Compulsory Purchase Association

Alternative Dispute Resolution Procedures in Land Compensation Cases: A summary of the principal options

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Parties and practitioners engaged in compulsory purchase compensation claims are increasingly willing to explore alternative methods of resolving disputes outside of the Upper Tribunal (Lands Chamber) ("Tribunal").

It is important that all parties involved in dealing with land compensation claims are aware of the various options available to facilitate the resolution of disputes without having recourse to litigation. This Note provides an impartial overview of the most commonly used forms of Alternative Dispute Resolution ("ADR") and highlights the key differences between the various different available methods.

Whilst there is currently no legal or procedural requirement in land compensation cases to compel parties to pursue ADR, there is an increasing expectation from professional bodies (e.g. RICS) and the Tribunal that parties have considered and, where appropriate, engaged in ADR in land compensation cases before a formal hearing.

Failure by a party to pursue ADR without good reason can have cost implications in Tribunal proceedings, for example limiting the ability of a party to recover costs or potentially leading to an adverse costs order being made against the refusing party.

What is ADR?

ADR is the term used to cover the various processes to resolve disputes without recourse to, or outside of, litigation (i.e. without having to go to court or, in the land compensation context, the Tribunal). ADR is flexible. The parties to a dispute can choose whether they want to use a binding process, meaning that the outcome can be enforced, or a non-binding process to facilitate settlement. A non-binding approach enables the parties to still commence or continue with litigation to resolve the dispute if settlement is not achieved through ADR, whether completely or in part.

Depending on the type of ADR adopted, parties can usually tailor the process to achieve a required outcome (e.g. binding decision). Parties also have the flexibility to combine elements of different forms of ADR into a tailored process (e.g. evaluative mediation) or, potentially, to pursue multiple forms of ADR separately to seek to resolve a dispute where appropriate.

Types of ADR

The range of ADR options available is non-exhaustive. Innovations in the processes adopted to resolve disputes continue. However, there are a number of recognised and well-established forms of ADR that are widely adopted and constitute the primary methods of ADR. These are summarised below.

1. **Mediation**

Mediation is a confidential and flexible procedure where a neutral third party ("Mediator") assists the parties in working towards a negotiated binding settlement. The parties retain control on whether or not to settle and on what terms.

How does it work?

The parties can agree who to appoint as Mediator, or may engage with a specialist ADR provider to nominate a suitable Mediator. A Mediator may be a lawyer or other professional (e.g. surveyor, accountant etc.) with professional qualifications and experience of conducting mediation.

Once selected, the parties and Mediator will enter into a binding mediation agreement setting out the terms of the Mediator's appointment and process (and fees) for conducting the mediation. This will include a provision that all information and matters discussed during the mediation process are to be treated as confidential and without prejudice (i.e. cannot be referred to in later litigation). The parties will generally bear their own costs and split the Mediator's fees equally. However alternative arrangements can be agreed, which may be appropriate in compensation cases.

Prior to the mediation, each party will usually prepare a position statement, setting out its respective position on the issues in dispute. The position statements are then exchanged and sent to the Mediator together with an agreed mediation bundle including only essential supporting documents (e.g. claim documents, any expert or factual evidence produced).

Mediation takes place at an agreed time and venue, and typically lasts one day, however there is no restriction on the length of a mediation or who can attend (e.g. parties, legal representatives, experts or other advisers). Parties may for example agree a shorter mediation, or one attended by a more limited number of people, in order to control costs.

The principal decision maker(s) for each party should ideally be present, or at least be available to instruct colleagues if further authority is required in order to settle. If not possible, then a conditional agreement subject to final approval by a governing Authority/Board might be used, ideally on an open basis, rather than without prejudice.

The process adopted on the day of mediation is flexible and often fluid. Typically the mediation will start with the parties meeting jointly with the Mediator, with opportunity at the start for each party to briefly set out its position orally. Usually, the parties will then adjourn to separate rooms and the Mediator will then talk separately to each party, with the intention of exploring and seeking to narrow the issues in dispute as the mediation day progresses.

