HS2

Property schemes

Alternative Dispute Resolution

Guidance for compulsory purchase claims

www.hs2.org.uk

Department for Transport

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

Telephone: 08081 434 434

General email enquiries: HS2enquiries@hs2.org.uk

Website: www.hs2.org.uk

High Speed Two (HS2) Limited has actively considered the needs of blind and partially sighted people in accessing this document. The text will be made available in full on the HS2 website. The text may be freely downloaded and translated by individuals or organisations for conversion into other accessible formats. If you have other needs in this regard please contact High Speed Two (HS2) Limited.

recycle

Printed in Great Britain on paper containing at least 75% recycled fibre.

Contents

Introduction

Whether you have received a compulsory purchase notice or served a successful blight notice, we (HS2 Ltd) and our suppliers will do our best to reach agreement with you or your advisers on your compensation entitlement by direct negotiation.

The purpose of this booklet is to set out your options for resolving disputes in cases where it is not possible to reach agreement by direct negotiation. The guidance sets out three forms of Alternative Dispute Resolution (ADR) which you may wish to consider in discussion with your appointed adviser and your HS2 Ltd case officer. This guidance applies to property compensation matters where you have a right to refer the dispute to the Upper Tribunal (Lands Chamber). It does not apply to:

- HS2's non statutory property schemes (including Voluntary Purchase, Need to Sell, Cash Offer and Homeowner Payment);
- minor construction related claims ;
- disputes over whether powers have been exercised properly,
- the assessment of advance payments; or
- losses whilst HS2 Ltd is still in temporary possession of land.

In all cases, HS2 Ltd aims to be fair, clear, competent and reasonable. Our Residents' Charter sets the standards that we aim to meet when communicating with property owners, and you can find out more at **www.gov.uk/hs2**

1 What is ADR?

Alternative Dispute Resolution (often referred to as "ADR") is any means of settling a dispute without going to a court or tribunal and can be a faster and/or cheaper way of resolving a disputed matter than taking it to a court or tribunal for a decision. ADR can take many different forms and can be used to:

- help the parties negotiate to reach a mutually acceptable compromise;
- involve an independent expert to determine a fair figure;
- help the parties resolve some elements of the claim to reduce the time and expense at the Upper Tribunal (Lands Chamber); and
- make both sides bring forward information or arguments needed to resolve the claim before a tribunal case is required.

2 When might ADR be appropriate?

We will consider each request to use ADR based on the particular circumstances of each case. Consideration will be given on the suitability of ADR, the type of ADR and its chances of bringing the matter fully or partially to a successful conclusion.

Examples where ADR might be appropriate are disputes over the:

- amount of disturbance compensation;
- market value of property being acquired;
- amount of professionals' fees to be reimbursed by HS2 Ltd;
- amount of severance/ injurious affection payment;
- extent of loss after HS2 Ltd's temporary possession of land has ceased; and
- approach to assessing compensation.

Or where:

- there are conflicting professional judgements; and
- the cost of formal litigation is disproportionate to the amount disputed.

Circumstances which might lead us to conclude that ADR is not appropriate include:

- cases where the cost of ADR would be disproportionate or excessive for the circumstances of the case;
- points dealing with complex legal principles; and
- where one (or both) of the parties has refused to enter into meaningful negotiation.

3 Forms of ADR available for HS2 disputes

There are a number of different forms of ADR used to resolve disputed matters. There are three forms of ADR which we consider are most likely to be appropriate in relation to disputes in connection with HS2 compensation. Additional detail on each type of ADR is included in the table below and at Annex A, but can be summarised as:

3.1 Early Neutral Evaluation

An independent person or panel is appointed by those in dispute to provide a reasoned, written Opinion setting out its view of the likely outcome of the case after hearing all parties' evidence. The Opinion is not a judgement nor a decision but can be used by the parties on which to base further negotiations.

3.2 Mediation

A structured negotiation in which a trained mediator works with the parties to help them agree a mutually acceptable solution.

Mediation can take place face to face or the mediator can go between the parties identifying issues and possible solutions.

3.3 Independent Expert Determination

The expert considers the material or evidence put forward by the parties to the dispute, either orally or in writing, and makes a determination based on that evidence.

The expert's determination or award is binding on the parties.

4 Forms of ADR

The following table sets out the main features of each form of ADR that may be used for Hs2 compensation disputes. More detailed information on each type of ADR is enclosed at Annex A to this document.

