

## THE LEGAL RECORDS AT RISK PROJECT

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<http://ials.sas.ac.uk/research/areas-research/legal-records-risk-lrar-project>

### Legal Records at Risk Project Case Study into alternative dispute resolution records in the Transport for London Corporate Archives, 23 May 2016

Below is a truncated version of the case study report. For the full version see

<http://ials.sas.ac.uk/research/areas-research/legal-records-risk-lrar-project/lrar-case-studies>

The case study looked at a specific category of legal records, alternative dispute resolution (ADR) records, which had been created and later selected for archival preservation within a major transport company, Transport for London (TfL). The particular aims were as follows:

1. To look at the business context within which ADR records sit and achieve a brief overview of the dispute resolution process in a large business.
2. To gain an idea of the extent, content and value of such records.
3. To determine how ADR records are selected by the Archives for preservation.
4. To understand how ADR records are classified and indexed by the Archives.
5. To support the hypothesis that ADR archives are primarily located within business archives and must therefore be searched for under their business context.

### Methodology

1. Interviews: as part of the case study we conducted interviews with Jonathan Morris, Head of Commercial Dispute Resolution in TfL Legal, Simon Guild, Head of Information Access in Information Governance and Melissa McGreechan, Assistant Archivist, TfL Corporate Archives in Information Governance. The purpose was to obtain an overview of the business context of ADR records, the dispute resolution process within TfL and the policies around selection and preservation of, and internal/external access to, ADR records.
2. Searching the catalogue: the TfL Corporate Archives on-line catalogue (<http://www.tflcorporatearchivescatalogue.co.uk/CalmViewA/>) was examined in detail to identify relevant records and understand the process by which researchers would locate them.
3. Examining the records: sample records were selected and examined in detail by the project team to understand their context, content and value in reflecting the development of the ADR process in the UK. Four visits in all were made to TfL to search the records and talk to stakeholders.

### Locating records: thinking beyond the obvious

#### Search:

When using the catalogue to locate legal records we found that, if a word appeared in the title or description a catalogue search would pick it up, but records may not necessarily be defined in the

descriptions in the way researchers expect; files tend to be classified and described by function rather than subject matter. For example, the TfL Legal department lists and indexes construction disputes by contract number or company name, and this process will be followed by the Archives when cataloguing, so for “mediation” or “arbitration” records it might also be necessary to search on “settlement”, “award”, “dispute” or “contract” or by the name of the company, project or location.

Word searches of the catalogue by the LRAR team produced the following results:

- A search for “legal” records produced 1074 hits for records dating from 1620-2014. Records listed included Lands Tribunal records, property agreements, deeds, wills, indentures, contracts, court cases, legal advice and the corporate records of TfL’s various legal depts.
- The biggest number of hits came from a search on “contracts”, with 4,636 results listing major and minor contracts and leases dating from 1798-2015 and including contractual disputes.
- A search on “deeds” yielded 532 results dating from 1620-2002.
- Searching under “arbitration” in the catalogue yielded 291 file level entries, ranging from 1856-2000 as follows: individual arbitration cases relating primarily to construction or employment disputes and, post 1933, TfL’s own records of proceedings and awards of the London Passenger Transport Arbitration Tribunal (the official records of the Tribunal are held by TNA).
- Searching on “disputes” gave 99 results dating from 1855-1995 and comprising mostly industrial and construction contract issues.
- “Conciliation” searches yielded 360 results, primarily in relation to conciliation staff, but with some records of industrial disputes.
- “Mediation” only gave 7 results dating from 1986-1995; these were of particular interest as they related to construction disputes.
- “Adjudication” yielded only one result, relating to a tender for the Northern Line Adjudication: Depot Enabling Works in 1995.
- “Court case” gave 46 results from 1865-1995 and comprised both court and tribunal cases.
- “Tribunal” yielded 349 results from 1910-1996 and primarily comprised records of transport tribunals both in the UK and abroad.

Many entries will of course be duplicated. The wide variations in catalogue search results indicate the need for researchers to think beyond obvious keywords when seeking relevant material. “Disputes”, for example, could refer to arbitration, mediation, conciliation or a court case.