The aim is for the Mediator to seek to facilitate an agreement between the parties. He/she may employ a range of techniques as part of the process. For example, certain individuals (e.g. expert witnesses) from each party may convene separately to discuss particular issues, or joint meetings may be held between some or all of the individuals from each party to help arrive at a settlement as a whole or in respect of certain aspects.

If the mediation is successful, the parties will usually be encouraged by the Mediator to enter into a binding written agreement setting out the terms of settlement on the day of mediation. A Tomlin type Consent Order can be used to record and advise the UTLC of the settlement reached, where a case has already been referred and when perhaps there has been an agreed stay in proceedings subject to the mediation outcome. Such an Order permits either party to apply to the UTLC to enforce its terms, avoiding the need to start fresh proceedings.

<u>Are there different types of mediation?</u>

Yes, mediation is entirely flexible and the parties will agree how the process is to be conducted prior to and often during the mediation itself.

A key issue is often how much input the parties wish the Mediator to have. The most common type of mediation is the facilitative model. In this the Mediator will help the parties achieve a settlement without expressing their own opinion on the issues in dispute.

Alternatively, an increasingly popular approach is for parties to agree to adopt an evaluative mediation process, where the Mediator is instructed to evaluate the issues in dispute and give a view on the strengths and weaknesses of each party's position to help facilitate settlement. In cases where this is contemplated, it will be particularly important to ensure that the appointed mediator is one with relevant expertise in the area(s) in dispute.

In appropriate cases, parties may agree that the Mediator conducts the mediation with the assistance of a separate expert where there are specialist issues in dispute (e.g. valuation).

2. Early Neutral Evaluation

Early Neutral Evaluation ("ENE") is a process where the parties appoint an independent and impartial evaluator to give a non-binding assessment of the issues referred. The rationale is that the evaluation outcome will reflect the likely decision of the Tribunal on the issues in the event the case is litigated.
ENE is often used to help inform negotiations between the parties. It is particularly useful when there is an issue of principle in dispute, such as a legal or valuation point in a land compensation case.
It is often anticipated that the outcome of the evaluation will aid negotiations between the parties and lead to an agreed settlement without recourse to litigation or other third party decision making processes (e.g. expert determination or arbitration).

<u>How does it work?</u>
There is no set procedure for ENE. The parties will appoint an evaluator with relevant expertise (whether legal or technical). They will enter into an ENE agreement which often sets out the procedure and details relating to the conduct of the evaluator, or alternatively the parties can agree that the evaluator will set the procedure. The ENE agreement will generally include a provision that the ENE will be confidential and without prejudice.

The parties and the evaluator may agree that the evaluation will proceed on the basis of written submissions and documentary evidence only. Provision can also be made for an additional hearing. Unless the parties agree otherwise, the evaluator will conduct his own investigations, enquiries and research so as to form their own independent judgment. The ENE will be produced in writing, giving conclusions and brief reasons, unless the parties agree otherwise. The parties are then free to decide whether they will settle the dispute on the basis of the evaluation provided or to use the decision to assist with future negotiations or litigation.

Each party usually bears its own costs of preparation for the ENE and will split the evaluator's costs equally between them. Again, alternative arrangements can be agreed, which may be appropriate in compensation cases.

3. Expert Determination

Expert determination typically involves the appointment of a third party specialist with expertise suitable to the case to give a binding decision. This form of ADR provides a quick and cost effective means of determining disputes of a specialist or technical nature, where dispute about the law or the facts are likely to be limited. In land compensation cases, expert determination may be pursued to determine the whole or

part of a case, for example an experienced surveyor may be instructed to determine the issue of the value of land taken following, or in anticipation of, a compulsory purchase.

How does it work?
The parties will agree to appoint a third party specialist with expertise and technical knowledge relevant to the dispute. It is possible for parties to appoint more than one expert, for example a lawyer together with a surveyor, where appropriate. In land compensation cases involving particular expertise, such as transport, planning or highways issues, the appointment of an expert practitioner with experience in the relevant area of expertise may be considered.