Type of ADR	What cases may this type of ADR be appropriate for?	Main features	Who will cover the costs for the process?
Early Neutral Evaluation (ENE)	• Matters involving complex or multiple issues where issues can be considered separately and an early independent assessment will help the parties better understand the merits of their own and each other's cases. • Where strong legal or expert opinions exist on both sides of the dispute which has led to stalemate.	• **Outcome is non-binding** • Can be a quicker process than other ADR options • Gives the parties a better understanding of the risks of pursuing litigation before greater costs are incurred • Narrows the issues • Reduces the costs of further negotiations • It is confidential	The costs of the ENE Panel will be shared between the parties. Parties cover the costs of their own professional advisers.
Mediation	• Where the costs of litigation would be disproportionate to the claim and where the parties are in deadlock over a resolution. • Multiple issues are being disputed. • No points of principle are at stake nor legal issues that need to be resolved.	• **Outcome is non-binding** • The mediator has no power over the parties: their task is to help the parties work out their own solution • Mediator is able to give guidance on possible solutions which are fair to both sides • It is confidential • No guarantee that all of the points in dispute will be agreed	The Mediator's costs will be shared between the parties. Parties cover the costs of their own professional advisors.
Independent Expert Determination	• Disputes as to the value of residential, small business premises or agricultural properties. • Small disturbance claims.	• Outcome binding on both parties • The expert will be independent and appointed by the parties or an independent third party • The expert can use its own experience and knowledge to help decide the matter • The process is flexible and can be adapted to the situation • No right of appeal except in limited circumstances • May not be suitable for factual or complex legal disputes	The independent expert will be asked to decide if the parties should share the costs or if one party should pay a greater proportion based on the outcome or conduct.

5 How would the appropriate form of ADR be decided?

If you, your agent or HS2 Ltd believes that ADR may be appropriate to resolve your case, any party can raise it as a possibility with the other. If you or your agent raise the possibility of ADR, we will consider the request and confirm our view on whether that form of ADR, another form, or ADR more generally is appropriate in your case. If we do not believe that ADR is appropriate in the circumstances, we will explain why.

If HS2 Ltd raises the possibility of ADR, it will be for you to come to a decision as to whether you wish to pursue ADR. In any case, it is recommended that you take professional advice before coming to a decision on any suggested form of ADR you wish to pursue. You will need to cover these costs initially, but it may be possible for you to recover them from HS2 Ltd as part of your compensation claim. ADR can only be entered into with the agreement of the parties.

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

If you or your advisers wish to know more about ADR before making a decision, we can assist by:

- Discussing the process with you and your advisers; or
- Put you in touch with representative bodies such as the Royal Institution of Chartered Surveyors (RICS) and the Central Association of Agricultural Valuers (CAAV) or professionals experienced in ADR who can provide more detailed, independent information.

7 Who else can advise on the implications of ADR?

Legal advisers and surveyors are usually able to provide advice on ADR. There are also various charities and not for profit organisations such as Citizens Advice who may be able to provide free advice or guidance in relation to ADR.

8 How to get started

If the person handling your claim on behalf of HS2 Ltd, or you or your professional advisors, come to the conclusion that no further progress can be made in direct negotiation, then we will move on to consider ADR. This is explained below and in the appendices to this booklet.

If we offer or agree to progress with ADR, it will follow the process summarised below:

1. HS2 Ltd will confirm whether it considers ADR to be appropriate for your case and if so the proposed method (see section 4 above). It would then be up to you to decide whether you want to go ahead with ADR. It is recommended that you take professional advice before coming to a decision on any suggested ADR.
2. We will ask you to agree with us who is to be the third party individual or panel member/s. Both parties need to be satisfied that the individuals appointed as part of the ADR process are independent and have no conflict or vested interest in the outcome of the dispute.
3. HS2 Ltd will send you a list of individuals from contracts we have in place that are independent of the case and who we consider are appropriate to help resolve the dispute for the form and type of ADR proposed and we will ask you to rank them in order of your preference.
4. We will then approach them in the order you have indicated to see if they have the capability and capacity to be appointed, that they have no conflicts of interest and obtain a quotation, which we will share with you before securing their services. If the highest ranked party is not available or is conflicted, we will approach the next ranked supplier until a supplier is secured.
5. If you reject our offer of a third party you can suggest who you would wish to use and why. HS2 Ltd will consider your suggestions and notify you if any of the parties identified are considered appropriate. We would then approach them in the same way as set out above to ensure they have the capability and capacity to be instructed and are free of any conflict of interest.
6. We would then look to see if that party is available to be appointed from a framework contract available to HS2 Ltd or through panels available to the Department for Transport or Central Government. If they are, HS2 Ltd would then be able to secure their services. If they are not available on a framework contract, HS2 Ltd would then seek to secure their services directly. In either case, HS2 Ltd will ask for a quotation and if we are happy with it we will share it with you to ensure you are content to proceed.