### **Context:**

To correctly interpret ADR records in the TfL Archives it was necessary to understand their business, historical and recordkeeping contexts as follows:

The ADR process in TfL:

- External law firms are employed for any significant disputes and always for large arbitration cases. The main category of dispute relates to construction contracts and costs can run into millions. TfL’s construction contracts prior to 1996 sometimes included a standard arbitration clause to facilitate the process.
- Arbitrators are selected by mutual consent between the parties. Some contracts include lists of pre-agreed adjudicators/arbitrators. If the parties can’t agree a nominating authority (eg London Court of International Arbitration, Centre for Effective Dispute Resolution, Institute of Civil Engineers) is asked. The team has only ever used single arbitrators.
- Arbitrators’ terms of appointment usually comprise standard forms proposed by the arbitrator and subject to negotiation and agreement by the parties. Some suites of standard form

contracts contain model adjudication/arbitration terms. TfL's Commercial lawyers draw up contracts and regularly review provisions eg for New Engineering Contract (NEC) contracts. Contracts specify that arbitrations are confidential between the 2 parties, though the period of confidentiality is not specified. It is likely in any case that a liberal view would be taken to providing access due to the Freedom of Information Act and TfL's commitment to transparency (see below under Compliance Context); in other words TfL would approach the decision on the basis of "why wouldn't we disclose" rather than "why should we disclose".

- Domestic arbitration has declined in recent years as a result of S.108 of the Construction Act (**Housing Grants, Construction and Regeneration Act 1996**), which gives an automatic right to refer a dispute to adjudication (meaning there's now no need to provide for this mechanism in contracts). Adjudication provides a relatively quick decision which is immediately implementable; adjudications are quicker and cheaper. Contracts will still provide for a full dispute resolution procedure (either arbitration or court) which a party dissatisfied with the adjudication decision may pursue, but the adjudication decision stands unless and until overturned. Arbitrations have therefore reduced from c.2-3 a year a few years ago to 1 a year at present and that figure will probably reduce further in the future.
- Additionally, following procedural changes within the Technology and Construction Court c. six to eight years ago, TfL reviewed its standard dispute resolution provisions and decided it would go to court as the final stage in a dispute instead of arbitration. TfL's greater commitment to transparency has also reduced the perception of the need to use arbitration to protect confidentiality. The standard procedure now is adjudication - court.
- Mediation is usually discussed pre-adjudication but is a mechanism that parties will keep in mind at any stage through to full trial in court or arbitration. Mediation offers greater flexibility to the parties to be innovative in reaching a settlement. In general less documentation is needed than in adjudication or arbitration – most mediations only last one day.

#### Recordkeeping and records retention:

- The business and legal life span of a case file can be very long indeed. Contracts executed as a deed have to be kept for 14 years after end of contract (given the terms of the Limitation Act), while Public Private Partnership (PPP) contracts have a current life of 30 years. Once the legally specified retention period expires, however, there is no value to TfL Legal in keeping the records and the decision on what to preserve permanently is left to the Archives, which keeps major dispute resolution case and contracts over £500,000.
- Retention of records by arbitrators themselves: most arbitrators TfL has dealt with are barristers and solicitors and they are instructed to return the papers to the parties at the conclusion of the case. In the case of appeals it is the awards and records of the parties to the hearing which are used as evidence, not the arbitrators' notes. According to TfL Legal, arbitrators' own notes should be destroyed after the case is over, but TfL does not mandate or monitor this.
- Selection by the Archives: the Archives collects legal records if they are relevant to the business context of a department and/or reflect a major dispute or cause celebre. It also holds numerous legal documents such as contracts and deeds. It does not deliberately target legal records – if they are relevant to the business context or reflect a major dispute or cause celebre they will be kept.
- Access: most records, including ADR records, are open to the public after 20 years.

## The records:

For details of records physically examined see Appendix.

We found detailed records relating to arbitration and mediation cases. Most were either industrial or construction disputes; files relating to the latter sometimes, but not always, included the relevant sections of the contracts under dispute. Typical examples of construction disputes included:

