Heritage Railway Association
GUIDANCE NOTE

Dispute Resolution Procedure
- Commercial Agreements

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Disclaimer

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Interpretation

The term ‘railway’ should be taken to include heritage tramways and similar bodies where appropriate.

1. Recommendations

This Guidance Note offers recommendations, necessarily couched in legalistic terms, to members involved with heritage railways in England or Wales the means of resolving disputes with other parties arising from any contractual arrangements in the following circumstances:

1. Where members are in the course of entering into contractual arrangements, the Guidance explains the advisability of including in any such contract means of settling any disputes, which may later arise, by the incorporation in the contract of an appropriate clause (examples of which are given).

2. In cases where a contract is already in existence but does not include a disputes settlement clause and a dispute subsequently arises, possible alternative methods of resolving the dispute.

2. Introduction

A. Unfortunately there are occasions where a dispute may arise between one or more parties. It is a matter of some importance that all commercial agreements are prepared in such a way that there is no dispute as to the terms of the agreement. This will normally mean reducing the agreement to writing and then making sure it is signed by those authorised to do so or sealed if the requirement is for a deed. The agreement must be completed before any part of it takes effect.

B. In the event of a dispute then it is vital that the parties enter into negotiation in an attempt to settle the dispute. An early concerted effort as to negotiation can often save much time and expense.

C. All agreements should make provision for a possible dispute. There is a variety of methods of dispute resolution and the nature of the agreement will assist in the selection of the appropriate dispute method. The purpose of this advice note is to provide an explanation of some forms of dispute resolution in order to assist with selection of the appropriate dispute method.

D. This guidance note deals with:

1. Arbitration
2. Court Proceedings [Litigation]
3. Alternative Dispute Resolution [ADR]
4. Example clauses
3. Arbitration

A. Arbitration is based on the parties’ agreement: all parties must agree to submit the dispute in question to arbitration.

B. Arbitration is a private forum in which an independent arbitrator makes an award, acting in a judicial fashion, to finalise the dispute. The outcome (the award) is final and binding on the parties. The arbitrator focuses on the issues (fact or law) presented by the parties. An agreement to arbitrate is usually contractual. Applications to a court are limited in order to support the process or to set aside an award on limited grounds. For example, a court will stay legal proceedings to ensure that the matter is referred to arbitration for determination where it is satisfied that the dispute arises under a contractual arbitration agreement (section 9, Arbitration Act 1996).

C. The steps involved in arbitration include:
   1. An agreement to arbitrate
   2. The selection of arbitrator
   3. Preparation for the hearing, unless it is agreed that the evidence be limited to documentation photographs etc. and arguments as to written submissions
   4. Presentation of the case by each party
   5. An award
   6. Enforcement

D. Arbitration is said to have the following characteristics:
   1. Flexibility
      There is scope for the adoption of innovative, effective and efficient procedures. The parties are generally free to agree a suitable procedure and also to influence the procedure more than is possible in court proceedings. Similarly, the tribunal will give directions that are finely tuned so as to ensure speedy and efficient determination.
   2. Expertise
      The parties can choose their tribunal. The arbitrator can be chosen with the skills that match the subject matter of the dispute.
   3. Privacy
      Arbitration, unlike litigation, in private English Law recognises an implied duty of confidentiality that prevents the disclosure to third parties of most documents produced or disclosed in an arbitration. This is in stark contrast to litigation.
   4. Enforcement
      This is important if one of the parties is an international party. The Foreign Arbitral Awards New York Convention provides an extensive regime for international arbitration awards.
   5. Cost
      Although arbitration is often perceived as being cheaper than litigation this is not always the case. The parties must pay the arbitrator and administrative costs (room hire etc) and therefore arbitration may become as expensive, if not more so, as litigation conducted through the courts.
4. Litigation

A. Litigation is when the dispute is determined by the County Court or High Court, in England and Wales. The Court Procedure Rules 1998 (CPR) set out extensive procedural rules and protocols. The Rules have had an overriding effect of enabling the court to deal with cases justly and at proportionate cost.

B. Litigation is said to have the following characteristics:

1. Multiparty disputes
   The CPR allows the court to join in third parties which may result in overall savings in costs. In arbitration there is no power to join in other parties and for tactical reasons a third party will often refuse to consent to be joined in.

2. Recalcitrant Parties
   The CPR has coercive powers to enforce procedural difficulties created by a party.

3. Summary determination

4. English courts tend to be robust in disposing of meritless claims or defences on a Summary Basis.

5. The CPR now provides for the court to have greater control of legal costs but depending on the dispute they can still be substantial.