7. If HS2 Ltd is unable to agree on the appointment of a third party through this process, then another option is to approach the RICS, CAAV or Law Society to appoint a party or panel to the dispute.

8. Once the third party/ies are identified, all the parties (i.e. you, us, and the third party) will need to agree the terms of appointment of the expert/mediator/panel. Depending on the circumstances of the case, we may have key terms that should be included in the appointment which we can discuss with you (or your advisers). An agreement will be required to formally appoint the third party, and it will cover such matters as the scope of the question/s, confidentiality, costs and in the case of Independent Expert record that that the decision is binding.

9 What if I do not have an adviser?

If you have not appointed somebody to represent you, we would encourage you to appoint a professional advisor, such as a surveyor who is a member of the RICS or CAAV, to act on your behalf in relation to the negotiation of compensation. In representing you, your advisor should have the relevant compulsory purchase experience and hold appropriate professional indemnity insurance. You should also ask for a copy of the RICS Practice Statement that is mandatory for surveyors acting on compulsory purchase matters.

10 Annex A – Early Neutral Evaluation (ENE): further detail on how it works

The objective in an ENE is for a panel of experts (or single expert in a simple case) to express their professional opinion on the merits of the parties' legal and other arguments and give a recommendation of the likely outcome of the case were it to proceed to litigation. By contrast, a mediator does not express an opinion on the merits of the case, their task is to assist the parties to reach an agreed solution to their dispute.

The expert/s or evaluator(s) to be appointed would be agreed between the parties, as would the details of the procedure for the ENE. The parties should also agree the scope of the evaluation which could be all the matters in dispute or one or more specific points.

Each side would prepare a case summary and put it to the evaluator in writing, copying to the other side, usually with a joint statement of facts and matters than have already been agreed. The amount of documentation will normally be limited as the purpose of the exercise is to avoid the significant costs of formal litigation. The evaluator will usually be able to raise questions at one or more meeting(s) depending on the agreed procedure.

The process would be carried out in confidence and any evidence or statements put forward by a party under the process could not be used against it by the other party in any subsequent court or tribunal case.

The evaluator would consider the case put forward by each side and provide an impartial written opinion on the strengths and weaknesses of each case and their opinion of the likely outcome if the case or identified points were to be litigated, based on their professional expertise and experience.

10.1 How is ENE applied to HS2?

Like Mediation, ENE is conducted on an entirely confidential and without prejudice basis. This means that the documents for the ENE, the notes of any meeting, any evidence adduced and the arguments recorded cannot be referred to in any Upper Tribunal or other formal proceedings. The resulting opinion cannot be produced or referenced in subsequent, formal hearings.

The adoption of ENE does not take away any rights that claimants have for reference to the Upper Tribunal (Lands Chamber) which is formal and binding on both sides. ENE sits alongside Mediation and Independent Expert ADR options as an attempt to avoid the need to take a matter to Tribunal (which can be potentially expensive and lengthy).

ENE is offered as an alternative to Mediation and use of Independent Expert. However, where, following an ENE, parties are still not able to settle their differences, Mediation may be helpful in concluding a settlement. In these circumstances, the ENE panel's opinion will already be known to all, including the mediator.

10.2 Who appoints a panel?

If ENE is to work, both parties must have faith in the knowledge, expertise and independence of the evaluator/panel and respect their findings, even though they are not bound by them.

For this reason, we would seek to try and agree the identity of the evaluator/panel with you and, only as a last resort and with your agreement, approach professional bodies such as the RICS, CAAV or Law Society for the appointment. The appointment process that HS2 Ltd must follow is set out above.

The composition of the panel - the number and expertise needed - will be agreed by the parties to the dispute and will reflect the size and complexity of the issues.

10.3 How does ENE work?

The initial steps in preparation for the evaluation are for the parties to the dispute to agree:

- the appointment of the evaluator/panel;
- the procedure to be used with each other and the evaluator/panel; and
- the preparation and submission of case summaries, statement of agreed facts, and other key documents as agreed and necessary for the evaluator/panel.

Once the expert/evaluator or panel is appointed, it will meet with the parties, view the key documents and listen to the parties' arguments.

