that we should contribute to those costs if they consider that they can be claimed back under the Compensation Code.

Will you or the DfT show me the evidence that you send to the Residents' Commissioner?

No, we will send the evidence direct to the Residents' Commissioner.

What if I want to challenge what you or the DfT say about my case?

You will be expected to present your own case to the Residents' Commissioner. This will be your opportunity to give your side of things. If the Residents' Commissioner wants further evidence from you or us, they will ask for it.

Will the Residents' Commissioner be able to provide an evaluation in every case?

The Residents' Commissioner will usually be able to provide an evaluation of a case. However, if there is not enough evidence to help them decide, they may not be able to provide an evaluation (but that is not likely to happen very often).

How long will it take the Residents' Commissioner to provide an evaluation of my case?

That will depend on how complicated your case is and the amount of evidence presented. If the Residents' Commissioner thinks it is unlikely that they will be able to deal with your case faster than ADR or the Upper Tribunal, you and we can choose one of those methods instead.

Appendix B – Independent expert

Using an independent expert can be a relatively quick and cost-effective way of deciding disputes, particularly those of a specialist or technical nature. It is a well-recognised way of settling disputes in almost all areas of commercial life. An independent expert's decision is binding.

Under this process, an independent person who is an expert on the subject being disputed is appointed. They will consider the evidence you and we put forward, weigh up the details of each argument and make a decision. They can use their own experience and knowledge of the issues when making their decision. They may decide on a different compensation amount than the one you and we put forward.

It is important that the expert has an in-depth knowledge of the issues being disputed, evaluates all the evidence, and gives you and us an opportunity to respond to the other's evidence so that we both have confidence in the process.

How does this apply to HS2?

The independent expert's decision is intended to be binding. It cannot be challenged, unless the expert has answered the wrong question (not the question they have been asked), there is evidence of fraud or bias, or the expert can be shown to have significantly misread or misunderstood the evidence.

You and we have to sign a contract at the beginning of the process. The contract sets out the terms of appointment and how the costs will be met, and states that the decision will be binding. The contract should also set out:

- how we, you and the expert will exchange material and evidence;
- the type of material we and you have to provide;
- whether we would be expected to comment on each other's evidence (usually referred to as providing rebuttal evidence); and
- the timescales for the expert to publish their decision.

The expert may draw up the contract or we can produce a contract for you and your adviser to consider.

Who appoints the independent expert?

We would try to agree on the choice of expert with you (as set out in this guidance booklet) or, as a last resort and if you agree, we would approach professional bodies such as the RICS, CAAV or Law Society.

How does the independent expert make their decision?

Once the expert is appointed, they will set out what they need from us both. This will probably include a request that we each:

- set out, in writing, an explanation of our cases and any facts and issues we have agreed on; and
- send them evidence to support our cases.

They will have a timetable for us to send the above information, and whether we should exchange this at the same time or one of us should go first in making our case.
Also, the expert will say whether we should respond to or comment on each other's material. This is often referred to as rebuttal evidence.

If the dispute is about the valuation of a residential property or piece of agricultural land, your and our valuations should be given to the expert at the same time and rebuttal evidence would not be needed. This will simplify the process and save time and costs for us both.

Once the independent expert has considered the material, they will issue a written judgement explaining their decision and how they have arrived at it. This decision will be binding on both of us, except in exceptional circumstances.

As part of the decision or after receiving further submissions from you and us, the independent expert will also decide who should pay their costs. These further submissions will usually be written representations setting out why one party should pay a higher or lower amount than the other.

How are the costs met?

We and you will initially share the costs equally (and each of us will be responsible for paying the costs of our own professional advisers). As part of their decision, the expert will say whether one of us should pay a higher contribution to the expert's costs or pay a proportion of the other side's costs. This will depend on the amount of the claim or your and our conduct during the case.

What are the advantages of using an independent expert?

The expert can use their own experience and knowledge to help decide the matter, so is not relying only on the information you and we provide. The process is flexible and can be adapted to the situation.

What are the disadvantages of using an independent expert?

There is no right to appeal against the decision except in limited circumstances. If one of us refuses to keep to the expert's decision, the other would have to ask the court to enforce the decision.

Appendix C – Mediation

Mediation is where a trained and independent third party (the mediator) works with the parties in a dispute to help them find a solution that is acceptable to both of them, but does not make a decision on the matter.

How does it apply to HS2?

Mediation is entirely confidential and 'without prejudice' (see page 3). Any agreement is also confidential and cannot be referred to or produced in formal proceedings.