5. ADR

A. There is a variety of ADR mechanisms available to the parties including:

1. Negotiation
2. Mediation
3. Mini trial
4. Conciliation
5. Early neutral evaluation
6. Expert determination
7. Adjudication
8. Dispute Review Board (DRB)
9. Med-Arb

B. Each of these ADR mechanisms is briefly described as follows:

1. Negotiation
   Negotiation is the most flexible and informal of the dispute resolution methods. Parties attempt to reach agreement on matters in dispute without the assistance of a third party. It can save the costs and time associated with assisted dispute resolution processes. It is a private dispute resolution option. Therefore, reputations and relationships can remain intact.

   Discussions usually proceed on a without prejudice basis. If the negotiations do not succeed in settling the matter, the parties’ rights are not prejudiced.

2. Mediation
   Mediation is the process whereby parties, with the assistance of a neutral third party (the mediator), identify the issues in dispute, explore the options for resolution and attempt to reach agreement. It is a voluntary, non-binding and private form of dispute resolution. The parties retain control of the decision on whether or not to settle and on what terms. Mediation allows more creativity and flexibility over settlement options than litigating in the court or arbitration.
There are different styles of mediation, but the most common in the UK is facilitative mediation, in which, unlike a judge or arbitrator, the mediator will not decide the case on its merits but will work to facilitate agreement between the parties. Occasionally, mediators may be asked to evaluate the claim or issue or identify the strengths and weaknesses of a particular case. This is called evaluative mediation.

Mediation in its various forms has proved to be a very popular method of resolving disputes. Mediation even in complex disputes has achieved a very high rate of success.

3. Executive tribunal (“mini-trial”)

A representative of each party makes a formal presentation of their best case to a panel comprised of senior executives for the disputing parties and an independent chairperson. The panel then retires to discuss the dispute and the chairperson normally acts as a mediator between the senior executives. The method has frequently been used for significant commercial disputes. Unless the parties so request, the chairperson does not make a binding determination. The entire process is private, confidential and without prejudice.

4. Conciliation

Conciliation is similar to mediation except that, usually, the third party will actively assist the parties to settle the dispute (for example, by making suggestions regarding settlement options). The term is widely used to describe the facilitated settlement discussions that occur in the employment arena. It is also the term used in Europe to describe the function performed by judges when they hold settlement conferences with the parties in an attempt to assist them to reach a settlement of their dispute.

5. Early neutral evaluation

The parties appoint an independent person to provide a non-binding opinion on the merits which evaluates the facts, evidence and law relating to a particular issue, or the whole case. The rationale is that, once armed with the opinion, the parties will be able to negotiate an outcome, without the assistance of a third party. Alternatively the parties are free to settle the dispute on the basis of the evaluation provided.

The Commercial Court and the Technology and Construction Court make provision for early neutral evaluation.

6. Expert determination

Expert determination is an informal process that produces a binding decision.

An expert is appointed by the parties to determine an issue, usually of a technical nature. As an expert's decision is an evaluation, this approach is treated as having different legal characteristics to an arbitration award. The expert is the tribunal and does not act as an arbitrator. Accordingly, the procedure is not subject to arbitration, legislation and the supervision of the court.

The expert's decision is contractually binding on the parties. There is a large body of case law on various aspects of this process.

7. Adjudication

Adjudication has been used as a method for dispute resolution in the construction industry for decades, and since the introduction of the Housing Grants, Construction and Regeneration Act 1996, parties to certain construction contracts have had a statutory right to refer disputes to adjudication. Even if a contract does not attract the statutory scheme, the contract may (and usually does) nevertheless provide equivalent or similar rights to adjudicate disputes. This is usual if the contract is a standard form of contract, such as one produced by an industry contract writing body. The right to go to adjudication in that case arises under the contract.
An adjudicator usually provides a decision on disputes as they arise during the course of a contract. Typically, the decision of an adjudicator has interim binding effect; that is, the decision is binding pending agreement of the parties altering its effect or a referral of a dispute to arbitration or litigation for final determination.

8. Dispute review board (DRB)

A dispute review board is a project specific adjudication process. A panel (usually of three neutrals) is appointed at the start of a project. The panel visits the site of the project, usually three or four times a year, and deals with disputes by providing an interim binding decision (like adjudication). The parties can challenge board decisions via arbitration or litigation. The board can have a preventative effect on disputes. DRBs have tended to be used for large scale construction projects, for example, the Hong Kong Airport and, more recently, the construction of the Olympic Stadium.

9. Med-arb (a hybrid process)

Med-arb (or arb-med) is when mediation is combined with arbitration to resolve a dispute.