Working through a series of informal meetings with the parties, sometimes both together, sometimes separately, but always only as many as are required, the panel will (help the parties to):

- identify the key issues;
- eliminate minor issues by compromising or simply dropping them;
- test the reality of the parties' respective claims and aspirations; and
- establish the basic strengths or weaknesses of the parties' positions.

Each side will be given an opportunity to present or develop any of its contentions, both privately and in front of the opposing party. The evaluator/panel will invite a party to produce further material or argument in connection with one of its submissions or, for example, to reflect upon whether it really wants to pursue this or that aspect of the claim. The panel will balance the benefit of allowing the parties to discuss and evolve their positions during the process against the objective of the ENE which is to reduce cost and delay and give a timely result.

The dispute having been stripped down to its basic components, the minor issues dropped or compromised upon and the arguments fully aired, the expert/evaluator or panel will produce a reasoned, written Opinion, setting out its view of the likely outcome of the case, were it to be taken to a hearing before the Upper Tribunal (Lands Chamber). The Opinion is just that – an opinion. It is not a judgement, nor a decision nor an order.

The meetings will have been held at the parties' or expert's/panel's offices – always by agreement, never by "order". One benefit of the informality is that all concerned work

together repeatedly and come to know one another. This in itself can assist the settlement process.

The next step is usually a negotiation based upon, if not total acceptance of, the panel's Opinion. If one (or, unusually, both) parties reject/s the Opinion totally, then it is in no sense binding upon them. Either side may press ahead with a traditional form of dispute to the Upper Tribunal (Lands Chamber) .

10.4 How are the costs to be met?

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

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

As ENE will apply to more complicated and complex issues, taking more time and expertise to resolve, both parties have to be committed to the success of the process. For this reason, the costs are to be shared equally.

10.5 What are the advantages of ENE?

- Focuses on the matters in dispute;
- can be a quicker process than other ADR options;
- gives the parties a better understanding of the risks of pursuing litigation before greater costs are incurred;
- narrows the issues;
- reduces the costs of further negotiations; and
- it is entirely confidential – there is no 'hearing', and nothing is said or done in public – and is without prejudice to your legal rights.

10.6 What are the disadvantages of ENE?

- May be costly if considerable work is required in preparation; and
- parties can become entrenched in their positions once they receive the Opinion.

11 Annex B – Mediation: further detail on how it works

Mediation is a structured negotiation in which a trained and independent third person (the mediator) works with the parties to a dispute, to help them find a mutually acceptable solution which is not imposed on them (as it is, for example, when an Independent Expert or Tribunal makes a decision on a case).

11.1 How is it applied to HS2?

Like ENE, Mediation is conducted on an entirely confidential and without prejudice basis. That is, the documents for the mediation, the notes of any meeting, any evidence adduced and the arguments recorded cannot be referred to in any Upper Tribunal or other formal proceedings. Any resulting agreement is likewise confidential and cannot be referenced or produced in formal proceedings.

Unlike ENE, a mediator seeks only to facilitate agreement between the parties and not give an indication of the relative technical merits of either case. A mediator may not necessarily have expert knowledge of compulsory purchase or valuation but will have skills and experience in the mediation process.

The adoption of Mediation, like ENE does not take away any rights that claimants have for reference to the Upper Tribunal (Lands Chamber) which is formal and binding on both sides.

11.2 How does Mediation work?

Once appointed, the mediator controls the procedure from then on. Typically:

- Each side will be asked by the mediator to produce a short "case summary" setting out its arguments on the main issues, with copies of important documents. This goes to the mediator and the other side.
- The mediator fixes a date, time and venue for the "mediation day" that is convenient for all concerned.
- On the day, the parties get together with the mediator, sign the mediation agreement, and commence the process - usually with a joint opening session attended by all, at which the mediator explains their role, indicates how things will be run, and invites each side briefly to comment on their position.
- The mediator then speaks to each side in turn, privately, to gain a fuller understanding of their views and concerns, their contentions, their problems and, above all, their needs. What you say to the mediator is confidential: the mediator may not pass on the information you provide, without your express authority. But the mediator will build up the fullest possible picture of the dispute and, from that position of knowledge, will be able to help both sides make constructive proposals and concessions, so as to arrive at an agreement.
- Once agreement is reached, it results in a simple written agreement that is signed by both parties; it then becomes legally binding on the parties. Until then, no part of the process is binding on either party and either party can halt the process at any time.