Unlike early neutral evaluation (see Appendix D), a mediator's aim is only to help parties reach an agreement. They do not comment on the merits of either case. A mediator may not necessarily have expert knowledge of compulsory purchase or valuation but will have skills and experience in mediation.

Using mediation does not take away any rights that you or we have to refer our case to the Upper Tribunal.

How does mediation work?

You and we would enter into an agreement to for the mediation. The agreement will cover:

- how mediation will be arranged and the process itself;
- confidentiality and privilege of information (which may prevent the sharing of confidential and sensitive material);
- how much information we share and the timetable for exchanging this information;
- how the mediation is ended; and
- responsibility for costs and the mediator's fees.

The mediator controls the procedure from the time they are appointed. Usually, the following happens:

- The mediator fixes a date, time and venue that is convenient for everyone.
- They will ask each of us to produce a short summary setting out our arguments on the main issues, with copies of important documents. This goes to the mediator and both of us.
- On the day of the mediation, we and you sign the mediation agreement and begin the mediation. The mediator explains their role, says how things will be run, and asks us both to briefly comment on our position.

- We then move to separate rooms and the mediator will speak to each of us privately, to get a better understanding of our views and concerns, what we are disputing, and our problems and needs. What you and we say to the mediator is confidential – they cannot pass on the information without our permission. The mediator will build up the fullest possible picture of the dispute and then help both of us make constructive proposals and compromises, to try to reach a solution.
- The mediator is not an adviser. It is not their role to tell us what our rights are or how we should settle the dispute. They are impartial throughout the process.
- Neither you nor we need to change from our initial position before mediation if we do not want to, and we can leave the mediation at any time. The aim of mediation is to find a solution that is acceptable to both of us.
- If an agreement is reached, you and we will sign a settlement agreement that sets out the terms that have been agreed. The agreement will be binding on both of us. Your and our representatives usually prepare an outline of this document before mediation, that can then be finalised for us both to sign.

How will the costs be met?

In mediation, the parties usually agree in advance that they will each pay:

- their own costs; and
- 50% of the mediator's fees and expenses.

It is important that both you and we have a part in making mediation a success. For this reason, the costs are usually shared equally.

What are the advantages of mediation?

Mediation as a form of ADR is widely recognised as having a large number of advantages, as follows:

- It is entirely voluntary. Either of us can leave or end mediation at any time. The mediator cannot make us continue with the process.
- Communication problems between us can be overcome. The mediator is a neutral third party who can act as an intermediary between our different personalities and negotiating styles.
- The mediator can help us work through a stalemate situation.
- Confidentiality and privilege of information are key parts of mediation, and agreements to mediate usually include clauses to protect these.

- We and you have complete control over the choice of mediator and so can choose one who is most appropriate for the dispute. However, we cannot choose a judge if the matter goes to full trial.
- The legal costs, lost opportunity costs (for time lost focusing on a case and not on other matters) and management time can be reduced by using mediation.
- Mediation can produce outcomes that might not be possible through a court or tribunal.
- Personal, commercial and technical needs, interests, aims and objectives can be achieved through mediation. The process helps us both to identify underlying interests and the implications that various outcomes may have on those interests.
- The process is entirely flexible and can be tailored to meet your and our needs and all issues.
- We and you take an active part in the mediation process and control the outcome.
- Mediation can provide a solution more quickly compared with other forms of ADR or a referral to an Upper Tribunal. It can be arranged quickly, often within a few weeks.
- The process is low risk – there is nothing to lose by trying mediation.
- Mediation has a high success rate and produces lasting results. The statistics vary, but 65% to 85% of cases are settled by mediation, and some mediators advertise success rates of more than 90%. The outcome is likely to be more acceptable than that of a court or tribunal, as we both have responsibility for creating it.
- Even if mediation does not help to settle a dispute, both you and we are likely to have benefited from it by:
  - having the opportunity to listen to each other's points of view;
  - reducing the number of issues being disputed; and
  - testing the strengths and weaknesses of our cases and the strategies used in the run-up to any tribunal or court case.

What are the disadvantages of mediation?

There is no guarantee that all the points being disputed will be agreed. Also, mediation can be costly if considerable work is needed to prepare for it, which will then add to the overall costs of the dispute if the mediation is unsuccessful.

Appendix D – Early neutral evaluation

Early neutral evaluation (ENE) is a form of ADR in which an independent and impartial evaluator or panel is appointed to assess the merits of your and our cases.