The parties and the expert will then reach an agreement on the rules and procedures to be followed in respect of the expert's engagement. This provides flexibility for the parties to agree the terms of the expert appointment. This may include the formulation of the issues to be determined, the form and timing for written submissions and evidence to the expert, processes for the expert to raise queries of either party, whether meetings with the expert will be required, confidentiality of information and the time and form of decision made by the expert.

The expert procedure adopted is typically set out in a binding contract incorporating the expert's terms of reference. The expert will generally issue his/her determination in writing, unless the parties agree otherwise. The parties can agree that an expert's decision is final and binding, limiting the prospect of appeal.

The expert may be given the power to make a costs award, however this is subject to the terms of the expert's appointment.

4. Arbitration

Arbitration is a formal, private process to determine a dispute by an appointed independent legal expert. An arbitrator's decision is final, binding and capable of being enforced by action in the civil courts, akin to a court judgment.

How does it work?
The arbitration process is governed by the Arbitration Act 1996, which includes comprehensive provisions dealing with the appointment, conduct, decision making and enforcement of the entire arbitration process. The starting point is for the parties to enter into a formal contract, known as an arbitration agreement, which gives jurisdiction to the arbitrator to determine the particular dispute. The agreement will deal with the terms of the arbitrator's appointment, the issues to be determined and all practicalities for the conduct of the arbitration process.

Typically, a single arbitrator is appointed, however it is possible for a panel of arbitrators to be convened or for a separate assessor to assist the arbitrator in reaching a decision. The appointment of more than one arbitrator or the use of an assessor can be particularly useful where expertise in a specific discipline is required, for example valuation or planning. The Tribunal itself may be appointed as an arbitrator, although in these cases the procedure is likely to be the same as that applying to a normal reference made pursuant to the statutory compensation code.

Arbitration is a flexible process. The parties can agree the degree of formality to be adopted in the process. The parties can agree to follow formal procedural rules or, alternatively, instruct the arbitrator to determine the process to be followed.

Arbitration can be conducted without a hearing, with written representations by each party only and a written final award. The parties can however agree for hearings to take place either to address procedural issues or to hear submission or evidence from each party in order to assist the arbitrator in reaching a decision. For example, it is common that, following the appointment of the arbitrator, a preliminary meeting is convened for the arbitrator to set the timetable for the proceedings after hearing the parties' submissions.

In land compensation cases, arbitration may be adopted as a viable alternative to pursuing legal proceedings in the Tribunal. Unlike expert determination, arbitration is more suited to cases where there are material legal or factual issues in dispute as the arbitrator has jurisdiction to scrutinise and determine such issues.

The advantage of arbitration when compared with Tribunal proceedings is that it can enable the parties to pursue a formal binding decision making process that is often faster, more flexible, offers greater control (e.g. appointment of a chosen arbitrator) and is confidential.

5. Other honourable mentions

ADR comes in a variety of different forms and can be used at every stage of the claims process. It is important for parties to think carefully about the most appropriate method of ADR. There are other methods of ADR which have not been covered in detail in this note, some of which include:

a. **Med-arb (a hybrid process)** – where mediation is combined with arbitration to resolve a dispute. The parties may agree that if mediation fails in whole or on any issue, the Mediator will become an arbitrator and can issue a final and binding award on the outstanding matters;

b. **Conciliation** – similar to mediation except that the third party will actively assist the parties to settle the dispute (for example, by making suggestions regarding settlement options).

6. Conclusions

This note is provided to assist CPA members in understanding the alternatives that may be worth considering, either to avoid, or to be used in parallel to, a reference to the Tribunal. The decision as to what ADR process is best will always depend on a number of factors and will change from claim to claim. It is essential for CPO practitioners to understand the alternatives available and to advise their clients accordingly.

This note is provided as background only and should not be relied on as advice.