- An arbitration case in 1903-1910 between The British Westinghouse Electric and Manufacturing Company Limited and The Underground Electric Railways Company of London Limited (89 folders, ref: LT000195), including points of claim; briefs to respondents; notes on hearings; correspondence; evidence; summary.
- An arbitration (compensation) dispute in 1932-1934 between the Metropolitan Railway Line and the Edgware Golf Club over the diversion of the club (2 bound volumes, ref: LT001541) contained correspondence, maps and papers (including valuations submitted to hearing) concerning arbitration between Foster Brothers Company Limited and the London Passenger Transport Board (LPTB) over claims of disturbance and damage to the Foster Brothers' business caused by LPTB works at Uxbridge. It also included presumably extraneous material such as the handicaps of golf members!
- International mediation records also feature, such as a 1986-1987 contract mediation case between London Transport International Services Ltd and the Singapore Mass Rapid Transit Corporation relating to construction of a tunnel (1 box, ref: LT001434). Records include correspondence, memoranda, reports, working and legal papers concerning consultancy work provided by London Transport International Services Ltd.
- The records of a 1992-1996 contract dispute which went to mediation (10 folders, ref: LT000577) include correspondence, summary of dispute, contract summary, legal advice, attendance notes, proceedings, synopsis of matters referred for mediation, site visit notes, contractor's response, London Underground's instructions to counsel, lists of documents submitted and correspondence with CEDR re appointment of mediator and agreement (terms of mediation) drafted by CEDR (but no copy of the agreement, alas).

## Case Study conclusions

1. TfL holds a wealth of legal records in its Archives, including numerous records relating to alternative dispute resolution. This supports our thesis that the bulk of surviving archival ADR – and other legal - records will at present be found within business archives.
2. ADR records will be found under a variety of series titles, which are based on either functions or departmental structures at the time the records were created. “Arbitration” or “mediation” is rarely (though occasionally) included in series titles. Researchers therefore need to be careful not only to think widely about keyword terms, but also not to narrow their fields of search to series titles or the records of “Legal” departments.
3. ADR records in TfL are not only numerous, but often very detailed and comprehensive, containing not only the minutes of the case itself and the findings, but solicitors' shorthand notes, correspondence, summaries and copies of original documents used as evidence.
4. Concerns that confidentiality of proceedings might be a barrier to accessing modern ADR records appear to be unfounded, at least as far as TfL is concerned. It is probable that a similarly liberal approach to access to ADR records will be found in other business archives, though we have yet to investigate whether they have the same commitment to transparency and openness as TfL.

## Appendix: sample records examined

Series	Series title and dates	Item description/notes on viewing
LT000102	Staff: Local Working Party Meetings 1984-1987	Minutes of the meetings of Machinery Attendants Local Working Party 1-18, including details of discussions on the Jubilee Line works, escalator chain lubricating equipment and proposed incentive schemes for attendants. Also included are notes of meeting with SC9 representatives and the Conciliation Committee.
LT000155	London Transport Executive (LTE): Chief Establishment Office: Staff Administration Office: Sponsorship Housing Arrangements for Staff: Minutes, Correspondence and Memoranda, 1919-1950	Includes staff arbitration tribunal papers
LT000195	Underground Electric Railways Company of London Limited: Power Department: Reports of Proceedings between Westinghouse Electric and Manufacturing Company Limited and the Underground Electric Railways Company of London Limited, 1903-1910	Arbitration Case between The British Westinghouse Electric and Manufacturing Company Limited and The Underground Electric Railways Company of London Limited: Points of claim; briefs to respondents; notes on hearings; correspondence; evidence; summary
LT000232	London Passenger Transport Board (LPTB) and Successors: Office of the Executive: Arthur Herbert Grainger: Correspondence, Minutes of Meetings and Reports, 1934-1965	Minutes of the proceedings of a tribunal concerning differences between the London Transport Executive and the Transport and General Workers' Union regarding the proposed payment of extra rates to road operating and garage and depot staffs for duties after 1pm on Saturday, 1949
LT000302	London Passenger Transport Board (LPTB): Office of the Comptroller and Accountant: London Passenger Pooling Scheme Papers, 1931-1936	London Passenger Pooling Scheme: Arbitration Proceedings Counsel's Brief, 1934-1935
LT000343	Metropolitan and Great Central Joint Committee: Secretary's Records, 1889-1947	Metropolitan and Great Central Joint Committee: standing arbitration correspondence 1923