11.3 How are the costs of Mediation to be met?

In Mediation, the parties usually agree in advance that they will each bear:

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

It is important that both parties have a stake in making a success of the mediation. For this reason, the costs are usually shared equally.

11.4 What are the advantages of Mediation?

- It is entirely voluntary;
- the mediator has no power over the parties: their task is to help the parties work out their own solution;
- the mediator is able to give guidance on possible solutions which are fair to both sides ;
- can work well if both parties are prepared to engage with the process; and
- it is entirely confidential – there is no 'hearing', and nothing is said or done in public – and is without prejudice to your legal rights.

11.5 What are the disadvantages of Mediation?

- No guarantee that all of the points in dispute will be agreed; and
- can be costly if considerable work is required in preparation for the mediation.

12 Annex C – Independent Expert: further detail on how it works

Expert determination is a process in which an independent third party who has expertise in the subject matter is appointed to decide a dispute. The Expert will consider the material put forward by the parties to the dispute and weigh up the merits of each argument and make a decision. The Expert can use their own experience and knowledge of the issues in forming their decision. The Expert may determine a figure for themselves which is different to the figures tabled by the parties to the dispute.

It is important that the Expert has an in-depth knowledge of the issues in dispute, evaluates all the evidence presented and gives the parties an opportunity to make representations so that the parties have confidence in the process.

12.1 How is it applied to HS2?

The Independent Expert's decision is intended to be binding on the parties and will not be subject to challenge unless the Expert has erred in some way by answering the wrong question or there is evidence of fraud or actual bias or can be shown to have materially misread or misunderstood the evidence.

It will be necessary to have a contract at the outset of the process to be signed by the parties to the dispute to set out the terms of appointment and record the fact that the decision will be binding (unless there is a manifest error as set out above) and how the costs of the dispute are to be met. The contract would also be expected to set out:

- the process for the exchange of material/evidence between the parties and expert;
- the type of material to be provided;
- the timetable for the exchange of material;
- whether the parties would be expected to comment on the evidence tabled by the other side (usually referred to as rebuttal evidence); and
- the timescales for the Expert to publish their decision.

The contract may be produced by the Expert or alternatively we could produce an agreement for you and your adviser/s to consider.

12.2 Who appoints the Independent Expert?

We would seek to try and agree the identity of the Expert with you (as set out above) and, only as a last resort and with your agreement, approach professional bodies such as the RICS, CAAV or Law Society for the appointment of an Independent Expert.

12.3 How does Independent Expert determination work?

Once the Expert is appointed, they will set out their directions to the parties. We would expect the directions to include a request that the parties set out in writing an explanation of their case, any agreed facts and issues, and submit evidence in support of the points in dispute.

The Expert's directions will include a timetable for the submission of the case material and whether this is to be exchanged between the parties simultaneously or whether one party is to go ahead of the other in making out their case.

The directions will also set out whether the parties are to respond or provide comment on each other's material. This is often referred to as rebuttal evidence.

In a case where the dispute arises from the valuation of a residential property or piece of agricultural land we would expect that each parties' respective valuations would be tabled to the Expert simultaneously and that rebuttal evidence would not be required. This is to simplify the process and to save cost and time for both parties.

Once the Independent Expert has considered the material, they will produce a written judgement explaining their decision together with an explanation as to how they have arrived at their decision. This decision will be binding on both sides save in exceptional circumstances as set out above.

As part of the decision or after receiving subsequent submissions from the parties, the Independent Expert will also decide on who should pay the costs of the Expert determination.

12.4 How are the costs of an Independent Expert to be met?

The costs of the Independent Expert will initially be paid for equally by both sides and each party will be responsible for their own professional costs. As part of the Independent Expert's decision they will be asked to consider whether one party should pay a higher contribution to the Expert's costs and also to pay a proportion of the other sides costs based on the outcome of the decision relative to the figures submitted as part of the claim material or the conduct of the party during the Expert determination.

12.5 What are the advantages of using an Independent Expert?

- The expert can use its own experience and knowledge to help decide the matter so is not solely relying on the information provided by the parties; and
- the process is flexible and can be adapted to the situation.

12.6 What are the disadvantages of using an Independent Expert?

- There is no right to appeal except in limited circumstances; and
- if one party refuses to follow the expert's decision, the other party would have to sue to enforce the decision.

HS2

High Speed Two (HS2) Limited
Two Snowhill
Snow Hill Queensway
Birmingham B4 6GA
Freephone: 08081 434 434
Email: HS2enquiries@hs2.org.uk
CS984 06/18

www.hs2.org.uk