The aim of ENE is to provide an objective and realistic view on the strengths and weaknesses of our cases, and act as a basis for negotiations.

ENE may relate to facts, evidence, technical issues or legal merits (or a combination of these). It can be used at any stage of a dispute. The process is voluntary and can only be carried out if you and we agree. Using ENE does not mean we cannot use other forms of dispute resolution. ENE is usually not binding and the process is usually 'without prejudice'.

The evaluator gives their view on what the outcome would be if the matter went to the Upper Tribunal. They do not resolve the dispute, or even necessarily make suggestions as to how it should be resolved, unless they are specifically asked to do so by either you or us. They have no power to award compensation and do not try to force you or us to accept proposed terms of a settlement.

The extent of analysis the evaluator provides will vary according to their experience, the time they have been asked to spend on the task and the material we and you give them.

How does ENE apply to HS2?

Like mediation, ENE is entirely confidential and 'without prejudice'. The evaluator's opinion cannot be produced or referred to in any later, formal hearings.

Using ENE does not take away any rights that you and we have to refer a case to the Upper Tribunal. ENE is an alternative to using mediation or an independent expert. However, if after ENE we still cannot settle our differences, mediation may be helpful in settling the dispute. In these circumstances, we, you and the mediator will be told the evaluator's or panel's opinion.

Who appoints the evaluator?

If ENE is to work, both we and you must have faith in the knowledge, expertise and independence of the evaluator (or panel if one is used) and respect their findings, even though we are not bound by them.

For this reason, we would aim to try to agree the choice of evaluator or panel with you. We would only appoint an evaluator from a professional body such as the RICS, CAAV or Law Society as a last resort and if you agree.

You and we will agree the members of the panel (numbers and expertise), to reflect the size and complexity of the issues being disputed.

How does ENE work?

When preparing for the evaluation, you and we need to agree:

- who to appoint as the evaluator or panel;
- the procedures they will use; and
- how we will prepare and provide summaries of our cases, a statement of agreed facts, and other necessary documents.

Once we have appointed the evaluator (or panel), they will meet us to read the key documents in the case and listen to our arguments.

Through informal meetings (sometimes with both of us and sometimes separately), the panel will help us to:

- identify the main issues;
- eliminate minor issues by compromising on or simply dropping them;
- test your and our claims and what we want to achieve from ADR; and
- establish the basic strengths or weaknesses of our positions.

Each of us will have an opportunity to present or develop our arguments, both privately and in front of the other. The evaluator or panel will invite you or us (or both of us) to produce further material or argument, for example, to consider whether we really want to continue with any part of the claim. They will balance the benefit of allowing us to discuss our positions and move on against the aim of ENE, which is to reduce costs and delay and get a faster result.

After minor issues have been dropped or compromised on, and the arguments put forward in full, the evaluator or panel will produce a reasoned, written opinion, setting out their view of the likely outcome of the case if it were to be taken to the Upper Tribunal. Their opinion is just that – an opinion. It is not a judgement, a decision or an order.

The meetings will have been held at your, our or the evaluator's offices and arranged informally. One benefit of this is that both of us work together regularly and get to know one another. This in itself can help in settling the dispute.

The next step is usually a negotiation based on the evaluator's or panel's opinion. If one of us (or, unusually, both of us) reject the opinion, it is not in any way binding and we can refer the dispute to the Upper Tribunal.

How are the costs met?

In ENE, the parties usually agree in advance that they will each pay:

- their own costs; and
- 50% of the evaluator's or panel's fees and expenses.

As ENE will be used in more complex issues, which take more time and expertise to resolve, we both have to be committed to its success. For this reason, we share the costs equally.

What are the advantages of ENE?

The potential benefits of ENE are that it:

- focuses on the matters in dispute;
- can be a quicker process than other ADR options;
- gives us a better understanding of the risks of taking legal action, which would be more costly;
- reduces the number of issues;
- reduces the costs of further negotiations; and
- is entirely confidential. There is no hearing, nothing is said or done in public, and the process is 'without prejudice'.

What are the disadvantages of ENE?

It may be costly if we need to do a lot of work to prepare for it. Also we can become 'fixed' in our positions once we receive the evaluator's or panel's opinion.

HS2

High Speed Two (HS2) Ltd
Two Snowhill, Snow Hill Queensway
Birmingham B4 6GA
Freephone: 08081 434 434
Email: HS2enquiries@hs2.org.uk

CS1834

www.hs2.org.uk