Series	Series title and dates	Item description/notes on viewing
LT000577	LUL: Legal Department: Litigation section – reports and papers, 1992-1996	Costain Building and Civil Engineering Ltd: Earl's Court Station: Platform Reconstruction and Interim Refurbishment Contract BCE 0236: Mediation Papers 21 Feb 1994-31 Aug 1995 between Costain and LUL. Includes correspondence, summary of dispute, contract summary, legal advice, attendance notes, proceedings, synopsis of matters referred for mediation, site visit notes, contractor's response, LUL instructions to counsel, lists of documents. Corr with CEDR re appointment of mediator and agreement (terms of mediation) drafted by CEDR (no copy of agreement, alas)
LT000594	London Passenger Transport Board (LPTB): Parliamentary Office: Correspondence and Papers on the Independent Undertakings Arbitration Tribunals, 1926-1946	The London Passenger Transport Arbitration Tribunal - The London Passenger Transport Board (LPTB) and The independent Undertakings - Brief to Counsel, 1929-1933
LT000644	London Passenger Transport Board (LPTB): Secretary: East London Railway Joint Committee: Papers, Minutes and Correspondence, 1880-1947	East London Railway Joint Committee: arbitration – 2 cases 1886-1887. Includes proceedings; selection of members; solicitor's shorthand notes
LT000665	London Transport and predecessors: Labour Relations Office, 1925-1984	Control Grade Staff – arbitration. Correspondence, minutes and papers 1960-1970
LT000694	London Passenger Transport Board (LPTB): Parliamentary Office and Solicitor: Correspondence, Notes and Memoranda regarding London Passenger Transport Bills, 1913-1971	London Passenger Transport Act 1933 - arbitration under Section 23 between the London Passenger Transport Board (LPTB) and the Council of the Metropolitan Borough of Fulham, 1938
LT000783	London Passenger Transport Board (LPTB) and Successors: Solicitor: Papers, Correspondence and Memoranda concerning Staff Arbitration Cases with regards to the London Passenger Transport Act 1933, 1924-1960	London Passenger Transport Act 1933: Individual Arbitration Cases, 1934-1938
LT000799	London Passenger Transport Board (LPTB): Office of the Executive: Correspondence, Minutes and Reports, 1928-1964	Report by the Board of Conciliation entitled 'The Proposal of the London Transport Executive in an Endeavour to Overcome the Shortage of Bus Drivers and Conductors'. Includes details of a history of negotiations and an explanation of London Transport's proposal 1955

Series	Series title and dates	Item description/notes on viewing
LT001434	London Transport International Services Ltd: Singapore – correspondence and reports, 1968-1991	Mass Rapid Transit (MRT) Mediation: Contract 105: Correspondence, memoranda, reports, working and legal papers re consultancy work provided by London Transport International Services Ltd for the tunnel mediation between the Singapore Mass Rapid Transit Corporation and John King Management Services 11 Jun 1986-10 Dec 1987
LT001541	London Passenger Transport Board Estate Office: Railway Acts, 1880-1974	Arbitration (compensation) dispute between the Metropolitan Railway Line and the Edgware Golf Club over the diversion of the club; Correspondence, maps and papers (including valuations submitted to hearing) concerning arbitration between Foster Brothers Company Limited and the London Passenger Transport Board (LPTB) over claims of disturbance and damage to the Foster Brothers' business caused by LPTB works at Uxbridge. 1936-1937
LT001670	London Regional Transport (LRT) and Predecessors: Bus Operations: Correspondence, Memoranda and Minutes of Meetings, 1913-1992	Arbitration award – Difference of interpretation between the London Transport Board and the Transport and General Workers' Union of certain clauses in the Central Bus Drivers and Conductors Agreement - June 1966. Includes correspondence, background papers, verbatim notes of Board's proceedings, award.
LT001176	London General Omnibus Company (LGOC): Office of the Operating Manager: Correspondence and Memoranda, 1914-1933	Correspondence and minutes of meetings concerning a conciliation scheme between representatives of the Railway Executive Committee and Railway Staff Union representatives. Also contains details of proposals for the creation of a trainmen's committee in place of existing conciliation boards 1914-1920
LT001907	London Regional Transport (LRT): London Underground Limited (LUL): Central Line Project (CLP): Correspondence, Reports, Meetings and Engineering Drawings, 1988-2001	Reports and information from the legal department; consists of time and money claims, case laws, time and damages in construction contracts, delay analysis, construction disputes, claims and resolutions, building contract claims and extracts from legal documents
LT001934	London Regional Transport (LRT): London Underground Limited (LUL): Northern Line Renewal Project, 1967-1999	Northern Line Adjudication: Depot Enabling Works - budget/ tender cost comparison and proposed changes to schedule 6 part one of the usage contract, 1995
LT000172	London Passenger Transport Board (LPTB) and Successors: Chief Engineer: Contracts, Agreements and Tenders, 1931-1952	Contracts nos 1-99: some (not all) include a standard arbitration clause