In med-arb, if mediation fails in whole or on any issue, the parties may agree that the mediator becomes an arbitrator and issues a final and binding award on the outstanding matters. There is concern about the process, as the prospect of the mediator becoming an arbitrator may prevent frank discussion in the private sessions in the mediation.

6. Clause Examples

A. If a dispute arises, formal dispute procedures should be avoided if at all possible. This may be achieved by providing a structure of a less formal nature prior to embarking upon a formal procedure. This is known as a multi-tiered dispute resolution procedure and can help to maintain a good commercial relationship between the parties and can save significant amounts of time and money. Such a clause provides a basic framework for the parties to try to resolve through negotiation and mediation either before or in parallel to court or arbitration proceedings.

1. An example of multi-tiered clause is at Appendix A.

2. An example of a Mediation clause appears at Appendix B.

3. An example of an Arbitration clause appears at Appendix C.

4. An example of an expert determination clause appears at Appendix D.
Appendix A

A. If a dispute arises out of or in connection with this agreement or the performance, validity or enforceability of it (Dispute) then [except as expressly provided in this agreement,] the parties shall follow the procedure set out in this clause:

1. Either party shall give to the other written notice of the Dispute, setting out its nature and full particulars (Dispute Notice), together with relevant supporting documents. On service of the Dispute Notice, the [TITLE] of [PARTY 1] and [TITLE] of [PARTY 2] shall attempt in good faith to resolve the Dispute;

2. If the [TITLE] of [PARTY 1] and [TITLE] of [PARTY 2] are for any reason unable to resolve the Dispute within [30] days of it being referred to them, the parties will attempt to settle it by mediation in accordance with the CEDR Model Mediation Procedure. Unless otherwise agreed between the parties, the mediator shall be nominated by CEDR Solve. To initiate the mediation, a party must serve notice in writing (ADR notice) on the other party to the Dispute, requesting a mediation. A copy of the ADR notice should be sent to CEDR Solve. The mediation will start not later than [NUMBER] days after the date of the ADR notice.

B. The commencement of mediation shall not prevent the parties commencing or continuing [court or arbitration] proceedings in relation to this dispute

OR

No party may commence any court or arbitration proceedings in relation to the whole or part of the dispute until [NUMBER] days after service of the ADR notice provided that the right to proceedings is not prejudiced by delay

Appendix B - Mediation

A. Before commencing [court proceedings/arbitration] the parties may on the written request of both parties ("Dispute Resolution Request") agree in writing to enter into an alternative dispute resolution procedure with the assistance of a mediator agreed by the parties or, in default of such an agreement within 15 Business Days of receipt of the Dispute Resolution Request, appointed by the Centre for Dispute Resolution, 70 Fleet Street, London EC4Y 1EU.

B. The parties shall then submit to the supervision of the mediation by the Centre for Dispute Resolution for the exchange of relevant information and for setting the date for negotiations to begin.

C. Except for the party's right to seek interlocutory relief in the courts, no party may commence other legal proceedings under the jurisdiction of the courts or any other form of arbitration until [*] Business days after the appointment of a mediator.

D. If, with the assistance of the mediator, the parties reach a settlement, such settlement shall be reduced in writing and, once signed by a duly authorised representative of each of the parties, shall be and remain binding on the parties.
Appendix C - Arbitration

Any dispute arising out of or in connection with this Agreement shall be finally resolved by arbitration in accordance with the provisions of the [Chartered Institute of Arbitration Rules] as at present in force and subject to English law and for this purpose the parties acknowledge and agree that:

1. The Tribunal shall consist of a single arbitrator;
2. The arbitrator shall be appointed by the parties jointly or, failing agreement within 5 Business Days after either party has served notice in writing on the other party requiring the appointment of an arbitrator, by the Chairman from time to time of The Heritage Railway Association, 2 Littlestone Road, New Romney, Kent TW28 8PL;
3. Any right of application or appeal to court concerning any question of law arising in the course of the arbitration shall be excluded insofar as the law allows; and
4. The place of the arbitration shall be London and all submissions and awards shall be made in England.

Appendix D - Expert Determination

Any dispute or difference arising between the parties as to their respective rights, duties and obligations under this Agreement or as to any other matters arising out of it, or in connection with the subject matter of this Agreement shall be referred to and determined by an independent person acting as an expert who has been professionally qualified for not less than 10 years and who is also a specialist in relation to such subject matter such independent person to be agreed between the parties or failing such agreement to be nominated by the President of the Chartered Institute of Arbitration on the application of either party.